

1996

Jane Harper, Richard D. Harper, Frank Cattelan,
Richard Richins v. Summit County, The Summit
County Commission, Summit County Planning
Commission, Utelite Corporation : Reply Brief

Utah Court of Appeals

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

JANE HARPER, RICHARD D. HARPER, FRANK CATTELAN and RICHARD RICHINS,	:	
	:	APPELLANTS' JOINT REPLY
	:	BRIEF
	:	
Plaintiffs, Appellees, and Cross-Appellants	:	
	:	
v.	:	
	:	
SUMMIT COUNTY, a body politic, THE SUMMIT COUNTY COMMISSION, SUMMIT COUNTY PLANNING COMMISSION and UTELITE CORPORATION,	:	Case No. 960486-CA
	:	
Defendants, Appellants and Cross-Appellees.	:	

APPEAL FROM A DECISION OF THE
THIRD JUDICIAL DISTRICT COURT, SUMMIT COUNTY
JUDGE FRANK NOEL

Oral Argument Priority Classification No. 15

UTAH COURT OF APPEALS
BRIEF

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FRANK CATTELAN and RICHARD
RICHINS,

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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 Reply Brief.

RESPONSE TO PLAINTIFFS' STATEMENT OF FACTS

This action below involved two distinct proceedings: (a) the claim for injunctive relief against Summit County resolved by partial summary judgment and (b) the claim of nuisance against Utelite resolved by a trial to both the court and the jury. Summit County and Utelite have appealed from the summary judgment and its effect on the later trial; the plaintiffs cross-appeal from the result at trial.

The plaintiffs' Statement of Facts disregards the difference between defending the partial summary judgment and attacking the later verdict. To preserve the partial summary judgment, the plaintiffs must defend the proposition that the facts found by Judge Wilkinson were not in dispute and that no other fact material to the result was in dispute. To obtain reversal of the trial court's verdict, in contrast, the plaintiffs must marshall the evidence at trial in favor of the verdict to demonstrate that the conclusions of the trial judge and the jury are without a legally sufficient evidentiary basis. See Willard Pease Oil and Gas Co. v. Pioneer Oil and Gas Co., 899 P.2d 766, 770, 773 (Utah 1995); 4447 Associates v. First Security

Financial, 889 P.2d 467, 470-71 (Utah App. 1995), cert. denied, 899 P.2d 1231 (1995).

The plaintiffs have disregarded their dual relationship to the facts in this action. They neither address the supposedly undisputed material facts cited in the partial summary judgment nor do they marshall the evidence at trial in support of the verdict and findings. Rather, the plaintiffs simply re-argue their version of the facts demonstrating simultaneously that (a) Judge Wilkinson embraced a particular view of the facts in 1991 in the face of profound evidentiary disputes, and (b) the evidence at trial four years later more than sufficed to support the result adverse to the plaintiffs.

ARGUMENT

I. THE FACTS MATERIAL TO THE PARTIAL SUMMARY JUDGMENT AGAINST SUMMIT COUNTY ARE CLEARLY IN DISPUTE.

The plaintiffs' own brief unwittingly confirms the defendants' argument that disputes of material fact precluded entry of summary judgment against Summit County. To establish a violation of the Summit County Development Code, the plaintiffs attack the defendants' position that the Utelite loading facility ("Facility") was an accessory use to the pre-existing nonconforming use of the property by the Union Pacific Railroad (the "Railroad"). They then conclude with their own factual determination that "[l]oading rock aggregate cannot be considered an 'accessory use' to the nonconforming use of a railroad track." Appellees' Brief, p. 27.

The plaintiffs seek to resolve the fact issue of accessory use by (1) ignoring all evidence regarding the Railroad's historic use of its Echo yard and tracks, and (2) making the factual determination in a conclusory manner in their favor. Likewise, Judge Wilkinson decided the legal issue without so much as acknowledging the existence of essential material facts.

The real issue before the court below was not whether Summit County, by deeming the Facility a "permitted use," violated its development code with respect to rural residential zoning.¹ The County's analysis, discussed in the letter of the Deputy County Attorney to the plaintiffs' counsel (Appellants' A-8), was whether the Facility was an accessory use to the Railroad's use of its right-of-way. No one disputed that the Railroad's yard was a valid nonconforming use; however, the trial court had to determine whether the facts would support Summit County's determination that the loading of products onto railroad cars at the Railroad's yard was an accessory use to a valid nonconforming use.

It is fundamental zoning law that a nonconforming use which pre-exists a zoning change is unaffected by the new zoning.

E.g., Gibbons & Reed Co. v. North Salt Lake City, 431 P.2d 559, 564 (Utah 1967); Swenson v. Salt Lake City, 398 P.2d 879, 881

¹ Or even agricultural zoning. While there is some issue as to whether the County correctly determined the surrounding zoning to be agricultural or rural residential, that issue is immaterial to the County's evaluation of the nonconforming use and whether Utelite's building was a use accessory to the nonconforming use.

(Utah 1965). Even if the Facility did not exist on the Railroad right-of-way at the time of the zoning change, that does not preclude its status as an accessory use to the pre-existing nonconforming use. Gibbons & Reed at 564 ("the entire tract is generally regarded as within the exemption of an existing nonconforming use, although the entire tract is not so used at the time of the passage or effective date of the zoning ordinance.").

As argued by the plaintiffs themselves, this case includes issues of whether the Railroad's nonconforming use was extended by the installation of the Facility or abandoned for non-use. Appellees' Brief pp. 27-28. On the one hand, the plaintiffs cite evidence showing no loading at the time they constructed their homes; on the other hand, the defendants offered evidence that the Echo tracks had been used historically as a railroad yard which included extensive loading operations. The issue of accessory use is a fact-intensive question.

The plaintiffs have not argued that the Railroad's use of its right-of-way is not a valid nonconforming use. They seem to accept the Railroad's use of the right-of-way for temporary storage of railroad cars.² They did not argue before the trial court over the nature of the use or whether it had been improperly extended. That would have acknowledged the factual

² It is interesting to observe that parking railroad cars would not be a permitted use in a rural residential zone absent the valid nonconforming use of the railroad right-of-way.

dispute at the heart of this issue. They simply made conclusory arguments about the zoning status and the nature of the Facility which the trial court erroneously accepted as undisputed facts.

The plaintiffs make similar conclusory arguments as to the facts surrounding the issuance of the building permit.

Appellees' Brief p. 28. The record, however, shows that Judge Wilkinson had before him the uncontroverted testimony of the County Building Inspector regarding the building permit. R. 195. The building inspector testified that the Facility as originally constructed was exempt from building permit requirements except for electrical wiring installation. R. 195-96. The facts show that the permit was issued after construction of the exempt portion of the project and before the electrical installation. Again, the plaintiffs highlight a factual dispute and then argue for their characterization of the facts.

Judge Wilkinson's refusal to recognize and weigh the basic factual premises on which Summit County based its view that the Facility was a "permitted use" does not render those facts immaterial. Nor does the plaintiffs' unilateral conclusion that the Facility was not an accessory use to the nonconforming use make the underlying facts undisputed.

II. THERE IS NO MERIT TO PLAINTIFFS' ARGUMENT THAT REMOVAL OF THE UTELITE FACILITY IS SUPPORTED BY LAW.

The plaintiffs have presented no factual or legal basis in support of the appropriateness of Judge Wilkinson's order for removal of the Facility. Their conclusory arguments are

misleading and not on point. Most obvious among these is the erroneous assertion that "Summit County had the opportunity to appeal, and lost." (Appellees' Brief, p. 30.) This implies that an appellate court has reviewed the merits of the partial summary judgment; that has not happened.

Judge Wilkinson's 60-day temporary stay language compelled Summit County to attempt an interlocutory appeal of the partial summary judgment. (Appellants' Addendum A-2 at p. 4.) At that stage of the proceedings with claims still pending, the attempt had little likelihood of success--not by reason of the merits of the underlying appeal, but because at that stage of the proceedings below any appeal was discretionary with the Supreme Court. The Supreme Court ultimately denied the petition for interlocutory appeal, not because it agreed with Judge Wilkinson but because the summary judgment order did not dispose of all the issues in the case. A denial of interlocutory appeal, not on the merits, has no relevance to the present appeal.

The plaintiffs provide no legal basis for their conclusion that "the Development Code, Utah statutes and case law all permit removal." Appellees' Brief p. 31. To impose such a harsh remedy--destruction of an expensive loading facility and elimination of Utelite's ability to ship product by rail--the court must find something more than just a debatable violation of the development code. At a minimum, the court must make a specific finding that the Facility is not an accessory use to the railroad's nonconforming use, i.e., that the building does not

belong there. Judge Wilkinson did not entertain that question of fact, much less decide it. The conclusory facts asserted by plaintiffs do not support an order for removal of the facility.

The refusal of later judges to acquiesce in the plaintiffs' attempt to remove the Facility was proper in light of the facts as ultimately disclosed at trial. The Facility is not a nuisance. (Appellants' Addendum A-6.) Generally, equitable relief is not available where its imposition would result in substantial economic waste. See, e.g., Panelko, Inc. v. John Price Associates, Inc., 642 P.2d 1229, 1236 (Utah 1982).

Further, where events have rendered the injunctive relief unnecessary or ineffectual, that relief should not be granted. Panelko at 1236. By the time of trial, the evidence clearly showed that Utelite had made substantial efforts to resolve the conditions which the plaintiffs alleged to be nuisances. The trial court so found. (Appellants' Addendum A-6.) An order to remove the Facility would not further abate alleged problems and clearly would amount to an inequitable imposition of economic waste. Judge Noel correctly refused to enforce the removal of the Facility.

III. THE TRIAL COURT ERRED IN DETERMINING THAT THE COUNTY VIOLATED THE OPEN MEETINGS ACT.

As a threshold matter, plaintiffs' claims of violation of the Utah Open and Public Meetings law are barred by the running of the 90-day limitation period set forth in Utah Code Ann. § 52-4-8. Without specifying any supporting facts, Judge

Wilkinson found that "the equitable tolling doctrine" precluded application of the limitation to the plaintiffs' claims. However, even assuming the existence of evidence to warrant tolling of the 90-day limitation period until the plaintiffs knew of facts indicating a possible open meetings violation, those facts clearly came to light nearly one and one-half years prior to the commencement of this action. Once those facts come to light, the 90-day limitation period begins to run. Berenda v. Langford, 914 P.2d 45, 51 (Utah 1996); Anderson v. Dean Witter Reynolds, 920 P.2d 575, 578 (Utah App. 1996) (statute of limitation begins running at the time "plaintiff first knew or should have known the facts giving rise to the cause of action"). Simply ignoring the existence of a cause of action will not prevent the running of the statute of limitation. *Id.*

Plaintiffs argue that exceptional circumstances existed which indefinitely tolled the running of the statute. However, the facts presented to the trial court and argued on appeal-- "failure to provide notice . . . and to keep written minutes"-- are not exceptional. Appellees' Brief, p. 35. These are merely the essential elements of the claim. The plaintiffs offer nothing more than this.

Judge Wilkinson failed to address the issue of when the tolling ended and the statutory limitation period began to run. He seems to have assumed that the limitation period, once tolled, remained tolled indefinitely until the plaintiffs chose to file their suit. This certainly is not the law.

The plaintiffs were put on notice of the Utelite construction as soon as it began. They were put on notice of the nature of the Facility's operations as soon as Utelite commenced loading. Both of these occurred over a year prior to the filing of this action. Either fact was sufficient notice for the plaintiffs to investigate their open meetings claims. Their failure to act upon these facts does not nullify the limitation provisions. These claims are barred as a matter of law.

Even if the open meetings claims were not time barred, Judge Wilkinson erred in finding a violation of the Act. That decision was based upon the premise advanced by the plaintiffs that Summit County made a zoning decision to allow an otherwise non-permitted use in a rural residential zone. However, the facts underlying that premise were in considerable dispute.

The defendants offered evidence that Summit County, through a planning staff employee, stated to Utelite his understanding regarding the status of the Railroad's property and the appropriateness of the Facility. He sought confirmation of his view from the planning commission, which agreed.³ Such informal administrative determinations regarding whether a proposed use fits within existing zoning are made thousands of times every day in cities and counties throughout the country. Frequently, they

³ This issue, like many of the others here on appeal, arises primarily because Judge Wilkinson ignored the fundamental disputed facts on which the parties based the characterization of their claims and defenses. It is impossible to decide the open meetings issue without deciding the factual issue as to the nature of the action taken by the County.

involve nothing more than reading a map and applying common sense and experience. Not one of these is rendered only after advance notice and public hearing.

The issue is whether, because the staff member chose to discuss with the planning commission his response to Utelite's question, that discussion must take place only after public notice, listing on the meeting agenda and public hearing/discussion. Ignoring the immense burden, if not near paralysis, this would impose on governmental operations, the plaintiffs argue that it must. However, the real world consequences of this position are absurd.

Two examples demonstrate this absurdity. If county employees cannot agree on a thermostat setting and the issue comes before the county commission for resolution, the plaintiffs would require published notice, inclusion in the meeting agenda and public discussion of the merits of different thermostat settings. More analogous to the present facts, a homeowner wishes to know whether she can construct an improvement on her property. In consultation with county staff, the homeowner learns of the staff's understanding of those regulations governing of the construction. The homeowner visits with planning commission members to confirm the information received. The plaintiffs would hold the county liable for failure to give notice of the contact with the commission.

If every routine, non-legislative issue discussed at a regular meeting of a public body requires notice, agenda

inclusion and public debate, the everyday work of cities and counties would dissolve into a bureaucratic nightmare. Any staff member seeking confirmation from the planning commission that his or her views or actions were appropriate would have to wait until public notice was given. Even minor administrative issues or interpretations of the law would be subject to public debate. Every building permit application would have to be noticed for public hearing. No staff member could talk to a commission member before or after a meeting, whether or not the subject of the discussion was on the agenda, without fear of violating the open meetings law. Clearly the law does not anticipate this burden.

IV. SUMMIT COUNTY DID NOT DEPRIVE PLAINTIFFS OF DUE PROCESS.

Once again, the fundamental factual nature of Summit County's actions was at issue before Judge Wilkinson: Did the administrative interpretation and application of the zoning ordinance to the Facility require notice and public hearing? In arguing the affirmative, the plaintiffs rely on case law dealing with situations where local officials are acting in a legislative capacity to make zoning changes or enact zoning ordinances. Those cases clearly require notice and public hearing.

The present case, in contrast, arose from an administrative determination, based on staff's interpretation of the Development Code, that a proposed use fell within the scope of an existing nonconforming use. Functionally, such a decision falls in the same category as deciding whether a barn is an accessory use in

an agricultural zone or whether a guest house is an accessory use in a residential zone. Both involve the application of existing zoning law to specific fact situations. Neither is a legislative zoning decision requiring notice and hearing.

The plaintiffs have failed to establish, before the trial court and here, (1) what process they are due for this type of administrative decision, and (2) how they were deprived of this process. They clearly have not made out a prima facie case for lack of due process. As a result, the trial court's finding that the plaintiffs' due process rights were violated is incorrect as a matter of law.

V. BECAUSE THEY DID NOT BRING AND PREVAIL ON A CLAIM UNDER 42 U.S.C. § 1983, PLAINTIFFS ARE NOT ENTITLED TO ATTORNEY'S FEES PURSUANT TO 42 U.S.C. § 1988.

Plaintiffs argue that the trial court erred in not awarding attorney's fees under the provisions of 42 U.S.C. § 1988, which provides for an award of attorney's fees to a party prevailing on the merits of an underlying civil rights claim. However, mere success at the trial court level on a state law claim for declaratory or injunctive relief does not establish a deprivation of a specific federal constitutional right pursuant to 42 U.S.C. § 1983. Despite the grant of partial summary judgment on July 8, 1991, and entry of Findings of Fact and Conclusions of Law on August 23, 1993, plaintiffs made no reference to any federal constitutional allegations until the filing of plaintiffs' Second Amended Complaint on March 11, 1994.

The Utah Supreme Court has recognized that a party is not entitled to recover attorney's fees under similar circumstances where a plaintiff obtained injunctive relief under state law which was not the result of a successfully prosecuted federal civil rights violation. Ambus v. Utah State Bd. of Educ., 858 P.2d 1372, 1375-1377 (Utah 1993).

VI. THE RAILROAD, AS OWNER OF THE PROPERTY ON WHICH UTELITE OPERATED THE FACILITY, CLAIMED AN INTEREST IN AN ADJUDICATION OF THE PERMISSIBLE USES OF THAT PROPERTY.

The plaintiffs argue that the placement of the Facility on the Railroad's property in Echo violated the Summit County Development Code. Yet, the plaintiffs insist that the Railroad has absolutely no legally recognized interest in the adjudication of this alleged limitation on its use of the Echo property and, thus, is not indispensable to this proceeding. However, to state the issue is to resolve it: a property owner has a clear interest in limitations on the use of his or her property.

The plaintiffs seek in this litigation to limit the Railroad's use of its property. The Railroad has a direct interest in the outcome of the litigation.

The plaintiffs argue that the defendants failed to move to join the Railroad. It is the plaintiffs who may move to join. Utah R. Civ. P. 19(a). The defendants brought a timely motion to dismiss for non-joinder, the sole motion available to them to address their concerns about the absence of the Railroad.

(R. 143) See Utah R. Civ. P. 12(b)(7).

It is further nonsensical to suggest that the propriety of joinder is affected in any way by a non-parties failure to intervene. The Utah Rules of Civil Procedure set forth precisely what a defendant must do to raise the issue of joinder: Rule 19(a) identifies the characteristics of a party who must be joined; Rule 12(b)(7) provides for dismissal, upon motion, if such a party is not joined. The defendants have complied with these rules.

VII. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN DENYING WRITTEN DISCOVERY AFTER THE ENTRY OF PARTIAL SUMMARY JUDGMENT AGAINST SUMMIT COUNTY.

Plaintiffs argue that the trial court erred in not requiring Summit County to respond to discovery after entry of partial summary judgment. This discovery was on the very same factual and legal issues covered in the partial summary judgment. This would amount to post-judgment discovery of Summit County. Plaintiffs cannot have it both ways. They argue that the partial summary judgment against Summit County was final while attacking the trial court for denying them additional discovery directed at the very issues on which they had prevailed.

The trial court acted within its broad discretion under Utah R. Civ. P. 26(c) to prevent the anomalous result of requiring Summit County to respond to a total of 21 interrogatories and 5 requests for production of documents, all of which dealt exclusively with facts and legal theories associated with Judge Wilkinson's prior order.

Summit County took the position that they should remain an interested observer on the sidelines of the field of play. Plaintiffs could pursue their claims against Utelite to a conclusion. This would result in a final order disposing of all claims as to all parties and would then permit Summit County to appeal as a matter of right on the substantive merits of the partial summary judgment.

VIII. THE PLAINTIFFS' NUISANCE CLAIM DID NOT ALLEGE CONDUCT SUBJECT TO A SPECIFIC STATUTORY PROHIBITION.

This Court has held that, for conduct to constitute a nuisance per se, it must be "specifically prohibited by statute" Erickson v. Sorensen, 877 P.2d 144, 149 (Utah App. 1994). In Erickson, for instance, the plaintiff identified a reference in the Utah Code to the Manual on Uniform Traffic Control Devices as a statutory prohibition sufficient to establish a nuisance per se. This Court held that this reference was "not of the *specific statutory* nature required to establish nuisance per se." 877 P.2d at 149 n. 4 (*italics in original*).

Similarly, the alleged zoning violation in this action does not violate any specific statutory prohibition. The plaintiffs cite to Utah Code Ann. §§ 17-27-7, -8, and -23 for a specific statutory prohibition. (Although not noted in the body of the Appellees' Brief, each of these sections was repealed in 1992.) Together these authorized the counties' adoption of an official map and sanctions for noncompliance with that map. They do not specifically prohibit the construction and operation of an

aggregate loading facility. Were these a sufficient basis for a claim of nuisance per se, any deviation from an official map would be actionable as a nuisance with damages being the only issue. This is not the law.

IX. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN DENYING THE PLAINTIFFS' MOTION TO FURTHER AMEND THEIR COMPLAINT TO INCLUDE NEW CLAIMS AGAINST SUMMIT COUNTY AND UTELITE.

The plaintiffs have failed to show that the trial court abused its discretion in denying their motion for leave to file a third amended complaint. Not only was this motion untimely and calculated to produce delay and prejudice, its denial in no way prevented the plaintiffs from seeking independent relief on these separate claims. "A motion to amend a pleading is addressed to the discretion of the trial court." Timm v. Dewsnap, 921 P.2d 1381, 1389 (Utah 1996). An appellate court will not reverse a denial of a motion to amend "absent a showing of an abuse of that discretion." Mountain America Credit Union v. McClellan, 854 P.2d 590, 592 (Utah App. 1993).

The trial court considers three factors: "(1) the timeliness of the motion; (2) the moving party's reason for the delay; and (3) the resulting prejudice to the responding party." Mountain America at 592.

A primary consideration that a trial judge must take into account in determining whether leave should be granted is whether the opposing side would be put to unavoidable prejudice by having an issue adjudicated for which he had not had time to prepare.

Bekins Bar V Ranch v. Huth, 664 P.2d 455, 464 (Utah 1983).

The plaintiffs moved for leave to amend very late in the proceedings well after the entry of partial summary judgment against Summit County and after depositions of the parties. Subsequent to the entry of partial summary judgment in August, 1993, Summit County had limited involvement in this action. All remaining claims (with the exception of a request for attorney's fees) were against Utelite. Summit County did not conduct discovery or, aside from attending certain depositions, otherwise represent its interests in the dispute because it had no direct stake in the remaining claims.

The trial court twice heard motions by the plaintiff to add the road/access claims, which are the heart of the proposed third amended complaint, to the action. R. 782 and 916. The court consistently ruled that the amendment required the involvement of a new party, the Railroad, which would significantly delay the three and one-half year old proceedings. The trial court also noted that "the plaintiffs can obtain the additional relief they seek by filing a new civil action in this Court." R. 1028-29.

The addition of the road/access claims would directly implicate the property rights of the Railroad over whose property the alleged public road passed. A finding for the plaintiffs would render a portion of the Railroad's property a public road. The Railroad had not participated in the discovery preceding the motion and Summit County's participation was limited. The claims in the proposed third amended complaint would have greatly broadened the basic case for nuisance and trespass actually set

forth in the governing pleadings. See Second Amended Complaint dated March 11, 1994, R. 304-42.

The plaintiffs insist that the claims in their amended pleading were already the subject of discovery in the action. The fact that, at a deposition, a party chooses to explore or a witness chooses to discuss matters of fact not set forth in the pleadings does not serve to amend those pleadings nor does it compel the trial court to permit an amendment that is otherwise untimely and prejudicial. In the final analysis, the denial of the motion to amend caused the plaintiffs no harm and had no effect on the result at trial. The sole plaintiffs with an interest in the access claims, Richard Richins and the Dicker Hill Trust, were at liberty to file a separate action against all affected parties. They have never done so.

X. THE TRIAL COURT'S REFUSAL TO ADMIT EVIDENCE REGARDING ACCESS AND THE ALLEGED "PUBLIC" ROAD WAS NOT ERROR AND DID NOT AFFECT THE RESULT AT TRIAL.

The trial court ruled that the plaintiffs Richins and Dicker Hill Trust could not introduce evidence at trial of their alleged loss of access to property via a public road. In their brief, the plaintiffs correctly note that this exclusion of evidence flowed from the trial court's earlier refusal to grant leave to file the proposed third amended complaint, which included claims for loss of access.

The plaintiffs claim that "lack of access was a basis for the pending nuisance claim." Appellees' Brief, p. 45. Yet, they cannot cite to a single allegation in their Second Amended

Complaint that places access or the public of the road in issue. In reality, the plaintiffs Richins and Dicker Hill Trust have reasonable access to their property. They merely resent the occasional brief wait at the Facility when trucks were unloading. (Appellants' Addendum A-6 at Finding 8(c).)

The plaintiffs have further failed to proffer the evidence they would have offered. Absent such a proffer, this Court cannot determine whether the exclusion of that evidence affected the result at trial. See Ashton v. Ashton, 733 P.2d 147 (Utah 1987); Onyeabor v. Pro Roofing, Inc., 787 P.2d 525 (Utah App. 1990) and Utah R. Civ. P. 61.

XI. THE TRIAL COURT DID NOT COMMIT ERROR IN ALLOWING THE JURY TO VIEW THE FACILITY IN OPERATION.

Rule 47(j) of the Utah Rules of Civil Procedure authorizes the trial court to permit the jury to view "property which is the subject of litigation" when "it is proper" "There is a presumption as to the correctness of the trial judge's ruling in the absence of a demonstration to the contrary, and that decision will not be upset absent a clear abuse of discretion.'" State v. Cabututan, 861 P.2d 408, 412 (Utah 1993) citing 75 Am.Jur.2d Trial § 259 (1991).

On Utelite's motion, Judge Noel ruled that the jury could visit the Facility and observe it in operation. He tied his granting of the motion to the plaintiffs' insistence that the Facility remained a nuisance at the time of trial:

If Mr. Warlaumont [the plaintiffs' counsel] feel that the only issue in the case is past damages, your

objection would be well taken. In light of all of the changes and the very recent changes, I think it's probative on the issue of current damages, present lost property values, and so I think the current situation is probative and I think that the Court can somewhat overcome the problems that you've mentioned by instructing the jury on those issues, which the Court intends to do right now. R. 2664-65.

The Court then gave the jury the following instructions with respect to the jury view:

As I indicated to you yesterday, we're going to take you down to the site of this loading facility and let you observe it in operation from the vantage point of some of the properties involved in this litigation.

I have a couple of instructions that I would like to give you before we go down there and that is, number one, as you view this facility today, you must keep in mind that this is how the facility operates today under the current conditions and under all of the changes that have been made. And some of the testimony has been fairly recent.

And under today's current weather and time of year and so forth, you must keep that in mind and it's how it operates today, not necessarily how it operated in the past or will operate in the future.

For that, you need to rely upon the statements and testimony from the witness stand that you will hear during the course of this trial. So, bear that in mind. (R. 2665-66.)

With these instructions freshly in mind, on September 14, 1995, at the commencement of the third day of trial, the jury visited the Facility and observed its operation. The plaintiffs had full opportunity, both before and after the visit, to explain to the jury any differences between conditions at the time of the visit and conditions on other occasions. To this end, the plaintiffs played for the jury a tape recording of the noise

generated by the operation of the Facility (R. 2408) and presented a video of the Facility in operation on a windy day (R. 2421, 2435, 2464, 2509-11, -13).

The plaintiff Cattelan testified at length regarding photographs he had taken of various allegedly adverse conditions at the Facility. (R. 2578-86.) He testified from extensive written logs that he had maintained noting noise and dust problems over the six and one-half years of operation.

(R. 2587-4.) Further, each plaintiff was permitted to estimate the alleged diminution to the value of their property, as of the date of trial, arising from the operation of the Facility. (See, e.g., R. 2437-42, 2464-67, 2593-2607.)

For its part, Utelite offered evidence from various witnesses that the conditions observed at the Facility on September 14, 1995, were not atypical. (R. 2797, 2921, 2929, 2939-42, 2953-54 and Ex. 125, 2964-69, 2976-80, 3015-17.) These witnesses included a trucker who operated the Facility, two persons who worked daily in the vicinity of the plaintiffs' property, a former resident of Echo who made frequent visits to the town, Utelite's environmental expert, the head of the County Health Department, and a state environmental regulator. (The last named witness also explained the distortions resulting from the use of photographs to evaluate visual emissions. R. 2968, 2973.)

Seen in this context, the plaintiffs' "strenuous objection" to the jury's view of the Facility in operation rings hollow.

(Appellees' Brief, p. 45.) The plaintiffs alleged a continuing nuisance for six and one-half years up to the date of trial. They complained at length of ongoing dust and noise from the operation. Yet, they insisted that actually seeing the Facility in operation, where noise and dust could not be disguised, might mislead to the jury. Where one claims the existence of a nuisance at the time of trial, observation of current operations is relevant and not misleading. Obviously, in the context of a claim that the nuisance has been continuous over a period of six and one-half years, no single visit or video or photo will be entirely typical. However, it is not enough to object just because a visit to the site may not support the plaintiffs' allegations.

XII. THE TRIAL COURT'S DETERMINATION THAT THE FACILITY IS NOT PRESENTLY A NUISANCE WAS NOT CLEAR ERROR.

The plaintiffs have challenged Judge Noel's determination that the Facility is not presently a nuisance. As already noted, they have failed to marshal the evidence to show the absence of credible evidence to support the trial court's Findings. What the plaintiffs ask this Court to do is to substitute their view of conflicting proof for that of Judge Noel reached after review of all the evidence.

The plaintiffs have further failed to identify specific Findings for which there is no support in the record. Findings 1 and 2 were confirmed by the site visit and never were in serious dispute. (R. 2813.) Findings 3 through 5 were established by

the testimony of Kip Bigelow, Utelite's business manager, who scheduled the loading. (R. 3005-09.) Carsten Mortensen, Utelite's president, testified in detail with respect to each item set forth in Findings 6 through 8. (R. 2855-64.) The plaintiff Jane Harper confirmed that many of these improvements had occurred. (R. 2480-83.) The sole remaining Finding was based on the prior Findings as confirmed by the trial court's own knowledge through the review of the video, the tape and the photographs together with the site visit. In short, Judge Noel chose to believe Utelite and to disregard the plaintiffs' numerous complaints. He properly denied further injunctive relief.

XIII. THE JURY'S VERDICT ON PAST DAMAGES ARISING FROM UTELITE'S OPERATIONS AT THE FACILITY IS BINDING IN ALL FUTURE PROCEEDINGS WITH RESPECT TO LIABILITY.

Judge Noel relied on Judge Wilkinson's partial summary judgment to hold Utelite liable as a matter of law under the doctrine of nuisance per se. (Appellants' A-5 at 1-2.) Only the issues of causation and damages, actual and punitive, went to the jury. The plaintiffs had full opportunity to present evidence to the jury of their damages and of conduct by Utelite that might merit an award of punitives.

Confronted with claims for damages spanning over six years and exceeding \$500,000 and additional claims for punitives, the jury chose to award \$5,000 each to the Harpers, \$2,500 to the plaintiff Cattelan and \$1,500 to the plaintiffs Richins and Dicker Hill Trust. The jury found that there had been no

reduction in the value of the plaintiffs' property and no loss of business income. The jury further found that the plaintiffs were not entitled to an award of punitive damages.

If this Court reverses the partial summary judgment or finds that Judge Noel erroneously applied the doctrine of nuisance per se, the plaintiffs must try the issue of liability in order to establish a basis for recovering damages. Should they prevail thereafter on claims of nuisance, trespass, negligence or even intentional infliction of emotional harm, the plaintiffs' recovery for the time period prior to September 15, 1995, is limited to the damages assessed by the jury at the trial of this action. All damages potentially recoverable for these claims are included in the broad damages available under the theory of nuisance presented to the jury. See generally, Branch v. Western Petroleum, Inc., 657 P.2d 267 (Utah 1982).

Obviously, were this Court to direct that the road/access issue be included in further proceedings (or if the plaintiffs separately pursue that issue as directed by Judge Brian), the plaintiffs could recover separate damages arising from that specific claim. The road/access issue was not tried and is distinct from the damages awarded at trial.

Whatever the outcome of other issues on appeal, the jury's finding on damages is binding on the parties in all further proceedings. There is no legal basis to give the plaintiffs a second bite at that apple. If Utelite is ultimately adjudged liable to the plaintiffs for wrongful conduct before


September 15, 1995, the jury has set the precise amount of each plaintiff's recovery.

CONCLUSION

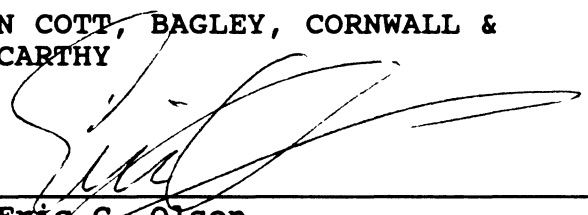
This Court should vacate the partial summary judgment against Summit County and the judgment of liability against Utelite. If this Court cannot rule as a matter of law on the record before it that Summit County acted within its discretion in viewing the Facility as an accessory use to the Railroad's valid nonconforming use at Echo, then this action must be remanded to the trial court for resolution of all disputed issues of fact.

RESPECTFULLY SUBMITTED this 18th day of February, 1997.

WILLIAMS & HUNT

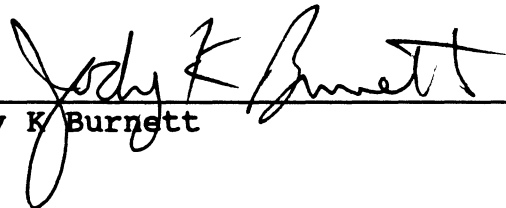
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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of February, 1997, two (2) true and correct copies of the foregoing **Appellants' Joint Reply Brief** was mailed postage prepaid thereon, by first class mail in the United State Mail, to James L. Warlaumont, COLLARD, APPEL & WARLAUMONT, 9 Exchange Place, Suite 1100, Salt Lake City, Utah 84111.



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