

2010

Mark Kappos and Mala Kappos v. The State of Utah, Department of Transportation : Brief of Appellee

Utah Court of Appeals

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Case No. 20100365

IN THE UTAH COURT OF APPEALS

MARK KAPPOS and **MALA KAPPOS**,

Plaintiffs/Appellants,

v.

THE STATE OF UTAH, DEPARTMENT OF TRANSPORTATION,

Defendant/Appellee.

Appeal from a Decision and Order of the Second Judicial District Court
in and for Weber County, State of Utah,
Honorable W. Brent West, Presiding

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ORAL ARGUMENT NOT REQUESTED BY DEFENDANT/APPELLEE

FILED
UTAH APPELLATE COURTS

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PRIOR AND RELATED APPEALS

Estate of Higley v. State, Department of Transportation, 2010 UT App 227, 238 P.3d 1089, concerned UDOT-condemned property that was subject to the same condemnation order that underlies the present appeal. The parcel at issue in *Estate of Higley*, unlike the Kappos parcel, was undeveloped at the time of the litigation in that case. Plaintiffs Mark and Mala Kappos, in the present appeal, are the son-in-law and daughter of Edwin Higley, whose estate was the plaintiff in the earlier case. *See* R.85.

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Plaintiffs/Appellants,

v.

THE STATE OF UTAH, DEPARTMENT OF TRANSPORTATION,

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Appeal from a Decision and Order of the Second Judicial District Court
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BRIEF OF DEFENDANT/APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

The notice of appeal in this case, R. 1179-80, was filed on April 27, 2010, within 30 days of the Second District Court's March 30, 2010 order, R. 1176-78, denying plaintiffs' postjudgment motion to amend or reinstate their complaint to include constitutional claims. R. 1014-15. While the notice of appeal is timely as to the decision on that motion, it is untimely as to any of the court's substantive decisions, the last of which was entered on September 3, 2009.¹ This Court has jurisdiction over the appeal

¹It would likewise be untimely to appeal from the court's January 4, 2010 ruling on the Department of Transportation's motion, under Utah R. Civ. P. 59(b), to amend a 2008 order of dismissal without prejudice to dismissal with prejudice, R. 1012-13, but the court decided that motion in plaintiffs' favor.

under Utah Code Ann. § 78A-4-103(2)(j) (West 2009), on transfer from the Utah Supreme Court. Because the appeal is timely only as to the order denying plaintiffs' motion to amend or reinstate, the Court's jurisdiction extends only to review of that order.

ISSUES PRESENTED UPON APPEAL

Plaintiffs' statement of the issues on appeal is a paragraph containing six questions addressing the correctness of the district court's legal rulings on their various substantive claims, all of which depend on whether a notice of interest recorded on plaintiffs' property by the Utah Department of Transportation (UDOT) constituted a wrongful lien. However, the sole issue properly before the Court for decision is whether the district court correctly denied plaintiffs' motion to amend or reinstate the complaint because it was filed after all of plaintiffs' claims had been dismissed.

Standards of Review: Whether the district court properly rejected plaintiffs' postjudgment motion to amend or reinstate their complaint on the ground that all of their claims had been dismissed is essentially a question of jurisdiction. "Whether the district court . . . has jurisdiction is a question of law that we review for correctness, giving no deference to the lower court." *State v. Reber*, 2007 UT 36, ¶ 8, 171 P.3d 406. "Whether a notice of interest is a wrongful lien 'presents a question of law which we review for correctness, giving no deference to the trial court's legal conclusions.'" *Birch v. Myers*, 2009 UT App 180, ¶ 2, 214 P.3d 115 (quoting *Russell v. Thomas*, 2000 UT App 82, ¶ 8, 999 P.2d 1244).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

All relevant text of constitutional provisions, statutes, and rules pertinent to the issues before the Court is contained in the body of this brief.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Below

The complaint in this case, R. 1-31, was filed on May 19, 2006, alleging claims of quiet title, slander of title, and defamation, based on a notice of interest recorded by UDOT on the subject property, which had been previously condemned. In an order entered September 13, 2007, R. 348-52, the district court dismissed all claims except quiet title based on a mistake in the condemnation order, and further ruled that no recovery of money damages would be permitted. Following a December 18, 2007 order consolidating the case with another action brought by plaintiffs against UDOT, R. 390-91, the court granted UDOT's second motion for partial judgment on the pleadings and dismissed, with prejudice, all damages claims stemming from the consolidated case on August 4, 2008. R. 524-25. On the same day, the court entered an order permitting plaintiffs to amend their complaint to allege a constitutional taking. R. 526-27. The Second Amended Complaint was filed that day, asserting takings claims under the federal and state constitutions. R. 528-60.

On November 3, 2008, the district court dismissed the constitutional takings claims without prejudice. R. 653-55. UDOT subsequently moved, under Utah R. Civ. P. 54(b), for revision of the November 23 order to dismissal with prejudice. R. 852-55. On April

10, 2009, the court dismissed, with prejudice, the quiet title claim based on mutual mistake. R. 672-79. On September 3, 2009, after UDOT withdrew its notice of interest on the disputed property, the court entered an order dismissing, with prejudice, the quiet title claim based on a theory of bona fide purchaser for value, stating that the withdrawal mooted the issue. R. 991-93. Finally, on January 4, 2010, the court denied UDOT's Rule 54(b) motion to amend the November 3, 2008 order to dismissal with prejudice, the last issue remaining between the parties. R. 1012-13.

On January 6, 2010, after the court had issued its final order, plaintiffs moved to amend or reinstate their complaint to reassert the takings claims that had been dismissed without prejudice in the November 3, 2008 order. R. 1014-15. The court denied the motion by order entered March 30, 2010. R. 1176-78. Plaintiffs filed a notice of appeal on April 27, 2010, purporting to appeal from the substantive rulings entered in and prior to the January final order. R. 1179-80 (Addendum A, attached).

B. Statement of Relevant Facts

The facts relevant to the jurisdictional issue are those stated above. As to the substantive issues raised by plaintiffs, the relevant facts were stated by the district court judge in his June 15, 2007 decision as follows:

In 1974, UDOT obtained an order condemning Plaintiffs' property (Plaintiffs' Complaint, Exhibit F), but it failed to record it in the appropriate county, Weber, for approximately 30 years. During this delay, Edwin Higley (the owner of the disputed property at the time UDOT condemned it), sold the same land, in at least two parcels—one to Ed Green Construction Inc., and one to Ed Green individually. (Affidavit of Ed Green, Exhibits B & C). Mr. Green has stated, and UDOT does not contest, that he knew

nothing of UDOT's condemnation order, and he paid valuable consideration for both parcels of property. (Affidavit of Ed Green, Page 2, ¶¶ 7 & 15). The Plaintiffs purchased these two parcels in 2001 and 2002, and they immediately recorded their deeds. (Affidavit of Ed Green, Exhibits D & E).

UDOT recorded the condemnation order on January 14, 2003, and then, it filed a notice of interest on the Plaintiffs' property on January 19, 2006. (Plaintiffs' Motion for Summary Judgment, Exhibits B & C).

R. 328-29. The court recounts that plaintiffs filed a prior suit to nullify the UDOT documents under the statutes applicable to wrongful liens, but the judge in that case ruled that they did not qualify for relief. R. 329. Plaintiffs then filed this separate suit.

The facts as stated by the district court were uncontested only for purposes of plaintiffs' 2007 motion for partial summary judgment. *See* R. 204-26. Later discovery revealed that Ed Green did not pay Ed Higley for the lot allegedly purchased by Mark and Mala Kappos. As he testified in his deposition,

So I did not make—on this lot I did not make a payment to Ed Higley for that lot. I deeded the lot to—to his family instead of payment. Instead of paying—so Ed deducted the \$35,000 that I owed him on that lot, because each lot was \$35,000. So instead of paying Ed 35,000, he said just deed it to him, and he released his—his mortgage on that amount that I owed him.

Q. And that was given to Ed Higley's daughter?

A. The lot was deeded to them apparently from this, and so that was given to them.

Q. As a gift?

A. However Ed wanted to do it.

R. 724 at 46:7-20. He further testified that he did not remember paying anything for the river lot that was ultimately deeded to Mark and Mala Kappos. R. 726 at 55:1-5. In explaining the representation in his prior affidavit that he had received valuable consideration for both parcels, he stated,

Basically it was the payment I didn't make to Ed Higley, and so he relieved that debt. So to me, that's what—that's what it means, is instead of paying Ed, he just deducted that from the amount I owed him. So I assume that to be—to me, that's no different than—than—you know, I didn't have to make a payment. I just furnished the land.

R. 727 at 59:2-9. Asked if he had prepared the affidavit, he responded, "No. I did not."

R. 715 at 9:25.

In addition, Mala Kappos identified the consideration paid for the property as follows:

Plaintiffs' property was given to Plaintiffs by Ed and Afton Higley. Ed and Afton Higley are the parents of Mala Kappos. Ed Higley told Mala, Mark and the rest of the family that he was providing said property to her resulting from the significant day-to-day physical, moral and emotional care which Mala had provided to Ed and Afton Higley over the years. Mala was their primary caregiver through several illnesses and through their deaths. Mala completed all kinds of household tasks for them over those many years. Moreover, Mala was their bookkeeper since age 12. In addition, Afton had dementia for nearly twenty years, and Mala provided all kinds of care to her during that time.

R. 733-34.

SUMMARY OF ARGUMENT

Plaintiffs' April 27, 2010 notice of appeal is untimely to obtain review of any of the district court's rulings on the merits of their complaint. The only decision within thirty days of the notice was the court's denial of plaintiffs' motion to amend or reinstate their complaint. While the motion was nominally brought under Utah R. Civ. P. 59(e), which would toll the time for appeal, Rule 59(e) governs motions to alter or amend a judgment, not a complaint. As the district court correctly ruled, once a case is adjudicated

to finality, regardless of whether a dismissal is with or without prejudice, a complaint cannot be amended. Because plaintiffs' motion to amend was not, in substance, a Rule 59(e) motion, it cannot support review of the district court's determinations on the merits.

Even if the Court were to conclude that it had jurisdiction over the district court's substantive decisions, plaintiffs' arguments are without merit. This Court has unequivocally held that a notice of interest based on an existing property interest is not a wrongful lien. Because plaintiffs' damages claim, by their own admission, was based on the wrongful lien statutes, the district court correctly dismissed it. Moreover, UDOT was clearly within its right to file a notice of interest based on the 1974 condemnation judgment. But the Court need not—indeed, should not—reach these issues in light of plaintiffs' failure to file their notice of appeal within thirty days of any decision but their untimely motion to amend or reinstate their complaint, miscaptioned as a Rule 59(e) motion.

ARGUMENT

I. THE NOTICE OF APPEAL IS UNTIMELY AS TO THE DISTRICT COURT'S RULINGS ON THE MERITS OF PLAINTIFFS' CLAIMS

The time for taking an appeal is spelled out in Rule 4 of the Utah Rules of Appellate Procedure. Under Rule 4(a), an appeal "shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from." In this case, the final order dismissing the last issue between the parties was entered on

January 6, 2010. Plaintiffs' April 27, 2010 notice of appeal was untimely as to the district court's final order.

Subsection (b) of the rule extends the time for appeal when certain postjudgment motions are filed. Plaintiffs characterized their postjudgment motion to amend or reinstate their constitutional takings claims as brought under Utah R. Civ. P. 59(e). Rule 59(e) permits the filing of a motion to alter or amend the judgment within ten days after entry of the judgment. Plaintiffs' motion was, in fact, filed only two days after the district court entered its final order of dismissal. However, the motion did not, in substance, seek to alter or amend the judgment; instead, it sought to amend or reinstate the complaint under Utah R. Civ. P. 15. *See* R. 1014. Such a use of Rule 59(e) is impermissible.

Utah's appellate courts have repeatedly held that after a final adjudication, a plaintiff may not file an amended complaint. The Utah Supreme Court addressed the issue in *Steiner v. State*, 27 Utah 2d 284, 495 P.2d 809 (1972). In *Steiner*, after the trial court granted the State's motion to dismiss, the plaintiffs neither took an appeal nor moved to alter or amend the judgment, but attempted to file an amended complaint one year later. The supreme court concluded that "even though the dismissal was without prejudice[,] that order was a final adjudication and did not authorize the plaintiffs to file an amended complaint in these proceedings." *Steiner*, 495 P.2d at 810. In *Nichols v. State*, the Court revisited the issue and, citing to *Steiner*, emphasized that "Utah has adopted the majority rule that an order of dismissal is a final adjudication, and thereafter, a plaintiff may not file an amended complaint. After an order of dismissal, the plaintiff

must move under Rules 59(e) or 60(b) to reopen the judgment." *Nichols*, 554 P.2d 231, 232 (Utah 1976) (footnote omitted). This Court has ruled similarly. In *Suarez v. Friel*, 2005 UT App 396, 2005 WL 2303797, the Court considered an inmate's due process challenge to an original parole grant hearing. Citing *Nichols*, the Court observed that the district court had properly denied Suarez's postjudgment motion to amend his petition after entry of an order of dismissal but without moving to reopen the judgment. *Suarez*, 2005 UT App 396 at *1 n.1.

Although plaintiffs' motion to amend or reinstate the complaint nominally invoked Rule 59(e), the purpose of the motion, as shown in plaintiffs' supporting memorandum, was to revive the claims already dismissed and interject new claims. *See* R. 1017 ("The grounds for constitutional claims by Plaintiffs against Defendants are that Defendants (the State of Utah) violated the constitutional takings clauses of the Utah and federal constitutions as well as other constitutional rights" by recording a notice of interest on the property). Under *Steiner* and *Nichols*, this is not an appropriate use of the rule. *See also Glasscock v. State*, 2003 UT App 254 at *1, 2003 WL 21664764 ("In determining whether a motion is a rule 59(e) motion, the substance of the motion, not its caption, is controlling."). Because the substance of plaintiffs' motion, amendment of their complaint, is not contemplated by Rule 59(e) or any other postjudgment motion that would toll the time for appeal, the decision denying the motion cannot serve as the trigger for a notice of appeal as to merits long since decided.

Moreover, as plaintiffs conceded in their reply memorandum to UDOT's Motion for Summary Disposition, even if the motion were properly taken, "it is entirely within the Court's discretion" whether to reinstate the takings claims. R. 1039. *See also Turville v. J & J Props., L.C.*, 2006 UT App 305, ¶ 30, 145 P.3d 1146 (concluding that even "where a party moves for leave to amend after an interlocutory dismissal [rather than, as here, after a final order of dismissal], a trial court may exercise its discretion in determining whether to grant the motion."). Here, however, the district court correctly ruled that its "final adjudication prevents Plaintiffs' already dismissed Complaint from being amended or from having their already dismissed constitutional takings claim reinstated." R. 1177.

Plaintiffs could have taken a timely appeal from the district court's final order. They cannot use a miscaptioned motion to extend the time to appeal from the court's substantive decision and to breathe new life into claims that have been fully adjudicated and a complaint that has been dismissed. The district court correctly denied the motion in compliance with binding precedent, and there are no grounds on which to reverse its decision.

II. ALL OF PLAINTIFFS' SUBSTANTIVE CLAIMS FAIL BECAUSE UDOT'S NOTICE OF INTEREST WAS NOT A WRONGFUL LIEN

Each of plaintiffs' issues on appeal depends in some manner on establishing that UDOT's notice of interest constituted a wrongful lien against plaintiffs' property. But, as

the district court correctly concluded, the notice of interest does not meet the definition of a lien or encumbrance, let alone a wrongful one:

A lien is defined as "a legal right or interest that a creditor has in another's property lasting usually until a debt or duty that it secures is satisfied." Black's Law Dictionary 941 (7th ed. 2004). An encumbrance is defined as "any interest in a third person consistent with a title in fee in the grantee, if such outstanding interest injuriously affects the value of the property." Hancock v. Planned Dev. Corp., 791 P.2d 183, 186 (Utah 1990). UDOT does not allege that it is a creditor, and it asserts an ownership interest in the property—an interest which is inconsistent with title in fee in the grantee. Therefore, UDOT has not filed a lien or encumbrance.

R. 333.

The district court's determination is supported by both statute and case law. As the court observed, under Utah Code Ann. § 38-9-1(6)(b) (West 2004), a document is not a wrongful lien if it is "authorized by or contained in an order or judgment of a court of competent jurisdiction in the state[.]" R. 333. At the time UDOT's notice of interest was filed, there were competing claims to the property—claims that had not been resolved. For example, while plaintiffs asserted that their title was superior because their interest was recorded before UDOT's and they were bona fide purchasers for value, the issue of their bona fide status was unproven and, as the court remarked, it was plausible that they would be unable to prove it, rendering their claim of title invalid. R. 334. Consequently, the notice of interest was authorized by the condemnation judgment and cannot be a wrongful lien.

This Court has held that a notice of interest does not constitute a wrongful lien when based on an existing property right, even if that right is subject to total divestment.

Birch v. Myers concerned an estate proceeding in which the trial court ruled that proceeds from the sale of the decedent's home belonged to a revocable living trust. The trial court held that a notice of interest filed by one of the decedent's heirs, who held a future interest in the property, was a wrongful lien. This Court reversed the trial court on that point, noting that

[t]he Utah Code specifically provides that "[a]ny person claiming an interest in land may preserve and keep effective such interest by filing [a notice of interest]," Utah Code Ann. § 57-9-4(1) (2000), and we do not see that this or any other section limits the filing of notices to protect only certain categories or quanta of interests.

2009 UT App 180 at ¶ 2 (alterations in original). The Court concluded that the heirs' future interest in the property, even if subject to total divestment, was an existing interest from the time of its creation, and was "future" only in the sense that its possession or enjoyment was to take place at a future time. *Id.* UDOT's notice of interest in the present case, like the notice in *Birch*, does no more than preserve an existing interest—one that may be subject to divestment by an earlier-recorded deed—until it can be properly adjudicated. Under *Birch*, there is nothing wrongful about UDOT's recorded notice.

Russell v. Thomas, cited by plaintiffs, is distinguishable on its facts. The dispute in *Russell* centered on an agreement between the parties for the sale of certain real property. The court observed that "the Agreement does not purport to convey an interest in land, but is nothing more than a promise to do so at a later time." *Russell v. Thomas*, 2000 UT App 82, ¶ 14, 999 P.2d 1244. In contrast to the present case, the Court in *Russell* explicitly found that "[n]o order or judgment of a court of competent jurisdiction

authorizing such action is in existence." *Id.* at ¶ 6. Because the defendant in *Russell*, unlike UDOT in this case, held no interest in the property, the Court held his notice of interest on the property to be a wrongful lien.

Plaintiffs' claim for damages fares no better. Plaintiffs state that they "relied upon Utah Code Annotated § 38-9-1 *et seq.* to claim damages as against UDOT[,]" and explicitly disclaim any reliance on the statutes governing quiet title actions. Aplt. Brief at 10. But because, as the district court correctly ruled, the notice of interest is not a wrongful lien under section 38-9-1, there is no basis for the damages plaintiffs seek.

Finally, even if plaintiffs' damages claim, contrary to their own representation, had been based on a quiet title theory, their invocation of Utah's Governmental Immunity Act (GIA) is unavailing. While Utah Code Ann. § 63G-7-301(2)(b) (West 2009) waives immunity for actions "brought to foreclose mortgages or other liens on real or personal property, to determine any adverse claim on real or personal property, or to obtain an adjudication about any mortgage or other lien that the government entity may have or claim on real or personal property[,]" plaintiffs' failure to establish that UDOT's notice of interest constitutes a lien is fatal to their cause of action under a quiet title theory.

Additionally, UDOT's withdrawal of the notice in 2008 moots any issue as to an adverse claim on the property. "Generally, the resolution of substantive issues renders an appeal moot. As we have previously stated, 'when the requested relief cannot affect the rights of the litigants,' we deem the case moot." *Salt Lake City v. Tax Comm'n of Utah*, 813 P.2d 1174, 1177 (Utah 1991) (quoting *Burkett v. Schwendiman*, 773 P.2d 42, 44 (Utah 1989))

(internal citation omitted). Even assuming, for the purpose of this argument only, that the district court incorrectly ruled that the GIA immunizes UDOT from damages for the allegedly wrongful lien, any error in that ruling would be irrelevant to the outcome: that plaintiffs are not entitled to damages because the notice of interest was not a lien at all.

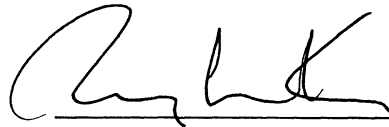
CONCLUSION

Plaintiffs' motion to amend or reinstate their complaint, filed after all their claims had been dismissed, was not, in substance, a Rule 59(e) motion or any other motion that would toll the time to appeal under Utah R. App. P. 4(b). Therefore, its denial did not start the time to appeal from the prior orders of dismissal, either with or without prejudice. As a consequence, this Court has jurisdiction only to determine whether the denial of that motion was correct. Precedent establishes the correctness of the district court's decision. But even if the Court concludes that there is jurisdiction over the substantive decisions, plaintiffs' failure to show error in the district court's ruling that UDOT's notice of interest was not a lien—wrongful or otherwise—leaves the Court without grounds to reverse those decisions. For these reasons, as explained above, UDOT respectfully requests the Court to affirm the district court's decision.

STATEMENT REGARDING ORAL ARGUMENT

UDOT believes that the jurisdictional issue in this appeal is both clear and dispositive. Consequently, it does not request oral argument, but desires to participate if oral argument is ordered.

DATED this 8th day of December, 2010.

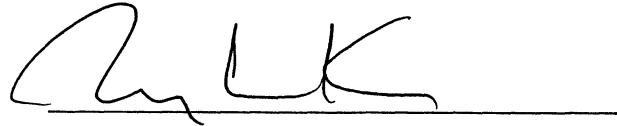
A handwritten signature in black ink, appearing to read 'Nancy L. Kemp', written over a horizontal line.

Nancy L. Kemp
Assistant Attorney General
Attorney for Defendant/Appellee

CERTIFICATE OF MAILING

I hereby certify that on this 8th day of December, 2010, I caused to be mailed, first class postage prepaid, two true and correct copies of the foregoing BRIEF OF APPELLEE to the following:

M. Darrin Hammond
Smith Knowles, P.C.
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A handwritten signature in black ink, appearing to read "MDH", is written over a horizontal line.

ADDENDUM A

APR 29 2010

SECOND DISTRICT COURT

2010 APR 27 P 1:30

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IN THE SECOND JUDICIAL DISTRICT OF WEBER COUNTY
OGDEN DEPARTMENT, STATE OF UTAH

MARK KAPPOS and MALA KAPPOS,

Plaintiffs,

vs.

THE STATE OF UTAH, DEPARTMENT OF
TRANSPORTATION,

Defendant.

NOTICE OF APPEAL

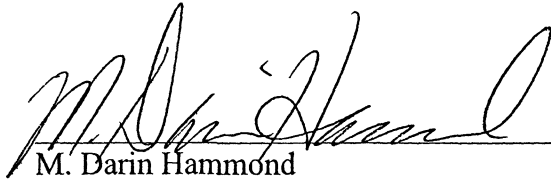
Civil No. 060902775

Judge: W. Brent West

Notice is hereby given that Plaintiffs Mark Kappos and Mala Kappos (Appellants), by and through their counsel, M. Darin Hammond of SMITH KNOWLES, P.C., hereby appeal to the Utah Court of Appeals and/or the Utah Supreme Court that final judgment of the Honorable W. Brent West entered in this matter on March 30, 2010 and entitled Order: Complaint Amendment/Reinstatement of Constitutional Takings Claim. This appeal is taken with regard to rulings and orders entered prior to the date of final judgment which will be more fully set forth during the process of the appeal.

DATED this 21 day of April, 2010.

SMITH KNOWLES, P.C.

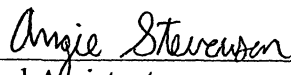


M. Darin Hammond
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April, 2010, I mailed a true and correct copy of the foregoing, **NOTICE OF APPEAL** by First Class United States mail, postage pre-paid to the following:

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Legal Assistant