

1996

Jane Harper, Richard D. Harper, Frank Cattlelan,
Richard Richins v. Summit County, The Summit
County Commission, Summit County Planning
Commission, Utelite Corporation : Brief of
Appellant

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Jane Harper, Richard D. Harper, Frank Cattlelan, Richard Richins v. Summit County, The Summit County Commission, Summit County Planning Commission, Utelite Corporation*, No. 960486 (Utah Court of Appeals, 1996).

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UTAH COURT OF APPEALS
BRIEF
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DOCKET NO. 960486-CA

IN THE UTAH COURT OF APPEALS

JANE HARPER, RICHARD D. HARPER,
FRANK CATTELAN and RICHARD
RICHINS,

Plaintiffs, Appellees,
and Cross-Appellants

v.

SUMMIT COUNTY, a body politic,
THE SUMMIT COUNTY COMMISSION,
SUMMIT COUNTY PLANNING
COMMISSION and UTELITE
CORPORATION,

Defendants, Appellants
and Cross-Appellees.

JOINT BRIEF OF APPELLANTS

Case No. 960486-CA

APPEAL FROM A DECISION OF THE
THIRD JUDICIAL DISTRICT COURT, SUMMIT COUNTY
Judge FRANK HOEL

Oral Argument Priority Classification No. 15

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OCT 15 1996

COURT OF APPEALS

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The appellants Summit County, the Summit County Commission and the Summit County Planning Commission (hereinafter referred to collectively as "Summit County") and Utelite Corporation ("Utelite"), each defendants below, submit this Joint Brief of Appellants.

STATEMENT OF JURISDICTION

The Court of Appeals has appellate jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. Did the trial court commit reversible error by entering findings of fact and a partial summary judgment on a disputed factual record?

Standard of Review:

Issue of law--correctness. Berenda v. Langford, 914 P.2d 45, 50 (Utah 1996); Kilpatrick v. Wiley, Rein & Fielding, 909 P.2d 1283, 1289 (Utah App. 1996).

Preservation of Issue:

Memoranda opposing partial summary judgment (R. 169-71, 182-88); Objections to Proposed Findings of Fact, Conclusions of Law and Proposed Order (R. 245-49); Utelite's Motion to Set Aside Order for Partial Summary Judgment (R. 516-47).

2. Did the trial court commit reversible error by concluding that Summit County's actions leading to the placement of the Utelite loading facility violated the Summit County Development Code?

Standard of Review and Preservation of Issue: same as Issue 1 above.

3. Did the trial court commit reversible error by concluding that Summit County's actions leading to the placement of the Utelite facility deprived the plaintiffs of due process of law?

Standard of Review and Preservation of Issue: same as Issue 1 above.

4. Did the trial court err in determining that Summit County acted in violation of the Utah Open and Public Meetings Law, Utah Code Ann. § 52-4-1, *et seq.*?

Standard of Review and Preservation of Issue: same as Issue 1 above.

5. Did the trial court commit reversible error by stating in its order for partial summary judgment an intention to issue an injunction requiring Summit County to effectuate the removal of the Utelite loading facility?

Standard of Review and Preservation of Issue: same as Issue 1 above.

6. Did the trial court commit reversible error by determining that the Union Pacific Railroad was not a necessary and indispensable party to this action?

Standard of Review:

Interpretation of the Rules of Civil Procedure--correctness.

Carrier v. Pro-Tech Restoration, 909 P.2d 271, 272 (Utah App. 1995); Berenda, *supra*, at 50.

Preservation of Issue:

Summit County's motion to dismiss for non-joinder (R. 143-48); Utelite's memorandum in opposition to plaintiffs' motion for partial summary judgment (R. 169-71); Objections to Proposed Findings of Fact, Conclusions of Law and Proposed Order (R. 247-48).

7. Did the trial court commit reversible error in failing to set aside the prior rulings and orders of Judge Wilkinson which had been demonstrated during the course of later proceedings to be in error?

Standard of Review:

Legal issue--correctness. Savage v. Educators Ins. Co., 908 P.2d 862, 864-65 (Utah 1995).

Preservation of Issue:

Trial Transcript at 19 (R. 2369); Utelite's Motion to Set Aside Order for Partial Summary Judgment and supporting memorandum (R. 513-536); Utelite's Motion for Partial Summary Judgment re: Nuisance Per Se and supporting memorandum (R. 1205-1223).

8. Did the trial court commit error in concluding that violation of the Summit County Development Code constituted a legally sufficient basis for a claim of nuisance per se?

Standard of Review:

Legal issue--correctness. Savage v. Educators Ins. Co., 908 P.2d 862, 864-65 (Utah 1995).

Preservation of Issue:

Trial Transcript at 19-20; Utelite Motion for Partial
Summary Judgment Re: Nuisance Per Se (R. 1205-23).

DETERMINATIVE STATUTORY PROVISIONS

Utah Code Ann. § 52-4-8. Suit to void final action--Limitation--
Exceptions.

Any final action taken in violation of Sections 52-4-3
and 52-4-6 is voidable by a court of competent
jurisdiction. Suit to void final action shall be
commenced within 90 days after the action except that
with respect to any final action concerning the
issuance of bonds, notes, or other evidences of
indebtedness suit shall be commenced within 30 days
after the action.

STATEMENT OF THE CASE

Introduction

This action was litigated for nearly six years in Third
District Court for Summit County before a number of different
judges. The convoluted procedural history and confusing results
reflect the limitations of the system of rotating judges still
employed in Summit County. See Gillmor v. Wright, 850 P.2d 431,
438-40 (Utah 1993) (Orme, Ct. App. J. concurring). By resolving
fact issues on summary judgment and otherwise misapplying the law
in the first substantive ruling in this action, Judge Homer
Wilkinson introduced error that went uncorrected and continued to
taint later proceedings and to perplex subsequent judges who
handled the case. This Court should correct both that threshold
error and all subsequent errors flowing from it.

Nature of the Case

The plaintiffs seek injunctive and monetary relief with respect to Summit County's approval and Utelite's placement of a rail car loading facility (the "Facility") in the vicinity of the plaintiffs' property in the unincorporated area of Summit County known as Echo, Utah. The case proceeded in two stages: (a) litigation of claims for injunctive relief against Summit County based on alleged procedural defects in the approval of the Facility (resolved by summary judgment in 1991/93) and (b) litigation of claims for equitable and monetary relief based on nuisance per se (resolved by partial summary judgment and by trial to the jury and the court in 1995/96).

Course of Proceedings

The Claims Against Summit County

The plaintiffs commenced this action on July 31, 1990, by filing a Complaint naming the Summit County entities as defendants. The plaintiffs alleged that, in approving the placement of a loading facility in Echo, Utah (the "Facility"), Summit County (a) had failed to afford the plaintiffs due process, (b) had abused its discretion, (c) had violated the Summit County Development Code, (d) had violated the Open Meetings Act, and (e) had otherwise acted contrary to "statutes, ordinances and common law." (R. 1-14) On November 2, 1990, the plaintiffs filed an Amended Complaint, naming Utelite as a defendant, but without advancing any new theories and without stating any specific claims against Utelite. (R. 62)

On April 19, 1991, the plaintiffs moved for Summary Judgment against Summit County. (R. 104) Utelite was not named as a party to that motion.^{1/}

On May 9, 1991, Summit County and Utelite moved to dismiss the action pursuant to Rule 12(b)(7) because the plaintiffs had failed to join as a party defendant the owner of the property on which Utelite had built the Facility--the Union Pacific Railroad (the "Railroad"). (R. 143, 161)

The motion for summary judgment and the motion to dismiss were heard on July 8, 1991, by Judge Homer Wilkinson.^{2/} The trial court granted the motion for summary judgment and denied the motion to dismiss. At the hearing, Judge Wilkinson observed:

I do decline to grant their [the plaintiffs'] Motion for a Cease and Desist Order and for a Writ of Injunction. That I don't know what the parties intend to do concerning this matter--I probably think I do. But I think that if I issue that cease and desist order, that could put them out of business. It could do irreparable damages to them during the appellate procedure. And I think that the parties could be further injured by that, but I think that could be some monetary damages. And therefore, I am going to grant the Motion for Summary Judgment but refuse to grant the Motion for Injunctive Relief to cease and desist.

However, I will indicate that if this matter is not taken further, within 30 or 60 days, that the injunctive relief would be granted. And I am certainly not advising you to

^{1/} The plaintiffs stated: "At the outset it should be noted that Plaintiffs' Motion for Summary Judgment is limited to claims against Summit County and does not seek relief from Utelite." (R. 204)

^{2/} Because of rotating assignments to the Third District Court, Summit County, and the duration of these proceedings, various judges have heard this action: Judge Wilkinson, Judge Young, Judge Iwasaki, Judge Brian and Judge Noel.

appeal the case, but in my own mind I can see that there is probably not much chance that you are not going to.

(R. 235-242 attached as Addendum 1.)^{3/}

On August 22, 1991, the plaintiffs lodged with the Court proposed Findings of Fact and Conclusions of Law together with a proposed Order granting the Summary Judgment. (R. 245) Despite an October 15, 1991, hearing on Summit County's objections to the form of these, the proposed Findings and Conclusions and the proposed Order remained unsigned for nearly two years.

(R. 265-71, 275)

On July 26, 1993, the trial court issued an Order to Show Cause why the action should not be dismissed for failure to prosecute. (R. 275) At an August 23, 1993, hearing on the Order to Show Cause, Judge Wilkinson finally entered the Findings and Conclusions and Order Granting Summary Judgment tendered in August 1991. (R. 278, 282 attached hereto as Addenda 2 and 3) The Order found that, in "the emplacement of the Utelite Facility," Summit County had violated the Summit County Development Code, the Open and Public Meetings Law, Utah Code Ann. § 52-4-1, and the due process rights of the plaintiffs. (A. 3:1) The Order denied the motion to dismiss. In pertinent part, the Order provided (A. 3:2):

The effectiveness of this order is stayed for sixty (60) days from the date this order is entered. If no appeal is taken within that time period, then an injunction shall issue and Defendant Summit County shall be required to

^{3/} References to the Addendum shall be "A." followed by the number of the attachment and the specific page number within of that attachment cited.

effectuate the removal of Utelite from their currently occupied site.

Summit County filed a Petition for Interlocutory Appeal with the Utah Supreme Court on September 13, 1993, which the Supreme Court denied by order dated October 28, 1993.

The Claims Against Utelite

At a pretrial conference held on February 14, 1994, Judge David Young granted the plaintiffs leave to file a Second Amended Complaint. (R. 303) On March 11, 1994, the plaintiffs filed their Second Amended Verified Complaint for Declaratory and Injunctive Relief stating for the first time damage claims against Utelite. The plaintiffs' claims against Utelite included "common law nuisance," "statutory nuisance," "trespass," "negligence," "infliction of emotional distress," and "attorney's fees and expenses." (R. 304-42) As to Summit County, the plaintiffs sought an award of attorney's fees.

On November 4, 1994, the plaintiffs sought leave to file a Third Amended Complaint to add claims regarding an alleged public right-of-way affected by the placement of the Facility. (R. 779) The trial court entered an order dated March 13, 1995, denying any further amendment because it would necessarily involve adding the Railroad as a party thus delaying the proceedings. (R. 1024-27)

Utelite gave notice on July 14, 1995, of its request that, notwithstanding the plaintiffs' request for a jury trial, the judge determine all equitable issues including any claim for injunctive relief. (R. 1734-35)

By Order dated September 6, 1995, Judge Pat Brian entered partial summary judgment in favor of Utelite dismissing the claims for infliction of emotional distress and for award of attorney's fees, the latter without prejudice to the plaintiffs' renewal of the claim at the conclusion of trial. (R. 1766-68 attached as Addendum 4.)

The remaining claims against Utelite came on for trial before Judge Frank G. Noel on September 12, 1995. Before the commencement of trial, the court ruled that (a) Judge Wilkinson's 1993 Order for Partial Summary Judgment implicitly included a finding that the Utelite loading facility violated the Summit County Development Code and (b) by reason of this violation the Facility was a nuisance per se. (R. 2365-69) Given this finding of liability, the parties stipulated to dismissal without prejudice of all other claims of liability leaving only the issues of actual damages and punitive damages for the jury and the issue of equitable relief for the court. (R. 2368-69)

The jury heard evidence from September 12 through 15, 1995, and returned a verdict awarding general damages for the six and one-half year time period from April 24, 1989, through September 15, 1995, in the following nominal amounts: Jane and Richard Harper--\$5,000 each; Frank Cattelan--\$3,000; and Richard Richins--\$1,500.^{4/} The jury found that the plaintiffs had not suffered any reduction in the market value of their property or, in the case of the plaintiff Cattelan, any business injury. The

^{4/} The plaintiffs had sought general damages in excess of \$250,000.

jury also found that the plaintiffs were not entitled to any exemplary damages. (R. 1988-90)

On February 13, 1996, the trial court entered its Final Judgment on Special Verdict denying the Harpers any further equitable relief and otherwise entering Judgment consistent with the jury's Special Verdict. (R. 2097-2102 attached as Addendum 5.) On April 23, 1996, pursuant to the Utah Open Meetings Act, the trial court entered its Order Re: Award of Plaintiffs' Attorney's Fees awarding to the plaintiffs against Summit County the sum of \$11,150. (R. 2322-23) On May 10, 1996, the trial court entered its Findings of Fact and Conclusions of Law Re: Equitable Relief finding:

The Facility at present (a) is not injurious to the plaintiffs, (b) does not adversely affect the plaintiff's use and enjoyment of their property, and (c) does not cause any property damage to the plaintiffs.

(R. 2332-36 attached as Addendum 6.) This completed all proceedings in the trial court, and Summit County and Utelite jointly noticed their appeal on May 31, 1996.^{5/}

STATEMENT OF FACTS

Utelite and the Railroad

Utelite mines and processes lightweight aggregate at its plant near Peoa, Utah. (R. 2831) Until 1989, Utelite loaded aggregate for out-of-state shipment via the Railroad's Park City

^{5/} To avoid any contention that they had failed to preserve their right to appeal, Summit County and Utelite had previously noticed an appeal in response to the February 13, 1996, Final Judgment on Special Verdict on March 4, 1996. Based on a review of the docketing statements submitted in support of those appeals and cross-appeals in Case No. 960121, the Utah Supreme Court, by Order entered May 31, 1996, dismissed the appeal without prejudice for lack of finality.

branch line at a portable loading facility next to the Spring Chicken Inn in Wanship, Utah. (R. 2836)

The Railroad owns a right-of-way through the unincorporated town of Echo, Utah. This right-of-way includes two main transcontinental line tracks along with a passing track and an "industry track." (R. 2816-18) The Railroad has operated in Echo since 1869. (R. 1673) In the past, the Railroad has operated a loading facility and a railroad yard at the Echo right-of-way. (R. 2616-17)

In 1988, the Railroad obtained regulatory authority to abandon its Park City branch line. (R. 2802) To secure Utelite's agreement to the abandonment of the Park City line, the Railroad offered (a) to lease property at the Echo right-of-way to Utelite on favorable terms and (b) to defray certain expenses associated with Utelite's establishment of a loading facility at the Echo right-of-way. (R. 2839) Utelite accepted the Railroad's offer and commenced preparations to construct a new loading facility on the industry track at the Echo right-of-way. (R. 2839-40)

Utelite and Summit County

As part of those preparations, Utelite inquired of Summit County regarding any regulatory approval needed to construct the Facility. (R. 559) Summit County suggested that Utelite attend a December 13, 1988, meeting of the Summit County Planning Commission to verify what permits or other approvals might be needed to construct the Facility. (*Id.*)

Utelite officer Carsten Mortensen ("Mortensen") attended the December 13, 1988, meeting of the Summit County Planning Commission to inquire regarding any needed governmental approval. Summit County Planning Commission officials at the meeting indicated to Mortensen that the placement of the Facility on the Railroad's industry track was a "permitted use" consistent with the historic use of the property as a railroad siding and loading site. Mortensen understood from this that placement of the Facility did not require any special action by the Planning Commission. (*Id.*) Summit County confirmed this by a letter dated January 13, 1989. (R. 122 attached as Addendum 7.)

Utelite completed the Facility and commenced operations there on April 24, 1989.

Utelite and the Plaintiffs

The plaintiffs own property near the Facility. The Railroad's tracks through Echo lie between the Facility and the property of all plaintiffs but Richins (whose property lies west of I-84). Trains pass through Echo on these tracks between 15 and 20 times per day. (A. 6:2)

Semi-trucks transport aggregate to the Facility for loading. Weekly at the Facility, Utelite loads on average six and one-half railroad cars. To load a single railroad car requires four truckloads and a total of 40 minutes loading time. The Facility currently operates, with occasional exceptions, on weekdays during daylight hours. (A. 6:2)

The plaintiffs have complained that the Facility generates intolerable levels of dust and noise. To deal with dust from the loading operations, Utelite has taken the following steps:

- (a) Construction of a metal enclosure at the Facility.
- (b) Installation of a bag house and duct work at the Facility.
- (c) Paving of the access road to the Facility.
- (d) Installation of curtains and an electric door at the Facility.
- (e) Watering down aggregate at the Utelite plant.
- (f) Installation of a hood and metal coverings over the conveyor belt and drop areas at the Facility.
- (g) Response to resident complaints called in to the Utelite plant including termination of loading on windy days. (A. 6:3)

To deal with noise problems from the operation of the Facility, Utelite has taken the following steps:

- (a) Installation of a muffler on the bag house.
- (b) Instruction to truckers not to bang railroad cars in connection with loading. (A. 6:3)

To deal with other annoyances, Utelite has:

- (a) Removed outdoor lighting at the Facility.
- (b) Terminated night loading.
- (c) Instructed truck drivers to yield to other vehicles seeking access to the frontage road on the far side of Interstate 84 through the road at the Facility. (A. 6:3, 4)

As a result of the actions taken by Utelite, the Facility at present (a) is not injurious to the plaintiffs, (b) does not adversely affect the plaintiffs' use and enjoyment of their

property, and (c) does not cause any property damage to the plaintiffs. (A. 6:4)

SUMMARY OF ARGUMENT

The fundamental error which tainted all further proceedings in this action occurred when Judge Homer Wilkinson resolved disputed questions of material fact on a motion for partial summary judgment. The transcript of the Judge's Bench Ruling amply demonstrates that the trial court improperly considered the weight, persuasiveness and credibility of the evidence on at least three (3) critical disputed factual issues. The court then entered findings of fact that ignored those critical factual disputes and afforded no support for the conclusions of law.

Judge Wilkinson compounded this fundamental deficiency when he erroneously determined:

- (a) Summit County's interpretation of its Development Code in response to Utelite's inquiry regarding the proposed construction of the Facility violated the Development Code and was therefore null and void.
- (b) This interpretation deprived plaintiffs of due process of law.
- (c) The plaintiffs could wait over 18 months to challenge Summit County's course of dealings with Utelite under the Utah Open Meetings Law.
- (d) The modest procedural defect identified by the trial court required the removal of the Utelite facility.
- (e) The Union Pacific Railroad was not a necessary and indispensable party to a judicial determination regarding the historical, present and future use of its property and facilities in Echo, Utah.

The various other judges who heard various aspects of later proceedings in this case declined to correct Judge Wilkinson by revisiting his earlier erroneous ruling.

The plaintiffs' damage claims against Utelite proceeded to a jury trial based, in part, on Judge Frank Noel's reliance on the implication in Judge Wilkinson's earlier ruling that there was a zoning violation. From this Judge Noel erroneously concluded that the continued operation of the Facility was a nuisance per se. These fundamental errors in the decisions of the trial court should be reversed.

ARGUMENT

I. THE TRIAL COURT COMMITTED ERROR IN GRANTING PARTIAL SUMMARY JUDGMENT AGAINST SUMMIT COUNTY ON A DISPUTED FACTUAL RECORD.

Judge Wilkinson "adopt[ed]" Findings of Fact in granting partial summary judgment. (A. 2:1) On their face, the findings do not disclose whether the trial court viewed them as undisputed facts or findings from evidence that "persuaded" the court. (See A. 1:4, ln. 3.) If the findings are true factual determinations from a disputed record, they are inappropriate and require reversal. If the findings purport to state all "undisputed facts" material to determination of the motion for partial summary judgment, there are clearly several material facts not addressed by the trial court that are in dispute.

Summary judgment requires the absence of any genuine issue of material fact. Rule 56(c), Utah R. Civ. P. "'The trial court must not weigh the evidence or assess credibility' in a summary

judgment." Dubois v. Grand Central, 872 P.2d 1073, 1076 (Utah App. 1994) quoting Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, 681 P.2d 1258, 1261 (Utah 1984). "If summary judgment is proper . . . , the material facts are, by definition, undisputed and there are no facts which the court has to *find*." Taylor v. Estate of Taylor, 770 P.2d 163, 168-69 (Utah App. 1989) (emphasis in original). Thus, a court need not enter findings of fact in ruling on a motion for summary judgment and any such findings invite scrutiny. See, e.g., Rule 52(a), Utah R. Civ. P.; Thayne v. Beneficial Utah, Inc., 874 P.2d 120, 125 (Utah 1994).

Judge Wilkinson's ruling in favor of the plaintiffs on their Motion for Partial Summary Judgment required resolution of disputed fact issues. The key threshold fact at issue was whether Summit County's course of dealings with Utelite in December 1988 and January 1989 could somehow be characterized as constituting a legislative exercise of the zoning power resulting in an amendment to the Summit County Development Code effectively rezoning the property in question, as opposed to merely an administrative inquiry into the interpretation and application of Summit County's Development Code as applied to a specific proposed use or activity.

The plaintiffs asserted that "[o]n December 13, 1988, Utelite went before the Summit County Planning Commission seeking approval for construction of the facility in Echo." (R. 103

[emphasis added])^{6/} All Utelite or Summit County have ever acknowledged was that "[t]he President of Utelite Corporation dropped into a Planning Commission meeting on December 13, 1988, to inquire as to the zoning in Echo." (R. 183) In connection with a later Motion to Set Aside the Partial Summary Judgment, Utelite's president submitted his affidavit that "he attended the December 13, 1988, meeting . . . to inquire regarding the necessity of a building permit and any other required governmental approvals." (R. 550) See also R. 2114 (Deposition of Carsten Mortensen at 65-71). Summit County's confirming letter stated the following about the December 13, 1988, contact: "It was the consensus of the Commission that the Utelite operation . . . could be moved to the Echo location. This would be considered a permitted use at the Echo site." (A. 7)

In his Finding 2, Judge Wilkinson resolved this dispute. Without explanation, he adopted the plaintiffs' characterization of the Utelite/Summit County contacts as "seeking approval for the construction." (R. 279) Although he never so stated expressly, it appears that Judge Wilkinson viewed Summit County's response to Utelite's inquiry as the functional equivalent of a legislative decision amending the provisions of the Summit County Development Code resulting in the rezoning of the property in

^{6/} Although the Motion for Partial Summary Judgment relied upon Utelite's discovery responses, the appellants' review of the record on appeal disclosed for the first time that these were not submitted to the trial court. (R. 104-42) See Rule 4-502(3), Code of Judicial Administration. The actual language of the interrogatory answers cited in the motion did not admit that Utelite ever sought any approval.

question rather than simply an administrative decision interpreting the existing provisions of the Development Code in response to Utelite's inquiry regarding the proposed construction of the loading facility. Most of the remaining error in this action flowed from that critical unwarranted and unexplained resolution of a disputed issue of material fact. Despite the efforts of Utelite and Summit County to obtain reconsideration of this error up to the very commencement of trial, no other judge would revisit the merits of Judge Wilkinson's decision. (R. 245, 513 and 2369)

Judge Wilkinson himself acknowledged the factual dispute regarding the nature of the Summit County/Utelite contacts:

[W]hen you say that the president of Utelite walked into a meeting and discussed this and then the administrator sends him a letter and says, Go ahead and do it, that it's a permitted use, it just doesn't wash with this Court that the activities can be carried on in that manner.

(A. 1:3 lns. 10-15; emphasis added.)

The court clearly did not like what it had heard of the Utelite/Summit County contacts, but a hearing on a motion for partial summary judgment was not the place to evaluate the meager record. This impatience led Judge Wilkinson to commit error in deciding on a disputed record that Utelite "sought approval" from Summit County.

Closely related to the factual dispute over "approval" is a second factual dispute over the Railroad's long-established

nonconforming use of its Echo right-of-way^{7/} and the placement of the Facility on that right-of-way. Judge Wilkinson stated:

[I]t really boils down to a question of whether they adhered to that Code or they did not adhere to the Code, and the question of whether it's a permitted use under the Code or it was a nonconforming use. And I am not persuaded. I am not persuaded that there is a factual issue that's present as far as the Development Code is concerned.

(A. 1:3 lns. 23-25, 1:4 lns. 1-2; emphasis added.) Judge Wilkinson apparently concluded that Summit County was mistaken in viewing the Facility as a "permitted use."

The trial court's findings do not identify any facts, disputed or undisputed, to support this view of the Railroad's use; the evidence otherwise demonstrates that the Railroad's use of its right-of-way was very much in dispute. Summit County highlighted this issue in correspondence with the plaintiffs' counsel dated February 13, 1990, filed as an exhibit in opposition to the motion for partial summary judgment. (R. 200-01 attached as Addendum 8.) The Railroad later filed an affidavit regarding its use in connection with the motion for reconsideration. (R. 553-55) Finally, several witnesses testified at trial regarding past use of the right-of-way for loading purposes. (R. 2615-18; 2794-98)

Judge Wilkinson was somehow "persuaded" that the Railroad's historic use of its right-of-way did not suffice to create a

^{7/} A nonconforming use is "[a] use which lawfully existed prior to the enactment of a zoning ordinance, and which is maintained after the effective date of the ordinance, although it does not comply with the zoning restrictions applicable to the district in which it is situated. . . ." Young, Anderson's American Law of Zoning, 4 ed. (1995) § 6.01 at 481-82.

preexisting use and a valid accessory use. However, on a motion for partial summary judgment in the face of a factual dispute, the trial court was not at liberty to favor one view of the evidence over another.

The trial court itself identified a third area of factual dispute: the nature and extent of any harm to the plaintiffs caused by the alleged wrongs of Summit County.

But I am also mulling over in my mind as to the many factual issues that might be there. By that I am saying this -- and counsel has argued that the parties had not been injured. I think he has a point to a certain extent. But I guess a factual issue could be that they were parties that have or are in the realm of injury or as he used the term, the quality of life.

(A. 1:3 lns. 16-22; emphasis added.) The extent of any claimed injury to the plaintiffs was an important fact consideration where the plaintiffs sought injunctive relief that Judge Wilkinson acknowledged on the record "could do irreparable harm" to Utelite. (R. 253:16) Yet, the trial court's Order For Partial Summary Judgment promises just such relief despite remaining factual issues.

Judge Wilkinson committed error by implicitly deciding several disputed issues of material fact in order to grant partial summary judgment. This Court should vacate those findings and reverse the partial summary judgment. The trial court should consider all of the evidence regarding the Utelite/Summit County contacts and the results of those contacts

and only then determine whether the plaintiffs are entitled to any relief.^{8/}

II. SUMMIT COUNTY'S ACTIONS DID NOT VIOLATE THE DEVELOPMENT CODE AND, THEREFORE, JUDGE WILKINSON COMMITTED REVERSIBLE ERROR IN HOLDING THEM NULL AND VOID.

Judge Wilkinson clearly concluded, without any support in the record or legal analysis, that placement of the Facility on the industry track in Echo was a substantive violation of the Development Code. (R. 255:18-22) From the irrelevant and legally inconsequential facts set forth in his findings, Judge Wilkinson assumed an entire set of material facts not before him and then made the leap to an erroneous legal conclusion. Thus, several years later at trial Judge Noel faced the central issue to that point in the litigation--whether there was a substantive zoning violation--and could find only an "implicit" ruling in the 1993 Order. (R. 2366) This implicit legal conclusion, aside from being based on disputed facts and undisclosed assumptions, was wrong as a matter of law.

No one can seriously dispute that the Railroad has operated on its transcontinental right-of-way for over a century. As already noted, the Railroad in the past has operated a coal loading facility and conducted other railroad operations in Echo. Assuming that Summit County has jurisdiction over a federally

^{8/} Evidence of the Railroad's past use and the plaintiffs' alleged injuries is now in the record as the result of the trial.

granted right-of-way,^{9/} the Railroad's use of its right-of-way is a valid nonconforming use predating the Development Code.

In his February 13, 1990, letter to counsel (A. 8), Deputy County Attorney Franklin P. Andersen stated Summit County's position with respect to the allegation of a zoning violation:

I don't believe we are concerned with a zoning issue, but rather a use issue[:] . . . whether loading aggregate into train cars is a use associated with railroading activities in the Echo railroad yards.

In this instance, the railroad yard uses are non-conforming as defined in Summit County's Development Code, Section 1.6(52). Transportation of freight is the very essence of the railroad business; loading and unloading of freight is fundamental to that activity and is necessarily performed in yards or depots. The activity of Utelite Corporation is a "use customarily incidental to and located upon the same . . . [property] . . . occupied by the main use and devoted exclusively to the main use of the premises." It is thus an accessory use subordinate, yet essential, to the main railroading use. See Summit County Development Code, Section 1.6(63).

In entering partial summary judgment, Judge Wilkinson implicitly rejected this position without the least explanation why Summit County's interpretation "just [didn't] wash with him" (R. 237)

The plaintiffs' position, embraced similarly without explanation by Judge Wilkinson, would greatly limit the Railroad's use of its right-of-way. The court gave no hint as to what would be a "valid accessory use" of the Railroad's admittedly valid preexisting use of its right-of-way. While this

^{9/} Federal law governs a land grant right-of-way. Other courts have held that state or county action cannot impair a railroad's rights derived from the federal government. See Boise Cascade Corp. v. Union Pacific Railroad Co., 630 F.2d 720 (10th Cir. 1980), cert. denied, 450 U.S. 995 (1981); Puett v. Western Pacific Railroad Co., 752 P.2d 213 (Nev. 1988).

determination is one of law, it "'can be answered only by consideration of the underlying factual situation.'" Alta v. Ben Hame Corp., 836 P.2d 797, 800 (Utah App. 1992). Judge Wilkinson proceeded as if there were no "factual situation."

This implicit legal conclusion led Judge Wilkinson to consider whether Summit County had made a fundamentally legislative decision on December 13, 1988, to change the zoning designation of the Railroad's property. Judge Wilkinson found that Summit County had made a formal "zoning decision" in the sense of exercising the legislative power to amend the provisions of the Summit County Development Code with respect to the Railroad's property as opposed to merely stating its administrative interpretation of the relevant provisions of the Development Code.

The record shows the following sequence of relevant events:

1. The president of Utelite contacted Jerry Smith, a member of the Summit County planning staff, to inquire whether a building permit was required for construction of the Facility at Echo. (R. 2114 at 65-67)

2. In response, Smith stated his belief that there would be no building permit or other requirements, but suggested that Utelite confirm this with the Planning Commission. (R. 2114 at 70; R. 550)

3. Before the Planning Commission on December 13, 1988, Mr. Smith told the Planning Commission what Utelite proposed and

what he had stated in response and asked whether the Planning Commission agreed with him. (R. 2114 at 68-71)

4. The Planning Commission indicated its agreement with Smith's statements to Utelite. The entire informal discussion took less than five minutes. (R. 2114 at 71)

To characterize this as a legislative exercise of the zoning power is to transform a citizen's casual request for information into a full-blown deliberation by a public body. Such routine "over-the-counter" inquiries are made on a daily basis in jurisdictions all over the state of Utah. In this case, the trial court improperly characterized that routine inquiry and response as somehow constituting a procedural violation of the Development Code.

The Court and the parties can only speculate as to the reasoning behind Judge Wilkinson's conclusion that Summit County violated its own Development Code. However, Summit County's conclusion remains undisputed: the activity of loading rail cars on an industry track in a railroad yard on a railroad right-of-way in a transportation corridor constitutes an accessory use to the pre-existing use of rail traffic. Conversely, the course of dealings between Summit County and Utelite cannot fairly be characterized as a legislative exercise of the zoning power resulting in an amendment to the Development Code with respect to the use of the Railroad's property. At a minimum, this Court should reverse the trial court's summary judgment and remand for appropriate findings.

III. THE TRIAL COURT CLEARLY ERRED IN DETERMINING THAT THE ACTIONS OF SUMMIT COUNTY DEPRIVED PLAINTIFFS OF DUE PROCESS OF LAW.

Without explanation, Judge Wilkinson found that Summit County had not afforded the plaintiffs due process. To find a lack of due process under the U. S. Constitution, a court must determine whether there is a protected liberty or property interest and, if so, what procedures are required to satisfy due process requirements.^{10/} Matthews v. Eldredge, 424 U.S. 319 (1976). See also Gray v. Dep't of Employment Security, 681 P.2d 807, 816 (Utah 1984) ("[t]he prerequisites to the application of due process protections are: (1) state action and (2) a constitutionally protected liberty or property interest").

In this action, both the plaintiffs and the trial court employed the term "due process" without the slightest heed to its legal content. The plaintiffs did not allege or prove the existence of a protected property interest. They made no showing of what process was appropriate to protect their interests, much less that they were deprived of that protection. The court below likewise failed to engage in the requisite due process analysis.

Even under circumstances where such allegations were adequately supported by the record, a mere violation of the Utah Open and Public Meetings Law does not rise to the level of a deprivation of due process. First, the right created by the statute is a legislatively created right, not a fundamental

^{10/} The demonstration of a property interest is also required under the state constitution. See The Celebrity Club Inc. v. Utah Liquor Control Comm'n, 657 P.2d 1293, 1298 (Utah 1982).

property or liberty right. Second, Utah Code Ann. § 52-4-1, et seq. provides a remedy (i.e., process) to address the claims of violation of the Open Meetings Act. See Utah Code Ann. §§ 52-4-8 through -10. Because there is a process available, there is no basis for claiming denial of due process. See Smith v. Colorado Dep't of Corrections, 23 F.3d 339, 341 (10th Cir. 1994) ("Fourteenth Amendment due process guarantees pertaining to property are satisfied when an adequate, state post-deprivation remedy exists for deprivations. . . .").

The core issue remains whether the course of dealings between Utelite and Summit County was administrative in character, not requiring notice and hearing, or a fundamental exercise of legislative discretion resulting in a rezoning of the Railroad's property which would require notice and hearing in order to satisfy due process requirements. The sole evidence before the trial court was that the activities were administrative. Absent demonstration of a protected interest and identification of the proper process to protect that interest, no finding of lack of due process can logically or legally follow. The trial court's determination that Summit County deprived the plaintiffs of due process is erroneous and should be reversed.

IV. THE TRIAL COURT ERRED IN DETERMINING THAT SUMMIT COUNTY'S ACTIONS VIOLATED THE OPEN MEETINGS LAW.

The Utah Open Meetings Law provides that any "final action" taken in violation of the provisions of the statute is "voidable" if suit is "commenced within 90 days after the action" Utah Code Ann. § 52-4-8. The undisputed facts in this case

establish that plaintiffs waited until July 31, 1990, approximately 16-1/2 months late, to file an action despite the commencement of construction on or about February 21, 1989 (R. 128), the first loading of railroad cars on April 15, 1989 (R. 109), and receipt of correspondence from the Deputy County Attorney outlining the County's position in considerable detail on February 13, 1990. (A. 8)

In the face of those undisputed facts, Judge Wilkinson, without any explanation, accepted the plaintiffs' argument that the statute was subject to "equitable tolling."^{11/} (R. 224; A. 2:3) By this, he presumably meant that facts existed to place the Summit County/Utelite contacts within the ambit of the discovery rule articulated in Myers v. McDonald, 635 P.2d 84 (Utah 1981). (R. 225) The statute would be tolled if Summit County engaged in concealment of facts or there existed "exceptional circumstances that render the application of a statute of limitations irrational or unjust" Warren v. Provo City Corp., 838 P.2d 1125, 1129 (Utah 1992).

What evidence persuaded Judge Wilkinson to invoke the "equitable tolling doctrine" is yet another mystery for, aside from a single conclusion of law (No. 4), he offered no explanation for his ruling. (A. 2:3) The plaintiffs argued that the very omissions that constituted the violation of the Act--

^{11/} "Equitable tolling" is a doctrine developed in the federal courts that "permits a plaintiff to avoid the bar of the statute of limitations if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim." Cada v. Baxter Healthcare Corp., 920 F.2d 446, 451 (7th Cir. 1990). No reported Utah case has used this term.

failure to give notice and to keep minutes--were the "exceptional circumstances" leading to concealment of the claim: "the very actions of which Plaintiffs complain also served to conceal the violations of the Act." (R. 225)

If lack of notice, absence of minutes or the secret nature of a meeting sufficed to permit equitable tolling, the 90-day limitations period, which has no express tolling provision, would be a nullity. Any meeting covered by the statute would necessarily afford the basis for a claim of equitable tolling.

As applied by Judge Wilkinson, the equitable tolling doctrine suspends forever the 90-day limitations period. The limitations period was not tolled; it was eliminated. This extraordinary conclusion requires a determination that neither construction of the Facility, commencement of operations, nor even Summit County's pointed correspondence with the plaintiffs' attorney (A. 8) put the plaintiffs on notice; they were free to file their Open Meetings Act claim at their leisure.

The 90-day limitation on voiding final action for non-compliance with the open and public meetings statutes seeks finality with respect to governmental action. The application of the Act now before this Court contradicts that policy. However one characterizes the December 13, 1988, contact, Utelite was entitled to (and did in fact) rely on the representations then made. To void any such action, the plaintiffs had to file an action by March 13, 1989. Instead of doing so, they watched as construction proceeded on the Facility. Sixteen and one-half

months late they sued to void the purported "final action." By then, the facility was built and had been in operation for over a year. The policy of finality mandates the application of the statute of limitations. This Court should reverse the partial summary judgment on the Open Meetings Act claim and vacate the award of fees under Utah Code Ann. § 52-4-9(2).

Should the Court somehow determine the 90-day statute of limitations in Utah Code Ann. § 52-4-8 does not apply to these facts and circumstances, then it would become necessary to evaluate the merits of the plaintiffs' claim alleging a violation of the Open Meetings Law. It is important to note in that context that the plaintiffs do not dispute the adequacy of the notice for the December 13, 1988, Summit County Planning Commission meeting. Rather, they focus on the level of detail required in the agenda for that meeting.

Taken to its logical conclusion, the plaintiffs' position would require specific notice and publication in the agenda of every single item discussed at a public meeting, no matter how ministerial or insignificant. This argument fails the test of reason. It is common for a public body of a local governmental unit subject to the Open Meetings Law to permit time for broad citizen input or staff reports as part of a meeting agenda without specific notice. Convening such a public body for the limited purposes of discussing or implementing administrative or operational matters is not even defined as a meeting to which the provisions of the statute apply. Utah Code Ann.

§ 52-4-2(2)(b)(ii). It logically follows that such routine operational issues do not require a separate listing on the agenda and are not regarded as the type of "final action" to which the provisions of the Act apply.

V. THE TRIAL COURT COMMITTED ERROR IN ORDERING THE SHUTDOWN OF THE UTELITE FACILITY.

The confusion underlying Judge Wilkinson's findings and substantive legal conclusions extends to his articulation of the relief granted. At the hearing on the motion, the trial court stated unequivocally: "I purposely am not issuing the injunctive relief." (R. 240:25) The judge noted that issuance of injunctive relief "could put them [Utelite] out of business. It could do irreparable damages to them" (R. 238:15-16)

The Order For Partial Summary Judgment itself reads:

The effectiveness of this order is stayed for sixty (60) days from the date this order is entered. If no appeal is taken within that time period, then an injunction shall issue and Defendant Summit County shall be required to effectuate the removal of Utelite from their currently occupied site.

(A. 3:2) This language promises future equitable relief for the plaintiffs; yet once again, neither the findings nor the underlying record set forth evidence to warrant that relief.

The plaintiffs and the trial court rely on Utah Code Ann. § 17-27-23 (1990, repealed July 1, 1992) to claim injunctive relief. That section authorized "any owner of real estate within the county" to "institute injunction . . . proceedings to prevent, enjoin, abate or remove the unlawful building, use or act." This statute has been construed not to require "a specific

showing of irreparable injury" Utah County v. Baxter, 635 P.2d 61, 65 (Utah 1981). (Note that the current version of this statute permits only the county to obtain an injunction by proof of a zoning violation alone. See Utah Code Ann.

§ 17-27-1002(1)(b).)

Judge Wilkinson proceeded as if he had no discretion in fashioning a remedy for the perceived deviation from the Development Code. He ruled on an extremely limited fact record and disregarded the known facts that would dictate a less draconian remedy. First, the court ignored the plaintiffs' delay in bringing the action after they were aware of the construction, the operation and any alleged annoyance. Second, the court did not take into consideration Utelite's abandonment of the Wanship loading site at the Railroad's request. By the August 23, 1993, date of the partial summary judgment, Utelite had drastically changed its position--the Railroad had abandoned the Park City branch line and Utelite no longer had an acceptable existing alternate site for loading. Finally, the court overlooked the difficult position of Summit County. The Facility was at Echo because Summit County told Utelite that the placement would constitute a "permitted use." Such facts could well support a claim of "equitable estoppel" against the County. See Alta v. Ben Hame Corp., 836 P.2d 797, 802-03 (Utah App. 1992).

Judge Noel at trial in 1995 pursued an inquiry into the facts that Judge Wilkinson failed to make in 1991. "[S]olely by reason of Judge Wilkinson's August 23, 1996, Order and the

findings implicit in that ruling," Judge Noel "found . . . that the Facility is a nuisance per se." (R. 2335) However, after considering four days of testimony regarding Utelite's operation of the Facility and "the Court's visit to the Facility while in operation and the Court's and third-party's review of videos, tapes and photographs of the Facility in operation," Judge Noel found:

[T]he Facility at present (a) is not injurious to the plaintiffs, (b) does not adversely affect the plaintiff's [sic] use and enjoyment of their property, and (c) does not cause any property damage to the plaintiffs.

(A. 6:4) The court concluded that the plaintiffs "are not entitled to any further equitable relief from this Court other than the equitable relief previously granted by Judge Wilkinson."

(A. 6:5)

The plaintiffs have now had the opportunity to be heard with respect to the merits of the placement of the Facility. Judge Noel (and the jury, which awarded only nominal damages even *after* being instructed that the Facility was a nuisance per se) found against the plaintiffs on the merits. To the extent the plaintiffs claim entitlement to an additional administrative hearing on any alleged zoning change or violation, the appropriate remedy should be the granting of such a hearing, not the closure and removal of the Facility. Judge Wilkinson committed error in identifying closure as the ultimate remedy in his August 23, 1993, Order and that portion of the Order should be reversed.

VI. THE TRIAL COURT ERRED IN DETERMINING THAT UNION PACIFIC RAILROAD WAS NOT A NECESSARY AND INDISPENSABLE PARTY TO THIS ACTION.

The Railroad owns the right-of-way on which Utelite built the Facility. The plaintiffs alleged and the trial court ruled that, as a matter of law, the Railroad could not use its right-of-way in Echo to load the goods of rail customers such as Utelite. At the same time, the plaintiffs argued and the trial court agreed that the Railroad was not an indispensable party to an action adjudicating its use of the right-of-way. This ruling was error.

Rule 19, Utah R. Civ. P., governs joinder of indispensable parties:

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of action shall be joined as a party in the action if . . . he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may . . . as a practical matter impair or impede his ability to protect that interest.

(Emphasis added).

A party who must be present for a full and fair determination of his rights as well as the rights of the other parties is an indispensable party. Call v. City of West Jordan, 788 P.2d 1049, 1054-55 (Utah App. 1990). "The purpose of the rule is to guard against the entry of judgments which might prejudice the rights of such parties in their absence." Cowen and Co. v. Atlas Stock Transfer Co., 695 P.2d 109, 114 (Utah 1984); see also Bonneville Tower Condominium Management Comm'n v. Thompson Michie Assoc., Inc., 728 P.2d 1017, 1019 (Utah 1986) ("A

plaintiff may not obtain relief adverse to the property rights of others who are not adverse parties to the case without bringing them before the court").

The Railroad is an indispensable party whose property rights are directly impacted by this litigation. Judge Wilkinson's Bench Ruling acknowledged as much:

I am also denying the Motion that the Union Pacific Railroad is an indispensable party. This Court is not convinced that it is. The parties entered into a contract with Utelite, and it will affect them. But they are not an indispensable party in this Court's opinion as far as the underlying decision that was made concerning the installation of the facility at Echo.

(A. 1:2 lns. 9-15 [emphasis added].) To so rule, the trial court had to ignore the precedent set by finding a violation of the Development Code in the placement of the Facility. As construed by the plaintiffs and Judge Noel, Judge Wilkinson held that the Railroad's nonconforming use at Echo did not permit an accessory use of loading customer materials onto railroad cars.

This action centers on the Railroad's use of its Echo right-of-way: whether surrounding AG-1 or RR-2 zoning displaces the Railroad's preexisting nonconforming use. The Railroad has a substantial interest in assuring that the accessory use of its property for loading continue despite the change in uses of surrounding property. The Railroad is clearly an indispensable party to such a determination.

VII. THE TRIAL COURT ERRED IN ADHERING TO PRIOR RULINGS AND ORDERS OF JUDGE WILKINSON WHEN THE ERROR IN THOSE RULINGS WAS DEMONSTRATED DURING THE COURSE OF THE PROCEEDINGS.

Judge Young, Judge Brian and Judge Noel each declined the invitation to revisit the issues resolved by Judge Wilkinson despite an expanded record and the manifest absence of any justification for the earlier partial summary judgment. Nothing in the record indicates that they agreed with his ruling, but they apparently felt bound in some fashion by the law of the case doctrine.

Application of that doctrine arises frequently in Summit County and other counties with rotating judge assignments. See Trembly v. Mrs. Fields Cookies, 884 P.2d 1306, 1311 (Utah App. 1994); Gillmor v. Wright, 850 P.2d 431, 439 (Utah 1993) (Orme, Ct. App. J. concurring). Judge Wilkinson's ruling was not "law of the case." While generally "a judge cannot overrule the decision of another judge of the same court," DeBry v. Valley Mortgage Co., 835 P.2d 1000, 1003 (Utah App. 1992), "[t]he second judge may reverse the first judge's ruling if the issues decided by the first judge are presented to the second judge in a 'different light'. . . ." Sittner v. Big Horn Tar Sands & Oil, Inc., 692 P.2d 735, 736 (Utah 1984).

Judge Orme of this Court, concurring in the Supreme Court case of Gillmor v. Wright, *supra*, offered the following critique of the law of the case doctrine as applied to an erroneous ruling of Judge Wilkinson in Summit County:

I believe [the law of the case doctrine] was viewed with undue reverence by Judge Murphy, probably because the prior

determination had been made by a fellow judge who previously had the Summit County assignment. [T]his issue recurs with some frequency in counties served by rotating judges. . . .

850 P.2d at 438. In Gillmor, Judge Murphy had concluded that law of the case "dictated" adherence to Judge Wilkinson's previous ruling. 850 P.2d at 439. Judge Orme argued that this view produced "an unwarranted delay in delivering justice and burden[ed] the appellate courts with issues that are capable of expeditious resolution at the trial level":

The law of the case doctrine is not a limit on judicial power, but only a practice designed "to protect both court and parties against the burdens of repeated reargument by indefatigable diehards." [Citations omitted.] "The doctrine is not an inexorable command that rigidly binds a court to its former decisions but rather is an expression of good sense and wise judicial practice." [Citations omitted.] *Id.*

Judge Orme saw a practical difficulty with adherence to law of the case in protracted litigation handled by different judges:

Simply put, the law of the case doctrine does not prohibit a judge from catching a mistake and fixing it. [Citations omitted.] . . . If this had been Judge Murphy's case on his Salt Lake County individual calendar, and he had entered some interim order like Judge Wilkinson did, and he became convinced at trial that he was wrong, he would not have hesitated to fix it, relying on his fuller knowledge of the matter, more complete briefing, or other circumstances exposing the error. The happenstance that Summit County is still on a master calendar, served by constantly rotating judges, should not change that prerogative of the judge who actually decides the case on its merits. . . . [T]he two judges, while different persons, constitute a single judicial office for law of the case purposes, namely, the third district judge serving Summit County. (Emphasis added.)

Judge Orme offered the following solution:

In situations like the one before us, a judge who recognizes a mistake by the judge previously concerned with the same case and yet fails to correct that mistake simply delays the inevitable correction at the appellate level. In my view,

if Judge Murphy could have deviated from his own prior interim decision--and he clearly could have done so here--he could have deviated from Judge Wilkinson's. And he could have done so with certainty that this court would not reverse a second judge's sound correction of a prior error on the basis that the correction was not in accordance with the law of the case established by the first judge.

Id. at 439-40 (Orme, Ct. App. J. concurring)

This rationale has subsequently been followed in this Court. See Trembly, *supra*, 884 P.2d at 1311 (where the ruling on summary judgment was not a final order, the second rotating judge was not precluded from reevaluating the prior ruling). The facts of record simply did not support Judge Wilkinson's conclusion that Summit County had violated its Development Code. However, Judge Noel felt constrained to embrace the partial summary judgment and its implications. This led to extensive proceedings at great expense to the parties but of limited utility.

It is clear from the jury's nominal verdict and the Findings and Conclusions Re: Equitable Relief ultimately entered by Judge Noel that neither fact finder vindicated Judge Wilkinson's view of the merits. While these determinations now cap any relief available upon retrial of this action, the trial need not have occurred had the judges who handled the case after Judge Wilkinson examined substantively the premises on which they were proceeding.

VIII. THE TRIAL COURT INCORRECTLY DETERMINED THAT A CLAIM OF NUISANCE PER SE CAN BE BASED ON AN ALLEGED LOCAL ZONING VIOLATION.

Judge Noel, relying on Judge Wilkinson's implicit finding of a violation of the Development Code, held the Facility to be a

nuisance per se. So instructed, the jury considered only the issue of damages and returned a verdict of general damages ranging from \$1,500 to \$5,000 per plaintiff for alleged injuries spanning over six years. The jury found no injury to property or other special damages and no exemplary damages. (A. 5) Judge Noel found that the Facility was not presently causing any injury to the plaintiffs. (A. 6)

To prove a nuisance per se, a plaintiff must demonstrate that "the conduct creating the nuisance is also specifically prohibited by statute. . . ." Erickson v. Sorensen, 877 P.2d 144, 149 (Utah Ct. App.), *cert. denied*, 883 P.2d 1359 (Utah 1994). Violation of a county zoning ordinance is not a nuisance per se. Padjen v. Shipley, 553 P.2d 938, 939 (Utah 1976) ("It was error to deem a violation of the ordinance a nuisance per se, viz., as a matter of law").

The trial court apparently viewed the language cited above as nothing more than dicta. However, the plaintiffs failed to cite any authority holding a zoning violation alone as a sufficient basis for finding a nuisance per se. Further, the plaintiffs did not identify a single instance of conduct on the part of Utelite that constituted a violation of a "specific statutory prohibition." Erickson, 877 P.2d at 149. In the words of the Erickson court, the plaintiffs failed to demonstrate that the legislature had "already struck the balance" between the "relative interests of the plaintiff and defendant" in favor of either party. *Id.* (citing Turnbaugh v. Anderson, 793 P.2d 939,

943 (Utah 1990)). Judge Noel's overly broad application of nuisance per se should be reversed.


CONCLUSION

The most obvious resolution of this appeal is to remand for a hearing on the merits regarding fact issues improperly resolved by Judge Wilkinson. The results of the trial relating to damages would continue to serve as a ceiling to any relief on tort claims.


The Court may also choose to hold as matter of law that the Facility is an accessory use to the Railroad's valid preexisting use. Such a holding comports with the record and would bring this litigation to an end.

RESPECTFULLY SUBMITTED this 15th day of October, 1996.

WILLIAMS & HUNT

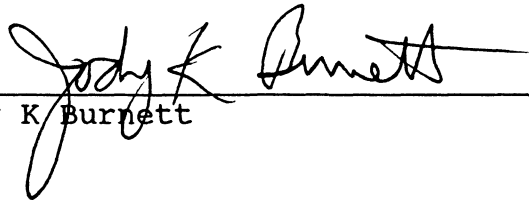
By 
Jody K. Burnett
Attorneys for Defendants/
Appellants Summit County

VAN COTT, BAGLEY, CORNWALL & MCCARTHY

By 
Eric C. Olson
Attorneys for Defendant/
Appellant Utelite Corporation

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of October, 1996, two (2) true and correct copies of the foregoing JOINT BRIEF OF APPELLANTS was mailed, postage prepaid thereon, by first class mail in the United States mail, to James L. Warlaumont, COLLARD, APPEL & WARLAUMONT, 9 Exchange Place, Suite 1100, Salt Lake City, Utah 84111.



Jody K. Burnett

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IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

FILED

JUL 25 1991

JANE HARPER, et al., :
Plaintiffs, : Case No. 10718 Clerk of Summit County
v. : Transcript of: By Deputy Clerk
SUMMIT COUNTY, UTELITE CORP., : JUDGE'S BENCH RULING
et al., :
Defendants. :
* * *

BEFORE THE HONORABLE JUDGE HOMER F. WILKINSON

Coalville, Utah

Monday, July 8, 1991

APPEARANCES

For the Plaintiffs: JEFFREY W. APPEL, Esq.
Haley & Stolebarger
175 South Main Street, #1000
Salt Lake City, Utah 84111
For the Defendant FRANKLIN P. ANDERSON, Esq.
Summit County: Deputy Summit County Attorney
60 North Main Street
Coalville, Utah 84017
For the Defendant JOHN T. NIELSEN, Esq.
Utelite Corporation: VanCott, Bagley, Cornwall &
McCarthy
50 South Main Street, #1600
Salt Lake City, Utah 84144

REPORTER: SUZANNE WARNICK, CSR, RPR-CM
Official Court Reporter
240 East 400 South, #534
Salt Lake City, Utah 84111
801-535-5479

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MONDAY, JULY 8, 1991; P.M. SESSION

J U D G E ' S B E N C H R U L I N G

THE COURT: Well, let me indicate to you that I have gone over the material, and the Court is still vascillating somewhat as far as the situation is concerned. But let me start to give you my ruling.

First of all, I am denying the Motion to Dismiss on the question of standing. I am also denying the Motion that the Union Pacific Railroad is an indispensable party. This Court is not convinced that it is. The parties entered into a contract with Utelite, and it will affect them. But they are not an indispensable party in this Court's opinion as far as the underlying decision that was made concerning the installation of the facility at Echo.

The Court is also of the opinion that the plaintiffs do not have the responsibility here as far as exhausting administrative remedies. I agree with everything both counsel say on that. But I think that the administrative remedy is a situation where of course there has been a zoning change or a question arises, then they have to take that to the Board of Equalization for them to make that decision and then take the course.

I think that here we do have a situation involved as far as a legal issue involving due process, a possible

1 constitutional issue. I also am of the opinion that the
2 plaintiffs are not out of court on the Statute of Limitations
3 under the Open Meeting Law. I am not thoroughly convinced
4 that the Open Meeting Law is the crux of this case either,
5 but I don't think they are out of court.

6 Now, we get to the Motion for Summary Judgment,
7 and I am having a hard time rationalizing in my mind that the
8 County did not violate the office as far as the development
9 laws, the Development Code and the Zoning Code as far as the
10 properties are concerned. And also, when you say that the
11 president of Utelite walked into a meeting and discussed this
12 and then the administrator sends him a letter and says, Go
13 ahead and do it, that it's a permitted use, it just doesn't
14 wash with this Court that the activities can be carried on in
15 that manner.

16 But I am also mulling over in my mind as to the
17 many factual issues that might be there. By that I am saying
18 this -- and counsel has argued that the parties had not been
19 injured. I think he has a point to a certain extent. But I
20 guess a factual issue could be that they were parties that
21 have or are in the realm of injury or as he used the term,
22 the quality of life.

23 And of course it's argued that the Development
24 Code is a factual issue. But yet it really boils down to a
25 question of whether they adhered to that Code or they did not

1 adhere to the Code, and the question of whether it's a
2 permitted use under the Code or it was a nonconforming use.
3 And I am not persuaded. I am not persuaded that there is a
4 factual issue that's present as far as the Development Code
5 is concerned.

6 I guess what I am saying and in talking to myself
7 and making my decision here, that this Court is of the
8 opinion that the Motion by the plaintiff is well taken, that
9 the Motion for Summary Judgment should be granted. The Court
10 does grant their Motion for Summary Judgment.

11 However, I do decline to grant their Motion for a
12 Cease and Desist Order and for a Writ of Injunction. That I
13 don't know what the parties intend to do concerning this
14 matter -- I probably think I do. But I think that if I issue
15 that cease and desist order, that could put them out of
16 business. It could do irreparable damages to them during the
17 appellate procedure. And I think that the parties could be
18 further injured by that, but I think that that could be some
19 monetary damages. And therefore, I am going to grant the
20 Motion for Summary Judgment but refuse to grant the Motion
21 for Injunctive Relief to cease and desist

22 However, I will indicate that if this matter is
23 not taken further, within 30 or 60 days, that the injunctive
24 relief would be granted. And I am certainly not advising you
25 to appeal the case, but in my own mind I can see that there

1 is probably not much chance that you are not going to.

2 MR. NIELSEN: Would the Court mind restating or
3 explaining its ruling with respect to the time limit, the 60
4 days? I didn't quite understand.

5 THE COURT: Well, I said 30 or 60 days. I am
6 saying that if the defendants did not make the decision to
7 appeal this case within 30 days, then the Injunction and
8 Cease and Desist Order would be placed into effect. If an
9 appeal is filed, then it would not be granted pending the
10 disposition of the appeal.

11 MR. APPEL: So essentially you are giving them a
12 stay of 30 to 60 days before effectiveness?

13 MR. NIELSEN: Is it 60 or 30?

14 THE COURT: I said 60 or 30. Really I am saying,
15 how much time do you need? I know these things take time. I
16 think we better take 60 days.

17 MR. NIELSEN: I would much prefer 60.

18 THE COURT: I have no problem with that. This has
19 been going on for two or three years now. I have no problem
20 with that. Again, I am not advising you to appeal, but I am
21 saying that I can see a devastating effect that that could
22 have on the company.

23 MR. APPEL: Your Honor, by means of clarification,
24 you mentioned that I believe the Statute of Limitations did
25 not affect us with respect to the Open Meetings Act. Did you

1 find a violation of the Open Meetings Act?

2 THE COURT: Yes. I think the Open Meeting Law was
3 violated. Well, first let me state this: I don't think this
4 was ever put on the agenda. And I can understand what
5 Mr. Anderson says. It wasn't put on the agenda, and
6 therefore there was no minutes. But for them to allow an
7 individual to walk into their meeting and make a presentation
8 and then have their administrative officer respond to that,
9 that causes me concern. And I think that's a violation of --
10 maybe it wouldn't be strictly the Open Meeting Law, but it
11 would be a violation of the way their procedure was, the way
12 they were doing business concerning that. That when that
13 gentleman came in, that they then should have excluded him
14 from that or put it in the minutes or set it up saying, You
15 can appear at the next meeting and present your request.

16 MR. APPEL: Okay, your Honor.

17 THE COURT: Any other questions?

18 MR. APPEL: One final. We asked for -- I guess
19 what you have done is you have ruled that the zoning decision
20 concerning Utelite is null and void because it was
21 incorrectly done, but you are not ordering Summit County to
22 proceed with the cease and desist. But you have ruled that
23 it is null and void.

24 THE COURT: That is correct. That is correct. But
25 I purposely am not issuing the injunctive relief.

1 MR. APPEL: But the declarations that I asked for
2 have been granted?

3 THE COURT: Yes.

4 MR. APPEL: Okay.

5 THE COURT: Any other questions?

6 MR. APPEL: No, your Honor.

7 THE COURT: Mr. Appel, would you prepare the
8 pleadings and Findings of Facts?

9 MR. APPEL: I will.

10 THE COURT: If there is nothing further, then court
11 will be in recess.

12 (This concludes this Bench Ruling at 4:15 p.m.)

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C E R T I F I C A T E

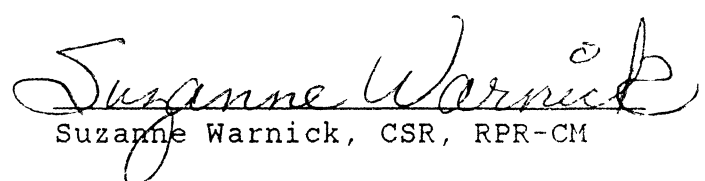
STATE OF UTAH)
 :
COUNTY OF SALT LAKE)

I, SUZANNE WARNICK, CSR, RPR-CM, do certify that I
am a Certified Shorthand Reporter, Registered Professional
Reporter with the Dertificate of Merit, and Notary Public in
and for the State of Utah.

That at the time and place of the proceedings in
the foregoing matter, I appeared as the court reporter in the
Third Judicial District Court for the Honorable Judge Homer
F. Wilkinson, and thereat reported in stenotype all of the
proceedings had therein.

That thereafter, my said shorthand notes of the
Judge's Bench Ruling were transcribed by computer into the
foregoing pages; and that this constitutes a full, true and
correct transcript of the same.

WITNESS MY HAND and official seal at Salt Lake
City, Utah, this 18th day of July 1991.


Suzanne Warnick, CSR, RPR-CM

My commission expires:
1 April 1995.

IN THE THIRD JUDICIAL DISTRICT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

No.
FILED
AUG 23 1993
Clerk of Summit County
Deputy Clerk

JANE HARPER, RICHARD D. HARPER,
FRANK CATTELAN, RICHARD RICHINS,
and ETHEL S. RAYMOND,

Plaintiffs,

v.

SUMMIT COUNTY, a body politic, the
SUMMIT COUNTY COMMISSION, and the
SUMMIT COUNTY PLANNING COMMISSION,
and UTELITE CORPORATION,

Defendants,

FINDINGS OF FACT
CONCLUSIONS OF LAW

Civil No. 10718

Judge Homer F. Wilkinson

The above-entitled matter came on regularly for hearing July 8, 1991, the Honorable Homer F. Wilkinson presiding. The Plaintiffs were represented by Jeffrey W. Appel of Haley & Stolebarger, Defendants Summit County was represented by Franklin P. Anderson and Defendant Utelite Corporation was represented by John T. Nielsen. Argument was heard with respect to Defendant Utelite and Summit County's Motions to Dismiss and Plaintiffs' Motion for Partial Summary Judgment. Having heard the arguments of counsel and being fully advised of the premises, the Court makes its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

The Court hereby adopts the following Findings of Fact:

1. In the Fall of 1988, Defendant Utelite Corporation (hereinafter "Utelite") decided to relocate a railroad loadout facility (hereinafter "Utelite facility") to Echo, Utah.

2. On December 13, 1988, Utelite went before the Summit County Planning Commission seeking approval for construction of the facility in Echo.

3. The posted agenda for the December 13, 1988 meeting of the Planning Commission provides no notice to the public that there would be a discussion concerning the proposed relocation and construction of the Utelite facility.

4. The minutes of the December 13, 1988 meeting of the Planning Commission contain no reference to a discussion or any testimony concerning the proposed relocation and construction of the Utelite facility.

5. Utelite received verbal permission at the December 13, 1988 meeting of the Planning Commission to begin construction of the facility.

6. On January 13, 1989, Jack Willis on behalf of Robert McGregor, Chairman of the Planning Commission, sent a letter to Utelite confirming a discussion at the December 13, 1988 meeting of the Planning Commission regarding the proposed relocation of the Utelite facility.

7. The January 13, 1989 letter indicated that it was the consensus of the Planning Commission that the Utelite operation could be moved to the Echo location and would be considered a "permitted use" at the Echo site.

8. Construction of the Utelite facility began on or about February 21, 1989 at a location directly across from and adjacent to a residential area of Echo in which Plaintiffs reside.

9. On February 28, 1989, Utelite applied for and received from Summit County, building permit # 89007, which is specifically designated as an "electrical permit."

10. The Utelite facility was substantially completed by April 25, 1989, at which time the first loading of railroad cars took place.

11. In October 1989, Utelite made application for a building permit from Summit County, which permit was issued on November 28, 1989 as building permit # 89291 for the construction of the loadout facility in Echo.

CONCLUSION

The Court concludes, as a matter of law, that:

1. Plaintiffs have standing to maintain this action pursuant to the terms of the Summit County Development Code, the laws of the State of Utah and the Constitution of the State of Utah.

2. Union Pacific Railroad is not an indispensable party to this action.

3. Plaintiffs in this instance were not required to exhaust administrative remedies for the reason that due process and other constitutional rights are involved and were violated.

4. The statute of limitations contained in the open meeting law Utah Code Ann. §52-4-1 et seq. has not been violated due to application of the equitable tolling doctrine.


5. The decision of Defendant Summit County concerning the

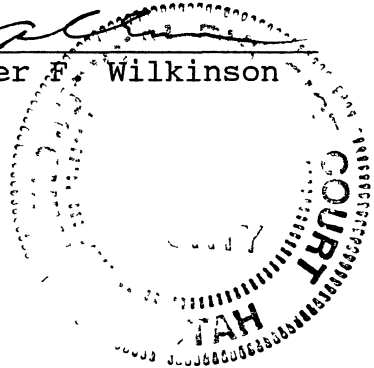
approval of utilization of the site currently occupied by Utelite Corporation was in violation of the provisions of the Summit County Development Code and, thus, that decision is null and void.

6. The decision of Defendant Summit County concerning the approval of utilization of the site currently occupied by Utelite Corporation was made in violation of the provisions of the Open Meeting Act Utah Code Ann. §52-4-1- et seq.

7. Injunctive relief requiring the County to ensure the removal of the Utelite facility is granted with the stay of the effectiveness of that portion of this order for sixty (60) days from the date of this order.

DATED this 23 day of August, 1993.


Honorable Homer F. Wilkinson



IN THE THIRD JUDICIAL DISTRICT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

No.
FILED

AUG 23 1993

Clerk of Summit County

By
Deputy Clerk

JANE HARPER, RICHARD D. HARPER,
FRANK CATTELAN, RICHARD RICHINS,
and ETHEL S. RAYMOND,

Plaintiffs,

v.

SUMMIT COUNTY, a body politic, the
SUMMIT COUNTY COMMISSION, and the
SUMMIT COUNTY PLANNING COMMISSION,
and UTELITE CORPORATION,

Defendants,

ORDER FOR PARTIAL SUMMARY
JUDGMENT

Civil No. 10718

Judge Homer F. Wilkinson

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED Plaintiffs Motion for Partial Summary judgment is granted and that the actions of Defendant Summit County with respect to the zoning decision allowing Utelite to occupy its current site was accomplished in violation of law, the Summit County Development Code, and the Open Meeting's Act and is thus null and void for the following reasons:

1. The acts and omissions of the Defendants leading to the emplacement of the Utelite Facility in Echo, Utah, were contrary to the Summit County Development Code and are therefore null and void.

2. Defendants actions were in violation of the Open and Public Meeting's law, Utah Code Ann. § 52-4-1 et seq.


3. Defendants acts and omissions have harmed Plaintiffs without providing them due process of law.

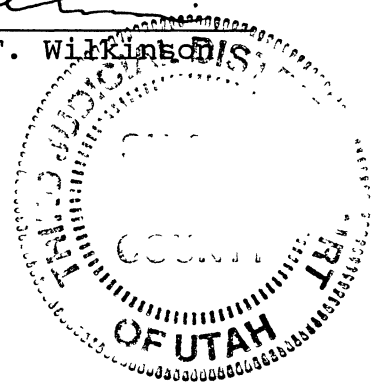
4. The effectiveness of this order is stayed for sixty (60) days from the date this order is entered. If no appeal is taken within that time period, then an injunction shall issue and Defendant Summit County shall be required to effectuate the removal of Utelite from their currently occupied site.

5. Defendant Utelite Corporation and Defendant Summit County's Motions to Dismiss are denied.

DATED this 23 day of August, 1993.

So Ordered:


Honorable Homer F. Wilkinson



VAN COTT, BAGLEY, CORNWALL & MCCARTHY
John T. Nielsen (#2408) ✓
Eric C. Olson (#4108) ✓
Attorneys for Defendant Utelite Corporation
50 South Main Street, Suite 1600
P. O. Box 45340
Salt Lake City, Utah 84145
Telephone: (801) 532-3333

NO. FILED

SEP 7 1995

Clerk of Summit County

By _____
Deputy Clerk

*signed in
SL by Jody
Pat B. Brian
9-6-95*

IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

JANE HARPER, RICHARD D.)	
HARPER, FRANK CATTELAN,)	ORDER RE: MOTIONS FOR
RICHARD RICHINS and THE)	PARTIAL SUMMARY JUDGMENT
DICKER HILL TRUST,)	
)	
Plaintiffs,)	Civil No. 90-03-10718
)	
vs.)	Honorable Pat B. Brian
)	
SUMMIT COUNTY, a body)	
politic, the SUMMIT COUNTY)	
COMMISSION, SUMMIT COUNTY)	
PLANNING COMMISSION and)	
UTELITE CORPORATION,)	
)	
Defendants.)	
)	

On May 30, 1995, this Court heard argument in the above matter with respect to the various motions of the parties for partial summary judgment on claims and defenses in this action. The plaintiffs were represented by James L. Warlaumont. The Summit County defendants were represented by Jody K Burnett and Franklin P. Andersen. The defendant Utelite Corporation ("Utelite") was represented by Eric C. Olson. By agreement of the parties, the hearing took place in Salt Lake City, Utah rather than in Summit County, Utah.

The Court having reviewed the submissions of the parties, having heard the argument of counsel and being otherwise sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. Utelite's Motion for Partial Summary Judgment on the claim of nuisance per se is denied.

2. Utelite's Motion for Partial Summary Judgment on the claim of trespass is denied.

3. Utelite's Motion for Partial Summary Judgment on the claim of intentional and negligent infliction of emotional distress is granted. There exists no genuine issue of material fact with respect to the alleged outrageousness of Utelite's conduct and Utelite is entitled to judgment on the Tenth Cause of Action as a matter of law. Nothing in this Order, however, shall limit the plaintiffs from claiming damages for emotional distress under their nuisance and trespass claims.

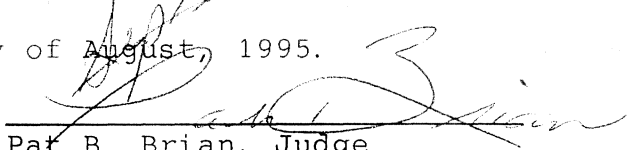
4. Utelite's Motion for Partial Summary Judgment on the claim for attorney's fees and costs pursuant to Utah Code Ann. § 78-27-56 is granted and the Eleventh Cause of Action is dismissed without prejudice to the plaintiffs' renewing said claim after the conclusion of trial.

5. The plaintiffs' Motion for Partial Summary Judgment on Utelite's defenses of estoppel, waiver and laches is denied.


6. The Court reserves until after the jury trial herein any ruling on Summit County's Motion for Partial Summary Judgment on the claim for award of attorney's fees and costs

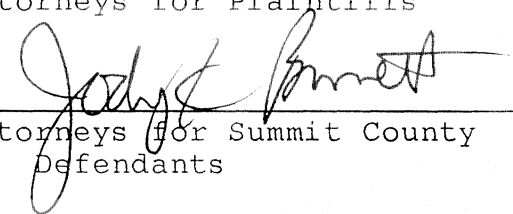
under 42 U.S.C. §§ 1983 and 1988 as well as Utah Code Ann. §
54-2-9.

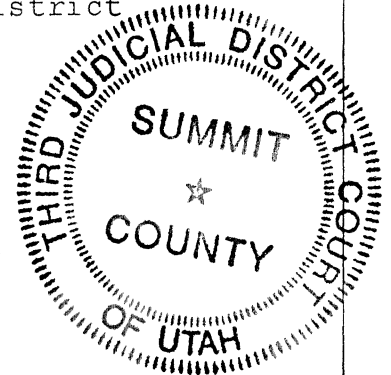
DATED this 6 day of ^{September} ~~August~~, 1995.


Pat B. Brian, Judge
Third Judicial District
Summit County

Approved as to Form:


Attorneys for Plaintiffs


Attorneys for Summit County
Defendants



BOOK T PAGE 756

No.
FILED

FEB 27 1996 103

Clerk of Summit County

IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY ~~By~~
~~Deputy Clerk~~

STATE OF UTAH

JANE HARPER, RICHARD D.)
HARPER, FRANK CATTELAN,)
RICHARD RICHINS and THE)
DICKER HILL TRUST,)

Plaintiffs,)

vs.)

SUMMIT COUNTY, a body)
politic, the SUMMIT COUNTY)
COMMISSION, SUMMIT COUNTY)
PLANNING COMMISSION and)
UTELITE CORPORATION,)

Defendants.)

FINAL JUDGMENT ON SPECIAL
VERDICT

Civil No. 90-03-10718

Judge Frank G. Noel

No.
FILED

FEB 27 1996

Clerk of Summit County

By
Deputy Clerk

The damage claims by the plaintiffs herein against the defendant Utelite Corporation were tried to a jury in this Court on September 12 through 15, 1995. The Court also heard the evidence with respect to the plaintiffs' claim for equitable relief supplementary to any such relief already awarded in this action.

Judge Frank G. Noel presided at the trial. The plaintiffs were represented by James L. Warlaumont. The defendant was represented by Eric C. Olson. The Court now enters its Final Judgment in this action disposing of all remaining claims in this matter.

Before the commencement of trial, the Court determined that the Order Granting Partial Summary Judgment entered on August 23, 1993 by Judge Homer Wilkinson (the

"Wilkinson Order") was law of the case and, by implication, the Wilkinson Order included the finding that the Utelite loading facility was in violation of the Summit County Development Code. Based on this finding implicit in the Wilkinson Order, the Court further held that the Utelite loading facility in Echo, Utah was a nuisance per se.

The parties thereafter stipulated to the dismissal without prejudice of all remaining theories of liability--nuisance, trespass and negligence--advanced by the plaintiffs against the defendant Utelite Corporation. This stipulation did not affect or apply to the claims resolved by Judge Wilkinson's Order Granting Partial Summary Judgment. The defendant Utelite expressly waived its right to assert the bar of the statute of limitations with respect to any claim so dismissed without prejudice.

The issue of liability being resolved as a matter of law and all other remaining theories of liability being dismissed without prejudice, only the issues of actual and punitive damages were submitted for consideration by the jury. The Court submitted the following interrogatories to the jury as part of a Special Verdict, which were answered as indicated:

Please answer the following questions from a preponderance of the evidence. If you find the evidence preponderates in favor of the issue

BOOK U U PAGE 901

presented, answer "Yes." If you find the evidence is so equally balanced that you cannot determine a preponderance of the evidence, or if you find that the evidence preponderates against the issue presented, answer "No." Also, any damages assessed must be proven by a preponderance of the evidence.

1. Was Utelite loading facility a proximate cause of damages to:

Richard Harper Yes X No

Jane Harper Yes X No

Frank Cattelan Yes X No

Richard Richins &
the Dicker Hill Trust Yes X No

If you answered question #1 "yes" as to any of the plaintiffs then go on to the next questions. Otherwise have the foreperson sign the verdict form and return to the courtroom.

2. If you answered question #1 "yes" as to any of the plaintiffs then as to that plaintiff answer the following questions:

What amount of money will fairly compensate the plaintiffs for damages sustained as a result of the loading facility and its operation?

General Damages: (adverse health effects, inconvenience, annoyance, discomfort, loss of

BOOK U U PAGE 902

enjoyment of home and property, mental distress and emotional injury to the date of trial.)

Richard Harper	\$5,000
Jane Harper	\$5,000
Frank Cattelan	\$3,000
Richard Richins & the Dicker Hill Trust	\$1,500

Reduction in Market Value of Property Affected:

Richard and Jane Harper	\$ <u>0</u>
Frank Cattelan	\$ <u>0</u>
Richard Richins & the Dicker Hill Trust	\$ <u>0</u>

Loss of Business Income:

Frank Cattelan	\$ <u>0</u>
----------------	-------------

Considering all the evidence in the case, do you find from clear and convincing evidence that plaintiffs are entitled to an award of punitive and exemplary damages, against Utelite Corporation?

Answer: Yes No X

The Court having reviewed the Special Verdict of the jury, having heard the evidence at trial, having considered the argument and submissions of counsel and being otherwise duly and sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED as follows:

BOOK U PAGE 903

2100

1. The plaintiff Jane Harper is awarded judgment against the defendant Utelite Corporation in the amount of \$5,000 with interest thereon at the statutory rate from the date of this Judgment.

2. The plaintiff Richard Harper is awarded judgment against the defendant Utelite Corporation in the amount of \$5,000 with interest thereon at the statutory rate from the date of this Judgment.

3. The plaintiff Frank Cattelan is awarded judgment against the defendant Utelite Corporation in the amount of \$3,000 with interest thereon at the statutory rate from the date of this Judgment.


4. The plaintiffs Richard Richins and the Dicker Hill Trust are jointly awarded judgment against the defendant Utelite Corporation in the amount of \$1,500 with interest thereon at the statutory rate from the date of this Judgment.

5. With respect to the plaintiffs' claims for property damages, loss of business income and punitive damages, Judgment is hereby entered in favor of the defendant Utelite Corporation and against the plaintiffs and said claims are dismissed with prejudice.

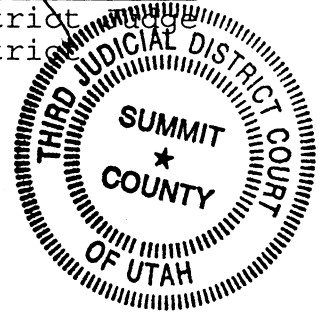
6. The court does not grant the plaintiffs any equitable relief apart from such equitable relief as the

plaintiffs may be entitled to pursuant to the terms of the
Wilkinson order.

DATED this 13th day of Feb., 1996.



Frank G. Noel, District Judge
Third Judicial District
Summit County



No.
FILED

MAY 17 1996

VAN COTT, BAGLEY, CORNWALL & McCARTHY
Eric C. Olson (#4108)✓
Attorneys for Defendant Utelite Corporation
50 South Main Street, Suite 1600
P. O. Box 45340
Salt Lake City, Utah 84145
Telephone: (801) 532-3333

Clerk of Summit County

By
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

JANE HARPER, RICHARD D.)
HARPER, FRANK CATTELAN,)
RICHARD RICHINS and THE)
DICKER HILL TRUST,)

Plaintiffs,)

vs.)

SUMMIT COUNTY, a body)
politic, the SUMMIT COUNTY)
COMMISSION, SUMMIT COUNTY)
PLANNING COMMISSION and)
UTELITE CORPORATION,)

Defendants.)

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
RE: EQUITABLE RELIEF

Civil No. 90-03-10718

Honorable Frank G. Noel

The Court heard evidence at the trial in this action held on September 12 through 15, 1995. The Court has issued Minute Entries dated February 13, 1996 and April 25, 1996 with respect to the plaintiffs' claim for equitable relief supplementary to any such relief already awarded in this action. The Court has also entered its Final Judgment of Special Verdict resolving, *inter alia*, the plaintiffs' claim for equitable relief.

On the basis of the jury's verdict and the Court's independent determination of facts based on its view of the evidence presented at trial including a personal view of the properties in question, the Court now enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The defendant Utelite Corporation ("Utelite") operates a loading facility (the "Facility") adjacent to the Union Pacific railroad tracks at Echo, Utah.
2. The plaintiffs own property in the vicinity of the Facility. The Union Pacific railroad tracks that run through Echo, Utah lie between the Facility and the property owned by Jane Harper, Richard D. Harper and Frank Cattelan. Trains go through Echo, Utah on these tracks in excess of fifteen to twenty times per day.
3. At the Facility on a weekly basis, Utelite loads an average of six and one-half railroad cars with its kiln dried aggregate products.
4. Semi-trucks transport the aggregate product to the Facility for loading. It takes four trucks approximately forty minutes to load a single railroad car.
5. The Utelite Facility currently operates, with occasional exceptions, on weekdays during daylight hours.

6. To deal with dust from the loading operations, Utelite has taken the following steps:

- a. Construction of a metal enclosure at the Facility.
- b. Installation of a bag house and duct work at the Facility.
- c. Paving of the access road to the Facility.
- d. Installation of curtains and an electric door at the Facility.
- e. Watering down aggregate at the Utelite plant.
- f. Installation of a hood and metal coverings over the conveyor belt and drop areas at the Facility.
- g. Response to resident complaints called in to the Utelite plant including termination of loading on windy days.

7. To deal with noise problems from the operation of the Facility, Utelite has taken the following steps:

- a. Installation of a muffler on the bag house.
- b. Instruction to truckers not to bang railroad cars in connection with loading.

8. To deal with other annoyances, Utelite has:

- a. Removed outdoor lighting at the Facility.
- b. Terminated night loading.

c. Instructed truck drivers to yield to other vehicles seeking access to the frontage road on the far side of Interstate 84 through the road at the Facility.

9. As a result of the actions taken by Utelite, confirmed by the Court's visit to the Facility while in operation and the Court's and third-party's review of videos, tapes and photographs of the Facility in operation, the Facility at present (a) is not injurious to the plaintiffs, (b) does not adversely affect the plaintiff's use and enjoyment of their property, and (c) does not cause any property damage to the plaintiffs.

CONCLUSIONS OF LAW

1. This Court has equitable power pursuant to Utah Code Ann. § 78-38-1 to enjoin or abate any nuisance created by Utelite at the Facility.

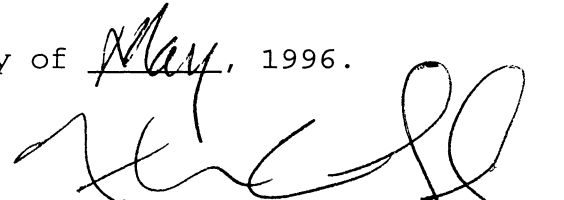
2. The Court has found solely by reason of Judge Wilkinson's August 23, 1993 Order and the findings implicit in that ruling that the Facility is a nuisance per se.

3. Notwithstanding the Court's finding that the Facility is a nuisance per se, in order to obtain further equitable relief from this Court with respect to the present operation of the Facility, the plaintiffs have the burden of proving that the Facility presently is injurious to their

health, is offensive to the senses, or obstructs the free use and enjoyment of their property.

4. The plaintiffs have failed to meet that burden of proof and are not entitled to any further equitable relief from this Court other than the equitable relief previously granted by Judge Wilkinson.

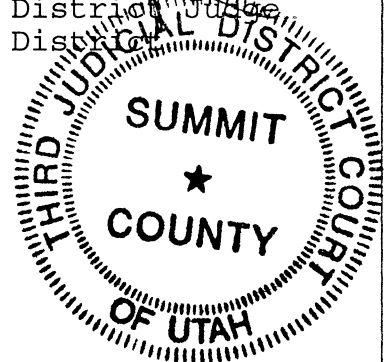
DATED this 10th day of May, 1996.



Frank G. Noel, District Judge
Third Judicial District
Summit County

Approved as to Form:

Attorneys for Plaintiffs



SUMMIT COUNTY BOARD
OF COMMISSIONERS

PLANNING COMMISSION
COALVILLE, UTAH

SUMMIT COUNTY STATE OF UTAH

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January 13, 1989

Carsten Mortensen
P.O. Box 387
Coalville, UT 84017

RE: Relocation of Utelite Facilities

Dear Mr. Mortensen:

This is to confirm a discussion at the December 13th Planning Commission meeting regarding the relocation of the facilities.

It was the consensus of the Commission that the Utelite operation presently set-up in Wanship on the Union Pacific railroad lines could be moved to the Echo location. This would be considered a permitted use at the Echo site.

If you have any questions please call the Summit County Planning Office at 336-4451 ext. 306.

Sincerely,

Jack Willes in behalf of Robert Mc Gregor

Robert McGregor, Chairman
Summit County Planning Commission

ROBERT W. ADKINS
SUMMIT COUNTY ATTORNEY

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ASSISTANT SUMMIT COUNTY ATTORNEY

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FRANKLIN P. ANDERSEN
DEPUTY, SUMMIT COUNTY ATTORNEY

ALOMA M. ERCANBRACK
PARALEGAL

EXHIBIT "A"

February 13, 1990

Jeffrey W. Appel
HALEY & STOLEBARGER
Tenth Floor, Walker Center
175 South Main Street
Salt Lake City, Utah 84111-1956

RE: Union Pacific - Utelite Loading Facility
Echo, Utah

Dear Jeff:

By way of direct answer to your concerns previously expressed, please be advised that your requested actions of Summit County authorities to issue immediate "cease and desist orders to Utelite Corporation" and to initiate a zoning or rezoning process for the Echo area have been thoroughly reviewed by this office. For the following reasons, neither action was found appropriate at this time.

Although much dialogue has been devoted to characterizing the Utelite Loading Facility as existing contrary to County zoning requirement, such characterization is, in my opinion, incorrect and misfocused. I don't believe we are concerned with a zoning issue, but rather a use issue. I have therefore reviewed your request in light of the question of whether loading aggregate into train cars is a use associated with railroading activities in the Echo railroad yards.

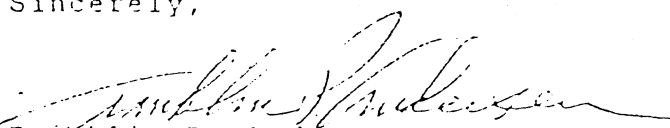
In this instance, the railroad yard uses are non-conforming as defined in Summit County's Development Code, Section 1.6(52). Transportation of freight is the very essence of the railroad business; loading and unloading of freight is fundamental to that activity and is necessarily performed in yards or depots. The activity of Utelite Corporation is a "use customarily incidental

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to and located upon the same...[property]...occupied by the main use and devoted exclusively to the main use of the premises." It is thus an accessory use subordinate, yet essential, to the main railroading use. See Summit County Development Code, Section 1.6(53).

Accordingly, I have concluded that to invoke the County's police powers in an attempt to compel Utelite Corporation and/or the railroad to cease operations or to move such operations to another area would be an unreasonable exercise of the County's police power and an unconstitutional taking of vested property rights.

Sincerely,


Franklin P. Andersen
Deputy Summit County Attorney

ame

cc: Summit County Commission
Jim Peterson
Susan Glasman

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