

1977

Bruce C. Jeppson and Jean W. Jeppson, His Wife v.  
United Television, Inc., aka KTVX T.V. Channel 4 :  
Appellant's Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

EDDIE C. JEPSON and )  
JEAN W. JEPSON, his wife, )  
)  
)  
Plaintiffs and Appellants, )  
)  
vs. )  
)  
UNITED TELEVISION, INC., aka )  
KUTV T.V. CHANNEL 4, )  
)  
Defendant and RESPONDENT. )

Case No.  
15318

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APPELLANT'S BRIEF

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Appeal from the order of the Third  
Judicial District Court, Salt Lake County,  
State of Utah

The Honorable Dean E. Conder, Judge

---

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FILED

SEP 15 1977

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TABLE OF CONTENTS

	Page
NATURE OF THE CASE -----	1
DISPOSITION IN LOWER COURT -----	1
RELIEF SOUGHT ON APPEAL -----	2
STATEMENT OF FACTS -----	2
ARGUMENT -----	5

POINT I.

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT ON THE GROUNDS THAT THE FACTS ALLEGED FAIL TO STATE A CAUSE OF ACTION.-----	5
-------------------------------------------------------------------------------------------------------------------------------------------------------------------	---

POINT II.

THE TRIAL COURT, IN GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT ERRED IN NOT HEARING THE FACTS AND ISSUES ON THE UTAH PENAL STATUTES SET FORTH IN PLAINTIFFS' SECOND CAUSE OF ACTION, AS WELL AS THE ISSUES RAISED IN THE THIRD CAUSE OF ACTION.-----	12
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----

CONCLUSION -----	17
------------------	----

AUTHORITIES CITED

FCC RULES AND REGULATIONS, SECTION 73.1206 -----	4,5,7
14 ALR 2nd, 755 -----	7
38 AM JUR 2nd Pages 3-72-----	17

TABLE OF CONTENTS continued,

STATUTES CITED

76-9-402	Utah Code Annotated, 1953, as Amended-----	1
76-9-405	Utah Code Annotated, 1953, as Amended-----	1
76-9-406	Utah Code Annotated, 1953, as Amended -----	1
76-4-8	Utah Code Annotated, 1953, as Amended -----	1
76-9-401 (2)	Utah Code Annotated, 1953, as Amended --	1

CASES CITED

Smith v. Doss,	251 Ala 250; 37 So. 2nd 118 -----	1
Voelker v. Tyndall,	266 Ind. 43; 75 N.E. 2nd 548 -----	1
Froelich v. Adair,	213 Kan. 357; 516 P.2nd 993 -----	1
Donahue v. warner Bros.Pictures Distributing Corp.		
2 UT 2nd 256; 272 P. 2nd 177 -----		1

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	)	
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APPELLANTS' BRIEF

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NATURE OF THE CASE

Plaintiffs sought damages and a restraining order against Defendant for invasion of privacy in connection with telephone conversations going out over the air by television without Plaintiffs' knowledge or permission.

DISPOSITION IN LOWER COURT

Defendant filed a motion to dismiss Plaintiffs' complaint, and after argument and written memorandums were submitted by counsel, Judge Dean E. Conder granted Defendants' motion and ordered a dismissal of Plaintiffs' complaint.

## RELIEF SOUGHT ON APPEAL

Plaintiffs seek a reversal of the District Court's order of dismissal and to have the case remanded for a full hearing on the merits and issues set forth in the complaint.

### STATEMENT OF FACTS

On March 11, 1977, Plaintiffs filed a complaint against Defendant in the District Court of Salt Lake County, State of Utah, and the complaint alleges three causes of action. The first cause of action deals with the question of invasion of the right of privacy under the civil law as a tort. The second cause of action goes to The Utah Penal Statutes dealing with the abuse of the right of privacy and the injunctive relief, exemplary damages and right to attorney's fees involved. The third cause of action refers to the question of mental suffering, shock and fright as a result of Defendants' actions. The complaint sets forth essentially the following facts:

On the afternoon of March 2, 1977, Plaintiffs' residence rang at their house. Plaintiff, Jean W. Jeppson, answered the phone and a man's voice asked her if this was the Jeppson residence, and Mrs. Jeppson responded that it was. Then the man stated, "This is Dialing for Dollars, do you have your number set on?" Plaintiff responded, "No, I don't." Then the man who was an agent and employee of Defendant television station said, "oh, that is unfortunate, (with considerable emphasis) because you could have won \$50.00." Mrs. Jeppson then

"well now I'll tell you, I'd rather have peace in my home."

all that garbage on television, even for \$50.00." The man laughed and then Mrs. Jeppson said, "Thank you for calling." Thereafter Plaintiff hung up the phone.

Within moments after this conversation took place Plaintiffs' phone began ringing and continued to do so the rest of the afternoon and into the evening with all kinds of callers using rude, abusive, obscene, threatening and harassing language toward Plaintiffs. Plaintiffs were shocked, frightened, upset, embarrassed, humiliated, and considerably concerned about their safety and welfare for days thereafter because of these many weird and crank calls, all resulting from the conversation between Plaintiff and Defendants' employee going over the television and air throughout the state and perhaps elsewhere.

Defendants' employee and agent, while on the air, and in view of television watchers, recited aloud Plaintiffs' telephone number, gave out the Plaintiffs' name, possibly their address, and carried out the conversation with Mrs. Jeppson without informing her that it was heard and being carried on television. The facts, if allowed to be presented in a court hearing, would further show that Mrs. Jeppson had never before heard of the "Dialing for Dollars" television program, had never watched it, and had absolutely no idea that her telephone comments and conversation was being broadcast and televised throughout the state.



Plaintiffs' complaint further sets forth the additional facts, which must be admitted by Defendant for purposes of this appeal, that the acts of Defendant complained of in conducting its trade and advertising for its program, "Dialing for Dollars."

Furthermore, Defendant is a duly licensed television station and subject to the rules and regulations of the Federal Communications Commission. That among the rules and regulations promulgated by the FCC is Section 73.1206 "Broadcast of Telephone Conversations," which states in essence that a licensee shall inform any party to a telephone call of the licensee's intention to broadcast the conversation before it is in fact broadcast.

After Plaintiffs filed their complaint in this case and before any answer to said complaint was submitted, Defendant filed a motion to dismiss the complaint on the grounds that it did not state a claim upon which relief could be granted. Thereafter argument was heard by the court on the motion and memorandums submitted by the parties.

The Honorable Dean E. Conder, Judge of the District Court, ruled in favor of Defendant on the matter and granted the motion to dismiss, concluding that the Court recognized the existence of the law of privacy but that under the facts alleged, Plaintiffs did not have a cause of action.

It is from the trial courts' granting of Defendants' motion to dismiss that this appeal is taken.

## ARGUMENT

### POINT I

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT ON THE GROUNDS THAT THE FACTS ALLEGED FAIL TO STATE A CAUSE OF ACTION.

The Honorable Dean E. Conder set forth certain facts and conclusions in his memorandum decision in granting Defendants' motion to dismiss (R 22-23.) Judge Conder stated in Pertinent Part:

"Defendant conducts a well known program known as "Dialing for Dollars" in which they select random names from the telephone book and call the number." - - - - -

"The conversation is simultaneously broadcast over the T.V. station - - - - -"

"This Court recognizes the existence of the law of privacy but concludes that under the facts as alleged Plaintiffs fail to state a cause of action - - - - - "the Court concludes that by having a person's name and telephone number listed in the telephone book, the person invites others to call. The real problem here is whether or not the broadcasting of the conversation over the T.V. was an invasion of the right. Plaintiffs cite the FCC Regulation 73.1206 requiring the caller to advise the listener that the conversation is being broadcast. An exception is provided where it states that 'such party is aware, or may be presumed to be aware from the circumstances of the conversation, that it is being or likely to be broadcast.' The Court feels that this case comes under the exception."

In as much as the trial court granted Defendants' motion to dismiss the complaint before any evidence was presented or the facts fully developed, it is obvious that all the facts stated in the complaint must be admitted or construed in the light most favorable to Plaintiffs. The lower court either recognized the existence of the law of privacy, and we assume that Judge Conder had in mind not only the Utah Penal Statutes involved, but also the civil law as a Tort.

It is hoped that the Utah Supreme Court in this appeal will lend further light and direction on this question, and we refer the court to both Plaintiffs' and Defendants' memoranda for some of the other references, citations, and arguments involved. (R. 12-21 and R. 24-29.)

Judge Conder seems to be saying here that even though the right of privacy in the civil law as a Tort exists, he does not believe the fact situation in this case is strong enough to come within the framework of the right. We believe that the Court's conclusion on the latter question is in error.

In the first place, the lower court is assuming that the T.V. program, "Dialing for Dollars," is such a well known program that everyone that may be called may be aware that a telephone conversation is going out over the air. We believe this to be a wrong assumption, especially without taking any evidence. The facts of the complaint show Mrs. Jeppson did not watch television, and a further development of the facts would

show she had no idea what that program was or what they did.

Furthermore, simply because a person may list his name and phone number in a telephone directory, does this give the right or open the door to record the conversation on a tape recorder and then publish this recording to the world, or, as in this case, to broadcast the conversation over the air to the world? We think not. Such action is an invasion of this natural law of the right of privacy and protected by the constitution.

In 14 ALR 2nd, 755 we read:

"Modern life with its accompanying increase in public media of communication, such as newspapers, monthly and weekly magazines, moving pictures, radio and television, has created novel situations that in turn gave rise to the problem of protecting the individual who desires seclusion and freedom from intrusion into his private life as well as from undo and undesirable publicity.----"

"Concluding that the right of privacy was supported by logic and the weight of authority the court in, Smith vs. Doss at 251 Ala 250; 37 So. 2nd 118, said that it was defined as the right of a person to be free from unwarranted publicity or the unwarranted appropriation or exploitation of personality, the publicizing of one's private affairs with which the public had no legitimate concern, or the wrongful intrusion into one's private activities in such manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities."

"The right has been said to have its foundation in natural law and guaranteed by both the Federal and State Constitutions, so that as between man and man it must be respected." (See Voelker vs. Tyndall, 226 Ind. 43; 75 N.E. 2nd 548)"

Judge Conder also intimates in his decision that if Defendant had been in direct violation of the FCC Regulation 73.1206, of advising the listener that his conversation was

being broadcast, (and not coming within the exception to the rule,) perhaps the facts would be strong enough to sustain a cause of action for invasion of the right of privacy.

It is our contention that the lower court erred in its interpretation of the regulation in concluding that the case comes within the exception stated.

The FCC Regulation 73.1206 - "Broadcast of Telephone Conversations" (ed 8/76) - is set forth as follows:

"Before recording a telephone conversation for broadcast, or broadcasting such a conversation simultaneously with its occurrence, a licensee shall inform any party to the call of the licensee's intention to broadcast the conversation, except where such party is aware, or may be presumed to be aware from the circumstances of the conversation, that it is being or likely will be broadcast. Such awareness is presumed to exist only when the other party to the call is associated with the station (such as an employee or part-time reporter), or where the other party originates the call and it is obvious that it is in connection with a program in which the station customarily broadcasts telephone conversations."

The exception to the rule takes effect only where the other party is aware, or may be presumed to be aware of the broadcast. The presumption of awareness exists only where the other party to the call is associated with the station or where the other party originates the call.

It is obvious from the Plaintiffs' complaint that Jeppson was not aware that her conversation was being broadcast and that she was never so informed. It is also obvious that Plaintiffs were not associated with one station nor did they originate the call. The conduct of Defendant in broadcasting

Mrs. Jeppson's conversation and comments over the air without first informing her that it was being broadcast is in direct violation of the FCC Regulations.

Now we submit that the very purpose of the Regulation is to protect and insure the public in their right of privacy.

Counsel for Defendant, in his memorandum, (R.20) refers to the fact that there was nothing indecent, vulgar, obscene, etc. in the telephone call to Mrs. Jeppson from Defendants' employee. It was, at worst, only an annoyance, such as telephone surveys, sales solicitations, charitable contributions, wrong numbers and the like. This is true, and it is not the call to Plaintiffs from Defendant that is offensive and objectionable, but it is the publication and broadcasting to the world the conversation without first informing Mrs. Jeppson what was taking place, which resulted in blackening her name and reputation among some of the public and her friends, and further causing Plaintiffs great embarrassment and humiliation as well as emotional unrest, shock and fright.

One's choice of words and comments have got to be different and more carefully guarded in public than in private, especially over the air. Each individual is entitled to that choice, and when they are deprived or deceived in some way, the results, as in this case, may be highly offensive to the individual and an invasion of his privacy.

It is amazing to counsel for Plaintiffs that there are so many people out in the world who would be listening to a program like "Dialing for Dollars" and write down or memorize name and phone number of the person being called so as to place a call themselves within a matter of seconds to such a home and make rude, obscene, vulgar and threatening comments. There will be many weird and irresponsible people out there, and Defendant, as a licensed television station, dealing with the public as it does, has to be aware and familiar with this fact. Therefore, it is a much greater duty upon Defendant to adhere strictly to the rules and regulations of the profession by which they are governed.

Counsel for Defendant refers to Prosser, Harper and the Restatement of Torts (R. 19-20) to note that "it is every invasion of a privacy interest that is actionable" and that "liability exists only if the Defendant's conduct was such that he should have realized that it would be offensive to the ordinary sensibilities."

We submit, however, that with the high professional duty Defendant was under and with the rules and regulations governing the broadcasting and publishing of telephone communications, Defendant is obligated to adhere to, and then to broadcast conversations of an unsuspecting individual without informing her of that fact is such conduct that Defendant is aware, or should be aware, that such intrusion into her private affairs is or would be offensive.

In the case of Froelich vs. Adair, 213 Kan. 357; 516

p. 2nd 993, the Court said:

"One who intentionally intrudes, physically or otherwise upon the solitude or seclusion of another or his private affairs or concerns is subject to liability to the other for invasion of his privacy if the intrusion would be highly offensive to a reasonable man. Neither publication nor malice is an essential element of the cause of action."

The lower court no doubt felt that the broadcasting of the conversation with Mrs. Jeppson over the air was not so offensive that it was an intrusion or invasion of privacy, but it appears to counsel that at the very least the question of whether or not the intrusion would be offensive to a reasonable man should be a question of fact for a jury after a development of all the facts, and it should not have been ruled on as a matter of law.

We submit, therefore, that the lower court erred in granting Defendants' motion to dismiss Plaintiffs' complaint on the grounds that the facts alleged failed to state a cause of action.



POINT II.

THE TRIAL COURT, IN GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT ERRED IN NOT HEARING THE FACTS AND ISSUES ON THE UTAH PENAL STATUTES SET FORTH IN PLAINTIFFS' SECOND CAUSE OF ACTION, AS WELL AS THE ISSUES RAISED IN THE THIRD CAUSE OF ACTION.

Plaintiffs' Second Cause of Action sets forth a violation by Defendant of the applicable Utah Penal Statutes, "offenses against privacy," and we refer particularly to Title 76-9-402, 76-9-405, and 76-9-406, Utah Code Annotated, Utah Session Laws of 1973, as amended.

Judge Conder did not refer, in his memorandum decision, to these statutes and we must conclude that he determined as a matter of law that they do not apply in this case. It is our contention that the statutes do apply and that there was a violation of the same by Defendant for which relief should have been granted.

Again, for purposes of this appeal, the facts set forth in Plaintiffs' complaint must be deemed as correct or admitted. The complaint sets forth the facts in paragraphs 5, 6, and 7 (R.3-4) to the effect that Defendant in contacting Plaintiffs in its "Dialing for Dollars" program was doing so for purposes of advertising or purposes of trade in their broadcasting.

business and used Plaintiffs' name without first obtaining plaintiffs' consent. Now, this comes directly within the statute 76-9-405, "abuse of personal identity." The statute reads as follows:

(1) A person is guilty of abuse of personal identity if, for the purpose of advertising any articles of merchandise for purposes of trade or for any other advertising purposes, he uses the name, picture, or portrait of any individual or uses the name or picture of any public institution of this state, the official title of any public officer of this state, or of any person who is living, without first having obtained the written consent of the person, or, if the person be a minor, the written consent of his parent or guardian, or, if the person is dead, without the written consent of his heirs or personal representatives.

Counsel for Defendant, in his memorandum (R-18), argues that the phrase, "for the purpose of advertising any articles of merchandise for purposes of trade or for any other advertising purposes," is limited to the advertisement of merchandise and the promotion of the sale of collateral items.

We submit that this limitation is a wrong interpretation of the statute. If it were limited to advertising articles of merchandise for purposes of trade only, it would be redundant to add the phrase "for any other advertising purposes," because

its already been said. The legislative intent has to be the use of a person's name, without his consent, for any advertising purposes, in addition to, "for purpose of advertising articles of merchandise in trade."

We believe the case of Donahue V. Warner Bros. Distributing Corp., 2 Ut 2d 256; 272 P. 2nd 177, interpreting the former Utah Statute, Section 76 - 4-8 U.C.A., where the phrase "for advertising purposes or for purpose of trade" was used does not restrict the advertisement to the sale of collateral items. Furthermore, if the new statute enacted as 76 - 9 - 405 were meant to restrict the advertisement to the promotion or sale of collateral items, what would there be in adding the phrase "or for any other advertising purposes"?

Furthermore, it cannot be assumed at this stage of proceeding, that Defendant in conducting its "Dialing for Dollars" program did not promote the sale of merchandise collateral items, and the setting forth of the advertising and trade aspect in Plaintiffs' complaint brings the matter squarely within the statute, as Plaintiffs' name, number, conversation was used without their consent in the further promotion, and advertising aspect of Defendants' own business.

Section 76-9-406 of the Code sets forth the injunctive relief and damages in these privacy offenses:

"Any person, or the heirs of any deceased person, who has been injured by a violation of this part may bring an action against the person who committed the violation. If in the action the court finds the defendant is violating or has violated any of the provisions of this part, it shall enjoin the defendant from a continuance thereof. It shall not be necessary that actual damages to the plaintiffs be alleged or proved, but if damages are alleged and proved, the plaintiff in the action shall be entitled to recover from the defendant the actual damages, if any, sustained in addition to injunctive relief. A finding that the defendant is in violation of this part shall entitle the plaintiff to reasonable attorney's fees. Exemplary damages may be awarded where the violation is found to be malicious."

Plaintiffs seek relief under the above statute for the violation and abuse by Defendant of their personal identity, and the lower court was in error in not hearing evidence as to damages and reasonable attorney's fees and in not granting injunctive relief.

Counsel for Plaintiffs also feel that Defendant in this case, has violated Subsection (a) and (c) of Title 76-9-402 of the Code, which states:

"(1) A person is guilty of privacy violation if, except as authorized by law, he:

(a) Trespasses on property with intent to subject anyone to eavesdropping or other surveillance in a private place; or

(c) Installs or uses outside of a private place any device for hearing, recording, amplifying, or broadcasting sounds originating in the place which would not ordinarily be audible or comprehensible outside, without the consent of the person or persons entitled to privacy there."

When Defendant broadcast the conversation of Plaintiff over the air without telling Mrs. Jeppson and in violation of the F.C.C. Regulations, it was in fact an eavesdropping and a trespass into her private living room of a conversation which was not meant for public dissemination.

Title 76-9-401 (2) of the Code covers the definition of 'eavesdropping,' It states:

"(2) 'Eavesdrop' means to overhear, record, amplify or transmit any part of a wire or oral communication of others without the consent of at least one party thereto by means of any electronic, mechanical, or other device."

Also, when Defendant broadcast the conversation of Mrs. Jeppson, originating in her home, by means of the use of broadcasting facilities, without her consent it appears to counsel that this, too, comes squarely within the privacy violation of Title 76-9-402 (c) of the statute above referred to.

Now, it is true, as Judge Conder mentions (R-22), this is an unusual and interesting case, and we can find no precedence under the fact situation, but had there been a brutal beating, attack or other type disaster result from this conversation being broadcast, there is little doubt to counsel's mind that the court would have found a case for privacy violation. The principle, however, is the same, and the privacy of Plaintiffs' home and conversation there was violated in the same manner as though a recording device had been placed in the home and then later broadcast publicly.

As to Plaintiffs' third cause of action set forth in the complaint, the lower court did not comment on and apparently overlooked its possible significance.

The third cause of action sets forth a claim for severe emotional and mental distress and suffering and shock and fright as a result of Defendants' wrongful act. This is a separate claim from the law of privacy or the statutes on privacy.

The general law is set forth in 38 Am Jur 2nd Pages 3-72, under fright, shock and mental disturbance, and the complaint at least sets forth a cause of action on this theory.

The lower court has, therefore, erred in not hearing the facts and issues involved in Plaintiffs' second and third causes of action set forth in the complaint.

#### CONCLUSION

The Plaintiffs' complaint adequately sets forth facts sufficient to state a cause of action involving the right of privacy, both under the civil law and the Utah privacy statutes, as well as a case under the theory of fright, shock and mental disturbance, and the order of dismissal granted by the lower court should be reversed and the case remanded for a full hearing.

DATED THIS 16th day of September 1977.

Respectfully Submitted,

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CERTIFICATE OF MAILING

I hereby certify that on the 16th day of September 1977, two true and correct copies of the foregoing Brief for Appellant were mailed, postage prepaid to Mr. Ray R. Clark, Attorney for Respondent, 900 Kearns Building, Salt Lake City, Utah, 84101.

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