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The Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Thomas C. Horne; Bruce R. Wisan; Mark Shurtleff; and Hon. Denise Posse Lindberg; et al. : Reply Brief of Appellee

Utah Supreme Court

IN THE UTAH SUPREME COURT

FUNDAMENTALIST CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, Plaintiff and Appellee, v. THOMAS C. HORNE; BRUCE R. WISAN; MARK SHURTLEFF; and HON. DENISE POSSE LINDBERG; et al., Defendants and Appellants.	Case No. 20120158-SC

RESPONSE BRIEF OF APPELLEE

Review of Question of Law Certified by the
United States Court of Appeals, Tenth Circuit

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I. THE CERTIFIED QUESTION IS A LEGAL QUESTION WHICH DOES NOT REQUEST OR REQUIRE THIS COURT TO CLARIFY THE *LINDBERG* DECISION

As Appellee showed in its opening brief, the Tenth Circuit did not ask this Court to tell it whether *Lindberg* precluded Appellee's federal action. As Appellee suspected they would, however, Appellants overwhelmingly focus on that question. None of the Appellants makes any effort to describe a principled basis upon which this Court might rewrite the certified question to permit this Court to revisit *Lindberg* in the fashion they advocate. No such authority exists, because both the Utah Constitution and this Court's rules limit this Court's jurisdiction to answering the question of law presented. UTAH CONST., art. VIII, § 3; UTAH R. APP. P. 41; *Burkholtz v. Joyce*, 972 P.2d 1235, 1236 (Utah 1998).

Appropriate distinction must be made between the question before the Tenth Circuit—whether *Lindberg* precludes Appellee's claims under *res judicata* principles applicable in the federal system—and the certified question before this Court. That question centers on the preclusive effect in the Utah court system of denial of a petition for extraordinary writ under Utah law when the denial is accompanied by a written opinion. Most of Appellants' arguments should be made to the Tenth Circuit, because the issues they discuss are beyond the scope of this Court's jurisdiction on the certified question.

On the abstract legal question, Appellants focus their energy on their argument that this Court need not resolve the underlying merits of a dispute for preclusion to attach.

Appellee has not advanced a contrary argument in this case, as it is well-settled that preclusion can attach when the underlying dispute is placed off-limits by, for example, a statute of limitations. Such dismissals, however, are procedural, barring the remedy but not the right. *Lee v. Gaufin*, 867 P.2d 572, 575 (Utah 1993). Thus, a statute of limitations dismissal may close the doors to actions in the same system of courts, but the doors remain open in a different system of courts with a different statute of limitations, because the remedy but not the right has been barred.

Neither is it disputed that under proper circumstances, a laches dismissal of an extraordinary writ petition may bar the underlying claim, although the Appellants' primary reliance on *Gates v. Taylor*, 2000 UT 33, 997 P.2d 903, is misplaced. *Gates* narrowly holds that the denial of a writ bars pursuit of the same writ in another court of the state.

These statements of general law, however, leave the Tenth Circuit's question unanswered. Appellee has argued that the proper answer to the certified question is that the preclusive effect of dismissal of an extraordinary writ petition on laches grounds is contextual, and depends on such factors as the nature of the underlying claim against which the defense is asserted; the procedural context in which the claim and defense are asserted; the extent to which the claim and defense are analyzed; and whether an evidentiary record was developed on which the facts necessary to establish the defense could be grounded. The determination does not turn upon the presence of a written opinion. Factors informing the analysis include the nature of the record before this Court on the extraordinary writ; the party status of the petitioner in the creation of that record; whether the decision is based on adjudicated facts in the record; whether a true and thorough lach-

es analysis was applied, including balancing of all competing interests; and "whether it affirmatively appears the denial was intended to be on the merits." *Kennecott Copper Corp v. Salt Lake County*, 575 P.2d 705, 708 (1978).

These questions must addressed without attempting to revisit the *Lindberg* decision. As Appellee argued in its opening brief, it would be a misuse of the certification process to ask this Court to decide the preclusive effect of one of its past decisions in a federal case. When preclusive effect is at issue, the "first court does not get to dictate to other courts the preclusion consequences of its own judgment." 18 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 4405, at 82 (2007); *accord Smith v. Bayer Corp.*, 131 S.Ct. 2368, 2375 (2011) ("Deciding whether and how prior litigation has preclusive effect is usually the bailiwick of the *second* court.") (emphasis in original).

II. A LACHES DISMISSAL IN ONE CONTEXT CANNOT HAVE ABSOLUTE, *PER SE* PRECLUSIVE EFFECT IN ALL OTHER CONTEXTS.

Appellee does not argue that a laches dismissal can never be on the merits for purposes of *res judicata*. But Appellants' converse proposition, that a laches dismissal is always on the merits, is not true either. Instead, as noted above, whether a particular laches dismissal has preclusive effect depends on such factors as the nature of the underlying claim against which the defense is asserted; the procedural context in which the claim and defense are asserted; the extent to which the claim and defense are analyzed; and whether an evidentiary record was developed on which the facts necessary to establish the defense could be grounded. This is due in substantial part to the fact that laches is an affirmative defense that depends on proof of facts. *See Crompton v. Jenson*, 78

Utah 55, 1 P.2d 242, 247 (1931) ("[T]he burden is on the defendant to show . . . that extraordinary circumstances exist which require the application of the doctrine of laches . . . .").

The *Day v. Estate of Wiswall* case, 93 Ariz. 400, 381 P.2d 217 (1963), illustrates both the factual nature of a laches defense and the necessity of evidentiary findings as to its basis for it to have preclusive effect. The Arizona court held: "The judgment in the California suit was not one of dismissal, but, after a full hearing and consideration of evidence and a finding of laches as a fact, was that the plaintiff take nothing by reason of the actions. It was therefore a judgment on the merits." 381 P.2d at 220 (emphasis added).

The *Johnson v. City of Loma Linda* case, 24 Cal.4th 61, 99 Cal. Rptr. 2d 316, 5 P.3d 874 (2000), also illustrates the various factors that must be considered in assessing the preclusive effect of a laches dismissal. The court there described the laches decision from the first case as a "now-final factual finding" on the claim against which the defense was asserted. 5 P.3d at 879. Like Utah courts, California courts view the affirmative defenses of laches and statute of limitations as barring the remedy but not the underlying right. *See id.* at 884; *compare Lee v. Gaufin*, 867 P.2d 572, 575 (Utah 1993) ("Statutes of limitations are essentially procedural in nature and establish a prescribed time within which an action must be filed after it accrues. They do not abolish a substantive right to sue, but simply provide that if an action is not filed within the specified time, the remedy is deemed to have been waived . . . ."). Applying this view, *Johnson* held that a claim based upon a different legal theory survived the laches bar of a different cause of action based upon the same facts.

Both *Day* and *Johnson* correctly view laches as an affirmative defense that must be established factually by applying evidence in the record to the nature and circumstances of the claims.

Given the factual nature of the laches defense, perhaps it is not surprising that Appellants' briefs focus heavily on alleged "reliance interests" that were created between October 2006, when the trust was reformed, and August 2008, when the FLDS first moved to intervene. There are two problems with that focus, however. First, it attempts to draw this Court beyond the scope of the certified general question of law to the specific question of the preclusive effect of this Court's *Lindberg* decision in the federal court litigation. Second, it reveals that the asserted "reliance interests" are conjectural and unsupported by underlying evidence. In this respect, it underscores Appellee's position on the certified question: Because laches is fact-intensive, its preclusive effect depends in part on whether there is an evidentiary basis for any necessary factual findings.

At pages 12-13 of their brief, Appellants Lindberg and Wisan refer to five categories as supporting the reliance claims. First, they assert that the Intervenors settled their claims for "nominal" damages in reliance on the perceived virtues of the reformation to those individuals. The record shows, however, that the settlements were not nominal. The Intervenors received 21.15 acres of land in the Maxwell Canyon portion of Hildale, $100,000 was paid to their attorneys, and a $250,000 fund was established in their name and initially placed under the control of their attorneys. (App. 4684-86.) The Intervenors' self-serving, post-hoc claims that they settled because they had achieved vir-

tuous non-monetary goals are unsupported by any evidence: the record citations are to the Intervenors' complaint and the settlement agreement.

Second, Lindberg/Wisan assert that Wisan dissuaded others from suing, "presumably because Jeffs was no longer in control." (Lindberg/Wisan Brief, pp. 12-13.) Here, the word "presumably" signals a lack of evidentiary support, and indeed the record citations are to an unsworn report of the Fiduciary prior to the reformation of the trust that "it is hoped that the prospect of [reformation] will cause former occupants to refrain from initiating litigation against the Trust and its property" (App. 2176), and a letter from Trust attorney Shields to a claimant's attorney who wanted to revisit the litigation of the 1980s (App. 6095-96).

Third, Lindberg/Wisan assert that the "private beneficiary petitioners" dropped their challenges to the 1998 Trust Restatement. (Lindberg/Wisan Brief, p. 13.) Again, the record citations are misleading: the first two are to one unsworn petition for suspension of the trustees and appointment of a fiduciary filed by three individuals in May 2005 (App. 5204, 5208-09), and the final citation is to an unsworn "Notice of Interested Parties and Response to Petitions" filed by the individuals who later came to be referred to as the Intervenors (App. 5219-20). In the laches balance, it is difficult to see how claims by three individuals, first asserted seven years after the Trust Restatement, would be important reliance interests which outweigh (despite their rejection by the fiduciary in the cited letter) the FLDS Association's constitutional challenge, brought less than two years after the reformation.

Fourth, Lindberg/Wisan assert that "other people relied" on the reformation. (Lindberg/Wisan Brief, p. 13.) This gross generalization is so broad as to be meaningless. It is not even limited as to time. Indeed, of the three record citations offered in support, one is to the statement of a Wisan employee who claims to have relied on Wisan's appointment, not the reformation. (App. 2059.) Another is to a declaration and related legal memorandum of a person whom Wisan installed to operate a dairy farm, but who also claims no special reliance on the reformation. (App. 4905-07, 4919-22, 4924-42.) The final citation is to a statement of an individual who claims general reliance on the reformed trust, unspecified as to time or nature and with no claim of prejudice. (App. 2048.)

Fifth, Lindberg/Wisan cite to a "more detailed summary" contained in the federal record. That summary, however, is nothing more than the unsupported statement of facts contained in a legal memorandum filed by Wisan in the federal district court. It is supported by no affidavit or other reference to admissible evidence, and thus is simply an argument in search of a foundation.

This Court may search the record in vain for evidentiary support for the claims made in Appellants' briefs. None is cited. Even if an evidentiary record had been made, it would not help Appellants meet their burden of proof of the affirmative defense of laches, because the FLDS were not parties, were not allowed to present their evidence in any forum, and are simply not bound by the probate court's actions.

Despite these flaws in their analysis, Appellants make the remarkable argument that this Court, in *Lindberg*, made detailed factual findings of its own. (*E.g.*, Lind-

berg/Wisan Brief, pp. 2, 16, 25; Shurtleff Brief, pp. 16-17; Intervenors Brief, p. 5.) Appellants' complete failure to cite any admissible evidence in support of their claims—let alone an evidentiary record to which the FLDS had an opportunity to contribute and cross-examine—exposes the fallacy of the entire foundation upon which their *res judicata* argument is constructed.

Insofar as the foregoing discussion relates to the certified question, what it shows is that, while the reliance claims may have been sufficient to dissuade this Court from exercising its discretionary jurisdiction, that does not automatically mean they were sufficiently supported to establish laches as an evidentiary fact for *res judicata* purposes in a different court exercising mandatory jurisdiction over the underlying substantive claims. This was the reason the federal district court was able to independently assess Appellee's claims.

III THE FEDERAL COURT CAREFULLY AND CORRECTLY ANALYZED THE PRECLUSIVE EFFECT THAT SHOULD BE GIVEN TO *LINDBERG* IN THE FEDERAL COURT SYSTEM.

Continuing their effort to have this Court not answer the certified question but instead tell the Tenth Circuit how it should view the preclusive effect of *Lindberg,* Appellants attempt to create a caricature of the federal district court's process as being shallow and insufficiently respectful of this Court's handling of the case. The Intervenors inaccurately claim that the decision was based on a "false premise" that laches cannot apply unless the merits are affirmatively considered. (Intervenors' Brief, p. 4.) Appellants Shurtleff and Horne, while not directly attacking the decision, pursue the same line of argument. Appellants Lindberg and Wisan assert that the federal district court adopted a

minority position and felt that this Court "did not pay appropriate attention to the merits . . . ." (Lindberg/Wisan Brief, p. 18.)[1]

Again, Appellee reiterates its basic position that opining as to the preclusive effect of *Lindberg* in the federal court proceedings is beyond the certified question and beyond this Court's jurisdiction. But accepting Appellants' invitation to review the federal district court's approach, any fair-minded consideration shows that not only did it properly analyze the law with respect to the preclusive effect of laches generally, it also understood that whether a particular decision has preclusive effect is a function of the underlying claims, facts and circumstances, including whether the underlying claim relates to an ongoing violation of some kind.

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[1] Judge Lindberg also makes the irrelevant accusation that Judge Benson threatened to send the U.S. Marshalls to arrest her. (Lindberg/Wisan Brief, p. 21.) Although irrelevant, this assertion appears to have been included in the brief as part of the caricature of Judge Benson as insufficiently respectful of the state court system. In fact, however, he did not threaten to send the Marshalls, and displayed a measured response to Judge Lindberg's deliberate disobedience of his order:

> [O]n April 11, 2011, Defendant Lindberg issued a four-page written order . . . expressly stating that she will not abide by this court's preliminary injunction order. In addition, she has instructed Defendant Wisan . . . to violate the preliminary injunction order by not turning over the assets, documents, or anything else pertaining to the trust until she orders otherwise.
>
> . . . Rather than seek [a stay] from this court, Judge Lindberg has declared that she will resist and disobey this court's lawfully entered order. Accordingly, Defendant Judge Lindberg is hereby ordered to appear and show cause, if any, why she should not be held in contempt of court for failing to abide by this court's preliminary injunction order and for ordering Defendant Bruce Wisan to also violate the preliminary injunction order. (App. 4952.)

The federal district court's analysis was thorough, informed and sensitive to the differences between this Court's duty in considering a discretionary writ and its own duty in exercising mandatory jurisdiction over federal constitutional claims. It first engaged in an independent laches analysis (App. 51-56), including detailed consideration of the various reasons for delay (App. 52-53), and particular consideration of the fact that the state was continuing to administer the UEP Trust pursuant to the Reformation (App. 52.) It concluded:

> These circumstances do not amount to the type of inexcusable delay that supports the dismissal of plaintiffs' claims of serious constitutional violations on the basis of laches. This is particularly the case with respect to the state's continuation of its administration of the Trust. While it is true the plaintiffs could have acted sooner, their reasons and actions under all the circumstances have not been sufficiently unreasonable to warrant a finding of laches. (App. 54.)

The federal district court also examined the alleged injury caused by the delay. It first noted that in the federal case the defendants made literally no effort to defend the constitutionality of the state's actions:

> The court finds it interesting, and somewhat telling, that the defendants' responses to the plaintiffs' constitutional challenges are so tepid as to be nearly nonexistent. In extensive briefing in this case, the defendants cite no case that is even suggested to be remotely similar enough to the instant case to support their defense. This is because there isn't one. (App. 39.)

Concluding, therefore, that the constitutional claims were meritorious and important, that court looked for evidence which would, in the equitable balance, justify extinguishing plaintiff's important constitutional claims, again with particular emphasis on the fact that the claimed constitutional violations were ongoing:

> On the present state of the record, it would be inequitable in the extreme to dismiss this case in its entirety on the basis of laches and thereby allow these serious constitutional violations to multiply and get worse. . . . . To apply laches in this situation would be to place the violation of the First Amendment behind the fees and expenses of the very state actors, and those of the (mostly) former, and now disaffected, members of the FLDS church who have encouraged the state actors to take over the Trust. (App. 55-56.)

Having concluded that the laches defense had not been factually established, the federal district court then turned to the *res judicata* issue. Far from adopting a minority position, the court concluded that the issue does not turn on rigid application of a bright-line rule, but rather that it must be decided contextually. The court noted the procedural context of *Lindberg*, in which this Court was not obligated to accept jurisdiction and thus not obligated to factually resolve the laches defense. It concluded that for the dismissal to be preclusive, there must have been "some appropriate attention paid to the merits." (App. 62.) It based this conclusion on its reconciliation of the two primary cases cited by the parties—the same cases cited by the Tenth Circuit, *Day v. Estate of Wiswall*, 93 Ariz. 400, 381 P.2d 217, 220 (1963); and *Johnson v. City of Loma Linda*, 24 Cal.4th 61, 99 Cal. Rptr. 2d 316, 5 P.3d 874 (2000).

Specifically, the federal district court noted that in *Day*, the first court had made a finding of laches "[a]t the conclusion of a trial 'upon the facts'" (App. 59-60), whereas in *Johnson* laches was applied "based only on a consideration of (1) delay by the plaintiff and (2) prejudice to the defendant (and third parties)," without balancing the merits of the suit and the relative harm to the plaintiff (App. 63). *Res judicata* did not attach to the laches decision in *Lindberg* because "the Utah Supreme Court focused solely on delay

and prejudice (to the defendants) and nothing more," *i.e.*, without considering the relative harm to the plaintiffs in the equitable balance. (*Id.*)

It is clear from the foregoing that, contrary to Appellants' argument, the federal district court did not adopt (and Appellees do not advocate) a rule requiring resolution of the underlying merits before *res judicata* can attach to a laches dismissal. Instead, what is required is a full resolution of the affirmative defense of laches on the merits. In *Day*, the Arizona court followed exactly that rule, holding: "The judgment in the California suit was not one of dismissal, but, after a full hearing and consideration of evidence and a finding of laches as a fact, was that the plaintiff take nothing by reason of the actions. It was therefore a judgment on the merits." 381 P.2d at 220 (emphasis added).

From the federal district court's perspective, *Lindberg* had simply not fully resolved the merits of the laches defense as that court was required to do in the exercise of its mandatory jurisdiction. The court repeatedly returned to this Court's statement in *Lindberg*:

> In determining whether to apply the doctrine of laches, we consider the relative harm caused by the petitioner's delay, the relative harm to the petitioner, and whether or not the respondent acted in good faith.

FLDS v. Lindberg, 2010 UT 51, ¶ 28 (emphasis added) (citing *Papanikolas Bros. Ents. v. Sugarhouse Shopping Center Assoc.*, 535 P.2d 1256, 1260 (Utah 1975)).

The essence of the federal district court's decision was that resolution of the merits of the laches defense required assessment of "the relative harm" to the petitioners if they were not allowed to pursue their claims. Relative harm could not be considered without an assessment of the strength of the underlying claims on their merits:

> Under this definition [of laches], the court recognizes an obligation to perform an assessment of the merits of the plaintiffs' case in addition to the factors of delay and prejudice to others. (App. 61.)

Each of the Appellants' briefs ignores the balancing requirement of *Papanikolas Bros.* and incorrectly focuses exclusively on injury to the defendants. (Lindberg/Wisan Brief, pp. 15, 32, 39; Shurtleff Brief, pp. 10, 12, 15; Horne Brief, pp. 12-13; Intervenors Brief, *passim*.)

Of course, in the context of extraordinary writ jurisdiction, the relative harm was comparatively less because only that *remedy* was being denied. If the underlying *rights* were being extinguished as well, then one would expect a discussion of the relative harm of such a decision in the Court's opinion, along with an evidentiary basis for finding harm to the defendants, but there was none. That, along with this Court's explicit statement that "[w]e decline to reach the merits of plaintiff's claims," caused the federal district court to conclude that the finding of laches barred only the remedy of extraordinary writ, and did not preclude the federal court from exercising its independent jurisdiction to address the underlying cause of action.

One further contextual aspect of this case, explicitly addressed by the federal district court, underscores why a *per se* rule cannot automatically extend a laches dismissal made in one context to any other context in which the underlying claim might be made. That aspect centers on the fact that the underlying claim here involves an ongoing structural violation of the Constitution.

As the federal district court noted, this is not a case with a beginning and an end: Given the nature of the underlying claim, a case exists so long as the constitutional viola-

tions continue. Where laches is raised as a bar to a particular *remedy,* that does not mean it must stand as a bar to the underlying *claim*, particularly where the claim did not just arise in the past, but out of a continuing, every-day occurrence.

Moreover, as Appellee demonstrated in its opening brief, it is well established that secular courts lack any jurisdiction or authority to adjudicate legal disputes that turn on the resolution of questions of church governance, theology, or practice. This structural bar is absolute, not only because of a fear that secular courts will reach incorrect decisions about such matters, but also because even the bare inquiry into such matters is coercive and entangling. *E.g.*, *NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979); *Tomic v. Catholic Diocese*, 442 F.2d 1036, 1038 (7th Cir.), *cert. denied*, 549 U.S. 881 (2006).

The structural nature of this constraint may not require a court to exercise purely discretionary jurisdiction, but it prevents application of the affirmative defense of laches to bar the underlying substantive claim. Delay in bringing a challenge does not give the government power the constitution otherwise denies it. Consider the Affordable Care Act: The creation of huge reliance interests following passage of the law has not prevented the U.S. Supreme Court from considering a structural challenge to that law as exceeding Congress's powers. Consideration of the context in which the underlying substantive claims arose in this case thus provides a further, conclusive basis for rejecting the *per se* rule that laches dismissal is always preclusive: if that context involves a structural constitutional violation—a violation that has been raised, but deferred, in a pending fed-

eral court challenge—laches simply cannot preclude the federal court's exercise of its mandatory jurisdiction to hear that claim.[2]

In other words, the Establishment Clause absolutely bars secular courts and government generally from exercising their authority in any way that answers, depends upon, or otherwise involves a question of church governance, theology, or practice.[3] If this kind of fundamental, structural violation is at issue, while a specific remedy may be sought too late, that does not mean that any and all claims that it should be stopped must automatically be barred as well. This is simply one example, which happens to arise from the particular claim, context, facts and circumstances of this case, of why the Appellants' urging this Court to adopt a new *per se* rule giving laches dismissals automatic preclusive effect is unwise, unworkable and unsupportable.

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[2] A more complete discussion of this issue is contained at App. 2911-25.

[3] Carl H. Esbeck, *The Establishment Clause As a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 42-43 (1998):

> Many courts, facing cases involving intrachurch disputes, determine that they cannot hear the matter because adjudication will inevitably entail resolving questions of religious doctrine. [] These courts are correct to dismiss for lack of jurisdiction or otherwise abstain .... Jurisdiction, of course, concerns the scope of a court's power as defined by the Constitution. These courts could just as well have "reached the merits" and held that the Establishment Clause bars courts from resolving an intrachurch dispute. By "reaching the merits" these courts do not actually hand down a substantive resolution of the spiritual issue dividing the litigants. Rather, the courts conclude that the Establishment Clause denies them the power to adjudicate the dispute.

IV. THE VARIOUS "BRIGHT LINE" RULES ADVOCATED BY APPELLANTS ARE SIMPLY INCORRECT STATEMENTS OF THE LAW.

Appellants Lindberg and Wisan assert that all laches dismissals are judgments on the merits regardless of procedural or factual context, and regardless of what the court says in the process. Appellant Horne advocates the same rule, although placing his reliance on UTAH R. CIV. P. 41(b). Appellant Shurtleff fails to provide any answer at all to the general legal question presented, instead focusing all of his argument on the *Lindberg* decision which, as noted above, is not the certified question. The Intervenors make essentially the same argument as Appellant Shurtleff, although couched as usual in their overheated rhetoric about the FLDS Church.

The *res judicata* issue in this case, as a legal issue, comprises two different parts. First is the question whether a laches dismissal in general must necessarily be viewed as a decision on the merits, as argued by Appellants Lindberg, Wisan, and Horne. Second is the question actually asked by the Tenth Circuit, whether refusal to consider an extraordinary writ petition on grounds of laches is simply the refusal of a remedy, or an extinguishment of the underlying right the petitioner sought to have reviewed. The Appellants' briefs do not adequately answer these questions.

A. *Appellants' Own Authorities Confirm That Laches Dismissals of Petitions for Extraordinary Writs Are Not Necessarily Preclusive.*

Despite Appellants Lindberg and Wisan's initial argument that all laches dismissals are "on the merits," Appellants—including Lindberg/Wisan later in their brief—seem to accept the proposition that the *res judicata* effect of any laches dismissal—

including dismissal of a petition for extraordinary writ—is contextual. Thus, the rule of *Kennecott Copper Corp. v. Salt Lake County*, 575 P.2d 705, 708 (Utah 1978), applies (with or without written opinion by virtue of the repeal of the constitutional provision requiring written opinions):

> A judgment denying a writ of prohibition without written opinion is not res judicata unless the sole possible ground of the denial was that the court acted on the merits, or unless it affirmatively appears the denial was intended to be on the merits.

Id. at 707-08.

Thus, the question comes full circle back to whether the prior decision was "on the merits," which again is contextual. The A.L.R. annotation cited by the Appellants recognizes the same rule:

> It is axiomatic that the doctrine will not operate unless the judgment was rendered upon the merits, and in several cases the courts have declined res judicata effect to judgments denying a writ of mandamus, and to judgments denying a writ of prohibition, where the judgment was not rendered upon the merits of the application. A difficulty arises in determining whether the disposition was or was not upon the merits where the judgment denying either writ was rendered without opinion. In such cases the courts have ruled that the denial is not res judicata unless the sole possible ground of the denial was that the court acted on the merits, or unless it affirmatively appears that such denial was intended to be on the merits.

Annotation, *Judgment Granting or Denying Writ of Mandamus or Prohibition As Res Judicata*, 21 A.L.R. 3d 206, § 2 (1968).

Appellants Lindberg and Wisan leap over the primary question whether the decision was on the merits. They make the tautological point that if it is "on the merits" then *res judicata* attaches (Brief, p. 36.) This, of course, begs the question, and the Appellants' briefs provide no guidance as to how the second court is to decide whether the first

court's decision was "on the merits" for this purpose. The cases they cite, however, clearly support Appellee's argument that the determination requires looking at procedural context, the depth of analysis, and whether an evidentiary record was developed in the prior case upon which the factual underpinnings of the defense could be grounded.

In *Meagher County Newlan Creek Water Dist. v. Walter*, 169 Mont. 358, 547 P.2d 850 (1976), for example, the first case had challenged a water district's right to condemn. "This Court denied the relief sought because briefs and oral argument demonstrated there was no merit to Appellants' contention under Montana law." 547 P.2d at 850. In other words, there was no question that the merits had been reached in the first case, which was why in the second case *res judicata* prevented those merits from being revisited. *Id.* Similarly, in *Ramirez-Pabon v. Board of Personnel of Puerto Rico*, 254 F.2d 1 (1st Cir. 1958), it was not disputed that the first judgment—which turned on a legal issue not a factual one—was on the merits, the only question being whether the court that entered it had jurisdiction to do so. 254 F.2d at 4. The same is true of *City of Elmhurst v. Kegerreis*, 392 Ill. 195, 64 N.E.2d 450 (1946), where a writ of mandamus was granted on the merits against the City in the first case challenging the legality of a zoning ordinance, and the City filed a second case against the same party in the same system of courts attempting to raise the same legal issue. 64 N.E.2d at 455. Finally, *State ex rel. Hamilton v. Cohn*, 1 Wash 2d 54, 95 P.2d 38 (1939), stands for the proposition that "if an order or judgment may have been rested on either one of two grounds, one going to the merits and the other not, it is generally considered as resting on the issue that did not go to the merits . . . ." *Gable v. Allen*, 25 Wash 2d 186, 169 P.2d 699, 700 (1946); *see* 95 P.2d at 43.

With the exception of *Hamilton*, these cases are all distinguished from the present case on the ground that in those cases the "on the merits" nature of the prior adjudication was not in dispute. In the present case, in contrast, there was never an evidentiary inquiry into the factual basis for the laches claim. Thus, rather than support the Appellants' argument that an extraordinary writ dismissal is always on the merits, the cases actually support Appellee's contention that such a dismissal does not have *res judicata* effect unless it occurred in a context where the merits could be and were addressed and, if factually based, the facts could be and were resolved. It is an application of the *Hamilton* presumption against resolution on the merits where alternative grounds are present.

Finally, this Court's *per curiam* decision in *Gates v. Taylor*, 2000 UT 33, 997 P.2d 903 follows the same rule. The Court gave the prior decision of the Court of Appeals, which denied the identical extraordinary writ motion, *res judicata* effect because "it is clear that the matter was decided on the merits and not on any procedural ground." 2000 UT 33, ¶ 1.

All of these cases point to the same rule: the *res judicata* effect of an extraordinary writ decision must be determined from the facts and circumstances of the case, as Appellee has argued above and in its opening brief. It is simply inconceivable that a defense based on proof of evidentiary facts can attain preclusive status when the facts upon which the defense is based have never been resolved by a fact-finder in any forum. Under such circumstances, the cases stand for the proposition that a discretionary denial of a writ must be presumed limited to denial of the extraordinary remedy, and not

extended to include resolution of issues which were not properly before the reviewing court.

B. *There Is No General Rule That Laches and Statute of Limitations Dismissals Are Always On the Merits, As Appellants Urge.*

Appellants Lindberg and Wisan, beginning on page 27 of their brief, make an argument that a laches dismissal is always on the merits for *res judicata* purposes. As discussed above and in Appellee's opening brief, that overly broad generalization is plainly an incorrect statement of the law. Examination of Appellants' authorities further demonstrates that, even in cases where the first court reaches the merits of the laches or statute of limitations defense, such decision is not binding on another court in a different court system. 18A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 4441 (2d ed. 2002) (finding that dismissal for laches or an expired limitations period does not preclude a subsequent action involving the same parties and claims in a different court system); RESTATEMENT (FIRST) OF JUDGMENTS § 49 cmt. *a*, at 193-94 (same); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 110 cmt. *b*, at 325 (1988) (same). Although this latter point seems clearly to be in the province of the federal court system in the present case, all of the Appellants seem to hope this Court will pre-empt the discussion. This is an invitation this Court should refuse.

Close examination of the string-cited cases at pages 27-29 of the Lindberg/Wisan brief demonstrates Appellants' reliance on "sound-bite" citation without appropriate attention given to the underlying circumstances of each cited case. None of the cited cases involves a situation where there was any dispute concerning the facts underlying the limi-

tations dismissal. In *Nathan v. Rowan*, 651 F.2d 1223 (6th Cir. 1981), one of the cited cases, for example, the first statute of limitations dismissal had been by summary judgment. The court explained that the decision was "on the merits" because the "facts were uncontradicted." 651 F.2d at 1226.

> A summary judgment on the basis of the defense of the statute of limitations is a judgment on the merits. Summary dismissal on this basis requires that no genuine issue of material fact exists as to whether the suit was commenced in a timely fashion and whether the plaintiff knew or had reason to know of the facts giving rise to his cause of action.

Id.

Angel v. Bullington, 330 U.S. 183 (1947), another "sound-bite" citation, examined whether a state decision enforcing a statute barring suits for mortgage deficiency judgments was binding on a federal court sitting in diversity. In the first case, the state court's decision was based "on the inaccessibility of all the courts of the State to such litigation." 330 U.S. at 190. The merits of the enforceability of the statute barring suits for deficiency judgments had been decided by the state's highest court. A federal court sitting in diversity "enforces State law and State policy," and thus the federal court challenge to the same statute by the same plaintiff was precluded. *Id.* at 190-91.

Far from supporting a general rule like that advocated by Appellants here, the *Nathan* case, and the other cited cases, support the proposition that the affirmative defense of laches or statute of limitations must have been factually determined in the previous case in order for *res judicata* effect to even be considered. This is consistent with the *Day* and *Johnson* cases as well, each of which turned on the level of attention paid to the affirmative defense in the underlying case.

C. *Rule 41(b) Is Irrelevant to the Certified Question.*

Appellant Horne argues that under Rule 41(b), *Lindberg* was a decision on the merits that precluded Appellee's federal action. Rule 41(b) provides in pertinent part:

> Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

Once again, Appellants' argument is puzzling: Even if Rule 41(b) were relevant, the *Lindberg* dismissal "otherwise specifies." This Court expressly "decline[d] to reach the merits of plaintiff's claims," and did so at the express request of Appellants.

As it happens, however, Rule 41(b) is not relevant, either to the certified question or to the matter of Lindberg's supposed preclusive effect. The United States Supreme Court, in *Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001), strongly criticized the use of Rule 41(b) to determine preclusive effect, and has authoritatively confined its reach to questions about the preclusive effect of dismissed actions subsequently filed within the same court system. None of the Appellants discusses or even cites *Semtek*.

The plaintiff in *Semtek* filed an action in California state court which the defendant removed to federal district court pursuant to the latter's diversity jurisdiction. 531 U.S. at 499. The federal court subsequently dismissed the plaintiff's action "on the merits and with prejudice" because the applicable California limitations period had expired. *Id.* The plaintiff then filed an action alleging the same claims against the defendant in the state court of Maryland, which had a longer limitations period; removal to federal court was

not available because the defendant was a Maryland citizen. *Id.* at 499-500. The Maryland court eventually dismissed the plaintiff's action on the ground that it was precluded by the prior dismissal in federal district court. *Id.* at 500.

The U.S. Supreme Court reversed, flatly rejecting the defendant's argument that under Rule 41(b) the prior federal court dismissal "on the merits and with prejudice" precluded the later action in Maryland state court. 531 U.S. at 503 ("[I]t is no longer true that a judgment 'on the merits' is necessarily a judgment entitled to claim-preclusive effect; and there are a number of reasons for believing that the phrase 'adjudication upon the merits' does not bear that meaning in Rule 41(b)."). To the contrary, the Court found the "traditional rule" to be the opposite, "that expiration of the applicable statute of limitations merely bars the remedy and does not extinguish the substantive right, so that dismissal on that ground does not have claim-preclusive effect in other jurisdictions with longer, unexpired limitations periods." *Id.* at 504. The Court accordingly held that under Rule 41(b) the prior federal district court dismissal on limitations grounds precluded a refiling of the action *in that district court*, but not a filing in the courts of other jurisdictions. *Id.* at 506 ("[T]he effect of the 'adjudication on the merits' default provision of Rule 41(b) . . . is simply that, unlike a dismissal 'without prejudice,' the dismissal in the present case barred refiling of the same claim in the United States District Court for the District of California. That is undoubtedly a necessary condition, but it is not a sufficient one for claim-preclusive effect in other courts.").[4]

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[4] This understanding of *Semtek* was subsequently adopted by the Tenth Circuit. *See Styskal v. Weld City Bd. of City Comm'rs*, 365 F.3d 855, 858-59 (10th Cir. 2004) (hold-

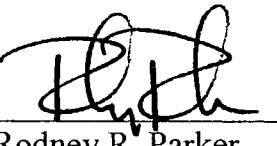
Semtek thus bars the use of Rule 41(b) to give preclusive effect to limitations dismissals outside of the court system that rendered the dismissal, even when (unlike here) the court specifies that dismissal is "on the merits."

CONCLUSION

For the foregoing reasons, Appellee respectfully requests that the proper response to the Tenth Circuit is a narrow legal response, indicating that the preclusive effect of dismissal of an extraordinary writ petition on laches grounds depends upon the express language used, the nature of the case, and the circumstances of the denial. The determination does not turn upon the presence of a written opinion.

DATED: May 21, 2012.

SNOW, CHRISTENSEN & MARTINEAU

By 

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ing that whether state law claims dismissed "with prejudice" by the federal district court could subsequently be filed in state court "is a matter of claim preclusion law that is not determined solely by how the federal dismissal is styled").

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