

2010

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

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

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

M. Darin Hammond; Smith Knowles; Attorneys for Appellants.

Nancy L. Kemp; Utah Attorney General's Office; Attorneys for Appellee.

Recommended Citation

Brief of Appellant, *Kappos v. State of Utah*, No. 20100365 (Utah Court of Appeals, 2010).
https://digitalcommons.law.byu.edu/byu_ca3/2333

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals 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 COURT OF APPEALS

| | |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------|
| <p>MARK KAPPOS and MALA KAPPOS,</p> <p>Petitioners/Appellants,</p> <p>vs.</p> <p>THE STATE OF UTAH, DEPARTMENT OF TRANSPORTATION,</p> <p>Respondents/Appellees.</p> | <p>Appellate Case No: 20100365</p> |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------|

**OPENING BRIEF OF APPELLANTS
MARK KAPPOS AND MALA KAPPOS**

**APPEAL FROM THE DECISION AND ORDER
OF THE SECOND JUDICIAL DISTRICT**

| | |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------|
| <p>Nancy L. Kemp UTAH ATTORNEY GENERAL'S OFFICE Civil Appeals Division 160 East 300 South, 5th Floor Salt Lake City, UT 84114 <i>Attorneys for Appellee</i></p> | <p>M. Darin Hammond SMITH KNOWLES, P.C. 4723 Harrison, Suite 200 Ogden, Utah 84403 <i>Attorneys for Appellants</i></p> |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------|

ORAL ARGUMENT REQUESTED

**FILED
UTAH APPELLATE COURTS
OCT 28 2010**

IN THE UTAH COURT OF APPEALS

MARK KAPPOS and MALA KAPPOS,

Petitioners/Appellants,

vs.

THE STATE OF UTAH, DEPARTMENT
OF TRANSPORTATION,

Respondents/Appellees.

Appellate Case No: 20100365

**OPENING BRIEF OF APPELLANTS
MARK KAPPOS AND MALA KAPPOS**

**APPEAL FROM THE DECISION AND ORDER
OF THE SECOND JUDICIAL DISTRICT**

| | |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------|
| Nancy L. Kemp UTAH ATTORNEY GENERAL'S OFFICE Civil Appeals Division 160 East 300 South, 5 th Floor Salt Lake City, UT 84114 <i>Attorneys for Appellee</i> | M. Darin Hammond SMITH KNOWLES, P.C. 4723 Harrison, Suite 200 Ogden, Utah 84403 <i>Attorneys for Appellants</i> |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------|

ORAL ARGUMENT REQUESTED

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 24(a)(1) of the Utah Rules of Appellate Procedure, the following is a complete list of all parties to the proceedings below that are involved in this Appeal.

Mark Kappos, Appellant

Mala Kappos, Appellant

State of Utah, Department of Transportation, Defendant below, Appellee

TABLE OF CONTENTS

| | |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| PARTIES TO THE PROCEEDINGS | i |
| TABLE OF CONTENTS..... | ii |
| TABLE OF AUTHORITIES..... | iv |
| JURISDICTIONAL STATEMENT | vii |
| STATEMENT OF ISSUES ON APPEAL | vii |
| STANDARD OF REVIEW | vii |
| CONSTITUTIONAL PROVISIONS WHOSE INTERPRETATION ARE DETERMINATIVE | vi |
| STATUTES WHOSE INTERPRETATIONS ARE DETERMINATIVE..... | viii |
| STATEMENT OF THE CASE | viii |
| STATEMENT OF FACTS | xi |
| SUMMARY OF APPELLANTS' AGRUMENT | xii |
| ARGUMENT | 1 |
| I. BECAUSE UDOT FAILED TO TIMELY RECORD ITS INTEREST IN THE SUBJECT PROPERTY, IT HAD NO VALID BASIS TO SUBSEQUENTLY RECORD A NOTICE OF INTEREST ON THE KAPPOS PROPERTY ON JANUARY 19, 2006 | 1 |
| II. THE DISTRICT COURT ERRED IN DETERMINING THAT THE UDOT NOTICE OF INTEREST WAS NOT A LIEN ON APPELLANTS' PROPERTY..... | 4 |
| III. THE DISTRICT COURT ERRED IN RULING THAT THE NOTICE OF INTEREST WAS NOT A WRONGFUL LIEN | 6 |
| IV. THE DISTRICT COURT ERRED IN RULING THAT APPELLANTS CANNOT RECOVER DAMAGES FROM UDOT | 9 |

| | |
|-------------------------------------------------------------------------------------------------------------------------------------|--------------|
| V. THE UTAH GOVERNMENTAL IMMUNITY ACT DOES NOT GIVE UDOT IMMUNITY FROM THIS SUIT | 11 |
| VI. THE DISTRICT COURT ERRED IN GRANTING UDOT’S MOTION TO DISMISS THE APPELLANTS’ QUIET TITLE BONA FIDE PURCHASER CLAIM..... | 15 |
| VII. THE DISTRICT COURT ERRED IN NOT ADDRESSING APPELLANTS’ CONSTITUTIONAL CLAIMS | 16 |
| CONCLUSION..... | 18 |
| APPENDIX | |
| Appendix 1: Plat of Kappos Lots | |
| Appendix 2: UDOT's Notice of Interest | |
| Appendix 3: Ruling, Defendant’s Motion to Dismiss and Plaintiffs' Motion for Summary Judgment, dated June 15, 2007 | |
| Appendix 4: Kappos Deeds from Green | |
| Appendix 5: Green Deeds from Higley | |
| Appendix 6: 1974 Condemnation Order | |
| Appendix 7: Decision dated October 27, 2009 | |
| Appendix 8: Decision dated June 9, 2008 | |
| Appendix 9: Utah Code Annotated § 63-30d-201 <i>et seq</i> (2006) and Utah Code Annotated § 63-30d-301 <i>et seq</i> (2006) | |
| Appendix 10: Decision dated March 1, 2010 | |

TABLE OF AUTHORITIES

Statutes

Utah Code Annotated § 57-3-103 (pages vi, 1, 6, 8, and 15)
Utah Code Annotated § 38-9-1 *et seq* (pages 7, 9, and 10)
Utah Code Annotated § 38-9-1(2) (page vi)
Utah Code Annotated § 38-9-1(6) (page vi)
Utah Code Annotated § 38-9-4(1) (page vi)
Utah Code Annotated § 78-40-1 (page vi)
Utah Code Annotated § 78-40-2 (page vii)
Utah Code Annotated § 63-30d-201 *et seq* (2006) (page vii)
Utah Code Annotated § 63-30d-301 *et seq* (2006) (page vii)
Utah Code Annotated § 57-9-4 (page 8)
Utah Code Annotated § 38-9-7 (page 8)
Utah Code Annotated § 38-9-1 and § 38-9-4 (page 8)
Utah Code Annotated § 78-40-1 through 13 (1987) (page 10)
Utah Code Annotated § 63-30d-301(2) (page 11)

Cases

Kenny v. Rich, 186 P.3d 989, 997 (Utah App. 2008) (pages v, 5, and 9)
Ockey v. Lehmer 189 P.3d 51, 59-60 (Utah 2008) (page v)
W.W. Planning, Inc. v. Clark, 456 P.2d 406 (Ariz. App. 1969) (page 3)
First Interstate Bank of Sheridan v. First Wyoming Bank, 762 P.2d 379 (Wyo. 1988) (page 3)
Sun Valley Land and Minerals, Inc. v. Burt, 853 P.2d 607 (Idaho App. 1993) (page 3)
Hancock v. Planned Dev. Corp., 791 P.2d 183, 186 (Utah 1990) (page 4)
Russell v. Thomas, 999 P.2d 1244 (Utah App. 2000) (pages 7 and 8)
Jack Parson Companies v. Nield, 751 P.2d 1131 (Utah 1988) (page 10)
Trujillo v. UDOT, 986 P.2d 754, 760 (Utah App. 1999) (pages 11 and 14)
Houghton v. Department of Health, 125 P.3d 860 (Utah 2005) (page 11)
Tindley v. Salt Lake City School District, 116 P.3d 295 (Utah 2005) (page 12)
Johnson v. UDOT, 133 P.3d 402, 407 (Utah 2006) (pages 12 and 14)
Health Care Services Group, Inc. v. Utah Department of Health, 40 P.3d 591, 598-99 (Utah 2002) (page 13)
Rocky Mountain Thrift Stores, Inc. v. Salt Lake City Corporation, 784 P.2d 459 (Utah 1989) (page 13)
Sandberg v. Lehman, 76 P.3d 699 (Utah App. 2003) (page 13)
Carroll v. State Road Commission, 496 P.2d 888, 891 (Utah 1972) (page 14)
Keegan v. State, 896 P.2d 618, 625 (Utah 1995) (page 14)

Other Authorities

None

Rules

None

Treatises

Summary of Utah Real Property Law, vol. 1, page 87, § 2.42 (BYU 1978) (page 3)

Constitutional Provisions

None

JURISDICTIONAL STATEMENT

As provided by statute, the Court of Appeals has jurisdiction to review this matter pursuant to Utah Code Ann. §78-2a-3(2).

STATEMENT OF ISSUES ON APPEAL

Did the district court err in determining that the UDOT notice of interest was not a lien on Appellants' real property? Did the district court err in ruling that the notice of interest was not a wrongful lien? Did the district court err in ruling that Appellants cannot recover damages from UDOT? Did the district court err in finding that the State of Utah is immune from suit? Did the district court err in dismissing Appellants' claims based upon bona fide purchaser? Did the district court err in not addressing Appellants' constitutional claims?

STANDARD OF REVIEW

The standard for review for this matter is that the appellate court should give no deference to the trial court's conclusions of law and review the legal conclusions reached by the trial court for correctness. See, Kenny v. Rich, 186 P.3d 989, 997 (Utah App. 2008) Findings of fact are set aside if they are found to be clearly erroneous by the appellate court. See, Ockey v. Lehmer 189 P.3d 51, 59-60 (Utah 2008).

CONSTITUTIONAL PROVISIONS WHOSE INTERPRETATION ARE DETERMINATIVE

None.

STATUTES WHOSE INTERPRETATIONS ARE DETERMINATIVE

Utah Code Annotated § 57-3-103

Each document not recorded as provided in this title is void as against any subsequent purchaser of the same real property, or any portion of it, if: (1) the subsequent purchaser purchased the property in good faith and for valuable consideration; and (2) the subsequent purchaser's document is first duly recorded.

Utah Code Annotated § 38-9-1(2)

“Lien claimant” means a person claiming an interest in real property who offers a document for recording or filing with any county recorder in the state asserting a lien or other claim of interest in certain real property.

Utah Code Annotated § 38-9-1(6)

“Wrongful lien” means any document that purports to create a lien or encumbrance on an owner's interest in certain real property and at the time it is recorded or filed is not:

- (a) expressly authorized by this chapter or another state or federal statute;
- (b) authorized by or contained in an order or judgment of a court of competent jurisdiction in the state; or
- (c) signed by or authorized pursuant to a document signed by the owner of the real property.

Utah Code Annotated § 38-9-4(1)

A lien claimant who records or files or causes a wrongful lien as defined in Section 38-9-1 to be recorded or filed in the office of the county recorder against real property is liable to a record interest holder for any actual damages proximately caused by the wrongful lien.

Utah Code Annotated § 78-40-1

Action to determine adverse claim to property – Authorized. An action may be brought by any person against another who claims an estate or interest in real property or an interest or claim to personal property adverse to him, for the purpose of determining such adverse claim.

Utah Code Annotated § 78-40-2

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

Utah Code Annotated § 63-30d-201 *et seq* (2006)

Due to the length of this statute it is included in Appendix 9 hereto.

Utah Code Annotated § 63-30d-301 *et seq* (2006)

Due to the length of this statute it is included in Appendix 9 hereto.

STATEMENT OF THE CASE

When Appellants were attempting to sell their real property in Uintah, Utah during calendar year 2006, they became informed that UDOT claimed an interest in their property by virtue of an old condemnation order dated January 28, 1974. In furtherance of its claim, UDOT recorded a notice of interest on the Kappos residential property on January 19, 2006. Because the Kapposes obtained title to the subject property from was a bona fide purchaser for value, the State had no valid claim on their property and should not have recorded a notice of interest. The notice of interest recorded by UDOT wholly

prevented them from selling their property. The purpose of this action is for Appellants to seek damages from UDOT for its wrongful notice of interest.

STATEMENT OF FACTS

1. The property which is the subject matter of this appeal is owned by Mark and Mala Kappos and is located at 1577 East 6850 South, Uintah, Weber County, Utah (“the subject property”). R. 204.

2. The subject property includes two parcels: Parcel Number 07-540-0002 (hereinafter referred sometimes as “the home lot”) and 07-107-0026 (parcel behind lot and next to Weber River hereinafter references sometimes as “the river parcel”). The home lot and the river parcel are both owned by Appellants. R. 204-05. See also, Appendix “1” which shows plat map generated by Weber County which demonstrate the location of these two parcels.

3. On or about November 15, 2005 the Kapposes listed their property for sale with Coldwell Banker, a real estate brokerage. R. 131, Affidavit of Mala Kappos ¶7.

4. UDOT recorded a notice of interest as of January 19, 2006 on both of the above properties owed by Appellants. R. 217-18. See also Appendix “2”.

5. After attempting to sell their property, the Kapposes were informed through an agent of UDOT that they could not sell their property because of an alleged prior eminent domain proceeding. R. 131.

6. At that same time the Kapposes were informed that on January 16, 2003, the State of Utah Department of Transportation recorded a final order of condemnation

dated January 28, 1974. R. 131-32.

7. The Kapposes became unable to sell their property to anyone because of the notice of interest recorded by the State of Utah two months after listing their property for sale. R. 132-33, Affidavit of Mala Kappos paragraphs 10 through 17. Also, R. 144, Affidavit of Shauna Larsen.

8. UDOT has failed to set forth a sufficient reason for asserting the notice of interest on the property of the Appellants. R. 205.

9. UDOT did not record a similar notice on any of the Appellants' neighbors who had the same chain of title. R. 826-33 and R. 210-11.

10. Prior to the above course of events, Appellants had purchased the home lot from Ed Green Construction, Inc. with a recording date of August 9, 2001. R. 185, Affidavit of Ed Green ¶ 11 and R. 822.

11. Ed Green Construction, Inc. previously acquired title to the Kappos home lot from Edwin Higley with a recording date of June 1, 2000. R. 185, Affidavit of Ed Green ¶ 8, also R. 817-18.

12. With a recording date of August 26, 2002, the Kapposes received title to the river parcel from Ed Green. R. 185, Affidavit of Ed Green ¶ 12 and R. 824.

13. Ed Green previously acquired title to the river parcel from Edwin Higley with a recording date of May 10, 2000. R. 185, Affidavit of Ed Green ¶ 9 and R. 820.

14. Ed Green paid \$175,000.00 to Edwin Higley for the purchase of the subject parcels. R. 185-86, Affidavit of Ed Green ¶ 7, and R. 848.

15. Ed Green had no knowledge of a prior conveyance of the subject property

by Edwin Higley to the State of Utah. R. 185-86, Affidavit of Ed Green ¶ 15, and R. 329.

16. The recording of the above condemnation order took place approximately 29 years after the condemnation allegedly took place. R. 220-26.

17. As a result of the notice of interest recorded on January 19, 2006, The Kapposes were unable to sell the property, have been unable to re-finance the property, and have been unable to access any of their equity in the property. R. 131-32, Affidavit of Mala Kappos ¶¶ 10-11.

18. In March 2007, Appellants received an offer to purchase the property from Mark and Kimberly Lyon for the amount of \$740,000.00. R. 776-90.

19. Because the Kapposes could not convey free and clear title to said property, the sale failed to close. R. 769-70, Affidavit of Mark Kappos ¶¶ 7-9.

20. Since the recording of the notice of interest, the fair market value of the property dropped drastically to \$500,000.00. R. 770, Affidavit of Mark Kappos ¶ 9.

21. Appellants had planned on using some of their home equity to invest. Had their equity been accessible to them and but for UDOT's notice of interest, they would have realized approximately \$240,000 in additional value. Instead, that has now been lost due to the State's actions. R. 768-70, Affidavit of Mark Kappos ¶¶ 7-9.

22. It was not until July 16, 2008 that the State of Utah released its notice of interest on the property. R. 761, Withdrawal of notice of interest.

23. Based upon the above facts, the following is a historical timeline set forth for visual reference.

Historical Timeline

| January 28 1974 | February 25 1974 | May 10 2000 | June 1 2000 | August 9 2001 | August 26 2002 | January 16 2003 | January 19 2006 | 2007 | July 2008 |
|--------------------------------------------|----------------------------------------------|--------------------------------------------------|-------------------------------------------------|-------------------------------------------------|--------------------------------------------------|---------------------------------------------------------|----------------------------------------------|----------------------------------------------|----------------------------------------------|
| Condemnation Judgment against Higley | Judgment recorded Davis County only | Higley Conveyance to Green river parcel | Higley Conveyance to Green home parcel | Green Conveyance to Kappos home parcel | Green Conveyance to Kappos river parcel | Condemnation Judgment recorded in Weber County | Notice of Interest recorded by UDOT | Kapposes sale to Lyons fell through | Notice of Interest released by UDOT |

24. Based upon the above facts, the following is the chain of title for the respective parties:

Kappos Chain of Title (Based Upon the Home Lot)

Ed Higley to Ed Green Construction, Inc.



Ed Green Construction, Inc. to Kappos

Date of Deed: June 1, 2000

Recording Date: June 1, 2000

Date of Deed: August 8, 2001

Recording Date: August 9, 2001

UDOT's Chain of Title

Ed Higley to UDOT

Date of Order: January 19, 1974

Recording Date: January 16, 2003

SUMMARY OF APPELLANT'S ARGUMENT

Because UDOT failed to timely record its interest in the subject property, it had no valid basis to subsequently record a notice of interest regarding the Kappos property on January 19, 2006. The district court erred in determining that the UDOT notice of interest was not a lien on Appellants' property. The district court erred in ruling that the

notice of interest was not a wrongful lien. The district court erred in ruling that appellants cannot recover damages from UDOT. The Utah Governmental Immunity Act does not give UDOT immunity from this suit. The district court erred in granting UDOT's motion to dismiss the appellants' quiet title bona fide purchaser claim. The district court erred in not addressing appellants' constitutional claims.

ARGUMENT

I. BECAUSE UDOT FAILED TO TIMELY RECORD ITS INTEREST IN THE SUBJECT PROPERTY, IT HAD NO VALID BASIS TO SUBSEQUENTLY RECORD A NOTICE OF INTEREST ON THE KAPPOS PROPERTY ON JANUARY 19, 2006.

The result of the above-mentioned facts was that both UDOT and Ed Green had received conveyances from Edwin Higley for transfer of the same real property. UDOT believed that it had acquired the subject property from Edwin Higley. Moreover, Ed Green believed that he acquired title to the same property from Edwin Higley. Both grantees appeared to have valid conveyances. The answer to the question of who has the superior claim to the title of real property in this situation is answered by Utah Code Annotated § 57-3-103 which provides as follows:

Each document not recorded as provided in this title is void as against any subsequent purchaser of the same real property, or any portion of it, if: (1) the subsequent purchaser purchased the property in good faith and for valuable consideration; and (2) the subsequent purchaser's document is first duly recorded.

Therefore, in Utah, the grantee who records its deed first obtains paramount title if he purchased in good faith. Based upon the above statute, there is a two part analysis. Under Utah Code Annotated § 57-3-103 it should first be determined who recorded their deed first and second it is determined whether or not the subsequent purchaser recorded their deed in good faith.

With regard to the first question, it is undisputed that Ed Green and Ed Green Construction, Inc. recorded their deeds prior to the recording of the condemnation judgment in favor of UDOT. Ed Green Construction, Inc. recorded his conveyance of the home lot which he had obtained from Ed Higley on June 1, 2000 with the Weber County Recorder. R. 196-97. Ed Green previously acquired title from Ed Higley with regard to the river parcel and recorded his deed on May 10, 2000. R. 199. Ed Green then conveyed the home lot to Appellants as of a recording dated August 9, 2001 and the river parcel to the Appellants on August 26, 2002. R. 201-03. By contrast, UDOT waited to record its January 28, 1974 judgment that it had obtained from Ed Higley until January 16, 2003. R. 313-32 and R. 222-26. The recording of the above condemnation order took place approximately 29 years after the condemnation had allegedly occurred. But it is clear that Ed Green recorded his deeds to the same property prior to the recording of any interest which UDOT had claimed.

The next inquiry according to Utah Code Annotated § 57-3-103 is whether or not the subsequent purchaser (Ed Green) purchased the property in good faith and for a valuable consideration. Ed Green had no knowledge of any prior conveyance of the subject property by Edwin Higley to the State of Utah. R. 185-86. A copy of the Real Estate Purchase Contract shows the consideration paid by Ed Green to Ed Higley is a part of the record (\$175,000.00). R. 848 and R. 189-95. Interestingly, UDOT only recorded a notice of interest on Lot 2 of the subdivision and not on any of the other lots even though the condemnation order was recorded against those lots as well. R. 210-11. The same situation existed for all of the lots in the subdivision because Ed Higley had conveyed a

much larger parcel through the condemnation procedure to UDOT than what was individually conveyed to each of the lot owners in the subdivision.

It is undisputed that Ed Green paid valuable consideration for the purchase of the property from Ed Higley and that he had no knowledge of any alleged prior sale between Higley and the State of Utah. R. 185-86. As a result, he obtained bona fide purchaser status. The overwhelming weight of authority on this issue is that once a bona fide purchaser takes title to property he can pass it to the whole world free of the claims of the alleged first purchaser. See, case law from Utah's sister states including W.W. Planning, Inc. v. Clark, 456 P.2d 406 (Ariz. App. 1969) (ruling that a bona fide purchaser can deliver good title to a grantee even if that grantee has notice of a prior adverse equity); First Interstate Bank of Sheridan v. First Wyoming Bank, 762 P.2d 379 (Wyo. 1988) (holding that a bona fide purchaser may sell or convey property to persons who will then receive protections as a bona fide purchaser.); Sun Valley Land and Minerals, Inc. v. Burt, 853 P.2d 607 (Idaho App. 1993) (one who purchases with knowledge of a defect enjoys the same protection as the person from whom he purchased the property); Bailey v. Butner, 176 P.2d 226 (Nev. 1947) (finding that a subsequent purchaser from a bona fide purchaser enjoys bona fide purchaser protection status). See also, Summary of Utah Real Property Law, vol. 1, page 87, § 2.42 (BYU 1978). Thus, the Kapposes obtained title to the subject property from a bona fide purchaser, Ed Green.

Based upon the foregoing, the State of Utah never had a claim to the subject properties after Ed Green recorded his deeds from Ed Higley on May 10, 2000 and June 1, 2000 because UDOT failed to record its 1974 condemnation order in Weber County

prior to the recording of the property sales to Ed Green and Ed Green Construction, Inc., in the year 2000. Therefore, UDOT has no claim whatsoever to the subject property. UDOT lost that claim when Ed Higley recorded his deeds in May 2000 and June 2000 respectively.

II. THE DISTRICT COURT ERRED IN DETERMINING THAT THE UDOT NOTICE OF INTEREST WAS NOT A LIEN ON APPELLANTS' PROPERTY.

Appellants presented the above issues to the District Court by way of a motion for partial summary judgment. At the same time, the District Court considered UDOT's motion to dismiss. On or about June 15, 2007 the Second District Court issued a ruling entitled Ruling, Defendant's Motion to Dismiss and Plaintiffs' Motion for Summary Judgment. R. 328-42 (which is also attached hereto as Appendix 3). The District Court set out elements to qualify for relief under the wrongful lien statute stating that a property owner must show that, "(a) the document at issue purports to create a lien or encumbrance; (b) the lien was "wrongful" as defined by the Act; and (c) the lien the wrongful at the time it was filed." R. 332.

"The documents that were filed in this case do not purport to establish a lien or encumbrance as defined by the wrongful lien statutes. A lien is defined as "a legal right or interest that a creditor has in another 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. 332-33.

In summary, the District Court concluded that the notice of interest recorded by UDOT on Appellants' property was not a lien or encumbrance.

The standard of review which the Court should use in determining whether or not the District Court's legal conclusion on this issue is appropriate is the correctness standard. See, Kenny v. Rich, 186 P.3d 989, 997 (Utah App. 2008). The above case sets forth that the appellate court should give no deference to the trial court's conclusions of law and review the legal conclusions reached by the trial court for correctness. The legal conclusion that UDOT's notice of interest is not a lien or encumbrance is completely incorrect. The language of the notice of interest recorded by UDOT is "the undersigned, Utah Department of Transportation, State of Utah, does hereby assert and claim an interest in and to the following described property: [Both of Appellants parcels]." See, Appendix 2. The State of Utah had already recorded its Order of Condemnation on January 16, 2003 and therefore the recording of the notice of interest went outside the scope of the recording of the Order of Condemnation. Moreover, the effect of the recording of the notice of interest by UDOT defeated Appellants' attempts to sell the subject property. R. 132-33, R. 144, and R. 369-70.

As a result of the notice of interest recorded by UDOT, the Kapposes could not sell their property, could not access the equity in their property and could not do anything whatsoever with the title thereto. The State of Utah should not be engaging in this type of conduct – recording baseless notices of interest on property of its citizens. The conduct of the State of Utah to record a notice of interest when UDOT had lost any rights

of the property whatsoever pursuant to Utah Code Annotated § 57-3-103 is blatantly wrong. UDOT knew what it was doing when it recorded the notice of interest on the Appellants' property and clearly made the calculated decision to record it only against the Appellants' property and not against any other property of any other lot owner in the same subdivision who had the same chain of title. R. 210-11. The conduct was specifically targeted at Appellants and has no basis whatsoever. Although all of the other owners identified on the plat Appendix 1 had the same chain of title through Ed Higley and Ed Green, UDOT did not record a notice of interest on their properties--just the Kapposes. R. 826-33. Any analysis of the situation would show that UDOT had lost any claim to the subject property by failing to record earlier than Ed Green's deeds from Ed Higley. Moreover, the statutory and case law concerning bona fide purchaser status is abundantly clear on this issue and UDOT should not have engaged in this conduct by virtue thereof.

The District Court made a legal determination that the notice of interest did not constitute a lien or encumbrance. This legal conclusion is erroneous and this Court should correct that legal conclusion and direct the District Court to find that the notice of interest was a lien or encumbrance recorded by UDOT against the Appellants' property.

III. THE DISTRICT COURT ERRED IN RULING THAT THE NOTICE OF INTEREST WAS NOT A WRONGFUL LIEN.

The notice of interest was clearly intended by the State of Utah to prevent Appellants from selling their property or doing anything with it. That result was achieved by UDOT in preventing Appellants from selling their property. R. 769-70.

Because the final condemnation order of January 19, 1974 is of no effect as to the subject properties owned by the Kapposes, the notice of interest upon which the final condemnation order is based, is a wrongful lien. A notice of interest is in violation of Utah law. See, Russell v. Thomas, 999 P.2d 1244 (Utah App. 2000).

In Russell, the parties entered into a contract requiring the buyer to pay the seller more than \$500,000.00 for its interest in real property which included payment of certain amounts for lots to be developed and that a note would be secured by a trust deed and trust deed note to be recorded after closing of the construction loan and escrow arrangements were made. At no time did the real property owner in Russell convey to the lien claimant an interest in any of the lots. Notwithstanding, the claimant filed a notice of interest with the county recorder and the property owner filed a petition to clear title arguing that the Defendants had no legitimate legal claim to an interest in the properties and no contractual or legal right to file a so called “notice of interest”. The Russell court agreed with the property owner and the issue went up on appeal. The Court of Appeals noted that the trial court engaged in summary proceedings as provided an Utah Code Annotated § 38-9-1 *et seq.* The court stated “to file a notice of interest the person must minimally claim to have an interest in the land.” Id. at 1247. The Russell court further stated that in order to determine whether a document conveys an interest in land, the court should look at the agreement between the parties. The court found that the agreement in question did not purport to convey an interest in land but was nothing more than a promise to do so at a later time. The appellate court concluded that the Defendants did not have an interest in the property, that the notice of interest could not be authorized

under Utah Code Annotated § 57-9-4, and was therefore not exempted from the wrongful lien definition. Accordingly, the Russell court found that the notice of interest was a wrongful lien and that the Plaintiff was entitled to summary relief pursuant to the Utah Code Annotated § 38-9-7.

Similarly in this case, there are no grounds for a notice of interest being recorded on the Kappos property and said document constitutes a wrongful lien under Utah Code Annotated § 38-9-1 and § 38-9-4. The order of condemnation was recorded approximately 29 years late and did not grant any rights to the State of Utah by virtue of its being recorded after a recording by a subsequent bona fide purchaser of the real property. Moreover, because the notice of interest is based upon the 1974 condemnation order, it violates Utah Code Annotated § 57-3-103. Based upon the foregoing, the notice of interest recorded by the State of Utah Department of Transportation on January 19, 2006 was clearly a wrongful lien. Appellants should be entitled to recover all of their damages under the wrongful lien section of Utah Code Annotated § 38-9-1 *et seq.*

Utah Code Annotated § 38-9-1 as it existed at the time of the Court's decision states, "wrongful lien" means:

"Any document that purports to create a lien or encumbrance on a owner's interest in certain real property and at the time it is recorded or filed is not: (a) expressly authorized by this chapter or another state of federal statute; (b) authorized by or contained in an order or judgment of a court of competent jurisdiction in the state; or (c) signed by or authorized pursuant to a document signed by the owner of the real property."¹

¹ It is interesting to note that Utah Code Annotated § 38-9-1(6) has since been amended to include the term "notice of interest" as a wrongful lien.

While it may have been appropriate to record the Condemnation Order, it was completely illegal for UDOT to record the notice of interest because it did not meet any of these requirements. It is not expressly authorized by any statute. Moreover, the notice of interest is not authorized or contained in an order or judgment of a court of a competent jurisdiction especially given the fact that the judgment had already been recorded in 2003. Finally, the notice of interest was not authorized by Appellants Mark and Mala Kappos. Therefore, the Court should remand this case to the Judicial District Court instructing the court to find that the notice of interest was a wrongful lien.

The District Court made a legal determination that the notice of interest was not wrongful. This conclusion is erroneous and this Court should apply the standard of reviewing that conclusion for correctness set forth in the Kenny v. Rich case. This Court should direct the District Court to correct its erroneous legal conclusion and make a determination that the notice of interest recorded by UDOT was wrongful and that damages should be awarded under the wrongful lien statute. Utah Code Annotated § 38-9-1 *et seq.*

IV. THE DISTRICT COURT ERRED IN RULING THAT APPELLANTS CANNOT RECOVER DAMAGES FROM UDOT.

The District Court ruled that Appellants cannot recover damages from UDOT. R. 482-83. The standard of review with regard to this question is also that the Appellate Court should give no deference to the trial court's conclusions of law and should review the legal conclusions reached by the trial court for correctness. See, Kenny v. Rich, 186 P.3d 989, 997 (Utah App. 2008).

Appellants relied upon Utah Code Annotated § 38-9-1 *et seq.* to claim damages as against UDOT. The District Court cited to the quiet title sections of Utah Code Annotated § 78-40-1 through 13 (1987) in determining that no monetary damages could be recovered by Appellants. R. 335. However, Appellants did not rely upon the quiet title statute to claim damages, rather Appellants were relying upon the wrongful lien statute of 38-9-1 *et seq.* to recover damages as against UDOT. The wrongful lien statute does authorize damages and does not exclude the State of Utah. Thus, the District Court discounted the wrongful lien statute when making this ruling.

Moreover, the District Court cited another case in refusing to grant damages. See, Jack Parson Companies v. Nield, 751 P.2d 1131 (Utah 1988). That case does not stand for the proposition that Appellants cannot obtain damages. This matter is distinguished from the Nield case because in this case UDOT clearly lost its right to claim any title to the property by failing to record its condemnation order in a timely manner. In the Nield case, a seller brought a quiet title action against a purchaser's assignee relating to a real estate purchase contract. The court eventually decided that damages could not be allowed in that action because quiet title actions do not include any remedies for refusing to release title. But the wrongful lien statute was not discussed in that case because it had not been enacted at the time of the facts at hand. Id. at 1134 fn.1. The Kapposes have invoked the wrongful lien statute and have asked the court for damages in addition to attempting to quiet title. Because Appellants asked the District Court to interpret the wrongful lien statute, the court cannot rely upon the quiet title statute to defeat their claims under the wrongful lien statute. Moreover, the District Court should not have

dismissed Appellants' slander of title and defamation claims. R. 162 for the same reasons.

UDOT's notice of interest is the direct cause of damages to Appellants. When UDOT recorded its Condemnation Order it was basically meaningless because it was obvious to all title searchers that it had been recorded late. But when UDOT determined that it was not successful in asserting its claim pursuant to the Condemnation Order, it went one step further and recorded the notice of interest on the Kappos property only. This conduct was wrongful and caused the Appellants significant damages including the loss of a valuable sale of their home. This Court should recognize the damages suffered by the Appellants and direct the District Court to make a determination as to the amount of those damages.

V. THE UTAH GOVERNMENTAL IMMUNITY ACT DOES NOT GIVE UDOT IMMUNITY FROM THIS SUIT.

The District Court also erred in determining that the Utah Governmental Immunity Act does not allow Appellants to obtain damages against UDOT. R. 482-83. "[I]mmunity is an affirmative defense which the defendant bears the burden of proving." Trujillo v. UDOT, 986 P.2d 754, 760 (Utah App. 1999). The Utah Governmental Immunity Act does not prevent claims for quiet title actions. See, Houghton v. Department of Health, 125 P.3d 860 (Utah 2005).

The District Court concluded that UDOT has not waived its immunity for damages. R. 483. On the contrary, Utah Code Annotated § 63-30d-301(2) states that, "immunity from suit of each governmental entity is waived... (b) as to any action brought

to foreclose mortgages or other liens and 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 governmental entity may have or claim on real or personal property.” This action clearly deals with a claim of a governmental entity on private real property. Thus, although the court concluded that the State of Utah is immune from this lawsuit the result which it obtained was incorrect.

The District Court further stated that the Supreme Court of Utah case of Tindley v. Salt Lake City School District, 116 P.3d 295 (Utah 2005) is dispositive and that UDOT by recording a notice of interest was engaged in a governmental function. Appellants disagree with this conclusion because in the Tindley case the Supreme Court of Utah dealt with whether or not the Utah legislature could place a cap on damages in a situation where high school students were injured or killed in an automobile accident occurring on a return trip from out of state on an extracurricular activity. The Tindley case only addressed the constitutionality of governmental immunity and did not discuss specific waivers and non-waivers of governmental immunity.

The District Court stated that UDOT’s actions of recording the notice of interest were within its governmental function. R. 483. But this conclusion is in error.

Governmental immunity is not waived if the claim arises from a discretionary function, but governmental immunity is waived if the claim arises from an operational function. *See, Johnson v. UDOT*, 133 P.3d 402, 407 (Utah 2006). The case law suggests that a discretionary function is made at the policy making level not at the operational level. *See, Johnson v. UDOT*, 133 P.3d 402, 407 (Utah 2006).

The discretionary function exception to waiver of governmental immunity from suit for injury proximately caused by a negligent act or omission of an employee committed from the scope of employment is limited to broad policy decisions requiring evaluation of basic governmental policy matters, not operational administrative acts. *See, Health Care Services Group, Inc. v. Utah Department of Health*, 40 P.3d 591, 598-99 (Utah 2002).

There are many Utah cases which address the distinction between operational and discretionary functions. For instance, the design, capacity and construction of a city-wide drainage system was within the discretionary function exception to the Governmental Immunity Act. *See, Rocky Mountain Thrift Stores, Inc. v. Salt Lake City Corporation*, 784 P.2d 459 (Utah 1989) (finding that the design of a drainage system is a discretionary function but that decisions relating to operation and maintenance of the system may not have been made on the policy level and that the case should be remanded for factual determination).

In *Sandberg v. Lehman*, 76 P.3d 699 (Utah App. 2003) the court dealt with the issue as to whether or not immunity would be allowed relating to the design and operation of a landfill. The parties agreed that the design and operation of the landfill was a governmental function but disagreed as to whether the discretionary function except of the Governmental Immunity Act applied to the facts of the case. The court stated that discretionary function immunity is a distinct and limited form of immunity that should be applied only when a plaintiff is challenging a governmental decision that involves a basic policy-making function. *Id.* at 702. In *Sandberg* the court concluded that the decisions leading to omission of safety features at a concrete pit were not the

result of policy evaluation, judgment and expertise and further declined to extend the discretionary function immunity to those facts. *Id.* at 709.

Discretionary function immunity should be confined to those decisions and acts occurring at the basic policy-making level and not extended to those acts and decisions taking place at the operational level. *See, Carroll v. State Road Commission*, 496 P.2d 888, 891 (Utah 1972). The Utah Court of Appeals has stated that a government entity's policy-based decisions which are entitled to discretionary function immunity as distinguished with those that occur at the operational level are important to differentiate because "not every governmental action involving discretion is a discretionary function within the meaning of the Act." *See, Trujillo*, 986 P.2d 752, 758 (Utah App. 1999). Otherwise, "the exception would swallow the rule as almost all governmental decisions involve some discretion." *Id.* The decisions which are entitled to immunity are characterized "by the high degree of discretion and judgment involved in weighing alternatives and making choices with respect to public policy and planning." *See, Keegan v. State*, 896 P.2d 618, 625 (Utah 1995). Operational level decisions "concern routine, everyday matters, not requiring evaluation of broad policy factors." *Id.* at 623.

A good illustration of this analysis is found in *Johnson v. UDOT*, 133 P.3d 402 (Utah 2006). In that case, the court determined that the Department of Transportation's use of orange plastic barrels on highway construction project did not qualify for the discretionary exception to the waiver of governmental immunity under the Governmental Immunity Act. "While the judiciary strives not to interfere with governmental deliberations addressed by the political process, the government cannot escape liability

by simply claiming that some discretion, however minimal, was used in making a decision.” *Id.* “The key... is that the government actually exercises a level of discretion in a manner that implicates policymaking and thrusts the decision into the political process.” *Id.*

In this case, the recording of UDOT’s notice of interest on the Kappos real property was not a governmental policy, but an operational administrative act carelessly and negligently targeting the Appellants. This Court should find that governmental immunity does not apply to these facts.

VI. THE DISTRICT COURT ERRED IN GRANTING UDOT’S MOTION TO DISMISS THE APPELLANTS’ QUIET TITLE BONA FIDE PURCHASER CLAIM.

UDOT recognized that its notice of interest had no valid basis and eventually released the notice of interest on its own volition on July 16, 2008 by recording its withdrawal of notice of interest concerning the subject property. R. 744. With that act as its sole basis and in re-arguing all of the issues pertaining to Utah Code Annotated § 57-3-103, UDOT asked the District Court to dismiss Appellants’ claim for quieting title to the property. While Appellants are appreciative that the State of Utah has released its notice of interest and that it did so voluntarily, such conduct only begs the question of whether or not damages should have been awarded. The District Court determined that no damages could be awarded and therefore rejected Appellants’ arguments that although the release of notice of interest had quieted title to the property, still did not address the damages which UDOT had caused the Kappos family. R. 768-70. The Kappos family

suffered a great deal as a result of the recording of the notice of interest by UDOT which was wrongful from its inception. The Kapposes had intended to move their family to a new location, downsize their home and send their children to different schools. R. 768-70. The Kapposes had decided that moving to a new location would be better for their family. However, they could not sell their property and the sale of their property was actually defeated because of the notice of interest. R. 769-70. In addition, the Kapposes could not access any equity in their property during the extended period that the notice of interest was on the property. Moreover, the value of the property has significantly dropped since the sale of the property which the Kapposes lost as a result of the notice of interest. R. 770. Most importantly, the Appellants lost an actual buyer of their property at a price of \$740,000.00. R. 769-70. The damages to the Kapposes as a result of UDOT's actions are significant and have been completely discounted and overlooked by the District Court. This Court should review that decision and make a legal determination that the District Court erred in reaching that conclusion. Damages in this situation should be allowed.

VII. THE DISTRICT COURT ERRED IN NOT ADDRESSING APPELLANTS' CONSTITUTIONAL CLAIMS.

The District Court originally allowed Appellants to amend their complaint to allege constitutional issues. R. 526-27. However, by way of an order dated November 3, 2008 the court dismissed Appellants constitutional takings claim, based on both the United States and Utah Constitutions without prejudice. R. 653-55. Later, after other issues in the case were resolved which are not being appealed, Appellants asked the court

to reinstate the constitutional takings claim. In its decision filed March 1, 2010, the court determined that it would not reinstate Appellants' claim for constitutional taking even though it had been dismissed without prejudice. The court authorized Appellants to file a separate complaint to proceed with the constitutional takings claim. R. 1044-45. In a prior decision recorded October 27, 2009, while addressing UDOT's motion to dismiss the constitutional claim with prejudice, the District Court stated:

Admittedly, the Court's prior Ruling on the Plaintiffs' Constitutional Taking Claims is ambiguous. But so were the Plaintiffs' initial pleadings. With very little help in analysis, from the Plaintiffs in regards to their claims, the court was left to guess as to the Plaintiffs' theories of recovery. The court, guessing that the issue of mistake might in some way shape or form be part of the Plaintiffs' constitutional taking claim, dismissed that claim without prejudice. It was anticipated by the, the Court, that the Plaintiffs would file an amended complaint clarifying their claim or theory of recover. The Plaintiffs did file an amended complaint clarifying their Constitutional Takings Claim. The issues raised by the Plaintiffs in their amended complaint and in their response to the Defendant's motion as sufficient to deny the Defendant's motion. R. 997.

The court clearly felt that there was merit to Appellants' constitutional takings claim but refused to address it. The constitutional takings claim should have been addressed by the District Court in order to proceed on the basis of judicial economy rather than requiring a whole new lawsuit be filed when the judge was already familiar with the facts of the case.

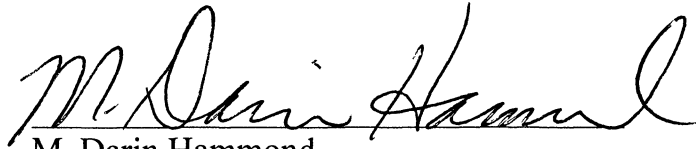
Based upon the foregoing, the District Court erred in not addressing Appellants' constitutional takings claims.

CONCLUSION

The District Court erred in making numerous legal determinations which prevented Appellants from recovering damages from UDOT for its wrongful notice of interest. The wrongful notice of interest caused the Appellants significant harm for the period of time that it was hindering title to their property. Therefore, this Court should reverse the rulings of the District Court, allow Appellants to recover damages and direct the District Court to determine the amount of those damages.

RESPECTFULLY SUBMITTED this 28 day of October, 2010.

SMITH KNOWLES, P.C.



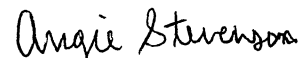
M. Darin Hammond

Attorneys for Appellants Mark and Mala Kappos

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing **OPENING BRIEF OF APPELLANTS** were mailed by first-class mail with postage fully prepaid this 28th day of October, 2010, to each of the following:

Nancy L. Kemp
UTAH ATTORNEY GENERAL'S OFFICE
Civil Appeals Division
160 East 300 South, 5th Floor
Salt Lake City, UT 84114



Legal Assistant

APPENDIX

297.43'
RICHARD D
HENDRICKSON & WF
071070023
277.34' 34,582 SQ FT

MARK D KAPPOS
- & wf MALA
071070026
32,608 SQ FT
SUO'54'24"W TU 58

GREG E BACKUS
& wf DELORES
071070025
31,394 SQ FT
TU 58

JARED A LUCAS
 (ED GRE) CONST INC-CLAIMS-)
 071070022
 TU 58 29.028 SO FT
 S 00°51'24" W 230.64

6850

JOHN M JORDANA
8 WF CAROL V
0-107000-4
30,301 ST RT
TUG

215



7 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100

V21G5530

WHEN RECORDED, MAIL TO:
Utah Department of Transportation
Right-of-Way, Fourth Floor
4501 S. 2700 West, Box 148420
Salt Lake City, Utah 84114-8420

EX 2155560 PB 1 OF 2
JULIE DRAFTS, WEBER COUNTY RECORDER
19-JAN-06 240 PM FEE \$1.00 DEP JKL
REC FOR: 1007
County Serial Numbers: 07-107-0025, 07-540-0002
UDOT Project Number: 1-804-8(7)43
Parcel Number: 49.6

NOTICE OF INTEREST

The undersigned, Utah Department of Transportation, State of Utah, does hereby assert and claim an interest in and to the following described property:

The property is located in Weber County, Utah, and more particularly described as follows: See Exhibit "A" attached hereto and by this reference made part of this document.

Said interest is pursuant to a Final Order of Condemnation recorded on 1/16/03 entry number 1905412, Book 2308 Page 1538 in the Weber County Recorder's office and on 2/25/74 Entry number 391720, Book 533 Page 927 recorded in the Davis County Recorder's Office.

IN WITNESS WHEREOF, said UTAH DEPARTMENT OF TRANSPORTATION has caused this instrument to be executed this 18th day of January, 2006 by the Director of Right-of-Way.

STATE OF UTAH)

) ss.

COUNTY OF SALT LAKE)

Utah Department of Transportation

Lyle D. McMillan
Lyle D. McMillan, Director of Right-of-Way

On the date above Lyle D. McMillan personally appeared before me, who acknowledged to me that he is the Director of Right of Way and that this instrument was signed by him in behalf of the Utah Department of Transportation.

WITNESS my hand and official stamp


The date is this 21st day of January, 2006.

EN 2155560 PG 2 OF 2


County Serial Numbers: 07-107-0026, 07-540-0002
UDOT Project Number: J-80N-617M6
Parcel Number: 49-5

EXHIBIT A

LEGAL DESCRIPTION

07-107-0026 

PART OF THE SOUTHWEST QUARTER OF SECTION 27, TOWNSHIP 5 NORTH, RANGE 1 WEST, SALT LAKE BASE AND MERIDIAN, U.S. SURVEY, DESCRIBED AS FOLLOWS: BEGINNING AT THE SOUTHEAST CORNER OF LOT 2, KAPPOS ESTATES SUBDIVISION, UTAH TOWN, WEBER COUNTY, UTAH; THENCE SOUTH 00D55'24" WEST 266.37 FEET TO THE CENTERLINE OF WEBER RIVER; THENCE ALONG SAID CENTERLINE SOUTH 85D38'11" WEST 48.23 FEET TO A 1500-FOOT RADIUS CURVE, THE CENTER OF WHICH BEARS SOUTH 04D21'49" EAST AND SOUTHWESTERLY ALONG SAID CURVE TO THE LEFT THROUGH A CENTRAL ANGLE OF 02D46'34" A DISTANCE OF 72.46 FEET; THENCE NORTH: 00D55'24" EAST 277.34 FEET TO THE SOUTHWEST CORNER OF SAID LOT 2; THENCE SOUTH 89D38'53" EAST ALONG THE SOUTH LINE OF SAID LOT 120.00 FEET TO THE POINT OF BEGINNING.

07-540-0002 

ALL OF LOT 2, KAPPOS ESTATES SUBDIVISION, UTAH TOWN, WEBER COUNTY, UTAH

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

| | |
|-----------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| MARK KAPPOS and MALA KAPPOS, Plaintiffs, vs. THE STATE OF UTAH, DEPARTMENT OF TRANSPORTATION, Defendant. | <div style="text-align: right;">JUN 15 2002</div> <div style="text-align: center;">RULING, DEFENDANT'S MOTION TO DISMISS AND PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT</div> <div style="text-align: center;">Civil No. 06Q902775 Judge W. Brent West</div> |
|-----------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

In this quiet title action, the Defendant, the Utah Department of Transportation (UDOT), has moved to dismiss all the Plaintiffs' claims, arguing that the Plaintiffs have failed to comply with the Utah Governmental Immunity Act (UGIA). Additionally, the Plaintiffs have moved for partial summary judgment, arguing that UDOT must release its notice of claim on their property. The Court will dismiss all of the Plaintiffs' remaining claims without prejudice except for the Plaintiffs' claim which seeks to quiet title due to a mistake in the condemnation order. The Court denies the Plaintiffs' motion for partial summary judgment.

BACKGROUND

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,

DECISION - COURT DENIES THE PLAINTIFFS' MOTION



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). Subsequently, the Plaintiffs filed a petition to nullify UDOT's documents pursuant to Utah Code Ann. § 38-9-1, et. seq (Wrongful Lien Statutes). (Petition, Case Number 060901882). The Honorable Michael D. Lyon ruled that the Plaintiffs did not qualify for relief under these provisions, because (a) at the time the UDOT filed its notice it was not wrongful; and (b) determining priority of title (between bona fide purchasers for value and title based on a condemnation order) is prohibited by the Wrongful Lien Statutes. (Order Dated May 8, 2006; ¶¶ 17 & 18).

As a result of this Order, the Plaintiffs filed this separate suit which included claims for (1) quiet title; (2) slander of title; and (3) defamation of title. (Complaint, Case Number 060902775). The Plaintiffs' complaint provided alternate bases for their quiet title claim—(a) Plaintiffs' title was superior to UDOT's due to their status as bona fide purchasers for value and (b) the condemnation order mistakenly included the description of the disputed property when another property was intended for inclusion. Id. UDOT filed a motion to dismiss arguing that (1) the Plaintiffs failed to comply with the notice requirements of the Utah Governmental

Immunity Act (UGIA), and (2) Plaintiffs' claims of slander and defamation of title were barred by UGIA. The Court entered an order dismissing the Plaintiffs' slander and defamation of title claims, because they are barred by the UGIA.

However, the Court was unable to rule on the Plaintiffs' remaining claim(s)—quiet title, because it was unclear what the Plaintiffs were actually claiming. In the Plaintiffs' complaint, they sought monetary damages as a remedy to their quiet title claim—a remedy which is highly unusual in a quiet title claim. (Plaintiffs' Complaint, Page 8 ¶ 41). The Court's extensive research failed to uncover one case where a court awarded monetary damages pursuant to a quiet title cause of action. After reviewing the documentation in this case, it was apparent that the Plaintiffs were alleging that their damages were caused by UDOT's filing of the above-referenced documents—not by its claim to the property. (Affidavit of Mala Kappos, Pages 2-3, ¶¶ 10, 11, 13, & 14). Since the Court had not been informed of the Plaintiffs' previous petition to nullify a wrongful lien, this indicated that the Plaintiffs' quiet title claim was actually a hybrid of two different claims—one for wrongful lien and one for quieting title.

The proper characterization of these claims (as a traditional quiet title, wrongful lien, or something else) was important, because equitable claims are exempt from the requirements of the UGIA, but legal claims are not. Without a proper understanding of the Plaintiffs' claim(s), the Court could not characterize the claim(s) as legal or equitable. Therefore, the Court could not conclude whether the Plaintiffs' quiet title claim was subject to the requirements of the UGIA—a conclusion that was necessary to rule on UDOT's motion to dismiss.

To do substantial justice, the Court requested that the Plaintiffs specify what cause(s) of action they were pursuing or to inform the Court that they needed more time for discovery. The Plaintiffs told the Court that they needed more time for discovery (Plaintiffs' Request to Complete Discovery), but subsequently, the Plaintiffs filed a motion for summary judgment asking the Court to have UDOT remove its notice of interest—essentially, an action under the Wrongful Lien Statutes.

In the hearing on the Plaintiffs' motion for summary judgment, the Plaintiffs would not specify which claims they were making, and UDOT renewed its motion to dismiss. Due to these unusual circumstances, the Court will discuss the relationship between quiet title and wrongful lien actions, characterize the Plaintiffs' remaining quiet title claim(s), ascertain whether the Plaintiffs have stated claim(s) for which relief can be granted, and determine whether the Plaintiffs' claims should be dismissed due to the failure to comply with the notice requirements of the UGIA.

THE RELATIONSHIP BETWEEN QUIET TITLE AND WRONGFUL LIENS—THE PLAINTIFFS' CLAIMS

Quiet title actions are used to resolve disputes in which a party asserts an ownership interest in property which is invalid, or, it is used to determine which of two parties has superior title when more than one party has a valid claim to ownership. Nolan v. Hoopiaina (In re Hoopiaina Trust), 144 P.3d 1129, 1137 (Utah 2006). Quiet title actions can also be used to remove a wrongful lien or encumbrance. Anderson v. Wilshire Invs., L.L.C., 123 P.3d 393 (Utah 2005).

However, property owners who seek to remove a wrongful lien or encumbrance, may

have a second option—a petition under the Wrongful Lien Statutes. In the Wrongful Lien Statutes, the legislature has provided for an expedited procedure to resolve wrongful liens/encumbrances if certain requirements are met. One of the most important of these requirements is that the wrongful lien or encumbrance asserted by the plaintiff must meet the definition of wrongful under the Wrongful Lien Statutes—a definition which is much stricter than under traditional property law. If these requirements are not met, the party must pursue relief under traditional quiet title principles.

Using this understanding of quiet title principles, relying on its previous observations, and the Plaintiffs’ motion for summary judgment, the Court will construe the Plaintiffs’ remaining quiet title claim as four different causes of action: (1) a wrongful lien under the Wrongful Lien Statutes, (2) quiet title due to a wrongful lien, (3) quiet title as UDOT’s ownership claim is based on a mistake in the order of condemnation, and (4) quiet title due to the superiority of the Plaintiffs’ title under the legal concept of a bona fide purchaser for value.

WRONGFUL LIEN PURSUANT TO THE WRONGFUL LIEN ACT

The Plaintiffs’ claim for a wrongful lien pursuant to the Wrongful Lien Statutes fails to state a claim for which relief can be granted. To qualify for relief under the Wrongful Lien Statutes, a property owner must show that (a) the document at issue purports to create a lien or encumbrance; (b) the lien was “wrongful” as defined by the Act; and (c) the lien was wrongful at the time it was filed. Utah Code Ann. § 38-9-7. The Plaintiffs’ claim fails to meet any of these requirements.

The documents that were filed in this case do not purport to establish a lien or

encumbrance as defined by the Wrongful Lien Statutes. 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.

Even if UDOT had been asserting a lien/encumbrance, it would not have been wrongful under the Wrongful Lien Statutes. The Act states that a lien is *not* wrongful if it was authorized by or contained in an order or judgment of a court of competent jurisdiction in the state. Utah Code Ann. §38-9-1(6)(b). Since the condemnation order authorized UDOT to take the property, it is not wrongful under the Wrongful Lien Statutes.

The Plaintiffs cannot show that UDOT’s documents were wrongful at the time they were recorded. The Plaintiffs have asserted that UDOT’s condemnation order and its notice of interest were wrongful at the time they were filed, because by the time these documents were recorded the Plaintiffs’ title to the property was superior to UDOTs under the legal concept of bona fide purchaser for value. Under Utah Code Ann. §57-3-103 a party that fails to record a document which conveys property to it, risks losing its claim to that property if (a) the original owner sells the same property to a second party; (b) the second party purchased the property in good faith; (c) the second party paid valuable consideration for the property; and (d) the second party records its

deed before the first buyer. While the Plaintiffs may eventually be able to prove that they are bona fide purchasers for value, they had not done so when UDOT filed its documents. At this time (and at the time UDOT filed) it is plausible that the Plaintiffs will not be able to establish that they are bona fide purchasers for value—rendering their claim to the property invalid. Therefore, UDOT’s recording was not wrongful at the time it filed.

Since the Plaintiffs’ claim does not meet any of the requirements for relief under the Wrongful Lien Statutes, their claim under the Wrongful Lien Statutes fails to state a claim for relief.

PLAINTIFFS’ CLAIM FOR QUIET TITLE DUE TO A WRONGFUL LIEN

The documents recorded in this case are not liens or encumbrances. (See discussion supra, Wrongful Lien Pursuant to the Wrongful Lien Act, ¶ 3). Therefore, the Plaintiffs’ claim for quiet title due to a wrongful lien fails to state a claim for relief.

PLAINTIFFS’ CLAIMS FOR QUIET TITLE DUE TO A MISTAKE IN THE ORDER CONDEMNING PROPERTY AND SUPERIORITY OF PLAINTIFFS’ TITLE

The Plaintiffs have stated claims for relief in their claim for quieting title due to a mistake in the order condemning the property and their claim that their title is superior due to the legal concept of bona fide purchasers for value. However, the Plaintiffs *may not* request monetary damages as a part of these claims.

Since the Plaintiffs’ quiet title claim included an unusual request for monetary damages as a remedy, one of the pivotal issues in this case, is whether traditional quiet title principles allow a plaintiff to recover monetary damages. The Court concludes that a plaintiff may not receive monetary damages for a traditional quiet title cause of action. Rather, if a plaintiff in a

quiet title action seeks damages, he/she must plead and prove an additional cause of action which authorizes damages as a remedy.

The plain language of the statutes which authorize a quiet title action and the case of Jack B. Parson Companies v. Nield, 751 P.2d 1131 (Utah 1988) support this conclusion. In Nield, the defendant provided money for a company's down payment on a land sales contract in which plaintiff was the seller. In exchange, the defendant received an assignment of the company's rights in the real estate contract—an assignment he recorded. When the company defaulted, the defendant refused to redeem the property or release his assignment, as the plaintiff requested, for approximately eight months. This refusal resulted in financial damage to the plaintiff. The plaintiff filed suit claiming a cause of action in quiet title and one in wrongful refusal to cleanse title. In overturning the trial court's award for damages for wrongful refusal to cleanse title, the Nield court stated; "[t]here is no basis in law for this award. Quiet title actions are statutory in nature, and *Utah Code Ann. §§ 78-40-1 through -13* (1987), authorizing quiet title actions, does not include any remedies for refusing to release title." Id. at 1133 (internal citations omitted). Further, the Nield court explained that at common law, there was no action for refusal to cleanse title. "This Court held that there was no affirmative duty to release the lien and that 'at the common law, no action for damages would lie because of a refusal to release a mortgage or discharge a lien or claim against property.'" Id. at 1134 (internal citations omitted).

A review of the current statute shows that it still does not include a remedy for refusing to release title—only for the wrongful withholding of property. Based on the plain language of the current statute and the language in Nield, the Court concludes that a plaintiff is not allowed to

recover monetary damages in a quiet title action, nor are they allowed to recover monetary damages for a cause of action which is similar to wrongful refusal to cleanse title.

The Nield case closely parallels this action—the Plaintiffs, in this case, seek an order quieting title in the land and damages for UDOT’s refusal to release its recorded documents. As in Nield, the party clouding title, UDOT, originally had the authority to file its documents which clouded the property owner’s title. (See discussion supra, Wrongful Lien Pursuant to the Wrongful Lien Act ¶ 5). The Plaintiffs, in this case, also requested that UDOT release title, but UDOT refused. (Plaintiffs’ Complaint, Page 6, ¶ 32). According to the Plaintiff’s affidavit, the monetary damages incurred by the Plaintiffs resulted from this refusal—not from UDOT’s claim. (Affidavit of Mala Kappos, Pages 2-3, ¶¶ 10, 11, 13, & 14). While the Plaintiffs have not alleged a separate cause of action such as wrongful refusal to cleanse title, their request for damages is essentially the same as the wrongful refusal to release damages in Nield—they are alleging the same type of damages and asking for compensation. Since Nield has prohibited claims which are similar to the wrongful refusal to release filed documents, the Plaintiffs’ request for monetary damages is not allowed. Therefore, the Plaintiffs’ may not request monetary damages as a part of their quiet title action.

PLAINTIFFS’ FAILURE TO COMPLY WITH UGIA’S NOTICE REQUIREMENTS

UDOT has argued that, even if the Plaintiffs have stated a claim for relief, the Plaintiffs’ failure to comply with the UGIA’s notice requirements should result in a dismissal, because failure to comply with the UGIA’s notice requirements divests the Court of subject matter jurisdiction. The Plaintiffs have argued that their quiet title claim is an equitable claim which is

not subject to the UGIA's notice requirements, but they also assert that they gave notice.

Equitable claims are exempt from UGIA's notice requirements. American Tierra Corp. v. West Jordan, 840 P.2d 757, 759 (Utah 1992). However, if a claim is subject to the UGIA, failure to strictly comply with the UGIA's notice requirements divests a court of subject matter jurisdiction over a plaintiff's claim(s). Davis v. Cent. Utah Counseling Ctr., 147 P.3d 390, 399 (Utah 2006). Therefore, the Court must determine whether a quiet title claim is legal or equitable.¹

As construed earlier, the Plaintiffs have stated two different "quiet title" actions. The first alleges that UDOT should never have received title to the property, because the condemnation order mistakenly included the description of the disputed property when a different property should have been included. The second alleges that the Plaintiffs have superior title to UDOT, because they are bona fide purchasers for value. These are two different cause of action. In Nolan v Hoopiiaina (In Re Hoopiiaina Trust), the Supreme Court of Utah distinguished between "true quiet title actions" which seek to perfect a party's title against adverse claims and other quiet title actions which seek the remedy of quieting title, but do so on the basis other than the perfection of title from an adverse claim, i.e., fraud, mistake, accident, etc. 144 P.3d 1129, 1135-38 (Utah 2006). The Plaintiffs' claim that they are bona fide purchasers for value is a true quiet title action, and their claim that there was a mistake in the judgment is a not true quiet title action—it is an action to reform a judgment based on a mistake.

¹ The Court recognizes that the Plaintiffs' complaint also stated claims for slander and defamation of title—claims that were dismissed for failure to state a claim for which relief could be granted. While UDOT's motion to dismiss based on the Plaintiffs' failure to follow the notice of claim requirements could apply to these claims, the Court will not address its applicability, because these claims have already been dismissed.

Plaintiffs' claim that there was mistake in the judgment is an equitable action. Mistake in a judgment or order due to a "mistake of fact or false assumption may be grounds for relief under rule 60(b)(7) or pursuant to an independent action in equity regardless of the length of time that has passed." Gillmor v. Wright, 850 P.2d 431, 435 (Utah 1993) (Internal Quotation Omitted). Here, the Plaintiffs have filed a separate action. It is one in equity. Therefore, it is exempt from the UGIA's notice requirements.

However, the Plaintiffs' claim that they are bona fide purchasers for value is a legal claim. In Holland v Wilson, 327 P.2d 250 (Utah 1958), the Supreme Court of Utah decided that a party in a quiet title action is entitled to a jury, because quiet title claims are legal. "This court has already held that an action to quiet title is an action at law and either side upon request is entitled to a jury trial." Id at 251. The Court continued;

We are further of the opinion that although historically an action to quiet title was originally equitable and the law courts had no jurisdiction to grant such relief, that situation does not prevail in this state. Formerly the equity courts afforded relief because there was no adequate remedy at law. In this jurisdiction, however, there is an adequate remedy provided by statute under the provisions of Chapter 40 of Title 78, U.C.A.1953.

Id at 252. In another quiet title case, Babcock v Dangerfield, 94 P.2d 862, (Utah 1939), the Supreme Court of Utah stated, "it is clear from the pleadings in this case that the action is one at law and therefore that a jury trial should have been granted." (Internal Citations Omitted). Given this case law, the Court concludes that the Plaintiffs' quiet title claim was a legal cause of action. Therefore, they must have strictly complied with the UGIA's notice requirements or the Court will be divested of subject matter jurisdiction to consider their claims.

The Court finds that the Plaintiffs did not provide appropriate notice, because it did not deliver a notice of claim to the Utah Attorney General (attorney general) before filing suit.² The UGIA requires that a notice of claim must be sent to the entity before maintaining an action, Utah Code Ann. § 63-30-12 and Utah Code Ann. § 63-30d-401. Additionally, a claimant must deliver the notice of claim to both the entity and the attorney general within one year after the claim arose. See, Utah Code Ann § 63-30-12 and Utah Code Ann § 63-30d-402. Usually, a plaintiff would comply with these requirements by filing a notice of claim with the attorney general and the entity within one year, and then he/she would file suit.

However, the Plaintiffs' quiet title claim muddies the time requirements for filing notice of claim with the attorney general. The UGIA specifies that a claim arises when the statute of limitations would begin to run against a private person. See, Utah Code Ann. § 63-30-11 and Utah Code Ann. § 63-30d-401. Since the statute of limitations does not apply to "true quiet title actions," such as the Plaintiff's bona fide purchaser for value claim, Nolan v Hoopiaina (In Re Hoopiaina Trust), 144 P.3d 1129, 1135-38 (Utah 2006), the one year requirement does not apply. Therefore, if a plaintiff was asserting a quiet title claim, it would have to deliver a notice of claim to the entity before it filed suit, but there would be no deadline to deliver the notice of claim to the attorney general's office—even though the UGIA requires that the attorney general receive notice of claim.

This case demonstrates this problem. The Plaintiffs sent a letter to Diane McGuire, a real estate specialist, with the Utah Department of Transportation, on March 3, 2006—before they

²Different versions of the UGIA was passed after UDOT filed the condemnation order in January, 2003 and before it filed a notice of interest in January, 2006. The notice requirements do not differ in material ways.

filed. However, they did not send the notice to the attorney general's office until October 17, 2006—after they filed suit. Therefore, the attorney general was not notified as required before this case was filed.

Because of this ambiguity in the statute, the Court looks to the intent of the statute, and it concludes that such a plaintiff in a quiet title action must serve the attorney general before it files suit. The UGIA clearly intends that a plaintiff send two notices—one to the entity and one to the attorney general. Lamarr v. Utah State DOT, 828 P.2d 535, 540-41 (Utah Ct. App. 1992). The purpose of serving the attorney general is to ensure that the State's legal needs are met. Brittain v. State by & Through Utah Dep't of Employment Sec., 882 P.2d 666, 671 (Utah Ct. App. 1994). If there is no deadline for a plaintiff in a quiet title action to notify the attorney general, it would contravene the statute's intent to ensure that the State's legal needs are met. Therefore, a plaintiff in a quiet title action, must send its notice of claim to the attorney general before it files suit. Since the Plaintiffs in this case failed to file a notice of claim with the attorney general until after they filed suit, their claim to quiet title due to their bona fide purchaser for value statute is dismissed without prejudice.

The Court also finds that the notice of claim that the Plaintiffs sent before they filed suit was not sufficient, because it was not sent to the appropriate person at UDOT. The letter the Plaintiffs sent was addressed to Diane McGuire, a real estate specialist. Under Rule 4 of the Utah Rules of Civil Procedure, service on a state agency must be made by serving any member of its governing board, its executive employee, or its executive secretary. Since the letter Plaintiffs' sent was not directed to any of these parties, the Plaintiffs' notice of claim was insufficient.

Since the Plaintiffs failed to provide adequate notice of claim, the Court dismisses all of the Plaintiffs' claims except for its claim to quiet title due to a mistake in the condemnation order.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The Plaintiffs' motion for partial summary judgment is denied. The motion seeks to have UDOT's recorded documents removed under the Wrongful Lien Statutes, because they are wrongful. As discussed *infra*, the UDOT's claim is not a lien or encumbrance, and at this time, it is not clear whether UDOT's claim is wrongful. (See discussion supra Wrongful Lien Pursuant to the Wrongful Lien Act, ¶ 5). Therefore, the Court denies the motion.

Ms. Lui will prepare an order for the Court's signature.

Dated this 14th day of June, 2007

A handwritten signature in black ink, appearing to read 'W. Brent West', written over a horizontal line.

W. Brent West, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 15 day of June, 2007, I sent a true and correct copy
of the foregoing Ruling to counsel as follows:

M. Darin Hammond
Counsel for the Plaintiffs
Smith Knowles, P.C.
4723 Harrison Blvd., Suite 200
Ogden, UT 84403

T. Laura Lui, Assistant Attorney General
Counsel for the Defendants
Utah Attorney General
P O Box 140857
Salt Lake City, UT 84114-0857


Deputy Court Clerk

WHEN RECORDED MAIL TO:
Mark D. Kappos
Mala Kappos
2130 East 3325 North
Layton, Utah 84040

AT CONFIRMATION RECORDING ONLY
HERITAGE WEST TITLE MAKES NO
REPRESENTATION AS TO CONDITION OF
FILE, NOR DOES IT ASSUME ANY
RESPONSIBILITY FOR VALIDITY,
SUFFICIENCY OR EFFECT OF DOCUMENT

QUIT CLAIM DEED

(Corporate Form)

441983 24A

Ed Green Construction, Inc.,

a corporation organized and existing under the laws of the State of Utah, with its principal office at 2160 North Valley View Drive, of Layton, State of Utah, grantor, hereby QUIT CLAIMS to

Mark D. Kappos and Mala Kappos, husband and wife as joint tenants

grantee of Layton, for the sum of TEN DOLLARS, the following described tract(s) of land in Weber County, State of Utah:

ALL OF LOT 2, KAPPOS ESTATES SUBDIVISION, UINTAH TOWN, WEBER COUNTY,
UTAH ACCORDING TO THE OFFICIAL PLAT THEREOF ON FILE AND OF RECORD IN
THE OFFICE OF THE WEBER COUNTY RECORDER.

ALSO, PART OF THE SOUTHWEST QUARTER OF SECTION 27, TOWNSHIP 5 NORTH, RANGE 1 WEST, SALT LAKE BASE AND MERIDIAN, U.S. SURVEY, DESCRIBED AS FOLLOWS:

BEGINNING AT THE SOUTHEAST CORNER OF LOT 2, KAPPOS ESTATES SUBDIVISION, UINTAH TOWN, WEBER COUNTY, UTAH; THENCE SOUTH 00D55'24" WEST 266.37 FEET TO THE CENTERLINE OF THE WEBER RIVER; THENCE ALONG SAID CENTERLINE SOUTH 85D38'11" WEST 48.23 FEET TO A 1500-FOOT RADIUS CURVE, THE CENTER OF WHICH BEARS SOUTH 04D21'49" EAST AND SOUTHWESTERLY ALONG SAID CURVE TO THE LEFT THROUGH A CENTRAL ANGLE OF 02D46'04" A DISTANCE OF 72.46 FEET; THENCE NORTH 00D55'24" EAST 277.34 FEET TO THE SOUTHWEST CORNER OF SAID LOT 2; THENCE SOUTH 89D58'03" EAST ALONG THE SOUTH LINE OF SAID LOT 120.00 FEET TO THE POINT OF BEGINNING, CONTAINING 0.76 ACRES.

07-540-0002

The officers who sign this deed hereby certify that this deed and the transfer represented thereby was duly authorized under a resolution duly adopted by the board of directors of the grantor at a lawful meeting duly held and attended by a quorum.

In witness whereof, the grantor has caused its corporate name and seal to be hereunto affixed by its duly authorized officers this 14 day of July, A.D. 2001

Ed Green Construction, Inc.

Edward D. Green President,

STATE OF Utah)
County of) ss.

44 1788174 0K2157 PG1489
DOWN CROFTS, HERBER COUNTY RECORDER
09-AUG-01 404 PM FEE \$11.00 DEP JPM
REC FOR HERITAGE.WEST

On the 8 day of July, A.D. 2009, personally appeared before me Edward D. Green, who being by me duly sworn, did say that he is the President of Ed Green Construction, Inc., a corporation, and that the foregoing instrument was signed in behalf of said corporation by authority of a resolution of its Board of Directors, and the said Edward D. Green acknowledged to me that said corporation executed the same.

NOTARY PUBLIC.

My Communication Experiences

My resident is:

WHEN RECORDED MAIL TO:
Mark D. Kappos
Mala Kappos
2130 East 8325 North
Layton, Utah 84040

ACCOMMODATION RECORDING

ACCOMMODATION RECORDING ONLY
HERITAGE WEST TITLE TAKE AND
REPRESENTATION AND CONDITION OF
TITLE, NOR DOES IT ASSUME ANY
RESPONSIBILITY FOR VALIDITY,
SUFFICIENCY OR EFFECT OF DOCUMENT

ACCOMMODATION
HERITAGE WEST TITLE TAKE AND
REPRESENTATION AND CONDITION OF
TITLE, NOR DOES IT ASSUME ANY
RESPONSIBILITY FOR VALIDITY,
SUFFICIENCY OR EFFECT OF DOCUMENT

QUIT CLAIM DEED

Edward Green,

EX-7-00036-03-107-001134
HERITAGE WEST TITLE TAKE AND
REPRESENTATION AND CONDITION OF
TITLE, NOR DOES IT ASSUME ANY
RESPONSIBILITY FOR VALIDITY,
SUFFICIENCY OR EFFECT OF DOCUMENT
grantee,

of Layton, County of Davis, State of Utah,

hereby QUIT-CLAIM to

Mark D. Kappos and Mala Kappos, husband and wife as joint tenants

grantees,

of Layton, County of Davis, State of Utah

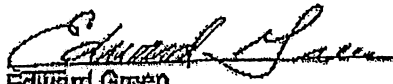
for the sum of TEN AND NO/DOLLARS and other good and valuable consideration, the
following tract of land in County State of Utah, to-wit

PART OF THE SOUTHWEST QUARTER OF SECTION 27,
TOWNSHIP 6 NORTH, RANGE 1 WEST, SALT LAKE BASE AND
MERIDIAN, U.S. SURVEY, DESCRIBED AS FOLLOWS:

BEGINNING AT THE SOUTHEAST CORNER OF LOT 2, KAPPOS
ESTATES SUBDIVISION, UTAH TOWN, WEBER COUNTY, UTAH;
THENCE SOUTH 00D58'24" WEST 268.37 FEET TO THE
CENTERLINE OF WEBER RIVER; THENCE ALONG SAID
CENTERLINE SOUTH 85D38'11" WEST 48.28 FEET TO A
1600-FOOT RADIUS CURVE, THE CENTER OF WHICH BEARS
SOUTH 04D21'48" EAST AND SOUTHWESTERLY ALONG SAID
CURVE TO THE LEFT THROUGH A CENTRAL ANGLE OF 02D46'04"
A DISTANCE OF 72.40 FEET; THENCE NORTH 00D58'24" EAST
277.84 FEET TO THE SOUTHWEST CORNER OF SAID LOT 2;
THENCE SOUTH 88D58'58" EAST ALONG THE SOUTH LINE OF
SAID LOT 120.00 FEET TO THE POINT OF BEGINNING,
CONTAINING 0.75 ACRES.

07-107-00016 (07-107-00025) k1

WITNESS, the hand of said grantors, this 16th day of August, 2002
Signed in the presence of


Edward Green

STATE OF Utah

)ss.

County of Weber

EX-1070342-012257 PG1132
DOUG CROFTS, WEBER COUNTY RECORDER
26-AUG-02 303 PM FEE \$10.00 DEP JPH
REC FOR: HERITAGE WEST

On the 16th day of August, 2002 personally appeared before me Edward Green, the
signers of the foregoing instrument, who duly acknowledged to me that he executed the

WHEN RECORDED MAIL TO:

Ed Green

also n valley view dr.
layton, ut 84040

QUIT CLAIM DEED

Edwin M. Higley grantor

of Clearfield City, County of Davis, State of Utah, hereby

QUIT CLAIM to

~~Ed Green, grantor,~~ Edward Green, grantee

of Layton City, Davis County, State of Utah, for the sum of

Ten Dollars and other good and valuable considerations—

the following described tract of land in Weber County, State of

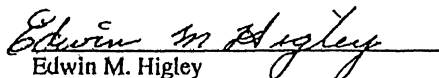
Utah, to wit:

See Attached Exhibit "A"

WITNESS the hand of said grantor, this _____ day of May, 2000

Signed in the presence of

ACCOMMODATION RECORDING ONLY
HERITAGE WEST TITLE MAKES NO
REPRESENTATION AS TO CONDITION OF
TITLE, NOR DOES IT ASSUME ANY
RESPONSIBILITY FOR VALIDITY,
SUFFICIENCY OR AFFECT OF DOCUMENT


Edwin M. Higley

STATE OF UTAH,

ss.

County of Davis

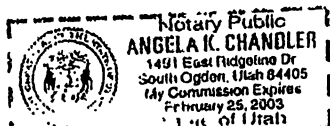
On the 8th day of May, A.D. 2000 personally appeared before me Edwin M. Higley the signer of the within instrument, who duly acknowledged to me that he executed the same.

Notary Public



My Commission Expires

My Residence is



E# 1704719 BK2071 PG1330
DOUG CROFTS, WEBER COUNTY RECORDER
10-MAY-00 1000 AM FEE \$12.00 DEP JPH
REC FOR: HERITAGE WEST

WHEN RECORDED MAIL TO:

Edward Green
2190 North Valley View Dr.
Layton, Utah 84041

WARRANTY DEED

Edwin M. Higley

grantor

of Clearfield City,

County of Davis

State of Utah

hereby CONVEY and WARRANT to

Ed Green Construction, Inc.

grantee

of Layton City,

County of Davis,

State of Utah

for the sum of Ten Dollars and other good and valuable considerations-----

the following described tract of land in Weber County, State of

Utah, to-wit:

07-540-0001 to 0005 TT
All of Lots 1 through 5, Kappas Estates Subdivision, Uinta Town, Weber County, Utah,
according to the official plat thereof on file and of record in the Office of the Weber County
Recorder.

Subject to Easements, Covenants, Restrictions, and Rights of Way, and Reservations
appearing of record and taxes for the year 2000 and each year thereafter.

WITNESS the hand of said grantors, this 1 day of June, 2000.

Signed in the presence of


Edwin M. Higley

STATE OF UTAH.

ss

COUNTY OF DAVIS

On the 1 day of June, A.D. 2000 personally appeared before me Edwin M. Higley
the signer of the within instrument, who duly acknowledged to me that he executed the same.


Notary Public

My Commission Expires _____ My Residence is _____



NOTARY PUBLIC
EDWARD D. CLAYTON
314 WEST 800 SOUTH
ST. GEORGE, UT 84770
MY COMMISSION EXPIRES
OCTOBER 27TH, 2003
STATE OF UTAH

WHEN RECORDED MAIL TO:
Edward Green
2150 North Valley View Dr.
Layton, Utah 84041

WARRANTY DEED

Edwin M. Higley

grantor

of Clearfield City,

County of Davis

State of Utah,

hereby CONVEY and WARRANT to

Ed Green Construction, Inc.

grantee

of Layton City,

County of Davis,

State of Utah

for the sum of Ten Dollars and other good and valuable considerations-----

the following described tract of land in Weber County, State of

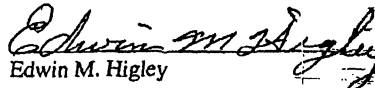
Utah, to-wit:

07-540-0001 to 0005 T.F.
All of Lots 1 through 5, Kappos Estates Subdivision, Uinta Town, Weber County, Utah,
according to the official plat thereof on file and of record in the Office of the Weber County
Recorder.

Subject to Easements, Covenants, Restrictions, and Rights of Way, and Reservations
appearing of record and taxes for the year 2000 and each year thereafter.

WITNESS the hand of said grantors, this 1 day of June, 2000.

Signed in the presence of


Edwin M. Higley

STATE OF UTAH,

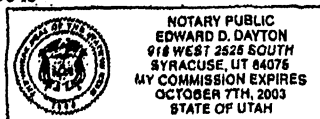
ss

COUNTY OF DAVIS

On the 1 day of June, A.D. 2000 personally appeared before me Edwin M. Higley
the signer of the within instrument, who duly acknowledged to me that he executed the same.


Notary Public

My Commission Expires _____ My Residence is _____



E# 1708943 BK2075 PG895
DOUG CROFTS, WEBER COUNTY RECORDER
01-JUN-00 347 PM FEE \$14.00 DEP JPM
REC FOR: HERITAGE.WEST

7

Recorded at request of State Dept. of Highways Fee Paid 7.00
Date FEB 25 1974 at 12:34 P.M. MARGUERITE S. BOURNE Recorder Davis County
BY Theresa L. Luedem Deputy Book 533 Page 927

927

IN THE SECOND DISTRICT COURT IN AND FOR DAVIS COUNTY

391720

STATE OF UTAH

-THIS INSTRUMENT CHECKED WITH

JUDGMENT ☐
COUNTERCLAIM ☒
RECEIPTS ☒
MAPS ☒

DATE 1-26-74
BY CSA

UTAH STATE ROAD COMMISSION, :

Plaintiff, :

AGREES YES ☒ NO ☐
FINAL ORDER OF CONDEMNATION

-v-

Civil No. 16491

EDWIN M. HIGLEY and AFTON C. :
HIGLEY, his wife; KERMIT :
BRIMHALL and NAYON BRIMHALL, :
his wife, :

Project No. I-80N-6(7)46
Parcel Nos. 49:A, 49:E, 49:2E,
49:3E, 49:4E, 49:5E and 49:S
Total Payment: \$68,928.04

Defendants

It appearing to the court and the court now finds that

heretofore, on the 4th day of January, 1974, this court made

☒ and entered its judgment in the above entitled proceeding,

and said judgment is hereby referred to; and

It appearing to the court and the court now finds that

pursuant to the law and the said judgment, the plaintiff did

pay said judgment to the defendants Edwin M. Higley and Afton

C. Higley, his wife, Kermit Brimhall and Nayon Brimhall, his

wife, together with all interest required by said judgment to

be paid; and

It further appearing to the court that the plaintiff

has made all payments as required by law and order of this court,

and that this is not a case where any bond was required to be

given, and all and singular the law in the premises being given

by the court understood and fully considered,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the

parcels of land hereinafter described are hereby taken and con-

demned in fee simple title as to Parcel Nos. 49:A, 49:S and for

easement rights as to Parcel Nos. 49:E, 49:2E, 49:3E, 49:4E and

49:5E, for the purpose described and set forth in the plaintiff's

complaint, i.e., for the use of the plaintiff, the State of Utah,

for highway purposes.

EX 1705412 BK2308 PG1638
DOUG CROFTS, WEBER COUNTY RECORDER
16-JAN-03 442 PM FEE \$0.00 DEP JPM
REC FOR: UTAH.DEPT..OF.TRANSPORTATION

indexed
red
Compared

Q 7 7 7

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said use is a public use and a use authorized by law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a copy of this final order of condemnation be filed with the county recorder of Davis County, State of Utah, and thereupon the property interests hereinafter referred to and set forth shall vest in fee simple title as to Parcel Nos. 49:A, 49:S and for easement rights as to Parcel Nos. 49:E, 49:2E, 49:3E, 49:4E and 49:5E, in the plaintiff. The following is a description of the property so ordered and condemned as hereinabove provided, which is hereby vested in fee simple title as to Parcel No. 49:A, 49:S and for easement rights as to Parcel Nos. 49:E, 49:2E, 49:3E 49:4E and 49:5E in the plaintiff, all of such property being situated in Davis County, State of Utah, and is more particularly described as follows:

Parcel No. 80N-6:49:A

A parcel of land in fee for a freeway known as Project No. 80N-6, being part of an entire tract of property, in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 27, T. 5 N., R. 1 W., S.L.B.&M. The boundaries of said parcel of land are described as follows:

Beginning on the easterly line of the SW $\frac{1}{4}$ of said Section 27 at a point 90.0 ft. radially distant southerly from the center line of the eastbound lane of said project, which point is approximately 1491 ft. northerly from the SE. corner of said SW $\frac{1}{4}$; thence Northerly 364 ft.; more or less, along said easterly line to a point 120.0 ft. radially distant northwesterly from the center line of the westbound lane of said project; thence Southwesterly 516 ft., more or less, along the arc of a spiral to the left which is concentric with and 120.0 ft. radially distant northwesterly from an 800.0-foot ten-chord spiral for a 1°00' curve to a point opposite Engineer Station 232+00 (Note: Tangent to said spiral at its point of beginning bears approximately S. 87°26' W.); thence S. 75°49' W. 200.23 ft. to a point 90.0 ft. radially distant northwesterly from the center line of said westbound lane opposite Engineer Station 230+02.50; thence Southwesterly 606 ft., more or less, along the arc of a spiral to the right which is concentric with and 90.0 ft. radially distant northwesterly from a 1200.0-foot ten-chord spiral for a 2°00' curve to a westerly boundary line of said entire tract (Note: Tangent to last said spiral

at its point of beginning bears S. 84°21' W.); thence Southerly 236 ft., more or less, along said westerly boundary line to a southwesterly boundary line of said entire tract; thence S. 85°08' E. 29.38 ft.; thence N. 88°53' E. 77.93 ft.; thence N. 88°45' E. 189.76 ft.; thence N. 89°56' E. 499.83 ft. to a point 90.0 ft. radially distant southerly from the center line of said eastbound lane opposite Engineer Station 232+00; thence Easterly 511 ft., more or less, along the arc of a spiral to the right which is concentric with and 90.0 ft. radially distant southerly from an 800.0-foot ten-chord spiral for a 0°30' curve, (Note: Tangent to last said spiral at its point of beginning bears N. 88°56' E.) to the point of beginning. The above described parcel of land contains 9.01 acres, more or less.

Together with any and all abutters rights of underlying fee to the center of existing rights of way appurtenant to this conveyance.

(Note: GLO Survey Bearing of the south line of said Section 27 is rotated 0°15'19" clockwise to match Highway Survey Bearings. All bearings and distances in the above description are based on the Utah State Plane Coordinate System.)

Together with any and all rights or easements appurtenant to the remaining portion of said entire tract of property by reason of the location thereof with reference to said freeway, including, without limiting the foregoing, all rights of ingress to or egress from said remaining portion, contiguous to the lands hereby conveyed, to or from said freeway.

Parcel No. 80N-6:49:E

An easement upon part of an entire tract of property in the NE¼SW¼ of Section 27, T. 5 N., R. 1 W., S.L.B.&M., in Davis County, Utah, for the purpose of constructing thereon a cut slope and appurtenant parts thereof incident to the construction of a freeway known as Project No. 80N-6.

Said part of an entire tract is described as follows:

Beginning on the easterly line of the SW¼ of said Section 27 at a point 115.0 ft. radially distant southerly from the center line of the eastbound lane of said project, which point is approximately 1471 ft. northerly from the SE. corner of said SW¼; thence Westerly 510 ft., more or less, along the arc of a spiral to the left which is concentric with and 115.0 ft. radially distant southerly from an 800.0-foot ten-chord spiral for a 0°30' curve to a point opposite Engineer Station 232+00 (Note: Tangent to said spiral at its point of beginning bears N. 85°28' W.); thence S. 1°04' E. 46.73 ft.; thence S. 85°08' E. 342.75 ft.; thence N. 85°06' E. 168 ft., more or less, to the easterly line of said SW¼; thence Northerly 65 ft., more or less, along said easterly line to the point of beginning containing 0.75 acre, more or less.

(Note: GLO Survey Bearing of the south line of said Section 27 is rotated 0°15'19" clockwise to match Highway Survey

930

Bearings. All Bearings and distances in the above description are based on the Utah State Plane Coordinate System.)

Parcel No. 80N-6:49:2E

An easement upon part of an entire tract of property in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 27, T. 5 N., R. 1 W., S.L.B.&M., in Davis County, Utah, for the purpose of constructing thereon an irrigation and utility facility and appurtenant parts thereof incident to the construction of a freeway known as Project No. 80N-6. Said part of an entire tract is described as follows:

Beginning at a point 90.0 ft. radially distant southerly from the center line of the eastbound lane of said project opposite Engineer Station 232+00, which point is approximately 510 ft. westerly along the southerly line of said NE $\frac{1}{4}$ SW $\frac{1}{4}$ and 177 ft. northerly along a straight line from the SE. corner of said NE $\frac{1}{4}$ SW $\frac{1}{4}$; thence S. 89°56' W. 499.83 ft.; thence S. 88°45' W. 189.76 ft.; thence S. 88°53' W. 77.93 ft.; thence S. 85°08' E. 286.43 ft.; thence N. 89°56' E. 482.62 ft.; thence N. 1°04' W. 30.0 ft. to the point of beginning, containing 0.43 acre, more or less.

(Note: GLO Survey Bearing of the south line of said Section 27 is rotated 0°15'19" clockwise to match Highway Survey Bearings. All bearings and distances in the above description are based on the Utah State Plane Coordinate System.)

After irrigation and utility facility is constructed on the above described part of an entire tract at the expense of said State Road Commission, said State Road Commission is thereafter relieved of any further claim or demand for costs, damages or maintenance charges which may accrue against said irrigation and utility facility and appurtenant parts thereof.

Parcel No. 80N-6:49:3E

An easement upon part of an entire tract of property in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 27, T. 5 N., R. 1 W., S.L.B.&M., in Davis County, Utah, for the purpose of constructing thereon an irrigation facility and appurtenant parts thereof incident to the construction of a freeway known as Project No. 80N-6.

Said part of an entire tract is described as follows:

Beginning on the easterly line of the SW $\frac{1}{4}$ of said Section 27 at a point 90.0 ft. radially distant southerly from the center line of the eastbound lane of said project, which point is approximately 149. ft. northerly from the SE. corner of said SW $\frac{1}{4}$; thence westerly 511 ft., more or less, along the arc of a spiral to the left which is concentric with and 90.0 ft. radially distant southerly from an 800.0-foot ten-second spiral for a 0°30' curve to a point opposite Engineer Station 232+00. Note: Tangent to said spiral at its point of beginning bears approximately N. 89 28' ...; thence S. 1 04' E. 25.0 ft. to a point 115.0 ft. radially distant southerly from the center line of said eastbound lane opposite Engineer Station 232+00; thence Easterly 510 ft., more or less, along the arc of a spiral to the right which

is concentric with and 115.0 ft. radially distant southerly from an 800.0-foot ten-chord spiral for a 0°30' curve to said easterly line of said SW¼ (Note: Tangent to last said spiral at its point of beginning bears S. 88°56' E.); thence Northerly 25.0 ft., more or less, along said easterly line to the point of beginning, containing 0.29 acre, more or less.

(Note: GLO Survey Bearing of the south line of said Section 27 is rotated 0°15'19" clockwise to match Highway Survey Bearings. All bearings and distances in the above description are based on the Utah State Plane Coordinate System.)

After said irrigation facility is constructed on the above described part of an entire tract at the expense of said State Road Commission, said State Road Commission is thereafter relieved of any further claim or demand for costs, damages or maintenance charges which may accrue against said irrigation facility and appurtenant parts thereof.

Parcel No. 80N-6:49:4E

An easement upon part of an entire tract of property in the NE¼SW¼ of Section 27, T. 5 N., R. 1 W., S.L.B.&M., in Davis County, Utah, for the purpose of constructing thereon an irrigation overflow facility and appurtenant parts thereof incident to the construction of a freeway known as Project No. 80N-6. Said part of an entire tract is described as follows:

Beginning at a point 112.29 ft. radially distant northerly from the center line of the westbound lane of said project opposite Engineer Station 231+50, which point is approximately 492 ft. northerly along the easterly line of said NE¼SW¼ and 565 ft. westerly along a straight line from the SE. corner of said NE¼SW¼; thence N. 5°31' W. 77.71 ft.; thence S. 73°11' W. 25.49 ft.; thence S. 5°31' E. 76.52 ft.; thence N. 75°49' E. 25.29 ft. to the point of beginning, containing 0.04 acres, more or less.

(Note: GLO Survey Bearing of the south line of said Section 27 is rotated 0°15'19" clockwise to match Highway Survey Bearings. All bearings and distances in the above description are based on the Utah State Plane Coordinate System.)

ALSO:

A temporary work easement to facilitate the construction of said irrigation facility and appurtenant parts thereof, being upon a parcel at least 20 ft. wide, adjoining westerly the westerly side line of the above described easement, containing 0.04 acre.

The above described temporary work easement shall expire upon the completion of said construction.

After the irrigation overflow facility is constructed on the above described part of an entire tract at the expense of said State Road Commission, said State Road Commission is thereafter relieved of any further claim or demand for costs, damages

or maintenance charges which may accrue against said irrigation overflow facility and appurtenant parts thereof.

Parcel No. 80N-6:49:5E

An easement upon part of an entire tract of property in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 27, T. 5 N., R. 1 W., S.L.B.&M., in Davis County, Utah, for the purpose of constructing thereon an irrigation overflow facility and appurtenant parts thereof incident to the construction of a freeway known as Project No. 80N-6.

Said part of an entire tract is described as follows:

Beginning on the easterly line of the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 27 at a point 120.0 ft. radially distant northerly from the center line of the westbound lane of said project; thence Northerly 135 ft., more or less, along said easterly line to a northerly line of Davis County which is the center of the Weber River; thence Westerly 17 ft., more or less, along said northerly line of Davis County and said center of the Weber River to a point of intersection with a radial line extending northerly from the center line of said westbound lane opposite Engineer Station 237+00; thence S. 2°37' E. 135 ft., more or less, to a point 120.0 ft. radially distant northerly from the center line of said westbound lane opposite Engineer Station 237+00; thence Easterly 10 ft., more or less, along the arc of a spiral to the right which is concentric with and 120.0 ft. radially distant northerly from an 800.0-foot ten-chord spiral for a 1°00' curve (Note: Tangent to said spiral at its point of beginning bears N. 87°23' E.) to the point of beginning, containing 0.04 acre, more or less.

ALSO:

A temporary work easement to facilitate the construction of said irrigation facility and appurtenant parts thereof, being upon a parcel of land 25.0 ft. wide, adjoining westerly the westerly side line of the above described easement, containing 0.08 acre, more or less.

The above described temporary work easement shall expire upon the completion of said construction.

(Note: GLO Survey Bearing of the South line of said Section 27 is rotated 0°15'19" clockwise, to match Highway Survey Bearings. All bearings and distances in the above description are based on the Utah State Plane Coordinate System.)

After irrigation overflow facility is constructed on the above described part of an entire tract at the expense of said State Road Commission, said State Road Commission is thereafter relieved of any further claim or demand for costs, damages or maintenance charges which may accrue against said irrigation overflow facility and appurtenant parts thereof.

Parcel No. 80N-6:49:5

A parcel of land in fee, being a severed portion of an entire tract of property lying in Davis and Weber Counties, being

all of the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 27, T. 5 N., R. 1 W., S.L.B.&M. lying north of a freeway known as Project No. I-80N-6(7)+6. The boundaries of said tract are described as follows:

Beginning at the NE. corner of said NE $\frac{1}{4}$ SW $\frac{1}{4}$; thence South 757 ft. along the east boundary line of said NE $\frac{1}{4}$ SW $\frac{1}{4}$ to the northerly no-access line of said freeway; thence Westerly along said no-access line the following three (3) courses: Southwesterly 516 ft., more or less, along the arc of a spiral to the left which is concentric with and 120.0 ft. radially distant northerly from an 800.0-foot ten-chord spiral for a 1°00' curve to a point opposite Engineer Station 232+00 Westbound Lane (Note: Tangent to said spiral at its point of beginning bears approximately S. 87°26' W.); thence S. 75°49' W. 200.23 ft. to a point 90.0 ft. radially distant northwesterly from the center line of said westbound lane opposite Engineer Station 230+02.50; thence Southwesterly 606 ft., more or less, along the arc of a spiral to the right which is concentric with and 90.0 ft. radially distant northwesterly from a 1200.0-foot ten-chord spiral for a 2°00' curve, to a west boundary line of said tract of land (Note: Tangent to last said spiral at its point of beginning bears S. 84°21' W.); thence North 190 ft. along said west boundary line to the Davis and Weber County line; thence West 25 ft. to the west line of said NE $\frac{1}{4}$ SW $\frac{1}{4}$; thence North 723 ft. along said west line to the NW. corner of said NE $\frac{1}{4}$ SW $\frac{1}{4}$; thence East 1323 ft., more or less, along the north line of said NE $\frac{1}{4}$ SW $\frac{1}{4}$ to the point of beginning. The above described tract of land contains 25.22 acres, more or less.

Dated this 29th day of January, 1974.

R. Donald C. H. H.
DISTRICT JUDGE

I, WALKER County Clerk and Ex officio Clerk of the District Court of the State of Utah, in and for the County of Wasatch, do hereby certify that the foregoing copy of the above described tract of land is a true and correct transcript thereof now of record in this office and is a true and correct transcript thereof from and of the whole of said original as the same appears of record in my office and in my custody.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal this 29th day of January, A.D. 19 74.

File No. 16491 RODNEY V. WALKER
Clerk
By Wanda S. Wood
Deputy Clerk
Original Filed 1/29/74

**IN THE SECOND JUDICIAL DISTRICT COURT
WEBER COUNTY, STATE OF UTAH**

MARK KAPPOS and
MALA KAPPOS,
Plaintiffs,

vs.

THE STATE OF UTAH,
DEPARTMENT OF TRANSPORTATION,
Defendant.

DECISION

Judge: W. Brent West
Case: 060902775
Clerk: Pamela Allen

OCT 27 2009

SECOND JUDICIAL DISTRICT COURT

2009 OCT 27 P 2:00

The Defendant's Motion to Revise the Court's Order Regarding the Plaintiffs'

Constitutional Takings Claim from Without Prejudice to Prejudice is denied. This case has been litigated piecemeal and the Court has been asked to review legal issue after legal issue without the benefit of any evidence or testimony. Admittedly, the Court's prior Ruling on the Plaintiffs' Constitutional Taking Claims is ambiguous. But, so were the Plaintiffs' initial pleadings. With very little help in analysis, from the Plaintiffs in regards to their claims, the Court was left to guess as to the Plaintiff's theories of recovery. The Court, guessing that the issue of mistake might in some way shape or form be part of the Plaintiffs' Constitutional Taking Claim, dismissed that claim without prejudice. It was anticipated, by the Court, that the Plaintiffs would file an amended complaint clarifying their claim or theory of recovery. The Plaintiffs did file an amended complaint clarifying their Constitutional Takings Claim. The issues raised by the Plaintiffs in their amended complaint and in their response to the Defendant's motion are sufficient to deny the Defendant's Motion.

DECISION - DEFENDANT'S MOTION TO REVISE THE C



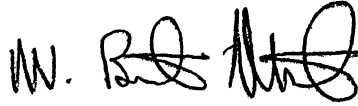
VD30086618

000001 2

Page two
Decision
Case 060902775

The Plaintiffs' counsel will please prepare an Order, consistent with this Ruling.

Dated this 26th day of October 2009.



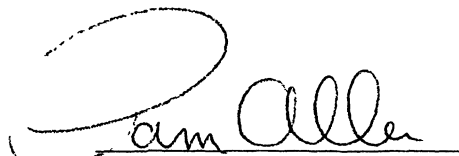
Judge W. Brent West
Second District Court

CERTIFICATE OF MAILING

I hereby certify that on the 27 day of October, 2009, I mailed a true and correct copy of the foregoing Decision to the parties as follows:

M. Darin Hammond
4723 Harrison Blvd Ste 200
Ogden Ut 84403

Gary D. Josephson
Assistant Attorney General
PO Box 140857
Salt Lake City Ut 84114-0857


Deputy Clerk



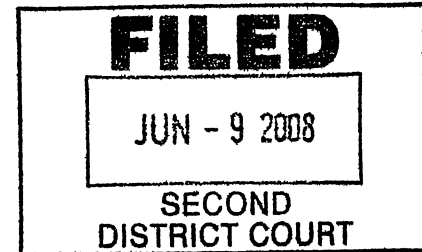
**IN THE SECOND JUDICIAL DISTRICT COURT
WEBER COUNTY, STATE OF UTAH**

MARK KAPPOS, and
MALA KAPPOS,
Plaintiffs,

DECISION

vs.

THE STATE OF UTAH, DEPARTMENT
OF TRANSPORTATION,
Defendant.



MARK KAPPOS and
MALA KAPPOS,
Plaintiffs,

Judge: W. Brent West
Clerk: Pamela Allen
Case: 060902775

JUN - 9 2008

vs.

THE STATE OF UTAH, DEPARTMENT
OF TRANSPORTATION,
Defendant.

The Defendant's Second Motion for a Partial Judgment on the Pleadings is granted. In its Kappos I decision, this Court ruled that a quiet title cause of action will not support a request for damages as a matter of law. That principle applies equally as well in Kappos II. Therefore, the damage portion of the quiet title claim in Kappos II is dismissed with prejudice.

A ruling on damages in this quiet title action is not premature. The legal principle is constant and is not dependent upon the filing of an appropriate notice of claim. Failure to file a notice of claim for damages is not the reason the damage claim was dismissed in Kappos II. It

Page two
Decision
Case 060902775

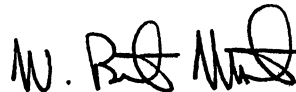
was dismissed because damages are simply not available in a traditional quiet title claim.

In addition, immunity from the Plaintiff's damage claim has not been waived by the Defendant. The logic of Tindley v Salt Lake City School District, 116 P.3d 295 (Utah 2005) is dispositive. The Defendant, by recording its notice of interest, was engaged in a governmental function.

The Defendant has not waived its immunity for damages in a quiet title action, which damages couldn't be awarded anyway. The takings provision does not apply because the Plaintiff has not alleged a constitutional cause of action and finally, the general waiver for employee negligence does not apply in this instance.

Defense counsel will please prepare an Order, consistent with this Ruling.

Dated this 6th day of June, 2008.

A handwritten signature in black ink, appearing to read "W. Brent West", written over a horizontal line.

Judge W. Brent West
Second District Court


Page two
Decision
Case 060902775

CERTIFICATE OF MAILING

I hereby certify that on the 9th day of June, 2008, I mailed a true and correct copy of the foregoing Decision to the parties as follows:

REED STRINGHAM
GARY JOSEPHSON
PO BOX 140856
SALT LAKE CITY UT 84114-0856

M DARIN HAMMOND
4723 HARRISON BLVD STE 200
OGDEN UT 84403


Deputy Clerk

Section
63-30d-904. Indemnification of governmental entity by employee not required.

PART 1

GENERAL PROVISIONS

63-30d-101. Title, scope, and intent.

(1) This chapter is known as the "Governmental Immunity Act of Utah."

(2) (a) The waivers and retentions of immunity found in this chapter apply to all functions of government, no matter how labeled.

(b) This single, comprehensive chapter governs all claims against governmental entities or against their employees or agents arising out of the performance of the employee's duties, within the scope of employment, or under color of authority. 2004

63-30d-102. Definitions.

As used in this chapter:

(1) "Claim" means any asserted demand for or cause of action for money or damages, whether arising under the common law, under state constitutional provisions, or under state statutes, against a governmental entity or against an employee in the employee's personal capacity.

(2) (a) "Employee" includes:

(i) a governmental entity's officers, employees, servants, trustees, or commissioners;

(ii) members of a governing body;

(iii) members of a government entity board;

(iv) members of a government entity commission;

(v) members of an advisory body, officers, and employees of a Children's Justice Center created in accordance with Section 67-5b-104;

(vi) student teachers holding a letter of authorization in accordance with Sections 53A-6-103 and 53A-6-104;

(vii) educational aides;

(viii) students engaged in providing services to members of the public in the course of an approved medical, nursing, or other professional health care clinical training program;

(ix) volunteers as defined by Subsection 67-20-2(3); and

(x) tutors.

(b) "Employee" includes all of the positions identified in Subsection (2)(a), whether or not the individual holding that position receives compensation.

(c) "Employee" does not include an independent contractor.

(3) "Governmental entity" means the state and its political subdivisions as both are defined in this section.

(4) (a) "Governmental function" means each activity, undertaking, or operation of a governmental entity.

(b) "Governmental function" includes each activity, undertaking, or operation performed by a department, agency, employee, agent, or officer of a governmental entity.

(c) "Governmental function" includes a governmental entity's failure to act.

(5) "Injury" means death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person or estate, that would be actionable if inflicted by a private person or his agent.

(6) "Personal injury" means an injury of any kind other than property damage.

(7) "Political subdivision" means any county, city, town, school district, public transit district, redevelopment agency, special improvement or taxing district, special district, an entity created by an interlocal agreement adopted under Title 11, Chapter 13, Interlocal Cooperation Act, or other governmental subdivision or public corporation.

(8) "Property damage" means injury to, or loss of, any right, title, estate, or interest in real or personal property.

(9) "State" means the state of Utah, and includes each office, department, division, agency, authority, commission, board, institution, hospital, college, university, Children's Justice Center, or other instrumentality of the state.

(10) "Willful misconduct" means the intentional doing of a wrongful act, or the wrongful failure to act, without just cause or excuse, where the actor is aware that his conduct will probably result in injury. 2004

PART 2

GOVERNMENTAL IMMUNITY — STATEMENT, SCOPE, AND EFFECT

63-30d-201. Immunity of governmental entities from suit.

(1) Except as may be otherwise provided in this chapter, each governmental entity and each employee of a governmental entity are immune from suit for any injury that results from the exercise of a governmental function.

(2) Notwithstanding the waiver of immunity provisions of Section 63-30d-301, a governmental entity, its officers, and its employees are immune from suit for any injury or damage resulting from the implementation of or the failure to implement measures to:

(a) control the causes of epidemic and communicable diseases and other conditions significantly affecting the public health or necessary to protect the public health as set out in Title 26A, Chapter 1, Local Health Departments;

(b) investigate and control suspected bioterrorism and disease as set out in Title 26, Chapter 23b, Detection of Public Health Emergencies Act; and

(c) respond to a national, state, or local emergency, a public health emergency as defined in Section 26-23b-102, or a declaration by the President of the United States or other federal official requesting public health related activities. 2004

63-30d-202. Act provisions not construed as admission or denial of liability — Effect of waiver of immunity — Exclusive remedy — Joinder of employee — Limitations on personal liability.

(1) (a) Nothing contained in this chapter, unless specifically provided, may be construed as an admission or denial of liability or responsibility by or for a governmental entity or its employees.

(b) If immunity from suit is waived by this chapter, consent to be sued is granted, and liability of the entity shall be determined as if the entity were a private person.

(c) No cause of action or basis of liability is created by any waiver of immunity in this chapter, nor may any provision of this chapter be construed as imposing strict liability or absolute liability.

(2) Nothing in this chapter may be construed as adversely affecting any immunity from suit that a governmental entity or employee may otherwise assert under state or federal law.

(3) (a) Except as provided in Subsection (3)(c), an action under this chapter against a governmental entity for an injury caused by an act or omission that occurs during the

performance of an employee's duties, within the scope of employment, or under color of authority is a plaintiff's exclusive remedy.

(b) Judgment under this chapter against a governmental entity is a complete bar to any action by the claimant, based upon the same subject matter, against the employee whose act or omission gave rise to the claim.

(c) A plaintiff may not bring or pursue any civil action or proceeding based upon the same subject matter against the employee or the estate of the employee whose act or omission gave rise to the claim, unless:

(i) the employee acted or failed to act through fraud or willful misconduct;

(ii) the injury or damage resulted from the employee driving a vehicle, or being in actual physical control of a vehicle:

(A) with a blood alcohol content equal to or greater by weight than the established legal limit;

(B) while under the influence of alcohol or any drug to a degree that rendered the person incapable of safely driving the vehicle; or

(C) while under the combined influence of alcohol and any drug to a degree that rendered the person incapable of safely driving the vehicle;

(iii) injury or damage resulted from the employee being physically or mentally impaired so as to be unable to reasonably perform his or her job function because of:

(A) the use of alcohol;

(B) the nonprescribed use of a controlled substance as defined in Section 58-37-4; or

(C) the combined influence of alcohol and a nonprescribed controlled substance as defined by Section 58-37-4; or

(iv) in a judicial or administrative proceeding, the employee intentionally or knowingly gave, upon a lawful oath or in any form allowed by law as a substitute for an oath, false testimony material to the issue or matter of inquiry under this section.

(4) Except as permitted in Subsection (3)(c), no employee may be joined or held personally liable for acts or omissions occurring:

(a) during the performance of the employee's duties;

(b) within the scope of employment; or

(c) under color of authority. 2004

63-30d-203. Exemptions for certain takings actions.

An action that involves takings law, as defined in Section 63-34-13, is not subject to the requirements of Sections 63-30d-401, 63-30d-402, 63-30d-403, and 63-30d-601. 2004

PART 3

WAIVERS OF IMMUNITY

63-30d-301. Waivers of immunity — Exceptions.

(1) (a) Immunity from suit of each governmental entity is waived as to any contractual obligation.

(b) Actions arising out of contractual rights or obligations are not subject to the requirements of Sections 63-30d-401, 63-30d-402, 63-30d-403, or 63-30d-601.

(c) The Division of Water Resources is not liable for failure to deliver water from a reservoir or associated facility authorized by Title 73, Chapter 26, Bear River Development Act, if the failure to deliver the contractual amount of water is due to drought, other natural condition, or safety condition that causes a deficiency in the amount of available water.

(2) Immunity from suit of each governmental entity is waived:

(a) as to any action brought to recover, obtain possession of, or quiet title to real or personal property;

(b) as to any action brought to foreclose mortgages or other liens on real or personal property, to determine an adverse claim on real or personal property, or to obtain an adjudication about any mortgage or other lien that the governmental entity may have or claim on real or personal property;

(c) as to any action based on the negligent destruction, damage, or loss of goods, merchandise, or other property while it is in the possession of any governmental entity or employee, if the property was seized for the purpose of forfeiture under any provision of state law;

(d) subject to Subsection 63-30d-302(1), as to any action brought under the authority of Article I, Section 22, of the Utah Constitution, for the recovery of compensation from the governmental entity when the governmental entity has taken or damaged private property for public uses without just compensation;

(e) subject to Subsection 63-30d-302(2), as to any action brought to recover attorneys' fees under Sections 63-2-40 and 63-2-802;

(f) for actual damages under Title 67, Chapter 21, Utah Protection of Public Employees Act; or

(g) as to any action brought to obtain relief from a land use regulation that imposes a substantial burden on the free exercise of religion under Title 63, Chapter 90b, Utah Religious Land Use Act.

(3) (a) Except as provided in Subsection (3)(b), immunity from suit of each governmental entity is waived as to any injury caused by:

(i) a defective, unsafe, or dangerous condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located on them; or

(ii) any defective or dangerous condition of a public building, structure, dam, reservoir, or other public improvement.

(b) Immunity is not waived if the injury arises out of, in connection with, or results from:

(i) a latent dangerous or latent defective condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located on them; or

(ii) a latent dangerous or latent defective condition of any public building, structure, dam, reservoir, or other public improvement.

(4) Immunity from suit of each governmental entity is waived as to any injury proximately caused by a negligent act or omission of an employee committed within the scope of employment.

(5) Immunity is not waived under Subsections (3) and (4) if the injury arises out of, in connection with, or results from:

(a) the exercise or performance, or the failure to exercise or perform, a discretionary function, whether or not the discretion is abused;

(b) assault, battery, false imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, or violation of civil rights;

(c) the issuance, denial, suspension, or revocation of, or by the failure or refusal to issue, deny, suspend, or revoke, any permit, license, certificate, approval, order, or similar authorization;

(d) a failure to make an inspection or by making an inadequate or negligent inspection;

(e) the institution or prosecution of any judicial or administrative proceeding, even if malicious or without probable cause;

(f) a misrepresentation by an employee whether or not it is negligent or intentional;

(g) riots, unlawful assemblies, public demonstrations, mob violence, and civil disturbances;

(h) the collection of and assessment of taxes;

(i) the activities of the Utah National Guard;

(j) the incarceration of any person in any state prison, county or city jail, or other place of legal confinement;

(k) any natural condition on publicly owned or controlled lands, any condition existing in connection with an abandoned mine or mining operation, or any activity authorized by the School and Institutional Trust Lands Administration or the Division of Forestry, Fire, and State Lands;

(l) research or implementation of cloud management or seeding for the clearing of fog;

(m) the management of flood waters, earthquakes, or natural disasters;

(n) the construction, repair, or operation of flood or storm systems;

(o) the operation of an emergency vehicle, while being driven in accordance with the requirements of Section 41-6a-208;

(p) the activities of:

(i) providing emergency medical assistance;

(ii) fighting fire;

(iii) regulating, mitigating, or handling hazardous materials or hazardous wastes;

(iv) emergency evacuations;

(v) transporting or removing injured persons to a place where emergency medical assistance can be rendered or where the person can be transported by a licensed ambulance service; or

(vi) intervening during dam emergencies;

(q) the exercise or performance, or the failure to exercise or perform, any function pursuant to Title 73, Chapter 10, Board of Water Resources — Division of Water Resources; or

(r) unauthorized access to government records, data, or electronic information systems by any person or entity.

2005

63-30d-302. Specific remedies — “Takings” actions — Government Records Access and Management Actions.

(1) In any action brought under the authority of Article I, Section 22, of the Utah Constitution for the recovery of compensation from the governmental entity when the governmental entity has taken or damaged private property for public uses without just compensation, compensation and damages shall be assessed according to the requirements of Title 78, Chapter 34, Eminent Domain.

(2) (a) Notwithstanding Section 63-30d-401, a notice of claim for attorneys’ fees under Subsection 63-30d-301(2)(e) may be filed contemporaneously with a petition for review under Section 63-2-404.

(b) The provisions of Subsection 63-30d-403(1), relating to the governmental entity’s response to a claim, and the provisions of 63-30d-601, requiring an undertaking, do not apply to a notice of claim for attorneys’ fees filed contemporaneously with a petition for review under Section 63-2-404.

(c) Any other claim under this chapter that is related to a claim for attorneys’ fees under Subsection 63-30d-301(2)(e) may be brought contemporaneously with the claim for attorneys’ fees or in a subsequent action. 2004

PART 4

NOTICE OF CLAIM AGAINST A GOVERNMENTAL ENTITY OR A GOVERNMENT EMPLOYEE

63-30d-401. Claim for injury — Notice — Contents — Service — Legal disability — Appointment of guardian ad litem.

(1) (a) Except as provided in Subsection (1)(b), a claim arises when the statute of limitations that would apply if the claim were against a private person begins to run.

(b) The statute of limitations does not begin to run until a claimant knew, or with the exercise of reasonable diligence should have known:

(i) that the claimant had a claim against the governmental entity or its employee; and

(ii) the identity of the governmental entity or the name of the employee.

(c) The burden to prove the exercise of reasonable diligence is upon the claimant.

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

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

(i) a brief statement of the facts;

(ii) the nature of the claim asserted;

(iii) the damages incurred by the claimant so far as they are known; and

(iv) if the claim is being pursued against a governmental employee individually as provided in Subsection 63-30d-202(3)(c), the name of the employee.

(b) The notice of claim shall be:

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

(ii) directed and delivered by hand or by mail according to the requirements of Section 68-3-8.5 to the office of

(A) the city or town clerk, when the claim is against an incorporated city or town;

(B) the county clerk, when the claim is against a county;

(C) the superintendent or business administrator of the board, when the claim is against a school district or board of education;

(D) the presiding officer or secretary/clerk of the board, when the claim is against a special district;

(E) the attorney general, when the claim is against the State of Utah;

(F) a member of the governing board, the executive director, or executive secretary, when the claim is against any other public board, commission, or body; or

(G) the agent authorized by a governmental entity to receive the notice of claim by the governmental entity under Subsection (5)(e).

(4) (a) If an injury that may reasonably be expected to result in a claim against a governmental entity is sustained by a claimant who is under the age of majority or mentally incompetent, that governmental entity may file a request with the court for the appointment of a guardian ad litem for the potential claimant.

(b) If a guardian ad litem is appointed, the time for filing a claim under Section 63-30d-402 begins when the order appointing the guardian is issued.

**IN THE SECOND JUDICIAL DISTRICT COURT
WEBER COUNTY, STATE OF UTAH**

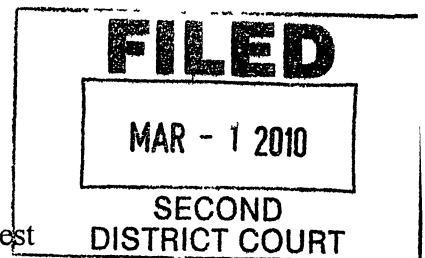
MARK KAPPOS and MALA KAPPOS,
Plaintiffs,

MAR 01 2010

DECISION

vs.

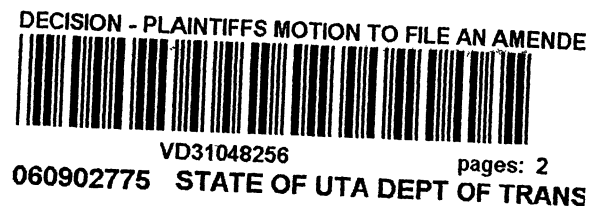
THE STATE OF UTAH, DEPARTMENT
OF TRANSPORTATION,
Defendant.



Judge: W. Brent West
Clerk: Pamela Allen
Case: 060902775

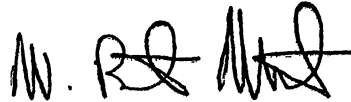
The Plaintiffs' Motion to File an Amended Complaint or to Reinstate their Claim for a Constitutional Taking is denied. First, the Court agrees with the Plaintiffs in that their motion is timely. However, the Court finds the case of *Steiner v. State*, 27 Utah 2d 284, 495 P.2d 809 (1972) dispositive on the procedural merits. An order of dismissal is a final adjudication and thereafter a complaint cannot be amended. Although these claims were dismissed, without prejudice, they were dismissed. This case is otherwise completed. Although the Plaintiffs' argument about judicial economy makes a great deal of sense, it appears that their remedy is to file a new complaint, if they desire to proceed on this claim.

Counsel for the State of Utah will please prepare a short Order, consistent with this ruling.



Page two
Decision
Case 060902775
Kappos vs State of Utah

Dated this 25th day of February 2010.



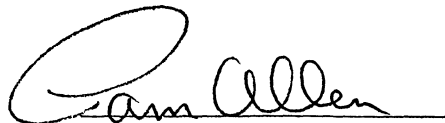
Judge W. Brent West
Second District Court

CERTIFICATE OF MAILING

I hereby certify that on the 1st day of ~~February~~ ^{March}, 2010, I mailed a true and correct copy of the foregoing Decision to the parties as follows:

M. Darin Hammond
4723 Harrison Blvd Ste 200
Ogden Ut 84403

Gary Josephson
Utah Attorney General's Office
160 East 300 South, Fifth Floor
PO Box 140857
Salt Lake City, Ut 84114-0857



Deputy Clerk