

# The Supreme Court of Ohio

STATE OF OHIO <i>ex rel.</i> SUNESIS	:	
CONSTRUCTION COMPANY	:	SUPREME COURT OF OHIO
	:	
Appellant-Relator,	:	CASE NO. 2015-1773
	:	
v.	:	
	:	
INDUSTRIAL COMMISSION OF OHIO	:	On Direct Appeal as of Right from an
	:	Action Originating in the Franklin
and	:	County Court of Appeals, Tenth
	:	Appellate
TIMOTHY ROARK, Deceased	:	
	:	
Appellees-Respondents	:	

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## APPELLEE-RESPONDENT, TIMOTHY ROARK, DECEASED'S BRIEF ON THE MERITS

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## **STATEMENT OF THE CASE**

Appellant, Sunesis Construction Co. (hereinafter “Sunesis”) seeks a writ of mandamus finding that the Industrial Commission abused its discretion in finding that it violated several Specific Safety Requirements, thereby proximately causing the death of Respondent, Timothy Roark, dec’d (hereinafter “Tim”). Sunesis alleges that the Industrial Commission abused its discretion because “[A]t no time did Sunesis decide, intend, or actually send Tim Roark or any other employee to work in the East trench on Sunday July 31, 2005” (Sunesis’ brief pg. 7) and that “it ordered Tim Roark to stay out of the East trench on Sunday morning July 31, 2005.” (Sunesis’ brief pg. 15). Further, Sunesis declares that the VSSR order at issue “is unsupported by evidence of either a violation or proximate cause” (Sunesis’ brief pg. 14) and “there is no evidence that any violation was the proximate cause of injury.” (Sunesis’ brief pg. 15).

Additionally, Sunesis asserts “*the evidence shows that Sunesis shoring systems in the East trench complied with the specific safety requirements. But, if the shoring systems did not comply, then the issue for this court is whether Sunesis complied with the specific safety requirements by instructing employees to stay out of the trench.*” (Sunesis’ brief pg. 18)(emphasis added). Sunesis’ assertions demonstrate an inability to conform its statements to the facts.

By way of background, Tim was a construction laborer for Sunesis when he was killed in a 20 foot deep trench cave-in on July 31, 2005. (Stip. Evid. 13-

19)<sup>1</sup>. An application for Violation of a Specific Safety Requirement was filed on January 29, 2007. (Stip. Evid. 435). Depositions had been taken in a civil action for wrongful death and were submitted as evidence in the VSSR action. This matter came for hearing before a Staff Hearing Officer of the Industrial Commission on September 17, 2008. The Staff Hearing Officer granted the VSSR application, finding that Sunesis violated Ohio Administrative Code §§ 4123:1-3-13(C)(2), 4123:1-3-13(D)(1)-(2) 4123:1-3-13(D)(9), 4123:1-3-13(E)(1)-(2).

Thereafter, Sunesis sought a writ of mandamus which the 10<sup>th</sup> District Court of Appeals issued in case 09AP0423. The Court found the SHO's order to be *Noll* non-compliant. The Court noted in its decision that:

“both decedent's estate and the commission pointed to additional testimony presented at the hearing and argued that it constitutes ‘some evidence’ to support the SHO's finding. However, this court need not search the commission's file for ‘some evidence’ to support its finding that is not otherwise specified as a basis for the commission's decision. While this evidence may well support the SHO's finding, the SHO did not specify the evidence as a basis for those findings.”

Pursuant to the writ, the Industrial Commission ordered a hearing to be set on the matter. Sunesis objected to any further hearings on the matter and argued that the commission was ordered to issue an order in compliance with *Noll* and not to have a new hearing. Sunesis filed an action in the 10<sup>th</sup> District

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<sup>1</sup> No supplemental stipulation of evidence was presented herein prior to the submission of Appellant's Brief on the Merits. For the sake of continuity, all references in this brief are to the stipulated record transmitted to this Court by the 10<sup>th</sup> District Court of Appeals in this matter.

Court of Appeals for a writ of prohibition which was ultimately dismissed by the court.

On December 15, 2011, the commission held a hearing before a SHO on the VSSR application. No new evidence was presented by either party at the hearing and the SHO issued an order based upon the same evidence that the original SHO had considered in granting the original VSSR. The SHO again granted the VSSR and Sunesis requested a rehearing, which was granted.

On March 13, 2012 a rehearing order was issued noting that the specific safety requirements which were found to have been violated in that order referred to Table 13-1 in the Appendix. That Table referred to certain requirements to determine the appropriate angle slope, depending on the type of soil involved. The case was sent back to another SHO for yet another merits hearing.

On October 4, 2012 a new SHO heard the VSSR Application and issued an order on October 30, 2012. That order once again granted the VSSR Application. In the October 30, 2012 order, which is the subject of this action, the Staff Hearing Officer stated, in part:

\*\*\*\* "The Staff Hearing Officer finds a violation of Ohio administrative Code 4123:1-3-13(D)(1) and (2), Ohio Administrative Code 4123:1-3-13(E)(1) and (2), and Ohio Administrative Code 4123:1-3-13(E)(4).

The pertinent facts are as follows. The Injured Worker was employed by the Employer as a construction laborer. On 07/31/2005, the Injured Worker was working alone at the bottom of a more than twenty foot deep trench/excavation when the trench/excavation "caved in" on top of the Injured Worker resulting in his death. The actual "cave-in" was not witnessed. The Decedent was found at the bottom of the trench/excavation crushed against the pipe which ran along the bottom

of the trench/excavation. He was buried up to his shoulders in dirt and debris. The coroner's report on file indicates that the cause of death was blunt force trauma to the head and asphyxiation. The file contains pictures of the scene of the accident prior to the decedent's body being removed or the accident scene being disturbed in any manner.

The evidence on file indicates that one side of the trench/excavation was comprised of a solid concrete slab and solid shale rock. Another side of the trench/excavation was secured by steel road plates which were 10 feet wide and 20 feet high. A third side of the trench was secured by the use of a 10 foot tall trench box. The Staff Hearing Officer finds that there is no allegation that these three walls were inadequately shored.

**The fourth wall of the excavation trench consisted of soft material, Class C soil with ground water.** The Employer attempted to shore this side of the trench/excavation by sloping the wall enough to ensure that a cave-in could not occur. A steel plate was also inserted at the top of this wall above the sloped area.

**Based upon the photographs of the accident scene,** the Staff Hearing Officer finds that the steel plate was placed at the top of the trench/excavation and did not cover the sloped portions of the wall.

The Staff Hearing Officer finds that the sloped wall of the trench/excavation caved in on the Decedent resulting in his death.

**This finding is based on the testimony of Mr. Chuck Renken at pages 18, 19, 67, 69, and 70 (Stip. Evid. 461, 462, 510, 512 & 513) of the Hearing Transcript filed 06/25/2008 and Mr. Jeffrey Darrah at pages 119-121 (Stip. Evid. 562, 563) of the Hearing Transcript filed 06/25/2008.** Mr. Renken is the Employer's Director of Human Resources and Safety and Mr. Darrah is the company Vice President. **This finding is also based upon the photographs on file which depict the scene of the accident before the scene was disturbed.** (Stip. Evid. 391) (emphasis added).

The SHO clearly indicates his factual findings and specifically identifies the parts of the record upon which he relied. Chuck Renken, Sunesis' Safety Director testified as to where the dirt came from that killed Tim and stated at page 67 (Stip. Evid. 510) of the hearing transcript that "I don't think it came

from beneath the plate. It came from up on the end down on top of him this way (indicating). At page 69 he testified:

Q. Okay. So it's your theory that it came from the end? All this dirt?

A. Again, I don't know for sure where it came from. Based upon this picture it looks like the void is, you know -- on the end of the trench where it must've come from. (Stip. Evid. 511).

Likewise, Jeffrey Darrah's testimony at pages 119-121 (Stip. Evid. 562) of the hearing transcript was relied on as were the photographs of the scene. (Stip. Evid. 391).

The October 30, 2012 order of the SHO continues:

The issue to be decided is twofold. First, a determination has to be made as to whether the sloped wall of the trench/excavation was properly sloped. Second, if the sloped wall is found to be improperly sloped or shored, whether the improper sloping or shoring is the proximate cause of the cave-in and the Decedent's death.

Ohio Administrative Code 4123:1-3-13(D) governs trenches. Ohio Administrative Code 4123:1-3-13(D)(1) states:

The exposed faces of all trenches more than five feet high shall be shored, laid back to a stable slope, or some other equivalent means of protection shall be provided where employees may be exposed to moving ground or cave-ins.

Ohio Administrative Code 4123:1-3-13(D)(2) states:

Sides of trenches and unstable or soft material, five feet or more in depth, shall be shored, sheeted, braced, sloped, or otherwise supported by means of sufficient strength to protect the employees working within them.

Ohio Administrative Code 4123:1-3-13(E) governs excavations. Ohio Administrative Code 4123:1-3-13(E)(1) states:

The walls and faces of all excavations in which employees are exposed to danger from moving ground shall be guarded by a shoring system, sloping of the ground, or some other equivalent means.

Ohio Administrative Code 4123:1-3-13(E)(2) states:



Supporting systems, i.e., piling, cribbing, shoring, etc., shall be designed by a qualified person and shall meet accepted engineering requirements.

Ohio Administrative Code 4123:1-3-13(E)(4) states:

Sides sloped and faces of all excavations shall meet accepted engineering requirements by scaling, benching, barricading, rock bolting, wire meshing or other equally effective means.

In the case at hand, the trench/excavation the Decedent was working in at the time of the industrial accident was over twenty feet deep. Further, the Decedent was working in soft material, Class C soil with ground water and was exposed to moving ground or the possibility of cave-ins at the time of the industrial accident. **This finding is based upon the testimony of Mr. Gary Bradford, the Employer's Field Superintendent, contained in Pages 24 and 15 (Stip. Evid. 351) of his deposition and the testimony of Mr. Anthony Roark, the decedent's supervisor, on Pages 103 and 104 (Stip. Evid. 316) of his deposition on file.**

The Staff Hearing Officer finds that the sloped side of the trench/excavation was not sloped by means of sufficient strength to protect the employee working in it. Further, the Staff Hearing Officer find that the slope did not meet accepted engineering requirements.

**Specifically, Mr. Renken acknowledges that the Employer knew that the trench/excavation at issue was not OSHA compliant at the time of the accident on page 16 (Stip. Evid. 459) of the Hearing Transcript. Importantly, Mr. Renken acknowledges that the slope was not sufficient to prevent cave-ins and protect the employees working in the trench/excavation on pages 83-86 (Stip. Evid. 526-529) of the Hearing Transcript.** (emphasis and citation to the Stip. Evid. added).

Once again, the commission clearly indicates its factual finding and specifically identifies the parts of the record upon which it relied. Mr. Renken testified:

“Q. So is it your understanding that the ends or the sloping ends do not need to be guarded in any manner in this excavation or trench?

A. If there's – no. If they're sloped back correctly, no.

Q. If they're sloped back correctly. **But we know in this case, according to your theory, that they weren't sloped back correctly, is that true?**

A. **Apparently not.**" (Stip. Evid. 526-529) (Emphasis and citation to the Stip. Evid. added)

The order further elaborated on the factual findings of the SHO and clearly set forth which part of the record he relied upon. In relevant part, it states:

"The Staff Hearing Officer finds that Ohio Administrative Code Rule 4121:1-3-13 refers to Trenches and Excavations. The Appendix to Rule 3121:1-3-13 includes Table 13-1, Approximate Angle of Repose for Sloping of Sides of Excavations. The note to Table 13-1 states: "the presence of ground water requires special treatment."

Additionally, Mr. Renken indicates that the slope was not engineered and probably did not meet acceptable engineering standards. **Mr. Renken's deposition states that the slope was not inspected by an engineer or any other qualified person on pages 72-73** (Stip. Evid. 515-516) **of the Hearing Transcript.**

The Deposition of Mr. Anthony Rorak (*sic*) supports Mr. Renken's conclusions. **Specifically, Mr. Roark indicates that he knew that the trench/excavation was not OSHA compliant at the time of the industrial accident on pages 117-118** (Stip. Evid. 320) **of his deposition.**

**Mr. Anthony Roark's deposition explains further on Pages 118-119.** (Stip. Evid. 320) **Mr. Roark indicates that applicable safety rules and regulations were routinely disregarded.** Mr. Roark compares safety regulations to speed limits. He states that, although the speed limit may be 55 miles per hour, everyone routinely drives 60 to 65 miles per hour without thinking twice about it.

**Additionally, Mr. Roark indicates, on Page 143** (Stip. Evid. 326) **of his deposition that the Employer decided to proceed with having employees work in the trench/excavation despite the fact that the Employer knew that the trench/ excavation satisfied neither OSHA safety standards nor the Employer's own safety standards.**

The deposition of Mr. Gary Bradford, (Pages 58-60) (Stip. Evid. 360) Field Superintendent, indicates that the Employer knew that both OSHA and the Employer's own safety regulations require all excavation/trenches in excess of twenty feet deep have a protective system which is designed by a professional engineer.

Mr. Bradford's deposition further indicates that the Employer knew the excavation/trench was in excess of twenty feet deep prior to the industrial accident. However, **Mr. Bradford states that the Employer decided to put employees in the trench/excavation even though they knew the trench/ excavation safety system was not designed by, or inspected by, a professional engineer on Pages 76-81** (Stip. Evid. 364-366) of his deposition.

The Staff Hearing Officer acknowledges that a violation of an OSHA regulation does not automatically equate to a violation of a specific safety requirement.

However, the Staff Hearing Officer finds the testimony of Mr. Renken, Mr. Anthony Roark, and Mr. Bradford probative in that these depositions depict the Employer's attitude toward safety. Expressly, these depositions indicate that the Employer was apathetic or careless, if not reckless, in complying with applicable safety rules and regulations.

The Staff Hearing Officer further finds that the above cited depositions establish that the trench/excavation was in soft wet material, Class C soil with ground water which exposed employees to the possibility of moving ground or cave-ins. Further, these depositions indicate that the sloped side of the trench/excavation was not sloped or otherwise supported by sufficient means to protect the employees working in them.

The Staff Hearing Officer further finds that the Employer's failure to adequately slope or shore the trench/excavation as required by these sections was the proximate cause of the cave-in and the Decedent's death.

Specifically, the Staff Hearing Officer finds that, had the trench/excavation been sloped or otherwise shored by means of sufficient strength to protect the employee's working in the trench/excavation, the industrial accident would not have occurred.

Therefore, the Staff Hearing Officer finds violations of Ohio Administrative Code 4123:1-3-13(D)(1) and (2).

Additionally, the above referenced depositions indicate that the slope on the soil side of the excavation/trench did not meet accepted engineering standards or accepted engineering requirements for scaling, benching, barricading, rock bolting, wire meshing or other equally effective means.

The Staff Hearing Officer further finds that the Employer's failure to design the trench/excavation in accordance with accepted engineering standards was the proximate cause of the cave-in.

The Staff Hearing Officer further finds that, had the trench/excavation been designed to meet accepted engineering standards, the industrial accident would not have occurred.

The Staff Hearing Officer therefore finds violations of Ohio Administrative Code 4123:1-3-13(E)(1), (2) and (4).

It is therefore ordered that an additional award of compensation be granted to the Injured Worker in the amount of 35 percent of the maximum weekly rate under the rule of State ex rel. Engle v. Indus. Comm. (1944), 142 Ohio St. 425.

The Staff Hearing Officer finds that no order requiring a correction of the violation is appropriate for the reason that the construction project has been concluded." \*\*\*\* (Emphasis and citation to the Stip. Evid. added).

Sunesis then filed a request for reconsideration which was granted by the Industrial Commission. The hearing before the full commission went forward on March 14, 2013. The commission first heard the issue of whether the commission should exercise its continuing jurisdiction and then, prior to making a decision on its exercise of jurisdiction, held a hearing on the merits of the VSSR. Once again, no new evidence was submitted by either side. Only the original evidence that had previously been presented at the hearing on September 17, 2008 was considered.

The commission took the matter under advisement and on March 15,

2013 issued an order finding that after further review and discussion it was the finding of the Industrial Commission that it did not have authority to exercise continuing jurisdiction pursuant to R.C. 4123.52. It further found that the Employer had failed to meet its burden of proving that sufficient grounds exist to justify the exercise of continuing jurisdiction. The Industrial Commission, in a unanimous finding, denied Sunesis request for reconsideration, thus affirming the SHO order of October 30, 2012.

Finally, Sunesis filed its third action in the 10<sup>th</sup> Appellate District, this time seeking a writ of mandamus to compel the Industrial Commission to deny the violation of any specific safety requirements. The matter was then heard by the Magistrate of the Court of Appeals who recommended that the writ be issued. On objection to the Magistrate's report, the Court of Appeals adopted the Magistrate's findings of fact, but not the conclusions of law, and denied Sunesis request for a writ of mandamus. Sunesis now brings this appeal.

## **STATEMENT OF FACTS**

### **A. Background**

On July 31, 2005 Tim Roark was killed when he was buried alive and asphyxiated in a cave-in while employed by Sunesis Construction Company. (Stip. Evid. 1-18). Tim died while working on the Cooper Creek Sewer Replacement Project ("Cooper Creek") for his employer, Sunesis. Cooper Creek was a project involving the replacement of sewers in the Galbraith Road area of Hamilton County, Ohio. Jeff Darrah was the vice-president of operations for Sunesis and a registered professional engineer. (Stip. Evid. 532). Chuck

Renken was the Director of Human Resources and Safety for Sunesis at the time of Tim's death. (Stip. Evid. 454). Gary Bradford was a field Superintendent for the project (Stip. Evid. 347) and Anthony Roark, Tim's brother, was the foreman on this part of the project. (Stip. Evid.292).

The project began about fourteen (14) months prior to the date of the cave-in and was running behind schedule. (Stip. Evid. 372, 501). The project completion date was July 31, 2005. After that time Sunesis would become liable for fines of up to \$1,200.00 per day. (Stip. Evid. 372). Sunesis crews had been working up to sixteen (16) hours a day, seven (7) days a week. *Id.* Since the day that Tim was hired, he had worked fourteen (14) days without a day off. (Stip. Evid. 322, depo pg. 125, l. 1-3). The project was supposed to have been completed on the day Tim Roark was killed. (Stip. Evid. 372, 502).

#### B. Site Conditions

The soil at the site where the cave-in occurred was unstable with respect to excavation and trenching (Stip. Evid. 351-352). The Galbraith Road section of the Cooper Creek Project where Tim Roark was killed involved Class C soil with water conditions. (Stip. Evid. 191, 351 & 352). Class C soil is moist, soft soil. (Stip. Evid. pg. 351, depo pg 23, l 17- pg 24, 18). Class C soil with water present is most likely to present a cave-in hazard. (Stip. Evid. 317, depo. pg. 105, l. 20.). Additionally, the soil had been dug up at some time before. (Stip. Evid. pg. 299, depo. pg. 34, l.19).

Sunesis had two crews working on the project in July, 2005. (Stip. Evid. 33). Gary Bradford was the superintendent and Larry Springer and Anthony

Roark were the foremen in charge of the crews. *Id.* Tim Roark worked under Anthony Roark. *Id.* Anthony Roark made the decisions regarding trench wall protection. (Stip. Evid. 33, Sparks depo. Pg. 11, l. 20).

The Cooper Creek project included laying pipe underground. At the time of the accident, a trench already existed at the site. The plan was to go down into the trench and tunnel underground from there in order to put the pipe in place. (Stip. Evid. 302, depo. pg.46, l. 16-25, 47:1-4). Prior to the cave-in, Tim Roark and Jason Cooper were working inside a casing, hand-digging or hand-mining to install underground sewer pipe. (Stip. Evid. 35). The way that the tunneling process worked was that Jason or Tim would go into the pipe and hand dig the excess dirt and bring it out. *Id.* The track hoe operator would then use the bucket of the hoe to push the pipe further into the casing. *Id.* They would then go back into the pipe and repeat the process. (Stip. Evid. 35, depo. pg.18, l. 1-20).

While attempting to tunnel underground, the workers encountered a large rock blocking their path. (Stip. Evid. 252, depo. pg. 52, l. 12-19; Stip. Evid. 299 depo. pg. 35, l. 8). Anthony Roark thought the crew should dig a second trench to continue laying the pipe rather than attempting to tunnel around the rock. (Stip. Evid. 302, depo. pg. 45, l. 8-12).

As the foreman, Anthony Roark did not have the authority to begin digging the second trench. (Stip. Evid. 302, depo. pg. 45, l.8-12). He got permission over the phone from a superior and began digging the trench right away. (Stip. Evid. 303, depo. pg. 50, l.8-18). No one consulted with an

engineer before digging the trench, which was more than twenty feet deep. (Stip. Evid. 484, depo. pg. 41, l. 9-11; 358, depo. pg. 49, l. 6-19).

While digging the trench, workers discovered a piece of concrete underground measuring approximately 14 x 10 feet. (Stip. Evid. 300, depo. pg. 37, l. 9-16). It was situated such that it protruded from the base in one of the trench walls. (Stip. Evid. 300, depo. pg. 36, l. 13-15). The concrete in the trench wall prevented the trench box from being placed within 2 feet of the trench base. (Stip. Evid. 459-460). Sunesis, instead of complying with safety requirements, chose to take a 10 foot trench box and beat it down into a 24 foot deep trench using the track hoe. This left at least 8 feet from the bottom of the trench unguarded. (Stip. Evid. 460). Sunesis then shoved road plates in around the bottom of the trench. (Stip. Evid. 304-305, depo. pg. 56, l. 2-10; 58:1-8.). In addition, Sunesis did not extend any part of the protection at least 6 inches above the vertical part of the trench face. (Stip. Evid. 265, depo pgs. 101-103, depo. pg. 117 & 118).

The day prior to the accident, Superintendent Gary Bradford went to the Cooper Creek site and inspected the trench. (Stip. Evid. 356, depo. 41:1-4). He concluded that the trench was not in compliance with OSHA safety standards or Sunesis safety standards. (Stip. Evid. 356, depo. pg 42, l. 4-6). Gary Bradford and Anthony Roark along with Larry Springer, decided that despite the safety concerns related to the trench, workers could continue to work in the trench. (Stip. Evid. 356, depo. pg. 42, l. 1-25, 43:1-18).

Chuck Renken, Sunesis' safety director, testified at the hearing with



regard to the safety requirement compliance:

Q. Okay. And you were working seven days a week back then?

A. Not uncommon for the summer, yes.

Q. Okay. Digging up that extra piece of concrete would have slowed you down substantially, wouldn't it?

A. We would have been paid substantially for digging it up.

Q. So somebody on the ground at the site decided not to try to do that but to try to get past it?

A. Yes.

Q. Okay. And use noncompliant trench guarding?

A. Not OSHA compliant, yes.

Q. **Was it Ohio Safety requirement compliant?**

A. **No.**

Q. Okay. And it was not Sunesis compliant?

A. No.

Q. I know you didn't have anything to do with that, but it seems the foreman just kind of pushed ahead, didn't it?

**A. The foreman made a decision on the ground, you know, at the scene of what he thought was safe and what he thought needed to be done in order to get the pipe through.**

**Q. In conjunction with Gary Bradford, the superintendent?**

**A. Yes.**

**Q. They conferred, they said we can't get this to OSHA compliant, is that true?** Is that your understanding?

A. **That's true.** I would also say, though, that there are situations in the field that make it difficult to be OSHA compliant, you know. And you know, experienced competent people have to make decisions every day about how can we make this trench safe or this project safe in what we do. That doesn't mean we're all taking chances. It means that, you know, you have to deal with whatever the circumstances are in front of you as you are confronted with.

Q. Kind of like driving fifty-five; it's not one of those things you really have to comply with, right?

A. No, sir. I mean, fifty-five there's no reason for you to not drive fifty-five but, you know, when there's a concrete structure in the way that you can't get your box to where it is and there's rock on the side that you feel is safe and when you've got trench—or road plates down on the other side, you felt like the trench was shored as safely as it could be.

Q. **Even if it's in direct violation of your own safety code, it's in direct violation of OSHA and the Ohio specific safety requirements?**

A. Mr. Roark and Mr. Bradford felt like it was a safe trench to be in.

Q. **Was it?**

A. **Well, no.** Obviously in hindsight I guess not. Somebody died in the trench. (Emphasis added) (Stip. Evid.503 -505).

While claiming that Sunesis “*complied with the specific safety requirements by instructing employees to stay out of the trench*” (Sunesis’ brief pg. 18) Anthony Roark used a jackhammer **in the trench** for four hours the day prior to the accident trying to break up the obstruction. (Stip. Evid. 198, depo. pg. 76, l. 21-25, 77:1-5)(emphasis added). Just prior to his death, Tim was attempting to cut part of the casing with a blowtorch and Leon Trisdale went to get him a pair of safety glasses. (Stip. Evid. 118, depo. pg. 65, l. 13-16). At that time, the cave in occurred and Tim was buried under the dirt and

killed. (Stip. Evid. 126, depo. pg. 73, 1.1-18). The workers dug him out but it was obvious that he was already dead. (Stip. Evid. 255, depo. pg. 63, 1. 22-25, 64:1). Tim had a fractured skull and died of traumatic asphyxiation. (Stip. Evid. 4, Coroner's Report).

A co-worker, Jason Cooper testified in his deposition:

Q. What do you understand happened to Tim Roark?

A. Well the stuff that hit him came from up above.

Q. How do you know that?

A. **Cause I seen where it came from.**

Q. It came from up above. Meaning, did it come up from above the trench box?

A. **Right directly above the end of the casing is where it came from.**

Q. Now was there a trench box at the location the dirt came from?

A. Well the box is aiming the other way, see? The box is sitting there like this (gesturing).

Q Uh-huh

A. The end of it's open, and it came from up there (indicating)

Q. Now, what are you taught or trained to do in trench excavation safety to prevent that dirt from coming from up above as it did, in your opinion trapping Timothy?

A. Well, normally you would put something in there.

Q. What would you normally put in there?

A. Some kind of big piece of steel, like another box panel, like another side of a box or something like that where it couldn't fall, or maybe a road plate or—

Q. **And there was no road plate there, was there?**

A. **No.**

Q. And there was no other box there?

A. Well there wasn't no place to put a box there. It was impossible to put a box there cause your box is already touching to whatever this structure was that we had to tunnel under to begin with and so it was touching that. The only way—the only thing you could've done was put something on the end—stood at the end of the box that was there.

Q. **And there was nothing there?**

A. **No there was nothing there.** (emphasis added) (Stip. Evid. 265, depo. pg. 101, l. 2 thru pg. 102, l. 20).

Sunesis foreman Anthony Roark testified at page 116:

Q. Okay. Was there any trench shoring prior to the cave-in, at the location at the head of the trench above where the casing extended?

A. Yeah, **there was a plate shoved in there.**

Q. There was?

A. Yes.

Q. Was that plate, based on your training, in place consistent with OSHA requirements?

A. **No. OSHA requirements probably don't even let you put a plate.** But what we did was put the plate in and then sloped it back away from the plate. Yeah, I believe that is — yeah, that's actually a combination trench — that is legal for OSHA in certain circumstances. Again, I'm not saying it was on this one.

Q. So you're not certain whether the shoring at the head --I'll call it the head of the trench — you know what I'm talking about?

A. Um-hmm.

Q. Can we just put an arrow there, since we're referring to it that way, and can you just put "head"?

A. (Complying.) Well, I won't say that. **I'm certain it wasn't OSHA legal.**

Q. **It was not?**

A. **I'm sure it wasn't.**

Q. All right. And you knew that it was not OSHA legal prior to the cave-in?

A. Yes.

Q. Okay. **And you knew that it was not OSHA legal prior to the cave-in in a number of ways; is that correct?**

A. **That's correct. Prior to the cave-in, I don't think anybody ever thought about all the OSHA rules as much as we do now.**

Q. I understand.

A. **But, yes, we knew them. You just — it's like a speed limit sign that says 55. I drove here 60, 65. I knew it wasn't legal, but I do it every day.**  
(Emphasis added) (Stip. Evid. 319).

## **LAW AND ARGUMENT**

### **I. PROPOSITION OF LAW NO. 1: Employers violate a specific safety requirement when they knowingly fail to comply with the requirement and expose employees to the hazardous conditions created by the violation.**

To support Sunesis' Proposition of Law, at page 16 of Sunesis' brief, Sunesis argues "Even assuming *arguendo* that the East trench did not comply with the specific safety requirements, Sunesis would not be responsible for violating a specific safety requirement because it ordered employees to stay out of the East Trench. That is, Sunesis did not send Tim Roark into a hazardous area. On the contrary, Sunesis instructed employees to stay out." However, when compared to the testimony before the commission, this statement is unsubstantiated and is plainly incorrect.

The evidence before the commission was that the Superintendent on the job, Gary Bradford, saw Sunesis employees working in the trench and did not instruct them to discontinue working in the trench. (Stip. Evid. 356, depo. pg. 42, lines 1-12). Gary Bradford did not instruct any other Sunesis employees to work within the casing because it was Anthony's job to instruct them not to. (Stip. Evid. 367, depo. pg. 86, lines 9-22). Further, when he was at the trench on the day before the cave-in, Gary Bradford knew that Sunesis employees would have to continue their work in the unprotected portion of the trench to clean it out. (Stip. Evid. 368, depo. pg. 90, line 18 – depo. pg. 91, line 2). Anthony Roark testified that he had no reason to believe that Gary Bradford wanted the other employees out of the trench and that they were to keep working. (Stip. Evid. 310, depo. pg. 79, lines 2-20).

The Site Foreman, Anthony Roark, testified that he took Tim into the trench where the cave-in happened on Sunday morning to see how much water had accumulated and to show him how much he had to clean out. (Stip. Evid. 313, depo. Pg. 92, lines 4-22). With regard to whether Tim was "ordered" to stay out of the trench, Sunesis' Site Foreman, Anthony Roark testified at Stip. Evid. 330, depo. pg. 157, l. 7.:

"Q. I'm just about finished  
As you were leaving Timothy -- the two of you went down into the trench Sunday morning where the cave-in happened he was there to finish cleaning out?

A. Yes

Q. You instructed him to clean out ***in the area around the casing?***

A. **Yes**

Q. And other than that, any other instructions given to him?

A. No (emphasis added).

That is exactly what Tim was doing when he was buried alive by the cave-in. This evidence flies in the face of Sunesis' statement at page 20 of its brief that "Again, all evidence proves that on Saturday, July 30, 2005, Sunesis ordered everyone *out of the trench*." (emphasis added).

The determination of disputed facts is within the final jurisdiction of the administrative adjudicator. *State ex rel. Allerton v. Indus. Comm.*, 69 Ohio St.2d 396 (1982). The administrative adjudicator is the sole evaluator of the weight and credibility of evidence. *State ex rel. Pass v. C.S.T. Extraction Company*, 74 Ohio St.3d 373, 376, 1996- Ohio-126.

After its wry assessment of the "facts" presented before the commission, Sunesis pivots to its presentment of the "unilateral negligence defense".

Sunesis, at page 17 of its brief states:

"The unilateral negligence defense shields an employer from VSSR liability when an employee "removes or ignores equipment or instruction that complies with a specific safety requirement." *State ex rel. Quality Tower Serv., Inc. v. Indus. Comm.*, 88 Ohio St.3d 190, 193, 2000-Ohio-296, 724 N.E.2d 778 (2000). When analyzing the unilateral negligence defense, it is necessary to determine whether the employer has complied with the specific safety requirements before the claimant's actions somehow thwart that compliance. *Id.*"

Disregarding for the moment that even by the testimony of its own witnesses the trench was in violation of specific safety requirements, there is no evidence that Tim took any such action. Interestingly, the whole quote from *State ex rel.*

*Quality Tower Serv., Inc. v. Indus. Comm.*, 88 Ohio St.3d 190, 2000-Ohio-296, 724 N.E.2d 778 (2000) is found at page 193 of the decision at states:

“*Brown* and *Cotterman* are regularly cited for establishing the boundaries of the unilateral negligence defense, *Pressware* at 288, 707 N.E.2d at 939; *Martin Painting* at 339, 678 N.E.2d at 211; *State ex rel. Northern Petrochemical Co., Nortech Div. v. Indus. Comm.* (1991), 61 Ohio St.3d 453, 455, 575 N.E.2d 200, 201-202; **however, the defense is not actually about an employee's negligence.** The employer instead avoids VSSR liability when “[the] employee unilaterally violates a safety requirement [emphasis added],” *Cotterman* at 47, 544 N.E.2d at 892; *Pressware* at 288, 707 N.E.2d at 939, that is, when the employee removes or ignores equipment or instruction that complies with a specific safety requirement. *Brown* at 164, 524 N.E.2d at 485; *Northern Petrochemical*. On the other hand, **an employee's negligence in failing to protect himself from injury due to an employer's VSSR will never bar recovery because specific safety requirements exist to promote a safe work environment and “to protect employees against their own negligence and folly.”** *Cotterman* and *Pressware*. **Thus, the critical issue in a VSSR claim is always whether the employer complied with the specific safety requirement.** *Id.*”(Emphasis added).

As noted by Sunesis in its brief, in its decision the Court of Appeals below stated at ¶9: “We note from the outset of our discussion that it is both undisputed and irrelevant that Roark found himself in an exposed position at the bottom of the trench only because he had directly disregarded explicit instructions.”(Appellant’s Appendix 000020). However, the Court of Appeals is incorrect in that statement because it was and is disputed that Tim directly disregarded explicit instructions, as seen from the testimony quoted previously. It is correct though that it is irrelevant to this VSSR determination. The Court of Appeals does go on to correctly explain at ¶21:

“Finally, claimant's fourth objection asserts that the magistrate improperly substituted his view of the weight and credibility of the evidence in place of the commission's when resolving disputed facts.



**The disputed facts in question concern the extent to which Sunesis intended for any employee to work in an exposed position in the trench, given its unsafe nature.** Evaluation of the VSSR claim in this case did not require a finding that Sunesis ordered Roark into the trench, nor a finding that Sunesis took inadequate measures to prevent an incautious employee from venturing into the trench. This factual issue is moot. (emphasis added).

**II. PROPOSITION OF LAW NO. 2: The Industrial Commission’s order finding that an employer violated a specific safety requirement will not be disturbed on appeal when the order is supported by credible evidence.**

As set forth above, there are five VSSR sections at issue in this case.

Ohio Administration Code 4123:1-3-13(D) is captioned “Trenches”. In this case, two of the ten rules are at issue:

- (1) The exposed faces of all trenches more than five feet high shall be shored, laid back to a stable slope, or some other equivalent means of protection shall be provided where employees may be exposed to moving ground or cave-ins. (See appendix “Table 13-1”).
- (2) Sides of trenches in unstable or soft material, five feet or more in depth, shall be shored, sheeted, braced, sloped or otherwise supported by means of sufficient strength to protect the employees working within them. (See appendix “Table 13-1” and “Table 13-2”).

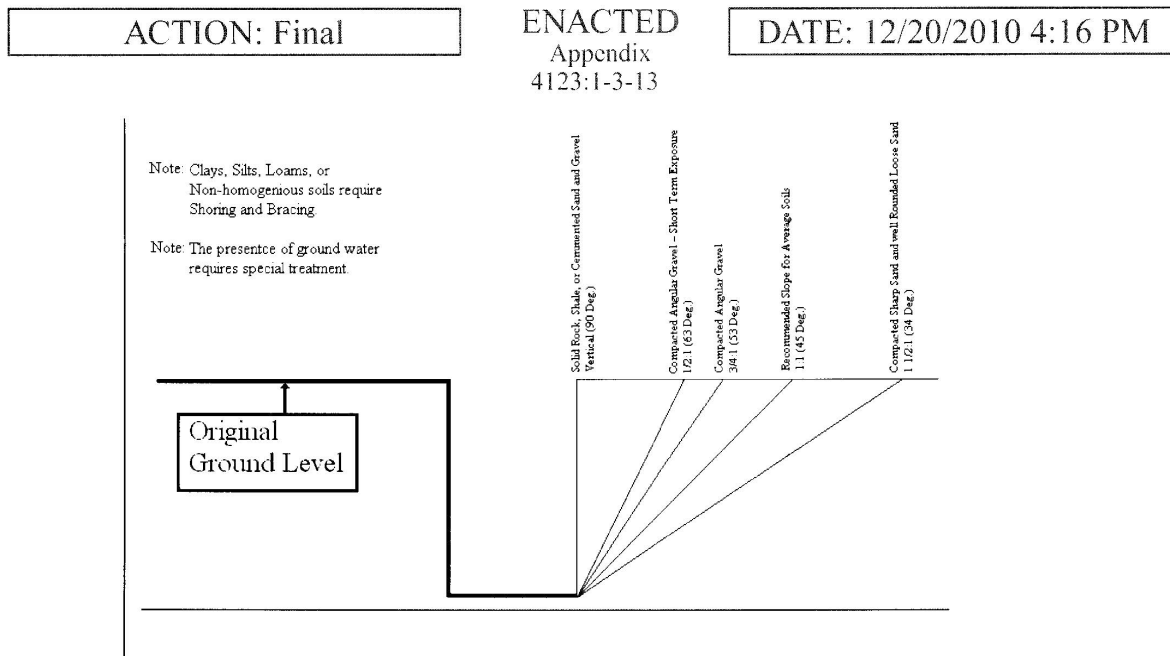
Ohio Administrative Code 4123:1-3-13(E) is captioned “Excavations”, wherein three of those rules provide:

- (1) The walls and faces of all excavations in which employees are exposed to danger from moving ground shall be guarded by a shoring system, sloping of the ground, or some other equivalent means. (See appendix “Table 13-1 and Table 13-2”).
- (2) Supporting systems, i.e. piling, cribbing, shoring, etc., shall be designed by a qualified person and shall meet accepted engineering requirements.

\* \* \*

(4) Sides, slopes, and faces of all excavations shall meet accepted engineering requirements by scaling, benching, barricading, rock bolting, wire meshing, or other equally effective means.

Three of the five above cited code sections reference Appendix Table 13-1, which exhibits a diagram showing five different degrees of sloping that are adequate for the type of soils described in the diagram. Table 13-1 provides:



Sunesis argues that the SHO failed to analyze the facts of this case using this table and provide the permissible degree of sloping for the trench at issue herein. However, it is clear from the face of Appendix, Table 13-1 that the commission was not required to provide any analysis regarding the degree of sloping permitted, *as this Table does not cover the type of soil that the evidence*

*showed and the SHO indicated was present at the trench herein.* (Emphasis added).

The SHO in this case stated that the “fourth wall of the excavation trench consisted of soil, ***soft material, Class C soil with ground water.***” (emphasis added). The testimony in the record clearly defines what “Type C” soil is, moist, soft soil, saturated topsoil, non-homogenous soil, that is more likely to cause cave-ins in trenching situations. (Stip. Evid. 00351, depo. pg. 24, lines 6-7; Stip. Evid. 00352 depo. pg. 25, lines 3-4; Stip. Evid. 00298, depo. pg. 32, lines 2-4). This was not controverted.

Class C soil is not covered in Appendix, Table 13-1, a fact acknowledged by the Court below. *State ex rel. Sunesis Construction Company v. Industrial Commission*, 2015-Ohio-3973. Yet Appellant continues to argue that the Industrial Commission erred by failing to analyze the facts of this case, (Class C soil), *with a table that covers other facts* (Solid Rock, Shale, Cemented Sand, Gravel, Compacted Angular Gravel, Average Soils, Compacted Sharp Sand and Well Rounded Loose Sand)(emphasis added). Had Appendix, Table 13-1 contained a sloping standard for Class C soil which was overlooked by the SHO, then Sunesis’ argument would have some merit and the SHO would have been remiss in ignoring it. But this is not the case. Sunesis is instead requesting the Commission to fit a square peg into a round hole and apply sloping standards where they simply don’t apply.

In reviewing the SHO’s order, it is clear that the SHO; i.) defined the type of soil involved (Class C with ground water); ii.) reviewed the Appendix Table

13-1, found that Class C soil was not covered and that ground water required “special treatment”; and iii.) reverted back to OAC 4123:1-3-13(D) to analyze the facts under the code.

The SHO stated in his order:

The Staff Hearing Officer further finds that the above cited depositions establish that the trench/excavation was in soft wet material, *Class C soil with ground water* which exposed employees to the possibility of moving ground or cave-ins. Further, these depositions indicate that the sloped side of the trench/excavation was not sloped or otherwise supported by sufficient means to protect the employees working in them.

The Staff Hearing Officer further finds that the Employer’s failure to adequately slope or shore the trench/excavation as required by these sections was the proximate cause of the cave-in and the Decedent’s death.

Specifically, the Staff Hearing Officer finds that, had the trench/excavation been sloped or otherwise shored by means of sufficient strength to protect the employee’s working in the trench/excavation, the industrial accident would not have occurred.

Therefore, the Staff Hearing Officer finds violations of Ohio Administrative Code 4123:1-3-13(D)(1)and(2). (Magistrate’s decision, p. 13)(emphasis added).

It is clear from the order that the SHO determined that the soil present at the trench was Class C soil with ground water. As Appendix, Table 13-1 does not cover Class C soil with ground water present, the SHO then reverted back to the Code. OAC 4123:1-3-13(D)(2) provides:

Sides of trenches in unstable or soft material, five feet or more in depth, shall be shored, sheeted, braced, sloped or otherwise supported by means of sufficient strength to protect the employees working within them. (See appendix “Table 13-1” and “Table 13-2”).

The Staff Hearing Officer recited this section in his Order when discussing proximate cause:

“The Staff Hearing Officer further finds that the Employer’s failure to adequately slope or shore the trench/excavation as required by these sections was the proximate cause of the cave-in and the Decedent’s death.

Specifically, the Staff Hearing Officer finds that, had the trench/excavation been sloped or otherwise shored by means of sufficient strength to protect the employee’s working in the trench/excavation, the industrial accident would not have occurred.

Therefore, the Staff Hearing Officer finds violations of Ohio Administrative Code 4123:1-3-13(D)(1)and(2). (Magistrate’s decision, p. 13).

The commission clearly and succinctly described the facts of the case, cited the applicable Code section and undeniably stated that the violation of the code section was the proximate cause of the injury. Sunesis’ assertion that the SHO abused his discretion for failing to determine the degree of sloping permitted under Appendix, Table 13-1 is clearly without merit.

The continued reference to the sloping requirements of Appendix Table 13-1 is a red herring, inapplicable to the facts of this case. Appendix Table 13-1 concerns Solid Rock, Shale, Cemented Sand, Gravel, Compacted Angular Gravel, Average Soils, Compacted Sharp Sand and Well Rounded Loose Sand and specifically states “the presence of ground water requires special treatment.” The commission did not abuse its discretion and did not fail to establish proximate cause by failing to determine the degree of sloping actually employed at the trench.

**III. PROPOSITION OF LAW NO. 3: The Industrial Commission abuses its discretion when it states that an employer violated a specific safety requirement without evidence of a violation or evidence that any violation proximately caused the injury. However, in this case there is substantial evidence of a violation that proximately caused the death of the employee.**

Respondent wholeheartedly agrees with Sunesis' Proposition of Law No.

3. The problem for Sunesis is that there is *overwhelming* evidence to support the commission's finding that Sunesis violated 4123:1-3-B(D)(l), 4123:1-3-13(D)(2), 4123:1-3-13(E)(l), 4123:1-3-13(E)(2), and 4123:1-3-13(E)(4) and that Tim was killed as a direct and proximate result of these violations. (Emphasis added).

**A. The evidence supports violations of 4123:1-3-13(D)(1); 4123:1-3-13(D)(2); and 4123:1-3-13(E)(1).**

Sunesis redundantly argues that the Industrial Commission abused its discretion in finding that Sunesis violated the above code sections as "these three specific safety requirements depend on Table 13-1 regarding the required angle of the sloped west end of the East trench" and "the Industrial Commission never applied these requirements in its analysis to the facts in this case." (Sunesis' brief, pg. 32).

Once again, Sunesis' argument is misplaced, as they are demanding further analysis where none is required. The code sections at issue require no discussion of sloping and make absolutely no reference to Appendix, Table 13-1. As noted above, Class C soil is not covered in Appendix, Table 13-1. Sunesis continues to argue that the Industrial Commission erred by failing to analyze

the facts of this case using this Table. Further discussion is not warranted as this argument has no merit.

**B. The evidence supports violations of 4123-1-3-13(E)(2) and 4123:1-3-13(E)(4).**

Sunesis argues that the Industrial Commission erred in finding a violation of the above code sections based upon Sunesis' failure to have the trench/excavation safety system designed or inspected by a professional engineer. (Sunesis' brief, p. 32). Sunesis attempts to support its arguments with statements which are not supported by the record. Specifically, Sunesis states:

There is **no statement or even suggestion from an engineer or qualified person** that Sunesis' efforts to shore, brace, and otherwise support the trench did not meet accepted engineering standards." (Sunesis' brief page 33) (emphasis added).

This is a clear misstatement of the facts. Chuck Renken, Sunesis Safety Director, seemingly a "qualified" person in matters of safety, stated at Stip. Evid. Pg. 514, l. 25 – 000516, l. 2:

Q. Okay. Now, would you agree that the walls and the faces of this excavation were guarded by a shoring system, sloping of the ground, or some other equivalent means?

A. Yes.

Q. **Okay. And you told me that you did not have any engineers check this, true?**

A. **That's correct.**

Q. **Okay. So you don't know whether or not the support system met accepted engineering requirements, do you?**

A. **Correct.**

Q. In fact -- if, in fact, the dirt did come from that end, they would not have met accepted engineering requirements, would they?

A. Again, hard to say because I don't know what the slope was on that end of the trench.

Q. Well, it was obvious enough -- it's obvious it was enough of a slope to cause a cave-in, true?

A. Yes.

Q. **Okay. And would that be acceptable to an engineer?**

A. **Probably not.**

Q. Okay. So we can agree that the wall or face or and, whatever - - whatever you want to call it, that's slope was not engineered correctly?

A. It was never engineered, yes.

Chuck Renken further testified at Stip. Evid.503-505:

Q. Okay. Digging up that extra piece of concrete would have slowed you down substantially, wouldn't it?

A. We would have been paid substantially for digging it up.

Q. So somebody on the ground at the site decided not to try to do that but to try to get past it?

A. Yes.

Q. Okay. And use noncompliant trench guarding?

A. Not OSHA compliant, yes.

Q. **Was it Ohio Safety requirement compliant?**

A. **No.**

Q. **Okay. And it was not Sunesis compliant?**

A. **No.**



Q. I know you didn't have anything to do with that, but it seems the foreman just kind of pushed ahead, didn't it?

A. The foreman made a decision on the ground, you know, at the scene of what he thought was safe and what he thought needed to be done in order to get the pipe through.

Q. In conjunction with Gary Bradford, the superintendent?

A. Yes.

Q. **They conferred, they said we can't get this to OSHA compliant, is that true?** Is that your understanding?

A. **That's true.** I would also say, though, that there are situations in the field that make it difficult to be OSHA compliant, you know. And you know, experienced competent people have to make decisions every day about how can we make this trench safe or this project safe in what we do. That doesn't mean we're all taking chances. It means that, you know, you have to deal with whatever the circumstances are in front of you as you are confronted with.

Q. Kind of like driving fifty-five; it's not one of those things you really have to comply with, right?

A. No, sir. I mean, fifty-five there's no reason for you to not drive fifty-five but, you know, when there's a concrete structure in the way that you can't get your box to where it is and there's rock on the side that you feel is safe and when you've got trench—or road plates down on the other side, you felt like the trench was shored as safely as it could be.

Q. **Even if it's in direct violation of your own safety code, it's in direct violation of OSHA and the Ohio specific safety requirements?**

A. Mr. Roark and Mr. Bradford felt like it was a safe trench to be in.

Q. **Was it?**

A. **Well, no. Obviously in hindsight I guess not. Somebody died in the trench.** (emphasis added).

It is clear from the four corners of the order that the commission relied upon this testimony to reach its conclusion. The SHO concludes, as it relates to the sections cited herein:

\*\*\*\*the above referenced depositions indicate that the slope on the soil side of the excavation/trench did not meet accepted engineering standards or accepted engineering requirements for scaling, benching, barricading, rock bolting, wire meshing, or other equally effective means.

The Staff Hearing Officer further finds that the Employer's failure to design the trench/excavation in accordance with accepted engineering standards, industrial accident would not have occurred.

The Staff Hearing Officer therefore finds violations of Ohio Administrative Code 41231:3-13(E)(1) \*\* and (4).

Unquestionably, Sunesis' own Safety Director provided testimony concerning Sunesis' failure to have the trench/excavation safety system designed or inspected by a professional engineer. The commission correctly applied the facts of this case to the law and established proximate cause. The commission's reasoning is clear. There is no abuse of discretion. The order must stand.

### **CONCLUSION**

Relator has failed to show that the Industrial Commission abused its discretion. The order of the commission is supported by overwhelming evidence that Sunesis violated numerous specific safety regulations and that the violations of the requirements cited in the commission's order were the proximate cause of the death of Timothy Roark. Sunesis is not entitled to a writ

of mandamus. The writ must be denied.

Respectfully submitted,



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#### **CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing merit brief of respondent Timothy Roark, deceased, was served upon all counsel of record by electronic mail, this 10<sup>th</sup> day of March, 2017.



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Bernard C. Fox, Jr. (0020466)