

1962

# Harry G. Heathman v. Sumner J. Hatch : Brief of Appellant

Utah Supreme Court

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Fabian & Clendenin; Attorneys for Respondent;

Harry G. Heathman; Pro Se;

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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HARRY G. HEATHMAN,  
*Plaintiff and Appellant,*

—vs.—

SUMNER J. HATCH,  
*Defendant and Respondent.*

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BRIEF OF APPELLANT

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Appeal from the Final Order of the  
Third District Court for Salt Lake County  
Hon. Maurice Harding, Judge, pro tem

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Supreme Court, Utah

Case No.  
9593

UNIVERSITY UTAH

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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.*

Case No.  
9593

---

## BRIEF OF APPELLANT

---

### NATURE OF CASE

This is an action brought by the appellant to recover expenses, costs, and damages for the negligent misrepresentation, breach of professional duty, betrayal of plaintiff's interests, and the willful fraud, deceit, and conspiracy of defendant in representing and advising plaintiff to his damage in matters of his defense against criminal charges wrongfully brought against plaintiff by County Attorney on complaint of one Ivan Bland, and defendant's neglect and refusal to proceed in the recovery of money due and enforcing plaintiff's possessory lien for work performed and material furnished upon vehicles allegedly owned by used car dealer, Ivan Bland.

## DISPOSITION IN LOWER COURT

On the 20th day of February, 1961, the complaint in this action was filed, (R. 1 to 6), and a motion to dismiss for more definite statement and to strike was filed by defendant March 13, 1961. (R. 7 to 8). Plaintiff filed notice of hearing May 18, 1961, noticed up defendant's motion to dismiss for hearing May 25, 1961 (R. 12 and 13). On May 23, 1961, defendant filed ex parte motion and order (R. 14, 15, 18) continuing hearing to June 22, 1961. Plaintiff filed motion (R. 20), Affidavit (R. 22), Order (R. 19), May 23, 1961. Plaintiff's motion granted, and hearing held May 25, 1961. Defendant's motion for more definite statement granted. Plaintiff filed amended complaint (R. 27) June 14, 1961. On June 13, 1961, plaintiff filed motion for summary judgment (R. 24) and notice of hearing. Court dismissed plaintiff's motion for summary judgment on motion of plaintiff, June 22, 1961. Defendant moved court for 30 days to reply to amended complaint. Court granted 20 days, plaintiff moved court to amend amended complaint. Granted by court (R. 43). Defendant filed motion to dismiss (R. 46) July 12, 1961. Plaintiff filed second amended complaint July 17, 1961. Defendant filed motion to dismiss (R. 84 through 88) August 3, 1961. Plaintiff filed motion to strike. Notice of hearing (R. 90 through 93) September 28, 1961. Hearing held October 17, 1961. Plaintiff's motion to strike denied. Motion to correct records denied (R. 94). Court entered order dated November 7, 1961 (R. 95) dismissing plaintiff's second amended complaint without prejudice. Finding of fact and conclusions of law filed nunc pro

tunc January 23, 1962. (R. 96 through 104). Plaintiff appeals December 5, 1961. (R. 102).

## RELIEF SOUGHT ON APPEAL

1. Plaintiff respectfully requests this Honorable Court to vacate order (R. 23 and 164) dismissing District Court Case No. 128599, wrongfully entered in this cause as plaintiff's motion, and to strike same from record.

2. Plaintiff respectfully requests this Honorable Court to vacate and strike "findings of facts and conclusions of law" entered *nunc pro tunc*, January 23, 1962, in this cause and declare same as void. (R. 96 through 101).

3. Plaintiff respectfully requests this court to discipline Attorneys Hatch and Jones, and to protect this plaintiff from further reprehensible and unlawful conduct and acts of Attorneys Hatch and Jones.

4. Plaintiff seeks a reversal of the order dismissing his verified second amended complaint (R. 95); that the same be reinstated; that defendant be required to answer; and that said cause be remanded to the Third District Court for trial and final determination on the merits, appellant being awarded costs on this appeal.

5. Or in the alternative permission to amend his complaint in accordance with this court's instructions.

## STATEMENT OF FACTS

The facts to support plaintiff's claim that order of dismissal (R. 23) Case 128599 and order (R. 164) should

be vacated and stricken from the record and declared void as a matter of law consist of the following:

Plaintiff's notice of dismissal, Case No. 128599, as provided by Rule 41(A)(1)(i), U.R.C.P., as a result of plaintiff's inexperience and inadvertence was captioned "motion" instead of "notice". (R. 157).

On or about March 10, 1961, defendant's attorneys prepared prejudicial motion and order to dismiss (R. 170-1-2), attached to the letter of defendant's attorneys dated March 10, 1961, and submitted same to the Honorable A. H. Ellett the following week for approval and signature. The Honorable A. H. Ellett, recognizing said motion and order as an attempt to prejudice plaintiff's voluntary dismissal as an *order* of the Court granting dismissal, denied said motion and refused to sign said order.

Defendant, through his attorneys on or about January 27, 1961, prepared an identical motion and order (R. 163-4) as previously denied by Judge Ellett, and in the middle of proceedings of this cause, Case No. 129540, held May 25, 1961, without a court reporter and over protests of plaintiff, without having the file of Case No. 128599 or the matter properly before the court, or motion and order properly served and noticed upon plaintiff as required by U.R.C.P. after a motion for order is denied by the Court and a direct violation of Title 78-7-19, U.C.A. 1953, and over objections of plaintiff, presented said motion and order to the Honorable Maurice J. Harding and obtained Judge Harding's signature on said prejudicial order, Case No. 128599. (R. 164) Order.

Said Minute Entry and Order, Case No. 129540, (R. 23, lines 10 and 11) reciting that order was signed on plaintiff's motion is a fabrication. Motion and order (R. 163-4) are plainly defendant's.

The facts are adequately presented in this record that the plaintiff has complied with the orders of the Court, and it is plain from the record that the *order* of the Court dismissing plaintiff's second amended complaint filed in this cause November 9, 1961, (R. 95), is a complete fallacy. There is no such order filed in this cause:

“Order of the court, requiring plaintiff to state the facts of his alleged cause of action in plain and concise terms”,

as grounds for said order of dismissal a certified by Clerk's certificate (R. 112).

That the only matters properly before the court to support dismissal of plaintiff's verified second amended complaint were defendant's motion to dismiss, motion for more definite statement, and motion to strike, filed March 13, 1961 (R. 7-8, par. 2) and defendant's motion to dismiss, filed August 3, 1961, (R. 84, 85, 86, 87, 88).

The facts plaintiff is depending upon to fully controvert Allegations 1 through and including 7 (R. 84, 85, 86), as recited in defendant's motion to dismiss, directed against plaintiff's second amended complaint (R. 84, 89) together with facts relied upon by plaintiff to support his request that by law he is entitled to protection from

the illegal acts, doings, and omissions of Attorney Jones are contained in transcript of proceedings of District Court Case No. 128599 (R. 177) and consist of Jones' unethical conduct in calling the Honorable Judge A. H. Ellett and deceiving Judge as to timely mailing of a motion directed against plaintiff's complaint, thereby obtaining Judge's agreement and action to orally order and instruct Clerk of the Court not to sign and enter plaintiff's default judgment as provided by law (R. 177, page 44, lines 9-30; pages 45, 46, 47 to line 28) Transcript of testimony and proceedings on motion to strike entry of default, and further, defendant and attorneys improper and unethical conduct in deceiving plaintiff and court with the false affidavit of Kathleen Cholley (R. 122) and willfully neglecting and refusing to withdraw said affidavit, and defendant and attorneys attempting to conceal said fabrication by tricks and fraud in willfully advising properly subpoenaed witness (R. 123, 129, 128) not to appear in court, and withholding said witness from plaintiff (R. 177, page 4, line 30; page 5, lines 1 to 30; page 7, line 18; pages 8 and 9; page 10, lines 1 to 15), and further obtaining cooperation of Clerk of the Court in interrupting cross-examination of witness by plaintiff at critical point of witness entrapment and then instructing witness and securing time for her recomposure (R. 177, page 25, lines 23 to 30), and defendant and attorney misconduct and violation of Title 78-7-19, U.C.A. 1953, (R. 23, lines 10-11).

The facts relied upon in prosecution of the appeal as to sufficiency of plaintiff's second amended complaint



(R. 48 incl. 83) are particularly set out in both first and second cause of action. The allegations are that the defendant Hatch was engaged by this plaintiff Heathman on or about September 6, 1960, (R. 48 and 49, Allegation No. 3), to defend him against a felony complaint wrongfully brought against plaintiff by one Ivan Bland September 2, 1960, and to foreclose plaintiff's possessory and mechanic's lien and on the alleged personal property of Ivan Bland (R. 49).

It is further alleged that defendant conspired with Chief Criminal Deputy County Attorney Richard C. Dibblee to frame plaintiff on the charge of Embezzlement and Grand Larceny and defendant exercised forbearance and consent in allowing plaintiff to be bound to the Third District Court on a felony charge, City Court Case No. 38158 (R. 50, Allegation No. 4), wrongfully extended and enlarged on different facts and circumstances than contained in original complaint Case No. 38052 (R. 50), and that defendant did, in fact, allow plaintiff to be bound to the Third District Court upon Case No. 38158 without a City Court arraignment or being served a copy of complaint without a preliminary hearing; that defendant had ample time and opportunity to properly perform as agreed with plaintiff and to properly defend plaintiff.

It is alleged defendant failed in all particulars of his agreement to defend and represent plaintiff (R. 51 and 52) and the facts of defendant's breach of professional duty and betrayal of plaintiff's interests are alleged (R. 52 and 53).

It is further alleged defendant deceived plaintiff by misstatement and misrepresentation that plaintiff had been bound to the Third District Court on complaint No. 38052 rather than complaint No. 38158, and withheld from plaintiff that he had been bound to the court on complaint No. 38158, and further deceived plaintiff by advising him that he was properly bound to the District Court and that there was no remedy at law to vacate said bind over and to quash information No. 17135 filed in district court and further advised plaintiff he must plead to said information, defendant well knowing this would result in plaintiff waiving his rights to protest or contest any irregularities prior to District Court arraignment (R. 53).

It is further alleged that defendant well knew of the proper legal remedy to vacate said bind over and refused to exercise ordinary prudence, skill, and knowledge in plaintiff's behalf, and well knew plaintiff had a right to rely on him, and did so rely on him, to plaintiff's damage and detriment.

It is further alleged on or about October 13, 1960, that plaintiff, learning of defendant's breach of professional duty, betrayal or plaintiff's interests, negligent misrepresentation and conspiracy discharged defendant, and being *unable to secure legal counsel* plaintiff, per se, went to the Supreme Court, back to the District Court, on or about December 22, 1960, there obtaining (1) District Court order (R. 54) vacating order of Marcellus K. Snow, Judge, binding him to the District Court on



Case No. 38158; (2) order quashing information No. 17135 filed in District Court as a result of being bound over on Case No. 38158; and (3) order for a preliminary hearing in City Court Case No. 38158.

It is further alleged plaintiff, defending himself, secured his own discharge and dismissal at preliminary hearing, held May 10 and 11, 1961, (R. 55) at which time the trial court found there was no probable cause for Complaint No. 38158 in the first instance.

It is further alleged on or about October 7, 1960, defendant failed and refused to follow reasonable and proper instructions of plaintiff, to plaintiff's detriment and damage (R. 55-60).

It is further alleged defendant on or about October 10, 1960, after unreasonable procrastination, prepared a void notice of sale to plaintiff's detriment and damage (R. 57 and 58), said notice of sale made a part of complaint (R. 42).

It is further alleged in particular special damages suffered by plaintiff (R. 61, 62, 63), as a result of the misconduct, misrepresentation, breach of professional duty, betrayal of plaintiff's interests, failure and refusal to exercise proper skill by defendant.

The facts of the impropriety of the filing of findings of facts and conclusions of law (R. 96-7-8-9), 101) are very apparent in this record.

That the prejudicial findings of facts and conclusions of law (R. 96, 101) are void as a matter of law and im-

properly presented to the court January 23, 1962, by Attorney Jones during the proceedings and hearing on Case No. 132540 (R. 234) by his usual improper conduct (R. 234, page 6, line 29; page 7, lines 1 to 17) and *signed* and *filed* by Judge Maurice Harding on January 23, 1962, when the Judge completely lacked jurisdiction of the case, the parties, and the subject matter. Judge Harding signed said findings after he had disqualified himself in Case No. 129540 (R. 234, page 17, lines 19 and 20). Judge Harding, being a Fourth District Judge, completely disqualified himself to sign any matter without proper invitation from the Presiding Judge of the Third District Court after he had denied jurisdiction of case.

That *nunc pro tunc* is not a valid or proper procedure for pre-dating and filing of findings of facts and conclusions of law and that findings of facts and conclusions of law must issue before judgment or *order* as a matter of law, dismissal *order* dated November 7, 1961 (R. 95).

The facts of defendant's willful knowing fraud, deceit, conspiracy, and malicious misrepresentation are adequately set out with particularity in plaintiff's second cause of action (R. 63 to 73, incl.). The allegations in No. I (R. 63), No. II (R. 63-69), No. III R. 69-70), No. IV (R. 74), No. V. (R. 72-73) state the facts of defendant's willful and knowing betrayal of plaintiff's interests and his deliberate fabrications to deceive and conceal the true facts from plaintiff of defendant's fraud and conspiracy with Richard C. Dibblee and others in allowing plaintiff to be unlawfully bound over to the

Third District Court. It is further alleged willful breach of professional duty imposed by law in defendant's willful refusal and failure to exercise a reasonable standard of professional skill in plaintiff's behalf in all matters entrusted to him and using his fiduciary position to conceal the true facts from plaintiff. The true facts are fully stated in each allegation as to defendant's fraud, deceit, conspiracy and willful fabrications.

The legal claims asserted in plaintiff's second amended complaint and contained in the record are treated in the argument herein.

It is very apparent from the record that defendant and his attorney's motion to dismiss (R. 84 incl. 88) is frivolous, deceiving, without foundation in law, and intended to confuse plaintiff, and a devise to stall for time and to lead this plaintiff into fatal error in law.

## ARGUMENT

### POINT I.

THE APPELLATE COURT MUST VIEW THE RECORD IN A MANNER MOST FAVORABLE TO PLAINTIFF.

The trial court in dismissing plaintiff's second amended complaint based upon defendant's motion to dismiss (R. 84) could only issue as a result of defendant having deceived the court; however, it appearing from the record that the matters recited in defendant's motion to dismiss, for more definite statement, and to strike of March 3, 1961, were before the court at hearing October 17, 1961, more particularly defendant's allegation that complaint fails to state a claim upon which

relief can be granted (R. 7). No answer was ever filed, nor does the court's order reflect the true grounds or basis for its holding. (R. 95).

It appears the court ruling must be considered to have encompassed all the grounds presented by defendant's motions. Before the ruling of the court may be affirmed, it must appear that the plaintiff's complaint when considered in a light most favorable to the plaintiff under any set of facts stated in the complaint could not state a claim for relief at law, or that misjoinder of issues and damage is a valid grounds for dismissal.

In *Tangreen v. Ingalls*, Supreme Court of Utah, No. 9297, November 30, 1961, 367 P. 2d 179, the Court stated as follows:

"The sustaining of summary motions without affording the party an opportunity to present his evidence is a stringent measure which Courts should be reluctant to grant. It should be borne in mind that although disposing of a case on such a motion may seem an easy and expeditious method of dealing with litigation it may not in fact be so.

"Unless the Court feels a high degree of assurance that such ruling is correct it may result in defeating that purpose and actually protracting the litigation by requiring an appeal and then having a trial which should have been done in the first place. Accordingly the privilege of presenting evidence should be denied only when taking the view most favorable to the party's claim he could not in any event establish a right to redress under the law; and unless it clearly so appears,

doubts should be resolved in favor of permitting him to go to trial."

In *Liquor Control Commission v. Athas*, 121 Utah 453, 4 243 P.2d 441 (1952), the Court stated as follows:

"A motion to dismiss should not be granted unless it appears to a certainty that plaintiff would be entitled to no relief under any state of facts that could be proved in support of its claim."

The Court further noted that a claim could be pleaded by "recitation of a conclusions of law or fact or both." To the degree that defendant's motion was based upon insufficiency of the complaint to state a cause, it is contrary to the above rules.

Plaintiff submits that his second amended complaint (R. 48 to 63) first cause of action clearly states a claim for relief well within the rule of the *Tangren b. Ingalls* case and the Liquor Control Commission case and the trial court erred in not so finding.

However, plaintiff submits even though the second amended complaint may be somewhat lengthy and not couched in professional language, as might have been done by a person learned in the law, yet the facts alleged constitute a legal wrong resulting in damages accruing to plaintiff and reflect a meritorious case against defendant as a matter of law and are a result of plaintiff's unprofessional efforts to inform the trial court and defendant of the wrongs suffered by this plaintiff at the hands of a skilled attorney who betrayed plaintiff and the trust plaintiff had deposited in defendant. Plaintiff

submits that Allegation No. 4, first cause of action, and Allegation No. II, second cause of action are somewhat as this Honorable Court said in its decision February 5, 1958, *McGavin v. Preferred Inc. Exchange*, 7 Utah 2d 161, 320 P2d 1109:

“The dismissal was bottomed on failure to state a claim on which relief could be granted. The complaint is somewhat prolix and is to a great extent a recitation of evidence, rather than being a short, concise, statement of a claim, as contemplated by our rules of procedure.<sup>1</sup> It sounds partly in contract and partly in deceit, with no separate statements in counts or paragraphs, as independent claims. The claims for general damages and punitive damage are mingled, the former for breach of contract and the latter presumably arising out of tort. Without separation as a distinct claim, there is a hint in some of the language of a claim for service performed, not arising out of an express promise.

“Since the dismissal was without prejudice, it seems obvious that, whatever claim plaintiff has would be pursued in another action, if not, in this one. It would seem reasonable and sensible therefore, and would expedite the matter considerably, if plaintiff were permitted to redraft his pleadings within the spirit of Rule 15, U.R.C.P. along lines suggested in this opinion. . . .”

But in this instant case plaintiff is a layman and felt it his duty to explain as best he could the particulars of defendant's breach of duty, and the fraud, deceit and

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1. Rule 8(A), 8(E), U.R.C.P. 1953.



conspiracy in second cause of action. Plaintiff submits a reasonable man could answer this complaint or any part of it, if it were not for defendant being responsible at law for all the damage and injury claimed by plaintiff.

## POINT II

THE APPELLATE COURT MUST CONSIDER ALL OF PLAINTIFF'S VERIFIED SECOND AMENDED COMPLAINT TRUE AS TO BOTH FIRST AND SECOND CAUSE OF ACTION.

The trial court should have considered plaintiff's complaint true in all particulars as a matter of law. Plaintiff's verified second amended complaint (R. 48-83) must be controverted or denied by a verified answer or defense; and Rule No. 8(d) U.R.C.P., EFFECT OF FAILURE TO DENY:

"Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. . . ."

Plaintiff cites the case of *Smoot v. Lund*, Supreme Court, No. 9515, March 14, 1962, in which a plaintiff's second cause of action was dismissed on a motion for summary judgment. Among other things, the court said:

"We turn to an examination of the plaintiff's claims to see whether a right to recovery could be made out, *assuming the facts to be as they contend.*"

Plaintiff respectfully submits had the trial court considered plaintiff's second amended complaint as true, court could not have dismissed plaintiff's complaint as a matter of law.

### POINT III.

THAT COURT ERRED IN DISMISSING PLAINTIFF'S SECOND AMENDED COMPLAINT WITHOUT ALLOWING SAME TO BE AMENDED IF IT IS INSUFFICIENT, AND ERRED IN NOT FULLY CONSIDERING PLAINTIFF COULD NOT OBTAIN AN ATTORNEY TO REPRESENT HIM, AND THAT COURT SHOULD *EXERCISE ITS DISCRETION IN BEHALF OF LAYMAN*.

Plaintiff submits that crying layman can appear that one is taking advantage of a non-professional standing; however, the law also recognizes the difficulties a layman experiences in obtaining an attorney to properly represent him in an action against another attorney, *Vanderbilt Law Review*, vol. 12, p. 774, and also recognizes that the trial court should exercise all its discretion in favor of the plaintiff layman even to allowing amendments to complaint to correct *fatal error*.

The California Supreme Court said as follows, on the above subject, in *Pete v. Henderson* (1954) 124 Cal. App. 2d 487, 269 P2d 78, 45 ALR 2d 58,

“... where it appears that the plaintiff a layman was trying the case in person because of the impossibility of securing an attorney to represent him. . . . That fact should be considered in determining whether the trial court should exercise any discretion it may have to grant relief from a particular default. That discretion should be exercised.”



Plaintiff respectfully submits that trial court erred in not fully considering plaintiff's almost insurmountable legal obstacles and in not making allowances for plaintiff's inexperience and not learned efforts at law to construct his complaint and erred in failing to exercise court's discretion in behalf of plaintiff.

#### POINT IV.

THAT THE TRIAL COURT ERRED IN ENTERING ORDER MAY 25, 1961, IN THIS CAUSE, CASE NO. 129540, DISMISSING PLAINTIFF'S COMPLAINT IN DISTRICT COURT CASE NO. 128599.

Plaintiff submits that said order entered May 25, 1961, in Case No. 128599 in the middle of proceedings held in this cause, Case No. 129540 (R. 23, lines 10-11 and R. 164) was a trick of defendant and attorney to obtain an order of the court dismissing plaintiff's cause in Case No. 128599, and a direct violation of Title 78-7-19, REPEATED APPLICATION FOR ORDERS FORBIDDEN, and that the attorney well knew he was taking advantage of plaintiff and well knew the impropriety of taking the matter before Judge Harding after his motion had been denied by Judge Ellett. (R. 170—1-2) Defendant and his attorney were obviously taking advantage of the fact that said hearing was not reported as this plaintiff had requested and demanded of Clerk of the Court, and defendant and attorney well knew the impropriety of bringing the subject matter before the court without motion being properly noticed and properly before the court and particularly during the proceeding of another hearing, and that attorney and defendant should be punished according to Title 78-7-20,

DISOBEDIENCE, CONTEMPT. This Honorable Court has recently said in *Hackford v. Industrial Commission*, (Sept. 28, 1961) 364 P2d 1091:

“The trial of disputes, whether before courts or administrative tribunals is *not a game of tricks* but is a proceeding purposed to find the truth on contested issues of facts and to correctly apply the law thereto.”

This plaintiff submits that all he wants is to go forward into the merits of this case, *if* the defendant can contest the issues present in complaint, however crude they may be. Plaintiff submits that trial court erred in entering an order dismissing his complaint in Case No. 128599 (R. 23 and 164).

Plaintiff respectfully submits that said order should be voided and stricken, pursuant to Title 78-7-20, as a matter of law.

#### POINT V.

THE APPELLATE COURT IN ABSENCE OF STATE BARR ASSOCIATION ACTING OR PERFORMING ITS DUTY SHOULD DISCIPLINE ATTORNEYS HATCH AND JONES AND PROTECT THIS PLAINTIFF FROM THEIR FURTHER MICONDUCT UPON THE FOLLOWING TWO THEORIES:

- A. APPELLATE COURT HAS THE ABSOLUTE AND FINAL JURISDICTION OF DISCIPLINING ATTORNEYS.
- B. APPELLANT HAS RIGHT TO PROTECTION FROM ATTORNEYS IN THEIR WILLFUL VIOLATION OF STATUTES AND CANNON OF RULES OF ETHICS ON ATTORNEY'S CONDUCT.

Plaintiff submits that he has tried repeatedly to obtain protection from Attorneys Jones and Hatch's misconduct from the court and the State Bar Association.

This plaintiff is now so disgusted and discouraged and plaintiff now has only contempt and pity for such breach of professional duty that is apparent in this record, and prays the court to examine this entire record for the misconduct and breach of ethics apparent herein, and if for no other reason than to protect the rest of the citizens of the State of Utah and the State Bar Association itself from the reprehensible action of Attorneys Jones and Hatch.

This Honorable Court, amongst other things, said as follows on this subject in *Re MacFalane* (April 1, 1960) 10 Utah 2d 217, 350 P2d 631:

“... We accept the fact that the final responsibility is upon this court and that this involves more than mere rubber stamp endorsement of the actions of the commission . . . in the prudent exercise of the power to discipline in order to maintain such standards lies the protection of the *public* and *The Bar* itself.”

#### POINT VI

THAT COURT ERRED IN ITS DETERMINATION BY ORDER DATED NOVEMBER 7, 1961, DISMISSING PLAINTIFF'S SECOND AMENDED COMPLAINT "FOR FAILURE OF THE PLAINTIFF TO COMPLY WITH ORDER OF THE COURT REQUIRING PLAINTIFF TO STATE THE FACTS OF HIS ALLEGED CAUSE OF ACTION IN PLAINT AND CONCISE TERMS". NO SUCH ORDER OR ENTRY MADE IN THIS CAUSE.

Plaintiff submits the trial court erred in entering order (R. 95). The record is definite as reflected by the certificate of the Clerk of the Court (R. 112) that no such order was made in this cause. As a matter of law it is well established that there is a proper method for the

court to enter an order, and this Honorable Court has frequently held that the trial courts must use the proper methods, prescribed by law. This Honorable Court said in *Butting Tractor v. Ford*, 272 P2d 191:

“In entering any judgment it is the duty of the Court to make such order not inconsistent with law as will effectuate justice.”

The court said in *Attorney General v Pomeroy*, October 27, 1937, 93 U 426 73 P2d 1277:

“An order will not be construed as going beyond the motion in pursuant of which it is given.”

#### POINT VII

THE APPELLANT'S FIRST CAUSE IN TORT AGAINST THE DEFENDANT ADEQUATELY STATES A PRIMA FACIE CAUSE AND CLAIM FOR RELIEF ON THE FOLLOWING THEORIES:

- A. AN ATTORNEY IS LIABLE IN DAMAGES FOR NEGLIGENCE, NEGLIGENT MISREPRESENTATION, MISCONDUCT, AND BREACH OF PROFESSIONAL DUTY IMPOSED BY LAW
- B. THAT DEFENDANT LAWYER VIOLATED THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF THE STATE OF UTAH AND THE STATUTES OF THE STATE OF UTAH DESIGNED TO PROTECT THE LIBERTY AND PROPERTY OF PLAINTIFF, THE EQUAL RIGHTS AND DUE PROCESS OF LAW INTENDED TO PROTECT PLAINTIFF.
- B(1) THAT TRIAL COURT'S DISMISSAL VIOLATED PLAINTIFF'S CONSTITUTIONAL RIGHTS FOR ABOVE REASONS

Plaintiff alleges the first cause of action in his second amended complaint adequately states a claim for relief in tort on negligence, negligent misrepresentation, and conspiracy.

This Honorable Court recently held in *Kimika Toma, Administratrix, v. Utah Power and Light Company*, 365 P. 2d 788, Supreme Court 9402, October 26, 1961 :

“A tort is a legal wrong committed by one against the person or property of another. It is the violation of a duty imposed by law. Three elements of every tort action are: (1) Existence of a legal duty from defendant to plaintiff; (2) Breach of that duty; (3) Damage as a proximate result. It may arise by the violation of the duty in a given transaction or by invasion of some public duty by which damages accrue to the individual.”

It is alleged in plaintiff's complaint that plaintiff had entrusted to defendant all matters of his defense and affairs; that plaintiff had a right to rely on defendant, did rely on him and was injured by so relying and that defendant had proper time and opportunity to adequately represent plaintiff, and that plaintiff suffered damage by defendant's breach of trust.

This Honorable Court said March 14, 1962, in *Smoot v. Lund*, Supreme Court Case No. 9515:

“Where an attorney is hired solely to represent the interests of a client, his fiduciary responsibility is of the highest order and he must not represent interests adverse to those of the client. It is also true that because of his professional responsibility and the confidence and trust which his client may legitimately repose in him, he must adhere to a high standard of honesty and integrity in dealing with his client. He is not permitted to take advantage of his position or superior knowledge to impose upon the client; nor to conceal facts or

law, nor in any way deceive him without being held responsible therefor.”

Now the court’s attention is respectfully called to the case of *Hodges v. Carter*, 239 N.C. 517, 80 S.E. 2d 144, 146, 1954, that a lawyer:

“... is answerable in damages for any loss to his client which proximately results from a want of that degree of knowledge and skill ordinarily possessed by others of his profession similarly situated, or from the omission to use reasonable care and diligence, or from the failure to exercise in good faith his best judgment in attending to the litigation committed to his care.”

and *Cornell v. Edien*, 139 Pac. 602, says among other things:

“... that client’s cause of action is upon his breach of professional duty and would exist though breach unintentional.”

The court’s attention is directed to two recent Pacific cases which hold that if the attorney’s erroneous acts and advice were a proximate cause of the injury, recovery can be had. *Modica v. Crist*, 102 Cal. 2d, 144, 146, 276 P2d, 614 (1954), *Ward v. Arnold*, 328 P 2d, 164, 166 (Wash. 1958) recite:

“... the law does not require that negligence of the defendant must be the sole cause. . . . We see no sound reason . . . why the degree of causation which must be proved in an action for damages for malpractice should be any different from that required in an ordinary negligence case.”

Plaintiff submits defendant is a skilled attorney-at-

law, in fact, is known as a criminal attorney well versed in the criminal statutes. Now the court's attention is respectfully called to the leading case in point, widely quoted, *Spangler v. Sellers* 5 Fed. 882, 887 (C.C.S.D. Ohio 1881) and the recent case of *Hodges v. Carter* 239N.C. 517, 80 S.E. 2d 144, 146 (1954) that a lawyer

“... is answerable in damages for any loss to his client which proximately results from a want of that degree of skill in relation to business of that character, nor that he would conduct it with the greatest degree of diligence, care, and prudence. But it required that he should possess the ordinary legal knowledge and skill common to members of the profession and that, in the discharge of the duties he had assumed, he would be ordinarily and reasonably diligent, careful, and prudent.”

It is submitted that the defendant is liable to the plaintiff in the first cause of action of his complaint in negligence based upon the facts alleged as a matter of law, based upon defendant's misconduct, breach of professional duty imposed by law, failure to exercise due care, ordinary prudence and skill in client's behalf.

#### A. NEGLIGENT MISREPRESENTATION

It is submitted that the misstatements, omissions, nondisclosure, and misrepresentation, as alleged in the complaint, give rise to an additional cause of action, base upon negligence. The law has recognized that a tort action on the basis of negligence may arise from a negligent misrepresentation. However, plaintiff recog-



nizes it is debatable whether the facts as pleaded covering nondisclosure, misstatement and misrepresentation, in plaintiff's first cause of action, should be treated as negligence or fraud; in any event it is submitted that defendant is liable to plaintiff for damages based on negligent misrepresentation. It is held in *Cornell v. Edien* 78 Wash. 662 139P 602, (1914) appeal from judgment on pleadings, Supreme Court said:

“Where an attorney wrongfully dismissed a cause of action . . . his client's cause of action depends not upon his fraud and *misrepresentation of an adverse verdict* but upon his breach of professional duty and would exist though breach was unintentional.”

#### B. NEGLIGENCE PREDICATED ON VIOLATION OF A STATUTE ENACTED FOR PROTECTION OF PLAINTIFF.

It is alleged in plaintiff's second amended complaint that defendant negligently and wrongfully allowed plaintiff to be bound over to the District Court without an arraignment, a violation of Title 77-22-1, U.C.A. 1953, without being served a copy of the complaint, a violation of Title 77-22-13, U.C.A. 1953, or having a day set for a preliminary hearing or waiving same, Title 77-22-15, or being allowed to have a preliminary hearing, a violation of Title 77-15-1, U.C.A. 1953, (R. 50, 51, 52).

Plaintiff submits the aforementioned statutes were enacted to protect the equal rights and the due process clauses of the Constitutions of the United States and



of the State of Utah for the protection of persons accused of a felony, a class of which this plaintiff was at that time.

It is further alleged defendant conspired with Chief Criminal Deputy County Attorney Richard C. Dibblee (R. 51, 52), a violation of Title 7~~6~~-12-1, U.C.A. 1953, CRIMINAL CONSPIRACY, defined:

1. If two or more persons conspire;
1. To commit a crime; or
2. *Falsely and maliciously to indict or convict another for any crime, or to move or maintain any suit, action, or proceedings; or,*
3. *Falsely to move or maintain any suit, action or proceedings; or*
4. To cheat and defraud any person of any property by any means which are in themselves criminal, or by any means which if executed would amount to a cheat, or to the obtaining of money or property by false pretenses; or
5. To commit any act . . . for the *perversion or obstruction of justice or the due administration of the laws; they are punishable by imprisonment in the county jail, not exceeding one year, or by fine not exceeding \$1,000.*

There can be no doubt that each of the forementioned statutes were violated by the defendant; that the plaintiff was a person of the class said statutes were meant to protect; and that the plaintiff was a victim of the very wrongs the statutes were meant to prevent.

It surely goes without saying the above statutes were

enacted and based upon The Constitution of the United States, Amendment V :

“ . . . No person shall be deprived of life, liberty, or property without due process of law, . . . ”

and the Constitution of the State of Utah, Article I, Section 7, which provides :

“No person shall be deprived of life, liberty, or property without due process of law.”

and that the trial court’s dismissal of plaintiff’s second amended complaint was a flagrant violation of the laws of the State of Utah and a violation of our State Constitution which provides in Article I, Section 11 :

“All courts shall be open, and every person, for injury done to him in his person or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay, and no person shall be barred from prosecuting or defending before any tribunal in this state, by himself or counsel, any civil cause to which he is a party.”

and a violation of plaintiff’s rights in the Constitution of the United States that provides, Amendment XIV:

“That no state shall deprive any person within its jurisdiction the equal protection of the law or deprive any person of life, liberty or property without due process of law.”

Due process of law is defined in *Hager v. Reclamation District* as follows, Supra III US 708:

“By due process is meant one which following the forms of law, is appropriate to the case.

... It must be pursued in the ordinary mode prescribed by law; it must be adapted to the end to be attained.... The clause in question means, therefore, that there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights.”

It is admitted the aforementioned Utah statutes are criminal statutes; however, this does not preclude a civil remedy being based upon a violation thereof which is the proximate cause of plaintiff's damages. It was noted in *Texas P. Ry. Co. v. Rigsby*, 241 U.S. 33 (1916) as follows:

“A disregard of the command of the statutes is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover damages from the party in default is implied.”

This Honorable Court indicated in *Langlois v. Rees*, 10 U. 2d 272-5, 351 P. 2d 638 (1960) that if a violation of a statute results in damage which the statute is designed to prevent, a supportable cause of action exists. Notwithstanding this case deals with violation of the statutes as to pedestrian and motor vehicle code and resulting personal injuries, plaintiff finds little difficulty in choosing whether it is more desirable to be personally injured by a negligently operated vehicle or by the acts, doings, and omissions of a negligent attorney; this plaintiff survived a near fatal truck accident and personally knowing it was forgotten after recovery;

whereas, the disgrace, oppression, shame, ridicule, and stigma of being branded a felon and other injuries have lingered on, long after the stomach ulcer quit bleeding and healed. The said ulcer was developed and aggravated as a result of the unusual frustrations, mental sufferings caused by defendant's violation of the statutes designed to protect plaintiff from just such wrongs, and resulting damage as plaintiff sets out in his complaint. This may not be law but it is the truth, good sense, and I surely intend to try and make some law out of it.

It is difficult to construe the conduct of defendant as that of a reasonable man and more particularly so as a skilled attorney, as noted in Prosser, *TORTS*, second edition, page 152:

“The standard of conduct of a reasonable man may be established by a statute or ordinance. The violation of such a legislative enactment may be negligence in itself if: (A) The plaintiff is one of a class of persons whom the statute was intended to protect, and (B) The harm which has occurred is of the type which it was intended to prevent.”

Plaintiff submits the breach of the aforementioned statutes by the defendant appear obvious from the pleadings and that defendant is liable to plaintiff for damages for negligence based on violation of a statute as a matter of law. Plaintiff contends the court erred in dismissing his first cause of action in his second amended complaint for said reason and in particular that said dismissal violates plaintiff's Constitutional

rights in both the Constitutions of the United States and the State of Utah, as heretofore set forth.

#### POINT VIII

THAT PLAINTIFF, A LAYMAN NOT SKILLED AND NOT LEARNED IN THE LAW, PREVAILED IN ALL MATTERS OF HIS DEFENSE WHERE DEFENDANT FAILED.

It is submitted that plaintiff's second amended complaint, first cause of action, sets out plaintiff prevailed in the same matters that defendant neglected and failed (R. 54) first cause, (R. 68 and 69) second cause of action. Inasmuch as this point is the main defense unscrupulous attorneys use as a matter of law to avoid having to answer for their wrongdoings, I shall let the defense elaborate on this point at law. The complaint speaks for itself on this point.

#### POINT IX

THAT DEFENDANT PREPARED A VOID NOTICE OF SALE IN BEHALF OF PLAINTIFF.

That defendant prepared a void notice of sale (R. 56) allegation No. 6, first cause, as alleged in complaint No. V (R. 72) second cause, there is no doubt. Said notice of sale is made a part of complaint (R. 42). It is held in *Wilson v. Carroll*, 80 Colo. 234, 250 P. 555 (1926) that an attorney can be held negligent in conduct of litigation from error in publication of notice of sale. Allegation No. V, second cause of action, adequately alleges fraud and fraudulent misrepresentation and damage arising therefrom.

#### POINT X

THAT DEFENDANT FAILED AND REFUSED TO FOLLOW PLAINTIFF'S REASONABLE INSTRUCTIONS.

An attorney has been held negligent in conduct of litigation from failure to follow client's instructions (R. 55) allegation No. 5, first cause.

(R. 69) Allegation III and (R. 71) Allegation IV, second cause of action, adequately alleges fraud and fraudulent misrepresentation, and damages arising therefrom. *Lally v. Kuster*, 177 Cal. 783, 171 Pac. 96 (1918).

#### POINT XI

**PLAINTIFF ADEQUATELY STATES A CLAIM FOR RELIEF AGAINST DEFENDANT FOR SPECIAL DAMAGES BASED UPON NEGLIGENCE AND NEGLIGENT MISREPRESENTATION.**

It is submitted that plaintiff has set out a claim for relief against defendant for special damages in his complaint and in particular in Allegation No. 7, sub-section 5 through and including sub-section 11 (R. 61, 62, 63). Therefore, plaintiff contends his claim for special damages is well pleaded.

#### POINT XII

**MISJOINDER OF ISSUES AND DAMAGE IS NOT A VALID GROUNDS TO DISMISS A COMPLAINT.**

It is submitted plaintiff has sufficiently described what legal damage plaintiff claims resulted from acts, doings, and omissions of defendant in Allegation No. 7, first cause of action (R. 58-9, 60-1-2-3) and Allegation No. VI, second cause of action (R. 73, 74-5-6-7-8-9, 80) to the degree the court considered defendant's motion to dismiss, paragraph 2 (R. 7). In this respect plaintiff contends even if it were found a misjoinder of claims

was made, pursuant to Rule 18, U.R.C.P. and Rule 20, U.R.C.P., dismissal would not be appropriate.

### POINT XIII

THAT THE TRIAL COURT ERRED IN SIGNING AND FILING "FINDINGS OF FACTS AND CONCLUSIONS OF LAW NUNC PRO TUNC" IN THIS CAUSE, JANUARY 23, 1962.

It is submitted Rule 52 (A), U.R.C.P., precludes the entering of findings of fact and conclusions of law after judgment or order.

In *Re Thompson's Estate*, 72 U. 17, 35, 260 P. 103,

"A judgment rendered on no findings, or not upon sufficient or proper findings to support it, has no more validity in equity than at law."

This Honorable Court held in *Utah Savings & Loan v. Mecham, et al.* (1960), 11 U. 2d 159, 356 P. 2d 281.

Our rules (Rule 52(A), U.R.C.P. 1953) provide that the court must find facts specially and these cases well illustrate the necessity for full compliance with this provision. It is apparent from the record (R. 234, page 17, lines 19-20) that Judge lacked jurisdiction to sign and enter defendant's findings of fact and conclusions of law (R. 96) January 23, 1962, nunc pro tunc.

Nunc pro tunc is not a proper method to timely file findings of fact and conclusions of law. In this matter the Court erred and plaintiff submits same should be voided and stricken from the record.



## POINT XIV

THE APPELLANT'S SECOND CAUSE ADEQUATELY STATES A PRIMA FACIE CAUSE AND CLAIM FOR RELIEF BASED UPON FRAUD, DECEIT, CONSPIRACY, AND WILLFUL FRAUDULENT MISREPRESENTATION AS FOLLOWS:

- A. AN ATTORNEY IS LIABLE IN DAMAGES FOR WILLFUL KNOWING FRAUDULENT MISREPRESENTATION AND MISCONDUCT, WILLFUL KNOWING, BREACH OF PROFESSIONAL DUTY IMPOSED BY LAW, BY WILLFUL KNOWING FAILURE TO EXERCISE DUE CARE, ORDINARY PRUDENCE AND SKILL IN CLIENT'S BEHALF.
- B. THAT DEFENDANT FRAUDULENTLY, WILLFULLY AND KNOWINGLY VIOLATED THE CONSTITUTIONS OF THE UNITED STATES AND OF THE STATE OF UTAH AND THE LAWS OF THE STATE OF UTAH DESIGNED TO PROTECT THE LIBERTY AND PROPERTY OF PLAINTIFF; THAT DEFENDANT FRAUDULENTLY, WILLFULLY, AND KNOWINGLY VIOLATED THE EQUAL RIGHTS AND DUE PROCESS OF LAW INTENDED FOR PLAINTIFF'S PROTECTION.
- B(1) THAT TRIAL COURT'S DISMISSAL VIOLATED PLAINTIFF'S CONSTITUTIONAL RIGHTS FOR ABOVE REASONS.

Plaintiff incorporates the argument of Point VII into this argument and states that his second cause of action (R. 63 to 83) adequately sets out willful, knowing fraud, deceit, conspiracy and fraudulent misrepresentation where reference is made to negligence in the arguments of Point VII.

In the second amended complaint, second cause of action, the facts alleging the fraud and deceit are set out with particularity as required by Rule 9(b) U.R.C.P. In *Davis Stock Co. v. Hill*, 2 U. 2d 20, 268 P. 2d 988 (1954),



this court set out the requirements for a pleading of fraud, noting that the true facts must be alleged also, unless they appear obvious from the pleadings.

In the instant case plaintiff has made a showing in particular that meets with all the tests of the above rule and following cases :

*Struck v. Delta Land and Water*, 63 U. 495, 227 P. 791 (1929) :

“Elements of actual fraud consist of :

1. a representation.
2. its falsity.
3. its materiality.
4. speakers knowledge of its falsity or ignorance of its truth.
5. his intent that it should be acted upon by person and in manner reasonably contemplated.
6. hearer’s ignorance of its falsity.
7. his reliance upon its truth.
8. his right to rely thereon; and
9. his consequent and proximate injury.”

*Pace v. Parrish*, *Utah* 247 P.2d 273 (1952) :

“Elements of actionable fraud to be proved are a false representation of existing material fact, made knowingly or recklessly for the purpose of inducing reliance thereon upon which plaintiff reasonably relies to his injury.”

In *Re Swans Estate*, 4 U.2d 277, 293 P.2d 682 (1956):

“...thus a definite need is shown that the presumption arising out of confidential dealings shall shift the burden of persuasion that there was no fraud or undue influence onto the confidential adviser. For the confidant relies on him and trusts him to give disinterested advice and counsel....”

“...but because in most cases it is apt to produce a correct finding of the facts, for a confidential adviser who practices fraud or undue influence has a strong motive for concealing the truth and the person whose confidence he betrays even though available as a witness does not know the schemes and plans used against him to accomplish the desired result....”

The court's attention is respectfully directed in the case of *Sherwood v. South*, 29 S.W. 2d, 805, attorney's improper collusion against client is a question for the jury on matters of fraud and damages.

There can be no complaint that the instant pleadings are not sufficient unless as a matter of law they do not state a claim for relief as set out. It is submitted that they adequately set out such a claim.

#### POINT XV

**PLAINTIFF ADEQUATELY STATES A CLAIM FOR RELIEF AGAINST DEFENDANT FOR SPECIAL DAMAGES BASED UPON FRAUD, DECEIT, AND CONSPIRACY.**

It is submitted that plaintiff has set out a claim for relief against defendant for special damages in his complaint and in particular in Allegation VI, sub-section 5 through and including sub-section 11 (R. 76, 77, 78, 79),

second cause of action. Therefore, plaintiff contends his claim for special damages is well pleaded in his second cause.

#### POINT XVI

PLAINTIFF ADEQUATELY STATES A CLAIM FOR RELIEF AGAINST DEPENDANT FOR TREBLE DAMAGES BASED UPON TITLE 78-51-31, U.C.A. 1953.

There can be no complaint that the instant pleadings are not sufficient in both first and second cause of action to support plaintiff's prayer and demand for treble damages under Title 78-51-31. DECEIT AND COLLUSION. It is submitted that they adequately set out such a claim (R. 63) first cause of action, sub-section 11; second cause of action (R. 79, sub-section 11).

#### CONCLUSION

The following statement is quoted from *Vanderbilt Law Review*, vol. 12, p. 774:

“The task set for a client who seeks to recover in an action of negligence is a formidable one. He must first find another attorney who will take his case and prosecute it. This is likely to prove particularly difficult in some cities, and it may be exaggerated by the need in some cases for the testimony of other attorneys regarding the character of the defendant's work. If the charge is negligence in regard to the conduct of litigation the client is required to win two cases; he must show both that the defendant was negligent and that plaintiff was entitled to win the original suit and would have won it except for the defendant's negligence. He is likely to find the court, whether at trial or appellate level,

sympathetic to the defendant as a colleague at the Bar."

Plaintiff nominates the *foregoing statement* as the all-time gross *understatement* of a problem at law.

Plaintiff submits whatever may be our wishes, our inclination, or the dictates of our passion, they cannot alter the state of fact, evidence, and law contained in this record. The law will not bend to uncertain wishes, imagination and wanton dictates of unscrupulous, unethical, politically powerful men, whose sanctimonious hypocrisy would destroy the very foundation of our freedoms, yes, our very nation and our democracy. That foundation is the greatest law and judicial system designed to promote justice, liberty, and equality for the benefit of *all men* the history of the world has ever known.

Plaintiff submits this Honorable Court should grant this plaintiff the entire relief he has sought on this appeal, or relief in the alternative as sought.

Respectfully submitted,

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for Appellant*