

Case No. 11-4066

IN THE UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

THE FUNDAMENTALIST CHURCH OF JESUS CHRIST OF
LATTER-DAY SAINTS, an Association of Individuals,

Plaintiff/Appellee.

v.

BRUCE R. WISAN, Special Fiduciary of the United Effort Plan
Trust; MARK SHURTLEFF, Attorney General for the State of Utah;
TERRY GODDARD, Attorney General for the State of Arizona; and
DENISE POSSE LINDBERG, Judge of the Third Judicial District
Court of Salt Lake County, State of Utah,

Defendants/Appellants.

APPELLEE'S ABBREVIATED RESPONSE TO NOTICE OF
INFORMATION RELEVANT TO EMERGENCY MOTION TO STAY
AND REQUEST FOR IMMEDIATE DECISION

Appellee submits this abbreviated response to the Notice of Information Relevant to Emergency Motion to Stay and Request for Immediate Decision, which Appellant Denise Posse Lindberg filed earlier this afternoon.

First, Judge Benson has not sent the U.S. Marshalls after Judge Lindberg. He has scheduled an order to show cause hearing to occur Monday, April 19, 2011, at noon.

Second, the “emergency” cited by Judge Lindberg is entirely of her own making. She consciously chose to expressly violate the declaratory judgment and injunctive relief ordered by a federal district court, and has otherwise chosen to participate as an active litigant in the federal case, rather than as a nominal party whose actions are being challenged on constitutional grounds. By choosing to defy the U.S. District Court and to participate in this matter as a litigant, she assumed the responsibilities of a litigant, which include the obligation to comply with the Federal Rules of Civil Procedure if she disagrees with Judge Benson’s order. The Federal Rules do not provide for her to return to her role as a state court judge and simply issue intemperate and ill-advised orders in direct conflict with the U.S. District Court. Since she obviously disagreed with Judge Benson’s judgment and order, her remedy was to file a motion seeking a stay of Judge Benson’s underlying injunction order before she issued her conflicting order, not after.

Third, Judge Lindberg’s motion to stay is procedurally improper: she failed first to approach the U.S. District Court to seek a stay as required by Fed. R. App. P. 8(a)(1). While she summarily alleges that such a motion would have been futile, it is far from clear that that process would not have yielded relief or an agreement of the parties. By choosing instead to precipitate a crisis by attempting to countermand an order of the U.S. District Court, Judge Lindberg failed to comply with this Court’s rules and thus forfeited any entitlement to the relief she seeks.

Fourth, by violating the declaratory judgment of the federal district court, Judge Lindberg forfeited any judicial immunity she might otherwise have had under 42 U.S.C § 1983, which makes clear that a judicial officer may be enjoined by a federal district court when “a declaratory decree is violated.” Although it is the almost uniform practice of state court judges to obey declaratory orders of federal judges, the federal courts have confirmed that injunctive relief may issue under § 1983 against any state court judge who violates a federal declaratory judgment issued in an action to which such judge is a party.

Finally, the process of transfer of control over property which is called for in the U.S. District Court’s order is narrowly crafted and carefully circumscribed to protect the interests which Judge Lindberg has attempted to protect through the judicial equivalent of self-help. Judge Benson is proceeding cautiously and with due deliberation, and this Court should not short-circuit Judge Benson’s efforts to address the situation through appropriate process. Appellees are making no effort to force transfer of control over the property before Judge Benson has had sufficient opportunity to rule on appropriate motions.

CONCLUSION

For the foregoing reasons, Appellees request that the Court not grant Judge Lindberg’s emergency request, and that the Court direct Judge Lindberg to address her motion to stay to the U.S. District Court in the first instance. Appellees request

the opportunity to address Judge Lindberg's motion to stay more fully and in a non-emergency context.

DATED: April 14, 2011.

By s/ Rodney R. Parker

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2011, I electronically filed the foregoing APPELLEE'S ABBREVIATED RESPONSE TO NOTICE OF INFORMATION RELEVANT TO EMERGENCY MOTION TO STAY AND REQUEST FOR IMMEDIATE DECISION with the Clerk of Court using the CM/ECF system which sent notification of such filing to the following:

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CERTIFICATE OF DIGITAL SUBMISSION

In compliance with the Tenth Circuit's General Order of March 18, 2009, I hereby certify:

(1) All required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk; and

(2) The digital submissions have been scanned for viruses with the most recent version of Kaspersky Anti-Virus, version 6.0.4.1424 updated April 14, 2011 and, according to the program, are free of viruses.

By s/ Rodney R. Parker
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