No. 121200

In the

Supreme Court of Illinois

DONNA COCHRAN,

Plaintiff-Appellee,

v.

SECURITAS SECURITY SERVICES USA, INC.,

Defendant-Appellant.

On Appeal from the Appellate Court of Illinois,
Fourth Judicial District, No. 4-15-0791.
There Heard on Appeal from the Circuit Court of the Seventh Judicial Circuit,
Sangamon County, Illinois, County Department, Law Division, No. 2012 L 245.
The Honorable **Peter C. Cavanagh**, Judge Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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REPLY BRIEF OF DEFENDANT-APPELLANT

I. This Court Should Not Eliminate The Requirement Of Willful And Wanton Conduct In An Illinois Action For Interference With The Right To Possession Of A Corpse.

A. Plaintiff's Duty Argument is Misguided.

In this appeal, Securitas urges this Court to hold, consistent with over 100 years of Illinois precedent, [1] that where a plaintiff brings an action for interference with the right to possess a corpse seeking to recover solely for emotional distress, plaintiff must plead and prove that the interference resulted from the defendant's willful and wanton conduct, and mere negligent interference is not sufficient.

Contrary to Point I of Plaintiff-Appellee's Brief (pp. 13-27), Securitas has not urged that there is no duty owed at all. Rather, as stated in Securitas' Opening Brief (pp. 8-9), its duty was limited to the duty to refrain from willful and wanton interference with plaintiff's right to possession of her son's corpse. It was in that context that the circuit court dismissed the Third Amended Complaint on the ground that "Plaintiff has failed to plead sufficient facts to support the allegation of a duty" owed by Securitas. (R. C723) (A. 17).

Plaintiff says that Securitas' assertion that its duty was "to refrain from willful and wanton interference" is a correct statement in an abstract sense, but not technically accurate. (Pl. Br. 18). There is nothing abstract or technical about it. In cases where recovery is permitted only for injuries caused by willful and wanton conduct, and not mere negligence, that is a correct statement of the duty

[1] The lengthy analysis of the Illinois appellate court decisions by Plaintiff's Amicus Curiae (ITLA Br. 4-11) confirms that no Illinois court of review, prior to the Fourth District's decision herein, has allowed a plaintiff to recover for emotional distress allegedly resulting from the *negligent* interference with the right to possess a corpse.

owed. *See Pfister v. Shusta,* 167 Ill. 2d 417, 420 (1995), where this Court, in the context of contact sport law, cited with approval appellate court decisions interpreting defendant's limited duty of care as "the duty to refrain from willful and wanton or intentional misconduct."

B. Plaintiff's Third Amended Complaint Did Not Plead a Cause of Action For Willful and Wanton Conduct.

Attempting to come within the existing precedent requiring that she plead that Securitas willfully and wantonly interfered with her right to possess her son's corpse, Plaintiff urges that her complaint sufficiently pled a cause of action for willful and wanton conduct.[2] (Pl. Br. 20-27). Neither the circuit court nor the Fourth District accepted this argument, 2016 IL App (4th) 150791, ¶ 34 (A. 9). This Court should reject it as well. Plaintiff's Third Amended Complaint (R. C600-07) (A. 39-46) contains no allegation that Securitas acted willfully or wantonly. Nor does Plaintiff allege any facts that would constitute willful and wanton conduct. Plaintiff's Third Amended Complaint contains no factual allegations that Securitas intentionally interfered with Plaintiff's right to possess her son's corpse, or acted with a "conscious disregard" or "utter indifference" to that right, as required for willful and wanton conduct. See I.P.I (Civil) § 14.01; *Pfister*, 167 Ill. 2d at 421-22; *Barr v. Cunningham*, 2017 IL 120751, ¶ 14.

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[2] Throughout her Brief (pp. 34, 35, 40), Plaintiff refers to "enhanced negligence" instead of willful and wanton conduct. We are unaware of any Illinois case recognizing or defining an "enhanced negligence" standard in any context, much less in cases alleging interference with the right to possess a corpse.

At best, the factual allegations of the Third Amended Complaint show that the error occurred due to a mistaken entry in the Memorial Morgue log book as to whose decomposed body was in the Ziegler case. (R. C603-04) (A. 42-43). Based on that erroneous log book entry, Securitas assisted in releasing the Ziegler case to Butler Funeral Home, believing it contained the body of William Carroll. *Id.* There is no allegation that Securitas knew that the Ziegler case released to and accepted by Butler Funeral Home did not contain the body of William Carroll, or that Securitas acted with a conscious disregard or utter indifference to the identity of the body in the Ziegler case. *See, Pendowski v. Patent Scaffolding Co.*, 89 Ill. App. 3d 484, 492 (1st Dist. 1980) (willful and wanton pleading must allege facts showing that defendant had a "state of mind" to act with "either intentional or conscious disregard" of a duty owed to plaintiff).

Plaintiff relies on the Third Amended Complaint's allegation of Securitas' violations of unstated "industry standards" and Memorial-Securitas "security policies." (R. C602-04) (A. 41-43) (Pl. Br. 6-7). This Court has held that internal rules, guidelines or policies are ordinarily insufficient to create a duty even in a negligence case, *Rhodes v. Illinois Cent. Gulf R.R.*, 172 Ill. 2d 213, 238 (1996). Furthermore, the policies cited in the Third Amended Complaint (R. C602-03) do not impose a requirement on Securitas to place an identification tag on any body, or to place an identification tag on a Ziegler case, much less any requirement that Securitas open a closed Ziegler case and attempt to make a visual identification of the decomposing remains therein before releasing the case to a funeral home. *Id.*

Nor is there any allegation that Mr. Cochran's body did not have an identification tag when it was received at the Memorial Morgue from the Moultrie County Coroner. (R. C601) (A.40). In any event, the Third Amended Complaint contains no allegation that Securitas intentionally breached any policy or acted with a conscious disregard or utter indifference to any policy.

Plaintiff cites cases involving willful and wanton interference, but they serve only to demonstrate the lack of any pled facts showing willful and wanton interference by Securitas in this case. In *Mensinger v. O'Hara,* 189 Ill. App. 48 (1st Dist. 1914) (Pl. Br. 22), it was alleged that defendant undertakers intentionally and deliberately cut off all of decedent's hair, thereby mutilating her body and rendering it unfit for viewing. *Id.* at 49-50. The *Mensinger* court noted that the hair could not have been cut off and removed from decedent's body "by mere neglect," but "could only be accomplished by design"; thus, defendants must have acted "knowingly and intentionally" and "with knowledge of what they were doing." 189 Ill. App. at 51.

In *Rekosh v. Parks,* 316 Ill. App. 3d 58 (2d Dist. 2000) (Pl. Br. 23), the complaint alleged that the defendant funeral home knowingly and deliberately released the decedent's remains to a person it knew was not authorized to receive the remains (decedent's ex-wife), and with further knowledge that the signature of decedent's next of kin on the cremation authorization and release form could have been forged. *Id.* at 69-71. Thus, the funeral home facilitated the cremation of a body knowing that there was a next of kin who may have been unaware of the

death, conduct which the court characterized as "so outrageous in character and extreme in degree as to go beyond all possible bounds of decency," that it established a claim of intentional infliction of emotional distress. *Id.* at 66.

In *Drakeford v. University of Chicago Hospitals*, 2013 IL App (1st) 111366 (Pl. Br. 24), the evidence supported a finding that the defendant hospital buried a deceased infant in a mass grave without an autopsy, even though it knew it had no consent from the infant's mother to do so. *Id.* at ¶¶ 15-17. Again, there are no allegations in the Third Amended Complaint of such knowingly wrongful conduct on the part of Securitas.

Simply put, Plaintiff wants this Court to change the law and lower the requirement of willful and wanton interference because, after four complaints (R. C2, C212, C271, C600), it is clear that she cannot meet that long-standing requirement.

C. This Court Should Not Eliminate the Requirement of Willful and Wanton Conduct in an Illinois Action for Interference of the Right to Possession of a Corpse.

Plaintiff ultimately addresses the fundamental issue on appeal (Pl. Br. 27-43), but neither her arguments nor those of her Amicus Curiae (ITLA) are persuasive. Plaintiff acknowledges that Illinois courts have followed the willful and wanton standard "over the last 100 years" (Pl. Br. 27), and that this was the commonly recognized standard as reflected in Restatement of Torts, § 868 (1939) and comment (a) providing: "[T]here is no right to maintain an action for mere negligence in dealing with the body." Plaintiff argues it is time for Illinois to

evolve to a mere negligence standard set forth in the Restatement (Second) of Torts § 868 (1979), and claims that this is now the majority rule – although she subsequently asserts that only 22 states have adopted a negligence standard. (Pl. Br. 44).

Plaintiff cites cases (Pl. Br. 30-31) where this Court has adopted various Restatement provisions. However, there are also cases where it has refused to do so. *See Jablonski v. Ford Motor Co.,* 2011 IL 110096, ¶¶ 118-119; *Blumenthal v. Brewer,* 2016 IL 118781, ¶¶ 101, 105-06 (Theis, J., dissenting opinion); *Mikolajczyk v. Ford Motor Co.,* 231 Ill. 2d 516, 543, 545 (2008), refusing to adopt a provision of Restatement (Third) of Torts that would "overrule precedent" and cause "a change in the substantive law of this state."

Securitas' Opening Brief (p. 9) acknowledged that a number of states have adopted a negligence standard, but urged this Court to follow the better-reasoned cases that have refused to do so, as exemplified by the Florida Supreme Court's decision in *Gonzalez v. Metropolitan Dade City Public Health Trust,* 651 So. 2d 673, 676 (Fla. 1995). Securitas set forth three separate grounds on which the Florida Supreme Court relied in refusing to adopt a negligence standard, and urged that these grounds should be persuasive to this Court as well. (Opening Br. 11-15). Plaintiff disagrees, but her arguments are not well-founded.

1. Expanding liability to include negligent interference with the right to possess a corpse would give plaintiffs in such cases a broader right of emotional distress recovery than exists under Illinois law for conduct directly involving a live person.

Plaintiff does not dispute that adopting a negligence standard in the instant case would give a plaintiff suing for emotional distress arising out of interference with a corpse a greater right of recovery than a plaintiff suing for emotional distress arising out of conduct directed at a living person. Plaintiff and ITLA urge that this disparate treatment is appropriate because Plaintiff is not suing Securitas for negligent infliction of emotional distress, but for the "free standing" tort of interference with the right to possess a corpse. (Pl. Br. 39-42) (ITLA Br. 2-4). Plaintiff states that whenever a separate tort can be alleged, the fact that Plaintiff is seeking to recover solely for emotional distress without any contemporaneous physical impact or physical injury is never an impediment to recovery under Illinois law. (Pl. Br. 34-35, 40-42). Plaintiff's assertion is incorrect.

Where a plaintiff's alleged injuries are emotional distress without any contemporaneous physical impact or physical injury, our appellate courts and this Court have been hesitant to permit recovery for negligent conduct even if the cause of action is pled as a separate tort. Thus, in *Brogan v. Mitchell International, Inc.*, 181 Ill. 2d 178, 184-85 (1988) (Opening Br. 15), this Court declined to allow recovery for emotional distress even though the cause of action pled was the separate tort of negligent misrepresentation. Similarly, Illinois has repeatedly refused to permit recovery for emotional distress in causes of actions

for legal malpractice. *Maere v. Churchill,* 116 Ill. App. 3d 939, 944-45 (3d Dist. 1983) (mental anguish damages were not recoverable under negligence theory against attorney); *Segall v. Berkson,* 139 Ill. App. 3d 325, 330-31 (4th Dist. 1985) (plaintiff's claim for alleged emotional distress caused by defendant's negligent performance of legal work should have been stricken). *See Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.,* 216 Ill. 2d 294, 306-07 (2005) (client must "demonstrate that he has sustained a *monetary loss* as the result of some negligent act on the lawyer's part") (emphasis added).

Plaintiff cites cases involving medical malpractice or auto accidents (Pl. Br. 35), but these cases involve plaintiffs who suffered undisputed physical injuries and are able to obtain emotional distress damages as part of a pain and suffering or loss of enjoyment of life award. *See Wood v. Mobil Chemical Co.,* 50 Ill. App. 3d 465, 476-77 (5th Dist. 1977) (plaintiff's anxiety, depression and other mental suffering arising from his own physical inabilities properly included in a pain and suffering award); *Holston v. Sisters of The Third Order of St. Francis,* 247 Ill. App. 3d 985, 1000-02 (1st Dist. 1993), *aff'd,* 165 Ill. 2d 150, 173-75 (1995) (mental anguish due to physical injury properly included in pain and suffering award); *Richardson v. Chapman,* 175 Ill. 2d 98, 115 (1997) (recovery for the plaintiff's nightmares resulting from the accident included in pain and suffering award).

None of the other cases cited by Plaintiff (Pl. Br. 35), involving architectural negligence, engineering malpractice, or accountant malpractice

mention any claim for emotional distress, and we can find no reported Illinois case allowing emotional distress damages in such causes of action. Again, see *Brogan*, 181 Ill. 2d at 183-86 and the legal malpractice cases cited *supra*. Thus, Plaintiff's claim that reversal of the Fourth District's decision will result in the tort of wrongful interference with the next of kin's right to possession of a corpse being "treated differently than every other common law tort (where the plaintiff may freely pursue damages for emotional distress for negligent conduct)" (Pl. Br. 32) is not supported by Illinois law. *See also Pasquale v. Speed Products Engineering,* 166 Ill. 2d 337, 350 (1995) (absent physical harm, emotional distress not recoverable in a strict liability in tort action).[3]

Both Plaintiff and ITLA rely heavily on this Court's decision in *Clark v. Children's Memorial Hospital,* 2011 IL 108656 (Pl. Br. 31-32) (ITLA Br. 9-10, 14), where this Court reversed its prior decision in *Siemieniec v. Lutheran General Hosp.,* 117 Ill. 2d 230 (1987), and held that plaintiffs in a wrongful birth action could recover *inter alia* damages for emotional distress without pleading or proving the "zone of danger" requirement for bystanders set forth in this Court's decision in *Rickey v. Chicago Transit Authority,* 98 Ill. 2d 546, 555 (1983). *Id.* at

[3] Nor do the cases cited at p. 41 of Plaintiff's Brief – denying recovery for the loss of companionship of a dog, *Jankoski v. Preiser Animal Hosp., Ltd.,* 157 Ill. App. 3d 818, 821 (1st Dist. 1987) and reversing an award for the loss of personal files and property listings as contrary to the manifest weight of the evidence, *Long v. Arthur Rubloff & Co.,* 27 Ill. App. 3d 1013, 1026 (1st Dist. 1975) – offer Plaintiff any support here. Neither case involved a claim for emotional distress.

¶ 112. The *Clark* court then remanded the case so that the plaintiffs could replead their claim for emotional distress without the restrictions of *Rickey*. *Id.* at ¶ 114.

Given the context of wrongful birth, *Clark* did not present any difficulty in separating recoverable emotional distress from non-recoverable emotional distress as in the instant case, nor was there the threat of opening the door to a myriad of heretofore non-existent and questionable claims. See Points I.C.2 and I.C.3, *infra.* Also, the defendants' failure in *Clark* to advise plaintiffs that their first child had an inherited infirmity that would put the second child at risk for the same infirmity certainly had physical ramifications – culminating in the birth of the second son with the same infirmity. *See Gallagher v. Duke University*, 852 F.2d 773, 778 (4th Cir. 1988) (recognizing a "physical injury" in wrongful conception/wrongful birth cases). In any event, the inapplicability of *Clark* to the instant case is manifest from the fact that *Clark*, 2011 IL 108656, ¶ 112, relied on the decision of the Florida Supreme Court in *Kush v. Lloyd,* 616 So. 2d 415, 422 (1992) – the same Court that three years later in *Gonzalez, supra*, refused to adopt a negligence standard in cases alleging interference with the right to possess a corpse.

As noted in *Clark,* at ¶ 111, there are personal tort cases such as defamation, conversion and misappropriation of identity where emotional distress damages are allowed. However, each of these is an intentional tort case, not a negligence claim. Likewise, in *Bushers v. Graceland Cemetery Ass'n of Albion, Ill.,* 171 F.Supp 205, 209, 211-14 (E.D. Ill. 1958) (Amicus Br. 11-13), where an oil well was erected near plaintiff's son's grave, the federal district court noted

that it was not dealing with a simple negligence case, *id.* at 212, but rather an illegal and unauthorized oil and gas lease that resulted in a continuing trespass on the property and easement rights of the cemetery lot owners, including plaintiff. *Id.* at 209, 211-13.

2. Delineating between recoverable and non-recoverable emotional distress in such cases would be extremely difficult.

Plaintiff argues that jurors have the ability to determine what is and what is not emotional distress, citing this Court's decision in *Corgan v. Muehling*, 143 Ill. 2d 296, 312 (1991) (Pl. Br. 43). However, that is not the difficulty envisioned by the Florida Supreme Court in refusing to permit actions for interference with the right to possess a corpse to proceed on allegations of mere negligence. *Gonzalez,* 651 So. 2d at 675-76. Any parent, such as Plaintiff, who unexpectedly loses a son is going to be extremely emotionally distressed. The "herculean," if not impossible, task would be for a jury or other fact-finder to separate out that non-recoverable emotional distress from the emotional distress allegedly resulting from the mishandling of the son's corpse. No such issue existed in *Clark, supra*, or in any of the intentional tort cases cited therein.

It may be argued that the same difficulty would arise in a case involving willful and wanton interference. But in those cases, *e.g., Mensinger, Rekosh, Drakeford, supra,* the willful and wanton acts themselves will afford some basis to measure and separate out the emotional distress caused by defendant's acts from the emotional distress arising from the death itself. This is reflected generally in

Illinois law, whereby direct victims of extreme and outrageous conduct sufficient to constitute intentional infliction of emotional distress are allowed to recover without any pleading or proof of a contemporaneous physical injury or impact, *Knierim v. Izzo,* 22 Ill. 2d 73, 84-87 (1961), while direct victims of negligent infliction of emotional distress may not recover without such proof. *Schweihs,* ¶ 44. Also, where the defendant's acts go beyond negligence and constitute willful and wanton conduct, the deterrence factor (Amicus Br. 14-15) is far more significant.

3. Expanding liability to negligent interference cases would open Illinois courts to a proliferation of emotional distress claims.

Plaintiff does not deny that allowing actions for interference with the right to possess a corpse to proceed based upon allegations of mere negligence would open up Illinois courts to all kinds of causes of action for perceived slights and wrongs in the handling of corpses. Indeed, Plaintiff admits that adopting a mere negligence standard would permit suits to be filed in "numerous factual scenarios" that "do[ ] not result in wrongful cremation." (Pl. Br. 49).

Securitas' Opening Brief (pp. 13-14) set forth numerous examples of the kinds of cases that could clog the courts. The authorities cited in Plaintiff's Brief provide many more. *See, e.g., Beaulieu v. Great Northern Ry. Co.,* 114 N.W. 353, 356 (Minn. 1907) (Pl. Br. 40-41) (railroad company sued for carrying corpse beyond the station of its destination); *Ross v. Forest Lawn Memorial Park,* 153 Cal. App. 3d 988, 995-96 (1984) (Pl. Br. 45) (cemetery liable where decedent's

friends disturbed flowers and the surface of the grave); *Binns v. West Minster Memorial Park,* 89 Cal. Rptr. 3d 890, 893-894 (Cal. App. 2009) (Pl. Br. 45) (body temporarily buried in wrong plot); *Hovis v. City of Burns,* 415 P.2d 29, 30-31 (Or. 1966) (Pl. Br. 45) (same); *Whaley v. County of Saginaw*, 941 F.Supp. 1483 (E.D. Mich. 1996) (Pl. Br. 36) (authorized autopsy removed decedent's corneas). There are many others, including cases mentioned in the treatise cited by Plaintiff (Pl. Br. 29), Prosser and Keeton, Law of Torts (5th ed. 1984) (p. 362, fn. 27, 31), *e.g., Estate of Harper v. Orlando Funeral Home, Inc.,* 366 So. 2d 126, 127 (Fla. App. 1979) (bottom of casket sagged downward); *Blanchard v. Brawley,* 75 So. 2d 891 (La. Ct. App. 1954) (decedent's body accidently burned by an acetylene torch while defendant was attempting to remove body from automobile wreckage). Recovery was not permitted in all of these cases, but they all demonstrate the wide array of potential litigation under a negligence standard.

Plaintiff urges that other states that have adopted a negligence standard have not been overwhelmed with such litigation. (Pl. Br. 44-45). However, Plaintiff's only "authority" for this assertion is the number of reported appellate cases. For example, Plaintiff cites six California court of appeal decisions involving such claims (Pl. Br. 45). Given the few cases that ever reach an appellate court, this could well reflect an inordinate number of claims filed and resolved without appellate review.

Again, in the context of the separate tort of legal malpractice, Illinois courts have repeatedly denied recovery for emotional distress, concluding that:

> "[W]e would be opening the door to any number of malpractice actions brought by clients who may have been less than satisfied with their legal representation but can point to no specific harm other than their own emotional distress. The potential for abuse would be too great." *Suppressed v. Suppressed,* 206 Ill. App. 3d 918, 925-26 (1st Dist. 1990).

Likewise here, allowing actions for negligent interference with the right to possess a corpse "would be opening the door to any number of" actions by persons "who may have been less than satisfied with" the handling of a corpse, and "[t]he potential for abuse would be too great."

E. The Illinois Legislature Has Provided a Remedy in Cases Like This.

Plaintiff cannot deny that the Illinois legislature, by its enactment of the Crematory Regulation Act, 410 ILCS 18/1 *et seq.*, has subjected crematory authorities such as Butler Funeral Home to civil liability in cases like this, without the need to prove willful and wanton conduct. *Rekosh v. Park,* 316 Ill. App. 3d 58, 71-72 (2d Dist. 2000).[4] Accordingly, Plaintiff's Complaint against Butler Funeral Home properly sought damages for Butler Funeral Home's violation of the Act in numerous respects, *e.g.*, cremating the body of Walter Cochran "without a valid crematory authorization"; failure to verify "that the identity of the human remains detailed in the crematory authorization matched the body of the decedent"; and cremating the body of Walter Cochran "without valid representation by an authorizing agent." (R. C289). See ITLA Br. 14 referring to

[4] Securitas' pinpoint citations for *Rekosh* in the Opening Brief (p. 16) inadvertently stated the pages of the N.E. 2d Rptr., 735 N.E. 2d at 777-78.

Butler Funeral Home's "statutory failure." Butler Funeral Home ultimately admitted that "DONNA COCHRAN did not authorize BUTLER to cremate the body of WALTER ANDREW COCHRAN" (R. C168), and settled Plaintiff's claims against it. (R. C661).

Plaintiff and her Amicus argue that Plaintiff cannot recover from Securitas under the Crematory Regulation Act because "Defendant Securitas did not cremate Walter's remains" (Pl. Br. 48), and because "Securitas is not a 'crematory authority' licensed to operate a crematory and perform cremations." (Amicus Br. 14). That is exactly the point. Securitas did not cremate Mr. Cochran's remains and it did not authorize the cremation. Indeed, there is no allegation that Securitas even knew that the body that was released to Butler Funeral Home was going to be cremated.

The legislature, which is presumed to know the case law requiring willful and wanton interference, *Vancora v. Katris,* 238 Ill. 2d 352, 378-79 (2010), understandably did not extend liability under the Act to such entities who had no knowledge of or involvement in the cremation. Thus, if any further erosion of the willful and wanton requirement is considered, it should be the legislature that does so. *Wakulich v. Mraz*, 203 Ill. 2d 223, 236-37 (2003); *Brewer*, 2016 IL 118781, ¶¶ 75-77. Indeed, if the mere negligence standard urged by Plaintiff were adopted, the liability provisions of the Crematory Regulation Act, *e.g.*, 410 ILCS 18/20 (d), 18/45(a), would essentially be rendered meaningless surplusage – as all involved with the handling of a cremated body, including crematoriums, could be held

liable without the need to plead and prove willful and wanton conduct. If that had been the legislature's intent, it would have drafted the Act accordingly.

CONCLUSION

For the reasons stated herein and in the Opening Brief, Securitas respectfully requests that this Court reverse the Appellate Court's judgment and affirm the Circuit Court's order dismissing the Third Amended Complaint against Securitas.

Respectfully submitted,

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Supreme Court Rule 341 (c) Certification of Compliance

Pursuant to Supreme Court Rule 341(c), I certify that this Reply Brief conforms to the requirements of Rules 341 (a) and (b). The length of the Brief, excluding the pages containing the Rule 341 (d) cover, the Rule 341 (c) certificate of compliance, and the certificate of service is 16 pages.

Respectfully submitted,

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