THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2016-002503
Case No. 2015-CP-40-2679

Valeria Farr, ... Appellant,

v.

Leon Lott in his capacity as Richland County Sheriff
and the Richland County Sheriff's Office, ... Respondents.

BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

This is an action for negligence and assault and battery brought pursuant to the South Carolina Tort Claims Act. The Appellant Valerie Farr has sued the Respondents Leon Lott, in his capacity as Richland County Sheriff, and the Richland County Sheriff's Department (hereafter referred to collectively as "Sheriff Lott"). Farr has alleged claims arising out of the sexual misconduct committed by former Deputy Tracy Stephens.

Sheriff Lott filed a motion for summary judgment which was heard by Circuit Court Judge Jocelyn Newman on October 11, 2016. By order filed November 14, 2016, Judge Newman granted summary judgment to the Respondents on both causes of action. (R. 1-11).

The Appellant Farr did not file a Rule 59(e) motion. Instead, she filed an appeal to this Court.

STATEMENT OF FACTS

On May 15, 2013, the Appellant Valerie Farr was driving her mother's car and noticed that the brakes were not working properly. (Complaint, ¶ 5). (R. 13). She had trouble stopping the vehicle and had to pull into a restaurant parking area next to a Kangaroo gas station located on Two Notch Road in Richland County. (Complaint, ¶ 5). (R. 13). Farr walked over to the Kangaroo gas station to purchase an item, when she was approached by Deputy Tracy Stephens. (Complaint, ¶ 5). (R. 13-14). Stephens questioned her and asked for her driver's license. (Complaint, ¶ 6). (R. 14). Farr panicked and ran from Stephens. (Complaint, ¶ 7). (R. 14). She was eventually apprehended by Stephens and was arrested for multiple criminal and/or traffic infractions. She was then placed in the back of his marked vehicle enroute to the Alvin S. Glenn Detention Center. (Complaint, ¶ 8). (R. 14).

While in his vehicle, Stephens explained to Farr that they could "work something out." (Complaint, ¶ 9). (R. 14). Stephens then pulled off to the side of the road on I -77 Southbound and inquired if she had any weapons or anything of the sort. (Complaint, ¶ 9). (R. 14). In particular, Stephens asked, "what's that bump in front of your dress," at which time Farr replied that it was her private area. (Complaint, ¶ 10). (R. 14). Stephens then asked to see it, while he was shining his

flashlight in between her legs. (Complaint, ¶ 10). (R. 14). Terrified, she did not resist and allowed Stephens to view between her legs. (Complaint, ¶ 11). (R. 14).

After a period of time, Stephens then started again onto the highway. (Complaint, ¶ 12). (R. 14). During this time, he advised that he "would work something out" with Farr if she would "help him out." (Complaint, ¶ 12). (R. 14). Stephens then stopped his vehicle on Bluff Road, exited the vehicle, and opened the passenger door to again shine his flashlight between Farr's legs. (Complaint, ¶ 12). (R. 14). Stephens then asked what was inside of her vagina and then shined the light there. (Complaint, ¶ 12). (R. 14-15). Continuing to be frightened, Farr inserted her finger into her vagina and rubbed herself while Stephens watched using flashlight. (Complaint, ¶ 12). (R. 15). During this time, Farr became so terrified that she began shaking. (Complaint, ¶ 13). (R. 15).

Stephens restarted the vehicle and proceeded onward to the Detention Center advising her, "Yeah, I'm going to help you out. You will be able to work something out." (Complaint, ¶ 14). (R. 15). Specifically, Stephens assured her that he would drop one of the violations when they appeared to court. (Complaint, ¶ 14). (R. 15).

Stephens then pulled over for a third time. (Complaint, ¶ 15). (R. 15). On this occasion, he pulled over on the street that leads into the Detention Center in front of a bail bonding office. (Complaint, ¶ 15). (R. 15). Stephens opened the

door of the vehicle and asked Farr if she needed to rub and check her upper thighs to see if they were all right. (Complaint, ¶ 15). (R. 15). He then asked her what she had in her top. (Complaint, ¶ 15). (R. 15). Farr then patted her chest area with her handcuffed hands to demonstrate to Stephens that she had no weapons. (Complaint, ¶ 15). (R. 15). Despite her assurances, Stephens claimed that he had not seen enough and insisted on seeing more. (Complaint, ¶ 15). (R. 15). Farr then pulled down her top exposing her breast while Stephens was shining his flashlight watching her. (Complaint, ¶ 15). (R. 15).

Stephens eventually restarted the vehicle and proceeded to the Detention Center. (Complaint, ¶ 16). (R. 15). At or about the time of booking, Farr informed two detention officers that she was being sexually harassed by Stephens. (Complaint, ¶ 16). (R. 15). Detention Center officials initiated protocols for Farr to file an official complaint against Stephens. (Complaint, ¶ 16). (R. 15). Stephens attempted to remove Farr from the Detention Center, but he was prohibited from doing so by Detention Center officers. (Complaint, ¶ 16). (R. 15). Stephens then left the area. (Complaint, ¶ 16). (R. 15).

Stephens was subsequently fired by Richland County Sheriff Leon Lott and was arrested by the Sheriff's investigators for Criminal Sexual Conduct (3rd Degree) and Misconduct in Office. (Complaint, ¶ 18). (R. 16, 124-125).

ARGUMENTS

I. The Circuit Court correctly ruled that the Respondents are entitled to absolute sovereign immunity pursuant to S.C. Code Ann. § 15-78-60(17).

The Appellant Valerie Farr contends that summary judgment was entered in error because the evidence shows that Deputy Tracy Stephens was acting within the "scope of employment" and "in a manner consistent with the culture created by Sheriff Lott" when he sexually assaulted her. *See*, Appellant's Brief, p. 10. In making this argument, Farr makes a number of errors that are fatal to her appeal. First, she fails to comprehend and address the actual bases for the summary judgment order issued by Circuit Judge Jocelyn Newman. Second, she fails to appeal from the actual rulings made by Judge Newman, and hence, her appeal is barred by the two-issue rule. Third, she fails to recognize that "scope of employment" is not the actual standard under the Tort Claims Act and specifically S.C. Code Ann. § 15-78-60(17). Finally, in asserting that sufficient evidence was presented, she relies on an adverse inference by a non-party's invocation of his Fifth Amendment rights which provides no basis for withstanding summary judgment and is not even an issue properly preserved for appeal. Each of these points will be addressed in more detail below.

A. The appeal is barred by operation of the "two issue rule."

In granting summary judgment on both the negligence and the assault and battery causes of action, Judge Newman relied on S.C. Code Ann. § 15-78-60(17), which provides that governmental entities are not liable for a loss resulting from "employee conduct outside the scope of his official duties or which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." S.C. Code Ann. § 15-78-60(17). Judge Newman made two separate and distinct rulings. First, she focused on the "scope of official duties" language and ruled that "a law enforcement officer who explicitly commits an unlawful act (i.e., Stephens using coercion to engage in sexual battery upon a subject and by offering to dismiss charges in exchange for sexual favors) is not only exceeding his authority but clearly [is] acting in contravention with the official business of the Sheriff." (R. 5). Second, Judge Newman applied other language from S.C. Code Ann. § 15-78-60(17) and determined that Farr had admitted that Stephens' conduct constituted both an intent to harm and actual malice which entitled Sheriff Lott to absolute sovereign immunity. (R. 7).

On appeal, however, Farr does not challenge those separate and distinct rulings by Judge Newman. Farr makes no reference to S.C. Code Ann. § 15-78-60(17), and more specifically, she does not address whether the conduct by

Stephens was within the scope of his official duties. She does not cite to, rebut or otherwise distinguish any of the South Carolina appellate cases cited by Judge Newman that hold that sexual misconduct, such as that alleged against Stephens, is not within an employee's scope of official duties.

Moreover, Farr raises no exception to the rulings based on the intent to harm and actual malice provisions of S.C. Code Ann. § 15-78-60(17). On that basis alone, the summary judgment order is subject to affirmance pursuant to the "two-issue" rule. In applying the "two-issue" rule, the Supreme Court has explained that "where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900, 903 (2010). Similarly, in *Folkens v. Hunt*, 290 S.C. 194, 348 S.E.2d 839 (Ct. App. 1986), this Court held that "[a]n alternative ruling of a lower court that is not excepted to constitutes a basis for affirming the lower court and is not reviewable on appeal." 348 S.E.2d at 845.

B. The Circuit Court correctly ruled that the sexual misconduct committed by former Deputy Tracy Stephens was outside the scope of his official duties.

Nonetheless, even if the Court reaches the merits, Sheriff Lott submits that Judge Newman correctly ruled that the sexual misconduct committed by Stephens

was outside the scope of his official duties. The term "scope of official duty" is defined in the Tort Claims Act as follows: "Scope of official duty ... means (1) acting in and about the official business of a governmental entity and (2) performing official duties." S.C. Code Ann. § 15-78-30(i).[1]

As Judge Newman discusses in her order, there are numerous South Carolina appellate decisions that fully support the conclusion that Stephens was acting beyond the scope of his official duties when he sexually assaulted, battered and/or harassed Valerie Farr as alleged. In fact, this case is factually similar to the case of *Doe v. South Carolina Budget and Control Board*, 329 S.C. 214, 494 S.E.2d 469 (Ct. App. 1997), where an on-duty police officer for the City of Tega Cay (Roberson) sexually assaulted the plaintiffs after stopping their vehicles for a purported traffic violation. The officer coerced the plaintiffs to engage in sexual acts in exchange for not arresting them. Although the assaults occurred while the officer was on-duty, this Court explained that "Roberson's 'duties' as a police officer do not include all conduct that Roberson might have engaged in while on duty." 494 S.E.2d at 472. This Court further recognized that "no cogent argument can be made that Roberson was

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[1] As Judge Newman also recognized, the term "scope of employment" is broader than the term "scope of official duties." (R. 5). The Supreme Court has explained as a matter of law that "sexual harassment by a government employee is not within the employee's scope of employment." *Frazier v. Badger*, 361 S.C. 94, 603 S.E.2d 587, 591 (2004). And, "it follows that acts not within the 'scope of employment' are not within the 'scope of official duties.'" *Id.* Thus, conduct that is not within the scope of employment is also not within the scope of official duties. *See also*, *Padgett v. South Carolina Insurance Reserve Fund*, 340 S.C. 250, 531 S.E.2d 305, 307, n.1 (Ct. App. 2000).

furthering the business of his employer at the time he sexually assaulted [the victims]" 494 S.E.2d at 473. Accordingly, this Court concluded that the officer's conduct exceeded the scope of his official duties.[2]

Likewise, in *Loadholt v. South Carolina State Budget & Control Board*, 339 S.C. 165, 528 S.E.2d 670 (Ct. App. 2000),[3] three female employees of the Hampton County Sheriff alleged that Sheriff Loadholt sexually assaulted and harassed them. The plaintiffs brought numerous causes of action against Sheriff Loadholt including claims for sexual harassment, violation of equal protection under Section 1983, tort of outrage, assault, battery, false imprisonment, invasion of privacy, and retaliatory discharge. This Court found that Loadholt's conduct exceeded the scope of his official duties. This Court explained that "although Loadholt required [plaintiffs] to report to his office to discuss county business, his subsequent alleged sexual assaults on [plaintiffs] clearly exceeded the scope of his official duties as Sheriff of Hampton County." 528 S.E.2d at 674. This Court further recognized that "[his] duties as sheriff did not encompass all conduct in which he engaged in while on duty." *Id.*

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[2] The Supreme Court granted a writ of certiorari in *Doe* and summarily affirmed the finding that "[the officer's] actions were not within 'the scope of his ... official duties.'" *Doe v. South Carolina Budget and Control Board*, 337 S.C. 294, 523 S.E.2d 457, 458 (1999).

[3] In *Loadholt*, the Supreme Court initially granted a writ of certiorari, but after hearing oral argument, the Court dismissed the writ as improvidently granted. Therefore, this Court's opinion remains the operative opinion. *See*, *Loadholt v. South Carolina State Budget & Control Board*, 349 S.C. 640, 564 S.E.2d 667 (2002).

Additionally, in *Padgett v. South Carolina Insurance Reserve Fund*, 340 S.C. 250, 531 S.E.2d 305 (Ct. App. 2000), the plaintiff alleged that a professor at South Carolina State University "'approached her ... and without her consent laid hands on her in a sexually coercive manner.'" 531 S.E.2d at 306. This Court, however, concluded that the actions by the professor were outside the scope of his official duties.

The case of *Frazier v. Badger*, 361 S.C. 94, 603 S.E.2d 587 (2004), is also instructive. In that case, the Supreme Court concluded that the acts of sexual harassment of a teacher by an assistant principal were not within the principal's scope of official duties. The Supreme Court explained that "sexual harassment by a government employee is not within the employee's 'scope of employment.'" 603 S.E.2d at 591. Accordingly, the Court concluded as a matter of law that "Badger's sexual advances toward Frazier were outside the scope of his official duties or employment." *Id.*

Based on this case law -- which Farr does not even attempt to refute or distinguish -- Judge Newman correctly ruled that the sexual misconduct committed by Stephens was not within the scope of his official duties, and as a result, Sheriff Lott is entitled to absolute sovereign immunity under S.C. Code Ann. § 15-78-60(17).

C. The Circuit Court correctly ruled that the sexual misconduct committed by former Deputy Tracy Stephens constituted an intent to harm and actual malice.

As mentioned, Valerie Farr does not challenge on appeal the rulings based on the findings of intent to harm and actual malice. As Judge Newman explains in her order, Farr conceded in responses to requests for admissions that Stephens' conduct constituted an intent to harm and actual malice. (Request for Admission Responses). (R. 158). Moreover, South Carolina has adopted the rule of inferred intent in cases involving sexual assault or misconduct. In *State Farm Fire and Casualty Co. v. Barrett*, 340 S.C. 1, 530 S.E.2d 132 (Ct. App. 2000), this Court ruled that "an intent to harm will be inferred as a matter of law when a person sexually assaults, harasses, or otherwise engages in sexual misconduct towards an adult." 530 S.E.2d at 136. Therefore, Judge Newman correctly ruled that Stephens' conduct constitutes intent to harm and actual malice, and as a result, Sheriff Lott is entitled to absolute sovereign immunity under S.C. Code Ann. § 15-78-60(17) on this additional unappealed basis.

D. The Appellant improperly relies on an adverse inference by a non-party's invocation of his Fifth Amendment rights which provides no basis for withstanding summary judgment and is not even an issue properly preserved for appeal.

In her opening brief, Farr argues that "[t]here is also evidence that Sheriff Lott allowed an inappropriate culture to evolve at the Sheriff's department." *See*, Appellant's Brief, p. 12. That "evidence," according to Farr, is based on questions posed to Stephens in his deposition to which he invoked his Fifth Amendment rights.

Frankly, it is unclear how this "evidence," should it even been deemed as such, would even undermine the sovereign immunity rulings made by Judge Newman. Nonetheless, it is clear that this argument is not preserved for appeal. Judge Newman never addressed such "evidence" nor any adverse inference from a non-party's invocation of his Fifth Amendment rights in her order. Moreover, that issue was never raised by a Rule 59(e) motion and, therefore, is not preserved for appellate review.[4]

Farr's position is faulty in several additional respects. First, it is true that South Carolina law recognizes that an adverse inference may be drawn against a party to a

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[4] The Supreme Court has repeatedly stressed "the long-established preservation requirement that the [appealing] party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments." *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716, 724 (2000). "Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error." *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 594 S.E.2d 485, 498 (Ct. App. 2004).

civil action who refuses to testify under the privilege of the Fifth Amendment. *See*, *Griffith v. Griffith*, 332 S.C. 630, 506 S.E.2d 526 (Ct. App. 1998). However, there is no appellate authority in South Carolina imputing a non-party's Fifth Amendment invocation to a party. Courts that have addressed this issue have typically rejected bright-line rules, and instead have concluded that the party urging the use of the inference must show that the circumstances of the particular case justify the imputation of the adverse inference. *See generally*, *LiButti v. United States*, 107 F.3d 110, 121 (2d Cir. 1997). Typically, the party seeking to use the invocation must establish some relationship of loyalty between the other two parties. 107 F.3d at 122. The "overarching concern" in assessing the propriety of drawing an adverse inference from assertion of the Fifth Amendment privilege by a non-party is "whether the adverse inference is trustworthy under all of the circumstances and will advance the search for the truth." 107 F.3d at 124. In fact, "[m]ost of the courts that have imputed adverse Fifth Amendment inferences from one party to another have done so where there is a close family or business relationship between the person who exercised the Fifth Amendment right and the individual against whom an adverse inference is drawn." *Auto-Owners Ins. Co. v. Newsome*, 2013 WL 5797729, *4, n. 4 (D.S.C. 2013). In the present case, however, there is no such close relationship that would even remotely warrant the imputation of the adverse inference to Sheriff Lott.

Moreover, it is well settled that an adverse inference based on a Fifth Amendment invocation alone is not sufficient evidence to defeat summary judgment. *See*, *Curtis v. M&S Petroleum, Inc.*, 174 F.3d 661, 675 (5th Cir. 1999) ("[t]he adverse inference from a party's refusal to answer questions was not enough to create an issue of fact to avoid summary judgment"); *Avirsgan v. Hull*, 932 F.2d 1572, 1580 (11th Cir. 1991) ("[t]he negative inference, if any, to be drawn from the assertion of the fifth amendment does not substitute for evidence needed to meet the burden of production").

In sum, Farr has quite simply not presented any evidence that Sheriff Lott encouraged a "culture" whereby the sexual assault or harassment of an arrestee should be construed as conduct within the scope of a deputy's official duties. Such a contention is truly absurd.

II. The Circuit Court was correct in granting summary judgment on the negligent retention cause of action.

The Appellant Valerie Farr also contends on appeal that she presented sufficient evidence to withstand summary judgment on her negligent retention cause of action. In granting summary judgment on that claim, Judge Newman explained that "Plaintiff has presented no previous circumstance in which the Defendant Sheriff had actual or constructive knowledge that Stephens – either

while on duty or otherwise – engaged in any form of sexual harassment, discrimination, abuse, or misconduct with respect to female subjects or arrestees." (R. 10). Ultimately, Judge Newman concluded "that no reasonable fact finder can find a nexus or similarity between the prior acts and the ultimate harm caused and summary judgment is warranted." (R. 10).

Judge Newman correctly relied on the leading case of *Doe v. ATC, Inc.*, 367 S.C. 199, 624 S.E.2d 447 (Ct. App. 2005), in which this Court held as follows:

> Our review of negligent hiring and retention cases from other jurisdictions leads us to conclude that such cases generally turn on two fundamental elements -- knowledge of the employer and foreseeability of harm to third parties. These elements, from a factual perspective, are not necessarily mutually exclusive, as a fact bearing on one element may also impact resolution of the other element. From a practical standpoint, these elements are analyzed in terms of the number and nature of prior acts of wrongdoing by the employee, and the nexus or similarity between the prior acts and the ultimate harm caused. Such factual considerations -- especially questions related to proximate cause inherent in the concept of foreseeability -- will ordinarily be determined by the factfinder, and not as a matter of law. Nevertheless, the court should dispose of the matter on a dispositive motion when no reasonable factfinder could find the risk foreseeable or the employer's conduct to have fallen below the acceptable standard.

624 S.E.2d at 450. (Citations omitted). This Court explained that the applicable standard is "whether the employer knew the offending employee was in the habit of misconducting himself in a manner dangerous to others." 624 S.E.2d at 450-

451. Thus, it is necessary that the plaintiff "demonstrate some propensity, proclivity, or course of conduct sufficient to put the employer on notice of the possible danger to third parties." 624 S.E.2d at 451.

This Court in *Doe* further explained that "a single isolated incident of prior misconduct (of which the employer knew or should have known) may support a negligent retention claim, *provided the prior misconduct has a sufficient nexus to the ultimate harm*." 624 S.E.2d at 451. (Emphasis added). This Court pointed to *Doe v. Greenville Hospital System*, 323 S.C. 33, 448 S.E.2d 564 (Ct. App. 1994), as such an example because "the prior isolated incident involved the same sexual misconduct against the same victim." *Doe*, 624 S.E.2d at 451.

As Judge Newman correctly ruled, however, that level of nexus or similarity between the prior acts and the ultimate harm is completely lacking in this record. Farr cited two prior acts, but one of those is easily discounted and is barely mentioned by Farr in her brief. In that incident, Stephens was accused by an arrestee named Micah Sanders of asking inappropriate and perhaps harassing questions, but that conduct is alleged to have occurred on May 14, 2013, *just one day* prior to Stephens' interaction with Farr. Sanders did not make a report of Stephens' conduct until May 16, 2013, which led Judge Newman to conclude that "the factual timeline clearly reveals that the Defendants were never placed on actual or constructive [notice] of such risk" prior to the offending conduct towards

Farr. (R. 9). Farr does not challenge that ruling on appeal.

Rather, Farr focuses on the other incident that occurred in March 2013, which involved an altercation between Stephens and his teenage son at their residence. Judge Newman described the evidence as follows:

> In this March 2013 event, there appears to be no dispute that Stephens was parenting a disrespectful and recalcitrant teenaged son during which time Stephens accidentally struck him in the eye. The record is devoid of evidence that Stephens acted in a deliberate and intentional manner with respect to his son.

(R. 10). Farr does not challenge on appeal this recitation of the evidence, although she does add that the son incurred a black eye. Yet, the key ruling is as follows: "Regardless, this Court observes that these domestic-related circumstances were of a different and distinct nature for which to establish a foreseeable risk for the wrongful misconduct as is alleged in the case at bar." (R. 10). Thus, there is no evidence of a nexus or similarity between the March incident and the sexual misconduct at issue in this case.[5]

This Court's decision in *Doe v. ATC, Inc.*, 367 S.C. 199, 624 S.E.2d 447 (Ct. App. 2005), shows that Judge Newman's analysis is correct. In *Doe*, the offending employee was accused of inappropriately touching the legs of, kissing, and making

[5] Farr cites to the affidavit of James Flowers, who offers the opinion that Stephens' conduct towards his son was not reasonable and should have resulted in his termination. But importantly, Flowers' testimony does not establish the requisite nexus which was the basis of Judge Newman's summary judgment ruling.

persistent sexual comments to a disabled adult woman over a period of several months. The offending employee had a prior incident with a female employee in which he made an inappropriate advance and inappropriate sexual comments to her. In affirming a directed verdict, this Court held that, although both incidents "may be described as sexual in nature," there lacked a sufficient nexus to the ultimate harm as the prior incident was a "far cry from the reprehensible, persistent pattern of abuse" against the disabled woman. 624 S.E.2d at 451.

In the present case, the prior incident was not sexual nor law enforcement related. The incident involved disciplinary action against Stephens' son. Even if that conduct was inappropriate in some respect, there is simply no nexus or similarity with the sexual misconduct directed at Valerie Farr. Accordingly, Judge Newman was correct in ruling that "no reasonable fact finder can find a nexus or similarity between the prior acts and the ultimate harm caused." (R. 10). On that basis, the summary judgment on the negligent retention cause of action should be affirmed.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondents respectfully request that this Court affirm the order of Circuit Court Judge Jocelyn Newman granting summary judgment to the Respondents.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondents certifies that the Final Brief of Respondents complies with Rule 211(b), SCACR.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Respondents certifies that the Final Brief of Respondents complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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