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Aug 29 2025

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2022-000867
Unpublished Opinion No. 2008-UP-297

Bittmint LLC and Harbour Town Surf Shop LLC..... Apellants,

v.

Lynda H. Johnson, Charles S. Giannone, and Sea Pines Resort, LLC Respondents.

RESPONDENTS' PETITION FOR REHEARING

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JOHNSON, CHARLES S. GIANNONE, AND
SEA PINES RESORT, LLC

SUMMARY OF THE PETITION FOR REHEARING

This Court's decision in Bittmint, LLC v. Johnson (Unpublished Opinion No. 2025-UP-273) reversed the circuit court's grant of directed verdict to Respondents. The Court decided there were two factual issues the circuit court should have been submitted to the jury: (1) whether Sea Pines Resort, LLC ("Sea Pines" or "Resort") possessed an enforceable right of first refusal over the subject Property, and (2) whether Sea Pines exercised its right within the thirty days of receiving written notice of the price and terms of the contract for sale to Bittmint, LLC ("Appellant" or "Bittmint") as required by the 1973 Covenants containing the right of first refusal. Respondents respectfully submit that the Court overlooked or misapprehended material points in reaching these conclusions.

First, the Court misapprehended the evidence at trial regarding whether Sea Pines possessed an enforceable right of first refusal. The only evidence presented at trial was that Sea Pines held this right. *No contrary evidence was introduced*, and the testimony the Court relied upon from Bittmint's attorney, Michael Mogil, did not create a factual dispute because he was expressly precluded by the trial court from offering—and did not offer—any opinions about the enforceability or applicability of the right of first refusal. Moreover, Mogil's written communications with attorneys for Sea Pines and for Respondents Johnson and Giannone, *i.e.*, the "Sellers," which were admitted into evidence, merely showed that Mogil was investigating the issue and was uncertain as to the answer—they contained no statements about whether Sea Pines possessed a right of first refusal, enforceable or not, and thus created no factual dispute requiring jury resolution. Mogil did not agree or disagree with the evidence that Sea Pines held an enforceable right of first refusal. Further, the trial court ruled that Mogil could not testify to his opinions, including whether Sea Pines possessed a right of first refusal, because he had not

been disclosed or qualified as an expert witness. (Tr. Trans., R. p. 940:14-16; p. 946:18-21). That ruling was not appealed.

Second, the Court misapprehended the evidence regarding the thirty-day exercise period. The Commercial Use Covenants dated January 25, 1973 (hereinafter, the “1973 Covenants”) require receipt by Sea Pines of *written* notice of both the “*price and terms*” of a sale to trigger the thirty-day period. (Pl. Trial Ex. 1 at § 19, R. p. 1105). The only evidence presented at trial on this issue showed that Sea Pines did not receive written notice of the price *and the terms* of the sale until April 17, 2017, when Bittmint’s attorney provided Sea Pines with a copy of the Contract for Sale. (Trial Tr., R. p. 853:11-17). Sea Pines exercised its right fifteen days later, on May 2, 2017, well within the thirty-day period. (Trial Tr., R. p. 844:7-8; p. 934:24-936:12); (Pls. Trial Ex. 18, R. p. 1164).

Third, the Court overlooked two independent grounds that support affirming the directed verdict, including the separate offer and acceptance created through Bittmint’s submission of the waiver document to Sea Pines, and a waiver was never obtained from Sea Pines, which was a condition to closing under the Contract for Sale. (Pl. Trial Ex. 11 at ¶¶ 6, R. p. 1152).

Fourth, the Court failed to address claims that were abandoned on appeal. Bittmint abandoned the appeal as to the claims that were not addressed in its brief, which were: Set Aside Deed against Defendants, (2d Am. Compl. at ¶¶ 45-49, R. pp. 97-98); Third Party Beneficiary by [Surf Shop] against Defendants, (id. at ¶¶ 50-57, R. pp. 98-99); Violation of the Statute of Repose against [Sea Pines], (id. at ¶¶ 58-61, R. pp. 99-100); and Intentional Interference with Prospective Contractual Relations against [Sea Pines], (id. at ¶¶ 62-66, R. pp. 100-102). See State v. Lindsey, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011) (explaining an issue is abandoned on appeal if not raised in a brief and supported by authority).

For these reasons, Respondents respectfully request that this Court vacate the opinion , grant rehearing, and affirm the circuit court’s directed verdict and its award of attorneys’ fees to the Respondents based on their status as prevailing parties.

ARGUMENT

1. The Court misapprehended the evidence regarding Sea Pines’ enforceable right of first refusal because there was no conflicting evidence at trial.

The Court held that “Bittmint presented evidence creating more than one reasonable inference as to whether Resort had an enforceable right of first refusal in the Property.” Bittmint, LLC v. Johnson, No. 2025-UP-273, slip op. at 11. In reaching this conclusion, the Court relied on testimony from Bittmint’s attorney, Michael Mogil, and communications between Mogil and attorneys for Sea Pines and the Sellers, Respondents Johnson and Giannone. Id.¹ However, the Court misapprehended this evidence and overlooked a critical evidentiary ruling on the issue.

Prior to Mogil’s trial testimony, the circuit court explicitly prohibited Mogil from offering any opinion about the enforceability of the 1973 Covenants or their applicability to the subject property. In fact, when Respondents objected to Mogil offering opinions about the covenants, Bittmint assured the court before Mogil’s testimony began that he would not testify to any legal conclusions. **(R. pp. 920:20-921:3)**. When Bittmint nevertheless attempted to elicit Mogil’s opinion on whether the covenants applied to the property, the trial court sustained the Respondents’ prompt objection and unequivocally ruled: “Well, he’s not an expert, so he can’t

¹ “A directed verdict should be granted where the evidence raises no issue for the jury as to the defendant's liability.” Guffey v. Columbia/Colleton Reg'l Hosp., Inc., 364 S.C. 158, 163, 612 S.E.2d 695, 697 (2005). “When reviewing a directed verdict, [the appellate] court will view the evidence and all reasonable inferences in the light most favorable to the nonmoving party.” Thomas v. Dootson, 377 S.C. 293, 296, 659 S.E.2d 253, 255 (Ct. App. 2008). The court “cannot ignore facts unfavorable to . . . [the nonmoving] party and . . . must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts.” Hopson v. Clary, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct. App. 1996).

give his opinion.” (R. pp. 939:20-940:16). Mogil complied with this ruling, offering no opinion on the issues of the covenants’ enforceability or applicability, even when Plaintiff’s trial counsel repeatedly attempted to elicit such testimony despite the court’s exclusion of such opinions and the sustained objections. (R. p. 920: 16-25; p. 921:1-3; p. 939:20-940:16; p. 945:22-946:21; p. 960:18-961:1). The trial court’s ruling was entirely proper, as Mogil had not been disclosed as an expert witness and had previously testified under oath during his deposition that he would not “discuss the enforceability or applicability of the covenants” at trial. (R. pp. 945:22-946:21). Bittmint did not appeal the ruling.

To view Mogil’s testimony as creating a factual dispute about the enforceability or applicability of Sea Pines’ right of first refusal, nevertheless, effectively permits trial by ambush and undermines the circuit court’s essential role as gatekeeper of expert testimony. This type of litigation gamesmanship has historically been discouraged by our court. The Court’s opinion here encourages gamesmanship, ambush and trickery by litigants and their counsel.²

Mogil never testified whether the right of first refusal was enforceable or applied.³ Adhering to the circuit court’s evidentiary ruling, he offered no opinion on these matters.⁴ Thus,

² To be sure, Mogil was very careful *not* to engage in such gamesmanship and did not offer any testimony that contradicted the evidence that Sea Pines holds the right of first refusal. Respectfully, the Court’s opinion misapprehends and stretches Mogil’s testimony well beyond what he actually said.

³ The closest Mogil came to opining on the enforceability or applicability of the covenants occurred during proffered testimony outside the jury’s presence, (R. pp. 943:21-944:24), when he stated that he filed the *lis pendens* because “I [Mogil] didn’t feel like they were controlled by this[.]” (R. p. 944:23-24). The court excluded this testimony from evidence. (R. p. 946:8-21).

⁴ Mogil testified, “I didn’t agree with Mr. Frazier and then I filed what’s called a *lis pendens*,” (R. p. 947:18-20), and “I looked at everything that Mr. Frazier referenced me to, I just didn’t agree.” (R. p. 948:1-4). Even taken out of context, these statements are neutral and vague. Mogil never specified what he did not agree with, other than “Mr. Frazier,” or why, and in any event, he never stated that he *disagreed*. Regarding the applicability or enforceability of the covenants, Mogil took no position. The trial court had ruled that he could not offer such opinions because he

no reasonable inference—or any inference at all—regarding the validity or applicability of the right could be drawn from Mogil’s testimony.

A. The only evidence at trial established that Sea Pines held the right of first refusal.

The evidence at trial uniformly established that Sea Pines held the right of first refusal over the Property. This evidence included:

- The testimony of Steve Birdwell who testified that Sea Pines held and exercised the right of first refusal under the Commercial Use Covenants, also known as the 1973 Covenants. **(Trial Tr., R. pp. 1010:19-1011:17).**
- The testimony of Robert Bender, who confirmed that Sea Pines held the right of first refusal for the Property. **(Trial Tr., R. p. 848:4-12).**
- The Contract for Sale between Bittmint and the Sellers (Johnson and Giannone), drafted by Bittmint’s own attorney, which explicitly recognized Sea Pines’ right by requiring Sellers to “obtain all appropriate waivers and approvals from Sea Pines” and conditioning closing on obtaining these waivers. **(Pl. Trial Ex. 11 at ¶¶ 6-7, R. p. 1152).**
- Testimony from Johnson that she knew Sea Pines had a right of first refusal over the Property, which she owned with her brother Giannone. **(Trial Tr., R. p. 862:16-21; p. 872:6-11).**
- Evidence that Bittmint’s members, Bitton and Mintz, knew Sea Pines held the right of first refusal and had previously sought Sea Pines’ waiver of this right when purchasing a neighboring property. **(Trial Tr., R. pp. 811:7-812:23; p. 813:11-18; p. 911:10-20).**
- The waiver document that Bittmint’s attorney completed and submitted to Sea Pines, which stated: “The above referenced property is hereby offered for sale to the company pursuant to the same terms & price contained in the current contract of sale with the bona fide purchaser(s) referenced above.” **(Defs. Trial Ex. 9, R. p. 1282).**
- The Assignment of Option to Repurchase, which Bittmint itself introduced into evidence. **(Pls. Trial Ex. 2, R. pp. 1113-14).**

had not been disclosed or qualified as an expert witness. These two neutral and vague remarks neither contradicted the evidence establishing Sea Pines’ right of first refusal nor created a jury issue.

B. Mogil's testimony did not create a factual dispute about Sea Pines' right of first refusal.

The Court appears to have misapprehended Mogil's testimony and written communications with Sea Pines' attorney, Fraser. The emails between Mogil and Fraser simply showed that Fraser sent Mogil references to multiple sets of covenants, one of which was the 1973 Covenants. (**Trial Tr., R. pp. 935:18-939:19**). That exchange did not create a factual dispute about whether Sea Pines held the right of first refusal under the 1973 Covenants or whether it applied to the Property. If Mogil stating he filed a lawsuit is sufficient evidence to overcome a directed verdict motion, no directed verdict could ever be granted—allegations would be sufficient a trial.

Similarly, Mogil's letter to the Sellers' attorney stating there were "issues presented by the exercise of the option, including a determination of *exactly what rights Sea Pines has*, if any," (**Pls. Trial Ex. 24, R. p. 1169**) (double emphasis added), was not evidence that Sea Pines lacked the right of first refusal. He merely communicated that he was investigating the issue. In fact, the letter can only be read to indicate that Mogil still believed there was a possibility that Sea Pines did in fact hold an enforceable right of first refusal. He has never wavered from that position; he doesn't know and isn't qualified to say.

In sum, the record contains substantial and uncontroverted evidence establishing that Sea Pines held the right of first refusal over the Property. Bittmint failed to introduce any contrary evidence from which a jury could reasonably infer that Sea Pines did not hold the right. Accordingly, the circuit court should be affirmed in its entirety with respect to all causes action on this dispositive basis alone.

2. The Court misapprehended the evidence regarding the thirty-day exercise period.

This Court also held that “the evidence presented created more than one reasonable inference as to whether Resort exercised its purported right of first refusal within the thirty days required by the 1973 Covenants.” Bittmint, LLC v. Johnson, No. 2025-UP-273, slip op. at 12. However, the Court misapprehended both the requirements of the 1973 Covenants and the evidence presented at trial.

A. The 1973 Covenants required written notice of both “price and terms” to trigger the thirty-day period.

The relevant provision of the 1973 Covenants states that “the said Company shall have thirty (30) days within which to exercise its option to purchase said property” and further provides that “should the Company fail or refuse, **within thirty (30) days after receipt of written notice of the price and terms**, to exercise its options to purchase said property at the offered price, then the owner of said property shall have the right to sell said property.” (Pl. Trial Ex. 1 at § 19, R. p. 1105) (double emphasis added).

The plain language of this provision requires written notice of both the “price and terms” to trigger the thirty-day period. The terms of a contract for the purchase and sale of real property might include elements such as closing date, contingencies, financing arrangements, property condition requirements, or other material provisions that would substantially affect the nature of the transaction. Price alone is insufficient for the holder to understand the contract that it would be entering into upon exercising its right of first refusal, which the drafters of the right of first refusal at issue clearly recognized by requiring written notice of the price *and* terms to trigger the 30-day exercise window.

The Court seems to have misrepresented the evidence and conflated a nonbinding letter of intent, which was not ever actually received by the Resort, with the Contract for Sale that was

received less than 30 days prior to the Resort exercising its right of first refusal and actually closing on the sale. Indeed, material differences exist between the letter of intent and the subsequent Contract for Sale. Unlike the Contract for Sale, the letter of intent was signed by only one seller, Lynda Johnson, without Giannone. (**Compare R. pp. 1150 and 1153**). Critically, the letter of intent expressly states that “until a full form Contract of Sale . . . is executed, the transaction is non binding.” (**R. p. 1150**). This provision alone precludes the letter of intent from constituting “notice” that could trigger Sea Pines’ deadline to exercise its right of first refusal.

The letter of intent merely outlines a basic purchase price without specifying numerous material terms, such as earnest money requirements, financing contingencies, and closing conditionals, that would be essential for a holder of a right of first refusal to evaluate whether to exercise its option. (**R. p. 1150**). By contrast, the Contract for Sale is an agreement signed by both Sellers and containing specific payment provisions, including a detailed payment structure that required the deposit of minimal earnest money and made Purchaser’s obligation to close contingent on being able to finance a large portion of the purchase price. (**R. p. 1151, §§ 2-3**).

The Contract contains numerous additional material terms entirely absent from the letter of intent, including: property condition warranties and a termite inspection contingency in Sections 4 and 5; risk allocation provisions for property damage in Section 9; and specific title requirements in Section 11 regarding “marketable title.” (**R. pp. 1152-1153**). Moreover, Section 6 of the Contract grants Purchaser an option to back out of buying one parcel if, for any reason, it cannot close on both of the parcels that together comprised the Property. (**R. p. 1152**).

Even the closing timeline differs substantially between the documents. The letter of intent contemplated closing within 120 days from Seller's confirmation that Charles Giannone conveyed his interest in Lot 8 to Johnson. (**R. p. 1150**). In contrast, Section 7 of the Contract

established closing to occur within 90 days of all relevant waivers and approvals being obtained or 45 days after financing approval, whichever was later. (**R. p. 1152**).

Given the substantial differences in material terms, the preliminary, non-binding letter of intent signed by only one Seller could not have constituted the “written notice of the price and terms” required to trigger Sea Pines’ thirty-day exercise period under the right of first refusal.

B. Sea Pines exercised its right within thirty days of receiving written notice of the price and terms.

The uncontroverted evidence at trial established that Sea Pines first received written notice of the complete terms of the sale when Bittmint’s attorney furnished the Contract for Sale on April 17, 2017. (**Trial Tr., R. p. 853:11-17**). The record contains no evidence of any prior written communication that conveyed the full terms of the proposed transaction. Sea Pines exercised its right of refusal on May 2, 2017, fifteen days after receiving a copy of the contract and well within the allotted 30 days. (**Trial Tr., R. p. 844:7-8; p. 934:24-936:12**); (**Pls. Trial Ex. 18, R. p. 1164**). This timeline conclusively establishes Sea Pines’ timely exercise of its right.

In reversing the circuit court, this Court cited testimony from Mintz, one of Bittmintz’ members, that Johnson told him she had given a letter of intent to Sea Pines in February 2017. Bittmint, LLC v. Johnson, No. 2025-UP-273, slip op. at 12. However, this testimony, even if accepted as true,⁵ fails to create a jury issue regarding Sea Pines’ timely exercise of its right. The letter of intent, which was signed by only one (not both)⁶ of the Property’s owners, contained the price but left the other terms of the potential transaction to be negotiated. (**Pls. Tr. Ex. 10, R. p. 1150**). In fact, the letter expressly states that the transaction was “non-binding,” until such time

⁵ There was no evidence that Johnson actually provided the letter of intent to the Resort or that it every received it prior to exercising it right of first refusal.

⁶ Only one Seller signed the non-binding letter of intent; whereas, both Sellers signed the Contract for Sale. (**Compare R. pp. 1150 and 1153**).

the parties could agree to additional terms, **(Pls. Tr. Ex. 10, R. p. 1150)**, which is consistent with state law that “agreements to agree” are not valid contracts. BCD LLC v. BMW Mfg. Co., LLC, 360 Fed.Appx. 428, 435 (4th Cir. 2010) (explaining that “an ‘agreement to agree’ . . . does not amount to a contract under South Carolina law.”) (citations omitted)). Consequently, regardless of whether or when Sea Pines received this preliminary letter, it could not have triggered the thirty-day period under the 1973 Covenants, which required written notice of both “price and terms.” Because the only evidence showed that Sea Pines did not receive the terms of the parties’ agreement until April 17, 2017, and exercised its right fifteen days later on May 2, 2017, no factual dispute existed for the jury to resolve. The circuit court correctly granted directed verdict on this issue of whether Sea Pines timely exercised the right of first refusal.

3. The Court overlooked several other independent grounds for affirming the circuit court’s directed verdict.

The Court’s opinion does not address several other independent grounds that support affirming the circuit court’s directed verdict.

A. Bittmint’s waiver request constituted a separate offer that Sea Pines accepted.

The waiver document that Bittmint submitted to Sea Pines stated: “The above referenced property is hereby offered for sale to the company pursuant to the same terms & price contained in the current contract of sale with the bona fide purchaser(s) referenced above.” **(Defs. Trial Ex. 9, R. p. 1282)**. This language created a separate offer that Sea Pines accepted.

Although Bittmint argued that it merely used a form created by Sea Pines, Bittmint’s attorney filled in the information and submitted the completed form to Sea Pines. **(Trial Tr., R. pp. 849:16-850:22)**. Under South Carolina law, “[a]cts of an attorney are directly attributable to and binding upon the client.” Shelton v. Bressant, 312 S.C. 183, 208, 439 S.E.2d 833, 834 (1993).

Despite its significance, the Court’s opinion overlooked this independent ground for affirming the circuit court’s directed verdict as to all claims—that Bittmint’s waiver request constituted a separate offer accepted by Sea Pines.

B. The Contract for Sale required a waiver from Sea Pines.

The Contract for Sale between Bittmint and Sellers explicitly conditioned closing on “all appropriate waivers and approvals” being obtained from Sea Pines.” (**Pl. Trial Ex. 11 at ¶¶ 6-7, R. p. 1152**). It is undisputed that the waiver was not obtained. Therefore, Sellers were not contractually obligated to close with Bittmint.

The Court’s opinion did not address this contractual provision, which provided an additional basis for affirming the circuit court’s directed verdict as to all of Bittmint’s causes of action.

4. The Court should affirm the circuit court’s ruling as to claims abandoned on appeal.

The opinion does not address the fact that Bittmint abandoned several claims on appeal. Bittmint’s brief to this Court addressed only four purported causes of action: (1) breach of contract, (2) intentional interference with contractual relations, (3) violation of the common law rule against perpetuities, and (4) invalid assignment of rights. Bittmint abandoned the appeal as to the claims ignored in its brief, which were: Set Aside Deed against Defendants, (2d Am. Compl. at ¶¶ 45-49, R. pp. 97-98); Third Party Beneficiary by [Surf Shop] against Defendants, (*id.* at ¶¶ 50-57, R. pp. 98-99); Violation of the Statute of Repose against [Sea Pines], (*id.* at ¶¶ 58-61, R. pp.99-100); and Intentional Interference with Prospective Contractual Relations against [Sea Pines], (*id.* at ¶¶ 62-66, R. pp. 100-102). See State v. Lindsey, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011) (explaining an issue is abandoned on appeal if not raised in a brief and supported by authority). Even if this Court were to reverse the directed verdict as to

the four claims addressed in Bittmint’s brief (which it should not do for the reasons stated above), the Court should grant this petition and enter an amended order affirming the circuit court’s directed verdict as to these abandoned claims.

CONCLUSION

The Court’s opinion reversing the circuit court’s directed verdict rests on two fundamental misapprehensions of the record. First, the Court incorrectly concluded that a factual dispute existed regarding Sea Pines’ enforceable right of first refusal, despite uncontroverted evidence establishing this right and the circuit court’s explicit ruling prohibiting Bittmint’s attorney from offering any opinion on the issue, to which he adhered. Second, the Court misapprehended the plain language of the 1973 Covenants, which required written notice of both “price and terms” to trigger the thirty-day exercise period—a requirement that was indisputably satisfied when Sea Pines timely exercised its right fifteen days after receiving the Contract for Sale.

Furthermore, the Court’s opinion overlooked several other grounds that support affirmance of the directed verdict: (1) Bittmint’s submission of the waiver document, which constituted a separate offer that Sea Pines accepted; (2) Bittmint’s failure to fulfill the condition of the contract that it obtain the waiver from Sea Pines; and (3) Bittmint’s abandonment of four of its claims on appeal.

The circuit court, having observed the witnesses firsthand and properly applied the directed verdict standard to the evidence presented, correctly determined that no factual issues existed for the jury to resolve. The reversal of the directed verdict undermines the circuit court’s gatekeeping function regarding expert testimony and misapprehends or overlooks the evidence, or lack thereof, upon which its directed verdict was based. For these reasons, Respondents

respectfully request that this Court vacate its Opinion No. 2025-UP-273, grant the petition for rehearing and enter a substituted opinion affirming the circuit court.

Respectfully submitted,

s/ John P. Linton, Jr.

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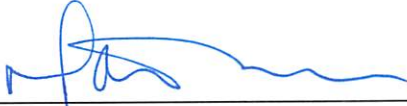
PROOF OF SERVICE

I certify that the foregoing **Respondents' Petition for Rehearing** wase served on the following counsel of record by electronic mail on this 29th day of August 2025.

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August 29, 2025

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Re: Bittmint, LLC v. Lynda H. Johnson
Appellate Case No. 2022-000867
WGL File 0859.10

Dear Ms. Kitchings:

Attached for filing on behalf of Respondents in the above-captioned matter, please find a ***Petition for Rehearing*** with Proof of Service. The filing fee of \$50 is enclosed with this letter sent via regular mail.

Thank you very much for your courtesies in this matter.

Sincerely,

WALKER GRESSETTE & LINTON, LLC

A handwritten signature in blue ink, appearing to be "M. Minniti", written over a horizontal line.

M. Eugenia Minniti
Paralegal

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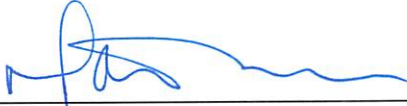
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I certify that the foregoing **Respondents' Petition for Rehearing** was served on the following counsel of record by electronic mail on this 29th day of August 2025.

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