THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
John C. Hayes, III, Circuit Court Judge

Case No. 2009-CP-46-3827

John R. Sexton and Patricia Sexton, ... Appellants,

v.

Alex R. Espinal, M.D. and
Palmetto Surgery, LLC, ... Respondents.

BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

This is an appeal from a medical malpractice case. The Appellants John Richard Sexton and Patricia Sexton (referred to collectively as "Sexton") brought suit against the Respondent Alex R. Espinal, M.D. alleging that on March 7, 2007, Dr. Espinal was negligent in his performance of a laparoscopic partial colectomy to remove a polyp from John R. Sexton's ascending colon thereby causing an anastomotic leak and significant healing complications.[1] Specifically, Sexton charges that Dr. Espinal did an inadequate pre-operative investigation, failed to perform an updated examination on the day of surgery, and failed to consider the patient's low oxygen saturation before proceeding with the surgery.[2]

Following the completion of discovery, the case went to trial before Circuit Court Judge John C. Hayes, III and a jury beginning on August 1, 2011, in the York County Court of Common Pleas. After three days of trial, the jury returned a verdict in favor of Dr. Espinal and his practice. (R. 1-3). Sexton's post-trial motion for a new trial absolute was denied by Judge Hayes. (R. 570-571).

Sexton then filed a timely appeal to this Court.

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[1] The Appellant Patricia Sexton brought a claim for loss of consortium.

[2] The Respondent Palmetto Surgery, LLC is Dr. Espinal's medical practice. The Respondents are referred to collectively as "Dr. Espinal" throughout this brief.

STATEMENT OF FACTS

The Appellant, John Richard Sexton, age 58, underwent a colonoscopy on February 16, 2007, performed by Digestive Disease Associates of York County. Several polyps were removed during the procedure but a sessile polyp (sessile meaning adhering to the colon wall) was not amenable to section. (R. 648-649). Sexton was thereafter referred to Dr. Alex R. Espinal, who is a board-certified general surgeon. Sexton first saw Dr. Espinal on March 2, 2007, at which time Dr. Espinal took a medical history. The intake records from Dr. Espinal do not reflect that he was told that Sexton was a smoker. (R. 573-575, 700-702). Records from other medical providers taken contemporaneously reflect that Sexton did reveal that he was a smoker although the amount varied from one-half pack a day to two packs a day for 40 years. (R. 610, 627, 630, 647).

Sexton presented to Piedmont Medical Center on the early morning of March 7, 2007. Sexton and family members testified that Sexton was complaining of the flu and was told by unidentified medical personnel at Piedmont Medical Center that the surgery would not go forward. (R. 190-191, 209-210). The medical records do not reflect such communication. The records instead reflect that Sexton's temperature was normal. (R. 601). Persons authorized to cancel the surgery would have been Dr. Espinal as the surgeon and Dr. Susan Lupo, the

attending anesthesiologist. (R. 333, 406). Neither Dr. Espinal nor Dr. Lupo recall complaints of flu or issues as to terminating the surgery. (R. 330, 333, 388, 414).

At admission, Sexton did have a low oxygen saturation (or O Sat) of 85%. Oxygen saturation is the amount of oxygen in the blood. (R. 601). Normal is 95% or greater. Admitting personnel contacted Dr. Lupo, who ordered a chest x-ray. Dr. Lupo did not regard the chest x-ray as remarkable and ordered two liters of oxygen to be administered by nasal cannula. (R. 410-414). Dr. Espinal met with Sexton for a pre-surgical evaluation, and at that time, the oxygen saturation had increased to 92%. While Dr. Espinal was not aware of the earlier reading of 85%, he testified that he did not consider a lower oxygen saturation to be contraindicative to the procedure. (R. 330-333). The procedure to remove the polyp was performed, and a 10 by 3 centimeter section of the ascending colon was removed. (R. 335-338). Pathology showed that the tissue was moderately atypia or precancerous. (R. 339-341).

Sexton's post-surgical condition declined, and by March 10, 2007, Dr. Espinal had concluded that Sexton was suffering an anastomotic leak or a leak at the surgical site with colon content leaking into the bowel. While a known complication of the surgery, an anastomotic leak is quite serious. (R. 338). Surgery was performed on March 10, 2007, to repair the anastomotic leak. Sexton was on a respirator after surgery. (R. 351-353). His condition worsened as he

developed adult respiratory distress syndrome. Gradually his condition improved, and he was discharged on April 10, 2007 to HealthSouth Rehabilitation Hospital. (R. 357-358, 626-629). He was not able to return to work until August 2007. (R. 194).

ARGUMENTS

I. The trial court did not abuse its discretion in admitting evidence of the Appellant's smoking habit and history.

The Appellant Sexton argues on appeal that the trial judge's admission of evidence regarding Sexton's smoking habit and history constitutes reversible error. Sexton contends that Dr. Espinal failed to prove that smoking caused any injury to Sexton and that evidence of smoking was not probative of any issues raised at trial.

Under South Carolina law, "[t]he admissibility of evidence lies within the sound discretion of the trial court whose decision will not be overturned on appeal absent a clear abuse of that discretion." *Watson v. Chapman*, 343 S.C. 471, 540 S.E.2d 484, 487 (Ct. App. 2000). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." *Fields v. Regional Medical Center Orangeburg*, 363 S.C. 19, 609 S.E.2d 506, 509 (2005).

"Generally, all relevant evidence is admissible." *McCall v. IKON*, 380 S.C. 649, 670 S.E.2d 695, 701 (Ct. App. 2008). "Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* See, Rule 401, SCRE. Evidence of Sexton's smoking

history was relevant to the issues before the jury, and importantly, such evidence was presented by both parties before any objection was first made by Sexton's counsel.

Sexton alleges that the laparoscopic partial colectomy performed by Dr. Espinal to remove a polyp from the ascending colon was negligently performed thereby causing an anastomotic leak and significant healing complications. Specifically, Sexton charges that Dr. Espinal did an inadequate pre-operative investigation, failed to perform an updated examination on the day of surgery, and failed to consider the patient's low oxygen saturation before proceeding with the surgery. As a result of these allegations, evidence relating to pre-operative procedures, including information made available to Dr. Espinal related to Sexton's pulmonary function and limitations, was relevant. Such evidence includes the evidence of Sexton's smoking history.

Sexton cannot deny on appeal the relevance and admissibility of such evidence. The trial testimony and documentary evidence presented by Sexton himself address the issue of his smoking habit. Sexton's counsel did not make any objection to evidence of Sexton's smoking history until the cross-examination of John R. Sexton that occurred at the close of the first day of trial. Prior to that objection, Sexton had admitted 33 exhibits including various medical records that were replete with evidence of Sexton's smoking. (R. 44-45). By way of example,

those exhibits include the records of Digestive Disease Associates where Sexton reported that he smoked "very little." (R. 647). In addition, Sexton introduced into evidence the pre-anesthesia questionnaire in which he described a pack a day habit for forty years. (R. 610). Further, Sexton submitted the consult records of Dr. Michael Denenberg, which reflect "a history of cigarette smoking, 2 packages per day for 40 years, and continues to smoke up until the time of surgery." (R. 630). Finally, he included the history and physical from Healthsouth Rehabilitation Hospital, which states: "With regard to his habits he has smoked 2 packs of cigarettes a day for about 40 years." (R. 627). This evidence was presented by Sexton himself – before he made any objection to evidence of smoking and without requesting any limiting instruction as to relevance or admissibility.

In addition, prior to any objection to evidence of smoking, Sexton presented the testimony of his expert witness, Dr. Robert Solymvari, who provided the initial testimonial evidence of smoking. Dr. Solymvari explained the process of obtaining an appropriate pre-operative history and physical which includes the patient's "social history as far as smoking and drinking." (R. 110). Dr. Solymvari also discussed on direct examination the need to establish a "base line" with a patient based on such factors as a smoking history. In assessing an x-ray, the doctor explained that "[i]f you have somebody who has had industrial exposure to certain toxins or is a heavy smoker and they have an established chronic

inflammation of lung from smoking then there could have, you know, they could say well there's no change so it's most likely the patient is at this base line." (R. 134).

Later, on cross-examination, Dr. Solymvari confirmed that smoking was an issue with Sexton's pre-operative evaluation:

> Q. And smoking was an issue in this case, was it not, Doctor?
>
> A. Yes.

(R. 157). Thereafter, without objection, Dr. Solymvari testified at length regarding the references to Sexton's smoking history contained in the medical records. (R. 158-159). He further testified as follows about the effects of smoking – again without objection:

> Q. Doctor, would you agree that in forty-five years if someone [smoked] between one and two packs a day, doesn't – isn't very little?
>
> A. No, it's not little. It's significant.
>
> Q. ... And would that amount of smoking cause a patient to have COPD?
>
> A. It can yes.
>
> Q. And COPD is what?
>
> A. That's called Chronic Obstructive Pulmonary Disease and it's due to chronic irritation of the air ways in the lung. Patients develop basically a lung disease that restricts their breathing.

Q. And would that account for low oxygen saturations?

A. Well, there's a wide variation of COPD.

Q. Okay.

A. It can or it cannot but the earliest stage of COPD there is correlation, you can make a general statement like that.

(R. 159).

Thus, prior to any objection being made, Sexton's own medical expert testified as to his history of smoking and the importance of learning that information as part of a pre-operative history and physical. Dr. Solymvari further admitted that Sexton's smoking history was an issue in the case. And, Dr. Solymvari is correct in that regard. The evidence of smoking is relevant to address Sexton's claim that Dr. Espinal was negligent in his pre-operative investigation and in his decision to proceed with the surgery. In addition, Dr. Solymvari offered the opinion that Sexton's chest x-ray taken prior to surgery was abnormal (R. 121-122, 148), but Dr. Susan Lupo, the anesthesiologist, testified that the x-ray was consistent with someone with Sexton's smoking history. (R. 429). The issue raised by Sexton's expert regarding that chest x-ray is an additional basis for the trial judge to permit evidence of Sexton's smoking history. Moreover, Sexton made the timing of the surgery an issue, that is, whether the surgery should have

been delayed until Sexton's oxygen saturation levels were higher. Sexton's history of smoking and resulting COPD were relevant to that issue as well, supporting the opinion of Dr. Eric Bour, the defense surgical expert, that it is not unusual to see a low oxygen saturation level in a patient with a similar smoking history and that it was appropriate to proceed with the surgery. (R. 447, 449). Finally, the evidence was also admissible on the issue of Sexton's credibility. Clearly, Sexton's counsel – at least initially – believed that the evidence was relevant because they admitted the medical records and the testimony of Dr. Solymvari addressing the smoking. For these reasons, Sexton's position on appeal that such evidence is irrelevant and was admitted by Judge Hayes in error lacks any merit.

In addition, Sexton has waived his right to challenge on appeal the admission of evidence of his smoking history. It is well settled that "if a party deems testimony to be irrelevant or prejudicial, an objection should be interposed when the testimony is initially offered." *Campbell v. Jordan*, 382 S.C. 445, 675 S.E.2d 801, 805 (Ct. App. 2009). The failure to timely object when the evidence was initially offered "waives [the] right to argue error on appeal." *Id. See also, City of Greenville v. Bryant*, 257 S.C. 448, 186 S.E.2d 236, 238 (1972).

Furthermore, this Court has held that "[t]he admission of improper evidence is harmless where the evidence is merely cumulative to other evidence." *State v. Kirton*, 381 S.C. 7, 671 S.E.2d 107, 122 (Ct. App. 2008). In *Kirton*, the defendant

had objected to certain testimony of the victim. This Court found the admission of the victim's testimony over objection was harmless error because it was merely cumulative to the same testimony offered by two earlier witnesses that was entered into evidence without a contemporaneous objection. *See also*, *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993) (finding any error in admission of evidence cumulative to other unobjected-to evidence is harmless); *State v. Johnson*, 298 S.C. 496, 381 S.E.2d 732, 733 (1989) (admission of improper evidence is harmless where it is merely cumulative to other evidence); *State v. Williams*, 321 S.C. 455, 469 S.E.2d 49 (1996) (improperly admitted evidence harmless where cumulative).

The same is true in the present case. The record clearly reflects that the first objection to any evidence of smoking was made during the cross-examination of John Richard Sexton. (R. 202). Even if Sexton is correct in the position he has now taken on appeal that evidence of smoking was inadmissible from that point in the trial when the first objection was made, that would constitute harmless error at best. As discussed above, the presentation of medical records documenting the smoking history and the testimony of Dr. Solymvari were presented before any objection was made. Therefore, any evidence of Sexton's smoking history offered thereafter was cumulative to the earlier, properly admitted evidence.

It should also be noted that Sexton has offered a different objection on appeal than was made in trial. It is well settled that "[t]he same ground argued on

appeal must have been argued to the trial judge." *McKissick v. J.F. Cleckley & Co.*, 325 S.C. 327, 479 S.E.2d 67, 75 (Ct. App. 1996). *See also*, *State v. Wimbush*, 347 S.C. 513, 556 S.E.2d 413, 417 (Ct. App. 2001) (evidentiary issue not preserved for appellate review because defendant "did not articulate the grounds for objection that he now argues on appeal"). On appeal, Sexton raises a Rule 403 objection – that the probative value of the evidence is outweighed by the potential prejudice. Neither that objection nor any argument related thereto was made at trial. (R. 202-203). Moreover, on appeal, Sexton includes a detailed discussion of the stigmatizing effect of smoking and the negative impact that could have on jurors. That argument was never made to the trial judge, and as a result, may not be made for the first time on appeal.

Finally, Sexton contends on appeal that Dr. Espinal's counsel improperly argued to the jury that Sexton's smoking caused the low oxygen saturation levels which in turn contributed to the development of the anastomotic leak and poor healing. Dr. Espinal's counsel made a comment in closing as follows: "Now, again, is it caused by the smoking? Perhaps. Be that as it may." (R. 528). Sexton's counsel made no objection, contemporaneous or later, to that comment. Likewise, Sexton's counsel did not move to strike the comment or seek any curative instruction. This Court has explained that "[t]he proper course to be pursued when counsel makes an improper argument is for opposing counsel to

immediately object and to have a record made of the statements or language complained of and to ask the court for a distinct ruling thereon." *Hawkins v. Pathology Associates of Greenville, P.A.*, 330 S.C. 92, 498 S.E.2d 395, 406 (Ct. App. 1998). (Emphasis in original). Where a contemporaneous objection to an improper closing argument is not made, the issue is not preserved for appellate review. *Id. See also, Webb v. CSX Transportation,, Inc.,* 364 S.C. 639, 615 S.E.2d 440, 450 (2005) (a contemporaneous objection is required to preserve closing argument issue for appeal). Thus, even assuming the brief comment by Dr. Espinal's counsel on the issue of causation was improper based on the evidentiary record, which is denied, that issue is not preserved for appeal.

Nonetheless, there is sufficient evidence to support the brief causation comment by Dr. Espinal's counsel in closing argument. Sexton complains that there is no evidence to support the argument that his smoking "most probably" caused the development of the anastomotic leak and poor healing. That is incorrect. Dr. Solymvari, Sexton's own expert, testified that smoking resulting in COPD lowers oxygen saturation levels. (R. 159). Dr. Solymvari further agreed that "[t]he leak occurred because there is not enough oxygen to the anastomosis." (R. 167). Dr. Lupo, the anesthesiologist, testified that a person with Sexton's long smoking history has COPD. (R. 411). She explained that "[s]o if he smoked somewhere between one and two packs a day for forty years that's what we call

eighty packs years of smoking history and that person has COPD period. It's a critical diagnosis. And I expect that someone with that kind of history is going to run oxygen saturation on room air of 89, 90, maybe 91, so 85 was a little low." (R. 412). Dr. Eric Bour, the defense surgical expert, also acknowledged that it would not be unusual to see low oxygen saturation levels on a patient with a forty year history of smoking. (R. 447).

The Supreme Court has held that "[b]efore expert medical testimony is admissible on the question of causation between plaintiff's injuries and the acts of the defendant, the testimony must satisfy the 'most probably' rule." *Payton v. Kearse*, 329 S.C. 51, 495 S.E.2d 205, 211 (1998). It is well settled that "it is not necessary that the testifying expert actually use the words 'most probably.'" *Martasin v. Hilton Head Health System*, 364 S.C. 430, 613 S.E.2d 795, 800 (Ct. App. 2005). "The question is not whether the precise terminology of 'most probably' is used by the expert in establishing causation. Rather the question is whether the medical testimony satisfies the 'most probably' standard." *Madison v. Brantley*, 302 S.C. 282, 395 S.E.2d 190, 191 (Ct. App. 1990). *See also*, *Gamble v. Price*, 289 S.C. 538, 347 S.E.2d 131 (Ct. App. 1986). In the present case, there is no testimony from an expert using the words "most probably" that Sexton's smoking history caused or contributed to the anastomotic leak and complications with healing. However, the cumulative testimony of the expert witnesses, as

outlined above, satisfies the "most probably" standard and would permit defense counsel to comment to the jury that the smoking history contributed to Sexton's poor result. Thus, even if the issue regarding defense counsel's closing argument had been properly preserved by a contemporaneous objection at trial, that issue would not support the reversal of the jury's verdict.[3]

In sum, Sexton's argument that evidence of his smoking habit and history is not relevant to any issues is clearly incorrect. Sexton himself introduced both exhibits and expert testimony that touched on his smoking history. That evidence was in the trial record – placed there by Sexton – before any objection was made to that evidence. Sexton's history of smoking was relevant to a number of the liability issues presented and was discussed by each of the experts. To the extent that the history of smoking was improperly raised as a causation issue by defense counsel in closing, no objection was made nor was a curative or limiting instruction requested. Further, the expert testimony as a whole allowed defense counsel to make the brief comment that he did. The issue was not properly preserved for review, and even if it had been, no reversible error or prejudice has been

[3] In addition, the jury returned a general verdict. (R. 2-3). Sexton's counsel agreed to the verdict form and did not request special interrogatories. (R. 491-493). Without special interrogatories, it is pure speculation to assume the jury even reached the issue of proximate cause. It is as likely that the jury found no breach of the standard of care consistent with the opinion of the expert witnesses that an anastomotic leak is a known complication of colon surgery and may occur without medical negligence. Without special interrogatories showing that the jury reached the issue of proximate cause, Sexton cannot establish any prejudice from defense counsel's comment on causation related to the smoking.

demonstrated. The Court is respectfully asked to affirm the jury's verdict.

II. The trial court did not abuse its discretion in excluding evidence of the Appellant's oxygen saturation readings taken during trial by his counsel.

The Appellant Sexton's counsel, on his cross-examination of Dr. Bour, attempted to question the witness based upon an out-of-court pulse oximeter reading taken by plaintiff's counsel during the trial which allegedly resulted in an oxygen saturation reading of 92%.[4] Sexton's counsel was asking Dr. Bour to make a series of assumptions, at which time he included an assumption that Sexton had a current oxygen saturation reading of 92%. (R. 477). Dr. Espinal's counsel immediately objected, and Judge Hayes sustained the objection. (R. 477). After the jury was excused, the objection was again sustained with Judge Hayes stating, "What his oxygen level is today is not an issue." (R. 478).

Sexton's counsel proceeded with a proffer. In response to the series of assumptions, Dr. Bour testified that he could not opine whether Sexton's oxygen saturation level would be higher or lower than 85%:

> Q. Assume he hadn't had any treatments. Assume that he still smokes half a pack to a pack of cigarettes a day. Would you expect his oxygen saturation rates

[4] A pulse oximeter is a medical device that is placed on a thin part of a patient's body, usually a fingertip or an earlobe, with a monitor displacing percentage of arterial hemoglobin in the oxyhemoglobin configuration or oxygen in the blood.

to be lower than eighty-five or higher than eighty-five?

A. I don't know. There is no way to make that conclusion. No possible way whatsoever. That's like asking -- That's like going to the fair and guessing someone's weight. You just can't -- you can't make any assumptions based on non-fact. And you're continuing to make assumptions, you're assuming this and assuming that and assuming this and assuming that and by the time you get to the end of it there's no fact left. It's all just a bunch of assumptions. And so to say that somebody's oxygen saturation is four years and six months ago and different than they are today is -- I mean that's ludicrous. It's implausible. And there is absolutely not way to predict or state that with any fact whatsoever.

(R. 479-480). The proffer later included testimony from John Richard Sexton that a pulse oximeter reading was taken on the morning of the third day of trial and again during a subsequent break. He testified that the tests were conducted by his counsel and that the readings were both 92%. (R. 488-489).

A colloquy followed wherein Dr. Espinal's counsel argued that the four year lapse of time makes the testimony unreliable and irrelevant. Moreover, defense counsel objected to the proffered testimony because there was no notice from Sexton's counsel that they intended to conduct an experiment, that the test was not conducted by medical personnel or an expert witness, and that no information or basis was given as to calibration, equipment, standards, and fluctuations. (R. 490). The particular device that Sexton's counsel attempted to utilize was not identified

nor was there any medical testimony as to the accuracy of the device or the qualifications of the operator. Having heard again from counsel, Judge Hayes sustained the objection on the grounds given. (R. 491).

In the case of *Beasley v. Ford Motor Co.*, 237 S.C. 506, 117 S.E.2d 863 (1961), the Supreme Court explained as follows:

> For an experiment to be admissible the conditions of it must be similar, or substantially similar, to the facts under investigation; and this must be determined by the trial judge. After finding such similarity the court will exercise its discretion as to whether the experiment will be permitted. The admission of evidence of experiments or permitting them to be performed in court is a matter peculiarly within the discretion of the trial court, and this discretion will not be interfered with unless it is apparent that it has been abused.

117 S.E.2d at 865. (Citations omitted). The appellate courts have similarly ruled that the trial judge has broad discretion with respect to the admission or rejection of demonstrations or similar evidence. *Davis v. Traylor*, 340 S.C. 150, 530 S.E.2d 385, 388 (Ct. App. 2000). *See also*, *State v. McWee*, 322 S.C. 387, 472 S.E.2d 235 (1996); *Green v. Boney*, 233 S.C. 49, 103 S.E.2d 732 (1958).

Clearly, Judge Hayes did not abuse his discretion in disallowing evidence of the pulse oximeter readings taken during the trial by plaintiff's counsel. Sexton failed to present any evidence of the similarities of the circumstances between March 2007 (when the surgery occurred) and August 2011 (when the case was tried). He failed to show that there were no changes in other variables, such as

Sexton's pulmonary function, overall health status or other pertinent factors, between 2007 and 2011 so as to support his argument that Sexton's oxygen saturation reading of 85% in March 2007 was abnormal for him. The test was not conducted by an expert who could vouch for and testify as to the proper use and calibration of the equipment; instead, the test was conducted by Sexton's own counsel with no evidence of the procedure followed, the calibration of the equipment or the reliability of the reading. Indeed, counsel who conducted the test could not have testified.[5] Sexton thus failed to show the reliability of the pulse oximeter readings that were proffered. Finally, defense counsel was not given notice of the test or the evidence that was proffered so as to prepare to respond to it. For each of these reasons, Judge Hayes did not abuse his discretion, and as a result, reversible error did not result.

[5] If Sexton's counsel believed that evidence of his oxygen saturation level at the time of trial was necessary for reply testimony, he could have attempted to present that evidence through a medical expert who could verify the process that was followed in obtaining the current reading and, more importantly, could also have offered the opinion that a current reading would be comparable to Sexton's norm in 2007, if an expert could so opine. That is the opinion evidence and inferences drawn therefrom that Sexton sought to admit by simply advising the jury that his current pulse oximeter reading was 92%. However, that opinion required expert testimony. As the proffer demonstrates, Sexton was unable to elicit such an opinion from Dr. Bour. It is unknown whether he could have elicited that opinion from his own expert.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondents respectfully request that this Court affirm the order of Circuit Court Judge John C. Hayes, III denying the Appellant's post-trial motions and affirm his rulings on the evidentiary issues raised on appeal. The Respondents request that this Court uphold the jury's verdict and the judgment in favor of the Respondents.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondents certifies that the Final Brief of Respondents complies with Rule 211(b), SCACR.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Respondents that the Final Brief of Respondents complies with the Supreme Court's Order of August 13, 2007, regarding personal identifiers and sensitive information.

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Respondents, does hereby certify that service of the **Brief of Respondents** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 15th day of April 2013:

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