

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

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](https://digitalcommons.law.byu.edu/byu_ca2)



Part of the [Law Commons](#)

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

Terry R. West; Attorney for Appellant.

Benson L. Hathaway, Jr.; Stirba and Hathaway; Attorneys for Appellee.

---

## Recommended Citation

Reply Brief, *Indian Village Trading Post v. Bench*, No. 960024 (Utah Court of Appeals, 1996).  
[https://digitalcommons.law.byu.edu/byu\\_ca2/21](https://digitalcommons.law.byu.edu/byu_ca2/21)

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

UTAH COURT OF APPEALS  
BRIEF

UTAH  
DOCUMENT  
KFU  
50  
.A10

IN THE UTAH COURT OF APPEALS NO. 960024-CA

INDIAN VILLAGE TRADING POST,  
INC.

Petitioner/Appellant

v.

AL BENCH, as Fire Marshall and Fire  
Chief of the Rockville-Springdale Fire  
Protection District,

Respondent/Appellee  
Cross-Appellant

:  
:  
:  
:  
:  
:

Case No. 960024-CA

Priority No. 15

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT

CROSS-APPEAL FROM AN ORDER ON MOTION TO  
DISMISS, AUGUST 30, 1995. APPEAL FROM FINAL ORDER  
IN CASE ENTERED DECEMBER 12, 1995 OF THE DISTRICT  
OF THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR  
WASHINGTON COUNTY, STATE OF UTAH

*Judge Eves*

BENSON L. HATHAWAY, JR., (Bar No. 4219)  
STIRBA & HATHAWAY  
Attorneys for Respondent/Appellee and Cross-Appellant  
215 South State Street, Suite 1150  
Salt Lake City, UT 84111  
Telephone: (801) 364-8300

**FILED**

JUN 28 1996

**COURT OF APPEALS**

TERRY WEST (Bar No. 4770)  
Attorney for Petitioner/Appellant  
P.O. Box 450  
Springdale, Utah 84767

**IN THE UTAH COURT OF APPEALS**

---

**INDIAN VILLAGE TRADING POST,  
INC.**

**Petitioner/Appellant**

**v.**

**AL BENCH, as Fire Marshall and Fire  
Chief of the Rockville-Springdale Fire  
Protection District,**

**Respondent/Appellee  
Cross-Appellant**

:  
:  
:  
:  
:  
:  
:

**Case No. 960024-CA**

**Priority No. 15**

---

**REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT**

---

**CROSS-APPEAL FROM AN ORDER ON MOTION TO  
DISMISS, AUGUST 30, 1995. APPEAL FROM FINAL ORDER  
IN CASE ENTERED DECEMBER 12, 1995 OF THE DISTRICT  
OF THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR  
WASHINGTON COUNTY, STATE OF UTAH**

---

**BENSON L. HATHAWAY, JR., (Bar No. 4219)  
STIRBA & HATHAWAY  
Attorneys for Respondent/Appellee and Cross-Appellant  
215 South State Street, Suite 1150  
Salt Lake City, UT 84111  
Telephone: (801) 364-8300**

**TERRY WEST (Bar No. 4770)  
Attorney for Petitioner/Appellant  
P.O. Box 450  
Springdale, Utah 84767**

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	iii
STATE CASES .....	iii
RULES .....	iii
OTHER .....	iii
ARGUMENT .....	1
I.    THERE IS NO ACTUAL CONTROVERSY, THEREFORE THE ISSUES RAISED BY PETITIONER ARE MOOT AND THIS CASE SHOULD BE DISMISSED. ....	1
II.   INDIAN VILLAGE HAD OTHER PLAIN, ADEQUATE AND SPEEDY REMEDIES. ....	4
III.  RESPONDENT IS NOT AN ENTITY RECOGNIZED UNDER RULE 65B(e)(2)(A) AND (B) AGAINST WHICH RELIEF UNDER THE RULE IS APPROPRIATE. ....	6
IV.  THE REVIEW SOUGHT BY PETITIONER IS NOT WITHIN THE SCOPE OF RULE 65B. ....	8
CONCLUSION .....	11

## TABLE OF AUTHORITIES

### STATE CASES

<i>Anderson v. Baker</i> , 296 P.2d at 283 (Utah 1956) . . . . .	5
<i>Baker v. Angus</i> , 910 P.2d 427 (Utah App. 1996) . . . . .	2
<i>Bennion v. Sundance Dev. Corp.</i> , 897 P.2d 1232 (Utah App. 1995) . . . . .	3
<i>Great Salt Lake Authority v. Island Ranching Co.</i> , 414 P.2d 963 (Utah 1966) . . . . .	7
<i>Hurley v. Board of Review of Indus. Comm'n</i> , 767 P.2d 524 (Utah 1988) . . . . .	9
<i>Jenkins v. Bishop</i> , 589 P.2d 770 (Utah 1970) . . . . .	4
<i>Keegan v. State of Utah</i> , 896 P.2d 618 (Utah 1995) . . . . .	9
<i>Little v. Utah State Div. of Family Services</i> , 667 P.2d 49 (Utah 1983) . . . . .	9
<i>Merrihew v. Salt Lake County Planning and Zoning Comm'n</i> , 659 P.2d 1065 (Utah 1983) . . .	5
<i>Reynolds v. Reynolds</i> , 78 P.2d 1044 (Utah 1980) . . . . .	4
<i>Stromquist v. Cokayne</i> , 646 P.2d 746 (Utah 1982) . . . . .	3

### RULES

Utah Rule of Civil Procedure 12(b)(6) . . . . .	1
Utah Rule of Civil Procedure 65B . . . . .	6, 7, 8, 10

### OTHER

Utah Constitution, Article VIII, Section 5 . . . . .	10
WRIGHT, MILLER AND COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 3533 . . . . .	3

## ARGUMENT

### I. THERE IS NO ACTUAL CONTROVERSY, THEREFORE THE ISSUES RAISED BY PETITIONER ARE MOOT AND THIS CASE SHOULD BE DISMISSED.

In its Brief in Opposition to Respondent's Cross-Appeal, the Petitioner attempts to sidestep the mootness issue by framing a controversy based on factual allegations that were not in the Petitioner's original Petition below and do not appear anywhere in the record. Petitioner argues that its claim is not moot since an actual controversy exists. Petitioner maintains that Al Bench "abused his discretion" in his conclusions reached based on the November 1, 1991 flow test; that Table III-B of the Uniform Fire Code gives the Petitioner "the right to have three or more fire hydrants to protect its building"; that Petitioner, in fact, installed four fire hydrants; that four hydrants equally spaced around the building give more protection than three hydrants; and, that Petitioner spent a considerable amount of money for hydrant No. 3 and 200 feet of supply line, and therefore, "an actual controversy between the parties" exists. (See Petitioner's Brief, p. 7.) The Petitioner's reasoning is, in short, *non sequitur*.

Aside from its logical infirmity, Petitioner's argument is fundamentally wrong and procedurally flawed. The Respondent's Motion to Dismiss below was based on the language in the Petition and brought pursuant to Utah Rule of Civil Procedure 12(b)(6). In considering a Rule 12(b)(6) motion to dismiss, the Court accepts as true the allegations in the Plaintiff's Complaint and has to determine whether or not a legally cognizable claim lies against the named Defendant based on the accepted facts and all logical

inferences drawn therefrom. See, *Baker v. Angus*, 910 P.2d 427, 430 (Utah App. 1996). Petitioner's Petition named as Respondents Al Bench as Fire Marshall and former Fire Chief of the Rockville-Springdale Fire Protection District. R.00001-00003. Petitioner claims for relief in its Complaint,

That the Court review the Fire Chief's decision made on December 10, 1991, and take evidence on the issues raised therein, 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 No. A-III-A-1 [sic] of the Uniform Fire Code, and determine if the test showed that the system was not adequate for safe fire fighting capabilities, and specifically whether hydrant No. 3 was a dangerous hydrant. . . .

*Id.*

It is undisputed that at all times during the proceeding below, and thereafter, Al Bench was not the Fire Chief, was not the Fire Marshall, and was not affiliated as an official or member of the Rockville-Springdale Fire District. The Fire District was not at any time a party to the action below. Whether or not, as the Petitioner argues, Al Bench, when he was the Chief, abused his discretion is of no bearing in determining whether or not the Petitioner's claim is moot. Further, Table III of the Uniform Fire Code does not create a right to "3 or more hydrants" for Petitioner, nor does it create a right to fire protection in any person or entity. (See Petitioner's Opening Brief, Exhibit "C"). Whether or not Table III of the Uniform Fire Code creates in the Petitioner a right to three or more fire hydrants to protect its facility, and what the Petitioner did in an attempt to bring his property into compliance with the Uniform Fire Code, has no bearing on a mootness determination. If the judicial

relief requested by the Petitioner cannot affect the rights of the litigants, the case is moot. See *Bennion v. Sundance Dev. Corp.*, 897 P.2d 1232 (Utah App. 1995). If, as the Petitioner apparently seeks, the court below were to conclude that Al Bench as the Fire Chief abused his discretion in interpreting the results of the November 1, 1991 flow test, and order Al Bench to approve the Indian Village system as being safe for fire fighting capabilities and require Al Bench to allow Terry West to reinstall the third fire hydrant and use his 200 feet of abandoned line, such a ruling would have no effect. Al Bench as a lay person and citizen of Springdale has no authority to approve the November 1, 1991 version of the Indian Village Trading Post fire hydrant system nor does he have authority to allow Terry West to reactivate his hydrant No. 3 and utilize the 200 feet of abandoned supply line. Whatever the Court may ultimately order in response to the Petition will in no way affect the right of the litigants. *Id.* When an issue or case becomes moot, "fundamental principles of procedure dictate that [courts] do not adjudicate moot cases . . ." *Stromquist v. Cokayne*, 646 P.2d 746 (Utah 1982).

The case below is driven by only one thing, and that is the Petitioner's insatiable drive for vindication. A favorable result for Petitioner would satisfy no other purpose. However, Utah courts do not render advisory opinions and are reluctant to "waste their limited resources simply to satisfy curiosity or a naked desire for vindication". WRIGHT, MILLER AND COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 3533; *Reynolds v. Reynolds*, 78 P2d 1044, 1045 (Utah 1980).



Petitioner's claims are moot, and the court below erred in not granting the Respondent's Motion to Dismiss below.

**II. INDIAN VILLAGE HAD OTHER PLAIN, ADEQUATE AND SPEEDY REMEDIES.**

To prevail on a Rule 65B petition, the petition must on its face assert that no other plain, adequate, and speedy remedy existed, and that Petitioner must show ultimately that indeed this is so. See *Jenkins v. Bishop*, 589 P.2d 770, 772 (Utah 1970). There is no reference in the Petition that no other plain, adequate or speedy remedy exists, nor did Petitioner show below, or has it shown in its Brief, that no such remedy exists. R.00001-00003. The mere fact that Petitioner failed to plead that no plain, adequate or speedy remedy existed, is of itself sufficient to justify the denial of the writ. *Jenkins*, at 772.

Petitioner argues in its Brief that since the Fifth District Court, in another proceeding, involving other parties, suggested that Petitioner could file a claim against the Fire Chief, "if he so desires," which notably the Petitioner construes as a direction of the court; and since counsel for the Fire District in a prior Fifth District Court matter involving other parties, which matter is not before this Court, and is not the subject of this appeal or otherwise recorded, stated that the appropriate Rule 65B remedy might be against the Fire Chief, see Petitioner's Brief, pp. 8-10, it follows that the Petitioner had no other plain, adequate or speedy remedy.

Aside from making no logical sense, Petitioner mistakenly perceives that the Fifth District Court is in the business of representing a litigant's interests and rendering a litigant legal

advice. Likewise, Petitioner supposes that the statements made by counsel for the Fire District are somehow either legal advice and instruction to him or tantamount to legal precedence or orders of the court. What the Court below and opposing counsel said to Petitioner in another proceeding is neither the law of the case or legal precedence. Neither the court, nor the Fire District's counsel represent Petitioner, nor does either have any obligation to advise Petitioner of its legal rights or represent its interest. The Petitioner's reliance on these statements for purposes of authority rebutting the Respondent's argument that other plain and adequate remedies existed, is for that reason and otherwise logically misplaced.

Almost immediately upon receiving the findings based on then Chief Bench's November 1, 1991 flow test, Petitioner sought and received a hearing before a special blue chip appeals board convened by the Fire District on January 30, 1992. R. 00132. That appeals board upheld the findings and conclusions of then Chief Bench in every respect. The disappointed Petitioner's appropriate response at that point would have been an appeal of the appeals board's decision to the State District Court. Petitioner chose not to do so. Likewise when Petitioner received adverse rulings in the Fifth District in the other matters to which it has freely referred, it could have appealed. It chose not to do so. Unfortunately, it is not the call of Rule 65B to provide an avenue for appeal when an appeal in the ordinary course has gone stale. See *Anderson v. Baker*, 296 P.2d at 283, 286 (Utah 1956); and *Merrihew v. Salt Lake County Planning and Zoning Comm'n*, 659 P.2d 1065, 1067 (Utah 1983).

As Petitioner could have appealed the January 30, 1992 Special Appeals Board determination had it chosen to do so, and as Petitioner could have appealed several other related adverse rulings of the Fifth District, had it chosen to do so but instead allowed the appropriate time period in which appeal to lapse, it had other plain, adequate and speedy remedies and the Court erred in not dismissing its Petition for an Extraordinary Writ.

**III. RESPONDENT IS NOT AN ENTITY RECOGNIZED UNDER  
RULE 65B(e)(2)(A) AND (B) AGAINST WHICH RELIEF  
UNDER THE RULE IS APPROPRIATE.**

Petitioner seeks relief in Petition under Utah Rule of Civil Procedure 65B(e)(2)(A) and/or (B). R. 00001-00003. These subsections of Rule 65B provide in relevant part that relief under the rule may be appropriate "(A) where an inferior court, administrative agency, or officer exercising judicial functions has exceeded its jurisdiction or abused its discretion; (B) where an inferior court, administrative agency, corporation or person has failed to perform an act required by law as a duty of office, trust or station;". *Id.* The Respondent Al Bench was not, nor can it factually be argued, at any time during the pendency of the proceeding below, nor is he presently, an inferior court, an administrative agency, an officer exercising judicial functions, a corporation, or a person who has a duty of office, trust or station. At the time leading up to and following shortly after the November 1, 1991 flow test and the January 30, 1992 Special Appeals Board, the Respondent Al Bench served as the Fire Chief and Fire Marshall for the Rockville-Springdale Fire District. R. 00132.

Petitioner argues in its Brief that the court below had authority to review the Respondent's decision below because the Respondent's act was that "of an administrative agency" and because the Petitioner "alleges that the administrative agency's Fire Chief has abused his discretion." Petitioner's Brief, p. 10. Petitioner does not provide any legal authority, indication in the pleadings, or reference to the record that indicates that the Respondent indeed was an administrative agency. During the time of the November 1, 1991 flow test, the Respondent was, at best, a single representative of the Rockville-Springdale Fire District acting under the authority of that District. He was not during that time frame an agency as contemplated by the rules, nor did ultimate issues of compliance rest with him. The Petitioner sought the review of Respondent's decision by the Fire District Special Appeals Board, which Petitioner received. An individual member of a district or agency does not constitute the represented agency as defined by Utah law. See *Great Salt Lake Authority v. Island Ranching Co.*, 414 P.2d 963, 965 (Utah 1966).

There is no further argument that Al Bench was at any point in time an inferior court, an officer exercising judicial functions, a corporation or a person with a duty as a result of his office, trust or station.

The Petitioner raises for the first time in its Brief the concept that it may be entitled to relief under Rule 65B(e)(2)(C) since, it argues, "the Fire Chief had a duty to approve the system, and the cross-appellee had a right to use its system." Petitioner's Brief, p. 11. In its original Petition, at the hearing on the Motion

to Dismiss and finally at the evidentiary hearing, Petitioner never made this argument nor sought relief under Rule 65B(e)(2)(C). R. 00001-00003. Neither does the Petitioner seek in its Petition an order forcing the Respondent to "perform an act required by law as a duty of his office, trust or station." Utah R. Civ. P. 65B(e)(2)(B). In its Petition, the Petitioner asks the court below to "review the Fire Chief's decision made on December 10, 1991 . . . and determine if the tests showed that the system was not adequate for safe fire fighting capabilities. . ." R. 00001-00003. It was this Petition upon which Petitioner sought extraordinary relief under Rule 65B, and upon which the Motion to Dismiss was based, not the arguments in Petitioner's Brief otherwise unsupported by the record below.

As the Respondent is not an inferior court, administrative agency, officer exercising judicial functions, a corporation or person of office, trust or station, the court below erred in not dismissing the Petition.

**IV. THE REVIEW SOUGHT BY PETITIONER IS NOT WITHIN  
THE SCOPE OF RULE 65B.**

In its Brief, Petitioner argues that since then Chief Bench's November 1, 1991 flow test "showed that the fire hydrant system water flowed 3,210 GPM, 460 GPM more than what Table III-A of the U.F.C. requires, and that since Petitioner'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, that the court below did not err in denying Respondent's Motion to Dismiss." Petitioner's Brief, pp.12-13. Again, Petitioner's argument is an utter *non sequitur*. Petitioner correctly points out that the relief

sought in its Petition is a review of the Respondent's decision based on the November 1, 1991 flow test and a determination of whether or not, "the tests showed that the system was not adequate for safe fire fighting capabilities, and specifically whether hydrant No. 3 was a dangerous hydrant." R. 00001-00003. It is this relief articulated by the Petitioner in its Petition which is not sanctionable under Rule 65B. "Where the responsibility for basic policy decisions has been committed to one of the branches of our tri-partite system of government, the courts have refrained from sitting in judgment of the propriety of those decisions." *Little v. Utah State Div. of Family Services*, 667 P.2d 49, 51 (Utah 1983); *Keegan v. State of Utah*, 896 P.2d 618 (Utah 1995). While Petitioner would like the Court to become in essence a super fire chief and state that Respondent made the wrong decision, and that in fact, Petitioner's fire hydrant system is safe for fire fighting purposes, this form of relief is beyond that contemplated by Rule 65B. The findings of fact gathered by Respondent in its flow test and as reviewed and affirmed by the Special Appeals Board on January 30, 1992, are to be "accorded substantial deference and will not be overturned if based on substantial evidence, even if another conclusion from the evidence is permissible." See *Hurley v. Board of Review of Indus. Comm'n*, 767 P.2d 524, 526-527 (Utah 1988). When an appropriate petition is filed, the court will only review the record below to determine whether an agency, a judicial officer, or inferior tribunal abused its discretion, or whether the petitioner was otherwise denied due process. The courts are not to review and reverse the agency's, inferior tribunal, or judicial officer's decision. Proceeding based

on the relief sought in the Petition in this case is anathema to the tri-partite system and the deference afforded inferior tribunals, administrative agencies, judicial officers, corporations and persons of office, trust or station by the reviewing court. The court below therefore erred in not dismissing the Petition on this basis alone.

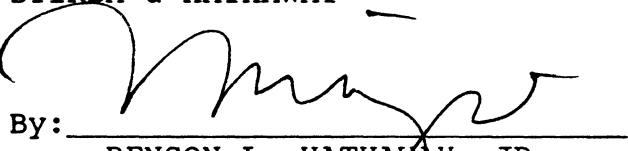
The Petitioner raises for the first time in its Brief the concept that Section 5 of Article VIII of the Utah Constitution vests general appellate jurisdiction in the District Court, impliedly over the Respondent's conduct below. Petitioner's Response Brief, p. 13. Again, Petitioner did not seek a review in the District Court pursuant to Section 5 of Article VIII of the Utah Constitution in its Petition nor was this in any way raised in or even a part of the court proceedings below. Moreover, Article VIII Section 5 provides that "the district court shall have original jurisdiction in all matters except as limited by this Constitution or by statute, and power to issue all extraordinary writs. The district court shall have appellate jurisdiction as provided by statute." This general grant of Section 5 of Article VIII does not obviate the requirements of the Utah Rules of Appellate Procedure, Utah Rules of Civil Procedure, and in particular Rule 65B nor does it obviate the requirement that an appeal be sought in a timely manner as provided in the Utah Rules of Appellate Procedure or otherwise in the applicable administrative act. It is naive for Petitioner to argue that the Utah Constitution provides for a right of appeal unfettered by any time limitation, procedural requirement or any other sort of limitation provided otherwise in statute, rule of procedure, or administrative regulation. *Id.*

### CONCLUSION

For the reasons set forth herein and as more fully discussed in Respondent's Cross-Appellant's Brief, Respondent respectfully requests that this Court find that the Fifth District Court erred in denying Respondent's Motion to Dismiss, and enter an order of dismissal.

DATED this 27 day of June, 1996.

STIRBA & HATHAWAY

By:   
BENSON L. HATHAWAY, JR.  
Attorneys for  
Respondent/Appellee

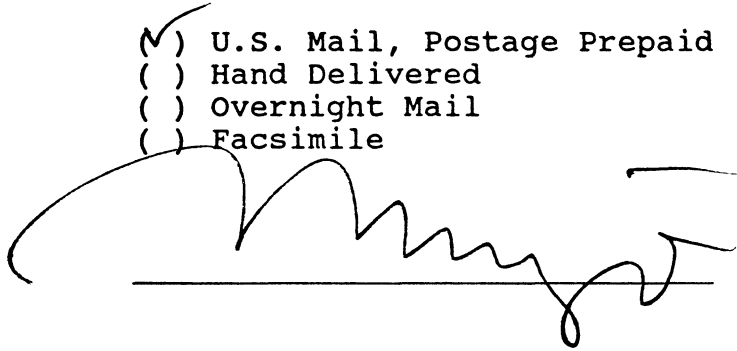


CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28 day of June, 1996, I caused to be served a true copy of the foregoing REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT, by the method indicated below, to the following:

Terry R. West  
P.O. Box 450  
Springdale, UT 84767

☒ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile

A handwritten signature in black ink, appearing to be "Terry R. West", is written over a horizontal line.