NO. 44222-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SHAWN GREENHALGH and JAMES PFAFF,

Appellants,

v.

DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

The Appellants in this case are two Washington State inmates who filed a class action seeking damages from the State of Washington for: (1) the value of personal property Appellants directed DOC to dispose of after Appellants chose to not take advantage of DOC's offer to mail the property out at DOC expense to persons of Appellants' choosing, and (2) the costs Appellants paid to mail out personal property that DOC had previously offered to mail out at DOC expense. Appellants assert a number of constitutional, statutory, and regulation violations. The trial court dismissed Appellants' action, concluding that there were no genuine issues of material fact and that Appellants' claims failed as a matter of law. Appellants now appeal the trial court's dismissal with prejudice of their action.

II. RESTATEMENT OF THE CASE

A. Procedural History

Respondents agree with Appellants' statement of the procedural history of this case with the exception of Appellants' assertion that Respondents moved for partial summary judgment on August 22, 2012. Respondents did not move for partial summary judgment but instead moved for summary judgment on all Appellants' claims and requested that Appellants' entire "action be dismissed with prejudice." CP 50.

B. Factual Background

In late 2008, DOC was faced with severe budget problems and was forced to look for ways to reduce its costs. CP 53, Declaration of Dan Pacholke. One of the ways it considered to reduce costs was to eliminate inmates from possessing most personal clothing items. CP 53. DOC estimated that it would save over $100,000.00 per year by eliminating most inmate personal clothing, savings that would occur due to a decrease in electricity and other costs to wash clothing, and reductions in staff time to handle, process, and document inmates' personal clothing items. CP 53-54.

Inmates were given nearly a year's notice of DOC's plan to eliminate most personal clothing items. CP 54. Inmates were given notice on January 20, 2009, that DOC would be eliminating most personal clothing items beginning on January 1, 2010. CP 54. Inmates were also advised at this time that beginning March 1, 2009, inmates would no longer be authorized to receive personal clothing items from any source. CP 54.

DOC amended its inmate property policy, DOC 440.000, on March 1, 2009, to further notify inmates of the impending changes concerning personal clothing items and to advise them of the various options DOC would make available to them to dispose of their personal clothing items.

CP 54. These options included DOC paying the cost of sending out two boxes of personal clothing between July 1, 2009, and September 30, 2009, inmates sending out their personal clothing at their own expense after September 30, 2009, and DOC allowing approved visitors to pick up inmates' personal clothing until January 1, 2010. CP 54. Inmates were also advised in this policy that beginning January 1, 2010, they would have 30 days to dispose of clothing items identified as excess or unauthorized, and that if an inmate failed to pay the costs of sending out non-allowable property, the property could be donated to a charity or thrown away pursuant to WAC 137-36-040. CP 54.

Inmates Greenhalgh, DOC #701558, and Pfaff, DOC #278724, had personal clothing items after December 31, 2009, that were no longer allowable and were therefore contraband. CP 77 and 151. Inmate Pfaff was notified that he needed to arrange to have the contraband clothing items sent out and inmate Pfaff sent a letter to the MICC property room directing the MICC employees who worked there to dispose of his clothing because he was "without funds to have it sent here." CP 77. Inmate Pfaff's clothing items were apparently disposed of pursuant to his directions to MICC property room staff.

Although inmate Pfaff claimed in his February 8, 2011, letter to the MICC property room that he did not have sufficient funds to mail his

personal clothing out of MICC, his DOC inmate account records show that he had sufficient funds in his account during 2010 and 2011 to send his clothing out. CP 81-87. Appellant Pfaff also had $35.00 in his postage subaccount from February 1, 2011, to February 17, 2011, which Pfaff could have used to pay the $15.00 DOC estimated it would cost to ship Pfaff's contraband clothing out of the institution. CP 88. On February 17, 2011, inmate Pfaff paid UPS postage of $36.86 to ship a different package out of a DOC institution. CP 85.

In response to being advised that he needed to send his contraband clothing items out of prison, inmate Greenhalgh directed MICC property room staff to send his clothing items to Scott Frakes, the Superintendent of the Monroe Correctional Complex (MCC), which is the DOC institution inmate Greenhalgh had been transferred to. CP 151. Inmate Greenhalgh chose to send some of his clothing items out of MCC and apparently chose to have his remaining clothing items disposed of by MCC. CP 151, 153.

Although inmate Greenhalgh claimed that he did not have any non-incarcerated person to send his personal clothing to, he sent personal clothing items and other personal property to his sister, Nicole Dickmann, in 2005, 2006, 2007, and 2008. CP 55.

III. ARGUMENT

A. Standard Of Review

Respondents accept Appellants' statement of the standard of review for this appeal.

B. RCW 72.02.045(3) Does Not Require DOC To Store Inmates' Contraband Property Until They Are Released From Custody

Appellants' primary argument on appeal is that RCW 72.02.045(3) required DOC superintendents to store inmates' contraband clothing items until their release from DOC custody. Appellants' statutory claim was properly rejected by the trial court.[1]

The fundamental objective of statutory construction is to ascertain and carry out the intent of the Legislature. *Bellevue Fire Fighters Local 1604 v. Bellevue*, 100 Wn.2d 748, 751, 675 P.2d 592 (1984), *cert. denied*, 471 U.S. 1015 (1985). However, where statutory language is plain and unambiguous, the statute's meaning must be derived from the wording of the statute itself. *Bellevue Fire Fighters*, 100 Wn.2d at 750.

In interpreting statutes, courts accord substantial weight to an agency's view of the law that it administers. *Alpine Lakes v. Natural Resources*, 102 Wn. App. 1, 14, 979 P.2d 929 (1999). An agency's interpretation of a statute should be upheld if it reflects a plausible

[1] Appellants do not argue that there is any genuine issue of material fact that precludes the grant of summary judgment in this case.

construction of the language of the statute and is not contrary to legislative intent. *Id.* Finally, statutory interpretations that produce unlikely, absurd, or strained consequences should be avoided. *City of Seattle v. State*, 136 Wn.2d 693, 697, 965 P.2d 619 (1998).

RCW 72.02.045 grants prison superintendents broad authority to manage prisons, including broad authority to manage inmates' property. Under this statute superintendents are the custodians of inmates' property and funds. RCW 72.02.045(3). Superintendents have the "authority to determine the types and amounts of property that convicted persons may possess in department facilities." *Id.* Superintendents may also "determine the types and amounts that the department will transport at the departments' expense" when inmates are transferred between department institutions or to other jurisdictions. *Id.* Superintendents may dispose of or discard inmate property that inmates have not paid to ship after the inmates have been transferred. *Id.* Superintendents have the authority to disburse funds from inmates' accounts for the "needs of the convicted person as may be deemed reasonably necessary." *Id.* Finally, DOC has the authority to pay inmates' legal financial obligations and to collect debt owed to DOC from inmates' accounts. RCW 72.11.020 (legal financial obligations); RCW 72.09.450 (DOC debt).

The authority granted in RCW 72.02.045 must be viewed in the light of RCW 72.01.050 which states in relevant part:

> The secretary of corrections shall have full power to manage, govern, and name all state correctional facilities, subject only to limitations contained in law relating to the management of such institutions.

RCW 72.01.050(2).

The extraordinarily broad grant of authority in RCW 72.01.050(2) means that unless the legislature has explicitly required DOC to store inmates' contraband property or expressly prohibited DOC from requiring inmates to send out or have someone pick up their contraband property, then DOC may lawfully act as it did in this case. It is apparent that the legislature has not expressly or implicitly limited DOC's authority to manage inmate contraband property. Because DOC's interpretation of its statutory authority to manage prison contraband is reasonable and not contrary to legislative intent, DOC's interpretation should be upheld. *Alpine Lakes, supra.*

To support their statutory argument, Appellants rely exclusively on the following two sentences in RCW 72.02.045(3):

> The superintendent shall be the custodian of all funds and valuable personal property of convicted persons as may be in their possession upon admission to the institution, or which may be sent or brought in to such persons, or earned by them while in custody, or which shall be forwarded to the superintendent on behalf of

> convicted persons. . . . When convicted persons are released from the custody of the department either on parole, community placement, community custody, community supervision, or discharge, all funds and valuable personal property in the possession of the superintendent belonging to such convicted persons shall be delivered to them.

Appellants rely on the dictionary definition of "custodian" and read into this definition a requirement that DOC superintendents must store inmates' contraband property until they are released from DOC custody. Neither the dictionary definition nor the statute say this or require this. The definition of a "custodian" is "one in charge of something: caretaker." *Websters II New Riverside University Dictionary* 340 (1988). The definition of custodian does not suggest that a custodian has any obligation to store property for any particular period of time but does indicate that the custodian has authority over the property. DOC superintendents properly exercised their authority over Appellants' contraband property by making such property fully available to Appellants to deal with at their choice, first at no expense to Appellants, then later at Appellants' own expense. The statute does not constrain prison superintendents' long-standing and broad powers which include the authority to require inmates to dispose of contraband property.

Appellants read far too much into the statutory provision requiring superintendents to deliver inmates' property to them when they are released from DOC custody. This provision only requires prison superintendents to deliver inmate property the superintendents possess at the time an inmate is released from custody; this provision does not require superintendents to store contraband property inmates have been ordered to send out. That the legislature did not intend for DOC to be a storage facility for inmate property is amply demonstrated in other portions of this statute:

> If a convicted person fails to pay the costs of transporting any excess property within ninety days from the date of transfer, such property shall be presumed abandoned and may be disposed of in the manner allowed by RCW 63.72.040(1) through (3).

RCW 72.02.045(3).

If a superintendent may lawfully dispose of allowed property an inmate fails to ship after being transferred, the superintendent may clearly dispose of contraband property that an inmate fails to send out after having received instructions to do so.

Appellants' concession that DOC is not required to store contraband items they bring with them to prison or which are sent to them in prison is fatal to their statutory argument:

> Neither are they (Appellants) making the case that RCW 72.02.045(3) would require WDOC to store or preserve all property they receive while incarcerated. . . . DOC Policy 440.000 would limit the inmate personal property that WDOC would be required to store or preserve. This policy restricts unauthorized or contraband personal property from newly incarcerated inmates who enter WDOC facilities and that is received by inmates from facility offender stores, approved vendors, monthly/quarterly packages, education or religious programs, and/or hobby craft items made by the inmate.

See Appellants' Brief, at 16.

Appellants' concession that DOC is not required to store or maintain contraband items brought into prison by an inmate or sent in to an inmate directly refutes their argument that RCW 72.02.045(3) requires DOC to store all property brought into prison by an inmate or sent into an inmate in prison until the inmate's release from custody. Appellants apparently make this concession to avoid the obviously absurd result that would follow if RCW 72.02.045(3) were interpreted to require DOC to store all contraband property brought into DOC by an inmate and all contraband property sent to an inmate until the inmate was released from DOC custody.

Appellants attempt to avoid the consequences of their concession by arguing that the contraband property at issue in this case is somehow different from other contraband because it was previously

allowed by DOC. However, Appellants point to nothing in RCW 72.02.045(3) or any other statute to support this argument.

Appellants' argument that previously allowed contraband must be treated differently from other contraband and must be stored by DOC until the inmate is released from DOC custody is incorrect as a matter of law. The law recognizes only two classes of inmate property; contraband items and non-contraband items.

As a matter of law, Appellants' personal clothing items became contraband on January 1, 2010:

> "Contraband" means any object or communication the secretary determines shall not be allowed to be: (a) brought into; (b) possessed while on the grounds of; or (c) sent from any institution under the control of the secretary.

RCW 72.09.015(5).

RCW 63.42.020(3) also defines contraband:

> "Contraband" means all personal property including, but not limited to, alcoholic beverages and other items which a resident of a correctional institution may not have in the resident's possession, as defined in rules adopted by the secretary.

Long standing DOC regulations likewise define contraband as any item an inmate may not have in his/her possession. WAC 137-36-020(1); WAC 137-48-020(1). Under DOC's regulations, even property of a type

that inmates may lawfully possess is contraband if possessed in quantities not allowed:

> All authorized items in excess or in noncompliance with the levels established by the superintendent of each institution shall be considered contraband and shall be disposed of as such in WAC 137-36-040.

WAC 137-36-030(4). When DOC lawfully prohibited inmates from possessing personal clothing after December 31, 2009, such clothing became contraband as a matter of law and was properly processed and disposed of as contraband by DOC under WAC 137-36-040 and DOC Policy 440.000.

Appellants' reliance on WAC 137-36-060 is equally misplaced. This regulation states, in relevant part: "Upon formal release from the institution, all personal property in the custody of the superintendent shall be returned to the inmate." Like RCW 72.02.045(3), this regulation only requires superintendents to return property that superintendents possess at the time inmates are released; it does not require superintendents to store property or to pay the costs of sending out non-allowable property.

Appellants' claim under WAC 137-36-060 fails as it is inconsistent with WAC 137-36-040(1)(a) which provides:

> Contraband items will be confiscated by the superintendent and disposed of in the following manner:

> (a) Items which are determined to be owned by an inmate will be mailed or transferred to a person designated by the inmate at the inmate's expense. If the inmate is without funds, refuses to pay the required postage or refuses to designate an individual to receive the property, such items shall be donated to a charitable organization.

Appellants' contraband personal clothing items were properly subject to the disposition provisions of WAC 137-36-040 as the definition of contraband includes any "items which a resident of a correctional institution may not have in his possession, as defined in regulations adopted by the superintendent of an institution and approved by the secretary." WAC 137-36-020(1). DOC had clear legal authority to require Appellants to send out their contraband personal property, therefore Appellants' claims under RCW 72.02.045(3) and WAC 137-36-060 fail as a matter of law and were properly dismissed.

Appellants further contended below that by characterizing their personal clothing as contraband after December 31, 2009, DOC extinguished Appellants' property rights in such clothing:

> The authority under 72.02.045(3) "to determine the types and amounts of property that convicted persons may possess in department facilities" deals only with actual or physical possession. It does not give DOC the authority or power to deprive Plaintiff Greenhalgh or Pfaff of ownership of personal clothing items . . . .

CP 333-34, Plaintiffs' Supplemental Brief, at 3-4.

DOC did not terminate or extinguish Appellants' property rights in their personal clothing. To the contrary, DOC took numerous steps to preserve and honor such rights by offering to send such property out at DOC expense, by allowing visitors to pick up such property, and, ultimately, by giving Appellants yet another opportunity to send their property out at their own expense. The loss of Appellants' property was caused only by Appellants' own failure to dispose of their property, not by any improper or unlawful action taken by DOC.

Appellants' citation to various former statutes that applied to DOC is irrelevant to this Court's interpretation of RCW 72.02.045 as it exists today, especially in light of the 2005 amendments to the statute that provided DOC greater authority over inmate property after the decision by the Supreme Court in *Burton v. Lehman*, 153 Wn.2d 416, 103 P.3d 1230 (2005). Even if considered by this Court, none of the statutes cited by Appellants required DOC to store contraband property items for inmates until their release from prison, therefore these former statutes do not support Appellants' strained interpretation of RCW 72.02.045(3).

Appellants also argue that DOC official Dan Pacholke's declaration is evidence "of WDOC's prior practice of preserving or storing inmate personal property and of WDOC's belief that it had a responsibility to do so." Appellants' Brief, at 20. Mr. Pacholke's declaration clearly

refers to allowable property, not contraband property. Just as clearly, the cost savings to which Mr. Pacholke refers in his declaration were primarily premised upon DOC not retaining or storing any of the clothing items that inmates could no longer possess:

> DOC currently has approximately 18,000 inmates in DOC institutions. Because of the costs to DOC of handling, transporting, and storing inmate property, DOC's regulations and policies attempt to minimize the types and amounts of property DOC will store for inmates. Consequently, all types of property that inmates are not allowed to possess, including personal clothing, are considered contraband and inmates are required to send out contraband property at their own expense under DOC regulation WAC 137-36-040.

CP 55, Declaration of Dan Pacholke. Appellants' distorted interpretation of Mr. Pacholke's declaration should be rejected.

Appellants' reliance on *Burton v. Lehman*, 153 Wn.2d 416, 103 P.3d 1230 (2005) is misplaced. *Burton* did not concern contraband property inmates were not allowed to receive or possess but only involved DOC's responsibility to ship inmates' allowable property when inmates were transferred to a different institution. Moreover, *Burton* involved the former version of RCW 72.02.045 and does not apply to this case as a result of the 2005 amendments to this statute that reinforced DOC's authority to determine the types and amounts of property inmates may possess, required inmates to pay the costs of shipping their property, and

allowed DOC to dispose of any property inmates fail to ship at their own expense.

Appellants' reliance on *Blum v. State of Arizona*, 171 Ariz. 201, 829 P.2d 1247 (1992) is equally misplaced.[2] In *Blum*, the Arizona Court of Appeals was called upon to interpret Arizona Revised Statute § 31-228 which provides:

> When a prisoner is released on parole or discharged from a facility of the department of corrections there shall be returned to the prisoner everything of value taken upon commitment to the department of corrections, or thereafter received by the prisoner.

The court in *Blum* held that this statute precluded the Arizona DOC from destroying or disposing of property that Arizona inmates could no longer possess as a result of changes to the property policies of the Arizona DOC. *Blum* is inapposite as RCW 72.09.045 is markedly different from the statute at issue in *Blum*.

While the Arizona statute at issue in *Blum* requires prison officials to return to released prisoners "everything of value taken upon commitment to the department of corrections, or thereafter received by the prisoner", RCW 72.02.045 contains no such language and only requires DOC to deliver to released inmates "property in the possession of the

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[2] Appellants disingenuously rewrite portions of RCW 72.02.045(3) in an attempt to make it appear that this statute is identical or very similar to the Arizona statute at issue in *Blum*. *See* Appellants' Brief, at 13.

superintendent belonging to such convicted persons." *Blum* has no relevance to this case.

C. Respondents Did Not Proximately Cause Appellants' Damages

Appellants allege that Respondents "negligently or intentionally" violated RCW 72.02.045(3) thereby causing them economic harm for which they seek damages. Appellants' damage claims for the alleged violation of RCW 72.02.045(3) fail as a matter of law for lack of proximate causation of Appellants' damages.

A plaintiff must demonstrate both components of proximate cause; cause in fact and legal causation. *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wn.2d 747, 753, 818 P.2d 1337 (1991). Cause in fact refers to the "but for" connection between an act and an injury, while legal causation requires a determination of whether liability *should* attach, based on logic, common sense, policy, and similar considerations. *Id.*, 117 Wn.2d at 753, 756; *and see Anderson v. Weslo, Inc.*, 79 Wn. App. 829, 838, 906 P.2d 336 (1995).

In this case DOC gave Appellants multiple opportunities to have their contraband clothing delivered to a place of their choosing at no expense to Appellants, including offering to mail out such clothing at DOC expense and allowing such clothing to be picked up by Appellants' visitors. CP 53-55. Appellants consciously chose to

ignore these opportunities in an apparent effort to position themselves to file a lawsuit against DOC for damages.

Mr. Greenhalgh, after having been notified that he had contraband clothing items that he needed to send out to a "non-incarcerated" person, cleverly chose to send his property to the superintendent of the institution where he was incarcerated, Mr. Frakes. CP 151. While Mr. Frakes was literally a "non-incarcerated" person, it is clear that DOC intended the term "non-incarcerated" person to be an inmate's family or friends, not a DOC employee in a DOC prison. Nevertheless, Mr. Greenhalgh's property was sent to Superintendent Frakes who notified Mr. Greenhalgh that he needed to send out his contraband clothing. Mr. Greenhalgh then chose to send some of his clothing out, with the remainder presumably to be disposed of by DOC. CP 151, 153. Having sent some of his property out at his own expense, and having had some of his property disposed of by DOC, Mr. Greenhalgh had now craftily positioned himself to seek damages as a member of both of the two proposed classes of Plaintiffs in this case; inmates who paid to ship out their property, and inmates who did not ship out their property which was then discarded by DOC.

Mr. Pfaff's situation is similar to Mr. Greenhalgh's. Mr. Pfaff apparently made no effort to send his contraband clothing out in 2010

even though he clearly had sufficient income in prison to mail this property out. CP 81-87. After having received notice in January 2011 that he needed to pay $15.00 to mail out his contraband clothing, Mr. Pfaff wrote the MICC property room and advised them that they should dispose of his property because "I am without funds to have it sent here." CP 77.[3] Mr. Pfaff's claim in his letter that he had no funds to send out his property was demonstrably false because at the time Mr. Pfaff wrote this letter he had $35.00 in his DOC postage subaccount that he could have used to pay the cost of mailing out his contraband clothing. CP 88.

Like Mr. Greenhalgh, Mr. Pfaff had, or at least thought he had, perfectly positioned himself as a member of the class of prisoners who lost property because they failed to mail it out. Indeed, Mr. Pfaff had made himself the poster child for the class of inmates who lost property because he had, if his letter was to be believed, lost his property only because he was indigent. However, the facts are that Mr. Pfaff caused the loss of his property because he refused to mail it out at state

[3] Appellants falsely assert in their statement of facts that Mr. Pfaff directed staff to dispose of his personal clothing because he "was indigent and did not have the requested $15.00 in his spendable or postage accounts when the shipping costs were due to be paid." Appellants' Brief, at 8. This assertion is contrary to Mr. Pfaff's admission that he received "$35.00 from the Wiles" on February 2, 2011, and then transferred these funds to his spendable account on February 17, 2011. *Id.*

expense, refused to have a visitor pick it up, and then refused to mail it out at his own expense when he had the means to do so.

Under these circumstances, this Court may affirm the trial court's dismissal of this action on the basis of the lack of proximate cause of the damages claimed by Appellants. Appellants intentionally refused to take advantage of the generous opportunities afforded by DOC to transfer their property out of the prison at no expense to Appellants, and instead chose to lose their property or incur the expense of sending their property out. The question for the court is whether DOC should be liable for damages under these circumstances based on "logic, common sense, policy, and similar considerations." *Ayers, supra.* All of these considerations militate against allowing Appellants to seek damages from DOC when Appellants themselves are the sole cause of their damages in this case. Because DOC did not proximately cause the damages Appellants claim in this case, this Court should affirm the dismissal of Appellants' action by the trial court.

D. The Trial Court Correctly Dismissed Appellants' Remaining Claims On Their Merits

Appellants argue that the trial court improperly dismissed their remaining, non-RCW 72.02.045(3) claims based on the trial court's erroneous decision on Appellants' RCW 72.02.045(3) claim, and without

discussion or consideration of such claims. Appellants do not argue or discuss the merits of their remaining claims. Appellants' argument concerning their remaining claims fails as the trial court correctly dismissed such claims on their merits and without regard to Appellants' claim under RCW 72.02.045(3).

The record of the proceedings below does not support Appellants' argument. The parties thoroughly briefed all Appellants' individual claims in the trial court and there is nothing in the record below to suggest that the trial court did not assess each of these claims individually. Moreover, there is nothing in the record below indicating that the trial court dismissed Appellants' other claims based on its conclusion concerning Appellants' claim under RCW 72.02.045(3). The trial court was not required to discuss and analyze all Appellants' remaining claims in either its oral decision or its order granting summary judgment to Respondents.

An appellate court reviews de novo all trial court rulings made in conjunction with a summary judgment motion. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). As such, a trial court's findings of fact and conclusions of law in an order granting summary judgment are "gratuitous, superfluous, and of no consequence" in an appeal of such an order. *Skimming v. Boxer*, 119 Wn. App. 748, 755, 82

P.3d 707 (2004); *see also* CR 52(a)(5)(B) ("Findings of fact and conclusions of law are not necessary . . . on decisions of motions under rules 12 or 56 . . . .").

It is well established that Washington appellate courts will not consider issues that are raised but not adequately briefed by a party. *Graves v. Employment Sec. Dep't*, 144 Wn. App. 302, 312, 182 P.3d 1004 (2008). Since the trial court was not required to make findings of fact or conclusions of law in its order granting Respondents' motion for summary judgment and Appellants have presented no argument that the dismissal of all Appellants' claims other than their statutory claim was error, this Court should affirm the dismissal of such claims.

IV. CONCLUSION

The trial court correctly concluded that Appellants' claims failed as a matter of law and dismissed Appellants' action. Respondents respectfully request that this Court affirm the judgment of the trial court in this case.

RESPECTFULLY SUBMITTED this 3rd day of May, 2013.

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CERTIFICATE OF SERVICE

I certify that on the date below I served a copy of the BRIEF OF RESPONDENTS on all parties or their counsel of record as follows:

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KATRINA TOAL
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