

IN THE SUPREME COURT OF THE STATE OF NEVADA

BARTHOLOMEW MAHONEY
Appellant,

vs.

BONNIE MAHONEY
Respondent.

Supreme Court No. 82412/82413
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APPELLANT'S OPENING BRIEF

Appeal from an Order Granting Respondent's Motion to Reduce Arrearages,
Interest, and Penalties to Judgment; to Modify Alimony; to Review Child
Support, for Sanctions and Attorney's Fees and Costs, Eighth Judicial District
Court, Honorable Vincent Ochoa

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BARTHOLOMEW MAHONEY
Appellant,

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Supreme Court No. 82412/82413

District Court No. D-13-477883-D

NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed.

1. Bartholomew Mahoney is an individual
2. Aaron D. Grigsby of the Grigsby Law Group represented appellant in the district court and have appeared in this Court.
3. No publicly traded company has any interest in this appeal.

These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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ROUTING STATEMENT

Family law cases are presumptively assigned to the Nevada Court of Appeals¹.

¹ NRAP 17(b)(5)

STATEMENT OF ISSUES

- I. DID THE DISTRICT COURT VIOLATE BARTHOLOMEW MAHONEY'S RIGHT TO DUE PROCESS BY FAILING TO NOTICE HIM OF THE EVIDENTIARY HEARING?
- II. WHETHER THE DECEMBER 28, 2020, ORDER WAS SUPPORTED BY SUBSTANTIAL EVIDENCE?
- III. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN AWARDING ATTORNEY'S FEES?

STATEMENT OF THE CASE

The facts which will be set forth herein will be set forth as they appear and were presented in case number D-13-477883-D, in the Eighth Judicial District, before the District Court Judge Vincent Ochoa, granting Respondent, Bonnie Mahoney's Motion to Reduce Arrearages, Interest, and Penalties to Judgment; to Modify Alimony; to Review Child Support for Sanctions and Attorney's Fees and Costs entered December 28, 2020, as well as the Appellant's Appendix filed herewith. The December 3, 2020, evidentiary hearing was held without the presence of Bartholomew Mahoney. Mr. Mahoney was not properly noticed of the December 3, 2020, evidentiary hearing.

STATEMENT OF FACTS

The parties were divorced by Decree on February 8, 2016¹. The parties have two minor children at the time of the divorce; Brigitte Mahoney born October 29, 2001, and Sophia Mahoney born June 12, 2004². The Decree gave Bonnie Mahoney primary physical custody of the parties' minor children³. On May 9, 2019, Bonnie filed a Motion to Reduce Arrears and Penalties to Judgment⁴. Bart

¹ AA00001-12

² AA000004

³ AA000004

⁴ AA000013-34

Mahoney filed his Opposition on August 21, 2019⁵ and Bonnie filed her Reply on October 4, 2019⁶.

On November 13, 2019, the district court set the matter for evidentiary hearing on May 7, 2020, at 1:30 pm⁷. The undersigned filed a Motion to Withdraw as counsel for Bartholomew Mahoney in March 2020⁸. An Order allowing the undersigned to withdraw as the attorney of record was filed on April 28, 2021⁹. Thereafter, counsel for Bonnie entered into a Stipulation and Order with Bartholomew Mahoney to continue the May 7, 2020, evidentiary hearing¹⁰. The evidentiary was rescheduled for October 29, 2020, at 1:30 pm¹¹.

On September 17, 2020, the district court rescheduled the evidentiary for December 3, 2020, at 9:15 am¹². The district court failed to serve the Notice of Rescheduling of Hearing on Bartholomew Mahoney¹³. Bonnie subsequently claims to have served the Notice of Rescheduling of Hearing on Mr. Mahoney¹⁴.

⁵ AA000192-213

⁶ AA000219-236

⁷ AA000254-259

⁸ AA000277-284

⁹ AA000289-292

¹⁰ AA000293-297

¹¹ AA000293-297

¹² AA000298-299

¹³ AA000298-299

¹⁴ AA000300-303

An Order Setting Evidentiary Hearing was filed on October 4, 2020¹⁵. The Certificate of Service attached to the Order Setting Evidentiary Hearing list Bartholomew Mahoney but is silent as to how and if it was actually served¹⁶. At the December 3, 2020, hearing the district court made a finding “that Bart was fully noticed about the December 3, 2020, Evidentiary Hearing¹⁷.”

JURISDICTIONAL STATEMENT

Bartholomew Mahoney has standing to appeal. This is an appeal from a final judgment¹⁸. The Nevada Rules of Appellate Procedure Rule 3A provides in pertinent part:

- (a) Standing to Appeal. A party who is aggrieved by an appealable judgment or order may appeal from that judgment or order, with or without first moving for a new trial;
- (b) Appealable Determinations. An appeal may be taken from the following judgments and orders of a district court in a civil action:
 - (1) A final judgment entered in an action or proceeding commenced in the court which the judgment is rendered.

The district court did not properly notice of the December 3, 2021, evidentiary hearing to Bartholomew Mahoney. The hearing was held without the

¹⁵ AA000304-308

¹⁶ AA000308

¹⁷ AA000392

¹⁸ NRAP 3A(b)(1)

presence of Mr. Mahoney and amounted to a one sided presentation of evidence. A final order was entered on December 28, 2020¹⁹, and an order granting attorney's fees and costs entered on January 11, 2021²⁰.

SUMMARY OF ARGUMENT

The district court rescheduled the evidentiary hearing in this matter and failed to properly notice Bartholomew Mahoney. There is no evidence that the district court ever noticed Mr. Mahoney of the rescheduled hearing date. The December 3, 2020, hearing was conducted without the presence of Bartholomew Mahoney. Having the matter without the presence of one of the parties, was not a judgment on the merits. This led to a deeply flawed and erroneous judgment. Bonnie Mahoney.

Without the presence of Mr. Mahoney, the December 3, 2020, hearing amounted to a prove-up on a default judgment. Bonnie took advantage if Bartholomew's absence to obtain judgments in direct violation of Nevada law.

ISSUES PRESENTED

1. Did the district court violate Bartholomew Mahoney's right to Due Process by failing to notice him of the evidentiary hearing?
2. Whether the December 28, 2020, Order was supported by substantial evidence?

¹⁹ AA000391-454

²⁰ AA000485-498

3. Whether the district court abused its discretion in awarding attorney's fees?

ARGUMENT

I. THE DISTRICT COURT VIOLATED BARTHOLOMEW MAHONEY'S RIGHT TO DUE PROCESS BY FAILING TO NOTICE HIM OF THE EVIDENTIARY HEARING

The constitutional guarantee of due process of law, found in the Fifth and Fourteenth Amendments to the U.S. Constitution, prohibits all levels of government from arbitrarily or unfairly depriving individuals of their basic constitutional rights to life, liberty, and property. Procedural due process limits the exercise of power by the state and federal governments, by requiring that they follow certain procedures in criminal and civil matters. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment²¹." In analyzing due process requirements, the Nevada Supreme Court has long held that the most basic requirement of due process, is the opportunity to be heard at a meaningful time and in a meaningful manner²².

[T]he Constitution recognizes higher values than speed and efficiency.

Indeed, one might fairly say of the Bill of Rights in general, and the Due Process

²¹ Mathews v. Eldridge, 424 US 319, 332; 96 S Ct 893 (1976)

²² Kirkpatrick v. Eighth Judicial District Court, 118 Nev. 223, 43 P.3d 998 (2002)

Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones²³. The firmly established policy of the State of Nevada is that "justice is best served when controversies are resolved on their merits whenever possible."²⁴

On November 13, 2019, the district court set the matter for evidentiary hearing on May 7, 2020, at 1:30 pm²⁵. The undersigned filed a Motion to Withdraw as counsel for Bartholomew Mahoney in March 2020²⁶. An Order allowing the undersigned to withdraw as the attorney of record was filed on April 28, 2021²⁷. Thereafter, counsel for Bonnie entered into a Stipulation and Order with Bartholomew Mahoney to continue the May 7, 2020, evidentiary hearing²⁸. The evidentiary was rescheduled for October 29, 2020, at 1:30 pm²⁹.

²³ Stanley v. Illinois, 405 US 645, 650-51; 92 S. Ct 1208 (1972)

²⁴ Gutenberger v. Continental Thrift and Loan Company, 94 Nev. 173, 175, 576 P.2d 745 (1978), Yochum v. Davis, 98 Nev. 484, 653 P.2d 1215(1982), Lesley v. Lesley, 113 Nev. 727, 941 P.2d 451 (1997)

²⁵ AA000254-259

²⁶ AA000277-284

²⁷ AA000289-292

²⁸ AA000293-297

²⁹ AA000293-297

On September 17, 2020, the district court rescheduled the evidentiary for December 3, 2020, at 9:15 am³⁰. The district court failed to serve the Notice of Rescheduling of Hearing on Bartholomew Mahoney³¹. Bonnie subsequently claims to have served the Notice of Rescheduling of Hearing on Mr. Mahoney³². An Order Setting Evidentiary Hearing was filed on October 4, 2020³³. The Certificate of Service attached to the Order Setting Evidentiary Hearing list Bartholomew Mahoney but is silent as to how and if it was actually served³⁴. At the December 3, 2020, hearing the district court made a finding “that Bart was fully noticed about the December 3, 2020, Evidentiary Hearing³⁵.”

“Findings of fact of the district court will not be set aside unless clearly erroneous.³⁶” “A finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed³⁷.”

The district court’s ruling that Mr. Mahoney was fully noticed about the December 3, 2020, evidentiary hearing is clearly erroneous. Fundamental fairness

³⁰ AA000298-299

³¹ AA000298-299

³² AA000300-303

³³ AA000304-308

³⁴ AA000308

³⁵ AA000392

³⁶ Hermann Trust v. Varco-Pruden Buildings, 106 Nev. 564, 566, 796 P. 2d 590, 591-92 (1990)

³⁷ Unionamerica Mtg. v. McDonald, 97 Nev. 210, 211-12, 626 P. 2d 1272, 1273 (1981) (quoting United States v. Gypsum Co., 333 U.S. 364, 395 (1948))

requires the district court to provide to a proper person litigant all information regarding modification of any court dates. The Nevada Supreme Court has long held that a district court is without jurisdiction to try a case on the merits when proper notice of the trial is not given³⁸. The record is devoid of any evidence demonstrating that the district court noticed Bart of the December 3, 2020, evidentiary hearing. Based on the record, the district court appears to rely on the representations of Bonnie and her counsel regarding notice to Mr. Mahoney³⁹.

What is clear from reviewing the record is that the Notice of Rescheduling Hearing was not served on Bartholomew Mahoney⁴⁰. The Order Setting Evidentiary Hearing does list Mr. Mahoney on the certificate of service but does not actually whether or how it was served upon Mr. Mahoney⁴¹. Counsel for Bonnie also claims to have served Bartholomew with the Notice of Rescheduling. The Nevada Supreme Court has long held, “something as fundamental and decisive as service is best taken away from the parties or their counsel or counsel’s employees⁴².”

For obvious reasons, the veracity of Bonnie and her counsel regarding service of the Notice of Rescheduling of Hearing is subject to scrutiny. The

³⁸ Roberts Mining & Milling Co. v. Third Judicial Dist. County, 56 Nev. 299, 50 P.2d 512 (1935)

³⁹ AA000501

⁴⁰ AA000298-299

⁴¹ AA000308

⁴² Sawyer v. Sugarless Shops, 106 Nev. 265, 792 P.2d 14 (1990)

district court had the sole responsibility to notice Mr. Mahoney of the new date for the evidentiary hearing. The district court failed to notice Bartholomew Mahoney of the rescheduled evidentiary hearing. As such, it denied him a meaningful opportunity to present evidence which resulted in a flawed and erroneous order.

The district court sent several notices of the trial date to Bartholomew's prior counsel. In fact, when counsel did not respond to the notices sent by the district court, the district court prior counsel regarding an outstanding pretrial memorandum. Once the district court has informed that it had overlooked the withdrawal of counsel for Bartholomew Mahoney, the better approach would have been for the district court to have extended the same courtesy of a phone call to Mr. Mahoney.

The December 3, 2020, hearing was not a hearing on the merits. It was a one sided presentation of facts that resulted in a manifestly unjust and erroneous order. Further, due to the world wide pandemic, access to the Regional Justice Center was restricted. Mr. Mahoney would submit that the district court's duty to ensure that a proper person litigant was informed of all court dates was heightened while access to the court house was limited because of the pandemic.

Bartholomew Mahoney was denied due process of law and December 28, 2020, and January 11, 2020¹, Orders should be reversed and remanded for a hearing on the merits.

II. WHETHER THE DECEMBER 28, 2020, ORDER WAS SUPPORTED BY SUBSTANTIAL EVIDENCE

An arbitrary or capricious exercise of discretion is one “founded on prejudice or preference rather than on reason,” or “contrary to the evidence or established rules of law⁴³.” A manifest abuse of discretion is “[a] clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule⁴⁴.” “Manifest abuse of discretion does not rule from a mere error in judgment, but occurs when the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable or result of partiality, prejudice, bias or ill will⁴⁵.”

It has long been the policy of this Court to have cases tried on their merits⁴⁶. Nevada requires that matters involving child custody and child support be decided on their merits⁴⁷. A hearing in which only one party is allowed to participate cannot be a hearing on the merits. Without the presence of Mr. Mahoney, counsel for Bonnie had carte blanche as to the issues and evidence presented to the district court.

⁴³ Black’s Law Dictionary, 119 (9th ed. 2009)(defining “arbitrary”) and 239 (defining “capricious”)

⁴⁴ State v. Eighth Judicial District Court, 127 Nev. 927, 267 P.3d 777 (2011)

⁴⁵ Blair v. Zoning Hearing Bd. Of Tp. Of Pike, 676 A. 2d 760, 761 (Pa. Commw. Ct. 1996)

⁴⁶ Yochum v. Davis, 98 Nev. 484, 653 P.2d 1215 (1982)

⁴⁷ Blanco v. Blanco, 129 Nev. 732, 311 P.3d 1170 (2013)

Bartholomew Mahoney was denied to opportunity to present evidence that one of the parties minor children was residing with him full-time. Additionally, the December 28, 2020, Order awarded Bonnie child support for a child that had already reached the age of majority. This resulted in Bonnie receiving an extra 3 months of child support for a 19-year old subsequent to her graduation from high school. A district court lacks authority to make a child support award regarding a child beyond the age of majority⁴⁸. The resolution of the child support issue by default is impermissible and is a denial of due process.

This December 3, 2020, Order was the equivalent of a prove-up on a matter resolved by default or summary judgment. A litigant has the right to a trial where there is the slightest doubt as to the facts⁴⁹. Due to the absence of Mr. Mahoney, Bonnie was able to make a one sided presentation of the facts resulted in tens of thousands of dollars in erroneous findings by the district court. For example, pursuant to the Stipulated Decree of Divorce, Bartholomew Mahoney was also required to pay Bonnie twenty-five (25%) of his annual bonuses for a four (4) year period commencing September 1, 2015⁵⁰. The district court awarded Bonnie approximately \$80,000.00 in bonuses that occurred prior to the September 1, 2015,

⁴⁸ Ellett v. Ellett, 94 Nev. 34, 573 P.2d 1179 (1978)

⁴⁹ Stone v. Mission Bay Mortgage Co., 99 Nev. 802, 672 P.2d 629 (1983)

⁵⁰ AA000007

commencement date outlined in the Decree⁵¹. If the correct ruling is clear, however, refusing to follow it is an abuse of discretion⁵². Additionally, the language of the Decree limited the division of bonuses to the annual bonus received by Mr. Mahoney. Bonuses received by Mr. Mahoney outside of the annual bonus were included in the award granted to Bonnie in the December 28, 2020, Order.

What makes the December 28, 2020, Order even more egregious is the fact that the district court allowed Bonnie to combine the erroneous child support and spousal support awards then applying penalties and interest to the total in violation of Nevada law. During the course of the litigation, Bonnie filed a schedule of arrearages on three separate occasions⁵³. On each of her schedule of arrearages, Bonnie improperly assessed interest and penalties to spousal support, attorney's fee, cost and bonuses. The schedule of arrears presented to the district court during the December 3, 2020, evidentiary hearing lumped together spousal support and assessed interest and penalties for both. No provision under Nevada law permits the calculation of penalties and interest for alimony arrears at the same level as child support arrears. When there is a question of law or the application or statement of the law at issue on appeal the Nevada Supreme Court "is obligated to

⁵¹ AA000398-99

⁵² Fabbi v. First Nat'l Bank of Nev., 62 Nev. 405, 414, 153 P.2d 122, 125 (1944)

⁵³ AA000035- ; AA000237-242; AA000342-380

make its own independent determination on this issue, and should not defer to the district court's determination⁵⁴.” The district court modified child support retroactively to June 1, 2019, but applied the child support calculation that went into effect on February 1, 2020, for the time period from June 1, 2019, to February 1, 2020.

The February 8, 2016, Stipulated Decree of Divorce has no provision to apply interest to any delinquent payments as to spousal support, attorney's fees and bonus payments. The only remedy outlined in the Stipulated Decree of Divorce was that Bonnie would receive a larger percentage of the bonuses if Mr. Mahoney failed to make timely payments. Where a document is clear on its face, it will be construed from the written language and enforced as written⁵⁵. The written language of Decree of Divorce clearly outlines all of the terms of the settlement agreement. Contracts will be construed from their written language and enforced as written⁵⁶. Where "a written contract is clear and unambiguous on its face, extraneous evidence cannot be introduced to explain its meaning⁵⁷."

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN AWARDING ATTORNEY'S FEES AND COSTS

⁵⁴ Sheehan & Sheehan v. Nelson Malley and Co., 121 Nev. 481, 486, 117 P.3d 219, 223 (2005)

⁵⁵ Ellison v. California State Auto Ass'n, 106 Nev. 601, 603, 797 P.2d 975, 977 (1990)

⁵⁶ Kaldi v. Farmers Ins. Exch., 117 Nev. 273, 278, 21 P.3d 16, 20 (2001)

⁵⁷ Geo. B. Smith Chemical v. Simon, 92 Nev. 580, 582, 555 P.2d 216, 216 (1976)

“The courts and text writers all concur that by ‘judicial discretion’ is meant sound discretion guided by fixed legal principles. It must not be arbitrary nor capricious, but must be regulated upon legal grounds-grounds that will make it judicial. It must be compelled by conscience, and not by humor. So that when a judge properly exercised his judicial discretion he will decide and act according to the rules and equity, and so as to advance the ends of justice⁵⁸.” Discretion is abused when a court makes a ruling “based its ruling on an erroneous view of the law⁵⁹.”

Although an award of attorney’s fees is within the discretion of the district court, the award must still be just and equitable. When making an award of attorney’s fees, the attorney’s fees must be reasonable, and the district court should make written findings as to the reasonableness of the fees⁶⁰. “The decision to award attorney’s fees is within the sound discretion of the district court, but an award made in disregard of applicable legal principles may constitute an abuse of discretion⁶¹.” A district court “abuse[s] its discretion [if] it granted an award of costs based upon the prevailing party’s submission of itemized materials that did

⁵⁸ Goodman v. Goodman, 68 Nev. 484, 489, 236 P. 2d 305, 306 (1951)

⁵⁹ Bergmann v. Boyce, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993)

⁶⁰ Brunzell v. Golden Gate Nat’l Bank, 85 Nev. 345, 455 P.2d 31 (1969)

⁶¹ Barozzi v. Benna, 112 Nev. 635, 639, 918 P.2d 301, 303 (1996)

not show how the costs were necessary to and incurred in the present action⁶².” In Foster v. Dingwall, the Nevada Supreme Court expressly held that a default did not imply a carte blanche approach to damages⁶³. Where a district court has abused its discretion with regard to an award of attorney’s fees, this Court may reverse the award⁶⁴. In the instant case, there were no findings, analysis or testimony to justify the award of attorney’s fees.

Costs are not to be automatically granted upon the submission of a verified memorandum. As the Nevada Supreme Court has repeatedly held, any submission of costs must be timely made and must be submitted with sufficient justifying documentation. The Nevada Supreme Court has stated it will reverse a district court that has abused its discretion in awarding fees and costs⁶⁵. A party must "demonstrate how such [claimed costs] were necessary to and incurred in the present action⁶⁶. The Motion seeking attorney fees and costs did not include a single receipt, spreadsheet or invoice demonstrating or supporting any of the costs it sought.

⁶² Village Builders, 96 L.P. b. U.S. Laboratories, Inc., 121 Nev. 261, 277, 112 P.3d 1082, 1093 (2005)

⁶³ Foster v. Dingwall, 126 Nev. 56, 227 P.3d 1042 (2010)

⁶⁴ Carrell v. Carrell, 108 Nev. 670, 836 P.2d 1243 (1992)

⁶⁵ Cadle Co. v. Woods & Erickson LLP, 131 Nev. 114, 345 P.3d 1049 (2015)

⁶⁶ Id.

A district court cannot award attorney's fees without stating its basis for the amount⁶⁷. Likewise, a district court must show that costs awarded were actually incurred and reasonable⁶⁸. Without these showings, this Court cannot evaluate the award's propriety⁶⁹. Finally, Bonnie was awarded a lump sum but the district court did not allocate that figure amount Bonnie's claimed fees and costs.

CONCLUSION

The Nevada Supreme Court has directed that cases should be heard on the merits. Given the weight of the law favoring a determination of cases on the merits and the due process requirements at issue, the district court erred by not providing Bartholomew Mahoney notice of the rescheduled evidentiary hearing. Additionally, the district court clearly made manifest errors due to the one sided presentation of facts and evidence. Based on the foregoing, Bartholomew Mahoney, respectfully requests that this Court reverse District Court's Order and remand the matter for an evidentiary hearing on the merits.

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⁶⁷ Henry Prods. Inc. v. Tarmu, 114 Nev. 1017, 1020, 967 P.2d 444, 446 (1998)

⁶⁸ Cadle Co., at 116

⁶⁹ Integrity Ins. Co. V. Martin, 105 Nev. 16, 19, 769 P.2d 69, 70 (1989)

DATED this 21st day of September, 2021

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(0)(5) and the type style requirements of NRAP 32(0)(6) because this brief has been prepared in a proportionally spaced typeface using 14 point font of the Times New Roman style.
2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points containing 3217 words.
3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 21st day of September, 2021

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 21st day of September, 2021, I submitted the forgoing Appellant’s Opening Brief for filing via the Court’s electronic filing system. A copy was served as follows:

BY ELECTRONIC FILING TO

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