THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge
Fifteenth Judicial Circuit

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SC Court of Appeals

Appellate Case No.: 2017-001258

Christine LeFont,.....Appellant,

v.

City of Myrtle Beach.....Respondent.

RESPONDENT'S INITIAL BRIEF

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ATTORNEYS FOR RESPONDENT

Murrells Inlet, South Carolina
January 5, 2018

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II. If the ruling on the Tort Claims Act is not the law of the case, whether the Circuit Court erred by granting Respondent's motion for directed verdict based on S.C. Code Ann. § 15-78-60(15).

III. Whether the Circuit Court erred by granting directed verdict based on Appellant's failure to present evidence that the hole in the employee parking lot was a dangerous condition that Respondent either created or had actual or constructive notice of its existence.

IV. Whether the Circuit Court erred by granting directed verdict based on Appellant's failure to present evidence that Respondent breached a duty to Appellant by failing to warn Appellant of a dangerous concealed condition known to Respondent.

V. Whether Appellant's arguments concerning constructive notice and her status as an invitee or business visitor were preserved for appellate review.

STATEMENT OF THE CASE

Appellant Christine LeFont filed the original Complaint on January 5, 2015 against the City of Myrtle Beach (hereinafter "Respondent" or "City") and the Myrtle Beach Convention Center Hotel Corp. Appellant asserted a single negligence cause of action against both Defendants. The City filed a timely Answer denying liability and raising affirmative defenses. Specifically, the City asserted Appellant's claims were subject to the provisions of the South Carolina Tort Claims Act (hereinafter "Tort Claims Act"), including specifically S.C. Code Ann. § 15-78-60(15). (Answer, ¶ 26). The parties subsequently entered a Stipulation dismissing the Convention Center Hotel Corp..

The case proceeded to jury trial before the Honorable R. Markley Dennis, Jr. the week of September 5, 2016. On September 7, 2016, at the close of all evidence, Respondent moved for directed verdict. (Tr. p. 323, l. 21 – p. 330, l. 9). The trial court granted Respondent's motion and directed a verdict on multiple grounds including a lack of evidence establishing liability under S.C. Code Ann. § 15-78-60(15) and under a traditional premises liability analysis. (Tr. p. 332, l. 5 – p. 341, l. 24.) The Order granting directed verdict to the City was entered on September 7, 2016. (Sep. 7, 2016 Order).

On September 20, 2016, Appellant filed a Rule 59(e) motion for reconsideration. (Appellant's Rule 59(e) Motion for Reconsideration). The trial court denied Appellant's motion by Order dated April 27, 2017. Appellant served a Notice of Appeal on May 26, 2017. Appellant appeals the September 7, 2016 Order directing a verdict for the defense and the April 27, 2017 Order denying Appellant's Motion for Reconsideration.

STATEMENT OF THE FACTS

This premises liability action arises out of Appellant's trip and fall in a parking lot behind the Myrtle Beach Convention Center on August 13, 2014. Appellant and her husband, who own a business importing and distributing a specialty energy drink, were participating in a trade show at the Myrtle Beach Convention Center organized by H.T. Hackney, a large food distributor. (Tr. p. 61, ll. 17-25). The food show is open on Saturday and Sunday, August 12 and 13, 2014. (Tr. p. 65, ll. 15-16). Appellant's incident occurred on the second day of the show. (Tr. p. 285, ll. 21-25).

The Convention Center has a large lot dedicated to public parking. A smaller employee parking lot is located immediately behind the Convention Center. Appellant was running late the morning of her incident. (Tr. p. 93, ll. 17-18). Appellant entered the employee parking lot and dropped off her husband near the loading docks allowing him to easily and quickly carry boxes of their drink product into the Exhibit Hall. (Tr. p. 64, ll. 16-20). Appellant then parked in the employee lot believing it would take only a few minutes to go inside and find out if she needed to go back to the warehouse for more product. (Tr. p. 66, ll. 18-20; Tr. p. 94, ll. 9-14, 24 – p. 95, l. 16). As she walked towards the Convention Center, Appellant contends she stepped in a hole or depression in the pavement and fell. (Tr. p. 67, ll. 21-22; p. 73, ll. 9-21; p. 73, l. 12- p. 74, l. 2).

STANDARD OF REVIEW

Rule 50 of the South Carolina Rules of Civil Procedure provides that the judge may direct a verdict when, at trial, the case presents only questions of law. Rule 50(a), SCRCP. On a motion for directed verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion and deny the motion where either the evidence yields more than one inference or its inference is in doubt. Jinks v. Richland County, 355 S.C. 341, 345, 585 S.E.2d 281, 286 (2003). "However, this rule does not authorize submission of speculative, theoretical, or hypothetical views to the jury." Proctor v. Dep't of Health & Envtl. Control, 368 S.C. 279, 292-93, 628 S.E.2d 496, 503 (Ct. App. 2006).

In reviewing a grant of directed verdict, the appellate court applies the same standard as the trial court. However, the appellate court will only reverse the trial court's ruling on a directed verdict motion when there is "no evidence to support the ruling or where the ruling is controlled by an error of law." Law v. S.C. Dep't of Corr., 368 S.C. 424, 434-35, 629 S.E.2d 642, 648 (2006). Furthermore, the appellate court must determine "whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his [or her] favor." Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006). However, both the trial court and appellate court are only concerned with the existence or non-existence of evidence and neither have the authority to decide credibility issues or to resolve conflicts in testimony. Id. See also Hoover v. Broome, 324 S.C. 531, 538, 479 S.E.2d 62, 66 (Ct. App. 1996).

DISCUSSION/ARGUMENT

I. Appellant Failed to Present Evidence Establishing Liability Under S.C. Code Ann. § 15-78-60(15)

A. The trial court's ruling based on the Tort Claims Act is the law of the case.

As an initial matter, Respondent notes that Appellant has not appealed the trial court's ruling based on application of S.C. Code Ann. § 15-78-60(15). The trial judge spent considerable time explaining the application of the Tort Claims Act and his reliance on Major v City of Hartsville, 410 S.C. 1, 763 S.E.2d 348 (2014) which similarly involved § 15-78-60(15). (Tr. p. 332, l. 5 – p. 333, l.24; p. 334, l. 13 – p. 336, l. 22; p. 338, ll. 21 – 24). Appellant's brief, however, contains no challenge to the court's ruling under the Tort Claims Act. Therefore, the trial court's ruling on this ground is the law of the case. See Charleston Lumber Co. v. Miller Hous. Corp., 338 S.C. S.C. 171, 525 S.E.2d 869 (2000) (an unappealed order, right or wrong, is ordinarily the law of the case); Resolution Trust Corp. v. Eagle Lake & Golf Condominiums, 310 S.C. 473, 427 S.E.2d 646 (1993) (the trial judge's procedural ruling is the law of the case since it has not been appealed); Anderson v. Short, 323 S.C. 522, 476 S.E.2d 475 (1996) (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); First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 566, 511 S.E.2d 372, 387 (Ct. App. 1998) ("holding an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance"). Appellant's failure to appeal all grounds of the directed verdict order, therefore, requires affirmance.

B. The evidence supports the trial court's ruling under the Tort Claims Act.

Even if this Court construes Appellant's argument to encompass a challenge to the trial court's application of § 15-78-60(15), the trial court's directed verdict ruling should nevertheless

be affirmed because Appellant failed to present evidence establishing liability under S.C. Code Ann. § 15-78-60(15).

The Tort Claims Act is the exclusive remedy for torts committed by a governmental entity or its employees. S.C. Code Ann. § 15-78-20(b); see also Benton v. Roger C. Peace Hospital, 313 S.C. 520, 523, 443 S.E.2d 537, 538 (1994). S.C. Code Ann. § 15-78-60 sets out numerous exceptions to the waiver of sovereign immunity. Subsection 15 provides in relevant part:

The governmental entity is not liable for a loss resulting from:

> .... a defect or a condition in, on, or under, or overhanging a highway, road, street, causeway, bridge, or other public way caused by a third party unless the defect or condition is not corrected by the particular governmental entity responsible for the maintenance within a reasonable time after actual or constructive notice.

S.C. Code Ann. 15-78-60(15)

Accordingly, to prove liability under subsection 15, a plaintiff must show the governmental entity was on notice of the condition that proximately caused his or her injury and failed to correct the condition within a reasonable time after receiving notice.

Appellant presented no evidence that Respondent had knowledge – either actual or constructive - of the hole in the employee parking lot. Appellant's brief directs the Court to no testimony that any employee of Respondent had actual knowledge the hole was present before Appellant fell. Instead, Appellant argues the City was on constructive notice because the hole was located within the employee parking lot. Of course, the fact that the hole existed on the day of Appellant's fall is not enough to prove constructive notice. It is well settled that proving constructive notice requires evidence that the condition existed for such a period of time that it should have been discovered in the use of reasonable care. Fickling v. City of Charleston, 372

S.C. 597, 643 S.E.2d 110 (Ct. App. 2007). Appellant's brief points to no evidence establishing when the hole was created or how long it had been present prior to Appellant's injury. The trial court correctly determined Appellant had failed to meet the required evidentiary burden and properly granted directed verdict. See Wintersteen v. Food Lion, Inc., 336 S.C. 132, 518 S.E.2d 828 (Ct. App. 1999) (finding Plaintiff failed to establish constructive notice when determining how long substance was on floor would be speculation); Wimberly v. Winn-Dixie Greenville, Inc., 252 S.C. 117, 165 S.E.2d 627 (1969) (concluding trial court should have directed a verdict in favor of the defendant because "no evidence is pointed out which reasonably tends to prove that the rice was on the floor at any particular time prior to the actual fall. The jury should not be permitted to speculate that it was on the floor for such a length of time as to infer that defendant was negligent in failing to detect and remove it"); Pennington v. Zayre Corp., 252 S.C. 176, 179, 165 S.E.2d 695, 696 (1969) (affirming grant of involuntary nonsuit in case where plaintiff slipped on plastic bags on the floor: "The plastic bags were obviously on the floor at the time of the fall. There is no evidence in the record that the bags were on the floor for any time prior thereto. To hold that the bags had been there sufficiently long that they should have been discovered by the merchant would be pure speculation.").

In so ruling, the Circuit Court noted the differences between the present matter and Major v. City of Hartsville, 410 S.C. 1, 763 S.E.2d 348 (2014). (Tr. p. 335, ll. 10-19). Specifically, Major dealt with a frequently recurring problem with rutting at a particular intersection. Major also presented evidence of the City's practice of repairing the recurring ruts. There was also testimony from City employees that additional efforts to repair the ruts at the subject location were suspended because it was deemed "a fruitless effort because a few days later ... it was right back to the same condition." Major v. City of Hartsville, 410 S.C. 1, 3, 763 S.E.2d 348, 350

(2014). As the trial judge noted, Appellant has presented no evidence, like that presented in Major, of a recurring problem or a history of Respondent repairing similar problems in the employee parking lot. The trial court, therefore properly granted directed verdict based on S.C. Code Ann. § 15-78-60(15).

II. Appellant Failed to Present Evidence that Respondent Created the Dangerous Condition or Had Actual or Constructive Notice of the Condition.

Under the traditional premises liability analysis, recovery for injuries caused by a dangerous or defective condition on a defendant's property requires a showing that defendant committed a specific act that created the dangerous condition or that defendant had actual or constructive knowledge of the dangerous condition and failed to remedy it. Anderson v. Racetrac Petroleum, Inc., 296 S.C. 204, 205, 371 S.E.2d 530, 531 (1988); Pringle v. SLR, Inc. of Summerton, 382 S.C. 397, 404, 675 S.E.2d 783, 787 (Ct. App. 2009).

In showing a defendant created a dangerous condition, a plaintiff must also present evidence that defendant created the condition through some negligent act or omission. Pringle v. SLR, Inc. of Summerton, 382 S.C. 397, 675 S.E.2d 783 (Ct. App. 2009). The party alleging negligence has the burden of proving actionable negligence and "[t]his burden cannot be met by relying upon the theory that the thing speaks for itself or that the very fact of injury indicates negligence." King v. J.C. Penney Company, 238 S.C. 336, 120 S.E.2d 229, 230 (1961); see also Hunter v. Dixie Home Stores, 232 S.C. 139, 101 S.E.2d 262, 265 (1957) (noting "[i]t is elementary that in order for a plaintiff to recover damages there must be proof not only of injury, but also that it was caused by the actionable negligence of the defendant. It should be kept in mind that the doctrine of res ipsa loquitur does not apply in this State.").

Appellant has directed this Court to no evidence in the record showing or creating an inference that Respondent created the hole in the employee parking lot. There is no evidence

establishing or tending to show when the hole was created or that it was created by Respondent. Additionally, there is no evidence the condition was created by a negligent act or omission of Respondent.

On the second prong of the premises liability analysis, the record contains no evidence that Respondent had actual or constructive knowledge the hole was present. The only evidence in the record relating to the length of time the hole was present was that it was present the day of Appellant's incident. However, as the trial judge noted, the fact that the hole existed on the day of the incident does not create an inference from which it can be decided that the hole was present for a sufficient length of time that it should have been discovered through reasonable care. (Tr. p. 337, l. 10 – p. 338, l. 5). Without evidence that Respondent created the hole by a negligent act or omission or evidence showing how long the hole existed or that Respondent had recurring problems with pot holes in the employee parking lot, the trial court properly directed a verdict. See Pennington v. Zayre Corp., 252 S.C. 176, 179, 165 S.E.2d 695, 696 (1969).

In support of her argument that the Court erred in finding no evidence of constructive notice, Appellant asserts: (1) City personnel were regularly "within the area of the hole"; (2) the hole "had *possibly* existed for a while;" and (3) the City had an established practice to deal with unsafe conditions on the premises. (Appellant's Initial Brief, p. 14 (emphasis added)). However, none of these factors establish constructive notice or create an inference from which a jury could find constructive notice.

Appellant's first point – that employees of the City are regularly in the employee parking lot – was not raised to the trial court and is therefore not preserved for review. See Pye v. Estate of Fox, 369 S.C. 555, 565, 633 S.E.2d 505, 510 (2006) (finding issue must be raised to and ruled upon by circuit court to be preserved); Watson v Underwood, 407 S.C. 443, 756 S.E.2d 155

(Ct.App.2014) (declining to consider issues that were not addressed by court or raised in appellant's 59(e) motion.). Notwithstanding the question of issue preservation, the fact that City employees regularly park in the employee parking lot does not mean the hole was present for a sufficient length of time that it should have been discovered. Without evidence establishing when the hole was created and that it had been present for a sufficient length of time that Respondent should have reasonably discovered it through the exercise of reasonable care, there can be no finding or inference of constructive knowledge.

Appellant's second argument – that the hole "had possibly existed for a while" – was not raised below and is not preserved for appellate review. If this Court finds the argument preserved, Respondent would show there is no evidence in the record that the hole existed at any time prior to the date of Appellant's incident. Even if there was evidence of this possibility, the fact that it is possible the hole was present for five minutes, five hours or five weeks is precisely why this argument fails. See Wimberly v. Winn-Dixie Greenville, Inc., 252 S.C. 117, 165 S.E.2d 627 (1969).

Appellant's third argument for constructive notice is also misplaced. The fact that Respondent has a policy for employees to report dangerous conditions that are seen during the course of the workday does not establish or yield an inference of constructive notice. The trial judge pointed out the absence of evidence – similar to that presented in Major – showing a recurring problem with potholes in the employee parking lot or a history of Respondent repeatedly repairing the same condition. (Tr. p. 334, l. 13 – p. 336, l. 22; p. 338, ll. 21 – 24). Accordingly, the Circuit Court correctly concluded there was an absence of "evidence that would establish constructive notice of the pothole and therefore require the City to take any action independent of what was done," (Tr. p. 341, ll. 21-24).

III. Appellant Failed to Present Evidence that Respondent Breached a Duty to Appellant as Licensee.

A. The evidence supports the trial court's finding that Appellant was a licensee in the employee parking lot.

It is well settled that the scope of a defendant's duty in a premises liability action is based upon the status of the person injured at the time of his or her injury. Sims v. Giles, 343 S.C. 708, 715, 541 S.E.2d 857, 861 (Ct.App.2001). South Carolina recognizes four general classifications of persons to whom varying duties are owed by the possessor: adult trespassers, invitees, licensees, and children. Id. Typically, "[a] licensee is a person whose presence is tolerated, a person not necessarily invited on the premises, but one who is privileged to enter or remain on the premises only by the property owner's express or implied consent." Sims, 343 S.C. at 720, 541 S.E.2d at 863-64 (citing Frankel v. Kurtz, 239 F. Supp. 713 (W.D.S.C. 1965)). When a licensee enters a premises, the primary benefit is to the licensee. Hoover v. Broome, 324 S.C. 531, 479 S.E.2d 62 (Ct. App. 1994); Landry v. Hilton Head Plantation Prop. Owner's Ass'n, Inc., 317 S.C. 200, 452 S.E.2d 619 (Ct. App. 1994). Therefore, licensees can be "said to accept the premises as they are . . . ." Singleton v. Sherer, 377 S.C. 185, 659 S.E.2d 196 (Ct. App. 2008) (quoting F.P. Hubbard & R.L. Felix, The South Carolina Law of Torts 111-12 (2d ed. 1997)).

The Circuit Court properly concluded that Appellant was a licensee at the time of her incident. (Tr. p. 339, ll. 5-6; p. 341, ll. 10-14). The trial testimony established that Appellant was in the employee parking lot for her own benefit. Appellant testified that she was running late on the day of the incident. (Tr. p. 93, ll. 17 – 18). She entered the employee parking lot so that she could drop off her husband near the loading docks so that he could quickly and easily carry boxes of their product to their booth inside the exhibit hall. (Tr. p. 64, ll. 16-20). If

Appellant did not park in the employee lot, she would have parked on the opposite side of the building. (Tr. p. 95, ll. 5-9). Instead, for her own convenience, Appellant parked in the employee parking lot believing it would only take a few minutes to run inside and find out if she needed to go to the warehouse for more product. (Tr. p. 66, ll. 18-20; p. 94, ll. 9-14; p. 94, l. 24 – p. 95, l. 4). Appellant's presence in the employee parking lot was, by her own admission, for her own convenience. (Tr. p. 95, ll. 2-16). Because Appellant's presence in the employee parking lot was for her own convenience and benefit, the trial court properly characterized Appellant as a licensee.

Even if Appellant was an invitee or business visitor while participating in the food show, she would enjoy that classification only while she was inside the Exhibit Hall where vendors are expected to be present. The parking lot where Appellant was injured was clearly designated for Convention Center employees. Appellant admitted knowing the small lot located immediately behind the Convention Center was for employees. (Tr. p. 92, l. 25 – p. 93, l. 8). Notwithstanding Appellant's admission, numerous employee parking signs throughout the lot make clear the lot is not for use by the public. (Tr. p. 179, l. 25 – p. 180, l.23). Therefore, when Appellant entered the employee parking lot she exceeded the scope of any invitation.

B. There is no evidence that Respondent breached a duty to Appellant by failing to warn Appellant of a concealed dangerous condition known to Respondent.

A property owner's duty towards a licensee is (1) to use reasonable care to discover him and avoid injury to him in carrying on activities upon the land, and (2) to use reasonable care to warn him of any concealed dangerous conditions or activities which are known to the possessor, or any change in the condition of the premises which may be dangerous to him, and which he may reasonably be expected to discovery. Neil v. Byrum, 288 S.C. 472, 343 S.E. 2d 615, 616 (1986) quoting Frankel v. Kurtz, 239 F.Supp. 713, 717 (D.S.C. 1965).

The trial court's directed verdict ruling based on Appellant's characterization as a licensee was supported by two principal evidentiary shortcomings. First, assuming the hole was a dangerous condition, there is no evidence in the record that the hole in the parking lot was concealed. Appellant did not testify the hole was concealed. In fact, Appellant's testimony supports the finding that the hole was in plain sight. Appellant agreed she could have seen the hole if she had simply looked down at the pavement. (Tr. p. 90, ll. 8 – 15). She further testified there was nothing obstructing her view. (Tr. p. 91, ll. 1 – 14).). The hole was not located between cars or behind any obstruction. The photographic evidence shows the hole was in plain sight. Because the hole was not concealed, there was no duty to warn Appellant and therefore no breach.

Second, even if the hole was concealed, there was no breach of a duty owed to Appellant because – as discussed previously – the record does not contain a scintilla of evidence showing or supporting an inference that Respondent had knowledge of the hole prior to the incident date.

C. The arguments that Appellant was an invitee or business visitor were not preserved for appellate review.

Appellant's arguments regarding her classification as an invitee or a business visitor were not raised to the trial court and are, therefore, not preserved for appellate review. Pye v. Estate of Fox, 369 S.C. 555, 565, 633 S.E.2d 505, 510 (2006) (finding issue must be raised to and ruled upon by circuit court to be preserved); Watson v Underwood, 407 S.C. 443, 756 S.E.2d 155 (Ct.App.2014) (declining to consider issues that were not addressed by court or raised in appellant's 59(e) motion.). Appellant's trial counsel presented no argument to the trial court concerning mutual benefit or interest or Appellant's presence being connected to the purpose for which the premises was held open. These arguments are, therefore, not properly before this Court.

If the Court finds these arguments properly before this Court, Respondent would show that the arguments do not support a characterization of Appellant as an invitee or business visitor when her status is determined at the time and place of her injury. There is no evidence of a mutual benefit based on Appellant's presence in the Respondent's employee parking lot. Furthermore, the employee parking lot is not held open to the public. Therefore, Appellant's presence in the parking lot, even if it was related to the food show, does not make her a business visitor. When Appellant's status is considered in light of her location at the time of her injury, the evidence does not support an inference that Appellant was an invitee.

Even if there was evidence supporting a finding of invitee status, it does not change the outcome or warrant reversal. Premises liability plaintiffs, whether they are an invitee or licensee, must present evidence that their injury was the result of a negligent act or omission of defendant or that the defendant had actual or constructive knowledge of the dangerous condition and failed to remedy it. Anderson v. Racetrac Petroleum, Inc., 296 S.C. 204, 205, 371 S.E.2d 530, 531 (1988). As discussed in the sections above, the record contains no evidence that Respondent created the hole or that Respondent had actual or constructive notice of the hole at any time prior to Appellant's incident. Appellant's claim fails under either scenario.

IV. Appellant's Argument Concerning Other Findings by the Trial Court.

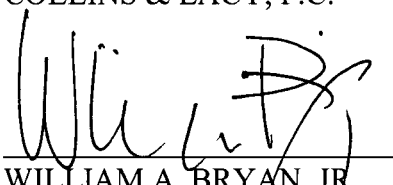
With respect to the Appellant's arguments that the trial court erred by finding, as a matter of law, the hole was an open and obvious condition and by finding the hole was not a hazardous condition, Respondent would show that the trial judge made no such rulings as a matter of law. Respondent would further show the trial court's rulings, as discussed in the three sections above, do not depend on a determination of the hole being an open and obvious condition or that the hole was or wasn't a hazardous condition.

CONCLUSION

For the foregoing reasons, Respondent requests this Court affirm the Circuit Court's Order granting directed verdict for Respondent.

Respectfully submitted,

COLLINS & LACY, P.C.

By: 

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PROOF OF SERVICE

I certify that I have served the Respondent's Initial Brief and Respondent's Designation of Matter by depositing a copy in the United States Mail, first class postage prepaid, on January 5, 2018, addressed to the attorney of record as follows:

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January 5, 2018

The Honorable Jenny A. Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: **Christine LeFont v. City of Myrtle Beach**
Appellate Case No. 2017-001258
C&L File No. 000456-01020

Dear Ms. Kitchings:

Please find enclosed for filing the original and one (1) copy each of Respondent's Initial Brief and Respondent's Designation of Matter with Proof of Service in the above-referenced matter. Please file the originals and return the clocked copies in the self-addressed stamped envelope provided.

By copy of this letter, I am serving counsel of record with a copy of Respondent's Initial Brief and Respondent's Designation of Matter.

With kind regards,

Sincerely,

William A. Bryan, Jr.

WAB/acg
Enclosures
cc: Thomas Winslow, Esquire
Ryan Compton, Esquire
Stephen Goldfinch, Jr., Esquire

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