

1957

## Gordon C. McGavin v. Preferred Insurance Exchange et al : Brief of Respondents

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Ray, Quinney & Nebeker; W. J. O'Connor, Jr.; Attorneys for Defendants and Respondents;

---

### Recommended Citation

Brief of Respondent, *McGavin v. Preferred Insurance Exchange*, No. 8714 (Utah Supreme Court, 1957).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/2887](https://digitalcommons.law.byu.edu/uofu_sc1/2887)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

NOV 8 1957

LAW LIBRARY

IN THE SUPREME COURT  
of the

STATE OF UTAH FILED

OCT 24 1957

GORDON C. McGAVIN,  
*Plaintiff and Appellant,*

vs.

PREFERRED INSURANCE EX-  
CHANGE, a corporation, WAYNE  
MURRAY and WAYNE MURRAY,  
JR., doing business as MURRAY &  
COMPANY, a co-partnership, UTAH  
MOTOR CLUB, INC., a corporation,  
and SAM ARGE,

*Defendants and Respondents.*

Clerk, Supreme Court, Utah

Case No. 8714

## BRIEF OF RESPONDENTS

RAY, QUINNEY & NEBEKER,  
W. J. O'CONNOR, JR.,  
300 Deseret Building  
Salt Lake City, Utah  
*Attorneys for Defendants  
and Respondents.*

## TABLE OF CONTENTS

	PAGE
THE ISSUE BEFORE THE COURT .....	1
STATEMENT OF POINTS .....	2
ARGUMENT .....	3
POINT I .....	3
POINT II .....	7
POINT III .....	8
POINT IV .....	10
POINT V .....	12
POINT VI .....	12
POINT VII .....	13
CONCLUSION .....	14

## CASES CITED

Renshaw, v. Renshaw, 153 Fed. 2d 310 .....	6
Hall v. Douglas Aircraft Co. (Cal. App.) 73 P. 2d 668 .....	10
Hoyt v. Wasatch Homes, Inc., 1 Utah 2d 9, 261 P. 2d 927 .....	11

## TEXTS CITED

Utah Rules of Civil Procedure, Rule 8 (a) .....	3
Utah Rules of Civil Procedure, Rule 8 (e) (1) .....	3
Restatement of the Law, Agency, Chapter 14 .....	11

# IN THE SUPREME COURT of the STATE OF UTAH

---

GORDON C. McGAVIN,  
*Plaintiff and Appellant,*

vs.

PREFERRED INSURANCE EX-  
CHANGE, a corporation, WAYNE  
MURRAY and WAYNE MURRAY,  
JR., doing business as MURRAY &  
COMPANY, a co-partnership, UTAH  
MOTOR CLUB, INC., a corporation,  
and SAM ARGE,

*Defendants and Respondents.*

Case No. 8714

---

## BRIEF OF RESPONDENTS

---

### THE ISSUE BEFORE THE COURT

Appellant, the plaintiff below, in his brief at page 4, states that the "prime question to be determined on this appeal is whether the amended complaint states facts upon which relief can be granted against the defendants

and respondents or any of them.” That is the only question before this court on appeal and is the identical issue decided by the lower court upon respondents’ motion to dismiss. That court’s decision dismissing the amended complaint without prejudice is based upon the ground set forth in said motion, namely, that the complaint fails to state a claim on which relief can be granted. The trial court’s order of dismissal will not be disturbed in the absence of clear error.

## STATEMENT OF POINTS

### POINT I

THE AMENDED COMPLAINT VIOLATES RULE 8(a) and 8(e) OF THE UTAH RULES OF CIVIL PROCEDURE.

### POINT II

THE AMENDED COMPLAINT DOES NOT STATE GROUNDS FOR RELIEF IN CONTRACT.

### POINT III

THE AMENDED COMPLAINT DOES NOT STATE GROUNDS FOR RELIEF IN TORT.

### POINT IV

APPELLANT’S AUTHORITIES ARE NOT IN POINT.

## POINT V

THIS IS NOT A CASE OF UNJUST ENRICHMENT.

## POINT VI

THE STATEMENTS IN APPELLANT'S BRIEF PERTAINING TO A FOREIGN CORPORATION ARE IRRELEVANT.

## POINT VII

APPELLANT'S AMENDED COMPLAINT CONTAINS NO BASIS FOR AN AWARD OF PUNITIVE DAMAGES.

## ARGUMENT

## POINT I

THE AMENDED COMPLAINT VIOLATES RULE 8(a) and 8(e) (1) OF THE UTAH RULES OF CIVIL PROCEDURE.

Rule 8(a) of the Utah Rules of Civil Procedure provides that the complaint shall contain "(1) a short and plain statement of the claim, showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled." Rule 8(e) (1) states: "Each averment of a pleading shall be simple, concise and direct." A reading of the amended complaint shows it to be a glaring violation of those Rules.

The complaint, repeated in full in appellant's brief, there takes up about seven pages, and is anything but a short, simple or a plain statement of the claim. It contains a demand for judgment wholly inconsistent with the statement of any claim, whatever that claim may be, set forth in the complaint. The amended complaint, like appellant's brief, consists mostly of accusations, opinions, narration of evidentiary material and conversations.

The most that can be gleaned from the amended complaint (TR. 28-32) in the way of essential allegations to establish a claim is that defendants Preferred Insurance Exchange and Murray & Company appointed one Paul J. Parrish as state agent in Utah to write insurance, with instructions to appoint such agents "as he deemed essential to establish an organization through which insurance could be sold." Parrish then appointed plaintiff as agent for Preferred Insurance Exchange and to assist Mr. Parrish in the management of the state agency for the Exchange. It should be noted that the complaint does not aver Mr. Parrish had any authority from the defendants to appoint plaintiff as such assistant, but only as an insurance agent. The complaint is silent as to the other defendants' part in the appointment of Mr. Parrish or plaintiff, and those defendants, therefore, had nothing to do with said appointment.

Paragraph 6 of said complaint, together with paragraph 12, contains the only reference in the complaint to any method or agreement as to plaintiff's compensation for his work, efforts and expenditures allegedly performed or incurred by plaintiff. In said paragraph 6 it is stated that Mr. Parrish promised "that plaintiff would be paid



the regular agent's commission on all policies sold directly by him and also receive a share of the overriding commissions on all insurance sold in Utah for Preferred Insurance Exchange." Mr. Parrish allegedly told plaintiff that he would also have an opportunity for permanent employment at a substantial income, whatever that has to do with this lawsuit. The type of payment set forth in paragraph 6 just quoted, namely, commissions, is customary for an insurance agent. The complaint does not indicate plaintiff had any right to look to any other source of payment from defendants for his work or expenditures.

Contrary to what appellant's brief infers, the amended complaint does not state a valid claim for payment of expenses or for work performed pursuant to any agency established by any defendant. The complaint does not set forth any amounts due for those items, and does not even ask for such payment. In paragraph 12 of the complaint plaintiff alleges that "By said acts (whatever that includes) defendant companies repudiated their agreement with plaintiff whereby they induced plaintiff to render various services in building up a state organization on the promise of substantial commissions in the future . . . to his damage in the sum of \$10,000.00." Such an allegation cannot be considered a prayer for compensation or reimbursement for work or expenditures, but is apparently a demand for damage payment for some wrongful act in the nature of tort, supposedly committed by defendants. The nature of this demand becomes apparent from a study of the remaining parts of the complaint, wherein plaintiff avers the defendants wrongfully prevented him from continuing as an insurance agent for defendants. Plaintiff asked for \$10,000.00 "general dam-



ages” (Appellant’s Brief, p. 26). Furthermore, respondents are unable to tell from the complaint wherein their conduct was legally wrongful.

Respondents have presented the above analysis of the subject complaint partly to see whether it meets the requirements of said Rule 8 of our Civil Procedure. Please note that Rule 8(a) and (e) are not in the alternative. The pleading must be plain, simple, concise *and* direct. Appellant’s amended complaint is none of these. That is one reason it fails to state a legal claim.

In a federal case from the U. S. Court of Appeals, District of Columbia, *Renshaw vs. Renshaw*, 153 Fed. 2d 310, the lower court granted, without prejudice, a motion to dismiss the complaint, the motion being partly on the ground that the pleading failed to state a claim, and partly that some of its averments were not simple, concise and direct as required by Rule 8(e). The order granted the motion without comment. The allegations were more specific than in the present case. In affirming the judgment of dismissal the appellate court announced:

“The complaint itself was fourteen printed pages, of the size and style customary in printing joint appendices to briefs in this court, and the seven exhibits attached thereto were another seventeen printed pages. The dismissal, without prejudice, of a complaint upon the basis of Rule 8(e) (1) is largely within the discretion of the trial court. We will not disturb its action unless we find clear error. We find none here.”

## POINT II

THE AMENDED COMPLAINT DOES NOT  
STATE GROUNDS FOR RELIEF IN CONTRACT.

Let us further examine the complaint. Does it set forth the requirements of a binding contract and a cause of action against defendants for its breach? Where is the consideration moving from plaintiff? There is none. For all that appears in the complaint, plaintiff had no obligation as an agent; gave nothing for his appointment as agent, and could refuse to act or could resign at any time with impunity. The alleged agency was for an indefinite period. It could be cancelled by either plaintiff or defendant at any time. If the supposed agreement was not to be completed within a year, it violated the Statute of Frauds.

Paragraph 7 of the complaint contains a long list of alleged "promises" of defendant Preferred Insurance Exchange which, according to paragraph 10, were all broken by "said defendants," whatever party that may be. But there were no legally enforceable promises to break. Plaintiff gave no consideration for any such promises. The complaint does not even allege plaintiff suffered damage from a "violation" of any of these so-called promises. In paragraph 8 of the complaint it cannot be ascertained which of "said defendants" allegedly told plaintiff the various things there set forth, because paragraph 7 refers specifically to "promises" of Preferred Insurance Exchange and Preferred Underwriters, and paragraph 8 seems to be a continuation of the narration in paragraph 7. Furthermore, paragraph 8, like 7, does not indicate that plaintiff had any right to expect payment for his services from a

source other than sales commissions; and neither paragraph discloses any contractual duty owed plaintiff by defendants.

Paragraph 9 of the amended complaint alleges among other things that plaintiff appointed state agents, while paragraph 10 complains that plaintiff did not have the power of attorney necessary to make such appointments. Why should plaintiff reasonably incur expense in appointing agents until he had such authority? While paragraph 9 refers to other general, somewhat vague services allegedly performed by plaintiff, none of those services is made the basis of any legal claim by plaintiff in the amended complaint. The only paragraph referring to any "damages," number 12, speaks of "various services" rendered by plaintiff "in building up a state organization," whatever such various services were. The complaint does not ask anything for, nor place any value on, such services, and an essential element for such a claim therefore is absent. In paragraph 12 the figure of \$10,000.00 is given as damages but on what account or theory, escapes these respondents. That figure is one generously plucked from the air. At page 26 of appellant's brief is another reference to this figure of \$10,000.00 as "general damages."

### POINT III

#### THE AMENDED COMPLAINT DOES NOT STATE GROUNDS FOR RELIEF IN TORT.

Appellant's brief attempts to construct some "facts," or more truly, arguments, on which to base a claim for a tort. The complaint gives no grounds for any relief on such theory. The statements made in appellant's brief

are immaterial to a consideration of that point as well as the other points raised by the subject appeal. See, for instance, the arguments, conclusions and unfounded charges set forth at pages 12, 16 through 20, and 24 through 26 of said brief. Such matter has no proper place in this appeal. The court must consider only what is alleged in the amended complaint.

According to the complaint, the tortious conduct of the defendants supposedly arose from certain dealings between defendants and Utah Motor Club and its manager, Sam Arge, whereby the Motor Club was made a state insurance agent in place of Paul Parrish. The complaint fails to show by what legal right plaintiff could object to such a transaction. Where is shown the duty of defendants not so to deal with Utah Motor Club? If anyone had the right to complain, it would be Parrish, who is not even a party to this lawsuit. Clearly Utah Motor Club, Inc. and Sam Arge owed no duty to plaintiff to refrain from the new agency arrangement and cannot be held for causing any breach of a contract which was terminable at the will of either party, and to which plaintiff was not even a party or a third party beneficiary. Obviously the other defendants cannot be liable to plaintiff on a tort theory or otherwise for terminating Parrish's contract and making one with the Motor Club. Defendants needed no consent of plaintiff to do that. The complaint does not even state that the new arrangement was unsatisfactory to plaintiff, or resulted in any termination of plaintiff's employment.

A significant point not only as to this tort theory advanced in appellant's brief, but as to any claim based

on contract, express or implied, is that defendants did not terminate plaintiff's agency relationship. What did end plaintiff's employment, according to the complaint itself, is the condition added by the Motor Club *after* it had been appointed state agent, to the effect that plaintiff could sell insurance only to club members, under an arrangement which was "illegal." The complaint does not allege or show that the making of such condition was authorized, approved or ratified by either of the other defendants, respondents here, Preferred Insurance Exchange or Murray & Company. They had no part in it.

#### POINT IV

#### APPELLANT'S AUTHORITIES ARE NOT IN POINT.

The cases presented by appellant to support his theory as to reimbursement for services performed and expenses incurred are not in point. Respondents have no quarrel with the principles announced in such decisions, but respectfully submit that the facts therein presented are far from our situation. In each case listed under Point II of the argument in appellant's brief, the complaint clearly sets forth the services and expenses performed and incurred, and the value placed on each item by the plaintiff; and further, the complaint contains a clear demand for judgment for those amounts. The plaintiff, in those decisions, made a binding agreement to perform as agent and clearly had authority to incur the particular expenses. In the case of *Hall v. Douglas Aircraft Co.*, (Cal. App.), 73 P. 2d 668, cited on p. 14 of appellant's brief, the plaintiff agent performed work that led to the sale of the par-



ticular airplanes he was appointed to sell. In the Utah case of *Hoyt v. Wasatch Homes, Inc.*, 1 Utah 2d 9, 261 P. 2d 927, also cited in appellant's brief, the agent's complaint set forth a value for his services, based on an agreed commission, and the demand of the complaint was for judgment for that amount. In that decision the agent performed the work agreed upon in obtaining a prospective purchaser of the property. In all of the cases cited by appellant, the defendant principal terminated the agency contract, such fact was set forth in the complaint, and its causal connection with the failure of the agent to receive compensation or reimbursement prayed for in the complaint was well defined in the pleadings. Furthermore, each of those cases was concerned with an enforceable, clearly stated contract relationship, with certain mutual obligations of the parties well outlined in the pleadings. Such is not the condition of the complaint now before this court.

The quotations from the *Restatement of the Law, Agency, Chapter 14*, presented on pages 14 and 15 of appellant's brief, are likewise not in point. The amended complaint does not set forth facts to bring it within any situation contemplated in the *Restatement of Law*.

Appellant's whole argument to sustain Point II of his brief, wherein he claims he is entitled to some compensation or reimbursement, appears to be an afterthought. His complaint does not present any justifiable grounds for that argument. The matters presented by appellant under that point are outside the bounds of the amended complaint which defendants' motion attacks, and their presentation in the brief is highly irregular.

## POINT V

THIS IS NOT A CASE OF UNJUST ENRICHMENT.

Appellant's amended complaint as well as his brief contains some references indicating a theory for relief against defendants on the grounds of unjust enrichment. For instance, paragraph 10 of the complaint states that defendants "procured from plaintiff the list of contacts of insurance prospects . . . for the purpose of giving the same to Utah Motor Club, Inc. to enable it to reap benefits from the efforts of the plaintiff." (Plaintiff's complaint does not charge that defendants obtained said list wrongfully.) Said paragraph further alleges that defendants were negotiating "to deprive plaintiff of present and future compensation by way of overriding commissions. . . ." The complaint, at most, accuses defendants of an intention to obtain some benefit from the alleged acts, but does not state any defendant received such benefit, and the prayer of the complaint has nothing to do with the theory of unjust enrichment.

## POINT VI

THE STATEMENTS IN APPELLANT'S BRIEF PERTAINING TO A FOREIGN CORPORATION ARE IRRELEVANT.

At pages 20 through 23 of his brief appellant brings up the point that Preferred Underwriters, Inc. is a non-complying corporation. At no time has any defendant raised a defense that Preferred Insurance Exchange is immune from liability. The motion of defendants to dis-



miss the complaint is not based in any respect on that ground, and defendants did not raise that point in argument before the lower court. Furthermore, none of the defendants is attempting to enforce any contract in this lawsuit, and appellant's amended complaint does not allege liability or seek to enforce a claim against defendants on the ground that a defendant has failed to qualify to do business in Utah. Respondents are unable to see in what way said Point III of appellant's brief is relative to this appeal.

## POINT VII

### APPELLANT'S AMENDED COMPLAINT CONTAINS NO BASIS FOR AN AWARD OF PUNITIVE DAMAGES.

Respondents take the position that appellant has no claim for punitive damages, first, because the complaint does not state any facts upon which relief should be granted appellant for any damages, and, second, that if any grounds for relief were stated in said complaint, there is still no support in law or in fact for the demand that defendants be assessed punitive damages. The lower court could find no support for appellant's claim for those damages, and appellant's brief presents no legal authority for such claim. Respondents do not know of any court decision or statute which even indicates support for that position.

## CONCLUSION

The lower court correctly granted respondents' motion to dismiss the amended complaint on the ground that it fails to state a claim upon which relief can be granted. It is fitting and just that no such pleading be allowed to stand upon the court records of this state, and that appellant be required to file a proper complaint. Respondents respectfully urge that this Court affirm the Third District Court's Judgment dismissing the amended complaint without prejudice, and that respondents be awarded their costs of this appeal.

Respectfully submitted,  
RAY, QUINNEY & NEBEKER,  
W. J. O'CONNOR, JR.

*Attorneys for Defendants  
and Respondents.*