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David Fisher, individually and on behalf of Office Management, L.C., v. Lavern Davidhizar, an individual : Reply Brief

Utah Court of Appeals

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IN THE COURT OF APPEALS FOR THE STATE OF UTAH

DAVID FISHER, individually and on behalf of OFFICE MANAGEMENT, L.C., Plaintiffs/Appellees/Cross-Appellants, vs. LAVERN DAVIDHIZAR, an individual, Defendant/Appellant/Cross-Appellee.	Case No. 20090752 – CA

REPLY BRIEF OF APPELLANT/CROSS-APPELLEE

Appeal from the Fifth District Court of Washington County, State of Utah,
The Honorable James L. Schumate

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ORAL ARGUMENT REQUESTED

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RESPONSE TO PLAINTIFFS' STATEMENT OF FACTS

In the Brief of Appellee/Cross-Appellant (the "Appellee Brief"), Plaintiffs set forth numerous factual assertions. Dr. Davidhizar does not respond point-by-point to each of these assertions but notes that, in many instances, the facts averred by Plaintiffs are unsupported by the references to the record, refer to documents from the record for which no authentication or explanations are offered, are often conclusory, and, at times, are based on inadmissible hearsay. More importantly, Plaintiffs' recitation of the facts and Plaintiffs' attempt to create an evidentiary battle highlight the inappropriateness of the trial court's disposition of the case on summary judgment. As discussed more fully below, sorting through and weighing the various and often contradictory factual assertions is the province of the jury, not the court.

ARGUMENT

I. There Were Genuine Issues of Material Fact That Precluded Entry of Summary Judgment on Davidhizar's Claims and Defenses Related to Fraud and Negligent Misrepresentation.

Plaintiffs' Appellee Brief focuses primarily on a recitation of evidence that purportedly counters the evidence proffered by Dr. Davidhizar in support of his fraud claims and defenses. Plaintiffs use these proffered facts to make their ultimate assertion that Dr. Davidhizar did not present clear and convincing evidence demonstrating fraud. But in making this assertion, Plaintiffs ask this Court to indulge in the same error that the trial court committed—i.e., to weigh the disputed evidence and decide whether that evidence clearly and convincingly demonstrates the occurrence of fraud. In so doing,

Plaintiffs disregard the legal principle that on summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

It is well established that the court "cannot weigh disputed material facts in ruling on a summary judgment motion." *Hardy v. Prudential Ins. Co. of America*, 763 P.2d 761, 765 (Utah 1988). Therefore, the evidence Plaintiffs present in an attempt to counter the evidence presented by Dr. Davidhizar is largely irrelevant. As discussed in the Brief of Appellant (the "Appellant Brief"), Dr. Davidhizar presented evidence that, if believed, was sufficient to clearly and convincingly demonstrate the elements of fraud. For purposes of summary judgment, that is the end of the inquiry. And it was the trial court's failure to conclude the inquiry at this juncture and to proceed to weigh the disputed evidence and enter summary judgment in favor of Plaintiffs that constitutes grounds for reversal.[1]

A. *The Misrepresentations Regarding the Amount of Income Generated by the OMC Contracts Is Sufficient to Support Dr. Davidhizar's Fraud Claims and Defenses.*

In the Appellee Brief, Plaintiffs do not dispute that Fisher and OMC represented that the OMC contracts were "generating between $5,000 and $7,000" of income each month. Nor do Plaintiffs challenge, for purposes of their argument on appeal, that such

[1] Although, as discussed in the Brief of Appellant (the "Appellant Brief"), a claim for negligent misrepresentation requires a showing of a lesser mental state than fraud, all references to fraud claims and defenses for purposes of this Reply Brief include Dr. Davidhizar's claim for negligent misrepresentation. (*See* Appellant Brief at 35.)

representations were false. Instead, Plaintiffs assert that Dr. Davidhizar cannot base a fraud claim on these misrepresentations because they were expressions of an "opinion" of value and not representations of fact. Plaintiffs' own recitation of the facts, however, demonstrates the fallacy of this position.

According to Plaintiffs, they represented to Dr. Davidhizar that their "opinion" of value was derived from "the *actual* income collected and the *actual* billing made by OMC." (Appellee Brief at 7, ¶ 22 (Emphasis added.).) Plaintiffs' agent expressly stated that the suggested value was based on the projected gross income for one year, which, according to the represented actual income, would be $60,000 to $80,000. (*See* Appellee Brief at 7, ¶¶ 20-22.) According to Plaintiffs' own recitation of the facts, Plaintiffs also represented that the "actual amount collected would be more than $70,000 a year and the actual amount billed would be more than $200,000 a year." (Appellee Brief at 8, ¶ 23.) These statements constitute factual representations, not an opinion about value. In fact, Fisher's own deposition testimony demonstrates that he understood the representation made on February 18, 2002 to be that "the OMC contracts they had with doctors was [sic] generating between $5,000 and $7,000 a month." (R. 1203: 124.) Dr. Davidhizar presented substantial evidence in response to the initial summary judgment motion and subsequent motion in limine that Plaintiffs' representations concerning income were false, and that Fisher knew the OMC contracts were losing money. (*See* Appellant Brief at 7-9, ¶¶ 17-19.)

According to Plaintiffs, it does not matter whether these representations were accurate or not, because they were an opinion of value. (Appellee Brief at 17.) It seems self-evident, however, that specific representations about "actual" income are representations of material fact and cannot be construed merely as an "opinion" of value.

The cases cited by Plaintiffs do not support their argument. In *Wright v. Westside Nursery*, 787 P.2d 508 (Utah Ct. App.1990), the court held that a representation about an owner's opinion of the value of a certain piece of real estate could not serve as the basis for fraud because "misrepresentations as to value do not ordinarily constitute fraud, as they are regarded as mere expressions of opinion or 'trader's talk' involving matter of judgment and estimation as to which men may differ." *Id.* at 512 (quotations and citations omitted).

But here, the statement about how much "actual" income the OMC contracts were generating was not an expression of opinion "involving [a] matter of judgment or estimation as to which men may differ," *id.*, nor was it expressed as such. The representations about actual income were representations of fact that were either true or false, not subject to differing opinions.

Significantly, Plaintiffs contend that Dr. Davidhizar did not reasonably rely on the representations regarding income because Dr. Davidhizar had received financial information from OMC that demonstrated the OMC contracts were losing money. Although the fallacy of this argument is addressed later in this Reply, the fact that Plaintiffs make the argument emphasizes that even they understand the representations

about income to be factual in nature, as Plaintiffs could hardly expect Dr. Davidhizar to investigate representations about their opinion by reviewing financial documents.[2]

In short, the representations concerning the purported actual income derived from the OMC contracts cannot be construed as an expression of opinion. Such statements were clearly misrepresentations about material facts that induced Dr. Davidhizar to enter into the Agreement that he later rescinded.[3]

B. *Dr. Davidhizar Presented Sufficient Evidence Concerning Plaintiffs' Misrepresentations about the Status of the OMC Contracts to Support his Fraud Claims and Defenses.*

On appeal, Plaintiffs attempt to marshal evidence that purportedly counters the evidence presented by Dr. Davidhizar concerning the misrepresentations about the status of the OMC contracts. Plaintiffs then ask this Court to weigh that evidence and make credibility determinations in affirming the trial court's entry of summary judgment. Yet, ignored by Plaintiffs, is the fact that it was the trial court's willingness to engage in this precise exercise below that is the fundamental reason for reversal on appeal.

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[2] The second case cited by Plaintiffs in support of their argument is *Byers v. Federal Land Co.*, 3 F.2d 9 (8th Cir. 1924). Like *Wright v. Westside Nursery*, 787 P.2d 508 (Utah Ct. App.1990), *Byers* is a case dealing with opinions about the value of land, not specific factual representations about actual income. *See id.* at 11. Therefore, *Byers* is likewise inapposite here.

[3] In the Appellee Brief, Plaintiffs state that "the trial court correctly ruled that Davidhizar did not proffer clear and convincing evidence that Attorney Fisher's expression of value was fact and not opinion," suggesting that the trial court accepted Plaintiffs' argument that the representations were expressions of opinion. (Appellee Brief at 18-19.) But the trial court did not appear to make any findings of fact or conclusions of law suggesting that it accepted this argument, and Plaintiffs fail to cite any such finding or conclusion in support of their assertion.

As detailed in the Appellant Brief, Dr. Davidhizar presented ample evidence below concerning Plaintiffs' misrepresentations about the status of the OMC contracts that would allow his fraud claims and defenses to survive summary judgment. On appeal, Plaintiffs assert that the evidence presented by Dr. Davidhizar is not clear and convincing because Dr. Cutler, one of the doctor's whose contract status was at issue, offered testimony that contradicted Dr. Davidhizar's statements. In fact, Dr. Cutler's testimony was very inconsistent on this point. Although, Plaintiffs cite to some statements in one portion of Dr. Cutler's deposition suggesting that he had not previously informed Fisher about his intent to terminate his contract, in another portion of his deposition, Dr. Cutler stated that it "may be true" that he had orally told Fisher prior to the February 18 Meeting that he intended to terminate his contract (R. 838:36), and, in another place, that "it's possible" he told Fisher earlier about his intent (R. 1222:38). It was apparent from his deposition testimony that Dr. Cutler's memory about the facts was poor.

There was, however, other evidence amply demonstrating that Plaintiffs knowingly misrepresented the status of the OMC contracts. First, both Dr. Davidhizar and Dennis McOmber testified that Dr. Cutler told them that he intended to change or terminate the contract and that he had previously informed Fisher about this issue. (R. 1211:53-54; R. 1232:33-36.)[4]

[4] To the extent that the testimony of Dr. Davidhizar and Dennis McOmber concerning Dr. Cutler's statements constitutes hearsay, this is the first time Plaintiffs have raised an

Second, there is testimony in the record that Fisher himself made statements demonstrating that Dr. Cutler had talked with him prior to the February 18 Meeting about problems with his contract. According to Henry Eugene Coder, immediately after the Agreement was executed and Dr. Davidhizar was driving away, Fisher told Coder that Dr. Cutler had "already elected to opt out of his contract" and was "negotiating to make it a lease agreement." (R. 1224:206). Coder also testified that there was a time during the February 18 Meeting when the parties separated to discuss the negotiations. According to Coder, statements were made during that separate meeting between Fisher, Darwin Fisher, Cheryl Fisher and Coder that Dr. Cutler "was not happy" and "he wanted out of his contract and that [Fisher] was negotiating the lease agreement." (R.848-49:240-43.)

Finally, perhaps the most persuasive evidence on the record demonstrating that, at the time the Agreement was executed, Dr. Cutler intended to terminate his contract, is the fact that he did, in fact, send notice of his intent to terminate his contract only six days after the Agreement was executed. (R. 1221:34).

But Dr. Cutler's contract was not the only contract for which Dr. Davidhizar presented evidence regarding misrepresentations as to status. Dr. Davidhizar also

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objection on such grounds. Plaintiffs did not raise the issue below before the trial court. Moreover, in light of the fact that Dr. Cutler's memory about the facts is poor (according to Dr. Cutler's own statements), the trial court may allow admission of the statements of Dr. Davidhizar and Dennis McOmber concerning their meeting with Dr. Cutler pursuant to Rule 807 of the Utah Rules of Evidence. *See* Utah R. Evid. 807. Regardless, based on Dr. Cutler's self-admitted poor memory and his inconsistent statements on the issue, Dr. Davidhizar is entitled to have an opportunity to question Dr. Cutler on the witness stand in the presence of a jury.

presented evidence that there were issues with the Medical Table placed with Dr. Jeppsen, another doctor under contract with OMC. Because of a dispute between Plaintiffs and their technician assigned to operate the table, that table had been unmanned and had generated no revenue and no new billings for approximately four to six weeks immediately prior to the February 18 meeting. (R. 1238-39:207-10; 1234-35:79-81.) In addition, Plaintiffs had experienced problems with the billing company relating to the same Medical Table. (R. 1204:29; 1238:207-08; 1239:209.)

Plaintiffs assert in their Appellee Brief that Dr. Davidhizar's affidavit testimony regarding the OMC contract with Dr. Jeppsen is hearsay and inadmissible. The evidence presented by Dr. Davidhizar on this issue, however, was deposition testimony of individuals, including Fisher, and was based in part on statements made by Fisher to others—statements which would be admissible as admissions by a party-opponent. *See* Utah R. Evid. 801(d)(2). Dr. Davidhizar is uncertain about the genesis of Plaintiffs' inaccurate assertion that the evidence related to this contract is based on affidavit testimony. Plaintiffs also assert that Fisher "was not aware of [the allegations concerning Dr. Jeppsen's contract] until he received Davidhizar's memorandum opposing Fisher's motion for summary judgment and therefore, it was never an issue in this case." (Appellee Brief at 22). This statement is puzzling. Certainly there is nothing improper about raising issues in response to a summary judgment motion, and Dr. Davidhizar is not aware of any legal principle that would prevent an issue from being raised in such a

context. Moreover, Plaintiffs were already aware of the evidence concerning Dr. Jeppsen's contract as it was presented during discovery through deposition testimony.

In short, the ample evidence presented by Dr. Davidhizar regarding the misrepresentations about the status of the OMC contracts was more than sufficient to defeat a summary judgment motion if the trial court had properly accepted such evidence as true and drawn all reasonable inferences in Dr. Davidhizar's favor, as the court was obligated to do by law. Yet, instead, the trial court engaged in the improper exercise in which Plaintiffs now invite this Court to also participate– namely, to weigh the evidence, make credibility determinations, and decide if Dr. Davidhizar has met the clear and convincing standard of proof necessary to prevail on his fraud claims and defenses. As indicated in Dr. Davidhizar's Appellant Brief, this Court has previously reversed decisions where trial courts dismissed fraud claims on summary judgment when the evidence presented below was much less compelling than in the present case.

C. *There Is a Genuine Issue of Material Fact Concerning Whether Dr. Davidhizar Reasonably Relied on the Misrepresentations.*

"Reasonable reliance must be considered with reference to the facts of each case, and is usually a question for the jury to determine." *Conder v. A.L. Williams & Assocs., Inc.*, 739 P.2d 634, 638 (Utah Ct. App. 1987). On appeal, Plaintiffs set forth various factors to be considered in determining whether a person's reliance has been reasonable, including: "age, intelligence, experience, mental condition, knowledge of each of the parties, the parties[']relationship, and the materiality of the representation." (Appellee

Brief at 23.) Plaintiffs fail to explain, however, why the Court should consider and weigh these various fact-intensive factors within the context of a summary judgment motion.

Indeed, the enunciation of facts and record references set forth in the Appellee Brief related to this issue demonstrate the inappropriateness of making this fact-dependent determination on summary judgment. (Appellee Brief at 8-10, ¶¶ 27-41.) Not only are the facts set forth by Plaintiffs conclusory, at times based on hearsay, supported by confusing and ambiguous record references, and often based on documents from the record for which no authentication or explanations are offered, the facts are inconsistent with the evidence presented by Dr. Davidhizar. It is for reasons such as these that the issue of reasonable reliance is generally—and should be in this case—reserved for the trier of fact.

Based on their confusing and unsupported factual allegations, Plaintiffs assert that Dr. Davidhizar knew that the Medical Tables were losing money. In support of this assertion, Plaintiffs refer to documents dated more than four months prior to the parties' meeting in February 2002. Plaintiffs offer no admissible evidence demonstrating that these documents were actually received by Dr. Davidhizar. But even if they were, the documents themselves reference potential changes that would be made in the short term to remedy problems, and are not inconsistent with the specific misrepresentations made months later regarding the amount of income being generated by the OMC contracts or the status of such contracts.

Plaintiffs also assert that they delivered OMC's accounting records to Nash and Coder the night before the February 18 Meeting. Nash, however, testified that the documents he received were "inadequate," "incomplete," and in "horrible form"; they did not include financial statements, balance sheets, or Profit and Loss calculations. (R. 1242:110-12.) Dr. Davidhizar testified that "he didn't see any documents before the meeting." (R.1210:28.) Moreover, Plaintiffs have presented no admissible evidence demonstrating which documents were actually delivered or whether such documents accurately portrayed OMC's bleak financial picture.

Plaintiffs' argument is, essentially, that it was unreasonable for Dr. Davidhizar to trust Plaintiffs' statements about the financial and current status of the OMC contracts and, instead, he should have undertaken an independent investigation. The law is clear, however, that a party "may justifiably rely on positive assertions of fact without independent investigation." *Robinson v. Tripco Investment, Inc.*, 2000 UT App 200, ¶ 20, 21 P.3d 219 (quotations and citations omitted).

Setting forth numerous duplicative and ambiguous references to the record concerning Robert Nash, Plaintiffs also assert that Dr. Davidhizar did not rely on Plaintiffs' misrepresentations at all, but instead relied on Nash in determining whether to enter into the Agreement. This argument is demonstrably flawed for at least three reasons. First, it contradicts Dr. Davidhizar's own testimony about his reliance on the misrepresentations. (R. 654; 1215:85-88.) To the extent there is inconsistent testimony, credibility determinations should be made by the trier of fact. Second, Nash's opinion as

an accountant was only one of the factors upon which Dr. Davidhizar relied in making his decision. There is nothing in the record to suggest that, in the absence of Plaintiffs' misrepresentations about the income and status of the OMC contracts, Dr. Davidhizar would have still executed the Agreement based merely upon the advice of Nash. Finally, Plaintiffs seem to miss the point that Nash heard and relied on the same misrepresentations in making his recommendation to Dr. Davidhizar. In fact, Nash testified that at the meeting Plaintiffs "presented a prospectus that made it look like OMC and the tables were making quite a bit of money, and from the appearance of that document it appeared to be profitable." (R. 821:96.) In other words, any reliance by Dr. Davidhizar on the opinion of Nash was still fundamentally based on Plaintiffs' misrepresentations.

Plaintiffs also assert that Dr. Davidhizar's reliance on the misrepresentations was not reasonable because the OMC contracts contained a provision allowing the doctors to cancel upon thirty-day notice. Here, it seems Plaintiffs are really arguing that because the doctors could cancel upon thirty-day notice, any misrepresentation Plaintiffs made about the status of the contracts was not a material misrepresentation. The fact that the doctors had the option of terminating the OMC contracts on thirty-day notice, however, does not make reliance on representations about the income the contracts were generating and the current status of such contracts unreasonable; nor does it make such misrepresentations immaterial. "A material fact is any fact, the knowledge or ignorance of which would naturally influence [a party]'s judgment . . . in estimating the degree and character of the

risk involved in a transaction." *Walter v. Stewart*, 2003 UT App 86, ¶ 23, 67 P.3d 1042 (alterations in original) (quotations and citations omitted). In light of the termination provisions in the OMC contracts, an understanding of the current status of contracts becomes even more relevant and material. Accurate representations about the status of the contracts would allow the buyer to evaluate the potential risk of termination. Had Dr. Davidhizar known that at least two of the three contracts were experiencing problems and that Dr. Cutler had already expressed dissatisfaction with his contract, he could have properly evaluated the risks and future viability of the contracts. Instead, Plaintiffs misrepresented these material facts and now seek to cloak themselves behind the assertion that their misrepresentations did not matter because the doctors could have terminated at any time upon thirty-day notice.

II. It Was a Clear Abuse of Discretion for the Trial Court to Sanction Dr. Davidhizar by Dismissal of His Fraud Claims and Defenses for Merely Making a Request to Amend.

As explained in Dr. Davidhizar's Appellant Brief, the trial court's dismissal of Dr. Davidhizar's fraud and negligent representation claims was an inappropriate sanction for his failure to amend prior to the scheduling order deadline because: (1) although the scheduling order permitted parties to amend up to a certain deadline, it never required amendment (with the penalty of dismissal if a party chose not to amend); (2) as evidenced by this appeal, the trial court did not actually permit Dr. Davidhizar to file an amended pleading, so no violation of the scheduling order

actually occurred (consequently, the trial court essentially penalized Dr. Davidhizar for making the request to amend); and (3) it is entirely inequitable for the trial court to so harshly penalize Dr. Davidhizar for making a request to amend in violation of the scheduling order when the court permitted Plaintiffs to move for dismissal four days before trial and close to three years after the scheduling order deadline for filing dispositive motions.

Furthermore, the Utah Supreme Court has held that "[s]anctions are warranted when '(1) the party's behavior was willful; (2) the party has acted in bad faith; (3) the court can attribute some fault to the party; or (4) the party has engaged in persistent dilatory tactics tending to frustrate the judicial process.'" *Kilpatrick v. Bullough Abatement, Inc.*, 2008 UT 82, ¶ 25, 199 P.3d 957 (quoting *Morton v. Cont'l Baking Corp.*, 938 P.2d 271, 276 (Utah 1997)). A failure by the trial court to make a "threshold factual finding" regarding "willfulness, bad faith, fault or persistent dilatory tactics" on the part of the party on whom the court is imposing sanctions generally constitutes an abuse of discretion. *Id.* at ¶¶ 24, 26, 29.

Here, contrary to "[to those] cases meriting sanctions, there is [no] consistent pattern of behavior [by Dr. Davidhizar of] disregarding discovery requirements or court orders." *Id.* at ¶ 35. Nor is there any "evidence that [Dr. Davidhizar was] on

notice that [his] pattern of behavior w[ould] result in sanctions if it continue[d]." *Id.* at ¶ 35. Furthermore, even if such circumstances existed, which the record clearly demonstrates they did not (indeed, Plaintiffs do not even suggest this), the trial court never made any factual findings regarding these circumstances. The trial court's failure to make the requisite factual findings, along with the dearth of evidentiary and equitable support for sanctions, constituted a blatant abuse of discretion by the trial court that should be reversed by this Court.

III. Plaintiffs Waived Any Potential Objections Under Rule 9(b).

Plaintiffs filed their request to dismiss for failure to plead with specificity five (5) years after Dr. Davidhizar's Counterclaim, almost three (3) years after Plaintiffs had moved for summary judgment on the Counterclaim (in which Plaintiffs significantly made no mention of a failure to plead with particularity), and four days before trial on the Counterclaim. If this Court does not consider such conduct by Plaintiffs "belated" and does not reverse the trial court's dismissal on Rule 9(b) grounds, then this Court will be effectively condoning and encouraging parties to litigate for years—at the expense of the parties and the court—the substance of any issues not plead with particularity and then, if it looks like substantive efforts might fail, to subsequently move, right before trial, to dismiss the case for procedural inadequacies. Such a policy would overload the

judiciary, contravene the purpose of Rule 9(b)'s particularity requirements, and greatly undermine the interests of equity, judicial economy, and resolution of cases on their merits.

IV. In Light of the History of the Case, It Was an Abuse of Discretion for the Trial Court to Deny Dr. Davidhizar's Motion to Amend.

In the Appellee Brief, Plaintiffs assert that Dr. Davidhizar's Motion to Amend was untimely, unjustified, and prejudicial, and therefore the trial court properly denied amendment under Utah Rule of Civil Procedure 15(a). In considering a request to amend under Rule 15(a), Plaintiffs are correct that courts "ha[ve] generally focused on three factors . . . : (1) timeliness; (2) prejudice; and (3) justification." *Swan Creek Village Homeowners Assoc. v. Warne*, 2006 UT 22, ¶ 20, 134 P.3d 1122.

"The rationale for [the timeliness] factor is that 'the ongoing passage of time makes it increasingly difficult for the nonmoving party to *effectively respond* to the *new* allegations.'" *Id.* (quoting *Kelly v. Hard Money Funding, Inc.*, 2004 UT App 44, ¶ 29, 87 P.3d 734). "The general rule regarding prejudice is that an amendment should be denied when 'the opposing side would be put to unavoidable prejudice by having an issue adjudicated for which he [or she] had *no time to prepare*.'" *Id.* at ¶ 21 (quoting *Kasco Servs. Corp. v. Benson*, 831 P.2d 86, 92 (Utah 1992). Finally, "[t]he justification factor focuses on 'whether the moving party had

knowledge of the events that are sought to be added.'" *Id.* at ¶ 22 (quoting *Kelly*, 2004 UT App 44 at ¶ 32).

Here, contrary to Plaintiffs' contentions, all three factors weighed heavily in favor of amendment. Namely, the allegations that Dr. Davidhizar's amended Counterclaim would have specified were not new allegations to Plaintiffs, as Plaintiffs' treatment of these allegations in their Motion for Summary Judgment clearly demonstrated. Indeed, Plaintiffs had spent the entire litigation, up to the eve of trial, preparing to effectively respond to these allegations. Consequently, because Plaintiffs were fully aware of the allegations that Dr. Davidhizar's amended Counterclaim would have specified, Dr. Davidhizar's amendment would have been a pure formality and would have caused no substantive prejudice to Plaintiffs. The trial court's own statements during the December 18 Hearing reveal this lack of prejudice. (R. 1861:7) ("I really don't have any difficulty in implying into the pleadings of fraud in the inducement plan [sic]. It's been spoken of for years in this litigation. It has been eluded to either directly or indirectly for years.").]

In addition to amendment being proper under these three factors, amendment was further appropriate, as explained in Dr. Davidhizar's Appellant Brief, under Utah Rule of Civil Procedure 15(b). *See* Utah R. Civ. P. 15(b) ("When issues not

raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."). In the Appellee Brief, Plaintiffs claim that amendment under Rule 15(b) was not appropriate because the issue of whether Plaintiffs misrepresented the status of the OMC contracts was never raised by Plaintiffs in their Motion for Summary Judgment. This response is somewhat peculiar because Plaintiffs' Motion for Summary Judgment specifically acknowledges that "[Dr.] Davidhizar claims that Fisher knew prior to February 18, 2002, that Dr. Cutler had terminated his client contract with OMC and still included Dr. Cutler's client contract in the $60,000.00 – 80,000.00 valuation." (R. 320; 322-24.)

Moreover, the key inquiry underlying Rule 15(b) is not whether the party opposing amendment raised the issue. As explained by this Court,

> [w]hat [a party is] entitled to is notice of the issues raised and an opportunity to meet them. When this is accomplished, that is all that is required. Our rules provide for liberality to allow examination into and settlement of all issues bearing upon the controversy, but safeguard the rights of the other party to have a reasonable time to meet a new issue if he so requests.

Cowley v. Porter, 2005 UT App 518, ¶ 37, 127 P.3d 1224 (second alteration in original); *see also Kuhn v. Civil Aeronautics Bd.*, 183 F.2d 839, 841-42 (D.C. Cir. 1950) ("It is now generally accepted that there may be no subsequent challenge of

issues which are actually litigated, if there has been actual notice and adequate opportunity to cure surprise. If it is clear that the parties understand exactly what the issues are when the proceedings are had, they cannot thereafter claim surprise or lack of due process because of alleged deficiencies in the language of particular pleadings. Actuality of notice there must be, but the actuality, not the technicality, must govern."). It is evident here that the relevant inquiry of notice and opportunity was satisfied and, consequently, the trial court should have allowed amendment under Rule 15(b).

V. Plaintiffs' Unsupported and Undocumented Assertion that They Allocated Attorneys Fees Is Insufficient to Meet the Legal Requirements for Such an Award.

Critically, there is absolutely no evidentiary support for Plaintiffs' assertion in the Appellee Brief that they allocated their attorney fees between the various claims and defendants. If such allocation did occur—which Dr. Davidhizar adamantly contends it did not—it is entirely undocumented in the record, including in Plaintiffs' affidavits and in their final attorney fee damages summary. Furthermore, any such allocation was, contrary to law, completely undocumented in the trial court's findings. *See Foote v. Clark*, 962 P.2d 52, 55 (Utah 1998) (requiring the trial court findings to "mirror the requesting party's allocation of fees per claim and parties"). Utah courts are resolute that trial courts "'may not

award wholesale all attorney fees requested if they have not been allocated as to separate claims and/or parties.'" *Prince v. Bear River Mut. Ins. Co.*, 2002 UT 68, ¶ 56, 56 P.3d 524 (quoting *Valcarce v. Fitzgerald*, 961 P.2d 305, 318 (Utah 1998)); *see also Foote*, 962 P.2d at 56 ("Where the parties' evidentiary submissions in support of a request for attorney fees are deficient, so will be the court's evaluation of those fees."). Consequently, because there was no effort (or documented effort) here to allocate as required by law, and where, as discussed in the Appellant Brief, the trial court erroneously awarded prejudgment interest on Plaintiffs' incurred fees, this Court should reverse the trial court's award of attorney fees to Plaintiffs.

VI. It Was Clear Error to Award Plaintiffs Prejudgment Interest on the Assumed Loans that Were Unpaid by Plaintiffs.

In the Appellee Brief, Plaintiffs argue that although they never made payment on the principal amounts of the Assumed Loans, they are nonetheless entitled to prejudgment interest on the principal amounts because they should be compensated for being deprived of use of those principal amounts following Dr. Davidhizar's rescission of the Agreement. Plaintiffs ignore, however, that they would have never been entitled to use of the principal amounts irrespective of Dr. Davidhizar's rescission of the Agreement. That is, under the Agreement, Dr. Davidhizar was never obligated to pay the principal amounts to Plaintiffs. Instead, he was required, in exchange for 90% ownership interest in OMC, to take on

certain debts of OMC as his own. Consequently, there was no loss of use for Plaintiffs to suffer. *See Iron Head Const. Inc. v. Gurney*, 2009 UT 25, ¶ 10, 207 P.3d 1231 ("Plaintiffs are entitled to [prejudgment interest on] damages for the *loss of use* of the money that, but for the [defendant]'s breach and ensuing delay, *would have been paid to plaintiffs* in satisfaction of their . . . claim." (second and third alteration in original)(emphasis added)).

As explained in the Appellant Brief, because Plaintiffs never actually made any payments on the principal amounts of the Assumed Loans, they "suffered no loss of the time value" of money. *Id.* Consequently, not only were the alleged damages incomplete for purposes of prejudgment interest, *see id.* at ¶ 12, they were never actually suffered. Furthermore, Plaintiffs ignore that they were separately awarded all interest and fees they incurred and paid on the Assumed Loans. Accordingly, it was entirely improper and contrary to law for the trial court to award prejudgment interest on the unpaid principal amounts of the Assumed Loans.

VII. The Trial Court Erred in Failing to Consider the Status and Income of the Medical Tables When It Awarded Damages.

Plaintiffs' contention that Dr. Davidhizar is only entitled to an offset if he was successful on his Counterclaim is contrary to Utah law. Utah law permits a party to rely on the doctrine of setoff either defensively or offensively. *See Mark*

VII Fin. Consultants Corp. v. Smedley, 792 P.2d 130, 134 n.2 (Utah Ct. App. 1990) ("Although [the defendant] apparently pleaded the setoffs as a defense and not as a counterclaim seeking affirmative relief, the distinction is not critical . . . 'a defendant may desire to use recoupment or set-off defensively, rather than as the basis of a counterclaim seeking affirmative relief, and he may properly do so.'" (quoting J.W. Moore, *Moore's Federal Practice* § 8:27[3] (2d ed. 1989))).

In asserting that two of the tables were owned by OMC and that Dr. Davidhizar has never brought an action to recover the tables, Plaintiffs ignore that they brought this action to enforce the Agreement, pursuant to which Dr. Davidhizar obtains ownership of OMC. Thus, in neglecting this fact, Plaintiffs seek to obtain all the benefits of their purported bargain with Dr. Davidhizar, while also retaining all of the benefits they were required to convey to Dr. Davidhizar in conjunction with that bargain. Such a result is manifestly unjust and contrary to law. Accordingly, and as explained in the Appellant Brief, the trial court erred in failing to consider the status and income of the Medical Tables in awarding damages to Plaintiffs.

VIII. The Court Acted Appropriately and within Its Broad Discretion When it Denied Plaintiffs' Motion to Strike Dr. Davidhizar's Opposition to Plaintiffs' Motion for Summary Judgment.

On cross-appeal, Plaintiffs contend that the trial court abused its discretion in denying their Motion to Strike Dr. Davidhizar's Opposition to their Motion for Summary Judgment because (1) Dr. Davidhizar did not file his memorandum in opposition to summary judgment within ten days after service and (2) Dr. Davidhizar did not seek a court order extending the time to file the memorandum in opposition. Plaintiffs have failed to demonstrate an abuse of discretion on either ground.

"Generally, appellate courts grant '[a] trial judge . . . broad discretion in determining how a [case] shall proceed in his or her courtroom.'" *Pratt v. Nelson*, 2005 UT App 541, ¶ 12, 127 P.3d 1256. Accordingly, and as Plaintiffs acknowledge, an order denying a motion to strike will not be disturbed on appeal "except under circumstances which amount to a clear abuse of discretion." *Id.* at ¶ 9. "Under that standard, [this court] will not reverse unless the decision exceeds the limits of reasonability." *Neztsosie v. Meyer*, 883 P.2d 920, 922 (Utah 1994) (quotations and citations omitted). Plaintiffs have failed to demonstrate that such an exceedance occurred here.

In presenting their argument concerning the Motion to Strike, Plaintiffs attempt to paint a picture of a dilatory defendant who filed, without justification, his opposition to a summary judgment motion "nearly seven months" after the time for filing the opposition had expired. In reality, as demonstrated by Plaintiffs' recitation of the facts (Appellee Brief at 4-6, ¶¶ 1-14), the summary judgment motion corresponded with a period of transition during which Dr. Davidhizar's counsel was seeking to withdraw and Dr. Davidhizar was trying to obtain new counsel. Indeed, it was only in September 2005 that the trial court entered an order allowing Dr. Davidhizar's former counsel to withdraw, and it was only on November 10, 2005, that Dr. Davidhizar's new counsel filed an appearance. Importantly, Dr. Davidhizar filed his memorandum in opposition to summary judgment only fifteen days after his new counsel appeared in the case. Under these circumstances, the trial court's decision to deny Plaintiffs' motion to strike was not unreasonable.

Plaintiffs also make the rather peculiar assertion that "[t]he trial court abused its discretion by allowing Davidhizar to file his memorandum without leave of court and by not enforcing its own order denying Davidhizar additional time to respond to the summary judgment motion." [Appellee Brief at 41.] First, it is well-established that "a judge can change his or her mind any time up until the

entry of final judgment . . . as a trial court is not inexorably bound by its own precedents." *State v. Ruiz*, 2009 UT App 121, ¶ 10, 210 P.3d 955 (quotations and citations omitted). This is true of major rulings, such as the trial court's changing its prior ruling in this case regarding Plaintiffs' summary judgment motion, and it certainly must be true of such minor decisions as whether to grant an extension of time to file a responsive brief.

Moreover, the trial court has discretion to accept a late-filed memorandum even if leave of court was not sought prior to filing. The trial court's subsequent acceptance and consideration of the brief constitutes the necessary leave. This principle is illustrated in *Hartford Leasing Corp. v. State*, 888 P.2d 694 (Utah Ct. App. 1994). In that case, this Court ruled that a trial court was "well within its discretion in refusing to accept a supplemental memorandum that was submitted without prior invitation and outside the bounds of duly promulgated procedural rules." *Id.* at 702. In so ruling, the court, however, also noted that "[n]othing prevents the trial court from receiving additional memoranda if it wishes to do so." *Id.* at 702 n.9. While the court suggested that the party "may have been more successful in gaining acceptance of its supplemental memorandum if it had first sought leave of court," the opinion clearly indicates that the trial court had the

discretion to accept the additional memoranda even where the filing party had not previously sought such leave. *Id.* at 702 & n.9.

Notably, Plaintiffs claim that this Court's decision in *Pratt v. Nelson* supports their argument that the trial court abused its discretion in failing to strike Dr. Davidhizar's memorandum in opposition to Plaintiffs' Motion for Summary Judgment. Specifically, Plaintiffs maintain that "[a]ppellate courts have upheld trial courts' decisions to strike pleadings that have been filed untimely." [Appellee Brief at 41.] A careful review of *Pratt*, however, demonstrates that the court's decision in that case actually supports affirming the trial court's decision here.

In *Pratt*, this Court upheld the trial court's decision to strike an untimely memorandum because such a decision "falls within the trial court's broad discretion to manage the case before it." 2005 UT App 541 at ¶ 14. In making this determination, the court expressly stated that "the trial court could have, as a matter of judicial power, opted to consider the late-filed memorandum," but the appellate court could find no abuse of discretion in a contrary decision. *Id.* at ¶ 11. In other words, contrary to Plaintiffs' contentions, *Pratt* stands for no other proposition than the trial court has broad discretion in making such decisions and the appellate court will not overturn such decisions unless there is a clear abuse of discretion.

In short, the trial court clearly did not abuse its discretion in accepting Dr. Davidhizar's late-filed opposition to Plaintiffs' summary judgment motion. The only real prejudice to Plaintiffs caused by the trial court's acceptance of the brief was the fact that the motion was decided on its merits instead of on a technicality. Accordingly, Plaintiffs cross-appeal should be rejected, and the trial court's acceptance of the late-filed brief should be affirmed.

CONCLUSION

For the reasons set forth above and in the Appellant Brief, Dr. Davidhizar respectfully requests that this Court reverse and remand both the trial court's ruling dismissing his fraud and negligent misrepresentation claims and defenses and the trial court's damages award based on that dismissal. Dr. Davidhizar also asks this Court to affirm the trial court decision denying Plaintiffs' Motion to Strike.

DATED this 28th day of July 2010.

PARR BROWN GEE & LOVELESS, P.C.,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 28th day of July 2010, a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANT/CROSS-APPELLEE** was mailed via first-class U.S. mail, postage prepaid, upon the following:

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