

ORIGINAL

IN THE SUPREME COURT OF OHIO

12-0575

Brittanie Bruce,

Plaintiff-Appellant,

v.

Daniel Pieter Bruce,

Defendant-Appellee.

On Appeal from the
Marion County Court of
Appeals, Third Appellate District

Court of Appeals
Case No. 09-10-57

MEMORANDUM IN SUPPORT OF JURISDICTION
OF DEFENDANT-APPELLEE DANIEL PIETER BRUCE

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I. EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This is a case of public or great general interest because, if not corrected, the decision of the Third District Court of Appeals vacating a trial court judgment solely upon a finding of improper venue, without more, creates a precedent that both: elevates a procedural deficiency to be the equivalent of a violation of a substantive right; and, renders a voidable judgment indistinguishable from a void judgment. The necessary consequences of this precedent are twofold: 1) judicial resources will be squandered; and, 2) the public's perception of the judicial system will be severely undermined.

In this case, the Third District Court of Appeals vacated a judgment of the Marion County Court of Common Pleas, Family Division ("Marion County Court") issued after that trial court had conducted a two-day trial and considered testimony from eleven witnesses. The Appellate Court found that an earlier transfer of venue of the case from Hardin County to Marion County was improper and, consequently, vacated the Marion County Court's judgment without consideration of the underlying merits of the case. By vacating the judgment without further analysis, the Third District Court of Appeals blurred and/or eliminated the distinction between a void and voidable judgment, treating them as one and the same.

Jurisdiction defines the power of the court to render a valid judgment in a particular case. More specifically, R.C. 3105.011 confers jurisdiction on common pleas courts to determine domestic relations matters. In this case, the Marion County Court had both subject matter and personal jurisdiction over the proceeding. In comparison, venue merely connotes the geographical locality where a suit should be heard. It is a procedural matter that does not affect a substantive right. See *Morrison v. Steiner*, 32 Ohio St.2d. 86, 88, 290 N.E.2d 841 (1972); *Jetter v. Abbott*, 2nd Dist. No. 17888, 2000 WL 1072338 at *4 (July 31, 2000). This is best illustrated

by the Ohio Rules of Civil Procedure which provide that, no judgment issued by a court of proper jurisdiction, but improper venue, shall be void or subject to collateral attack. *See* Civ.R. 3(G). Furthermore, decisions relating to venue are interlocutory in nature and not subject to immediate review in Ohio. If venue was a substantive right, i.e., a right that when violated necessarily resulted in harm and prejudice to the litigant, redress for errors of venue would provide for interlocutory appeal, collateral attack and, further, any judgment by a court of improper venue would be void. Instead, because venue is a procedural issue only, the judgment of a court with improper venue is deemed voidable.

The distinction between a void and voidable judgment is more than a matter of semantics. A void judgment is considered a legal nullity and can be attacked collaterally. A voidable judgment has the effect of a proper legal order until its propriety is challenged on appeal through a direct attack on the merits.

A judgment based upon improper venue is voidable, not void. Voidable judgments based upon improper venue, such as the instant case, are subject to direct appeal on the merits and to the provisions of Civ.R. 60(B). *See Wagenbrenner v. Wagenbrenner*, 10th Dist. No. 10AP-933, 2011-Ohio-2811, at ¶12. In challenging such a judgment under Civ.R. 60(B), a movant is required to establish his entitlement to relief. The impropriety of venue alone would not invalidate the judgment. Rather, the underlying merits of the claims must be analyzed for purposes of determining the movant's entitlement to relief. Similarly, a voidable judgment based upon improper venue is challenged on appeal through a direct attack on the merits. Like any procedural deficiency, the appellant must show that the assigned error has merit and that it worked to his prejudice. Harm or prejudice must be found or, a substantive right must be affected. *See* R.C. 2309.59 and Civ.R. 61. Only then is the judgment of a lower court set aside.

It is, therefore, integral when challenging a voidable judgment based upon improper venue, whether on appeal or under Civ.R. 60(B), that both improper venue and prejudice be established.

In this case, the Third District Court of Appeals blurred the distinction between a void and voidable judgment, rendering them indistinguishable. Specifically, the Appellate Court, upon determining improper venue, ceased all further analysis of the merits of the appeal, failing to find harm or prejudice. It simply vacated the trial court's decision. By doing so, the court treated the trial court's decision as a legal nullity, i.e. void, and elevated venue above a procedural issue, equating it with a substantive right.

Correspondingly, the treatment of procedural deficiencies as the equivalent of substantive rights will encourage judicial waste through re-trials and undermine the integrity of the judicial system as a whole.

II. STATEMENT OF THE CASE AND FACTS

A. The Marion County Court Conducted A Full And Impartial Hearing And, Based Upon The Evidence Presented At that Hearing, Awarded Custody To Appellee.

1. Proceedings Before The Hardin County Court.

On October 11, 2006, Brittanie Bruce ("Appellant") and Daniel Bruce ("Appellee") filed a Petition for Dissolution before the Hardin County Court of Common Pleas ("Hardin County Court"). The Court entered a Decree of Dissolution on November 16, 2006, which adopted the parties' agreement that Appellant be designated legal custodian of the parties' children. However, approximately one year later, Appellee filed a Motion to Reallocate Parental Rights and Responsibilities, in part, because of Appellant's association with her boyfriend, Robert Burd ("Burd"). The parties resolved Appellee's Motion by entering into a Joint Shared Parenting Plan

("Parenting Plan"), which was adopted by the Hardin County Court without hearing on September 17, 2008. At the time the parties entered into this Parenting Plan, Appellant and the minor children resided in Hardin County and Appellee resided in Union County. Further, at this time, Appellant had represented that Burd was not residing with her. (*See* Tr. 106-107).

In October 2008, just weeks after adoption of the Parenting Plan, Appellant abruptly moved with the children from Hardin County to Marion County, Ohio. Burd moved into Appellant's Marion home with her and the parties' children. (Tr. 100, 124).

On July 23, 2009, Burd, while residing with Appellant and providing childcare for the parties' children, was indicted for possession of heroin. *See State of Ohio v. Burd*, Marion County Common Pleas Case No. 2009 CR 0364. (Tr. 100; Ex. L). Burd has a history of violence and substance and alcohol abuse. (Tr. 33-34, 56, 64, 71-72, 92). He is an admitted heroin addict who pled guilty to felony possession of heroin when he was pulled over by the police with heroin and used needles in his possession, without a valid driver's license and, with the parties' children in the car. (Tr. 55-58, 69).

Immediately after Appellee learned of Burd's arrest, on September 29, 2009, he filed his Motion to Terminate or, in the Alternative, Modify the Shared Parenting Plan alleging Appellant's relocation and Burd's presence in the home as substantial changes in circumstances.

2. Transfer Of Venue To The Marion County Court.

Concurrent with the filing of his Motion to Terminate the Shared Parenting Plan, Appellee also filed a Motion to transfer the case from Hardin County to Marion County, Ohio, the county where Appellant and her children resided. Appellee continued to reside in Union County. The Hardin County Court granted, and the Marion County Court accepted, the transfer of the case.

Approximately two years after Appellant's relocation to Marion, the Marion County Court conducted a two-day trial, taking testimony from eleven witnesses and admitting a substantial number of exhibits. Appellant was not precluded from presenting any witnesses or exhibits that she would be permitted to present in Hardin County. The Marion County Court issued its Decision and Judgment Entry granting Appellee's Motion to Terminate the Shared Parenting Plan on October 20, 2010, and designating Appellee as the residential parent and legal custodian of the parties' minor children.

B. The Marion County Court Had Proper Jurisdiction, Engaged In A Full And Impartial Hearing And, Made Its Decision Based Upon The Evidence Presented.

During its two-day trial, the Marion County Court was presented with the following evidence. In 2008, at the time the parties entered into their Parenting Plan, Appellant represented that Burd was not living in the Appellant's home with the parties' children. (SE p.4; Tr. 106-107)¹. Within weeks of the Hardin County Court adopting the Parenting Plan, Appellant relocated with the children to Marion, Ohio, without previously discussing or notifying Appellee of her move. (Tr. 190; SE p.5). When Appellant and the children moved to Marion, Burd moved with them and he was listed as a leasee on the lease for Appellant's residence in Marion, Ohio. (Tr. 100, 341; SE p.7; Ex. I, K, K-1, L, M and 4). Burd was also personally served with his warrant for arrest and indictment for heroin possession at Appellant's Marion residence on July 25, 2010. *See State of Ohio v. Burd*, Marion County Common Pleas Case No. 2009-CR-0364.

The Marion County Court heard evidence that, on June 25, 2009, Burd purchased heroin in Columbus, picked up Appellant and the parties' two children and drove to their residence

¹ All references to the Statement of Evidence filed with the Third District Court of Appeals pursuant to App.R. 9(C) will be cited as "SE."

where he was met by the Marion Police. (Tr. 54-57; Ex. C). With the children just outside the car, Detective Mark Elliott questioned Burd. Id. Detective Elliott testified before the trial court that Burd admitted he had heroin and two used syringes in his possession and that he was a heroin addict. Id. (Tr. 56-57). Detective Elliot also testified that, on that day, the Marion police officers informed Appellant that Burd admitted to the purchase, use, and possession of heroin. (Ex. L). The Marion Police spoke directly to Appellant because they were “concerned over the fact that [Burd] was driving with her and the kids in the vehicle and was most likely under the influence of the drug.” Id. Burd later tested positive for heroin. (Tr. 57-58).

Dean Dibling (“Dibling”), Burd’s probation officer, testified he had reviewed Burd’s Presentence Investigation Report noting numerous crimes. (Tr. 71). From 2003 to 2009, both Dibling and Marion City Prosecutor Brent Yager testified that Burd had been charged with and/or convicted of a litany of crimes, including but not limited to: driving without a valid driver’s license; Felonious Assault; OMVI; OVI refusal; and Domestic Violence (twice). (Tr. 71-72, 91-92). In addition, Burd had numerous license suspensions for violating Financial Responsibility laws. Id. Dibling testified that Burd had also been jailed for his failure to pay child support for children from his prior relationship. (Tr. 73).

Adding to this significant criminal history, a Warrant on Indictment was issued on July 23, 2009 for Burd’s arrest for Possession of Heroin and Possession of Drug Abuse Instrument. (Tr. 59; Ex. L p.14). Burd plead guilty to felony possession of heroin on October 14, 2009. (Ex. L p.4). Dibling also testified Burd was an absconder, who had not reported to him, his probation officer, and he would be put in prison when located. (Tr. 84-85).

The Marion County Court also heard evidence that Appellant did not initially disclose Burd’s arrest to Appellee, then patently misrepresented why the police had been to her home

and, finally, she failed to disclose Burd's heroin addiction to Appellee. (SE p.10-11). Evidence was also introduced, and not rebutted, that Appellant, despite knowing Burd was a heroin addict, did not have any concerns or reservations about him providing childcare for the parties' children while she was at work, emailing Appellee that, "the kids will be with Rob most of the time as I have many things to pay for." (Ex. H; Tr. 144-145). Appellant admitted on cross examination that she continued to allow Burd to regularly watch the children during the day and that he continued living with them at her residence only until August 2009. (Tr. 57; Ex. H-7; SE p.10).

Contradicting Appellant's testimony, Dibling testified that Burd continued to live at Appellant's residence through February 1, 2010. (Tr. 75). Mr. Warren, the court appointed guardian ad litem ("GAL") testified that Appellant had told him Burd moved out of the house in June 2009. (Tr. 13, 15, 23). Finally, Appellant's neighbor, William Tobin, and process server Jodi Lill testified Burd had resided in Appellant's home until May or June 2010. (Tr. 327, 391). On cross-examination, the GAL admitted that, if he had been advised that Burd was residing in Appellant's home or providing childcare for the children after June 2009, it would have negatively influenced his recommendation. (Tr. 21, 23-24).

The GAL also testified that Appellant expressed concern with the Parenting Plan and the distance traveling to exercise visitation while Appellee had concerns that Burd was living in the home and providing childcare for his children, along with countless irregular childcare providers, and that the parties' daughter, since the move to Marion, was struggling with school and was withdrawn. (Tr. 16, 19-20). Finally, the GAL advised the trial court that Appellant's lack of communication, both with school items and Burd's arrest, was troubling. (Tr. 19).

In issuing its Decision, the Marion County Court reviewed the factors set forth in R.C. 3109.04(F)(1) and (2), and its analysis of the factors and findings was supported by the evidence

in the record. Based upon the overwhelming weight of the evidence presented, the Marion County Court found that Appellant had failed to share important information regarding her relocation and her home environment; and, that Appellant kept vital information about Burd and his drug arrest from Appellee. (See Tr. 136-138, 141-146; SE p.9; Ex. H). The Marion County Court found Appellant not forthcoming with information that impacted the children. (Decision p.8).² Ultimately, with ample support in the record, the Marion County Court found that Appellant's pattern of withholding information important to the health and safety of the children demonstrated a lack of ability to effectively communicate and was not in the spirit of shared parenting. The court found shared parenting not in the best interest of the children and, after analysis of R.C. 3019.04(E)(1)(a)(iii), designated Appellee as the residential parent and legal custodian of the children, finding that the harm likely to be caused by the changed environment was outweighed by the advantages of such change. (Decision p.9).

C. The Third District Court Of Appeals Erroneously Vacated The Marion County Court's Decision Based On Improper Venue And Without Finding Prejudice To Appellant.

Appellant filed her Notice of Appeal to the Third District Court of Appeals on November 1, 2010. Appellant assigned five errors on appeal. Four of these errors related to the merits of the case, while the fifth assigned as error a procedural issue: the transfer of venue from Hardin County to Marion County. Specifically, Appellant argued that venue was improperly transferred from Hardin County to Marion County because Rule 3 of the Ohio Rules of Civil Procedure does not authorize a trial court to transfer a case to another county, except where a fair and impartial trial cannot be had.

² All references to Decision refer to the Decision and Judgment Entry of the Marion County Court.

The Third District Court of Appeals found the Hardin County Court abused its discretion when it transferred the case to Marion County. (Op. ¶19).³ Based solely upon this determination, the Court of Appeals ceased all further analysis of the merits and issued its Judgment Entry and Opinion vacating the Marion County Court's judgment and remanding the cause.

Appellee filed an Application for Reconsideration pursuant to App.R. 26(A)(1) on January 19, 2012. The Third District Court of Appeals denied Appellee's Application for Reconsideration on February 21, 2012.

III. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. 1: A voidable judgment based upon improper venue may be vacated only upon a finding of prejudice to a litigant.

A. The Marion County Court Had Jurisdiction And Authority To Hear And Decide This Case Upon Its Merits.

Jurisdiction is a court's statutory or constitutional power to adjudicate a case. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998); *Morrison v. Steiner*, 32 Ohio St.2d 86, 87, 290 N.E.2d 841 (1972), paragraph one of the syllabus. It is a "condition precedent to the court's ability to hear the case. If a court acts without jurisdiction, then any proclamation by that court is void." *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 75, 701 N.E.2d 1002 (1998); *Patton v. Diemer*, 35 Ohio St.3d 68, 518 N.E.2d 941 (1988), paragraph three of the syllabus. "Once a tribunal has jurisdiction over both the subject matter of an action and the parties to it, '* * * the right to hear and determine is perfect; and the decision of every question thereafter arising is but the exercise of the jurisdiction thus conferred * * *.'" *State ex rel. Pizza v. Rayford*, 62 Ohio St.3d 382, 384, 582 N.E.2d 992 (1992), quoting *Sheldon's Lessee v. Newton*, 3 Ohio St. 494, 499 (1854).

³ All references to Op. refer to the Opinion of the Third Appellate District, Marion County filed January 9, 2012.

The jurisdiction of the court of common pleas and its divisions is determined by statute. Section 4(B), Article IV, Ohio Constitution. R.C. 3105.011 confers jurisdiction on the court of common pleas, including its domestic relations division, to determine all domestic relations matters. See R.C. 3105.171; *Keen v. Keen*, 157 Ohio App.3d 379, 381, 811 N.E.2d 565 (2nd Dist.2004).

Based upon R.C. 3105.011 and 3109.04, the Marion County Court had the jurisdiction and authority to hear this case and issue a decision terminating the parties' Parenting Plan. The trial court's jurisdiction was not challenged by Appellant. The trial court's jurisdiction, its power of a court to hear and decide a case, was not affected by improper venue nor was the court's judgment rendered void. *State ex rel. Lyons v. Zaleski*, 75 Ohio St.3d 623, 624, 665 N.E.2d 212 (1996). Rather, the Marion County Court's judgment was rendered only voidable by improper venue.

B. Improper Venue Is A Procedural Deficiency That Renders A Judgment Voidable, Not Void.

A void judgment is a judgment imposed by a court when the court lacks subject matter jurisdiction or authority to act over the case. Whereas, a voidable judgment is one imposed by a court that possesses both jurisdiction and the authority to act, but the court's judgment is irregular or erroneous. *State v. Payne*, 114 Ohio St.3d 502, 507, 873 N.E.2d 306 (2007).

The distinction between "void" and "voidable" is crucial. A void judgment is a legal nullity which can be attacked collaterally. Conversely, a voidable judgment will have the effect of a proper legal order unless its propriety is successfully challenged through a direct attack on the merits. (Emphasis added.) *Wagenbrenner v. Wagenbrenner*, 10th Dist. No. 10AP-933, 2011-Ohio-2811, at ¶11, citing *GMAC, LLC v. Green*, 10th Dist. No.08AP-295, 2008-Ohio-4461, at ¶27.

Venue is defined as the particular locality where a suit should be heard, after jurisdiction is established. *Morrison v. Steiner*, 32 Ohio St.2d at 87, 290 N.E.2d 841. It is a procedural matter that does not affect a substantive right. *See Snell v. Cincinnati St. Ry. Co.*, 60 Ohio St. 256 (1899); *Jetter v. Abbott*, 2nd Dist. No. 17888, 2000 WL 1072338 (July 31, 2000). This is confirmed by Civ.R. 3(G), which states, “The provisions of this rule relate to venue and are not jurisdictional. No order, judgment, or decree shall be void or subject to collateral attack solely on the ground that there was improper venue; however, nothing here shall affect the right to appeal an error of court concerning venue.” Civ.R. 3(G). Therefore, any judgment entered by a court with proper jurisdiction, but improper venue, merely renders that judgment voidable, not void. *Bowers v. Baughman*, 29 Ohio App.2d 277, 279, 281 N.E.2d 201 (3rd Dist.1972).

A voidable judgment based upon a procedural deficiency, such as improper venue, must be redressed through direct appeal or the provisions of Civ.R. 60(B). *Wagenbrenner v. Wagenbrenner*, 10th Dist. No. 10AP-933, 2011-Ohio-2811. Both methods of redress require an analysis of the merits of the cases. To prevail under Civ.R. 60(B), the movant must demonstrate a meritorious defense or claim to present that affects the outcome. *GTE Automatic Elec. Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus. To prevail on appeal, “[a]s with any other procedural deficiency, upon a showing that the assigned error has merit and that it worked to the prejudice of the appellant,” then judgment of the lower court will be set aside. (Emphasis added.) *Eisenberg v. Peyton*, 56 Ohio App.2d 144, 151, 381 N.E.2d 1136 (8th Dist.1978).

In this case, the Third District Court of Appeals was required to find that, not only was venue in Marion County improper, but that this improper venue prejudiced Appellant, i.e. the improper venue was more than harmless error. *Id.*; *See R.C. 2309.59; Civ.R. 61*. Instead, the

Third District Court of Appeals eliminated the distinction between a void and voidable judgment. It found that the mere procedural deficiency of improper venue, without a further finding of prejudice or harm to Appellant, rendered the trial court's decision a nullity, i.e. void. By doing so, the Appellate Court rendered void judgments and voidable judgments indistinguishable.

C. Reversal Of A Voidable Decision, Based Upon A Procedural Deficiency, Requires A Showing Of Prejudice.

Before an appellate court may reverse the decision of a trial court on a procedural error, such as improper venue, the record must affirmatively show not only that the error intervened, but that the error was to the prejudice of the appellant. *In re Appropriation for Hwy. Purposes of Lands of Arnold*, 23 Ohio App.2d 56, 64, 261 N.E.2d 142 (3rd Dist.1970); *Smith v. Flesher*, 12 Ohio St.2d 107, 114-115, 233 N.E.2d 137 (1967). However, now, because of the precedent created by the Third District, a clear directive must now be given to Ohio courts that a voidable judgment of a trial court should not be disturbed unless an abuse of discretion has affected a substantive right of an adverse party or it is inconsistent with substantive justice. See *Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 239, 834 N.E.2d 323 (2005).

Restated, non-prejudicial error does not entitle an appellant to reversal of a judgment. To secure a reversal of judgment, an appellant must not only show some error, but also show error prejudicial to her. *Smith v. Flesher*, 12 Ohio St.2d at 114-115, 233 N.E.2d 137. In this case, it was incumbent upon Appellant to demonstrate that the improper venue harmed or prejudiced her. *Mangan v. Mangan*, 2nd Dist. No. 07-CA-100, 2008-Ohio-3622, at ¶ 9; *Holm v. Smilowitz*, 83 Ohio App.3d 757, 772, 615 N.E.2d 1047 (4th Dist.1992). The Appellant made no such affirmative offerings. Where, as here, the harm or prejudice is not immediately apparent, the Appellant must explain how the result would have materially differed were it not for intervening error. *Id.* In other words, prejudice, even from improper venue, is not presumed. Therefore, the

real issue to be determined by the Third District Court of Appeals was, “was Appellant prejudiced by venue in the Marion County Court?” To answer this question, the Appellate Court should have, but did not, analyze all the assigned errors and underlying merits of the case to determine if Appellant was prejudiced by the trial being conducted in Marion County as opposed to Hardin County.

When it appears that a trial court ultimately arrived at the proper judgment, a procedural error which intervened is not prejudicial and judgment should be affirmed. *Allstate Ins. Co. v. Angelo*, 7 Ohio App.2d 149, 153, 219 N.E.2d 218 (5th Dist.1966). It is well settled that errors are not deemed prejudicial where their avoidance would not have changed the result of the proceedings. *Fada v. Information Sys. & Networks Corp.*, 98 Ohio App.3d. 785, 792, 649 N.E.2d 904 (2nd Dist.1994). It was incumbent upon Appellant to, in addition to pointing to the procedural error of improper venue, demonstrate through evidence presented to the Third District Court of Appeals that this procedural error prejudiced her and that the outcome would have been different without this error. *Mangan v. Mangan*, 2nd Dist. No. 07-CA-100, 2008-Ohio-3622, at ¶ 9. Similarly, it was also incumbent upon the Third District Court of Appeals to determine whether venue was proper and, if it was not, to conduct an analysis of whether the Appellant was prejudiced by the error and if the outcome would have differed but for the error.

D. The Third District Court Of Appeals’ Decision Creates A Precedent Encouraging Waste of Judicial Resources And Undermining The Public’s Confidence In The Judicial System.

To permit an appellate court to vacate a voidable judgment solely based upon the reason that rendered the judgment voidable in the first place, without an additional finding of prejudice or harm to the litigant, has far-reaching consequences. It will equate procedural deficiencies with violations of substantive rights. It will force courts to re-litigate matters solely on

procedural deficiencies that do not impact the evidence or outcome of the case. R.C. 2309.59 and Civ.R. 61 will be undermined and the judicial process will be reduced to a grinding pace as matters of harmless error are re-litigated, clogging the judicial system.

Furthermore, allowing a re-hearing or re-trial over a procedural deficiency that does not change the outcome of a case is inherently wasteful and creates judicial diseconomy. This diseconomy can only be avoided by a finding from this Court that a determination of improper venue must be bolstered by an additional finding of harm or prejudice to the litigant to justify vacating the judgment of a trial court. Failure to so hold will compromise the ability of trial courts to render justice and will undermine the public's belief in the integrity of the judicial system.

IV. CONCLUSION

Appellee Daniel Bruce respectfully urges the Court to accept jurisdiction of this appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing Memorandum in Support of Jurisdiction of Defendant-Appellee Daniel Pieter Bruce was sent, via regular U.S. Postal Mail, postage prepaid this 6th day of April, 2012 to the following:

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