

COURT OF APPEALS, STATE OF COLORADO

101 West Colfax Ave., Suite 800
Denver, CO 80202

Appeal from the District Court, Denver County,
Colorado

Honorable Ann B. Frick, District Judge
Case No. 10CV7731

Plaintiff-Appellants: COLORADO MEDICAL SOCIETY,
a Colorado nonprofit corporation, and THE COLORADO
SOCIETY OF ANESTHESIOLOGISTS, a Colorado nonprofit
corporation

Defendant-Appellees: JOHN HICKENLOOPER, in his official
capacity as the Governor of Colorado

Intervenor-Appellees: COLORADO ASSOCIATION OF
NURSE ANESTHETISTS; COLORADO NURSES
ASSOCIATION; and COLORADO HOSPITAL
ASSOCIATION

▲ Court Use Only ▲

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Case No:

NOTICE OF APPEAL

Pursuant to C.R.S. § 13-4-102(1) and C.A.R. 3 and 4, Colorado Medical Society (“CMS”) and the Colorado Society of Anesthesiologists (“CSA”), through their attorneys, submit this Notice of Appeal:

I. NATURE OF THE CASE

A. Nature of the Controversy.

This appeal concerns whether it is consistent with Colorado law for a certified registered nurse anesthetist (“CRNA”) to administer anesthesia without physician supervision. Last year, former Governor Bill Ritter decided to opt-out of federal regulations that require anesthesia in hospitals, ambulatory surgery centers and critical access hospitals to be administered only by a physician or by a CRNA who is supervised by a physician. In doing so, the Governor certified that his decision was consistent with state law. This certification is necessary for the opt-out decision to be effective. CSA and CMS requested that the District Court order Governor Hickenlooper to retract Ritter’s opt-out decision. The court permitted multiple parties to intervene, including the Colorado Hospital Association, the Colorado Association of Nurse Anesthetists, and the Colorado Nurses Association.

The intervenors filed a motion for judgment on the pleadings under C.R.C.P. 12(c); Defendant Hickenlooper filed a Motion to Dismiss under C.R.C.P. 12(b)(1) for lack of standing and C.R.C.P. 12(b)(5) for failing to state a claim; and Plaintiffs

filed a Motion for Summary Judgment and Motion for Preliminary Injunction. In a written order dated April 8, 2011, the District Court denied the 12(c) motion, determining that the separation of powers doctrine did not preclude Plaintiffs' suit and that Plaintiffs were not required to exhaust non-existent administrative remedies. The Order further rejected the 12(b)(1) motion by determining that Plaintiffs have standing. Nevertheless, the Order dismissed Plaintiffs' claims under 12(b)(5). Finally, the Order dismissed Plaintiffs' Motion for Summary Judgment and Motion for Preliminary Injunction as moot.

B. Judgment and Order Being Appealed and Basis for Appellate Court's Jurisdiction

CSA and CMS appeal the District Court's Order, dated April 8, 2011, dismissing Appellants' claims with prejudice pursuant to C.R.C.P. 12(b)(5) and denying their Motion for Summary Judgment and Motion for Preliminary Injunction. Appellate jurisdiction is based on C.R.S § 13-4-102(1) and C.A.R. 3 and 4.

C. Whether the Judgment or Order Resolved All Issues Before the Trial Court.

Yes.

D. Whether the Judgment Was Made Final Under C.R.C.P. 54(b).

Rule 54(b) does not apply because all issues pending before the district court have been resolved for purposes of appeal.

E. The Date of Judgment or Order and the Date of Mailing to Counsel.

The District Court Order was issued on April 8, 2011 and was served April 8, 2011, via the e-filing system.

F. Whether There Were Any Extensions Granted to File Any Motion(s) for Post-Trial Relief.

None.

G. The Date Any Motion for Post-Trial Relief Was Filed.

No such motion has been filed.

H. The Date Any Motion for Post-Trial Relief Was Denied or Deemed Denied Under C.R.C.P. 59(j).

No such motion was filed.

I. Whether There Were Any Extensions Granted to File Any Notice(s) of Appeal.

There were no extensions granted to file the notice of appeal.

II. ADVISORY LISTING OF ISSUES TO BE RAISED ON APPEAL

Without limiting the scope of issues that they might raise in their Opening Brief, and specifically reserving the right to raise any issue properly preserved, the appellants anticipate that the following issues related to whether the administration

of anesthesia by a CRNA without physician supervision is compatible with Colorado law may be raised:

1. Whether delivery of anesthesia services by a CRNA is a delegated medical function, as defined in C.R.S. § 12-38-103(4), requiring physician supervision?

2. Whether advanced practice nurses are exempt from the physician-supervision requirement applicable to delegated medical functions?

3. Whether a physician's common-law duty to supervise a CRNA pursuant to the Captain of the Ship doctrine renders delivery of anesthesia services by a CRNA without physician supervision inconsistent with state law?

4. Whether the District Court erred in applying the incorrect stand of review on a motion to dismiss by failing to accept all allegations in the complaint as true?

5. Whether CMS and CSA are entitled to summary judgment?

III. TRANSCRIPT INFORMATION

This case was dismissed on a motion to dismiss without oral argument and therefore no transcript was prepared.

IV. PREARGUMENT CONFERENCE

CSA and CMS do not request a preargument conference.

V. ATTORNEY INFORMATION

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VI. APPENDICES TO THIS APPEAL

Attached to this Notice of Appeal as an Appendix are the following:

1. Judgment dated April 8, 2011;

DATED May 12, 2011

Respectfully submitted,

HERSHEY SKINNER, LLC

*Original signature on file at the offices of
Hershey Skinner, LLC*


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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of May, 2011, a true and correct copy of the foregoing **NOTICE OF APPEAL (with attachments)** was sent via LexisNexis File & Serve to the following:

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s/ Linda Erickson 