THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM OCONEE COUNTY
COURT OF COMMON PLEAS

The Honorable R. Scott. Sprouse, Circuit Court Judge

Appellate Case No.: 2019-002009

RECEIVED
JUN 02 2020
SC Court of Appeals

Jane Doe

Appellant,

v.

Oconee Memorial Hospital; Greenville Health System; Upstate Affiliate Organization; Kevin Docyk, M.D.; Mary Beth Hendricks,

Respondents.

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STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit Court err in granting summary judgment to Respondents prior Appellant having an opportunity to complete full and fair discovery?

II. Did the Circuit Court err in dismissing Appellant's claims as time-barred by the applicable statute of limitations?

INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

This is an appeal of the circuit court's October 31, 2019 Order dismissing all medical malpractice claims asserted by Plaintiff. This action is related to another action that was previously appealed to this Court.[1] *See Doe v. Oconee Memorial Hospital, et al.*, Appellate Case No. 2018-001480. Appellant's claims all arise out of a visit Appellant made to Oconee Memorial Hospital after she was sexually assaulted in Atlanta, Georgia and subsequently sought testing and assistance from Respondents the following morning.

In the early morning hours of December 5, 2015, Doe was drugged and sexually assaulted in Georgia. *See* Plaintiff's Complaint at 3. Doe then drove herself to her hometown hospital, Oconee Memorial Hospital, and reported that she had been sexually assaulted. *Id.* She reported that she had been assaulted and believed she also had been drugged to various hospital employees, including the Respondents in this case. *Id.* After requesting that the hospital perform a sexual assault forensic exam and transfer the specimens collected to law enforcement, Doe was attended to by the individual Respondents, Dr. Docyk and Nurse Hendricks, whom Doe understood to be a sexual assault nurse examiner ("SANE"). *Id.* A sexual assault forensic examination was performed and specimens were collected from Doe's body. *Id.* Blood was drawn and included as one of the specimens collected as part of the sexual assault forensic

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[1] This appeal is also related to Appellate Case No. 2019-002011, which is an appeal from the same circuit court order which dismissed both the tort claims asserted by the Appellant in this action as well as a separate medical malpractice action brought by Appellant in Civil Action No. 2019CP3700271. Appellant filed a separate appeal of the dismissal of her separate medical malpractice claims; however, all pending actions relate directly to the same events that occurred on December 5, 2015.

examination kit. *Id.* Medical tests were performed and Doe was subsequently prescribed a number of medications by Dr. Docyk. *Id.* at 4. Doe then requested that the Respondents transfer the specimens collected from her body to the appropriate law enforcement agency. *Id.* Accordingly, SANE Hendricks telephoned the Dekalb County Sheriff's Office in Georgia to report the assault and, upon information and belief, arrange for the transfer of the specimens currently in the possession and control of the Respondents. *Id.*

As alleged in Plaintiff's Complaint, the Respondents did not preserve and securely maintain the specimens collected from Doe's body until such time as those specimens could be transferred directly to law enforcement for examination. *Id.* Instead, the sexual assault forensic examination kit ("rape kit") was given directly to Doe. *Id.* Doe, who had been drugged and sexually assaulted and undergone an invasive sexual assault forensic examination that same day, was instructed that she was to take the kit to law enforcement in Georgia. *Id.* Doe then left the hospital, went to her home to shower and obtain clean clothing, and then drove the kit back to DeKalb County, Georgia. *Id.* In February 2016, Plaintiff was contacted by the investigating officer in Dekalb County, Georgia, who informed her that the rape kit did not include the blood sample Doe provided to the Respondents. *Id.* at 5. As a result, there was a lack of blood evidence to corroborate or prove Doe's belief that she had been drugged by her assailant. *Id.* Moreover, the law enforcement officer indicated that the absence of this specimen, combined with the break in the chain of custody when the rape kit was given to Doe by the Respondents, resulted in the decision to close the case. *Id.* at

5-6.

Doe instituted her first action against the Respondents by filing a Complaint on December 5, 2017, alleging that Respondents were negligent in failing to order necessary tests, in failing to properly collect and protect medical evidence of a sexual assault and in failing to ensure that the chain of custody for said evidence was maintained. *See* July 9, 2018 Order, pp. 1-2. Appellant also alleged a claim against Respondents for intentional infliction of emotional distress. *Id.* Appellant's claims all arose out of a visit Appellant made to Oconee Memorial Hospital after she was sexually assaulted in Atlanta, Georgia and sought testing and assistance from Respondents the following morning. *Id.*

Respondents filed a Motion to Dismiss Appellant's Complaint on January 10, 2018, arguing that Appellant had failed to plead facts sufficient to make out both the duty and damage elements of her various claims of negligence. *Id.* Respondents also argued that Appellant's claim for intentional infliction of emotional distress could not be recognized under the facts of this case. Appellant filed a Motion to Amend her Complaint on June 4, 2018 and a hearing on Respondents' Motion to Dismiss was held later that same day. *Id.* Following that hearing, on June 8, 2018, both Appellant and Respondents filed supplemental Memoranda regarding Respondents' Motion to Dismiss

The Court issued an Order on July 9, 2018 granting Respondents' Motion to Dismiss Doe's Complaint, including all claims set forth therein. *See* July 9, 2018 Order, pp. 1-9. The Court did not rule on Doe's motion to amend her complaint. *Id.* The Court's Order specifically provided, however, that its ruling

was "without prejudice to any future claims by the Plaintiff in a new action against the Defendant pertaining to different causes of action". *Id.* Doe timely appealed that Order and that appeal is still pending. *See* Notice of Appeal, pp. 1-2.

Appellant Doe then instituted the present action by filing a Notice of Intent to File Suit on December 5, 2018, noticing an intent to file suit on allegations that Respondents deviated from the recognized and generally accepted standard of care in multiple regards to Doe's visit to Oconee Memorial Hospital ("OMH") on December 5, 2015 and relating to both Respondents' treatment of Doe and the handling of a sexual assault forensic examination. Thereafter, Appellant filed her Complaint for medical malpractice on May 13, 2019, alleging claims against Respondent for medical malpractice for those same issues. Specifically, Doe alleged that OMH failed to properly secure and preserve specimens taken from Doe, failed to ensure that the chain of custody for said specimens, improperly transferred those specimens to Respondents instead of law enforcement, failed to properly preserve and test the blood collected, failed to enact proper policies regarding the collection, testing and securing of such specimens and failed to properly train employees regarding those same issues.

Respondents filed a Motion to Dismiss Appellant's Complaint on December 21, 2018, arguing that Appellant's medical malpractice claims were barred by the doctrines of Res Judicata and/or Collateral Estoppel. *See* Defendant's Motion to Dismiss, pp. 2-3. Respondents also argued that Appellant's claims were essentially the same as those dismissed in the previous

action. *Id.* Respondent's motion was heard by the court on March 9, 2019. Following that hearing, Respondents filed a supplemental Memorandum regarding Respondents' Motion to Dismiss on March 25, 2019. *See* Defendants' Supplemental Memorandum in Support of Motion to Dismiss, pp. 1-5.

The circuit court entered an Order on April 11, 2019, denying Respondents' Motion to Dismiss. *See* April 11, 2019 Order, p. 1. Respondents then filed a Motion for Reconsideration of that Order on April 17, 2019.[2] *See* Plaintiff's Motion for Reconsideration, pp. 1-4. Appellant filed a Memorandum in Opposition to Respondents' Motion for Reconsideration on April 22, 2019. *See* Plaintiff's Memorandum in Opposition, pp 1-3. After review of the pleadings, the circuit court entered an Order on May 8, 2019 denying all issues in Respondents' motion to reconsider except that of the statute of limitations that the Court indicated was to be treated as a motion for summary judgment and for which the court granted a *de novo* hearing. *See* May 8, 2019 Order, p. 1. On May 15, 2019, Respondents filed their Answer to Appellant's Complaint. *See* Answer, pp, 1-9. Therein, Respondents admitted that the Respondents had given Doe her own rape kit and instructed her to deliver it to Georgia by herself. *Id.*

Appellant served discovery on Respondents on January 17, 2019. Respondents failed to answer the discovery and on August 16, 2019, Appellant was forced to file a Motion to Compel. *See* Plaintiff's Motion to Compel, pp. 1-21. Respondents filed a Supplemental Memorandum in Support regarding Respondents' Motion to Dismiss/Motion for Summary Judgment on September

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[2] Respondents' motion also sought a stay of the present action pending resolution of the prior appeal. *See* Motion for Reconsideration, pp. 3-4

16, 2019. *See* Defendant's Supplemental Memorandum in Support, pp. 1-8. Appellant also filed a Memorandum in Opposition to Respondents' Motion for Summary Judgment on September 19, 2019. A *de novo* hearing was held on September 23, 2019. *See* Transcript, pp. 1-35. Following that hearing, Appellant and Respondents filed supplemental Memorandum regarding Respondents' Motion to Dismiss on September 27, 2019 and October 1, 2019. *See* Plaintiff's Supplemental Memorandum in Opposition, pp. 1-9. Defendants' Reply Memorandum in Support, pp. 1-6.

The circuit court entered a form order on October 17, 2019, granting Respondents' motion to dismiss and stating that a formal order would follow. *See* October 17, 2019 Order, p. 1. Appellant then filed a Motion for Reconsideration of that Order on October 25, 2019. *See* Plaintiff's Motion for Reconsideration, pp. 1-2. On October 31, 2019 a formal Order was entered granting Respondents' motion to dismiss as to all of Appellant's medical malpractice claims. *See* October 31, 2019 Order, pp. 1-7. The circuit court summarily denied Appellant's Motion for Reconsideration on November 4, 2019. *See* November 4, 2019 Order, p. 1. This appeal followed, with Appellant filing a Notice of Appeal on December 11, 2019. *See* Notice of Appeal, pp 1-10.

STANDARD OF REVIEW

The appellate court applies the same standard of review as the circuit court in reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). If the facts alleged and inferences reasonably deducible from the allegations set forth in the complaint,

viewed in the light most favorable to the plaintiff, entitle him to relief on any theory, dismissal under Rule 12(b)(6) is improper. *Id.*; *see also Flateau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 415 (Ct. App. 2003). "The question is whether, in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 149, 714 S.E.2d 537, 539 (2011). The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Doe v. Marion*, at 395, 645 S.E. 2d at 248; *Doe v. Bishop of Charleston*, 407 S.C. 128, 134, 754 S.E.2d 494, 497 (2014).

When reviewing a motion to dismiss for failure to state facts sufficient to constitute a cause of action, the pleadings must be construed liberally, and all well pled facts must be presumed true. *Charleston County School Dist. v. Harrell*, 393 S.C. 552, 557, 713 S.E.2d 604, 607 (2011). Questions of law are reviewed de novo. *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

ARGUMENT

The circuit court erred in granting summary judgment in favor of Respondents because (1) Appellant was not given a full and fair opportunity to complete discovery on all relevant issues prior to entry of the Court's Order and (2) Appellant's claims are not time-barred by the applicable statute of limitations.

I. The Circuit Court Erred in Granting Summary Judgment to Respondents Prior to Completion of Discovery.

"Summary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery."

Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003). In regard thereto, the South Carolina Supreme Court has expressly and clearly noted that "(s)ummary judgment is not appropriate where further inquiry into the facts of a case is desirable to clarify the application of the law." *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008); *citing Middleborough Horizontal Prop. Regime Council of Co-Owners & Montedison S.p.a.*, 320 S.C. 470, 479, 465 S.E.2d 765, 771 (Ct. App. 1995). "[T]he nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is not merely engaged in a 'fishing expedition.'" *Id.* Rule 56(f) of the South Carolina Rules of Civil Procedure further provides that a court may refuse to rule upon a motion for summary judgment until such time as discovery and depositions may be taken. *See* S.C.R.C.P. 56(c).

In the instant action, Appellant was not given a full and fair opportunity for adequate discovery, let alone to complete discovery, prior to entry of the circuit court's Order. More specifically, Appellant had no legitimate opportunity to conduct any discovery and other meaningful inquiry into a key allegation made by Respondents in support of their motion to dismiss/motion for summary judgment on grounds that Plaintiff's claims are barred by the applicable statute of limitations - that *all* Respondents, including Greenville Health System (hereinafter "GHS"), are "a governmental entity and healthcare facility within the meaning of the South Carolina Tort Claims Act." That claim was key to one of the main arguments made in favor of summary judgment - that the South

Carolina Tort Claims Act's two-year statute of limitations was applicable to Appellant's claims and barred same as not having been filed within that applicable period of time. Accordingly, Appellant was entitled to the opportunity to conduct full and fair discovery into that particular issue before Respondents' motion for summary judgment was ripe for adjudication.

Appellant served Respondents with her first set of discovery requests on January 17, 2019, which included Appellant's First Set of Interrogatories, Requests for Production, and Requests to Admit to Respondents. Respondents then served their responses to Appellant's Requests to Admit on January 24, 2019, but served no other responses whatsoever to Plaintiff's other requests until September 17, 2019, less than a week prior to the hearing on Respondents' converted motion for summary judgment. In fact, and evidencing just how little of an opportunity Appellant was given prior to entry of the circuit court's Order, just weeks prior to the hearing on their motion Respondents continued to argue they should not be required to engage in any discovery until <u>after</u> their motion for summary judgment was ruled upon. Any such argument, which was presented to the circuit court prior to ruling on Respondent's motion, flies directly in the face of established South Carolina law providing that summary judgment is appropriate only after the nonmoving party has been provided an adequate opportunity to complete discovery on the relevant issues and where further inquiry is not required to delve into the application of law, including the issue of whether or not the South Carolina Tort Claims Act, including its two-year statute of limitations, was applicable to Appellant's claims in this matter.

With Respondents providing their responses to Appellant's initial discovery requests regarding the basic facts at issue in this case less than a week prior to the circuit court granting summary judgment, it is clear that Appellant was given no opportunity, let alone a full and fair opportunity, for complete discovery on Respondents' claim that Respondents are a "governmental entity" under the South Carolina Tort Claims Act. In fact, Respondents never actually raised that claim until after Plaintiff served her first discovery requests in this matter in January of 2019. Thereafter, Respondents actually refused to participate in even the initial discovery requests Appellant served on Respondents. Accordingly, Appellant did not have a full and fair opportunity to serve additional discovery requests aimed at delving into the true status of Respondents and, accordingly, whether or not the South Carolina Tort Claims Act and its two-year statute of limitations is applicable to this matter, prior to entry of the circuit court's Order. Since further inquiry was needed into that particular issue raised by Respondents in support of their motion, summary judgment thereon was not ripe for adjudication and the circuit court's grant of same prior to an opportunity for such discovery was in error.

II. The Circuit Court Erred in Holding that Appellant's Claims Are Barred by the Statute of Limitations.

Appellant also contends that the circuit court's decision to grant summary judgment on grounds that Appellant's claims were time-barred was also in error as the applicable statute of limitations does not bar those claims because they relate back to the original action filed by Appellant on December 5, 2017. Respondents argued in support of their motion that a two-year statute of

limitations applied to Appellant's claims because the Respondents are a governmental entity and healthcare facility within the meaning of the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10 *et seq.* (1976, as amended), and are, therefore, entitled to all rights, privileges, defenses, limitations, and immunities afforded by the Act. If Respondents' argument, as accepted by the circuit court, is correct, a two-year statute of limitations applied to Appellant's claims, which all relate to conduct that occurred on December 5, 2015. Appellant filed her original complaint against Respondents on December 5, 2017, asserting causes of action for negligence, gross negligence, negligent supervision, and intentional infliction of emotional distress. Appellant then filed a motion to amend her complaint approximately six months later on June 4, 2018.

Rule 15(a) provides that when a party asks to amend her pleading, "leave shall be freely given when justice so requires and does not prejudice any other party." Rule 15(a), SCRCP. "This rule strongly favors amendments and the court is encouraged to freely grant leave to amend." *Parker v. Spartanburg Sanitary Sewer Dist.,* 362 S.C. 276, 286, 607 S.E.2d 711, 717 (Ct. App. 2005) (citing *Jarrell v. Seaboard Sys. R.R., Inc.,* 294 S.C. 183, 186, 363 S.E.2d 398, 399 (Ct. App. 1987)). "Rule 15(a) is substantially the same as the Federal Rule," Rule 15(a), SCRCP notes, and the Supreme Court of the United States has referred to the Rule's "freely given" provision as a "mandate" that "is to be heeded," *Foman v. Davis,* 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222, 226 (1962). The *Foman* Court continued:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an

> opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given."

Id. (citing Fed. R. Civ. P. 15(a)); accord *Forrester v. Smith & Steele Builders, Inc.*, 295 S.C. 504, 507, 369 S.E.2d 156, 158 (Ct. App. 1988).

Prior to the hearing on Respondents' motion to dismiss the prior December 5, 2017 action, Appellant filed her motion to amend her complaint in that matter. Unfortunately, however, the circuit court did not conduct argument on Appellant's motion to amend and did not rule on the motion. Rather, in a footnote, the circuit court simply acknowledged the motion to amend had been filed, but stated:

> In ruling on Defendant's 12(b)(6) motion, the Court was constrained by the facts alleged in Plaintiff's Complaint. The Court notes that approximately one hour prior to the hearing on June 4, 2018, and without any prior notice to Defendant, Plaintiff electronically filed a motion to amend her complaint. While Plaintiff's counsel briefly mentioned the motion to amend during the hearing, the merits of Plaintiff's motion were not properly before the Court and were not discussed. Further, the Court could not consider the merits of Plaintiff's motion to amend even it were inclined to do so, because no proposed amended complaint was ever submitted to the Court.

Had the circuit court addressed Appellant's motion to amend and allowed Appellant to submit a proposed amended complaint, additional claims, including those at issue in the pending action that were dismissed by the circuit court's Order, could have been included in the prior action.

The circuit court never considered Appellant's motion to amend. While

the South Carolina Supreme Court has consistently held that a circuit court's ruling on a Rule 15 motion to amend is within its discretion, a court's failure to exercise its discretion is itself an abuse of discretion. *State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) (quoting *Samples v. Mitchell*, 329 S.C. 105, 114, 495 S.E.2d 213, 218 (Ct. App. 1997)). Under Rule 15(a), the circuit court should have considered whether the Respondents were prejudiced by any proposed amendments, or whether there was some other substantial reason to deny an amendment of Appellant's original complaint. Instead, the circuit court denied the motion to amend based solely on the fact that it was filed shortly before the hearing on Respondents' motion to dismiss Appellant's original complaint. The circuit court's failure to grant and/or even properly consider Appellant's motion to amend is currently on appeal before this Court, along with the circuit court's grant of Respondents' motion to dismiss the original action filed by Appellant.

While the circuit court did not grant Appellant's motion to amend her original complaint, it did expressly state in the order dismissing Appellant's original complaint that such dismissal was "without prejudice to any future claims by the Plaintiff in a new action against the Defendant pertaining to different causes of action." Thus, the circuit court appeared to expressly acknowledge that Appellant had the right to bring a separate action for any additional claims she may have sought to include by way of a motion to amend. For those reasons, Appellant respectfully contends that the claims that were dismissed by the circuit court in the instant action as being time-barred, should relate back to the original

action. South Carolina Rule of Civil Procedure 15(c) provides:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading.
>
> An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Rule 15(c), SCRCP.

The circuit court's grant of summary judgment on Appellant's new claims, as provided in the circuit court's previous order dismissing Appellant's original complaint, because the statute of limitations has passed is clear error. As noted, the claims dismissed by the circuit court's Order at issue "arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings", as such, the new action "relates back to the date of the original pleading." In particular, Appellant's new claims arose out of the exact same conduct previously at issue in the original 2017 complaint and, in fact, the factual circumstances of those claims were already set out in the original 2017 complaint. No new information was required to assert those claims and Respondents were fully aware of the facts and the asserted claims. Therefore, under the principles espoused by Rule 15(c), the claims at issue in the circuit court's Order in the instant action relate back to the date of the original pleading

that was filed within the statute of limitations. *See also Thomas v. Grayson*, 318 S.C. 82, 456 S.E.2d 377 (1995) (purpose of Rule 15(c) is to salvage causes of action otherwise barred by statute of limitations). As such, Defendants' motion for summary judgment on the grounds that Plaintiff's claims are barred by the statute of limitations should have been denied.

CONCLUSION

For all of the reasons set forth above, Appellant respectfully requests that this Court grant Appellant's appeal in this matter and reverse the circuit court's October 31, 2019 Order granting summary judgment to Respondents on Appellant's claims.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
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The Honorable R. Scott. Sprouse, Circuit Court Judge

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PROOF OF SERVICE

I certify that I have mailed for filing the Appellant's Brief, by placing a copy of it into the U.S. Mail, postage prepaid, to the South Carolina Court of Appeals on May 28, 2020. I further certify that I have mailed the Appellant's Brief to the Respondents' attorney by depositing a copy of it in the U.S. Mail, postage prepaid, address to Kenneth N. Shaw, Haynsworth Sinkler Boyd, P.A. at Post Office Box 2048, Greenville, SC 29602.

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May 28, 2020

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VIA FACSIMILE
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Re: Jane Doe vs. Oconee Memorial Hospital, et al.
Appellate Case No.: 2019-002009

Dear Ms. Kitchings:

Enclosed please find the Appellant's Initial Brief and Proof of Service for filing in the above-referenced case.

Should you have any additional questions or concerns, please do not hesitate to contact me.

Sincerely,

Courtney C. Atkinson
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CCA/awr

Enclosure

cc: Kenneth N. Shaw, Esq.

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