

1995

Walter Semidry v. Dot Adventures, Inc : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
230 S. 500 E. Suite 400
SALT LAKE CITY, UTAH, 84102

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WALTER SEMIDRY et. al.,	*	
	*	APPELLANTS' REPLY
	*	BRIEF
Plaintiffs/Appellants	*	
vs.	*	
	*	
DOT Adventures, Inc., et. al.,	*	CA No. 950814-CA
	*	
Defendants/Appellees	*	Priority 15
	*	

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ON APPEAL FROM THE FOURTH DISTRICT COURT
JUDGE BOYD PARK, PRESIDING

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INTRODUCTION

Defendants raise several issues in their Brief on Appeal that must be addressed in this Reply Brief. However, because the trial court's grants of Defendants' Motions for Summary Judgment resolved multiple claims and issues, none of the issues that will be dealt with herein are entirely dispositive of the case. Taken together, however, the Defendants raise three primary arguments and then cite the trial court and other authority in support of their allegations that Plaintiffs have failed, as a matter of law, to make and prove the factual allegations necessary to prevail upon their nine separate causes of action.

This reply brief will address the issues raised by Defendants' Brief on Appeal as they are set forth below.

SUMMARY OF ARGUMENT

One of the principal issues raised by the Defendants is the issue of whether Plaintiffs' Affidavits contradict their deposition testimony, or contain inadmissible hearsay. This issue is not properly before the Court on appeal, given that the trial court refused to rule on Defendants' Motion. Furthermore, Plaintiffs' Affidavits and Verified Complaint are the only significant evidentiary testimony in the record with regard to the second Motion for Summary Judgment, given that Plaintiffs depositions have never been entered into the record before the trial court. Finally, it is uncontestable that the trial court reviewed these affidavits, since they are cited directly in the trial court's Memorandum Decision.

The trial court erred in ruling as a matter of law that Jeanette Lynton could not be found personally liable for the actions of people who were allegedly her agents. The question of precisely which legal entity--the Nevada corporation, or Jeanette Lynton as an individual--was operating the Orem plant between August 1992 and January 5, 1993 was a question of materially disputed fact, not of law. It was therefore inappropriate for the trial court to decide this issue in favor of Defendant Lynton at Summary Judgment.

The trial court also erred in ruling as a matter of law that Plaintiffs had to prove actual damages in order to establish their prima facie claims. The trial court applied the damage rule appropriate to negligence actions, rather than the rule applicable to actions for damages based on intentional torts. Eight of plaintiffs' nine causes of action fall into the category of dignitary, or intentional, torts. As a matter of law, nominal damages are available for technical violations of these torts, and in most cases emotional damages are presumed, regardless of whether or not there is expert testimony to support them.

Finally, the trial court erred in ruling as a matter of law that, for one reason or another, plaintiffs had failed to allege or prove one or more necessary elements of each of their nine causes of action.

Because the trial court erred on so many different issues, the cumulative effect of these errors was a gross miscarriage of justice, when the trial court granted both of the Defendants' Motions for

Summary Judgment. Therefore, the trial courts' orders should be reversed, and this case should be remanded for trial on the merits.

ARGUMENT

Defendants' Allegations of Plaintiffs Hearsay and Conflicting Testimony are not ripe for determination.

Throughout their Brief on Appeal, Defendants attempt to discredit the testimony Plaintiffs offered in their Affidavits attached to their Memorandum in Opposition to Defendants' Second Motion for Summary Judgment. Defendants' refer in their "Statement of Facts" to the alleged hearsay evidence contained in these affidavits. This issue, and Defendants' additional arguments regarding the alleged conflicts between Plaintiffs' affidavit testimony and their deposition testimony are not properly before this Court, and cannot be decided. This is the case because these issues were, as the Defendants' point out, raised in their Motion to Strike and/or to Disregard Portions of the Affidavits. Plaintiffs responded in substantial and complete detail to Defendants' Motion. However, the Trial Court expressly declined to rule on this Motion in its Memorandum Decision:

Because the Court has found no genuine issue of material fact exists and defendants are entitled to summary judgment as a matter of law, the Court need not address defendants' Motion to Strike and/or to Disregard Portions of Plaintiffs' Affidavits.¹

Because the Trial Court did not rule in this Motion, these issues are not ripe for review or determination by this Court.² Furthermore,

¹ Record, p. 685.

² Should this Court wish to review these issues anyway, the Plaintiffs will quite willingly rest their case on their Memorandum in Objection to Defendants' Motion to Strike, Record

because the Trial Court refused to rule on this Motion to Strike, and because the Trail Court cites to the disputed affidavits in its Memorandum Decision, it must be presumed, on appeal, that the contents of the affidavits were properly part of the record considered in determining whether to grant Defendants' Motion for Summary Judgment.

It appears that Defendants would prefer to substitute the Plaintiffs' deposition testimony. However, it is clear from the record that this testimony was not before the trial court when it determined these motions for summary judgment. Although both parties cite various portions of the depositions in their Memorandum, the fact of the matter is that with one minor exception,³ none of the deposition testimony had been entered in evidence before the trial court, and indeed the deposition transcript was the subject of some controversy.⁴ The Utah Supreme Court faced a similar situation in the case of Pratt v. Mitchell Hollow Irr. Co., In that case, the Court stated:

pp 636-680. It is the Plaintiffs' position that the Defendants' contentions are quite competently answered and disposed of in that Objection.

³ Plaintiffs attached copies of eleven pages of their deposition testimony to their Memorandum in Opposition to Defendant Jeanette Lynton's Motion for Summary Judgment. These pages are the only parts of the depositions that have been entered into evidence.

⁴ See, e.g., Plaintiffs' "Statement of Attorney Regarding Corrections to Plaintiffs' Depositions," Record, pp. 177-164; Defendants' "Motion to Supress Depositions," Record p. 221; Defendants' "Memorandum in Support of Motion to Supress Depositions," Record, pp. 226-222; Plaintiffs' "Objection to Use of English Transcript," pp. 297-294.

We consider only the pleadings, depositions, admissions, answers to interrogatories, and affidavits properly before the trial court judge. Papers not properly filed with the trial court will not be considered. Depositions that were never introduced into evidence nor read by the trial judge will not be considered on appeal.⁵

As in that case, the deposition testimony in the present matter has never been entered into evidence. The only applicable record testimony before the trial court was the Plaintiffs' original verified complaint,⁶ an affidavit of Defendant Jeanette Lynton,⁷ an affidavit of Brian Lancaster,⁸ defendants' "Answer to Plaintiffs' First set of Interrogatories,"⁹ and the affidavits plaintiffs submitted in support of their Objection to Defendants' Motion for Summary Judgment.¹⁰ This testimony, actually in the record, is the only evidence that can be considered by this court in reviewing this matter on appeal.

The Issue of precisely what entity was doing business in Orem between August 1992 and January 1993--whether it was Jeanette Lynton, acting as an individual, or the Nevada corporation DOT Adventures--is a material disputed issue of fact, not a question of law.

The facts on the record before the trial court when Defendant Lynton's Motion for Summary Judgment was decided were simple:

⁵ Pratt by and through Pratt v. Mitchell Hollow Irr. Co., 813 P.2d 1169, 1171 (Utah 1991).

⁶ Record, pp. 9-1.

⁷ Record, pp. 135-128.

⁸ Record, pp. 85-79.

⁹ Record, pp. 286-251.

¹⁰ Record, pp. 457-419.

- 1) Defendant Lynton was an officer of the Nevada corporation DOT Adventures, incorporated in 1989, and in good standing through 1993.¹¹
- 2) Defendant Lynton, as an individual, was the registered owner in Utah of the trademark D.O.T.S., Dozens of Terrific Stamps. This trademark was originally registered in the state of Utah in 1989, and this registration was renewed in January 1992.¹²
- 3) In August and December 1992 a business entity hired employees and began manufacturing rubber stamps with novelty designs in Orem, Utah.¹³
- 4) The rubber stamps were sold under the trademark owned personally by Defendant Lynton--D.O.T.S., Dozens of Terrific Stamps.¹⁴
- 5) The employees of the business entity were paid with checks on a purported corporate account. The corporate name on the checks was DOT Adventures, Inc., with the address of the Orem production facility.¹⁵
- 6) During the period of time from August 1992 to January 1, 1993, there was no corporate entity with this name on record with the Utah State Division of Corporations.¹⁶

¹¹ Record, pp. 240-229.

¹² Record, pp. 58-56.

¹³ Record, pp. 9-10.

¹⁴ Record, pp. 59-55.

¹⁵ Record, pp. 132-128.

¹⁶ Record, pp. 62-55.

7) On January 5, 1993, the Nevada corporation, DOT Adventures, registered as a foreign corporation doing business in Utah under the name DOT Adventures, Inc.¹⁷

8) On March 18, 1993, ownership of the D.O.T.S., Dozens of Terrific Stamps trademark/dba was transferred to the Nevada Corporation, DOT Adventures.¹⁸

It is a disputed issue of material fact whether the entity manufacturing and selling stamps in Utah between August and January 5, 1993 was the individual Jeanette Lynton, the owner of the trademark name underwhich the Orem stamps were marketed and sold, or Jeanette Lynton acting in her capacity as a corporate officer of the Nevada corporation DOT Adventures. In ruling as a matter of law that the entity was the Nevada corporation, DOT Adventures, the trial court inappropriately confused issues of fact with issues of law.

It is a logical fallacy to argue as Defendant Lynton has argued¹⁹ that because the Nevada corporation DOT Adventures was in good standing in Nevada during the entire period in question, and because the Nevada corporation DOT Adventures registered in January 1993 as a foreign corporation doing business in Utah under the name DOT Adventures, Inc., that, *ipso facto*, the entity doing business in Utah prior to January 1993 was also the Nevada corporation DOT Adventures.

Plaintiffs are not, despite Defendants' arguments to the contrary, here arguing that the Nevada Corporation DOT Adventures has no standing to defend this case. Quite the contrary. As soon as Plaintiffs were notified of the existence of the Nevada corporation, and its alleged role in this matter, the Plaintiffs moved to amend

¹⁷ Record, p. 55.

¹⁸ Record, p. 56.

¹⁹ Appellee's Brief on Appeal, pp. 9-10, and 17.

their complaint to add the Nevada corporation as an alternative defendant.

But it is the Plaintiffs' position that the mere fact that the Nevada corporation DOT Adventures registered in January 1993 as a foreign corporation doing business in Utah under the name DOT Adventures, Inc. cannot establish as a matter of law or fact that this same Nevada corporation was the entity doing business in Utah under that name prior to registration--despite the similarity in the names being used.

The registration required by law **does** unquestionably establish the prima facie case that all actions taken in Utah in the name of DOT Adventures Inc. **after** January 5, 1993, were taken by the Nevada corporation DOT Adventures. But as a matter of law, that registration says absolutely nothing about actions prior to registration. Because there was no business entity legally registered in Utah between August 1992 and January 5, 1993, the question of who, precisely, was operating the Orem factory is an issue of fact, not of law. The stamps were being sold during this time under a trademark that was registered as the personal property of Defendant Jeanette Lynton. There was testimony in the record that Defendant Esquivel represented Ms. Lynton to be the owner of the business.²⁰ The only link on the record between the Nevada corporation DOT Adventures and the entity issuing paychecks between August and January is the similarity in the names, the January 1993 legal registration that linked the two names, and the Affidavits of

²⁰ Record, pp. 193-179.

Ms. Lynton and her accountant.²¹ The mere similarity of names does not establish as a matter of law that the business entities were identical, nor does the after-the-fact registration linking the two names. The credibility of Ms. Lynton's affidavit is questionable in this matter, and the affidavit testimony of Mr. Lancaster is inconclusive on this issue. Mr. Lancaster testifies clearly that the company records indicate that the Plaintiffs were employees of DOT Adventures, Inc. Plaintiffs are not disputing that this was the name on their paychecks. Mr. Lancaster further states that company records indicate that DOT Adventures, Inc. is a Nevada Corporation, doing business in Utah. Again, Plaintiffs do not dispute that this is what the official records indicate now. However, Mr. Lancaster's affidavit does not clarify whether corporate records between August 1992 and January 5, 1993 **also** indicate that the Utah entity was a Nevada corporation.

Plaintiffs asked, in their First Set of Interrogatories and Request for Production, for copies of "all business and/or management meeting minutes for the period of time between March 1992 and March 1993."²² Defendants objected to this production request, and failed to provide any responsive documents.²³ At oral argument on Defendant Lynton's Motion for Summary Judgment, plaintiffs requested either that Lynton's Motion be denied, or that, in the alternative, plaintiffs be allowed a continuance under Utah Rule of Civil

²¹ Record, pp. 135-133; 85-83.

²² Record, p. 287.

²³ Record, p. 272.

Procedure 56 (f), in order to pursue further discovery relating to this issue.²⁴ Relevant evidence that might be dispositive of this issue would be proof as to which entity--Lynton as an individual, or the Nevada corporation DOT Adventures, paid sales and income tax on the profits of the business between the months of August 1992 and January 5, 1993.

This factual issue is material. It bears directly on the question of who was employing Defendant Esquivel, and therefore who was ultimately responsible for his tortious actions. This issue of fact is disputed, and the evidence in the record is not conclusive as a matter of law. Therefore, the trial court's Order dismissing Jeanette Lynton as an individual defendant was in error, and should be reversed.

The Trial Court's insistence that Plaintiffs provide proof of actual damages, allegedly as part of their prima facie case, necessary to prevail against Defendants' Motion for Summary Judgment, was wrong as a matter of law.

Plaintiffs' Complaint and Amended Complaint set forth allegations of nine separate causes of action. Some are particular to one or another of the Plaintiffs individually, some apply to all four. The causes of action are for Wrongful Detainer, Assault, Battery, False Imprisonment, Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, and three counts of invasion of privacy in the form of intrusion into Plaintiffs' private property and personal affairs.²⁵ Eight of these

²⁴ Record, p. 745.

²⁵ Record, pp. 9-1; 107-99.

causes of action fall into a category of tort known as the dignitary tort.²⁶ Professor Dan Dobbs, in his three volume treatise The Law of Remedies devotes an entire chapter to this special class of tort. After defining what torts are classified as dignitary, he states the following:

All these dignitary harms may cause economic harm as well as affront to personality. If so, economic damages may be recovered. *However, in a great many of the cases, the only harm is the affront to the plaintiff's dignity as a human being, the damage to his self-image, and the resulting mental distress. It does not follow that recovery is limited to nominal damages, however, even if the extent of the emotional distress is not proved. On the contrary, the traditional rule for "trespassory" cases like assaults and batteries, was that "general damages" or "presumed damages" of a substantial amount can be recovered merely upon showing that the tort was committed at all.*²⁷

The undisputed facts of this case are that²⁸:

- 1) Plaintiff employees were detained for more than one hour in the cafeteria area of their place of employment--an area a substantial distance from the nearest door, such that Plaintiffs could not know if that door was locked or not.²⁹
- 2) Defendant Esquivel, the factory manager, in whom rested complete authority to hire and fire the factory employees, stated that, while he knew what he was doing was illegal, he did not care, and that all factory employees were going to have to submit to a search, one by one, in the bathrooms.³⁰

²⁶ See, e.g., Dobbs: The Law of Remedies, 2nd ed., Dan B. Dobbs (1993 West Publishing Company), Vol. 2, §7.1 (1), p. 259. The tort of negligent infliction of emotional distress does not fall into this category.

²⁷ Id., italics added.

²⁸ The record evidence in support of these facts is found in the Affidavits of plaintiffs and their relatives. The spanish originals of these Affidavits are found in the Record at pp. 397-346. However, all citations are to the Amended Translations, properly attested to by the translators, and found in the Record at pp. 454-420.

²⁹ Record, pp. 452, 447.

³⁰ Record, pp. 439-438, 452.

3) Defendant Esquivel stated that if anyone wanted to object, they could, but that then everyone would know who the thief was.³¹

4) Plaintiff employees were required one by one to enter the male or female bathroom respectively, with their supervisor, and submit to a search of their persons and personal property.³²

5) There was no rational basis for the search--there was no claim that the allegedly stolen \$20.00 bill was uniquely identifiable, therefore even had a \$20.00 bill been found in the search, there would have been no way to prove it was the one stolen.³³

6) Plaintiffs' personal property, including their wallets and lunch bags, were opened and searched.³⁴

7) Plaintiff Mazariegos was forced to pull her blouse out of her pants, undo her bra, and submit to her supervisor placing her hands under the blouse and running her hands up around her midriff under the bra line. She was further required to take off her shoes and socks and roll up her pant legs. Finally, the supervisor took a pencil and picked through Ms. Mazariegos' hair in a manner reminiscent of someone looking for lice.³⁵

These facts, despite Defendants' claims to the contrary, state a prima facie case for wrongful detention; false imprisonment; assault; battery; intentional infliction of emotional distress and invasion of privacy by intrusion upon seclusion. Plaintiffs were first threatened with an unlawful search. They were then required, implicitly, to chose between losing their employment or sitting idly by for more than one hour, instead of attending to the work which the Plaintiffs had hired on to do, and then one by one entering and remaining in a bathroom while their supervisors rifled through their wallets, pockets, purses, lunch sacks, or physically searched thier person--all in an illegal and completely pointless search for an

³¹ Record, pp. 447, 439-438.

³² Record, pp. 454-438.

³³ Record, p. 451.

³⁴ Id.

³⁵ Record, pp. 449-446.

unidentifiable twenty dollar bill. This entire situation was offensive to the dignity and personal integrity of the individuals involved. The Plaintiffs, and others who submitted to the search, felt they had no choice but to submit to this humiliation, because of the economic power Defendant Esquivel wielded in their lives. And yet the trial court found in part that because damages had not been proven, summary judgment was appropriate on all causes of action.

Defendants' brief cites the discussion between Plaintiffs' counsel and the trial court during oral argument on this matter. What the Defendants fail to recognize, however, is that Plaintiffs' contention, both to the trial court and to this court on appeal, is that the trial court was in error in requiring plaintiffs to prove actual damages in order to prevail against the Defendants' Motion for Summary Judgment. It seems apparent upon review both of this discussion at oral argument and of the trial court's final decision on this matter, that the trial court failed to make the distinction between the intentional torts here at issue, and other torts involving negligence. Negligence torts **do** require proof of damages for a plaintiff to prevail. Intentional torts do not. This distinction is clearly made in Dobbs, The Law of Remedies:

The common law dignitary torts--a technical assault without physical harm, for example--are comparable to libel and slander in that they have traditionally supported damages for intangible injuries even when little or no economic or physical harm is done. The tort is said to damage in itself, or as more commonly put, the plaintiff can recover "general" or "presumed" damages in substantial or more-than-nominal amounts.

This rule is quite different from the rule applied to many other torts, such as ordinary negligence torts, in which no

damages may be recovered unless physical or economic harm is first shown.³⁶

One of the primary basis on which the trial court granted Defendants' Motion for Summary Judgment was a substantial discussion of damages. The trial court begins with the following statement of the incorrect legal rule:

It is well known that, in a civil suit, damages may not be recovered unless the plaintiff can prove the existence of damages resulting to the plaintiff as a result of a legal wrong inflicted by the defendant. . . . Damages recoverable for a tort are limited to those damages directly attributable to the tort.³⁷

After this introductory paragraph, the trial court goes on to discuss the Plaintiffs' failure to show any economic damages. The trial court then refuses to consider the psychological evidence that the court had itself requested, on the grounds that Dr. Mejia's expert report was not sworn in proper affidavit form, and was therefore inadmissible. The trial court concludes:

Lacking any evidence that plaintiffs have incurred any monetary or psychological damage resulting from the search conducted by defendants, the Court finds that plaintiffs have no cause of action against defendants. Accordingly, defendants' Motion for Summary Judgment is hereby granted.³⁸

This statement is a completely inaccurate statement of the law, and as such provides no basis for the trial court's grant of Defendants' Motion for Summary Judgment. This statement is also a completely inaccurate statement of the facts of the case, but this issue will be addressed in the final section of this brief. Because the trial

³⁶ Dobbs, supra, § 7.3(2), at pp. 304-305.

³⁷ Record, p. 687 [quotation and citation omitted].

³⁸ Record, p. 686-685.

court so completely misunderstood the proper legal damage rules applicable to this case, the trial court's grant of Defendants' Motion for Summary Judgment was inappropriate and should be reversed, and this matter remanded for trial on the merits.

The Trial Court Erred in Holding, As a Matter of Law, that Plaintiffs' Allegations and Testimony Failed to Establish the Necessary Prima Facie Case for Each of their Causes of Action.

Defendants remaining arguments in their Brief on Appeal are essentially limited to their attempts to support the trial court's holding that Summary Judgment was appropriate because plaintiffs failed to establish a prima facie case for each of their causes of action.

Wrongful Detention

In its Memorandum Decision, the Trial Court held, as a matter of law, that Plaintiffs' cause of action for wrongful detention failed because "plaintiffs have not proven that defendants substantially interfered with plaintiffs' liberty. Plaintiffs knew the location of an exit and made no attempt to leave."³⁹ (Defendants, in their brief on appeal, contend that a criminal statute does not create a cause of action in tort. However, this contention is also not properly before this Court, as the Trial Court considered this issue, but refused to rule on it.⁴⁰)

Contrary to the Trial Court's apparent understanding, the tort of wrongful detention, as defined in the Utah Code Annotated, §76-5-

³⁹ Record, p. 689.

⁴⁰ See, Record, pp. 689-692.

304, does not require that the Plaintiff attempt to leave. Rather, it requires a **knowing, unlawful, restraint** of another, **so as to interfere substantially with his liberty**. Esquivel stated that the search was illegal, but that he was going to require each employee to submit, regardless of the illegality.⁴¹ Esquivel further required the employees to remain for more than one hour in the cafeteria area, while they proceeded one by one to the bathrooms to be searched.⁴² The employees were effectively restrained from continuing in the normal productive activities for which they had been employed. They were further restrained from leaving entirely by the barely implicit threat of losing their jobs, should they not submit.⁴³

In determining whether to grant or deny a Motion for Summary Judgment, all reasonable inferences must be drawn in the light most favorable to the party opposing the motion.⁴⁴ In the present case, it is reasonable to infer from the undisputed facts that Defendant Esquivel's actions substantially interfered with the Plaintiffs' liberty to continue their daily productive routine in their work place. Therefore, the trial court's dismissal of this cause of action should be reversed and remanded for trial on the merits.

Assault and Battery

In dismissing Plaintiffs' causes of action for assault and battery, the trial court stated that "The Court finds no evidence

⁴¹ Record, pp. 452, 439-438.

⁴² Record, pp. 454-438.

⁴³ Id.

⁴⁴ Pratt, supra.

that defendant Esquivel intended the search of the plaintiffs to cause harmful or offensive contact, or to cause plaintiffs to be in imminent apprehension of such contact."⁴⁵ Defendants argue in support of the trial courts' decision that these causes of action must fail because there is no allegation that Defendant Esquivel intended to cause the Plaintiffs any physical harm, nor did any of the Defendants offer any threats of bodily harm or violence. However, both the trial court and the defendants again completely misstate and misunderstand the legal principles involved. One hornbook explains the legal rule this way:

To constitute a battery, [or assault, since the required intent is the same] the actor must have intended to bring about a harmful or offensive contact or to put the other party in apprehension thereof. A result is intended if the act is done for the purpose of accomplishing the result or *with knowledge that to a substantial certainty such a result will ensue*.⁴⁶

Plaintiffs have testified that the forced, illegal, search of their persons and personal property was offensive. Defendant Esquivel stated that he knew the search was illegal. From those two undisputed facts, it is reasonable to infer that Esquivel also knew that this type of search was illegal precisely because people found them offensive; therefore, it is also reasonable to infer that Esquivel knew that requiring forty of his employees to submit to such a search would offend them. These reasonable inferences from the undisputed facts are sufficient to support the Plaintiffs'

⁴⁵ Record, p. 689-688.

⁴⁶ The Law of Torts, 2nd ed. Fowler V. Harper, Fleming James, Jr., and Oscar S. Gray (Little, Brown & Co., Boston) 1986. § 3.3 pp. 272-273 [*italics added*].

allegations that Defendant Esquivel intended to cause offensive contact to the Plaintiffs and the other employees when he required them to submit to a search of their persons and property. Because the reasonable inferences, drawn in Plaintiffs' favor, are sufficient to indicate the strong probability, if not certainty, that Defendant Esquivel intended to cause offensive contact to his employees when he ordered them to submit to a physical search of their persons and property, the trial court erred in dismissing these two causes of action. The trial courts' order, therefore, should be reversed and Plaintiffs' causes of action for assault and battery should be remanded for trial on the merits.

False Imprisonment

In dismissing the Plaintiffs' fourth cause of action for false imprisonment, the trial court again misstates the law and confuses a number of legal issues. The trial court asserted that:

Regardless of whether plaintiffs consented to the search. . . plaintiffs voluntarily remained and submitted to the search. Even if plaintiffs were afraid of losing their employment, they submitted to the search without objecting or without attempting to leave the premises.⁴⁷

The trial court here claims to be ignoring the factual issue of whether or not the plaintiffs consented to the search. In reality, however, the trial court finds reasonable implied consent in the simple fact that the plaintiffs didn't object or attempt to leave. In other words, despite claims to the contrary, the trial court here rules **as a matter of law** that no reasonable jury would find that plaintiffs did **not** consent--simply because they failed to get up and

⁴⁷ Record, p. 688.

try to walk out, or to jump up and object. As the Plaintiffs have discussed previously, in their brief on appeal, when consent is not express, but must be implied from the circumstances, whether consent exists or not **is an issue of fact**, that must be decided by a jury. The trial court erred when it ruled as a matter of law on this disputed factual issue.

The trial court further ruled that dismissal of this cause of action was also appropriate because again, Plaintiffs were not confined, nor where they physically restrained. Defendants in their brief on appeal cite the case of Hepworth v. Covey Bros. Amusement Co., 91 P.2d 507, (Utah 1939) and assert that this case is not on point because Hepworth was arrested. This assertion is mistaken. Hepworth was not arrested, but rather the dance hall security officers, wearing their regular police uniforms, but acting in a non-police capacity, asked Hepworth to accompany them, and **implicitly threatened** him with arrest if he did not.⁴⁸ Based on their uniforms, Hepworth believed them to have the power to arrest him, and therefore felt compelled to comply with their 'request.' In the present case, Defendant Esquivel had the power to immediately terminate the employment of anyone who objected to the search. Esquivel himself had indicated that while he knew his actions were illegal, he didn't care. Esquivel also indicated that it would be presumed that any employee who objected was the thief. The Utah Supreme Court stated, in Hepworth:

⁴⁸ Hepworth v. Covy Bros. Amusement Co., 91 P.2d 507, (Utah 1939).

If the words or conduct are such as to induce a reasonable apprehension of force, and the means of coercion are at hand, a person may be as effectually restrained and deprived of liberty as by prison bars.⁴⁹

The Utah Supreme Court did not determine in Hepworth whether the force need be physical. In the present case, the force was economic--plaintiffs and their co-workers reasonably assumed that anyone who objected or attempted to leave would lose their job. But the fact that the force was economic does not make the force Esquivel used in this case any less real than if he had held a gun to the Plaintiffs' heads. Esquivel's means of coercion were readily at hand--he only had to say, "you're fired." Again, the reasonable inferences from the undisputed facts, drawn in favor of the Plaintiffs, support reversing and remanding this cause of action for trial on the merits.

Intentional Infliction of Emotional Distress

In dismissing the Plaintiffs' fifth cause of action, the trial court held as a matter of law that none of the conduct alleged and testified to, both in deposition and in affidavit form, was sufficiently offensive to give rise to a cause of action for intentional infliction of emotional distress. In other words, on the uncontested facts of this case--the search, the hands running under Ms. Mazariego's blouse and around her midriff, the pencil picking through her hair--the trial court believed that it would be **legally** impossible for a jury to find that this was outrageous conduct sufficient to give rise to a cause of action for intentional infliction of emotional distress. It is the plaintiffs' position

⁴⁹ Id., at 509.

that the trial court erred, and that this cause of action, like the others, should be remanded for trial on the merits.

Negligent (or Reckless) Infliction of Emotional Distress

The trial court dismissed plaintiffs' sixth cause of action, for reckless or negligent infliction of emotional distress on the grounds that there

was no evidence that the search was conducted in a manner which would involve an unreasonable risk of causing emotional distress or than any emotional distress might result in illness or bodily harm. Accordingly, the Court does not find any reason why defendants should have realized that such results might occur.⁵⁰

Defendants support the trial court's dismissal of this cause of action with extensive reference to the alleged contradictions between Plaintiffs' deposition testimony and affidavit testimony. As discussed previously, these issues are not properly before this court. The evidence properly before the court supports the following factual findings and reasonable inferences therefrom:

- 1) Defendant Esquivel knew the search was illegal.⁵¹
- 2) Defendant Esquivel ordered forty factory employees to submit to a physical search of their persons and property anyway.⁵²
- 3) It can be reasonably inferred that Defendant Esquivel knew that the search would be offensive and humiliating to the plaintiffs.
- 4) It can further be reasonably inferred that Defendant Esquivel acted either intentionally to cause this humiliation and offense, or in reckless disregard for the fact that such offense and humiliation would result from the search.
- 5) The affidavit testimony of the plaintiffs and their immediate family members testifies to the humiliation,

⁵⁰ Record, p. 687.

⁵¹ Record, pp. 452, 439-438.

⁵² Id., see also, Record pp. 449-442.

emotional, and in the case of Ms. Mazariegos, physical suffering this incident caused in their lives.⁵³

6) The affidavit testimony of Ms. Mazariegos and her sisters shows that her intense nervous condition, complete with such physical manifestations as a bloody discharge, were directly caused by the unlawful search and other tortious conduct of Mr. Esquivel.⁵⁴

Because the undisputed facts and reasonable inferences from the undisputed facts meet the necessary elements to establish a cause of action for negligent infliction of emotional distress on the part of Ms. Mazariegos, this cause of action should also be reversed and remanded for trial on the merits.

Invasion of Privacy: Intrusion Upon Seclusion

Plaintiffs' seventh, eighth and ninth causes of action are for invasion of privacy. The trial court dismissed these causes of action on the grounds that plaintiffs' claims of a physical search of their persons and personal property in the workplace, and intrusive questioning into highly personal affairs in an employment interview, did not constitute any invasion of plaintiffs private space. As Plaintiffs pointed out in their brief on appeal, the trial courts' holding effectively rules that no Utah employee has any reasonable expectation of **any** privacy, whatsoever, in their workplace. This is the case because on the facts of this case, the Defendants have intruded into about every private space of an employee, short of a strip search or direct questioning about their personal sex lives. Defendants have personally searched plaintiffs' purses, wallets, and lunch bags. Defendants have searched plaintiffs pockets, shoes,

⁵³ Record, pp. 452-426.

⁵⁴ Record, pp. 449-446, 436-432.

socks, bras, and hair. Defendants have asked about plaintiffs' worthiness to enter an LDS temple.⁵⁵

Employees are not property of their employer. Their personal affairs and personal property are their own, whether they are at home or on the job. While desks or lockers or other property of an employer might merely be loaned to an employee, their purses, wallets and pockets are still their own personal property, and plaintiff employees, like all other Utah employees, have a right to the privacy of that property. Plaintiffs have established the necessary prima facie case for an invasion of their privacy by intrusion upon seclusion. Despite the trial courts' assertions, and the Defendants' claims, intrusion upon seclusion is not limited to intrusion into one's car or home. The search of a purse or wallet is a commonly used illustrative example of this type of invasion of privacy.⁵⁶

The requirements of a prima facie case are specific:

- 1) an intrusion by the defendant(s)
- 2) into a matter which the plaintiff has a right to keep private.
- 3) by the use of a method which is objectionable to the reasonable person.⁵⁷

Plaintiffs' allegations, testimony, and the uncontested facts of this case are sufficient to establish this prima facie case in each of the three claims for intrusion upon seclusion which the Plaintiffs have raised. A physical search of one's person, pockets, purse, wallet or lunch bag constitutes a physical intrusion. Plaintiffs, even in

⁵⁵ Record, pp. 454-438.

⁵⁶ See, e.g., Privacy, 62A Am Jur 2d § 60, p. 683.

⁵⁷ Id., § 48, p. 673.

their capacity as employees of the Defendants, have a right to keep the contents of this extremely personal property private. A physical search of their personal property is generally illegal, without a warrant and probable cause. Thus, presumably such a search would be objectionable to a reasonable person.

Equally, highly personal questions regarding one's religious affiliation and moral standing as determined by that religion, are intrusive. That religious affiliation and moral standing are also within a zone of personal affairs that plaintiff rightfully may expect to keep private. Requiring such questions to be answered in an employment interview would be offensive to a reasonable person.

Because Plaintiffs' allegations meet the required prima facie case, these three causes of action for invasion of privacy should also be reversed and remanded for trial on the merits.

CONCLUSION

Defendants claims that plaintiffs' affidavit testimony contradicts their deposition testimony are not properly addressed to this court because the trial court refused to rule on this issue, and Plaintiffs' deposition testimony was not properly entered on the record before the trial court, and therefore was not properly considered in determining defendants' Motion for Summary Judgment. Because this is the case, this Court also is unable to consider that deposition testimony in ruling on the merits of this matter.

The question of precisely who was the responsible legal entity--whether it was Jeanette Lynton in her individual capacity, or Jeanette Lynton in her corporate capacity--is a materially disputed

issue of fact, and therefore the trial courts' ruling as a matter of law the Defendant Lynton was not liable was inappropriate and should be reversed, and this issue remanded for trial on the merits.

The trial court erred in ruling that Plaintiffs had failed to state a cause of action on any of their nine claims because they had failed to establish actual damages. The proof required by the trial court is not applicable to cases of dignitary torts. Because the trial court applied the incorrect legal rule in this matter, the courts' ruling on this issue was in error, and should be reversed, and this matter remanded for trial on the merits.

Finally, plaintiffs' affidavits and other testimony clearly establish the necessary elements of the prima facie cases required for each of their nine causes of action. Therefore, the trial court's Order dismissing all nine causes of action should be reversed and remanded for trial on the merits.

Because the trial court erred in its rulings on each of these matters, Plaintiffs respectfully request this Court to reverse the trial courts' orders granting the Defendants' Motions for Summary Judgment, and remand this entire matter for trial on the merits of Plaintiffs' claims.

DATED this _____ day of April, 1996.

MARTI L. JONES
ATTORNEY FOR PLAINTIFFS/
APPELLANTS

MAILING CERTIFICATE

I hereby certify that I mailed two copies of the foregoing Appellant's Reply Brief to Counsel for Defendants/Appellees, Lorin D. Martin, first class postage prepaid, to the following address:

Loren D. Martin
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this 8th day of April, 1996.
