

2004

Heughs Land, LLC, a Utah limited liability company v. City of Holladay, a municipal corporation and local subdivision of the State of Utah : Brief of Appellee

Utah Court of Appeals

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BRIEF

**UTAH
JUDICIAL
COURTS
56**

IN THE UTAH COURT OF APPEALS
DOCKET NO. 20040611-CA

HEUGHS LAND, LLC, a Utah limited liability company, :
Plaintiff–Appellant, : Case No. 20040611-CA
v. : District Court Case No. 030919270
CITY OF HOLLADAY, a municipal corporation and local subdivision of the State of Utah, :
Defendant–Appellee. :

**Appeal from the Third Judicial District Court
in and for Salt Lake County, State of Utah,
The Honorable Glenn K. Iwasaki**

BRIEF OF APPELLEE

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ORAL ARGUMENT REQUESTED

**FILED
UTAH APPELLATE COURTS
DEC 22 2004**

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	:	Case No. 20040611-CA
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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j) since this appeal was transferred from the Utah Supreme Court to the Utah Court of Appeals on July 21, 2004. R. at 117.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

The following constitutional provisions and statutes are determinative of the appeal:

1. U.S. CONST., amend. V.

“Nor shall private property be taken for public use, without just compensation.”

2. UTAH CONST., art. I, § 22.

“Private property shall not be taken or damaged for public use without just compensation.”

3. UTAH CODE ANN. § 63-30-10.5. **Waiver of immunity for taking private property without compensation**

“(1) As provided by Article I, Section 22 of the Utah Constitution, immunity from suit of all governmental entities is waived for the recovery of compensation from the governmental entity when the governmental entity has taken or damaged private property for public uses without just compensation. . . .”

4. UTAH CODE ANN. § 63-30-11. **Claim for injury – Notice – Contents – Service – Legal disability – Appointment of guardian ad litem**

“(2) Any person having a claim for injury against a governmental entity, or against its employee for an act or omission occurring during the performance of the employee’s duties, within the scope of employment, or under color of authority shall file a written notice of claim with the entity before maintaining an action, regardless of whether or not the function giving rise to the claims is characterized as governmental.

(3) (a) The notice of claim shall set forth:

- (i) a brief statement of the facts;
- (ii) the nature of the claim asserted; and
- (iii) the damages incurred by the claimant so far as they are known.

(b) The notice shall be

- (i) signed by the person making the claim or that person’s agent, attorney, parent, or legal guardian; and

(ii) directed and delivered to

(A) the city or town recorder, when the claim is against an incorporated city or town. . . .”

5. UTAH CODE ANN. § 63-30-13. **Claim against political subdivision or its employee – Time for filing notice.**

“A claim against a political subdivision or its employees for an act or omission occurring during the course of the employee’s duties, within the scope of employment, or under color of authority, is barred unless notice of claim is filed with the governing body of the political subdivision according to the requirements of Section 63-30-11 within one year after the claim arises”

SUMMARY OF THE ARGUMENT

Under the Utah Governmental Immunity Act (“Immunity Act”), before a party can bring a claim against any governmental entity, including a municipality, the party must direct or deliver a written notice of claim with the entity. If a party is bringing a claim against a municipality, the notice of claim must be directed to the city recorder. Failure to properly file a notice of claim bars the plaintiff from bringing the claim against the entity.

The district court was correct in dismissing Plaintiff’s state law claims for failure to comply with the Immunity Act. The Plaintiff failed to file any notice of claim to the Holladay City Recorder. Furthermore, pursuant to the Immunity Act, Plaintiff had until December 17, 2003 to file such notice. As the one-year period for compliance with the notice requirement expired on December 17, 2003, there can be no cure of the jurisdictional defect now or in the future. Thus, this Court should affirm the district court’s dismissal of Plaintiff’s state law claims.

The United States Supreme Court and the Utah Supreme Court have clearly held that a Fifth Amendment takings claim does not exist until the plaintiff has availed themselves and been denied just compensation via a state law inverse condemnation

claim. The district court was correct in dismissing Plaintiff's federal takings claims for lack of ripeness because Plaintiff has not yet availed itself and been denied just compensation in a state law inverse condemnation action. Thus, this Court should affirm the district court's dismissal of Plaintiff's federal claims.

ARGUMENT

I. The District Court Was Correct in Dismissing Plaintiff's State Takings Claim For Failure to Comply With the Notice-of-Claim Requirements of the Utah Governmental Immunity Act

Pursuant to Utah's Governmental Immunity Act, UTAH CODE ANN. § 63-30-1, *et seq.* ("the Immunity Act"), proper notice of claim is a jurisdictional prerequisite to any damages action against a political subdivision such as Holladay City:

A claim against a political subdivision or its employees for an act or omission occurring during the course of the employee's duties, within the scope of employment, or under color of authority, **is barred unless notice of claim is filed with the governing body of the political subdivision according to the requirements of Section 63-30-11** within one year after the claim arises. . . .

UTAH CODE ANN. § 63-30-13 (emphasis added); *see also Wheeler v. McPherson*, 40 P.3d 632, 636-37 (Utah 2002). The Immunity Act provides that a notice of claim shall be "directed and delivered to . . . the city or town recorder, when the claim is against an incorporated city or town." UTAH CODE ANN. § 63-30-11(3)(b)(ii)(A).

Utah Courts have consistently held that the Immunity Act's notice requirements are to be strictly construed and enforced. *See e.g. Gurule v. Salt Lake County*, 69 P.3d

1287, 1289 (Utah 2003) (“court has long required strict compliance”); *Bellonio v. Salt Lake City Corp.*, 911 P.2d 1294,1297 (Utah Ct. App. 1996) (“Utah Courts have typically required strict compliance with the notice of claim requirements. . . .”); *Bischel v. Merritt*, 907 P.2d 275, 279 (Utah Ct. App. 1995) (“Utah Courts have established a rule of strict compliance with the notice provisions of the Utah Governmental Immunity Act.”).

Neither actual notice to the appropriate city official nor other reasonably strict compliance is sufficient. *See Gurule*, 69 P.3d at 1289. In fact, any deviance from the clear and unambiguous requirements set forth in § 63-30-11 will bar a plaintiff’s claim against a governmental entity. *See Bellonio*, 911 P.2d at 1296 (failure to strictly comply with the notice requirements of § 63-30-11 barred claim against a city).

Here, the incident constituting the City’s final rejection of the Plaintiff’s proposal giving rise to Plaintiff’s claim occurred on December 17, 2002. *See* Complaint, R. at 7, and 25-29. The purported notice of claim provided by the Plaintiff on January 22, 2003, was directed and delivered to then-Mayor Larkin, not to the City Recorder. *See* Exhibit B, R. at 30. The Plaintiffs failed to “direct or deliver” any notice of claim to Holladay City Recorder Jerry Medina or his successor, Deputy Holladay City Recorder Stephanie Carlson, on or before the December 17, 2003, deadline for such notice.

It is clear that the Plaintiff failed to strictly comply with the Immunity Act’s notice requirements, which deprived the district court of subject matter jurisdiction. Further, as

the one-year period for compliance with the notice requirements expired on December 17, 2003, there can be no cure of the jurisdictional defect now or in the future. Under these circumstances, the only appropriate course of action was the dismissal of the Plaintiff's claims with prejudice for lack of subject matter jurisdiction. *See Gurule*, 69 P.3d at 1289 (“trial court was correct in dismissing the case for lack of subject matter jurisdiction”); *Wheeler*, 40 P.3d at 638 (“we affirm the district court's dismissal of plaintiffs' suit for lack of jurisdiction”).

The Plaintiff's first argument is that Article I, § 22 of the Utah Constitution is self-executing and is not subject to the Utah Governmental Immunity Act.¹ Aplt. Brief at 10. In support of their argument, Plaintiff cites to *Coleman v. Utah State Land Bd.*, 795 P.2d 622 (Utah 1990). *Coleman*, however, is distinguishable from the present case.² A reading of *Coleman* shows that the issue was not the procedural requirements of the Immunity Act, but rather the substantive immunity given to government entities under the Immunity Act. The Utah Supreme Court held in *Coleman* that under Article 1, § 22, government entities were not immune from a takings claim. *Id.* at 635. The Court did not

¹The fact that a constitutional provision is self-executing has no bearing on whether that provision is subject to the Immunity Act. Rather, if a constitutional provision is self-executing, it simply means the provision “is one that can be judicially enforced without implementing legislation.” *Spackman ex rel. Spackman*, 16 P.3d at 535.

²This is likely the reason why the lower court's memorandum decision does not mention *Coleman*. *See* Aplt. Brief at 13.

hold that a plaintiff bringing a state takings claim was exempt from the notice requirement under § 63-30-11. All of the other cases Plaintiffs cite in support of their argument, *Hamblin v. City of Clearfield*, 795 P.2d 1133 (Utah 1990), *Farmers New World Life Ins. Co. v. Bountiful City*, 803 P.2d 1241 (Utah 1990), *Bateman v. City of West Bountiful*, 89 F.3d 704 (10th Cir. 1996) and *Spackman v. Board of Education*, 16 P.3d 533 (Utah 2000) also deal with substantive immunity under UTAH CODE ANN. § 63-30-10.5 rather than the procedural requirements under the Immunity Act.

While the Plaintiff may ponder why *Pig's Gun Club, Inc. v. Sanpete County*, 42 P.3d 379 (Utah 2002), does not address *Colman v. Utah State Land Bd.*, 795 P.2d 622 (Utah 1990), the answer is quite simple. *Colman* and its progeny, as explained above, examined **substantive** sovereign immunity under the Immunity Act and Article I, Section 22. *Pig's Gun Club* examined the **procedural** requirements of the Act's notice provisions. As determined by the Utah Court of Appeals in *Nielson v. Gurley*, 888 P.2d 130 (Utah App. 1994) the substantive immunity provisions of the act are separate and independent from the procedural notice provisions and are entitled to a separate analysis. The "limitations" examined by *Colman* and the other pre-*Pig's Gun Club* cases cited by the Plaintiff's clearly address only the substantive sovereign immunity otherwise granted by the Act.

The other post-*Pig's Gun Club* cases cited by the Plaintiff are equally irrelevant.

In *Security Investment Ltd. v. Brown*, 47 P.3d 97 (Utah 2002), the Court disagreed with the plaintiffs' premise that their claims arose under Article I, Section 22 of the Utah Constitution and accordingly never reached the notice issue. *Id.* at 100. The quoted portion of *B.A.M. Dev., L.L.C. v. Salt Lake County*, 87 P.3d 710 (Utah Ct. App. 2004) represents a footnote to the dissenting opinion that does not address the notice requirement at all but again refers to the **substantive** sovereign immunity analysis contained in *Colman*, *supra*.

Pig's Gun Club, *supra*, conclusively establishes that the notice requirement of the Act applies to state law taking claims. The Plaintiff has failed to comply with that notice requirement and the court lacks subject matter jurisdiction to hear the Plaintiff's state law claims. *See Security Investment, Ltd.*, 47 P.3d at 101.

Plaintiff argues that the City of Holladay's distinction between substantive immunity and the procedural requirements of the Immunity Act "appears to be without support when viewed in the broader context of takings law." Aplt. Brief at 14. In support of its argument, Plaintiff states that the Utah Supreme Court in *Coleman* and *Pigs Gun Club* did not draw such a distinction. Aplt. Brief at 14. Plaintiff's argument is unconvincing because the issue in *Coleman* was on substantive immunity, that is, whether the defendants were immune from liability, not on whether the plaintiff complied with the procedural requirements of the Immunity Act. *Coleman*, 795 P.2d at 630. Thus, the court

did not need to examine the procedural requirements of the Immunity Act. In *Pigs Gun Club*, since the Utah Supreme Court found that the plaintiffs notice of claim was deficient, it needed not to address whether the defendants were immune from suit. *Pigs Gun Club, Inc. v. Sanpete County*, 42 P.3d 379, 382 (Utah 2002). The final reason given by Plaintiff against the distinction between substantive immunity and the procedural requirements of the Immunity Act is that the “only case which discusses the term ‘substantive immunity’ co-extensively with the Utah Governmental Immunity Act is *Nielson v. Gurley*.” Aplt. Brief at 14. In *Nielson v. Gurley*, 888 P.2d 130 (Utah Ct. App. 1994), the Court of Appeals found that the notice requirements of the Act constituted a separate and independent ground of protection to governmental defendants even in cases where immunity had been waived as to the underlying claim. The Court of Appeals stated:

[Nielson] confuses the scope of the notice requirement with the extent of substantive sovereign immunity protection. Complying with the notice provisions of the Governmental Immunity Act is a jurisdictional requirement and a precondition to suit, and is ***in no way co-extensive with the substantive provisions contained within the Governmental Immunity Act*** which insulate the sovereign and its operatives from liability. If, as Nielson argues, a plaintiff need only provide notice in those situations when the sovereign may properly invoke immunity under the substantive provisions of the Act, the notice requirement would be meaningless because the substantive provisions of sovereign immunity would fully protect the sovereign and its operatives in any event.

Id. at 135 (footnote and internal citations omitted, emphasis added). As *Nielson* makes

clear, the notice requirement is a separate and independent provision of the Act that must be complied with even in cases where there is no substantive immunity as a matter of waiver or otherwise. While this may be the only case that uses the phrase “substantive sovereign immunity” when speaking of the Immunity Act, other courts have found that the notice requirement is a precondition to suit and is separate analysis from the immunity provisions of the Immunity Act. *See e.g., Madsen v. Borthick*, 769 P.2d 245, 250 (Utah 1988) (holding that “because the plaintiffs . . . did not give the required notice and therefore failed to satisfy a precondition to suit, the trial court lacked jurisdiction to consider the merits of their claim”).

Furthermore, separate application of the notice requirement makes sense in light of the independent purpose that it serves. “The purpose of a notice of claim is to provide the governmental entity an opportunity to correct the condition that caused the injury, evaluate the claim, and perhaps settle the matter without the expense of litigation.” *Pig’s Gun Club*, 42 P.3d at 382 (internal quotation omitted). In light of the clear statutory and case law on this subject, there can be no dispute that the notice requirement of the Act applies to all claims against governmental entities regardless of whether substantive immunity has been waived for the claims asserted. The Defendants were accordingly entitled, at the minimum, to dismissal of all of the Plaintiff’s state law claims for lack of jurisdiction.

Additional evidence that before bringing a state takings claim a plaintiff must comply with the notice requirements of UTAH CODE ANN. § 63-30-11 is found in a comparison of § 63-30-5 and § 63-30-10.5. Section 63-30-5 waives immunity for claims arising from “contractual rights or obligations” and provides that such claims are not subject to the notice requirements of § 63-30-11. In contrast, while § 63-30-10.5 provides a waiver of immunity for state takings claims, the section does not provide that such claims are not subject to the notice requirements of § 63-30-11. If the legislature would have intended that state takings claims were exempt from the notice requirements of § 63-30-11, they would have so provided as they did in § 63-30-5.

In conclusion, the notice requirements of § 63-30-11 apply to Article I, § 22 of the Utah Constitution. Failure to comply with the notice requirements of the Immunity Act deprives the district court of subject matter jurisdiction. Accordingly, because Plaintiff failed to comply with the notice requirement under § 63-30-11, its state law claims against Holladay City are barred and were correctly dismissed.

II. The District Court was Correct in Dismissing Plaintiff’s § 1983 Takings Claim Against Holladay City for Lack of Ripeness

“The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.” *Williamson Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 194 (1985). “Nor does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a

reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking.” *Id.* (internal quotations and citations omitted). “If the government has provided an adequate process for obtaining compensation, and if resort to that process “yield[s] just compensation,” then the property owner “has no claim against the Government” for a taking.” *Id.* (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013, 1018, n.21, (1984)). The Court noted that “because the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State’s action . . . is not ‘complete’ until the State fails to provide adequate compensation for the taking.” *Id.* at 195. Accordingly, the United States Supreme Court held that “if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.” *Id.*

Based on the foregoing, the Utah Supreme Court has held that Utah residents are not permitted to assert federal takings claims without first availing themselves of an inverse condemnation action under state law. *See, e.g., Patterson v. American Fork City*, 2003 UT 7, ¶ 35, 67 P.3d 466, 476-77 (citing *Williamson*, 473 U.S. at 194) (the Court held that plaintiffs’ Fifth Amendment claim was unripe because the plaintiffs had not availed themselves of the state inverse condemnation procedure); *see also B.A.M. Dev.*,

L.L.C. v. Salt Lake County, 87 P.3d 710, 721, n.8 (Utah Ct. App. 2004) (explaining that under Utah law, “[t]he inverse condemnation action is available to any landowner who suffers destruction or impairment of a protected private property right.”). Accordingly, Plaintiff’s purported § 1983 claim simply does not exist until the Plaintiff has been denied just compensation in a state law inverse condemnation action. Because Plaintiffs have yet to be denied just compensation in a state law inverse condemnation action, Plaintiff’s § 1983 takings claim must be dismissed for lack of ripeness.

Plaintiff admits that as a result of *Williamson* “federal courts now routinely dismiss federal takings claims and require plaintiffs to litigate state inverse condemnation claims in state court first.” Aplt. Brief at 15. However, Plaintiff attempts to get around clear U.S. Supreme Court, Tenth Circuit and Utah Supreme Court case law by arguing that this Court should not adopt a literal interpretation of *Williamson* because to do so would preclude the Plaintiff from litigating its § 1983 takings claim since once it “has litigated state inverse condemnation claims in state court, any subsequent attempt to litigate federal takings claims in federal court is precluded under the doctrines of res judicata and collateral estoppel.” Aplt. Brief at 16. Plaintiff asserts that “courts have been notably resistant to an interpretation of *Williamson* that precludes state courts as a proper initial venue for federal takings claims,” and then asks this Court to find as other courts have that “the proper, and only, venue, following *Williamson*, for raising federal takings claims

is in state court.” *Id.* Plaintiffs argument must be rejected because first, *Williamson* is unambiguous in its holding that a Fifth Amendment takings claim is not ripe before a plaintiff has sought and been denied just compensation via a state law inverse condemnation proceeding, and second, there is binding precedent that supports the Defendant’s and the lower court’s interpretation of *Williamson*.

In *Williamson*, the United States Supreme Court held that “if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.” 473 U.S. at 194. In so holding, the Supreme Court in *Williamson* did not draw a distinction between asserting a Fifth Amendment claim in federal court and asserting a Fifth Amendment claim in state court. For example, the Court did not say that a property owner cannot claim a violation of the Just Compensation Clause *in federal court* until it has availed itself and been denied just compensation via a state court proceeding. Still, Plaintiff wants to interpret *Williamson* as only precluding “federal courts as an initial venue for litigating federal takings claims” and allowing federal takings claims to be brought initially in state court. Aplt. Brief at 15. However, Plaintiff’s interpretation of *Williamson* contradicts the clear wording of the opinion. In *Williamson* the Supreme Court clearly stated that a plaintiff who has not availed itself of a state procedure for seeking just compensation and been denied cannot assert a Fifth

Amendment claim irrespective if it is initially brought in state or federal court.

Case law supports the Defendant's and the lower court's interpretation of *Williamson*. For example, the Tenth Circuit in *Miller v. Campbell County v. United States*, 945 F.2d 348 (10th Cir. 1991), held that "[i]n those states that allow aggrieved property owners to bring an inverse condemnation action in order to recover compensation for property taken by the state, a Fifth Amendment takings claim is not ripe until the aggrieved property owner has used the procedure and been denied just compensation" (citation omitted). The Tenth Circuit did not draw a distinction as to what court, either federal or state, a plaintiff was precluded from asserting a Fifth Amendment claim, but simply stated that until the plaintiff has used the state court procedure and been denied just compensation could the plaintiff allege a Fifth Amendment takings claim.

Plaintiff asserts that "Utah state courts have not had the opportunity to fully explore this issue and provide a definitive opinion." Aplt. Brief at 15. Plaintiff's assertion is unfounded because the State's highest court has recently interpreted *Williamson* in a manner consistent with the lower court's judgment that is binding upon this Court. *Patterson v. American Fork City*, 67 P.3d 466 (Utah 2003).³ In *Patterson*,

³This Court is bound to follow Utah Supreme Court precedent. *See State v. Menzies*, 889 P.2d 393, 398, n.3 (Utah 1994) (explaining the Utah Court of Appeal's duty to strictly adhere to Utah Supreme Court precedent, pursuant to the doctrine of stare decisis).

several real estate developers brought a § 1983 claim against American Fork in which they asserted a deprivation of their Fifth Amendment rights based on the city's refusal to permit development at certain locations. *Id.* at 468-70. However, the real estate developers had failed to utilize a state law takings claim prior to asserting their federal claims. *Id.* at 477. Accordingly, the Utah Supreme Court, citing *Williamson*, dismissed the developers' federal claims on the grounds that they were not ripe:

We also find that the trial court was correct to dismiss Pattersons' Fifth Amendment takings claim. The Supreme Court has held that "[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process '[yields] just compensation,' then the property owner 'has no claim against the Government for a taking.'" [citation to cases omitted] In Utah, the appropriate post-taking remedy is an inverse condemnation action, and Pattersons have not utilized that remedy. "Unless and until plaintiffs avail themselves of [the inverse condemnation] remedy, their takings claim will remain unripe." [citation omitted]

Id. at 476-77 (alterations to quotations in original). The State's highest court interpreted *Williamson* in accordance with the Defendant's and the lower court's interpretation of *Williamson*. What Plaintiff asks is for this Court to overrule last years Supreme Court decision. However, this Court must follow binding precedent and interpret *Williamson* likewise by holding that Plaintiff's failure to use and be denied just compensation via a state law inverse condemnation proceeding bars Plaintiff's § 1983 Takings Claim.

Plaintiff attempts to distinguish *Patterson* from the present case by asserting that in

Patterson “the court dismissed plaintiff’s federal takings claims because plaintiffs, unlike Heughs Land, had not availed themselves of a state inverse condemnation remedies.” Aplt. Brief at 15. Plaintiff’s attempt to distinguish the present case from *Patterson* is unpersuasive because while the plaintiff in *Patterson* may have failed to utilize a state inverse condemnation action, the Plaintiff in this case has not yet been denied just compensation in a state inverse condemnation action, and both are required under *Williamson* in order for a federal takings claim to be ripe.

Furthermore, the lack of ripeness of Plaintiff’s § 1983 takings claim does not work any particular injustice on the Plaintiff or any other potential takings claimant. The Plaintiff has never been denied a forum or an opportunity to vindicate its property rights under the U.S. Constitution. Rather, the Plaintiff was afforded the opportunity to fully and fairly litigate its right to compensation by properly bringing a state law inverse condemnation claim. This full and fair litigation would likely have completely redressed any violation of the Plaintiff’s federal rights, but it cannot now occur due to the Plaintiff’s own failure to comply with state law procedural requirements.

CONCLUSION

The lower court was correct in dismissing Plaintiff’s state and federal claims. First, Plaintiff failed to comply with the notice requirements of UTAH CODE ANN. § 63-30-11 by not directing or delivering to the Holladay City Recorder a Notice of Claim.

Failure to comply with the notice requirements of the immunity act is an absolute bar to suite. Thus, the lower court was correct in dismissing Plaintiff's Art. I, § 22 takings claim. Finally, Plaintiff's § 1983 takings claim is unripe because Plaintiff has not yet availed itself and been denied just compensation via a state law inverse condemnation proceeding. Therefore, the lower court was correct in dismissing Plaintiff's § 1983 takings claim. Accordingly, Defendant respectfully requests this Court to uphold the lower court's dismissal of Plaintiff's claims in their entirety.

DATED this 22 day of December, 2004.

STIRBA & ASSOCIATES

By: 

PETER STIRBA

GREGORY P. NIELSEN

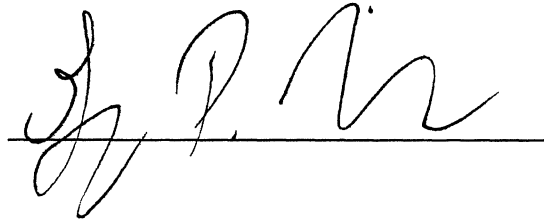
Attorneys for City of Holladay

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22 day of December, 2004, I caused to be served a true copy of the foregoing **BRIEF OF APPELLEE**, by the method indicated below, to the following:

Anthony J. Rampton, Esq.
Angela E. Atkin, Esq.
JONES, WALDO, HOLBROOK & MCDONOUGH
170 So. Main, Suite 1500
Salt Lake City, UT 84101

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

A handwritten signature in black ink, appearing to read "A. J. Rampton", is written over a horizontal line.