6-21-2017

Hull v. Giesler Appellant's Brief Dckt. 44562

IN THE SUPREME COURT OF THE STATE OF IDAHO

GREGORY HULL, Plaintiff-Counterdefendant-Appellant, vs. RICHARD B. GIESLER and Idaho Trust Deeds, LLC, Defendants-Counterclaimants-Respondents.	)	Docket No. 44562-2016 Twin Falls No. CV-2012-2168

APPELLANT'S BRIEF

Appeal from the District Court of the Fifth Judicial District for Twin Falls County
Honorable Randy J. Stoker, Presiding

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STATEMENT OF CASE

This case comes before the Court after a trial following an appeal found in *Hull v. Giesler*, 156 Idaho 765, 331 P.3d 507 (2014). The original appeal dealt with issues after the Trial Court determined an oral contract existed and attempted to define the parties' rights an remedies thereunder. This Court relied on *Restatement (Second) of Contracts,* §204 (1981) in its finding that when parties to a contract do not address an essential term to the contract, their rights are determined by the court supplying terms reasonable in the circumstances. *Id,* at 520.

The most recent trial dealt with the costs to be charged to Appellant as development costs and whether they were "reasonable" under the circumstances. Appellant objected to numerous expenses being sought as reimbursable from the second phase of the development. Appellant objected to these expenses as being inherently unreasonable when they included charges incurred during the first phase of development. The Appellant had reached an agreement to be bought out of the first phase of the development. Under that agreement, Respondent was required to pay all the costs of development for the first phase in exchange for keeping all the profits. The initial 40 acre development was known as "Belmont/Emerald" and Respondent kept 100% of the profit in exchange for supposedly paying "all the development costs."

At the conclusion of the trial, the Trial Court made its rulings approving essentially all of the expenses, including some admittedly incurred exclusively for the benefit of the original Belmont/Emerald Subdivision even though the Appellant had no interest and would receive no profit. Numerous other expenses or allocations were approved for reimbursement under the

rational of "front loading" expenses which were admittedly the responsibility of a homeowners association or were expenses of a privately owned water company in which Appellant held no interest and would share no profit.

The current course of proceedings seek review of the Trial Court's Order allowing Respondent to recover development costs not associated with Phase 1. They include recovery of expenses, farming expenses, electrical upgrades, and water delivery charges which are the contractual obligation of a homeowners association. Appellant is also seeking to reverse the Trial Court's evidentiary rulings in refusing to allow Appellant's witness, Greg Ruddell, from giving testimony as to "reasonable expenses" during the trial and allocate expenses to the various subdivisions.

The Trial Court issued its original findings, made subsequent modifications and both parties have sought to appeal various aspects of the Court's decision, including allowing recovery of expenses for costs incurred during the Belmont/Emerald phase in which the Court had previously ruled were the exclusive responsibility of Respondent.

STATEMENT OF FACTS

At the latest trial, the parties attempted to resolve the issue of the appropriate amount to be allocated for development costs which in turn would be utilized to determine the amount of profit to be divided between the parties. The costs of development going forward were to be focused on the remaining 107 acres, and in particular, costs specifically associated within the next phase known as "Triple Crown, Phase 1."

To determine the development costs, the Trial Court had to take into consideration that the parties had initially agreed to resolve their interest in the first phase of the development known as "Belmont/Emerald." Under a separate agreement, Appellant agreed to accept $200,000 for his interest in that initial 40 acre phase. Respondent retained 100% of the profit from that phase in exchange for the payment and the obligation to be responsible for all Belmont/Emerald development costs.

In spite of the agreement and proration of profits for the Belmont/Emerald phase, the Trial Court allowed numerous categories of expenses to be carried forward from the Belmont/Emerald development as costs allocated to Triple Crown. Moreover, the Trial Court had also previously ruled that any costs associated with farming operations conducted by Respondent pending complete development of the entire property, would be excluded from development costs. In spite of those prior rulings, the Trial Court has included in its decision, reimbursement of costs attributable to expenses clearly incurred exclusively for farming operations and from Belmont/Emerald expenses. Those costs appear in numerous categories regarding expenses allowed for upgrading the irrigation system, electrical upgrades, operation of a private water company and expenses incurred exclusively for farming. There are also expenses for lots locate din the Belmont/Emerald phase that were likewise included. Similar costs have been passed through to Appellant as development costs which have admittedly been the legal obligation of a homeowners association for a water delivery system and for capital costs of a private for profit corporation owned exclusively by Respondent.

ISSUES PRESENTED ON APPEAL

A. Did the Court err in allowing development expenses, direct or indirect, paid during the development of the first subdivision, Belmont and Emerald in 2006 and 2007, as well as costs incurred prior to Giesler being ordered by the Court to perform the next phase and while the land in Triple Crown Phase 1 was being farmed by Giesler?

B. Did the Court err in allowing the expenses for the next subdivision, Triple Crown Phase 1, after the parties had settled claims as to the first 40 acre subdivision, Belmont and Emerald, where Gielser agreed to be responsible for all remaining costs?

C. Did the Court err in finding that Giesler had met his burden of proof in establishing the direct costs related to Triple Crown Phase 1, where farming costs were still included as well as Belmont and Emerald costs for Belmont power undergrounds which were included in Triple Crown Phase 1 development costs?

D. Did the Court err in making Hull pay for one-half of the pressurized irrigation system used to supply water to the entire 147 acre subdivision, when Giesler personally owns the system, Triple Crown Water Company, uses it for farming, and contractually may charge the Home Owners Association for its operation, management, repair, as well as recapture of capital?

E. Did the Court err in not valuing the Nix lot at its fair market value when offset against development cost rather than selling it to maximize net profit?

F. Did the Court err by ordering Hull to share in net losses for lots added by Giesler to the subdivision, the Holms lots and two Belmont lots, that were not part of the remaining 107 acres, and thus not subject to Hull's interest in net profits?

G. Did the Court err by subjecting Hull to withstand any future loss when his interest is limited to net profits?

H. Did the Court err in ordering Hull to pay one-half of the accountant fees for Giesler's accountant, hired by the appointed Master, when said accountant acknowledged his role was an advocate of Giesler?

I. Did the Court err in allowing payment in the amount of $2,125 ordered by the Master to be paid to Hull by Giesler be considered as a receipt of net profit, when in fact they were reimbursement of actual costs paid by Hull?

J. Did the Court err in not allowing Hull's Motion for Summary Judgment, timely noticed for hearing, to be denied without oral argument and thereby depriving Hull of an opportunity to know in advance of trial what Giesler's defenses were to the issues address?

K. Did the Court err in refusing to allow Plaintiff's lay and expert witness Greg Ruddell to testify as to reasonable development costs.

ATTORNEY FEES ON APPEAL

Both the Trial Court and this Court have previously ruled that the parties have a legitimate binding oral contract to split profits from the development of a 147 acre tract of agricultural land into residential subdivisions. Consequently, the contract is commercial in nature and would entitle Appellant to recover his attorney fees on appeal.

Appellant therefor seeks recover of his attorney fees on appeal based on the fact that the contract was a commercial transaction and as such is governed by Idaho Code §12-120(3). In relevant part, the statute provides:

> In any civil action . . . and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs.
>
> The term "commercial transaction" is defined to mean all transactions except transactions for personal or household purposes. The term "party" is defined to mean any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

This Court has ruled that prevailing in a commercial transaction for purposes of the award of attorney fees, includes proof that the commercial transaction occurred. *O'Shea v. High Mark Development, LLC*, 153 Idaho 119, 280 P.3d 146 (2012). Although the Respondent in this case denied the existence of the contract between the parties, both the District Court and this Court ruled that a commercial transaction was entered into by virtue of the profit sharing agreement.

> Idaho Code §12-120(3) provides for attorney fees to the prevailing party in a civil action to recover on "any commercial transactions." Commercial transactions are all transactions except for personal or household purposes.

Wandering Trails, LLC v. Big Bite Excavation, Inc., 156 Idaho 586, 329 P.3d 368, 380 (2014).

The focus on the question of attorney fees or who is the prevailing party, shouldn't be on whether development costs were allowed, but rather, whether the costs sought were reasonable under the circumstances.

Appellant seeks recovery of his attorney fees pursuant to Idaho Appellate Rule 35(a)(5)(b)(5) and Idaho Appellate Rule 41.

ARGUMENT

1. STANDARD OF REVIEW.

Rulings by the Trial Court's refusing to admit evidence or allow testimony are reviewed under an abuse of discretion standard. *Hansen v. Roberts*, 154 Idaho 469, 299 P.3d 781 (2013).

> When reviewing the trial court's evidentiary rulings, this Court applies an abuse of discretion standard. *Edmunds v. Kraner,* 142 Idaho 867, 871, 136, P.3d 338, 342 (2006). These include trial court decisions admitting or excluding expert witness testimony, and excluding evidence on the basis that it is more prejudicial than probative. *Perry v. Magic Valley Reg'l Med. Ctr.,* 134 Idaho 46, 50-51, 995 P.2d 816, 820-21 (2000)

Id. at 786.

> To determine whether a trial court has abused its discretion, this Court considers whether the district court: (1) perceived the issue as one of discretion; (2) acted within the outer boundaries of that discretion consistent with applicable legal standards; and (3) reached its decision through the exercise of reason

Hansen v. Roberts, Supra cited at *Easterling v. Kendall,* 159 Idaho 902, 367 P.3d 1214 (2016); *See also*, *Ballard v. Kerr*, 160 Idaho 676, 378 P.3d 464 (2016); *Mattox v. Life Care Centers of America, Inc.,* 157 Idaho 468, 473, 337 P.3d 672, 632 (2014) (quoting *McDaniel v. Inland Northwest Renal Care Group Idaho, LLC*, 144 Idaho 219, 221-22, 159 P.3d 856, 858-59 (2007)

On the issue of the question of the reasonableness of the expenses which were ultimately allowed by the Court, that is a question of law. Since the Trial Court was supplying a missing contract term, that issue is a legal question over which the reviewing court exercises free review. Questions of law decided at the lower court are reviewed freely by the appellate court.

Questions of law are reviewed by the appellate court directly. *Sacred Heart Medical Center v. Nez Perce County*, 136 Idaho 448, 35 P.3d 265 (2001); *Friel v. Boise City Housing Authority*, 126 Idaho 484, 887 P.2d 29 (1994); and *Stuart v. State*, 136 Idaho 490, 494, 36 P.3d 1278, 1282 (2001) (Stuart IV).

However, it does rise to an abuse of discretion level when the Trial Court refuses to allow a party to submit evidence as to cost allocations which in this case concern direct evidence as to the reasonableness of expenses incurred in a residential subdivision.

"As to questions of law, this court exercises free review."

Id. at 494-95 – 36 P.3d at 1282, 1283. *See* also, *Hoagland v. Ada County*,154 Idaho 900, 906, 303 P.3d 587, 593 (2003) and *Sky Canyon Properties v. Golf Club*, 159 Idaho 162, 357 P.3d 1270 (2015)

2. <u>INTRODUCTION</u>.

The issues on appeal center around two primary issues; the first being the Court's "legal interpretation" of what development costs should be allowed as being "reasonable under the circumstances," since the parties did not define that term in their oral profit sharing contract. The first assignment of error, therefor, seeks review of this Court's legal conclusions as to what development costs were "reasonable under the circumstances."

The second issue concerns the Trial Court's rulings on evidentiary matters disallowing expert testimony to present evidence as to what would constitute reasonable development costs or to allow Appellant's expert witness to testify as to the allocation of various expenses which were supposed to be limited to costs directly associated with the Triple Crown Phase 1 parcel only.

The development costs issue is complicated by the fact that the same parties reached an agreement on their profit sharing interest for the first phase of development known as Belmont/Emerald. Under that agreement the Appellant waived his rights to share in net profits in exchange for a single cash payment of $200,000. However, as part of that agreement, Respondent was to pay the development costs for the Belmont/Emerald phase.

The second and most recent trial was focused exclusively on determining what were the appropriate amount of development costs for Triple Crown Phase 1 development. The issue, therefore, wasn't whether there were development costs, but what was the appropriate amount of development costs for the next phase of development.

During the trial, the Trial Court allowed numerous categories of expenses to be recouped or charged against the Appellant although the Trial Court denied the Appellant's expert, Greg Ruddell, to offer testimony regarding the reasonableness of expenses being charged by Respondent.

The Appellant seeks review of the Trial Court's rulings as to the allowance of certain development costs. The parties' oral profit sharing contract did not address what development costs were allowable. This Brief will examine the Trial Court's findings in the record to see whether there is sufficient evidence to support the Trial Court's ruling or make a finding that the conclusions were clearly erroneous.

The dispute at trial and which continues through this appeal process, is the reasonableness of expenses associated with the Triple Crown phase of development when there is an absence of a contractual term defining such expenses.

During the trial, the Trial Court acknowledged its obligation to supply or define the missing term of the contract by allocating the development expenses to Phase 1, also referred to as "Triple Crown." In an exchange with Respondent's counsel, the Court made the following query which illustrates the confusion with its role in determining what expenses were reasonable:

> **THE COURT**: Well, what should I do? I mean, there's no agreement between these parties other than that Mr. Hull got bought out of Belmont for $200,000 for his interest. But I can't find anything in this record that shows an agreement between these parties as to how to allocate anything. So I'm left with the situation of sitting here making it up as I go, and that's – I'm not sure that's what the Court should be doing, but if I don't do that, we'll never get this case resolved. I mean, do you agree that I have the inherent equitable power in this case to make a decision that would supply the terms, if you will, supply, I don't want to say terms, because that sounds like a contract, but to make those allocation decisions based on equity?
>
> **MR. WRIGHT**: I do. I don't know how else you can do it.

Tr., p. 522/523, L. 21 - 10.

The Court further expressed frustration over determining or allocating costs associated with a ditch removal expense:

> **THE COURT**: Well, and that is – that's again the essence of the problem here because I think the testimony is undisputed that the majority of that ditch went through phase 1. That there would a tail end of it in the blue part, phase 2, correct?
>
> **MR. WRIGHT**: Right.
>
> **THE COURT**: So – and you take the position from the start of this trial that I should not be making decisions about how much debt should be, development cost should be related to anything but phase 1. How do I, on this record, make a proportional determination of, assuming that I decide that's reasonable to take the ditch out, and we have whatever debt we have, how do I decide that based upon this record because nobody testified as to footage, percentage or anything. I can't just make that up. What do I do?

Tr., p. 527, L. 10 - 24.

The Trial Court then actively solicited input from Respondent's counsel as to what would be the proper allocation of certain costs:

> **THE COURT**: What you're suggesting is that as to things like, well, everything that has happened at this point for demolition, cleanup, the Thorpe bill, the Nix bills, the ditch, even though some of that relates to the property on phase 2, I essentially should front load that at this time and adjust that in the sale of the acres – the lots in phase 1. Is that what you're saying?

Tr., p. 529, L. 11-17

The follow-up response by Respondent's counsel further illustrates the confusion associated with the allocation of development costs:

> **MR. WRIGHT**: Yes. And there isn't, you know, any costs, we have presented, yeah, there's a lot of costs already in phase 2 that are specific to that that have nothing to do with phase 1, but these costs that are related to phase 1, they're kind of related to both, let's put them in 1 so we don't kind of always have that friction of what gets put forward, what doesn't.

Tr., p. 529, L. 18-24.

The Trial Court then recognized its own dilemma in supplying a practical definition of development costs as a reasonable contract term when the Court answered its own question this way:

> **THE COURT**: Why would that be fair and equitable to Mr. Hull? Because he certainly is not going to get the benefit of lot sales in phase 2 for a period of time; your client would be getting reimbursed up front. That's kind of contrary to the concept of a pro rata allocation of development costs, isn't it?

Tr., p. 529/530, L. 25 – 5.

In spite of this exchange and the obvious recognition of burdening the Appellant with costs not associated with the specific development before it, the Trial Court went forward and made two separate rulings allowing "front loading" of development costs from Phase 2 into Phase 1.

More problematic are the costs which the Trial Court carried forward from the original Belmont/Emerald Subdivision as allowable expenses to Triple Crown Phase 1. The Trial Court allowed innumerable expenses incurred in 2006-2007 from Belmont/Emerald even though the Trial Court had stated that Respondent Giesler was solely responsible for development costs from the Belmont/Emerald phase of the subdivision. In its rulings allowing the carry forward of expenses, the Trial Court did exactly what it warned would be unfair to Appellant as quoted in the above exchange.

Numerous other examples exist of expenses which the Trial Court allowed Respondent to carry into the Triple Crown development; costs that although they were clearly incurred either for the earlier development of Belmont/Emerald or were costs that were being "front loaded" from Phase 2 were allowed as Triple Crown costs. In the most egregious circumstances, expenses were charged to Appellant for irrigation farming expenses and water system upgrades that were legally the contractual obligation of the homeowners association or the privately owned water company, neither of which Appellant has any interest.

3. LEGAL AUTHORITY.

The Trial Court would have benefited from a review of this Court's prior rulings on how to define omitted contract terms. This Court's ruling in *Star Phoenix Mining Co. v. Hecla*

Mining Co., 130 Idaho 223, 939 P.2d 542 (1997), stated general principals regarding omitted terms in commercial contracts:

> It is well settled that a contract includes not only what is stated expressly but also that which of necessity is implied from its language.

Citing *Lane v. Pacific and Idaho Northern Railroad Company*, 8 Idaho 230, 67 P.656 (1902), and *Long v. Owen,* 21 Idaho 243, 121 P.99 (1912). Referencing *Commercial Insurance Co. v. Hartwell Excavating Co.*, 89 Idaho 531, 407 P.2d 312 (1965);.*Id.* at 541.

The Court went on to cite as its formulation of the above rule, *Davis v. Professional Business Services,* 109 Idaho 810, 712 P.2d 511 (1985) where it stated:

> In every contract there exist not only the express promises set forth in the contract but all such implied provisions as are necessary to effectuate the intention of the parties, and as arise from the specific circumstances under which the contract was made. In implying terms to a contract that is silent on the particular matter in question, only *reasonable terms* should be implied. Such implied terms are as much a part of the contract as those which are expressed.

Id. at 813-14, 712 P.2d at 514-15(emphasis in original)

Applying the above formula, it is evident that the Idaho Supreme Court has strived to apply reasonable and prudent terms to missing vital contract provisions which have not been provided for. To do so one must be mindful of the subject matter of the contract. In this case the subject is residential development costs which the Trial Court attempted to resolve in a vacuum without input or testimony of what are reasonable expenses based on other developments.

The concept of applying reasonable terms of omitted but essential contract term was but one of the crucial findings by this Court in the original appeal:

> . . . when parties to a contract have not agreed to a term essential to determine their rights and duties, the court supplies a term reasonable in the circumstances.

Hull vs. Giesler, *Id.,* at 520 citing *Restatement (Second) of Contracts,* §204 (1981). See also, *In Re: Davis*, 554 B.R. 918 – Bankr. Court, D. Idaho, 2016; and *Kantor v. Kantor*, 160 Idaho 812, 379 P.3d 1080 (2016):

The question before the Trial Court at the most recent trial was the reasonableness of development expenses charged by Respondent. However, from the above-quoted Supreme Court decisions, what is "reasonable" are to be defined by the circumstances of the case. There is no dispute that this is a case about the development of a residential subdivision property to be developed over a period of years. The costs of development the Trial Court was charged with finding were to be reasonable under the circumstances. How else could reasonable development costs be determined than through comparison with independent information as to reasonable development costs and allocating costs incurred for this specific phase only? That was the question presented to Judge Stoker by the Appellant and attempted to be answered by his witness, Greg Ruddell.

At trial Mr. Ruddell was asked to allocate the costs presented by Respondent and identify those which were not associated with Triple Crown. Mr. Ruddell was introduced as a real estate consultant. *See,* Tr., p. 469.

When counsel attempted to illicit testimony from Mr. Ruddell as to the allocation of charges used by Respondent for reimbursement, the Court refused to allow Mr. Ruddell to provide testimony and sustained objections *See,* Tr., p. 474-477 and 480-485.

The Trial Court went further and stated:

> **THE COURT**: There's no agreement that any of those costs have to be applied to phase 1, phase 2, phase 5. You're all just assuming things. Because I heard no testimony from anybody that Mr. Hull and Mr. Giesler reached any agreement on anything about this. It's all speculation. And all we're doing is just – we're arguing theory here. We're not arguing facts. I just don't find this testimony helpful at all.

Tr., p. 484/485, L. 24-5.

Based on the Trial Court's stated intent to continue sustaining objections Mr. Ruddell's exhibit on cost allocations, Appellant was unable to present evidence as to the reasonableness of expenses being charged. This is deeply troublesome given the fact that this was not a jury trial, but rather a bench trial. The Trial Court certainly had the knowledge and ability to weight the evidence for probative value. It is also noteworthy that the Ruddell exhibits were essentially compilations of information provided through discovery by Respondent and his accountant who was, by the way, allowed to testify as to his conclusions of reasonableness as to the recoverability of all of the expenses.

In Appellant's counsels' attempt to obtain approval for the introduction of the testimony and exhibits of Mr. Ruddell, the following exchange occurred:

> **MR. EDSON**: Your Honor, I believe that all the exhibits in Exhibit 2 reference an analysis of Mr. Hayes' calculations as well as the – his testimony that he had reviewed the summaries prepared by Mr. Hayes.

Tr., p. 494, L. 12-15.

In spite of such explanations, the Trial Court sustained the objections even though Mr. Ruddell had been identified in discovery as an expert witness and no Motion in Limine was filed to restrict his testimony. He did, however, respond to the Court's questioning that his analysis

was to review the exhibits prepared by Respondent's accountant who compiled the expense summaries.

Numerous other expenses were approved by the Trial Court in spite of testimony that the invoices for those items were used exclusively for farm irrigation purposes. *See*, Tr., p. 504-505.

The Appellant was denied the ability to present evidence or live testimony concerning the reasonableness and allocation of costs which the Trial Court ultimately allowed as reimbursable costs to Triple Crown, Phase 1. The lack of a specific contract identifying which should be allocated as a reasonable development cost was then left to the Trial Court's determination.

In spite of the lack of direct testimony from a witness, namely, Greg Ruddell, the Trial Court could have and should have entertained lay or expert testimony as to the reasonableness of development costs based on other subdivision development costs. That is exactly what Mr. Ruddell attempted to testify to in his initial testimony that he had consulted Marshall & Swift's cost evaluation book to establish subdivision costs generally. *See* Tr., p. 475, L. 3-7.

The Trial Court's original Memorandum Opinion from July, 2016 Trial dated August 4, 2016 and the Trial Court's Supplemental Memorandum Opinion Regarding the July, 2016 Trial, both incorporate the concept of "front loading" expenses to Phase 1. Nothing in the agreement between the parties addressed front loading expenses. Moreover, the authorities cited above dealing with implied terms defining what would be reasonable under the circumstances, never allowed front loading costs. The net affect is to require Appellant to pay for expenses on property yet to be developed or even offered for sale.

The Trial Court also allowed as recoupable expenses, charges which Appellant had never seen either in discovery or at the time of trial. The Trial Court went even further and ruled that unless Appellant objected to such expenses within ten days, the Trial Court was going to deem those expenses allowed without proof as to "reasonableness." *See,* Supplemental Memorandum, p. 2-3. In addition, the original Memorandum Opinion, page 3, allowed the recoupment of expenses which were carried forward from the Belmont/Emerald development expenses. Those findings were clearly in error.

The issue at trial was not whether Respondent was entitled to any development costs. Rather, whether the development costs were unreasonable and excessive under the circumstances. This is especially poignant given that the Trial Court excluded testimony and evidence as to reasonable development costs under the circumstances for residential developments in the Twin Falls County area.

CONCLUSION

This Court should reject the Trial Court's findings on the basis that they are premised on information which erroneously included expenses from earlier subdivisions, expenses from subdivision properties yet to be developed and charges for expenses for a privately owned water company conducting farming operations, none of which have a direct correlation or benefit to Phase 1 or the Appellant's right to net profits. By excluding testimony and evidence as to reasonable development costs, the Trial Court could not develop an adequate record to determine development costs that were reasonable. By taking a myopic view and looking exclusively at

costs presented by Respondent, the Trial Court was unable to determine what are reasonable expenses in the circumstances. Since it limited the evidence to a single source, this Court should overturn the ruling of the Trial Court and award attorney fees to Appellant on appeal.

Dated this 21st day of June, 2017

GERY W. EDSON, P.A.,

By _____
Gery W. Edson
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of June, 2017, I served a true and correct copy of the foregoing to the following parties by the method(s) indicated below:

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