WD86145

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

ERIC ENGLISH and ASHLEY ENGLISH,
Plaintiffs / Appellants,

vs.

JASON BARNETT, SARA BARNETT, and BARNETT REAL ESTATE INSPECTIONS, LLC,
Defendants / Respondents,

and

MATTHEW HARSHMAN AND ERICA HARSHMAN,
Third-Party Defendants / Respondents.

On Appeal from the Circuit Court of Jackson County
Honorable Kyndra J. Stockdale, Associate Circuit Judge
Case No. 2116-CV10560

REPLY BRIEF OF THE APPELLANTS

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A. Summary of opening brief

Eric and Ashley English appeal from a judgment declaring an easement exists across their driveway in favor of adjoining property owners Jason Barnett, Sara Barnett, and Barnett Real Estate Inspections ("the Barnetts") and granting the Barnetts injunctive relief (D20).

The trial court held an easement Matthew Baker, one of the developers of Meadow View Estates, granted to himself in 2005 covering a strip of un-platted land running on what is now the Englishes' property next to its boundary with the Barnetts' property ("the Underlying Easement") was not void due to merger, but instead ran with the land with the Englishes' property as the servient tenement and the Barnetts' property as the dominant tenement (D20 pp. 8-11). It held this was because the evidence at the bench trial below was that Mr. Baker, Janet Barnhart, and Bruce Barnhart (collectively "the Developers") intended the Underlying Easement to run for the benefit of future landowners, so the merger doctrine did not render it void (D20 pp. 8-11).

In their opening brief, the Englishes explained that the trial court's finding that the Underlying Easement was saved from merger because of the Developers' intent that it run with the land in perpetuity lacked substantial evidence in its support (Brief of the Appellant ["Aplt.Br."] 19-37). A subdivision developer's easement across his own property presumptively is invalid under the merger doctrine, as property owners may not have easements across their own land (Aplt.Br. 22-24). That presumption may be

overcome – and the developer's intention to create a lasting easement is established – only when the developer either (1) creates the easement in the subdivision plat itself, (2) creates the easement in the conveyance deeds for each affected property, or (3) both (Aplt.Br. 24-27).

Here, there was no evidence in the record falling into any of the three categories for overcoming the merger doctrine as to an easement across a developer's own land (Aplt.Br. 28-37). None of the evidence on which the trial court relied, which was essentially entirely 20 exhibits to which the parties stipulated (Tr. 3-4), showed that the Developers created the Underlying Easement in the subdivision plat or in any of the individual conveyance deeds to the Barnetts or the Englishes' predecessors, so no substantial evidence supported the trial court's conclusion that the Developers intended the Underlying Easement to last (Aplt.Br. 32-37).

B. The Barnetts misstate the applicable standard of review governing lack-of-substantial-evidence challenges.

At the outset of their response, the Barnetts argue that the Englishes misstated the applicable standard of review (Resp.Br. 10). They say the Englishes "allege the applicable standards of review for this appeal is a combination an [*sic*] abuse of discretion standard and de novo standard" (Resp.Br. 10). Instead, the Barnetts say the appropriate standard is that governing the "denial of a motion to amend a judgment [or] a denial of a motion for a new trial," "reviewed for an abuse of discretion" (Resp.Br. 10).

The Barnetts are correct that "abuse of discretion" is the standard of review for challenges to the denial of a post-judgment motion. But they are wrong that it applies here.

The Englishes never invoked some hybrid abuse-of-discretion/de-novo standard. Their opening brief does not mention the word "discretion" at all. Rather, as they explained, "When determining the sufficiency of the evidence … this Court will accept as true the evidence and inferences from the evidence that are favorable to the trial court's [judgment] and disregard all contrary evidence" (Aplt.Br. 20) (quoting *Watson v. Mense*, 298 S.W.3d 521, 526 (Mo. banc 2009)). And "[w]hether evidence is substantial and whether any inferences drawn are reasonable is a question of law reviewed de novo" (Aplt.Br. 20) (quoting *Wagner v. Bondex Int'l, Inc.*, 368 S.W.3d 340, 348 (Mo. App. 2012)). And while the Englishes questioned the sufficiency of the evidence in their post-judgment motion (D22 pp. 3-5), they do not appeal from the trial court's denial of that motion.

Rather, as the Englishes' point relied on plainly states, they challenge a material finding as lacking substantial evidence in its support.[1] So, they explained that finding lacked sufficient "evidence that, if believed, has some probative force on each fact that is necessary to sustain the circuit court's judgment." *Ivie v. Smith*, 439 S.W.3d 189, 199 (Mo. banc 2014).

The Englishes' challenge does not concern any discretionary ruling by the trial court. The Barnetts' suggestion otherwise is wrong. This Court should apply the well-known standard for sufficiency challenges from *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976).

[1] A challenge to the sufficiency of the evidence in judge-tried cases may be raised for the first time on appeal. § 510.310.4, R.S.Mo.; *see also Payne v. Nilsson*, No. WD86003, 2023 WL 8042436, 2 n.2 (Mo. App. Nov. 21, 2023).

C. Regardless of the language used to create the purported Underlying Easement, it was invalid from its inception due to merger.

On the merits, the Barnetts first argue that "[t]he trial court did not err in finding the [Underlying] Easement enforceable because it was properly created, in that it was an appurtenant easement granting [the Barnetts] a right of way over the [Englishes'] Driveway to access" the Barnett Property (Resp.Br. 10-12). They go on to say, "The trial court determined … that the [Underlying] Easement is appurtenant because it establishes a dominant tenement and a servient tenement" (Resp.Br. 12). The Barnetts are wrong that any of the evidence they invoke was legally sufficient to create an easement across the Englishes' driveway.

The Barnetts point to the document purporting to create the Underlying Easement and its language that it created "an irrevocable easement and right of way over, across, around, and through" the Englishes' driveway (Resp.Br. 11) (quoting Stip. Ex. 9 at 2). They argue this, coupled with their deed's statement that the Barnetts purchased their home "subject to building lines, easements, restrictions and conditions of record, if any …," was sufficient to create and preserve the Underlying Easement, the Barnetts argue (Resp.Br. 11) (quoting Stip. Ex. 12).

The Barnetts' argument is in error. As the Englishes explained in their opening brief, "The law of Missouri is that 'a man cannot have an easement over his own land'" (Aplt.Br. 22) (quoting *Ball v. Gross*, 565 S.W.2d 685, 688 (Mo. App. 1978)). Under that doctrine, because the Developers

deeded the Underlying Easement to themselves, it was presumptively invalid and no exception applied to preserve it (Aplt.Br. 28-37).

So, while the Barnetts are correct that the Underlying Easement may "abut[] the [Barnett] property, demonstrating a terminus of the right of way on the land to which it is claimed to be appurtenant," (Resp.Br. 12), that is irrelevant to the question at hand: whether the merger doctrine invalidates the Underlying Easement. As the Englishes explain below, none of the evidence the Barnetts now cite or on which the trial court relied sufficiently shows the Developers intended the Underlying Easement to survive subsequent conveyances of the affected properties. Accordingly, the Underlying Easement was invalid from its creation.

D. This case bears no material resemblance to *Phelan v. Rosener*, so the Barnetts' and the trial court's reliance on it is error; instead, it is on all fours with *Woodling v. Polk*, which requires reversal of the trial court's judgment.

Like the trial court, the Barnetts rely throughout their brief on *Phelan v. Rosener*, 511 S.W.3d 431 (Mo. App. 2017), to argue the Developers intended the Underlying Easement to run with the land and survive merger (Resp.Br. 13-16, 19-21). The Barnetts' comparisons are inapposite because they ignore *Phelan*'s material facts and downplay this case's similarity to *Woodling v. Polk*, 473 S.W.3d 233 (Mo. App. 2015).

First, the Barnetts oversimplify the holding in *Phelan*. They say the Court in *Phelan* "declined to apply the merger doctrine" because "a developer severed title by conveying a portion of the subject property shortly after creating the easement, demonstrating an intent by the owner to create an easement for the benefit of future landowners" (Resp.Br. 14).

In *Phelan*, this Court did not find a valid easement in that case solely because the developers' conveyance alone preserved the easement in question, as the Barnetts assert. Rather, it upheld the easement because both the document creating the easement and the deed conveying the property "*contain[ed] an identical description* of the … easement allowing for ingress and egress over" the affected property. *Phelan*, 511 S.W.3d at 440 (emphasis added). So, the deeds' specific easement language *and* the fact that the conveyance occurred the same day the developers created the easement were enough to prove the developers' intent to preserve the easement, not the timing of the conveyance alone. *Id.*

This distinction matters. As this Court explained in *Woodling*, "there are essentially two options for a developer who desires to create easements over the land he or she will eventually subdivide and sell." 473 S.W.3d at 236. "First … a developer can include the easement in the individual deeds conveying each lot, each at the time title is severed. … Second, more specific to a developer's circumstances, he or she can create easements through a subdivision plat …." *Id.* at 237. The Court explained the "best practice for developers is essentially to do both of these" by "initially creat[ing] easements in a recorded subdivision plat" and then including "identical easement language in each conveyance deed." *Id.*

The developers in *Phelan* did both of these things. First, they created the easement in the same document platting the land. *Phelan*, 511 S.W.3d at 435. Next, they included "an easement for ingress and egress … identical to" the easement in the platting documents. *Id.* at 436. So, because the

easement and the deed "related to the same subject; were executed contemporaneously; and the [easement] explained and fully consummated the intention of the parties to the deed," the documents were sufficient evidence of the developers' intention to create a lasting easement. *Id.* at 440.

Those circumstances from *Phelan*, which the Court in *Woodling* held are required, are missing here. The Developers did not create the Underlying Easement in the Meadow View Estates subdivision plat or in the deed conveying the Barnett Property (Stip. Exs. 4, 12). Instead, they executed a deed to create the Underlying Easement (Stip. Ex. 11).

So, this case is akin to *Woodling*, not *Phelan*. In *Woodling*, a developer executed and recorded an easement deed granting an easement to himself but never included it in any plat. 473 S.W.3d at 234. This Court affirmed the trial court's judgment finding no valid easement due to merger. *Id.* at 238. Because "the Easement Deed was not a subdivision plat" and was instead the developer's "attempt to create an easement in his own property," the easement was "insufficient *as a matter of law*." *Id.* (emphasis added). It made no difference the conveyance deed stated the buyers took the property "subject to existing building lines, easements … now of record, if any," as that language alone "was not specific enough to create any easement." *Id.*

The evidence this Court held was insufficient in *Woodling* to show a valid easement is exactly on what the Barnetts and the trial court relied to find the easement in this case was valid. As in *Woodling*, the Developers created the Underlying Easement through an individual deed, not the subdivision plat (Stip. Exs. 4, 11). And as in *Woodling*, the Barnetts'

conveyance deed stated generally that the purchase was "[s]ubject to … easements … of record, if any" (Stip. Ex. 12). That was insufficient to avoid merger in *Woodling*, and it must be here.

The Barnetts then incorrectly argue the Englishes "have overly relied on *Woodling* while ignoring key aspects of *Phelan*," and the decision in *Phelan* "distinguished itself from *Woodling*," so this Court should too (Resp.Br. 18, 22).

First, as explained above, the only evidence of the alleged easement in this case and the way in which the Developers tried to convey it is essentially identical to the developer's legally insufficient process in *Woodling*, not the more meticulous steps the *Phelan* developers took to preserve that easement.

Second, while this Court *did* distinguish *Woodling* in *Phelan*, the distinguishing facts only go to show why the Underlying Easement in this case is invalid. The Court in *Phelan* explained *Woodling* (as well as *Ball*, 565 S.W.2d at 685) were distinguishable first because the developers in *Phelan* executed the document creating the easement "contemporaneous[ly]" with their "conveyance of" the dominant tenement to a third party. 511 S.W.3d at 440. More importantly, the easement in *Phelan* itself specified it was created to provide ingress and egress to the particular properties at issue *and* several of the deeds conveying those properties "included an easement for ingress and egress over the entirety of the [land] identical to that in the" executed easement. *Id.* at 435-36, 440.

The point is that these facts redeeming the easement in *Phelan* were not present in *Woodling*, and they are not present here. The Underlying

Easement makes no specific reference to any dominant or servient estates or even specifies that it is meant for ingress and egress (Stip. Ex. 11). Moreover, none of the affected properties' conveyance deeds included specific language creating the Underlying Easement (or any easement), as they did in *Phelan* (Stip. Exs. 12, 13; Pet. Ex. 55). As the Court explained in *Phelan*, these are material facts affecting the validity of a developer-created easement. 511 S.W.3d at 439-41.

The Barnetts argue *Woodling*'s general rule that a developer should create an easement in a plat, through a conveyance deed, or both "contradicts the holding in *Phelan*" because in that case "there was no plat, but instead. [*sic*] involved a 'Road Maintenance Agreement' … creating an easement over a private roadway abutting several properties all owned by" the developers (Resp.Br. 18). A closer reading of *Phelan* belies the Barnetts' attempt to evade the principles this Court clarified in *Woodling*.

While it is true the valid easement in *Phelan* initially was created via a document called a "Road Maintenance Agreement," 511 S.W.3d at 435, the Barnetts incorrectly assert that document was not a plat. The developers in *Phelan* initially owned all the properties in that case that the easement affected. *Id.* at 434-35. These properties did not take shape as individual tracts until the developers executed a Road Maintenance Agreement, which included an exhibit that "set[] forth the metes and bounds legal description" of specific tracts within the developers' larger piece of land. *Id.* at 435. While not a plat in name, that exhibit functionally served as one. *See* BLACK'S LAW DICT. 1392 (11th ed. 2019) (a plat is "[a] map or plan of delineated or

partitioned ground; esp., a map describing a piece of land and its features, such as boundaries, lots, roads, and easements").

So, despite the Barnetts' intimation otherwise, *Phelan* and *Woodling* do not contradict each other. The developers in *Phelan* scrupulously ensured their easement would survive merger by using specific language to create it, describing its purpose, listing the affected properties, and then including the same language in the developers' conveyance deeds to third parties. These are exactly the steps this Court in *Woodling* said were necessary to save a developer-created easement from merger. But the developer in *Woodling* did not take them, so unlike in *Phelan*, that easement was "insufficient as a matter of law." 473 S.W.3d at 238. Likewise, the Developers here failed to take the necessary steps to preserve the Underlying Easement, too.

This case is like *Woodling*, not *Phelan*. As in *Woodling*, the evidence was insufficient as a matter of law to show that the Underlying Easement overcame the merger doctrine. This Court should reverse the trial court's judgment holding the Underlying Easement valid.

E. This Court should evaluate the trial court's findings with little deference as they were based entirely on uncontested evidence.

Next, the Barnetts accuse the Englishes of "attempt[ing] to relitigate facts they tried to prove during the bench trial, which the trial court rejected" (Resp.Br. 16). Citing the well-known *Houston v. Crider*, 317 S.W.3d 178 (Mo. App. 2010), which the Englishes cited and followed in their opening brief (Aplt.Br. 29), the Barnetts argue "[a]ny citation to or reliance upon evidence and inferences contrary to the judgment is irrelevant and immaterial to an appellant's point and argument challenging a factual proposition necessary to

sustain the judgment as not being supported by substantial evidence" (Resp.Br. 17). This argument ignores the posture of this case.

As the Englishes explained in their opening brief, "when the evidence is uncontested, no deference is given to the trial court's findings. Evidence is uncontested in a court-tried civil case when the issue before the trial court involves only stipulated facts *and does not involve resolution by the trial court of contested testimony*" (Aplt.Br. 20) (quoting *White v. Dir. of Revenue*, 321 S.W.3d 298, 308 (Mo. banc 2010)). This is because the trial court "is in a better position not only to judge the credibility of witnesses and the persons directly, but also their sincerity and character and other trial intangibles which may not be completely revealed by the record." *White*, 321 S.W.3d at 308-09 (quoting *Essex Contracting, Inc. v. Jefferson Cnty.*, 277 S.W.3d 647, 652 (Mo. banc 2009)). So, when the trial court's judgment is not dependent on witness credibility determinations, "the issue is legal, and there is no finding of fact to which to defer." *Id.* at 308.

Here, nearly every exhibit offered at trial was admitted under an agreement between the parties (Tr. 4). Those 20 stipulated exhibits, cited throughout the judgment, were the sole basis for the court's conclusion that the Developers intended to avoid voiding the Underlying Easement by merger (D20 pp. 6-11). Nowhere in the judgment does the trial court point to witness testimony to support a finding, and instead relied on the stipulated exhibits to make its findings and reach its conclusions. Nor do the Barnetts argue any material fact from witness testimony separately supports the trial court's judgment. Because the trial court decided the case based uncontested,

stipulated exhibits, this Court reviews those same exhibits *de novo* to determine their legal effect. *White*, 321 S.W.3d at 308.

Moreover, as the Englishes also explained in their opening brief, "'[w]hether evidence is substantial and whether any inferences drawn are reasonable *is a question of law' reviewed de novo*" (Aplt.Br. 20) (quoting *Wagner*, 368 S.W.3d at 348). This is especially true when the evidence the trial court relied on was admitted per a stipulation between the parties.

The Barnetts do not respond to this at all. The Englishes properly adhere to the applicable standard of review. Per *White* and its progeny, this Court owes no deference to the trial court's findings drawn from the stipulated documentary exhibits.

F. None of the evidence to which the Barnetts point or on which the trial court relied favor the court's findings, so the judgment lacks substantial evidence in its support.

As for the merits of the Englishes' challenge, the Barnetts argue the trial court did not rely on the Meadow View Estate plat (Stip. Ex. 4) or any of the Developers' conveyance deeds (Stip. Exs. 12, 13; Pet. Ex. 55) to reach its conclusions about the Developers' intent, so these exhibits "should be ignored, as they are not relevant or material to this Court's analysis as to whether the trial court had substantial evidence to support the judgment" (Resp.Br. 17). Again, the Barnetts are wrong.

As explained both above and in the Englishes' opening brief (Aplt.Br. 24-28), per *Woodling*, a developer-created easement only avoids invalidation for merger if the developer (1) creates the easement in a subdivision plat, (2) creates the easement in each individual conveyance deed, or (3) does both of

these things. 473 S.W.3d at 237. Under this law, the *only* "relevant or material" facts are whether the Meadow View plat or Developers' conveyance deeds created the Underlying Easement. That the trial court did not look exclusively to either of these documents is the cardinal error in its judgment. Because the Developers failed to preserve the easement by taking any of the actions described in *Woodling*, it was legally insufficient for merger.

Next, the Barnetts argue the Englishes "would have been on notice of the [Underlying] Easement had they reviewed the title paperwork the McKinneys [the Englishes' predecessors] received from the Developers, as well as the plat certificate and the Declarations" (Resp.Br. 18). They also assert that because the Englishes' title company notified them of the Underlying Easement's existence when they bought their home, "the easement was properly recorded" (Resp. Br. 18). The Barnetts are wrong for two reasons.

First, the question in this case is not whether the Developers properly recorded the Underlying Easement, but whether sufficient evidence demonstrating their intent to preserve that easement saved it from being void for merger. That the Developers properly recorded the Underlying Easement deed and a title company alerted the Englishes to that fact has no bearing on whether the easement was valid as a matter of law and burdened the Englishes' property to the benefit of the Barnetts' property.

Second, "the plat certificate and the Declarations" are not sufficient to preserve the Underlying Easement. The Barnetts do not specify the plat

certificate to which they are referring, as there are two in this case. Their argument fails either way.

The plat creating the Barnett Property (Stip. Ex. 4) makes no mention of any easement. To the contrary, it depicts the land covered by the Underlying Easement as un-platted (Stip. Ex. 4).

The declaration recorded simultaneously with that plat is also unavailing. On its face, it only applies to Meadow View Estates, of which the English Property is not a part (Stip. Ex. 5 at 2; Tr. 15). Moreover, that declaration only provided for an easement benefitting the Barnett Property if the "owners of [the Barnett Property] or [the Harshman Property] *elect to use the common driveway easement provided for in*" the *Original* Easement (Stip. Ex. 5 at 5). (The Original Easement was one the Developers deeded to themselves before the Underlying Easement, and which they released in 2005 (Stip. Exs. 3, 10).) But the Developers released the Original Easement (Stip. Ex. 10). More importantly, there is no evidence that the Barnetts and the Harshmans ever used that land as a common driveway. The Barnetts instead chose to construct their home and driveway on the other side of their property (Stip. Exs. 1, 2; Tr. 51). For each of these reasons, neither the Meadow View plat nor its associated declaration provides any support to the trial court's judgment.

The same is true of the other plat and declaration in this case. Although that plat (Stip. Ex. 6), which created the English Property's lot, depicted an easement across the Englishes' driveway, it does not follow that the Barnett Property is a dominant tenement of that easement. Rather, the

associated declaration, also filed simultaneously with its related plat, makes plain that easement is meant for a "private driveway *common to all tract owners* and will be reserved according to the recorded plat" (Stip. Ex. 7 at 5) (emphasis added). And on its face, that declaration only applies to the English and Barnes Properties (the Barnes Property is located directly west of the English Property and south of the Barnett Property (*see* Stip. Ex. 2)) (Stip. Ex. 7 at 2). So, while the second plat may depict the Underlying Easement, the text of its associated declaration makes clear the driveway is only for use by the Englishes and the Barneses. This makes sense, as those two properties do not border East Stoney Point Road (Stip. Exs. 1, 2).

So, none of the plats or declarations to which the Barnetts now point actually supports the trial court's judgment. The Englishes made these arguments in their opening brief (Aplt.Br. 32-37), but the Barnetts do not respond to them at all. Instead, they simply point to these documents' existence and claim they support the trial court's judgment without engaging the Englishes' argument about the documents' substance.

The Barnetts also cite a certificate of survey, completed in 2021 and entered into evidence per the parties' stipulation, which depicts the Underlying Easement (Resp.Br. 20). They argue this also is sufficient to support the judgment. They are in error.

The survey is nothing more than a visual depiction of the Underlying Easement (Stip. Ex. 18). That it conforms to the Underlying Easement's legal description has no bearing on whether that easement is void for merger. After all, a survey is merely "[t]he measuring of a tract of land and its

boundaries and contents" and "a map indicating the results of such measurements." BLACK'S LAW DICT. 1746 (11th ed. 2019).

The Barnetts' reliance on Brantley Elsberry's testimony is equally unavailing to support the trial court's conclusion. They argue his testimony "that he had reviewed the legal description of the [Underlying] Easement and was able to identify same" supports the trial court's judgment (Resp.Br. 20). This is not probative. Mr. Elsberry merely testified he reviewed several of the stipulated exhibits and that he was able to "generally map out … what property was covered by" the Underlying Easement based on its legal description (Tr. 80-82). That is no more helpful to the merger question than the 2021 survey. Merely translating an easement's written legal description to a visible medium makes no difference to that easement's validity. Neither the survey nor Mr. Elsberry's testimony is sufficient favorable evidence to support the judgment.

None of the evidence on which the Barnetts rely to defend the judgment does so. Neither the Meadow View Estates plat nor any conveyance deed contains the Underlying Easement. Per this Court's decision in *Woodling*, these are absences that in and of themselves require reversal. But even considering the plat creating the English property and the specific language in the declarations filed with both plats, there still is no substantial evidence supporting the trial court's conclusion that an easement across the Englishes' driveway exists for the Barnett Property's benefit.

The trial court's conclusion otherwise lacks substantial evidence in its support. This Court should reverse the trial court's judgment.

Conclusion

This Court should reverse the trial court's judgment, enter judgment declaring no valid easement benefitting the Barnett Property exists, and remand this case for further proceedings on the Englishes' trespass and injunctive relief claims.

Respectfully submitted,

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by /s/Jonathan Sternberg

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Certificate of Compliance

I certify that I prepared this brief using Microsoft Word for Office 365 in 13-point, Century Schoolbook font, which is not smaller than 13-point, Times New Roman font. I further certify that this brief complies with the word limitations of Supreme Court Rule 84.06(b) and this Court's Rule 41, as this brief contains 4,373 words.

/s/Jonathan Sternberg
Attorney

Certificate of Service

I certify that I signed the original of this reply brief of the appellant, which is being maintained by Jonathan Sternberg, Attorney, P.C. per Rule 55.03(a), and that on January 16, 2024, I filed a true and accurate Adobe PDF copy of this reply brief of the appellant via the Court's electronic filing system, which notified the following of that filing:

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I further certify that on January 16, 2024, I mailed a true and accurate copy of the foregoing to the following:

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