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THE STATE OF SOUTH CAROLINA
COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

The Honorable J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2017-002241
Civil Action No. 2017-CP-10-03130

Stephanie Walker Weaver,.....Respondent,

v.

Brookdale Senior Living, Inc., HBP LeaseCo, LLC
d/b/a Brookdale Charleston, Terri Robinson,
John Does and Richard Roe Corporations, Defendants,

Of whom Brookdale Senior Living, Inc., HBP LeaseCo, LLC
d/b/a Brookdale Charleston, and Terri Robinson are the ..... Appellants.

APPELLANTS' OPPOSITION TO RESPONDENT'S MOTION TO DISMISS ISSUE I (AND ITS SUBPARTS) OF APPELLANTS' INITIAL BRIEF AS UNAPPEALABLE

Pursuant to Rule 240(e), SCACR, Appellants Brookdale Senior Living, Inc., HBP LeaseCo, LLC d/b/a Brookdale Charleston and Terri Robinson (together, "Brookdale") submit this response in opposition to Respondent Stephanie Walker Weaver's Motion to Dismiss Issue I (And Its Subparts) of Appellants' Initial Brief as Unappealable ("Resp't Mot."). Respondent acknowledges that this Court has the authority to decide all issues presented in Brookdale's appeal, including whether her complaint states a legally cognizable claim. At the same time, however, Respondent seeks to avoid having this Court evaluate the legal sufficiency of her

claims, arguing that the Court is best-equipped to determine only part of the issues presented. Respondent provides no sound legal or factual basis for her position and wholly ignores the inefficiency and waste of judicial resources that would result from her suggested piece-meal approach.

Contrary to Respondent's arguments, the matters presented on appeal are directly related, "companion" issues. Brookdale disputes that it owes any duty to Ms. Weaver, but, if a duty is owed, it necessarily derives from Brookdale's obligations as set forth in the Residency Agreement. Brookdale further asserts that, because Ms. Weaver must rely on the Residency Agreement to establish the nature of Brookdale's legal duties, the Residency Agreement compels her to arbitrate any claims that may survive a motion to dismiss. It would be difficult if not impossible to decide whether Respondent is bound by Residency Agreement's arbitration provision without first determining the nature of her claims and, in particular, whether her claims derive from duties owed under the Residency Agreement. Moreover, as a matter of judicial economy, it simply makes no sense not to consider all of these related issues at once. This Court is best-positioned to decide whether Respondent's complaint states any valid legal claim, and it can and should exercise its discretion to do so.

BACKGROUND[1]

Ms. Weaver initiated this action in the Court of Common Pleas for Charleston County asserting claims against Brookdale, along with unnamed "Doe" and "Roe" defendants. Respondent asserts claims for negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress, in connection with the death of her grandmother,

[1] Brookdale includes here a brief recitation of the procedural background to provide context for the Court in connection with the Motion. Brookdale provides a comprehensive discussion of the factual and procedural background in its initial brief on appeal and refers the Court to that brief for additional detail and citations to the record.

Bonnie Walker, who, according to the complaint, wandered from her Brookdale residence and was killed by an alligator. Brookdale resolved all claims with Ms. Walker's estate and the settlement was approved by the probate court; however, Ms. Weaver has filed this separate lawsuit asserting additional claims. Brookdale moved to dismiss Ms. Weaver's complaint pursuant to Rule 12(b), SCRCP, or, in the alternative, to compel arbitration. The trial court denied Brookdale's alternative motions in a single order (the "September 28 Order"), and Brookdale filed a timely notice of appeal of all issues.

On February 15, 2018, Brookdale filed its initial brief on appeal arguing that (1) the trial court erred in failing to dismiss Respondent's complaint for failure to state any claim for relief, and (2) in the alternative, the trial court erred in failing to compel arbitration of Respondent's claims. (*See* Initial Br.) Ms. Weaver now asks this Court to refrain from deciding whether her complaint states any valid legal claim. (*See* Resp't Mot.)

Respondent contends that the two issues addressed in the September 28 Order are entirely unrelated and thus that the denial of the motion to dismiss cannot be appealed as a companion issue to the denial of the motion to compel arbitration. Respondent further argues that the trial court's decision on the motion to dismiss is not "conducive to appellate review" because it "substantively consists of two sentences" or, alternatively, because it would require a "weighing of the facts" by this court, which is inappropriate on appeal. (Resp't Mot. 2.) Respondent additionally asserts that this Court's review of the decision on the motion to dismiss would not promote judicial efficiency or avoid unnecessary litigation. Brookdale submits this brief in response.

ARGUMENT

I. This Court is fully capable of and in the best position to review and decide the pure issues of law presented by this appeal.

It is well-established that this Court has complete discretion to review a denial of a motion to dismiss when considered with an appealable issue also before the Court. *See FOC Lawshe Ltd. P'ship v. Int'l Paper Co.*, 352 S.C. 408, 414 n.1, 574 S.E.2d 228, 231 n.1 (Ct. App. 2002); *Cox v. Woodmen of World Ins. Co.*, 347 S.C. 460, 469, 556 S.E.2d 397, 402 (Ct. App. 2001). Whether this Court opts to exercise its jurisdiction is a case-by-case determination. *See id.* The fact that Respondent can point to cases where the Court chose not to review an interlocutory order in conjunction with an appealable issue does not, as Respondent suggests, compel that same result here. (*See* Resp't Mot. 3.) In fact, for each of the cases Respondent cites to support her claim that this Court "frequently refuses" to review an interlocutory order along with an appealable issue (*see id.*), there exists another where the Court does just that. *See, e.g., Se. Housing Found. v. Smith*, 380 S.C. 621, n.14, 670 S.E.2d 680, n.14 (Ct. App. 2008) (reviewing appeal of order granting Rule 60(b), SCRCP motion because it was "coupled with" an immediately appealable order); *Pitts v. Jackson Nat'l Life Ins. Co.*, 352 S.C. 319, 338-39, 574 S.E.2d 502, 511-12 (Ct. App. 2002) (entertaining an appeal from a denial of summary judgment because it was so closely connected to other issues properly before the court); *FOC Lawshe*, 352 S.C. at 414 n.1, 574 S.E.2d at 231 n.1 (hearing direct appeal of a denial of a motion to dismiss along with an immediately appealable issue also before the court); *Cox*, 347 S.C. at 469; 556 S.E.2d at 402 (same); *Roberts v. Recovery Bureau, Inc.*, 316 S.C. 492, 495 n.2, 450 S.E.2d 616, 618 n.2 (Ct. App. 1994) (same for appeal of denial of summary judgment); *see also Edge v. State Farm Mut. Auto. Ins. Co.*, 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005) (entertaining discretionary appeal of motion to dismiss along with immediately reviewable issue on cross-

appeal). Indeed, contrary to Respondent's position, the South Carolina Supreme Court has expressly confirmed that the appellate courts have "made a practice of accepting appeals of denials of interlocutory orders not ordinarily immediately appealable when these appeals are companion to issues that are reviewable." *Brown v. Cty. of Berkeley*, 366 S.C. 354, 362 n.5, 622 S.E.2d 533, 538 n.5 (2005).

Further, Respondent's argument that the trial court's September 28 Order ruling on the motion to dismiss is "not conducive to appellate review" is puzzling, at best. (*See* Resp't Mot. 7.) Respondent seeks to align this case with *Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006), arguing that the September 28 Order's denial of Brookdale's motion to dismiss is "not a meaningful platform for appellate review of the arguments." (*See* Resp't Mot. 7.) But *Queens Grant II* is distinguishable on its face. In *Queens Grant II*, the appellate court concluded that it would exercise restraint and decline to rule on the interlocutory appeal where the trial court made a "purposeful decision to avoid any consideration of the motion [for summary judgment]." *See Queens Grant II*, 368 S.C. at 371, 628 S.E.2d at 918. That is, the trial court in *Queens Grant II* made no determination on the merits as to the motion at issue. In contrast, the September 28 Order at issue in this case directly addressed the legal issues on the merits by concluding that "Plaintiff has sufficiently plead each cause of action." (*See* September 28 Order). In doing so, the trial court ruled that the facts as alleged by Respondent are sufficient to sustain each of the asserted causes of action as a matter of law. That the trial's court's ruling is brief and does not contain any in-depth, substantive discussion of the arguments does not make it any less appealable; this Court is well-capable of reviewing trial court rulings on pure issues of law, regardless of the level of detail provided in the lower court's decision.

Moreover, contrary to Respondent's assertions, Brookdale does not ask the Court to weigh any factual issues. For purposes of its motion to dismiss and its appeal here of the denial of that motion, Brookdale accepts as true all of the facts as alleged in Respondent's complaint. Brookdale merely asks this Court to decide whether, as a matter of law, those allegations state any valid claim for relief.

Respondent points to two examples of arguments in Brookdale's brief that she claims "involve[] factual matters that may still be developed and application of the law to those facts." (Resp't Mot. 9.) As an initial matter, this Court's "application of the law to facts" is entirely proper. Moreover, neither example, in substance, points out any factual "issue." First, Respondent references Brookdale's argument on appeal that the negligent infliction of emotional distress claim fails because Respondent failed to plead that she was in close proximity to and contemporaneously perceived the alligator attack, as is necessary for bystander liability. (*Id.* 8-9.) Respondent argues that there is an issue of fact in this regard, flagging her allegation in the complaint that she "was in close proximity to where her grandmother's body was discovered and contemporaneously perceived and was herself injured by discovering her grandmother's dismembered body." (*Id.*) This argument is a red herring. For purposes of its motion to dismiss, Brookdale does not dispute Respondent's allegation that she was in close proximity to where Ms. Walker was discovered or that she contemporaneously perceived and was injured by discovering Ms. Walker. Brookdale's argument is not that Respondent's claim fails because this allegation is untrue, rather, Brookdale asserts that the facts alleged by Respondent do not support a claim for negligent infliction of emotional distress because, under South Carolina law, Respondent must allege that she was in close proximity to and contemporaneously perceived *the incident that*

resulted in her grandmother's death, namely, the alligator attack. And it is undisputed that Respondent has not alleged this fact.

Second, Respondent references Brookdale's argument that her intentional infliction of emotional distress claim must be dismissed because she failed to allege that Brookdale directed any conduct at her with the intent to cause her emotional distress. (*Id.* at 9.) Ms. Weaver responds by realleging that "'Defendants notified her family of the disappearance' before looking for Mrs. Walker, 'informed' the family when they arrived that Mrs. Walker had not been located, and then the family looked for her." (*Id.*) Again, for purposes of its motion to dismiss (and its appeal of the denial of that motion), Brookdale accepts as true all facts as alleged in Respondent's complaint. Brookdale's position is that the facts as alleged are insufficient, as a matter of law, to state a claim for intentional infliction of emotional distress.

The trial court's conclusion that the complaint sufficiently alleges facts to sustain each of Respondent's claims presents legal issues well-situated for this Court's review, regardless of the level of detail included in the lower court's ruling. There are no factual issues to "weigh," and this Court is both highly qualified and best positioned to consider the pure issues of law presented.

II. This Court routinely exercises its discretion to review interlocutory orders where, as here, the order is a companion matter to an immediately appealable issue, involving overlapping factual and legal considerations.

South Carolina "[c]ourts have made a practice of accepting appeals of denials of interlocutory orders not ordinarily immediately appealable when these appeals are companion to issues that are reviewable." *Brown*, 366 S.C. at 362 n.5, 622 S.E.2d at 538 n.5; *see also Smith*, 380 S.C. at 635 n.14, 670 S.E.2d at 685 n.14 (reviewing appeal of order granting Rule 60(b), SCRCP because coupled with appealable issue); *Queen's Grant II*, 368 S.C. at 371, 628 S.E.2d at 918 (court has discretion to review "interlocutory orders not ordinarily appealable when they

are companion to reviewable issues."); *Pitts*, 352 S.C. at 338-39, 574 S.E.2d at 511-12 (entertaining an appeal from a denial of summary judgment because it was so closely connected to other issues properly before the court); *Roberts*, 316 S.C. at 495 n.2, 450 S.E.2d at 618 n.2 (same); *FOC Lawshe*, 352 S.C. at 414 n.1, 574 S.E.2d at 231 n.1 (same for denial of motion to dismiss); *Cox*, 347 S.C. at 469; 556 S.E.2d at 402 (same).

Respondent purports to accept this general rule but goes on to argue that the issues in the motion to dismiss and the motion to compel arbitration are "completely unrelated with no overlapping factual or legal analysis" and "lack a sufficient nexus or companionship to justify this Court's exercise of immediate appellate review." (*See* Resp't Mot. 4-5.) Respectfully, these contentions are entirely unsupported, based on even a cursory review of the record. As an initial matter, the close factual relationship between both motions is evidenced by the fact that they were presented in a single filing and decided in a single court order. (*See* September 28 Order.) Further, analysis for each issue critically relies on the Residency Agreement that Respondent's grandmother entered into with Brookdale upon moving into its facility. Although Brookdale maintains that it owed no legal duty directly to Respondent, any duties Brookdale owed, underlying Respondent's negligence claims, necessarily must derive from the Residency Agreement. (*See* Initial Br. 12-13). Thus, because Respondent must rely on the Residency Agreement as the source of those duties in asserting her negligence claims, she likewise is bound by that Agreement to arbitrate any claims that may survive the motion to dismiss, regardless of the fact that she is a nonsignatory to the Residency Agreement. In determining whether Respondent must arbitrate her claims, this Court necessarily must review each claim and determine, in particular, whether Respondent seeks to benefit from the Residency Agreement in asserting her claims, including by relying on the Agreement as the source of the alleged legal

duties owed to her. The overlap between the issues is apparent. That Respondent disputes Brookdale's position that she must rely on the Residency Agreement as the source of any legal duty and therefore is bound by all of its terms, including the Agreement's arbitration mandate, does not make the issues any less related or any less ripe for this Court's review. *Cf. Pitts*, 352 S.C. at 338-39, 574 S.E.2d at 511-12 (interlocutory order was so "closely connected" to other appealable issues such that the court found it "may properly review it at this time").

Respondent cites two cases in support of her argument that this Court should refuse to review the trial court's denial of Brookdale's motion to dismiss as a companion issue to the denial of its alternative motion to compel arbitration. She first cites *Brown v. County of Berkeley*, in which the court declined to exercise immediate appellate review of a denial of the individual defendants' motion dismiss, as a companion issue to a denial of the plaintiff's motion for a preliminary injunction, because the two issues "lack[ed] a sufficient nexus or companionship" (*Brown*, 366 S.C. at 362 n.5, 538 S.E.2d at 362 n.5). Respondent argues that "[t]he same result is warranted in this case." (Resp't Mot. 5 (citing *Brown*, 366 S.C. at 357, 622 S.E.2d at 535).) Yet *Brown* involved two legally and factually distinct issues raised in separate motions filed by different parties: (1) the plaintiff sought review of a motion denying a preliminary junction to stop an audit, which asked the appellate court to consider whether the special audit ordered by the defendant County of Berkeley was valid under a South Carolina statute; and (2) the individual defendant council members sought review of the trial court's denial of their motion to dismiss claims for defamation and intentional infliction of emotional distress based on principles of absolute immunity and under the South Carolina Tort Claims Act. *See Brown*, 366 S.C. at 361, 622 S.E.2d at 537. Here, unlike in *Brown*, the parties are consistent

across both issues, and the issues raised in the motion to dismiss clearly share a "sufficient nexus" with the arbitration issue. *Brown* is inapposite.

Respondent also relies on *Pitts v. Jackson National Life Insurance Co.*, where the court *agreed* to hear all issues on appeal, to argue that this case requires a different result because the issues here are different than in *Pitts*. (Resp't Mot. 6.) However, applying *Pitts* in the manner Respondent suggests would require re-writing the well-established legal standard for when this Court may hear companion issues, resulting in a material narrowing of this Court's discretionary jurisdiction. This is clearly not a result that the *Pitts* court contemplated, let alone embraced. In *Pitts*, the court agreed to review the plaintiff's appeal of both the trial court's decision to grant the defendant's motion to dismiss/motion for summary judgment, along with the plaintiff's companion (interlocutory) appeal of the trial court's decision to deny summary judgment to the plaintiff on his unjust enrichment claim. In doing so, however, the *Pitts* court did not change legal standard or narrow appellate court discretion to review an interlocutory appeal as a companion issue; to the contrary, it merely pointed out various aspects of that particular case that led to its conclusion that the issues on appeal were closely connected. *Pitts,* 352 S.C. at 338-39, 574 S.E.2d at 511-12.

Thus, the *Pitts* holding does not, as Respondent advocates, alter the "companion issues" analysis here to require that the motion to compel arbitration "encompass the claims that are the subject of the motion to dismiss." (Resp't. Mot. 6.) The proper test, as applied consistently in South Carolina jurisprudence, including in *Pitts*, is whether there is a sufficient nexus between the issues to warrant immediate appeal of all issues. Here, the overlapping legal and factual issues implicated in both the motion to dismiss and the alternative motion to compel arbitration make this precisely the type of case warranting joint review of all issues.

III. Judicial economy principles weigh in favor of this Court reviewing the trial court's denial of the motion to dismiss because doing so may avoid unnecessary litigation and narrow the issues for trial or arbitration.

Regardless of which party prevails on appeal, this Court's consideration of the trial court's denial of the motion to dismiss clearly promotes the principles of judicial economy to which South Carolina courts consistently adhere. *See Edge*, 366 S.C. at 517, 623 S.E.2d at 390 (entertaining an appeal "in an effort to avoid another appeal in the future and potentially narrow the issues for trial"); *Smith*, 380 S.C. at 635 n.14, 670 S.E.2d at 688 n.14 ("Because the trial court's grant of summary judgment on the [one issue] is a final determination that is properly before this Court, we believe judicial economy argues for the resolution of Smith's arguments on [other issue] at this time."); *see also Morris v. Anderson Cty.*, 349 S.C. 607, 610, 564 S.E.2d 649, 651 (2002) (acknowledging the court's ability to "consider an unappealable order along with an appealable issue where such a ruling will avoid unnecessary litigation"). Indeed, a review of all issues here could eliminate the need for further proceedings, regardless of forum, or at the least narrow the issues for future proceedings.

Respondent claims that this argument "assumes this Court will rule in [Brookdale's] favor on all or one of the multiple arguments it makes as to the denial of its motion to dismiss." (Resp't Mot. 8.) Not so. As an initial matter, of course, if this Court holds that the motion to dismiss should have been granted, as Brookdale contends, then the case is over and substantial unnecessary litigation will be avoided. Even if the Court were to rule in Respondent's favor on some or all of the claims Brookdale seeks to dismiss, however, that ruling promotes judicial efficiency. First, this Court's ruling on certain discrete legal issues could help to streamline the issues for arbitration or further litigation, including later appeals by Brookdale; for instance, whether the wrongful death statute encompasses Respondent's negligence claim, or whether a claim for bystander liability is valid where the plaintiff only perceives the injury or death after

the incident causing it occurred. Second, if this Court applies the approach suggested by Respondent and declines to review the denial of the motion to dismiss, the result is simply to delay resolution of the substantive issues. These issues will surely present again. Thus, regardless of which party prevails, it clearly is most efficient for the Court to decide Brookdale's appeal of the denial of its motion to dismiss while the Court is already considering a related, appealable issue.

Likewise, Respondent's reasoning that Brookdale could seek further appeal of this Court's decision regarding the motion to dismiss, and cause the litigation to "last for years," as a reason for this Court to decline ruling on the merits, does not follow. Brookdale could just as easily seek certiorari on the arbitration issue as it could issues related to the motion to dismiss, and Respondent could do the same.

Regardless of this Court's ultimate determination of the issues on the merits, immediate review of both the motion to dismiss and the companion motion to compel arbitration would promote judicial economy by avoiding needless prosecution and defense of claims, and would further assure that this Court would not have to entertain these exact issues again in a subsequent appeal. Other than Respondent's apparent desire to avoid this Court deciding the legal sufficiency of her claims, there is no valid or logical reason for delay.

CONCLUSION

Brookdale respectfully requests that this Court determine that the trial court's denial of Brookdale's motion to dismiss is immediately appealable, deny Respondent's motion to dismiss, and direct Respondent to file her initial brief in accordance with Rule, 208(a) SCACR.[2]

[2] Brookdale does not oppose Respondent's Motion To Stay The Time For Filing Respondent's Initial Brief And Designation Of Matter Pending The Court's Decision on Respondent's Motion To Dismiss, filed contemporaneously with Respondent's Motion to Dismiss.

Respectfully submitted,

March 12, 2018

By: 

R. Gerald Chambers, Jr. (SC Bar No. 12065)
Carmelo B. Sammataro (SC Bar No. 69746)
Turner, Padget, Graham & Laney, P.A.
Post Office Box 1473
Columbia, SC 29202
Phone: (803) 254-2200
Fax: (803) 799-3957
GChambers@TurnerPadget.com
SSammataro@TurnerPadget.com

ATTORNEYS FOR APPELLANTS

OF COUNSEL:
Richard A. Simpson (pro hac vice)
Kimberly A. Ashmore (pro hac vice)
Wiley Rein, LLP
1776 K Street NW
Washington, DC 20006
Phone: (202) 719-7000
RSimpson@wileyrein.com
KAshmore@wileyrein.com

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2017-002241
Civil Action No. 2017-CP-10-03130

Stephanie Walker Weaver,.....Respondent,

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John Does and Richard Roe Corporations, Defendants,

Of whom Brookdale Senior Living, Inc., HBP LeaseCo, LLC
d/b/a Brookdale Charleston, and Terri Robinson are the..... Appellants.

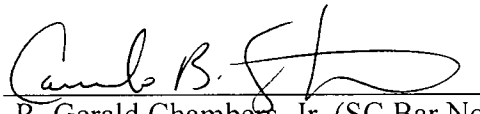
PROOF OF SERVICE

I certify this 12th day of March 2018 that I have served a copy of APPELLANTS' OPPOSITION TO RESPONDENT'S MOTION TO DISMISS ISSUE I (AND ITS SUBPARTS) OF APPELLANTS' INITIAL BRIEF AS UNAPPEALABLE upon other counsel of record, by mailing same, postage prepaid in the United States mail, addressed to the following:

Kenneth L. Connor, Esquire
C. Caleb Connor, Esquire
Connor & Connor, LLC
302 Park Avenue SE
Aiken, SC 29801

Eliza H. Cantwell, Esquire
Joshua P. Cantwell, Esquire
Cantwell Law Firm, LLC
P. O. Box 600
Charleston, SC 29402

ATTORNEYS FOR RESPONDENT

March 12, 2018 By: 

R. Gerald Chambers, Jr. (SC Bar No. 12065)
Carmelo B. Sammataro (SC Bar No. 69746)
Turner, Padget, Graham & Laney, P.A.
Post Office Box 1473
Columbia, SC 29202
Phone: (803) 254-2200
Fax: (803) 799-3957
GChambers@TurnerPadget.com
SSammataro@TurnerPadget.com
ATTORNEYS FOR APPELLANTS

OF COUNSEL:
Richard A. Simpson (pro hac vice)
Kimberly A. Ashmore (pro hac vice)
Wiley Rein, LLP
1776 K Street NW
Washington, DC 20006
Phone: (202) 719-7000
RSimpson@wileyrein.com
KAshmore@wileyrein.com

Turner | Padget

Carmelo B. Sammataro
E-mail: SSammataro@TurnerPadget.com
Writer's Direct Dial: (803) 227-4253
Writer's Direct Fax: (803) 400-1532

March 12, 2018

VIA HAND DELIVERY:

The Honorable Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Stephanie Walker Weaver v. Brookdale Senior Living, Inc., HBP LeaseCo, LLC d/b/a Brookdale Charleston, Terri Robinson, John Does and Richard Roe Corporations
Appellate Case No.: 2017-002241
File No.: 80.1593

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of Appellants' Opposition To Respondent's Motion To Dismiss Issue I (And Its Subparts) Of Appellants' Initial Brief As Unappealable regarding the above-referenced matter. Also enclosed are the original and one copy of the Proof of Service. Please file the original filings and return clocked copies to me via our office courier. Thank you for your assistance with this matter, and please contact me if you have any questions.

With kind regards, I am

Very truly yours,

TURNER, PADGET, GRAHAM & LANEY, P.A.

Carmelo B. Sammataro

CBS/tj
Enclosures

cc: Kenneth L. Connor, Esquire
C. Caleb Connor, Esquire
Eliza H. Cantwell, Esquire
Joshua P. Cantwell, Esquire
(w/enc.)