1996

Alayna J. Culbertson, J. Blaine Johnson, Eva C. Johnson, Diane Pearl Meibos v. The Board of County Commissioners of Salt Lake County, Commissioner Randy Horiuchi and Commissioner Brent Overson : Reply Brief

Utah Court of Appeals

Douglas R. Short; Salt Lake County Attorney; Patrick F. Holden; Deputy County Attorney; Jay D. Gurmankin;Chris R Hogle; Bermn, Gaufin, Tomsic & Savage; Attorney for Commissioners Overson and Horiuchi.
Diane Peral Meibos; Pro Se; Walter F. Bugden; Bugden, Collins & Morton.

IN THE COURT OF APPEALS

IN AND FOR THE STATE OF UTAH

ALAYNA J. CULBERTSON, J. BLAINE JOHNSON, EVA C. JOHNSON, and DIANE PEARL MEIBOS, Plaintiffs/Appellants vs. THE BOARD OF COUNTY COMMISSIONERS OF SALT LAKE COUNTY, COMMISSIONER RANDY HORIUCHI and COMMISSIONER BRENT OVERSON, individually, Defendants/Appellees	COURT OF APPEALS Case No. 960212CA Priority No. 14

REPLY BRIEF OF APPELLANTS

Appeal from the Order of the Third Judicial District Court
Entered April 14, 1995
The Honorable Glenn K. Iwasaki, Presiding

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Plaintiffs have no objection to oral argument, although they disagree with the Commissioners' mischaracterization of the nature and issues of this appeal. The issues before this Court are not "important issues of appellate jurisdiction ... and absolute legislative immunity."[1] The issues of this appeal involve questions of law regarding the illegal vacation of North Union Avenue, which was the sole access to plaintiffs' property, and questions of law involving judicial procedure. These issues were fully articulated in plaintiffs'/appellants' brief on appeal, and were almost totally ignored by the Board of County Commissioners and Overson and Horiuchi in their reply briefs.[2]

As to the issue of jurisdiction, the Court of Appeals has jurisdiction over this appeal as per the February 28, 1996 order of the Utah Supreme Court. Plaintiffs filed their appeal in a timely fashion, immediately following the trial court's entering of the "final" order in this case.[3] This issue will be more fully argued (again, for the fourth time) below.

APPELLANTS' REPLY TO DEFENDANTS' STATEMENTS OF THE CASE

The Board of County Commissioners', and Horiuchi's and Overson's Statements of the Case contain numerous misrepresentations of the record, out-of-context statements, and non-factual argument. However, rather that consume the

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[1]Plaintiffs might characterize this as "putting on airs."

[2]Plaintiffs also take exception to the Commissioners' unprofessional and insulting language. A phrase such as "vexatious and groundless appeal" is, in itself, vexatious and groundless, and serves no useful function in a legal brief. However, this type of language does tend to highlight Horiuchi's and Overson's malicious attitude toward the plaintiffs.

[3]Plaintiffs thought this was the final order. However, the County and the Commissioners then filed a Motion to Consolidate in this case at the end of September, 1995, more than five months after the date upon which they now claim the case was dismissed. This issue will also be articulated more fully in this brief.

Court's time with a point-by-point refutation, plaintiffs will simply reassert that the record speaks for itself, and that plaintiffs stand by their presentation of the facts. [Plaintiffs would note, however, if actual questions of fact exist, as defendants seem to imply, then perhaps the trial court erred in granting summary judgment.] To the extent any of those factual disagreements appear relevant in the reply argument, plaintiffs will explain the apparent discrepancy.

ARGUMENT

As stated above, the Board of County Commissioners and Commissioners Overson and Horiuchi have chosen to ignore the issues of this appeal. In doing this, they have failed to dispute any of the dispositive issues of fact or law presented by the plaintiffs in their brief.

They don't dispute that, after the hearing on May 25, 1994, plaintiffs' received no notification of any kind, written or oral, from the County concerning any of the subsequent meetings or any of the actions ultimately taken by the Commission regarding the vacation of North Union Avenue.

They don't dispute, or even explain, their own testimony that the decision to vacate North Union Avenue was not "made" or "rendered" until they adopted Ordinance No. 1275 in August, 1994, more than three months after the May 25th public hearing, in clear violation of the 30-day time limitation set forth in Utah Code Ann. §17-27-810 (1) (a).

They don't dispute, or even explain, their own testimony that they turned over the public right-of-way to Hermes before properly and legally vacating that right-of-way as outlined in Utah Code Ann. §17-27-810, thereby effecting the vacation decision prior to the time they claim to have "made" or "rendered" the decision. Nor do they dispute that this action nullifies the entire vacation process.

They don't dispute, or even explain, their own testimony that they attempted to "render" the road vacation, after the fact, more than 30 days after the public hearing, thereby nullifying the vacation decision.

They don't dispute the legal conclusion that, because they failed to follow the proscribed procedures, the "purported vacation of the Roadway is a nullity." Nelson v. Provo City, 872 P.2d 35, 38 (Utah App. 1994)

In an apparent attempt, then, to divert this Court from the actual issues at bar, the Board of County Commissioners, and Overson and Horiuchi have created a smoke screen of extraneous issues involving mischaracterizations of the facts and misapprehensions of the law of this case and even of the standard of review for their own issues. Again, rather that try to match the defendants point-by-point, plaintiffs will attempt to return this appeal to the real issues.

POINT I -- THE "VALIDITY" OF THE VACATION ORDINANCE(S) IS NOT NOW, NOR HAS IT EVER BEEN, A PROPER LEGAL ISSUE IN THIS CASE. PLAINTIFFS TIMELY CHALLENGED THE *ILLEGALITY* OF THE VACATION DECISION AS OUTLINED IN UTAH CODE ANN. §17-27-810

The law governing the vacation of public roads is very specific:

> **17-27-810 Grounds for vacating or changing a plat.**
> (1) (a) Within 30 days after the public hearing required by this part, the responsible body or officer shall consider the petition.
> (b) If the responsible body or officer is satisfied that neither the public nor any person will be materially injured by the proposed vacation, alteration, or amendment, and that there is good cause for the vacation, alteration, or amendment, the legislative body, by ordinance, *may* vacate, alter, or amend the plat, any portion of the plat, or any street or lot.
> (c) The responsible body or officer *may* approve the vacation, alteration, or amendment by ordinance, amended plat,

administrative order, or deed containing a stamp or mark indicating approval by the responsible body or officer.

(d) The responsible body or officer *shall* ensure that the vacation, alteration, or amendment is recorded in the office of the county recorder in which the land is located.

(2) An aggrieved party *may* appeal the responsible body's or officer's decision to district court as provided in Section 17-27-1001. (Emphasis added.)

With only a cursory reading of this law we can see that the body vacating a road [in this case, the County Commission] *may* do so by approving an ordinance, or they *may* choose one of several other methods. Note, on the other hand, that the action of recording the **decision** is required -- "the responsible body *shall* insure..." The choice to codify the vacation decision as an ordinance is *optional*, not mandatory. Likewise, an aggrieved party [in this case, the plaintiffs] *may*, if they so choose, appeal the Commission's **decision**, not the validity of the vacation ordinance, to the district court "as provided in Section 17-27-1001."

17-27-1001 Appeals

...

(2) Any person adversely affected by any **decision** made in the exercise of the provisions of this chapter may file a petition for review of the **decision** with the district court within 30 days after the local **decision** is rendered.

(3) The courts *shall*: [again, there's no option here]

(a) presume that land use decisions and regulations are **valid**; and

(b) determine only whether or not the decision is arbitrary, capricious, or ***illegal***. (Emphasis added.)

Within 30 days after the defendants blocked off and then handed over the public right-of-way that had been North Union Avenue to Hermes to destroy, plaintiffs filed their Complaint and then their Amended Complaint. Plaintiffs most assuredly did not, as alleged by defendants, challenge "the validity of the vacation ordinance." First, the law specifically prohibits challenging the *validity* of the land

use decision. Second, there was no ordinance to challenge. The defendants moved ahead with the vacation of the road without the benefit of an ordinance, and, in fact, did not adopt an ordinance for another seven weeks. That ordinance was adopted at a meeting of the County Commissioners which was held without any notice, written or oral, before or after, to plaintiffs.

Again, the vacation decision reflected in this vacation ordinance was not the decision voted on by the Commissioners at the May 25th hearing. The May 25th hearing left a strip of North Union Avenue with no connection to any other public road. The vacation ordinance, on the other hand, left a strip of North Union Avenue with no connection to any other public road except a 25-foot right-of-way that did not meet County code, and which was adopted without notice and without plaintiffs having any opportunity to comment on the decision.[4]

POINT II – IN THE *NELSON* CASE, THE COURT OF APPEALS MAKES NO MENTION OF THE "VALIDITY OF THE VACATION ORDINANCE." RATHER, IN RULING UPON THE "RESPONSIBLE BODY'S" FAILURE TO FOLLOW THE VACATION PROCEDURE, THIS COURT RULED "THE PURPORTED VACATION ... IS A NULLITY."

In ruling that the City had failed to follow the procedure for vacating a public street, the Court of Appeals makes no mention of "the vacation ordinance," nor does this Court rule that the conclusion of an unsuccessful or illegal road vacation is an "invalid vacation ordinance." Rather, this Court rules that failure to follow the vacation procedure "nullifies" the road vacation. The ordinance itself is nothing more than the embodiment of the **decision**, and should not be viewed as an end in and of itself, but merely as the means to an end [the "end" being the successful and legal completion of the road vacation process.] The "validity" of

[4]Ultimately, the Commissioners refused to defend even this right-of-way / public road when Hermes decided to build on it. Apparently, Hermes decided they needed the additional space, and they cut out about five feet of this already-inadequate street.

the vacation ordinance depends solely on the actions of the defendants. If the **decision** is illegal, and/or the vacation process is a *nullity*, then the vacation ordinance, a reflection of the decision and the process, could be deemed invalid. But it is the decision and/or the process which is being challenged, not the validity of the optional vacation ordinance.

POINT III -- THE "ADMISSIONS" OF PLAINTIFFS' COUNSEL REGARDING THE "VALIDITY OF THE VACATION ORDINANCE" DO NOT CONSTITUTE "WAIVER." RATHER, THOSE ADMISSIONS ARE MERELY A REFLECTION OF THE LAW.

Again, the defendants try to make a great deal of hay out of plaintiffs' counsel's "admissions" that plaintiffs weren't "challenging the validity of the vacation ordinance," but those admissions, for all the reasons set forth herein, do not constitute any type of waiver. On the contrary, plaintiffs have never "attacked" the validity of the road vacation ordinance, and have always "admitted" that fact. (RoA at 840.)

If defendants chose suddenly to "rely" on those statements in setting forth or failing to set forth their issues, then they did so in full and glorious disregard of the law and the facts of this case. Plaintiffs have always contended, and will always assert, that the decision to vacate North Union Avenue was **illegal** both in its effect upon plaintiffs' property and in the notice and process that led to that decision, and defendants had every opportunity to "rely" on that claim.

POINT IV -- THE CONVERSATION OF JANUARY 30, 1995, REGARDING THE "VALIDITY OF THE VACATION ORDINANCE," ENGAGED IN BETWEEN AND AMONG THE TRIAL COURT JUDGE, AND PLAINTIFFS' AND

DEFENDANTS' ATTORNEYS, AND REFERRED TO COPIOUSLY IN THE DEFENDANTS' BRIEFS, HAD NO LEGAL SIGNIFICANCE. NOR DOES THE "DEMEANOR" OF ANY OF THE PARTICIPANTS FIGURE INTO THE ADJUDICATION OF ANY ISSUE OF LAW.

On January 30, 1995, the trial court, in considering plaintiffs' motion to amend their complaint, accepted the Commissioners statement that, unbeknownst to plaintiffs, they had not made the decision to vacate North Union Avenue, until they adopted, without notice to plaintiffs, a corrected vacation ordinance, more than three months after the public hearing required by the law, and more than 60 days after their allowable time expired.

However, instead of recognizing this statement as an admission that the Commissioners had illegally vacated North Union Avenue, the trial court then began asking plaintiffs' counsel a series of questions regarding plaintiffs' intentions as to the validity of the vacation ordinance, questions which plaintiffs have since established had no legal significance in plaintiffs' challenge to the legality of the vacation decision.

Nevertheless, the Commissioners, in their brief, would have this Court believe that, in making a ruling on these issues of law, the Court should defer to the Commissioners' best guess as to what might have been the trial court's unstated observation of plaintiffs' counsel's "appearance," "demeanor," or tone of voice during this discussion.[5] Of course, were the trial court or the Appeals Court to allow something as subjective as "appearance" or "nuance" to help them determine an issue of law, that would constitute a mighty "abuse of discretion," indeed.

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[5] This plaintiff, unlike defendants' attorneys, was present at the January 30, 1995, and can testify that the "demeanor" of plaintiffs' counsel during the course of the trial court judge's questioning, was one of stunned confusion regarding the strange and meaningless nature of the trial court's questions concerning the validity of the vacation ordinance. The trial court should have been asking defendants why they chose to illegally vacate North Union Avenue, instead of asking plaintiffs whether they intended to incorrectly and ineffectively challenge the road vacation ordinance. The trial court was already on notice that plaintiffs were alleging the illegality of the vacation decision, as that had been the issue before the court for more than seven months.

POINT V -- AT THE END OF THE JANUARY 30, 1995 HEARING ON THE MOTION TO AMEND, THE TRIAL COURT JUDGE MADE NO BENCH RULING OR BENCH ORDER PROHIBITING PLAINTIFFS FROM "CHALLENGING THE VALIDITY OF THE VACATION ORDINANCE," NOR DID HE PROHIBIT PLAINTIFFS FROM AMENDING THE COMPLAINT TO INCLUDE THE ISSUES OF DAMAGES

The trial court did not issue an "order from the bench prohibiting Plaintiffs from amending the complaint to add damage claims...," nor did the trial court judge dismiss plaintiffs' claims regarding the illegality of the vacation decision, as defendants would have this Court believe. As plaintiffs have repeatedly explained, none of their complaints attacked the validity of the vacation ordinance. (RoA at. 840.) Consequently, defendants' attempts to preclude "assaults" on the validity of the vacation ordinance were meaningless. The trial court said nothing about plaintiffs' claims regarding the illegality of the vacation decision, which was the basis of all three of plaintiffs' complaints.

The trial court agreed to allow the plaintiffs to amend their complaint just as they had submitted it, including retaining their challenges to the legality of the vacation decision and their requests for damages. (RoA at 845.) The trial court then signed an order effecting that ruling, an order which contains no restrictions as to what plaintiffs could or could not allege. (RoA at 294-295.)

Talk from the bench is no more binding than an unsigned minute entry, and the trial court's "ruling" had no legal or jurisdictional meaning without an order effecting that "ruling." After the talk stopped, the trial court judge apparently backed off his threats to rule on issues which were not properly before the court, or to rule on motions which had not been properly briefed. Instead, the trial court

judge signed the order allowing plaintiffs to file their complaint exactly as they had submitted. The order itself is the bottom line, not the discussion of that order.[6]

Because the trial court granted Plaintiffs' Motion to Amend to include claims for both compensatory and punitive damages, there was no reason for Plaintiffs to appeal that order. None of the defendants chose to appeal the trial court's order on this issue, even though the court allowed plaintiffs to seek damages and to continue to pursue their claims regarding the illegality of the vacation decision.

POINT VI -- THE VACATION DECISION, AND SUBSEQUENT ORDINANCES, CONTAINED ROAD VACATION DECISIONS WHICH PLAINTIFFS DID NOT WISH TO CHALLENGE.

Among the myriad of reasons why plaintiffs have not sought to overturn the entire vacation decision (as embodied by the vacation ordinance) is that the decision renders some actions which are not being challenged by plaintiffs. For instance, the vacation decision dealt with rights-of-way other than North Union Avenue, and plaintiffs did not have standing to challenge the vacation of those rights of way.

Also, the Commissioners established a 25-foot public road to the west of plaintiffs' property. Although the plaintiffs are in yet-another-legal-battle to bring that road up to minimum county standards, plaintiffs have never sought to have that decision declared illegal. In fact, some of the damage claims plaintiffs have asserted against the individual Commissioners as part of this lawsuit arose from

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[6]Plaintiffs note, with some irony, that this is exactly what happened regarding the order dismissing plaintiffs' Second Amended Complaint, which is the subject of this suit. The trial court dismissed all plaintiffs' claims without prejudice, and entered an unsigned minute entry ruling that all claims were dismissed without prejudice. However, the judge then signed an order which said, in part, exactly the opposite of what he had ruled -- that certain of plaintiffs' claims would be dismissed with prejudice. Moral -- "It don't mean nothin' till you sign on the dotted line."

the Commissioners refusal to enforce this public right-of-way, by allowing Hermes to cut into and then build on top of this public roadway.

POINT VII -- PLAINTIFFS HAVE NEVER ATTEMPTED TO FILE CLAIMS AGAINST THE INDIVIDUAL COMMISSIONERS, HORIUCHI AND OVERSON, REGARDING THEIR "LEGISLATIVE FUNCTIONS." THE CLAIMS FOR DAMAGES AGAINST THE COMMISSIONERS AROSE FROM THEIR MALICIOUS REFUSAL TO ENFORCE THE LAW AND TO PROVIDE PLAINTIFFS WITH EQUAL PROTECTION OF THE LAW

For all their high falutin' talk about being a protected legislative body, the County Commission is nothing but a government agency that is not burdened by separation of powers or any of the other safeguards designed by the Founding Fathers and outlined in the United States and Utah State Constitutions. They are not an "absolute" legislative body, and so their immunity is not absolute. The Commission is a mere Board, an agency whose powers are derived from and defined by the statute that created them.

While the Commissioners proudly tout that they possess legislative, executive and judicial powers, and are protected in their indiscriminate wielding of these powers, the closer truth is not quite so glamorous. In fact, and in law, the Commissioners have powers which appear to be legislative, executive or judicial in nature, but which are actually defined as being either *discretionary* or *non-discretionary*. Simply stated, they are mostly immune in their performance of their discretionary functions, but they are liable for damages if they fail to perform their non-discretionary functions.

A quick rundown of the Commissioners discretionary and non-discretionary functions involved in this lawsuit might go as follows:

1. The process involved in the vacation of a public road is mostly *non-discretionary;*

2. The decision to vacate a road is mostly *discretionary;*

3. Setting roadway standards is *discretionary*;

4. Enforcing the roadway standards in *non-discretionary*;

5. Adopting an ordinance is *discretionary*; and,

6. Enforcing that ordinance is *non-discretionary.*

Plaintiffs have never attempted, contrary to Overson's and Horiuchi's bloated rhetoric, to file claims against the Commissioners for "any Speech or Debate," or any other protected function.[7]

Plaintiffs' claims for damages against Horiuchi and Overson involved their willful and malicious refusal to enforce the laws of this county when those laws inconvenienced Hermes or themselves, their willful and malicious refusal to provide plaintiffs with equal protection of the law, and their willful and malicious attempts to deprive plaintiffs of basic civil rights and property rights.

None of these actions constitute "legislative functions," nor are they "absolutely immune" from damage claims. Furthermore, damage claims are factual, and not subject to summary judgment. The trial court never ruled that plaintiffs couldn't sue the Commissioners. Consequently, there is no ruling on this issue for this Court to affirm.[8]

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[7]Plaintiff Meibos notes here that, ironically, both Overson and Horiuchi, as well as the Salt Lake County Director of Public Works and the Director of Development Services, have threatened to sue Meibos and several others for criticizing their public record.

[8]Perhaps the most disturbing aspect of the Commissioners' Brief is their paranoid, arrogant, and insulting claims that plaintiffs are duplicitous, that plaintiffs are attempting to maintain a groundless appeal "at all costs," and that plaintiffs' appeal is "frivolous and interposed solely to harass..." At least to this plaintiff, such statements represent the lowest form of common incivility, These plaintiffs attended a hearing on this redevelopment project before the Supreme Court of the State of Utah, in which three of the justices openly chastised the County for their abuses of power, and encouraged the plaintiffs to sue both the County and Hermes over the vacation of this road and their failure to abide by their zoning laws. One can only wonder what kind of public servant would think that plaintiffs have no right to attempt to protect their home and property from governmental intrusion and destruction, would characterize this legally-

Again, this entire line of argument is meaningless except as a transparent way to gouge the county taxpayers and to verbally harass the plaintiffs. These plaintiffs have no outstanding damage claims against the Commissioners in any court, hence this issue is not ripe for adjudication.

POINT VIII -- PLAINTIFFS' NOTICE OF APPEAL WAS FILED TIMELY, AND IN GOOD FAITH, AFTER THE TRIAL COURT HAD SIGNED THE ORDER DISMISSING THE POST-JUDGMENT MOTIONS

Without wishing to rehash old ground, there are a few key dates from this case that should be reviewed for a proper consideration of this

On March 29, 1995, the trial court, without ruling on any of plaintiffs' claims, ruled from the bench that plaintiffs' Second Amended Complaint should be dismissed without prejudice, and instructed Salt Lake County's and Hermes' attorney, Nick Colessides, to prepare the order effecting that ruling. (RoA at 922-923)

Also on March 29, the trial court entered a Minute Entry stating that plaintiffs' complaint was dismissed without prejudice. (RoA at 637)

On April 6, 1995, the Commissioners submitted an order dismissing with prejudice all claims regarding the road vacation ordinance, and dismissing without prejudice all other claims.

On April 10, 1995, plaintiffs filed an Objection to this order and a Request for Hearing, challenging the language contained in the order. (RoA at 639-643)

On April 14, 1995, without notifying plaintiffs, the trial court signed the order. (RoA at 647-649)

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protected action as "frivolous," and would view as "harassment" plaintiffs' efforts to seek a redress of their grievances through the proper legal channels.

On April 21, 1995, plaintiffs filed a Notice to Submit their objection for decision by the trial court. (RoA at 650-651)

On May 15, 1995, plaintiffs prepared a Notice of Appeal, which they took to the trial court. Plaintiffs discussed with the clerk of the court the Notice and the pending objection to the content of the order. This clerk held a telephonic conference with the clerk of Supreme Court to decide if plaintiffs' Notice of Appeal should be filed at this time. Plaintiffs and the clerk were told that the Notice should be filed after the trial court had dealt with the Objection. (RoA at 856)

On May 18, 1995, by way of unsigned Minute entry, the trial court denied plaintiffs' objection and request for hearing, clarifying that the April 14th order had accurately reflected the trial court wishes regarding plaintiffs' claims. The trial court instructed the County Commission to prepare the order effecting that ruling. (RoA at 652-653) The Commission did not prepare the order.

Plaintiffs called the trial court numerous times over the next few weeks to see if an order had been signed and entered, but there was no order. (RoA at 856)

On July 10, 1995, plaintiffs contacted the Commissioners' attorney regarding this order, and the attorney said he did not intend to submit an order. (RoA at 856)

On July 11, 1995, plaintiffs pro se submitted a Motion to Submit Order and a proposed order for the trial court to sign which would effect the ruling of the trial court's May 18, 1995 minute entry. (RoA at 656-658)

The Commission objected to plaintiffs motion and order (RoA at 667-675), and on August 2, 1995, the trial court set a hearing date for this issue to be heard. (RoA at 676-677)

On or about August 30, 1995, the trial court heard this issue and ruled that the Commission was to submit an order as per the court's previous instructions. (RoA at 678)

Thereafter, defendants' counsel prepared and submitted an order, which the trial court eventually signed on September 26, 1995. (RoA at 701-702)

On September 25, 1995, the Board of County Commissioners and Overson and Horiuchi filed a Motion to Consolidate this case with a case pending before the Third District Court. The defendants backdated this Motion and Certificate of Service to show a date of August 25, 1995. (RoA at 681-700)

On September 27, 1995, prior to receiving defendants' Motion to Consolidate, plaintiffs filed their Notice of Appeal with the trial court. (RoA at 706-706)

On October 18, 1995, plaintiffs filed their Docketing Statement.

On October 24, 1995, while defendants' Motion to Consolidate the issues of another more recent action with the issues "pending" in this case was awaiting hearing in the trial court, defendants filed their first Motion to Dismiss plaintiffs' appeal. The defendants claim in this motion, ironically enough, was that plaintiffs had filed their Notice of Appeal too late -- that all pending issues in this action had been dismissed on April 14, 1995.

On December 20, 1995, more than eight months after the trial court signed the April 14th order, the trial court, Judge Glenn Iwasaki presiding, held a hearing to consider defendants' Motion to Consolidate. At that hearing plaintiffs requested Rule 11 sanctions against defendants for filing a Motion to Consolidate after all issues in this case had been disposed of and for falsifying their Certificate of Service. Defendants' counsel testified that they had filed their Motion to Consolidate in good faith, believing that appealable issues were still pending

before the trial court in this action.[9] The trial court affirmed that defendants were acting in good faith when they filed the Motion to Consolidate, and refused to sanction defendants. (RoA at 753-737)

Obviously, there's a problem here with the consistency of defendants' argument. They claim on the one hand that all questions of law and fact in this case were disposed of on April 14, 1995, while arguing out of the other side of their collective mouth[10] that there were still questions of law and fact pending in this case as of December 20, 1995. Are we entitled to "rely" on their allegations?

Plaintiffs could enter a great deal of argument here, but the facts and the law are really quite simple. Plaintiffs' Objection and the attendant pleading tolled the thirty-day time period because its ultimate resolution spoke to the substance of the appeal. This Court has ruled, "If an amendment or modification does not change the substance or character of a judgment, it does not enlarge the time for an appeal." Nielson v. Gurley, 888 P.2d 130 (Utah Ct. App. 1994). The logical conclusion to this ruling is that if the amendment or modification sought *does* change the substance or character of a judgment, then it must enlarge the time for an appeal.

The Objection acted as a U.R.C.P. Rule 52(b) or Rule 59 post-judgment motion, and it was necessary to dispose of the motion by signed order before an appeal could be taken. The fact that it was not strictly identified as a Rule 52(b) or Rule 59 motion does not take away from its tolling effect:

> Filing of an "exception to order and motion for reconsideration" of summary judgment tolled the thirty-day time

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[9]Rule 42 of the Utah Rules of Civil Procedure states in relevant part

(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated...

[10]Naturally, plaintiffs recognize that one should never mix metaphors, but this one felt so good. Our apologies to this Court for the literary *faux pas*.

> period within which to file a notice of appeal, notwithstanding the incorrect title placed upon the pleading, since the judge ruled on the motion as if it were a motion for a new trial. Watkiss & Campbell v. Foa & Son, 808 P.2d 1061 (Utah 1991)

Plaintiffs' Notice of Appeal prepared in May was premature, and plaintiffs, had they filed that notice, would have been required to file another notice after the dismissal, by signed order, of their Objection.

> A notice of appeal filed after a ruling on a motion to alter or amend a judgment has been announced, but before the entry of an order disposing of the motion, is premature and does not confer jurisdiction on the court. Anderson v. Schwendiman, 764 P.2d 999 (Utah Ct. App. 1988)

Plaintiffs were advised to wait to file their Notice of Appeal until they had a signed order disposing of plaintiffs' objections in some way, which turned out to be sound advice.

> An unsigned minute entry is not a final judgment for purposes of appeal. A judgment, tolled by a timely post-judgment motion, starts to run on the date when the trial court enters its first signed order denying the motion. Gallardo v. Bollander, 800 P.2d 816 (Utah 1990)

Plaintiffs filed their Notice of Appeal in good faith as soon as they were able to obtain a written order disposing of their Objection. The long waiting period was caused by the defendants, who refused to prepare the dispositive although they had been specifically instructed to do so. (Maybe their ulterior motive was to challenge the timeliness of plaintiffs' appeal.) Additionally, even after the trial court had entered the dispositive order, defendants continued to assert that there were still questions of law or fact pending before the trial court in this case.[11]

[11]Plaintiffs truly believe that somewhere along the line, they should be entitled to Rule 11 sanctions regarding some of these actions.

CONCLUSION

The issues of law raised by plaintiffs in the appellant brief have not been answered by the defendants. Plaintiffs respectfully request this Court for a ruling as to when, as a matter of law, the decision to vacate North Union was made and rendered. Such a determination must be a matter of law, and not a matter of fact. Otherwise, parties aggrieved by illegal vacations of their public easement and access would be unable to determine exactly when it is appropriate and timely to challenge the vacation decision in district court, and other property owners might be subjected to exactly the same type of political gamesmanship and abuse of power of the type that has characterized all of the Commissioners' dealings with these plaintiffs.

Plaintiffs also request the Court to deny defendants' various motions to dismiss plaintiffs' Notice of Appeal, on the grounds that plaintiffs filed in a timely fashion, and that any delay in the filing of the Notice of Appeal was caused by defendants' bad faith attempts to interfere with the judicial process.

RESPECTFULLY SUBMITTED this 28th day of March, 1997.

Diane Pearl Meibos
Plaintiff/Attorney pro se

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of March, 1997, I mailed in the United States mail, postage prepaid, a true and correct copy of the foregoing REPLY BRIEF OF APPELLANTS to:

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