

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No.: 2015-CP-10-00955
Appellate Case No.: 2019-001520

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Oct 19 2020

SC Court of Appeals

Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc and
Jack Love, individually, and on behalf of all others similarly situated Appellants

v.

Island Pointe, LLC, Complete Building Corporation, Tri-County Roofing, Inc., WC
Services, Inc., Miracle Siding, LLC and Wilson Lucas Sales d/b/a Miracle Siding, LLC,
Eloy Alonzo Vasquez, JMC Construction, Inc., and JMC Construction LLC...Defendants

Of which WC Services, Inc. is the Respondent

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. The motion for judgement notwithstanding the verdict (“JNOV”) or in the alternative for a new trial were properly denied in light of the evidence and reasonable inferences at trial that Respondent was not required to install fire sprinklers within the attics of residential buildings of Palmetto Pointe.**
- II. The motion for directed verdict and JNOV on the basis of alleged penetrations of interior firewalls at Palmetto Pointe was properly denied in light of the absence of evidence of such penetrations within common walls of units at Palmetto Pointe, and the absence of evidence that Respondent was responsible for fire sealing any penetrations, and that none of the project plans introduced at trial were sealed, signed, for final, or approved for construction.**
- III. The trial court properly refused requested jury charges numbers 39 and 38 as the law controlling at trial since the municipal ordinance which was the basis of these requests was never authenticated or introduced into evidence, and the issue of that ordinance’s applicability or inapplicability to the fire sprinklers at Palmetto Pointe was itself disputed by the evidence.**
- IV. That testimony at trial regarding out of court conversations with the authority having jurisdiction for the applicable fire code for Palmetto Pointe (City of Folly Beach Fire Chief George Tittle) were properly admitted by the trial court as either non-hearsay or admissible hearsay.**

STATEMENT OF CASE

This construction defect action was tried by jury beginning on May 6, 2019 and concluding on May 16, 2019. The jury returned its unanimous verdict in favor of the Appellants/Plaintiffs against four of five defendants who remained as parties, but returned its verdict in favor of Respondent/Defendant as to all claims asserted against Respondent/Defendant at trial. Appellants filed and served their May 24, 2019 motion for judgment notwithstanding the verdict and/or for a new trial, which was denied by July 15, 2019 order of the trial court. Thereafter Appellants filed and served their motion to

reconsider on July 25, 2019, which was also denied by the trial court by order dated August 5, 2019. This appeal follows Appellants' September 6, 2019 notice of appeal.

FACTS

Respondent, as the fire sprinkler subcontractor, was responsible for the installation of the fire sprinkler systems within the twenty (20) buildings and forty (40) residences, as well as the clubhouse comprising the Palmetto Pointe at Peas Island condominium community in Charleston County, South Carolina ("Palmetto Pointe"). The other four defendants at trial included the general contractor and three (3) other subcontractors variously responsible for the installation of siding, roofing, and deck waterproofing. Appellants' damages sought and recovered against the four (4) defendants arose from water infiltration and resulting damages in the form of costs to repair defective conditions and resulting water damages at Palmetto Pointe. There was no evidence introduced at trial that the fire sprinklers as installed by Respondent caused or contributed in any way to water intrusion and resulting damages at Palmetto Pointe.

Appellants contended that the fire sprinklers installed by Respondent were contrary to the fire/building code that Appellants contended were applicable to the construction of Palmetto Pointe. Appellants also contended that as built the fire sprinklers were contrary to plans Appellant contended were applicable to the final construction of Palmetto Pointe. Further, Appellants contend that there was no evidence at trial upon which a reasonable jury could have reached a verdict in Respondent's favor. As noted below, as to each of Appellants' contentions conflicting evidence was, in fact, presented and introduced over the course of trial. Appellants also submitted to the trial court two (2) requests to charge the jury (Requests to Charge No. 39 and No. 38) which the trial court

refused. Appellants also sought a new trial based on the trial court's refusal to charge these two (2) jury charges.

STANDARD OF REVIEW

A motion for judgment notwithstanding the verdict/new trial ("JNOV") may be granted only if no reasonable jury could have reached the challenged verdict. Burns v. Universal Health. Svcs., 361 S.C. 221, 232, 603 S.E.2d 605, 611 (Ct. App. 2004). When considering a motion for JNOV the court is only concerned with the existence of evidence, and neither a trial nor an appellate court has authority to make determinations about the weight or credibility of the evidence, nor has the authority to resolve conflicts of testimony or evidence. Id. at 231-32, 603 S.E. 2d at 611. The jury's verdict will be upheld if there is any evidence to sustain the factual findings implicit in the jury's verdict. Id. Additionally, if more than one inference can be drawn from the evidence, a grant of JNOV is improper. All evidence and reasonable inferences from the evidence are viewed in the light most favorable to the non-moving party. Id. A trial court's ruling on a JNOV motion will be reversed only when there is no evidence to support the ruling or where the ruling is controlled by an error of law. Id. This deference respects that in a trial by jury it is the province of the jury, as the judges of the evidence, testimony, and witnesses, to weigh conflicting evidence and testimony and to determine the credibility and believability of conflicting evidence and testimony. Small v. Pioneer Mach., 329 S.C. 448, 494 S.E. 2d 835 (Ct. App. 1997).

When instructing the jury, the trial judge is required to charge only the current and correct law of South Carolina. Cohens v Atkins, 333 S.C. 345, 509 S.E. 2d 286 (Ct. App. 1999). When an appellate court reviews an alleged error in the refusal to give a jury

charge, it must consider the charge in question based upon the trial court's charges as a whole, and upon the evidence and the issues presented at trial, since jury instructions should be confined to the issues made by the pleadings and supported by the evidence. Stoneledge at Lake Keowee Owners' Ass'n v. Co., LLC, 425 S.C. 276, 821 S.E. 2d 509 (Ct. App. 2018).

The courts of general jurisdiction of South Carolina cannot take judicial notice of municipal ordinances. Rather, if material to an action a municipal ordinance must be plead and proved at trial. Steinberg v. South Carolina Power Co., 165 S.C. 367, 163 S.E. 881 (S.C. 1932). Ordinances of the municipalities of South Carolina are admissible into evidence upon certification of the municipal clerk that the ordinance in question is correct and genuine. *S.C. Code Ann § 19-3-10 (2019)*. Setting aside for the moment the requirement in a jury trial that a municipal ordinance must be plead and proven, the determination from conflicting evidence at trial whether a party has violated a statute is typically a question for the jury. Cooper v. County of Florence, 306 S.C. 408, 412 S.C. 417 (1991).

ARGUMENT

- I. The trial court correctly denied Appellants' Trial motion since there was disputed evidence, as well as inferences based upon the disputed evidence, upon which a reasonable jury could find in favor of Respondent:**
 - A. There was evidence introduced at trial that Respondent was not required to install fire sprinklers within the attics at Palmetto Pointe in compliance with City of Folly Beach Ordinance §90.08(C)**

As the fire sprinkler subcontractor, Respondent worked at Palmetto Pointe pursuant to a subcontract agreement entered with the general contractor defendant, Complete

Building Corporation. (*R. pp. 467-470*). Under Respondent's subcontract the fire sprinkler system installed was required to comply with two (2) items. The first was the national fire standard NFPA 13D (2002 ed.) (*R. pp. 399-428*), which did not require fire sprinklers in attic spaces not used or intended for living purposes. (*R. p. 417, see paragraph/section 8.6.5*). The second was a letter dated March 6, 2006 that addressed fire suppression at Palmetto Pointe. (*R. pp. 474-475*). This March 6, 2006 fire suppression letter set forth a recap of a February 14, 2006 meeting of the developers of Palmetto Pointe (Tommy Browne and Chris Union), the then City of Folly Beach Fire Chief (George Tittle¹), and the then Building Official (Tommy E. Hall). In that letter the building official wrote to one of the Palmetto Pointe developers, and courtesy copied Chief Seabolt (James Island Fire Department Chief), Robert Wise, and Chief Tittle (City of Folly Beach Fire Chief). *Id.* In pertinent part, this March 6, 2006 letter also stated the City of Folly Beach fire sprinkler requirements for Palmetto Pointe, as follows:

90.8 (*sic*) Of The City of Folly Beach Code of ordinances covers The City's Requirements for fire sprinkler systems. Your project requires the following:

1. Each unit will be equipped with an NFPA 13D fire sprinkler system.
2. Per 90.3(C) (*sic*), you may omit the garage area where there is a 1hr. fire construction separating the dwelling from the garage.
3. The "Club House" must be sprinkled in accordance with its primary occupancy.

Though not referenced in the March 6, 2002 letter (*R. pp. 474-475*), in pertinent part Folly Beach Ordinance §90.08 also provided as follows:

- C) Subject to the approval of the Fire Chief, sprinklers may be omitted from buildings where sprinklers are considered undesirable due to the nature of the contents, or in rooms or areas which are of noncombustible construction with noncombustible content.

¹ George Tittle died December 19, 2017

D) Variances to this section may be granted after a hearing by the Fire Chief, Building Official and member of the building industry appointed by the City Council. (*R. pp. 429-430*)

In addition, this ordinance contained a table, which indicated that the omission of fire sprinklers from “[a]ttics, not used for living or storage” in “[t]wo-[f]amily” dwellings was unacceptable, but that their omission in garages was acceptable if separated by a one (1) hour rated fire wall. (*R. pp. 429-430*). Although the ordinance excerpt regarding the garage sprinkling requirement was referenced in the March 6, 2006 fire suppression letter, there was no reference in that letter to the attic provisions in the ordinance.

The authenticity of a copy of NFPA 13D (2002 ed.) (*R. pp. 399-428*) and a copy of City of Folly Beach Ordinance § 90.08 (*R. pp. 429-430*) was stipulated to at trial for reference and publication to the jury during the examination of witnesses, but neither was entered as evidence for submission to the jury during its deliberations. (*R. p. 77, line 17- p. 79, line 2*)

Largely through the trial testimony of Appellants’ fire code expert, Douglas Smits, Appellants contended that since the attics in question at Palmetto Pointe were constructed of combustible material and were accessible for the storage of combustible content, in the absence of direct evidence that the City of Folly Beach had held a hearing and granted a variance of the attic fire sprinkler provision, Respondent’s failure to install attic fire sprinklers constituted a breach of the applicable fire/building code. (*R. p. 97, lines 1-19; R. p. 145, lines 4-15*) However, Appellants’ expert witness agreed that the national fire standard NFPA 13D, also applicable to Palmetto Pointe, did not require fire sprinklers in the attics at Palmetto Pointe. (*R. p. 145, line 16- p. 147, line 8*) Mr.

Smits testified that he was not and had never served as the authority having jurisdiction for the application of either building or fire codes within the jurisdiction encompassing Palmetto Pointe. Mr. Smits also testified that since his retention by Appellants in early 2016 he never communicated with the authority having jurisdiction for the fire code applicable to Palmetto Pointe (City of Folly Beach Fire Chief George Tittle), or with anyone involved in the design of the fire sprinklers installed at Palmetto Pointe. (*R. p. 141, line 8 – p. 143, line 2*) As the resident fire marshal and the authority having jurisdiction regarding fire code interpretation and application to Palmetto Pointe, George Tittle possessed the ultimate authority concerning the application of both NFPA 13D and Folly Beach Ordinance § 90.08 to the construction of Palmetto Pointe. (*R. p. 148, line 11 - p. 149, line 18.*)

In contrast to Appellants' fire code expert, other witnesses testified about having had contact with the City of Folly Beach Fire Chief during or since the fire sprinkler installations at Palmetto Pointe. These witnesses included the defect expert witness retained by the co-defendant general contractor, Alan Schweickhardt. Mr. Schweickhardt prepared a scope of repairs, which notably did not include any repairs to the fire sprinkler systems installed by Respondent at Palmetto Pointe. In addition, in the context of his work on behalf of the general contractor, Mr. Schweickhardt testified that he spoke with City of Folly Beach Fire Chief George Tittle. Mr. Schweickhardt testified that after his communication with Mr. Tittle he did not amend or revise his scope of repairs to include any work on the fire sprinklers installed at Palmetto Pointe. (*R. p. 159, line 9 – p. 162, line 13*) He also testified that he never instructed that the cost of installing sprinklers in the attics at Palmetto Pointe be included in a repair estimate put together on the defendant general contractors' behalf. (*R. p. 162, lines 9-13*)

Respondent called as a witness South Carolina licensed professional engineer, Christopher Constantine, who sealed and submitted the certification of the fire sprinkler system at Palmetto Pointe to the Office of the South Carolina State Fire Marshal. (*R. pp. 666-676*) Mr. Constantine's sprinkler certification identified NFPA 13D as the only code or standard governing the sprinkler design at Palmetto Pointe. (*R. p. 667*) Mr. Constantine testified that during the course of the fire sprinkler design and the Palmetto Pointe construction he was in contact with Mr. Tittle and was never required to revise his design to incorporate the Folly Beach ordinance § 90.08 attic fire sprinkler requirement. (*R. p. 192, line 13 – p. 193, line 24; R. p.. 194, line 6- p. 196, line 4*)

Respondent also called as a witness during trial Chad Christopher who, as a former employee of Respondent, worked with both Christopher Constantine and Fire Chief Tittle in the design of the fire sprinkler systems installed at Palmetto Pointe. Mr. Christopher testified that he was not instructed to include fire sprinklers in the attics at Palmetto Pointe, but rather was instructed to exclude them from the attics. (*R. p. 167, lines 3-5; R. p. 173, line 18 – p. 174, line 21; R. p. 175, line 5 – p. 179, line 1; R. pp. 664-665*)

Finally, Respondent called as its fire code expert witness South Carolina licensed professional engineer Mark Lazo. (*R. p. 223, lines 22-24*) Mr. Lazo testified that in his opinion, fire sprinklers were not required to be installed in the attics of the residential buildings at Palmetto Pointe and that this opinion was based in part on his communication with Mr. Tittle, which he also testified was the kind of information typically relied upon by experts in his field in forming expert opinions. Mr. Lazo testified

that Mr. Tittle told him that the attic fire sprinkler provision of ordinance § 90.08 was neither required nor enforced at Palmetto Pointe, but rather that the fire sprinklers were required to comply with NFPA 13D (2002 ed.). (*R. p. 235, line 3 – p. 237, line 18; R. p. 245, line 22- p. 246, line 5.*) Mr. Lazo testified that this opinion was also based upon his reading of the March 6, 2006 fire suppression letter (*R. pp. 474-475*) as documenting a waiver of attic fire sprinklers otherwise required by the City of Folly Beach ordinance § 90.08. (*R. p. 268, line 10 – p. 269, line 12*) Mr. Lazo also inspected the attic of the clubhouse at Palmetto Pointe, in which fire sprinklers were present. Mr. Lazo testified that fire sprinklers within the attic of the clubhouse building complied with the requirements set forth in the March 6, 2006 fire suppression letter (*R. pp. 474-475*) and the applicable version of NFPA 13 (*R. pp. 329-428*), given that the primary occupancy of the clubhouse, unlike the residences, was an “assembly” building. (*R. p. 230, lines 3-11; R. p. 237, line 10 – p. 239, line 19*)

B. That the fire sprinkler plans introduced at trial were neither sealed, signed, nor approved as final or for construction, and therefore the fire sprinklers as built did not conflict with the final plans applicable to the construction of the property at issue

Two (2) relevant exhibits of plans were introduced at trial. The first was a single sheet of the plumbing plans, P101 for Palmetto Pointe. (*R. p. 466*) The second purported to be Respondent’s drawings of fire sprinklers. (*R. pp. 476-483*) Neither exhibit was signed, sealed, or approved by any engineer, designer, or code official as “final” or “for construction”. (*R. p. 105, lines 6-24*) At the trial of this action no final, approved for construction plans were introduced by any party regarding any aspect of construction at Palmetto Pointe. (*R. p. 231, line 21 – p. 232, line 4*) Each of these plans reflected

access of water for the fire sprinkler cabinets and sprinkler systems from the side of each adjacent unit at Palmetto Pointe. As built, water for the fire cabinets and sprinkler systems entered fire sprinkler cabinets located at the front/garage area of the adjacent units. (*R. p. 104, line 13 - p. 106, line 9*) Although the as built fire sprinkler cabinet location was never raised as an issue before trial by Appellants' fire code expert, at trial the as built location of fire sprinkler cabinets became a fire sprinkler defect issue. (*R. p. 138, lines 3-22.*)

In contrast, evidence was presented at trial that the building code official had occasion to pressure test and inspect the as built fire sprinkler cabinets and pipes for leaks without taking issue with the locations of fire sprinkler cabinets at the center/garage areas of the residential buildings. (*R. p. 242, line 11 – p. 245, line 22; R. p. 267, line 15 – p. 268, line 9.*) Nevertheless, Appellants' fire code expert testified that this was at variance with the unsealed, unsigned, unapproved fire sprinkler plans (*R. pp. 476 -483*), and increased the risk of penetrations of the fire assemblies between the units within common party walls. (*R. p. 104, line 16 – p. 105, line 5; R. p. 109, line 23 – p. 110, line 5*) Unlike the attics of residences at Palmetto Pointe (*R. p. 100, line 18 – p. 102, line 8*), there was no evidence at trial of any investigations performed by anyone of penetrations of fire assemblies within any of the common party walls located between any units within any of the residential buildings of Palmetto Pointe. Neither was any evidence presented that Respondent (or for that matter anyone who worked on the Palmetto Pointe project) was responsible for fire sealing any firewall penetrations at Palmetto Pointe. (*R. p. 157, line 11 – p. 158, line 11; R. p. 239, line 20 – p. 240, line 18*) The only direct evidence introduced reflecting Respondent's scope of work at Palmetto Pointe did not include fire sealing of any penetrations of any fire assemblies at Palmetto Pointe.

(*R. pp. 467-470*) As noted by Appellants' construction defect expert Russell Mease, penetrations of fire assemblies are not the problem; rather the problem arises when penetrations of fire assemblies are not properly fire sealed so that the integrity of the fire separation remains intact. (*R. p. 80, line 8 – p. 81, line 20*)

As for the two sets of plans (*R. p. 466; R. p. 476-483*) numerous witnesses, including Appellants' fire code expert, testified that these exhibits were both unsigned and unsealed, and therefore were just as likely drafts as opposed to final, "for construction" plans. (*R. p. 105, lines 2-24; R. p. 231, line 5 – p. 232, line 4; R. p. 240, line 19 – p. 245, line 21*)

II. That the trial court correctly ruled concerning out of court conversations of the City of Folly Beach fire marshal/authority having jurisdiction with testifying expert witnesses

At trial, defendant/general contractor Complete Building Corporation's defect expert Alan Schweickhardt testified that his scope of repairs was silent regarding any need for any repair work on the fire sprinklers at Palmetto Point. (*R. p. 161, lines 6-23*) This witness testified that his scope of repairs had gone through several revisions. (*R. p. 158, line 24 – p. 159, line 20*) Mr. Schweickhardt also testified that he had spoken with the authority having jurisdiction over fire code compliance for Palmetto Pointe, City of Folly Beach Fire Chief George Tittle, but did not testify what he was told by Mr. Tittle. (*R. p. 159, line 24 – p. 161, line 20*) Over the objection of Appellants' counsel Mr. Schweickhardt said that despite his conversation with Mr. Tittle he did not revise any version of his scope of repairs to include any repair to the fire sprinklers installed at Palmetto Pointe. (*R. p. 161, lines 6-20; p. 162, lines 9-13.*) The trial court correctly

permitted this testimony since it was not hearsay testimony of an out of court statement introduced at trial to prove the truth of any out of court assertion. *Rule 801(c) SCRE*. Mr. Schweickhardt was not asked and did not relay to the jury what he had been told by the out of court declarant, George Tittle, but rather was asked what he did or rather did not do as a result of his conversation.

In addition, Respondent's fire code expert, Mark Lazo, testified that in his opinion fire sprinklers were not required in the attics of the residential buildings at Palmetto Pointe. (*R. p. 230, lines 10-25; R. p. 237, lines 4-18; R. p. 245, line 22- p. 246, line 5*) Mr. Lazo also testified that information from the authority having jurisdiction over the application of the fire code to a construction project was the type of information that experts in his field reasonably rely upon in forming opinions regarding fire code issues and the design and installation of fire sprinkler systems. (*R. p. 235, line 7 – p. 237, line 3*) Amongst the facts upon which he based his opinion, Mr. Lazo testified that he spoke with George Tittle, the authority having jurisdiction over fire code for Palmetto Pointe, and that the information he received from his communication with George Tittle, in part, formed the basis of his expert opinion. (*R. p. 235, line 7 – p. 237, line 9*) Finally, over the hearsay objection of Appellants' counsel, Mr. Lazo told the jury that George Tittle told him that he had not enforced and did not require Respondent to design or install fire sprinklers in the attics of the residences at Palmetto Pointe. (*R. p. 237, lines 4-18*)

Under South Carolina practice, an expert's opinion may be based in all or in part on facts or data not itself admissible, so long as it is the type of facts or data reasonably relied upon by experts within the expert's field of expertise in forming their opinions. *Rule 703 SCRE*. Further, not only may an expert's opinion be based upon what might

otherwise constitute impermissible hearsay if offered directly into evidence, an expert may testify at trial as to the facts or data relied upon in forming their opinion. Duncan v Ford Motor Co., 385 S.C. 119, 682 S.E.2d 877 (Ct. App. 2009); In re Manigo, 389 S.C. 96, 697 S.E.2d 629 (Ct. App. 2010). Consequently, the trial court did not err in overruling the objection of Appellant and permitting Mr. Lazo to testify about the information received from his conversation with the authority having jurisdiction, George Tittle.

III. That given the disputed evidence on whether City of Folly Beach Ordinance § 90.08 was applicable to Respondent's work, the trial court correctly refused Appellants' Requests To Charge No. 39 and No. 38.

At trial, the trial court requested and the parties submitted proposed jury charges. By a May 14, 2019, email to the trial court Appellants requested the trial court charge Plaintiffs' Charge No. 38 and 39. Essentially, through these two (2) requests, Appellants sought to have the trial court charge the City of Folly Beach Ordinance § 90.08 as though it were the law applicable to this action. (*R. pp. 677-679; R. pp. 429-430*). During trial, the trial court refused to admit the ordinance (*R. pp. 429-430*) into evidence when proffered by Appellant (*R. p. 254, line 2 – p.255, line 1*), and similarly refused to include these two (2) charges amongst the numerous charges given prior to the commencement of the jury's deliberations.

As previously addressed, whether and to what extent, if any, the City of Folly Beach ordinance was applicable to respondent's work at Palmetto Pointe was the object of significant evidentiary dispute at trial. By evidence and inference from evidence admitted, Appellants contended that the municipal ordinance was controlling, and that no variance to its requirement of fire sprinklers within the attics had been granted. By

evidence and inference from evidence admitted, Respondent contended that the attic sprinkler requirement of the municipal ordinance was not applicable to Respondent's work, was not enforced by the authority having jurisdiction, and as evidenced by the March 6, 2006 fire suppression letter (*R. pp. 474-475*) had been waived. Although counsel for Appellants and Respondent stipulated to the accuracy and authenticity of a copy of the ordinance marked as a Court's exhibit (*R. pp. 429-430*), the ordinance was never plead and proven and despite being tendered by Appellant was never admitted into evidence during trial. (*R. p. 254, line 2 – p. 255, line 1*)

In light of the conflicting evidence and inferences presented at trial, and the resulting factual issue regarding the applicability or inapplicability of the municipal ordinance in question, the trial court correctly declined to charge as the law in this action Plaintiffs' Charge Nos. 38 and 39. Given the record at trial concerning this municipal ordinance, it could well have constituted reversible error had the trial court charged the two (2) requested charges as though the attic provision of the municipal ordinance were the law applicable to this action. *Cole v. Raut*, 378 S.C. 398, 663 S.E.2d 30 (2008) (A jury charge irrelevant and inapplicable to the evidence and issues presented at trial may confuse the jury and constitutes reversible error where the jury's confusion affects the outcome of the trial).

Conclusion

Based upon the foregoing the trial court properly denied the Appellants' motion for judgment notwithstanding the verdict or in the alternative for a new trial, and this Court should affirm the same.

(Signature on following page)

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Of which WC Services, Inc. is the Respondent

RESPONDENT'S CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Respondent's Final Brief complies with
S.C.A.C.R. 211(b).

(Signature on following page)

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