

1991

# Gudmundsen v. : Brief of Appellant

Utah Supreme Court

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Pete N. Vlahos; attorney for appellant.

P. Keith Nelson; attorney for respondent.

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IN  
URGENT

UTAH SUPREME COURT

BRIEF

KEY NO.

*14580 A*

IN THE SUPREME COURT OF THE  
STATE OF UTAH

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IN RE:	/	
SERGE B. GUDMUNDSEN,	/	No. 14580
Disciplinary Proceeding.	/	

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BRIEF OF APPELLANT

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Appeal from the Judgment and Findings of the  
Board of Commissioners of the Utah State Bar

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FILED

JUN 22 1976

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BRIEF OF APPELLANT

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STATEMENT OF THE KIND OF CASE

This is an action brought by the Board of Commissioners of the Utah State Bar seeking the imposition of disciplinary proceedings as against the Appellant herein.

FINDINGS OF FACT AND RECOMMENDATIONS FOR DISCIPLINE

The Board of Commissioners of the Utah State Bar made findings in violation of specific sections of the Violations of the Code of Professional Responsibility and Canons of Judicial Ethics by the Appellant in regards to his relationship with the matter of Verus Thornley v. J. Christensen and the Appellant's relationship with a client, namely Mr. and Mrs. Charles T. Hales.

The Board of Commissioners of the Utah State Bar made recommendations to the Utah Supreme Court, that the Appellant,

Serge B. Gudmundson, be suspended from the practice of Law until he can satisfy the Board of Commissioners of the Utah State Bar and the Utah Supreme Court, that he is competent to practice law in the State of Utah.

#### RELIEF SOUGHT ON APPEAL

The Appellant seeks reversal of the Findings of Fact and recommendations of the Board of Commissioners of the Utah State Bar, that Appellant be suspended from the practice of law, and a reversal of the Findings that the conduct of the Appellant in regards to the two matters presented before the Board at its hearings warrant the recommendation made to this Honorable Court.

#### STATEMENT OF FACTS

The matter before the Board of Commissioners was partially founded on Complaint made by Mr. and Mrs. Charles T. Hales of Fielding, Utah, wherein the services of the Appellant was retained on October 18, 1972 (TR-20), to defend the parties on charges of drunken driving and public intoxication (TR-24). The original place of trial set for the Hales was in Tremonton (Dep.35) and the Appellant made an appearance for the Hales in Tremonton and obtained a Change of Venue from Tremonton to Brigham City for the matter. (TR-35)

Subsequently a jury trial was held in both matters in the City Court of Brigham City, wherein Mr. Hales was acquitted and Mrs. Hales was convicted. (TR-35)

The Appellant thereupon filed an Appeal to the District Court in Box Elder County on behalf of Mrs. Hales, and through a series of postponements of the actual trial of Mrs. Hales, the matter was subsequently dismissed through the efforts of the Appellant. (TR-36)

The services theretofore rendered by the Appellant on behalf of the Hales was appearance in Tremonton for Change of Venue, then a subsequent trial for both of the individuals before a jury in the City Court of Brigham City, and subsequently an Appeal from the conviction of Mrs. Hales from the City Court to the District Court with an ultimate dismissal of the matter against Mrs. Hales. Two jury trials were held as to the two Defendants, the Hales, in the matter wherein the Appellant appeared for the parties. (TR-36)

The Appellant was paid the sum of \$2,200.00 by the Hales in the defense of both of the Hales of the criminal matters brought against them and for a civil action against the police officers who made the arrest. Pursuit of the civil matter was never undertaken by the Appellant. (St.Exh.1)

The Appellant admitted to the Hales and to their Attorney,

Mr. Farr, that monies was due and owing as refund for some of the fees paid by Hales to the Appellant, but no sum had been worked out as to the value of services rendered by the Appellant on behalf of the Hales. (St.Exh.1)

The matter as against Mrs. Hales was not dismissed until September or October, 1973 (R-45), and the Hales had retained Mr. Lionel Farr to seek a refund for them in December, 1973. (TR-45)

Even though the Hales had retained Mr. Farr in December, 1973, to seek a refund, as late as April 29, 1974, Mr. Hales had authorized the Appellant to pursue his civil suit, even though he had already hired Lionel Farr to get a refund of his fees from the Appellant. (TR-54)

In March 15, 1974, Mr. Lionel Farr was advised of the eye surgery to be performed upon the Appellant (TR-78), and the Appellant had not been able to practice law since April, 1974, to present date because of multiple surgical operations on both eyes. (TR-85) The Appellant has made a refund of fees remaining to the Hales and a Satisfaction of Judgment has been filed by Mr. Farr on behalf of his clients, the Hales. (Exh.A attached)

The second matter considered by the Bar Commission was the employment of the Appellant on September 11, 1972, to

represent Mrs. Verus N. Thornley and her minor son on a criminal complaint and to institute a civil suit against the complainant neighbor. (TR-88)

The client paid a fee to the Appellant for handling the two criminal matters and the civil matter in the sum of \$1,500.00. (TR-90)

A jury trial was held in the criminal matter concerning Mrs. Thornley in the City Court and she was convicted of the criminal offense. (TR-117)

A Notice and Appeal was taken in the matter from the City Court to the District Court (TR-118) and a jury trial was thereafter held in the District Court and Mrs. Thornley was acquitted in that matter.

A civil suit was subsequently filed by the Appellant on behalf of Mrs. Thornley in the District Court seeking damages for malicious prosecution. Appellant advised Mrs. Thornley that he had invested hours and hours of research upon the matter of the civil suit and that he advised Mrs. Thornley that if she stopped the civil suit, that there would be very little refund because of the time the Appellant had put into the case. (TR-100)

The Deposition was taken of Mrs. Thornley, which was attended to by the Appellant (R-119). The Deposition of the

complainant in the criminal matter against Mrs. Thornley, a Mr. Christensen, and who was also the Defendant in the civil action was taken by the Appellant in February, 1974, with Mrs. Thornley testifying that she was present at both instances (TR-103).

The charge against Mrs. Thornley's son was dismissed in Juvenile Court.

Mrs. Thornley testified that she was advised by the Appellant, that the \$1,500.00 which had been paid to handle all of the matters would not result in any additional charges, even though an Appeal to the District Court and taking of Deposition had occurred, and that there would be no charge of any additional cost as to the conduct of her criminal and civil matters. (TR-118)

Mrs. Thornley further testified, that at no time did she request an accounting from the Appellant; that she did not have any knowledge of the research in the matter invested by the Appellant. (TR-128)

Mrs. Thornley testified under oath, that she did not pay the Appellant any monies for cost of filing the Complaint nor for taking of the Deposition and attending the other Deposition, which was taken of Mrs. Thornley (TR-128).

The Complaint of the Board of Bar Commissioners sets forth as an admission, that the Appellant was physically disabled subsequently to having undertaken the matter on behalf of Verus N. Thornley (R-4), and also subsequent to undertaking the handling of the matter for the Hales (R-5).

The Appellant was still disabled as of December 10, 1975 (R-7). The Record further shows that at the time of the hearing in this instant matter before the Board of Bar Commissioners, in the instant matter of the Findings of Fact and Recommendations of the Board of Bar Commissioners as presently before this Court, that the Appellant was unable because of his physical disability to attend at his hearing, that he had four cataract operations, twice on each eye, and that he could not see and had very limited vision and could not travel to Salt Lake City for his hearing. (TR-5)

The ruling of the Board was that the proceedings would go forward in the matter of the discipline of the Appellant without his presence, "That we have given as much time as we can to Mr. Gudmundsen". (TR-6)

Counsel for Appellant entered into the Record, that in each instance of a calling of hearing, that there was a medical report from a doctor accompanying request for continuances (R-6), and that the Commissioners made a record of admission of notices

from medical doctors of the requests for continuance because of the disability of the Appellant and from letters from Counsel for Appellant requesting such continuances reflecting the disability of the Appellant. (Dep.7)

The Record before the Court from the Board of Bar Commissioners reflected that the matter did continue and a hearing was held without the presence of the Appellant.

#### ARGUMENT

##### POINT I

##### DUE PROCESS REQUIRES ADEQUATE HEARING.

It is submitted to this Honorable Court, that the exhibits and records before this Court, including the findings entered by the Board of Commissioners of the Utah State Bar evidence that the Appellant was not physically capable of being present for his defense, in that he was suffering from physical disability because of a multiple surgical intervention necessitated four times upon the eyes of the Appellant (TR-5), made difficult and almost impossible any valid defense to be presented by the Appellant before the Board.

There was a decision by the Board of Commissioners, that the trial of the Disciplinary Hearings as against the Appellant would be held regardless of his presence, in that the Appellant

had Counsel present, and it was alleged by the Board, that an adequate defense of the Appellant could be made by Counsel for Appellant without the necessity of his client being present. (TR-6)

An examination of the Transcript from the Court will evidence that the Counsel for the Appellant was indeed unable to make an adequate defense of his client, the Appellant herein, in that a strict interpretation of the rules of evidence was determined to be the proper manner of proceeding by the Board of Commissioners, and therefore, Counsel for Appellant was repeatedly denied opportunities to introduce matters in contradiction and mitigation of testimony of the adverse witnesses by reason of the absence of the Appellant.

## POINT II

### DISCIPLINE OF ATTORNEY SHOULD NOT BE PUNITIVE.

In Geer v. Stathopoulos, 390 P.2d 606, Sup.Ct. of Colo., the Court stated:

That capricious or arbitrary exercise of discretion by the administrative Board can arise, by exercise of its discretion in such a manner after consideration of evidence before it, has clearly indicated that its action was based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions.

The Colorado Supreme Court further stated the abiding

and well based principle, that when a Court is called upon to review action of an administrative agency, it should be placed in the same position as such agency, and therefore, if the agency has some knowledge of some fact, and it acts upon such knowledge, it should see to it that what it knows becomes part of the record in order to permit the reviewing Court to evaluate the matter so known.

It is submitted to this Honorable Court, that in the instant matter before the Court, the record as evidenced by the transcript of the proceedings, evidences that the Board did not desire to place into evidence all materials that would be of aid to this Honorable Court, as the Court of ultimate authority and the reviewing Court in such matters, so that this Court would have before it all of the records available in the records of the Board of Commissioners to draw its own conclusions as to whether or not the conduct of the Appellant had been wrongful and in violation of the Canons of Professional Ethics for which the Appellant has been charged.

It is submitted to the Court, that the principle of law set forth in Marks v. France, 325 P.2d 368, may be applicable in the instant situation where the Court stated that an administrative body, such as the Board of Examiners in Optometry, cannot be the final judge of reasonableness of its orders, and while Courts

will not be permitted to substitute their judgment for that of administrative bodies, nevertheless Courts are definitely charged with the solemn duty of determining whether the procedure employed in reaching judgment, or whether judgment itself as rendered, is unreasonable, arbitrary, or oppressive under circumstances of each particular case.

The record as to both of the complainant parties, namely the Thornleys and the Hales, evidences a great amount of work performed by the Attorney, the Appellant herein, and also an attempt by the clients to establish their concept of what their fee should be after having been cleared of all criminal charges against them through the capability of the Appellant in handling the defenses necessary in their actions.

The Statutes of the State of Utah at 78-51-16, Utah Code Annotated, as amended 1953, specifically give the Appellant as a member of the Utah State Bar the right to defend himself by the introduction of evidence and the examination of witnesses called against him, and that it is obviously apparent that if the Appellant is physically unable to attend at his own hearing and his Counsel cannot introduce, under the Rules of Evidence established by the Board, those matters in refutation and mitigation of the testimony of witnesses testifying against the Appellant, then there is no way in which the Appellant

can have been allowed his right of hearing as provided for under this Statute.

It is further submitted to this Court, that in accordance with 78-51-41, Utah Code Annotated, as amended 1953, that the compensation of an Attorney and Counselor for his services is governed by agreement, expressed or implied, which is not restrained by law.

The Appellant recognizes the rights of the Court and Board of Commissioners to consider whether or not a charge is so outrageous as to be in violation of the Canons of Ethics reflecting a reasonableness of fee, but that this should not be interpreted as taking away from an attorney the right to recover the value of his services and be paid for his efforts expended on behalf of clients. The client should not be allowed to establish what shall constitute fair compensation for an Attorney as determined by the client after the client has been relieved of the fear of criminal punishment by the success of Counselor for the client in eliminating criminal charges against the client.

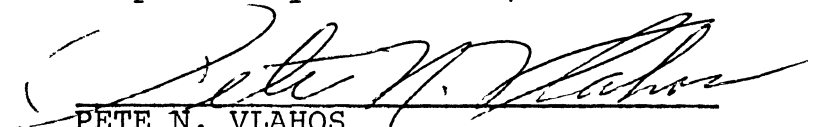
In mitigation of the findings against the Appellant, it is submitted to this Honorable Court, that the Appellant has not been engaged in the practice of law due to his surgical interventions and physical disabilities for more than two years,

and that in accordance with the Affidavit hereto attached by Counsel for the Appellant, there has been a satisfactory settlement as to the complainants in both the Thornley and Hales matter as to any claim they might have for excess attorney's fees and as set forth in Exhibit A hereto attached, which is the Affidavit of Counsel, and is provided so that this Honorable Court can have before it all matters necessary to consider a just verdict as to any disciplinary action that is sought to be imposed upon the Appellant.

#### CONCLUSION

It is, therefore, submitted to this Honorable Court, that consideration should be given to the type of defense that was afforded to the Appellant due to his physical inability to be present at his defense and aid in his own presentation of evidence of those testifying against him; that the Appellant has not engaged in the practice of law for a considerable period of time and will not be engaged in the practice of law for some period in the future, and further, that the claims, if any, of the complainants has been satisfied as set forth in Exhibit A hereto attached.

Respectfully submitted,

  
PETE N. VLAHOS  
Attorney for Appellant  
Legal Forum Building  
2447 Kiesel Avenue  
Ogden, Utah 84401

Schedule A

AFFIDAVIT

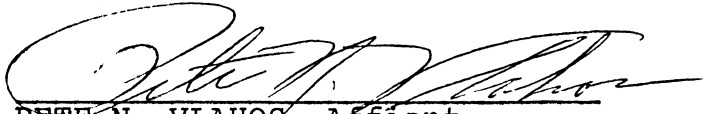
STATE OF UTAH :  
                  :SS  
COUNTY OF WEBER:

PETE N. VLAHOS, being first duly sworn upon his oath,  
deposes and states:

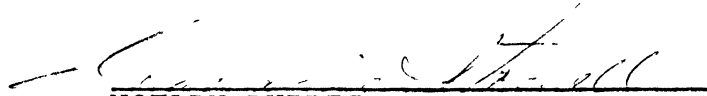
That he has at all times pertinent hereto been Counsel  
for Appellant, Serge B. Gudmundson, and that all claims of  
Verus Thornley and Mr. and Mrs. Charles T. Hales have been paid  
and an Accord and Satisfaction, together with Satisfaction of  
Judgment, have been entered as to the claims of the aforesaid  
parties, and that there is no indebtedness whatsoever as between  
Serge B. Gudmundson and the claimants.

Further, Affiant sayeth naught.

DATED this 11 day of June, 1976.

  
\_\_\_\_\_  
PETE N. VLAHOS, Affiant

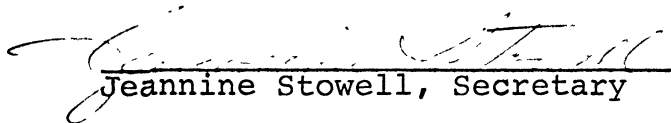
Subscribed and sworn to before me this 11 day of  
June, 1976.

  
\_\_\_\_\_  
NOTARY PUBLIC  
Residing at Ogden, Utah

My Commission Expires:  
7/1/77

CERTIFICATE OF MAILING

A copy of the foregoing Brief of Appellant was posted in the U.S. mail postage prepaid and addressed to the Attorney for the Respondent, P. Keith Nelson, 716 Newhouse Building, Salt Lake City, Utah 84111, on this 15 day of June, 1976.

  
Jeannine Stowell, Secretary