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47-CV-2014-900160.00

Judge: DENNIS E O'DELL

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NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF MADISON COUNTY, ALABAMA

JENNIFER AHIA ET AL V. CAROLINE FANN ET AL
47-CV-2014-900160.00

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C001 AHIA JENNIFER

C002 AHIA JENNIFER AS NEXT FRIEND OF ELLA AHIA A MINOR

SUPPLEMENT

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IN THE CIRCUIT COURT OF MADISON COUNTY, ALABAMA

JENNIFER AHIA, et al.

Plaintiffs,

v. **CIVIL ACTION NO.: 2014- 900160**

CAROLINE FANN, et al.

Defendants.

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO THE ROPER DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This case involves a car collision on January 23, 2012. That morning, Defendant Caroline Fann ran a red light at the intersection of California Street and Fraser Avenue. At the scene, Fann admitted she was looking at her cellphone instead of the roadway. Fann crashed into the broadside of Plaintiff Jennifer Ahia's minivan. Jennifer and her daughter Ella suffered injuries. To date, Jennifer continues to require treatment for her injures.

Caroline Fann's negligence and wantonness is undisputed. The motion filed by the Roper Defendants does not dispute Fann's tortious conduct. Likewise, the motion does not contest plaintiffs' claims for uninsured/underinsured benefits.

The motion only addresses issues of negligent/wanton entrustment. At the time of the collision, Fann was driving a Ford Focus owned by Defendant Jeff Roper. Although Roper asserts he had no knowledge of Fann's incompetence in his motion, his later deposition revealed otherwise. In truth, Roper knew his son

had a problem with drugs requiring time in rehabilitation facilities and that his then-girlfriend Caroline Fann was a drug "addict." Incredibly, Roper knew the pair had his car hours before the collision while both were intoxicated and arguing. In deposition, Roper even described how the pair were drunken, arguing, and slurring their speech. Roper had a spare key available to remove his car quietly from an intoxicated and upset Caroline Fann's possession but chose not to do so. He left the car with two drunken drug addicts involved in an argument. Defendant Jeff Roper's request for summary judgment on entrustment should be denied.

NARRATIVE SUMMARY OF UNDISPUTED FACTS

A. Background of Roper Automotive

Defendant Jeff Roper ("Roper") owns and operates Roper Automotive. (Dep. Roper, p.24, 27-28). His business functions primarily as an automotive repair shop. (Dep. Roper, p.22).

Roper does not possess a license to sell cars. (Dep. Roper, p.35). Yet, from time to time, he buys and sells cars on the premises. (Dep. Roper, p.22). He obtains vehicles from customers who cannot afford to pay, or did not pay, for service. (Dep. Roper, pp.22-23). Roper owned the Ford Focus driven by Caroline Fann in the collision, for about a year. (Dep. Roper, pp.23-24). He purchased the car from an owner unable to pay for repairs. (Dep. Roper, p.23). He then prepared the Ford Focus for sale at Roper Automotive. (Dep. Roper, p.113). Caroline Fann totaled the car in this crash. (Dep. Roper, p.55).

B. The Ford Focus Could Not Be Taken From Roper Automotive Without Jeff Roper's Knowledge and/or Permission.

Each morning, Jeff Roper drove to Roper Automotive. Roper parked in the small lot at the front of the building where he could see all other cars, including the Ford Focus. (Dep. Roper, pp.95-96, Exhs 2,3). This lot is the only access to his building. (Dep. Roper, Exhs 2,3). As photographs show, it is a small lot in which Roper would have parked near and seen, the Ford Focus. (Dep. Roper, Exhs 2,3). A single front door leads to the waiting area. (Dep. Roper, Exhs 2,3,4).

At the end of the waiting area, a secured door leads to Roper's private office. (Dep. Roper, pp.98-99). That door remained locked whenever Roper was not physically present. (Dep. Roper, p.44). Roper typically did not leave during the day. He usually did not leave for lunch. If he did leave, he locked his personal office so it could not be accessed without his knowledge. (Dep. Roper, p.38).

In addition to keeping his office locked, Roper had multiple video cameras on site.[1] Anyone entering his personal office would have been recorded by at least three separate cameras. A camera records everyone entering the parking lot (where the Ford Focus was kept). (Dep. Roper, p.47). A camera records everyone entering the lobby/waiting area. (Dep. Roper, p.45). And, a camera records activities in Roper's personal office. (Dep. Roper, pp.45).

Equipment in Roper's locked office recorded everything from the cameras. (Dep. Roper, pp.45-49). To turn off the recorder a person would have already been

[1] Roper has been using the video recording system for over five (5) years. (Dep. Roper, p.44-45).

recorded by (1) the parking lot camera, (2) the lobby camera, and (3) the private office camera, before reaching and flipping the switch to stop further recording.

Roper kept the keys to his vehicles (including the Ford Focus) on a board in his locked office. (Dep. Roper, pp.39-40). A surveillance camera recorded the key board. (Dep. Roper, pp.45-46). He also kept a spare set of keys to each vehicle at his home. (Dep. Roper, p.75). "If – if I buy a car, I'll usually go get three to four [sets] made, put them up at home because you're going to lose a key." (Dep. Roper, p.75).

C. Roper Knew His Son Ryan Roper And Caroline Fann Were Incompetent Drivers.

Ryan Roper is Jeff Roper's son. (Dep. Roper, p.7). In an unrelated proceeding involving a collection matter, Jeff Roper answered Court papers attesting Ryan "[h]as never worked here! Ryan Roper took some comp. cks. But was never employed at Roper Automotive." (Garnishment Answer).[2] Yet, this statement to a court was untrue. Ryan has, and continues, to work for Roper Automotive for which he is paid. (Dep. Roper, p.13-14). Moreover, Jeff Roper supplies his son Ryan with keys to the shop. (Dep. Roper, p.78).

Roper provides his adult son Ryan an apartment. (Dep. Roper, pp.69-71). Ryan "does not have a steady job." (Dep. Roper, p.4). However, Ryan has been performing work for Roper Automotive for the last 20 years. (Dep. Roper, pp.13-14). Roper has paid his son with business funds. (Id.).

[2] *Crestwood v. Roper*, SM-2011-001459.00, Document Number Nine (9).

Ryan had significant drug addiction issues before the 2012 crash. Previously, Ryan spent time in drug rehabilitation at Cedar Lodge in Guntersville. (Dep. Roper, p.89). Roper also knew his son Ryan had prior legal problems due drugs and alcohol. (Dep. Roper, p.89). According to Alacourt, Ryan had previous drug charges involving Cocaine possession as well as several traffic citations. (AlaCourt Records).

Ryan had been dating Caroline Fann for months prior to the January 2012 collision. (Dep. Roper, p.15). Ryan brought Fann to Jeff Roper's home for dinners and to Roper Automotive. (Dep. Roper, pp.15-16). Jeff Roper knew Caroline Fann was a drug "addict." (Dep. Roper, p.10). He knew she liked to both drink and do drugs. (Dep. Roper, p.11). Roper knew both Ryan and Caroline were drunk in the hours leading up to the collision in this case. (Dep. Roper, p.83).

D. The Use Of Roper Automotive Vehicles.

Roper now claims he refuses permission for others to drive company cars, including his Ford Focus. Yet, he has no written rules/policies. (Dep. Roper, p.33). "I don't have anything written down." (Id.).[3] Roper further admits "I can't say that I have never let them borrow one of my cars." (Dep. Roper, pp.34-35).

Indeed, the evening before this collision, Roper and his wife were actually retrieving another company vehicle taken by his mechanic for a personal reason. (Dep. Roper, p.68). And, Roper did not even know the reason. (Id.).

[3] In the case at bar, Roper did NOT report the Ford Focus stolen when police initially investigated the wreck. He only reported it stolen a week later after the insurance company knew Mrs. Ahia suffered injury.

Incredibly, Roper answered discovery in this case claiming Caroline Fann had NEVER driven the Ford Focus previously. (Interrogatory Responses). Yet, after the collision, he admitted to police she had used the vehicle on a prior occasion. (Dep. Roper, Exh 5).

E. The Hours Leading Up To The Collison.

When he left work that evening, Roper and his wife went to an apartment complex to retrieve another Roper Automotive vehicle. (Dep. Roper, pp.67-69). Roper owned this small three-unit complex. (Dep Roper, pp.69-71). He provided one unit to his son Ryan and another to a Roper Automotive mechanic. (Id.). The Roper Automotive mechanic had taken a company truck for a personal use unknown to Jeff Roper. (Dep. Roper, pp.68-69). Roper is unsure as to whether or not he spoke with his mechanic that night. (Dep. Roper, p.73). He did not need to do so since he had spare keys to all his vehicles. (Id.).

Roper claims he immediately saw the Ford Focus upon arriving at the complex where his son and mechanic live. (Dep. Roper, p.71). Roper asserts he knocked on his son's door with the intent to re-obtain possession of the Ford Focus but his son did not answer. Roper then left. (Dep. Roper, p.73).

On the way home, Roper called his son. (Dep. Roper, p.81). He spoke with both Ryan and Caroline. (Dep. Roper, pp.81-82). He could tell they were drunk. (Dep. Roper, pp.82-84). And, they were slurring their speech. (Dep. Roper, p.84). Caroline was also crying due some altercation between the two. (Dep. Roper,

p.84). "They were having an all-out argument of some kind or something was going on, you know, and everything." (Id.).

Despite knowing Ryan and Caroline were involved in a drunken argument, Roper left his Ford Focus in their possession. (Dep. Roper, pp.84-85). He did not ask his mechanic living next door to help by disabling or taking the vehicle. (Dep. Roper, pp.82-85). He did not look for his spare keys to remove the vehicle from the drunken pair inside. (Dep. Roper, pp.82-83). He did not report the car stolen that night. He simply went home and went to sleep. (Dep. Roper, pp.84-87).

Later, Caroline drove. Roper believes "[t]hey [Ryan and Caroline] had gotten into it and she was getting away from him." (Dep. Roper, p.114). Hours later (Roper claims it was still nighttime even though the collision did not occur until daylight hours), Roper awoke to a phone call from the police informing him of the collision. (Dep. Roper, p.87).

F. The Aftermath Of The Collison

After leaving his car with the drunken pair, Roper went home and went to bed. Later, he awoke to a ringing phone. It was a call informing him of the collision. (Dep. Roper, pp.87-88). Roper repeatedly asserted the call came before daybreak. However, the collision did not occur until early morning – after school started. (Dep. Roper, Exh 6). Regardless, Roper immediately went to his office where he met with several people including his son Ryan and Caroline Fann. (Dep. Roper, pp.87-89). According to Roper, Caroline was still intoxicated. (Dep. Roper, pp.91-92).

A week later, when he was trying to force Caroline Fann to pay for the damaged Ford Focus and she did not immediately do so, Roper called the police and reported she had taken the vehicle without permission. (Dep. Roper, Exh 5). He told the police officer he was going to take legal action against her. (Dep. Roper, Exh 5). After Caroline Fann delivered all her personal valuables to him, Roper took no further action. (Dep. Roper, pp. 56,104). "She brought me her coin collection, some – all of her valuables, everything, not to prosecute her." (Dep. Roper, p.56). In Roper's interrogatory answers, he again asserted Caroline Fann took the Ford Focus from his business premises. (Dep. Roper, Exh 1). As with many other Roper assertions, this is simply not true.[4] In deposition, he finally admitted his son Ryan actually got the keys and took the vehicle from Roper Automotive. (Dep. Roper, p.116).

Although Roper now claims the Ford Focus was taken without permission, he did not tell the police this at the time of the collision. And, he's changed none of his policies to prevent other Roper Automotive cars from being used freely. (Dep. Roper, p.105). His son Ryan still works some for him despite continued drug problems requiring another period in rehabilitation. (Dep. Roper, p.93).

[4] Jeff Roper knows his accusation Caroline Fann took the Ford Focus from Roper Automotive is not true. He has the videotape to show what really happened. Yet, when asked about the tape, he made several excuses to avoid describing what it showed.

ARGUMENT

I. STANDARD OF REVIEW

Summary judgment is only proper when there is "no genuine issue of material fact and...the moving party is entitled to a judgment as a matter of law." *Dillard v. Pittway Corp.*, 719 So.2d 188 (Ala.1998); *see also*, Rule 56(c), *A.R.C.P.* Movant, Jeff Roper has the burden of showing this standard is met. *Id.* Roper must show clearly there is no material fact in dispute. *See*, *Jones v. State Farm Mutual Automobile Insurance Company*, 679 So.2d 1114 (Ala.Civ. App.1996); *see also, Crowne Investments, Inc. v. Bryant*, 638 So.2d 873 (Ala. 1994).

Only if the movant makes a prima facie showing that no genuine issue of material fact exists, does the burden shifts to non-movant, the Ahias, to present evidence creating a genuine issue of material fact. *See, Dillard, supra*, citing *Foremost Ins. Co. v. Indies House, Inc.,* 602 So.2d 380 (Ala. 1992). The burden does not shift to the opposing party to establish a genuine issue of material fact until the moving party has made a prima facie showing there is no such issue of material fact. *See, Mills v. Bruno's, Inc.,* 641 So.2d 777 (Ala. 1994).

Only after the burden has shifted is the non-movant required to produce "substantial evidence" in support of his claim. *See*, Ala.Code §12-21-12. "Substantial evidence" is defined as "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the

existence of the fact sought to be proved." *Dillard, supra*, quoting *West v. Founders Life Assurance Co. of Florida*, 547 So.2d 870 (Ala. 1989).

In reviewing whether the non-moving party has met its burden, the Court must stop short of weighing the evidence and making credibility determinations of the truth of the matter. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). And, the Court must construe all evidence and factual inferences arising from it in the light most favorable to the non-moving party. *See*, Rule 56(c)(3) *A.R.C.P.*; *see also, Capital Alliance, Inc. v. Thorough-Clean, Inc.*, 639 So.2d 1349 (Ala. 1984). Similarly, the Court must resolve all reasonable doubts against the movant, Jeff Roper. *See, Ex parte Anderson*, 682 So.2d 467 (Ala. 1996). Summary judgment is weighed heavily in favor of the non-movant. *See*, Rule 56(c), A.R.C.P; *see also, Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Jones v. Blanton*, 644 So. 2d 882 (Ala. 1994); and, *Martin v. Arnold*, 643 So. 2d 564 (Ala. 1994).

As summary judgment is only proper when there is no genuine issue of material fact, factual differences must be resolved by trial on the merits. *Wallace v. White Agencies, Inc.*, 641 So.2d 795 (Ala.Civ.App. 1993). Simply stated, "[a] party is not required to prove their entire case to defeat a motion for summary judgment. They are only required to demonstrate that a factual dispute exists that requires resolution by the jury." *Underwood v. South Central Bell*, 590 So.2d 170, 176 (Ala. 1991), citing *Wimberly v. K-Mart, Inc.*, 522 So.2d 260 (Ala. 1988). Jeff Roper has not satisfied his burden in this case.

II. JENNIFER AND ELLA AHIA HAVE PRESENTED SUBSTANTIAL EVIDENCE ON THE ISSUES OF NEGLIGENT/WANTON ENTRUSTMENT

This is a simple case. Yet, the facts are difficult to determine. That difficulty is due one reason – Jeff Roper. Roper's story shifts based upon circumstance. Roper testified in his affidavit that Caroline Fann had never previously driven his car. Yet, he told police she had. Roper testified in affidavit he had never seen Caroline Fann intoxicated. Yet, he admitted in deposition (1) he knew she was an addict before the wreck; (2) spoke with her hours before the wreck and knew she was actually intoxicated, upset, and in possession of his car; and, (3) saw her after the wreck still intoxicated. Roper testified in affidavit Caroline Fann stole the car keys from his office. Yet, in deposition he admitted his son obtained the keys. What is clear in the case at bar – Jeff Roper knowingly left his car in the possession of an intoxicated young girl with a history of drug addiction who was crying due some altercation with her boyfriend. And, Roper made this choice when he possessed a spare set of keys (or an employee next door) that would allow him to remove the vehicle quietly from the drunken and arguing young pair.

A. Defendant Jeff Roper Entrusted His Ford Focus To Caroline Fann And Ryan Roper

In Alabama, a presumption of entrustment arises when one person drives the vehicle of another. *Edwards v. Valentine*, 926 So.2d 315, 320 (Ala.2005). Although rebuttable, the presumption is a strong one. The vehicle owner has a

substantial burden in disputing it. "[T]he owner of a vehicle is faced with a substantial burden in order to disprove an entrustment." *Id.*

Jeff Roper's choice to begin voicing a lack of permission a week after the accident when faced with another injured driver, is very telling. And, this belated choice certainly falls short when compared to his choices the evening of the collision. Jeff Roper's actions speak louder than his words to this Court. Indeed, his words have changed based on circumstance. His actions, on the other hand, clearly fail to rebut the presumption of entrustment.

Jeff Roper absolutely entrusted the Ford Focus to Caroline Fann. Our law is well-settled that "[e]ntrustment can include either [1] actual entrustment, [2] continuing consent to use the vehicle, or [3] leaving the vehicle available for use." *Id.* "A case of entrustment by 'leaving the vehicle available' may occur, even though 'the entrustor has not given … permission [to use the vehicle on a particular occasion] and may even have expressly refused it." *Id.* (also citing *Negligent Entrustment in Alabama*, 23 Ala.L.Rev. 733, 739).

Jeff Roper's testimony he expressly denied permission prior to the collision is simply not credible. Roper's actions, in letting other employees drive his cars, clearly shows a continuing consent to use his vehicles. Moreover, he clearly left his Ford Focus available for a pair of incompetents in the hours prior to this collision.

Roper's current position is contrary to every known and admitted action he took prior to the collision. Indeed, Roper said Fann took the keys from his office

and drove the car from his business. Yet, Roper parked and worked right next to the slot where his Ford Focus was parked and never noticed it missing? And, Roper was in the office with the car keys all day where he would have observed anyone "taking" them. If Roper left his office, he locked the door securing the keys inside. And, *just in case*, multiple cameras recorded anyone "taking" the keys. When pressed in deposition as to the surveillance (or more pointedly why there is no surveillance of Caroline Fann), Roper could not even come up with a good excuse to explain why the events are not depicted. Although accusing Caroline Fann (under oath) of getting the keys from his office, Roper finally admitted his son Ryan obtained keys and car. Ryan could have never obtained the keys from the office or the car from the lot without Jeff Roper knowing it. And, Ryan could not have taken the car without Jeff Roper's implied consent.

Roper now wants the Court to believe he instructed the drunken pair on the telephone that night not to use the vehicle. If he did, it is certainly inappropriate to tell a drunken individual not to drive and then leave him/her with the keys. But, it is doubtful Roper issued this instruction. Roper was at his son's apartment complex that night to obtain another vehicle he owned which was also being used for personal reasons by someone else. For this other vehicle, Roper simply used his spare keys to obtain the vehicle without telling his mechanic who had borrowed it. In deposition, Roper was unconcerned his mechanic might be unaware the vehicle was gone.

Roper had spare keys for the Ford Focus as well. He could have easily used his keys without interaction with the drunken pair inside the apartment. This was the easiest choice available if he truly did not want the pair to have access to the vehicle. Yet, Roper chose not to use his keys. He also chose not to use several other available (and easy) alternatives to secure the vehicle.

Finally, after the collision, Roper did not report the vehicle as stolen. He did not tell police it had been taken without permission. He waited a week to say anything – a week in which his insurance carrier learned Mrs. Ahia had been hurt and in which he was able to get Caroline Fann to deliver her personal possessions in payment. And, in deposition Roper made it clear he used the subsequent threat of criminal charges to obtain as much as possible from Caroline Fann.

Nevertheless, assuming *arguendo* and contrary to the actual events, Roper did tell Ryan and/or Caroline not to use the Focus that evening, such expression would be insufficient to rebut entrustment. Alabama law is clear on that point. Here, the relevant facts are very clear. Roper knew Ryan and Caroline had the Ford Focus at Ryan's apartment. Roper knew Ryan and Caroline were drunk. Roper knew they were so intoxicated the pair had difficulty speaking with him. Roper knew Ryan and Caroline were inside Ryan's apartment involved in an altercation so traumatic Caroline was emotionally distraught. That is the scene in which Roper left his vehicle and keys.

Now, Roper argues he "took every reasonable precaution he could to prevent unauthorized use." (Roper brief, p.4). He had spare keys to the car. He had

a mechanic living next door. He had a phone available to call the police. He did nothing reasonable. He did nothing at all. He incredibly ignored the easiest solution which simply required him to use spare keys.

After arguing he was reasonable, Roper next asks this Court to believe he did not "have reason to believe that Ms. Fann would operate the vehicle without his permission." (Roper brief, p.5). Really? Caroline Fann was intoxicated. She had been in an altercation with her boyfriend. This boyfriend had (1) a criminal past; (2) a history of drug abuse; and, (3) was also intoxicated. The two were in the close quarters of the boyfriend's apartment. The car was Caroline Fann's only way to leave an explosive situation. It was her only way to leave at all. As the sober one aware of the situation, it was infinitely reasonable for Roper to believe one of them might use the vehicle to get away from the situation. And, it is incredible Roper would assume Caroline Fann would not drive the car when she had done so previously.

Indeed, it is NOT reasonable for Roper to assert a drunken person slurring her speech could fully comprehend any telephone instruction from him (or even remember instructions later). And, it is also NOT reasonable for Roper to assert a young girl in this scenario would refrain from using an available vehicle.

Here, the use of Roper's vehicles is no isolated event. In deposition, Roper protested that he had instructed everyone not to drive his vehicles. For purposes of this motion, the undersigned will set aside his doubts as to the self-serving instruction now claimed by Roper. If Roper had issued such an instruction, events

around him revealed it would be ignored. His mechanic simply took another vehicle for personal use. Somebody took the keys to the Ford Focus with multiple cameras recording events and drove it from the small lot in plain site of everyone at Roper Automotive. And, Caroline Fann had driven Roper Automotive vehicles previously without asking (contrary to the Roper affidavit). How could Roper ever assume an instruction not to drive made by telephone to a drunken young girl in an altercation with her boyfriend, would be followed? Why did Roper believe his instruction would be followed in this circumstance when it had not in the past? How is the action Roper claims reasonable? It is not. Any questions of reasonableness (if Roper truly asserts he acted reasonably) are issues for trial.

B. Defendant Roper Knew Caroline Fann Was An Incompetent Driver

In Alabama, "[i]t is well stated 'that one who is an habitual drunkard is an incompetent driver.'" *Id.* at 322. Here, Roper knew Caroline Fann had a habitual problem with intoxication. In deposition, Roper admitted he knew (prior to the wreck) that Caroline Fann was an actual drug "addict." And, he understood she liked both alcohol and drugs. She was clearly an incompetent driver.

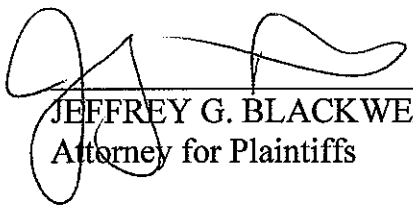
Yet, the evidence far surpasses a habitual addiction to intoxicating drugs. Roper knew Caroline Fann was actually intoxicated when he left the car and keys in her possession hours before the collision. Indeed, he knew she was so intoxicated she could barely speak. And, she had been involved in an emotional

altercation amplifying the situation. By Roper's own admission, Caroline Fann was not competent to operate a vehicle in the hours leading up to this collision.

Moreover, according to Roper, Caroline Fann was still intoxicated when they met again after the wreck. In the case at bar, Roper filed a summary judgment asserting falsely he had never seen Caroline Fann intoxicated. Yet, he both saw and heard her in an intoxicated state. Caroline Fann was not competent to operate the Ford Focus. If only Jeff Roper had used his spare keys to prevent her from driving it, we would not be here today.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully request this Honorable Court deny the motion for summary judgment filed by Defendants Jeff Roper and Roper Automotive.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on 21st day of July, 2015, I electronically filed the foregoing with the Clerk of the Court using the Alafile system which will send notification of such filing to:

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