W2025-00779-COA-R3-CV

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**IN THE COURT OF APPEALS OF TENNESSEE**
**AT JACKSON**

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SCOTT PATRICK WERNER and KELLY LYNN WERNER BECK,
*personal representatives of* THE ESTATE OF DR. STANLEY WERNER,
Plaintiffs-Appellees,
v.
DE'ANTHONY MELTON,
Defendant-Appellant.

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# REPLY BRIEF OF APPELLANT DE'ANTHONY MELTON

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### I. STANDARDS OF REVIEW

As an initial matter, Dr. Werner argues at length that the Court should not treat this judgment as what it is, a default judgment, even though he originally argued that case law on default judgments is instructive since Mr. Melton did not answer or respond to any pleadings. (TR Vol. VII, pp. at 29 (Supplemental Response to Defendant's Motion to Set Aside Judgment)). These are not unique circumstances and, when faced with similar circumstances, this Court has applied the standards for a default judgment even where the judgment was obtained on the merits. *See, e.g.*, *Miclaus v. Miclaus*, No. E201802134COAR3CV, 2019 WL 2578256, at *2-4 (Tenn. Ct. App. June 24, 2019) (applying default judgment standards to a Rule 60.02 motion where the defending party did not respond and the case was resolved on the merits at trial); *Obi v. Obi*, No. M2010-00485-COA-R3CV, 2011 WL 2150733, at *5 (Tenn. Ct. App. June 1, 2011) (applying default judgment standards to a Rule 60.02 motion where the defending party failed to respond even though there was a trial leading to judgment, because "[a]lthough the judgment in this case is technically not a default judgment since the trial court heard

evidence, the effect was the same"); *see also Sutton v. United States*, 1991 WL 590, at *2 n.1 (6th Cir. Jan. 4, 1991) ("Entry of summary judgment here was arguably legal error because it was apparently made solely on the basis that it was unopposed, in effect a default judgment."). To do otherwise and apply summary judgment standards would (effectively) abrogate Tennessee Rule of Civil Procedure 55.01, as no plaintiff would *ever* move for default when it could simply move for summary judgment (by default) instead, as Dr. Werner did here, and receive the protection of a higher standard and additional damages that were not pled.

Make no mistake, what is before the Court is a default judgment dressed up as one for summary judgment. Dr. Werner attempts to evade this fact by claiming the judgment was based on requests for admission, but those requests were only deemed admitted because Mr. Melton was deemed to have been served with process (which he was not). In the end, the undisputed facts relied on in reaching summary judgment are only undisputed because Mr. Melton was not served and, therefore, did not respond to the requests for admission. (*See* TR Vol. VII, pp. at 3 (Judgment)). Dr. Werner even acknowledges this in his Brief. (Appellee's Brief, pp. at 39) ("[T]he vast majority of evidence supporting Dr. Werner's

motion for summary judgment were Appellant's admissions."). Dr. Werner's gamesmanship in setting up a summary judgment by default should not rewarded.

Dr. Werner claims that an abuse of discretion standard applies to all the Rule 60.02 issues, (*see* Appellee's Brief, pp. 22-25), but this is not so, as a *de novo* standard applies to the service issue, *see Jones*, 2025 WL 2336449, at *4. He also argues that Mr. Melton must present clear and convincing evidence to overcome the court's ruling that Mr. Melton was properly served but offers no legal authority to support that claim. (*See* Appellee's Brief, pp. at 25). Notably, when addressing Rule 60.02(3) for lack of jurisdiction, the Court applies a *de novo* standard of review with no presumption of correctness. *Jones v. Automated Bldg. Sys. Inc.*, No. E2024-00383-COA-R3-CV, 2025 WL 2336449, at *5 (Tenn. Ct. App. Aug. 13, 2025) ("However, we apply de novo review, with no presumption of correctness, when reviewing a trial court's ruling on a Tennessee Rule 60.02(3) motion to set aside a judgment as void due to a lack of jurisdiction over a defendant." (quotations omitted)). To the extent any presumption of correctness attaches, it is to factual issues, but whether service was proper is a matter of law, not fact. *Turner v. Turner*, 473

S.W.3d 257, 268 (Tenn. 2015) ("Moreover a decision regarding the exercise of personal jurisdiction over a defendant involves a question of law to which de novo review applies[.]" (alterations in original and quotations omitted)). Even then, any presumption can be overcome by a preponderance of the evidence. *Sykes v. Sykes*, 647 S.W.3d 596, 601 (Tenn. Ct. App. 2021). Again, Dr. Werner provides no authority to support his claim that clear and convincing evidence is required on the service issue. (*See* Appellee's Brief, pp. at 25).[1] While it is true that clear

[1] Dr. Werner may be basing this claim on *Brummitte v. Lawson*, which provides that the "clear, concrete, and convincing" standard applies for credibility determinations, *see* 182 S.W.3d 320 (Tenn. Ct. App. 2005) (highlighting that for non-credibility factual findings, a preponderance of the evidence standard applies), but the Court's written order did not find service sufficient based on any credibility determination, (TR Vol. III, pp. at 404-07 (Order Denying Motion to Set Aside Judgment)). Dr. Werner repeatedly and unsuccessfully attempts to link the credibility determination regarding Mr. Eushery to the finding of sufficient service, but there is nothing in the Court's Order or the April 25, 2025, hearing transcript that indicates that the Court's determination that service was effective was based on any credibility determination. (*See generally id.*; TR Vol. V., Apr. 25, 2025, Hr'g Tr.). The credibility determination is linked to and discussed with the court's finding regarding what happened at the Environmental Court hearing and the actual facts surrounding the dog bite, not service. (*See* TR Vol. III, pp. at 406 (Order Denying Motion to Set Aside Judgment)). Any claim that the court's finding that service was sufficient was based on a determination of Mr. Eushery's credibility is unsupported by the record. (*See generally id.*; TR Vol. V., Apr. 25, 2025, Hr'g Tr.). Because the trial court's finding that service was proper was not based on any credibility determinations, *Brummitee*'s clear, concrete,

and convincing evidence may normally be required on most Rule 60.02 issues, this Court has explained that a lesser standard applies to requests to set aside default judgments. *See Jones*, 2025 WL 2336449, at *4-5 (acknowledging that Rule 60.02 motions generally require clear and convincing evidence but applying a lesser standard anyway, stating that "this Court has stated that a request to vacate a default judgment should be granted if there is reasonable doubt as to the justness of dismissing the case before it can be heard on its merits" (quotations omitted)). Therefore, any heightened standard is inapplicable here, as what is before the Court is really a default judgment. *See Miclaus*, 2019 WL 2578256, at *2-4; *Obi*, 2011 WL 2150733, at *3-7.

## II. DR. WERNER DOES NOT ADDRESS OR CONTEST THE FACT THAT THE JUDGMENT IS BASED ON A FALSE SET OF FACTS

A significant portion of Appellant's Brief is devoted to showing that Dr. Werner presented a false set of facts to the court to obtain summary judgment. (*See* Appellant's Brief, pp. at 45-53). Dr. Werner does not address this section at all in his response Brief. (*See generally* Appellee's

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and convincing standard is inapplicable. Additionally, the court made no credibility determination as to Mr. Melton's sworn declaration, which states that Mr. Eushery merely visited Mr. Melton periodically. (*See* TR. Vol II, pp. at 257 (Declaration of De'Anthony Melton)).

Brief). Instead, he hides behind his requests for admission, which were only deemed admitted because Mr. Melton was not served. That is because Dr. Werner does not want the Court to think about the misrepresentations, mischaracterizations, and material omissions in his "version" of the facts, and is banking on the Court letting him skate by on disputed procedural issues. Every court's obligation is to see justice done, and Dr. Werner very much wants this Court to forget that obligation.

There is no need to repeat the thorough description of Dr. Werner's misrepresentations to the court here, as that can be found in the Appellant's Brief, supported by considerable citations to the record. (*See* Appellant's Brief, pp. at 45-53). But these misrepresentations highlight the injustice that would occur if this Judgment were allowed to stand. *See Jones*, 2025 WL 2336449, at *4-5 ("[T]his Court has stated that a request to vacate a default judgment should be granted if there is reasonable doubt as to the justness of dismissing the case before it can be heard on its merits." (quotations omitted)). Dr. Werner provided the trial court with a false Complaint, Statement of Undisputed Material Facts, and Affidavit which misrepresented what happened as described by the

Police Report, Environmental Court summons, and Dr. Werner's own declaration. (*See* Tr. Vol. III, pp. at 382 (Police Report); TR Vol. III, pp. at 395 (Environmental Court Summons); TR. Vol. III, pp. at 377-78 (Declaration of Dr. Stanley Werner)). Dr. Werner's entire argument is that a misrepresentation is permissible, so long as the opposing party does not call him on it a specific stage of the proceedings. According to Dr. Werner, he was only obligated to tell part of the truth – not the whole truth.[2]

The dog was not on the loose when Dr. Werner was bitten, as he originally claimed, but was safely inside a garage or shed – comfortable, contained, and alone. (*See* Appellant's Brief, pp. at 45-53). The dog was not vicious and did not viciously attack him and, in fact, Dr. Werner reached down towards the dog when it was eating, and it bit him. (*See id.*) Here again, it is important to note that the dog was contained in a segregated area, an area that Dr. Werner chose to enter —though he did

[2] Dr. Werner's insistence that "notice pleading" absolves him of the responsibility to be fulsome in offering facts to the court may work at the pleading stage (though that is certainly disputed), but it does nothing to ameliorate misrepresentations at the summary judgment stage. There is no such animal as "notice pleading" when it comes to a dispositive motion. It is a binary proposition. Dr. Werner either told the truth or he did not. In fact, he did not tell the truth.

not need to— and it was also Dr. Werner's choice to reach down toward the dog while it was eating.[3] Dr. Werner concealed this from the trial court, and then, after making meager and insufficient attempts at service, obtained a monetary judgment three times the amount asked for in the *ad damnum*, without any proof of those damages, for an incident that was actually his fault.

Allowing this to stand would be a grave injustice. Especially where the trial court declined to consider the true facts of what happened and, instead, disregarded the Police Report, the Environmental Court

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[3] This is important as a trial court, even when presented with a purportedly unopposed motion for summary judgment, still has an independent duty to determine whether summary judgment is appropriate. *See Pate v. State*, No. E200300297COAR3CV, 2003 WL 22734740, at *5-6 (Tenn. App. Nov. 20, 2003) ("It necessarily follows that a motion for summary judgment should not be granted solely because the non-moving party failed to respond."); *see also Shuman v. Simply Right, Inc.*, No. 3:14-CV-01368, 2015 WL 6554303, at *2 (M.D. Tenn. Oct. 28, 2015) ("Rather, the court is required, at a minimum, to examine the movant's motion for summary judgment to ensure that the movant has demonstrated the absence of a genuine issue of material fact." (quotations omitted)); *Coach, Inc. v. S.W. Flea Mkt.*, No. 2:10-CV-02410-DKV, 2012 WL 8470191, at *1 (W.D. Tenn. Feb. 21, 2012) ("Therefore, despite the fact that [the defendants] have not responded to [the plaintiff's] motion [for summary judgment], this court must determine whether [the plaintiff] is entitled to judgment as a matter of law."). Otherwise, a trial court is just rubber-stamping motions anytime they are purportedly uncontested.

documents, and other facts which underscore the error of summary judgment here. (*See* TR. Vol. V, Apr. 25, 2025, Hr'g Tr., pp. at 24-27 ("So, regardless of what actually happened right – we know, as lawyers, a fact is a fact if it's proven . . . So, we have a motion for summary judgment, which was granted. So, as far as this Court is concerned, that's what happened in this case. . . . So, the Code people can say what they want to say, it doesn't have anything to do with this case in Division 5.")). This was an abuse of discretion by the trial court. Under such circumstances, especially considering the excessive and improper damages award, which was three times more than what was prayed for in the Complaint, this is plainly unjust, and the Judgment should be set aside. *See Youree v. Recovery H. of E. Tennessee, LLC*, 705 S.W.3d 193, 203 (Tenn. 2025) ("[T]his Court has stated that a request to vacate a default judgment should be granted if there is reasonable doubt as to the justness of dismissing the case before it can be heard on its merits." (quotations omitted)).

## III. DR. WERNER FAILED TO CARRY HIS BURDEN TO SHOW PERSONAL SERVICE WAS MADE ON MR. MELTON

Dr. Werner continues to deflect from the fact that it is his burden to show that Mr. Eushery could accept service on behalf of Mr. Melton.[4] *Orusa v. First Natl. Bank of Am.*, No. M2023-01204-COA-R3-CV, 2025 WL 2093225, at *7 (Tenn. Ct. App. July 25, 2025) ("This court has previously held that the burden of showing that the summons was served on a person authorized to receive service for the defendant is on the plaintiff." (collecting cases)). And Dr. Werner has still failed to provide any competent evidence that Mr. Eushery was residing with Mr. Melton at the time of the March 29, 2023, attempt at service.

Dr. Werner continues to rely on the process server's identification of Mr. Eushery, even though the process server's affidavit did not state

[4] It appears that Dr. Werner does not contend that Mr. Melton evaded or attempted to evade service, (*see* Appellee's Brief, pp. at 26-27), and thus, Dr. Werner cannot claim the March 29, 2023, attempt at service on Mr. Eushery was effective under Tennessee Rule of Civil Procedure 4.04, *see In re Ethan D.*, No. E2024-01322-COA-R3-PT, 2025 WL 2673874, at *3 (Tenn. Ct. App. Sept. 18, 2025) ("Specifically, an individual may be served by leaving copies of the summons and the complaint at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing in the house or abode but only if the defendant evades or attempts to evade service." (alterations in original and quotations omitted)).

that Mr. Eushery identified *himself* as Mr. Melton's roommate. Instead, the process server simply included that in his affidavit, with no explanation of the basis of that determination. (*See* TR Vol. 3, pp. at 325 (Timothy Miduzia Affidavit)). Dr. Werner cannot unilaterally decide who is residing where for service purposes, which is exactly what he continues to do by relying on the process server's guess that Mr. Eushery was Mr. Melton's roommate. This is not sufficient to effectuate service. *See United States. v. Floyd*, No. CV 12-1890 (JBS/KMW), 2015 WL 5771137, at *2 (D.N.J. Sept. 30, 2015) (finding service ineffective because New Jersey Rule of Civil Procedure 4:4-4(a)(1) "consistently require[s] that service be made upon an actual resident of the household, rather than simply a visitor," the person served at the home was only a visiting niece and "the affidavit of service provides no indication that [the visitor] identified herself any differently to the process server").[5]

[5] To the extent Dr. Werner claims that Mr. Eushery was residing with Mr. Melton in New Jersey because Mr. Eushery gave Mr. Melton's Tennessee address to the Shelby County Sheriff's Deputy or Environmental Code Enforcement Officer after the dog bite, there is a simple explanation for this. The citation was the result of a dog that resided at Mr. Melton's Tennessee home, so Mr. Eushery gave the address of where the dog was then residing. This has no bearing on whether Mr. Eushery truly resided at Mr. Melton's New Jersey home.

Dr. Werner primarily relies on *Miller v. United States Fidelity & Guaranty Co.* to argue Mr. Eushery resided with Mr. Melton on March 29, 2023, but *Miller* involved an insurance dispute and analyzed the term "residence" within the framework of an insurance policy. *See* 316 A.2d 51, 55 (N.J. App. 1974). *Miller* does not mention or address service of process in any way and does not analyze New Jersy Rules of Court, making it irrelevant here. *See id.* And that is especially true considering relevant New Jersey case law finding that visitors, even family staying at the home, were not residing in that home for service purposes. *See Floyd,* 2015 WL 5771137, at *2; *Weeks v. Sheppard*, No. A-6130-04T3, 2006 WL 709137, at *1 (N.J. Super. App Div. Mar. 22, 2006) (finding that service on an adult son visiting and staying with his parents during the Christmas holidays was not service upon a member of the household residing therein and, therefore, was ineffective).

## IV. THE RECORD DOES NOT SHOW THAT DR. WERNER SERVED MR. MELTON BY CERTIFIED MAIL AND ORDINARY MAIL UNDER THE NEW JERSEY RULES OF COURT

Dr. Werner argues that service was effective pursuant to New Jersey Rule of Court 4:4-3 because he simultaneously sent certified mail and ordinary mail to Mr. Melton's New Jersey home. (*See* Appellee's

Brief, pp. at 32). Notably, Dr. Werner claims that "[a]s the record reflects, Dr. Werner served Appellant via certified mail with restricted delivery and ordinary mail on April 10, 2023 (TR, at 326)." *Id.* This is inconsistent with the record. Dr. Werner presumably cites a letter to claim that the April 10, 2023, attempt at service by mail was sent via certified mail and via ordinary U.S. Mail, but it could just as easily be read as being sent by certified mail through U.S. Mail. (*See* TR Vol. III, pp. at 326). Moreover, attached to this letter is only a receipt for certified mail. (*See id.* at 327). This is especially relevant because when Dr. Werner sent a complaint via ordinary mail to Mr. Melton's employer, he produced a receipt for that ordinary mail. (*See e.g.*, TR Vol. III, pp. at 307). This evidence is corroborated by the fact that Dr. Werner's own response to Mr. Melton's Motion to Set Aside Judgment, which makes no mention of an attempt at service by ordinary mail on April 10, 2023, states that:

> [o]n April 10, 202[3], counsel sent Mr. Melton another copy of the Complaint via Certified Mail, Restricted Delivery, Return Receipt Requested to Defendant's home address at 1 Carly Court, Voorhees, NJ, 08043 and that mail was return to us marked "UNCLAIMED." See Exhibit 14.

(TR Vol. II, pp. at 273 (Response in Opposition to Motion to Set Aside Judgment)). Notably, the "Exhibit 14" cited in the Response is the same

letter Dr. Werner now claims proves service was sent by both certified mail and ordinary mail. The Judgment in this case also references the April 10, 2023, attempt at service, stating that "[f]inally, Dr. Wemer then also served Mr. Melton via certified mail at the Vorhees address," but does not mention any use of ordinary mail. (TR Vol. III, pp. at 405 (Order Denying Motion to Set Aside Judgment)).

Rule 4:4-3 requires simultaneous mailing of certified mail and ordinary mail to constitute effective service. N.J. Ct. R. 4:4-3. By Dr. Werner's own admission, there was no simultaneous mailing here. (TR Vol. III, pp. at 273 (Response in Opposition to Motion to Set Aside Judgment)). Thus, to the extent Dr. Werner attempts to proceed under an April 10, 2023, mailing, such service was ineffective because the record does not establish that Dr. Werner sent ordinary mail and certified mail simultaneously.

Even if Dr. Werner did send ordinary mail and certified mail simultaneously, such service is still ineffective because Dr. Werner did not make a good faith effort to achieve personal service before attempting service by simultaneous mail. Specifically, there is no affidavit in the record establishing any such good faith service attempts.

Dr. Werner was required but failed to file an affidavit of service after the April 10, 2023, attempt at service by mail. *See Baux-Johnson v. Norkia Home Improvements, LLC*, No. A-0308-22, 2024 WL 4553360, at *7 (N.J. Super. App. Div. Oct. 23, 2024) ("The only prerequisite to effecting service pursuant to the method provided in Rule 4:4-3(a) is that a reasonable and good faith attempt to effect service by the methods provided in Rule 4:4-4(a)(1) through (9) was made and described in an affidavit of service."). New Jersey Rule of Court 4:4-7 requires that "[i]f service is made by mail, the party making service shall make proof thereof by affidavit which shall also include the facts of the failure to effect personal service and the facts of the affiant's diligent inquiry to determine defendant's place of abode, business or employment." N.J. Ct. R. 4:4-7.

Dr. Werner points to an affidavit filed on November 18, 2022, as satisfaction of this requirement. Simply put, it is not, as "the affidavit or certification must be filed ***after*** the mailing, because it must memorialize not only the diligent inquiry but also 'proof of service,' including 'the return receipt card, or the printout of the electronic confirmation,' stating whether the certified mail was delivered or unclaimed." *U.S. Bank Nat.*

*Ass'n v. Curcio*, 130 A.3d 1269, 1276 (N.J. Super. App. Div. 2016) (emphasis added). Thus, Dr. Werner cannot proceed under Rule 4:4-3(a) because he did not file an affidavit describing the efforts made to serve Mr. Melton. *See Dodson v. King*, No. CV 23-3344 (RK) (RLS), 2024 WL 4025863, at *2 (D.N.J. Aug. 30, 2024) ("Plaintiff's initial attempt at service in the case at bar fails. A litigant must first attempt personal service, and only after a good faith effort—set forth in an affidavit—is unsuccessful, a party may attempt service by mail. Here, Plaintiff failed to submit an affidavit detailing his good faith efforts to effectuate service."). These technical rules must be strictly followed. *See, e.g.*, *Mouzone v. W. Mkt. Associations LLC*, No. CV 25-6317 (ES) (JSA), 2025 WL 2989112, at *5 (D.N.J. Oct. 6, 2025) ("Plaintiff downplays his noncompliance with New Jersey's service rules by claiming that [the defendant's] subsequent engagement with the case confirms actual receipt, rendering technical defects in service immaterial. The Court disagrees." (citations and quotations omitted)), *report and recommendation adopted*, No. CV 25-6317 (ES) (JSA), 2025 WL 2987525 (D.N.J. Oct. 23, 2025); *United States v. Mamone*, No. CV 21-20339 (RK) (JBD), 2025 WL 1531325, at *4 (D.N.J. May 29, 2025) (holding that

service was ineffective because plaintiff failed to comply with the requirements of New Jersey Rule of Court 4:4-7); *Wingate Inns Int'l, Inc. v. Hanna G.N. Corporation, et al.*, No. 21-4715, 2022 WL 154398, at *2 (D.N.J. Jan. 18, 2022) (finding insufficient service of process where plaintiff failed to comply with Rule 4:4-7).

In fact, it does not appear from the record that Dr. Werner ever filed proof of service by mail with the court as required by Rule 4:4-7, though his Brief cites an exhibit attached to his Response to Mr. Melton's Motion to Set Aside Judgment which was filed on August 6, 2024, (*see* TR Vol. III, pp. at 260 (Response in Opposition to Motion to Set Aside Judgment), there is no indication that this was ever filed with the trial court. Rule 4:4-7 requires that "[p]roof of service shall be promptly filed with the court within the time during which the person served must respond thereto either by the person making service or by the party on whose behalf service is made." N.J. Ct. R. 4:4-7. Dr. Werner never filed proof of the April 10, 2023, service attempt and thus Dr. Werner's purported service by mail was plainly deficient. *See PCIREO-1, LLC v. 479 Georgia Tavern Rd., LLC*, No. A-1415-17T2, 2019 WL 993101, at *4 (N.J. Super.

App. Div. Feb. 28, 2019) ("After executing service, a party must promptly file proof of service with the court.").

But even if Dr. Werner had complied with New Jersey's service requirements, which he did not, when viewing the purportedly compliant Affidavit, it does not establish that *any* good faith efforts at service were made. The Affidavit does not describe any attempts at service on Mr. Melton's New Jersey home and only describes attempts at providing service to his employers. (TR. Vol I, pp. at 10-13 (Affidavit of Clay Culpepper)); *see also Dodson*, 2024 WL 4025863, at *2.

Even if the Court looks beyond the Affidavit, Dr. Werner only made one attempt at personal service at Mr. Melton's New Jersey home before attempting service by mail. Simply put, Dr. Werner resorted to service by mail far too soon. *See PCIREO-1, LLC v. Marker*, No. A-1586-17T4, 2018 WL 5728262, at *5 (N.J. Super. App. Div. Nov. 2, 2018) (affirming a finding of lack of good faith attempt at service where service was attempted by simultaneous certified mail and ordinary mail before a second or third attempt at personal service).

The record does not reflect that Dr. Werner ever attempted to serve Mr. Melton by simultaneous certified mail and ordinary mail at his New

Jersey home, nor does it reflect that he promptly placed proof of any such simultaneous mailing upon the record. Therefore, the April 10, 2023, mailing cannot serve as the basis for personal jurisdiction.

## CONCLUSION

The trial court's decision to deny Mr. Melton's Motion to Set Aside Judgment was error. For the foregoing reasons and the reasons stated in Appellant's Brief, that Motion should have been granted, and the Judgment below should be reversed.

Respectfully Submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Tenn. R. App. P. 30(e), I hereby certify that the forgoing brief contains 4,248 words and complies with the word count limitations and electronic filing requirements set forth in Tenn. Sup. Ct. R. 46.

By: /s/ Aubrey B. Greer
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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief was served this 5th day of December 2025, via the Court's e-file system and email on the following:

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