SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 20418

TOWN OF LEDYARD
Plaintiff - Appellant

v.

WMS GAMING, INC.
Defendant - Appellee

REPLY BRIEF OF THE PLAINTIFF-APPELLANT TOWN OF LEDYARD

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES i

ARGUMENT 1

I. THE APPELLATE COURT ERRED IN CONCLUDING THAT GENERAL STATUTES § 12-161a DID NOT AUTHORIZE THE TRIAL COURT TO AWARD THE TOWN ATTORNEY'S FEES INCURRED IN DEFENDING THE WMS ACTION 2

A. General Statutes § 12-161a Permits The Town To Recover Attorney's Fees Proximately Caused By This Collection Action 2

B. The Town Is Entitled To Attorney's Fees It Incurred Defending The Federal Action That Were Proximately Caused By This Collection Proceeding 6

C. The Tribal Sovereignty Issues That Gave The Federal Court Jurisdiction Over The Consolidated Federal Action Are Irrelevant To The Analysis Under § 12-161a 10

D. Interpreting § 12-161a To Allow The Town To Recover Attorney's Fees That Were Proximately Caused By This Collection Proceeding Raises No Constitutional Concerns 12

CONCLUSION 13

TABLE OF AUTHORITIES

PAGE

Cases

Abrahams v. Young and Rubicam, Inc., 240 Conn. 300, 692 A.2d 709 (1997) 5

Ganim v. Smith & Wesson Corp., 258 Conn. 313,780 A.2d 98 (2001) 3

Holmes v. Securities Investor Protection Corp., 503 U.S. 258 (1992) 3

In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation, 725 F.3d 65 (2d Cir. 2013), cert. denied sub nom. Exxon Mobil Corp.v. City of New York, NY, 572 U.S. 1080 (2014) 13

Mashantucket Pequot Tribe v. Town of Ledyard, 722 F.3d 457 (2d Cir. 2013) 11

Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463 (1976) 12

Small v. Going Forward, Inc., 281 Conn. 417, 915 A.2d 298 (2007) 4

White v. Mazda Motor of Am., Inc., 313 Conn. 610, 99 A.3d 1079 (2014) 8

Wyeth v. Levine, 555 U.S. 555 (2009) 13

Statutes

28 U.S.C. § 1362 12

Conn. General Statutes § 12-140 6

Conn. General Statutes § 12-161a ..... *passim*

Conn. General Statutes § 42-110g 5

Rules

Practice Book § 84-11 12

Miscellaneous

Black's Law Dictionary (11th Ed. 2019) 3

Brett M. Kavanaugh, Book Review, "Fixing Statutory Interpretation Judging Statutes by Robert A. Katzmann," 129 Harv. L. Rev. 2118, 2161-62 (2016) 4

Karl N. Llewellyn, "Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed," 3 Vand. L.Rev. 395 (1950)..... 3

Merriam-Webster's Online Dictionary 5

ARGUMENT

This appeal is about a limited legal issue – when considering a claim for attorney's fees under General Statutes § 12-161a, is a trial court permitted to award attorneys fees that were: (1) incurred *only in* the prosecution of the collection action; or (2) incurred *as a result of and directly related to* the collection proceeding? The Appellate Court adopted the former standard, while the trial court concluded that the latter standard applies. A resolution of this question requires this Court to determine the meaning of General Statutes § 12-161a.

Only two portions of the Defendant's brief address this question – its first argument, in which it (somewhat) attempts to defend the Appellate Court's construction of statute; WMS Brief, pp. 12-15; and its last argument, wherein the Defendant disputes the Town's interpretation of the statute. Id., pp. 23-35. Sandwiched in between these arguments are claims that ignore the fact that this is an interlocutory appeal. The Defendant argues that: (1) "[t]his state-court collection action was not the actual cause of the federal-court attorneys' fees the Town seeks;" and (2) "[n]one of the fees incurred by the Town in defending against MPTN's federal lawsuit were proximately caused by or directly related to this action." WMS Brief, pp. 15-23. But these arguments must be addressed to the trial court and are not properly before this Court. The question before this Court is which standard § 12-161a requires the trial court to apply to determine, as a matter of fact, what attorney's fees are recoverable.

The trial court correctly concluded that, pursuant to General Statutes § 12-161a, the Town is entitled to recover the attorney's fees that it incurred defending the WMS Federal Action because that case was proximately caused by this collection proceeding. The Appellate Court's decision to the contrary should be reversed.

I. THE APPELLATE COURT ERRED IN CONCLUDING THAT GENERAL STATUTES § 12-161a DID NOT AUTHORIZE THE TRIAL COURT TO AWARD THE TOWN ATTORNEY'S FEES INCURRED IN DEFENDING THE WMS ACTION

A. General Statutes § 12-161a Permits The Town To Recover Attorney's Fees Proximately Caused By This Collection Action

As the Town demonstrated in its principal brief, under the plain meaning of § 12-161a, the Town is entitled to recover attorney's fees that are proximately caused by this collection action. That interpretation is supported by dictionary definitions, cases from this Court and the Appellate Court interpreting similar language in other contexts, and the fact that the legislature has used more restrictive language in other statutes when it wanted to limit attorney's fees to those incurred in a specific case or docket number. See Town's Brief, pp. 13-18.

Despite expressly arguing in the Appellate Court that § 12-161a permits recovery of attorney's fees that are proximately caused by this collection action, WMS now retreats from that argument in an attempt to defend the Appellate Court's overly restrictive interpretation of the statute.[1] However, in its defense of the Appellate Court's interpretation, WMS is really arguing for a different interpretation, claiming that the phrase means that

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[1] Despite WMS's attempt to back-pedal out of its previous position, WMS Brief, p. 13 n.5, WMS could not have been clearer in its brief to the Appellate Court in arguing that the language "as a result of and directly related to" in § 12-161a means "proximately caused by":

> Taken together, then, the phrase "incurred as a result of and directly related to" requires the Town to show not only that the fees it incurred defending against the Tribe's federal suit were caused by or a result of this collection action against WMS; it also must show that the causal connection between its filing of this tax-collection action and the fees incurred in the federal suit was substantial enough to say that these federal attorneys' fees were proximately caused by this tax-collection action.

WMS AC Brief, p. 15.

there must be a "substantive connection" between the attorney's fees and the collection action. WMS Brief, pp. 13-14. This is not the interpretation used by the Appellate Court as the phrase "substantive connection" does not appear in the Appellate Court decision. Moreover, WMS does not identify any authority that supports its interpretation, nor does it explain what a "substantive connection" means in this context. While WMS implies that the definition of "related" from Black's Law Dictionary supports its interpretation, Black's says nothing about a "substantive connection." Instead, Black's defines "related" simply to mean "connected in some way; having relationship to or with something else." Black's Law Dictionary (11th ed. 2019). In contrast to WMS's unsupported interpretation, the Town explained in its brief that this Court has endorsed the U.S. Supreme Court's interpretation of "proximate cause" as requiring "some **direct relation** between the injury asserted and the injurious conduct alleged." (Emphasis added.) Ganim v. Smith & Wesson Corp., 258 Conn. 313, 350 (2001) (quoting Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 268-69 (1992)).

The only other point raised by WMS in support of its interpretation is that reading "as a result of and directly related to" to mean proximate cause purportedly would violate the supposedly "cardinal rule" that "every phrase in a statute should be given meaning." WMS Brief, pp. 13-14. However, this Court has cautioned against blind reliance on the such rules of interpretation (including in refusing to apply the very rule advocated by WMS):

> Although the so-called canons of statutory construction may at times serve as useful tools in deciphering legislative meaning, to rely on any one of them as a compelling factor in the interpretive process is problematic, because as Professor Karl Llewellyn persuasively has demonstrated, "there are two opposing canons on almost every point." K. Llewellyn, "Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed," 3 Vand. L. Rev. 395,401 (1950). The so-called "canons" are not that, at least in the sense that any one of them reliably can

> be determined to apply or not to apply in any given case. They are, instead, merely guides drawn from experience, to be employed or not to be employed carefully and judiciously, depending on the circumstances.

Small v. Going Forward, Inc., 281 Conn. 417, 424-25 n.4 (2007) (refusing to apply "presum[ption] that there is a purpose behind every sentence, clause, or phrase used in an act and that no part of a statute is superfluous" in light of, among other things, relationship of statute to other provisions (Citation omitted.)). With respect to the "anti-redundancy canon" that WMS advocates for in this case, then-Judge Kavanagh commented that

> Judges say that we should not interpret statutes to be redundant. But humans speak redundantly all the time, and it turns out that Congress may do so as well. Congress might do so inadvertently. Or Congress might do so intentionally in order to, in Shakespeare's words, make "double sure." Either way, statutes often have redundancies, whether unintended or intended.
>
> The anti-redundancy canon nonetheless tells us to bend the statute to avoid redundancies, at least to the extent we reasonably can. But if one statute says "No dogs in the park" and another one says "No animals in the park," I believe we should generally assume that the drafter wanted no animals in the park and *really* wanted to make sure that there were no dogs in the park. The anti-redundancy canon instead would have judges try to find some meaning of "animals" that excludes dogs and thereby avoids the redundancy. Such an exercise is little more than policymaking and, in my view, often quite wrongheaded.
>
> We need to be much more cautious when invoking the anti-redundancy canon. Our North Star should always be determining the best reading of the actual words of the statute.

(Emphasis in original) Brett M. Kavanaugh, Book Review, "Fixing Statutory Interpretation Judging Statutes by Robert A. Katzmann," 129 Harv. L. Rev. 2118, 2161-62 (2016).

Here, reliance on the "anti-redundancy" canon is especially unwarranted because closer examination reveals that there actually is no redundancy in the Town's interpretation. According to WMS (and the Appellate Court), because this Court has interpreted the phrase "as a result of" to mean "proximately caused by" in the context of CUTPA, General

Statutes § 42-110g(a), interpreting the entire phrase "as a result of and directly related to" as denoting proximate cause would render "directly related to" superfluous. However, this Court did not articulate that interpretation of § 42-110g(a) until 1997 in Abrahams v. Young & Rubicam, Inc., 240 Conn. 300, 306 (1997), 15 years after the General Assembly enacted § 12-161a. It is illogical to say that the legislature would have understood the phrase "as a result of" to mean proximate cause in 1982 based on a judicial interpretation that this Court did not adopt until 1997. Instead, the more likely explanation is that the legislature realized that the phrase "as a result of" may be interpreted broadly as allowing recovery if the tax collection proceeding was a but-for cause of the attorney's fees, regardless of how attenuated the connection. Because this Court has long used terminology similar to "directly related to" when discussing proximate cause; see Town's Brief pp. 15-17; the legislature understood that, by using the phrase "directly related to," it was incorporating a proximate cause requirement in § 12-161a.

In any event, even adopting WMS's interpretation, the Town would be entitled to recover its attorney's fees from the WMS Federal Action. WMS does not define or explain "substantive connection," leaving the Court to figure out on its own what that phrase means. The most likely definition of "substantive" in this context would be "considerable in amount or numbers; substantial" or "real rather than apparent." Merriam-Webster Online Dictionary, available at https://www.merriam-webster.com/dictionary/substantive. "Connection" in this context would mean "the state of being connected; such as ... [a] causal or logical relation or sequence," or [a] contextual relation or association." Id. Thus, under the ordinary meaning of that phrase, a "substantive connection" is a "real" or "substantial" relation, either causal or contextual. Given that the WMS Federal Action was

brought in direct response to, and for the express purpose of enjoining, this proceeding, there plainly is a real or substantial relation between this proceeding and the WMS Federal Action.

B. The Town Is Entitled To Attorney's Fees It Incurred Defending The Federal Action That Were Proximately Caused By This Collection Proceeding

Throughout its brief, WMS conflates two separate issues. The first is **whether** the WMS Federal Action (and thus the fees incurred by the Town defending that action) was caused by this collection proceeding. The second issue—which has not yet been litigated before the trial court, but which WMS spends an inordinate amount of time addressing—is **how much** of the Town's legal fees from the Federal Action were caused by this collection proceeding.

The trial court correctly concluded that, because the Town's decision to file this action led directly to the filing of the WMS Federal Action, the attorney's fees incurred by the Town defending the WMS Federal Action "resulted from" and were "directly related to" this proceeding. WMS's argument to the contrary is inconsistent with the words of the statute and the record. WMS argues that the Town's legal fees from the WMS Federal Action were not caused by this proceeding because those fees were not incurred prosecuting this case. WMS Brief, p. 19. However, nothing in § 12-161a suggests that the Town is limited to recovering fees incurred in the prosecution of this action. As the Town explained in its principal brief, when the legislature intends to limit attorney's fees in that manner, it does so expressly. E.g. General Statutes § 12-140 ("All reasonable and necessary costs or expenses ... for attorney's fees ... incurred by the municipality in defending any civil action brought as a result of a tax sale or an alias tax warrant ... shall

be paid by the delinquent taxpayer ...."). Instead, § 12-161a allows the Town to recover legal fees that were the "result of and directly related to" this action. As the trial court rightly concluded, the Town's fees from WMS Federal Action are recoverable because that action was "directly aimed at stopping [this] collection proceeding[] ...." Mem. Dec. p. 12, A80.

WMS also argues that the WMS Federal Action did not result from and was not related to this proceeding because it was not a party to that case. However, WMS ignores that it played a significant role in bringing about the WMS Federal Action by immediately notifying MPTN of the suit and offering to refrain from paying the tax bill if MPTN affirmed that it would indemnify WMS for the costs of the taxes and of defending this action. Ex. A to Pl. Mot. for Summary Judgment ("Pl. Ex. A"), A52. Had there not been an agreement to indemnify WMS, then WMS would have paid the fees and the litigation would never have reached this point. As the trial court recognized, while WMS technically was not a party to the WMS Federal Action, that "lawsuit was a mutually agreed upon and coordinated effort between WMS and [MPTN]" that would not have been possible without WMS's cooperation. Mem. Dec., p. 12.

WMS also argues that the Court should ignore that the complaint in the WMS Federal Action expressly sought to enjoin this proceeding because, before the Town brought this action, MPTN sought an injunction in the AC Coin Action generally prohibiting the Town from taxing gaming machines leased to MPTN. However, contrary to WMS's argument, the AC Coin Action did not seek the "exact same relief" as the WMS Federal Action. WMS Brief, p. 23. Rather, the WMS Federal Action expressly sought to enjoin the Town from prosecuting **this very proceeding**. A151. The AC Coin Action obviously could

not have sought that relief, because the Town did not bring this action until two years after MPTN filed the AC Coin Action.

To the extent that WMS is really saying that the Town should not be entitled to attorney's fees as it relates to the AC Coin Action, that is an issue for the trial court's determination as to the amount of attorney's fees to be awarded. To this end, WMS's argument that the Town would have incurred the same legal fees in the AC Coin Action even if MPTN never brought the WMS Federal Action is both wrong and procedurally improper. WMS Brief, pp. 15-18.

First, WMS's argument is procedurally improper because it did not seek summary judgment on that basis in the trial court. A party cannot obtain reversal of a summary judgment decision on a basis that was not raised in the trial court. White v. Mazda Motor of Am., Inc., 313 Conn. 610, 630-32 (2014). WMS is essentially arguing that the Town cannot recover any of its attorney's fees from the WMS Federal Action because it cannot prove that those fees were incurred as a result of this collection proceeding. However, the only issue addressed in the cross motions for summary judgment was whether, as a matter of law, § 12-161a authorizes the Town to recover the attorney's fees incurred defending the WMS Federal Action. WMS did not argue in its motion for summary judgment that the Town cannot recover any fees from that action on the basis that it cannot establish that those fees were caused by this proceeding. Because WMS never raised that issue, the Town never had an opportunity to present any evidence to demonstrate how much it incurred in legal fees defending the WMS Federal Action, and the trial court had no reason to address that issue. See White v. Mazda Motor of Am., Inc., 313 Conn. at 630 n.8 ("We require the trial court and opposing parties to address only those arguments that a plaintiff actually

raises, not every possible argument that a plaintiff could have made but did not."). In its memorandum of decision, the trial court concluded only that § 12-161a authorizes the Town to recover the attorney's fees incurred defending the WMS Federal Action, and noted that a hearing would be held to determine the amount of the award. That hearing has not yet happened, because WMS appealed. The Town cannot be deprived of the opportunity to demonstrate that its attorney's fees from the WMS Federal Action were caused by this proceeding when WMS never raised that issue in the trial court.

Even putting aside that WMS cannot prevail on a basis that it never raised in the trial court, WMS is wrong in arguing that the Town would have incurred all of the same legal fees even if MPTN never tried to enjoin the Town from prosecuting this case. Even without the Town having had the chance to present any evidence on the issue, it is clear that the Town incurred at least some legal fees related to the WMS Federal Action that would not have been incurred if MPTN had not brought that case. In addition to answering the complaint and taking other action before the federal cases were consolidated, the Town also had to engage in discovery related to WMS, including participation in a deposition of WMS on June 16, 2011, and motion practice related to a motion for protective order filed by WMS.[2] See Ex. to Mem. in Support of Summary Judgment (Dkt. No. 149); Docket, *Mashantucket Pequot Tribe v. Town of Ledyard*, No. 3:06-cv-01212 (D. Conn.) WMS A6.

[2] WMS also argues that the fees incurred by the Town in the WMS Federal Action did not result from this proceeding because MPTN allegedly could have brought the WMS Federal Action even if the Town never commenced this proceeding. WMS Brief, p. 19 n.10. However, the Town cannot be deprived of its right to recover attorney's fees incurred as a result of this proceeding based on a hypothetical alternate reality that never happened. WMS's conjecture aside, the undisputed facts establish the WMS Federal Action was brought in direct response to this action, and for the express purpose of stopping the Town from prosecuting this action.

Thus, there is no basis to conclude that the Town would have incurred exactly the same fees even if MPTN never brought the WMS Federal Action.

C. The Tribal Sovereignty Issues That Gave The Federal Court Jurisdiction Over The Consolidated Federal Action Are Irrelevant To The Analysis Under § 12-161a

WMS also argues that the Town cannot recover its attorney's fees from the federal action because the two cases were "about different things." WMS Brief, pp. 19-23. This argument echoes the Appellate Court's rationale that, just because MPTN was allowed to sue in federal court to protect its tribal sovereignty, the WMS Federal Action was not "directly related" to this proceeding. As the Town explained in its principal brief, however, the federal courts discussed MPTN's tribal sovereignty only in the context of deciding whether MPTN was allowed to sue in the District Court. Town's Brief, pp. 26-28. That MPTN's interest in protecting its right to self-government was sufficient to provide the District Court jurisdiction over that case does not negate the fact that the WMS Federal Action was brought as a direct result of this proceeding.

WMS goes a step further than the Appellate Court, claiming that the Town is trying to "relitigate" the jurisdictional issues addressed by the federal courts. WMS Brief, p. 21. To this end, WMS argues that this Court is collaterally estopped from concluding that § 12-161a authorizes the Town to recover its attorney's fees from the WMS Federal Action. Id. at 21-23. However, WMS's argument fundamentally misunderstands the question at issue in this appeal, and mischaracterizes the Town's position. The only question in this appeal is whether, as a matter of law, § 12-161a permits the Town to recover any of the attorney's fees that it incurred from the WMS Federal Action. The answer to that question is "yes," because the WMS Federal Action (and therefore the Town's legal fees incurred defending that case) was proximately caused by the commencement of this proceeding.

Contrary to WMS's contention, in addressing the standing and Tax Injunction Act issues, the federal courts did not hold that the WMS Federal Action was not "brought to enjoin [this proceeding] and prevent the Town from collecting the personal property taxes at issue in this case." WMS Brief, p. 21. In fact, any such holding would have been directly contradicted by MPTN's complaint, which expressly sought that very relief. See A151 (asking District Court for "[a]n injunction prohibiting the [Town] from taking any steps to collect personal property taxes with respect to the leased gaming machines, including but not limited to **prosecution of the WMS State Court Action**," i.e., this collection proceeding (emphasis added)). Instead, the federal courts only held that the property taxes in question constituted a sufficient encroachment on MPTN's sovereign interests to allow MPTN to sue in federal court. See Mashantucket Pequot Tribe v. Town of Ledyard, 722 F.3d 457, 463-65 (2d Cir. 2013).

WMS also does not attempt to reconcile its position that the federal case had nothing to do with preventing the Town from collecting personal property taxes from WMS with MPTN's own arguments from that case. As noted in the Town's principal brief, MPTN repeatedly asserted that it sought to prevent the Town from collecting taxes from WMS, and that it had standing to do so because those taxes allegedly caused an economic injury due to MPTN's indemnification agreement with WMS. See Town's Brief, p. 28. Thus, WMS's attempt to disassociate this case from the federal case is both legally dubious and contrary to the position taken in that case.

D. Interpreting § 12-161a To Allow The Town To Recover Attorney's Fees That Were Proximately Caused By This Collection Proceeding Raises No Constitutional Concerns

Finally, WMS argues that interpreting § 12-161a to allow the Town to recover attorney's fees incurred defending the WMS Federal Action to the extent those fees were proximately caused by this collection action would be preempted by 28 U.S.C. § 1362. This argument was not raised before the trial court and is not properly before this Court in this appeal.[3] Nonetheless, on the merits, WMS does not provide any explanation to support this argument, except to state in conclusory fashion that the Town's interpretation "would undermine Congress's purpose in enacting [§ 1362]." WMS Brief, p. 33. That statute does nothing more than allow federally recognized tribes to sue in federal court in cases involving a federal claim, and its purpose was simply to ensure that "a tribe's access to federal court to litigate a matter arising 'under the Constitution, laws, or treaties' would be at least in some respects as broad as that of the United States suing as the tribe's trustee." Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 473 (1976).[4]

That purpose would not be thwarted by allowing the Town to recover from WMS for the costs of attorney's fees incurred defending the WMS Federal Action. Indeed, there is a strong presumption "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (Citation

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[3] While WMS did raise this unpreserved argument in the Appellate Court, it was not addressed by the Appellate Court, and WMS did not file with this Court a statement of alternative grounds to affirm under Practice Book § 84-11.

[4] 28 U.S.C. § 1362 provides in full: "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

omitted.) Wyeth v. Levine, 555 U.S. 555, 565 (2009). The burden of overcoming that presumption is particularly heavy when a party claims that a state law is preempted because it would undermine Congress's purpose. In such cases, it is not enough that there is some "tension" between state and federal law; a state law will not be preempted unless "the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together." (Citation omitted.) See In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation, 725 F.3d 65, 102 (2d Cir. 2013). Interpreting § 12-161a to allow the Town to recover from WMS its attorney's fees incurred defending the WMS Federal Action would not even be in tension with Congress's purpose in providing a federal forum to federally recognized tribes, much less irreconcilable with that purpose. Thus, there is no constitutional concern with interpreting § 12-161a in accordance with its plain meaning and allowing the Town to recover attorney's fees proximately caused by this tax collection proceeding.

CONCLUSION

For any and all of the reasons set forth herein and in the Town's principal appellant brief, the Appellate Court's decision must be reversed.

Respectfully submitted,

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CERTIFICATION

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2, that on September 18, 2020:

(1) the electronically submitted brief has been delivered electronically to the last known e-mail address of each counsel of record for whom an e-mail address has been provided; and

(2) the electronically submitted brief and the filed paper brief have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and

(3) a copy of the brief has been sent to each counsel of record, in compliance with Section 62-7; and

(4) the brief being filed with the appellate clerk are true copies of the brief that were submitted electronically; and

(5) the brief complies with all provisions of this rule.

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CERTIFICATION OF FORMAT AND SERVICE

I hereby certify that a copy of the Plaintiff-Appellant's Reply Brief was sent via electronic mail and mailed, first-class postage-prepaid, this 18th day of September, 2020 to:

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