

2004

K. J. and Ruth Achter; et al. v. The Utah Department of Transportation, and agency of the State of Utah : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

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UTAH STATE COURT OF APPEALS

<p>K. J. and RUTH ACHTER; et al.,</p> <p>Plaintiffs/Appellants,</p> <p>vs.</p> <p>THE UTAH DEPARTMENT OF TRANSPORTATION, an agency of the State of Utah,</p> <p>Defendant/Appellee.</p>	<p>Court of Appeals No. 20040050-CA</p> <p>Priority No. 15</p>
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BRIEF OF APPELLANTS

Appeal from the Third Judicial District in and for Salt Lake County, State of Utah
Third District No. 030912759, The Honorable Sheila K. McCleve

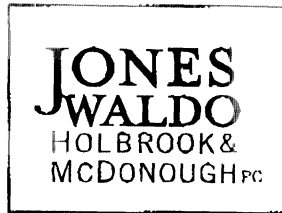
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FILED
UTAH APPELLATE COURTS
JUN 25 2004

FILED
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Re: *Achter, et al. v. State of Utah Department of Transportation* (Court of Appeals
No. 20040050-CA)

To the Clerk of the Court:

This letter is to certify, in accordance with Rule 24 (a) (11), Utah Rules of Appellate Procedure, that no addendum is necessary to Appellants' Brief in the above matter. I apologize for the omission in the brief.

Cordially,

A handwritten signature in black ink, appearing to read "Vincent C. Rampton". The signature is stylized with a large, sweeping initial "V".

Vincent C. Rampton

UTAH STATE COURT OF APPEALS

<p>K. J. and RUTH ACHTER; et al.,</p> <p>Plaintiffs/Appellants,</p> <p>vs.</p> <p>THE UTAH DEPARTMENT OF TRANSPORTATION, an agency of the State of Utah,</p> <p>Defendant/Appellee.</p>	<p>Court of Appeals No. 20040050-CA</p> <p>Priority No. 15</p>
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Plaintiffs/Appellants,

vs.

THE UTAH DEPARTMENT OF TRANSPORTATION, an agency of the State of Utah,

Defendant/Appellee.

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On appeal from an Order of Dismissal by the Third Judicial District Court for Salt Lake County, State of Utah, The Honorable Sheila K. McCleve presiding, granting Defendant's Motion to Dismiss, entered December 7, 2003.

INTRODUCTION

The named Plaintiffs and Appellants in this case (hereafter "Appellants"), all property owners along the expanded Highway 89 corridor between Farmington and South Ogden, were compelled to file suit before the trial court to vindicate their right to recoup costs and attorneys fees incurred by reason of UDOT's attempts to expropriate their property rights without paying compensation. Despite its own regulation entitling property owners such as Appellants to the recovery of reasonable costs and expenses (including attorneys fees) incident to the settlement of inverse condemnation proceedings, UDOT has made every effort to avoid compensating *any* of the landowners along the Highway 89 corridor (including the named Appellants in this action) for attorneys fees necessarily incurred due to its own conduct.

The Appellants' problems began in 1996, when UDOT published an Environmental Impact Statement announcing that 136 homes and 22 businesses located along a proposed Highway 89 expansion corridor between South Ogden and Layton, Utah, would likely be impacted by future road expansion. This announcement promptly rendered the affected properties unmarketable – yet UDOT refused to acquire them, or to compensate the owners for its actions.

Numerous property owners (including Appellants) thereupon engaged legal counsel to pursue both judicial and legislative remedies. The result was a combination of lobbying before both the legislature and the Department of Transportation, and the filing of a Complaint before the Second Judicial District Court for Davis County, State of Utah, on behalf of all property owners within the affected corridor (proposed for certification as a class pursuant to Rule 23, Utah R. Civ. P.). Before the Davis County Court could rule upon certification of the class, however, UDOT negotiated a settlement in the Davis County action. The settlement, however, even though it named only four of the remaining nominal plaintiffs in the Davis County action, benefitted far more corridor residents and landowners than that – it resulted in the allocation of approximately \$10 million to compensate numerous property owners along the affected corridor, and established a compensation “matrix” for acquisition of properties and compensation of their owners, including the named Appellants in this proceeding.

The settlement, however, expressly reserved the question of the recoverability of attorneys fees – which UDOT continued to maintain it was not obligated to do for any affected property owner. In post-settlement proceedings, the Second District Court initially held that UDOT was not liable for attorneys fees to any property owner with whom UDOT had made settlement. The Utah Supreme Court reversed, however, holding that, pursuant to federal regulations expressly adopted by UDOT, attorneys fees were recoverable in

connection with the settlement effected in the Davis County proceeding. The case was remanded for a determination of reasonable attorneys fees.¹

UDOT then submitted a motion *in limine* in the Davis County action, asking the court to exclude evidence of any costs and attorneys fees incurred by any property owner not expressly named as a party plaintiff therein – including members of the putative class never accepted nor rejected in that action. The Davis County Court held that, as the class had not been certified, *it had no personal jurisdiction* over any property owner not named as a party plaintiff in that action, and could therefore award no attorneys fees therein except in favor of the named plaintiffs therein.

At this point, the Appellants (who had expressly entered into retainer agreements with legal counsel in connection with UDOT’s taking of their properties, but had been members of the proposed class in the Davis County proceeding, rather than individually-named plaintiffs therein) filed this action before the Third Judicial District Court for Salt Lake County, State of Utah, submitting themselves to the personal jurisdiction of that court for purposes of seeking an award of attorneys fees as provided by the Utah Supreme Court.

UDOT, though, moved to dismiss. UDOT’s argument, essentially, was that (1) the Appellants named in this action were not parties to a “proceeding” settled by UDOT in the Second District, and therefore have no claim for relief under the federal/state regulatory scheme; and (2) Appellants’ claims in this action are somehow barred by the doctrine of *res*

¹ *Robinson v. State*, 20 P. 3d 396 (Utah 2001).

judicata, or claim preclusion, due to the ruling issued in the Davis County action, even though it had expressly held that Appellants were not even parties thereto. The trial court agreed, holding that, if Appellants were not before the Second District Court, they were outside the scope of parties to a “proceeding” entitled to the recovery of fees by law, whereas if they *were* parties before the Second District Court, they are bound by *res judicata*.

In fact, the named Appellants herein have very much been a part of the “proceeding” leading up to the settlement entered into in the Davis County action, and are entitled to recovery of attorneys fees which they necessarily incurred incident thereto. The law recognizes the term “proceeding” to be a broad one, broader in its scope than the term “action.” Given the language, purpose, and policy underlying the regulatory scheme upon which Appellants (and all property owners in the affected corridor) rely in this matter, it is unreasonable to conclude that Appellants have not been a party to a judicial, legislative and administrative “proceeding” giving rise to the settlement of their grievance against UDOT, and thus their entitlement to attorneys fees. Even if the term “proceeding” is limited to the Davis County action, moreover, Appellants were part of the identified group offered for class certification therein, and thereby participated in that “proceeding.” Moreover, whether or not they were named as parties to the Second District Court action, Appellants herein incurred their attorneys fees “because of” that proceeding and incident to “a settlement” effectuated therein, thereby clearly qualifying under the express regulatory language.

Appellants' claims in this action are clearly not barred by the doctrine of *res judicata* or claim preclusion by reason of any order entered in the Davis County case. It is precisely because the Second District Court *declined* to exercise jurisdiction over them, and thus to rule on their petition, that Appellants have been compelled to file this action at all.

JURISDICTION

This is an appeal from a final Order and Judgment of the Third Judicial District Court for Salt Lake County, State of Utah, The Honorable Sheila K. McCleve presiding, dismissing the lower court action under Rule 12(b)(6), Utah R. Civ. P., holding that Appellants' Complaint failed to state a claim for which relief may be granted.

Jurisdiction obtains pursuant to Section 78-2-2(3)(j), Utah Code Ann. 1953 (as amended). The appeal was referred to the Court of Appeals pursuant to Utah Code Ann. § 78-2-2(5), by order of referral dated January 20, 2004.

STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD FOR REVIEW

1. Whether the lower court erred in finding that, as a matter of law, Appellants stated no claim for which relief could be granted to recover attorneys fees incident to UDOT's taking of their property pursuant to 49 C.F.R. Part 24.107 and Utah Admin. Code R933-1.

2. Whether the lower court erred in finding that, as a matter of law, Appellants' stated claim for relief against UDOT for recovery of costs and attorneys fees incident to

UDOT's taking of their property was barred under the doctrine of *res judicata*, or claim preclusion.

The standard of review for both issues before this Court is *de novo* review, the lower court having dismissed Appellants' claims as failing to state a claim for which relief may be granted under Rule 12(b)(6), Utah R. Civ. P. This Court is obliged to construe the Complaint in the light most favorable to Appellants, and to indulge all reasonable inferences in their favor. *Educators Mutual Insurance Association v. Allied Property & Casualty Insurance Company*, 890 P.2d 1029 (Utah 1995); *Prows v. State*, 822 P.2d 764 (Utah 1991); *Heiner v. S. J. Groves and Sons Company*, 790 P.2d 107 (Utah Ct. App. 1990).

DETERMINATIVE CASE LAW AND STATUTORY PROVISIONS

1. 49 C.F.R. Part 24.107:

The owner of the real property shall be reimbursed for any reasonable expenses, including reasonable attorney, appraisal, and engineering fees, which the owner actually incurred because of a condemnation proceeding, if:

- (a) the final judgment of the court is that the agency cannot acquire the real property by condemnation, or
- (b) the condemnation proceeding is abandoned by the agency other than under an agreed-upon settlement; or
- (c) the court having jurisdiction renders a judgment in favor of the owner in an inverse condemnation proceeding or the agency effects a settlement of such proceeding.

2. 42 U.S.C. § 4621(b):

This subchapter establishes a uniform policy for the fair and equitable treatment of persons displaced as a direct result of programs or projects

undertaken by a federal agency or with federal financial assistance. The primary purpose of this subchapter is to ensure that such persons shall not suffer disproportionate injuries as a result of programs and projects designed for the benefit of the public as a whole and to minimize the hardship of displacement on such persons.

3. Utah Admin. Code R933-1-1. Right of Way Acquisition Incorporation of Federal Publication.

The State of Utah incorporates by reference 49 CFR 24 as amended in the Federal Register, March 2, 1989, as its administrative rules on the acquisition of rights of way for federal-aid projects.

4. *Robinson, et al. v. Utah Department of Transportation*, 2001 UT 21, 20 P. 3d 396 (Utah 2001).
5. *Snyder v. Murray City Corporation*, 2003 UT 13, 471 Utah Adv. Rep. 5, 2003 Utah Lex. 34 (2003)

STATEMENT OF THE CASE

This action was filed on June 30, 2003, before the Third Judicial District Court for Salt Lake County, State of Utah, as the result of a ruling by The Honorable Glen R. Dawson of the Second Judicial District Court for Davis County, State of Utah, in the case of *Kay K. Robinson; Vane R. and Marilee L. Scadden; Benjamin E. and Le Joie Reichel, Plaintiffs, v. State of Utah and its Agency, The Utah Department of Transportation, Defendant*, Civil No. 970700484, that the named Appellants herein (all of them property owners who (1) retained the services of legal counsel incident to UDOT's taking of their property interests, and (2) as a direct and proximate result thereof, obtained settlements from UDOT of claims for inverse condemnation of their property) were not entitled to the recovery of any costs or

attorneys fees as part of the Second District Court action, they not having been expressly-named parties thereto) (R. 42-44). On July 1, 2003, UDOT filed a Motion to Dismiss Appellants' Complaint, arguing that (1) not having been named as parties to the Second District Court action, they were not part of a "proceeding," entitling them to recovery of attorneys fees under applicable federal and state law, and (2) their claim was, in any case, barred by the doctrine of *res judicata*, or claim preclusion.

By Order dated October 14, 2003, the trial court ruled that, if Appellants *were* properly parties to the Second District action, their claim for attorneys fees was barred by the doctrine of *res judicata*; if Appellants *were not* parties to the Second District Court action, they had no standing to seek attorneys fees under applicable law (R. 87-91). The lower court's ruling was memorialized in a Order of Dismissal signed December 12, 2003, and filed December 17, 2003 (R. 92-95). Appellants filed their notice of appeal from the lower court's Order on January 13, 2004 (R. 96-98).

STATEMENT OF FACTS

On appeal from an order granting a motion to dismiss, this Court accepts as true all well-pleaded allegations of the Complaint, and opposes the trial court's ruling only if it clearly appears that the plaintiff can prove no set of facts in support of its claim. *Prows v. State*, 822 P.2d 764 (Utah 1991); *Coleman v. Utah State Land Board*, 795 P.2d 622 (Utah 1990).

Accordingly, both the lower court's ruling and this Court's review thereof must accept the following facts, taken from Appellants' Complaint herein (R. 1-9):

1. During the early 1980's, the Utah Department of Transportation ("UDOT") determined that the Highway 89 corridor between Farmington and South Ogden needed significant expansion and improvements in order to increase public safety. After exploring potential alternatives and holding public meetings, UDOT planned and plotted a preferred route, as published in a required Environmental Impact Statement ("EIS"),² and alerted the public that 136 homes and 22 businesses, among other public properties, were to be affected. Appellants' properties were among those specifically identified by the EIS report.

2. After publication of the EIS, Appellants attempted to sell their properties, but were unable to obtain fair market value as a direct and proximate result of having been identified as an impacted property. Consequently, the value and marketability of all of the affected properties had been negatively impacted.

3. Appellants first requested that UDOT purchase the impacted properties for fair market value. UDOT denied the Appellants' request, indicating a lack of funding.

4. The Appellants' property had effectively been condemned or taken by UDOT's actions, without just compensation.

² This final draft of this report was issued on September 9, 1996, in compliance with the National Environmental Policy Act.

5. Appellants entered into various agreements with attorneys (collectively referred to as “Appellants’ Counsel”), to pursue, negotiate, resolve or litigate their claims of inverse condemnation and just compensation against UDOT.

6. In November 1997, the above-named Appellants, as interested or otherwise similarly situated parties (“Appellants”) participated in the filing of a Complaint (“Original Complaint”)³ in the Second Judicial District Court, Davis County, initiating an inverse condemnation claim against the State of Utah and its agency the Utah Department of Transportation (“UDOT”) regarding the expansion and improvements of U.S. Highway 89 (“Highway 89”) through Davis County.

7. Since being retained, Appellants’ counsel has expended significant time, efforts and costs for all Appellants, parties, and affected property owners interested or similarly situated by inverse condemnation of UDOT along Highway 89. Specifically, Appellants’ counsel engaged in extensive efforts to negotiate and litigate a settlement which included working with the Utah State Legislature to develop a fund for compensating the victims of the State’s condemnation acts, which resulted in approximately a \$10,000,000.00 (Ten Million Dollar) funding allocation to resolve the inverse condemnation proceeding.

8. Following the Legislature’s allocation of funds, UDOT had the necessary capital to begin settling its cases with the named Appellants and began to do so. Four of the

³ See *Robinson v. State of Utah* (Civil No. 970700484 Second Judicial District Court, Davis County, Judge Dawson).

parties originally named in the Original Complaint, entered into a stipulation to dismiss the original Complaint and settled, thus establishing a template for the Appellants in this case to obtain individual resolution of property valuation and payments for those amounts.

9. The Stipulation for Settlement left up to the court to decide the issue of Appellants' attorneys fees.

10. Subsequently, all of the above-named Appellants applied for, received benefits from, and ultimately settled any condemnation claim which they may have had against UDOT.

11. Appellants' counsel made a motion to assess attorneys fees and costs associated with the original Complaint against UDOT. Appellants' counsel was denied this request by The Honorable Judge Dawson of the Second Judicial District Court. This ruling however, was overturned by the Utah Supreme Court on March 6, 2001. The Court held therein that, "the Utah Administrative Code mandates an award of plaintiff's attorney's fees where UDOT settles the plaintiff's inverse condemnation action," and remanded the case for further proceedings.

12. On remand, pursuant to a Motion *in Limine*, Judge Dawson ruled on February 22, 2002, that he lacked personal jurisdiction over any of the Appellants named in this Complaint ("Second Complaint"), and could not receive evidence or make an award as to these Appellants requiring the above listed Appellants to file this separate action relative to their claim for reimbursement of attorneys fees.

13. The above-named Appellants, as owners of real property, contracted for attorney services, entering into signed contingent fee retainer agreements, received specific benefits of the \$10 million settlement, and consequently are under an obligation to pay a reasonable contingent attorneys fee as they became part of a class of beneficiaries of the original Complaint.

14. Having obligated themselves to the payment of attorneys fees for the settlement of their claims, Appellants have requested of UDOT to reimburse them for any reasonable expenses, including reasonable attorneys fees, as required by law. To date, UDOT has denied such request.

15. In addition to the above, some Appellants referenced above, were told by UDOT that they must first discharge their attorneys prior to UDOT's willingness to enter into a settlement negotiation and purchase their properties.

RELATED OR PRIOR APPEALS

There are no related or prior appeals relative to this action.

SUMMARY OF ARGUMENT

The Supreme Court decision of *Robinson, et al. v. Utah Dept. of Transportation*, 2001 Utah 21, 20 P.3d 396 (Utah 2001), established the rights of Utah landowners forced to initiate "proceedings" in inverse condemnation to recover costs and attorneys fees from the condemning agency – this by reason of 49 C.F.R. Part 24.107, adopted wholesale by the Utah Department of Transportation and Utah Admin. Code R933-1. Appellants herein, while they

were never admitted as nominal parties to the Second District Court action, were nonetheless part of the “proceeding” settled by UDOT in Second District – (1) Appellants, no less than the named plaintiffs in the Second District action, retained counsel and were represented in resolution of claims represented in that action; (2) through their counsel, they participated in negotiation and resolution of claims as represented in that action; (3) all fees were incurred “because of” the Second District Court action; (4) the Second District Court action resulted in “a settlement”; and (5) Appellants actually petitioned for joinder in the Second District Court action (which, however, was settled as to all aspects with the exception of attorneys fees before the Motion to Amend was ruled upon).

The lower court improperly posited that Appellants herein may have been barred by the Second District Court ruling under doctrines of claim preclusion, or *res judicata*. The Second District Court’s ruling, however, made abundantly clear that the Appellants were *not* parties therein – the court’s ruling stated that, due to their status as non-parties, that court had no personal jurisdiction to make an award of attorneys fees.

The trial court’s assumption that Appellants were either not parties to the Second District Court action (and thus not entitled to fees under governing law), or *were* parties to that action and therefore barred by *res judicata*, misconstrues both the enabling statute and the doctrine of claim preclusion. Appellants are not, and cannot be, bound by the Second District Court ruling denying their application for attorneys fees, as that ruling was *based on* the proposition that they were non-parties, and therefore beyond the court’s personal

jurisdiction. To suggest that such exclusion likewise precludes Appellants from seeking recovery of attorneys fees expended incident to the overall “condemnation proceeding” (as defined under federal regulatory law), however, would create a meaningless distinction between the four parties selected as nominal plaintiffs in the Second District Court action, and the remaining parties positioned in exactly the same way, who had sought joinder in the Second District Court action prior to its settlement.

ARGUMENT

POINT I

APPELLANTS HEREIN STATED A VALID CLAIM OF ENTITLEMENT OF RECOVERY OF ATTORNEYS FEES INCIDENT TO UDOT’S TAKING OF THEIR PROPERTY, PURSUANT TO 49 C.F.R. PART 24.107, AND UTAH ADMIN. CODE R933-1.

UDOT’s first argument before the trial court was that, due to its procedural structuring of the settlement entered in the Davis County action, it has managed to strip the named Appellants in this action of their right to recover any attorneys fees, in that they were not properly parties to the Davis County action, and therefore not part of the “settlement” entered in that “proceeding.” UDOT prevailed upon the trial court to read the applicable rule so narrowly that only the named parties litigant in the Davis County action have any right to attorneys fees, regardless of how many landowners were required to retain legal counsel to battle UDOT’s taking of their property, prior to effectuation of the global settlement of which the Davis County action was only a small part:

Relief can only be granted in this action if the plaintiffs were part of an inverse condemnation proceeding *and* effected a settlement of such proceeding.

(UDOT's Memorandum, R. 45-74, at p. 5.) Such a hyper-technical reading of the regulation in question disregards not only its underlying policy, but its express language, in the interest of avoiding a clear obligation to pay attorneys fees incurred in resisting an uncompensated taking of nearly 300 privately-owned properties along the Highway 89 corridor.

49 C.F.R. § 24.107, adopted wholesale by UDOT as a governing state takings regulation, forms part of a regulatory scheme adopted by the office of the Secretary of Transportation governing real property acquisition for federal and federally-financed road projects.⁴ It reads in its entirety as follows:

The owner of the real property shall be reimbursed for any reasonable expenses, including reasonable attorney, appraisal, and engineering fees, which the owner actually incurred because of a condemnation proceeding, if:

(a) the final judgment of the court is that the agency cannot acquire the real property by condemnation, or

(b) the condemnation proceeding is abandoned by the agency other than under an agreed-upon settlement; or

(c) the court having jurisdiction renders a judgment in favor of the owner in an inverse condemnation proceeding or the agency effects a settlement of such proceeding.

⁴ It is undisputed in this action that the Highway 89 project received federal funds; in addition, as noted below, 49 C.F.R. § 24.107 has been adopted wholesale as part of UDOT's state regulatory scheme – see Rule 933-1-1, Utah Admin. Code.

49 C.F.R. Part 24.107 was promulgated pursuant to the Uniform Relocation Assistance Real Property Acquisition Procedures Act, 42 U.S.C. §§ 4601-4655. At 42 U.S.C. § 4621(b), Congress declared the purpose of the Uniform Act as follows⁵:

This subchapter establishes a uniform policy for the fair and equitable treatment of persons displaced as a direct result of programs or projects undertaken by a Federal agency or with Federal financial assistance. The primary purpose of this subchapter is to ensure that such persons shall not suffer disproportionate injuries as a result of programs and projects designed for the benefit of the public as a whole and to minimize the hardship of displacement on such persons.

UDOT attempted once before to avoid the clear implication of its adoption of 49 C.F.R. Part 24.107, persuading the Second District Court that no attorneys fees were recoverable by the named plaintiffs therein, or any other landowner along the Highway 89 corridor. The Utah Supreme Court, however, ruled that fees were properly recoverable – see *Robinson, et al. v. Utah Department of Transportation*, 2001 UT 21, 20 P. 3d 396 (Utah 2001). UDOT now argues that only parties named in actual litigation may recover fees incurred through its conduct, even though non-party landowners are in precisely the same position as were those nominally included in the Second District case caption. Both a proper construction of 49 C.F.R. Part 24.107 against the backdrop of the above-stated policy, and a literal reading of its language, compel the conclusion that UDOT’s attempt to avoid responsibility to these

⁵ That wholesale adoption, by one jurisdiction, of legislative language from another jurisdiction also presumptively adopts statements of underlying legislative purpose and judicial interpretations of legislative intent, see *De Baritault v. Salt Lake City Corp.*, 913 P. 2d 743 (Utah 1996); *State v. Powasnik*, 918 P. 2d 146 (Utah App. 1996).

Appellants through its current attempt at procedural maneuvering is both misplaced and improper under law.

A. Appellants' Participation in the Legislative, Administrative and Judicial Effort Undertaken by Appellants Along the Highway 89 Corridor, Which Resulted in Compelling UDOT to Acquire Properties Along the Corridor, Makes Them Part of a "Proceeding" Within the Meaning of 49 C.F.R. Part 24.107.

49 C.F.R. Part 24.107 entitles a landowner to a recovery of reasonable expenses, including attorneys fees, "which the owner actually incurred because of a condemnation proceeding . . ." The term "proceeding" has traditionally been given a broad interpretation in the law. It is a comprehensive term, broader than the term "action." Generally speaking, it includes any prescribed course of action for enforcing a legal right, of which the actual prosecution of judicial action is only a part. See *Borough of Jamesburg v. Hubbs*, 80 A.2d 100, 6 N.J. 578 (N.J. 1951); *Wilder v. Colburn*, 21 Haw. 701 (Haw. 1913). It has been expressly held to include the conducting of business before a nonjudicial body – see *Ryan and Vidas v. Modern Electronic Products, Inc.*, 295 N.W.2d 514 (Minn. 1980).

49 C.F.R. Part 24.107 advisedly uses the term "condemnation proceeding," as opposed to "condemnation action," in its granting of reasonable attorneys fees to the landowner. It clearly contemplates efforts beyond the walls of the courthouse, aimed at securing just compensation to displaced Appellants. The regulation itself, in fact, contemplates pre-litigation "proceedings" falling well outside the scope of a filed lawsuit, including pre-litigation notice to the affected property owner of a contemplated taking (49 C.F.R. Part

24.102(b)); a detailed pre-litigation appraisal process which includes input from the landowner (49 C.F.R. Part 24.102(c)); the issuance of a written purchase offer by the condemning authority, including a summary statement of interest being acquired and value being paid therefor (49 C.F.R. Part 24.102(e)); specified pre-litigation negotiation procedures to be undertaken in attempts to resolve the landowner's claim without the filing of litigation (49 C.F.R. Part 24.102(f)); the specification of criteria for the appraisal of private property (49 C.F.R. Part 24.103); an internal process for agency review of appraisals (49 C.F.R. Part 24.104); etc. It stretches logic to the breaking point to assume that, where the landowner incurs appraisal, engineering and legal expenses in the course of these pre-litigation procedures mandated by law, yet still ends up having to file an inverse condemnation proceeding which thereafter is settled by the condemning agency, such expenses are not nonetheless considered part of the "condemnation proceeding" for purposes of reimbursement under Section 24.107.

By the same token, Appellants in this action, as all affected property owners along the affected Highway corridor, were compelled to hire legal counsel to pursue their interests in the face of UDOT's determination to take their land without the payment of just compensation. Whether or not the resulting representation was strictly confined to the prosecution of the inverse condemnation lawsuit before the Second District Court is not the point. The underlying facts are that (1) the Appellants are owners of real property within the affected area; (2) they actually incurred legal fees incident to UDOT's attempts to take their

property without payment of just compensation; (3) the legal representation thus procured resulted in the filing, and later settlement, of an inverse condemnation action, which settlement benefitted Appellants. Whether or not these Appellants' names appeared in the Davis County case caption is irrelevant – they incurred their legal fees as part of a larger “condemnation proceeding” which resulted in a settlement of their claims (albeit outside of the Davis County action), and should be entitled to recover their attorneys fees. To impose any more restrictive reading on Section 24.107 would defeat Congress’s statement of underlying purpose and policy.

B. Appellants’ Participation in the Davis County Condemnation Action, as Members of the Proposed Class, Entitles Them to the Recovery of Their Attorneys Fees.

Even if this Court reads the term “proceeding,” as used in Section 24.107, as applying only to the Davis County inverse condemnation action, UDOT’s attempt to exclude Appellants’ participation in an attorneys fee award, by arguing that they were not among the named settling parties involved in final resolution of that action (as interpreted by the Second District Court) fails on its face. Appellants’ involvement in the Davis County action was more than sufficient to satisfy the requirements of the regulation.

Appellants were members of the petitioning class which initiated the Davis County proceeding. As set out at paragraph 6 of their Complaint, Appellants participated in the preparation and filing of the Complaint in the Second District Court action. The Court should note, in fact, that prior to the settlement reached in the Davis County action, the

parties plaintiff in that action filed a proposed Amended Complaint which *expressly named* the Appellants in this action (R. 65-74). The Second District Court never ruled on the proposed amendment, however, as UDOT's \$10 million global settlement with property owners (litigant and non-litigant alike) rendered it unnecessary. The fact that Appellants were ultimately not named separately as parties in the settlement agreement of record in the Davis County does not deprive them of their status as participants in that action. As noted above, a "proceeding" includes all phases of the process invoked in the vindication of a legal right – not strictly nominal participation in the judgment itself.

1. Appellants' attorneys fees were incurred "because of" the Second District Court action.

Appellants in this action retained counsel to obtain for them the relief which was finally afforded as a direct and proximate result of the initiation of the Second District Court action. But for the initiation of that action, the settlement matrix ultimately offered by UDOT to all affected property owners – including the Appellants herein – would not have occurred. Under these circumstances, Appellants' attorneys fees were clearly "incurred because of a condemnation proceeding."

2. The Davis County action resulted in "a settlement."

Under Section 24.107, Appellants are entitled to the recovery of costs and fees incurred because of a condemnation proceeding if "the agency effects *a settlement* of such proceeding" (emphasis added). The regulation does not mandate that the stated settlement be with the specific landowner in order to trigger a right to the recovery of costs and fees.

UDOT's insistence, in its Memorandum, that because the named Appellants' herein were not specifically named in the settlement entered in the Davis County action, they are therefore not entitled to their attorneys fees, ignores the plain language of the regulation itself. Appellants incurred attorneys fees; they incurred such fees in connection with the Davis County action; and UDOT, as the condemning agency, effected "a settlement" in that action. Under even the narrowest reading of the regulation, therefore, Appellants must be held entitled to the recovery of costs and fees.

UDOT's entire argument, understandably, emphasizes a narrow reading of the regulation to preclude Appellants' claims by urging a narrow interpretation of the term "proceeding." In reality, the more appropriate reading and focus should be on the term "settlement." The clear intent of section 24.107 is to allow a landowner to recover when a condemning agency "effects a settlement," not to obsess over the nature and status of the "proceeding" in which the settlement was affected. Appellants herein clearly effectuated a settlement with UDOT – via legislative action, administrative negotiations, and judicial action – all of which formed part of the "proceedings" in question.

UDOT has attempted to avoid its obligations for attorneys fees from the outset of this matter, the language of its own regulation notwithstanding. It first denied liability for fees altogether; it then managed to squeeze the Appellants named in this action out of participation in the attorneys fees award before the Davis County Court. It even approached affected Appellants individually, attempting to persuade them to discharge

legal counsel before settlement could be effectuated in the hopes of avoiding attorneys fees. UDOT now claims, in essence, that it has so engineered the resolution of the Second District Court action that the named Appellants in this action fall through the procedural cracks; that, because it agreed to a larger settlement with affected Appellants along the Highway 89 corridor (all of whom had joined for certification as a class in the Davis County action), while still avoiding certification of the plaintiff class in that action, it owes attorneys fees only to the named parties therein. UDOT claims that other landowners – whose costs and attorneys fees are no less a product of UDOT misconduct than those incurred by the named parties before the Davis County Court – must somehow (and in direct derogation of the policies underlying both the state and federal regulatory structure) be deprived of their right to reimbursement for those fees. Neither the intent underlying the regulatory scheme nor its express language can possibly countenance such a result.

POINT II

THE LOWER COURT ERRED IN APPLYING THE DOCTRINE OF *RES JUDICATA*, OR CLAIM PRECLUSION, TO APPELLANTS' CLAIMS.

Having argued, in one breath, that the named Appellants in this action were so far removed from the Davis County action that they cannot claim the right of attorneys fees incurred with respect thereto, UDOT argued, in the next breath, that the named Appellants herein are so inextricably bound up in the Davis County action that their

claims herein are barred under the doctrine of *res judicata*. The trial court seized upon this argument, ruling that Appellants herein were bound by *res judicata* to the extent that they were before the Second District Court, and beyond the scope of the statute granting recovery of fees if they were not.

The lower court ruling ignores the clear and unambiguous language of Judge Dawson's disposition of UDOT's motion *in limine* in the Second District action, and the fact that two separate and distinct tests are involved.

A. Appellants Are Not Bound by Claim Preclusion.

The doctrine of *res judicata*, and more particularly the application thereof termed "claim preclusion," provides that parties to a civil action may not re-litigate, in a separate proceeding, any causes of action which were or could have been resolved by the prior action. Application of the doctrine was explained by the Utah Supreme Court in the case of *Snyder v. Murray City Corporation*, 2003 Utah 13, 471 Utah Adv. Rep. 5, 2003 Utah Lex. 34 (2003) as follows:

Generally, "claim preclusion bars a party from prosecuting in a subsequent action a claim that has been fully litigated previously" [citations omitted]. In order for a claim to be precluded under this doctrine the party seeking preclusion must establish three elements:

First, both cases must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or be one that could or should have been raised in the first action. Third, the first action must have resulted in a final judgment on the merits.

2003 Utah at p. 16.

The inapplicability of the claim preclusion doctrine to Appellants' claims in this action is self-evident under the foregoing standard. By UDOT's own admission, it petitioned the Second District Court for an order *in limine*, preventing any introduction of evidence relating to attorneys fees incurred by any person not a nominal party thereto. The Davis County Court's March 19, 2002, ruling went well beyond the evidentiary nature of the motion, however – Judge Dawson expressly concluded as follows:

This court has *no jurisdiction in this action over any person except the four property owners bound by the Stipulation.*

(Emphasis added.) Having no jurisdiction over any persons not named in the suit and stipulation, therefore, the court can hardly have rendered an adjudication on the merits of any claim asserted by the Appellants to this action. The Second District Court action not having concluded with an adjudication of Appellants' claims on the merits, claim preclusion does not apply.

B. Appellants' Non-party Status Does Not Preclude Their Participation in a "Proceeding" Under 49 C.F.R. Part 24.107.

The lower court, in essence, held that either Appellants were parties to the Davis County action, and are therefore barred by claim preclusion from pursuing this claim, or they were not parties to the Davis County action, and therefore may not take advantage of the provisions of Section 24.107. The holding in this regard completely disregards the different scope of the two provisions.

Claim preclusion is a rigid, literal doctrine intended only to preclude the re-litigation of claims by or against parties to a prior proceeding, to the extent that those claims were (or could have been) adjudicated on their merits in the prior action. 49 C.F.R. Part 24.107, by contrast, affords attorneys fees to any landowner actually incurring such fees “because of a condemnation proceeding,” where the condemning agency “effects a settlement of such proceeding.” UDOT’s success in precluding the named Appellants herein from participating in an attorneys fee award before the Davis County Court does not force them beyond the ambit of Section 24.107, but is fatal to any assertion of claim preclusion.

To accept the lower court’s “either-or” analysis of Appellants’ status before the Second District uses an artificial distinction to defeat the purposes articulated in 42 U.S.C. § 4621(b). Appellants, no less than the named plaintiffs before the Second District Court, have been put to the task of hiring and paying counsel in order to obtain a settlement on their claims of inverse condemnation. They were part of a proposed class before that court, and even went to the point of petitioning for inclusion as named plaintiffs therein. Only the timing of the settlement precluded their joinder. To exclude them from participation in the awarding of costs and fees would be to exalt form over substance.

CONCLUSION

No one wishes more than Appellants that they had been permitted to participate in the Second Judicial District Court's adjudication of attorneys fees, to all affected landowners in the Highway 89 corridor, as contemplated by their original Complaint. It was UDOT's success in persuading Judge Dawson that he lacked personal jurisdiction over any landowner not expressly named as a party to the stipulation entered in the Davis County action that has necessitated the filing of this case. With or without the Second District Court's exercise of personal jurisdiction over these Appellants, however, the fact remains that they are landowners in an area affected by UDOT's proposed acquisition; that they had to incur attorneys fees, and participate in the prosecution of a purported class action in Second District Court, in order to compel UDOT to make peace with all the affected property owners along the corridor; and that – despite the express language of both state and federal regulations – those attorneys fees have not been reimbursed by UDOT.

Dated this 25th day of June, 2004.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Brief of Appellants was mailed via first class mail, postage prepaid, to the following this

25th day of June, 2004:

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