

2000

G. Richard Kasteler and Mary L. Daines v.
Greggory J. Savage, Matthew N. Evans, Holme
Roberts & Owen, a Utah Limited Liability
Partnership, Parkside Salt Lake Corporation, a
Delaware corporation : Brief of Appellee

Utah Supreme Court

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

 Part of the [Law Commons](#)

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

John Martinez, Nick J. Colessides; attorneys for appellants.

Gordon L. Roberts, James T. Blanch; Parsons Behle & Latimer; attorneys for appellees.

Recommended Citation

Brief of Appellee, *Kasteler v. Savage*, No. 20000201.00 (Utah Supreme Court, 2000).
https://digitalcommons.law.byu.edu/byu_sc2/426

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

IN THE UTAH SUPREME COURT

G. RICHARD KASTELER and MARY L.
DAINES,

Plaintiffs and Appellants,

vs.

GREGGORY J. SAVAGE, MATTHEW N.
EVANS, HOLME ROBERTS & OWEN, a
Utah Limited Liability Partnership,
PARKSIDE SALT LAKE
CORPORATION, a Delaware corporation,

Defendants and Appellees.

BRIEF OF APPELLEES

Appeal No. 20000201-SC
District Court No. 990908395

Oral Argument Priority No. 15

**APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE GLENN K. IWASAKI, DISTRICT JUDGE**

JOHN MARTINEZ
2974 East St. Mary's Circle
Salt Lake City, Utah 84108

NICK J. COLESSIDES
466 South 400 East, Suite 100
Salt Lake City, Utah 84111-3325

Attorneys for Plaintiffs/Appellants

GORDON L. ROBERTS (2770)
JAMES T. BLANCH (6494)
PARSONS BEHLE & LATIMER
201 South Main Street, Suite 1800
Post Office Box 45898
Salt Lake City, Utah 84145-0898
Telephone: (801) 532-1234

Attorneys for Defendants/Appellees

IN THE UTAH SUPREME COURT

G. RICHARD KASTELER and MARY L.
DAINES,

Plaintiffs and Appellants,

vs.

GREGGORY J. SAVAGE, MATTHEW N.
EVANS, HOLME ROBERTS & OWEN, a
Utah Limited Liability Partnership,
PARKSIDE SALT LAKE
CORPORATION, a Delaware corporation,

Defendants and Appellees.

BRIEF OF APPELLEES

Appeal No. 20000201-SC
District Court No. 990908395

Oral Argument Priority No. 15

**APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE GLENN K. IWASAKI, DISTRICT JUDGE**

JOHN MARTINEZ
2974 East St. Mary's Circle
Salt Lake City, Utah 84108

NICK J. COLESSIDES
466 South 400 East, Suite 100
Salt Lake City, Utah 84111-3325

Attorneys for Plaintiffs/Appellants

GORDON L. ROBERTS (2770)
JAMES T. BLANCH (6494)
PARSONS BEHLE & LATIMER
201 South Main Street, Suite 1800
Post Office Box 45898
Salt Lake City, Utah 84145-0898
Telephone: (801) 532-1234

Attorneys for Defendants/Appellees

LIST OF PARTIES

All parties to this appeal and to the proceedings below are listed in the case caption.

TABLE OF CONTENTS

	<u>Page</u>
LIST OF PARTIES.....	ii
TABLE OF AUTHORITIES.....	v
INTRODUCTION.....	1
STATEMENT OF JURISDICTION.....	1
ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW.....	1
DETERMINATIVE PROVISIONS ON APPEAL.....	3
STATEMENT OF THE CASE.....	3
A. Proceedings Below.....	4
B. Statement of Facts.....	5
SUMMARY OF ARGUMENT.....	10
ARGUMENT.....	13
I. STANDARD OF REVIEW.....	13
II. THE DISTRICT COURT CORRECTLY DISMISSED THIS ACTION IN ITS ENTIRETY ON THE GROUND THAT THE LIS PENDENS AT ISSUE WERE PROPER UNDER THE LIS PENDENS STATUTE AND CANNOT SUBJECT DEFENDANTS TO LIABILITY.....	14
A. The Linchpin of Plaintiffs’ Argument Fails Because Defendants Could Have Enforced Plaintiffs’ Surety Bonds in the Unlawful Detainer Action.....	16
B. Even if Defendants Should Have Filed an Independent Action To Enforce the Bonds, the Unlawful Detainer Action Still “Affected Title” to Plaintiffs’ Houses, and the Lis Pendens Were Therefore Proper.	21
III. APART FROM THE LIS PENDENS STATUTE, THE DISTRICT COURT’S DISMISSAL OF THIS ACTION WAS CORRECT BECAUSE THE LIS PENDENS AT ISSUE ARE ABSOLUTELY PRIVILEGED UNDER THE JUDICIAL PROCEEDING PRIVILEGE.	26

IV. APART FROM THE LIS PENDENS STATUTE AND THE ABSOLUTE PRIVILEGE, THE DISTRICT COURT’S DISMISSAL OF THIS ACTION WAS CORRECT BECAUSE EACH CLAIM IN THE COMPLAINT INDEPENDENTLY FAILS TO STATE A VALID CLAIM FOR RELIEF.....	32
A. Plaintiffs’ “Wrongful Lien” <u>Claim</u> Fails Because Lis Pendens Are Not Liens and Are Expressly Excluded From the Coverage of the Wrongful Lien Statute.....	33
B. Plaintiffs’ “Slander of Title” Claim Fails Because the Lis Pendens Were Truthful as a Matter of Law and Because Plaintiffs Failed To Allege Special Damages.....	36
C. Plaintiffs’ “Quiet Title” Claim Is Moot Because Defendants Have Released the Lis Pendens.	38
D. Plaintiffs’ “Intentional <u>Infliction</u> of Emotional Distress” Claim Fails Because Defendants’ Alleged Conduct Was Not “Outrageous” as a Matter of Law.....	38
E. Plaintiffs’ “Negligent Infliction of Emotional Distress” Claim Fails Because It Omits Essential Elements of That Cause of Action.	39
CONCLUSION.....	40
CERTIFICATE OF SERVICE.....	41
 ADDENDUM A	
Memorandum Decision dated January 19, 2000	
 ADDENDUM B	
Order and Final Judgment, dated February 7, 2000	
 ADDENDUM C	
Order Setting Amount for Counter Possession Bond, dated August 13, 1998	
 ADDENDUM D	
Renter’s Counter Bond, dated August 13, 1998	

ADDENDUM E

Lis Pendens [G. Richard Kasteler], dated March 29, 1999

ADDENDUM F

Lis Pendens [Mary L. Daines], dated March 29, 1999

ADDENDUM G

Partial Satisfaction of Judgment, dated June 4, 1999

ADDENDUM H

Writ of Garnishment, dated July 30, 1999

ADDENDUM I

Writ of Garnishment, dated June 30, 1999

ADDENDUM J

Release of Lis Pendens [Mary L. Daines], dated September 1, 1999

ADDENDUM K

Release of Lis Pendens [G. Richard Kasteler], dated September 1, 1999

ADDENDUM L

Fitzgerald v. Utah County, 931 F.2d 900, 1991 WL 70672 (10thCir. April 29, 1991)

TABLE OF AUTHORITIES

	<u>Page(s)</u>
 <u>FEDERAL CASES</u>	
<i>Boisjoly v. Morton Thiokol, Inc.</i> , 706 F. Supp. 795 (D. Utah 1988).....	39
<i>Busch v. Doyle</i> , 141 B.R. 432 (D. Utah 1992)	25, 32
<i>Chenich v. Chenich</i> , 87 B.R. 101 (9th Cir. 1988)	33
<i>Fitzgerald v. Utah County</i> , 931 F.2d 900, 1991 WL 70672 (10th Cir. April 29, 1991)	19, 20, 31
<i>Hamilton v. Smith</i> , 808 F.2d 36 (10th Cir. 1986)	32
<i>Keller v. Ray, Quinney & Nebeker</i> , 896 F. Supp. 1563 (D. Utah 1995), <u>aff'd</u> , 78 F.3d 597 (10th Cir. 1996)	38, 39
<i>Manders v. Manders</i> , 897 F. Supp. 972 (S.D. Tex. 1995)	30
<i>Yale v. Nat'l Indem. Co.</i> , 602 F.2d 642 (4th Cir. 1979)	20
 <u>STATE CASES</u>	
<i>Allen v. Ortez</i> , 802 P.2d 1307 (Utah 1990)	27
<i>Allred v. Cook</i> , 590 P.2d 318 (Utah 1979)	37
<i>Alvarez v. Galetka</i> , 933 P.2d 987 (Utah 1997)	6
<i>Ashmus v. Donohoe</i> , 272 Wis. 234, 75 N.W.2d 303 (1956)	20
<i>Barber v. Calder</i> , 522 P.2d 700 (Utah 1974)	19
<i>Bass v. Planned Mgmt. Servs.</i> , 761 P.2d 566 (Utah 1988)	36, 37, 38
<i>Bd. of Equalization v. State Tax Comm'n</i> , 927 P.2d 176 (Utah 1996)	35
<i>Birch v. Fuller</i> , 9 Utah 2d 79, 337 P.2d 964 (1959)	26, 31

<i>Boyce v. Boyce</i> , 609 P.2d 928 (Utah 1980).....	14, 21, 32
<i>DeBry v. Godbe</i> , 1999 UT 111, 992 P.2d 979	27, 28
<i>Dime Sav. Bank of New York v. Sandy Springs Assocs., Inc.</i> , 261 Ga. 485, 405 S.E.2d 491 (1991)	33
<i>Fitzgerald v. Critchfield</i> , 744 P.2d 301 (Utah App. 1987).....	18
<i>Handy v. Union Pac. R.R. Co.</i> , 841 P.2d 1210 (Utah App. 1992)	39, 40
<i>Hansen v. Kohler</i> , 550 P.2d 186 (Utah 1976)	26, 27, 28, 30, 31, 36
<i>Hansen v. Sea Ray Boats, Inc.</i> , 830 P.2d 236 (Utah 1992)	39
<i>Hensley et al. v. Minehan</i> , 29 Ga. App. 251, 114 S.E. 647 (1922)	19
<i>Hidden Meadows Dev. Co. v. Mills</i> , 590 P.2d 1244 (Utah 1979)	33
<i>Junction Irrigation Co. v. Snow</i> , 118 P.2d 130 (Utah 1941).....	20
<i>Lawson v. Salt Lake Trappers, Inc.</i> , 901 P.2d 1013 (Utah 1995)	39
<i>Platts v. Parents Helping Parents</i> , 947 P.2d 658 (Utah 1997)	35
<i>Prappas v. Meyerland Cmty. Improvement Ass'n</i> , 795 S.W.2d 794 (Tex. Ct. App. 1990)	29
<i>Price v. Armour</i> , 949 P.2d 1251 (Utah 1997)	27, 28
<i>Ringier Am., Inc. v. Enviro-Technics, Ltd.</i> , 284 Ill. App. 3d 1102, 673 N.E.2d 444 (1996)	36
<i>Russell v. Standard Corp.</i> , 898 P.2d 263 (Utah 1995)	13
<i>Russell v. Thomson Newspapers, Inc.</i> , 842 P.2d 896 (Utah 1992).....	38
<i>Salt Lake County v. Bangerter</i> , 928 P.2d 384 (Utah 1996).....	2, 3, 5
<i>Scott-Kinnear, Inc. v. Eberly & Meade, Inc.</i> , 879 P.2d 838 (Okla. 1994)	36

<i>Sperber v. Galigher Ash Co.</i> , 747 P.2d 1025 (Utah 1987).....	38
<i>Sperry v. Sperry</i> , 1999 UT 101, 990 P.2d 381	14
<i>St. Benedicts' Dev. Co. v. St. Benedict's Hosp.</i> , 811 P.2d 194 (Utah 1991).....	2, 13
<i>Straub v. Fisher and Paykel Health Care</i> , 1999 UT 102, 990 P.2d 384	39
<i>Timm v. Dewsnup</i> , 921 P.2d 1381 (Utah 1996)	14, 22, 23, 24, 32
<i>Tuft v. Fed. Leasing</i> , 657 P.2d 1300 (Utah 1982)	24
<i>Whipple v. Am. Fork Irrigation Co.</i> , 910 P.2d 1218 (Utah 1996).....	13
<i>Winters v. Schulman</i> , 977 P.2d 1218 (Utah App. 1999)	24

DOCKETED CASES

<i>Parkside Salt Lake Corporation v. Insure-Rite, Inc.</i> , Civil No. 98 090 6982 (3d Dist. Utah 1998)	6
--	---

STATE STATUTES AND RULES

Utah Code Ann. §§ 38-9-1 (1997)	33, 35
Utah Code Ann. § 38-9-2 (1997)	3, 34
Utah Code Ann. § 38-9- 2(2) (1997).....	14
Utah Code Ann. § 78-2-2(3)(j) (2000).....	1
Utah Code Ann. § 78-36-10(4) (1996)	18
Utah Code Ann. § 78-36-8.5(2)(b) (1996)	6, 8, 16, 17
Utah Code Ann. § 78-40-2 (1996)	3, 14, 16, 22, 32, 35
Utah R. Civ. P. 12(b)(6)	2, 4, 13, 17, 19 37

INTRODUCTION

This is a case in which agents of the losing party in an unlawful detainer action sued the winning party and its attorneys for more than five million dollars (\$5,000,000.00) simply because the attorneys did their jobs and effectively protected their client's interests in accordance with the law. What grievous sin did the attorney Defendants commit to warrant such a massive claim? They recorded two lis pendens on behalf of their client Parkside, which remained in effect for a mere five months, truthfully disclosing that Plaintiffs had pledged their houses as security for a property bond in the unlawful detainer action. What do the Plaintiffs contend Defendants should have done differently? They literally argue that prior to the recording of the lis pendens, Parkside should have sued them in an entirely separate lawsuit seeking to foreclose on the houses Plaintiffs had pledged as security. For thus depriving them of the right to be hauled into court, Plaintiffs contend, Defendants deserve to have a multi-million-dollar judgment entered against them.

The district court correctly nipped this lawsuit in the bud, dismissing the Complaint in its entirety because Plaintiffs' own allegations demonstrate that Defendants acted properly in all respects. This Court too should place its stamp of approval on the attorney Defendants' thorough and professional legal services to their client by affirming the district court's dismissal order.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2(3)(j) (2000).

ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

Appellees offer the following statement of issues in lieu of that contained on pages 1 and 2 of Appellants' Opening Brief (hereinafter "Br. of Appellants"). This formulation of the issues more accurately captures the arguments presented to the district court and the basis for the court's decision below.

Because this appeal challenges the district court's dismissal of this action under Rule 12(b)(6) of the Utah Rules of Civil Procedure, all of the issues in this appeal are legal issues to be reviewed for correctness, considering all Complaint allegations and reasonable inferences to be drawn from them in a light most favorable to Appellants. See, e.g., St. Benedicts' Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194, 196 (Utah 1991) (setting forth standard of review for Rule 12(b)(6) dismissal).

ISSUE #1:

Did the district court correctly dismiss this action in its entirety because the lis pendens upon which Plaintiffs based all of their claims were properly filed in an "action affecting the title to real property," as permitted under the Utah lis pendens statute?

Defendants raised this issue before the district court both in their memoranda in support of their motion to dismiss (R. 56-59; 245-52) and at oral argument on the motion. (R. 306.)

ISSUE #2:

Should this Court affirm the district court's judgment of dismissal on the alternative ground that the lis pendens upon which Plaintiffs based all of their claims are absolutely privileged under Utah law?

Defendants raised this issue before the district court both in their memoranda in support of their motion to dismiss (R. 60-62; 253-56) and at oral argument on the motion. (R. 306.) The district court dismissed the Complaint without reaching this issue,¹ but this Court may nevertheless affirm on this ground because Defendants properly presented it to the district court. Salt Lake County v. Bangerter, 928 P.2d 384, 386 (Utah 1996) (holding that this Court may affirm a judgment below "on any ground available to the trial court, even if it is one not relied on below") (quoting Harline v. Barker, 912 P.2d 433, 438 (Utah 1996)).

¹ Contrary to the Brief of Appellants, the district court's memorandum decision dismissing Plaintiffs' Complaint did not reach the absolute privilege issue. (R. 274-81.)

ISSUE #3:

Should this Court affirm the district court's judgment of dismissal on the alternative ground that each of the five claims set forth in Plaintiffs' Complaint independently fails to state a claim upon which relief may be granted?

Defendants raised this issue before the district court both in their memoranda in support of their motion to dismiss (R. 62-66; 258-60) and at oral argument on the motion. (R. 306.) The district court dismissed the Complaint without reaching this issue, but this Court may nevertheless affirm on this ground because Defendants presented it to the district court. Bangerter, 928 P.2d at 386.

DETERMINATIVE PROVISIONS ON APPEAL

In addition to the determinative provisions set forth in the Brief of Appellants (Br. of Appellants at 2-3), the following statutory provision is of central importance in this appeal:

Utah Code Ann. § 38-9-2. Scope.

....

(2) The provisions of this chapter [the Wrongful Lien Act] shall not prevent a person from filing a lis pendens in accordance with Section 78-40-2 or seeking any other relief permitted by law.

STATEMENT OF THE CASE

Appellees object to Appellants' Statement of the Case (Br. of Appellants at 4-6) because it omits or glosses over several factors that are important to the outcome of this appeal and because it contains certain erroneous assertions that materially distort the record below. Most significantly, Appellants repeatedly intimate in their brief that the lis pendens recorded on their houses were gratuitous and unnecessary because the tenant in the underlying unlawful detainer action voluntarily satisfied the judgment against it. (Br. of Appellants at 5, 7-8, 12.) The record is clear, however, that the tenant did not even satisfy the principal component of the judgment until more than two months after the lis pendens were recorded. Moreover, Defendant Parkside was forced to garnish the tenant's

bank accounts to satisfy the interest, costs, and attorney's fees components of the judgment, which garnishment did not occur until after Kasteler's and Daines' counsel had prematurely demanded the removal of the lis pendens. Thus, the Brief of Appellants is misleading in its suggestion that Defendants insisted on maintaining the lis pendens even after the judgment had been satisfied.

Appellees offer the following Statement of the Case, which more thoroughly describes the Complaint allegations and other materials that the district court considered.

A. Proceedings Below.

On August 18, 1999, Plaintiffs G. Richard Kasteler ("Kasteler") and Mary L. Daines ("Daines") filed a Complaint in the action below against Defendant Parkside Salt Lake Corporation ("Parkside") and its attorneys—Defendants Gregory J. Savage ("Savage") and Matthew N. Evans ("Evans"). (R. 1-25.)² The Complaint alleged claims for "wrongful lien," "slander of title," "quiet title," "intentional infliction of emotional distress," and "negligent infliction of emotional distress," based exclusively on two lis pendens that Savage and Evans, on behalf of Parkside, filed and recorded on Plaintiffs' houses on or about March 30, 1999 (the "Lis Pendens"). Id. In their prayer for relief, Plaintiffs sought a judgment of "not less than" six thousand dollars (\$6,000.00) in damages under the "wrongful lien" statute, fifty thousand dollars (\$50,000.00) in compensatory damages, five million dollars (\$5,000,000.00) in punitive damages, and seventy-five thousand dollars (\$75,000.00) in costs and attorney's fees. (R. 11-12.)

On September 9, 1999, Defendants filed a motion to dismiss the Complaint pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure, asking the district court to dismiss the Complaint in its entirety for failure to state a claim upon which relief may be granted. (R. 41-43.) In support of their motion, Defendants argued that dismissal was

² Plaintiffs also named Holme Roberts & Owen, the law firm where Savage and Evans practice, as a Defendant below.

warranted on three separate grounds: (1) the Lis Pendens upon which the entire Complaint was based were proper under Utah's lis pendens statute; (2) the Lis Pendens were absolutely privileged under the judicial proceeding privilege; and (3) each claim for relief was independently defective as a matter of law. (R. 47-144.)

On November 29, 1999, the district court heard oral argument on Defendants' Motion To Dismiss Complaint. (R. 271-72, 306.)

On January 19, 2000, the district court issued a Memorandum Decision granting Defendants' motion on the ground that the Lis Pendens at issue were properly recorded under Utah's lis pendens statute and therefore could not subject Defendants to liability under any legal theory. (R. 274-81.) A copy of the Memorandum Decision is attached hereto as Addendum A. Because this holding disposed of the Complaint in its entirety, the Court did not reach the additional, independent grounds for dismissal set forth in Defendants' motion and supporting memorandum. (R. 280, Add. A at 7.)³

On February 7, 2000, the district court entered an Order and Final Judgment, a copy of which is attached hereto as Addendum B, dismissing the action below in its entirety. (R. 282-85.)

On March 8, 2000, Plaintiffs filed a Notice of Appeal to this Court. (R. 293-95.)

B. Statement of Facts.

On July 17, 1998, Defendant Parkside filed an unlawful detainer action against its commercial tenant Insure-Rite, Inc. (hereinafter the "Unlawful Detainer Action"), alleging that Insure-Rite had unlawfully failed to vacate certain business premises owned

³ As noted above, contrary to assertions in the Brief of Appellants, the district court did not reach the "absolute privilege" issue in its Memorandum Decision. However, absolute privilege provides a valid alternative basis for the district court's dismissal order, and the issue is therefore properly before this Court for consideration. Bangerter, 928 P.2d at 386 (holding that this Court may affirm a judgment below "on any ground available to the trial court, even if it is one not relied on below").

by Parkside, which are located at 215 South State Street, Suite 401, Salt Lake City, Utah 84111-2354. (R. 2-3 at ¶ 5.)⁴

Defendants Savage and Evans, attorneys practicing in the law firm of Holme Roberts & Owen (“HRO”; also a Defendant below), were counsel for Parkside in the Unlawful Detainer Action. (R. 3 at ¶¶ 7-8.)

On August 13, 1998, the court in the Unlawful Detainer Action entered an order requiring Insure-Rite to post a counter-possession bond in the form of a property bond, pursuant to Utah Code Ann. § 78-36-8.5(2)(b), as security for the costs and actual damages that Parkside would be entitled to recover if it prevailed in the Unlawful Detainer Action. (R. 99-100.) A copy of this order is attached hereto as Addendum C.⁵ Insure-Rite was required to post such a bond in order to remain in possession of the premises until the conclusion of the Unlawful Detainer Action. (Br. of Appellants at 4.)

Also on August 13, 1998, Plaintiffs Kasteler and Daines satisfied Insure-Rite’s security obligations by posting a “Renter’s Counter Bond” on behalf of Insure-Rite with the court in the Unlawful Detainer Action (R. 188-94), which bond pledged Kasteler’s and Daines’ houses as security as follows:

This property bond represents security posted with the Court by the Renter, Defendant, as the probable amount of costs of suit and actual damages that may result to the Owner (Plaintiff) if Plaintiff [sic] has

⁴ Parkside filed the Unlawful Detainer Action, entitled Parkside Salt Lake Corporation v. Insure-Rite, Inc., Civil No. 98 090 6982, in the Third Judicial District Court of Salt Lake County, State of Utah. (R. 93-97.)

⁵ Because this order is an item of public record, it was appropriate for the district court to consider it in connection with Defendants’ motion to dismiss without converting the motion to a Rule 56 motion for summary judgment. See Alvarez v. Galetka, 933 P.2d 987, 990 n.6 (Utah 1997) (noting that “items attached to pleadings, items of public record, and items in trial record will not convert 12(b)(6) motion to rule 56 motion for summary judgment”) (citing 2A James Wm. Moore et al., Moore’s Federal Practice ¶ 12.07 (2d ed. 1996)). The same is true with respect to several other items of public record that the parties presented without objection to the district court, many of which are attached hereto as addenda. There is no contention to the contrary in the Brief of Appellants.

improperly withheld possession of the premises located at: 215 SOUTH STATE STREET SUITE 401, SALT LAKE CITY UTAH 84111-2354.

PROPERTY BOND

We the undersigned, G. Richard Kasteler, and Mary L. Daines, are residents of Salt Lake and Davis County, respectively, State of Utah, and we each own property in the State of Utah. We jointly and severally undertake the obligation of this bond in the sum of \$25,000.00, and we shall pay all costs and damages which may be awarded to the Owner, not exceeding the sum undertaken. We state that each of us has a net worth, above debts, more than the sum undertaken, and we pledge the property listed herein as security in the above entitled action.

(R. 188-89, emphasis added.) A copy of this bond is attached hereto as Addendum D. The parcels of property pledged in Kasteler's and Daines' Renter's Counter Bond were Kasteler's house at 6278 South Granada Drive, Salt Lake City, Utah, and Daines' house at 1210 Millbrook Way, Bountiful, Utah. (R. 190-91; Add. D at 3-4.)

On November 30, 1998, the court in the Unlawful Detainer Action granted partial summary judgment in favor of Parkside on Parkside's principal claim—holding that Insure-Rite was “in unlawful detainer of the premises leased from” Parkside—and entered an Order of Restitution directing Insure-Rite promptly to vacate the leased premises. (R. 110-13.)

On March 15, 1999, the court in the Unlawful Detainer Action entered an order granting summary judgment in favor of Parkside on the issue of damages and ordering Insure-Rite to pay Parkside a damage award of \$108,417.24, plus interest, attorney's fees, and costs. (R. 115-16.)

Approximately two weeks later, on or about March 30, 1999, Savage and Evans, in their capacity as counsel for Parkside, and in an effort to protect Parkside's security for its judgment against Insure-Rite, filed for recordation in the Salt Lake County Recorder's Office two lis pendens (the “Lis Pendens”) bearing the caption of the Unlawful Detainer Action. (R. 3-4 at ¶¶ 9-10, 14-17, 20-23.) Copies of the two Lis Pendens (R. 14-17; 20-23) are attached hereto as Addenda E and F. One of the Lis Pendens was recorded on Kasteler's house, (R. 14-17; Add. E), and the other was recorded on Daines' house. (R.

20-23; Add. F.) Except for the fact that the two Lis Pendens had different property descriptions attached to them, they were identical to one another in form and content. Each Lis Pendens stated in full as follows:

TO WHOM IT MAY CONCERN:

You are hereby advised of the pendency of the above-entitled action concerning title to certain real property situated in Salt Lake County, State of Utah, that is more particularly described in Exhibit "A" attached hereto.

This is an unlawful detainer action. Pursuant to Utah Code Ann. § 78-36-8.5 the Defendant Insure-Rite Inc. filed a counterpossession property bond and filed as security for the property bond the property described in Exhibit "A". On November 30, 1998, the Court determined that Insure-Rite had improperly withheld possession of the leased premises and has since awarded money damages in the amount of \$108,417.24, plus interest, attorney's fees and costs to the Plaintiff. Plaintiff therefore may satisfy judgment through obtaining title to the property described in Exhibit "A".

(R. 14-15, 20-21; Add. E at 1-2; Add. F at 1-2.)

Although HRO, on behalf of Parkside, could have immediately foreclosed on Kasteler's and Daines' houses at that point to satisfy part of Parkside's judgment against Insure-Rite, it instead elected to spare Kasteler and Daines that unpleasant experience and sought to satisfy the judgment through other means. First, Parkside allowed Insure-Rite time to make a voluntary payment. On or about June 4, 1999, over two months after the recording of the Lis Pendens, Insure-Rite made a payment of \$108,417.24 in satisfaction of the principal amount of the judgment. (R. 118-20.) HRO, on behalf of Parkside, filed a Partial Satisfaction of Judgment acknowledging that payment, but it expressly reserved Parkside's "right to collect reasonable attorneys' fees, court costs and interest which the Court ha[d] awarded to Parkside. . . ." (R. 119.) A copy of this Partial Satisfaction of Judgment is attached hereto as Addendum G.

On August 17, 1999, despite the fact that Insure-Rite had satisfied only the principal component of Parkside's judgment, counsel for Kasteler and Daines mailed a letter to all of the Defendants demanding immediate removal of the Lis Pendens. (R. 206;

Br. of Appellants at 5.)⁶ Savage replied to that letter on August 20, 1999, reminding counsel that Kasteler and Daines had pledged their houses as security for the judgment against Insure-Rite, that they had never requested the court in the Unlawful Detainer Action to release their houses as security, and that the judgment remained unsatisfied. (R. 221; Br. of Appellants at Ex. 4.) Savage's letter closed by stating that the Lis Pendens were proper and would not be removed, but it invited Kasteler's and Daines' counsel to "address this matter to the Court" in the Unlawful Detainer Action if he disagreed. Id.⁷

Insure-Rite never voluntarily satisfied the interest, costs, or attorney's fees portions of Parkside's judgment. Instead, Defendants were forced to garnish Insure-Rite's bank accounts on June 30, 1999, to obtain additional funds for Parkside representing interest, costs, and attorney's fees. (R. 122-25, 127-30.) Copies of these writs of garnishment are attached hereto as Addenda H and I. Only on August 30, 1999 was Parkside able to acknowledge full satisfaction by Insure-Rite of the court's judgment in the Unlawful Detainer Action, including interest and all court-awarded attorney's fees and costs incurred by Parkside up to and including April 30, 1999. (R. 132-34.)⁸

⁶ As stated above, the Brief of Appellants misleadingly suggests that Insure-Rite had satisfied the judgment in full when Kasteler's and Daines' counsel demanded the removal of the Lis Pendens. (Br. of Appellants at 5, 7-8, 12.) The record is clear, however, that significant portions of the judgment remained unsatisfied at that time.

⁷ Although Plaintiffs make much of this correspondence in their Brief of Appellants, (Br. of Appellants at 5-6), the record is clear that Plaintiffs never intended to give Defendants a meaningful opportunity to respond to their counsel's August 17 letter or to address the propriety of the Lis Pendens with the court in the Unlawful Detainer Action. Plaintiffs' counsel sent the August 17 letter to Defendants by regular mail. (R. 206.) Accordingly, the letter was not received until August 19, and Savage was not able to send his response until August 20. (R. 221; Br. of Appellants at Ex. 4.) By then, however, Plaintiffs had already filed their Complaint in this case on August 18, 1999 (R. 1-25), only one day after their counsel had mailed the August 17 letter to Defendants.

⁸ Parkside again reserved its right to collect reasonable attorney's fees and costs incurred after April 30, 1999. (R. 133.)

Because Parkside had received payment for almost all of the total judgment in the Unlawful Detainer Action, as described above, Savage and Evans Defendants filed documents with the Salt Lake County Recorder on September 1, 1999, releasing the Lis Pendens on Kasteler's and Daines' houses. (R. 136-39, 141-44.) Copies of these releases are attached hereto as Addenda J and K.

SUMMARY OF ARGUMENT

This case is not, as Plaintiffs suggest, a complicated academic balancing act involving the policies and common-law traditions of “[l]andlord-tenant law, surety law and lien law.” (Br. of Appellants at 7.) Nor does this case present the question of whether landlords may employ “self-help” rather than valid legal process in unlawful detainer cases. (Br. of Appellants at 8.) Rather, this case presents the simple question of whether people who voluntarily encumber their houses with a property bond may assert multi-million-dollar tort claims against the bond creditors and their lawyers merely for informing potential home purchasers, through entirely truthful lis pendens, that the bond exists.

The answer to this question, as the district court correctly concluded, is a resounding no.⁹ It is certainly true that Kasteler and Daines would have encountered difficulty had they attempted to sell their houses during the five-month period that the Lis Pendens were in effect; in other words, Plaintiffs are correct that prospective purchasers or lenders would be reluctant to “buy a pig in a poke” by acquiring a property interest that is subject in part to the outcome of a lawsuit. (Br. of Appellants at 8.) But that is exactly the point of the property bond that Kasteler and Daines deliberately executed. They are the ones who placed the “pig in the poke” and impaired the marketability of their houses

⁹ At no point in this lawsuit, either at the district court level or in their Brief of Appellants, have Plaintiffs cited a single case in which any bond creditor has ever been held liable on any legal theory for recording a lis pendens against property pledged as security for the bond.

by pledging them as security in the Unlawful Detainer Action. At the moment they executed their “Renter’s Counter Bond” (R. 188-94; Add. D), Kasteler and Daines relinquished the right to sell or encumber their houses without giving priority to the bond. Had they attempted to do so (and there is no allegation in the Complaint that they did), they would have been in contempt of court in the Unlawful Detainer Action. The Lis Pendens at issue in this case did not create that problem for Plaintiffs; Plaintiffs created it for themselves. The Lis Pendens merely gave teeth to Plaintiffs’ security obligations by ensuring that no bona fide purchaser could impair Parkside’s security if Kasteler and Daines attempted to thumb their noses at the Unlawful Detainer court by selling their houses out from under the bond.

Preventing such mischief is consistent with the best traditions of the lis pendens doctrine, and there are multiple reasons why the district court was correct to halt Plaintiffs’ entire lawsuit in the starting gates. Defendants presented the district court with numerous independent grounds for dismissing Plaintiffs’ Complaint. Any one of these grounds, standing alone, would require affirmance of the district court’s dismissal order. Together, they impose an insurmountable barrier to Plaintiffs’ claims on appeal.

ISSUE #1: First, the district court correctly dismissed Plaintiffs’ entire Complaint because the Lis Pendens were proper under Utah’s lis pendens statute. Contrary to Plaintiffs’ central argument, Defendants could have enforced Kasteler’s and Daines’ property bond in the Unlawful Detainer Action itself, without having to sue them in an independent enforcement action. By filing their bond, Kasteler and Daines essentially surrendered their houses to the jurisdiction of the court in the Unlawful Detainer Action, which therefore had the power to enforce the bond without the necessity of a separate action. Moreover, Kasteler and Daines made a general appearance in the Unlawful Detainer Action when they filed their bond, thus empowering the court to enforce the bond according to its terms. The Unlawful Detainer Action therefore

“affected title” to Kasteler’s and Daines’ houses within the meaning of the lis pendens statute, and the Lis Pendens were proper.

Moreover, even if a separate enforcement action were required (which it was not), the Unlawful Detainer Action still “affected title” to Kasteler’s and Daines’ homes. It was the Unlawful Detainer Action alone that determined Kasteler’s and Daines’ liability on their bond. Any subsequent enforcement action would have been nothing more than a straightforward application of res judicata to which Kasteler and Daines would have had no defenses. Because the Unlawful Detainer Action would have been utterly dispositive in such an enforcement action, the Unlawful Detainer Action “affected title” to Kasteler’s and Daines’ houses under Utah law even if a separate enforcement action were required. The Lis Pendens were therefore proper, and Plaintiffs’ lawsuit was correctly dismissed.

ISSUE #2: Entirely apart from whether the Lis Pendens conformed to the requirements of the statute, the dismissal of Plaintiffs’ Complaint was correct because the Lis Pendens are absolutely privileged under the judicial proceeding privilege. This Court, like the courts of most jurisdictions, has held that lis pendens enjoy the protection of the absolute judicial proceeding privilege. Contrary to Plaintiffs’ argument, that rule of law has not been supplanted or superseded in any way. Moreover, this Court has repeatedly held that statements within the judicial proceeding privilege are absolutely privileged not only against defamation claims, but against all claims of liability. It was therefore appropriate that the district court dismissed this action in its entirety.

ISSUE #3: Finally, the district court’s dismissal order was correct because each individual claim in Plaintiffs’ Complaint independently fails for a variety of reasons. Plaintiffs’ principal claim—their “wrongful lien” claim—fails for the fundamental reason that lis pendens simply are not liens. It is well settled that lis pendens merely describe encumbrances on property; they are not encumbrances themselves. Accordingly, the wrongful lien statute expressly excludes lis pendens from the scope of its coverage. The

“lien” at issue in this case is the property bond that Kasteler and Daines chose to execute; it is not the Lis Pendens, which merely gave notice of the bond.

Plaintiffs’ “slander of title” claim fails because the Lis Pendens were truthful in all respects, and Plaintiffs do not contend otherwise. The claim also fails because Plaintiffs have not alleged special damages in the form of a lost sales opportunity, as required to state a claim for slander of title. Nor could Plaintiffs allege special damages. Any such allegation would be an outright concession that Kasteler and Daines acted in contempt of the Unlawful Detainer court by attempting to sell their houses out from under the bond.

Plaintiffs’ remaining claims are similarly defective. The “quiet title” claim is moot because Defendants released the Lis Pendens on September 1, 1999; the “intentional infliction of emotional distress” claim fails because Defendants’ alleged conduct is insufficiently “outrageous” as a matter of law; and the “negligent infliction of emotional distress” claim fails because it omits essential elements of such a claim.

Even when examined individually, none of Plaintiffs’ legal theories states a valid claim for relief. This provides yet another ground upon which this Court should affirm the dismissal of Plaintiffs’ Complaint.

ARGUMENT

I. STANDARD OF REVIEW.

The propriety of the district court’s dismissal of Plaintiffs’ Complaint under Utah R. Civ. P. 12(b)(6) is a question of law that this Court should review for correctness. See Russell v. Standard Corp., 898 P.2d 263, 264 (Utah 1995); St. Benedict’s Dev. Co. v. St. Benedict’s Hosp., 811 P.2d 194, 196 (Utah 1991). This Court should affirm the district court’s dismissal if the facts alleged in Plaintiffs’ Complaint, when assumed to be true, fail to provide any valid basis for the relief requested. Id. See also Whipple v. Am. Fork Irrigation Co., 910 P.2d 1218, 1220 (Utah 1996) (stating that dismissal is justified “when the allegations of the complaint clearly demonstrate that the plaintiff does not have a claim”). When reviewing a Rule 12(b)(6) dismissal, this Court “recite[s] the facts in the

light most favorable to the losing party below.” Sperry v. Sperry, 1999 UT 101, ¶ 2, 990 P.2d 381. In keeping with this standard, the foregoing Statement of Facts is drawn from the face of Plaintiffs’ Complaint and appropriate items of public record, with all doubts resolved in Plaintiffs’ favor.¹⁰

II. THE DISTRICT COURT CORRECTLY DISMISSED THIS ACTION IN ITS ENTIRETY ON THE GROUND THAT THE LIS PENDENS AT ISSUE WERE PROPER UNDER THE LIS PENDENS STATUTE AND CANNOT SUBJECT DEFENDANTS TO LIABILITY.

All of Plaintiffs’ claims fail in this case because each is premised upon an act—Defendants’ filing of the Lis Pendens—that Defendants were expressly permitted to perform under Utah statute. Utah’s lis pendens statute provides in pertinent part that:

In any action affecting the title to, or the right of possession of, real property the plaintiff at the time of filing the complaint or thereafter, and the defendant at the time of filing his answer when affirmative relief is claimed in such answer, or at any time afterward, may file for record . . . a notice of the pendency of the action

Utah Code Ann. § 78-40-2 (1996) (emphasis added). In interpreting this statute, this Court has broadly observed that “a notice of lis pendens may be filed with respect to property whose title would be affected by pending judicial action.” Boyce v. Boyce, 609 P.2d 928, 932 (Utah 1980) (emphasis added). The question of whether a lis pendens has been properly filed is a question of law for the Court to decide. Timm v. Dewsnup, 921 P.2d 1381, 1392 (Utah 1996).¹¹

¹⁰ Defendants recognize that this Court must, for the purpose of this appeal, accept as true all factual allegations asserted in the Complaint. However, Defendants do not stipulate to these facts for any other purpose, and if there are further proceedings in this matter, Defendants fully reserve the right to present a factual defense and controvert the Complaint allegations where appropriate.

¹¹ Throughout the Brief of Appellants, Plaintiffs mistakenly discuss their interpretation of the lis pendens statute only within the analytical framework of the “wrongful lien” statute, which Plaintiffs erroneously contend requires lis pendens to be “expressly authorized” by the “plain language” of the lis pendens statute in order to avoid being categorized as wrongful liens. This faulty analytical approach is a red herring that should not distract this Court. Because lis pendens simply are not liens, and are in fact expressly excluded from the scope of the wrongful lien statute, Utah Code Ann. § 38-9-

At the heart of this case is a procedural issue that Plaintiffs incorrectly believe invalidates the Lis Pendens at issue in this case under the terms of the lis pendens statute. Through what can best be described as a plea for this Court to exalt form over substance, Plaintiffs surprisingly contend that Defendants tortiously violated their rights by failing to file a lawsuit against them seeking to foreclose on their houses. Plaintiffs' argument, in their own words, is that "the landlord first should have filed an independent enforcement action against [Kasteler and Daines] on their bond as required by Utah statute and common law, and only thereafter, could the landlord have recorded *lis pendens* on Appellants' homes." (Br. of Appellants at 12 (emphasis in original).) That assertion is quite clearly the "linchpin" of Plaintiffs' argument on appeal.¹²

All of Plaintiffs' claims arise from the Lis Pendens that Defendants recorded on their houses. Yet Plaintiffs do not and cannot contend that their houses were entitled to be free from lis pendens. They merely assert that Defendants made a procedural error by failing to sue them prior to recording the Lis Pendens. In other words, Kasteler and Daines literally argue as the basis for their multi-million-dollar lawsuit that Defendants deprived them of their alleged right to be hauled into court in addition to having lis pendens recorded on their houses. As they admit in their brief, "if the Appellees herein had filed an action against the Appellants-sureties on their bond first, and thereafter recorded the *lis pendens* involved, Appellants' lawsuit would not have resulted." (Br. of Appellants at 30 (emphasis in original).)

2(2) (1997), it would be inappropriate for this Court to interpret the lis pendens statute through the lens of the wrongful lien statute. Instead, this Court should simply interpret and apply the lis pendens statute directly, as it always has. If the Lis Pendens at issue in this case were proper under this Court's interpretation of the lis pendens statute, then they certainly cannot constitute "wrongful liens" or support any of Plaintiffs' claims in this case. Even Plaintiffs cannot seriously contend that lis pendens can be actionable as wrongful liens despite satisfying the requirements of the lis pendens statute as properly interpreted by this Court.

¹² Plaintiffs emphasize the alleged requirement of an independent action no fewer than eleven times in their brief. (Br. of Appellants at 5, 7-12, 24-25, 30.)

Why do Plaintiffs believe this makes a difference? Because they concede that if Utah law permitted Defendants to enforce Plaintiffs' property bond in the Unlawful Detainer Action itself, rather than requiring an independent action on the bond, then the Unlawful Detainer Action would "affect title" to Plaintiffs' houses and would justify recording the Lis Pendens under Utah Code Ann. section 78-40-2. If the Lis Pendens were proper under the statute, even Plaintiffs themselves acknowledge that their "lawsuit would not have resulted." (Br. of Appellants at 30.) Plaintiffs argue, however, that an independent action is required to enforce a tenant's counter bond because Utah's possession-bond statute, Utah Code Ann. section 78-36-8.5(2)(b) (1996), does not expressly state that an independent action is unnecessary. (Br. of Appellants at 24-25.) If that "linchpin" proposition is incorrect, however, and a tenant's counter bond can be enforced in an unlawful detainer action, then all of Plaintiffs' claims fail under the weight of Plaintiffs' own arguments.¹³

A. The Linchpin of Plaintiffs' Argument Fails Because Defendants Could Have Enforced Plaintiffs' Surety Bonds in the Unlawful Detainer Action.

Contrary to Plaintiffs' argument, a tenant's counter bond can be enforced against the sureties who post it in the very same action in which it is posted. The district court correctly applied this rule of law as support for its dismissal order below, and Defendants respectfully invite this Court's attention to the district court's carefully reasoned Memorandum Decision. (R. 274-81; Add. A.)

The law does not require the cumbersome, inefficient waste of judicial resources that would accompany the requirement of an independent action. In arguing otherwise, Plaintiffs cite a handful of statutes and procedural rules addressing various types of bonds and note that many of these statutes and rules expressly state that "[t]he surety's liability

¹³ The converse is not true. Even if an independent action were necessary to enforce a tenant's counter bond, Plaintiffs' claims would still all fail as a matter of law for the many reasons set forth below. This linchpin is critical to Plaintiffs' case only; not to Defendants'.

[on the bond] may be enforced on motion without the necessity of an independent action.” (Br. of Appellants at 24-25.) Plaintiffs argue that because these magic words are not present in the possession-bond statute, the “default” rule strips the court of jurisdiction over the sureties and requires an entirely separate lawsuit to enforce a tenant’s counter bond. Id.

What Plaintiffs fail to observe, however, is that the possession-bond statute provides an even stronger jurisdictional basis for the court in an unlawful detainer action to enforce a counter bond against the surety by requiring that “[t]he bond shall be payable to the clerk of the court.” Utah Code Ann. § 78-36-8.5 (2)(b) (1996) (emphasis added). Rather than merely requiring sureties to submit personally to the jurisdiction of the court for enforcement purposes, as other bond statutes and rules do, the possession-bond statute goes one step further and ensures that the court will have jurisdiction to enforce a bond by essentially requiring the sureties to surrender to the court any money or property pledged as security. This unquestionably provides the court in the unlawful detainer action with jurisdiction to enforce the bond against the surety immediately.¹⁴ If that were not the case, it would be impossible for the court to order “immediate” execution on an unlawful detainer judgment—a procedure that the unlawful detainer statutes expressly require. See

¹⁴ Rule 62 of the Utah Rules of Civil Procedure further supports the proposition that requiring security to be deposited with the court is an alternative method by which a court can acquire jurisdiction to enforce an undertaking. Rule 62(d) allows a party to obtain a stay delaying execution on a money judgment pending appeal by “giving a supersedeas bond.” When such a bond is given, it must “provide that each surety submits to the jurisdiction of the court . . . and that the surety’s liability may be enforced on motion and upon such notice as the court may require without the necessity of an independent action.” Utah R. Civ. P. 62(i)(4). As an alternative to requiring such a bond, however, Rule 62 allows the court to “permit a deposit of money in court or other security to be given in lieu of giving a supersedeas bond” Utah R. Civ. P. 62(i)(2). The rule contains no language expressly granting the court jurisdiction to execute on security deposited in court. As with the possession-bond statute, such language is unnecessary because the court obviously has jurisdiction over property that has been relinquished to it as security.

Utah Code Ann. § 78-36-10(4) (1996) (requiring that “execution upon the [unlawful detainer] judgment shall be issued immediately after the entry of the judgment. In all cases, the judgment may be issued and enforced immediately.”) (emphasis added). The district court expressly adopted this line of reasoning (R. 274-81; Add. A), and Plaintiffs have offered no explanation, other than ipse dixit assertions, of why it is incorrect.

The property bond that Kasteler and Daines posted in the Unlawful Detainer Action satisfied the requirements of the possession-bond statute, and the bond could have been enforced against them in that very action. The bond, which both Kasteler and Daines signed, designated their houses as “security posted with the Court” in the Unlawful Detainer Action. (R. 188; Add. D at 1 (emphasis added).) The bond contained the caption of the Unlawful Detainer Action and was filed in the Unlawful Detainer Action. Id. Thus, in accordance with the requirements of the possession-bond statute, and through the unambiguous language of the bond itself, Kasteler and Daines essentially surrendered their houses to the court in the Unlawful Detainer Action as security for their undertaking to “pay all costs and damages which may be awarded to the Owner” in the Unlawful Detainer Action up to the amount of \$25,000. (R. 188-89; Add. D at 1-2.) By thus voluntarily appearing and pledging their houses as security in the Unlawful Detainer Action, Kasteler and Daines submitted themselves and their houses to the jurisdiction of the court, which could accordingly enforce the bond. No “independent enforcement action” was necessary.

Indeed, under Utah case law, even if the language of the possession-bond statute did not operate to subject Kasteler’s and Daines’ houses to the control of the court in the Unlawful Detainer Action, their act of filing the bond in the Unlawful Detainer Action nevertheless constituted a “general appearance” in that action sufficient to vest the court with jurisdiction to enforce the bond. In Fitzgerald v. Critchfield, 744 P.2d 301 (Utah App. 1987), the defendant obtained a discharge of a prejudgment attachment on certain livestock by furnishing an attachment bond in the form of an undertaking by a surety as

required by Utah R. Civ. P. 64C(g). Id. at 305. Contrary to the requirements of the rule, the bond did not expressly provide that the surety submitted itself to the jurisdiction of the court for the purpose of enforcing the bond. Id. Nevertheless, following an order to show cause hearing on the surety's failure to pay on the bond, the trial court ruled that the bond was intended to guarantee any judgment against the defendant. Id.

The Court of Appeals in Fitzgerald concluded that although the bond did not contain the precise language submitting the surety to the jurisdiction of the court, the bond would nevertheless "be enforced according to the terms of the authorizing rule." Id. More importantly, the appellate court stated as an alternative basis for affirming the trial court that the surety had "made a general appearance at the show cause hearing, thereby submitting itself to the court's jurisdiction to enforce payment on its undertaking." Id. (emphasis added).¹⁵ Under Utah law, an appearance in court "for any purpose except a special appearance to object to jurisdiction over [one's] person constitutes a general appearance." Barber v. Calder, 522 P.2d 700, 702 n.4 (Utah 1974) (emphasis added). Although the Fitzgerald court specifically held that the surety in question had made a general appearance at a show cause hearing, courts from other jurisdictions have held that the posting of a surety bond itself constitutes a general appearance. See, e.g., Hensley et al. v. Minehan, 29 Ga. App. 251, 114 S.E. 647 (1922) (approving trial court's judgment on a bond "against both principal and his surety" because "both [the principal] and his

¹⁵ Plaintiffs argue that the Fitzgerald case is inapposite because it involves Utah Rule of Civil Procedure 64C, which expressly provides for the enforcement of bonds without the necessity of independent actions. (Br. of Appellants at 23 n.5.) However, the significance of the Fitzgerald decision in this case is not its analysis of Rule 64C, but rather its alternative holding that the bond surety had made a general appearance. This aspect of the Fitzgerald decision is directly on point in this case, and Plaintiffs have not addressed it at all.

surety have voluntarily appeared in the proceedings by filing a replevy bond for the property levied on under the attachment”).¹⁶

In light of the above authority, Kasteler and Daines entered a “general appearance” in the Unlawful Detainer Action when they voluntarily signed and filed the property bond with the court in that action.¹⁷ Under the Utah Court of Appeals’ decision in Fitzgerald, this general appearance gave the court jurisdiction to enforce the bond against Kasteler and Daines in the Unlawful Detainer Action.¹⁸ Contrary to the “linchpin” of Plaintiffs’ argument in this case, the Unlawful Detainer Action did “affect title” to Kasteler’s and Daines’ houses, and the Lis Pendens recorded by Defendants were entirely proper under the Utah statute. Therefore, Plaintiffs’ claim that they were tortiously deprived of the

¹⁶ See also Yale v. Nat’l Indem. Co., 602 F.2d 642, 645 (4th Cir. 1979) (posting a surety bond constitutes a “general appearance”); Ashmus v. Donohoe, 272 Wis. 234, 236-37, 75 N.W.2d 303, 304-05 (1956) (filing of a surety bond “amounted to a general appearance and gave the court jurisdiction for all purposes”).

¹⁷ This distinguishes Kasteler’s and Daines’ situation from that of the injunction bond surety in the Junction Irrigation case, which is the case cited by Plaintiffs as support for the so-called “general rule” requiring an independent action. (Br. of Appellants at 24.) In Junction Irrigation, which has since been legislatively overruled, this Court held that under the circumstances of the case, a party who had been wrongfully enjoined was required to pursue an independent action to enforce an injunction bond posted by the other party. Junction Irrigation Co. v. Snow, 118 P.2d 130, 131-32 (Utah 1941). In that case, however, there was no indication that the surety on the injunction bond had itself filed any document with the court or had otherwise appeared before the court in any capacity. Kasteler and Daines, by contrast, signed and filed a document in the Unlawful Detainer Action voluntarily submitting themselves and their houses to the jurisdiction of the court.

¹⁸ Although the district court expressly adopted this line of reasoning and concluded that Kasteler and Daines had entered a general appearance in the Unlawful Detainer Action by filing their bond (R. 279-80; Add. A at 6-7), there is no mention of the “general appearance” issue anywhere in the Brief of Appellants. This “general appearance” analysis is an entirely independent basis for concluding that a separate enforcement action was not required. Therefore, Plaintiffs have completely failed to address an issue that is sufficient in and of itself to require affirmance of the district court’s dismissal order.

privilege of being sued in an independent action has no basis in law and should be rejected by this Court.

B. Even if Defendants Should Have Filed an Independent Action To Enforce the Bonds, the Unlawful Detainer Action Still “Affected Title” to Plaintiffs’ Houses, and the Lis Pendens Were Therefore Proper.

The Lis Pendens at issue in this case were proper under Utah’s lis pendens statute even if independent actions are necessary to enforce counter bonds under the unlawful detainer statute. As noted above, this Court has held that under the lis pendens statute, “a notice of lis pendens may be recorded with respect to property whose title would be affected by pending judicial action.” Boyce, 609 P.2d at 932 (emphasis added). By pledging their houses as security in the Unlawful Detainer Action, Kasteler and Daines unquestionably created a situation where title to their houses “would be affected” by that action in a direct and palpable fashion, regardless of the technical necessity of an independent enforcement action.

This is so because the outcome of the Unlawful Detainer Action would have completely and irrefutably dictated the result of the enforcement action.¹⁹ The only condition necessary to trigger Kasteler’s and Daines’ liability on their bond was an award of costs or damages in favor of the owner in the Unlawful Detainer Action. (R. 189; Add. D at 2.) Once such a judgment was entered in the Unlawful Detainer Action, the die was cast. That judgment would have been res judicata in any subsequent action to execute on Kasteler’s and Daines’ houses, and they would accordingly have had no defense in such an action. Thus, the Unlawful Detainer Action plainly “affected title” to Kasteler’s and

¹⁹ This is yet another reason why it would be an indefensible waste of resources to require entirely separate lawsuits to enforce counter bonds filed in unlawful detainer actions. Because the surety’s liability on the bond is a foregone conclusion once the unlawful detainer action has been litigated to final judgment, the only thing a separate enforcement action would accomplish would be the unnecessary expenditure of additional time and resources by the courts and the parties.

Daines' houses within the meaning of the lis pendens statute. Utah Code Ann. § 78-40-2 (1996).

Plaintiffs seek to sidestep this unavoidable conclusion by asserting that the lis pendens statute forbids the recording of lis pendens if an action's "effect" on title to real property occurs anywhere outside the strict confines of the action itself. (Br. of Appellants at 19-21.) As Plaintiffs state their argument, the lis pendens statute "plainly and closely ties 'the action' to 'the property' upon which the *lis pendens* is recorded. . . . Nowhere in the Unlawful Detainer complaint (R. 98-97) is there any mention of the homes of Appellants Mr. Kasteler and Ms. Daines, and the *lis pendens* therefore were invalid." Id. at 19 (emphasis in original).²⁰

This Court recently rejected such a narrow construction of the lis pendens statute in the case of Timm v. Dewsnup, 921 P.2d 1381 (Utah 1996). Although Plaintiffs cite Timm in their Brief of Appellants (Br. of Appellants at 19-20), the case in fact strongly supports the proposition that an action can "affect title" to real property within the meaning of Utah's lis pendens statute even if the effect will occur outside the strict parameters of the action itself. In Timm, the defendants had borrowed money from the plaintiffs and had pledged certain parcels of real property as security for the loan, one of which—the "trust deed property"—was secured by a deed of trust. Id. at 1383-84. The defendant borrowers defaulted on the loan, and the lenders filed a complaint against them seeking to recover the unpaid balance of the loan. Id. at 1384. As part of the action, the

²⁰ Far more glaring is Plaintiffs' omission from their Complaint in this action of any mention of their property bond. (R. 1-24.) Nowhere in their Complaint do Plaintiffs even hint that they had voluntarily pledged their houses as security in the Unlawful Detainer Action long before the Defendants recorded the Lis Pendens at issue. Standing by itself, the Complaint creates the impression that Kasteler and Daines had no involvement of any kind in the Unlawful Detainer Action and that Defendants gratuitously recorded Lis Pendens on their houses for no reason at all. The best that can be said of this omission by Plaintiffs is that it renders their Complaint extraordinarily misleading.

lenders sought to determine their respective rights and priorities with respect to some of the property that the borrowers had pledged as security, but not the trust deed property. Id. Instead of including the trust deed property as part of the action, the lenders intended to conduct a separate non-judicial trust deed sale of the property. Id. The borrowers responded by filing a lis pendens on the trust deed property that referred to the lenders' action involving the loan default and the other pieces of property. Id. at 1392. On the lenders' motion, the trial court released the borrowers' lis pendens. Id.

On appeal, this Court reversed. Like Plaintiffs in this case, the lenders in Timm argued on appeal that title to the trust deed property “was not the subject of [their] litigation” against the borrowers and that the court had therefore properly released the lis pendens. Id. at 1392. In response, the borrowers argued “that the trust deed property is affected by the outcome of [the] litigation and therefore the lis pendens should not have been released.” Id. (emphasis added). This Court held for the borrowers, noting that because their “interest in the trust deed property is subject to the outcome of [the] case,” the trial court had erred in releasing the lis pendens, despite the fact that title to the trust deed property would be affected in the context of a nonjudicial foreclosure sale. Id. at 1393. Under the same reasoning, the Lis Pendens at issue in this case were proper because title to Kasteler’s and Daines’ houses was “subject to the outcome” of the Unlawful Detainer Action, even if the effect would technically be felt in a separate enforcement action.²¹

²¹ This Court should not be misled by Plaintiffs’ attempt to turn the Timm case to their advantage by seizing on the irrelevant “amended counterclaim” issue. (Br. of Appellants at 20.) The material factors in the Timm “action” are not complicated. Simply put, lenders were seeking to recover money they claimed was due under promissory notes. The borrower asserted that the promissory notes were paid in full. The resolution of whether the promissory notes had been paid in full would determine whether the lenders’ planned nonjudicial foreclosure sale of the borrowers’ trust deed property would be proper. That alone was the Court’s stated basis for holding that the borrowers’ lis pendens on the trust deed property was appropriate: “If the trial court finds on remand that [the borrowers] had paid the amounts owed on the promissory notes in full, then the lenders’ [nonjudicial] foreclosure on the Dewsnums’ property, including the trust deed property, would be in error. Thus Mr. Dewsnum’s interest in the trust deed property is

Any other result would severely undermine the fundamental purpose of the lis pendens doctrine and wreak havoc on the rights of litigants in unlawful detainer actions. As this Court has observed:

The doctrine of lis pendens preserves the status quo by keeping the subject of the lawsuit within the power and control of the court until judgment or decree shall be entered. The recording of a lis pendens serves as a warning to all persons that any rights or interests they may acquire in the interim are subject to the judgment or decree.

Tuft v. Fed. Leasing, 657 P.2d 1300, 1302 (Utah 1982) (emphasis added) (quoting Bagnall v. Suburbia Land Co., 579 P.2d 914, 916 (Utah 1978)). This doctrine is indispensable in preventing the temptation toward “mischief” that would otherwise beset parties to hotly contested litigation in which title to property is at issue:

The mischief that would follow if the parties to an action under such circumstances could alienate away property which is before the court for determination is obvious.

Tuft, 657 P.2d at 1302 (quoting Glynn v. Dubin, 369 P.2d 930, 931 (1962)).

Far from acknowledging the importance and applicability of these policies, however, Plaintiffs literally argue in their Brief of Appellants that they were free to sell or encumber their houses, destroying Parkside’s security interest, and that there was nothing any of the Defendants could do about it without subjecting themselves to a \$5,000,000.00+ lawsuit. As Plaintiffs put it, “[i]t is possible that sureties may attempt to

subject to the outcome of this case.” 921 P.2d at 1393 (emphasis added). The fact that the borrowers intended to file an amended counterclaim raising issues directly involving title to the trust deed property simply was not part of the Court’s analysis of this issue.

Also, Winters v. Schulman, 977 P.2d 1218 (Utah App. 1999), upon which Plaintiffs rely heavily (Br. of Appellants at 19, 21), is readily distinguishable from this case. In Winters, the defendant had recorded a lis pendens referring to a divorce action that had been concluded by a final order seven years earlier. Id. at 1223. Moreover, the lis pendens was recorded on property that the ex-husband had not acquired until a year after the final divorce decree. Id. at 1220. In this case, by contrast, Defendants recorded the Lis Pendens with respect to a pending unlawful detainer action in which the property upon which the Lis Pendens were recorded had been expressly pledged as security. Furthermore, to the extent that the Court of Appeals in Winters employed dicta suggesting a stricter standard for assessing the propriety of lis pendens than the standard employed by this Court in Timm, this Court’s approach obviously takes precedence.

alienate surety lands before landlords have an opportunity to file independent actions against the sureties to enforce their obligations on Renters Counter-Bonds.” (Br. of Appellants at 25 n.6.) Yet Plaintiffs dismiss such appalling possibilities as unimportant, casually asserting that it should be “left . . . to the Utah Legislature to make other provisions.” Id.

This argument, like this entire lawsuit, demonstrates an amazingly cavalier attitude by Plaintiffs toward the responsibilities they chose to assume as sureties in the Unlawful Detainer Action. This is not, as Plaintiffs contend (Br. of Appellants at 21), a case in which a party has improperly recorded a lis pendens merely because it ultimately intends to satisfy a money judgment by executing on the opposing party’s real property. See, e.g., Busch v. Doyle, 141 B.R. 432, 436 (D. Utah 1992). Rather, it is case in which Kasteler and Daines chose to act as sureties and voluntarily elected to place title to their houses at issue by pledging them as security in the Unlawful Detainer Action.

What did Kasteler and Daines think they were doing when they made these commitments to the court and Parkside in the Unlawful Detainer Action? How can they argue with a straight face that they were immediately free to go out and sell or encumber the very houses that they had just “posted with the Court” to satisfy a court order requiring security to protect Parkside in the Unlawful Detainer Action? (R. 99-100, 188-94; Add. C, D.) If such actions were permitted, property bonds in unlawful detainer actions would be absolutely worthless. The allegedly tortious Lis Pendens that Defendants recorded in this case merely functioned to inform a universe of otherwise bona-fide purchasers that any interest they acquired in Kasteler’s and Daines’ houses would be subordinate to the property bond with which Kasteler and Daines had already chosen to burden themselves. The only thing the Lis Pendens prevented Kasteler and Daines from doing was selling or encumbering their houses out from under the property bond—the very thing they had essentially promised they would not do when they pledged the houses as security. Under these circumstances, the Defendant attorneys arguably

would have committed malpractice if they had not filed the Lis Pendens on behalf of their client. At very least, the Lis Pendens were proper under the Utah statute, and Plaintiffs' claims were properly dismissed by the district court.

III. APART FROM THE LIS PENDENS STATUTE, THE DISTRICT COURT'S DISMISSAL OF THIS ACTION WAS CORRECT BECAUSE THE LIS PENDENS AT ISSUE ARE ABSOLUTELY PRIVILEGED UNDER THE JUDICIAL PROCEEDING PRIVILEGE.

Even if the Lis Pendens at issue in this case were technically improper under the lis pendens statute (which they were not), the dismissal of Plaintiffs' Complaint was still correct because this Court has expressly held that lis pendens filed in connection with pending actions are absolutely privileged and cannot give rise to liability. In Hansen v. Kohler, 550 P.2d 186 (Utah 1976), as part of a complicated dispute over a real estate transaction, one party brought a "slander of title" action against another party based on the latter's filing of lis pendens in an action that was pending between them. Id. at 189. In remanding the case, this Court directed the district court to dismiss the slander of title claim for failure to state a claim upon which relief can be granted, id., reasoning as follows:

The contention of Hansen is the recording of the lis pendens was privileged; and, therefore, Pierce had no claim for slander of title. This contention is well made. . . . The sole purpose of recording a notice of lis pendens is to give constructive notice of the pendency of the proceeding; its only foundation is the action filed—it has no existence independent of it. . . . [S]ince the effect of a lis pendens is to give constructive notice of all the facts apparent on the face of the pleadings, the recordation of a notice of lis pendens is, in effect, a republication of the pleadings. Since the publication of the pleadings is absolutely privileged, the republication thereof by recording a notice of lis pendens is similarly privileged. . . . In the instant action, Hansen's recordation of a lis pendens was absolutely privileged and the action of Pierce for slander of title cannot be sustained.

Id. at 189-90 (emphasis added; citations omitted).

This Court's recognition in Hansen of an absolute privilege for lis pendens recorded in connection with pending actions²² was merely a specialized application of the

²² The Hansen court distinguished an earlier Utah case—Birch v. Fuller, 337 P.2d 964 (1959)—in which there was no legal action pending at the time the lis pendens was

“judicial proceeding privilege,” which creates an absolute privilege against liability for any statements made in connection with judicial proceedings. Indeed, the Hansen court cited to the very same provisions of the Restatement of Torts that establish the more general judicial proceeding privilege:

The privilege stated in this section is based upon the public interest in according to all men the utmost freedom of access to the courts of justice for the settlement of their private disputes. Like the privilege of an attorney, it is absolute. It protects a party to a private litigation or a private prosecutor in a criminal prosecution from liability for defamation irrespective of his purpose in publishing the defamatory matter, of his belief in its truth or even his knowledge of its falsity.

Id. at 190 (emphasis added) (quoting Restatement of Torts § 587 cmt. a).

This Court has long recognized that statements of attorneys, parties, judges, witnesses, and other participants in the judicial process enjoy an absolute privilege against defamation liability if made during a judicial proceeding. See, e.g., DeBry v. Godbe, 1999 UT 111, ¶ 10, 992 P.2d 979. The Court candidly recognizes that this “privilege protects those who make otherwise defamatory statements from legal liability.” Price v. Armour, 949 P.2d 1251, 1256 (Utah 1997). “The policy behind such privilege is to encourage full and candid participation in judicial proceedings by shielding the participant from potential liability for defamation.” Id. at 1256. The judicial proceeding privilege “is premised on the assumption that the integrity of the judicial system requires that there be free and open expression by all participants and that this will only occur if they are not inhibited by the risk of subsequent defamation suits.” Id. at 1256 (quoting Allen v. Ortez, 802 P.2d 1307 (Utah 1990)).

In typical defamation cases, this Court has devised a three-part test to determine whether a particular type of statement is entitled to the protection of the judicial

filed. 550 P.2d at 190. In such circumstances, *lis pendens* lose their absolute privilege. Id. In this case, however, the Complaint allegations themselves establish that the Unlawful Detainer Action was pending at the time Defendants filed the *Lis Pendens* at issue. The absolute privilege is therefore fully applicable.

proceeding privilege. DeBry, 1999 UT 111, ¶ 11; Price, 949 P.2d at 1256.²³ The Hansen case essentially represents the Court’s conclusion that as a category of “statements,” lis pendens recorded during pending actions satisfy any applicable tests, qualify for the absolute judicial proceeding privilege, and cannot give rise to liability. This conclusion is fatal to Plaintiffs’ claims in this case.

Moreover, although Hansen appears to have involved only a “slander of title” claim, the absolute privilege recognized by the Hansen court applies to all claims for relief arising out of the privileged statements—in this case the Lis Pendens. See DeBry, 1999 UT 111 ¶ 25 (concluding that “the judicial proceeding privilege extends not only to defamation claims but to ‘all claims arising from the same statements’”) (emphasis in original) (quoting Price, 949 P.2d at 1258). For this reason, the absolute privilege bars all five of Plaintiffs’ claims—each of which arises out of the Lis Pendens. This privilege provides an independent ground—wholly apart from the appropriateness of the Lis Pendens, discussed above—upon which this Court can affirm the dismissal of Plaintiffs’ Complaint.

In an effort to avoid the clear applicability of the judicial proceeding privilege, Plaintiffs have proposed an erroneous interpretation of Utah’s “absolute privilege” doctrine that renders the doctrine completely meaningless. (Br. of Appellants at 27-30.) First, Plaintiffs assert that the absolute privilege accorded to lis pendens has been “supplanted” to the extent it is inconsistent with the wrongful lien statute. Id. at 27-28. In other words Plaintiffs appear to argue that a lis pendens is not entitled to the protection of the privilege unless it complies with the law in all respects anyway.

²³ “To establish the judicial proceeding privilege, the statements must be (1) ‘made during or in the course of a judicial proceeding’; (2) ‘have some reference to the subject matter of the proceeding’; and (3) be ‘made by someone acting in the capacity of judge, juror, witness, litigant, or counsel.’” DeBry, 1999 UT 111, ¶ 11 (quoting Price, 949 P.2d at 1256).

Of course, it makes no sense for the law to afford a “privilege” to statements that would not be actionable even in the absence of the privilege, and courts from other jurisdictions have considered and expressly rejected Plaintiffs’ argument. In Prappas v. Meyerland Cmty. Improvement Ass’n, 795 S.W.2d 794 (Tex. Ct. App. 1990), the plaintiff made the very same argument that Plaintiffs make here: that the judicial proceeding privilege does not apply to lis pendens that are filed in contravention of the applicable lis pendens statute. The appellate court squarely rejected this contention, holding that the existence of the privilege was not dependent upon whether or not the conduct was “authorized” or “unauthorized” by the relevant statutory requirements. Id. at 798 (stating that “[w]e cannot accept [plaintiffs’] distinction between ‘authorized’ and ‘unauthorized’ [lis pendens] notices, turning as it does on technical compliance with the statute”). The court stated that the proper remedy for a plaintiff harmed by an improperly filed lis pendens is not a tort suit against the filer, but, rather, a request for a judicial order removing the lis pendens. Id. at 797.²⁴ The court used examples from other judicial contexts to explain its holding:

For example, irrelevant evidence is inadmissible in a trial. [Rule 402]. Such evidence, when offered, is therefore subject to an order to strike it from the record. Thus if a witness testifies, “Yes, the defendant is the man who shot me, and by the way, he has a loathsome disease,” the court should sustain a timely objection, strike the slanderous remark, and instruct the jury to disregard it. Yet no one would suppose for a moment that the privilege evaporated simply because the comment was unauthorized. The same result would occur if an impropriety surfaced in another part of civil proceedings . . . , namely pleadings. For example, an amended pleading would be “unauthorized” if it were filed late and without leave of court, see Tex. R. Civ. P. 63, but one cannot conceive of such a defect making the slightest difference as far as absolute privilege is concerned. Rather, the remedy would be for the aggrieved party to ask the court to strike the

²⁴ As noted above, in Defendant Savage’s August 20 letter to Plaintiffs’ counsel, he invited Plaintiffs to address the propriety of the Lis Pendens with the court in the Unlawful Detainer Action, stating, “If you disagree with this position, please let me know and we will address this matter to the Court.” (R. 221; Br. of Appellants at 5-6 and Ex. 4.) Plaintiffs never accepted this common-sense invitation to test the validity of the Lis Pendens in the Unlawful Detainer Action, preferring instead to file a separate multi-million-dollar tort action against Defendants.

offending papers. Although such a pleading, like irrelevant evidence, is not authorized in the sense in which appellants employ that term, no loss of privilege ensues.

Id. (emphasis added); see also Manders v. Manders, 897 F. Supp. 972, 976-78 (S.D. Tex. 1995) (citing Prappas and granting summary judgment to a defendant where the plaintiff alleged that the defendant had intentionally interfered with plaintiff's business relations by allegedly maliciously and unlawfully filing a lis pendens).

Under this authority, the Lis Pendens at issue in this case enjoy the protection of the absolute judicial proceeding privilege even if they were recorded in direct contravention of the lis pendens statute (which they were not). Indeed, when this Court extended the privilege to lis pendens in Hansen, it expressly acknowledged that the privilege would protect lis pendens that were otherwise improper, shielding those who record them from liability "irrespective of [their] purpose in publishing the defamatory matter, of [their] belief in its truth or even [their] knowledge of its falsity." 550 P.2d at 190. If deliberate falsity does not strip lis pendens of the protection of the absolute privilege, the privilege must certainly remain intact in the face of alleged technical noncompliance with the lis pendens statute.

The only factor identified in the Hansen opinion that can operate to deprive a lis pendens of the protection of the absolute privilege is if it is recorded when no lawsuit is pending. 550 P.2d at 190. This exception is inapplicable in this case because the Unlawful Detainer Action was pending at the time the Lis Pendens were recorded. Plaintiffs nevertheless seek to take advantage of this exception by repeating their erroneous argument that an "independent action" was allegedly necessary to enforce Plaintiffs' bond. As a result, Plaintiffs again argue, the Unlawful Detainer Action did not "affect title" to Plaintiffs' houses and the Lis Pendens were therefore "unsupported" by a pending action. (Br. of Appellants at 23-30.)

This argument remains incorrect for all of the reasons discussed above in section II of this brief. Even more importantly in the present context, this argument simply misses

the point of the judicial proceeding privilege. In an unpublished 1991 decision involving Utah law, the Tenth Circuit applied the absolute privilege doctrine to affirm the dismissal of a slander of title claim based on the filing of a lis pendens by Utah County. Fitzgerald v. Utah County, 931 F.2d 900, 1991 WL 70672 (10th Cir. April 29, 1991) (attached hereto as Addendum L.²⁵ Utah County had recorded a lis pendens on land owned by the Fitzgeralds that had been the subject of an unrecorded sale. Id. at **3. The lis pendens referred to a lawsuit that Utah County had filed challenging similar unrecorded land sales, but not the Fitzgeralds'. Despite the fact that the Fitzgeralds were not parties to the lawsuit referenced in the lis pendens (and were in fact much further removed from that lawsuit than Plaintiffs in this case were from the Unlawful Detainer Action), the Tenth Circuit held that the absolute privilege doctrine set forth in Hansen v. Kohler barred their slander of title claim:

Utah holds that the recording of a lis pendens is privileged and therefore cannot support a claim for slander of title. See Hansen v. Kohler, 550 P.2d 186, 189-90 (Utah 1976). . . . The instant case is distinguishable from Birch v. Fuller, 9 Utah 2d 79, 337 P.2d 964 (1959), upon which the Fitzgeralds rely, because in Birch no underlying action was filed. Here, as in Hansen, an underlying lawsuit was filed. Although plaintiffs argue that Hansen is not controlling because they were not named in the suit, we conclude that this fact is not significant. The decision in Hansen was based on the Court's holding that a lis pendens is privileged because it merely republishes the pleadings, which are themselves privileged. The lis pendens here thus derives its privilege from the action it republishes. In Birch, to the contrary, the lis pendens did not republish an underlying privileged pleading.

Id. (emphasis added). This analysis applies just as strongly, if not more strongly, to the Lis Pendens at issue in this case, which simply consisted of a fair republication of absolutely privileged filings in the Unlawful Detainer Action. For this reason, the judicial

²⁵ Defendants also presented a copy of the Fitzgerald case to the district court. (R. 264-67.) Although Fitzgerald is not binding precedent in this Court, both because it is a federal court opinion and because it is unpublished, Defendants nevertheless offer the case as a well-reasoned articulation of the legal principles they urge this Court to employ in addressing virtually identical privilege issues.

proceeding privilege shields the Lis Pendens from liability and provides an alternative basis for affirming the district court's dismissal order.

IV. APART FROM THE LIS PENDENS STATUTE AND THE ABSOLUTE PRIVILEGE, THE DISTRICT COURT'S DISMISSAL OF THIS ACTION WAS CORRECT BECAUSE EACH CLAIM IN THE COMPLAINT INDEPENDENTLY FAILS TO STATE A VALID CLAIM FOR RELIEF.

Plaintiffs' arguments before both the district court and this Court have focused almost exclusively on whether the Lis Pendens were statutorily permissible under the terms of the lis pendens statute, Utah Code Ann. section 78-40-2. By focusing so prominently on this issue rather than the actual elements of their claims for relief, Plaintiffs appear to assume that if the Lis Pendens were improper under the statute, it necessarily follows that they support Plaintiffs' tort claims against Defendants.

That assumption is unwarranted. Although the Lis Pendens certainly cannot be actionable if they satisfied the terms of the lis pendens statute, the opposite is not necessarily true. Even if the Lis Pendens were technically improper under the statute (which they were not), and even if they were not absolutely privileged (which they were), the Lis Pendens still do not, as matter of law, satisfy the essential elements of any of Plaintiffs' individual claims for relief. Plaintiffs could and should have addressed any alleged concerns they had regarding Defendants' compliance with the lis pendens statute simply by asking the court in the Unlawful Detainer Action to release the Lis Pendens, as Defendant Savage invited them to do. (R. 221; Br. of Appellants at 5-6 and Ex. 4.) Indeed, almost all of the cases cited by Plaintiffs concerning the propriety of lis pendens merely address the question of whether the court should release or remove the lis pendens at issue. They do not involve tort claims based on the filing of lis pendens.²⁶ A careful

²⁶ See, e.g., Timm v. Dewsnap, 921 P.2d 1381, 1392-93 (Utah 1996) (holding that trial court had erred in "releasing" lis pendens); Boyce v. Boyce, 609 P.2d 928, 932 (Utah 1980) (reviewing trial court's order to remove notice of lis pendens); Hamilton v. Smith, 808 F.2d 36, 37 (10th Cir. 1986) (affirming trial court's injunction against filing notice of lis pendens in action that did not affect the title to real property); Busch v. Doyle, 141

analysis of the individual claims set forth in Plaintiffs' Complaint shows that none of them states a valid claim upon which relief may be granted.

A. Plaintiffs' "Wrongful Lien" Claim Fails Because Lis Pendens Are Not Liens and Are Expressly Excluded From the Coverage of the Wrongful Lien Statute.

Plaintiffs' "wrongful lien" claim, Complaint at 4-7, is based on Utah Code Ann. §§ 38-9-1 to -7 (1997) and is fundamentally flawed for a number of reasons. Most importantly, the wrongful lien claim fails for the simple reason that lis pendens are not liens, under either statutory definitions or common law. Under the statutory definition, to constitute a "wrongful lien," a document must "purport[] to create a lien or encumbrance on an owner's interest in certain real property" Utah Code Ann. § 38-9-1 (1997). A lis pendens simply does not meet this statutory definition because it does not "encumber" the property on which it is recorded. It merely provides record notice that pending proceedings might affect title to the property. As this Court has observed, "[t]he sole purpose of recording a lis pendens is to give constructive notice of the pendency of proceedings which may be derogatory to an owner's title or right to possession." Hidden Meadows Dev. Co. v. Mills, 590 P.2d 1244, 1248 (Utah 1979). Courts from other jurisdictions have expressly interpreted this distinction to mean that a lis pendens is not a lien. See, e.g., Dime Sav. Bank of New York v. Sandy Springs Assocs., Inc., 261 Ga. 485, 486, 405 S.E.2d 491, 493 (1991) ("A lis pendens is not a lien on the property. It merely notifies prospective purchasers that the property is involved in a lawsuit.") (emphasis added; citations omitted); Chenich v. Chenich, 87 B.R. 101, 106 (9th Cir. 1988) ("[A] lis pendens is not a lien in the property or a vested right. It is merely a notice of litigation which is dependent upon the outcome of that litigation." (emphasis added)).

B.R. 432, 436 (D. Utah 1992) (granting motion for order to release lis pendens in action that did not affect the title to real property).

This case dramatically illustrates the difference between a lis pendens and a “lien or encumbrance.” The Lis Pendens at issue in this case did not “create” any encumbrance of any kind on Plaintiffs’ houses. They merely described, truthfully, a pending legal proceeding that had the potential to result in the sale of Plaintiffs’ houses to satisfy a judgment. The “encumbrance” on Plaintiffs’ houses was created by the property bond that they themselves posted in the Unlawful Detainer Action pledging their houses as security. The Lis Pendens simply identified that encumbrance; it did not create it.²⁷ Thus, the Court should not be moved by Plaintiffs’ cry that the Lis Pendens had the effect of rendering their houses “unmarketable and unsuitable as security for a loan.” (Br. of Appellants at 16.) They should have expected as much when they pledged their houses as security. And if they were attempting to sell the houses out from under the property bond, then they are the ones who should be called upon to explain themselves in this matter—not Defendants.

Moreover, lest there were any doubt that lis pendens do not create “liens or encumbrances” within the meaning of the wrongful lien statute, the statute contains a “scope” section that expressly excludes lis pendens from the statute’s coverage. “The provisions of this [wrongful lien] chapter shall not prevent a person from filing a lis pendens in accordance with Section 78-40-2” Utah Code Ann. § 38-9-2(2) (1997) (emphasis added). It is difficult to imagine how the wrongful lien statute could be more clear in excluding lis pendens from its coverage.²⁸

²⁷ Another way to illustrate this distinction is to imagine that Savage and Evans had simply recorded the property bond itself, rather than recording lis pendens describing the bond. The effect on the marketability of Plaintiffs houses would have been exactly the same because it was the bond that encumbered title to Plaintiffs’ houses. The Lis Pendens did not become “liens” merely because they were the means Defendants employed to tell the world that Plaintiffs had encumbered their houses.

²⁸ This statutory exclusion also underscores the basic proposition that lis pendens are not liens.

Plaintiffs respond to this argument by asserting that because this statutory exclusion refers to lis pendens filed “in accordance with Section 78-40-2” of the Utah Code, it should only apply to lis pendens that strictly satisfy the requirements of the lis pendens statute. (Br. of Appellants at 18.) Plaintiffs’ argument fails because it would render the statutory exclusion in section 38-9-2(2) mere surplusage. The basic statutory definition of “wrongful lien” already provides that the filing or recording of a document is not “wrongful” if it is “expressly authorized” by any “state or federal statute.” Utah Code Ann. § 38-9-1(6)(a) (1997). Thus, lis pendens that comply perfectly with the lis pendens statute are excluded from the definition of “wrongful lien” at the outset. For the express statutory exclusion in section 38-9-2(2) to have any independent significance, it must be interpreted to exclude all lis pendens that persons purport to file in accordance with the lis pendens statute, even if they run afoul of the terms of that statute in some respect (which the Lis Pendens in this case do not).

This is the appropriate interpretation under pertinent canons of statutory construction, which provide that courts “are compelled to give the statutory language meaning,” should “assume that each term in the statute was used advisedly,” and should “avoid an interpretation which renders portions of, or words in, a statute superfluous or inoperative.” Platts v. Parents Helping Parents, 947 P.2d 658, 662 (Utah 1997) (citations and internal quotation marks omitted). A statutory interpretation that “fails to give effect to all parts of the statute . . . is contrary to [the Utah Supreme Court’s] general rules of statutory construction.” Bd. of Equalization v. State Tax Comm’n, 927 P.2d 176, 179 (Utah 1996) (holding that statutory “exemptions” must be construed so that each has independent significance). Thus, to give effect to all statutory terms, this Court should interpret the wrongful lien statute to exclude lis pendens from the scope of its coverage, regardless of whether the lis pendens comply perfectly with the lis pendens statute.

B. Plaintiffs’ “Slander of Title” Claim Fails Because the Lis Pendens Were Truthful as a Matter of Law and Because Plaintiffs Failed To Allege Special Damages.

Plaintiffs’ “slander of title” claim is fatally defective for at least two critical reasons. First, the claim fails because the Lis Pendens were not “false” as a matter of law. The existence of a false statement is an essential element of a slander of title claim under Utah law. Bass v. Planned Mgmt. Servs., 761 P.2d 566, 568 (Utah 1988). Courts from various jurisdictions have affirmed the dismissal of slander of title complaints based on lis pendens that accurately describe the proceedings to which they refer. See, e.g., Ringier Am., Inc. v. Enviro-Technics, Ltd., 284 Ill. App. 3d 1102, 1106, 673 N.E.2d 444, 447 (1996) (1996) (“Because the lis pendens notice does no more than accurately inform its reader of the existence of the counterclaim, it was in no sense ‘false’ and cannot form the basis of liability.”); Scott-Kinnear, Inc. v. Eberly & Meade, Inc., 879 P.2d 838, 840 (Okla. 1994) (affirming dismissal of slander of title claim based on lis pendens that “fairly stated the issues of the lawsuit to which it related”).²⁹ In this case, a simply review of the Lis Pendens shows that they fairly described the circumstances of the Unlawful Detainer Action and were not “false.” (R. 14-17, 20-23; Add. E and F.)

Throughout this case, Plaintiffs have never even attempted to rebut this argument. They completely ignored the argument at the district court level, and there is absolutely no contention that the Lis Pendens were “false” anywhere in the Brief of Appellants. Regardless of anything else, the absence of “falsity” in the Lis Pendens is fatal to Plaintiffs’ slander of title claim.

Moreover, the slander of title claim fails for the separate reason that Plaintiffs have not adequately alleged special damages as required under Utah law. To recover for

²⁹ Significantly, both of these courts also held that the respective slander of title claims were properly dismissed because the lis pendens in question were absolutely privileged, following the same line of reasoning employed by this Court in Hansen.

slander of title, a plaintiff must, among other things, prove that he or she has suffered “special damages”:

There are no general or presumed damages in slander of title actions. Special damages are ordinarily proved in a slander of title action by evidence of a lost sale or the loss of some other pecuniary advantage. Absent a specific monetary loss flowing from a slander affecting the saleability or use of the property, there is no damage.

Bass, 761 P.2d at 568 (emphasis added). When special damages are claimed, as required to state a claim for slander of title, they must be specifically stated in the complaint. Utah R. Civ. P. 9(g). A complaint that fails to allege special damages in connection with a claim that requires a showing of special damages is subject to dismissal under Utah R. Civ. P. 12(b)(6). See Allred v. Cook, 590 P.2d 318, 322 (Utah 1979) (affirming dismissal of slander complaint that claimed no special damage). In this case, to satisfy the pleading rules, Plaintiffs would have had to allege specifically in their Complaint that they tried to sell their houses and failed because the Lis Pendens were on record. Plaintiffs, of course, cannot make such an allegation. Alleging that they lost a specific opportunity to sell their houses would be tantamount to admitting that were deliberately attempting to impair the security that they had posted with the court in the Unlawful Detainer Action.

Plaintiffs’ argument that they did adequately plead special damages reflects an erroneous interpretation of the case law discussed above. (Br. of Appellants at 32-33.) First, notwithstanding Defendants’ assertion to the contrary, the Bass case does in fact provide that “special damages” in the form of a specific lost sale attributable to the alleged slander must be proven to sustain a slander of title claim. 761 P.2d at 568. Second, mere “notice pleading” is insufficient with respect to special damages. The Utah Rules of Civil Procedure require special damages to be alleged specifically, and slander of title claims are subject to dismissal under Rule 12(b)(6) if that requirement is not met. Finally, and directly contrary to Plaintiffs’ assertion, the Bass case expressly states that a claim for attorney’s fees incurred to remove a cloud from a plaintiff’s title is insufficient to supply the required element of “special damages” if the plaintiff fails to allege and

prove the loss of a specific sales opportunity. 761 P.2d at 569. Plaintiffs' slander of title claim lacks the necessary element of special damages and fails as a matter of law.

C. Plaintiffs' "Quiet Title" Claim Is Moot Because Defendants Have Released the Lis Pendens.

The Lis Pendens were released on September 1, 1999 (R. 136-39, 141-44; Add. J, K), and Plaintiffs' quiet title claim is therefore moot. Plaintiffs' groundless and speculative fear that "there is nothing to prevent Appellees from improperly re-filing" the Lis Pendens in the future (Br. of Appellants at 33-34), is an insufficient reason to keep this claim alive under the "capable of repetition yet evading judicial review" exception to the mootness doctrine.³⁰

D. Plaintiffs' "Intentional Infliction of Emotional Distress" Claim Fails Because Defendants' Alleged Conduct Was Not "Outrageous" as a Matter of Law.

Plaintiffs' "intentional infliction of emotional distress" ("IIED") claim fails as a matter of law because the conduct alleged in the Complaint is insufficiently "outrageous" to state a valid IIED claim. Among other things, a plaintiff asserting an IIED claim must prove that the defendant engaged in conduct considered "outrageous and intolerable in that it offends the generally accepted standards of decency and morality." Russell v. Thomson Newspapers, Inc., 842 P.2d 896, 905 (Utah 1992) (citing Samms v. Eccles, 358 P.2d 344, 346-47 (Utah 1962)). Whether conduct is sufficiently outrageous to support such a claim is a threshold question for the court to resolve as a matter of law. Keller v. Ray, Quinney & Nebeker, 896 F. Supp. 1563, 1573 (D. Utah 1995) (granting summary judgment where conduct alleged was not "outrageous and intolerable"), aff'd, 78 F.3d 597 (10th Cir. 1996); Sperber v. Galigher Ash Co., 747 P.2d 1025, 1028 (Utah 1987).

³⁰ Moreover, the Unlawful Detainer Action is over and on appeal, so there would be no reason to re-file the Lis Pendens in any event.

Under Utah law, courts have routinely held conduct far more extreme than Defendants' filing of the Lis Pendens to be insufficiently outrageous to sustain a claim for IIED. For example, in Keller, the court ruled that statements by the defendant threatening to crush the plaintiff "like a peanut," "put him out of business," "take everything he owned," and "follow Plaintiff to his grave" were insufficiently outrageous to support an IIED claim as a matter of law. 896 F. Supp. at 1573. In another case, threatening an employee's job, discrediting his reputation, and wrongfully removing him from an important position in violation of public policy were held to be insufficiently outrageous to satisfy the standards of Utah law. Boisjoly v. Morton Thiokol, Inc., 706 F. Supp. 795, 802 (D. Utah 1988). Defendants' filing of the Lis Pendens at issue in this case pales in comparison to such conduct, and Plaintiffs' IIED claim accordingly fails as a matter of law.

E. Plaintiffs' "Negligent Infliction of Emotional Distress" Claim Fails Because It Omits Essential Elements of That Cause of Action.

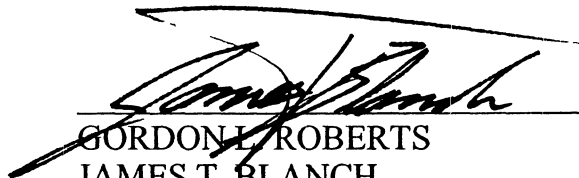
Finally, Plaintiffs' "negligent infliction of emotional distress" ("NIED") claim fails as a matter of law because the Complaint allegations do not remotely satisfy the elements of NIED as recognized by this Court. Recovery for NIED is permitted only in narrow circumstances in which a plaintiff "was personally within the zone of danger" created by the defendant's negligence "and feared physical impact or peril due to the negligent acts of the defendant. . . ." Hansen v. Sea Ray Boats, Inc., 830 P.2d 236, 240 (Utah 1992) (emphasis added). See also Straub v. Fisher and Paykel Health Care, 1999 UT 102, ¶ 8, 990 P.2d 384 (no recovery for NIED "unless the plaintiff herself has been placed in actual physical peril"); Lawson v. Salt Lake Trappers, Inc., 901 P.2d 1013, 1016 (Utah 1995) (holding that NIED action "requires that the plaintiff feared physical injury or peril"). Plaintiffs' Complaint allegations fail to satisfy these elements of an NIED claim, and their claim should accordingly be dismissed.

In attempting to defend their NIED claim (Br. of Appellants at 34-35), Plaintiffs cite exclusively to Handy v. Union Pac. R.R. Co., 841 P.2d 1210, 1217-18 (Utah App. 1992). The Handy case, however, does not even involve Utah law. It is a Federal Employer Liability Act (“FELA”) case that happened to be tried in Utah state court, and the formulation of NIED set forth in that case is taken from an opinion of a federal district court in Massachusetts dealing with negligence in the FELA context. Moreover, even if the NIED standard set forth in Handy were the correct legal standard, it would still require an allegation that Plaintiffs suffered “physical harm manifested by objective symptomatology.” Id. at 1217. Plaintiffs state in their Brief of Appellant that the Complaint contains such an allegation (Br. of Appellants at 35), but that is simply not true. The Complaint does not allege that Plaintiffs suffered “physical harm” as a result of the Lis Pendens. (R. 10-11.) The NIED claim fails as a matter of law and was properly dismissed.

CONCLUSION

The district court properly dismissed Plaintiffs’ Complaint in its entirety because the Lis Pendens at issue in this case complied in all respects with the lis pendens statute. The district court’s dismissal order was also correct because the Lis Pendens are absolutely privileged and because each separate claim in Plaintiffs’ Complaint independently fails as a matter of law. This Court should affirm the judgment below in all respects.

DATED this 20th day of November, 2000.

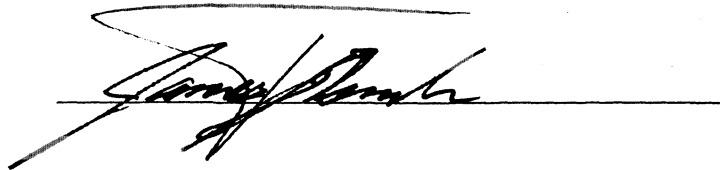

GORDON L. ROBERTS
JAMES T. BLANCH
PARSONS BEHLE & LATIMER
Attorneys for Defendants/Appellees

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of November, 2000, I caused to be mailed by first-class mail, postage prepaid, two true and correct copies of the foregoing **BRIEF OF APPELLEES** to each of the following:

John Martinez
2974 East St. Mary's Circle
Salt Lake City, Utah 84108

Nick J. Colessides
466 South 400 East, Suite 100
Salt Lake City, Utah 84111-3325

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

Tab A

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
FILED DISTRICT COURT
Third Judicial District

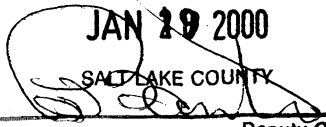
G. RICHARD KASTELER and MARY L.
DAINES,

Plaintiffs,

vs.

GREGGORY J. SAVAGE, MATTHEW N.
EVANS, HOLME ROBERTS & OWEN, a
Utah Limited Partnership,
PARKSIDE SALT LAKE CORPORATION,
a Delaware corporation,

Defendants.

JAN 19 2000
SALT LAKE COUNTY
By  Deputy Clerk

MEMORANDUM DECISION

Case No. 990908395

Honorable GLENN K. IWASAKI

Court Clerk: Janet Banks

January 19, 2000

The above-entitled matter comes before the Court pursuant to Defendants' Motion to Dismiss. The Court heard oral argument with respect to this motion on November 29, 1999. Following the hearing, the matter was taken under advisement.

The Court having now considered the motions, memoranda, exhibits attached thereto and for the good cause that has been shown, hereby enters the following ruling.

BACKGROUND

This case centers around the procedures a landlord must use to enforce a tenant's property counter-bond against the tenant's surety. Specifically, on July 17, 1998, defendant Parkside Salt Lake Corporation ("Parkside"), filed an unlawful detainer action against Insure-Rite, Inc. ("Insure-Rite"), alleging that Insure-Rite had unlawfully failed to vacate certain business premises

owned by Parkside, which are located at 215 South State Street. On August 13, 1998, the court in the unlawful detainer action entered an order requiring Insure-Rite to post a counter-possession bond in the form of a property bond, pursuant to Utah Code Ann. §78-36-8.5(2)(b), as security for the costs and actual damages that Parkside would be entitled to recover if it prevailed in the unlawful detainer action. On that same day, G. Richard Kasteler ("Kasteler") and Mary L. Daines ("Daines")-the plaintiffs in the present action-complied with the court's order in the unlawful detainer action by posting a Renter's Counter-Bond on behalf of Insure-Rite with the court in the unlawful detainer action. This bond pledged Kasteler's and Daines' homes as security.

On November 30, 1998, the court in the unlawful detainer action granted partial summary judgment in favor of Parkside on its principal claim and entered an Order of Restitution directing Insure-Rite to promptly vacate the premises it had leased from Parkside. On March 15, 1999, the court in the unlawful detainer action entered an order granting summary judgment in favor of Parkside on the issue of damages and ordering Insure-Rite to pay Parkside a damage award of \$108,417.24 plus interest, attorney's fees, and costs.

On March 30, 1999, Greggory J. Savage ("Savage") and Matthew N. Evans ("Evans"), of Holme Roberts & Owen, in their capacity as

counsel for Parkside, filed for recordation in the Salt Lake County Recorder's Office two lis pendens bearing the caption of the unlawful detainer action.

Ultimately, the judgment was satisfied by other means. On September 1, 1999, Savage and Evans, on behalf of Parkside, filed documents with the Salt Lake County Recorder releasing the Lis Pendens on Kasteler's and Daines' houses.

On August 18, 1999, Kasteler and Daines filed this action asserting claims for relief against all defendants for wrongful lien, slander of title, quiet title, intentional infliction of emotional distress and negligent infliction of emotional distress.

ANALYSIS

In support of their motion, defendants argue plaintiffs' complaint should be dismissed in its entirety because the lis pendens out of which all of plaintiffs' claims arise are both permitted by Utah's lis pendens statute and are absolutely privileged. Additionally, it is defendant's position each individual claim in plaintiffs' complaint suffers from specific defects that cause it to fail as a matter of law.

Plaintiffs oppose the motion arguing Utah law expressly provides that the landlord must bring an independent action on the renter's counter-bond. Furthermore, assert plaintiffs, since defendants did not properly file the lis pendens, such filings are

not protected by the judicial proceedings privilege. With respect to the claims individually, plaintiffs contend they have sufficiently pled all of the necessary elements to support their causes of action.

"A rule 12(b)(6) motion to dismiss admits the facts alleged in the complaint but challenges the plaintiff's right to relief based on those facts." St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194, 196 (Utah 1991) quoting 61A Am. Jur. 2d Pleading § 227 (1981). When ruling on a rule 12(b)(6) motion to dismiss the factual allegations in the complaint are accepted as true and all reasonable inferences to be drawn from them are considered in a light most favorable to the plaintiff. Id. quoting Colman v. Utah State Land Board, 795 P.2d 622, 624 (Utah 1990); Lowe v. Sorenson Research Co., 779 P.2d 668, 669 (Utah 1989).

Pursuant to Utah Code Ann § 78-40-2:

In any action affecting the title to, or the right of possession of, real property the plaintiff at the time of filing the complaint or thereafter, and the defendant at the time of filing his answer when affirmative relief is claimed in such answer, or at any time afterward, may file for record with the recorder of the county in which the property or some part thereof is situated a notice of the pendency of the action, containing the names of the parties, the object of the action or defense, and a description of the property in that county affected thereby. From the time of filing such notice for record only shall a purchaser or encumbrancer of the property affected thereby be deemed to have

constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names.

Plaintiff contends that since the prior action did not affect title to the houses posted as bond, the aforementioned required an independent action be filed. However, after reviewing the applicable statutory and case law, such does not appear to be the case.

As an initial matter, the possession-bond statute provides the court in an unlawful detainer action jurisdiction by requiring that "[t]he bond shall be payable to the clerk of the court." Utah Code Ann. § 78-36-8.5(2)(b) (1996). Accordingly, rather than merely requiring sureties to submit personally to the jurisdiction of the court for enforcement purposes, the possession-bond statute ensures that the court will have jurisdiction to enforce a bond by essentially requiring the sureties to surrender to the court any money or property pledged as security. Indeed, if this were not the case, it would be impossible for the court to order "immediate" execution on an unlawful detainer judgment—a procedure that the unlawful detainer statutes expressly require. See Utah Code Ann. § 78-36-10(4) (1996).¹

¹ Utah Code Ann. § 78-36-10(4) provides:

If the proceeding is for unlawful detainer after default in the payment of the rent, execution upon the judgment shall be issued

Furthermore, the property bond that Kasteler and Daines posted in the unlawful detainer action satisfied the requirements of the possession-bond statute and the bond could have been enforced against them in that very action. Indeed, the bond which Kasteler and Daines signed designated their houses as "security posted with the Court" in the unlawful detainer action. It also contained the caption of the unlawful detainer action and was filed in the unlawful detainer action. Essentially, Kasteler and Daines surrendered their houses to the court in the unlawful detainer action as security for their undertaking to "pay all costs and damages which may be awarded to the Owner" in the unlawful detainer action up to the amount of \$25,000. By this voluntary appearance and the pledging of their houses as security in the unlawful detainer action, Kasteler and Daines submitted themselves and their houses to the jurisdiction of the court, which could enforce the bond. Accordingly, no independent enforcement action was necessary.

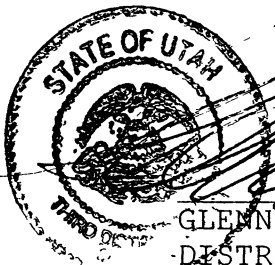

This position is further supported by the case of Fitzgerald v. Critchfield, 744 P.2d 301 (Utah App. Ct. 1987), where it was questioned whether the surety had submitted itself to the

immediately after the entry of the judgment.
In all cases, the judgment may be issued and
enforced immediately.

jurisdiction of the court for purposes of enforcing the bond. In Fitzgerald, the Court of Appeals concluded that although the bond did not contain the precise language submitting the surety to the jurisdiction of the court, the bond would nevertheless "be enforced according to the terms of the authorizing rule." Id. at 305. Furthermore, the court stated that as an alternative basis, the surety had made a general appearance at the show cause hearing, thereby submitting itself to the court's jurisdiction to enforce payment on its undertaking. Id.

Based upon the forgoing, the Court concludes defendants were not required to bring an independent action on the renter's counter-bond. Further, since all parties agreed a finding by this Court that the lis pendens was proper under Utah's lis pendens results in the failure of plaintiffs' claims against defendants, the Court does not reach the merits of the plaintiffs' claims individually. Defendants' Motion to dismiss is well taken and accordingly, granted.

DATED this 19 day of January, 2000

 
GLENN K. IWASAKI
DISTRICT COURT JUDGE

Case No. 990908395

Certificate of Mailing

I certify that on the 20th day of January, 2000, I sent by first class mail a true and correct copy of the attached document to the following:

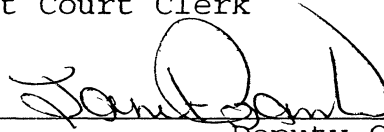
GORDON L. ROBERTS
JAMES T. BLANCH
201 SOUTH MAIN STREET, SUITE 1800
P.O. BOX 45898
SLC, UTAH 84145-0898

NICK J. COLESSIDES
466 SOUTH 400 EAST, SUITE 100
SLC, UTAH 84111-3325

JOHN MARTINEZ
2974 EAST ST MARY'S CIRCLE
SLC, UTAH 84108

District Court Clerk

By: _____



Deputy Clerk

****Individuals with disabilities needing special accommodations during this proceeding should call 238-7300, at least three working days prior to the proceeding.
TDD phone for hearing impaired, 238-7391.**

Tab B

GORDON L. ROBERTS (2770)
JAMES T. BLANCH (6494)
PARSONS BEHLE & LATIMER
Attorneys for Defendants
201 South Main Street, Suite 1800
Post Office Box 45898
Salt Lake City, Utah 84145-0898
Telephone: (801) 532-1234

FILED DISTRICT COURT
Third Judicial District

FEB - 7 2000
SALT LAKE COUNTY
By [Signature] Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT, DIVISION I

SALT LAKE COUNTY, STATE OF UTAH

* * * * *

G. RICHARD KASTELER and MARY L.
DAINES,

Plaintiffs,

vs.

GREGGORY J. SAVAGE, MATTHEW N.
EVANS, HOLME ROBERTS & OWEN, a
Utah Limited Liability Partnership,
PARKSIDE SALT LAKE CORPORATION,
a Delaware corporation,

Defendants.

ORDER AND FINAL JUDGMENT

Case No. 99 09 08395

Judge Glenn Iwasaki

* * * * *

On November 29, 1999, the Court heard oral argument on Defendants' Motion To Dismiss Complaint in the above-captioned action. Defendants Gregory J. Savage, Matthew N. Evans, Holme Roberts & Owen, and Parkside Salt Lake Corporation were represented by their counsel, Gordon Roberts and James Blanch. Plaintiffs G. Richard Kasteler and Mary L. Daines were represented by their counsel, Nick Colessides. On January 19, 2000, the Court, having considered the written memoranda submitted by the parties, having reviewed the applicable legal authorities, having heard the oral arguments of counsel, and being fully advised in the premises, entered a Memorandum Decision ("Memorandum Decision") granting Defendants' Motion To Dismiss Complaint in its entirety. Now, for the reasons set forth in said Memorandum Decision, the Court hereby ORDERS, ADJUDGES and DECREES as follows:

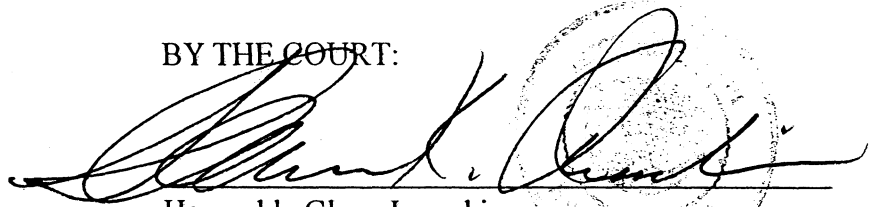
1. For the reasons set forth in the Court's Memorandum Decision, which is incorporated herein by reference, the Court concludes that Plaintiff's Complaint fails to state a claim against Defendants upon which relief can be granted for any of the claims asserted therein.

2. Pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure, the Court hereby dismisses all claims asserted in Plaintiffs' Complaint with prejudice, with Plaintiffs to bear Defendants' costs as provided in Utah R. Civ. P. 54(d)(1).

3. This Order constitutes the Final Judgment of this Court on all claims asserted by any party in this action. Therefore, the Court hereby dismisses this action in its entirety, with prejudice.

IT IS SO ORDERED this 7 ^{FEB.} day of January, 2000.

BY THE COURT:

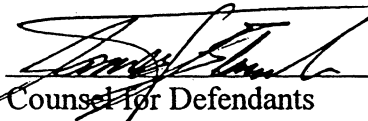
A handwritten signature in black ink, appearing to read "Glenn Iwasaki", written over a horizontal line.

Honorable Glenn Iwasaki
Third District Court Judge



Approved as to form and substance:

Counsel for Plaintiffs

A handwritten signature in black ink, written over a horizontal line.

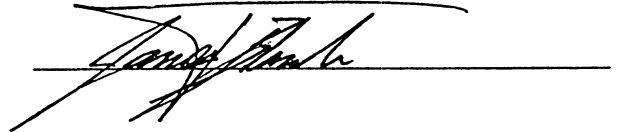
Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January, 2000, I caused to be hand-delivered a true and correct copy of the foregoing **ORDER AND FINAL JUDGMENT** to the following:

Nick J. Colessides
Attorney at Law
466 South 400 East, Suite 100
Salt Lake City, Utah 84111-3325

John Martinez
Attorney at Law
2974 East St. Mary's Circle
Salt Lake City, Utah 84108

A handwritten signature in black ink, appearing to read "Sandy P. Smith", is written over a horizontal line.

Tab C

NICK J. COLESSIDES (# 696)
JOHN T. GIANNOPOULOS (# 7209)
Attorney at Law
466 South 400 East, Suite 100
Salt Lake City, Utah 84111-3325
Tele: (801) 521-4441

Attorneys for Defendant

IN THE THIRD JUDICIAL DISTRICT OF
SALT LAKE COUNTY, STATE OF UTAH

PARKSIDE SALT LAKE CORP.
a Utah, corporation,

Plaintiff,

vs.

INSURE-RITE, INC.,
a Utah corporation,

Defendant.

)
) ORDER
) SETTING AMOUNT
) FOR COUNTER POSSESSION BOND
)
)
)


) Case No. 98 090 6982
)
)

) Judge: Stephen L. Henriod
)
)

Based upon Defendant's Motion Setting Amount for Counter Possession Bond, pursuant to § 78-36-8.5 (2)(b) UTAH CODE ANNOTATED, 1953 as amended, 1996 Replacement, and good cause otherwise appearing therefor

IT IS HEREBY ORDERED, DECREED, AND ADJUDGED
that the amount of the Counter Possession Bond is hereby set at \$25,000.00, the same to be in the form of a property bond.

Dated this 13th date of August, 1998

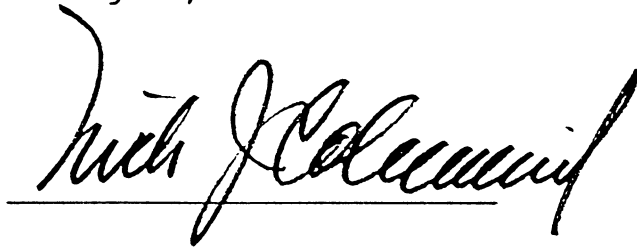

District Court Judge

MAILING CERTIFICATE

Mailed a copy of the foregoing Order Setting Amount of Counter Possession Bond to:

MR ROBERT L STOLEBARGER ESQ
MR GREGORY J SAVAGE ESQ
ATTORNEYS AT LAW
HOLME ROBERTS & OWEN
111 EAST BROADWAY, SUITE 1100
SALT LAKE CITY, UT 84111

via the United States Postal Service, postage prepaid, first class mail, this 13th day of August, 1998.

A handwritten signature in black ink, reading "Rich J. Coleman", is written over a horizontal line.

Tab D

NICK J. COLESSIDES (# 696)
JOHN T. GIANNOPOULOS (# 7209)
Attorney at Law
466 South 400 East, Suite 100
Salt Lake City, Utah 84111-3325
Tele: (801) 521-4441

Attorneys for Defendant

IN THE THIRD JUDICIAL DISTRICT OF
SALT LAKE COUNTY, STATE OF UTAH

PARKSIDE SALT LAKE CORP.)	
a Utah, corporation,)	
)	
Plaintiff,)	
	)	RENTER'S COUNTER BOND
vs.)	
)	
INSURE-RITE, INC.,)	
a Utah corporation,	)	Case No. 98 090 6982
)	
Defendant.	)	Judge: Stephen L. Henriod
)	

This property bond represents security posted with the Court by the Renter, Defendant, as the probable amount of costs of suit and actual damages that may result to the Owner (Plaintiff) if Plaintiff has improperly withheld possession of the premises located at: 215 SOUTH STATE STREET SUITE 401, SALT LAKE CITY UTAH 84111-2354.

PROPERTY BOND

We the undersigned, G. Richard Kasteler, and Mary L. Daines, are residents of Salt Lake and Davis County, respectively, State of Utah, and we each own property in the property in the State of

Utah. We jointly and severally undertake the obligation of this bond in the sum of \$ 25,000.00, and we shall pay all costs and damages which may be awarded to the Owner, not exceeding the sum undertaken. We state that each of us has a net worth, above debts, more than the sum undertaken; and we pledge the property listed herein as security in the above entitled action.

SURETY NO.: 1

RENTER'S COUNTER BOND

Case No.: 98 09 06982

1. Location of real property being pledged to execute this bond: 1210 East Millbrook Way, Bountiful, Utah 84010.
2. Names of any others that have an ownership interest in the property: None
3. Detailed description of the property: A house dwelling with necessary appurtenant facilities; for legal description see attached exhibit "AA".
4. Liens presently against property: A sum not in excess of \$100,900.00.
5. Fair market value of property: \$383,000.00
6. Total amount of outstanding bonds for which property is presently being pledged as security: \$ None, other than the pledge for the within security.

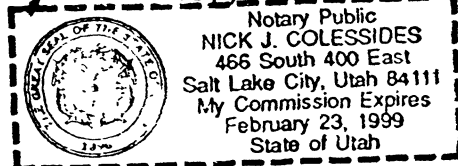
Mary L. Daines
Mary L. Daines
1210 East Millbrook Way
Bountiful, Utah 84010
Tele: 801.295-5072

STATE OF UTAH)
 : ss
COUNTY OF SALT LAKE)

The foregoing instrument was acknowledged before me this 12th day of August, 1998, by Mary L. Daines, the signer hereof.


My Commission Expires:

~~NOTARY PUBLIC, Residing in~~
~~Salt Lake County, Utah.---~~



Case No.: 98 09 06982


1. Location of real property being pledged to execute this bond: 6278 South Granada Drive, Salt Lake City, Utah 84121.
2. Names of any others that have an ownership interest in the property: None
3. Detailed description of the property: A house dwelling with necessary appurtenant facilities, located in Salt Lake County, Utah; for legal description see attached exhibit "BB".
4. Liens presently against property: A sum not in excess of \$198,000.00
5. Fair market value of property: \$275,000.00
6. Total amount of outstanding bonds for which property is presently being pledged as security: \$ None, other than the pledge for the within security.


G. Richard Kasteler
6278 South Granada Drive
Salt Lake City, Utah 84121
Tele: 801.531-0731

STATE OF UTAH)
)
) : ss
COUNTY OF SALT LAKE)

The foregoing instrument was acknowledged before me this 12th day of August, 1998, by G. Richard Kasteler, the signer hereof.

My Commission Expires:

NOTARY PUBLIC, Residing in
Salt Lake County - ~~Utah~~ ^{North Salt Lake}
 NICK J. COLESSIDES
466 South 400 East
Salt Lake City, Utah 84111
My Commission Expires
February 23, 1999
State of Utah

MAILING CERTIFICATE

Mailed a copy of the foregoing Renter's Counter Bond
to:

MR ROBERT L STOLEBARGER ESQ
MR GREGORY J SAVAGE ESQ
ATTORNEYS AT LAW
HOLME ROBERTS & OWEN
111 EAST BROADWAY, SUITE 1100
SALT LAKE CITY, UT 84111

via the United States Postal Service, postage prepaid, first
class mail, this 13th day of August, 1998.

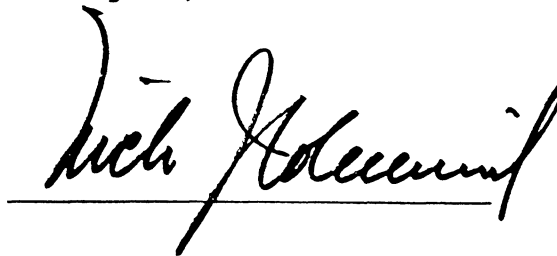
A handwritten signature in black ink, appearing to read "Nick Holme", is written over a horizontal line.

EXHIBIT "AA"

Beginning on the South line of a street (Millbrook Way) at a point South 89 deg. 49 min West 661.41 feet and South 0 deg. 08 min West 1160.01 feet from the East Quarter corner of Section 29, Township 2 North, Range 1 East, Salt Lake Meridian, in the City of Bountiful, and running thence South 0 deg. 08 min. West 159.99 feet to the South line of the Northeast Quarter of the Southeast Quarter of said Section 29; thence South 89 deg. 51 min. West 103.37 feet; thence North 0 Deg. 08 min. East 171.83 feet to said street at a point on a 325 foot radius curve to the left; thence along said curve for an arch distance of 86.98 feet along said street; thence East 17.45 feet to the point of beginning

EXHIBIT "BB"

Sidwell No.: 22-21-231-009

Unit No. 8 in Block B, of MONTE CRISTO PHASE I, a Condominium Project, according to the Record of Survey Map filed for record as Entry No. 2559805 in Book 73-8 of Plats at Page 56, together with the appurtenant undivided ownership interest in the "Common Areas and Facilities" of Monte Cristo Phase I, II, III, and IV as set forth in the Fourth Amendment To The Declaration of Covenants, Conditions and Restrictions of Monte Cristo, a Condominium Project and the Final Amended Exhibit "B" attached thereto, filed for record as Entry No. 2665379 in Book 3727 at pages 173 through 178 of Official Records. Said Common Areas and Facilities being set forth and defined by the original Declaration filed for record as Entry No. 2559806 in Book 3389 at page 144 through 182 of Official Records, and the First, Second, Third and Fourth Amendments thereto.

6612170
04/04/97 3:37 PM 14.00
NANCY WORKMAN
RECORDER, SALT LAKE COUNTY, UTAH
SALT LAKE TITLE
REC BY: V ASHBY , DEPUTY - WI

JK / 636PG1742

Tab E

Date _____
Request of _____
Nancy Workman, Recorder
Salt Lake County, Utah
By _____ Deputy

When Recorded Please Return To:

HOLME ROBERTS & OWEN LLP
Greggory J. Savage, #5988
Matthew N Evans, #7051
111 East Broadway, Suite 1100
Salt Lake City, Utah 84111
Telephone: (801) 521-5800

Attorneys for Plaintiff

IN THE THIRD JUDICIAL COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

PARKSIDE SALT LAKE)	
CORPORATION, a Delaware)	
corporation,	)	LIS PENDENS
)	
Plaintiff,)	
	)	Civil No. 980906982
v.)	
	)	Judge Steven L. Henriod
INSURE-RITE, INC., a Utah corporation,)	
)	
Defendant.)	
)	
)	

TO WHOM IT MAY CONCERN:


You are hereby advised of the pendency of the above-entitled action concerning title to certain real property situated in Salt Lake County, State of Utah, that is more particularly described in Exhibit "A" attached hereto.

This is an unlawful detainer action. Pursuant to Utah Code Ann. § 78-36-8.5 the Defendant Insure-Rite Inc. filed a counterpossession property bond and filed as security for the property bond the property described in Exhibit "A". On November 30, 1998, the Court determined that Insure-Rite had improperly withheld possession of the leased premises and has

since awarded money damages in the amount of \$108,417.24, plus interest, attorney's fees and costs to the Plaintiff Plaintiff therefore may satisfy judgment through obtaining title to the property described in Exhibit "A".

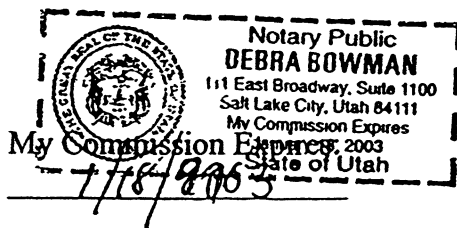
DATED this 25th day of March, 1999.

HOLME ROBERTS & OWEN LLP

By 
Greggory J. Savage
Matthew N. Evans
Attorneys for Plaintiff

STATE OF UTAH)
 :SS.
SALT LAKE COUNTY)

The foregoing instrument was acknowledged before me this 29th day of March, 1999, by Matthew N. Evans on behalf of Holme Roberts & Owen LLP, Attorneys for Plaintiff.



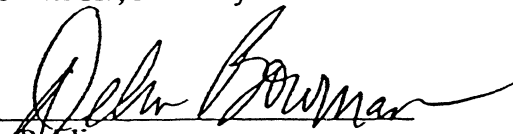

Notary Public

EXHIBIT A

Sidwell No.: 22-21-231-009

Unit No. 8 in Block B, of MONTE CRISTO PHASE I, a Condominium Project, according to the Record of Survey Map filed for record as Entry No. 2559805 in Book 73-8 of Plats at Page 56, together with the appurtenant undivided ownership interest in the "Common Areas and Facilities" of Monte Cristo Phase I, II, III, and IV as set forth in the Fourth Amendment To The Declaration of Covenants, Conditions and Restrictions of Monte Cristo, a Condominium Project and the Final Amended Exhibit "B" attached thereto, filed for record as Entry No. 2665379 in Book 3727 at pages 173 through 178 of Official Records. Said Common Areas and Facilities being set forth and defined by the original Declaration filed for record as Entry No. 2559806 in Book 3389 at page 144 through 182 of Official Records, and the First, Second, Third and Fourth Amendments thereto.

CERTIFICATE OF SERVICE

I certify that I caused to be mailed via First Class, U.S. Mail, postage prepaid the foregoing **LIS PENDENS** to the following this 20th day of March, 1999 to the following:

Nick J. Colessides
John T. Giannopoulos
466 South 400 East, Suite 100
Salt Lake City, Utah 84111-3325

John E.S. Robson
Fabian & Clendenin
215 South State, #1200
Salt Lake City, UT 84111

G. Richard Kasteler
6278 South Granada Drive
Salt Lake City, Utah 84121



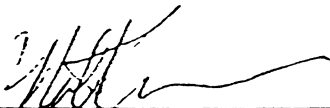
Tab F

is _____ Sy _____ Deputy

since awarded money damages in the amount of \$108,417.24, plus interest, attorney's fees and costs to the Plaintiff. Plaintiff therefore may satisfy judgment through obtaining title to the property described in Exhibit "A".

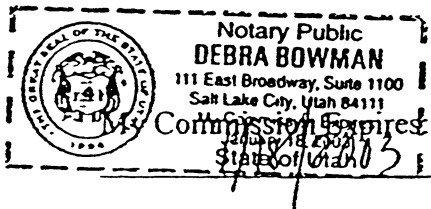
DATED this 29th day of March, 1999.

HOLME ROBERTS & OWEN LLP

By 
Greggory J. Savage
Matthew N. Evans
Attorneys for Plaintiff

STATE OF UTAH)
 : ss.
SALT LAKE COUNTY)

The foregoing instrument was acknowledged before me this 29th day of March, 1999, by Matthew N. Evans on behalf of Holme Roberts & Owen LLP, Attorneys for Plaintiff.



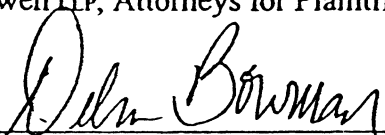

Notary Public

EXHIBIT A

Beginning on the South line of a street (Millbrook Way) at a point South 89 deg. 49 min West 661.41 feet and South 0 deg. 08 min West 1160.01 feet from the East Quarter corner of Section 29, Township 2 North, Range 1 East, Salt Lake Meridian, in the City of Bountiful, and running thence South 0 deg. 08 min. West 159.99 feet to the South line of the Northeast Quarter of the Southeast Quarter of said section 29; thence South 89 deg. 51 min. West 103.37 feet; thence North 0 deg. 08 min. East 171.83 feet to said street at a point on a 325 foot radius curve to the left; thence along said curve for an arch distance of 86.98 feet along said street; thence East 17.45 feet to the point of beginning

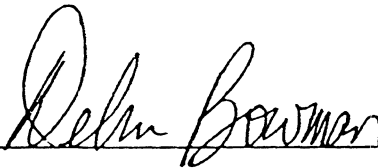
CERTIFICATE OF SERVICE

I certify that I caused to be mailed via First Class, U.S. Mail, postage prepaid the foregoing LIS PENDENS to the following this 30th day of March, 1999 to the following:

Nick J. Colessides
John T. Giannopoulos
466 South 400 East, Suite 100
Salt Lake City, Utah 84111-3325

John E.S. Robson
Fabian & Clendenin
215 South State, #1200
Salt Lake City, UT 84111

Mary L. Daines
1210 East Millbrook Way
Bountiful, Utah 84010



Tab G

HOLME ROBERTS & OWEN LLP
Greggory J. Savage, #5988
Matthew N. Evans, #7051
111 East Broadway, Suite 1100
Salt Lake City, Utah 84111
Telephone: (801) 521-5800

Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY, STATE OF UTAH

PARKSIDE SALT LAKE)	
CORPORATION, a Delaware	)	PARTIAL SATISFACTION OF
corporation,	)	JUDGMENT
)	
Plaintiff,)	
	)	Civil No. 980906982
v.)	
	)	Judge Stephen L. Henroid
INSURE-RITE, INC., a Utah corporation,)	
)	
Defendant.)	

Plaintiff Parkside Salt Lake Corporation ("Parkside") acknowledges partial satisfaction of that certain judgment in favor of Parkside, and against Insure-Rite Inc. ("Insure-Rite"), Defendant and Third-Party Plaintiff, dated and entered March 26, 1999, in the amount of \$108,417.24, and designated as Judgment No. 1. This amount constitutes damages awarded to Parkside for the fair market rental value of the leased space unlawfully occupied by Insure-Rite trebled pursuant to Utah Code Ann. § 78-36-10. Parkside directs the clerk of the above-entitled Court to release of record that portion of Judgment No.1 that has been satisfied as acknowledged herein.

This partial satisfaction of judgment does not effect Parkside's right to collect reasonable attorneys' fees, court costs and interest which the Court has awarded to Parkside in said Judgment No. 1.

DATED this 4th day of June, 1999.

HOLME ROBERTS & OWEN LLP

By [Signature]

Greggory J. Savage

Matthew N. Evans

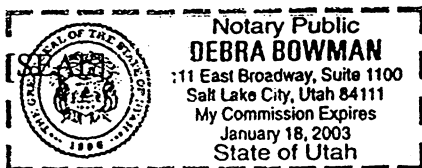
Attorneys for Plaintiff

STATE OF UTAH)

: ss.

COUNTY OF SALT LAKE)

The foregoing instrument was SUBSCRIBED AND SWORN to before me this 4th day of June, 1999, by Greggory J. Savage, the signer hereof.



[Signature]
NOTARY PUBLIC

CERTIFICATE OF SERVICE

I certify that I caused to be mailed via First Class, U.S. Mail, postage prepaid the foregoing **PARTIAL SATISFACTION OF JUDGMENT** to the following this 4th day of June, 1999 to the following:

Nick J. Colessides
John T. Giannopoulos
466 South 400 East, Suite 100
Salt Lake City, Utah 84111-3325

John E.S. Robson
Fabian & Clendenin
215 South State, #1200
Salt Lake City, UT 84111

A handwritten signature in cursive script, appearing to read "John E.S. Robson", is written over a horizontal line.

Tab H

FILED
DISTRICT COURT
39 AUG -4 PM 1:00
Served Willson Robison
Relation to Def
Time 14/10 Date 7-30-72
Address
CITY Deputy
for Constable Collins 461-0234

HOLME ROBERTS & OWEN LLP
Greggory J. Savage (5988)
Matthew N. Evans (7051)
111 East Broadway, Suite 1100
Salt Lake City, Utah 84111
Telephone: (801) 521-5800
Facsimile: (801) 521-9639

Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

PARKSIDE SALT LAKE	)	WRIT OF GARNISHMENT (Non-Wage)
CORPORATION,)	
)	
Plaintiff,)	
v.)	
	)	Civil No. 980906982
INSURE-RITE, INC.,)	
	)	Judge Stephen L. Henroid
Defendant.)	

THE STATE OF UTAH TO: Zions First National Bank.

You are hereby ordered and commanded by the Court to hold, until further order of this Court, and not pay to Insure-Rite, Inc. any money or other personal property in your possession or under your control, whether now due or hereafter to become due, which are not exempt from execution, up to the amount remaining due on the judgment or order plus court approved costs in this matter, being not less than \$33,001.56.

You are required to answer the attached Interrogatories and file your answer with the Clerk of the Court within five (5) business days of the date this Writ is served upon you. The

address of the Clerk is: The Third Judicial District Court, 450 S. State Street, Salt Lake City, UT 84111. You are also required to send a copy of your Interrogatory answers to Plaintiffs' counsel at the following address:

Greggory J. Savage
Matthew N. Evans
Holme Roberts & Owen, LLP
111 East Broadway, #1100
Salt Lake City, Utah 84111

If you fail to answer the Interrogatories, the judgment creditor may ask the Court to make you pay the amount you should have withheld.

If you are indebted to or hold property or money belonging to Insure-Rite, Inc. which is subject to this Writ, you shall immediately mail by first class mail a copy of the Writ of Garnishment and your answer to the Interrogatories, the Notice of Garnishment and Exemptions and two (2) copies of the Request for Hearing to Insure-Rite, Inc. at their last known address shown on your records at the time of the service of this Writ. In lieu of mailings, you may hand-deliver a copy of these documents to Insure-Rite, Inc.

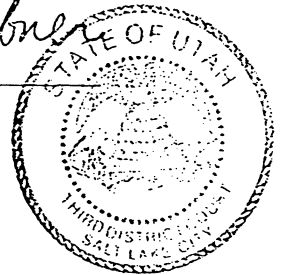
YOU MAY DELIVER to the officer serving this Writ the portion of Insure-Rite, Inc.'s property or money to be held as shown by your answers. You will then be relieved from further liability in this case unless your answers are successfully disputed. You may, in the alternative, hold the money or property until further order of the Court.

If you do not receive an order from the Court regarding this Writ and the property you held pursuant to this Writ within sixty (60) days after filing your answers to the attached interrogatories, this Writ shall expire and you may ignore it.

DATED this 30 day of July, 1999.

CLERK OF THE COURT

By: Maui Disbner
DEPUTY CLERK



RETURN OF SERVICE
(GARNISHMENT/GARNISHEE ORDER)

I HEREBY MAKE RETURN OF SERVICE AND CERTIFY:

- Garnishee: ZIONS FIRST NATIONAL BANK

Constable Susan Collins

00125

Tab I

Li. Mc du

1645 6.30.9

Dep. T. d. Co.

HOLME ROBERTS & OWEN LLP
Greggory J. Savage (5988)
Matthew N. Evans (7051)
111 East Broadway, Suite 1100
Salt Lake City, Utah 84111
Telephone: (801) 521-5800
Facsimile: (801) 521-9639

Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

PARKSIDE SALT LAKE CORPORATION,	)	WRIT OF GARNISHMENT (Non-Wage)
)	
Plaintiff,)	
)	
v.)	
INSURE-RITE, INC.,	)	Civil No. 980906982
)	
Defendant.	)	Judge Stephen L. Henroid
)	

THE STATE OF UTAH TO: Zions First National Bank.

You are hereby ordered and commanded by the Court to hold, until further order of this Court, and not pay to Insure-Rite, Inc. any money or other personal property in your possession or under your control, whether now due or hereafter to become due, which are not exempt from execution, up to the amount remaining due on the judgment or order plus court approved costs in this matter, being not less than \$14,500.00.

You are required to answer the attached Interrogatories and file your answer with the Clerk of the Court within five (5) business days of the date this Writ is served upon you. The

address of the Clerk is: The Third Judicial District Court, 450 S. State Street, Salt Lake City, UT 84111. You are also required to send a copy of your Interrogatory answers to Plaintiffs' counsel at the following address:

Greggory J. Savage
Matthew N. Evans
Holme Roberts & Owen, LLP
111 East Broadway, #1100
Salt Lake City, Utah 84111

If you fail to answer the Interrogatories, the judgment creditor may ask the Court to make you pay the amount you should have withheld.

If you are indebted to or hold property or money belonging to Insure-Rite, Inc. which is subject to this Writ, you shall immediately mail by first class mail a copy of the Writ of Garnishment and your answer to the Interrogatories, the Notice of Garnishment and Exemptions and two (2) copies of the Request for Hearing to Insure-Rite, Inc. at their last known address shown on your records at the time of the service of this Writ. In lieu of mailings, you may hand-deliver a copy of these documents to Insure-Rite, Inc.

YOU MAY DELIVER to the officer serving this Writ the portion of Insure-Rite, Inc.'s property or money to be held as shown by your answers. You will then be relieved from further liability in this case unless your answers are successfully disputed. You may, in the alternative, hold the money or property until further order of the Court.

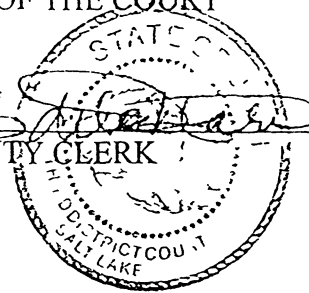
If you do not receive an order from the Court regarding this Writ and the property you held pursuant to this Writ within sixty (60) days after filing your answers to the attached interrogatories, this Writ shall expire and you may ignore it

DATED this 30 day of June, 1999.

CLERK OF THE COURT

By

DEPUTY CLERK



Tab J

7457768

When Recorded Please Return To:

HOLME ROBERTS & OWEN LLP
Greggory J. Savage, #5988
Matthew N. Evans, #7051
111 East Broadway, Suite 1100
Salt Lake City, Utah 84111
Telephone: (801) 521-5800

Attorneys for Plaintiff

7457768
09/01/1999 04:43 PM 16.00
NANCY WORKMAN
RECORDER, SALT LAKE COUNTY, UTAH
HOLME ROBERTS & OWEN
111 E. BROADWAY STE. 1100
SLC UT 84111
BY: RDJ, DEPUTY - WL 4 P.

IN THE THIRD JUDICIAL COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

PARKSIDE SALT LAKE
CORPORATION, a Delaware
corporation,

Plaintiff,

v.

INSURE-RITE, INC., a Utah corporation,

Defendant.

RELEASE OF LIS PENDENS

Civil No. 980906982

Judge Stephen L. Henriod

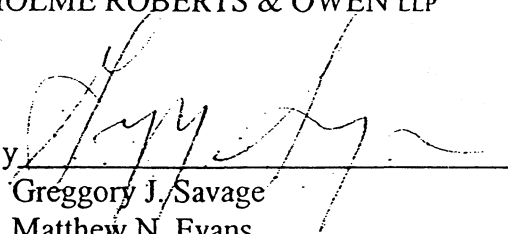
On or about March 29, 1999, plaintiff Parkside Salt Lake Corporation filed a lis pendens, recorded as Entry No. 7304439 in Book 8262, Page 7913 of the official records of Salt Lake County, State of Utah. Plaintiff Parkside Salt Lake Corporation, by and through its counsel, hereby releases the lis pendens insofar as it affects the property described in Exhibit "A" attached hereto.

BOOK 8306 PG 7904

DATED this 1st day of September, 1999.

HOLME ROBERTS & OWEN LLP

By

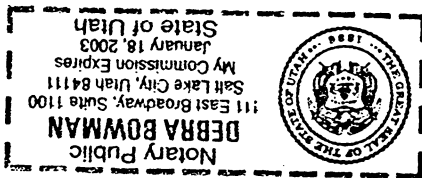

Greggory J. Savage

Matthew N. Evans

Attorneys for Plaintiff

STATE OF UTAH)
 :SS.
SALT LAKE COUNTY)

The foregoing instrument was acknowledged before me this 1st day of September, 1999,
by Greggory J. Savage on behalf of Holme Roberts & Owen LLP, counsel for Plaintiff Parkside
Salt Lake Corporation.




Notary Public

CERTIFICATE OF SERVICE

I certify that I caused to be mailed via First Class, U.S. Mail, postage prepaid the foregoing **RELEASE OF LIS PENDENS** to the following this 1st day of September, 1999 to the following:

Nick J. Colessides
466 South 400 East, Suite 100
Salt Lake City, Utah 84111-3325

John E.S. Robson
Fabian & Clendenin
215 South State, #1200
Salt Lake City, UT 84111

Mary L. Daines
1210 East Millbrook Way
Bountiful, Utah 84010



EXHIBIT A

Beginning on the South line of a street (Millbrook Way) at a point South 89 deg. 49 min West 661.41 feet and South 0 deg. 08 min West 1160.01 feet from the East Quarter corner of Section 29, Township 2 North, Range 1 East, Salt Lake Meridian, in the City of Bountiful, and running thence South 0 deg. 08 min. West 159.99 feet to the South line of the Northeast Quarter of the Southeast Quarter of said section 29; thence South 89 deg. 51 min. West 103.37 feet; thence North 0 deg. 08 min. East 171.83 feet to said street at a point on a 325 foot radius curve to the left; thence along said curve for an arch distance of 86.98 feet along said street; thence East 17.45 feet to the point of beginning

Tab K

7457767
09/01/1999 04:43 PM 16.00
NANCY WORKMAN
RECORDER, SALT LAKE COUNTY, UTAH
HOLME ROBERTS & OWEN
111 E BROADWAY STE. 1100
SLC UT 84111
BY: RJJ, DEPUTY - WI 4 P.

When Recorded Please Return To:

HOLME ROBERTS & OWEN LLP
Greggory J. Savage, #5988
Matthew N. Evans, #7051
111 East Broadway, Suite 1100
Salt Lake City, Utah 84111
Telephone: (801) 521-5800

Attorneys for Plaintiff

IN THE THIRD JUDICIAL COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

PARKSIDE SALT LAKE
CORPORATION, a Delaware
corporation,

Plaintiff,

v.

INSURE-RITE, INC., a Utah corporation,

Defendant.

RELEASE OF LIS PENDENS

Civil No. 980906982

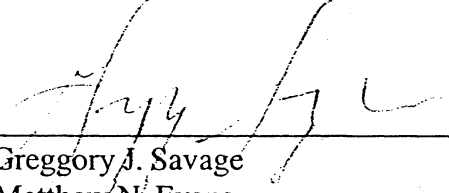
Judge Stephen L. Henriod

On or about March 29, 1999, plaintiff Parkside Salt Lake Corporation filed a lis pendens, recorded as Entry No. 7304440 in Book 8262, Page 7917 of the official records of Salt Lake County, State of Utah. Plaintiff Parkside Salt Lake Corporation, by and through its counsel, hereby releases the lis pendens insofar as it affects the property described in Exhibit "A" attached hereto.

DATED this 1st day of September, 1999.

HOLME ROBERTS & OWEN LLP

By


Greggory J. Savage

Matthew N. Evans

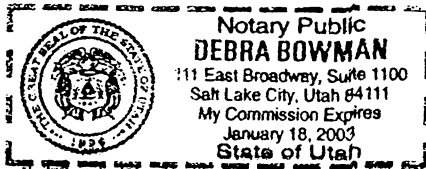
Attorneys for Plaintiff


STATE OF UTAH)

:ss.

SALT LAKE COUNTY)

The foregoing instrument was acknowledged before me this 1st day of September, 1999,
by Greggory J. Savage on behalf of Holme Roberts & Owen LLP, Attorneys for Plaintiff Parkside
Salt Lake Corporation.




Notary Public

CERTIFICATE OF SERVICE

I certify that I caused to be mailed via First Class, U.S. Mail, postage prepaid the foregoing **RELEASE OF LIS PENDENS** to the following this 1st day of September, 1999 to the following:

Nick J. Colessides
466 South 400 East, Suite 100
Salt Lake City, Utah 84111-3325

John E.S. Robson
Fabian & Clendenin
215 South State, #1200
Salt Lake City, UT 84111

G. Richard Kasteler
6278 South Granada Drive
Salt Lake City, Utah 84121

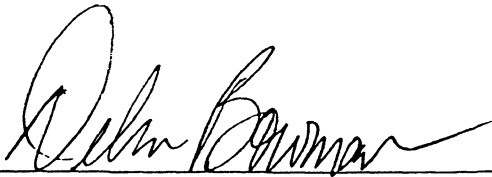


EXHIBIT A

Sidwell No.: 22-21-231-009

Unit No. 8 in Block B, of MONTE CRISTO PHASE I, a Condominium Project, according to the Record of Survey Map filed for record as Entry No. 2559805 in Book 73-8 of Plats at Page 56, together with the appurtenant undivided ownership interest in the "Common Areas and Facilities" of Monte Cristo Phase I, II, III, and IV as set forth in the Fourth Amendment To The Declaration of Covenants, Conditions and Restrictions of Monte Cristo, a Condominium Project and the Final Amended Exhibit "B" attached thereto, filed for record as Entry No. 2665379 in Book 3727 at pages 173 through 178 of Official Records. Said Common Areas and Facilities being set forth and defined by the original Declaration filed for record as Entry No. 2559806 in Book 3389 at page 144 through 182 of Official Records, and the First, Second, Third and Fourth Amendments thereto.

Tab L

(Cite as: 931 F.2d 900, 1991 WL 70672 (10th Cir.(Utah)))

NOTICE: THIS IS AN UNPUBLISHED
OPINION.

(The Court's decision is referenced in a
"Table of Decisions Without Reported
Opinions" appearing in the Federal Reporter.
Use FI CTA10 Rule 36.3 for rules regarding
the publication and citation of unpublished
opinions.)

**J. Walter FITZGERALD, Betty M.
Fitzgerald, Printess K. Fitzgerald,
Jenence**

Fitzgerald, Plaintiffs-Appellants,

v.

**UTAH COUNTY, Jeril Wilson, Lynn W.
Davis, Defendants-Appellees.**

No. 88-2384.

United States Court of Appeals, Tenth Circuit.

April 29, 1991.

D. Utah, No. C-83-0736W.

D. Utah

AFFIRMED.

Before SEYMOUR and BALDOCK, Circuit
Judges, and THEIS, District Judge. [FN*]

ORDER AND JUDGMENT [FN]**

SEYMOUR, Circuit Judge.

****1** J. Walter Fitzgerald, Betty M. Fitzgerald,
Printess K. Fitzgerald, and Jenence Fitzgerald
(the Fitzgeralds) brought this action pursuant
to 42 U.S.C. § 1983 (1988) and state law
against Utah County and its employees and
agents asserting claims arising out of
enforcement of the County's zoning
ordinances. The critical facts underlying the
action are the Fitzgeralds' failure to obtain a
waiver under a County regulation of otherwise
applicable zoning requirements, and the
publicizing of their noncompliance with those
ordinances. The Fitzgeralds sold or attempted

to sell land zoned for agricultural use to
buyers who believed that they would
ultimately be able to use the property for
residential purposes. The Fitzgeralds alleged
that when the County refused to approve the
waiver and publicized the Fitzgeralds' failure
to comply with the zoning regulations, buyers
who had already entered into purchase
contracts stopped paying on those contracts
and potential sales were lost.

The Fitzgeralds challenged the validity of the
Utah County ordinances on several grounds.
In addition, they contended that the zoning
regulations constituted a taking of their
property in violation of the Fifth and
Fourteenth Amendments, claimed that
defendants' alleged defamatory statements
deprived them of their property interests in
either their realty or realty contracts without
due process, and asserted a state law claim for
slander of title based on the filing of a lis
pendens. Defendants moved for summary
judgment. The district court referred the
matter to a magistrate, who issued a report
recommending that summary judgment be
granted to all defendants except Utah County,
deputy County attorney Lynn Davis, and Utah
County Commissioner Jeril Wilson. The
report recommended that only two of
plaintiffs' claims be allowed to go forward:
the defamatory-injury-to-property claim
against all three remaining defendants, and
the slander-of-title claim against defendants
Utah County and Lynn Davis. The district
court accepted the report except for the
recommendation relating to the slander-of-
title claim. The court rejected the
recommendation that this claim remain in the
suit, concluding instead that it was barred by
the applicable statute of limitations. The
district court held two evidentiary hearings on
the remaining defamatory-injury-to-property
claim, and then granted defendants' motion to
dismiss. The Fitzgeralds appeal and we
affirm.

I.

Under Utah County zoning ordinances

promulgated pursuant to state zoning statutes, a subdivision plan or plat cannot be recorded until approved by the county planning commission, and no land located within a subdivision can be sold until the plat has been recorded. See Utah Code Ann. § 17-27-21 (1987 replacement); Utah County Ordinance 4-3-52 (Addendum to Brief of Appellants, doc. B). Under state law, a subdivision is defined as "the division of a tract, or lot or parcel of land into three or more lots, plats, sites or other divisions of land for the purpose ... of sale or of building development." Utah Code Ann. § 17-27-27. This definition specifically excludes "a bona fide division or partition of agricultural land for agricultural purposes." *Id.* Thus, unlike a tract of land that is divided and sold for residential purposes, the division of an agricultural tract need not be approved and recorded prior to sale. In conjunction with the above regulations, Utah County enacted the zoning ordinance at issue, under which a property owner who wants to divide and sell agricultural land without recording a plat must obtain a waiver from the County Building Inspector. The waiver requires the recordation of deed covenants precluding residential or other non-agricultural use of the land. See Utah County Ordinance § 4-3-53 (Addendum to Brief of Appellants, doc. B).

****2** The Fitzgeralds divided and sold agricultural land without recording the plat. They assert on appeal that these divisions were to be used as small farmsteads, and therefore recording the plat was unnecessary. However, they also failed to obtain the required waivers because apparently not all the purchasers were willing to execute covenants precluding residential use. The record reflects that at least some of the purchasers expected that the land would be rezoned to permit residential use in the future.

The Fitzgeralds first assert that the ordinances are invalid and void, and administered unconstitutionally. We have carefully reviewed the analysis and authorities addressing these claims in the magistrate's report, which the district court adopted. We are in substantial agreement with the disposition of these issues as set out

therein.

The Fitzgeralds also contend that the ordinances constitute a taking of their property without just compensation in violation of the Fifth Amendment. The law is clear that such a claim is not ripe until all administrative avenues for review of the unfavorable zoning decision have been exhausted and state procedures for obtaining just compensation have been utilized. See *Williamson Co. Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186-87 (1985); *Landmark Land Co. of Oklahoma, Inc. v. Buchanan*, 874 F.2d 717, 721 (10th Cir.1989). Here, state law provides an appeal to the board of adjustment for persons aggrieved by a decision made in the course of administering or enforcing zoning regulations. See Utah Code Ann. § 17-27-16. The Fitzgeralds have not pursued their claims with the board of adjustment, nor have they demonstrated that an appeal would be futile or that the decision at issue is otherwise final. Moreover, and of equal significance, the Fitzgeralds have not established that they pursued state procedures for obtaining just compensation. Accordingly, their taking claim is premature.

II.

The Fitzgeralds also appeal the district court's dismissal of their claim alleging that defendants deprived them of their property interest without due process by issuing defamatory statements. The district court held two hearings to enable the Fitzgeralds to present evidence on this claim to raise a fact issue in opposition to defendants' motion for summary judgment. At the second hearing, plaintiffs proffered evidence describing the testimony that would be presented at trial by people who bought land from plaintiffs believing that the land would be rezoned for residential use. These buyers allegedly stopped paying on their contracts when they learned that the land would not be rezoned.

We agree with the district court that this evidence, taken as true, does not support a constitutional claim. The Due Process Clause mandates the procedures necessary to provide

defamed persons an opportunity to clear their names by allowing them to establish that the defamatory statements are false. See *Codd v. Velger*, 429 U.S. 624, 627 (1977) (per curiam). Thus, only when "a false and defamatory impression" is created and disseminated is a hearing mandated. *Id.* at 628; *Melton v. City of Oklahoma City*, --- F.2d ---, ---, No. 85-1758, slip op. at 19-21 (10th Cir. March 19, 1991) (en banc). Assuming that a defamatory injury to property without due process could under some circumstances state a claim for relief under section 1983, plaintiffs have failed to establish an essential element of such a claim. Plaintiffs' proffered evidence, viewed most favorably to them, showed that the buyers who stopped paying on their contracts did so because defendants' statements led them to believe that their property could never legally be used for residential purposes. As the district court observed, the statements to this effect attributed to defendants were not defamatory because they were true.

****3** Plaintiffs asserted below and on appeal that the defamatory statements included allegations that their land sales were illegal, which they vehemently deny. Plaintiffs' own proffered evidence, however, shows that their damages were not caused by the charges of illegal sales. Instead, their buyers were influenced to stop payment on their contracts by statements that residential use of the land would never be allowed. Moreover, as set out in Part I, *supra*, it appears from the record that plaintiffs' sales were in fact illegal. It is undisputed that plaintiffs did not obtain the waiver from the County Building Inspector required to subdivide and sell agricultural land without recording a plat, nor did they record their plat.

"Any sale or other transfer of land into three or more parcels without the owner or agent of the owner first having obtained a signed waiver from the Building Inspector, or having recorded an approved subdivision plat, shall be considered prima facie evidence of the illegal subdivision of land and a violation of this section and Section 4-3-52 of this ordinance, subject to the penalties stated therein."

Utah County Ordinance § 4-3-53 (Addendum to Brief of Appellants, doc. B). Section 4-3-52 provides that one who sells property within an unrecorded and unapproved subdivision is guilty of a misdemeanor and subject to civil remedies. See Utah County Ordinance § 4-3-52 (Addendum to Brief of Appellants, doc. B). Accordingly, we affirm the district court's disposition of plaintiffs' claim for defamatory injury to property without due process. We do not address the state law claims asserting interference with contractual relations because they are raised for the first time on appeal.

III.

Finally, we affirm the dismissal of the Fitzgeralds' slander-of-title claim, albeit on grounds different from those relied on by the district court. This state law cause of action was based on a *lis pendens* covering the property at issue recorded in connection with the filing of a lawsuit by Utah County. The lawsuit challenged unrecorded land sales similar to the sales made by the Fitzgeralds, although they were not named defendants in that suit.

This claim fails on two equally dispositive grounds. First, Utah holds that the recording of a *lis pendens* is privileged and therefore cannot support a claim for slander of title. See *Hansen v. Kohler*, 550 P.2d 186, 189-90 (Utah 1976).

"[S]ince the effect of a *lis pendens* is to give constructive notice of all the facts apparent on the face of the pleadings, the recordation of a notice of *lis pendens* is, in effect, a republication of the pleadings. Since the publication of the pleadings is absolutely privileged, the republication thereof by recording a notice of *lis pendens* is similarly privileged."

Id. at 190. The instant case is distinguishable from *Birch v. Fuller*, 9 Utah 2d 79, 337 P.2d 964 (1959), upon which the Fitzgeralds rely, because in *Birch* no underlying action was filed. Here, as in *Hansen*, an underlying lawsuit was filed. Although plaintiffs argue

that Hansen is not controlling because they were not named in the suit, we conclude that this fact is not significant. The decision in Hansen was based on the Court's holding that a lis pendens is privileged because it merely republishes the pleadings, which are themselves privileged. The lis pendens here thus derives its privilege from the action it republishes. In Birch, to the contrary, the lis pendens did not republish an underlying privileged pleading.

****4** In addition, under Utah law, a slander of title action requires proof of special damages "by evidence of a lost sale or the loss of some other pecuniary advantage." Bass v. Planned Management Serv., 761 P.2d 566, 568 (Utah 1988). Damages may not be presumed. Id. The Fitzgeralds have proffered no evidence of the requisite specific monetary loss due to the filing of the lis pendens. Accordingly, we affirm the ruling against the Fitzgeralds on this cause of action.

AFFIRMED.

FN* Honorable Frank G. Theis, United States Senior District Judge for the District of Kansas, sitting by designation.

FN** This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir.R. 36.3.

END OF DOCUMENT