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IN THE SUPREME COURT OF THE

STATE OF UTAH

BRUCE C. JEPPSON and JEAN W. JEPPSON, his wife, Plaintiffs and Appellants,	:	
vs.	:	Case No. 15318
UNITED TELEVISION, INC., aka KTVX T.V. CHANNEL 4, Defendant and Respondent.	:	

RESPONDENT'S BRIEF

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

OCT 21 1977

Clerk, Supreme Court, Utah

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TABLE OF CONTENTS

	Page
NATURE OF CASE	1
DISPOSITION IN THE LOWER COURT	2
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	4
CONCLUSION	20

TABLE OF CASES

Donahue vs. Warner Bros. Pictures Distributing Corp., 2 Ut.2d 256, 272 P.2d 177 . .	7-8, 9
Froelich vs. Adair, (Kan.), 516 P.2d 993	16-18
Rhodes vs. Sperry & Hutchinson & Co., 193 N.Y. 223, 85 N.E. 1097	8
Williams vs. KCMO Broadcasting Division--Meredith Corporation, (Mo.App.), 472 S.W.2d 1	15

TEXTS CITED

38 Am.Jur.2d, pp. 3-72	18-19
Harper and James, The Law of Torts, Section 9.5, pp. 677-678	14
Harper and James, The Law of Torts, Section 9.7, p. 691	14
Prosser on Torts, 4th Ed., pp. 802-803	5-6

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Prosser on Torts, 4th Ed., p. 811 13

Restatement of Torts, Section 867, Comment d . . 14

Restatement of Torts, Tentative Draft No. 13,
Section 652B 14, 15

STATUTES CITED

Section 76-4-8, U.C.A. 1953 . . . . 6, 9, 10

Section 76-4-9, U.C.A. 1953 . . . . 6, 7, 9, [illegible]

Section 76-9-402, U.C.A. 1953 . . . . 9, 10

Section 76-9-403, U.C.A. 1953 11

Section 76-9-405, U.C.A. 1953 11

Section 76-9-406, U.C.A. 1953 . . . . 10, 12

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Defendant and Respondent.	:	

RESPONDENT'S BRIEF

NATURE OF CASE

This is an action by plaintiffs for alleged invasion of their right of privacy arising out of a telecast wherein an announcer from the defendant station called plaintiff Jean W. Jeppson on the program called "Dialing for Dollars," and a telecast of the telephone conversation was made.

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DISPOSITION IN LOWER COURT

Defendant filed a motion to dismiss plaintiffs' complaint on the grounds that it did not state a claim upon which relief could be granted. Written memoranda were filed by the respective parties and after oral argument, and after taking the matter under advisement, the Honorable Dean E. Conder granted defendant's motion and dismissed plaintiffs' complaint.

RELIEF SOUGHT ON APPEAL

Defendant seeks an affirmance of the judgment below.

STATEMENT OF FACTS

The charging part of plaintiffs' complaint is set forth in paragraphs 3, 4, 5 and 10. For the convenience of the Court, they are set forth herewith:

> "3. On or about March 2, 1977, at about 3:00 O'clock P.M. of said day, Defendant, through one of its agents telephoned the residence of Plaintiffs. Plaintiff, Jean W. Jeppson answered the phone and a man's voice was heard and asked if this was Mrs. Jeppson, or the Jeppson residence and Mrs. Jean Jeppson responded that it was. The the man stated to the effect, 'this is Dialing for Dollars, do you have your T.V. set on?', to which Jean Jeppson stated, 'no I don't.' Then the agent for Defendant said, 'Oh, that is unfortunate (with considerable emphasis) because you could have won $50.00.' Then Mrs. Jeppson said, 'well now I'll

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tell you, I'd rather have peace in my home than all that garbage on television, even for $50.00.' Then the man laughed to some extent. Mrs. Jeppson then said, 'Thank you for calling.' Then she hung up the phone.

"Within about one minute from the time Plaintiff hung up the phone the phone began to ring and continued to do so with calls for the rest of the afternoon for several hours from people throughout the state of Utah, all of which calls referred to the conversation that had taken place between Plaintiff, Jean W. Jeppson and the agent for Defendant. That said callers to Plaintiff were rude and abusive, obscene, threatening and harassing to Plaintiffs.

"4. That more than a dozen abusive and harassing calls came to Plaintiffś in their home as a direct result of the conversation that had taken place between Mrs. Jeppson and the agent for the Defendant. In addition there have been numerous comments by friends and others that discovered, or learned, or heard of the conversation that has been embarassing and humiliating and caused Plaintiffs considerable outrage, mental suffering, shame and is an attack on their reputation and character. That in addition many of the crank calls that came to Plaintiffs on this matter have caused considerable unrest and fear, shock, and fright to Plaintiffs for their safety and well-being.

"5. That Defendant through it's agent gave out over the air and over television the telephone number and name of Plaintiffs and furthermore carried out the conversation with Plaintiff, Jean W. Jeppson, over the air and on television without first informing Plaintiff that the same was going over television and throughout the state of Utah on the air."

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"10. That Defendant in making its telephone call on television and over the air in its program, Dialing for Dollars, with Plaintiff was doing so for purposes of advertising or purp of trade in their [sic] broadcasting business."

Plaintiffs brought their action in three counts. (R. 2-6) The first cause of action was based upon a common law theory of invasion of right of privacy. (R. 2-3) The second cause of action was based upon the Utah statutes dealing with the same subject. (R. 4) The third cause of action appears to be nothing but a separate claim for punitive damages arising out of the same acts as set forth in the first and second causes of action. (R. 4-5)

Defendant attacked plaintiffs' complaint by a motion to dismiss for failure to state a claim upon which relief could be granted. (R. 9-10) Both parties submitted written memoranda in support of their respective positions. (R. 12-29) After oral argument to the court, the motion was taken under advisement, and subsequently granted. (R. 30-3[illegible]) Plaintiffs did not seek leave to amend, but stood upon the allegations of their complaint. This appeal followed. (R. 33)

ARGUMENT

Although plaintiffs have made separate arguments under the theories of invasion of common law and statutory

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right of privacy, we believe that the two points can best be considered together.

An evaluation of the merits of plaintiffs' claim requires a review of the historical development of the tort known as invasion of the right of privacy. The initial history is well traced in Prosser on Torts, 4th Ed., commencing at page 802. The author there said:

> ". . . Prior to the year 1890, no English or American court ever had granted relief expressly based upon the invasion of such a right, although there were cases which in retrospect seem to have been groping in that direction, and Judge Cooley had coined the phrase, 'the right to be let alone.' In 1890 there appeared in the Harvard Law Review a famous article, by Samuel D. Warren and Louis D. Brandeis, which reviewed a number of cases in which relief had been afforded on the basis of defamation, invasion of some property right, or breach of confidence or an implied contract, and concluded that they were in reality based upon a broader principle which was entitled to separate recognition. In support of their argument they contended that the growing excesses of the press made a remedy upon such a distinct ground essential to the protection of private individuals against the unjustifiable infliction of mental pain and distress. . . ."

and on the next page the author continues:

> "The first state really to come to grips with the doctrine thus advanced was New York. After cases in its lower courts had accepted the existence of the right of privacy proposed by Warren and Brandeis, it fell into the hostile hands of the Court of Appeals in Robertson v. Rochester Folding-Box Company, where the defendant made use of the

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picture of a pulchritudinous young lady to advertise its flour without her consent. In a four-to-three decision, with a vigorous dissent, the court flatly denied the existence of any right to protection against such conduct, because of the lack of precedent, the purely mental character of the injury, the 'vast amount of litigation' which might be expected to follow, the difficulty of drawing a distinction between public and private characters, and the fear of undue restriction of liberty of speech and freedom of the press.

". . .In consequence the next New York legislature enacted a statute making it both a misdemeanor and a tort to make use of the name, portrait or picture of any person for 'advertising purposes or for the purposes of trade' without his written consent. This act remains the law of New York, where there have been upwards of a hundred decisions dealing with it. Except as the statute itself limits the extent of the right, the New York decisions are quite consistent with the common law as it has been worked out in other states, and they are customarily cited in privacy cases throughout the country. . . ."

One of the first states to follow New York, was Utah which enacted a statute similar to the New York Act, Sec. 76-4-8 and Sec. 76-4-9, U.C.A., 1953. Those statutes provided as follows:

Sec. 76-4-8. "Any person who uses for advertising purposes or for purposes of trade, or upon any postal card, the name, portrait or picture of any person, if such person is living, without first having obtained the written consent of such person, or if a minor, of his parent or guardian, or, if such person is dead, without the written consent of his heirs or personal representatives is guilty of a misdemeanor."

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> Sec. 76-4-9: "Any living person, or the heirs or personal representatives of any deceased person, whose name, portrait or picture is used within this state for advertising purposes or for purposes of trade, without the written consent first obtained as provided in the next preceding section may maintain an action against such person so using his name, picture or portrait to prevent and restrain the use thereof; and may in the same action recover damages for any injuries sustained by reason of such use, and, if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is declared to be unlawful, the jury or court, if tried without a jury, in its discretion, may award exemplary damages."

This Court construed the above-quoted statutes in Donahue vs. Warner Bros. Pictures Distributing Corp., 2 Ut.2d 256, 272 P.2d 177. That case involved a movie which contained a fictionalized account of the life of plaintiffs' decedent. Plaintiffs sued defendant on the theory that the moving picture was a commercial venture and that, therefore, the use of decedent's life history without consent of his heirs was a violation of the statute. The conflicting theories upon which the case was submitted to this court were set forth in the opinion as follows:

> "It is the plaintiff's theory that the use of a person's name or picture in any manner in which the profit motive is present comes within the meaning of the phrase 'for purposes of trade' as used in our statute and is proscribed by it; whereas defendant contends to the contrary that such a broad application of the statute, which

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> would interdict the publication of person's name or the portrayal of his character in news reports or any media of information which was operated for profit, such as newspapers, radio and television broadcasts, magazine articles, biographical sketches, historical accounts, novels, plays, etc., would so offend against the constitutional guarantees of freedom of speech and of the press that the statute if so interpreted would be unconstitutional. Defendants therefore argue that the statute was only intended to apply to actual advertising or the promotion of sales of a collateral commodity, which interpretation would obviate the difficulties as to its constitutionality. We are confronted with the question as to which of these contentions is correct. . . ."

This court then reviewed the history of actions for invasions of right of privacy essentially as set forth in our quotation from Prosser. The court then quoted from the case of Rhodes vs. Sperry & Hutchinson & Co., 193 N.Y. 223, 85 N.E. 1097, as follows:

> ". . .Such is the character of the right of privacy preserved by legislation protecting persons against the unauthorized use of their names or portraits in the form of advertisement or trade notices. It is a recognition by the lawmaking power of the very general sentiment which prevailed throughout the community against permitting advertisers to promote the sale of their wares by this method, regardless of the wishes of the persons thereby affected." (Emphasis added.)

That case, construing the New York statute, had been decided prior to the time that Utah adopted the New

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York act and therefore, assumedly adopted the act with the construction placed upon it by the New York court. This court finally concluded as follows:

> "This leaves us two alternatives: First to give it a strict and literal application, to prohibit the use of a name, portrait or picture in any manner whatsoever, whether factual or fictional, in connection with any publication where a profit motive is present; or Second, the interpretation contended for by defendants, that the statute was intended only to prohibit the use of names, portraits or pictures in connection with advertising or the promotion of the sale of collateral items."

In holding for the contention advanced by the defendant, this court said:

> ". . .On the other hand, social considerations, the legislative history of our statute, and its context considered in the light of rules of statutory construction, all point persuasively to the conclusion that the interpretation contended for by the defendant is that which comports with the legislative intent."

Since there is no allegation or claim that defendant's telecast was intended to advertise or promote "the sale of collateral items," it appears clear that under the law as it existed up to 1973, plaintiffs would have had no right of action under either the common law, or the statutes of this state. In that year, Sections 76-4-8 and 9 were repealed as part of a general revamp of the Utah Penal Code. They were

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replaced by Sections 76-9-402 to 406 inclusive. Although plaintiffs have referred to Sections 76-4-8 and 9 in their complaint, they apparently make no claim for them here, since they are not cited in their brief, and were repealed before the date of the telecast in question. The issue, therefore, is whether the newly enacted statutes 76-9-402, 405 and 406 change the law as it existed in 1973, and create a cause of action which did not previously exist.

Section 76-9-402 provides, insofar as material here, as follows:

> "76-9-402. Privacy violation.--(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.
>
> (2) Privacy violation is a class B misdemeanor."

A reading of this statute clearly indicates that it has no application to the facts of this case, as alleged

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in plaintiffs' complaint. There is no claim here that the defendant did anything more than call the plaintiff Jean Jeppson on her telephone and broadcast the conversation which took place. Certainly defendant did not trespass on plaintiffs' property. Subpart (c) clearly refers to a hidden microphone or other similar "bugging" device, and not to a telephone with a publicly listed number.

Section 76-9-403 is entitled "Communication abuse" and has to do with the interception of telephone and telegraph messages, letters, or other means of private communication or divulging the content of such communications. It clearly has no application here.

Section 76-9-405 provides as follows:

> "Abuse of personal identity.--(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.
>
> (2) Abuse of personal identity is a class B misdemeanor." (Emphasis added.)

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This is the Section which most closely resembles former Section 76-4-8. By its terms it is clearly limited to abuse of personal identity "for the purpose of advertising any articles of merchandise for purposes of trade or for any other advertising purposes. . . ." The language of the statute appears to embody fully the holding of this court in Donahue, that is, that to be actionable under the statute the broadcast must advertise or promote the sale of "collateral items." There is no allegation or even suggestion in plaintiffs' complaint that any merchandise was being advertised in connection with the broadcast of which plaintiffs complain.

Section 76-9-406 merely provides a remedy for offenses committed under the previously discussed statutes. The second cause of action fails to state a claim for an invasion of the plaintiffs' right of privacy under the Utah statutes.

We turn then to the question of whether plaintiffs have stated a claim apart from statute for a common law tort known as invasion of the right of privacy. As noted earlier in this brief, there was no common law right of action for invasion of the right of privacy prior to 1900. The right was first recognized by statute in New York. Utah and

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Virginia followed with their own statutory enactments. In the period of the thirties, several states recognized a right of action for invasion of the right of privacy. Utah, so far as our research reveals, has never recognized the existence of such a right, other than as provided by statute. As pointed out by Prosser, there have been more than one hundred case decisions in New York interpreting its statute. Those cases have been accepted by other states as consistent with what the common law should be in the absence of statute. In short, there is no right of action for invasion of the right of privacy broader than that provided by the state statutes.

It must be further observed that it is not the publication of any private matter which is actionable. The rule in this regard is well stated by Prosser at page 811, as follows:

> "The final limitation is that the matter made public must be one which would be offensive and objectionable to a reasonable man of ordinary sensibilities. The law is not for the protection of the hypersensitive, and all of us must, to some reasonable extent, lead lives exposed to the public gaze. Anyone who is not a hermit must expect the more or less casual observation of his neighbors and the passing public as to what he is and does, and some reporting of his daily activities. . . ." (Emphasis added.)

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To the same effect is Harper and James on The Law of Torts Section 9.5, pages 677 and 678:

> ". . .It is not every invasion of a privacy interest that is actionable, of course. The mere fact of living in a social order implies certain annoying contacts with others which even the least fastidious member of the community may on occasion resent. Nevertheless, such experiences are the price of social intercourse. It is only when these annoyances become unreasonable by offending against prevailing standards of decency that the law takes cognizance of them. . . ." (Emphasis added.)

and at page 691, Section 9.7:

> ". . .All will admit that some intrusions into one's personal life are so indecent and outrageous and calculated to cause such excruciating mental pain to all but the most callous that it would be a reproach to the law not to allow redress. On the other hand, it is equally clear that society cannot protect the neurotically thin-skinned against those trivial invasions of privacy which the normal person suffers with equanimity. The mores and the law must distinguish the one from the other." (Emphasis added.)

Also to the same effect is Restatement of Torts, Section 8[illegible] Comment d:

> ". . .On the other hand, liability exists only if the defendant's conduct was such that he should have realized that it would be offensive to persons of ordinary sensibilities. It is only where the intrusion has gone beyond the limits of decency that liability accrues. . . ." (Emphasis added.)

Tentative Draft No. 13 of the Restatement of Torts Sec. 652B provides as follows:

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"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." (Emphasis added.)

As illustrative of a case supportive of this view, see Williams v. KCMO Broadcasting Division--Meredith Corporation, (Mo.App.), 472 S.W.2d 1.

There was nothing indecent, vulgar, obscene, scandalous, threatening, terrifying, or even of questionable taste in the telephone contact which plaintiffs allege defendant made with plaintiff Jean Jeppson, as set forth in paragraph 3 of the complaint. The call was, at worst, a mild annoyance of the kind commonly experienced daily by nearly everyone having a telephone. Telephone surveys, telephone sales solicitations, telephone solicitations for charitable contributions, and even wrong numbers are annoying and irritating, but are of the type that the possessors of telephones must expect to experience.

The real gravamen of plaintiffs' complaint appears to be not the momentary interruption in plaintiff's day by the telephone call initiated by defendant, but by a series of telephone calls which plaintiff allegedly received thereafter. This defendant, of course, cannot be responsible for

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the reactions of others to a telephone call which was innocently initiated in the reasonable expectation that plaintiff would be pleased to be the potential lucky recipient of a fifty-dollar prize. Whatever animosity and adverse criticism plaintiffs received were apparently as the result of Mrs. Jeppson's own acid comments to the broadcaster, and not anything stated by the defendant's announcer.

Plaintiffs place great reliance on the provisions of FCC Regulation 73.1206. This regulation was not plead in plaintiffs' complaint. Assuming, however, that the court may take judicial notice of it, we submit that this is a regulation designed to direct and control the conduct of radio business--not to create private rights of action for individuals. The apparent purpose of the regulation is to prevent the inadvertent publication of objectionable material over the airways by a person not being aware that he is on the air. The right of action for invasion of right of privacy depends upon local statutory and common law--not federal regulations.

Plaintiffs also rely strongly in the case of Froelich v. Adair, (Kan.), 516 P.2d 993. That case is wholly different on its facts, and therefore, of little persuasive

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value. However, the court there recognized the rule which we have advocated here. In its syllabus No. 2 the court said:

> "2. One who intentionially 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, <u>if the intrusion would be highly offensive to a reasonable man</u>." (Emphasis added.)

See also the dissenting opinion of Justice Fromme, who said:

> ". . .The admitted facts of this case giving rise to the claim of intrusion of seclusion bring the case within the recognized limitation that no action exists unless the wrongful intrusion is such as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities. In ¶2 of the syllabus the court holds:
>
>> "'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, <u>if the intrusion would be highly offensive to a reasonable man</u>.' [Emphasis added.]
>
> "The last phrase of this syllabus delimits such an action. Intrusion of seclusion to be actionable must be highly offensive to a reasonable man. The common link uniting all of the cases which recognize the cause of action is the unwarranted, obtrusive and objectionable intrusion into the privacy of another. In this case the appellant admits (appellant's brief page 10) it is not the embarrassment potential of the information obtained, it is the intrusion

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itself which the court should analyze to see if one's seclusion has been intruded upon. The character of the intrusion should determine liabilitity or non-liability. The degree of the mental anguish does not determine liability, only the amount of damages.

"No court has said that every invasion of itself into another person's private quarters constitutes an actionable invasion of privacy. It is only when the invasion is so outrageous that the traditional remedies of trespass, nuisance, intentional infliction of mental distress, etc., will not adequately compensate a plaintiff for the insult to his individual dignity that an invasion of privacy action will lie. The intrusion itself must be patently offensive before an invasion of privacy action will lie. The totality of the intruder's conduct must be extreme, intentional and outrageous; the conduct must be so offensive that it would cause mental harm or anguish in a person of ordinary sensibilities. An invasion of privacy action should not be utilized to avoid the more stringent requirements of other torts designated to compensate an individual for physical or mental injury."

In support of their third count plaintiffs rely o[n] the article on Fright, Shock, Etc. in 38 Am.Jur.2d, pp. 3-[...] This treatise demonstrates the lack of merit to plaintiffs claim. Thus at pages 3-5, ¶1, the rule is announced as follows:

"Although some forms of mental or emotional disturbances are recognized as real harm or damage, the well-established general rule is that liability may not be predicated upon the negligence of an actor

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where the resulting damage is merely a mental or emotional disturbance. This general rule is applied where the mental or emotional disturbance is not accompanied by a bodily impact, and is not attended or followed by an injury to the person or body of the plaintiff, and where there is no other legal injury or cause of action, or other element of recoverable damages upon which a cause of action might be predicated. In such cases, the rule of damnum absque injuria has been said to prevail."

And at pages 6-8, ¶4 it is stated:

"The almost universal view is that an actor is liable for a severe mental disturbance which he causes intentionally, or where the wrongful act or omission is wilful, wanton, or malicious, as distinguished from a wrongful act constituting negligence merely. Additional indirect authority in support of the view that there is liability for an intentional wrong which causes mental disturbance is to be found in the cases which state that there can be no recovery for a mental or emotional disturbance in the absence of any element of wilfulness, wantonness, malice, insult, abuse, or inhumanity.

"Some authorities, in defining the intentional tort, impose certain limitations or prescribe certain elements, such as that the actor must be guilty of 'extreme and outrageous conduct,' and that the conduct must cause 'severe emotional distress'." (Emphasis added.)

Clearly defendant's motives were innocent. Far from desiring to cause plaintiffs any mental harm, defendant was only offering to them an opportunity for financial reward in a game which most persons would regard as fun.

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CONCLUSION

The allegations of plaintiffs' complaint wholly fail to state a claim upon which relief can be granted under the law of this state. It follows, therefore, that the judgment of the court below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Mailed a copy of the foregoing Respondent's Brief to: Gaylen S. Young, Jr., attorney for Plaintiff and Appel 2188 Highland Drive, Salt Lake City, Utah 84106, this ___ day of October, 1977.

Secretary

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