

1993

Woods Cross City, a municipal corporation v. Craig Kirk : Brief of Appellee

Utah Court of Appeals

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DOCKET NO.

930262

WOODS CROSS CITY, a
municipal corporation,

Appellee/Plaintiff,

vs.

CRAIG KIRK,

Appellant/Defendant.

• • • • •

Docket No. 930262-CA
Priority No. 15

Civil No. 920000780CV
Judge S. Mark Johnson

BRIEF OF APPELLEE

APPEAL FROM AN ORDER OF
THE SECOND CIRCUIT COURT OF
DAVIS COUNTY, STATE OF UTAH
HONORABLE S. MARK JOHNSON
DATE OF ORDER: MARCH 24, 1993
CASE NO. 920000780CV

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PARTIES MENTIONED BELOW

Plaintiff/Appellee:

Woods Cross City, a municipal corporation;

Defendant/Appellant:

Craig Kirk

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JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction over this Appeal from the Second Circuit Court pursuant to Utah Code Ann. § 78-2a-3(2)(d) (1992).

ISSUES PRESENTED FOR REVIEW

Appellee, Woods Cross City (hereinafter "the City"), is dissatisfied with the statement of issues presented by Appellant, Craig Kirk (hereinafter "Kirk"), and submits the following statement of issues as permitted under Utah R. App. P. 24(b). Appellant's Statement of the Issues of Fact (a) through (c) are improper in that they presume the trial court referred specifically to property located at 1450 West 500 South, Woods Cross, Utah. In actuality, the trial court merely referred to property located "on the south side of 500 South and west of 1400 West" (Judgment at ¶ 1 (March 24, 1993)).

- I. Was the trial court correct in determining that there are no issues of material fact present in this case which would preclude summary judgment in the City's favor ?
- II. Was the trial court correct in determining that the undisputed facts entitle the City to judgment as a matter of law under Section 12-10-102 of the Woods Cross City Ordinances and Section 10-9-1002 of the Utah Code Annotated ?
- III. Was the trial court correct in dismissing Kirk's Counterclaim and Affirmative Defenses ?
- IV. Do the new issues presented for the first time on appeal justify overturning the trial court's grant of summary judgment in the City's favor ?
- V. Should the City be awarded damages, costs and attorneys fees under Utah R. App. P. 33 on the ground that Kirk's appeal is frivolous and pursued solely for the purpose of delay ?

STANDARD OF REVIEW

In reviewing an appeal from a grant of summary judgment, the Court shall view the facts in a light most favorable to the losing party and shall review the trial court's conclusions of law for correctness. Blue Cross & Blue Shields v. State of Utah, 779 P.2d 634 (Utah 1989).

DETERMINATIVE STATUTES AND RULES

The statutes and rules that are pertinent to the resolution of the issues presented on appeal are set forth verbatim in Exhibit "A" attached hereto.

STATEMENT OF THE CASE

Nature of the Case. This is an action by Woods Cross seeking a permanent injunction against Craig Kirk enjoining the use of his property located within the City for commercial and/or industrial purposes in violation of the Woods Cross City zoning ordinances. Kirk is appealing the trial court's grant of summary judgment in the City's favor.

Course of Proceedings. Except as provided herein and as otherwise provided or supplemented in the City's Statement of Facts set forth below, the City agrees with Kirk's Statement of the Course of Proceedings and will not duplicate such effort as permitted under Utah R. App. P. 24(b). The City disagrees with Kirk's Statement No. 2 in that the City's Motion for Summary Judgment was filed on December 2, 1992, not November 2, 1992, and

Statement No. 5 in that the City's Notice to Submit for Decision was filed on December 21, 1992, not December 2, 1992. The City further objects to Kirk's Statements No. 8 & 9 in that the trial court did entertain and rule on Kirk's Motion to Dismiss, Motions to Strike Affidavits and Motion to Stay Proceedings, as evidenced in the Judgment dated March 24, 1993.

Disposition in Circuit Court. The Circuit Court, Honorable S. Mark Johnson presiding, granted Woods Cross' Motion for Summary Judgment permanently enjoining Kirk from using his property located at approximately 1450 West 500 South for parking and storing large commercial vehicles and equipment in violation of the Woods Cross zoning ordinances.

Statement of Facts. Construing Woods Cross City's Complaint in a light most favorable to Kirk and indulging all reasonable inferences in Kirk's favor, the following facts appear of record:

1. Appellee, Woods Cross City, is a municipal corporation and political subdivision of the State of Utah with its principal place of business being Woods Cross City, Davis County, Utah (hereinafter "the City"). (Complaint at ¶ 1, Answer at ¶ 1.)

2. Appellant, Craig Kirk, is an individual and owner of property located within Woods Cross City, Utah (hereinafter "Kirk"). (Complaint at ¶ 2, Answer at ¶ 2.)

3. Kirk owns certain property within Woods Cross located at approximately 1450 West 500 South (hereinafter "the Property"). (Complaint at ¶ 2, Answer at ¶ 2.)

4. The Property is zoned A-1 Agricultural under the Woods Cross City zoning ordinances. (Complaint at ¶ 2, Answer at ¶ 2, Affidavit of Tim Stephens at 1.)

5. Kirk is parking and storing large commercial and industrial trucks and equipment on the Property. (Affidavit of Tim Stephens at 2; Affidavit of Dero Gertsch; Affidavit of Leslie Gertsch; Affidavit of Brent Stephenson; and Affidavit of Gayle Stephenson.)

6. The parking and storing of large commercial and industrial trucks and equipment is not a permitted use of the Property under the Woods Cross zoning ordinances. (Complaint; Affidavit of Tim Stephens at 2.)

7. The City filed a Complaint against Kirk on August 4, 1992, for his use of the Property in violation of City ordinances. (Complaint.)

8. The City's Complaint requested judgment and permanent injunction enjoining Kirk from using the Property for commercial and/or industrial purposes including but not limited to its use for storing or maintaining commercial vehicles. (Complaint at ¶ 1.)

9. The City's Complaint described the property at issue as that located at "approximately 1450 West 500 South, Woods Cross City, Utah." (Complaint at ¶ 2.)

10. Kirk's agent, R.L. Hansen of B & C Building Company, described the Property as that located at "1450 West 500 South"

in applying for a building permit from the City to construct a "barn" on said Property. (Complaint at ¶ 4.)

11. The City filed a Motion for Summary Judgment and Memorandum in Support thereof on December 2, 1992. (Motion for Summary Judgment and Memorandum in Support.)

12. Kirk filed Motions to Strike the Affidavits of Dero Gertsch, Leslie Gertsch, Tim Stephens, Brent Stephenson, and Gayle Stephenson, which were submitted in support of the City's Motion for Summary Judgment, on December 8, 1992. (Motions to Strike Affidavits.)

13. Kirk filed a Motion to Dismiss on December 18, 1992. (Motion to Dismiss.)

14. Kirk filed a Motion to Stay Proceedings on January 14, 1993. (Motion to Stay.)

15. The City's Motion for Summary Judgment, Kirk's Motion to Dismiss, Motions to Strike Affidavits, and Motion to Stay Proceeding were heard before the Honorable S. Mark Johnson on February 11, 1993, at 10:30 a.m. Both parties were represented by respective counsel. (Judgment at p. 1.)

16. The City's Motion for Summary Judgment was granted and Kirk's Motion to Dismiss, Motions to Strike Affidavits, and Motion to Stay Proceedings were denied by the Court on March 9, 1993, and Judgment was entered on March 24, 1993 (hereinafter "the Judgment"). (Judgment at p. 2.)

17. Kirk filed a Notice of Appeal of the Judgment with the Utah Court of Appeals on the April 23, 1993. (Notice of Appeal.)

18. The City did not receive a copy of Kirk's Notice of Appeal from Kirk. (Affidavits of Michael Z. Hayes and Kristi L. Hutchings filed with the City's Memorandum of Points and Authorities in Support of Motion for Summary Disposition.)

19. Kirk filed a Docketing Statement with the Utah Court of Appeals on June 3, 1993. (Docketing Statement.)

20. The City did not receive a copy of Kirk's Docketing Statement from Kirk. (Affidavits of Michael Z. Hayes and Kristi L. Hutchings filed with the City's Memorandum of Points and Authorities in Support of Motion for Summary Disposition.)

21. Kirk filed a Statement Regarding Transcript with the Utah Court of Appeals on July 25, 1993. (Statement Regarding Transcript.)

22. The City did not receive a copy of Kirk's Statement Regarding Transcript from Kirk. (Affidavits of Michael Z. Hayes and Kristi L. Hutchings filed with the City's Memorandum of Points and Authorities in Support of Motion for Summary Disposition.)

23. Kirk filed an Amended Docketing Statement on August 25, 1993. (Amended Docketing Statement.)

24. The City did not receive a copy of Kirk's Amended Docketing Statement from Kirk. (Affidavits of Michael Z. Hayes and Kristi L. Hutchings filed with the City's Memorandum of Points and Authorities in Support of Motion for Summary Disposition.)

25. Kirk filed an Application for Re-Zone of his Property with the City sometime in November of 1992. The document is dated October 13, 1992. (City's Memorandum in Opposition to Kirk's Motion to Stay Appeal Proceedings at ¶ 4.)

26. The Woods Cross City Council denied Kirk's Application for Re-Zone. (City's Memorandum in Opposition to Kirk's Motion to Stay Appeal Proceedings at ¶ 5.)

27. Kirk filed an appeal of the City Council's denial of his Application for Re-Zone with the Second District Court on March 23, 1993. (City's Memorandum in Opposition to Kirk's Motion to Stay Appeal Proceedings at ¶ 6.)

SUMMARY OF THE ARGUMENT

The trial court was correct in granting the City's Motion for Summary Judgment against Kirk in that there exist no issues of material fact and the City is entitled to judgment as a matter of law. The material facts in this case are that Kirk owns property within Woods Cross City located at approximately 1450 West 500 South; Kirk is using such property to park and store large commercial trucks and equipment; the property is zoned A-1, which zone does not permit the parking or storing of large commercial trucks and equipment. Injunctive relief for violation of City zoning ordinances is proper in this case as a matter of law under Section 12-10-102 of the Woods Cross City Ordinances and Section 10-9-1002 of the Utah Code Annotated.

Kirk failed to exhaust administrative remedies regarding the issues raised in his Counterclaim and affirmative defenses and the trial court was correct in dismissing the same.

Kirk may not raise for the first time on appeal the argument that he did not have adequate opportunity for discovery prior to summary judgment. This argument is meritless anyway and should not preclude summary judgment in the City's favor.

The trial court did address and rule on Kirk's Motion to Dismiss, Motion to Strike Affidavits and Motion to Stay Proceedings. Kirk's argument that these items were not entertained by the Court is specious and does not preclude summary judgment in the City's favor.

Finally, Kirk's appeal is based upon frivolous arguments and is pursued for purposes of delay and in bad faith. Pursuant to Utah R. App. P. 33, the City should be awarded damages, double costs and attorneys fees incurred as a result of this appeal.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN GRANTING THE CITY'S MOTION FOR SUMMARY JUDGMENT AGAINST KIRK AS THERE EXIST NO ISSUES OF MATERIAL FACT AND THE CITY IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

A. THERE EXIST NO ISSUES OF MATERIAL FACTS.

The undisputed facts in this case are as follows. Kirk owns property located at approximately 1450 West 500 South, Woods Cross, Utah, hereinafter referred to as "the Property." The Property is zoned Agricultural A-1 under the Revised Ordinances of Woods Cross, Utah. Kirk built a structure on the Property pursuant to a Building Permit obtained from the City wherein

Kirk's agent described the structure as a "barn" and listed the location of the Property as "1450 West 500 South," Woods Cross. Kirk is using the Property and the "barn" to park large asphalt paving trucks and equipment used in his patching and paving business.

Kirk does not contest the fact that the Property is zoned A-1 or that it is being used in violation of the Woods Cross City zoning ordinances. Kirk's appeal is based solely on the contention that Kirk "is not the owner of the property located at 1450 West 500 South, Woods Cross City, Utah . . ." and therefore has never conducted any business on that property or ever parked any vehicles on that property. Appellant's Brief at p. 15.

Kirk's argument is specious, non-meritorious and frivolous. As the City discussed in its Motion for Summary Disposition, there is no issue of fact regarding the location of the property involved in this case. Kirk owns *some* property in the area of 1450 West 500 South, Woods Cross City, which is zoned A-1 and which Kirk is using to park and store large commercial vehicles and equipment. No address has been given to the property, so the parties have been referring to the property as merely that located at "approximately 1450 West 500 South, Woods Cross City, Utah." Even Kirk used this reference to his property when applying for a building permit with the City. Kirk now claims that the property he owns is "1473 West 500 South, Woods Cross City, Utah." This contention is based upon a random assignment of numbering from Utah Power & Light as noted in Kirk's bill from

the Company. Despite Kirk's argument, only the City can assign an address to a property (see Affidavit of Scott Anderson attached to the City's Reply to Kirk's Memorandum in Opposition to the City's Motion for Summary Judgment). As testified to in the Affidavit of Scott Anderson, the Public Works Director of Woods Cross City, no address has been assigned to the Property. (Affidavit of Scott Anderson at ¶ 3.) Thus, referring to the Property as that located at "approximately 1450 West 500 South" is sufficiently clear for purposes of this case. Regardless, the Judgment of the Circuit Court does not specifically refer to "1450 West 500 South" anyway, but merely refers to "property which is located on the south side of 500 South and west of 1400 West" (Judgment at ¶ 1 (March 24, 1993)).

Furthermore, the trial court addressed Kirk's "incorrect address" argument which was raised in both Kirk's Memorandum in Opposition to the City's Motion for Summary Judgment and in Kirk's Motion to Dismiss. The trial court found as a matter of fact that the Property at issue was properly identified. At the oral argument before the trial court, Judge Johnson specifically asked Kirk's attorney if Kirk owned property in the area to which the pleading referred. Kirk's attorney answered in the affirmative. Judge Johnson further explained that he did not want there to be any misunderstanding or issue regarding the property the parties were talking about. Kirk's attorney agreed, thereby consenting to the fact that he knows what property the case involves, that such property is zoned A-1, and that the

Property is being used for parking and storing of large commercial vehicles and equipment.

These conclusions are not disputed by any evidence submitted by Kirk. Kirk contends that the Affidavit he filed in opposition to the City's Motion for Summary Judgment "created a genuine issue of material fact in this case." Kirk's Brief at 16. While it is conceded in Amica Mutual Insurance Co. v. Schettler, 768 P.2d 950, 952 (Utah Ct. App. 1989), that "[o]ne sworn statement under oath is all that is necessary to create a factual issue, thereby precluding the entry of summary judgment," the court also noted that "when the moving party has presented evidence sufficient to support a judgment in its favor, and the opposing party fails to submit contrary evidence, a trial court is justified in concluding that no genuine issue of fact is present or would be at trial." Amica, 768 P.2d at 953 (citation omitted). In addition, the Utah Supreme Court has noted that affidavits in opposition to a Motion for Summary Judgment must contain specific evidentiary facts that would be admissible in evidence showing there is a genuine issue for trial. Treloggan v. Treloggan, 699 P.2d 747 (Utah 1985).¹ Kirk's Affidavit fails to meet the required standard as it presents no specific evidence contrary to the facts establishing that Kirk owns property at approximately 1450 West 500 South which Kirk is using in

¹ See also, Utah R. Civ. P. 56(e) which states that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to matters stated therein."

violation of Woods Cross City zoning ordinances. Wherefore, the trial court was justified in concluding that no genuine issue of fact is present or would be at trial.

Kirk contends that there exists an issue of material fact regarding the City's allegation that Kirk is using his property for conducting a business without a license. Much of this claim is based upon Kirk's specious argument that he does not own the property located at 1450 West 500 South in Woods Cross, and therefore is not responsible for what takes place on such property. Kirk's Affidavit merely says that he is not conducting a business, or storing vehicles or using a phone on property located at 1450 West 500 South because he does not own such property. Kirk's Affidavit does not and cannot say that he has not built a structure on property located in the vicinity of 1450 West 500 South or that he is not parking and storing large commercial vehicles. As noted above, the property referenced in the pleading notes "approximately 1450 West 500 South in Woods Cross." Kirk knows what property this case involves and has failed to controvert any fact or create an issue of material fact regarding his use of the Property for conducting a business without a license and in violation of the Woods Cross City zoning ordinances.

In addition, regardless of whether there is enough evidence to support summary judgment on Kirk's use of his property without a business license, summary judgment is appropriate in this case. Summary judgment may be granted upon any number of established

violations of the Woods Cross City zoning ordinances. Thus, the trial court need not have found as a matter of fact or law that Kirk was conducting business without a license, since it found as a matter of fact and law that he was parking and storing large commercial vehicles and equipment on the Property in violation of the zoning ordinances entitling the City to injunctive relief.

B. THE CITY IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

The City is entitled to judgment as a matter of law. The Woods Cross zoning ordinances provide as a matter of law that land zoned for Agricultural A-1 may be used for:

- (A) agriculture;
- (B) single family dwelling;
- (C) horticulture;
- (D) accessory uses including:
 - (1) accessory buildings which are customarily used in conjunction with, and incidental to, the principal use or structure;
 - (2) swimming pools;
 - (3) home occupations;
 - (4) household pets;
 - (5) storage of materials used for construction of a building;

Section 12-10-102 of the Revised Ordinances of Woods Cross, Utah, 1992. Kirk's use of the Property to park and store paving trucks and equipment is use of the Property for industrial and/or commercial purposes. Such use is not permitted under Section 12-10-102, and is therefore in violation of the Woods Cross zoning ordinances as a matter of law. Under Utah Code Ann. § 10-9-1002 (1992), the City is entitled to obtain an injunction prohibiting Kirk's further industrial and/or commercial use of the Property.

Furthermore, the City "need only establish the violation [of the ordinance] to obtain the injunction." Utah Code Ann. § 10-9-1002(1)(b) (1992). A specific showing of irreparable injury is not required in an action by the City to enjoin a violation of its zoning ordinances as "a showing that the zoning ordinance has been violated is tantamount to a showing of irreparable injury" Utah County v. Baxter, 635 P.2d 61, 65 (Utah 1981). A specific showing of damages is also not required. Harris v. Springville City, 712 P.2d 188 (Utah 1984). Under the applicable laws, ordinances and undisputed facts, the City is entitled to summary judgment as a matter of law and the trial court's finding should be affirmed.

II. THE TRIAL COURT DID NOT ERR IN GRANTING THE CITY'S MOTION FOR SUMMARY JUDGMENT REGARDING THE DISMISSAL OF KIRK'S COUNTERCLAIM AND AFFIRMATIVE DEFENSES.

Kirk has not properly exhausted his administrative remedies regarding the issues raised in his Counterclaim and affirmative defenses and therefore the trial court properly granted the City's Motion for Summary Judgment regarding such claims. It is well-established law that failure to exhaust administrative remedies prevents one from seeking relief from the courts. Merrihew v. Salt Lake County Planning, 659 P.2d 1065 (Utah 1983). The Utah Supreme Court noted in Merrihew: "[w]e do not reach the issue of the validity of the zoning ordinance because we hold that the Plaintiff's failure to exhaust administrative remedies prevents him from seeking relief at this time from the courts."

Merrihew, 659 P.2d at 1067. The Utah Legislature has also recognized the importance of exhausting administrative remedies in the area of local land use and planning. Section 10-9-1001(1) of the Utah Code Annotated provides:

No person may challenge in district court a municipality's land use decisions made under this chapter or under the regulation made under authority of this chapter until that person has exhausted his administrative remedies.

Utah Code Ann. § 10-9-1001(1) (1992).

In essence, Kirk's Counterclaim and affirmative defenses request the court to re-zone the Property from A-1 to I-1 or to grant a non-conforming use permit to allow Kirk to use the Property to store and park large commercial vehicles and equipment. It would have been improper for the trial court to entertain such a request as there exists administrative procedures and remedies for Kirk to exhaust prior to raising such claims before the court. Under Woods Cross City ordinances and Utah Code Ann. § 10-9-101, et seq., Kirk should have filed an application for re-zone or for a non-conforming use permit with the City Planning Commission setting forth all the reasons why the Property should be re-zoned. The decision of the Planning Commission, if adverse to Kirk, could then be appealed to the City Council. The City Council's decision, if adverse to Kirk could then be appealed to the District Court. Utah Code Ann. § 10-9-1001 (1992).

Subsequent to this action by the City against Kirk, Kirk filed an application for re-zone of his Property from A-1 to I-1

with the City Planning Commission. The City Council ultimately denied Kirk's re-zone request and Kirk filed an appeal of that decision with the Second District Court. The appeal to the Second District Court is in its discovery stage. The application for re-zone and appeal in the Second District Court is the correct procedure for determining the issues raised in Kirk's Counterclaim. They should not be entertained by this Court in conjunction with the present case regarding Kirk's violations of existing Woods Cross zoning ordinances.

If Kirk's argument is taken to its logical extreme, any person could entirely circumvent the City's re-zone and permit application process. Under Kirk's argument, rather than requesting a property re-zone or conditional use permit from the local government, a property owner could simply use his or her property in violation of local ordinances, and when the local government brought an action for violation of its ordinances, the property owner could counterclaim asking the court to re-zone the property. This is not allowed, however, as the Utah Legislature has specifically delegated land use and zoning decisions to local authorities not the courts. In addition, the administrative remedies of the local jurisdiction must be exhausted prior to seeking relief from the courts. Utah Code Ann. § 10-9-1001(1) (1992). Kirk's argument also incorrectly implies that a person may violate current city ordinances if an application for re-zone has been filed with the city or if a challenge has been made to the applicable ordinance. Once again, this is not the case as

property owners must comply with current law until and unless otherwise permitted by re-zone, conditional use permit or judicial determination.

Kirk's use of his Property in violation of the Woods Cross zoning ordinances is not exempted simply because he has filed for a re-zone with the City. Nor is it for this Court or the trial court to determine whether such re-zone should be granted, absent exhaustion of administrative remedies already provided by state and local law.² Finally, despite Kirk's argument, an "attempt" to exhaust administrative remedies is not sufficient to qualify as exhaustion of administrative remedies.

III. THE NEW ISSUES PRESENTED FOR THE FIRST TIME ON APPEAL DO NOT JUSTIFY OVERTURNING THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT IN THE CITY'S FAVOR.

A. SUMMARY JUDGMENT IS NOT PROHIBITED IN THIS CASE BY KIRK'S ARGUMENT RAISED FOR THE FIRST TIME ON APPEAL THAT HE DID NOT HAVE ADEQUATE OPPORTUNITY TO CONDUCT DISCOVERY.

Summary Judgment in the City's favor should not be overturned on the grounds that Kirk did not have adequate opportunity to conduct discovery. First, Kirk raises this issue for the first time on appeal. It is well-established law that issues not raised below may not be addressed for the first time

² See Provo City v. Claudin, 63 P.2d 570 (Utah 1936), discussed in the City's Memorandum of Points and Authorities in support of its Motion for Summary Judgment at p. 11, wherein the Utah Supreme Court declined to hear the Claudin's substantive argument regarding the constitutionality of Provo's zoning ordinance as applied to the Claudin's since the Claudin's had failed to first exhaust administrative remedies provided under Provo ordinances.

on appeal. Smith v. Iversen, 848 P.2d 677 (Utah 1993). In Smith, the Utah Supreme Court declined to consider an argument which was not adequately framed in the pleadings nor adequately raised in the summary judgment motion or supporting memorandum, and noted "it is fundamental that the trial court should have the first opportunity to address issues later raised on appeal." Smith, 848 P.2d at 677 (citations omitted). Furthermore, Rule 56(f) of the Utah Rules of Civil Procedure provides that a party opposing a motion for summary judgment may submit an affidavit stating the reasons why he or she needs more opportunity for discovery prior to entry of summary judgment. Utah R. Civ. P. 56(f). Kirk failed to raise the issue of "adequate discovery" in his Memorandum in Opposition to the City's Motion for Summary Judgment, at oral argument before the trial court, under a Rule 56(f) Motion, or in any other pleadings submitted to the Court. The issue may not now be raised or considered by the Court for the first time on appeal.

In addition to improper timing, Kirk's "lack of adequate discovery" argument is meritless. While it is true that summary judgment may not be appropriate if discovery is incomplete, the parties and the court need not go on a fishing expedition for purely speculative or irrelevant facts. Downtown Athletic Club v. Horman, 740 P.2d 275 (Utah Ct. App. 1987). As noted in Downtown Athletic, "a court should deny a motion to continue if the motion opposing summary judgment is dilatory or without merit." Downtown Athletics, 740 P.2d at 276. In the case at

hand, the material facts have been properly established, they are not in dispute, and the City is entitled to judgment as a matter of law based on such facts. Further discovery in this case would not add anything to these material facts, and would only be dilatory or without merit. Thus, summary judgment in the City's favor is proper.

B. SUMMARY JUDGMENT IS NOT PROHIBITED IN THIS CASE BY KIRK'S ARGUMENT THAT THE TRIAL COURT FAILED TO RULE ON KIRK'S MOTION TO DISMISS AND MOTION TO STRIKE AFFIDAVITS.

Summary Judgment in the City's favor should not be overturned on the grounds that the trial court failed to rule on Kirk's Motion to Dismiss and Motion to Strike Affidavits. Of all of Kirk's arguments, this is perhaps the most ridiculous. Both parties fully addressed these motions through Memorandum submitted in support and opposition of the same as well as at oral argument. More importantly, the trial court addressed these arguments and ruled on them in conjunction with granting the City's Motion for Summary Judgment. The Judgment dated March 24, 1993, states on page 1: "Plaintiff's Motion for Summary Judgment and Defendant's Motion to Dismiss, Motions to Strike Affidavits, and Motions to Stay Proceedings came on before the Honorable S. Mark Johnson on Thursday, the 11th day of February 1993" The Judgment then ordered, adjudged and decreed that "Defendant's counterclaim in its entirety is dismissed" and "Defendant's Motion to Dismiss, Motions to Strike Affidavits, and Motion to Stay Proceedings are denied." Judgment at ¶¶ 4 & 5 (March 24,

1993). Thus, there is no merit to Kirk's argument that these Motions need to be heard when in fact they have already been heard and adjudicated upon by the trial court.

IV. THE CITY SHOULD BE GRANTED DAMAGES, COSTS AND ATTORNEY'S FEES INCURRED IN THIS APPEAL ON THE GROUNDS THAT THE APPEAL IS FRIVOLOUS AND PURSUED SOLELY FOR THE PURPOSE OF DELAY.

Kirk's appeal in this case is not only non-meritorious, but also frivolous and in bad faith. Pursuant to the Utah Rules of Appellate Procedure, the City is entitled to just damages, double costs and reasonable attorney's fees incurred as a result of such frivolous appeal. Rule 33 provides:

If the court shall determine that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages and single or double costs, including reasonable attorney's fees, to the prevailing party.

Utah R. App. P. 33.

A frivolous appeal has been defined as "[o]ne in which no justiciable question has been presented and appeal is readily recognizable as devoid of merit in that there is little prospect that it can ever succeed." Hunt v. Hurst, 785 P.2d 414, 415 (Utah 1990) (citing Black's Law Dictionary 601 (5th ed. 1979)). Rule 33, as amended in 1990, also provides that for purposes of the Appellate Rules, "a frivolous appeal . . . is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law."

Kirk's appeal is frivolous under both these standards as it is based solely on the argument of a wrong address. Kirk claims he does not own property located at 1450 West 500 South in Woods Cross, and therefore is not responsible or liable for any wrongdoing on such property. However, the Judgment does not refer specifically to the Property as located at 1450 West 500 South, but describes the Property owned by Kirk in that general area. More importantly, the parties know the property this case involves.³ To argue otherwise is in bad faith. Finally, Kirk's pursuit of this appeal is mainly a delay tactic in order to permit Kirk to continue to violate the ordinances of Woods Cross. Since Kirk's Motion to Stay the injunction was granted, Kirk is using the Property in violation of the Woods Cross zoning ordinances and the City has no way to prevent such use pending this appeal. It is therefore in Kirk's best interest to continue the judicial process regardless of its merit in order to avoid enforcement of the injunction preventing Kirk's improper use of the Property.

In awarding damages under this Rule, the Supreme Court noted in Hunt, that "[w]e do not believe or intend that the litigation of new or uncertain issues will be chilled by imposing sanctions on attorneys who pursue what in reality are nuisance claims and do so in an unlawyer-like fashion by writing an unprofessional

³ As previously discussed, the trial judge specifically questioned Kirk's attorney about this issue at the oral argument held on February 11, 1993. It was conceded at that time that the parties understood the property involved in the case.

brief and relying on improper materials and arguments in the brief." Hunt, 785 P.2d at 415. In the case at hand, Kirk's filing and notice practice (i.e. failure to send opposing counsel a copy of any pleading filed with the Court of Appeals except the Brief, which was itself seven days late), and the frivolous basis for its appeal, fall squarely within the sanctions permitted under Rule 33. Wherefore, the City respectfully requests this Court for just damages, double costs and attorney's fees incurred by the City in this appeal.

CONCLUSION

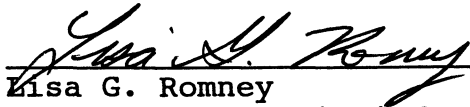
Viewing the facts and all reasonable inferences therefrom in a light most favorable to Kirk, it is clear that there exists no issue of material fact regarding the location of the property at issue in this case, that such property is zoned A-1 under the Woods Cross Ordinances and that Kirk is parking and storing large commercial vehicles and equipment on such Property.

The major purpose of summary judgment is "to avoid unnecessary trial by allowing the parties to pierce the pleadings to determine whether there is a genuine issue to present the fact finder." Reagan Outdoor Advertising, Inc. v. Lundgren, 692 P.2d 776 (Utah 1984). In circumstances where the grant is justified, it serves the salutary purpose of eliminating the time, trouble and expense of trial which would be to no avail anyway. McBride v. Jones, 615 P.2d 431, 432 (Utah 1980). The trial court correctly determined that a trial would be to no avail in this

case and properly granted the City's Motion for Summary Judgment thereby serving the salutary purpose of eliminating any unnecessary time, trouble and expense to the parties and the courts.

The City respectfully requests this Court to affirm the judgment of the trial court dated March 24, 1993, granting the City's Motion for Summary Judgment and dismissing Kirk's Counterclaim and Motions. The City further requests an award of damages, costs and attorney's fees the Court deems appropriate for defense of this frivolous appeal.

DATED this 24th day of June, 1994.



Lisa G. Romney
Attorney for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that on this 24th day of June, 1994,
two (2) true and correct copies of the foregoing BRIEF OF
APPELLEE was mailed first class mail, postage prepaid to the
following:

Charles A. Schultz
P.O. Box 1516
Sandy, Utah 84103

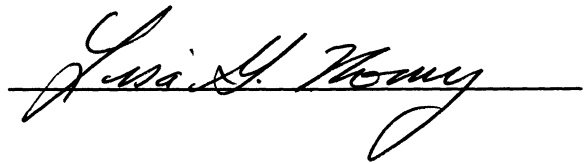
A handwritten signature in cursive script, reading "Linda S. Momy", is written over a horizontal line.

EXHIBIT "A"

DETERMINATIVE STATUTES AND RULES:

Woods Cross Ordinance § 12-10-101

Utah Code Ann. § 10-9-1001 (1992)

Utah Code Ann. § 10-9-1002 (1992)

Utah R. Civ. P. 56

Utah R. App. P. 33

CHAPTER 12-10**AGRICULTURE ZONE A-1**

12-10-101	Purpose
12-10-102	Permitted Uses
12-10-103	Conditional Uses
12-10-104	Minimum Lot Standards
12-10-105	Maximum Building Height
12-10-106	Off-Street Parking, Loading, and Access
12-10-107	Signs
12-10-108	Site Plan Review
12-10-109	Fencing

12-10-101 Purpose

The Agriculture Zone A-1 is established to provide areas in which agricultural pursuits can be encouraged and supported within Woods Cross. The A-1 Zone is designed and intended to protect agriculture uses from encroachment of urban development until such time as residential, commercial, or industrial uses in such areas become necessary and desirable. Conversion of the agriculture zone to zones allowing urban uses should be accomplished in an orderly and progressive manner with no "leap frog" encroachments of such uses or development into agriculture areas.

12-10-102 Permitted Uses

- (A) Agriculture
- (B) Single Family Dwelling
- (C) Horticulture
- (D) Accessory Uses:

Accessory uses and structures are permitted in the A-1 Zone, provided they are incidental to, and do not substantially alter the character of, the permitted principal use or structure. Such permitted accessory uses include, but are not limited to, the following:

- (1) Accessory buildings such as garages, carports, bathhouses, greenhouses, gardening sheds, barns, recreation rooms, and similar structures which are customarily used in conjunction with, and incidental to, the principal use or structure.
- (2) Swimming Pools
- (3) Home Occupations subject to the regulations of Chapter 27 of this Title.
- (4) Household Pets

- (5) Storage of Material used for construction of a building, including contractor's temporary office, provided that such use is on the building site or immediately adjacent thereto, and provided further that such use will be permitted only while construction is actually in progress and 30 days thereafter.

12-10-103 Conditional Uses

- (A) Public Uses
- (B) Quasi-Public Uses
- (C) Grazing and Pasturing
- (D) Agricultural Industry

12-10-104 Minimum Lot Standards

All lots shall be developed and all structures and uses shall be placed in accordance with the following minimum standards:

- (A) Lot Size: 1 acre
- (B) Lot Width: 100 feet
- (C) Front & Rear Yard: 30 feet
- (D) Side Yard: 8 feet and a total width of the two required side yards of 18 feet; main buildings only.
- (E) Side Yard Corner: 20 feet for all buildings on the side adjacent to the street.
- (F) Accessory Buildings: Accessory Building shall be 6 feet or more in the rear of the main building and at least 1 foot from all property lines; and shall be 15 feet from dwellings on adjacent lots. (Accessory buildings shall not be built over utility easements that may run along side and rear property lines.)

energy devices based on renewable resources from being installed on buildings erected on lots or parcels covered by the plat or subdivision.

History: C. 1953, 10-9-901, enacted by L. 1991, ch. 235, § 52. **Effective Dates.** — Laws 1991, ch. 235, § 110 makes the act effective on July 1, 1992

PART 10

APPEALS AND ENFORCEMENT

10-9-1001. Appeals.

(1) No person may challenge in district court a municipality's land use decisions made under this chapter or under the regulation made under authority of this chapter until that person has exhausted his administrative remedies.

(2) Any person adversely affected by any decision made in the exercise of the provisions of this chapter may file a petition for review of the decision with the district court within 30 days after the local decision is rendered.

(3) The courts shall:

- (a) presume that land use decisions and regulations are valid; and
- (b) determine only whether or not the decision is arbitrary, capricious, or illegal.

History: C. 1953, 10-9-1001, enacted by L. 1991, ch. 235, § 53; 1992, ch. 30, § 13. **Effective Dates.** — Laws 1991, ch. 235, § 110 makes the act effective on July 1, 1992.

Amendment Notes. — The 1992 amendment, effective April 27, 1992, made grammatical changes in Subsection (1)

COLLATERAL REFERENCES

Am. Jur. 2d. — 83 Am Jur 2d Zoning and Planning § 1019 et seq

C.J.S. — 101A C J S Zoning and Land Planning § 265 et seq

10-9-1002. Enforcement.

(1) (a) A municipality or any owner of real estate within the municipality in which violations of this chapter or ordinances enacted under the authority of this chapter occur or are about to occur may, in addition to other remedies provided by law, institute:

- (i) injunctions, mandamus, abatement, or any other appropriate actions; or
- (ii) proceedings to prevent, enjoin, abate, or remove the unlawful building, use, or act.

(b) A municipality need only establish the violation to obtain the injunction.

(2) (a) The municipality may enforce the ordinance by withholding building permits.

(b) It is unlawful to erect, construct, reconstruct, alter, or change the use of any building or other structure within a municipality without approval of a building permit.

(c) The municipality may not issue a building permit unless the plans of and for the proposed erection, construction, reconstruction, alteration, or use fully conform to all regulations then in effect.

History: C. 1953, 10-9-1002, enacted by L. 1991, ch. 235, § 54.

Effective Dates. — Laws 1991, ch. 235, § 110 makes the act effective on July 1, 1992.

COLLATERAL REFERENCES

A.L.R. — Laches as defense in suit by governmental entity to enjoin zoning violation, 73 A.L.R.4th 870.

10-9-1003. Penalties.

(1) The municipal legislative body may, by ordinance, establish civil penalties for violations of any of the provisions of this chapter or of any ordinances adopted under the authority of this chapter.

(2) Violation of any of the provisions of this chapter or of any ordinances adopted under the authority of this chapter are punishable as a class C misdemeanor upon conviction either:

- (a) as a class C misdemeanor; or
- (b) by imposing the appropriate civil penalty adopted under the authority of this section.

History: C. 1953, 10-9-1003, enacted by L. 1991, ch. 235, § 55; 1992, ch. 23, § 24.

Effective Dates. — Laws 1991, ch. 235, § 110 makes the act effective on July 1, 1992.

Amendment Notes. — The 1992 amendment, effective July 1, 1992, added Subsection (1), designated Subsection (2), and added "either" to precede new Subsections (2)(a) and (2)(b).

Cross-References. — Sentencing for misdemeanors, §§ 76-3-201, 76-3-204, 76-3-301.

CHAPTER 10

CITIES OF FIRST AND SECOND CLASS

(Repealed by Laws 1961, ch. 24, § 2; 1977, ch. 48, § 1; 1979, ch. 31, § 1; 1988, ch. 169, § 66.)

10-10-1 to 10-10-75. Repealed.

Repeals. — Laws 1988, ch. 169, § 66 repeals § 10-10-1, Utah Code Annotated 1953, relating to division of city into wards, effective April 25, 1988.

Sections 10-10-2 to 10-10-8 (Utah Code Annotated 1953; L. 1957, ch. 20, § 1), relating to budget system, were repealed by Laws 1961, ch. 24, § 2.

Sections 10-10-9 to 10-10-22 (Utah Code Annotated 1953; L. 1953, ch. 20, § 1; 1955, ch. 16, § 1; 1955, ch. 17, § 1), relating to the civil ser-

vice commission, were repealed by § 10-1-114, enacted by Laws 1977, ch. 48, § 1. For present provisions, see § 10-3-1001 et seq.

Sections 10-10-23 to 10-10-75 (L. 1961, ch. 24, § 1; 1967, ch. 24, § 1; 1971, ch. 14, § 1; 1972 (1st S.S.), ch. 1, §§ 1 to 12; 1973 (1st S.S.), ch. 1, § 1), the Uniform Municipal Fiscal Procedures Act, were repealed by Laws 1979, ch. 31, § 1. For present provisions, see §§ 10-6-101 to 10-6-159.

scheduled appearance in another court on that date, but due to fact that there were no law or motion days between time objection was filed and trial date, objection was never heard, refusal to set aside default judgment entered when appellants failed to appear on trial date was an abuse of discretion *Griffiths v. Hammon*, 560 P.2d 1375 (Utah 1977)

Time for appeal.

Under former Rule 73(h) the time for appeal from a default judgment in a city court ran

from the date of notice of entry of such judgment, rather than from the date of judgment. *Buckner v. Main Realty & Ins. Co.*, 4 Utah 2d 124, 288 P.2d 786 (1955) (but see *Central Bank & Trust Co. v. Jensen*, *supra*, and Rule 58A(d)).

Cited in *Utah Sand & Gravel Prods. Corp. v. Tolbert*, 16 Utah 2d 407, 402 P.2d 703 (1965), *J.P.W. Enters., Inc. v. Naef*, 604 P.2d 486 (Utah 1979); *Katz v. Pierce*, 732 P.2d 92 (Utah 1986).

COLLATERAL REFERENCES

Brigham Young Law Review. — Reasonable Assurance of Actual Notice Required for In Personam Default Judgment in Utah: *Graham v. Sawaya*, 1981 B.Y.U. L. Rev. 937.

Am. Jur. 2d. — 47 Am. Jur. 2d Judgments §§ 1152 to 1213.

C.J.S. — 49 C.J.S. Judgments §§ 187 to 218.

A.L.R. — Necessity of taking proof as to liability against defaulting defendant, 8 A.L.R.3d 1070.

Appealability of order setting aside, or refusing to set aside, default judgment, 8 A.L.R.3d 1272.

Defaulting defendant's right to notice and hearing as to determination of amount of damages, 15 A.L.R.3d 586.

Opening default or default judgment claimed to have been obtained because of attorney's mistake as to time or place of appearance, trial, or filing of necessary papers, 21 A.L.R.3d 1255.

Failure to give notice of application for default judgment where notice is required only by custom, 28 A.L.R.3d 1383.

Failure of party or his attorney to appear at pretrial conference, 55 A.L.R.3d 303.

Default judgments against the United States under Rule 55(e) of the Federal Rules of Civil Procedure, 55 A.L.R. Fed. 190.

Key Numbers. — Judgment ⇐ 92 to 134.

Rule 56. Summary judgment.

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set

forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Compiler's Notes. — This rule is similar to Rule 56, F.R.C.P.

Cross-References. — Contempt generally, §§ 78-7-18, 78-32-1 et seq.

NOTES TO DECISIONS

ANALYSIS

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 —Resting on pleadings.
 —Objection.
 —Sufficiency.
 —Hearsay and opinion testimony
 —Superseding pleadings.
 —Unpleaded defenses.
 —Verified pleading.
 —Waiver of right to contest.
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 —Exclusive control of facts
 —Who may make.
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 —Deeds.
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 —Foreclosure of trust deeds.
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 —Guardianship.
 —Mortgage note.
 —Negligence.
 —Nonspecific denial of requests for admission.
 —Note.
 —Recovery for goods and services.
 —Stock ownership.
 —Wrongful possession.
 Summary judgment proper.
 —Contract action.
 —Contract terms.
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 —Jurisdiction.
 —Negligence.

NOTES TO DECISIONS

Cited in *State v. Erickson*, 802 P.2d 111 (Utah Ct. App. 1990).

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments in Utah Law — The Utah Court of Appeals, 1988 Utah L. Rev. 150.

Rule 32. Interest on judgment.

Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the trial court.

COLLATERAL REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d Appeal and Error § 941.

C.J.S. — 5 C.J.S. Appeal and Error § 995.

A.L.R. — Date from which interest on judgment starts running, as affected by modification of amount of judgment on appeal, 4 A.L.R.3d 1221.

Right to interest, pending appeal, of judgment creditor appealing unsuccessfully on grounds of inadequacy, 15 A.L.R.3d 411.

Running of interest on judgment where both parties appeal, 11 A.L.R.4th 1099.

Retrospective application and effect of state statute or rule allowing interest or changing rate of interest on judgments or verdicts, 41 A.L.R.4th 694

Key Numbers. — Interest ⇐ 39(2).

Rule 33. Damages for delay or frivolous appeal; recovery of attorney's fees.

(a) **Damages for delay or frivolous appeal.** Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney.

(b) **Definitions.** For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.

(c) **Procedures.**

(1) The court may award damages upon request of any party or upon its own motion. A party may request damages under this rule only as part of the appellee's motion for summary disposition under Rule 10, as part of the appellee's brief, or as part of a party's response to a motion or other paper.

(2) If the award of damages is upon the motion of the court, the court shall issue to the party or the party's attorney or both an order to show cause why such damages should not be awarded. The order to show cause shall set forth the allegations which form the basis of the damages and permit at least ten days in which to respond unless otherwise ordered for good cause shown. The order to show cause may be part of the notice of oral argument.

(3) If requested by a party against whom damages may be awarded, the court shall grant a hearing.

Advisory Committee Note. — Rule 33 is substantially redrafted to provide definitions and procedures for assessing penalties for delays and frivolous appeals.

If an appeal is found to be frivolous, the court

must award damages. This is in keeping with Rule 11 of the Utah Rules of Civil Procedure. However, the amount of damages — single or double costs or attorney fees or both — is left to the discretion of the court. Rule 33 is amended