IN THE NEW MEXICO COURT OF APPEALS

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
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WILLIS S. MUNCEY,

Plaintiff-Appellee,

vs.

EYEGLASS WORLD, LLC,

Defendant-Appellant.

No. 29,813
Second Judicial District Court
No. CV 2005 07697
The Honorable William F. Lang

REPLY BRIEF OF APPELLANT EYEGLASS WORLD, LLC

ORAL ARGUMENT IS REQUESTED

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STATEMENT OF COMPLIANCE

As required by Rule 12-213(G), we certify that this brief complies with the type-volume limitation of Rule 12-213(F)(3). According to Microsoft Office Word 2007, the body of the Reply Brief, as defined by Rule 12-213(F)(1), contains 4,368 words.

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I. INTRODUCTION

Although plaintiff devotes most of his answer brief to points no longer in dispute, his brief leaves no doubt that the issues of law for this Court are those Eyeglass World LLC ("EGW") articulated. Plaintiff admits he (a) learned that EGW had copied his patient files shortly after the copying occurred, (b) tried to recover only the files he wanted (the Lasik files) and (c) instead attempted to force EGW to *keep* the rest of the files so he could, through a conversion lawsuit, try to recover damages. He also confirms there was *no* evidence EGW used those files after copying them.

Plaintiff's brief therefore confirms each of these grounds for reversal:

1. There is no substantial evidence of proximate causation of damages because there is no evidence either that EGW used the disputed files after copying them or that, regardless of use, plaintiff suffered any harm.

2. Plaintiff failed to discharge his duty to mitigate damages because he admits he did not attempt to recover the allegedly converted property.

3. Plaintiff failed to establish the "defiance of rights" element of conversion because undisputed facts show EGW came into possession of those files lawfully, but plaintiff never demanded their return.

4. As a matter of law, punitive damages are inappropriate.

5. Plaintiff's request that the jury award $1 million for EGW's complaint to the Optometry Board improperly injected a new liability theory on which the jury was not instructed, warranting the striking of $1 million from the judgment.

II. REPLY TO PLAINTIFF'S FACTUAL ASSERTIONS

Given the substantial evidence standard, EGW did not revisit factual points and instead limited its appeal to questions of legal sufficiency arising from undisputed facts. Plaintiff assails this respect for the review standard as a "shift" in position (AB 2) and devotes most of his brief to arguing points that EGW has not raised. To avoid further diversion, EGW notes here only one point where plaintiff particularly stretches the record.

Plaintiff claims EGW makes a new argument in asserting there was no evidence it used the disputed files and hence no evidence proving proximate causation of damages. (AB 2) But, as EGW demonstrated in its Brief-in-Chief, the lack of evidence of damages was raised at the outset of trial, by directed verdict motion, and by a posttrial motion for JMOL, and the trial court queried plaintiff throughout the case and during the directed verdict motion about the lack of such evidence. (BIC 17-19, 21; Tr.6/08/2009:11, 85-86; 6/09/2009:156-57, 164-66)

III. ARGUMENT

Because plaintiff cannot answer the points EGW raises on appeal, plaintiff mostly recounts the evidence on other points that are no longer in dispute. Because

this fails to overcome the deficiencies in plaintiff's case, EGW begins by describing the jury instructions on the key elements disputed on appeal, and then shows how plaintiff has confirmed there is insufficient evidence on those elements.

A. There Is No Substantial Evidence To Satisfy Plaintiff's Burden To Prove Proximate Causation Of Damages

As the trial court instructed, plaintiff "has the burden of proving that such Conversion ... was a proximate cause of ... his damages," and the jury could award only "the difference between the fair market value of the converted personal property immediately before the conversion and its fair market value immediately after the conversion." (RP2:609, 619)

Plaintiff admits he was aware of the file copying shortly after it occurred, yet never demanded the return of the files and copies. He claims EGW's copying alone completed the conversion, and the measure of damages is the value of the files. (AB 33) But as shown, the measure that the trial court instructed the jury to apply required proof not merely of the files' value, but of an *impairment* in value. Plaintiff cannot propose a new measure now: "Jury instructions become the law of the case against which the sufficiency of the evidence is measured." *Atler v. Murphy Enterprises, Inc.*, 2005-NMCA-006, ¶13, 136 N.M. 701, 104 P.3d 1092.

Moreover, plaintiff's new measure, derived from forced sale cases, makes no sense in this context. If copying alone permits a plaintiff to recover the files' full value, then EGW would owe plaintiff the files' full value even if plaintiff had

demanded the return of all originals and copies the day after the copying and EGW had complied. But there *obviously* would be no impairment in value in that scenario, so copying alone cannot establish damages. Plaintiff's invocation of forced sale cases—in which damages are presumed and the plaintiff need not prove them—is an admission he cannot meet the standard on which the jury was instructed, which placed the burden on him to demonstrate an impairment in value.

Plaintiff fares no better in arguing the jury could infer the files' value derived from his exclusive control and ownership of them. (AB 33) Plaintiff's loss of exclusive control occurred—not with the disputed copying—but earlier, when his coverage term expired on May 30, 2007. At that time, plaintiff left the files at EGW even though he had no agreement with it applicable to the post-May 30 period. (Tr.6/09/2009:63)[1] Moreover, even after the copying, plaintiff could have enjoyed exclusive control without any impairment in value if he simply had demanded the files' return—as he did with his Lasik files.

The cases also show that copying alone could not be a proximate cause of damages. Plaintiff failed to offer evidence showing how copying records could impair their value. And, in every case EGW has found, and each that plaintiff cites, the use of the files was an essential component of conversion liability.

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[1] Plaintiff emphasizes the lease provision that provided that while he was leasing space from EGW, he would maintain control over his files. (Ex. 11, § 3(c)) But that contract applied to a relationship in which plaintiff provided coverage to EGW. The parties had no agreement once plaintiff's coverage duties ended.

Thus, in *Tessmar v. Grosner*, 128 A.2d 467 (N.J. 1957), the court relied on the defendant's *use* of patient charts, and not merely their copying, to impose conversion liability: "Such *use* of the charts as he made of them *after copying* the names and addresses was not in accordance with the purpose of the agreement and was in violation of the property rights of the executor in them." *Id.* at 470 (emphasis added). Similarly, in *Warshall v. Price*, 629 So.2d 903 (Fla. Dist. Ct. App. 1993), the court relied on the *use* of files: "[T]he element of 'act of dominion wrongfully asserted' was established when Price testified he *used the list* without Warshall's consent for the purpose of soliciting those patients." *Id.* at 904 (emphasis added); *accord, e.g., Giovinazzi v. Chapman*, No. 44241, 1982 Ohio App. LEXIS 13516, at *7 (Ohio Ct. App. Aug. 26, 1982) ("[I]t would be unfair trade competition for a competitor to wrongfully secure possession of *and make use of such* a confidential trade list, ...") (emphasis added); *Conant v. Karris*, 520 N.E.2d 757, 763 (Ill. App. Ct. 1987) ("[T]he complaint sufficiently alleges that the information in this printout was *used* by defendants.") (emphasis added); *Hanger Prosthetics & Orthotics, Inc. v. Capstone Orthopedic, Inc.*, 556 F.Supp.2d 1122, 1136-37 (E.D. Cal. 2008) (unauthorized use of patient lists is conversion).

Lacking evidence of use, plaintiff instead recites evidence that EGW copied the files with the *intent* that a replacement doctor would use them. (AB 19-21, 36) But plaintiff was required to show more—*i.e.* an actual use that impaired the files' value. When EGW copied the files, plaintiff had left them behind without

specifying his plans. Whatever EGW may have intended then, plaintiff learned of the copying immediately and the parties soon were in a litigation posture. (Tr.6/09/2009:18, 80-81, 122-24) There is *no* evidence EGW used the files after copying.

Plaintiff inaccurately states EGW admitted in opening statement that it used the files. (AB 19) But EGW's counsel stated only: "After the copies were made, they were . . . put on the shelf for the replacement eye doctor to use." (Tr.6/08/2009: 85) This reflects only that, before plaintiff had specified his plans, EGW possibly intended for the replacement doctor to use them. Counsel did not admit any actual ensuing use, nor was there any such evidence. That is why, on EGW's directed verdict motion, plaintiff did not claim any "admission" but instead simply misled the trial court by arguing there was *evidence* of use. And in the testimony Plaintiff cites regarding "active files" (AB 20), the witness testified that the originals were in another room, and never said that the copies were used.

Plaintiff also claims the jury was free to speculate that such use occurred. But speculation is not substantial evidence. Indeed, since there was no evidence of use, the jury would have to speculate not only use, but how EGW used the files before it could determine their value had been "impaired" by $300,000. Although juries have latitude, they may not pull facts out of thin air. *See Lovington Cattle Feeders, Inc. v. Abbott Labs.*, 97 N.M. 564, 568, 642 P.2d 167, 171 (1982) ("damages, to be recoverable, must be proven with reasonable certainty and not be

based upon speculation"); *Rael v. F & S Co.*, 94 N.M. 507, 511, 612 P.2d 1318, 1322 (Ct. App.1979) (to same effect).

The lack of substantial evidence to prove proximate causation of damages alone warrants judgment for EGW on the conversion count.

B. Plaintiff Confirms He Failed To Mitigate His Damages

"It is a well established principle in New Mexico that an injured party has a responsibility to mitigate its damages, or run the risk that any award of damages will be offset by the amount attributable to its own conduct." *Air Ruidoso, Ltd. v. Executive Aviation Ctr., Inc.*, 1996-NMSC-042, ¶14, 122 N.M. 71, 920 P.2d 1025. Here, however, plaintiff identifies as his "mitigation" only these acts: he learned of the copying shortly after it occurred and contacted his attorney, and his attorney instructed him to amend his preexisting lawsuit to add a conversion claim. (AB 30-31) That cannot qualify as proper mitigation.

A lawsuit *seeks* damages. Mitigation, by contrast, consists of out-of-court efforts that aim to *avoid* damage. Thus, an employee who believes he has been wrongfully terminated may sue to seek damages. But to mitigate damages, that employee must seek a new job. *Chavez v. Manville Prods. Corp.*, 108 N.M. 643, 650, 777 P.2d 371, 378 (1989) (recognizing an employee's duty of mitigation).

Plaintiff states "it is unclear what more Dr. Muncey could have done to protect his interests or limit his damages." (AB 31) The answer is simple. He could have reclaimed the files—as he did with his Lasik files. He did not do so

because, unlike with the Lasik files, he did not want the remaining files but instead wanted to collect damages for them. But the fact that he *could* have avoided harm precludes a damages award. *Akutagawa v. Laflin, Pick & Heer, P.A.*, 2005-NMCA-132, ¶¶13-19, 138 N.M. 774, 126 P.3d 1138 (affirming summary judgment on ground plaintiff could not demonstrate damage because plaintiff declined to take step that could have avoided harm).

Plaintiff argues the jury was instructed on mitigation and the parties argued the issue to the jury. (AB 29-30) That, however, does not eliminate this Court's duty to review the mitigation evidence for legal sufficiency. Moreover, plaintiff argued in closing that the copying alone established his damages—a point that was legally erroneous but that misled the jury to find mitigation inapplicable because the harm supposedly had occurred already.

Plaintiff argues EGW's failure to mitigate assertion "is simply an attempt to blame Dr. Muncey for not preventing EGW from stealing his files. . . ." (AB 30) But the duty to mitigate does not "blame" a plaintiff for failing to prevent a tort. It merely requires a plaintiff, upon a tort's commission, to take reasonable steps to avoid harm. *See Hickey v. Griggs*, 106 N.M. 27, 29, 738 P.2d 899, 902 (1987) ("[M]itigation is designed to discourage persons ... from passively suffering economic loss which could [have been] averted by reasonable efforts."); *see also Akutagawa*, 2005-NMCA-132, ¶¶13-19 (rejecting argument that focused on

defendant's wrongdoing because that was no answer to plaintiff's failure to mitigate).

Plaintiff argues his duty to mitigate did not arise until he determined he had been damaged. The case he cites, *Elephant Butte Resort Marina v. Woolridge*, 102 N.M. 286, 292, 694 P.2d 1351, 1357 (1991), involved a plaintiff who suffered damages before discovering the defendant's breach. But here plaintiff admittedly became aware of the copying—which was easily detectable—immediately and fails to identify any damage that occurred during his purported "investigation." Under his argument, he would *never* have a duty to mitigate—there would be no duty before he "determined" he had been damaged, and no duty after that "determination" because the damages occurred instantly upon copying

It is a reasonable and minimal burden to require a plaintiff who claims a conversion to try to get the allegedly converted property back. Plaintiff's failure to take that simple step is undisputed and constitutes a failure to mitigate as a matter of law, again warranting judgment for EGW on the conversion count.

C. There Is Insufficient Evidence To Satisfy The Defiance Element

Plaintiff argues he was not required to demand the return of the files because a "demand and refusal" theory is only one way to prove conversion and he did not pursue that alternative at trial. Instead, he asserts (a) EGW exercised control over his property "in exclusion or defiance" of his rights, or (b) EGW's file copying was

an "unauthorized and injurious use." Plaintiff ignores why a demand was required *under the circumstances here.*

The "unauthorized *and* injurious use" prong is inapplicable because, as shown, there was no evidence of any use of the files, much less an injurious one.

As for "exclusion or defiance," plaintiff argues he left the files at EGW only for his contractor-optometrists to use in providing coverage to EGW, and he never gave EGW permission to copy the files. (AB 8, 10, 16-17) That argument ignores a crucial undisputed fact. Although plaintiff left the files at EGW in April 2007 so his contractor-doctors could provide coverage until May 30, 2007, after that date, his agreement with EGW expired. (Tr.6/08/2009:125-26) Thus, it is undisputed he left his files in *EGW*'s custody *after* he and his contactor-doctors no longer had any relationship with it. (Tr.6/09/2009:63) Thus, EGW indisputably came into possession of the files lawfully.

As EGW showed in its Brief-in-Chief, the courts consistently have required a demand for the return of allegedly converted property when the defendant originally came into possession of that property lawfully. (BIC 27-31) Plaintiff not only fails to discuss most of these cases, but his one attempted distinction proves EGW's point. As he notes, *Taylor v. McBee*, 78 N.M. 503, 433 P.2d 88 (Ct. App. 1967), stands for the proposition that when "by joint agreement one individual effectively exercises possession and control over all of the property, one cannot later claim that the individual in possession of the property is liable for

conversion until such time as the individual in possession refuses to return such property after demand." (AB 24-25, *quoting Larranaga v. Mile High Collection & Recovery Bureau, Inc.*, 807 F.Supp. 111, 115 (D.N.M. 1992)).

Here, when plaintiff left his files in EGW's custody after May 30, he necessarily agreed it could "exercise possession and control" over the files. Thus, like in *Taylor*, a completed conversion could not occur unless "EGW refuse[d] to return such property after demand."

Plaintiff's focus on whether he authorized EGW to copy the files and the purported impropriety of the copying is no answer. Irrespective of whether EGW was entitled to copy the files, because plaintiff left them in EGW's custody without specifying his plans, he was required to demand their return when he learned of the copying. As EGW's cited cases show, even if there is ambiguity as to whether defendant came into possession lawfully, a simple demand requirement clarifies the ambiguity and ensures courts need adjudicate only matters where the defendant has refused to recognize clearly asserted ownership rights. By contrast, the absence of a demand requirement would encourage what transpired here—a plaintiff pounces on the defendant's handling of property left in defendant's custody without instructions or agreement and refuses to take simple steps that would restore plaintiff's ownership interests fully because his real goal is to strike it rich in a lawsuit. There is no upside for the law and society in that rule, which is undoubtedly why no case has endorsed it.

Plaintiff's final claim is that his refusal to dismiss his preexisting lawsuit sufficed to meet the demand requirement. (AB 25) But plaintiff filed that lawsuit and agreed to dismiss it long before the disputed copying occurred. Accordingly, all plaintiff's refusal to dismiss shows is that he is an unreasonable person, and that he pounced on the file copying as a way to revive that lawsuit, and not due to any genuine interest in the files. The lawsuit cannot satisfy the demand requirement.

The lack of a demand is another independent and alternative reason to direct judgment for EGW on the conversion count.

D. Punitive Damages

1. The Evidence Is Insufficient To Permit Punitive Damages

Although plaintiff characterizes the file copying as egregious, he never comes to grips with the unusual circumstances here. He does not acknowledge that he left the files at EGW after his relationship with it had ended and without any arrangement with it. When confronted with that unprecedented situation, EGW asked its outside counsel whether it would be permissible to copy the files. EGW did not contact the patients, market products to them, or sell the information in the files. Even viewing this in the most damning light, this episode cannot be characterized as more than a regrettable mistake that could have been resolved simply without causing any harm.

Punitive damages, by contrast, are not warranted in every case in which tort liability is established but are instead reserved for heightened wrongdoing. *See,*

e.g., Allsup's Convenience Stores, Inc. v. North River Ins. Co., 1999-NMSC-006, ¶53, 127 N.M. 1, 976 P.2d 1 (filed 1998). Because this case does not meet that standard, the punitive damages award should be stricken as a matter of law.

Plaintiff misses the point in criticizing outside counsel's opinion that the file copying was permissible. (AB 39) If Mr. Zifrony's analysis was wrong, that might be relevant to conversion liability (assuming plaintiff could get around the other elements discussed previously). But that EGW turned to counsel before copying the files shows its actions were not *malicious*.

Similarly, in criticizing EGW's explanation for why it copied the files (RB 39), plaintiff ignores that EGW did not know plaintiff's plans. (Tr.6/09/2009:63) It appeared he had abandoned the files but since EGW could not be sure, it made a copy. Again, even if that was a mistake, it was not *malicious*.

Plaintiff argues that without a punitive damages award, "EGW has no incentive to refrain from the copying of patient files. . . ." (AB 40) The outsized $300,000 compensatory damages award provides EGW with *plenty* of incentive to refrain from any repeat of this regrettable episode.

Perhaps most telling is what plaintiff does *not* say. As EGW noted, the level of harm to the plaintiff is a crucial consideration to punitive damages. *See* BIC 37. But here, the copying did not harm plaintiff—he offered no evidence that the copying caused him to lose, for example, patients or revenues or even goodwill. Rather, the copying *enriched* him through a generous damages award. That is

why, when plaintiff learned of the copying, he did not try to recover the files, but instead refused to go near them. Given that refusal, his current assertions of patient confidentiality ring hollow. As shown, it is doubtful whether *any* liability should attach. Punitive damages should not be added to plaintiff's windfall.

2. The Amount Of The Award Violates Due Process

The preceding discussion demonstrates that no punitive damages were proper, so little more need be said regarding the amount. It is notable, however, that plaintiff relies primarily on a 1998 case to suggest an 8:1 ratio is permissible in a purely economic injury case. AB 42, *citing Weidler v. Big J Enters.*, 1998-NMCA-021, ¶ 48, 124 N.M. 591, 953 P.2d 1089. In more recent years, however, the United States Supreme Court has made clear that courts must take a more stringent approach. *See Exxon Shipping v. Baker*, 128 S.Ct. 2605, 2634 (2008); *Philip Morris USA v. Williams*, 127 S.Ct. 1057, 1063 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003).

For example, *Exxon Shipping* reviewed studies of punitive damage awards, which "put the median ratio for the entire gamut of circumstances at less than 1:1 [citation], meaning that the compensatory award exceeds the punitive award in most cases." 128 S.Ct. at 2633. Following that observation, courts that previously had articulated a view similar to *Weidler* have been skeptical of awards involving a ratio greater than 1 to 1 in cases that involved no physical injury and in which plaintiff recovered substantial compensatory damages. *Compare Bardis v. Oates,*

119 Cal.App.4th 1, 20-23, 14 Cal.Rptr.3d 89 (2004) (California appellate court affirms 9:1 ratio in economic injury case), *with Roby v. McKesson Corp.*, 47 Cal.4th 686, 712, 101 Cal.Rptr.3d 773, 219 P.3d 749 (2009) (California Supreme Court after *Exxon Shipping* and *Williams* approves 1:1 ratio as constitutional maximum in employment discrimination case); *accord e.g., Bridgeport Music, Inc. v. Justin Combs Pub.*, 507 F.3d 470, 487 (6th Cir. 2007); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 796-99 (8th Cir. 2004).

Because these decisions applied the more recent Supreme Court precedents, the evolution in the law that they recognize should apply here.

Finally, plaintiff relies on an inapposite comparison to HIPAA civil and criminal penalties (AB 43) to justify the excessive punitive damages even though the trial court repeatedly rejected plaintiff's attempts to piggyback on purported HIPAA violations. (RP2:537-38; Tr.6/08/2009:11) He further fails to demonstrate that the penalties he recites would apply even in a situation where the plaintiff has left his files behind after his relationship with the defendant has ended and without making any arrangements regarding the files. In any event, the controlling precedents disfavor this "parade of horribles" analogy to purported criminal liability [*Campbell*, 538 U.S. at 428] and preclude plaintiff from using punitive damages to redress the purported rights of third parties [*Williams*, 127 S.Ct. at 354]. And, if plaintiff were truly concerned about third parties' rights, he would

have demanded that EGW return the files and copies instead of attempting to force it to keep the non-Lasik files, so he could try to recover damages.

The maximum punitive damages is a one to one ratio to appropriate compensatory damages.

E. Improper Closing Argument

It would have been fair appellate debate if plaintiff honestly acknowledged his request for $1 million based on EGW's Board Complaint was overzealous error, and analyzed whether it met the requirements for a fundamental error. But remarkably, plaintiff instead claims that a request to impose *$1 million* on a *new unpled legal theory* on which *the jury had not been instructed* was *permissible.* (AB 45-49) That cannot be so.

Plaintiff observes that the Board Complaint was brought up prior to closing argument in pleadings and evidence. (AB 46-49) But that is a far cry from him pleading EGW was *liable* for making the Complaint. From EGW's perspective, the Complaint was an irrelevant fact that plaintiff was emphasizing solely to try to prejudice the jury against EGW. Thus, instead of defending in the way it would have attacked a pleaded claim, EGW's incentive was to devote as little time as possible to that incident. Plaintiff's failure to plead a liability claim also deprived the jury of instructions on the legal standards involving the qualified privilege to make complaints to a licensing board.

Thus, plaintiff is wrong that the jury's malice finding in awarding punitive damages suffices to impose liability for the Complaint. (AB 48 n. 10) On the Complaint, the jury never heard the applicable law, nor a proper defense, and it found malice on a separate issue—whether the *acts constituting the conversion* were malicious. That finding cannot substitute for pleading a claim based on the Complaint, permitting EGW to defend that claim, and instructing the jury on it.

The question is whether this Court should uphold a $1 million liability imposed on a theory that was not pleaded and on which the jury was not instructed. As EGW noted, "the common element in civil cases that have been reversed for unpreserved error has been the total absence of anything in the record of the case showing a right to relief in the person granted relief." *Gracia v. Bittner*, 120 N.M. 191, 194-95, 196-97, 900 P.2d 351, 354-55, 356-57 (Ct. App. 1995). Parties have no right to damages unless they plead a claim, permit their opponent to defend it, and a fact-finder determines the claim under the applicable law. There is a total absence in this record of any of those requirements showing a right to relief. If nothing else, the Court should strike $1 million from the punitive damages.

IV. CONCLUSION

Plaintiff seeks to capitalize on his leaving behind and later refusing to reclaim records that he later inconsistently claimed were worth $300,000. Just as a vacating tenant would never leave behind $300,000 worth of property without any

agreement with his landlord, if plaintiff valued those files, he either would have never left them at EGW without any agreement, or at minimum, would have quickly moved to recover them upon learning of their copying. Plaintiff's attempt to shoehorn these undisputed facts into the elements of conversion fails to establish any substantial evidence of damages, mitigation, "defiance" or conduct warranting punitive damages. This Court should reverse the $2,300,001 awarded on the conversion cause of action, and order judgment for EGW on that claim, or reverse and order judgment for EGW on the punitive damages award, or reduce that award to a 1:1 ratio with an appropriate compensatory damages award.

V. STATEMENT REGARDING ORAL ARGUMENT

Eyeglass World LLC respectfully requests that the Court hold oral argument in this matter.

DATED: June 9, 2010

Respectfully submitted,

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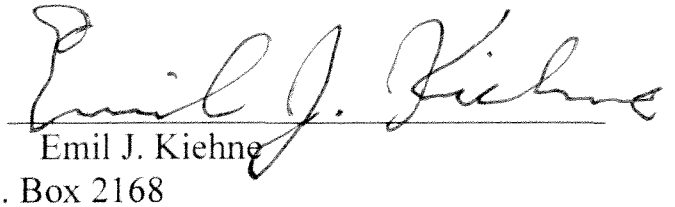
By: 
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WE HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellant EGW, LLC was served via first-class mail upon the following counsel of record this 9th day of June, 2010:

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