THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, Master In Equity
and Special Circuit Court Judge for Beaufort County

Case No. 2012-212486

Madeline R. Arata and Kenneth C. Arata ..... Appellants,

v.

Village West Owner' Association, Inc.
d/b/a Village West Horizontal
Property Regime ..... Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Village West Horizontal Property Regime is a condominium project on Hilton Head Island comprised of five (5) buildings with a total of eighty (80) residential units ("Village West"). In 2005, the Respondent, Village West Owners' Association, Inc. ("Association") sued the Appellants, Kenneth C. Arata and Madeline R. Arata (collectively "Aratas") to foreclose a lien filed to collect a special assessment imposed on a pro rata basis against all units within Village West ("Arata 1"). In Arata 1, the trial court granted summary judgment in favor of the Association. The Aratas appealed, and in order to stay execution of the order of foreclosure and sale, the Aratas posted a $75,000 cash bond. The Court of Appeals affirmed the lower court in an unpublished opinion, and on October 31, 2007 the South Carolina Supreme Court denied Aratas' Petition for a Writ of Certiorari. After remittitur, and in accordance with the terms of the bond, the Clerk of Court paid the bond money over to Edward E. Bullard, Esquire, the Attorney who represented the Association in Arata 1.

On January 6, 2009 the Aratas filed the instant case against the Association asserting the following causes of action concerning the same special assessment and bond ("Arata 2"):

1. for relief from judgment or to set aside the judgment pursuant to Rule 60, SCRCP;
2. for fraud; and
3. for an accounting.

The Association filed a motion to dismiss the cause of actions to set aside the

judgment and for fraud pursuant to Rule 12(b)(6), SCRCP. The Association also filed an answer and counterclaim. The counterclaim seeks judgment against the Aratas for the attorney's fees and expenses incurred by the Association in Arata 2.

On June 15, 2009, the Honorable Marvin H. Dukes, III sitting as a Special Circuit Court Judge for the Beaufort County Court of Common Pleas, dismissed the causes of action seeking to set aside the judgment under Rule 60, SCRCP and for fraud for failure to state a cause of action. On October 8, 2009 Judge Dukes denied the Aratas' motion to reconsider, and the Aratas appealed.

On June 30, 2011, the Court of Appeals reversed the trial court holding that the Aratas had pleaded a cause of action for extrinsic fraud. In its Unpublished Opinion the Court of Appeals wrote: "[w]ithout the Aratas' allegation of extrinsic fraud amounting to fraud on the court, the Regime is clearly entitled to the defense of res judicata, as found by the master". (R. p. 21). The case was remanded to the trial court.

Immediately prior to the trial, Judge Dukes heard and took under advisement the Motions for Summary Judgment of both Arata and Village West. At the end of the trial, Judge Dukes denied both Motions for Summary Judgment and decided the case on the merits. On March 26, 2012, Judge Dukes issued an Order for Judgment ruling in favor of the Association and dismissing the Aratas claims with prejudice.

On June 20, 2012, Judge Dukes denied the Aratas Motion to Alter or Amend the Judgment pursuant to Rule 60, SCRCP, denied the Aratas' Motion to Amend Complaint, and awarded Village West attorney's fees and costs. With respect to their Rule 60(b) Motion for Relief from Judgment, the Aratas argued that Judge Dukes erred in deciding

the Motions for Summary Judgment on less than ten (10) days notice. While the Aratas do not advance this argument on appeal, the record shows that counsel for Arata agreed to waive the ten (10) day notice requirement. (R. p. 131, lines 19 - 25; p. 132, lines 1-4). The only other argument advanced by the Aratas in support of their Rule 60(b) Motion, was that Judge Dukes erred in refusing to continue the trial, which also is not argued on appeal. (R. pp. 10 - 11). Other than a Motion to Amend Complaint which was denied based upon the concession of counsel for the Aratas that it was moot, Arata made no other post trial motions.

FACTS

In 2004 the Association imposed a special assessment against all of the units in Village West, the Arata's share of which was approximately $34,000.00. (1st Supp. R. p. 22). The special assessment was required because the proceeds from the resolution of prior construction defect litigation instituted by the Association were not sufficient to cover the cost to make all the necessary repairs. (R. p. 192, lines 23-25; p. 193, lines 1-2). In Arata 1, the Aratas alleged that certain provisions in Village West's Master Deed and Bylaws required that the shortfall be paid by only those unit owners whose units were directly affected by the work. (R. pp. 27, 32).

The Court of Appeals disagreed and held that it was proper for Village West to impose the special assessment on a pro rata basis against all units in Village West because:

1. Article V, Section (e) of the Association's Master Deed[1] provides that "[t]he obligations of all Unit owners with regard to assessments for common expenses and the maintenance and repair of the individual Units shall be as provided in the By-laws...";

2. Article VII, Section 6(c) of the By-Laws provides that "[a]ll maintenance, repair and replacement to the common elements as defined in the Master Deed, the painting and decorating of the exterior doors and exterior window sash and the washing of exterior glass shall be made by the Board... and shall be charged to the Unit Owners as

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[1] At the trial in Arata 2, the Aratas failed to introduce into evidence the Association's Master Deed and Bylaws.

a common expense..."; and

3. Article VII, Section (a) of the Master Deed defines Village West's common elements to include "the foundation, roofs, perimeter walls, walls and partitions separating units, [and] load bearing floors...". (R. pp. 32-34).

The provisions in the Master Deed and Bylaws which the Aratas argued in Arata 1 compelled a different result are as follows:

ARTICLE IX

RECONSTRUCTION AND REPAIR

In the event of casualty loss or damage to the Property, the Association's Board of Directors shall be responsible for the proceeds of all casualty insurance to the repair or reconstruction of the Property in accordance with the provisions of this ARTICLE IX. Reconstruction of repair shall be mandatory unless two-thirds or more of the Property is destroyed or substantially damaged. If two-thirds or more of the Property is destroyed or substantially damaged, reconstruction shall not be mandatory ... If less than two-thirds of the Property is destroyed or substantially damaged, then such Property shall be repaired in the following manner:

...

(3) If the insurance proceeds paid to the Board are insufficient to cover the cost of reconstruction, the deficiency shall be paid as a special assessment by the Unit Owners whose units are being reconstructed or repaired in proportion to the damage done to their respective Units.

(4) The insurance proceeds received by the Board ... and any special assessments collected to cover a deficiency in insurance shall constitute a construction fund from which the Board ... shall disburse payment of the costs of reconstruction and repair. The first disbursements from the construction fund shall be insurance proceeds; and if there is a balance in the fund after payment of all costs of reconstruction and repair, it shall be distributed to the Unit Owners who paid special assessments in proportion to their payments. Any balance remaining after such distribution shall be retained by the Association.

(R. pp. 30-32).

The second is Article X, which provides in relevant part:

ARTICLE X

INSURANCE TRUST

In the event of casualty loss to the Property, all insurance proceeds indemnifying the loss or damage shall be paid jointly to the Board of Directors as Insurance Trustee .... The Board of Directors, acting as Insurance Trustee, shall receive and hold all insurance proceeds in trust for the purposes stated in this ARTICLE X, and for the benefit of the Association, the Unit Owners, and their respective mortgagees in the following share:

(2) Insurance proceeds paid on account of loss or damage to less than all of the Units, when the damage is restored, shall be held for the benefit of Unit Owners of the damaged Units ... in proportion to the costs of repairing each damaged unit.

(R. p. 32).

In Arata 2, the Aratas seek to have the judgment in Arata 1 set aside based upon extrinsic fraud alleged to have been committed by the Association and its previous attorney. (1st Supp. R. pp. 2-9). The extrinsic fraud claimed by the Aratas in Arata 2, is that the Association's attorney in Arata 1 made false representations and concealed lost records. (1st Supp. R. pp. 2-9). The Complaint alleges that the Association through its attorney withheld evidence that the reconstruction and repair was in part from damage as a result of Hurricane Floyd, a casualty, and that the construction and repair was to both units and common elements. (1st Supp. R. pp. 2-9). The Complaint also alleges that Mr. Bullard falsely represented to the Court in Arata 1 that the repair and reconstruction was not from a casualty and was only to common elements. (1st Supp. R. p. 7). It is the Association's position that the Aratas failed to prove extrinsic fraud and, therefore, *res judicata* bars their claims in Arata 2. Further, since the casualty the Aratas point to (Hurricane Floyd) was not connected to the special assessment in any way, and there was

no evidence introduced at trial by the Aratas showing that the repair work performed in conjunction with the special assessment was to anything other than the common elements, there would be no basis for the Aratas to obtain relief in any event. This is because the Master Deed and Bylaws provisions the Aratas' want to rely on have no bearing on how the shortfall in funds needed to pay for the repairs made after the settlement of the construction defect litigation were to be divided among the owners in Village West.

With respect to extrinsic fraud, the evidence at trial showed that the Aratas engaged in no discovery in Arata 1.[2] The Court file shows that the Summons and Complaint in Arata 1 was filed on March 14, 2005, and the Amended Complaint was served on the Aratas on April 11, 2005. (R. p. 186, lines 4 - 18). Judgment was not granted in Arata 1 until January 16, 2006, which shows that the Aratas had in excess of eight (8) months to serve discovery requests. Further, counsel for the Aratas admitted at trial that Village West's attorney in Arata 1 had no affirmative obligation to produce the box of records absent a discovery request. (R. p. 158, lines 2-12).

In fact, the box of records was voluntarily produced the Association's then attorney. (R. p. 67, lines 13-24; p. 125). On August 24, 2007, while Arata 1 was on appeal the Association's attorney wrote the Aratas' attorney, and advised him that he had discovered a box of the Association's records that was available to be inspected. (R. p. 125). Soon after August 24, 2007, Mrs. Arata and her attorney examined the documents

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[2]At trial counsel for the Aratas stipulated that there had been no discovery in Arata 1. (R. p. 188, lines 2 - 25).

in the box. (R. p. 196, lines 9 - 11). They made copies of three (3) documents, which are the documents they allege in the Complaint in Arata 2, would have compelled a different outcome in Arata 1 had they known about them then. (1st Supp. R. p. 5; R. p. 51, lines 21 - 25; p. 180, lines 1 - 20).

The Aratas also assert that the Association's attorney falsely represented to the Court in Arata 1 that the repair and reconstruction was not from a casualty and was only to common elements. (1st Supp. R. p. 7). Likewise, the Aratas asserted at trial that in an Affidavit filed in Arata 1, Mary Probert, a previous President of the Association, falsely swore under oath that there was no casualty. (R. pp. 123 - 124). This affidavit was not alleged in the Complaint, and Judge Dukes refused to consider it on the basis that it was outside the scope of the pleadings. Judge Dukes also concluded that based upon the evidence at trial concerning Hurricane Floyd and the absence of any connection to the special assessment, that the statements by the Association's prior attorney and president appeared to be true. (R. p.6; p. 236, lines 14 -25, p. 237, lines 1 - 5).

With respect to the casualty loss issue, it is undisputed that Hurricane Floyd passed by Hilton Head Island on September 16, 1999. (R. p. 193, lines 17 - 19; p. 215, lines 2 - 7; p. 69). All of the damage caused by Hurricane Floyd was repaired shortly after the storm and paid for out of the general operating funds of the Association. (R. p. 219, lines 11 - 13). As explained by Ray Dowling, the Association's property manager at the time, he inspected Village West on September 17, 1999, the day after Hurricane Floyd. (R. p. 215, lines 2 - 7). Mr. Dowling listed all of the damage he observed in a report. (R. p. 216, lines 6 - 9). Mr. Dowling indicated that the damage was not extensive, consisting

mainly of broken or missing roof tiles, shutters blown off, and damage to the membrane of one of the roofs caused by a decorative false chimney that broke loose and fell on it. (R. p. 218, lines 2 - 25; pp. 69 - 70). All of the Hurricane Floyd damage was repaired within several months and paid for out of the general operating account of the Association. (R. p. 219, lines 6 - 13). The cost to repair this damage was in the $5,000.00 range, and there was no special assessment imposed against the owners in Village West. (R. p. 218, lines 2 - 6; p. 219, lines 9 - 10). Mr. Dowling's testimony was not refuted or discredited in any way.

It is also undisputed that the special assessment that the Aratas continue to contest was not imposed until 2004, and that the special assessment was required because the proceeds from the settlement of construction defect litigation were not sufficient to cover in full the cost of the repairs that were needed at Village West.[3] (R. p. 192, lines 23 - 25; p. 193, lines 1 -2). As such, there is no evidence linking the damage caused by Hurricane Floyd in 1999 to the special assessment in 2004 which is being challenged by the Aratas.[4] Further, the Aratas introduced no evidence that the reconstruction and repair work performed after and in connection with the special assessment was to anything other than the common elements.

One of the documents relied on by Arata in support of their claim of extrinsic

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[3]At trial Mrs. Arata acknowledged this to be the case. (R. p. 192, lines 23 - 25; p. 193, lines 1 - 19).

[4]At trial, counsel for the Aratas conceded that there was no special assessment associated with repair of the damage from Hurricane Floyd in 1999. (R. p. 168, lines 21 - 25; p. 169, lines 1 - 2).

fraud was a letter from Thomas Carlson, Vice President of Calibogue Construction Company, Inc. to architect, Peter Sherratt dated July 20,1998. (R. p. 45; Note: This letter is not included in the Record on Appeal as Exhibit "B" to the Complaint as it should have been. It is, however, for some reason, included in the Record at page 45). This letter discussed the estimated cost to complete certain repair work in the Clipper Building at Village West.

Mr. Carlson testified that his company was hired by Village West to perform forensic investigations and prototype repairs in connection with the second construction defect litigation. (R. p. 224, lines 18 - 21; p. 225, lines 1-2). His company also made repairs to the Spinnaker Building. (R. p. 225, lines 3 - 24). At no time did Calibogue Construction Company, Inc. perform any work to repair damage to the buildings at Village West caused by Hurricane Floyd or any other casualty. (R. p. 226, lines 22 - 25). Mr. Carlson testified that all of his company's work was associated with either the construction defect litigation and/or repairing damage caused by defective construction. (R. p. 227, lines 1 - 8).

Calibogue Construction Company, Inc. did not perform the work at Village West associated with the special assessment in 2004, but rather it was performed by a company based in Greenville, South Carolina called Rice-Cleveland. (R. p.193, lines 3 - 12; p. 227, lines 9 - 15; p. 103, lines 19 - 22).

ARGUMENTS

I. THERE WAS AMPLE EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDING THAT THERE WAS NO EVIDENCE OF EXTRINSIC FRAUD, AND THE TRIAL COURT APPLIED THE CORRECT LAW IN REACHING ITS CONCLUSION THAT THERE HAD BEEN NO EXTRINSIC FRAUD.

On appeal of an action at law tried without a jury, South Carolina appellate courts will not disturb the trial court's findings of fact unless no evidence reasonably supports the findings. Regions Bank v. Strawn, Op. No. 5026 (S.C. Ct. App. filed August 22, 2012) (Adv.Sh. No. 29 at 51); citing Townes Assocs. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). In such instances, the appellate court's role is limited to correction of errors of law. Regions Bank v. Strawn, Op. No. 5026 The trial court's findings in a law action are equivalent to a jury's findings, and questions regarding credibility and the weight of the evidence are left solely to the trial court. Id. "We may not consider the case based on our view of the preponderance of the evidence, but must construe the evidence presented to the [trial court] so as to support [its] decision wherever reasonably possible." Sheek v. Crimestoppers Alarm Sys., 297 S.C. 375, 377 S.E.2d 132 (Ct. App. 1989) "We must look at the evidence in the light most favorable to the respondents and eliminate from consideration all evidence to the contrary." Id.

It is well settled in South Carolina that in order to set aside a judgment for fraud proof of extrinsic fraud is required. Aaron v. Mahl, 381 S.C.585, 674 S.E.2d 482 (2009); Chewning v. Ford Motor Co., 354 S.C. 72, 579 S.E.2d 605 (2003). Extrinsic fraud, the only type of fraud for which a court may grant relief from a judgment, is fraud that induces a person not to present a case or deprives a person of the opportunity to be heard.

See Raby Const., L.L.P. v. Orr, 358 S.C. 10, 594 S.E.2d 478 (2004). Intrinsic fraud, on the other hand, is fraud which misleads a court in determining issues and induces the court to find for the party perpetrating the fraud. Chewning, 579 S.E.2d 605. Relief may be granted for extrinsic but not intrinsic fraud on the theory that the latter deceptions should be discovered during the litigation itself, and to permit such relief undermines the stability of all judgments. Mr. G v. Mrs. G, 320 S.C. 305,465 S.E.2d 101 (Ct.App. 1995)."The subornation of perjury by an attorney and/or the intentional concealment of documents by an attorney are actions which constitute extrinsic fraud." Chewning 579 S.E.2d 605.

Allegations that a party failed to disclose documents generally amount to intrinsic fraud. Aaron, 674 S.E.2d 482 (Alleged delay or failure to previously produce collection agreement during course of litigation did not amount to extrinsic fraud.); Raby Const., L.L.P. v. Orr, 358 S.C. 10, 594 S.E.2d 478 (2004) (The alleged failure to disclose computer records which might have shown a different amount owed on a construction project did not constitute extrinsic fraud entitling relief from judgment especially where complaining party could have through diligence discovered the existence of such information during the underlying litigation). See also Bowman v. Bowman, 357 S.C. 146, 591 S.E.2d 654 (Ct. App. 2004) ("South Carolina's strong policy towards finality of judgments trumps a party's ability to set aside a judgment where, as here the party could have discovered the evidence prior to trial". Discovery of eight (8) life insurance policies post trial did not provide basis to re-open divorce case for purposes of adjusting equitable distribution award, where this evidence could have been discovered prior to trial.)

Furthermore, when considering whether to grant relief from final judgments, "a court must balance the interest of finality against the need to provide a fair and just resolution of the dispute." Chewning, 579 S.E.2d 605. South Carolina's appellate courts have a longstanding policy towards preserving final judgments and have recognized that important benefits are achieved by the preservation of final judgments. Id.; Raby Const., L.L.P. 594 S.E.2d 478.

The evidence at trial was undisputed that the Aratas engaged in no discovery in Arata I, even though having more than eight (8) months to do so; that the Association's attorney in Arata I was under no duty to disclose the Association's records absent a discovery request; and that the Association's attorney in Arata I voluntarily disclosed the box of records in question. Further, the claim that the Association's attorney's allegedly false statement to the Court in Arata I to the effect that there was "no casualty" is without evidentiary support, as the undisputed evidence is that the only casualty was caused by Hurricane Floyd, and the limited damage caused by Hurricane Floyd was unrelated to the special assessment imposed five (5) years later. The trial judge's findings of fact are supported by the evidence at trial, and his conclusion that there was no extrinsic fraud is consistent with applicable law. Furthermore, as is discussed below, the documents which the Aratas allege were wrongfully withheld do not support their contention that the construction cost shortfall should have been allocated differently based upon other provisions in the Association's Bylaws. See Bowman, 591 S.E.2d 654 (Litigant's post trial discovery of evidence did little to advance the argument that there should have been a different result.)

II. THE ONLY INFERENCE THAT COULD BE DRAWN FROM THE EVIDENCE WAS THAT THE EVIDENCE OF A CASUALTY (LIMITED DAMAGE CAUSED BY HURRICANE FLOYD IN 1999) WAS NOT CONNECTED IN ANY WAY TO THE SPECIAL ASSESSMENT IN 2004. ACCORDINGLY, THERE IS NO BASIS TO ARGUE THAT THE SPECIAL ASSESSMENT SHOULD HAVE BEEN ALLOCATED OTHER THAN ON A PRO RATA BASIS AMONG ALL PROPERTY OWNERS AT VILLAGE WEST.

In an effort to argue that the construction cost shortfall should have been prorated based upon other provisions in the Association's Bylaws, the Aratas claim that part of the damage that was repaired in connection with the work associated with the special assessment involved repairs caused by damage from a casualty. As pointed out in the Statement of Facts, throughout this litigation the Aratas have relied upon Articles IX and X of the Association's Bylaws in support of their argument that the shortfall should not have assessed on a pro rata basis. This Court in Arata I, held that the clear, unambiguous intent of Article IX "is to provide the board guidance in the event of a casualty loss or damage caused by a casualty". Village West v. Arata, 2007-UP-015, S.C. Ct. App., filed January 11, 2007

The evidence at trial, however, showed that the only casualty loss was caused by Hurricane Floyd in 1999, that this damage was very limited as the cost of repairs was approximately $5,000.00, and the repair costs were paid out the Association's general operating fund without there being a special assessment. The evidence further showed that the special assessment at issue in this case was imposed in 2004 after the proceeds from the settlement of construction defect litigation were insufficient to cover the cost of all the repairs that were needed. The only inference that can be drawn from the evidence

is that the casualty from Hurricane Floyd in 1999 was not connected to the special assessment in 2004, and therefore, as held by this Court in Arata I, the Association's Board relied on the correct provisions in the Bylaws in pro rating the special assessment among all property owners in Village West.

III. NO EVIDENCE WAS SUBMITTED AT TRIAL SHOWING THAT THE REPAIR WORK PERFORMED IN CONNECTION WITH THE SPECIAL ASSESSMENT WAS TO ANYTHING OTHER THAN THE ASSOCIATION'S COMMON ELEMENTS. ACCORDINGLY, THERE IS NO BASIS TO ARGUE THAT THE SPECIAL ASSESSMENT SHOULD HAVE BEEN ALLOCATED OTHER THAN ON A PRO RATA BASIS AMONG ALL PROPERTY OWNERS AT VILLAGE WEST.

The Aratas submitted no evidence at trial showing that the construction work performed in connection with the special assessment was performed on anything other than on common property. In their complaint, the Aratas allege that the assessment should not have been pro rated because work was performed on portions of the buildings other than common property. They submitted no evidence of this at trial. The documents relied on by the Aratas are not connected in any way to the work performed in connection with the special assessment. They are dated in 1998 and 1999, approximately five (5) years prior to the special assessment.[5] For the most, these are documents prepared by Calibogue Construction Company, Inc. Its President, Thomas J. Carlson, testified without contradiction that his company did not perform any of the work in connection with the special assessment, nor any of the repairs associated with the damage from Hurricane Floyd. His company's roll was limited to making some construction defect repairs in

[5]The Aratas failed to introduce the admissions set forth in the Association's Response to Request for Admissions into evidence at trial, and therefore should not entitled to rely on them on appeal, even though they do not support their position in any event.

previous years, and doing forensic investigation and prototype repairs in connection with the second construction defect litigation.

IV. MANY OF THE DOCUMENTS THAT THE APPELLANTS RELY ON IN SUPPORT OF THEIR ARGUMENTS ON APPEAL WERE NOT INTRODUCED INTO EVIDENCE AT THE TRIAL OF THE CASE.

The Aratas had the burden to prove their claim of extrinsic fraud. Many of the documents they rely on in support of their arguments on appeal were not introduced into evidence at the trial of the case. These include the Association's Master Deed and Bylaws, the Association's Response to Request for Admissions, the documents the Association's prior attorney allegedly failed to disclose, the statements of Edward E. Bullard, Esquire to the court in Arata I, and the statements of James D. Donahoe, Esquire in a Memorandum of Law filed in Arata I.

CONCLUSION

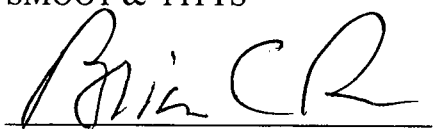
The trial court's judgment and dismissal of the case should be affirmed, because the Aratas failed to prove extrinsic fraud entitling them to relief from the previous judgment against them. As such, the doctrine of *res judicata* dictates dismissal. Further, the documents and evidence they discovered after the decision in Arata I, do not support

their contention that the construction repair shortfall should not have been assessed on a pro rata basis.

Respectfully submitted.

SMOOT & PITTS

October 1, 2013

By: 

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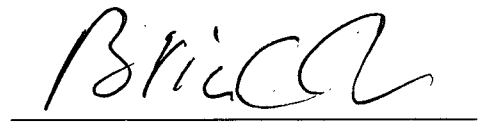
CERTIFICATE OF COMPLIANCE WITH
RULE 211(b)

The undersigned Certifies that the Brief of Respondent complies with Rule 211(b).

SMOOT & PITTS

By: 

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CERTIFICATE OF SERVICE

I, Brian C. Pitts, Attorney with the Law Firm of Smoot & Pitts do hereby certify that on October 1, 2013, I sent a copy of Respondent's Brief and Certificate of compliance to the person(s) named below by depositing same into the United States mail with sufficient postage affixed thereto to assure delivery as follows:

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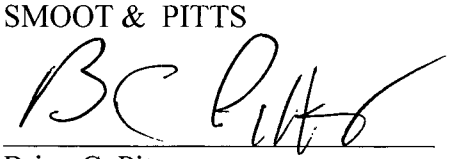
By: 

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