

1992

Wesley G. Harline v. Ronald C. Barker and Larry Whyte : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



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.

Thomas L. Kay, Esq.; Mark O. Morris, Esq.; Attorneys for Defendants/Appellees.

Paul N. Cotro-Manes; Attorney for Plaintiff/Appellant.

Recommended Citation

Brief of Appellant, *Wesley G. Harline v. Ronald C. Barker, Larry Whyte*, No. 920113 (Utah Court of Appeals, 1992).
https://digitalcommons.law.byu.edu/byu_ca1/4028

This Brief of Appellant 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.

UTAH
DOCUMENT
KFU
50
.A10
DOCKET NO. 920113CA

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

WESLEY G. HARLINE,

Plaintiff/Appellant,

vs.

RONALD C. BARKER and LARRY
WHYTE,

Defendants/Appellees.

Case No. 920113-CA

Category No. 16

APPELLANT'S BRIEF

APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL DISTRICT
COURT OF SALT LAKE COUNTY, UTAH, THE HONORABLE
JAMES S. SAWAYA, JUDGE

PAUL N. COTRO-MANES
Attorney for Plaintiff/
Appellant
4537 Tanglewood Drive
Salt Lake City, Utah 84117

Thomas L. Kay, Esq.
Mark O. Morris, Esq.
Attorneys for Defendants/Appellees
60 East South Temple, Suite 800
Salt Lake City, Utah 84111

FILED

MAY 11 1992

[illegible]

Case No. 920133-CA

Category No. 16

)
)
)
)
)
)
)

))

Thomas L. Kay, Esq.
Mark O. Morris, Esq.
Attorneys for Defendants/Appellees
60 East South Temple, Suite 800
Salt Lake City, Utah 84111

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES AND CASES	ii, iii, iv
STATEMENT OF JURISDICTION	1
NATURE OF PROCEEDINGS BELOW	1
STATEMENT OF ISSUES ON APPEAL	2
STATEMENT OF STANDARD OF APPELLATE REVIEW	2
RULES, STATUTES AND LAWS WHICH ARE DETERMINITIVE.	3
STATEMENT OF THE CASE	4
STATEMENT OF THE FACTS	4
SUMMARY OF ARGUMENT	15

ARGUMENT:

POINT ONE

SUMMARY JUDGMENT CAN ONLY BE GRANTED WHERE THERE ARE NO MATERIAL FACTS IN CONTROVERSY.	16
---	----

POINT TWO

DAMAGES OR ISSUES FOR DETERMINATION BY THE TRIER OF FACTS.	22
--	----

POINT THREE

UTAH RULES OF CIVIL PROCEDURE REQUIRE A DISCLOSURE OF ALL WITNESSES AND EXHIBITS	22
---	----

POINT FOUR

UTAH RULES OF CIVIL PROCEDURE REQUIRE A PARTY TO REVEAL ALL MATTERS THAT COULD LEAD TO DISCOVERY OF ADMISSIBLE EVIDENCE	23
---	----

CONCLUSION	24
ADDENDUM	26

AUTHORITIES CITED

	Page
American Jurisprudence, 2nd, Vol 7, p. 249, Attorneys at Law, Sect 199	19
American Law Reports, 2d, Vol 45, p. 96, Section 5	22
Constitution of Utah, Article VIII, Section 3	1
Rule 1009, Federal Bankruptcy Rules	19
Rule 2004, Federal Bankruptcy Rules	20
Rule 3(a), Utah Rules of Appellate Procedure.	1
Rule 4(a), Utah Rules of Appellate Procedure.	1
Rule 26(b)(1), Utah Rules of Civil Procedure.	3, 22
Rule 37, Utah Rules of Civil Procedure	3
Rule 56, Utah Rules of Civil Procedure.	3
Utah Code Annotated, 78-2-2(3)(j)	1
Utah Code Annotated, 78-2-2(4).	1
Utah Code Annotated, 78-2a-3(2)	1

TABLE OF CASES

Alexander vs. Russo, 571 P.2d 350 (Kansas App. 1977)	18
W. M. Barnes Company v. Sohio National Resources Company, 627 P.2d 56 (Utah 1981)	20
Carlson vs. Langdon, 751 P. 2d 344 (Wyo. 1988)	17
Collins on behalf of Collins vs. Perrine, 778 P.2d 912 (N.M. App. 1989)	21

Dunn v. McKay, Burton, McMurray and Thurman, 584 P.2d 894 (Utah App. 1978)	20, 22
Ellis v. Gilbert, 19 Utah 2d 189, 429 P.2d 39 (1967).	3, 23
In Re Doan, 672 F.2d 831	19
E. F. Hutton, 305 F. Supp. 387	18
English v. Keinke, 774 P.2d 688 (Utah App. 1989)	2
Frontier Foundations, Inc., vs. Layton Construction Company, 171 Utah Adv Rep 25 (Utah App. 1991)	3
Hill vs. Grand Central, Inc. 25 Utah 2d 121, 477 P.2d 150 (1970)	20
Hansen v. Wightman, 538 P.2d 1238 (Wash. App. 1975).	19, 21
Holbrook Company vs. Adams, 542 P.2d 191 (Utah 1975).	16
Hunt v. EEI Engineering, Incorporated, 808 P.2d 1137 (Utah App. 1991)	3
Jackson vs. Dabney, 645 P.2d 613 (Utah 1982).	20
George vs. Caton, 93 N.M. 370, 600 P.2d 822 (1979)	17
In Re Greshenbaum, 598 F.2d 779 (1979).	19
Grievance Committee of Wyoming, State Bar vs. Raner, 765 P.2d 925 (Wyo. 1988)	17
Larson vs. Overland Thrift and Loan, 818 P.2d 1316 (Utah App. 1991)	2
Lack vs. Deseret Bank, 746 P.2d 802 (Utah App. 1987)	21
Lindsay v . Gibbons and Reed, 27 Utah 2d 419, 479 P.2d 28 (1972).	22
Matter of the Disiplinary Proceeding Against Gary G. McClothen, 99 Wash. 2d 515, 663 P.2d 1330 (1983)	18

Mountain States Telephone & Telegraph Company vs. Garfield County, 811 P.2d 184 (Utah 1991)	2
P.A.A.D. vs. Graystone Pines Homeowners, 789 P.2d 52 (Utah App. 1990)	21
Margulies by Margulies vs. Upchurch, 696 P.2d 1195 (Utah 1985)	18
Mower vs. McCarthy, 122 Utah 1, 245 P.2d 224 (1952)	24
Salt Lake City Corporation vs. James Construction Company 761 P.2d 42 (Utah App. 1988)	21
Sandberg vs. Klein, 576 P.2d 1291 (Utah 1978).	20
Sandy City vs. Salt Lake County, 178 Utah Adv Rep 3 (Utah, 1992)	2
Reeves vs. Geigy Pharmaceutical, Incorporated, 808 P.2d 1137 (Utah App. 1991)	3
Shurtz vs. BMW of North America, Incorporated, 814 P.2d 1108 (Utah 1991)	3
Smith vs. Superior Court of Los Angeles County, 440 P.2d 65 (Cal. 1968)	3, 18
State Road Commission vs. Petty, 17 Utah 2d 381, 412 P.2d 914 (1966).	2, 23, 24
Tignor v. Parkinson, 729 F.2d 977 (1984).	19
Winegar v. Froerer Corporation, 813 P.2d 104 (Utah 1991).	2

STATE OF UTAH

Defendants/Appellees.

Category No. 16

APPELLANT'S BRIEF

Plaintiff/Appellant claims jurisdiction pursuant to Article VIII, Section 3, Constitution of Utah; Utah Code Annotated 78-2-2 (3) (j) and (4); 78-2a-3 (2) (Effective January 1, 1992; and Rules 3 (a) and 4 (a), Utah Rules of Appellate Procedure, in that this appeal is from a final judgment of the Third Judicial District Court of Salt Lake County, Utah.

A Notice of Appeal was timely filed.

Plaintiff/Appellant brought this action against his former attorneys for malpractice arising out of their alleged actions while his attorneys representing him in a pending bankruptcy proceeding still pending in the United States Bankruptcy

Court of Utah.

ISSUES PRESENTED FOR REVIEW

1. Did the Trial Court err in granting Defendants/Appellees a summary judgment of no cause of action, pursuant to a motion filed by them against the Plaintiff?

2. Did the Trial Court err in entering a bench ruling, not reduced to a formal order, that denied Plaintiff/Appellant's motion to compel the Defendants/Appellees to reveal who their witness would be in the event of a trial and answering other interrogatories propounded by the Plaintiff/Appellant?

STANDARD OF APPELLATE REVIEW

Issue No. 1:

Summary Judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Larson v. Overland Thrift & Loan, 818 P.2d 1316 (Utah App. 1991)

On review of a summary judgment the appellate court must examine all the facts presented and the inferences drawn therefrom in a light most favorable to the losing party. Sandy City v. Salt Lake County, 178 Utah Adv. Rep. 3 (Utah 1992); English v. Kienke, 774 P.2d 688 (Utah App. 1989); Mountain States Tele & Tel. Co v. Garfield County, 811 P.2d 184 (Utah 1991); Winegar v. Froerer Corp., 813 P.2d 104 (Utah 1991).

The appellate court should affirm a judgment based upon a summary judgment motion only where it appears there are no genuine dispute of any material facts. Reeves vs Geigy Pharmaceutical, Inc., 764 P.2d 636 (Utah App. 1988); Hunt v. EEI Engineering, Inc., 808 P.2d 1137 (Utah App. 1991).

The appellate court accords no deference to a trial court's legal conclusions. Shurtz v. BMW of North America, Inc., 814 P.2d 1108 (Utah 1991). Frontier Foundations, Inc., vs. Layton Construction Co., 171 Utah Adv Rep 25 (Utah App. 1991)

Issue No. 2:

The appellate court should construe the Rules of Civil Procedure liberally. State ex rel Road Commission v. Petty 17 Utah 2d 382, 412 P.2d 914 (1966).

The appellate court should construe the Rules of Civil Procedure to simplify and make more efficient, pre-trial discovery and eliminate "trial by ambush". Ellis v. Gilbert, 19 Utah 2d 189, 429 P.2d 39 (1967).

RULES, STATUTES AND LAWS WHICH ARE DETERMINATIVE
OF THE ISSUES SET OUT FOR REVIEW

Issue No. 1:

Rule 56, Utah Rules of Civil Procedure.
(Set forth in the Addendum)

Issue No. 2:

Rule 26(b)(1), Utah Rules of Civil Procedure.
(Set forth in the Addendum)

STATEMENT OF THE CASE

This is an action brought by the Plaintiff/Appellant against the two Defendants/Appellees for alleged legal malpractice of the two defendants who are practicing attorneys at law.

Defendants/Appellees filed a motion for Summary Judgment and filed their memorandums of authorities with exhibits in support thereof, which was responded to by the plaintiff who likewise filed exhibits and affidavits and reply memorandums.

Plaintiff also filed a motion under Rule 37, Utah Rules of Civil Procedure to overrule certain objections filed by the defendants to the answering of certain interrogatories, and for an order to compel the defendants to answer the interrogatories.

The Court, in a bench ruling, not reduced to a formal order, denied plaintiff's motion in its entirety.

The Court granted summary judgment in favor of the Defendants/Appellees and against the Plaintiff/Appellant stating that "there are no genuine issues of material fact and that the defendants are entitled to judgment as a matter of law."

The present appeal followed in a timely manner and the Supreme Court referred this matter to the Utah Court of Appeals as is provided by statute and rules.

STATEMENT OF FACTS

1. All depositions of the Plaintiff, (Dr. Harline

hereafter) and Defendants, (Mr. Barker and Mr. Whyte hereafter) were before the Court and pertinent parts thereof were set forth in the memorandums filed with the court as were various exhibits, bankruptcy court transcripts and documents. References are made to the various documents hereafter by citing page number of the Record, but references are made to the Exhibits by letter number of the original document due to questions of the pagination numbering of some of the record.

2. Mr. Barker and Mr. Whyte are both duly licensed attorneys at law, who practice law in Salt Lake City, Utah. R. 2, Complaint; R. 13, Answer.

3. Dr. Harline filed a voluntary petition in Bankruptcy under Chapter 11, 11 USC 1, et.seq., on February 14, 1986, which was converted to a Chapter 7 proceeding in September, 1988, and his discharge was denied.

R. 242, Exhibits "A" and "L".

4. The Bankruptcy Court entered its Order directing Dr. Harline and his attorneys to amend his bankruptcy schedules at the time that it converted the proceedings to a Chapter 7 proceedings.

R. 242, Exhibit "L", Entry No. 74; R. 75 Affidavit, Cotro-Manes, Exhibit "C", R-6, Complaint, Attached Court Order.

5. Mr. Barker and Mr. Whyte did not amend any of Dr. Harline's bankruptcy schedules. R. 242, Exhibit "L".

6. Dr. Harline, had been represented by Mr. Pete Vlahos, Esq., of Ogden, Utah, and then Mrs. Betty Marsh, Esq., of Ogden as his attorneys prior to his retaining Mr. Barker and Mr. Whyte. R. 242, Exhibits "C", "D" and "E".

7. Dr. Harline has a pending malpractice suit which he filed against his first attorney Mr. Pete Vlahos, which action was moved from the Second Judicial District Court to the Third Judicial District Court.

8. Mr. Barker denied that he was retained to represent Dr. Harline in his bankruptcy matter, Bankruptcy No. 86-00623-JHA, but was retained solely to represent him in certain Adversary Actions filed in the bankruptcy case against Dr. Harline. R. 356 (Depo., Whyte p. 17).

9. Dr. Harline claimed in his verified complaint, deposition and affidavit in opposition to the Motion for summary judgment that Mr. Barker did in fact represent him in his bankruptcy proceeding. R. 2, verified complaint; R. 162, p. 2, (Depo., Harline), also p. 119 thereof; R. 356, (Affidavit of Harline, par 3).

10. Mr. Barker throughout his entire deposition denied that he was ever retained to represent Dr. Harline in his

bankruptcy matter, or failed and refused to give a direct and unequivocal answer:

Mr. Barker testified:

"Q. (Mr. Cotro-Manes at line 16): Were you retained to go into the various aspects of the personal bankruptcy of Dr. harline?

A. I don't believe so." R. 356, (Depo, Barker, p. 128)

11. Mr. Barker represented to the United States Bankruptcy Court that he was representing Dr. Harline in his Bankruptcy matter by his personal appearance before the United States Bankruptcy Court on November 28, 1986. The official transcript of the Court hearing on November 26, 1986 before the Honorable John H. Allen, United States Bankruptcy Judge (Ex. 1 to depos., of Barker and Whyte) in the matter of the withdrawal of Ms. Marsh as attorney of record for Dr. Harline in his bankruptcy matter, states on page 3:

"The Court: Are there other appearances?

Mr. Barker: Ronald Barker."

R. 358, (Ex. 4; Depo, Marsh, Ex 1, depo's of Barker, Whyte).

12. Mrs. Marsh in explaining the reasons for her motion to withdraw, which had been filed on November 14, 1986, stated to the Court:

(line 17, p. 3) "I'm asking the Court to allow me to withdraw. Mr. Barker, who is present here today, has already received the files that were given to him, I believe by the Vlahos & Sharp firm and he is already involved in proceeding forward.

The Court then ruled from the bench:

"The COURT: Well, I think that counsel has stated, counsel, old counsel--I don't want to say old counsel, then former counsel.

Mrs. Marsh: Thank you, Your Honor.

THE COURT: Has stated proper grounds to withdraw and new counsel has come in and I think it is appropriate. I'm not going to put any limitations on the withdrawal because of those reasons. I's sure Mr. Barker will cooperate in moving things along and I'll require an order authorizing withdrawal and then at this point I assume Mr. Barker will file his appearance."

R. 358, (Ex., L to Def's Supp.,

Memo., pp. 3 and 5).

13. Mrs. Marsh testified:

Q. (Mr. Cotro-Manes) And in reading over the transcript of the court appearance, (Exhibit 4) apparently Mr. Barker had a few things to say. Do you recall him actually saying those to the Court?

A. Yes, I do.

she previously testified:

Q. Did he--did anyone register any objection to his appearance?

A. Oh no.

R. 359, (Depo., Marsh, p. 20).

14. Mr. Barker represented to the United States Bankruptcy Court by a sworn and verified petition for attorney's fees that he commenced to represent Dr. Harline in his bankruptcy matter on November 10, 1986. R. 359 (Ex. 11, Depo's., Barker and Whyte, R. 61 (Affidavit, Cotro-Manes, Ex. "A")).

15. No other attorney made any subsequent appearance for Dr. Harline other than Mr. Barker, Mr. Whyte (Ex. No. 35, Depo., Whyte) , R. 242, Ex. "L", and Mr. Cotro-Manes, the present attorney of Dr. Harline, who did not make his appearance until July 18, 1989. R. 242, Ex "L", p. 10, Docket No. 176.

16. Mr. Barker, his sworn deposition to the contrary notwithstanding, swore under oath in his affidavit that he commenced to represent Dr. Harline in his bankruptcy on December 31, 1991. R. 242, Affidavit of Barker in support of Motion for Summary Judgment, Ex. G, wherein on page 3, paragraph 6 Mr. Barker, again under oath stated:

"My First appearance on behalf of Harline in general bankruptcy proceedings was on about December 31, 1986."

17. Mr. Barker was paid by Dr. Harline for general bankruptcy matters for work done by Mr. Barker from November 10, 1986 through November 31, 1986. R. 61 Ex., No. "A", Affidavit of Cotro-Manes), R 163, Affidavit, Harline, par 6 and billings and cancelled check appended thereto.

18. Mr. Whyte, while an employee of Mr. Barker in his

deposition testified that he did not represent Dr. Harline in his personal bankruptcy. R. 360.

19. Mrs. Betty Marsh, testified that Mr. Barker had been contacted to represent Dr. Harline as early as late October, or early November, 1986. R. 357 (Depo., Marsh, pp. 13, 14, 19).

At page 13 of her deposition Mrs. Marsh stated that in late October, mid to late October, she was acting as attorney for Dr. Harline.

On page 14 she stated that she had possibly had two brief conversations with Mr. Barker.

She testified:

"A. (Mrs. Marsh) I think that I had one brief telephone call--again, I am not positive of this--I think I had one brief telephone call with Mr. Barker, long distance, he was in Salt Lake city, and I think we discussed this rather briefly, but it was somewhere between when Dr. Harline and/or Jerry Wight had advised me that he would be present at the hearing and then of course the day of this hearing we talked about--I don't remember exactly--he was there for the hearing because of the fact that he was replacing both me and the Vlahos Firm."

R. 357 (Depo., Marsh, p. 14), see also R 242, Ex "A", p 14.

20. Dr. Harline testified that he believes his contacts with Mr. Barker was as early as late October or early November, 1986. R. 162, Affidavit, Harline, p. 1; R. 242, Exhibit "B"; Depo., Harline p. 4 & 5).

21. Mr. Larry Whyte was the employee of Mr. Barker and under the supervision of Mr. Barker. R. 359-360 (Depo., Whyte, p. 13).

22. Defendants both testified that they did not have nor had they seen Dr. Harline's Bankruptcy Schedules, Mr. Barker, the employer of Mr. Whyte, not at all and Mr. Whyte as late as summer or fall of, 1987.

Mr. Barker testified:

"Q. (Mr. Cotro-Manes): I believe you testified you had not seen the bankruptcy schedules in this matter?

A. (Mr. Barker) that's my best recollection."

R. 361

23. Mr. Barker testified that he had not seen Dr. Harline's Bankruptcy statement of affairs prior to the commencement of this suit nor had he requested any of his employees to obtain copies.

Mr. Barker testified:

"Q. (Mr. Cotro-Manes): I show you what has been marked for the purposes of this deposition as plaintiff's Exhibit 17, which appears to be. . . statement of affairs for debtor not engaged in business on the second page.... It is your testimony that you've never seen these documents before.

A. (Mr. Barker) As near as I can recall, I've not seen them prior to this litigation.

Q. Did you ever request Mr. Whyte for or on your behalf to obtain copies of the bankruptcy

schedules of Dr. Harline?

A. Not that I recall."

R. 362 (Depo., Barker, p. 104).

Mr. Whyte testified:

"Q. (Mr. Cotro-Manes) I show you what has been marked as Plaintiff's Exhibit 17, which appears to be the various documents which respect to the statement of affairs, bankruptcy filings, schedules and whatever, and ask you if you can tell me within a time frame, like fall, winter, spring, whenever it was that you first saw this document.

A. I'd say summer or fall of 1987."

R. 362 (Depo., Whyte, p. 31).

24. Defendants both testified that they had not looked at the docket sheet on Dr. Harline's Bankruptcy, Mr. Barker the employer of Mr. Whyte, not at all and Mr. Whyte not until the summer of 1988.

Mr. Barker testified in his deposition:

"Q. (Mr. Cotro-Manes in referring to Exhibit 19): Have you ever seen this docket sheet before or copies of it or the original on file with the clerk's office?

A. (Mr. Barker): Don't believe so.

Q. Did you ever ask anyone from your office to obtain a copy of the docket of the matters filed in the Harline Bankruptcy?

A. Not that I recall.

Q. Did you specifically ever ask Mr. Larry Whyte to ever obtain a copy of it?

A. Not that I recall."

R. 362 (Depo., Barker, p. 107)

Mr. Whyte, testified:

"Q. (Mr. Cotro-Manes) Did you ever see the docket sheet on Dr. Harline's bankruptcy?

A. I don't know --

Mr. Kay: 'ever' as in this litigation or excluding this litigation?

Mr. Cotro-Manes: At any time.

Q. (by Mr. Cotro-Manes) At any time?

A. I don't specifically recall having seen the docket sheet prior this litigation. I just don't recall seeing it."

R. 363 (Depo., Whyte, p. 138, 139)

25. Defendants both testified that they had not seen the order of Court directing the filing of amended schedules. R. 242, Ex. "G", p. 2 (Barker Affidavit); R. 363 (Depo., Barker, p. 57); R. 242, Ex "H", p. 2 (Whyte Affidavit).

26. Arrangements for Mr. Barker to come in as attorney for Dr. Harline were originally arranged for through the law firm representing Dr. Harline's professional corporation and who had previously represented him in his personal bankruptcy.

R. 356 (Depo., Harline p. 82).

27. Mr. Barker, admits that he became attorney of record for Dr. Harline, at least in some capacity, by December 31, 1986.

R. 357

28. Mr. Barker never discussed with prior counsel, Mrs. Marsh matters pertaining to the bankruptcy proceeding. He testified:

"Q. (Mr. Cotro-Manes) I believe you've already testified you had no conferences with Mrs. Marsh relative to Dr. Harline's bankruptcy or bankruptcy matters?

A. (Mr. Barker) At the bankruptcy court. That's the only thing I can recall."

Q. Did you ever request of Mrs. Marsh to send you any documents or records or papers with respect to Dr. Harline or Dr. Harline's Bankruptcy matters.

A. I don't recall doing so."

R. 363 (Depo., Barker, p. 135)

29. Mr. Barker did not request or obtain any copies of any 2004 examinations of Dr. Harline, nor did he make inquiry of Dr. Harline that such examinations had been taken. R. 364 (Depo., Mr. Barker, pp. 139-140)

Mr. Whyte testified:

"Q. Do you recall ever requesting or obtaining copies of any other 2004 examination of Dr. Harline?

A. You said requesting or obtaining?

Q. Yes. I can break it down into two questions if you want.

A. No. I don't recall ever requesting, and I don't know if I've ever obtained or seen or had a copy of another 2004 Examination."

R. 364 (Depo., Whyte, p. 48)

30. Mr. Whyte knew of a 2004 examination of Dr. Harline which took place in September, 1986, but made no effort to obtain a copy of the transcript or to ascertain what had been brought out in the examination. R. 364 (Depo., Whyte. pp. 48 and 49).

31. Dr. Harline paid fees, both to Mr. Barker and to Mr. Whyte, in amounts of \$24,0000 and \$112,000 respectively.

R. 372.

32. Dr. Harline served interrogatories upon the defendants, to which, in part, defendants asserted objections, which ran to the disclosure of witnesses who they may or would call at the time of trial, on the grounds that the interrogatory sought information protected by the attorney-client privilege and attorney work product doctrine. They objected to describe or identify exhibits on the same grounds. They further objected to revealing whether they ever prepared amendments to Dr. Harline's bankruptcy, reviewed his schedules or statement of affairs; the number of bankruptcy proceedings each had represented clients in or the names of clients they represented clients in bankruptcy matters on the grounds of relevancy.

R. 213 through 226, (Motion to Compel, Ex. "A").

SUMMARY OF ARGUMENT

1. Where there are genuine issues of fact unresolved

the granting of a summary judgment is error. As the relationship between Dr. Harline and Mr. Barker and Mr. Whyte, the extent of that relationship, the date that such a relationship occurred and what the conduct of the defendants was and whether damages resulted therefrom remains in question, the trial court erred in granting the defendants a summary judgment.

2. Pre-trial discovery should not be by ambush or by trickery and it is error of a trial court to deny a party the ability to conduct meaningful pre-trial discovery.

ARGUMENT

POINT ONE

SUMMARY JUDGMENT CAN ONLY BE GRANTED WHERE THERE ARE NO MATERIAL FACTS IN CONTROVERSY

The question of whether there was an attorney-client relationship, and when that relationship arose, was a material fact that remains unresolved in this matter.

Plaintiff claims that there was such a relationship.

Defendants deny this relationship.

This is a crucial and material fact that would preclude any summary judgment. If this is the only contested material fact, it is sufficient to deny a summary judgment, as only one contested fact is necessary to deny a summary judgment. Holbrook Co. v. Adams, 542 P.2d 191 (Utah 1975).

The question of the existence of an attorney-client relationship is a question of fact for determination by the trier of fact after a trial is held on the merits of the case. George v. Caton, 93 N.M. 370, 600 P.2d 822 (1979), and no formal contract is necessary to create a relationship of attorney and client, George, supra (citing cases from nine other jurisdictions, p. 827 of the Pacific citation).

In George, a Navaho family allegedly contracted with a law firm to represent them in a wrongful death action. The action was not timely filed. The attorney's (two) testified that no attorney-client relationship had ever existed. A motion for summary judgment was granted the attorneys based upon their testimony. The appellate court reversed the summary judgment and held that it was a question of fact as to whether or not an attorney-client relationship was created. This is exactly the same situation that the case at bar poses. Mr. Barker and Mr. Whyte say that no relationship, as to the bankruptcy, ever arose. Dr. Harline says to the contrary.

Whether the relationship of attorney-client exists depends on the facts and circumstances of each case. Grievance Com., Wyo, State Bar v. Riner, 765 P.2d 925 (Wyo. 1988); Carlson v. Langdon, 751 P.2d 344 (Wyo. 1988). Attorney-Client relationships may be implied. Margulies by Margulies v. Upchurch, 696 P.2d 1195

(Utah 1985); citing E.F. Hutton, 305 F. Supp. 387; Alexander v. Russo, 571 P.2d 350 (Kansas App. 1977) No fee need be paid, Smith v. Superior Court of Los Angeles County, 440 P.2d 65 (Cal. 1968); Alexander, supra.; Matter of the Discretionary Proceeding Against Gary G. McGlothen, 99 Wash. 2d 515, 663 P.2d 1330 (1983), although under the facts of this case, fees of over \$112,000 were paid to Whyte and over \$24,000.00 were paid to Barker.

In the present matter, the record shows that defendants clearly, by their sworn statements, undertook to represent Dr. Harline in his bankruptcy matter. However, in spite of these sworn statements, they deny such an undertaking. This is a contested question of fact, which alone is sufficient to reverse the trial court's granting of a summary judgment in favor of the defendants. However, there were more than one contested fact, they, the attorneys, claimed that even if there was an attorney-client relationship, still, the attorneys were not retained to file amended statements or schedules or to do anything with respect to the bankruptcy; further, they failed to look to the bankruptcy schedules to ascertain their adequacy and completeness. Also, they failed to speak with his former attorney, Betty Marsh to ascertain the current status of the bankruptcy matter.

They failed to look at the court files to ascertain any outstanding order or the status of the pending bankruptcy.

They failed to move for an extension of time to file such amendments in conformity with the Order of Court.

They knew or should have known that schedules could be amended at anytime during the pendency of a bankruptcy matter, irrespective of their failure to move for an extension of time, this is not even discretionary with the Court to deny. Tignor v. Parkinson, 729 F.2d 977 (1984); In Re Doan, 672 F. 2d 831 (1982); In Re Greshenbaum, 598 F.2d 779 (1979).

All of the above assertions by Dr. Harline are denied by Mr. Barker and Mr. Whyte.

Bankruptcy Rule 1009 states:

" (a) General Right to Amend. A voluntary petition, list, schedule, statement of affairs, . . . may be amended by the debtor as a matter of course at any time before the case is closed."

The law is clear that an attorney owes a duty of making a reasonable investigation of the facts of a case that he has undertaken to represent a client with respect thereto. Hansen v. Wightman, 538 P.2d 1238, (Wash. App. 1975). Further, he has a duty to his client to use knowledge, skill and ability, ordinarily possessed and exercised by members of the legal profession similarly situated. 7 Am Jur 2d 249, Attorneys at Law, Sect 199. It is submitted that any attorney, under any circumstances, would look at a file to ascertain the status of a matter, and what in his

opinion should be done with respect thereto. In a bankruptcy matter it is submitted that the looking of the Statement of Affairs and the Schedules would be the minimal that any competent attorney would look to. It is further, submitted that previous 2004 proceedings, which are depositions in the bankruptcy arena, should be looked to. As previous counsel had been involved, it is submitted that a competent attorney would also contact that or those attorneys to ascertain what had transpired and their thoughts, impressions and ideas.

What an attorney should do, is a question of fact for the determination of the trier of fact. Jackson vs. Dabney, 645 P.2d 613 (Utah 1982) and while the facts of this case clearly demonstrate acts of malpractice on the part of the defendants, it is admitted that it is not up to the Court to weigh the creditability of the testimony on a motion for summary judgment, it must determine if there are disputed issues of material fact. Sandberg v. Klein, 576 P.2d 1291 (Utah 1978); Hill v. Grand Central Inc., 25 Utah 2d 121, 477 P.2d 150 (1970); W. M. Barnes Co. v. Sohio National Resources Co., 627 P.2d 56 (Utah 1981).

Utah law commands that an attorney represent the interests of his client with competence and diligence, and that there is an implied covenant to do so. Dunn v. Kckay, Burton, McMurray and Thurman, 584 P.2d 894 (Utah 1978).

Utah law, and the cases decided thereunder, are clear that Summary Judgment should be granted only when it is clear from the undisputed facts that the opposing party cannot prevail. Lack v. Deseret Bank, 746 P.2d 802 (Utah App. 1987); P.A.A.D. v. Graystone Pines Homeowners, 789 P.2d 52 (Utah App. 1990).

It is not necessary for the plaintiff on a motion for summary judgment to prove his legal theories, it is only necessary for him, the non-moving party, to show "facts" which controvert those facts alleged by the defendants. Salt Lake City Corp. v. James Construction, Inc., 761 P.2d 42 (Utah App. 1988). While it is true that the defendants contend that Dr. Harline in signing the bankruptcy papers and that this is what caused his harm but it is submitted that this is a matter of contributory negligence, and it is submitted that this issue can only be determined by the trier of fact. Hansen v. Wightman, 538 P.2d 1238 (Wash. App. 1975). If not contributory negligence, then, perhaps, an independent intervening cause to the injuries to the plaintiff, which would preclude recovery by the plaintiff. However, the existence of an independent intervening cause, is an issue for determination by the trier of fact, and not one of law. Collins on behalf of Collins v. Perrine, 778 P.2d 912 (N.M. App. 1989).

Mr. Barker and Mr. Whyte attempt to assert that it is necessary for Dr. Harline to prove that the attorney-client

relationship was entered into in October or November, 1986. This is wrong. When ever the attorney-client relationship occurred, if the attorney commits an act of malpractice, he is liable for any damages, whether nominal or otherwise, which may have resulted from his acts or failures to act. If that relationship occurred remains a disputed fact in this case.

POINT TWO

DAMAGES, ARE ISSUES FOR DETERMINATION BY THE TRIER OF FACTS

The amount of damages is an issue for determination by a trier of fact, and nominal damages may be awarded in a legal malpractice action, Annotation, 45 ALR2d 96, Sect. 5; Dicta in Dunn v. Mckay, Burton, McMurray and Thurman, 584 P.2d 894 (Utah 1978), even if no greater damages are established. Mere speculation or conjecture cannot be the basis for a judgment, but if there is evidence from which an inference may be reasonably drawn, it would be error to remove that determination from the trier of fact. Lindsay v. Gibbons and Reed, 27 Utah 2d 419, 479 P.2d 28 (1972).

POINT THREE

UTAH RULES OF CIVIL PROCEDURE REQUIRE A DISCLOSURE OF ALL WITNESSES AND EXHIBITS

Rule 26(b)(1), Utah Rules of Civil Procedure, in pertinent part states:

"Parties may obtain discovery . . . and the identity and location of persons having knowledge of any discoverable matter."

One of the purposes of the Utah Rules of Civil Procedure is to eliminate the elements of surprise and trickery, Ellis v. Gilbert, 19 Utah 2d 189, 429 P.2d 39 (1987). As stated in the case of State Road Commission v. Petty, 17 Utah 2d 381, 412 P.2d 914 (1966):

"The idea of making a lawsuit a game of tricks by keeping information secret to surprise the opposition at a critical moment is more suited to the fictionalized drama of stories and plays than to actual trials in a court of justice.

The Court went on and observed:

"We see no impropriety in requiring the plaintiff to state the names and addresses of its witnesses."

POINT FOUR

UTAH RULES OF CIVIL PROCEDURE
REQUIRE A PARTY TO REVEAL ALL
MATTERS THAT COULD LEAD TO
DISCOVERY OF ADMISSIBLE EVIDENCE

Mr. Barker and Mr. Whyte objected to the answering of interrogatories of Dr. Harline, in part, on the basis that the interrogatories were not relevant.

Those interrogatories ran from when Mr. Barker and Mr. Whyte commenced to represent Dr. Harline though their past experience in dealing with bankruptcy matters in their practice of law. Ellis v. Gilbert, supra. It is submitted that the

interrogatories were in fact relevant and the trial court did not make any effort to examine Dr. Harline's motion, as clearly, upon reading the interrogatories and the objections thereto, or if it did look at the interrogatories and the answers, it erred in applying common sense. It is inescapable but what the interrogatories were proper and would have lead not only to discoverable evidence but also to answers to critical issues involved in this malpractice action. It is conceded that the actions of the trial court with respect to discovery matters are generally up to the trial court, Utah v. Petty, supra, but this is not without limit. Also, discovery is to be liberally permitted. Utah v. Petty, supra.; Mower v. McCarthy, 122 Utah 1, 245 P.2d 224.

CONCLUSION

It is respectfully submitted that the trial court erred in granting summary judgment in this matter where there remained genuine issues of fact unresolved.

It is respectfully submitted that the trial court erred in denying Dr. Harline's motion to overrule objections to interrogatories and to deny his motion to compel answers to interrogatories.

The summary judgment should be set aside and the matter remanded back to the trial court for trial on the merits.

The Trial Court's denial of Dr. Harline's motion to overrule the objections should be overturned and an order entered overruling defendant's objections, further, the court should enter its order to compel the defendants to answer the interrogatories heretofore propounded by the plaintiff.

ADDENDUM

1. Rule 26, Utah Rules of Civil Procedure

DEPOSITIONS AND DISCOVERY.

Rule 26. General provisions governing discovery.

(a) **Discovery methods.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) **Discovery scope and limits.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) **In general.** Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in Subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Subdivision (c).

2. Rule 56, Utah Rules of Civil Procedure

Rule 56. Summary judgment.

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

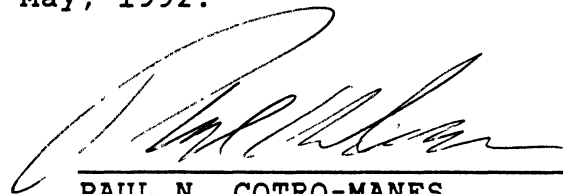
(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

DATED this 11th day of May, 1992.

A handwritten signature in black ink, appearing to read 'Paul N. Cotro-Manes', written over a horizontal line.

PAUL N. COTRO-MANES
Attorney for Plaintiff/Appellant
4537 Tanglewood Drive
Salt Lake City, Utah 84117

CERTIFICATE OF SERVICE

This is to certify that on the 17th day of May, 1992, the undersigned caused to be mailed to the defendants, by United States Mail, postage prepaid the requisite number of Appellant's Brief, as required by the Appellate Rules of Procedure, and addressed to:

Thomas L. Kay, Esq.,
Mark O. Morris, Esq.,
Attorneys at Law
60 East South Temple, #800
Salt Lake City, Utah 84111

A handwritten signature in dark ink, appearing to read "Mark O. Morris", is written over a horizontal line.