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T. Collins Jackson v. Kenderick Harward et al : Brief of Respondents

Utah Supreme Court

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In the
Supreme Court of the State of Utah

FILED

T. COLLINS JACKSON,
Plaintiff and Appellant,

VS

KENDRICK HARWARD, BLAIN C.
CURTIS, HEBER CHRISTIAN-
SON, McKAY LARSON, TEX R.
OLSEN, SPENCER OLIN,
Defendants and Respondents.

APR 15 1959

Clerk, Supreme Court, Utah

Case No.
9000

BRIEF OF RESPONDENTS

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FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

PUBLIC NOTICE - B
72034

Report No. 3349

BROADCAST ACTION

April 14, 1959

The Commission en banc, by Commissioners Doerfer (Chairman), Bartley, Craven, Ford and Cross, took the following action on April 13:

FCC SEEKS LAW CHANGE TO PERMIT LICENSING
TV REPEATER OPERATION IN VHF BAND

The Commission is recommending that Congress amend the Communications Act to permit it to license qualifying TV "repeater" stations in the VHF band under certain conditions and, if that is done, to allow up to one year of time for existing "booster" and "repeater" operations to conform with certain requirements necessary to prevent interference to other broadcast and non-broadcast services.

Pending Congress's consideration of this recommendation, the Commission is extending from June 30 to September 30 the general period of grace for such operations.

Specifically, the Commission seeks amendment of Section 319(d) to enable it to consider licensing such stations engaged solely in rebroadcasting TV programs if they were constructed on or before Jan. 1, 1959; also amendment of Section 318 to clarify the statutory requirements concerning radio operators of equipment used for this purpose.

The Commission's study of the interference problem posed by the use of repeaters in the VHF band indicates potential interference to other VHF repeaters, to the reception of programs of regular VHF television stations, to FM broadcast, and to nonbroadcast services, such as public safety (police and forestry) services using frequencies between TV Channels 4 and 5, and to the operation of the aerial navigation services employing radio fan markers on 75 Mc, also between Channels 4 and 5.

Taking all of these considerations into account, the Commission believes that the following minimum requirements should be imposed upon the operation of VHF repeaters:

Transmission of the rebroadcast signals on a channel other than the channel on which the signal is received.

Maximum power output limited to no more than 1 watt.

Facilities for on and off remote control.

The designation of a person responsible for required periodic checks and other related functions.

The selection of transmitting frequency, appropriate minimum mileage separation from co-channel transmitters of regular television broadcast stations (still to be determined) and such other operating conditions as may be needed to insure reasonable protection to regular broadcast and nonbroadcast services.

(over)

Require repeaters to obtain consent of stations whose signals they rebroadcast, pursuant to Section 325(a) of the Act.

Further, the Commission feels that in order to minimize any possible hazard to aerial navigation it is desirable to take early steps toward the elimination of the operations on Channels 4 and 5 of VHF repeaters or boosters which retransmit on the same channel as the incoming signal. The object would be to eliminate the possibility of such a VHF repeater receiving, amplifying and transmitting signals of aerial fan markers operating on 75 Mc, with the possible result that an aircraft pilot might be misled as to his true position. While the possibilities of this occurring appear relatively remote, and while it would require a combination of circumstances in addition to the retransmission of the fan marker signal to create a serious hazard, the Commission believes that the earliest possible elimination from Channels 4 and 5 of VHF repeaters which transmit on the incoming frequency is highly desirable.

In numerous small communities and outlying areas beyond the direct range of TV broadcast stations, TV programs are made available to local residents by means of small low-powered repeating devices. Located at favorable reception points on hills and mountains, they pick up TV signals from distant stations, amplify and retransmit them to nearby home receivers which are unable to obtain satisfactory direct reception.

Hitherto, cognizant of the potential interference of such operation, the Commission has confined the authorization of repeater devices to "translators" operating in the UHF band. UHF translators offer several distinct advantages, both as to the limitation of interference and as to the range of useful service of good grade.

Prior to and during lengthy Commission proceedings devoted to a study of conditions under which it might be desirable to authorize repeaters in the VHF band, numerous VHF boosters and repeaters have been installed, without FCC authorization. The Commission has direct knowledge of over 300, and it has been estimated that the total number is substantially greater. In December 1958 the Commission announced the conclusion, to which it had come at that time, that the advantages of UHF translators so outweighed the considerations favoring the authorization of VHF repeaters that it would be in the public interest to confine repeaters to the UHF band.

Since that time, however, the Commission has had the matter under continuing review, and has received additional field data which indicate that, under certain conditions, VHF repeater operation may be conducted with less actual interference than had previously been calculated. Aware of the useful purpose served by these devices, and taking into account the investments made in those which have been installed, the Commission is now of the opinion that, if the Communications Act is appropriately amended, VHF repeaters could be licensed under conditions which will insure due protection to other users of the radio spectrum including aerial navigation services.

The present language of Section 319 prohibits the Commission from licensing broadcast facilities which were constructed without a prior permit from the Commission. Section 318 now requires practically all radio transmitters to be operated by licensed operators.

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In the
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T. COLLINS JACKSON,
Plaintiff and Appellant,

VS

KENDRICK HARWARD, BLAIN C.
CURTIS, HEBER CHRISTIAN-
SON, McKAY LARSON, TEX R.
OLSEN, SPENCER OLIN,
Defendants and Respondents.

Case No.
9000

BRIEF OF RESPONDENTS

STATEMENT OF FACTS

The Defendants propounded interrogatories to the Plaintiff (Tr. 13-16) requiring Plaintiff to state in detail and with particularity the acts, omissions or conduct of each of the Defendants upon which Plaintiff based his cause of action (Tr. 13). To this the Plaintiff answered that the Defendants, in concert with one another, "participated in the installation and operation of a television

booster rebroadcasting station in contravention of the laws of the State of Utah and of the Federal Government'' (Tr. 20, 21).

The Plaintiff further admitted, in discovery proceedings, that (A) he has no license or permit from the F.C.C. (Tr. 21) (B) he has no franchise from any county, city, or other local authority (Tr. 21) (C) he was in violation of his contract with Telluride Power to carry his lines (Tr. 21, 32, 33) (D) he was operating under an assumed name without any registration thereof (Tr. 27) (E) he is capturing a fugitive signal without paying any consideration therefor or participating in the production thereof (Tr. 21).

At the hearing below the Plaintiff received, over the objection of the Defendants, leave to amend his answers to the interrogatories which he later did in an apparently desperate attempt to fabricate a justiciable issue upon which he could go to trial. (Tr. 44)

STATEMENT OF POINTS

POINT I

THE COURT BELOW PROPERLY GRANTED THE RESPONDENTS' MOTION FOR SUMMARY JUDGMENT..

A. THE APPELLANT, ASSUMING ALL ALLEGATIONS OF HIS COMPLAINT ARE TRUE, HAS PLEADED NO RIGHT WHICH MAY BE PROTECTED AT LAW OR IN EQUITY.

B. THE APPELLANT, ASSUMING THE ALLEGATIONS OF HIS COMPLAINT ARE TRUE, HAS PLEADED NO DUTY ON THE PART OF THE RESPONDENTS WHICH HAS BEEN VIOLATED.

ARGUMENT

POINT I

THE COURT BELOW PROPERLY GRANTED THE RESPONDENTS' MOTION FOR SUMMARY JUDGMENT..

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The Respondents brought their Motion before the Trial Court for a Summary Judgment within that spirit of the Rules expressed in Barron and Holtzoff, Volume 3 Page 58 to the effect that

a Summary Judgment is intended to prevent vexation and delay, improve the machinery of justice, promote the expeditious disposition of cases and avoid unnecessary trials.

The underlying basis of the Respondents' Motion is that the elements of any cause of action, i.e.: a primary right and a corresponding duty, are entirely both absent from the claims of the Appellant. As stated in Volume 1 American Jurisprudence Page 418, Actions, Section 21:

A cause of action arises out of an antecedent primary right superior to that of the offending party. It is axiomatic that there can be no wrong without a corresponding right and no breach of duty by one person without a corresponding right belonging to some other person. The existence of

a legal right is, accordingly, an essential element of the cause of action, inasmuch as a Plaintiff must recover on the strength of his own case instead of the weakness of the Defendant's case, since it is his right, instead of the Defendant's wrong doing, that is the basis of recovery.

This is the set of rules upon which these Respondents presented their Motion below and the Argument is necessarily divided into two main headings:

A. THE ABSENCE OF A LEGAL PRIMARY RIGHT IN THE PLAINTIFF

B. THE NON-EXISTENCE OF ANY LEGAL DUTY ON THE PART OF THE DEFENDANTS

A. The Plaintiff comes before this Court admitting in the pleadings, in the Answers to the Interrogatories, and Responses to the Demands for Admissions, that he is deficient in all of the following particulars:

1. That he has no license or permit from the Federal Communication Commission or from any other governmental or administrative body (TR 21).

2. That he has no franchise from Sevier County in violation of Article XII, Section 8 of the Utah Constitution and Section 17-5-39 UCA 1953 (TR 21).

3. That he has no franchise, license, or permit from any municipality within Sevier County, in violation of the same constitutional provision and Section 10-8-14 UCA 1953. (TR 22)

4. That during all times material to these proceedings, he has been subject to a contract authorizing the use of utility poles for carrying his line which provides as a condition precedent that he must secure all local franchises required by law. (TR 21, 32, 33)

5. That at all times material to these proceedings he has operated under an unregistered assumed name, contrary to the provisions of Section 42-2-1 UCA 1953. (TR 27)

6. That he has been capturing a fugitive television signal without paying any consideration for or contributing to the production thereof. (TR 21)

7. That he is "a receiver" rather than "a broadcaster" and as a receiver is attempting to "reap where he has not sown" (See Volume 15 ALR 2d, Page 791). (Tr. 21)

In justification of these facts, the Appellant has stated variously that he does have a property right in the fugitive signal although it has cost him nothing for its production; that he can acquire franchises and rights to use public easements, roads and highways by prescription and that at the time he installed his apparatus in Sevier County he was requested to do so by its inhabitants.

The Appellant contends that since he is a "receiver" rather than a "broadcaster" he is not subject to regulation by the Federal Communications Commission or any other governmental or administrative body.

In *20th Century Sporting Club, Inc. v. Massachusetts Charitable Association* and the other cases cited at Pages 791 of 15 ALR 2d, it has been held unequivocally that a "receiver" has no property right in a signal and in fact may be enjoined from taking advantage of the telecast of productions to permit members of the public to view the program on the Defendant's television screen. These cases manifestly and unanimously hold that there can be no property right in a fugitive signal captured by an interloper and thus they all defeat Plaintiff's argument that he has a right in a signal which he admits he intercepts without paying therefor any consideration but has nevertheless transmitted on to residents of Sevier County for his own economic gain.

We strongly urge upon the Court that for those reasons alone the Plaintiff is vested with no legal primary right protectable by law and this action quite correctly was summarily dismissed.

However, the Appellant is lacking not only in this particular, itself dispositive entirely of the Motion, but should have had his proceeding dismissed as they were below for the reason that there was no duty on the part of the Defendants to avoid any harm or injury, if in fact any harm or injury occurred, to the Appellant.

B. THE NON EXISTENCE OF A DUTY ON THE PART OF THE DEFENDANTS.

We maintain that the Defendants have not been, at any time material to these proceedings or at any other time, in violation of any State or Federal Law or Regu-

lation. We maintain that these Defendants, under the provisions of Chapter 22, Section 1, Laws of Utah 1957, were required, upon a finding that adequate economical and proper television could not be made available to the public by private sources, to equip and maintain any type of transmission or relay facilities that could bring television to the inhabitants of Sevier County.

The District Court has heretofore held that the statute contemplates and provides a public purpose and therefore is constitutional. An appeal taken from that ruling by the Plaintiff has been dismissed. (See Supreme Court of Utah No. 8902, Civil No. 4955 Sevier County).

The Plaintiff cannot contend that the type of facilities which are being operated by the Defendants are in violation of any federal statute or any regulations in view of *C. J. Community Services v. Federal Communications Commission*, 246 Federal 2d, Page 660, a 1958 case where it was held that the Federal Communications Commission in the public interest, and when warranted by circumstances indicating public necessity and the public welfare, had the discretion to permit operation of a booster system. In that case the Court of Appeals for the Circuit of the District of Columbia held:

“The Federal Communications Commission says in effect that instead of serving the public interest by making reception by “boosters” available it has no alternative whatever but the ouster of the booster.

We think there is an alternative. The Commission’s decision noted that “The Rules and

standards do not now provide for the licensure of the operation of such an installation" thus despite the Commission's clear duty to provide for the use of such channels throughout the past 22 years of the Commission's life, it has failed to adopt rules under which signals may be picked up, reinvigorated and made available to the residents of the town. We suggest therefore that the Commission may well get on with the rule making proceeding apparently contemplated as a means of filling the service area of television stations. We say that the Commission acted mistakenly in its belief that it lacked discretion to withhold the issuance of a cease and desist order and that upon this point the Commission's order must be reversed.

This decision clearly holds that there is no violation either of a federal law or a federal regulation in the operation of a "booster" type apparatus. This holding would bring the type of installation being operated by the Defendants within the purview of Chapter 22 Law of 1957, wherein there is authorized among other types of facilities any "that is authorized by law for purposes of supplying television to the people."

If these Defendants have not acted in contravention of any federal, state, or administrative law, rule, or regulation then the Plaintiff's case must fail for that reason alone since there is non-existence of any duty on the part of these Defendants to avoid injury to the Plaintiff, even if it be assumed that he suffered injury which as we have contended under sub-heading A, is also absent.

(Going one step further, however, and assuming (which we do not admit) that there was a violation

the rules of the Federal Communications Commission, how can it be said that the establishment of a regulation of that Commission can bestow upon a private individual a civil remedy against an individual violating the same. The extension of the principle allowing redress to a person injured by the violation of a criminal statute to embrace situations wherein an administrative body enacts a regulation pursuant to a law would place an unreasonable and in fact absurd burden upon those individuals who must deal with regulatory agencies. They would be faced with the intolerable threat of having the laws changed from day to day by individuals not subject to recall by election or direct control from any source but who could alternately bestow and take away a civil right without going through the legislative process.

If the Plaintiff is claiming that a violation of a federal regulation by these Defendants has given rise to a cause of action in his favor the complete answer is that creation of administrative rules and regulations do not confer such a right.

Even were we to assume that the existence of administrative regulations confers upon those subject there-to a duty the breach of which gives rise to a civil action in favor of an individual injured thereby, still the Plaintiff is remediless for the reasons expressed in Volume 50, American Jurisprudence 582, Statutes, Section 586, where it is stated:

“The legislative intent to grant or withhold a private right of action for the violation of the statute, or the failure to perform a statutory duty,

is determined primarily from the form or language of the statute. The nature of the evil sought to be remedied and the purpose it was intended to accomplish may also be taken into consideration; in this respect the general rule is that a statute which does not purport to establish a civil liability, but merely makes provisions to secure the safety or welfare of the public as an entity, is not subject to a construction establishing a civil liability."

Certainly the adoption of any federal regulation would have as its purpose the protection of the public and not the protection of a trespasser who is intercepting a signal as a mere volunteer. The nature of the evil sought to be remedied is not the evil of competing or scrambling for a fugitive signal. A statute does not purport to establish a civil liability where it is designed merely to make provisions to secure the welfare of the public. The purpose of any regulation of the Federal Communications Commission designed to decrease interference in the channels is to protect the public or the consumer and not to protect individuals who are not licensed and who have no rights under or sanctioned by the Commission, or by any other governmental regulatory agency.

By the same token, even should the statute be said to impose a duty upon these Defendants, the violation of which duty would be actionable in the Courts, then the Plaintiff cannot avail himself of that construction since he is not one of the class entitled to take advantage of

the law. 50 Am. Jur. 582, Statutes Sec. 587, where it is said:

“An action for the violation of a statutory duty is maintainable by one who is of a class entitled to take advantage of the law intended to be protected by the Statute and for the benefit of whom the statute was enacted. Indeed even though the violation of the statute is regarded as actionable, it is generally required that the injury be done to one of the class designed to be protected by the statute or for whose benefit the statute was enacted and to whom a duty of compliance with the statute is owed. It has also been stated as a general rule that a statutory right of action may be maintained only for the benefit of the person specified in this statute.

The Federal Communications regulations are all, where dealing with interdictions against interference, aimed at prohibiting interference with the signal of other *licensees*. The Plaintiff here admits in the interrogatories he has no such license, and as he stated in his oral argument, he is not even a broadcaster and therefore certainly not within the class of people entitled to benefit by any rules and regulations of the Federal Communications Commission or laws creating that Commission.

The Plaintiff has alleged in his Complaint that all these Defendants are officers of Sevier County and yet in oral argument upon the motion, he has contended that they are sued in their private capacity. This demonstrates that the Plaintiff has finally realized that he is in an impossible dilemma in determining which course to pur-

sue and that in either event he has no action against the Defendants.

First, if he sues these individuals alleging that they are public officials or acted as public officials in the conduct complained of in the complaint, then he is fully square with the decision in *Hjorth et al. vs. Whitburg*, 121 Utah 324, 241 Pac. 2d 907, wherein it is sta

It is the general rule of law that state and municipal officials performing a duty imposed upon them by statute and exercising in good faith the judgment and discretion necessary therefor are not liable personally in damages for injuries to private individuals resulting as a consequence of their official act.

It must necessarily be as so held, otherwise public officials would be fearful to act at the risk of finding themselves personally liable for acts done in good faith in performance of their duty.

On the other hand if the Plaintiff complains that these Defendants are acting individually and in concert to do him damage then he is faced with the proposition that all of the provisions of the Utah State Law, (which he argues prohibits the activity complained of) must be disregarded since all those principles and provisions which the Plaintiff has cited and argued have been argued by him as prohibiting only the activity of governmental agencies in the field of television and television rebroadcasting. The Defendants then would be equally entitled as the Plaintiff to attempt to intercept and broadcast or transmit any fugitive signals which t

could capture from any source whatsoever and distribute the same to all the residents of Sevier County. Plaintiff, if he pursues this theory, must abandon all claim of a violation of State Statutes.

It is clear, we submit, that the Defendants have violated neither a federal nor a state statute; that they have done only that permitted by the law authorizing local governments to furnish television to remotely situated areas, and only that which Plaintiff has been doing for several years.

The Plaintiff clearly is asking for freedom *from* competition rather than freedom to compete with others. It is his contention that his business has been destroyed by attempts on the part of the Defendants to provide citizens of Sevier County with adequate, economical and proper television and that their operation is in violation of nebulous rules, regulations and statutes whereas he is exempt, himself, from all of the same.

In short, the Plaintiff contends that the Defendants have no legal right to do a thing which he has no legal right to do himself.

We have searched the pleadings and proceedings thoroughly in an attempt to discover any assertable right which the Plaintiff has, and can find none. He has no affirmative interest in property but only the asserted claim that the Defendants are doing something which is interdicted by regulations of the Federal Communications Commission, yet the Community Service Case cited above holds that even federal regulations have not been

violated. He does not show that he affirmatively has any right either to do the acts which he claims constituted his business which was damaged or any interest which may be protected in law or in which he may assert a claim of property. His entire case is that the weakness of the Defendants' position entitles him to recover from them. We have amply demonstrated, however, that the position of the Defendants is not weak, but is in fact based upon privileges on a parity with, or even superior to, those of the Plaintiff.

The following are our observation concerning the Brief of the Appellant:

The Appellant in his desperation to find a theory upon which relief can be granted him has scatter-gunned the entire field of tort law attempting to grasp upon some cogent basis for obtaining relief and has claimed some remedy under what he calls "six theories."

Examination of all six demonstrates that he has pre-supposed, without even arguing, that he has a primary legal right which he can assert, and a property interest which the law can protect.

We would be seriously imposing upon the Court's time to reiterate the many reasons expressed above why the Plaintiff has neither an assertable right nor a property interest, or the Defendants any lawful duty, for the enforcement of which the Plaintiff may have recourse to the Courts; nevertheless we think it proper to comment briefly on those six theories which the Plaintiff claims present issues justiciable before this Court.

First, he states that this action is brought for a trespass to the Plaintiff's property and business interests. We have demonstrated that the Plaintiff has neither a business nor a property interest unless it can be said that he is entitled to a Decree of this Court protecting him against competition. As we stated previously, he is a mere volunteer, intercepting a fugitive signal which is not, as he states in his brief, "his signal," but is the signal of the originator who could enjoin the Plaintiff from rebroadcasting the same (15 ALR 2d 791).

Plaintiff secondly claims that the Defendants were negligent. If the Plaintiff has no legal right or property interest which can be protected by the courts it is immaterial whether or not a person acts negligently even though some damage may result to the Plaintiff. There must be a concurrence of a right, a duty, and a wrong and without any one of those elements a cause of action fails. Vol. 1 Am. Jur. 422, Action, Section 27.

The Plaintiff states that his third cause of action involves a nuisance by reason of continuing trespasses. If there are no trespasses there are no nuisances.

The Plaintiff claims that his fourth cause of action proceeds on the theory that the Defendants have induced the Plaintiff's customers to breach their contracts with him. The complete answer to this contention is that the Plaintiff, under any view of facts, has no right to contract with any persons because he has nothing to give them in consideration for their promise to pay or their payment to him of fees for his services.

The Plaintiff's claim here can be likened to a person suing another for interfering with his contract to sell the Brooklyn Bridge.

The Plaintiff states that his fifth cause of action is for a conspiracy. In *Trautwein v. Harbourt*, 40 N. J. S. 247, 123 A. 2d 30, 59 ALR 2d 1277 it is held:

"A conspiracy can not be made the subject of a civil action unless something is done which, without the conspiracy, would give a right of action."

In *Lewis v. Turner*, 314 Pac. 2d 625, it is held:

"Where the facts and circumstances relied upon to establish a conspiracy are as consistent with a lawful or honest purpose as with an unlawful undertaking, they are insufficient."

In *Beardsley v. Kilmer*, 321 New York, N. Y. 80, 140 N. E. 203, a case controlling the facts in the issue at bar, it was held that even though one object of persons in establishing a newspaper in a city was to punish the publisher of another newspaper for attacks made upon them by such paper there is no right of action for conspiracy if some of the objects of the competing newspaper were to give the community a first class journal and to protect themselves against the other newspaper by driving it out of business.

Here there certainly was no intention to drive any one out of business; but assuming there were, no cause of action would accrue.

The Plaintiff asserts that his sixth cause of action alleges malice in committing the torts which he claims damaged the Plaintiff. Malice is, we admit, a question of fact, but even if malice is proved there must be an accompanying legal wrong otherwise there is no cause of action. A person can do a thing maliciously and unless his malice is accompanied by a legal "wrong" it is not actionable per se. There is a very clear statement of this principle found in Am. Jur. Vol. 1 p. 420, where it is stated:

"A malicious motive or a mere intention to do wrong, not connected with the infringement of a legal right, can not be made the subject of a civil action, for malice, of itself, as a state of mind, is not a wrong for which the law gives redress. Accordingly it may be laid down as a general rule that a rightful or legal act or the exercise of a legal right, is not rendered actionable as a wrong to another by virtue of a bad intent with which it was done or the existence of a malicious motive that prompted it."

The rule is very clearly stated in an annotation in 54 Am. St. Rep. 886:

"Whatever a man has a legal right to do he may do with impunity and without raising a cause of action against himself because of bad motives, if he exercises his legal right in a legal way, even though damage results to another."

Thus we have demonstrated, we submit, that the Plaintiff must show a "wrong" committed by the Defendants in *addition* to showing that there is a right in the Plaintiff which can be protected. We submit that not only

has he failed to show both but that he has failed to show *either*.

The Plaintiff, in the face of the holding in *C. J. Community Services v. F.C.C.*, 246 F 2d 660, nonetheless claims that “boosters are still unlawful.” The case holds explicitly that the F.C.C. has absolute discretion to issue or withhold a “cease and desist order” against a booster television station and that each such case must be weighed upon its own merits considering public convenience, interest, and necessity, and that boosters as such are *not* outlawed per se, but only when the Commission finds that they in fact constitute, in the specific instance, an interference with other licensed communications. As amazing as it may sound, this is the “statutory violation” upon which Plaintiff bases his cause of action against these Defendants.

CONCLUSION

We respectfully submit that this Plaintiff has so utterly failed to show any semblance of a cause of action that these proceedings were properly dismissed in Summary Judgment.

Respectfully submitted,

KEN CHAMBERLAIN
Attorney for Respondents