In The

Supreme Court of Virginia

RECORD NO. 101837

HOME PARAMOUNT PEST CONTROL COMPANIES, INC.,

Appellant,

v.

JUSTIN SHAFFER and CONNOR'S TERMITE AND PEST CONTROL INC.,

Appellees.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF CASE 1

STATEMENT OF FACTS 3

ASSIGNMENTS OF ERROR 6

ARGUMENT 7

I. STANDARD OF REVIEW 7

II. THE CIRCUIT COURT ERRED BY CONSIDERING ONLY ONE FEATURE OF THE NON-COMPETE AGREEMENT IN ISOLATION, AND RELYING ON ONLY ONE FACTOR IN THE AGREEMENT IN FINDING THE NON-COMPETE OVERBROAD 7

A. The scope of Shaffer's non-compete was narrowly drawn to protect the legitimate business interests of the employer 9

B. The Court erred in not considering the “function” clause of the non-compete in light of the narrow geographic scope and accepted time limitations............ 13

C. The non-compete provision was being used to enforce a limited level of competition based on a narrow legitimate business interest 17

CONCLUSION/RELIEF REQUESTED 19

CERTIFICATE PURSUANT TO RULE 5:26(h) 22

TABLE OF AUTHORITIES

Page(s)

CASES

Cantol, Inc. v. McDaniel,
2006 WL 1213992 (E.D. Va. 2006) 8

Janvier v. Arminio,
272 Va. 353, 634 S.E.2d 754 (2006) 7

Mantech International Corp. v. Analex Corp.,
75 Va. Cir. 354 (2008) 12

Meissel v. Finley,
198 Va. 577, 95 S.E.2d 186 (1956) 7-8

Modern Environments, Inc. v. Stinnett,
263 Va. 491,561 S.E.2d 694 (2002) .... *passim*

Paramount Termite Control Co. v. Rector,
238 Va. 171, 380 S.E.2d 922 (1989) 16, 17

Richardson v. Paxton Co.,
203 Va. 790, 127S.E.2d 113(1962) 8

Simmons v. Miller,
261 Va. 561, 544 S.E.2d 666 (2001) 8

Weichert Co. of Virginia v. First Commercial Bank,
246 Va. 108,431 S.E.2d 308 (1993) 7

OPENING BRIEF

STATEMENT OF CASE

Home Paramount Pest Control Companies, Inc. ("Home Paramount") initiated this lawsuit against defendants Justin Shaffer ("Shaffer") and Connor's Termite and Pest Control, Inc. ("Connors"). Specifically at issue is the enforceability of the non-compete agreement Shaffer signed at the outset of his employment with Home Paramount, as well as in January of 2009.

Home Paramount alleged that Shaffer had breached the non-compete agreement he signed as a Home Paramount employee. (Joint Appendix, 1-18) (hereinafter referred to as "J.A."). Among other things, Home Paramount alleged that Shaffer actively attempted to divert Home Paramount customers that he serviced, to Connors. (Id.).

On January 19, 2010, defendants filed their first plea in bar, which Home Paramount opposed. (J.A. 32-36; 37-41). There was extensive supplemental briefing by all three parties. (J.A. 46-49; 50-54). Defendants' first plea in bar was heard on Feb. 12, 2010 and was deferred so that an evidentiary hearing could take place. (J.A. 55).

On April 15, 2010 defendants again appeared at calendar control for purposes of getting their second plea in bar heard, and a hearing was set

for May 26, 2010. Defendants submitted a brief in support of the plea in bar. (J.A. 56-66). Plaintiff opposed the second plea in bar and also filed a brief. (J.A. 67-72).

A hearing was held on May 26, 2010 on defendants' plea in bar; a court reporter was present and transcribed the hearing. (J.A. 73-173). The trial court considered evidence and heard the testimony from several witnesses, and then gave its opinion from the bench. (Id.). The trial court also entered a written order that same day. (J.A. 174). Home Paramount appeals from the Order of the Circuit Court for Fairfax County Virginia granting defendants' plea in bar on claims I and II of a seven count complaint. (J.A. 174).

On June 22, 2010, Home Paramount filed a motion and Order of Nonsuit of all remaining claims. (J.A. 175-177). The Nonsuit Order, which was the final Order in the case, was entered on June 28, 2010. (J.A. 178). On July 15, 2010 Home Paramount filed its timely Notice of Appeal to this Court. (J.A. 181-182). On August 16, 2010, Home Paramount filed all transcripts in the case, together with its Notice of Filing of Transcripts. (J.A. 183-184). An appeal was awarded by the Virginia Supreme Court on January 6, 2011.

STATEMENT OF FACTS

From June of 2008 until July of 2009, defendant Justin Shaffer was employed by Home Paramount Pest Control Companies, Inc. as a commercial and residential pest inspector. (J.A. 101). As an inspector, there was a large sales component to Shaffer's job. (Id.). In that role, he was assigned existing customer accounts and the responsibility for developing new business within a certain, well-defined geographic area. Upon leaving his employment with Home Paramount, Shaffer took a job with Connor's Termite and Pest Control, Inc. (J.A. 107).

The following is a summary of the evidence submitted during the second plea in bar hearing that was held on May 26, 2010. Paul Hoffman served as Shaffer's manager while Shaffer was employed by Home Paramount. (J.A. 97-98). Hoffman testified that Shaffer was not restricted from working in areas other than those where he worked for Home Paramount, i.e., those parts of Fairfax County west of Falls Church. (J.A. 100). Hoffman testified that Shaffer would not have been prohibited from working in any capacity he liked for whomever he liked in those parts of Fairfax County west of the city of Falls Church, or in other parts of Virginia, or in any other states. (J.A. 100-102). Hoffman also testified that he had

spent considerable time trying to develop a relationship with Landmark Terrace. (J.A. 102). Hoffman testified that he had taken Shaffer to Landmark Terrace, and that Landmark Terrace had been one of the accounts to which Justin Shaffer was assigned. (Id.).

The Court also heard testimony from defendant Justin Shaffer. Shaffer has a B.S. degree in biology with a focus on entomology. (J.A. 106). He worked in an entomology lab while in college, where he collected termite samples, maintained cockroach and termite colonies and fed bed bug colonies. (J.A. 106-107). Shaffer went to work for Steritech after graduating from college. After leaving Steritech, he went to work at Home Paramount. (J.A. 107). All of Shaffer's professional training, education, and experience have been in the field of pest control. Shaffer has no qualifications or training whatsoever in accounting (J.A. 108) or in janitorial work (Id.) or in the repair and maintenance of vehicles. (Id.).

Shaffer testified that he understood that the non-compete applied only to those portions of Fairfax County where he had worked for Home Paramount; in other words, those portions of Fairfax County east of Falls Church. (J.A. 114-115.) Shaffer also testified that he understood that he

was not restricted except in those areas in Fairfax County covered by the Falls Church Branch. (Id.).

The Court also heard the testimony of Edward Connor Jr., who is Justin Shaffer's manager at Connors. (J.A. 92). Connor's testimony was that his company had never solicited work before from Landmark Terrace prior to Justin Shaffer's employment with Connors. However, after Shaffer came to work for Connors, Connors and Shaffer did submit a proposal to Landmark Terrance. (J.A. 93-95).

Furthermore, the evidence at the plea in bar hearing, which was accepted by the Court, also showed that Shaffer's ability to make a living was not impaired by the non-compete. Indeed, the non-compete agreement does not prohibit Shaffer from working for Connors, and it does not prohibit Shaffer from working for Connors in Fairfax County so long as Shaffer does not perform work for Connors in the same parts of Fairfax County to which he was assigned while employed by Home Paramount. The restricted area includes only the parts of Fairfax County east of Annandale and the City of Falls Church.

Appellant Home Paramount urges this Honorable Court to reverse the trial court and find that the non-compete agreement is enforceable or in

the alternative to remand the case back to the trial court with instructions on how to perform the proper legal analysis with regard non-compete agreements.

ASSIGNMENTS OF ERROR

1. The Circuit Court erred in finding the non-compete overly broad, because the Court focused only on the scope of the restricted activities and did not consider that portion of the agreement in light of the narrow geographic scope of the restriction (J.A. 127-128) which applied only to certain limited geographic boundaries within Fairfax County, and did not prevent employee from working for Connors in the exact same office in which he is employed. (J.A. 137-138).

2. The Court erred in failing to consider the specific facts of this case in interpreting the non-compete; for example, the Court failed to consider Shaffer's academic training and work experience in the area of pest control and entomology when it determined whether the scope of the restricted activity was broader than necessary to protect Home Paramount's interests. (J.A. 132-133).

3. The Court erred in disregarding the specific facts put into evidence at the plea in bar hearing, which established that Shaffer and Connors had solicited Home Paramount customers. (J.A. 92-97).

Judge White executed an Order which reflected his ruling at the conclusion of the May 26, 2010 second plea in bar hearing. Counsel for Home Paramount objected to Judge White's Order "for the reasons stated on the Record." (J.A. 174).

ARGUMENT

I. STANDARD OF REVIEW

A plea in bar presents a distinct issue of fact which, if proven, creates a bar to the plaintiffs right of recovery. The moving party has the burden of proof on that issue. *Weichert Co. of Virginia v. First Commercial Bank*, 246 Va. 108, 109, 431 S.E.2d 308, 309 (1993). Home Paramount appeals the Circuit Court for Fairfax County's entry of an Order sustaining the plea in bar of defendants after receiving evidence and testimony that was not in dispute; thus, Home Paramount's appeal presents a question of law concerning the trial court's application of the law to essentially undisputed facts. The appropriate standard of review is *de novo*. *Janvier v. Arminio*, 272 Va. 353, 363, 634 S.E.2d 754, 759 (2006).

II. THE CIRCUIT COURT ERRED BY CONSIDERING ONLY ONE FEATURE OF THE NON-COMPETE AGREEMENT IN ISOLATION, AND RELYING ON ONLY ONE FACTOR IN THE AGREEMENT IN FINDING THE NON-COMPETE OVERBROAD.

The Virginia Supreme Court has made it clear that non-compete provisions are disfavored and will be strictly construed. That is not to say, however, that such agreements will never be enforceable. Each case must be determined on its own facts. See, *Modern Environments, Inc. v. Stinnett*, 263 Va. 491, 493, 561 S.E.2d 694, 695 (2002) citing *Meissel v.*

Finley, 198 Va. 577, 579, 95 S.E.2d 186, 188 (1956). The provisions of a non-compete agreement must be read together and the agreement must be interpreted as a whole, together with the specific facts of each case.

Consistent with these general principles, the Supreme Court of Virginia has established a three-part test to measure the enforceability of non-compete clauses. This test requires that the employer show that the clause (i) is narrowly drawn to protect the employer's legitimate business interest; (ii) is not unduly burdensome on the employee's ability to earn a living; and (iii) is not against sound public policy. *Richardson v. Paxton Co.*, 203 Va. 790, 127 S.E.2d 113, 117 (1962). In particular, the analysis of these interrelated factors "requires consideration of the restriction in terms of function, geographic scope, and duration." *Simmons v. Miller*, 261 Va. 561, 544 S.E.2d 666, 678 (2001). "The considerations of function, geographic scope, and duration are not separate and distinct issues: a single consideration that is unreasonable may be reasonable as construed in light of the other two." *Cantol, Inc. v. McDaniel*, 2006 WL 1213992 p.4 (E.D. Va.).

At the plea in bar hearing, counsel for Connors and Shaffer made it clear that the plea in bar and the argument for dismissal of the non-

compete focused only on the "function" factor. (J.A. 77; 119). The trial court also did so in finding that the non-compete agreement was not enforceable thus committing reversible error. (J.A. 148-149).

A. The scope of Shaffer's non-compete was narrowly drawn to protect the legitimate business interests of the employer.

Home Paramount put on evidence that Hoffman had worked for about a year to bring in Landmark Terrace as a client. (J.A. 98). Hoffman had performed work developing Landmark Terrace as a client even before Shaffer became a Home Paramount employee. (J.A. 102). When Shaffer began working at Home Paramount, Hoffman introduced him to the Landmark Terrace managers. (Id.). Other business opportunities developed by Home Paramount and Shaffer included Orleans Village and Yorktowne Square. (J.A. 102). Hoffman further testified that Yorktowne Square now sends less work to Home Paramount than it used to. (Id.).

Also introduced into evidence at the plea in bar hearing was the formal contract between Home Paramount and Landmark Terrace. (J.A. 104). This was a contract that Justin Shaffer brought in while he was employed by Home Paramount. (Id.). During the testimony of Edward Connor Jr. at the plea in bar hearing, Mr. Connor testified that Connors did

a proposal for services to Landmark Terrace after Shaffer came to work for Connors. That proposal was entered into evidence as Exhibit 1. (J.A. 93-94). Connor Jr. testified that Kathy Carver was the name of the manager at Landmark Terrace, and that he had never met her before Justin Shaffer came to work for Connors. (J.A. 94). Connor Jr. also knew that Shaffer had serviced Landmark Terrace and Kathy Carver while employed at Home Paramount. (J.A. 96).

The factual background provided above clearly demonstrates that Home Paramount had, and continues to have, a legitimate business interest that it attempted to protect through the Employment Agreement executed by Shaffer. The business interest is narrow, and Home Paramount's attempt to enforce the non-compete agreement is narrow as well. But for Shaffer's and Connors' attempt to solicit Home Paramount customers directly and/or indirectly, this lawsuit would never have been filed.

Connors and Shaffer, as well as the trial court, rely heavily on the Virginia Supreme Court's Opinion in *Modern Environments, Inc. v. Stinnett*, 263 Va. 491, 561 S.E.2d 694 (2002). It is important to distinguish the procedural history and facts of that case to this one. Justice Lacy points out

in her Opinion that, *"Modern* offers neither argument nor evidence of any legitimate business interest that is served by prohibiting Stinnett from being employed in any capacity by a competing company." *Modern Environments, Inc. v. Stinnett*, 263 Va. 491, 495, 561 S.E.2d 694, 696 (2002). In this case, Home Paramount not only argues that it has a need to protect a legitimate business interest, it demonstrates through the undisputed evidence how that legitimate business interest is being impacted by Shaffer's violation of his non-compete/non-solicitation agreement. Shaffer may not have been directly involved in soliciting Landmark Terrace on behalf of Connor's, but a reasonable inference can be made that he was indirectly involved based on the evidence set forth above. Enforcing the non-compete agreement would prevent such behavior thus protect Home Paramount's legitimate business interest.

The trial court examined the non-compete provision in a vacuum, focusing on a single word and a single phrase contained in the non-compete agreement as the basis for his ruling. "The language that I specifically find troublesome is the language dealing with the word 'indirectly,' and the phrase 'or concern himself or herself in any manner whatsoever in carrying on or conducting in the business of exterminating, pest control, termite control, and fumigation.'" (J.A. 148-149). By focusing

solely on a single word and a single phrase and relying on the Virginia Supreme Court's ruling in *Modern Environments*, the trial court fails to perform the proper analysis that is dictated and required by the Virginia Supreme Court in *Modern Environments* itself. The trial court's failure to perform the complete analysis in light of the undisputed evidence that a legitimate business interest was being violated by Shaffer, with the assistance of Connors, is in error as a matter of law.

Furthermore, there appears to be a trend in the courts (See, *Mantech International Corp. v. Analex Corp.*, 75 Va. Cir. 354 (2008)) to find any justification for holding non-compete provisions of employment agreements invalid. If the law in Virginia is that non-compete provisions are so disfavored that they are not enforceable under any circumstances, then at least employers will understand that basic concept and find other means to protect themselves and their legitimate business interests.

Home Paramount asserts that such a position would be against public policy and hamper business, especially those that are customer-based and built up through years of hard work just so that an employee moving to a new company can have the opportunity to reap those benefits, and for all intents and purposes, steal that business. The non-compete agreement must be reviewed in its whole, and in the context of the facts of

the case. The trial court must also determine how that agreement is being enforced, as set forth by the many cases that preceded *Modern Environments*. Choosing limited portions of the agreement and finding that the whole agreement invalid, thus leaving the damaged business owner with his legitimate business interests violated, is not supported by the law and is against public policy.

B. <u>The Court erred in not considering the "function" clause of the non-compete in light of the narrow geographic scope and accepted time limitation.</u>

Based on the facts of this case, the trial court erred in finding the non-compete overly broad. The defendants' arguments, and the trial court's ruling, focused on the "function" clause of the non-compete. That clause, however, which restricts Shaffer from being an "owner, an agent, a servant, a representative, or an employee and as a member of a partnership, or as an officer, director, stockholder of any corporation ..." must be read, as in every non-compete case, in light of the rest of the agreement and the specific facts of each case.

The non-compete agreement in this case is enforceable. First, the "function" restrictions to which Shaffer agreed must be read together with a view towards the geographic scope of the restrictions. Second, the time

limitation is an accepted length of time under these circumstances. It is true that Shaffer was limited in a fairly broad range of activity—but he was only limited in that range of activity in a specific geographic region; namely, in certain very specific parts of Fairfax County and for only two years.

In its ruling, the trial court recognized that the geographic scope of the non-compete agreement's restrictions was small. (J.A. 149). However, the trial court found that the "function" portion of the non-compete was "very overbroad." (Id.). In finding the function portion of the agreement overly broad, the trial court failed to recognize that Shaffer's academic training and his entire professional life have been spent in the field of entomology and pest control.

Moreover, the argument that Shaffer would be limited from working as a bookkeeper or doing vehicle maintenance for Connors by the agreement is, on the facts of this case, completely irrelevant. The non-compete agreement at issue in this case does not limit Shaffer in any way with regard to any work he might perform only in the Connors office, because that office is not in the narrow geographic region in which Shaffer is restricted. More importantly the non-compete agreement is not being used by Home Paramount to prevent Shaffer from performing hypothetical job duties as referenced in the trial court's rational (J.A. 142-144) but to

protect a legitimate business interest (i.e. protect its customer list). At the same time, Shaffer has absolutely no experience or academic training in the fields of janitorial services, automobile repair, or accounting. (J.A. 107-108). There is absolutely no reason to think a pest control company like Connors would employ Shaffer to perform any services *other* than pest control. The realities of the modern economy and of our modern educational system is that employees obtain academic training and are trained to perform a specific type of work, and then spend their professional lives working in increasingly narrow, specialized professional areas.

It is also important to recognize that there was absolutely nothing in the non-compete provision to prevent Shaffer from working for Connors in the exact job he currently holds. Shaffer himself understood that, and his testimony at the hearing was that he was not restricted in any manner whatsoever from performing pest control services for Connors "west of Annandale and Fairfax ..." (J.A. 115). Shaffer went on, in his testimony, to list other places he was able to work for Connors: "... Winchester, Centerville, Woodbridge, Richmond, Silver Spring, all of Maryland, all of D.C. ..." (J.A. 114-115). Needless to say, areas where Shaffer could work would also include places like Loudoun County, Prince William County, and

an endless number of other locations, both within and outside of Virginia. (Id.).

Further, the evidence before the trial court at the plea in bar hearing was that Connors in fact does have work all across the country, and that Shaffer can and did perform work in many other states. The evidence at the plea in bar hearing was that Shaffer is not restricted in any way from performing work for Connors in Washington, D.C, or in Maryland, North Carolina, West Virginia, Delaware, and many others. (J.A. 100-101). The non-compete provision which Shaffer signed does not prevent him from working for Connors, and clearly Connors has plenty of work outside of the restricted area for which Shaffer is well-suited.

In determining whether the scope of the restriction on Shaffer's activity is reasonable, the Court must consider the length of the restriction in addition to the geographic scope of the agreement, and whether that scope is no broader than necessary to protect Home Paramount's interests. In that regard, this Court held more than 21 years ago in *Paramount Termite Control Co. v. Rector*, 238 Va. 171, 380 S.E.2d 922 (1989) that a geographic scope and time restricting former employees from competing in the same county where they worked for Paramount was

reasonable. Id., 238 Va. at 175, 380 S.E.2d at 925. Further, the Virginia Supreme Court held that the former employees' ability to earn a livelihood was not substantially impaired because the employee was able to perform work in other counties and cities within a driving distance of his home. Id. It has been settled law for more than 20 years that similar language of Home Paramount's non-compete agreement is not overly broad and is enforceable.

C. The non-compete provision was being used to enforce a limited level of competition based on a narrow legitimate business interest.

A well-known technique in these types of cases is to argue that the scope of a non-compete is overly broad because the individual would be prohibited from working for a competitor as a janitor or some other type of job far removed from the individual does for a living. That was the approach taken by defense counsel in the Circuit Court (J.A. 77), and ultimately became a part of the trial court's rationale for its decision. (J.A. 142-150).

The trial court completely failed to consider Shaffer's experience, education, and training, however, in ruling that the function restriction of the non-compete was overly broad. Shaffer has a B.S. degree from in biology with a focus on entomology. (J.A. at 106). He worked in an entomology lab

while in college, where he collected termite samples, maintained cockroach and termite colonies and fed bed bug colonies. (Id.). After graduating from college, Shaffer took a job with a pest control company called Steritech. (J.A. at 107). After leaving Steritech, he went to work at Home Paramount. (Id.). In other words, all of his professional training, his education, and his experience have been in the field of pest control. At the same time, at the plea in bar hearing, the evidence from Shaffer was that he has no qualifications or training whatsoever in accounting, (J.A. 108) or in janitorial work, (Id.) or in the repair and maintenance of vehicles. (Id.). Rather, the evidence was that all of Shaffer's education and job experience has been in the field of pest control.

Despite Shaffer's own testimony about his inexperience in fields other than pest control, counsel for the defendants argued that "restricting any former employee of Home Paramount from performing any function for Connor's Pest Control, whether it be in their support staff, whether it be answering telephones, whether it be in the bookkeeping department or whatever. We put on evidence that we do have support positions in Connors, and those positions are available." (J.A. 125). The trial court erred in not considering Shaffer's background in ruling on scope of the "function" clause. For example, the trial court asked if Shaffer would "be

prohibited from selling dog food to these people to feed the canine dogs?" (J.A. 142). As was argued at the plea in bar hearing, if Shaffer were selling dog food to Connors, he would be in the business of selling dog food and not "carrying on or conducting the business of exterminating, pest control, termite control, and/or fumigation services." (Id.).

The trial court failed to take into consideration all the factors in this case, as required *Modern Environments*. In particular the trial court ignores that Home Paramount is attempting enforce the non-compete agreement in an extremely limited area, for only two years, and in reality for exactly the same type of work that he did for them (i.e. sales). This Court does not have the same record before it as it did in *Modern Environments*. In this case, Home Paramount is simply trying to narrowly enforce its non-compete agreement to a situation where its business is being damaged by a former employee, who has gone to work for a competitor.

CONCLUSION/RELIEF REQUESTED

The Appellant, Home Paramount Pest Control Companies, Inc. respectfully requests that this Honorable Court reverse the trial court's decision or in the alternative remand the case to the trial court with instructions. Home Paramount respectfully requests that this Honorable

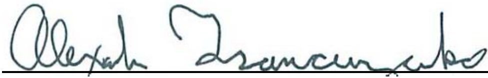
Court hold that the non-compete provision of the Employment Agreement executed by Justin Shaffer be found to be enforceable as a matter of law, based on the facts and circumstances of this case and the Record below. In the alternative, Home Paramount respectfully requests that this Honorable Court remand this matter to the trial court with instructions for the trial court to conduct a full and complete analysis of the enforceability of the Home Paramount non-compete agreement in the context of the undisputed evidence based on the current status of the law in the Commonwealth of Virginia.

Home Paramount further respectfully requests that this Honorable Court direct the trial court to examine and analyze the non-compete agreement in the context of the facts of this case and in the context of the agreement as a whole, and not simply rely on specific words of phrases that can be construed out of their proper context.

WHEREFORE, based on the aforegoing Appellant's Opening Brief, Home Paramount Pest Control Companies, Inc. respectfully requests that this Honorable Court reverse the trial court's ruling of May 26, 2010, finding that the non-compete agreement is unenforceable or, in the alternative,

remand this matter to the trial court for further examination and analysis based on direction and instruction from this Honorable Court.

RESPECTFULLY SUBMITTED,



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CERTIFICATE PURSUANT TO RULE 5:26(h)

The Appellant certifies the following pursuant to Rule 5:26(h) of the Rules of the Supreme Court of Virginia, as amended:

The name of the Appellant is Home Paramount Pest Control Companies, Inc. Counsel for Appellant is as follows:

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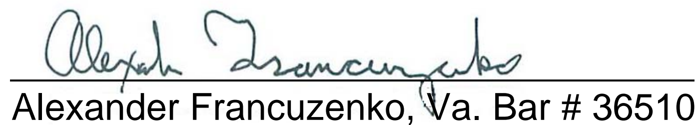
The Appellant requests to state orally its arguments in support of this Appeal.

I hereby certify that fifteen (15) paper copies, and one (1) electronic copy on CD, of the foregoing Appellant's Opening Brief and Joint Appendix were hand-filed with the Clerk of the Supreme Court of Virginia, and that the required number of bound copies, and one electronic copy on CD, of the same were served, via UPS Ground Transportation, to all opposing counsel on this 15th day of February, 2011.



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