THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM BARNWELL COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

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Appellate Case No.: 2021-000596
Case No.: 2021-CP-06-00028

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Ashley Whitehead, individually and as
Guardian ad Litem for Brantley W.,
a minor under the age of fourteen (14) years
and William B. Whitehead, Appellants,

v.

Barnwell School District 45, Respondent.

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# FINAL BRIEF OF APPELLANTS

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## STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in dismissing Ashley and William Whitehead's individual claims for their own emotional distress.

## STATEMENT OF THE CASE

This case is about two things. On the one hand, it is about the emotional distress of Brantley, a four-year-old boy who was traumatized when the Respondent's school bus driver dropped him off at the wrong location, alone and unsupervised in an unfamiliar parking lot for a significant period of time, until he was finally found and reunited with his parents. (R. p.9, ¶6). On the other hand, it is about the emotional distress of Brantley's parents, Ashley and William Whitehead, who entrusted the safety, well-being, and physical custody of their four-year-old son to the school district and were traumatized when the school district lost their child, his whereabouts, safety and well-being unknown to them, while they frantically searched to find him. (R. p.9, ¶6). This appeal involves only the part about the parents.

At the time of this incident, Brantley was a student attending Respondent's school and was a bus rider. (R. p.9, ¶6). Prior to this incident, the Whiteheads informed the school district that Brantley should be delivered after school to Creation Station, a local daycare center. (R. p.9, ¶6). On September 11, 2020, when Brantley was not timely delivered to his daycare center, a daycare worker called his mother. (R. p.9, ¶7). At that point, his mother, in a terror-stricken state fearing that her young son was forever lost, called her husband and both began frantically searching. (R. p.9, ¶7). They both suffered the direct injury of losing their child for a significant period of time while his whereabouts, safety and well-being were unknown because the school district lost him; all control had been stripped from Brantley's parents.

Fortunately, the minor was ultimately located and returned to his parents, but the emotional trauma had already been caused to both Brantley and his parents. As a result, the Whiteheads filed their Complaint against the school district. (R. pp. 7-11). Ashley Whitehead, as GAL for Brantley, asserted a negligence cause of action on Brantley's behalf. (R. pp. 7-11). Ashley and William Whitehead, in their individual capacities, each asserted negligence claims against the school district for medical expenses incurred on behalf of Brantley as well as damages for the emotional distress, manifested by physical symptoms, they each sustained as a result of the school district's negligence in losing their child. (R. pp. 7-11).

In response to the Whiteheads' Complaint, the school district filed a motion to dismiss the entire action pursuant to Rule 12(b)(6), SCRCP. (R. pp. 12-13). The circuit court heard arguments on April 1, 2021. (R. pp. 38-60). At the conclusion of arguments, the court instructed counsel for each party to submit proposed orders within 30 days. (R. p.21). On April 5, 2021, the Respondent submitted its proposed order. (R. pp. 61-65). On April 16, 2021, Appellants submitted their proposed order. (R. pp. 65-68). On May 10, 2021, the circuit court issued its order denying the school district's motion to dismiss Brantley's negligence claim and the parents' negligence claim for medical expenses incurred on behalf of Brantley but granting the motion to dismiss the parents' individual claims for emotional distress. (R. pp. 2-6). This appeal therefore involves only the parents' individual claims for emotional distress.

## STANDARD OF REVIEW

When reviewing the dismissal of a claim pursuant to Rule 12(b)(6), SCRCP, the appellate court must apply the same standard of review as the trial court:

> In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. 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. Dismissal under 12(b)(6) is improper if the facts alleged and inferences reasonably deducible from them, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory. Moreover, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action.

Capital City Ins. Co. v. BP Stuff, Inc., 382 S.C. 92, 674 S.E.2d 524 (Ct. App. 2009)(citing Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007); Plyler v. Burns, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007)). Therefore, "the trial court's grant of a motion to dismiss will be sustained only if the facts alleged in the complaint do not support relief under any theory of law." Id. (citing Ashley River Props. I, LLC v. Ashley River Props. II, LLC, 374 S.C. 271, 278, 648 S.E.2d 295, 298 (Ct.App. 2007)).

## ARGUMENT

The circuit court held that the parents' individual claims for emotional distress could not survive because they could not meet the elements of bystander liability recognized in Kinard v. Augusta Sash & Door, 286 S.C. 579, 336 S.E.2d 465 (1985). (R. pp. 2-6). The implication of the circuit court's ruling is that Kinard essentially overruled the cases upon which the Appellants rely, namely Mack v. South-Bound R. Co., 52 S.C. 323, 29 S.E. 905 (1898), Spaugh v. Atlantic Coast Line R. Co., 158 S.C. 25, 155 S.E. 145 (1930), and Padgett v. Colonial Wholesale Distrib. Co., 232 S.C. 593, 103 S.E.2d 265 (1958). (R. pp. 2-6). What the circuit court failed to appreciate is that the bystander analysis adopted in Kinard does not apply to the facts of this case because the Whitehead parents were not mere bystanders; rather, they were direct victims of the Respondent's

negligence. Kinard, as well as Doe v. Greenville County School District, 375 S.C. 63, 651 S.E.2d 224 (2007), also relied upon by the circuit court, are therefore inapplicable, and the circuit court erred in applying the holdings of those cases to these facts. The circuit court should have applied the longstanding line of cases, namely Mack, Spaugh, and Padgett, which clearly recognize a negligence cause of action for shock, fright and emotional upset experienced by direct victims of the negligent conduct, even when there is no physical impact, provided that there is some physical manifestation of the emotional trauma.

**A. Mack, Spaugh and Padgett make it clear that the circuit court erred in dismissing the parents' individual negligence claims for emotional distress.**

This long-standing body of law finds its genesis in the 1898 Supreme Court decision of Mack v. South-Bound R. Co., 52 S.C. 323, 29 S.E. 905 (1898). In Mack, a young boy was almost struck by a train as he was attempting to move his mule off the railroad track. There was no physical impact between the train and the young boy. Suit was brought on behalf of the boy against the railroad company for negligence in causing injury to the boy. Specifically, the boy "was terribly frightened, his nervous system was shocked, his mind was affected and particularly destroyed, his reason unbalanced, and he for a long time was made ill and sick, and suffered great mental anguish and physical pain, arising from the terrible shock to his nervous system and the fright he received." Id. The question before the court was whether the railroad company was "liable for injuries sustained in consequence of fright caused by its negligence." Id. The court analyzed the issue in detail:

> Danger excites alarm. Few people are wholly insensible to the emotion caused by imminent danger, though some are less affected than others. It must also be admitted that a timid or insensitive person may suffer, not only in mind, but also in body, from such a cause. Great emotion may, and sometimes does, produce physical effects. The action of the heart, the circulation of the blood, the

> temperature of the body, as well as the nerves and appetite, may all be affected. A physical injury may be directly traceable to fright, and so may be caused by it. We cannot say, therefore, that such consequences may not flow proximately from unintentional negligence; and, if compensation in damages may be received for a physical injury so caused, it is hard, on principle, to say why there should not also be a recovery for the mere mental suffering, when not accompanied by any perceptible physical effects.

Id. Ultimately, in holding that Mack, the young boy, could recover for the mental anguish he suffered, the court further explained:

> The nerves and nerve centers of the body are a part of the physical system, and are not only susceptible of lesion from external causes, but are also liable to be weakened and destroyed from causes primarily acting upon the mind. If these nerves, or the entire nervous system, are thus affected, there is a physical injury thereby produced; and if the primal cause of this injury is tortious, it is immaterial whether it is direct, as by a blow, or indirect, through some action upon the mind.

Id.

In the 1930 case of Spaugh v. Atlantic Coast Line R. Co., 158 S.C. 25, 155 S.E. 145 (1930), the court addressed the same issue in a different fact scenario. Mr. and Mrs. Spaugh resided in the town of Holly Hill with their infant children and Mrs. Spaugh's invalid mother. The Spaughs left their children and Mrs. Spaugh's invalid mother with a caregiver for the day and traveled to Florence. When Mr. Spaugh learned that he needed to stay overnight in Florence, they purchased a train ticket for Mrs. Spaugh, and an employee of the railroad company specifically told them that the ticket would return Mrs. Spaugh to Holly Hill that same evening. However, after her husband left and Mrs. Spaugh boarded the train, she learned that the connecting train would not deliver her to Holly Hill until the following morning. Mrs. Spaugh was forced to disembark the train, frantic about how she could make it home to care for her infant children and invalid mother. After some time of being stranded alone in an unfamiliar place, a traveling man gave her a ride to another

town in the direction of Holly Hill "where she remained for some time, sick and greatly distressed, fearing that her infant children and invalid mother would have to spend the night alone." Id. Finally, a farmer offered her a ride to Holly Hill, "where she arrived sick and almost a nervous wreck." Id. Mrs. Spaugh subsequently brought a negligence action against the railroad company claiming damages for emotional distress. Although the defendant argued that Mrs. Spaugh could not recover in the absence of a physical impact, the court held otherwise:

> In order to receive bodily injury, it was not necessary that the Plaintiff should lose a limb or receive a broken limb, or to have wounds inflicted on her body. Having her nervous system injured and being made sick constitutes bodily injury, and for which she should be entitled to receive damages in proportion to such injury, provided the proof establishes **negligence on the part of Defendant's agent in misinforming the Plaintiff or the Plaintiff's husband, acting for her**, as to the train schedules between the points in question, **and such negligence caused the alleged injury complained of.**

Id. (citing Shepherd v. Southern Ry. Co., 135 S.C. 75, 133 S.E. 231; Milhans v. Southern Ry., 72 S.C. 442, 52 S.E. 41; Taber v. Seaboard Air Line Ry., 81 S.C. 317, 62 S.E. 311; Taber v. Seaboard Air Line Ry., 84 S.C. 291, 66 S.E. 292; Murrell v. Charleston & W.C.R. Co., 115 S.C. 228, 105 S.E. 350; Entzminger v. Seaboard Air Line Ry., 79 S.C. 151, 60 S.E. 441; and Campbell v. Seaboard Air Line Ry., 83 S.C. 448, 65 S.E. 628). Significantly, the court focused on the duty the defendant owed to Mrs. Spaugh to provide accurate information, thereby making her a direct victim of the defendant's negligence. As such, the court allowed her negligence claim for mental distress, with physical manifestation, without any requirement of a physical impact.

In 1958, the court faced the same issue in Padgett v. Colonial Wholesale Distributing Co., 232 S.C. 593, 103 S.E.2d 265 (1958). When Mr. Padgett was sitting in his living room watching television, Defendant's liquor truck collided with Mr. Padgett's house. Mr. Padgett was neither

struck by the truck nor did he suffer any physical injury as a direct result of the collision with his house. Rather, he suffered shock and fear for his well-being that he claimed manifested itself in physical symptoms. As a result, he sued for negligence. Obviously, the driver of the truck owed Mr. Padgett a duty of care in operating his vehicle, and he breached that duty by failing to exercise due care. The question before the court was whether Mr. Padgett could recover for emotional damage when he suffered no physical impact that resulted in an actual physical injury. Relying on Mack, Spaugh and other similar cases, the court held that Mr. Padgett could recover for damages for emotional distress that manifested itself with physical symptoms, even in the absence of a physical impact. Id.

This line of cases involved plaintiffs whose injuries resulted **directly** from the defendant's negligence: Mack was almost hit by a train; Spaugh was delivered to the wrong location and was therefore prevented from getting home in a timely fashion to care for her infant children and incapacitated mother; Padgett was inside his house when it was struck by a truck. These three cases do not involve bystanders who witnessed injury to another; rather, the plaintiffs were the **direct** victims of the negligence. The respective defendants owed the respective plaintiffs a duty of care and the emotional injury in each case arose out of the defendant's breach of the duty of care. In fact, Spaugh illustrates perfectly that both the minor and his parents have viable claims in the pending litigation. Ms. Spaugh is like Brantley, the four-year-old in this case, because she was left alone in an unknown place without any funds to make her way home. As a result, she experienced fear for her own well-being just as the minor did here. In addition, Ms. Spaugh is like Mr. and Mrs. Whitehead, Brantley's parents, because Ms. Spaugh's minor children and invalid mother were in essence lost to her because she could not make it home; she lost all control over

insuring their safety. As a result, she experienced fear for their well-being just as the Whitehead parents experienced fear for Brantley's well-being during the time he was lost to them. Mrs. Spaugh experienced **direct injury** in two separate ways and was allowed to recover for both.

Here, the Whitehead parents were not bystanders who witnessed a physical injury to someone else; rather, they were the direct victims of the school district's negligence. The school district owed them a duty of care to properly supervise their minor child. The Whitehead parents entrusted their minor son to the school district, and the school district owed them, the parents, a duty of care to properly supervise the minor. When the parents were notified that the school had lost their child, they directly suffered emotional distress as a result of losing physical custody of their child and losing the ability to keep him safe because his whereabouts were unknown. Because the Whitehead parents were direct victims of the Defendant's negligence, the analysis ends with Mack, Spaugh, and Padgett. The bystander analysis simply does not apply, and the circuit court erred in holding otherwise.[1]

**B. Kinard did not overrule the Mack, Spaugh, and Padgett line of cases and is wholly inapplicable to these facts.**

By applying Kinard v. Augusta Sash & Door, 286 S.C. 579, 336 S.E.2d 465 (1985) and Doe v. Greenville County School District, 375 S.C. 63, 651 S.E.2d 224 (2007) to these facts, the circuit court essentially held that Mack, Spaugh, and Padgett are no longer good law. In fact, the circuit court seemed make a correlation between the age of those cases and the court's belief that

[1] In its Motion to Dismiss, the school district argued that the Whiteheads' individual claims should be dismissed because they did not sustain a physical injury. However, in their Complaint, the Whiteheads alleged the manifestation of physical symptoms as a result of the mental injuries they sustained. While the circuit court order does not seem to rely on any lack of physical manifestation, Appellants submit that in the context of the Motion to Dismiss, the allegations of the Complaint are sufficient to survive a motion to dismiss on this ground and to the extent the circuit court order is based on that argument, the circuit court erred.

the cases are no longer good law, at least in part because of their age. (R. p.4, p.52 lines 15-25; p.53 lines 1-23). However, Kinard and Doe are not inconsistent with the prior cases and certainly did not overrule them; rather, both Kinard and Doe are bystander claims and wholly inapplicable here. In Kinard, a mother and daughter were driving in their vehicle when a load of roof trusses fell from the Defendant's truck and crushed them. Kinard, 286 S.C. 579, 336 S.E.2d 465 (1985). Both mom and daughter were severely physically injured and the daughter was left severely disabled. The mother claimed damages not only for her own personal injuries but also claimed damages for severe shock and emotional trauma as a result of witnessing severe physical injury to her daughter. The issue before the court was whether it should allow the mother's action for negligent infliction of emotional distress as a result of witnessing her daughter being crushed by roof trusses. The court held that the cause of action should be allowed for certain bystanders and set forth elements that must be met for a bystander's claim to succeed. Id.

The purpose of the elements is to limit the class of persons who can collect damages as a result of injuries actually sustained by another. In other words, in the context of her claim for emotional distress suffered in witnessing her daughter sustain physical injuries, the mother was not a direct victim of the negligence but rather a bystander. The court in Kinard did **not** hold that direct victims have no claim for emotional distress manifested by physical symptoms. Rather, the court recognized a new cause of action for negligent infliction of emotional distress for certain bystanders. The reason for the strict elements is to limit the group of people who qualify as bystanders, not to strip a negligence cause of action from the direct victim of the negligence.

Perhaps most significantly, a close review of Kinard reveals that the court did not even mention Mack, Spaugh or Padgett. Id. The court did not need to mention them because they were **not** bystander claims and did not apply to the facts before the court in Kinard. Kinard,

decided in 1985, in **no way** overrules Mack, Spaugh or Padgett. In fact, in 2003, 18 years after Kinard, our Supreme Court relied on Mack, Spaugh and Padgett in the case of Bray v. Marathon Corp., 356 S.C. 111, 588 S.E.2d 93 (2003). Bray, an employee, was operating a compactor when the equipment malfunctioned. As a result of the defect, Bray's co-worker was crushed to death. Bray filed a products liability action against the manufacturer of the equipment asserting strict liability and negligence causes of action that allegedly caused Bray to suffer emotional trauma. Bray sustained no physical impact. In its strict liability analysis, the court held that "the bystander analysis of Kinard does not apply to a strict liability claim" because "[a] user of a defective product is not a mere bystander but a primary and direct victim of the product defect." Id. For that reason, "there is no need for a limitation on foreseeable victims to avoid disproportionate liability as was found necessary in the bystander setting." Id. Moreover, in its negligence analysis, the court specifically looked all the way back to Mack, Spaugh and Padgett in holding that the Court of Appeals erred in holding that Bray could not recover under a negligence cause of action. Rather, she was a foreseeable victim to whom the manufacturer owed a duty of care. The court reasoned that as a user of the product, Bray was a foreseeable victim under either claim. In other words, she was not a mere bystander, but a direct victim because she was the user of the equipment. Therefore, Kinard was inapplicable and the bystander analysis was not necessary because Bray was already within the class of foreseeable plaintiffs. Here, the Whitehead parents whose child was lost by the Respondent were not mere bystanders but were primary and direct victims of the Respondent's negligence; they were already foreseeable victims of the school district's negligence. The court's analysis in Bray not only is proof that Mack, Spaugh, and Padgett are alive and well, but is also proof that Kinard has no applicability to these facts.

Likewise, the circuit court's reliance on Doe v. Greenville County. Sch. Dist., 375 S.C. 63,

651 S.E.2d 305 (2007), is misplaced. There, a minor was sexually assaulted by a school employee. The parents of the minor brought a claim against the school for negligent infliction of emotional distress for the emotional distress they experienced once they learned of the sexual relationship between their minor daughter and the school employee. They were clearly claiming emotional damages as a result of physical injuries sustained by another. Therefore, the bystander analysis applied. In holding that the parents had no such claim, the court explained:

> In Kinard, the Court recognized that a parent may bring a cause of action for negligent infliction of emotional distress as a result of injury to his or her child. The Court instructed that such an action is strictly limited to the "bystander liability' scenario. This Court has not otherwise defined the parameters of a cause of action for the negligent infliction of emotional distress **arising out of an injury to someone other than the Plaintiff**.

Id. In other words, when a direct injury is not involved, the only way to pursue a negligent infliction of emotional distress claim is to satisfy the bystander analysis. Otherwise, any parent whose child is injured could pursue an independent claim for negligent infliction of emotional distress even when the parent did not witness the injury. It is important to note that this is not a case where the parents learned of an injury to their child after the injury occurred as in the Doe case. Rather, these parents knew their child was missing and experienced the injury during the actual event. Here, the parents are not bringing an action as a result of an injury to their child; rather, they actually lost their child for a period of time and suffered injuries resulting directly from Respondent's negligence in losing their minor child. They are direct victims of Respondent's negligence unlike the parents in Doe who learned of an injury to their child after the fact, no different from parents who learn after the fact that their child was injured in an automobile wreck or a husband who learns after the fact that his wife was injured in an automobile wreck.

In its order, the circuit court also relies on Dooley v. Richland Memorial Hosp., 283 S.C.

372, 322 S.E.2d 669 (1984), as support for its decision to dismiss the parents' individual claims for emotional distress. (Order p.3). Again, the circuit court's reliance on Dooley is in error. In Dooley, an individual was injured in a wreck. Based on identification found in the vehicle, law enforcement identified the patient to the hospital as Doug Dooley, a 32 year old man. Relying on law enforcement, the hospital then contacted the parents of the patient and told them their son had been badly injured. The parents rushed to the hospital to be with their son. Later in the evening, the parents discovered that the patient had been misidentified and was not their son. The parents brought a negligence action against the hospital for emotional distress the parents suffered as a result of the hospital's negligence in misinforming them. Id. Although the circuit court here placed emphasis on Dooley as support for its decision to dismiss the Whitehead parents' individual claims for emotional distress, the Dooley case offers no support. Rather, the court in Dooley found it unnecessary to decide whether a negligence action could be pursued based on the facts before it because there was simply no evidence of negligence against the hospital and no evidence of any physical manifestation of the mental injury. Therefore, the court found that the cause of action failed under any theory of recovery, and a decision about whether the law recognized the cause of action was not necessary. Id.

Ultimately, if the circuit court is correct that Kinard controls the outcome of this case, that means that Kinard eliminates direct victims of negligence from the recovery of emotional distress when there is no physical impact. This result is obviously flawed and is the result of error. In Kinard, the court addressed only situations in which a plaintiff attempts to recover damages for emotional trauma **as a result of witnessing physical injury to another party.**[2] The Kinard court

[2] In fact, the Kinard court made clear that it was not giving an opinion on whether the cause of action existed in situations other than the bystander context. See, Kinard v. Augusta Sash & Door Co., 286 S.C. 579, 336 S.E.2d 465 (1985), fn. 2.

chose to allow a small class of bystanders to pursue a claim for negligent infliction of emotional distress suffered as a result of witnessing injury to another person provided the plaintiff meets the elements of the bystander analysis. In other words, the court recognized that a defendant's duty of care should extend to certain bystanders to whom a duty of care would not otherwise be owed. In that way, the Kinard court created a new class of foreseeable plaintiffs. Contrary to the circuit court's holding here, the bystander liability recognized by Kinard expands the class of plaintiffs from the direct victims of a defendant's negligence to include certain bystanders who are not direct victims of negligence and to whom a defendant would not owe a duty of care without bystander liability. Stated differently, Kinard created a cause of action for negligent infliction of emotional distress for certain bystanders who suffer emotional harm "**arising out of an injury to someone other than the plaintiff.**" Doe v. Greenville County School District, 375 S.C. 63, 651 S.E.2d 305 (2007). The flaw in the circuit court's reasoning is this: if Kinard in effect overrules Padgett, Spaugh and Mack, that means that a bystander (who is the indirect victim of negligence) can recover for emotional distress but the direct victim (like Mr. Padgett, Mrs. Spaugh, and Mr. Mack) cannot. Such a result is nonsensical.[3]

[3] In Ford v. Hutson, 276 S.C. 157, 276 S.E.2d 776 (1981). The court adopted the tort of outrage or intentional infliction of emotional distress. The court's analysis in adopting that new cause of action is helpful here. The tort of outrage/intentional infliction of emotional distress is an intentional tort that does not require the existence of a duty of care. Rather, when a defendant intentionally acts so outrageously, even to someone **to whom he owes no duty of care**, he can be held responsible for severe emotional distress even **without** the manifestation of physical symptoms. With the addition of the outrage cause of action, at least four causes of action exist in South Carolina that allow a plaintiff to recover for emotional distress without any physical impact to the plaintiff: (1) a negligence cause of action for direct victims of a defendant's negligent conduct (Mack, Spaugh, and Padgett); (2) a negligent infliction of emotional distress cause of action for certain bystanders who suffer emotional distress arising out of physical injury sustained by another person (Kinard); (3) an outrage or intentional infliction of emotional distress cause of action for victims who suffer severe emotional distress regardless of foreseeability or duty, even without physical manifestation (Ford v. Hutson); and (4) wrongful death causes of action that allow

## CONCLUSION

For each of the reasons set forth above, the circuit court erred in dismissing the Whitehead parents' individual claims for emotional distress manifested by physical symptoms.

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September 23, 2021

certain statutory beneficiaries to recover for the emotional distress they suffer when a loved one meets an untimely death.

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a minor under the age of fourteen (14) years,
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**CERTIFICATE OF COUNSEL**

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I certify that the Final Brief of Appellants and the Final Reply Brief of Appellants comply with Rule 211(b), SCACR.

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