

APPEAL NO. 09-1909

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MICHAEL DAHLEN, et al,

Plaintiffs – Appellants

v.

SHELTER HOUSE, et al,

Defendants – Appellees

Appeal from the United States District Court for the
Southern District of Iowa, Davenport Division

The Honorable John A. Jarvey

BRIEF OF APPELLEE
SHELTER HOUSE COMMUNITY SHELTER AND TRANSITION
SERVICES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a) and Eighth Circuit Rule 26.1A, Defendant-Appellee states that there are no parent companies or any publicly-held corporations that own ten percent or more of Shelter House Community Shelter and Transition Services.

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JURISDICTIONAL STATEMENT

The United States District Court for the Southern District of Iowa, Davenport Division, lacked subject matter jurisdiction over Appellants' claim because it was not ripe for review in federal court, resulting in its dismissal. (JTAPP 92). The Appellants' "taking" claim was not ripe for review in federal court because: (1) there was no final decision by the government body; and (2) claimants had not been denied just compensation for the "taking" under any available state procedures. See Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186, 195 (1985).

STATEMENT OF THE ISSUES

- I. WHETHER THE DISTRICT COURT ERRED IN FINDING ONE REASON APPELLANTS' CLAIM WAS NOT RIPE FOR REVIEW WAS THEY FAILED TO PURSUE A STATE INVERSE CONDEMNATION CLAIM.

Williamson County Reg'l Planning Comm'n v. Hamilton Bank,
473 U.S. 172 (1985)

Kosceilski v. City of Minneapolis, 435 F.3d 898 (8th Cir. 2006)

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Cormack v. Settle-Beshears, 474 F.3d 528 (8th Cir. 2007)

- II. WHETHER THE DISTRICT COURT ERRED IN FINDING ONE REASON APPELLANTS' CLAIM WAS NOT RIPE FOR REVIEW WAS THERE HAD NOT BEEN A FINAL DECISION BY THE GOVERNMENT BODY.

Williamson County Reg'l Planning Comm'n v. Hamilton Bank,
473 U.S. 172 (1985)

Iowa Code § 414.10

Iowa City Ordinance § 14-8C-3

Iowa City Ordinance § 18-1-2(A)(2)

- III. WHETHER APPELLANTS' CLAIM NECESSITATES A DETERMINATION OF OWNERSHIP OF THE DISPUTED PROPERTY BASED ON STATE LAW PRINCIPLES AND, THEREFORE, WAS NOT RIPE AND DID NOT CREATE A FEDERAL QUESTION.

Montgomery County v. Case, 232 N.W. 150 (Iowa 1930)

Nichols v. Kirchner, 40 N.W.2d 13 (Iowa 1949)

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IV. WHETHER SHELTER HOUSE IS A PARTY AGAINST WHOM RELIEF CAN BE GRANTED UNDER 42 U.S.C. § 1983.

American Mfs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999)

Rendell-Baker v. Kohn, 457 U.S. 830 (1982)

Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974)

Green v. Racing Ass'n of Cent. Iowa, 713 N.W.2d 234 (Iowa 2006)

42 U.S.C. § 1983

STATEMENT OF THE CASE

Appellants, Janet and Michael Dahlen (the “Dahlens”), have actively worked to delay and prevent the building of a new homeless shelter in the neighborhood of their mobile home court since 2004. (App. 7) They now assert they have acquired an interest by adverse possession in certain property (the “Property”) to which Appellee, Shelter House, has record title. (App. 43) It is unclear from the Dahlens’ claim when the asserted interest was allegedly acquired or where the boundary lines of the Property are located. The Dahlens apparently do not claim that any portion of the proposed shelter facility is to be built on the Property, but do assert the Property was included in the site plan for the homeless shelter. (Appellants’ Brief p. 7) The Dahlens did not bring this or

any other lawsuit to establish said interest in the Property, but instead to claim that the government has taken the Property from them and given it to Shelter House, resulting in liability under 42 U.S.C. § 1983. (App. 43 and 92) The Dahlens assert that all four of the Defendants actually committed the “taking.” (App. 43) However, it is unclear exactly what acts of the various Defendants affected the “taking.” The Appellants’ Brief asserts only that the approval of the site plan for the new shelter by the Iowa City Planning and Zoning Commission was such an act.¹ (App. 42 and Appellants’ Brief p. 9) It is unclear how Appellants assert Appellant Michael A. McNiel has been deprived of property. (App. 90)

On September 25, 2008, Plaintiffs filed their first Complaint in this case. (App. 5) On November 25, 2008, Plaintiffs filed their First Amended Complaint in this case. (App. 27 and 41) On December 2, 2008, the Plaintiffs filed a parallel Complaint in state court (objecting to the site plan because of their claimed interest in the Property and requesting an injunction). (App. 74-76) On December 5, 2008, the Dahlens filed an appeal of the building permit with the Iowa City Board of Adjustment premised on the same alleged issues with the site plan. (App. 77-79) All Defendants filed Pre-Answer Motions to Dismiss in this case. (App. 49 and 64) Plaintiffs resisted these motions. (App. 58 and 88)

¹ Notably, the site plan was not approved until eleven days after this lawsuit was filed. (App. 3 and 27).

On March 25, 2009, the Honorable John A. Jarvey granted the motions to dismiss and found Plaintiffs' claim was not ripe for review in federal court. (App. 92)

STATEMENT OF THE FACTS

Shelter House has record title to real property known as 429 Southgate Avenue, Iowa City, Iowa. In July of 2004, the Iowa City Board of Adjustment granted a special exception to Shelter House to allow transient housing on that property, which is the same property included in the site plan. (App. 11 and 43) The Dahlens challenged the same, leading to four years of litigation, resulting in the Iowa Supreme Court affirming the grant of the special exception by the Board. Bontrager Auto Service, Inc., et al. v. Iowa City Board of Adjustment, 748 N.W.2d 483 (Iowa 2008). The Dahlens did not assert any interest in the Property during the course of this previous litigation, but did assert that the preliminary site plan was illegal for other reasons. Id. Following the Iowa Supreme Court Decision, Shelter House proceeded to have a site plan approved as a first step toward getting a building permit approved. Iowa City Ordinance § 18-1-2(A). Appellants filed this Federal Court lawsuit on September 25, 2008. (App. 3) The Iowa City Planning and Zoning Commission reviewed and approved the site plan on November 6, 2008. (App. 27) The Iowa City Planning and Zoning Commission issued Shelter House a building permit on November

26, 2008. (App. 80) The Dahlens do not claim any portion of the shelter is to be built on the Property, but do assert the Property was included in the site plan. (Appellants' Brief p. 7) Contrary to the Dahlens' claim, there is no designated set back between the Dahlens' property and Shelter House's property. The City of Iowa City does have a drainage easement over the north thirty feet of the property and, for this reason, the site plan shows no permanent improvements in this area. (App. 32)

Appellants proceeded to file the numerous lawsuits outlined above, and appealed the approval of the site plan and issuance of the building permit to the Iowa City Board of Adjustment, which had not yet made a decision at the time Defendants' Motions to Dismiss were granted. (App. 93) Appellants have not pursued a state inverse condemnation claim. (App. 93)

SUMMARY OF THE ARGUMENT

The Dahlens assert they have acquired ownership in some portion of Shelter House's property by adverse possession. They further assert the ownership interest acquired by adverse possession has been "taken" by the government and given to Shelter House.

This takings claim was not ripe for review and the District Court, therefore, lacked subject matter jurisdiction. First, Plaintiffs had not exhausted available state remedies. Specifically, Plaintiffs failed to file a state inverse

condemnation action, which is a sufficient state remedy. Second, there had been no final decision by the government body, as an appeal was still pending with the Iowa City Board of Adjustment at the time of the dismissal.

A third reason Plaintiffs' claim was not ripe for review was that the Dahlens' alleged ownership interest in the Property had not been established. The proper way to establish such an interest would be to bring a quiet title action based on state principles, which does not create a federal question.

Finally, Shelter House is not a party against whom relief can be granted under 42 U.S.C. § 1983, because the acts Plaintiffs allege were taken by Shelter House were not done under color of state law, since Shelter House is not a state actor.

For the above reasons, the District Court's granting of Defendants' motions to dismiss should be upheld.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND ONE REASON APPELLANTS' CLAIM WAS NOT RIPE FOR REVIEW WAS THEY FAILED TO PURSUE A STATE INVERSE CONDEMNATION CLAIM.

Claims must be ripe before the court has subject matter jurisdiction over them under Article III, §2 of the United States Constitution. See Christopher Lake Development Co. v. St. Louis County, 35 F.3d 1269, 1272 (8th Cir. 1994).

The Dahlens bring their claim under 42 U.S.C. § 1983, alleging a government “taking” in violation of the Just Compensation Clause. (App. 92) In order for such a taking claim to be ripe for review in federal court, claimants must have been denied just compensation under any available state procedures for the alleged taking. See Williamson County Reg’l Planning Comm’n v. Hamilton Bank, 437 U.S. 172, 186, 195 (1985); Kosceilski v. City of Minneapolis, 435 F.3d 898, 903 (8th Cir. 2006). “Under Williamson County, a property owner may not bring a federal claim for violation of the Just Compensation Clause until it has exhausted any available state procedure for seeking just compensation and been denied it.” Snaza v. City of Saint Paul, 548 F.3d 1178, 1182 (8th Cir. 2008) (citing Williamson County, 473 U.S. at 195; Kottschade v. City of Rochester, 319 F.3d 1038, 1040 (8th Cir. 2003)).

Such state proceedings are available under Iowa law. In fact, prior to the dismissal of this case, the Dahlens had filed a state court suit objecting to the site plan for various reasons, including their asserted ownership in the property and requesting that any development according to the site plan be enjoined. (App. 74-76) Thus, it is disingenuous for Dahlens to now claim no adequate state remedy exists for seeking an injunction. Plaintiffs, themselves, point out that in Matter of Condemnation of Certain Rights in Land for the Construction of a County Road in Allamakee County, 666 N.W.2d 137 (Iowa 2003), the court

held an injunction was an available remedy in state court. (Appellants' Brief pp. 12-13)

Further, the Iowa Constitution provides that “[p]rivate property shall not be taken for public use without just compensation.” Iowa Const. Art. 1 § 18. Iowa law allows inverse condemnation actions to remedy alleged takings. Kingsway Cathedral v. Iowa Dept. of Transp., 711 N.W.2d 6 (Iowa 2006) (stating inverse condemnation is a generic description applicable to all actions in which a property owner, in the absence of a formal condemnation proceeding, seeks to recover from a governmental entity for the appropriation of his property interest). Thus, the Plaintiffs’ claim was not ripe for review because they had not yet exhausted state procedures, including but not limited to filing a state claim for inverse condemnation. (App. 93)

Plaintiffs do not contend that they have pursued a state inverse condemnation claim. (App. 93) Instead, the Plaintiffs appear to argue that they are not required to pursue a state claim for inverse condemnation because it is an inadequate remedy and would therefore be futile. (Appellants’ Brief p. 13). However, a state inverse condemnation action has been found to be an adequate state remedy under Williamson County. Mitchell v. Mills County, 673 F. Supp. 332, 336 (S.D. Iowa 1987), *aff’d* on other grounds, 847 F.2d 486 (8th Cir. 1988). The Eighth Circuit has consistently held that the inverse condemnation remedy

implied from similar provisions in other state's constitutions to be an adequate state remedy. See Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. 1986). The Eighth Circuit has consistently required those bringing a "taking" claim in federal court to first pursue a state inverse condemnation action. See, e.g. Koscielski v. City of Minneapolis, 435 F.3d 898 (8th Cir. 2006).

In spite of the above precedent, the Dahlens argue that a state inverse condemnation claim is an inadequate remedy because the alleged "taking" in this case was a "private taking," which is not authorized by state law. (App. 96) In order to establish federal subject matter jurisdiction over the Plaintiffs' taking claim, the Plaintiffs must prove there has been a "private taking" by the Defendants. (Order p. 6)

The Dahlens argue there was a "private taking" because they do not believe the actions they allege constitute a "taking" were exercised for a reason meeting the definition of "public purpose" in Iowa Code §6A.22. (Appellants' Brief p. 11) Specifically, they allege that the approval of the site plan by the Iowa City Planning and Zoning Commission and other unnamed acts by the other Defendants simultaneously affected a "taking" of the Property and a gifting of it to Shelter House, a private entity. (Appellants' Brief pp. 11-12) However, transfer of property to a private party is not evidence of a lack of public purpose. Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 243-244

(1984). Iowa courts have found federal cases interpreting the federal constitution's taking provision persuasive in interpreting the state constitution's taking provision. Kingsway Cathedral v. Iowa Dept. of Transp., 711 N.W.2d 6, 9 (Iowa 2006).

Iowa Code §6A.22 includes “enjoyment of property by the general public” in the definition of “public purpose.” Had the Property been taken and given to Shelter House, it would satisfy this definition as Shelter House is a nonprofit offering services to the public. There are no reported cases that interpret Iowa Code §6A.22. However, in Simpson v. Low Rent Housing Agency, 224 N.W.2d 624 (Iowa 1974), the Iowa Supreme Court held that exercising eminent domain to provide low rent housing was for a “public purpose,” even though only some members of the general public meeting specific qualifications would reside there. The court pointed out that the same is true for schools and that “[a]n occupancy by some may promote, or even be vital to, the welfare of all.” Id. Cases from other jurisdictions have held that the use of eminent domain to give land to a private non-profit organization to provide housing for the homeless satisfies the public use requirement. See, e.g., Israni v. Sup. Ct. of San Diego County, 106 Cal. Rptr.2d 48 (Cal. App. 2001); East Thirteen Street Cmty. Ass'n v. New York State Urban Dev. Corp., 595 N.Y.S.2d 961 (N.Y. App. Div. 1993).

The District Court concluded that the alleged taking could not, as a matter of law, have been affected for a non-public purpose. (App. 95) This was in part because the court was “unable to find an instance where an Iowa court or a federal court in this circuit has held a “taking” to be without a public purpose.” (App. 96) It is not sufficient to merely allege a lack of statutory authority for the alleged “taking” to create a ripe federal substantive due process claim. See Chesterfield Development Corp. v. City of Chesterfield, 963 F.2d 1102 (8th Cir. 1992). Plaintiffs rely on Clajon Production Corp. v. Petera, 70 F.3d 1566, 1575 (10th Cir. 1995). However, in that case, there was no question that the commission which took the property was not vested with the power of eminent domain. The assertion of a lack of statutory authority because of a lack of public purpose is patently meritless in this case. The Dahlens have not alleged sufficient facts to prove the alleged “taking” was a rare “private taking,” rendering a state inverse condemnation claim an inadequate remedy. The Plaintiffs have not met their “heavy burden” of showing that the remedy of inverse condemnation and all other state remedies are inadequate. Cormack v. Settle-Beshears, 474 F.3d 528, 531 (8th Cir. 2007).

II. THE DISTRICT COURT CORRECTLY FOUND ONE REASON APPELLANTS' CLAIM WAS NOT RIPE FOR REVIEW WAS THERE WAS NO FINAL DECISION BY THE GOVERNMENT BODY.

In order for a federal taking claim to be ripe for review in federal court, there must be a final decision by the government body. See Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985). The site plan the Plaintiffs allege affected the taking was not approved by the Iowa City Planning and Zoning Commission until eleven days after this lawsuit was filed. (App. 3 and 7) Plaintiffs have not filed an appeal of the issuance of the approval of the site plan with the Iowa City Board of Adjustment, which they could have done under Iowa City Ordinance 14-8C-3 and Iowa Code § 414.10. However, on December 5, 2008, the Dahlens did file an appeal of the issuance of the building permit with the Iowa City Board of Adjustment, stating "a building permit cannot be issued until a proper site plan has been submitted and approved" and asserting the site plan was improper for reasons including the Dahlens' claimed interest in the Property. (App. 79) As pointed out by Plaintiffs, a building permit cannot be issued unless a valid site plan has been approved. Iowa City Ordinance 18-1-2(A)(2). (Appellants' Brief Addendum p. xx) Thus, if the building permit was revoked by the Iowa City Board of Adjustment for failure to have a proper site plan approved, Shelter House would

be required to seek approval of a revised site plan. No decision had been reached by the Iowa City Board of Adjustment at the time Defendants' Motions to Dismiss were granted. (App. 84 and 93)

Plaintiffs, for the first time in this appeal, also assert that although no actual final decision has been made by the government body, a deemed final decision has been made under McKenzie v. City of White Hall, 112 F.3d 313, 316-317 (8th Cir. 1997), because a physical invasion of the property has occurred. In this case, unlike McKenzie, an administrative appeal was pending. (App. 84) Further, the Dahlens have asserted a regulatory taking via the approval of a site plan, not a physical taking. Unlike McKenzie, neither the City nor City entities in this case claim the right to enter or physically occupy the Property. While Shelter House has such a right, it is not due to approval of the site plan or any other action of government entities, but is due to the fact that they are the record title holders of the Property. (App. 67) Thus, McKenzie is not applicable to this case and no final decision has been made by the governing body, so Plaintiffs' "takings" claim is not ripe.

III. APPELLANTS' CLAIM NECESSITATES A DETERMINATION OF OWNERSHIP OF THE DISPUTED PROPERTY BASED ON STATE LAW PRINCIPLES AND, THEREFORE, WAS NOT RIPE AND DID NOT CREATE A FEDERAL QUESTION.

An appellate court may affirm a district court's dismissal on any basis supported by the record. Phipps v. F.D.I.C., 417 F.3d 1006 (8th Cir. 2005).

Dahlens' claims are rooted in their contention that they have acquired an interest in the Property by adverse possession. (App. 43) "There are usually no equities in favor of one who claims property of another by adverse possession and his acts are to be strictly construed. The law presumes the possession of land is under the regular title." Nichols v. Kirchner, 40 N.W.2d 13, 16 (Iowa 1949). One asserting title by adverse possession has the burden of proving it. Montgomery County v. Case, 232 N.W. 150, 152 (Iowa 1930). Dahlens have not established their interest in the Property and, therefore, cannot receive relief for the "taking" thereof. Id. An interest by adverse possession is properly established by a quiet title action in Iowa state court. Iowa Code § 646.2. No federal question is raised by a dispute of property ownership between two Iowa residents. Therefore, the court lacked subject matter jurisdiction under Article III, §2 of the United States Constitution and this case was properly dismissed. (App. 38-39)

IV. SHELTER HOUSE IS NOT A PARTY AGAINST WHOM RELIEF CAN BE GRANTED UNDER 42 U.S.C. § 1983.

An appellate court may affirm a district court's dismissal on any basis supported by the record. Phipps v. F.D.I.C., 417 F.3d 1006 (8th Cir. 2005).

In order to state a claim for relief under § 1983, Plaintiffs must have established that they were “deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law.” American Mfs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 49-50, 119 S.Ct. 977 (1999); Dennen v. City of Duluth, 350 F.3d 786, 790 (8th Cir. 2003). Courts have consistently treated the “under color of state law” element of § 1983 “as the same thing as the ‘state action’ required under the Fourteenth Amendment.” Rendell-Baker v. Kohn, 457 U.S. 830, 838, 102 S.Ct. 2764 (1982); Sullivan, 526 U.S. at 50; Lugar v. Edmondson Oil Co., 457 U.S. 922, 935, 102 S.Ct. 2744 (1982). “[S]tate action requires both an alleged constitutional deprivation ‘caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible,’ *and* that ‘the party charged with the deprivation must be a person who may fairly said to be a state actor.’” Sullivan, 526 U.S. at 50 (quoting Lugar, 457 U.S. at 937) (emphasis added).

Defendant Shelter House is a private entity, not a state actor or government official. The only acts attributed to Shelter House in the Dahlens' First Amended Complaint are that Shelter House has "entered upon" the Property and "cut down trees located thereon." (App. 43) Such conduct, if proved and if proved to be in violation of Plaintiffs' alleged interest in the Property, was not pursued by Shelter House due to approval of a site plan or any other "state action," but rather because Shelter House is the record owner of the subject real property. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 98 S.Ct. 1729 (1978). These acts were not done pursuant to a statute. Entering the land and cutting trees was not done in an official capacity and are not functions traditionally performed by a government. Id.

Shelter House acknowledges that in some circumstances, which are not present here, the acts of a private party are "fairly attributable to the State" so as to be deemed under "color of state law" for § 1983 purposes. However, this occurs "if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" Brentwood Acad. v. Tennessee Secondary School Athletic Ass'n, 531 U.S. 288, 295, 121 S.Ct. 924 (Iowa 2001) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351, 95 S.Ct. 449 (1974)).

Shelter House, itself, made the decision to build a new shelter facility and seek approval of the site plan to do so. The Supreme Court has held that “the mere fact that a business is subject to state regulation does not by itself convert its action into that of the State.” Sullivan, 526 U.S. at 52 (quoting Jackson, 419 U.S. at 350. “[A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State. Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment.” Green v. Racing Ass’n of Cent. Iowa, 713 N.W.2d 234 (Iowa 2006), citing Jackson, 419 U.S. at 357 (“Approval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into ‘state action.’”).

As Shelter House is a private party that cannot be said to be a state actor and its actions, which are the subject of the Plaintiffs’ Petition, were not directed or dictated by the state, it cannot be said to be a state actor and, therefore, cannot be liable under § 1983. Therefore, the claims against Shelter House were properly dismissed.

CONCLUSION

For the reasons set forth above, the District Court's Order granting the Defendants' Motions to Dismiss should be upheld.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify this Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, based upon the word count tool in Microsoft Word 97-2003, used to prepare this Brief, this Brief contains 3,685 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I certify this Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared in a proportionally spaced typeface including serifs using Microsoft Word 97-2003, in Times New Roman, font size 14.

Pursuant to 8th Cir. R. 28A(d)(2), I certify the file copied to the CD-ROM that I am providing to the Court and all parties has been scanned for viruses and is virus-free.

By: /s/ Timothy J. Krumm

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd Day of June, 2009 Appellee's Brief was filed with the United States Court of Appeals for the Eight Circuit by mailing 10 true and accurate copies of Appellee's Brief, and one CD-ROM containing the same, via First Class Mail, postage prepaid to:

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I further hereby certify that on the 22nd day of June, 2009, two true and accurate copies of Appellee's Brief, and one CD-ROM containing the same, were sent via First Class Mail, postage prepaid, to:

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