

1992

Jackie Turner v. Oak Norton, Inteldex Corporation, dba Inteldex Services, and General adjustment Bureau, Inc., a Delaware Corporation : Petition for Writ of Certiorari

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

920289

IN THE UTAH SUPREME COURT

JACKIE TURNER,

Appellee/Cross-Appellant,

vs.

OAK NORTON, INTELDEX
CORPORATION, dba INTELDEX
SERVICES, and GENERAL ADJUST-
MENT BUREAU, INC., a Delaware
Corporation,

Appellants/Cross-Appellees.

920289
Supreme Court Case No.

PETITION FOR WRIT OF CERTIORARI

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CLERK SUPREME COURT
UTAH

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Appellee/Cross-Appellant,
vs.
OAK NORTON, INTELDEX
CORPORATION, dba INTELDEX
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I.

PARTIES TO THIS PROCEEDING

All parties to this proceeding are listed in the caption of this case.

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IV.

QUESTIONS PRESENTED FOR REVIEW

The following questions are presented to the Supreme Court for review:

1. Should certiorari be granted where the decision of the Utah Court of Appeals (for the first time in Anglo-Saxon legal history) condones private parties entering a private home through trickery?

2. Is certiorari proper where the Court of Appeals has decided an important issue of state law which has not been settled by the Supreme Court? This question is whether emotional distress damages are recoverable in a fraud case. As the Court of Appeals stated in its opinion: "Whether emotional distress damages are recoverable for fraud is a question of first impression under Utah law." (185 Utah Adv. Rptr. at p. 18.) That important question should be decided by the Supreme Court.

3. Is certiorari proper where the Court of Appeals has decided a question of state law in a way that is in conflict with a decision of the Supreme Court? Jackie Turner asserts that the standard of review espoused by the Court of Appeals conflicts with the Supreme Court's opinions in Koer v. Mayfair Markets, 19 Utah 2d 339, 431 P.2d 566 (1967); Management Committee v. Graystone Pines, Inc., 652 P.2d 896 (Utah 1982); and Roylance v. Davies, 18 Utah 2d

295, 424 P.2d 142 (1967). The confusion should be resolved by the Supreme Court.

V.

OFFICIAL REPORTS

The opinion of the Court of Appeals is reported at Turner v. General Adjustment Bureau, Inc. et al., 185 Utah Adv. Rptr. 16 (Utah Ct. App. 1992), as Exhibit A.

VI.

GROUND FOR JURISDICTION

The Court of Appeals opinion was filed on April 22, 1992. By stipulation of all parties to this appeal, the time within which to file a Petition for Writ of Certiorari was extended to June 19, 1992.

The Supreme Court has jurisdiction to review the decision of the Court of Appeals by writ of certiorari under Utah Code Ann. § 78-2-2 and Rules 45-51 of the Utah Rules of Appellate Procedure.

VII.

CONTROLLING PROVISIONS OF LAW

The controlling provisions of law in this case are case law citations designated in the Argument section of this Petition. Constitutions, statutes, ordinances, and regulations do not govern this appeal.

VIII.

STATEMENT OF THE CASE¹

This action arises from a "pretext" surveillance investigation performed by a private detective firm ("Intellex") through its employees Dennis Dye and Ronnie Hyer. The subject of the investigation was James Turner, Jackie Turner's husband².

The opinion of the Court of Appeals summarizes the facts as follows:

On November 30, 1984, Turner's husband filed a workers' compensation claim asserting that he was injured in a work related accident. His employer's workers' compensation insurance carrier, Occidental Fire and Casualty Insurance Company, retained GAB to adjust the claim. GAB, in turn, hired Inteltech to investigate the claim.

Inteltech employees, masquerading as representatives of a product marketing research company, conducted an undercover investigation of the claim over a period of approximately three months. Utilizing the marketing company facade, they gained access to the Turner home to gather information about the activities of Turner's husband³. Inteltech employees visited the Turners at their home and asked them to test various consumer products on a

¹In this petition, "R." refers to the record; "T." refers to the trial transcript, found at R. 953-955; "T. of H." refers to the transcript of the May 4, 1990 hearing on Turner's motions for judgment notwithstanding the verdict and for a new trial, found at R. 952.

²James and Jackie Turner were subsequently divorced.

³The private detectives entered the home at least five times under this same pretext. (T. 261-263.)

continuing basis. In addition to testing products, an Inteltech employee invited Turner to participate in a shopping spree. However, on the day the shopping spree was scheduled to occur, Inteltech canceled it. Turner claims that as a result of the invitation, she lost approximately twenty dollars because she had hired and paid a babysitter⁴.

185 Utah Adv. Rptr. at p. 17.

Jackie Turner then brought this action against the defendants claiming fraud, invasion of privacy, and conspiracy. (R. 2-12.) The jury rendered a verdict against Turner on the fraud and invasion of privacy claims; and therefore, did not reach the conspiracy claim of damages. (R. 721-723; 894-897.)

After trial, Turner moved for judgment notwithstanding the verdict or for a new trial on all issues submitted to the jury. (R. 725-726; 818-819.) The trial court granted judgment notwithstanding the verdict and denied the motion for a new trial. (T. of H. 19-29; R. 813, 890-893.) The trial court entered judgment, jointly and severally, against the defendants on the fraud, invasion of privacy, and conspiracy claims for \$20 in out-of-pocket expenses; \$5,000 for general damages; and \$3,000 for punitive damages. Turner moved to amend that judgment to allow the damage issue to go to the jury. (R. 930-931.) The trial court denied that motion to amend. (R. 935-937.)

⁴The depth and sophistication of the ruse is shown by plaintiff's trial exhibit 1 (Ex. B, hereto). Note that American Marketing Research & Development is a wholly fictitious company.

The Court of Appeals reversed the trial court's grant of a judgment notwithstanding the verdict, concluding that (1) the trial court erred in granting judgment notwithstanding the verdict; (2) the trial court correctly refused to instruct the jury that emotional distress damages are recoverable in a cause of action for fraud; and (3) the trial court correctly admitted evidence of Turner's psychiatric history and past drug use. (See, Ex. A.)

IX.

ARGUMENT

POINT I

THE OPINION OF THE COURT OF APPEALS IS THE FIRST TIME IN HISTORY THAT ANY ANGLO-SAXON COURT HAS CONDONED ENTERING A PRIVATE HOME BY TRICKERY

Certiorari may be granted where a decision of the Court of Appeals ". . . has so far departed from the accepted and usual course of judicial proceedings. . . as to call for the exercise of the Supreme Court's power of supervision." Rule 46(c) Utah Rules of Appellate Procedure. This is such a case.

In Semayne's Case, 5 Co. Rep. 91a, 77 Eng. Rep. 194 (K.B. 1603) the court stated:

. . . that the house of every one is to him as his castle and fortress, as well for his defense against injury and violence, as for his repose. . . .

The United States Supreme Court has repeatedly endorsed the importance of the axiom that, "a man's house is his castle."

Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L. Ed.2d 1371 (1980) (" . . . unequivocal endorsement of the tenet that 'a man's house is his castle'."); Weeks v. United States, 232 U.S. 383, 390, 34 S.Ct. 341, 343, 58 L.Ed. 652 (1913) ("The maxim that 'every man's house is his castle,' . . . has always been looked upon as of high value to the citizen.")

It has been 389 years since Semayne's case, supra. In that time, no Anglo-Saxon Court has ever approved or condoned the entry of a private home by private citizens through trickery. Indeed every case been to the contrary.

One of the leading cases on invasion of privacy is De May v. Roberts, 9 N.W. 145 (Mich. 1881). De May is important here because of its factual similarity to this case. In that case, De May, a doctor, brought a person named Scattergood with him to assist in the delivery of the plaintiff's baby. Upon arriving at the plaintiff's home, De May did not properly identify Scattergood. The plaintiff assumed Scattergood was also a doctor. As the court outlined, De May and Scattergood were "bid to enter, treated kindly and no objection whatever made to the presence of defendant Scattergood. . . . [B]oth of the defendants in all respects throughout acted in a proper and becoming manner actuated by a sense of duty and kindness." Id. at 147. Affirming judgment for the plaintiff based on Scattergood having witnessed the delivery, the court explained:

It would be shocking to our sense of right, justice and propriety to doubt even but that for such an act the law would afford an ample remedy . . . the plaintiff had a legal right to the privacy of her apartment at such a time and the law secures to her this right by requiring others to observe it, and to abstain from its violation. The fact that at the time, she consented to the presence of Scattergood, supposing his to be a physician, does not preclude her from maintaining an action and recovering substantial damages upon afterwards ascertaining his true character. In obtaining admission at such a time and under such circumstances without duly disclosing his true character, both parties were guilty of deceit, and the wrong thus done entitles the injured party to recover damages afterward sustained from shame and mortification upon discovering the true character of the defendants.

Id. at 148-49; See also, Dietemann v. Time, Inc., 284 F.Supp. 925 (D.C. Cal. 1968); Young v. Western & A.R. Co., 39 Ga. App. 761, 148 S.E. 414 (1929) (search without warrant); Thompson v. City of Jacksonville 130 So.2d 105 (Fla. 1961) (same); Walker v. Whittle, 83 Ga. App. 445, 64 S.E.2d 87 (1951) (entry without legal authority to arrest husband); Welsh v. Pritchard, 125 Mont. 517, 241 P.2d 816 (1952) (landlord moving in on tenant); Ford Motor Co. v. Williams, 108 Ga. App. 21, 132 S.E.2d 206 (1963) reversed 219 Ga. 505, 134 S.E.2d 32, conformed to 108 Ga. App. 723, 134 S.E.2d 483 (entry into plaintiff's home was held to be an invasion of her privacy, even though he was not there at the time); Miller v. National Broadcasting Co. 187 Cal. App.3d 1463, 232 Cal. Rptr. 668 (1987) (Most individuals understand it is a crime or a tort or both to go

into a private home without consent.); State v. Hyem, 630 P.2d 202 (Mont 1981); Hester v. Barnett, 723 S.W.2d 544 (Mo. App. 1987), c.f., Restatement (Second) of Torts § 652B Illustration 4:

A is seeking evidence for use in a civil action he is bringing against B. He goes to the bank in which B has his personal account, exhibits a forged court order, and demands to be allowed to examine the bank's records of the account. The bank submits to the order and permits him to do so. A has invaded B's privacy.

If this decision stands, it will be the first time in the history of Anglo-Saxon law that any court anywhere has condoned entry into a private home by private parties through trickery. Likely, private detectives all over the U.S. will cite this case to justify similar schemes of trickery⁵.

POINT II

CERTIORARI IS PROPER BECAUSE THE COURT OF APPEALS DECIDED AN IMPORTANT ISSUE OF STATE LAW, WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THE SUPREME COURT

In this case, the Court of Appeals addressed an issue of first impression in Utah: whether emotional distress damages are recoverable in an action for fraud. The Court of Appeals ruled in the negative; however, there is a split of authority on the issue.

⁵The private detective firm (Inteltech) has prepared a packet which justifies the legality of this type of pretext surveillance for potential customers. (T. 103.) The opinion of the Utah Court of Appeals will surely go into that packet for all future customers across the U.S. to see. At the time of trial, Inteltech had fifty to one hundred such pretext investigations in process. (T. 100.)

A thorough analysis of this issue was undertaken by Professor Andrew L. Merritt of the University of Illinois College of Law in his well-reasoned law review article, Damages for Emotional Distress in Fraud Litigation: Dignitary Torts in a Commercial Society, 42 Vand. L. Rev. 1 (1989).

In that article, Professor Merritt discusses the existing case law on this issue:

The proper measure of fraud damages always has been a matter of controversy. . . . Relatively few cases have considered the propriety of awarding damages for non-pecuniary loss. . . . Though a substantial body of precedent now addresses this issue, no judicial consensus has emerged.]

Id. at 3. Based on a detailed analysis of policy issues, Professor Merritt concludes:

Balancing these interests suggests that, as a general rule, emotional distress damages should be awarded in fraud actions.

This issue of first impression should be addressed by the Utah Supreme Court.

POINT III

CERTIORARI IS PROPER BECAUSE THE COURT OF APPEALS DECIDED A QUESTION OF STATE LAW IN A WAY THAT IS IN CONFLICT WITH DECISIONS OF THE UTAH SUPREME COURT

When a court grants a judgment notwithstanding the verdict, the standard of appellate review is the same standard which applies when passing upon a motion for directed verdict. Koer

v. Mayfair Markets, 19 Utah 2d 338, 342, 431 P.2d 566 (1967). A directed verdict is appropriate when "reasonable minds would not differ on the facts to be determined, from the evidence presented⁶." See, Management Committee v. Graystone Pines, Inc., 652 P.2d 896 (Utah 1982).

This was the standard applied by the trial court. In granting the judgment notwithstanding the verdict, Judge Wilkinson stated "no reasonable minds could have differed on the evidence which was presented to [the jury]." (185 Utah Adv. Rptr. at p. 17.)

The Court of Appeals, however, concluded that judgment notwithstanding the verdict is only justified if, "after looking at the evidence and all of its reasonable inferences in a light most favorable to the party moved against, the trial court concludes that there is no competent evidence which would support a verdict in his favor." (185 Utah Adv. Rptr. at p. 17.) The Court of Appeals cites Gustaveson v. Gregg, 655 P.2d 693 (Utah 1982) and King v. Fereday, 739 P.2d 618 (Utah 1987) to support its conclusion.

The difference between those two standards is significant. There are many cases where there may be some evidence to support the verdict, but the overwhelming weight of the evidence is

⁶Koer states the test slightly differently: ". . . the absence of any substantial evidence to support the verdict." 19 Utah 2d at 342.

such that reasonable minds really could not differ on the evidence presented.

This confusion and inconsistency in the standard of review should be resolved by the Supreme Court.

X.

CONCLUSION

For the reasons set forth in Points I, II, and III, the Supreme Court should grant certiorari in this case to review the opinion of the Court of Appeals.

DATED this 19 day of June, 1992.

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Appellee/Cross-
Appellant

By: _____

ROBERT J. DEBRY

CERTIFICATE OF MAILING

I hereby certify that four true and correct copies of the foregoing PETITION FOR WRIT OF CERTIORARI were mailed, postage prepaid, this 19 day of June, 1992 to the following:

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2847-074\jn

EXHIBIT A

police. Compare *Piazzola*, 442 F.2d at 280; *Moore*, 284 F. Supp. at 727-28; *People v. Kelly*, 195 Cal.App.2d 669, 16 Cal. Rptr. 177 (1961); *People v. Cohen*, 57 Misc. 2d 366, 292 N.Y.S.2d 706 (1968); *Commonwealth v. McCloskey*, 217 Pa.Super. 432, 272 A.2d 271 (1970). Nor did university officials attempt to delegate their right to inspect rooms to the police, which would result in the circumvention of traditional restrictions on police activity. Compare *Piazzola*, 442 F.2d at 286; *Moore*, 284 F. Supp. at 728; *Kelly*, 16 Cal. Rptr. at 179; *McCloskey*, 272 A.2d at 272. In light of the recurring troubles with vandalism and other damage that had occurred on Hunter's floor, Smith alone made the decision to conduct a room-to-room search for university purposes, without any input from the university police. The sole purpose of Officer Milne's presence was to provide assistance in the event that Smith confronted problems he was not able to handle on his own. Thus, no action was taken which would promote circumvention of constitutional restrictions placed on police action.

CONCLUSION

The search undertaken to protect the university's interest in maintaining a safe and proper educational environment, as well to fulfill the requirements of the housing contract, was reasonable. Accordingly, we reverse the trial court's determination that evidence of the stolen property found in Hunter's room should be suppressed. Additionally, since the trial court's sole ground in suppressing Hunter's confession is based on its erroneous determination that the stolen property should be suppressed, that determination is also reversed. This matter is remanded to the trial court for further proceedings consistent with this opinion.

Leonard H. Russon, Judge

WE CONCUR:

Regnal W. Garff, Judge

Pamela T. Greenwood, Judge

1. Utah Code Ann. §76-6-404 (1990) enumerates the elements of theft; Utah Code Ann. §76-6-412(1)(d) (1990) provides that if the value of the property stolen is \$100 or less, then theft of such constitutes a class B misdemeanor.

2. The State further argues that even if the warrantless search did violate Hunter's constitutional rights, the trial court nonetheless erred in suppressing Hunter's confession on the basis that, but for the entry and seizure of the property, Hunter would not have confessed to the theft. Because of our resolution of the search issue, we need not address the State's argument on this second issue.

3. Compare, e.g., *Moore v. Student Affairs Comm. of Troy State Univ.*, 284 F. Supp. 725, 729 (M.D. Ala. 1968); *State v. Kappes*, 26 Ariz. App. 567, 550 P.2d 121, 124 (1976); *People v. Kelly*, 195 Cal.App.2d 669, 16 Cal. Rptr. 177 (1961); *People v.*

Winn, 1971; *Smyth v. Lubbers*, 398 F. Supp. 777 (W.D. Mich. 1975); *Morale v. Grigel*, 422 F. Supp. 988, (D. N.H. 1976); *People v. Cohen*, 57 Misc. 2d 366, 292 N.Y.S.2d 706 (1968).

Cite as

185 Utah Adv. Rep. 16

IN THE UTAH COURT OF APPEALS

Jackie TURNER,
Plaintiff, Appellee, and Cross-
Appellant,

v.

GENERAL ADJUSTMENT BUREAU, INC.;
Oak Norton; and Inteldex Corporation, d/
b/a InteltechServices,
Defendants, Appellants, and Cross-
Appellees.

No. 910587-CA

FILED: April 22, 1992

Third District, Salt Lake County
Honorable Homer F. Wilkinson

ATTORNEYS:

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Adjustment Bureau

Robert L. Stevens and Michael L. Schwab,
Salt Lake City, for Oak Norton and
Inteldex

Gordon K. Jensen, West Valley City, and
Glen A. Cook, Salt Lake City, for Jackie
Turner

Before Judges Garff, Greenwood, and
Russon.

This opinion is subject to revision before
publication in the Pacific Reporter.

GARFF, Judge:

Defendants, General Adjustment Bureau (GAB), Inteldex Corporation, d/b/a Inteltech (Inteltech), and Oak Norton (Norton) appeal the trial court's judgment notwithstanding the verdict (j.n.o.v.) in favor of plaintiff, Jackie Turner (Turner), and the punitive damages award. Turner cross appeals, asserting that the trial court erred (1) by refusing to instruct the jury that emotional distress damages are recoverable in a cause of action for fraud, (2) by admitting evidence concerning Turner's past drug use and psychological history, and (3) by refusing, after granting j.n.o.v., to submit the issue of damages to the jury. We reverse.

FACTS

On November 30, 1984, Turner's husband filed a workers' compensation claim asserting that he was injured in a work-related accident. His employer's workers' compensation insurance carrier, Occidental Fire and Casualty Insurance Company, retained GAB to adjust his claim. GAB, in turn, hired Inteltech to investigate the claim.

Inteltech employees, masquerading as representatives of a product marketing research company, conducted an undercover investigation of the claim over a period of approximately three months. Utilizing the marketing company facade, they gained access to the Turner home to gather information about the activities of Turner's husband. Inteltech employees visited the Turners at their home and asked them to test various consumer products on a continuing basis. In addition to testing products, an Inteltech employee invited Turner to participate in a shopping spree. However, on the day the shopping spree was scheduled to occur, Inteltech cancelled it. Turner claims that as a result of the invitation, she lost approximately twenty dollars because she had hired and paid a babysitter.

Turner further claims that as a result of her unwitting participation in the undercover investigation, she lost time she could have spent working. Turner's work consisted of tasks performed for her landlord on a by-the-hour basis, for which she received rent credits.

On July 20, 1987, at a hearing on the workers' compensation claim of Turner's husband, Inteltech employees appeared and testified about information gathered through the undercover investigation. It was then that Turner first became aware that Inteltech employees had represented themselves as market researchers for the purpose of investigating her husband's claim. After the hearing, the administrative law judge denied her workers' compensation claim.

Turner sued, claiming fraud, invasion of privacy, and conspiracy. She sought special, general, and punitive damages. The case was tried to a jury on March 12 through 14, 1990.

At the close of Turner's case, defendants moved for a directed verdict, which the court denied. Turner, in turn, moved for a directed verdict at the close of defendants' cases, which the court took under advisement. The issues of fraud, invasion of privacy, conspiracy, and Norton's personal liability were submitted to the jury. The jury rendered a verdict against Turner on both the fraud and invasion of privacy claims, and therefore, did not reach the conspiracy claim and damages issues. Thereafter, Turner moved for j.n.o.v. and for a new trial on all issues submitted to the jury.

After oral argument, the trial court granted j.n.o.v. and denied the motion for a new trial.

could have differed on the evidence which was presented to [the jury] And it was highly offensive to this Court for the defendants to do what they did to [Turner]." As to the claim of fraud, the court found that Turner proved damages in the amount of twenty dollars for the babysitter. The court, however, found that Turner's evidence concerning damages for lost work time was "too speculative."

The court entered judgment, jointly and severally, against GAB and Inteltech on the fraud, invasion of privacy, and conspiracy claims in the following amounts: \$20.00 for out-of-pocket damages; \$5,000.00 for general damages; \$3,000.00 for punitive damages; post-judgment interest; and attorney fees. The trial court further found Norton to be personally liable for the entire amount of the judgment. Turner moved to amend the judgment to allow the damages issues to go to the jury. The court denied the motion.

STANDARD OF REVIEW

A j.n.o.v. can be granted only when the losing party is entitled to judgment as a matter of law. *Hansen v. Stewart*, 761 P.2d 14, 17 (Utah 1988). In other words, j.n.o.v. "is only justified if, after looking at the evidence and all of its reasonable inferences in a light most favorable to the party moved against, the trial court concludes that there is no competent evidence which would support a verdict in his favor." *Gustaveson v. Gregg*, 655 P.2d 693, 695 (Utah 1982); *King v. Fereday*, 739 P.2d 618, 620 (Utah 1987). On appeal, we apply the same standard. *Gustaveson*, 655 P.2d at 695; *King*, 739 P.2d at 620. In determining whether competent evidence supports the verdict, we accept as true all testimony and reasonable inferences flowing therefrom that tend to prove defendants' case, and we disregard all conflicts and evidence that tend to disprove defendants' case. *Koer v. Mayfair Mkts.*, 19 Utah 2d 339, 431 P.2d 566, 568-69 (1967).

FRAUD

Defendants contend that the trial court erred in granting j.n.o.v. because competent evidence supported the jury's verdict of no fraud in that Turner was not damaged as a result of the undercover investigation.

To establish fraud, a party must prove by clear and convincing evidence each of the following elements: (1) a representation was made; (2) concerning a presently existing material fact; (3) which was false; (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that there was insufficient knowledge upon which to base such a representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely

upon it; (c) and was thereby induced to act; (9) to that party's injury and damage.¹ *Mikelson v. Quail Valley Realty*, 641 P.2d 124, 126 (Utah 1982); *Pace v. Parrish*, 122 Utah 141, 144-45, 247 P.2d 273, 274-75 (1952).

The trial court in the instant case applied the wrong standard in granting j.n.o.v. Instead of determining whether competent evidence supported the verdict, see, e.g., *King v. Fereday*, 739 P.2d 618, 620 (Utah 1987), the court found that no reasonable minds could have differed on the evidence presented.

Viewing the evidence in favor of defendants, we conclude that substantial competent evidence supported the jury's verdict of no cause of action for fraud. Turner's evidence that she sustained damage when she hired and paid a babysitter apparently was not, as viewed by the jury, clear and convincing. At trial, when asked how much she paid the babysitter, Turner vaguely and equivocally testified, "I think it was like twenty bucks or something like that It was reasonable." Furthermore, Turner did not identify the babysitter nor did she produce evidence of payment as claimed.

Finally, competent evidence supported the jury's implied finding that Turner did not sustain any lost work time damages. Consistent with the jury's finding, the court found this claim to be "too speculative" inasmuch as it was based solely on Turner's unsubstantiated assertions of lost work time. Because the jury had competent evidence to support its verdict that no fraud occurred,² the trial court erred in granting j.n.o.v. on the claim of fraud.³

INVASION OF PRIVACY

Defendants claim that competent evidence supported the jury's verdict that there was no invasion of Turner's privacy. Invasion of privacy as a common law tort has developed into four distinct torts.⁴ However, Turner's cause of action is based only on the tort of intrusion upon seclusion.

To establish an invasion of privacy claim of intrusion upon seclusion,⁵ a complaining party must prove by a preponderance of the evidence an intentional substantial intrusion, physically or otherwise, upon the solitude or seclusion of the complaining party that would be highly offensive to the reasonable person.⁶ Restatement (Second) of Torts §652B & cmt. d (1977); accord *W. Page Keeton et al., Prosser and Keeton on the Law of Torts*, §117, at 855 (5th ed. 1984). The language "highly offensive to the reasonable person" suggests a determination of fact for which a jury is uniquely qualified. See *Cruz v. Montoya*, 660 P.2d 723, 729 (Utah 1983). In determining issues of fact,⁷ a jury necessarily accepts the testimony of certain witnesses and discounts conflicting testimony. *Fillmore Prods. v. Western States Paving*, 592 P.2d 581, 582 (Utah 1979). On appeal, we will not

unless no competent evidence supports the verdict. *Id.*

After viewing the evidence and all reasonable inferences flowing therefrom in a light most favorable to defendants, see *Koer v. Mayfair Mkts.*, 19 Utah 2d 339, 431 P.2d 566, 568-69 (1967), we conclude that competent evidence supported the jury's verdict of no invasion of privacy. The record discloses first, that the purpose and scope of the undercover investigation was limited to gathering information concerning the workers' compensation claim.⁸ Second, at no time did Inteltech representatives enter Turner's home without her permission. Third, the investigation visits were relatively short. Fourth, Turner's credibility was called into question by competent evidence. Based on the foregoing, the jury could reasonably conclude, as it apparently did, that Inteltech employees did not substantially intrude in a manner that would be highly offensive to a reasonable person. Therefore, the trial court erred by granting j.n.o.v. on the invasion of privacy claim.

EMOTIONAL DISTRESS DAMAGES FOR FRAUD

Turner cross appeals, claiming that the trial court erred by refusing to instruct the jury that emotional distress damages may be recovered in a fraud action. A challenge to a trial court's refusal to give a jury instruction presents questions of law. *Ramon By and Through Ramon v. Farr*, 770 P.2d 131, 133 (Utah 1989). Consequently, we do not defer to the trial court's rulings. *Id.* We affirm such a refusal when the proposed instruction does not properly and fairly state the law as applied to the facts of the case. *Id.* at 133-34.

Whether emotional distress damages are recoverable for fraud is a question of first impression under Utah law. Authorities are split on this issue. Illustrative of decisions not allowing recovery of emotional distress damages in a fraud action are *Cornell v. Wunschel*, 408 N.W.2d 369, 382 (Iowa 1987); *Carrigg v. Blue*, 323 S.E.2d 787, 789 n.1 (S.C. Ct. App. 1984); *Umphrey v. Sprinkel*, 682 P.2d 1247, 1258-59 (Idaho 1983); *Ellis v. Crockett*, 451 P.2d 814, 820 (Haw. 1969); and *Harsche v. Cxyz*, 61 N.W.2d 265, 272 (Neb. 1953). In contrast, *Kilduff v. Adams, Inc.*, 593 A.2d 478, 484 (Conn. 1991); *Trimble v. City of Denver*, 697 P.2d 716, 730 (Colo. 1985); *Crowley v. Global Realty, Inc.*, 474 A.2d 1056, 1058 (N.H. 1984); *McRae v. Bolstad*, 646 P.2d 771, 775-76 (Wash. Ct. App. 1982), *aff'd*, 676 P.2d 496 (Wash. 1984); and *Rosener v. Sears, Roebuck & Co.*, 168 Cal. Rptr. 237, 246 (1980), *appeal dismissed*, 450 U.S. 1051, 101 S. Ct. 1772 (1981) illustrate decisions allowing such recovery.

As indicated above, many jurisdictions follow the rule that emotional distress

n for fraud. Cf. *First Sec. Bank of Utah B.J. Feedyards, Inc.*, 653 P.2d 591, 598 (Utah 1982) (emotional distress damages "are extreme remedy, which should be dispensed with caution"). This rule stems from the principle that fraud, as an economic tort, protects only pecuniary losses. *Walsh v. Ingersoll Co.*, 656 F.2d 367, 370 (8th Cir. 1981). According to a leading treatise on remedies:

[D]eception is an economic, not a dignitary tort, and resembles, in the interests it seeks to protect, a contract claim more than a tort claim. For this reason, though strong men may cry at the loss of money, separate recovery for mental anguish is usually denied in deceit cases, just as it is denied in contract cases, simply because emotional distress, though resulting naturally enough from many frauds, is not one of the interests the law ordinarily seeks to protect in deceit cases.

Roberts, *Handbook on the Law of Remedies*, at 602 (1973) (footnotes omitted); see *Pihakis v. Cottrell*, 243 So.2d 685, 692 (Ala. 1971) ("plaintiff must show ... actual pecuniary loss as the result of the fraud"); *Jur. v. General Motors Corp.*, 539 S.W.2d 600-01 (Mo. Ct. App. 1976) ("deception belongs to that class of tort of which pecuniary loss constitutes a part of the cause of action").

Under section 525 of the Restatement (Second) of Torts, "One who fraudulently makes a misrepresentation of fact, ... is liable to liability to the other in deceit for pecuniary loss." (Emphasis added.) Furthermore, in addressing the measure of damages for fraudulent misrepresentation, section 549 of the Restatement states, "The recipient of a fraudulent misrepresentation is entitled to recover ... the pecuniary loss ... of which the misrepresentation is a legal cause, including the difference between the value of what was received in the transaction and its purchase price and 'pecuniary loss suffered otherwise as a consequence of ... the misrepresentation.'" Restatement (Second) of Torts §549(1)(a) and (1977) (emphasis added). While the Restatement does not specifically exclude emotional distress damages in a cause of action for fraud, the repeated references to "pecuniary loss" implicitly excludes such recovery. R. 1, *Recovery of Damages for Fraud* 156 (Utah 1991).

Just as much as fraud is an economic tort directed towards redressing pecuniary losses, *Corbett v. Utah*, 408 N.W.2d at 382; *Walsh*, 656 F.2d 370, we conclude that the better reasoned approach is to disallow recovery of emotional distress damages in a fraud action. As a result, the trial court correctly refused to instruct the

EVIDENCE OF PSYCHIATRIC HISTORY AND PAST DRUG USE

On cross appeal, Turner claims that the trial court erred by admitting evidence concerning her psychiatric history and past drug use. Whether evidence is admissible is a question of law reviewed under a correctness standard. *State v. Ramirez*, 817 P.2d 774, 781 n.3 (Utah 1991).⁹

Turner contends that the trial court erred in admitting evidence of her psychiatric history and past drug use because the evidence was irrelevant. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Utah R. Evid. 401. Quite clearly, the evidence pertaining to Turner's psychiatric history and past drug use was relevant to the determination of whether her claimed emotional distress damages under her invasion of privacy claim were the result of a preexisting condition or were caused by defendants' conduct.

Turner contends that even if the evidence relating to her psychiatric history and past drug use were relevant, the court erred in admitting it because the prejudicial effect of the evidence outweighed its probative value. Under Utah Rule of Evidence 403, relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice." The trial court's determination that evidence is admissible under Rule 403 is reviewed for correctness, "[b]ut in deciding whether the trial court erred as a matter of law, we de facto grant it some discretion, because we reverse only if we conclude that it acted unreasonably in striking the balance." *Ramirez*, 817 P.2d at 781 n.3. In *Terry v. Zions Coop. Mercantile Inst.*, 605 P.2d 314 (Utah 1979), *rev'd on other grounds*; *McFarland v. Skaggs Cos.*, 678 P.2d 298, 304 (Utah 1984), the Utah Supreme Court defined evidence that is "unfairly prejudicial" as evidence having

... a tendency to influence the outcome of the trial by improper means, or ... if it appeals to the jury's sympathies, or arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions of the case.

Id. at 323 n.31.

The evidence involving Turner's psychiatric history and past drug use was probative of whether her claimed emotional distress damages were the result of a preexisting condition or were caused by defendants' conduct. Having reviewed the trial court's determina-

tion that the danger of unfair prejudice did not substantially outweigh the evidence's probative value, we conclude, in light of the discretion given to a trial court in performing a Rule 403 balancing, that the court correctly admitted the evidence.

Finally, pursuant to the tort law doctrine commonly referred to as the "thin-skull" or "eggshell skull" rule,¹⁰ Turner argues that because defendants are required to take her as they find her, the court abused its discretion in admitting evidence of her psychiatric history and past drug use. This argument fails because, "even though it is true that one who injures another takes him as he is, nevertheless the plaintiff may not recover damages for any pre-existing condition or disability she may have had which did not result from any fault of the defendant." *Brunson v. Strong*, 17 Utah 2d 364, 412 P.2d 451, 453 (1966) (footnote omitted).

CONCLUSION

For the above-stated reasons, we conclude that the trial court (1) erred in granting j.n.o.v., (2) correctly refused to instruct the jury that emotional distress damages are recoverable in a cause of action for fraud, and (3) correctly admitted evidence concerning Turner's psychiatric history and past drug use. Other arguments raised by the parties need not be considered in view of our decision herein. Therefore, we reverse the judgment of the trial court, and remand for judgment consistent with the jury's verdict. No costs are awarded.

Regnal W. Garff, Judge

WE CONCUR:

Pamela T. Greenwood, Judge
Leonard H. Russon, Judge

1. GAB contends that Turner must prove substantial damage to recover under her claim of fraud. In support, GAB cites to *Dilworth v. Lauritzen*, 18 Utah 2d 386, 424 P.2d 136, 138 (1967), where the Utah Supreme Court, after stating that "one of the essential elements of fraud is that the plaintiff sustain damages," cites to *Pace v. Parrish*, 122 Utah 141, 144-45, 247 P.2d 273, 274-75 (1952), and section 105 of the third edition of *Prosser on Torts* (currently located at section 110 of the fifth edition of *Prosser and Keeton on the Law of Torts*). Although section 110 of *Prosser and Keeton on the Law of Torts* supports the proposition that substantial damage is required before a fraud or deceit cause of action can arise, see W. Page Keeton et al., *Prosser and Keeton on the Law of Torts*, §110, at 765 & n.1 (5th ed. 1984), GAB reads *Dilworth* too broadly. Utah law requires that a party sustain only some injury or damage. See *Mikkelsen v. Quail Valley Realty*, 641 P.2d 124, 126 (Utah 1982); *Dugan v. Jones*, 615 P.2d 1239, 1246 (Utah 1980); *Taylor v. Gasor, Inc.*, 607 P.2d 293, 294 (Utah 1980); *Rummell v. Bailey*, 7 Utah 2d 137, 320 P.2d 653, 659 (1958); *Pace*, 247 P.2d at 274-75. Moreover, this court has interpreted *Pace* to require that a complaining party need only "establish some damage." *Conder v. A.L. Williams & Assocs.*, 739

P.2d 634, 640 (Utah App. 1987).

2. The failure to prove any of the previously mentioned elements of fraud is fatal to a complaining party's case. Inasmuch as competent evidence supports the jury's implied finding of no damage, we need not address arguments concerning other elements of fraud.

3. Assuming, *arguendo*, Turner could prove some sort of damage under her fraud claim, as a complaining party, she still had a duty to mitigate damages. *Conder*, 739 P.2d at 639. A complaining party is not entitled to recover damages resulting from wrongful conduct which could have been avoided or minimized by reasonable means. *Angelos v. First Interstate Bank of Utah*, 671 P.2d 772, 777 (Utah 1983); *Conder*, 739 P.2d at 639.

Defendants' evidence demonstrates that Turner failed to mitigate the damages she claims to have sustained by having to hire and pay a babysitter. Turner testified that an Inteltech investigator called and cancelled the shopping spree the day it was scheduled. Other than the bald statement that the babysitter still had to be paid, Turner gave no explanation why she could not cancel the babysitter or otherwise minimize her damages.

4. In the classic article entitled *Privacy*, Prosser enumerated the four torts under the right to privacy as follows:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs;

2. Public disclosure of embarrassing private facts about the plaintiff;

3. Publicity which places the plaintiff in a false light in the public eye; and

4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 389 (1960); *Cox v. Hatch*, 761 P.2d 556, 563 n.7 (Utah 1988).

5. There is little case law to assist us in the determination we make today concerning Turner's invasion of privacy claim. The most probable reason for this is because

even today most individuals not acting in some clearly identified official capacity do not go into private homes without the consent of those living there; not only do widely held notions of decency preclude it, but most individuals understand that to do so is either a tort, a crime, or both.

Miller v. National Broadcasting Co., 232 Cal. Rptr. 668, 678-79 (Ct. App. 1986) (footnotes omitted).

6. Once a party establishes a cause of action for invasion of privacy, that party recovers for mental distress damages proved, if such damages are the kind that normally result from such an invasion. Restatement (Second) of Torts §652H(b) (1977); see also *Fairfield v. American Photocopy Equip. Co.*, 291 P.2d 194, 198 (Cal. Ct. App. 1955) ("the fact that damages resulting from an invasion of the right of privacy cannot be measured by a pecuniary standard is not a bar to recovery").

7. The jury has broad prerogatives in determining issues of fact. *Evans v. Stuart*, 17 Utah 2d 308, 410 P.2d 999, 1002 (1966).

8. There is no evidence in the record and no claims were made at trial that Inteltech employees harassed

EXHIBIT B

American Marketing Research & Development

50 SOUTH MAIN STREET
SUITE 600
SALT LAKE CITY, UT 84144
(801) 535-4373

Mr. and Mrs.

Dear Mr. and Mrs.

We would like to officially welcome you on board as consumer product tester for American Marketing Research and Development. Thank you for your willingness to work with your area field researcher, Mr. Hyer.

AMRD is an independent marketing firm. AMRD is not affiliated with any of the corporations or their subsidiaries for whom we do research. Our unaffiliated status enables AMRD to be totally objective.

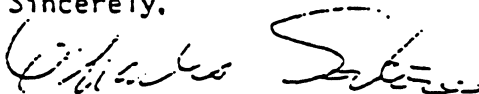
Under FTC guidelines, we are required to inform you that: 1) no test product can or will be sold to you; 2) you are permitted to terminate your testing at any point; and 3) all test results are coded for computer use and your name is not associated with them, unless stipulated by your prior, written consent.

Our marketing existence depends on insightful product analysis from unbiased consumers like yourself, who have been chosen on a completely random, demographic basis.

Optimum testing results are obtained when consumers do not alter their regular routine while using the products. Assimilate your normal usage as much as possible. If a product does not perform up to expectations, please let us know. Don't be afraid to report negative results. We never solicit unfavorable analysis, but such findings can be invaluable to the manufacturers.

If you ever have questions about a test product, or encounter a problem with any study, please give me a call at (412) 261-0430.

Sincerely,



Charles (Chuck) Sortore
Marketing Research Director

CS/lp

