

**IN THE DISTRICT COURT OF TULSA COUNTY  
STATE OF OKLAHOMA**

<b>JEANNE BEEN as Personal Representative of the</b>	)	
<b>Estate of ROBERT JENKINS, Deceased,</b>	)	
	)	
<b>Plaintiff,</b>	)	
<i>v.</i>	)	<b>Case No. CJ-2003-02541</b>
	)	
<b>JASON M. WEED and LANDMARK EDUCATION</b>	)	
<b>CORPORATION,</b>	)	
	)	
<b>Defendant/Cross-Claimant,</b>	)	
<i>v.</i>	)	
	)	
<b>JASON M. WEED,</b>	)	
	)	
<b>Cross Plaintiff,</b>	)	
<i>v.</i>	)	
	)	
<b>LANDMARK EDUCATION CORPORATION,</b>	)	
	)	
<b>Cross-Defendant.</b>	)	

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**PLAINTIFF’S RESPONSE TO DEFENDANT LANDMARK’S MOTION FOR ORDER  
CERTIFYING THE DISTRICT COURT’S RULING FOR INTERLOCUTORY APPEAL**

COMES NOW, the Plaintiff, Jeanne Been (hereinafter "Been") as Personal Representative of the Estate of Robert Jenkins, Deceased (see Tulsa County Case No. PB-2002-655 and "**Exhibit A**" attached hereto), and for her Response to Defendant Landmark’s Motion For Order Certifying the District Court’s Ruling for Interlocutory Appeal, hereby states and alleges as follows:

**ANATOMY OF THE LITIGATION**

1. Plaintiff Jeanne Been as Next Friend of [her son] Robert Jenkins, Deceased, with the knowledge and consent of her daughter-in-law [Robert's widow], filed her original Petition on April

21, 2003, citing in part that the death of her son, Robert Jenkins, on December 12, 2001 had been caused by Jason M. Weed, Defendant.

2. On December 5, 2003, the Plaintiff filed an Amended Petition adding Landmark Education Corporation as a Co-Defendant.

3. On December 12, 2003, the Plaintiff filed a Second Amended Petition adding a additional causes of action against Landmark Education Corporation as a Co-Defendant.

4. On January 30, 2004 Defendant Landmark Education Corporation filed its Motion to Dismiss Plaintiff's Claims and Brief in Support, pursuant to 12 O.S. §2012(B)(6) and (B)(10), stating that Plaintiff Been lacked the standing to sue Landmark and her failure to state a claim upon which relief could be granted.

5. On February 17, 2004 Jeanne Been made Application for Substitution of Special Administrator Tim Gresham for Mortgage Clearing Corporation with Decedent's Mother Jeanne Been and Petition for Letters of Administration, Appointment of Personal Representative, Determination of Heirs, and Termination of Joint Tenancy in Tulsa County Case No. PB-2002-665, *In the Matter of the Estate of Robert Jenkins, Deceased*. This probate case had been filed by Mortgage Clearing Corporation as a potential judgment creditor, and who agreed to the substitution of Jeanne Been as her son's Personal Representative.

#### **INTERLOCUTORY APPEAL BY DEFENDANT LANDMARK**

6. The Defendant Landmark seeks certification of its interlocutory appeal of the Court's Order executed and filed on April 21, 2004. "The Court granted (1) Plaintiff's Application for Leave

to Amend Petition to Substitute as Plaintiff Jeanne Been, Personal Representative of the Estate of Robert Jenkins, Deceased, and (2) denied as moot that portion of Landmark's Motion to Dismiss Plaintiff's Claims that urged dismissal of Plaintiff's claims based on Plaintiff's lack of capacity to sue."

7. The Court's Order was signed and filed with the Court Clerk of Tulsa County on April 21, 2004, in full compliance with 12 O.S. §696.3.

8. The Order was prepared by the Court, and the Court Clerk's record reflects that the Order was mailed to all of the attorneys for the parties on the same date, April 21, 2004.

9. The Defendant filed their Motion for Order Certifying Order for Interlocutory Appeal on June 2, 2004.

10. Said Motion was received by the Plaintiff on June 3, 2004.

### **PROPOSITION I**

#### **THE DEFENDANT LANDMARK MUST FIRST SEEK LEAVE OF THE SUPREME COURT FOR AN EXTENSION OF TIME BASED UPON A SHOWING OF GOOD CAUSE.**

Defendant Landmark was allowed thirty (30) days plus three (3) days for mailing, excluding holidays and weekends, from the Court's April 21, 2004 Order to allow it to perfect their appeal. Oklahoma Statute 12. O.S. §993(A) states in relevant part that:

#### A. When an order:

1. Discharges, vacates, or modifies or refuses to discharge, vacate, or modify an attachment;
2. Denies a temporary or permanent injunction, grants a temporary or permanent injunction except where granted at an ex parte hearing, or discharges, vacates, or modifies or refuses to discharge, vacate, or modify a temporary or permanent injunction;

3. Discharges, vacates, or modifies or refuses to discharge, vacate, or modify a provisional remedy which affects the substantial rights of a party;
4. Appoints a receiver except where the receiver was appointed at an *ex parte* hearing, refuses to appoint a receiver, or vacates or refuses to vacate the appointment of a receiver;
5. Directs the payment of money *pendente lite* except where granted at an *ex parte* hearing, refuses to direct the payment of money *pendente lite*, or vacates or refuses to vacate an order directing the payment of money *pendente lite*;
6. Certifies or refuses to certify an action to be maintained as a class action; *or*
7. Grants a new trial or opens or vacates a judgment or order,

the party aggrieved thereby may appeal the order to the Supreme Court without awaiting the final determination in said cause, by filing the petition in error and the record on appeal with the Supreme Court within thirty (30) days after the order prepared in conformance with Section [696.3](#) of this title, is filed with the court clerk. If the appellant did not prepare the order, and Section [696.2](#) of this title required a copy of the order to be mailed to the appellant, and the court records do not reflect the mailing of a copy of the order to the appellant within three (3) days, exclusive of weekends and holidays, after the filing of the order, the petition in error may be filed within thirty (30) days after the earliest date on which the court records show that a copy of the order was mailed to the appellant. The Supreme Court may extend the time for filing the record upon good cause shown.

12. O.S. §993(A)

Therefore, the Defendant's Motion is not timely brought and precluded absent a grant of extension of time by the Supreme Court upon a showing of good cause.

## **PROPOSITION II**

**DEFENDANT LANDMARK'S MOTION FAILS TO MEET THE THRESHOLD REQUIREMENTS FOR CERTIFICATION AS AN INTERLOCUTORY APPEAL, SINCE THE ISSUE DOES NOT REACH THE MERITS OF THE CONTROVERSY.**

The Defendant's motion to dismiss was based solely on procedural grounds not the merits of the Plaintiff's wrongful death claim. It was in fact a 12 O.S. §2012(B)(10) "motion for lack of

capacity" to sue the Defendant.

Assuming that the Defendant had prevailed in their Motion, or does prevail on appeal, the merits of the wrongful death causes of action would never be reached and, therefore, would be a "dismissal otherwise than on the merits". The Plaintiff could, and would in fact, simply re-file the case, pursuant to 12 O.S. §100.

Consequently, the Defendant cannot in good faith represent this Order to be one which "affects a substantial part of the merits of the controversy," 12 O.S. §952(b)(3) when it wholly fails to reach the merits of the case.

### **PROPOSITION III**

#### **THE CERTIFICATION OF THIS ORDER FOR INTERLOCUTORY APPEAL WILL NOT MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THE LITIGATION.**

As discussed in Proposition III, 12 O.S. 100 renders all of the Defendant's arguments moot. Should the Defendant prevail upon appeal, it would be accomplished "otherwise than on the merits". The Plaintiff could, and would in fact, simply re-file her lawsuit. This would result in an unnecessary duplication of efforts by the parties, and would additionally be a waste of the Court's time and efforts. The Defendant's Motion does not meet the standard of the authority they cited, *i.e.*, *Warren v. Howell*, 23 P.2d 934, 935 (Okla.1951). The Plaintiff remedy is **not** limited to the appeal from the Order since both the relation-back statute and the savings statute allow the Plaintiff to reach the merits of the claim, otherwise than on an appeal from this Order.

The Defendant's Motion is, however, a method by which the Defendant may attempt to "forum shop". Should Defendant Landmark prevail, could only succeed in only in realigning the parties so as

to require the Plaintiff to refile her case against the Defendant Landmark alone. The Defendant could, and would reasonably be expected to remove the cause of action filed by the Plaintiff to Federal Court. Success, therefore, would allow the Defendant to pick a forum other than that chosen by the Plaintiff and now the Cross-Claimant, Jason Weed.

### CONCLUSION

Defendant Landmark's Motion to Certify the Interlocutory Appeal is not timely brought, and requires leave of the Supreme Court in order to proceed. It fails to meet the threshold requirements for such appeal found in 12 O.S. §952(b)(3) in that : [1] it does not affect a substantive part of the merits of the controversy or [2] materially advance the ultimate termination of the litigation. It is a poorly veiled attempt at forum-shopping through a not so subtle attempt to re-align of the parties.

WHEREFORE, for the reasons stated herein, the Plaintiff prays that the Court not certify the subject order for immediate appeal.

Respectfully submitted,

HAYES & LIDDELL, P.C.

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Personal Representative of Robert Jenkins, Deceased*

**CERTIFICATE OF MAILING**

This is to certify that on this, the \_\_\_ day of June, 2004, a true and correct copy of the above and foregoing instrument was sent via facsimile and mailed, postage pre-paid thereon *via* the U.S. Mails, to the following:

Mitchell M. McCune  
406 South Boulder, Suite 400  
Tulsa, OK 74103

Ronald L. Wallace  
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Gaylon C. Hayes/Janet M. Liddell