

2002

Julian Dean Hatch v. Larry Davis : Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

James C. Bradshaw; Brown Bradshaw & Moffat; David J. Bird; Richards Bird & Kump; Attorneys for Appellees.

Budge W. Call; Bond & Call; Attorneys for Appellant.

Recommended Citation

Reply Brief, *Hatch v. Davis*, No. 20020778 (Utah Court of Appeals, 2002).
https://digitalcommons.law.byu.edu/byu_ca2/3982

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

Budge W. Call (5047)
Attorney for Plaintiff
and Appellant
311 South State, Suite 450
Salt Lake City, UT 84111
Telephone: (801) 521-8900
Facsimile: (801) 521-9700

IN THE UTAH COURT OF APPEALS

| | | |
|--------------------------|---|---------------------------------|
| JULIAN DEAN HATCH , |) | APPELLANT'S REPLY BRIEF |
| Plaintiff and Appellant, |) | |
| vs. |) | |
| LARRY DAVIS |) | Appellate Case No. 20020778 -CA |
| Respondent and Appellee. |) | Trial Court No. 980600010 |

THIS IS AN APPEAL FROM THE JUDGMENTS RENDERED
IN THE SIXTH DISTRICT COURT BY JUDGE K.L.MCIFF.

James C. Bradshaw
BROWN BRADSHAW & MOFFAT
10 West Broadway, Suite 210
Salt Lake City, UT 84101
(801) 532-5297
Attorneys for Defendant
and Appellee, Larry Davis

Budge W. Call
BOND & CALL
311 South State, Suite 450
Salt Lake City, UT 84111
(801) 521-8900
Attorneys for Plaintiff
and Appellant, Julian Hatch

David J. Bird
RICHARDS BIRD & KUMP
333 East 400 South, #200
Salt Lake City, UT 84111
(801) 328-8987
Attorneys for Defendant
and Appellee, Larry Davis

FILED
UTAH APPELLATE COURTS
MAR 23 2004

Budge W. Call (5047)
Attorney for Plaintiff
and Appellant
311 South State, Suite 450
Salt Lake City, UT 84111
Telephone: (801) 521-8900
Facsimile: (801) 521-9700

IN THE UTAH COURT OF APPEALS

| | | |
|--------------------------|---|--|
| JULIAN DEAN HATCH , |) | APPELLANT'S REPLY BRIEF |
| Plaintiff and Appellant, |) | |
| vs. |) | |
| LARRY DAVIS |) | Appellate Case No. 20020778 -CA Trial Court No. 980600010 |
| Respondent and Appellee. |) | |

THIS IS AN APPEAL FROM THE JUDGMENTS RENDERED
IN THE SIXTH DISTRICT COURT BY JUDGE K.L.MCIFF.

James C. Bradshaw
BROWN BRADSHAW & MOFFAT
10 West Broadway, Suite 210
Salt Lake City, UT 84101
(801) 532-5297
Attorneys for Defendant
and Appellee, Larry Davis

Budge W. Call
BOND & CALL
311 South State, Suite 450
Salt Lake City, UT 84111
(801) 521-8900
Attorneys for Plaintiff
and Appellant, Julian Hatch

David J. Bird
RICHARDS BIRD & KUMP
333 East 400 South, #200
Salt Lake City, UT 84111
(801) 328-8987
Attorneys for Defendant
and Appellee, Larry Davis

TABLE OF CONTENTS

| | |
|--|-----------|
| TABLE OF AUTHORITIES | iv |
| RESPONSE TO DAVIS’S STATEMENT OF FACTS | 1 |
| SUMMARY OF ARGUMENT | 7 |
| ARGUMENT | 12 |
| I. THE APPELLANT PERFECTED THE RECORD AND MARSHALED THE EVIDENCE IN SUPPORT OF THE CHALLENGED FINDINGS AFTER TRIAL | 12 |
| II. THE TRIAL COURT ERRED IN FAILING TO DISMISS THE MALICIOUS PROSECUTION CLAIM DURING THE PRE-TRIAL STAGES | 13 |
| A. Davis’s Counterclaim fails to state a legal claim for Malicious Prosecution | 13 |
| B. The jury should have been informed of the Court’s dismissal of the Malicious Prosecution claim. | 14 |
| III. THE TRIAL COURT ERRED IN FAILING TO DISMISS THE ABUSE OF PROCESS CLAIM | 15 |
| A. Davis’s Counterclaim fails to state a legal claim for Abuse of Process | 15 |
| B. The jury was not properly instructed on the necessary elements for the Abuse of Process claim | 17 |
| IV. THE DETERMINATION OF “PROBABLE CAUSE” FOR PURPOSES OF THE ABUSE OF PROCESS CLAIM SHOULD NOT HAVE BEEN LEFT TO THE JURY TO DECIDE | 18 |

| | | |
|--------------|---|-----------|
| V. | THE COURT ERRED IN FAILING TO DISMISS THE CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS | 19 |
| A. | The relevant record was provided and the evidenced marshaled, but it fails to adequately support of Davis’s claim for Intentional Infliction of Emotional Distress. | 19 |
| B. | Davis’s claim for emotional distress based on actions that occurred in the early 1990s is barred by Utah’s four (4) year statute of limitations. | 21 |
| C. | A jury instruction should have been given regarding Utah’s four (4) year statute of limitations for infliction of emotional distress. | 21 |
| D. | There is a “presence requirement” necessary for infliction of emotional distress for actions directed to another party. | 22 |
| VI. | HATCH HAS A CONSTITUTIONAL RIGHT TO BE CRITICAL OF PUBLIC OFFICIALS AND TO PETITION THE GOVERNMENT WITH HIS GRIEVANCES | 23 |
| VII. | THE TRAIL COURT ERRED IN ALLOWING EXPERT TESTIMONY AFTER THE COURT RULED AT THE PRE-TRIAL CONFERENCE THAT SUCH TESTIMONY WOULD NOT BE ALLOWED | 24 |
| VIII. | THE TRIAL COURT NEVER ENTERED A FINAL JUDGMENT PURSUANT TO RULE 54(b) OF THE UTAH RULES OF CIVIL PROCEDURE | 25 |
| | CONCLUSION | 25 |

TABLE OF AUTHORITIES

| <u>Federal Cases</u> | <u>Page(s)</u> |
|---|----------------|
| <u>Bennett v. Jones, Waldo, Holbrook & McDonough</u> , 70 P.3d 17 (Utah 2003) | 16 |
| <u>Breigger Properties L.C. v. H.E. Davis & Sons, Inc.</u> , 52 P.3d 1133 (Utah 2002) . . | 10,21 |
| <u>Chapin v. Knight-Ridder, Inc.</u> , 993 F.2d 1087 (4th Cir. 1993) | 23 |
| <u>Rosenblatt v. Baer</u> , 383 U.S. 75 (1996) | 23 |
| <u>Utah Cases</u> | |
| <u>Amica Mut. Ins. Co. v. Schettler</u> , 768 P.2d 950 (Ut.App. 1989) 977 P.2d at 1255 . . | 8,15 |
| <u>Andreini vs. Hultgren</u> , 860 P.2d 916 (Ut. App. 1993) | 10,22 |
| <u>Baird v. Intermountain School Fed. Credit Union</u> , 555 P.2d 877 (Utah 1976) (Rec. 33, 178-179) | 13,14 |
| <u>Cheves v. Williams</u> , 993 P.2d 1911 (Utah 1999) | 11 |
| <u>Crease v. Pleasant Grove City</u> , 519 P.2d 888 (Utah 1974) | 17 |
| <u>D’Ashton v. Aston</u> , 844 P.2d 345, 349 (Ut.App. 1992) | 11 |
| <u>Davidson Lumber Sales, Inc. v. Bonneville Inv., Inc.</u> , 794 P.2d 11, 19 (Utah 1990) | 21 |
| <u>Dubois v. Grand Central</u> , 872 P.2d 1073 (Ut.App. 1994) | 20 |
| <u>Gilbert v. Ince</u> , 981 P.2d 841,845 (Utah 1999) | 9 |
| <u>Hodges vs. Howell</u> , 4 P.3d 803 (Ut. App. 2000) | 10,22 |
| <u>In re Estate of Grimm</u> , 784 P.2d 1238, 1246 (Ut.App. 1989) | 10 |
| <u>Robertson v. Utah Fuel Co.</u> , 889 P.2d 1382 (Ut.App. 1995) <u>cert. denied</u> | 21 |
| <u>Samms v. Eccles</u> , 358 P.2d 344, 346-47 (Utah 1961) | 10,11,22 |

| | |
|--|------|
| <u>Sperber v. Galigher Ash Co.</u> , 747 P.2d 1025 (Utah 1987) | 20 |
| <u>West v. Thomson Newspapers</u> , 835 P.2d 179 (Ut.App. 1992) <u>cert. denied</u> 843 P.2d 1042, vacated on other grounds, 872 P.2d 999 | 23 |
| <u>Winters v. Schulman</u> , 979 P.2d 1218 (Ut.App. 1999) | 8,15 |

Cases from Other Jurisdictions

| | |
|--|---------|
| <u>Andrews v. Stallings</u> , 8982 P.2d 611 (N.M.App. 1995) | 20 |
| <u>Bosler v. Shuck</u> , 714 P.2d 1231 (Wyo. 1986) | 10,17 |
| <u>Breeden v. League Services Corp.</u> , 575 P.2d 1374 (Okla. 1978) | 20 |
| <u>Caudle v. Mendel</u> , 994 P.2d 372 (Alaska 1999) | 17 |
| <u>CIT Financial Services v. Erbs Indoor RV Center</u> , 702 P.2d 858 (Id.App. 1985) | 11 |
| <u>Costello v. Ocean County Observer</u> , 643 A.2d 1012 (N.J. 1994) | 23 |
| <u>DeVaney v. Thriftway Marketing Corp.</u> , 953 P.2d 277 (N.M. 1997) <u>cert. denied</u> 524 U.S. 915 | 17 |
| <u>Executive Mgt. Ltd. v. Ticor Title Ins. Co.</u> , 963 P.2d 464 (N.M. 1998) | 3,17 |
| <u>Friedman v. Roseth Corp.</u> , 75 N.Y.S.2d 515 | 16 |
| <u>Garcia v. Lawson</u> , 928 P.2d 1164 (Wyo. 1996) | 20 |
| <u>Giles v. Hill Lewis Marce</u> , 988 P.2d 143 (Az.App. 1999) | 3,16,17 |
| <u>Keates v. City of Vancouver</u> , 869 P.2d 88 (Wash.App.Div.2 1994) | 20 |
| <u>R.D. v. W.H.</u> , 875 P.2d 26 (Wyo. 1994) | 22 |
| <u>Lund v. Caple</u> , 675 P.2d 226 (Wash. 1984) | 31,44 |
| <u>Meidinger v. Koniag, Inc.</u> , 31 P.2 77 (Alaska 2001) | 29,36 |
| <u>Snyder v. Medical Services Corp. of Eastern Washington</u> , 985 P.2d 1023 | 20 |

| | |
|---|------|
| <u>Terry v. Wonder Seal Co.</u> , 170 S.E.2d 745 (Ga.App. 1969) | 16 |
| <u>Vaanese v. Gall</u> , 518 N.E.2d 1177 (Ohio 1988) <u>cert. denied</u> 487 U.S. 1206 § 63-11-17.2, U.C.A. | 23 |
| <u>Westar Mortgage Corp. v. Jackson</u> , 61 P.3d 823 (N.M. 2002) | 9,18 |

Utah Statutes and Restatements

| | |
|---|----------|
| Restatement (Second) Of Torts § 46(b)(2) | 11,22 |
| Restatement (Second) Of Torts § 47 | 23 |
| Prosser, Law of Torts (4 th ed., 1971) | 8,16 |
| Rule 54(b) Utah R. Civ. Proc. | 11,12,25 |
| Rule 11(e) Utah R. App. Proc. | 12 |

RESPONSE TO DAVIS'S STATEMENT OF FACTS

Davis has made allegations in his Statement of the Case and Statement of Facts, that are not properly cited to the Record, which contain argument, or they are totally irrelevant to this proceeding, to which Hatch responds as follows:

1. Hatch objects to Davis's Statement of Case No. 10. This assertion is not cited to the Record. Hatch did attempt to take the deposition of Davis's expert and scheduled her deposition pursuant to the trial court's instruction at the Pre-Trial Conference; however, Davis's expert failed to appear. (Rec. 672-674; 688-695).

2. Hatch objects to No. 12. A transcript of the all the relevant evidence offered in support of the finding of infliction of emotional distress has been provided, pursuant to Rule 11 of the Utah Rules of Appellate Procedure. Hatch is not required to provide a transcript of legal arguments. The 11 trial witnesses identified by Davis testified regarding the assault and battery on February 1, 1996. Hatch is not appealing or challenging the trial court's finding that there was probable cause and issues of fact as to the assault and battery claim; and Davis has not appealed the trial court's decision on this issue. Hatch contends, after the trial court found probable cause and issues of fact on this issue; both the Malicious Prosecution and Abuse of Process claims should have been dismissed. The trial court erred in submitting probable cause issue to the jury.

3. In response to No. 15, Hatch's counsel did raise an issue with the language in the jury instruction regarding "harassment" and the proper language that should be included, sufficient to raise the issue on appeal. Hatch's counsel clearly states that

harassment is not an abuse. (Rec. 1194, p. 716).

4. In response to No. 16, Hatch did raise his First Amendment rights and his right to criticize public officials in his Motion for Summary Judgment (Rec. 311-312), in his Motion in Limine to Exclude Evidence at Trial (Rec. 656), as well as, after trial (Rec. 1194, pp. 717-720).

5. In response to 17 & 18, Davis fails to cite any law that requires a party to request on the record that the jury be advised when a cause of action has been dismissed. The jury should have been advised of this. The verdict form contained the assault and battery claim first, but in such a way as to require the jury to find an abuse of process, if it doesn't find in favor of Hatch on his assault and battery claim.

6. In response to No. 19. The reason the award was reduced was because the jury, not acting upon any evidence but mere prejudice found \$75,000.00 in attorneys fees, when this issue was ever presented to the jury, and no evidence of such an amount.

7. In response to No. 16. The Judgment entered was a "Partial Judgment," stating that, "it does not resolve all issues raised between the parties, and the time for appeal shall not commence to run until a final judgment is entered that fully concludes the litigation." (Rec. 796).

8. The trial court requested additional information regarding the Abuse of Process claim after the jury trial. Hatch submitted additional information and a letter, dated April 15, 2002, which included the case Amica Mutual Insurance Co. v. Schettler, 768 P.2d 950, 959 (Ut.App. 1989) and objected to any treatment of Davis's claim as an

abuse of civil process, arguing that 2 elements are necessary for such a claim (1) ulterior motive and (2) a willful act in use of the process not proper in the regular course of the proceedings, citing, Giles v. Hill Lewis Marce, 988 P.2d 143 (Az.App. 1999) and Executive Mgt. Ltd. v. Tigor Title Ins. Co., 963 P.2d 464 (N.M. 1998). (See letter, dated April 15, 2002, attached in the Addendum, as Ex. A).

9. In response to No. 25. Hatch testified at trial, that although there was a deed recorded on the Brook's Subdivision property, he did not own the property. Hatch was paying for the property and set up a legal Trust with Mitchell as beneficiary, in case he was unable to fully pay her. (Rec. 1194, pp. 693-694). This Order was not entered with the concurrence of all the parties. Hatch's counsel in fact filed a Motion to Vacate the Order Precluding the Transfer of Encumbrance of Property, raising the same issues raised on appeal. (Rec. 813-815) Furthermore, a letter was sent to the trial court and Davis's counsel, regarding the need of personal service on Mr. Hatch. (See letter, dated April 18, 2002, attached in the Addendum, as Ex. B).

10. Hatch objects to No. 26. The Bankruptcy Pleadings are not part of the Record on appeal, and have not been designated as such. Any reference to the Bankruptcy Proceeding should be stricken by this Court, and are not properly before the Court to be considered on appeal. The deed on the property was not filed by Hatch, but by Mitchell to secure her interest in the property. The deed was dated two years previously, in January 2000.

11. Hatch objects to Nos. 27 & 28. This information is solely offered for

prejudicial reasons and has nothing to do with the issues appealed by Hatch in this case. (Davis did not appeal any issues in the case). The Bankruptcy filing was necessary as Hatch could not obtain a stay in the case. There was no finding of any fraud or bad-faith in the Bankruptcy proceeding, although vehemently argued for by Davis. The proceeding was not dismissed because of any fraud or post-verdict transfers, but because the schedules were not complete. The dismissal was without prejudice, and can be re-filed, with complete schedules. (See Order of Dismissal, Addendum, Ex. C).

12. In response to Statement of Fact No. 3, the term, “long time girl friend” is not in the record, and should be stricken.

13. In response to No. 4, there is no evidence that Hatch became “obsessed” with Davis. Hatch had concerns about the Park and voiced his legitimate concerns to Davis and his supervisors, at Davis’s request. (Rec. 1193, pp. 253, 270, 273).

14. In response to No. 5, there is no evidence that Hatch made trips to Cedar City or Salt Lake City 6 times to personally met with Davis’s supervisors.

15. In response to No. 6, there were 17 letters sent over a four period, before the 4 year statutory time period. The last letter was in 1993. These letters do not contain any threats against Davis, but question his ability to operate the Park. (See Hatch’s Statement of Facts Nos. 5-24).

16. In response to No 7, Davis failed to prove at trial, and has failed to cite to the Record, where he established that the issues raised by Hatch were false.

17. In response to No. 8, Davis claims that Hatch is hiding behind “political

issues” while it is Davis who asserts in his Counterclaim that Hatch is trying to coerce Davis to comply with Hatch’s political views. (Rec. 6 & 62).

18. In response to No. 9, Davis can still only maintain that he had to respond to Hatch’s inquiries and had some concern about his employment; however, Davis’s job was never at risk. (Rec. 1194, p. 650-651).

19. In response to No. 10. There is no evidence that Hatch stalked, harassed or threatened Davis in any way. Hatch has a right to attend Town Council meetings and to express his concerns about the Town and the State Park. Davis testified at trial, that it was he that got up during the Town meeting and walked over and confronted Hatch, saying “if you have something to say, you ought to be man enough to say it to my face.” Davis was not a withdrawn and fearful man; and was not in fear of Hatch. (Rec. 1194, pp. 631-632).

20. In response to Nos. 13, 14 & 15; evidence was presented, other than by Hatch and Mitchell, that an assault and battery did occur, such as Joel and Carol Greer. These are recorded in the Police Report of Monte Luker, which was admitted as an Exhibit at trial. (Plaintiff’s Trial Exhibit 80).

21. In response to No. 16. There was no evidence presented that Hatch accused Judy Davis of stealing mail, or petitioned that she be removed as postmistress. There was no evidence presented, based on personal knowledge, of any ethics investigation into Judy Davis as postmistress. Judy Davis did not know of any letters or petitions, or action taken against her as a result of Hatch. (Rec. 1194, p. 354). David

Wescott, the author of the B.O.S.S. letter did not testify and the letter does not contain any quotes from Hatch. This B.O.S.S. was letter attached to another letter and was never mentioned at trial.

22. Davis claims that when Judy Davis tells him of Hatch, he gets upset. However, Judy Davis, herself, never felt threatened, never suffered any emotional distress, and could not think of any outrageous or intolerable thing that was done against her by Hatch. Judy Davis did not file against Hatch for infliction of emotional distress or for any other claim. (Rec. 1194, pp. 340-341).

23. In response to No. 17, there was no testimony of anything Hatch did a few months before trial; and no testimony of any specific conduct by Hatch against Mr. Davis personally since 1993. The claim that the prior suits were against Judy Davis, personally and frivolous, was a misrepresentation to the trial court and to this Court. Davis sued the Town of Boulder and prevailed in his 1996 lawsuit in a federal jury trial in 1999.

24. In response to No. 18, there is no evidence that Hatch filed frivolous lawsuits. In fact, Hatch prevailed in the federal lawsuit that he filed against the Town of Boulder.

25. In response to No. 25; (a) Davis's job was never in jeopardy; and he had no reason to believe otherwise (Rec. 1194, pp. 650-651); (b) Davis did not become withdrawn, and did not shy away from Hatch. Davis is the one that who confronted Hatch at the Town meeting (Rec. 1194, pp. 631-632); (c) Davis suffered these symptoms before meeting Hatch and prior to the 4 year limitation period. Davis did not try to

obtain any medical relief for these symptoms (Rec. 1193, p. 344, 1194 pp. 653-655); and did not see Dr. Gregory about his symptoms until a month before trial and after the discovery deadline had passed. (See Motion in Limine, Rec. 654-659).

SUMMARY OF ARGUMENT

There is one issue on appeal, the finding on Davis's claim for Intentional Infliction of Emotional Distress that Hatch claims is not supported by the evidence. In challenging this finding Hatch has provided a transcript of all relevant evidence to support this finding. Hatch did perfect the record and did provide a transcript of all evidence relevant to this finding.¹

Hatch's appeal involves numerous legal issues, raised in the record, with various motions, including a Motion to Dismiss (Rec. 52-57), a Motion for Summary Judgment (Rec. 282-454), and Motions in Limine (Rec. 654-659). These legal issues go far beyond Hatch's challenge to the finding on Davis's claim for Intentional Infliction of Emotional Distress.

For instance, Hatch has maintained from the beginning that Davis's Counterclaim fails to state a legal claim for Malicious Prosecution, since the underlying proceeding had not been terminated in his favor. Hatch filed a Motion to Dismiss and this claim should have been dismissed in the initial stages. Hatch should not be required to perfect the record, or marshal the evidence, to show that this claim was legally

¹The testimony claimed to be missing of eleven witnesses, were witnesses of the assault and battery at the February 1996 Town Meeting. They did not present evidence about Davis's claim of Intentional Infliction of Emotional Distress. In fact they could not recall anything happening at the Town Meeting.

deficient from the beginning. This issue was raised and preserved in Hatch's Motion to Dismiss. In fact, Judge Mower ruled on this very issue, from which Hatch sought an interlocutory appeal.²

Davis's Counterclaim also fails to allege the necessary elements for an Abuse of Process claim. This Court made it clear that *a claim for civil abuse of process requires a prerequisite that the prior proceedings have terminated in favor of the person against whom they were brought.*" Amica Mut. Ins. Co. v. Schettler, 768 P.2d 950, 959 (Ut.App. 1989); Winters v. Schulman, 977 P.2d 1218 (Ut.App. 1999). Davis's Counterclaim fails to allege this prerequisite; therefore, this claim should have been dismissed in the initial stages along with the Malicious Prosecution claim. Davis appears to completely ignore this straight forward ruling.

Furthermore, Davis asserts that Hatch abused the process in filing the current lawsuit for purposes of harassment, a means to make money, and to extort Davis to acquiesce to Hatch's political and philosophical views. (Davis's Brief p.31). Even if these claims were proven true, they are legally deficient under the law to state a claim for Abuse of Process.³

²The interlocutory appeal was not granted, but obviously Hatch's Motion had merit as Judge McKiff did finally dismiss Davis's claim for Malicious Prosecution at the close of evidence at trial. Davis claims that it was proper to dismiss it at this time, i.e., at the close of evidence, but offers no case law in support of this assertion.

³Most people who file lawsuits seek money damages. Cases involving extortion for abuse of process purposes, do not involve extorting someone to a person's political or philosophical views, but extorting payment of a debt or seizure of property by some improper means of attachment, execution, garnishment, arrest, or criminal prosecution. *PROSSER, Law of Torts, § 121 (4th ed. 1971)*. None of these types of claims were asserted or were even an issue in this case.

Davis asserts that for his abuse of process claim he does not have to show a lack of probable cause in bringing the underlying action. (Davis Brief p. 32). However, the Utah case Davis relies on (Davis Brief p. 25), Gilbert v. Ince, 981 P.2d 841, 845 (Utah 1999) clearly states, that the underlying action must be brought *without probable cause*. Id. at 846. The Utah Supreme Court, further stated that Gilbert had the obligation of proving that Ince acted “without probable cause.” Therefore, the Abuse of Process claim should have been dismissed after the court’s ruling, at the end of Hatch’s case-in-chief, when the court found that Hatch had met his prima facie burden on the facts sufficient to go to the jury. Westar Mortgage Corp. v. Jackson, 61 P.3d 823 (N.M. 2002).

Davis argues that the trial court properly presented the probable cause question to the jury for decision, along with the assault and battery claim.⁴ (Davis Brief p. 32) However, this was in error. This same argument was made to the New Mexico Supreme Court in Westar Mortgage Corp. v. Jackson, the New Mexico Court stated, that the existence of probable cause in the underlying proceeding, and whether the facts amount to probable cause is a question of law for the court to decide, and not the jury. Id. at 832.

In addition, although Davis alleges the action was filed with an improper motive. He does not allege or establish any willful act in use of the process not regular in the course of the proceeding. This was raised by Hatch in the supplemental cases

⁴The jury was not deciding the issue of probable cause in this instance, but was deciding the issue of assault and battery by a preponderance of the evidence, a totally different standard.

requested by the court. (See Addendum, Ex. A). To find otherwise, would open the flood gates to abuse of process claims every time a plaintiff fails to prevail in his case, although he establishes a prima facie case, and all the necessary elements to submit his claims to the jury. Furthermore, an improper act may not be inferred from an improper motive alone; if the act itself is still regular, the motive, ulterior or otherwise, is immaterial.⁵ Bosler v. Shuck, 714 P.2d 1231 (Wyo. 1986).

The evidence in this case, even when marshaled Davis's favor, fails to establish any conduct that can be considered "outrageous and intolerable" or offensive against the generally accepted standards of decency and morality; or that Davis actually suffered severe emotional distress from such conduct. Samms v. Eccles, 358 P.2d 344, 346-47 (Utah 1961); In re Estate of Grimm, 784 P.2d 1238, 1246 (Ut.App. 1989).

Furthermore, Utah's 4 year limitation period applies and Davis's claims are based on actions which occurred in the early 1990s, well beyond the 4 year limitation period. In considering damages, the jury should have been instructed as to this statutory period, as Davis's recovery, if any, would be limited to this statutory period. Breiggar Properties, L.C. v. H.E. Davis & Sons, Inc., 52 P.3d 1133 (Utah 2002). Furthermore, Davis testified that he suffered emotional distress before the 4 year limitation period. Therefore, an issue of fact was raised for the jury to decide, when Davis first suffered damages and when statute of limitations commenced. Andreini v. Hultgren, 860 P.2d 916 (Ut.App. 1993); Hodges v. Howell, 4 P.3d 803 (Ut.App. 2000) (at what particular

⁵This is directly contrary to the Instruction given to the jury in this case, which lists the ulterior motive, as the one essential element for Abuse of Process. (Rec. 744)

legal injury occurs to commence statute of limitations is a factual question for the jury to determine).

Davis's claim for emotional distress is based mainly on Hatch's dealings with his wife, Judy Davis (Rec. 321, p. 21). However, the general rule is that liability is limited to family members *who are present at the time*. Restatement (Second) Of Torts § 46(b)(2); Samms v. Eccles, 358 P.2d 344 (Utah 1961). Hatch cannot be found liable for such conduct in this case, when Mr. Davis was not present.

Davis's Intentional Infliction of Emotional Distress claim against Hatch is also prohibited by the First Amendment, which specifically provides citizens the right to petition their government, and to be critical of public officials. Hatch raised this right in his Motion for Summary Judgment (Rec. 311-312) and in his Motion in Limine (Rec. 656). Hatch had a constitutional right to voice his grievances to state officials.

The trial court also improperly issued supplemental orders and writs of execution before there was a final judgment entered. D'Ashton v. Aston, 844 P.2d 345, 349 (Ut.App. 1992); Cheves v. Williams, 993 P.2d 1911 (Utah 1999). A judgment which does not adjudicate all the claims between the parties is not a final judgment and cannot support the issuance of an execution. CIT Financial Services v. Erbs Indoor RV Center, 702 P.2d 858 (Id.App. 1985).

Finally, the trial court did not certify the Partial Judgment as a final judgment under Rule 54(b); and did not make the necessary findings and determination to certify it as a final judgment under Rule 54(b). In fact, the trial court specifically states

that it is not a final judgment for purposes of appeal, and that it does not resolve all the issues raised between the parties, contrary to any findings necessary under Rule 54(b).

ARGUMENT

I. THE APPELLANT HAS PERFECTED THE RECORD AND HAS MARSHALED THE EVIDENCE IN SUPPORT OF THE FINDINGS THAT HE IS CHALLENGING.

Davis complains that the records was not perfected on appeal. Rule 11(e), Utah R. App. P. provides that, for an appellant to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence,⁶ relevant to such finding or conclusion.

Hatch has complied with this requirement and has provided a transcript of all evidence relevant to his challenge of the jury's findings on Davis's claim for Intentional Infliction of Emotional Distress. Hatch is not challenging the trial court's rulings on the other issues based upon a lack of evidence. For example, Hatch is not challenging the court's finding that there was probable cause to present the assault and battery claim to the jury. However, Hatch is asserting that the Malicious Prosecution and Abuse of Process Claims should have been initially dismissed for legal reasons. Furthermore, Davis did not file an appeal on the finding of probable cause at the end of Hatch's case-in-chief on his assault and battery claim; nor on the dismissal of his Malicious Prosecution claim, and Davis did not request a transcript to challenge these

⁶Davis argues that there needs to be a transcript of the legal arguments; however, this Court can review such legal issues without a transcript of the arguments, it is only a transcript of the relevant evidence that needs to be presented when challenging a finding as unsupported by the evidence.

findings.⁷

The eleven witnesses Davis claims to have been excluded, were witnesses of the assault and battery at a February 1996 Town Meeting. They did not testify about Davis's emotional distress; and Davis has failed to set forth any alleged testimony, that these witnesses testified to regarding Davis's emotional distress.⁸

II. THE TRIAL COURT ERRED IN FAILING TO DISMISS THE MALICIOUS PROSECUTION CLAIM DURING THE PRE-TRIAL STAGES.

A. Davis's Counterclaim fails to state a legal claim for Malicious Prosecution.

Davis's Counterclaim fails to state a legal claim for Malicious Prosecution, since the underlying proceeding had not been terminated in his favor. Baird v. Intermountain School Federal C.U., 55 P.2d 877, 878 (Utah 1976). This claim should have been dismissed in the initial stages. It is not necessary to perfect the record or marshal the evidence to show that this claim was legally deficient from the beginning. This issue was raised and preserved in Hatch's Motion to Dismiss. In fact, Judge Mower ruled on this very issue, from which Hatch sought an interlocutory appeal

⁷Davis claims that a transcript was not properly ordered from the court. However, Hatch did order a transcript from the court executive as required under Rule 11 (e), as evidenced by the documents in the file, and letter sent in response by the court clerk regarding the transcribing. (See Addendum, Ex. D). As far as notice to Davis, Davis has been aware of this appeal, has been executing on the judgment, and has had access to the file, including the transcript request, and correspondence by the court. In fact, Davis had the Sixth District Court Clerk, testify in Bankruptcy Court against Hatch. Davis cannot claim he did not have an opportunity to order any transcripts, he desired.

⁸Davis claims that two witnesses testified that Hatch bragged about his ability file lawsuits rather than working at a job. However this does not go to support any of the elements in Davis's claim for Infliction of Emotional Distress

Davis now concedes that the Malicious Prosecution claim should have been dismissed, because the underlying action had not been dismissed in Davis's favor at the time the Counterclaim was filed. (Davis did not appeal this ruling). Davis rather contends that it was proper for the trial court to wait until the close of the evidence to dismiss the Malicious Prosecution claim. (Davis Brief p. 21). However, such a ruling would be directly contrary to Utah case law and the clear mandate that dismissal is a pre-requisite. Baird v. Intermountain, supra. Davis does not provide any case law in support of his assertion, which lies directly contrary to Utah law, but only argues that it is harmless error.⁹ Id.

B. The Jury should have been informed of the Court's dismissal of the Malicious Prosecution claim.

After 4 days of trial and evidence, the court decided to dismiss the Malicious Prosecution and Abuse of Process claims, since all of the elements had not been satisfied, and the underlying proceeding had not been decided in Davis's favor based on a lack of probable cause. The court then decided to dismiss just the Malicious Prosecution claim, although both claims were based on the filing of the lawsuit without probable cause or hope of success.

After dismissing the Malicious Prosecution claim, the court failed to inform the jury that this claim was being dismissed and the reasons for the dismissal, i.e., that

⁹To say that it is harmless error to allow a party to proceed without satisfying this legal element, would totally vitiate this legal element established as a pre-requisite to state such a claim; and would throw the flood gates open for every answer filed, to now contain a claim for malicious prosecution, before there has been any determination of the underlying proceeding.

in order to find Malicious Prosecution, the case must first be decided in favor of the accused based on a lack of probable cause. This prejudiced Hatch because throughout trial Davis had combined the two claims and maintained that the claims against him were filed without any hope of success or probable cause.¹⁰

III. THE TRIAL COURT ERRED IN FAILING TO DISMISS THE ABUSE OF PROCESS CLAIM.

A. Davis's Counterclaim fails to state a legal claim for Abuse of Process.

This Court made it clear that *a claim for civil abuse of process requires that the prior proceedings have terminated in favor of the person against whom they were brought.*" Amica Mut. Ins. Co. v. Schettler, 768 P.2d 950, 959 (Ut.App. 1989). In Winters v. Schulman, 977 P.2d 1218 (Ut.App. 1999), this Court states that *a prerequisite to an abuse of process claim is a that the prior suit terminates in favor of the defendant therein.* Davis's Counterclaim fails to allege this prerequisite; therefore, his claim for Abuse of Process should have been dismissed in the initial stages along with the Malicious Prosecution claim.

Furthermore, Davis asserts that Hatch abused the process in filing the current lawsuit for purposes of harassment, a means to make money, and to extort Davis to acquiesce to Hatch's political and philosophical views. (Davis's Brief p.31). Even if these claims were proven true, they are still legally deficient to state a claim for Abuse

¹⁰This also likely resulted in inconsistent findings, as the trial dismissed the Malicious Prosecution, because there was no lack of probable cause established on the underlying claim, while the jury awarded damages for abuse of process based upon the filing of the underlying action, without probable cause.

of Process. Cases involving extortion for purpose of abuse of process, do not involve extorting someone to your political or philosophical views, but extorting payment of a debt or seizure of property by improper means of attachment, execution, garnishment, arrest, or criminal prosecution. PROSSER, Law of Torts, § 121 (4th ed., 1971). None of these types of claims were asserted or were even an issue in this case.

Davis in his Counterclaim never alleged or established at trial, how the filing of this action, for assault and battery, extorted Davis or required him to comply with Hatch's political or philosophical views. This claim should have been dismissed. Bennett v. Jones, Waldo, Holbrook & McDonough, 70 P.3d 17, 29 (Utah 2003).

Furthermore, Davis's claim for Abuse of Process is missing another essential element, i.e., a willful act in use of the judicial process not proper in the regular course of the proceedings. Giles v. Hill Lewis Marce, 988 P.2d 143 (Az.App. 1999). There was no evidence presented, that Hatch used any process not proper in the regular course of the proceedings. This claim should have been dismissed in the initial stages. Bennett v. Jones, Waldo, Holbrook & McDonough, supra at 29.

Finally, the Abuse of Process claim alleges, that the case was improperly filed without probable cause; therefore the same sound judicial policy which requires termination of prior litigation for malicious prosecution should apply to the Abuse of Process claim in this case. Friedman v. Roseth Corp. 75 N.Y.S.2d 515; Terry v. Wonder Seal Co., 170 S.E.2d 745 (Ga.App. 1969).

B. The jury was not properly instructed on the necessary elements for the Abuse of Process Claim.

As stated above abuse of process requires two elements: (1) an ulterior motive; and (2) a willful act in use of the process not proper in the regular conduct of the proceedings. Giles v. Hill Lewis Marce, 988 P.2d 143 (Az.App. 1999); Executive Mgt. Ltd. v. Ticor Title Ins. Co., 963 P.2d 464 (N.M. 1998).

The court never dealt with the second element for abuse of process. There was no willful act by Hatch in use of the process not proper in the regular conduct of the proceedings alleged or established at trial. There was no misuse of discovery, no improper seizure of property, no arrest, no criminal proceedings initiated, none of the uses generally found in an abuse of process case. The fact that Hatch did not ultimately prevail, does not by itself constitute an “improper use of the process,” Crease, *supra*.

A willful act under the abuse of process claim requires an ***overt act done in addition to the initiating of the suit***; thus, the mere filing of the lawsuit, even for an improper purpose, is not a proper basis for an abuse of process claim. Meidinger v. Koniag, Inc., 31 P.2 77 (Alaska 2001); Caudle v. Mendel, 994 P.2d 372 (Alaska 1999); DeVaney v. Thriftway Marketing Corp., 953 P.2d 277 (N.M. 1997) cert. denied 524 U.S. 915; Giles v. Hill Marce, 988 P.2d 143 (Arz.App. 1990). Moreover, improper acts may not be inferred from an improper motive alone; if the act itself is still regular, the motive ulterior or otherwise is immaterial. Bosler v. Shuck, 714 P.2d 1231 (Wyo. 1986). This is directly contrary to the jury instruction given regarding Abuse of Process in this case, stating that the ulterior motive or purpose was the essential element. (Rec. 744).

IV. THE DETERMINATION OF “PROBABLE CAUSE” FOR PURPOSES OF THE ABUSE OF PROCESS CLAIM SHOULD NOT HAVE BEEN LEFT FOR THE JURY TO DECIDE.

The existence of probable cause in a proceeding underlying a claim for abuse of process is a question of law for the court. Westar Mortgage Corp. v. Jackson, 61 P.3d 823 (N.M. 2002). Even if facts are in dispute, the role of the jury is only to determine the facts bearing on the probable cause question; however, whether those facts constitute probable cause remains a matter for the court to decide, not the jury. Id.

At the end of Hatch’s case-in-chief, the trial court found sufficient probable cause on Hatch’s claims to go to the jury. Specifically, “*that there is room within the evidence that has been admitted for the jury to reach either conclusion with respect to all claims,*” that, *if Mr. Hatch is believed and Ms. Mitchell is believed, it could find both assault and battery.*”¹¹ (Trans. Vol, II, pg 712).

Davis claims that the trial court properly presented the probable cause question to the jury for the jury to decide.¹² (Davis Brief p. 32) However, this was in error. This same argument was made to the New Mexico Supreme Court in Westar Mortgage Corp. v. Jackson, Id. at 832, and the Court stated that the existence of

¹¹Davis claims that Hatch failed to perfect the record or marshal the evidence, but Hatch is not challenging this finding by the trial court (and Davis did not appeal), rather Hatch is asserting that based on this finding, it was improper for the trial court to submit the question of probable cause on the underlying claim to the jury, especially when the jury was also considering the assault and battery claim on the preponderance standard.

¹²The jury was not deciding the issue of probable cause in this instance, but was deciding the issue of assault and battery by a preponderance of the evidence, a totally different standard.

probable cause in such cases, and whether the facts amount to probable cause, is a question of law for the court to decide, not for the jury to decide.

V. THE COURT ERRED IN FAILING TO DISMISS THE CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

- A. The relevant record was provided and the evidence marshaled, but it fails to adequately support Davis's claim for Intentional Infliction of Emotional Distress.

All the evidence regarding the issue of extreme and outrageous conduct has been marshaled in favor of Davis, as specifically set forth in Hatch initial Brief, *Statement of Facts, paragraphs 5 through 24*, which include the letters written by Hatch, contained in Defendant's Exhibit 103. This evidence marshaled and viewed in Davis's favor is not sufficient to support a finding of extreme or outrageous conduct.

Hatch wrote letters, upon Davis's invitation, to Davis's supervisors (which was Hatch's right) complaining about an Indian burial display and other operations at the State Park, which were legitimate issues. Hatch also complained about his treatment from Davis, as being unresponsive and unprofessional. Hatch further requested an investigation of the matters and the policies at the Park and stated that Davis may not be the right person to continue to manage the Park.¹³ However, according to Davis's own testimony, Hatch's complaints never put Davis's job in jeopardy; and Davis never received any indication that his job was in jeopardy.

¹³Davis claims Hatch failed to marshal the evidence on this issue, but fails to set forth any facts, which Hatch allegedly failed to marshal, or present to the Court, on this issue.

The actions of Hatch in writing letters to Davis and his supervisors, who are government official, and asking questions about the policies at the state Park and complaining about the way Davis ran the Park and treated Hatch, and even asking for an investigation and stating that Davis needs to be replaced as Park manager; do not rise to the level necessary to constitute “extreme and outrageous” conduct. Andrews v. Stallings, 8982 P.2d 611 (N.M.App. 1995); Snyder v. Medical Services Corp. of Eastern Washington, 985 P.2d 1023 (Wash.App.Div.3 1999)(insults, threats, and annoying employee, does not rise to necessary level); Garcia v. Lawson, 928 P.2d 1164 (Wyo. 1996)(no claim for bad taste, boorishness, condescension, obnoxiousness or social ineptitude); Keates v. City of Vancouver, 869 P.2d 88 (Wash.App.Div.2 1994)(police officer yelling at husband suspected of murdering wife, was not outrageous, even though officer yelled into husband’s face about murdering his wife, was insulting to husband and unbecoming to officer); and Breeden v. League Services Corp., 575 P.2d 1374 (Okla. 1978)(where collection company sent letters to debtor’s home, to her work, made several attempts to contact her by phone, both at home and at work, totaling 16 attempts, and in one call called her a God damned liar and deadbeat, collection company’s conduct was not outrageous).

Furthermore, termination from employment is not sufficient to constitute extreme and outrageous conduct. Sperber v. Galigher Ash Co., 747 P.2d 1025 (Utah 1987)(mere discharge from employment does not rise to level of outrageous or intolerable conduct, even if based on false reasons); Dubois v. Grand Central, 872 P.2d

1073 (Ut.App. 1994); Robertson v. Utah Fuel Co., 889 P.2d 1382 (Ut.App. 1995) cert. denied (discharge from employment not intolerable even if employee is required to discuss drug addiction).

- B. Davis's claim for emotional distress based on actions that occurred in the early 1990s is barred by Utah's four (4) year statute of limitations.

Davis's claim for emotional distress is based on actions that occurred and damages suffered in early 1989 and 1990, far beyond the 4 year limitation period. The letters were written between 1990 and 1993, well beyond the limitation period. Therefore, any claim for damages during this period of time should have been dismissed and this evidence should have been excluded. Davidson Lumber Sales, Inc. v. Bonneville Inv., Inc., 794 P.2d 11, 19 (Utah 1990)

- C. A jury instruction should have been given regarding Utah's four (4) year statute of limitations for infliction of emotional distress.

As set forth above, Davis's claims, occurring beyond the 4 year limitation period should have been barred and this evidence excluded at trial. If not excluded, at a minimum, the jury should have been instructed regarding the 4 year limitation period as Davis is not entitled to recover for damages beyond this statutory period. Breiggar Properties, L.C. v. H.E. Davis & Sons, Inc., 52 P.3d 1133 (Utah 2002).

In addition, Davis testified at trial that he suffered his emotional distress at the time of each incident, in the early 1990s; and the court in its Post-Verdict ruling found that there was no single incident that constituted extreme and outrageous conduct.

Therefore, this creates a factual question for the jury to decide when Davis first suffered his alleged damages, and if such injury was beyond the statutory time period. Andreini v. Hultgren, 860 P.2d 916 (Utah 1993); Hodges v. Howell, 4 P.3d 803 (Ut.App. 2000).

- D. There is a “presence requirement” necessary for infliction of emotional distress for actions directed to another party.

Davis claims intentional infliction of emotional distress as a result of Hatch’s dealings with his wife, Judith Davis, as the Boulder Town Clerk.¹⁴ However, for a person to recover for such emotional distress that person *must be present at the time*. Restatement (Second) Of Torts § 46(b)(2); Samms v. Eccles, 358 P.2d 344 (Utah 1961); Lund v. Caple, 675 P.2d 226 (Wash. 1984). Even in the Wyoming case, cited by Davis, the court concedes that this is the general rule followed in most jurisdictions and at most times. R.D. v. W.H., 875 P.2d 26 (Wyo. 1994). The general rule should be followed in this case. The circumstances giving rise to an exception to the general rule are not present in this case.¹⁵

Hatch cannot be found liable for such conduct, when Davis was not present. If Hatch is found liable for such conduct, then there would be no limitation to this claim. Furthermore, since emotional distress is the only damage claimed by Davis,

¹⁴Davis in his Brief (pg. 39) claims that Hatch’s dealings with his wife was of minute consequence. However, Davis testified that it was Hatch’s dealings with his wife that was the most upsetting to him. (Rec. 321, p. 21).

¹⁵In R.D. v. W.H., *supra*, although plaintiff was not present when his child was given a firearm and drugs, he was present and did witness the immediate effect of his child’s death on a drug overdose. In this case, Judy Davis did not suffer from anything Hatch allegedly did; and in fact, Judy Davis herself suffered no emotional distress from Hatch.

and he has no actual damages, he cannot recover for any actions directed to a third person. Restatement (Second) Of Torts § 47.

VI. HATCH HAS A CONSTITUTIONAL RIGHT TO BE CRITICAL OF PUBLIC OFFICIALS AND TO PETITION HIS GOVERNMENT WITH HIS GRIEVANCES.

Hatch raised his First Amendment rights in this case, in his Motion for Summary Judgment; his Motion in Limine; and at the Pre-Trial Conference. The criticism of government is at the very center of the constitutionally protected area of free speech. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized. Rosenblatt v. Baer, 383 U.S. 75 (1996).

The First Amendment requires clear and convincing evidence that the statements published were false and were made with “actual malice, ” which does not refer to ill will, but rather to knowledge of the falsity.¹⁶ West v. Thomson Newspapers, 835 P.2d 179 (Ut.App. 1992) cert. denied 843 P.2d 1042, vacated on other grounds, 872 P.2d 999; Chapin v. Knight-Ridder, Inc., 993 F.2d 1087 (4th Cir. 1993). Actual malice is required otherwise would-be critics of official conduct would remain silent and would be deterred from voicing their criticism. Costello v. Ocean County Observer, 643 A.2d 1012 (N.J. 1994). Hatch’s letters critical of Davis and his operation of the State Park is protected under the First Amendment.

¹⁶At common law actual malice connoted ill will and a conscious disregard for the rights and safety of others; and is constitutionally insufficient to prove actual malice in context of public official. Vaaneese v. Gall, 518 N.E.2d 1177 (Ohio 1988) cert. denied 487 U.S. 1206.

VII. THE TRAIL COURT ERRED IN ALLOWING EXPERT TESTIMONY AFTER THE COURT PREVIOUSLY RULED AT THE PRE-TRIAL CONFERENCE THAT SUCH TESTIMONY WOULD NOT BE ALLOWED.

At the Pre-trial Conference the court ruled that Davis's disclosure of his expert witness was not sufficient and did not comply with the Rule of Civil Procedure. Davis was to provide his expert for a deposition and was to immediately provide the reports. Davis's expert never did this and yet was able to testify at trial, contrary to the court's previous ruling.

Hatch's counsel did not have an opportunity to review the reports to rebut them or to take the expert's deposition before trial by the end of the week, as previously ordered by the court at the Pre-trial Conference. This greatly prejudiced Hatch at trial, and this information should have been excluded at trial consistent with the court's previous ruling at the Pre-trial Conference. It was an abuse of discretion for the court to allow Davis's expert to testify contrary to its previous order.

Davis claims that Hatch's counsel had months to take the deposition of Davis's expert, however, the expert did not provide any expert report until after the discovery deadline had past. In fact, the report was not filed until after the Pre-Trial Conference and the expert failed to appear at her scheduled deposition as the parties agreed at the Pre-trial Conference. It was prejudicial to Hatch and an abuse of discretion for the trial court to rule in favor of Hatch on this issue at the Pre-trial Conference and then at trial change its ruling and say that Hatch in some way was trying to avoid the testimony.

VIII. THE TRIAL COURT NEVER ENTERED A FINAL JUDGMENT PURSUANT TO RULE 54(b) URCP.

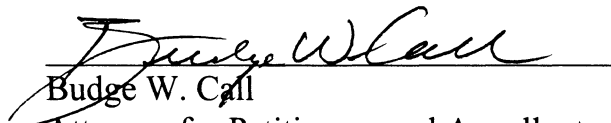
It is clear from the record that a final judgment had not been entered at the time the trial court issued its Order of April 11, 2002.¹⁷ Davis now claims that Rule 54(b) allows the trial court to enter a final judgment. However, the trial court was never asked to certify its Partial Judgment as a final judgment under Rule 54(b); and the trial court never made the necessary findings or determination to enter the judgment as final for purposes of Rule 54(b). To the contrary, the trial court indicates that its ruling is not final, that it is only a partial judgment, that there are further issues to be resolved between the parties, and the judgment is not to be considered final for purposes of appeal. The Partial Judgment therefore was not entered as a final judgment by the trial court.

CONCLUSION

For the foregoing reasons the Judgment should be set aside; Davis's claims dismissed with prejudice; and Hatch should be able to proceed on his claims.

DATED this 23 day of March, 2004.

BOND & CALL, L.C.


Budge W. Call
Attorney for Petitioners and Appellants

¹⁷Davis claims that Hatch fraudulently transferred his assets, however, there is no evidence of this on the record. To the contrary Hatch testified that he did not own the property outright, although it was deeded to him, and that he was purchasing the property from Mitchell, who had not been paid in full, but still had an interest in the property. (Rec. 1194, pp. 693-694). There was also no finding of fraud by the Bankruptcy Court and such allegations should be stricken and/or disregarded.

CERTIFICATE OF MAILING

I hereby certify on the 23rd day of March, 2004, two (2) copies of the foregoing **REPLY BRIEF OF THE APPELLANT** was mailed, postage prepaid, to the following:

David J. Bird
RICHARDS, BIRD & KUMP
333 East 400 South, #200
Salt Lake City, UT 84111

James C. Bradshaw
BROWN BRADSHAW & MOFFAT
10 West Broadway, Suite 210
Salt Lake City, UT 84101



c:\bwc\appbrhatch ha8

ADDENDUM

- Exhibit A April 15, 2002, Letter to Court regarding: Abuse of Process Claim
- Exhibit B April 18, 2002. Letter to Court regarding: Order Precluding Transfer of Property.
- Exhibit C Bankruptcy Court, Order of Dismissal
- Exhibit D February 4, 2003, Letter from Court; Re: Hatch vs. Davis Request for Transcript.

Exhibit “A”

KEVIN BOND, P C
kb@bondcall law com

LAW OFFICES OF
BOND & CALL, L.C.
INDEPENDENT PROFESSIONAL CORPORATIONS
311 SOUTH STATE STREET SUITE 410
SALT LAKE CITY, UTAH 84111

TELEPHONE (801) 521-8900
FAX (801) 521-9700

CCF

BUDGE W CALL P C
bcall@bondcall law com

GARFIELD COUNTY
NO. _____ FILED

APR 18 2002

Clerk

Deputy

April 15, 2002

VIA FACSIMILE (435) 896-8047 AND REGULAR MAIL

The Honorable Kay L. McIlff
Judge of the Sixth District Court
55 South Main Street
Panguitch, UT 84759

Re Julian Dean Hatch v. Larry Davis - Abuse of Process Claim
Case No. 980600010

Dear Judge McIlff

This letter is in response to the Court's invitation for additional cases and reasons why judgment for abuse of process should not be entered in the above-referenced matter.

In the case Amica Mutual Insurance Co v. Schettler, 768 P.2d 950, 959 (Utah App. 1989), the Court of Appeals makes clear that an action for abuse of process was premature when civil proceedings on which it was based and had not yet terminated.

While the Utah courts have often treated abuse of process and malicious prosecution in a tangential manner, the Court, as well as the parties in this case, have treated them likewise during the proceedings and through the trial until after all the evidence had been presented. In essence, the abuse of process tried in this case is a claim for wrongful use of civil proceedings and not an abuse of process claim as referred to by the Defendants in their supplemental memorandum of law regarding abuse of process.

Indeed, a true claim for abuse of process requires two (2) elements, (1) an ulterior motive, and (2) a willful act in use of the process not proper in the regular conduct of the proceedings. Giles v. Hill Lewis Marce, 988 P.2d 143 (Az. App. 1999) and Executive Mgt. Ltd. v. Ticor Title Ins. Co., 963 P.2d 464 (N.M. 1998). There was no allegation or evidence of the second element presented in the proceedings or trial in this case. The result of harassment alone is not enough.

EXHIBIT A

The Honorable Kay L McIff
Judge of the Sixth District Court
April 15, 2002
Page 2

Since the parties and the Court in this case treated the abuse of process claim as a wrongful filing of civil proceeding, and not an abuse of process claim requiring a wilful act in use of the process not proper in the regular proceedings, the Court should treat the matter as a wrongful use of civil proceedings and should not enter any judgment for abuse of process

Sincerely,

BOND & CALL, L C


Budge W Call

BWC/sjo
cc James C Bradshaw, Esq (Via Facsimile)

Exhibit “B”

KEVIN BOND P C
kbond@bondcall law com

LAW OFFICES OF
BOND & CALL, L.C.
INDEPENDENT PROFESSIONAL CORPORATIONS
311 SOUTH STATE STREET SUITE 410
SALT LAKE CITY, UTAH 84111
TELEPHONE (801) 521-8900
FAX (801) 521-9700

BUDGE W CALL P C
bcall@bondcall law com

GARFIELD COUNTY
NO. _____ FILED

APR 22 2002

Clerk

Deputy

April 18, 2002

VIA FACSIMILE (435) 896-8047 AND REGULAR MAIL

The Honorable Kay L. McIff
Judge of the Sixth District Court
55 South Main Street
Panguitch, UT 84759

Re Julian Dean Hatch v. Larry Davis - Order Precluding Plaintiff's
Transfer or Encumbrance of Property
Case No. 980600010

Dear Judge McIff:

I received the Order Precluding Plaintiff's Transfer or Encumbrance of Property in the above-referenced matter. I indicated that Mr. Hatch would have to be personally served with the Order before it took effect and Mr. Bradshaw agreed. Therefore, the Order should not be effective until after service is made on Mr. Hatch. This is consistent with due process and the Rules of Civil Procedure, which require personal service of such an order.

Furthermore, the Order indicates that it would end 90 days after final judgment is entered on the jury's verdict. The Motion only requests a period of 45 days after final judgment is entered. This change also needs to be made.

Sincerely,

BOND & CALL, L.C.

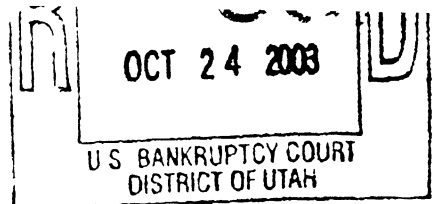

Budge W. Call

BWC/sjo

cc James C. Bradshaw, Esq. (Via Facsimile)

EVUIDIT 0

Exhibit “C”



INSON & TREASE, P.C.
Y L. TREASE (#4929)
orneys for Debtor(s)
Julian D. Hatch
xchange Place
on Building, Suite 200
Lake City, UT 84111
phone No. (801) 596-9400

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

JULIAN D. HATCH,

Debtor(s).

Bankruptcy No.: 03B-21734
[Chapter 13]

Judge: Judith A. Boulden

ORDER OF DISMISSAL

Creditor Larry Davis' Motion to Dismiss Petition came on for hearing on July 28, 2003, August 7, 2003, before the Honorable Judith A. Boulden, U.S. Bankruptcy Court Judge. The or was present and represented by Jory L. Trease. Creditor Larry Davis was represented by s C. Bradshaw. After hearing the testimony of witnesses, arguments of counsel and good : appearing, the court made factual and legal findings on the record which are hereby porated into this order. The Court having reviewed the evidence and being otherwise fully

advised in the premises, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the Debtor's Bankruptcy Petition is dismissed pursuant to 11 U.S.C. §1307.

It is so ordered

and it is further ORDERED that the creditors motion for

DATED this *24* day of October, 2003.

Reconsideration is denied.

BY THE COURT:


Judith A. Boulden, Judge

United States Bankruptcy Court

COURT CLERK'S
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this ____ day of _____, 2003, I caused a true and exact copy of the foregoing **ORDER OF DISMISSAL** to be delivered to the following by depositing a copy of the same in the United States Postal Service, postage prepaid and addressed as follows:

J. Vincent Cameron (via ECF)
Chapter 13 Trustee
47 West 200 South, Suite 320
Salt Lake City, UT 84111

U.S. Trustee (Via ECF)
#9 Exchange Place, Suite 100
Salt Lake City, UT 84111

James C. Bradshaw (Hand-Delivery)
BROWN, BRADSHAW & MOFFAT
10 West Broadway, Suite 210
Salt Lake City, UT 84101

Steven W. Baeder
333 East 400 South, Suite 204
Salt Lake City, UT 84111

Julian D. Hatch
165 East Burr Trail Road
P.O. Box 1365
Boulder, UT 84716

JOHNSON & TREASE, P.C.
#9 Exchange Place
Boston Building, Suite 200
Salt Lake City, UT 84111

ENTERED OCT 27 2003

Deputy Clerk

Exhibit “D”

COPY

Sixth District Court

February 4, 2003

BUDGE W. CALL
Attorney at Law
311 South State Street, Suite 410
Salt Lake City, UT 84111

Re: Hatch vs. Davis Request for Transcript

Dear Mr Call:

First let me apologize for the lack of communication between my office and yours. I have been out of the office on personal leave since September and returned on the 20th of January. Since that time, I have learned that the transcript request has not been completed. Due to a conflict with the court reporter the transcript request will take more than 90 days to complete. I have contacted an official court transcriber approved by the Administrative Office of the Courts and she has agreed to have the transcript prepared in 30 days.

I had a conversation with Mr. Hatch today regarding this matter, he has instructed me to forward the check back to your office. You will need to make contact with the reporter and arrange for payment at that time. I don't believe that she will start on the transcript until she has received payment so you may want to contact her as soon as you can. Again I apologize for any problems this may have caused you. Please contact me if you need any additional information.

The reporter's name is:

JERI KEARBEEY
1230 Gaylene Circle
Sandy, UT 84094
(801) 566-4540

Sincerely,

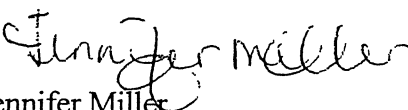


Jennifer Miller
District Court Clerk

EXHIBIT D

Orig. Tape of Jerry trial sent
UPS on 2-11-03 to
Jeri Kearby
Sandy UT

ENTRY 2  GROUND TRACKING NUMBER 1Z 966 W22 03 1002 233 7 1

Jennifer Miller

Administrative Office of the Courts
Official Court Transcribers
(current as of 08/28/02)

Penny C. Abbott
1817 East 800 South
Salem, Utah 84653
(801) 423-1009

Lora Barker
4375 Redwood Cove
Cedar Hills, Utah 84062
(801) 785-7637

Carolyn Erickson
1775 Ellen Way
Sandy, Utah 84092
(801) 523-1186

Independent Reporting & Videography
Attn: Ann M. Love
1220 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
(801) 538-2333

Jeri Kearbey
1230 Gaylene Circle
Sandy, Utah 84094
(801) 566-4540

Beverly Lowe
1771 South California Avenue
Provo, Utah 84606
(801) 377-0027

Melinda Rollins
4393 South 2500 East
Vernal, Utah 84078
(435) 789-1560

Lanette Shindurling
c/o CitiCourt
50 South Main Street, Suite 920
Salt Lake City, 84144
1-877-532-3441

Alan P. Smith
385 Brahma Drive
Salt Lake City, Utah 84107-6006
(801) 263-9359 (office)
(801) 266-0320 (home)

Pamela C. Smith
3454 Creek Road
Salt Lake City, Utah 84121
(801) 942-6430

Laura Thompson
1258 North 1100 East
Layton, Utah 84040
(801) 546-4008

Dorothy Tripp Snarr
P.O. Box 444
Garden City, Utah 84028
(801) 363-4024

J. Elizabeth Van Fleet
P.O. Box 2702
St. George, Utah 84771-2702
(435) 634-9564

Billie Way
437 8th Avenue
Salt Lake City, Utah 84103
(801) 364-4943

Transcript Request / Billing Statement / Appellate Court Notification

Sixth and Seventh Districts

Please Return this Statement With Payment Amount Due

Transcript Request Date: October 10, 2002

Clerk:

Case Type Civil

Date Transcript is needed AS

Case Name: Hatch -vs- Davis

☒ Mail transcript ☐ I will pick it up

Case Number: 980600010

Date(s) of Hearing: April 2, 3, 4, 5 and 9, 2

Judge: K L McIff

Court Location:

Hearing Type (s): Jury Trial

(Circle One) Original & 1 Copy

Requested by: Budge W Call

Original and ___ copies

Address: 311 South State, Suite 450
Salt Lake City, UT 84111

___ copy(s) only

Phone & Fax: 801-521-8900 phone
801-521-9700 fax

Case on Appeal? NO YES

| Date | Record a=audio v=video r=reporter | Tape counter beginning | Tape count ending | Estimated # of pages | |
|--------------------------|--|------------------------------|----------------------|-------------------------|--|
| April 2-5 and 9, 2002 | Audio | 6-2-489 001 | 7070 | | |
| | | 6-2-490 001 | 7030 | | |
| | | 6-2-491 001 | 7109 | | |
| | | 6-2-492 001 | 7137 | | |
| | | 6-2-493 001 | 6658 | | |
| | | 6-2-494 001 | 7135 | | |
| | | 6-2-495 001 | 7141 | | |
| | | 6-2-496 001 | 6655 | | |

Reporter:

Date Sent:

Transcriber:

Date Sent

Appeal cases only:

Date Acknowledgment Sent

Date Transcript Mailed/ Filed:

Date Notice of Filing Sent

Remit payment to District Court, (list _____ county)

*CASHIER: Duplicate receipt is to be forward to the Designated Clerk.

Clerk complete the Information in the Applicable Table on reverse side: