THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
William H. Seals, Jr., Circuit Judge

Court of Common Pleas Case No. 2015-CP-26-07275
Appellate Case No. 2019-002001

BEI-BEACH, LLC,.....Plaintiff,

v.

MASHBURN CHRISTMAN, LLC;
LEND LEASE (US) CONSTRUCTION
INC., f/k/a Bovis Lend Lease, Inc.; and
MCRORY CONSTRUCTION COMPANY
LLC., ...Defendants,

Of whom

LEND LEASE (US) CONSTRUCTION
INC., f/k/a Bovis Lend Lease, Inc. is the.....Appellant,

v.

SPANN ROOFING & SHEET METAL, INC.,
TRAVELERS CASUALTY AND SURETY
COMPANY OF AMERCIA,
STRICKLAND WATERPROOFING COMPANY,
EVEREST REINSURANCE COMPANY,
WALLCRAFT CONSTRUCTION, INC., OLD
REPUBLIC INSURANCE COMPANY,
MADISON CONSTRUCTION GROUP, INC.,
WORTHINGTON INTEGRATED BUILDING
SYSTEMS, McDOWELL COMMERCIAL
CONSTRUCTION, LLC, JOLLAY MASONRY,
NATIONAL FIRE INSURANCE COMPANY
OF HARTFORD, R.J. KENNEY ASSOCIATES,
INC., ANTUNOVICH ASSOCIATES, TG
CONSTRUCTION, LLC, LUIS BANEGAS d/b/a
LUIS TRIM WORK, NORA DEL CARMEN
LAGOS, NORA DEL CARMEN LAGOS d/b/a

LUIS TRIM WORK, and OVATION CUSTOM TRIM, LLC., ... Third-Party Defendants,

Of whom

ANTONOVICH ASSOCIATES is the.....Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err as a matter of law in failing to recognize a contractor's independent cause of action for negligence/gross negligence/recklessness against an architect?

II. Did the trial court err as a matter of law in failing to recognize a special relationship between an Architect and a Contractor, which supports a cause of action for Breach of Warranty of Plans and Specifications?

III. Did the trial court err in finding a Contractor's claims against an Architect in a construction defect case are solely limited to a claim of equitable indemnity based on *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC*, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015)?

STATEMENT OF THE CASE

This is an appeal from the circuit court's grant of partial summary judgment in favor of Respondent Antunovich Associates ("Antunovich") by Order dated November 21, 2019 and the January 6, 2020 Order denying Appellant's Motion for Reconsideration. This claim was initiated by BEI-Beach, LLC ("BEI-Beach") on October 2, 2015 as Owner of The Market Common in Myrtle Beach, South Carolina. BEI-Beach, as Owner, sued Mashburn Christman, LLC, Lendlease (US) Construction Inc. f/k/a Bovis Lend Lease, Inc. ("Lendlease") and McCrory Construction Company, LLC on claims of breach of implied warranty and negligence/gross-negligence/ carelessness/ recklessness/ willfulness/ wantonness related to the construction of Buildings A-2, A-3, A-4, A-5, A-6, A-7, and A-8 of The Market Common ("Market Common A-Buildings").

Lendlease served as general contractor for the construction of buildings A6, A7 and A8. By way of Third-Party Complaint, Lendlease brought claims against Antunovich, who served as the Architect of Record for design and construction of the Market Common A-Buildings. Lendlease claims damages against Antunovich for costs of investigating BEI-Beach's claims, along with special and consequential damages, including damage to its business and business reputation under causes of action for contribution, negligence/gross negligence/recklessness, and breach of warranty of plans and specifications. The circuit court granted Antunovich's motion for partial summary judgment, ending Lendlease's claims for contribution, negligence/gross-negligence/recklessness and breach of warranty of plans and specifications. Lendlease moved for reconsideration pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure as to the Court's granting of summary judgment as to Lendlease's negligence/gross negligence/recklessness and breach of warranty of plans and specifications causes of action,

which was denied. Lendlease did not move for reconsideration as to its cause of action for Contribution. Lendlease filed its notice of appeal on December 3, 2019.

STATEMENT OF THE FACTS

BEI-Beach is the owner of a 113-acre mixed-use development complex, known as The Market Common, in Myrtle Beach, S.C. ("Project"). BEI-Beach purchased The Market Common Property on January 7, 2011 from LUK-MB1, LLC. LUK-MB1, LLC was the original development entity of the multiple residential/retail mixed use buildings known as the Market Common A-Buildings which were all designed by one (1) architect, Antunovich, and constructed by three (3) separate contractors, including Appellant. In 2005, Antunovich contracted with LUK-MB1, LLC to design the Market Common Project, including Buildings A2, A3, A4, A5, A6, A7 and A8. Antunovich prepared specifications and design documents for the Owner and for use by the general contractors during construction of the Project. Lendlease served as the general contractor for Buildings A6, A7 and A8, through its October 3, 2006 contract with LUK-MB1, LLC. As the general contractor, Lendlease relied on the specifications and design documents prepared by Antunovich.

As Architect of Record, Antunovich warranted that its design plans and specifications would comply with building code requirements, local rules, ordinances and regulations, and in compliance with industry standards. *See* Lendlease Amended Third-Party Compl. ¶ 131. (R. p. 46.) While the Owner has alleged multiple construction deficiencies for the Market Common A-Buildings against three (3) separate general contractors, the only constant variable among all the buildings alleged to have deficiencies by the Owner is the Architect, Antunovich.[1] For example,

[1] The Owner, BEI-Beach, LLC, moved to amend its Complaint and add direct claims against Antunovich Associates. The court denied BEI-Beach, LLC's motion to amend based on the expiration of the statute of limitations. BEI-Beach, LLC has not appealed that Order. BEI-Beach, LLC's proposed amended complaint was supported by the Affidavit of Scott Harvey, AIA. *See* Harvey Aff. (R. pp. 91-95.)

the vinyl windows specified by Antunovich in its architectural project plans were inappropriate for the designated wind zone design pressure requirements for the region in which the Market Common A-Buildings are located. *See* Moore Aff. ¶ 5 (R. p. 67); *see also* Harvey Aff. ¶ 5 (R. p. 93.) Despite questions from various Project participants regarding the designated design pressure ratings specified by Antunovich, Antunovich issued the final instructions and specifications with the erroneous design pressure ratings. *See* Harvey Aff. ¶ 11. (R. p. 94.)

BEI-Beach has sued Lendlease claiming damages caused by alleged defective construction and violations of building code requirements related to the design and construction of the Project. Under its contract with the prior Owner, Lendlease had no responsibility for the design of the Market Common A-Buildings.

STANDARD OF REVIEW

When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Turner v. Milliman*, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011). A trial court may properly grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; *see also Cullum Mech. Const., Inc. v. S.C. Baptist Hosp.*, 344 S.C. 426, 432, 544 S.E.2d 838, 841 (2001). Summary judgment is not appropriate, however, when further inquiry into the facts of the case is desirable to clarify the application of the law. *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000) (citing *Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997)). In determining whether any triable issues of fact exist, the court must view the evidence and all

reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Id.* (citing *Manning v. Quinn*, 294 S.C. 383, 365 S.E.2d 24 (1988)).

ARGUMENT

I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO RECOGNIZE A CONTRACTOR'S INDEPENDENT CAUSE OF ACTION FOR NEGLIGENCE/GROSS NEGLIGENCE/RECKLESSNESS AGAINST AN ARCHITECT.

Under South Carolina Law, in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina, including Architects, the claimant must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit. *See* S.C. Code Ann. §15-36-100 (B). Lendlease's Third-Party Complaint against Antunovich is supported by the Affidavit of Richard H. Moore, P.E. *See* Lendlease's Third-Party Complaint. (R. pp. 41-64.) According to Mr. Moore, the vinyl windows specified for the Market Common Project, Buildings A6, A7, and A8, were inappropriate for the designated wind zone design pressure requirements for the region in which the Market Common Project is located. *See* Moore Aff. ¶ 5. (R. p. 67.) In Mr. Moore's professional opinion, Antunovich's actions, as it relates to the performance of its obligations owed to the Owner ***and Contractor***, constitutes a breach of a design professional's standard of care and responsibilities. *Id. a*t ¶7. (R. p. 67.) (emphasis added).

In *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.,* our state Supreme Court recognized a duty owed by a design professional to a contractor, independent of any contract duties, not to negligently design or negligently supervise a project. 320 S.C. 49, 463 S.E.2d 85 (1995). The duty owed to the contractor is separate from the contractual duties and obligations owed by the Architect to an Owner in the traditional design and construction process.

As it relates to the Market Common Project, Lendlease has no contractual relationship with Antunovich; therefore, Lendlease has no recourse through contractual rights under a contract with Antunovich. South Carolina recognizes a special relationship between Architect and Contractor, which gives recourse to the Contractor against the Architect absent a contractual relationship. *Tommy*, 320 S.C. at 53-55, 463 S.E.2d at 87-88. A special relationship creates a duty of care outside the terms of any contract. *Id.* at 55. *see also State Ports Autho v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 346 S.E.2d 324 (1986) (tort action maintainable by third party against professional when duty exists).

Here, as the Architect of Record on the Market Common Project, Antunovich has a special relationship with Lendlease, as general contractor, and owes certain duties and obligations to Lendlease, including the obligation to specify building components that comply with local and national building codes. According to the sworn affidavit of Richard L. Moore, P.E., Antunovich breached the duty owed to Lendlease. *See* Moore Aff. ¶ 5. (R. p. 67.) Lendlease, through its third-party complaint, has asserted claims for professional negligence and breach of warranty of plans and specifications against Antunovich. Claims that independently survive under the law of South Carolina in the absence of a contractual relationship.

In its professional negligence cause of action, Lendlease, as the third-party Plaintiff, must prove that Antunovich failed to conform to generally recognized and accepted practices in the profession. *City of York v. Turner-Murphy Co., Inc., 317 S.C. 194, 425 S.E.2d 615 (Ct. App. 1994).* The affidavit of Mr. Moore supports Lendlease's allegation that Antunovich breached the duty of care owed to Lendlease on this project. *See* Moore Aff. ¶ 5. (R. p. 67.) Mr. Moore swears to the opinion that Antunovich acted in a way that is outside the generally recognized and accepted practices in the design profession. *See* Moore Aff. ¶¶ 6-7. (R. p. 67.) The laws of the State of

South Carolina provide that a tort action is maintainable by a third party against a design professional when a duty exists. *State Ports Autho.*, 289 S.C. 373, 346 S.E.2d 324 (1996). Having legally established the presence of a duty, and an alleged breach of that duty through the sworn affidavit of Mr. Moore, Lendlease must show its damages were proximately caused by Antunovich. Ordinarily, the question of whether proximate cause exists is one of fact for the jury. *Thomas Sand Co. v. Colonial Pipeline Co.*, 349 S.C. 402, 563 S.E.2d 109 (Ct. App. 2002). With the presence of a duty and evidence of a breach of duty having been met, to dispose of Lendlease's claim at the summary judgment stage is premature and an error of law on the part of the Court. Since the question of proximate cause is generally an issue of fact to be decided by the jury, the trial Court has effectively ruled that Antunovich owes no duty to Lendlease. The laws of our state have been established otherwise.

Lendlease, through its pleadings and submitted project documents, alleges to have incurred actual damages resulting from the professional negligence of Antunovich. No Lendlease representative has been deposed in this matter by Antunovich, the Plaintiff, or any other party. Antunovich argues that no evidence has been presented by Lendlease to establish damages independent from those sought against Lendlease by the Plaintiff. *See* Hearing Tr. at 18:10-19:12 (Oct. 30, 2019). (R. pp. 242-243.) However, Lendlease alleges such damages have been incurred and Lendlease representatives are expected to testify that Lendlease has incurred the following actual damages:

- Cost of windows purchased by Lendlease that do not meet required wind load requirements, which are now recommended for removal and replacement;

- Investigative fees paid to Richard H. Moore, P.E. to analyze the project documents and determine whether the windows specified and approved by Antunovich meet applicable building code requirements at the time of construction;
- Loss of business revenues as a result of pending construction defect claim.

The damages set forth above and alleged by Lendlease in its negligence cause of action are not derivative of the damages sought by Plaintiff. The cost of the windows purchased by Lendlease is supported by project file documents produced by Lendlease to all parties in the case. Lendlease has properly pled its cause of action for negligence and provided evidence that it can carry its burden of proof.

Antunovich further argues erroneously that the economic loss rule precludes Lendlease's recovery against Antunovich. In *Tommy*, the Supreme Court found that the trial judge erred in finding the doctrine of "economic loss" prohibited the plaintiff from maintaining a suit in tort for purely economic losses. *Id.; see also State Ports Autho v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 346 S.E.2d 324 (1986) (tort action maintainable by third party against professional when a duty exists). Lendlease's claim for professional negligence against Antunovich is not a masked indemnity claim. A design professional, such as an architect or engineer, owes a duty of care to a contractor, who has been employed by the same project owner as the design professional and who has relied upon the design professional's work product in carrying out his or her obligations to the Owner, notwithstanding the absence of privity of contract between the contractor and the design professional, due to the special relationship that exists between the two, and consequently, the contractor may, upon proper proof, recover purely economic damages in an action alleging professional negligence on the part of the design professional. *Eastern Steel*

Constructors, Inc. v. City of Salem, 209 W. Va. 392, 549 S.E.2d 266 (2001). The economic loss rule does not preclude Lendlease's claim of recovery against Antunovich.

For the reasons set forth above, the circuit court erred in granting summary judgment and denying Lendlease the opportunity to present its claim to a jury as to the extent of the damages incurred by Lendlease directly attributable to Antunovich. *See Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 186–87, 708 S.E.2d 787, 795 (Ct. App. 2011). Thus, the circuit court's grant of summary judgment in favor of Antunovich as to Lendlease's claim for professional negligence should be reversed.

II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO RECOGNIZE A SPECIAL RELATIONSHIP BETWEEN AN ARCHITECT AND A CONTRACTOR, WHICH SUPPORTS A CAUSE OF ACTION FOR BREACH OF WARRANTY OF PLANS AND SPECIFICATIONS.

In *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.,* the Supreme Court found that where there is a special relationship between the design professional and the contractor, the design professional may owe a duty to the contractor. 320 S.C. at 53-55, 463 S.E.2d at 87-88; *see also Cullum*, 344 S.C. at 433, 544 S.E.2d at 842. The Supreme Court further recognized a duty owed by a design professional to a contractor, independent of any contract duties, not to negligently design or negligently supervise a project. *Id.* Lendlease, through the affidavit of Mr. Moore, has presented evidence that Antunovich erred in preparation of the design documents given to Lendlease to rely upon in the construction of the Market Common Project. *See* Moore Aff. ¶¶ 6-7. (R. p. 67.) In its holding, the Supreme Court expressed that there was "no logical reason to insulate design professionals from liability when the relationship between the design professional and the [claimant] is such that the design professional owes a professional duty to the [claimant] arising separate and distinct from any contractual duties between the parties or with third parties." *Tommy,* 320 S.C. at 55, 463 S.E.2d

at 89 (citing *Gilliland v. Elmwood Properties*, 301 S.C. 295, 391 S.E.2d 577 (1990)); *State Ports Auth. v. Booz–Allen & Hamilton, Inc.*, 289 S.C. 373, 346 S.E.2d 324 (1986)). A special relationship creates a duty of care outside the terms of any contract. *Tommy,* 320 S.C. at 55, 463 S.E.2d at 85.

Whether a design professional owes a duty depends on the facts and circumstances of each case. *Id.* Lendlease did not contract with Antunovich, the Owner did. Lendlease did not pay Antunovich any money to perform design professional services on the Market Common Project, the Owner did. Lendlease's claims against Antunovich are not based on any contractual obligations or rights. Our courts have held that where there is a special relationship between an alleged tort-feasor and an injured party, not arising in contract, a breach of that duty will support tort action. *Tommy*, 320 S.C. 49, 463 S.E.2d 85. Here, Plaintiff has no claim against Lendlease for the cost of the original purchase of the windows, or for the cost incurred by Lendlease through Mr. Moore's investigation and recommendation for removal and replacement of the windows at the Market Common Project, or for the damage to Lendlease's business or business reputation. These damages are wholly owned by Lendlease through its causes of action against Antunovich for professional negligence and breach of warranty of plans and specifications. Lendlease's damages arise out of legally recognized claims that are separate and distinct from any claim Plaintiff has against Lendlease or any claim for recovery that Plaintiff has against Lendlease.

The record before the court shows more than a scintilla of evidence that a special relationship between Lendlease and Antunovich exists and that Antunovich's errors and omissions have breached its responsibilities to Lendlease, as general contractor, supporting Lendlease's cause of action for breach of warranty of plans and specifications. Thus, the circuit court's grant of

summary judgment in favor of Antunovich as to Lendlease's claim for breach of warranty of plans and specifications should be reversed.

III. THE TRIAL COURT ERRED IN FINDING A CONTRACTOR'S CLAIMS AGAINST AN ARCHITECT IN A CONSTRUCTION DEFECT CASE ARE SOLELY LIMITED TO A CLAIM OF EQUITABLE INDEMNITY.

If the Supreme Court of South Carolina wanted to limit a contractor's rights of recovery against an architect solely to equitable indemnity, the legal theory of breach of warranty of plans and specifications would not exist. However, our Supreme Court recognizes such a claim and the general contractor's right to rely on the design professional's expertise. *See Tommy*, 320 S.C. 49, 463 S.E.2d 85. Lendlease's claim for breach of warranty of plans and specifications against Antunovich stands separate and distinct from Plaintiff's claims against Lendlease. Antunovich relies solely on the Court of Appeals' decision in *Stoneledge*, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015), to support its position that any theory of liability of a contractor against the architect lies only under an equitable indemnity cause of action. *See* Hearing Tr. at 11:21-13:8. (R. pp. 235-237.) However, the Court of Appeals decision in *Stoneledge* arises out of the relationship between a general contractor and subcontractor, not the special relationship between that exists between a Contractor and an Architect. This distinction is significant.

In *Stoneledge*, a townhome association brought action against a general contractor alleging construction defects, and the contractor crossclaimed against the subcontractor for negligence and equitable indemnity. 413 S.C. 615, 776 S.E.2d 426. In granting summary judgment against the contractor on its crossclaims, the circuit court held that the general contractor's negligence crossclaim against the subcontractor did not constitute an independent cause of action from its equitable indemnity claim. *Id.* In its holding, the circuit court relied on its findings that the contractor did not sustain its own damages as a result of any negligence by the subcontractor and

the townhome association was the only party that suffered damages as a result of the subcontractor's negligence. *Id.* at 621, 776 S.E.2d at 429. The basis for the Court of Appeals' decision is premised on the fact that any recovery the Owner may have against a general contractor, like Lendlease, would naturally flow down to the subcontractors engaged by the general contractor to actually perform the work alleged to be deficient by the Owner.

Unlike *Stoneledge*, the claims Lendlease has against Antunovich are not only separate and distinct from those of the Plaintiff, but Lendlease also incurred separate and distinct damages from those of the Plaintiff. As discussed above, Lendlease did not contract with Antunovich or pay Antunovich any money to perform design professional services on the Market Common Project. Plaintiff moved to amend its Complaint to add direct claims against Antunovich, but the Plaintiff's motion to amend was denied as being barred by the applicable three-year statute of limitations. Lendlease's claims against Antuonvich are not based on any contractual obligations or rights. Further, Lendlease's damages are not derivative of the damages sought against it by the Plaintiff. Contrastingly, in *Stoneledge*, the contractor's claims were based on the contractor's obligations and rights it had with the townhome association, the Plaintiff.

Furthermore, Lendlease's claim against Antunovich are distinguishable from the claims disposed of in *Stoneledge* because Lendlease's claims against Antunovich arise out of an independent duty on the part of Antunovich to provide plans and specifications with the expectation that those plans and specifications would be relied upon by the Contractor. The evidence presented by Lendlease, by way of Affidavit of Mr. Moore, demonstrates that Antunovich breached the warranty of plans and specifications owed to the Contractor as Architect of Record. *See* Moore Aff. (R. pp. 65-68.) The warranty of plans and specifications is not an

obligation that flows between a contractor and subcontractor and was not a cause of action before the Court in *Stoneledge*.

By preparing the plans and specifications for The Market Common Project, Antunovich warranted their sufficiency for Lendlease's use. *Tommy*, 320 S.C. at 56, 463 S.E.2d at 89. If a party furnishes plans and specifications for a contractor to follow in a construction job, the party impliedly warrants their sufficiency for the purpose in view. *Id.* According to Mr. Moore, the vinyl windows specified by Antunovich for The Market Common Project, Buildings A6, A7 and A8, were inappropriate for the designated wind zone design pressure requirements for the region in which the Project is located. *See* Moore Aff. ¶ 5. (R. p. 67.) The improper designation of design pressure requirements violates the applicable building code and therefore are not sufficient for Lendlease's use. *See* Moore Aff. ¶ 5. (R. p. 67.) As a result, Antunovich breached its warranty of plans and specifications to Lendlease.

An architect is generally liable for foreseeable consequences of the failure to exercise reasonable care in preparation of architectural design. *See Hill v. Polar Pantries*, 219 S.C. 263, 64 S.E.2d 885 (1951). It is foreseeable that a contractor will rely upon the architect's design in construction of a building. Thus, an architect is liable to a contractor when the design plans and specifications are faulty and defective. *Id. Polar Pantries* is noteworthy for the Supreme Court's adoption of language regarding the furnishing of plans and specifications, and the broader affirmation that the person holding himself out as specially qualified impliedly warrants that the work he undertakes will be of proper workmanship and reasonably fit for the intended use. 219 S.C. 263, 64 S.E.2d 885; *see also* 7 S.C. Jur. *Architects and Engineers* § 19. Lendlease's claim against Antunovich for breach of warranty of plans and specifications is recognized by the Supreme Court, is separate and distinct from the claims of the Plaintiff and caused damages to

Lendlease independent of having to defend the lawsuit against it. *Stoneledge*, at 622, 776 S.E.2d at 430 (*citing Addy v. Bolton*, 257 S.C. 28, 183 S.E.2d 708 (1971)).

CONCLUSION

For all the above reasons, Appellant Lendlease (US) Construction Inc. respectfully requests that this Court reverse the circuit court's grant of summary judgment to Respondent Antunovich Associates on November 21, 2019 and further reverse the circuit court's January 6, 2020 denial of Appellant's Motion for Reconsideration.

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June 29, 2020

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Third-Party Defendants,

Of whom

ANTONOVICH ASSOCIATES is the Respondent.

CERTIFICATE OF COUNSEL

Undersigned counsel hereby certifies that this Final Brief complies with Rule 211(b).

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