THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough, Master-in-Equity

Civil Action No. 2011-CP-10-296
Appellate Case No. 2013-001576

JP Morgan Chase Bank, National Association, ... Respondent,

v.

Clorenda Mae White, John Henry White, Andrea Denise White, as Legal Heir and as Personal Representative of the Estate of Anthony Franklin White, Melanie White, Jason White and Mark White, as Legal Heirs of the Estate of Anthony Franklin White and Charleston County Clerk of Court, ... Defendants

Of Whom John Henry White is the ..... Appellant.

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Counter-Statement of Issue on Appeal

I. Did Appellant properly preserve the issues related to the July 11, 2013, order for appeal?

II. If the issues related to the July 11, 2013, order were properly preserved, did the trial court abuse its discretion in denying Appellant's Rule 60 motion?

Counter-Statement of the Case

JP Morgan Chase Bank, National Association ("Respondent")[1] initiated this foreclosure action against John Henry White ("Appellant") and all other named and necessary parties by way of a foreclosure Complaint filed on January 14, 2011, seeking to foreclose on the mortgage given by Julia Mae White on real property located in Charleston County (the "Mortgaged Property"). (See Complaint, R. ____.) On February 7, 2011, Appellant, who was represented by counsel, answered. (See Answer, R.____.) After considering all facts and arguments presented to the Court on October 9, 2012, Judge Scarborough entered judgment in favor of Respondent on its foreclosure claim on October 30, 2012, and scheduled a judicial sale for the Mortgaged Property on December 4, 2012. (See Record of Foreclosure Hearing and Master in Equity's Order and Judgment of Foreclosure and Sale ("Foreclosure Order"), R. ___ and ___.) Appellant did not appeal the October 30, 2012, Foreclosure Order.

On February 22, 2013, Appellant filed a Motion to Vacate the Foreclosure Order. (02/22/13 Rule 60 Motion, R. _____.)[2] The Court entered an order on March 18, 2013, postponing eviction until April 30, 2013, to allow Appellant to redeem the Mortgaged Property. (03/18/13 Form 4 Order, R. ___.) A hearing was held with Judge Scarborough on May 6, 2013, and again on July 8, 2013. As a result of the latter hearing, Judge Scarborough ordered that Appellant would be evicted from the

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[1] Respondent was substituted as plaintiff following its merger with Chase Home Finance LLC. (Order Amending Caption, R.___.)

[2] Appellant also filed a "Supplemental" Motion to Vacate on April 19, 2013. Unless mentioned separately, the two motions are referred to collectively as the "Rule 60 Motion." (Supplemental Motion to Vacate, R.___.)

subject property on 5:00 p.m. on August 30, 2013, "if Plaintiff JP Morgan Chase Bank, N.A. and Defendant John Henry White do not agree to a purchase price before that time." (07/11/13 Order, R.___.) The parties did agree to a price term of $22,500. (See Order filed August 30, 2013, R.___; Order filed November 12, 2013, R.____.) Appellant appealed the Court's July 11, 2013, Order, improperly identified in the Notice of Appeal as the "July 10, 2013" Order. (Notice of Appeal, R.__.) Respondent has moved to dismiss this appeal. That motion remains pending before the Court.

Background

On November 13, 1997, Julia Mae White ("Ms. White"), Appellant's mother, executed and delivered to A&M Mortgage Corporation a note whereby she promised to pay the principal sum of $36,800.00 (the "Loan"). (Record of Foreclosure Hearing at 2 and Exhibit "A", R.___.) The Loan was secured by a mortgage on Ms. White's property located on James Island in Charleston County, South Carolina. (Record of Foreclosure Hearing at 2-3 and Exhibit "B", R.___.) The Mortgaged Property, as more fully set forth in the Mortgage, is described as Lot 3 on a plat recorded in the RMC Office of Charleston County in Plat Book EB, page 271. (Id., R.___.) The Note and Mortgage were subsequently assigned to the Respondent. (Record of Foreclosure Hearing at 3 and Exhibit "C", R.___.)

On January 23, 2004, a revised plat was recorded in the RMC Office of Charleston County records at Plat Book DE, Page 16, whereby Lot 3—the Mortgaged Property—was subdivided into Lots 3A, 3B, and 3C. (Revised Plat of 01/23/04, R.____.) The revised plat did not alter the Mortgage or its encumbrance on the

Mortgaged Property. Subsequently, the Loan went into default. (Record of Foreclosure Hearing at 3-4 and Exhibit "D", R.___.) On January 14, 2011, Respondent filed an action seeking to foreclose on the Mortgaged Property. (See generally Complaint). Respondent waived any right to a deficiency judgment. (Id. at ¶ 14, R.___.)

On February 7, 2011, Appellant answered the Foreclosure Complaint. (Answer, R.__ and Foreclosure Order at ¶ 4, R.___.) At the time, and until May 6, 2013, Appellant was represented by counsel. (04/16/13 Motion to Withdraw of Edward M. Brown, R.__; 05/06/13 Order Granting the Motion to Withdraw, R.___.) On October 9, 2012, a hearing was held on Respondent's Foreclosure Complaint, after notice to all Defendants or counsel of record, which resulted in the October 30, 2012, Foreclosure Order from Charleston County Master-in-Equity Mikell R. Scarborough. (See generally Foreclosure Order, R. ___.)

Respondent was the high bidder at the foreclosure sale held on December 4, 2012, after which it received the Master's Deed, which was recorded on January 4, 2013. (Master's Deed, R.___.) Appellant sought to prevent eviction by filing a Motion to Vacate the Foreclosure Order pursuant to Rule 60 of the South Carolina Rules of Civil Procedure. (02/22/13 Rule 60 Motion, R. _____.) The present appeal resulted from Judge Scarborough's order dated July 11, 2013, which does not address Appellant's Rule 60 Motion. (07/11/13 Order, R.___.)

Standard of Review

While Respondent fundamentally argues that Appellant's Rule 60 Motion has not been preserved and is not properly before this Court, to the extent it is considered

to have been appealed, the decision to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge. Raby Const., L.L.P. v. Orr, 358 S.C. 10, 17-18, 594 S.E.2d 478, 482 (2004). The standard of review, therefore, is limited to determining whether there was an abuse of discretion. Id.

Argument

I. Appellant Has Not Presented this Court with a Justiciable Appeal.

This appeal should be dismissed because no justiciable controversy exists. "A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute." Pee Dee Elec. Coop. v. Carolina Power & Light Co., 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983). Justiciability encompasses several doctrines, including ripeness, mootness, and standing. Jackson v. State, 331 S.C. 486, 491, 489 S.E.2d 915, 917 n.2 (1997). Courts will not pass on moot and academic questions or make an adjudication where there remains no actual controversy. Jones v. Dillon-Marion Human Resources Dev. Comm'n, 277 S.C. 533, 536 n.2, 291 S.E.2d 195, 196 n.2 (1982).

Appellant has appealed the trial court's order of July 11, 2013, improperly identified in the Notice of Appeal as a July 10, 2013, order. The July 11, 2013, Order decreed that Appellant would be evicted at 5 p.m. on August 30, 2013, "***if Plaintiff JP Morgan Chase Bank, N.A., and Defendant John Henry White do not agree to a purchase price before that time.***" (See July 11, 2013, Order, with emphasis added, R.___.)

The parties agreed on a purchase price of $22,500. (See Order filed August 30, 2013, R.___; Order filed November 12, 2013, R.____). The parties agreed on that price on or before August 30, 2013. (July 11, 2013, Order, R.____.) Appellant has not been evicted.

As a result, an appeal of the July 11, 2013, Order will have no practical effect, and thus the appeal should be dismissed. "A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy. This is true when some event occurs making it impossible for reviewing Court to grant effectual relief." Mathis v. South Carolina State Highway Dept., 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973); see also Treasured Arts, Inc. v. Watson, 319 S.C. 560, 564, 463 S.E.2d 90, 92 (1995) (holding, where plaintiff sought to enjoin circuit solicitor from taking legal action to stop plaintiff's promotional campaign, that the issue on appeal related to injunctive relief was moot because the promotion had expired while the appeal was pending).

Since the parties agreed on a purchase price, counsel for Respondent and Appellant have continued to work out details of the settlement, including but not limited to Appellant's securing financing or funding, and Respondent wishes to finalize the settlement on the agreed-upon terms, if possible. (See Motion to Dismiss at Ex. E—December 20, 2013, letter of Dow A. Davidson.) Appellant's actions in filing this appeal and attempting to gain relief by "default" are entirely inconsistent with the agreement reached by the parties as recognized by the trial court's orders as to a price term. The appeal should be dismissed.

II. The July 11, 2013, Order Does Not Address the Issues that Appellant Incorrectly Seeks to Raise on Appeal.

Despite the fact that he was represented by counsel at the time of the October 30, 2012, Foreclosure Order, Appellant elected not to appeal the Foreclosure Order. Accordingly, that Order is not before this Court. Appellant filed his Rule 60 Motion several months after entry of the Foreclosure Order, and he has appealed a subsequent order of the master-in-equity—the July 11, 2013, Order, but he himself admits that the order on appeal did not address the issues raised in his Rule 60 motion. (Appellant's Br. at 3, R.___.) The July 11, 2013, Order simply provides for Appellant's eviction from the subject property on August 30, 2013, "if Plaintiff JP Morgan Chase Bank, N.A., and Defendant John Henry White do not agree to a purchase price before that time." (See 07/11/13 Order, R.___.) The July 11, 2013, Order does not address, either directly or indirectly, Appellant's Rule 60 Motion.

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to *and ruled upon* by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (emphasis added). Appellant's Rule 60 Motion has never been ruled upon by the trial court. Judge Scarborough entered only two orders after Appellant filed his Rule 60 Motion. Appellant's attempt to argue the issues raised by his Rule 60 Motion in the absence of a ruling by the trial court offends this State's long-established preservation requirement which logically mandates that a losing party "must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); see also Smith v. Phillips, 318 S.C. 453, 458

S.E.2d 427, 429 (1995) (stating that an appellate court generally will not address an issue unless the issue was raised to and ruled upon by the trial court); State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) (same); Sumter Building & Loan Ass'n v. Winn, 45 S.C. 381, 23 S.E. 29 (1895) (same).

Because the trial court has never ruled on or addressed the issues raised in the Rule 60 Motion, it was incumbent upon Appellant to pursue a Rule 59(e) motion to alter or amend the judgment. See I'On at 421, 526 S.E.2d at 724 (stating that parties should raise all necessary issues and arguments to trial court and attempt to obtain a ruling); Townsend v. City of Dillon, 326 S.C. 244, 247, 486 S.E.2d 95, 97 (1997) (stating that an issue not ruled upon by the trial judge is not preserved for appellate review); Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (ruling that issue was not preserved for appellate review where the trial court did not explicitly rule on the appellant's argument and the appellant made no Rule 59(e) motion to alter or amend the judgment).

The absence of any ruling on the issues raised in the Rule 60 Motion and Appellant's failure to seek such a ruling under Rule 59(e) unequivocally establish that the issues in the Rule 60 Motion have not been preserved for appeal. As for the ruling that *is* contained in the July 11, 2013, Order, Appellant has identified no reason to reverse an order that protected him from eviction for the period July 11 through August 30, 2013, while the parties attempted to agree on a purchase price.

III. If the Issues Raised in Appellant's Rule 60 Motion Were Preserved for Review, There Would Be No Abuse of Discretion to Warrant Reversal.

Even if the issues raised in Appellant's Rule 60 Motion were preserved, and if the July 11, 2013, Order were deemed to be a denial of the Rule 60 Motion, it could not be said that the trial court abused its discretion in denying it. Appellant raises four arguments in his brief, which can be summarized thus: (1) the trial court erred in failing to rule on his Rule 60 Motion; (2) Respondent's alleged failure to name him in a lis pendens requires reversal; (3) the trial court erred in failing to provide him notice; and (4) the trial court erred in ordering foreclosure because the mortgage allegedly did not refer to any buildings or improvements. The first of these arguments, regarding the trial court's failure to rule on Appellant's Rule 60 Motion, is addressed in Section II, *supra*. As detailed below, the second is frivolous, and the third and fourth afford neither a basis for Appellant's Rule 60 Motion nor grounds for reversal of the July 11, 2013, Order.

Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge. Raby Constr., L.L.P. v. Orr, 358 S.C. 10, 17, 594 S.E.2d 478, 482 (2004). An appellate court's standard of review, therefore, is limited to determining whether there was an abuse of discretion. Id. at 18, 594 S.E.2d at 482. An abuse of discretion arises when the trial court issuing the order was "controlled by an error of law or when the order, based upon factual conclusions, is without evidentiary support." Goodson v. Am. Bankers Ins. Co. of Fla., 295 S.C. 400, 402, 368 S.E.2d 687, 689 (Ct. App. 1988). Under the facts of the present case, if it is assumed that the July 11, 2013, Order does represent a denial of Appellant's Rule 60

Motion, it would not be an abuse of discretion to deny Appellant's Rule 60 Motion, because the law and factual record support denial of the motion.

a. Appellant's frivolous lis pendens argument does not support reversal.

Appellant's argument about alleged defects in the lis pendens is frivolous. First, the record shows that a lis pendens was filed and served with the summons and complaint upon all parties. (*See* Foreclosure Order, R. ____; Lis Pendens, R____; Affidavit of Service, R. ____.) Second, the purpose of a lis pendens is to inform a purchaser or encumbrancer that a particular piece of real property is subject to litigation. Shelley Constr. Co. v. Sea Garden Homes, Inc., 287 S.C. 24, 30, 336 S.E.2d 488, 491 (Ct. App. 1985); Wooten v. Seanch, 187 S.C. 219, 196 S.E. 877 (1938). Appellant had notice of the action; ***he filed an answer.*** (Answer, R._____.) Finally, "[t]he lis pendens mechanism is not designed to aid either side in a dispute between private parties," but is instead "designed primarily to protect unidentified third parties by alerting prospective purchasers of property as to what is already on public record, such as the fact of a suit involving property." Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 17, 567 S.E.2d 881, 889 (Ct. App. 2002). Thus, even if there were some defect in the lis pendens, which is clearly not the case, Appellant, who appeared in the action and answered the foreclosure complaint, could not be heard to complain of it via Rule 60.

b. Appellant's notice argument does not support reversal.

There is nothing in the record to support Appellant's specious contention that his due process rights were violated because he lacked requisite notice. Appellant was served with the summons and complaint. (See, e.g., Foreclosure Order, R. ____;

Affidavit of Service, R. _____.) He filed an answer. (Answer, R. ___.) He was represented by counsel when the foreclosure hearing was held, when the Foreclosure Order was entered, and for months thereafter. (May 6, 2013, Order Relieving Counsel, R. ____.) Furthermore, the record reflects that Respondent provided Appellant with notice of the foreclosure hearing and, after entry of the Foreclosure Order, notice of the court's judgment. (Affidavits of Service, R._____.)

When faced with similar circumstances in the past, this Court has been quick to reject what amount to frivolous attacks on a trial court's Rule 60 determinations. In one such case, the appellants argued in their Rule 60 motion that they did not receive actual notice that the trial was imminent. RRR, Inc. v. Toggas, 378 S.C. 174, 181, 662 S.E.2d 438, 441 (Ct. App. 2008). In finding that there had been no abuse of discretion, this Court noted that the trial court had found specifically that the clerk of court gave the appellants notice. Id. The present dispute is precisely the same, as Judge Scarborough expressly held in his Foreclosure Order that all parties had received notice of the foreclosure hearing and that foreclosure was proper based upon all evidence before the court. (Foreclosure Order at ¶ 4, R.___.)

Further, neither Appellant nor any other parties to the foreclosure presented any evidence in defense of the action. This Court has previously found no abuse of discretion in a trial court's denial of a Rule 60 motion by a defaulting defendant whose lead executive had suffered from numerous health problems that arguably could have led to the default. Tri-Cnty. Ice & Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 242-43, 399 S.E.2d 779, 782-83 (1990). This Court specifically stated that there was "no semblance of a justification for [executive's] failure to protect his rights." Id. at 243,

399 S.E.2d at 783. If lack of notice will not support the Rule 60 motion of a defaulting party, it certainly cannot support such a motion by a party who appeared in, answered, and failed to litigate the matter. Appellant's failure to appear at trial or defend the foreclosure cannot now be undone via an unfounded Rule 60 motion.

c. Appellant's foreclosure arguments do not support reversal; Appellant is not permitted to litigate via Rule 60 issues that he could have litigated in the action prior to entry of judgment.

Appellant's fourth argument is, in essence, that the trial court erred by not allowing him to relitigate the foreclosure in the context of his Rule 60 Motion. Appellant elected not to appeal the Foreclosure Order. Rather, well after the time for appeal had expired, he elected to try to litigate in the context of his Rule 60 Motion issues that he could have raised and litigated in the foreclosure itself. A party simply may not use a post-trial motion to raise an issue that could have been raised at trial. See, e.g., Gainey v. Gainey, 382 S.C. 414, 425, 675 S.E.2d 792, 797 (Ct. App. 2009) (finding a party may not use a post-trial motion to raise an issue that could have been raised at trial); Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995) (same).

Appellant's fourth argument is based on the language of the mortgage that was foreclosed in the action in which he appeared and answered, and on facts known to him at the time of the foreclosure action. Nowhere in his briefing does Appellant identify any mistake, inadvertence, surprise, or excusable neglect that explains his failure to raise in the foreclosure itself the issues he attempted to raise via the Rule 60 motion. Nowhere does he identify newly discovered evidence that could not have been discovered at the time of the foreclosure action. Nowhere does he identify any fraud,

misrepresentation or other misconduct by Respondent. Finally, nothing he says in his briefing, or in his Rule 60 Motion for that matter, supports a finding that the foreclosure judgment is void. In other words, there is nothing in his brief or in his Rule 60 Motion itself to support the granting of a motion under Rule 60, SCRCP.

This foreclosure action was properly prosecuted and correctly decided. Respondent met its burden of "establishing the existence of the debt and the mortgagor's default on that debt," and once that was established, Appellant failed to meet his "burden of establishing a defense to foreclosure such as lack of consideration, payment, or accord and satisfaction." U.S. Bank Trust Nat. Ass'n v. Bell, 385 S.C. 364, 374-75, 684 S.E.2d 199, 205 (Ct. App. 2009). Specifically, the Record of Foreclosure Hearing and the supporting documentation attached thereto unequivocally demonstrate that Respondent met its burden of establishing the existence of the debt and the Appellant's default on that debt. (See Record of Foreclosure Hearing, R.___.) The Record of Foreclosure Hearing clearly sets forth that the November 2007 Mortgage expressly encumbers the Mortgaged Property located on James Island. (Id. at 2-3 and Exhibits "A" and "B.") The assignments leading to Respondent's control of the Mortgage are also clearly set forth in the Record relied upon by Judge Scarborough. (Id. at 3 and Exhibit "C.") Finally, the default on the debt is established in the Record of Foreclosure Hearing. (Id. at 3-4 and Exhibit "D.")

Ms. White executed a Mortgage that encumbered Lot 3 on a plat recorded in the RMC Office of Charleston County in Plat Book EB, page 271. (Foreclosure Order at ¶ 6, R.___.) On January 23, 2004, a revised plat was recorded in the RMC Office of Charleston County records at Plat Book DE, Page 16, whereby Lot 3 was subdivided

into Lots 3A, 3B, and 3C. (Revised Plat of 01/23/04, R.____.) As reflected in the Master's Deed, following Ms. White's death and pursuant to her Last Will and Testament, the Mortgaged Property was conveyed to Appellant's sister, Clorenda Mae White via a Corrective Deed of Distribution, which was recorded November 3, 2010. (Master's Deed, R.___.) Appellant contends in his post-judgment arguments that the Mortgage was only intended to encumber Lot 3C, but that is not possible given that only Lot 3 existed at the time of the Mortgage—well before the subdivision occurred. (02/22/13 Rule 60 Motion, R. _____.) The Mortgage encumbered all of Lot 3, and the subdivision of the lot and subsequent deeding of the Mortgaged Property to Appellant's sister, which took place seven and thirteen years later, respectively, were subject to the existing Mortgage.

There is no evidence in the Record that refutes these indisputable public documents. Accordingly, the Foreclosure Order correctly includes all of Lot 3, and the resulting Master's Deed reflects the same as it bears the same property description as is found in the Mortgage. (Master's Deed, R.___.) Furthermore, these facts were known to and reviewed by Judge Scarborough at the time he entered the Foreclosure Order, demonstrating further that the foreclosure was proper in every respect.

Appellant's Rule 60 Motion is an after-the-fact attempt to litigate issues that he could have and, if he or his lawyer felt they had merit, should have litigated in the foreclosure action. More to the point, the law *required* him to litigate those issues in the action, and it does not countenance a party's attempt to obtain relief from judgment on grounds he could have raised in the defense of the action. Under no circumstances

could Judge Scarborough have abused his discretion in denying Appellant's improper Rule 60 Motion.

d. Appellant's Rule 60 Motion was not made within a reasonable time of the Foreclosure Order.

Additionally, there could be no abuse of discretion in denying the Appellant's Rule 60 Motion because the motion was not made within a reasonable time, as required by Rule 60. Rule 60(c) states, "a motion under Rule 60(b) must be made within a *reasonable time*... after the entry of the judgment or order or the date of the proceeding." S.C. R. Civ. P. 60(c)(1). Despite the fact that he and his lawyer had notice of the October 9, 2012 foreclosure hearing and he was subsequently served with the Foreclosure Order upon its entry on October 30, 2012, Appellant did not file his Rule 60 Motion until February 22, 2013. While this Court has been willing to make a finding of reasonableness where a party seeks relief as soon as he finds that a trial has taken place and an order has been entered against him, the global context of this dispute demonstrates that Appellant's delay is unreasonable. Williams v. Watkins, 384 S.C. 319, 326, 681 S.E.2d 914, 917 (Ct. App. 2009) (holding that a motion for relief filed on November 21, 2005 was reasonable when the judgment was entered on October 19, 2005).

In the present case, Appellant waited over three and a half months before filing his Rule 60 Motion. During that delay, the time for appeal the Foreclosure Order passed, the Mortgaged Property had been sold, and eviction proceedings had been commenced. It is fundamentally unreasonable to permit a Rule 60 challenge after so much has transpired. To hold otherwise would offend the principle that "[r]elief from

judgment under Rule 60 should not be considered a substitute for appeal from a final judgment, particularly when it is clear the party seeking relief could have litigated at trial and on appeal the claims he now makes by motion." Smith Companies of Greenville, Inc. v. Hayes, 311 S.C. 358, 359, 428 S.E.2d 900, 902 (Ct. App. 1993). Accordingly, Appellant's Rule 60 Motion also fails because it was not filed within a reasonable time after the entry of the Foreclosure Order.

Conclusion

For the reasons articulated above, this Court should dismiss the appeal. In the alternative, this Court should deny Appellant's desired relief because the issues and requests raised by him are not properly before this Court and, if they had been raised properly to this Court, denial of the Rule 60 Motion is supported by the facts and the law.

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2/19, 2014

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PROOF OF SERVICE

I HEREBY CERTIFY that I have served **INITIAL BRIEF OF RESPONDENT** on Appellant by depositing copies of it in the United States Mail, postage prepaid, addressed to the below Counsel of Record:

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February 19, 2014