

2006

# William T. Jacob v. B. Brett Bezzant : Brief of Appellant

Utah Supreme Court

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**IN THE UTAH SUPREME COURT**

<p>WILLIAM T. JACOB, an individual, COMMERCIAL PROPERTIES, INC., a Utah Corporation, and PHILLIPS MANUFACTURING COMPANY, INC., a Utah corporation,</p> <p>Plaintiffs/Appellants,</p> <p>vs.</p> <p>B. BRETT BEZZANT, an individual; NEWTAH, INC., dba AMERICAN FORK CITIZEN NEW UTAH, a Utah corporation,</p> <p>Defendants/Appellees.</p>	<p>Case No. 20060856-SC</p>
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**BRIEF OF APPELLANTS**

**APPEAL FROM GRANT OF DEFENDANTS' MOTION JUDGMENT ON THE  
PLEADINGS AND/OR SUMMARY JUDGMENT, MOTIONS FOR  
ATTORNEY'S FEES, AND FROM THE DENIAL OF PLAINTIFFS' MOTION  
TO RECONSIDER, IN THE FOURTH JUDICIAL DISTRICT COURT, UTAH  
COUNTY, STATE OF UTAH, THE HONORABLE FRED D. HOWARD,  
PRESIDING.**

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**ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED**

**FILED  
UTAH APPELLATE COURTS**

**APR 26 2007**

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## IN THE UTAH SUPREME COURT

<p>WILLIAM T. JACOB, an individual, COMMERCIAL PROPERTIES, INC., a Utah corporation, and PHILLIPS MANUFACTURING COMPANY, INC., a Utah corporation,</p> <p style="text-align: center;">Plaintiffs/Appellants,</p> <p style="text-align: center;">vs.</p> <p>B. BRETT BEZZANT, an individual, NEWTAH, INC., dba AMERICAN FORK CITIZEN NEW UTAH, a Utah corporation,</p> <p style="text-align: center;">Defendants/Appellees.</p>	<p style="text-align: center;">Case No. 20060856-SC</p>
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### BRIEF OF APPELLANTS

#### JURISDICTION

Appellants, WILLIAM T. JACOB, COMMERCIAL PROPERTIES, INC., and PHILLIPS MANUFACTURING COMPANY, INC., appeal from the district court's grant of the Defendants' Motion for Judgment on the Pleadings and/or Summary Judgment, motions for attorney fees and related motion to strike portions of affidavits; and from the denial of Plaintiffs' motion to reconsider. This Court has appellate jurisdiction pursuant to Utah Code Ann. §78-2-2(j).

#### STATEMENT OF ISSUES, STANDARDS OF REVIEW, AND PRESERVATION

**ISSUE 1:** Did the district court err in concluding that Defendants' internet posting, mailing and hand-delivering an "Urgent Election Notice" to the homes of American Fork City citizens, for the purpose of preserving a business relationship and

friendship, occurred in the “process of government” as defined by Utah Code Ann. §78-58-101, *et seq* (“the Act” or “the anti-SLAPP<sup>1</sup> Act”)?

**STANDARD OF REVIEW:** This is a question of statutory interpretation that is reviewed for correctness, “granting no deference to the district court's decision.” *Carter v. Univ. of Utah Med. Ctr.*, 2006 UT 78, ¶8.

**PRESERVATION:** This issue was preserved in Plaintiffs’ MEMORANDUM IN OPPOSITION TO DEFENDANTS BRETT BEZZANT AND NEWTAH, INC.’S MOTION FOR JUDGMENT ON THE PLEADINGS AND/OR MOTION FOR SUMMARY JUDGMENT (“JP Oppos.”) (R1648) and Plaintiffs’ MOTION TO RECONSIDER COURT’S RULINGS ON SUMMARY JUDGMENT AND/OR JUDGMENT ON THE PLEADINGS AND SUMMARY JUDGMENT ON DEFENDANTS’ COUNTERCLAIM MOTION TO RECONSIDER (“Motion to Reconsider”) R2603.

**ISSUE 2:** Did the district court err in awarding Defendants’ their attorneys fees under the Act and under 42 U.S.C. §1983, concluding that the action “was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification, or reversal of existing law”; and were Plaintiffs denied due process of law when the district court concluded affidavits submitted on this issue were inadmissible, and thereby refused to allow Plaintiffs to present evidence of a substantial basis in fact and law and their good faith in filing the lawsuit?

**STANDARD OF REVIEW:** This issue involves questions of law and questions

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<sup>1</sup> SLAPP is an acronym for “Strategic Litigation Against Public Participation.”

of fact. Questions of law and statutory interpretation are reviewed for correctness, “granting no deference to the district court's decision.” *Carter v. Univ. of Utah Med. Ctr.*, 2006 UT 78, ¶8. Because the factual determinations were made pursuant to a judgment on the pleadings, this Court must accept Plaintiffs’ factual allegations and all reasonable inferences therefrom as true and in a light most favorable to Plaintiffs. *In re Estate of West*, 948 P.2d 351, 353 (Utah 1997). Whether evidence is admissible is a question of law that can be reviewed for abuse of discretion or for correctness, “incorporating a clearly erroneous standard of review for subsidiary factual determinations.” *D.A. v. State (In the Interest of W.A.)*, 63 P.3d 607, 611 (Utah 2002) (citations and quotations omitted).

**PRESERVATION:** The issue of attorney fees was heavily litigated and thus preserved in several of the pleadings below. *See, e.g.*, R2161, 2167, 2463.

**ISSUE 3:** Did the district court err in granting Defendants’ motion for judgment on the pleadings and/or summary judgment, and thereby concluding that the statements at issue are not defamatory per se and that Plaintiffs’ claims for defamation and false light lack merit?

**STANDARD OF REVIEW:** “[F]or purposes of appellate review, the standard for reviewing a summary judgment or a judgment on the pleadings is the same, since motions for either kind of judgment can be granted only as a matter of law. ... [A] court must accept the material allegations of the [nonmoving party's pleadings] as true, ... and the trial court's ruling should be affirmed only if it clearly appears that [the nonmoving party] can prove no set of facts in support of his claim. Similarly, reviewing a grant of



summary judgment under rule 56, an appellate court may reverse the trial court only if ‘there is no genuine issue of material fact and . . . the moving party is entitled to judgment as a matter of law.’ Utah R. Civ. P. 56(c).” *In re Estate of West*, 948 P.2d 351, 353 (Utah 1997). “[W]hen an appellate court reviews a district court's grant of summary judgment, the facts and all reasonable inferences drawn therefrom are viewed in the light most favorable to the nonmoving party, while the district court's legal conclusions and ultimate grant or denial of summary judgment are reviewed for correctness.” *Massey v. Griffiths*, 2007 UT 10, ¶8 (some citations and quotations omitted). Whether a statement is defamatory is a question of law that is also reviewed for correctness. *West v. Thomson Newspapers*, 872 P.2d 999, 1008 (Utah 1994).

**PRESERVATION:** This issue was preserved in Plaintiffs’ JP Oppos. R1648.

**ISSUE 4:** Is the anti-SLAPP Act unconstitutional as applied to the facts of this case under the Open Courts provision of the Utah Constitution?

**STANDARD OF REVIEW:** Whether a statute is constitutional as applied to the facts of a specific case is a question of law. *Grand County v. Emery County*, 52 P.3d 1148, 1151 (Utah 2002). A statute is presumed constitutional such that any reasonable doubts are resolved in favor of its constitutionality. *Id.*

**PRESERVATION:** Plaintiffs raise this state constitutional law claim for the first time on appeal under the interests of justice and the exceptional circumstances doctrine.

## STATEMENT OF THE CASE

Plaintiffs filed their Complaint on October 26, 2000. R6. The parties stipulated to Plaintiffs filing an Amended Complaint (R280) on June 10, 2002. R293. The Amended Complaint named current Defendants as well as American Fork City and various individuals who were mostly public officials in that municipality. R280. Plaintiffs' claims included several violations of 42 U.S.C. §1983, defamation, and false light. *Id.*

In Defendants' Answer and Counterclaim (R385) filed July 18, 2002, they raised their claims and defenses under Utah Code Ann. §78-58-101, *et seq.* (2001), also known as the Citizen Participation in Government Act or anti-SLAPP Act (**Addendum A**), which was enacted in April 2001, six months after the action was commenced. Defendants then filed a Motion for Judgment on the Pleadings and/or Summary Judgment on July 31, 2002, arguing that Plaintiffs' claims should be dismissed under the anti-SLAPP Act and generally that Plaintiffs failed to state a claim for defamation or false light. R426. Under the provisions of the anti-SLAPP Act, Defendants' Motion was treated as one for judgment on the pleadings and resulted in a mandatory stay on discovery. Utah Code Ann. § 78-58-104.

In the meantime, the matter was removed to federal court on August 19, 2002, then returned to the state district court in or about August 2003. R523, 531, 996. Notwithstanding the federal court's refusal to award Defendants attorney fees based on its finding that Plaintiffs' acted in good faith (R1086), Defendants relitigated the issue in the district court and won. R1903.

On April 2, 2004, the district court issued its Ruling on Defendants' Motion for Judgment on the Pleadings and/or Motion for Summary Judgment (R1825, 1855;

**Addendum B**), wherein it concluded that Plaintiffs' claims should be dismissed under the anti-SLAPP Act. After the matter was heavily litigated over a period of several months, the court concluded that Plaintiffs' claims lacked any merit and awarded Defendants attorney fees and costs under the statute, which fees exceeded \$200,000. R1897, 1900, 1903, 2637, 2833, 2987, 2992, 3000, 3038, 3045; **Addendum C**.

On October 7, 2005, Plaintiffs filed a Motion to Reconsider Court's Rulings on Summary Judgment and/or Judgment on the Pleadings, wherein Plaintiffs pointed out that Defendants' defamatory statements did not occur "in the process of government" as defined by the Act. R2603, 2630. The district court denied this motion on January 12, 2006. R2828. Via stipulation, all orders and judgments were adjudged final under Rule 54(b) on August 23, 2006 (R3058) and Plaintiffs timely filed a Notice of Appeal on September 13, 2006. R3068.

## **STATEMENT OF FACTS**

### **Introduction**

This case is about a private citizen, William T. (Bill) Jacob, who was publicly ridiculed and falsely accused of lying and negative campaigning. When Jacob sought redress of his grievances in good faith, he was not only denied access to the courts, but he was severely sanctioned just for seeking a judicial remedy that has existed at common law even prior to statehood.

To summarize the material facts that are provided in greater detail below, in the context of a pending municipal election, an American Fork City newspaper published a flyer containing false statements about Jacob, a private individual. Jacob sued for

defamation and the newspaper counterclaimed under the recently enacted anti-SLAPP Act, claiming that the purpose of the lawsuit was to punish the newspaper for exercising its First Amendment rights. After substantial analysis of conflicting legal authority, the district court dismissed Jacob's claims and ordered him to pay over \$200,000 in attorney fees and costs. The district court never found that Jacob's claims were frivolous. Rather, it concluded that the statements in the newspaper flyer were not defamatory.

While the facts in this case are construed in a light most favorable to Plaintiffs (*see*, Issues and Standards of Review, *supra*), the issues involve primarily questions of law. Because Plaintiffs' claims were dismissed under the recently enacted anti-SLAPP Act, some are also important questions of statutory interpretation and thus questions of first impression.

### **Relevant Facts**

Plaintiff, William T. (Bill) Jacob ("Jacob") is a private person and business owner in American Fork City ("AFC"), Utah, whose reputation for integrity, honesty, and sound judgment is essential to the success of his business. R280:5. Jacob is a shareholder and Chief Operating Officer of Plaintiffs Commercial Properties, Inc. ("CPI") and Phillips Manufacturing Company, Inc. ("PMC"). *Id.* (Plaintiffs will be collectively referred to herein either as "Plaintiffs" or "Jacob").

In 1993, Jacob established a confidential relationship with Newtah, the owner of the American Fork newspaper, *Citizen New Utah*, and Brett Bezzant, Newtah's publisher, whereby Jacob agreed to provide information about current events of interest to AFC citizens in exchange for Defendants protecting Jacob's anonymity. *Id.* at 11; R1528

(Defendants who are parties to this appeal will be collectively referred to herein either as “Defendants” or “Bezzant”). This agreement was reaffirmed in 1997 when Bezzant agreed not to reveal Jacob as the source of such information. *Id.* at 12.

In 1997, Jacob learned that AFC public officials were conducting closed meetings in violation of the Open Meetings Law, during which they covertly planned the purchase and development of land contrary to an already existing Strategic Plan that had been publicly discussed and adopted five years prior in 1992. R280:12-13, 20. When Jacob attempted to express his concerns as a private citizen about the closed meetings during a 1997 city council meeting, a city employee told him to “shut up, sit down, and quit talking.” *Id.* at 19. Subsequently during a press conference held in July 1997, an AFC public official falsely accused Jacob of “grilling” AFC council members without factual basis. *Id.* at 21-2. Through a series of subsequent events involving threats, intimidation, and confrontation perpetrated by AFC public officials, hostility toward and retaliation against Jacob and other private citizens who questioned the propriety of public officials’ activities continued to escalate. *Id.* 19-25.

Because of increasing threats, intimidation, and the unlawful use of police force, by the fall of 1997 Jacob and his wife feared for their safety such that, among other things, they avoided traveling alone at night. R280:26-7; *see also*, R280:20-9. When Jacob’s wife expressed these fears during an October 1997 city council meeting, other private citizens in attendance responded with an enthusiastic round of applause, indicating that Jacob and his wife were not the only citizens who felt intimidated and threatened. *Id.* at 28.

Notwithstanding these fears, Jacob continued his efforts to keep AFC citizens informed. *Id.* at 28, 30-1, 33-7. In retaliation, in January 1998 the mayor of AFC threatened Jacob that his or his daughter's home might be burglarized and a subsequent police investigation might reveal something that Jacob wanted to "keep quiet," suggesting that illegal drugs, pornography, or other contraband would be planted. *Id.* at 30-1. In November 2000 and consistent with the constant harassment, Jacob received a document via mail entitled, "Certificate of Upgrade to Complete Asshole" that was signed by "Citizens Who Know." *Id.* at 35.

In 1992, AFC adopted Ordinance Nos. 92-05-20 and 92-05-21, which define "exempt" AFC employees as all elected officials, all appointed officials, the City Administrator, the Chief of Police, attorneys serving as legal counsel, consultants rendering professional services, part-time employees working thirty hours per week or less, and all volunteer personnel serving with or without pay. R280:10. Ordinance No. 92-05-21 prohibits any such exempt employee from seeking or holding public office in AFC. *Id.* at 11.

In 1999, Ricky Storrs and Tom Hunter announced their intent to seek public office in AFC. R280:36. Jacob contends that both were exempt employees under the foregoing city ordinances. Storrs worked part-time for AFC as an EMT, while Hunter was employed as AFC's Employee Benefit Consultant. *Id.* Jacob was not the only concerned private citizen. Hunter's and Storrs' apparent conflicts of interest were the topic of articles published by *The Deseret News* and the *Provo Daily Herald*. *Id.* AFC citizens also questioned Hunter directly about his conflict during a "Meet the Candidate Night" in

September 1999. *Id.* at 38.

To better inform the public about this issue and pursuant to the existing confidentiality agreement between Bezzant and Jacob, on October 27, 1999, Bezzant distributed an anonymous “Nonpartisan Citizens Group Information Bulletin” (“NPCG Bulletin”) (**Addendum D**; R2740) that questioned the propriety of Hunters’ and Storrs’ seeking and holding public office in violation of AFC ordinances. R280:38-9. Bezzant saw the NPCG Bulletin and knew of its content before it was distributed. R1528. Bezzant also admits that he could have refused to distribute the NPCG Bulletin. R1527.

Immediately upon distribution of the NPCG Bulletin, Hunter contacted Bezzant and threatened to sue him and Newtah, and to discontinue advertising in the *Citizen* unless Bezzant published a retraction prepared by Hunter. *Id.* at 39-40. Contrary to their existing confidentiality agreement, Bezzant disclosed Jacob’s name to Hunter as the person who paid for the distribution of the NPCG Bulletin. *Id.* Hunter then contacted Jacob and threatened to sue him for defamation if he did not have Bezzant publish the prepared retraction. *Id.* R1457 (December 9, 1999 Letter from Brett Bezzant to William T. Jacob, **Addendum G**). Hunter’s attorney reiterated these threats in a letter sent to Jacob during this same time period. *Id.* at 40. Jacob ignored Hunter’s threats because he believed AFC citizens should be informed about the candidates and their conflicts of interest.

However, Bezzant immediately published an “Urgent Election Notice” and “Apology” (“Notice”) (**Addendum E**; R2609-10) that disclosed Jacob’s name (“William T. (Bill) Jacob”) and referred to the NPCG Bulletin as “Mr. Jacob’s flyer,” falsely

identified him as the author of the NPCG Bulletin, falsely accused him of feeding the public false and misleading information, and described the Bulletin attributed to him as a “classic” example of “negative campaigning intended to hurt one candidate in order to favor another.” *Id.* The Notice was published with the express approval of candidates Hunter and Storrs. R1529-30 (Response to Requests for Admission Nos. 6, 7, 12, 13). The Notice was mailed and hand delivered to the residents of American Fork, and published on the *Citizen World Wide* website. **Addendum B** at 9. The content of the Notice is as follows:

New Utah! Offers apology to Tom Hunter, Rick Storrs for campaign flyer

## **Urgent Election Notice**

To: All American Fork Residents

From: Publisher Brett Bezzant, American Fork Citizen New Utah!

### **Correction and Apology to American Fork City Council Candidate Tom Hunter**

The Oct. 27<sup>th</sup> issue of the American Fork Citizen New Utah! and New Utah! Shopper carried a political advertisement that ran as a preprinted flyer, paid and produced by William T. (Bill) Jacob and others involved in a “Nonpartisan Citizens Group.”

In fairness to Mr. Hunter and his candidacy, New Utah! apologizes for distributing this flyer without giving Mr. Hunter the opportunity to respond to what we believe is false and misleading information regarding his service to American Fork City.

Mr. Hunter is not and never has been employed by American Fork City. Neither has he received any employee compensation nor any other employee benefit from American Fork City. However, Mr. Hunter does own Hunter & Associates Insurance and his firm was selected in 1997 to act as an independent insurance broker on the employee benefits package for American Fork City. His firm provides this same kind of service for many other employers.



Since this client/agent relationship with American Fork City is a potential conflict of interest, Mr. Hunter intends, if elected, to file a letter with the Mayor clearly identifying the potential conflict and stating that he will abstain from voting on any issue that involves his pre-existing interest in the employee benefits package.

Contrary to what Mr. Jacob's flyer implied, Mr. Hunter is, to the best of our knowledge, a qualified and eligible city council candidate and his candidacy has not, in any way, violated the policies or procedures of American Fork City.

### **We also apologize to City Councilman Rick Storrs**

The same flyer also questioned the candidacy of Rick Storrs, citing a city personnel ordinance that does not even apply to Mr. Storr's part-time volunteer employment as a city EMT. The precedent for his eligibility as a city councilman and as an incumbent candidate have been well established in at least two other elections. We apologize to Mr. Storrs for distributing misleading information that would bring his candidacy into question.

### **Comments on the flyer**

Mr. Jacob's flyer is falsely labeled as a "nonpartisan" group. Since American Fork no longer has political parties, there is no such thing as a "nonpartisan" group. Unfortunately, this flyer is a classic example of negative campaigning intended to hurt one candidate in order to favor another. We believe it hurts the entire process. Again, we apologize to Candidates Hunter and Storrs for distributing this misinformation.

After publication of the foregoing, AFC Mayor Ted Barratt publicly denounced the authors of the NPCG Bulletin attributed to Jacob as "scum-feeders" and "bottomfeeders." R280:40. Jacob commenced this lawsuit, the procedural history of which is outlined in the Statement of the Case, *supra*.

Additional material facts will be cited herein as warranted.

### **SUMMARY OF ARGUMENT**

The anti-SLAPP statute does not apply to these facts. Bezzant's conduct did not occur in the "process of government." Bezzant admits he published the Notice to

preserve his friendship and business relationships with Hunter and Storrs and that he did not intend to influence the decisions of the legislative and executive branches of government, as required by the Act's plain language.

There is also no evidence, clear and convincing or otherwise, that Jacob's purpose in filing the lawsuit in this case was motivated by bad faith or by a desire to chill Bezzant's right to participate in the process of government.

The district court erred in awarding Bezzant attorney's fees based on its conclusions that Jacob's claims lack legal and factual merit. The district court engaged in a detailed legal analysis of seemingly conflicting authority when it evaluated Jacob's claims, which fact standing alone demonstrates their merit. The district court also failed to construe the facts in a light most favorable to Jacob and denied him due process of law when it refused to permit Jacob to produce evidence of his good faith in bringing suit, particularly when the basis for Bezzant's claim for attorney's fees was Jacob's purported bad faith.

Bezzant is equitably estopped from seeking attorney fees because he was unable to provide any response to Jacob's specific request for information relative to Bezzant's defense that Jacob's claims were filed in bad faith. Moreover, because a federal court has already denied Bezzant's request for attorney's fees based on a finding of good faith, the law of the case doctrine precludes the district court's subsequent inconsistent order.

The district court erred in concluding that the statements at issue are not defamatory and did not cast Jacob in a false light. Not only did Jacob establish a prima facie case for defamation and false light, the court failed to construe the facts in a light

most favorable to Jacob. Also, because the statements accused Jacob of deliberately misleading the public in an effort to promote negative campaigning and identified him contrary to his wishes while holding him out as an object of public contempt and ridicule, the statements are defamatory per se.

Finally, application of the anti-SLAPP Act to these facts violates the Open Courts provision of the Utah Constitution.

## **ARGUMENT**

### **I. THE ANTI-SLAPP ACT DOES NOT APPLY TO THESE FACTS.**

The district court found that Jacob's claims were filed "for the purpose of chilling Bezzant's political speech and thereby preventing or interfering with Bezzant's proper participation in the process of government. ... Jacob intended to use this litigation as a means of punishing Bezzant for Bezzant's publication of the political speech contained in the election notice." **Addendum B** at 14. These findings and conclusions are incorrect for three reasons. First, Bezzant's publication was not a "proper participation in the process of government" as defined by the Act. Second, there is no evidence that Jacob filed his claims to chill Bezzant's "proper participating in the process of government." Finally, the district court failed to construe the evidence in a light most favorable to Jacob. Accordingly, the Act does not apply to these facts.<sup>2</sup>

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<sup>2</sup> Although the district court denied Jacob's Motion to Reconsider on the ground that the motion was procedurally improper, the court still addressed the question of whether Defendants' publication occurred in the process of government and found that it did. R2828 (**Addendum I**). The district court's analysis is flawed. A motion to reconsider should be considered and construed according to its substance. *Bonneville Billing & Collection v. Torres*, 15 P.3d 112, 113 (Utah App. 2000). A court should carefully

A. Defendants Were Not Participating in the Process of Government When They Published the Notice.

The anti-SLAPP Act only applies to an action if its “primary purpose ... is to prevent, interfere with, or chill the moving party’s proper participation in the process of government.” Utah Code Ann. §78-58-104(2). Section 78-58-102(5) defines “process of government” as “the means and mechanisms by which the legislative and executive branches of government make decisions, and the activities leading up to the decisions, including the exercise by a citizen of the right to influence those decisions under the First Amendment to the U.S. Constitution.” *See Addendum A*. Even if Defendants’ statements are “political speech” as the district court concluded they were (**Addendum B** at 14), political speech has no nexus to the decision-making mechanisms of the legislative and executive branches of government.

When construing statutes, this Court “assumes that each term included in the [statute] was used advisedly.” *Carrier v. Salt Lake County*, 104 P.3d 1208 (Utah 2004). A court must look to a statute’s plain language to determine the intent and purpose of the legislature, and must not go beyond that plain language unless it is ambiguous. *State v. McKinnon*, 2002 UT App 214, ¶6, 51 P.3d 729. This Court has already concluded that there is no ambiguity in the limiting provisions of the anti-SLAPP Act. *Anderson v. Tobias*, 116 P.3d 323, 336 (Utah 2005). The legislature’s advised use of the plain

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of such a motion and correct any errors raised therein. *Gillmore v. Cummings*, 806 P.2d 1205, 1208 (Utah App. 1991). The substance of Jacob’s motion in this case raised errors of law based on the court’s incorrect application of the controlling statute. Therefore, the district court erred in denying Jacob’s motion to reconsider because it raised legal errors of statutory interpretation that the district court should have corrected.

language limiting the Act's application to the decision making mechanisms of the legislative and executive branches of government was intended to limit the Act's scope accordingly.

Thus the Act does not apply when, as here, a newspaper, in admitted response to threats of a lawsuit and lost advertising, posts on its website and hand-delivers to citizens an "Urgent Election Notice" and "apology." These facts evidence no intent to influence the decisions of the legislative and executive branches of government. Notably, nor have the Defendants so claimed.

Under the plain language of the Act, Bezzant's conduct is not protected.

**B. The "Urgent Election Notice" Was Hand Delivered to and Intended for the Citizens of American Fork and had No Nexus to the Decision Making Mechanisms of Government.**

Even the district court initially concluded that Bezzant's conduct did not qualify for the Act's protection, if inadvertently. In its first ruling before the statutory definition of "process of government" was raised, the district court found, "Bezzant's publication of the election notice was primarily directed to the citizens of American Fork who had a direct interest in the upcoming election." **Addendum B** at 16-17. There was no finding that the Notice was intended to influence decisions of the legislative and executive branches of government and there was not one iota of evidence to suggest otherwise.

Later when Jacob pointed out that such conduct was not directed to the decision making mechanisms of any branch of government and thus the Act did not apply, the district court created its own facts and found that Bezzant's Notice was directed "to those in the city's executive and legislative positions who had the power to disqualify the

candidates.” R2545 at 5; **Addendum F**. There is no factual support for this subsequently crafted finding. Moreover, the district court’s inconsistent and creative findings evidence its failure, indeed its refusal, to construe the facts in a light most favorable to Jacob.

When evaluating Bezzant’s true intent, nothing is as persuasive as his own admissions. Defendants’ Answer and Counterclaim admits the following:

Plaintiffs’ lawsuit is without merit and is not brought or asserted in good faith, but instead is a Strategic Lawsuit Against Public Participation (SLAPP) filed to chill and discourage Defendants’ publication of information and commentary on issues of public interest relating to the American Fork City Council election, and in particular, to punish Defendants for publishing information and commentary critical of the Bulletin prepared by plaintiff. (Thirty-Second Defense).

16. The Editorial is personally addressed from Bezzant to “All American Fork Residents.
17. The Editorial disputes the allegations contained in Jacob’s Bulletin concerning the eligibility of Hunter and Storrs to run for the American Fork City Council and apologizes to readers for distributing the Bulletin without giving the candidates an opportunity to respond before the election.
20. In distributing the Editorial at his own expense, it was Bezzant’s intent to publicly communicate the information he received from Hunter and Storrs disputing the allegations made about them in the Bulletin; to disseminate such information prior to the municipal election so that the residents of American Fork City could be more fully informed on the matter before they cast their votes; to comment upon the Bulletin and its effect on the political process; to apologize for distributing the Bulletin without giving Hunter and Storrs an opportunity to respond prior to the election; to participate in the process of American fork City government by communicating to voters information and commentary relevant to the municipal election; and to engage in activity that is at the core of the First Amendment – political speech and commentary.

R385 (emphasis added).

A letter Bezzant wrote to Plaintiff Jacob is even more helpful:

... in fairness to the two candidates mentioned in your advertisement, I corrected what was lacking in your preprinted flyer ... I discussed with ... our managing editor, the possibility of publishing some disclaimer in the newspaper. ...

Wednesday morning [October 27, 1999] I received an angry message from Tom Hunter. He wanted to know who paid for the flyer and threatened to sue whomever that was as well as the newspaper. He also threatened to cancel his business advertising with the newspaper. He was, understandably, upset ...

In my conversation with Tom Hunter ... I ... offered to deliver my own response prior to the election. I asked him to write down what he would like me to publish ...

In retrospect, my response was partly an emotional one. I was, in effect, defending a friend whose character had been maligned. Tom Hunter is not only a valued business client of the newspaper, he is also my insurance agent and friend.

R1457 (**Addendum G**).

The Notice was widely published via mailing, door-to-door delivery, and on a web site that is accessible from anywhere in the world. No statements contained therein were personally or generally directed to members of the executive or legislative branches of government and, according to Bezzant's own admissions, the publications were not intended to influence the decisions of those branches but were in defense of a friend. The Notice was published to the citizens of AFC. **Addendum E**. Its title unambiguously and publicly communicates an "apology" to Hunter and Storrs for the previous NPCG Bulletin. *Id.* Bezzant's publications were designed to sooth the ruffled feathers of two candidates who were in reality not qualified to run for public office and who wrote it or approved of it prior to distribution. R1529-30.

Construing the facts in a light most favorable to Jacob, Bezzant was not participating in the process of government when he publicly accused Jacob of distributing

false and misleading information and of negative campaigning. Moreover, there is no fact in this case to suggest that Bezzant's publications were intended to petition or to otherwise influence the decisions of the executive or legislative branches. The district court's conclusion that the anti-SLAPP Act applied to these facts is incorrect as a matter of law.

C. Anti-SLAPP Statutes Are Wisely Limited to Protecting Citizens' Rights to Petition Government.

While the foregoing demonstrates that Bezzant's Notice does not qualify for the anti-SLAPP statute's protection, a comparison to similar legislation in other states sheds additional light on the Act's purpose and legislative intent.

The New Hampshire Supreme Court preemptively recognized the problem with overreaching and unconstitutional application of proposed anti-SLAPP legislation. Accordingly, the court advised the New Hampshire legislature that such proposed legislation would violate the state constitution. *Opinion of the Justices*, 138 N.H. 445, 641 A.2d 1012, 1994 N.H. LEXIS 50 (declining to address the constitutionality of the proposed legislation under the federal constitution because the fact that the proposed bill would deprive litigants of their state constitutional right to a jury trial in civil cases was dispositive). *See also, Avis v. Board of Review*, 837 P.2d 584, 586 (Utah App. 1992) ("Utah's open courts provision guarantees a person access to the courts 'for an injury done to him in his person, property or reputation.' Utah Const. Art. I, §11."). With these same concerns in mind, other states that have enacted anti-SLAPP legislation have been careful to limit its application.



In New York for example, anti-SLAPP legislation is limited to actions “brought by a public applicant or permittee [or a developer], and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission.” NY CLS Civ. R. §76-a (2005). *See also, Long Island Ass’n for Aids Care v. Greene*, 269 AD2d 430, 702 NYS2d 914 (2000) (holding anti-SLAPP did not apply because claims asserted against defendant were not materially related to any efforts by her to report on, comment on, challenge, or oppose application by plaintiff for permit, license, or other authorization from public body); *Guerrero v. Carva*, 779 NYS2d 12 (App Div, 1<sup>st</sup> Dept, 2004) (explaining that anti-SLAPP did not apply where defamatory flyer distributed by tenants regarding a landlord and developer did not relate to any petition or other permit-related proceeding).

Strategic lawsuits against public participation, or SLAPPS, “are typically filed by real estate developers against citizens’ groups or individuals who have voiced their opposition to a planned development.” *Scanlon v. McHugh*, 4 Mass. L. Rep. 334, 1995 Mass. Super. LEXIS 228, n. 6 (noting that “right to petition” is defined by the Mass. Act as “any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding; any statement reasonably likely to enlist public

participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government”).

Because it includes rights to petition the judiciary, the Massachusetts act applies more broadly than the Utah language limiting the “process of government” only to the executive and legislative branches of government. A moving party in Massachusetts must also establish that claims against him are based upon the exercise of his right to petition “under the constitution of the United States or of the Commonwealth [of Massachusetts].” *Id.* (holding that although the defendant’s defamatory statements constituted conduct under the anti-SLAPP statute because it did involve the right to petition regarding a proposed real estate development, the plaintiff had made the requisite showing that the statements were false and that he had suffered actual injury in the form of mental suffering); *See also, Anderson Dev. Co. v. Tobias*, 2005 UT 36, 116 P.3d 323 (involving a developer suing private citizens for their opposition to development).

The language in Georgia’s anti-SLAPP legislation is similarly restrictive. The Georgia act applies only to “any written or oral statement, writing, or petition made before or to a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, or any written or oral statements, writing, or petition made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law.” *See, Georgia Community Support & Solutions, Inc. v. Berryhill*, 2005 Ga. App. LEXIS 840, n. 3 (“The anti-SLAPP statute does not encompass all statements that touch upon matters of public concern”).

Similar to the anti-SLAPP acts in New York, Massachusetts, and Georgia,<sup>3</sup> the Utah statute was crafted to apply to a narrow range of conduct: that occurring in the process of government as defined by the Act. This limitation on the type of conduct subject to an anti-SLAPP claim is well reasoned and specifically designed to create statutory protection for private citizens against abusive lawsuits filed by large private interests. *See, Salvo v. Ottoway Newspapers, Inc.*, 1998 Mass. Super. LEXIS 724 (explaining that SLAPP suits are “generally meritless suits brought by large private

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<sup>3</sup> In contrast to New York, Georgia, Massachusetts, and Utah, California’s anti-SLAPP act is both drafted and construed more broadly to encompass matters of “public interest,” which accounts for the substantial volume of litigation and widely divergent rulings that have been generated since its enactment in the early 1990’s. *See e.g., Du Charme v. International Brotherhood of Electrical Workers*, 110 Cal. App. 4<sup>th</sup> 107, 1 Cal. Rptr. 3d 501, 2003 Cal. App. LEXIS 1002. However, even in California, courts have narrowly construed what constitutes a matter of “public interest,” concluding that defamatory statements directed at an individual, even in the context of a public issue, are not necessarily issues of public interest. *Id.* at 117 (explaining that “a union’s allegedly defamatory statements were not made in connection with a public issue or an issue of public interest because they concerned the supervision of a staff of eight by an individual who had previously received no attention or media coverage, and the only people directly involved in and affected by the situation were the supervisor and his eight supervisees. . . . [T]he mere publication (in a newsletter, for example, or on a Web site) should not turn otherwise private information (e.g., job termination) into a matter of public interest”); *see also, O’Meara v. Palomar-Pomerado Health System*, 23 Cal. Rptr. 3d 406 (Cal. App. 2005) (holding that anti-SLAPP did not apply to doctor’s action against defendant because, among other reasons, defendant’s conduct of defaming the doctor in a peer review hearing “did not involve an exercise of their free speech or petition rights”). Further, even in California a prima facie showing of defamation defeats a SLAPP counterclaim. *Lafayette, Morehouse, Inc. v. Chronicle Publishing Co.*, 44 Cal. Rptr. 2d 46 (App. 1 Dist. 1995) 37 Cal. App. 4<sup>th</sup> 855, *rehearing denied, review denied, cert. denied*, 519 U.S. 809; *see also, e.g., Fleishman v. Superior Court*, 125 Cal. Rptr. 2d 383 (App. 2 Dist. 2002) 102 Cal. App. 4<sup>th</sup> 350 (motion to strike under anti-SLAPP must be denied if plaintiff alleges prima facie case which, if believed by trier of fact, will result in judgment for the plaintiff); *Wang v. Hartunian*, 3 Cal. Rptr. 3d 909, (App. 2 Dist. 2003) 111 Cal. App. 4<sup>th</sup> 744 (same).

interests to deter common citizens from exercising their political or legal rights or to punish them for doing so”) (citation omitted). Anti-SLAPPs were never intended to banish private citizens from the courts and punish them for seeking a judicial remedy for very public wrongs, such as occurred here.

Further, the misuse of anti-SLAPP legislation against private citizens, as in this case, has been strongly criticized in a federal forum as “stand[ing] the purpose of the legislation on its head.” *Yeshiva Chofetz Chaim Radin, Inc. v. The Village of New Hempstead*, 98 F. Supp. 2d 347, 360 (US So. Dist. NY 2000) (“The new anti-SLAPP law creates a new right of action for victims of SLAPP suits. It places new restrictions on the ability of public applicants to seek redress from courts. . . . As such, the new anti-SLAPP law is in derogation of the common law. It is well established that statutes in derogation of the common law are to be construed narrowly”) (citations omitted).

As the foregoing analysis demonstrates, while recognizing the potential for abuse and unconstitutional application if anti-SLAPP legislation is not narrowly confined to infringements upon the right to petition government, other states have either preemptively discouraged the legislation or have restricted its application to its narrow purpose: precluding large private interest plaintiffs from bringing meritless lawsuits to harass and intimidate private citizens. It was never intended to enable a large private interest to publish defamatory statements about a private citizen, then to punish that citizen for seeking a remedy from the court as has occurred in the present case.

D. There is No Evidence, Clear and Convincing or Otherwise, that Jacob’s Purpose in Bringing Suit was to Chill Bezzant’s Participation in the Process of Government.

For the district court to conclude that Jacob's Complaint was a SLAPP action, it had to find, while construing all of the facts and reasonable inferences in a light most favorable to Jacob, there was still clear and convincing evidence that Jacob filed suit to interfere with or chill Bezzant's proper participation in the process of government. Utah Code Ann. §78-58-104(2); *Anderson v. Tobias*, 116 P.3d 323 (Utah 2005).

The district court was unable to point to any fact suggesting Jacob's purpose in filing suit was improper. Rather, the court concluded, "The lengthy procedural history ... supports the proposition that Jacob intended to use this litigation as a means of punishing Bezzant for Bezzant's publication of the political speech contained in the election notice." **Addendum B** at 14. However, a "proposition" based on a vaguely referenced procedural history is not clear and convincing evidence of an improper purpose. Moreover, the district court's language again demonstrates a failure to construe the facts in Jacob's favor, which is required on a motion for judgment on the pleadings.

SLAPP suits are fundamentally aimed at harming the First Amendment right of citizens to petition government. Therefore, the hallmark of a SLAPP suit is one that lacks any merit and is brought for the sole purpose of obtaining an economic advantage over a citizen party by increasing his litigation costs to the extent that his case becomes weakened or abandoned. *eCash Technologies, Inc. v. Guagliardo*, 210 F. Supp. 2d 1138 (C.D. Cal. 2001); *Wilcox v. Superior Court* (App. 2 Dist. 1994) 27 Cal. App. 4<sup>th</sup> 809 (explaining that SLAPP suits are brought by large private interests to deter citizens from exercising their First Amendment rights, or to punish them for doing so). A SLAPP suit

is not a legitimate dispute of facts and law like this case is, the outcome of which is contingent upon judicial interpretation of conflicting authority.

Thus anti-SLAPP statutes only apply when the actual objective of the suit is to interfere with the defendant's First Amendment rights, primarily the right to petition government. *Foothills Townhome Assn. v. Christiansen*, 65 Cal. App. 4<sup>th</sup> 688 (App. 4 Dist. 1998), *rehearing denied, review denied, cert. denied*, 525 U.S. 1106; *see also, Dixon v. Superior Court* (App. 4 Dist. 1994) 30 Cal. App. 4<sup>th</sup> 733 (explaining that plaintiffs who bring SLAPP suits do not intend to win, but do so to cause delay and distraction, and to punish citizen activists by causing them to incur litigation costs for exercising their right to speak and petition government for redress of grievances). Indeed, the purpose of anti-SLAPP legislation is to encourage private citizens to participate in government and to prevent the chilling of such participation through the abuse of judicial process. *People ex re. 20<sup>th</sup> Century Ins. Co. v. Building Permit Consultants, Inc.*, App. 2 Dist. 2000) 86 Cal. App. 4<sup>th</sup> 280; *see also, Dixon v. Superior Court* (App. 4 Dist. 1994) 30 Cal. App. 4<sup>th</sup> 733 (explaining that plaintiffs who bring SLAPP suits do not intend to win, but rather intend to delay and create a distraction, and to punish activists for exercising their right to petition government by causing them to incur litigation costs).

Notwithstanding the fact that Bezzant's conduct cannot be construed as "proper participation in the process of government," there are no facts to support an inference that Jacob's primary motivation in bringing suit was to interfere with or chill any of Bezzant's rights. The facts compel the opposite conclusion. The most obvious such fact is that the

Complaint was filed a year after the election of Bezzant's friend and business associate to the AFC City Council.

The anti-SLAPP required the district court to find Jacob never believed his claims had any merit prior to concluding the Act applied. There are no facts to suggest that Jacob lacked an honest belief that his claims were meritorious, even if not construed in a light most favorable to Jacob. There is no dispute that Bezzant published the Notices in this case. There is no dispute that the Notices named Jacob contrary to his express wishes. There is no dispute that the Notices accused Jacob of intentionally publishing false information and of "classic" negative campaigning, and thereby held him out as an object of public ridicule, contempt and hatred. Bezzant's pleadings are devoid of any fact suggesting Jacob filed his claims in bad faith or that he lacked a reasonable belief in their merits. The district court made no finding that Jacob believed his claims lacked merit.

Further, Jacob's prior attorney, Brent Stephens, submitted specific requests for discovery giving Bezzant an opportunity to support his bare allegation in his first Answer that Jacob's claims were brought in bad faith and were frivolous. R1544. In response, Bezzant stated only a general belief but was unable to cite any facts suggesting bad faith, and could only reserve the right to supplement his response as additional facts were obtained in discovery. R1540. No supplementation ever occurred. Bezzant's inability to cite a single fact evidencing Jacob's alleged bad faith hardly supports a finding that Jacob's claims were brought primarily to interfere with or chill Bezzant's rights.

Based on the foregoing facts and law, the district court's conclusion that the anti-SLAPP Act applies in this case is incorrect.

II. THE TRIAL COURT ERRED IN SANCTIONING PLAINTIFFS' GOOD FAITH EFFORTS TO OBTAIN A JUDICIAL REMEDY BY AWARDING DEFENDANTS ATTORNEYS FEES.

The district court awarded Bezzant his attorney fees on two separate occasions. First, Bezzant was awarded fees for litigating Jacob's claims under 42 U.S.C. §1983. **Addendum B** at 23. Later, Bezzant was awarded fees and costs under Utah Code Ann. §78-58-105. Both provisions require a showing of bad faith before imposition of the attorney fees sanction can be justified.

A. The District Court Erred in Awarding Fees Under the anti-SLAPP Act Because Jacob's Claims Have Both Legal and Factual Merit.

Failing to construe the facts in a light most favorable to Jacob and only after much briefing and analysis, the district court concluded that Jacob's claims lacked factual and legal merit because (1) Bezzant's Notice did not convey a defamatory meaning as a matter of law; (2) the Notice was protected by Utah's public interest privilege;<sup>4</sup> (3) the statements in the Notice were opinion and not verifiable statements of fact; (4) the statements were not defamatory per se and Jacob failed to plead special damages; (5) Jacob's claims "were so deficient that they did not even pass the 'relatively low' threshold for surviving a motion for summary judgment." **Addendum F** at 10. The court also concluded that Jacob's claims were "not supported by a substantial argument for the extension, modification, or reversal of existing law." *Id.*

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<sup>4</sup> Notably, in concluding that the statements were privileged, the district court cited *Seegmiller, infra*, which it previously determined this Court had implicitly overruled. **Addendum B** at 16.



To justify an award of attorney fees, Utah Code Ann. §78-58-105 requires a showing “that the action involving public participation in the process of government was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification, or reversal of existing law.” This language is almost identical to that provided in Rule 11 of the Utah Rules of Civil Procedure, which provides for similarly harsh sanctions only when “the claims, defenses, and other legal contentions therein are [not] warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.” However, while Rule 11 imposes an equitable notice requirement and sanctions counsel, the attorney fees provision in the anti-SLAPP Act provides no notice requirement and sanctions the party.

An award of attorney’s fees is generally recognized as a harsh and punitive sanction for demonstrable bad faith. *See* Utah Code Ann. §78-27-56. This Court recently instructed, “We remind trial courts that the reason for awarding attorney fees based on bad faith is to punish the wrongdoer, and not compensate the victim, and that fees should therefore be awarded only upon specific evidence of bad faith.” *Still Standing Stable, LLC v. Allen*, 122 P.3d 556, 560-61 (Utah 2005) (holding that “lack of legal merit is insufficient for an attorney fee award under [§78-27-56]”) (citations, quotations, and brackets omitted).

A finding of bad faith is required under the anti-SLAPP Act. The statute was expressly created to punish parties for knowingly abusing the judicial process by bringing a meritless action for the purpose of interfering with and chilling a person’s right to

petition government. Such abuse of the judicial process embodies the essence of bad faith. In contrast, the Act was not intended to punish unsuspecting plaintiffs who honestly seek a judicial remedy for genuinely disputed harms based on genuinely disputed conflicting authority, such as occurred here.

As already noted, any evidence of bad faith is absent from the record in this case. Jacob also argued that Defendants' anti-SLAPP counterclaim resulted in an unconstitutional application of the Act, thereby arguing in good faith for the extension, modification, or reversal of existing law. R1005, 1648, 1779. Indeed, after oral argument on March 16, 2004 on Bezzant's motion for judgment on the pleadings, Judge Lynn W. Davis commended, "Well argued and well briefed ... I think it's nicely done on behalf of both of your clients. . . . I'll take the matter under advisement. There are technical issues here. If I spoke from the bench and made a ruling right now I might overlook evidence, et cetera." R3069:93.

The district court then concluded that Jacob's claims lacked merit only after analysis of conflicting authority on point. Specifically, the court concluded that this Court implicitly overturned its holding in *Seegmiller v. KSL, Inc.*<sup>5</sup> with its subsequent decision in *Larson v. Sysco Corporation*<sup>6</sup> such that a written statement constitutes libel per se only if it alleges criminal conduct, a loathsome disease, unchaste behavior, or operation of an unlawful business. **Addendum B** at 15.

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<sup>5</sup> 626 P.2d 968, 977 n. 7 (Utah 1981) (defining libel per se as "defamatory words specifically directed at the person claiming injury, which words must, on their face, and without the aid of intrinsic proof, be unmistakably recognized as injurious").

The district court engaged in similar analysis of additional pertinent authority. *Id.* Thus, the district court based its conclusions that a sanction of attorney fees was warranted not on a finding that Jacob's claims were frivolous or for any act of bad faith, but based on its legal conclusion that this Court implicitly overturned *Seegmiller* with its subsequent decision in *Larson*.

Accordingly, the district court made no finding of bad faith based on any "factual determination of [Plaintiffs'] subjective intent." *Still Standing Stable, LLC v. Allen*, 122 P.3d 556, 559 (Utah 2005). Rather, the court equated "without merit" with "bad faith," apparently and erroneously "believing that an absence of legal merit meant that bad faith could be presumed." *Id.*

The trial court's analysis evidences the legal merit of Plaintiffs' claims under *Seegmiller* and other pertinent authority, thereby defeating the court's finding that Jacob's claims were so lacking in merit that Bezzant was entitled to attorney's fees and costs. It also defeats its conclusion that this was a SLAPP action, which by definition is completely lacking in merit. *See, supra*. Thus, Jacob was severely punished not for bad faith, but because he and his competent legal counsel did not accurately predict the trial court's unpredictable conclusion that this Court implicitly overruled *Seegmiller*, which case is still good law.

Jacob's claims have a substantial basis in fact and law and were filed in good faith. The detail and significant analysis of the district court's ruling alone demonstrates the

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<sup>6</sup> 767 P.2d 557 (Utah 1989).

substantial merit of Jacob's claims. Thus, the district court's conclusions are incorrect and the award of attorney fees is improper.

B. Jacob Was Denied Due Process of Law When the District Court Refused to Permit Evidence of Good Faith.

When Bezzant moved for attorney fees under the Act, he argued that Jacob's claims lacked a substantial basis in fact and law accused Jacob of being motivated solely by a desire to punish Bezzant for exercising his First Amendment rights. R1952; R1969. In response to Bezzant's allegations, Jacob submitted affidavits from himself and both current and previous counsel explaining Jacob's and his counsel's intent. R2161, *et seq.* (**Addendum H**). Attorneys David Aagard and Brent Stephens both submitted affidavits explaining how they independently conducted an exhaustive evaluation of the merits of Jacob's claims prior to filing suit. R2161. David Aagard in particular analyzed the merits of this case in light of *Mast v. Overson*, 971 P.2d 928 (Utah App. 1998), and determined that that the facts in *Mast* were distinguishable from this case. Jacob's current counsel also addressed the distinguishing factors of *Mast* in Jacob's memorandum in opposition to the Bezzant's motion for judgment on the pleadings and during oral argument on March 16, 2004. *Id.*

Bezzant moved to strike this evidence on the ground that those portions of the affidavits rebutting Bezzant's claims of bad faith were inadmissible. R2167; R2218. Without offering any analysis of its own, the district court expressly adopted Bezzant's arguments, concluding that the affidavits "consist of argument, opinions, and inadmissible legal conclusions"; accordingly, all of the evidence rebutting Bezzant's

claims and demonstrating Jacob's good faith was stricken. **Addendum F** at 3. The district court failed to recognize that the only way Jacob could rebut Bezzant's allegations of bad faith was through testimony explaining his intent and his attorneys' review of the merits of the case prior to filing.

Moreover, the district court granted Bezzant's motion to strike Jacob's evidence in the same ruling wherein it granted Bezzant's motion for attorney fees. **Addendum F**. In other words, Jacob was not allowed to present, and the district court refused to consider, any evidence demonstrating his good faith, while Bezzant was permitted to make unsupported allegations of bad faith. This refusal resulted in Jacob being ordered to pay Bezzant over \$200,000 simply for legitimately seeking a judicial remedy. Not only did the district court err in concluding that this evidence was inadmissible, but by excluding it the court denied Jacob of his right to due process of law.

A person may not be deprived of property without due process of law. Utah Const. art. I, § 7; U.S. Const. Fifth Amendment, Fourteenth Amendment. The right to present evidence in one's behalf is an essential element of due process that is recognized as necessary to preserve fundamental fairness. *See, Burgers v. Maiben*, 652 P.2d 1320, 1322 (Utah 1982) (right to present evidence is a "minimal procedural protection" in judicial proceedings); *In re Criminal Investigation*, 754 P.2d 633, 650 (Utah 1988) (same); *Von Hake v. Thomas*, 759 P.2d 1162, 1170 (Utah 1988) (in a prosecution for contempt, federal due process requires that the accused have the right to offer evidence in the form of testimony or affidavits).

Judicial standards are established upon due process principles of fundamental fairness and require the minimal right to meet an opposing party's claims by presenting evidence. *McGrew v. Industrial Comm'n*, 85 P.2d 608, 624 (Utah 1938). *See also*, Ut. R. Civ. P. 43 (mandating that all admissible evidence shall be admitted); Utah Code Ann. §78-32-3 (providing the right to present evidence by testimony or affidavit in a contempt proceeding).

Jacob has a property interest in the \$200,000 sanction imposed by the district court. But the court unfairly stopped Jacob from presenting any relevant evidence to rebut Bezzant's unsupported assertions of bad faith. The court merely adopted Defendants' position that "the assertions made in the affidavits consist of argument, opinions, and inadmissible legal conclusions." **Addendum F**. The district court also refused to address Jacob's contention not only that Bezzant opened the door when he made Jacob's intent an issue, but the evidence was not offered as argument, legal conclusions, or opinion. Rather, it was offered as evidence of Jacob's intent in filing the lawsuit, which intent Bezzant made the central issue of his motion for attorney fees.

Based on the foregoing facts and law, the district court erred in concluding that the affidavits were inadmissible and in striking them. Moreover, by doing so the district court prohibited Jacob from presenting any evidence in his defense and thereby violated his right to due process of law.

C. Bezzant is Equitably Estopped From Seeking Attorney Fees.

As noted above, when Jacob requested information to support Bezzant's general Rule 11 defense (which is virtually identical to the sanction provision of the Act) that Jacob's claims lacked merit and were filed in bad faith, Bezzant was unable to provide any response other than to reserve the right to supplement as facts became known through discovery. R1540. No supplementation ever occurred. Bezzant is still unable to cite a fact to support his claim that Jacob filed this action in bad faith. Bezzant's admissions equitably estop him from now taking a contrary position.

A party is equitably estopped from taking a certain position during litigation when the following three conditions are met: (1) the first party's prior admissions or failure to act is inconsistent with a later asserted claim; (2) there is reasonable action or inaction on the part of the second party based on the first party's admission or failure to act; and (3) allowing the first party to contradict its prior admission or failure to act will cause injury to the second party. *Youngblood v. Auto-Owners Ins. Co.*, 2007 UT 28, ¶14.

All of these conditions are met on these facts. Bezzant admitted he could provide no facts supporting his defense that Jacob's claims were brought in bad faith and he failed to supplement that response. R1540. Jacob, knowing that his Complaint was filed in good faith, reasonably relied on Bezzant's admission and subsequent failure to act and thus continued to pursue his claims on their merits. Further, Bezzant's failure to respond to the discovery requests and thereby give Jacob notice of the specific facts supporting Bezzant's claim of bad faith is analogous to the invited error doctrine where a party is estopped from claiming error when it allowed the error to occur. *See, Chang v. Soldier*

*Summitt Development*, 82 P.3d 203 (Utah App. 2003); *State v. Chaney*, 989 P.2d 1091 (Utah App. 1999).

When the district court allowed Bezzant to contradict his prior admission and failure to act, Jacob was injured in an amount exceeding \$200,000. Accordingly, the doctrine of equitable estoppel bars Bezzant's claim for attorney fees under the anti-SLAPP Act.

D. The District Court Erred When it Awarded Bezzant Attorney's Fees Incurred for Litigating Jacob's §1983 Claims.

Similar to the attorney fees provisions under the anti-SLAPP Act and Rule 11, a party is entitled to an award of attorney's fees related to claims brought under 42 U.S.C. §1983 only upon a showing of bad faith. *See, Houston v. Norton, et al*, 2158 F.3d 1172, 1174 (10<sup>th</sup> Cir. 2000) (explaining that for an award of attorneys fees to be justified under 42 U.S.C. §1988, "the plaintiff's action must be meritless in the sense that it is groundless or without foundation. The fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for the assessment of fees. ... [A] plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so").

As applied to the facts in this case, Jacob has pled facts sufficient to establish a *prima facie* claim of civil rights violations under §1983. Jacob's Amended Complaint alleges widespread abuses, including threats, intimidation, and retaliation by AFC public officials. R280:19-28, 30-31, 33-37. Jacob has also alleged that Tom Hunter and Ricky



Storrs were “exempt” AFC employees. R280:38-39. Further, there is no dispute that Hunter and Storrs insisted that the defamatory Notice be published or that they even wrote and/or approved of its content prior to distribution. R1529-30. Even the AFC mayor expressed strong and defamatory sentiments about Jacob relative to the controversy surrounding Hunter’s and Storrs’ exempt employee status. R280:40. Furthermore, in the Amended Complaint Jacob alleged that Bezzant was complicit with AFC public officials and employees and, therefore, was subject to suit pursuant to a §1983 claim. R280:40. Accordingly, when the facts and all reasonable inferences therefrom are interpreted in a light most favorable to Jacob, a prima facie claim was pled and might have been proved had the district court allowed discovery to continue.

Based on the foregoing facts and law, Jacob’s civil rights claims under §1983 had both legal and factual merit, and the district court improperly awarded Bezzant his attorney’s fees incurred for litigating those claims.

E. The Law of the Case Doctrine Precludes an Award for Attorneys’ Fees and Costs Prior to January 2003.

When this matter was removed to the federal court on Jacob’s §1983 claims, Bezzant’s request for attorneys fees and costs was denied based on the federal court’s January 15, 2003, finding after review of the merits of Jacob’s claims that Jacob acted in good faith as to the removal. R1086. This finding is the law of this case.

The law of the case doctrine “was developed to promote the obedience of inferior courts as well as ‘to avoid the delays and difficulties involved in repetitious contentions and reconsideration of rulings on matters previously decided in the same

case.’’ *Gildea v. Guardian Title Company of Utah*, 31 P.3d 543, 546 (Utah 2001) (quoting *Thurston v. Box Elder County*, 892 P.2d 1034, 1037 (Utah 1995). The law of the case will be enforced unless “exceptional circumstances” exist: “(1) when there has been an intervening change of controlling authority; (2) when new evidence has become available; or (3) when the court is convinced that its prior decision was clearly erroneous and would work a manifest injustice.” *Gildea* at 546.

While the federal court denied Bezzant’s request for attorney’s fees based on Jacob’s good faith related to the removal (R1086), it is noteworthy that the court’s finding could only be made after it had reviewed the merits of Jacob’s claims. Had the federal court concluded that Jacob’s claims lacked merit and were filed in bad faith, it is unlikely that the court could have found that Jacob’s removal of the case to the federal court was in good faith.

Since the federal court’s ruling denying Bezzant’s request for attorney fees, there has been no intervening change of controlling authority, no new evidence has become available, and the federal court’s ruling is not clearly erroneous or manifestly unjust. Accordingly, the district court erred in awarding Bezzant attorney’s fees subsequent the federal court’s ruling.

### III. THE DISTRICT COURT APPLIED AN INCORRECT STANDARD AND THUS ERRED IN CONCLUDING THAT THE STATEMENTS WERE NOT DEFAMATORY.

The trial court concluded that Bezzant’s statements did not constitute defamation per se and that Jacob had failed to plead special damages. **Addendum B** at 14-15. The trial court further concluded that the Notice was protected by Utah’s public interest

privilege<sup>7</sup> and that the statements did not convey a defamatory meaning. **Addendum B** at 16-17. While failing to construe the facts and all reasonable inferences in a light most favorable to Jacob and failing to construe his allegations as true, the district court made fact-dependent findings that the statements were published amidst a heated political debate of which there was public awareness, there was no evidence of malice, publication was not excessive, and there was no evidence that Bezzant knew the statements were false. *Id.*

Of course, these findings were made after discovery was stayed. The court also made these findings despite the facts showing that Bezzant published the Notice and revealed Jacob's name knowing the statements were false and also knowing that Jacob wished to remain anonymous. *See, e.g.,* R1604-06.

The district court applied the wrong standard. To survive a motion for a judgment on the pleadings filed, a plaintiff need only establish a prima facie case, because all of the facts must be construed in a light most favorable to the plaintiff. *See, e.g., Fleishman v. Superior Court*, 125 Cal. Rptr. 2d 383 (App. 2 Dist. 2002) 102 Cal. App. 4<sup>th</sup> 350 (a motion to strike under California's anti-SLAPP statute must be denied if the plaintiff establishes a prima facie case, which if believed by the trier of fact, will result in judgment for the plaintiff). Further, because the context of the analysis is a motion for judgment on the pleadings, the district court was required to construe all facts and

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<sup>7</sup> Notably, in concluding that the statements were privileged, the district court cited *Seegmiller, supra*, which it previously determined this Court had implicitly overruled. **Addendum B** at 16.

reasonable inferences in a light most favorable to Jacob and to accept Jacob's allegations as true. Here, Jacob established a prima facie case of both defamation and false light.

A prima facie case for defamation includes, (1) the defendant published statements about the plaintiff; (2) that were false; (3) not subject to privilege; (4) with the requisite degree of fault; and (5) the statements resulted in damages. *Debry v. Godbe*, 872 P.2d 999 (Utah 1994). A prima facie case for false light includes, (1) the defendant gave publicity to a matter concerning another that places the other before the public in a false light; (2) the false light in which the other was placed would be highly offensive to a reasonable person; and (3) the defendant had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other was placed. *Stein v. Marriott Ownership Resorts, Inc.*, 944 P.2d 374, 380 (Utah App. 1997). A false light claim is "closely allied" with a claim for defamation and "the same considerations apply to each." *Id.*

There is no dispute that Bezzant published the Notice. Jacob has also affirmatively alleged that the statements in the Notice are false, not subject to any privilege<sup>8</sup>, and they placed Jacob in a false light and were published with at least negligence and a reckless disregard for the truth (*see, e.g.*, R1643 (Jacob's JP Oppos.; R1631-39). These allegations are fact-dependent and thus must be accepted as true and

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<sup>8</sup> The district court erred as a matter of law in concluding the statements were privileged. Defamatory publications relating even to matters of public interest that are directed at private individuals are not privileged if the defendant was negligent in printing the defamatory material. *Cox v. Hatch*, 763 P.2d 556 (Utah 1988).

all reasonable inferences construed in a light most favorable to Jacob. However, the district court failed to apply this standard.

Further, the Bezzant's Notice was defamatory per se. A publication such as the Notice at issue here is libel. "[L]ibel is classified as per se if it contains defamatory words specifically directed at the person claiming injury, which words must, on their face, and without the aid of intrinsic proof, be unmistakably recognized as injurious." *Seegmiller v. KSL, Inc.*, 626 P.2d 968, 977, fn. 7 (Utah 1981) (citation and quotations omitted). Libel is per se and actionable if it includes words "which impute to a person the commission of a crime, or degradation of character, or which have a tendency to injuriously affect him in his office of trust, profession, trade, calling, or business, or which tend to degrade him in society, or expose him to public hatred, contempt, or ridicule ..." *Nichols v. Daily Reporter Co.*, 83 P. 573, 547 (Utah 1905); *accord*, *Prince v. Peterson*, 538 P.2d 1325, 1328 (Utah 1975). A libelous accusation of dishonesty and "negative campaigning," such as occurred in this case, has a tendency to degrade the subject in society and expose him to public hatred, contempt, and ridicule. As such, it is defamatory per se and thus requires no pleading of special damages. *Baum v. Gillman*, 667 P.2d 41, 43 (Utah 1983) (Stewart, J., dissenting); *Prince v. Peterson, supra*; *Combes v. Montgomery Ward & Co.*, 228 P.2d 272 (Utah 1951).

The district court rejected this Court's holding in *Seegmiller*, concluding without any supporting legal authority that this Court intended to implicitly overrule its own holding with its subsequent decision in *Larson v. Sysco Court*, 767 P.2d 557 (Utah 1989). The district court's conclusion is wrong. There is nothing in *Larson* to indicate that this

Court intended to overrule *Seegmiller*, which is still good law. Holding that a private person, such as Jacob, need only prove that media published defamatory statements negligently rather than with malice, this Court expressed particular concern that *Seegmiller*

...was plucked by the defendant from the anonymity of private life and thrust against his will into the limelight. ... [W]e recognize that the integrity of an individual's reputation is essential to his standing in society, in his vocation, and even in his family. It may indeed be indispensable to one's sense of self-worth. The dignity of virtually every human being depends in part upon his right to be known as the person he truly is. ... [I]t has been recognized that an assault upon a person's character may be far more damaging and long-lasting than an assault upon his person. Indeed, freedom from false attacks on one's personality may be viewed as at least as essential to ordered liberty as freedom from physical abuse.

*Seegmiller v. KSL, Inc.*, 626 P.2d at 972-73.

However, citing *Mast v. Overson*, 971 P.2d 928 (Utah App. 1998), the district court rejected Jacob's contention that he is not a public figure. **Addendum B** at 19.

While the court's conclusion was incorrect, "the public/private figure distinction should not be a consideration that significantly affects a court's determination as to whether allegedly defamatory language actually conveys defamatory meaning as a matter of law."

*Mast v. Overson*, 971 P.2d 928. The district court concluded that Bezzant's statements were "less caustic" than the statements in *Mast* and did not convey a defamatory meaning as a matter of law. *Id.* Finally, the district court concluded that Jacob's claims for false light and defamation are defective because Bezzant's statements are "non-actionable" editorial opinion rather than statements of fact, notwithstanding the fact that the statements were not published in an editorial. *Id.* at 20.

The district court's analysis and conclusions are incorrect. *Mast* involved a public debate surrounding the construction of a golf course that the Citizen Taxpayers of Utah ("CTU") opposed. As CTU president, David Mast was willingly quoted in several newspaper articles and publicly interviewed regarding CTU's position. During a subsequent press conference, Salt Lake County Commissioner, Brent Overson, accused Mast as falsely representing himself as a "concerned taxpayer" because Mast had a prospective financial interest in the property as a developer. Overson further stated that a CTU advertisement regarding the debate was "rife with misstatements and barefaced lies."

Mast did not argue that Overson accused him of dishonesty. Rather, Mast argued that Overson's statements alleged criminal conduct and were defamatory per se. Finding that Mast was a public figure and had deliberately placed himself in the limelight, the appellate court concluded that the statements at issue did not allege criminal conduct and were not defamatory per se. *Mast v. Overson*, 971 P.2d 928 (Utah App. 1998). These facts are inapposite to this case. Jacob has never "relinquished [any] part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood." *Id.* (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974)).

Bezzant's Notice was an extraordinary strategic public relations campaign crafted to preserve friendships and business relationships. It was entitled "apology" and addressed to AFC citizens. Bezzant deliberately plucked "William T. (Bill) Jacob" from anonymity and falsely accused him of dishonesty, misleading the public, publishing false

information, and of negative campaigning to help one candidate by hurting another, thereby impugning his reputation for honesty and exposing him to public hatred, contempt and ridicule. This attack on Jacob's character was deliberate, methodical, and hand-delivered to the homes of AFC citizens. It was strategically designed to hold Jacob out as an object of public ridicule and contempt and received Hunter's and Storrs' express approval. The purpose was to distract voters from Hunter's and Storrs' conflicts of interest by holding a private person out as a target for public contempt.

Accordingly, Bezzant's Notice constitutes defamation per se and Jacob's damages are presumed.

IV. AS APPLIED TO THE FACTS HERE, THE ANTI-SLAPP ACT VIOLATES THE CONSTITUTIONAL MANDATE THAT COURTS SHALL BE OPEN FOR REDRESS OF GRIEVANCES.

Article I, §11, of the Utah Constitution, also known as the Open Courts provision, guarantees access to the courts and prevents arbitrary deprivation of remedies. That provision specifically protects a person's right to seek a remedy for injury done to his reputation and "limits the legislature's ability to substantially modify or abrogate remedies to ... reputation." *Ross v. Schackel*, 920 P.2d 1159, 1162 (Utah 1996). It specifically provides:

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Article I of the Utah Constitution, also known as the Declaration of Rights, includes what are considered those important rights that are guaranteed to all citizens in our



society. The Utah Constitution was drafted amidst a long and oftentimes hostile power struggle between the federal government and the “Mormon” people of Utah who sought statehood as a way to “escape domination by the federal government.” *Charter for Statehood: The Story of Utah’s State Constitution* at 38-8, Jean Bickmore White (Univ. of Utah Press 1996). When the final and ultimately accepted draft of the Utah Constitution was debated in 1895, the public sentiment expressed was that “. . . the people want, and they have the right to demand, not a code of all the laws we have ever had or ever expect to have, but a plain, square, honest definition of rights and powers, and a broad basis for future legislation.” Editorial, *Deseret Evening News*, March 27, 1895.

Article I, §11, which has not been altered since 1895, has been recognized by this Court as a substantive provision guaranteeing access to the courts based on fairness and also providing remedies to persons who have been injured in their person, property, or reputation. *Berry v. Beech Aircraft Corp.*, 717 P.2d 670 (Utah 1985). It is intended to prevent the legislature from closing the courts’ doors against any person who has a legal right associated with a recognized remedy. *Brown v. Wightman*, 47 Utah 31, 34, 151 P. 366, 366-67 (Utah 1915). This Court further explained:

[T]he plain meaning of the guarantee imposes some substantive limitation on the legislature to abolish judicial remedies in a capricious fashion. In general, open courts provisions in Utah and other states have served two principal purposes:

First, they were intended to help establish an independent foundation for the judiciary as an institution. See Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 Or. L. Rev. 1279 (1995); *Industrial Comm’n v. Evans*, 52 Utah 394, 174 P. 825, 831 (1918) (“The question of ultimate legal liability cannot be withdrawn from the courts.”). Second, open courts or remedies clauses were intended to grant individuals rights to a judicial remedy for the protection of their person, property, or reputation from

abrogation and unreasonable limitation by economic interests that could control state legislatures. See Schuman, 65 Temp. L. Rev. at 1208; Berry, 717 P.2d at 675.

*Laney v. Fairview City*, 2002 UT 79, ¶¶30-31 (some citations omitted) (explaining the history of state open courts provisions created in response to political abuses that caused distrust of the legislature; also citing other Utah constitutional provisions specifically designed to limit legislative power).

Article I § 11 expressly recognizes the right of access to the courts. “The clear language [of this provision] guarantees access to the courts and a judicial procedure that is based on fairness and equality.” *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 675 (Utah 1985). Under this provision, Courts are to “resolve doubts in favor of permitting parties to have their day in court on the merits of a controversy.” *Carman v. Slavens*, 546 P.2d 601, 603 (Utah 1976). “At a minimum, a day in court means each party shall be afforded the opportunity to present claims and defenses, and have them adjudicated on the merits according to the facts and the law.” *Miller v. USAA Cas. Ins. Co.*, 44 P.3d 663, 674-75 (Utah 2002).

The seminal case analyzing the question of whether a statute violates the Open Courts provision is *Berry v. Beech Aircraft Corp.*, 717 P.2d 670 (Utah 1985), in which this Court established a two-part test. First, section 11 is violated by a statute abrogating a right protected by it if the law fails to provide “an effective and reasonable alternative remedy by due course of law for vindication of his constitutional interest ... [which alternative remedy] must be substantially equal in value or other benefit to the remedy

abrogated in providing essentially comparable substantive protection to one's ... reputation..." *Burgandy v. State*, 983 P.2d 586, 588 (Utah App. 1999).

Second, if no such alternative remedy is provided, "abrogation of the remedy or cause of action may be justified only if there is a clear social or economic evil to be eliminated and the elimination of an existing legal remedy is not an arbitrary or unreasonable means for achieving the objective." *Id.*

Jacob has a constitutional right to seek a remedy for damages to his reputation. That right existed prior to Utah's statehood and is expressly protected in Utah's Declaration of Rights. However, application of the anti-SLAPP Act to this case has completely abrogated Jacob's constitutionally protected right. Not only has Jacob been left with no remedy, he has been severely penalized just for seeking one in the first place.

Further, the social or economic evil purported to be eliminated by the Act, the abuse of judicial process by large private interests to punish private citizens for participating in the process of government, does not apply in this case. Jacob is not a large private interest; he is a private citizen. Jacob did not file suit to chill anyone's First Amendment rights. Jacob filed suit because he was seeking a judicial remedy for a specific harm with a known remedy that has existed in this state since prior to statehood. The Defendants are not private citizens; they are large private interests owned by Pulitzer Newspaper Group at the time of the events giving rise to the claims in this case. R2161 (*see* advertisement attached as Exhibit A to that pleading). When they published the Notice, Defendants were not participating in the process of government. They were

concededly seeking to preserve friendships and business relationships, and to hold Jacob out for public hatred, contempt, and ridicule.

Because the Act completely abrogates Jacob's remedy for harm to his reputation, and because the societal or economic evil the Act was intended to eliminate does not exist in this case, its application to these facts is a violation of Jacob's constitutional rights under article I, §11, of the Utah Constitution.

A. This Court Should Consider Jacob's State Law Claim Under the Exceptional Circumstances Doctrine.

The exceptional or extraordinary circumstances doctrine allows review of issues that have not been raised below. *See, State v. Irwin*, 924 P.2d 5, 10 (Utah App. 1996); *State v. Nelson-Waggoner*, 2004 UT 29, ¶23, 93 P.3d 186. It applies to "rare procedural anomalies" and is used sparingly "where [an appellate court's] failure to consider an issue that was not properly preserved for appeal would have resulted in manifest injustice." *Nelson-Waggoner*, 2004 UT 29, ¶23. While the exceptional circumstances doctrine has not been precisely defined, it is considered a "safety device" to insure fairness and protect against manifest injustice. *Id.* (quoting *Irwin*, 924 P.2d at 8) (citation omitted).

Although Jacob's open courts argument was not raised in the district court, the exceptional circumstances doctrine allows this Court to review the issue. Exceptional circumstances justifying review in this case include the fact that it involves important constitutional issues of first impression on how the anti-SLAPP Act is supposed to be applied, the case has not yet gone to trial so the issue has not been waived and it could be


raised on remand, and the issue involves questions of law that can easily be reviewed for the first time on appeal. Not reviewing Jacob's claim will also result in a manifest injustice because of the fundamental nature of the constitutional interests involved.

A review of the important statutory interpretation questions of first impression in this case will not be complete without considering the state constitutional claim. Manifest injustice will be prevented by considering the state constitutional issue at this juncture. Moreover, judicial efficiency will be furthered and justice served by reviewing the issue. Therefore, the constitutional issue should be reviewed now.

### **CONCLUSION**

Plaintiffs respectfully request this Court to find that the anti-SLAPP Act does not apply in this case and is unconstitutional as applied to these facts, and thereby reverse the district court's dismissal of Plaintiffs' claims as well as the court's grant of Defendants' motions for attorney's fees, and remand this matter back to the district court for the completion of discovery and trial. Respectfully submitted this 26<sup>th</sup> day of April, 2007.

FILLMORE SPENCER, LLC

  
Jennifer K. Gowans  
Attorneys for Appellant

### CERTIFICATE OF MAILING

I hereby certify that on this 21<sup>st</sup> day of April, 2007, I caused to be mailed by United States mail, postage prepaid, a true and correct copy of the foregoing **BRIEF OF APPELLANT** to the following:

JEFFREY J. HUNT  
DAVID C. REYMANN  
Parr Waddoups Brown Gee & Loveless  
185 South State Street, Suite 1300  
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to read "Jennifer K. Harris". The signature is fluid and cursive, with a large initial "J" and "H".

# ADDENDA

Tab A



**§ 78-58-101. Title** This chapter is known as the "Citizen Participation in Government Act."  
**HISTORY:** C. 1953, 78-58-101, enacted by L. 2001, ch. 163, §§ 1. **NOTES: EFFECTIVE DATES.** --Laws 2001, ch. 163 became effective on April 30, 2001, pursuant to Utah Const., Art. VI, Sec. 25.

**§ 78-58-102. Definitions** As used in this chapter: (1) "Action involving public participation in the process of government" means any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing requesting relief to which this act applies. (2) "Government" includes a branch, department, agency, instrumentality, official, employee, agent, or other person acting under color of law of the United States, a state, or subdivision of a state or other public authority. (3) "Moving party" means any person on whose behalf the motion is filed. (4) "Person" means the same as defined in Section 68-3-12. (5) "Process of government" means the mechanisms and procedures by which the legislative and executive branches of government make decisions, and the activities leading up to the decisions, including the exercise by a citizen of the right to influence those decisions under the First Amendment to the U.S. Constitution. (6) "Responding party" means any person against whom the motion described in Section 78-58-103 is filed. (7) "State" means the same as defined in Section 68-3-12.

**§ 78-58-103. Applicability** (1) A defendant in an action who believes that the action is primarily based on, relates to, or is in response to an act of the defendant while participating in the process of government and is done primarily to harass the defendant, may file: (a) an answer supported by an affidavit of the defendant detailing his belief that the action is designed to prevent, interfere with, or chill public participation in the process of government, and specifying in detail the conduct asserted to be the participation in the process of government believed to give rise to the complaint; and (b) a motion for judgment on the pleadings in accordance with the Utah Rules of Civil Procedure Rule 12(c). (2) Affidavits detailing activity not adequately detailed in the answer may be filed with the motion.

**§ 78-58-104. Procedures** (1) On the filing of a motion for judgment on the pleadings: (a) all discovery shall be stayed pending resolution of the motion unless the court orders otherwise; (b) the trial court shall hear and determine the motion as expeditiously as possible with the moving party providing by clear and convincing evidence that the primary reason for the filing of the complaint was to interfere with the first amendment right of the defendant; and (c) the moving party shall have a right to seek interlocutory appeal from a trial court order denying the motion or from a trial court failure to rule on the motion in expedited fashion. (2) The court shall grant the motion and dismiss the action upon a finding that the primary purpose of the action is to prevent, interfere with, or chill the moving party's proper participation in the process of government. (3) Any government body to which the moving party's acts were directed or the attorney general may intervene to defend or otherwise support the moving party.

**§ 78-58-105. Counter actions -- Attorney's fees -- Damages** (1) A defendant in an action involving public participation in the process of government may maintain an action, claim, cross-claim, or counterclaim to recover: (a) costs and reasonable attorney's fees, upon a demonstration that the action involving public participation in the process of government was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification, or reversal of existing law; and (b) other compensatory damages upon an additional demonstration that the action involving public participation in the process of government was commenced or continued for the purpose of harassing, intimidating, punishing, or otherwise maliciously inhibiting the free exercise of rights granted under the First Amendment to the U.S. Constitution. (2) Nothing in this section shall affect or preclude the right of any party to any recovery otherwise authorized by law.

Tab B

FILED 1/17/04  
Fourth Judicial District Court  
of Utah County, State of Utah  
Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH

WILLIAM T. JACOB, an individual; COMMERCIAL  
PROPERTIES, INC., a Utah Corporation; and  
PHILLIPS MANUFACTURING COMPANY, INC., a  
Utah Corporation,

Plaintiffs,

vs.

BRETT BEZZANT, an individual; NEWTAH, INC.,  
dba AMERICAN FORK CITY, a Utah corporation;  
AMERICAN FORK CITY, a Utah municipal  
corporation; TED BARRATT, an individual;  
TERRY FOX, an individual; DON HAMPTON, an  
individual; TOM HUNTER, an individual; RICKY  
STORRS, an individual; CARL WANLASS, an  
individual; and DOES I through X,

Defendants.

**RULING ON DEFENDANTS' MOTION  
FOR JUDGMENT ON THE PLEADINGS  
AND/OR MOTION FOR SUMMARY  
JUDGMENT**

Civil No. 000403530

Judge Lynn W. Davis

This matter comes before the Court on defendant's Motion for Judgment on the Pleadings and/or Motion for Summary Judgment. Oral arguments were held on March 16, 2004. Randall K. Spencer appeared on behalf of William T. Jacob ("Jacob") and Jeffrey J. Hunt appeared on behalf of Brett Bezzant ("Bezzant"). The Court having heard oral arguments and carefully considered the Motions and Memoranda of the Parties now makes the following ruling.

**I.**  
**PROCEDURAL HISTORY**  
**(As Stipulated by the Parties)**

1. On or about October 26, 2000, William T. Jacob filed this lawsuit against Brett Bezzant, an individual; and Newtah, Inc., dba *The American Fork Citizen New Utah!*, a Utah corporation, in the Fourth Judicial District Court for Utah County, State of Utah. Jacob's Complaint alleged a claim for defamation against the *Citizen* and Bezzant.
2. The *Citizen* and Bezzant were served with a Summons and a copy of the Complaint on or about February 13, 2001. The *Citizen* and Bezzant filed an Answer to the Complaint on March 2, 2001.
3. An Attorneys Planning Meeting was held on March 22, 2001 between counsel for the *Citizen* and Bezzant and then-counsel for Jacob, David Aagard. At the conclusion of that meeting, the *Citizen* and Bezzant served their First Set of Discovery Requests on Jacob.
4. On June 14, 2001, Mr. Aagard withdrew as counsel for Jacob due to health-related problems. The *Citizen* and Bezzant thereafter filed a Notice to Appear or Appoint Counsel requesting that Jacob obtain substitute counsel.
5. On or about June 18, 2001, The *Citizen* and Bezzant submitted Defendants' Rule 26(a)(1) Initial Disclosures designating in part Tom Hunter, Ricky Storrs and Kevin Bennett as potential trial witnesses.
6. On July 9, 2001, the law firm of Snow Christensen & Martineau ("Snow Christensen") entered its appearance on behalf of Jacob. R. Brent Stephens, a partner at Snow Christensen, specifically appeared on Jacob's behalf.
7. On July 25, 2001, through Mr. Stephens, Jacob served his First Set of Interrogatories, Requests for Admissions, and Requests for Production of Documents on the *Citizen* and Bezzant.
8. The *Citizen* and Bezzant agreed to grant Jacob's new counsel an extension in responding to its pending discovery requests. On October 24, 2001, Jacob served his Responses to those requests.
9. On or about October 25, 2001, Jacob submitted Plaintiff's Rule 26(a)(1) Initial Disclosures, designating in part claims of specific damages.
10. On November 9, 2001, Jacob filed Notices for five depositions he planned to take in this case: Ted Barratt (the Mayor of American Fork City); Tom Hunter (an American Fork City Councilman); Ricky Storrs (an American Fork City Councilman); Pamela Hunsaker (the

American Fork City Treasurer); and Kevin Bennett (the American Fork City Attorney). Those five depositions were taken by Jacob between December 2001 and February 2002.

11. Jacob agreed to grant the *Citizen* and Bezzant an extension to respond to his discovery requests. On December 10, 2001, the *Citizen* and Bezzant served their Responses to Jacob's pending discovery requests.
12. On February 26, 2002, the *Citizen* and Bezzant filed a Motion to Compel based on Jacob's alleged refusal to, *inter alia*, disclose the identity of the members of the Nonpartisan Citizens Group and to provide documents concerning Jacob's financial condition. That Motion was fully briefed by the parties, and the *Citizen* and Bezzant filed a Notice to Submit the Motion for Decision on April 18, 2002. Because of subsequent events, detailed below, the Motion to Compel has not yet been heard by the Court.
13. On May 3, 2002, Jacob moved the Court for leave to file an Amended Complaint. The Amended Complaint added two new plaintiffs – CPI and Phillips – and eight new defendants – American Fork City, Mayor Ted Barratt, Tom Hunter, Ricky Storrs, Kevin Bennett, Terry Fox, Don Hampton, and Carl Wanlass (collectively, the "City Defendants"). The new City Defendants were all various public officials of American Fork City.
14. In addition to the defamation claim in the original Complaint, the proposed Amended Complaint added new claims against the *Citizen* and Bezzant for "false light" and for violation of constitutional rights under 42 U.S.C. § 1983. The Amended Complaint also included various claims against the City Defendants, including procurement of defamation alleging that certain city officials directed Bezzant, who allegedly acted as the City's implicit agent, in publishing allegedly defamatory material.
15. On or about June 6, 2002, Jacob filed a Stipulation and Motion for Leave to Amend Complaint, signed by counsel for all parties, in the Fourth District Court.
16. On June 12, 2002, the Court granted Jacob leave to file his Amended Complaint and deemed the Amended Complaint filed as of that date.
17. On or about July 11, 2002, the City Defendants filed an Answer and Jury Demand.
18. On July 15, 2002, the *Citizen* and Bezzant filed an Answer and Counterclaim to the Amended Complaint. The *Citizen's* and Bezzant's Counterclaim alleged three causes of action: a claim under Utah's Citizen Participation in Government Act, Utah Code Ann. § 78-58-101, *et seq.* (the "Anti-SLAPP Statute"); Wrongful Civil Proceedings; and Bad Faith Action under Utah Code Ann. § 78-27-56.
19. On July 31, 2002, and pursuant to the Anti-SLAPP Statute, the *Citizen* and Bezzant filed a Motion for Judgment on the Pleadings and/or Motion for Summary Judgment seeking

dismissal of Jacob's and the other Plaintiffs' claims against the *Citizen* and Bezzant.

20. Pursuant to the Anti-SLAPP Statute, all discovery in this case was automatically stayed upon the filing of the *Citizen's* and Bezzant's Motion as of July 31, 2002. See Utah Code Ann. § 78-58-104(1)(a).
21. On August 19, 2002, Counterclaim Defendants, CPI and Phillips, filed a Notice of Removal seeking to remove this case to the United States District Court for the District of Utah. The case was initially assigned to Judge Dee V. Benson, but was later transferred to Judge Ted Stewart.
22. On August 26, 2002, Plaintiffs/Counterclaim Defendants filed a Motion to Dismiss Counterclaim seeking dismissal of the *Citizen's* and Bezzant's Counterclaim. Additionally, Plaintiffs/Counterclaim Defendants filed a Notification of Claim of Unconstitutionality in the Federal Court.
23. On September 5, 2002, the *Citizen* and Bezzant filed a Motion to Remand this case back to the Fourth District Court.
24. On September 19, 2002, the City Defendants filed a Motion to Disqualify Snow Christensen as counsel for Plaintiffs based on alleged conflicts of interest. In particular, the City Defendants alleged that Snow Christensen had previously represented some of the City Defendants on matters that were substantially related to the instant case.
25. On October 2, 2002, Jacob – along with five other named plaintiffs – filed a new lawsuit in federal court, purporting to be a class action, entitled *Crookston, et al. v. American Fork City, et al.*, Case No. 2:02-CV-1094 (the "Federal Lawsuit"). Mr. Stephens and Snow Christensen appeared as Plaintiffs' counsel in the Federal Lawsuit. The defendants in the Federal Lawsuit are the same City Defendants. The *Citizen* and Bezzant were not named defendants in the Federal Lawsuit. The Federal Lawsuit was eventually assigned to Judge Paul G. Cassell.
26. On October 10, 2002, Jacob moved to consolidate this case with the Federal Lawsuit on the grounds that many of the issues in the lawsuits were allegedly similar. On that same date, Plaintiffs also opposed the *Citizen's* and Bezzant's Motion to Remand and requested that the case remain in federal court.
27. On October 17, 2002, Plaintiffs opposed the City Defendants' Motion to Disqualify Snow Christensen as counsel for Plaintiffs.
28. On November 7, 2002, David W. Slagle, chairman of the board of Snow Christensen, filed a Motion to Withdraw as Counsel of Record for Plaintiffs. On the same day, Mr. Slagle, on behalf of Snow Christensen, moved to withdraw its opposition to the Motion to

Disqualify filed by the City Defendants.

29. Snow Christensen simultaneously moved to withdraw as counsel for Plaintiffs in the Federal Lawsuit based on the same conflicts of interest.
30. Soon thereafter, Plaintiffs retained a different attorney to oppose Snow Christensen's Motion to Withdraw. On November 18, 2002, James Lowrie and the law firm of Jones Waldo Holbrook & McDonough entered their special appearance for this purpose.
31. Also on November 18, 2002, R. Brent Stephens filed a "Notice of Recertification of Memorandum and Affidavit Pursuant to Rule 11" in which Mr. Stephens argued that there was no basis for his own firm's withdrawal as counsel for Plaintiffs.
32. On November 25, 2002, Plaintiffs filed a Memorandum in Opposition to Snow Christensen's Motion to Withdraw as Counsel, and a Memorandum in Opposition to Snow Christensen's Motion to Withdraw their opposition to the Motion to Disqualify. These briefs were signed by Mr. Lowrie on Plaintiffs' behalf.
33. On December 4, 2002, the *Citizen* and Bezzant filed a Waiver of Oral Argument on their Motion to Remand and Request for Decision on the Briefs.
34. On December 31, 2002, Plaintiffs filed a Motion to Take Deposition of Don Hampton Pursuant to Rule 30(2)(c) and requested an expedited hearing on this Motion. Plaintiffs noticed Mr. Hampton's deposition for January 29-31, 2003. The deposition was requested pursuant to three pending cases: the present case, the Federal Lawsuit, and a separate case pending in the Fourth District Court before Judge Stott, Case No. 990402547, in which CPI was the plaintiff.
35. On January 9, 2003, the *Citizen* and Bezzant filed a Memorandum in Opposition to Plaintiffs' Motion to Take Deposition of Don Hampton on the grounds that, *inter alia*, all discovery in this case had been stayed under the Anti-SLAPP Statute.
36. Plaintiffs also sought to depose Mr. Hampton in the Federal Lawsuit. On January 10, 2003, Plaintiffs filed a Stipulation and Motion in the Federal Lawsuit, signed by counsel for the City Defendants, which stipulated and agreed to take the concurrent deposition of Don Hampton on January 29, 2003.
37. On January 15, 2003, Judge Cassell held a hearing in the Federal Lawsuit on Snow Christensen's Motion to Withdraw as Jacob's counsel. Judge Cassell granted the Motion to Withdraw based on Snow Christensen's admitted conflict of interest, but permitted R. Brent Stephens to take the deposition of Don Hampton in the Federal Lawsuit as agreed upon by Plaintiffs and the City Defendants on January 29, 2003.

38. On January 16, 2003, Judge Ted Stewart granted the *Citizen's* and Bezzant's Motion to Remand without oral argument, finding that the case had been improperly removed by Plaintiffs and remanding this case back to the Fourth District Court. Judge Stewart denied the *Citizen's* and Bezzant's request for attorneys' fees.
39. On January 29 and 30, 2003, Mr. Hampton's deposition was taken by Plaintiffs.
40. On January 31, 2003, based on Judge Cassell's ruling in the Federal Lawsuit, the *Citizen* and Bezzant filed a Second Notice to Appear or Appoint Counsel requesting that Jacob obtain new counsel in this case. On February 24, 2003, Plaintiffs filed an Objection to this Notice (through Mr. Stephens) on the basis that this Court had not yet granted the Motion to Withdraw in this case, and that Judge Cassell's ruling in the Federal Lawsuit was not binding.
41. On April 8, 2003, the *Citizen* and Bezzant filed Notices to Submit for Decision requesting a ruling on Snow Christensen's Motion to Withdraw as Counsel and on the City Defendants' Motion to Disqualify, both of which had been fully briefed.
42. On July 1, 2003, the *Citizen* and Bezzant filed a Third Notice to Appear or Appoint Counsel requesting that Jacob obtain new counsel in this case so that the pending motions could be heard. On July 25, 2003, Plaintiffs again objected to this Notice, arguing that the Motion to Withdraw had not yet been granted.
43. On August 13, 2003, following a telephone conference with the parties, this Court issued a Minute Entry clarifying that it had not yet received any portion of the file compiled by the federal court after this case was removed by Plaintiffs, which prevented consideration of some of the pending motions. The *Citizen* and Bezzant therefore undertook to obtain the record compiled while this case was pending in federal court and submitted a full copy of this record to the Court on August 15, 2003.
44. This Court then scheduled oral arguments for November 6, 2003 on Snow Christensen's Motion to Withdraw as Counsel and the City Defendants' Motion to Disqualify.
45. On October 24, 2003, Plaintiffs (still acting through Mr. Stephens) filed a Motion to Stay or, in the Alternative, to Dismiss this Action Without Prejudice. This Motion sought to stay this case until the Federal Lawsuit was resolved, and further requested that the Motion be considered prior to the Court's consideration of the Motion to Withdraw and the Motion to Disqualify.
46. On November 4, 2003, the *Citizen* and Bezzant filed a Memorandum opposing Plaintiffs' latest Motion on the grounds that Mr. Stephens' continued participation in the case was improper given the pending conflicts issues, and because the *Citizen* and Bezzant were not parties to the Federal Lawsuit.



47. On November 6, 2003, the Court heard oral argument on Snow Christensen's Motion to Withdraw as Counsel and the City Defendants' Motion to Disqualify. By bench ruling on that date, the Court granted Snow Christensen's Motion to Withdraw, effective immediately, and instructed counsel for the *Citizen* and Bezzant to prepare and serve a Notice to Appear or Appoint Counsel on Plaintiffs. The Court deferred consideration of the Motion to Stay until Plaintiffs had obtained new counsel.
48. On November 6, 2003, the *Citizen* and Bezzant filed and served a Fourth Notice to Appear or Appoint Counsel pursuant to the Court's order.
49. On December 10, 2003, Mr. Randall K. Spencer entered his appearance as counsel of record for Plaintiffs in this case.
50. On January 6, 2004, Plaintiffs moved the Court to dismiss without prejudice all claims asserted by Plaintiffs against the City Defendants, to which the City Defendants stipulated. The Court subsequently granted this Motion.
51. On February 2, 2004, Plaintiffs filed their Memorandum in Opposition to the *Citizen's* and Bezzant's Motion for Judgment on the Pleadings and/or Motion for Summary Judgment. On that same date, the *Citizen* and Bezzant filed a Memorandum opposing Plaintiffs' Motion to Dismiss Counterclaim.
52. Both the *Citizen's* and Bezzant's Motion for Judgment on the Pleadings and/or Motion for Summary Judgment and Plaintiffs' Motion to Dismiss Counterclaim were subsequently fully briefed and submitted to the Court for decision. The Court heard oral argument on these Motions on March 16, 2004.

## II. FACTUAL SUMMARY

1. Newtah is a Utah corporation that, during the relevant time frame, owned and operated the print newspaper *American Fork Citizen New Utah* and the online version *New Utah*. Brett Bezzant was, during the relevant time frame, the publisher of the *American Fork Citizen New Utah*.
2. The *Citizen* newspaper is published on a weekly basis and contains news coverage of local events as well as editorials on politics, current events, and other issues. The *Citizen* has approximately 3,000 subscribers.
3. In October 1999 Jacob asked the *Citizen* to publish a political advertisement. Jacob then produced and paid for a political bulletin/advertisement claiming that Rick Storrs and Tom Hunter were legally prohibited from holding seats of the American Fork City Council

because both individuals were already connected to the City through ties that would create a conflict of interest. The Citizen published Jacob's advertisement on October 27, 1999, the final issue of the citizen published prior to the election.

4. The content of Jacob's political advertisement is set forth below:

NONPARTISAN CITIZENS GROUP INFORMATION BULLETIN

A 1999 ELECTION QUESTION: CAN TWO CITY EMPLOYEES SEEK POLITICAL  
OFFICE? FACTS LISTED BELOW....

**\*\*CANDIDATE RICKY STORRS\*\***

STORRS FACT #1: Candidate Storrs is a City employee functioning under the "Exempt Personnel Policies and Procedures" of the City. (See City Ordinance No. 92-05-20)

STORRS FACT #2: As a City EMT Ambulance Employee, Candidate Storrs, by City Personnel Policy, is prohibited from holding political office while employed by the City. (See City ordinance #95-05-21).

STORRS FINDINGS OF FACT: Candidate Storrs has been employed by the City for several years. The public record indicates that Candidate Storrs failed to go on leave without pay from his City employment, while seeking election to political office. (See City ordinance #92-05-21)

A VOTER'S QUESTION: Will the failure of Candidate Storrs to go on leave without pay from his City employment create a special privilege for himself while he is seeking election to political office, and if elected, will he give up his employment with the City during the term of his political office?

**\*\*CANDIDATE TOM HUNTER\*\***

HUNTER FACT #1: Candidate Hunter is employed by the City as a health insurance consultant functioning under the "Exempt personnel policies and Procedures" of the City. (See City Ordinance #92-05-20)

HUNTER FACT #2: As a health insurance consultant, Candidate Hunter, by City Personnel Policy, is prohibited from holding political office while employed by the City. (See City Ordinance #92-05-21)

HUNTER FINDINGS OF FACT: Candidate Hunter has been employed by the City since 1997. The public record indicates that Candidate hunter failed to go on leave without pay from his City employment, while seeking election to political office. (See City Ordinance #92-05-21)

A VOTER'S QUESTION: Will the failure of Candidate Hunter to go on leave without pay from his City employment create a special privilege for himself while he is seeking election to political office, and if elected, will he give up his employment with the City during the term of his political office?

5. Storrs and Hunter contacted the Citizen and complained about the political advertisement. Specifically, Hunter and Storrs questioned the veracity of the political advertisement and objected to the fact that they would not have a chance to rebut such allegations before the election.
6. Based on information received from Hunter and Storrs, the Citizen published a political editorial, or election notice, on the *New Utah* web site and hand-distributed the election notice to American Fork Residents on October 30, 1999. (Jacob has characterized the allegedly defamatory material as an "election notice" whereas Bezzant refers to the allegedly defamatory material as a "political editorial." This Court will hereinafter refer to the allegedly defamatory material as an "election notice" to avoid confusion, but the Court will not attach any weight to such a label.) Bezzant paid the entire cost of printing and distributing the election notice.
7. The full content of the Bezzant's election notice is set forth below:

New Utah! Offers apology to Tom Hunter, Rick Storrs for campaign flyer

### **Urgent Election Notice!**

To: All American Fork Residents  
From: Publisher Brett Bezzant, American Fork Citizen New Utah!

## **Correction and Apology to American Fork City Council Candidate Tom Hunter**

The Oct. 27<sup>th</sup> issue of the American Fork Citizen New Utah! And New Utah! Shopper carried a political advertisement that ran as a preprinted flyer, paid and produced by William T. (Bill) Jacob and others involved in a "Nonpartisan Citizens Group."

In fairness to Mr. Hunter and his candidacy, New Utah! apologizes for distributing this flyer without giving Mr. Hunter the opportunity to respond to what we believe is false and misleading information regarding his service to American Fork City.

Mr. Hunter is not and never has been employed by American Fork City. Neither has he received any employee compensation nor any other employee benefit from American Fork City. However, Mr. Hunter does own Hunter & Associates Insurance and his firm was selected in 1997 to act as an independent insurance broker on the employee benefits package for American Fork City. His firm provides this same kind of service for many other employers.

Since this client/agent relationship with American Fork City is a potential conflict of interest, Mr. Hunter intends, if elected, to file a letter with the Mayor clearly identifying the potential conflict and stating that he will abstain from voting on any issue that involves his pre-existing interest in the employee benefits package.

Contrary to what Mr. Jacob's flyer implied, Mr. Hunter is, to the best of our knowledge, a qualified and eligible city council candidate and his candidacy has not, in any way, violated the policies or procedures of American Fork City.

### **We also apologize to City Councilman Rick Storrs**

The same flyer also questioned the candidacy of Rick Storrs, citing a city personnel ordinance that does not even apply to Mr. Storrs's part-time volunteer employment as a city EMT. The precedent for his eligibility as a city

councilman and as an incumbent candidate have been well established in at least two other elections. We apologize to Mr. Storrs for distributing misleading information that would bring his candidacy in question.

### **Comments on the flyer**

Mr. Jacob's flyer is falsely labeled as a "nonpartisan" group. Since American Fork no longer has political parties, there is no such thing as a "nonpartisan" group. Unfortunately, this flyer is a classic example of negative campaigning intended to hurt one candidate in order to favor another. We believe it hurts the entire process. Again, we apologize to Candidates Hunter and Storrs for distributing this misinformation.

8. Hunter and Storrs were subsequently elected to the American Fork City Council and continue to serve as Council members.
9. On October 26, 2000 Jacob filed a Complaint in the instant action against the Citizen. Jacob's complaint alleged that the Citizen's publication of the editorial defamed Jacobs.
10. The Citizen filed an Answer to Jacob's Complaint on March 2, 2001. In the Answer, the Citizen alleged that Jacob's Complaint was a Strategic Lawsuit Against Public Participation ("SLAPP") designed to discourage the Citizen's commentary on issues of public interest.
11. On May 3, 2002, after engaging in a contentious round of discovery, Jacob filed an Amended Complaint that included American Fork City and various city officials as defendants. The Complaint alleges a conspiracy between the Citizen and American Fork officials to deprive Jacob of constitutionally protected rights.
12. The Citizen filed a Counterclaim against Jacob and two other plaintiffs identified as CPI and PMC soon after Jacob filed his Amended Complaint. The Counterclaim alleges that Jacob's actions in this case violated Utah's Anti-SLAPP statute.

### **III.**

#### **ANALYSIS**

Defendants Brett Bezzant and Newtah (collectively referred to as "Bezzant") ask this Court for a judgment on the pleadings, or in the alternative for a summary judgment ruling, dismissing defendants from Plaintiff William Jacob's lawsuit. Bezzant contends Jacob's claims should be dismissed for three independent reasons: (1) Jacob's lawsuit is subject to dismissal

under Utah's Anti-SLAPP statute because its primary purpose is to prevent or chill Bezzant's proper participation in the process of government, (2) Jacob's claims for defamation and false light are defective, and (3) Jacob's assertion that Bezzant violated Jacob's constitutional rights under 42 U.S.C. § 1983 does not fulfill the elements set forth in the statute.

#### **A. JACOB'S CLAIMS SHOULD BE DISMISSED UNDER UTAH'S ANTI-SLAPP STATUTE**

Bezzant argues that this lawsuit should be dismissed because Jacob's claims run afoul of Utah's Anti-SLAPP statute. Specifically, Bezzant contends that Jacob initiated this lawsuit as a retributive action designed to punish Bezzant's use of political speech and his legitimate participation in the political process. Conversely, Jacob argues this case does not contain any indicia of a SLAPP lawsuit because he has pursued this litigation in a good faith effort to prevail on the merits. Jacob also contends that the Utah Anti-SLAPP statute does not apply to the case at bar because the legislature passed the statute after Jacob filed his original Complaint.

##### **1. The Anti-SLAPP statute is applicable in the case at bar.**

This Court finds that the Anti-SLAPP statute does apply to the case at bar because the express language of Utah's Anti-SLAPP statute demonstrates that the statute applies to pleadings other than the original Complaint. The language found in § 78-58-102(1) of the Utah Code indicates that the provisions of the Anti-SLAPP statute apply to "any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing requesting relief." Utah Code Ann. § 78-58-102(1) Similarly, § 78-58-105(1) of the Utah Code provides a remedy "upon a demonstration that the action involving public participation in the process of government was commenced *or continued* without a substantial basis in fact and law." Utah Code Ann. § 78-58-105(1)(emphasis added). These statutory provisions of the Utah Code clearly indicate that the Utah Legislature created the Anti-SLAPP statute with the intention that it apply to various instruments and stages of the litigation proceedings.

Jacob did file his three page original Complaint before the Anti-SLAPP statute became effective. However, Jacob's filing of an Amended Complaint, consisting of 274 paragraphs and sixty-three pages of text, subsequent to the date the statute was implemented brings this litigation under the purview of the Anti-SLAPP statute. Indeed, under § 78-58-102(1), any judicial pleading Jacob filed after the Anti-SLAPP statute took effect could conceivably subject Jacob to the provisions of the Utah Anti-SLAPP statute.

Additionally, the Utah Anti-SLAPP statute is also applicable to the case at bar because it is a remedial statute. In a 1983 decision, the Utah Supreme Court noted that "remedial and procedural amendments apply to accrued, pending, and future actions." *State v. Norton*, 675 P.2d 577, 585 (Utah 1983). In an earlier decision, the Court provided guidance as to what constitutes a remedial statute when it stated that "[s]tatutes enacted to promote and facilitate the administration of justice are prominent in the category of remedial statutes." *State v. Higgs*, 656 P.2d 998, 1002 (Utah 1982).

The language of the Anti-SLAPP statute supports an inference that the statute applies to a variety of pleadings and is a remedial statute intended to further the administration of justice. Indeed, the statute appears to be a prototypical remedial statute in that it is designed to further the administration of justice by reducing abusive litigation and providing a remedy to plaintiffs subjected to harassing lawsuits. As a remedial statute, the Anti-SLAPP statute encompasses "accrued, pending, and future actions" and can be applied to the case at bar.

## **2. Jacob's actions in this litigation are prohibited by Utah's Anti-SLAPP statute.**

When Utah enacted its Anti-SLAPP statute, § 78-58-101 *et seq.* of the Utah Code, it joined the growing number of states that have recognized the potential for strategic abuse of the legal system by individuals and entities attempting to interfere with a party's right to political commentary and participation. In response to a growing number of "Strategic Lawsuits Against Public Participation," or "SLAPP" suits, such states have enacted statutes similar to Utah's in an attempt to deter parties from filing frivolous lawsuits in retaliation for unfavorable political speech. In *Beilenson v. Superior Court of Ventura County*, the California Court of Appeals articulately set forth the policy concerns engendered by SLAPP lawsuits:

SLAPP lawsuits stifle free speech. They undermine the open expression of ideas, opinions and the disclosure of information. The marketplace of ideas, not the tort system is the means by which our society evaluates and validates those opinion. The threat of a SLAPP action brings a disquieting stillness to the sound and fury of legitimate political debate. The SLAPP action . . . has no place in our courts. *Beilenson v. Superior Court of Ventura County*, 52 Cal. Rptr. 2d 357, 365 (Cal. Ct. App. 1996).

Utah's Anti-SLAPP statute provides that "a defendant in an action who believes that the action is primarily based on, relates to, or is in response to an act of the defendant while participating in the process of government and is done primarily to harass the defendant, may file . . . a motion for judgment on the pleadings in accordance with the Utah Rules of Civil Procedure Rule 12(c)." Utah Code Ann. § 78-58-103(1). Defendant Brett Bezzant has filed such a motion in the case at bar. In order to prevail on his Motion for Judgment on the Pleadings, Bezzant must demonstrate that the primary purpose of Jacob's lawsuit is "to prevent, interfere with, or chill [Bezzant's] proper participation in the process of government." Utah Code Ann. § 78-58-104(2).

First, this Court finds that Bezzant's publication of the election notice at issue constitutes political speech and is afforded significant protection under the First Amendment. In 1976, the United States Supreme Court identified discussion of political candidate's qualifications for office as an area of political speech meriting First Amendment protection:

Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our

Constitution. The First Amendment affords the broadest protection to such expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." . . . In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. . . . [I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office. *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976).

Bezzant's election notice should be considered protected political speech because the content of the election notice addresses whether Tom Hunter and Rick Storrs should be eligible to hold positions on the American Fork City Council. Furthermore, the context surrounding the publication of the election notice, Bezzant's publication of the election notice in the midst of a heated political debate in the days leading up to an election, also supports the proposition that the election notice is protected political speech. In accordance with the aforementioned case law, this Court finds that Bezzant's election notice is political speech entitled to broad protection under the First Amendment.

Second, the evidence presented to this Court intimates that Jacob filed the litigation at issue for the purpose of chilling Bezzant's political speech and thereby preventing or interfering with Bezzant's proper participation in the process of government. The lengthy procedural history set forth in Section I of this opinion supports the proposition that Jacob intended to use this litigation as a means of punishing Bezzant for Bezzant's publication of the political speech contained in the election notice.

## **B. JACOB'S CLAIMS FOR DEFAMATION AND FALSE LIGHT LACK LEGAL MERIT**

Bezzant argues that Jacob's claims for defamation and false light are legally defective because (1) Jacob did not plead special damages, (2) the allegedly defamatory language is protected by Utah's "public interest" privilege and Jacob has not demonstrated that Bezzant acted with malice, (3) the allegedly defamatory language does not convey defamatory meaning, (4) the allegedly defamatory language is a non-actionable expression of editorial opinion, and (5) any statements of fact contained in the allegedly defamatory language are truthful and not defamatory. Conversely, Jacob contends that his claims for defamation and false light should not be dismissed because the allegedly defamatory language at issue is not protected speech and Jacob has established a prima facie case for defamation. This Court finds that Jacob's claims for defamation and false light are defective for the reasons discussed below.

### **1. Jacob failed to adequately plead special damages**

Under Utah law, defamation can be either *per se*, in which case damage is implied, or *per quod*, in which case the plaintiff must specifically plead "special damages," *i.e.* specific,



measurable out-of-pocket losses. If a complaint does not allege special damages, then the allegedly defamatory statements must constitute defamation *per se* in order for damages to be recoverable. *Proctor & Gamble Co. v. Haugen*, No. 1:95CV0094K, 1999 U.S. Dist. Lexis 22143 (D. Utah 1999).

The Utah Supreme Court has indicated that slander *per se* only exists under the following circumstances:

In order to constitute slander *per se*, without a showing of special harm, it is necessary that the defamatory words fall into one of four categories: (1) charge of criminal conduct, (2) charge of a loathsome disease, (3) charge of conduct that is incompatible with the exercise of a lawful business, trade, profession, or office; and (4) charge of the unchastity of a woman. If the words spoken do not apply to one of the foregoing classifications, special harm must be alleged. *Allred v. Cook*, 590 P.2d 318, 320 (Utah 1979).

Whether the words of the election notice fall into one of the categories set forth in *Allred* is a question of law for the court. *Proctor & Gamble Co. v. Haugen*, No. 1:95CV0094K, 1999 U.S. Dist. Lexis 22143 (D. Utah 1999).

Jacob contends that the allegedly defamatory language at issue constitutes libel *per se*, rather than slander, because the language was disseminated in writing. Therefore, Jacob argues that a libel *per se* standard should be used in the case at bar. In 1981, the Utah Supreme Court indicated that libel is classified as *per se* if it contains "defamatory words specifically directed at the person claiming injury, which words must, on their face, and without the aid of intrinsic proof, be unmistakably recognized as injurious." *Seegmiller v. KSL, Inc.*, 626 P.2d 968, 977 n. 7 (Utah 1981). However, nearly ten years after *Seegmiller* was decided, the Utah Supreme Court revisited the issue of defamation *per se* in *Larson v. Sysco Court* and employed the *Allred* four-category test, despite the fact that the allegedly defamatory language in *Larson* involved a written termination report. *Larson v. Sysco Court*, 767 P.2d 557 (Utah 1989). Specifically, the *Larson* Court dismissed Larson's libel claim because the claim did not allege criminal conduct, a loathsome disease, unchaste behavior, or operation of an unlawful business. *Id.* at 560. Through its ruling, the *Larson* Court implicitly rejected the use of disparate standards for libel *per se* and slander *per se* and adopted *Allred's* four-category test as applicable to both forms of defamation.

This Court finds that Bezzant's election notice does not constitute defamation *per se*. Even Jacob acknowledges that the election notice alleges, at most, that Jacob acted dishonestly by disseminating misinformation to the public. Such claims do not constitute allegations of criminal conduct, a loathsome disease, unchaste behavior, or operation of an unlawful business. Since Jacob's allegations do not fit any of the categories outlined in *Allred*, the election notice at issue is not defamatory *per se*. Because the election notice does not constitute defamation *per se*, Jacob's failure to plead special damages with specificity is fatal to his defamation claim.

## **2. The allegedly defamatory statements are protected by Utah's "public interest privilege"**

Utah recognizes a qualified privilege for publications regarding a matter of public interest. Utah Code Ann. § 45-2-3(5). The Utah Supreme Court has indicated that the privilege certainly applies "when there is a legitimate issue with respect to the functioning of governmental bodies, officials, or public institutions, or with respect to matters involving the expenditure of public funds." *Seegmiller v. KSL, Inc.*, 626 P.2d 968, 978 (Utah 1981). In order to overcome the privilege the plaintiff must demonstrate that the publication was made with common law malice, was excessively published, or that the defendant had no reasonable belief in the truth of the statements made. *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 904-05 (Utah 1992).

This Court finds that the content of the election notice at issue is protected by Utah's "public interest privilege" because the election notice addressed the qualifications of candidates for public office and was published in the midst of a heated political debate surrounding those candidates. Indeed, the evidence presented before this Court indicates that there was substantial public awareness and concern regarding the candidacies and qualifications of Tom Hunter and Rick Storrs.

Furthermore, Jacob's allegations and the facts of the case at hand demonstrate that Jacob has not overcome the public interest privilege. In order to defeat this privilege, Jacob must prove that Bezzant's statements in the election notice "were made with ill will, were excessively published, or [Bezzant] did not reasonably believe his or her statements were true." *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 904-05 (Utah 1992). None of the evidence presented before this Court satisfies Jacob's burden of proof in this instance.

Jacob has not shown that Bezzant's publication was motivated by ill will. In fact, the allegations set forth in Jacob's Amended Complaint indicate that Bezzant was not motivated by personal animus. Instead Jacob alleges that he and Bezzant enjoyed a six-year working relationship prior to Bezzant's publication of the election notice and that Bezzant published the allegedly defamatory language under the coercive influence of Hunter and Storrs.

Nor has Jacob adequately demonstrated that Bezzant's election notice was excessively published. Utah law indicates that excessive publication can only occur where "publication of the defamatory material extended beyond those who had a legally justified reason for receiving it." *DeBry v. Godbe*, 992 P.2d 979 (Utah 1999). Jacob's Amended Complaint states that the editorial was only published twice: once in a preprinted article and once on the Newtahn Internet website. Furthermore, the circumstances surrounding the publication at issue indicate that the election notice was published in an attempt to respond to an earlier political advertisement that Jacob published in Bezzant's newspaper. While it is true that the election notice was delivered door-to-door in American Fork and perhaps had somewhat broader exposure than the newspaper's circulation of 3,000 households, the publication of the material did not extend beyond those who had a legally justified reason for receiving it. Bezzant's publication of the election notice was primarily directed to citizens of American Fork who had a direct interest in the upcoming election.

Under such circumstances, the context and scope of Bezzant's publication of the election notice indicate that Bezzant did not excessively publish the notice.

Finally, Jacob has not shown that Bezzant knew the content of his election notice was false. Indeed, the evidence and facts presented to this Court support the proposition that the election notice's interpretation of certain City ordinances was the official legal interpretation of such ordinances as set forth by American Fork's political officials and legal counsel. Additionally, Jacob has presented no evidence that demonstrates Bezzant had reason to doubt the veracity of the information included in his election notice. Therefore, Jacob has failed to meet the requisite level of proof required to overcome the "public interest privilege" associated with Bezzant's publication of the election notice.

### **3. The allegedly defamatory statements do not convey defamatory meaning as a matter of law**

Perhaps the principle defect in Jacob's defamation and false light claims is the fact that the allegedly defamatory statements at issue do not carry defamatory meaning as a matter of law. "Whether a statement is capable of sustaining a defamatory meaning is a question of law [.]" *West v. Thomson Newspapers*, 872 P.2d 999, 1008 (Utah 1994). The Utah Supreme Court has provided guidance for courts attempting to determine whether a statement conveys defamatory meaning. Specifically, the Utah Supreme Court has indicated that "a publication is not defamatory simply because it is nettlesome or embarrassing to a plaintiff, or even because it makes a false statement about the plaintiff." *Cox v. Hatch*, 761 P.2d 556, 561 (Utah 1988). Rather, a court should look to whether reasonable people could reasonably infer defamatory meaning from the statement at issue. *Id.* Furthermore, in determining whether a particular statement conveys defamatory meaning, a court "must carefully examine the context in which the statement was made, giving the words their most common and accepted meaning." *West v. Thomson Newspapers*, 872 P.2d 999, 1009 (Utah 1994).

The facts of the case at bar are quite similar to those found in *Mast v. Overson*, 971 P.2d 928 (Utah Ct. App. 1998); and therefore, an analysis of *Mast* provides valuable guidance as to whether the statements in the case at bar convey defamatory meaning.

In *Mast*, David Mast, a private citizen, opposed the development of a local golf course. Mast published an anonymous advertisement arguing against the golf course in the local Salt Lake City newspapers. In this advertisement, signed by "The Citizen Taxpayers of Utah," Mast alleged that Salt Lake County Commissioner Brent Overson "misleads the public and continues to violate state law" by holding secret meetings and failing to disclose government records. *Mast v. Overson*, 971 P.2d 928, 929-30 (Utah Ct. App. 1998)

Overson subsequently held a press conference for the purpose of responding to Mast's allegations. At the press conference Overson identified Mast as the individual who placed and paid for the newspaper ad in question. Overson also stated that the ad was "politically motivated,

mean spirited, and a sham. Finally, Overson asserted that Mast had engaged in "character assassination" with an ad that was "rife with misstatements and bare-faced lies." *Mast v. Overson*, 971 P.2d 928, 931 (Utah Ct. App. 1998). Mast sued Overson for defamation resulting from the statements Overson made during the press conference.

The Utah Court of Appeals held that Overson's statements were not defamatory. Within its ruling, the Court set forth some of the policy considerations undergirding its ruling: "Overson's statements were not defamatory as a matter of law. The discourse between Mast and Overson is commendable for demonstrating why 'debate on public issues should be uninhibited, robust, and wide-open,' and statements made in the course of such debate do not become compensable merely because they 'include vehement, caustic, and sometimes unpleasantly sharp attacks.'" *Mast v. Overson*, 971 P.2d 928, 934 (Utah Ct. App. 1998). One section of the *Mast* ruling is particularly applicable to the case at bar. Commenting on Overson's statement that Mast's ad was "rife with misstatements and bare-faced lies," the Appellate Court held that, "because these statements were published in the context of a political debate on a public issue and the audience was thus not apt to take them at face value, there was no likelihood of damage to Mast's reputation and the statements, therefore, were not defamatory." *Id.* at 933.

As previously mentioned, the similarities between *Mast* and the case at bar are striking. First, just as the golf course controversy in *Mast* generated significant public controversy, Hunter and Storrs candidacies for the American Fork City Counsel attracted a great deal of public attention. Second, like Mast, Jacob placed an anonymous political ad in a local paper and used that ad as a vehicle for attacking the controversial actions of specific public officials. Third, like Overson, Bezzant publicly identified the individual who placed the political ad (Jacob) and indicated that he believed the political ad contained "false and misleading information." Finally, like Mast, Jacob sued Bezzant for defamation under the premise that Bezzant's imputation that Jacob's article was misleading harmed Jacob's reputation.

Amidst all these similarities, two differences between *Mast* and the case at bar have captured this Court's attention: (1) Mast's voluntary involvement in the golf course controversy may have been greater than Jacob's involvement in the election controversy, and (2) the allegedly defamatory language in *Mast* was significantly more vitriolic than the language at issue in the case at bar.

First, Jacob contends that *Mast* is quite dissimilar from the case at bar because Mast actively sought the public spotlight in connection with the golf course controversy while Jacob attempted to remain anonymous in regard to the election controversy. Jacob points out that Mast was quoted and identified as the President of Citizen Taxpayers of Utah in various newspaper articles and was even publicly interviewed regarding the golf course controversy. Based on such actions, Jacob argues that, Mast should be considered a public figure for defamation purposes. Conversely, Jacob asserts that his own actions in the case at bar are consistent with those of a private individual in that such actions demonstrate Jacob's desire to avoid the public spotlight. Jacob asserts that this public/private figure distinction is a critical difference between *Mast* and the

litigation presently before the Court.

This Court cannot agree with Jacob's characterization of his actions as being consistent with those of a private citizen attempting to avoid the political spotlight. In the two year's leading up to Bezzant's publication of the election notice, Jacob was featured or quoted in at least fifty one different newspaper articles. Many of these articles focused on American Fork politics and highlighted clashes between elected officials and certain members of the local citizenry. Indeed, one article describes Jacob as having a "constant presence" in local politics and notes that Jacob is present at most meetings of the City Council. (See WTJ0393 and 0408 in Exhibit "A" of Defendant's Reply Memorandum). The evidence presented before this Court belies the proposition that Jacob is a private individual and indicates that Jacob has repeatedly sought the public spotlight when commenting on local political issues.

Furthermore, this Court rejects Jacob's argument that the public/private figure distinction is a pivotal issue in the case at bar. Rather, the Court finds that it need not consider Jacob's status as a public or private figure for purposes of determining whether Bezzant's election notice conveyed defamatory meaning. Despite Jacob's attempt to portray the *Mast* decision as revolving on the standard of fault issue, that issue never arose in *Mast* and does not appear in the *Mast* court's opinion. A plaintiff's status as a public or private figure generally only comes into play when determining what standard of fault should be applied to a defamation defendant. Accordingly, the public/private figure distinction should not be a consideration that significantly affects a court's determination as to whether allegedly defamatory language actually conveys defamatory meaning as a matter of law.

Second, the allegedly defamatory language in *Mast* is much more caustic than the language at issue in the current litigation. Whereas Bezzant indicated that he believed Jacob's political advertisement to be "false" "misleading," and "misinformation"; Overson described Mast's political advertisement in much more vitriolic terms. Specifically, Overson characterized Mast's political advertisement as being "deceptive . . . mean spirited, . . . and rife with misstatements and bare-faced lies." *Mast v. Overson*, 971 P.2d 928, 930 (Utah Ct. App. 1998). Despite Overson's scathing characterization of Mast's political advertisement, the Utah Court of Appeals found that Overson had not defamed Mast because "these statements were published in the context of a political debate on a public issue and the audience was thus not apt to take them at face value." *Id.* at 933. The Court of Appeals further held that since "there was no likelihood of damage to Mast's reputation . . . the statements . . . were not defamatory." *Id.* Since Bezzant's statements regarding Jacob's political advertisement were considerably less caustic than Overson's diatribe, and because Bezzant's statements were published in the context of a political debate on a public issue, this Court follows the lead of the Utah Court of Appeals and holds that Bezzant's characterization of Jacob's political advertisement does not convey defamatory meaning as a matter of law.

#### 4. The allegedly defamatory statements are non-actionable statements of editorial opinion

This Court also finds Jacob's defamation and false light claims are defective because the allegedly defamatory statements contained in Bezzant's election notice are non-actionable statements of editorial opinion rather than statements of fact. In order to state a claim for defamation, a plaintiff must allege defamatory statements of fact that are "capable of being objectively verified as true or false." *West v. Thomson Newspapers*, 872 P.2d 999, 1018 (Utah 1994). In *West*, a 1994 case in which a mayor sued a local newspaper for comments appearing in the newspaper's editorial section, the Utah Supreme Court indicated that "the distinction [between fact and opinion] can only be based on the totality of circumstances surrounding the [allegedly defamatory] statement. *Id.* at 1018. The court then set forth four factors that are useful in distinguishing fact from opinion: "(1) the common usage or meaning of the words used; (2) whether the statement is capable of being objectively verified as true or false; (3) the full context of the statement -- for example, the entire article or column -- in which the defamatory statement is made; and (4) the broader setting in which the statement appears." *Id.*

Jacob's Amended Complaint only identifies four allegedly defamatory phrases in Bezzant's election notice. These phrases are quoted, in context, below. The allegedly defamatory phrases are in **bold**:

(1) In fairness to Mr. Hunter and his candidacy, *New Utah!* apologizes for distributing this flyer without giving Mr. Hunter the opportunity to respond to what we believe is **false and misleading information** regarding his service American Fork City.

(2) Mr. Jacob's flyer is **falsely labeled as a "nonpartisan group"**. Since American Fork no longer has political parties, there is no such thing as a "nonpartisan group."

(3) Unfortunately, **this flyer is a classic example of negative campaigning intend to hurt one candidate in order to favor another**. We believe it hurts the entire process.

(4) Again, we apologize to Candidates Hunter and Storrs for distributing this **misinformation**.

These statements apparently constitute the entire basis for Jacob's defamation and false light claims. It is the opinion of this Court that, under the factors set forth in *West*, the phrases at issue should be considered statements of editorial opinion rather than statements of fact.

First, the common meaning of the allegedly defamatory words in the Editorial suggests that the words are nothing more than political rhetoric common to public debates. Phrases such as "negative campaigning," "nonpartisan, and "misinformation" are frequently used in connection

with politics and political issues. Furthermore, Bezzant qualifies phrases like "false and misleading information" by stating that "we believe" the information in Jacob's political advertisement is false. Bezzant's repeatedly uses phrases like "we believe" and "to the best of our knowledge" throughout the election notice and thereby intimates that the election notice contains editorial opinions rather than statements of fact. Indeed, this Court finds that, according to their "common meaning or usage," the phrases "we believe" and "to the best of our knowledge" carry a connotation that the speaker/writer using such phrases is stating an opinion rather than a fact.

Second, none of the allegedly defamatory statements in the election notice can be objectively verified as true or false. With regard to the first phrase, Bezzant's use of the words "we believe" creates a statement of subjective intent immune to objective verification. The second phrase merely expresses Bezzant's opinion that the designation "nonpartisan citizens group" is meaningless because American Fork City no longer has political parties. Similarly, in the third phrase at issue, Bezzant merely expresses the opinion that Jacob's political advertisement is a classic example of negative campaigning that "we believe . . . hurts the entire process." The final phrase at issue, where Bezzant apologizes for publishing "misinformation," merely echoes the qualified opinion Bezzant expressed at the beginning of the election notice and should not be construed as a statement of fact.

Third, the overall tone of Bezzant's election notice, coupled with the fact that phrases like "we believe" and "to the best of our knowledge" are liberally sprinkled throughout the text, intimates that the content of the election notice should be construed as editorial opinion rather than factual statements.

Fourth, the election notice regarding Hunter and Storrs candidacies was published during the final days of a heated political debate leading up to the American Fork City elections. Utah case law suggests that "courts are much more likely to construe statements as opinion when they are made by participants in, and people who comment on, political campaigns." *West v Thomson Newspapers*, 872 P.2d 999, 1018 (Utah 1994).

Based on the foregoing analysis, this Court holds that the allegedly defamatory statements contained in Bezzant's election notice should be considered expressions of editorial opinion rather than statements of fact. Therefore, such statements cannot support Jacob's defamation and false light claims.

### **C. JACOB'S 42 U.S.C. § 1983 CLAIMS LACK LEGAL MERIT**

#### **1. Jacob's § 1983 claims fail because Bezzant did not publish the allegedly defamatory language "under color of law"**

Bezzant contends, among other things, that Jacob's claims under 42 U.S.C. § 1983 should be dismissed because Jacob cannot show that Bezzant published the allegedly defamatory statements under "color of law." In contrast, Jacob argues his § 1983 claims are meritorious in

that Bezzant acted under "color of law" by publishing the allegedly defamatory language at the direction of American Fork City public officials. This Court finds that Jacob's §1983 claims are not meritorious because Bezzant did not act "under color of law" when he published the allegedly defamatory language at issue.

"To state a cause of action under 42 U.S.C. § 1983 . . . the challenged conduct must constitute state action." *Scott v. Hern*, 216 F. 3d 897, 906 (10<sup>th</sup> Cir. 2000). Furthermore, "attempts to charge the media with state action have generally met with a cool reception in the courts." *Jones v. Taibbi*, 508 F. Supp. 1069, 1073 n. 6 (D. Mass. 1981). In such cases "[e]ven a 'considerable degree of cooperation' between a private party and the state does not, standing alone, justify a finding that the challenged action . . . occurred under color of state law." *Id* at 1073 n. 7. Indeed, in situations similar to the case at bar, courts have held that journalists involved in publishing newspaper articles have not engaged in the requisite state action to support state action claims. *Idema v. Wager* 120 F. Supp. 2d 361, 369 (S.D.N.Y. 2000).

Under the case law previously cited, and in light of the undisputed fact that Bezzant is not a government official, Jacob's claim that the Bezzant was acting under "color of law" can only be sustained if Bezzant voluntarily published the statements at issue at the behest of a government official acting in an official capacity. Jacob claims that Bezzant acted "under color of law" by publishing the allegedly defamatory language at the behest of American Fork City Councilman Rick Storrs. In effect, Jacob is asserting that his § 1983 claims derive from a conspiracy between American Fork City and Brett Bezzant. The Tenth Circuit Court of Appeals has indicated that, in light of the potential for abusive lawsuits, courts impose a heightened pleading standard on § 1983 conspiracy claims: "When a plaintiff in a § 1983 action attempts to assert the necessary 'state action' by implicating state officials . . . in a conspiracy with private defendants, mere conclusory allegations with no supporting factual averments are insufficient; the pleadings must specifically present facts tending to show agreement and concerted action." *Scott v. Hern*, 216 F.3d 897 (10<sup>th</sup> Cir. 2000).

This Court holds that Jacob has not met the heightened pleadings standard applied to § 1983 conspiracy claims. Indeed, Jacob's § 1983 claims against Bezzant appear to be nothing more than conclusory allegations that lack the requisite factual undergirding necessary to survive summary judgment. Even Jacob's own allegations in prior pleadings indicate that Bezzant was not acting under "color of law" when he published the allegedly defamatory statements. Specifically, in his Amended Complaint Jacob alleges that Councilman Storrs was acting for his own private pecuniary benefit when Storrs convinced Bezzant to publish the alleged defamation. Therefore, according to the arguments set forth in Jacob's Amended Complaint, Storrs was not acting in his official capacity when he asked Bezzant to publish the statements at issue. Since Storrs was not acting in his official capacity during the time in question, Bezzant's publication of the allegedly defamatory language cannot have a sufficient nexus with state action to support Jacob's § 1983 claim.

Furthermore, this Court finds that Bezzant cannot be implicated in the conspiracy Jacob



has alleged if, as Jacob asserted in his Amended Complaint, American Fork government officials used coercive threats to procure Bezzant's publication of the election notice at issue. Amended Complaint ¶¶ 172-74. Jacob's allegations that American Fork officials threatened Bezzant with lawsuits and lost advertising opportunities prevents Jacob from now claiming that Bezzant should be held liable under 42 U.S.C. § 1983 for depriving Jacob of his civil rights.

## **2. Bezzant is awarded attorney fees in connection with Jacob's § 1983 claims**

Under 42 U.S.C. § 1988, "in any action or proceeding to enforce a provision of section[] . . . 42 U.S.C. §§ 1981-1983 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). Under the facts of this case, and in light of the extensive procedural history associated with Jacob's claims, this Court exercises its discretion and awards Bezzant attorney fees and costs associated with litigating Jacob's § 1983 claims. Such fees and costs shall be submitted by affidavit.

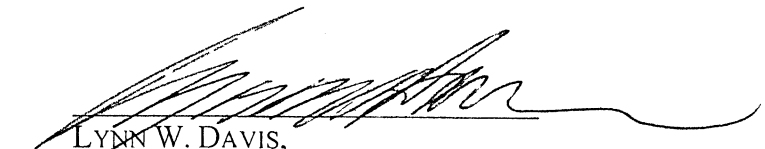
### **D. BEZZANT'S COUNTERCLAIM IS NOT DISMISSED**

The facts and legal arguments pertaining to Bezzant's Counterclaim are inextricably intertwined with the facts and arguments concerning Jacob's Complaint. Therefore, based on the foregoing legal analysis and in reliance on the facts and arguments previously addressed in this ruling, the Court finds Jacob has not met his burden of proof and declines to dismiss Bezzant's Counterclaim against Jacob.

## **IV. CONCLUSION**

Pursuant to the discussion outlined above, this Court hereby grants Defendant's Motion For Judgment On The Pleadings And/Or Motion For Summary Judgment and Denies Plaintiff's Motion To Dismiss Counterclaim. Brett Bezzant's counsel is instructed to prepare an order consistent with the findings contained herein.

DATED this 2<sup>nd</sup> day of April, 2004.

  
LYNN W. DAVIS,  
Fourth District Court Judge

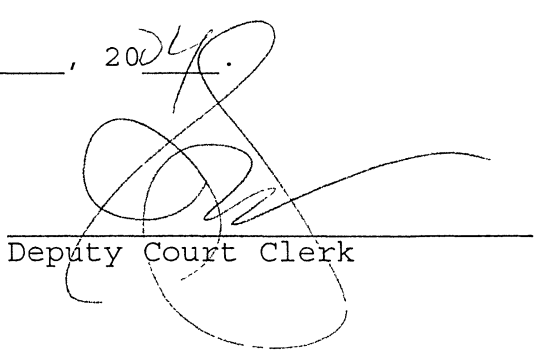
CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 000403530 by the method and on the date specified.

METHOD NAME

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Dated this 7 day of April, 2024.

  
\_\_\_\_\_  
Deputy Court Clerk

FILED  
Fourth Judicial District Court  
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4/28/04 ST Deput.

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IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

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WILLIAM T. JACOB, an individual;  
COMMERCIAL PROPERTIES, INC., a Utah  
corporation; and PHILLIPS  
MANUFACTURING COMPANY, INC., a  
Utah corporation,

Plaintiffs,

vs.

BRETT BEZZANT, an individual;  
NEWTAH, INC., dba AMERICAN FORK  
CITIZEN NEW UTAH, a Utah corporation;  
AMERICAN FORK CITY, a Utah municipal  
corporation; TED BARRATT, an individual;  
KEVIN BENNETT, an individual; TERRY  
FOX, an individual; DON HAMPTON, an  
individual; TOM HUNTER, an individual;  
RICKY STORRS, an individual; CARL  
WANLASS, an individual; and DOES I  
through X,

Defendants.

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**ORDER AND JUDGMENT  
GRANTING DEFENDANTS'  
MOTION FOR JUDGMENT ON  
THE PLEADINGS AND/OR  
MOTION FOR SUMMARY  
JUDGMENT AND DENYING  
PLAINTIFFS' MOTION TO  
DISMISS COUNTERCLAIM**

Civil No. 000403530

Judge Lynn W. Davis

BRETT BEZZANT, an individual;  
NEWTAH, INC., dba AMERICAN FORK  
CITIZEN NEW UTAH, a Utah corporation,

Counterclaimants,

vs.

WILLIAM T. JACOB, an individual;  
COMMERCIAL PROPERTIES, INC., a Utah  
corporation; and PHILLIPS  
MANUFACTURING COMPANY, INC., a  
Utah corporation,

Counterclaim Defendants.

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This matter came before the Court on the Motion for Judgment on the Pleadings and/or Motion for Summary Judgment, filed by Defendants and Counterclaimants Brett Bezzant (“Bezzant”) and Newtah, Inc. (“Newtah”) d/b/a *The American Fork Citizen New Utah!* (collectively, the “*Citizen*”), and on the Motion to Dismiss Counterclaim filed by Plaintiffs and Counterclaim Defendants William T. Jacob (“Jacob”), Commercial Properties, Inc. (“CPI”), and Phillips Manufacturing Company (“Phillips”) (collectively, “Plaintiffs”). Oral arguments on these Motions were held on March 16, 2004. Randall K. Spencer appeared on behalf of Plaintiffs, and Jeffrey J. Hunt and David C. Reymann appeared on behalf of the *Citizen*.

The Court, having heard the arguments of counsel and carefully considered the motions, memoranda, and other materials submitted by the parties, issued an extensive written Ruling on

Defendants' Motion for Judgment on the Pleadings and/or Motion for Summary Judgment, dated April 2, 2004 (the "Ruling"). The Ruling is incorporated herein by this reference.

As set forth in and consistent with the Ruling, the Court hereby ORDERS as follows:

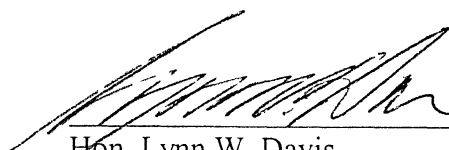
1. The *Citizen's* Motion for Judgment on the Pleadings and/or Motion for Summary Judgment is hereby GRANTED. All of Plaintiffs' claims against the *Citizen* are hereby dismissed with prejudice and on the merits.

2. Pursuant to 42 U.S.C. § 1988, the Court hereby enters judgment against Plaintiffs, jointly and severally, for the amount of the attorney fees and costs incurred by the *Citizen* in connection with litigating Plaintiffs' claims brought under 42 U.S.C. § 1983. The amount of this award shall be submitted by affidavit from the *Citizen's* counsel. Plaintiffs shall pay the amount of this judgment to the *Citizen* no later than thirty (30) days from the date this Court confirms the amount of the award and enters an order consistent therewith.

3. Plaintiffs' Motion to Dismiss Counterclaim is hereby DENIED.

DATED this 28<sup>th</sup> day of April 2004.

BY THE COURT.

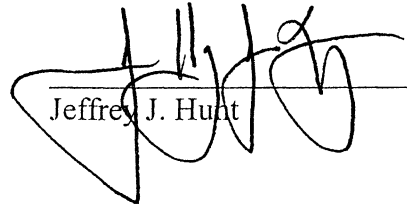
  
Hon. Lynn W. Davis  
Fourth District Court Judge



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 6 day of April 2004, a true and correct copy of the foregoing **ORDER AND JUDGMENT GRANTING DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS AND/OR MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION TO DISMISS COUNTERCLAIM** was served, via U.S. Mail, postage prepaid, on the following:

Randall K. Spencer  
SPENCER, SMITH & CARD, LLC  
39 West 300 North  
Provo, Utah 84601

  
\_\_\_\_\_  
Jeffrey J. Hunt

Tab C

Entered  
in Court  
8/12/09

IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH

WILLIAM T. JACOB, an individual; COMMERCIAL  
PROPERTIES, INC., a Utah Corporation; and  
PHILLIPS MANUFACTURING COMPANY, INC., a  
Utah Corporation,

Plaintiffs,

vs.

BRETT BEZZANT, an individual; NEWTAH, INC.,  
dba AMERICAN FORK CITY, a Utah corporation;  
AMERICAN FORK CITY, a Utah municipal  
corporation; TED BARRATT, an individual;  
TERRY FOX, an individual; DON HAMPTON, an  
individual; TOM HUNTER, an individual; RICKY  
STORRS, an individual; CARL WANLASS, an  
individual; and DOES I through X,

Defendants.

**RULING ON DEFENDANTS'  
ATTORNEYS' FEES**

Civil No. 000403530

Judge Lynn W. Davis

This matter comes before the Court on Plaintiffs' Objection to the Affidavit of Jeffery J. Hunt Regarding Attorneys' Fees Pursuant to 42 U.S.C. § 1988; and Objection to Memorandum of Costs ("Objection"). These Parties stipulated to waive oral argument on the Objection and to allow the Court to rule based upon the pleadings. Accordingly, the Court has focused exclusively on the arguments contained within the memoranda and has not examined any of the other potential legal theories or arguments. The Court having carefully considered the Memoranda of the Parties now makes the following ruling.



**I.**  
**PROCEDURAL HISTORY**

1. On or about October 26, 2000, William T. Jacob filed this lawsuit against Brett Bezzant, an individual; and Newtah, Inc., dba *The American Fork Citizen New Utah!*, a Utah corporation, in the Fourth Judicial District Court for Utah County, State of Utah. Jacob's Complaint alleged a claim for defamation against the *Citizen* and Bezzant.
2. Oral arguments were held on March 16, 2004. Randall K. Spencer appeared on behalf of William T. Jacob et al., ("Jacob" or "Plaintiffs") and Jeffrey J. Hunt appeared on behalf of Brett Bezzant et al., ("Bezzant" or "Defendants"). The only question still alive in this proceeding is whether the attorneys' fees for the claims under 42 U.S.C. § 1983 and costs of the trial awarded by this court were justly calculated.
3. This court resolved the underlying First Amendment/slander dispute in this case on April 2, 2004, dismissing Jacob's anti-SLAPP and 42 U.S.C. § 1983 claims and failing to dismiss Bezzant's counterclaim. This Court also awarded attorneys' fees to Bezzant in connection with Jacob's § 1983 claims.
4. On or about April 6, 2004, Defendants submitted the Affidavit of Jeffery J. Hunt Regarding Attorneys' Fees Pursuant to 42 U.S.C. § 1988 ("Affidavit of Fees") stating the fees and costs incurred in connection with the § 1983 claims.
5. On or about April 12, 2004, Defendants submitted Brett Bezzant and Newtah, Inc.'s Memorandum of Costs and Necessary Disbursements ("Memo of Costs") detailing the costs incurred in connection with this matter pursuant to Utah Rules of Civil Procedure 54(d).
6. On or about April 19, 2004, Plaintiffs submitted the Objection.
7. On or about May 6, 2004, Defendants submitted Brett Bezzant and Newtah, Inc.'s Response to the Objection ("Response").

**II.**  
**ANALYSIS**

At the outset it is important to note that Plaintiffs' Objection does not claim that the court

acted outside its discretion in granting attorneys' fees pursuant to its 42 U.S.C. § 1988 authority.<sup>1</sup>

As Defendants' Response notes, "[t]he Court's decision under 42 U.S.C. § 1988 was fully supported and justified by the record, and it need not be revisited here." [Response at p. 5].

Plaintiffs list three specific objections to the attorneys' fees and costs awarded to the Defendants. Plaintiffs claim that: 1) Awarding fees and costs to Defendants violates the Law of the Case doctrine because the federal court already denied attorneys' fees and costs for claim brought in this matter on January 15, 2003 (therefore, at most the court could award fees for actions taken after January 15, 2003); 2) the affidavit on fees was not sufficiently specific to show that the attorneys were working on § 1983 claims; and the hourly rates they charged were excessive; 3) the court order did not award costs for any part of the trial not related to § 1983 claim, so the cost claimed in Defendants' Memo of Costs should be denied.

**A. Law of the Case Doctrine**

Plaintiffs claim that awarding attorneys' fees in this matter, at least before January 15, 2003, is contrary to the federal court's decision not to award fees and violates the law of the case doctrine, which is designed to avoid "reconsideration of rulings on matters previously decided in the same case." *Gildea v. Guardian Title Company of Utah*, 31 P.3d 543, 546 (Utah 2001). Defendants counters that the federal court was not addressing the underlying merits of the substantive claims when it refused to award fees and costs. The law of the case doctrine as addressed in *Gildea* is not implicated since the substantive claims were not "previously decided" by

---

<sup>1</sup> Plaintiffs maintain that their claims under § 1983 were brought in good faith, but they do not further object to the Court's April 2, 2002 Ruling where the court exercised discretion pursuant to § 1988 granting reasonable attorneys' fees for the § 1983 claim. Their objections relate primarily to the way the fees were calculated, not to the Court's § 1988 authority.

the federal court and cannot therefore be “reconsidered.” *Id.*

The federal court found that the case had been improperly removed and remanded the matter back to this Court. Notwithstanding its decision to remand, the federal court found no bad faith in Plaintiffs’ attempt to *remove* the case and therefore didn’t award fees for the *removal*. The Response cites the federal court’s order finding that “the removal was an attempt to expand removal law and was made in good faith. Accordingly the court will not award attorneys’ fees.” [Response p. 4] However, when the federal court refused to award fees and costs it was addressing the 28 U.S.C. § 1447(c) removal for lack of subject matter jurisdiction claim. As a result, the federal court’s decision not to award fees in the removal matter has nothing to do with this court’s decision to grant the fees under § 1988 in the § 1983 *substantive claim*. Thus, this Court’s award in no way implicates the law of the case and is appropriate.

## **B. Deficiencies in the Affidavit Regarding Fees and Costs**

### **1. Insufficient Specificity of Attorneys’ Fees**

Plaintiffs claim that the Affidavit of Fees fails to adequately separate costs and fees associated with the § 1983 claims from other anti-SLAPP claims that were litigated jointly. In such cases, attorney fees must be “allocated as to separate claims and/or parties.” *Valcarce v. Fitzgerald*, 961 P.2d 305, 318 (Utah 1998). Plaintiffs also cite *Prince v. Bear River Mut. Ins. Co.*, 56 P.3d 524 (Utah 2002), requiring that the claims for fees be separated into 1) successful claims for which there may be entitlement to attorney’s fees, 2) unsuccessful claims which would have carried entitlement to attorney’s fees, and 3) claims with no entitlement to attorney’s fees, so that fees may be awarded only on prevailing claims. In the case before this Court, the distinction between successful and unsuccessful claims seems irrelevant since the Defendants prevailed on all

claims.

To separate the fees associated with the § 1983 claim, Mr. Hunt conservatively looks at four isolated proceeding where the § 1983 claim was litigated and asks for fees for one-third of the hours in each of these matters. He uses only one-third of the hours because there were two other primary claims litigated along with the § 1983 claim. Plaintiffs' Objection offers no alternative for calculating the fees, instead they merely state that the Affidavit of Fees has not sufficiently separated the fees awarded by this Court from the fees spent on other claims jointly litigated.

In contrast, Defendants assert that the Affidavit of Fees completely complies with the rule governing attorney's fees affidavits, Utah Rule of Civil Procedure 73. Upon careful review, this Court agrees that the Affidavit of Fees provides the amount claimed and explains how this amount was calculated. Rule 73(b)(2) requires a "reasonably detailed description of the time spent and work performed." Mr. Hunt identified specific events related to the claim, identified the attorneys who did the work and gave their billing rates, and reasonably discounted the hours by two-thirds to account for the unrelated claims that were argued jointly with the § 1983 claim. Rule 73(b)(2) requires the affidavit to provide "factors showing the reasonableness of the fees." In addition to the factors above, the Affidavit of Fees states that although this litigation has stretched over four years with a total bill well over \$115,000, the amount claimed is only a small fraction of this total. Furthermore, the claims in this litigation were always prepared and argued jointly. Consequently, it would be unreasonable to separate the exact hours and days spent on the § 1983 claim from the other claims litigated. Mr. Hunt offers his professional judgment that at least one third of this time was spent on the § 1983 claim. In sum, the Affidavit of Fees meets the standard of reasonableness required by Rule 73, as well as satisfying the *Valcarce* requirement of allocating costs to separate

claims. 961 P.2d at 318.

## **2. Excessive Rates**

Plaintiffs also argue that the rates charged by attorneys at Parr Waddoups Brown Gee & Loveless were excessive. However, this claim of excessiveness does not appear to be accurate. Mr. Hunt testified to the reasonableness of the rate for his experience and expertise in the Salt Lake City market. Moreover, although the Plaintiffs are currently represented by a less expensive lawyer from Utah County, during much of this litigation they were represented by the Salt Lake City office of Snow, Christensen & Martineau.

### **C. Award of Costs Pursuant to Utah R. Civ. P. 54(d)**

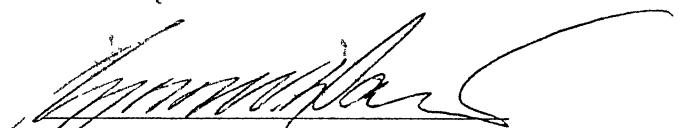
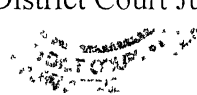
Plaintiffs claim that the Defendants' Memo of Costs improperly included the total costs incurred in this litigation. Plaintiffs claim that because this Court has not expressly awarded these costs, the Defendant can only collect costs associated with the § 1983 claim.

Defendants rebut this proposition by citing Utah R. Civ. P. 54(d)(1): “[An award of all costs] shall be allowed as of course to the prevailing party unless the court otherwise directs.” The court order did not explicitly direct that these costs not be awarded, and this Court’s order allowing fees and costs related to Defendants in the matter of the § 1983 claim should not be interpreted to preclude Defendants from receiving the other costs associated with the litigation pursuant to Rule 54. Further, Defendants subtracted the costs included in the § 1988 award of costs and fees from the total costs claimed in the Memo of Costs to avoid double counting. Hence, the Memo of Costs conforms to Rule 54 and the costs claimed appear reasonable. Therefore, this court should grant Defendants’ costs of \$6,386.22 for the entire proceeding be paid by Defendants.

**III.**  
**CONCLUSION**

Accordingly, this Court hereby denies Plaintiffs' Objection to Affidavit of Jeffery J. Hunt Regarding Attorneys' Fees Pursuant to 42 U.S.C. § 1988; and Objection to Memorandum of Costs. Consistent with the findings contained herein, the Court will now execute the previously submitted "Order and Judgment Regarding Award of Attorney Fees and Costs Under 42 U.S.C. § 1988" and the "Order and Judgment Regarding Award of Costs and Necessary Disbursements." Counsel for Defendants, Mr. Hunt, is hereby instructed to prepare an Order consistent with this Ruling.

DATED this 12<sup>TH</sup> day of August, 2004.

  
LYNN W. DAVIS,  
Fourth District Court Judge  


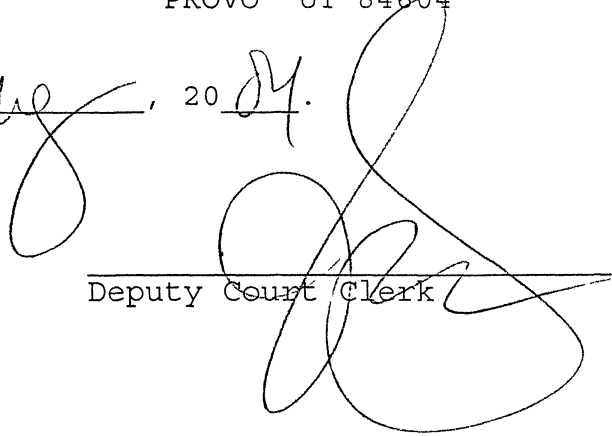
CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 000403530 by the method and on the date specified.

METHOD NAME

Mail JEFFREY J HUNT  
ATTORNEY DEF  
185 SOUTH STATE, SUITE 1300  
P. O. BOX 11019  
SALT LAKE CITY, UT 84111  
Mail RANDALL K SPENCER  
ATTORNEY PLA  
3301 N UNIVERSITY AVE  
PROVO UT 84604

Dated this 12 day of Aug, 2004.

  
Deputy Court Clerk

*Stacy*  
*14:10*

Jeffrey J. Hunt, Esq. (5855)  
David C. Reymann, Esq. (8495)  
PARR WADDOUPS BROWN GEE & LOVELESS  
185 South State Street, Suite 1300  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7840  
Facsimile: (801) 532-7750  
Attorneys for Defendants and Counterclaimants  
Brett Bezzant and Newtah, Inc. d/b/a *American*  
*Fork Citizen New Utah!*

---

**IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY**

**STATE OF UTAH**

---

WILLIAM T. JACOB, an individual;  
COMMERCIAL PROPERTIES, INC., a Utah  
corporation; and PHILLIPS  
MANUFACTURING COMPANY, INC., a  
Utah corporation,

Plaintiffs,

vs.

BRETT BEZZANT, an individual;  
NEWTAH, INC., dba AMERICAN FORK  
CITIZEN NEW UTAH, a Utah corporation;  
AMERICAN FORK CITY, a Utah municipal  
corporation; TED BARRATT, an individual;  
KEVIN BENNETT, an individual; TERRY  
FOX, an individual; DON HAMPTON, an  
individual; TOM HUNTER, an individual;  
RICKY STORRS, an individual; CARL  
WANLASS, an individual; and DOES I  
through X,

Defendants.

**ORDER AND JUDGMENT  
REGARDING AWARD OF COSTS  
AND NECESSARY  
DISBURSEMENTS**

Civil No. 000403530

Judge Lynn W. Davis



BRETT BEZZANT, an individual;  
NEWTAH, INC., dba AMERICAN FORK  
CITIZEN NEW UTAH, a Utah corporation,

Counterclaimants,

vs.

WILLIAM T. JACOB, an individual;  
COMMERCIAL PROPERTIES, INC., a Utah  
corporation; and PHILLIPS  
MANUFACTURING COMPANY, INC., a  
Utah corporation,

Counterclaim Defendants.

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This matter came before the Court on the Memorandum of Costs and Necessary Disbursements of Defendants and Counterclaimants Brett Bezzant (“Bezzant”) and Newtah, Inc. (“Newtah”) d/b/a *The American Fork Citizen New Utah!* (collectively, the “*Citizen*”).

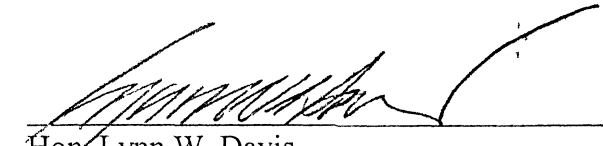
The Court having considered the *Citizen’s* Memorandum of Costs and Necessary Disbursements and the other pertinent materials submitted by the parties, and pursuant to Utah R. Civ. P. 54(d) and the Court’s previously-entered Order and Judgment Granting Defendants’ Motion for Judgment on the Pleadings and/or Motion for Summary Judgment and Denying Plaintiffs’ Motion to Dismiss Counterclaim, hereby ORDERS as follows:

1. The *Citizen* is hereby awarded costs and necessary disbursements in the amount of \$6,386.22.

2. Plaintiffs shall pay this judgment to the *Citizen* within thirty (30) days of the date of this Order and Judgment.

DATED this 12<sup>TH</sup> day of August 2004.

BY THE COURT:

  
Hon. Lynn W. Davis  
Fourth District Court Judge

Jeffrey J. Hunt, Esq. (5855)  
David C. Reymann, Esq. (8495)  
PARR WADDOUPS BROWN GEE & LOVELESS  
185 South State Street, Suite 1300  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7840  
Facsimile: (801) 532-7750  
Attorneys for Defendants and Counterclaimants  
Brett Bezzant and Newtah, Inc. d/b/a *American  
Fork Citizen New Utah!*

8/10/04  
14:13

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**IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY**

**STATE OF UTAH**

---

WILLIAM T. JACOB, an individual;  
COMMERCIAL PROPERTIES, INC., a Utah  
corporation; and PHILLIPS  
MANUFACTURING COMPANY, INC., a  
Utah corporation,

Plaintiffs,

vs.

BRETT BEZZANT, an individual;  
NEWTAH, INC., dba AMERICAN FORK  
CITIZEN NEW UTAH, a Utah corporation;  
AMERICAN FORK CITY, a Utah municipal  
corporation; TED BARRATT, an individual;  
KEVIN BENNETT, an individual; TERRY  
FOX, an individual; DON HAMPTON, an  
individual; TOM HUNTER, an individual;  
RICKY STORRS, an individual; CARL  
WANLASS, an individual; and DOES I  
through X,

Defendants.

**ORDER AND JUDGMENT  
REGARDING AWARD OF  
ATTORNEY FEES AND COSTS  
UNDER 42 U.S.C. § 1988**

Civil No. 000403530

Judge Lynn W. Davis

BRETT BEZZANT, an individual;  
NEWTAH, INC., dba AMERICAN FORK  
CITIZEN NEW UTAH, a Utah corporation,

Counterclaimants,

vs.

WILLIAM T. JACOB, an individual;  
COMMERCIAL PROPERTIES, INC., a Utah  
corporation; and PHILLIPS  
MANUFACTURING COMPANY, INC., a  
Utah corporation,

Counterclaim Defendants.

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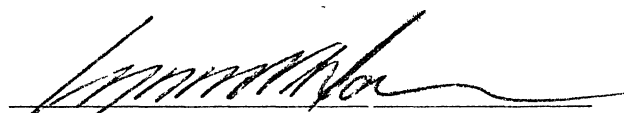
This matter came before the Court on the Affidavit of Jeffrey J. Hunt Regarding Attorneys' Fees Pursuant to 42 U.S.C. § 1988, which was submitted in connection with this Court's written Ruling on Defendants' Motion for Judgment on the Pleadings and/or Motion for Summary Judgment, dated April 2, 2004. In that Ruling, the Court awarded Defendants and Counterclaimants Brett Bezzant ("Bezzant") and Newtah, Inc. ("Newtah") d/b/a *The American Fork Citizen New Utah!* (collectively, the "*Citizen*") the amount of the attorney fees and costs incurred by the *Citizen* in litigating claims brought under 42 U.S.C. § 1983 by Plaintiffs and Counterclaim Defendants William T. Jacob ("Jacob"), Commercial Properties, Inc. ("CPI"), and Phillips Manufacturing Company ("Phillips") (collectively, "Plaintiffs").

The Court having considered the Affidavit of Mr. Hunt and the other pertinent materials submitted by the parties, hereby ORDERS as follows:

1. The amount of the award and judgment entered against Plaintiffs, jointly and severally, and in favor of the *Citizen*, is determined to be \$13,693.94.
2. Plaintiffs shall pay this judgment to the *Citizen* within thirty (30) days of the date of this Order and Judgment.

DATED this 12<sup>th</sup> day of August 2004.

BY THE COURT:

  
\_\_\_\_\_  
Hon. Lynn W. Davis  
Fourth District Court Judge

FILED  
Fourth Judicial District Court  
of Utah County, State of Utah

10/18/05 1101 Deputy

Jeffrey J. Hunt, Esq. (5855)  
David C. Reymann, Esq. (8495)  
PARR WADDOUPS BROWN GEE & LOVELESS  
185 South State Street, Suite 1300  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7840  
Facsimile: (801) 532-7750  
Attorneys for Defendants and Counterclaimants  
Brett Bezzant and Newtah, Inc. d/b/a *American  
Fork Citizen New Utah!*

---

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

---

WILLIAM T. JACOB, an individual;  
COMMERCIAL PROPERTIES, INC., a Utah  
corporation; and PHILLIPS  
MANUFACTURING COMPANY, INC., a  
Utah corporation,

Plaintiffs,

vs.

BRETT BEZZANT, an individual;  
NEWTAH, INC., dba AMERICAN FORK  
CITIZEN NEW UTAH, a Utah corporation;  
AMERICAN FORK CITY, a Utah municipal  
corporation; TED BARRATT, an individual;  
KEVIN BENNETT, an individual; TERRY  
FOX, an individual; DON HAMPTON, an  
individual; TOM HUNTER, an individual;  
RICKY STORRS, an individual; CARL  
WANLASS, an individual; and DOES I  
through X,

Defendants.

**ORDER GRANTING  
COUNTERCLAIMANTS'  
MOTION TO STRIKE AND  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

Civil No. 000403530

Judge Fred D. Howard  
Division 5

BRETT BEZZANT, an individual;  
NEWTAH, INC., dba AMERICAN FORK  
CITIZEN NEW UTAH, a Utah corporation,

Counterclaimants,

vs.

WILLIAM T. JACOB, an individual;  
COMMERCIAL PROPERTIES, INC., a Utah  
corporation; and PHILLIPS  
MANUFACTURING COMPANY, INC., a  
Utah corporation,

Counterclaim Defendants.

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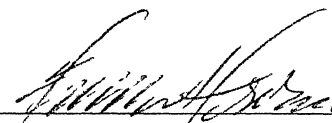
These matters came before the Court on two motions filed by Defendants and Counterclaimants Brett Bezzant (“Bezzant”) and Newtah, Inc. d/b/a *American Fork Citizen New Utah!* (“Newtah”) (collectively, the “*Citizen*”): (1) The *Citizen*’s Motion for Partial Summary Judgment, filed October 19, 2004; and (2) The *Citizen*’s Motion to Strike Inadmissible Portions of Affidavits of David Aagard, R. Brent Stephens, Randall K. Spencer, and William T. Jacob (“Motion to Strike”), filed March 18, 2005. A hearing was held on both motions at 1:30 p.m. on September 13, 2005, Randall K. Spencer representing Plaintiffs and Counterclaim Defendants, and Jeffrey J. Hunt and David C. Reymann representing the *Citizen*. The Court, having considered the pertinent materials submitted by the parties and having heard the arguments of counsel, issued a written Ruling Re: Counterclaimants’ Motion to Strike Inadmissible Portions of Affidavits of David Aagard,

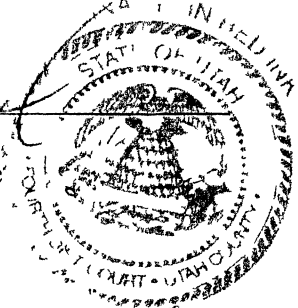
R. Brent Stephens, Randall K. Spencer, and William T. Jacob and Motion for Partial Summary Judgment, dated September 16, 2005 (the "Ruling"), which is incorporated herein by this reference.

For the reasons set forth in the Ruling and for good cause shown, the Court hereby GRANTS the *Citizen*'s Motion for Partial Summary Judgment and Motion to Strike in full and as prayed for. The *Citizen* is hereby awarded all costs and reasonable attorneys fees it has incurred in this action from April 30, 2001 through the date of entry of this Order, less the amount of attorneys fees and costs already awarded to the *Citizen* by this Court. The amount of this award shall be established by affidavit submitted by counsel for the *Citizen*, subject to Court approval.

DATED this 18 day of OCTOBER 2005.

BY THE COURT:

  
Hon. Fred D. Howard  
Fourth District Court Judge

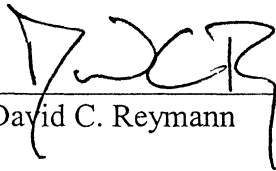




**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 26<sup>th</sup> day of September 2005, a true and correct copy of the foregoing **ORDER GRANTING COUNTERCLAIMANTS' MOTION TO STRIKE AND MOTION FOR PARTIAL SUMMARY JUDGMENT** was served, via facsimile and U.S. Mail, postage prepaid, on the following:

Randall K. Spencer  
FILLMORE SPENCER, LLC  
3301 North University Ave.  
Provo, Utah 84604

  
\_\_\_\_\_  
David C. Reymann

**FILED**

Fourth Judicial District Court  
of Utah County, State of Utah

1/12/06 WHL Deputy

**IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH**

WILLIAM T. JACOB, an individual;  
COMMERCIAL PROPERTIES, INC., a Utah  
corporation; and PHILLIPS  
MANUFACTURING COMPANY, INC., a  
Utah corporation,

Plaintiffs,

vs.

B. BRETT BEZZANT, an individual,  
NEWTAH, INC., dba AMERICAN FORK  
CITIZEN NEW UTAH, a Utah corporation,  
and DOES I THROUGH X,

Defendants.

BRETT BEZZANT, an individual; NEWTAH,  
INC., dba AMERICAN FORK CITIZEN  
NEW UTAH, a Utah Corporation,

Counterclaimants,

vs.

WILLIAM T. JACOB, an individual;  
COMMERCIAL PROPERTIES, INC., a Utah  
Corporation; and PHILLIPS  
MANUFACTURING CO.,

Counterclaim Defendants.

**RULING RE: PROPOSED ORDER  
AND JUDGMENT REGARDING  
AWARD OF ATTORNEYS FEES  
AND COSTS UNDER UTAH CODE  
ANN. § 78-58-105(1)(a)**

Case # 000403530

Judge Fred D. Howard

Division 5

This matter comes before the Court on Counterclaimants' submission of a *Proposed Order and Judgment Regarding Award of Attorneys Fees and Costs Under Utah Code Ann. § 78-58-*

105(1)(a). The Court, having reviewed the file and being fully advised in the premises, hereby issues the following ruling.

### **RULING**

The Court notes that Defendants and Counterclaimants Brett Bezzant and Newtah, Inc. d/b/a *The American Fork Citizen New Utah!* (collectively, the “*Citizen*”) submitted a Proposed Order and Judgment Regarding Award of Attorneys Fees and Costs with an accompanying Affidavit of Jeffrey J. Hunt on October 21, 2005. On October 27, 2005, Plaintiffs filed an Objection to the Proposed Order. Defendants filed a Response to Plaintiffs’ Objection and a Request to Submit for Decision on November 14, 2005.

Defendants assert that the basis for the Court’s award of costs and reasonable attorney’s fees arises under Section 105(1)(a) of Utah’s Citizen Participation in Government Act, Utah Code Ann. § 78-58-105(1)(a). In his affidavit, counsel for Defendants Jeffrey Hunt attests that he has reviewed his firm’s billing records and his files to confirm the reasonableness and accuracy of the figures he has claimed. Mr. Hunt has provided the Court with a spreadsheet prepared by his firm’s accounting department showing the hours spent and fees and costs incurred by the *Citizen* on a monthly basis by each attorney that has worked on the case. Mr. Hunt has also included a printout of the state court docket in the case and a printout of the docket in the case during the time it was removed to federal court.

Plaintiffs object to the proposed order, arguing that they are entitled to conduct discovery relative to Defendants' counterclaim and that it is inappropriate to award attorneys' fees and costs on the representations of counsel's affidavit alone. Defendants respond that Plaintiffs have not filed any objection to Mr. Hunt's affidavit or challenged in any way the reasonableness or accuracy of the costs and attorneys' fees set forth by Mr. Hunt. Defendants argue that Rule 73 of the Utah Rules of Civil Procedure specifies the substantive requirements for affidavits regarding attorneys' fees and that Mr. Hunt has met the specified requirements. In addition, Defendants respond that the request for additional discovery is outrageous in the context of this case because it is an attempt to further prolong litigation that has been pending for more than five years.

The Court notes Plaintiffs' objection to the proposed order and argument regarding discovery. The Utah Supreme Court has clarified that "[c]alculation of reasonable attorney fees is in the sound discretion of the trial court" but "must be supported by evidence in the record." *Dixie State Bank v. Bracken*, 764 P.2d 985, 988 (Utah 1988). The Utah Supreme Court has identified four questions that must be addressed by the trial court before attorneys' fees may be assessed:

1. What legal work was actually performed?
2. How much of the work performed was reasonably necessary to adequately prosecute the matter?
3. Is the attorney's billing rate consistent with the rates customarily charged in the locality for similar services?
4. Are there circumstances which require consideration of additional factors, including those listed in the Code of Professional Responsibility?

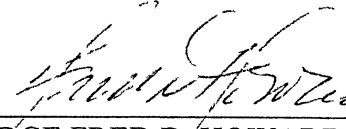
*Id* at 990.

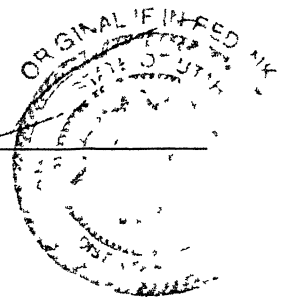
This Court notes that in order to perform a proper analysis of the reasonableness of Defendants' attorneys' fees and costs, this Court will require more specific information than a general accounting summary statement and a copy of court dockets. The Court has reviewed Exhibit "C" of Mr. Hunt's affidavit and requests that Mr. Hunt supplement his affidavit to more fully delineate the work performed during the months in question and the hours billed to each task. If such an accounting can no longer be accessed through the law firm's record keeping systems, copies of the monthly invoices summarized in Exhibit "C" may be an appropriate submission for the Court's review, or counsel should assess their file and records and prepare a summary of work performed with attendant hours and billings.

The Court hereby respectfully denies Plaintiffs' request for discovery relating to the award of attorneys' fees. The Court requests that counsel for Defendants supplement his affidavit within fourteen (14) days of the date of this Ruling.

Dated this 12 day of January, 2006.

BY THE COURT:

  
\_\_\_\_\_  
JUDGE FRED D. HOWARD  
District Court Judge



### CERTIFICATE OF DELIVERY

I certify that true copies of the foregoing Ruling were delivered on the 12 day of ~~September, 2005~~ *January 2006* to the following in the manner indicated, to wit:

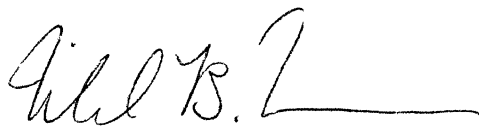
**by U.S. first class mail**

Counsel for Plaintiffs:

Randall K. Spencer  
FILLMORE SPENCER, LLC  
3301 North University Ave.  
Provo, Utah 84604

Counsel for Defendants:

Jeffrey J. Hunt  
David C. Reymann  
PARR WADDOUPS BROWN GEE & LOVELESS  
185 South State Street, Suite 1300  
Salt Lake City, Utah 84111

  
\_\_\_\_\_  
Deputy Court Clerk

**FILED**  
Fourth Judicial District Court  
of Utah County, State of Utah

3/29/06 WJB Deputy

**IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH**

WILLIAM T. JACOB, an individual;  
COMMERCIAL PROPERTIES, INC., a Utah  
corporation; and PHILLIPS  
MANUFACTURING COMPANY, INC., a  
Utah corporation,

Plaintiffs,

vs.

B. BRETT BEZZANT, an individual,  
NEWTAH, INC., dba AMERICAN FORK  
CITIZEN NEW UTAH, a Utah corporation,  
and DOES I THROUGH X,

Defendants.

BRETT BEZZANT, an individual; NEWTAH,  
INC., dba AMERICAN FORK CITIZEN  
NEW UTAH, a Utah Corporation,

Counterclaimants,

vs.

WILLIAM T. JACOB, an individual;  
COMMERCIAL PROPERTIES, INC., a Utah  
Corporation; and PHILLIPS  
MANUFACTURING CO.,

Counterclaim Defendants.

**RULING RE: SUPPLEMENTAL  
AFFIDAVIT OF JEFFREY J. HUNT  
REGARDING COSTS AND  
ATTORNEYS' FEES; and  
PROPOSED ORDER AND  
JUDGMENT REGARDING AWARD  
OF ATTORNEYS FEES AND COSTS  
UNDER UTAH CODE ANN. § 78-58-  
105(1)(a)**

Case # 000403530

Judge Fred D. Howard

Division 5

This matter comes before the Court on Defendants' submission of a *Supplemental Affidavit of Jeffrey J. Hunt Regarding Costs and Attorneys' Fees* in conjunction with their earlier

submission of a *Proposed Order and Judgment Regarding Award of Attorneys Fees and Costs Under Utah Code Ann. § 78-58-105(1)(a)*. The Court, having reviewed the file and being fully advised in the premises, hereby issues the following ruling.

### **RULING**

The Court notes that Defendants and Counterclaimants Brett Bezzant and Newtah, Inc. d/b/a *The American Fork Citizen New Utah!* (collectively, the “*Citizen*”) submitted a Proposed Order and Judgment Regarding Award of Attorneys Fees and Costs with an accompanying Affidavit of Jeffrey J. Hunt on October 21, 2005. On January 12, 2006, the Court issued a Ruling requesting that Mr. Hunt supplement his affidavit to more fully delineate the work performed during the months in question and the hours billed to each task. Defendants submitted a Supplemental Affidavit of Jeffrey J. Hunt Regarding Costs and Attorneys’ Fees on January 19, 2006. Plaintiffs filed an Objection to Supplemental Affidavit on January 27, 2006 and Defendants filed a Response and Renewed Request to Submit for Decision on February 2, 2006. On February 8, 2006, Plaintiffs filed a Reply to Defendants’ Response.

Defendants assert that the basis for the Court’s award of costs and reasonable attorney’s fees arises under Section 105(1)(a) of Utah’s Citizen Participation in Government Act, Utah Code Ann. § 78-58-105(1)(a). Attached to the supplemental affidavit of Jeffrey Hunt are copies of monthly invoices from his firm’s accounting department detailing the work performed, hours



billed, and fees and costs incurred by the *Citizen* for each month from April 30, 2001 through the end of September 2005.

Plaintiffs object to the Supplemental Affidavit, arguing that it is inappropriate to award Defendants attorneys' fees and costs under the anti-SLAPP statute. Plaintiffs assert that attorney Jeffrey Hunt took this matter on a *pro bono* basis to garner media attention and obtain publicity as a First Amendment attorney and therefore object that there is no indication in the exhibits that Defendant Bezzant ever paid any fees or costs in this matter . Defendants respond that Plaintiffs' Objection neither objects to nor challenges the necessity, reasonableness, or accuracy of the costs and attorneys' fees set forth in Mr. Hunt's supplemental affidavit or previously filed affidavit and the Court should therefore enter judgment for the full amount of such costs and fees.

The Court notes Plaintiffs' objection to the Supplemental Affidavit and assertion that counsel for Defendants took this matter on a *pro bono* basis and that the fees were thus never "incurred" by Defendants. The Court notes that the Supplement Affidavit filed by Mr. Hunt includes detailed monthly invoices setting forth work performed, costs incurred, and hours billed in this matter. Whether Mr. Hunt worked *pro bono* is irrelevant in determining the reasonableness of Mr. Hunt's claimed attorneys' fees. Therefore, the Court respectfully overrules Plaintiffs' objection.

The Utah Supreme Court has clarified that "[c]alculation of reasonable attorney fees is in the sound discretion of the trial court" but "must be supported by evidence in the record."

*Dixie State Bank v. Bracken*, 764 P.2d 985, 988 (Utah 1988). The Utah Supreme Court has identified four questions that must be addressed by the trial court before attorneys' fees may be assessed:

1. What legal work was actually performed?
2. How much of the work performed was reasonably necessary to adequately prosecute the matter?
3. Is the attorney's billing rate consistent with the rates customarily charged in the locality for similar services?
4. Are there circumstances which require consideration of additional factors, including those listed in the Code of Professional Responsibility?

*Id.* at 990.

The Court notes that the legal services provided by counsel for Defendants generally included telephone conferences; research; drafting and reviewing correspondence, documents, and pleadings; participating in discovery and depositions; and preparation for and attendance at hearings. For the period of time between April 30, 2001 through the end of September 2005, Mr. Jeffrey Hunt spent a total of 374 hours performing these legal services. During the years in question, Mr. Hunt's billing rate ranged from \$200.00 per hour to \$250.00 per hour. Mr. David Reymann spent a total of 513.75 hours performing legal services, billed at a rate ranging from \$150.00 per hour to \$190.00 per hour. The Court also notes that Mr. Edward Carter spent 4.5 hours on the matter, billed at \$115.00 per hour. Various paralegals also performed services totaling 5.05 hours, billed at a rate ranging from \$75.00 per hour to \$100.00 per hour. The Court

finds that the billing rates charged by Defendants' counsel and law firm staff are consistent with rates customarily charged in this area for this type of service. The Court likewise finds that the services rendered by Defendants' counsel were reasonably necessary to defend the issues raised in the complaint. Finally, the Court does not find any additional factors that would preclude the Court from awarding attorneys' fees to Defendants.

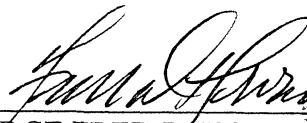
The Court previously awarded the *Citizen* \$6,386.22 for costs incurred from February of 2001 until March of 2004. Since March of 2004, the invoices attached to Mr. Hunt's Supplemental Affidavit include costs for long distance telephone calls, photocopies, facsimiles, Lexis research, and a transcript fee. The Court notes that it may award to Defendants "costs" that are properly taxable under Rule 54 of the Utah Rules of Civil Procedure. In regard to costs that may be awarded, the Utah Supreme Court has stated, "Costs were not recoverable at common law; and are therefore generally allowable only in the amounts and in the manner provided by statute." *Frampton v. Wilson*, 605 P.2d 771, 773 (Utah 1980). Elucidating upon the meaning of "costs," the Court stated, "The generally accepted rule is that it means those fees which are required to be paid to the court and to witnesses, and for which the statutes authorize to be included in the judgment." *Id.* at 774. The Court has also declared that "[t]here is a distinction to be understood between the legitimate and taxable 'costs' and other expenses of litigation which may be ever so necessary, but are not properly taxable as costs." *Id.* See also *Young v. Utah*, 16 P.3d 549, 553 (Utah 2000). This Court finds that the costs requested by Mr.

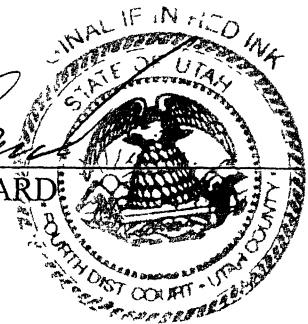
Hunt cannot be considered “taxable costs” as required by the Utah Supreme Court and therefore denies Mr. Hunt’s request for costs incurred since March of 2004.

The Court finds that since April 30, 2001, through the end of September 2005, the *Citizen* has incurred \$169,427.50 in attorneys’ fees in connection with this case. The Court notes that it previously awarded the *Citizen* attorneys’ fees of \$13,693.94 in connection with the Section 1988 Order. Therefore, the Court awards the *Citizen* additional attorneys’ fees in the amount of \$155,733.56 for legal services performed. Contemporaneous with this Ruling, the Court will sign the Order and Judgment Regarding Award of Attorneys’ Fees & Costs that was previously submitted by Defendants.

Dated this 29<sup>th</sup> day of March, 2006.

BY THE COURT:

  
\_\_\_\_\_  
JUDGE FRED D. HOWARD  
District Court Judge



### **CERTIFICATE OF DELIVERY**

I certify that true copies of the foregoing Ruling were delivered on the 29 day of March, 2006 to the following in the manner indicated, to wit:

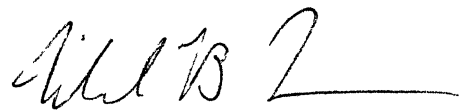
**by U.S. first class mail**

Counsel for Plaintiffs:

Randall K. Spencer  
FILLMORE SPENCER, LLC  
3301 North University Ave.  
Provo, Utah 84604

Counsel for Defendants:

Jeffrey J. Hunt  
David C. Reymann  
PARR WADDOUPS BROWN GEE & LOVELESS  
185 South State Street, Suite 1300  
Salt Lake City, Utah 84111



---

Deputy Court Clerk

**FILED**  
Fourth Judicial District Court  
of Utah County, State of Utah

3/29/06 WBS Deputy  
9:31 a.m.

Jeffrey J. Hunt, Esq. (5855)  
David C. Reymann, Esq. (8495)  
PARR WADDOUPS BROWN GEE & LOVELESS  
185 South State Street, Suite 1300  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7840  
Facsimile: (801) 532-7750  
Attorneys for Defendants and Counterclaimants  
Brett Bezzant and Newtah, Inc. d/b/a *American  
Fork Citizen New Utah!*

---

**IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY**

**STATE OF UTAH**

---

WILLIAM T. JACOB, an individual;  
COMMERCIAL PROPERTIES, INC., a Utah  
corporation; and PHILLIPS  
MANUFACTURING COMPANY, INC., a  
Utah corporation,

Plaintiffs,

vs.

BRETT BEZZANT, an individual;  
NEWTAH, INC., dba AMERICAN FORK  
CITIZEN NEW UTAH, a Utah corporation;  
AMERICAN FORK CITY, a Utah municipal  
corporation; TED BARRATT, an individual;  
KEVIN BENNETT, an individual; TERRY  
FOX, an individual; DON HAMPTON, an  
individual; TOM HUNTER, an individual;  
RICKY STORRS, an individual; CARL  
WANLASS, an individual; and DOES I  
through X,

Defendants.

---

**ORDER AND JUDGMENT  
REGARDING AWARD OF  
ATTORNEYS FEES AND COSTS  
UNDER UTAH CODE ANN. § 78-  
58-105(1)(a)**

Civil No. 000403530

Judge Fred D. Howard  
Division 5

BRETT BEZZANT, an individual;  
NEWTAH, INC., dba AMERICAN FORK  
CITIZEN NEW UTAH, a Utah corporation,

Counterclaimants,

vs.

WILLIAM T. JACOB, an individual;  
COMMERCIAL PROPERTIES, INC., a Utah  
corporation; and PHILLIPS  
MANUFACTURING COMPANY, INC., a  
Utah corporation,


Counterclaim Defendants.

---

This matter came before the Court on the Affidavit of Jeffrey J. Hunt Regarding Costs and Attorneys' Fees, which was submitted in connection with this Court's written Ruling Re: Counterclaimants' Motion to Strike Inadmissible Portions of Affidavits of David Aagard, R. Brent Stephens, Randall K. Spencer, and William T. Jacob and Motion for Partial Summary Judgment (the "Ruling") and subsequent Order Granting Counterclaimants' Motion to Strike and Motion for Partial Summary Judgment (the "Order"). The Ruling and Order are incorporated herein by this reference. This Order and Judgment determines the amount of costs and reasonable attorneys fees to be awarded to the *Citizen*.

The Court, having considered the Affidavit of Mr. Hunt and the other pertinent materials submitted by the parties, being fully advised in the premises, and good cause appearing therefor, hereby ORDERS as follows:

1. The Court finds that the attorneys fees and costs detailed in the Affidavit of Mr. Hunt were reasonably and necessarily incurred by the *Citizen* in connection with the above-captioned case for all of the reasons specified in Mr. Hunt's Affidavit and are properly recoverable under Utah Code Ann. § 78-58-105(1)(a).

2. The Court hereby enters judgment against Plaintiffs, jointly and severally, in favor of the *Citizen* in the amount of \$155,733.56. This amount represents \$155,733.56 in reasonably incurred attorneys fees and \$ 0 in costs incurred by the *Citizen* in connection with the above-captioned matter from April 30, 2001 through the end of September 2005, less the amount of attorneys fees and costs already awarded to the *Citizen* by prior Order and Judgment. 

3. With respect to the prior awards, on or about August 12, 2004, this Court entered an Order and Judgment Regarding Award of Attorney Fees and Costs Under 42 U.S.C. § 1988 (the "Section 1988 Order"), which awarded the *Citizen* attorneys fees in the amount of \$13,310.83 and costs in the amount of \$383.11. On August 12, 2004, pursuant to Rule 54(d) of the *Utah Rules of Civil Procedure*, the Court also entered an Order and Judgment Regarding Award of Costs and Necessary Disbursements to the *Citizen* (the "Costs Order"), as the prevailing party under Rule 54(d). The Costs Order awarded the *Citizen* costs in the amount of \$6,386.22. Collectively, the Section 1988 Order and the Costs Order are referred to herein as the "Prior Judgments". The amounts already awarded under the Prior Judgments have been deducted from the *Citizen's* present request and are not duplicative with this judgment.

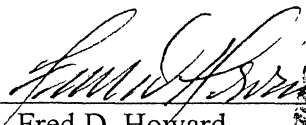


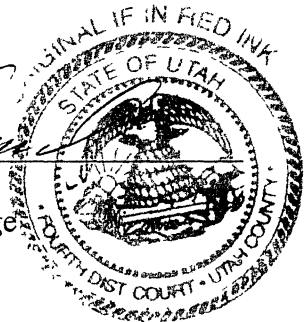
4. All amounts awarded hereunder, as with the Prior Judgments entered by the Court, shall bear post-judgment interest at the statutorily applicable rate as of their date of entry.

5. The *Citizen* is further entitled to an award of its costs and reasonable attorneys fees incurred after September 2005 in connection with the above-captioned matter. Such amounts shall be awarded by supplemental judgment(s) upon submission of supplemental affidavit(s) from the *Citizen's* counsel.

DATED this 29<sup>th</sup> day of March 2006.

BY THE COURT:

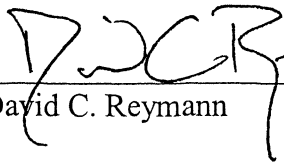
  
\_\_\_\_\_  
Hon. Fred D. Howard  
Fourth District Court Judge



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 21<sup>st</sup> day of October 2005, a true and correct copy of the foregoing **ORDER AND JUDGMENT REGARDING AWARD OF ATTORNEYS FEES AND COSTS UNDER UTAH CODE ANN. § 78-58-105(1)(a)** was served, via hand-delivery, on the following:

Randall K. Spencer  
FILLMORE SPENCER, LLC  
3301 North University Ave.  
Provo, Utah 84604

  
\_\_\_\_\_  
David C. Reymann

Jeffrey J. Hunt, Esq. (5855)  
David C. Reymann, Esq. (8495)  
PARR WADDOUPS BROWN GEE & LOVELESS  
185 South State Street, Suite 1300  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7840  
Facsimile: (801) 532-7750  
Attorneys for Defendants and Counterclaimants  
Brett Bezzant and Newtah, Inc. d/b/a *American  
Fork Citizen New Utah!*

---

**IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY**

**STATE OF UTAH**

---

WILLIAM T. JACOB, an individual;  
COMMERCIAL PROPERTIES, INC., a Utah  
corporation; and PHILLIPS  
MANUFACTURING COMPANY, INC., a  
Utah corporation,

Plaintiffs,

vs.

BRETT BEZZANT, an individual;  
NEWTAH, INC., dba AMERICAN FORK  
CITIZEN NEW UTAH, a Utah corporation;  
AMERICAN FORK CITY, a Utah municipal  
corporation; TED BARRATT, an individual;  
KEVIN BENNETT, an individual; TERRY  
FOX, an individual; DON HAMPTON, an  
individual; TOM HUNTER, an individual;  
RICKY STORRS, an individual; CARL  
WANLASS, an individual; and DOES I  
through X,

Defendants.

**NOTICE OF ENTRY OF  
JUDGMENT**

Civil No. 000403530

Judge Fred D. Howard

BRETT BEZZANT, an individual;  
NEWTAH, INC., dba AMERICAN FORK  
CITIZEN NEW UTAH, a Utah corporation,

Counterclaimants,

vs.

WILLIAM T. JACOB, an individual;  
COMMERCIAL PROPERTIES, INC., a Utah  
corporation; and PHILLIPS  
MANUFACTURING COMPANY, INC., a  
Utah corporation,

Counterclaim Defendants.

---

Pursuant to Rule 58A(d) of the *Utah Rules of Civil Procedure*, notice is hereby given that on March 29, 2006 the Court herein entered its Order and Judgment Regarding Award of Attorneys Fees and Costs Under Utah Code Ann. § 78-58-105(1)(a). A true and correct copy of this Order and Judgment is attached hereto.

DATED this 31 day of March 2006.

PARR WADDOUPS BROWN GEE & LOVELESS

By: \_\_\_\_\_

Jeffrey J. Hunt

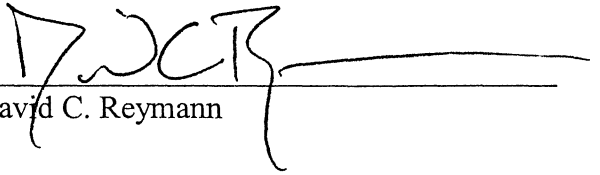
David C. Reymann

Attorneys for Defendants and Counter-  
claimants Brett Bezzant and Newtah, Inc.  
*d/b/a American Fork Citizen New Utah!*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 31 day of March 2006, a true and correct copy of the foregoing **NOTICE OF ENTRY OF JUDGMENT** was served, via U.S. Mail, postage prepaid, on the following:

Randall K. Spencer  
FILLMORE SPENCER, LLC  
3301 North University Ave.  
Provo, Utah 84601

  
\_\_\_\_\_  
David C. Reymann

**FILED**  
Fourth Judicial District Court  
of Utah County, State of Utah

3/29/06 *WDB* Deputy  
9:31 a.m.

Jeffrey J. Hunt, Esq. (5855)  
David C. Reymann, Esq. (8495)  
PARR WADDOUPS BROWN GEE & LOVELESS  
185 South State Street, Suite 1300  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7840  
Facsimile: (801) 532-7750  
Attorneys for Defendants and Counterclaimants  
Brett Bezzant and Newtah, Inc. d/b/a *American  
Fork Citizen New Utah!*

---

**IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY**

**STATE OF UTAH**

---

WILLIAM T. JACOB, an individual;  
COMMERCIAL PROPERTIES, INC., a Utah  
corporation; and PHILLIPS  
MANUFACTURING COMPANY, INC., a  
Utah corporation,

Plaintiffs,

vs.

BRETT BEZZANT, an individual;  
NEWTAH, INC., dba AMERICAN FORK  
CITIZEN NEW UTAH, a Utah corporation;  
AMERICAN FORK CITY, a Utah municipal  
corporation; TED BARRATT, an individual;  
KEVIN BENNETT, an individual; TERRY  
FOX, an individual; DON HAMPTON, an  
individual; TOM HUNTER, an individual;  
RICKY STORRS, an individual; CARL  
WANLASS, an individual; and DOES I  
through X,

Defendants.

---

**ORDER AND JUDGMENT  
REGARDING AWARD OF  
ATTORNEYS FEES AND COSTS  
UNDER UTAH CODE ANN. § 78-  
58-105(1)(a)**

Civil No. 000403530

Judge Fred D. Howard  
Division 5

BRETT BEZZANT, an individual;  
NEWTAH, INC., dba AMERICAN FORK  
CITIZEN NEW UTAH, a Utah corporation,

Counterclaimants,

vs.

WILLIAM T. JACOB, an individual;  
COMMERCIAL PROPERTIES, INC., a Utah  
corporation; and PHILLIPS  
MANUFACTURING COMPANY, INC., a  
Utah corporation,


Counterclaim Defendants.

---

This matter came before the Court on the Affidavit of Jeffrey J. Hunt Regarding Costs and Attorneys' Fees, which was submitted in connection with this Court's written Ruling Re: Counterclaimants' Motion to Strike Inadmissible Portions of Affidavits of David Aagard, R. Brent Stephens, Randall K. Spencer, and William T. Jacob and Motion for Partial Summary Judgment (the "Ruling") and subsequent Order Granting Counterclaimants' Motion to Strike and Motion for Partial Summary Judgment (the "Order"). The Ruling and Order are incorporated herein by this reference. This Order and Judgment determines the amount of costs and reasonable attorneys fees to be awarded to the *Citizen*.

The Court, having considered the Affidavit of Mr. Hunt and the other pertinent materials submitted by the parties, being fully advised in the premises, and good cause appearing therefor, hereby ORDERS as follows:

1. The Court finds that the attorneys fees and costs detailed in the Affidavit of Mr. Hunt were reasonably and necessarily incurred by the *Citizen* in connection with the above-captioned case for all of the reasons specified in Mr. Hunt's Affidavit and are properly recoverable under Utah Code Ann. § 78-58-105(1)(a).

2. The Court hereby enters judgment against Plaintiffs, jointly and severally, in favor of the *Citizen* in the amount of \$155,733.56. This amount represents \$155,733.56 in reasonably incurred attorneys fees and \$0 in costs incurred by the *Citizen* in connection with the above-captioned matter from April 30, 2001 through the end of September 2005, less the amount of attorneys fees and costs already awarded to the *Citizen* by prior Order and Judgment. 

3. With respect to the prior awards, on or about August 12, 2004, this Court entered an Order and Judgment Regarding Award of Attorney Fees and Costs Under 42 U.S.C. § 1988 (the "Section 1988 Order"), which awarded the *Citizen* attorneys fees in the amount of \$13,310.83 and costs in the amount of \$383.11. On August 12, 2004, pursuant to Rule 54(d) of the *Utah Rules of Civil Procedure*, the Court also entered an Order and Judgment Regarding Award of Costs and Necessary Disbursements to the *Citizen* (the "Costs Order"), as the prevailing party under Rule 54(d). The Costs Order awarded the *Citizen* costs in the amount of \$6,386.22. Collectively, the Section 1988 Order and the Costs Order are referred to herein as the "Prior Judgments". The amounts already awarded under the Prior Judgments have been deducted from the *Citizen's* present request and are not duplicative with this judgment.

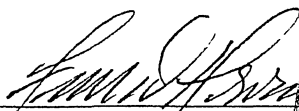


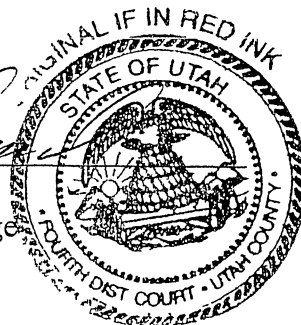
4. All amounts awarded hereunder, as with the Prior Judgments entered by the Court, shall bear post-judgment interest at the statutorily applicable rate as of their date of entry.

5. The *Citizen* is further entitled to an award of its costs and reasonable attorneys fees incurred after September 2005 in connection with the above-captioned matter. Such amounts shall be awarded by supplemental judgment(s) upon submission of supplemental affidavit(s) from the *Citizen's* counsel.

DATED this 24<sup>th</sup> day of March 2006.

BY THE COURT:

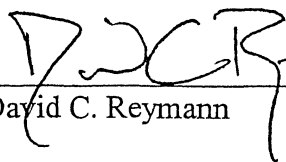
  
Hon. Fred D. Howard  
Fourth District Court Judge



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 21<sup>st</sup> day of October 2005, a true and correct copy of the foregoing **ORDER AND JUDGMENT REGARDING AWARD OF ATTORNEYS FEES AND COSTS UNDER UTAH CODE ANN. § 78-58-105(1)(a)** was served, via hand-delivery, on the following:

Randall K. Spencer  
FILLMORE SPENCER, LLC  
3301 North University Ave.  
Provo, Utah 84604

  
\_\_\_\_\_  
David C. Reymann

**FILED**  
Fourth Judicial District Court  
of Utah County, State of Utah

4/27/06 *WBA* Deput  
9:46

Jeffrey J. Hunt, Esq. (5855)  
David C. Reymann, Esq. (8495)  
PARR WADDOUPS BROWN GEE & LOVELESS  
185 South State Street, Suite 1300  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7840  
Facsimile: (801) 532-7750  
Attorneys for Defendants and Counterclaimants  
Brett Bezzant and Newtah, Inc. d/b/a *American  
Fork Citizen New Utah!*

---

**IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY**

**STATE OF UTAH**

---

WILLIAM T. JACOB, an individual;  
COMMERCIAL PROPERTIES, INC., a Utah  
corporation; and PHILLIPS  
MANUFACTURING COMPANY, INC., a  
Utah corporation,

Plaintiffs,

vs.

BRETT BEZZANT, an individual;  
NEWTAH, INC., dba AMERICAN FORK  
CITIZEN NEW UTAH, a Utah corporation;  
AMERICAN FORK CITY, a Utah municipal  
corporation; TED BARRATT, an individual;  
KEVIN BENNETT, an individual; TERRY  
FOX, an individual; DON HAMPTON, an  
individual; TOM HUNTER, an individual;  
RICKY STORRS, an individual; CARL  
WANLASS, an individual; and DOES I  
through X,

Defendants.

---

**SUPPLEMENTAL ORDER AND  
JUDGMENT REGARDING  
AWARD OF ATTORNEYS FEES  
AND COSTS UNDER UTAH  
CODE ANN. § 78-58-105(1)(a)**

Civil No. 000403530

Judge Fred D. Howard  
Division 5

BRETT BEZZANT, an individual;  
NEUTAH, INC., dba AMERICAN FORK  
CITIZEN NEW UTAH, a Utah corporation,

Counterclaimants,

vs.

WILLIAM T. JACOB, an individual;  
COMMERCIAL PROPERTIES, INC., a Utah  
corporation; and PHILLIPS  
MANUFACTURING COMPANY, INC., a  
Utah corporation,

Counterclaim Defendants.

---

This matter came before the Court on the Second Supplemental Affidavit of Jeffrey J. Hunt Regarding Costs and Attorneys' Fees, which was submitted in connection with this Court's Order and Judgment Regarding Award of Attorneys Fees and Costs Under Utah Code Ann. § 78-58-105(1)(a), dated March 29, 2006. The Court, having considered the Second Supplemental Affidavit of Mr. Hunt and the other pertinent materials submitted by the parties, being fully advised in the premises, and good cause appearing therefor, hereby ORDERS as follows:

1. For all of the reasons specified in Mr. Hunt's Affidavit and the other submissions by the parties, the Court finds that the attorneys' fees detailed in the Second Supplemental Affidavit of Mr. Hunt were reasonably and necessarily incurred by the *Citizen* in connection with the above-captioned case from October 2005 through the end of March 2006, and are properly recoverable under Utah Code Ann. § 78-58-105(1)(a).

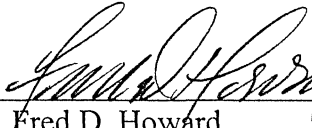
2. The Court hereby enters judgment against Plaintiffs, jointly and severally, in favor of the *Citizen* in the amount of \$14,380.00.

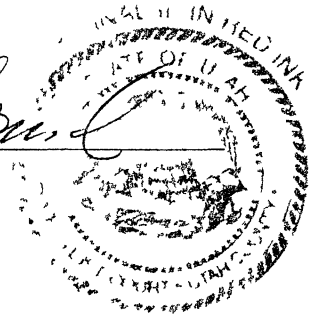
3. All amounts awarded hereunder, as with all prior judgments entered by the Court against Plaintiffs, shall bear post-judgment interest at the statutorily applicable rate as of their date of entry.

4. The *Citizen* is further entitled to an award of its costs and reasonable attorneys fees incurred after March 2006 in connection with the above-captioned matter. Such amounts shall be awarded by supplemental judgment(s) upon submission of supplemental affidavit(s) from the *Citizen's* counsel.

DATED this 27 day of APRIL 2006.

BY THE COURT:

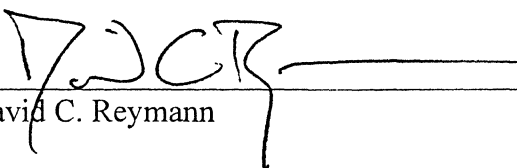
  
\_\_\_\_\_  
Hon. Fred D. Howard  
Fourth District Court Judge



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 26<sup>th</sup> day of April 2006, a true and correct copy of the foregoing **SUPPLEMENTAL ORDER AND JUDGMENT REGARDING AWARD OF ATTORNEYS FEES AND COSTS UNDER UTAH CODE ANN. § 78-58-105(1)(a)** was served, via U.S. Mail, postage prepaid, on the following:

Randall K. Spencer  
FILLMORE SPENCER, LLC  
3301 North University Ave.  
Provo, Utah 84604

  
\_\_\_\_\_  
David C. Reymann

FILED IN  
4TH DISTRICT COURT  
STATE OF UTAH  
UTAH COUNTY

2006 MAY -1 P 3:09

*11/5/06*

Jeffrey J. Hunt, Esq. (5855)  
David C. Reymann, Esq. (8495)  
PARR WADDOUPS BROWN GEE & LOVELESS  
185 South State Street, Suite 1300  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7840  
Facsimile: (801) 532-7750  
Attorneys for Defendants and Counterclaimants  
Brett Bezzant and Newtah, Inc. d/b/a *American  
Fork Citizen New Utah!*

---

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

---

WILLIAM T. JACOB, an individual;  
COMMERCIAL PROPERTIES, INC., a Utah  
corporation; and PHILLIPS  
MANUFACTURING COMPANY, INC., a  
Utah corporation,

Plaintiffs,

vs.

BRETT BEZZANT, an individual;  
NEWTAH, INC., dba AMERICAN FORK  
CITIZEN NEW UTAH, a Utah corporation;  
AMERICAN FORK CITY, a Utah municipal  
corporation; TED BARRATT, an individual;  
KEVIN BENNETT, an individual; TERRY  
FOX, an individual; DON HAMPTON, an  
individual; TOM HUNTER, an individual;  
RICKY STORRS, an individual; CARL  
WANLASS, an individual; and DOES I  
through X,

Defendants.

---

**NOTICE OF ENTRY OF  
JUDGMENT**

Civil No. 000403530

Judge Fred D. Howard

BRETT BEZZANT, an individual;  
NEWTAH, INC., dba AMERICAN FORK  
CITIZEN NEW UTAH, a Utah corporation,

Counterclaimants,

vs.

WILLIAM T. JACOB, an individual;  
COMMERCIAL PROPERTIES, INC., a Utah  
corporation; and PHILLIPS  
MANUFACTURING COMPANY, INC., a  
Utah corporation,

Counterclaim Defendants.

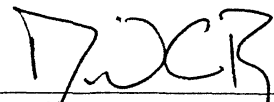
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Pursuant to Rule 58A(d) of the *Utah Rules of Civil Procedure*, notice is hereby given that on April 27, 2006 the Court herein entered its Supplemental Order and Judgment Regarding Award of Attorneys Fees and Costs Under Utah Code Ann. § 78-58-105(1)(a). A true and correct copy of this Order and Judgment is attached hereto.

DATED this 1 day of May 2006.

PARR WADDOUPS BROWN GEE & LOVELESS

By: \_\_\_\_\_

  
Jeffrey J. Hunt  
David C. Reymann

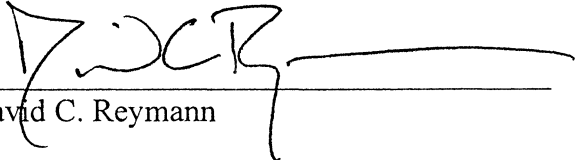
Attorneys for Defendants and Counter-  
claimants Brett Bezzant and Newtah, Inc.  
d/b/a *American Fork Citizen New Utah!*



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the   1   day of May 2006, a true and correct copy of the foregoing **NOTICE OF ENTRY OF JUDGMENT** was served, via U.S. Mail, postage prepaid, on the following:

Randall K. Spencer  
FILLMORE SPENCER, LLC  
3301 North University Ave.  
Provo, Utah 84601

  
\_\_\_\_\_  
David C. Reymann

**FILED**  
411515 Fourth Judicial District Court  
STATE OF UTAH  
UTAH COUNTY, State of Utah

2006 MAY - 4/27/06 *WBI* Deputy  
9:46

Jeffrey J. Hunt, Esq. (5855)  
David C. Reymann, Esq. (8495)  
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185 South State Street, Suite 1300  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7840  
Facsimile: (801) 532-7750  
Attorneys for Defendants and Counterclaimants  
Brett Bezzant and Newtah, Inc. d/b/a *American  
Fork Citizen New Utah!*

---

**IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY**

**STATE OF UTAH**

---

WILLIAM T. JACOB, an individual;  
COMMERCIAL PROPERTIES, INC., a Utah  
corporation; and PHILLIPS  
MANUFACTURING COMPANY, INC., a  
Utah corporation,

Plaintiffs,

vs.

BRETT BEZZANT, an individual;  
NEWTAH, INC., dba AMERICAN FORK  
CITIZEN NEW UTAH, a Utah corporation;  
AMERICAN FORK CITY, a Utah municipal  
corporation; TED BARRATT, an individual;  
KEVIN BENNETT, an individual; TERRY  
FOX, an individual; DON HAMPTON, an  
individual; TOM HUNTER, an individual;  
RICKY STORRS, an individual; CARL  
WANLASS, an individual; and DOES I  
through X,

Defendants.

**SUPPLEMENTAL ORDER AND  
JUDGMENT REGARDING  
AWARD OF ATTORNEYS FEES  
AND COSTS UNDER UTAH  
CODE ANN. § 78-58-105(1)(a)**

Civil No. 000403530

Judge Fred D. Howard  
Division 5

BRETT BEZZANT, an individual;  
NEWTAH, INC., dba AMERICAN FORK  
CITIZEN NEW UTAH, a Utah corporation,

Counterclaimants,

vs.

WILLIAM T. JACOB, an individual;  
COMMERCIAL PROPERTIES, INC., a Utah  
corporation; and PHILLIPS  
MANUFACTURING COMPANY, INC., a  
Utah corporation,

Counterclaim Defendants.

---

This matter came before the Court on the Second Supplemental Affidavit of Jeffrey J. Hunt Regarding Costs and Attorneys' Fees, which was submitted in connection with this Court's Order and Judgment Regarding Award of Attorneys Fees and Costs Under Utah Code Ann. § 78-58-105(1)(a), dated March 29, 2006. The Court, having considered the Second Supplemental Affidavit of Mr. Hunt and the other pertinent materials submitted by the parties, being fully advised in the premises, and good cause appearing therefor, hereby ORDERS as follows:

1. For all of the reasons specified in Mr. Hunt's Affidavit and the other submissions by the parties, the Court finds that the attorneys' fees detailed in the Second Supplemental Affidavit of Mr. Hunt were reasonably and necessarily incurred by the *Citizen* in connection with the above-captioned case from October 2005 through the end of March 2006, and are properly recoverable under Utah Code Ann. § 78-58-105(1)(a).

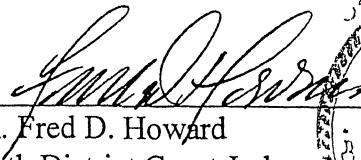
2. The Court hereby enters judgment against Plaintiffs, jointly and severally, in favor of the *Citizen* in the amount of \$14,380.00.

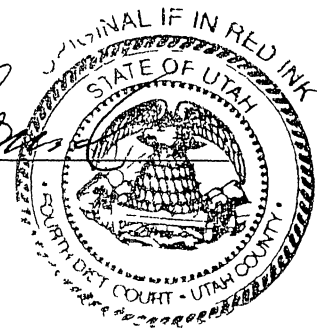
3. All amounts awarded hereunder, as with all prior judgments entered by the Court against Plaintiffs, shall bear post-judgment interest at the statutorily applicable rate as of their date of entry.

4. The *Citizen* is further entitled to an award of its costs and reasonable attorneys fees incurred after March 2006 in connection with the above-captioned matter. Such amounts shall be awarded by supplemental judgment(s) upon submission of supplemental affidavit(s) from the *Citizen's* counsel.

DATED this 27 day of APRIL 2006.

BY THE COURT:

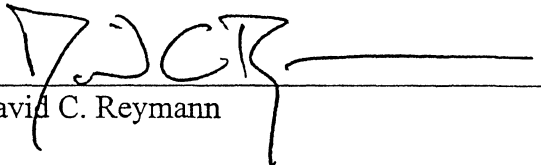
  
Hon. Fred D. Howard  
Fourth District Court Judge



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 26<sup>th</sup> day of April 2006, a true and correct copy of the foregoing **SUPPLEMENTAL ORDER AND JUDGMENT REGARDING AWARD OF ATTORNEYS FEES AND COSTS UNDER UTAH CODE ANN. § 78-58-105(1)(a)** was served, via U.S. Mail, postage prepaid, on the following:

Randall K. Spencer  
FILLMORE SPENCER, LLC  
3301 North University Ave.  
Provo, Utah 84604

  
\_\_\_\_\_  
David C. Reymann

Tab D

# NONPARTISAN CITIZENS GROUP INFORMATION BULLETIN

## A 1999 ELECTION QUESTION: CAN TWO CITY EMPLOYEES SEEK POLITICAL OFFICE? FACTS LISTED BELOW. . . .

### \*\*CANDIDATE RICKY STORRS\*\*

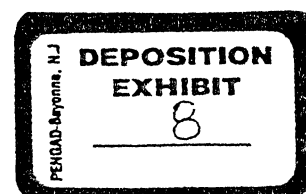
STORRS FACT #1: Candidate Storrs is a City employee functioning under the "Exempt Personnel Policies and Procedures" of the City. (See City Ordinance No. 92-05-20)

STORRS FACT #2: As a City EMT Ambulance Employee, Candidate Storrs, by City Personnel Policy, is prohibited from holding political office while employed by the City. (See City Ordinance #95-05-21)

STORRS FINDINGS OF FACT: Candidate Storrs has been employed by the City for several years. The public record indicates that Candidate Storrs failed to go on leave without pay from his City employment, while seeking election to political office. (See City Ordinance #92-05-21)

A VOTER'S QUESTION: Will the failure of Candidate Storrs to go on leave without pay from his City employment create a special privilege for himself while he is seeking election to political office, and if elected, will he give up his employment with the City during the term of his political office?

### \*\*CANDIDATE TOM HUNTER\*\*



HUNTER FACT #1: Candidate Hunter is employed by the City as a health insurance consultant functioning under the "Exempt Personnel Policies and Procedures" of the City. (See City Ordinance #92-05-20)

HUNTER FACT #2: As a health insurance consultant, Candidate Hunter, by City Personnel Policy, is prohibited from holding political office while employed by the City. (See City Ordinance #92-05-21)

HUNTER FINDINGS OF FACT: Candidate Hunter has been employed by the City since 1997. The public record indicates that Candidate Hunter failed to go on leave without pay from his City employment, while seeking election to political office. (See City Ordinance #92-05-21)

A VOTER'S QUESTION: Will the failure of Candidate Hunter to go on leave without pay from his City employment create a special privilege for himself while he is seeking election to political office and if elected, will he give up his employment with the City during the term of his political office?

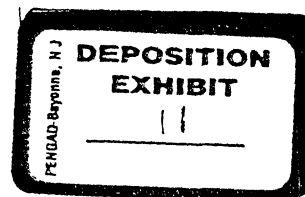
Tab E





Subscribe Now!

# New Utah!



October 28, 1999

Volume 21 No. 43

Headlines

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Business

Sports

Recreation

Entertainment

Obituaries

Classified Ads

Public Notices

ELECTION '99

clickTV

*New Utah!* offers apology to Tom Hunter, Rick Storrs for campaign flyer

## Urgent Election Notice!

To: All American Fork Residents

From: Publisher Brett Bezzant, American Fork Citizen *New Utah!*

### Correction and Apology to American Fork City Council Candidate Tom Hunter

The Oct. 27th issue of the *American Fork Citizen New Utah!* and *New Utah! Shopper* carried a political advertisement that ran as a preprinted flyer, paid and produced by William T. (Bill) Jacob and others involved in a "Nonpartisan Citizens Group."

In fairness to Mr. Hunter and his candidacy, *New Utah!* apologizes for distributing this flyer without giving Mr. Hunter the opportunity to respond to what we believe is false and misleading information regarding his service to American Fork City.

Mr. Hunter is not and never has been employed by American Fork City. Neither has he received any employee compensation nor any other employee benefit from American Fork City. However, Mr. Hunter does own Hunter & Associates Insurance and his firm was selected in 1997 to act as an independent insurance broker on the employee benefits package for American Fork City. His firm provides this same kind of service for many other employers.

Since this client/agent relationship with American Fork City is a potential conflict of interest, Mr. Hunter intends, if elected, to file a letter with the Mayor clearly identifying the potential conflict and stating that he will abstain from voting on any issue that involves his pre-existing interest in the employee benefits package.

Contrary to what Mr. Jacob's flyer implied, Mr. Hunter is, to the best of our knowledge, a qualified and eligible city council candidate and his candidacy has not, in any way, violated the policies or procedures of American Fork City.

### We also apologize to City Councilman Rick Storrs

The same flyer also questioned the candidacy of Rick Storrs, citing a city personnel ordinance that does not even apply to Mr. Storrs' part-time, volunteer employment as a city EMT. The precedent for his eligibility as a city councilman and as an incumbent candidate have been well established in at least two other elections. We apologize to Mr. Storrs for distributing misleading information that would bring his candidacy in question.

BEZ-2609

## Comments on the flyer

Mr. Jacob's flyer is falsely labeled as a "nonpartisan" group. Since American Fork no longer has political parties, there is no such thing as a "nonpartisan" group. Unfortunately, this flyer is a classic example of negative campaigning intended to hurt one candidate in order to favor another. We believe it hurts the entire process. Again, we apologize to Candidates Hunter and Storrs for distributing this misinformation.



This page is powered by

Tab F

FILED  
Fourth Judicial District Court  
of Utah County, State of Utah

9/16/05 *MS* Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH

WILLIAM T. JACOB, an individual;  
COMMERCIAL PROPERTIES, INC., a Utah  
corporation; and PHILLIPS  
MANUFACTURING COMPANY, INC., a  
Utah corporation,

Plaintiffs,

vs.

B. BRETT BEZZANT, an individual,  
NEWTAH, INC., dba AMERICAN FORK  
CITIZEN NEW UTAH, a Utah corporation,  
and DOES I THROUGH X,

Defendants.

BRETT BEZZANT, an individual; NEWTAH,  
INC., dba AMERICAN FORK CITIZEN  
NEW UTAH, a Utah Corporation,

Counterclaimants,

vs.

WILLIAM T. JACOB, an individual;  
COMMERCIAL PROPERTIES, INC., a Utah  
Corporation; and PHILLIPS  
MANUFACTURING CO.,

Counterclaim Defendants.

**RULING RE:  
COUNTERCLAIMANTS' MOTION  
TO STRIKE INADMISSIBLE  
PORTIONS OF AFFIDAVITS OF  
DAVID AAGARD, R. BRENT  
STEPHENS, RANDALL K.  
SPENCER, AND WILLIAM T.  
JACOB and MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

Case # 000403530

Judge Fred D. Howard

Division 5

This matter comes before the Court on Counterclaimants' *Motion to Strike Inadmissible  
Portions of Affidavits of David Aagard, R. Brent Stephens, Randall K. Spencer, and William T.*

*Jacob* and *Motion for Partial Summary Judgment*. The Court, having reviewed the file and being fully advised in the premises, hereby issues the following ruling.

### **RULING**

Defendants and Counterclaimants Brett Bezzant and Newtah, Inc. d/b/a *The American Fork Citizen New Utah!* (collectively, the “Citizen”) filed a Motion for Partial Summary Judgment on October 19, 2004. Plaintiffs submitted their Memorandum in Opposition to Defendant’s Motion for Partial Summary Judgment on February 17, 2005. Defendants replied on March 18, 2005 and submitted a Motion to Strike Inadmissible Portions of Affidavits that same day. In addition, Defendants filed a Request to Submit the Motion for Partial Summary Judgment with the Court on March 18, 2005. On April 19, 2005, after all parties had made their submissions in conjunction with the Motion to Strike, Defendants filed a Request to Submit the Motion to Strike with the Court. A hearing date was set for September 13, 2005 for the parties to make arguments on both pending motions.

In their Motion to Strike Inadmissible Portions of Affidavits, Defendants assert that the statements set forth in the affidavits or portions thereof submitted by Plaintiffs’ current and former lawyers in the case constitute inadmissible argument, opinions, legal conclusions, and/or hearsay, and/or lack foundation or personal knowledge. Rule 56(e) of the Utah Rules of Civil Procedure provides the following guidance as to the acceptable form of affidavits in a summary judgment matter:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

Rule 56(e) U.R.C.P.

After reviewing the substance of the affidavits submitted by Plaintiffs, the Court finds that the affidavits do not include any new facts, not already in the pleadings, that would be admissible in evidence. Rather, the assertions made in the affidavits consist of argument, opinions, and inadmissible legal conclusions. Therefore, for the reasons set forth in Defendants' Memorandum in Support of the *Citizen's* Motion to Strike Inadmissible Portions of Affidavits of David Aagard, R. Brent Stephens, Randall K. Spencer, and William T. Jacob, the Court hereby strikes the affidavits submitted by Plaintiffs.

In Defendants' Motion for Partial Summary Judgment, Defendants assert that under Utah Code Section 78-58-105(1)(a), they are entitled to the portion of their costs and attorneys fees incurred in this matter that have not yet been awarded by the Court. Plaintiffs argue that Defendants have misinterpreted the provisions of Utah's Anti-SLAPP statute, asserting that a dismissal of a case under U.C.A. § 78-58-104 does not automatically meet the requirements of an award of attorneys fees under U.C.A. § 78-58-105. Section 78-58-105 provides the following:

(1) A defendant in an action involving public participation in the process of government may maintain an action, claim, cross-claim, or counterclaim to recover:

(a) costs and reasonable attorney's fees, upon a demonstration that the action involving public participation in the process of government was commenced or continued without a substantial basis in fact and law and could not be supported

by a substantial argument for the extension, modification, or reversal of existing law;  
and

(b) other compensatory damages upon an additional demonstration that the action involving public participation in the process of government was commenced or continued for the purpose of harassing, intimidating, punishing , or otherwise maliciously inhibiting the free exercise of rights granted under the First Amendment to the U.S. Constitution.

Utah Code Ann. § 78-58-105.

The Court agrees with Plaintiffs' argument that a dismissal under U.C.A. § 78-58-104 does not automatically lead to an award of attorney's fees under U.C.A. § 78-58-105. In order for a party to prevail in a counterclaim for an award of costs and reasonable attorney's fees under U.C.A. § 78-58-105, the party must demonstrate (1) that the Anti-SLAPP statute is applicable to the action, (2) that the other party's claims lack factual and legal merit, and (3) that the action is not supported by a substantial argument for the extension, modification, or reversal of existing law. The Court can conceive of a situation where a plaintiff's claims would be dismissed under section 104 of Utah's Anti-SLAPP statute, but would not result in an award of costs and attorney's fees under section 105. For example, in a case of first impression where the law is unsettled or unclear, the existing law may or may not sustain a cause of action given a certain factual setting. Such a case would have the potential to bring about changes in the law. The Court finds, however, that Jacob's present action is not such a case.

First, the Court finds that Utah's Anti-SLAPP statute does apply to this case. During the motion hearing, Plaintiffs asserted a new argument, not included in Plaintiffs' pleadings, that

the Anti-SLAPP statute does not apply to the case at bar given the statutory definition of the “process of government.” Section 78-58-102 of the Utah Code defines the “process of government” as “the mechanisms and procedures by which the legislative and executive branches of government make decisions, including the exercise by a citizen of the right to influence those decisions under the First Amendment to the U.S. Constitution.” Plaintiffs argued that election campaign events do not amount to the process of government. The Court finds this reasoning unpersuasive in light of the facts of this case. As Defendants asserted in response to Plaintiffs’ argument, the editorial that Defendants published dealt directly with the qualifications of Mr. Hunter and Mr. Storrs to have their names included on the ballot for positions on the City Council. The editorial was not just directed to the citizens of American Fork, but also to those in the city’s executive and legislative positions who had the power to disqualify the candidates. Judge Davis, in his Ruling of April 2, 2004, also determined that the Anti-SLAPP statute is applicable to this case. The Court is persuaded, in accordance with Judge Davis’s ruling, that this action involved public participation in the process of government.

Second, the Court finds that Defendants have demonstrated that Plaintiffs’ claims lacked factual and legal merit. The Court is persuaded that the reasoning contained in Judge Davis’ Ruling is sufficient to support Defendants’ burden of proof that Plaintiffs’ action was commenced or continued without the necessary substantial basis in fact and law. In his Ruling, Judge Davis pointed to four main defects in Plaintiffs’ case that led him to determine that Jacob’s



claims lacked legal merit: (1) the *Citizen's* Editorial did not convey defamatory meaning as a matter of law; (2) the Editorial was protected by Utah's public interest privilege; (3) the Editorial constituted statements of editorial opinion, not verifiable statements of fact; and (4) Plaintiffs failed to plead special damages, which they were required to do because they did not allege defamation *per se*. As any one of the above reasons would have been sufficient to dismiss Plaintiffs' claims, Defendants have made more than a sufficient demonstration, in accordance with U.C.A. § 78-58-105(1)(a), that Plaintiffs' claims did not have a substantial basis in fact and law.

In addition, the Utah Supreme Court recently clarified that a plaintiff's claim is not necessarily supported by a substantial basis in fact and law simply because it survives a motion of summary judgment. *See Anderson Dev. Co. V. Tobias*, 2005 UT 36, 528 Utah Adv. Rep. 3 (June 14, 2005). The Supreme Court reasoned, "Because dismissal of a claim based on either a motion to dismiss or a motion for summary judgement denies the nonmoving party of the right to litigate his claim on the merits, the threshold for surviving such a motion is relatively low." *Id.* at ¶ 49. In this case, Plaintiffs' claims were so deficient that they did not even pass the "relatively low" threshold for surviving a motion for summary judgment.

Third, the Court finds that Plaintiff's action is not supported by a substantial argument for the extension, modification, or reversal of existing law. In a review of Plaintiffs' pleadings, especially Plaintiff's Memorandum in Opposition to Defendant's Motion for Partial Summary

Judgment, the Court fails to find an argument that the law of defamation is deficient and that the facts of Plaintiffs' case are so unique as to bring about an extension, modification, or reversal of defamation law as it currently stands. To the contrary, all of Plaintiffs' attempts are to promote their causes of action under existing law. They do not show how their cause of defamation is distinct from those already available under existing law.

Notwithstanding the fact that Plaintiffs' affidavits have been stricken, the Court notes that the affidavits contained arguments that could have been made in Plaintiffs' pleadings or at the motion hearing. However, even after a review of the arguments made in the affidavits by Plaintiffs' prior and current counsel, the Court is unpersuaded that Plaintiff has marshaled substantial arguments for the extension, modification, or reversal of existing law. For example, in paragraph 4 of David Aagard's affidavit, Aagard argues that the case, *Mast v. Overson*, 971 P.2d 928 (Utah Ct. App. 1998), was distinguishable from Jacob's facts. Aagard's reasoning is an attempt to simply support his assertion that Jacob had a viable claim, not an attempt to show that *Mast* is bad law that should be reversed.

Judge Davis was not faced with a case of first impression or claims that were grounded in areas of law that have not matured. The law of defamation that Judge Davis applied is well grounded, clear, well-reasoned, and has been established over the course of many years. The application of the law in this matter was thus predictable. In light of the settled nature of defamation law and the lack of any illustration in Plaintiffs' pleadings that defamation law is

deficient and should be altered, the Court finds that Plaintiffs' action is not supported by a substantial argument for the extension, modification, or reversal of existing law.

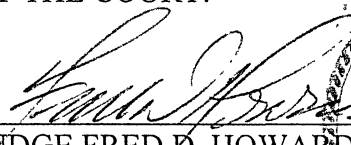
Plaintiffs contend that U.C.A. § 78-58-105 requires that a party's conduct be such that the claims are so lacking in merit that they do not even comply with Rule 11 of the Utah Rules of Civil Procedure. The Court is not persuaded that the requirements for Rule 11 sanctions must be met for an award of costs and attorney's fees under U.C.A. § 78-58-105. Section 78-58-105 does not include any provision that requires a notice to be served upon a SLAPP plaintiff in order for the defendant to recover costs and attorney's fees. The plain language of the statute only requires that the defendant demonstrate that the action involved public participation in the process of government and that it was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification, or reversal of existing law. The Court finds that Defendants have met this burden.

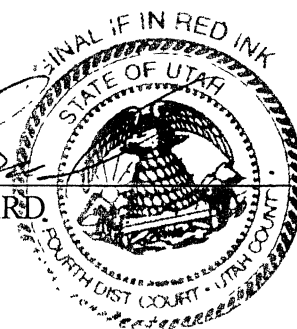
The Utah Supreme Court also made an important clarification relating to U.C.A. § 78-58-105 that, to avoid an improper retroactive application of Section 105, a plaintiff is only entitled to recover fees, costs, and damages incurred from the date of enactment of the Anti-SLAPP Statute—April 30, 2001. *See Anderson*, 2005 UT at ¶ 48. The Defendants have appropriately modified their Motion for Partial Summary Judgment to request only the attorney's fees and costs they have incurred since April 30, 2001.

For the above reasons, this Court hereby grants Defendants' Motion for Partial Summary Judgment and the relief requested. Counsel for Defendants is instructed to prepare an order consistent with this Ruling.

Dated this 15<sup>th</sup> day of September, 2005.

BY THE COURT:

  
\_\_\_\_\_  
JUDGE FRED D. HOWARD  
District Court Judge



### **CERTIFICATE OF DELIVERY**

I certify that true copies of the foregoing Ruling were delivered on the 16 day of September, 2005 to the following in the manner indicated, to wit:

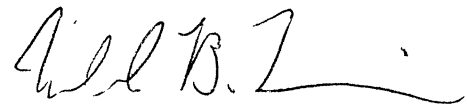
**by U.S. first class mail**

Counsel for Plaintiffs:

Randall K. Spencer  
FILLMORE SPENCER, LLC  
3301 North University Ave.  
Provo, Utah 84604

Counsel for Defendants:

Jeffrey J. Hunt  
David C. Reymann  
PARR WADDOUPS BROWN GEE & LOVELESS  
185 South State Street, Suite 1300  
Salt Lake City, Utah 84111



Deputy Court Clerk

Tab G

# New Utah!

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FAXed  
10/14/00

December 9, 1999

William T. Jacob  
1100 North 100 East  
American Fork, Utah 84003

Dear Bill:

In the spirit of trying to arrive at some kind of mutual understanding, I'll do my best to answer your questions.

Q1. For what purpose did I disclose your identity as the individual who paid and produced the "Non-partisan Citizens Group" Storrs/Hunter advertisement?

A1. There are many federal, state, and, in some cases, municipal statutes governing campaign disclosures. Some of them specifically require the publication of the names of those persons or officers responsible for the advertisement. As far as I know American Fork City does not currently have a campaign disclosure ordinance that would apply to the Non-partisan Citizen Group. However, Salt Lake County, for example requires that any person or association of persons who expend more than \$250 on an issue campaign, such as an initiative, referendum, or bond issue establish a campaign committee and report all contributions and expenditures. There is, however, a state statute that applies in this case (see answer to Q2).

The governing principle and the intent of these laws seems to be that government business, including elections, should be as open as possible and that voters have a right to "follow the money"—to know who is trying to buy influence through the means of paid political advertising.

Following this principle and in fairness to the two candidates mentioned in your advertisement, I corrected what was lacking in your preprinted flyer—the name of at least one responsible person. Before publishing this correction (the preparations for which had to be completed within less than two days), I attempted to reach you at your home telephone specifically to see if you would tell me who else should be listed as members or officers of the "Non-partisan Citizens Group."

I also considered naming you as the responsible party for the advertisement opposing the bond as well, but decided not to mix the issues. Furthermore, the bond advertisement was not a personal attack as the Hunter/Storrs advertisement seemed to be. (see the answer to question Q7)

Q2. On what basis did I conclude that I could disclose your identity without your

NEWTAH 0049 .

permission?

A2. Utah Code Section 20A-11-901 (1) (a) (iii)

Based on my understanding of the above, it never occurred to me to ask your permission. I also recall that you told me something about how you were placing the ads because, unlike others, you were accustomed to "taking the heat" for such things. You were the only person we dealt with, i.e., you inquired about rates and distribution; you delivered the flyers; and you paid for the advertisement with a check drawn on your personal account. Based on the above state statute, Tom Hunter (and anyone else) has a legal right to know not only your name, but probably the names of other members of the "Non-partisan Citizens Group." (I hope you realize that, depending on how you decide to pursue your objectives, that type of full disclosure may eventually become necessary.) I believe I had not only a legal, but also an ethical obligation to disclose your identity.

Q3. What is New Utah's policy as to the disclosure of the identity of the purchasers of political advertisements?

A3. We have no written policy, but our practice has been and will continue to be to tell all that we know to anyone who asks about paid political advertising. If anything, we have required too little public disclosure.

On a personal note and based on our "off the record" discussion, I sympathize with any member of your group who fears some kind of retaliation. To be perfectly honest, I was surprised that you were the least bit concerned about my disclosure of your identity. It never occurred to me that you wanted to remain anonymous. As far as protecting our news sources, we could only promise such protection in extreme situations on a case by case basis. And, of course, this would apply only to a specific news story or series of stories on the same subject. It could never be applied to political advertising.

Q4. What events led to New Utah's publication of its "Correction and Apology?"

A4. Since you brought in the preprinted flyers to our Advertising Manager, Tom Hollingsworth, after our normal deadline on Tuesday, Oct. 26, he loaded them directly on our truck. I didn't even see the flyer in question until about 4:00 p.m.— one hour before our press deadline. When I saw the flyer, my initial reaction was disgust. It implied to me that Tom Hunter was intentionally hiding his "employment" with the city in order to gain some personal advantage as a city councilman. By so implying it seemed to attack his character and integrity. I discussed with Marc Haddock, our managing editor, the possibility of publishing some disclaimer in the newspaper, but he felt American Fork City Editor Barbara Christiansen's personal column about Rick Storrs sufficiently addressed the issue and we were both reluctant about taking time we did not have to re-make pages before our press deadline.

Wednesday morning I received an angry message from Tom Hunter. He wanted to know who paid for the flyer and threatened to sue whomever that was as well as the newspaper. He also threatened to cancel his business advertising with the newspaper. He was, understandably, upset. I'm sure he believed he was acting in good faith regarding his candidacy and client/agent relationship with American Fork City. He, too, perceived the flyer as an attack on his character. I



called him back and told him you were the only person we dealt with. That led to his phone conversation with you.

In my conversation with Tom Hunter, I told him how I felt about the flyer. He lamented the fact that our next issue would be Nov. 3rd and that we apparently could not respond to the flyer prior to the election. I told him that was not necessarily true and offered to deliver my own response prior to the election. I asked him to write down what he would like me to publish. He sent me a FAX labeled "retraction" and said it had been approved by his attorney. Since the flyer was a paid advertisement, I did not consider my response a retraction nor was I intimidated by his threat to sue the newspaper. Although I used some of what Tom Hunter wanted me to say, the response was my own. However, I did receive his verbal approval of the wording prior to its publication.

In retrospect, my response was partly an emotional one. I was, in effect, defending a friend whose character had been maligned. Tom Hunter is not only a valued business client of the newspaper, he is also my insurance agent and friend.

Since the "Non-partisan Citizens Group Information Bulletin" also mentioned Rick Storrs, I decided to mention the question posed about his candidacy as well. I called Mr. Storrs and he told me the city personnel ordinance cited did not apply to him. Given his current years of service on the city council and his not-so recent mayoral candidacy, I took that information as an established precedent that he could continue to serve the city as an EMT. Mr. Storrs did not suggest any other wording, but I did FAX a copy of my response to him and received his verbal approval as well.

In addition to Hunter and Storrs, I also discussed my response with Managing Editor Marc Haddock (Barbara Christiansen was out of town at the time.) The "Correction and Apology" was then delivered just as the newspaper was distributed to American Fork residents, some by mail and some by our newspaper carriers.

Q5 Who provided information to New Utah upon which it based its conclusion that the Non-partisan Citizens Group's political advertisement was false and misleading?

A5 Tom Hunter, Rick Storrs and William T. Jacob

Q6 What were the facts upon which New Utah relied in concluding that the Non-partisan Citizens Group's political advertisement was false and misleading?

A6 Here we differ as to what is fact and what is opinion. I relied on the fact that Tom Hunter's purported designation as an "employee" is debatable and subject to legal interpretation. Such designation is not a foregone conclusion and has not been proven in court. If his "employment" were a simple fact, it would not require a one page analysis of the words used in the city ordinance. In item 2 of your analysis, for example, an "employee" is defined as one whose employer has the power or right to control and direct the employee in the material details of how the work is to be performed. In my experience this typically means the control of *where* and *when* the employee works, which obviously does not apply to Mr. Hunter. Furthermore, the city ordinance is very explicit about other positions. If the author of this ordinance had wanted it

to apply to "agents" or "insurance agents," don't you think those words would have been included? Given the same ordinance, I believe a strong case could be made that Mr. Hunter is NOT, by definition, an "employee"-- exempt or otherwise.

The statement is false because the city ordinance does not make Tom Hunter an "employee." The ordinance does not use the words "agent" or "insurance agent," but even if those terms could, by legal authority, be construed to mean "consultant," which is doubtful. Such semantic maneuvering still does not make Tom Hunter a city employee in any sense of the word. The ordinance, in this case, merely restricts the political activity of city employees AND others, such as attorneys, consultants, volunteers, etc. However, the ordinance does not define attorneys, consultants, volunteers, etc. as "employees." The IRS has a complicated set of rules that distinguishes employees from independent contractors. By those rules, Tom Hunter is not, by any stretch of the imagination, an employee. By what the term "employee" would mean to virtually all of the audience for the Storrs/Hunter advertisement, Tom Hunter is not an employee.

Q7. What was New Utah's factual basis for concluding that the Non-partisan Citizen's Group's political advertisement was "negative campaigning" and "hurts the entire process"?

A7. Again, we differ as to what is fact and what is opinion. However, by attempting to mislead the residents of American Fork by stating that Tom Hunter was an employee of American Fork City, or at least that such "employment" was beyond any doubt, the political advertisement implied that Mr. Hunter was lacking in personal integrity and could not be trusted to execute his public office because he would be creating his own "special privileges." Since the advertisement was placed in the last New Utah! issue prior to the election, with no chance for Mr. Hunter to respond in the same newspaper and prior to the election, it was apparently intended to convince voters to vote for someone other than Mr. Hunter.

I believe that both Mr. Hunter and Mr. Storrs ran for public office with a good faith presumption that they are in compliance with all city ordinances and personnel policies. The political advertisement was negative because it cast Mr. Hunter and Mr. Storrs in a negative light. It hurts our local political process because such negative attacks on a candidate's character, whether implied or explicit, discourage other potential candidates from running for local office.

Q8. Was New Utah's "correction and apology" publication intended to represent the responses of Mr. Hunter and Mr. Storrs to the Non-partisan Citizens Group's political advertisement?

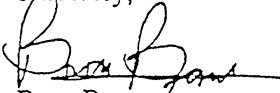
A8. No.

For what it's worth, I think the Non-partisan Citizens Group could have accomplished the same thing without expecting the reader to accept your conclusions without reservation. For example, it could have said, "According to our studied analysis of city ordinances and personnel policies, we believe candidate Tom Hunter qualifies as an "employee" and, as such, should go on leave without pay while seeking election to political office or give up his employment with the city during his term of office."

Such wording probably would have fostered more cooperation rather than hostility.

I still don't understand where you're going with this or what more you expect of me. We likely will never agree on this issue, but I think we're both trying to do what is in the city's best interest. I sincerely hope you will accept that so we can move on to more important things. Instead of fighting each other, perhaps we should find some mutually acceptable way of improving things at City Hall.

Sincerely,

A handwritten signature in black ink, appearing to read "Brett Bezzant", written over a horizontal line.

Brett Bezzant

Publisher, Citizen & Taxpayer

Tab H

Randall K. Spencer (6992)  
**FILLMORE SPENCER, LLC**  
Attorneys for Plaintiffs and  
Counterclaim Defendants  
3301 North University Ave.  
Provo, Utah 84604  
Telephone: (801) 426-8200  
Fax No.: (801) 426-8208

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IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

---

WILLIAM T. JACOB, an individual,  
COMMERCIAL PROPERTIES, INC.,  
a Utah corporation; and PHILLIPS  
MANUFACTURING COMPANY, INC.,  
a Utah corporation,

Plaintiffs,

vs.

B. BRETT BEZZANT, an individual,  
NEWTAH, INC., dba AMERICAN FORK  
CITIZEN NEW UTAH, a Utah corporation,  
and DOES I THROUGH X,

Defendants.

**AFFIDAVIT OF DAVID AAGARD**

Case No. 000403530

**JUDGE: FRED D. HOWARD**

BRETT BEZZANT, an individual;  
NEWTAH, INC., dba AMERICAN FORK  
CITIZEN NEW UTAH, a Utah Corporation,  
Counterclaimants

vs.

WILLIAM T. JACOB, an individual;  
COMMERCIAL PROPERTIES, INC., a  
Utah Corporation; and PHILLIPS  
MANUFACTURING CO.,

Counterclaim Defendants.

STATE OF UTAH

COUNTY OF UTAH

I, David Aagard, having first been duly sworn, depose and state as follows:

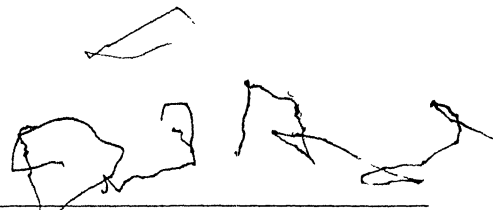
1. At all times relevant herein I was a licensed attorney representing William T. Jacob (“Jacob”).
2. On or about October 26, 2000, I filed the initial complaint herein setting forth a claim for libel. Such complaint had as its basis an October 28, 1999 “election notice” by defendant Bezzant asserting Jacob to be the author of an earlier anonymous bulletin which Bezzant declared to be false, misleading, misinformation and negative campaigning.
3. Based on my many years (more than 15) of representing Jacob, during which I met and communicated with some of his partners, associates, employees, customers, suppliers, competitors, and fellow citizens, I had formed an opinion of Jacob’s reputation. I considered this opinion in assessing the merit of Jacob’s claim. At the time of Bezzant’s notice, my opinion was that Jacob was a longtime resident of American Fork with a reputation as a prominent businessman, religious leader, and citizen. This reputation included a commitment to integrity, honesty, and service. It appeared clear to me that Bezzant’s notice injured and disparaged Jacob’s reputation.
4. I reviewed some of Utah libel case law, including the case of Mast v. Overson, 971 P.2d 928 (Utah Ct. App. 1998). Though the Mast case set a high threshold for libel in the political arena, I believed it to be distinguishable from Jacob’s facts. In the Mast case, the parties

traded insults and name calling in mutual political combat. The Court found the insults not to be defamatory, at least in part, because the public generally expects such political verbal combat to be exaggerated. In Jacob's case, there was no mutual political combat. Jacob's anonymous bulletin questioned Storrs's and Hunter's eligibility to hold public office. Such anonymous bulletin was neither directed to, nor had as its subject, Bezzant. Bezzant's notice came, not from a mutual combatant, but from the editor of the local newspaper, an unprovoked local authority. This distinguishing fact justified, in my mind, giving Bezzant's disparaging remarks their literal defamatory meaning.

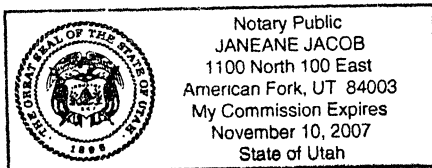
5. I also considered whether Bezzant's disparaging remarks should be protected as editorial opinion. Because Jacob's anonymous bulletin limited itself to the technical question of Storrs's and Hunter's eligibility for public office, the scope of an opposing editorial opinion by a newspaper should have been limited to that subject. Bezzant's naming Jacob as the author and his characterization of the anonymous bulletin as false, misleading, misinformation and negative campaigning was unnecessary and beyond editorial opinion on the subject of eligibility. I believed such excess by Bezzant evidenced an intention to injure Jacob personally.
6. Because Jacob's damages were not easily quantifiable and were continuing to accrue, I did not specify them in the initial complaint. As they accumulated and became more measurable over time, I expected to specify them in discovery, in an amended complaint, or in trial.
7. At the time of filing the initial complaint, I believed Jacob's libel claim had a substantial basis in fact and in case law.
8. I never, on behalf of Jacob or otherwise, acted to punish Bezzant for exercising his first

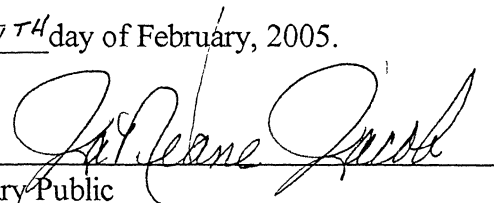
amendment rights. My purpose was to repair Jacob's damaged reputation and to determine Bezzant's motivation for disparaging Jacob. I believe consideration of my actions evidence an attempt to accomplish this purpose with a minimum of expense to Jacob and Bezzant. I did not file the complaint until the eve of the statute of limitations in order to allow Jacob the maximum amount of time to meet and communicate with Bezzant in an effort to settle. After Mr. Hunt's appearance as Bezzant's attorney, I met with Mr. Hunt and proposed a stay of prosecution of the case in order to explore settlement. I also informed Mr. Hunt of my deteriorating health and my intention to withdraw if settlement was not successful. Over the following approximate three months I proposed and discussed a number of formats for settlement with Mr. Hunt. I believe that progress was being made and settlement was possible when Mr. Hunt unilaterally terminated the stay and demanded discovery. I then withdrew as Jacob's counsel.

Dated this 17<sup>th</sup> day of February, 2005.

  
\_\_\_\_\_  
David Aagard  
Affiant

Sworn to and subscribed before me this 17<sup>th</sup> day of February, 2005.



  
\_\_\_\_\_  
Notary Public



Randall K. Spencer (6992)  
**FILLMORE SPENCER, LLC**  
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Counterclaim Defendants  
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Provo, Utah 84604  
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Fax No.: (801) 426-8208

---

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

---

**AFFIDAVIT OF R. BRENT STEPHENS**

WILLIAM T. JACOB, an individual,  
COMMERCIAL PROPERTIES, INC.,  
a Utah corporation; and PHILLIPS  
MANUFACTURING COMPANY, INC.,  
a Utah corporation,

Plaintiffs,

vs.

B. BRETT BEZZANT, an individual,  
NEWTAH, INC., dba AMERICAN FORK  
CITIZEN NEW UTAH, a Utah corporation,  
and DOES I THROUGH X,

Defendants.

Case No. 000403530

JUDGE: FRED D. HOWARD

BRETT BEZZANT, an individual;  
NEWTAH, INC., dba AMERICAN FORK  
CITIZEN NEW UTAH, a Utah Corporation,  
Counterclaimants

vs.

WILLIAM T. JACOB, an individual;  
COMMERCIAL PROPERTIES, INC., a  
Utah Corporation; and PHILLIPS  
MANUFACTURING CO.,

Counterclaim Defendants.

STATE OF UTAH

COUNTY OF UTAH

I, R. Brent Stephens, after being duly sworn, depose and state as follows:

1. I was contacted towards the end of October of 2004 by Mr. Spencer requesting me to provide an affidavit in this matter. In view of the fact that my law firm has withdrawn from the case pursuant to motion and order, I informed Mr. Spencer that I would provide information pursuant to service of a subpoena for deposition or trial.

2. Mr. Spencer contacted me during the last week of January, 2005 and stated that the Court denied his request to take my deposition in connection with pending motions for summary judgment pursuant to Rule 56(f) and requested that I provide this affidavit in view of the fact that a deposition was not possible in connection with resisting the pending motions. In light of the fact that I have a duty to my clients in connection with this matter to avoid possible further prejudice to the client based on my firm's withdrawal, I have agreed to provide this affidavit to fulfill duties and responsibilities under the rules of professional conduct and to promote the fair and efficient administration of justice.

3. I was counsel for Plaintiffs in the above entitled matter from July 9, 2001 until November 6, 2003 when my law firm's motion to withdraw as counsel was granted by the Court

4. I did not represent Plaintiffs in this matter at the time the original Complaint was filed. Upon retention I reviewed the original Complaint and the Rule 26 (a) (1) supporting documents and found it to state a claim for relief and that my review of the facts supported each and every allegation contained therein.

5. I was counsel of record at the time of the filing of the Amended Complaint.

6. In my 33 years of practice, I cannot remember a single case where I engaged in a more exhaustive Rule 11 type investigation prior to filing the Amended Complaint. Between my client and myself, we relied upon volumes of supporting documents and cited facts and/or legal authority in support of every single paragraph in the Amended Complaint. After preparation of the Amended Complaint, I actually noted next to each paragraph the support for each fact and law asserted.

7. I spent hours conducting research on Westlaw gathering legal support for the Amended Complaint and the theories of liability contained therein.

8. Upon submitting the Amended Complaint to defense counsel, they never informed me that it warranted sanctions equivalent to Rule 11 and stipulated to its filing on June 12, 2002. Throughout the course of my representation of Mr. Jacob and the other Plaintiffs, Defense counsel never stated or implied that the Plaintiffs claims were so lacking in merit that they violated Rule 11, were otherwise without merit, or were interposed for an improper purpose.

9. After the filing of the original Complaint, David Aagard, counsel previous to me, was required to withdraw because Defendants ended settlement negotiations, and requested responses to discovery. As I understand and based on a review of the correspondence, Mr. Aagard had previously informed defendants' counsel that if the action did not settle during those negotiations, he would be required to withdraw because of his health. Mr. Aagard had been diagnosed as having Amyotrophic Lateral Sclerosis (Lou Gehrig's Disease).

10. On March 22, 2001, prior to Mr. Aagard's withdrawal and even prior to the filing

of an attorney's planning meeting report, Defendants initiated discovery by serving comprehensive discovery requests on Plaintiff which included detailed interrogatories and requests for production. Based on my experience, such conduct is not consistent with litigation of a complaint now alleged to be so lacking in merit to justify sanctions.

11. After I appeared as counsel, the parties exchanged Rule 26(a) material, and at least five depositions were taken; subsequently, the Amended Complaint was filed on June 12, 2002. Furthermore, the depositions revealed facts which, if believed, supported significant and meritorious claims regarding the conduct of American Fork city officials which violated civil rights of plaintiffs and others under color of law.

12. After I filed the Amended Complaint on June 12, 2002 pursuant to stipulation of opposing counsel, Defendants asserted a counterclaim pursuant to U.C.A. §78-58-105 which is known as the "anti-SLAPP" statute, and similar to the original Answer, asserted that Plaintiffs claims were brought in bad faith and lacked merit among other averments.

13. Prior to the filing of the Amended Complaint, I did submit interrogatories and requests for production to Defendants on or about the 25<sup>th</sup> of July, 2001. Interrogatory 8 (u) & (v) specifically stated: "Identify all facts in your Answer relating to or supporting your allegation: ...(u) in the TWENTY-SIXTH DEFENSE of your Answer that 'plaintiffs' claims are without merit and not brought or asserted in good faith' [and] (v) in the TWENTY-SEVENTH DEFENSE of your Answer that 'plaintiff's lawsuit is without merit and is not brought or asserted in good faith, but instead is a Strategic Lawsuit Against Public Participation (SLAPP)'." In submitting these interrogatories, I wanted to know if the bad faith affirmative defenses were based on any information of which I was not aware and should further examine. Furthermore, I

submitted requests for production numbers 41 & 42 asking for all documents supporting the affirmative defenses 26 & 27 asserting bad faith lack of merit. *See* Answer to original Complaint filed on March 2, 2001; Plaintiffs' First Set of Interrogatories, Requests for Admissions, and Requests for Production of Documents to Defendant submitted on July 25, 2001 and attached as **Exhibit 1** hereto.

14. On December 10, 2001, Defendants submitted their responses to my discovery requests regarding their twenty-sixth and twenty-seventh affirmative defenses which assert bad faith and lack of merit. The defendants did not provide any facts supporting those defenses. The response merely referred to the conclusory allegations of the affirmative defense contained in their Answer and quoted the statute. Finally, Defendants stated, "Discovery is continuing and Newtah anticipates the discovery of additional facts supporting these defenses." No further facts were brought to my attention prior to the counterclaim being filed. *See* Defendants' Response to Plaintiff's First Set of Interrogatories, Requests for Admissions, and Requests for Production of Documents submitted on December 10, 2001 and attached as **Exhibit 2** hereto.

15. Defendants' counterclaim pursuant to U.C.A. §78-58-105 as I understood it after review, never facially asserted that the claims for defamation and false light were "without a substantial basis in fact and law and not supported by a substantial argument for the extension, modification, or reversal of existing law." U.C.A. §78-58-105(a).

16. On August 19, 2002, I filed a petition to remove the matter to federal court in light of the pending claims pursuant to 42 U.S.C. §1983, and my belief that Defendants were utilizing the state SLAPP statute in a manner completely unintended and unwarranted under existing law.

17. I detailed in the Amended Complaint plaintiffs' factually supported claim that Defendant Bezzant was an unwilling instrumentality of certain defendants to intentionally chill first and fourteenth amendment freedoms of the Plaintiffs I represent.

18. In light of the information learned largely through the depositions in this matter, on October 2, 2002, I filed a Federal class action on behalf of a number of citizens of American Fork against American Fork City alleging violations of civil rights of a class defined in the Amended Complaint.

19. On October 10, 2002, I moved to consolidate this case with the Federal Lawsuit because the cases clearly met the threshold test for consolidation under the Federal Rules of Civil Procedure if both cases had remained in federal court.

20. On January 16, 2003, Judge Ted Stewart granted Defendants' Motion to Remand the case back to the State Court and specifically denied Defendants' request for attorney fees finding that we were seeking a good faith extension of existing law regarding removal.

21. There was significant delay in the transferring of files from the Federal Court to this Court. According the Court record, it was not until August 15, 2003 that the transfer occurred.

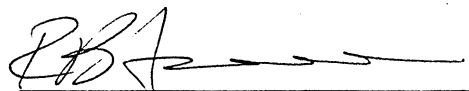
22. On October 24, 2003, I filed a Motion to Stay or, in the Alternative, to Dismiss this Action Without Prejudice. This motion was based upon my conclusion that the proper forum for the major part of the case was in federal court in that the federal claims were more broad than the defamation claim and the remedial relief sought affected the entire relationship between the governmental officials, police force and the citizens of American Fork. The relief sought in the federal class action would also overlap the relief being sought in the Amended

Complaint and I did not want the state court action to go to final judgment that could prejudice the class in the federal action. While the American Fork City Defendants were willing to dismiss this matter (and subsequently were dismissed from the case shortly after I withdrew) the Bezzant Defendants refused after I offered to dismiss them without prejudice.

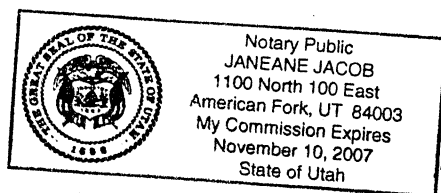
23. On November 6, 2003, my law firm withdrew as counsel in this matter over the clients' objections. I argued on behalf of the client in connection with the motion.

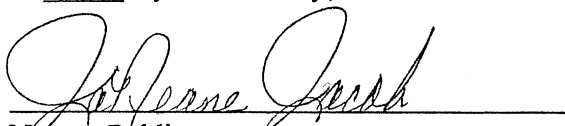
22. I hereby attest that all allegations of the amended complaint were made in good faith after detailed due diligence. I have thirty three years of experience litigating cases in state and federal court and I do not recall a single instance of a motion ever being filed asserting bad faith on any submission I signed under Rule 11.

Dated this 17 day of February, 2005.

  
R. Brent Stephens  
Affiant

Sworn to and subscribed before me this 17<sup>TH</sup> day of February, 2005.



  
Notary Public

Randall K. Spencer (6992)  
**FILLMORE SPENCER, LLC**  
Attorneys for Plaintiffs and  
Counterclaim Defendants  
3301 North University Ave.  
Provo, Utah 84604  
Telephone: (801) 426-8200  
Fax No.: (801) 426-8208

---

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

---

**AFFIDAVIT OF WILLIAM T. JACOB**

WILLIAM T. JACOB, an individual,  
COMMERCIAL PROPERTIES, INC.,  
a Utah corporation; and PHILLIPS  
MANUFACTURING COMPANY, INC.,  
a Utah corporation,  
Plaintiffs,

vs.

B. BRETT BEZZANT, an individual,  
NEWTAH, INC., dba AMERICAN FORK  
CITIZEN NEW UTAH, a Utah corporation,  
and DOES I THROUGH X,  
Defendants.

Case No. 000403530

JUDGE: FRED D. HOWARD

BRETT BEZZANT, an individual;  
NEWTAH, INC., dba AMERICAN FORK  
CITIZEN NEW UTAH, a Utah Corporation,  
Counterclaimants

vs.

WILLIAM T. JACOB, an individual;  
COMMERCIAL PROPERTIES, INC., a  
Utah Corporation; and PHILLIPS  
MANUFACTURING CO.,

Counterclaim Defendants.



STATE OF UTAH:

COUNTY OF UTAH

WILLIAM T. JACOB, being first duly sworn, deposes and states as follows:

1. I am a citizen of American Fork City, over the age of 18, and have personal knowledge concerning the facts set forth herein.

2. On October 26, 1999, pursuant to a long standing agreement of anonymity and a "protected source" agreement, I delivered approximately 6,500 preprinted copies of a "Nonpartisan Citizens Group Information Bulletin" ("Bulletin") to Tom Hollingsworth, advertising manager for Brett Bezzant and Newtah, Inc. ("Original Defendants"), to be distributed as an insert in the *Citizen*. I also delivered a check in the amount of \$162.50 as advance payment in full.

3. I am not the author the Bulletin, and my name was not listed anywhere therein.

4. On October 28, 1999, Bezzant published an "Urgent Election Notice" on the *Citizen* worldwide web site, wherein Bezzant falsely identified me as the author of the Bulletin and further claimed that it contained false and misleading information and misinformation, thereby calling me a liar and exposing me to public hatred, contempt and ridicule. The so-called "Urgent Election Notice" was not on the opinion page of the web site; rather, it was accessible only via an icon entitled, "Election 99". Bezzant also published a door knob style flyer headlined, "Correction and Apology to City Council Candidate Tom Hunter" which contained the same substantive content as the "Urgent Election Notice" (collectively, "Election Notices") and on October 29, 1999, it was distributed by hand-delivery and United States mail to citizens of American Fork.

5. I never gave Bezzant my permission to reveal my identity in association with the

Bulletin. Nor did Bezzant contact me prior to publication of the Election Notices to ascertain the truth of his allegations against me. Rather, he recklessly relied upon information from Tom Hunter and Ricky Storrs, and assumed facts that were not true.

6. During the election campaign of 1999, there was very little media coverage or publicity regarding Tom Hunter's and Ricky Storrs's conflicts of interest caused by their exempt employee status with American Fork City ("City") to seek and hold political office.

7. I have studied American Fork City ordinances that are applicable to the underlying dispute in this case. I am familiar with the provisions therein which expressly state that exempt employees are prohibited from seeking and holding political office for the American Fork City Council.

8. I was present during a deposition when Ricky Storrs testified that he is classified as an exempt employee. I was also present when Tom Hunter, Mayor Ted Barratt, and Kevin Bennett testified that Tom Hunter is an employee benefit consultant to the City. Consultants to the City are expressly classified as exempt employees under City Ordinance #92-05-20. Tom Hunter also testified that he holds a pecuniary interest in the contract between the City and the insurance provider because he receives commissions from the insurance provider. Hunter testified that he was aware that no member, officer, or employee of the City shall have any interest, direct or indirect, in any contract or the proceeds thereof between the City and any provider.

9. I was present during deposition testimony when Tom Hunter testified that in response to the Bulletin, he contacted Bezzant and demanded that Bezzant publish a preprinted "retraction" approved by Hunter's attorney. Otherwise, Hunter threatened Bezzant that he would discontinue his newspaper advertising business with the *Citizen* and sue both Bezzant and me. Furthermore, I did receive a letter from Hunter's attorney threatening to immediately take action

and file a lawsuit against me, attached hereto as EXHIBIT “A”.

10. Prior to the Original Defendants’ recent Motion for Judgment on the Pleadings, Bezzants’ publications that attacked me personally have been referred to only as a “retraction”, an “Urgent Election Notice”, or a “Correction and Apology”, both in the original publications and in the subsequent answers and responses to discovery requests. They were never identified as “editorials”, nor was the claim ever made that they were merely opinion. As such, the public perceived them as formal, authoritative, factual “Election Notices”, “Apologies”, and “Corrections” in response to my alleged “misinformation”, which is precisely how they were designed to be perceived. They were not identified or perceived as mere opinion and commentary.

11. Even if the Election Notices had been identified and published as mere editorial opinion, which they were not, Bezzant’s malicious personal attack and unauthorized use of my name as a “protected source” still exposed me to public hatred, contempt, and ridicule and is still defamatory.

12. Although Bezzant now claims that he felt a “civic obligation” to print the Election Notices, I know from my conversations with Bezzant that what he really felt was fear that at least Tom Hunter would sue him and discontinue advertising in the *Citizen*. Bezzant told me that he had to make a choice of being sued by Hunter or being sued by me. Bezzant also said that Hunter was a valued business client of the *Citizen*, as well as his insurance agent and friend.

13. Moreover, contrary to Bezzant’s recent claim made in hindsight that the content of the Election Notices reflected only his opinion, Bezzant admits that he in fact published the Election Notices only upon the review and express approval of Tom Hunter and Ricky Storrs.

14. My family and I were very upset and embarrassed when Bezzant publicly and falsely

accused me of printing false and misleading misinformation and of being a liar. Both my personal and professional reputation have been damaged as a result of the publication of the Election Notices, which were designed as an artifice to single me out and expose me to public hatred, contempt, and ridicule.

15. I highly value my constitutional rights of freedom of speech and the press, and my right to privacy. I also cherish the rights of all concerned citizens to be actively involved in and contribute to their communities. I have no desire to preclude anyone else from exercising these same rights or from participating in their communities within appropriate constitutional parameters.

16. However, I do not believe that citizens who speak out on community issues should be personally attacked and falsely labeled a liar for doing so, particularly at the behest of public officials/candidates and via malicious, false and defamatory publications that are mis-perceived as authoritative and objective fact, and thus are well beyond the constitutional parameters of fair comment.

17. I filed this action with no desire or motivation to chill or inhibit others' constitutional rights, which rights I value. Rather, I filed this action because I was personally, publicly and unjustifiably attacked in an egregious and malicious manner designed to single me out and expose me to public hatred, contempt, and ridicule. The harm that I have suffered as a result is real and not frivolous. Furthermore, there obviously has been no chilling effect caused by the filing of my Complaint as Original Defendants continue to publish critical and libelous statements about me and my associates. *See*, "American Fork May Want to Consider . . ." by Dave Robinson, *American Fork Citizen*, October 23, 2003, attached as EXHIBIT "B".

18. I have made numerous good-faith, albeit unsuccessful, attempts to resolve my dispute

with Bezzant in a fair and reasonable manner and without court intervention. However, based upon my personal knowledge of the facts in this case, I know that Bezzant has colluded with and permitted himself to be manipulated by public officials in their collective efforts to punish me for my community involvement as a citizen of American Fork. Further and contrary to his claims, Bezzant has never requested that I dismiss this action. Indeed, I have read Bezzant's Affidavit and most of his allegations are not true.

19. Based upon my personal knowledge of the facts underlying this action, my role as a concerned citizen of American Fork, my participation in the distribution of the anonymous Bulletin, and my communications with Bezzant subsequent to publication of the Election Notices, I believe that the primary purpose of the Election Notices, the Counterclaim and the consequent Motion for Judgment on the Pleadings/ Summary Judgment is to prevent, interfere with, and/or to chill my participation and the participation of other concerned citizens in the process of government, including the right to engage in the legitimate public debate regarding various community issues in American Fork City.

20. As a result of Bezzant's malicious and defamatory publication and subsequent and related conduct, including but not limited to his frivolous and groundless anti-SLAPP Counterclaim and Motion for Judgment on the Pleadings, Commercial Properties, Inc., Phillips Manufacturing Company, Inc., and I have incurred substantial attorneys' fees, costs, and expenses.


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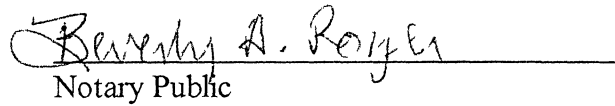
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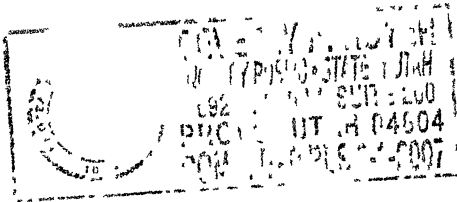
Dated this 7<sup>th</sup> day of February, 2005.

  
William T. Jacob  
Affiant

Sworn to and subscribed before me this 17<sup>th</sup> day of February, 2005.

  
Beverly A. Royer  
Notary Public

My Commission Expires: 03/01/07



Randall K. Spencer (6992)  
**FILLMORE SPENCER, LLC**  
Attorneys for Plaintiffs and  
Counterclaim Defendants  
3301 North University Ave.  
Provo, Utah 84604  
Telephone: (801) 426-8200  
Fax No.: (801) 426-8208

---

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

---

WILLIAM T. JACOB, an individual,  
COMMERCIAL PROPERTIES, INC.,  
a Utah corporation; and PHILLIPS  
MANUFACTURING COMPANY, INC.,  
a Utah corporation,  
  
Plaintiffs,  
  
vs.

**AFFIDAVIT OF RANDALL K.  
SPENCER**

B. BRETT BEZZANT, an individual,  
NEWTAH, INC., dba AMERICAN FORK  
CITIZEN NEW UTAH, a Utah corporation,  
and DOES I THROUGH X,  
  
Defendants.

Case No. 000403530

JUDGE: FRED D. HOWARD

BRETT BEZZANT, an individual;  
NEWTAH, INC., dba AMERICAN FORK  
CITIZEN NEW UTAH, a Utah Corporation,  
Counterclaimants

vs.

WILLIAM T. JACOB, an individual;  
COMMERCIAL PROPERTIES, INC., a  
Utah Corporation; and PHILLIPS  
MANUFACTURING CO.,

Counterclaim Defendants.

STATE OF UTAH

COUNTY OF UTAH

I, Randall K. Spencer, depose and state as follows:

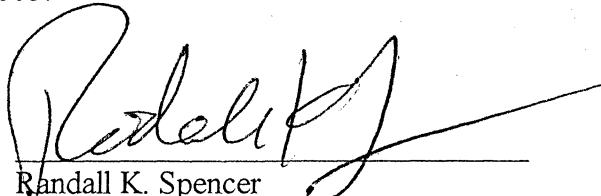
1. I am currently counsel for William T. Jacob and the other Plaintiffs and Counterclaim defendants in the above entitled matter.
2. I was contacted in November of 2003 by Mr. Jacob and was requested to represent him and the other Plaintiffs.
3. Prior to entering an appearance, I reviewed the amended Complaint and hundreds of pages of documents provided to be by Mr. Jacob.
4. I also reviewed the elements of the causes of action, and I was very satisfied that the claims were meritorious pursuant to a Rule 11 of the Utah Rules of Civil Procedure standard.
5. I subsequently signed and submitted Plaintiffs' Memorandum in Opposition to Judgment on the Pleadings and/or Summary Judgment, Plaintiffs' Reply Memorandum in Support of Motion to Dismiss Counterclaim among other pleadings.
6. I am confident that every pleading that has been submitted in this case complies with the standards of Rule 11 and the essentially equivalent language of U.C.A. §78-58-105 (2001).
7. I have spent many hours working with my clients in this matter, and am confident that no improper motives have existed in the pursuit of this litigation.
8. In preparing the Memorandum in Opposition to Judgment on the Pleadings and/or Summary Judgment, Reply Memorandum in Support of Motion to Dismiss Counterclaim among other pleadings, I believed then, and still believe now that the arguments were not



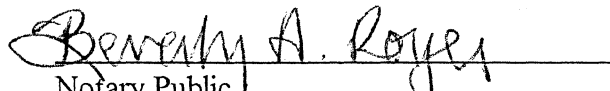
only compliant with Rule 11, but were in fact meritorious such that we should have prevailed at least for purposes of the gatekeeping functions of summary dispositions.

9. It is my further belief that Defendants' motion for sanctions of attorney fees and costs against me and my client for advancing this claim without substantial basis in fact and law and without a substantial argument for the extension, modification, or reversal of existing law is simply wrong.

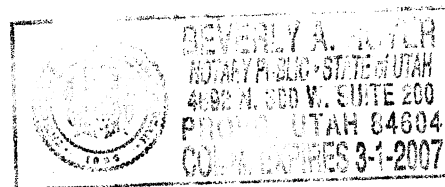
Dated this 17 day of February, 2005.

  
Randall K. Spencer  
Affiant

Sworn to and subscribed before me this 17<sup>th</sup> day of February, 2005.

  
Notary Public

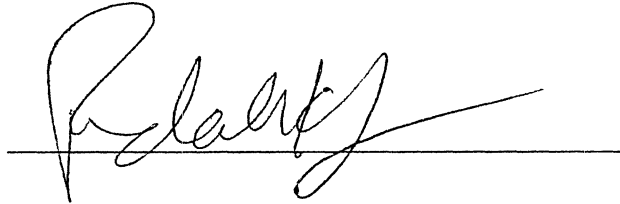
My Commission Expires: 3/01/07



**MAILING CERTIFICATE**

I hereby certify that on the 17 day of Feb, 2005, I caused to be delivered a copy of the foregoing to the following:

Jeffrey J. Hunt, Esq.  
Parr Waddoups Brown Gee & Loveless  
185 South State Street, Suite 1300  
Salt Lake City, Utah 84111  
Fax: 801-532-7840

A handwritten signature in cursive script, appearing to read "Parr Waddoups", is written over a horizontal line.

Tab I

**FILED**  
Fourth Judicial District Court  
of Utah County, State of Utah  
1/12/06 nm Deputy

**IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH**

WILLIAM T. JACOB, an individual;  
COMMERCIAL PROPERTIES, INC., a Utah  
corporation; and PHILLIPS  
MANUFACTURING COMPANY, INC., a  
Utah corporation,

Plaintiffs,

vs.

B. BRETT BEZZANT, an individual,  
NEWTAH, INC., dba AMERICAN FORK  
CITIZEN NEW UTAH, a Utah corporation,  
and DOES I THROUGH X,

Defendants.

BRETT BEZZANT, an individual; NEWTAH,  
INC., dba AMERICAN FORK CITIZEN  
NEW UTAH, a Utah Corporation,

Counterclaimants,

vs.

WILLIAM T. JACOB, an individual;  
COMMERCIAL PROPERTIES, INC., a Utah  
Corporation; and PHILLIPS  
MANUFACTURING CO.,

Counterclaim Defendants.

**RULING RE: PLAINTIFFS'  
MOTION TO RECONSIDER**

Case # 000403530

Judge Fred D. Howard

Division 5

This matter comes before the Court on Plaintiffs' submission of a *Motion to Reconsider*  
*Court's Rulings on Summary Judgment and/or Judgment on the Pleadings and Summary Judgment*

*on Defendants' Counterclaim.* The Court, having reviewed the file and being fully advised in the premises, hereby issues the following ruling.

### **RULING**

The Court notes that Plaintiffs filed a Motion to Reconsider with an accompanying memorandum on October 7, 2005. On October 27, 2005, Defendants filed a Memorandum in Opposition to Plaintiffs' Motion. Plaintiffs filed a Response on November 8, 2005 and Defendants filed a Request to Submit for Decision on November 17, 2005. The Court notes that Plaintiffs have requested a hearing on the issue of reconsideration. The Court declines to grant this request due to the fact that the Court is well familiar with the issues and the facts of this case. The Court has reviewed its notes and previous Ruling on this issue and the parties' memoranda and does not consider a hearing to be necessary in order to decide the issues before the Court.

Plaintiffs assert that the Court should reconsider its Ruling of September 16, 2005 because the Court ruled on Defendant's Motion for Partial Summary Judgment prior to considering Plaintiffs' supplemental authority and that the law cited by Plaintiffs is dispositive and demonstrates that the anti-SLAPP Act does not apply to the facts of the present case. Defendants argue that a Motion to Reconsider is inappropriate and not contemplated by the Utah Rules of Civil Procedure. Defendants argue that Plaintiffs have not offered any new facts, new law, or new argument that has not already been exhaustively considered.

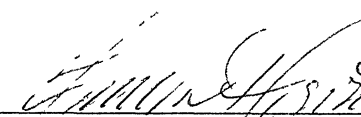
The Court first notes that Plaintiffs' Motion to Reconsider Court's Rulings is inappropriate under the Utah Rules of Civil Procedure for the simple reason that no such motion exists. The Utah Supreme Court has long held a motion for reconsideration to be improper. *Utah State Employees Credit Union v. Riding*, 469 P.2d 1, 3 (Utah 1970) ("We are unaware of any such motion under our rules"). The Utah Supreme Court has also declared that "a motion to reconsider the final judgment of the district court [is] a motion which is not provided for under the Utah Rules of Civil Procedure and which has never been recognized as a proper motion in this state. *Wisden v. Bangerter et al.*, 893 P.2d 1057, 1058 (Utah 1995). In order to prevent litigants from endlessly requesting a court to reverse itself, the Utah Supreme Court does not allow such a motion. In the interest of judicial economy and finality, the Utah Supreme Court has held that a motion to reconsider is not a valid motion. *Drury v. Lunceford*, 415 P.2d 662 (Utah 1966).

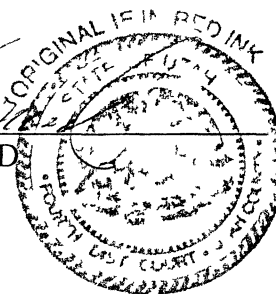
The Utah Supreme Court has held that a motion for reconsideration after a summary judgment ruling can be considered a motion for a new trial under Rule 59. *Watkins & Campbell v. Foa & Sons*, 808 P.2d 1061, 1064 (Utah 1991). In order for the motion to be granted, however, the movant must demonstrate that one of the requirements for a new trial are met, which are as follows: (1) irregularity in the proceedings of the court, (2) misconduct of the jury, (3) accident or surprise, (4) newly discovered evidence, (5) excessive or inadequate damages, (6) insufficiency of the evidence, or (7) error in law.

Plaintiffs have failed to produce evidence that would satisfy any of the above requirements to justify the Court granting a new trial. The Court respectfully disagrees with the arguments of Plaintiffs in their Motion to Reconsider, which issues and arguments are the same as previously considered. As Defendants note in their Opposition Memorandum, the entire basis of Plaintiffs' reconsideration motion was discussed at oral argument and directly rejected by this Court in its Ruling of September 16, 2005. In a motion for a new trial, the movant cannot simply reiterate the same arguments that failed previously and expect the Court to rule in its favor. The Court is unpersuaded to change its analysis or ruling. Having reached such conclusion, the Court respectfully denies Plaintiffs' Motion to Reconsider.

Dated this 12<sup>th</sup> day of January, 2006.

BY THE COURT:

  
JUDGE FRED D. HOWARD  
District Court Judge



### CERTIFICATE OF DELIVERY

I certify that true copies of the foregoing Ruling were delivered on the 12 day of ~~September, 2005~~ January 2006 to the following in the manner indicated, to wit:

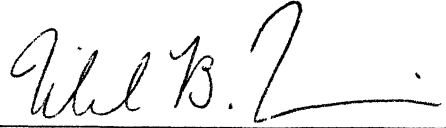
**by U.S. first class mail**

Counsel for Plaintiffs:

Randall K. Spencer  
FILLMORE SPENCER, LLC  
3301 North University Ave.  
Provo, Utah 84604

Counsel for Defendants:

Jeffrey J. Hunt  
David C. Reymann  
PARR WADDOUPS BROWN GEE & LOVELESS  
185 South State Street, Suite 1300  
Salt Lake City, Utah 84111

  
\_\_\_\_\_  
Deputy Court Clerk