

1996

# Indian Village Trading Post, Inc. v. Al Bench, as Fire Marshall and Fire Chief of the Rockville-Springdale Fire Protection District : Reply Brief

Utah Court of Appeals

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DOCKET NO. 960024-CA

IN THE UTAH COURT OF APPEALS

INDIAN VILLAGE TRADING POST,  
INC.,

Petitioners/Appellant

vs.

Al Bench, as Fire Marshall and  
Fire Chief of the Rockville-  
Springdale Fire Protection  
District,

Respondent/Appellee

Case No. 960024-CA

Priority No. 15

REPLY BRIEF OF PETITIONER-APPELLANT AND BRIEF OF CROSS-APPELLEE

AN APPEAL FROM A MEMORANDUM OPINION DATED  
OCTOBER 26, 1995, AND AN ORDER OF DISMISSAL  
DATED DECEMBER 12, 1995,

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

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**FILED**

Utah Court of Appeals

JUN 05 1996

Marilyn A. Branch  
Clerk of the Court

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Exhibit A.	Bench deposition Volume IV, Exhibit 30 (diagram of Zion Park Complex).
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### STATEMENT OF FACTS

1. In March 1990, the Town of Springdale adopted the Uniform Fire Code ("UFC") and Tables III of the UFC. (R. 645, ll. 20-23).
2. Section 10.301© of the UFC gives the Fire Chief almost unlimited discretion to determine the water flow and the number of hydrants for any building he approves. It also allows the Fire Chief to use Tables III-A and III-B to set fire hydrant requirements. See §10.301© of the UFC attached to Appellants Brief as Exhibit "C".
3. Fire Chief Bench ("Bench") elected to use Tables III-A and III-B for cross-appellee's fire hydrant requirements of 2,750 g.p.m. from three fire hydrants, (R.656, ll. 2-13) and never used his discretion to raise Table III-A water flow requirements. (R. 658, ll. 13-15).
4. On July 13, and again on August 15, 1991, Bench placed a red-tag on cross-appellee's building for among other things not providing adequate water flow from cross-appellee's fire hydrant system. (R. 49).
5. On November 1, 1991, Bench conducted a water flow test to determine if cross-appellee's fire hydrant system met the requirements of Table III-A of the UFC, and reported the results of the test in a letter dated December 10, 1991. (R. 63).
6. The November 1, 1991, test showed that the fire hydrant system water flowed 3,210 gpm. However, Bench claimed the

results of the test showed that the system was not adequate for safe fire fighting capabilities because the test showed that hydrant #3 had only 1,090 g.p.m. water flow available to it. Id.

7. Before Bench would lift the red-tag from cross-appellee's building, he required that the petitioner make inoperative it's #3 fire hydrant and 200 feet of supply line. (R. 49 ¶5 and R. 67).
8. The #3 fire hydrant was placed in a location that not only provided needed fire protection to Petitioner's new building, but was also placed in that location to provide fire protection for a new motel building that was planned. (R. 49 ¶6).
9. On June 10, 1992, cross-appellee filed a Rule 65B Petition seeking extraordinary relief (Civil No. 920500615CV) to review the November 1, 1991, test results and determine if the results show that the fire hydrant system is not adequate for safe fire fighting capabilities. (R. 78)
10. On July 1, 1992, the cross appellee filed an Amended Petition for extraordinary relief. Id.
11. On August 31, 1993, cross-appellee filed a Second Amended Rule 65(B) Petition for extraordinary relief listing Rockville-Springdale Fire Protection District as Respondent. The petition alleged that Bench abused his discretion when he found that the November 1, 1991, water flow results



- showed that the hydrant system was not adequate for safe fire fighting capabilities. (R. 49 ¶7 and 78).
12. On December 15, 1993, the cross-appellant filed a Memorandum in Support of Motion to Dismiss (Civil No. 920500615CV), wherein on page 4 he said "If the aggrieved party is still adamant about seeking review of a Fire Chief's decision, the aggrieved party may file for extraordinary relief under Rule 65B in a District Court to have the fire Chief's decision reviewed." (R. 69-71).
  13. On January 7, 1994, the cross-appellant filed a Reply Memorandum in Support of Motion to Dismiss, wherein on pages 3-4 he said "this Court should inquire whether the Fire Chief abused his discretion." (R. 73-76).
  14. On March 9, 1994, the trial court in finding the "Fire District" was not a proper party to the action, said "it is within the exclusive discretion of the Fire Chief to decide finally how the Fire Code will be applied in any particular case and it is his discretion which would be subject to review under Rule 65B, not the advisory opinion of the Fire Board." The court dismissed the Petition with prejudice. (Emphasis added) (R. 78-79).
  15. On March 19, 1994, the cross-appellee filed among other things a Motion to Alter or Amend Judgement. (R. 82).

16. On May 9, 1994, oral argument came before the trial court and Paul G. McMillin, filed a Minute Entry that reads as follows:

"(4:22) This case is before Judge J. Philip Eves for hearing on Petitioner's Motion for Clarification, Alter or Amend Judgment and leave to Amend Petition. . . . Mr. Stirba is heard in response, indicates that the case has already been decided, and Mr. West either appeal or file a new case. . . . Mr. West's Motion to Amend for extraordinary relief is denied. If he so desires, Mr. West is to file a claim against Al Bench, but it must be a new and separate case if he wants further relief. . . . (emphasis added) (R. 82).

17. On May 10, 1994, the cross-appellee followed the direction of the court and filed a new Petition for extraordinary relief (Civil No. 940500723CV) listing Al Bench, as former Fire Chief, as Respondent. (R. 1-3).

### **SUMMARY OF ARGUMENT**

#### **I. CROSS-APPEAL**

Before Bench would remove two red-tags from cross-appellee's building, he required cross-appellee's #3 fire hydrant and 200 feet of supply line to be made inoperative because he claimed that the November 1, 1991, water flow test showed that the fire hydrant system was not adequate for safe fire fighting capabilities as long as hydrant #3 was operative. (R. 2, ¶5). A case becomes moot when the judicial relief requested cannot affect the rights of the litigants. Bennion v. Sundance Development Corporation, 897 P.2d 1232 (Utah App. 1995). Table III-B of the UFC gives the cross-appellee the right to have three or more fire hydrants to protect his building. Cross-appellee

installed four fire hydrants around his building. Four hydrants equally spaced around a building give more protection than three hydrants. The cross-appellee paid a considerable amount of money for hydrant #3 and 200 feet of supply line for protection of its new 12,000 square foot building and cross-appellee has a right to have and to use that added fire protection. Therefore, there is an actual controversy between the parties and the case is not moot.

On June 10, 1992, cross-appellee filed a Rule 65(B) Petition seeking extraordinary relief (Civil No. 920500615CV) to review the November 1, 1991, test results. (R. 78). On March 9, 1994, the trial court dismissed this cause of action with prejudice holding the Fire District was not the proper party to the action, stating,

"it is within the exclusive discretion of the Fire Chief to decide finally how the Fire Code will be applied in any particular case and it is his discretion which would be subject to review under 65B, not the advisory opinion of the Fire Board." (emphasis added) (R. 78-79).

On March 19, 1994, among other things the cross-appellee made a Motion to Alter or Amend Judgement. (R. 50, ¶12 and R. 82). On May 9, 1994, in the courts Minute Entry the court denied this motion and said,

"If he so desires, Mr. West is to file a claim against Al Bench, but it must be a new and separate case if [he] wants further relief." (R. 82).

The court directed the cross-appellee to file a new Petition with Bench listed as the Respondent. The next day on May 10, 1994,

the cross-appellee followed the direction of the court and filed a new Petition for extraordinary relief (Civil No. 940500723CV) listing Al Bench, as former Fire Chief, as Respondent. (R. 1-3).

The cross-appellant argues that an appeal of the courts ruling denying Appellant's Motion to Alter or Amend Judgement would have been a plain, adequate and speedy remedy within the meaning of Utah R. CIV. P. 65B(a) and therefore, the cross-appellee placed itself out of the reach of an extraordinary writ when it did not file an appeal. However, an appeal under these circumstances would not have been a plain, speedy and adequate remedy at law within the meaning of Utah R. CIV. P. 65B(a), because it was faster, and less expensive to follow the Court's direction and file a new action. Furthermore, both the Petitioner and Respondent agreed that Bench should have been named as Respondent rather than the Fire District.

## **ARGUMENT**

### **I. CROSS-APPEAL**

- A. THE ISSUES RAISED IN THE PETITION ARE NOT MOOT THEREFORE, THE TRIAL COURT DID NOT ERROR WHEN IT DENIED THE CROSS-APPELLANT'S MOTION TO DISMISS ON THE GROUND THAT THE CASE WAS MOOT.**

In an effort to open its new restaurant the cross-appellee made the #3 fire hydrant and its 200 feet of supply line inoperative as directed to do so by Bench. The fact that Petitioner is currently in compliance with the Uniform Fire Code is irrelevant to the issue of whether or not petitioner's claims are moot, because the cross-appellee claimed that it's fire

protection system was in compliance with the Uniform Fire Code prior to making its #3 fire hydrant inoperative. (R. 2 at ¶4).

A case becomes moot when the judicial relief requested cannot affect the rights of the litigants. Bennion v. Sundance Development Corporation, 897 P.2d 1232 (Utah App. 1995). If in fact Bench "abused his discretion" when he found that the November 1, 1991, water flow test showed that the fire hydrant system was not adequate for safe fire fighting capabilities, then cross-appellee in fact loses his right to use his #3 fire hydrant and 200 feet of supply for fire protection. Table III-B of the UFC gives the cross-appellee the right to have three or more fire hydrants to protect his building. Cross-appellee installed four fire hydrants around his building. Four hydrants equally spaced around a building give more protection than three hydrants. The cross-appellee paid a considerable amount of money for hydrant #3 and 200 feet of supply line for protection of its new 12,000 square foot building and cross-appellee has a right to have and to use that added fire protection. Therefore, there is an actual controversy between the parties.

The cross-appellant argues,

"Of utmost importance to this issue is the fact that Al Bench is no longer the Fire Chief or Fire Marshall. Therefore, any order directing him to perform any action would have no effect and as he is no longer in any position of authority. Moreover, the Fire Protection District under which Al Bench served as Fire Chief is not a party to the action below."

However, the Rule 65B Petition for extraordinary relief filed by cross-appellee did not ask the court to direct Bench or the Fire

District to do anything. Concerning the issues before it, the court said,

**THE COURT:** "Once again let me explain what I view as the issues. And I'm taking these directly from the petitioner's Petition for Extraordinary Relief. To determine if the water flow test conducted on November [1], 1991, showed that the petitioner's fire protection system did not comply with Table A III-A(1). . . . Number two, to determine if the test showed that the system was not adequate . . . safe fire fighting capabilities. And number three, to specify specifically whether hydrant three was a dangerous hydrant." (R. 922-923).

If the court found that Bench had abused his discretion in finding that the test results showed that the system was unsafe, there wouldn't be anything that Bench or the Fire District needed to do to make the #3 fire hydrant operative.

**B. THE CROSS-APPELLEE DID NOT HAVE ANOTHER PLAIN, ADEQUATE AND SPEEDY REMEDY.**

On June 10, 1992, cross-appellee filed a Rule 65(B) Petition seeking extraordinary relief (Civil No. 920500615CV) to review the November 1, 1991, test results. (R. 78) On March 9, 1994, the trial court dismissed this cause of action with prejudice holding among other things that,

"it is within the exclusive discretion of the Fire Chief to decide finally how the Fire Code will be applied in any particular case and it is his exercise of discretion which would be subject to review under Rule 65B, not the advisory opinion of the Fire Board. . . Accordingly, the Petition is ordered dismissed upon the alternative ground that the Respondent, [Rockville-Springdale Fire Protection District] is not a proper party to the action." (emphasis added) (R. 78-80).

On March 19, 1994, among other things the cross-appellee made a Motion to Alter or Amend Judgement. (R.50, ¶12 and R. 82).

On May 9, 1994, in the court's Minute Entry the court denied this motion and said,

"If he so desires, Mr. West is to file a claim against Al Bench, but it must be a new and separate case if [he] wants further relief." (R. 82).

The court directed the cross-appellee to file a new Petition with Bench listed as the Respondent. The next day on May 10, 1994, the cross-appellee followed the direction of the court and filed a new Petition for extraordinary relief (Civil No. 940500723CV) listing Al Bench, as former Fire Chief, as Respondent. (R. 1-3).

The cross-appellant argues that an appeal of the courts ruling denying Petitioner's Motion to Alter or Amend Judgement would have been a plain, adequate and speedy remedy within the meaning of Utah R. Civ. P. 65B(a) and therefore, the cross-appellee placed itself out of the reach of an extraordinary writ when it did not file an appeal. This argument is in direct conflict with what the cross-appellant argued on December 15, 1993, January 7, 1994, and on May 9, 1994. On December 15, 1993, the cross-appellant filed a Memorandum in Support of Motion to Dismiss, arguing that the Fire District was not a proper party to the action, (Civil No. 920500615CV), wherein on page 4 he said,

"If the aggrieved party is still adamant about seeking review of a Fire Chief's decision, the aggrieved party may file for extraordinary relief under Rule 65B in a District Court to have the Fire Chief's decision reviewed." (R. 69-71).

On January 7, 1994, the cross-appellant filed a Reply Memorandum in Support of Motion to Dismiss, wherein on page 3-4 he said,

"this Court should inquire whether the Fire Chief abused his discretion." (R. 73-76).

On May 9, 1994, oral argument came before the trial court and Paul G. McMillin, filed a Minute Entry that reads as follows:

"(4:22) This case is before Judge J. Philip Eves for hearing on Petitioner's Motion for Clarification, Alter or Amend Judgment and leave to Amend Petition. . . . Mr. Stirba is heard in response, indicates that the case has already been decided, and Mr. West either appeal or file a new case. . . . (emphasis added) (R. 82)

There is little doubt that the cross-appellee could have appealed the courts ruling. However, an appeal under these circumstances would not have been a plain, speedy and adequate remedy at law within the meaning of Utah R. Civ. P. 65B(a), because it was faster, and less expensive to follow the Court's direction and file a new action. Furthermore, both the Petitioner and Respondent agreed that Bench should have been named as Respondent rather than the Fire District.

**C. RELIEF UNDER RULE 65B(e) CAN BE GRANTED WHERE AN ADMINISTRATIVE AGENCY, OR OFFICER EXERCISING JUDICIAL FUNCTIONS ABUSED ITS DISCRETION, OR WHERE A PERSON HAS FAILED TO PERFORM AN ACT REQUIRED BY LAW AS A DUTY OF OFFICE, TRUST OR STATION, OR AND WHERE A PERSON HAS REFUSED THE PETITIONER THE USE OR ENJOYMENT OF A RIGHT TO WHICH THE PETITIONER IS ENTITLED. UTAH R. CIV. P. 65B(e) (2) (A), (B) & (C).**

**1. RULE 65B(e) (2) (A).**

The court had the authority to review the Chief's decision because it is the act of an administrative agency and the cross-appellee alleges that the administrative agency's fire chief has abused his discretion.



## **2. Rule 65b(e) (2) (B) and (C) .**

In March 1990, the Town of Springdale adopted the Uniform Fire Code and Table III of the UFC. (R. 645, ll. 20-23). The Fire Chief enforces the Uniform Fire Code to make sure any fire hydrant system is in compliance with the water flow and number of fire hydrants required by the Chief and/or Table III-A and III-B of the UFC. See §10.301(C) of the UFC attached to Petitioner's Brief as Exhibit "C". Fire Chief Bench elected to use Tables III-A and III-B for cross-appellee's fire hydrant requirements of 2,750 g.p.m. out of three hydrants, (R. 656, ll. 2-13) and never used his discretion to raise Table III-A requirements. (R. 658, ll. 13-15). The results of the water flow test conducted on November 1, 1991, showed that the cross-appellee's hydrant system water flowed 3,210 g.p.m. (R. 63), which is 450 g.p.m. more than what is required by Table III-A of the UFC. Therefore, the cross-appellee's system was in compliance with the UFC. If the system could be used with safety with hydrant #3 operative, the fire chief had a duty to approve the system, and the cross-appellee had a right to use its system. The cross-appellee paid a considerable amount of money for hydrant #3 and 200 feet of supply line. Therefore, cross-appellee has a right to have and to use that added fire protection which hydrant #3 provided.

Chief Bench abused his discretion when he found that the November 1, 1991, water flow test showed that the system was not adequate for safe fire fighting capabilities with hydrant #3

operative, because his determination was not supported by a reasonable basis. See Argument Issue I, Petitioner/Appellant Brief pages 14-24.

**D. THE REVIEW SOUGHT BY PETITIONER WAS WITHIN THE SCOPE CONTEMPLATED BY RULE 65B.**

On November 1, 1991, Bench conducted a water flow test to determine if cross-appellee's fire hydrant system met the requirements of Table III-A of the UFC, and reported the results of the test in a letter dated December 10, 1991. (R. 63). The test showed that the fire hydrant system water flowed 3,210 g.p.m., 460 g.p.m. more than what Table III-A of the UFC requires. *Id.* However, Bench still claimed the results of the test showed that the system was not adequate for safe fire fighting capabilities. *Id.*

When reviewing the Fire Chief's discretionary decisions, his findings of fact will be "accorded substantial deference and will not be overturned if based on substantial evidence, even if another conclusion from the evidence is permissible." Hurley v. Board of Review of Industrial Commission, 767 P.2d 524, 526-527 (Utah 1988). The cross-appellee's Rule 65B Petition asked the court to review the Fire Chief's decision which was based on the test results found in Bench's letter dated December 10, 1991, to determine whether or not the November 1, 1991, test results would support the finding that petitioner's system was not adequate for safe fire fighting capabilities. (R. 2-3). The Hurley standard

of review as stated above can certainly be applied to the relief sought.

In conclusion. For the reasons set forth above, the Fifth District Court did not err in denying respondents Motion to Dismiss.

E. EVEN IN THE ABSENCE OF ANY EXPRESS STATUTORY PROCEDURE, PETITIONER HAS A RIGHT OF REVIEW IMPLEMENTED THROUGH SECTION 5 OF ARTICLE VIII OF THE UTAH CONSTITUTION WHICH VESTS GENERAL APPELLATE JURISDICTION IN THE DISTRICT COURT.

Even in the absence of any express statutory procedure, Petitioner has a right of review implemented through Section 5 of Article VIII of the Utah Constitution which vests general appellate jurisdiction in the District Court. Peatross v. Board of Com'rs of Salt Lake City, 555 P.2d 281, 283 (Utah).

#### ARGUMENT

##### II. IN RESPONSE TO CROSS-APPELLANT'S BRIEF.

A. UNDER THE UNIFORM FIRE CODE, THE FIRE CHIEF IS GIVEN BROAD DISCRETION IN ADMINISTERING AND ENFORCING THE UFC.

The cross-appellee concedes Section 10.301© of the UFC gives the Fire Chief almost unlimited discretion to determine the water flow and the number of hydrants for any building he approves. However, John Elder, the Chief of the Fire Prevention Bureau of the State Fire Marshal's Office of the State of Utah, acknowledged that the fire chief would need to be able to justify his decisions based on a rational basis. (R. 860)

Bench was asked by his attorney to explain to the Court what factors he relied on in reaching his conclusions set out in his

December 10, 1991, report. He answered, (1) he considered the experience of his fire fighters and found that their experience and training were minimal; (2) he considered his equipment which was very old and probably had seen better years; (3) he considered the fact that the surrounding area, and petitioner's building is located probably in the most congested part of town; (4) he considered the hydrants on the other side of the street that the town water superintendent had told him from "day one" were very poor hydrants that could not be trusted; (5) he considered the Bed and Breakfast with wood-shingles next door; (6) he considered the "mutual aid" companies that were at his disposal; and, (7) he considered other various factors. (R. 938-941). All these factors were known by Bench when he used his discretion and elected to use Tables III-A and III-B of the UFC to set petitioner's requirements at 2,750 gallons per minute from a minimum of three hydrants. (R. 656, 11.2-13). Bench testified that he never used his discretion to raise the water flow requirements of Table III-A. (R. 658, 11. 13-15). Furthermore, Bench testified that he ever required 1,000 gpm out of hydrant #2 and #3 until December 10, 1991 which was over a year from when the hydrants were installed. (R. 672, 11. 1-22).

**B. THE EVIDENCE RELIED ON BY BENCH IN REACHING HIS CONCLUSIONS SET OUT IN HIS DECEMBER 10, 1991 LETTER WAS NOT SUPPORTED BY A REASONABLE OR RATIONAL BASIS.**

The cross-appellant listed the following evidence relied on by Bench and presented to the court:

**i. PLACEMENT OF THE HYDRANTS.**

The cross-appellant used two pages to describe the history of the placement of the hydrants. However, the placement of the hydrants were not relevant to the issues which were before the court. The court said, "the exact history of Mr. West's disputes with Springdale officials is not relevant to the issues before the court." See Memorandum Decision attached to appellant brief as Exhibit "D" page one. Concerning the issues before it, the court said,

"Once again let me explain what I view as the issues. And I'm taking these directly from the petitioner's Petition for Extraordinary Relief. To determine if the water flow test conducted on November [1], 1991, showed that the petitioner's fire protection system did not comply with Table A III-A(1). . . . Number two, to determine if the test showed that the system was not adequate . . . safe fire fighting capabilities. And number three, to specify specifically whether hydrant three was a dangerous hydrant." (R. 922-923.)

**ii. WATER FLOW TESTS.**

There was no water flow test taken in March 1991 as claimed by cross-appellant on page 26 of its brief, the first water flow test was conducted on July 2, 1991, by John Elder. The cross-appellant claims that the water flow test made by John Elder showed that there was insufficient flow to the hydrants, and that the results of the test indicated that there were only 1,800 gallons per minute flowing from the two hydrants and that there was a needed flow of 2,750 to 3,000 gallons per minute. Id. at pp 26-27. However, it is not true that hydrant #2 and #3 needed to flow 2,700 to 3,000 gallons per minute. The July 2, 1991,

water flow test was not made to determine if the two hydrants met the water flow required by Table III-A of the UFC, it was made to determine if hydrant #3 was dry or its water flow insignificant, and if the test showed hydrant #3's water flow was insignificant then the cross-appellee would be required to "loop his system." See Elder's letter dated January 27, 1991, attached to Petitioner's Brief as Exhibit "E". Table III-A and III-B require 2,750 g.p.m. out of three hydrants not two, and this is why hydrant #1 was installed, and was tested on July 12, 1991, to determine if the system complied with Table III-A. After the July 2, 1991, test was conducted, Elder did not order the petitioner to provide a "looped system," and agreed that when hydrant #1 was installed, it was no longer necessary to loop the system. (R. 854, ll. 1-13).

The cross-appellant quotes extensively from John Elder in an effort to show that Elder's testimony supports the court's finding that,

"[T]he court is persuaded by the testimony of . . . John Thorpe Elder, . . . that the fire system design installed by Mr. West created a substantial hazard because hydrants two and three (both on the 6-inch line), is used simultaneously, could not produce adequate fire flow to support fire fighters . . . See Memorandum Decision attached to appellant's brief as Exhibit "D" page 7. (emphasis added).

However, Elder testified that he did know what Bench took into consideration in exercising his discretion, and that he did not have the expertise to venture an opinion as to

whether the petitioner's hydrant system was **safe**. The transcript reads,

THE COURT: "As you know of the situation, are you able to say what he exercised or what he took into consideration in exercising his discretion?" ELDER: "I'm not your Honor."

THE COURT: "Okay. Also there's an allegation in this lawsuit that the fire hydrant number three was an **unsafe** hydrant-- or that it was not an unsafe hydrant even though apparently the chief had determined that it was. . . Are you -- do you have expertise to venture an opinion on that?"

ELDER: "No". (R. 864, ll. 9-21).

If Elder has no expertise to venture an opinion whether the petitioner's hydrant system was safe, there should be no question that the court could not use the testimony of Elder, to support its finding that Bench relied on credible supporting evidence in making his determination that the two fire hydrants on the six-inch dead end line created a system that is not adequate for **safe** fire fighting.

Bench said his concerns about the petitioner's system was based on the fact,

"that with **only 1,100** gallons available to both of those hydrants at 20 PSI, that it's an either/or situation. Once you put a pumper on each of those, it becomes . . . a very dangerous situation." . . . (R. 717, ll. 8-12)

However, the results of the November 1, 1991, flow test will not support bench's claim that hydrant #2 and #3 cannot water flow more than 1,100 gpm collectively with hydrant #1 closed. Because, Tandy and Mertens both agree, that without performing a field test or running a computer simulated test, you can't determine the available water flow from hydrant #2 and #3

collectively or individually, with hydrant #1 closed or restricted to less than 2,120 g.p.m.<sup>1</sup> When Bench was asked if he had ever run a water flow test to determine what the back two hydrants would water flow at 20 psi with hydrant #1 closed, he admitted that he had not. (R. 547, ll. 6-11). Therefore, the results of the November 1, 1991, flow test furnishes no evidence that will support Bench's claim. If Bench was concerned what hydrant #2 and #3 could water flow collectively with hydrant #1 closed, he should have designed such a test.

Bench stated over and over and over again that hydrants #2 and #3 could not water flow more than 1,100 g.p.m. collectively.<sup>2</sup> However, when Bench was asked if he could determine from the results of the water flow test conducted on November 1, 1991, the water flow from hydrant #3, if hydrant #1 was closed, he answered, "NO". (R. 720, l. 23 to 721, ll.14). Therefore, this proves conclusively that Bench's conclusion that hydrants #2 and #3 couldn't flow more than 1,100 g.p.m., with hydrant #1 closed, is not supported by a reasonable basis. See ARGUMENT, ISSUE I., POINT B. Petitioner/Appellant Brief page 24-28.

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1. SEE (R. 886, ll. 8-12); (R. 897, ll. 16-23); (R. 612, l. 12 to 613, l. 11).

2. See (R. 546, l. 15 to p. 547, l. 5) [only 1,100 g.p.m. available]; (R. 690, ll. 8-12) [only 1,100 g.p.m. available]; (R. 717, ll. 8-18) [only 1,100 g.p.m. available]; (R. 721, ll. 9-11).



iii. APPEALS BOARDS.

The cross-appellee appealed Bench's claim that hydrant #3's water flow was not adequate for safe fire fighting capabilities to two Boards of Appeals. Bench lied to both boards when he told them that hydrant #3's water flow was so insufficient that it would never register on his test equipment. (R. 112. Pla 202 and Pla 203). The cross-appellant admits that Bench testified before the board that he couldn't get a reading on hydrant number three. On page 33 of its brief it says,

"Before the board, the then Chief Bench testified that he couldn't get a reading on hydrant number three. R.00692. At the time of the July 12, 1991, test, the then Chief Bench said in regards to the test, "[i]t really did not move it one increment, but we gave [it] the benefit of the doubt." R. 00693. After examining all the evidence presented, the board chose to uphold the then Chief Bench's findings."

However, the record shows that Bench did not make the statement that is underlined during the July 12, 1991, test. The record reads,

**MULLEN:** Mr. Bench, when we broke, you stated that on July 12, you gave -- the benefit of the doubt to the readings you took on the Pitot gauge, right? **BENCH:** Correct. **MULLEN:** Your Honor, at this point, we'd like to play a four-minute tape of that test with Mr. Bench calling out the reading of the Pitot gauge. . . . **MULLEN:** Okay. Did you hear that phrase there on the tape about the -- **BENCH:** It moved one point. **MULLEN:** It's not the benefit of the doubt there, is it? **BENCH:** I said, "one point" But it did not quite move one point. **MULLEN:** You did not say on that tape "It didn't quite move one point," you said, "One point." **BENCH:** No, I did not. No, I did not. **MULLEN:** One point again, right, Mr. Bench? **BENCH:** That's what I said. **MULLEN:** Not benefit of the doubt, right? **BENCH:** That's what I said. **MULLEN:** The gauge starts at five, doesn't it? **BENCH:** As I remember that gauge, it does start at five. **MULLEN:** So to move it one point gets it up to 6, right? **BENCH:** That's my

understanding of the gauge at the time. **MULLEN:** And if we were to look at Exhibit 94, the handwritten notes we saw on Monday, we'd see that you gave that hydrant there a six, right? **BENCH:** I assigned it a value of six. . . . **MULLEN:** Now, Mr. Bench, isn't it true you told the board of appeals on July 18th -- . . six days after this -- that you could not even get hydrant number three to give you a reading to measure on your instruments? **BENCH:** I don't remember what my exact words were. . . . **MULLEN:** Okay, Your Honor. We have another tape, then. . . . **MULLEN:** Okay. That was your voice there -- "it did not measure on our readings: -- right? **BENCH:** -- yes. . . **MULLEN:** And on that test, you got a measurement of six on your Pitot gauge? **BENCH:** I think we just saw me state six. **MULLEN:** That's right. So it did register on the Pitot gauge -- on your instruments on July 12, didn't it?. . . **BENCH:** Yes, it did. (R. 694-706).

The Cross-appellant made it appear that the underlined statement was given to the board of appeals. However, this explanation was given to the trial court to cover up his lies to the board of appeals concerning his test results. (R. 708). Therefore, when the board of appeals chose to uphold Bench's findings, all they had was Bench's statement "it did not measure on our readings." *Supra*.

Bench finally admitted that hydrant #3 measured on his test equipment on all of his tests. Mullen asked Bench,

**MULLEN:** My question was all the tests you conducted hydrant number three registered on the Pitot gauge, didn't it? **BENCH:** I don't remember if it did every one or not. . . Like if you take a look at this, it did. It barely did. **MULLEN:** Let's take a look in your deposition, if we can. Would you take a look Page 110 in your deposition, . . I'd like you to turn and look at . . . Line 24, . . . **Q.** Which test did it move the Pitot gauge? **A.** It moved the Pitot gauge on all three of the tests. (R. 707-708).

Bench tried to explain to the court why he said that hydrant #3 did not measure on his equipment. He said,

"And relatively speaking, six on a scale of 200 is not bumping the gauge. It was a figurative form of speech that I was using to say how insignificant it was. Which I've said through the process, that there's insignificant flow. . . ." (R. 952-953); See also, Appellant's Brief page 33.

However, if Bench was acting in "good faith" and honestly thought that a reading of 6 on the gauge was insufficient for safe fire fighting, he would have told the Boards of Appeals that 6 on the gauge shows that the hydrant was water flowing 822 gallons per minute, and then explained why he thought 822 gallons per minute water flow was unsafe. He wouldn't have ***purposely lied*** to the Board.

On page 33-34 the cross-appellant quotes Bench as saying,

"the board members had all the information and numbers in front of them. And I gave that same information ***verbally***, as I remember it." (emphasis added).

Based on this claim the cross-appellant went on to say in his brief,

"Contrary to the Petitioner's assertion that Al Bench is lying, all data related to pitot gauge readings and flow test results were provided to every appeals board and, in fact, the water flow did not, or at best barely bumped the pitot gauge. The January 30, 1992, board upheld the discretion and findings of then Chief Bench." See page 34 of cross-appellant's brief.

However, if this Court will listen to Exhibit 202, which is an excerpt of the July 18, 1991, board of appeals hearing, you will hear Bench being asked to give the board the results of the July 12, 1991, water flow test he conducted. He said that he could not because the water flow from hydrant #3 was so insufficient that it would not register on his test equipment. See Trial

Exhibit 202. Both boards of appeals upheld Bench's findings, that hydrant #3 was unsafe, because he lied to them. He said hydrant #3 would not register on his test equipment. Both hearings were recorded on video tapes and the cross-appellant has copies of them. I challenge the cross-appellant to find where Bench "verbally" gave the test results to either board of appeals.

iv. **SOLUTIONS OFFERED BY BENCH IN HIS DECEMBER 10, 1991, LETTER ARE NOT SUPPORTED BY A REASONABLE OR RATIONAL BASIS.**

The cross-appellant said the following on page 34 of his brief.

"As of mid-July 1990, Mr. West was aware of alternatives that had been suggested to make his system safe. In the Chief Bench's December 10, 1991, letter, he incorporated the already discussed alternatives and added another option. Specifically, the then Chief Bench suggested:

- 1) Loop the system.
- 2) Sprinkle the building.
- 3) Increase the size of the six-inch line sufficiently to provide 1,000 GPM to each hydrant with the #1 hydrant flowing.
- 4) Install a hydrant at the mark designated by the District in front of the Laundromat and remove the #3 hydrant."

1) **LOOP THE SYSTEM.**

John Elder is the Chief of the Fire Prevention Bureau of the State Fire Marshall's Office of the State of Utah. When Elder learned that hydrant #2 and #3 were installed on a six-inch dead end supply line, he was concerned whether or not hydrant #3

would have adequate water to serve a pumper if hydrant #2 was being used. (R. 814, l. 8 to 815, l. 2).

In a letter dated January 23, 1991, Elder ordered the Fire Department to water flow hydrants #2 and #3 to determine the available water to hydrant #3 during simultaneous use. He said *if* #3 is dry or the flow is insignificant, then the water line will be run to the north and connected to the main line on the highway, thus providing a looped system." (emphasis added) See Letter attached to Petitioner's Brief Exhibit "E". Elder conducted the test he referred to in his letter on July 2, 1991. After the test was conducted, Elder did not order the petitioner to provide a "looped system," and agreed that when hydrant #1 was installed, it was "no longer necessary to loop the system." (R. 854, ll. 1-13).

After the flow test was conducted on November 1, 1991, Elder was asked by Mayor Robert Ralston of the Town of Springdale, to determine from the test results whether the petitioner's hydrant system was in compliance with Table III-A of the UFC. In a letter dated February 7, 1992, Elder said,

"It would appear from the documentation sent to us, that if 2,750 gallons per minute is required for the site, and 2,120 gallons per minute is available from hydrant number one, that **only 630 gallons per minute would be required from hydrants two and three collectively**. Since 1,090 gallons per minute is available from either hydrants two or three, it would appear the code requirement of 2,750 gallons per minute has been met." (R. 823, l. 2 to 824, l. 5) (emphasis added)

2) SPRINKLE THE BUILDING.

Bench claims,

"that with **only 1,100** gallons available to both of those hydrants at 20 PSI, that it's an either/or situation. Once you put a pumper on each of those, it becomes . . . a very dangerous situation." . . . (R. 717, ll. 8-12)

However, a sprinkled building Table III-A of the UFC still requires a minimum of 1,500 gallons per minute. Therefore, the alleged danger still remains even if the building had been sprinkled. Because, one 1,000 gpm rated pumper can pump up to 1,500 gpm. (R. 897, ll. 10-15) (R. 609, ll. 17-24).

3) INCREASE THE SIZE OF THE SIX-INCH LINE SUFFICIENTLY TO PROVIDE 1,000 GPM TO EACH HYDRANT WITH THE #1 HYDRANT FLOWING.

Bench required all of the cross-appellee's hydrants to water flow 1,000 gpm to protect his two 1,000 gpm rated pumpers. See Petitioner's Brief, ARGUMENT, ISSUE I. However, 1,000 gpm hydrants would not correct the problem because 1,000 gpm rated pumpers can water flow up to 1,500 gpm. SUPRA.

4) INSTALL A HYDRANT AT THE MARK DESIGNATED BY THE DISTRICT IN FRONT OF THE LAUNDROMAT AND REMOVE THE #3 HYDRANT.

If this option was chosen, this would make the dangers worse than the dangers alleged by Bench. This is true because of the following reasons.

1. 1,000 gpm rated pumpers can pump up to 1,500 gpm. Id.
2. If hydrant #3 was removed and relocated in front of the Laundromat both hydrant #1 and #3 would be supplied by the main ten-inch supply line and would receive their water before hydrant #2.

3. The November 1, 1991, water flow test showed that with only two hydrants flowing, hydrant #1 flowing 2,100 gpm hydrant #3 water flowed 820 gpm. (R. 63).
  4. After relocating hydrant #3, if there were two 1,000 gpm rated pumpers pumping from hydrant #1 and #3, they would be pulling up to 3,000 gpm before hydrant #2 received its water.
  5. If during the November 1, 1991, hydrant #3 could only water flow 820 gpm with hydrant #1 taking 2,100 gpm first, then if hydrant #1 and #3 were taking 3,000 gpm first, hydrant #2 would be flowing less than 820 gpm because it is taking its water last on the six-inch dead end supply line.
- v. **TWO HYDRANTS ON A SIX-INCH, DEAD-END LINE DO NOT CREATE A FIRE HAZARD TO FIRE FIGHTERS IF USED SIMULTANEOUSLY, IF THE PROPER TEST WAS TAKEN AND IT WAS SHOWN THAT THERE WAS ADEQUATE WATER FLOW.**

On page 35-36 of the Cross-Appellant's Brief he said, John Elder,

"does not allow two hydrants to be placed on a six-inch dead end line. This is because of the possibility of not having enough water to pump from one hydrant while water is being drawn or drafted from the other hydrant. This is one reason that Mr. Elder required that Indian Village's system to be tested. This is one of the factors that then Chief Bench used in determining that the system was inadequate.

It is true Elder did in fact order the July 2, 1991, water flow test to determine if hydrant #3's water flow was sufficient to use when hydrant #2 was flowing. However, Bench could not use this fact as a factor in determining that the system was inadequate. Because, after the test showed that the two hydrants water flowed 1,800 gpm, (R. 501, 11. 1-11) Mr. Elder did not order the petitioner to loop his system, and agreed that when hydrant #1 was installed it was no longer necessary to loop the system. Supra. Whether or not the cross-appellant likes it or

not cross-appellee passed Elder's test, the only test that was designed to determine whether the six-inch system was adequate for safe fire fighting. (R.547, ll. 6-11).

On page 37 of the Cross-Appellant's brief he tries to insinuate that Mertens thought that the results of the November 1, 1991, water flow test as reported in Bench's letter dated December 10, 1991, showed that the water flow would only be able to adequately fight a "normal" fire. The cross-appellant deliberately took the word "normal" out of context. Actually Mertens said the following concerning the results of the November 1, 1991, water flow test:

"Q. Now Mr. Mertens, if we took the Indian Village system, and we considered it to be only these three hydrants, -- three, two and one-- and excluded the rest of them, based on Mr. Bench's calculations for November 1st -- 820 gallons per minute out of number three at 43 PSI, 2,120 out of number one -- would these three hydrants constitute an adequate and safe system for fire fighting? A. Yes, It's more than adequate without even opening number two and without even taking number three down to 20 PSI. This test already shows it's adequate." (R. 566, ll. 20 to R. 567, ll. 5). . . Q. Okay. Now, the 2,750 gallon requirement that the code has in Table III -- is that -- a minimum amount that's necessary? Is that for fighting a large fire or a small fire? Can you tell us about that? A. That table has been developed from tables over time and represents what you would consider the maximum you'd ever need. Because what that number figures is that . . your building is completely involved. You're using as many hoses on that building to surround it as possible. And so it's . . the worst condition. Q. . . is there anything you could call a normal fire that you might be fighting? A. Yes. It's . . when an engine company or fire department shows up at a fire, they're normally seeing a fire which is -- especially the downtown area -- is discovered and called in, and they're finding that they might have a room involvement, or it may have spread to the second room. Q. And can you give us an estimate of . . what percentage of the 2,750 gallons per minute would be needed to suppress that type of a fire at



Indian Village? . . A. I would say that on your response to that type of fire, you would be using [no] more than 500 gallons per minute. (R. 576, 1. 10 to 579, 1. 19).

On page 35-40 the cross-appellant argues that because, two hydrants are on installed on a six-inch dead end line, this automatically causes the system to be inadequate without water flow testing the system or regardless of what the test results show. The trial court asked the following questions to Mr. Mertens concerning the hydrants installed on the six-inch dead end line:

"COURT. Assume that you're faced with the circumstances that .. when the fire chief comes on the site, he finds this system installed in the configuration that you see? A. Exactly as installed, I would say that then he would run a test just to make sure he delivers 2,750 [gpm] and make sure he has sufficient number. And he's overprotected both in number and flow. COURT. How does one properly run the test to determine whether you have flow of 2,750? A. You can open up .. any of the hydrants. And the way it is done is if you open up one hydrant, [if] it does not have enough, you open up a second hydrant at the same time. And if you don't have enough, you open a third hydrant at the same time. If you don't have enough in three, you open up a fourth hydrant at the same time. COURT: So you draw your conclusion that the flow was adequate from the fact that while hydrant number one was running, hydrant number three was open, and that together they produced more than 2,750 gallons per minute? A. Yes. I've seen several tests, and they've all produced more than 2,750 as a combination. Obviously if you only test number two and three alone, then you may not get 2,750. But that's not . . how you run the test. COURT: All right. (R. 634, 6 to R. 635, 1. 7).

The following were questions asked by Mr. Hathaway to Mr. Mertens concerning the hydrants installed on the six-inch dead-end line:

"Q. Are you familiar with the . . fire protection handbook, Mr. Mertens? A. Very much so. . . Q. Are you aware that it .. cautions against the use of six inch lines, particularly

in dead end situations? A. I know what it says about that, yes. But [the system] can easily be calculated to know what you have. (R. 614, 11. 13-22). Q. Mr. Mertens, . . . Would you ever design and install a new system that consisted of 400 feet of a six-inch diameter line with two hydrants on it? A. Yes. There's nothing wrong with it, as long as it met the fire flow requirements. Q. . . . You would consider that to be reasonable under the circumstances, in your designing experience? A. Absolutely. And that's why I'm going to Madison tomorrow and continue teaching how you design for minimum demands in order to be able to meet fire flow requirements, and how to do that. Q. And you ..consider that to be in your prerogative, notwithstanding [that] .. standards or recommendations may be out there nationally; correct? A. Well . . . there's a lot of information . . . which is considered like old hat kind of -- pull out of the air. . . . What [they're] referring to is . . . "Well, I don't know what [a six-inch line] is going to do." But we know what [this six-inch line] is going to do. And you can calculate it, and it's been calculated, and so that all is known. And that's why I teach the hydraulic design, so that you know what your system is capable of doing." (R. 622, 1. 8 to 623, 1. 8).

The cross-appellant spent four pages quoting from Mr. Tandy to show that the trial court could rely on Tandy's testimony to support its finding that the court was persuaded by the testimony of Mr. Tandy that the fire system designed and installed by the petitioner created a substantial hazard. However, ALL of Tandy's testimony concerning the court's finding has been marshaled and shows that it is based on the testimony of Bench that the results of the November 1, 1991, flow test showed that only 1,100 gpm is available to hydrants #2 and #3 collectively with hydrant #1 closed. See Petitioner's Brief ARGUMENT POINT I B and C. Tandy testified as follows:

Mr. MULLEN: Your testimony was -- and correct if I'm wrong -- that you do not know what is going to happen back here when this [hydrant #1] is off?" MR. TANDY: "Let me

rephrase it. I know that is a potentially lethal situation. And if you're pumping from hydrant number three, and you have an engine crew come in and begin pumping [at] capacity or max capacity from hydrant number two, . . . it will lose its pressure and lose its volume to the point where those people are in a very life-threatening situation." (R. 900, 11. 12-22) See also, citations which cover similar testimony.<sup>1</sup>

However, on cross examination, Tandy testified that he *did not know* what the water flow would be from hydrants #2 and #3 if hydrant #1 was closed without pumping from it. Hathaway asked Tandy,

"Now, based on your experience and your flow testing and your fire fighting, if hydrant number one was shut down, would it increase the flow to hydrants number two and three?" TANDY: *I couldn't say.* (R. 886, 11. 8-12); See also (R. 897, 11. 16-23) [*"Not without pumping it"*].

In conclusion, Tandy admits he didn't know from the November 1, 1991, test results what hydrants #2 and #3 would flow with hydrant #1 closed without pumping from them. Yet, ALL his testimony is based on the assumption that hydrant #2 and #3 are incapable of water flowing more than 1,100 gpm with hydrant #1 closed or flowing less than 2,120 gpm. This assumption, as shown in Petitioner's Brief ARGUMENT POINT I B, is without a reasonable basis. Therefore, Tandy's testimony will not support the court's finding that Bench relied on credible supporting evidence in making his determination that the two fire hydrants on the dead

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1. (R. 874, 11. 22-25); (R. 875, 1. 14 to 877, 1. 20); (R. 878, 1. 9 to p. 881, 1. 2); (R. 881, 1. 11 to p. 882, 1. 9); (R. 898, 11. 2-12); (R. 904, 11. 9-21); (R. 907, 1. 10 to 908, 1. 5); (R. 911, 1. 18 to 912, 1. 1).

end six-inch line created a system that is not adequate for safe fire fighting.

- vi. BENCH CLAIMED THAT THE CODE REQUIRES YOU TO OPERATE THE HYDRANT AT A MINIMUM OF 20 PSI BECAUSE YOU COULD CAVITATE OR COLLAPSE THE SYSTEM. HOWEVER, THIS REQUIREMENT CAN'T BE FOUND IN THE UFC.

Rather than to duplicate what has already been stated in Petitioner Brief ARGUMENT, ISSUE I, A. b. in an effort to argue against cross-appellant's assertion that the evidence supports Bench's claim that the cross-appellee's system creates a danger of cavitating the pumper or collapsing the system, the cross-appellee directs this Court to cross-appellee's brief.

Both Tandy and Mertens agree to avoid a cavitation of the pumper or damage to the supply system, when pumping a quantity of water that is less than the pumping capacity of the pumper, the incoming pressure gauge mounted on the truck must be monitored at all times.<sup>1</sup> The cross-appellant admits this is true, if you want to prevent the collapse and/or cavitation. See cross-appellants brief page 41. Furthermore, Mertens testified that if you properly monitor the incoming pressure gauge, any size pumper can hook onto any hydrant and pump whatever water is available. (R. 572, l. 12 to R. 573, l. 24).

Because the cross-appellee pointed out that Bench admitted

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1. See (R. 894, ll. 4-11); (R. 569, ll. 8-18).

that his pumper truck had an incoming pressure gauge, but didn't know if it worked or whether it was accurate, and that none of his fire fighters were trained to operate the gauge, (R. 949, 11. 2-17) the cross-appellant made the following ridiculous statement:

"They must make do with what they have, an unreliable gauge and a volunteer fire department. While Petitioner argues that this is dangerous, it is the only system that was available to then Chief Bench." Cross-Appellant's Brief p. 41.

Bench's solution for a gauge, that doesn't work, is not to replace or repair the gauge, but is to require all of the cross-appellee's hydrants to water flow 1,000 gpm to protect his two 1,000 gpm rated pumpers. However, 1,000 gpm hydrants would not correct the problem that is caused by a gauge that doesn't work, because 1,000 gpm rated pumpers can water flow up to 1,500 gpm. *Supra*. Furthermore, with a gauge that doesn't work, how would Bench use with safety the hydrants in town he said he did not trust, fearing that they could break if too much water was drawn from them. Bench said the following concerning these hydrants:

"On the other side of the street, there was an old existing water and hydrant system. . . It was on an old four inch line. . . The town water superintendent told me from the very early goings in my being fire chief, that the water line and the hydrants on that side of the street were very poor. In fact, the line could not be trusted. It -- could break if there was too much drawn out of.. those hydrants. And the . . hydrants later when we flowed them showed . . how poor they really were. They . . would not move the Pitot gauge at all. But I knew that those were bad hydrants, from day one." (R. 939-940).

Concerning the poor hydrants, Mullen asked Bench,

"Q. But you told me you had a fire hydrant across the street that . . wouldn't even register on the Pitot gauge, right? A. Correct. Q. And that's a hydrant for the Town of Springdale; correct? A. Not one I would use. (R. 543-544).

However, the cross-appellant admitted in his foot note number ten on page 30 of his brief, that in fact Mr. Bench used the hydrant across the street to approve a permit for a T-shirt shop. If this hydrant was used with Bench's pumper with a gauge that didn't work, why wouldn't it cavitate his pumper or collapse the system?

Concerning the statement made by Bench that none of his fire fighters have been trained on how to operate the gauge, Mr. Hathaway asked Mr. Mertens if it makes a difference if you have a trained fire fighting staff or an untrained one. Mr. Mertens said "no," reminding Mr. Hathaway that "there are requirements for fire department training." (R. 594, ll. 5-14)

Bench claimed that the code requires you to operate the hydrant at a minimum of 20 psi because you could cavitate or collapse the system.<sup>1</sup> However, this requirement can't be found in the UFC.

On page 41-42 of Cross-Appellant's Brief, the cross-appellant stated the following:

"If, as Mr. Mertens testified, that 20 PSI is normally an accepted figure, regardless of the actual physics of when a system collapses or cavitates, then Chief Bench was justified in relying on the "normal accepted figure."

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1. See (R. 527, l. 15 to 528, l. 9); (R. 546, l. 23 to 547, l. 5)

However, the cross-appellant should have finished what Mertens said to understand if 20 PSI is necessary to keep a pumper from cavitating or a system from collapsing. The following is what Mertens testified to concerning this matter:

Q. And do you agree that the . . . minimum PSI that's acceptable under the UFC is 20 PSI in such a test? A. I don't recall that the 1988 version has 20 PSI in it. It's a normally accepted figure, regardless of whether it's in there. But if you look at the technical data behind it, it also says that you can go down to 10 pounds. And places do it to five pounds. But 20 pounds, to me, would be the acceptable figure. If I could not get 2,750 off of here at 20 pounds, but I could at 15 pounds, I'd accept the system. Because the difference between 20 pounds with hydrants right next to a building is not going to make any difference at all. Because you're not going to lose that much pressure in your hose getting to the truck. Q. Would you accept 10? A. Yes, I would. (R. 638, ll. 13 to 639 ll. 4).

Furthermore, Mertens testified that maintaining 20 psi residual pressure in the supply system doesn't have anything to do with keeping pumpers from cavitating or the supply line from collapsing if the pressure drops below 20 psi. One reason that 20 psi residual pressure is used, is that it gives you enough pressure to overcome all the hose that you connect to the hydrant in order to get water to your truck and to prevent the pressure dropping to low by the time you get to your truck. Pumpers are designed to suck under negative pressure. Therefore, before a pumper would cavitate, the inlet pressure would have to be **less than zero**. And before the pipes in the ground would ever collapse, it would have to take substantially **less than zero pounds** positive pressure. There's no reason why you couldn't

drop your pressure down to 5 to 10 psi while pumping. (R. 569-571).

Tandy, respondent's expert, said he did not know whether you could go below 20 PSI residual pressure in an emergency to fight a fire. He said that he was not an expert in this area. (R. 903 11. 10-19).

#### REGARDING FOOTNOTE #10

In defense to cross-appellee's charge that Bench lied to the trial court, the cross-appellant said,

"This is another instance where Petitioner claims Chief Bench lied to or tried to deceive the Court. Chief Bench had used the line across the street to approve a permit for a T-shirt shop, but did not want to depend on it for fire protection for the Indian Village complex. The evidence before the court was that this shop was quite small and would not have required the same amount of water flow or pressure to combat a fire as would the Indian Village complex, thus making it adequate for the fire protection of the t-shirt shop but inadequate for Indian Village. (emphasis added) (footnote 10).

However, the evidence does not show that the T-shirt shop was quite small, but shows that the T-shirt shop was attached to the Zion Park motel complex. The square footage of the Zion Park complex requires 2,750 gpm water flow out of three hydrants, the same hydrant requirements the Indian Village complex was required to provide. Furthermore, the hydrant across the street water flowed only 400 gpm, (See Bench deposition Volume IV, Exhibit 30 (diagram of Zion Park Complex) attached hereto as Exhibit "A," which was used at trial at R. 960-963), this is the hydrant Bench said he would never use. (R. 543-544).



To try to save Bench's credibility the cross-appellant cited R. 986-987 for footnote number 10, wherein among other things, Hathaway asked Bench,

"Q. Is that [T-shirt shop] 12,500 square feet? A. It was presented as -- the plans that I reviewed were a small -- a small building. Q. In fact, it's a few square feet? It's built in between existing buildings, is it not? A. Uh-hh. It was built between two existing buildings.

The answers given by Bench are another example where Bench deliberately lied to the trial court. The T-shirt shop is not a "small building," "built between two existing buildings" but is a new building attached to two existing buildings making up the Zion Park complex which has more than 11,600 square feet in it and Bench knew this. See Bench deposition Volume IV, Exhibit 30 (diagram of Zion Park Complex) attached hereto as Exhibit "A".

**C. THE COURT ERRED IN FINDING THE PETITIONER HAD FAILED COMPLETELY TO DEMONSTRATE THAT THE DECISION WAS BASED ON ANY WRONGFUL CONDUCT, PASSION, PARTIALITY, OR FRAUD.**

Bench's actions may be overturned if they were the result of wrongful conduct, passion, partiality or fraud. Even when the local officer's actions call for the exercise of his discretion, if he exercises that discretion in an extremely wrong or a flagrantly improper manner, his decision is reviewable and reversible. "[T]he action of an officer in a matter which calls for the exercise of his discretion or judgment will not be reviewed . . . unless . . . such action is shown to be extremely wrong or flagrantly improper and

unjust, so that the decision can only be explained as the result of caprice, passion or partiality." State v. Morehouse, 112 P. 169, 171 (Utah 1910) (emphasis added). As stated in another Utah Supreme Court opinion, although "an official act may be quasi-judicial or discretionary, yet if the discretion is qualified, and the refusal to perform the act is merely capricious, arbitrary, or wrongful, the officer may, nevertheless, be coerced by mandamus to do the act." Utah Ass'n of Credit Men v. Bowman, 113 P. 63, 65 (Utah 1911) (emphasis added). See also, Dillon v. Bd. Of Educ., 351 S.E.2d 58, 59 (W.Va. 1986) ("Mandamus will lie to control a board of education in the exercise of its discretion upon a showing of caprice, passion, partiality, fraud, arbitrary conduct, some ulterior motive, or misapprehension of the law.") (emphasis added).

Furthermore, a discretionary decision made in bad faith also provides grounds to reverse the local official. See Chavez v. Sandia Corp., 555 P.2nd 699, 700 (N.M. 1976) (the district court properly limited its review to employers' administrative board's decision to whether the decision "was made in **bad faith** or was arbitrary or capricious." (emphasis added)

As stated above, fraud also provides ground to review and reverse a local official's decision. See Bd. Of County

Commissioners v. Price, 385 P.2d 479, 482 (Okla. 1963) (where the local officer acts arbitrarily "or fraudulently, a writ of mandamus may be issued to require the performance of his duty") (emphasis added). See also, Mobile Oil Corp. v. McHenry, 200 Kan. 211, 436 P.2d 982, 996 (1968) (judicial interference is warranted when there is "fraud, corruption, and conduct so oppressive, arbitrary, or capricious as to amount to fraud . . . and the courts have power to relieve against all consequential injuries); Anderson v. Dunn, 180 Kan. 811, 308 P.2d 154, 157 (1957) (when a public official's actions are tainted with fraud, or are so "capricious, arbitrary, or oppressive as to amount to constructive fraud, then the only avenue open to the aggrieved party is through some extraordinary legal remedy such as mandamus. ") (emphasis added).

Finally, if "there has been such an abuse of discretion as to amount to no exercise of discretion at all, mandamus will lie to compel the proper exercise of powers granted." Crain v. Dept. Of Health & Environmental Sciences, 582 P.2d 332, 334 (Mont. 1978).

In Petitioner Brief, ARGUMENT, ISSUE II, are listed seven instances wherein Bench's actions as described, are suspect under virtually every category described above, including

lying. Thus, the very basis for Bench's subsequent decision if any, that the Indian Villages system was not safe for adequate fire fighting capabilities is highly suspect.

**D. CROSS-APPELLANT'S ISSUE II. D. DOES NOT LIST ANY EVIDENCE OR ARGUMENT THAT HAS NOT ALREADY BEEN ADDRESSED THAT WOULD SUPPORT THE COURTS FINDINGS COMPLAINED OF, SO NO FURTHER ANSWER IS WARRANTED.**

**E. THE LOWER COURT ERRED IN EXCLUDING CERTAIN PIECES OF EVIDENCE PRESENTED BY PETITIONER.**

**1. CROSS-APPELLEE ACCEPTS CROSS-APPELLANT'S STANDARD EMPLOYED BY THE COURTS IN DETERMINING THE ADMISSIBILITY OF EVIDENCE.**

**2. RICK ROSENBERG'S TESTIMONY WAS EXCLUDED BY THE COURT.**

On page 48 of Cross-Appellant's Brief, the cross-appellant said the following:

"Mr. Mertens testified that he had seen the results from Mr. Rosenberg's simulation that such test showed it might be possible to get 1,500 GPM from hydrant three and based on these numbers and tests, the system was safe. 00566-00568. Even though Mr. Rosenberg himself did not testify to the results of the computer simulation, that information was before the Court. Mr. Rosenberg's testimony would have been duplicative. As Mr. Rosenberg's reports and the data contained were before the Court below, notwithstanding the Court's exclusion of Mr. Rosenberg, the Petitioner cannot argue that a different result would be obtained had Rosenberg testified. Hence, no substantial right has been affected in the Court's exclusion."

However, the facts do not support these statements and conclusions for the following reason:

The only computer simulated tests that Mr. Mertens said he had seen are the following:

- (1) Two tests that showed fire hydrant #3 flowed more than 1,500 gpm, and fire hydrant #2 flowed about 1,800 gpm, at 20 PSI, when each was flowing individually. (R. 560, l. 25 to 561, l. 5) and,
- (2) one test that showed with fire hydrant #1 closed, and both fire hydrants #2 and #3 flowing, fire hydrant #3 would water flow more than 800 g.p.m. and fire hydrant #2 would flow about 900 g.p.m. (R. 574, l. 10 to 575, l. 16).

However, there was three other computer simulated water flow tests that Mr. Mertens did not see or testify about created on September 11, 1995, by Mr. Rosenberg that were made in an effort to duplicate the November 1, 1991, test results as Bench recorded them in him letter dated December 10, 1991. (R. 63).

Mr. Mertens testimony was rebutted by Bench's testimony. (R. 717, ll. 8-12). However, it is hard to impeach or argue with computer generated test results. If Mr. Rosenberg had been allowed to testify, he would have placed the various computer simulated test readouts he had created into evidence. Without Rosenberg to lay the foundation for the computer readouts, they could not have been placed into evidence.

Mr. Rosenberg's testimony and the computer readouts certainly would not have been duplicative as argued by cross-appellant. For example, Rosenberg would have testified as to how and why his computer could duplicate Bench's field test conducted on November 1, 1991, and various other scenarios. He

would have testified as to the kind of software program he used and to its margin of accuracy, in gallons per minute.

Rosenberg's testimony and the simulated water flow test were critical to prove Bench's claim, that hydrant #2 and #3 could not water flow more than 1,100 gpm with hydrant #1 closed, was not based on a rational basis, and that his readings taken during the November 1, 1991, test had been falsified. This information was not before the court as argued by the cross-appellant.

On page 47 of Cross-Appellant's Brief, the cross-appellant said the following:

"In its brief, Petitioner asserts for the first time that Mr. Rosenberg's testimony was offered to show that then Chief Bench had falsified the results of the November 1, 1991, test. Upon review of the record, however, it is clear that this proffer was never made. Petitioner now asserts that Mr. Rosenberg's testimony would have established an element of fraud on then Chief Bench's part. . . Moreover, virtually all the witnesses who testified, including Petitioner's expert, Mr. Mertens, testified that the numbers and calculations in Al Bench's December flow test report were correct. Petitioner's assertions that the results have in some way been falsified are directly contrary to the evidence presented to the Court." (emphasis added).

However, the facts do not support these statements and conclusions for the following reason:

**A. PETITIONER DID IN FACT OFFER MR. ROSENBERG'S TESTIMONY TO SHOW THAT BENCH FALSIFIED HIS NOVEMBER 1, 1991, TEST EQUIPMENT READINGS.**

The following is taken from the record to show that the cross-appellee did in fact offer Rosenberg's testimony to

show that Bench had falsified the November 1, 1991, Test Equipment Readings:

"**MULLEN**: Judge, there is one issue. And I want to alert the Court to it right now. I think that Mr. Tandy reopened the door to the computer expert . . . **COURT**: . . I don't think that the door's been opened to any additional evidence regarding the computer simulations. It seems to me we're still dealing with the information that was available to the chief on the day he made his decision. **MULLEN**: Judge, that's what we are saying. We're going to prove the information available to him could not have been what he put here, through that computer simulation. **COURT**: How are you going to do that? **MULLEN**: Because the simulation will show that if you put those figures in [and] the 43 PSI, you don't get those flows. **COURT**: But he didn't have the computer simulation. **MULLEN**: Well, Judge, it goes to his credibility as to what he said he measured after he put the gauge on it. **COURT**: Is there an issue as to what the gauge shows? **MULLEN**: Yes. . . **HATHAWAY**: The . . plaintiff has . . rested, as I see, first. **COURT**: That's true. **HATHAWAY**: And there is . . . no evidence before the Court rebutting those figures. There is no evidence that those figures were not correct. **COURT**: Well, the plaintiff has rested, but only after I refused to let . . their engineer testify as to the computer simulation. **HATHAWAY**: There's no further evidence, Your Honor, . . whatsoever that those numbers are inaccurate, or that the gauges are misread, or that . . the information gathered was wrong. There's been no evidence of that. **MULLEN**: Well, Your Honor, we would proffer that our simulation will show that. And that's what we proffered when we tried to get him on. (R. 919, 1. 23 to 922. 1. 23).

**B. THE COMPUTER SIMULATED TESTS THAT WERE REJECTED AS NOT RELEVANT WOULD HAVE PROVEN THAT BENCH DID NOT USE HIS TEST EQUIPMENT READINGS THAT WAS READ DURING THE NOVEMBER 1, 1991, WATER FLOW TEST TO CALCULATE THE TEST RESULTS AS REPORTED IN HIS LETTER DATED DECEMBER 10, 1991.**

The computer simulated tests that were rejected as not relevant would have proven that Bench did not use his test equipment readings that were read during the November 1, 1991, water flow test to calculate the test results as reported in his letter dated December 10, 1991. This conclusion is based on the following facts.

(1) The test equipment readings Bench claimed he read during the test are as follows:

- a. Hydrant #1 read 30 psi on the pitot gauge on each of the two ports which were open.
- b. Hydrant #2 read 43 psi on the pressure gauge.
- c. Hydrant #3 read 6 psi on the pitot gauge on one of the ports which was open.

(R. 111, D-1).

(2) Bench took the test equipment reading he claimed he read and computed those readings into gallons per minute and reported those results in his letter dated December 10, 1991. (R. 63). The reported results are as follows.

- a. Hydrant #1 flowed 2,120 gpm from two ports
- b. Hydrant #2 recorded 43 psi residual pressure.
- c. Hydrant #3 flowed 820 gpm from one port.

(3) Rosenberg took two of the three reported readings in fact(2) above, and inputted those readings into his software program. Then the computer generated what the third reading should have been on a simulated flow test readout.

(4) Rosenberg created three computer simulated tests to prove that regardless of which two readings reported by Bench were imputed into the computer the other reading generated by the computer was far from the reading reported by Bench, far outside the software's margin of error.



- (5) After Rosenberg adjusting for the margin of accuracy for both the computer test and the field test, the two test results should have been very close. However they were so far apart that it was impossible for the results as Bench reported in his letter dated December 10, 1991, to have come from his test equipment readings he claimed he read on November 1, 1991.
- (6) Fact number (3), (4), and (5) above, would have been established by Rosenberg's rejected testimony and readouts.

Bench falsified the results of the water flow tests conducted on July 2, July 12, and October 16, 1991, to two Boards of Appeals. See Appellant's Brief, ISSUE II, ¶¶ C and D). The appellant proffered the testimony of Rosenberg to show among other things that the results of the flow test conducted on November 1, 1991, was also falsified. The testimony would have shown that the results of the test as reported by Bench were different than what was recorded on the test equipment.

Therefore, considering the above facts there is a reasonable likelihood a different result would have been reached if Rosenberg's testimony and his computer simulated water flow test readouts had been placed into evidence.

**3. THE COURT ERRED BY SUSTAINING AN OBJECTION TO A QUESTION ASKED BENCH, WHETHER IT WAS TRUE THAT IN MARCH 1991, AT A FIRE BOARD MEETING, HE HAD AGREED THAT THE MINIMUM FLOW NEEDED FOR THE TWO HYDRANTS IN BACK WOULD BE 550 GPM.**

In a letter dated January 23, 1991, Elder ordered the Fire District to test hydrants #2 and #3 to determine if the water flow from hydrant #3 was insignificant while hydrant #2 was flowing, and if they found the flow of

hydrant #3 was insignificant the petitioner would have to "loop" its system. Supra. However, the letter did not state what the minimum hydrant #3 had to water flow before its flow was acceptable.

In discovery the petitioner had been furnished an audio tape of the March 1991 Fire Board meeting. Mullen asked Bench, if it wasn't true that at this meeting, there had been a minimum of 550 g.p.m., agreed to which the back two hydrants needed to flow? This question was objected to as not being relevant and the objection was sustained. (R. 728, 1. 8 to 729, 1. 14).

Concerning this matter, on page 48-49 of Cross-Appellant's Brief, cross-appellant argued,

"Had evidence been admitted that a discussion regarding the minimum flow for the back two hydrants had taken place at the March 1991 Fire Board Meeting, such evidence would still not be relevant. Even giving Petitioner the benefit of the doubt that such a discussion took place, such discussion, months earlier, had no bearing on the test administered and evidence gathered on November 1, 1991 or the conclusions reach as stated in the December 10, 1991, letter." (emphasis added).

However, this argument is flawed for the following reasons:

- (1) P-81 was entered into evidence over the objection of Hathaway that it was not relevant. Because, it was a July 2, 1991, letter that reported the results of the water flow test conducted by John Elder on July 2, 1991, which the December 10, 1991, letter referenced in fact (4), below. (R. 497-499) (R. 111 P-81).
- (2) P-92 was entered into evidence over the objection of Hathaway that it was not relevant. Because, it was a July 13, 1991, letter that gave the results

of the water flow test conducted by Bench on July 12, 1991, which the December 10, 1991, letter referenced in fact (4), below. (R. 506-508) (R. 111 P-92).

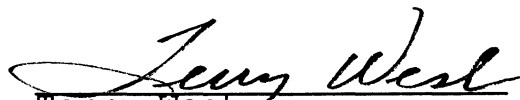
- (3) P-209 was entered into evidence, because, it contained the results of the October 16, 1991, water flow test, which the December 10, 1991, letter referenced in fact (4), below. (R. 721-722) (R. 112 P-209).
- (4) One of the conclusions reached by Bench and stated in the December 10, 1991, letter was, "Only 1,090 gpm is available to the #2 and #3 hydrants on the dead end 6" line . . This reinforces the previous tests conducted by John Elder and myself which showed poor fire flow from those hydrants. The system is not adequate for safe fire fighting capabilities." (R. 63).
- (5) In all four water flow tests (see facts (1), (2), (3), and (4) above) the water flow from hydrants #2 and/or #3 exceeded 550 gpm, by more than 50%. See Petitioner's Brief, Statement of Facts ¶¶ 20-23.

**If** at trial it had been established that Bench and the Fire Board had agreed that 550 gpm would be the minimum water flow hydrant #3 needed to flow, while hydrant #2 was flowing, for acceptable water flow, there is reasonable likelihood a different result would have been reached.

#### **CONCLUSION**

For the reasons set forth above, the petitioner requests this Court to find that the Fifth District Court did not err in denying Respondent's Motion to Dismiss, and to reverse the Order of Dismissal dated December 12, 1995, and hold that the respondent *abused his discretion* when he concluded that the results of the water flow test conducted on November 1, 1991, showed that the water flow from petitioner's hydrants #2 and #3 was not adequate for safe fire fighting capabilities, or order a new trial.

DATED this 4<sup>th</sup> day of June 1996.



Terry West  
The attorney for  
Petitioner/Appellant

MAILING CERTIFICATE

I hereby certify that on the 4<sup>th</sup> day of June 1996, I caused to be mailed, postage prepaid, **TWO** true and correct copies of the foregoing REPLY BRIEF OF THE PETITIONER-APPELLANT AND BRIEF OF CROSS-APPELLEE to the following:

Benson L. Hathaway  
STIRBA & HATHAWAY  
Attorney for Fire District Defendants  
215 South State Street, Suite 1150  
Salt Lake City, Utah 84111

  
Terry West

## Exhibit A

Hydrant #2

189'

24'

300'

LA Young  
855 Zion Park Blvd  
Permit # 150  
3-8-91

Zion Park Motel  
Complex

over 11,600 sq Ft

3 Hydrants 2750-3000 GPM

24'

51'

51'

27'

11'

5'

120'

81'

Hydrant #1  
400 GPM

