

2007

Jason Cody v. Willard Lowe, Renee Hancock : Brief of Appellee

Utah Court of Appeals

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Jason Cody; Pro se.

Branden B. Miles; Attorney for Appellees.

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No. 20070802 -CA

IN THE UTAH COURT OF APPEALS

JASON CODY,

Plaintiff/Appellant,

v.

WILLARD LOWE AND RENEE HANCOCK,

Defendants/Appellees.

APPELLEE WILLARD LOWE'S BRIEF

Appeal from an Order granting Willard Lowes' and Renee Hancock's Motion to Dismiss in the Second Judicial District Court, Weber County, State of Utah, the Honorable Ernie Jones presiding

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ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

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LIST OF ALL PARTIES

All parties to the proceeding appear in the caption of this Brief.

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No. 20070802 - CA

IN THE UTAH COURT OF APPEALS

JASON CODY,

Plaintiff/Appellant,

v.

WILLARD LOWE And Renee Hancock,

Defendants/Appellees.

APPELLEE WILLARD LOWE'S BRIEF

JURISDICTION

The Utah Supreme Court has original appellate jurisdiction over this case. Utah Code Ann. § 78-2-2(3)(j) (Lexis 2006). On October 3, 2007, the Utah Supreme Court transferred the case to this Court pursuant to Utah Code Ann. §§ 78-2-2(4) and 78-2a-3(2)(j) (Lexis 2006).

ISSUES PRESENTED

I. This Court Should Decline to Address the Appeal as the Brief Does Not Comply with Utah Rules of Appellate Procedure and Does Not State a Legal Basis for Review.

Appellant's Brief lacks any legal argument and provides no citation to applicable case law supporting the claim of denial of due process of law by the District Court or the respective clerks and presiding judges. As such, Cody has provided no legal basis for overturning the District Court ruling.

1. Standard of Review

This question does not involve review of the trial court's order and therefore no standard of review applies.

II. Plaintiff's Due Process argument was not raised in the court below and as such should not be addressed for the first time on appeal.

Defendant's contention that he has been denied due process of law in violation of the "Fo[u]rth Amendment, the Fifth Amendment, and the Fourteenth Amendment to the Constitution of the United States of America" is raised for the first time in this appeal and should not be addressed here.

1. Standard of Review

This question does not involve review of the trial court's order and therefore no standard of review applies.

2. Preservation of the Issue

Cody failed to raise the constitutional issues before the trial court and has not properly preserved them. *Luke v. Redko Int'l, N.V.*, 2005 UT App 517 (citing *Hart v. Salt Lake County Comm'n*, 945 P.2d 125, 129 (UT App. 1997)).

III. Cody was not denied Due Process when the District Court Reviewed the Pleadings and Made a Ruling Based on Those Pleadings

A. Consideration of the Motion to Dismiss Does not violate the Utah Rules of Civil Procedure or deny Plaintiff Due Process of Law.

Trial courts have broad discretion to determine how a case will proceed. Branden Miles, acting pro bono in this matter, filed a Motion to Dismiss with the District Court on July 5, 2007. The Motion was filed prior to any hearings, motions to submit, requests for default, or setting of trial dates pursuant to Utah Rules of Civil Procedure 12(h). Did the District Court fail to comply with the Utah Rules of Civil Procedure when they reviewed all pleadings on the record?

1. Standard of Review

Appellate courts review the trial court's interpretation of rules for correctness. *State v. Brooks*, 908 P.2d 856, 858-59 (Utah 1995) ("The standard of review for a simple legal interpretation of a rule...is correctness"); *Utah Dept. of Environment. Quality v. Redd*, 2002 UT 50, ¶ 12 ("where this review requires us to examine statutory language, we look first to the plain meaning of the statute").

2. *Preservation of the Issue*

Willard Lowe and Renee Hancock filed the Motion to Dismiss, and Cody opposed the motion. R at 032 – 050 and R at 097 - 108. The court entered an order granting the Defendant's Motion on August 23, 2007. R at 120 -122.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Annotated §78-7-5(3)

Utah Rules of Appellate Procedure 24

Utah Rules of Civil Procedure 12(b), (c), and (h).

Utah Rules of Civil Procedure 55

STATEMENT OF THE CASE

Nature of the Case

Pro se Appellant Jason Cody appeals the trial court's final order that granted dismissal to Willard Lowe and Renee Hancock. Cody sued Lowe and Hancock to recover damages he claims were caused by Hancock and Lowe's testimony in a criminal case in which Cody was the Defendant.

Course of the Proceedings and Disposition Below

Cody claims that the District Court violated his rights when they dismissed the civil action against Lowe and Hancock. The original action arises as a result of Lowe's and Hancock's testimony against Cody in a criminal trial in which Cody was convicted of assaulting Lowe and Hancock in a dispute over the location of a potted plant.

Cody filed his first complaint against Lowe and Hancock, alleging harassment, malicious mischief, obstruction of justice, perjury, submitting false claims, conspiracy to commit perjury and intentional infliction of emotional distress, on May 17, 2007. R. at 001. His amended complaint, adding an allegation of Malicious prosecution was filed on June 4, 2007. R. at 010-013. Lowe and Hancock received notice of this action on June

11, 2007. R. at 025-026. Lowe and Hancock, being elderly and on fixed incomes, were unable to afford an attorney and unfamiliar with the legal process so they contacted attorney Branden Miles for advice. Mr. Miles received permission from his employer to assist Lowe and Hancock as a pro bono attorney.

Through Mr. Miles, Lowe and Hancock filed a Motion to Dismiss for Failure to State a Claim on July 5, 2007. R. at 032-050. Cody filed an "Order to Enter Judgment by Default in Favor of the Plaintiff" on July 5, 2007, the same day that the Motion to Dismiss was received by the District Court. R. at 029.

Cody's Motion to Enter Default Judgment was filed fifteen days later on July 20, 2007. R. at 060. On that same day, Cody also asked the District Court for leave to amend his complaint a second time. R. 076-083.

On July 23, Cody filed an opposition to Lowe and Hancock's Motion to Dismiss. R. at 097. Lowe and Hancock moved to consolidate the cases on July 26, 2007 and Cody opposed consolidation on August 13, 2007. R. at 109, R. at 117.

On August 23, 2007, after reviewing the pleadings, the Honorable Judge Ernie Jones granted the Motion to Dismiss. R. at 120-122. Cody filed a notice of appeal on September 21, 2007. R. at 125.

Statement of Facts

On May 18, 2006, the Appellant, Jason Cody, brutally assaulted Appellees Willard Lowe and Renee Hancock in front of their home. R. at 032 (Motion to Dismiss for Failure to State a Claim, p. 1). A neighbor intervened and police were called to the scene. R. at 033 (*Id.* at 2). Mr. Lowe and Ms. Hancock were transported to the hospital and Cody was taken to the Weber County Jail. R. at 033 (*Id.*) Mr. Lowe had sustained multiple wounds to his head and Ms. Hancock was treated for a broken bone and a partially severed pinky, the results of being bitten by Cody. R. at 033 (*Id.*)

Cody was tried and convicted of Aggravated Assault, a third-degree felony; Assault with Substantial Bodily Injury, a class A misdemeanor; and Criminal Mischief, a class A misdemeanor as a result of the incident.¹ R. at 034 (*Id.* at 3.). Both Lowe and Hancock, as the victims

¹ The case number for the Criminal charges is 061902461.

of the assaults, testified during the criminal trial as to the incident and the injuries they sustained.

Cody filed this suit in response to the incidents outlined above.

SUMMARY OF THE ARGUMENT

This Court should affirm the trial court in all respects. Cody raises only one issue on appeal and has not provided any information which requires or supports the reversal of the trial court.

First, the Appellant's Brief fails to meet even the basic requirements outlined in the Utah Rules of Appellate Procedure or the "pro se guide" provided to Cody by the Supreme Court of Utah on October 3, 2007. At a minimum, the brief should include an argument section supported by citations to the law and appropriate precedent. Cody has not provided any such argument for the Appellee to respond to or for the Court to base a decision on. Therefore, the Court should decline to address the issue presented.

Second, Cody did not raise any claim that the denial of his Motion for Entry of Default violated his federal constitutional rights before the trial court. He is therefore barred from asserting them for the first time on appeal.

Finally, the trial court properly granted the Motion to Dismiss, even though it was filed outside of the time prescribed for an answer. Cody's Complaint was frivolous and failed to state a claim upon which relief could be granted. His Motion for Entry of Default, filed fifteen days after the Motion to Dismiss, was insufficient to support a default judgment given the pleadings before the trial court. Default judgments must be requested by the Plaintiff and are granted only if the trial court determines that the judgment is warranted. The three day delay in the filing of the Motion to Dismiss is, at best, harmless error. Even if the default judgment had been entered prior to Lowe and Hancock's Motion to Dismiss, the judge has the discretion to set aside the judgment for good cause and such would have been the case here.

ARGUMENT

I. This Court Should Decline to Address the Appeal as the Brief Does Not Comply with Utah Rules of Appellate Procedure and Does Not State a Legal Basis for Review.

The procedure for filing an appeal, including the minimum requirements of an Appellant Brief, is provided for in the Utah Rules of Appellate Procedure. Utah R. App. P. 24. Notably lacking in the Appellant's Brief is an argument section. "The argument shall contain the contentions and reasons of the appellant with respect to the issues presented...*with citations to the authorities, statutes, and parts of the record relied on.*" Utah R. App. P. 24(a)(9) (emphasis added). Although Cody makes numerous contentions in his "Summary of Argument" and "Conclusion" the brief lacks an "Argument" section and is conspicuously devoid of any citation to authorities and statutes. Failure to properly brief an issue is sufficient grounds for this Court to assume the correctness of the trial court's decision and affirm the trial court. See e.g., *Carrier v. Salt Lake County*, 2004 UT 98, ¶ 43 ("it is well established that a reviewing court will not address arguments that are not adequately briefed"); *State v. Wareham*, 772 P.2d 960, 966 (UT 1989) (declining to address issue when "brief wholly lacks legal analysis and authority to support" argument);

Selvage v. J.J. Johnson and Assocs., 910 P.2d 1252, 1264 (UT App. 1996) (declining to address issue where party “cites no authority” or “any further analysis” in support of argument).

Cody has not provided this Court with any legal framework upon which to base a review and as such, this Court should decline to address the issue.

II. Appellant's Due Process Argument was Not Raised in the Court Below and Should Not be Addressed for the First Time on Appeal.

As a general rule, issues raised for the first time on appeal are not addressed by the reviewing court. *Carrier*, 2004 UT 98 ¶ 43. The exception to this rule is found where the appellant “can demonstrate exceptional circumstances” as to why the issue was not raised at the trial level.² *Pugh v. Draper City*, 2005 UT 12, ¶ 18. Cody failed to raise the Federal Constitutional question before the trial court and is raising it here for the first time. Cody has provided no support for his claim that he was denied due process in order to meet the high standard for a showing of exceptional circumstances. *Id.*

² A second exception has been carved out in cases where Appellant can show the trial court committed “plain error.” *State v. Ison*, 2006 UT 26, ¶ 39. This exception will be addressed in Section III in addressing the actions taken by the District Court.

The Appellant Brief is sadly lacking in any legal argument, but it is clear that Cody bases his claim on the so called "failure...to comply with the Utah Rules of Civil Procedure." [Appellant's Brief, p. 3]. Failure to comply with a state or local regulation alone will not give rise to Federal Constitutional protections. *City of Canton v. Harris*, 489 U.S. 378 (1989).

This issue has not been briefed and the bald accusations of Appellant at this late date do not provide a legal basis for review of the District Court's decision.

III. Cody was not Denied Due Process when the District Court Reviewed the Pleadings and Made a Ruling Based on those Pleadings.

A. Consideration of the Motion to Dismiss does not Violate the Utah Rules of Civil Procedure.³

Trial judges are granted broad discretion in determining the process of litigation in their court. *Hartford Leasing Corp. v. State*, 888 P.2d 694, 702 (UT App. 1994); see also Utah Code Ann. § 78-7-5(3) (Lexis 2006) (Court

³ It is important to note here that Appellant has waived the right to argue the merits of the Motion to Dismiss. His only argument, both here and at the trial level, consists of his misunderstanding as to the application of the Rules of Civil Procedure and entry of Default Judgment. Although the Dismissal was unquestionably warranted, by not raising the question, Appellant has waived any issue on the merits of the Dismissal itself.

has authority to “provide for the orderly conduct of proceedings before it or its officers”). In this case, the trial court did not abuse its discretion when it granted the Motion to Dismiss filed by Lowe and Hancock.

Under the Utah Rules of Civil Procedure a party may move for judgment on the pleadings, or Motion to Dismiss, at any time that will not “delay the trial.” Utah R. Civ. P. 12(c). Although the Motion to Dismiss was received three days beyond the twenty days prescribed for filing an answer, Appellant was not prejudiced by this delay. The Motion to Dismiss was filed with the trial court and a copy sent to Appellant prior to a Notice of Default or even a Motion requesting that the trial court enter a default. R. at 032-050 and R. at 060-064 (Motion to Dismiss and Motion to Enter Judgment by Default, respectively).

Cody makes several claims based on the Utah Rules of Civil Procedure. The sum and substance is that the Second District Court Clerk and Judge Ernie Jones attempted to “circumvent the law to suit their own personal preference” in denying him the default judgment that he was entitled to. [Appellant’s Brief, p. 4]. Default Judgment can be entered in one of two ways: 1) by the clerk upon motion by the Plaintiff; or 2) upon application to the Court. Utah R. Civ. P. 55(b).

Before a clerk can enter a default judgment, four factors must be met. Of particular concern for this case is the fourth factor, requiring that the judgment be for a “certain sum or for a sum that can be made certain by computation.” Utah R. Civ. P. 55(b)(1)(C) and (D). The Amended Complaint called for an “award of actual damages” in the amount of \$50,000, plus punitive damages and fees. R. at 010-013 (Amended Compl. p. 4). Neither the Complaint, nor the Amended Complaint offered proof of damages sufficient to allow entry of judgment by the Clerk. See, e.g. *Skanchy v. Calcados Ortope SA*, 952 P.2d 1071, 1076 (UT 1998) (“if the damages claimed are unliquidated, a default judgment can be entered only by a judge). Therefore, under the Utah Rules of Civil Procedure, the Court Clerk was precluded from entering default judgment in this case.

Before a judge can enter a default where the claim involves unliquidated damages, an application must be made to the court requesting the entry of default. Utah R. Civ. P. 55 (b)(2) (Lexis 2006). Cody's application for entry of default was filed with the Court on July 20, 2007, fifteen days after the Motion to Dismiss was filed and taken under consideration by the Judge. R. at 060. (Motion to Enter Judgment by Default in Favor of Plaintiff). In order to enter judgment on this Complaint,

Judge Jones was required to “review the complaint, determine whether the allegations state a valid claim for relief, and award damages in an amount that is supported by some valid evidence.” *Calcados Ortope SA*, 952 P.2d at 1076. “The allegations in [this] complaint are *not a sufficient* basis for awarding damages.” *Id.* See also, *Russell v. Martell*, 618 P.2d 1193, 1195-96 (Utah 1984) (reversing default judgment where sums were not certain and no hearing was held).

Default judgment is not guaranteed simply because a defendant fails to appear. *Heathman v. Fabian & Clendenin*, 377 P.2d 189, 190 (Utah 1962). The Rules of Civil Procedure allow for entry of default “only if the well-pled facts show that the plaintiff is entitled to judgment as a matter of law.” *Pennington v. Allstate Ins. Co.*, 973 P.2d 932, 940 (Utah 1998). In order to decide if there was some valid evidence to support the claim, and to justify setting a hearing date to determine damages, Judge Jones reviewed the Complaint, as well as Cody’s Opposition to the Motion to Dismiss and drew “all reasonable inferences in favor of Mr. Cody.” R. at 120. (Ruling Granting Defendants’ Motion to Dismiss for Failure to State a Claim, p. 1). As discussed in the Ruling, after giving Cody the benefit of the doubt, Judge Jones found that “[e]ach of the Plaintiff’s causes of

action fails to state a claim upon which relief can be granted. The Plaintiff has either failed to support each claim with adequate factual support, or has failed to state a cognizable cause of action in compliance with the well-pleaded complaint rule." R. at 121 (*Id.* at p.2).

The trial court, pursuant to the Rules of Civil Procedure, considered the evidence before it in determining whether a default judgment was warranted and what amount should be awarded. Even liberally construed, the heart of Cody's argument is that the court erred in not granting his motion for default judgment. As shown above, this argument has no foundation in law or in fact. The trial court acted properly and the ruling should be affirmed.

B. Default Judgments are not favored in the law, and can be Set Aside for Good Cause.

It is well-settled that default judgments are not favored in the law. *Heathman*, 377 P.2d at 190 (Utah 1962); see also, *Menzies v. Galetka*, 2006 UT 81, ¶ 63 ("judgment by default is an extreme measure and a case should, whenever possible, be decided on the merits"). When a default judgment is entered in a case, the trial court has been given broad

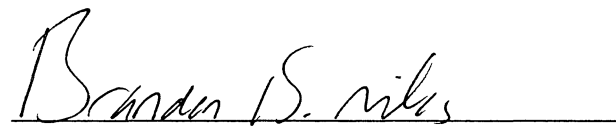
discretion in setting aside those judgments and “should be generally indulgent toward vacating default judgments.” *Menzies v. Galetka*, 2006 UT 81, ¶ 63 (internal quotations and citations omitted). Cody claims that the Rules of Civil Procedure require the judge to enter a default judgment because the Answer was filed three days late. [Appellant's Brief, p.5]. While this claim is clearly erroneous, even if a default had been entered, Lowe and Hancock would have been entitled to have the judgment set aside. Once set aside, the trial court would have considered the Motion to Dismiss; therefore, at most, the trial court's refusal of the motion to enter default was harmless error. As such, Cody has failed to establish sufficient grounds for reversal of the dismissal and the trial court ruling must be upheld.

CONCLUSION

This Court should affirm the trial court. Lowe and Hancock established that the Utah Rules of Civil Procedure supported dismissal in the lower court and that Cody did not properly preserve a due process claim in the lower court. Because the only issue raised in this appeal is the alleged violation of his due process rights, which were not properly preserved, this Court should refuse to consider the appeal. Further, as

shown above, the trial court properly followed the Utah Rules of Civil Procedure in considering the evidence and ruling on the pleadings. Therefore, the decision of the trial court should be affirmed.

DATED this 18th day of June, 2008.

A handwritten signature in cursive script, reading "Branden B. Miles", is written over a horizontal line.

BRANDEN B. MILES

Attorney for Willard Lowe and Renee Hancock

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of June, 2008, I caused
to be served, by U.S. Mail, two true and correct copies of the foregoing,

APPELLEE WILLARD LOWE AND RENEE HANCOCK BRIEF, to the following:

Jason Cody
P.O. Box 9732
Ogden, UT 84409

Brandon S. Miles

Addendum

A

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY
OGDEN DEPARTMENT, STATE OF UTAH

RECEIVED
SEP 05 2007
ATTORNEY

JASON CODY,

Plaintiff,

vs.

WILLARD LOWE and
RENEE HANCOCK,

Defendants.

RULING GRANTING
DEFENDANTS' MOTION TO
DISMISS FOR FAILURE TO
STATE A CLAIM

Civil No. 070902903
Judge Ernie W. Jones

The Defendants, Willard Lowe and Renee Hancock, have moved to dismiss Mr. Cody's complaint for failure to state a claim pursuant to Utah R. Civ. P. 12(b)(6). Mr. Cody has opposed the motion. Having considered the parties' memoranda, the Court grants the motion for the reasons stated in the Defendants' memorandum.

A motion to dismiss under Rule 12(b)(6) "admits the facts alleged in the complaint but challenges the plaintiff's right to relief based on those facts." *St. Benedict's Dev. Co. v. St. Benedict's Hosp.*, 811 P.2d 194, 196 (Utah 1991). In reviewing the complaint, the Court draws all reasonable inferences in favor of Mr. Cody.

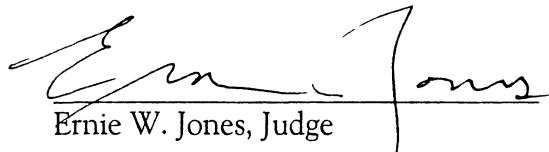
On May 18, 2006, the Plaintiff, Jason Brad Cody, brutally assaulted the Defendants. On February 15, 2007, the Plaintiff was convicted of aggravated assault, assault with substantial bodily injury, and criminal mischief arising from his assault on the

Defendants. On May 17, 2007, the Plaintiff filed this complaint against his victims, stating seven causes of action.

Each of the Plaintiff's causes of action fails to state a claim upon which relief can be granted. The Plaintiff has either failed to support each claim with adequate factual support, or has failed to state a cognizable cause of action in compliance with the well-pleaded complaint rule. See Utah R. Civ. P. 8(a). Additionally, the Plaintiff fails to support claims of fraud or other forms of deception with particularity according to Utah R. Civ. P. 9(b).

The Court, therefore, grants the Defendants' motion to dismiss. The Court dismisses the complaint with prejudice. Mr. Miles will please prepare the appropriate order.

Dated this 23 day of August, 2007.

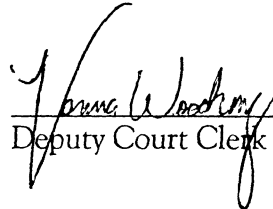

Ernie W. Jones, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 23rd day of August, 2007, I sent a true and correct
copy of the foregoing ruling as follows:

Branden B. Miles
Counsel for Defendants
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Jason B. Cody
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Ogden, UT 84409-1182


Deputy Court Clerk

Addendum

B

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FILE COPY

**IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR WEBER COUNTY,
STATE OF UTAH, OGDEN DEPARTMENT**

JASON CODY

Plaintiff

v.

WILLARD LOWE
RENEE HANCOCK

Defendants

)
)
) **MOTION TO DISMISS FOR FAILURE TO**
) **STATE A CLAIM**
)
) **Case No. 070902903 MI (Lowe)**
) **Case No. 070902904 MI (Hancock)**
)
) **Judge Roger S. Dutson**
) **Judge Ernie W. Jones**
)
)
)

Pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure, defendants move the court for an order dismissing claims one through seven in the plaintiff's complaint. The grounds for this motion are that each claim fails to state a claim upon which relief can be granted. The plaintiff has either failed to support each claim with adequate factual support, or the plaintiff has failed to state a cognizable cause of action in compliance with the well-pleaded complaint rule 8(a) of the Utah Rules of Civil Procedure. Additionally, the plaintiff fails to support claims of fraud or other forms of deception with particularity according to Rule 9(b) of the Utah Rules of Civil Procedure. This motion is supported by the memorandum in support filed with this motion and all other pleadings on file with the court in this action.

FACTS

On May 18, 2006, the plaintiff, Jason Brad Cody, brutally assaulted Willard Lowe and Renee Hancock in front of their home. During a dispute over the location of a potted tree, the plaintiff

punched Willard Lowe, a 74-year-old man who weighed about 125 pounds, in the stomach causing him to fall to the ground. Mr. Lowe had not hit the Defendant nor threatened to do so prior to his being struck. Once Mr. Lowe fell to the ground, the Defendant, who was fifty-six and weighed more than 200 pounds, jumped on top of Mr. Lowe and pinned his arms underneath him. From this position, the Defendant repeatedly punched, slapped, and slammed Mr. Lowe's head onto the asphalt of the roadway.

Mr. Lowe struggled to get out from under the Plaintiff, but was unable to because of his size. Renee Hancock is 69 years old. She observed the Plaintiff punching Mr. Lowe repeatedly and she ran out to help Mr. Lowe. Ms. Hancock attempted to pull the Plaintiff off of Mr. Lowe, but the Plaintiff seized her hand and bit down on it, breaking a bone and severing a tendon in her finger.

Shortly after the Plaintiff bit through Ms. Lowe's hand, a neighbor pulled the Plaintiff off Mr. Lowe and separated the parties. Multiple people then called the police. The police and medical personnel arrived to treat Mr. Lowe and Ms. Hancock. Both were transported to the hospital. Mr. Lowe sustained multiple abrasions to his head, his eye was severely swollen, and he was bleeding profusely from various cuts in his head. Ms. Hancock was treated for her broken bone and had a tendon partially severed in her pinky. She has undergone physical therapy but continues to have problems with numbness and her ability to hold things with that hand.

The Plaintiff complained of breathing difficulty, but ultimately it was determined that he was fine and he was transported to the Weber County Jail. He was charged with Aggravated Assault, a third degree felony; Assault with Substantial Bodily Injury, a class A misdemeanor; and Criminal Mischief, a class A misdemeanor. Information on the criminal case can be found under case number 061902461.

On February 15, 2007, after the evidence was heard during a non-jury trial, the Plaintiff was found guilty beyond all reasonable doubt for these offenses. On April 2, the Plaintiff was sentenced to a suspended prison sentence with formal probation and 180 days in the Weber County Jail. He is currently still and inmate at the jail where he has now commenced this frivolous lawsuit.

ARGUMENT

I. PLAINTIFF’S MOTION SHOULD BE DISMISSED BECAUSE HE FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

According to Rule 12(b)(6) of the Utah Rules of Civil Procedure, a claim may be dismissed when the plaintiff fails “to state a claim upon which relief can be granted.” *URCP 12(b)(6)*. A well-plead complaint sets forth “(1) a short and plain statement of the claim showing that the plaintiff is entitled to relief; and (2) a demand for judgment for the relief to which he deems himself entitled.” *URCP 8(a)*. Additionally, claims that allege fraud or any sort of misrepresentations, omissions, or other forms of deception must be stated with particularity. *URCP 9(b)*. *Williams v. State Farm Ins. Co.*, 656 P.2d 966 (Utah 1982).

A plaintiff must assert facts to support the conclusion that he has been, somehow, wronged. In *Utah Steel & Iron Co. v. Bosch*, a plaintiff submitted a three-paragraph complaint which alleged that the defendants conspired together to annoy, threaten, and intimidate the plaintiff until the plaintiff had to discontinue his business and, as a result, suffered damages. *Utah Steel & Iron Co. V. Bosch*, 475 P.2d 1019 (Utah 1970). The defendant filed a motion to dismiss which the trial court denied. On appeal, the Utah Supreme Court dismissed the complaint for failure to state a claim upon which relief can be granted, reasoning that a mere allegation that the defendants conspired to annoy, threaten, and

intimidate the plaintiff is insufficient when it does not state the nature or substance of the acts alleged committed by the defendants. *Id.* The court further reasoned that a well-plead complaint should “give the opposing party fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved.” *Id. Citing Blackham v. Snelgrove, 280 P 2d 453 (Utah 1955).*

Even pro se plaintiffs who have no legal training or experience must assert a certain amount of specificity in their complaints, especially when involving allegations of fraud or deception. In *Heathman v. Hatch*, a layperson sued his attorney, supporting his claim with a 33-page complaint which alleged the defendant was guilty of fraud, conspiracy, and negligence. *Heathman v. Hatch, 372 P.2d 990 (Utah 1962).* Though a few specific facts were asserted, the court found that the terms “fraud, conspiracy, and negligence” were conclusory accusations, for they only asserted legal conclusions rather than giving any specific facts to support those conclusions. *Id.* The court reasoned that the objective of Rule 8(a) is to require “that the essential facts upon which redress is sought be set forth with simplicity, brevity, clarity, and certainty so that it can be determined whether there exists a legal basis for the relief claimed.” *Id.* Similarly, in a case which arose out of *Heathman v. Hatch*, the court reasoned that a complaint alleging false affidavits and false pleadings should provide the “contents, nature, or substance of the alleged false statement[s].” *Heathman v. Fabian & Clendenin, 377 P.2d 189 (Utah 1962).* The court found that, given the general accusations contained in the complaint, “it [was] clear beyond question that no claim was stated upon which relief could be granted.” *Id.*

¹ Specifically, the court found this claim insufficient because it gave no notice to the defendants about the nature or substance of the acts complained of nor was there any mention of causation between the defendants’ actions and the alleged effect on the plaintiff *Utah Steel & Iron Co. V Bosch, 475 P 2d 1019 (Utah 1970).*

A. Malicious Prosecution

In order to successfully maintain a claim for malicious prosecution, the plaintiff must establish four elements: (1) that the defendant initiated a criminal proceeding against the plaintiff, (2) the criminal proceeding was initiated without probable cause, (3) the criminal proceeding was for purposes of malice rather than bringing an offender to justice, and (4) the criminal proceedings terminated in the accused's (the plaintiff's) favor. Failure to establish any one of the four elements is fatal to the plaintiff's cause of action. *Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950 at 959. *Gilbert v. Paul R. Inc & Callister*, 981 P.2d 841 (Utah 1999). Specifically, malicious prosecution only occurs when the defendant² initiates criminal proceedings against an *innocent* plaintiff³. *Hatch v. Davis*, 102 P.3d 774 (Utah Ct. App. 2004). (*That plaintiff was prosecuted and found guilty is an absolute affirmative defense.*)

On February 15, 2007, the plaintiff in this case, Jason Cody, was convicted of aggravated assault (a 3rd degree felony), assault with substantial bodily injury (a class A misdemeanor), and criminal mischief (a class A misdemeanor) for causing bodily injury to both defendants, Willard Lowe and Renee Hancock, which occurred on May 18, 2006. The plaintiff was sentenced to 180 days in jail. Because the plaintiff here was successfully prosecuted and found guilty beyond any reasonable doubt, the Court should grant the defendant's motion to dismiss the malicious prosecution claim.⁴

1 Defendant in the civil suit, victim or witness in the prior criminal action.

2 Plaintiff in the civil suit, defendant in the prior criminal action.

3 It should also be noted that though the plaintiff alleges an 8th cause of action against the defendants for malicious prosecution, he fails to support this claim with any facts. Therefore, should the court decide to not give summary judgment, the plaintiff's claim for malicious prosecution should at least be dismissed for failure to state a claim upon which relief can be granted as he has asserted no facts to support his claim. *URCP 12(b)(6)*. *URCP 8(a)*.

B. Claims Based on Allegations of Deception

Claims that allege fraud or any sort of misrepresentations, omissions, or other forms of deception must be stated with particularity so as to give the defendant notice of the “contents, nature, or substance of the alleged false statements[s]. *URCP 9(b). Williams v. State Farm Ins. Co.*, 656 P.2d 966 (Utah 1982). *(When a plaintiff complains of conduct “described by such general terms as libel, intimidate, or false statements, the allegation of the conclusion is not sufficient; the pleading must describe the nature or the substance of the acts or words complained of.) Heathman v. Fabian & Clendenin*, 377 P.2d 189 (Utah 1962). Mere allegations are insufficient when the nature and substance of the acts alleged committed by the defendant are not stated, and legal conclusions must be supported by facts. *Utah Steel & Iron Co. V. Bosch*, 475 P.2d 1019 (Utah 1970). *Heathman v. Hatch*, 372 P.2d 990 (Utah 1962).

The first four claims addressed here are all similar in two ways. First, each claim asserts that the defendants have engaged in some sort of deception; therefore, the plaintiff is required to state a claim with particularity. Second, each claim fails to support the plaintiff’s conclusory accusation of deception with any facts, particular or otherwise, regarding the nature or substance of the acts or statements complained of, thereby not giving any notice to the defendant about the contents, nature, or substance of the alleged false statements.

For his claims of obstruction of justice⁵, perjury⁶, conspiracy⁷, and submitting a false claim⁸, the plaintiff only asserts broad, conclusory allegations without providing *any* facts to show the contents, nature, and substance of the alleged acts committed or statements made by the defendants. The plaintiff even fails to provide a date or period of time when any of these alleged falsities occurred. For example, in his claim for obstruction of justice, the plaintiff only alleges that the defendants “provided false and erroneous information” to the police and courts which caused the plaintiff to be arrested, prosecuted, and ultimately convicted.⁹ Additionally, in his claim for perjury, the plaintiff only alleges that the defendants gave false information in affidavits and that the defendants gave false testimony in court.¹⁰

2 The plaintiff’s claims for obstruction of justice are stated as follows: (1) “Defendant has provided false erroneous information and statements to the police in attempts to cause problems for the Plaintiff and causing the Plaintiff to be arrested and jailed by the city police” and (2) “Defendant has provided false and erroneous information to the courts causing them to take actions against Plaintiff.” These claims are brought against both defendants.

3 The plaintiff’s claims for perjury are stated as follows: (1) “Defendant has sworn to false information in affidavits” and (2) “Defendant has given false testimony to the courts on several occasions concerning the Plaintiff.” These claims are brought against both defendants.

4 The plaintiff’s claim for conspiracy to commit perjury and obstruction of justice is stated as follows: “Defendant has conspired with other persons to submit false information to police and false testimony to the courts.” This claim is brought against both defendants.

5The plaintiff’s claim for submitting a false claim is stated as follows: “Defendant has submitted false erroneous claims to the court with regard to medical expenses and restitution.” This claim is brought against both defendants.

6 Additionally, as codified in the Utah Criminal Code, obstruction of justice occurs only when the person accused of obstruction intends to “*hinder, delay, or prevent* the investigation, apprehension, prosecution, conviction, or punishment of any person.” *Utah Code Ann. 76-8-306*. Here, the defendants provided information to police, prosecutors, and the court with the intent to do just the opposite—the defendants wanted the plaintiff investigated, apprehended, prosecuted, convicted, and punished. The plaintiff even supports this view by alleging in his complaint that the information provided by the defendants caused the plaintiff to be arrested, jailed, prosecuted, and convicted. Therefore, because the defendants did not obstruct justice but, instead, initiated it, the plaintiff has no claim against the defendants for obstruction of justice. Further, obstruction of justice is an offense against the state, so it is questionable whether the plaintiff even has a legitimate cause of action for such an offense.

7 Further, according to section 76-8-505 of the Utah Criminal Code, a person may not be found guilty of falsification in official matters when the only proof of falsification is a mere contradiction between the accused and another witness. *Utah Code Ann. 76-8-505(1)* Here, the plaintiff’s complaint only provides the implied assertion that he believes the defendants’ statement were false. Such evidence alone is not enough to prove perjury. Additionally,

Similarly, in his claim for submitting a false claim, the plaintiff only alleges that the defendants submitted false claims to the court regarding medical expenses, though the plaintiff does not allege any facts about the nature or cause of these medical expenses or even why the defendants' medical expenses have anything to do with the plaintiff. Finally, Plaintiff's claims only allege criminal offenses which are prosecuted by the government. He has not identified a legally-cognizable, private cause of action. Because the plaintiff only asserts broad, conclusory accusations that do not give the defendant notice of the content, nature, or substance of the alleged acts and statements complained of, the plaintiff's claim should be dismissed.

Similar to the plaintiff's claims that the defendant has obstructed justice and perjured himself, the plaintiff also asserts the broad, conclusory allegation that the defendant has conspired with unidentified "other persons" to commit obstruction of justice and perjury. A plaintiff who asserts that the defendant is liable for civil conspiracy must prove all of the following five elements: (1) a combination of two or more persons, (2) with a common object to accomplish, (3) had a meeting of the minds about that object to be accomplished or the course of action to accomplish that object, (4) those persons participated in one or more unlawful, overt acts, and (5) caused damages to the plaintiff as a proximate result of their actions. *Alta Indus v. Hurst*, 846 P.2d 1282 (Utah 1993); *Israel Pagan Estates v. Cannon*, 746 P.2d 785 (Utah Ct. App. 1987) (*Civil conspiracy is recognized as common law in Utah and is similar to criminal conspiracy 76-4-201 of the Utah Code, requiring only the additional element of damages.*).

perjury is usually an offense against the state, so it is questionable whether the defendant even has a cognizable cause of action for perjury.

Here, similar to the other claims for perjury and obstruction of justice, the plaintiff fails to support his broad, conclusory allegations by providing any facts regarding the contents, nature, or substance of the acts and false statements alleged committed by the defendant. Additionally, the plaintiff only asserts the legal conclusion that the defendants are liable for conspiracy without supporting that conclusion with any facts. Furthermore, the plaintiff does not specify who the other conspirators were, the conspirators' common objective, or any meeting of the mind among the unknown conspirators.

In conclusion, because the plaintiff has only asserted broad, conclusory allegations without giving any facts to show the contents, nature, and substance of the alleged acts committed and statements made by the defendant and because the plaintiff has, instead, only asserted legal conclusions which are also not supported by any facts, the plaintiff's claims for civil conspiracy, perjury, obstruction of justice, and submitting a false claim should all be dismissed for failure to state a claim upon which relief can be granted.

C. General Claims

A well-plead complaint should "give the opposing party fair notice of the nature and basis and grounds of the claim and a general indication of the type of litigation involved." *Utah Steel & Iron Co. V. Bosch*, 475 P.2d 1019 (Utah 1970). *Blackham v. Snelgrove*, 280 P.2d 453 (Utah 1955). Mere accusations are not enough if the nature or substance of the acts alleged committed by the defendant are not stated. *Utah Steel & Iron Co. V. Bosch*, 475 P.2d 1019 (Utah 1970). Furthermore, legal conclusions and accusations must be supported by facts. *Heathman v. Hatch*, 372 P.2d 990 (Utah 1962). Essentially, a plaintiff must supply the defendant and the court with enough information to know both the legal cause of action the claim is brought under and the basic facts which support that the

plaintiff has a claim. Here, in each claim, the plaintiff fails to do one, the other, or both. The remaining claims should be dismissed for failure to state a claim upon which relief can be granted because either (1) the claims are not supported by sufficient facts and are, instead, conclusory accusations; or (2) the claims do not state a cognizable cause of action for which there is a remedy at law.

1. Intentional Infliction of Extreme Emotional Distress

Intentional infliction of emotional distress is only actionable if (1) the defendant's conduct is outrageous and intolerable in that it offends against the generally accepted standards of decency and morality; (2) the defendant intends to cause or acts in reckless disregard of the likelihood of causing emotional distress, (3) the plaintiff suffers severe emotional distress; and (4) the defendant's conduct proximately causes the plaintiff's emotional distress. *Hatch v. Davis*, 102 P.3d 774 (Utah Ct. App. 2004). *Bennett v. Jones*, 70 P.3d 17 (Utah 2003).

Claims for intentional infliction of emotional distress are highly subjective and volatile in nature: they are easily fabricated, easy to assert, and hard to defend against. For those reasons, Utah courts have strictly limited recovery under emotional distress claims. *Bennett v. Jones*, 70 P.3d 17. For a claim of intentional infliction of emotional distress to survive, the conduct claimed to be distressing "must evoke outrage or revulsion, it must be more than unreasonable, unkind, or unfair." *Id.* "Conduct is not outrageous merely because it is tortuous, injurious, or malicious, or because it would give rise to punitive damages or because it is illegal . . . and clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Id.* For example, derogatory statements do not give rise to a claim of emotional distress. *Zoumadakis v. Uintah Basin Med. Ctr.*, 122 P.3d 891 (Utah Ct. App. 2005). Similarly, a mere claim of improper filing of a law suit or abusive litigation is

also not enough to show emotional distress. *Amderson Dev. Co., v. Tobias*, 116 P.3d 323 (Utah 2005).

The conduct described in the plaintiff's complaint¹¹ arose from nothing more than a dispute over a potted tree. A dispute between neighbors is not uncommon: it is definitely not outrageous or revolting, and little else is less trivial. The plaintiff has alleged no facts which connect the defendant's conduct to the plaintiff's loss of home or spouse, especially given that the plaintiff's own actions which resulted in his criminal conviction and 180-day jail sentence for assaulting the defendants could have been the proximate cause of those events. Additionally, the plaintiff has failed to state with any specificity the so-called "various diseases and disorders" from which he allegedly now suffers nor are any facts given from which it can even be inferred that those diseases and disorders are "severe."

In conclusion, because the plaintiff has given inadequate factual support that he suffers from severe emotional distress, because the plaintiff has given inadequate factual support that the defendant caused such distress, and because the plaintiff has, in general, not supported his claim with adequate facts to show the nature and substance of the acts alleged committed by the defendants, the court should dismiss plaintiff's claim for intentional infliction of emotional distress.

2. Harassment

The court should dismiss the plaintiff's claim against the defendant for harassment because there

⁸ The plaintiff's claim for intentional infliction of emotional distress alleges the following: "Through the aforementioned actions of the Defendant[s], [they] have caused the Plaintiff to be evicted from his home of 34 years and the dissolution of his marriage and the subsequent loss of his home itself. Also causing Plaintiff's health problems and exacerbation of various diseases and disorders suffered by Plaintiff, thereby causing Plaintiff to suffer extreme emotional distress." This claim is brought against both defendants.

is no cognizable, civil cause of action for, simply, harassment.¹² Instead, harassment is the result of certain actions, conditions, or behavior, and occasionally the law regulates that behavior and provides a remedy for the harassment. For example, trespass, assault, or private nuisance are types of behaviors that cause harassment and provide a plaintiff with a cognizable cause of action.

a. Assault

Assault is intentionally causing another person reasonable, imminent apprehension of harmful or offensive contact. *Restatement (Second) of Torts, 21*. Furthermore, a person is not liable for assault for mere words or gestures unless those words and gestures are coupled together with other acts or circumstances that make a person reasonably apprehensive of imminent harmful or offensive contact. *Restatement (Second) of Torts, 31*.

Here, the plaintiff only alleges that the defendant made gestures at the plaintiff and called the plaintiff vulgar names.¹³ The plaintiff does not provide any facts to describe the alleged gestures or language or any surrounding circumstances. Mere name calling alone is not enough to show that the defendant is liable to the plaintiff for assault, and without any further facts or detail it is impossible to determine whether the plaintiff has a claim for assault. Thus, the plaintiff's claim for assault should be dismissed.

⁹ Harassment is also considered a crime under the Utah Criminal Code when a person "with intent to frighten or harass another . . . communicates a written or recorded threat to commit any violent felony." *Utah Code Ann. 76-5-106* Even if the criminal harassment statute were used as a model for a civil offense of harassment, the plaintiff has asserted no facts to support either that the defendant communicated a written or recorded threat or that the defendant threatened the plaintiff with a violent felony.

¹⁰ The plaintiff's claim under a cause of action heading for harassment is stated as follows: "Defendant engaged in actions to harass plaintiff by making various gestures at Plaintiff and by calling Plaintiff vulgar names and using obscene language." This claim is only brought against defendant Willard Lowe.

b. Private Nuisance

Under a claim of private nuisance, a plaintiff must show (1) an existence of injury to the plaintiff's use and enjoyment of his property and (2) an injury that is both substantial and unreasonable. *Walker Drug Co., Inc. V La Sal Oil Co.*, 972 P 2d 1238 (Utah, 1998). "A substantial injury is a significant injury, a harm of importance, involving more than a slight inconvenience or petty annoyance." *Id.* (It is undisputed that the interference with the plaintiff's property must be significant.) Furthermore, "unsubstantiated fears . . . are not the kind of substantial and significant interference with a landowner's use and enjoyment of his property" which is contemplated under an action for private nuisance. *Id.* (Unsubstantiated fear of contamination on adjacent property is not a significant interference.)

Here, the plaintiff alleges that the defendants placed various objects in the roadway which obstructed the plaintiff's view and made it difficult for him to enter and exit his driveway.¹⁴ It is also important to clarify that the plaintiff is not alleging that the defendants blocked his driveway, preventing the plaintiff from exiting or entering his property; rather, the plaintiff is alleging that the defendants obstructed his view. The first object, the potted tree, is placed where it is in order to mark the boundary of the defendant's property—hardly an unreasonable action. As a *potted* tree, the trunk is thin, the tree has few leaves and branches, and the widest portion of this condition is the pot in which the tree is planted. As for the defendant's truck and camper, it is not uncommon for a larger vehicle to obstruct

¹⁴ The plaintiff's claim, under a cause of action heading for harassment, are stated as follows: (1) "Defendant caused a potted tree to be placed in the roadway near to Plaintiff's driveway to make it difficult for Plaintiff to access and egress his driveway," and (2) "Defendant parked his pickup truck with large camper shell in the roadway at the end of Plaintiff's driveway making it dangerous for Plaintiff to exit his driveway due to the obstructed view. This was contrary to the Park's rules." These claims are brought against both defendants.

the view for another vehicle. The parked truck was also not a permanent condition which constantly obstructed the plaintiff's view as he entered and exited his driveway. Additionally, neither the tree nor the truck are "substantial" or "significant" injury or harms of importance nor are they unusual; rather, both are only petty annoyances that caused the plaintiff the slight inconvenience of having to be more observant as he exited his driveway.

In conclusion, because the plaintiff has failed to assert any facts to show that he suffered from a significant harm to the use and enjoyment of his property, the plaintiff's claims should be dismissed.

c. Trespass

Civil trespass is an intentional wrongful entry or physical invasion onto another's land. *Walker Drug Co., Inc. V. La Sal Oil Co.*, 972 P.2d 1238 (Utah 1998). Citing *O'Neil v. San Pedro*, 114 P. 129 (Utah 1911) Also citing *Restatement (Second) of Torts*, 158. (A person is "liable to another for trespass . . . if he intentionally enters land in the possession of the other. . . .") Though under a cause of action of harassment, the plaintiff alleges that the defendant "trespassed onto [his] leased property after [being] told not to trespass."¹⁵ However, the plaintiff only asserts the legal conclusion that the defendants trespassed without giving any facts to support that broad, conclusory allegation.

The plaintiff also fails to assert any damages which were caused by the defendant's trespass. Damages for trespass are, generally, the difference between the value of the property immediately before and immediately after the trespass or, alternatively, the cost of restoration or repair. *Henderson v. For-Shor Co.*, 757 P.2d 465 (Utah Ct. App. 1988). (*Trespassers who drove over grass and*

¹² The plaintiff's claim, under a cause of action heading for harassment, is stated as follows: "Defendant further harassed Plaintiff by repeatedly trespassing on Plaintiffs leased property after he had been told not to trespass." This claim is only brought against defendant Willard Lowe.

knocked over signs only liable to property owner for nominal damages of one dollar.) However, when no actual or substantial damages are shown, “the law will infer nominal damages for the unauthorized entry onto the real property of another. *Id.* Nominal damages are “a trivial sum such as one cent or one dollar [which is] awarded to the plaintiff whose legal right has been invaded but who has failed to prove any compensatory damages. *Id.* (Citing *Gould v. Mountain States Te. & Tel. Co.*, 309 P.2d 802 (Utah 1982). (A considerable amount such as \$100 for trespass is not “nominal” damages).

In conclusion, because legal conclusions must be supported by facts so as to give the defendants notice of the nature and substance of the acts alleged committed, because the plaintiff fails to assert anything but a legal conclusion, and because the plaintiff fails to assert any damages, the plaintiff’s claim for trespass should be dismissed.

d. Remaining Charges

The plaintiff’s final two claims under a cause of action for harassment assert that the defendant took “unwelcome photographs” of the plaintiff, his wife, and their property and that the defendant made false accusations¹⁶ about the plaintiff to management of a mobile home community.¹⁷ These allegations alone are so vague that, without additional facts, it is impossible to determine what sort of cause of action the plaintiff is suing under and should, therefore, be dismissed.

13 As the plaintiff is again alleging that the defendants made some sort of false statement, such a claim should also be pled with particularity according to the Utah Rule of Civil Procedure 9(b).

14 The plaintiff’s claims under a cause of action heading for harassment are stated as follows: (1) “Defendant harassed Plaintiff by taking unwelcome photos of the Plaintiff and his spouse and their home and cars.” This claim is only brought against defendant Willard Lowe. (2) “Defendant engaged in actions to harass Plaintiff by making false accusations that Plaintiff broke the rule of the Mobile Home Park by not having a vehicle properly registered and licensed.” This claim is only brought against Renee Hancock.

2. Malicious Mischief

Malicious mischief, or criminal mischief, is codified in the Utah Criminal Code, under which a person commits criminal mischief if he “intentionally damages, defaces, or destroys the property of another.” *Utah Code Ann. 76-6-106(2)(c)*. An important element of malicious mischief is intent—specifically, malice—and the plaintiff has not asserted any facts to show that the defendant acted intentionally, let alone that the defendants acted with a malicious intent, to cause damage to the plaintiff’s property. If anything, the nature of the complained of actions seem like an accident.¹⁸ Yet even if the plaintiff’s claim could be viewed as negligent destruction of property, the plaintiff has not alleged that the defendants owed him a duty which they later breached.

Malicious mischief, is above all else, destruction of property. The plaintiff makes several accusations under his malicious mischief claim; however, three of them do not constitute damage to property. First, the plaintiff’s allegation that the defendant made false statements¹⁹ does not demonstrate any damage to property. Second, the plaintiff’s accusations that the defendant spread moth balls in order to exacerbate the plaintiff’s asthma are not destruction of property.²⁰ Additionally, the plaintiff even fails to allege any facts about where the moth balls were spread and without such facts it is nearly

15 The plaintiff’s claim under cause of action heading malicious mischief alleges the following: (1) “Defendant is responsible for damage to Plaintiff’s vehicle (scratches on paint), by causing his friend’s front yard gate to open and strike Plaintiff’s vehicle while it was parked in Plaintiff’s driveway.” and (2) “Defendant caused damage to Plaintiff’s property by watering a shed wall of the Plaintiff’s while watering his friend’s yard.” These claims are brought against both defendants.

16 As the plaintiff is again alleging that the defendants made some sort of false statement, such a claim should also be pled with particularity according to the Utah Rule of Civil Procedure 9(b).

18 The plaintiff’s claim under a cause of action heading for malicious mischief is stated as follows: “Defendant spread moth (2) ball crystals to exacerbate Plaintiff’s asthma.” This claim is only brought against defendant Renee Hancock.

impossible to contemplate any cause of action under which the plaintiff could sue. Finally, the defendant's alleged attack on the plaintiff is also not destruction of property.

Assault is intentionally causing another person reasonable, imminent apprehension of harmful or offensive contact. *Restatement (Second) of Torts*, 21. Battery is intentionally causing harmful or offensive contact to another. *Restatement (Second) of Torts*, 13. Here, the plaintiff only alleges the legal conclusion that the defendants assaulted him without providing any facts to support that conclusion.²¹

In conclusion, because the plaintiff has only alleged legal conclusions without providing any facts to support those conclusions, because the plaintiff has not given any facts to illustrate the nature and substance of the acts alleged committed by the defendants, and because the plaintiff has not provided enough facts to identify a cognizable cause of action under which he has a legitimate claim, the plaintiff's claim should be dismissed.

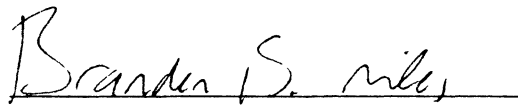
²⁰ The plaintiff's claim brought under a cause of action heading for malicious mischief is stated as follows: "Defendant, without provocation, attacked and physically assaulted plaintiff while Plaintiff was standing at the end of his driveway, a very short while later, Defendant's friend joined in the assault of the Plaintiff." This claim is only brought against the defendant, Willard Lowe.

CONCLUSION

In general, the plaintiff's entire complaint is a broad, conclusory accusation that is not supported by any facts to illustrate the nature and substance of the acts alleged committed by the defendants. The plaintiff's claims of obstruction of justice, perjury, submitting a false claim, and conspiracy are allegations of fraud or deception which must be pled with particularity. Under each of those claims, the plaintiff fails to provide any facts to show the contents, nature, or substance of the alleged false statements and, therefore, does not give the defendants notice of the nature, basis, and grounds of the claim. The remaining claims of intentional infliction of emotional distress, harassment, and malicious mischief are either legal conclusions which are not supported by any facts or are broad, conclusory accusations which are not supported by facts sufficient enough to determine whether a cognizable cause of action exists or whether the plaintiff has a legitimate claim under an identifiable cause of action.

For these reasons and the reasons set forth above, this court should dismiss each of the Plaintiff's claims for failure to state a claim upon which relief can be granted.

DATED this 7th day of July 2007.

A handwritten signature in cursive script, reading "Branden B. Miles", written over a horizontal line.

Branden B. Miles

Attorney for Defendant Renee Hancock

CERTIFICATE OF DELIVERY

I hereby certify that I mailed on the 7th day of July 2007, a copy of the foregoing MOTION
TO DISMISS FOR FAILURE TO STATE A CLAIM to:

Jason B. Cody
P.O. Box 9732
Ogden, UT 84409-1182

Addendum

C

Jason Cody Pro Se
P.O. Box 9732
Ogden, Utah 84409
Phone 801 627-1182

In The Second Judicial District Court In and For
Weber County, State of Utah
Ogden Department

Jason Cody
Plaintiff

V.

Renee Hancock
Defendant

Memorandum In Opposition
To motion to dismiss for
Failure to state a claim

Civil No. 070902904 mi

The Honorable
Roger S. Outson

Plaintiff Jason Cody, prose, submits this memorandum
in opposition to Defendant's motion to dismiss for failure to
state a claim, filed July 09, 2007.

Introduction

As an initial matter, The Utah Rules of Civil Procedure
do not allow for a motion to dismiss for failure to state a claim
to be brought after the pleadings are closed and the proper
time to file such a motion is prior to making a final pleading.
See URCP Rule 12 (a) (b) (c) (h). URCP Rule 12 (e) addresses
what would be the proper motion to rectify the defendant's stated
problems with the sufficiency of the complaint if it were
available, but it too would have been required to be filed prior
to 5:00 PM on July 02, 2007 which was the close of pleadings.

However, there are other problems with this motion as well. URCP Rule 7(a)(b)(c) (c) 2) (c)(3)(C) addresses the issues that a pleading is not a motion and visa versa, a motion is not a pleading. At Rule 7(c) (c) 3)(C) the rule is clear that an over-length memoranda is not permitted without leave of the court, and the record indicates that such leave was not applied for on this motion. The motion is yet further out of compliance by lacking the required table of contents, etc. that shall be part of memoranda with more than ten pages of argument.

URCP Rule 8(d) is made a mockery of by this motion to dismiss and its statement of alleged 'facts' and this important rule that has been upheld for such long standing should be respected by an officer of the court and not purposely ignored. I contend that it is impossible for an officer of the court to meet his public duty to the court when his practice of law so blatantly flies in the face of URCP Rule 11(b) (b) (1) (b) 2). Perhaps the court could encourage him to be more focused on his public duty to the court by getting his attention with sanctions, at the court's discretion. Perhaps he was hoping that the court would make findings of fact and conclusions of law in his favor, when the fact is that defendant and her counsel have already waived the issue of fact by their default by failing to appear, see URCP Rule 52(c) (c) 1).

Regardless, the court should not even entertain this problematic motion but should reject it out of hand for its repeated failures to comply with the URCP Rule 7, Rule 8, Rule 11, Rule 12, and Rule 52. For all these reasons this motion to dismiss for failure to state a claim should be denied by the court. And the section called 'Facts' should be excluded and stricken from the motion entirely.

Argument

To begin, I would like to make the most strenuous objection to the section of the motion to dismiss for failure to state a claim labeled as 'Facts'. These are not facts, at least not true facts but are rather the same old fabrications and false accusations that the instant action was brought to address. If the defendant and her attorney wanted to once again allege these so called Facts, why didn't they allege them in a responsive pleading if they wanted to challenge the averments of my complaint? Why wait and do it in a motion? Especially this particular motion which by its very nature states once again upon being filed that the facts alleged in the complaint are admitted. See U.R.C.P. Rule 12(h) (1)(i) which states, (h) waiver of defenses - A Party waives all defenses and objections not presented either by motion, or by answer, or reply, except (i) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim, may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits - Also see U.R.C.P. Rule 12 notes to provisions under heading, motion to dismiss for failure to state a claim. - Explained. A motion to dismiss under subdivision (b) (6) admits the facts alleged in the complaint but challenges the plaintiff's right to relief based on those facts. *St. Benedict's Dev. Co. v. St. Benedict's Hosp.* 911 P.2d 174 (Utah 1996); *Russell v. Standard Corp.*, 898 P.2d 263 (Utah 1995). - Standard. In ruling on a motion to dismiss for failure to state a claim, the Court must construe the complaint in the light most favorable to the plaintiff and indulge all reasonable

inferences in his favor. *Mounteer V. Utah power and light co.*, 823 P.2d 1055 (Utah 1991); *Russell V. Standard Corp.* 898 P.2d 263 (Utah 1995).

A real fact in this case is that the defendant did not file an answer to the complaint as required by URPC Rule 7, (a) which states, (a) Pleadings. There shall be a complaint and an answer; a reply to a counterclaim; an answer to a cross-claim, if the answer contains a cross-claim; a third party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third party answer, if a third party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third party answer. Also see URPC Rule 12 (a) which states, (a) When presented. Unless otherwise provided by statute or order of the court, a defendant shall serve an answer within twenty days after the service of the summons and complaint is complete within the state, and within thirty days after service of the summons and complaint is complete outside the state. And Rule 12(b) which states, (b) how presented. Every defense in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) Lack of Jurisdiction over the subject matter, (2) Lack of Jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief may be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted.

Also under heading of — How Presented. in the 'notes to decisions' of Rule 12 and the sub heading, — Failure to state a claim upon

which relief can be granted - A complaint does not fail to state a claim unless it appears to a certainty that the plaintiff would be entitled to NO relief under any state of facts which could be proved in support of the claim - *Liquor Control Comm'n V. Athas* 121 Utah 457, 243 P.2d 441 (1952); *Christensen V. Lel's automatic Transmission Service Inc.*, 24 Utah 2d 165, 467 P.2d 605 (1970) and, standard of review.

The propriety of a dismissal under this rule is a matter of law, reviewable for correctness. *Stokes V. Van Wagoner*, 1999 Utah 94, 987 P.2d 602 Also URCP Rule 55(a) states, (a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear the clerk shall enter the default of that party. And Rule 54(c)(2) states, Judgment by default. A Judgment by default shall not be different in kind from, or exceed in amount, that specifically prayed for in the demand for judgment.

Why didn't the defendant answer? She certainly had enough time and so did her attorney, Mr. Branden B. Miles, who just happened to be the deputy county attorney that had prosecuted me at the criminal trial where Judge John Morris convicted me on all charges due to the false statements and testimony by the defendant and her friend and probably a large dose of sympathy from the Judge helped as well, I can't say what happened for sure, that day, that convinced the Judge he should find me guilty when clearly the weight of evidence was in my favor, but I realize that these things happen, we hear all the time about a person that has been convicted of crimes and sentenced to prison for several years but then they are exonerated by DNA evidence - or perhaps the police apprehend a person who turns out to be a serial killer and confesses to murders

and leads police to the remains of the corpse, while for years now some other poor son of a gun has been serving time for that murder. What I have always held to be one of the great tragedies of a situation like that was how very often the prosecutor would continue to attempt to keep the now exonerated person locked up, I don't suppose I will ever understand that kind of thinking or behavior.

Why, just as recently as June 22, 2007 I was in Judge Morris's courtroom for a sentence review hearing and Mr. Miles was still putting forth a great effort to have me transferred from Jail to Prison. It was that morning that I learned that the defendant and friend had obviously been in contact with attorney Miles as he was aware that I had filed these civil suits against them, I didn't know that he was representing them in the civil cases until I discovered that he had filed these motions as their attorney and then I was puzzled, I just couldn't make any sense out of it. Here was this prosecutor that I thought had an absolute hatred for me, now representing these defendants as my opponent in these cases and he hadn't filed an answer? What was going on? Certainly an attorney so sharp of mind as Mr. Miles could not have forgotten or neglected to file a timely response, and especially with me as the adverse party, a person whom he would like to see dead was the opinion I had. And then he had filed this motion? This motion! The motion that speaks and says, yes, I admit all your allegations are true, but I don't think you should get that much money. Then it struck me, and I understood what had happened. 2+2 made 4. Mr. Miles, being the excellent attorney that he is, had obviously sat down with his clients to discuss things and refresh his memory as to what they had told him had happened on that bright spring

that had gone so wrong when that criminal, that bully, had attacked them and beat them up. And what legal strategy should we employ to beat down this terrible man who had almost bitten your leg clean off and now has the nerve, the audacity to sue you? at about this time things started to unravel and either their conscience had caught up with them, (doubtful) or they were scared that maybe he could prove it. After all he did seem to have that tape recorder handy somewhere and quite often he had a camera or video camera with him, and he's so sneaky, maybe he had some kind of evidence, maybe he could prove it! so the two conspirators confessed to what they had done to frame him and get him kicked out of the trailer park for good. What are we going to do now?

yes, it was quite a conundrum alright, there were going to be boogey men jumping out of the bushes on this one. After all he had his career to think of, he was up and coming, how would it look if people found out that he had put an innocent man in jail, nearly in prison.

No, that just wouldn't do, and you folks don't want to go to jail, do you? No, we have to make this just go away. Nobody needs to know. I'll represent you to try and save you some money but that's all I can do. (a little bit of ethics). So, that's why they didn't file answers, and that's why they did file this particular motion, yeah that makes sense.

And then I received copies of the motions through the mail. And there, starting right on the first page is the same old story, and he goes on a third of a page and a half, giving these so-called facts.

Now, I'm right back to, I just can't make any sense out of it.

OK, now I think I've got it! Mr Miles, attorney, for the defendant, is being pretty sneaky as well as quite unprincipled. He has filed this particular motion because he believes that he can use UCCP Rule 12(b) to twist things around and abracadabra, Presto change,

the motion to dismiss for failure to state a claim suddenly becomes a motion for Summary Judgment and he is allowed to present all the evidence he can muster and essentially get a second chance at things, as is over, and if he is allowed to bring in his evidence from the criminal he prosecuted he can claim that since I was found guilty by Judge Morris, beyond a reasonable doubt, that his evidence is therefore impeccable and in impeccable and he will save the day after all. Pretty sneaky plan. Good work, for an unethical dishonest scoundrel with no sense of decency or any personal honor and who obviously could not care less about his duty and responsibility as an officer of the court, or the canon of ethics, or the simple morality of being truthful in his dealings with the court, nor any allegiance to Justice and fair play and the American way.

Just maybe he did forget to file an answer and he is now concerned about the possible liability to his clients, that's just tough.

Don't let him get away with it, he's lying and cheating and making a mockery of URCP Rule 11(b) which states, (b) Representation to the Court. By presenting a pleading, written motion, or other paper to the Court (whether by signing, filing, submitting or later advocating), an attorney or unrepresented party, is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, (b)(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (b)(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law: See also Rule 11 'notes to decisions' - nature of duty

imposed. This rule emphasizes an attorney's public duty as an officer of the court, as opposed to the attorney's private duty to represent a client's interest zealously. *Clark V. Booth*, 821 P.2d 1146 (Utah 1991). URCP Rule 12 'Notes to decisions' heading, Summary Judgment — conversion of motion to dismiss. Motion to dismiss pursuant to subdivision (b)(6) may be converted to Summary Judgment only when it appears as a matter of law that the plaintiff cannot recover; --- *Harvey V. Sanders*, 534 P.2d 905 (Utah 1975).

It is generally not well advised to treat a motion to dismiss as one for summary judgment - *Salt Lake County V. Salt Lake City* 570 P.2d 119 (Utah 1977).

Where defendant's motion was initially for dismissal because of Plaintiff's failure to state a claim upon which relief could be granted, once matters outside the pleadings were presented to and not excluded the trial court, the motion was properly treated as one for summary judgment. *Lind V. Lynch*, 665 P.2d 1276 (Utah 1983).

— Court's discretion. If a motion to dismiss under subdivision (b)(6) is presented, the decision to consider matters outside the pleadings initially lies in the discretion of the trial court. *Strand V. Associated Students of Univ. of Utah* 561 P.2d 191 (Utah 1977).

Plaintiff asks the court to prevent a sham by excluding 'Facts' from the defendant's motion to dismiss for failure to state a claim, as the only reason its there is to be the trigger for Mr. Miles fraud upon the court.

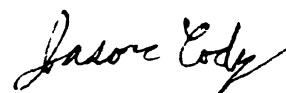
Conclusion

How sad, this whole motion has been a sham from the very start. Attorney Miles is eager to show us how clever he is with his magic motion trick but what he is really doing is thumbing

his nose at the rules of the court that guide and govern our system of Justice. Don't allow him to perpetrate this fraud, hold him to the true meaning of his motion which admits by his own filing of it that he acknowledges the truth of the claims made in the complaint. The defendant made the same acknowledgement when she chose not to file an answer. Don't let them pull this 'fast one' but instead exclude their 'facts' which is nothing more than a ticking time bomb. Then deny the motion for the several legitimate reasons that you have to deny it with. Let's uphold the Dignity of our Justice system and not allow Mr. Miles or anyone else to muddy its virtue.

For these reasons and the reasons, facts, and case law stated above, and to preserve the righteousness, honesty, and fairness of our Utah Court Rules, and respect for the virtue and dignity of our Justice system and our courts, I ask you to do what you know to be ~~right~~, exclude the 'Facts' from your consideration of the motion and strike it from the motion to dismiss, then exercise your discretion and deny this mutated motion to dismiss for failure to state a claim on account of its failure to comply with The Utah Rules of Civil Procedure.

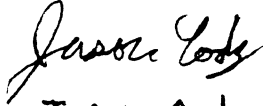
Dated this 21st day of July, 2007


Jason Cody Pro Se

Certificate of Service

I hereby certify that on this 21st day of July, 2007
I served a true and correct copy of the foregoing
Memorandum in opposition to Motion to dismiss for
failure to state a claim, by U.S. Mail, Postage Prepaid,
upon Attorney for the defendant, Branden B. Miles,
2380 Washington Blvd., Suite 230, Ogden, Utah 84401.

dated July 21, 2007


Jason Cody Pro Se