Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs

2012

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

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2

Part of the Law Commons

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Rodney R. Parker; Richard A. Van Wagoner; Snow, Chrstenensen and Martineau; Attorneys for Plantiff-Appellee.
Roger H. Hoole; Gregory N. Hoole; Hoole and King; Attorneys for Intervenors .

Recommended Citation
Reply Brief, *The Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Horne*, No. 20120158.00 (Utah Supreme Court, 2012).
https://digitalcommons.law.byu.edu/byu_sc2/3151

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE SUPREME COURT FOR THE STATE OF UTAH

THE FUNDAMENTALIST CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, an Association of Individuals,

Plaintiff/Appellee,

vs.

BRUCE R. WISAN, Special Fiduciary of the United Effort Plan Trust; MARK SHURTLEFF, Attorney General for the State of Utah; THOMAS C. HORNE, Attorney General for the State of Arizona; and DENISE POSSE LINDBERG, Judge of the Third Judicial District Court of Salt Lake County, State of Utah,

Defendants/Appellants,

and

RICHARD JESSOP REAM; THOMAS SAMUEL STEED; DON RONALD FISCHER; DEAN JOSEPH BARLOW; WALTER SCOTT FISCHER; RICHARD GILBERT; BRENT JEFFS,

Intervenors/Appellants.

INTERVENORS' REPLY BRIEF ON CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Case No. 20120158 SC

FILED
UTAH APPELLATE COURTS
MAY 22 2012

Rodney R. Parker (4110)
Rick Van Wagoner (4690)
Frederick Mark Gedicks (7860)
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
Salt Lake City, UT 84111
Attorneys for Appellee

Roger H. Hoole (5089)
Gregory N. Hoole (7894)
HOOLE & KING, L.C.
4276 South Highland Drive
Salt Lake City, Utah 84124
Attorneys for Intervenors

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

IN THE SUPREME COURT FOR THE STATE OF UTAH

THE FUNDAMENTALIST CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, an Association of Individuals,

Plaintiff/Appellee,

vs.

BRUCE R. WISAN, Special Fiduciary of the United Effort Plan Trust; MARK SHURTLEFF, Attorney General for the State of Utah; THOMAS C. HORNE, Attorney General for the State of Arizona; and DENISE POSSE LINDBERG, Judge of the Third Judicial District Court of Salt Lake County, State of Utah,

Defendants/Appellants,

and

RICHARD JESSOP REAM; THOMAS SAMUEL STEED; DON RONALD FISCHER; DEAN JOSEPH BARLOW; WALTER SCOTT FISCHER; RICHARD GILBERT; BRENT JEFFS,

Intervenors/Appellants.

INTERVENORS' REPLY BRIEF ON CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Case No. 20120158 SC

Rodney R. Parker (4110)
Rick Van Wagoner (4690)
Frederick Mark Gedicks (7860)
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
Salt Lake City, UT 84111
Attorneys for Appellee

Roger H. Hoole (5089)
Gregory N. Hoole (7894)
HOOLE & KING, L.C.
4276 South Highland Drive
Salt Lake City, Utah 84124
Attorneys for Intervenors

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

Kenneth A. Okazaki
Stephen C. Clark
Ryan M. Harris
JONES WALDO HOLBROOK &
MCDONOUGH
170 South Main Street, Suite 1500
P.O. Box 45444
Salt Lake City, UT 84145-0444

James C. Bradshaw
BROWN BRADSHAW & MOFFAT
10 West Broadway, Suite 210
Salt Lake City, UT 84101

Jeffrey L. Shields
Zachary T. Shields
Michael D. Stanger
CALLISTER NEBEKER &
MCCULLOUGH
10 East South Temple, Suite 900
Gateway Tower East
Salt Lake City, UT 84133

Brent M. Johnson
ADMINISTRATIVE OFFICE OF
THE COURTS
450 South State Street, N31
Salt Lake City, UT 84114-0241

Mark P. Bookholder
ARIZONA ATTORNEY GENERAL
1275 West Washington
Phoenix, AZ 85007

Bridget K. Romano
Peggy E. Stone
David N. Wolf
Joni J. Jones
ASSISTANT ATTORNEY GENERAL
160 East 300 South, 6th Floor
Salt Lake City, UT 84114-0856

Randy S. Hunter
ASSISTANT ATTORNEY GENERAL
160 East 300 South, 5th Floor
Salt Lake City, UT 84114-0858

C. Frederick Beckner, III
Kathleen Moriary Mueller
Amy Maropoulos
Adam Carl Doverspike
SIDLEY AUSTIN LLP
1501 K Street NW
Washington DC 20005

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

TABLE OF CONTENTS

I. REPLY 1

A. The Express terms of the Writing 2

B. The Nature of the Case 3

C. The Circumstances of the Denial 6

II. CONCLUSION . . . .

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

Intervenors, Thomas Samuel Steed, Don Ronald Fischer, Dean Joseph Barlow, Richard Gilbert, Brent Jeffs, Walter Scott Fischer and Richard Jessop Ream, submit this Reply Brief On Certified Question from the United States Court of Appeals for the Tenth Circuit.

I. REPLY

The FLDS are clearly troubled by the fact that this Court wrote a detailed written opinion in response to their petition for extraordinary relief. In their Opening Brief, the FLDS argue that "where the court gives a written explanation of the reasons for dismissing a petition for extraordinary writ, the preclusive effect of the dismissal depends on [1] the express terms of the writing as well as [2] the nature of the case and [3] the circumstances of the denial." Opening Brief of Appellee at 2-3. Intervenors will accept this proposed analysis for purposes of their Reply Brief, while noting that it requires a case by case review. Because the certified question arose in the context of *Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Lindberg*, 2010 UT 51, 238 P.3d 1054, that specific case will be reviewed and analyzed here.

For the reasons set forth below, this Reply Brief will conclude that under the analysis suggested by the FLDS, detailed written decisions denying discretionary petitions for extraordinary writ based on laches—in the manner in which this Court decided *Lindberg*—are on the merits for purposes of claim preclusion.

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

A. The Express terms of the Writing.

The FLDS attempt to downplay this Court's written opinion in *Lindberg*: "The principle that a minute entry denial is presumptively not a decision of the merits, however, does not establish the converse position that a denial in a written opinion is presumptively on the merits. . . ." *Id.* at 13-4. No authority is cited for this conclusion. If a detailed written opinion is not—at least—presumptive of a decision on the merits, it is certainly a good indication that the court meant what it said.

The *Lindberg* opinion is lengthy and detailed and must be read as a whole. Despite the express dispositive nature and holding of the opinion, the FLDS focus on one sentence in which this Court states it did not need to reach the constitutional assertions, to argue that the opinion is meaningless. In so doing, they ignore the well settled law of Utah that courts should resolve cases on the narrowest applicable grounds and avoid deciding constitutional issues whenever possible. *See* Intervenors' Brief on Certified Question from the United States Court of Appeals for the Tenth Circuit, at 5-6 (referencing and discussing examples of the cases).

Read in totality, the decision in *Lindberg* affirmatively appears to be on the merits. Concerned that this will be confirmed, the FLDS argue, despite the certified question before this Court, that "[i]t is for the Tenth Circuit to determine the preclusive effect (if any) of *Lindberg* within the federal court system. . . ." Opening Brief of Appellee, at 7. They ask, "does it affirmatively appear that the denial was intended to

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

be on the merits, or is that the only possible conclusion given the grounds for denial?" *Id.* at 15. Then, rather than answer the question, they argue that this Court's precedents "should be applied in [the Tenth Circuit], not this Court, to ascertain the preclusive effect of *Lindberg*. . . ." *Id.*

What is readily apparent are three things. First, despite the sentence relied on by the FLDS, read as a whole, *Lindberg* was decided on the merits and should be confirmed by this Court as having preclusive effect. Second, the FLDS do not want this Court analyzing or addressing the express terms of its decision in *Lindberg* because this Court, better than any other court, knows of its extensive review of the voluminous file, its careful analysis of the facts and claims, and its intention to have its written opinion afforded preclusive effect. Third, notwithstanding the FLDS's argument, the Tenth Circuit has made it clear that the issue of laches is likely dispositive of this appeal, and that, as to the certified question, this Court has the final word.

Thus, on the first point raised by the FLDS, when a petition for extraordinary writ is decided, the express terms of the denial, or as in *Lindberg*, the express terms of the detailed written opinion must be read as a whole and given the preclusive effect intended by the court.

B. The Nature of the Case.

For the reason addressed below, the FLDS brief ignores the underlying nature of this case and the extensive procedural facts that played out over many years before

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

the district court. Thus, they seek to avoid having to address the troubled procedural history for which they solely are responsible. Having ignored their wilful failure to engage in the district court proceedings, the FLDS, in stead, hasten to criticize this Court's methodology and decision in *Lindberg*.

Despite the fact that the FLDS sat on their rights for years and then elected to petition for extraordinary relief after all appeal deadlines had long passed, they argue that "because this court is not a fact finding court its rejection of an extraordinary writ cannot resolve the underlying merits except in *unusual circumstances*" *Id.* at 11 (emphasis added, capitalization omitted). To the extent, that argument is not rejected out of hand, this Court should simply note that *Lindberg* involved "unusual circumstances," including the receipt and review of new evidence.

The criticism that "[i]t is not the function of the appellate court to try the facts or substitute for the trial court in the determination of factual issues" is without merit under these unusual circumstances. *Id.* The need to decide the FLDS's petition for extraordinary writ was necessitated by the very history which gave rise to this Court's eventual decision on laches. That this Court did not exercise its discretion to dismiss the petition in one sentence but instead, went on to analyze the underlying procedural history, factual record, receive and review new evidence, review lengthy briefs, hear enlarged oral argument and then write a lengthy opinion clearly signaled that it wanted to resolve the matter with finality.

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

The FLDS brief continues "[i]f another court has not created a proper evidentiary record, factual issues must be litigated before the appellate court." *Id.* at 12. Given the unusual circumstances giving rise to the FLDS's petition, this unusual step was, in fact, taken. The Court considered all new evidence submitted by the FLDS, including testimony in the form of declarations.[1] Under the circumstances, the petition was given every possible consideration before the Court reached its decision. To the extent the FLDS are unhappy, they must recognize that a laches defense necessarily arises when one party's conduct prevents all of the parties from litigating normally.

When a laches decision is on the merits, as here, the losing party loses the right to later assert that the case was somehow not fully and fairly litigated. In sum, the FLDS claim that "[h]ere preclusion would be based on facts that were never litigated," is only true to the extent they prevented it. *Id.* at 12.

C. The Circumstances of the Denial.

The FLDS argue: "A finding of laches depends upon facts: the reasons for the delay, the surrounding circumstances, and the consequences of the delay to the various

---

[1]The Court declined to receive evidence submitted by the Intervenors which sheds a very bright light on why the FLDS refused to engage in the Intervenors' underlying tort and racketeering lawsuits or in the subsequent probate action. Rather than allow the Court to be fully informed on this point, the FLDS successfully moved to strike that evidence. "Because of our resolution in this case, we find it unnecessary to rule. . . ." *Lindberg*, 2010 UT 51, ¶ 22 n. 8. The FLDS do not complain about this result. This important evidence, however, was subsequently placed in the record in the collateral federal district court case, is part of the record on appeal to the Tenth Circuit, and is therefore now available in the record before this Court.

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

stakeholders in the litigation." *Id.* at 16. This Court addressed each of these factors in its opinion. At oral argument, the Court specifically asked counsel for the FLDS why the FLDS waited so many years before challenging the Trust's reformation. Counsel did not dispute the delay, responding that "the answer to that question lies inside the religious box" and relates to "a test of faith." App. at 4106, 4127-28. Counsel did not, however, acknowledge what the religious test was, and, as mentioned, objected to this Court's review of the evidence. The Court, however, was already aware of the Trust's role in child abuse and rape from the extensive record and the district court's rulings.

The test of faith concerning what was in the "religious box," of course, was whether, in light of the FLDS command to marry more girls at a younger age, the people would give up Warren Jeffs to protect their property: "The Lord will have me do this, get more young girls married, not only as a test to the parents, but also to test this people to see if they will give the Prophet up." App. at 3151. The consequence of this religious choice was also clear: "But brethren, this will bring the government down upon us quickly. Even put the United Effort Plan Trust lands under government control. . . ." App. at 3155-56. The FLDS passed this religious test knowing full well the consequences.

In short, the many years of deliberately answering the courts nothing were the result of a religious choice. Years later, the FLDS should not be heard to be asking any court to undo that choice.

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

It was this religious test and what was in the "religious box"—child abuse and rape—that put counsel's constitutional arguments in *Lindberg* in the proper context and helped inform this Court's decision on the FLDS's constitutional claims. It declined to reach those claims in its written decision even though counsel had argued that this Court's commitment to the Constitution should be strong enough to stay outside the religious box even if it did not agree with what was happening inside. App. at 4106, 4127-28, 4154. By electing not to reach those claims in its opinion, this Court flatly rejected counsel's argument, and it did so on the merits of laches.

There was no need for the Court to further balance the facts or address whether the First Amendment provides immunity for child abuse, rape and other illegal activity. By resolving the case on laches, this Court made it abundantly clear that it fully understood the facts and claims, and based on the same, concluded that it would not return the Trust to the very individuals responsible for using it for illegal practices and child abuses.

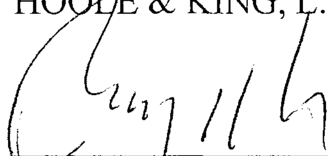
II. CONCLUSION

For these additional reasons, Intervenors respectfully request that the certified question be answered in a manner that makes it clear *Lindberg* was decided on the merits and should have preclusive effect.

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

DATED this 21st day of May, 2012

HOOLE & KING, L.C.



Roger H. Hoole
Gregory N. Hoole
Attorneys for the Intervenors

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of May, 2012, I caused two copies of the foregoing INTERVENORS' REPLY BRIEF ON CERTIFIED QUESTION to be mailed, with first class postage prepaid, to the following:

Jeffrey L. Shields
Zachary T. Shields
Michael D. Stanger
CALLISTER NEBEKER & MCCULLOUGH
10 East South Temple, Suite 900
Gateway Tower East
Salt Lake City, UT 84133

Kenneth A. Okazaki
Stephen C. Clark
Ryan M. Harris
JONES WALDO HOLBROOK & MCDONOUGH
170 South Main Street, Suite 1500
P.O. Box 45444
Salt Lake City, UT 84145-0444

James C. Bradshaw
BROWN BRADSHAW & MOFFAT
10 West Broadway, Suite 210
Salt Lake City, UT 84101

Mark P. Bookholder
ARIZONA ATTORNEY GENERAL
1275 West Washington
Phoenix, AZ 85007

Brent M. Johnson
ADMIN. OFFICE OF THE COURTS
450 South State Street, N31
P.O. Box 140241
Salt Lake City, UT 84114-0241

Bridget K. Romano
Peggy E. Stone
David N. Wolf
Joni J. Jones
ASSISTANT ATTORNEY GENERAL
160 East 300 South, 6th Floor
P.O. Box 140856
Salt Lake City, UT 84114-0856

Rodney R. Parker
Richard A. VanWagoner
Frederick Mark Gedicks
SNOW CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, UT 84145-5000

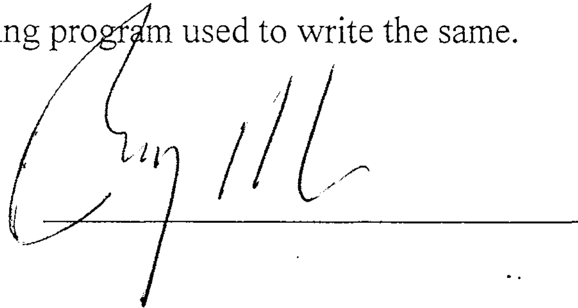
Randy S. Hunter
ASSISTANT ATTORNEY GENERAL
160 East 300 South, 5th Floor
P.O. Box 140858
Salt Lake City, UT 84114-0858

C. Frederick Beckner, III
Kathleen Moriary Mueller
Amy Maropoulos
Adam Carl Doverspike
SIDLEY AUSTIN LLP
1501 K Street NW
Washington DC 20005

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

CERTIFICATE OF COMPLIANCE WITH RULE 24(f)(1)(C)

I hereby certify that the foregoing Intervenors Reply Brief on Certified Question complies with the type-volume limitation ordered by this Court and contains 2,840 words as determined by the word processing program used to write the same.



Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.