IN THE COURT OF APPEALS OF MARYLAND

September Term, 2012

No. 9

JAMES COLEMAN,
Appellant,

v.

SOCCER ASSOCIATION OF COLUMBIA, *et al.*,
Respondents.

On Appeal From the Circuit Court for Howard County
(Honorable Timothy J. McCrone, Judge)
Pursuant to a Writ of Certiorari to the Court of Special Appeals

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AMICI CURIAE BRIEF OF THE AMERICAN TORT REFORM ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, COALITION FOR LITIGATION JUSTICE, INC., AMERICAN INSURANCE ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, PHYSICIAN INSURERS ASSOCIATION OF AMERICA, AMERICAN MEDICAL ASSOCIATION, AND NFIB SMALL BUSINESS LEGAL CENTER IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether this Court should overrule *Harrison v. Montgomery County Board of Education*, 295 Md. 442, 456 A.2d 894 (1983), and hold that the common law doctrine of contributory negligence, which has been settled law in Maryland for over 160 years, should be judicially abrogated and replaced with comparative negligence.

INTEREST OF *AMICI CURIAE*

Amici[1] are organizations representing a wide range of Maryland employers, health care professionals, and their insurers. Thus, *amici* have a strong interest in supporting Maryland's longstanding application of the contributory negligence doctrine. The doctrine fosters individual responsibility and provides predictability in the law. Judicial abrogation of the doctrine would adversely affect *amici*'s members, many of which continue to struggle in the challenging economic environment. The change advocated by Appellant would also undermine the regional competitiveness of Maryland businesses, since the District of Columbia, Virginia, and North Carolina all apply the contributory negligence doctrine.

STATEMENT OF THE CASE

Amici adopt Respondents' Jurisdictional Statement.

STATEMENT OF FACTS

Amici adopt Respondents' Statement of Facts as relevant to *amici*'s argument here.

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[1] None of the parties or their counsel, or anyone other than the *amici*, their members, or their counsel, authored this brief in whole or in part or made a monetary contribution intended to fund the brief's preparation or submission.

INTRODUCTION

Contributory negligence has been the law in Maryland since the doctrine was first adopted over 160 years ago in *Irwin v. Sprigg*, 6 Gill 200, 205 (Md. 1847). As this Court explained in *Harrison*, the doctrine is a "fundamental principle of Maryland negligence law, one deeply imbedded in the common law of [the] State, having been consistently applied by Maryland courts...." 295 Md. at 458, 456 A.2d at 902. In *Harrison*, the Court held that because of "the great importance of the doctrine of *stare decisis*," 295 Md. at 460, 456 A.2d at 903, and because abolition of contributory negligence "is plainly a policy issue of major dimension... of great magnitude, with far-reaching implications," 295 Md. at 463, 456 A.2d at 905, "any change in the established doctrine" should be left to the Legislature. *Id.* Nothing has changed in the law so materially since *Harrison* to merit a different decision today.

Further, the change sought by Appellant would have a "house of cards" effect, impacting numerous collateral issues of law. *See* 295 Md. at 462-63, 456 A.2d at 904-05. Maryland statutory law has developed in significant ways based upon a contributory negligence system. Established common law doctrines would also be distorted and require reevaluation by this Court. For example, as a matter of fairness and logic, joint and several liability would have to be changed if comparative fault were adopted.

In addition, Maryland businesses would be adversely affected by a seismic shift to comparative fault, putting them at a competitive disadvantage in the region at a time when many are already facing hardships. Consumers would face higher prices for goods and services to offset the costs to business from increased litigation and liability. "Tort

reform" measures, including on joint and several liability, could be expected in response.

For these reasons, this Court should affirm the judgment below. If the Court does reach the issue of whether to retain the longstanding contributory negligence doctrine, it should follow *Harrison*, uphold the doctrine, and defer any change to the Legislature.

ARGUMENT

I. THIS COURT SHOULD FOLLOW ITS RULING IN *HARRISON V. MONTGOMERY COUNTY BOARD OF EDUCATION* AND CONTINUE TO APPLY THE CONTRIBUTORY NEGLIGENCE DOCTRINE

"Maryland has steadfastly adhered to the [contributory negligence] doctrine since its adoption in 1847." *Harrison*, 295 Md. at 450, 456 A.2d at 898 (citing *Irwin*, 6 Gill at 200). As noted in *Harrison*, this Court has wisely followed the principle of *stare decisis*, "always recogniz[ing] that declaration of the public policy of Maryland is normally the function of the General Assembly" under Article 5 of the Maryland Declaration of Rights. 295 Md. at 460, 456 A.2d at 903.

In *Harrison*, the Court was squarely presented with the question whether to judicially abrogate the well-established contributory negligence doctrine and replace it with comparative fault. The Court noted the consistent application of the doctrine for well over a century and the "great importance" of *stare decisis* in Maryland law. 295 Md. at 460, 456 A.2d at 903. The Court then cited "numerous occasions" where it had been asked to expand tort liability but "declined to change well-settled legal precepts established by our decisions, in each instance expressly indicating that change was a

matter for the General Assembly." *Id.*[2] The Court added, "The rationale underlying these decisions is buttressed where the legislature has declined to enact legislation to effectuate the proposed change." 295 Md. at 462, 456 A.2d at 904.[3] It was "thus important" that from 1962 through 1982, the legislature considered but never enacted bills to replace contributory negligence with comparative fault, "indicative of an intention to retain the contributory negligence doctrine." *Id.*

Consistent with its rejection of similar requests to alter long-established common law rules in a manner contrary to the public policy of the State, the Court in *Harrison* concluded that adoption of comparative fault "involves fundamental and basic public policy considerations properly to be addressed by the legislature." 295 Md. at 463, 456 A.2d at 905.[4] The Court explained, "All things considered, we are unable to say that the circumstances of modern life have so changed as to render contributory negligence a vestige of the past, no longer suitable to the needs of the people of Maryland." *Id.*

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[2] The Court has continued to adhere to the principle of *stare decisis* in situations that would fundamentally alter Maryland's tort liability environment. *See DRD Pool Serv., Inc. v. Freed*, 416 Md. 46, 63, 5 A.3d 45, 55 (2010) (upholding noneconomic damages cap, stating "[t]he principle of *stare decisis* controls our decision today.").

[3] *See also State v. Wiegmann*, 350 Md. 585, 605, 714 A.2d 841, 850-51 (1998) ("the Legislature's failure to change a common law rule is reflective of this state's public policy."); *Comptroller of Treasury v. Clyde's of Chevy Chase, Inc.*, 377 Md. 471, 502, 833 A.2d 1014, 1032 (2003) ("We have long recognized that the rejection of proposed legislation has some relevance in respect to ascertaining the intent of the Legislature."); *State v. Bell*, 351 Md. 709, 723, 720 A.2d 311, 318 (1998) (describing the legislature's failure to act as "significant" in demonstrating its intent).

[4] *See also Stewart v. Hechinger Stores Co.*, 118 Md. App. 354, 360, 702 A.2d 946, 949 (1997) (agreeing with *Harrison* that adoption of comparative fault is a public policy decision that should be made by the legislature).

Circumstances have not materially changed since *Harrison* to merit a different conclusion today. At the time *Harrison* was decided, comparative fault had already been adopted in a majority of states outside the region, so that body of law was already formed and is not of post-*Harrison* vintage. *See* 295 Md. at 446, 456 A.2d at 896. Furthermore, this Court has repeatedly applied the doctrine of contributory negligence since *Harrison*,[5] and at no point has the Court expressed "any general dissatisfaction with the contributory negligence doctrine" or stated there is a "pressing social need to abandon the doctrine in favor of a comparative fault system." 295 Md. at 458, 456 A.2d at 902. And, in the years since *Harrison*, the list of failed legislation to replace contributory negligence with comparative fault has just grown longer. In fact, we understand that from 1966 to 2012, comparative fault legislation has been introduced in approximately thirty sessions of the General Assembly and has never been enacted.[6] Indeed, it seems apparent that Appellant is raising the issue here specifically because the legislature has carefully considered it numerous times and said "no." The legislature's repeated rejection of comparative fault constitutes a clear and affirmative policy decision that this Court should respect.

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5 *See Int'l Bhd. of Teamsters v. Willis Corroon Corp. of Maryland*, 369 Md. 724, 728, 802 A.2d 1050, 1052 (2002) ("contributory negligence is an absolute defense in Maryland to an action for negligence"); *Franklin v. Morrison*, 350 Md. 144, 167, 711 A.2d 177, 189 (1998) ("Maryland law does not recognize comparative negligence."); *Bd. of County Comm'rs of Garrett County, Maryland v. Bell Atlantic-Maryland, Inc.*, 346 Md. 160, 180, 695 A.2d 171, 181 (1997) ("Under Maryland law, contributory negligence of a plaintiff will ordinarily bar his, her, or its recovery.").

6 *See generally Negligence Systems: Contributory Negligence, Comparative Fault and Joint and Several Liability*, Office of Policy Analysis, Maryland Dept. of Legislative Services (2004) at 31-34 [hereinafter Maryland Dept. of Legislative Services Negligence Systems Report] (summarizing 37 comparative fault bills introduced in the General Assembly between 1966 and 2003).

II. ABOLITION OF CONTRIBUTORY NEGLIGENCE WOULD DISTORT AND DISRUPT WELL-SETTLED LAW

The Court also must consider that the change sought by Appellant would have dramatic "ripple effects" with regard to the statutory law and other common law rules.

A. Maryland Statutory Law Has Developed to Incorporate Contributory Negligence

Numerous provisions of the Maryland Code expressly reference contributory negligence and would require modification under a comparative fault system. For example, the Maryland Rules of Civil Procedure specifically list contributory negligence among the affirmative defenses a defendant may plead in an Answer. *See* MD. CODE ANN., CIV. PROC. § 2-323(g)(5). Other statutes provide for the availability of contributory negligence as a defense, so it is unclear what impact a plaintiff's fault would have in these actions if comparative fault were adopted by common law rule. *See* MD. CODE ANN., TRANSP. § 19-101(b) (for negligence actions involving police officers, the "State or a political subdivision of this State may use the defense of contributory negligence"); MD. CODE ANN., TRANSP. § 19-102(c) (contributory negligence defense is available in liability actions involving vehicles commandeered by police).

Tensions also may arise with respect to the interface of statutory law and the new common law rule in other circumstances where the legislature has established the public policy of the state. *See, e.g.,* MD. CODE ANN., CTS. & JUD. PROC. § 3-1607 (drug dealer may not avoid civil liability by raising contributory negligence as a defense in an action based on use of controlled dangerous substance by a deceased individual); MD. CODE ANN., CRIM. LAW § 4-104(e)(l)(ii) (violation of statute prohibiting a person from storing

or leaving a loaded firearm in a location where an unsupervised child would gain access cannot be considered as evidence of contributory negligence); MD. CODE ANN., HUMAN SERVICES § 7-704(b)(2) (failure of a blind or visually impaired pedestrian to carry appropriate cane does not constitute contributory negligence *per se*).

Even in the narrow context of transportation safety, the General Assembly has enacted multiple laws stating that a specific statutory violation cannot be considered as evidence of contributory negligence. *See* MD. CODE ANN., TRANSP. § 21-1306(e)(1)(ii) (statute requiring motorcycle riders to wear protective headgear); MD. CODE ANN., TRANSP. § 22-201.2(c)(1)(ii) (statute requiring use of headlights or fog lights when windshield wipers are operated); MD. CODE ANN., TRANSP. § 22-412.2(i) (statute requiring use of child safety seats); MD. CODE ANN., TRANSP. § 22-412.3(h)(1)(ii) (statute mandating seatbelt use). These policy decisions presumably were made to lessen the impact of the contributory negligence doctrine, under which a minimally at-fault plaintiff would be barred from recovery.

If it were to abrogate contributory negligence, this Court would inject chaos into the law, foster litigation, and potentially upset the careful balance struck by the legislature in all of these situations. Furthermore, the Court's own credibility would be weakened by the potential ripple effects, since there is frankly no way to determine how such statutes would apply in a comparative fault system that was never contemplated (or desired) by the legislature.

B. Established Legal Doctrines and Concepts Would Require Reevaluation and Reform

Beyond confounding the General Assembly's policy choices, judicial adoption of comparative fault would necessarily upset many established common law doctrines, creating additional unpredictability in the law and leading to potential unbalance. As the Court astutely recognized in *Harrison*,

> **The last clear chance doctrine, assumption of the risk, joint and several liability, contribution, setoffs and counterclaims, and application of the doctrine to other fault systems, such as strict liability in tort,[7] are several of the more obvious areas affected by the urged shift to comparative negligence. Even that change has its complications**; beside the "pure" form of comparative negligence, there are several "modified" forms, so that abrogation of the contributory negligence doctrine will necessitate the substitution of an alternative doctrine. **Which form to adopt presents its own questions and the choice is by no means clear.[8] That a change from contributory to comparative negligence involves considerably more than a simple common law adjustment is readily apparent.**

295 Md. at 455, 456 A.2d at 900-01 (emphasis added) (internal citation omitted); *see also* Standing Comm. on Rules of Practice & Proc., *Special Report to Court of Appeals on Aspects of Contributory Negligence and Comparative* Fault (Apr. 15, 2011), at http://www.courts.state.md.us/rules/reports/170thReport.pdf.

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[7] *See* Am. L. Prod. Liab. 3d § 40:37 (2008) ("Most jurisdictions that have adopted the doctrine of comparative negligence or fault apply comparative fault principles to strict liability actions.").

[8] *See generally* Xinyu Hua, *Product Recall and Liability*, 27 J.L. Econ. & Org. 113, 114 (2011) ("Thirty-three states adopt the 'modified' comparative negligence rule, which completely bars a plaintiff from recovery if the plaintiff's negligence is larger than the defendant's fault. The remaining states adopt the 'pure' comparative negligence rule, which awards a plaintiff damage compensation according to her relative fault.").

In particular, joint and several liability would have to be changed if comparative fault were adopted. As this Court knows, joint and several liability provides that when two or more persons engage in conduct that might subject them to individual liability and their conduct produces a single, indivisible injury, each defendant may be held liable for a plaintiff's entire compensatory damages award.

The contributory negligence doctrine provides the foundation for joint liability. The justification for requiring a defendant to bear the burden of an insolvent co-defendant's negligence was that it was believed to be fairer for the solvent culpable defendant to bear the loss than to leave a *blameless* plaintiff without a full recovery. Once contributory negligence is abolished, however, the justification for requiring solvent defendants to bear an insolvent defendant's share of fault is lost. Maryland courts would no longer have the assurance that imposition of joint and several liability would pit a morally blameless plaintiff against a morally blameworthy defendant. In some cases, the plaintiff could be substantially more at fault than the solvent joint tortfeasor.

As the Tennessee Supreme Court explained when it adopted comparative fault in *McIntyre v. Balentine*, 833 S.W.2d 52, 58 (Tenn. 1992): "Having thus adopted a rule more closely linking liability and fault, it would be inconsistent to simultaneously retain a rule, joint and several liability, which may fortuitously impose a degree of liability that is out of all proportion to fault." *See also Dix & Associates Pipeline Contractors, Inc. v. Key*, 799 S.W.2d 24, 27 (Ky. 1999) (adopting comparative fault while simultaneously abolishing joint and several liability). Another commentator has explained:

> [O]ne can see the inconsistency that exists when a particular jurisdiction chooses to side with fairness to plaintiffs by adopting comparative negligence, while ignoring the unfairness that defendants must bear as a result of joint and several liability.

Michael P. Addair, Comment, *A Small Step Forward: An Analysis of West Virginia's Attempt at Joint and Several Liability Reform*, 109 W. Va. L. Rev. 831, 849 (2007). For these reasons, virtually every state in the country that has adopted comparative fault has also moved to abolish or modify the common law doctrine of joint and several liability. *See* American Tort Reform Association, *Joint and Several Liability Rule Reform*, at http://www.atra.org/issues/joint-and-several-liability-rule-reform (national state survey). [9]

III. THE GENERAL ASSEMBLY IS THE APPROPRIATE FORUM TO DECIDE WHETHER MARYLAND SHOULD ADOPT COMPARATIVE FAULT BECAUSE THE DOCTRINE WOULD REPRESENT A COMPLEX AND SWEEPING CHANGE IN THE LAW

When considering broad public policy issues, this Court "has *always* recognized that declaration of public policy is normally the function of the legislative branch of government." *Felder v. Butler*, 292 Md. 174, 183, 438 A.2d 494, 499 (1981) (emphasis

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[9] According to another survey:

> [A] majority of states have abolished or modified the traditional doctrine of joint liability. Eighteen states have abolished joint liability and replaced it with pure several liability, under which each defendant is liable for its proportionate share of fault for the harm. Four states have eliminated joint liability for noneconomic damages. Fourteen states have abolished joint liability in cases where the defendant's comparative responsibility is below some threshold level. Some states provide other limits on joint liability.

Steven B. Hantler *et al., Is the "Crisis" in the Civil Justice System Real of Imagined?*, 38 Loy. L.A. L. Rev. 1121, 1148-50 (2005). Since 2005, other states have chosen to abolish joint or modify joint and several liability, most recently including Pennsylvania.

added).[10] This is the proper course, as the Court held in *Harrison*, and should be followed again here.

By constitutional design, the General Assembly's role in deciding public policy is superior to that of the judiciary, particularly with respect to tort law, because the impacts go far beyond the question of who should prevail a particular case. The General Assembly can focus more broadly on how tort law impacts the availability and cost of goods and services, and has the unique ability to weigh and balance the many competing societal, economic, and policy considerations involved.

For example, through the legislative hearing process, the General Assembly has access to broad information, including the ability to receive comments from persons representing a multiplicity of perspectives, and to use the legislative process to obtain

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[10] This Court's history of deferring to the General Assembly on broad public policy issues is shared by other states. For example, as the Alabama Supreme Court explained when it rejected judicial adoption of comparative fault, "the great majority of the jurisdictions which have recognized the applicability of the comparative negligence doctrine in negligence actions generally have done so under statutory provisions expressly imposing the doctrine." *Golden v. McCurry*, 392 So. 2d 815, 817 (Ala. 1980) (citation omitted). The court concluded:

> After due and deliberate consideration, we hold that, even though this Court has the inherent power to change the common law rule of contributory negligence, it should, as a matter of policy, leave any change of the doctrine of contributory negligence to the legislature. **By refusing to exercise our inherent power, we follow the procedure common to most jurisdictions. We note that the change from contributory to comparative negligence in most, but not all, jurisdictions has come through the legislative process.**

Id. (emphasis added) (citation omitted); *see also Williams v. Delta Int'l Mach. Corp.*, 619 So. 2d 1330, 1333 (Ala. 1993) (rejecting adoption of comparative fault after "exhaustive study" and "lengthy deliberations"); *Holmes v. Amerex Rent-A-Car*, 710 A.2d 846, 854 n.3 (D.C. 1998) (adoption of comparative fault "ideally would be a subject for comprehensive consideration by the legislature.").

new information. If a point needs further elaboration, an additional witness can be called to testify or a prior witness can be recalled. This process allows legislatures to engage in broad policy deliberations and to formulate policy changes carefully. As one scholar has explained:

> The legislature has the ability to hear from everybody — plaintiffs' lawyers, health care professionals, defense lawyers, consumers groups, unions, and large and small businesses. . . . [U]ltimately, legislators make a judgment. If the people who elected the legislators do not like the solution, the voters have a good remedy every two years: retire those who supported laws the voters disfavor. These are a few reasons why, over the years, legislators have received some due deference from the courts.

Victor E. Schwartz, *Judicial Nullifications of Tort Reform: Ignoring History, Logic, and Fundamentals of Constitutional Law*, 31 Seton Hall L. Rev. 688, 689 (2001).

Further, legislative development of tort law gives the public advance notice of significant changes affecting rights and duties, and the time to comport behavior accordingly. As the United States Supreme Court noted in a landmark decision regarding punitive damages, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive *fair notice* . . . of the conduct that will subject him to [liability]. . . ." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996) (emphasis added). The Court's statement is particularly applicable here.

Courts, on the other hand, are uniquely and best suited to adjudicate individual disputes concerning discrete issues and parties. The focus on individual cases does not provide comprehensive access to broad scale information to the extent available to the legislature, even with the benefit of *amici*. Further, judicial changes in tort law may not provide prospective "fair notice" to everyone potentially affected.

IV. ADOPTION OF COMPARATIVE FAULT WOULD UNDERMINE PERSONAL RESPONSIBILITY, RAISE COSTS FOR CONSUMERS, HURT MARYLAND'S REGIONAL COMPETITIVENESS, AND ADVERSELY AFFECT MARYLAND EMPLOYERS

The doctrine of contributory negligence fosters personal responsibility. Adoption of comparative fault, particularly in its "pure" form, would encourage "horse play" and increase litigation, since plaintiffs who are substantially – or even mostly – at fault for their own harms could bring lawsuits.

All Maryland employers – including nonprofits, the State of Maryland, the City of Baltimore, and the State's counties and municipalities – would experience higher costs. No person or entity that is subject to civil tort litigation would be spared. As the Maryland Office of Policy Analysis in the Department of Legislative Services has explained:

> Adoption of comparative fault would broaden the potential liability of such "deep pocket" defendants as the State of Maryland, local governments, physicians, hospitals, and private employers. Even when defendants eventually win lawsuits, they have to expend large amounts of money and time for their defense.

Report of Dep't. of Legislative Servs., *Negligence Systems: Contributory Negligence, Comparative Fault, and Joint and Several Liability*, 28 (Jan. 2004), at http://dls/state/md.us/data/polanasubare/polanasubare_coucrijusncivmat/Negligence-Systems.pdf.

"These costs, in turn, will be passed on to consumers." *Id.* For example, studies have found that "insurance consumers in states that have adopted comparative negligence pay more for automobile liability insurance than do consumers in states that retain traditional contributory negligence." David T. Winkler *et al.*, *Cost Effects of Comparative Negligence: Tort Reform in Reverse*, 44 CPCU J. 114, 114 (June 1991); *see*

also Joseph E. Johnson & William L. Ferguson, *An Analysis of the Relative Cost of the Adoption of Comparative Negligence – A Paired State Study: Delaware and Maryland* (1989) (concluding that Delaware's adoption of comparative fault in 1984 directly resulted in an increasingly disparate automobile insurance cost differential compared with Maryland).

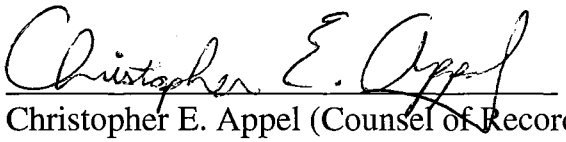
The aggregate impact could cause businesses or consumers to underinsure or forgo insurance altogether, creating other societal problems and moral hazard. Job losses could be expected. *See* Regional Economic Studies Institute, Towson State Univ., *Estimated Economic Impact of Comparative Negligence* (prepared for Maryland Chamber of Commerce) (1997) (comparative fault would result in approximately 20,800-42,500 jobs being lost over a four year period depending on whether a "pure" or "modified" approach was selected). These losses, in turn, would adversely affect Maryland's tax base. *See id.*

Finally, the adoption of comparative fault would hurt the regional competitiveness of Maryland businesses (particularly smaller businesses), since the District of Columbia, Virginia, and North Carolina all apply the contributory negligence doctrine.

CONCLUSION

For these reasons, this Court should affirm the judgment below. If it reaches the issue, the Court should retain the contributory negligence doctrine and defer any change to the Legislature as in *Harrison*.

Respectfully submitted,



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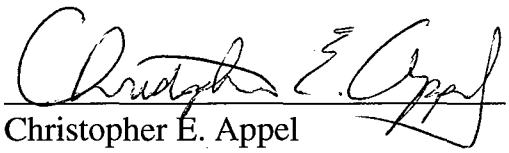
STATEMENT OF RULE 8-504 COMPLIANCE

Pursuant to Rule 8-504(a)(8), I certify that the foregoing brief is in Times New Roman font with a 13-point typeface.



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