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Shelby Cnty Judge of Probate, AL
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ENTERED AUG 30 2007

**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
CIVIL DIVISION**

RECEIVED IN OFFICE

AUG 29 2007

ANNE-MARIE ADAMS
Clerk

JAMES BERRY BROOKS, JR.,
Plaintiff,

v.

CIVIL ACTION NUMBER:
CV 06-2460

JIM FINCH,
Defendant.

DEFAULT JUDGMENT

This matter comes before the Court on Plaintiff's motion for default judgment. The Court, having examined the file in this case finds the following:

1. Summons and complaint was initially filed in this action on April 25, 2006;
2. Service of process was perfected against Defendant by process server hand delivering the said summons and complaint to Defendant on May 11, 2006;
3. Defendant responded to Plaintiff's complaint by filing a motion to dismiss on June 15, 2006;
4. On August 25, 2006, Defendant's motion to dismiss was denied by this Court and Defendant was directed to respond to Plaintiff's complaint;
5. On September 25, 2006, Defendant filed his answer to Plaintiff's complaint as well as filed a motion for more definite statement of the said complaint;
6. On October 3, 2006, counsel of record for Defendant sought to withdraw from representation of Defendant;
7. On October 11, 2006, the Court GRANTED Defendant's motion to withdraw and GRANTED Defendant's motion for more definite statement, directing Plaintiff to file an amended complaint within 30 days of the said order;
8. On November 13, 2006, Plaintiff complied with the Court's October 11, 2006 order and filed an amended complaint with a more definite statement of his claim;
9. On May 30, 2007, Plaintiff filed application for default with the Clerk of Court due to Defendant's failure to respond or answer Plaintiff's November 13, 2006 amended complaint.

The Court in *Agio Industries, Inc. v. Delta Oil Co., Inc.*, 485 So.2d 340 (Ala.Civ.App.,1986), addressed a situation where the Court granted default in a case where Defendant initially defended a case, but failed to respond to an amended complaint. The Court wrote:

"A review of the pleadings reveals that there was no new claim asserted against Agio in the amended complaint. It simply re-alleged the same express warranty claim that had been alleged in the original complaint. While the better practice is to either answer such a pleading or, in the alternative, move to strike it under Rule 12(f), A.R.C.P., some doubt exists as to whether a response to an amended complaint is always required. *The probable answer is that a response is required.* See *Zeigler v. Baker*, 344 So.2d 761 (Ala.1977) ("An amended pleading pro tanto supersedes a pleading which it amends."); *Holley v. St. Paul Fire & Marine Insurance Co.*, 396 So.2d 75 (Ala.1981) (where the court noted that once an amended pleading is interposed, the original pleading no longer performs any function in the case, thus, a ruling on a motion to dismiss a prior complaint is unnecessary); *Hawk v. Bavarian Motor Works*, 342 So.2d 355 (Ala.1977) (an amended complaint adding a new count must be answered under Rule 8(d), A.R.C.P.). However, no Alabama appellate court has heretofore determined whether an amended complaint that adds nothing to the original complaint as against a defendant requires a response. At least two recognized authorities suggest that a new pleading to an amended complaint is not necessary where the original answer is responsive to the amended complaint. See generally 71 C.J.S. *Pleading* § 314 (1951); 61 Am.Jur.2d *Pleading* § 333 (1981).

We do not decide the issue here, as it is not necessary to this decision. We merely opine that because the necessity of a response to a redundant count in an amended complaint has not yet been decided by an Alabama court, there existed some doubt as to the propriety of the default judgment granted to Delta. Because the granting of a default judgment when doubt as to its propriety exists may constitute an abuse of discretion, we reverse the trial court's denial of Agio's motion to set aside the default judgment granted Delta. The most that can be said of Agio's failure to respond is that it was "reasonably excusable." See *Lightner Investigators, Inc. v. Goodwin*, 447 So.2d 679 (Ala.1984)." 485 So.2d at 342.

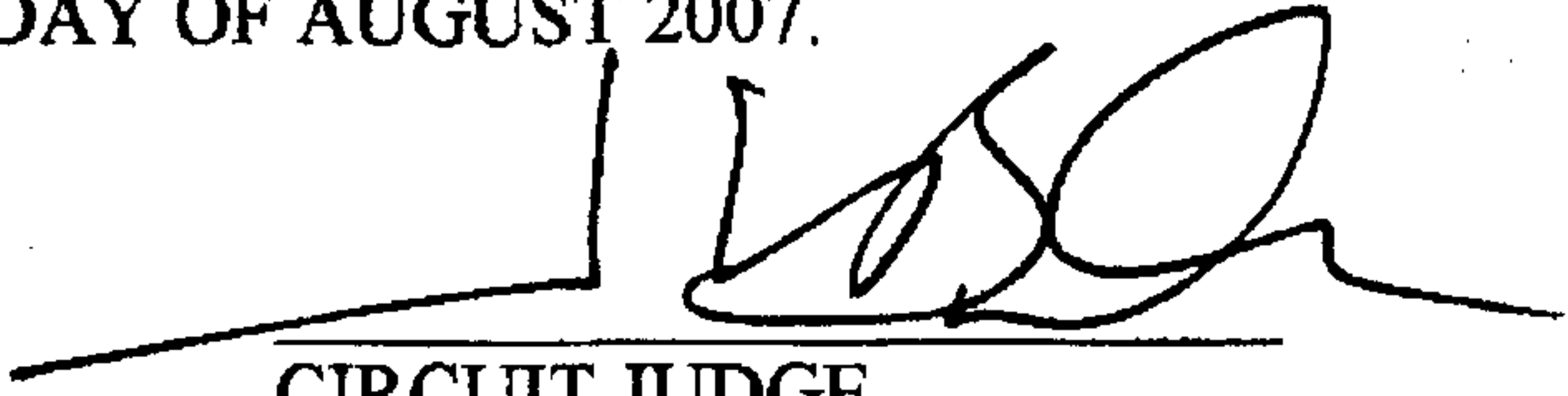
The matter before this Court is distinguishable from the cited authority in that since the withdrawal of counsel of record for Defendant in October of 2006, there has been no activity on behalf of Defendant to discover or otherwise defend the claim. In the cited authority, there was an active defense by counsel of record. However, similar to the cited authority, Plaintiff's restated complaint does not allege any new claim or cause of action, and in fact, withdraws one of the counts contained in the original complaint.

On balance, and under the better practice rule stated in the cited authority, an amended complaint does supersede all previous complaints and technically requires a new response from Defendant, or else Defendant is subject to suffering entry of default judgment for failing to respond or otherwise defend the amended complaint. However, as has been made clear in the cited authority, should Defendant respond within in the time prescribed and seek to set aside entry of default, even under the circumstances of this case, the Court would seriously consider such a timely filed and properly grounded motion to set aside.

Wherefore, the foregoing matters and authority having been considered, Plaintiff's motion for default judgment is hereby GRANTED and judgment by Default is hereby entered against Defendant and in favor of Plaintiff in the amount demanded of \$264,400.75.

Costs of these proceedings are hereby taxed to Defendant.

DONE AND ORDERED THIS THE 28 DAY OF AUGUST 2007.

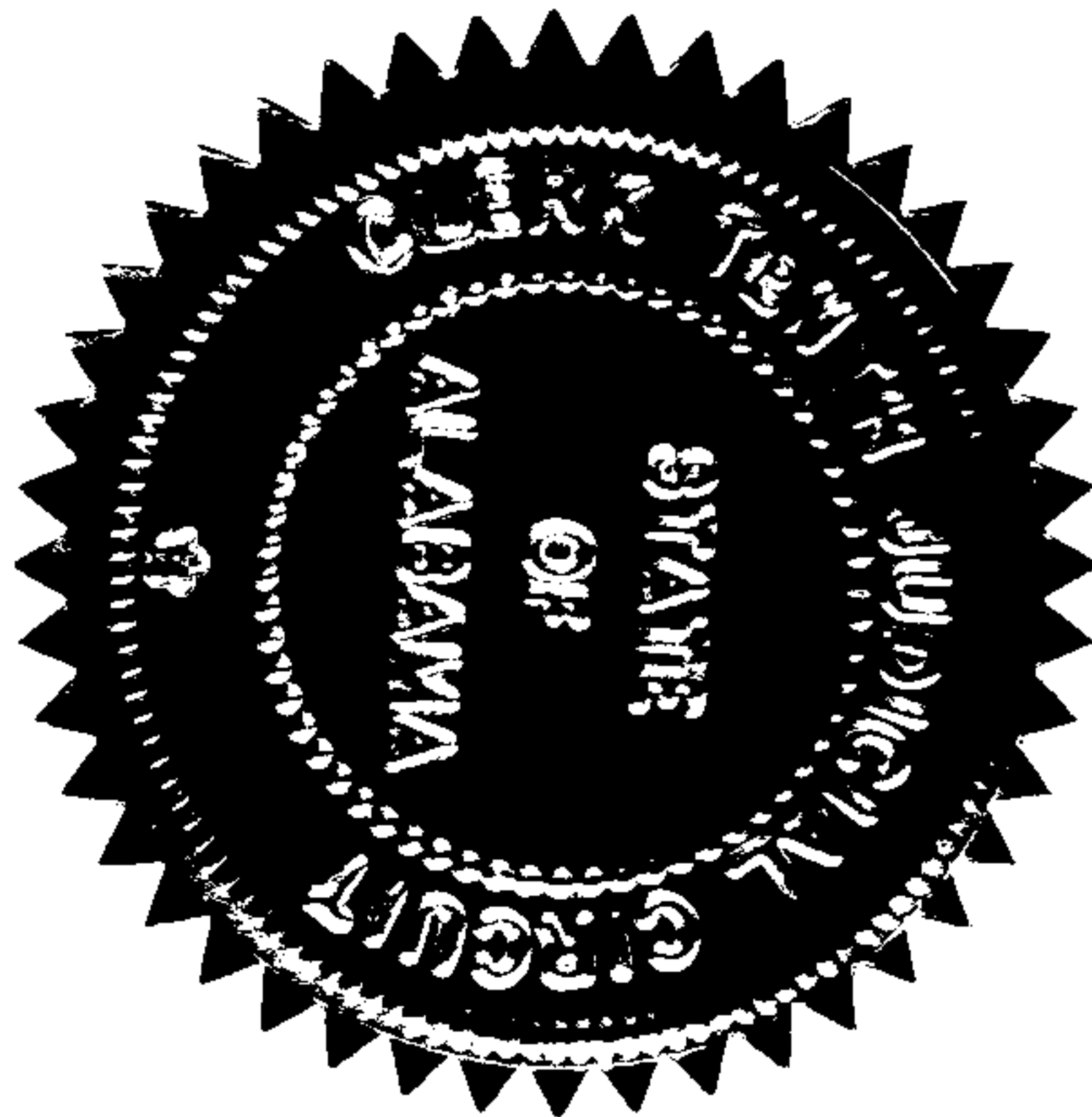

CIRCUIT JUDGE



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I, Anne-Marie Adams, Clerk of the Circuit Court, of Jefferson County, do hereby certify that the foregoing is a true, correct and full copy of the instrument herewith set out as appears of record in said Court.

WITNESS my hand and the seal of said Court, this

the SEP 12 2007 day of 20
Anne-Marie Adams
CLERK

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CV-2006-002460.00
CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
ANNE-MARIE ADAMS, CLERK

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

BROOKS JAMES BERRY JR)
Plaintiff)
v.) Case No.: CV-2006-002460.00
FITCH JIM)
Defendant)

ORDER

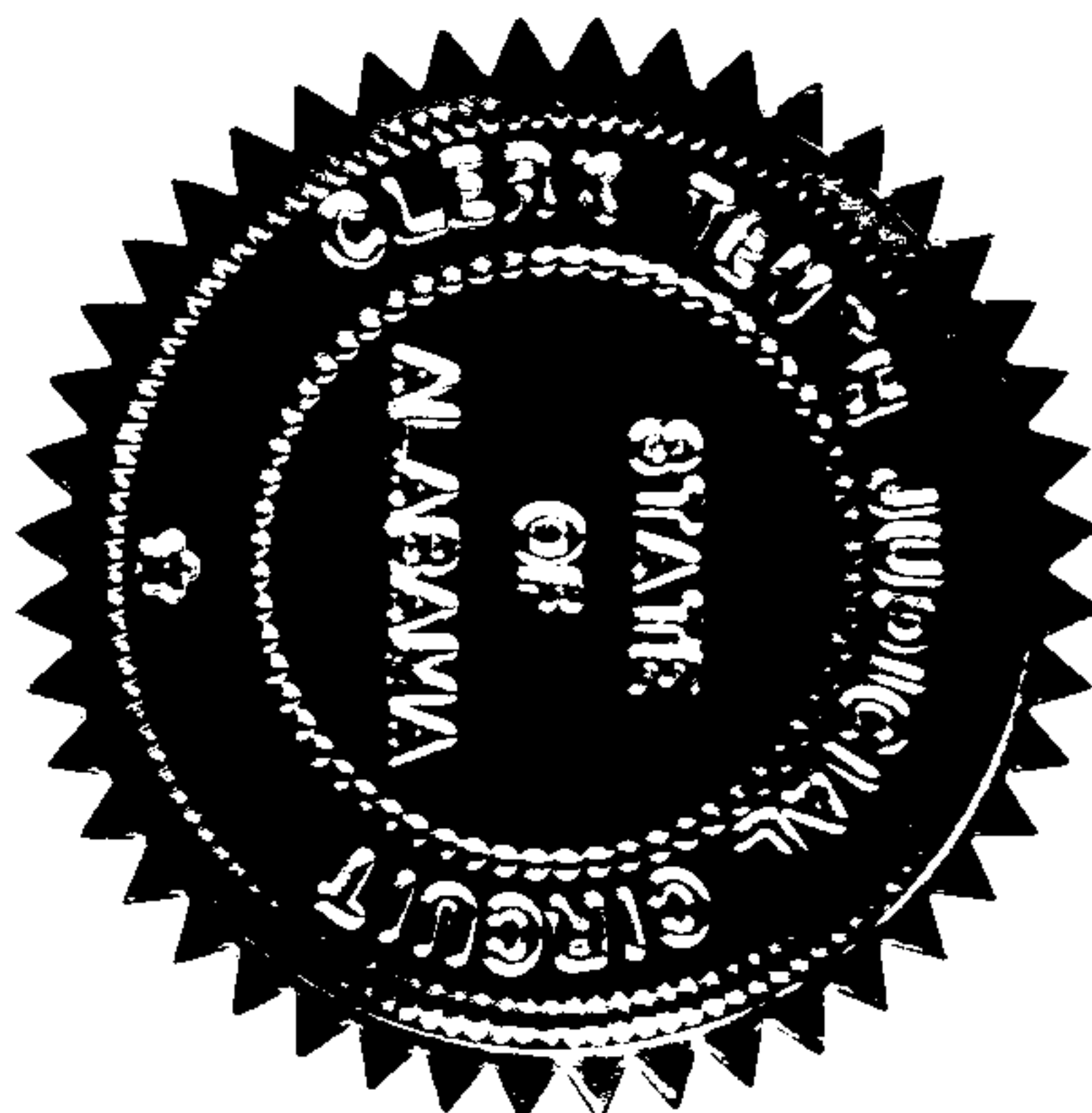
MOTION TO CORRECT CLERICAL ERROR filed by BROOKS JAMES BERRY JR is hereby GRANTED.

Motion to correct considered and granted. The default judgment entered 8-28-2007 is corrected to read "Defendant Jim Fitch", this ordered is entered nunc pro tunc.

DONE this 9th day of September, 2007

/s JOSEPH L. BOOHAKER

CIRCUIT JUDGE



, Anne-Marie Adams, Clerk of the Circuit Court, of Jefferson County, do hereby certify that the foregoing is a true, correct and full copy of the instrument herewith set out as appears of record in said Court.

WITNESS my hand and the seal of said Court, this

day of SEP 12 2007
Anne-Marie Adams
Clerk