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Counter-Statement of Questions Presented

- I. Whether this court should refuse to issue a writ of certiorari when the petitioner has failed to assert, much less demonstrate, that it is entitled to the discretionary review it now seeks.
 - A. Whether this court should refuse to issue a writ of certiorari where the petitioner has failed to present any “special and important reasons” for further review.
 - B. Whether this court should refuse to issue a writ of certiorari where the petitioner has attempted to introduce new legal theories and appellate arguments that were not previously presented as issues on appeal.
- II. Whether this court should refuse to issue a writ of certiorari where the Court of Appeals and the circuit court both determined that the petitioner’s claimed damages were entirely too speculative and conjectural to be recovered in a judicial proceeding.
- III. Whether this court should refuse to issue a writ of certiorari to consider the petitioner’s “good faith and fair dealing” theory of breach when the petitioner never attempted to present that argument as an issue on appeal.

Counter-Statement of the Case

A. Underlying Facts

Morningstar Fellowship Church (Morningstar) purchased 52 acres of land in northeastern York County in September 2004 (the “Property”). The Property had formerly been owned by PTL Ministries and, at one time, had served as the headquarters of that vast organization, overseen by televangelist Jim Bakker. Following PTL’s highly-publicized collapse in the late 1980s, the Property changed hands several times before Morningstar purchased it. The Property contained several buildings and other structures left behind by PTL, including a vacant, incomplete and deteriorating high-rise condominium tower (the “Tower”).

Morningstar’s seller had previously committed to demolish the Tower and, when it sold the Property to Morningstar, inserted a provision in the parties’ contract which obligated Morningstar to complete the planned demolition within twenty-four months. R. at 137.

Morningstar's deed also contained an easement that would allow the Property's seller to re-enter the Property and demolish the Tower if Morningstar failed to do so. R. at 164.

In late 2004, Morningstar submitted a proposed development plan to York County which confirmed Morningstar's plans to demolish the Tower. That development plan called for demolition within two years following county approval of the plan. York County approved that development plan in January 2005. R. at 165.

Within months, Morningstar had changed course. In the fall of 2005, Morningstar announced plans to complete the Tower, rather than demolish it. Morningstar requested that York County approve plans for completion and renovation of the Tower, but York's County Council rejected that request on December 14, 2005. Id.

Nearly two years later, as Morningstar's self-imposed deadline to demolish the Tower approached, Morningstar proposed a comprehensive development agreement for the Property. Among other provisions, the proposed development agreement would afford Morningstar an opportunity finish and renovate the Tower. The county agreed, and on January 13, 2008, Morningstar and York County entered a formal development agreement (the "Development Agreement"). R. at 73-93. The Development Agreement provided a five (5) year schedule for development of the Property, including completion and renovation of the Tower. The Development Agreement also imposed interim completion "benchmarks" upon Morningstar, including one that provided:

Within 180 days of County approval of the commercial site plan for the Property, should [Morningstar] or its contractor be unable to obtain bid, performance and payment bonds from an A+ Best rated insurer, or letters of credit from a national bank or a substantial equivalent acceptable to County, then this Development Agreement shall be deemed null and void. At such time, the Tower shall be demolished, with all costs for its demolition borne by [Morningstar].

(R. at 77).

Even though the parties dispute whether York County properly and effectively conveyed its approval of Morningstar's commercial site plan, the record clearly establishes that York County approved Morningstar's plan on or about August 18, 2009. R. pp. 865-66; 874-75; 882-85; 945-48; 968-69; 1040; 1045. The record also establishes that Morningstar was unable to provide the county with any bid, performance or payment bond, letter of credit or other acceptable evidence of the financial viability of its project within 180 days of site plan approval. R. at 1030-34. On March 5, 2010, York County formally declared Morningstar in default of the Development Agreement. R. at 804-05.

B. Disposition in the Circuit Court and the Court of Appeals

On January 24, 2013, Morningstar sued York County, alleging that the county had breached the parties' Development Agreement. R. at 496-503. Morningstar's complaint included claims for breach of contract, declaratory judgment and for breach of the implied duty of good faith and fair dealing. *Id.* York County timely answered and asserted counterclaims for breach of contract, declaratory judgment, and nuisance. R. at 504-14.

In June 2014, York County moved for summary judgment or partial summary judgment as to Morningstar's claims. R. at 59. On July 16, 2014, the circuit court issued an order granting York County summary judgment on Morningstar's cause of action for breach of the covenant of good faith and fair dealing, but denying the County's motion as to the breach of contract claim. R. at 4.

In September 2014, York County moved for an order excluding Morningstar's claimed damages as a matter of law. R. at 274. For reasons that are not clear, that motion was not set for a hearing. Then, on January 23, 2015 (a few weeks before trial), York County also filed a separate motion *in limine* to prevent certain evidence, including evidence of settlement

discussions and mediation, from being introduced at trial. R. at 297. Both motions were heard by Judge Daniel D. Hall the week before trial was scheduled to begin.

On February 3, 2015, Judge Hall issued a single order granting the County's motion to exclude damages, and also granting much of the County's motion *in limine*. R. at 17-28. Of relevance to Morningstar's petition for writ of certiorari, Judge Hall found and concluded that Morningstar's claims for damages were based entirely on conjecture and speculation, were not supported by any competent or admissible evidence and were not established with any reasonable certainty. R. at 19-23. For that reason, Judge Hall ruled that Morningstar would be precluded from introducing any evidence of its claimed damages at trial. R. at 19. The trial court separately found that evidence of the parties' settlement discussions, mediation presentations and a public petition were neither relevant nor probative of any issue for trial, and should be excluded *in limine*. R. at 23-28.

Based upon Judge Hall's orders, and the trial court's exclusion of all of Morningstar's claimed damages, York County immediately moved for entry of judgment. R. at 440. That same day, Morningstar filed a notice of appeal. On April 16, 2015, the Court of Appeals dismissed Morningstar's appeal as interlocutory. *See* S.C. App. Order, filed April 16, 2015 (Case No. 2015-000262).

The case was remanded, and then, on October 22, 2015, York County renewed its motion for entry of judgment. R. at 482. On November 10, 2015, Judge Hall granted York County's motion, in part, and entered judgment against Morningstar on its breach of contract cause of action. R. at 31-35.

Again, Morningstar appealed. On June 13, 2018, the South Carolina Court of Appeals issued an unpublished opinion affirming the circuit court's judgment. *See* 2018-UP-250 (Ct.

App. June 13, 2018). Morningstar petitioned for rehearing. On August 16, 2018, the Court of Appeals denied that petition. *See* S.C. App. Order filed Aug. 16, 2018.

Considerations Governing Review

“A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted *only where there are special and important reasons.*” Rule 242(b) S.C.A.C.R. (emphasis added). Those reasons might include:

- (1) Where there are novel questions of law;
- (2) Where there is a dissent in the decision of the Court of Appeals;
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court;
- (4) Where substantial constitutional issues are directly involved;
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Id.

Arguments

“A writ of certiorari is an extraordinary form of relief that generally is used only in the absence of other effective relief.” Rowe v. City of West Columbia, 334 S.C. 400, 408, 513 S.E.2d 379, 382 (Ct. App. 1999)(citing Ray v. State, 330 S.C. 184, 186, 498 S.E.2d 640, 640 n.1 (1998)). Consequently, a party seeking a writ of certiorari carries a heavy burden of persuasion. Not only must the petitioner convince this court (or at least two justices) that the Court of Appeals’ opinion warrants further review, but it must also demonstrate that there are “special and important reasons” for this court to undertake that endeavor. Rule 242(b) S.C.A.C.R. In this instance, Morningstar has failed to meet its burden on either count and its petition should be denied.

I. Morningstar has failed to demonstrate that it is entitled to a writ of certiorari.

A. *Morningstar's has failed to present any "special and important reason" that this court should review the Court of Appeals' unpublished opinion in this case.*

South Carolina's appellate court rules plainly state that "a writ of certiorari is not a matter of right, but of sound judicial discretion." Rule 242(b) S.C.A.C.R. The writ will be granted only when "special and important reasons" exist. Id. Those reasons might include a need for this court to consider a novel issue of law, resolve an apparent conflict in judicial authority or address "substantial constitutional issues." Id. None of those considerations is present in this case and Morningstar has not even attempted to show that they are.

Morningstar does not contend that this case implicates important constitutional issues, because it does not. Nor does the Court of Appeals' unpublished opinion in this case conflict with any prior decision of this court, or with a prior decision of the United States Supreme Court. Morningstar cannot argue that there was a dissent in the Court of Appeals, because that court's decision was unanimous. Morningstar has not even suggested that the Court of Appeals' decision hinged on a novel question of law.

Morningstar's case against York County alleged a simple breach of contract based, primarily, upon its contention that York County did not properly communicate site plan approval to Morningstar. R. at 501. Its claims failed when the trial court determined that Morningstar's alleged damages were entirely speculative, conjectural and "not recoverable in this action as a matter of law." R. at 19. Neither Morningstar's claims nor the court's disposition of those claims hinged upon a novel question of law.

Simply put, there is no “special” or “important” reason that this court should devote its time, energy or resources to further review of this case. Morningstar has failed to demonstrate that it is entitled to the exceptional writ it seeks, and its petition should be denied.

B. Morningstar’s petition is an impermissible attempt to introduce new legal theories and appellate arguments, even though those arguments were never actually presented by Morningstar as issues on appeal.

Even if Morningstar had demonstrated “special and important reasons” that a writ of certiorari might be warranted, none of its “questions presented” is properly before this court. Rule 242(d)(2) mandates that “only those questions raised in the Court of Appeals *and* in the petition for rehearing shall be included in the petition for writ of certiorari.” (italics added). Despite this clear mandate, the “questions” that Morningstar has “presented for review” in this petition are not remotely similar to the issues presented in its appellate brief.

Morningstar’s appellate brief sets forth three issues on appeal:

- (1) whether the trial court improperly limited the scope of Morningstar’s breach of contract claim to “the facts pertaining to the reasonableness of [York County’s] notice of approval of the site plan”;
- (2) whether the trial court improperly excluded all of Morningstar’s damages evidence through its ruling on a motion *in limine*;¹ and
- (3) whether the trial court erred in excluding evidence of mediation discussions and statements made by individual county council members as evidence of the County’s breach of contract.

Appellant/Respondent’s Brief, Statement of Issues on Appeal. In sharp contrast, its petition for writ of certiorari attempts to present three *different* “questions” to this court:

¹ As York County has repeatedly pointed out in responding to Morningstar’s appeals, the trial court did not exclude Morningstar’s evidence of damages through an *in limine* ruling. Instead, the trial court made a dispositive ruling, which was based upon the record. See Respondent/Appellant’s Brief at 15-17.

- (1) whether the circuit court and Court of Appeals overlooked Morningstar's evidence of "monies already spent" in determining that Morningstar's damage claims were entirely speculative and conjectural;
- (2) Whether the Court of Appeals affirmed the trial court's judgment on Morningstar's breach of contract claim without considering "evidence of [the County's alleged] lack of good faith and fair dealing"; and
- (3) Whether the Court of Appeals overlooked "Morningstar's expert evidence" that, presumably, supported its claim of damages.

Each of the "questions presented" in Morningstar's petition was first introduced through the petition for rehearing that Morningstar filed in the Court of Appeals. By the time Morningstar filed that petition, of course, the Court of Appeals had already ruled upon the issues presented in Morningstar's appeal and had unanimously affirmed the circuit court's judgment. Morningstar's petition for rehearing was not a legitimate attempt to seek rehearing of some fact or issue that the Court of Appeals supposedly overlooked or misapprehended. *See* Rule 221 S.C.A.C.R. It was a last-gasp effort to salvage Morningstar's case by attempting to draw the Court of Appeals' attention to three new issues that, in hindsight, might have appeared more "winnable" to Morningstar and its newly-retained appellate counsel.² Because none of those issues had been presented during Morningstar's appeal, none of them was properly presented through its petition for rehearing. Herron v. Century BMW, 395 S.C. 461, 469, 719 S.E.2d 640, 644 (2011)("[A] party may not raise an issue for the first time in a petition for rehearing."). By the same token, none of those issues is properly before this court upon a petition for writ of certiorari.

South Carolina's rules of appellate procedure require a party to set forth, in its initial appellate brief, "each of the issues presented for review." Rule 208(b)(1)(B) S.C.A.C.R. (setting forth requirements for an appellant's initial brief). "Ordinarily, no point will be considered which is not set forth" in that statement. Id. Once initial briefs have been served, parties are not

² Donald L. Brown, Esq. entered an appearance in November 2017, more than a year after Morningstar filed its final appellate brief. *See* Docket Entries for Appellate Case 2015-002460.

allowed to change the substance of their appellate arguments. *See* Rule 211(b) S.C.A.C.R. (“The final brief(s) shall be identical to the brief(s) previously served under Rule 208. . . .”). Furthermore, when a losing party later seeks rehearing, that party is not permitted to introduce new arguments or issues for the court’s consideration. Kennedy v. South Carolina Retirement Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001)(quoting JEAN H. TOAL, ET AL, *APPELLATE PRACTICE IN SOUTH CAROLINA* 309 (1999)(citing Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E.2d 234 (1933)). In a similar vein, a litigant petitioning for a writ of certiorari is limited to “those questions raised in the Court of Appeals *and* in [the petitioner’s] petition for rehearing.” Rule 242(d)(2) S.C.A.C.R. (emphasis added). South Carolina’s appellate court rules do not permit parties to “test” varying issues or arguments at various stages of appeal in the hope of finding one that might, eventually, prove successful.

The “questions presented” in Morningstar’s petition do not remotely resemble the “issues” that Morningstar initially set forth as the bases for its appeal. This court should refuse to consider any of the “questions presented” in Morningstar’s petition, because those questions are not properly before this court.

II. Morningstar fails to recognize that its claimed damages – whether past, present or future – were too speculative and conjectural to be recovered in a judicial proceeding.

Morningstar’s petition focuses heavily upon the exclusion of its evidence of damages. First, Morningstar argues that both the Court of Appeals and the trial court focused solely upon its claims for future damages, without considering its claims for alleged “past” damages and expenditures. *See* Petition for Writ of Certiorari, Question I. Next, Morningstar argues that the trial court and Court of Appeals failed to consider so-called “expert” evidence of Eddie J. Brown, an engineer who prepared an estimate for Morningstar of the “work in place” of the

Tower.³ Id. Question III. As previously discussed, however, neither of these issues may be properly considered by this court because neither of them was an issue presented in Morningstar's appeal. *See* Rule 208(b)(1)(B) S.C.A.C.R. Nonetheless, even if this court were to consider the substance of Morningstar's arguments, those arguments are unavailing.

Morningstar's contention that the Court of Appeals focused exclusively on Morningstar's claim for "future" damages, while ignoring its claim for "past" damages, is incorrect. Both the trial court and the Court of Appeals considered all three components of Morningstar's claimed damages – its claim for "loss of value of the Tower" (\$11,889,719); its alleged incurred "cost[s] of engineering, marketing, architectural, legal and development" (\$819,460.89); and its claim for future "lost income . . . over the next five years" (\$7,187,421). *See* Trial Court Order at 2-7 (R. at 18-23); Ct. App. Op. 2018-UP-250, at 3. Both the trial court and the Court of Appeals concluded that Morningstar could not recover any of those alleged damages as a matter of law – not because they were premised upon uncertain future events, but because they were inherently conjectural, speculative and "not based on reasonable certainty." Trial Court Order at 3; 4; 7 (R. at 19; 20; 23); Ct. App. Op. 2018-UP-250 at id.

With regard to the so-called "expert report" of Morningstar's engineer, Eddie Brown, it is somewhat disingenuous for Morningstar to contend that the Court of Appeals "overlooked" that report, when the full report (assuming one exists) is not even in the record. In its petition, Morningstar directs this court's attention to page 408 of the record, but the document at page 408 is merely a summary "Statement of Probable Cost for Completion of 'Heritage Towers,'" not an expert witness' report or an affidavit. Moreover, the "Statement of Probable Cost (Salvageable Work in Place)" is a single line-item appearing on that page, with no back-up calculation or

³ Presumably, Mr. Brown's calculation is an estimate of what it would have cost Morningstar to replicate that which PTL left behind when it abandoned construction of the Tower.

explanation. The document on which that line-item entry appears was part of a pre-designated trial exhibit that the trial court determined was inadmissible because it was “information exchanged at mediation.” *See* R. at 25 (citing S.C.R. Evid. 408 and S.C. A.D.R. Rule 8). Morningstar’s present assertion that it considered Mr. Brown’s calculation “crucial” to its case is belied by its abject failure to present Mr. Brown’s analysis by affidavit or through his sworn testimony *at any stage* of these proceedings.

Courts are not obliged to scour a record in search of evidence that, presumably, supports a party’s position. *Cf. Jones v. Eaton Corp.*, 2017 WL 2332638, at *15 n.25 (D.S.C. 2017). If the report of Morningstar’s engineer was so critical to its case, Morningstar easily could have, and certainly should have, brought more attention to that evidence. At a minimum, Morningstar should have designated the engineer’s full report or affidavit for inclusion in the record, rather than rely upon a single line-item entry buried within another, inadmissible, document. Rule 209(b) S.C.A.C.R.

In any event, Mr. Brown’s “statement of probable cost (salvageable work in place)” would hardly qualify as admissible expert testimony. There is no indication that Mr. Brown’s “statement of probable cost (salvageable work in place)” was supported by verifiable facts or data. *See* Rule 703 S.C. R. Evid. There is no evidence that Mr. Brown was tendered, or qualified, as an expert witness in valuing “salvageable work in place.” *See* Rule 702 S.C. R. Evid. There is no evidence that Mr. Brown provided sworn opinion testimony within a reasonable degree of professional certainty. *Cf. Jamison v. Hilton*, 413 S.C. 133, 141, 775 S.E.2d 58, 62 (holding that expert testimony must be set forth with “reasonable certainty.”). The document appearing at page 408 of the record is neither an expert’s report nor is it admissible expert testimony.

Even if a qualified “valuation” expert *had* properly testified concerning the value of the “salvageable work in place,” that testimony would be irrelevant to the question of Morningstar’s alleged damages in this lawsuit. When Morningstar first acquired the land on which the Tower sits, it became the owner of a partially-completed and deteriorating structure that it was contractually obligated to demolish. Order for Partial Summary Judgment at 1 (R. at 4). Presumably, the “salvageable work in place” had some value. While Mr. Brown apparently calculated his estimate of that value (in 2010), Morningstar did not present any evidence that the value of the “salvageable work in place” decreased after the County declared Morningstar in default of the parties Development Agreement.⁴ Morningstar produced no evidence that it had suffered recoverable damages for “loss of the ‘salvageable work in place,’” as a proximate result of York County’s alleged breach. The trial court properly prohibited Morningstar from claiming damages for which it had no evidentiary support. R. at 19. The Court of Appeals also correctly ruled when it affirmed that decision. Ct. App. Op. 2018-UP-250, at 3.

Neither the trial court nor the Court of Appeals misapprehended or failed to consider any issue regarding Morningstar’s claimed damages. Morningstar is not entitled to a writ of certiorari, and its petition should be denied as to Questions I and III.

III. Morningstar’s “good faith and fair dealing” argument cannot form the basis for a writ of certiorari because the issue was not presented as part of Morningstar’s appeal.

Presumably, Morningstar does not challenge the circuit court’s dismissal of its stand-alone “good faith and fair dealing” cause of action. That cause of action was dismissed through an order granting York County partial summary judgment. *See* R. at 9-10 (citing Rotec Svcs. Inc. v. Encompass Svcs. Inc., 359 S.C. 467, 597 S.E.2d 881 (Ct. App. 2004)). Morningstar did

⁴ As the trial court noted, Morningstar’s own expert opined “that the cost to renovate and restore has not significantly increased due to any change in the building condition . . . between 2010 and present.” R. 19.

not appeal that portion of the trial court's order, and the trial court's determination as to that cause of action is the law of the case. Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 398, 593 S.E.2d 183, 189 (Ct. App. 2004)(“Any unappealed portion of the [circuit] court's judgment is the law of the case, and must therefore be affirmed.”).

It appears that Morningstar now focuses on the proposition that its “good faith and fair dealing” allegations, though dismissed as a separate cause of action, provided it another pathway to proving a breach of contract claim. *See* Petition for Writ of Certiorari, Question II. However, there are serious fallacies with this argument.

First, Morningstar overlooks that a breach of contract claim has three essential elements: (a) the existence of a contract; (b) its breach; and (c) damages caused by that breach. Hotel and Motel Holdings, LLC v. BJC Enterprises, LLC, 414 S.C. 635, 653, 780 S.E.2d 263, 272 (Ct. App. 2015). When Morningstar failed to produce any admissible evidence of damages, its breach of contract claim failed as a matter of law. There was no reason for the trial court to consider separately whether York County had performed “in good faith,” or whether those allegations provided Morningstar an alternative pathway to proving an alleged breach of the parties' contract. With no provable damages, Morningstar had no claim for breach of contract.

Morningstar's argument also sidesteps the fact that it was “within the purview of the circuit court to limit the issues [for trial] in the order granting partial summary judgment to York County.” Op. 2018-UP-250, at 2. The circuit court reviewed the extensive case record and considered the party's arguments before determining that the only material issue in dispute was “whether reasonable notice of approval was communicated, and knowledge of such approval was received, by Morningstar, either directly, or [through] its agent.” R. at 14. The circuit court's case management orders should not be “second-guessed” through a petition for writ of certiorari.

Most importantly, though, Morningstar's argument ignores that it *did not argue on appeal* that it was entitled to pursue a breach of contract claim based upon the County's alleged breach of the implied covenant of good faith and fair dealing. While Morningstar's appellate brief included some boilerplate mention of the implied covenant of good faith and fair dealing,⁵ its argument focused, almost exclusively, on its assertion that it should have been allowed to present evidence that York County failed to provide notice of site plan approval "pursuant to Section XI.H" of the Development Agreement and, thereby, breached the parties' contract. *See* Appellant/Respondent's Brief at 11-14. Morningstar now emphasizes the significance of its "good faith and fair dealing" theory of breach, but that was not an issue raised by Morningstar on appeal. For that reason, this court may not consider that argument through a writ of certiorari. Rule 242(d)(2) S.C.A.C.R. (petition for writ of certiorari is limited to "those questions raised in the Court of Appeals and in [the petitioner's] petition for rehearing.>"). This court should deny Morningstar's petition for writ of certiorari as to Question II.

CONCLUSION

Morningstar's petition for writ of certiorari should be denied in its entirety. Morningstar has failed to demonstrate any "special and important reasons" that this court should issue a writ of certiorari. Morningstar sued York County for breach of contract, but it failed to produce any admissible evidence of damages. For that reason, the trial court granted judgment in favor of York County. On appeal, the Court of Appeals affirmed the trial court's judgment in an unpublished, and unanimous, opinion. There is nothing novel or unique about the facts of this case, and there is nothing novel or unique about the manner in which the Court of Appeals disposed of Morningstar's appeal. The Court of Appeals' unpublished opinion does not conflict with any prior decision of this court, or with any prior decision issued by the United States

⁵ Appellant/Respondent's Brief at 10.

Supreme Court. There is simply no reason for this court to grant Morningstar's petition, and the petition should be denied as to all questions presented.



October 12, 2018

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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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OCT 16 2018

S.C. SUPREME COURT

APPEAL FROM YORK COUNTY
IN THE COURT OF COMMON PLEAS
The Hon. Daniel D. Hall, Circuit Court Judge
S. Jackson Kimball, Special Circuit Court Judge

AND FROM THE UNPUBLISHED OPINION OF THE COURT OF APPEALS
Unpublished Opinion No.: 2018-UP-250
Submitted March 1, 2018; Filed June 13, 2018

AND FROM THE SOUTH CAROLINA COURT OF APPEALS
Order Denying Petition for Rehearing
Filed August 16, 2018

MORNING STAR FELLOWSHIP CHURCH, PETITIONER

V.


YORK COUNTY, SOUTH CAROLINA, RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned, an employee of Hamilton Martens, LLC certifies that the Respondent's Return to Appellant's Petition for Writ of Certiorari was served upon other counsel of record by depositing same in the United States Mail with sufficient postage affixed and addressed as follows:

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