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STATE OF NEW HAMPSHIRE  
SUPREME COURT  
Docket No. 2019-0553

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RICHARD D. ARELL, JR. and NATALIE E. ALLARD-ARELL  
v.  
HENRY M. PALMER and JANIS A. MONTY-PALMER

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Rule 7 Mandatory Appeal  
From the Merrimack County Superior Court

BRIEF OF THE APPELLEES  
RICHARD D. ARELL, JR. and NATALIE E. ALLARD-ARELL

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### **QUESTIONS PRESENTED**

1. Whether the Trial Court was correct in finding that a “temporary easement” for access to a well “until such time as Grantees have another water source available” was ambiguous as to the intended duration of the easement?
2. Whether the Trial Court was correct in concluding, through application of the rule of reason, that “it is reasonable that the Palmers be ordered to take reasonable steps to create a well on their own property”?
3. Whether the Trial Court was correct in ordering the Palmers to investigate the viability of creating a well and to seek a further hearing before the Trial Court if the Palmers determine after a thorough investigation that it is not possible to dig a viable well on their property or that the cost far exceed the customary cost of creating a well?

## **STATEMENT OF THE CASE**

On July 5, 2018, Richard D. Arell, Jr. and Natalie E. Allard-Arell (collectively, the “Arells”) filed their Petition for Declaratory Judgment and Injunctive Relief (“Petition”), seeking a declaratory judgment that defendants Henry M. Palmer and Janis A. Monty-Palmer (collectively, the “Palmers”) were required to seek a new water source and discontinue use of a well easement within a reasonable time.<sup>1</sup> Appendix to Brief of the Appellant (“App.”) 3-8. On August 15, 2018, the Palmers filed their Defendants’ Answer to Petition for Declaratory Relief and Injunctive Relief and Defendants’ Counterclaim. App. 9-18. The Palmers’ Counterclaim sought a declaratory judgment that they have the right to use the subject well without interference by the Arells, an injunction against any interference by the Arells, and an award of attorneys’ fees. *Id.* On August 28, 2018, the Arells filed their Answer to Respondents’ Counterclaims. App. 19-22.

On April 3, 2019, after limited document discovery, the Palmers filed their Motion for Summary Judgment, seeking summary judgment on all counts of the Petition and the Counterclaim. App. 23-105. On May 16, 2019, the Arells filed their Objection to Respondents’ Motion for Summary Judgment and Cross-Motion for Summary Judgement. App. 106-165. On June 17, 2019, the Palmers filed their Reply to Plaintiffs’ Objection to Defendants’ Motion for Summary Judgment and Objection to Plaintiffs’ Cross-Motion for Summary Judgment. App. 166-188. On June 27, 2019,

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<sup>1</sup> The Arells also sought a determination that the well easement expired on the earlier of the transfer of the real estate or the death of both named grantees. The Trial Court found for the Palmers on this issue, and the Arells did not appeal the Trial Court determination.

the Arells filed their Reply to Respondents' Objection to Petitioners' Cross-Motion for Summary Judgment. Appendix to Brief of the Appellees at 3-8.

On July 12, 2019, Judge Kissinger of the Merrimack County Superior Court ("Trial Court") held a hearing on the summary judgment motions. *See* transcript of "Motion for Summary Judgment Before the Honorable John C. Kissinger, Jr. Judge of the Superior Court" ("Tr."), prepared by eScribers in this matter. On August 30, 2019, the Trial Court issued the Order on Cross-Motions for Summary Judgment, granting summary judgment for the Arells on Counts I and II of their Petition. Appellants' Brief at 030-040.

On September 20, 2019, the Palmers filed their Rule 7 Notice of Mandatory Appeal, appealing the Trial Court's decision granting summary judgment for the Arells.

### **STATEMENT OF THE FACTS**

In 2000, Esther L. Edmunds, Trustee of the Esther L. Edmunds Revocable Trust (“Edmunds Trust”) was the owner of approximately fifty acres of land located on both the north and south sides of Canterbury Road, Chichester, New Hampshire. App. at 125, ¶ 4. On December 12, 2000, the Edmunds Trust conveyed approximately 19.1 acres located on the north side of Canterbury Road with the homestead to the Palmers by warranty deed recorded in the Merrimack County Registry of Deeds Book 2236, Page 1438 (“Palmer Property” and “Palmer Deed”) App. 149-50. The Palmer Deed included the following language creating the Well Easement:

TOGETHER WITH a **temporary** easement over a portion of said Tax Map 3, Lot 0119 owned by Grantor to access the existing well located on that lot **for purposes of serving the existing single family residence** located on the premises herein conveyed **until such time as Grantees shall have another water source available**. Grantees shall be responsible for all costs and liability associated with the maintenance, repair and operation of the well, water lines, pumps and similar matters related to Grantee’s utilization of the well.

*Id.* (emphasis added).

On August 22, 2002, Margaret F. Roberts, Warren C. Edmunds and Donald C. Edmunds, Trustees of the Edmunds Family Irrevocable Trust, successors in title to the Edmunds Trust, conveyed the balance of the Edmunds Trust real property, all being located on the south side of Canterbury Road, to the Arells by deed recorded at Book 2394, Page 1769 (“Arell Property” and “Arell Deed”). App. 130-31. The Arell Deed provided that the conveyance was:

Subject to the well rights in favor of Henry M. Palmer and Janis A. Monty-Palmer in Warranty Deed dated December 12, 2000 and

recorded in the Merrimack County Registry of Deeds at Book 2236, Page 1438.

*Id.*

The Palmer Property and the Arell Property are on opposite sides of Canterbury Road in Chichester. App. 152, 154. The Palmer Deed granted the Well Easement for the Palmers to use the well on the Arell Property temporarily and for the sole purpose of servicing the then-existing single-family residence located on the Palmer Property, and only “until such time as [the Palmers] shall have another water source available.” App. 149. Despite the clear language of the Palmer Deed, the Palmers have not installed a new well or discontinued their use of the Well Easement. App. 126, ¶ 6. This is despite the fact that several other properties on Canterbury Road in Chichester have their own wells. *Id.*, ¶ 7.

In approximately 2015, the Palmers installed a manufactured housing unit on the Palmer Property in addition to the Palmer’s residence (“Second Residence”). *Id.*, ¶ 8. In 2014, the Palmers applied for approval to install a new individual sewage disposal system for five bedrooms—presumably the combined number of bedrooms for the existing residence and the Second Residence. *Id.*, ¶ 9; App. 133. Notably, the sewage disposal plan (“Septic Plan”) identifies a “New Well to Be Drilled,” which is located in equal distances between the existing residence and the Second Residence. App. 133. The Septic Plan also shows the 75-foot protective well radius. *Id.* There is no indication in the Chichester Town records whether the Palmers installed a well. *Id.* Either the Palmers installed a well on the Palmer Property for the Second Residence, or the Palmers are using the Well



Easement for the Second Residence, in clear violation of the terms of the Palmer Deed.

In the spring of 2018, Mr. Arell approached Mrs. Monty-Palmer to inform her that the Palmers would be receiving a letter from the Arells' attorney regarding discontinuance of the Well Easement. App. 127, ¶ 10. By letter dated May 1, 2018, the Arells—through counsel— notified the Palmers that their sixteen year use of the Well Easement “ha[s] exceeded any reasonable interpretation of ‘temporary’ use of the [Well],” and that “[t]o the extent the [Second Residence] is being served by [the Well], [the Palmers] are also exceeding the scope of the easement.” App. 135-36. The Arells requested that the Palmers discontinue their use within a year. *Id.*

In a response letter dated May 31, 2018, Mrs. Monty-Palmer responded that the Palmers “would not be seeking another water source that would cause [them] unnecessary financial hardship.” App. 138-39. Mrs. Monty-Palmer did not state that water was not available on the Palmer Property, but instead expressed a concern as to the cost. *Id.* Since they purchased the Palmer Property, the Palmers have several improvements, including the installation of the Second Residence, a new septic system and a new paved driveway, and the addition of a pool and deck. App. 127, ¶ 12; App. 141-45.

### **SUMMARY OF THE ARGUMENT**

The Arells brought this case to settle a simple neighborly dispute concerning whether the Well Easement is of a temporary and definite duration, or whether it may continue to burden their property indefinitely forever. Assuming that it is meant to last only temporarily, the Arells also sought an order regarding exactly how long the Well Easement may continue to burden their property and setting forth the Palmers' obligations to identify another water source. After extensive briefing on these issues, the Trial Court granted summary judgment for the Arells, concluding that: 1) the language of the Palmer Deed creating the Well Easement is ambiguous as to the intended duration of the Well Easement; 2) application of the Rule of Reason results in a finding that the Palmers have an obligation to take steps to identify and procure a new source of water; and 3) setting a deadline of three years for the Palmers to investigate and establish a well on the Palmer Property, or to file something with the Trial Court explaining why the establishment of such a well is not possible or would be unreasonably costly.

The Trial Court's order is correct in every aspect. The Palmer Deed described the Well Easement as a "temporary" easement that shall last "until such time as Grantees shall have another water source available." This language is at least ambiguous as to whether the Well Easement is intended to last for a temporary, limited duration, or whether it may exist forever as long as no other water source is available. To adopt the Palmers' position that the Well Easement may last forever, you would have to completely ignore the inclusion of the word "temporary," since nothing that is temporary may continue indefinitely; it must terminate.

Having concluded that the easement language is ambiguous, the Trial Court then correctly applied the Rule of Reason to determine what is a reasonable duration for the Well Easement in the context of the specific circumstances of the case, including the various burdens and benefits to the parties. The Trial Court found that the Palmers have enjoyed the use of the Well for over seventeen years without ever making efforts to identify another water source. Because the Palmers' identification and establishment of a well on their property is the only way the Well Easement can terminate—and therefore remain a “temporary” easement—the Trial Court held that the Well Easement necessarily imposed an obligation on the Palmers to take steps to establish a new source of water for the Palmer Property. Given the already lengthy duration of the Well Easement, the Court gave the Palmers three years in which to construct a new well. If performance of their obligation to construct a new well on the Palmer Property is impossible, the Palmers have the burden to prove such an impossibility defense, not the Arells.

The Trial Court's decision is correct and should be affirmed by this Court.

## ARGUMENT

### **I. The Trial Court Trial Court properly found that the language of the Palmer Deed was ambiguous as to the intended duration of the Well Easement.**

“The proper interpretation of a deed is a question of law for the [the Court].” *Appletree Mall Assocs., LLC v. Ravenna Inv. Assocs.*, 162 N.H. 344, 347 (2011). “In interpreting a deed, [the Court] give[s] it the meaning intended by the parties at the time they wrote it, taking into account the surrounding circumstances at that time.” *Ettinger v. Pomery Ltd. P’ship*, 166 N.H. 447, 450 (2014). “If the language of the deed is clear and unambiguous, [the Court] will interpret the intended meaning from the deed itself without resort to extrinsic evidence.” *Id.* “If, however, the language of the deed is ambiguous, extrinsic evidence of the parties’ intentions and the circumstances surrounding the conveyance may be used to clarify its terms.” *Lynn v. Wentworth by the Sea Master Association*, 169 N.H. 77, 84 (2016). “The language of a contract is ambiguous if the parties to the contract could reasonably disagree as to the meaning of that language.” *Birch Broad., Inc. v. Capitol Broad. Corp.*, 161 N.H. 192, 196 (2010) (quotation omitted).

The Trial Court found that the language of Palmer Deed creating the Well Easement was ambiguous because “either of the parties’ suggested interpretations could fit within the meanings of the work ‘temporary.’” Appellant’s Brief at 034. The Palmer Deed granted to the Palmers “a **temporary** easement over a portion of said Tax Map 3, Lot 0119 owned by Grantor to access the existing well located on that lot for purposes of serving the existing family residence located on the premises herein conveyed until such time as Grantees **shall have another water source available.**” App.

149. On summary judgment, the Arells argued that the use of the word “temporary” unambiguously indicates an intent that the Well Easement shall “last[] for a time only” and “exist[] or continu[e] for a limited time,” rather than an unlimited or indefinite time. App. 111-13. The Palmers argued that the language that the Well Easement shall last “until such time as [the Palmers] have another water source available” unambiguously indicates an intent that the Well Easement may continue to exist and burden the Arells’ property forever. *See, e.g.*, App. 170. Face with two reasonable but contrary interpretations of the deed language, the Trial Court properly found that the language was ambiguous. *Birch Broad, Inc.*, 161 N.H. at 196.

Webster’s Third New International Dictionary defines “temporary” as “lasting for a time only” and “existing or continuing for a limited time.” *Webster’s Third New International Dictionary* 2353 (unabridged ed. 2002). Webster’s Third New International Dictionary defines “available” as “capable of availing; having sufficient power or force to achieve an end” or “that is accessible or may be obtained.” *Webster’s Third New International Dictionary* 150.

The Palmer Deed describes the Well Easement as “temporary” and provides that the Well Easement shall exist “until such time as Grantees shall have another water source available.” App. 149. This second clause, when read alone, could suggest that the Well Easement could last indefinitely, with an indeterminate and potentially nonexistence end. This is clearly at odds with the language characterizing the Well Easement as “temporary,” i.e., “lasting for a time only” or “existing or continuing for a limited time,” since this requires that the duration of the Well Easement be limited from the time of its commencement.

When faced with a similar temporary easement in *Dalser Realty, LLC v. Manchester Housing and Redevelopment Authority, Inc.*, Super. Ct. No. 216-2015-CV-00651, 2017 WL 8773146 (Feb. 15, 2017), Judge Brown of the Hillsborough County Superior Court, Northern District, held that such an easement is ambiguous as to its intended duration. *See* App. 157-65. In *Dalser Realty*, the easement at issue was a “Temporary Road Access Easement” for the defendant to access landlocked property by traveling over the plaintiff’s property. App. 157. By its terms, the Temporary Road Access Easement “shall expire and be of no further force and effect upon the completion of construction of the new road,” which was to be undertaken by the defendant. App. 158. “No date certain was provided for the construction of the new permanent access road.” *Id.* In interpreting the language creating the Temporary Road Access Easement, Judge Brown noted that “until the new road is built—an occurrence entirely outside of plaintiff’s control—the easement shall persist indefinitely.” App. 161. Based on this “inherent conflict” in the language of the Temporary Road Access Easement, Judge Brown concluded that it was ambiguous. *Id.*

Like Judge Brown did in *Dalser Realty*, the Trial Court concluded that the language creating the Well Easement is ambiguous because of the “inherent conflict” between its identification as a “temporary” easement and the language stating that it shall exist “until such time as Grantees shall have another water source available.” Also—like the construction of a new road in *Dalser Realty*—the availability of a new water source for the Palmer Property is “entirely outside of [the Arells’] control.”<sup>2</sup> This conflict creates

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<sup>2</sup> Like the language of the Well Easement here, the language creating the Temporary Road Access Easement in *Dalser Realty* stated the terminating condition in general terms, without identifying

a situation in which an easement explicitly labeled as “temporary” could potentially last indefinitely. Accordingly, the language could be found to be ambiguous.

The Palmers argue that any ambiguity in the Palmer Deed language should be construed against effecting a “forfeiture” of the Well Easement. However, forfeiture is exactly what the plain Well Easement contemplates. Furthermore, none of the cases cited by the Palmers asserting that forfeiture is disfavored are applicable since none of the cases include the critical language found in the Well Easement: “[t]ogether with a temporary easement.”

Additionally, the Palmers’ arguments that the Well Easement—as a determinable easement—as unambiguously intended to last forever conveniently ignore the crucial inclusion of the word “temporary” in the Palmer Deed. Nothing described as “temporary” is intended to last forever. The Trial Court correctly held that the use of the word “temporary” created an ambiguity that requires the application of the Rule of Reason.

**II. The Trial Court was correct in concluding, through application of the Rule of Reason, that “it is reasonable that the Palmers be ordered to take reasonable steps to create a well on their own property.”**

If the language of an easement deed is ambiguous, the Court will use “the rule of reason to interpret and give reasonable meaning to general or unclear terms in the deed language granting an easement,” and also “irrespective of the deed language,” to “determine whether a particular use of the easement would be unreasonably burdensome.” *Heartz v. City of*

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the party responsible for constructing the permanent road: “...which rights shall expire and be of no further force and effect upon completion of construction of the new road...” App. 158.

*Concord*, 148 N.H. 325, 331 (2002). “The rule of reason requires the court to **give a meaning to words which the parties or their predecessors in title have actually used** or else to give a detailed definition to rights created by general words either actually used or, whose existence is implied by law.” *Id.* (emphasis added). “Reasonableness is a question of fact that is determined by considering the surrounding circumstances, such as location and the use of the parties’ properties, and the advantages and disadvantages to each party.” *Id.*

In *Dalser Realty*, Judge Brown analyzed the language in documents that were entered into around the time of the creation of the Temporary Road Access Easement and concluded that the documents indicated an “understand[ing] that the temporary easement would last only a brief period, and that the new permanent access road would be constructed within a reasonable time.” App. 162. In applying the Rule of Reason, Judge Brown compared the fact that the defendants had enjoyed the Temporary Road Access Easement for five years—and had made improvements on their properties by utilizing the Temporary Road Access Easement—with the fact that the plaintiff’s property had been burdened during that time, thereby preventing plaintiff from further expanding its business. App. 163. Judge Brown concluded that “[i]n light of the facts and circumstances of th[e] case . . . the continued indefinite use of the temporary access easement [is] unreasonable,” and ordered defendants to construct the permanent road. *Id.*

Here, the Trial Court noted that the “Palmers have enjoyed the use of the ‘temporary’ easement for nineteen years.” Appellants’ Brief at 035. The Trial Court held that it “is unreasonable to assume that ‘becomes available’ means the spontaneous appearance of a well or access to public water,” and



concluded that “it is reasonable that the Palmers be ordered to take reasonable steps to create a well on their own property” because “there is simply no other mechanism by which the easement can end.” *Id.*

The facts and circumstances surrounding the creation of the Well Easement and the use of the parties’ properties supports the Trial Court’s assessment that the Palmers’ continued and unending use of the Well is unreasonable. It is undisputed that the Palmer Property and the Arell Property were under common ownership prior to the conveyance of the Palmer Property to the Palmers, and that the Well was the sole water source for the previous owners of the Palmer Property. App. 125 at ¶ 4. *See* App. 005 at ¶ 10; App. 010 at ¶ 10. The most reasonable inference from the inclusion of the Well Easement in the Palmer Deed was that the seller of the Palmer Property wanted to increase the Palmer Property’s marketability by including temporary access to the Well, which would allow the purchasers of the Palmer Property to immediately occupy the Palmer Property while they undertook efforts to identify and obtain another source of water.<sup>3</sup> Furthermore, the Palmers have presented no evidence that it was the intention of Ms. Edmunds in granting the Well Easement that it could potentially last forever until the end of time. On the contrary, the inclusion of the word “temporary” indicates an intent that the Well Easement would continue for a limited time to allow for another water source to become available, if not

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<sup>3</sup> The Palmers argue that the Well Easement is determinable. However, “determinable” only means that their right to use the Well Easement will cease without further action of the Arells. Determinable does not change the temporary nature of the Well Easement. In fact, it only confirms that the Well Easement is intended to terminate, and that the Palmers do not have the right to use the Well Easement “until such time as the owners of the Palmer Property elect[] in their sole discretion to establish a different water source.” App. 15 at ¶ 7.

through access to a public water source then through the Palmers' establishment of a new well on the Palmer Property.

Additionally, the Arell Property has been burdened for over seventeen years, during which time the Palmers have undertaken no efforts to identify and obtain another source of water. *See* App. 126 at ¶ 6. Instead, the Palmers have made numerous other significant improvements to the Palmer Property, the whole time benefitting from the free source of water available to them from the Well. *See* App. 127 at ¶ 12. Accordingly, the Palmers' arguments about the costs of investigating and establishing a well on their property are difficult to take seriously, and the Court may reasonably ignore any argument based on the financial burden to the Palmers of digging a new well on the Palmer Property.

Furthermore, the Palmers have unreasonably exceeded the scope of the Well Easement by adding the Second Residence to the Palmer Property and hooking it up to the Well such that the Well is now the sole source of water for Second Residence. *See Nadeau v. Town of Durham*, 129 N.H. 663, 668 (1987) (applying Rule of Reason and holding that proposed use of right-of-way by 14 proposed units of housing was an unreasonable expansion of the use of the right-of-way by two single-family homes as originally contemplated). The Well Easement is clearly intended to "serv[e] the [then-existing single family residence located on the [Palmer Property]]." App. 149. The addition of the Second Residence unreasonable expansion of the Well Easement.

Applying the Rule of Reason, it is unreasonable for the **temporary** Well Easement to continue indefinitely, supplying the Palmers with a reliable source of water while continuing to burden the Arell Property. Accordingly,

the Trial Court properly found find that the circumstances of the Well Easement necessarily imply an obligation on the part of the Palmers to identify and obtain another source of water for the Palmer Property. *See Village Green Condominium Ass'n v. Hodges*, 167 N.H. 497, 504 (2015) (holding that owner of dominant estate had obligation to contribute to maintenance of easement property, despite there being no such obligation included in the terms of the easement).

**III. The Trial Court was correct in ordering the Palmers to investigate the viability of creating a well and to seek a further hearing before the Trial Court if the Palmers determine after a thorough investigation that it is not possible to dig a viable well on their property or that the cost far exceed the customary cost of creating a well.**

Having properly found, through application of the Rule of Reason, that the Well Easement necessarily imposed an obligation on the Palmers to investigate and construct a well on their property, the Court correctly placed the burden on the Palmers to prove the impossibility of the creation of such a well. “[T]o justify the termination of a contract on account of impossibility of performance, the impossibility must be complete and permanent.” *Perry v. Champlain Oil Co.*, 99 N.H. 451, 453 (1955) (citing *Black on Rescission of Contracts*, §208, p. 586). If a defendant seeks to avoid liability based upon a defense, the defendant has the burden of proof with respect to the issue at trial. *Thurston v. Kennett*, 22 N.H. 151 (1850); *Hawthorne Trust v. Maine Savings Bank*, 136 N.H. 533, 538 (1992).

The Court properly found that the Palmer Deed imposed an obligation on the Palmers to investigate and construct a new source of water. If the Palmer’s wish to argue that they are unable to meet this obligation because

of impossibility, they have the burden of proving that defense. Accordingly, the Trial Court properly imposed upon the Palmers the obligation to prove that it is not possible to dig a viable well on their property or that the cost far exceeds the customary cost of creating a well.

### **CONCLUSION**

The Arells purchased the Arell Property subject to the Well Easement, which is explicitly described in the Palmer Deed as “temporary.” Based on the use of the word “temporary,” the Arells understood—as any reasonable person would—that the Well Easement would last for a time, but would not last forever. Now, after seventeen years have come and gone with no indication that the Palmers intend to find an alternative water source for the Palmer Property, the Arells have understandably become concerned that “temporary” is starting to look more and more like “forever.” It was this concern that prompted them to file their suit in Superior Court in order to obtain clarity about what “temporary” actual means.

In its decision on summary judgment, the Trial Court properly found that the parties’ conflicting reasonable interpretations of the Palmer Deed rendered it ambiguous. The Trial Court then properly looked outside of the Palmer Deed itself to conclude that it was the intent of the parties to the Palmer Deed that the Well Easement last only for a time to allow the Palmers to locate and establish an alternative water source. Finally, the Trial Court properly applied the rule of reason to determine that it was reasonable to provide the Palmers with a three year timeframe within which to investigate the feasibility of establishing a well on the Palmer Property,

and, if feasible, establish such a well, or come back to the Trial Court and provide evidence that such a well is not feasible. The Trial Court's decision is correct and consistent with the universal understanding that a "temporary" easement is not permitted to last forever. This Court should affirm the Trial Court's decision.

**REQUEST FOR ORAL ARGUMENT**

The Arells request oral argument of not less than fifteen minutes. Karyn P. Forbes will argue for the Arells.

**CERTIFICATION PURSUANT TO RULE 26(7)**

Pursuant to Supreme Court Rule 26(7), I hereby certify compliance with Supreme Court Rule 26(2), (3), and (4). I further hereby certify the within brief complies with the word limitation in Supreme Court Rule 16(11) of 9,500 words. This brief contains 4,671 words.

Respectfully submitted,

RICHARD D. ARELL and  
NATALIE E. ALLARD-ARELL

By their attorneys,  
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Date: March 6, 2020

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing document is being served electronically upon Timothy E. Britain and Jeffrey C. Christensen, Cleveland, Waters and Bass, P.A., and to Erich J. Hasselbacher, Brook & Scott, PLLC, through the Court's electronic filing system, in compliance with Supreme Court Rule 16(3).

Dated: March 6, 2020

/s/ Karyn P. Forbes  
Karyn P. Forbes, Esq.