

2004

W. Scott Jepson v. State of Utah Department of Commerce, Division of Occupational and Professional Licensing : Reply Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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DOCKET NO. 20040808-CA

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W. SCOTT JEPSON, RN

Appellant,

vs.

STATE OF UTAH, DEPARTMENT OF
COMMERCE,
DIVISION OF OCCUPATIONAL AND
PROFESSIONAL LICENSING (DOPL),
Respondent

Appeal No. 20040808-CA

DOPL Case No. 2002-151

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REPLY BRIEF OF APPELLANT

Appeal from a Final Order (June 16, 2003) of The Division of Occupational and Professional Licensing [DOPL], and from an Order on Review (July 30, 2004) of the Department of Commerce upholding DOPL's Order of an illegal post trial change of Utah Controlled Substances Act Rule - R156-37-502(4) made without complying with Utah Administrative Rule Making Act, §63-46a-3(2)(c), (3), (4)(d), (6), (7)(a)(i),(b), (8)(b), and DOPL's retrospective application of its illegal Rule change to Appellant's acts of April 2002, making Appellant's then legal acts illegal and Ordering Appellant to commit future criminal acts.

The Honorable Steven Eklund, ALJ, Presiding at DOPL Trial

The Honorable Mesuda Medcalf, ALJ, Presiding, Dept. of Commerce Review

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ARGUMENT

Introduction

Although DOPL's position in this case is simple to understand – it wants, and has ordered, “delivery” by administering nurses (specifically Jepson) of controlled drugs to non-patients – it's position is nevertheless wrong, illegal, and infeasible. Furthermore, DOPL concluded that failure to “deliver” is theft, an unjustified, intolerable conclusion, devoid of any factual evidentiary support. The tacit approval of DOPL's order by the Department of Commerce (Commerce) arguing that DOPL as drafter of Rule R156-37-502(4) [Rule 502(4)] is in the best position to “interpret” Rule 502(4) , does not change this fact – that the position is wrong, illegal, and indefensible. Neither DOPL nor Commerce “interpreted” the rule, rather DOPL substantively changed the rule and Commerce simply concluded the change was an “interpretation” and that it was reasonable. It is neither.

DOPL failed at trial to meet its burden and prove its case. To ignore that would be manifestly unjust. There is something fundamentally wrong with any approach which in the first place ignores the prosecution's burden of proof at trial.

DOPL retained three (3) findings and conclusions from the dismissed counts and used them to support its reprimand (see top p 5, Jepson's principal brief - hereafter “JPB”) This is error and should be reversed.

As to Petition Counts I and III, the Jury/Board should never have been allowed to hear nurse Baker's testimony, and said Counts should be dismissed ab initio. All of the

conclusions of DOPL and Commerce are based exclusively upon Baker's testimony advocating illegal distribution by "delivery" of controlled substances to non-patient family members.

The controlled substance act and rules apply to all medical disciplines under DOPL's supervision, not just nursing. Therefore DOPL's "substantive change" to rule 502(4) limiting application to institutions and suspending application from home nursing, cannot be supported by any rationale, particularly when DOPL's own ruling requires illegal criminal distribution of controlled substances by "delivery" to non-patient family members. Even if DOPL could change Rule 502(4) without compliance with the Utah Administrative Rulemaking Act, which it can't, it cannot change statutes by requiring - no - ordering a nurse - Jepson - to commit criminal acts of illegal drug distribution.

Petition Count III alleged and DOPL argues that Jepson failed to "produce" a medication he purchased for a patient. There was no evidence that Jepson purchased the medication with his own money, rather Garth specifically testified he gave Jepson the money to buy the morphine. The word "produce" is the word chosen by the DOPL prosecution. It means: *to bring forth; to present for inspection; cause to appear; write; to bear, yield; to give birth to;*¹ and so forth. The synonyms for the word produce are: create, engender, father, generate, hatch, make, originate, parent, procreate, sire,

¹ The New Lexicon Webster's Encyclopedic Dictionary of the English Language, Lexicon Publications, Inc. New York, 1990, p. 798

and spawn.² DOPL also argues that because Jepson did not “deliver” the morphine to Beckstrom, he failed to make it “available.” This is nonsense. “Available” means *capable of being obtained, obtainable*. Its synonyms are: **attainable, disponible, gettable, procurable**.³ As clearly seen, neither the definition nor any synonym for the word produce means “deliver,” certainly not “deliver into the possession of another.” The words produce and available are not legal terms of art. They are ordinary English words, the definitions and meanings of which can be gleaned from an English dictionary and from their synonyms, which can be found in a common Thesaurus. Neither does the word “available” mean “deliver.” Jepson did “produce” the morphine and kept it “available,” at all times pertinent to this case. He was reachable and the morphine was available 24 hours a day by cell phone. The prosecution failed to prove its own charging language, and failed to prove any of the elements of the theft statute upon which Count III rested (see JPB, pp. 34-38). DOPL gratuitously used the word “took” in its findings and conclusions. Took is past tense of Take. Take means *to get possession of by using force or superior strength; to steal or remove without right*.⁴ A “taking” occurs when a

² Roget’s II the New Thesaurus, Houghton Mifflin company, Boston, Mass., 1980, p 722

³see Roget’s II the New Thesaurus, Houghton Mifflin Company, Boston, Mass., 1980, p 722; see also *The New Lexicon Webster’s Encyclopedic Dictionary of the English Language*, Lexicon Publications, Inc. New York, 1990, p. 798

⁴ *The New Lexicon Webster’s Encyclopedic Dictionary of the English Language*, Lexicon Publications, New York, 1990;

person with a preconceived design to appropriate property to his own use obtains possession of it by means of fraud or trickery. *People v Edwards*, 72 Cal. App. 102, 236 P. 944, 948, *Blacks Law Dictionary*, revised 4th edition, 1968, p 1625. Jepson never took or stole anything from Mortensen or Beckstrom. DOPL has no valid argument against the dismissal of Count III, and it should be dismissed.

The reason DOPL attempts to recast the issues and the facts set forth by Jepson in his principle brief, is that DOPL has no factual or legal basis of defending its own illegal and unconstitutional treatment of Jepson. Jepson's statement of facts is accurate with citations into the transcript. DOPL and Commerce make gratuitous assumptions and use them as facts. For example, DOPL makes no attempt to defend against the issues raised under Jepson's first analysis – Statutorily prohibited "Delivery" vs. DOPL ordered "Delivery." One must ask why. The obvious answer is that the entire thrust of DOPL's ORDER and the ORDER on REVIEW of Commerce, affirming the DOPL Order, were both focused upon "Delivery," which makes both orders illegal. "Delivery" of the morphine, which Jepson refused to do, is the statutory definition of illegal distribution of a controlled substance. There is no defense DOPL can raise. Delivery of liquid morphine by a nurse, except by administration, is illegal. DOPL knows it, and so did Jepson. Jepson obeyed the law. DOPL ordered him to break the law. DOPL accused Jepson of unprofessional and unlawful conduct, and then convicted him of it, without requiring any proof of the elements of the theft statute cited under Count III. It found Jepson obeyed §58-37-8(2)(a)(I) under Count I. Both should be dismissed.

ARGUMENT
Admission by DOPL

1. The very first thing this Court should notice is that DOPL utterly failed in its brief to respond to Jepson's First Analysis about statutorily prohibited "delivery" of the lethal morphine and the related issues (see Jepson principle brief, p 11-23).
2. What is the effect of DOPL's silence on the "delivery" issues? Silence is usually interpreted as consent or agreement. We suggest that it connotes an admission by DOPL that Jepson is correct in his First Analysis. If this Court agrees with Jepson's First Analysis, then Petition Counts I and III should be dismissed ab initio, this appeal resolved in favor of Jepson, and Jepson's record ordered cleared.

DOPL's Brief contains Five Main Points

3. DOPL argues five (5) main points in its response brief: 1) Jepson failed to object to Nurse Baker's testimony; 2) Exclusion of JCAHO Exhibit was proper; 3) Rule 502(4) was "interpreted" not "substantively changed" by DOPL; 4) Jepson failed to preserve issue about off-record discussion with Judge; and 5) Private reprimand with public disclosure is reasonable because it discourages repeat conduct, maintains a record, protects the public, and gives Jepson a second chance.

Point # 1 - Jepson Objected Six Times to Nurse Baker's Testimony

4. Any experienced trial lawyer knows that it is not as easy in the Courtroom to make or complete an objection, as it looks on paper. Hindsight from a paper analysis (court transcript) is easy. Listening to a witness, getting interrupted or cut off by the Judge, and

responses from opposing counsel are sometimes happening all at the same time. It never looks that way on paper, but is a reality in trial. Karl Parry/DOPL want this Court to falsely believe that Jepson made no objection to Nurse Baker testifying as an expert witness. That is simply untrue and unsupported in the transcript. Their analysis is faulty. In one place DOPL claims “no objection” (DOPL brief, p 11, line 16). DOPL then turns around and admits in another place that Jepson did object to Baker as an expert witness: *Only one of Jepson’s objections went to the issue of Nurse Baker’s qualifications to be an expert witness* (DOPL brief p. 16, lines 5-6). How many objections are needed to preserve an issue for appeal? Only one. DOPL admits there was one.

5. DOPL falsely claims on page 16 of its Brief, that Attorney Jepson “*even asked Nurse Baker a question regarding standard of care.*” That is patently false. All that I asked her was to verify what she had said. It was not a solicitation for her opinion, certainly not her expert opinion. It was a review during cross examination of what she had stated on direct. That’s all it was.

6. Let’s look at the actual trial transcript with some explanations inserted, in regard to Jepson’s claimed objections: (April 25, 2004 - Transcript (AT) pp. 98-100, 136)

Lima: *Once a controlled substance prescription is issued to a patient, does the home health nurse determine if and when the medication can either be physically delivered to the patient or the caregivers or be retained by the patient or the caregivers?* P 98, lines 19-23

1st Objection - *“I am going to object. I think that’s a Legal question. Depends upon what the statute says and the rules say. It’s not subject to an opinion on that point”* P 98 line 24 thru P 99 line 2

I objected to getting an “opinion” meaning an expert opinion for the very reason that the prosecution had not laid the proper foundation or qualified Baker as an expert, nor had they offered her as an expert witness. The Judge cut me off and said:

Judge replied: *“I think the question was put to the witness in the capacity as an Expert Witness and I think she can answer to the extent she understands the question.”* P 99, lines 3-6

Since the Judge’s comment about “expert witness” came on the heels of my use of the word “opinion” it is unquestionable that he took my objection as going toward Nurse Baker offering any expert “opinion” testimony. Here the Judge (not the prosecution) first brought up the idea that Baker was “in the capacity” of an expert witness. If you check the transcript you will find the prosecution never even mentioned the words “expert witness.” Therefore I made my:

2nd Objection - *“Then I object because she has not been qualified in that area”* P 99, lines 7-8

The Judge cut me off in mid-sentence and argued with me before I could even complete my objection. The “area” I was referring to and didn’t get to finish was of course the area I already mentioned which was opinion testimony.

The Judge replied *“I think she was being offered as one, is she not, Miss Lima?”* P 99, lines 9-10
Lima says: *“She is”* P 99, line 11

There can be absolutely no question that the Judge understood and took my objections as going toward Baker offering expert opinion testimony. I was so astonished that the Judge offered the witness as an expert, because the prosecution failed to, that I

then began my 3rd objection about the Judge offering the witness as an expert:

3rd Objection - *“I beg your pardon, Judge. She was offered”[?] - “she was not offered, but I guess she is now” [being offered] “as a qualified expert on home health nurs[ing].” [emphasis added plus two bracketed words]*

DOPL argues that my objection in this instance was somehow an admission that Baker was an expert. Preposterous, especially in light of all of the objections taken together from this single exchange between the Judge and me and from reading the exchange as a whole. The Judge cut me off once again, but I kept talking:

The Judge replied, *“I think that’s what she is here to testify - . . . p 99, lines 15-16*

Further Objection - *“Yeah. The question here is where the legal duty lies as to who makes what determination and I think we can - “ P 99, lines 17-19*

Then the Judge cut me off again and the:

Judge replies: *“The question was put in the context of a home health nurse and the question, as I recall it, was does the home health care nurse have the authority to decide when or how to administer controlled substances.” P 99, lines 20-24*

I then agreed with the Judge’s use of the word authority and continued with my objections:

4th Objection - *“Exactly. And the word authority means nurses are controlled by statute and regulations and so the proper question should be, if it’s asked, what is the statute or where is the regulation and what does it say, not do you have an opinion about what the law is, so I maintain my objection. P 99, line 25 thru P 100, line5*

Here again I maintained the same expert “opinion” objection which I raised in my very first objection to which the Judge immediately responded with the words “expert

witness” and continued thereafter until he finally said:

Judge replied: *I think the witness can answer the question and the source and the basis for her answer can then be explored and then I’ll allow it.* . . . P 100, lines 6-8

Witness: If I understand the question correctly, are you asking me if a pharmacist prescribes - or if a physician prescribes a medication for a patient is there any reason why I don’t think that patient should have that medication? P 100, lines 9-13

Ms. Lima: Yes. P 100, line 14

I then had to object because the witness was asserting in her question to the prosecutor that she intended to give an opinion:

5th Objection - “Objection. *That is not what the question was. The question was a determination of authority to act, not what her opinion is.*” P 100, lines 15-17

Once more, I objected to Baker offering an expert “opinion.” Then after the Judge allowed Baker to continue to give opinion testimony, another 6th objection was stated:

6th Objection: Mr. Scott Jepson: *Objection. She has already clearly stated that she doesn’t have the background in administering narcotics to have any expert testimony.* P. 136, lines 3-5

You will please note in the transcript that there was no ruling by the Judge on this last objection. No ruling was ever made whether Baker was accepted by the court as an expert witness or whether her testimony was being “allowed” according to the Judge’s own prior ruling, wherein he stated: *I think the witness can answer the question and the source and the basis for her answer can then be explored and then I’ll allow it.*

7. DOPL’s arguments that Jepson failed to object to Baker offering expert witness testimony are ludicrous. Our Supreme Court has ruled in past cases that an objection

doesn't have to take on a particular form, just *some form of specific preservation*.¹ What counts is whether the Judge understood Jepson's objections as going to the issue of Baker's giving expert opinion testimony and had a *fair opportunity to avoid an error*. The Judge clearly understood that, and discusses it, and even used the words "expert witness." Please bear in mind that Karl Parry, who advanced DOPL's arguments on this issue was not present at the trial.

8. Another of the several frivolous arguments advanced by DOPL, and reasserted by Commerce, was that Baker was listed on an "advance notice" sent before trial. If that is

¹ *State v Seale*, 853 P.2d 862 "Although Seale's objection was vague, the judge clearly understood it ...if the specific ground is '**apparent from the context**...'; *State v Eldredge*, 773 P.2d 29 (Utah 1989) The principle underlying rule 103(a)'s requirement of a timely objection ... stating the specific ground of objection is that in the interest of orderly procedure, the trial court ought to be given an opportunity to address a claimed error and, if appropriate, correct it; *Hanson v Stewart*, 761 P.2d 14 (Utah 1988) The requirement of a specific objection on the record ensures that the trial court will understand the basis of the objections and have an opportunity to correct any errors before the case goes to the jury. . . the trial court has been given a **fair opportunity** to avoid an error... [emphasis added]; *State v McCardell*, 652 P.2d 942 (Utah 1982) However, the court in its discretion, and in the interests of justice, may review the erroneous admission of evidence even though the grounds of the objection thereto are not correctly stated; *State v Rangel*, 866 P.2d 607(Ut App. 1993) In discussing this 'plain error' exception, the Utah Supreme Court stated that 'in order for an error to be 'plain,' an appellate court must find that it should have been obvious to the trial court that it was committing error;" *State v Scheol*, 910350-CA (Utah App. 1991) As a general rule, we will not review a claim on appeal unless 'a contemporaneous objection or *some form of specific preservation of claims of error*' has been made a part of the record. *State v. Johnson*, 774 P.2d 1141, 1144 (Utah 1989) (quoting *State v Tillman*, 750 P.2d 546, 551 (Utah 1987). The two exceptions to this rule are '**plain error**' and '**exceptional circumstances**.' See *State v Archambeau*, 171 Utah Adv. Rep. 53, 53 (Utah App. 1991); *Salt Lake City v Holtman*, 806 P.2d 235 (Utah App. 1991) The objective of the rules requiring a specific objection at trial is to bring issues to a trial court's attention and provide an opportunity to resolve them. In the present case, these objectives were met.

all that is required under the rules of evidence for a person to be an expert witness, then let's throw out all of the foundational principles of evidence and all of this Courts opinions about foundation requirements at trial, and take DOPL's view – that no foundation need be laid, no experience is necessary, no qualifications are necessary, no witness need be offered as an expert, and what do you end up with - that's right - Nurse Baker. The argument about “advance notice” is actually a defense argument. She was listed as an expert, therefore, Jepson's objection to her “opinion” is ipso facto an objection to her giving expert “opinion” testimony - i.e. implicit within the objection using the word “opinion.”

9. Furthermore, on this point, DOPL knew in advance of trial that the entire case focused on the handling and control of liquid morphine, and they had over one year in which to have found just one qualified witness having experience with liquid morphine. It is no excuse in light of defense objections as to qualifications of Baker, to argue on appeal that the case is being too narrowly construed by the defense. The defense called four medical witnesses, all with expertise and experience in handling liquid morphine. DOPL failed to produce even one qualified medical witness. Why? The answer is selfevident. Every nurse or Doctor experienced and specialized in the handling and control of liquid morphine would testify that Jepson did the right thing and that leaving the lethal morphine in a patient's home is a violation of the standard of care under these unusual circumstances. DOPL therefore had to call an inexperienced unknowledgeable and untrained nurse to testify about liquid morphine, a subject she knew nothing about.

10. Last of all, DOPL argues that *Jepson does not offer any reasoning, however, as to why her testimony, assuming it was properly accepted as evidence, does not constitute substantial evidence of the relevant standard of care.* This argument by DOPL ignores the evidence and Jepson's entire principle brief. Jepson has addressed the following: 1) Baker testified advocating "delivery" which is illegal and criminal; 2) Baker is unqualified to give expert testimony in this case; 3) Baker's testimony violates Rule 403, 703, URE and violates the Burton, Anton, Robb and Dikeou Rules; 4) Five qualified medical witnesses testified opposite of Baker; 5) The trial Judge never ruled nor accepted her as an expert witness and never ruled allowing her testimony after it was presented; 6) Baker had no experience with liquid IV morphine; 7) Baker never testified about the standard of care for the handling and control of a lethal quantity and concentration of liquid IV morphine; 8) Baker disqualified herself; 9) Baker offered only lay personal opinion testimony, not expert testimony, and 10) DOPL admitted that Baker only offered personal opinion testimony. Reasons 1-6 above, are covered in Jepson's principle brief on file. So, let's look at reason "7":

11. The only "standard of care" testimony Baker offered is found in four places:

1) April 25, 2003 Transcript - P 100, line 20 through p. 101 line 15

Q: What is the standard of care when — in a situation where a patient is issued controlled substances by his or her physician? Is the nurse — does the nurse have any say as to whether or not the family can retain the drug? [emphasis added]

A: Well, the nurse — the person probably wouldn't be accepted for home health unless it was a safe situation and a workable situation, because you have to have a caregiver there, especially for a patient like this, If I felt like it was a safe situation

and they were giving her her medications correctly and she has a new one ordered that was a controlled substance, it would be — you know, my job would be to make sure they understood how to use it safely and — if I was concerned and felt like that wasn't going to work, then, again I would involve a social worker or someone else in my — who I was working with and maybe get some interventions going and find a more workable situation.

2) April 25, 2003 Transcript - P 101, line 16 through p. 102 line 1

Q: What is the standard of care regarding the wasting of controlled substances in a home health setting? [emphasis added]

A: You would like to have somebody watch you waste it, if that's what you were going to do. I am thinking — say you had a medication order and you didn't need it at the time. You would, you know, keep it in the refrigerator or just store it. It's — you know, it's got the patient's name on it, not the nurse. My duty would be to make sure they understood about the medication and you know, ongoing teaching and then evaluation of the patient and her medications and what was working and what wasn't.

3) April 25, 2003 Transcript - P 102, line 2 through p. 102 line 17

Q: If the decision was made to waste the medication, could you walk me through the process of how that waste would actually occur, according to your interpretation or understanding of the standard of care as it applies to a nurse in a home health setting? [emphasis added]

A: If it was a controlled substance I would have the family watch me and we would waste it together. I did a lot of hospice nursing and when we have to change a morphine cassette you would bring out the new morphine cassette to put in and the old one to take out. And maybe there was a few cc's of morphine left. The family would watch you cut the bag and waste it and put in the new one. Again, you know, narcotics in a home health situation, you are involved in that when it's a safe situation. You don't take people off the service it's not safe so it's never been an issue.

4) April 25, 2003 Transcript - P 102, line 2 through p. 102 line 17

Q: If you worked for a facility that had no separate wasting forms or procedure in place, what would be the nursing practice that you think meets minimum standard of care in handling a wasting situation? [emphasis added]

care in handling a wasting situation? [emphasis added]

A: Well I would have a competent witness.

Mr. Arron Jepson. Excuse me. I'm sorry. I have to object. The question phrased says Minimum standard of care. There is only one standard of care. Is there a minimum and maximum? And if there is then the question assumes facts not in evidence.

Administrative Law Judge: Tell the witness to not relate her answer on the basis of any minimum; just as to the standard of care.

Q. (My Ms. Luke) Just as to the standard of care.

A: I would write down the medication that I was wasting and the amount. I would have the person who was witnessing me make sure that they understood the magnitude of what we were doing. I would write it down and record it, because I care for my license.

12. DOPL argues, and would deceptively lead this Court to believe, that Baker gave testimony about the standard of care for the handling and control of liquid morphine, but she didn't. In the first quote above, Baker was asked about a family retaining a drug, and her answer was non-responsive and was about a patient being accepted into home health care. In the second through fourth quotes above, Baker talked only about wasting a drug. Nowhere else in the entire prosecution case in chief does Baker, or any other witness, talk about the standard of care of anything, let alone liquid morphine. The standard of care is a factual finding. If there is no prosecution testimony about it, and there wasn't, the jury/board cannot find a fact, or in other words, cannot find a standard for which there was no factual testimony offered by the prosecution.

13. Now let's look at reason eight (8) offered by Jepson for the disallowance of Baker's testimony. Her testimony from the April Transcript p. 118, line 25 through p. 119, line

17 was as follows:

Q: Okay. So you have had some experience administering morphine?

A: At the time I was an L.P.N., so very little.

Q: Rarely?

A: And usually it was I.M.

Q: Did you ever administer I.V. morphine?

A: No.

Q: Okay. And then since then, you have not had positions or — you haven't had any kind of position where you would have exposure to being required to administer I.V. morphine, correct?

A: Nope.

Q: So your testimony is that you have no experience in administration or control of I.V. morphine?

A: No.

Q: Thank you.

Mr. Arron Jepson: No, means no experience?

The Witness: Right

14. Baker clearly disqualified herself. Now let's look at reason nine (9): Baker gave

only lay personal opinion testimony. Here are some examples from the **April 25, 2003**

Transcript (AT) (DOPL recognized this and admitted it - see paragraph 15 below:

"If I were going ... (P. 98, lines 1-2); "I would recommend..." (98, line 2); "I think it's important..." (p 98, line 4); What is the standard of care...?" (P 100 line 20). "I felt like...if I was concerned... I would..." (p 101, lines 3, 7-8); "If I felt like it was a safe situation..." (P 101, line 3); "My job would be ..." (P 101, line 6); "If I was concerned and felt like..." (P 101, line 7); "I would involve ..." (P 101, line 8); "...who I was working ..." (P 101, line 9); "I think it would be up to the nurse and the family." (P 101, line 14); "You would like to have somebody watch you ..." (P 101, line 18); "I think as a nurse I would want to record that just to cover myself..." (P 102, lines 20-21); "Probably in the patient's record and perhaps in a log..." (P 103, lines 1-2); "I would report..." (P 117, line 5); "My understanding is... I don't believe so." (P 123. Lines 5, 21); "I understand as a nurse..." (P 124, line 3); "If it wasn't a safe situation I wouldn't be in there taking care of the patient." (P 127, line 13 thru P 128, line 7); "I would write down...because I care for my license...I would probably ...When I recorded...I would do it right there..." (P 137, lines 5,9,14,20,22); "I

wouldn't want...No I would want...I don't believe so." (P 138, lines 5,7,11).

14. Now let's examine reason ten (10). DOPL through its attorney, Karl Parry, admitted as follows:

...Ms. Baker could testify as to how she would act or handle different situations as posed to her, (Standard of Care). That is how questions were posed to her by the division and is how she answered many of the hypothetical and factual questions. (see DOPL's Memorandum Opposing Request for Agency Review, dated February 13, 2004, p. 17, paragraph 2, lines 11-14; see Record on Appeal p. 89) [emphasis added]

15. DOPL's assertion in footnote "4" page 18, that Baker was treated by DOPL, ALJ, and Jepson as an expert is patently false. None of them treated Baker as an expert. DOPL never even laid the foundation, nor offered Baker as an expert. The Court never accepted, approved, nor designated her, during trial, as an expert - in stark contrast from the Court's treatment of defense witnesses. Jepson objected six times to her offering any opinion evidence.

16. Therefore Jepson has offered at least ten reasons why Baker's testimony should have been, and should now be, disallowed, in addition to the 6 objections offered during trial.

Point # 2 - Exclusion of JCAHO Exhibit

17. DOPL improperly raises objections on appeal that are not in the trial transcript. For example: prejudice (2nd para, p. 20). Jepson has addressed the substantial and prejudicial nature of the exclusion, see JPB pp. 42-48.

Point # 3 - Rule R156-37-502(4)

18. Rule 502(4) is mentioned, referred to, discussed and or analyzed in JPB on the

following pages: 3, 4, 5, 7, 8, 9, 10, 13, 18, 19, 20, 22, 23, 29, 32, and especially at pp. 39-42, and 44. In DOPL's Brief, point # 3, it argues principally that (a) it "interpreted" Rule 502(4), not "substantively changed it," (b) that liquid morphine should have been left in the Beckstrom home because the duragesic patches were left, (c) there is a distinction between a home and institution, and (d) Rule 502(4) uses an "objective" test by the nurse.

19. DOPL's "interpretation" argument is false and frivolous. DOPL charged Jepson with violating the rule as written. Then, when the evidence showed Jepson's compliance and obedience to the rule and justified his maintaining control of the morphine, DOPL, acted post trial in changing the rule, limiting it to institutions, and suspending its application to a class of nurses. This is a change, not an interpretation. It affected an entire class - home health nurses, and such a rule change mandates DOPL follow the Utah Administrative Rulemaking Act see JPB, Exhibit 1D, §63-46a-3(2): *...each agency shall make rules when agency action: (c) applies to a class of persons...* DOPL's language is: *That rule governs a failure of a practitioner to maintain controls over controlled substances in an institutional setting.....R156-37-502(4) does not strictly apply in a home health care setting* (Order p. 11, Record p. 191).

20. DOPL's and Commerce's arguments that the morphine should be treated the same as duragesic patches is mindless. It ignores the facts and the law. Garth took possession of the patches directly from the pharmacist and he and his wife intended to administer them to the patient. Ownership attached (Jury Instruction, JPB, exhibit 9). Jepson could not

then control nor take the patches - hence, as a factual matter, they were not “left” by Jepson, as DOPL inaccurately argues, but rather were retained by Beckstroms. In contrast, the liquid morphine was obtained by Jepson directly from the pharmacist (please read §58-37-8(2)(a)(i) carefully and notice the wording “directly from a practitioner.”) and, Jepson was under Doctor’s orders to administer it to the patient “as needed,” and to “be careful with that.” The morphine was never in the physical possession of Beckstrom nor Mortensen, and therefore no ownership, by them, attached. Jepson was required to maintain control, and he perceived a substantial risk of leaving a huge volume (300mg) and heavy concentration (15mg/ml) of liquid IV morphine in a family home, and therefore did not leave the morphine in the home.

21. DOPL and Commerce try to draw a distinction between a home and an institution. That misses the point. The Rule language makes no such distinction. What DOPL did was change the rule and divided the state pool of nurses into two groups. DOPL’s new Rule 502(4) applies to one group and not to the other. That’s a substantive rule change. One group is required to obey the law by maintaining control, and the other group is forced to break the law by relinquishing control and illegally distributing drugs by “delivery” to patient’s families.

22. DOPL argues that Rule 502(4) uses an “objective” test by the nurse. It is obvious from this case that there is nothing objective about the rule. All those in this case with morphine experience have one viewpoint, and the single witness (Baker) with no morphine experience has the opposite viewpoint. Three doctors and two nurses with

morphine experience testified at trial that 300 mg of liquid morphine was too risky and dangerous to leave in a home. The only witness who testified that Jepson should have left the morphine was also the only witness with no liquid morphine experience. From a prudent practitioner viewpoint, that calculates to be 5 prudent practitioners to 1 in favor of Jepson's conduct. The viewpoint of the "one" can hardly be viewed as substantial evidence in light of the whole record. A question arises here, whether any of the Board members, had expertise in the handling and control of liquid morphine. It appears not, since they believed the only witness who had no experience. They believed the "1" and not the "5." They believed the insubstantial over the substantial. They believed the incompetent over the competent. They believed the prosecutor's words "is this a theft?" without any supporting evidence. They fabricated a "standard of care" out of thin air, not based upon fact, testimony nor evidence. If nothing else, this proves that state boards, or at least the state nursing board, don't necessarily know more, nor are they in any better position to judge and determine correct rules and regulations based upon trial evidence, or the lack thereof, than is this honorable Court. No deference should be given the Board.

Point # 4 - Jepson failed to preserve off-record discussion with Judge

23. DOPL claims Jepson failed to preserve his off-record discussion with the Judge. DOPL's argument is false and is addressed in JPB, pp. 42-48, Sixth Analysis . It need not be repeated here.

Point # 5 - Private Reprimand with Public Disclosure is Unreasonable

24. DOPL claims that the ordered private reprimand with public disclosure is reasonable

because it discourages repeat conduct, maintains a record, protects the public, and gives Jepson a second chance. Both DOPL and Commerce found that repeat conduct is unlikely and that Jepson intended to follow the law.¹ They found that the public was not in danger, and hence issued stays. Regarding giving Jepson a second change - that's humorous. As soon as an illegal disclosure was made by DOPL, post trial, to Jepson's hospital employer in Arizona that a disciplinary proceeding existed, Jepson lost his job. That's apparently what DOPL calls a "second chance." Last of all is the argument about "maintaining a record." That argument does not even apply because Jepson obeyed the law as written and published at the time of the incident -April, 2002.

25. This appeal would not exist but for (a) the post trial illegal unconstitutional action of DOPL's nursing board in illegally and substantively changing Rule 502(4), and (b) its illegal application of that change retrospectively to Jepson, making his past legal conduct,

¹ DOPL found: *"...Respondent acted with good intentions. . . there is no evidence of any potential or actual injury . . . Respondent generally provided good nursing care . . . an isolated incident. . . it is not likely Respondent would repeat that conduct. . . Respondent has not been previously subject to any disciplinary licensure action. . . rather unique facts of this case.* (See DOPL ORDER pp. 12-13; Record p. 192-193) [emphasis added]. The Department of Commerce found: *The Beckstroms testified that Petitioner [Jepson] was a good nurse and that he took appropriate care of Ms. Mortensen; the only concern they had was that the morphine was not available for Ms. Mortensen if she later needed it. The Division found that Petitioner had no intention to injure Ms. Mortensen, and she was not in fact injured; she did not need the morphine that he kept and later destroyed. At all times, his intentions were to comply with the law and the standard of care for home health nurses, not to violate them. Furthermore, Petitioner has no record of any prior disciplinary actions during his many years as a licensed registered nurse.* [emphasis added] Order on Review, p. 21, lines 3-10, Record at p. 26, lines 3-10.

and criminally distribute controlled substances, such as liquid morphine, by “delivery” into the physical possession of the non-patient family members, such as Beckstorms, for whom the prescription was not written, and who (patient and family) have no legal claim to nor right of possession of the controlled substance (morphine in this case) dispensed directly to the administering nurse (see exhibit 9, JPB)

Miscellaneous

26. The evidence at trial, which the DOPL nursing Board heard, referred 37 times to the fact, and it is a fact, that the controlled substance in this case was a “lethal” dose or quantity and concentration of morphine.²


27. The answer to issue 17, p 42, JPB is – yes, based upon the Fifth Analysis.

IN CONCLUSION: In light of the whole record, there is no evidence, let alone substantial evidence to support Petition Counts I and III and they should be dismissed with prejudice, ab initio. The three anthitetic conclusions challenged by Jepson which were based upon the dismissed Petition Counts II and IV (JPB top p. 5) should be reversed and dismissed. The prosecution’s misconduct (see JPB p 45; MT 190: 5) should be identified as misconduct which misled the Jury/Board. This Court should find and rule that DOPL, supported by Commerce, should have, but failed to, follow the requirements of the Utah

² **April Transcript** - 10 references 151 2, 12, 20, 152 25, 158 14, 176 22, 195 5; 10,12, 245 4 **May Transcript** - 24 references 15 2, 5, 33 13, 38 17, 39 11, 40 8,41 1, 4, 45 3, 5, 80 7, 90 3, 105 20, 106 12, 110 4, 120 16, 126 22, 128 16, 17, 175 4, 12, 16, 178 20, 182 8, **DOPL Findings, Conclusions, and Order (Record p. 182)** - 3 references “Excessive dosage and concentration of the morphine” - 5 1-2, 7 17-18, “Lethal” 12 9-11

Administrative Rulemaking Act, in substantively changing Rule 502(4). This Court should also find and rule that DOPL and Commerce acted in an unconstitutional ex post facto manner, when they illegally and retrospectively applied substantively changed Rule 502(4) to Jepson's legal acts, making them illegal and criminal. This Court should also find and rule that the exclusion of the JCAHO exhibit was prejudicial error. Jepson asserts that the Petition was filed in violation of Rule 11 URCP, and was not brought or asserted in good faith. If this Court agrees, please award attorney's fees to Jepson. And finally, Jepson's nursing license and record should be ordered cleared. Thank you.

Respectfully submitted this 1 day of April, 2005.


Arron F. Jepson
Attorney for Scott Jepson

Certificate of Delivery

The undersigned hereby certifies that a true and correct copy of the above Brief of Appellant has been hand delivered to Judge Mesuda Medcalt, Heber M. Wells Building, 160 East 300 South, Salt Lake City, Utah, 84114, and to Karl Perry, Assistant Attorney General, Division of Commercial Enforcement, 160 East 300 South, Fifth floor, Salt Lake City, Utah, 84114, this 1 day of April, 2005.


Arron F. Jepson, Attorney for Scott Jepson

(a) the applicant or licensee has engaged in **unprofessional conduct**, as defined by statute or rule under this title;

58-31b-402(1) UCA: After a proceeding pursuant to Title 63, Chapter 46b, Administrative Procedures Act, and Title 58, Chapter 1, Division of Occupational and Professional Licensing Act, the division may impose an administrative penalty of up to \$10,000 for unprofessional or unlawful conduct under this chapter in accordance with a fine schedule established by rule.