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Division III  
State of Washington  
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No. 368220 - III

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**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III**

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**JENS RICHTER, as an individual d/b/a GLOBAL EQUINE SIRES  
and A-1 PERFORMANCE SIRES, Plaintiff/Appellant**

**vs.**

**ALLIE HELINSKI and BRENT HELINSKI, individually and the  
marital community thereof,  
Defendants/Respondents**

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**APPEALED FROM SPOKANE COUNTY SUPERIOR COURT  
CAUSE NO. 18-2-03782-9**

**THE HONORABLE JULIE M. MCKAY**

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**APPELLANT'S OPENING BRIEF**

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## **I. INTRODUCTION**

This Appeal is the result of the trial court vacating a judgment entered in favor of Appellant Jens Richter, d/b/a, Global Equine Sires and A-1 Performance Sires (“Richter”) as a result of two default judgments entered against Respondents Allie Helinski and Brent Helinski (“Respondents”). At no time after Respondents were properly served with the summons and complaint did Respondents ever formally appear, answer, or otherwise defend the Appellant’s lawsuit. As a result of Respondent’s failure to appear or otherwise defend the lawsuit, orders of default were entered against Allie Helinski and Brent Helinski resulting in a judgment.

The undisputed facts show that while Allie Helinski retained the services of Robert Sargent, attorney, to defend the lawsuit on her behalf, Mr. Sargent never appeared, answered or otherwise defended on behalf of Ms. Helinski and her marital community, formally or informally, prior to an order of default and default judgment being entered. Further, Mr. Sargent never even attempted to make contact with Richter’s counsel until after an order of default was entered against Ms. Helinski. The undisputed facts also show, that at no time did Mr. Sargent ever enter a formal appearance, answer or otherwise defend the lawsuit on behalf of Brent Helinski, Ms. Helinski’s husband. Because Respondents failed to appear

or otherwise defend, as required by court rule, a judgment for damages was entered against the Respondents without notice.

After receiving notice of the judgment, Respondents moved the trial court to vacate the judgment. As to Ms. Helinski, the trial court found that Mr. Sargent had failed to appear or otherwise defend prior to entry of the order of default, and therefore was not entitled to notice of the default. The trial court also found Mr. Sargent did not substantially comply with the appearance requirements prior to the time the default order was entered against Mr. Helinski. Ms. Helinski failed to present substantial evidence of prima facie defense to Richter's claims, and did not prove mistake, inadvertence, surprise or excusable neglect, however, the trial court still vacated Richter's judgment based on Washington's policy preferring to have cases heard on the merits.

The trial court abused its discretion in vacating the judgment against the Respondents, and the trial court's decision should be overturned and Richter's judgment should be reinstated.

## **II. ASSIGNMENTS OF ERROR**

- A. The trial court abused its discretion by vacating the judgment without finding the failure to appear or answer was the result of mistake, inadvertence, surprise or excusable neglect.

- B. The trial court abused its discretion by vacating the judgment without Respondents presenting substantial evidence of a prima facie defense to Richter’s complaint.

**III. ISSUES PRESENTED**

1. Did the trial court abuse its discretion in vacating the judgment against Respondent Allie Helinski pursuant to CR 60(b) without finding the failure to appear or answer was the result of mistake, inadvertence, surprise or excusable neglect?
2. Did the trial court abuse its discretion by vacating the judgment without Respondents presenting substantial evidence of a prima facie defense to Richter’s complaint.

**IV. STATEMENT OF THE CASE**

**Facts**

Appellant Jens Richter (“Richter”) owns and operates Global Equine Sires (“Global”) and A-1 Performance Sires (“A-1”), which for the most part, sell high-end horse semen online to customers. CP 4-6. On June 3, 2016, Richter, who already owned Global, purchased A-1 from Respondent Allie Helinski. CP 48; 55. In accordance with the parties’ agreement, Ms. Helinski continued to work as an independent contractor for Richter, and would receive 10% from each sale she made. CP 49. After purchasing A-1 from Ms. Helinski, Richter maintained semen inventory with Ms. Helinski in the State of Washington. CP 48-51. Richter started to receive concerns from customers who had purchased

semen from Ms. Helinski that they were being charged and the wrong semen was being sent, they were being sent ineffective semen straws, or no semen was being sent at all. CP 49. Richter had no knowledge of these transactions being made by Ms. Helinski, did not receive the orders, and did not receive the payments. CP 5. Ms. Helinski was using Richter's business, A-1, to make these unauthorized sales, was keeping the money, and not providing the corresponding product. CP 1-11; 48-51; 57-64; 68-70.

In addition to the unauthorized sales described above, Richter maintained large inventory of horse semen in a protective container in Washington in the possession of Ms. Helinski, and despite requests she would not return the inventory to Richter. CP 49-51. The total value of horse semen inventory in Ms. Helinski's possession is \$295,550.00. CP 50; 66.

At the February 22, 2019, reasonableness hearing, Richter provided the trial court with evidence of the unauthorized sales. CP 57-64; 68; 70. The evidence showed that Ms. Helinski had received money from unauthorized sales, failed to provide the product to customers, and provided fraudulent straws to customers. *Id.* Richter also provided the trial court with the inventory list still in Ms. Helinski's possession. CP 66. As a result of Ms. Helinski's continued unauthorized sales and customer

complaints, Richter was forced to shut down A-1 in an effort to prevent further damage. CP 50.

On February 22, 2019, Richter testified and presented evidence at the reasonableness hearing showing damages in the amount of \$373,891.00, which included an award of attorney's fees and costs of \$9,270.00. CP 48-84. Based on the evidence and testimony presented, the trial court entered a judgment against Ms. Helinski in the amount of \$373,891.00. CP 92-95. On March 8, 2019, Richter filed an "Application for Writ of Garnishment" and "Application of Garnishment for Financial Institution." CP 97-103. On March 12, 2019, Richter began to execute his judgment, which caused Respondents to appear in this lawsuit for the first time. CP 104-110.

#### **Procedural History**

On August 20, 2018, Richter caused a cease and desist letter to be personally served on Respondent Allie Helinski. CP 211-212. On August 29, 2018, Appellant filed a Summons and Complaint against the Respondents in Spokane County Superior Court. CP 1-11. On August 31, 2018, Respondent Allie Helinski was personally served with the summons and complaint. CP 13. On September 14, 2018, Richter caused a letter to be sent to Ms. Helinski demanding the return of the horse semen in her possession. CP 216. This demand was sent six days prior to Ms.

Helinski's answer being due, and it indicated the intent to file for an injunction to prevent further unauthorized sales and that further legal action would be taken to obtain Richter's property in Ms. Helinski's possession if no response was received by the end of business on September 21, 2018. CP 216. On September 24, 2018, after Richter never received a response to either letter or the summons and complaint, he caused an order of default to be entered against Ms. Helinski. CP 225-226. On September 26, 2018, Respondent Brent Helinski, Allie Helinski's husband, was personally served with the summons and complaint. CP 24.

On October 5, 2018, 12-days after the order of default was entered against Ms. Helinski, attorney Robert Sargent left a voicemail for Mr. Freebourn indicating he was hired by Ms. Helinski. CP 206; 225-226. Unbeknownst to counsel for Richter, on or about September 15, 2018, Ms. Helinski met with and apparently hired attorney Robert Sargent to defend her in this lawsuit. CP 142. At no time during this litigation did Mr. Sargent ever formally appear, answer or defend the lawsuit. CP 206-207; RP 20, ln. 10-14. Because Mr. Freebourn was busy preparing for three trials, he never returned Mr. Sargent's voicemail. CP 206. On October 17, 2018, an order of default was entered against Mr. Helinski because he never formally appeared or filed an answer to the summons and complaint. CP 222-223.

Between October 22, 2018, and October 25, 2018, almost a month after the default order was entered against Ms. Helinski, and after the default order was entered against Mr. Helinski, Mr. Sargent appeared at the office of Richter's counsel and left a business card. CP 207. On October 26, 2018, attorney Victoria Johnston, co-counsel for Richter, had a telephone discussion with Mr. Sargent regarding the lawsuit wherein Mr. Sargent indicated he was helping a friend. CP 194-195; 199. Ms. Johnston was familiar with Mr. Sargent during her time working as a public defender for Spokane County, and did not have an understanding Mr. Sargent was privately practicing law. CP 195. Ms. Johnston informed Mr. Sargent that Richter wanted the horse semen inventory in Ms. Helinski's possession returned as soon as possible. CP 195.

After speaking with Mr. Sargent on October 26, 2018, Ms. Johnston was unsure who Mr. Sargent was representing in the lawsuit, so she sent Mr. Sargent an email on October 30, 2018. CP 195; 203. In Ms. Johnston's October 30, 2018, email, she requested, "*please clarify who you represent in this matter.*" CP 203. Mr. Sargent replied to Ms. Johnston's email the same day, and indicated he would get back to Ms. Johnston later that same day or the next morning. CP 203. After sending this response email, Mr. Sargent never made contact with Richter's counsel again. CP 207. At no time did Mr. Sargent ever file a notice of

appearance, an answer, or provide any indication in writing that he was representing either or both of the Respondents.

On January 23, 2109, 85-days after Mr. Sargent's last contact with Richter's counsel, Richter filed a motion for entry of judgment. CP 37-39; 85-87. Because there was no notice of appearance, answer or attempt to defend the lawsuit, the motion for entry of judgment was noted for hearing without notice to Respondents. On February 22, 2019, a reasonableness hearing was held before the trial court to establish the damages for entry of judgment, and the judgment against the Respondents was entered at the conclusion of the reasonableness hearing. CP 91-96. The trial court minutes from the reasonableness hearing notes the Respondents were paged, were not present, and were not represented by counsel. CP 96.

On April 25, 2019, Respondents appeared in this action for the very first time by causing their counsel to file a motion to set aside the default orders and have the judgment vacated. CP 111-113. In support of their motion, Respondents submitted a memorandum and declarations. CP 114-168. Richter submitted his response to Respondents' motion, which included a memorandum, declarations, and evidence supporting his judgment. CP 169-231. A hearing was held before the trial court on May 10, 2019, and at the conclusion of the hearing, the trial court issued an order vacating the default orders and judgment. CP 243-244.

During its decision, the trial court found it was undisputed that Mr. Sargent did not file a notice of appearance and did not formally appear in the lawsuit. RP 20, ln. 10-14. The trial court also concluded that Mr. Sargent had not done enough to substantially comply such that notice requirements must be met prior to entry of default. RP 23, ln. 6-15. The trial court then applied the White factors to determine whether the judgment should be vacated. RP 23. With regard to the first White factor, whether there is at least a prima facie defense, the trial court found there was at least a prima facie defense to the lawsuit based solely upon the statements provided by Ms. Helinski in her declaration. RP 24-25.

Examining the second White factor, whether there was a mistake, inadvertence, surprise, or excusable neglect, the trial court concluded the Respondents could not meet this factor because Mr. Sargent did not comply with the court rules and do what he was obligated to do as a lawyer. RP 25, ln. 3-10. The trial court ultimately concluded that based on the preferred policy of having a case decided on the merits as opposed to a default, the default orders and judgment should be vacated. RP 25-26.

The trial court abused its discretion and erred as a matter of law by vacating the default judgment entered against the Respondents. Richter asks this Court to overturn the trial court's decision, and to reinstate the default judgments against the Respondents.

## V. ARGUMENT

### A. Standard of Review.

A trial court's decision to vacate a default judgment is reviewed for abuse of discretion. Yeck v. Dep't of Labor & Indus., 27 Wash.2d 92, 95, 176 P.2d 359 (1947). A trial court abuses its discretion if it makes a decision based on untenable ground or for untenable reasons. Braam v. State, 150 Wash.2d 689, 706, 81 P.3d 851 (2003). When determining whether to grant a motion to vacate a default judgment, "*the trial court must balance the requirement that each party follow procedural rules with a party's interest in a trial on the merits.*" Showalter v. Wild Oats, 124 Wash. App. 506, 510, 101 P.3d 867 (2004). Defaults are disfavored under Washington policy, however, the courts "*value an organized, responsive, and reasonable judicial system where litigants acknowledge the jurisdiction of the court to decide their cases and comply with court rules.*" Little v. King, 160 Wash.2d 696, 703, 161 P.3d 345 (2007).

The Washington Supreme Court has stated:

*litigation is inherently formal. All parties are burdened by formal time limits and procedures. Complaints must be served and filed timely and in accordance with the rules, as must appearances, answers, subpoenas, and notices of appeal. Each has its purpose and each purpose is served with a certain amount of formality monitored by judicial oversight to ensure fairness.*

Morin v. Burris, 160 Wash.2d 745, 757, 161 P.3d 956 (2007). When a party seeks to set aside a default judgment pursuant to CR 55 or CR 60, the court requires that party establish “*they actually appeared or substantially complied with the appearance requirements and were thus entitled to notice.*” Morin, 160 Wash.2d at 755.

Alternatively, a defendant may seek to set aside a default judgment by meeting the four-part test stated in White v. Holm, 73 Wash.2d 348, 35-52, 438 P.2d 581 (1968). The four-part test in White requires the defendant show:

***(1) That there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by opposing party; (2) that the moving party’s failure to timely appear in the action, and answer the opponent’s claim, was occasioned by mistake, inadvertence, surprise or excusable neglect; (3) that the moving party acted with due diligence after notice of entry of default judgment; and (4) that no substantial hardship will result to the opposing party.***

White, 73 Wash.2d at 352. The first two elements are the major elements, and the latter two elements are secondary. Id. If a party is only able to show a prima facie defense, the reasons for the party’s failure to appear will be securitized with greater care. Id. at 352-353. The White test “*prevents those who purposely do not contest a default or do not timely do so from benefitting from their actions.*” Alvarado v. Spokane County, 198 Wash. App. 638, 645, 394 P.3d 1042 (2017). The factors

identified in White, reflect Washington's policy preference for decisions on the merits. Id. at 646.

Considering the above standards, the trial court abused its discretion by vacating Richter's judgment against the Respondents. At no time prior to entry of judgment did the Respondents appear, answer or otherwise defend this lawsuit. Therefore, Respondents were not entitled to notice of the default and entry of judgment. CR 55(a)(3). The trial court came to the same conclusion in this regard. RP 20, ln. 10-14; RP 23, ln. 6-15.

It was only when Richter began to execute his judgment that the Respondents finally took the lawsuit against them seriously and appeared in the lawsuit. The trial court failed to properly apply the White factors when deciding to vacate Richter's judgment. The trial court did not find Mr. Sargent's failure to appear or otherwise defend was the result of mistake, inadvertence, surprise or excusable neglect. RP 25, ln. 3-10. The trial court also found there was at least a prima facie defense by Respondents based solely on the self-serving statements appearing in the Declaration of Allie Helinski. RP 24-25.

The trial court abused its discretion in vacating the default orders and judgment, and its decision should be reversed and Richter's judgment should be reinstated.

**B. There are no Facts or Evidence Supporting Vacating the Judgment Entered Against Allie Helinski.**

The undisputed facts show that Ms. Helinski was personally served with the summons and complaint on August 31, 2018. CP 13. Therefore, Ms. Helinski's answer to the complaint was due on September 21, 2018. CR 4(a)(2). Because Ms. Helinski failed to appear, answer or otherwise defend the lawsuit, she was not entitled to notice of the motion for default. CR 55(a)(3). On September 24, 2018, an order of default was entered against Ms. Helinski. CP 225-226. The trial court agreed Ms. Helinski was not entitled to notice prior to entry of default. RP 23, ln. 6-15.

Final judgment was not entered against Ms. Helinski until February 22, 2019; at this time Ms. Helinski still had not appeared, answered or otherwise defended the lawsuit. *“Generally a default judgment is proper when the adversary process has been halted because of an essentially unresponsive party.”* Johnson v. Cash Store, 116 Wash. App. 833, 848 (2003). Based on the undisputed facts, and findings of the trial court, the only way Ms. Helinski could get relief from the judgment was for the trial court to vacate the judgment and order of default pursuant to CR 60(b) after examining the White factors.

The second White factor requires the trial court to make a finding “(2) *that the moving party’s failure to timely appear in the action, and answer the opponent’s claim, was occasioned by mistake, inadvertence, surprise or excusable neglect...*” White, 73 Wash.2d at 352. The record shows the trial court found that Mr. Sargent’s failure to appear, answer or otherwise defend this lawsuit was not the result of mistake, inadvertence, surprise or excusable neglect. RP 25. Specifically, the trial court stated:

*Then evidence of mistake, inadvertence, surprise, and excusable neglect, that also gives me a bit of pause because Mr. Sargent is the Helinskis. They’ve done what they needed to. He – by “he” I mean Mr. Sargent – did not. Mr. Sargent is the one responsible for filing the notice of appearance, frankly, as soon as practical, at least in my experience. But, again, every attorney does things differently. Why, I have no explanation for.*

RP 25, ln. 3-10.

Even if the trial court finds the existence of a prima facie defense to the lawsuit, the first White factor, when the second White factor is not satisfied it is fatal to a motion to vacate a default judgment. Alvarado v. Spokane County, 198 Wash. App. 638, 644, 394 P.3d 1042 (2019); See also, Johnson, 116 Wash. App. at 849. In Johnson, this Court upheld the trial court’s decision to deny a motion to vacate and found inexcusable neglect where a store manager failed to properly forward a properly served summons and complaint to defense counsel resulting in a default. Johnson, 116 Wash. App. at 848-849.

This case is similar to the facts in Johnson. After Ms. Helinski was served with the summons and complaint, she alleges she hired attorney Robert Sargent to defend her. CP 142. For whatever reason, Mr. Sargent never filed a notice of appearance, an answer, or any written notice of any kind to Richter's counsel prior to the default order being entered against Ms. Helinski on September 24, 2019. The trial court noted in its decision it was Mr. Sargent's obligation and responsibility to formally appear, and he failed to do so as required. RP 25, ln. 3-10. Mr. Sargent's actions, or lack thereof, were not the result of a mistake, inadvertence, surprise or excusable neglect. Mr. Sargent's failure to appear, answer, and do what was necessary to defend the lawsuit after being provided with the summons and complaint by Ms. Helinski is inexcusable neglect, if not willful noncompliance. Johnson, 116 Wash. App. at 848-849.

At the heart of the White, factors is whether the party seeking relief from the judgment intentionally ignored the obligation to respond. 198 Wash. App. at 645. "*The White test prevents those who purposely do not contest a default or do not timely do so from benefitting from their actions. Id. Prior judicial decisions "have repeatedly held that, if a company's failure to respond to a properly served summons and complaint was due to a break-down of internal office procedure, the failure was not excusable."* Rosander v. Nightrunners Transport, LTD,

147 Wash. App. 392, 407, 196 P.3d 711 (2008), citing, TMT Bear Creek Shopping Ctr., Inc. v. Petco Animal Supplies, Inc., 140 Wash. App. 191, 212, 165 P.3d 1271 (2007). If a company is held to the aforementioned standard, then surely, Mr. Sargent, a licensed Washington attorney, should be held to this same standard and his failure to respond to a properly served summons and complaint cannot be excusable.

Because there are no facts or evidence supporting a finding that Mr. Sargent's failure to appear or answer was a mistake, inadvertence, surprise or excusable neglect, the trial court abused its discretion in vacating the judgment against Ms. Helinski. This Court should reverse the trial court's decision to vacate the judgments and reinstate the judgments against the Respondents.

**C. Ms. Helinski Failed to Present Evidence and Facts Supporting a Defense to Richter's Claims.**

The first White factor requires the trial court to examine whether, *"there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by opposing party."* White, 73 Wash.2d at 352. The law requires the trial court review prima facie defenses in the light most favorable to the defendant, and reasonable inferences therefrom., because vacating a judgment will be pointless if the subsequent trial would result in another judgment in favor of the plaintiff.

Rosander v. Nightrunners Transport, LTD, 147 Wash. App. at 406. *An inference is a logical conclusion or deduction from, an established fact.*”  
Lamphiear v. Skagit Corp., 6 Wash. App. 350, 356, 493 P.2d 1018 (1972). *“The rule is well established that the existence of a fact or facts cannot rest in guess, speculation, or conjecture.”* Id. The defendant meets the burden to establish a prima facie defense, *“if it produces evidence that, if later believed by the trier of fact, would constitute a defense to the claims presented.”* Id. at 404. *“[M]ere speculation is not substantial evidence of a defense.”* Little v. King, 160 Wash.2d 696, 705, 161 P.3d 345 (2007).

When attempting to establish a prima facie defense, *“[a] defendant must set out concrete facts and cannot merely state allegations.”* Ha v. Signal Elc., Inc., 182 Wash. app. 436, 322 P.3d 991 (2014). *“A fact is an event, an occurrence, or something that exists in reality.”* Grimwood v. University of Puget Sound, Inc., 110 Wn.2d 355, 359, 753 P.2d 517 (1988), citing, Webster’s Third Int’l Dictionary 813 (1976). A fact *“is what took place, an act, an incident, a reality as distinguished from supposition or opinion.”* Id. at 359, citing, 35 C.J.S. Fact 489 (1960). There are no “facts” as required in Ms. Helinski’s declaration sufficient to establish a prima facie defense to Richter’s claims.

The only evidence presented by Ms. Helinski in support of her defense to the claims asserted by Richter was her declaration, which attached the contract between Richter and Ms. Helinski. CP 140-141; 146. In her declaration, Ms. Helinski dedicates only a few paragraphs to her defense, and in those paragraphs, she does nothing more than deny the claims. In contrast, Richter submitted a declaration with attached evidence showing concrete evidence establishing his claims and damages. CP 48-84. In addition, Richter testified in open court at the reasonableness hearing to facts supporting his claims, evidence and to the damages suffered as a result of Ms. Helinski's conduct.

Ms. Helinski is required to come forward with competent evidence of a prima facie defense, she cannot simply rely upon self-serving statements denying the claims asserted against her. See, Little v. King, 160 Wash.2d 696, 704, 161 P.3d 345 (2007). Richter provided substantial evidence supporting his claims and damages, including documentation of the unauthorized sales made by Ms. Helinski. CP 48-84. In support of her motion to vacate, Ms. Helinski offered no evidence showing she had a defense to Richter's claims. The type of evidence supplied by Ms. Helinski, essentially a self-serving affidavit, would not create a genuine issue of material fact in a summary judgment motion. CR 56(c).

Because Ms. Helinski failed to present any evidence of at least a prima facie defense to Richter's claims, the trial court's decision should be reversed to avoid pointless litigation because this lawsuit will just result in another judgment in favor of Richter at considerable expense to all parties and at the expense of judicial resources. Richter's judgments should be reinstated.

## **VI. CONCLUSION**

The trial court abused its discretion and erred as a matter of law in vacating the judgments against the Respondents. Respondents, especially Ms. Helinski, were not entitled to notice when the default orders were entered because they did not appear, answer or otherwise defend the lawsuit before their time to do so had expired. Further, Respondents failed to show that their failure to appear, answer and defend was the result of a mistake, inadvertence, surprise or excusable neglect, and failed to present sufficient evidence of a defense. It is unfortunate Respondents lawyer failed to meet the required obligations, however, Respondents are not without a remedy, they certainly can pursue their damages.

In the end, Richter is entitled to have a judgment entered against the Respondents. Richter followed the rules, and provided more than enough time for the Respondents to defend this action. After the initial default order was entered against Ms. Helinski on September 24, 2018,

Richter waited until February 22, 2019, before entering the judgment against Respondents. Respondents left Richter no choice but to proceed with a default judgment.

This Court should reverse the trial court's decision to vacate the judgments against the Respondents, and reinstate Richter's judgments.

DATED this 4<sup>th</sup> day of September, 2019.

ROBERTS | FREEBOURN, PLLC

*s/ Chad Freebourn*

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CHAD FREEBOURN, WSBA #35624  
Attorney for Jens Richter d/b/a Global  
Equine Sires and A-1 Performance Sires

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 4<sup>th</sup> day of September, 2019, I caused to be served via the Court of Appeal filing system a true and correct copy of the foregoing document to the following:

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*s/ Chad Freebourn*  
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**Superior Court Case Number:** 18-2-03782-9

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