

1995

Walter Semidey v. Dot Adventures, Inc : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

230 South 500 East, #400
Salt Lake City, Utah 84102

WALTER SEMIDEY, et al.,
Plaintiff / Appellants,

vs.

DOT ADVENTURES, Inc., et al.
Defendants / Respondents

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Case No. 950814-CA

PRIORITY 15

BRIEF OF RESPONDENT

Appeal from the Fourth District Court, Judge Park

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**UTAH COURT OF APPEALS
BRIEF**

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LIST OF ALL PARTIES

The caption on Plaintiffs' Brief is not correct because it lists Jeanette R. Lynton as a Defendant and does not list all the Defendants named by Plaintiffs. Plaintiffs' Amended Complaint¹ included additional parties.

As a result of the trial court's ruling by Order dated 9/8/94², that DOT Adventures, Inc., was a valid corporation. The District Court directed that Jeanette R. Lynton be dismissed from the case and that her name be deleted from the caption. Consequently, the caption of the case should read as follows:

Walter Semidey, Angel Santiago, Humberto Bardales, and Rosa Mazariegos,

Plaintiffs,

vs.

DOT Adventures, Inc., Miguelangel Esquivel, Maria "Cookie" Reyes, Humberto Hernandez,

Defendants.

¹ Exhibit 1, Plaintiffs' Amended Complaint filed June 13, 1994, **R 107-99**

² Exhibit 2, Order filed September 9, 1994, **R 304-303**

TABLE OF CONTENTS

	Page No.
JURISDICTION.....	1
ISSUES PRESENTED FOR REVIEW	1
STANDARD OF APPELLATE REVIEW.....	1
DETERMINATIVE STATUTORY PROVISIONS.....	1
STATEMENT OF THE CASE	2

TABLE OF AUTHORITIES

Cases:	Page No.
Boies v. Raynor, 361 P.2d 1 (Ariz. 1961).....	30
Camfield Tires, Inc., v. Michelin Tire Corp., 719 F.2d 1361 (8th Cir. 1983)	32
Contreras v. Crown Zellerbach Corp., 565 P.2d 1173 (Wash. 1977).....	38
Cox v. Hatch, 87 Utah Adv. Rep. 3, 761 P.2d 556 (1988).....	40, 41, 43
Essick v. Yellow Freight Systems, Inc., 965 F.2d 334 (7th Cir. 1992).....	32
G.G.A., Inc., v. Leventis, 773 P.2d 841 (Utah App. 1989)	1
Ganaway v. Salt Lake Dramatic Association, 17 Utah 37, 53 P. 830.....	22
Hansen v. Heath, 852 P.2d 977 (Utah 1993).....	44
Hepworth v. Covey Bros. Amusement Co., 97 Utah 205, 91 P.2d 507 (Utah 1939)	
.....	18, 19, 24
Industrial Power Contractors, v. Industrial Commission of Utah	
832 P.2d 477 (Utah App. 1992).....	44
Jeppsen v. Jensen, 155 P.2d 429 (Utah 1916).....	24
Matter of Estate of Grimm, 784 P.2d 1238 (Utah App. 1989).....	39
Mildon v. Bybee, 13 Utah 2d 400, 375 P.2d 458 (1962)	18
Morgan v. Pistone, 25 Utah 2d 63, 475 P.2d 839 (1970).....	22
Pentecost v. Harward, 699 P.2d 696 (Utah 1985).....	39
Pratt by and through Pratt v. Mitchell Hollow Irr. Co., 813 P.2d 1169 (Utah 1991) ..	1
Reiser v. Lohner, 641 P.2d 93 (Utah 1982).....	28, 29, 30
Retherford v., AT&T Communications 200 Utah Adv. Rep. 22,	
844 P.2d 949 (1992)	28, 29

Roberts v. Hollocher, 664 F.2d 200, 204 (8th cir. 1981)	44
Ross v. Olsen, 481 P.2d 675 at 676 (Utah 1971).....	33
Russell v. Thompson Newspapers, Inc., 200 Utah Adv., Rep. 15, 842 P.2d 896 (1992)	28
Samms v. Eccles, 11 Utah 2d 289, 358 P.2d 344 (1961)	27, 28, 30
Sperber v. The Galigher Ash Company, 71 Adv. Rep. 3, 747 P.2d 1025 (1987).....	29
State v. Barkas, 91 Utah 574, 65 P.2d 1130 (1937)	21
State v. Schreuder, 726 P.2d 1215 (Utah 1986)	44
Van T. Junkins & Associated, Inc., v. US Industries, Inc., 736 F.2d 656 (8th Cir.)..	32
White v. Blackburn, 128 Utah Adv. Rep. 20, 787 P.2d 1315 (1990).....	28, 30
Turner v. General Adjustment Bureau, Inc., 832 P.2d 62 (Utah App. 1992)	41, 42
Statutes and Rules:	Page No.
Utah Code Annotated §16-10A-1502(6)	1, 10
Utah Code Annotated §16-10A-401	10
Utah Code Annotated §76-5-304	17, 18
Utah Code Annotated §78-2-2(3)(j).....	1
Utah Code Annotated §78-2a-3(2)(k).....	1
Rule 56(e) Utah Rules of Civil Procedure	45
Rule 4-501(2)(a) Utah Code Of Judicial Administration.....	46
Rule 4-501(2)(b) Utah Code Of Judicial Administration.....	11, 46
Rule 803(4) Utah Rules of Evidence	43
Other sources:	
74 Am Jur 2d, Torts, §49.....	25
6A C.J.S. Assault & Battery §2.....	21
6A C.J.S. Assault & Battery §8.....	22
6A C.J.S. Assault & Battery §16.....	25
77 C.J.S. Right of Privacy and Publicity §10.....	40
Nevada Corporate Law §§78.039-78.045.....	10
Restatement of Torts 2d, Emotional Distress, Comment to §46.....	30
Restatement of Torts 2d, §652A	41

Restatement of Torts 2d, §652B.....	41
Restatement of Torts 2d, §652C.....	41
Restatement of Torts 2d, §652D.....	41
Restatement of Torts 2d, §652E	41
Restatement of Torts 2d §892.....	25

Addendum Table of Contents

ADDENDUM “A”	1
ADDENDUM “B”	5

List of Exhibits

1. Plaintiffs’ Amended Complaint filed June 13, 1994,	R 107-99
2. Order filed September 9, 1994,	R 304-303
3. Order filed July 14, 1995,	R 703-701
4. Certified Copy of the Certificate of Authority and Certificate of Corporate Status,	R 231-229
5. Affidavit of Bryant Lancaster, CPA, filed May 31, 1994,	R 85-79
6. Memorandum Decision filed May 25, 1995,	R 696-685
7. Defendants’ Motion For Summary Judgment and Motion to Strike, filed July 11, 1994,	R 138-136
8. Memorandum in Support of Motion for Summary Judgment and Motion to Strike filed July 11, 1994,	R 127-119
9. Plaintiffs’ Objection to Defendant Lynton’s Motion For Partial Summary Judgment, filed July 19, 1994,	R 218-178
10. Defendants’ Reply Memorandum in Support of Defendant Lynton’s Motion for Partial Summary Judgment, filed August 8, 1994,	R 252-229
11. Defendants’ Memorandum in Support of Motion For Summary Judgment - Failure to State Cause of Action, filed October 13, 1994,	R 341-315
12. Plaintiffs’ Objection to Defendants’ Motion For Summary Judgment, filed November 1, 1994,	R 418-344
13. Interim Order Regarding Defendant’s Motion For Summary Judgment, filed February 24, 1995,	R 476-474
14. Plaintiffs’ Second Objection to Defendants’ Motion for Summary Judgment,	

filed March 13, 1995,	R 513-477
15. Plaintiffs' Amended Second Objection to Defendants' Motion for Summary Judgment, filed March 23, 1995,	R 604-544
16. Defendants' Motion to Strike and/or to Disregard Portions of Plaintiffs' Affidavits, filed April 24, 1995,	R 630-629
17. Defendants' Memorandum in Support of Motion to Strike and/or to Disregard Portions of Plaintiffs' Affidavits, filed April 26, 1995, .	R 628-618
18. Reply to Plaintiffs' Second Objection to Defendants' Motion for Summary Judgment, filed April 3, 1995,	R 617-606
19. Deposition of Rosa Mazariegos, dated April, 19, 1994,	
20. Deposition of Walter Semidey, dated April 21, 1994	
21. Deposition of Jose Humberto Bardales, dated April 21, 1994	
22. Deposition of Angel Santiago, dated April 20, 1994	
23. Hearing Transcript dated August 16, 1994,	R 728-756
24. Hearing Transcript dated February 10, 1995,	R 757-789
25. Interim order filed February 24, 1995,	R 476-474

STATEMENT OF JURISDICTION OF THE APPELLATE COURT

The Supreme Court has appellate jurisdiction over this matter pursuant to §78-2-2(3)(j). Under §78-2a-3(2)(k), the Court of Appeals has jurisdiction pursuant to transfer from the Supreme Court.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. Did the District Court commit reversible error when it granted Defendants' Motion For Summary Judgment, dismissing the action against Jeanette R. Lynton, an individual?

2. Did the District Court commit reversible error when it granted Defendants' Motion For Summary Judgment dismissing the action against all the Defendants?

In reviewing any order granting summary judgment, the Court of Appeals is to view facts and inferences in a light most favorable to the party opposing the judgment, giving no deference to the trial court's legal conclusions,³ and the Court of Appeals is free to reappraise the trial court's legal conclusions.⁴

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND RULES

§16-10A-1502(6):

The failure of a foreign corporation to have authority to transact business in this state does not impair the validity of its corporate acts, nor does the failure prevent the corporation from defending any proceeding in this state. [Emphasis added]

³ Pratt By and Through Pratt v. Mitchell Hollow Irr. Co., 813 P.2d 1169 (Utah 1991).

⁴ G.G.A., Inc., v. Leventis, 773 P.2d 841 (Utah App. 1989).

STATEMENT OF THE CASE

This entire action arises out of a single incident which occurred on or about December 16, 1992, at the work place of Plaintiffs and the corporate Defendant DOT Adventures, Inc. (hereinafter "DOT"). On or about that date, an employee had reported that \$20.00 was missing from her purse. Miguelangel Esquivel (hereinafter "Esquivel"), DOT's plant manager, asked the employees of DOT, possibly 50 in number, including the four Plaintiffs, to submit to an individual check or search of their persons. Following the checking or searching, the employees went back to work. At the time, none of the employees objected to being checked or searched. No objection or complaint was made by anyone until Plaintiffs filed this action.

Some nine months later, after all Plaintiff had obtained other, higher paying, jobs with other companies, Plaintiffs filed this action, claiming that during the time of their employment, specifically on or about December 16th, 1992, Plaintiffs had a cause of action which arose from the checking or searching process.

Plaintiffs' Amended Complaint alleged that Plaintiffs had causes of action against all Defendants for: wrongful detention; assault; battery; false imprisonment; intentional and reckless infliction of emotional distress; intrusion into physical privacy; intrusion into personal belongings; and intrusion into personal affairs.

As to Jeanette R. Lynton (hereinafter "Lynton"), Plaintiffs alleged that Lynton was personally liable because she was a stockholder, officer and director of DOT. Lynton was not present during the checking or searching and had no knowledge of it until some time later.

Plaintiffs' action against Lynton rested upon a theory that since DOT, a Nevada Corporation had not obtained a Certificate Of Authorization from the Utah Division of Corporations to do business in Utah until January 5, 1993, the Nevada corporation doing business in Utah had somehow lost its corporate status, leaving Lynton as a sole proprietor, personally liability for all debts and actions against the company or any of its agents.

Plaintiffs sought to have the trial court rule, as a matter of law, that a foreign corporation loses its corporate status when it begins doing business in Utah without first obtaining a Certificate Of Authorization from the Utah Division of Corporations and that Lynton therefore became personally liable, as a matter of law.

Rejecting Plaintiffs' argument, on September 8, 1994, the District Court granted Partial Summary Judgment⁵, dismissing Jeanette R. Lynton from the case.

Completing discovery, Defendants moved for Summary Judgment, supported by Memorandum. At the hearing held on July 14, 1995, the trial court tried to explain to Plaintiffs' counsel the nature of the elements required to establish the alleged causes of action, stating that the court, not observing any question of material fact, and, viewing the allegations in light most favorable to the Plaintiffs, could not see how the matter could go forward. The trial court made the observation that, even if Plaintiffs' were able to establish facts sufficient to sustain all of their allegations, there would still be a questions of damages. "Where are your damages?" For a detailed account from the record, please reffer to "Addendum A",

⁵ Exhibit 2, Order filed September 9, 1994, R 304-303

Even then, declining to dismiss the case at that point, the trial court granted Plaintiffs an additional thirty (30) days to show that they could produce evidence to meet the elements of their multiple allegations, including any admissible evidence supporting their claim of having suffered severe emotional injury damages.

Plaintiffs filed additional documents to which the Defendants responded as a matter of law. Without requiring further hearing, the District Court granted Summary Judgment⁶ dismissing Plaintiffs' Complaint against all the remaining Defendants.

STATEMENT OF FACTS

The Parties.

1. The Defendant, DOT Adventures, Inc., (hereinafter "DOT"), is a Nevada corporation qualified to do business in Utah.⁷

2. On January 5, 1993, DOT Adventures, a Nevada corporation, obtained formal authority from the Utah Division of Corporations to transact business in the state of Utah under the name of "DOT Adventures, Inc."⁸

3. The Defendants, Miguelangel Esquivel (hereinafter "Esquivel"), Marie Reyes (hereinafter "Reyes") and Humberto Hernandez (hereinafter "Hernandez"), were employed by DOT, working at the manufacturing plant (hereinafter "Plant") in Orem, Utah.

4. Esquivel, was the Plant Manager.⁹ His duties required him to oversee and efficiently manage the ongoing daily manufacture and shipment of DOT products.

⁶ Exhibit 3, Order filed July 14, 1995, R 703-701

5. Reyes, and Hernandez were supervisors, acting under the authority and direction of Esquivel.¹⁰

6. The Plaintiffs, Walter Semidey (hereinafter "Semidey"), Angel Santiago (hereinafter "Santiago"), Humberto Bardales (hereinafter "Bardales"), and Mazariegos (hereinafter "Mazariegos"), were employed by DOT, working at the Plant. The Plaintiff's salary checks were all drawn under the name of DOT Adventures, Inc.¹¹

7. DOT's business is the design, manufacture and marketing of a large variety of small rubber stamps used by purchasers to decorate personal communications. The manufacture and shipment of such rubber stamps is accomplished at the Plant.

The incident.

8. For cause of action, the Plaintiffs' have alleged that on December 16 or 17 of the year 1992 (hereinafter "December 16, 1992"), at the Defendant's Plant in Orem, the following events occurred:

a. At approximately 10:00 a.m., Esquivel gave instructions that work at the Plant was to stop and that all employees were to gather to the lunch area.¹²

⁷ Exhibit 4, Certified Copy of the Certificate of Authority and Certificate of Corporate Status, **R 231-229**

⁸ Exhibit 4, Certified Copy of the Certificate of Authority and Certificate of Corporate Status, **R 231-229**

⁹ Exhibit 1, Plaintiffs' Amended Complaint filed June 13, 1994, **R 107-99, at R 106, para. 6**

¹⁰ Exhibit 1 Plaintiffs' Amended Complaint filed June 13, 1994, **R 107-99, at R 106, para 8, and R 105, para 10**

¹¹ Exhibit 5, Affidavit of Bryant Lancaster, CPA, filed May 31, 1994, **R 85-79, at R 82-79**

¹² Exhibit 1, Plaintiffs' Amended Complaint filed June 13, 1994, **R 107-99, at R 105, para 16**

b. At the lunch area, Esquivel told everyone present that he had received information that twenty dollars (\$20.00) had been stolen from a purse of one of the Plant workers.¹³

c. At the lunch area,¹⁴ Esquivel gave directions to the supervisors that all employees would be checked or searched.¹⁵

d. Esquivel stated that if anyone objected, he or she was to indicate that objection or raise their hand. No person objected. No person raised their hand.¹⁶

e. Esquivel instructed all male employees to individually, one at a time, go to the men's room with Hernandez. The female employees were to go to the women's room with Reyes (a female supervisor).¹⁷

f. The male Plaintiffs report that in the rest room they were asked to show their pockets, wallets and the inside of their shoes.¹⁸

g. While she admits that none of her clothing was removed, the Plaintiff female employee, Mazariegos, alleges that she was also asked to loosen her bra and that Reyes (the female supervisor) touched her by running her fingers along and inside the lower line of her bra.¹⁹ Mazariegos did not say at that time that she objected to the procedure or the alleged touching.

¹³ Exhibit 1, Plaintiffs' Amended Complaint filed June 13, 1994, **R 107-99, at R 105, para 17**

¹⁴ Exhibit 19, Deposition of Rosa Mazariegos, dated April, 19, 1994, pg. 15 lines 16-18

¹⁵ Exhibit 19, Deposition of Rosa Mazariegos, dated April, 19, 1994, pg. 17 lines 2-

¹⁶ Exhibit 19, Deposition of Rosa Mazariegos, dated April, 19, 1994, pg. 17, lines 14-17

¹⁷ Exhibit 19, Deposition of Rosa Mazariegos, dated April, 19, 1994, pg. 18, lines 6-24

¹⁸ Exhibit 20, Deposition of Walter Semidey, dated April 21, 1994, pg. 42, lines 12-13

¹⁹ Exhibit 19, Deposition of Rosa Mazariegos, dated April, 19, 1994, page 23, lines 7-19

h. No other person has described any touching similar to that described by Mazariegos, and none is alleged.

i. Semidey testified that he believed that if the incident had been ordered by the police, it would have been lawful.²⁰

j. After the checking was completed, Esquivel told everyone to go back to work. Everyone went back to work.²¹

k. No stolen money was found.

9. Although the Plaintiff Mazariegos claims that the Plaintiffs were told that no one was to leave,²² no door was locked or barred.²³

10. The Plaintiff Bardales, testified in his deposition that no one stated that he would be prohibited from leaving.²⁴

11. None of the Plaintiffs made any attempt to leave.²⁵ None were restrained. No guard was posted. No physical show of force or restraint was demonstrated.²⁶

12. There is no evidence or testimony that there was any showing of restraint or an indication that it would be used to prevent anyone from leaving.

13. There is no evidence or testimony that there was any force used. There is no evidence or testimony that any physical pain was caused to any of the Plaintiffs.

²⁰ Exhibit 20, Deposition of Walter Semidey, dated April 21, 1994, pg 35, lines 3-6

²¹ Exhibit 19, Deposition of Rosa Mazariegos, dated April, 19, 1994, pg 20, lines 3-

²² Exhibit 19, Deposition of Rosa Mazariegos, dated April, 19, 1994, page 28, lines 13-16

²³ Exhibit 21, Deposition of Jose Humberto Bardales, dated April 21, 1994, pg 42, lines 11-13

²⁴ Exhibit 21, Deposition of Jose Humberto Bardales, dated April 21, 1994, pg 42, lines 14-18

²⁵ Exhibit 19, Deposition of Rosa Mazariegos, dated April, 19, 1994, pg 28, lines 13-16

²⁶ Exhibit 21 Deposition of Jose Humberto Bardales, pg 42, lines 14-18, and, Exhibit 6 Memorandum Decision filed May 25, 1995, **R 696-685 at R 688, paragraph 17**

14. There is no evidence or testimony that the supervisors' checking was performed with anger.

15. There is no evidence or testimony that any of the Plaintiffs had any fear that they would be injured in any way. There is no evidence or testimony that there was any reason to fear injury. There is no evidence or testimony that any injury was intended.²⁷

The Plaintiff's motivation for filing the action.

16. The Plaintiff Semidey, described his reason or motivation for the filing of the complaint. He said: "The sole reason for us being here is the feeling of offense as a result of this conduct, meaning the search incident."²⁸

There was no notice to Defendants of any claim.

17. Until the Complaint was filed with the Court, no Plaintiff objected about the incident to any DOT supervisor or officer.

18. No objection was received by DOT until the Complaint was filed more than nine months after the incident.

Proceedings in the trial court - first Motion For Summary Judgment.

19. On July 11, 1994, Defendants filed a Motion For Summary Judgment, asking the Court to dismiss the action against Defendant Lynton personally, because DOT was a Nevada corporation and Lynton was not personally liable for the corporate actions of DOT.²⁹ The Motion was supported by a Memorandum.³⁰

²⁷ Exhibit 6, Memorandum Decision filed May 25, 1995, **R 696-685, at R 689-688, para. 16**, and Exhibit 22, Deposition of Angel Santiago, dated April 20, 1994, pg. 40, lines 3-7

²⁸ Exhibit 20, Deposition of Walter Semidey, dated April 21, 1994, page 59, lines 14-17

²⁹ Exhibit 7, Defendants' Motion For Summary Judgment and Motion to Strike, filed July 11, 1994, **R 138-136**

³⁰ Exhibit 8, Memorandum in Support of Motion for Summary Judgment and Motion to Strike filed July 11, 1994, **R 127-119**

20. The Plaintiffs filed their response to the motion under the caption of Plaintiffs' Objection To Defendant Lynton's Motion For Partial Summary Judgment.³¹

21. Plaintiffs' response claimed that there were disputed issues of fact, but the response did not raise any issues of fact by reference to any sworn testimony or admissible evidence.³²

22. In reality, Plaintiffs' response merely argued that "DOT Adventures," a Nevada Corporation, which qualified to do business in Utah under the name "DOT Adventures, Inc." is not be the same corporation because the word "Inc." was added to the end of the name on the Utah Certificate of Authority.³³

23. Plaintiffs' response admitted the existence of the Nevada Corporation "DOT Adventures," and attached a copy of the Nevada Certificate of Corporate Status to Plaintiffs' response.³⁴

24. Defendants Reply Memorandum In Support Of Defendant Lynton's Motion For Summary Judgment,³⁵ provided certified copies of official documents from the State of Nevada and the State of Utah demonstrating that the Utah Certificate Of Authority,³⁶ was issued based upon the application filed by DOT

³¹ Exhibit 9, Plaintiffs' Objection to Defendant Lynton's Motion For Partial Summary Judgment, filed July 19, 1994, **R 218-178**

³² Exhibit 9, Plaintiffs' Objection to Defendant Lynton's Motion For Partial Summary Judgment, filed July 19, 1994, **R 218-178**

³³ Exhibit 9, Plaintiffs' Objection to Defendant Lynton's Motion For Partial Summary Judgment, filed July 19, 1994, **R 218-178, at R 218-215**

³⁴ Exhibit 9, Plaintiffs' Objection to Defendant Lynton's Motion For Partial Summary Judgment, filed July 19, 1994, **R 218-178 at R 199-198**

³⁵ Exhibit 10, Defendants' Reply Memorandum in Support of Defendant Lynton's Motion for Partial Summary Judgment, filed August 8, 1994, **R 252-229**

³⁶ Exhibit 4, Certified Copy of the Certificate of Authority and Certificate of Corporate Status, **R 231-229, at R 231**

Adventures, a Nevada Corporation.³⁷ Utah laws³⁸ require inclusion of "Inc.", Nevada law³⁹ does not. Appellants' entire case against Ms. Lynton personally, relied solely upon Appellants most unique double or two corporation theory. Before the trial court, Appellants vigorously argued that there were two corporations, one of which was DOT Adventrues, Inc., (a Utah corporation) and the other of which was DOT Adventures (a Nevada corporation). Appellants never produced any evidence in law or fact as to the "Inc."

25. Based upon certified copies of the Utah Certificate Of Authority and its underlying application, which documents were not disputed, the trial court concluded, that "DOT Adventures," a Nevada Corporation, had qualified to do business in Utah under the name "DOT Adventures, Inc.," as required by Utah law, and that under the provisions of §16-10A-1502(6), UCA, a foreign corporation does not lose its corporate status by doing business prior to receipt of the Utah Certificate Of Authority.

26. The trial court also concluded, as a matter of law, that the Defendant Lynton, knowing nothing of the incident and not being present at the time of the incident, had no part in the alleged incident and that she was not personally liable merely because she was a stockholder, officer and/or director of the corporation.

³⁷ Exhibit 4, Certified Copy of the Certificate of Authority and Certificate of Corporate Status, **R 231-229, at R 230**

³⁸ Utah Code Annotated, §16-10a-401, The name of a corporation: (a) must contain the word "corporation," or "company," or the abbreviation "corp." "inc.," or "co.," or words or abbreviations of like import in another language.

³⁹ See: Nevada Corporation Law, §§78.039 through 78.045. It is impossible to prove a negative. No Nevada law requires the use of "Inc." in the name of any corporation. Appellants have not shown and are unable to base any double or two corporation theory upon such an argument. Appellants have produced no evidence otherwise.

The trial court granted a partial summary judgment, dismissing the action against Defendant Lynton personally.⁴⁰

Proceedings in the trial court - Defendant's second Motion For Summary Judgment.

27. On October 11, 1994, Defendants filed a motion for summary judgment as to all remaining issues and as to all the remaining Defendants. The Motion was supported by a memorandum.⁴¹

28. In Plaintiffs' response, entitled Objection to Defendants' Motion for Summary Judgment dated 11/1/94,⁴² Plaintiffs provided a so-called "Statement Of Disputed Facts," but the Plaintiffs' statement did not provide any testimony to contest Defendants' recitation of facts, and it did not dispute the material facts recited by Defendant's Memorandum.⁴³

29. Plaintiffs' response did not comply in any respect with Rule 4-501(2)(b) Code Of Judicial Administration. There is not one single reference in Defendant's Response to any paragraph contained in Defendants' Statement Of Facts.⁴⁴

30. Plaintiffs' response relied upon affidavits which contain summaries of hearsay conversations, without foundation. As an example, Plaintiffs argue in their statement of facts that Esquivel demanded the search as a "deliberate and calculated insult ...,"⁴⁵ but Plaintiffs do not support the hearsay conclusion with admissible testimony. In the next paragraph of Plaintiff's so-called statement of facts, Plaintiffs

⁴⁰ Exhibit 2, Order filed September 9, 1994, **R 304-303**, and Exhibit 24, Hearing Transcript dated February 10, 1995, **R 757-789**, at **R 750-751**, lines 4-17

⁴¹ Exhibit 11, Defendants' Memorandum in Support of Motion For Summary Judgment - Failure to State Cause of Action, filed October 13, 1994, **R 341-315**

⁴² Exhibit 12, Plaintiffs' Objection to Defendants' Motion For Summary Judgment, filed November 1, 1994, **R 418-344 at R 418-399**

⁴³ Exhibit 12, Plaintiffs' Objection to Defendants' Motion For Summary Judgment, filed November 1, 1994, **R 418-344 at R 418-413**

⁴⁴ Exhibit 12, Plaintiffs' Objection to Defendants' Motion For Summary Judgment, filed November 1, 1994, **R 418-344 at R 418-413**

⁴⁵ Exhibit 12, Plaintiffs' Objection to Defendants' Motion For Summary Judgment, filed November 1, 1994, **R 418-344, at R 414**

argue, in the alternative, that if the statement is not true, the following alternative statement is true:

18. In the alternative, Mr. Esquivel acted in deliberate and intentional disregard of the emotional distress and humiliation caused by his insulting behavior ...⁴⁶

31. The statement made in paragraph 18 quoted above is not supported by reference to sworn testimony or evidence.

32. Plaintiffs memorandum did not provide the court with evidence or testimony to demonstrate that there were any issues of fact. The memorandum merely argued Plaintiffs' position.

33. Plaintiffs' memorandum could have alleged that all the Plaintiffs were touched during the alleged search, but Plaintiffs' statement of facts does not claim they all were touched. To the contrary, Plaintiffs' Memorandum admits:

20. The male supervisor did not physically touch most of the male workers.⁴⁷

34. There were numerous male workers at the Plant. Only three of those male workers have joined in this action.

35. Plaintiffs' memorandum does not allege that Santiago (one of the male plaintiffs) was touched. Santiago's supporting affidavit does not claim that he was touched.⁴⁸

36. Plaintiffs' memorandum does allege that Mazariegos, the only female Plaintiff was touched. While the Memorandum alleges that each female was touched by the female supervisor, there is no support for the claim. The only

⁴⁶ Exhibit 12, Plaintiffs' Objection to Defendants' Motion For Summary Judgment, filed November 1, 1994, **R 418-344, at R 414**

⁴⁷ Exhibit 12, Plaintiffs' Objection to Defendants' Motion For Summary Judgment, filed November 1, 1994, **R 418-344, at R 414**

⁴⁸ Exhibit 12, Plaintiffs' Objection to Defendants' Motion For Summary Judgment, filed November 1, 1994, **R 418-344, at Santiago Affidavit, R 374-372**

affidavit signed by a female which alleges a female was touched is the Mazariegos affidavit which states:

When it was my turn to enter the bathroom the supervisor made me unbutton my pants and loosen my blouse. She also made me undo my bra. Then she stuck her hands under my blouse and ran her hands all over the area of my waist and even under my bra. Then she told me to take off my shoes and socks, and to roll my pants legs up above my knees. Last of all, she stuck a pencil in my hair and searched through all my hair with a pencil.⁴⁹

37. Plaintiffs' memorandum admits that not one of the factory workers raised their hands to object to the check or search.⁵⁰

38. Plaintiffs' memorandum argues that the Plaintiffs did not consent to the check or to the search, but they nonetheless permitted it to happen due to fear.⁵¹

39. Plaintiffs' memorandum does not demonstrate that any of the Plaintiffs suffered severe emotional distress or any specific injury.

40. The Mazariegos affidavit contains nothing more than a summary or conclusion that Mazariegos, although she continued employment with DOT, couldn't work after the incident.⁵²

41. At the hearing on the Defendants' Motion for Summary Judgment held on February 10, 1995,⁵³ the trial court expressed concern that Plaintiffs' memorandum did not raise any issues of fact and that the trial court repeatedly asked Plaintiffs' counsel to tell the trial court what evidence she had to support the basic elements of her allegations.

⁴⁹ Exhibit 12, Plaintiffs' Objection to Defendants' Motion For Summary Judgment, filed November 1, 1994, **R 418-344, at Mazariegos Affidavit, R 382-379**

⁵⁰ Exhibit 12, Plaintiffs' Objection to Defendants' Motion For Summary Judgment, filed November 1, 1994, **R 418-344, at R 415, para 14**

⁵¹ Exhibit 12, Plaintiffs' Objection to Defendants' Motion For Summary Judgment, filed November 1, 1994, **R 418-344, at R 413, para 23**

⁵² Exhibit 12, Plaintiffs' Objection to Defendants' Motion For Summary Judgment, filed November 1, 1994, **R 418-344, at Mazariegos Affidavit, R 382-379**

⁵³ Exhibit 24, Hearing Transcript dated February 10, 1995, **R 757-789**, beginning at 776

42. At the hearing, the trial court advised Plaintiffs' counsel that she had not provided sufficient evidence of the individual elements of proof required to establish a *prima facie* case, as to the various causes of action alleged by Plaintiffs, and if Plaintiffs did not provide the minimum evidence required, as to each element of proof required to establish a *prima facie* case, the trial court would have to grant Defendants' Motion For Summary Judgment.

43. In Addendum "A" attached hereto, the Defendants have provided a synopsis of the conversation between the trial court and Plaintiff's counsel, whereby the trial court attempted to educate Plaintiff's counsel and explain to her what she would have to establish in order to avoid having the various causes of action dismissed. The trial court went through virtually every cause of action and reiterated every element of proof required in an effort to assist Plaintiffs' counsel.

44. The court entered an Interim Order dated 2/24/95 granting the Plaintiffs additional time within which to present sufficient facts and/or testimony necessary to defeat Defendants' Motion For Summary Judgment.⁵⁴ The Order provided, among other things:

1. The Court grants Plaintiffs until March 13, 1995, to show any basis they may have as to why this matter should continue, and that full Summary Judgment as requested by Defendants should not be granted as to all remaining alleged causes of action. As a minimum, Plaintiff shall provide the following:

- a) a list of witnesses for trial and a proffer as to what each witness will say, including the specifics as to what they will say about their damages, along with supporting corroboration or expert witnesses, if any;
- b) any tangible evidence that would support Plaintiff's claim for damages; and
- c) any appropriate testimony to be presented at trial.⁵⁵

⁵⁴ Exhibit 25, Interim Order Regarding Defendant's Motion For Summary Judgment, filed February 24, 1995, R 476-474

⁵⁵ Exhibit 25, Interim Order Regarding Defendant's Motion For Summary Judgment, filed February 24, 1995, R 476-474

45. As permitted by the Trial Court's Order, Plaintiffs submitted additional documents.⁵⁶ The additional documents submitted by the Plaintiffs consisted of the following:

- a. A Memorandum in opposition to Defendants' Motion⁵⁷, entitled Plaintiffs' Second Objection to Defendants' Motion for Summary Judgment, filed March 13, 1995 and did not provide any additional testimony or evidence. The Plaintiff also filed an additional memorandum entitled Plaintiffs' (Amended) Second Objection to Defendants' Motion for Summary Judgment, filed March 23, 1995. This memorandum did not provide any additional testimony or evidence.
- b. A psychological opinion regarding all the Plaintiffs, contained in one letter from a Juan A. Mejia, who interviewed all the Plaintiffs, one by one, on February 18-19, 1995, more than two years after the alleged incident.⁵⁸
- c. An affidavit of Linda J. Gummow who apparently did not interview any of the Plaintiffs, but who stated, in her affidavit, that she reviewed the opinion of Juan A. Mejia and she reviewed an "English translation of statements of the ... individuals." The statements were not attached to the affidavit.⁵⁹

⁵⁶ Exhibit 14, Plaintiffs' Second Objection to Defendants' Motion for Summary Judgment, filed March 13, 1995, **R 513-477** and Exhibit 15, Plaintiffs' Amended Second Objection to Defendants' Motion for Summary Judgment, filed March 23, 1995, **R 604-544**

⁵⁷ Exhibit 14, Plaintiffs' Second Objection to Defendants' Motion for Summary Judgment, filed March 13, 1995, **R 513-477**

⁵⁸ See Exhibit 15, Plaintiffs' Amended Second Objection to Defendants' Motion for Summary Judgment, filed March 23, 1995, **R 604-544 at The Psychological Evaluation of Juan A. Mejia, MD, at R 582-573**

⁵⁹ Exhibit 15, Plaintiffs' Amended Second Objection to Defendants' Motion for Summary Judgment, filed March 23, 1995, **R 604-544 at The Affidavit of Linda J. Gummow, R 572-570**

d. Copies of Amended English translations of Plaintiffs' affidavits which were originally before the trial court and which the trial court had already concluded were insufficient.⁶⁰

46. Defendants' filed a Motion to Strike and/or to Disregard Portions of the newly presented Plaintiffs' Affidavits.⁶¹ The Motion was supported by a Memorandum.⁶²

47. As Defendant's Memorandum demonstrated, the amended translations of the affidavits submitted by the individual Plaintiffs contained statements which contradicted the Plaintiffs' prior sworn deposition testimony and rather than creating an issue of fact, the Plaintiffs' affidavits merely demonstrated that the individual Plaintiffs had made contradictory statements about the events.⁶³ The amended translations did not provide any additional information which demonstrated that genuine issues of fact precluded the granting of Defendants' Motion for Summary Judgment.⁶⁴

48. The Defendants responded by submitting what amounted to their reply memorandum to the supplemental responses provided by Plaintiffs.⁶⁵

49. The trial court then issued a detailed Memorandum Decision dated 5/22/95 in which the trial court analyzed each cause of action asserted by Plaintiffs, and each essential element of a *prima facie* case which Plaintiffs would have to demonstrate, as to each cause of action, and the trial court determined that the Plaintiffs had failed to provide admissible testimony or evidence to support one or

⁶⁰ Exhibit 15, Plaintiffs' Amended Second Objection to Defendants' Motion for Summary Judgment, filed March 23, 1995, **R 604-544 at the English Translations of Affidavits, R 567-545**

⁶¹ Exhibit 16, Defendants' Motion to Strike and/or to Disregard Portions of Plaintiffs' Affidavits, filed April 26, 1995, **R 630-629**

⁶² Exhibit 17, Defendants' Memorandum in Support of Motion to Strike and/or to Disregard Portions of Plaintiffs' Affidavits, filed April 26, 1995, **R 628-618**

⁶³ Exhibit 17, Defendants' Memorandum in Support of Motion to Strike and/or to Disregard Portions of Plaintiffs' Affidavits, filed April 26, 1995, **R 628-618, at R 626-621**

⁶⁴ Exhibit 17, Defendants' Memorandum in Support of Motion to Strike and/or to Disregard Portions of Plaintiffs' Affidavits, filed April 26, 1995, **R 628-618, at R 620-618**

⁶⁵ Exhibit 18, Reply to Plaintiffs' Second Objection to Defendants' Motion for Summary Judgment, filed April 3, 1995, **R 617-606**

more of the essential elements of each cause of action and so there was no basis upon which the Court could deny Summary Judgment and require a trial.⁶⁶

50. On July 14, 1995, the court signed its Order dismissing the case.⁶⁷

SUMMARY OF ARGUMENT

DOT was and is a Nevada corporation, in good standing, doing business in Utah. While DOT did not obtain its Certificate Of Authority from the Utah Division Of Corporations until two weeks after the incident which is the subject matter of this action, DOT nonetheless was a corporation and the stockholders, officers and directors of the corporation were not personally liable for the obligations and/or debts of the corporation.

The trial court was correct in determining that Lynton, as a stockholder, officers and director was not personally liable to the Plaintiffs for the alleged actions of Esquivel, the plant manager.

Plaintiffs failed to demonstrate that they had admissible testimony or evidence which could establish each essential element required to present a *prima facie* case, in regard to each cause of action, at trial.

In addition, Plaintiffs failed to raise an issue of a material fact which would preclude the trial court from granting Defendants' Motion For Summary Judgment.

ARGUMENT

POINT 1

PLAINTIFFS' FIRST AND FOURTH CAUSES OF ACTION SHOULD BE DISMISSED.

Unlawful detention, a criminal offense, is not the basis for a civil cause of action.

The Utah Code Ann. §76-5-304 provides as follows:

⁶⁶ Exhibit 6, Memorandum Decision filed May 25, 1995, R 696-685

⁶⁷ Exhibit 3, Order filed July 14, 1995, R 703-701

- (1) A person commits unlawful detention if he knowingly restrains another unlawfully so as to interfere substantially with his liberty.
- (2) Unlawful detention is a class B misdemeanor.

"Unlawful Detention," under the Utah Code Annotated, §76-5-304, is a crime, but the Utah Criminal Code does not establish a civil liability or a civil penalty. In order to establish "false imprisonment" a person must demonstrate that force or the threat of force coupled with a reasonable apprehension of the use of force were utilized to detain or restrain the person.

In Mildon v. Bybee, 13 Utah 2d 400, 375 P.2d 458 (1962), a claim of malicious prosecution was made against a Deputy Sheriff, who, armed with a warrant of arrest for one person, mistakenly took another into custody and drove away with him in the officer's car. In reviewing a directed verdict of no cause of action, the Utah Supreme Court equated false imprisonment with unlawful detention and stated:

Nevertheless, false imprisonment occurs whenever there is an unlawful detention or restraint of another against his will.
(Id. at 459.)

In Hepworth v. Covey Bros. Amusement Co., 97 Utah 205, 91 P.2d 507, the Utah Supreme Court said:

We wish to invite attention to a distinction in the law which we believe has been confused in the briefs. False arrest may be committed only by one who has legal authority to arrest or who has pretended legal authority to arrest. False imprisonment may be committed by anyone who imprisons without a legal right. . . .

"Any exercise of force, or express or implied threat of force, by which in fact the other person is deprived of his liberty, compelled to remain where he does not wish to remain or go where he does not wish to go, is an imprisonment. * * * The essential thing is the restraint of the person. * * * 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. * * *" 11 R.C.L. 793, 794, sec. 5.

(Id. at 509.)

In order for the restraint to be "unlawful", the restraint must be imposed with force or with the threat of force coupled with a reasonable apprehension that force will be used if the person being restrained does not comply.

Plaintiffs' Brief relies upon and cites Hepworth,⁶⁸ and argues that "there was no evidence or force, other than the authority of the floorwalkers and their police uniforms."⁶⁹ However, in Hepworth, a city police officer, in uniform searched Hepworth, arrested Hepworth and told him that if he didn't accompany the police officer and cooperate, the police officer would take Hepworth to the police station to book him. Plaintiffs' Memorandum urges the Court to believe that Hepworth, who was arrested, by a policeman in uniform, was not restrained by force or threat of force. However, a person who has been arrested, must presume that he is held by force or threat of force. Hepworth does not support Plaintiffs' argument that whether Plaintiffs were restrained by force is a jury question because in the case at hand, the Plaintiffs were not arrested by a policeman in uniform.

Hepworth relies upon the assumption that false arrest automatically gives rise to a presumption of false imprisonment. Hepworth at page 509 says: "False arrest is merely one means of committing a false imprisonment."

In the case at hand, in order to establish a *prima facie* case, the Plaintiffs must demonstrate, as a matter of fact, that they were "unlawfully detained." According to the rule of law in Hepworth cited above, the Plaintiffs must demonstrate that they were restrained and deprived of liberty by force or the threat and a reasonable apprehension of force.

The depositions of the Plaintiffs demonstrate that no Plaintiff was detained or restrained by force or the threat of force. When asked if anyone had locked the

⁶⁸ Plaintiffs' Appellate Brief, pgs. 21-22

⁶⁹ Plaintiffs' Appellate Brief, pg. 22

doors so she could not leave or if anyone had used threatening words, Mazariegos' response was: "No."⁷⁰

Plaintiffs' First Cause of Action is for "Wrongful Detention"⁷¹ and in support thereof the Complaint alleges that Defendant Esquivel unlawfully detained the Plaintiffs. In the trial court's detailed Memorandum Decision, the court noted the fact that the doors remained unlocked. The court further noted that Plaintiffs had no evidence against Defendants of any threat or force to detain the Plaintiffs.⁷² Plaintiffs had no evidence that "defendants substantially interfered with plaintiffs' liberty. Plaintiffs knew the location of an exit and made no attempt to leave."⁷³

The Plaintiffs' Fourth Cause of Action is for "False Imprisonment"⁷⁴ and in support thereof the Complaint alleges that Defendant Esquivel "unlawfully detained" the Plaintiffs. Plaintiffs' First and Fourth Causes of action against the Defendants, are one and the same.

The only evidence provided to the trial court demonstrated that no force or threat of force was used and any of the Plaintiffs could have left at any time. The Trial Court observed:

17. As to plaintiffs' fourth cause of action, false imprisonment, the Court again finds no evidence that plaintiffs were confined. Plaintiffs were aware of an exit, and plaintiffs were not physically restrained. Plaintiffs did not attempt to discover whether the door was locked and did not attempt to leave. The Court further finds that defendants did not falsely imprison plaintiffs by any threat of force. . . .⁷⁵

Plaintiffs argue that they chose not to leave the premises because they didn't want to lose their jobs.⁷⁶ The argument made by Plaintiffs that they chose not to

⁷⁰ Exhibit 19, Deposition of Rosa Mazariegos, dated April, 19, 1994, pg. 28, lines 13-18

⁷¹ Exhibit 1, Plaintiffs' Amended complaint filed June 13, 1994, R 107-99, at R 105, paras 15-17

⁷² Exhibit 6, Memorandum Decision filed May 25, 1995, R 696-685, at R 689-688, at R 692, para. 8

⁷³ Exhibit 6, Memorandum Decision filed May 25, 1995, R 696-685, at R 689-688, at R 692, para. 15

⁷⁴ Exhibit 1, Plaintiffs' Amended complaint filed June 13, 1994, R 107-99, at R 104, paras 30-32

⁷⁵ Exhibit 6, Memorandum Decision filed May 25, 1995, R 696-685, at R 689-688, at R 688, para. 17

⁷⁶ Plaintiffs' Appellate Brief, pg. 12

leave, constitutes an admission that the Plaintiffs were free to leave, they simply chose not to leave.

Plaintiffs did not have a *prima facie* case of wrongful detention or false imprisonment. The trial court was correct in determining that Plaintiffs' lacked the evidence required to establish the essential elements of a case of wrongful detention or false imprisonment and the two causes of action should have been dismissed.

POINT 2
PLAINTIFFS' SECOND CAUSE OF ACTION FOR ASSAULT
AND PLAINTIFFS' THIRD CAUSE OF ACTION FOR BATTERY
MUST BE DISMISSED.

An "assault" requires a threat of force and bodily harm coupled with a wrongful act.

In 6A C.J.S. Assault & Battery §2, at pages 316-317, the definition of assault is as follows:

An assault may be defined as any intentional, unlawful offer of corporal injury to another by force, or force unlawfully directed toward the person of another, under such circumstances as create a well founded fear of imminent peril, coupled with the apparent present ability to effectuate the attempt if not prevented. Also the term has been defined as an unlawful attempt, coupled with the present ability, to commit a violent injury on the person of another; an attempt or offer, with force or violence, to do a corporal hurt to another, whether from malice or wantonness, under such circumstances as denote, at the time, an intention to do it, coupled with a present ability to effectuate such intention.

In State v. Barkas, 91 Utah 574, 65 P.2d 1130 (1937) the Utah Supreme Court, in accord with the foregoing definition stated:

It is too elemental to require argument, that to point a loaded revolver at another to frighten or wound him constitutes an assault . . .
(Id. at 1132.)

To constitute an "assault" there must be a wrongful act. In 6A C.J.S. Assault & Battery §8, at pg. 328, citing the Utah case of Ganaway v. Salt Lake Dramatic Association, 17 Utah 37, 53 P. 830, the following comment is found:

There can, however, be no assault or assault and battery without a wrongful act. It is not every touching or laying on of hands that constitutes an assault and battery; to gently touch another for the purpose of doing a lawful act does not amount to an assault and battery; the touching of, or injury to, another must be done in an angry, revengeful, rude, or insolent manner so as to render the act unlawful. Similarly, an accidental hurt, in which the actor is blameless, does not amount to a battery.

A cause of action for battery is based upon an allegation and the establishment of intent, malice, anger, etc. In 6A C.J.S. Assault & Battery §8, at pg. 329 the following is found:

Generally, intent is an essential element in an action for assault and battery. More precisely, it is the rule that intent is the gist of the action only where the battery was committed in the performance of an act not otherwise unlawful; or as it is sometimes stated, there is no assault and battery unless the touching was with intent to injure, or unless defendant was otherwise engaged in a trespass or other unlawful transaction at the time of the act complained of. . . .

There can, however, be no assault or assault and battery without a wrongful act. . . .

Utah is in accord with the common law cited above to the effect that there must be intent to injure or harm in order to constitute an assault or a battery. In Morgan v. Pistone, 25 Utah 2d 63, 475 P.2d 839 (1970), the Utah Supreme Court held that a doctor who touched a minor, young lady neighbor, to emphasize his point of view was not guilty of an assault or battery. The Court stated:

Plaintiff, a minor female at the time of the alleged terrifying touching, and an adult at time of the trial, said one thing, and defendant, an adult male, said another, i.e., that he touched simply to call attention by way of explanation that he, a doctor, disliked the degradation attendant on plaintiff's repeated suggestions that his role in society best could be described by the sound of a duck. . . .

On such highly emotional and controversial evidence the jury apparently believed the doctor was put upon with greater force and vigor, by the plaintiff's unkind, opprobrious epithets than was the plaintiff by the gentle touching designed only to warn, not to wound. Hence we cannot say that the jury erred in finding that there was not that kind of intentional touching amounting to a technical battery. (Id. at 839-840.)

In the case at hand, Plaintiff's Complaint, Second Cause of Action for Assault does not allege a wrongful act or the threat of bodily harm or violence. The Complaint alleges:

27. By requiring that all employees submit to a physical search of their person and belongings before being allowed to leave the premises, Mr. Esquivel intentionally created in all non-supervisory employees the reasonable apprehension of harmful or offensive touching.⁷⁷

Absent an allegation, supported by testimony or evidence that Defendant Esquivel engaged in any threats and/or acts of bodily harm or violence, the Plaintiffs' Second Cause of Action for assault must be dismissed.

Plaintiff's Complaint, Third Cause of Action for Battery does not allege an intent to injure or harm. The Complaint alleges:

29. By requiring all supervisors to physically search the person and property of all employees, Mr. Esquivel intentionally caused the harmful or offensive touching of all non-supervisory employees.⁷⁸

As to Plaintiffs cause of action for "battery," Mazariegos is the only Plaintiff who claims to have been touched. As to all the other Plaintiffs the cause of action for battery must be dismissed because they don't even claim to have been touched.

Mazariegos testified in her deposition that she was in fact touched, but not in such a way as to cause harm or injury.⁷⁹ The trial court observed:

⁷⁷ Exhibit 1, Plaintiffs' Amended complaint filed June 13, 1994, R 107-99, at R 103, para. 27

⁷⁸ Exhibit 1, Plaintiffs' Amended complaint filed June 13, 1994, R 107-99, at R 104, para. 21

⁷⁹ Exhibit 19, Deposition of Rosa Mazariegos, dated April, 19, 1994, pgs. 20, lines 15-25 and page 21, lines 1-2

16. As to plaintiffs' second and third causes of action, assault and battery, the Court does not find any evidence that defendants threatened plaintiffs with any violence or harm. According to the Model Utah Jury Instructions, intention to cause harmful or offensive contact or imminent apprehensions of such is one of the elements of assault. See M.U.J.I. 10.18 (Assault Elements). The Court finds no evidence that defendant Esquivel intended the search of plaintiffs to cause harmful or offensive contact, or to cause plaintiffs to be in imminent apprehension of such contact. In fact, the deposition testimony indicates that plaintiffs understood that defendant Esquivel intended the search to recover a fellow employee's stolen property. . . . The Court further finds no evidence that defendant Esquivel intended to cause acts of bodily harm or violence, and no evidence that Esquivel attempted to or threatened to cause injury or harm.⁸⁰

Absent an allegation, supported by testimony or evidence that Defendant Esquivel caused a touching of Mazariegos with an intent to injure or harm, or cause acts of bodily harm or violence, the Plaintiffs' Third Cause of Action must be dismissed against her and all the other Plaintiffs.

The trial court was correct in determining that Plaintiffs did not have evidence to establish the essential elements of a *prima facie* case of assault and battery.

Having determined that no assault or battery could be established, it was not necessary for the trial court to consider whether Plaintiffs suffered damages. Plaintiffs' Appellate Brief cites Hepworth v. Covey Bros. Amusement Co., 91 P.2d 507 (Utah 1939) and Jeppsen v. Jensen, 155 P.2d 429 (Utah 1916), as well as other cases,⁸¹ for the proposition that proof of damages is not required in order to recover nominal damages in assault and battery cases. Since no assault or battery was established by Plaintiffs, the matter never advanced to the issue of damages, and Plaintiffs' reliance upon the cases allowing nominal damages in assault and battery cases, is not well taken.

⁸⁰ Exhibit 6, Memorandum Decision filed May 25, 1995, R 696-685, at R 689-688, para. 16

⁸¹ Plaintiffs' Appellate Brief, pgs. 44-45

POINT NO. 3
PLAINTIFFS GAVE THEIR CONSENT TO BE TOUCHED, AND
CONSENT IS AN ABSOLUTE DEFENSE TO A CLAIM OF ASSAULT
AND BATTERY, AND PLAINTIFFS' SECOND AND THIRD CAUSES
OF ACTION MUST BE DISMISSED.

In 6A C.J.S. Assault & Battery §16, at pgs. 337-338 the defense of consent is set forth as follows:

It is a defense to an action for assault or an assault or battery that the injured party consented to, or participated in, the acts causing the injury, and such consent may be either express or implied. This is the rule at least in cases where life and limb are not exposed to serious danger in the common course of things, and where the damaged inflicted have not exceeded the bounds of the consent or invitation. . . .

It is a general rule that one cannot maintain an action for a wrong occasioned by an act to which he has consented, under the familiar maxim "*volenti non fit injurie*," except where the act involves the life or person, or a breach of the peace, or amounts to a public offense.⁸²

According to the Restatement of Torts:

- (1) Consent is willingness in fact for conduct to occur. It may be manifested by action or inaction and need not be communicated to the actor.
- (2) If words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact.⁸³

In the case at hand, the sworn deposition testimony of the Plaintiffs was as follows:

Santiago was not touched by anyone.⁸⁴ But he was asked to take out his wallet and to empty his pockets.⁸⁵ He testified the checking "was voluntary,"⁸⁶ but he also

⁸² 74 Am Jur 2d, Torts, §49

⁸³ Restatement, Torts 2d §892

⁸⁴ Exhibit 22, Deposition of Angel Santiago, dated April 20, 1994, pg. 33, lines 3 - 4

⁸⁵ Exhibit 22, Deposition of Angel Santiago, dated April 20, 1994, pg. 32, lines 13-15

⁸⁶ Exhibit 22, Deposition of Angel Santiago, dated April 20, 1994, pg. 35, lines 9-11

added he was concerned that if he didn't voluntarily consent to the check he might lose his job or others might think he took the money.⁸⁷

Bardales indicated he did not object to being searched and consented to the search. He stated:

I had this coat on. I was wearing a coat. I opened it in the way that I had it opened so that he could see the pockets and tell that there wasn't anything there.

I asked him if he wanted me to do anything else. I asked him if he wanted me to take off my shoes or anything else. He said, No, that was sufficient. Then I left, and the next person went in.⁸⁸

Mazariegos testified that when she was asked to raise her hand if she objected to the search, she did not raise her hand.⁸⁹ She admitted that she was not touched with intent to injure or offend and stated that her supervisor (Cookie) only touched the bra and not her breasts.⁹⁰

Semidey testified that he along with everyone else went into the bathrooms voluntarily.

Q. Did you ever see any forced used against any person to facilitate the search?

A. (By the translator) No, because the men went into the men's bathroom and the women into the women's. We went in voluntarily.⁹¹

Plaintiffs' Appellate Brief argues that whether a person gives their consent is a jury question and cannot be decided on a motion for summary judgment.⁹² However, the testimony of the Plaintiffs themselves indicates that they all outwardly demonstrated their consent to be checked or searched. The Trial Court stated:

⁸⁷ Exhibit 22, Deposition of Angel Santiago, dated April 20, 1994, pg 35, lines 9-11

⁸⁸ Exhibit 21, Deposition of Jose Humberto Bardales, dated April 21, 1994, pg 40, lines 20-25 and pg 41, lines 1-2

⁸⁹ Exhibit 19, Deposition of Rosa Mazariegos, dated April, 19, 1994, pg 17, lines 14-17

⁹⁰ Exhibit 19, Deposition of Rosa Mazariegos, dated April, 19, 1994, pg 44, line 25 and pg 45, lines 1-3

⁹¹ Exhibit 20, Deposition of Walter Semidey, dated April 21, 1994, pg 43, lines 3-7

⁹² Plaintiffs' Appellate Brief, pgs 17-18

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.⁹³

Whether Plaintiffs inwardly resented the search or not, is not relevant. The fact is that no Plaintiff objected and each Plaintiff voluntarily consented to be searched. There is no evidence to the contrary. As a matter of uncontested, undisputed fact, Defendants have established their Defense of Consent and the Plaintiffs' Second and Third Causes of Action must be dismissed.

POINT 4
PLAINTIFFS' FIFTH AND SIXTH CAUSES OF ACTION—
INTENTIONAL AND RECKLESS INFLICTION OF EMOTIONAL
DISTRESS MUST BE DISMISSED

In Samms v. Eccles, 11 Utah 2d 289, 358 P.2d 344 (1961), the Utah Supreme Court established the rule of law concerning claims for emotional distress. The Court stated:

Our study of the authorities, and of the arguments advanced, convinces us that, conceding such a cause of action may not be based upon mere negligence, the best considered view recognizes an action for severe emotional distress, though not accompanied by bodily impact or physical injury, where the defendant intentionally engaged in some conduct toward the plaintiff, (a) with the purpose of inflicting emotional distress, or (b) where any reasonable person would have known that such would result; and his actions are of such a nature as to be considered outrageous and intolerable in that they offend against the generally accepted standards of decency and morality. This test seems to be a more realistic safeguard against false claims than to insist upon finding some other attendant tort, which may be of minor character, or fictional.

(Id. at 347.)

⁹³ Exhibit 6, Memorandum Decision filed May 25, 1995, R 696-685

Samms v. Eccles, goes so far as to say that even though a person's conduct may be extremely offensive to another person, that in and of itself is not sufficient to create a cause of action in Utah. In Samms v. Eccles the Court said:

We quite agree with the idea that under usual circumstances the solicitation to sexual intercourse would not be actionable even though it may be offensive to the offeree.
(Id. at 347.)

The landmark case of Samms v. Eccles has been followed in numerous Utah cases. See Russell v. Thompson Newspapers, Inc., 200 Utah Adv. Rep. 15, 842 P.2d 896 (1992). In Reiser v. Lohner, 641 P.2d 93 (Utah 1982), citing Samms v. Eccles, the Utah Supreme Court stated:

It is well established in Utah that a cause of action for emotional distress may not be based upon mere negligence. . . .

. . . .

In the instant case, there is not so much as an allegation that defendants intended in any way to harm plaintiffs or any one of them. The summary judgment was therefore proper. [Emphasis added.]
(Id. at 100.)

In White v. Blackburn, 128 Utah Adv. Rep. 20, 787 P.2d 1315, (1990), the Utah Court of Appeals stated:

To support a cause of action for intentional infliction of emotional distress, appellant must show the following elements: (1) outrageous conduct by the defendant; (2) the defendant's intent to cause, or the reckless disregard of the probability of causing, emotional distress; (3) severe emotional distress; and (4) an actual and proximate causal link between the tortious conduct and the emotional distress. . . .
(Id. at 21.)

In Retherford v. AT & T Communications, 200 Utah Adv. Rep. 22, 844 P.2d 949 (1992), the Utah Supreme Court stated:

To sustain her claim for intentional infliction of emotional distress, Retherford must show that (i) Gailey's, Randall's, Johnson's, and Bateson-Hough's conduct was outrageous and intolerable in that it offended against the generally accepted standards of decency and

morality; (ii) they intended to cause, or acted in reckless disregard of the likelihood of causing, emotional distress; (iii) Retherford suffered severe emotional distress; and (iv) their conduct proximately caused Retherford's emotional distress. . . .

(Id. at 33.)

In Sperber v. The Galigher Ash Company, 71 Utah Adv. Rep. 3, 747 P.2d 1025 (1987), the Utah Supreme Court stated:

Although Sperber does not allege that Galigher Ash Co. discharged him with the purpose of inflicting emotional distress upon him, he does assert that the company's conduct was "intentional, malicious and in reckless and wanton disregard of the effect of such conduct . . ." or, in other words, that Galigher Ash knew that its conduct would cause emotional distress. To state a claim, however, a plaintiff must additionally allege conduct on the part of the defendant that is outrageous and intolerable to the extent that it offends societal standards of morality and decency.

(Id. at 4.)

In the case at hand the Plaintiffs Complaint alleges as follows:

34. Defendant Esquivel's extreme and outrageous actions, in requiring every employee to submit to the indignity of a physical search, intentionally and recklessly inflicted upon the Plaintiffs in this action severe emotional distress.

35. Defendant Esquivel knew, or should have known, that there was a reasonable likelihood that subjecting all employees to a physical search of their person and property would cause them severe emotional distress.⁹⁴

Intention to harm is a prerequisite under Reiser v. Lohner. Under the rule established in Reiser v. Lohner, the complaint must allege intentional conduct in order to state a claim for relief for severe emotional distress. In the alternative, if intention to harm is not alleged, the plaintiff must allege that any reasonable person would have known the conduct was "of such a nature as to be considered

⁹⁴ Exhibit 1, Plaintiffs' Amended Complaint filed June 13, 1994, **R 107-99, at R 102, paras 34 and 35**

outrageous and intolerable in that they offend against the generally accepted standards of decency and morality."⁹⁵

Liability for emotional distress does not extend to mere insults, indignities, threats, annoyances, petty oppression, or other trivialities. There is no occasion for the law to intervene in every case where some one's feelings are hurt.⁹⁶

In the case at hand, while the caption in the Fifth and Sixth Causes of Action contains the word "INTENTIONAL," there is no language in the complaint which claims the conduct of Esquivel was intentional, intending to cause injury. Paragraph 27 clearly refers only to negligent conduct; and, under the rule in Samms v. Eccles and Reiser v. Lohner negligent conduct, even reckless negligent conduct is not sufficient to sustain a claim for emotional distress in Utah. There is no allegation in the complaint that the conduct was so "outrageous and intolerable" that it offended "against the generally accepted standards of decency and morality."

Plaintiffs cite Boies v. Raynor, 361 P.2d 1 (Ariz. 1961) for the proposition that a person's mental state constitutes admissible evidence of damages.⁹⁷ However, Boies v. Raynor is not controlling Utah law, and does not impose upon the trial court, in the case at hand, a duty to hold that any mental suffering, fright, or shame, no matter how slight, constitutes a sufficient basis to require a trial court to submit Plaintiffs' claims to a jury.

Taking the required elements of proof one at a time, as established in White v. Blackburn: there was no evidence that Esquivel's conduct was "outrageous." There was no evidence that Esquivel acted with an intent to cause emotional distress. There was no evidence that Esquivel acted with "reckless disregard" of the probability of causing emotional distress. There was no evidence that Plaintiffs suffered "severe emotional distress." While the Plaintiffs, two years after the fact,

⁹⁵ Samms v. Eccles, at page 347

⁹⁶ Restatement, Torts 2d, Emotional Distress, Comment to §46

⁹⁷ Plaintiff's Appellate Brief, pgs. 40-41

allege that as a direct result of the incident they all felt bad, there was no evidence that Esquivel's conduct was the proximate cause of severe emotional distress.

Alternatively, if Plaintiffs had alleged, in their Amended Complaint, that Esquivel intended to harm the Plaintiffs and/or that Esquivel's conduct was so offensive that it was "against the standards of decency and morality," there wasn't any evidence before the trial court to support either of the two alternative allegations, so as to create a factual question which needed to be resolved by a trial.

Mazariegos testified that she knew the purpose of the checking was to find the money and that she was offended because of the inquiry, not because of Esquivel's conduct. Her testimony was as follows:

Q. Do you believe that the purpose of the checking was to offend you as an individual person, solo?

A. (By the translator) I think they wanted to know who had the money.

Q. It's "yes" or "no."

A. (By the translator) Both things, to offend and to find the money. If they check it's because they think they have the money.

Q. The question is to offend—a plan to offend everyone or to offend only you.

A. (By the translator) I don't know they were looking for money, and they check everybody, and that is what offends.⁹⁸

The deposition testimony of the Plaintiffs is not contested. As a matter of uncontested fact, the Plaintiffs admitted that Esquivel's conduct was motivated by a sincere desire to protect the employees from theft by their fellow employees; and, to recover stolen property for one of the employees. There was no testimony before the court which created an issue of fact as to whether Esquivel acted with an intent to harm or injure the Plaintiffs and/or that his conduct offended against the "standards of decency and morality."

⁹⁸ Exhibit 19, Deposition of Rosa Mazariegos, dated April, 19, 1994, pg. 51, lines 22-25 and pg 52, lines 1-10

There was no admissible testimony or evidence before the court to demonstrate that Esquivel's conduct proximately caused severe emotional distress to one or more of the Plaintiffs. When the Plaintiffs were deposed, no Plaintiff claimed to have suffered severe emotional distress. Not one Plaintiff sought medical attention as a result of the incident. As a practical matter, Plaintiffs' deposition testimony described the incident as offensive, nothing more.

A party cannot create an issue of fact by contradicting its own prior sworn deposition testimony.

A party cannot create a genuine issue of material fact by contradicting or changing his own prior testimony. Camfield Tires, Inc., v. Michelin Tire Corp., 719 F.2d 1361 at 1365-1366 (8th Cir. 1983). In Van T. Junkins & Associated, Inc. v. U.S. Industries, Inc., 736 F.2d 656 (8th Cir.) the Court stated:

When a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.⁹⁹

In Essick v. Yellow Freight Systems, Inc., 965 F.2d 334 (7th Cir. 1992), the court stated:

In Babrocky, we held that “a party should not be allowed to create issues of credibility by contradicting his own earlier testimony. . . . In so holding, we noted that if we allowed a party to create a genuine issue of material fact by changing his own prior testimony: “the very purpose of the summary judgment motion—to weed out unfounded claims, special denials, and sham defenses—would be severely undercut.” . . . We also noted that the plaintiff had not explained the contradiction or attempted to resolve the disparity.¹⁰⁰

⁹⁹ Van T. Junkins & Associated, Inc. v. U.S. Industries, Inc., 736-F.2d 656, at 657 (8th Cir.)

¹⁰⁰ Essick v. Yellow Freight Systems, Inc., 965 F.3d 334 at 335 (7th Cir. 1992)

Stated another way, the Utah Supreme Court recognized the same long standing rule, "that Plaintiff's testimony is no stronger than its inconsistent weakness." Ross v. Olsen, 481 P.2d 675, at 676 (Utah 1971).

The Defendants filed a Motion to Strike the Plaintiffs affidavits for the reason that they contradicted Plaintiffs' prior sworn deposition testimony.¹⁰¹ The Motion was supported by a Memorandum.¹⁰² The trial court did not rule upon the Motion To Strike because, according to its ruling, Plaintiffs had failed to meet other preliminary requirements to establish a *prima facie* case. The trial court stated:

...The Court will first address the issue of summary judgment and, if summary judgment is not appropriate, the Court will then address defendant's Motion to Strike and/or Disregard Portions of Plaintiffs' Affidavits.¹⁰³

After the depositions of the Plaintiffs were completed, and after Defendants filed their Motion for Summary Judgment, the Plaintiffs furnished affidavits in which they substantially modified their earlier deposition testimony, in an attempt to demonstrate that they suffered severe emotional injuries as a result of the incident. Examples of the contradictions created by the affidavits are as follows.

Mazariegos testified in her deposition that she was angry, but not severely emotionally upset. She said she was mostly upset because soon after the incident she was without a job and couldn't sleep for that reason. She stated:

Q. (By Mr. Martin) You came back to work the next day after the checking?

A. (By the translator) I think so. I don't remember.

Q. Were you angry the next time you came to work?

¹⁰¹ Exhibit 16, Defendants' Motion to Strike and/or to Disregard Portions of Plaintiffs' Affidavits, filed April 26, 1995, **R 630-629**

¹⁰² Exhibit 17, Defendants' Memorandum in Support of Motion to Strike and/or to Disregard Portions of Plaintiffs' Affidavits, filed April 26, 1995, **R 628-618**

¹⁰³ Exhibit 6, Memorandum Decision filed May 25, 1995, **R 696-685, at R 693, Para.**

A. (By the translator) Yes. I was upset. I was feeling bad for about a month.

Q. Feeling bad with anger?

A. (By the translator) Yes.

Q. Angry enough to break things?

A. (By the translator) No. I never do that even if I am very angry.

Q. Angry enough to hurt someone?

A. (By the translator) No. I don't hurt anybody when I get angry.

Q. Angry enough to yell at children or family?

A. (By the translator) No.

Q. Angry enough to stay awake all night or --

A. (By the translator) Yes. I stay several days without being able to sleep, but not because of anger. I was -- I couldn't sleep because I didn't have work, a job.¹⁰⁴

The affidavit prepared after the deposition substantially modifies the earlier deposition testimony of Mazariegos and says:

When I got home I was devastated. I had a bloody discharge that wasn't normal, but that was caused by my nerves and fear. I was almost hysterical. I couldn't sleep all night long. But even so, I didn't want to lose my job, and I returned to work, although I was very nervous and angry.¹⁰⁵

Mazariegos' Affidavit is countered by her sister's affidavit which indicates that Mazariegos had a pattern of being nervous and upset long before the incident. According to Esperanza Mazariegos' Affidavit:

But while she was working at the stamps place, she would almost always arrive home angry and very nervous. She would also almost always come home with a headache. I noticed that she was extremely nervous, and I made her take linden tea to help her calm down. I also gave her massages almost every night, and rubbed Vick's vapor rub into her head so she would relax and calm down.¹⁰⁶

¹⁰⁴ Exhibit 19, Deposition of Rosa Mazariegos, dated April, 19, 1994, pgs. 48-49

¹⁰⁵ See Exhibit 15, Plaintiffs' Amended Second Objection to Defendants' Motion for Summary Judgment, filed March 23, 1995, R 604-544, at The Affidavit of Rosa Mazariegos, R 559

¹⁰⁶ See Exhibit 15, Plaintiffs' Amended Second Objection to Defendants' Motion for Summary Judgment, filed March 23, 1995, R 604-544, at Affidavit of Esperanza Mazareigos, R 551

According to another sister of Plaintiff Mazariegos, namely Matilde Mazariegos, the Plaintiff was always nervous and upset:

But when she worked at the stamps place she would almost always arrive angry and very nervous. She would come home with headaches, and it was difficult for her to finish the things she had to do. She also began to act ebittered (sic) and sad. She would get angry with us, and many times she did not want to do her chores, nor eat.¹⁰⁷

The three Mazariegos' Affidavits demonstrate that Mazariegos was always upset and angry when she came home from work. The three affidavits, taken together, make it impossible for the Plaintiff Mazariegos to show that the incident in question was the proximate cause of her being upset, angry, etc. on the day of the incident, or for any period of time thereafter.

Semidey testified in his deposition that he wasn't damaged by the incident. He said:

Q. Now, maybe this sounds silly. It seems that from your explanation here today that as a result of this action you suffered no monetary loss. Is this true?

A. (By the translator) Yes, right.

Q. You were not damaged in any way except by feelings?

A. (By the translator) That's right.

Q. It also seems that you did not claim, other than your own fear, that there was any forced detention of any person. Is this true?

A. (By the translator) For my own person? Only to my person?

Q. Is that an answer? In other words -- maybe we're not communicating.

The sole reason for us being here is the feeling of offense as a result of this conduct, meaning the search incident. Is this true?

A. (By the translator) Yes.

....

Q. You were offended by the checking, true?

A. (By the translator) Yes.¹⁰⁸

¹⁰⁷ See Exhibit 15, Plaintiffs' Amended Second Objection to Defendants' Motion for Summary Judgment, filed March 23, 1995, **R 604-544 at the Affidavit of Matilde Mazariegos, R 550-549**

¹⁰⁸ Exhibit 20, Deposition of Walter Semidey, dated April 21, 1994, pgs. 58-60

In what appears to be a modification of his earlier deposition testimony, Semidey's Affidavit says: "I was upset, nervous and angry,"¹⁰⁹ and "I felt very upset, very defensive, very aggressive. I continued this way for several days."¹¹⁰

Santiago testified in his deposition that he had very little concern over the incident. He said:

Q. Did anyone assault you?

A. No.

Q. Did anyone cause you to fear for your safety?

A. No, no fear.

Q. Did anyone cause you to believe that you would be harmed?

A. No, I don't fear.¹¹¹

Q. (By Mr. Martin) If we can talk a moment about your emotions. Explain to me, if you can, the degree of your emotions which resulted from the checking.

A. You mean when I was searched, when I was checked?

Q. Yes.

A. Just simply a person feels uncomfortable.

Q. Anyone could understand this.

A. Uh-huh.

Q. did you become so concerned over a week that it caused you to lose sleep?

A. The checking? No, I was fine with myself, with my own conscience.¹¹²

In what appears to be a direct contradiction of his earlier deposition testimony, Santiago's Affidavit says: "I felt humiliated and offended."¹¹³

Bardales testified in his deposition:

Q. I think every person can understand, at least in this country, being very much offended by an extreme discourtesy, lack of courtesy. Did this, as you described, exceptional lack of courtesy,

¹⁰⁹ See Exhibit 15, Plaintiffs' Amended Second Objection to Defendants' Motion for Summary Judgment, filed March 23, 1995, **R 604-544**, at the Affidavit of Walter Semidey, **R 564**

¹¹⁰ See Exhibit 15, Plaintiffs' Amended Second Objection to Defendants' Motion for Summary Judgment, filed March 23, 1995, **R 604-544**, at the Affidavit of Walter Semidey, **R 563**

¹¹¹ Exhibit 22, Deposition of Angel Santiago, dated April 20, 1994, pg 40, lines 1-7

¹¹² Exhibit 22, Deposition of Angel Santiago, dated April 20, 1994, pg 45, lines 16-25 and pg 46, 1-2

¹¹³ See Exhibit 15, Plaintiffs' Amended Second Objection to Defendants' Motion for Summary Judgment, filed March 23, 1995, **R 604-544**, at the Affidavit of Angel Santiago, **R 556**

appear to you to be done with a purpose intending to inflict injury, mental or physical?

A. (By the translator) I understand that not just the lack of courtesy, but I consider it an attack to the person. Personally, I felt emotionally very bad that whole day, an experience that never happened to me. Worse, I never thought that in this country that could happen to me. I've always tried to maintain my principles, and I've always been -- and I've never had any problem. This is the first time that I find myself in this situation.¹¹⁴

The Bardales' Affidavit prepared later greatly exaggerates the matter and adds substantial claims and says:

This experience was one of the worst of my life. It left me very nervous and depressed. I got angry at my wife without any reason. I was very emotional and jittery for around a month after I left the company.¹¹⁵

The affidavits of the Plaintiffs contain statements which are inconsistent with their previous deposition testimony. Even without that obvious defect, the affidavits of the Plaintiffs do no more than provide summaries of the state of mind of the Plaintiffs on the date of the incident, i.e. that they were offended and angry. But the affidavits do not demonstrate severe emotional distress proximately caused by the incident.

As to the Plaintiffs' Fifth Cause of Action, the Trial Court observed that Plaintiffs did not have the necessary testimony or evidence to establish a prima facie case of intentional infliction of severe emotional distress, proximately caused by the incident in question.

18. As to plaintiffs' fifth cause of action, intentional infliction of emotional distress, the Model Utah Jury Instructions require the elements of outrageous conduct by defendants and an intention to cause emotional distress, or actions taken with reckless disregard of the

¹¹⁴ Exhibit 21, Deposition of Jose Humberto Bardales, dated April 21, 1994, pgs. 44-45

¹¹⁵ See Exhibit 15, Plaintiffs' Amended Second Objection to Defendants' Motion for Summary Judgment, filed March 23, 1995, R 604-544, at the Affidavit of Jose Humberto Bardales, R 553

probability of causing emotional distress. M.U.J.I. 22.1 (Intentional Infliction of Emotional Distress). The Court does not find that defendants' conduct constituted outrageous conduct. Neither does the Court find any evidence that defendants intended to cause emotional distress or that defendants acted with reckless disregard of the probability of causing emotional distress.¹¹⁶

As to the Plaintiffs' Sixth Cause of Action, the Trial Court observed:

19. As to plaintiffs' sixth cause of action, reckless infliction of emotional distress, the Model Utah Jury Instructions find no liability for the negligent infliction of emotional distress absent a showing that defendants should have realized their conduct involved an unreasonable risk of causing emotional distress or that, if emotional distress were caused, illness or bodily harm might result. M.U.J.I. 22.5 (Negligent Infliction of Emotional Distress - Part I). The Court finds no evidence that the search was conducted in a manner which would involve an unreasonable risk of causing emotional distress or that 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.¹¹⁷

Plaintiffs cite Contreras v. Crown Zellerbach Corp., 565 P.2d 1173 (Wash. 1977) as support for their claims.¹¹⁸ However, Contreras is a case from Washington and is not controlling Utah case law. The "tort of outrage" has not been recognized in Utah, and Plaintiffs do not cite any Utah case law which recognizes the tort. Plaintiffs' amended complaint does not include a cause of action for the tort of "outrage." Contreras was a case involving aggravated circumstances and the cause of action was for the "tort of outrage" because the Plaintiffs were subjected to:

continuous humiliation and embarrassment by reason of racial jokes, slurs and comments made in his presence.
(Id. at 1174.)

In addition, in Contreras, the Court concluded that Contreras was subjected to malicious and wrongful accusations of stealing property, and was subjected to public

¹¹⁶ Exhibit 6, Memorandum Decision filed May 25, 1995, R 696-685, para. 18

¹¹⁷ Exhibit 6, Memorandum Decision filed May 25, 1995, R 696-685, para. 19

¹¹⁸ Plaintiffs' Appellate Brief, pg. 27

scorn and ridicule which prevented Contreras from obtaining full-time employment.

Plaintiffs cite Pentecost v. Harward, 699 P.2d 696 (Utah 1985). Pentecost does not support Plaintiffs' position in the case at hand. In Pentecost the landlord forcibly removed the tenants belongings from the property, by "self-help," and refused to return them to the tenants. The court held the complaint stated a cause of action:

for intentional infliction of emotional distress. One who intentionally causes severe emotional distress to another through extreme and outrageous conduct is liable . . .¹¹⁹

Plaintiffs cite Matter Of Estate Of Grimm, 784 P.2d 1238 (Utah App. 1989). However, Grimm holds against Plaintiffs position. In Grimm, the court quoted, with approval, from the Restatement Of Torts and said:

It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, or whether it is necessarily so. Where reasonable men may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability.¹²⁰

In Grimm, the court continued to quote from the Restatement and said: The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it. The intensity and the duration of the distress are factors to be considered in determining its severity. . . . It is for the court to determine whether, on the evidence severe emotional distress can be found; it is for the jury to determine whether, on the evidence, it has in fact existed.¹²¹

¹¹⁹ Pentecost v. Harward, 699 P.2d 696, at 700 (Utah 1985)

¹²⁰ Matter of the Estate of Grimm, 784 P.2d 1238, at 1246 (Utah App. 1989)

¹²¹ (Id. at 1246.)

In the case at hand, the trial court indicated that Plaintiffs' testimony and evidence had not met the minimum threshold required to put the matter to a jury on the issue of severe emotional distress. In simple terms, Plaintiffs affidavits did not demonstrate the severity of emotional distress required by the Restatement Of Torts as quoted in Grimm.

Plaintiffs' complaint, Fifth and Sixth Causes of Action for Intentional and Reckless Infliction of Emotional Distress must be dismissed.

POINT 5
PLAINTIFFS' SEVENTH, EIGHTH, AND NINTH
CAUSES OF ACTION MUST BE DISMISSED

In 77 C.J.S. Right of Privacy and Publicity §10, the following is found:

The elements of the tort of invasion of privacy by means of intrusion and seclusion have been variously defined. The tort has been described as consisting of an invasion or interference by physical intrusion or some other form of investigation or examination, into a place where plaintiff has secluded himself, or into his private or secret concerns, that would be highly offensive to an ordinary, reasonable person. Other authorities have stated that the elements are intrusion, which may consist of watching, spying, prying, besetting, overhearing, or some other similar conduct, intrusion upon plaintiff which concerns those aspects of himself, his home, his family, his personal relationships, and his communications which one normally expects will be free from exposure to defendant, substantial and unreasonable intrusion, and an intentional act or course of conduct by defendant. Still other authorities have simply stated the elements of the tort as the existence of secret and private subject matter, the right in plaintiff to keep that subject matter private, and the obtainment by defendant of information about that subject matter through unreasonable means.

In Cox v. Hatch, 87 Utah Adv. Rep. 3, 761 P.2d 556 (1988) the Utah Supreme Court examined the Restatement of Torts (1977) regarding the torts of invasion of privacy as follows:

Invasion of privacy as a common law tort has evolved over the years into four separate torts. The Restatement (Second) of Torts (1977)

defines four different types of invasion of privacy. Section 652A of the Restatement states:

- (1) One who invades the right of privacy of another is subject to liability for resulting harm to the interests of another.
- (2) The right of privacy is invaded by
 - (a) unreasonable intrusion upon the seclusion of another, as stated in §652B; or
 - (b) appropriation of the other's name or likeness, as stated in §652C; or
 - (c) unreasonable publicity given to the other's private life, as stated in §652D; or
 - (d) publicity that unreasonably places the other in a false light before the public, as stated in §652E.

(Id. at 6.)

In Cox v. Hatch, the Utah Supreme Court held that the publication of the photograph of a person with Senator Hatch did not constitute an invasion of privacy. The court stated:

In sum, we hold that pictures of public officials and candidates for public office taken in public or semi-public places with persons who either pose with them or who inadvertently appear in such pictures may not be made the basis for an invasion of privacy or abuse of personal identity action. . . .

(Id. at 6.)

Plaintiffs cite Turner v. General Adjustment Bureau, Inc., 832 P.2d 62 (Utah App. 1992) In Turner, the Utah Court recited the elements of an invasion of privacy as follows:

To establish an invasion of privacy claim of intrusion upon seclusion, 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. . . .¹²²

In Turner, footnote 5, on page 67, suggests that as to claims of personal intrusion, as opposed to claims of public disclosures, the appellate court would

¹²² (Turner v. General Adjustment Bureau, Inc., 832 P.2d 62, at 67 (Utah App. 1992))

require an invasion of the complainant's private residence. It does not appear as though Turner would consider a search of an employee at his public place of employment, to constitute an "intrusion into privacy" cause of action.

Plaintiffs' Seventh and Eighth Causes of Action.

In the case at hand, the Plaintiffs' complaint, Seventh and Eighth Causes of Action are based upon claims that the Defendant Esquivel caused the Plaintiffs' bodies and belongings to be searched, while they were at their place of employment. Neither of the two causes of action fall within the only available category, i.e. "unreasonable intrusion upon the seclusion of another."

Plaintiffs were asked to go to the men's and women's rest rooms, respectively and were searched. All the Plaintiffs describe the search as occurring in the rest rooms. The testimony as contained in the depositions of the Plaintiffs demonstrate that the only conduct complained of consisted of the search and/or offer to search the Plaintiffs while they were at their place of employment. There are no claims and no evidence of any attempt by Defendants to invade the Plaintiffs' personal residences, automobiles or anything which could be remotely considered to be a place of Plaintiffs' "seclusion."

Even if Plaintiffs were to amend their complaint to state a cause of action, as recognized in Utah, the deposition testimony would not support a claim that Defendants' conduct is actionable.

The Trial Court observed:

20. As to plaintiffs' seventh and eighth causes of action, intrusion into physical privacy and intrusion into personal belongings, the Court does not find that the search, conducted at plaintiffs' place of employment, constituted an "unreasonable intrusion upon the seclusion of another." Restatement (Second) of Torts §652A(2)(a)(1977). Plaintiffs made no claims that defendants attempted to invade

plaintiffs' homes, automobiles, or other areas which could be considered places of seclusion for plaintiffs.¹²³

Plaintiffs' Seventh and Eight Causes of Action must be dismissed.

Plaintiffs' Ninth Cause of Action.

Plaintiffs' Ninth Cause of Action is based upon a claim that the Defendant Esquivel inquired into the religious affiliation of the Plaintiff Semidey and asked whether Semidey had a "valid temple recommend."¹²⁴ Plaintiffs allege that such conduct constituted an "unwarranted, unnecessary, and wrongful intrusion into Plaintiffs Semidey's private affairs."¹²⁵

Again, referring to Cox v. Hatch and the Restatement, such conduct does not fall within the parameters of the common law tort of invasion of privacy recognized in Utah and in the Restatement.

The Trial Court observed:

21. As to plaintiffs' ninth cause of action, intrusion into personal affairs, this Court does not find this to fall within the parameters of the common law tort of invasion of privacy recognized in Utah and in the Restatement of Torts.¹²⁶

Since Plaintiffs' Ninth Cause of Action fails to state a claim for relief which is recognized in either Utah common law or in the Restatement, the complaint fails to state a claim upon which relief may be granted, and it must be dismissed.

POINT NO. 6
PLAINTIFFS DID NOT HAVE ADMISSIBLE EVIDENCE THAT THEY
HAD SUFFERED SEVERE EMOTIONAL INJURY

Rule 803(4), Utah Rules of Evidence, provides for the admission of certain statements made for purposes of medical diagnosis and treatment, as follows:

¹²³ Exhibit 6, Memorandum Decision filed May 25, 1995, R 696-685, at R 687, para. 20
¹²⁴ Exhibit 1, Plaintiffs' Amended Complaint filed June 13, 1994, R 107-99, at para 41
¹²⁵ Exhibit 1, Plaintiffs' Amended Complaint filed June 13, 1994, R 107-99, at para 42
¹²⁶ Exhibit 6, Memorandum Decision filed May 25, 1995, R 696-685, at R 687, para. 21

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception of general character of the cause of external source thereof insofar as reasonably pertinent to diagnosis or treatment.

In order to qualify under Rule 803(4), the patient's statement must meet a two pronged foundational test: (1) is declarant's motive in making the statements consistent with a desire to promote treatment, and (2) is it reasonable for the physician to rely on the information in his diagnosis or treatment? Such foundational requirements are imposed to assure that the patient has a "strong motivation to be truthful." Roberts v. Hollocher, 664 F.2d 200, 204 (8th Cir. 1981), cited in Industrial Power Contractors v. Industrial Commission Of Utah, 832 P.2d 477 (Utah App. 1992); and Hansen v. Heath, 852 P.2d 977 (Utah 1993).

Plaintiffs cite the earlier case of State v. Schreuder, 726 P.2d 1215 (Utah 1986) for the proposition that a psychological report prepared solely for purposes of litigation may be admissible in evidence.¹²⁷ However, in Schreuder, the Court recognized that the "trial court tightly controlled Dr. Moench's testimony."¹²⁸ Furthermore, Schreuder stated:

A psychiatrist or a psychologist of course cannot be made a conduit for testifying in court as to any and all out-of-court statements made. As with admission of evidence of any kind, great discretion is accorded the trial judge in the determination of admissibility. The trial court must, as with any evidence, assess the inherent reliability of the testimony, the relevance of the testimony, and undertake a balancing test¹²⁹

In the case at hand, the letter from the psychologist, Juan A. Mejia, demonstrates he examined the plaintiffs two years after the incident, not for the purposes of diagnosis and treatment, but for the purpose of providing testimony at

¹²⁷ Plaintiffs' Appellate Brief, pgs. 42-43

¹²⁸ State v. Schreuder, 726 P.2d 1215, at 1224 (Utah 1986)

¹²⁹ (Id. at 1225.)

trial. The letter is not in the form of an affidavit and it does not meet the minimum requirements imposed by Rule 56(e), Utah Rules of Civ. Proc. for the purposes of opposing a motion for summary judgment.

The affidavit of Dr. Linda J. Gummow demonstrates that she did not meet with or examine any of the plaintiffs. The statements made in her affidavit are not based upon her personal knowledge, but instead are based upon hearsay statements provided to her. The trial court commented upon the lack of personal knowledge demonstrated in the affidavit, in the trial court's Memorandum Decision.¹³⁰ The affidavit of Gummow does not meet the minimum requirements imposed by Rule 56(e), Utah Rules of Civ. Proc. in that the affidavit is not based upon personal knowledge.

As indicated earlier in this Brief, while Plaintiffs were angry or upset, they did not suffer "distress inflicted . . . so severe that no reasonable man could be expected to suffer it."¹³¹ The trial court correctly ruled that Plaintiffs had not met the minimum threshold requirement of demonstrating severe emotional distress so as to be entitled to present evidence of damages on the matter to a jury.

The trial court was correct in ruling that the additional submittals from Plaintiffs consisting of the letter from Juan A. Mejia, and the affidavit of Dr. Linda J. Gummow did not meet the minimum requirements imposed by Rule 56(e), Utah Rules of Civ. Proc. Stated in simple terms, Plaintiffs did not have admissible testimony or evidence that Plaintiffs suffered severe emotional distress as a proximate result of the incident.

¹³⁰ Exhibit 6, Memorandum Decision filed May 25, 1995, **R 696-685**, at **R 687**, para. 23
¹³¹ Matter of Estate Of Grimm, 784 P.2d 1238, 1246 (Utah App. 1989)

POINT NO. 7
PLAINTIFFS FAILED TO RAISE AN ISSUE OF A MATERIAL FACT
WHICH PRECLUDED THE COURT FROM GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

Rule 4-501(2)(b) Code of Judicial Administration provides in part as follows:

The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be stated in separately numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies, and if applicable, shall state the numbered sentence or sentences of the movant's statement that are disputed. All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement. [Emphasis added.]

In the case at hand, Defendant's Memorandum complied with Rule 4-501(2)(a) and set forth six pages of facts supported by reference to admissible testimony and evidence.¹³² As indicated previously in this Brief, Plaintiffs' statement of facts did not respond to Defendants' recitation of facts as required by Rule 4-501(2)(b),¹³³ and Defendants' statement of facts must therefore be deemed admitted for the purposes of the Defendant's Motion for Summary Judgment.

In Plaintiffs' Brief on appeal, Plaintiffs make a misrepresentation to the Court and state: "Defendants did not submit any factual evidence of their own in support of their second Motion for Summary Judgment."¹³⁴ Plaintiffs assertions that Defendants did not support their Motion with admissible testimony and evidence are without merit, and are directly contrary to the record in this case.

¹³² Exhibit 11, Defendants' Memorandum in Support of Motion For Summary Judgment - Failure to State Cause of Action, filed October 13, 1994, **R 341-315**

¹³³ See page 11 of this Brief

¹³⁴ Plaintiffs' Appellate Brief, pg. 4

Plaintiffs' Brief on appeal contains a Statement Of Facts,¹³⁵ but the facts are not supported by specific references to admissible testimony or evidence. Instead, Plaintiffs' Brief on appeal makes nothing more than a general reference to the depositions of the Plaintiffs, the Plaintiffs' own amended complaint, and Plaintiffs affidavits.¹³⁶ Without a specific reference to support the individual factual statements made by Plaintiffs, it is not possible to verify that the factual claims are supported by admissible testimony or evidence.

The Plaintiffs have not established that there were any genuine issues of material facts which precluded the trial court from granting a summary judgment to Defendants.

POINT NO. 9
THE TRIAL COURT'S DECISION WAS BASED, IN PART,
UPON THE PREMISE THAT PLAINTIFFS COULD NOT
ESTABLISH A PRIMA FACIE CASE

In Plaintiffs' Brief, Plaintiffs argue that the trial court weighed the evidence and ruled against Plaintiffs.¹³⁷ However, Plaintiffs' characterization of the trial court's decision, is not accurate. Rather than weighing the evidence, the trial court concluded that Plaintiffs had not presented admissible testimony or evidence to establish certain required elements of proof, which Plaintiffs are required to establish in order to present a prima facie case. The trial court made numerous references to the Model Utah Jury Instructions for the purpose of demonstrating that certain essential factual elements would have to be established, as to each cause of action.

¹³⁵ Plaintiffs' Appellate Brief, pgs. 4-7

¹³⁶ Plaintiffs' Appellate Brief, pgs. 4-7

¹³⁷ Plaintiffs' Appellate Brief, pg. 9

Since Plaintiffs' evidence did not demonstrate certain essential elements of proof, the trial court concluded the plaintiffs were not entitled to present their case to a jury.

CONCLUSION

THEREFORE, the Respondent requests that the decision of the trial court be sustained.

DATED this 15 day of ~~February~~ ^{March}, 1996.

LOREN D. MARTIN, P.C.

By: _____

Loren D. Martin

Attorney for Defendants/Respondents

MAILING CERTIFICATE

I hereby certify that I mailed copies of the foregoing Brief and Addendum to the Brief, postage, pre-paid, on ~~February~~ ^{March} 4th, 1996, to the following:

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