

1988

John Call and Clark Jenkins v. City of West Jordan, Utah : Brief of Respondent

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

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880047

IN THE UTAH COURT OF APPEALS

JOHN CALL and CLARK JENKINS,)

Plaintiffs-Appellants)

vs)

Case No. 880047CA

CITY OF WEST JORDAN, UTAH,)

Defendant-Respondent)

RESPONDENT'S BRIEF

APPEAL FROM A TRIAL AND JUDGMENT ENTERED BY THE
THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY

The Honorable Pat A. Brian, District Judge

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FILED
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Utah Court of Appeals

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2. Plaintiffs' failure to present evidence concerning the alleged "civil rights" violation, to not litigate the "civil rights" issue and to "appeal" the "civil rights" issue (directly or on "rehearing") precludes the Plaintiffs from now asserting the same.

3. Plaintiffs' failure to properly litigate, prevail upon, and appeal (directly and/or on "rehearing") the alleged "civil rights" violation issue precludes the Plaintiffs from recovering attorney's fees pursuant to 42 U.S.C. § 1988.

4. The defense of this case was not conducted in bad faith so as to justify the award of attorney's fees to the Plaintiffs.

5. Plaintiffs' claim for reimbursement of the Master's fees is improper as the Plaintiffs did not prevail on accounting issues and the Plaintiffs waived the preparation of the Master's final report.

6. Plaintiffs' "motion for joinder of additional party-plaintiffs" is a thinly-disguised "motion for class certification", which has been exhaustively litigated and uniformly decided adversely to the Plaintiffs, at all levels.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This action presents the following issues for review:

1. Whether a judgment, entered by the trial court in strict compliance with the directions of the Utah Supreme Court, may be reviewed and modified by the Utah Court of Appeals, upon unproven issues not found by the trial court and not previously "appealed" by the Plaintiff.
2. Whether the failure of counsel to correctly anticipate a ruling of the Utah Supreme Court constitutes "bad faith", warranting an award of attorney's fees as a sanction, when the trial court "found" in favor of counsel on the asserted "fact".

STATEMENT OF THE CASE

This action was originally filed in 1978 to challenge the constitutionality and validity of a municipal ordinance providing for the imposition of an "impact fee" upon developers of land. Following an adverse decision from the Utah Supreme Court, the plaintiffs restructured their theory to allege an "as applied" unconstitutionality.

Thereafter the Plaintiffs again restructured their claims to allege the impact fee ordinance was invalid because of non-compliance with certain statutory requirements. On this issue, the Plaintiffs received a favorable decision from the Utah Supreme Court in 1986.

In the instant appeal the Plaintiffs seek to restructure their claims, by providing for the expansion of the decision of the Utah Supreme Court, so as to make the case involve a federal "civil rights" violation and to provide for recovery on various "procedural" matters.

SUMMARIES OF ARGUMENT

1. The Utah Court of Appeals should not interfere with the trial court's judgment entered consistent with the directions mandated by the Utah Supreme Court in the Call III decision [727 P.2d 180 (Utah 1986)]
2. Plaintiffs' failure to present evidence concerning the alleged "civil rights" violation, to not litigate the "civil rights" issue and to "appeal" the "civil rights" issue (directly or on "rehearing") precludes the Plaintiffs from now asserting the same.
3. Plaintiffs' failure to properly litigate, prevail upon, and appeal (directly and/or on "rehearing") the alleged "civil rights" violation issue precludes the Plaintiffs from recovering attorney's fees pursuant to 42 U.S.C. § 1988.
4. The defense of this case was not conducted in bad faith so as to justify the award of attorney's fees to the Plaintiffs.

5. Plaintiffs' claim for reimbursement of the Master's fees is improper as the Plaintiffs did not prevail on accounting issues and the Plaintiffs waived the preparation of the Master's final report.

6. Plaintiffs' "motion for joinder of additional party-plaintiffs" is a thinly-disguised "motion for class certification", which has been exhaustively litigated and uniformly decided adversely to the Plaintiffs, at all levels.

ARGUMENT

This litigation, like "Ole Man River", just keeps "rollin' along." The legal issues involved in the instant appeal cannot be properly understood and appreciated without an understanding of the laborious history of this litigation.

In 1978 the Plaintiffs filed this litigation to challenge the constitutionality of an ordinance which provided that an "impact fee" be paid by land-developers (subdividers). In 1979 the Utah Supreme Court upheld the facial constitutionality of the "impact fee" ordinance. **Call vs City of West Jordan, Utah**, 606 P.2d 217 (Utah 1979) [hereinafter **Call I**].

However, following Plaintiffs' petition for rehearing, the Utah Supreme Court remanded the case for trial in the district court on the issue of whether the impact fee assessed against the Plaintiffs was "reasonable", that is, whether the impact fee assessed and collected bore a reasonable relationship to

the needs created by the Plaintiffs' development. **Call vs City of West Jordan, Utah**, 614 P.2d 1257 (Utah 1980) [hereinafter **Call II**].

In the spring of 1981---in a radical departure from their claimed assertion that there was "no enabling legislation" (a point upon which the Utah Supreme Court had decided adversely to them)---the Plaintiffs filed, against Defendant's objection, an "amended" complaint, claiming, inter alia, that there was no compliance with the provisions of Section 10-9-25, Utah Code, in that it was alleged there was no "public hearing" held concerning the adoption of the impact fee ordinance. The amended complaint also pleaded numerous other "theories" of recovery against the Defendant.

In November 1981, following denial (by Judge Jay Banks of the Third District Court) of Plaintiffs' renewed motion for class action certification, the Plaintiffs filed an interlocutory appeal on the "class action" issues. The Utah Supreme Court denied that appeal without formal opinion. December 8, 1981. Docket No. 18098.

Thereafter the Plaintiffs filed an original proceeding in the Utah Supreme Court seeking a writ of mandamus against Judge Banks to require him to enter formal findings concerning his refusal to certify the class action. The Utah Supreme Court declined to issue the writ of mandamus against Judge Banks. February 10, 1982. Docket No. 18217.

In August 1982 the Defendant filed an interlocutory appeal concerning Judge Rigtrup's ruling, denying to the Defendant a jury trial on the "reasonableness" of the impact fee. The Utah Supreme Court declined to consider the interlocutory appeal.

On September 1 and 2, 1982 and November 18, 1982, trial was held before the Honorable David B Dee of the Third District Court in and for Salt Lake County. At the conclusion of the presentation of Plaintiffs' evidence, the Defendant moved to dismiss the Plaintiffs' claims, as such had not been proved by a preponderance of the evidence. That motion was granted by the trial court. That ruling prevented the Defendant from presenting its case-in-chief in response to Plaintiffs' unproven claims. [A copy of Judge Dee's Memorandum Decision is attached hereto as Attachment B.]

The Plaintiffs thereafter appealed Judge Dee's dismissal.

In July 1986 the Utah Supreme Court issued its **Call III** decision, holding that no "public hearing" had been held and the impact fee ordinance was invalid. 727 P.2d 180 (Utah 1986) The Utah Supreme Court denied Plaintiffs' claims for "class action certification". The Utah Supreme Court remanded the case back to the district court "to enter judgment consistent with this opinion." 727 P.2d at 184.

The Plaintiffs petitioned for rehearing on the issue of the Court's refusal to favorably consider the "class action" certification. The Defendant petitioned for rehearing on the issue that the Court's ruling (concerning the "public hearing") was based upon insufficient evidence (precipitated by the trial court's dismissal of Plaintiffs' claims at the conclusion of

Plaintiffs' evidence) and precluded the presentation of complete evidence in the Defendant's case-in-chief. In October 1986 the Utah Supreme Court denied both parties' petitions for rehearing.

On January 9, 1987 Plaintiffs' counsel filed his "second set of interrogatories" and "requests for production", seeking additional information concerning "amendments" to the impact fee ordinance. [Plaintiffs' counsel seemed intent on continuing to litigate the case, even after he ostensibly won in Call III, by developing new legal theories on behalf of unnamed subdividers.!!]

On January 30, 1987, Judge Dee entered an order allowing the Defendant to file an "amended" answer (to address the new issues countenanced by the Utah Supreme Court in Call III) and to re-open the case, to allow presentation of the Defendant's case-in-chief. Immediately the Plaintiffs filed an original proceeding against Judge Dee (and successor judges of the Third District Court) in the Utah Supreme Court, seeking to order the judges from re-opening the case. The Utah Supreme Court granted the relief sought by the Plaintiffs. April 6, 1987. Docket No. 870098

In June 1987 the Plaintiffs filed a motion to "add additional plaintiffs" to their case. This motion was considered by Judge Brian and was denied.

In September 1987 the Plaintiffs filed a motion for entry of judgment on the "civil rights" claims. After exhaustive argument, that motion was denied by Judge Brian.

In September 1987---FOURTEEN MONTHS AFTER THE Call III DECISION WAS ANNOUNCED---the Defendant, frustrated that the Plaintiffs' counsel was doing nothing to move the case to final disposition as ordered by the Utah Supreme Court, moved for entry of judgment. On October 11, 1987---after numerous hearings concerning the judgment and its "form", Judge Brian entered the written order and "judgment."

THE JUDGMENT WAS PAID BY THE DEFENDANT ON THAT DATE.

Thereafter, the Plaintiffs filed motions for the award of litigation expenses. The great majority of the claimed expenses was denied by Judge Brian.

Thereafter, the Plaintiffs filed this appeal with the Utah Supreme Court. The case was subsequently "poured over" to the Utah Court of Appeals.

I

THE JUDGMENT OF THE TRIAL COURT IS CONSISTENT WITH
THE DIRECTIONS MANDATED BY THE UTAH SUPREME COURT
AND SHOULD BE AFFIRMED

On July 23, 1986, the Utah Supreme Court filed its third opinion in the above-entitled action. 727 P.2d 180 (Utah 1986). That decision held that the West Jordan flood-control impact fee ordinance, adopted in 1975, was invalid due to the City's alleged failure to hold a "public hearing" prior to the adoption of the ordinance. The decision also analyzed (and denied) Plaintiffs' claim for "class action" certification. The decision of the trial judge on other issues was left untouched! In disposing of the appeal, the Utah Supreme Court was explicit

in its directions when it wrote:

We remand this case to the trial court to enter judgment consistent with this opinion.

727 P.2d at 184. Emphasis added.

To now say that the Court should direct the trial court enter judgment on alleged "civil rights claims" does violence to that clear direction and the procedural history of this litigation. If Mr DeBry thought that the Supreme Court "forgot" to address the "civil rights" issue, he should have noted that in his "petition for rehearing". He didn't. [In fact, the "civil rights" issue was not even mentioned in Plaintiff's original appellate briefs. Obviously, Mr DeBry didn't care about the issue then. He surely should not be permitted to care about it now and be rewarded for his lackadaisical approach to pleadings and practice.]

An expansion of the judgment to include the alleged "civil rights violations" claims (1) has been already decided adversely to the Plaintiffs by Judge Dee, whose decision was not overturned or modified by the Utah Supreme Court in Call III, (2) there was absolutely no evidence nor argument presented at the trial court or the Supreme Court concerning the alleged "civil rights violations", and/or (3) the City could in 1977---when the impact fees were paid---not be held liable for a "civil rights violation" because a municipality was not a "person" within the ambit of 42 U.S.C. § 1983, as construed in *Monroe vs Pape*, 365 U.S. 167 (1961).

Plaintiffs' counsel---openly admitting before Judge Brian that his motion (to have the Court enter judgment on the "civil rights violations" claims) is for the purpose of increasing his attorney's fees---asserts that this Court may enter judgment on issues outside of the scope of the Supreme Court's directive. With such an assertion the Defendant must strongly disagree. Not only does that run counter to the clearly-expressed direction of the Supreme Court, but it runs afoul of well-established legal principles.

In addressing the powers of the trial court in this situation, **Corpus Juris Secundum** at "Appeal and Error", § 1965, notes:

Where, however, the appellate court by its decision and directions **puts an end to the litigation, the lower court is without jurisdiction except to comply with whatever directions are made;** and frequently the directions given on remand impose limitations either as to subject matter or relieve, or both, so that the trial court has power and discretion only within the limitations imposed. **Matters disposed of and determined by the opinion and decision of the appellate court cannot be relitigated in the trial court.** The rule is more explicitly and definitely stated in some cases which hold that, where a case is remanded with specific directions, **the lower court is without power to do anything but carry out the directions,** and the judgment of the lower court entered in conformity with the requirements of the mandate and embodying a complete determination of the rights of the parties exhausts the court's jurisdiction as to matters decided. Thus, **where the appellate court has tried the case de novo, its judgment is final and nothing remains for the trial court to do except enter the judgment.**

Emphasis added. Citations to footnotes omitted.

Section 1966 of "Appeal and Error" in **Corpus Juris Secundum** notes:

On the remand of the cause after appeal, **it is the duty of the lower court to comply with the mandate of the appellate court and to obey the**

directions therein, without variation and without departing from the mandate of the appellate court, even though the mandate may be or is supposed to be erroneous. Accordingly, the trial court commits error if it fails to follow the directions of the appellate court.

Emphasis added. Citations to footnotes omitted.

In § 1967 of "Appeal and Error" in *Corpus Juris Secundum* the following statement is made:

After a cause has been determined on appeal and remanded, **the lower court is ordinarily without power to open, vacate, or modify the judgment of the appellate court, or to alter, extend, or relieve from precise fulfillment of, a specific condition on which the effect of the appellate judgment is made to depend.**

Likewise, after affirmance on appeal, except as directed by the appellate court, the lower court is generally without power to vacate, alter, or modify the judgment originally entered by it, except, perhaps, as to matters not considered on appeal. **Likewise, the trial court generally does not have power to open, vacate, or modify a judgment or decree entered by it in strict conformity to the mandate of the appellate court, without obtaining the consent of the appellate court.**

Emphasis added. Citations to footnotes omitted.

Utah case law is consistent with these principles. In *O'Gara vs Findlay*, 7 Utah 2d 218, 321 P.2d 953 (1958), the Utah Supreme Court wrote:

When a judgment of a lower court is affirmed by the highest court of that particular jurisdiction, such affirmance is deemed conclusive of all issues which were raised or which might have been raised on appeal. The necessity of such a ruling is apparent in the prevention of piecemeal appeals. **Once a matter has been heard, with opportunity for consideration of all relevant issues, there is merit in bringing it to rest. Litigation must come to an end in order that the parties can know with certainty their status.**

321 P.2d at 953-954. Emphasis added.

In **Powerine Company vs Zions Savings Bank and Trust Company**, 148 P.2d 807 (Utah 1944), the trial court---following remand on appeal---made new findings of fact and conclusions of law. Because those new findings were "at variance" with the Supreme Court's earlier decision, one of the parties again appealed. The Supreme Court noted that "no new determination should have been made by the trial court, except by way of entering findings to conform to the previous opinion." 148 P.2d at 808. The Utah Supreme Court then continued:

. . . For as said in **Kelsch v. Dickson**, 71 N.D. 430, 1 N.W..2d 347, 349:

"However wise a man may be, however sound his judgment and understanding, nevertheless, he is bound to subordinate to the wisdom, judgment, knowledge and understanding of a superior court, whose order is the law of the case, until modified, or until reversed by higher authority.

Our pronouncements are the law of the case, binding not less upon us than upon the lower court. We therefore shall not review them.

148 P.2d at 808. Emphasis added.

In **Street vs Fourth Judicial District Court**, 191 P.2d 153 (Utah 1948), the Utah Supreme Court observed:

As a general rule, where a judgment or decree is affirmed or reversed and remanded with directions to enter a particular judgment, the trial court may not permit amended or supplemental pleadings to be framed to try rights already settled. This rule is not only reasonable, but necessary, if litigation is ever to come to an end. After an appellate court has once ruled upon issues presented to it, such ruling becomes the law of the case, and the trial court is bound to follow it, even though it considers the ruling erroneous.

191 P.2d at 158. Emphasis added. Citation to authority omitted.

In Fourth District Court, supra, the Court quoted at length from Justice Hanson in the case of *Utah Copper Company vs District Court*, 91 Utah 377, 64 P.2d 241:

The rule is well established and there does not seem to be anything to the contrary that when a case has been determined by a reviewing court and remanded to the trial court, the duty of the latter is to comply with the mandate of the former. The mandate is binding on the lower court and must be strictly followed and carried into effect according to its true intent and meaning as determined by the directions given by the reviewing court. . . . The lower court upon remand of a case from a higher court must obey the mandate or remittitur and render judgment in conformity thereto and has no authority to enter any judgment not in conformity with the order. Whatever comes before and is decided and disposed of by the reviewing court is considered as finally settled and the inferior court to which a mandate issues is bound by the decree as the law of the case and must carry it into execution according to the mandate, and after the reviewing court has determined the case before it and remanded it to the lower court, the latter is without power to modify, alter, amend, set aside, or in any manner disturb or depart from the judgment of the reviewing court; that the judgment of the reviewing court is not reviewable in any way by the court below and the lower court cannot vary or examine the decree of the higher court for any other purpose than execution, or give any other or further relief or review it even for apparent error upon any matter decided on appeal, or meddle with it further than to settle so much as has been remanded.

191 P.2d at 157. Emphasis added.

WHAT THE SUPREME COURT HAS DECIDED AND WRITTEN, IT HAS DECIDED AND WRITTEN. The trial court has no authority to add to or take away from that decision. Similarly, the Utah Court of Appeals has no authority to modify, or even review, that decision. Judge Brian carefully considered the Call III decision; he, after an almost exhausting series of "hearings"

and motions from Plaintiffs' counsel, dictated the "form" of the judgment, to be "consistent with" the **Call III** decision. His decision should be affirmed.

II

PLAINTIFFS ARE PRECLUDED FROM LITIGATING AND APPEALING THE ALLEGED "CIVIL RIGHTS VIOLATION"

The Plaintiffs assert that the "Judgment" be "expanded" to include recovery for an alleged, but unproved, "civil rights violation". The Plaintiffs' are not entitled to such as a matter of law. The material facts necessary for such a judgment are not only in dispute, but have been already decided adversely to the Plaintiffs!

In 1977 the Plaintiffs owned land outside the city limits of West Jordan. The Plaintiffs voluntarily applied for annexation to the City, which was effected in 1977. The Plaintiffs thereafter applied for approval to develop the Wescall subdivision. They received such approval and paid the flood-control impact fee. At the time of payment no "protest" was filed against the assessment of the impact fee. [The dismissal of the Plaintiffs' claims before the Defendant was required to present its defense case-in-chief precluded receiving testimony from the named-plaintiffs on this issue.]

When the case was actually tried before Judge Dee in November 1982, the Plaintiffs presented absolutely NO EVIDENCE as to any "civil rights violation." The Plaintiffs did not even testify and were not even present for the trial!

At the conclusion of the presentation of the Plaintiffs' evidence, the City moved to dismiss the Plaintiffs' claims. After thorough consideration of the matter, Judge Dee granted the motion to dismiss: he ruled that the Plaintiffs had failed to prove by a preponderance of the evidence any of their claims. Judge Dee later entered extensive "Findings of Fact" and "Conclusions of Law". Although Plaintiffs objected to those "findings" and "conclusions", at no time did the Plaintiffs suggest additional "findings" concerning any "civil rights violation" issues. Indeed, there could be no such "finding", as Plaintiffs' sole witness was Mr Sharkey, an accountant whose testimony could be reduced to a single sentence: that he could not figure out what the City did with the impact fees monies received from developers, including the Plaintiffs.

Plaintiffs could have "briefed" and "argued" the alleged "civil rights violation" theory. They didn't---either in the trial court or in the Utah Supreme Court. [See Attachment "E" to this brief.] Even in the "petition for rehearing" no mention was made of the alleged "civil rights violation". Thus, the ruling of the Supreme Court in Call III must stand. The "doctrine of the law of the case" prevents a re-examination of issues already examined and decided adversely to the Plaintiffs! In Call III the Utah Supreme Court made no mention of "civil rights violation".

Not only was there absolutely no proof or other evidence presented at the trial, there was no showing that the City was---in 1977, when the "civil rights violation" allegedly occurred---subject to "civil rights liability" under 42 U.S.C.

§ 1983. Indeed, under the prevailing case law at the time, a municipality was not a "person" which could violate the "civil rights" of a person. **Monroe vs Pape**, 365 U.S. 167 (1961). It was not until 1978---one year after the Plaintiffs paid their impact fees---that the United States Supreme Court reversed the **Monroe vs Pape** decision and declared that a municipality was a "person" for purposes of §1983 liability. **Monell vs Department of Social Services**, 436 U.S. 659 (1978). Plaintiffs have made absolutely no showing that **Monell** was to be applied "retroactively."

It is not a "civil rights violation" merely because someone pays an impact fee---not even "under protest"---and then FOUR YEARS LATER (in 1981) first raises the claim of a "civil rights violation" (which was not even proved) and then NINE YEARS AFTER the fee was paid, the Supreme Court declares---on the basis of only part of the evidence presented and not upon a complete presentation of the City's defense---that the ordinance, under which the fees were paid, was invalidly adopted.

No one made the Plaintiffs annex into West Jordan; they did so voluntarily so they could make use---for their own economic and business profit---of the available infrastructure (roads, services and utilities) within the City. If the Plaintiffs really thought their "civil rights" were being "violated" by payment of the fee, Why did the Plaintiffs wait for FOUR YEARS to even raise the issue of the alleged "civil rights" violation?

It is perhaps understandable why Plaintiffs' counsel (as contrasted from Plaintiffs themselves) wants to have a "civil rights violation" judgment: arguably under the provisions of 42 U.S.C. § 1988, the Plaintiffs would be thus entitled to an award of attorney's fees.

III

AN AWARD OF ATTORNEY'S FEES UNDER 42 U.S.C. § 1988
IS IMPROPER BECAUSE PLAINTIFFS DID NOT PREVAIL
ON THE "CIVIL RIGHTS CLAIM"

The flaw in Plaintiffs' claim for award of attorney's fees pursuant to 42 U.S.C. § 1988 is that, as shown above, the Plaintiffs did not prevail in their assertion of a civil rights violation.

IV

THE DEFENDANT DID NOT CONDUCT
ITS DEFENSE IN "BAD FAITH" SO AS TO JUSTIFY
AN AWARD OF ATTORNEY'S FEES

Plaintiffs claim that the award of attorney's fees should be awarded by reason of the Defendant's alleged "bad faith" (a Rule 11 violation) for having claimed that a "public hearing" was held.

The flaw in Plaintiffs' analysis is that the conclusion of the Utah Supreme Court on that issue is not, per se, evidence of the Defendant's (or its counsel's) "bad faith": it is certainly well nigh to impossible to predict how the Utah Supreme Court will rule on an issue.

In this context, it must be remembered that THE TRIAL COURT FOUND THAT A "PUBLIC HEARING" WAS HELD. Thus, the holding of the "public hearing" was not merely the unsubstantiated assertion of counsel; it was a "finding" of the trial court.

And further, one must remember that such a determination of the trial court was on the basis of only a part of the evidence available to the Defendant. [When Judge Dee had ruled that the Defendant (City) had complied with Judge Rigtrup's pre-trial order" (concerning evidence of the "public hearing"), he ruled that the City need not put on additional evidence. In this regard, it is significant to note that the Supreme Court's ruling (In Call III) thus was (1) based upon only a partial quantity of the evidence and (2) precluded the City from presenting its case-in-chief. This anomalous result was unsuccessfully pointed out to the Utah Supreme Court in the Defendant's petition for rehearing.]

And one must also remember that it was the Plaintiffs who, in April 1987, obtained a writ of mandamus from the Utah Supreme Court preventing the re-opening of the Defendant's case. The Plaintiffs cannot have "their cake and eat it too".

The mere fact that the Plaintiffs "win" does not mean that the Defendant conducted its defense "in bad faith."

That the Utah Supreme Court would interpret "public hearing" differently does not establish the Defendant's "bad faith". The significant factor is that THE TRIAL JUDGE DETERMINED THERE HAD BEEN A PUBLIC HEARING. The Defendant can hardly be faulted when the trial court makes such a finding.

Furthermore, the Defendant was precluded from presenting its entire case in chief. The Defendant's preliminary presentation was never intended to constitute the entire case-in-chief of the City. Indeed, Judge Dee recognized this when he allowed (January 1987) the Defendant to re-open the case to present its case-in-chief.

Judge Dee's dismissal of the Plaintiffs' claims at the conclusion of the presentation of Plaintiffs' evidence PRECLUDED the City from having its full "day in court" on this issue and the full litigation of Section 10-9-25.

The testimony presented by the Defendant concerning the public hearing was merely in compliance with the Court's pre-trial order. Judge Dee repeatedly ruled that the City had complied with its pre-trial order. He stated:

. . . I have already ruled on the question whether I thought he's complied with Judge Rigtrup's order, and I think he has, . . .

Record at 1711-1712. Emphasis added.

In Call III the Supreme Court ruled that no "public hearing" had been held and directed that judgment be entered against the City. It is highly unusual that the Supreme Court would so rule and thus totally dispose of the legal issues, without giving the Defendant the opportunity to fully present its case-in-chief, when the trial court repeatedly found there was compliance with that pre-trial order. [The correct procedure would have been to remand the case for presentation of the City's case-in-chief.]

In any event, the finding of the trial court (Judge Dee) that a public hearing had been held viciates any and all claims that the Defendant's defense was asserted or maintained "in bad faith". The fact that the Supreme Court---contrary to principles of the "law of the case" and its clear direction in **Call II** as to the issues to be tried---allowed, over the Defendant's objection, consideration of other issues certainly could not have been reasonably expected. The fact that the Supreme Court would totally dispose of the issue, without receiving the entire quantum of evidence available and without giving the Defendant an opportunity to present its case-in-chief, could not have been expected.

The mere fact that the Plaintiff prevails on a technicality, decided by the Supreme Court as a matter of first impression, does not render the Defendant's assertion of its defenses thereto "in bad faith". The Plaintiffs are not entitled to an award of attorney's fees.

V

PLAINTIFFS ARE NOT ENTITLED TO REIMBURSEMENT
OF THE MASTER'S FEES BECAUSE THE PLAINTIFFS
DID NOT PREVAIL ON THE "REASONABLENESS" ISSUE AND
BECAUSE THE PLAINTIFFS WAIVED THE PREPARATION
OF THE MASTER'S FINAL REPORT

In September 1980, Judge Rigtrup of this Court ordered the Defendant "to identify the records and indicate where they may be found."

The Defendant did so. Thereafter the Plaintiffs' counsel, in my opinion, continued to "play dumb" by claiming the records of the City were unintelligible to him. The culmination of that attitude was the Plaintiffs' motion "to appoint a master" to go

through the records of the City. That motion, heard by Judge Conder, was granted, with the proviso that the Plaintiffs pay the master's fees.

The Master found nothing wrong with the City's records. The master's preliminary report concluded that it was possible to perform the assigned duties; however, the estimated cost for such was apparently greater than the Plaintiffs were willing to pay. THE PLAINTIFFS WAIVED THE PREPARATION OF THE FINAL MASTER'S REPORT. [See Attachment D in this brief.]

It is unconscionable to think that the Defendant should have to pay for the Master. The Plaintiffs "lost" on the master-type issues (i.e. the determination as to the existence of the alleged "unreasonableness" of the impact fee) involved in this litigation.

It is incredible to think that the Plaintiffs should be entitled to receive reimbursement for the master's fees for the PRELIMINARY report when (1) the Master was appointed at their request, to provide a report at Plaintiffs' expense, to do work that the Plaintiffs themselves could have done but refused to do so, (2) the Plaintiffs WAIVED the preparation of the Master's final report, and (3) the Plaintiffs failed to prevail on any of the issues for which the Master was appointed.

The City had no control over the services performed for the Plaintiffs by their expert; the Plaintiffs were responsible for retaining him and deciding the scope, terms and duration of his employment. Under such conditions, the Defendant cannot be

held responsible to reimburse the Plaintiffs for their "expert" services! This is especially the case when those services were performed for issues upon which the Plaintiffs ultimately lost!

This issue was exhaustively considered by Judge Brian of the District Court---in an advantaged position to carefully consider the proceedings---in November 1987. He found against the Plaintiffs on the "costs" and "accounting fees" issues. The Plaintiffs' claims for reimbursement for those costs should be denied.

VI

PLAINTIFFS' ASSERTION THAT THE CASE BE REMANDED FOR
JOINDER OF THE INDISPENSABLE PARTY SUBDIVIDERS IS
MERELY THE REGURGITATION OF THE PLAINTIFFS'
PREVIOUSLY-UNSUCCESSFUL MOTIONS FOR "CLASS ACTION"
CERTIFICATION

The Plaintiffs' assertion that the case be "remanded" for "joinder" of the allegedly-indispensable party subdividers blatantly shows the lack of regard Plaintiff's counsel holds for the rulings of the Court.

This assertion---exhaustively argued before Judge Brian in 1987---is merely a thinly-disguised "class action" certification, which has been REPEATEDLY DENIED BY THE TRIAL COURT AND BY THE SUPREME COURT. It is incredible that Plaintiffs' counsel would, on page 25 of his "brief", make the assertion that his "motion" for joinder of additional party plaintiffs was "consistent with the foregoing authority and the expectations of the Utah Supreme Court." WHAT? The Supreme Court expressly ruled against him on the "class action" claims.

To raise the "joinder" issue, particularly at this late stage, allegedly justified by the most novel and creative sleight-of-hand interpretation of the Rules, itself borders on "bad faith" for which sanctions are appropriate!

Counsel's request that the case be "remanded" for the "joinder" proves that this litigation is not primarily for the benefit of the Plaintiffs (John Call and Clark Jenkins), but rather is for the sole benefit of Plaintiffs' counsel (Mr DeBry), who seemingly is singularly interested in dragging on this litigation for another decade, for his own apparent financial gain!

Plaintiffs' thinly-disguised "motion to add additional plaintiffs" is merely, in substance, **A RESURRECTION AND REGURGITATION OF THE PLAINTIFFS' PREVIOUSLY-UNSUCCESSFUL ATTEMPTS TO HAVE THIS ACTION "CERTIFIED" AS A "CLASS ACTION.** Such has been thoroughly litigated and decided---numerous times and at all levels of the Utah judicial system!

This action was originally pleaded as a "class action." This is now the TWELFTH TIME the "class action" has been examined. In each of those previous considerations, the "class action" certification was denied. It is incredible to think that at this late stage of proceedings---TEN YEARS AFTER THE CASE WAS ORIGINALLY FILED AND AFTER THE CASE HAS BEEN CONSIDERED BY THE UTAH SUPREME COURT FOUR TIMES---that "class action" status is now appropriate, even if disguised as a "joinder" of allegedly-indispensible parties.

The Utah Supreme Court has EXPRESSLY DENIED Plaintiffs' requested "class certification", not once but TWICE---the second time being AFTER the Call III decision was filed!

The doctrine of the "law of the case" also prevents a re-examination of the "class action" issue. That doctrine states that once a case has been adjudicated and appealed, the law---as announced by the appellate court---must be followed. In **Richardson vs Grand Central Corporation**, 572 P.2d 395 (Utah 1977), the Utah Supreme Court stated:

The purpose of the doctrine of the "law of the case" is that in the interest of economy of time and efficiency of procedure it is desirable to avoid the delays and difficulties involved in **repetitious contentions and rulings upon the same proposition in the same case.**

572 P.2d at 397. Emphasis added. Plaintiffs' renewed "motion" is certainly a "repetitious contention . . . upon the same proposition."

CONCLUSION

For the Utah Court of Appeals to re-open the judgment previously entered by the trial court, following the Utah Supreme Court's clear mandate, does violence to longstanding legal principles. The Supreme Court has made it clear that this litigation---vigorously contested for over ten years---must come to an end!

The Plaintiffs failed to prove their alleged "civil rights violation". When the case was appealed to the Utah Supreme Court, they failed to appeal that issue. When the Utah Supreme Court decided **Call III**, the Plaintiffs failed to challenge the

Court's ruling on the that issue on the "petition for rehearing". The Plaintiffs have thus waived their right to have the Court of Appeals consider the alleged "civil rights" issue.

The Plaintiffs are precluded from recovering attorney's fees for the civil rights violation, because they did not prevail on that issue.


The Court should not order the award of attorneys fees and the Master's costs. The Plaintiffs "waived" the preparation of the Master's report. The Defendant did not conduct its defense in "bad faith", as the trial court "found" a "public hearing" had been held.

The Plaintiffs' assertion that "joinder" of "additional party-plaintiffs" at this late stage is merely a re-hash of the long-dead "class action certification" issue, uniformly and consistently decided against the Plaintiffs.

DEMAND FOR ATTORNEY'S FEES

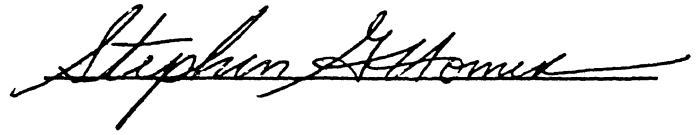
The Plaintiffs' repetitious filing of frivolous appeals, concerning issues which have already been litigated and adversely decided against the Plaintiffs (and/or their counsel), warrants the imposition of sanctions (including the award of attorney's fees), in order to discourage such conduct. The Defendant respectfully seeks such an award of attorney's fees.

Respectfully submitted this 17th day of May, 1988.


STEPHEN G HOMER
Attorney for Defendant-Respondent

CERTIFICATE

I certify that I caused to be hand-delivered four copies of the foregoing RESPONDENT'S BRIEF to the office of Mr Robert J DeBry, 4001 South 700 East, Salt Lake City, Utah, this 17th day of May, 1988.

A handwritten signature in cursive script, reading "Stephen L. Thomas", is written over a single horizontal line.

Addendum

ATTACHMENT "A"

Decision of the Utah Supreme Court in **Call vs City of West Jordan, Utah**, 727 P.2d 180 (Utah 1986)

ATTACHMENT "B"

Memorandum Decision of Judge David B Dee, dated 22 December 1982

ATTACHMENT "C"

Finding #22 of Judge David B Dee, dated 21 April 1983

ATTACHMENT "D"

Plaintiffs' Amended Motion to Modify Order Appointing Master, dated 4 January 1982

ATTACHMENT "E"

Plaintiffs' "Petition for Rehearing" filed subsequent to **Call III** decision, dated 5 August 1986

John CALL and Clark Jenkins,
Plaintiffs and Appellants,

v.

CITY OF WEST JORDAN, Utah,
Defendant and Respondent.

No. 19186.

Supreme Court of Utah

July 23, 1986

Rehearing Denied Oct. 29, 1986

ATTACHMENT 'A'

Subdividers brought action to challenge validity of ordinance adopted by city which required subdividers to dedicate 7% of proposed subdivision land to city or to pay equivalent of that value in cash to be used for flood control and/or park and recreation facilities. The Third District Court, Salt Lake County, David K. Winder, J., upheld ordinance and subdividers appealed. The Supreme Court, 606 P 2d 217, affirmed and remanded. On rehearing, the Supreme Court, 614 P 2d 1257, upheld facial constitutionality of ordinance and remanded with instructions. On remand, the Third District Court, Salt Lake County, David B. Dee, J., entered judgment in favor of city and subdividers appealed. On appeal, the Supreme Court, Howe, J., held that city planning and zoning commission failed to comply with statutory requirements of public hearing prior to adoption of impact fee ordinance where advance notice to public was not provided, ordinance being considered had not yet been drafted, and public did not have opportunity to voice their views.

Remanded with instructions

Stewart, J., dissented

1. Appeal and Error ⇨1201(3)

District court did not abuse its discretion in allowing developers to amend complaint after remand, where issues in amended complaint were not specifically foreclosed by appellate court during prior

2. Zoning and Planning ⇨111, 115

City planning and zoning commission failed to comply with statutory requirements of public hearing prior to adoption of impact fee ordinance where advance notice of purpose of meeting was not provided to public. Ordinance in issue had not yet been drafted, and public did not have opportunity to express their views, it was not sufficient that ordinance was adopted at regularly scheduled city council meeting. U.C.A. 1953, 10-9-1 to 10-9-30.

3. Parties ⇨9, 11

District court did not abuse its discretion in denying class action status to developers challenging impact fee ordinance where proposed class members were identifiable, where each claim would require individual consideration by court regardless of class status and where there was no possibility that inconsistent judgments would be issued if individual claims were brought. Rules Civ. Proc., Rule 23.

Robert J. Debray, Salt Lake City, for plaintiffs and appellants.

Stephen G. Homer, West Jordan City Atty., West Jordan, for defendant and respondent.

HOWE, Justice

Plaintiffs, John Call and Clark Jenkins, appeal from the trial court's dismissal of their complaint and the entry of judgment in favor of defendant, City of West Jordan.

In 1974, West Jordan formulated a plan to expand its flood control and public park systems to meet the increasing needs of the growing city. As part of its plan, West Jordan decided to impose an impact fee as a condition to granting plat approval to subdivision developers. The fee was seven percent of the land in the subdivision or, at the option of the city, the equivalent value in cash. West Jordan, Utah, Ordinance 33, § 9 (7-9-72) (1975). Plaintiffs paid the fees under protest and later brought this action

We have issued two previous opinions in this case. In our first opinion, *Call v. City of West Jordan*, 606 P 2d 217 (Utah 1979) (*Call I*), we held that U.C.A., 1953, §§ 10-9-1 to -30 empowered West Jordan to exact an impact fee to provide for flood control and parks as a condition to granting plat approval. On rehearing, in *Call v. City of West Jordan*, Utah 614 P 2d 1257 (1980) (*Call II*), we upheld the facial constitutionality of the ordinance, but we remanded to give plaintiffs an "opportunity to present evidence to show that the dedication required of them had no reasonable relationship to the needs for flood control or parks and recreation facilities created by their subdivision, if any." *Id.* at 1259.

[1] On remand, the trial court allowed plaintiffs to amend their complaint to include a claim that the ordinance was invalid because West Jordan had not followed statutory requirements in enacting it. Although West Jordan does not cross appeal the allowance of the amendment, it urges this Court to limit the case to the constitutional "reasonableness" issue. However, the pleadings may be amended after remand within the sound discretion of the trial court so long as they do not cover issues specifically foreclosed by the appellate court. *Street v. Fourth Judicial District Court, Utah County*, 113 Utah 60, 191 P 2d 153 (1948), Utah R. Civ. P. 15, *see White v. Lobdell*, 196 Mont. 156, 638 P 2d 1057 (1982), *Diversified Capitol Corp. v. City of North Las Vegas*, 95 Nev. 15, 590 P 2d 146 (1979). The trial court allowed West Jordan to argue why the pleadings should not be amended, but after consideration allowed the amendment. Neither *Call I* nor *Call II* specifically addressed this issue, and we find no abuse of discretion in the trial court's allowing the amendment. Therefore, the issue of whether West Jordan had followed statutory requirements in enacting the ordinance was properly before the trial court.

Because of problems encountered by the plaintiff in its discovery of information in the possession of West Jordan and because of the delay in *Call v. City of West Jordan*, we have

Corp. v. South Jordan City, 631 P 2d 8 (Utah 1981), the trial court issued a pretrial order which placed on West Jordan the burden of producing evidence on seven issues. These issues may be condensed into two main issues: (1) the reasonableness of the impact fee as applied to plaintiffs, and (2) whether the ordinance had been adopted according to statutory requirements.

It is necessary in this opinion to treat only the second issue. West Jordan is required at the threshold to present prima facie evidence that the city had followed the statutory requirements contained in U.C.A., 1953, §§ 10-9-1 to -30 in enacting the ordinance. Within section 25, the legislature has set forth specific procedures that a municipality must follow to exercise the powers granted to it.

In exercising the powers granted to it by the act, the planning commission shall prepare regulations governing the subdivision of land within the municipality. A public hearing thereon shall be held by the legislative body, after which the legislative body may adopt said regulations for the municipality.

The trial judge held in his conclusions of law that the ordinance was validly promulgated and that "[i]t was not shown by preponderance of the evidence that the city failed to comply with the provisions of section 10-9-25, Utah Code Annotated, in the promulgation of the ordinance." This conclusion was supported by the court's finding of fact No. 22.

Prior to the adoption of the Ordinance, the governing body of the City conducted a public hearing in which an overall master plan for the development of the city was discussed. This hearing (held in August 1974) was conducted in the West Jordan school auditorium so as to accommodate the large number of citizens attending. The specific concept of flood control and having an impact fee paid by new developers was discussed at that public hearing. The Ordinance was prepared by the West Jordan Planning and Zoning Commission even though it

City Attorney was responsible for the selection of the actual language used in the text of the Ordinance. The plaintiffs submitted no evidence to show that a public hearing was not held or that the Planning and Zoning Commission did not prepare the Ordinance.

We need not rule on the accuracy of this finding to resolve the issues presented in this case. Nevertheless, we are free to substitute our judgment for that of the trial court on the issue of law as to whether these facts satisfy the requirements of section 10-9-25. *Owells v. Clark*, 658 P.2d 585 (Utah 1982), *Automotive Manufacturers Warehouse, Inc. v. Service Auto Parts, Inc.*, 596 P.2d 1033 (Utah 1979). As mentioned above, the pretrial order placed upon West Jordan the burden of making a prima facie showing that it had satisfied the requirements of section 10-9-25. We hold as a matter of law that it failed to carry this burden.

Some months prior to the August 1974 public hearing, the West Jordan Planning and Zoning Commission had discussed on numerous occasions the idea of requiring developers to dedicate a portion of their subdivision or to pay an equivalent value in cash for parks and flood control. In fact, on March 20, 1974, the Commission adopted a motion to have the city require five percent from subdividers to use for parks. A month later, after the Commission had exacted the five percent fee from at least one subdivider, the city planner told the Commission that the city had no legal basis to impose the fee. During this time, a special committee was preparing the West Jordan Master Plan. The master plan speaks only in general terms about the need for parks and recreational facilities. It also addresses in vague terms who should pay for capital improvements to the city, hinting that incoming residents should pay more than existing residents because "equity in community improvements are [sic] seldom fairly shared through taxation." Nothing in the master plan proposes that developers either dedicate seven percent of their subdivisions or the cash equivalent of a portion of

West Jordan asserts, however, that the "specific concept of flood control and having an impact fee paid by new developers was discussed" at the public hearing on the master plan. The minutes of the public hearing were not introduced as an exhibit, nor are they included in the record. However, one of the witnesses for West Jordan testified as to what was in the minutes:

[Mr. Moosman:] [T]he minutes reflect that Mrs. Schmidt asked [the city planner] concerning what was going on with the flood control problems. And perhaps I could read that. It would be quicker.

....

[The Court:] . . . Go ahead and read the pertinent parts. What does Mrs. Schmidt say?

A. [The witness:] She asked [the city planner] to tell what the County Flood Control had in mind for developers in the—

Q. Yeah. Go ahead.

A. [The city planner] then explained that each developer must take care of his own flood water that originates on his property. They have suggested catch basins that can be used both for flood control and recreational use. . . .

It is to be observed that an impact fee was not mentioned. In January 1975, four months after the master plan public hearing, the city council enacted the ordinance which imposed the seven percent impact fee. No evidence of any other public hearing remotely related to the ordinance appears in the record.

[2] One's imagination must be stretched beyond rational limits to accept the master plan public hearing as satisfying the public hearing requirement of section 10-9-25. The ordinance was not even drafted until months after the master plan public hearing. Section 10-9-25 is very clear in this respect. The Commission must first prepare the regulations, one of which would provide for the impact fee.

legislative body may adopt said regulations for the municipality. In requiring a public hearing, our legislature contemplated that interested parties would have an opportunity to give their views, pro and con, regarding a specific legislative proposal, and thereby aid the municipal government in making its land use decisions. *See generally* 1 R. Anderson, *American Law of Zoning* § 4.11 (2d ed. 1976); 8A E. McQuillin, *The Law of Municipal Corporations* § 25.251 (rev. 3d ed., 1976).

West Jordan also argues that because the ordinance was adopted at a regularly scheduled city council meeting which was open to the public, the public hearing requirement was satisfied. Although the statute does not specifically address the required notice, we hold that because the statute calls for a *public hearing* our legislature contemplated something more than a regular city council meeting held, so far as the record here discloses, without specific advance notice to the public that the proposed ordinance would be considered. *See* 1 R. Anderson, *American Law of Zoning* § 4.11 (2d ed. 1976). Notice, to be effective, must alert the public to the nature and scope of the ordinance that is finally adopted. *Id.* at 200. Failure to strictly follow the statutory requirements in enacting the ordinance renders it invalid. *Melville v. Salt Lake County*, 536 P.2d 133 (Utah 1975); *Anderson* at 199. This well established rule is followed by the great majority of jurisdictions. Annot., 96 A.L.R.2d 149 (1964); *see Town of Beverly Shores Plan Commission v. Enright*, 463 N.E.2d 246 (Ind. 1984) (statute required municipality to publish two notices in newspaper within ten days of hearing—ordinance invalidated where first notice appeared in newspaper eleven days before hearing); *Kalakowski v. Clarendon*, 139 Vt. 519, 431 A.2d 178 (1981); *Morland Development Co. v. Tulsa*, 596 P.2d 1255 (Okla. 1979) (city ordinance establishing flood control districts invalidated because of failure to follow statutory requirements). We therefore hold that the West Jordan, Utah, Ordinance

One further matter must be addressed. Plaintiffs urge that we reverse the trial judge's findings denying class action status to this lawsuit. We will reverse a trial court's decision on class action status only when it is shown that the trial court misapplied the law or abused its discretion. *Gold Strike Stamp Co. v. Christensen*, 436 F.2d 791 (10th Cir. 1970); 3B J. Moore & J. Kennedy, *Moore's Federal Practice* § 23.97 (2d ed. 1985); 2 H. Newberg, *Newberg on Class Actions* § 7.39 (2d ed. 1985). In the history of this lawsuit, plaintiffs requested class action certification on three different occasions from three different trial judges. All three denied their requests. Plaintiffs do not assert that the trial court misapplied the law in denying class action status. Thus, we shall review the trial court's decision to determine whether it abused its discretion.

[3] The trial court found that the "putative class is not so numerous that joinder of all parties is impracticable." Plaintiffs assert that the size of the class alone mandates that joinder is impracticable. However, size of the class is not solely determinative of impracticability. We acknowledge that there may be instances where sheer size alone would determine impracticability. One of the salutary effects of Rule 23, Utah R.Civ.P., is that it allows access to the courts for numerous claimants to request redress of claims that are too small to merit the expenses of litigation on an individual basis. 1 H. Newberg, *Newberg on Class Actions* § 3.03 n. 38, § 3.06 at 145 (2d ed. 1985). In other instances, the size and membership of the class may be unknown, which makes joinder impracticable. However, we are here dealing with a class whose members have been identified. They are developers engaged in business whose claims are not so insubstantial that joinder or individual suits would not merit the cost. It is unlikely that denial of class action status would preclude them from pursuing their remedies. *See 1 Newberg* at 145. Judicial econ-

would still need to be determined on an individual basis, regardless of class action status. Because of our ruling on the merits of the case, there is no possibility of inconsistent judgments and no issue of substantial public interest remains. Given the facts of this case, we cannot hold that the trial court abused its discretion in denying class action status.

We remand this case to the trial court to enter judgment consistent with this opinion. Costs to plaintiffs.

HALL, C.J., and DURHAM and ZIMMERMAN, JJ., concur.

STEWART, J., dissents.



Gustav E. CLAUS, Plaintiff
and Appellant,

v.

Marlise CLAUS, Defendant
and Respondent.

No. 20021.

Supreme Court of Utah.

Aug. 1, 1986.

Divorce decree dividing marital property was entered by the Third District Court, Salt Lake County, James S. Sawaya, J., and husband appealed. The Supreme Court held that: (1) division of marital property was eminently fair; (2) making Internal Revenue Service obligation into husband's separate debt was not abuse of discretion; (3) award of temporary alimony to wife was not abuse of discretion in view of her inability to earn income during parties' separation.

1. Divorce \S 252.2, 253(4)

Division of marital property was eminently fair in awarding approximately equal equities despite court not finding values of parties' premarital assets and increase in those values after date of marriage.

2. Divorce \S 252.4

In dividing marital property, making Internal Revenue Service obligation separate debt of husband was not abuse of discretion in light of joint income tax returns disclosing that wife's income was minimal at best.

3. Divorce \S 215

Award of one year of temporary alimony in amount of \$350 per month was not abuse of discretion in view of wife's inability to maintain real estate license or manage parties' rental properties during separation due to pendency of divorce.

J. Richard Bell, Salt Lake City, for plaintiff and appellant.

George H. Searle, Salt Lake City, for defendant and respondent.

PER CURIAM:

In this divorce action, plaintiff appeals from that portion of the decree dealing with the distribution of the parties' marital estate and the award of temporary alimony to defendant. We affirm.

The parties were married four and one-half years before they separated. No children were born of the marriage. Both had been married before and had brought several pieces of real property into the marriage. The trial court awarded plaintiff all the assets of his two corporations, real property owned by those corporations, and a rental unit acquired by the parties during the marriage. Defendant was awarded the home she lived in at the time of the divorce, real property the parties had acquired with proceeds from her real property holdings, and property acquired by the parties under uniform real estate contracts. Plaintiff



FILED
SALT LAKE COUNTY, UTAH
1982
W. STEPHEN G. HOMER, JR., City Attorney
D. R. GILBERT, Clerk

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

JOHN CALL and CLARK JENKINS,	:	
Plaintiffs,	:	MEMORANDUM DECISION
vs.	:	Civil No. C-78-829
CITY OF WEST JORDAN, UTAH	:	
Defendant.	:	

The trial of the above-captioned matter on a procedural basis came on before this Court September 1 and 2, 1982 following the previous Pretrial Order of Judge Rigtrup, with plaintiff being represented by Robert J. Debry, Esq., and defendant being represented by Stephen G. Homer, Esq., City Attorney for West Jordan. At that procedural hearing, limited issues of defendant's projected case in chief were presented for the purpose of allowing discovery to be continued on behalf of the plaintiff. Then, on November 18, 1982, trial commenced with plaintiffs producing witness Gerald Sharkey, a C.P.A., who went over the information which had been obtained by defendant as a result of the discovery previously allowed.

At the conclusion of the plaintiffs' presentation, the defendant prior to putting on its case in chief, moved the Court to dismiss plaintiffs' Complaint or grant Judgment in favor of the defendant, and the Court at that juncture requested that counsel for both sides provide written memoranda concerning their position so that the Court could make the appropriate ruling. The Court after having received

ATTACHMENT 'B'

written memoranda on the two issues raised at this juncture,
now makes and enters its Memorandum Decision as follows:

The two issues for determination are:


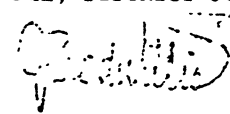
1. Whether the matter herein involved should be certified for class action under Rule 23, Utah Rules of Civil Procedure, and
2. Whether defendant's motion to dismiss plaintiffs' Complaint or as characterized, grant a motion in favor of defendant against the plaintiffs should be granted.

On the first issue concerning the certification of class action, the Court after having reviewed the prior decisions of Judge Banks and Judge Winder as they are limitedly shown in the file, together with the information supporting those prior motions and the present status of the file and the authorities presented by defendant, now rules that the matter should not be certified for class action, and the motion for such certification is denied.

On the second issue, it seems clear from the testimony of the witness presented by the defendants, and also by an examination of the accounting records as testified to by Mr. Sharkey, that the impact fee assessed against the Wescall Subdivision was not unreasonable, and on this issue the Court finds that the plaintiffs failed to convince this Court by a preponderance of the evidence that there was an unreasonable fee assessed, and on this basis, therefore, the Court grants the defendant's motion to dismiss plaintiffs' Complaint, and no cause for action.

Mr. Stephen G. Homer is directed to prepare the appropriate Findings of Fact, Conclusions of Law and Judgment, not inconsistent with this Memorandum Decision.

Dated this 22 day of December, 1982.


DAVID B. DEE, DISTRICT JUDGE


ATTACHMENT 'C'

Dale F. Gardiner
MATHESON, JEPPSON & GARDINER
Attorneys for Plaintiffs
419 East First South
Salt Lake City, UT 84111
Telephone: 363-2244

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

JOHN CALL, an individual,
and JOHN CLARK JENKINS,
an individual,

Plaintiffs,

vs.

CITY OF WEST JORDAN,

Defendant.

AMENDED MOTION TO MODIFY ORDER
APPOINTING MASTER

Civil No. C-78-829

Plaintiffs, having stipulated with defendant that their motion for an award of attorney's fees for failure to make discovery and motion to modify order appointing master may be separated and heard before District Judge Kenneth Rigtrup and District Judge Dean Conder, comes now and amends its motion to modify the order appointing master as follows:

Plaintiffs move the Court for an order requiring defendant City of West Jordan (1) to pay the initial fee of the master and (2) to pay the fee for the master's final report.

In the alternative, plaintiffs move the Court for an order terminating the master and excusing plaintiff's from paying for the master's final report.

DATED this 4th day of January, 1982.

MATHESON, JEPPSON & GARDINER

By

Dale F. Gardiner
Attorneys for Plaintiffs
419 East First South
Salt Lake City, Utah 84111

Dale F. Gardiner

CERTIFICATE OF DELIVERY

I hereby certify that a copy of the foregoing Amended Motion to Modify Order Appointing Master was hand delivered to Stephen G. Homer, West Jordan City Attorney, 1850 West 7800 South, West Jordan, UT 84084, this 4th day of January, 1982.

Donna G. Hurst

ATTACHMENT 'D'

ROBERT J. DEBRY - A0849
ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiffs-Appellants
4252 South 700 East
Salt Lake City, Utah 84107
Telephone: (801) 262-8915

IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN CALL AND)	
CLARK JENKINS,)	
)	PETITION FOR REHEARING
Plaintiffs-Appellants,)	
)	
vs.)	
)	
CITY OF WEST JORDAN,)	No. 19186
)	
Defendant-Respondent.))	

Appellant (Call) respectfully petitions this Court to rehear that portion of its opinion which refuses to certify this case as a class action. In support of this petition, appellant relies upon the points and authorities below.

ATTACHMENT "E"

POINT ONE

REHEARING IS NECESSARY
BECAUSE THE COURT'S OPINION IS BASED UPON
CONJECTURE AND SPECULATION OUTSIDE OF THE RECORD

The central issue on class certification was whether or not Rule 23(a)(1), Utah Rules of Civil Procedure, had been met.¹ This is often referred to as the numerosity requirement.

A. THE COURT'S OPINION WAS BASED UPON A CORRECT LEGAL PRINCIPLE.

During the briefing, Call argued that the size of the class was approximately one hundred members. Call further argued that classes of forty or more members would be presumed to satisfy Rule 23(a)(1).²

This Court ruled that a finding on Rule 23(a)(1) should not be based upon numbers alone. This Court ruled that the Court ought to look at other factors in deciding whether or not joinder is "impracticable." See Slip Opinion at p. 5 & 6.

¹"One or more members of a class may sue or be sued representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable Rule 23(a)(1), Utah Rules of Civil Procedure.

²"...The difficulty inherent in joining as few as for class members should raise a presumption that joinder impracticable, and the plaintiff whose class is that large larger should meet the test of Rule 23(a)(1) on that fact alone." Newberg on Class Actions, 2 Ed., §3.05 at p. 142.

Call concedes that this Court's legal analysis is correct. Newberg states the rule as follows:

But numbers are only one of several considerations. Apart from class size, factors relevant to the joinder impracticability issue include judicial economy arising from the avoidance of a multiplicity of actions, geographic disbursement of class members, size of individual claims, financial resources of class members, the ability of claimants to institute individual suits, and requests for prospective injunctive relief which will involve future class members.

Newberg on Class Actions, 2nd Ed., §3.06.

B. THIS COURT ERRED IN APPLYING THE FACTS TO CORRECT LEGAL PRINCIPLES.

After reaching a correct legal conclusion, this Court applied facts to the law. However, in so doing, this Court resorted to speculation and conjecture outside the record. Specifically, this Court speculated that the putative class members:

. . .are developers engaged in business whose claims are not so insubstantial that joinder or individual suits would not merit the cost.

If true, that is of course a key fact which fits into the Court's legal analysis. However, there is no factual basis for that speculation. Certainly, Judge Dee did not make any such finding. The true facts are that:

A. Approximately 60% of the claims of putative class members are for less than \$10,000.

B. Approximately 44% of the claims of putative class members are for less than \$5,000.

C. Approximately 26% of the claims for putative class members are less than \$2,500.

D. Approximately 8% of the claims of putative class members are for less than \$1,000.

(R. 895-896.³)

There is simply no factual basis to suppose that people with claims of \$1,000 to \$5,000 can afford the expense and risk of individual litigation. After all, this case has already consumed eight years risk of individual litigation and three Supreme Court opinions.

If this opinion is permitted to stand, it will mean that there can never be a class action in Utah unless the damages are less than \$500 per person. That is simply not the law in any other jurisdiction (state or federal). Rather, the correct rule is as follows:

It is important to note that though the existence of small claims may be a strong element in approving class actions, the presence of large claims is not a ground for class denial.

Newberg on Class Actions, 2nd Ed., §4.39 at p. 363.

³This is only a partial list of subdivisions. Compare R. 191-192.

POINT TWO
REHEARING IS NECESSARY AS SEVERAL
IMPORTANT ISSUES REMAIN IN THE CASE

Call has urged that this case be certified under Rule 23(b)(1)(A), Utah Rules of Civil Procedure.⁴ Indeed, Call has pointed out that Rule 23(b)(1)(A) was invented for this specific type of case:

To illustrate: separate actions by individuals against a municipality to declare a bond issue invalid. . .to prevent or limit the making of a particular appropriation or to compel or to invalidate an assessment. . .

Notes of the Advisory Committee on Rules, 39 F.R.D. 100.

This Court's opinion disposes of that argument as follows:

Because of our ruling on the merits of the case, there is no possibility of inconsistent judgments and no issue⁵ of substantial public interest remains.

Slip Opinion, at p. 6.

⁴"The prosecution of separate actions by or against individual members of the class would create a risk of [i]nconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class."

⁵That is a dangerous rule which has apparently never been followed by any court in the U.S. This precedent would invite trial courts to always deny claims for class certification under Rule 23(b)(1)(A). The trial court would always be upheld on appeal because an appellate court could always say that there is no chance for inconsistent judgments after the ruling on the merits. In short, this opinion would emasculate Rule 23(b)(1)(A). For a case which so holds, see India v. United Air Lines, Inc., 83 F.R.D. 1, 12 at paragraph 20, (N.D. Cal. 1979).

However, the Court's opinion overlooks the fact that other important issues remain in the case.

For example, Call has prayed for injunctive relief. (R. 331-343, See Prayer at paragraphs 1(b), 2(b), 3(b), 4(b), 5(b), 6(b), and 7(b).) Although this Court has ruled on the merits, the case must now be returned to consider the shape of any injunctive relief. It is not likely that West Jordan will roll over and play dead on the injunction issue. Certainly, the shape of the injunction will have impact on all putative class members.

There is also an important statute of limitations issue left in the case. West Jordan is not ready to pay out claims to all comers. Rather, West Jordan has taken the position that the statute of limitations bars all other putative class members. (See Exhibit A.) Thus, the trial court must decide whether the statute of limitations has been tolled by reason of the class action.⁶ That is obviously an issue that will have classwide applications.⁷

⁶Because of the trial court's adverse rulings, West Jordan has had no reason to raise the statute of limitations defense until now.

⁷It is true that West Jordan made no statute of limitations claim against Call. Or, in other words, the statute of limitations issue is moot as to Call. However, it is settled that Call may still litigate class issues that may not be moot as to him. See Deposit Guarantee Natl. Bank v. Vreland, 445 U.S. 326 (1980); and, United States Parole Comm. v. Geraghty, 445 U.S. 388 (1980). See also, Newberg on Class Actions, 2nd Ed., §2.32 and §2.33.

Finally, there is an important issue remaining of a civil rights violation under 42 U.S.C. §1983. (See R. 338 at paragraphs 38-41.) Because of the adverse rulings of the lower court, that issue has been moot. However, the civil rights claim is now ripe for further proceedings in the trial court.

In summary, there are important issues remaining. Thus, it is too soon to discard the class device as unnecessary.

POINT THREE

REHEARING IS NECESSARY BECAUSE THE COURT HAS OVERLOOKED OVERWHELMING AUTHORITY ON THE ISSUE OF INDIVIDUALIZED DAMAGES

This Court has denied class certification, in part, because:

Judicial economy would be little served because the amount of the claim of each class member would still need to be determined on an individual basis, regardless of class action status.

Slip Opinion, at p. 6.

Virtually, no other court (state or federal) has adopted such a rule:

Though at least some courts have suggested that differences in the amount of damages claimed will make a plaintiff's claim atypical, most courts have declined even to consider that argument, and nearly all of those that have ruled on it have rejected it outright. If differences in amounts of individual damages would make a class action improper, a class action for damages would never be possible, because variations in amount of damages among class members are inevitable unless they

happen to be identically situated factually, which is not required under Rule 23. The existence of a class action provision for damage actions itself indicates that the drafters of the rule contemplated certifications for classes raising common liability issues, even where the amounts of damages claimed varied among class members.

Newberg on Class Actions, 2nd Ed., §3.16.

See also, Appellant's Reply Brief, at p. 34 and 35.

If this opinion is permitted to stand, it will serve as an erroneous precedent for hundreds of other class actions now pending in the trial courts.

POINT FOUR

THE CASE SHOULD BE RETURNED TO THE TRIAL COURT FOR REPROCESSING BECAUSE THE TRIAL COURT FAILED TO MAKE ANY FINDING OF SUBSTANCE

This Court has observed that the correct standard of review is whether the trial court abused its discretion. (Slip Opinion, at p. 5.) However, how can this Court review the trial court's discretion when it doesn't know what the trial court had in mind? See Gibson v. Supercargoes & Checkers of Intl. Longshoremen's Union, 543 F.2d 1239 at n.2 (9th Cir. 1976). Moreover, the absence of adequate findings was an invitation for this Court to speculate on facts. (See Point One above.)

During the briefing, Call advised the Court of this defect in the record. See Appellant's Reply Brief, at p. 35, n.13. See also Gulf Oil v. Bernard, 452 U.S. 89, 68 L.Ed. 2d 693, 101 S. Ct. 2193 (1981); India v. United Air Lines, Inc., 565 F.2d 554, 562 (9th Cir. 1977); Eisenberg v. Gagnon, 766 F.2d 770 (3rd Cir. 1985).

In Eisenberg, supra, the appellate court refused to make its own findings on class issues:

First, we find it difficult to evaluate, on a cold record, several of the remaining prerequisites to a 23(b)(3) class action, which the district court did not address. . .

Second, class actions depend on the continuing supervision of the district court, including reconsideration of the efficacy of class action treatment as the circumstances change. One circumstance that has clearly changed is that Eisenberg & Nissen have won a judgment on the merits. [Emphasis added.]

See also, India v. United Airlines, supra, for a case where the appellate court remanded for the trial court to enter appropriate findings.

DATED this 5 day of Aug, 1986.

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