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

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IN THE SUPREME COURT OF THE STATE OF UTAH

FUNDAMENTALIST CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,

Plaintiff-Appellee,

v.

THOMAS C. HORNE; BRUCE R. WISAN; MARK SHURTLEFF; HON. DENISE POSSE LINDBERG,

Defendants-Appellants,

and

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

Intervenors-Appellants.

No. 20120158-SC

DEFENDANT-APPELLANT THOMAS C. HORNE ARIZONA ATTORNEY GENERAL'S RESPONSE BRIEF

Matter on Certified Question

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ARGUMENT

I. The Parties Agree That Dismissal of a Petition for Extraordinary Writ Accompanied by a Written Opinion May Bar the Later Adjudication of the Same Claim.

The Appellee ("Plaintiff-Association") acknowledges 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 upon the express terms of the writing as well as the nature of the case and the circumstances of the denial." (Appellees' Opening Brief ["Ass'n Br."] at 2-3.) Thus, the Plaintiff-Association agrees that the dismissal of a petition for extraordinary writ may have a preclusive effect on the claims alleged.

This recognition comports with this Court's opinion in *Kennecott Copper Corp. v. Salt Lake County*, 575 P.2d 705 (Utah 1978). There, the Court recognized that the denial of a petition for extraordinary writ "without any opinion is consistent with the view this court merely refused to exercise its original jurisdiction, or it was of the opinion an extraordinary writ was not a proper remedy." 575 P.2d at 708. On the other hand, the Court also recognized that a judgment denying a writ of prohibition without a written opinion may nonetheless be res judicata if "the sole possible ground of the denial was that the court acted on the merits" or where "it affirmatively appears the denial was intended to be on the merits." *Id.* Two important principles may be drawn from *Kennecott*. First, even without a written opinion, a dismissal or denial of a petition for extraordinary may still nonetheless be res judicata. Second, where the dismissal of the petition appears to be "on the merits" within the meaning of that term for preclusion purposes, the dismissal is res judicata.

While the Court has the discretion to summarily deny a petition for extraordinary writ for no reason at all, where the Court accepts briefing, hears oral argument, and issues an opinion, it has exercised its discretion to review the matters presented. Where the Court issues an opinion under those circumstances, the opinion is provided for a reason. It is neither an advisory opinion nor pure dicta.

Because the Court exercised its discretion to review the petition, heard oral argument, and issued a written opinion explaining its determination in *Fundamentalist Church of Jesus Christ of Latter Day v. Lindberg,* 2010 UT 51, 238 P.3d 1054, the determination of whether the dismissal is preclusive depends on what the Court stated as the basis for the dismissal. Plaintiff-Association acknowledges this by stating that "the preclusive effect of the dismissal depends upon the express terms of the writing." (Ass'n Br. At 2-3.)

The point of contention between the Appellants and the Plaintiff-Association thus appears to be on the following question: Does a dismissal on the basis of laches constitute a decision "on the merits" such that later adjudication of the same claim is barred?

II. The Dismissal of a Claim on the Basis of Laches Is a Dismissal "on the Merits."

For the reasons stated in the Appellants' Opening Briefs, a dismissal on the basis of laches constitutes a decision "on the merits" that bars a later adjudication of the same claim.

If, for example, the Court reviews a petition for extraordinary writ and dismisses it as unripe, there is no preclusive effect if those claims eventually ripen into a justiciable controversy. On the other hand, if the Court states that the petitioner's claims are barred by the statute of limitations, it is clear that the petitioner is barred from reasserting those claims at a later date. Under those circumstances, the Court has determined that the time to assert those claims has come and gone. The same is true of laches.

In *American National Bank & Trust Co. v. City of Chicago*, 826 F.2d 1547 (7th Cir. 1987), the Seventh Circuit provides clarity on this issue:

> A decision "on the merits" bars further litigation; a decision "not on the merits" does not. "Dismissed for want of jurisdiction" is the common conclusion of an opinion that has not reached the merits. See Fed. R. Civ. P. 41(b); Ill. Sup. Ct. Rule 273; Restatement of Judgments § 49 (1942); Restatement (Second) of Judgments § 20(a) and comment c (1982). So if the court says "you have come to the wrong court, try another" or "this suit is premature, wait until the case is ripe" it will use the language of jurisdiction. Such adjudications, not "on the merits," may be followed by litigation in the right court or at the right time. But if the court says "you are too late" or otherwise wraps up the case in a way that indicates that the plaintiff has irrevocably failed, the use of jurisdictional language does not mean that the plaintiff may try again. A decision may be "on the merits" for purposes of preclusion even though the court did not resolve the merits. A dismissal for want of prosecution has this effect, see *Kimmel v. Texas Commerce Bank,* 817 F.2d 39 (7th Cir.1987), ***as does a dismissal for laches***. *Smith v. Chicago, supra.*

Id. at 1552-53 (emphasis added). The Arizona Supreme Court has also explained:

> [C]ourts often describe a judgment as being "on the merits" if it finally resolves an action in a manner that precludes later relitigation of the claims involved.

* * *

> The Restatement (First) of Judgments §§ 48, 49 (1942) provided that judgments rendered "on the merits" would have claim preclusive effect and identified such judgments as based on substantive law rather than merely on rules of procedure. Because the phrase "on the merits" now may refer to judgments that bar the relitigation of a claim while not directly passing on its substance, the Restatement has abandoned the phrase as "possibly misleading." Restatement [(Second) of Judgments] § 19 cmt. a.

4501 Northpoint LP v. Maricopa County, 212 Ariz. 98, 101, 128 P.3d 215, 218 (2006). Here, the Plaintiff-Association erroneously conflates the "on the merits" language for claim and issue preclusion with a substantive review of the underlying claims. As is explained in the Appellants' briefs and above, they are not the same.

Plaintiff-Association argues that *Day v. Estate of Wiswall*, 93 Ariz. 400, 381 P.2d 217 (1963), and *Johnson v. City of Loma Linda*, 99 Cal. Rptr. 2d 316, 5 P.3d 874 (2000), support its argument that a laches dismissal does not have preclusive effect. (Ass'n Br. at 14-15.) Appellants explained why *Day* supports their argument concerning the preclusive effect of a decision based on laches and why *Johnson* is distinguishable. Opening Brief of Appellants Wisan and Lindberg at 33-34; Utah Attorney General's First Brief at 21-22.

The *Johnson* opinion is inconsistent with Utah jurisprudence generally holding that a dismissal, with certain limited exceptions, constitutes a "decision on the merits." Arizona Attorney General's Opening Brief at 16-18. Additionally, a more recent California Court of Appeals decision shows a narrowing of the application of the *Johnson* opinion. In *Perez v. Richard Roe 1*, 146 Cal. App. 4th 171, 52 Cal. Rptr. 3d 762 (Cal.

App. 2006), the court explained that where a second action does not allege new facts or a new claim, a judgment based on statute of limitations is res judicata. 146 Cal. App. 4th at 185-86, 52 Cal. Rptr. 3d at 772-73. However, a dismissal on the basis of the statute of limitations, like a dismissal on the basis of laches, does not involve an evaluation of the substantive merits of the underlying claim. Nonetheless, the court found that res judicata applies to a statute-of-limitations dismissal. Given the dichotomy of the case law in California and the different approach by Utah courts to the determination of when a dismissal is "on the merits," the *Johnson* opinion offers little to no guidance on the certified question before the Court.

Because the Court declared in *Lindberg* that the Plaintiff-Association's claims are barred by laches, the Court made a determination that they are precluded from asserting those claims now or at any time in the future in any Utah state court. What else does it mean for claims to be barred by laches?

III. The Certified Question Briefing Is Not the Appropriate Forum for Challenging the *Lindberg* Opinion.

Although Plaintiff-Association insists that "[t]he certification process, however, does not permit revisitation of *Lindberg,*" it dedicates almost half its brief to doing just that. (Ass'n Br.at 5). The Plaintiff-Association is partially correct;[1] this is the

[1] Plaintiff-Association suggests that this Court may only address the certified question in the abstract without considering the specific facts in this case. (Ass'n Br. at 5-6). Although the certified question is a legal issue, the Court must determine the question in light of the relevant facts. *See* Utah. R. App. P. 41(c) ("The order shall also set forth all facts which are relevant to the determination of the question certified and which show the nature of the controversy, the context in which the question arose, and the procedural steps by which the question was framed."). It is therefore appropriate for

inappropriate forum for assignments of error to the *Lindberg* opinion. Those arguments are more appropriately addressed in a petition for writ of certiorari to the United States Supreme Court. Plaintiff-Association sought and received an extension of time to file that petition, but *chose* not to do so.

Additionally, the correctness of a judicial determination has no bearing on its preclusive effect, especially where the party precluded chose not to seek any further review. In *Collins v. Sandy City Board of Adjustment*, 2002 UT 77, 52 P.3d 1267, this Court exercised its certiorari jurisdiction. In that case, the Utah Court of Appeals found that the petitioners' suit was barred by issue preclusion due to the determination of the same issue in an earlier suit they failed to appeal. *Id.* at ¶ 1, 52 P.3d at 1268. The petitioners argued that issue preclusion did not apply due to an intervening change in law. *Id.* The Court found no change in law, finding instead that the court of appeals reached an erroneous legal conclusion in the earlier suit. *Id.* at ¶ 15, 52 P.3d at 1270. In affirming the court of appeals' determination that issue preclusion applied, this Court explained:

> Consistent with the United States Supreme Court's opinion in *Moitie II*, we hold that the [petitioners] made a calculated choice to forego their appeals and that the predicament in which they find themselves is of their own making. *Cf. id.* at 400-01, 101 S.Ct. 2424. They could have challenged the decision rendered in [the first suit] but elected not to do so. They therefore forfeited their right to attack the decision on direct appeal and now seek to collaterally attack the judgment. However, we 'cannot be expected, for [their] sole relief, to upset the general and well established doctrine of res

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the Court to decide the certified question based on the *Lindberg* laches opinion and not on the basis of a hypothetical laches opinion.

> judicata, conceived in the light of the maxim that the interest of the state requires that there be an end to litigation – a maxim which comports with common sense as well as public policy.' "

Id. at ¶ 19 52 P.3d at 1271 (quoting *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401-02, 101 S.Ct. 2424 (1981) ("*Moitie II*")). Before arriving at this conclusion, the Court took note of the following principles articulated in the *Moitie II* opinion:

> an erroneous conclusion reached by the court in the first suit does not deprive the defendants in the second action of their right to rely upon the plea of res judicata . . . . A judgment merely voidable because [it is] based upon an erroneous view of the law is not open to collateral attack, but can be corrected by a direct review and not by bringing another action upon the same cause [of action]. We have observed that [the] indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of res judicata to avert.

Id. at 77, ¶18, 52 P.3d at 1271(quoting *Moitie II*, 452 U.S. at 398-99, 101 S.Ct. 2424).

Although Plaintiff-Association's attempted assignments of error to the *Lindberg* opinion are without merit, those arguments are irrelevant and therefore not addressed herein.[2]

CONCLUSION

For the reasons stated above and in the Appellants' Opening Briefs, the Court should find that under Utah preclusion law, its discretionary review of a petition for

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[2] Nonetheless, it should be noted that in the *Lindberg* matter, the Plaintiff-Association acknowledged its prejudicial delay when it petitioned the Court: "Petitioner Association members recognize and acknowledge that time has elapsed since the 'reformation,' and that equitable relief may in some individual instances be necessary or appropriate to protect reasonable expectations thereby created." Plaintiff-Association's Petition for Extraordinary Writ at 2-3.

extraordinary writ and subsequent dismissal on laches grounds is a decision "on the merits," such that later adjudication of the same claim is barred.

Respectfully submitted this 21st day of May, 2012.

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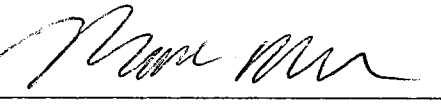
CERTIFICATE OF COMPLIANCE WITH RULE 24(f)(1)

This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 2,163 words, excluding the parts of the brief exempted by Utah R. App. P. 24 (f)(1)(B).

This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 13 point font in Times New Roman style.

Dated this 21st day of May, 2012.



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CERTIFICATE OF SERVICE

I, Mark P. Bookholder, certify that on May 21, 2012, I served a copy of the attached DEFENDANT-APPELLANT THOMAS C. HORNE ARIZONA ATTORNEY GENERAL'S REPLY BRIEF upon the following parties in this matter, by mailing it via first class mail with sufficient postage prepaid to the following addresses:

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