COURT OF APPEALS, STATE OF COLORADO
Colorado State Judicial Building
2 East 14th Avenue, 3rd Floor
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DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO
Case No. 05-CV-2290
Honorable John N. McMullen

▲COURT USE ONLY▲

Case Number: 11-CA-508

Plaintiffs-Appellees:

SAINT JOHN'S CHURCH IN THE WILDERNESS, a Colorado nonprofit corporation; CHARLES I. THOMPSON, an individual; CHARLES W. BERBERICH, an individual

Defendant-Appellants:

KEN SCOTT, an individual; CLIFTON POWELL, an individual

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PLAINTIFFS-APPELLEES' ANSWER BRIEF

C.A.R. 23(f)

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules and specifically that:

This Answer Brief complies with C.A.R. 28(g);

This Answer Brief contains 9478 words, including headings, footnotes, and citations;

This Answer Brief complies with C.A.R. 28(k)

This Answer Brief contains under a separate heading a statement of whether Plaintiff-Appellees agree with Defendants-Appellants' statements concerning the standard of review and preservation for appeal, and if not why not.

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D. Did the United States Supreme Court decision in *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) question the rationale of this Court's opinion in *St. John's I*?

STATEMENT OF THE CASE

This matter was the subject of a previous appeal and remand from this Court in *St John's Church in the Wilderness v. Scott*, 194 P.3d 475 (Colo. App. 2008), *cert. denied* 2009 Colo. Lexis 832 (Colo. 2009) ("*St. John's I*"). *St. John's I* affirmed the judgments entered by Judge McMullen in October 2006, modified

the Injunction with regard to the prohibition against entry on all days and all times, and remanded to the trial court for "additional findings of fact and conclusions of law as to each o the six portions of the buffer zone."

On January 27, 2011, after full day hearing, the trial court entered an Order on Remand.[1] The Order on Remand systematically addressed and made specific and comprehensive findings of fact and conclusions of law on the issues and questions identified in *St. John's I* as to each of the six buffer zones.

Defendants' Opening Brief filed on September 6, 2011, does not raise any error in any findings of fact or conclusions of law in the Order of Remand. Defendants' Opening Brief argues only that (1) the trial court failed to follow the mandate regarding the prohibition against entry; and (2) that this Court in *St. John's I* erred in affirming the paragraph 3(ii), 3(iii) and 3(iv) of the Injunction now set forth in the Order of Remand. This appeal has an unusual posture, because there is little dispute about the findings of fact and conclusions of law in the Order on Remand, but a tenacious attack by Defendants on the soundness of this Court in *St. John's I.*

[1] A copy of the January 27, 2011 Order on Remand, found in Volume 7 of the record on appeal, is attached to this Brief as Addendum 1.

Statement of Facts

The Defendants' conduct on Palm Sunday 2005 was assuredly not, as Defendants' Opening Brief asserts, merely a "peaceful protest." Opening Brief at 37. To the contrary, after a lengthy preliminary injunction hearing and a five-day evidentiary trial, Judge John McMullen found and concluded that the Defendants by ***yelling, shouting, and screaming, intentionally and willfully interfered with Plaintiffs' religious worship services.*** Based on a solid foundation of cogent findings of fact, Judge McMullen in October 2006 entered a narrowly-tailored, content-neutral Injunction that limited no more of Defendants' speech than necessary to protect the Plaintiffs' right to worship and right to protect their children from gruesome images.[2]

The facts as determined by Judge McMullen, and affirmed by *St. John's I*, are these. On Palm Sunday, 2005, the St. John's congregation celebrated with an outdoor liturgy followed by a procession into the cathedral. Tr. Vol. 6, 10/10/06 Findings at 8:12-22. Palm Sunday, one of the holiest days of the year for Episcopalians, is traditionally worshiped with a palm procession that marks Jesus' entry into Jerusalem at the beginning of the last week before the crucifixion and

[2] A copy of the transcript of the trial court's October 10, 2006 oral findings of fact and conclusions of law, located at volume six of the transcript, is attached to this Brief as Addendum 2, and hereafter referred to as "Findings."

resurrection. Judge McMullen found "that as a part of the Episcopalian liturgy for Holy Week they attempt to follow the footsteps of Jesus. The Palm Sunday procession is intended to reenact Jesus' entry into Jerusalem, and it's common among Episcopalian churches to have that type of procession." *Id.* at 7:2-7. Judge McMullen found that an outdoor liturgy and procession was a traditional element of Palm Sunday celebration in the Episcopal tradition:

> The Palm Sunday liturgy is set forth in Exhibit 8 and contains indoor and outdoor services. The outdoor services starts with a gathering on what's called the east lawn which has been shown in several exhibits. And there the service starts with prayers and the blessing of the palms and then the procession starts along Clarkson around – up to the corner of 14th and along 14th Avenue to the main doors of the church. The outdoor procession included among other things the singing of hymns by the adult choir, the children's choir, and the congregation during the procession.

Id. at 8:12-22. Approximately 300 people participated in each of the 9:00 a.m. and 11:15 a.m. processions, which spread onto the sidewalk and lead up to the doors of the Cathedral. *Id.* at 7:13-14

Judge McMullen found that the Defendants parked their cars in front of the Cathedral at 7:00 a.m. Then, positioning themselves "probably about 20 feet from the people in the procession," *id.* at 9, the Defendants began screaming at the Church members who were attempting to pray:

> From the time the congregation gathered on the east lawn for prayers and the blessing of the palms, Kenneth Scott spoke in an extremely

> loud voice which has variously been described as yelling, shouting, screaming, but in any event, vocalized in an extremely loud voice . . . *I would find that his voice was so loud during the time and during the procession that it substantially interfered with the service.*

Id. at 15:11-22 (emphasis added). A police officer that had observed many protests and witnessed the Palm Sunday protest testified, "Mr. Scott has the loudest voice he's ever heard among all the protesters in that – in Mr. Scott's group and others." *Id.* at 8-11.

While screaming, shouting, and yelling at the members of the congregation who were trying to pray and sing hymns, Defendants displayed posters with graphic and disturbing images. The trial court expressly found that Defendants intentionally targeted graphic images at the children attending the outdoor worship services, knowing and intending to cause them distress:

> I would find that on March 19, 2005, as shown in Exhibit 13, Jo Scott appeared on the "Tapestry of Life" television program and said among other things that, we're gonna be at St. John's Sunday picketing, we're gonna take . . . big posters of aborted babies and we're going to bring them out and make them look at them *because they have children there with them.*

Id. at 4:9-17 (emphasis added). Judge McMullen found that "these posters were highly disturbing to both adults and children in the congregation because of the gruesomeness or goriness of the posters apart from any message intended to be conveyed." *Id.* at 5:24-6:3. Testimony at trial established that it was extremely

difficult for the congregation praying outdoors and participating in the procession to not see the posters "short of closing their eyes." *Id.* at 5. Judge McMullen noted that one police officer testified that people participating in the outdoor services could only avoid these posters if they were blind. *Id.* at 5:20.

The trial court found that a significant number attending the church service were deeply shaken and upset:

> I would find that the conduct of Mr. Scott and Mr. Powell . . . and other protesters caused people attending services at St. John's that day to be visibly upset. I would find that significant number were visibly upset, some evidencing shaking, crying, anger, and fright.
>
> I would find that Reverend Carlsen's daughter, age seven, who was in the children's choir which was part of the procession . . . buried her face in a hymnal as she passed the protesters and was still upset about the posters I've described several days later. I would find that Mr. Thompson, one of the Plaintiffs who testified, couldn't sing the hymns during the procession he was so distracted and upset. . . .

Id. at 18:3-17. Defendants' intentional conduct was so extreme and outrageous that members of the church were deprived the opportunity to celebrate Palm Sunday in the Episcopal tradition:

> I would also find that after the announcement of the 11:15 procession was made inside the church, 85 to 100 people stayed inside. Mr. Berberich, a Plaintiff, testified he stayed inside because he did not want to subject himself to in his terms the abuse of the protesters that he'd experienced in 2004. . . I think it is reasonable to infer that he was not the only one who stayed inside the church and declined or opted not to participate in the procession because they did not want to subject themselves to the Defendants. I would find that Mr.

> Thompson's grandson was kept out of the procession so that he would not have to be exposed to the comments of the protesters, the loudness of the protest and particularly the posters of mutilated fetuses.

Id. at 18:19-19:9. These findings by the trial court support the conclusion that Defendants – by screaming and displaying graphic and disturbing posters – intentionally prevented church members from practicing traditional Episcopalian liturgy, ceremony, and prayer. The trial court's findings and conclusions that Defendants intentionally interfered with worship services rest upon facts that are not specifically contested in the opening briefs filed in this appeal.

The trial court found that Defendants had protested at St. John's Cathedral during Holy Week in previous years, and were cited for disturbing worship services at St. John's in 2004. *Id.* at 3:17-20, 12:17-22. The trial court found that Defendants' conduct was sufficient for the police to have issued a citation for disturbing worship services. *Id.*

Finally, the trial court found that Defendants planned and acted together to engage in conduct intended to disrupt the worships/services, *id.* at 24:2-8, and that they would do so again if not enjoined. *Id.* at 25:4-17. Accordingly, the court entered an Injunction permanently prohibiting Defendants from:

> 1. At all times on all days, from entering the premises and property of St. John's Cathedral.

2. During worship and preparation for worship, from a period beginning one-half hour before and ending one-half hour after a religious event or series of religious events, including but not limited to worship services on Sundays between the hours of 7:00 a.m. and 1:00 p.m., from focused picketing, congregating, patrolling, demonstrating, or entering that portion of public right-of-way shown on Exhibit 1 attached hereto and incorporated by this reference.

3. During worship and preparation for worship, from a period beginning one-half hour before and ending one-half hour after a religious event or series of religious events, including but not limited to worship services on Sundays between the hours of 7:00 a.m. and 1:00 p.m., from whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds in areas highlighted in yellow on Exhibit 1.

4. At all times on all days, from blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot owned by St. John's Cathedral.

5. At all times on all days, from encouraging, inciting, or securing other persons to commit any of the prohibited acts listed herein.

R. Vol. 5, p.1349.[3] The 2006 Injunction prohibited only focused picketing and screaming in limited areas adjacent to the cathedral during worship and preparation for worship. The Injunction did not restrict Defendants' screaming and focused picketing at other times. The Injunction permitted, even during times of worship services, screaming and focused picketing in areas not immediately adjacent to areas used by the congregation for worship services and processions.

[3] A copy of the original October 2006 Injunction entered by the trial court is attached to this Brief as Addendum 3.

Defendants then appealed the Judgment and orders entered by Judge McMullen. This Court concluded that there was sufficient evidence in the record to support the trial court's finding and conclusion that Defendants *knowingly and intentionally* interfered with the Plaintiffs' religious ceremonies *by yelling, shouting, and screaming*. *St John's I,* 194 P.3d at 483. This Court affirmed the Judgment in favor of Plaintiffs, affirmed most of the terms of the Injunction, and remanded for specific findings on whether the restrictions in the Injunction burdened no more speech than necessary in the six separate buffer zones. *St. John's I,* 194 P.3d at 487.

Following remand, Judge McMullen held a full-day hearing and made further and additional findings of facts and conclusions of law as to the six buffer zones:

> Defendants, Clifton Powell and Kenneth Scott are PERMANENTLY ENJOINED from engaging in the following acts in areas highlighted in yellow in Exhibit 1 as modified by this order:
>
> (i) On days on which they engage in any conduct proscribed by this Injunction, from entering upon the property or premises of plaintiffs, St. John's Church of the Wilderness.
>
> (ii) During worship and preparation for worship, from a period beginning one half hour before and ending one half hour after a religious event or series of religious events, including but not limited to worship service on Sundays between the hours of 7:00 a.m. and 1:00 p.m. from: (a) shouting or yelling at or using any noise amplification devices(s) in a manner reasonably calculated to: (1)

> disturb parishioners' ability to worship; (2) interfere with the plaintiff church's ability to use its property for worship services and/or worship related events; (3) cause parishioners to become physically upset; (4) deter parishioners from participating in worship services and/or worship-related events on plaintiff church's property; and (b) displaying large posters or similar displays depicting gruesome images of mutilated fetuses or dead bodies in a manner reasonably likely to be viewed by children under 12 years of age attending worship services and/or worship related events at plaintiff church.
>
> (iii) At all times on all days, from blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot owned by St. John's Cathedral.
>
> (iv) At all times on all days, from encouraging, inciting, or securing other persons to commit any of the prohibited acts listed herein.

R. Vol. 7, p. 1832. Judge McMullen also deleted buffer zone 1, and that portion of zone 6 on Clarkson Street north of 14th Avenue. Judge McMullen found that the restrictions in place for zones 2, 3, 4, 5, and the remainder of 6 burdened no more speech than necessary to serve the interests protected by the Injunction. *Id.* at 1833-1840. Judge McMullen deleted the prohibition against entry "at all times on all days, from entering the premises and property of St. John's Church" and limited the prohibition against entry to those times when (and if) Defendants engage in any conduct proscribed by the Injunction.

ARGUMENT

I. Summary of Argument

The primary direction from this Court on remand in *St. John's I* was that the trial court make "additional findings of fact and conclusions of law as to each of the six portions of the buffer zone with regard to" six specific issues. *St. John's I*, 194 P.3d at 488. Defendants' Opening Brief does not contend that the trial court erred in any of the findings and conclusions in the Order on Remand on regarding the place and manner restrictions imposed by the buffer zone. Accordingly, the buffer zone, as now modified in the Order on Remand, is no more than necessary to serve the interests protected by the Injunction.

Defendants' first contention in this appeal is that the trial court erred by failing to vacate the prohibition in the 2006 Injunction against the Defendants' entry on the property and premises of St. John's Church in the Wilderness. Defendants misapprehend the trial court's rulings. Paragraph 3(i) of the Order on Remand now *permits* the Defendants *to enter* the Cathedral premises anytime, *except on days on which they engage in any conduct prescribed by the Injunction.*

Defendants' second contention is that Paragraph 3(ii) of the Order on Remand should be vacated, and this Court's decision in *St. John's I* should be reversed "by virtue of" the decisions in *Snyder v. Phelps* and *Brown v.*

Entertainment Association. But neither *Snyder* nor *Brown* question or undermine any of the rationale or rulings of *St. John's I*, and *Snyder* reaffirms the continued vitality of *Madsen v. Women's Health Center*, 512 U.S. 753 (1994), the decision that provides the controlling authority supporting entry of the Injunction.

Defendants' third contention is that *St. John's I* erred by affirming the prohibitions in Paragraph 3(iii) and Paragraph 3(iv) against obstruction of access and using surrogates to violate the Injunction. However, the rulings in *St. John's I* concluding that the trial court's findings on these issues are sufficient to support Paragraph 3(iii) and Paragraph 3(iv) are sound and binding as law of the case. *St. John's I*, 194 P.3d at 481-482.

II. Defendants Waived Any Argument That the Restrictions in Zones 2, 3, 4, 5 and 6 are More Than Necessary to Serve The Interests Protected by the Injunction

Standard of review. Trial courts are allowed broad discretion in granting and shaping the terms of injunctive relief, and a trial court's determinations "will only be reversed upon a showing of an abuse of that discretion." *Langlois v. Bd. of County Comm'rs*, 78 P.3d 1154, 1158 (Colo. App. 2003). The buffer zones that were the subject of the remand by *St. John's I*, should "burden no more speech than necessary to serve a significant government interest." *Madsen*, 512 U.S. at 761. Questions of constitutional law are reviewed *de novo*.

Evans v. Romer, 854 P2d 1270, 1274 (Colo. 1993). Defendants' Opening Brief does not contain a statement of the standard of review for this issue.

Defendants' Opening Brief does allege any error in the trial court's Additional Findings of Fact and Conclusions of Law as to the Six Buffer Zones. The word "zone" appears only a handful of times in Defendants' Opening Brief, and then only to suggest that *all* of the buffer zones violate the First Amendment. Defendants' Brief at 47. Defendants' Opening Brief does not contend that any of the 5 remaining buffer zones burden more speech than necessary to protect Plaintiffs' right to worship and right to protect their children from harmful visual assault. Issues not raised in the Opening Brief are waived. *See People v. Czemerynski*, 786 P.2d 1100, 1107 (Colo. 1990) (issues not raised in appellant's initial brief will not normally be considered by the court.) Accordingly, Defendants have conceded that buffer zones in the Order on Remand are no more than necessary to serve the interests protected by the Injunction.

III. The Order on Remand Properly Modified the Injunction to Limit the Prohibition on Entry to Those Days When Plaintiffs Engage In Any Conduct Proscribed by the Injunction

Standard of Review. Under the law of the case doctrine, conclusions of an appellate court on issues presented to it, as well as rulings logically necessary to sustain such conclusions, become the law of the case and generally must be

followed in subsequent proceedings in that case. *In re Marriage of Burford*, 26 P.3d 550, 554 (Colo. App. 2001). Plaintiffs agree with Defendants' statement that trial courts must follow the directions of an appellate mandate.

Defendants' Brief contends that "the trial court failed to follow this court's directive" in *St. John's I* to eliminate the restriction barring entry to the Cathedral on all days and at all times contained in the original Injunction. Opening Brief at 29. Defendants are mistaken. The provision prohibiting Defendants from entering St. John's Cathedral on all days and at all times in the original Injunction is gone. Paragraph 3(i) of the Order on Remand *permits* the Defendants *to enter* the Cathedral premises anytime, *except on days on which they engage in any conduct prescribed by the Injunction*. This restriction is consistent with the mandate in *St. John's I*, and is essential to assure that Defendants do not again disturb the worship services of the St. John's parishioners.

The 2006 Injunction prohibited Defendants from "At all times on all days, from entering the premises and property of St. John's Cathedral." Addendum 3 at 1349. Although the prohibition on entry was not an issue raised in the briefs filed in the first appeal, this Court in *St. John's I* determined that there was not sufficient evidence that Defendants entered St. John's or conspired to do so to support the prohibition:

> There is no evidence that Scott and Powell entered the Church, or the Church's property, created a private nuisance inside the Church, or conspired to do so. Nor is there evidence that their *mere presence* on Church property injures the Church, the named parishioners, other parishioners, or children. Therefore we conclude that the Church as not proved that irreparable harm will result unless Scott and Powell are prohibited, on all dates and at all times, from entering the Church's premises or property.

Id. at 482 (emphasis in original). Following remand, Judge McMullen modified this Injunction to conform to this Court's ruling. The Injunction as modified *eliminates* the prohibition on entering St. John's *on all dates and at all times* and prohibits entrance to St. John's only when *Defendants engage in conduct proscribed by the Injunction*:

> Defendants, Clifton Powell and Kenneth Scott are PERMANENTLY ENJOINED from engaging in the following acts in areas highlighted in yellow in Exhibit 1 as modified by this order:
>
> (i) On days on which they engage in any conduct proscribed by this Injunction, from entering upon the property or premises of plaintiffs, St. John's Church of the Wilderness.

Thus the restriction on Defendants entering St. John's property applies only on days on which they engage in any conduct proscribed by the Injunction. The Order on Remand recognizes that Defendants' *mere presence* does not cause a problem; it is only Defendants' yelling, screaming, and interfering with worship services that is enjoined. The trial court recognized that this restriction was essential to protection of the Plaintiffs' right to worship, because if paragraph 3(i) did not exist,

Defendants could avoid the restrictions on the buffer areas and disrupt services by demonstration ***on*** St. John's property.

IV. There Has Been No Change In Controlling Law Since *St. John's I* Was Decided, and The Rulings In *St. John's I* Are Law of the Case

Standard of review. Ordinarily when a court has issued a final decision, that decision becomes law of the case and is not subject to relitigation. When the law of the case doctrine is applied to the decisions of an equal court, the court in its discretion may decline to apply the doctrine if it determine that the previous decision is no longer sound because of (1) changed conditions or law, or (2) legal or factual error, or (3) if the prior decision would result in manifest injustice. *Vashone-Caruso v. Suthers,* 29 P.3d 339, 343 (Colo. App. 2001). Plaintiffs disagree with Defendants' contention (Opening Brief at 33) that the rulings by this Court in *St. John's I* may be reviewed *de novo.*

The crux of Defendants' argument for vacating paragraph 3(ii) of the Order on Remand, is that *St. John's I* is no longer binding because of the "intervening" United States Supreme Court decisions in *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) and *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729 (2011). But neither *Snyder* nor *Brown* reversed or questioned any precedent controlling the *St. John's I* ruling. Indeed to the contrary, the reasoning and rationale of the

Snyder decision supports and strengthened *St. John's I*'s conclusion that there is no constitutional right for Defendants to interfere with or disrupt another's religious worship services or practices.

This Court in *St. John's I* relied principally upon the United States Supreme Court decision in *Madsen,* 512 U.S. at 76, which holds that "the freedom of association protected by the First Amendment does not extend to joining with others for the purpose of depriving third parties of their lawful rights." *Snyder* and *Brown,* far from overruling *Madsen*, expressly affirm the *Madsen* holding. In *Snyder*, Chief Justice Roberts's majority opinion affirmed the vitality of *Madsen,* and observed that:

> We have identified a few limited situations where the location of the targeted picketing can be regulated under provisions that the Court has determined to be content neutral. In *Frisby*, for example, we upheld a ban on such picketing "before or about" a particular residence . . . In *Madsen* . . . we approved an injunction requiring a buffer zone between protestors and an abortion clinic entrance. The facts here are obviously quite different, both with respect to the activity being regulated and the means of restricting those activities.

Snyder, 131 S. Ct at 1218. The distinguishing facts in *Snyder* were that the demonstrators did not interfere with the plaintiffs' funeral observances:

> ***The picketing was conducted some 1,000 feet from the church, out of sight of those at the church.*** The protest was not unruly; ***there was no shouting,*** profanity, or violence. The record confirms that [here] any distress occasioned by Wesboro's picketing turned on the content and viewpoint of the message conveyed, ***rather than any interference with the funeral itself.***

Id. Thus the Supreme Court reversed the judgment in favor of plaintiffs for the claim of intrusion upon seclusion and civil conspiracy, because the plaintiffs ***had not interfered with the funeral itself.*** Here, of course, the trial court after five days of testimony, concluded that Defendant Scott and Powell intentionally and knowingly disrupted and ***interfered with the religious ceremonies of the parishioners of St. John's Cathedral.*** Had Powell and Scott been demonstrating 1,000 feet away from St. Johns, there would have been no litigation and no Injunction. Plaintiffs have never begrudged Defendants from demonstrating on *any* public street with *any* message anywhere in Denver at *any* time so long as they do not interfere with Plaintiffs' right to worship in peace. The Injunction as modified in the Order of Remand limits no more speech than necessary to serve Plaintiffs' right to worship free from harassment and interference.

Plaintiffs argue that "*Snyder* . . . held that a state court judgment may not trump the First Amendment, even where the audience is upset by the speech." Opening Brief at 35. That sentence does not correctly state the holding of the *Snyder* decision. First, although *Snyder* arose in the federal, not the state judicial

system, the First Amendment applies with the same force in state and federal courts through the Fourteenth Amendment. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925). That the Injunction was entered by a state court, and not a federal court, is irrelevant. Second, the suggestion that courts may not "trump" the First Amendment is self-evident, but is also not the holding of the *Snyder* decision. And the notion that the First Amendment protects types of speech that might "upset" listeners has been understood since the Bill of Rights were ratified by three-fourths of the States in 1791.

The actual holding of *Snyder* is that the First Amendment protects demonstrators from tort liability for engaging in protected speech where they "stayed well away from the memorial service" and did not "in any way interfere[] with the funeral service itself." *Snyder,* 1315 S. Ct. at 1220. That holding is consistent with *Madsen* and *St. John's I*, where this Court affirmed Judge McMullen's finding that Defendants did ***not*** stay "well away from the" worship services but instead knowingly and intentionally interfered with Plaintiffs' worship and prayer services.

The second "intervening" decision cited by Plaintiffs, *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729 (2011) is even less relevant than *Snyder*. *Brown* held only that a California law prohibiting the sale or rental of violent video games to minors was barred by the First Amendment. *Brown* did not involve demonstrators or the intentional harassment of parishioners during worship services, at was the case with Scott and Powell. The children worshiping at St. John's had no desire to purchase violent videos or view gruesome images of aborted fetuses, but simply wanted to participate in the religious observation of Palm Sunday and reenact Jesus' entry into Jerusalem. As this Court properly observed in *St. John's I*, there is no question that government has a legitimate interest in protecting very young children from being assaulted with frightening and gruesome images. *St John's I*, 194 P.3d at 485. In addition, as the trial court concluded, the large gruesome posters placed where St. John's members could not avert their eyes, interfered with the solemnity and purpose of the worship service, for both adults and children.

V. *St John's I* Correctly Affirmed the Prohibition Against Obstructing Access and the Prohibition Against Violating the Injunction Through Surrogates

Standard of review. When a court has issued a final decision, ordinarily that decision becomes law of the case and is not subject to relitigation.

When the law of the case doctrine is applied to the decisions of an equal court, the court in its discretion may decline to apply the doctrine if it determine that the previous decision is no longer sound because of (1) changed conditions or law, or (2) legal or factual error, or (3) if the prior decision would result in manifest injustice. *Vashone-Caruso v. Suthers,* 29 P.3d 339, 343 (Colo. App. 2001). Plaintiffs disagree with Defendants' contention (Opening Brief at 31) that the rulings in *St. John's I* are subject to *de novo* review. To the extent that there is an exception to the law of the case doctrine that would permit a reexamination of the rulings in *St. John's I*, determinations regarding the credibility of witnesses, the sufficiency and weight of evidence, and conclusions based on these determinations are all within the trial judge's discretion and will not be disturbed on review unless clearly erroneous. *See Broncucia v. McGee*, 475 P.2d 336, 337 (1970).

St. John's I upheld the prohibition in the Injunction against obstructing access, ruling that the evidence is sufficient to demonstrate that Defendants created a private nuisance and conspired to create a private nuisance at St. John's Cathedral:

> We conclude that these findings are sufficient to support the provision prohibiting Scott and Powell, at all times and on all days, from blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into, and egress from any building or parking lot owned by the Church because such conduct would harm the public interest.

St. John's I, 194 P.3d at 481. Turning to the prohibition against violating the Injunction through surrogates, *St. John's I* held that the trial court made sufficient findings to support the civil conspiracy judgments against Defendants, which provides the basis for this term in the Injunction:

> The prohibition against using surrogates enjoins [Defendants] from engaging in further civil conspiracies to violate the injunction and, thereby, from committing a private nuisance against the Church.

St. John's I, 194 P.3d at 482. Both of these rulings in *St. John's I* are correct and supported by overwhelming evidence in the record.

A. *St. John's I* Correctly Concluded that the Defendants' Conduct Constituted A Private Nuisance under Colorado Law

Private nuisance is an interference with another's private use and enjoyment of property. *Allison v. Smith*, 695 P.2d 791, 793-94 (Colo. App. 1984). The elements of private nuisance are: (1) unreasonable interference with use and enjoyment of private property, (2) that is substantial in nature such that it would be offensive or cause inconvenience or annoyance to a reasonable person in the community, and (3) the interference is intentional or negligent. *Pub. Serv. Co. v. Van Wyk*, 27 P.3d 377, 391 (Colo. 2001); *Lowder v. Tina Marie Homes, Inc.*, 601 P.2d 657, 658 (1979).

The trial court addressed and made specific findings on each of the elements of the private nuisance tort.

> I would find that the evidence establishes these elements against Mr. Powell. St. John's is the owner of the property, that's undisputed. The cathedral is used primarily for worship and was being used for worship on Palm Sunday 2005. As described above, Mr. Powell interfered with the worship of a substantial number of the parishioners – reasonable parishioners and reasonable people would find that conduct offensive and annoying. And finally I would find that his conduct was either intentional or knowing.

Findings at 23:1-11. The reasonableness and degree of interference are questions of fact that will not be disturbed unless clearly erroneous. *See Van Wyk*, 27 P.3d at 392; Colo. R. Civ. P. 52(a).

Ample evidence exists to support Judge McMullen's finding that the Defendants' screaming and graphic posters prevented St. John's members from participating in outdoor worship services at the Cathedral. October 10, 2006 Findings at 18:19-19:4. A police officer monitoring the demonstration testified, "it was like Mr. Scott was trying to drown out the service and the only way people could avoid hearing it is if they were hearing impaired." *Id.* at 16:3-5. Parishioners remained inside the church and abstained from the outdoor liturgy and processional to avoid exposure to Defendants' harassment. *Id.* at 18:19-19:13. Indeed, the Defendants' conduct was so outrageous and distressful that children and adults were upset, trembling and crying. *Id.* at 20:10-16.

As for Defendant Scott, the trial court granted summary judgment, in key part finding as follows:

> e. As the procession of parishioners and clergy proceeded from the courtyard on the church property along the sidewalk on Fourteenth Avenue . . . defendant Scott . . . screamed anti-abortion and anti-homosexual remarks at the parishioners as they prepared to enter the church. Scott also displayed large posters of aborted fetuses as replicated in plaintiffs' motion for summary judgment.
>
> f. As a result of Scott's conduct as described above, Canon Carlson, who was leading the procession, as well as numerous parishioners including children, became visibly upset to the point where Scott's conduct substantially interfered with their ability to participate in Palm Sunday worship services.

Rec. Vol. 5 at 1319, Order of 9/26/06. Ample trial testimony supports Judge McMullen's conclusion that the Defendants' screaming and posters interfered with the worship services. For example, Plaintiff Charles Berberich directly testified that the Defendants' actions denied him the ability to practice his Episcopalian religion in the manner that he desired:

> Q. Did you participate in the outdoor portion of the service on Palm Sunday 2005?
>
> A. No, I did not.
>
> Q. Why not?
>
> A. Because I did not wish to submit myself to the abuse from protesters.
>
> Q. Do you normally participate in the outdoor portion of the service?

A. Yes, I do.

Q. As you understood it, what were your choices with respect to the outdoor portion of the service on Palm Sunday 2005?

A. Usually whenever we have an outdoor portion to a service, the presiding priest announces that it will occur outside and invites the congregation to come outside or to follow a certain route and then says, Anyone who feels unable or does not wish to join the procession is certainly free to remain in the church. After that announcement, I decided to stay in the church.

Q. What did you believe would happen if you went outside with the congregation?

A. I believed that I would hear yelling and view many of the signs which have been shown today or during the trial today, and I didn't wish to submit myself to that kind of abuse.

Q. Was your decision not to go outside influenced by your experience in 2004 and in other years?

A. Definitely.

Tr. Vol. 1 71:8-72:10. Testimony from other witnesses was consistent with the view that the Defendants' acts prevented the Plaintiffs and other members of the St. John's congregation from worshiping and praying in accordance with traditional Episcopalian practice. Plaintiff Charles Thompson testified as to his experience:

Q. You mentioned that there were prayers at the beginning. Were you able to pray at the beginning of the service?

A. Not really. Our ability to pray was very much impeded and interfered with by the sounds from the other side – from the north side of 14th Avenue.

Q. Were there any – did the priests of St. John's read any scriptures while they were on the lawn?

A. Yes, they [did].

Q. Were you able to focus and concentrate on the scripture that was read?

A. My answer is similar. It was very difficult to concentrate on the scripture readings as well.

Q. How would you describe the level of volume as well as the tone of the protest you heard as you were standing on the lawn trying to worship?

A. The volume was intense. I would describe it – a lot of it as shouting. I believe they were shouting words but I could never really hear words when I was at – in that – when at was at that part of the lawn. It was really a whole kind of wave of sound, not very distinct in terms of words.

Q. What about the tone?

A. The – the – well I would describe the tone as to me it seemed angry.

. . . .

Q. Did the protesters – as you were processing, did the protesters affect your ability to participate in that portion of the worship service?

A. They did because at that point we – the thing we are doing at that point is singing a hymn and frankly I think most of us gave up doing that because the singing was being drowned out by the shouting.

Tr. Vol. 2, p. 127:15-128:15; 131:18-24. The Defendants' Opening Brief fails completely to acknowledge that the focus of Judge McMullen's findings was that

Episcopal tradition calls for an *outdoor* Palm Sunday procession reenacting Jesus' entry into Jerusalem. Judge McMullen concluded, with overwhelming support in the record, that Defendants engaged in their screaming and poster-waving conduct knowing and intending it to disrupt and interfere with St. John's liturgy, singing, and prayers. Moreover, Plaintiff Thompson testified that Defendants' screaming could be heard inside the Cathedral until the procession was finished and the doors could be closed:

> Q. At any time while you were inside the cathedral after the procession could you still hear protesters outside?
>
> A. I could hear them – I continued to hear them up until the time the entire procession entered the church and the doors were closed.

Tr. Vol. II, p. 132: 10-15. This Court in *St. John's I* correctly held that "we conclude that there is evidence in the record to support the [trial] court's findings and conclusions that Powell [and Scott] created a private nuisance." *Id.* at 480.

B. *St. John's I* Correctly Concluded That The Defendants Conspired To Interfere With The Plaintiffs' Worship Services

St. John's I correctly concluded that Plaintiffs proved by a preponderance of the evidence there was (1) an agreement, (2) between two or more people, (3) that one or more of them will commit an unlawful act or do a lawful act by unlawful means, (4) that one or more of them commit an overt act in

furtherance of the agreement, and (5) that the overt act caused harm to the plaintiff. *See* Colo. Civ. Jury Instructions 27:1; *Jet Courier Serv., Inc. v. Mulei*, 771 P.2d 486, 502 (Colo. 1989). A tortious act is an unlawful act for the purposes of civil conspiracy under Colorado law. *See Double Oak Constr., L.L.C. v. Cornerstone Dev. Int'l, L.L.C.*, 97 P.3d 140, 145 (Colo. App. 2003).

Judge McMullen concluded that "the evidence establishes all of the above elements with regard to each of the Defendants." Findings at 24:4-5. Kenneth Scott and Clifton Powell's conduct before March 20, 2005, showed an agreement to accomplish their protest by unlawful means. Both had been issued a citation for disturbing worship services at St. John's in 2004. *See id.* at 12:22. Judge McMullen found that Defendants acted in accordance with an agreement with others to disrupt worship services at St. John's Cathedral.

> I would find that on March 19, 2005, as shown in Exhibit 13, Jo Scott appeared on "Tapestry of Life" television program and said among other things that, We're gonna be at St. John's Sunday picketing, we're gonna take all the kids that we have pictures of, big posters of aborted babies and we're going to bring them out and make them look at them because they have children there with them.
>
> . . . .
>
> I would find as I did during the trial that this was a statement in furtherance of the agreement to protest St. John's by publicizing. In accordance with the plan, the Defendants and Jo Scott and a woman named Mary Ellen and three or four others arrived at St. John's between 7:00 and 7:30 a.m. on Palm Sunday.

Id. at 4:9-17; 4:22-5:2. Like Kenneth Scott, Clifton Powell harassed parishioners walking from their cars to St. John's "in a voice that has been described at various times as loud, angry and confrontational." *Id.* at 20:3-4. In response to the conduct of the Defendants, "[m]any people were visibly upset, showing, crying, trembling, fear, and anger." *Id.* at 20:10-16. Based on this evidence, the trial court found and concluded that Defendants conspired to commit a private nuisance.

This Court, in *St. John's I*, properly and correctly affirmed the conclusion that Defendants engaged in a civil conspiracy to interfere with Plaintiffs religious ceremonies. "We conclude that there is evidence in the record to support the [trial] court's findings and conclusions . . . that both Scott and Powell engaged in a civil conspiracy to commit a private nuisance." *St. John's I*, 194 P.2d at 480.

C. *St. John's I* Properly Found The Existence Of All Elements Necessary to Enter An Injunction

For a permanent injunction to issue, a plaintiff must demonstrate "(1) actual success on the merits; (2) irreparable harm unless the injunction is issued; (3) that the threatened injury outweighs the harm that the injunction may cause to the opposing party; and (4) that the injunction . . .will not adversely affect the public interest." *Langlois v. Bd. of County Comm'rs*, 78 P.3d 1154, 1158 (Colo. App. 2003). Trial courts are allowed broad discretion in granting and

shaping the terms of injunctive relief, and Judge McMullen's determinations "will only be reversed upon a showing of an abuse of that discretion." *Id.* at 1157. The Plaintiffs obtained actual success on the merits, prevailing on both the claim for private nuisance and civil conspiracy.

1. Irreparable Harm Will Occur Without The Injunction

Judge McMullen expressly found that irreparable harm would result if the injunction were not issued.

> I would find that irreparable harm would result if an injunction were not issued. The irreparable harm is the interference with St. John's members including the individual Plaintiff's ability to worship without interference at St. John's Cathedral and St. John's use of its property for worship services.

Findings at 24:22-25:3. Ample evidence supports this finding, including the following testimony from Charles Berberich, who testified that the Defendants' actions denied him the ability to worship:

> Q. Did the protests on Palm Sunday 2005 interfere with your ability to worship?
>
> A. Yes.
>
> Q. How so?
>
> A. First of all I was cut off from the whole section of the liturgy which constitutes our process of worship. Secondly, while I was inside, I was also disturbed by the protest and was unable to concentrate on what was going on. And so generally I found the whole experience [] very much degraded and I was unable to worship as normal for a Palm Sunday.

Q. Did the content of the protest affect you at all?

A. Not particularly, I was concerned about the noise, shouting, a shower of abuse as I perceived it. It could have been about anything.

Tr. Vol. 1, p. 78:15 – 79:5. Mr. Berberich also testified as to the type of harm caused by the Defendants' conduct:

Q. How did you feel about not participating in the outdoor portion of the service?

A. I was very disappointed. The service for me was incomplete. I enjoy the kind of you might say role playing that Palm Sunday service involves where people receive the palms and wave them in the air and so forth. And I felt kind of cut off from my fellow congregation when I did not participate in it.

Tr. Vol. 1 p. 73:8-15. Judge McMullen specifically recognized that the testimony of Plaintiff Thompson and Plaintiff Berberich was credible. Findings at 11:3.

Judge McMullen's findings that this type of harm is irreparable are well supported by the record. Many of the members of the St. John's congregation were denied the ability to observe Palm Sunday in a solemn, reflective manner consistent with their religious tradition. Participation in Holy Week and other religious ceremonies are experiences that if prevented and disturbed, can never be replaced. The disappointment and hurt experienced by those deprived of their right to worship is deep and enduring.

Finally, Judge McMullen expressly found that the Defendants' conduct and injury to the Plaintiffs would occur again if not enjoined:

> Regarding whether or not it's likely that this type of harm will occur in the future if the Defendants are not enjoined, I would find by a preponderance of the evidence that unless enjoined the Defendants would engage in substantially the same type of protest in – that they did on Palm Sunday 2005 that meant that they would do that in the future. . . . . And the Defendants have protested at St. John's many times in the past in a similar fashion, and there's absolutely no reason to believe that that would not continue absent an injunction.

Findings at 25:4-17. Moreover the Opening Briefs filed in this appeal confirm, implicitly if not explicitly, that absent the injunction, the Defendants would continue to disrupt Plaintiffs' religious services as they have in the past.

2. The Injunction Does Not Adversely Affect The Public Interest

Judge McMullen found that the injunction did not adversely affect the public interest, and that protecting the right to worship is a significant and long-recognized government interest:

> The fourth element of a [permanent] injunction is that it does not adversely affect the public interest. I think this requires little comment other than it's not adverse to the public interest to restrict conduct in a way consistent with the First Amendment where that conduct interferes with religious services and the protection of children.

Id. at 29:17-23. The observation that an injunction is consistent with the public interest to prevent interference with religious worship services is not challenged in

the briefs of Scott, Powell or the amicus. Indeed, many states and municipalities have enacted ordinances protecting the ability of citizens to practice religion according to beliefs free from interference.[4] Denver Ordinance § 38-90, provides:

> It shall be unlawful for any person to disquiet or disturb any congregation or assembly for religious worship by making a noise or by rude or indecent behavior or profane discourse within the place of worship of such congregation or assembly during religious services; or so near the same as to disturb the order or solemnity of such meeting.

Judge McMullen found that the Defendants had been cited previously under this ordinance for conduct at St. John's, and the police had grounds to cite them again under the ordinance for their conduct on Palm Sunday, 2005. Findings at 12:20.

3. The Injury To The Right To Worship And To Children Attending The Service Outweighs Any Harm To The Defendants

The right to free speech granted by the First Amendment of the United States is not absolute. Speech is often regulated, particularly where the "right" to free speech collides with other protected rights or governmental interests. *See People v. Becker*, 759 P.2d 26, 29 (Colo. 1988); *Elrod v. Burns*, 427 U.S. 347, 360 (1976). The Constitution permits state courts to issue injunctions

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[4] *See, e.g.*, Cal. Penal Code § 302(a) (West 1997) (providing for a fine of up to $1,000 for anyone who "intentionally disturbs or disquiets any assemblage of people meeting for religious worship at a tax-exempt place of worship"); N.Y. Penal Law § 240.21 (Consol. 1998) (providing that anyone "who makes unreasonable noise or disturbance" within 100 feet of a religious service is guilty of aggravated disorderly conduct); N.C. Gen. Stat. § 14-288.4(a)(7) (1997) (stating that anyone who "engages in conduct which disturbs the peace or order at any religious service" commits unlawful disorderly conduct).

that restrict speech so long as the injunction is content-neutral and burdens no more speech than is necessary to serve a significant government interest. *See Madsen* 512 U.S. at 765.

(i) The Government has a Significant Interest in Protecting the Right to Worship

The leading First Amendment decision analyzing the standard to be applied when issuing a judicial order protecting the right to worship from intentional interference and disturbance is *St. David's Episcopal Church v. Westboro Baptist Church*, 921 P.2d 821, 830 (Kan. App. 1996), *cert. denied*, 519 U.S. 1090 (1997). There, the Kansas Court of Appeals upheld the issuance of an injunction very similar to the one issued by Judge McMullen.

Chief Judge Brazil, writing for the Kansas court, agreed with the trial court's conclusion that the government has a significant interest in protecting citizens' right to worship:

> [T]he First Amendment to the United States Constitution and Section 7 of the Bill of Rights of the Kansas Constitution . . . safeguard the free exercise of religion from governmental interference. ***However, the right of free exercise would be a hollow one if the government could not step in to safeguard that right from unreasonable interference from another private party.*** In discussing the time, place, and manner restrictions that may be placed upon free speech, the United States Supreme Court has noted that "religious worship may not be disturbed by those anxious to preach the doctrine of atheism." *Kovacs v. Cooper*, 336 U.S. 77 (1949). ***More broadly stated to apply here, one's religious worship may not be unduly***

> ***disturbed by another anxious to preach a different religious or social philosophy.***

St. David's, 921 P.2d at 549 (emphasis added). Accordingly, *St. John's I*'s conclusion that protecting the right to free exercise of religion is a significant governmental interest that can justify narrow restrictions imposed by state nuisance law upon the Defendants' exercise of free speech, is sound. The principle that the Free Exercise Clause confers a right to unimpeded religious worship is supported in other opinions and authorities:

> The Court is troubled by the notion that a person may be subjected to focused picketing at their place of worship. ***Indeed, the right to engage in quiet and reflective prayer without being subjected to unwarranted intrusion is an essential component of freedom of religion.*** The government certainly has a significant interest in protecting this important First Amendment right.

Tompkins v. Cyr, 995 F. Supp. 664, 671-73 (N.D. Tex. 1998) (emphasis added).

Defendants' Opening Brief, while failing to cite *St. David's*, suggests that *Olmer v. City of Lincoln*, 192 F. 3d 1176 (8th Cir. 1999) supports their interference with St. John's worship services. *Olmer* involved a challenge to a broadly worded *ordinance* that was not narrowly tailored to prevent interference with religious worship, but in dicta strongly supports the result in *St. John's I*:

> The City also claims that it has a legitimate interest in preserving the right of its citizens to exercise their religion freely. Such an interest, in the abstract, is undoubtedly substantial and important. ***If, for example, anti-abortion protesters were to*** attempt to enter a church without

> permission, or to ***interrupt church services with their own speech, the city could doubtless*** prosecute them under a general trespass or disturbing-the-peace provision, or, if necessary, ***adopt a more specific prohibition directed against disturbing or interrupting services of worship***.

Id. at 1180 (emphasis added). The Injunction affirmed by *St. John's I* is far narrower than the *Olmer* ordinance. The Injunction applies to Scott and Powell, who have a history of interfering with worship services in the past and vow to do so in the future, applies only to very limited times, and applies only to limited parts of the sidewalk adjacent to the areas where outdoor prayers and processions are conducted.

Judge McMullen found that St. John's children participated in the procession on St. John's property reenacting the Jesus' entry into Jerusalem, and that Defendants intentionally assaulted St. John's children with gruesome posters, in an effort that Defendants intended to, or at least knew would, disrupt the St. John's worship services. "We're going to bring them out and make them look at them *because they have children there with them.*" Findings at 4:16-17. Thus there could be no option to shield Plaintiffs' children from this intentional assault, other than requiring them to remain at home, "which would be an obvious assault upon their free exercise of religion." *St. David's*, 921 P.2d at 821.

(ii) The Permanent Injunction Is Content Neutral And Burdens No More Speech Than Necessary To Protect The Right To Worship And To Protect Children In The Congregation

St. John's I concludes that the problem with Defendants' screaming and gruesome posters is not with their content, but with the fact that any screaming and gruesome posters would interfere with the St. John's congregation's religious services involving the solemn and reflective reenactment of Jesus' entry into Jerusalem. As priest Steven Carlson testified: "The point of our Holy Week observances is to follow Jesus through the last week of his life through Good Friday and – and the celebration of the resurrection on Easter Sunday. And inasmuch as we're going to follow Jesus, we need to have a Palm Sunday procession." Tr. Vol. II, Tr. 140:22-141:3. Judge McMullen properly concluded that a narrow restriction placing screaming and posters at a reasonable distance during and in preparation of worship services, is essential to protecting the right to worship. Judge McMullen reasoned that:

> Here it is possible to issue an injunction which is content neutral for the purpose of restricting the noise level which caused the reactions of the parishioners and interference with their religious worship and the display of large posters of mutilated fetuses and thereby promote the significant if not compelling governmental interest of protecting the Plaintiffs' right to the free exercise of their religion, the protection of children, and St. John's right to use its property for the purpose of conducting religious services.

Findings at 27:25-28:10. As Judge Brazil concluded in *St David's*, "the government's purpose [is] the threshold consideration." *St David's*, 921 P.2d at 829 (*quoting Madsen,* 512 U.S. at 763). *St. David's* held that the express purpose of the injunction was to prevent potential violence between church members as occurred during previous encounters, a consideration that was not viewpoint-based. Here the express purpose of the Injunction is to prevent Defendants from disrupting the worship services and prevent the assault on children that Defendants had managed on multiple occasions.

St. John's I affirmed the Injunction not because of the content of Defendants yelling, but because screaming and focused posters interfered with Plaintiff's right to worship. The United States Supreme Court has consistently *rejected* the argument that people who want to "propagandize protests or view have a constitutional right to do so whenever and however and wherever they please." *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966).

The Injunction in the Order on Remand is carefully tailored to burden no more speech than necessary to allow Plaintiffs to worship in peace and to protect their children. The Injunction is only effective thirty minutes before, during, and thirty minutes after a scheduled worship service. The Defendants are free to protest at any other times. Moreover, the Injunction allows the Defendants

to demonstrate on and sidewalks immediately adjacent to St. John's Cathedral on all other portions of 14th Street, Washington Street, Clarkson Street – as well as ***all*** other Denver Streets. The Injunction simply requires Defendants to remain just far enough away to prevent interference with worship services at St. John's Cathedral.

CONCLUSION

The Defendants had for many years intentionally disrupted the worship services at St. John's Cathedral, often targeting the most holy and solemn days of the year. The First Amendment does not protect those who are intent, for whatever reason, on disrupting other's religious practices. The Injunction restricts only those activities that interfere with St. John's religious services.

Judge McMullen's additional findings and conclusions in the Order of Remand are amply supported by the trial testimony and well grounded in law. The Order on Remand complies with the mandate in *St. John's I.* And the rulings of law in *St. John's I* remain sound and its rationale has not be questioned by any subsequent United States Supreme Court decision. The trial courts' Order on Remand should be affirmed in its entirety.

Dated: November 4, 2011

/s/ Russell O. Stewart

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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2011 I caused a copy of the foregoing **PLAINTIFFS-APPELLEES' ANSWER BRIEF** to be served electronically by LexisNexis on the following attorney at the following address:

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ADDENDUM TO PLAINTIFFS-APPELLEES' ANSWER BRIEF