

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT NO:
2012-P-0635

APPEALS COURT
SINGLE JUSTICE
NO.:2012-J59

ALEXANDER B.C. MULHOLLAND,
JR., et al.

Plaintiffs,

v.

ATTORNEY GENERAL OF THE
COMMONWEALTH OF
MASSACHUSETTS, et. al.

Defendants.

PROBATE AND FAMILY
DEPARTMENT OF THE
TRIAL COURT
No. ES09E0094QC

**RESPONSE TO JOINT STATUS REPORT OF
PLAINTIFFS/APPELLEES AND DEFENDANTS/APPELEES**

The Appellants¹ file this Response to the Joint Status Report of the Plaintiffs/Appellees and Defendants/Appellees (“the Appellees”) and in light of this Court’s order to stay appellate proceedings until July 24, 2012. The Appellants have filed three interrelated notices of appeal challenging: (1) the Probate Court’s denial of the Motion to Intervene and the Entry of Judgment on the Complaint for Deviation; (2) the Single Justice of the Appeals Court’s denial of the Motion to Stay Pending Outcome of the Appeal; and (3) the Probate Court’s order allowing the Motion of the Plaintiffs to Strike a Portion of the Interveners’ Notice of Appeal. In their Joint Status Report, the Appellees request that this Court decide only one issue—whether the Appellants’ had the right to intervene. The Appellees’ approach encourages piecemeal litigation

¹ Douglas J. DeAngelis, Catherine T.J. Howe, Jacqueline and Jonathan Phypers, Peter Buletza, Kenneth Swenson, Robert Weatherall, Jr., Joanne Delaney, Cara Doran, Andrew and Susan Brengle, Michele and Jason Wertz, and Clark Ziegler

and is severely wasteful of scarce judicial resources. All of the appeals should be decided together in a single appellate proceeding.

The Appellees cite to the Probate Court's allowance of the Plaintiffs' Motion to Strike a Portion of the Interveners' Notice of Appeal in support of their position that Appellants have no right to appeal from the underlying judgment. The Probate Court's ruling on this motion contradicts well-established law that "[q]uestions going to the merits of the claimed appeal are for the appellate court to decide." *Rudders v. Building Commissioner of Barnstable*, 51 Mass. App. Ct. 108, 111 (2001). Appellees argued that striking the portion of the Appellants' notice of appeal concerning the judgment was merely "procedural"; however, there was no "procedural" basis—e.g., failure to give timely notice, failure to docket the appeal, or failure to give a required bond—upon which to strike the appeal. *See id.* at n. 7. In *Rudders*, the Appeals Court held that "there is no basis for annulling a notice of appeal... for the reason that, in the lower court's view, the appeal would be without merit, whether for the appellant's lack of aggrievement, or for any other ground of substance." *Id.* at 110-11. A lower court can only dismiss an appeal on procedural grounds (e.g. filing notice untimely, *Catalano v. First Essex Savs. Bank*, 37 Mass. App. Ct. 377, 383 (1994); failure to docket appeal, Mass. R.A.P. 10(c); failure to give required bond, *Kargman v. Dustin*, 5 Mass. App. Ct. 101, 106-08, (1977)).

None of the cases cited by the Appellees in their Joint Status Report for the proposition that non-parties cannot appeal from a judgment—*Corbett v. Related Companies Northeast, Inc.*, 424 Mass. 714 (1997); *Baker v. Board of Selectmen of Town of Foxborough*, 77 Mass. App. Ct. 1117 (2010), or *Worcester Memorial Hospital v. Attorney General*, 337 Mass. 769 (1958)—involve a lower court deciding that the party moving to intervene lacked standing to appeal the

judgment. In each case, either the Appeals Court or the Supreme Judicial Court decided whether the agreement for judgment could stand in the face of the intervener's challenge.

By striking a substantive portion of the appeal, the Probate Court exercised a power that is reserved for an appellate court. Not even a single justice of the Appeals Court can grant the relief that the Probate Court allowed. *See* Mass. R.A.P. 15(c) (single justice may not “dismiss or otherwise determine an appeal or other proceeding”); *Albano v. Bonanza International Development Co.*, 5 Mass. App. Ct. 692, 693 n. 1 (1977) (“A single justice of [the Appeals Court] is without power to allow a motion to dismiss an appeal”). The Probate Court was not permitted to grant the relief sought by the Plaintiffs' Motion to Strike, and this ruling is the proper subject of an appeal.

The Appellees' request to limit the appeal only to the right to intervene will lead to unnecessary proceedings. If either this Court or the Supreme Judicial Court allows intervention, the Interveners will be permitted to challenge to the Agreement for Judgment. It would be needlessly burdensome, time consuming and severely wasteful of scarce appellate resources to allow the Appellants' motion to intervene and then require a subsequent separate appeal on their challenge to the Agreement for Judgment. *See Kobico, Inc. v. Pipe*, 44 Mass. App. Ct. 103, 104 n. 2 (1997) (“no good reason” for separate appeals where claims raise virtually identical issues; “[t]wo appeals also have a negative impact, to say the least, on judicial economy at the appellate level”).

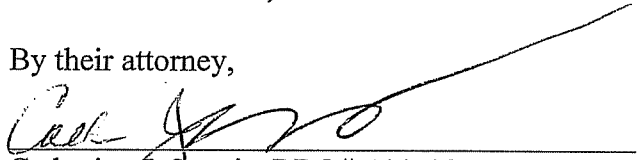
According to the clerk of the Probate Court, the record is expected to be assembled within the month of June. (The record in the Single Justice Appeal has been assembled and the proceedings stayed). Upon notice of assembly of the record by the Probate Court, the Appellants will promptly docket the appeal and move to consolidate the appeals. This Court has already

ordered the matter stayed until July 24. There will be no unnecessary burden or undue delay caused by maintaining this order and allowing the consolidated appeals to be briefed and heard in a single appellate proceeding.

Respectfully Submitted,

DOUGLAS J. DeANGELIS, CATHERINE T.J. HOWE, JACQUELINE PHYPERS, JONATHAN PHYPERS, PETER BULETZA, KENNETH SWENSON, ROBERT WEATHERALL, JR., JOANNE DELANEY, CARA DORAN, ANDREW BRENGLE, SUSAN BRENGLE, MICHELE WERTZ, JASON WERTZ and CLARK ZIEGLER, individually and on behalf of their minor children,

By their attorney,


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Dated: June 11th, 2012

CERTIFICATE OF SERVICE

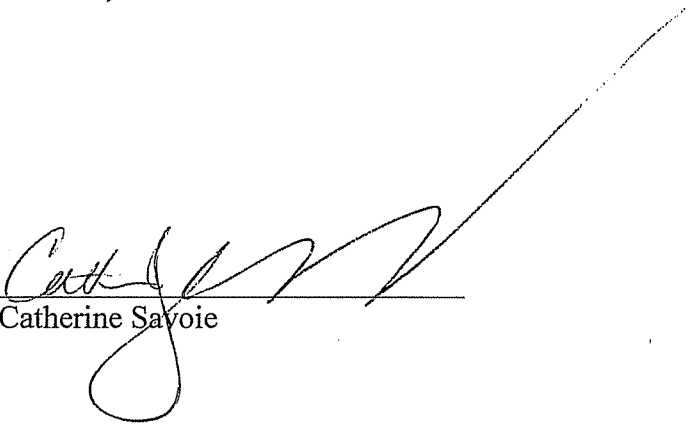
I, Catherine Savoie, hereby certify that on this 11th day of June, 2012, I served a copy of the foregoing by first-class mail upon the following counsel:

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