

1962

Harry G. Heathman v. Sumner J. Hatch : Brief of Respondent

Utah Supreme Court

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**IN THE SUPREME COURT
of the
STATE OF UTAH**

FILED
MAY 14 1962

HARRY G. HEATHMAN, Clerk, Supreme Court, Utah

Plaintiff and Appellant,

vs.

SUMNER J. HATCH,

Defendant and Respondent.

No. 9593

JUN 1 1962

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RESPONDENT'S BRIEF

**Appeal from the Judgment of the Third District Court for
Salt Lake County
Hon. Maurice Harding, Judge**

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IN THE SUPREME COURT
of the
STATE OF UTAH

HARRY G. HEATHMAN,
Plaintiff and Appellant,

vs.

SUMNER J. HATCH,
Defendant and Respondent.

No.
9593

RESPONDENT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action for damages by the plaintiff against the defendant, an attorney duly licensed to practice in the State of Utah and a member of the Salt Lake County Bar. The plaintiff purports to allege that defendant negligently represented him at a preliminary hearing in the City Court of Salt Lake County in the defense of a felony charge brought against the

plaintiff by the State of Utah. Plaintiff also purports to allege that the defendant fraudulently, maliciously, and willfully conspired with certain members of the staff of the Salt Lake County Attorney's office in procuring or permitting the plaintiff to be bound over on the charge.

DISPOSITION IN LOWER COURT

The Honorable Maurice Harding, Judge, sitting in the Third District Court of Salt Lake County, on November 7, 1961, dismissed the plaintiff's second amended complaint for failure of the plaintiff to comply with the orders of the court requiring plaintiff to state the facts of his alleged causes of action in plain and concise terms (R. 95).

RELIEF SOUGHT ON APPEAL

The plaintiff apparently seeks reversal of the order of the court dismissing his second amended complaint without prejudice. There are other matters mentioned and discussed in plaintiff's brief, but they are wholly immaterial to any issues properly before this court.

STATEMENT OF FACTS

The court below in its findings of fact (R. 96 et seq.) has fully and completely stated the facts which are pertinent to this case and to the ruling of the court below. These findings of fact are detailed and somewhat

lengthy and respondent does not believe it would serve any proper purpose to repeat them here at this point in the brief, and respectfully refers the attention of this court to the findings of fact contained in the record on appeal at R. 96 et seq.

ARGUMENT

Point 1. The plaintiff has failed to sustain his burden of showing that the findings of fact and conclusions of law herein are not supported by the record.

On or about August 3, 1961, the defendant filed a motion to dismiss directed to plaintiff's second amended complaint in case No. 129540, in the Third District Court (R.84). The plaintiff's second amended complaint had been filed July 17, 1961. In his motion the defendant pointed out the previous history of plaintiff's complaints and the various arguments and motions and proceedings which had been had with respect thereto. The motion shows that the court had, on many occasions, and in particular, at a hearing on May 25, 1961, instructed the plaintiff in length and in great detail, with respect to the proper manner of pleading, and advised him of the defects in his pleadings. This hearing on May 25, 1961, was not reported, but the court in its findings commencing at (R. 96) discusses in detail the events which took place at said hearing.

Defendant's said motion to dismiss directed to plaintiff's second amended complaint came on or before

the court for hearing on October 17, 1961, and the court heard arguments in support of the motion submitted by attorney for defendant, Shirley P. Jones, Jr., and the court also heard arguments from Mr. Harry G. Heathman. The court then took the motion under advisement, and on November 7, 1961, entered his order dismissing plaintiff's complaint without prejudice. It should be pointed out that the court would have been perfectly justified at this point in the proceedings in dismissing the plaintiff's complaint with prejudice, but the court had been exhibiting super-human patience and leniency with Heathman and only dismissed the complaint without prejudice. One would normally assume that the plaintiff, after receiving notice of the entry of such an order, would then file a new complaint and make at least some attempt to comply with the instructions and lessons that the court had given him in pleading. This the plaintiff did not do. He instead filed a notice of appeal, appealing the court's order. Ordinarily findings of fact and conclusions of law on a motion of this type are not required. *Wright vs. Union Pacific R. R. Co.*, 22 U. 338, 62 P. 317. Since the plaintiff had taken the rather unusual step of appealing this order, it was deemed advisable by the court to make and file his findings of fact and conclusions of law, and this the court did, on January 23, 1962, and entered the findings and conclusions nunc pro tunc as of November 7, 1961, the date of the order of dismissal without prejudice.

All presumptions on appeal are in favor of the

trial court's judgment. *Thompson vs. Hayes*, 24 U. 275, 67 P. 670.

In *Sorenson vs. Korsgaard*, 83 U. 177, 27 P.2d 439; and in *Larsen vs. Madsen*, 87 U. 48, 48 P.2d 429, this court held that where there was no bill of exceptions or transcript of testimony, findings of the trial court were presumed to be supported by the evidence.

It would seem that the findings of the court in this case, in view of the holdings in *Sorensen* and *Larsen* *supra* must be presumed to be correct and correctly state the facts until the appellant shows that such findings are not supported by the record. This the appellant has not even attempted to do in his brief on appeal in this court.

Point 2. There was no error in the *nunc pro tunc* entry of the court's findings of fact and conclusions of law.

Plaintiff seems to argue in his brief that because of the mere fact that the court's order of dismissal without prejudice was entered on November 7, 1961, and the findings and conclusions were not signed until January 23 of 1962, that it therefore necessarily follows that the court had no power or jurisdiction to act in the circumstances. The plaintiff cites no authority for this position and it would seem, in the circumstances of this case, that plaintiff's assumptions are totally unwarranted.

Rule 75 (h) of *Utah Rules of Civil Procedure* provides as follows: "If anything material to either

party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the *district court* either before or after the record is transmitted to the Supreme Court * * * may direct that the omission or misstatement shall be corrected. * * * ” It would seem that Judge Harding wanted the record to correctly reflect the reasons for his ruling and that this was his intention in accordance with the rule when he made and entered findings of fact and conclusions of law nunc pro tunc with respect to his order of November 7, 1961, dismissing Heathman’s complaint without prejudice.

CONCLUSION

There is no merit whatsoever in plaintiff’s claims and irresponsible allegations against the defendant contained in the numerous complaints that he has filed in the Third District Court. There is no merit whatsoever in his appeal to this court. It is unfortunate that Judge Harding did not make his order of dismissal with prejudice and upon the merits, because it is defendant’s belief that if the court were to take the time to carefully study the mass of materials that plaintiff has filed already in this case, it would then be a simple matter for this court to affirm an order of dismissal on the merits and dispose of this vexatious litigation. In the circumstances, it would appear that apparently the only thing that can be done at this juncture in the proceedings is to determine whether or not Judge Harding’s

order was correct, and if so, to affirm it and turn plaintiff loose to continue his misuse of the facilities of the court below.

Respectfully submitted,

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