STATE OF MAINE
THE SUPREME JUDICIAL COURT SITTING AS THE LAW COURT
Docket No.: Cum-23-409

ROBERT CLARKE AND BOB'S LLC

Appellants

v.

LAUREEN FAMA

Appellee

JOINT REPLY BRIEF OF APPELLANTS

On Appeal from the Cumberland County Superior Court

Docket No.: PORSC-CV-22-243

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FACTS

Bob's and Mr. Clarke incorporate the procedural history and factual statement from their Joint Appellants' Brief herein. (Blue Br. 1-4). Bob's and Mr. Clarke note, however, that many of the factual statements made by Ms. Fama in her brief fall outside the undisputed findings of fact made by the trial court, and reference facts that were disputed or not relevant during summary judgment briefing. (Red Br. 2-5). All of these disputed and irrelevant facts should be disregarded by this Court, as those facts were not found or relied upon by the trial court in issuing its summary judgment order.

SUMMARY OF ARGUMENT

In her brief, Ms. Fama conflates the issues on appeal in several major ways. First, Ms. Fama repeatedly states the trial court determined a fact issue existed as to whether Mr. Fama's injuries arose in the course and scope of his employment. This is incorrect, as the trial court was unequivocal in finding that it was undisputed Mr. Fama's injuries arose out of and in the course and scope of his employment with Sanford Contracting.

Second, Appellees continue to analyze the immunity and course and scope issue as if a right to worker's compensation benefits remains to be determined. This, too, is incorrect. The arguments made by Ms. Fama and case law cited in support of those arguments might be persuasive if the question before this Court was whether

Mr. Fama was entitled to worker's compensation benefits as a result of his injuries and death. That, however, is not the issue before this Court, and that fact is not disputed. Mr. Fama's estate *was compensated* via a worker's compensation settlement for his injuries and death. Necessary to that settlement was an acknowledgement that Mr. Fama's injuries arose out of and in the course and scope of his employment with Sanford Contracting. Otherwise, worker's compensation benefits would have been denied. If worker's compensation benefits were denied on that basis, Ms. Fama's arguments in this appeal may be persuasive.

With these issues clarified, this Court should reach the merits of this appeal because all of the exceptions to the final judgment rule apply to the summary judgment order in this case. More specifically, this Court has been clear that where the denial of a motion for summary judgment pertains to issues of privilege and/or immunity from suit, this Court will review such decisions even if that order is otherwise interlocutory. Ms. Fama's arguments in opposition incorrectly rest on citations to cases determining whether worker's compensation benefits *should* be awarded, and completely disregard the undisputed fact that worker's compensation benefits *were* awarded. All facts necessary to Mr. Clarke's entitlement to immunity have been found by the trial court, and therefore this Court should reach the merits of this appeal.

With respect to Mr. Clarke's entitlement to immunity, Maine law is clear that an employer and any co-employees are entitled to immunity from suit for injuries sustained by an employee or co-employee that arose out of and in the course and scope of that injured employee's employment. The trial court in this case found it was undisputed that Mr. Fama's injuries and death arose out of and in the course and scope of his employment with Sanford Contracting. It likewise found that Mr. Clarke was employed by Sanford Contracting and was a co-employee and on assignment in Maine with Mr. Fama at the time of his injuries and death. Finally, it found that the worker's compensation claim was resolved entirely via a settlement. These were the only findings necessary to establish Mr. Clarke's entitlement to immunity. Ms. Fama's arguments in opposition again incorrectly rely on case law analyzing whether an injury occurred during the course and scope of employment as a prerequisite to the injured employee's entitlement to worker's compensation benefits. That is not at issue in this appeal as worker's compensation benefits were paid and the entire claim was resolved via a worker's compensation settlement. Based on those payments, Mr. Clarke is entitled to immunity.

Finally, Maine's Liquor Liability Act mandates that a Plaintiff name and retain the intoxicated tortfeasor in addition to the servers of the alcohol for a liquor liability claim to be viable. *See* 28-A M.R.S. § 2512(1). This Court has been clear that based on the plain language of the Liquor Liability Act, to be "named and

retained" for purposes of Section 2512(1), the alleged intoxicated tortfeasor must be named as a real party in interest and must have an actual financial stake in the litigation until its conclusion. Because Mr. Clarke is immune from suit, he cannot be named and retained for purposes of Ms. Fama's liquor liability claim. As such, Ms. Fama's claims against Bob's fail as a matter of law.

ARGUMENT

A. ***This Court Should Address the Merits of this Appeal as Several Exceptions to the Final Judgment Rule Pertain to the Interlocutory Order at Issue.***

In her brief, Ms. Fama correctly cites the exceptions to the final judgment rule. She then argues, however, this Court should not reach the merits of this appeal. Ms. Fama's arguments are unpersuasive and are premised on a fundamental misunderstanding of the trial court's findings and the actual issues on appeal. Because all three exceptions to the final judgment rule apply, this Court should reach the merits of this appeal.

i. The Collateral Order Exception

The collateral order exception "applies 'when the appellant can establish that (1) the decision is a final determination of a claim separable from the gravamen of the litigation; (2) it presents a major unsettled question of law; and (3) it would result in irreparable loss of the rights claimed, absent immediate review.'" *Bond v. Bond,* 2011 ME 105, ¶ 11, 30 A.3d 816, 820-21 (quoting *Fiber Materials, Inc. v. Subilia,* 2009 ME 71, ¶ 25, 974 A.2d 918 (quotation marks omitted)).

Ms. Fama acknowledges that the worker's compensation immunity issue decided on summary judgment is separable from the gravamen of the claims in her amended complaint. (Red Br. 11). She incorrectly argues, however, that the remaining two requirements are not met for the exception to apply.

First, Ms. Fama claims that the issues in this appeal do not concern an unsettled area of the law. The issues in this appeal, however, involve a worker's compensation settlement and its effects on co-employee immunity, and the interplay of those two issues with the Maine Liquor Liability Act's "Named and Retained" requirement. Undersigned was not able to locate any case law from this Court addressing this unsettled area of the law nor did Ms. Fama cite a single case in support of her position that this is a settled area of the law.

Second, Ms. Fama claims that Mr. Clarke's and Bob's rights will not be irreparably lost if this Court does not reach the merits of this appeal. In support of that argument, she cites *United States Dep't of Agric., Rural Hous. Serv. v. Carter* 2002 Me 103, 799 A.3d 1232 and *Richardson-Merrell, Inc. v. Koller*, 472 US 424 (1985) for the proposition that having to participate in a trial, or the expense of litigation, cannot constitute the irreparable loss of a right. What Ms. Fama fails to acknowledge is that neither case she cited dealt with the issue of immunity. When a Defendant is entitled to statutory immunity, requiring that Defendant to incur the costs of litigation and participate in a trial unquestionably constitutes an irreparable

loss of their immunity from suit. Because all three requirements for the collateral order exception are met, this Court should reach the merits of this appeal.

ii. The Death Knell Exception

The death knell exception "allows a party to appeal an interlocutory order immediately if 'substantial rights of a party will be irreparably lost if review is delayed until final judgment.'" *Carter*, 2002 ME 103, ¶12, 799 A.2d 1232, 1235 (quoting *Webb v. Haas,* 1999 ME 74, ¶ 5, 728 A.2d 1261, 1264, quoting *Cook v. Cook,* 574 A.2d 1353, 1354 (Me.1990)). A right is "irreparably lost if the appellant would not have an effective remedy if the interlocutory determination were to be vacated after a final disposition of the entire litigation." *Fiber Materials, Inc. v. Subilia*, 2009 ME 71, ¶ 14, 974 A.2d 918. "Put differently, where an interlocutory order has the practical effect of permanently foreclosing relief on a claim, that order is appealable." *Id.*

Ms. Fama acknowledges this Court's precedent establishing a litigant's entitlement to immunity can trigger the death knell exception to the final judgment rule. (Red. Br. 12). She goes on to argue, however, that Mr. Clarke's entitlement to immunity does not fall within that precedent. In support of that argument, she cites two cases.

First, Ms. Fama cites *Wilcox v. City of Portland*, 2009 ME 53, 970 A.2d 295. This Court in *Wilcox* was faced with an appeal from the City of Portland on 13

consolidated cases brought by city employees relating to airborne biotoxins from mold. The City's motion for summary judgment based on immunity afforded by the Maine Tort Claims Act ("MTCA") had been denied by the trial court. This Court held that the immunity exception to the final judgment rule did not apply because the protections afforded by the MTCA were inapplicable if the claims against the governmental entity were covered by insurance, which issue had been left open by the parties in briefing summary judgment. *Id*. ¶ 12. This Court ultimately concluded that all necessary fact findings applicable to determining immunity must be made by the trial court before the immunity exception to the final judgment rule can apply. *Id*. ¶¶ 13-14.

Unlike in *Wilcox*, all the factual findings pertinent to Mr. Clarke's entitlement to immunity were made by the trial court. Title 39-A M.R.S. § 104 provides a broad grant of immunity to *all* co-employees, which grant focuses only on whether an employee's injuries arose out of and in the course and scope of *that employee's* employment. *See* 39-A M.R.S. § 104 (observing that exemptions from liability provided by the Act "apply to ***all employees***, supervisors, officers and directors of the employer for any personal injuries ***arising out of*** and in the course of employment, or for death resulting from those injuries"). In this case, the trial court found it was undisputed that Mr. Fama's injuries arouse out of and in the course and scope of his employment with Sanford Contracting, Mr. Clarke was a co-employee

on assignment in Maine with Mr. Fama, and the entire worker's compensation claim was paid via a worker's compensation settlement. (A. 11-12). These are the only findings necessary to Mr. Clarke's entitlement to immunity. As such, this Court's holding in *Wilcox* is inapplicable to the facts of this case.

Ms. Fama next cites *Gilbert v. Maheaux*, 391 A.3d 1203 (Me. 1978) for the proposition that in determining "whether to award compensation the ultimate conclusion of whether an employee is injured by an accident arising out of and in the course and scope of his employment may be a question of law, one primarily of fact, or a mixed question of law and fact." (Red Br. 13). Again, whether Mr. Fama was entitled to worker's compensation benefits is not at issue in this appeal. Ms. Fama submitted a claim for worker's compensation benefits arguing the injuries to Mr. Fama arose out of and in the course and scope of his employment, and that claim for benefits was paid. There are no outstanding fact issues pertinent to Mr. Clarke's entitlement to immunity, and therefore the Death Knell exception applies.

iii. The Judicial Economy Exception

The judicial economy exception "is available in those rare cases in which appellate review of a non-final order can establish a final, or practically final, disposition of the entire litigation." *Subilia*, 2009 ME 71, ¶ 26, 974 A.2d 918 (quotation marks omitted). It applies "only when a decision on the appeal . . . regardless of what it is, would effectively dispose of the entire case." *Id.* A party

need only establish that, in at least one alternative, our ruling on appeal might establish a final, or practically final disposition of the entire litigation. *Maples v. Compass Harbor Vill Condo. Ass'n*, 2022 ME 26, ¶ 17 n.9, 273 A.3d 358.

Ms. Fama's sole argument in opposition to the applicability of the judicial economy exception is her claim that even if this Court found Mr. Clarke is entitled to immunity from suit, her loss of consortium claim against Bob's in Count IV survives. (Red Br. 15). This argument is incorrect.

If Mr. Clarke is immune, then Ms. Fama's liquor liability claims against Bob's fail as a matter of law. 28-A M.R.S. § 2512 (1); *Swan v. Sohio Oil Co.*, 618 A.2d 214 (Me. 1992). Because the Liquor Liability Act is "the exclusive remedy against servers who may be made defendants . . . for claims by those suffering damages based on the servers' service of liquor," *See* 28-A M.R.S. § 2511, she does not have an independent claim for loss of consortium as alleged. If the liquor liability claim was viable, loss of consortium damages could be recovered pursuant to section 2508, but that Act is the sole basis for any claim against Bob's. Therefore, if this Court were to vacate the summary judgment order and hold that Mr. Clarke is entitled to immunity, that holding would entirely dispose of all claims in this litigation. Therefore, the judicial economy exception applies to this appeal.

B. *Mr. Clarke is Entitled to Co-Employee Immunity Pursuant to Maine Law.*[1]

As is consistent throughout her brief, Ms. Fama begins her arguments against application of the co-employee immunity doctrine by stating "[t]he Trial Court correctly denied summary judgment because it could not be determined as a matter of law whether Mr. Fama's death arose out of and in the course and scope of employment." (Red Br. 16). The trial court never made such a finding or reached such a conclusion.

The trial court actually made contrary findings. The trial court found it was undisputed that Mr. Fama's injuries did in fact arise out of and in the course and scope of his employment with Sanford Contracting and that it was likewise undisputed that the worker's compensation claim submitted by Ms. Fama for Mr. Fama's injuries was accepted, settled, and paid. (A. 11-12). The trial court further found it was undisputed that the worker's compensation settlement compensated Ms. Fama for Mr. Fama's "work-related injuries and death" and extinguished the employer's liability for Mr. Fama's injuries and death. (A. 11). As noted previously, these are the only factual findings necessary to establish Mr. Clarke's entitlement to

[1] In her brief, Ms. Fama states that "[c]hoice of law was not argued by either party at the summary judgment level". (Red Br. 17 n.2). Again, this statement is not accurate. Mr. Clarke spent several pages of his Motion for Summary Judgment arguing application of Maine law over Massachusetts law to the facts of this case. *See* Clarke Motion for Summary Judgment at pages 4-6. A more accurate statement would be that Ms. Fama did not provide any opposition to Mr. Clarke's argument that Maine law applied in opposing summary judgment, and therefore waived any argument in opposition to application of Maine law. *See York Hospital v. Dep't of Health & Human Servs*., 2008 ME 165, ¶ 29, 959 A.2d 67, 73) ("issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

immunity, and those findings were in fact made by the trial court. Because the trial court found Mr. Fama's injuries arose out of and in the course and scope of his employment, that Mr. Clarke was a co-employee on assignment in Maine with Mr. Fama at the time of the injuries and death, and that the worker's compensation payments extinguished liability against Mr. Clarke and Mr. Fama's employer, Mr. Clarke is entitled to co-employee immunity. *See* 39-A M.R.S. § 104. (observing that exemptions from liability provided by the Act "apply to *all employees*, supervisors, officers and directors *of the employer for any personal injuries arising out of and in the course of employment, or for death resulting from those injuries*") (emphases added).

i. The case law cited by Ms. Fama is inapplicable and unpersuasive.

The case law cited by Ms. Fama in support of her argument that a fact dispute exists precluding Mr. Clarke's entitlement to immunity demonstrates her continued misunderstanding of what was at issue on summary judgment and what is at issue in this appeal. As discussed below, Ms. Fama continues to cite cases that entirely centered on whether an employee was acting in the course and scope of his employment such that the employee would be entitled to worker's compensation benefits. Again, neither of those facts are in dispute in this appeal. Ms. Fama submitted a worker's compensation claim arguing Mr. Fama's injuries and death arose out of and in the course and scope of his employment, and that claim was

accepted, settled, and paid. (A. 8, 11-12). Appellants nevertheless address the cases cited by Ms. Fama, below.

In the first case cited by Ms. Fama, *Wessner v. Montgomery,* CV-02-4, 2003 WL 21211996 (Me. Super. Ct. April 28, 2003), the Plaintiff was an employee of a golf club, and the defendant was the club's president. The Plaintiff, a salaried employee, drove to a general store to get lunch and while at the store he saw the defendant, who grabbed his wrist. *Id.* at *1. The plaintiff alleged he sustained injuries in the altercation. The golf club submitted a notice of claim for compensation benefits to its worker's compensation carrier. *Id.* The plaintiff did not submit a claim for worker's compensation benefits but did submit some medical bills to the carrier for payment, and a portion of the medical bills were paid by worker's compensation. *Id.* The worker's compensation carrier declined to pay lost wage compensation, and plaintiff did not challenge that decision. *Id.*

The *Wessner* case is procedurally distinguishable from this case in critical ways. In *Wessner*, the plaintiff had not submitted a worker's compensation claim for his injuries. In this case, Plaintiff did submit a worker's compensation claim for the death of Mr. Fama. (A. 8, 10-11). In *Wessner,* only some medical bills were paid by the worker's compensation carrier. Here, there was a full settlement of the worker's compensation claim submitted by the plaintiff as a result of Mr. Fama's death. (A. 8, 11-12). Indeed, Ms. Fama did not identify any damages sought in this lawsuit that

were not covered by the worker's compensation benefits paid as a result of Mr. Fama's death, because no such damages exist. In *Wessner*, it was disputed whether the assault arose out of and "in the course and scope" of employment because the comp carrier did not pay wage benefits and only paid a portion of the medical bills incurred by Plaintiff. In this case, no such dispute exists because the entirety of Plaintiff's worker's compensation claim was accepted, paid, and resolved through a settlement agreement. (A. 8-12). Therefore, *Wessner* has no application to the issues of this case, as it is factually and procedurally distinguishable.

Ms. Fama next cites *Comeau v. Maine Costal Services, et al*, 449 A.2d 362 (Me. 1982), which is likewise factually and procedurally distinguishable from this matter. In *Comeau*, the superior court entered a decree affirming the denial of worker's compensation benefits by the Worker's Compensation Commission because it was determined the employee's injuries did not arise out of and in the course and scope of his employment. This Court affirmed the decree entered by the Superior Court.

As an initial matter, *Comeau* dealt with an intentional tort committed by a non-employee against an employee, whereas here, it is undisputed both Mr. Fama and Mr. Clarke were co-employees, and were both working together in Maine for their employer at the time of the altercation. (A. 7-8). More importantly, *Comeau*, was litigated in the workers' compensation system, and centered on whether the

plaintiff's injuries arose out of and in the course and scope of his employment as a requirement for an entitlement to worker's compensation benefits. Ultimately, no benefits were paid to the plaintiff because it was found that the injuries did not arise out of and in the course and scope of the plaintiff's employment. In this case, however, whether Mr. Fama's injuries and death arose out of and in the course and scope of his employment is undisputed. (A. 8, 10-12). Ms. Fama submitted a claim for worker's compensation benefits resulting from Mr. Fama's death while he was on assignment in Maine for Sanford Contracting, and that claim was accepted and resolved entirely through a settlement. (A. 8, 11.) Unlike *Comeau*, Ms. Fama is not seeking a finding about her entitlement to worker's compensation benefits because her claim for benefits was accepted and paid.[2]

ii. Ms. Fama's arguments regarding the release are unpersuasive.

Ms. Fama's final argument against Mr. Clarke's entitlement to co-employee immunity is that the worker's compensation settlement and release does not prevent her from pursing Mr. Clarke individually. (Red. Br. 23-26). This argument is unpersuasive for several reasons.

First, Ms. Fama's argument regarding the absence of any "findings of liability" in the settlement agreement is unavailing because whether the parties

[2] Again, the trial court found it was undisputed that the worker's compensation settlement compensated Ms. Fama for Mr. Fama's "work-related injuries and death". (A. 11).

resolved the worker's compensation claim through settlement as opposed to a contested hearing has no bearing on the effects of that settlement. Indeed, Ms. Fama does not cite any legal authority to support this proposition, because no such authority exists. If Ms. Fama's position were adopted for the first time now, all settlements would be without force or effect because there are rarely "findings of liability" contained in those releases.[3] The settlement in this case was a mutual agreement to extinguish liability for the death, injuries, and damages sustained by Mr. Fama arising out of and in the course of his employment with Sanford Contracting in exchange for the worker's compensation benefits paid to Plaintiff.[4] (A. 8, 10-12).

Second, Ms. Fama argues that because Mr. Clarke did not sign the release, she is entitled to pursue claims against him individually. Again, no legal authority is provided to support this position because no such authority exists. Rarely, if ever, does a defendant or tortfeasor sign a release because it is the plaintiff or claimant that is releasing the claims in exchange for money. In exchange for more than $400,000.00, Ms. Fama signed the release in this case releasing the claims relating

[3] If Ms. Fama truly believed the release did not extinguish the claims at issue because it did not contain a "finding of liability", she surely would have filed a claim against Sanford Contracting. The absence of a claim against Sanford Contracting implicitly establishes her understanding that the release did in fact extinguish the claims stemming from Mr. Fama's "work related injuruies".

[4] The bargained for exchange was that the employer and co-employee were statutorily immune from suit once the worker's compensation claim was paid. This is one reason why worker's compensation statutes exist.

to Mr. Fama's injuries and death that arose out of and in the course and scope of his employment. (A. 8, 10-11).

Third, Ms. Fama again cites *Wessner*, this time for the proposition that the settlement and release agreement she signed does not extinguish her claims against Clarke. She argues that the court in *Wessner* permitted the Plaintiff to pursue his action against his co-employee despite accepting benefits because "there was a genuine issue of material fact on whether the plaintiff's injury occurred in the course and scope of employment." (Red. Br. 24). The Court in *Wessner* was careful to state that "the plaintiff's continuing acceptance of benefits, demonstrated by his repeated acts of submitting medical bills for payment by the compensation carrier, may be strongly suggestive of an election to seek relief under the worker's compensation laws and *thus a waiver of his rights in the courts* . . . ." *Id.* *4 (emphasis added). Unlike the plaintiff in *Wessner*, Ms. Fama explicitly elected to seek relief through a worker's compensation settlement "thus waiving her rights in the courts". Unlike the Plaintiff in Wessner, Ms. Fama settled the worker's compensation claim and executed a settlement and release agreement.[5]

Ultimately, Ms. Fama cannot have her cake and eat it too. She resolved any dispute about whether Mr. Fama's injuries and death arose out of and in the course

[5] Again, the trial court found it was undisputed that the worker's compensation settlement compensated Ms. Fama for Mr. Fama's "work-related injuries and death". (A. 11).

and scope of his employment with Sanford Contracting by negotiating and accepting the $400,000.00 worker's compensation settlement with Sanford Contracting's worker's compensation carriers. (A. 8, 10-12). She cannot submit that claim, accept that settlement, and then subsequently argue the injuries and damages did not actually arise out of Mr. Fama's employment with Sanford Contracting in an attempt to recover those same damages in a separate action against Mr. Clarke. This is the exact reason co-employee immunity exists. Therefore, based on the undisputed facts as applied to the law, Mr. Clarke is entitled to co-employee immunity as a matter of law and judgment should have been entered in his favor.

C. ***Because Mr. Clarke is Entitled to Co-Employee Immunity, Ms. Fama's Claims Against Bob's Fail as a Matter of Law.***

Ms. Fama does not address the merits of Bob's claims pertaining to the Liquor Liability Act's named and retained provision or exclusivity provisions in her brief. By way of silence, Ms. Fama appears to concede that if Mr. Clarke is entitled to co-employee immunity, her Liquor Liability claim against Bob's fails as a matter of law. Ms. Fama's failure to provide any argument or authority to support a position that her Liquor Liability claim against Bob's could survive if Mr. Clarke is immune from suit, at a minimum, amounts to a waiver of any such argument. *See York Hospital v. Dep't of Health & Human Servs*., 2008 ME 165, ¶ 29, 959 A.2d 67, 73) ("issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived" (citing *Mehlhorn v. Derby*, 2006 ME

110, ¶ 11, 905 A.2d 290)). Bob's adopts, incorporates, and reasserts the arguments made in the Joint Appellants' brief on these issues herein. (Blue Br. 26-34).

CONCLUSION

Based on the undisputed findings of fact in the trial court's order (A. 7-8), it was an error of law to deny Mr. Clarke's Motion for Summary Judgment. The undisputed facts applied to Maine law confirm that Mr. Clarke is entitled to co-employee immunity pursuant to 39-A M.R.S. § 104. Because Mr. Clarke is immune from suit, he cannot be named and retained for purposes of Ms. Fama's Liquor Liability Claim against Bob's, which is fatal to those remaining claims.

WHEREFORE, Appellants respectfully request that this Court:

1. Vacate the trial court's order denying summary judgment to Robert Clarke and Bob's LLC;

2. Remand this case to the Superior Court with instructions to enter judgment in favor of Robert Clarke who is immune from suit pursuant to 39-A M.R.S. §104; and

3. Remand this case to the Superior Court with instructions to enter judgment in favor of Bob's LLC given that Robert Clarke's immunity from suit is fatal to Plaintiffs' Liquor Liability Claim against Bob's pursuant to 28-A M.R.S. § 2512(1).

Dated at Portland, Maine, this 23rd day of April, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that I have, this 23rd day of April, 2024, caused two (2) copies of the Appellees' Joint Reply Brief to be served upon the following persons via U.S. Mail, First Class, postage pre-paid and by email.

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