IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
CASE NO. 23-ICA-217

Phillip D. Tice,
Defendant Below , Petitioner

v.

John S. Veach,
Plaintiff Below, Respondent.

Appeal from Order Entered
by the Circuit Court of
Randolph County
(Civil Action 17-C-125)

PETITIONER'S REPLY BRIEF

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I. Table of Contents

II. Table of Authorities

CASES

RULES

OTHER AUTHORITY

III. INTRODUCTION TO REPLY

"A mandatory injunction is one that commands the doing of some action and cannot be issued without a hearing on the merits." *Cantrelle v. Lafourche Par. Council*, 2021-0678 (La. App. 1 Cir 02/01/22), 340 So. 3d 1059, 1068. Respondent offers no convincing argument to distinguish the trial court's action from a mandatory injunction as defined above. The trial court's order cannot be distinguished from the issuance of a mandatory injunction because it "commanded the doing of some action." The trial court ordered Petitioner to: "…within 30 days of the marking of the fence posts lying within the 14 foot right of way, remove those obstructions…" JA 369. Petitioner was commanded to do an action, *remove those obstructions.* To avoid removing those pre-existing obstructions pending appeal, Petitioner posted a $3,500.00 cash bond with the Circuit Clerk of Randolph County. This is an injunction.

Incongruously, in his Response Brief to this Court, Respondent claims "…no injunction was sought or ordered." Resp. Br., bottom p. 15. Offered in support of the "absence of an injunction" is the fact that Respondent and the trial court failed to comply with requirements for issuance of the injunction. *Id.* The trial court did not conduct the required "hearing on the merits," as set forth in the above opening quote. The same Respondent that once misleadingly convinced the trial court it could place Respondent's claimed prescriptive easement over his granted easement now proposes that no injunction was issued because neither he nor the trial court followed the requirements for issuance of an injunction. Lacking a defense for the trial court's issuance of an injunction, Respondent denies that one was ever issued.

IV. REPLY TO RESPONDENT'S STATEMENT OF THE CASE

Respondent's Response to Petitioner's Statement of the Case provides few references to the record and thus fails to demonstrate how or why the factual statements contained in Petitioner's

Statement of the Case are inaccurate. The numbered paragraphs of Respondent's Response Brief are addressed in the following.

1. Respondent says that the right-of-way was not placed "…through the area of buildings the grant intended to go around." Yet the right-of-way has been placed between Petitioner's garage apartment where the old tool shed stood and the area where the 1930s house stood on the property when the right-of-way grant was made.[1] Additionally, instead of following the driveway as per the original 1992 plat, Respondent's surveyor has now placed the right-of-way off to the north of the driveway (JA 169), instead of to the south of the driveway to avoid the area where the tool shed used to be located and the garage apartment is now located (JA 8). Respondent's surveyor Teter has testified that the driveway has not moved since 1992. Respondent ignores the fact that the easement grant calls for the right-of-way to run "…over the driveway or lane leading to the house … [thence] in a southwesterly direction around and to the South of a tool shed now located on said premises…" JA 8. There is no dispute that Respondent's surveyor has placed the right-of-way through the area of buildings the grant intended to go around.
2. Respondent ignores significant facts in paragraph 2, p. 4 of his Brief. Respondent therein states that his surveyor, Teter, has placed the right-of-way exactly as determined by the trial court's jury. Respondent's statement is false for the following reasons:
   a) Respondent's surveyor plat now used is a revised plat and is not the one which was approved by the jury.
   b) Respondent's surveyor did not place all the points on the ground that appear on the plat which was approved by the jury.

[1] Tice was not permitted to pursue the evidence regarding the pre-existing structures but was compelled to address the few that now remain ordering them removed. *See*, e.g., JA 112.

c) Respondent's surveyor has not placed the right-of-way on Petitioner's property where he testified to the jury that it would go.

Instead of following the plat approved by the jury, Respondent's surveyor Teter found it necessary to prepare a new plat changing the calls leading up the driveway from Route 24. *See* JA 10, JA 166 and JA 167 Teter's revised plat. Moreover, surveyor Teter avoided marking the points of the right-of-way leading from Route 24 up Petitioner's driveway. Had he marked those points, it would have been apparent that the both the original plat submitted to the jury and his revised plat were incorrect.[2] Finally, contrary to Teter's testimony before the jury, Teter's right-of-way does not follow Petitioner's driveway, despite the revisions Teter made to the plat approved by the jury. To reiterate, instead of following Petitioner's driveway, the right-of-way veers sharply off to the north of Petitioner's driveway and runs through the area of a pre-existing fence line.[3] Some of the old fence posts in that fence line remain to date, which forced Respondent to acknowledge their existence since they blocked the ROW location he promoted. Hence Respondent has asked the trial court to order them removed, resulting in the issuance of the injunction. See Final Order prepared by Respondent's counsel, JA 367.

3. Respondent attempts to justify the trial court's failure to render findings to support the injunction by denying that an injunction was issued.

4. In paragraph 4 Respondent wants this court to ignore the shiny object in the room – the revised plat. Respondent deflects from the conflicts between Teter's plat submitted to the

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[2] Tice appeared at the hearings with his surveyor prepared to show the court that Teter's beginning points leading from Route 24 up Tice's driveway were wildly off, taking the right-of-way into the step banks along the driveway and even off Tice's property. The trial court refused to permit Tice to pursue this evidence that Teter's work was incorrect even though the purpose of the hearings was to determine the right-of-way's location.

[3] Respondent has never disputed the existence of the fence line to the north of Tice's driveway. Instead, like the injunction he sought to remove the remaining posts, Respondent choses to ignore its existence.

jury and Teter's revised plat (new evidence accepted by the trial judge) by declaring that Petitioner simply seeks to "…upset the jury's verdict…" Apparently, Respondent has forgotten that his own surveyor testified that the right-of-way followed the driveway and that his plat followed the driveway.

5. Paragraph 5 contains quotes from the trial judge who stated in part: "…the issue of the location of the right-of-way has been determined by the jury." However, in that quote, the trial court inappropriately imbued the jury with having located the right-of-way before Respondent's surveyor, Teter, had located it. The jury never got to see and approve the location platted after the verdict. On remand, to avoid confronting the irregularity in Teter's work, the trial court baldly pronounced "…the right-of-way that was determined by the jury, that Mr. Teter has prepared is consistent with the plat that was approved–recognized by the jury and approved by the Supreme Court." By doing so, the trial court failed to recognize that Teter had changed his plat at the very points of the inception of the right-of-way where it leaves Route 24. Further, the trial court refused to consider the real reason that Teter failed to mark those new points on the ground. Teter never marked them because they wildly deviated from the driveway. Finally, the court chose to ignore the newly apparent fact that Teter ran the right-of-way off the driveway at the top of the hill and through structures existing when Teter claims his plat was made. Respondent now seeks to have this court overlook the above facts that exist in the court's record below.

6. In paragraph numbered 6 on page 3 of his Response Brief, Respondent differs with Petitioner's assertion that the Supreme Court "…placed no specific limits on the jurisdiction and authority of the trial court on remand…" Indeed, the Supreme Court affirmed the trial court's order pertaining to Teter's plat because the Supreme Court did not find "plain error"

"…such that the jury's verdict becomes a miscarriage of justice…" JA 16. After reversing as to the prescriptive easement, the Supreme Court then simply remanded the matter "…for entry of an order consistent with this decision." If the trial court's jurisdiction on remand was limited to the plat adopted by the jury, then the trial court exceeded the scope of its jurisdiction by adopting new evidence, Teter's newly revised plat.

On remand, the Supreme Court left the trial court to determine, per the jury approved plat, how and where the right-of-way would be located on Petitioner's property. This is when the literal roadblock occurred for Respondent. Teter encountered issues during the process of locating the right-of-way on Petitioner's property. Respondent' s surveyor ran the right -of-way into pre-existing structures. Thus, it was discovered that Teter's plat, which had been approved by the jury and relied upon by the Supreme Court, would not physically work.

The trial court had jurisdiction over the newly discovered evidence under Rule 60(b) along with the jurisdiction and authority to properly apply the principles of equity in entering the injunction, but the trial court failed to properly apply its jurisdiction on remand.

In summary, in paragraphs 1-6 Respondent offers no substantive response to Petitioner's underlying point–when Teter attempted to place the right-of-way on the ground he ran it though pre-existing structures (fence posts remaining in an old fence line) that blocked Respondent's use of the right-of-way. *Respondent does not deny that Teter has run the right-of-way through a pre-existing fence line.* Therefore, on remand before the trial court, unless the parties reached an agreement regarding this new evidence, the trial court was required to balance the equities and issue an injunction against either or both of the parties. Respondent's glib response ignores the principles of equity applicable to an injunction and further ignores the fact that one was issued. Resp. Br, p. 2 ¶ 3.

Respondent approaches Petitioner's Statement of the Case, subpart C., found in paragraphs 7A-7J, much the same.

- 7A-7B. In paragraphs 7A and 7B Respondent simply feigns that Teter did not alter and revise the plat that was approved by the jury ignoring the record cited by Petitioner on pp. 4, 5, JA 52, JA 169 in which Teter admitted to changing his plat and falsely claimed that his points followed the "same existing driveway." *See* JA 169 demonstrating Teter's points running the right-of-way off the driveway to the north.
- 7C, 7E-7I. In paragraphs 7C and 7E - 7I, pages 4-5, Respondent again ignores the fact that the trial court was required to address the issuance of an injunction and did so, ordering the removal of fence posts on Petitioner's property. And Respondent does not deny that the fence posts that the court ordered removed are in the fence line existing when Teter claims he put the right-of-way points on his 1992 plat. *See* Resp. Br. p. 4, ¶ 7E.
- 7D and 7J. In paragraphs 7D and 7J, Respondent recaps the trial court's refusal to consider the new evidence before it on remand–the evidence that Teter was unable to properly locate the right-of-way on Petitioner's property using his 1992 plat. Respondent leaves out the fact that the trial court did consider Respondent's own new evidence, a revised plat. Indeed, Respondent successfully urged the trial court to ignore the errors in Teter's work and simultaneously sidestep the prerequisite mandates for the issuance of the injunction that became necessary because of errors in Teter's work. Since the trial court considered Respondent's new evidence, then it was required to

consider Petitioner's relevant new evidence. That was the point of Petitioner's 60(b) Motion.

V. REPLY TO RESPONDENT'S SUMMARY ARGUMENT

On remand, Teter was ordered to mark, on the ground, the right-of-way. Respondent incorrectly concludes that the right-of-way's location "was proven" simply because Teter placed points on Petitioner's property. Respondent's circular reasoning ignores the purpose for which the trial court conducted evidentiary proceedings on remand. Had the trial court not been left with a question of fact to be resolved, it could have simply, s*ua sponte*, ordered Teter to record his plat and mark his locations on Petitioner's property. This it did not do.

On remand, the trial court, sitting without a jury, undertook to factually determine the location of the right-of-way on Petitioner's property. The right-of-way's location on the land had not been factually confirmed by the jury. Attempting to correct mistakes on his old plat, Teter offers the trial court a new plat, which new evidence the court accepted. The trial court accepted Respondent's new evidence but failed to permit and consider Petitioner's evidence that the location was wrong. Instead, the court ordered Petitioner to remove pre-existing structures, which structures conclusively prove that Teter's location was wrong. Respondent provided nothing of substance to support his drafted final order. That final order adopted *in toto* by the trial court failed to contain anything other than insufficient conclusory findings supporting the location of the right-of-way and contained no findings to support the injunction that the trial court issued.

VI. STATEMENT REGARDING ORAL ARGUMENT

The parties agree that oral argument under Rule 19 is appropriate and that the appeal may properly be resolved by memorandum decision.

VII. ARGUMENT

Standard of Review.

Petitioner has argued that a *de novo* standard of review will apply to this appeal because the trial court failed to "...enter any findings of fact or conclusions of law to support granting Respondent an injunction." *See* top P. 17 of Pet's Br. Respondent argues that *Ringer v. John,* 203 W. Va. 687, 690, 742 S.E.2d 103,106 (2013) is inapplicable, although the trial court's failure to apply the principles governing its injunction order is decidedly a question of law governed by that decision and others like it. *See* top p. 7, Resp. Br. A fundamental error in the trial court's final order is the court's failure to conduct proper proceedings and enter findings incident to the issuance of the injunction. Therefore, this Court's review of the most fundamental error committed by the trial court is *de novo*.

A. The Lower Court Erred In That, After The Remand, It Improperly Allowed Plaintiff Respondent's Surveyor Teter To Replace The Plat Which Had Been Adopted By The Supreme Court In The First Appeal But Then Refused To Consider And Resolve The Fact That When Teter Placed, At The Court's Direction, Markers On The Ground, It Exposed The Fact That Teter's Plats Ran The ROW Through Pre-existing Structures And His Plats Were Therefore Invalid.

In his response to the above assignment of error, Respondent again finds it necessary to ignore the fact that Teter revised the plat on remand that he previously submitted to the jury. *See* p. 7, Resp. Br. Respondent flippantly further asserts that it is irrelevant that the surveyed right-of-way went through a pre-existing fence line even though the result was the issuance of the injunction Respondent requested to remove posts remaining in that fence line. Ironically, Respondent acknowledges that Rule 52 requires findings and conclusions of law in the granting of an injunction. Since findings and conclusions are required for the issuance of an injunction Respondent finds himself in the unenviable position of feigning that no injunction was issued. *See* Resp. Br. top p. 10.

In an effort to wrongfully imply that Petitioner agreed with Teter's findings, Respondent quoted only a select portion of the transcript. Resp. Br. pp 8-9. Petitioner has never agreed with Teter's findings. Respondent's use of that inquiry is misleading.

First, it should be noted that the marked points at the top of Petitioner's driveway are the points that take the right-of-way off to the north of the driveway that Teter testified the right-of-way followed. [4]

Second, Respondent has again avoided addressing the new replacement points Teter identified on his revised plat which begin with the grant's description as the right-of-way leads from Route 24.

Third, Teter has avoided addressing the replacement points which do not comport with the jury approved plat. The trial judge did not ask about those points that Teter changed leading from Route 24. *Conspicuously, Teter never located these replacement points that lead from Route 24 though ordered to do so in the trial court's order on remand. JA 22.*

Teter's failure to attempt to mark the points "a," "b" and "c" at the beginning of the grant's description demonstrates that Teter knows his work is erroneous. In fact, Teter conceded that points "a," "b," and "c," were not the same as the points on his 1992 plat, which he was to use to locate the right-of-way on the ground. JA 52.

The trial court should have required Teter to locate these new points (a, b, and c) leading from Route 24. No one interfered in any way with Teter's placement of markers for those new points (a, b, and c).[5] The court should have required Teter to explain why his description took

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[4] *See* quotations on page 8, Resp. Br., referring to the markers Teter placed on the land according to the 1992 survey being those commencing near the top of the drive entry that veer off to the north of the driveway.

[5] In his Brief, Respondent deflects to Tice's objection to Teter adding additional points in the center of his field between existing markers. Those additional points are not the subject of this appeal.

the right-of-way north of the driveway it was to have followed and through a pre-existing fence line. The trial court should have required Teter to address the discrepancies in his work product.

Instead, the court refused to permit Petitioner to demonstrate, through his surveyor, how the revised points leading up the driveway vary wildly from the driveway's location, further demonstrating that Teter could not locate the right-of-way from his 1992 plat. *See* JA 113 cutting Petitioner's presentation of evidence short, even cutting off counsel's proffer of what that evidence would be. Teter's inability to locate the right-of-way as it leaves Route 24 further demonstrates that the 1992 plat is simply wrong. If the beginning points of the granted right-of-way are wrong, then those that follow will be wrong. The court should have overruled Respondent's constant objections and followed this evidence.

Petitioner sought to demonstrate that the right-of-way as located by Teter would not only require removal of remaining fence posts but would have run it against the front of the old house that was located on Petitioner's property in 1992. *See* JA 9 referring to the 1930s house and *see* JA 341, in which the Court would not even afford counsel the right to submit a proffer of his evidence. The court's restrictions were inconsistent with the purpose of the remand and the evidentiary hearings conducted thereunder.

Petitioner's Rule 60(b) motion was proper because the purpose of the remand hearings was to factually establish the location of the right of way. In his Brief, Respondent simply ignores the facts uncovered in the hearing process. Respondent ignores the fact that Teter's markers take the right-of-way through a pre-existing fence line to the north of Petitioner's driveway, contrary to his trial testimony on the direction of the right of way. *See* Petr's Br., pp. 4-6, Resp. Br. p. 9. Respondent then leaps to the indefensible conclusion that Rule 52, requiring findings to support the trial court's order denying the Rule 60(b) motion, is inapplicable. The

court's conclusory findings from the order Respondent's counsel prepared are quoted, ignoring all the above discrepancies Petitioner sought to have the court address. Resp. Br., p. 10. Nonetheless, Respondent acknowledges that findings and conclusions must accompany the issuance of an injunction (*see* Resp. Br. top of page 11), which again explains why Respondent must feign that an injunction was not issued.

Thus Petitioner has aptly complained in this appeal that the trial court did not fully comply with the purpose and intent of the Supreme Court's remand, "…to prevent a cloud on Petitioner's title and to protect the reputation of the proceedings before the trial court,…" (quoted in Resp. Br, p. 12).[6] Respondent dismisses Petitioner's complaint out of hand thereby avoiding addressing the above point and the effect of the orders Respondent submitted and adopted *in toto* by the court. Resp. Br. p. 12.

The trial court should have addressed the newly discovered evidence that Teter could not properly locate the right-of-way on Petitioner's property. In fact, Teter could not even properly locate it using his revised plat. JA 166, JA 167. Instead of addressing that evidence, the court entered an order which served to malign Petitioner by unnecessarily publishing the award of the injunction against him in a one-sided order submitted by Respondent's counsel, which Order Respondent is entitled to record indexed to Petitioner's deed. JA 370. The recording of the Court's final order is entirely unnecessary. That is because Respondent's attorney had already prepared, submitted, and caused to be entered an order from the hearing conducted on March 4, 2022, which permitted recordation of Teter's said revised plat. JA 219.

[6] The first aspect of that process on remand was the entry of an order removing reference to prescriptive easement (JA 19 dated July 6, 2021). However, counsel has learned during these appellate pleadings that said corrective order required by the Supreme Court was never recorded amongst the county deed books as directed therein.

On a whole new tangent, Respondent makes light of Petitioner's construction of his garage apartment, claiming Petitioner placed it in the path of the designated right-of-way. Resp. Br. p. 12. But Respondent fails to mention that he waited until after that structure was built to have his current attorney disclose Teter's 1992 plat, which contained Teter's sketch of the right of way. Up to that point, Petitioner had no way of knowing that Respondent would attempt to locate the right-of-way in the path of Petitioner's garage apartment instead of taking it to the south around the area of the structure in accord with the stated intent of the grant. *See* Petr.' Br. pp 5-7 with citations to the record. Respondent does not mention that during the entire time the garage apartment was under construction, he claims to have been passing through the project area.

The above facts and factors are reasons why the trial court should have considered the application of The Third Restatement of Property, Servitudes § 4.8(3) and the need to relocate the right-of-way. Once it was established that the language of the grant was inadequate and that even Teter could not properly locate the right-of-way on Petitioner's property, the provisions of the Restatement became relevant in the proceedings. It cannot be sincerely claimed that the language in the grant provided both the specific location and dimensions of the right-of-way. Otherwise, a professional surveyor such as Teter would have been able to accurately locate the right-of-way on Petitioner's property. In fact, Teter's reason for ignoring the location of the grant's one structural landmark, the old toolshed, was that "he did not see a building in the picture that clearly appeared to be a tool shed." JA 11.

Therefore, the trial court erred in failing to consider and pursue the evidence that was before the court in accordance with Rule 60(b).

B. The Lower Court Erred In Refusing To Consider Petitioner Tice's Motion To Amend Its Post Appeal Final Order And Grant Petitioner A Tailored Injunction To Equitably

Locate The Right-Of-Way and Erred in Granting Respondent Veach A Mandatory Injunction For Removal Of Pre-existing Structures Without Consideration Of The Prerequisite Findings For Granting An Injunction.

Petitioner's use of the term "tailored injunction" is intended to refer to an injunction which would have appropriately addressed the needs of both parties. It would have balanced the equities between them. It would have provided Respondent with the access he is to be afforded while narrowing the injunction to avoid destroying the value and practical use of Petitioner's small farm/residential property. There is nothing novel about the components of an injunction ruling, well established in West Virginia case law. *See* Petr's. Br. p.19. Respondent does not dispute that each requirement set forth in Petitioner's Opening Brief applies to the issuance of an injunction. Instead, Respondent nonsensically asserts that because he and the trial court ignored the requirements for issuance of an injunction, that proves none was issued. *See* Resp. Br. p. 15.

While Respondent states that the concept of the tailored injunction was not pled until after the initial evidentiary hearing on remand, he fails to mention that Petitioner sought to have the court consider it during the initial hearing and the court declined to address it at that time. *See* Resp. Br. footnote 4, p. 13. At the initial hearing on March 4, 2022, the court indicated that it would not consider injunctive relief at that time and took the matter under advisement. *See* Petr. Br. pp. 6-7. Petitioner's request before the trial court was proper. Respondent had prayed for an injunction in his own complaint. On remand, it became apparent that the aforementioned structures were blocking Teter's right-of-way location. Again, neither Respondent nor his surveyor Teter deny that the fence line was there when Teter dated his 1992 plat. Teter has not even suggested that he "doesn't recall seeing it," in contrast to his failed recollection of the tool shed.

Respondent knew, when filing his suit, that he would likely need to obtain an injunction over the hotly contested right-of-way path he chose. As pointed out *supra*, Respondent had

waited until June 2009 (after Petitioner had constructed his garage apartment structure) to disclose surveyor Teter's 1992 plat. JA 192. Respondent and Teter knew before disclosing this plat that the designated right-of-way path would land directly in front of Petitioner's structure, and Teter knew, or should have known, that the right-of-way depicted on this 1992 plat would run through the pre-existing fence line and existing posts, and even dangerously close to the front of the 1930's house referred to in the Supreme Court's order remanding the case. JA 9.

Respondent Veach must underhandedly skirt the issuance of the trial court's injunction for the following reasons:

- During the recent proceedings, it became obvious that Teter's 1992 plat did not even conform with Teter's testimony but veered off Petitioner's driveway to the north into the pre-existing fence line where posts remain.
- The fact that an injunction was required to remove 1992 pre-existing structures before Respondent could use the path chosen is compelling proof that Teter's survey is simply defunct.
- Even Teter's post-trial revised plat, in which he changed the calls at the beginning of the right-of-way where it leads from Route 24, did not bring the right-of-way within Petitioner's driveway as Teter has claimed it exists.
- The fact that it was necessary for the trial court to order the removal of pre-existing structures (fence posts and gate that Respondent testified at trial he had routinely passed through) (JA 9-10), constituted newly discovered evidence and strong support for Petitioner's Rule 60(b) motion which was dismissed out of hand by the trial court. The court was required to decline Teter's plats at that time and consider Petitioner's evidence as to the correct location of the right-of-way.

- It is beyond question that the issuance of the injunction required compliance with the prerequisite procedures and findings, including balancing the equities between the parties.
- While balancing the equities, the trial court would be compelled to consider the consequences of the injunction and the need to tailor, fashion, and narrow the injunction to meet the needs of both parties.
- Respondent cannot deny that he has multiple alternative entry points into his property holdings. A proper injunction hearing will expose Respondent's dogged insistence on a course that causes Petitioner the greatest damage to his property. A proper injunction hearing will reveal that Respondent's dogged insistence on the designated course has more to do with diminishing Petitioner's property value than gaining convenient access. Perhaps Respondent aims to add Petitioner's property to his adjoining tracts and knows Petitioner is not interested in selling.

VIII. CONCLUSION

This Court should reverse and remand the case back to the trial court requiring it to conduct proper proceedings under Petitioner's Rule 60(b) motion and proper proceedings pursuant to any injunction the trial court may deem necessary in this matter.

Respectfully submitted this 13th day of November, 2023.

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(Civil Action 17-C-125)

CERTIFICATE OF SERVICE

I, Braun a. Hamstead, counsel for the Petitioner, Phillip D. Tice, in this action do hereby certify that a true and correct copy of **Petitioner's Reply Brief** was electronically filed with the Clerk of the Court using the Court's E-Filing system, File and ServeXpress (FSX), on this 13th day of November, 2023, which will send notification of such filing upon the below listed counsel of record:

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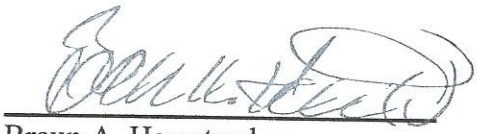

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