

2000

# John B. Hawkins v. Tom Callahan : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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JOHN B. HAWKINS,	)	REPLY BRIEF OF THE
	)	APPELLANT
Plaintiff and Appellee,	)	
	)	Trial Court No. 980906136
v.	)	
	)	Appellate Court No.
TOM CALLAHAN,	)	2000550-CA
	)	
Defendant and Appellant.	)	

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Appeal from the Third District Court, Salt Lake County,  
Judge Hilder

Argument priority classification: 15

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Clerk of the Court

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None.

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None.

## **ARGUMENT**

### **I. NOTICE OF APPEAL WAS TIMELY FILED**

Utah Rules of Appellate Procedure, Rule 4(c) governs the filing of the notice of appeal in the present case. Sub-paragraph (c) provides:

Filing Prior to Entry of Judgment or Order. Except as provided in paragraph (b) of this rule, a notice of appeal filed after the announcement of a decision, judgment, or order, but before the entry of the judgment or order of the Trial Court shall be treated as filed after such entry and on the day thereof.

In the present case, the Trial Court issued a Minute Entry and Order dated May 24, 2000 and the clerk purportedly mailed it to the parties on May 26, 2000. (As the Court explained in the Minute Entry, the Rule 59 motion had been pending for over 6 months as a result of a confusion at the courthouse.) The notice of appeal was filed on June 7, 2000. The final judgment was the Amended Judgment executed by the Court on June 16, 2000. The date stamp on the document is June 19, 2000. Pursuant to Utah Rules of Appellate Procedure, Rule 4(c), the Notice of Appeal is to be treated as though it was filed after the Amended Judgment was filed on the same date thereof.

This situation was most recently addressed in Nielsen v. Gurley, 888 P.2d 130 (Utah App. 1994) in which the analysis of the Appellate Court concluded that where an

amended order was merely a clarification of a ruling and not an enlargement thereof, a new time for measuring the date for appeal was not necessarily created by execution of the amended order. Id. at 133. In Nielsen v. Gurley, the memorandum decision was issued December 18, 1992, the notice of appeal was filed December 21, 1992 and judgment was entered January 7, 1993. The Court of Appeals treated the notice of appeal as filed January 7, 1993.

This situation is discussed in Nelson v. Stoker, 669 P.2d 390 (Utah 1983) (prior to adoption of Utah Rules of Appellate Procedure on January 1, 1985) in which the Supreme Court quoted various authorities, including the Notes of the Advisory Committee on Appellate Rules, which stated with respect to Fed. R. App. P.4(a)(2):

The proposed amendment to Rule 4(a)(2) would extend to civil cases the provisions of Rule 4(b), dealing with criminal cases, designed to avoid the loss of the right to appeal by filing the notice of appeal prematurely.

The Supreme Court determined that discretion remained with the Appellate Court under the circumstances which also involved a "premature" notice of appeal, and found in favor of the Appellant because of the absence of prejudice to the Appellee and in recognition of the difficulty in knowing when a final order will be signed and docketed. Id. at 393. See also C.M.C. Cassity, Inc. v. Aird, 707 P.2d 1304

(Utah 1985) (Also applying rules prior to 1985 adoption of Utah Rules of Appellate Procedure).

The time for appeal was 30 days. The causes of action being appealed were Defendant's counterclaims for breach of contract, wrongful eviction and the punitive damages element of the tortious self-help eviction claim. Plaintiff's unlawful detainer claim failed at trial because of defects in the notice by Plaintiff. Nonetheless, whether the deadline of filing an notice of appeal was the ten day deadline, because one of the several claims originally filed in this case was for unlawful detainer, or whether the thirty day deadline applied, because of the several other causes of action in the case, is irrelevant. The Notice of Appeal was filed after the Trial Court's decision on Defendant's Rule 59 Motion but before the execution and entry of the final judgment. Pursuant to Utah Rules of Appellate Procedure, Rule 4(c), the Notice of Appeal is to be treated as though it was filed after the entry of the amended judgment on the same day of filing.

Appellee cites U-M Investments v. Ray, 658 P.2d 1186 (Utah 1982) in which no notice of appeal was filed after the minute entry that disposed of the Rule 59 motion. The Supreme Court specifically referenced the absence of an appeal after the date of the minute entry. The Supreme

Court reasoned that the process of filing a notice of appeal after disposition of a post trial motion aids in discouraging delay, as may have been involved under the circumstances of that case.

Anderson v. Schwendiman, 764 P.2d 999 (Utah App. 1998), also cited by Appellee, involved both an "announcement" of decision prior to a notice of appeal being filed as well as an appeal which was earlier dismissed by the Court of Appeals for being premature. The Court of Appeals was not dealing with a written decision on the motion which could be subject to appeal or confer jurisdiction on the Appellate Court.

In the present case, notice of appeal was filed after the Minute Entry and Order for two reasons. First, the Minute Entry and Order were taken by Defendant to be the final order of the Court. Second, the Court had directed that its Minute Entry was its final order on the last sentence the Minute Entry and Order, dated May 24, 2000. It was imperative that the time for appeal not be missed in the event the Court (which knew it was being appealed and may have been the reason for inclusion of the reference to the minute entry as the final order) did not quickly notify the parties if and when a subsequent order was signed. See Minute Entry and Order dated May 24, 2000 for a history of



the protracted six month delay in resolving the Rule 59 motion, which was the basis of Defendant's concern in this regard. In the present case, the decision of the Trial Court had been made. There was a written "disposition", as required by Rule 4(b). Only a notice of appeal filed before a "disposition" of the Rule 59 motion would be without effect as provided by Rule (4)(b). It was the execution of the final judgment mirroring the minute entry, as addressed by Rule 4(c), which was pending. To find otherwise would be to nullify both the express provisions and intent of Rule 4(c). Moreover, Defendant had been waiting over 6 months, for a ruling on the motion. It would be contrary to the interests of justice to deprive him of his appeal for any reason when the Minute Entry and Order seemed designed to create an uncertainty as to whether or not it would affect Defendant's right to appeal if Defendant waited to see if the amended judgment would be signed and become the final order.

**II. THE APPELLANT IS UNDER NO DUTY TO MARSHAL  
ORAL ARGUMENT FROM PRE-TRIAL MOTION HEARINGS**

It is undisputed that the Trial Court issued various orders prior to trial, including without limitation its order establishing the requested admissions. The evidence submitted is all in written form. As the Appellee explains

in the Appellee brief, the Appellee has not chosen to appeal the soundness of the Court's decisions with regard to the Trial Court's pre-trial orders. The Appellant believes that the pre-trial order establishing the requested admissions was properly issued. Because the Appellant has no desire to overturn any of the orders made prior to trial, the Appellant is under no obligation to have transcribed any of the oral argument with respect to motions which lead to those orders.

In Appellee's Argument on page 16, the Appellee alleges that the Appellant has failed to cite to the evidence supporting the Court's ruling. The Appellant refers this Court to page 5 of the Brief of the Appellant, where the Appellant makes specific reference to the Plaintiff's testimony. Cross-examination of the Plaintiff is discussed in the statement of facts on pages 5 through 7. Other than this testimony by the Plaintiff which is cited by the Appellant in the statement of facts, there was no other evidence supporting the Trial Court's decision. Therefore, the Appellant has marshalled all of the evidence supporting the Trial Court's decision.

More significantly, however, the first question presented for appeal is not a question involving the testimony of the parties. Instead, the first question of

appeal is a question of law. Did the Trial Court have the authority under the circumstances of this case to announce at the commencement of trial that it would accept evidence contradicting the admissions established by the order which the Trial Court executed on November 27, 1998? The evidence to be marshalled with respect to that question only requires the Appellant to identify the existence of the order. The order is not a subject of appeal. The Appellee has not filed a cross appeal as to that order. Therefore, the order establishing the admissions must stand. It is the subsequent action of the Court which is challenged. The subsequent action of the Court is limited to the things which occurred at trial and in response to the Defendant's Rule 59 motion. The entire trial has been transcribed and the entire relevant record is before this Court.

**III. THE APPELLANT'S ARGUMENT CONCERNING THE TRIAL COURT'S PRE-TRIAL ORDER ESTABLISHING THE REQUESTED ADMISSIONS IS NOT PROPERLY BEFORE THIS COURT.**

Various arguments and references made by the Appellee do not apply to any specific legal argument properly before this Court. For example, in Appellee's statement appearing on pages 1 through 4 of the brief of Appellee, the Appellee describes various perceived procedural defects with the service of the complaint, processing of a possession bond,

service of discovery requests, and the Trial Court's order establishing the admissions in question. If the Appellee had filed a cross-appeal claiming that the Trial Court should not have issued the order establishing the admissions as requested, then one might expect the Appellee to address some of these facts as background for such a cross appeal. Nonetheless, such a cross appeal is not properly before this Court. There is no appeal with respect to the Trial Court's granting the order establishing the admissions as requested, dated November 27, 1998. Appellee has not marshalled the evidence for or against the Court's decision with respect thereto. Therefore, it would be inappropriate to attempt to address such matter in this Reply Brief. Appellant simply submits that the propriety of the Court's order dated November 27, 1998 has not been challenged on appeal.

Under heading III of the Brief of the Appellee, the Appellee also attempts to argue that the Trial Court erred with respect to the Order establishing the admissions as requested. As pointed out above, the propriety of that order is not before this Court on appeal. If the Appellee wished to attack that order, the Appellee should have filed a cross-appeal. Moreover, in order to attack that order, the Appellee must marshal the evidence necessary for the

Court to review the issue of whether or not the Trial Court erred in granting the Defendant's motion for an order establishing admissions. The argument of the Appellee focuses on the question of whether or not he timely received the requests for admissions. The presentation of this argument is very misleading. It gives the false impression that the Trial Court determined that it would receive evidence at trial contradicting the admissions on the basis that the request for admissions were not timely received. However, at trial, whether or not the admissions had been timely received was never a question raised by the Trial Court. Instead, the Trial Court's indication was that it would judge the credibility of the witnesses and/or the documents introduced at trial to determine whether or not the documents had been altered. Interestingly, the Appellee apparently recognizes that the request for admissions may have been sent to the Plaintiff, himself, who initially represented himself pro se in this case. Not only does this reference on page 19 of the Brief of the Appellee undermine the argument of the Appellee, but it also serves to highlight the numerous questions which remain unanswerable as a result of the Appellee's failure to marshal the evidence necessary to explain why the Trial

Court granted the Defendant's motion which resulted in the order establishing admissions, dated November 27, 1998.

**IV. THE TRIAL COURT DID NOT HAVE DISCRETION TO OVERTURN ITS ORDER ESTABLISHING THE ADMISSIONS AT THE COMMENCEMENT OF TRIAL.**

The Appellee continues to attack the Trial Court's order establishing admissions on pages 20 through 22 of the Brief of the Appellee. The Appellee alleges that Plaintiff's objection to Defendant's motion for order compelling discovery "could have been treated by the Court as a motion to withdraw the request for admissions." Of course, all of the arguments raised by the Appellee were issues disposed of by the Trial Court prior to its execution of the order establishing admissions, dated November 27, 1998. At trial, the Court never made any reference to any motion by the Defendant for relief from the admissions. Likewise the Trial Court's decision with respect to Defendant's Rule 59 motion stated that its actions had nothing to do with a motion originating with the Plaintiff. The minute entry and order, date May 24, 2000 specifically states "the Court recalls and the view of the video confirms that at the outset of trial, the Court indicated, admittedly on its own motion (and alerted to the possibility by Plaintiff's Trial Brief), that it would revisit the request for admissions, particularly the one

regarding the purported lease extension, if it appeared that the extension was the result of fraud or forgery" (emphasis added). The Court stated that it was on its own motion that it made the decision to upset its order establishing the admissions. There is no rule giving the Trial Court authority to upset the established admissions on its own motion at the commencement of trial.

As discussed under argument heading I and II of the Brief of the Appellant, by this reference incorporated herein, Utah Rules of Civil Procedure, Rule 36(b) as interpreted in Langeland v. Monarch Motors, Inc. 952 P.2d 1058 (Utah 1998), expressly precludes the Trial Court from doing so. The Defendant relied upon the Trial Court's own ruling based on Langeland in preparing for trial.

The specific witnesses who would have been brought to trial to impeach the credibility of the Plaintiff, if the Defendant had not relied upon the Trial Court's order establishing admissions, would have been the other tenants at the premises. These tenants included a gentleman by the name of Mr. Chen and a gentleman by the name of Dan Rohrberg. If the Court has any question whether Dan Rohrberg would have impeached the testimony of the Plaintiff, the Court need look no further than the hand written affidavit of Mr. Rohrberg signed and notarized on

August 3, 1998 and which was incorporated as part of the requested admissions as Exhibit "C" [R. 125-126]. It is undisputable that Defendant was prejudice by the Trial Court's action.

**V. THERE WAS NO FRAUD UPON THE COURT.**

If the Trial Court doubted the authenticity of the lease and the lease extension, then it was required to address that question at the time of its order establishing the admissions in November 1998.

Throughout the brief of the Appellee, the Appellee refers to a "fraud upon the Court." The first reference appears on page 3 of the brief of the Appellee in the Appellee statement of the case. The Appellee asserts that at the outset of trial on March 22, 1999, that the Trial Court informed the parties that it was not going to allow a fraud upon the Court to be perpetrated. No such words were used by the Trial Court. Instead, the Trial Court stated:

"We do have the issue of the request for admissions that have been deemed admitted, and I think that is basically the rule and the law of the case. However, there are some admissions, as I read them, that give me some trouble. I don't know how critical, for example, the lease extension is to anyone's case. And although that appears to have deemed admitted, I think, counsel, if there's anything that, I guess in this case, that Plaintiff feels that I have deemed admitted but that results from fraud or a forgery, I think I may take proof on that. Because that, to me, would not be something that



perhaps should be included. I don't know if it was, but I see the allegation that it was.

So I'm going to give you a little bit of leeway there, Mr. Turner, to point out things that you think are not--is not correct but that are deliberately not correct or result from some wrongdoing, because I think there's some area there where the Court does need to invoke its discretion. Again, there may not be any such thing in fact, but if you raise it, if that's the purpose, alert the Court to that." (Brief of the Appellant, pp 3:17-4:12)

With regard to both the lease and the lease extension, there was conflicting verbal testimony. The Plaintiff testified that he signed both documents. The changes to the lease are largely irrelevant to the case or the entire appeal, however. The case turns upon the lease extension. The Plaintiff testified that when he signed the lease extension, a majority of the text appearing above his signature was not present. In contrast, the Defendant testified that the lease extension was in the same form as it had been when it was signed by the Plaintiff. Cross-examination of the Plaintiff revealed glaring inconsistencies, approaching impossibility, with respect to the Plaintiff's testimony that the lease extension had been altered after his execution. That subject matter is addressed under Argument III of the Brief of the Appellant, by this reference incorporated herein.

The lease extension card was a document accepted into evidence by the Court. It contained no sign of tampering. Putting aside the lack of credibility of Plaintiff's testimony, this was simply a matter where two witnesses gave conflicting testimony. Would the Appellee characterize every instance of conflicting verbal testimony by witnesses as an attempt to "perpetrate a fraud against the Court"?

The Trial Court was intelligent. The Trial Court knew that if it was going to do something to buttress the findings of fact, then it needed to make a statement in support of its ruling that it found the Defendant to be not credible. The Trial Court, therefore, had motive to make the generalized statement that it did concerning the Defendant's credibility. Nonetheless, the Trial Court never identified any instance of inconsistent testimony by the Defendant. The Trial Court never identified any "self-serving" statement which impeached the credibility of the Defendant. Particularly with respect to the lease extension, no testimony was ever offered even by the Plaintiff to explain how the lease extension card could have been altered after it was signed by the Plaintiff.

If conflicting testimony is enough to give rise to a "fraud upon the Court" allowing the Trial Court to set

aside its own Order establishing requested admission, then all orders establishing admissions are subject to attack by competing testimony at trial. No party will ever be able to safely rely on an admission, even with a Trial Court Order supporting it and actual documents which should speak for themselves.

In the end, the Trial Court did not find that a fraud had been perpetrated against it or the Plaintiff when the order establishing the requested admissions was entered. Through the entire transcript, the Trial Court's statements only reflect a decision to treat Defendant's testimony as not being credible. Even before the Defendant testified, the Trial Court stated that it accepted the Plaintiff's testimony without question as to the subject. These statements show that the Trial Court's action did not involve a "fraud upon the Court."

The following is the totality of the evidence which the Appellee's brief references in support of its contention that the Trial Court's finding that the lease had been modified was supported by some evidence. First, the Plaintiff verified the lease. Second, the Plaintiff testified that he did not have his own copy of the document. Third, the Plaintiff identified the items on the lease that were in his handwriting as opposed the hand

writing of the Defendant. Fourth, the Plaintiff testified as to items that were not written on the lease at the time he signed the lease. Fifth, the Plaintiff introduced copies of other leases signed by other tenants. Sixth, the Plaintiff testified about the differences between the handwritten portions of each of the three leases. Finally, another tenant testified that there was no cable television at the premises.

In somewhat of a contrast, the totality of the evidence referenced by Appellee with respect to the alleged alteration of the lease extension includes the following. Plaintiff testified that Mr. Hawkins would prepare 3x5 cards for signature by Plaintiff. Plaintiff testified that he would sign the 3x5 cards as requested by Defendant. Plaintiff testified that he did not speak with Defendant about extension of the lease until March, 1998.

As addressed in the Brief of the Appellant, the Trial Court accepted the testimony of the Plaintiff at face value, without regard to the inconsistencies of the Plaintiff's testimony. As discussed in the Brief of the Appellant, the Trial Court was already prepared to make a finding based solely on the Plaintiff's testimony before Mr. Callahan ever testified.

Particularly with regard to the lease extension, it is patently unfair for the Trial Court to overturn its Order establishing admissions based on nothing more than the testimony of the Plaintiff that although he had signed the card containing the lease extension, provisions concerning the lease extension had been added after he signed. Certainly, Plaintiff's testimony did not raise the issue to any special level. Plaintiff's testimony was not so earth shattering that it would lead one to conclude that the lease extension was some effort to perpetrate a fraud upon the Court. The testimony was nothing more than the simply generic testimony which occurs in any litigation in which people have different recollections about events.

With regard to the lease extension, in particular, and as discussed in the Brief of the Appellant, the Plaintiff's testimony that the lease extension had been altered was not credible. Even if the Trial Court had the discretion to alter the admissions at the time of trial, or based on testimony at trial, the testimony did not justify any amendment to admission no. 18, nor did the evidence justify a finding that Exhibit "B" (Plaintiff's Exhibit "4") was anything other than an unaltered extension of the lease, as it purported to be on its face.

Appellee argues that Plaintiff also testified that the only time he spoke to Mr. Callahan about extending the Lease was in March 1998. The Lease Extension was signed January 20, 1998. Mr. Callahan would have had to have created the forgery two months before Plaintiff alleges that the subject even came up! [R:301 Plaintiff's Exhibit 4; 505 p. 37:6-16] The relevant facts are fully discussed in the Brief of the Appellant.

In contrast, the Brief of the Appellee does not cite to a single example of where the Trial Court recognized any statement by Mr. Callahan was self-serving, contradictory or otherwise lead the Court to conclude that Mr. Callahan's testimony with regard to the lease extension should not be believed. At the end of the case, the Trial Court was astute enough to know that it needed to make a statement concerning the credibility of the Defendant in order to support the judgment that it was about to render. However, the transcript of the entire trial reveals that the Court had made the determination to set aside the critical admission without listening to the testimony of Mr. Callahan and, possibly, even without regard to the testimony of the Plaintiff.

**VI. DEFENDANT IS ENTITLED TO ATTORNEY'S FEES AS REQUESTED.**

Appellee does not raise any relevant facts or issues under their argument concerning attorney's fees. It is common sense that if the decision of the Trial Court is altered as a result of this appeal, then an award of costs and attorney's fees with respect to both the Trial and this appeal is appropriate.

**VII. OTHER FACTS AND ISSUES RAISED IN APPELLEE'S BRIEF ARE IRRELEVANT OR OTHERWISE WITHOUT MERIT.**

Since they do not apply to any specific legal argument being made by Appellee in the brief of the Appellee, various issues or statements appear in the Appellee's brief are addressed under this final heading.

For example, the majority of the numbered paragraphs in Defendant's statement of facts will not affect the outcome of this appeal. Therefore, although the Defendant may dispute the Appellee's characterization of the facts, no detailed response will be provided. All of the relevant facts are addressed with specific references to the trial transcript in the Brief of the Appellant. The references appearing in the Brief of the Appellee are to pages only, and the Appellee has not marshalled all of the references to the subject-matter addressed, including conflicting evidence. The statement of relevant facts

appears to be an effort on the part of the Appellee to re-try the case or various pretrial motions, rather than address the subject matter of the appeal. Various statements also represent mischaracterizations of the testimony or issues that were not even relevant at trial.

Reference is made to whether or not Plaintiff's Rule 59 Motion in the Trial Court was timely filed. For example, in the summary of the argument on page 9, the Plaintiff alleges that the Rule 59 motion was filed prior to the entry of judgment and that it was filed again 13 days after the judgment was signed. The Plaintiff initially raised this argument at the Trial Court level. However, the Plaintiff subsequently withdrew this objection on November 2, 1999, citing Hudema v. Carpenter, 989 P.2d 491 (Utah App. 1999) (the words "not later than" provides a deadline but does not prohibit early service), which the Plaintiff acknowledged permitted the Trial Court to hear the Rule 59 motion filed prior to the Court's execution of the judgment. [R: 471-472] (Incidentally, the second Rule 59 motion referred to by the Appellee was simply a refileing of the same motion at a later date following the execution of the judgment. The second motion was supported by reference to the earlier filed memorandum in support. The Appellee's reference to



different Rule 59 motions gives the misleading impression that there may have been some difference between the two.) In any event, the Trial Court granted the Rule 59 motion in part. The amended judgment became the final judgment of the Court. The timeliness of the notice of appeal must be measured with respect to the amended judgment, as addressed in detail above. Notwithstanding the fact that it was timely filed, whether or not the Rule 59 motion had been timely is not relevant to this appeal.

Finally, unless the Appellee subsequently corrected the error, the Court of Appeal may wish to reject the Brief of the Appellee on the basis of the Appellee failure to follow the formatting requirements for a brief. Specifically, the font size used by the Appellee on the copy sent to Appellant is smaller than that allowed by the Utah Rules of Appellate Procedure, Rule 27.

### **CONCLUSION**

In summary, Defendant Callahan requests that this Court reverse the decision of the trial court to accept evidence contradicting the admissions pursuant to the trial court Order of November 27, 1998, or alternatively that this Court find that the evidence presented at trial does not support the finding that there was an alteration by Defendant of the lease agreement or the lease

extension. Defendant Callahan further requests that this Court hold on the basis of the lease extension that Plaintiff breached the lease agreement between the parties and wrongfully evicted Defendant Callahan prior to the expiration of the lease extension. Defendant Callahan request that this Court direct the trial court to make appropriate findings based on the evidence presented at trial and include in Defendant's damages award the difference in value between the premises he rented from Plaintiff and the premises that were subsequently rented, general damages including pain and suffering associated with the days which Defendant Callahan spent homeless following the wrongful eviction, punitive damages, and an adjustment to the award of costs and attorney's fees to reflect the fact that Defendant Callahan prevailed at trial on all issues. Defendant Callahan requests an award of costs and fees incurred in connection with this appeal and requests leave of Court to present evidence as to the appropriate amount.

DATED this 21<sup>st</sup> day of December, 2000.


  
\_\_\_\_\_  
Thor B. Roundy  
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CERTIFICATE OF SERVICE BY MAIL

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I, THOR B. ROUNDY, certify that on this 2<sup>nd</sup> day of ~~December~~<sup>January</sup>, 2000, I served two copies of the attached REPLY BRIEF OF THE APPELLANT, Trial Court No. 980906136, Appellate Court No. 2000550, upon counsel for the appellee in this matter by mailing it to him by first class mail with sufficient postage prepaid to the following address:

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\_\_\_\_\_  
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Attorney for Appellant