

1995

Walter Semiday, Angel Santiago, Humberto  
Bardales, and Rosa Mazariegos v. Jeanette R.  
Lynton, Dot Adventures, Inc : Brief of Appellant

Utah Court of Appeals

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

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WALTER SEMIDAY, ANGEL SANTIAGO,	*	
HUMBERTO BARDALES, and ROSA	*	
MAZARIEGOS,	*	
	*	BRIEF OF APPELLANT
Plaintiffs,	*	
vs.	*	
	*	
JEANETTE R. LYNTON, /aka/ JEANETTE	*	
ROMERO MARKHAM, /dba/ D.O.T.S.,	*	CA No. 950814-CA
DOZENS OF TERRIFIC STAMPS,	*	
MIGUEL ANGEL ESQUIVEL, JOHN DOES	*	Priority # 15
I & II and JANE DOES I-III.	*	
	*	
Defendants.	*	
	*	

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ON APPEAL FROM THE FOURTH DISTRICT COURT  
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## STATEMENT OF JURISDICTION

The Supreme Court has appellate jurisdiction over this matter pursuant to Utah Code Annotated (1953) §78-2-2.3(j). The Court of Appeals has jurisdiction pursuant to assignment from the Supreme Court. Utah Code Annotated (1953) §78-2a-2(k).

## STATEMENT OF THE ISSUES AND

### STANDARD OF REVIEW

#### Issues:

A. Whether the trial court properly held that no reasonable person could find for the Plaintiffs on their claims for Wrongful Detention, Assault, Battery, False Imprisonment, Intentional and Reckless Infliction of Emotional Distress, and Invasion of Privacy, where the defendants had required the plaintiffs and some thirty-five co-workers to leave their normal work stations, congregate in the company lunch area, some thirty feet from the nearest door, wait there for a period exceeding one hour, until each employee had been taken individually to a company restroom and physically searched for an allegedly stolen twenty dollar bill.

B. Whether the trial court erred in ruling as a matter of law that because Plaintiffs had not submitted any evidence of damages of monetary or emotional damages, Defendants were entitled to Summary Judgment, where 1) the Plaintiffs had submitted their own and the affidavits of family members as evidence of actual emotional damages, as well as 2) the Report of one Expert Witness and the Affidavit of another, and where 3) the causes of action alleged were

for the intentional torts of wrongful detention, assault, battery, false imprisonment, intentional infliction of emotional distress and invasion of privacy.

Standard of Review:

The Motion for Summary Judgment is based on law, and presents a question of law, and as such should be accorded no particular deference, but be reviewed for correctness. Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985). Summary Judgment is only proper when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. The determination of whether the moving party is entitled to a judgment is a question of law, which is reviewed for correctness. Johnson v. Morton Thiokol, Inc., 818 P.2d 997, 1000 (Utah 1991). The appellate court is completely free to reappraise the trial court's legal conclusions. Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1038-1039, (Utah 1989). Furthermore, in determining a Motion for Summary Judgment, the Court is required to draw all reasonable inferences in favor of the party opposing the Motion for Summary Judgment. Smith v. Batchelor, 832 P.2d 467, 468 (Utah 1992).

**STATEMENT OF THE CASE**

Nature of the Case: This is a case in tort. There are multiple causes of action by multiple plaintiffs against multiple defendants. The causes of action include claims for the intentional torts of wrongful detention, assault, battery, false imprisonment,

intentional infliction of emotional distress as well as claims for reckless infliction of emotional distress and invasion of privacy.

Course of Proceedings: Plaintiffs filed this case in the Fourth District Court of Utah in October 1993, and asked for a jury trial. Defendants were served in January 1994. Defendants filed an answer. The parties began discovery. In July 1994 Defendant Lynton filed a Motion for Partial Summary Judgment requesting that she be found not personally liable. The Motion was briefed and argued, and the Fourth District Court, Judge Boyd Park presiding, granted Lynton's Motion for Summary Judgment and dismissed her from the case in August 1994. Discovery continued. In October 1994 Defendants filed a Motion for Summary Judgment on all claims. This Motion was briefed and argued. At oral argument on this matter on February 10, 1995, the trial court requested that the Plaintiffs submit additional evidence of damages, and gave them thirty days to submit this additional proof. The trial court also gave the Defendants a reasonable amount of time to respond to the additional evidence. As requested by the trial court, the Plaintiffs prepared and submitted additional proof of damages.

After filing their response to Plaintiffs' Second Objection, Defendants also filed a Motion to Suppress the Plaintiffs' Affidavits. Plaintiffs filed an Objection to this Motion. On May 22, 1995 the trial court issued a twelve page Memorandum Decision granting Defendants' Motion for Summary Judgment on all counts. The trial court specifically chose not to rule on the Defendants' Motion to Suppress. Counsel for the Defendants summarized the trial

courts' Memorandum Decision into a three page Order. The trial court signed that order on July 14, 1995. The Plaintiffs filed their timely Notice of Appeal in the trial court on Monday, August 14, 1995.

Disposition: The trial court granted both Defendant Lynton's Motion for Partial Summary Judgment and Defendants' Motion for Summary Judgment. The trial court issued a twelve page Memorandum Decision on the second Motion for Summary Judgment, with the order that the Defendants prepare an Order consistent with the Memorandum.

Statement of Facts: Defendants did not submit any factual evidence of their own in support of their second Motion for Summary Judgment. Therefore, the following facts are unchallenged and, as the statement of facts by the party in opposition to Summary Judgment must be taken as true for the purposes of this Appeal. This statement of the undisputed material facts is based on the Plaintiffs' Deposition testimony and three distinct sections of the Record. These sections are the Plaintiffs' Amended Complaint, Record pp. 107-99; the Plaintiffs' Affidavits in Opposition to the Defendants' Second Motion for Summary Judgment, Record pp. 397-344; and the Amended English Translations of these Affidavits, Record, pp. 457-420.

1. In August 1992 the Nevada corporation DOT Adventures acted to establish a production facility in Orem, Utah for the purpose of manufacturing and selling novelty rubber stamps.

2. Plaintiffs were all employed as workers in this facility for varying periods of time between August and December of 1992. None of the Plaintiffs remained as employees of the facility past December 31, 1992.
3. The language used on the factory floor was Spanish, and the vast majority of factory employees, including the factory manager, were Hispanic.
4. Miguelangel Esquivel (Esquivel), the factory manager, had a demonstrated pattern of verbally demeaning the factory workers with invasive and harassing statements and accusations, such as the following: "You are a bunch of thieves, robbers, ungratefults; you are talebearers because you speak badly of the company;" [You don't] pay [y]our tithing, and because of this things [go] badly in the company; [You are] wetbacks, and if immigration came they would take [you] all away; [I am] sick of people's gossip, and that [you are] a bunch of scandlemongers.
5. Esquivel habitually told the plaintiffs and other factory workers that they were a bunch of thieves, that he knew that they were stealing the stamps. He also told them that he had been endowed with the authority that the company president and sole officer, Mrs. Jeanette Lynton, had granted him to do whatever he wanted with the employees. Basing himself on the fact that many of the employees were members of the Mormon Church, he would tell the employees that they needed to pay their tithing to continue working. He also threatened them by saying that if he dismissed them from their jobs, they would

have to go to ask help from their bishops to provide food for themselves and their families.

6. Esquivel would say things to the factory workers such as "I am certain that you don't pay your tithing. I know that's why things go badly for you." He would also say "I am certain that you are a bunch of hypocrites. To my face you smile at me, but behind my back you tell tales of me, I am certain." He would accuse them of not being able to enter the temple of the church. He would accuse them of being wetbacks and say that he knew who the illegals were.
7. On at least one occasion Esquivel asked in an employment interview to see the applicant's LDS temple recommend as a purported qualification for the job.
8. However, on or around December 17, 1992, Esquivel went beyond harrassing words. On that day he gathered the approximately forty factory workers into the cafeteria area of the factory and informed them that, although he knew it was illegal, he had had enough, and was going to require them to submit to a person by person private search of their persons and belongings because a co-employee reportedly complained that someone had stolen twenty dollars from her.
9. Esquivel further stated that if anyone wanted to object, he could raise his hand, and everyone would then know who the thief was.
10. Each of the Plaintiffs was required to enter the applicable rest room with their supervisor and submit to a search of their

persons and belongings. The male supervisor was minimally invasive in his search, only requiring the men to turn out their pockets and open their wallets and lunch bags. However, the male supervisor did search the wallets.

11. The female supervisor, on the other hand, required the women to pull their blouses out of their pants or skirts and undo their bras, after which she ran her hands around their mid-ribs under their blouses. The female supervisor also picked through the women's hair with a pencil.
12. All Plaintiffs were laid off as employees of the company prior to January 1, 1993.
13. In January 1993 Defendant DOTS formally registered as a foreign corporation doing business in Utah.
14. In October 1993 the Plaintiffs in this matter filed suit for the intentional torts of assault, battery, false imprisonment, wrongful detention, intentional and reckless infliction of emotional distress and various counts of invasion of privacy.

#### **SUMMARY OF ARGUMENT**

The trial court erred in granting the Defendants' Motion for Summary Judgment on all counts. The trial court erred in ruling, as a matter of law, that no reasonable jury could find in favor of the Plaintiffs, on any of their causes of action, on the uncontested facts. The trial court also erred on both factual and legal grounds in ruling that Plaintiffs had failed to establish proof of damages sufficient to permit a jury to find in their favor at trial.

Because, according to the trial court, this was the case, there was no point in permitting this case to go to the jury.

This is the first issue the Plaintiffs will address herein. In reviewing and arguing this determination, Plaintiffs will examine the law applicable to each of their causes of action, the trial court's legal findings on each cause of action, and the facts that serve as the basis for Plaintiffs' contention that a jury could reasonably find in their favor. Because the undisputed facts in the record would allow a reasonable jury to find in favor of the Plaintiffs on each of their causes of action, the trial court's ruling must be reversed, and this case must be remanded for further proceedings.

The second issue on appeal pertains to the trial court's ruling as a factual matter that Plaintiffs had submitted no evidence of damages, and thus had no cause of action. On this point the trial court erred both factually and legally. Plaintiffs did provide undisputed, legally admissible evidence of actual damages. The trial court erred when it in part ignored and in part ruled inadmissible Plaintiffs' evidence regarding their damages. Furthermore, in requiring Plaintiffs to submit proof of actual damages in order to prevail at Summary Judgment, the trial court ignored the availability under the law of both nominal and general damages in every one of Plaintiffs' causes of action.

The undisputed facts of this case are subject to multiple interpretations regarding the reasonableness and meaning of the actions of the parties. Therefore, the trial court erred in



substituting its own judgment for that of a jury. Furthermore, despite the trial court's ruling to the contrary, the Plaintiffs submitted legally admissible evidence of actual damages more than sufficient to create a disputed issue of material fact. Finally, the trial court applied the wrong legal standard of damages in refusing to allow general or nominal damages in cases of intentional tort. For each of these reasons, the trial court's ruling in this case must be reversed and remanded for trial.

#### ARGUMENT

Issue I. Whether the trial court properly held that no reasonable person could find for the Plaintiffs on their claims for Wrongful Detention, Assault, Battery, False Imprisonment, Intentional and Reckless Infliction of Emotional Distress, and Invasion of Privacy, where the defendants had required the plaintiffs and some thirty-five co-workers to leave their normal work stations, congregate in the company lunch area, some thirty feet from the nearest door, wait there for a period exceeding one hour, until each employee had been taken individually to a company restroom and physically searched for an allegedly stolen twenty dollar bill.

The primary issue on appeal in this case is fairly simple. With the exception of the question of actual damages, to be dealt with under Issue II, there are no material disputed facts. In dismissing most of the causes of action the trial judge made reference to the correct standard of law. But Summary Judgment dismissing each of the Plaintiffs' eight separate causes of action was entirely inappropriate in this case because the trial court, rather than submit the case to a jury, substituted his own judgment on the determining issues found in the grey area between fact and law, often called mixed issues of fact and law. It is a settled

principle that, in determining whether there are material disputed facts, the facts and *all reasonable inferences drawn therefrom* must be viewed in the light most favorable to the nonmoving party. Smith v. Batchelor, 832 P.2d 467, 468 (Utah 1992) [emphasis added].

In granting Summary Judgment for the Defendants, the trial court either completely ignored this principle, or determined that in his own judgment, no reasonable jury could possibly rule in favor of the Plaintiffs on any of their causes of action. In ruling this way, the trial court clearly erred, and thus this case should be reversed and remanded. In order to examine more particularly precisely how the trial court erred in ruling as he did on each of the Plaintiffs' causes of action, the following subsections of this brief will examine the supporting facts and reasonable inferences that might support a ruling in favor of the Plaintiffs on each of their causes of action.

**Wrongful Detention.** Plaintiffs' first cause of action is for Wrongful Detention. Wrongful detention is a civil cause of action, based on the crime of unlawful detention. The elements of the tort of wrongful detention are found in Utah Code Annotated (1953) §76-5-304(1) and are the **knowing, unlawful, restraint of a person that interferes substantially with his liberty**. The following undisputed facts are in the record and would support a finding for the Plaintiffs on this cause of action.

As stated in the undisputed facts section above, the Plaintiffs, along with more than 35 of their co-workers, were required by Defendant Esquivel, the factory manager, to leave their

work stations and gather in the factory cafeteria area, some thirty feet from the closest door. Then the Plaintiffs were informed that because a co-worker had alleged the theft of a twenty dollar bill, none of the workers would be permitted to leave the cafeteria area until each worker had been personally searched by his or her supervisor. Defendant Esquivel informed the workers that they would be required to enter the factory bathrooms one by one, where they would be searched. (Bardales Deposition, p.23; Record p. 447).

Defendant Esquivel also stated that he knew that what he was going to do was illegal, but that he didn't care.<sup>1</sup> Finally, Defendant Esquivel stated that if any of the workers wanted to object, they could raise their hand, and then everyone would know who the thief was.<sup>2</sup>

By virtue of his own admission to the workers, it has been established that Esquivel knew his actions were illegal. Therefore, the specific remaining elements of the tort are those the trial court focussed on in its Memorandum Decision (Record, pp. 685-696).<sup>3</sup> Specifically, the trial court found that plaintiffs could not prevail against the Defendants' Motion for Summary Judgment because

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<sup>1</sup> Semiday Deposition, pp. 41; 44; Bardales Deposition, p. 23; Record, pp. 452 and 439.

<sup>2</sup> Record, pp. 439 and 447.

<sup>3</sup> Although under normal circumstances citation to the final Order would be more appropriate, where, as in this case, that Order summarizes in three pages the trial court's twelve page Memorandum Decision, examples of the trial court's legal and factual reasoning will be taken from the Memorandum Decision, as it is a more complete record.

they had not proven that defendants substantially interfered with plaintiffs' liberty because the plaintiffs knew the location of an exit and made no attempt to leave. (Record, p. 689).

The trial court held that as a matter of law, the Plaintiffs' liberty was not substantially interfered with because they could have walked out of the plant at any time. However, the Utah statute that provides the elements of the crime of unlawful detention, the criminal parallel to the tort of wrongful detention, does not require that there be no avenue of escape.<sup>4</sup> Rather, it simply requires that the Defendant substantially interfere with the Plaintiffs' liberty to act on their own desires. In this case a reasonable presumption would be that the Plaintiffs' desired simply to do the job they had been hired to do, and go home at the end of the day. Regardless of the fact that the defendants could possibly have walked out of the factory at any time, a reasonable jury could still find that the Defendants substantially interfered with the Plaintiffs' liberty to do the job for which they were hired.

The trial court's holding that the Plaintiffs were not wrongfully detained because they knew where the door was and did not

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<sup>4</sup> Although not controlling, the case of Orem City v. Fillmore, (Case # 93 10 0350) is instructive regarding the normal interpretation of this statute in criminal cases. In that case, a Utah Fourth Circuit case involving the crime of Unlawful Detention, the Defendant prevented someone else from backing out of a parking space by intentionally placing his car behind the parked car. Even though the individual in the car was in no way prevented from getting out and walking away, the Defendant was convicted of this crime on June 7, 1993.

walk out of that door ignores the reasonable presumption, based both on Esquivel's statements when he ordered the search and on the previous threatening statements he had made to the factory workers that, had the Plaintiffs chosen to walk out the door, their employment with the factory would have been forfeit.

While unpleasant choices are a part of the daily life of most human beings, the deliberate interference with someone else's right of self determination requires some form of power over the other person--whether that be physical power, economic power, or political power. Both criminal law and tort law are intended to protect individuals from others who would use their power abusively. The basic elements of the abuse of power are codified in case law and in statute. However, at the most fundamental level, society at large must determine what the words actually mean and what constitutes the abuse of power. For this reason the law has removed certain determinations from the province of the judge, and given them to the community, in the form of jurors.

The Defendants in this case arguably used the economic power they had over the Plaintiffs to require them to leave their work stations for over an hour, and enter the factory bathrooms one by one to be searched. Whether or not this use of the Defendants' economic power constitutes an abuse of that power, sufficient to substantially interfere with the Plaintiffs' liberty, is a question that must be determined by society, in the form of a jury. The trial court on this issue improperly held, as a matter of law, that because the Plaintiffs could have escaped merely by sacrificing

their continued employment, the Defendants' actions did not substantially interfere with the Plaintiffs' liberty.

This determination by the trial court also implies, as a matter of law, that the Defendants' use of their economic power over the Plaintiffs did not, and cannot, legally constitute the tortious abuse of power defined as Wrongful Detention. Because the Plaintiffs have established facts sufficient to support a finding by society that the Defendants abused their economic power over them and substantially interfered with their liberty, this cause of action should be reversed and remanded for trial.

The defense has also argued that one cannot create a civil cause of action from a crime. This is simply not true. Criminal law protects the interests of the society at large. In criminal cases, the State is the prosecuting party. As a result, the standard of proof in a criminal case is always higher than that of a civil case.<sup>5</sup> However, criminal cases are brought on behalf of the state, not the individual, and the general money damages available to an individual in a civil case are not available in criminal cases, where restitution is limited to actual costs incurred.<sup>6</sup> Therefore, as a matter of public policy, the existence of a crime, particularly an intentional crime, presupposes a parallel civil

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<sup>5</sup> See, for example, Privacy in the Workplace, Jon D. Bible and Darien A. McWhirter, pp. 4-8 (Quorum Books, Westport Conn.) 1990; The American Law of Torts, Stuart M. Speiser, Charles F. Krause, and Alfred W. Gans. (Clark, Boardman, Callaghan, New York) 1991, §26:3.

<sup>6</sup> Id.

cause of action for general damages caused by the unlawful actions of the defendants.

The trial courts' grant of summary judgment on this cause of action should be reversed and remanded for trial on the merits because there are issues regarding the reasonableness of the actions of the parties, as well as issues regarding the reasonable meaning of such terms as "substantial interference with liberty" that must be determined by the trier of fact.

**Assault.** The elements of a prima facie case for civil assault are an act, made with the intention to inflict a harmful or offensive contact, that places another in apprehension of an immediate harmful or offensive contact. Restatement 2d. Torts, §21. The interest that is protected by this cause of action is a purely mental interest, and requires no evidence of actual damages.<sup>7</sup>

a. **Intent.** The Plaintiffs in this case have testified that Defendant Esquivel, acting in his capacity as plant manager, told an entire group of some forty employees that they could not leave or return to their work stations until each of them had entered the appropriate bathroom and been physically searched by

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<sup>7</sup> The Law of Torts, 2nd ed. Fowler V. Harper, Fleming James, Jr., and Oscar S. Gray. (Little, Brown & Co, Boston) 1986. Interference with the person, § 3.4.

their supervisor.<sup>8</sup> Esquivel stated that he knew the search was illegal, but that he didn't care.<sup>9</sup>

Mr. Esquivel has offered no testimony or other evidence regarding his intent. Even if he had, this would be a disputed material fact. In either case, the Plaintiffs' version of events must, for purposes of deciding the Defendants' Motion for Summary Judgment, be taken as true.

The fact that Esquivel stated that he knew the search was illegal is prima facie evidence both that he knew a physical search of their persons would be offensive to most normal people, and further that he intended both the search and the apprehension of the search, regardless of their offensiveness.

Defendant Esquivel's intent may also be reasonably inferred from other circumstances of this case, discussed previously, such as the relationship between the harm he was allegedly preventing, i.e., the stolen twenty dollar bill, and the action he took to remedy the harm, as well as the likelihood of proving, even if one were found, that a twenty dollar bill on the person of another factory worker was the twenty dollar bill alleged to have been stolen.<sup>10</sup> A jury might well find on the facts of this case that the possibility of

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<sup>8</sup> Record, pp.419-457.

<sup>9</sup> Semiday Deposition, pp. 41; 44; Bardales Deposition, p. 23; Record, pp. 452 and 439.

<sup>10</sup> See, for example, Plaintiff Semiday's question regarding how a twenty dollar bill in his wallet could be distinguished from that allegedly stolen. Semiday Deposition, pp. 40-41.



resolving the theft by a physical search of all the factory workers was so remote that Esquivel's primary motivation and intent must have been something entirely different. That same jury might also reasonably conclude that the twenty dollar bill was merely an excuse for Esquivel to demonstrate his power as factory manager by forcing everyone to submit to a search or lose their job.

This interpretation of the facts is further supported by the fact that Esquivel apparently made no attempt to limit the search to individuals with some proximity or ability to take the twenty dollars. For all of the above reasons, it would be more than possible for a reasonable juror to find that, when he required the plaintiffs and their co-workers to submit to a physical search, Defendant Esquivel acted intentionally and deliberately to create in the Plaintiffs and their co-workers the apprehension of an offensive touching. The Plaintiffs have further testified that Esquivel's action had that specific effect, and did indeed place them in apprehension of an immediate offensive touching. (Record, pp. 419-457).

**b. Reasonable Apprehension.** Defendants argued before the trial court that the mere threat of an offensive contact is not sufficient to permit a recovery. But this is a mischaracterization of the law. The actual legal principle is more accurately stated as follows:

Words do not make the actor liable for assault unless together with other acts or circumstances they put the other in

reasonable apprehension of an imminent harmful or offensive contact with his person.<sup>11</sup>

In this case, Defendant Esquivel had the actual ability, in his capacity as plant manager, to compel each of the forty factory workers to submit to this search or forfeit their employment. He further had the power to order the supervisors to search each of the workers individually. The fact that Esquivel had the present ability to carry out his threat of an offensive contact, and actually did proceed promptly to carry out his threat, resulting in multiple offensive contacts, is sufficient to establish that the Plaintiffs' apprehension of an offensive touching was reasonable. The case law and the Restatement 2d Torts recognize a cause of action for the right to be free of the apprehension of offensive bodily contact.<sup>12</sup> Again, the legal distinction is between a mere threat and a threat coupled with the ability to carry out the threat or some action evincing ability. The present case clearly falls inside the line dividing those two situations. Because a reasonable juror could find that the Defendants' action created in the Plaintiffs a reasonable apprehension of an immediate offensive contact with their persons, this cause of action must be remanded to permit the jury to decide this issue.

**Consent.** The trial court's decision on this and many, if not all, of the Plaintiffs' other causes of action was based in part on a further finding that, because there was no evidence that

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<sup>11</sup> The American Law of Torts, supra, §26:16.

<sup>12</sup> Id., §26:15.

defendants threatened plaintiffs with any violence or harm, no reasonable juror could find that the Plaintiffs' submission to the search was anything but consent, freely and voluntarily given. Consent, where freely given, is an absolute defense to all intentional torts.

However, consent comes in many forms. It may be written, it may be an express statement, it may be implied. Different legal considerations apply to factual situation. In the present case, consent was neither express nor written. Therefore, both the consent argued by the defendants and the consent found by the trial court must be consent implied from the circumstances. However, here again the trial court invaded an area of factual determination exclusively the jury's. This is so because implied consent can only be a factual determination derived from the totality of the circumstances--i.e., based on all the other facts, the finder of fact must determine whether the Defendants reasonably implied that the Plaintiffs' consented. Comment c to §892 of the Restatement (Second) of Torts, (1977) explains:

If a reasonable person would not understand from the words or conduct that consent is given, the other is not justified in acting upon the assumption that consent is given even though he honestly so believes; and there is no apparent consent. Id.

The trial court in the present case improperly invaded the province of the jury in holding, as a matter of law, that Plaintiffs had freely consented to remain and be searched. Because none of the Plaintiffs expressly consented, any consent must be implied from the totality of the circumstances. In a case that required a comparable

determination of reasonableness in a negligence action, the Utah Supreme Court stated:

Before the question of negligence [or, as in this case, consent] becomes one of law, for the court, the facts shown by the evidence must be such that all reasonable men must draw the same conclusions from them. If the facts proven are such that reasonable men may differ as to whether or not there was negligence, [or consent], the question is one for the jury to consider. Singleton v. Alexander, 431 P.2d 126, 129, (Utah 1967), 19 Utah 2d 292. [Comments added].

The undisputed facts of the present case must include consideration of the totality of the evidence, including the previous history of verbal abuse, the veiled threats Esquivel had raised previously regarding the impact on their families of their unemployment, and the possibility of being reported to the INS for deportation. Given those two threats in particular, it would not be impossible for a reasonable juror to find that Esquivel's threats to the Plaintiffs' economic well being and, in some cases, continued physical presence in the U.S., coupled with Esquivel's apparent power to carry out either or both threats, constituted duress, and that therefore the Defendants could not reasonably assume that Plaintiffs' failure to object meant, ipso facto, that they freely and willingly consented to the search.

The issue of consent is, except in extraordinary cases, an issue for the jury to decide. This is not an extraordinary case, precisely because the basic facts may be interpreted in more than one way. A jury might find that because none of the Plaintiffs objected Defendants reasonably implied that they consented. However, in determining whether consent is reasonably implied in any

given set of circumstances, *the trier of fact* is responsible for determining whether consent was reasonably implied. Restatement §892.

Furthermore the trier of fact will also be required to determine whether that implied consent was given under duress. According to §892B of the Restatement, "duress is constraint of another's will by which he is compelled to give consent when he is not in reality willing to do so." In determining the existence of duress, the Restatement requires that the age, sex, mental capacity, relation of the parties and any antecedent circumstances be considered. Again, it would be reasonable for a jury to find that, given the power of Defendant Esquivel to fire the Plaintiffs at will, given their limited job skills and the limited alternative jobs available to them, and given Esquivel's previous implicit threats against any who might be illegal aliens, that the Plaintiffs submitted to the search under duress, and did not, in fact, consent.

**Battery:** The elements of a civil cause of action for battery applicable to this case<sup>13</sup> are the **intentional infliction of a harmful or offensive contact to the person of another.**<sup>14</sup> These

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<sup>13</sup> In order to simplify the issues, the complicated phrasing of the hornbooks, intended to include cases of transferred intent or intent merely to cause apprehension, but not actual harm, has been deleted. It does not appear that these additional elements contribute anything to the present discussion, therefore they have been avoided where possible.

<sup>14</sup> See, for example, Restatement 2d. Torts §18; Handbook on the Law of Torts 5th Ed., William Prosser and Paige Keeton, West Publishing Co. 1988, pp. 39, §9.

elements have been explicitly testified to in at least two of the searches. The physical search of Rosa Mazariegos was full of offensive contacts with her person, from the hands run around her midriff to the pencil that was used to poke through her hair. (Record, pp. 446-447). Given, as has already been shown, that Esquivel clearly intended, at a minimum, an illegal and presumably offensive contact, all of the elements of a Battery are present. This is also true in the case of Mr. Semiday, where the individual conducting the search removed Mr. Semiday's shoes and socks. (Semiday Deposition, p. 41). Furthermore, the search of the remaining Plaintiffs' wallets, pockets, and other personal effects may constitute a technical battery, where those personal effects are shown to be connected to the Plaintiffs.

The trial court erred in dismissing this cause of action for the same reasons previously discussed--i.e., the trial court found as a matter of law that no reasonable juror could rule in favor of the Plaintiffs on this issue. The trial court dismissed this cause of action in the same discussion and on the same grounds as he dismissed the cause of action for assault. Specifically, the trial court found that no reasonable jury could find in favor of the Plaintiffs because there was no evidence that defendants threatened plaintiffs with any violence or harm and because there was no evidence that defendant Esquivel intended the search of plaintiffs to cause harmful or offensive contact.

The issues of consent, duress, and intent have been fully discussed above, in the section on assault, and the same discussion

is applicable here. To summarize the argument briefly, a reasonable jury could find for the Plaintiffs, on the grounds that either 1) their consent to an offensive touching was not reasonably implied under the circumstances, or that 2) any consent was obtained under duress. Furthermore, a reasonable jury could also find that Esquivel clearly intended to cause an offensive contact to the persons of the Plaintiffs where the search he ordered bore little or no relationship to the theft it was allegedly intended to discover, where the search had little or no likelihood of actually discovering a thief, and where Esquivel clearly stated his intent to order the search despite his awareness that it was illegal.

Because a reasonable jury could find for the Plaintiffs on the facts of this matter, the trial court erred in dismissing the cause of action for battery, rather than permitting it to be determined by the jury. For this reason, the Plaintiffs' cause of action for battery must also be reversed and remanded for trial on the merits.

**False Imprisonment:** The elements of a prima facie case for False Imprisonment under Utah law require that the Plaintiffs prove at trial that:

By the exercise of force, or the express or implied threat of force, [they were] compelled to remain where [they] do not wish to remain or to go where [they] do not wish to go. 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. Hepworth v. Covey Bros. Amusement Co., 91 P.2d 507, (Utah) 1939.

In Hepworth, two individuals acting as floorwalkers for a ballroom required two patrons to accompany them across the ballroom

floor to a room near the entrance of the ballroom. There was no evidence of force, other than the authority of the floorwalkers and their police uniforms. This case was tried to a jury, and the jury found for the Plaintiff. On appeal, the Utah Supreme Court upheld the verdict.

The Restatement 2d Torts uses different language to define the tort of false imprisonment. According to the Restatement, the applicable elements of the tort of False Imprisonment are **"an action, intended to confine another within boundaries fixed by the actor, a resulting confinement, and a conscious awareness of the confinement."** Restatement 2d Torts, §35.

Although the definition of the Hepworth court fits within the Restatement definition, there is some variation in the terms used that deserves discussion here. In Hepworth the Utah Supreme Court held that "the exercise of force, . . . or the express or implied threat of force" was a required element of false imprisonment. In contrast, section §35 of the Restatement merely requires an action with the intent to confine, and actual confinement. Whether an "act done with the intent to confine that results in actual confinement" is the equivalent of the term "force," as used by the Utah Supreme Court in Hepworth, is an issue of law.

It appears from the trial court's ruling in the present case that he read Hepworth to require some display of actual physical force, and that a verbal act, coupled with the power to cause actual economic and other harm to the Plaintiffs was not a sufficient threat to constitute actual or implied force.



At best, this holding on the part of the trial court minimizes the very real power that employers have over their employees in the modern world. At worst, this holding actually permits and legitimizes the abuse of this power, by allowing employers such as that in the present case, to act with impunity to require the complete submission of their employees to every whim, regardless of how unreasonable it may be.

The trial court in the present case held that because no actual physical force was used to restrain them, Plaintiffs have no cause of action for False Imprisonment, because they could have walked out at any point. This ruling ignores the fact that, had the Plaintiffs gotten up and walked out of the factory rather than submit to the search, they would effectively have terminated their employment and subjected themselves to possible deportation. It is clear that under current Utah law, had the Plaintiffs walked out and been terminated for refusing to submit to the search, they would then have had a cause of action for wrongful termination in violation of public policy.<sup>15</sup> The question presented by this case, however, is whether or not the individual **must**, without exception, attempt the escape and suffer the consequences before having a legal remedy for the Defendants' actions. Such an absolute legal principle is not in the public interest because it unfairly penalizes those uneducated and unsophisticated employees who do not

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<sup>15</sup> See, for example, Berube, supra, where it was held that forcing an employee to consent to a polygraph might raise such a cause of action.

know what their legal rights are until after those rights have been abused. Such a legal principle would require that in any set of circumstances comparable to the present facts, an employee with little or no knowledge of the law could lose all right to redress merely by submitting, and waiting until later to consult with an attorney.

The better rule is the reasonable man standard established by the Restatement §36--that confinement may result from an act, whether that act involves actual physical force or not, intended to confine, that results in actual confinement. The Restatement rule would clearly not allow recovery in every case of non-physical threat, but nor would it allow recovery in every case of physical threat. Instead, the Restatement rule would subject the issue of actual confinement to a jury determination of reasonability. More specifically the Restatement would find a confinement where there was no reasonable means of escape. Restatement §36. Furthermore, the Restatement would require the trier of fact to determine whether or not the Plaintiffs' refusal in any given case to get up and walk out, was reasonable under the totality of the circumstances.

§36 of the Restatement defines what is reasonably required under the circumstances in terms of a continuum between, on the one hand, a means of escape of which the Plaintiffs were aware that only entailed a slight inconvenience or the minor risk of nominal liability, and, on the other hand, a means of escape that, under the total circumstances would be "such as to make it offensive to a reasonable sense of decency or personal dignity."Id.

The undisputed facts of the present case are that Defendant Esquivel was the plant manager; that Esquivel habitually verbally harassed, intimidated, and threatened the factory workers. The Plaintiffs have testified that Esquivel was angry when he ordered the search. They have further stated that he required them to remain away from their normal work area, and that he required them, one by one, to enter a bathroom and submit to a search. Plaintiffs have stated that the nearest exit was some thirty feet away, and that it was closed. (Record, pp. 420-457).

The circumstances of this case would allow a jury to find in favor of either position. On the one hand, a jury might find that getting up and walking out would have caused the Plaintiffs, even in the event that they were fired, only a minor inconvenience, and that therefore the Plaintiffs were not confined.

On the other hand, however, a reasonable jury might also find a) that because any individual worker who sought to escape would have had to walk a distance of some thirty feet from the cafeteria area to the door, b) that because, given the distance, it was impossible to tell whether the door had been locked, and whether escape was a real, or merely illusory possibility, and that c) because by getting up and walking out Plaintiffs would have effectively been quitting their jobs, to require Plaintiffs to escape in this manner was unreasonable.

The trial court ruled in this case that no reasonable jury could find that the Plaintiffs were forced or compelled to remain in the cafeteria area, and enter the factory bathrooms one by one to

submit to the search of their persons. The trial court also ruled that Plaintiffs were not falsely imprisoned because, as a matter of law, they had a reasonable means of escape. But the trial court erred in ruling absolutely that it would be impossible for a reasonable jury to hold in the Plaintiffs' favor in this case. The facts of the present case are susceptible to more than one interpretation. Therefore, the issues of whether there was a reasonable exit such that Plaintiffs were not confined, and of whether Plaintiffs consented to remain or whether there was a substantial threat of force such that Plaintiffs were compelled to remain under duress, are questions for the jury to decide, not the judge.

**Intentional Infliction of Emotional Distress:** According to the Restatement, this is a comparatively new cause of action in tort. However, it is one that the Utah courts have expressly recognized.<sup>16</sup> The elements of this cause of action have been stated by the Utah Supreme Court as **the intentional causing of severe emotional distress through extreme and outrageous conduct.** Pentecost, Id., at 700. This definition was set forth in a case with facts analogous to those of the instant case. In Pentecost, a landlord's agent

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<sup>16</sup> See, for example, Matter of Estate of Grimm, 784 P.2d 1238, (Utah App. 1989) Utah Court of Appeals held that evidence was sufficient to present a jury question as to whether Defendants were liable for intentional infliction of emotional distress; Pentecost v. Harward, 699 P.2d 696 (Utah 1985), In reversing the lower court's grant of Summary Judgment to the defendant, the Utah Supreme Court held that material issues of fact existed as to whether a the self help actions of a landlord's agent raised a claim for intentional infliction of emotional distress.

resorted to self help, rather than legal process, in evicting the Plaintiff and her children and seizing their personal belongings, allegedly as compensation for non-payment of rent. As in the present case, the agent's self-help remedies were illegal.

Retherford v. AT&T Communications, 844 P.2d 949 (Utah 1992) is another Utah case that examines a summary judgement in favor of the Defendant on a cause of action for Intentional Infliction of Emotional Distress. In that case, the Utah Supreme Court held that evidence of emotional stress--Plaintiff's psychologist told her not to return to work in her previous environment--and evidence that Defendant's employees had "shadowed her movements, intimidated her with threatening looks and remarks, and manipulated circumstances at work in ways that made her job more stressful," was sufficient to state a cause of action. Id. In the present case, relatives of the Plaintiffs submitted affidavits testifying to the emotional and physical suffering caused the Plaintiffs by the Defendants' behavior. (Record, pp. 420-436). As causative actions, Plaintiffs allege that Esquivel used his position and power as plant manager to verbally and emotionally abuse Plaintiffs and to compel them to submit to an unlawful search of their persons and possessions.

Another case that discusses the elements of this cause of action is Contreras v. Crown Zellerbach Corp., 565 P.2d 1173 (Wash 1977). In that case, the Washington Supreme Court, En Banc, determined that where a Mexican-American alleged that his employer had permitted other employees to engaged in deliberate taunts, slander, and racial epithets, and that this behavior on the part of

his employer and co-workers had caused him to suffer severe emotional distress, due to the humiliations and public exposure to scorn and ridicule, was sufficient to state a cause of action for what Washington calls the Tort of Outrage. This case is cited in the Restatement 2d Torts §46, Definition of Intentional Infliction of Emotional Distress. Contreras is, of course, not controlling in Utah, but it is instructive, given the similarity of circumstances.

The trial court in the present case held, as a matter of law, that no reasonable jury could find that the Defendants intended to cause the plaintiffs emotional distress, nor that the Defendants acted with reckless disregard to the probability of causing emotional distress. It is the Plaintiffs' position on appeal that in so ruling the trial court clearly erred. The Plaintiffs in the present case have testified that Esquivel admitted that he knew his actions were illegal. Plaintiffs have also testified that the Defendants almost exclusively hired Hispanic individuals with limited English capability--arguably a more vulnerable workforce than comparable U.S. citizens. Plaintiffs have further testified that Defendant Esquivel over a period of months verbally harassed, threatened, and accused them of theft and other illegal actions, including illegal entry into the U.S. Plaintiff Mazariegos has testified that the female supervisor who searched her picked through her hair with a pencil, allegedly as part of a search for a twenty dollar bill. These undisputed facts, when combined with reasonable inferences on the part of the Plaintiffs regarding the complete lack of reasonable relationship between the alleged theft of an

unidentifiable and unremarkable \$20.00 bill, and the physical search of forty factory employees, could well support a finding that Defendants' sole intent in these circumstances was to humiliate the Plaintiffs and the other workers.

The trial court's holding that, as a matter of law, no reasonable jury could possibly find that the Defendants' conduct constituted outrageous conduct is also clearly erroneous and must be reversed. The determination of what society considers to be outrageous is, like previous issues discussed in this brief, a mixed issue of law and fact. Because reasonable men could differ on the outrageousness of the Defendants' actions, in compelling nearly forty Hispanic immigrant workers, legal and illegal, to submit to a fruitless and baseless search of their persons and property, this is yet another factual issue which must be determined by a jury.

Because the facts of the present case could support a jury finding in favor of the Plaintiffs on their cause of action for Intentional Infliction of Emotional Distress, the trial court's implicit holding that no reasonable juror could find in favor of the Plaintiffs is clear error. Therefore, the trial court's grant of Defendants' Motion for Summary Judgment on this cause of action must be reversed and remanded for trial on the merits.

**Invasion of Privacy.** The final three causes of action alleged by the Plaintiffs all involve the specific area of privacy labeled intrusion into private affairs. In order to establish an invasion of privacy claim of intrusion upon seclusion, a complaining party must prove by 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.<sup>17</sup>

**Counts 7 & 8.** The first two claims for invasion of privacy are based on the physical search of the Plaintiffs' persons and personal possessions. In granting summary judgement for the Defendants on these causes of action, the trial court ruled that as a matter of law the Defendants' search of the Plaintiffs' persons and personal effects did not constitute an unreasonable intrusion into their seclusion. This statement of the trial court's holding does not distinguish between the two possible legal rulings upon which the holding might be based. The first is the holding that, as a matter of law, no reasonable jury could find that the physical search of the persons and personal effects of the Plaintiffs in the present matter was unreasonable or highly offensive. The second is the holding that, as a matter of law, no employee in Utah has any reasonable expectation of privacy in their physical person and personal effects while at their place of employment.

The first of these legal rulings is insufficient to support the grant of Defendants' Motion for Summary Judgment. Like other issues previously discussed in this brief, this legal holding depends on the determination by the trial court of a mixed issue of law and fact that is, except in extremely unusual circumstances, considered the province of the jury.

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<sup>17</sup> Turner v. General Adjustment Bureau, Inc., 832 P.2d 62, 67 (Utah App. 1992).



The language 'highly offensive to the reasonable person' suggests a determination of fact for which a jury is uniquely qualified.<sup>18</sup>

On the undisputed facts of the present case, for all of the reasons discussed in previous sections of this brief, a jury could find that the Defendants' actions, in restraining and physically searching the Plaintiffs without probable, or even reasonable cause, were highly offensive, and would have been to the reasonable person. Thus, this holding cannot support the trial court's grant of summary judgment.

The second of these holdings also purports to be a legal principle. But the only legal principle that would support the trial court's failure to submit this case to a jury is the absolute principle that, as a matter of law, no employee in the state of Utah has a reasonable expectation of privacy in their physical person and personal effects while at their place of employment. Anything less than an absolute ruling on this issue would require the matter to be submitted to a jury for a determination of whether the Plaintiffs had a reasonable expectation of privacy and seclusion in their persons and personal effects, even while in the work place. Neither this Court nor the Utah Supreme Court has ever ruled directly on such a case. During the course of this appeal, this Court may choose to adopt the standard applied by the trial court, and affirm the trial court's dismissal of these two causes of action. However, it is the Plaintiffs' position that such an absolute standard is unnecessary and contrary to public policy. Rather, the Plaintiffs

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<sup>18</sup> Turner, supra.

would argue that a more reasoned approach, and one more consistent with previous Utah case law on this issue, is the position set forth in §652B of the Restatement.

The Restatement 2d Torts §652B, as cited in Cox v. Hatch, 761 P.2d 556 (Utah 1988), establishes a cause of action for unreasonable intrusion upon the seclusion of another. §652B defines the specific elements of the tort of Intrusion upon Seclusion as: the **intentional intrusion, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, where the intrusion would be highly offensive to a reasonable person**. There are two key phrases in this definition: "intrusion, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns" and "highly offensive to a reasonable person." The second phrase concerns the standard which a jury must apply to determine whether the parties' actions, given the undisputed facts, were reasonable or unreasonable. The first phrase contains two elements of the legal cause of action for invasion of privacy, or Intrusion upon Seclusion. In the present case the first element, an intrusion, is an undisputed fact. Thus, the basis for the trial court's ruling becomes the question of whether this intrusion was upon the solitude or seclusion of another.

In Cox, supra, the Utah Supreme Court held that the publication of photographs of the Plaintiffs, taken in a public place at a public event, did not constitute an invasion of privacy because the Plaintiffs had no reasonable expectation of privacy in such a situation. In the present case, the Defendants contend that

an actionable "intrusion into Plaintiffs' seclusion" is limited to intrusion upon Plaintiffs in the privacy of their own homes or automobiles. But it is the Plaintiffs' contention that, in accordance with the Restatement §652B, the privacy rights of an individual extend not merely to a dwelling or automobile, but also to their physical persons and such personal effects as purses and wallets. Plaintiffs further contend that, without reasonable cause, the subjection of these personal effects to physical search is an actionable invasion of privacy. The search in the present matter is not comparable to a locker or desk search. The Plaintiffs were specifically told that they and their personal effects were going to be physically searched. Although the level of actual intrusion then depended upon the supervisor doing the searching, the fact that some were forced to submit to more invasive searches does not obviate the fact that the privacy interests of each Plaintiff, in his or her person and property, were invaded.

Privacy in the Workplace, supra, has an entire chapter devoted to the legality of work place searches of employee's persons and property. The authors reach the conclusion, at the end of this chapter, that

the legality of a search hinges essentially on the manner, scope, justification and location of it. Searches of people attract greater judicial scrutiny than inspections of places, given the higher level of intrusiveness involved. . . . the central issue usually boils down to whether the employee had a reasonable expectation of privacy in the area in question. Id. p.169.

This position is supported by the Restatement, §652B, where one of the specific examples given to illustrate this cause of action is an

illegal search of an individual's wallet. This illustration is directly on point in the present case.

As a matter of law, this Court must decide whether Plaintiffs' persons and private affairs and concerns might reasonably be held to be secluded under their clothing, and in their pockets, wallets, purses, and lunch bags, or whether, on the contrary, no Utah employee has any reasonable expectation of privacy in these areas while at her place of employment. If this Court holds that an employee in Utah might reasonably have an expectation of privacy in her person and personal effects, even while in the workplace, then the trial court's ruling granting Defendants' Motion for Summary Judgment on these causes of action must be reversed, and these causes of action, along with the others, must be remanded for a jury to determine whether, on the actual facts of the present case, the Plaintiffs' expectation of privacy in these areas **was** reasonable, and whether, on the actual facts of the present case, the Defendants' invasion of these areas would have been highly offensive to a reasonable person.

Again, a jury might find that the Plaintiffs' alleged consent will bar recovery on this cause of action. On the other hand, as with the causes of action previously discussed, a jury might also find that Plaintiffs did not consent, and that the broad based, coercive nature of the search, without reasonable cause, would permit a recovery on this cause of action.

**Count 9.** The final cause of action is also one for Invasion of Privacy, or Intrusion into the Personal Affairs of

another. Thus, the same elements, of an unreasonable or highly offensive intrusion into an area where one has a reasonable expectation of privacy, must be established. The factual basis for this final cause of action differ from that of the previous causes of action. However, the material facts are again undisputed. As stated above, it is an undisputed fact that, during Plaintiff Semiday's first employment interview with the Defendant company, Defendant Esquivel requested, as a purported condition of employment, that Semiday show him his LDS temple recommend. As a matter of public policy, Federal and State anti-discrimination statutes stand, in part, for the principle that the employment decisions of businesses, with the exception of a limited category of religiously owned and operated businesses, should not be made on the basis of the prospective employee's religious affiliation or standing. This is true even where the business is discriminating in favor of a specific category, and thus an individual would have no legal cause of action under either of those laws. Because this is a matter of public policy, this Court should hold herein that, as a matter of law, all Utah employees have a reasonable expectation of privacy in the workplace regarding their religious standing and status. While an employee may choose, during the course of employment, to reveal certain facts, this choice should, as a matter of law, remain the employee's, not the employer's.

Because Utah employees have a reasonable expectation of privacy in the workplace regarding their religious standing and status, and because, as in the previous two causes of action, the fact of an

intrusion is uncontested, the remaining issues for this Court to determine are 1) whether a jury might reasonably find that the Defendant's intrusion would be highly offensive to a reasonable person, and thus unreasonable, and 2) whether a jury might reasonably find that Defendant's intrusion was not protected by consent on the part of Plaintiff Semiday.

It is important, in determining whether a reasonable person might find the Defendant's intrusion highly offensive, to note that the fact that an LDS church member does or does not have a temple recommend is indicative of even more personal, intensely private facts, than the simple question may indicate. An answer to that question provides an employer with information regarding sexual habits, smoking and drinking habits, the individual's financial affairs, and involvement with the LDS Church. A reasonable person might consider any or all of these areas deeply private and personal; because this is the case, a reasonable person might also find that a strange employer's intrusion into this area of a prospective employee's personal life was highly offensive and thus unreasonable.

The last factor which must be determined in deciding whether the trial court's ruling on this cause of action was appropriate is the issue of consent. Although the facts underlying this last cause of action are different from the facts underlying each of the previous causes of action, the issue of consent involves some parallel considerations. As in each of those causes of action, the basic facts may be interpreted in more than one way. A jury might

find that Semiday's failure to immediately object to this request on the part of his prospective employer, and his actions in taking out the recommend and giving it to the Defendant, are reasonably interpreted as freely given consent. But because Semiday did not expressly consent to this violation of his legal rights, his consent must be implied from the totality of the circumstances. Restatement 2d Torts §892. Therefore, a jury might also find that, given the employment interview setting, the relative power of the parties, Semiday's lack of legal knowledge and sophistication and his dependence upon the good will of this prospective employer, it would be unreasonable for that employer to believe, merely because the prospective employee failed to object, that the employee freely consented to this intrusion into his personal affairs.

Because the facts of this matter establish a cognizable claim for invasion of privacy, in that 1) a jury could reasonably find that the Defendant intruded unreasonably into an area of Plaintiff's personal affairs where 2) he had a reasonable expectation of privacy, and that 3) this intrusion would be highly offensive to the reasonable person, and that 4) the Defendant, given the totality of the circumstances, could not reasonably infer that the Plaintiff freely consented to this invasion of his privacy, the trial court erred in holding as a matter of law that Summary Judgment for the Defendants was appropriate. Because reasonable minds could find in favor of the Plaintiff on this cause of action, Summary Judgment on this cause of action must also be reversed and remanded for trial on the merits.

ISSUE II. Whether the trial court erred in ruling as a matter of law that because Plaintiffs had not submitted any evidence of damages of monetary or emotional damages, Defendants were entitled to Summary Judgment, where 1) the Plaintiffs had submitted their own and the affidavits of family members as evidence of actual emotional damages, as well as 2) the Report of one Expert Witness and the Affidavit of another, and where 3) the causes of action alleged were for the intentional torts of wrongful detention, assault, battery, false imprisonment, intentional infliction of emotional distress and invasion of privacy.

The issue of the Plaintiffs' ability to prove actual damages in this case was a significant factor in the trial court's ruling that as a matter of law Plaintiffs had failed to state a legally sufficient cause of action on any of their claims. Specifically, at oral argument on this Motion the trial court expressed several times his concern that Plaintiffs had no actual evidence of damages, despite the affidavits of the Plaintiffs and their family members, submitted in opposition to Defendants' Motion for Summary Judgment.<sup>19</sup> Because this was such a significant concern, the trial court delayed ruling on the Defendants' Motion for Summary Judgment for several months, and requested that Plaintiffs obtain and submit to the trial court actual evidence of their damages, in order to permit the trial court to rule in their favor. (Record, pp. 785-787).

Finally, both the Order prepared by the Defendants and the trial court's own Memorandum Decision cite the alleged failure of the Plaintiffs to provide any evidence of damages as a basis for Granting the Defendants' Motion for Summary Judgment on each of

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<sup>19</sup> Record, pp. 420-457.



Plaintiffs' causes of action.<sup>20</sup> In addition to all the purported legal reasons previously discussed as justification and support for the trial court's ruling in favor of Defendants' Motion for Summary Judgment, the trial court expressly stated in its Memorandum Decision that "lacking any evidence that plaintiffs have incurred any monetary or psychological damages resulting from the search conducted by defendants, the Court finds the plaintiffs have no cause of action against defendants." (Record, pp. 685-686).

This ruling of the trial court's is so clearly erroneous on so many different grounds as to be ludicrous. First, the trial court is factually wrong. Second, the trial court is legally wrong on 1) the legal admissibility of Plaintiffs' testimony regarding emotional damages; 2) the legal admissibility of Plaintiffs' Expert Witnesses Report; 3) the legal standard of evidence required, both as a) pertains to Plaintiffs' burden of proof on this issue in the present Motion for Summary Judgment and b) as pertains to proof of compensatory and general damages sufficient to permit recovery under the alleged causes of action; and finally, 4) the trial court ignores the settled law that a Plaintiff who states a prima facie case for an intentional tort such as Assault, Battery, False Imprisonment, or Invasion of Privacy may, even where there are no actual damages, recover nominal damages for the simple violation of a legally protected interest.

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<sup>20</sup> See Hearing Transcript, February 10, 1995, Record, pp. 782-783; 781-782; Order, Record, p. 701; Memorandum Decision, Record, pp. 687-685.

**Trial Court's Ruling is Factually Wrong.** The trial court's ruling that Plaintiffs had submitted no evidence to support their monetary and psychological/emotional damages is simply factually wrong. In support of their Objection to Defendants' Motion for Summary Judgment, the Plaintiffs filed, on November 1, 1994, eight affidavits. Each of these eight affidavits testifies to the emotional and/or physical devastation caused by the Defendants' actions. Plaintiffs and their families testified that as a direct result of the search to which they were subjected, the Plaintiffs suffered humiliation, embarrassment, extreme anxiety, depression, and a general sense of powerlessness. Three of these affidavits testify implicitly to actual monetary damages resulting from one Plaintiff's near nervous breakdown, caused by the search to which the Defendants subjected her, that directly resulted in her complete emotional inability to seek new employment for a period of months.

**Trial Court's Ruling is Legally Wrong.**

**Plaintiffs' Affidavits are Legally Admissible.** In the face of this testimony, the Defendants argued that the Plaintiffs' supplemental affidavits were inadmissible because they were submitted after the Plaintiffs' Depositions had been taken. The Defendants further alleged in their Motion to Strike Plaintiffs' Affidavits that the Affidavits were inadmissible because they contradicted the Deposition testimony. But despite the fact that the Defendants filed their Motion to Strike some five months after they received the Plaintiffs' Supplemental Affidavits, the *Defendants*

*did not ever cite a single example of such a contradiction.*<sup>21</sup> In fact, the Defendants themselves state that "[the Affidavits] **are an attempt to expand** from the sole issue related to the checking or searching to one of general allegation of rude and disrespectful treatment in the work place." (Record, p. 626, emphasis added). And "in her Affidavit, Rosa Mazariegos, **attempting to expand her damages** well beyond what she stated in her Deposition. . ." (Record, p. 625, emphasis added). Affidavits offered to expand on Deposition testimony, where such expansions do not materially contradict the Deposition testimony are not inadmissible.

All of these issues, however, were raised and addressed in the Defendants' Motion to Strike and/or Disregard, and the Plaintiffs' Memorandum in Opposition to that Motion. However, although the trial court apparently did disregard the Plaintiffs' affidavit testimony regarding the damages they suffered, as a matter of procedure the trial court declined to rule on the Defendants' Motion to Strike. (Record, p.685). Therefore, as a factual matter, this testimony remains in the record in support of Plaintiffs' opposition to Defendants' Motion for Summary Judgment.

But, regardless of whether Plaintiffs' Affidavit testimony remained in the record, the trial court did not cite, discuss, or in any other way appear to have considered these Affidavits as valid evidentiary testimony when it held that Plaintiffs had submitted no evidence to support any possible damage claim. Because the trial

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<sup>21</sup> Record, pp. 621-628; see also pp. 655-654; pp. 674-675; pp. 641-658; and pp. 621-628.

court did not rule on the Defendants' Motion to Strike, there is no express explanation for the courts' disregard of this evidence. But a statement the trial court made at oral argument may provide some explanation for the court's failure to consider this evidence. Specifically, the court stated:

But I can tell you, your people thoughts and feelings that are not appropriate for Cross Examination and may not even be admitted into evidence. It may not even get to a question on those [sic].<sup>22</sup>

If this is indeed the trial court's justification for ignoring the factual testimony regarding emotional damages, the court errs in believing that Plaintiffs' testimony regarding their thoughts and feelings is inadmissible. More specifically, this statement is untenable as a statement of legal principle where, as in *every single one of Plaintiffs' eight separate causes of action*, an actionable element of either the specific tort or of resulting general damages is specifically a *mental or emotional* harm. Where a tort is either intended in full or in part to protect individuals from mental or emotional damage, or where an element of the prima facie case concerns a particular mental state, testimony regarding the Plaintiffs' mental thoughts and feelings is admissible, highly relevant, and probative.<sup>23</sup>

**Plaintiffs' Expert Witness Report & Affidavit Legally Admissible.** Even assuming, strictly for the sake of this argument, that the trial court was correct in ignoring the Plaintiffs'

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<sup>22</sup> Record, p. 786.

<sup>23</sup> See, e.g., Boies v. Raynor, 361 P.2d 1, 3, 89 Ariz. 257 (Ariz. 1961).

affidavit testimony for one reason or another, the Plaintiffs also submitted, as evidence in support of their emotional damages, the Report of Dr. Juan Mejia and the Affidavit of Dr. Linda Gummow. This evidence alone should be sufficient to establish an issue regarding the factual existence of actual damages. However, the trial court, in its Memorandum Decision, ruled as a matter of law that Dr. Mejia's report was inadmissible. The trial court stated that Dr. Mejia's report was inadmissible a) because it was not submitted in affidavit form and therefore must be considered hearsay, and b) because the report cannot be admitted into evidence as a statement for purposes of medical diagnosis or treatment under Utah Rule of Evidence 803(4) as an exception to the hearsay rule because the evaluation by Dr. Mejia was performed solely to aid the pursuit of litigation, nor for the purpose of diagnosis to promote treatment.

Solely for the practical purposes of this appeal, Plaintiffs will not challenge the legal validity of the first of these rulings, although as a practical matter, this report was submitted in direct response to the trial court's request for examples of precisely how Plaintiffs intended to prove their factual damages at trial. Because, had this matter gone to trial, Dr. Mejia would have been available to provide the necessary foundation to establish the admissibility of this report, the trial court's refusal to consider it as evidence even of what Plaintiffs might prove at trial seems contrary to Utah Rule of Evidence 102, which states that:

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

However, even if Dr. Mejia's Evaluation Report is hearsay, it is still admissible as evidence in this matter, despite the fact that it was prepared solely to aid the pursuit of litigation. This is because the trial court interprets incorrectly Utah Rule of Evidence 803(4). Contrary to the trial court's actual holding, Utah Rule of Evidence 803(4) does not bar a psychological report that is prepared, whether to aid in the pursuit of litigation or not, "for purposes of medical [or psychological] diagnosis **or** treatment."<sup>24</sup> In fact, this rule was specifically adopted specifically to avoid the result that occurred in this case below. According to the advisory committee notes:

Conventional doctrine has excluded from the hearsay exception, as not within its guarantee of truthfulness, statements to a physician consulted only for the purpose of enabling him to testify. While these statements were not admissible as substantive evidence, the expert was allowed to state the basis of his opinion, including statements of this kind. The distinction thus called for was one most unlikely to be made by juries. **The rule accordingly rejects the limitation.**<sup>25</sup>

Because Dr. Mejia's evaluation does provide actual diagnoses of the emotional and psychological damage the Plaintiffs' suffered at the

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<sup>24</sup> See, e.g., State v. Schreuder, 726 P.2d 1215, 1222 (Utah 1986); Morgan v. Foretich, 846 F.2d 941, 950 (4th Cir. 1988); U.S. v. Renville, 779 F.2d 430, 436 (8th Cir. 1985).

<sup>25</sup> Notes of Advisory Committee on Proposed Rules, 28 U.S.C.A. Rule 803, at 279 (West 1984); cited in State v. Schreuder, supra, at 1223.

time their causes of action arose, this report falls into the exception established by Utah Rule of Evidence 803(4) to the general rule that hearsay is inadmissible. Therefore, the trial court erred in ruling it inadmissible and refusing to consider it as evidence of Plaintiffs' actual damages. Because the trial court ruled that the affidavit of Plaintiffs' second expert witness was inadmissible solely because it was based on Dr. Mejia's Report, this affidavit is also admissible as evidence of Plaintiffs' damages.

The trial court further erred in ruling as a matter of law that the Plaintiffs, without expert witness testimony, could not establish emotional damages sufficient to sustain any of their causes of action. This ruling, reduced to its essence, produces a completely absurd result--basically, this holding would bar any plaintiff who could not afford to obtain professional treatment from ever recovering damages for emotional suffering and harm.

**Expert Witness Testimony not Required to Prevail against Motion for Summary Judgment.** Fortunately, proof of emotional damages does not, as an absolute rule of law, require the testimony of an expert witness. This is particularly true where, as in the present case, the issue of damages arises in the context of a Motion for Summary Judgment. In ruling on a Motion for Summary Judgment, it is not the province of the trial court to assess the sufficiency of the evidence.<sup>26</sup> Where, as in the present case, the material facts are uncontroverted, the trial court must assume for the

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<sup>26</sup> Singleton, supra, at 128.

purpose of determining the Motion, that the party opposing the Motion has sufficiently proven its alleged facts, and that, unless the moving party is, on those fact, entitled to judgment as a matter of law, the Motion for Summary Judgment must be denied.<sup>27</sup>

Therefore, the trial court erred in the present case when he ruled that only expert witness testimony of damages would be sufficient to prevent a ruling for the Defendants on their Motion for Summary Judgment. Where the Defendants, as the party moving for Summary Judgment, had failed to submit any sworn testimony in contradiction to Plaintiffs' Affidavits and the Report and Affidavit of their Expert Witnesses, the trial court's findings that there were no material disputed facts regarding the existence of damages, and that damages did not exist, were clearly in violation of all standard practice and procedure with regard to Motions for Summary Judgment.<sup>28</sup>

**Plaintiffs' Causes of Action do Not Require Expert Witness Testimony to Recover Damages.** Even if this issue had arisen in another context, the law would not have supported a blanket dismissal of each of the Plaintiffs' eight separate causes of action merely because there was no expert witness testimony to support an award for emotional damages. This is so for two reasons. First,

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<sup>27</sup> See, e.g., TS 1 Partnership v. Allred, 877 P.2d 156, 158 (Utah App. 1994); Amica Mut. Ins. Co. v. Schettler, 768 P.2d 950, 957 (Utah App. 1989); W.M. Barnes Co. v. Sohio Nat. Res. Co., 627 P.2d 56, 58-59 (Utah 1981).

<sup>28</sup> Record, p. 686.

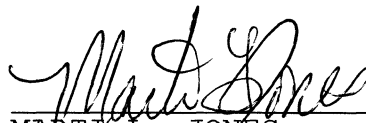


because no reasonable jury could find in their favor on any of their eight causes of action. In so ruling the trial court made impermissible factual determinations regarding the sufficiency of the evidence and regarding the reasonable inferences to be drawn from the facts in areas of mixed law and fact that are traditionally the responsibility of the jury to decide.

Furthermore, the trial court erred both on the facts and on the law in holding that Defendants were entitled to Summary Judgment as a matter of law because Plaintiffs had submitted no evidence sufficient to support an award of damages on any of their eight causes of action.

Because the trial court erred on these issues, and because the undisputed facts are sufficient, as a matter of law, to support a ruling by a jury in Plaintiffs' favor on each of their causes of action, this entire case must be reversed and remanded for trial on the merits.

*22nd*  
DATED this 16th day of January, 1996.

  
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MARTI L. JONES  
Attorney for Plaintiffs

some of Plaintiffs' causes of action do not require expert witness testimony to establish damages. For example:

In a civil action to recover damages for assault and battery, any evidence that will fairly show the nature and extent of the injuries received and the pecuniary loss suffered by the plaintiff as a result of such injuries is generally admissible. Assault and Battery, 6 Am Jur 2d, §218.<sup>29</sup>

Secondly, some or all of Plaintiffs' alleged causes of action do not require proof of any damages whatsoever in order to recover nominal damages.<sup>30</sup>

In conclusion, the trial court erred in holding that Plaintiffs had failed to provide any evidence of emotional or pecuniary damage and that the testimony of Plaintiffs' Expert Witnesses was inadmissible. The trial court also erred in holding as a matter of law that Plaintiffs could recover no damages, nominal or compensatory, on any of their eight causes of action, simply because they allegedly failed to offer expert witness testimony in opposition to a Motion for Summary Judgment. As a matter of both fact and law, the trial court's holding on this issue is clearly erroneous and must be reversed.

#### CONCLUSION

The trial court erred in ruling on the undisputed facts that Defendants were entitled to Summary Judgment as a matter of law

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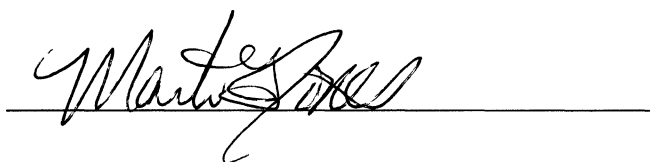
<sup>29</sup> See also, Hepworth, supra, at 510.

<sup>30</sup> See, e.g., Hepworth, id; Jeppsen v. Jensen, 155 P. 429, 431 (Utah 1916), 47 Utah 536; Marshall v. District of Columbia, 391 A.2d 1374, 1382 (D.C. App. 1978); Sutherland v. Kroger Co., 110 S.E.2d 716, 724 (W.Va. 1959); Aquino v. Bulletin Co., 154 A.2d 422, 426 (Penn. Sup. Ct. 1959); Lacey v. Laird, 139 N.E. 2d 25, 31 (Ohio 1956) 166 Ohio St. 12.

AMENDED CERTIFICATE OF HAND DELIVERY

I HEREBY CERTIFY that I personally hand Delivered two true and correct copies of the APPELLANT'S BRIEF in the above captioned case on the 22nd day of January, 1996 to the following attorney for the Defendants:

Loren D. Martin  
P.O. Box 11590  
139 East South Temple Street, # 400  
Salt Lake City, UT 84147-0590

A handwritten signature in cursive script, appearing to read "Loren D. Martin", is written over a horizontal line.

NO ADDENDUM