**Nos. 21-CV-665 & 21-CV-666**

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**DISTRICT OF COLUMBIA COURT OF APPEALS**



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**HENRIETTA CONDOMINIUM ASSOCIATION, et al.,**

**Appellants/Cross-Appellees,**

v.

**S2 U STREET, LLC,**

**Appellee/Cross-Appellant,**

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**On Appeal from the Superior Court of the District of Columbia, Civil Division**
**No. 2020 CAR 3007**

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# BRIEF OF APPELLANT

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## STATEMENT PURSUANT TO RULE 28(A)(2)(A)

The parties in this case are Appellants/Cross-Appellees Henrietta Condominium Association, Melissa J. Haupt, Nancy T. Montoya, Belkines Arenas Germosen, and Victoria and Pamela Flattau (collectively the "Henrietta Appellants"), and Appellee/Cross Appellant S2 U Street, LLC. In the Superior Court action below, the initial plaintiff was Lester Reese, who was who withdrew from the action in May 2021, when S2 U Street, LLC substituted in as plaintiff.

In this appeal the Henrietta Appellants are represented by Ray M. Aragon of Press, Dozier & Hamelburg, LLC. In the Superior Court action below, the Henrietta Appellants were represented by Vanessa Carpenter Lourie of the Law Offices of Vanessa Carpenter Lourie until July, 2021, when she was replaced as counsel of record by Ray M. Aragon.

In this appeal Appellee/Cross Appellant S2 U Street, LLC is represented by Carol S. Blumenthal and Kathryn Erklauer of Blumenthal, Cordone & Erklauer PLLC. In the Superior Court action below, Plaintiff Lester Reese was represented by Richard W. Luchs, Gwynne L Booth, and Gabrielle A. Best Husband of Greenstein Delorme & Luchs, P.C., and successor Plaintiff S2 U Street, LLC was represented by Carol S. Blumenthal and Kathryn Erklauer of Blumenthal, Cordone & Erklauer PLLC.

There are currently no intervenors or *amici curiae* in this matter.

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## SUMMARY AND QUESTIONS PRESENTED

This case involves a land dispute and a claim for adverse possession and equitable easement. Original Plaintiff Lester Reese, the long-term owner of a property in Northeast Washington, DC (the "Lester Property"), brought this adverse possession action against Appellants/Cross-Appellees Henrietta Condominium Association, Melissa J. Haupt, Nancy T. Montoya, Belkines Arenas Germosen, and Victoria and Pamela Flattau (the "Henrietta Appellants"), claiming a fenced-off driveway and surrounding area (the "Disputed Area") that the Henrietta Appellants and prior owners of the adjacent property (the "Henrietta Property") had used exclusively for decades for parking and access to the Henrietta property was in fact part of the Lester Property.

Following discovery, Plaintiff Reese moved for summary judgment. The trial court reviewed the evidence presented by the parties, found there were disputed issues of material fact, and denied summary judgment.

Plaintiff thereafter moved to "alter or amend" the order denying summary judgment, presenting no new evidence and no new issues of law, but simply reiterating the very arguments the trial court had previously rejected. The trial court held no hearing, but simply ruled on the papers, with no clear explanation of why its position had changed 180 degrees, even though no new evidence had been provided. Notwithstanding that no new issues or evidence was presented, the trial

court granted summary judgment to Plaintiff on the precise record upon which summary judgment had previously been denied.

The Henrietta Appellants, who had successfully opposed Plaintiff Reese's Summary Judgment Motion, were never informed of the reconsideration motion by their former attorney until after judgment had been entered, and thus were prevented from providing any additional evidence in opposition to the renewed request for summary judgment. Immediately upon learning of the summary judgment ruling, however, the Henrietta Appellants engaged new counsel and moved for reconsideration of the trial court's grant of summary judgment.

In its motion for reconsideration, the Henrietta Appellants presented a mass amount of new evidence demonstrating that the current and former owners of the Henrietta Property had for nearly 30 years used the driveway and Disputed Area claimed by Plaintiff openly, exclusively, continuously, and with the understanding that the driveway was an integral (i.e., wholly owned) part of the Henrietta Property. While the members of the Henrietta Condominium Association provided testimony regarding their exclusive use of the Disputed Area, the new evidence was primarily focused on the testimony of third-party witnesses, entirely new to the litigation, who were previously unknown to the Henrietta Appellants. Two former owners of the Henrietta Property testified that during their ownership the Disputed Area was used exclusively by Henrietta owners, and the Henrietta

Property was marketed with the understanding that the parking pad and surrounding area was an integral part of the Henrietta Property. A director of a local nonprofit organization who worked directly across the street from the Henrietta Property for more than 15 years testified that the Disputed Area had always been physically incorporated into the Henrietta Property and segregated from the Reese Property. A neighbor testified that the Disputed Area was integrated into the Henrietta Property, physically segregated from the Reese Property, and used exclusively by Henrietta owners since at least 1969, a period of more than 50 years. Yet another lifetime neighbor, now in his late sixties, testified that as a young boy he had played on the fence segregating the Reese Property from the Henrietta Property, with the Disputed Area on the "Henrietta" side of the dividing fence, and that the same fence had segregated the Reese Property from the claimed Disputed Area for the next six decades. The sworn evidence of the new witnesses matched clearly with Plaintiff Reese's admission that although he purchased the Reese Property in 1984, he did not have any knowledge of any alleged trespass by the Henrietta Appellants until 2020, a period of thirty-six years.

In addressing the newly discovered evidence supporting decades of adverse and exclusive possession of the disputed of the Disputed Area by Henrietta owners, the trial court simply barred its doors. Rather than use this new, previously unknown, outcome-determinative evidence its legal analysis, the trial court simply

refused to consider it. Rather, for the sake of convenience and finality, the trial court rejected without consideration all of the evidence presented by the Henrietta Appellants, positing that the evidence should have been produced previously in response to Plaintiff's first unsuccessful summary judgment motion, or in response to Plaintiff's motion for "relief" from the trial court's denial of summary judgment (a motion the Henrietta Appellants had no knowledge of until after judgment had been entered in favor of Plaintiff Reese). Disregarding nearly sixty years of consistent, undisputed evidence supporting the Henrietta Appellants' defense of adverse possession in favor of convenience and finality, the trial court upheld summary judgment in favor the Plaintiff.

This appeal presents the following questions:

1. Did the trial court err in reversing its finding that disputed issues of material fact precluded summary judgment when Plaintiff's motion for "relief" or "amendment" contained no new facts, no new evidence, and no new issues of law?

2. Did the trial court thereafter err in refusing even to consider overwhelming evidence provided by new third party witnesses indicating that the Disputed Area had been used openly, exclusively, continuously and under claim of ownership by current and former Henrietta Owners for at least 30 years, and possibly as many as sixty continuous years, thus elevating convenience and finality

over a just result, the overwhelming weight of evidence, and the right of the Appellants to trial of their claims?

## STATEMENT OF THE CASE

**1. The Litigants**. In 1984, Plaintiff Lester Reese purchased a property and improvements located at 350 U Street, Northeast, in Washington, DC (the "Reese Property"). Reese Aff. in Support of Summary Judgment ¶¶ 2-3 (A044). Plaintiff Reese continuously owned the Reese Property until 2021. *Id.* ¶3 (A044).

Appellants Henrietta Condominium Association and its members Nancy Montoya, Melissa Haupt, Belkines Arenas Germosen, Victoria Flattau, and Pamela Flattau, own the real property and improvements located at 2002 4th St., Northeast (the "Henrietta Property"), which is adjacent to the Reese Property. Henrietta Association RFA Responses, Answers 6-12. (A050-A051).

**2. The Alleged Encroachment**. Although Plaintiff Reese had owned the Reese Property for nearly 37 years when he brought this action, he admits that from 1984 until 2020, a period of 36 years, he was not aware of any encroachment. Reese Aff. ¶¶ 2-3 (A044,A045). Reese acknowledges he only became aware of the property encroachment about which he complains in 2020, at least 11 years after the prior owners of the Henrietta Property constructed a concrete driving pad and built a segregating fence on the "Disputed Area." Reese Aff. ¶¶ 6-7, 9 (A045). Mr. Reese further claims that in May 2020, a survey demonstrated that the

Henrietta Appellants "constructed structures and improvements approximately 23.18 feet south of the [Henrietta] Property line onto the [Reese] Property," and that these structures and improvements included a concrete driving pad, a short masonry walls, a chain-link fence, and a wooden fence." Reese Aff. ¶ 9 (A045). As such, Plaintiff acknowledges that he was entirely unaware, and thus accepted, the encroachment of the Henrietta Appellants and their predecessors for at least 36 continuous years.

**3.** **Trial Court Litigation**. This litigation followed, with Plaintiff asserting five causes of action, including Action to Quiet Title, Ejectment, Declaratory Judgment, and Trespass and Injunctive Relief. Complaint Dkt. 1 (A004). In their Answer and Counterclaim, the Henrietta Appellants asserted counterclaims for Adverse Possession, Prescriptive Easement, and Declaratory Judgment. Answer and Counterclaims, Dkt. 9 (A005).

**4.** **Plaintiff's First Motion for Summary Judgment**. Following discovery, Plaintiff Reese filed a motion for summary judgment, asserting that as a matter of law there was no evidence before the trial court that, even perceived in a light favorable to the Henrietta Appellants, could establish any of the elements of adverse possession. Summary Judgment Motion at 4-5. (A025-A026).

Notwithstanding the clear legal standard for summary judgment, *i.e.*, that judgment without hearing or trial is only appropriate when "the pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law," *see* D.C. Super. Ct. R. Civ. P. 56(c) ("Rule"), Plaintiff repeatedly misstated this standard. In his Summary Judgment Motion, Plaintiff claimed entitlement to judgment without trial or hearing regarding the Henrietta Appellants' defenses of adverse possession and prescriptive easement because "Defendants **cannot prevail** on any claim of adverse possession." Summary Judgment Motion at 4 (emphasis supplied). (A025). Plaintiff repeatedly claimed entitlement to judgment because "Defendants cannot establish the requisite criteria" for adverse possession, essentially arguing that because the Henrietta Appellants cannot ***prove*** entitlement to judgment prior to trial or hearing, Plaintiff was entitled to judgment. *Id.*[1] In making such arguments, Plaintiff Reese either forgot or ignored that in considering whether to grant or deny a summary judgment motion, a court "must view the record in the light most favorable to the party who opposes summary judgment **and thus resolve any doubts as to the existence of a factual dispute against the moving party."**

[1] Plaintiff Reese further claimed entitlement to judgment, claiming the Henrietta Defendants "cannot establish continuous use of the Area in Dispute," *id.* at 5, (A026), nor "prove exclusive possession," *id.*, nor "establish that they, in fact, have adversely possessed the Area in Dispute and any portion of the Subject Property," *id.* at 6, (A027). The resolution of such disputed matters of proof are of course the province of a jury, and are not to be addressed by a court on summary judgment.

*O'Malley v. Chevy Chase Bank, FSB,* 766 A.2d 964, 967 (D.C. 2001) (emphasis added).

These misstatements of law and of fact continued in the alleged facts Plaintiff asked the Court to accept as undisputed. In its Statement of Undisputed Facts, Plaintiff Reese asked the trial court to accept as undisputed many crucial facts that the Plaintiff provided no proof for, and which the Henrietta Defendants did not admit. In supporting its Motion for summary judgment, Plaintiff Reese asked the trial court to accept as "undisputed" literally scores of alleged facts that the Henrietta Defendants had not admitted to at all. Requests for Admission Nos. 15, 16, 18, 19, 70, 20, 69, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 41, 71, 42, 43, 44, 45, 72, 73, 46, 47, 99, 100, 49, 50, 52, 53, 54, 97, 96 were all cited to the trial court as supporting undisputed statements of fact, when in reality the Henrietta Appellants did not admit *any* of these alleged facts, instead stating that they were unable to admit or deny those facts. RFA Answers. (A048).

This is a serious matter, as many of Plaintiff Reese's allegedly undisputed facts have no support whatsoever other than reference to Requests for Admissions that the Henrietta Defendants could neither admit nor deny. For example, Plaintiff supported its assertion that the Henrietta Property was vacant (and thus allegedly could not have been used continuously by owners of the Henrietta Property) *only*

by citing to RFAs that the Henrietta Appellants did not admit. *See* Reese Statement of [Allegedly] Undisputed Facts ¶ 9 (claim of vacancy at the Henrietta Property supported only by citation to RFA answers 19 and 70, neither of which is an admission. *See* RFA Answers 19, 70 (A052-A059). Likewise, Plaintiff claims that it is undisputed that the Henrietta Property was vacant between 1998 and October 31, 2001, *see* Reese Statement of [Allegedly] Undisputed Facts ¶ 10 (A035), but the only support for this claim is a reference to the Henrietta Defendants' answers to RFAs 20 and 69, in which the Henrietta Appellants did not admit the truth of the alleged facts, *see* RFA Answers 20 and 69 (A052, A059). *See also* Reese Statement of [Allegedly] Undisputed Facts ¶ 11 (alleging as undisputed fact that the Henrietta Property was vacant following a transfer of the property to a new owner in October 2001, supported only by RFA Answer 23, which again was not admitted (A035). In total, Plaintiff Reese cited as support for allegedly undisputed facts sixty-five separate RFA answers in which the Henrietta Appellants did not admit the truth of the purported facts.

In opposing Plaintiff Reese's Summary Judgment Motion, the Henrietta Appellants identified a number of facts they claim were disputed. Opposition to Summary Judgment Motion at 5-6; (A337-A338). In particular, the Henrietta Appellants demonstrated that a fence between the properties had existed since before March 1999 until more than 15 years thereafter, and that the Disputed Area

was segregated from the Reese Property, and also demonstrated through its RFA answers that the Henrietta Appellants acknowledged use of the Disputed Area for parking throughout their property ownership. *Id.* (A337-A338) *See also* Henrietta Appellants' statement of undisputed facts precluding summary judgment at ¶ 1 (photographs demonstrated that the Disputed Area had been used for parking since at least March 1999) (A342); ¶ 4 (photographs demonstrating that a fence on the Disputed Area "closed off the disputed land from plaintiff's property for the benefit of defendants' property") (A342); ¶¶ 6-7 (a prior owner of the Henrietta property had constructed a concrete parking pad, wooden fence, and a masonry wall prior to 2009, demonstrating long-term use of the Disputed Area by Henrietta owners) (A343); ¶ 8 (a 2010 appraisal report of the Henrietta Property listed the property as containing for on-site parking spaces, indicating that the Henrietta Owners believed they owned the Disputed Area). The Henrietta Appellants also pointed out that Plaintiff Reese never challenged the use of the Disputed Area by the Henrietta owners from his purchase of the Reese Property in 1984 until 2020, a period of 36 years, and never demanded that the existing chain link fence or the later-installed wooden fence be removed. *Id.* ¶¶ 10-11. (A343).

**5.** **<u>The Trial Court Denies Summary Judgment</u>**. The trial court, reviewing the record, apparently did not review the voluminous evidence provided by the parties, but simply pointed out that the Henrietta Appellants had asserted

that from at least March 1999, prior owners of the Henrietta Property had fenced in the area in dispute with the chain-link fence for the exclusive use of the Henrietta Owners, and had further asserted that the chain-link fence continue to exist to the present. Order Denying Summary Judgment at 3. (A344). The trial court found that Plaintiff acknowledged the existence of the 1999 fence, but there was a dispute regarding whether it was a different fence. As a consequence, the trial court found that there was a factual dispute that was material and precluded summary judgment. *Id.* (A343)

**6. Plaintiff Moves to "Alter or Amend" the Order Denying Summary Judgment**. Undeterred by the denial of summary judgment, Plaintiff Reese filed an unusual motion to alter or amend the trial court's order denying summary judgment under Rule 59(e) of the District of Columbia Rules of Civil Procedure, in the alternative seeking relief under Rule 60(b) of the D.C. Rules of Civil Procedure. Plaintiff's Motion to Alter or Amend at 3-5. (A353-A355). Plaintiff Reese admitted, however, that in fact he was seeking "reconsideration" of the trial court's order denying summary judgment. *Id. at* 7. (A357.) In his Motion to Alter, Plaintiff Reese simply re-argued the points he had previously made in his Motion for Summary Judgment, but without adding any new evidence and without raising any new legal points. *Id.* (A357).

The Henrietta Appellants argued in opposition that Rule 59(e) applies only to altering or amending judgments, that the only element of Rule 60(b) that appeared to apply is Rule 60(b)(6), which provides relief from a court order for "any other reason," and that Plaintiff was simply re-litigating issues that had already been considered and rejected. Henrietta Appellants' Opposition to Plaintiff's Motion to Alter or Amend at 1. (A364). In summary, the Henrietta Appellants argued that Plaintiff Reese had failed to demonstrate the absence of any material factual issues, and that the trial court could only resolve the disputed issues raised by the evidence by resolving factual disputes. *Id.* at 4. (A367). The Henrietta Appellants also cited controlling authority that "where there is the slightest doubt as to the facts," summary judgment must be denied and the dispute must be submitted to the jury for resolution. *Patrick v. Hardisty,* 483 A.2d 692, 696 (D.C. 1984). *Id.* (A367). The dispute regarding the fence between the properties, as well as Mr. Reese's admission that he did not dispute the incursion of the Henrietta Owners for more than 36 years, were facts the Henrietta Defendants asserted created issues of fact that *still* precluded summary judgment, particularly as Plaintiff presented no new facts or evidence, but simply reiterated each and every point the trial court had already heard and rejected.

**7. <u>The Trial Court Reaches a New Decision on the Same Facts</u>.**

The trial court, which had previously found that disputed issues of material fact

precluded summary judgment, suddenly decided that it did not have "the slightest doubt" as to the facts. In its Order granting reconsideration and awarding summary judgment to Plaintiff Reese, the trial court simply ignored its prior analysis finding that disputed issues of material fact precluded summary judgment.

The trial court found that Plaintiff Reese's request for reconsideration under Rules 60(b) and Rule 59(e) was inappropriate, but rather than deny reconsideration, the trial court very helpfully directed Plaintiff to Rule 54(b), a source of relief Plaintiff had never mentioned or cited. Nevertheless, the trial court reviewed the Rule 54(b) standard, and argued that reconsideration was appropriate "and that harm or injustice would result if reconsideration were denied." Order Granting Reconsideration at 3, (A372). citing *United States ex rel. Westrick v. Second Chance Body Armor, Inc.*, 893 F. Supp. 2d 258, 268 (D.D.C. 2012). The trial court warned, however, that motions for reconsideration "cannot be used as an opportunity to reargue facts and theories upon which a court has already ruled." *Id*. at 3, *citing Ali v. Carnegie Institute of Washington*, 309 F.R.D. 77, 81 (D.D.C. 2015). (A374). The trial court then ignored its warning, permitting Plaintiff Reese to re-argue the exact facts and law the trial court had already rejected.

On reconsideration, the trial court also disregarded the standard for summary judgment motions, finding that the Henrietta Appellants had "failed to produce enough admissible evidence to make a *prima facie* case in support of their claims

of adverse possession and prescriptive easement," and that the Henrietta Defendants "have not established a claim for adverse possession." *Id* at 4-6. (A375-A377). Of course, requiring the Henrietta Appellants to fully establish their claim for adverse possession, or even to establish a *prima facie* case, is a standard applicable only at trial, but wildly inappropriate on summary judgment, which must be withheld where there is "the slightest doubt" as to the facts. As a consequence, rather than leaving to a jury the question of whether the photographic evidence of a parking pad and a fence segregating the Disputed Area from the Reese Property from at least 1999 tended to establish elements of adverse possession, or whether Plaintiff's admitted acceptance of the Henrietta incursion without complaint for more than 35 years tended to demonstrate adverse possession, the trial court resolved these issues itself. In doing so, the trial court not only directly contradicted its prior finding that a disputed issue of material fact precluded summary judgment, but directly ignored this Court's guidance that court should "indulge a presumption [] that possession is adverse whenever there is open and continuous use of another's land for the statutory period, and this in this presumption is effective to establish title in the absence of evidence to the contrary." *Smith v. Tippit,* 569 A.2d 1186, 1189 (DC 1990).

Having done an about face and convinced itself that it had not "the slighted doubt" in supporting the positions it previously rejected on the same evidence and

law, the trial court deprived the Henrietta Defendants of a hearing before the trial court, or a trial before the jury, unilaterally granting judgment to Plaintiff. *Id.* (A374-A377).

**8.** **The Henrietta Appellants Seek Reconsideration**. Having been informed by the trial court's prior opinions that motions for reconsideration are appropriate for the presentation of newly discovered evidence, or because the original decision would lead to injustice, the Henrietta Appellants moved for reconsideration of the trial court's order granting summary judgment. Henrietta Motion for Reconsideration. (A382). In their motion, the Henrietta Appellants disclosed that their prior counsel had failed to inform them of Plaintiff Reese's motion for reconsideration, and that they were entirely unaware of Plaintiff's reconsideration of the motion until after the Court had granted summary judgment for Plaintiff Reese, and thus had had no opportunity to provide additional evidence. *Id.* at 5-7 (A386-A388). ). A skeletal opposition filed by prior counsel without notice to or involvement of the Henrietta Appellants, was entirely non-substantive, consisting of less than three pages of discussion, but with no affidavits, testimony, substantiated evidence at all, and only several grainy photos of the **wrong** fence and the **wrong** property. *Id.* at 4-5 (A385-86) (citing testimony of Appellant Melissa Haupt). As such, the Henrietta Appellants, entirely unaware of the trial court's sudden about-face, had no opportunity to respond or to reply.

In moving for reconsideration, the Henrietta Appellants did not re-argue prior rejected facts and law as Plaintiff Reese had done. Instead, they gathered and presented to the trial court numerous sworn affidavits not only from the president of the Henrietta Condominium Association and each of the Association members, but also many entirely new third-party witnesses.

Thus, in addition to demonstrating the continuous and exclusive use of the Disputed Area during the time they lived at Henrietta Condominium, the Henrietta Appellants provided evidence indicating that the Henrietta owners had continuously and exclusively used (and made claim to ownership of) the Disputed Area for many decades. This testimony included, including a business neighbor across the street from the Henrietta Property who had for more than 15 years observed not only the physical integration of the Disputed Area into the Henrietta Property (and the physical separation by fences of the Disputed Area from the Reese Property), but also the continuous and exclusive use of the Disputed Area by the Henrietta Appellants and prior Henrietta owners. Motion for Reconsideration at 6-7, 15 (A387-88, A396) (citing testimony of business neighbor Michael Pickering).

The Henrietta Appellants also produced sworn affidavits by two prior non-party Henrietta owners, each of whom testified under oath that they had used the Disputed Area continuously and exclusively by Henrietta owners four parking and

storage, and believed the Disputed Area was part of the Henrietta Property. *Id.* at 5-6, 13-14 (A386-87, 394-95) (citing testimony of 2005-09 Henrietta owner Curtina Hoston, and 2009-10 Henrietta owner developer Alan Nash (*Id.* at 5-6, 15-16 (A338, A387-98). With the addition of this third-party testimony, the Henrietta Appellants fully demonstrated that for nearly thirty continuous years, successive owners of the Henrietta Property had used the Disputed Area for parking and storage, and had used the Disputed Area exclusively, and under a claim of right, with each owner testifying to their sincere belief that the Disputed Area was part of the Henrietta Property. *Id.* (A387).

This testimony was substantiated by a neighbor who was able to testify that the Disputed Area was segregated from the Reese Property continuously from 1969 to the present, was continuously occupied by Henrietta owners for parking or as a staging area for construction "since at least 2015," and that the Disputed Area "was part of the Henrietta property, particularly since it was always fenced off" from the other properties." *Id.* at 7 (A338) (citing testimony of neighbor Diane Schuler).

This new evidence was substantiated by a lifetime resident of the neighborhood, now in his late sixties, who testified that as a young boy he had played on the Reese Property, and had also played on a chain link fence that segregated the Disputed Area from the Reese Property and enclosed the Disputed

Area with the adjacent Henrietta Property. *Id.* at 7, 12-14 (A338, A393-95) (citing testimony of James "Jimmy" Lee). He further testified that the chain link fence he played on as a child had continuously separated the Disputed Area from the Reese Property for approximately sixty continuous years, and still remained in place, although somewhat worse for the wear, and testified that to his knowledge the Disputed Area had been used only and exclusively by Henrietta owners. *Id.*

**9. The Court Disregards the Henrietta Appellants New Evidence**.

Faced with new and compelling evidence that the Henrietta Appellants and their predecessor owners had used the Disputed area openly, exclusively, and under a claim of right for at least 30 years, including Plaintiff's concession that he permitted the incursion for more than 30 years, the Court if simply refused to consider any of the new evidence, or even to grant the Henrietta Defendants a hearing to address the new evidence. *See generally* Order Denying Reconsideration. (A400).

In refusing to consider the new evidence, the trial court ignored the very purpose of reconsideration under Rule 54 and Rule 60(b). As the trial court had carefully stated in its Order reconsidering its denial of summary judgment, reconsideration of an order is appropriate when "reconsideration is consonant with justice." *See* Order Granting Reconsideration at 3, citing *Marshall v. United States*, 145 A.3d 1014, 1019 (D.C. 2016). Indeed, the trial court in its prior Order

Granting Reconsideration stated that reconsideration is warranted if the moving parties "present newly discovered evidence, show that there has been an intervening change in law, or demonstrate that the original decision was based on a manifest error of law was clearly unjust." *Id.* (A400).

However, in considering the Henrietta Appellants' Motion for Reconsideration, the trial court simply asserted that the outcome-determinative evidence proffered by the Henrietta Appellants should have been produced earlier, either in response to Plaintiff's initial motion for summary judgment (which the trial court denied, deciding in favor the Henrietta Defendants' right to trial) or in response to the Plaintiff's Motion for Reconsideration, which the Henrietta Appellants never learned of until after the trial court had granted summary judgment. As such, the trial court opined that the Henrietta Defendants "have not presented newly discovered evidence," and had not shown that its refusal to consider the evidence was "clearly unjust." Order Denying Motion for Reconsideration at 6. (A405).

## STANDARD OF REVIEW ON APPEAL

Standard of Review for Grant of Summary Judgment. In reviewing an appeal of a grant of summary judgment, the Court of Appeals makes an "independent review" of the record, and applies the same standard as the trial court's standard for initially considering the motion. *O'Malley*, 766 A.2d at 967.

Entitlement of any party to summary judgment is reviewed *de novo* under the standards of Rule 56, obliging the Court of Appeals to conduct its own independent review of the record to determine whether any relevant factual issues exist by examining and taking into account the pleadings, depositions, and admissions of the parties, along with any affidavits on file, and construing all this material in the light most favorable to the party opposing a motion. *Mudd v. Occasions Caterers, Inc.*, 264 A.3d 1191, 1195 (D.C. 2021). Under these strict standards, a party is entitled to summary judgment only if, when the facts are viewed in the light most favorable to the non-moving party, there are no genuine issues of material fact and the moving party has demonstrated entitlement to judgment as a matter of law. *Id.* at 1195*; see also Aziken v. District of Columbia*, 194 A.3d 31, 34 (D.C. 2018). If upon *de novo* review a dispute of material fact exists, "then summary judgment is not appropriate, and an award of summary judgment must be reversed." *Mudd*, 264 A.3d at 195 (internal quotations and citations omitted). "Even a doubt as to whether a genuine issue [of fact] exists is sufficient to preclude summary judgment." *O'Malley*, 766 A.2d at 973, *citing Bason v. Am. Univ.*, 414 A.2d 522, 525 (D.C.1980). The application of these standards, applied only to Plaintiff's initial unsuccessful summary judgment motion, but to Plaintiff's entirely repetitive motion for reconsideration, would preclude summary judgment.

In addition to considering whether the trial court was justified in abruptly reconsidering and reversing its decision to deny Plaintiff's original summary judgment motion, and thereafter refusing to consider compelling evidence denying the Henrietta Appellants' motion, the Court of Appeals must consider the standards for granting reconsideration motions under Rule 54(b) (under which the trial court considered both Plaintiff's Motion for Reconsideration and the Henrietta Appellants' Motion for Reconsideration) and Rules 59(e) and 60(e)) (under which the trial court also considered the Henrietta Appellants' Motion for Reconsideration).

Standard of Review under Rule 54(b). Under Rule 54(b), as the trial court recognized, "it is well-established that motions for reconsideration, whatever their procedural basis, cannot be used as an opportunity to reargue facts and theories upon which a court has already ruled." Order Granting Reconsideration at 3. (A402.), citing *Ali v. Carnegie Institute of Washington*, 309 F.R.D. 77, 81 (D.D.C. 2015). Raising "arguments that should have been, but were not, raised in" the original filing "is, frankly, a waste of the limited time and resources of the litigants and the judicial system." Order Granting Reconsideration at 3 (A402), citing *Estate of Gaither v. District of Columbia*, 771 F. Supp. 2d 5, 9-10 (D.D.C. 2011). Thus, addressing or granting a motion for reconsideration under Rule 54(b) that simply reiterates prior arguments or theories is inappropriate.

A review of Plaintiff's initial summary judgment motion and motion for reconsideration demonstrate that they are entirely duplicative, and raised no new issues, whether factual or legal, whatsoever. As such, the application of this standard to Plaintiff's Motion for Reconsideration would have precluded reconsideration of Plaintiff's wholly repetitive arguments at all.

Standard of Review under Rules 60(b) and 59(e). With regard to the trial court's refusal to consider the evidence presented by the Henrietta Appellants in its Motion for Reconsideration, the Court of Appeals must review whether the trial court exercised "sound discretion" in doing so. *Reid v. District of Columbia*, 634 A.2d 423, 424 (D.C.1993) (citing Rule 60(b); *Huff v. Metropolitan Life Ins. Co.*, *supra* note 9, 675 F.2d at 122; *see Queen v. D.C. Transit Sys.*, 364 A.2d 145, 148 (D.C.1976) (citing Rule 59(e)). Typically, a post-judgment motion "requesting consideration of extraordinary circumstances" is properly considered under Rule 60(b). *Puckrein v. Jenkins*, 884 A.2d 46, 54 (D.C. 2005).

The discretion of the trial court to refuse to consider crucial evidence, however, is strictly limited, particularly when the trial court's action deprives a litigant of a trial on the merits of the case. "Because courts universally favor trial on the merits, even a slight abuse of discretion in refusing to set aside a judgment

may justify reversal."[2] *Starling v. Jephunneh Lawrence & Assocs*., 495 A.2d 1157, 1159–60 (D.C. 1985). Each case is unique and must be evaluated in light of its own particular facts, taking into consideration whether the movant (1) had actual notice of the proceedings; (2) acted in good faith; (3) took prompt action; and (4) presented an adequate defense. *Id.* at 1160 (citing Rule 59(e).

Moreover, reconsideration motions may be granted to present newly discovered evidence, *In re: Louisiana Crawfish Producers,* 852 F.3d 456, 468-469 (5th Cir. 2017), or as necessary to prevent manifest injustice. *Atlantic States Legal Foundation, Inc. V. Karg Bros., Inc*., 841 F. Supp. 51, 53 (N.D. N.Y. 1993). Notably, and particularly relevant here, serious misconduct of counsel may justify such relief. *Dale and Selby Superette & Deli v. U.S. Dept. of Agriculture*, 838 F. Supp. 1346 (D. Minn. 1993) (citing Rule (59)(e)). *See also* 11 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2810.1 (3d ed. April 2022 update) (same). As the Henrietta Appellants had no real opportunity to address a motion which they were never made aware after successfully prevailing against Plaintiff's initial summary judgment motion, application of this standard

[2] This standard applies in reviewing a trial court's refusal to set aside a default judgment. *See Alexander v. Polinger Co*., 496 A.2d 267, 269 (D.C. 1985). This is instructive as the Henrietta Appellants were entirely unaware of Plaintiff's Motion for Reconsideration until after judgment was entered against them. As courts strongly favor trial on the merits over such dispositive actions, in such a circumstance "even a slight abuse of discretion" can justify reversal. *Id.*

would demonstrate that the trial court's refusal to address the Henrietta Appellants' evidence was an abuse of its discretion.

## DISCUSSION

### A. The Trial Erred Procedurally and Legally in Entertaining Plaintiff Reese's Motion for Reconsideration and in Granting Summary Judgment

In Plaintiff's original motion for summary judgment, the trial court reviewed the arguments and evidence presented by the parties, and found that there were issues of disputed facts and precluded summary judgment. Order Denying Summary Judgment (A345).

Undeterred, Plaintiff essentially re-filed an identical motion, and simply re-argued all of the points it had previously made. Having warned that motions for reconsideration are inappropriate when they simply re-state prior arguments, the trial court allowed plaintiff to do exactly that, and entertained the exact factual and evidentiary arguments that the trial court had previously found unpersuasive.

The trial court should never have entertained Plaintiff's motion for reconsideration, as it raised no new issues and abused its discretion in taking Plaintiff's motion for reconsideration on board at all. The trial court for no apparent reason stated the standard of "no repetitive argument" and then embraced Plaintiff's reconsideration Motion, which had no new evidence or argument

whatsoever, much less of what was new, or why, and ironically found that it would be a significant injustice not to give Plaintiff a do-over to make the same points.

In addressing Plaintiff's motion for reconsideration, the trial court erred from the start in "correcting" Plaintiff's request for reconsideration under Rules 59 and 60(b), and considering it under Rule 54(b). Although the trial court asserted that Rule 54 provides a standard, the two Court of Appeals cases the trial court cites say the exact opposite. In *Marshall v. United States,* 145 A.3d 1014, 1019, the Court of Appeals stated that "there are no procedural rules (civil or criminal) that allow for reconsideration of interlocutory orders," but that the trial court has "inherent powers" to address such motions. *Id.* The second case cited by the trial court, *Bernal v. United States,* 162 A.3d 128, 133 (D.C. 2017), also states that while there are no governing rules, a trial court may reconsider interlocutory orders "while it exercises plenary jurisdiction over case." While there is no procedural bar to the trial court reconsidering its earlier orders, such reconsideration has been reviewed in light of any resulting procedural restraint and being "consonant with justice." Examples of such considerations have been applied to various cases, such as ones involving reconsideration of an order regarding a continuance, reconsideration of an order regarding transfer of venue and reconsideration regarding an order for withdrawal of a guilty plea. *See Bernal,* 162 A.3d at 133-134; *United States ex rel. Westrick*, 893 F. Supp. 2d at 268-269;

*Marshall,* 145 A.3d at 1014.However, it is made clear that no existing standard for trial courts to follow under Rule 54(b) exists at this time.

The trial court, by erroneously citing a Rule 54(b) standard that does not exist, clearly failed to apply the correct standard to the Plaintiff's motion for reconsideration, instead cobbling together a standard that appears to be some mix of Rule 59 and Rule 60(b) standards, rather than considering whether its decision aided the trial court's "plenary jurisdiction" over the case. Because such a standard is usually applied to procedural matters, it is entirely unclear what standard the trial court used, or how the unclear standard was applied.

The application of the Rule 54(b) "standard" to the trial court's actions requires reversal and dismissal of Plaintiff's motion for reconsideration; first because there is no such standard, and second because there is no way to tell why the trial court did what it did, other than to apply an elevated (and therefore wrong) summary judgment standard on reconsideration.

Compounding its initial abuse of discretion, the trial court then re-reviewed the standard for summary judgment set forth in Plaintiff's motion. Seeming to place a thumb on the scale, the trial court found that the Henrietta Appellants failed to make a *prima facie* case for adverse possession, Order at 5 (A376), and "have not established a claim for adverse possession or an easement." *Id.* at 6 (A377).

This of course is not the Rule 56 standard. The trial court faced photographic evidence that the fence segregating the Disputed Area from the Reese Property had existed since 1999, clearly establishing that a well-worn parking area physically integrated into the Henrietta Property had provided parking just a few feet away from the Henrietta Condominium for a minimum of 21 years. This evidence, combined with Mr. Reese's confession that for more than 36 years he was unaware of and certainly never objected to this decades-long incursion provides facts and evidence that must be determined by a jury, rather than the trial court. Even worse, in addressing the same facts and the same law, but reaching an entirely different decision without explaining why the evidence it had found after review material issues of disputed fact had somehow transformed from "disputed" into a situation in which the court did not have "the slightest doubt" resolving them, the only apparent difference being the trial court's application of a much higher standard than appropriate on summary judgment. The trial court had a duty to deny summary judgment if there are any disputed issues of material fact, but granted summary judgment to Plaintiff Reese because the Henrietta Appellants "failed to produce enough admissible evidence to make a *prima facie* case in support of their claims," and "have not established a claim or adverse possession." In applying what is essentially a **trial** victory standard in summary judgment context, rather than the summary judgment standard that *any* disputed issues of

material fact preclude summary judgment, the trial court committed clear error and abused its discretion leaving this Court no choice on its independent review but to reverse the award of summary judgment.

Thus, on appeal, the Court of Appeals must review first whether the trial court abused its discretion in entertaining an essentially identical motion making no points and providing no new evidence, based on a fictitious "Rule 54(b) standard." It must also address whether on reconsideration the trial court's findings that the Henrietta Appellants erred in granting summary judgment based on a finding that they failed to produce "enough admissible evidence to make a *prima facie* case in support of their claims of adverse possession" and "have not established a claim for adverse possession." Finally, as demonstrated above, the record is replete with dozens of allegedly undisputed facts in support of summary judgment with no support other than reference to RFA answers by the Henrietta Appellants that did not admit the genuineness of the alleged facts. On *de novo* independent review, the Henrietta Appellants believe it will become clear that the trial court abused its discretion, and that the Court of Appeals should carefully address whether the facts alleged to be undisputed by Plaintiff, but which were supported only or primarily by reference to the Henrietta Appellants' RFA answers in which the requested facts were not admitted, were inappropriately considered "undisputed," as they are not. Additionally, this Court must also apply the

compelling standard that the trial court carefully quoted and then completely ignored: whether on reconsideration the trial court inappropriately applied an inappropriate standard on reconsideration to strike the Henrietta Appellants' defenses. On review, it is clear that the trial court abused its discretion in considering a motion for reconsideration that contained no new law and no new evidence, but only arguments, law, and evidence that the trial court had previously rejected. Moreover, a careful review of the Order Granting Reconsideration (A371) clearly demonstrates that while the trial court articulated the appropriate standard in its initial denial of summary judgment, it applied a much higher and legally impermissible standard of evidence to strike the Henrietta Appellants' defenses and award Plaintiff judgment without trial.

It is not surprising that by applying an inappropriate and impermissibly high standard on reconsideration, the court granted Plaintiff summary judgment. However, it is equally clear that the court abused its discretion both in considering plaintiff's Motion for Consideration in the first place, then compounded its abuse of discretion with clear legal error in creating a heightened evidentiary standard that gave Plaintiff's an extraordinary and legally impermissible advantage. These clear errors, combined with the trial court's erroneous acceptance as "undisputed" facts that it did not prove and that the Henrietta Appellants did not admit, require the Court of Appeals to reverse the trial court's grant of summary judgment on

reconsideration to Plaintiff.

### B. The Trial Court Erred in Refusing to Consider the New Evidence Provided by the Henrietta Appellants in Their Motion for Reconsideration

The trial court also abused its discretion and committed reversible error in refusing to consider the new evidence proffered by the Henrietta Appellants. A simple review of the evidence indicates that it is outcome-determinative, and that the Henrietta Appellants will, if permitted by the trial court, be able not only to defeat summary judgment, but also to win title to the Disputed Area, as the evidence they provided is not only entirely undisputed by Plaintiff, but also clearly demonstrates that Henrietta Appellants and its predecessors have made open, continuous, and exclusive use of the Disputed Area for at least 30 years, far more than the 15-year requirement to establish title by adverse possession.

The trial court's first error in refusing to consider the Henrietta Appellants' evidence was not only that it abused its discretion, but that it failed properly to consider the evidence before it. As the Henrietta Appellants have shown, reconsideration of judgment is appropriate when there is newly discovered evidence, or as required to prevent manifest injustice.

In its analysis, the trial court considered one and only one part of this equation: whether some of the evidence might have been produced before, and

whether it was an appropriate exercise of discretion to bar the Henrietta Appellants (who were entirely unaware of the motion for reconsideration or the judgement against them) from responding to Plaintiff's renewed motion for summary judgment at all.. It did not even consider whether manifest injustice would result from this refusal. It also found that because one of the reasons for the failure to present evidence was the misconduct of counsel, it effectively had no discretion to consider the evidence. Motion Denying Reconsideration at 5. (A403). This finding is another error of law. As the Henrietta Appellants have demonstrated, each of these issues is subject to the "sound discretion" of the trial court. In refusing to consider that in granting summary judgment for Plaintiff the court was indeed reaching manifestly unjust results, ignoring 60 years of evidence in favor of order and "finality," the trial court seriously erred not merely in failing to exercise sound discretion, but in failing to exercise any discretion at all. The consequence of this failure to exercise discretion-precluding the Henrietta Defendants from presenting its clearly overwhelming evidence at hearing and trial require reversal.

Interestingly, but in a legally unfortunate manner, the application by the trial court of inconsistent standards to the Parties' motions for reconsideration demonstrate that it abused its discretion in both motions, creating an usual and punitive Catch-22 situation denying the Henrietta Defendants' right to present its

overwhelming evidence at trial. In granting Plaintiff's summary judgment motion on reconsideration, when motion for reconsideration simply rehashed the arguments the trial court had previously rejected, the trial court failed properly to exercise its discretion to decline to consider an inappropriate motion. In the face of no new evidence, no new facts, and no new legal argumentation, Plaintiff was not entitled to reconsideration of the trial court's denial of summary judgment. Then, again compounding its failure of discretion, it ignored the standards it set out in the Motion Granting Reconsideration and handed Plaintiff an inappropriate and one-sided victory.

Immediately thereafter, having abused its discretion in granting reconsideration and judgment to Plaintiff, it further abused its discretion by declining, on legally erroneous grounds, to consider the outcome-determinative evidence the Henrietta Defendants have assembled. This second abuse of discretion compounds yet again the trial court's errors in this action.

The trial court appeared to find it had **no** discretion to consider the new evidence, and that its duty was to elevate finale over any other consideration. Order Denying Reconsideration at 4 (A403). In doing so it failed to take into account the many exceptions permitting reconsideration Rule 60 and Rule 59, which include discovery of new evidence, the prejudice caused by the misconduct of counsel, and whether the Henrietta Defendants were unfairly deprived of the

opportunity to present evidence, first when they were not informed of the renewed summary judgment motion, and second when the Court rigidly closed its eyes to the evidence and testimony – from parties, neighbors, prior owners, and business neighbors – that should decide this case. Such Procustean rigidity not only results in clear and manifest injustice – the Henrietta Appellants will lose a significant amount of the property they and the owners had believed was there for more than 30 years, but also undermine the reputation of the Superior Court as a tribunal seeking justice, as opposed to simply finality. By acting with such rigidity and failing to consider the options available to it, the trial court erred badly, and by failing even to identify or address the factors that weigh in favor of reconsideration, such as whether the party was aware of the motion being granted and had an opportunity to properly respond, the trial court appeared unaware that it had discretion to do anything other than refusing to consider important new evidence. Weighing only the factors on one side of the scale (finality and order) and then deciding that no countervailing considerations may be considered (fairness, avoidance of manifest injustice, accuracy in result, depriving a trial to a party with accurate defenses, penalizing a party when it was not aware of the motion being granted), is in and of itself a failure to exercise its discretion, particularly when the order being reconsidered is not a final order but an interlocutory one, as the trial court recognized when it refused to certify the

Henrietta Rule 54(b) motion for immediate appeal. Order Denying Motion for Entry of Partial Final Judgment Dkt. 95 (A017). As an interlocutory order, the trial court had discretion to reconsider it "not subject to the limitations of Rule 59," *Williams v. Vel Rey Properties, Inc.* 699 A.2d 416, 419 (D.C. 1997) (citations omitted). As the Court of Appeals clearly stated in *Williams*, the "policy of promoting the finality of judgments "is not applicable to an interlocutory order, which by hypothesis is not final and is subject to modification by the court at any time before judgment is entered." *Id., citing* 11 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 2812 (1981). The same logic also applies to motion for reconsideration under Rule 60 of interlocutory orders.

That the trial court appeared to consider itself helpless to exercise discretion in light of the many equitable reasons demonstrated by the Henrietta Appellants and in light of clear contrary authority constitutes yet another error. This is precisely the type of situation in which the Court should exercise its discretion to prevent "manifest injustice." Instead, it failed to recognize it had discretion at all.[3]

[3] It also is both ironic and an additional abuse of discretion that the trial court faults the Henrietta Appellants for failing to produce additional evidence in opposing the original summary judgment motion. In doing so, the trial court appears to penalize the Henrietta Appellants for successfully clearing the summary judgment bar, but doing it by inches rather than feet. Counsel finds no cases in which parties were retrospectively penalized after prevailing in a summary judgment motion.

For the Henrietta Appellants to lose this important case simply because the trial court valued rigidity and finality over fairness and accuracy would create gross unfairness. On review the Court of Appeals should reverse the trial court's refusal to consider the crucial evidence in this case, and remand with instructions to reconsider the trial court's abuses of discretion and application of inappropriate standards for entertaining motions for reconsideration, as well as incorrect and highly elevated standards to survive summary judgment. Further, the Court of Appeals should find that the trial court's rigid denial of reconsideration to the Henrietta Appellants was based on the trial court's erroneous failure to recognize or apply the discretion it had to consider and apply 60 years of overwhelming evidence that would entitle the Henrietta Appellants to judgment in this case.

## CONCLUSION

Because the trial court abused its discretion in reconsidering its initial denial of summary judgment, committed clear error in erroneously granting summary judgment to Appellee, and then compounded these errors by refusing to consider new and crucial evidence offered by the Henrietta Appellants, the Court should reverse the trial court's actions, remand this action with instructions to the trial court to withdraw the summary judgment, and require the trial court in equity and in fairness to consider the overwhelming evidence before it demonstrating the right of the Henrietta Appellants to be awarded title to the disputed property at issue in this case.

Respectfully submitted,

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# District of Columbia
# Court of Appeals

## REDACTION CERTIFICATE DISCLOSURE FORM

**Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.**

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Ray M. Aragon
Signature

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21-CV-665 & 21-CV-666
Case Number(s)

August 4, 2022
Date

**PROOF OF SERVICE**

I, Ray Aragon, certify that on August 5, 2022, true and correct copies of:

-Opening Brief of Appellants/Cross-Appellees;
-Appendix of Appellants/Cross-Appellees; and
-Redaction Certificate Disclosure Form

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