

2015

Aaron Smith, Appellant, vs. Rocio Smith, Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

<p>AARON SMITH, Petitioner/Appellant, vs. ROCIO SMITH, Respondent/Appellee.</p>	<p>REPLY BRIEF OF APPELLANT Court of Appeals No. 20151023 District Ct. No. 084401555</p>
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Appeal from the Fourth District Court, Utah County Judge Fred D. Howard
From an Award of Fees, Costs and Expenses

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INTRODUCTION

The parties should bear their own respective costs and attorney's fees in this action. Neither party prevailed on their affirmative claims in Juvenile Court for termination of parental rights and each prevailed in their counter defense. Rocio is not legally or equitably entitled to approximately \$188,000 in attorney fees and costs, plus interest, at Aaron's added and overwhelming expense in the Juvenile Court matter as now unfairly claimed by her counsel. The District Court later summarily ordered an extreme one-sided award based on mistaken assumptions and errors, which this Court of Appeals is respectfully asked to correct.

After the Juvenile Court closed the case and terminated its jurisdiction, the District Court later accepted and followed counsel for Rocio's erroneous suggestion that the Juvenile Court had issued a valid prior award for recovery of fees, costs and expenses in an unspecified amount. However, no such order occurred and no deference thereto is warranted or required. To do so, would cause and mandate a most unfair and inequitable outcome.

To support the alleged Juvenile Court order regarding attorney's fees, there was no formal motion by Rocio's counsel and no documentation and no hearing or oral argument or due process as is required to invoke the lower court's consideration of such a request. Only after the matter was appealed by Aaron to this court did counsel for Rocio seek to go back and file such a motion, after the fact. Said attempt and filing merely serves as a further admission of the absence thereof at any time previous. Even as wrongly filed,

there was still no allocation or proper documentation or identification of prevailing or non-prevailing claims and recoverable or non-recoverable fees and costs.

The Utah Supreme Court has recognized that important procedural requirements to recover attorney fees are often overlooked by courts and practitioners and receive only cursory attention. See *Dixie State Bank v Bracken*, 764 P. 2d 985, 989, n.6 (Utah 1988). If a party has properly requested attorney fees and raised the issue, the other party must have full opportunity to meet it. *Palombi v. D & C Builders*, 452 P.2d 328 (Utah 1969). A party requesting an award of attorney fees has the burden of presenting evidence sufficient to support the award. *Salmon v. Davis County*, 916 P.2d 893 (Utah 1996); *Cottonwood Mall Co. v Sine*, 830 P.2d 266, 268 (Utah 1992). When a party does not provide such evidence and even if indisputably entitled to recover attorney's fees, they may not recover at all and even if there is no disputed issue of material fact. *Dixie, supra* at 988-89; *Regional Sales Agency, Inc. v. Reichart*, 784 P.2d 1210, 1216 (Utah Ct. App. 1989). "[A]n award made without adequate supporting evidence constitutes an abuse of discretion and must be overruled." *Bangerter v. Poulton*, 663 P.2d 100, 103 (Utah 1983). "Even if there were no disputed issue of material fact, the summary judgment would not award attorneys fee without a stipulation as to the amount, an un rebutted affidavit, or evidence given as to the value thereof." *Freed Finance Co. v. Stoker Motor Co.*, 537 P.2d 1039, 1040 (Utah 1975).

A party's failure to provide the court with sufficient evidence or failure to properly allocate between recoverable and non-recoverable fees, may result in a denial of the fee award altogether. *Dixie, supra* at 988-90; *Regional Sales, supra* at

1210, 1216; *Bangerter, supra* at 100, 103; *Freed Finance Co., supra* at 1039, 1040. A party is entitled only to those fees resulting from its principal cause of action for which there is a contractual or statutory obligation for such fees. *Utah Farm Production Credit Association v. Cox*, 627 P.2d 62 (Utah 1981). Attorney fees awarded under the terms of a contract may not allow recovery of any and all fees generated in a lawsuit. In the same way, attorney fees awarded under a statute will not allow an award of fees incurred in pursuit of some other grounds or statutory claims. *Graco Fishing v. Ironwood Exploration*, 766 P.2d 1074, 1079-80 (Utah 1988). **The party requesting attorney fees has the burden of allocating between the various claims brought before the court.** *Cottonwood Mall, supra*, 830 P.2d at 269-70. If a party fails to differentiate between recoverable and unrecoverable attorney fees, they may forfeit the award entirely at the trial court's discretion. *Utah Farm Prod., supra*; *Selvage v. J.J. Johnson & Associates*, 910 P.2d 1252, 1266 n.15 (Utah Ct. App. 1996); *Id.*, (citing *Schafir v. Harrigan*, 879 P.2d 1384, 1394 (Utah Ct. App. 1994)).

The court must make written findings of fact explaining the grounds for the award and why the amount awarded constitutes a reasonable and recoverable fee. *Hall v. Hall*, 858 P.2d 1018, 1025 (Utah Ct. App. 1993). The only established exception is when all the relevant facts are undisputed as with a motion for summary judgment. See, e.g., *Id.* at 1018, 1025; *Taylor v. Estate of Taylor*, 770 P.2d 163, 165-168. (Utah 1989). This matter is definitely a disputed claim. Courts may fail to make findings in support of an award of attorney fees or make findings, which properly reflect the appropriate factors and thus require the case to be remanded after appeal. *Rappleye v. Rappleye*, 855 P.2d 260, 266

(Utah Ct. App. 1993). *Saunders v. Sharp*, 818 P.2d 574, 580 (Utah Ct. App. 1991). *In re Estate of Quinn*, 784 P.2d 1238, 1249 (Utah Ct. App. 1989). See also *Mountain States Broadcasting Co. v. Neale*, 783 P.2d 551, 643, 649, n.10 (Utah Ct. App. 1989); *Sorensen v. Sorensen*, 769 P.2d 820, 832 (Utah Ct. App. Ct. 1989). To withstand Appellate review, findings should be as detailed as findings supporting a damage award. *Brown v. Richards*, 840 P.2d 143, 156 (Utah Ct. App. 1992).

An award made without adequate supporting evidence constitutes an abuse of discretion and must be overruled. *Bangerter supra*, at 103; *Mountain States Broad.*, 776 P.2d 643, 649 n.10 (Utah Ct. App. 1989) (and noting that a “reasonable fee” will only compensate party for those fees expended upon issues where the party prevailed); *Graco Fishing v. Ironwood Exploration*, 766 P.2d 1074, 1079-80 (Utah 1988) remanding for allocation of attorney fees between those incurred in pursuit of successful claims under one statute and unsuccessful claims pursued under another statute. See also *Utah Farm Prod. Credit Ass’n v. Cox*, 627 P.2d 62, 66 (Utah 1981) wherein the court found no abuse of discretion in the trial court’s refusal to award any attorney fees and where the party requesting the fees failed to distinguish between time spent prosecuting its complaint and the portion spent in defending against the counterclaim. See also *Selvage v. J.J. Johnson & Assoc.*, 910 P.2d 1252, 1266, n.15 (Utah Ct. App. 1996) noting that it may be proper to deny a request for attorney fees if the requesting party fails to allocate in accord with the directive in *Cottonwood Mall Co. v. Sine*, 830 P.2d 266, 268-270 (Utah 1992).

STATEMENT OF FACTS

1. On September 10, 2012, after the conclusion of the trial on the competing

petitions filed by Aaron and Rocio seeking termination of each other's parental rights regarding their two children, E.H. and N.H., the Juvenile Court announced, *sua sponte*, its intent to award attorney fees, costs and expenses to Rocio.

2. Before the September 10, 2012 hearing, Rocio did not file a written motion for attorney's fees, costs and expenses. Rocio has failed to identify and verify in a court transcript when any oral suggestion or request to award fees, costs and expenses was made (and such fails to meet the applicable standard regardless). Also, any request made for attorney fees, costs or expenses in the counter-petition filed by Rocio are not in the record.

3. Over the ensuing period of nearly eight months, Rocio's counsel never filed a motion with supporting affidavit and documentation to warrant such an award of fees, costs and expenses and no hearing or oral argument was ever held as well.

4. On April 29, 2013, the Juvenile Court entered its "2013 Final Juvenile Order". There was no pending motion, proffer, affidavit or supporting evidence by Rocio's counsel at the time of the court's final rulings.

5. On May 13, 2013, Aaron and his wife, Jennica, filed their Notice of Appeal regarding the April 29, 2013, Juvenile Court decision. (Record at 0844-0846).

6. On May 15, 2013 and while Aaron's Appeal was then pending, Rocio went back and filed (after the fact) a motion and affidavit in Juvenile Court. She claimed entitlement to attorney fees, costs and expenses in the prior proceedings in Juvenile Court, which were then under review by the Court of Appeals. At the same time, Rocio elected to not file a cross-appeal and did not seek to identify and determine an amount of fees, costs and expenses to which she claimed to be entitled.

7. On June 4, 2013, Rocio filed a memorandum objecting to the Petition for Appeal filed by Aaron. In her request for appellate fees, she acknowledged that no attorney fees were awarded in the lower court and she asked only for attorney fees to be ordered for having to respond to the Appeal. No attorney fees were ordered to be paid to Rocio by this Court.

8. On September 6, 2013, this Court issued its ruling regarding Aaron's Appeal and it states: ¹

[W]e vacate the findings of contempt and the sanctions imposed, and remand for a hearing on the allegations of contempt. The Juvenile Court's order is affirmed in all respects except for the determination of contempt, the findings of contempt are vacated, and the matter is remanded to the Juvenile Court for a hearing on the contempt allegations.²

No authority was given for the Juvenile Court to later award attorney fees, costs or expenses on remand except in the context of possible contempt sanctions to be determined. (That also did not occur as the Court completed its remand hearing and issued its order).

9. After holding a remand hearing on December 13, 2014 as directed by this Court, the Juvenile Court executed an order on January 23, 2014. It states how the remand from this Court was satisfied. The Court of Appeals had already vacated all of the Juvenile Court's earlier contempt findings and ordered sanctions. On remand, contempt charges and sanctions were limited to two minor charges and a total fine of

¹ See *State of Utah ex. rel. E.S. and N.S., A.S. and J.S. v. State of Utah and R.S.*, 2013 UT App 222, 319 P.3d 744. (hereinafter "*In re E.S.*")

² *In re E.S.*, 2013 UT App 222 ¶¶ 8-9, 319 P.3d 744.

\$1,000. No attorney fees, costs or expenses and no further sanctions were awarded.

10. The Final Juvenile Court Order was issued on March 17, 2014. No attorney fees, costs or expenses were awarded. No post judgment appeal was filed by Rocio.

11. After the Juvenile Court terminated its jurisdiction, Rocio filed in District Court on May 6, 2014 a new motion for attorney fees, costs and expenses previously charged in the Juvenile Court. The accompanying documents were identical to what she filed in Juvenile Court and which were not acted upon.

12. On May 6, 2014, Rocio moved the District Court, pursuant to the April 29, 2013 order of the Juvenile Court, to reduce the alleged award of attorney fees and costs to a monetary judgment. R. 472 – 591. Aaron objected to the unfair and untimely consideration of such fees, costs and expenses.

13. On November 26, 2014, the Honorable Thomas R. Patton heard oral argument on Rocio's motion. R. 641. Commissioner Patton announced that he understood that the Juvenile Court had previously ordered attorney fees and he felt that he lacked authority as a Commissioner to make any changes. Rather, the matter would be certified to the District Court judge for his review and further consideration.

14. On January 12, 2015, the Honorable Fred D. Howard heard oral argument on both Aaron's objection to the Commissioner's recommendation and Rocio's District Court motion for attorney fees and costs alleged in the earlier Juvenile Court proceedings. R. 701.

15. The District Court originally issued a ruling that presupposed the request

for attorney fees, costs and expenses was timely filed within a 14 day deadline as provided in U.R.C.P. Rule 54(d) regarding costs. The District Court accepted without question or analysis the prior presumed rulings of the Juvenile Court regarding the criteria and provisions included in Utah Code §30-3-3 and the parties' original Divorce Decree.

16. When it became apparent through a subsequent motion by Aaron filed in District Court that Rocio's request for attorney fees, costs and expenses was not, in fact, filed within 14 days, the Court issued a second opinion and changed its stated justification for awarding attorney's fees. This time, it relied solely on the criteria found in Utah Code § 30-3-3 and a general possibility of attorney fees awarded in actions brought to enforce a Divorce Decree.

II ARGUMENT

The trial court's decision to award attorney fees is a question of law to be reviewed for correctness.³

A. THE JUVENILE COURT DID NOT APPLY LAWFUL AUTHORITY TO MAKE AN AWARD OF FEES AND COSTS

The attorney fees, costs and expenses alleged and relied upon by Rocio were first awarded pre-appeal by the Juvenile Court as part of an unlawful and unfair imposition of sanctions for contempt and without notice and hearing. These were later vacated by the mandate of this Court. Nothing that was done by the Juvenile Court after the September

³ *Keith Jorgensen's, Inc. v. Ogden City Mall Co.*, 2001 UT App 128, ¶ 11, 26 P.3d 872.

10, 2013 Ruling of this Court supports or justifies the District Court's later reliance on presumed findings of the Juvenile Court pursuant to Utah Code §30-3-3 or the parties' divorce decree as now alleged by Rocio. The provisions of the original divorce decree between Aaron and Rocio do not apply and do not confer such authority on the Juvenile Court. Rocio also falsely asserts that some prior floating and unverified "oral motion" for attorney fees effectively roamed throughout the Juvenile Court proceedings as an effective "blank check" to be signed by the court at any time and without explanation and without due process. That is simply not the case. Respectfully, the Juvenile Court either did not possess or exercise actual authority to award fees, costs and expenses or attempted to exercise authority that it did not have. This Court is asked to not uphold and perpetuate the mistaken assumptions, which have denied the full and fair due process to which Aaron is entitled.

1. Other Lawful Options Were Also Not Applicable And Not Adopted

The Juvenile Court may award attorney fees, costs and expenses independent of a finding of contempt. The Court could have relied on "the inherent powers of the Court to promote the integrity and dignity of the Court; and to direct and control its officers for the regulation of the business of the Court."⁴ The Juvenile Court did not do so. The Juvenile Court may award attorney fees for violation of U.R.C.P. Rule 11 as well as successfully defending against a claim that U.R.C.P. Rule 11 has been violated.⁵ The Juvenile Court did not do so. After notice and opportunity for hearing, the Juvenile Court could make a

⁴ *State ex rel. P.R.*, 2011 UT App 65 ¶ 3, 249 P.3d 595 (footnote omitted.)

⁵ *K.F.K. v. T.W.*, 2005 UT App 85 ¶ 2, 110 P.3d 162.

finding of contempt “that was criminal in nature as a vindication of the court's authority, and assess a fine as a penalty ... [that] was incorporated into the final order dismissing the petition and terminating jurisdiction.”⁶ Again, the Court did not do so.

2. A Joint Undefined Award of Fees, Costs and Expenses for Contempt Was Eliminated By This Court

The fees, costs and expenses that Rocio seeks to recover were vacated by this Court. Neither notice nor meaningful opportunity to be heard were provided before findings of contempt and sanctions were imposed by the Juvenile Court.

The Juvenile Court made undefined findings regarding fees pursuant to Utah Code 30-3-3(1)⁷ and (2)⁸ as well as the parties’ original divorce decree.⁹ An undefined amount of fees, costs and expenses were awarded against both Aaron and stepmother Jennica, as a matter of joint and several liability. They were specifically referred to as contempt findings or sanctions.¹⁰ If Aaron and Jennica were to be jointly liable, the undefined amount of fees could only have been regarding contempt since unlike Aaron, Jennica was not a party to any divorce proceeding or decree involving Rocio. There are no other award of attorney fees and costs in the 2013 Final Juvenile Court Order.

On December 13, 2014, Juvenile Court Senior Judge Sterling Sainsbury held a hearing on remand regarding contempt. (Record at 0882.) On January 23, 2014, Judge Sainsbury executed an Order detailing how he fulfilled the mandate of this Court. No

⁶ *In re D.A.J.*, 2015 UT App 74 ¶ 8, 347 P.3d 430.

⁷ *See* 2013 Final Juvenile Order, ¶¶ 150, 162.

⁸ *Id.*, ¶¶ 150, 159.

⁹ *Id.*, ¶¶ 151, 159.

¹⁰ *Id.*, ¶¶ 192-193, 205, 208.

fees, costs or expenses were awarded in favor Rocio and against Aaron. The Juvenile Court indicated it had not entertained the motion for attorney fees, costs and expenses filed by Rocio and terminated the jurisdiction of the Juvenile Court. The Court could not act in the manner moved by Rocio after entering its Order confirming that it lacked jurisdiction. “[O]nce the termination petition was dismissed and the juvenile court’s jurisdiction ended, . . .the court lacked jurisdiction to enforce any prior order or agreement. See, *In re B.B.*, 2004 UT 39, ¶ 16, 94 P.3d 252.”¹¹

B. THE “AFFIRMED IN ALL RESPECTS” ELEMENT OF THIS COURT’S PRIOR RULING DOES NOT SUPPORT OR JUSTIFY A LATER AWARD AS ASSERTED BY ROCIO

Rocio presupposes that the District Court may simply enter an amount of fees, costs and expenses whenever and however because of certain summary language from the Juvenile Court in its 2013 Final Order. The same also applies to this Court’s prior opinion as cited previously herein.¹² The controlling standards are much more specific and substantial. Further, as emphasized herein, all prior references to potential attorney fees by the Juvenile Court were in the context of contempt sanction, which were vacated and not reinstated on remand. The isolated excerpt from this Court’s ruling and the earlier Juvenile Court are not sufficient to create and confer blanket entitlement by Rocio to an award of fees, costs and expenses by either the Juvenile or the District Court.

1. A General Affirmation Cannot Take the Place of the Requirement of Specified Fees, Costs or Expenses

¹¹ *In re D.A.J.*, 2015 UT App 74 ¶ 7, 347 P.3d 430.

¹² *In re E.S.*, 2013 UT App 222 ¶¶ 8-9, 319 P.3d 744 (emphasis added.)

The general language cited and applied out of context by Rocio does not excuse the absence or take the place of the required specific allocation and designation of attorney fees, costs and expenses in the 2013 Final Juvenile Order. Since the Order was final, there would be no opportunity or ability to change or amend that which was allegedly affirmed. This was especially apparent because of the limited scope of remand from this Court. No attorney fees could be awarded without identifying and including them as a matter of contempt. This did not occur and no appeal was taken by Rocio to challenge the Juvenile Court's decision not to do so.

2. Rocio Waived Fees, Costs and Expenses

[¶16] A prevailing party waives the right to attorney fees upon "the signed entry of final judgment or order, at which time trial issues become ripe for appeal and a party may file a timely notice of appeal pursuant to the Utah Rules of Appellate Procedure." *Meadowbrook, LLC v. Flower*, 959 P.2d 115, 117 (Utah 1998); see also *DFI Props, LLC v. GR 2 Enters, LLC*, 2010 UT 61, ¶ 18, 242 P.3d 781 (explaining that the requirement that the prevailing party submit a request for attorney fees before the entry of a final judgment prevents "piecemeal appeals" because otherwise "every case involving attorney fees could potentially be the genesis of two separate appeals--one appeal related to the merits and one appeal related to the attorney fees award" (citation and internal quotation marks omitted)).¹³

Rocio's failure to file a motion for an award of fees and costs during the

¹³ *Westmont Mirador LLC v. Shurtliff*, 2014 UT App 184 ¶ 16, 333 P.3d 369.

intervening nearly eight months between the conclusion of the trial and the Juvenile Court's 2013 Order constitutes a waiver of the right to do so. Utah Code §30-3-3(4) confirms the essential element of completion of all related orders and the final order or judgment. "Orders entered under this section prior to entry of the final order or judgment may be amended during the course of the action or in the final order or judgment."

3. The District Court Lacked Jurisdiction to Award Fees Absent An Amount Certain from the Juvenile Court

Without the Juvenile Court's prior determination of the specific amount, the District Court does not have subject matter jurisdiction over the claim of Rocio. In the 2014 case of *Zelig v. Uintah County*, a statute granted the Juvenile Court authority to determine the amount of the expert witness fee for the party responsible for paying the fee:

Therefore, we conclude that the Juvenile Court – the court that appointed the expert in the first place – is the appropriate court to determine the reasonableness of the work Doctor Zelig performed, his fee, and determine who was responsible for payment. ... We, therefore, also conclude that in the instant case, and the time and the posture it was brought, was never properly before the district court. We therefore vacate its judgment.¹⁴

In similar manner, the Juvenile Court in this case had "sole responsibility for setting the amount" of attorney's fees, costs and expenses applicable to termination of parental rights proceedings over which it had sole, exclusive jurisdiction. As such, "the District Court thus lacked jurisdiction over the limited dispute—at least until that important step had been taken."¹⁵

¹⁴ *Zelig v. Uintah County*, 2014 UT App 69 ¶¶ 7,9, 323 P.3d 610.

¹⁵ *Id.* at ¶ 6.

C. DENIAL OF DUE PROCESS IS REVERSIBLE ERROR

Rocio relies on *Keith Jorgensen's Inc. v. Ogden City Mall Co.*, 2001 UT App 128 to justify a complete failure and refusal to allocate fees, costs and expenses. This argument is in error. This Court has clarified as follows:

[I]n other contexts we have held that the failure to allocate attorney fees between compensable and non-compensable claims constitutes grounds for complete denial. See *Jorgensen's, Inc. v. Ogden City Mall*, 2001 UT App 128, ¶ 32, 26 P.3d 872.¹⁶

An award of fees under Utah Code § 30-3-3(1) " must be based on the usual factors of need, ability to pay, and reasonableness." ¹⁷ Utah Code § 30-3-3(2) does not eliminate the requirement of the ability to pay nor can the Decree.¹⁸ Aaron requested a hearing to be heard on these matters and was denied.

The District Court in the early divorce and custody proceeding found sufficient evidence of apparent sexual abuse involving Rocio that sole custody was awarded to Aaron. He was then advised by his counsel at that time to petition in Juvenile Court for termination of Rocio's parental rights. Rocio chose to respond with a similar petition of her own and on different grounds. Obviously, defending against Aaron's claims following the state's earlier review of potential sexual abuse is completely different from the burden of demonstrating an alternate basis for her proposed termination of Aaron's parental rights.

¹⁶ *Wilde v. Wilde*, 2001 UT App 318 ¶ 43, 35 P.3d 341.

¹⁷ See *Connell v. Connell*, 2010 UT App 139, ¶ 28, 233 P.3d 836 (citations omitted.)

¹⁸ See *Beehive Med. Elecs., Inc. v. Industrial Comm'n*, 583 P.2d 53, 60 (Utah 1978) ("It has always been recognized that a contract contains, implicitly, the laws existing at the time it is completed.").

A possible exception to this rule requires a “common core” of legal theories and facts. This clearly does not apply to competing petitions to terminate parental rights.

CONCLUSION

Rocio is not entitled to an award of attorney fees, costs and expenses: **1)** No specified amount of fees, costs or expenses was ever identified or determined by the Juvenile Court; **2)** Any award of attorney fees, costs or expenses by the Juvenile Court was a form of contempt sanctions, which were later vacated by this Court and were not adopted or reinstated by the Juvenile Court on remand; **3)** The District Court lacked independent authority under Utah Code §30-3-3 and original Divorce Decree and with no formal motion in Juvenile Court to later create and issue its own award regarding proceedings prior to and outside its own jurisdiction; **4)** There has never been a proper allocation of the alleged fees and costs or identification of prevailing and non-prevailing claims and parties and recoverable and non-recoverable fees and expenses; **5)** There has also been a fundamental denial of due process before such a large and overwhelming financial obligation can be fairly or reasonably imposed solely on Aaron when, as with Rocio, he too, prevailed in his defense and neither party prevailed in their respective affirmative claims. **6)** Even if Utah Code § 30-3-3 applied, Aaron was denied the right to present evidence of inability to pay the award.

DATED June 17, 2016

Law Office of F. LaVar Christensen

F. LaVar Christensen
Attorney for Appellant Aaron Smith

Certificate of Compliance with Rule 24(f)(1)
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1. This brief complies with the type-volume limitation of Utah R. App. P.(24)(f)(1) because it contains 4,972 words.

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F. LaVar Christensen

Dated: June 17, 2016

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **REPLY BRIEF OF APPELLANT** was served on the following this 17th day of June, 2016, by mailing, first class mail, postage fully prepaid to the following:

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