

2007

William R. Stratton v. JB Oxford Holdings : Brief of Appellant

Utah Court of Appeals

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No. 20070855

IN THE UTAH COURT OF APPEALS

WILLIAM R. STRATTON,

Plaintiff/Appellant ,

vs.

JB OXFORD HOLDINGS, INC.,

Defendant/Appellee,

BRIEF OF THE APPELLANT

Appeal from Orders of the
Third Judicial District Court, Salt Lake County, State of Utah,
the Honorable Tyrone E. Medley, judge presiding

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LIST OF ALL PARTIES

All of the parties are listed on the cover of this Brief.

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No. 20070855

IN THE UTAH COURT OF APPEALS

WILLIAM R. STRATTON,

Plaintiff/Appellant,

vs.

JB OXFORD HOLDINGS, INC.,

Defendant/Appellee,

BRIEF OF THE APPELLANT

Plaintiff/Appellant William R. Stratton submits this brief in support of his appeal from an order denying his Motion to Strike Orders and Set Hearing Date for Status Conference and Further Proceedings and Motion to Re-Open Discovery for the Limited Purpose of Adducing Evidence Regarding the Creation, Signing, Entry and Dissemination of Certain Orders in this Proceedings.

JURISDICTION

This Court has jurisdiction over this appeal under Utah Code Ann. §78-2-2(j) (West 2004), conferring jurisdiction on this Court over orders of any court of record over which the Court of Appeals does not have original appellate jurisdiction. Pursuant to Utah Code Ann. §78-2-2(4) (West 2004), this case was assigned to the Court of Appeals. The Court of Appeals thus has jurisdiction under Utah Code section 78-2a-3-(2)(j) (West 2004).

ISSUES PRESENTED

Relief from Orders

1-Did the trial court err in denying Plaintiff/Appellant's Motion to Strike Orders and Set Hearing Date for Status Conference and Further Proceedings?

2-Did the Court err in denying Plaintiff/Appellant's Motion to Re-Open Discovery for the limited Purpose of Adducing Evidence Regarding the Creation, Signing, Entry and Dissemination of Certain Orders in this Proceeding?

A. Standard of review

The challenged district court rulings were made with discretion and should be reviewed under an abuse of discretion standard of review. Menzies v. Galetka, 2006 UT 81 (Utah 2006).

B. Preservation of issue

Plaintiff/Appellant timely filed a Notice of Appeal following the District Court's denial of the above motions.

**DETERMINATIVE CONSTITUTIONAL
PROVISIONS, STATUTES AND RULES**

N/A

STATEMENT OF THE CASE**Nature of the Case**

This is an appeal from the trial court's denial of a Plaintiff/Appellant's Motion to Strike Orders and Set Hearing Date for Status Conference and Further Proceedings and the trial court's denial of Plaintiff/Appellant's Motion to Re-Open Discovery for the limited Purpose of Adducing Evidence Regarding the Creation, Signing, Entry and Dissemination of Certain Orders in this Proceeding.

Course of the Proceedings and Disposition Below

Plaintiff/Appellant Stratton sued Defendant/Appellee JB Oxford Holding, Inc. for damages that he claimed were caused by the breach of his employment contract. R. 1-13.

Following discovery, Defendant/Appellee filed a Motion for Summary Judgment Re: Liability claiming that it was not a party to the employment contract and hence not bound by the contract. R. 952-977. Defendant/Appellee also filed a Motion for Partial Summary Judgment Re: Mitigation of Damages claiming that if it was liable, Stratton failed to

mitigate his damages. R. 978-1153.

In connection with these two summary judgment motions, Defendant/Appellee filed a Motion in Limine requesting that the trial court exclude evidence not previously provided by Plaintiff/Appellant in discovery. R. 1154-1198.

Plaintiff/Appellant filed an Opposition to Motion for Summary Judgment Re: Liability demonstrating questions of fact concerning the obligations of Defendant/Appellee on the employment contract. R. 1226-1263. Plaintiff/Appellant also filed an Opposition to Motion for Summary Judgment Re: Mitigation demonstrating questions of fact concerning mitigation of damages. R. 1203-1217.

In connection thereto, Plaintiff/Appellant filed an Opposition to Motion in Limine claiming that appropriate information had been provided in discovery. R. 1218-1225.

Thereafter, Defendant/Appellee filed a Motion to Strike the Affidavits of J. Garry McCallister and John M. Whitesides (Motion to Strike) in support of the Opposition to Motion for Summary Judgment re: Liability. R. 1264-1273. Plaintiff/Appellant filed an Opposition to the Motion to Strike. R. 1358-1365.

The trial court granted the Motion in Limine, Motion to Strike, and then granted the motions for summary judgment. R. 1367. Counsel for Defendant/Appellee was directed to submit proposed orders. R. 1369.

Defendant/Appellee submitted proposed orders via letter dated May 3, 2005. R. 1401. The proposed orders were titled as follows: 1- Order on Defendant's Second Motion in

Limine, R. 1387-1389; Order on Defendant's Motion for Partial Summary Judgment re: Mitigation, R. 1390-1393; 3- Order on Defendant's Motion for Summary Judgment re: Liability, R. 1394-1396; 4- Order on Defendant's Motion to Strike, R. 1397-1400.

On August 11, 2005, the Orders were signed. R. 1387-1400. No notice was given to Plaintiff/Appellant that the Orders had been signed. R.1525, p.9.

Over three months before the orders were signed and filed, Plaintiff/Appellant submitted objections to each of the proposed orders. R. 1375-1386. These objections were timely pursuant to stipulation between counsel. R. 1374.

Interlineations denying the objections were handwritten on the orders and initialed by the trial judge. R. 1524, p.7. The interlineations were not dated. Counsel for Defendant/Appellee has a copy of the signed and entered orders that do not have the interlineations thereon. R. 1524, p. 7-8.

The trial judge has not specific recollection of the sequence of events concerning the signing of the orders in August 2005. R. 1525, p.21. Based upon practice, the trial judge stated that he ruled on the objections by writing on the orders. He thereafter gave them to the clerk for filing. The clerk could have sent to counsel a conformed copy of the order initially submitted and not one with the interlineations. R. 1525, p.20.

On November 16, 2006, the trial court set an Order to Show Cause for December 12, 2006, and ordered the parties to appear and show cause why the case should not be dismissed. R. 1402.

Counsel for Plaintiff/Appellant appeared at the OSC. The trial court struck the hearing and ordered counsel to file a pleading within 10 days. R. 1405.

A Notice to Submit was filed. R. 1406-1408. The trial court set oral argument on the Objections to Proposed Orders for January 22, 2007. R. 1409.

At the hearing, the trial court noted the differences between the two sets of orders. The trial judge ordered counsel for Plaintiff/Appellant to take the next appropriate step within 30 days. R. 1412.

On February 21, 2007, Plaintiff/Appellant filed a Motion to Strike Orders and Set Hearing Date for a Status Conference and Further Proceedings (Motion to Strike Orders). R. 1413-1417. (Plaintiff/Appellant also filed a Motion to Disqualify Judge and Supporting Memorandum based upon a perceived ex parte communication. R. 1418-1448. This was denied. R. 1486-1489.)

The Motion to Strike Orders was fully briefed with Defendant/Appellee filing an Opposition (R. 1458-1467), and Plaintiff/Appellant filing a Reply (R. 1468-1472).

The Motion to Strike Orders was set for oral argument on July 30, 2007. R. 1490-1492.

On June 25, 2007, Plaintiff/Appellant filed his Motion and Memorandum in Support of Plaintiff/Appellant's Motion to Re-Open Discovery for the Limited Purpose of Adducing Evidence Regarding the Creation, Signing, Entry and dissemination of Certain Orders in this Proceeding (Motion to Re-Open Discovery). R. 1493-1505.

On July 30, 2007, the trial court heard oral arguments on Plaintiff/Appellant's Motion

to Strike Orders and Motion to Re-Open Discovery. The trial court denied both motions. R. 1506. Orders were submitted and entered. R. 1507-1512.

STATEMENT OF FACTS

Plaintiff/Appellant sued Defendant/Appellee for Breach of Contract. In September 2004, Defendant/Appellee filed dispositive motions. On December 2, 2004, following oral argument, the Court granted the motions and directed Defendant/Appellee's counsel to submit the appropriate Orders.

On May 3, 2005, the orders were submitted. On May 23, 2005, objections to the orders were filed.

It was Plaintiff/Appellant's intention to appeal the Court's orders. Plaintiff/Appellant believed that there were issues of material fact that precluded the granting of the dispositive motions.

Over three months elapsed with no activity. Then, on August 11, 2005, the court signed the orders. However, Plaintiff/Appellant was never notified that the orders had been signed. Sometime thereafter, interlineations were placed on the orders denying the objections. Again, no notice was given to Plaintiff/Appellant.

The next notification of activity given to the Plaintiff/Appellant occurred on November 16, 2006, when the Court set an Order to Show Cause re: Dismissal due to inactivity. Plaintiff/Appellant's counsel appeared at the OSC on December 12, 2006. The OSC was stricken and subsequent hearing was held on January 22, 2007.

At the January hearing, the Court tried to make sense of the case history. The Court was advised that no notice had been given Plaintiff/Appellant regarding the signing of the orders and the rulings on the objections. In addition, the Court was advised that counsel for Defendant/Appellee had a copy of the orders, and that counsel's copy did not have the interlineations made thereon denying the objections.

Rather than admonish Defendant/Appellee's counsel for failing to give notice of the signing of the orders that were not interlineated, and thereafter formally enter the interlineated orders as of January 22, 2007 (since the interlineations were updated and apparently neither party had notice of the interlineated versions), the Court instructed Plaintiff/Appellant to take the "next appropriate step" within 30 days or the case would be dismissed.

It should have been clear that the Defendant/Appellee's failure to give notice of the signing of the orders resulted in unfair prejudice to the Plaintiff/Appellant. Simply put, if the un-interlineated orders were considered the final orders concerning the case, Plaintiff/Appellant would have lost his right to appeal.

Therefore, on February 21, 2007, Plaintiff/Appellant filed a Motion to Strike Orders and Set Hearing Date for a Status Conference. Said Motion was based on Plaintiff/Appellant's lack of notice of that the orders had been signed and the fact that two sets of orders existed: one set signed without the interlineations and one set signed with the interlineations.

Plaintiff/Appellant also filed a Motion to Disqualify Judge based upon possible ex parte

contact between the Court and Defendant/Appellee's counsel since Defendant/Appellee's counsel had one set of signed orders which were different than those with the interlineations as contained in the court file.

On May 3, 2007, the Court denied the Motion to Disqualify Judge. In the ruling, the Court noted that Plaintiff/Appellant's counsel was understandably concerned. However, the Court also noted that there was no evidence of ex parte contact.

On June 25, 2007, in order to discover the sequence of events concerning the signing of the orders and the placement of the interlineations, Plaintiff/Appellant filed a Motion to Re-Open Discovery for the Limited Purpose of Adducing Evidence Regarding the Creation, Signing, Entry and Dissemination of Certain Orders in the Proceeding.

On July 30, 2007, the Court denied Plaintiff/Appellant's Motion to Re-Open Discovery for the Limited Purpose of Adducing Evidence Regarding the Creation, Signing, Entry and Dissemination of Certain Orders in the Proceeding. The Court also denied Plaintiff/Appellant's Motion to Strike Orders and Set Hearing Date for a Status Conference.

Plaintiff/Appellant now appeals these rulings. Plaintiff/Appellant contends it was an abuse of discretion for the trial court not to strike the orders (both sets) because Plaintiff/Appellant was never given notice thereof and the orders themselves are void. Plaintiff/Appellant's failure to take actions thereafter (to file a notice of appeal) was therefore eligible for relief under Utah Rules of Civil Procedure Rule 60 (b). In addition,

Plaintiff/Appellant contends it was an abuse of discretion for the Court to deny Plaintiff/Appellant's Motion to Re-Open Discovery for the Limited Purpose of Adducing Evidence Regarding the Creation, Signing, Entry and Dissemination of Certain Orders in the Proceeding since there was no other way to determine how and when the orders were signed, how and when the interlineations were made, and how Plaintiff/Appellant's counsel came into possession of a set of signed orders that were different from those contained in the court file.

SUMMARY OF THE ARGUMENT

The court erred in denying Plaintiff/Appellant's Motion to Strike Orders and Set Hearing Date for a Status Conference and Further Proceedings because the motion was not untimely and the objections were not properly ruled upon because no notice to submit for decision had been filed. In addition, the date the orders became final orders is unknown because the objections were ruled upon sometime after the orders were initially signed and dated and the ruling on the objections contains no date.

Argument

I.

THE COURT ERRED IN DENYING THE MOTION TO STRIKE ORDERS AND SET HEARING DATE FOR A STATUS CONFERENCE AND FURTHER PROCEEDINGS

A. THE MOTION TO STRIKE WAS NOT UNTIMELY

The trial court denied the Motion to Strike Orders and Set Hearing Date for a Status Conference and Further Proceedings (Motion to Strike) on the grounds that the motion was untimely. This finding focused solely on the fact that the Motion was filed over one (1) year after the entry of the Orders. This was an abuse of discretion because it failed to consider both the lack of service of the signed Orders, and the fact that the Orders themselves were void.

Utah Rules of Civil Procedure, Rule 58A(d) states: “Notice of signing or entry of judgment. A copy of the signed judgment shall be promptly served by the party preparing it in the manner provided in Rule 5. The time for filing a notice of appeal is not affected by the requirement of this provision.” (Emphasis added.)

Defendant/Appellee did not serve, promptly or otherwise, a copy of the signed Orders.¹ Nevertheless, it is clear that this fact does not affect the time for filing a notice of appeal. Since the Orders were signed August 11, 2005, it could be argued that the time to file a notice of appeal in this case expired September 11, 2005.

However, as the Court in stated in Workman v. Nagle Constr., 802 P.2d 709 (Utah App. 1990), “if a losing party has remained ignorant of a judgment in part because the prevailing party has not complied with Rule 58A(d), the resulting delay is more reasonable for purposes of Rule 60(b)(5)-(7).”

¹ In fact, to date, and despite a request in open court, Plaintiff/Appellant has not received a copy of the signed Orders in the possession of Defendant/Appellee.

In Workman, the Plaintiff received a judgment against the Defendant. When the Plaintiff sought to enforce the judgment, the Defendant moved, pursuant to Rule 60(b), to set the judgment aside. Like the present case, the motion was filed over a year after the judgment was entered. The district court denied her motion, and she appealed.

The Court of Appeals reversed the district court ruling. The Court reasoned that “Rule 58A(d) and the current Rule 4-504 are...not inert desiderata. Rather, while noncompliance with those rules does not bring about the automatic invalidity of an entered judgment, it is a weighty factor in determining the timeliness of later challenges to the judgment under Utah R. Civ. P. 60(b)(5) through (7). A judgment is thus presumed effective when entered until a timely and meritorious challenge is brought against it, and Rules 58A(d) and 4-504 weigh heavily in determining whether a challenge under Rule 60(b)(5)-(7) is timely.”

The trial court abused its discretion by merely considering the delay in denying Plaintiff/Appellant’s Motion to Strike. Like Workman, since no notice was given that the orders had been signed, the trial court should have looked to beyond the delay and considered the validity of the Orders themselves.

It should be noted a copy of the signed order denying the Motion to Strike was also not served on Plaintiff/Appellant. This is not to suggest that Defendant/Appellee purposely failed to give notice in hopes that Plaintiff/Appellant would once again miss the thirty (30) day deadline; rather, it is an indication that lack of compliance with Rule 58A(d) is most likely common since not giving notice has more potential advantages than disadvantages.

In order to give incentive for providing the required notice, in cases where notice is not given, the Court should shift the burden to the opposing party to demonstrate why relief should not be granted, rather than have the burden be on the party injured by the lack of notice.

B. THE ORDERS WERE IMPROPERLY ENTERED AND THUS VOID

In ruling that the Motion to Set Aside should have been granted, the second factor considered by the court in Workman was the validity of the judgment. The Court found that the judgment was void. Like Workman, the orders in this case were void because they were entered before the objections were considered and ruled upon.

The submission and signing of orders is not merely a perfunctory or ministerial act. They are an important part of the judicial process. “The plain language of rule 7(f)(2) does not permit overriding the requirement of an order by implication or inference. Either an order must be submitted by the prevailing party or the court must give the parties explicit direction that no order is required.” Code v. Utah Dept of Health, 162 P.3d 1097, 1098 (Utah 2007).

Following the submission of proposed orders, the rules grant the parties rights to make objections. Utah Rules of Civil Procedure, Rule 7(f)(2) states: “Unless the court approves the proposed order submitted with an initial memorandum, or unless otherwise directed by the court, the prevailing party shall, within fifteen days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision. Objections to the

proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object.”

There is no language in the rule describing or limiting the type of objection that may be made. In this case, there were four objections made - one to each of the proposed orders.

The objection to the proposed order on the Motion for Summary Judgment re: Liability challenged the determination that there was no question of fact by referring to the Securities and Exchange Commission filings. It challenged the finding excluding the affidavit since the Court had expressly overruled the hearsay objection.

The objection to the proposed order on the Motion for Summary Judgment re: Mitigation challenged the factual finding that the evidence was “undisputed” concerning monies received. It also challenged the legal conclusion that Plaintiff/Appellant had a duty to mitigate.

The objection on the proposed order on Motion in Limine challenged the legal conclusion concerning witness lists. It challenged the factual basis concerning discovery. It also challenged the factual determination that Plaintiff/Appellant had been prejudiced.

The objection on the Motion to Strike the affidavits challenged the legal conclusions that the affidavits were not based on personal knowledge, and the factual finding concerning the witnesses.

In other words, the objections posed by the Plaintiff/Appellant were substantial

challenges to determinations of fact, evidentiary rulings, and conclusions of law. As such, they should have been treated as motions under Utah Rules of Civil Procedure Rule 52(b) or 59. As this Court held in DeBry v. Fidelity Nat'l Title Ins. Co., 828 P.2d 520 (Utah Ct. App. 1992), regardless of how it is captioned, an objection which questions the correctness of the court's findings and conclusions is properly treated as a post-judgment motion under either Rule 52(b) or 59(e)." Id. at 522-23; see also Regan v. Blount, 1999 UT App 154, P 5, 978 P.2d 1051, 1053 (Utah Ct. App. 1999) (stating if motion challenges determinations of fact, evidentiary rulings or legal conclusions, it is a Rule 52(b) or 59 motion); Reeves v. Steinfeldt, 915 P.2d 1073, 1077 (Utah Ct. App. 1996) (stating objection is in substance a Rule 59 motion inasmuch as it asks court to alter findings or amend conclusions and judgment).

Since the objections should have been treated as motions, a notice to submit for decision should have been filed. Rule 7(d) of the Utah Rules of Civil Procedure provides that when "briefing is complete, either party may file a "Request to Submit for Decision. The request to submit for decision shall state the date on which the motion was served, the date the opposing memorandum, if any, was served, the date the reply memorandum, if any, was served, and whether a hearing has been requested. If no party files a request, the motion will not be submitted for decision."

Since neither party submitted a notice pursuant to Rule 7(d), the Court should not have ruled upon the objections. The plain language of the rule requires that a party submit the

motion for decision. As the Court noted in Code, supra, it does not contemplate that the parties must engage in a guessing game to divine the court's intentions.

The objections in this case were substantively motions. As such, until they are ruled upon, the time period for filing a Notice of Appeal does not begin to run. By disregarding the mandate of Rule 7(d), the issues presented were not ripe for decision, and thus the orders were void ab initio.

Since both elements are present that the court looked to in Workman, supra, it is clear that the Court abused its discretion in denying the motion to strike the orders and set the case for proper hearing on the objections.

C. THE DATE THE ORDERS BECAME FINAL, APPEALABLE ORDERS IS UNKNOWN BECAUSE THE OBJECTIONS WERE UNDATED

As noted above, when the orders were originally signed on August 11, 2005, Defendant/Appellee did not give notice. Nevertheless, if the orders were final orders, the 30 day time limit for filing an appeal would begin to run.²

Assuming arguendo that the objections should not be treated as motions, it could be argued that by signing the orders, the Court, by implication, overruled the objections.

² As also noted above, this period does not begin to run if the objections to the motions were deemed a Rule 52(b) or a Rule 59 motions. In that event, the time begins to run from the entry of the order denying those motions. Utah R. App. P. 4(b)

However, such an argument would need to ignore the existence of the interlineations.

The interlineations denying the objections are undated. Since a set of orders exist without the interlineations, it is reasonable to conclude that the interlineations were not made at the same time the orders were signed. Therefore, it is reasonable to conclude that the objections were not considered at the time the orders were signed.

A clear and definite objection to the evidence is required at trial before appellate review can be requested. State v. Malmrose, 649 P.2d 56 (Utah 1982). Since the objections, although specific and timely made, were not considered prior to signing the orders, the issues raised in the objections were not ripe for judicial review, and thus the orders were not yet final orders.

If the interlineations incorporated and thus revived the orders, the orders would be final and ready for appellate review, but they are undated, and thus insufficient to trigger the 30-day appeal period. Therefore, both the orders without and with interlineations should be stricken, and the trial court should be directed to re-enter the orders with the specific grounds for denying the objections.

II.

THE COURT ERRED IN DENYING THE MOTION TO RE-OPEN DISCOVERY FOR THE LIMITED PURPOSE OF ADDUCING EVIDENCE REGARDING THE CREATION, SIGNING, ENTRY AND DISSEMINATION OF CERTAIN ORDERS

When did the trial court deny the objections by interlineations? Unfortunately, the resolution to this issue required discovery, and when this request was made, the trial court

abused its discretion and denied the motion.

To this date, one cannot determine with confidence the date the interlineations were made. The record reveals that the orders were submitted to the trial court with a cover letter dated May 3, 2005. The record reveals that the cover letter and orders were filed August 11, 2005, and the orders themselves were signed on August 11, 2005.

There was no significant activity on the case from August 11, 2005 until the hearing on January 22, 2007. At that hearing, the trial judge acknowledged that he had no recollection of the case. However, based upon his review of the file, he states, “there is no question that I signed and entered the orders. And not only did I sign and enter them, but in my own handwriting, by way of interlineations on each of the orders, I have written that Plaintiff/Appellant’s objections to the proposed orders are denied. And the orders were signed and entered on August the 11th of 2005.”

If the objections were ruled on at the same time the orders were signed, it is unclear why counsel for Defendant/Appellee would have “copies of those orders, which have the insignia with the indication that they had been signed and entered, even though I don’t believe his copies contain...my interlineations;....”

The indication at the hearing was that counsel for Defendant/Appellee received the Orders on August 15, 2005. However, the court clerk stated that there was no indication of mailing in the Court docket. Since August 11, 2005 was a Thursday, one can conclude that the Orders were mailed the same day they were signed, and the clerk failed to note this in

the docket. It is also reasonable to conclude that the interlineations were made sometime after August 11, 2005. Otherwise, why would the trial judge initial the interlineations?

Numerous other questions have been raised as a result of this irregular sequence of events. For example, why was the case left on the pending case list if all the issues were resolved in August? Why did the conformed copy of the orders in possession of counsel for Defendant/Appellee contain an insignia? Why were the orders and the cover letter filed and signed over three months after they were submitted when no Notice to Submit had been filed?

Limited discovery could have helped to answer these questions and determined the important appellate issue of timeliness. Since the rights of Plaintiff/Appellant are substantially impacted by this determination, and since the Defendant/Appellee would suffer no prejudice thereby, the trial court should have granted the request to conduct limited discovery. In addition, granting the discovery request would have promoted the policy that “the integrity of the judicial system should be protected against any taint of suspicion.” State v. Neeley, 748 P.2d 1091, 1094 (Utah 1988).

It is therefore requested that the court find that the trial court abused its discretion in denying the Motion to Re-Open Discovery.

CONCLUSION

The Court should reverse the trial court’s denial of the Plaintiff/Appellant’s Motion to Strike Orders and Set Hearing Date for Status Conference and Further

Proceedings and Motion to Re-Open Discovery for the Limited Purpose of
Adducing Evidence Regarding the Creation, Signing, Entry and Dissemination of
Certain Orders in this Proceedings.

RESPECTFULLY submitted this 19th day of February, 2008.

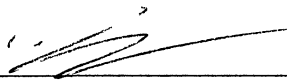
A handwritten signature in black ink, consisting of a large, stylized 'C' followed by a series of loops and a final flourish.

Chad M. Steur
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I certify that two true and correct copies of the foregoing, **BRIEF OF THE APPELLANT**, was served by U.S. mail this 19th day of February, 2008, to the following:

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