No. 73039

IN THE SUPREME COURT OF THE STATE OF NEVADA

TRUDI LEE LYTLE AND JOHN ALLEN LYTLE, TRUSTEES OF THE LYTLE TRUST,
Appellants,

vs.

MARJORIE B. BOULDEN, TRUSTEE OF THE MARJORIE B. BOULDEN TRUST; LINDA LAMOTHE AND JACQUES LAMOTHE, TRUSTEES OF THE JACQUES & LINDA LAMOTHE LIVING TRUST,
Respondents.

On Appeal from an Order of the Eighth Judicial District Court, Clark County, Nevada; The Honorable Timothy C. Williams, District Court Judge; District Court Case No. A-16-747800-C

ANSWERING BRIEF
of Respondents Robert Z. Disman And Yvonne A. Disman

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NRAP 26.1 DISCLOSURE

In accordance with NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Respondents Robert Z. Disman And Yvonne A. Disman are individuals and not affiliated with any corporation.

The only law firm that has appeared or is expected to appear for Respondents Robert Z. Disman And Yvonne A. Disman in the case is the Fidelity National Law Group, 1701 Village Center Circle, Suite 110, Las Vegas, Nevada 89134.

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I. INTRODUCTION

This appeal concerns a residential subdivision located in Las Vegas, Nevada variously called Rosemere Estates or Rosemere Court ("Rosemere" or "subdivision") and its association called Rosemere Estates Property Owners Association ("Rosemere Association"). In a previous lawsuit (at times referred to herein as, the "Rosemere I Litigation"), Appellants John Allen Lytle and Trudi Lee Lytle, Trustees of the Lytle Trust (collectively referred to herein as, the "Lytles") specifically sought and obtained a judgment that the Rosemere Association is a limited-purpose association and thus Rosemere property owners are not subject to the majority of the provisions of NRS Chapter 116 regarding common-interest ownership. The Lytles also obtained a money judgment against the association in the Rosemere I Litigation.

Thereafter, in an attempt to collect on their money judgment, the Lytles engaged in a stunning reversal of their previous stance on the limited nature of Rosemere Association. This time, embracing the provisions of NRS Chapter 116 applicable to full-fledged homeowners' associations, they adopted the stance that their money judgment against Rosemere Association may be enforced against all of the properties within the subdivision. Thus, they recorded abstracts of the judgment against all of the properties, including, but not limited to, those

belonging to Respondents Marjorie B. Boulden, Trustee of The Marjorie B. Boulden Trust, and Linda Lamothe and Jacques Lamothe, Trustees of The Jacques & Linda Lamothe Living Trust (at times collectively referred to herein as, "Respondents").

To redress the Lytles' wrongdoing, Respondents brought the underlying action against them for slander of title, and injunctive and declaratory relief. After careful consideration, the district court granted summary judgment in Respondents' favor, ordered the abstracts of judgment to be expunged and stricken from the record, and permanently enjoined the Lytles from recording and enforcing the judgment against Respondents' properties. The district court's decision is entirely proper in light of the previous judgment that the Rosemere Association is a limited-purpose association and Respondents' lack of involvement as parties in the Rosemere I Litigation. Hence, this Court should affirm the decision of the district court in its entirety.

II. STATEMENT OF ISSUE(S) PRESENTED FOR REVIEW

A. Issue on Appeal

The issue presented for this Court's review is whether the district court erred in granting Respondents a permanent injunction prohibiting the Lytles from

recording and enforcing the judgment obtained in the Rosemere I Litigation against Respondents' properties.

B. Joinder in All Answering/Amicus Briefs

Respondents Robert Z. Disman and Yvonne A. Disman (collectively referred to herein as, the "Dismans") are uniquely situated in this appeal. They purchased Respondent Marjorie B. Boulden, Trustee of The Marjorie B. Boulden Trust ("Boulden")'s Rosemere property after the district court granted summary judgment in her favor. The Dismans were added to the underlying action and appeal by virtue of their purchase, but did not participate in the proceedings from which the issue on appeal arises. Hence, they join in (and hereby adopt by reference) the Answering Brief of Respondents Boulden and Linda Lamothe and Jacques Lamothe, Trustees of The Jacques & Linda Lamothe Living Trust ("Lamothe"), as well as all other briefs filed in response to the Opening Brief.

III. STATEMENT OF FACTS

A. The Rosemere Subdivision

Rosemere is a residential subdivision located in Las Vegas, Nevada, comprised of nine (9) lots and/or properties. *See* AA, Vol. 1, at 61, ¶ 21. On January 4, 1994, Baughman & Turner Pension Trust, then owner and developer ("Developer") of Rosemere, recorded a Declaration of Covenants, Conditions and

Restrictions (CC and R's) governing the subdivision ("Original CC&Rs"). *See id.* at 32-35. The Original CC&R's did not provide for the organization of a homeowners' or unit-owners' association as defined by NRS Chapter 116. *See id.* Rather, they called for the establishment of a "property owners committee" for the limited purpose of maintaining specific elements of the subdivision. *See id.* at 34, ¶ 21.

The Developer sold the nine (9) Rosemere lots between May 1994 and July 1996, prior to the formation of any property owners committee or association. *See id.* at 61, ¶ 6. On or about November 6, 1996, John Allen Lytle and Trudi Lee Lytle purchased the lot identified as APN: 163-03-313-009, which they later transferred to the Lytles, as Trustees of the Lytle Trust. *See id.* at ¶¶ 8-9. According to the Lytles, "[t]he primary reasons that [they] selected the property were the limited restrictions contained in the Original CC&Rs ***and the lack of a 'unit-owners association,'*** as that term is legally defined by Chapter 116 of the Nevada Revised Statutes ("NRS")." *See id.* at 62, ¶ 11.

Sometime after the Lytles purchased their property, the Rosemere Association was formed and numerous attempts were made to amend the Original CC&R's. *See id.* at 62-65, ¶¶ 14-34. On July 3, 2007, an Amended and Restated Declaration of Covenants, Conditions, and Restrictions ("Amended CC&Rs") was

recorded setting forth new requirements for the subdivision. *See id.* at 65, ¶ 35. The Amended CC&Rs, however, did not receive the unanimous approval of all of the Rosemere property owners. *See id.* at ¶¶ 34-35.

B. The Rosemere I Litigation

In 2009, the Lytles commenced the Rosemere I Litigation in district court against the Rosemere Association, Case No. A-09-593497-C, seeking (1) a declaratory judgment that the Amended CC&Rs were not properly adopted and therefore void; (2) a permanent injunction prohibiting the association from amending the Original CC&Rs without the approval of all property owners; and (3) an award of general and special damages. *See id.* at 37-40.

The district court ultimately granted summary judgment in the Lytles' favor, and in an order prepared by the Lytles' counsel, the court made the following legal determinations.

II. LEGAL DETERMINATIONS

. . . .

C. Rosemere Is A *Limited Purpose Association* Under NRS 116.1201 And Not A *Unit-Owners' Association* Within The Meaning Of NRS, Chapter 116. (Emphasis in the original).

7. In order to create a valid unit-owners' association, as defined by Chapter 116, certain formalities "must" be followed. NRS 116.3101 provides, in pertinent part.

Organization of unit-owners' association.

> 1. A unit-owners' association must be organized no later than the date the first unit in the common-interest community is conveyed. . . .
>
> 8. ***The purpose of [NRS 116.]3101 is to provide the purchaser record notice that he/she/it is purchasing a property that is governed by a homeowners association and will be bound by Chapter 116, et seq.***
>
> . . . .
>
> 11. ***Here, no Chapter 116 unit-owners' association was formed*** because no association was organized prior to the date the first unit was conveyed. The Association was not formed until February 25, 1997, more than three years after Rosemere Estates was formed and the Original CC&Rs were recorded.
>
> . . . .
>
> 13. The Original CC&Rs provide for the creation of a "property owners committee," ***which is a "limited purpose association,"*** as defined by the 1994 version of NRS 116.1201, then in effect. That provision provided that Chapter 116 did not apply to "Associations created for the limited purpose of maintaining . . . "[t]he landscape of the common elements of a common interest community...."

Id. at 66-67 (emphasis added).

The district court invalidated the Amended CC&Rs, specifically holding that no NRS Chapter 116 unit-owners' association was formed with respect to the subdivision. *See id.* Thereafter, the Lytles obtained a monetary judgment, consisting of attorneys' fees and costs and other damages, against the Rosemere Association in the total amount of $361,238.59 plus post-judgment interest ("Rosemere I Judgment"). *See id.* at 79-80.

On August 18, 2016, the Lytles caused to be recorded an abstract of the Rosemere I Judgment against all of the properties within the subdivision, aside from their property. *See id.* at 78-80. On September 2, 2016, they caused to be recorded an abstract of the judgment against the property identified as APN: 163-03-313-002. *See id.* at 82-84. On September 2, 2016, they also caused to be recorded an abstract of the judgment against the property identified as APN: 163-03-313-008. *See id.* at 553, ¶ 14.

C. The Underlying Litigation

On December 8, 2016, Respondents Boulden and Lamothe commenced the underlying action in district court against the Lytles alleging claims for slander of title, and injunctive and declaratory relief. *See id.* at 1-7. Boulden was the owner of the property identified as APN: 163-03-313-008, commonly known as 1960 Rosemere Court, Las Vegas, NV 89117 ("1960 Rosemere Court"). *See id.* at 1, ¶ 1. Lamothe is the owner of the property identified as APN: 163-03-313-002, commonly known as 1830 Rosemere Court, Las Vegas, NV 89117. *See id.* at ¶ 2.

On February 24, 2017, Boulden and Lamothe moved for partial summary judgment on all of their claims for relief, with the issue of damages and attorneys' fees to be determined at a separate evidentiary hearing. *See id.* at 18-119. Following complete briefing and a hearing, the district court granted summary

judgment in their favor. *See id.*, Vol. 3, at 541-47. Specifically, the court held that the Lytles improperly clouded title to Respondents' properties by recording the abstracts of judgment against them, that those abstracts of judgment should be expunged and stricken from the record, and that the Lytles are permanently enjoined from recording and enforcing the judgment against Respondents' properties ("Order"). *See id.* After the court issued its Order, the Lytles released their abstracts of judgment against Respondents' properties, and in or about August 2017, Boulden sold 1960 Rosemere Court to the Dismans.

IV. STANDARD OF REVIEW

Generally, the Nevada Supreme Court reviews a district court's grant of a permanent injunction for an abuse of discretion. *Comm'n on Ethics v. Hardy*, 125 Nev. 285, 291, 212 P.3d 1098, 1103 (2009). However, when "the court's permanent injunction is based on a legal determination that summary judgment could properly be granted under the circumstances, . . . the proper standard of review is that for summary judgment," which is *de novo*. *A.L.M.N., Inc. v. Rosoff*, 104 Nev. 274, 277, 757 P.2d 1319, 1321 (1988) (citing *Coca-Cola Co. v. Overland, Inc.*, 692 F.2d 1250, 1253 (9th Cir.1982)); *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

Summary judgment is appropriate and shall be granted forthwith when the

pleadings and other evidence on file demonstrate that no "genuine issue as to any material fact [remains] and that the moving party is entitled to judgment as a matter of law." *Wood*, 121 Nev. at 729, 121 P.3d at 1029 (quoting Nev. R. Civ. P. 56(c); and *Tucker v. Action Equip. and Scaffold Co.*, 113 Nev. 1349, 1353, 951 P.2d 1027, 1029 (1997)). This Court has instructed that "when reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." *Id.*, 121 P.3d at 1029 (citing *Lipps v. Southern Nevada Paving*, 116 Nev. 497, 498, 998 P.2d 1183, 1184 (2000)).

The nonmoving party, however, is no longer able to defeat a summary judgment motion by alleging the slightest doubt as to the operative facts. *Id.* at 731, 121 P.3d at 1031 (overruling the slightest doubt standard and adopting the United States Supreme Court's standard outlined in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)). The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant. *Id.*, 121 P.3d at 1031.

V. LEGAL ARGUMENT

In the underlying summary judgment proceedings, the parties agreed that none of the facts were in dispute. Rather, they urged the district court to determine, as a matter of law, whether the Lytles were permitted to record abstracts of the Rosemere I Judgment against Respondents' properties. The court determined that the Lytles were not permitted to do so, that they clouded title to Respondents' properties by recording the abstracts, that the abstracts should be expunged and stricken from the record, and that the Lytles are permanently enjoined from recording and enforcing the Rosemere I Judgment against Respondents' properties. The court's decision is in all respects correct based upon the Rosemere Association's status as a limited-purpose association and Respondents' lack of involvement as parties in the Rosemere I Litigation.

A. The District Court Correctly Determined that the Lytles Were Not Permitted to Record Abstracts of the Rosemere I Judgment Against Respondents' Properties Because NRS 116.3117 Applies Only to Unit-Owners' Associations under NRS Chapter 116, and No Such Association Was Ever Formed in Rosemere.

NRS Chapter 116 (at times referred to herein as, the "Chapter" or "Chapter 116"), also known as the Uniform Common-Interest Ownership Act, governs certain common-interest communities in Nevada. The Chapter provides in relevant part:

NRS 116.3117 Liens against association.

1. In a condominium or planned community:

(a) Except as otherwise provided in paragraph (b), a judgment for money ***against the association***, if a copy of the docket or an abstract or copy of the judgment is recorded, is not a lien on the common elements, but is a lien in favor of the judgment lienholder against all of the other real property of the association and all of the units in the common-interest community at the time the judgment was entered. No other property of a unit's owner is subject to the claims of creditors of the association.

(b) If the association has granted a security interest in the common elements to a creditor of the association pursuant to NRS 116.3112, the holder of that security interest shall exercise its right against the common elements before its judgment lien on any unit may be enforced.

Here, the Lytles contend that pursuant to NRS 116.3117, their Rosemere I Judgment is a lien against all of the properties within Rosemere. *See* Opening Br., at pp. 22-25. In addition to being profoundly disingenuous, the Lytles' contention fails as a matter of law for the following reasons. First, NRS 116.3117, by its express terms, applies only to judgments against "the association," and NRS 116.011 defines "association" as "***the unit-owners' association organized under NRS 116.3101***." The judgment in the Rosemere I Litigation specifically provides that the Rosemere Association is not such an association:

> **II. LEGAL DETERMINATIONS**
>
> . . . .
>
> **C. Rosemere Is A *Limited Purpose Association* Under NRS 116.1201 And Not A *Unit-Owners' Association* Within The Meaning Of NRS, Chapter 116.** (Emphasis in the original).
>
> . . . .
>
> 11. Here, ***no Chapter 116 unit-owners' association was formed*** because no association was organized prior to the date the first unit was conveyed. The Association was not formed until February 25, 1997, more than three years after Rosemere Estates was formed and the Original CC&Rs were recorded. (Emphasis added).
>
> . . . .
>
> 19. ***The Association is a limited purpose association under NRS 116.1201, is not a Chapter 116 "unit-owners' association,"*** and is relegated to only those specific duties and powers set forth in Paragraph 21 of the Original CC&Rs and NRS 116.1201.

See AA, Vol. 1, at 66-68. Indeed, the judgment in the Rosemere I Litigation, which the Lytles' sought, obtained and subsequently drafted, could not have been any more clear and emphatic on the issue – ***no "association" within the meaning of Chapter 116 was formed in Rosemere.*** Hence, NRS 116.3117 has no application in this case.

Second, in keeping with the express terms of NRS 116.3117, Chapter 116 makes clear that its provisions do not apply to limited-purpose associations. Specifically, it provides in relevant part:

> NRS 116.1201 Applicability; regulations.
>
> 2. ***This chapter does not apply to***:

(a) ***A limited-purpose association***, except that a limited-purpose association:

(1) Shall pay the fees required pursuant to NRS 116.31155, except that if the limited-purpose association is created for a rural agricultural residential common-interest community, the limited-purpose association is not required to pay the fee unless the association intends to use the services of the Ombudsman;

(2) Shall register with the Ombudsman pursuant to NRS 116.31158;

(3) Shall comply with the provisions of:

(I) NRS 116.31038;

(II) NRS 116.31083 and 116.31152, unless the limited-purpose association is created for a rural agricultural residential common-interest community;

(III) NRS 116.31073, if the limited-purpose association is created for maintaining the landscape of the common elements of the common-interest community; and

(IV) NRS 116.31075, if the limited-purpose association is created for a rural agricultural residential common-interest community;

(4) Shall comply with the provisions of NRS 116.4101 to 116.412, inclusive, as required by the regulations adopted by the Commission pursuant to paragraph (b) of subsection 5; and

(5) Shall not enforce any restrictions concerning the use of units by the units' owners, unless the limited-

> purpose association is created for a rural agricultural residential common-interest community.

(Emphasis added).

Having found that no "association" within the meaning of Chapter 116 was ever formed, the district court in the Rosemere I Litigation declared that the Rosemere Association is a limited-purpose association under NRS 116.1201. *See* AA, Vol. 1, at 66-67. Accordingly, Chapter 116 does not apply to the association. *See* NRS 116.1201(2)(a). The only exception is that the association must abide by the provisions set forth in NRS 116.1201(a)(1-5). None of those provisions, however, permits a lien against a ***limited-purpose*** association to attach to individual properties within the community. *See id.*; *see also* NRS 116.3117 (expressly providing that it applies to judgments against "the association," which NRS 116.011 defines as "***the unit-owners' association organized under NRS 116.3101***.") (emphasis added).

In addition to running contrary to the express provisions of Chapter 116, the interpretation of NRS 116.3117 sought by the Lytles runs contrary to the very representations that they made, and upon which the district court relied, in invalidating the Amended CC&Rs. Specifically, the Lytles represented, "[t]he primary reasons that [they] selected the property were the limited restrictions contained in the Original CC&Rs ***and the lack of a "unit-owners association,"*** as

that term is legally defined by Chapter 116 of the Nevada Revised Statutes ("NRS")." *See* AA, Vol. 1, at 62, ¶ 11. Based upon the Lytles' representation, the Court determined:

> 8. The purpose of [NRS 116.]3101 is to provide the purchaser record notice that he/she/it is purchasing a property that is governed by a homeowners association and will be bound by Chapter 116, *et seq.*
>
> 9. There is a strong public policy in protecting property owners in common-interest communities against any alteration of the burdens of character of the community. (Citation omitted).
>
> 10. A buyer is said to have "record notice" of the recorded covenants, conditions and restrictions on the property, thus the mandate that the homeowners' association be formed prior to conveyance of the first unit in the community, together with the requirement that the CC&Rs be recorded. NRS 116.3101.
>
> 11. Here, no Chapter 116 unit-owners' association was formed because no association was organized prior to the date the first unit was conveyed. . . .

See id. at 66-67, ¶¶ 8-11. The essence of the Lytles' representations and the district court's determinations was that the Lytles purchased their property under the belief that there was no unit owners' association within the meaning of Chapter 116, that they had no notice of and did not consent to be governed by such an association or the provisions of Chapter 116, and that they should be protected from any attempt to alter the burdens or character of the community.

Then, in a complete reversal of their previous stance, the Lytles urged the district court to impose the provisions of Chapter 116 upon all of the other property owners in the community even though those owners purchased their properties under the same circumstances as the Lytles. That is, the owners purchased without record notice that their properties were governed by a NRS 116.3101 unit owners' association and will be bound by Chapter 116. The district court declined to adopt the selective and self-serving interpretation urged by the Lytles and properly determined that NRS 116.3117 has no application in this case based upon Rosemere Association's status as a limited-purpose association.[1]

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[1] Even as applied to NRS 116.3101 unit-owners' associations, NRS 116.3117 suffers from serious constitutional infirmities. The statute provides that a recorded judgment against the unit owners' association is a lien in favor of the judgment creditor against all of the units in the common-interest community. However, neither the statute nor Chapter 116 implements any safeguards ensuring that the individual unit owners had an opportunity to participate in the underlying proceedings from which the judgment against the association arises. Other jurisdictions recognize that all real property owners in a property owners association must be individually made parties in a case that affects all their substantial rights. *See Dahl v. Hartman*, 14 S.W.3d 434, 437 (Tex. Ct. App. 2000). Such measures ensure compliance with the due process provisions of the United States Constitution which requires that "at a minimum, [the] deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). NRS 116.3117 supplies judgment creditors of unit owners' associations with the statutory authority to divest unit owners of their property rights without any such measure of protection and thus runs afoul of due process requirements.

B. The District Court Correctly Determined that the Lytles Were Not Permitted to Record Abstracts of the Rosemere I Judgment Against Respondents' Properties Because Respondents Were Not Parties to the Rosemere I Litigation.

Absent NRS 116.3117, the Lytles had no other basis with which to record abstracts of the Rosemere I Judgment against Respondents' properties.

NRS 17.150(2) provides in relevant part:

> A transcript of the original docket or an abstract or copy of any judgment or decree of a district court of the State of Nevada or the District Court or other court of the United States in and for the District of Nevada, the enforcement of which has not been stayed on appeal, certified by the clerk of the court where the judgment or decree was rendered, may be recorded in the office of the county recorder in any county, and when so recorded it becomes a lien upon all the real property of the judgment debtor not exempt from execution in that county, owned by the judgment debtor at the time, or which the judgment debtor may afterward acquire, until the lien expires. . . .

It is undisputed in this case that Respondents were not involved as parties to the Rosemere I Litigation; hence, they are not judgment debtors with respect to the resulting judgment. The only judgment debtor is the Rosemere Association, and the only real property to which the judgment lien can attach is that titled in the name of the association. The Rosemere Association does not hold title to Respondents' properties; thus, the district court correctly held that the Rosemere I Judgment cannot be recorded or asserted against those properties.

VI. CONCLUSION

Based upon the foregoing, the Dismans respectfully request this Court to affirm the decision to the district court in its entirety.

DATED this 9th day of March, 2018.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that the Answering Brief of Respondents Robert Z. Disman and Yvonne A. Disman complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] The brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in size 14 font, Times New Roman; or

[ ] The brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[X] Proportionally spaced, has the typeface of 14 points and contains 3,681 words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains ____ words or ___ lines of text; or

[X] Does not exceed 30 pages.

3. Finally, I hereby certify that I have read this brief and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 9th day of March, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I mailed and electronically transmitted the foregoing **ANSWERING BRIEF OF RESPONDENTS ROBERT Z. DISMAN AND YVONNE A. DISMAN** upon all counsel of record to the Clerk's Office using the electronic filing system for filing and transmittal of a Notice of Electronic Filing to all parties listed as electronic systems registrants on the date below shown:

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DATED: 03/09/2018

An employee of Fidelity National Law Group