1981

Woodey B. Searle and Vonetta Searle, Randy B. Searle and Vickie Searle, Rance W. Searle and Gail Searle, Rhett A. Searle and Tony Searle

Utah Supreme Court

IN THE SUPREME COURT

WOODEY B. SEARLE and
SEARLE, RANDY B. SEARLE
VICKIE SEARLE, RANDY
and GAIL SEARLE,
SEARLE and

Plaintiffs

LONNIE JOHN
HUMANE SOCIETY

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IN THE SUPREME COURT OF THE STATE OF UTAH

WOODEY B. SEARLE and VONETTA SEARLE, RANDY B. SEARLE and VICKIE SEARLE, RANCE W. SEARLE and GAIL SEARLE, RHETT A. SEARLE and TONY SEARLE, Plaintiffs-Appellants, v. LONNIE JOHNSON and the HUMANE SOCIETY OF UTAH, Defendants-Respondents.	No. 17349

BRIEF OF APPELLANTS

STATEMENT AND NATURE OF CASE

Appellants brought this action seeking compensation for damages caused to Appellants' businesses by the intentional, false and malicious statements and actions of the Defendants when the Defendants launched a campaign to keep tourists from patronizing businesses in Vernal, Utah, in an unlawful attempt to force certain actions by local government officials.

DISPOSITION OF THE LOWER COURT

The District Court ruled, before trial, by way of summary judgment, that Defendants' deliberate efforts to destroy Plaintiffs' businesses were absolutely privileged

because of the right to petition protection of the First Amendment to the Constitution of the United States, in that such attacks were motivated by Defendants' hope that Plaintiffs and others so attacked would be forced to demand certain concessions desired by Defendants of the public officials of the community where Plaintiffs reside.

RELIEF SOUGHT ON APPEAL

Appellants seek to have this Court reverse the summary judgment of the trial court and remand the case for trial.

STATEMENT OF FACTS

In 1975 and 1976, Defendant The Humane Society of Utah of Salt Lake City, an affiliate of the national organization, and its director, Defendant Lonnie Johnson, a resident of Salt Lake City, attempted to convince the elected officials in Uintah County, Utah and Vernal City to make extensive changes in the animal control facility owned by those entities. Defendants also approached the Uintah County Attorney and the Attorney General of the State of Utah seeking criminal prosecution of the political entities, the Vernal City Councilmen and the Uintah County Commissioners. (R. 132-137 with attached exhibits) The political entities informed the Defendants that all the changes requested would not be made at that particular time, and that part of the reasons given for the desired changes were based on false information. The Uintah County Attorney and the

Attorney General's office found no violation of the laws of the State of Utah and refused to bring any legal action. When the Defendants failed to obtain the changes they desired in the animal control facility, the Defendants expressly and openly set out to destroy selected businesses in Vernal by keeping tourists from visiting Eastern Utah, in particular, Dinosaurland in Vernal, Utah. The Defendants' theory was that if enough economic damage could be caused to certain businesses, the owners of those businesses would be forced to join with Defendants in extracting from City and County government officials concessions which the Defendants had been unable to obtain through the usual processes of influencing government by reason or persuasion and through court action. (R. 191-192, 228) The Defendants launched a campaign on radio and television as well as newspapers and magazines using both local and national media. A large billboard was also placed along the freeway in Salt Lake City, Utah. (R. 107, 132-136) Defendants' target was tourist businesses and their campaign embodied statements which Defendants knew were untrue but which would attract great attention and result in national recognition for Defendants. (R. 132, 228, 230)

The Plaintiffs, ranchers in Uintah County, own a travel agency, restaurant, motel and gift shop in Vernal, Utah. The Plaintiffs are not involved in or connected with

the subject of the controversy between the Defendants and City and County officials, nor do they have any special relationship or influence with those officials. Plaintiffs do spend money advertising in the same markets Defendants chose to enter with its false and misleading campaign against Plaintiffs. As a result of the Defendants' actions, the Plaintiffs' businesses suffered a large reduction in tourist trade and income starting in 1976. To stop the actions taken by Defendants, the Plaintiffs filed this action seeking injunctive relief and to recover those losses. (R. 6-10) Soon after the complaint was filed, the Defendants, realizing the wrongfulness of their actions, removed the billboard and ceased their media attack. Plaintiffs now seek to be compensated for their losses.

The Plaintiffs' complaint includes the following allegations:

> Paragraph No. 8, Third Amended Complaint:
>
> Defendants, Lonnie Johnson and The Humane Society of Utah, have maliciously and unlawfully published false and misleading statements about and concerning Vernal, Utah, Uintah County, Utah, and Dinosaurland in eastern Utah, for the purpose and with the intent that such adverse publicity will keep tourists and other persons away from Vernal, Utah, and injure Plaintiffs' tourist business and the tourist business of other persons in Dinosaurland.
>
> Paragraph No. 9, Third Amended Complaint:
>
> The malicious, false and misleading statements published by the Defendants included a campaign conducted by the Defendants commencing in the

month of February, 1976, wherein the Defendants intentionally attempted to dissuade tourists and other persons from traveling to Dinosaurland where such persons would use the tourist facilities and services operated by Plaintiffs.

Paragraph No. 13, Third Amended Complaint:

Defendants, by publication of the statements referred to above and their conducting the above-referred to campaign to keep tourists out of Dinosaurland, have without justification intentionally inflicted harm to Plaintiffs' businesses.

Paragraph No. 14, Third Amended Complaint:

The acts performed by the Defendants constitute unjustified intentional infliction of harm to Plaintiffs' businesses, interference with prospective advantage in Plaintiffs' businesses, injurious falsehood affecting Plaintiffs' businesses, interference with patronage of Plaintiffs' businesses and unlawful restraint of trade, and Plaintiffs are entitled to recover for the damages caused to them thereby.

Paragraph No. 16, Third Amended Complaint:

Defendants' statements, actions and motives are willful, malicious, intentional and false.

Paragraph No. 17, Third Amended Complaint:

The statements made by Defendants were made by Defendants knowing said statements were false or in reckless disregard of the truth. (R. 465)

Upon the filing of Plaintiffs' complaint, Defendants immediately removed the case from the Fourth District Court of Utah to the Federal District Court for Utah. One of the arguments made by Defendants in support of the removal was

that a state court injunction and damages were being sought "for conduct fully protected by the First Amendment to the United States Constitution." (R. 25, 69) Plaintiffs moved the Federal District Court to remand the case to the Fourth Judicial District Court of Utah, arguing that the acts performed by Defendants were common torts and that only after the Utah courts define those torts and prescribe their elements will it be known whether a federal or Constitutional issue exists. Judge Willis W. Ritter remanded the case to the Utah District Court and ordered that:

> this case was improperly removed to this Court in that the complaint herein does not present a claim or right arising under the Constitution, treaties or laws of the United States. (R. 61, 63)

The Defendants then filed an action for declaratory and injunctive relief in the United States District Court for the District of Utah, asserting that this action in the State Court should be enjoined since the acts of Defendants complained of in Plaintiffs' complaint were privileged under the First Amendment. On September 6, 1976, Judge Ritter dismissed that action on the pleadings, once again holding that the complaint alleged a common law tort. (R. 205)

Defendants then filed a motion for summary judgment in this case claiming the actions of Defendants complained about were privileged under the First Amendment. Both parties briefed the issues fully and on December 21, 1977,

Judge Allen B. Sorensen denied that motion. (R. 245)

The case having been set for trial before the Honorable David Sam, the Defendants, once again by a motion for summary judgment, raised the defense that their actions were absolutely privileged by the First Amendment right to petition. On July 29, 1980, Judge Sam granted the Defendants' motion for summary judgment ruling that even if all the allegations in the Plaintiffs' complaint were considered to be true, the Defendants' actions were absolutely privileged by the First Amendment right to petition. (R. 1) (It should be noted that the trial judge signed two orders granting the motion for summary judgment. (R. 1, 4) The order prepared by Defendants' counsel (R.4) was prepared first and furnished to the Court. A telephone conference call was held and it was agreed by the Court and counsel that the order prepared by Plaintiffs' counsel (R.1) set forth more clearly the trial court's ruling and should be the order signed and filed by the judge. The trial judge erroneously signed and filed both orders granting Defendants' Motion For Summary Judgment.) It is from that summary judgment that Defendants appeal.

ARGUMENT

POINT I. PLAINTIFFS' COMPLAINT ALLEGES FACTS WHICH, WHEN PROVEN AT TRIAL, CONSTITUTE A CAUSE OF ACTION FOR INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE ENTITLING THEM TO COMPENSATION FOR THEIR DAMAGES.

It has long been recognized that every person has the right to engage in lawful business. Freedom of enterprise is one of the cornerstones of our democratic society. The protection of one's means of livelihood is just as important as the protection of the physical integrity of his personal property. The success or failure of a person's business often depends upon the reputation the business enjoys with potential customers. Thus, terms like reputation, good will and respect are very important and large amounts of money are spent to establish them. Good will is hard to come by and easy to destroy. See, Green, et al., Torts, 835, 866 (1968).

Because of the value of good will and the right to pursue a business free from unjustified interference, the common law has developed ways of protecting business interests. At a very early date, it was recognized that a party has a right to pursue a business free from unjustified interference. See, Garrett v. Taylor, 79 Eng. Rep. 485, involving threats of mayhem and vexatious suits against customers and workmen; and, Tarleton v. McGawley, 170 Eng. Rep. 153 (1793) where the defendant fired upon African natives with whom the plaintiff was about to trade. The

American courts slowly followed the English courts and began to recognize the right to be free from interference in economic dealings. The case of Evenson v. Spauling, 150 F. 517 (1907), is a good example. In that case, plaintiff had a wagon company and his salesmen would travel throughout the State of Washington selling wagons. Wherever the salesmen would go, they were followed by two or three of defendant's agents. When the salesmen engaged in conversations with potential customers, defendant's agents would interrupt and advise the customers not to buy, and to prevent trouble, many customers refused to buy. The court, in sustaining an injunction prohibiting defendant from following plaintiff's salesmen, said:

> While the appellees (plaintiffs) have no right to protection against competition, they have the right to protection against wanton and malicious interference and annoyance.

The case of Brennan v. United Hatters of North America, 65 A. 165 (1906), was one of the first cases to recognize liability for tortious interference with prospective economic advantage.

The New Jersey Supreme Court said:

> [I]n a civilized community which recognizes the right of private property among its institutions, the notion is intolerable that a man should be protected by the law in the enjoyment of property once it is acquired, but left unprotected by the law is his effort to acquire it...

It seems logical that as a state recognizes the right to be

free from interference with contracts entered into, the state also ought to give some protection for future contractual relations.

Today it is well recognized throughout the United States that interference with an individual's business is a compensable tort. Prosser refers to the tort as "intentional interference with prospective economic advantage." Prosser, Torts, §130 at 649 (4th Ed.). Harper & James calls the tort, "interference with reasonable economic expectations." Harper & James, Torts, §6.11 at 510 (1956). The Proposed Restatement of Torts 2d, §766(B) defines the tort as follows:

> §766(B) Intentional Interference with Prospective Contractual Relation.
>
> One who intentionally and improperly interferes with another's prospective contractual relation is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of:
>
> (a) inducing or otherwise causing a third person not to enter into or continue their prospective relation, or
>
> (b) preventing the other from acquiring or continuing the prospective relation.

Regardless of the name given to the tort, the courts and commentators generally agree that the elements of the tort are:

> (1) the present or probable future existence of a contract, business relations or business expectancy beneficial to the injured person;
>
> (2) knowledge of the contract, relations or ex-

pectancy on the part of the interferer;

(3) intentional interference which induces or causes a termination of the contract or foreclosure of the business relations or expectancy; and,

(4) resultant damages. Expanding Horizons in the Law of Torts - Tortious Interference, 23 Duke L. Rev. 341, 343 (1974).

While the Utah Supreme Court appears never to have directly faced the application of the doctrine of intentional interference with prospective economic advantage, there are three reasons why the Court should recognize the tort: (1) The same policy reasons that call for the protection of contract call for protection of the right to seek future contracts; (2) All of the Western States that have considered the problem have recognized the tort; and, (3) The Utah Supreme Court has indicated that it will recognize the tort.

There is dictum in two Utah cases that suggest the tort will be recognized. The first case is Soter v. Wasatch Development Corp., 21 Ut.2d 224, 443 P.2d 663 (1968). The case involved an allegation of interference with contract by defendant. The court said:

> In order to establish a right to recover on such a cause of action the plaintiffs would have to show that the defendants, without justification, by some wrongful or malicious act, interfered with the plaintiff's right of contract and that actual damages resulted. Id. at 664.

The second case was Gammon v. Federated Milk Producers Ass'n.,

Inc., 14 Ut.2d 291, 383 P.2d 402 (1965). In that case, plaintiff had a writing which, he had alleged, gave him exclusive right to transport all the milk certain farmers produced. Defendant persuaded the farmers to let him ship their milk at a lower rate. The trial court found that the plaintiff's agreement with the farmers was not an exclusive contract, but merely provided for payment to plaintiff in the event that the farmers used his services to deliver milk and entered a summary judgment on that basis. The Supreme Court remanded to determine if defendant had intentionally interfered with plaintiff's business. The court ordered the case submitted to:

> [T]he jury for determination of whether Federated, in urging its members who had converted to tank method to use only its transportation services, did so to further its legitimate business interests or had unjustifiably persuaded its members not to use Gammon's services so as to enable it to fix minimum prices for milk... Id. at 405-406.

Five of Utah's neighboring states that have considered the issue recognize the tort. In the case of Buckaloo v. Johnson, 537 P.2d 865 (Cal. 1975), the California Supreme Court said:

> The great weight of authority is that the tort of interference with contract is merely a species of the broader tort of interference with prospective economic advantage. (citations omitted) Thus, while the elements of the two actions are similar, the existence of a legally binding agreement is not a sine qua non to the maintenance of a suit based on the more inclusive wrong. Id. at 869.

The trial court granted defendant's motion for summary judgment based on the grounds that there was no contract. The Supreme Court reversed saying that the existence of a contract was not a prerequisite for the action.

The Oklahoma Supreme Court said in a case involving a dispute between two competing gas companies as to the quality of pipe used by one of the companies:

> [O]ne has the right to carry on and prosecute a lawful business in which he is engaged without unlawful molestation or unjustified interference from any person, and any malicious interference with such business is an unlawful act and an actionable wrong. Crystal Gas Co. v. Oklahoma Natural Gas Co., 529 P.2d 987, 989 (Ok. 1974).

In the case, the plaintiff failed to prove that the statements by the defendant were the proximate cause of the damages sustained by the plaintiff.

In Pre-Fit Door, Inc. v. Dor-Ways, Inc., 13 Ariz.App. 438, 477 P.2d 557 (1970), the Arizona Supreme Court said:

> The intentional and unjustified third party interference with valid contractual relations or business expectancies constitutes an actionable tort recognized in this State. (citations omitted) The tort has been crystalized and defined in Restatement of Torts §766 (followed by a quotation of the Restatement). Id. at 559.

The actual case dealt with a contract and the facts are not relevant to the present case.

The Oregon Supreme Court in Luisi v. Bank of Commerce, 449 P.2d 441 (Or. 1969), recognized the tort. In that case, Oscar Pollard and Ray Powell were partners in an automobile

dealership. Powell served notice that he wanted to terminate the business. Pollard agreed to buy him out. Plaintiff alleged that Pollard agreed to accept him as an equal partner in return for plaintiff providing the money to buy out Powell. Plaintiff claimed that the defendant bank interfered with the contract between himself and Pollard. The court said that there was no contract between plaintiff and Pollard, but:

> We do not mean to indicate that it is necessary, in all cases, that there actually be a contract in existence before a third party can be held responsible for interference. A third party can be held responsible for interference with a business interest even though the arrangement entered into does not rise to the dignity of a contract. See, 4 Restatement of Torts §766(b). Id. at 443.

The court, however, held that the plaintiff was limited to proving the existence of the contract because he had alleged interference with contract in his complaint.

In Scymanski v. Dufault, 80 Wash.2d 77, 491 P.2d 1050 (1972), Washington recognized the tort of intentional interference with prospective economic advantage.

The allegations of the Plaintiffs' Third Amended Complaint sets forth all the elements needed for a prima facie case of intentional interference with prospective economic advantage. Those allegations are further supported by the affidavits and discovery in the case. The Defendants have admitted that the Plaintiffs had a future prospective business relationship with tourists visiting the area and that

the Defendants intentionally interfered with that relationship. The Defendants, however, claim that even though their actions constituted all the elements of a prima facie case for intentional interference with prospective contract or economic advantage, that their actions were absolutely privileged under the First Amendment to the Constitution of the United States. The trial court, in agreeing with the Defendants, erred and the case should be returned to the District Court for a determination of the facts resulting in the tort and for a determination of whether justification or privilege exists in light of those facts.

POINT II. THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES DOES NOT PROVIDE AN ABSOLUTE PRIVILEGE TO COMMIT THE COMMON LAW TORT OF INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE AND, THEREFORE, THE CASE SHOULD BE REMANDED TO THE TRIAL COURT SO THAT THE TRIER OF FACT CAN DETERMINE, AFTER HEARING ALL OF THE EVIDENCE, WHETHER THE DEFENDANTS' ACTIONS WERE JUSTIFIED, PROPER OR PRIVILEGED.

A. This Court should set forth those elements which Defendants must establish to claim a First Amendment privilege and then remand the case to a jury for a consideration of the facts to determine whether the Defendants' actions were privileged.

It is elementary Constitutional law that while the First Amendment to the Constitution of the United States guarantees citizens certain of the most important rights known to man in a free society, there are certain actions which, although they may involve speech or efforts to influence government action, are not Constitutionally protected. Miller v. California, 413 U.S. 15 (1973); Brandenburg v. Ohio, 395 U.S. 444 (1969); Lehman v. Shaker Heights, 418 U.S. 298 (1974); Zacchinni v. Scrips-Howard Broadcasting, 433 U.S. 562 (1977); and, Time, Inc. v. Firestone, 424 U.S. 448 (1976). The Court has identified at least four categories of expression: commercial speech, Valentine v. Chrestgreen, 316 U.S. 52 (1944); libel, Gertz v. Welch, 418 U.S. 323 (1974); obscenity, Miller v. California, 413 U.S. 15 (1973); and, fighting words, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), which may be directly regulated by the State without necessarily contravening First Amendment guarantees. Also, such acts as kidnapping and the holding

of hostages for the purposes of influencing the actions of government are obviously not protected by the Constitution but actually criminal.

Unlike other areas of intentional torts such as injury to person or property or defamation, the branch of tort law dealing with unjustified, intentional interference with a prospective business relation has not developed a crystalized set of definite rules as to the existence or non-existence of privilege. See, Proposed Restatement of Torts 2d, §767, comment (b). Rather the law on this subject has traditionally been expressed in terms of whether the interference is improper rather than in terms of whether there is a specific privilege to act in a particular manner. The issue in each case is whether the interference is improper under the circumstances; whether upon a consideration of the relative significance of the factors involved, the conduct should be permitted without liability, despite the effect of harm to another. The decision depends upon a judgment and choice of values in each situation. See, Proposed Restatement of Torts 2d, §769 - §773. None of the previously identifiable situations, which have been found proper or justifiable, relate to the kind of activities engaged in by the Respondents in this action. The trial court in this case held that even if the Plaintiffs were able to prove the truthfulness of each of the allegations of their complaint at

trial, Defendants are entitled to judgment dismissing the complaint as a matter of law since Defendants' actions were absolutely privileged by the First Amendment to the Constitution of the United States. To hold the Defendants are immune under the First Amendment of the Constitution of the United States when called upon to respond for damages caused by untrue and malicious statements, confers an absolute privilege, regardless of the tortious nature of the activity.

The decision of the District Court below merely assumed without any analysis that the Defendants' actions were themselves an exercise of First Amendment rights. It is appropriate for the Court to decide what factors can constitute privileged conduct and then to submit the issue of whether the Defendants' conduct was privileged under the particular factual situation to the jury under proper instructions. It is not appropriate for the Court to decide as a matter of law what is privileged and whether the privilege exists in a given case where there are factual controversies. Unless it can be said that the First Amendment right of free speech guarantees Defendants an absolute right to intentionally and maliciously, by use of false and misleading statements, destroy Plaintiffs' businesses, the District Court erred in granting Defendants' motion for summary judgment and should be reversed.

B. Missouri v. N.O.W. did not establish a category of expression absolutely protected by the Constitution and the trial court erred in relying on Missouri v. N.O.W. to create an absolute privilege.

The trial court held that under the case of Missouri v. N.O.W., 620 F.2d 1301 (8th Cir. 1980), cert. denied, ___ U.S.___ (1980), the Defendants have an absolute privilege for their actions. Such a holding means that Defendants' actions were privileged even though they were intentional and malicious, and some of the statements made were false and made with an intent to cause injury to third party businesses which had no relationship with the political entity that the Defendants were trying to influence. The Court's reliance on Missouri v. N.O.W. for such a broad privilege is misplaced. This Court is not bound by the holding of Missouri v. N.O.W. and, even if it were, it is distinguishable, both legally and factually, from the present case. Furthermore, the ruling in Missouri v. N.O.W. did not purport to grant an absolute privilege and the holding of the District Court in this case goes further than the Missouri v. N.O.W. court.

The case of Missouri v. N.O.W. and the cases on which that decision is premised are anti-trust cases. They are not cases which involve typical facts involving the tort of intentional interference with prospective economic advantage as do the facts in the present case. As the 8th Circuit

Court of Appeals pointed out in Missouri v. N.O.W.:

> [T]he primary question with which we must deal is the applicability of the Sherman Act to a politically motivated but economically tooled boycott participated in and organized by non-competitors of those who suffer as a result of the boycott. Missouri v. N.O.W. at 1302.

The trial court and the appellate court in Missouri v. N.O.W. treated the case as an anti-trust case in determining whether the Sherman Act was applicable. Very little effort was expended by either court in considering the common law tort. The consideration that was given to the tort claim was premised on anti-trust law. The court in Missouri v. N.O.W. found that the boycott organized by N.O.W. was privileged because of the Noerr-Pennington doctrine. In Eastern Railroads President's Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), the United States Supreme Court held that the Sherman Act does not apply to activities which comprise the mere solicitation of government action with respect to passage and enforcement of laws. That decision was affirmed in United Mine Workers of America v. Pennington, 381 U.S. 657 (1965), when the court held that the First Amendment privilege existed even if the defendant's motive was to curtail competition. Both the Noerr and Pennington cases recognized that the First Amendment privilege was not absolute. In California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972), the court held that the

Noerr-Pennington First Amendment privilege was not absolute and that it could not be used as a means or pretext for achieving substantial evils or abusing the administrative and judicial processes.

The courts, while recognizing the great protection which must be given to the First Amendment rights, have never held that those rights are absolute and that a person has an absolute right to intentionally harm innocent parties or businesses in the exercise of those First Amendment rights. See, e.g., Miller v. California, 413 U.S. 15 (1973); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Hudgens v. NLRB, 424 U.S. 507 (1976); Zacchinni v. Scrips-Howard Broadcasting Co., 433 U.S. 562 (1977); Time, Inc. v. Firestone, 424 U.S. 448 (1976); Garnett Co., Inc. v. DePasqual, 443 U.S. 368 (1979); and, Gertz v. Welch, 418 U.S. 323 (1974). The trial court's holding that the Defendants' statements and actions were privileged even though they were false, malicious and done in an attempt to intentionally harm the Plaintiffs expanded the protection of the First Amendment rights further than any decision of the U. S. Supreme Court. The trial court's ruling appears to put no limitations on what a party can do, as long as he claims that his actions are politically motivated. The ruling would seem to legitimatize the actions of the nation of Iran in its holding of United

States' citizens as hostages in an attempt to influence the actions of the United States Government. The Defendants' actions, on a smaller scale, were very similar in that the Defendants attempted to place in hostage the local businesses, including the Plaintiffs, in an attempt to influence the actions of Vernal City and Uintah County. The First Amendment rights, though precious, were never intended to allow an individual to intentionally harm a person or his business on the premise that he was trying to achieve political changes.

Missouri v. N.O.W. is also factually distinguishable from the present case. In that case the plaintiff was a government entity whose political actions the defendant was trying to influence by boycott. In the present case, the Plaintiffs are businessmen involved in running a motel, cafe and gift shop, which businesses depend upon the tourist business for a sizeable portion of their income. The Plaintiffs are not officials of Vernal City or Uintah County and have no control over the political decisions made by either of those entities. The Defendants initiated a secondary boycott against the Plaintiffs intending to harm the businesses of the Plaintiffs and then claimed their actions were privileged. The claim of a First Amendment privilege in such a factual situation is not warranted. The Defendants have many lawful avenues open to them by which they could

petition the local government entities to seek desired changes in the dog pound. Instead of using those lawful methods, the Defendants intentionally harmed the Plaintiffs and other businesses which have no control over the political decisions made. To allow a First Amendment privilege in such a factual setting was surely not contemplated by the framers of the First Amendment nor has it been recognized by the courts.

The present case is further distinguishable from the Missouri case in that in Missouri, the government entity that the defendants were trying to influence was the State of Missouri, while the present case involves county and city governments. The law recognizes varying degrees of privilege depending on what level of government is involved. See, In Re Airport Car Rental Anti-trust Litigation, 474 F.Supp. 1072 (1979). (Cf. the distinction between public figures and private individuals in the defamation cases.) Furthermore, there is a vast difference between the changes the defendants in each case desired to have made. In the Missouri case, the defendants were attempting to have the State of Missouri and other states pass legislation ratifying an amendment to the Constitution of the United States, while in the present case the Defendants were attempting to punish local government officials because of past operations of an animal control facility. Grave doubts can be raised whether the activities engaged in by Defendants constitute exercise

of First Amendment rights and whether the actions sought to be extracted by Defendants were even political in nature. To allow an organization such as the Humane Society of Utah to cause intentional and malicious injury to businessmen such as the Plaintiffs, who have no control over political decisions, in an attempt by that organization and its directors to force its personal desires upon local political entities, is wrong. The courts have long recognized that it is wrong and have developed the common law tort of intentional interference with prospective economic advantage allowing the plaintiff to recover damages it incurred as a result of that wrong. The holding by the trial court that the Defendants' actions were absolutely privileged even though false, malicious and done with a wilful intent to harm the Plaintiffs, compounds the wrong the Plaintiffs have suffered. The abandoning of the common law tort which would rectify the wrong done to the Plaintiffs and the finding of such a broad privilege by the trial court was clearly erroneous and the case should be remanded for trial so that a jury can hear the facts and determine whether a privilege exists.

POINT III. THE TRIAL COURT ERRED WHEN IT SUMMARILY DISMISSED PLAINTIFFS' COMPLAINT WITHOUT ALLOWING PLAINTIFFS THE OPPORTUNITY TO PRESENT EVIDENCE AT TRIAL THAT DEFENDANTS' CAMPAIGN TO DESTROY PLAINTIFFS' BUSINESS CONSISTED OF FALSE AND MISLEADING STATEMENTS PUBLISHED INTENTIONALLY AND MALICIOUSLY AND WITHOUT LEGAL JUSTIFICATION.

The case is before the Court on appeal from a summary judgment granted by the trial court to the Defendants. A motion for summary judgment should be granted only when the pleadings, depositions, admissions, other discovery, and the affidavits show without dispute that the party seeking summary judgment is entitled to prevail as a matter of law. Gillmor v. Carter, 15 Ut.2d 280; 391 P.2d 426 (1964). The trial court, in deciding whether to grant a motion for summary judgment, must consider the pleadings, depositions, etc., in a light favorable to the party opposing the motion for summary judgment and all doubts must be resolved in favor of the opposing party. Durham v. Margetts, 571 P.2d 1332 (Ut. 1977); Foster v. Steed, 19 Ut.2d 435; 432 P.2d 60 (1967). Only if it appears to a certainty that the Plaintiff would not be entitled to relief under any state of facts, even if all the facts alleged by the Plaintiff were held to be true, should a motion for summary judgment be granted. Holbrook v. Adams, 542 P.2d 191 (Ut. 1975); Hughes v. Housley, 599 P.2d 1250 (Ut. 1979).

The trial court in granting the Defendants' motion for summary judgment had before it the pleadings, extensive

discovery, affidavits and prior court rulings, together with the extensive legal memoranda of the parties. The Plaintiffs' Third Amended Complaint alleged that the Defendants had maliciously and unlawfully published false and misleading statements for the purpose and with the intent to injure the Plaintiffs' business. The allegations of the Plaintiffs' Third Amended Complaint were supported by the discovery, affidavits and legal memoranda. The trial court after having reviewed the pleadings, affidavits, discovery and the legal memoranda held that even if the Plaintiffs were able to prove the truthfulness of each of their allegations at trial, the Defendants were entitled to judgment as a matter of law because their actions were privileged under the First Amendment right to petition. It is the position of the Plaintiff that there does not exist an absolute First Amendment privilege to the tort of interference with prospective economic advantage and, therefore, the case should be remanded for trial so that the trier of fact can determine, after hearing all of the evidence, whether the Defendants' actions were privileged. Soter v. Wasatch Development Corp., 21 Ut.2d 224, 443 P.2d 663 (1968); In Re Airport Car Rental Anti-trust Litigation, 474 F.Supp. 1079 (1979); Restatement of Torts 2d, §767; Political Boycott Activity and The First Amendment, 91 Harv. L. Rev. 659 (1978).

The Court's granting of the Defendants' motion for summary judgment without a trial was error and deprived Plaintiffs of their right to present the facts to the jury

for a determination of whether Defendants' actions were proper, justified or privileged. Only a determination that intentionally unlawful, false and malicious statements and actions have Constitutional protection could justify the summary judgment. That such is not a proper rule of law is clearly set forth in the section identified as Point II of this brief.