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Martinez v. Best Buy Co., Inc. : Reply Brief

Utah Court of Appeals

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Gregory J. Sanders; Patrick C. Burt; Kipp and Christensen PC.

Brian W. Steffensen; Steffensen Law Office.

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IN THE UTAH COURT OF APPEALS

**Hugo Martinez and Claudia
Martinez,**

Plaintiffs/Appellants,

VS.

Best Buy Co., Inc.

Defendant/Appellee.

**APPELLANTS' REPLY
BRIEF**

Case No. 20110182-CA

Gregory J. Sanders
Patrick C. Burt
Kipp and Christian PC
10 Exchange Place, 4th Floor
Salt Lake City, Utah 84111

Brian W. Steffensen
Steffensen ♦ Law ♦ Office
 448 East 400 South, Suite 100
 Salt Lake City, Utah 84111

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Gregory J. Sanders
Patrick C. Burt
Kipp and Christian PC
10 Exchange Place, 4th Floor
Salt Lake City, Utah 84111

Brian W. Steffensen
Steffensen ♦ Law ♦ Office
448 East 400 South, Suite 100
Salt Lake City, Utah 84111

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Plaintiffs/ Appellants the Martinezes in this Reply Brief will address the arguments raised by the Appellee Best Buy in its Appellee's Opening Brief in the order in which they appear.

I. Best Buy's Claim that the Martinezes Failed at Trial to Argue that the FTC Definition of Deception is Applicable is Feckless in the Extreme

Best Buy is entirely mistaken in its claim that the Martinezes did not raise or argue that the definition of "deception" is to be taken from the FTC developed law on this subject.

During the Martinezes' closing argument, Counsel stated the following:

22 ... "I'm not going to argue
23 unconscionability. I'm not sure we could establish the
24 standard for unconscionability. But deception.
25 Then we have to ask, what does deception mean? P94
It's not fraud. And I am going to quote from the National
2 Consumer Law Center's treatise on Unfair and Deceptive Act
3 and Practices Statutes. And they are called UDAP Statutes.
4 And most states have one. And the Utah Consumer Sales
5 Practice Act is considered to be Utah's Unfair and Deceptive
6 Act or Practice Statute.

7 And, in discussing the concept, in almost every
8 one of those it states [or] prohibits deceptive acts or
9 practices. And it states under Section 4.2.3.1[of the National
Consumer Law Center's treatise on Unfair and Deceptive Act
and Practices Statutes], **the modern**

10 concept of deception as shaped by the Federal court
11 Interpretations of the Federal Trade Commission Act provides
12 that intent, [scienter], actual reliance or damage and even
13 actual deception [are] unnecessary. All that is required is

14 **proof that a practice has a tendency or capacity, or under**
15 **the FTC's latest formulation is likely to deceive even a**
16 **significant minority of consumers.** And that, usually, the
17 standard of proof under the UDAP [for] deception is the
18 preponderance of the evidence standard and not a clear and
19 convincing that would be required for fraud.”

...

Trial Transcript, pp 94-95

The Martinezes clearly stated and argued that “deception” is to be defined as the Federal Courts which have interpreted the Federal Trade Commission Act have defined it. The Martinezes went on to state what the Federal FTC developed definition of “deception” is and argued that the FTC definition of “deception” governs in this case.

The Martinezes then explained in pages 95 through 100 how the conduct of Best Buy which was established at trial violated that FTC developed definition of “deception.”

Keeping this in mind – i.e., that the Martinezes expressly directed the trial court to look at the Federal Court interpretations of the Federal Trade Commission Act in determining the proper definition of “deception” – let us now look at the following statements from Best Buy’s Brief:

“The heart of plaintiffs' brief is based on the definition of the word "deceptive" according to FTC case law and precedent. However, plaintiffs never raised this argument at the trial court level and it is therefore not permissible for appellate review.” Appellee’s Brief, p. 5.

In this case, plaintiffs never raised the issue of the FTC definition of "deceptive" at the trial court level and therefore never gave the trial court an opportunity to rule on that issue. Instead, plaintiffs raise the issue for the first time on appeal, and state the trial court was wrong to not consider the FTC precedent. However, the record clearly shows that plaintiffs never raised the issue for the trial court's consideration.

These assertions by Best Buy are so obviously incorrect given the language from the Martinezes' closing argument at trial quoted above that Best Buy's assertions in this regard almost constitute a fraud upon this Court.

Why must the Court's of Utah look to FTC interpretations and/or definitions of these key terms? Because the Utah legislature directed the Courts of this State to follow the FTC's lead in construing the terms of the UCSPA:

"13-11-2. Construction and purposes of act.

This act shall be construed liberally to promote the following policies:

- (1) to simplify, clarify, and modernize the law governing consumer sales practices;
- (2) to protect consumers from suppliers who commit deceptive and unconscionable sales practices;
- (3) to encourage the development of fair consumer sales practices;
- (4) to make state regulation of consumer sales practices not inconsistent with the policies of the Federal Trade Commission Act relating to consumer protection;**
- (5) to make uniform the law, including the administrative rules,

with respect to the subject of this act among those states which enact similar laws; and

(6) to recognize and protect suppliers who in good faith comply with the provisions of this act. “

The only way “to make state regulation of consumer sales practices not inconsistent with the policies of the Federal Trade Commission Act relating to consumer protection” is to give the key operative terms – “deception” and “unconscionable” – the same meaning in Utah as the Federal Courts and the FTC have given to those terms.

As the Martinezes have stated previously,

The common definition of "deceptive" is:

" tending or having power to deceive : misleading" - Merriam -Webster

Does "deceptive" mean "fraud?" **No**, of course not. Deception is a lesser concept. It is something which "tends" to deceive.

Is there a scienter requirement? Do you have to prove an intent to deceive?

Again - **NO**. Deception is a much less stringent concept to prove:

"The modern concept of deception, as shaped by federal court interpretations of the Federal Trade Commission Act, substantially eliminates [the common law fraud] proof requirements. To show deception under the FTC Act, intent, scienter, actual reliance or damage, and even actual deception are unnecessary. All that is required is proof that a practice has a tendency or capacity (or, under the FTC's latest formulation, is likely to deceive"

National Consumer Law Center, Unfair and Deceptive Acts and Practices (7th ed. 2008), Section 4.2.3.1, p 190

The FTC definition of deception does not require intent; a practice is deceptive even if there is no intent to deceive. Ibid., p. 193 Citing *Federal Trade Comm 'n v. Algoma Lumber Co.*, 291 U.S. 67 (1934); *Federal Trade Comm 'n v. Freecomm Communications, Inc.*, 401 F. Ed 1192, 1203 (10th Cir. 2005)(key question is not intent to deceive, but 'the likely effect of the claim on the mind of the ordinary consumer')

This means that the Martinezes did not have to show that the Best Buy employee had an intention to deceive them. All they had to show is that his actions did in fact "tend to deceive," or "tend to mislead" them.

Consequently, “[t]he heart of plaintiffs’ brief” which argued that the definition of “deception” as developed by FTC case law should have been followed, was not only argued directly and clearly to Judge Peuler – but correctly followed the mandate of the Utah legislature found in the foregoing language of the UCSPA.

II. The Martinezes Presented a Case Which Was Clearly and Squarely Based Upon Allegations That Best Buy Violated the UCSPA

In response to the Martinezes’ claim that the Trial Court improperly

followed and applied “contract law” principles to this case rather than the correct “consumer law” or “UCSPA law” principles, Best Buy responded by arguing in its brief the following:

“Plaintiffs also claim that the trial court erred [sic] by treating this case as a contract case and using contract principles in determination of their UCSPA claim. However, at trial, plaintiffs dressed and presented this case as a contract case. As stated above, plaintiffs originally made a claim for breach of contract. The record shows that they continued to pursue their case under contract principles and it was not until plaintiffs' final rebuttal closing argument that plaintiffs' voluntarily dismissed their breach of contract claim.” Appellee’s Brief, p. 7

Once again, Best Buy grossly misrepresents the record in this case.

The Martinezes in their opening argument, stated the following:

But what happened here, and we are going to argue that there was deception and, essentially, negligent misrepresentation.

Now, we have a Utah Consumer Sales Practice Act that says you can not do deceptive acts. We are not asking this court to find that the contract wasn't formed or – well, let me be careful about that. I'm not sure (inaudible) about that. But, was there deception? Because the Utah Consumers Sales Practice Act says any deceptive act or practice violates the statute. Deceptive act or practice. So, I don't believe that any of the case law [that] talks about, well, if you should have (inaudible) and didn't sign the contract, read the contract you are out of luck. That deals with contract formation. That deals with enforcement of the contract, et cetera. That's not necessarily our case. Our case is, was there deception during this time period? Was there deception?

Trial Transcript, pp. 9-10

.... But was there a deception here? Well, deception is, doesn't require an intent to defraud. It requires that something is either said that is untrue or something is omitted that ought to be disclosed or talked about, is not talked

about, etc.

Trial Transcript, p. 11

Now, we are only suing them for the deception that occurred here under the Utah Consumers Sales Practice Act and negligent misrepresentation. We believe that once the evidence comes in you'll find that what I have told you is true. I'll explain further in my closing argument why under the definitions of deception these Utah Consumer Sales Practice Act, et cetera, that they are in fact violated.

Trial Transcript, pp. 12-13

III. The Trial Court's Interpretation of the Facts Was Improperly Colored By Her Belief That Contract Principles Applied and Caused Her to Make Erroneous Legal Rulings

This was one of those incredibly rare cases in which the facts were almost entirely without dispute.

The problem, as clearly argued by the Martinezes in their Opening Brief, is that the Trial Court admittedly applied contract principles to the facts rather than the clear provisions of the UCSPA.

Best Buy tries to get around this argument by trying to hide the incorrect legal rulings in its discussion of the findings of the trial court.

A. The Martinezes' Case at Trial Focused on Whether Best Buy's Actions Were Deceptive

Best Buy argued to the Trial Court that the terms of the contract were clear, that the Martinezes should have read it, and if they did not read it they are out of luck – even if the Best Buy employee made false and/or misleading statements to

the Martinezes about it.

The Martinezes argued that this case was not about contract formation. This case was about whether Best Buy committed any deceptive acts during the course of its interaction with the Martinezes – during which the Martinezes were induced to sign the HSBC credit card application – which violated the UCSPA.

The Martinezes argued that even if they could not get out of the contract given contract formation principles, they could still argue that the way in which Best Buy induced them to enter into the contract was deceptive and the Martinezes have a claim under the UCSPA arising because of those acts of deception.

This is some what analogous to the situation in the decision by this Court in *Estrada et al. v. Mendoza et al.*, Appeal No. 2100418-CA (Utah App, filed March 22, 2012), 2012 Ut App. 82 – a copy of which is attached hereto as Exhibit A.

In that case, Pay Day Loan borrowers were sued in small claims court, did not appear, were defaulted and then garnished for amounts which were more than they actually owed and/or that which was allowed by law.

The Appellate Court ruled that the default judgments and the garnishments themselves could not be collaterally attacked.

The Appellate Court also ruled, however, that:

The UCSPA creates a cause of action against a “seller” who commits either

a “deceptive” or an “unconscionable” act or practice . . . in connection with a consumer transaction . . . whether it occurs before, during, or after the transaction.” Id. Sections 13-11-4(1), -5(1). To that end, the UCSPA “shall be construed liberally” to, among other things, “protect consumers from suppliers who commit deceptive and unconscionable sales practices.” Id. 13-11-2(2). Ibid. at paragraph 5

...
Thus, Plaintiffs here are precluded from collaterally attacking the validity of the small claims court writs because they “failed to use any of the available legal avenues for challenging [them] at the time they were issued or executed.” See id. ¶ 10. However, Plaintiffs contend that their UCSPA claim does not constitute a collateral attack on those writs, because they “are not seeking to have the Writ[s] withdrawn” or “to have the garnishments released.” Rather, they rely on Defendants’ conduct in obtaining the writs as deceptive or unconscionable practices under the UCSPA and the common law of civil conspiracy. Ibid. at paragraph 8

We agree with Plaintiffs on this point. In pleading their UCSPA claim, Plaintiffs allege that Defendants’ acts in obtaining writs in the small claims court were “deceptive” or “unconscionable.” See Utah Code Ann. 13-11-4(1), -5(1). Hence their UCSPA claim does not “depend[] upon a determination that the [writs] were illegal.” See Moss, 2010 UT App 170, paragraph 9. The small claims court judgments are thus not “draw[n] in[to] question” by this claim. See id. (citation and internal quotation marks omitted). Nor do Plaintiffs seek to have those judgments “vacated or revised or modified,” or “to prevent [their] enforcement.” See id. (citation and internal quotation marks omitted). Therefore, Plaintiffs’ UCSPA claim is not a collateral attack on the small claims judgments and is thus not waived by Plaintiffs’ failure to challenge the writs in the small claims proceedings.
Ibid. at paragraph 9

In this case, the Martinezes advised the Court that the contract which was entered into by the Martinezes was with HSBC –not Best Buy. The Martinezes said that they were not trying in this case to rescind that contract or seek some

other contract related remedy.

Rather, the Martinezes stated that they were bringing a UCSPA claim against Best Buy for Best Buy's actions which were alleged to be "deceptive." As the Martinezes stated in their oral argument at trial, the central issue in this case is -- "Was there deception?"

The trial court was required, therefore, to apply the provisions and policies and principles of the UCSPA to the facts adduced at trial – and not the principles of contract formation.

Just like the plaintiffs/ appellants in the *Estrada v. Mendoza* case could not and did not attack or seek to set aside the default judgments and writs of garnishments themselves, but could still argue that the manner in which the Pay Day Lender had obtained those garnishments constituted deception or unconscionable acts; the Martinezes in this case were free to argue that even if they are bound by the contract with HSBC, **Best Buy still committed deceptive acts** during the course of getting the Martinezes to enter into that contract with HSBC.

B. The Martinezes proved each of the categories of deception outlined in their Opening Brief and as argued in their Closing Argument at Trial Transcript, pp. 93-100

The Trial Court's finding that the specific categories of deception identified

and proven by the Martinezes were not deceptive under the UCSPA constituted clear legal error. She did not apply the definition of “deception” as developed by the FTC to those facts.

1. It was deceptive for Best Buy to tell the Martinezes that they needed to sign "here" and "here" - one being the request for Account Shield - in order to apply for the credit card

The Trial Court admitted that it was incorrect for Best Buy to tell the Martinezes that in order to “apply for the credit card” the Martinezes had to sign on each and every line on the application. The Martinezes did not have to sign the line which “requested” the “AccountShield” product or service in order to “apply” for the card.

The evidence was clear that Best Buy said this.

It is clear that this statement was false.

The Trial Court said that even though this was false – and therefore clearly deceptive – applying contract formation principles the Martinezes were required to read the terms of the agreement.

However, if what the Best Buy employee said to the Martinezes was untrue, then he committed a “deceptive act” which violated the UCSPA by making that false statement.

Best Buy continues to incorrectly urge this Court to follow “Utah’s black letter law [governing contract formation] that a party is responsible to understand the terms of a contract which he or she signs.” Appellee’s Brief, p. 12.

The problem for Best Buy is that the “black letter” contract formation principles do not govern the UCSPA and its construction and implementation.

The UCSPA instructs Utah Courts that they must “construe [the UCSPA] liberally ... to protect consumers” from the deceptive acts and/or practices of “suppliers” in connection with “consumer transactions.” This is the “Black Letter Law” of consumer law.

The Trial Court and this Court must apply the correct “Black Letter Law.”
The Trial Court did not.

2. It was deceptive for Best Buy to fail to provide the Spanish translation of the application, but to get the Martinezes to sign Exhibit 1 which contained a certification that they had been provided with a Spanish translation

Best Buy knew that it had not provided the Martinezes with a Spanish translation of the credit card application. Nevertheless, Best Buy told the Martinezes to “sign here” in order to get the credit card – which line contained a false representation by the Martinezes that Best Buy had given them a Spanish translation.

Inducing the Martinezes to sign a false certification that they had been given a Spanish translation was clearly “deceptive” and violated the UCSPA.

3. It was deceptive for Best Buy to fail to disclose that one of the signature lines was a request to be enrolled in the Account Shield program

Best Buy not only told the Martinezes that they had to sign “here” and “here” in order to apply for the HSBC credit card – which itself was deceptive as outlined above, but also omitted to disclose that by signing on one of the lines the Martinezes would be obligating themselves to purchase and pay for something called the “AccountShield” product.

This omission of a material fact induced the Martinezes to unwittingly sign up for that product/ service and led to the problems and damages about which the Martinezes testified at trial on the issue of damages. It was deceptive not to disclose this.

“Black Letter” Contract law says that you are bound by that contract if you could have but did not read its provisions.

“Black Letter” Consumer law says that the “supplier” committed a deceptive act by failing to disclose the effect of signing on that line.

If this Court does not apply the correct “Black Letter” Consumer law to these types of cases, the UCSPA will be eviscerated and become meaningless.

The UCSPA can only be “construed liberally ... to protect consumers from suppliers who commit deceptive ... practices” through having “UCSPA Black Letter Law” applied to cases such this. UC 13-11-2(2) and as emphasized in *Estrada v. Mendoza*, supra.

4. It was deceptive for Best Buy to get the Martinezes to sign up for the Account Shield product without disclosing how much it would cost

The Martinezes testified that they had no idea that they were signing up for the AccountShield product, much less what it would cost them. They testified that they were not told what it would cost... obviously, since they weren't told anything about it.

Best Buy's witness could not testify about what was said by Best Buy to the Martinezes about that because he was not there. He had no personal knowledge of anything except Best Buy's general practices.

The Martinezes pointed out that the application does not disclose anything about the price of this supposed product:

“I mean, there isn't even a dollar figure, a price. I mean, this, I think this whole [AccountShield] thing is deceptive per se, because there's no disclosure of price. None. None. And, they give us, in this case, even if my client had read it, she still wouldn't have gotten that disclosure. And there's an omission on the document they use to start this as to price. And that is hugely [deceptive].” Trial Transcript, p 112.

Best Buy's witness – a store manager at a different store – could not read the language of the application but said that he thought it was a percentage of the balance – but he did not say what that percentage was.

So Best Buy's witness testified that the cost/ price of the "AccountShield" product was some undefined "percentage" of the credit card balance. That still does not disclose exactly what the Martinezes would have to pay for this service.

Further, the application itself belies the Best Buy witness' testimony. The application itself has no disclosure of price whatsoever. So, even if the Martinezes could have and/or had read it, the price would not have been disclosed to them.

That has got to be a deceptive practice. Best Buy got the Martinezes to unwittingly sign up for a product the price of which was never disclosed to them.

The Court said that the application could not be read so she would rely upon the Best Buy witness' testimony that it stated that the price would be an unidentified percentage of the card balance.

That ruling had the following errors:

- a. The Best Buy witness' testimony still did not identify exactly what "percentage" of the card balance would be charged. Was it 10%? 1%? 95%? Even after his testimony no one knows.
- b. The Best Buy witness' testimony is contradicted by the

language of the application itself. The Martinezes enlarged the copy of the application and were able to accurately set forth the language of that part of the application in their Opening Brief.

It does not disclose the price.

The Trial Court's ruling on this issue should be reversed.

This was not an "HSBC issue." It was Best Buy that met with the Martinezes and had the interaction with them that resulted in them signing the application and then being charged for this product which they had no idea they were purchasing. It was Best Buy who "offered" this service/ product and who during that process of "offering" that service/ product to the Martinezes, committed the identified deceptive acts.

Best Buy must be found liable for its own violations of the UCSPA. BEST BUY'S failure to disclose price should be declared to have been deceptive.

5. It was deceptive for Best Buy to get Mrs. Martinez to sign the Account Shield enrollment line without making any meaningful disclosure as to what benefit Mrs. Martinez would obtain from said enrollment

The testimony was clear and undisputed that Best Buy did not verbally disclose anything to the Martinezes about the AccountShield product/ service. If there was any disclosure, it was only that embodied in the language of the written

HSBC credit card application.

However, that language not only does not disclose what that product/service will cost, but it does not provide any detail as to exactly what benefit the Martinezes would receive by purchasing that product or service. It says something about paying or covering an account balance – but how much and under what circumstances? It is very unclear.

It is so unclear that one has to wonder if the Best Buy employee was supposed to make some sort of verbal explanation to the Martinezes which would fill in the many blanks.

Since Best Buy's employee failed to disclose anything about this product/service to the Martinezes – it was deceptive to induce them to sign up for this product. Fairness required full and complete disclosure about what that product would cost and what benefit the Martinezes would receive for that price.

- 6. It was deceptive for Best Buy to get Mrs. Martinez to sign the Account Shield enrollment line which contained the false certification that she had read and understood the program summary when Best Buy knew that she had not - because they did nothing to explain it to her**

Under the signature line for the Account Shield product, it contains a certification that the signor has read and understood the program summary. From the undisputed testimony of the Martinezes as to what happened at the Best Buy

store, it is clear that the Best Buy employee handed Mrs. Martinez the application and said “if you want to apply for this card, you have to sign here and here.” One of those “here”s was the line for Account Shield.

That was the entirety of the verbal disclosure about the details of the Account Shield product – and it was not only deceptively incomplete, but was also untrue.

Further, the language on the application is so unclear and lacking in meaningful and detailed disclosure that Best Buy could not have reasonably believed that the applicant would be able to “understand” what the program was – i.e., what it would cost and exactly what she would get for paying that price – even if the applicant had read each and every word therein.

So, it was deceptive to induce Mrs. Martinez to sign that false certification. Best Buy got her to sign something that its employee knew was untrue or could not have believed from the undisputed facts that it was true.

7. It was deceptive for Best Buy to electronically tell HSBC that Hugo Martinez had agreed to the Account Shield product

Best Buy’s witness at trial testified that after applicants for the HSBC credit card had filled out the credit card application and signed it, Best Buy would send an electronic message to HSBC that the applicants had agreed to the terms of the

application – including the enrollment in the Account Shield program/ product.

Hugo Martinez did not sign on the AccountShield “enrollment” line.

Hugo Martinez only signed on the general application line.

Hugo Martinez argued that since he did not sign on AccountShield “enrollment” line, he had not agreed to purchase that product/ service.

Hugo Martinez argued that it was not true for Best Buy to represent to HSBC that Hugo Martinez had agreed to be bound personally to pay for the cost of the Account Shield product.

For this reason, Hugo Martinez argued that it was deceptive for Best Buy to tell HSBC that he had agreed to purchase and pay for the Account Shield product.

Appellants argue that this is obvious and that on this additional ground Best Buy violated the UCSPA. The Trial Court’s ruling otherwise should be reversed.

IV. The Scope of the UCSPA is not Limited by the “Examples” of Wrongful Conduct Set Forth Therein

The UCSPA contains a list of examples of deceptive conduct. Best Buy argues that:

“One glimpse at this list shows that the intent of the legislature in enacting the UCSPA was to deter actions far different from the facts of this case. The legislature clearly shows that the UCSPA is intended to stop and penalize blatantly dishonest and deceitful sale practices”

Appellee’s Brief, pp. 13-14

The problem for Best Buy is that there is other language in the UCSPA which clearly states that the UCSPA is not limited to these types of supposedly “blatantly dishonest and deceitful sales practices.”

For instance, 13-11-4(1) clearly prohibits any and all “deceptive act[s] or practice[s]:”

“(1) A deceptive act or practice by a supplier in connection with a consumer transaction violates this chapter whether it occurs before, during, or after the transaction.”

In the next section, which contains the list of “examples” of violations to which Best Buy was referring, the UCSPA makes it clear that said list does not limit the scope of the UCSPA in any way:

“(2) **Without limiting the scope of Subsection (1)**, a supplier commits a deceptive act or practice if the supplier [commits the following acts]...”

Of critical and very telling importance is the “purpose” and “scope” language of the UCSPA, which clearly provides that:

“13-11-2. Construction and purposes of act.

This act shall be construed liberally ...:

...
(2) **to protect consumers from suppliers who commit deceptive and unconscionable sales practices;**

... [and]
(4) **to make state regulation of consumer sales practices not inconsistent with the policies of the Federal Trade Commission**

Act relating to consumer protection; ...”

A detailed analysis of all of the provisions of the UCSPA, rather than limiting the analysis solely to “one glimpse” of one portion of the UCSPA, leads one to the following inescapable conclusions:

- a. The UCSPA is intended to provide powerful and effective protection for Consumers and to also provide them with a private right of action and a meaningful remedy in the event that a supplier engages in any “deceptive” acts or practices.
- b. The Utah legislature has strongly and clearly instructed the Courts to construe the UCSPA liberally in order to protect consumers from “deceptive” acts or practices.
- c. The Courts are directed to look to the FTC definitions of “deception” for guidance in construing the language of the UCSPA so as to align the scope of the UCSPA with the scope of the FTCA.
- d. The FTC definition of “deception” does not require a showing of fraud, scienter, or intent;
- e. The list of “examples” in 13-11-4(2) is clearly not exclusive.
- f. If a supplier like Best Buy has committed any deceptive act – as defined by the Federal FTC definition of “deceptive” – the UCSPA

provides the consumer with a remedy including the award of statutory damages and attorneys fees.

V. The UCSPA is Intended to Benefit Suppliers Who Do Not Violate Its Terms – Not Best Buy

Best Buy did not “in good faith comply with the provisions” of the UCSPA. Best Buy’s conduct was deficient. Best Buy’s conduct was in seven identified ways “deceptive.”

The UCSPA is intended to benefit retailers who do not violate the UCSPA by penalizing those retailers – like Best Buy - who have violated the UCSPA.

Under the UCSPA, Best Buy can not excuse its deception by saying –

“Well, the consumer should have caught us in our deception;” or

“It is the consumer’s fault that they did not realize that we were deceiving them.”

Of course, that would be ridiculous – except for the fact that this is exactly what the Trial Court found.

The Trial Court’s rulings must be set aside because it is almost self-evident that a supplier can not excuse its violations of the UCSPA by blaming the consumer for not catching the supplier in those violations up front.

VI. Relief Requested by the Martinezes

The Martinezes ask this Court to:

1. Reverse all of Judge Peuler's rulings;
2. Find that based upon the undisputed testimony adduced at trial, and the application of correct Consumer Law legal principles, one or more of the seven (7) acts identified by the Martinezes as having been "deceptive" were in fact deceptive and constituted violations of the UCSPA;
3. Find that as a result of those violations of the UCSPA by Best Buy, each of the Martinezes is entitled to an award of minimum statutory damages of \$2,000 from Best Buy, plus their costs and attorneys fees;
4. Remand this case back to the Trial Court with instructions to enter judgment in favor of the Martinezes and against Best Buy accordingly; and that as a part thereof, direct the Trial Court to also award the Martinezes their costs and attorneys fees – which should include costs and fees incurred in prosecuting this appeal.

DATED this 26th day of March, 2012.

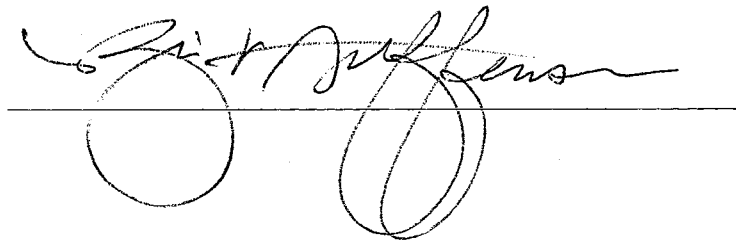
STEFFENSEN ♦ LAW ♦ OFFICE

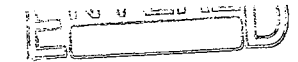

Brian W. Steffensen

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of March 2011, that I caused two (2) true and correct copies of the foregoing instrument to be mailed, postage prepaid to:

Gregory J. Sanders
Patrick C. Burt
Kipp and Christian PC
10 Exchange Place, 4th Floor
Salt Lake City, Utah 84111
Fax 801 359 9004

A handwritten signature in black ink, appearing to read "Patrick C. Burt", is written over a horizontal line. The signature is stylized with large, flowing loops.



FILED

IN THE UTAH COURT OF APPEALS

MAR 22 2012

BY:

---ooOoo---

Vilma Estrada, Lidia Hernandez
Arellano, Victor Bravo, Jose Lopez,
Hilda Hernandez, and Leila Stowell,

Plaintiffs and Appellants,

v.

Robin Mendoza, Fred W. Almanza,
Feria Access LLC, Southern
Management Professional Limited
Liability Company, and Does 1-50,

Defendants and Appellees.

MEMORANDUM DECISION

Case No. 20100418-CA

FILED

(March 22, 2012)

2012 UT App 82

Fourth District, Provo Department, 090402579
The Honorable Claudia Laycock

Attorneys: Brian W. Steffensen, Salt Lake City, for Appellant
Jamis M. Gardner, Provo, for Appellee

Before Judges Voros, Thorne, and Roth.

VOROS, Associate Presiding Judge:

¶1 This appeal originated as six separate actions.¹ Plaintiffs appeal a judgment on the pleadings in favor of Robin Mendoza, Fred W. Almanza, Feria Access LLC, and Southern Management Professional LLC (collectively, Defendants). We affirm in part, reverse in part, and remand for further proceedings.²

1. Six borrowers filed separate but identical lawsuits in Salt Lake County. The suits were transferred to Utah County and consolidated into a single action.

2. Pursuant to rule 37(a) of the Utah Rules of Appellate Procedure, Defendants filed a suggestion of mootness indicating that bankruptcy filings had rendered the appeal

(continued...)

¶2 “The grant of a motion for judgment on the pleadings is reviewed under the same standard as the grant of a motion to dismiss, i.e., we affirm the grant of such a motion only if, as a matter of law, the plaintiff could not recover under the facts alleged.” *Miller v. Gastronomy, Inc.*, 2005 UT App 80, ¶ 6, 110 P.3d 144 (citation and internal quotation marks omitted). When “reviewing a motion for judgment on the pleadings, this court accepts the factual allegations in the complaint as true; we then consider such allegations and all reasonable inferences drawn therefrom in a light most favorable to the plaintiff.” *Id.* ¶ 1 n.1 (citation and internal quotation marks omitted).

¶3 Plaintiffs are borrowers on payday loans gone awry.³ Defendant Mendoza owned and operated Feria Access, a payday lender with an office in Salt Lake City. Plaintiffs obtained, then defaulted on, payday loans from Feria Access’s Salt Lake City office. Defendants sued Plaintiffs in small claims court in Utah County. Plaintiffs allege that Defendants sued in Utah County with the “hope that [Plaintiffs] and others similarly situated might be unable to appear in Utah County and thus be defaulted.” Plaintiffs did fail to appear, and Defendants were indeed awarded default judgments. Defendants obtained writs of garnishment in amounts that Plaintiffs allege were

2. (...continued)

moot as to Mendoza and Feria Access. See Utah R. App. P. 37(a); *Salt Lake County v. Holliday Water Co.*, 2010 UT 45, ¶ 15, 234 P.3d 1105 (“An appeal is moot if during the pendency of the appeal circumstances change so that the controversy is eliminated, thereby rendering the relief requested impossible or of no legal effect.” (citation and internal quotation marks omitted)). Plaintiffs did not object or present counterargument in writing or at oral argument. Accordingly, we dismiss the appeal as to Mendoza and Feria Access.

3. “Payday loans are small-dollar, short-term, unsecured loans that borrowers promise to repay out of their next paycheck or regular income payment. . . . Because these loans have such short terms to maturity, the cost of borrowing, expressed as an annual percentage rate, can range from 300 percent to 1,000 percent, or more.” Federal Deposit Insurance Corporation, *Payday Lending*, <http://www.fdic.gov/bank/analytical/fyi/2003/012903fyi.html> (last visited Mar. 19, 2012). “While payday lending was virtually nonexistent in 1985, by 2002 it exploded into an industry with over twenty-five thousand retail outlets nationwide, more than McDonald’s, Burger King, Sears, J.C. Penney, and Target stores combined.” Christopher L. Peterson, *Usury Law, Payday Loans, and Statutory Sleight of Hand: Salience Distortion in American Credit Pricing Limits*, 92 Minn. L. Rev. 1110, 1111 (2008).

inflated. Plaintiffs neither appealed nor resorted to remedies available to them under rule 64D of the Utah Rules of Civil Procedure, which provides a process to object to inaccurate garnishments. Instead, Plaintiffs filed independent actions in district court.

¶4 Plaintiffs' complaint alleges three causes of action: civil conspiracy, violation of the Utah Consumer Sales Practices Act (the UCSPA), and violation of the Fair Credit Reporting Act. In granting Defendants' motion for judgment on the pleadings, the trial court ruled that Plaintiffs should have availed themselves of the remedies that the Utah Rules of Small Claims Procedure provide; that Plaintiffs waived any causes of action based on the inflated garnishments for failure to seek relief under rule 64D in small claims court; and that Plaintiffs' complaint failed to adequately state claims for civil conspiracy, violation of the UCSPA, and violation of the Fair Credit Reporting Act. Plaintiffs raise multiple claims of error on appeal.

1. Utah Consumer Sales Practices Act

¶5 The gravamen of Plaintiffs' case is that the Defendants violated the UCSPA, *see* Utah Code Ann. §§ 13-11-1 to -23 (2009). The UCSPA creates a cause of action against a "seller" who commits either a "deceptive" or an "unconscionable" "act or practice . . . in connection with a consumer transaction . . . whether it occurs before, during, or after the transaction." *Id.* §§ 13-11-4(1), -5(1). To that end, the UCSPA "shall be construed liberally" to, among other things, "protect consumers from suppliers who commit deceptive and unconscionable sales practices." *Id.* § 13-11-2(2).

¶6 Plaintiffs allege that Defendants engaged in deceptive and unconscionable conduct by obtaining garnishments for more money than they were legally owed. The trial court ruled that Plaintiffs waived any claim arising out of inflated garnishment amounts by bypassing remedies available to them in small claims court under rule 64D of the Utah Rules of Civil Procedure. Rule 64D(h) provides a process by which a judgment debtor can challenge a writ of garnishment. *See* Utah R. Civ. P. 64D(h). Rule 64D applies to the collection of small claims judgments. *See* Utah R. Small Claims P. 11(a) ("Judgments may be collected under the Utah Rules of Civil Procedure."). Plaintiffs argue that their failure to challenge the allegedly flawed garnishments in the underlying small claims action does not preclude them from bringing a new action based on those flaws.

¶7 "'With rare exception, when a court with proper jurisdiction enters a final judgment, . . . that judgment can only be attacked on direct appeal.'" *Moss v. Parr Waddoups Brown Gee & Loveless*, 2010 UT App 170, ¶ 9, 237 P.3d 899 (omission in

original) (quoting *State v. Hamilton*, 2003 UT 22, ¶ 25, 70 P.3d 111), *cert. granted*, 245 P.3d 757 (Utah 2010).⁴ “““The general rule . . . is that a judgment may not be drawn in question in a collateral proceeding and an attack upon a judgment is regarded as collateral if made when the judgment is offered as the basis of a claim in a subsequent proceeding.”“” *Id.* (quoting *Tolle v. Fenley*, 2006 UT App 78, ¶ 15, 132 P.3d 63 (quoting *Olsen v. Board of Educ.*, 571 P.2d 1336, 1338 (Utah 1977))). “““Where a judgment is attacked in other ways than by proceedings in the original action to have it vacated or revised or modified or by a proceeding in equity to prevent its enforcement, the attack is a ‘Collateral Attack.’““” *Id.* (quoting *Olsen*, 571 P.2d at 1338 (quoting Restatement of Judgments § 11 cmt. a (1942))).⁵

¶8 Thus, Plaintiffs here are precluded from collaterally attacking the validity of the small claims court writs because they “failed to use any of the available legal avenues for challenging [them] at the time they were issued or executed.” *See id.* ¶ 10. However, Plaintiffs contend that their UCSPA claim does not constitute a collateral attack on those writs, because they “are not seeking to have the Writ[s] withdrawn” or “to have the garnishments released.” Rather, they rely on Defendants’ conduct in obtaining the writs as deceptive or unconscionable practices under the UCSPA and the common law of civil conspiracy.

4. “The fact that certiorari was granted . . . does not deprive [the opinion] of precedential value for us.” *United States ex rel. Daneff v. Henderson*, 501 F.2d 1180, 1181 (2d Cir. 1974) (citation omitted); *cf. Clinton v. Jones*, 520 U.S. 681, 689 (1997) (“[O]ur decision to grant the petition [for certiorari] expressed no judgment concerning the merits of the case . . .” (citation omitted)).

5. It is unclear whether the plaintiffs in *Moss v. Parr Waddoups Brown Gee & Loveless*, 2010 UT App 170, 237 P.3d 899, *cert. granted*, 245 P.3d 757 (Utah 2010), alleged fraud on the court under rule 60(b) of the Utah Rules of Civil Procedure. Plaintiffs here did. After describing various means of challenging a final judgment in the trial court, rule 60(b) states, “This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court.” Utah R. Civ. P. 60(b). However, Plaintiffs’ brief never mentions rule 60(b) and cites no cases involving fraud on the court. Accordingly, any rule 60(b) claim is either abandoned on appeal or inadequately briefed. *See* Utah R. App. P. 24(a)(9) (stating that an adequately briefed argument “contain[s] the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on”).

¶9 We agree with Plaintiffs on this point. In pleading their UCSPA claim, Plaintiffs allege that Defendants' acts in obtaining writs in the small claims court were "deceptive" or "unconscionable." See Utah Code Ann. §§ 13-11-4(1), -5(1). Hence their UCSPA claim does not "depend[] upon a determination that the [writs] were illegal." See *Moss*, 2010 UT App 170, ¶ 9. The small claims court judgments are thus not "draw[n] in[to] question" by this claim. See *id.* (citation and internal quotation marks omitted). Nor do Plaintiffs seek to have those judgments "vacated or revised or modified," or "to prevent [their] enforcement." See *id.* (citation and internal quotation marks omitted). Therefore, Plaintiffs' UCSPA claim is not a collateral attack on the small claims judgments and is thus not waived by Plaintiffs' failure to challenge the writs in the small claims proceedings.

¶10 In dismissing Plaintiffs' claim under the UCSPA, the trial court also perfunctorily stated that the acts alleged by Plaintiffs are not deceptive or unconscionable acts or practices under the UCSPA. We do not read this as a ruling on the merits of Plaintiffs' UCSPA claims. The UCSPA establishes a policy of giving plaintiffs a reasonable opportunity to prove unconscionability: "If it is claimed or appears to the court that an act or practice may be unconscionable, the parties shall be given a reasonable opportunity to present evidence as to its setting, purpose, and effect to aid the court in making its determination." Utah Code Ann. § 13-11-5(2). In light of this policy—and in light of the absence of any discussion of the requirements of the UCSPA and whether the alleged acts met those requirements—we read the trial court's statements as a conclusion that the Plaintiffs' allegations constituted a collateral attack on the writs rather than a ruling on the merits of an UCSPA claim at the pleadings stage.⁶

¶11 We accordingly reverse the trial court's ruling that Plaintiffs' failure to challenge the writs in the small claims action bars their claim under the UCSPA and remand for further proceedings on this claim.⁷

6. Given our resolution of the issue, we need not address Plaintiffs' argument that they were denied due process due to their inability to address the merits of their UCSPA claim below. Nor do we address either party's arguments on appeal relating to the merits of Plaintiffs' UCSPA claim.

7. A deceptive or unconscionable act or practice by a supplier in connection with a consumer transaction violates the UCSPA "whether it occurs before, during, or after the transaction." Utah Code Ann. §§ 13-11-4(1), -5(1) (2009). We express no opinion as to
(continued...)

2. Civil Conspiracy

¶12 Next, Plaintiffs contend that the trial court erred in ruling that their complaint failed to adequately plead a cause of action for civil conspiracy.

¶13 To establish a claim of civil conspiracy, five elements must be shown: “(1) a combination of two or more persons, (2) an object to be accomplished, (3) a meeting of the minds on the object or course of action, (4) one or more unlawful, overt acts, and (5) damages as a proximate result thereof.” *Peterson v. Delta Air Lines, Inc.*, 2002 UT App 56, ¶ 12, 42 P.3d 1253 (quoting *Alta Indus. v. Hurst*, 846 P.2d 1282, 1290 n.7 (Utah 1993)). “The claim of civil conspiracy ‘require[s], as one of [its] essential elements, an underlying tort.’” *Puttuck v. Gendron*, 2008 UT App 362, ¶ 21, 199 P.3d 971 (alteration in original) (quoting *Coroles v. Sabey*, 2003 UT App 339, ¶ 36, 79 P.3d 974). “Thus, in order to ‘sufficiently plead’ a claim for civil conspiracy, a plaintiff is ‘obligated to adequately plead the existence of such a tort.’” *Id.* (quoting *Coroles*, 2003 UT App 339, ¶ 36). “Where plaintiffs have ‘not adequately pleaded *any* of the basic torts they allege . . . dismissal of their civil conspiracy claim’ is appropriate.” *Id.* (omission in original) (quoting *Coroles*, 2003 UT App 339, ¶ 38); *see also* 16 Am. Jur. 2d *Conspiracy* § 50 (2009) (“[I]f the acts alleged to constitute the underlying wrong provide no cause of action, then neither is there a cause of action for the conspiracy itself.”).

¶14 To satisfy the fourth element, Plaintiffs rely on the following six underlying torts: (a) fraud on the court in obtaining writs of execution and/or garnishment, (b) fraud on Plaintiffs based on inflated amounts of the writs of execution and/or garnishment, (c) violation of the UCSPA, (d) violation of the Fair Debt Collection Practices Act, (e) violation of the Fair Credit Reporting Act, and (f) defamation by reporting false credit information.

¶15 The first two underlying torts named above rely on the issuance of post-judgment writs in the small claims cases to satisfy the requirement of an unlawful act. Thus, unlike the UCSPA claim, this cause of action does “depend[] upon a determination that the . . . orders were illegal,” *Moss v. Parr Waddoups Brown Gee & Loveless*, 2010 UT App 170, ¶ 9, 237 P.3d 899 (omission in original), *cert. granted*, 245 P.3d 757 (Utah 2010).. It is thus barred as a collateral attack on a final judgment. We

7. (...continued)

whether an act occurring in the course of litigation arising from a consumer transaction falls within this definition.

therefore do not disturb the trial court's dismissal of Plaintiffs' conspiracy claim insofar as it is based on fraud.⁸

¶16 The third underlying tort named above is violation of the UCSPA. As explained above, Plaintiffs' UCSPA claim is not barred as a collateral attack on a prior judgment, because it does not depend on the small claims court writs being unlawful—it is sufficient that they were deceptive or unconscionable. *See supra* ¶¶ 8–10. We therefore reverse the trial court's dismissal of Plaintiffs' civil conspiracy claim insofar as it is based on a violation of the UCSPA. To the extent Plaintiffs are able to maintain their UCSPA claim, that claim is eligible to serve as a predicate act for their civil conspiracy claim.

¶17 The trial court also ruled that Plaintiffs had conceded that they do not have a cause of action under the Fair Credit Reporting Act or for defamation. Our review of the record suggests that the trial court was correct on this point. Furthermore, Plaintiffs' brief on appeal does not challenge the ruling. In addition, Plaintiffs concede that they do not have an independent cause of action under the Fair Debt Collection Practices Act. Nevertheless, Plaintiffs take the position that a wrongful act may serve as the underlying tort for purposes of a conspiracy claim even if they have no independent cause of action based on that wrongful act. Plaintiffs cite no authority in support of this theory, nor do they attempt to distinguish apparently contrary authority. For example, this court has cited authority stating that if “the acts alleged to constitute the underlying wrong provide no cause of action, then neither is there a cause of action for

8. We also agree with the trial court that Plaintiffs failed to adequately plead the underlying tort of fraud. Rule 9(b) of the Utah Rules of Civil Procedure specifies that “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” The tort of fraud includes nine elements. *See Armed Forces Ins. Exch. v. Harrison*, 2003 UT 14, ¶ 16, 70 P.3d 35 (listing the elements). However, mere recitation of those elements, or conclusory allegations unsupported by allegations of relevant surrounding facts, does not satisfy rule 9(b)'s particularity standard. *Id.* Here, Plaintiffs alleged only that “the defendants have requested and obtained through fraud upon the Court writs of execution and/or writs of garnishment against the Plaintiff(s) which included unjustified and deliberately inflated ‘costs’ or ‘judgment’ amounts, and the like.” We thus agree with the trial court that, insofar as the Plaintiffs' civil conspiracy claim rests on the underlying tort of fraud, it fails to adequately allege the elements of civil conspiracy and was properly dismissed on that ground.

the conspiracy itself.” *Puttuck*, 2008 UT App 362, ¶ 21 (quoting 16 Am. Jur. 2d *Conspiracy* § 50 (1998)). Plaintiffs’ absence of briefing on this point suggests that they may have abandoned it. In any event, we will not reverse on the basis of an unbriefed argument. See Utah R. App. P. 24(a)(9); *State v. Green*, 2004 UT 76, ¶ 13, 99 P.3d 820 (“[T]his court is not a depository in which the appealing party may dump the burden of argument and research.” (citation and internal quotation marks omitted)).

¶18 In sum, insofar as Plaintiffs’ claim for civil conspiracy rests on an allegation that Defendants violated the UCSPA, we reverse the trial court’s dismissal and remand for further proceedings. Insofar as the civil conspiracy claim rests on other grounds, we affirm the trial court’s dismissal.

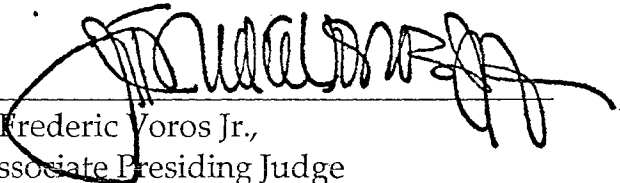
3. Dismissal Without Leave to Amend

¶19 Finally, Plaintiffs contend that the trial court erred by dismissing their complaint without granting leave to amend. “We review a district court’s denial of leave to amend for an abuse of discretion.” *Hudgens v. Prosper, Inc.*, 2010 UT 68, ¶ 15, 243 P.3d 1275.

¶20 After a responsive pleading has been served, “a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.” Utah R. Civ. P. 15(a). “To properly move for leave to amend a complaint, a litigant must file a motion that ‘shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.’” *Holmes Dev., LLC v. Cook*, 2002 UT 38, ¶ 57, 48 P.3d 895 (quoting Utah R. Civ. P. 7(b)(1)). “Further, a motion for leave to amend must be accompanied by a memorandum of points and authorities in support, and by a proposed amended complaint.” *Id.* (citing Utah R. Jud. Admin. 4-501(1)(A) (repealed 2003); *Behrens v. Raleigh Hills Hosp., Inc.*, 675 P.2d 1179, 1182 (Utah 1983); *Long v. Satz*, 181 F.3d 1275, 1279 (11th Cir. 1999)); accord *Puttuck v. Gendron*, 2008 UT App 362, ¶ 23, 199 P.3d 971.

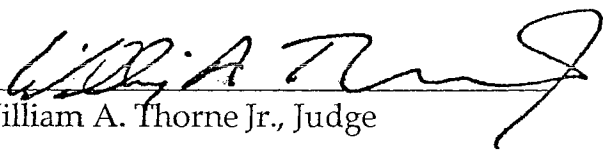
¶21 Plaintiffs here complied with none of these requirements. In addition, their argument on appeal is scant, consisting of two sentences. They cite two cases without analysis, one of which involves a litigant who, unlike Plaintiffs here, filed a written motion to amend accompanied by a proposed amended complaint and, apparently, a memorandum. See *Hudgens*, 2010 UT 68, ¶ 10. We see no abuse of discretion by the trial court on this point.

¶22 The judgment of the trial court is affirmed in part, reversed in part, and remanded for further proceedings.




J. Frederic Voros Jr.,
Associate Presiding Judge

¶23 WE CONCUR:



William A. Thorne Jr., Judge



Stephen L. Roth, Judge

CERTIFICATE OF MAILING

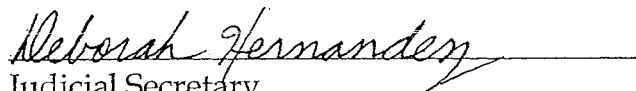
I hereby certify that on the 22nd day of March, 2012, a true and correct copy of the attached DECISION was deposited in the United States mail or placed in Interdepartmental mailing to be delivered to:

JAMIS M GARDNER
ROBINSON SEILER & ANDERSON LC
2500 N UNIVERSITY AVE
PO BOX 1266
PROVO UT 84603-1266

BRIAN W STEFFENSEN
STEFFENSEN LAW OFFICE
448 E 400 S STE 100
SALT LAKE CITY UT 84111-3013

HONORABLE CLAUDIA LAYCOCK
FOURTH DISTRICT, PROVO DEPT
125 N 100 W BX 0470
PROVO UT 84601

FOURTH DISTRICT, PROVO DEPT
ATTN: KRISTEN ROGERS
125 N 100 W BX 0470
PROVO UT 84601


Judicial Secretary

TRIAL COURT: FOURTH DISTRICT, PROVO DEPT , 090402579
APPEALS CASE NO.: 20100418-CA