

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Master In Equity

Marvin H. Dukes, III, Beaufort County Master-in-Equity

Case No. 2011-CP-07-5211

Solomon Johnson, Frank
Johnson, Ruth Green, Dorothy
Jones, Theresa Scott, Erma
Johnson, Kelly Barbara Jean
Ferguson a/k/a Barbara Jean
Albergottie, Alphonzo
Albergottie, David Pringle,
Pauline Lesesne, Marion
Pringle, Jr., Frederick Scott,
Paul K. Scott, Harold Jones,
Sandra, Williamson Powell,
Frederick L. Williamson,
Elvin Bennett, Janie L.
Ganues, Bertha Stafford,
Patrice Stafford, Mary Lee
Gary, Alnethia Gary, Edward
Stanley Stafford, Luerta Gary,
Kenneth Gary, Carlos Gary,
Ron Kenneth Stewart, Mary
Frances Duncan, Debra
Williams, Larry Williams,
Barbara Williams Smith,
Johnie Williams, Terri Elaine
Weaver, Letha G. Rhem,
Patricia Ann White, Sharon
White, Nolen White, Johnny
Washington,

Respondents,

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AUG 07 2015

SC Court of Appeals

The Heirs or Devisees of
Solomon White, Mary Ann
Pinckney White, Edward
White, Jacob White, Mary
White, Carrie White, Ellen
White Gary, Sam Gary, Emma
Gary Johnson, Miller Johnson,
Sr., Oscar Johnson, Eloise
Johnson, Miller Johnson, Jr.,
Leola Johnson, Richard
(Ritchie) Johnson, Sarah H.
Johnson, Mack Coles, Emily
Johnson Albergottie, Robert
albergottie, Louise Johnson
Pringle, Marion Pringle,
Mamie Gary, Thomas Brown,
Carrie Scott, Clarence Scott,
Jessie Mae Scott Smalls,
Williams Smalls, Jr.,
Nathaniel Scott, Camerine
Scott, Hermon V. Scott,
Luther Scott, Earnestine
Steward, Epstein Steward,
Lonny Brown, Gussy Brown,
Charles Brown, Danza Gary,
Victoria Brown, Dorothy
Williams, Joseph Williamson,
Sr., Elijah Williamson, Joseph
Williamson, Jr., Helen
(Sweetie) Brown Bennett,
Ervin Bennett, Janie Bennett
Green, Eloise Bennett Nixs,
Benjamin Nixs, Terry Nixs,
Carrie Gary, Harry Julius,
Richard Gary, Fronnie Gary,
Ella Gary, Francis Gary,
Florence (Nan) Gary, Aletha
(Tiny) Gary Watson, Andrew
Gadsden, Frank Watson,
Elizabeth Gary Stafford, Lee
Stafford, John Lee Stafford,
Joseph Gary, Nehemiah Gary,
Dorothy Gary, Harold Gary,
Cleveland Gary, Henry Gary,
Florrie Gary, Naomi Gary
Stafford, James Stafford, Sr.,

Appellants.


Hattie Mae Stafford, Edna
Brooker, Henry Brooker, Inell
Jones, Raymond Jones, James
Stafford, Jr., Hazel Gary,
Henry Gary, Jr., Henry Gary,
III, Herman Gary, Mary Ellen
Gary Williams, Herbert
Williams, Sr., Herbert
Williams, Jr., Louise Gary
White, Jimmy White, Lou
Ethel Washington, Margaret
Gary Levine, David Levin,
Eddie James Gary,
Wilhelmina Gary Murray,
Ezekiel Murray, Sr., Josephine
Gary Jenkins, Eddie Jenkins,
Joe Louis Gary, Heirs of
David Pringle, Salt Marsh
Partners, L.P., Janice E. Jones
and Ralph E. Johnson, Bobbie
J. Collins, Leroy Norris and
Odis Ann Norris, M. Lane
Morrison, Milles Lane
Morrison and Bank of
America, N.A., as Trustees,
Beaufort County Open Land
Trust, Williams McLean
Mixon and Barbara Hill
Mixon, as Trustees of the
Mixon Recoverable Trust
Agreement dated July 24,
2008, Robert J. Pinckney,
Mamie Brown, Susie
Cordeaux, Dorothy Lesesne,
Ben Pinckney, Etta Pinckney,
Henry Pinckney, Herbert
Pinckney, Ernestine P.
Rogers, Lillie Shell, and Ruth
P. Simmons, Richard Johnson,
Jr., Helen Coles, Jackie
Smalls, Sharon Smalls,
Andrea Smalls, Brooke
Smalls, Allan Scott, Cleon
Scott, Nia Malika Singletary,
Loretta L. Steward, Nathan
Jones, Eric Williamson,

Dwayne Williamson, Audrey
Brown, Joseph Johnson,
Jacqueline Johnson Major,
Robert Lee Green, Kenneth
Green, Juanita Green, Keith
Green, Joseph Green, Ellis
Green, Carl Green, Brown
Bennett, Dorsey Bennett,
William Nixs, Jennifer Nixs,
Jason Nixs, Thaddaus Nixs,
Edward Nixs, Edward Nixs,
Charles Nixs, Althea Nixs,
Clara Gary, Francis Gary, Jr.,
Adelia Gary, Charles Gary,
Albert Gary, Ulysses Gary,
Bernard Gary, David Gary,
Annette Singleton, Lillie Mae
Gifford, Shawndea Stafford,
James Stafford, Beulah
Gadsden, Jordan Harris, Leon
Stafford, Alvin Brooker,
Michael Stafford, Shirley
Stafford White, Gail Stafford
Marquez, Jacqueline Stafford,
Stephanie Jones, Renata
Jones, Ranell Jones, Germaine
Jones, Nathaniel Stafford,
Angela Stafford, Sonya Green,
James Stafford, III, Rasheen
James, Jusean James, Kierra
Stafford, Lena (Evelyn) Gary,
Brenda Patterson, Jeanette
Rutledge, Issac Williams,
Carolyn Achampny,
Antoinette Lewis, Geraldine
Brown, Johnny Washington,
Kurt Washington, Diane Gary,
Tracy Washington, Carren
Washington, Lunetha Gary,
James Stanley Gary, Gerald R.
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devises of all such persons
named above, and all persons
unknown having or claiming
to have any right, title, estate,

interest in or lien upon the real property described in the Complaint herein, being designated collectively as John Doe and Mary Roe, including all persons who may be deceased, minors, in the Armed Forces or the United States, Non Compos Mentis, and under any other disability

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Gary, Bernard Gary, Francis Gary, Jr. and
Charles Gary

August 5, 2015
Charleston, SC

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Marvin H. Dukes, III, Beaufort County Master-in-Equity

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STATEMENT OF ISSUE ON APPEAL

1. Did the Trial Court err by finding that the Clara Gary Family was not the sole owner of the properties based upon ouster of the cotenants?

STATEMENT OF THE CASE

This is an appeal from the Beaufort County Master in Equity Court's Partial Decree determining the heirs of Solomon White and Mary Ann White and determining whether the Clara Gary Family ousted the other heirs of Solomon White and Mary White from two parcels of land, and Final Decree that partitioned the properties into six (6) tracts. (Final Decree dated August 18, 2014 and Partial Decree dated July 24, 2013)

This case began in 2011. The case concerns two (2) parcels of land located in Beaufort County, South Carolina. One parcel is approximately thirty (30) acres, which was acquired by Solomon White in 1881. The other parcel is approximately ten (10) acres, which was acquired by Mary Ann White in 1885. (Deed - Plaintiffs' Exhibit #1 and Deed - Plaintiffs' Exhibit #2)

Solomon White and Mary Ann White married and had three (3) children. Two of their children, Jacob White and Edward White, died without issue. Their third child, Ellen White, married Sam Gary. Ellen White Gary and Sam Gary had seven (7) children. One of their of children, Carrie Gary, died without issue. Their remaining six (6) children Richard Gary, Emma Gary Johnson, Mamie Gary Brown, Alethia Gary Watson, Nehemiah Gary and Henry Gary all had issue. (Family Tree – Plaintiffs' Exhibit #37)

Clara Gary and her children are descendants of the Richard Gary branch of the White Family. Richard Gary, who died in 1967, had a son named Francis Gary. Francis Gary married Clara Gary. Francis Gary died intestate in 1994.

The Plaintiffs' Complaint alleged various causes of action. (Summons, Lis Pendens and Complaint Case No. 2011-CP-07-5211) The Clara Gary Family timely filed an Answer and Counterclaim alleging various defenses and affirmative defenses. (Amended Answer of Defendants: Clara Gary, Francis Gary, Jr., David Gary, Adelia Gary, Charles Gary, Albert Gary, Ulysses Gary, Bernard Gary, and Annette Singleton and Counter Claim) The Plaintiffs timely filed a Reply with several defenses. (Reply) At the call of the case for trial on April 22, 2013, the Parties agreed to bifurcate the trial. Testimony was presented on only two (2) issues. The two (2) issues that were heard by the Court were as follows: A determination of the heirs of Solomon White and Mary Ann White, and if the Richard Gary family had ousted the other heirs of Solomon White and Mary Ann White from the two (2) parcels of land. All other issues were held in abeyance. The trial proceeded regarding the above two (2) stated issues. (Transcript pgs. 29 – 35)

The Trial Court determined that the Plaintiffs and Defendants were the heirs of Solomon White and Mary Ann White. (Partial Decree dated July 24, 2013) Therefore, the heirs of the Whites owned the thirty (30) acre and Ten (10) acre properties. Solomon Johnson's son, Ralph Johnson, prepared a Family Tree that was admitted into evidence at the trial. (Plaintiffs' Exhibit #37) The Court found that the family tree as presented accurately reflected the heirs of Solomon White and Mary Ann White. (Partial Decree dated July 24, 2013) The Court stated that the Defendants did not present a Family Tree. (Partial Decree dated

July 24, 2013) Further, the Court stated that the Defendants presented no facts to dispute the Family Tree presented by the Plaintiff. The Court adopted the Plaintiffs' Family Tree and it was used to determine the heirs of Solomon White and Mary Ann White. (Partial Decree dated July 24, 2013)

The Court found that the Plaintiffs and Defendants were cotenants. (Partial Decree dated July 24, 2013) As a result, in order for the Defendants to have sole ownership of the properties, the Defendants would have to ouster the Plaintiffs. The Court found that the Defendants had not ousted the Plaintiffs. (Partial Decree dated July 24, 2013) The Court found that the Defendants, the Clara Gary Family, built houses and placed mobile homes on the thirty (30) acre tract. (Partial Decree dated July 24, 2013) However, the other heirs of Solomon White and Mary Ann White built houses and placed mobile homes on the thirty (30) acre tract. (Partial Decree dated July 24, 2013) As a result, the Court found that the properties were not occupied exclusively by members of the Clara Gary Family. The Court found that heirs of the Solomon White and Mary Ann White paid taxes on the properties. (Partial Decree dated July 24, 2013) The Clara Gary Family testified that the money paid to them by other branches of the family was rent. (Transcript pgs. 629 – 630) The Court found that the weight of the evidence indicated the payments were for taxes on the properties. (Partial Decree dated July 24, 2013) The Court found that the heirs of the Whites used the land for farming and the raising of livestock. (Partial Decree dated July 24, 2013) The Court found that the farming of the land and raising of livestock were done

primarily by two (2) branches of the Gary family, and not exclusively by one branch.

The bifurcated trial on the two issues was held on April 22, 2013 and April.23, 2013. A Partial Decree was signed and filed on July 24, 2013. Pursuant to the July 24, 2013 order some issues in the case were held in abeyance.

The Plaintiffs filed a motion on November 5, 2013 for the Court to determine the heirs in the case. A hearing concerning the motion was held on March 5, 2014. Notice of the motion was served on the Defendants' attorney Karl Smith. Mr. Smith motioned the Court to be relieved as Defendants' attorney. Mr. Smith's motion was granted on March 5, 2014. The Court found that Mr. Smith gave notice of the motion hearing to the Clara Gary Family. The Court at the March 5, 2014 hearing made a determination as to the living heirs of Solomon White and Mary Ann White. Also, the Court determined that the remaining issue was the partition of the thirty (30) acre and the ten (10) acre properties. (Order dated March 11, 2014)

The Partition hearing was held on August 5, 2014. The Final Decree in the case, which partitioned the thirty (30) acre and ten (10) acre properties, was signed and filed on August 18, 2014. The Final Decree partitioned thirty (30) acres and ten (10) acres with each branch of the Solomon White and Mary Ann White Family receiving approximately 6.6 acres. (Final Decree dated August 18, 2014) Additionally, the surveyor was ordered to prepare and file a plat that reflected the Court's ruling. An order approving the surveys was signed on April

29, 2015 and filed with the Court on April 30, 2015. (Order April 29, 2015)

This appeal of the case followed.

STATEMENT OF FACTS

Solomon White acquired title to thirty (30) acres of land in 1888 and Mary Ann White acquired title to ten (10) acres of land in 1888. (Deed - Plaintiffs' Exhibit #1 and Deed - Plaintiffs' Exhibit #2) The Clara Gary Family members are descendants of the Richard Gary branch of the Solomon White and Mary Ann White Family. Richard Gary, who died in 1967, had a son named Francis Gary. Francis Gary married Clara Gary. Francis Gary died intestate in 1994.

The dispute concerning ownership of the land in this matter arose after the death of Francis Gary. The dispute took place between Clara Gary, the widow of Francis Gary, her children, on the one hand, and Solomon Johnson, on the other hand. The dispute came to a head when Solomon Johnson filed suit, Case No.: 2006-CP-07-609, against Clara Gary and her family. A trial was held in the matter. However, the Court made no findings of fact or conclusions of law and dismissed the suit without prejudice. (Order Dated August 25, 2010) However, the dispute continued and Solomon Johnson filed the case giving rise to this appeal. (Summons, Lis Pendens and Complaint Case No. 2011-CP-07-5211)

The Clara Gary Family maintained that they are the sole owners of the disputed properties. The Clara Gary Family traces its family history back to their grandfather, Richard Gary. The witnesses for the Clara Gary Family testified that they did not know the other people listed on the Family Tree presented by the

Plaintiffs. (Transcript pgs. 548; 604 - 605) The Clara Gary Family maintained that the properties have been in their family starting with their grandfather, Richard Gary.

Richard Gary controlled the land exclusively, farmed the land, fenced the land, maintained the land and paid taxes on the land. He died intestate in 1967. Frances Gary, his son, took control of the properties along with his wife and children. They built houses and put mobile homes on the thirty (30) acre tract. They paid taxes on the properties. (Transcript pgs. 632; 642) They petitioned the County of Beaufort to pave roads on the properties. (Transcript pg. 383) They defended lawsuits brought against the properties. (Transcript pgs. 502-503) They prevented people from hunting on the properties. (Transcript pg. 358) The Clara Gary Family has been exercising this control of the property for over forty (40) years. When this action was brought by the Plaintiffs, the Clara Gary Family defended the action.

ARGUMENT

The Trial Court erred by finding that the Clara Gary Family were not the sole owners of the properties based upon ouster of the cotenants.

“Ouster” is the actual turning out or keeping excluded a party entitled to possession of any real property *Grant v. Grant*, 288 S.C. 86, 340 S.E. 2d 791 (Ct. App. 1986). Actual ouster of a tenant in common by a cotenant in possession occurs when the possession is attended with such circumstances as to evince a claim of exclusive right and title and a denial of the right of the other tenants to participate in the profits. *Woods v. Bivens*, 292 S.C. 76, 354 S.E.2d 909 (1987).

The Clara Gary Family, starting with Clara Gary's father-in-law, Richard Gary, possessed, controlled and managed the properties, uninterrupted, using the properties, exercising exclusive ownership over the same to the present day. The Clara Gary Family used the thirty (30) acre tract for farming and prevented others from doing so as well as used the ten (10) acre tract for hunting and prevented others from doing so.

"Ouster" is presumed from possession only if it is continued for a period of twenty years. *Freeman v. Freeman*, 323 S.C. 95, 99-100, 473 S.E. 2d 467, 470 (Ct. App. 1996). The Clara Gary Family has possessed the land for well over forty (40) years. David Gary, grandson of Richard Gary, testified that as a boy he observed his grandfather farm the thirty (30) acre tract, put fences up, and cut timber on the land. (Transcript pg. 339) Plaintiffs' Solomon Johnson's use of the disputed land is not evidence of his ownership of that land. David Gary's testimony showed that Plaintiff, Solomon Johnson, used the property of others such as the Pringle property for his hogs and cows and the Salt Marsh property to plant his crops. (Transcript pg. 348)

David Gary testified that he and his brothers put up "No Trespassing" signs on the ten (10) acre tract. (Transcript pg. 357) Charles Gary, grandson of Richard Gary, and his brothers hunted on the ten (10) acre tract. Charles testified that he and his brothers did not permit anyone else including the Plaintiffs to hunt on the ten (10) acre tract without getting permission from the Clara Gary Family. (Transcript pg. 358) Charles further testified that his family and his family alone

maintained the properties. (Transcript pg. 365) Charles and his family kept livestock on the thirty (30) acre tract. (Transcript pg. 365, Plaintiffs' exhibit 19)

The Clara Gary Family alone asked the County of Beaufort to pave the roads on the properties and gave an easement to the County of Beaufort to pave the roads. The County of Beaufort did not obtain permission from any other parties to pave the roads on the properties. (Transcript pg. 383) The Clara Gary Family also gave an easement to the power company to install electricity on the properties. (Transcript pg. 387)

A cotenant has the right, in common with his cotenants, to the possession of the property owned in common, so ordinarily the possession by one cotenant is the possession of all. However, "[t]he latter ceases when the exclusive possession of a cotenant becomes adverse to the right of possession by the other cotenant or cotenants; but the hostile character of the possession must be such as to amount to an ouster of the cotenant or cotenants must be clearly and unmistakably established by the evidence. While the possessor need not give express notice of the hostility of his possession to the other or others, the nature of it must be brought home, as it has been said, to the other owner or owners." *Watson v. Little*, 224 S.C. 359, 364, 79 S.E. 2d 384, 387 (1953). The Clara Gary Family met the requirements of *Watson* in their exercise of control over the properties. To the degree that other parties used the property such use was allowed by the Clara Gary Family and was de minimis.

The Clara Gary Family controlled the properties uninterrupted, maintained

the properties, used the properties for farming and hunting, and prevented others from using the properties.

The Clara Gary Family starting with Richard Gary paid the taxes on the Property. (Transcript pg. 391) The Court gave "little credit" to testimony of David Gary concerning who paid taxes and who had property reassessed. (Transcript pg. 407) However, testimony proved that the Clara Gary Family paid taxes on properties throughout years. (Transcript pgs. 411, 423) They cut timber approximately three (3) times and used that money to pay taxes on the properties. (Transcript pg. 493) They defended their ownership of the property in prior litigation. (Transcript pg. 502) The Clara Gary Family's use of the properties clearly displayed dominion, control and ownership to the exclusion of all others.

The Clara Gary Family did not put together a family tree. (Transcript pg. 547) They did not prepare a family tree because as far as they were concerned they owned the properties and had acquired exclusive ownership of the properties based upon Richard Gary's ownership of properties. In their view, as evidenced by their use of the properties, they were the only family that had any ownership interest in the properties.

The Clara Gary Family had no knowledge of the people listed on the Family Tree put into evidence by the Plaintiffs. Witnesses for the Clara Gary Family testified that they only had knowledge of their family members that went back to Richard Gary, their grandfather, who died intestate in 1967. He was survived by a son, Francis Gary, who died intestate in 1994 and was survived by

his wife, Clara Gary and eight (8) children. Clara Gary and several of her children reside on the property and continue to use the properties as they have done for over forty (40) years.

Annette Singleton, granddaughter of Richard Gary, has lived on the thirty (30) acre tract all of her life; she is 49 years old. She has observed her family farm the land by planting watermelon, potatoes, cotton, sugarcane, etc. (Transcript pg. 569) Her mother and siblings control the properties. (Transcript pg. 587) She testified that she does not know the people on Family Tree that was presented by Solomon Johnson. (Transcript pg. 604) She testified that no other people contribute to the use and upkeep of the properties. (Transcript pg. 597) Annette Singleton's father, Francis Gary, is the grandson of Solomon White and Mary White and her mother, Clara Gary, is related by marriage. (Transcript pg. 599) Additionally, Albert Gary, Richard Gary's grandson, testified that he did not know most of the people claiming to be members of his family, and most did not live on the properties. (Transcript pg. 628) Albert Gary further testified that he paid taxes on properties and that people outside of the Clara Gary Family paid rent to him and his father. (Transcript pgs. 629 - 630)

The actions of the Clara Gary Family demonstrate expressed actions to oust the other heirs of Solomon White and Mary Ann White. In *Fender v. Smashum*, 354 S.C. 504, 512 (2003), the South Carolina Court of Appeals found that a tenant in common "must show that his actions toward the property amounted to an ouster of the heirs before he can establish title by adverse

possession.” In *Fender*, the parties traced their titles in the property through a series of intestate and deed conveyances. *Id.* at 507. In that case, Respondent argued that his possession of the property was actual, open, notorious and exclusive under claim of title with continued occupation and possession of the premises for over ten years. *Id.* at 508. The heirs of Richard Gary assert the same argument against the other heirs of Solomon White and Mary Ann White. The Clara Gary Family assert that they ousted their cotenants by building houses and placing mobile homes on the property, by cutting and selling the timber on the properties, by farming the thirty (30) acre tract, by fencing the property and by putting up “No Trespassing” signs on the properties.

The South Carolina Court of Appeals found that “ouster is the actual turning out or keeping excluded a party entitled to possession on any real property.” *Fender*, 354 at 510 citing *Grant v. Grant*, 288 S.C. 86, 340 S.E. 2d 791 (Ct. App. 1986). Moreover, the Court of Appeals found that the “acts relied upon to establish an ouster must be of an unequivocal nature, and so distinctly hostile to disseize is clear and unmistakable. *Felder v. Fleming*, 278 S.C. 327, 330, 295 S.E.2d 640, 642 (1982).

In the present case, the acts of the Clara Gary Family toward the other heirs of Solomon White and Mary Ann White were “unequivocal” and “distinctly hostile” measures to disseize the other heirs of the properties. Although the heirs of Richard Gary did not prevent some of the other heirs from living on the property, they controlled the access to the properties. They controlled the

property continuously for more than sixty-five (65) years. They bush-hogged the thirty (30) acre tract. They landscaped the thirty (30) acre tract and graded the streets. They put down wells and septic tanks and stored supplies on the property. They fenced the properties and put "No Trespassing" signs on the ten (10) acre tract.

CONCLUSION

The actions of the Clara Gary Family met the requirements of ouster.

For the foregoing reasons, Petitioner respectfully submits that the Court should reverse the trial Court and order and find that the Clara Gary Family is the sole owner of the thirty (30) acre tract and ten (10) acre tract.

For the reasons stated, this Court should reverse the judgment of the Master In Equity.

Respectfully submitted,

COUNTS & HUGER, LLC



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Gary, Bernard Gary, Francis Gary, Jr. and

Charles Gary

August 5, 2015

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

**APPEAL FROM BEAUFORT COUNTY
Master In Equity**

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Pauline Lesesne, Marion
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Paul K. Scott, Harold Jones,
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Ron Kenneth Stewart, Mary
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Barbara Williams Smith,
Johnie Williams, Terri Elaine
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Patricia Ann White, Sharon
White, Nolen White, Johnny
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V.

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White, Carrie White, Ellen
White Gary, Sam Gary, Emma
Gary Johnson, Miller Johnson,
Sr., Oscar Johnson, Eloise
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I certify that I have served the Appellant's Initial Brief on the Clerk of Court for the Court of Appeals and Respondent and the Guardian ad Litem by depositing the requisite number of copies of it in the United States Mail, postage prepaid, on August 5, 2015, addressed to the following:

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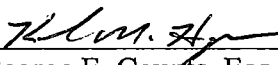
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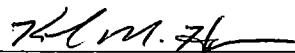
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Initial Brief of the Appellant has been served upon all parties and that it complies with Rule 208.

Respectfully submitted,

COUNTS & HUGER, LLC



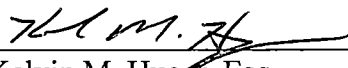
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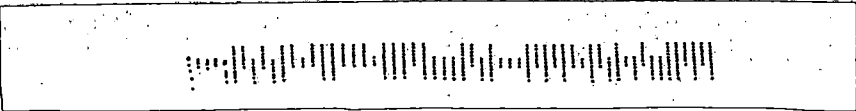
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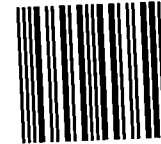
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Kelvin M. Huger, Esq.

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