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Woodey B. Searle and Vonetta Searle, Randy B. Searle and Vickie Searle, Rance W. Searle and Gail Searle, Rhett A. Searle and Tony Searle

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

- -

WOODEY B. SEARLE and VONETTA SEARLE, RANDY B. SEARLE and VICKIE SEARLE, RANCE W. SEARLE and GAIL SEARLE, RHETT A. SEARLE and TONY SEARLE,

Plaintiffs-Appellants, No. 17349

vs.

LONNIE JOHNSON and the HUMANE SOCIETY OF UTAH,

Defendants-Respondents.

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BRIEF OF RESPONDENTS

Appeal from the Judgment of the
Fourth Judicial District Court of Uintah County,
The Honorable David Sam, Judge.

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NATURE OF THE CASE

This is an action commenced by the plaintiffs against Defendants for an alleged financial loss to Plaintiffs' businesses located in Vernal, Utah caused by Defendants' actions in protesting the condition of the Uintah County-Vernal City Dog Pound by instituting a campaign allegedly discouraging tourism in Vernal City and Uintah County.

DISPOSITION IN LOWER COURT

The Honorable David Sam granted Defendants' Motion for Summary Judgment and entered a Judgment of no cause of action in favor of Defendants.

RELIEF SOUGHT ON APPEAL

Respondents seek affirmance of the lower court decision.

STATEMENT OF FACTS

A review of the record filed before this Court and the "Statement of Facts" submitted by Appellants in their brief shows that such "Statement" contains distortions of the true facts, innuendos which are not justified, and further omits much of the evidence which was before the lower court at the time the Summary Judgment was granted. While it is true that this Court must view the evidence in the light most favorable to the appellants for purposes of reviewing a Summary Judgment, it is also true that the entire record must be examined including evidence submitted by both sides of the controversy. Brady v. Fausett, 546 P.2d 246 (Utah 1976). For this reason, Respondents shall restate the facts in their entirety with the purpose of presenting a complete and objective recitation of the lower court record.

The Humane Society of Utah, contrary to Appellants' assertion, is not affiliated in any way with any other national organization. It has been formed for the purpose of protecting animals and preventing cruelty to them in accordance with various state and local laws. As early as

1971 the Humane Society requested the Uintah County Commission and Vernal City Council to improve the jointly owned facility located near Vernal, Utah which was used for the impoundment and destruction of dogs. (R. 151). From 1971 through 1975 it is uncontradicted that various contacts were made between the Humane Society and government officials of both Uintah County and Vernal City. (R. 151-152).

On February 22, 1974 a letter was written to Uintah High School by an agent of the Humane Society of Utah describing the conditions of the pound which was maintained by the city and county. The letter stated that animals were being executed by a sheriff who would sit on the tailgate of an automobile and shoot at the animals located in the wire enclosures until each was hit. (R. 148-150).

On August 5, 1975, Thomas Little, the executive director of the Humane Society, sent a letter to Jack Allred, a city councilman of Vernal City, and stated the following:

> Pursuant to our phone conversation the other day, please find enclosed two copies of a letter that was mailed to every resident of Cedar City plus all media. In the case of Vernal and Uintah Counties, we would place emphasis on tourists not missing the freezing, filthy little sheds in Dinosaur Land's sewer plant, etc., etc. Please advise of the city and county's attitude. I leave October 1st, and will require two weeks to prepare and submit news releases, mailing, etc. (R. 154).

No action was taken by the Humane Society at that time in

spite of the fact that 47 animals had to be euthanized due to distemper contacted at the pound. (R. 152).

On February 11, 1976 the Humane Society's chief investigator visited the pound and found eleven animals had died as a result of insufficient shelter and that several animals were in need of care due to the surrounding environment. He concluded that the animals were being confined in a cruel and illegal manner (R. 143-144, 146, 152). The Humane Society contacted the Uintah County Attorney who declined to prosecute the Uintah County Commission or the Vernal City Council for the maintenance of the pound on the basis that the members were "immune" from any action.

Shortly after the discovery of these dead aminals, a campaign was instituted by the Humane Society to attempt to eliminate the conditions existing at the pound. On February 14 through 18, 1976 commercial air time was purchased on the local radio station in Vernal and each commercial was aired six times a day. This commercial stated the following:

> Eleven animals experienced barbaric deaths in one twenty-four hour period at the Vernal-Uintah County Pound. The death of these animals can be attributed to the unconscious, brutal attitude of your local officials. This responsibility must be

shared by the residents of the Uintah Basin. Refusal to accept assistance and cooperation from the Humane Society over the past six years has an effect on all life including yours. The Humane Society of Utah will take every action available to rectify the disgrace of the bullet-riddled tin shacks used as a pound in Vernal. We ask your help in supporting us. Contact your officials today. (R. 133).

A newspaper ad was placed in the Vernal Express on February 19, 1976. This ad stated the following:

> WANTED, an answer from your council and commission. Your commissioners and councilmen were responsible for the deaths of eleven animals in one night. There is little question they are in violation of Utah criminal statutes. The Humane Society of Utah has been trying for five years to get the people of Vernal to build a decent, humane animal pound to replace the disgraceful tin shacks you see here. The responsibility for the welfare of all your animals must be shared by every resident of Uintah County. What is your answer? The Humane Society of Utah, 4613 South 4000 West, Salt Lake City, Utah 84020, 298-3548. (R. 145).

On February 20, 1976 a meeting was held between the Humane Society and Utah Attorney General Vernon Romney. It was the Humane Society's position that the Uintah County Attorney had wrongfully refused to prosecute the government officials for maintenance of the pound. The Attorney General concluded, however, that such a decision was discretionary with the County Attorney and was not within the power of the Attorney General's office. (R. 134, 145).

In March of 1976 a single billboard was erected at

33rd South and 600 West in Salt Lake City which stated the following:

> Dinosaur Land--Don't miss the bullet-riddled shacks--See pets swelter in the heat and freeze in the cold--Visit city-county pound--Vernal--Paid for by the Humane Society of Utah. (R. 134).

In conjunction with this billboard several interviews were conducted by news media with agents of the Humane Society. Copies of some of these news reports are contained in the record. (R. 139-141). During several interviews defendant Johnson was asked whether he felt the erection of the billboard by the Humane Society would have an adverse effect on tourism in Uintah County. Johnson stated that he hoped so in order that there would be pressure put on local officials to make the needed and necessary pound improvements.

On March 17, 1976 plaintiff filed this action in the Fourth Judicial District Court of Uintah County alleging that he had been injured by the conduct of defendant Lonnie Johnson in discouraging tourists from entering Vernal City and asking for damages of $250,000 caused from such loss. It should be noted that this suit was commenced in less than thirty days from the time the first campaign was begun within Vernal City itself.

In a subsequent interview on the date the lawsuit was

filed, Mr. Johnson stated, "If Mr. Searle is really interested in enticing tourism in the Uintah Basin, my suggestion would be to clean up the pound. There is nothing malicious about our advertising. It just states the facts and I am willing to back that up in court." (R. 133).

Since the appellants have attempted to completely distort the attempted removal of this case to Federal Court, it is necessary to briefly address this procedure. (Appellants' Brief pp. 5-6). On April 7, 1976 Lonnie Johnson filed an action in the U.S. District Court to remove the case from the state court on the assumption that this Court's decision in State v. Phillips, 540 P.2d 936 (Utah 1975) expressly held that the First Amendment of the U.S. Constitution did not apply to the states through the enactment of the Fourteenth Amendment and therefore Defendants' claim of First Amendment privilege would not be recognized in the state court. (R. 23-25).

Judge Willis Ritter granted Searle's Motion to Remand back to the state court on the basis that the state "Complaint" did not present a claim or right arising under the Constitution, treaties or laws of the United States. (R. 63). The lower Federal District Court held that the First Amendment defense asserted by defendant Lonnie Johnson did not permit removal

to the Federal District Court since the Searles' Complaint was not based upon federal constitutional or federal law.

A second action was filed in the Federal District Court for a declaratory judgment pursuant to the Federal Civil Rights Act. It was again claimed that the decision of this Court in the Phillips case precluded the assertion of the First Amendment right as a defense in the state action. Appellant Searle opposed this action also and specifically stated that Respondents' First Amendment rights would be adequately protected in the state court proceeding and that the Phillips case has not been followed by this Court as evidenced by subsequent decisions. (R. 206-208). The lower Federal District Court dismissed the declaratory judgment action without comment. (R. 205).

It should be noted that the lower Federal District Court made no ruling whatsoever as to the merits of the case or as to the defenses of constitutional privilege raised by respondent Johnson. The rulings were simply that the defenses asserted by Respondents could not be used as a means of gaining entry into the Federal Court system when the plaintiffs' Complaint itself did not contain federal or constitutional affirmative issues.

Respondent Lonnie Johnson asserted numerous defenses

in the state court action against Plaintiffs' Complaint including improper venue, truth of the matter asserted, privileged communication, First and Fourteenth Amendment privilege, Utah State Constitution privilege, and failure to specify special damages. (R. 13-17).

Respondent Lonnie Johnson sought a Motion for Change of Venue on the theory that an impartial trial could not be held in Uintah County since a claim was made that the entire economy of the county had been injured by the publicity generated by Respondent. (R. 19-20). The Motion for Change of Venue was denied by the lower court on July 15, 1976. (R. 121).

In November of 1977 defendant Lonnie Johnson moved for Summary Judgment on the basis that the actions complained against by Plaintiffs were privileged under the First Amendment right of freedom of speech and that Plaintiff belonged to too large a class to maintain a suit. (R. 176). At that time an affidavit was filed by Lonnie Johnson which stated the following:

> (1) That Lonnie Johnson was the executive director of the Humane Society of Utah which was a non-profit organization created for the prevention of cruelty to animals;
>
> (2) That at all times Johnson was acting in the public interest and in furtherance of the stated purpose of the Humane Society;

(3) Any action on the part of Johnson concerning the pound or tourist trade was motivated by a desire to influence the elected officials of Vernal City and Uintah County to make needed changes in the dog pound;

(4) Any statements made concerning the condition of the dog pound was based upon Johnson's personal observation or upon reports by agents of the Humane Society;

(5) At no time was Johnson acquainted with the plaintiff or any of his businesses and at no time did Johnson hold any ill will to plaintiff or intentionally seek to damage him. (R. 191-192).

A counter-affidavit was filed on behalf of Plaintiff by Demar Dudley who stated that he had heard Lonnie Johnson on a Salt Lake radio station in which Johnson urged the radio audience to boycott Vernal and not to vacation or use the tourist facilities. The affidavit further stated that Johnson expressed his intention to damage financially and economically the residents of Vernal, Utah engaged in the tourist business. (Tr. 228). In addition to these affidavits, both parties had submitted Answers to Interrogatories prior to Defendants' Motion which contained their various theories of action and defense. (R. 132-155; 156-165). The Motion of Defendant for Summary Judgment was denied by the Honorable Allan B. Sorensen on December 21, 1977. (R. 245).

Throughout the proceedings Plaintiffs filed three

Amended Complaints ultimately adding some eight more plaintiffs and the Humane Society of Utah as a defendant in addition to modifying the claims and damages being sought. (R. 6, 160, 388, 465).

In August of 1979 this matter was set for trial before the Honorable David Sam. After two days of attempting to empanel an impartial jury the lower court granted Defendants' Motion for Change of Venue and ordered the matter be transferred to Utah County. (R. 414).

On July 7, 1980 Defendants moved for Summary Judgment once again based upon recent federal court decisions involving similar cases. The positions of both parties were extensively briefed and on July 29, 1980 the lower court issued its ruling. The court stated in its minute entry:

> The Court has examined the pleadings on file herein and the recent ruling of the United States Court of Appeals for the Eighth Circuit in Missouri v. NOW, Docket No. 79-1379 and finds under the allegations of Plaintiffs' Complaint and the law applicable to those allegations that there is a First Amendment defense which bars Plaintiff's claim since Defendant's actions were politically motivated and not initiated for any anti-competitive, commercial or economic purpose. Accordingly, the Court finds that Defendant's activities are privileged on the basis of the First Amendment right to petition and in recognition of that important right even though it conflicts with commercial efforts. Defendant's Motion for Summary Judgment is granted, no cause of action. (R. 471).

An order reflecting this ruling was signed by the

lower court on August 12, 1980. (R. 1-2). It is from this order that the present appeal is taken. (R. 472).

ARGUMENT

THE TRIAL COURT CORRECTLY GRANTED DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

A. The Action of Defendants to Petition a Government for Political Change is an Absolute Right Under the United States Constitution and Utah Constitution in the Absence of a Showing That Such Action is a "Sham".

The lower court in its ruling stated the following:

> [U]nder the allegations of Plaintiff's Complaint and the law applicable to those allegations . . . there is a First Amendment defense which bars Plaintiff's claim since Defendant's actions were politically motivated and not initiated for any anti-competitive, commercial or economic purpose. Accordingly, the Court finds that Defendant's activities are privileged on the basis of the First Amendment right to petition and in recognition of that important right even though it conflicts with commercial efforts. (R. 471).

Appellants maintain that the lower court erred in this ruling and that the right to petition for political change doe not confer an absolute First Amendment right on the petitioner but only confers a conditional right which must be proven unde the circumstances of each case. (Appellants' Brief pp. 16-18) Thus, under Appellants' reasoning the common law tort of interference with contract comprises the substantive law and the First Amendment privilege of petitioning constitutes only a defense to the violation of this law.

The position taken by Appellants it totally without merit. As will be examined, the United States Supreme Court and numerous other federal courts have held that the First Amendment right to petition for a political change is paramount and superior to all federal and state statutory and common law. Only in rare instances in cases involving a "sham" can this right be defeated by application of state and federal law. For this reason, the ruling of the lower court was correct in finding an absolute right existed in the instant case.

1. The "Noerr Doctrine" and Subsequent Cases.

The First Amendment to the United States Constitution states the following:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Likewise, Section 1 of Article I of the Utah Constitution states a similar principle:

> All men have the inherent and unalienable right to enjoy and defend their lives and liberty; to acquire, possess, and protect property, to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.

Thus, both the United States and Utah Constitutions clearly give citizens the right to petition their government for grievances and to communicate freely their thoughts. It is fundamental that these rights should not be restricted except in instances where a clear abuse of these rights has occurred.

The landmark case decided by the United States Supreme Court concerning the right to petition governments for change is Eastern Railroad President's Conference v. Noerr Motor Freight, 365 U.S. 127 (1961). In Noerr a lower federal district court found liability pursuant to the antitrust laws against the defendant railroad which had conducted an extensive campaign to bring about legislation directed against the railroad's chief competitors, the long-haul truckers. There was evidence that the campaign was aimed at destroying the truckers as competitors and that the railroads had employed a widespread publicity and lobbying effort which was found to be highly deceptive. The federal appellate court affirmed the lower court's finding. The United States Supreme Court reversed.

The Supreme Court held that the First Amendment right to petition the government for the redress of grievances barred any interpretation of the Sherman Act to impose

liabilities for the railroad's activities. Specifically, it held that the Act could not be applied to such activities "Insofar as [the activities] comprised mere solicitation of governmental actions with respect to the passage and enforcement of laws." 365 U.S. at 138. This principle was irrespective of the railroad's motives or unethical methods in exercising the constitutional right.

Although the truckers did not base their complaint on the common law tort of interference with contractual or business relations, the truckers argued that the railroad's campaign was intended to and did injure the truckers with their customers and other public relations. The Court held that such injury was incidental to the railroad's attempt to influence governmental action and therefore no liability could attach. The Court stated the following:

> [To hold for the truckers] would substantially impair the power of government to take actions through its legislature and executive and operate to restrain trade. In a representative democracy such as this, these branches of government act on behalf of the people and to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes know to their representatives. Id. at 137.

The Court then noted that the Sherman Act was subordinate to the First Amendment right of petition:

> To hold that the government retains the power to act in representative capacity and yet

> hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which has no basis whatever in the legislative history of that Act. Secondly, and of at least equal significance, such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an attempt to invade these freedoms. Id. at 138. (Emphasis added).

The U.S. Supreme Court recognized, however, that if a campaign is designed not to change government policy but solely to eliminiate competition then such activity is not constitutionally protected. The Court stated:

> There may be situations in which a publicity campaign, ostensibly directed toward influencing government action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the Sherman Act would be justified. But this certainly is not the case here. No one denies that the railroads were making a genuine effort to influence legislation and law enforcement practices. Id. at 143, 144.

The Noerr doctrine was later re-asserted in the subsequent case of United Mine Workers v. Pennington, 381 U.S. 657 (1965). The court there stated:

> Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose. The Court of Appeals, however, would hold the conduct illegal depending upon proof of an illegal purpose . . . [This holding is not] permitted by Noerr for the reasons stated in that case. Joint efforts to influence public officials

> do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act. Id. at 670.

In 1972 the court recognized the "sham" exception in California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) and found that the activities of the defendant in alleged government petition was merely an effort to eliminate a competitor with no real purpose in changing existing legislation.

Appellants attempt in their brief to assert that the Noerr doctrine and subsequent case law concerns only an exception to the antitrust law and that somehow a common law tort of interference with contractual relations is not affected by this doctrine. (Appellants' Brief pp. 19-23). This argument is completely without merit as is evidenced by several court decisions in which it is clear that First Amendment rights transcend both federal antitrust laws and state common law.

One of the best examples of application of this principle is found in Sierra Club v. Humboldt Fur, Inc., 349 F. Supp. 934 (D. Cal. 1972). In that case the Sierra Club had petitioned the United States government to declare certain areas as wilderness. A company which had entered

into a contract with the U.S. Forest Service for logging in that area filed a complaint against the Sierra Club alleging state law liability for interference with an advantageous contractual relationship. The complaint alleged that the Sierra Club had intentionally, willfully, and wrongfully induced the United States to breach the contract with the company by asserting administrative appeals and that such actions resulted in the loss of the contract.

On a motion to dismiss filed by the Sierra Club based upon First Amendment right of petitioning the government for redress, the court granted the motion on the basis that the company failed to state a claim upon which relief could be granted.

The court in granting the motion made the following observation:

> The Supreme Court has never had occasion to decide what effect the right to petition the government has upon common law tort actions that might be brought against those who damage the interest of others in the exercise of this right (the right to petition the government for a redress of grievances). This Court believes, however, that the Supreme Court has outlined the applicable principles of law in its cases dealing with the relationship between the First Amendment and defamation and in cases interpreting the Sherman Act as inapplicable to those who conspire to bring about government action. Id. at 936.

The court noted first that the New York Times v. Sullivan

case, 370 U.S. 254, extended the First Amendment guarantee of free speech to the common law tort of defamation. The court stated that liability under common law defamation can only be imposed:

> [W]hen what appears to be an attempt to discuss matters of public interest is a "sham" in that the speaker knows his statements are false or speaks with reckless disregard of whether they are true or false. Importantly, the Court recently made it absolutely clear that absent this "sham" use common law "malice" is irrelevant to a person's right to speak freely without fear of liability. Rosenbloom v. Metro Media, Inc., 403 U.S. 29, n. 52 (1971). Id. at 937.

The Sierra court then examined common law torts in relation to the Noerr doctrine formulated by the U.S. Supreme Court. The court stated the following:

> This Court agrees that when a suit based on interference with advantageous relations is brought against a party whose "interference" consisted of petitioning a government body to alter its previous policy, a privilege is created by the guarantee of the First Amendment. This Court, however, does not believe that privilege should depend upon malice. For the reasons given by the Supreme Court in Eastern Railroad President's Conference, supra, this court is persuaded that all persons, regardless of motive, are guaranteed by the First Amendment the right to speak to influence the government or its officials to adopt new policy . . . . Id. at 938. (Emphasis added).

The court rejected a "malice" standard and instead stated that "liability can be imposed for activities ostensibly consisting of petitioning the government for redress of

grievances only if the petitioning is a 'sham' and the real purpose is not to obtain governmental action but to otherwise injure the plaintiff." Id. at 939.

Several other cases have recently supported these principles that an activity to influence government policy is absolutely protected in the absence of showing that such activity was for the sole purpose of injuring or destroying a third party and was therefore a "sham" attempt to petition the government.

The case closest factually to the instant case is State of Missouri v. National Organization for Women, 467 F. Supp.289 (D. Mo. 1979), aff'd, 620 F.2d 1301 (8th Cir. 1980). In that case the National Organization for Women, Inc., (NOW) organized a convention boycott against all states that had not ratified the proposed Equal Rights Amendment. One of the states toward which the boycott was directed was Missouri. The state consequently brought an action in parens patriae for all of its citizens and businesses injured because of the actions of NOW. The state sued under the federal antitrust laws, state anti-trust laws, and state common law tort theories including interference with contractual relations.

The lower court found that the motivation of NOW in

organizing the boycott was to make a symbolic gesture and to attract attention of the public to the issue of ratification. The court further found that NOW intended that the adverse economic impact of the boycott on those who would otherwise profit from conventions in Missouri would cause those persons to influence their legislators to support ERA ratification. The court found that the boycott was not intended as a punitive measure against Missouri for its past failure to ratify and that it was not motivated in any way by anti-competitive purposes since NOW was in no way competing with Missouri or its citizens. Finally, the lower court found that the boycott was non-commercial in that its participants were not business interests and its purpose was not increased profits and furthermore that the boycott was "non-economic, as it was not undertaken to advance the economic self-interest of the participants." 467 F. Supp at 293-296.

The conduct complained of by Missouri was NOW's activity in organizing a concerted effort to encourage businesses and groups not to utilize the facilties of the state of Missouri for the holding of various types of commercial and non-commercial conventions. NOW contacted numerous organizations, conducted a wide-spread publicity campaign,

and did everything possible to influence groups from entering those states which had not ratified the ERA. The lower court found the efforts of NOW were effective in that approximately $9,000,000 of convention revenue was lost to the state of Missouri because of the economic boycott.

The lower district court found in favor of NOW both as to the antitrust claims and as to the state tort claims. The lower court found the Noerr doctrine precluded federal and state antitrust liability since the campaign of NOW was politically motivated and was not a mere sham to cover up an attempt to interfere with the business relationship of a competitor. In fact, the court noted that none of the parties could be considered competitors.

The Eighth Circuit Court of Appeals affirmed the anti-trust aspect of the case by stating the following:

> NOW appears to have utilized its political power to bring about the ratification of the ERA by the state of Missouri. The tool it chose was a boycott, a device economic by nature. However, using a boycott in a non-competitive political arena for the purpose of influencing legislation is not proscribed by the Sherman Act. 620 F.2d at 1315.

Likewise, the Eighth Circuit affirmed the lower court's dismissal of the state antitrust claim on the same overriding principle. Id. at 1316.

The state tort claims for interference with contract, the same claim now asserted by Appellants in the instant case, were also considered by the lower federal district court and the Eighth Circuit Court of Appeals. The lower district court stated the following with reference to the economic tort claim:

> In this case economic pressure is being utilized in a good faith effort to influence the ratification of an amendment to the Constitution. In these circumstances, the interest sought to be advanced by NOW and especially the constitutional interest involved in protecting NOW's ability to exercise its right to petition and right to political association outweigh the interest in protecting the business expectancy involved. If NOW's actions were not a legitimate effort to influence the legislature, this Court would be presented with a different case. Under the particular facts of this case, the Court finds that NOW's convention boycott activities are privileged and therefore not actionable in court under Missouri law. 467 F. Supp.at 305-306. (Emphasis added).

The Eighth Circuit Court of Appeals affirmed the state tort claim dismissal and specifically found that only in those instances where a "sham" petitioning effort was being made to eliminate a competitor could liability be imposed. The court reviewed the Noerr doctrine, subsequent Supreme Court decisions, and the Sierra Club decision, supra, and stated the following:

> We agree with the Sierra Club court and find sufficient support in Noerr and the subsequent cases of the Supreme Court which refer to

> Noerr to support the conclusion that the right to petition is of such importance that it is not an improper interference even when exercised by way of a boycott. 602 F.2d at 1317.

Thus, the courts in the NOW case concluded that the Noerr doctrine was not limited solely to controversies involving the antitrust laws but was much broader by prohibiting any interference with the right to petition and seek change of government under any state or federal theory in the absence of showing that such effort was not legitimate and was in fact a "sham".

Other federal cases support the absolute right granted for seeking political change. In First National Bank of Omaha v. Marquette National Bank of Minneapolis, 482 F. Supp. 514 (D. Minn. 1979), aff'd, No. 80-1043 (8th Cir., Sept. 9, 1980) a suit was brought by one bank seeking to restrain an out-of-state bank from engaging in a bank credit card program. The lower court granted defendant's motions to dismiss plaintiff's complaint both as to federal banking laws, antitrust laws, and state tort law. The Federal District Court of Minnesota in dismissing the state claim of interference with business relationships again cited the Sierra Club decision and held as a matter of law that the activities of the defendants were protected by the Noerr doctrine. The court then stated:

> Several recent cases have stated that while the Noerr-Pennington doctrine evolved from antitrust claims, the First Amendment rights that it protects apply equally to other claims including a claim for tortious interference with business relationships . . . . The court agrees with this analysis since to hold otherwise would effectively kill the defendants' First Amendment rights. Id. at 524-525. (Emphasis added).

In Pennwalt Corp. v. Zenith Laboratories, 427 F. Supp. 413 (D. Mich. 1979) an action was brought under the federal antitrust laws and numerous other state and federal laws for unfair competition and trademark infringements. The court dismissed those claims involving the efforts of one of the manufacturing drug companies to sue or to threaten suit against various customers of a competing drug company. In dismissing the claims the court stated:

> While the Noerr-Pennington doctrine evolved from antitrust claims, the First Amendment rights that it protects are equally applicable to each of the other claims made by Zenith. As in antitrust cases, these are not absolute rights, but as discussed, nothing in the allegations made by Zenith would bring any of these claims within the "sham" exception to these First Amendment rights. For this reason, all of the remaining counterclaims are dismissed. Id. at 242.

In the recent case of Crown Central Petroleum Corp. v. Waldman, 1980-2 Trade Cas. ¶63,627 (D. Pa. March 21, 1980) the Federal District Court of Pennsylvania held that where service station attendants had shut down their service stations for a three-day period to protest the Department

of Energy's policy in profit margin there was no violation of federal or state anti-competitive laws. The court held that a boycott was a form of political expression and therefore protected by the First Amendment. In so holding, the court observed:

> The dealers could obviously ban together and present a written or oral demand . . . to enforce existing regulations and laws . . . But the dealers had been doing that with little or no apparent success. It might reasonably be that the only means of effective expression was the boycott. For us to hold that they must have continued to rely upon strictly written and oral communication would be to deny them what may have been their only effective means of communication arousing public sentiment. This we will not do.

Finally, the case of Henry v. First National Bank of Clarksdale, 595 F.2d 291 (5th Cir. 1979) is also relevant in determining whether liability can attach for a political boycott effort. This case began in the 1960's when a group of blacks organized boycotts against white merchants. Actions were brought under state statutes and state common law which prohibited secondary boycotts, restraints of trade, unlawful conspiracies, and tortious interference with contracts.

Damages in excess of $3,000,000 were sought for the economic harm done to the merchants during the boycott. The state trial court found in favor of the state and the

merchants and the decision was affirmed by the Mississippi Supreme Court.

An action was later brought in the federal district court to enjoin enforcement of the state court's judgment. The lower federal district court ordered an injunction be entered. The Fifth Circuit Court of Appeals addressed the propriety of the lower court's injunction. The black organization claimed that the damage award was unconstitutional since it prohibited and penalized activity protected by the First Amendment. The Fifth Circuit Court of Appeals in dealing with the likelihood of success on the merits in the issuance of the injunction stated the following:

> Consistent with the views underlying its injunction, the state court assessed the state defendants for all damages suffered by the state plaintiffs during the period of the boycott which the court found attributable to the failure or refusal of black citizens to trade with the white businesses in anticipated numbers.
>
> At the heart of the chancery court's opinion lies the belief that the mere organization of the boycott and every activity undertaken in support thereof could be subject to judicial prohibition under state law. This view accords insufficient weight to the First Amendment protection of political speech and association.
>
> There is no suggestion that the N.A.A.C.P., M.A.T. or the individual defendants were in competition with the white businesses or that the boycott arose from economic interest. On

> the contrary, the boycott grew out of a racial dispute with the white merchants and city government of Port Gibson and all of the picketing, speeches, and other communications associated with the boycott were directed to the elimination of racial discrimination in the town. This differentiates this case from a boycott organized for economic ends, for a speech to protest racial discrimination is essential political speech lying at the core of the First Amendment. Id. at 303.

The principles outlined in the preceding cases clearly establish that the lower court was correct in its conclusion that the activities of defendants in the instant case were protected and were not subject to liability.

2. Legal Standards Applied to Facts of the Instant Case.

The Noerr doctrine and the subsequent cases decided under this doctrine clearly hold that unless it can be established that an activity for governmental change is actually a "sham", such activity is constitutionally superior to federal and state statutory law as well as state common law. In the instant case, there can be no doubt from an examination of the pleadings in this case and the evidence submitted by the parties that no such "sham" exists and that the efforts of defendants were a legitimate effort to change the attitude and policy of the Vernal City and Uintah County governments.

The plaintiffs themselves throughout the four Amended

Complaints consistently stated that the purpose of Defendants' campaign was to cause political change. Paragraph 15 of Plaintiffs' Third Amended Complaint states the following:

> Defendants' campaign to interfere with and destroy the tourist business in Dinosaur Land, Utah, is motivated by their personal, political and other beliefs relating to city and county government in Vernal City and Uintah County and are not related to Plaintiffs or Plaintiffs' businesses. Defendants, nevertheless, have attempted to interfere with and destroy the tourist business in Dinosaur Land in which business Plaintiffs are engaged and by which they make their living. Defendants' motives were to destroy or interfere with the tourist business as a means of imposing their views of government on Vernal City and Uintah County officials. (R. 467). (Emphasis added).

Thus, the plaintiffs themselves admit that the campaign instituted by Defendants was a legitimate effort to protest the conditions at the pound and to influence the governmental officials in instituting change. The facts previously stated support this conclusion unequivocably.

Since 1971 the Humane Society attempted to bring about a change in the deplorable conditions existing at the Vernal City-Uintah County dog pound. Numerous letters were written, meetings were held, and even a warning of an adverse publicity campaign was given to the Vernal City Council some two years before the campaign was instigated.

When the dead animals were discovered in February of 1976 an all-out campaign was begun by the Humane Society. This campaign, however, did not merely consist of encouraging a boycott of tourist businesses but initially consisted of an effort to inform the citizens of Vernal and Uintah County of the conditions which existed at the pound. Numerous radio ads were broadcast in Vernal City and a full-page ad was run in the Vernal City and Uintah County newspapers. These commercials and ads were directed solely at the citizens of Vernal and Uintah County who were asked to contact their respective government officials to protest the conditions existing.

The billboard which was placed in Salt Lake City did not discourage tourists but instead asked them to "Visit the City-County Pound in Vernal" and to see the "bullet-riddled shacks".

The comments made by defendant Lonnie Johnson as to a tourist boycott were only an incidental part of the overall campaign. Johnson stated that he hoped that people would protest to the governments of Vernal and Uintah County including a boycott of those entities until such time as the conditions had been corrected. Thus, any effort by Defendants to discourage tourists to the Uintah County

Basin was only a portion of the overall campaign which had been launched to effectuate change in the city and county governments.

There has never been any contention by the plaintiffs that the effort of the Humane Society was not in fact to modify the conditions at the pound. It has never been contended by Plaintiffs that Defendants sought to eliminate the Vernal businesses for some competitive gain or advantage. It has never been claimed that Defendants competed in any way with the businesses of Plaintiffs or other businesses in Uintah County.

Thus, under the Noerr doctrine, in the absence of a showing that the purpose of the "boycott" was a sham, the conduct of Defendants is absolutely protected. The Sierra Club case graphically pointed out that when an organization is seeking government change through legitimate political activity the fact that other parties are economically harmed does not give rise to either statutory or common law liability.

The NOW case involves almost identical motives and factual situations. In NOW the purpose of the activity was to promote the ratification of the ERA amendment. In the instant case, the purpose of the activity was to upgrade

the conditions existing at the governmental dog pound. Appellants contend that the actions of Defendants in seeking a change in the dog pound is not entitled to the same type of protection of a group seeking a constitutional amendment. (Appellants' Brief p. 23). Appellants have "grave doubts" as to whether the activities engaged in by Defendants constitutes an exercise of First Amendment right, and "whether the actions sought to be extracted by Defendants were even political in nature". (Appellants' Brief p. 24). Such a statement is nonsensical. It is not a function of courts to determine the relative merits of the cause of an organization or to decide whether one cause is worthy of protection while another one is not. It is clear that in both the NOW case and the instant case a change was being sought from the legislative bodies of both entities.

In both cases economic boycott was urged to protest the conditions existing in the communities in which change was being sought. NOW encouraged outside organizations not to book conventions in Missouri. Defendants encouraged tourists not to visit Uintah County. In both cases economic harm to the community was being sought to pressure the governmental officials in making the requested changes.

Appellants contend that the NOW case is inappropriate

for comparison since the plaintiff in that case was the state of Missouri while the plaintiffs in this case are "businessmen involved in running a motel, cafe and gift shop." (Appellants' Brief p. 22). Appellants assert that a "secondary boycott" was instituted against the plaintiffs and that no First Amendment privilege is warranted. (Appellants' Brief p. 22). An examination of the NOW case, however, shows that this argument is totally without merit.

First, the state sued in parens patriae on behalf of all of its citizens and businesses which had been injured by the boycott. Thus, the effect was no different than had Uintah County or Vernal City sued on behalf of the plaintiffs in the instant case.

Second, the same argument of secondary boycott was raised in the NOW court and was categorically rejected by the Eighth Circuit Court of Appeals. Just as in the instant case where Appellants claim that they were the "target" for the boycott, (Appellants' Brief p. 3) the state of Missouri claimed that the "target" of that boycott were the businesses relying upon convention trade. The Court of Appeals stated the following with regard to these arguments:

> Further, the factual setting which Missouri depicts as the background to its "secondary boycott theory" ignores the posture of the case. Missouri paints the picture thus: NOW is withholding all

> convention business from the Holiday-Johnson Motel (HJM) until HJM goes to its legislator and convinces its legislator to vote for the ratification of the proposed ERA. This characterization of the facts protrays HJM as the target of NOW's boycott. The target of the boycott was not HJM; it was the state of Missouri. . . .
>
> We find Missouri's focus on the facts of this case, and not the district courts--misleading. The district court's view is more appropriate for the issues at hand. NOW's boycott was directed against states that had yet to ratify the proposed ERA. NOW was aware that such a boycott would work against the public's economic interest; NOW was hopeful that the public's interest would suffer to the extent that the public would be persuaded that ratification of the ERA was "desirable;" NOW wanted the public to influence the legislature to ratify the ERA; NOW operated on the presumption that legislators act with regard to the public interest. 620 F.2d at 1312-1313, n. 12.

Similarly, the record shows without question that it was the intent of the defendants to put pressure on the public in Uintah County for them to in turn pressure the various county and city governments to effectuate change. At no time were the businesses of Plaintiffs or any other businesses the "target" of Defendants' efforts. Rather, all efforts were directed towards the political entities which could change the conditions at the dog pound and internal and external pressures which could be applied to such entities were utilized as tools for the change.

Therefore, a close analysis of the instant case as compared with the NOW decision in the lower court and the

Eighth Circuit Court of Appeals shows a remarkable similarity and shows that the same claim now being made by the plaintiffs, i.e., an interference with contractual relations, was soundly rejected on the basis of the Noerr doctrine.

The decision in the recent Crown Central Petrolum case is equally applicable. The appellants in the instant case have claimed that Defendants had "many lawful avenues open to them by which they could petition the local government entities to seek desired changes in the dog pound." (Appellants' Brief pp. 22-23). This statement both ignores the previous five-year effort to effectuate such change and also ignores the right of Defendants to choose whatever means they believe is most effective to accomplish their goal. As the court in the Crown Central Petroleum case noted the Noerr doctrine allows a group to arouse public sentiment in any reasonable manner and a court cannot say that one means of communication is preferable to another.

Finally, the Henry v. First National Bank of Clarksdale case is also applicable to the instant situation. In that case black organizations instituted boycotts against merchants to eliminate racial discrimination in a southern town. Even though merchants guilty of discrimination and innocent of discrimination were both equally harmed, the court held that

they could not recover for the economic loss sustained as a result of an effort to politically change the environment existing in the community. Likewise, the fact that townspeople, merchants, or taxpayers were indirectly harmed by any supposed boycott by tourists of the Uintah County area is not actionable when such efforts were purely political in nature and were not directed to causing economic harm to eliminate competition.

Appellants' suggestion that the actions of Defendants can be likened to the illegal holding of American citizens by Iran is both absurd and offensive to the fundamentals of American values. (Appellants' Brief pp. 21-22). To compare the holding of hostages with the imposition of economic pressure points out the flawed logic used by Appellants throughout their brief. If this were indeed the case then many Americans from those of the Boston Tea Party to consumers boycotting non-union lettuce are guilty of holding others "hostage". In addition, all labor unions would be "guilty" of picketing and striking their employer "hostages".

In summary, therefore, it is the position of Respondents that the record before the lower court including the pleadings of the plaintiffs themselves clearly establish that the

campaign to improve the county and city dog pound was politically motivated and was in no sense a "sham". As such, therefore, under the Noerr doctrine and other decisions cited above, the defendants were absolutely privileged in their conduct and Plaintiffs' claim for damages cannot be maintained under any theory of state or federal statutory or common law.

B. Even Assuming Arguendo the Action of Defendants to Petition a Government for Political Change is Only Conditionally Privileged, Plaintiffs Have Failed to Prove "Malice" as an Essential Element of Their Prima Facie Case.

1. Applicable Legal Standards for Interference With Contractual Relations.

As the appellants have noted in their brief there is no Utah case specifically recognizing the doctrine of intentional interference with prospective economic advantage. (Appellants' Brief pp. 10-12). It is Respondents' position that this Court need not decide at this time whether such a doctrine should be adopted in Utah since the Noerr defense previously mentioned precludes liability under all state and federal statutory and common law theories. Thus, since there is no liability as a matter of law there is no need to decide whether the interference with prospective economic advantage doctrine exists in Utah since that question should never be reached.

However, assuming arguendo that this Court declines to adopt the Noerr doctrine of granting absolute immunity in absence of a sham effort to petition a government for change, then Respondents submit that Appellants have still failed to prove the necessary elements of their case even assuming that the doctrine of intentional interference with prospective economic advantage is adopted in Utah.

Section 766B of the Restatement of Torts is generally accepted as the foundation for the doctrine of interference with prospective economic advantage. This Court in Soter v. Wasatch Development Corp., 443 P.2d 663 (Utah 1968) recognized similar elements required in order to prove interference with an existing contract. This Court stated:

> In order to establish a right to recover on such a cause of action the plaintiff would have to show that the defendants, without justification, by some wrongful and malicious act, interferred with the plaintiff's right of contract, and that actual damages resulted. Id. at 664.

It is the obligation of the plaintiff in an action for interference with prospective economic advantage to prove, as part of the prima facie case, a lack of justification or privilege on the part of the defendants. As stated by the Superior Court of Pennsylvania in Bahleda v. Hakison Corp., 323 A.2d 121 (Pa. 1974):

> The presence of a privilege is not an affirmative defense, rather, the absence of such a

privilege is an element of the cause of action which must be pleaded and proved by the plaintiff. Id. at 121-122.

See also, Smith v. Ocean State Bank, 335 S.2d 641 (Fla. 1976); Pocketbook, Inc. v. Walsh, 204 F. Supp. 297 (D. Conn. 1962); Harver v. Ohio National Life Ins. Co., 390 F. Supp. 678 (D. Mo. 1974); Middleton v. Wallichs Music and Entertainment Co., 536 P.2d 1072 (Ariz. App. 1975); and American Hot Rod Assn., Inc. v. Carrier, 500 F.2d 1269 (4th Cir. 1974).

The authorities are also uniform in holding that a person who peaceably pursues his own interests is not liable for interference with others' contractual obligations unless his actions reach the threshhold of tortious conduct. As stated by the authority Prosser in his Treatise:

> No case has been found in which intended but purely incidental interference resulting from the pursuit of the defendant's own end by proper means has been held to be actionable. With intent to interfere the usual basis of the action, the cases have turned almost entirely upon the defendant's motive or purpose, and the means by which he has sought to accomplish it . . . . Some element of ill will is seldom absent from intentional interference; and if the defendant has a legitimate interest to protect, the addition of a spite motive usually is not regarded sufficient to result in liability . . . . In general, it may be said that any purpose sufficient to create a privilege to disturb existing contractual relations, such as the disinterested protection of the interests of third persons, or those of the public . . . will also justify interference with relations which are merely prospective. Prosser on Torts, 4th Ed. at 951-954. (Emphasis added).

As stated by the New York Superior Court in Rosenberg v. Del-Mar Division, 391 N.Y. Supp.2d 452 (1977):

> With regard to the tort claim, summary judgment was properly granted. As a general rule, interference with the business relations of another is not actionable unless unlawful means are used or the actor's sole motive is to injure the plaintiff. Plaintiff failed to adequately demonstrate the existence of either requirement as a bona fide factual question. Id. at 453. (Emphasis added).

Likewise, the Texas Supreme Court stated:

> One may lawfully induce another to refrain from having business relations with a third person, although it injuriously affects such third person, provided his action be to some legitimate interest of his own, and no definite legal rights, such as contract rights, are thereby violated. Davis v. Lewis, 487 S.W.2d 411 (Tex. 1972).

It is generally held that in a tort action for interference with contract the plaintiff must show "actual malice" on the part of the defendant in order to prevail. As noted by the Illinois Supreme Court:

> As previously mentioned, both parties agree that actual malice must be shown in the instant case; in addition, both agree that ill will alone is not enough to establish actual malice and that there must be a desire to harm, which is independent of and unrelated to a desire to protect the acting party's right and which is not reasonably related to the defense of a recognized property or social interest. Arlington Heights National Bank v. Arlington Heights Federal Savings & Loan Assn., 229 N.E.2d 541, 518 (Ill. 1967). (Emphasis added).

Respondents submit that a case involving a claim of interference with a prospective business relationship or

contract involve the same requirement of "malice" as does a claim of defamation or libel. As stated by the California Court of Appeals:

> Justification in inducing breach of contract is closely analygous to privilege in defamation. Under Civil Code Section 47 a publication is privileged if made in any official proceeding authorized by law . . . . It seems obvious that in order for the commissioner to be effective there must be an open channel of all communication by which citizens can call his attention to suspected wrongdoings. That channel would quickly close if its use subjected the user to a risk of liability for libel. Similarly, here the tort of inducing breach of contract cannot be used to dam up the open channel of communication through which citizens may express their grievances to public officials and challenge expenditures of public funds. Bledsoe v. Watson, 106 Cal. Rptr. 197, 200 (Cal. Ct. App. 1973).

This Court has always held in cases of slander or libel that it is the burden of the plaintiff to prove actual malice which is spite, ill will, or hatred before an action can be sustained. Combs v. Montgomery Ward & Co., 228 P.2d 272 (Utah 1951); Tanner v. Pillsbury Mills, 281 P.2d 391 (Utah 1955).

As to matters of public interest this Court held a special high standard applies:

> It is firmly established that matters of public interest and concern are legitimate subjects of fair comment and criticism, not only in newspapers, and in radio and television broadcasts, but by members of the public generally, and such comments and criticism are not actionable, however severe in their terms, unless they are made maliciously . . . . Ogden Bus Lines v. KSL, Inc., 551 P.2d 222, 224 (Utah 1976). (Emphasis added).

It is likewise proper to grant summary judgment when the pleadings and affidavits on file clearly show that a claim of malice, implied or in law, or abuse of privilege cannot be made. This Court stated as early as 1933 the following rule concerning the granting of summary judgment in defamation cases:

> The question of whether a qualifiedly privileged article is written or published with malicious motive or otherwise is generally speaking, a question of fact to be determined by the jury. However, in the absence of proof that such communication was published with actual malice, it is within the power and duty of the courts to say as a matter of law that the motive of the publication was without malice. Williams v. Standard Examiner Publishing Co., 27 P.2d 1 (Utah 1933). (Emphasis added).

In the KSL case, supra, this Court quoted from a New York decision in which summary judgment was granted in a defamation case in which no malice could be shown. The New York court stated:

> This Court accordingly concludes that plaintiffs' allegations of actual malice, in their complaint, and in opposition to this motion, are insufficient, and fail to raise triable issues of fact. Under the circumstances, summary judgment dismissing the complaint is the appropriate remedy. 551 P.2d at 226 quoting Commercial Programing Unlimited v. Columbia Broadcasting Systems, Inc., 367 N.Y.S.2d 986.

Numerous cases have held that summary judgment was proper in instances in which the public interest was being pursued in claims of libel or slander. In Safrets, Inc. v.

Gannett Co., Inc., 361 N.Y. Supp. 2d 276 (N.Y.S.C. 1974) a pet store owner brought suit against a newspaper and others alleging damages because of statements contained in a newspaper article concerning the plaintiff's treatment of animals. Addressing the issue of privilege, the court cited cases dealing with constitutional privileges as defined by the United States Supreme Court. The court then stated:

> We must decide whether the offending article here involved a question of general public interest or concern under Rosenbloom . . . . However that may be, we find that this article dealing with humane treatment of animals and birds, or conversely, prevention of cruelty to them, involves a subject of general concern . . . . There is no evidence here that the article was published with knowledge that it was false. Id. at 280-281.

The court granted summary judgment to the defendant newspaper and acknowledged that the freedom of speech as to matters of public interest afforded a privilege to a person commenting on the inhumane treatment of animals.

In Hahn v. Andrello, 355 N.Y. Supp. 2d 850 (N.Y.S.C. App. Div. 1974) an action was brought by an attorney against a councilman who for alleged defamation made when the councilman criticized the legal work done by the attorney with reference to problems involving the city dump. The court found that the attack went to the profession and business qualifications of the plaintiff but noted that the defamation involved matters

of public interest--namely an ordinance relating to a city dump. Because of this fact, the court stated, it was necessary for the plaintiff to prove and plead actual malice and failure to do so resulted in a dismissal of plaintiff's complaint.

In Cole Fisher Rogow, Inc. v. Carl Ally, Inc., 228 N.Y. Supp. 2d 556 (N.Y.S.C. App. Div. 1968) an action was commenced by an advertising agency for libel and slander arising from an advertisement which was inserted in opposition to that of the agency's client and which was critical of the type of advertisement used by the client. The plaintiff claimed business loss from the defamatory statement. The court held that the privilege of criticizing public affairs extended to advertisements and that actual malice was required for the plaintiff to prevail. The court stated:

> Plaintiff itself, would seem to negative any claim of actual malice when it asserts the advertisement was used in an effort to defeat the opposition--a legitimate device for use by a competitor. Id. at 564.

In the case of Moresi v. Teche Publishing Co., 298 So.2d 901 (La. Ct. App. 1974) an action was brought against a newspaper for an article allegedly defaming plaintiff's beach area by saying it was not fit for recreational purposes. The plaintiff sought damages for the loss of revenue caused

by the business deterioration. The court concluded that the article dealt with a subject of public concern, namely, the use of public land. The court then stated:

> Therefore, it is probable, that as a matter of law, these articles relating to a matter of public interest enjoy a constitutional privilege under the First Amendment to the Constitution of the United States. Even if the articles were defamatory, and we have concluded they are not, plaintiff could not recover for any damage to his business resulting therefrom without showing that the articles were false and were printed maliciously with a reckless disregard for truth. Id. at 906.

The preceding cases from Utah and other jurisdictions illustrate that matters of public interest concerning speech require protection of the highest standard--a showing of actual malice. It should be noted that several of the cases previously referred to involve claims made by persons and businesses for loss of business income. In these cases it was still required that actual malice be proven.

It should make little difference, for example, whether a person publishes or speaks in a meeting and states that an amusement park is unsanitary or whether he states at the meeting that he is encouraging all people not to patronize the amusement park because it is unsanitary. In both cases the damage to the plaintiff would be the same. The first case, however, would involve defamation and the second case would involve tortious interference of prospective economic advantage.

Certainly, if the matter is of sufficient public concern the standard of actual malice should be applicable in either case. The definition of "actual malice" has been stated by the United States Supreme Court as publishing a statement with knowledge that it was false or with reckless disregard of whether it was true or not. The defendant must entertain serious doubt as to the truth of the statement made. New York Times v. Sullivan, 376 U.S. 254 (1964); and St. Amant v. Thompson, 390 U.S. 727 (1968).

The preceding discussion illustrates the correctness of the lower court's decision even if it is assumed arguendo that the Noerr doctrine of absolute immunity does not apply in this case. The following discussion focuses upon these legal standards as applied to the facts of the instant case.

2. Legal Standards Applied to Facts of the Instant Case.

If this Court chooses to recognize the tort of intentional interference with prospective business advantage it is incumbent to also define the elements required. One of the essential elements necessary in any such case is a showing by the plaintiff of an improper motive or no justification. This in turn requires a showing of actual malice in the actions taken by the defendants.

Paragraph 15 of Plaintiffs' Third Amended Complaint

states that "Defendants' campaign to interfere with and destroy the tourist business in Dinosaur Land, Utah is motivated by their personal, political and other beliefs relating to city and county government in Vernal City and Uintah County, and are not related to Plaintiffs or Plaintiffs' businesses."

The "beliefs" referred to by Plaintiffs in their Complaint are clearly within public interest and concern Section 76-9-301 (U.C.A.) which provides that a person commits cruelty to animals if he fails to maintain necessary food, care, or shether or confines an animal in a cruel manner. There can be no serious doubt that the humane care of animals is a subject of social importance and public interest. As stated in the plaintiffs' own Complaint, the sole motivation of Defendants in making the statements and in conducting the campaign was to influence the actions of the elected officials.

There is nothing in the file to show that the statements made by Defendants were done in a reckless manner. The affidavit of Lonnie Johnson shows that all statements concerning the conditions of the pound were made from the investigation of Johnson himself or from investigations of Humane Society agents. There is no showing that statements

concerning the pound were made in disbelief of the truth. Likewise, there is no showing that the defendants bore any ill will toward the plaintiffs or attempted to injure them economically for any selfish or competitive gain.

The most that can be said from the file as it now exists is that the actions of Defendants were taken in the hope that economic pressure could be brought about by Plaintiffs and other citizens of Uintah County against the elected officials to effectuate the change in the dog pound. Such conduct and motivation can hardly be said to be the "malice" which is required to establish a lack of justification and improper motive necessary for a prima facie case.

Respondents submit that except for the bare allegations contained in Plaintiffs' Complaint of improper motive and lack of justification, there is not a single bit of evidence contained in the file to show that the statements made by defendant Lonnie Johnson in his affidavit are not correct. (R. 192). As such, the lower court was justified in ruling as a matter of law that the actions taken by the defendants were not improper and were justified and that therefore Plaintiffs' prima facie case could not be proven. Just as in defamation cases, in the absence of proof of such malice, summary judgment is proper. Ogden Bus Lines v. KSL, Inc.,

551 P.2d 222 (Utah 1976); Denman v. Star Broadcasting Co., 497 P.2d 1378 (Utah 1972).

In conclusion, the record before the district court after four years of litigation showed that the defendants did not act with a reckless disregard for the interests of the plaintiffs nor did they act with ill will intending to harm the plaintiffs. The record showed from Plaintiffs' own pleading that Defendants acted for a social interest in the protection of animals and therefore a finding of actual malice could not be made which would establish the prima facie case of the plaintiffs. The lower court properly granted summary judgment even assuming arguendo that only a conditional privilege existed.

CONCLUSION

The issue involved in the present case is one beyond the immediate facts. While Plaintiffs assert that they have been economically damaged by the actions of Defendants, the inverse could just as easily be asserted by Defendants, i.e., that the right to attempt social change has been injured by the filing of this lawsuit by Plaintiffs. Does the U.S. and Utah Constitutions which guarantee free speech and the right to petition governmental change permit the stoppage of these political rights by the filing of lawsuits based upon tort theories developed for the protection of economic abuse?

The answer to this question is found in the Noerr doctrine and the subsequent decisions interpreting this doctrine All state and federal statutory and common law actions must yield to First Amendment rights so long as the efforts being made do not constitute a sham where the real motive is other than seeking political change. To grant a cause of action to Plaintiffs in the instant case where there is no doubt that such a sham does not exist, is to effectively chill any effect of legitimate groups in the future to seek political change. In effect, such groups would always be subject to suit by some member of society who could claim injury because of the hoped for political change or injury from merely the attempt to change. Economic boycott has always been a legitimate method in American history to encourage such change and should not now be prohibited because of alleged indirect economic harm.

This Court has never recognized the tort of interference with prospective business advantage. Respondents submit that this case does not require such a determination because of the absolute right existing under the Noerr doctrine. However, in the alternative, if such tort is recognized the finding of "malice" must also be recognized as essential to a prima facie case. Here, the record is barren of any such malice and the

lower court was justified, just as in defamation cases, to grant judgment as a matter of law.

The judgment of the lower court should be affirmed.

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MAILING CERTIFICATE

I hereby certify that I mailed two true and correct copies of the foregoing Brief of Defendants-Respondents to Gayle F. McKeachnie and Clark B. Allred, McKeachnie & Allred, 53 South 200 East, Vernal, Utah 84078 on this 11 day of February, 1981.