

1995

Joseph M. Wisden v. Warren J. Granville : Brief of Appellant

Utah Court of Appeals

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Utah Court of Appeals

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Marilyn M. Branch
Clerk of the Court

IN THE UTAH COURT OF APPEALS

JOSEPH M. WISDEN,

Plaintiff/Appellant,

- vs -

WARREN J. GRANVILLE,

Defendant/Appellee.

Ct. of Appeals Case No. 950486
Supreme Ct. Case No. 950237
District Ct Case No. 940500236

APPELLANT'S BRIEF

Priority #15

This appeal is taken from the 2 May 1995 SUMMARY JUDGMENT dismissal pursuant to Defendant Granville's 31 October 1994, MOTION FOR SUMMARY JUDGMENT, the Honorable J. Philip Eves, presiding.

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7. <u>WISDEN v. HUMPHRIES</u> , Case No. 910500187, ORDER, Fifth District Court, Washington County, Utah p.
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JURISDICTION

This appeal is taken from the 2 May 1995 SUMMARY JUDGMENT dismissal pursuant to Defendant Granville's 31 October 1994, MOTION FOR SUMMARY JUDGMENT, the Honorable J. Philip Eves, presiding.

Pursuant to the granting of Defendant's MOTION FOR SUMMARY JUDGMENT from the District Court, Plaintiff appealed to the Utah Supreme Court, which has appellate jurisdiction over this matter pursuant to the Utah Judicial Code, UCA §78-2-2, and Article 1, Section 12, Utah State Constitution.

Pursuant to the authority vested in the Utah Supreme Court, this case was poured-over to the Court of Appeals for disposition on 3 August 1995.

ISSUES PRESENTED ON APPEAL

POINT #1. DID THE DISTRICT COURT ERR IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANT, WARREN J. GRANVILLE, ON THE BASIS OF "ABSOLUTE PROSECUTORIAL IMMUNITY?"

STANDARD OF REVIEW

This case may present issues of first impression to the Utah appellate courts.

1. Utah Rules of Civil Procedure, Rules 12 & 56 and annotations cited therein.
2. Utah State Constitution, Article 1, Section 7
3. Utah State Constitution, Article 1, Section 8
4. Utah State Constitution, Article 1, Section 9
5. Utah State Constitution, Article 1, Section 12
6. IMBLER v. PACHTMAN, 424 U.S. 409 (1975)
7. McDONALD v. LAKEWOOD COUNTRY CLUB, 461 P.2d 437 (Colo. 1969)
8. ROSE v. BARTLE, 871 F.2d 331 (3rd Ct App. 1989)
9. WEATHERS v. EBERT, 505 F.2d 514 (4th Ct App. 1974)

POINT #2. ARE THE NINE (9) INDICIA OF FRAUD, AS ENUMERATED IN THE CASE OF PACE - vs - PARRISH, 247 P. 2d 273 (Utah 1952), THE ONLY MEANS WHEREBY AN INDIVIDUAL CAN BE TORTIOUSLY DAMAGED BY FRAUD? AS IN THE INSTANT CASE, WHERE THE PLAINTIFF IS HARMED BY FRAUD, BUT THE INDIVIDUALS WHO RELIED ON THE DEFENDANT'S FRAUDULENT REPRESENTATIONS WERE LOCAL GOVERNMENTAL AGENTS ACTING IN A TYPE OF PROXY FOR THE PLAINTIFF AS THE PLAINTIFF WAS AT THE MERCY OF AND CONSTRAINED BY THE LAW ENFORCEMENT OR JUDICIAL POWERS OF SUCH LOCAL GOVERNMENTAL AGENTS (e.g. ARRESTING OFFICERS, JAIL PERSONNEL, COUNTY ATTORNEYS AND DISTRICT COURT JUDGES) WHO WERE THEMSELVES THE ACTUAL INDIVIDUALS RELYING ON THE FRAUDULENT REPRESENTATIONS OF THE DEFENDANT?.

STANDARD OF REVIEW

1. Utah Rules of Civil Procedure, Rules 9, 12 & 56 and annotations cited therein.
2. PACE v. PARRISH, 247 P.2d 273 (Utah 1952)

**VERBATIM RECITALS OF CONSTITUTIONAL PROVISIONS,
STATUTES, ORDINANCES, RULES AND REGULATIONS**

Utah Constitution, Article 1, Section 7

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

Utah Constitution, Article 1, Section 8

(1) All persons charged with a crime shall be bailable except:

(a) persons charged with a capital offense when there is substantial evidence to support the charge; or

(b) persons charged with a felony while on probation or parole, or while free on bail awaiting trial on a previous felony charge, when there is substantial evidence to support the new felony charge; or

(c) persons charged with any other crime, designated by statute as one for which bail may be denied, if there is substantial evidence to support the charge and the court finds by clear and convincing evidence that the person would constitute a substantial danger to any other person or to the community or is likely to flee the jurisdiction of the court if released on bail.

(2) Persons convicted of a crime are bailable pending appeal only as prescribed by law.

Utah Constitution, Article 1, Section 9

Excessive bail shall not be required; excessive fines shall not be imposed; nor shall cruel and unusual punishments be inflicted. Persons arrested or imprisoned shall not be treated with unnecessary rigor.

Utah Rules of Civil Procedure, Rule 9

(b) **Fraud, mistake, condition of the mind.** In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

Utah Rules of Civil Procedure, Rule 12(b)(6)

(b) How presented. Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after

STATEMENT OF THE CASE

Nature of the Case

Plaintiff seeks remedy in tort action for false imprisonment and fraud, rising to the levels of malice and fraud. Utah's governmental immunity is not applicable in this case as the defending party is a foreign citizen. Federal jurisdiction was not sought by the defending party on the basis of diversity of citizenship.

Course of the Proceedings and Disposition in the Court Below

1. Subsequent to the initial rise to this cause of action, caused by Plaintiff's rearrest after previously posting bail, reincarceration, and continued judicial hold after time had expired, Plaintiff filed his COMPLAINT on 1 February 1994, with the Fifth Judicial District Court in St. George, Utah. (**Record, page 1**)
2. Defendant was served the SUMMONS and COMPLAINT on 23 February 1994, by the Maricopa County Sheriff's Office. (**Record, page 26**)
3. The RETURN OF SERVICE was filed with the Fifth Judicial District Court on 4 March 1994. (**Record, page 26**)
4. On or about 24 March 1994, one (1) Donald H. Hansen of the Utah Attorney General's Office, filed a MOTION FOR ADMISSION OF COUNSEL PRO HAC VICE (on behalf of Defendant's counsel, John E. Birkemeier¹). (**Record, page 32**)
5. On or about 24 March 1994, Defendant caused to be filed DEFENDANT WARREN J. GRANVILLE'S MOTION TO DISMISS. (**Record, page 27**)
6. On or about 31 March 1994, a Hearing was scheduled for Monday, 9 May 1994, at 1:30 p.m., for oral argument on DEFENDANT WARREN J. GRANVILLE'S MOTION TO DISMISS. (**Record, page 37**)

¹ NOTE #1: This action took place after twenty (20) days had expired for the filing of the ANSWER in this case.

7. On 1 April 1994, Plaintiff filed his OPPOSITION TO DEFENDANT WARREN J. GRANVILLE'S MOTION TO DISMISS. (**Record, page 42**)

8. On 1 April 1994, Plaintiff filed his OPPOSITION TO MOTION FOR ADMISSION OF COUNSEL PRO HAC VICE. (**Record, page 38**)

9. On 8 April 1994, Plaintiff filed his first (1st) set of discovery requests to the Utah Attorney General. (**Record, page 56**)

10. On 11 April 1994, Plaintiff filed a DEFAULT CERTIFICATE for failure of the Defendant to timely respond to his COMPLAINT (**NOT Paginated to the Record**)

11. On 12 April 1994, one (1) Donald H. Hansen of the Utah Attorney General's Office, caused to be filed a MOTION TO STRIKE PLAINTIFF'S FIRST SET OF INTERROGATORIES, REQUESTS FOR ADMISSION AND REQUESTS FOR PRODUCTION TO THE UTAH ATTORNEY GENERAL. (**Record, page 72**)

12. On 13 April 1994, Plaintiff filed his MOTION TO QUASH DEFENDANT WARREN J. GRANVILLE'S MOTION TO DISMISS. (**Record, page 65**)

13. On 15 April 1994, Plaintiff filed his OPPOSITION TO UTAH ATTORNEY GENERAL'S MOTION TO STRIKE PLAINTIFF'S FIRST SET OF DISCOVERY REQUESTS TO THE UTAH ATTORNEY GENERAL. (**Record, page 78**)

14. On 9 May 1994, a Hearing was held for oral argument on Defendant Granville's MOTION TO DISMISS. (**Record, pages 81 & 485**)

15 The Court below ruled that " for purposes of a motion to dismiss at these early proceedings, the Court is required to read the allegations of the Complaint in the light most favorable to the complainant and to assume all things in his favor." (**Record, page 511**)

16 The Court below also ruled that “This is a suit for false imprisonment -- hold on just a second and let me check another count here - -- a suit for false imprisonment, the tort of fraud, seeking compensatory and punitive damages, and it would appear that those do not fall within the grant of absolute immunity if I am to assume that the facts as recited in Mr. Wisden’s Complaint are true and read all those in the light most favorable to him. So the motion to dismiss is denied at this stage.” **(Record, pages 511 & 512)**

17. On or about 27 May 1994, Defendant Granville caused to be filed his ANSWER to Plaintiff’s COMPLAINT. **(Record, page 82)**

18. On 1 June 1994, Plaintiff caused his first (1st) set of discovery requests to be served on Defendant Granville. **(Record, page 89)**

19. On or about 30 June 1994, Defendant Granville caused to be filed his RESPONSE TO REQUEST FOR ADMISSIONS. **(Record, page 107)**

20. On or about 30 June 1994, Defendant Granville caused to be filed his ANSWERS to Plaintiff’s FIRST (1ST) SET OF INTERROGATORIES. **(Record, page 114)**

21. A Scheduling Conference was held on 11 July 1994, and the Court subsequently entered its SCHEDULING ORDER. **(Record, pages 124 & 125)**

22. On 13 July 1994, Plaintiff file his MOTION TO COMPEL DISCOVERY. **(Record, page 127)**

23. On or about 26 July 1994, Defendant Granville caused to be filed his RESPONSE TO REQUEST FOR PRODUCTION OF DOCUMENTS. **(Record, page 159)**

24. On or about 26 July 1994, Defendant Granville caused to be filed his RESPONSE TO PLAINTIFF’S MOTION TO COMPEL DISCOVERY. **(Record, page 154)**

25. On 28 July 1994, Plaintiff filed his REPLY TO DEFENDANT’S RESPONSE TO PLAINTIFF’S MOTION TO COMPEL DISCOVERY **(Record, page 166)**

26. On Monday, 12 September 1994, a Hearing was held on Plaintiff's MOTION TO COMPEL DISCOVERY. Defendant Granville was ordered to comply with certain discovery requests. **(Record, page 180)**

27. On 20 September 1994, Plaintiff filed his MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT. **(Record, page 181)**

28. On or about 23 September 1994, Defendant Granville caused to be filed his SUPPLEMENTAL RESPONSES TO PLAINTIFF'S FIRST SET OF REQUEST FOR ADMISSIONS and FIRST SET OF INTERROGATORIES. **(Record, page 211+)**

29. On 13 October 1994, the Court below granted Plaintiff's Motion to file his AMENDED COMPLAINT. **(Record, page 221)**

30. On 21 October 1994, Plaintiff filed his AMENDED COMPLAINT. **(Record, page 224)**

31. On or about 31 October 1994, Defendant Granville caused to be filed his MOTION FOR SUMMARY JUDGMENT. **(Record, page 256)**

32. On or about 31 October 1994, Defendant Granville caused to be filed his ANSWER to Plaintiff's AMENDED COMPLAINT. **(Record, page 252)**

33. On 10 November 1994, Plaintiff filed his OPPOSITION TO WARREN J. GRANVILLE'S MOTION FOR SUMMARY JUDGMENT. **(Record, page 360)**

34. On or about 22 November 1994, Defendant Granville caused to be filed his REPLY IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT. **(Record, page 413)**

35. On 29 November 1994, Plaintiff filed his MOTION FOR SUMMARY JUDGMENT. **(Record, page 419)**

36. On or about 5 December 1994, Defendant Granville caused to be filed his SUPPLEMENT TO MOTION FOR SUMMARY JUDGMENT. **(Record, page 435)**

37. On or about 13 December 1994, Defendant Granville caused to be filed his RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT. **(Record, page 442)**

38. On 9 January 1995, the Court below held a hearing for oral argument on MOTIONS FOR SUMMARY JUDGMENT, by both parties. The Court took the matters under advisement. **(Record, page 455)**

39. On 19 January 1995, the Court below entered its Order on Plaintiff's MOTION TO COMPEL DISCOVERY. **(Record, page 457)**

40. On 6 April 1995, the Court below entered its MEMORANDUM DECISION, finding that there were no disputed issues of fact, that the matter was ripe for summary judgment, granted summary judgment in favor of the Defendant, and reversed his previous holding that Defendant Granville was not protected by prosecutorial immunity (**Record, page 463**)

41. On 3 May 1995, the Court below entered SUMMARY JUDGMENT in favor of the Defendant. (**Record, page 474**)

42. On 30 May 1995, Plaintiff filed his NOTICE OF APPEAL with the Court below. (**Record, page 479**)

Statement of the Facts

1. On or about 15 December 1988, an indictment or information was filed with the Superior Court in Maricopa County, Arizona, alleging various crimes of Fraudulent Schemes and Artifices, inter alia, classified as 2nd or 3rd degree felonies. (**Record pp. 3 ¶ #1** [COMPLAINT], **82** [ANSWER], **& 271** [EXHIBIT #1 to Defendant's MOTION FOR SUMMARY JUDGMENT])

2. On or about 19 January 1989, pursuant to the above referenced indictment or information, a WARRANT FOR ARREST was issued against the Plaintiff in this action, Joseph Michael Wisden. (**Record pp. 3 ¶ #2** [COMPLAINT], **14** [EXHIBIT #1 to Plaintiff's COMPLAINT], **82** [ANSWER], **& 282** [EXHIBIT #2 to Defendant's MOTION FOR SUMMARY JUDGMENT])

3. Said WARRANT FOR ARREST was issued from the Superior Court in Maricopa County, Arizona, Judge Tom O'Toole, presiding, and requesting bail or bond of \$4,795.00 to secure Plaintiff's appearance to answer the charges on said matter. (**Record pp. 3 ¶ #3** [COMPLAINT], **14** [EXHIBIT #1 to Plaintiff's COMPLAINT], **82** [ANSWER], **& 282** [EXHIBIT #2 to Defendant's MOTION FOR SUMMARY JUDGMENT])

4. Pursuant to said WARRANT FOR ARREST, information regarding the warrant was entered into the NCIC by the Maricopa County Sheriff's Office. (**Record pp. 3 ¶ #4** [COMPLAINT], **15** [EXHIBIT #2 to Plaintiff's COMPLAINT], **& 82** [ANSWER])

5. On or about 22/23 August 1990, Plaintiff was arrested pursuant to the heretofore described WARRANT FOR ARREST; and on information twixed to the Washington County Sheriff's Department, by one (1) Conrad Dominguez of the Washington County, Utah, Sheriff's Department; in Iron County, Utah. (**Record pp. 3 ¶ #5 [COMPLAINT], 15 [EXHIBIT #2 to Plaintiff's COMPLAINT], & 82 [ANSWER]**)

6. Plaintiff was thereafter transported to the Washington County jail by deputy Dominguez on 23 August 1990, and incarcerated on the basis of said warrant information. (**Record pp. 4 ¶ #6 [COMPLAINT], 16 [EXHIBIT #3 to Plaintiff's COMPLAINT], & 82 [ANSWER]**)

7. On or about 24 August 1990, Plaintiff was arraigned in the then Circuit Court in Washington County, Utah, on an Utah FUGITIVE COMPLAINT. (**Record pp. 4 ¶ #7 [COMPLAINT], 82 [ANSWER], & 300, [Exhibit H of EXHIBIT #3 to Defendant's MOTION FOR SUMMARY JUDGMENT]**)

8. On or about 29 August 1990, Plaintiff posted bail in the amount of \$4,500.00, was released from the Washington County jail, and began waiting for Arizona to act on the extradition process. (**Record pp. 4 ¶ #8 [COMPLAINT], 17 [EXHIBIT #4 to Plaintiff's COMPLAINT], & 82 [ANSWER]**)

9. At no time was Plaintiff obligated to make an appearance in Arizona pursuant to said WARRANT FOR ARREST, his posting of bail or pursuant to any of the various allegations made as fraudulent communications to law enforcement agents in Utah, by Defendant Warren J. Granville. (**Record pp. 4 ¶ #9 [COMPLAINT]**)

10. On or about 29 August 1990, one (1) Sheryl Berentz, a Maricopa County deputy, badge number 538, certified the execution of the WARRANT FOR ARREST and that Plaintiff was "in custody." (**Record pp. 4 ¶ #10 [COMPLAINT] & 14 [EXHIBIT #1 to Plaintiff's COMPLAINT]**)

11. Said WARRANT FOR ARREST, having been executed against the Plaintiff, was then caused to be filed on 29 August 1990, with the Clerk of the Superior Court in Maricopa County, Arizona. (**Record pp. 4 ¶ #11 [COMPLAINT] & 14 [EXHIBIT #1 to Plaintiff's COMPLAINT]**)

12. On or about 22 January 1991, the Defendant, Warren J. Granville, requested the above described (exhausted) WARRANT FOR ARREST to be reentered into the NCIC by the Maricopa County Sheriff's Office in Arizona. (**Record pp. 5 ¶ #13 [COMPLAINT], 19 [EXHIBIT #5 to Plaintiff's COMPLAINT], & 83 [ANSWER]**)

13. Said NCIC warrant information regarding the Plaintiff, Joseph M. Wisden, was thereafter fraudulently communicated by telex communications to agents in Washington County, Utah. (**Record pp. 5 ¶ #14 [COMPLAINT] & 21 [EXHIBIT #7 to Plaintiff's COMPLAINT]**)

14. Defendant Warren J. Granville, fraudulently communicated to Washington County deputy attorney, O. Brenton Rowe, that Plaintiff had failed to appear in response to a summons. (**Record pp. 5 ¶ #15 [COMPLAINT] & 20 [EXHIBIT #6 to Plaintiff's COMPLAINT]**)

15. Plaintiff was never under judicial obligation (SUMMONS) to appear in Superior Court in Maricopa County, Arizona, as Plaintiff had never received a SUMMONS by proper service of process according to lawful process, — or in a timely manner. (**Record pp. 5 ¶ #16 [COMPLAINT] & 107 ¶ #2 [GRANVILLE'S RESPONSE TO REQUEST FOR ADMISSIONS]**)

16. Plaintiff's release from incarceration by posting of bail on 29 August 1990, imposed no obligation or duty on him to appear in Superior Court in Maricopa County, Arizona, as Plaintiff refused to waive extradition, and bail was only for a Utah jurisdictional hold. (**Record pp. 5 ¶ #17 [COMPLAINT] & 17 [EXHIBIT #4 to Plaintiff's COMPLAINT]**)

17. On or about 15 February 1991, no new warrant for the arrest of the Plaintiff had been issued by competent authority, pursuant to the alleged felony charges described in **Statement of Fact #1** above. (**Record p. 5 ¶ #18 [COMPLAINT]**)

18. On or about 15 February 1991, no "bench warrant" for the arrest of the Plaintiff had been issued by competent authority, pursuant to Plaintiff's alleged failure to appear; allegedly mandated by a SUMMONS or Plaintiff's 29 August 1990, posting of bail. (**Record p. 5 ¶ #19** [COMPLAINT])

19. No authority exists in law or fact that granted Defendant, Warren J. Granville any capacity to issue a WARRANT FOR ARREST of the Plaintiff, or cause the already exhausted WARRANT FOR ARREST, heretofore described in **Statements of Fact #2 & #3** above, to be reentered into the NCIC by the Maricopa County sheriff's Office at the "request" of Defendant Granville. (**Record p. 6 ¶ #20** [COMPLAINT])

20. On or about 15 February 1991, Plaintiff was rearrested pursuant to the heretofore described (exhausted) WARRANT FOR ARREST and on information telexed to the Washington County Sheriff's Department from the Maricopa County Sheriff's Office; by two (2) Hurricane City Police Officers, Kim Seegmiller and Shane Copeland; in Hurricane, Utah. (**Record pp. 6 ¶ #22** [COMPLAINT], **21** [EXHIBIT #7 to Plaintiff's COMPLAINT], & **83** [ANSWER — admits arrest; denies exhausted warrant])

21. Plaintiff was thereafter transported to the Washington County jail by officers Seegmiller and Copeland on 15 February 1991, and imprisoned on the basis of the same warrant information heretofore described in **Statements of Fact #2 & #3** above. (**Record pp. 6 ¶ #23** [COMPLAINT] & **22** [EXHIBIT #8 to Plaintiff's COMPLAINT])

22. On or about 19 February 1991, Plaintiff was arraigned in the then Circuit Court in Washington County, Utah, on a new Utah FUGITIVE COMPLAINT, and released to his own recognizance. (**Record pp. 6 ¶ #24** [COMPLAINT] & **305**, [Exhibit K of EXHIBIT #3 to Defendant's MOTION FOR SUMMARY JUDGMENT])

23. Plaintiff was thereafter released from the unlawful detention compelled by the judicial hold of the new Utah FUGITIVE COMPLAINT, by a Writ of Habeas Corpus issued on 25 March 1991, thereby confirming the

unlawfulness of Plaintiff's incarceration and jurisdictional hold by the then Utah Circuit Court. (**Record pp. 6 ¶ #25 [COMPLAINT] & 311 ¶ #3, [Exhibit M of EXHIBIT #3 to Defendant's MOTION FOR SUMMARY JUDGMENT]**)

24. Plaintiff was imprisoned for eighty-nine (89) hours in the Washington County jail from 15 February until 19 February 1991, as a consequence of fraudulent warrant information contained on the NCIC on 15 February 1991, having been placed there at the specific direction of the Defendant, Warren J. Granville. (**Record pp. 7 ¶ #26 [COMPLAINT], 19, 21, & 22 [EXHIBITS #5, #7, & #8 to Plaintiff's COMPLAINT]**)

25. Following Plaintiff's imprisonment in the Washington County, Utah, jail, referred to in **Statement of Fact #24** above, Plaintiff was arraigned on a FUGITIVE COMPLAINT² on 19 February 1991, in the Fifth Circuit Court, Washington County, Utah, Case No. 911000305, pursuant to the allegation that, "[T]he Washington County Sheriff's Department was advised that [Plaintiff] had outstanding Warrant No. 8811353 from Maricopa County, Arizonaon [sic]" (**Record pp. 225 ¶ #2 [AMENDED COMPLAINT], 229/230 [EXHIBIT #1 to Plaintiff's AMENDED COMPLAINT], & 253 [ANSWER to AMENDED COMPLAINT]**)

26. As a consequence of the filing of the FUGITIVE COMPLAINT referred to in **Statement of Fact #25**, above, Plaintiff was again placed on a judicial hold to the then Utah Circuit Court. (**Record pp. 225 ¶ #3 [AMENDED COMPLAINT], 237 thru 239 [EXHIBIT #2 to Plaintiff's AMENDED COMPLAINT], & 253 [ANSWER to AMENDED COMPLAINT]**)

27. Plaintiff was thereafter ordered by the then Utah Circuit Court to appear at a hearing on 19 March 1991. (**Record pp. 226 ¶ #4 [AMENDED COMPLAINT], 239 [EXHIBIT #2 to Plaintiff's AMENDED COMPLAINT], & 253 [ANSWER to AMENDED COMPLAINT]**)

28. The judicial hold referred to in **Statement of Fact #27** above, constitutes continued unlawful detention on the Plaintiff, which is further proven by the granting of a Writ of Habeas Corpus, for relief from the unlawful detention, on 25 March 1991. (**Record pp. 226 ¶ #5 [AMENDED COMPLAINT]**)

² Pursuant to Utah Extradition statutes, U. C. A. §77-30-1 et seq.

29. As heretofore described Plaintiff was further unlawfully detained, by judicial hold of the Utah Courts, an additional thirty-four (34) days, constituting further injury and damages to Plaintiff, in false imprisonment, pursuant to the reentering of the exhausted warrant information (8811353) into the NCIC, at the direction or insistence of Defendant Warren J. Granville, Assistant Arizona Attorney General, and other unknown individuals. (**Record pp. 226 ¶ #6** [AMENDED COMPLAINT])

SUMMARY OF ARGUMENTS

POINT 1. Plaintiff argues that the conduct of the Defendant, Warren J.

Granville, was outside the parameters of his scope of responsibilities as an assistant attorney general for Arizona. Plaintiff also argues that prosecutorial immunity is not applicable to torts for false imprisonment and fraud, which are the subject matter of Plaintiff's cause of action. Summary Judgment for the Defendant was error because there were no material facts in dispute at the summary judgment phase of the proceedings, which were different from the facts originally alleged by the Plaintiff at the pre-ANSWER phase, when the Court below denied Defendant's Rule 12(b), MOTION TO DISMISS, at which time the Court below denied said MOTION for lack of prosecutorial immunity.

POINT 2. Plaintiff argues that the parameters of fraud pursuant to Pace - vs - Parish are too constricted. Plaintiff argues that the actions of fraud, by the Defendant, worked against him because of the personal possession of the Plaintiff by certain government agents, who acted vicariously for the Plaintiff to rely on false representations of the Defendant

ARGUMENT

POINT 1. DID THE DISTRICT COURT ERR IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANT, WARREN J. GRANVILLE, ON THE BASIS OF "ABSOLUTE PROSECUTORIAL IMMUNITY?"

Plainly stating Judge Eve's MEMORANDUM DECISION: "The Court finds that the conduct of which the plaintiff complains was clearly conduct undertaken by the prosecutor in the course of his official duty and in the process of carrying out his responsibilities which were an integral part of the judicial process." (*Record*, pp. 466 & 467) This statement is entirely opposite to the citations of appellate court decisions argued. In fact, Judge Eves himself refers to two (2) appellate cases that hold to the opposite of his 6 April 1995, MEMORANDUM DECISION.

Judge Eves states in his MEMORANDUM DECISION, "clearly the attempt by the prosecutor to serve a warrant issued by a court of competent jurisdiction in the State of Arizona is an act which is part of the judicial process. (See Rose v. Bartle, 871 Fed. 2d 331 {1989})."

Regarding "Prosecutorial Immunity," let's observe what Rose v. Bartle actually says:

As the [Federal] district court recognized, the seminal case on prosecutorial immunity is *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). In *Imbler*, It held that prosecutors are absolutely immune from civil liability for activities "intimately associated with the judicial phase of the criminal process;" that "in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit, for damages under section 1983." 424 U.S. at 430-31, 96 S.Ct. at 995.

Plaintiff emphasizes that the Rose decision delineates what specific conduct is "intimately associated with the judicial phase of the criminal process." That conduct is specifically limited to **A)** Initiating a prosecution, and; **B)** Presenting the State's case.

Rose v. Bartle goes on to say:

The Court left open the question of whether immunity was available “for those aspects of the prosecutor’s responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate.” *Id.* A number of courts of appeals, including this court, have suggested that only a qualified immunity is available for such activity. (*citations omitted*). Moreover, “[t]here may even be situations in which a prosecutor is found to have acted outside any legitimate prosecutorial role,” and therefore is not entitled to absolute immunity. (*citations omitted*).

Plaintiff asserts that Judge Eves clearly misconstrues the facts of Plaintiff’s case and then misapplies the Rose case in his 6 April 1995.

MEMORANDUM DECISION

Judge Eves asserts that Granville clearly attempted to serve a warrant, and that such act is a function of a prosecutor. In two ways, Judge Eves errs: **1)** His statement of fact is incorrect. — Defendant Granville did not attempt to serve a warrant, Granville caused the information from an already exhausted warrant to be reentered into the NCIC to be again executed against the Plaintiff by Utah law enforcement agents. Plaintiff’s assertions and statements of fact are very clear on this matter. **2)** Rose does not even imply that service of a warrant is part of the judicial process.

At oral argument for Summary Judgment in the Court below, Plaintiff relied not only on the heretofore referenced cases of Imbler vs. Pachtman and Rose vs. Bartle, but also on Weathers vs. Ebert, 505 F.2d 514, and McDonald vs. Lakewood Country Club, 461 P.2d 437 (Colo 1969).

In the Ebert case, while the appellate court dismissed on grounds of immunity, it stated that, “Making an arrest is a police function, not a judicial one, and Ebert would lack immunity if he were involved.” *Id.* at 517 Here we can clearly see that Judge Eve’s decision is in error by claiming that Defendant Granville’s actions were part of the “judicial” process. Ebert makes it clear that making arrests (*e.g. serving warrants*) is not a part of the judicial process — it is a police function!

Turning to Imbler, we find the greatest clarity and understanding on the matter regarding the functions of a prosecutor in order to enjoy *absolute immunity*. In addition, the Imbler Court clearly enumerated that only the torts of malicious prosecution and libel were protected by *absolute immunity*, and as reiterated by the Rose Court, above, only initiating prosecution and presenting the State's case were functions of a prosecutor, worthy of invoking *absolute immunity*.

Three (3) Justices on the Imbler Court, Justice White, Justice Brennan, and Justice Marshall, joined in a separate concurring opinion to give further clarity to the limitations of *absolute immunity*, and squarely placed the Defendant's conduct in error and the Court below in error, who granted the Defendant summary judgment in this case.

Justice White, writing for JJ's. Brennan and Marshall, wrote, "There was no absolute immunity at common law for prosecutors other than absolute immunity from suits for malicious prosecution and defamation. *Id* 424 U.S. at 441. At footnote #6 on the same page 441, Justice White notes, "Immunity of public official for false arrest was, unlike immunity of public officials for malicious prosecution, **NOT** absolute. **[EMPHASIS added]** *[citation omitted]* and when prosecutors were sued for that tort, they were not held absolutely immune. *[citation omitted]* a similar result has obtained in the lower courts in suits under 42 U.S.C. § 1983 against prosecutors for initiating unconstitutional arrests. *[citations omitted]*

Plaintiff clearly alleged material facts which are not in dispute by the Defendant. The appellate courts have clearly ruled on the limitations of *absolute prosecutorial immunity* and have consistently held that false imprisonment does not protect a prosecutor associated with such conduct. Contrary to Judge Eve's decision, the Rose Court, does not support Defendant Granville's actions to engage in any activity associated with Plaintiff's unlawful arrest. Therefore the Court below erred.

POINT 2. ARE THE NINE (9) INDICIA OF FRAUD, AS ENUMERATED IN THE CASE OF PACE - vs. - PARRISH, 247 P. 2D 273 (UTAH 1952), THE ONLY MEANS WHEREBY AN INDIVIDUAL CAN BE TORTIOUSLY DAMAGED BY FRAUD? AS IN THE INSTANT CASE, WHERE THE PLAINTIFF IS HARMED BY FRAUD, BUT THE INDIVIDUALS WHO RELIED ON THE DEFENDANT'S FRAUDULENT REPRESENTATIONS WERE LOCAL GOVERNMENTAL AGENTS ACTING IN A TYPE OF PROXY FOR THE PLAINTIFF AS THE PLAINTIFF WAS AT THE MERCY OF AND CONSTRAINED BY THE LAW ENFORCEMENT OR JUDICIAL POWERS OF SUCH LOCAL GOVERNMENTAL AGENTS (e.g. ARRESTING OFFICERS, JAIL PERSONNEL, COUNTY ATTORNEYS, AND DISTRICT COURT JUDGES WHO WERE THEMSELVES THE ACTUAL INDIVIDUALS RELYING ON THE FRAUDULENT REPRESENTATIONS OF THE DEFENDANT?

Plaintiff clearly demonstrates that he is harmed by fraud. Defendant Granville fraudulently represented to a number of individuals (ie. a Maricopa County Sheriff's Deputy, the Washington County Attorney's Office, the Washington County Sheriff's Office, the Hurricane City Police Department, the 5th Judicial District Court, and others) that a current and valid warrant existed for the arrest of the Plaintiff. Concurrent with this representation are the tacit representations that Plaintiff was not at liberty while on bail, that the warrant had not been previously executed, or that the originating court was agreeably with and in control of the process. None of the above representations were valid at the time of Plaintiff's February 1991, arrest.

In this case, Plaintiff was forced to rely on such false representations as certain governmental agents took the Plaintiff's liberty into their own hands and acted on such false representations for him.

The 1952 Pace, 247 P.2d 273, case insists that the injured party must rely on the false representations of another in order to sustain an action for fraud. Plaintiff contends his situation is an exception to the holding of Pace, as he was also injured by fraud, because of the reliance by others who held him hostage, thereby exercising the persona of the Plaintiff, vicariously through themselves. Plaintiff was forced to rely on the false representations of Defendant, through the proxy of others.

Such a concept is not unusual. It is practiced daily by members of the Mormon faith, around the world, who perform vicarious ordinance work for others, with certain individual standing proxy for others, in their absence.

Plaintiff cannot provide case law or legal reference in support of this argument as the Washington County Law Library has been closed to him by the Washington County Attorney, Eric Ludlow, and Plaintiff has been denied opportunity to research this argument³. However, Plaintiff contends his argument is sound and supported by reason, logic, and common sense.

Plaintiff relies on the wisdom of the appellate Court to lend its own reason to a sound concept, as presented by the Plaintiff, above.

Plaintiff is not seeking to overturn the Pace case, only to broaden its application, relevant to certain acts and facts which were not present when it was initially decided in 1952.

³ Plaintiff has embarked on a course of action including administrative appeal to the Washington County Commission under the G. R. A. M. A. statutes, and tort action for deprivation of constitutional rights.

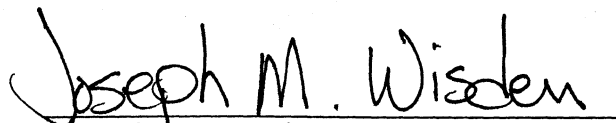
CONCLUSION

It is clear that Judge Eves misapprehended the facts of this case and skewed the actual meaning of the Rose decision. Plaintiff had already been arrested, released to bail, and was waiting for extradition to Arizona. The only conduct within the purview of a prosecuting attorney, is to seek a warrant from a court of competent jurisdiction. In this case, Defendant Granville did not do this. He acted outside the scope of his responsibilities by causing warrant information from an exhausted warrant to be reentered into the NCIC by a Maricopa County Sheriff's deputy. As stated in the Ebert case, "[being] involved in making unlawful arrest, he would lack immunity from suit for false arrest, since arrest is police function, not judicial one." Accordingly, Plaintiff is entitled to summary judgment in this matter, not the Defendant, and this case should be reversed and remanded back to the District Court.

WHEREFORE: Plaintiff prays for relief in the following:

1. Reverse the decision of the Court below.
2. Remand the case back to the District Court for further proceedings consistent with this Court's opinion, granting the Plaintiff summary judgment.
3. Award costs and fees to the Plaintiff, on appeal.
4. Award any other measures this Court deems just and appropriate.

DATED THIS 29th day of August, 1995.



Joseph M. Wisden

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

JOSEPH M. WISDEN,)	
Plaintiff,)	MEMORANDUM DECISION
vs.)	
WARREN J. GRANVILLE,)	
Defendant.)	Civil No. 940500236

This matter came before the Court for oral argument on the plaintiff's Motion to Compel Discovery and the Cross-Motions of the plaintiff and the defendant for Summary Judgment on January 9, 1995. Mr. Wisden was present representing himself. The defendant was represented by John E. Birkemeier. The Court heard oral argument, indicated, in part, what some of its rulings were going to be, and then took the matter under submission. Thereafter the Court became involved in a lengthy jury trial which occupied the Court's time from January 30th through February 24th. Having now reviewed the Memoranda of the parties and researched the law stated therein, the Court now enters the following Memorandum Decision and Orders.

The defendant Granville filed his Motion for Summary Judgment on November 1, 1994. His Motion states that there are no material issues of fact and that he is entitled to summary judgment dismissing each of the two causes of action set out in the plaintiffs Complaint. The grounds asserted for his Motion are:

1. That the defendant is immune from suit under the common-law doctrine of prosecutorial immunity under the facts of this case.

2. That the legal process used to obtain the arrest of the plaintiff and his return to the State of Arizona from the State of Utah was properly issued and that the finding of the guilt of the defendant constitutes a defense to his claim for false arrest and false imprisonment pursuant to the Restatement of Torts 2d, § 657.

3. That there is no factual basis upon which a claim of fraud can be established, given the elements set out in the case of Pace v. Parrish, 247 P. 2d 273 (Utah).

On November 29, 1994, the plaintiff filed his own Motion for Summary Judgment asserting that there are no genuine material issues of fact and that the Court should as a matter of law render judgment in his favor on his claims of false imprisonment and false arrest as well as his claim of fraud.

For purposes of determining these motions the Court takes as correct all the factual assertions made by the plaintiff both in support of his Motion for Summary

Judgment and in opposition to the Motion for Summary Judgment brought by the defendant. Even based on the facts as stated by the plaintiff, and without any reference to conflicting facts that may be set out by the defendant, the Court finds that there are no material issues of fact in genuine dispute and that the matter is ripe for summary judgment.

PLAINTIFF'S FRAUD CLAIM

Plaintiff alleges that the defendant committed fraud in communicating inaccurate information to various government employees who eventually effectuated the plaintiff's arrest and extradition to the State of Arizona to the State of Utah. Under the case of Pace v. Parrish, cited above, such claims do not establish a cause of action for fraud because the representations allegedly made by the defendant were not made to or relied upon by the plaintiff and therefore his fraud claim must fail. By implication the plaintiff's Motion for Summary Judgment on his fraud claim is denied and the defendant's Motion for Summary Judgment on the fraud claim is granted.

PLAINTIFF'S CLAIM FOR FALSE IMPRISONMENT AND FALSE ARREST

The defendant alleges that his conduct in the matter before the Court, as it relates to plaintiff's claim of false imprisonment and false arrest, enjoys the protection of the common-law doctrine of absolute immunity as described in the U.S. Court case of Imbler

vs. Pachtman, 424 U.S. 409, 96 Supreme Court 984 (1976). The defendant argues that because Mr. Granville is a prosecuting attorney in the State of Arizona, he enjoys absolute immunity for actions undertaken which are "an integral part of the judicial process". It is apparent from the facts as alleged by the plaintiff that he complains of the defendant's conduct in re-issuing a warrant for the plaintiff's arrest which the plaintiff claims was exhausted or executed. Clearly the attempt by the prosecutor to serve a warrant issued by a court of competent jurisdiction in the State of Arizona is an act which is part of the judicial process. (See Rose v. Bartel, 871 Fed. 2d 331 {1989}).

The general law is that prosecuting attorneys are protected by the doctrine of quasi-judicial immunity only if the conduct in question was performed within the scope of the prosecutor's official duties. In actions for false arrest or false imprisonment many jurisdictions have adopted the view that the immunity protecting the prosecutor who is acting within the scope of his duties is absolute and is not affected by his wrongful or malicious motive in arresting or imprisoning the plaintiff. Such motives are often found to be immaterial to an action for false imprisonment. (See 32 AmJur 2d § 78 - false imprisonment).

The Court finds that the conduct of which the plaintiff complains was clearly conduct undertaken by the prosecutor in the course of his official duty and in the process

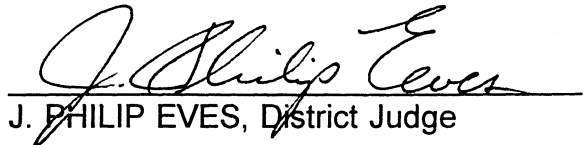
of carrying out his responsibilities which were an integral part of judicial process. Accordingly the defendant's Motion for Summary Judgment is granted and the plaintiff's Motion for Summary Judgment on the claim for false arrest and false imprisonment is denied.

The defendant had argued that the ultimate conviction of the defendant in the State of Arizona for the charges for which he was arrested and extradited constitute some sort of defense to the claim of false imprisonment and false arrest. The Court disagrees. Restatement of Torts 2d. § 657 applies to the tort of malicious prosecution. Clearly that has no application to a claim for false arrest or false imprisonment.

SUMMARY

The Court hereby grants the Motion for Summary Judgment submitted by the defendant. Plaintiff's Motion for Summary Judgment is denied. The Court has ruled separately on the Motion to Compel under Order dated 7th of November, 1994. Counsel for the defendant is to submit and prepare an appropriate Summary Judgment consistent with the Court's Memorandum Opinion.

DATED this 6th day of April, 1995.


J. PHILIP EVES, District Judge

Mailing Certificate

I hereby certify that on this 7th day of April, 1995, I mailed true and correct copies of the above and foregoing Memorandum Decision and Orders, first-class postage prepaid, to the following:

Joseph M. Wisden
465 South Bluff Street
St. George, UT 84770

John E. Birkemeier, Esq.
Assistant Attorney General
1275 West Washington
Phoenix, AZ 85007

Carolyn Smitherman
Court Administrative Executive

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IN THE FIFTH JUDICIAL DISTRICT COURT

WASHINGTON COUNTY, UTAH

RECEIVED DISTRICT COURT

APR 3 1995

WASHINGTON COUNTY

BY

JOSEPH M. WISDEN,

Plaintiff,

vs.

WARREN J. GRANVILLE,

Defendant.

Civil No. 940500236

SUMMARY JUDGMENT

This Court having heard argument on January 9, 1995 on Defendant Warren Granville's Motion for Summary Judgment and, this Court having granted Defendants' Motion for Summary Judgment by Memorandum Decision dated April 6, 1995 and having set forth in that Memorandum Decision the reasons Summary Judgment was granted,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That Defendant, Warren Granville take judgment against Plaintiff Joseph Wisden as to all claims set forth in the Amended Complaint, which is dismissed with prejudice; and

2. It is ordered awarding taxable costs to Warren Granville;

3. It is ordered that any request for Attorneys' Fees by Defendant Warren Granville will be separately considered.

DONE IN OPEN COURT this 2nd day of May, 1995.

J. Philip Eves
HON. J. PHILIP EVES
JUDGE OF THE DISTRICT COURT

CERTIFICATE OF SERVICE

I, Joseph M. Wisden, do hereby certify that I mailed or hand delivered true and correct copies of the foregoing APPELLANT'S BRIEF, by personal delivery, or by depositing same with the United States Postal Service, first class postage prepaid, this 2nd day of September, 1995, to the following:

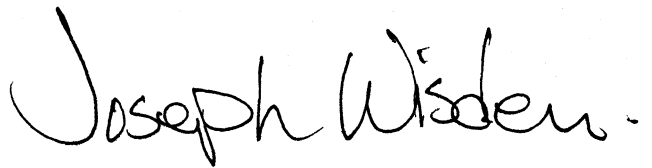
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Attorneys for the Defendant

A handwritten signature in cursive script that reads "Joseph Wisden". The signature is written in dark ink and is positioned above a horizontal line.

Joseph Wisden