1981

Redwood Gym, Alice'S Health Studio, Cindy'S Golden Touch, Gentlemen'S Quarters, Lynn'S Health Studio, Ginger'S Health Studio, Kelly'S Health Studio, Kim'S Health Studio, Cavalier Health Studio, and Continental Health Studio v. Salt Lake County Commission, Salt Lake County Attorney'S office, and Salt Lake County Sheriff'S Department : Brief of Respondents In Answer To Petition For Rehearing

ROBERT D. MAACK, ROBERT L. STOLEBARGER; ATTORNEYS FOR APPELLANTS;THEODORE L. CANNON; ATTORNEY FOR RESPONDENTS

IN THE SUPREME COURT OF THE STATE OF UTAH

REDWOOD GYM, ALICE'S HEALTH STUDIO, CINDY'S GOLDEN TOUCH, GENTLEMEN'S QUARTERS, LYNN'S HEALTH STUDIO, GINGER'S HEALTH STUDIO, KELLY'S HEALTH STUDIO, KIM'S HEALTH STUDIO, CAVALIER HEALTH STUDIO, and CONTINENTAL HEALTH STUDIO, Plaintiffs-Appellants, v. SALT LAKE COUNTY COMMISSION, SALT LAKE COUNTY ATTORNEY'S OFFICE, and SALT LAKE COUNTY SHERIFF'S DEPARTMENT Defendants-Respondents.	No. 16833

BRIEF OF RESPONDENTS IN ANSWER TO PETITION FOR REHEARING

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH
HONORABLE HOMER F. WILKINSON, PRESIDING

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IN THE SUPREME COURT OF THE STATE OF UTAH

REDWOOD GYM, ALICE'S HEALTH STUDIO, CINDY'S GOLDEN TOUCH, GENTLEMEN'S QUARTERS, LYNN'S HEALTH STUDIO, GINGER'S HEALTH STUDIO, KELLY'S HEALTH STUDIO, KIM'S HEALTH STUDIO, CAVALIER HEALTH STUDIO, and CONTINENTAL HEALTH STUDIO,	:	
Plaintiffs-Appellants,	:	No. 16833
v.	:	
SALT LAKE COUNTY COMMISSION, SALT LAKE COUNTY ATTORNEY'S OFFICE, and SALT LAKE COUNTY SHERIFF'S DEPARTMENT	:	
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NATURE OF THE CASE

Appellants seek a declaratory judgment adjudging a Salt Lake County ordinance invalid and unconstitutional.

DISPOSITION IN THE LOWER COURT

The lower court granted respondents' motion for summary judgment. This court filed its decision on January 19, 1981 and appellants have petitioned for a rehearing.

RELIEF SOUGHT ON APPEAL

Appellants seek a rehearing and an order reversing the lower court's summary judgment in favor of the respondents.

STATEMENT OF FACTS

Appellants brought this action seeking a declaratory judgment that the subject county ordinance was unconstitutional and unlawful.

The matter was submitted to the lower court based on stipulated facts and upon cross-motions for summary judgment. The lower court granted respondents' motion for summary judgment.

On January 19, 1981, the Supreme Court of Utah filed its written decision upholding the lower court's order.

On February 6, 1981 the appellants obtained an ex parte order extending the time to file a petition for rehearing.

During this extension (February 18, 1981) the Governor signed into law Senate Bill Number 26, also known as the Massage Practice Act.

On February 23, 1981, appellants petitioned for rehearing on the grounds of error and of a newly "discovered" matter, namely, the Massage Practice Act.

ARGUMENT

POINT I

LEGISLATION ENACTED AFTER THIS COURT'S DECISION DOES NOT GIVE APPELLANTS A BASIS FOR REHEARING.

A. APPELLANTS DO NOT HAVE STANDING TO SUE UNDER THE RECENTLY ENACTED "MASSAGE PRACTICE ACT."

On or about the 18th day of February, 1981, Governor Matheson of Utah signed into law the Massage Practice Act. This Act, a copy of which is attached as an appendix to appellants' brief in support of their petition for rehearing, provides for the creation of the Utah board of massage, the licensing requirements of "massage technicians" and "massage establishments," and the grounds for revoking such licenses.

Appellants argue that the Act renders the subject county ordinance unnecessary and an improper exercise of police power. However, appellants have not shown themselves to be "massage technicians" nor "massage establishments" as defined in the Act. Thus, they have no standing to sue under the Act.

By its own terms, the Act became effective upon the Governor's signature. There is no evidence that during the intervening two months since its effective date, that the State of Utah has threatened action to compell appellants to cease carrying on their businesses until they obtain a license from the State of Utah. There is no evidence that appellants have applied for a license under the Massage Practice Act. There is no evidence that they could qualify for such a license if they were to apply. There is no evidence that any of their rights have been lost nor that they are being threatened.

It would be improper for this court to judge the effect of the Act upon the subject county ordinance within the ambit of appellants' petition for rehearing where there is no evidence that appellants fall within the scope of the Act.

B. APPELLANTS' ARGUMENT THAT THE "MASSAGE PRACTICE ACT" RENDERS THE ENTIRE SUBJECT ORDINANCE INVALID CANNOT BE RAISED FOR THE FIRST TIME IN THE PETITION FOR REHEARING.

The issue of the compatibility of the subject county ordinance and the Act was not raised in the lower court nor in the briefs on appeal. A petition for rehearing is not the proper place to raise an issue for the first time. The Supreme Court of Alaska, with reference to petitions for rehearing, followed the rule of the majority of jurisdictions when it decided:

> It was not intended as a devise for raising questions which had never before been presented to the appellate or lower courts and administrative boards. This court will not consider questions raised for the first time on petition for rehearing.[1]

Appellants did raise in their initial brief on appeal the issue of preemption by the State of the entire area of sexual offenses, but they did not raise, prior to their brief in support of rehearing, the issue of the County's ability to license and regulate professions. On the contrary, this matter was submitted to the lower court for summary judgment on stipulated facts. Paragraph two of that stipulation [see page 35 of the Record] specifically provided that the County may license and regulate all lawful businesses.

Appellants' petition and supporting brief raise new issues of fact and law, that require and deserve an examination in a trial court. At the trial court the standing of the appellants can be determined, the purpose of the Act can be ascertained, the scope of the Act vis-a-vis the subject county ordinance can be defined, and the constitutionality of the Act tested.

Respondents urge this court to only inquire whether the order of the lower court, granting summary judgment, based on the stipulated facts and existing law, was erroneous.

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[1] Watts v. Seward School Board, 423 P2d 678 (Alaska 1967) at p. 679.

C. APPELLANTS' CLAIM, THAT THE ACT IS A NEWLY DISCOVERED MATTER THAT ENTITLES THEM TO A REHEARING, IS NOT SUPPORTABLE IN LAW.

Appellants' only cited authority[2] for granting a rehearing because of a newly discovered matter is a case that antedates statehood by 10 years and doesn't then deal with a newly discovered matter. Appellants' do not cite one case where this court has granted a rehearing because of a newly discovered matter.

There is authority in other jurisdictions for granting a rehearing where a new law intervenes between the judgment below and the decision on appeal but only when it "positively changes the rules which govern."[3] Illustrative of such a situation is where a state court's judgment, affirming a schoolteacher's dismissal on grounds of "immorality", was vacated because the statute defining "immorality" was completedly changed.[4]

Another illustration of this point is where a plaintiff in a malpractice action did not discover a foreign object inside his body until after the three year statute of limitations had run. The trial court ruled that the action was not brought within the

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2 Brown v. Pickard, 4 Utah 292, 11 P. 512 (1886).

3 Marshall v. Richardson, 240 SC 318, 125 SE2d 639 (1962).

4 Watts v. Seward School Board, 381 U.S. 126, 13 L. Ed. 2d 261, 85 S. Ct. 1321, on remand (Alaska) 421 P.2d 586, reh. den. (Alaska) 423 P.2d 678, vacated 391 U.S. 592, 20 L. Ed. 2d 842, 88 S. Ct. 1753, on remand (Alaska) 454 P.2d 732, cert. den. 397 U.S. 921, 25 L. Ed. 2d 101, 90 S. Ct. 899, reh. den. 397 U.S. 1071, 25 L. Ed. 2d 695, 90 S. Ct. 1495.

period of limitations and dismissed the action. After the lower court's ruling the state adopted the "discovery" rule that held the statute did not commence until the object was discovered. The Supreme Court reversed the lower court and gave the plaintiff the benefit of the new law.[5]

In the instant case, the Act does not "positively" change the rules which govern. Neither are appellants in danger of losing their livelihood as was the schoolteacher charged with immorality nor are they being foreclosed from filing a new action to test their preemption argument, as was the malpractice claimant. The appellants may, without substantial inconvenience, and no injustice, lodge an action in district court if their petition for rehearing is denied.

The purpose of a rehearing is not to raise questions that were not presented in the lower court and were not briefed nor argued on review. Surely its purpose is not for raising new issues about laws that were not in effect until a month after the decision was filed by the court and whose application is not retroactive.

POINT II

RESTATEMENTS OF ARGUMENTS MADE IN APPELLANTS' BRIEF DO NOT CONSTITUTE GROUNDS FOR REHEARING.

Appellants' allegations of error in Points II, III, IV, V, VI, VII, and VIII of their brief in support of their petition are

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[5] Denison v. Goforth, 75 Wash. 2d 843, 454 P.2d 218 (1969).

restatements of the same arguments presented in appellants' brief on appeal and have been fully considered by the court and do not constitute grounds for rehearing.

POINT III

THIS COURT SHOULD NOT RECONSIDER ITS DECISION IN THIS MATTER BECAUSE ONLY THREE JUSTICES JOINED IN THE OPINION.

Appellants, at Point IX of their brief in support of their petition for rehearing, argue that the decision in the instant case is deficient because only three justices were on the panel at the time this case was decided. As the basis for their argument, they cite Article VIII, Section 2 of the Utah State Constitution:

> The Supreme Court shall consist of five judges, which number may be increased or decreased by the legislature, but no alteration or increase shall have the effect of removing a judge from office. . . If a justice of the Supreme Court shall be disqualified from sitting in a cause before said court, the remaining judges shall call a district judge to sit with them on the hearing of such a cause. . . (Emphasis added.)

The part appellants chose to delete, as shown by the ellipsis, provides: "A majority of the judges constituting the court shall be necessary to form a quorum or render a decision."

In the instant case, a majority [3] of the judges rendered the decision and the constitutional provisions were satisfied.

CONCLUSION

Respondents earnestly request that this high court let stand its decision upholding the lower court's ruling, limited as it is

to the stipulated facts and the then existing law.

DATED this 10th day of April, 1981.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing BRIEF OF RESPONDENTS IN ANSWER TO PETITION FOR REHEARING were served by hand delivering the same on the 10th day of April, 1981, to the following attorneys for appellants:

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