SUPREME COURT OF THE STATE OF WASHINGTON
No. 98159-1

Court of Appeals, Division I, No. 78819-1-I

KAREN KOEHLER and EDWARD H. MOORE,

Petitioners,

v.

THE CITY OF SEATTLE, a Municipality; JASON M. ANDERSON and STEVEN A. MCNEW, individually,

Respondents.
(Defendants' counsel below)

Appeal from the Superior Court of King County
The Honorable Julie Spector
No. 17-2-23731-1 SEA

RESPONSE TO PETITION FOR REVIEW

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I. INTRODUCTION

Attorneys Karen K. Koehler and Edward H. Moore, Petitioners, seek review of the Court of Appeals' proper affirmation of King County Superior Court Judge Julie Spector's order issuing CR 11 sanctions against them. Petitioners are persistent in their refusal to accept any responsibility for their actions in filing a baseless motion, six months before the trial date, and on the one-year anniversary of Charleena Lyles' death, asking Judge Spector to make a finding that Officer Jason Anderson "probably committed perjury" during a civil deposition. Petitioners requested that Judge Spector refer the matter to the King County Prosecutor's Office for consideration of criminal charges. Both Petitioners signed the motion for purposes of CR 11. Petitioners now ask this Court to relieve them of responsibility for their own unfounded tactical and strategic decisions.

Conspicuous for its absence in Petitioners pleading to this Court is the fact, amongst others, that they provided a copy of the subject motion to the media before serving Respondents. Petitioners admitted they were on notice that the Respondents would seek CR 11 sanctions. Both sophisticated attorneys, Petitioners elected to stand on procedural objections rather than address the substance of Respondents' sanctions motion. Both the trial court

and Court of Appeals properly applied the law. This Court should not accept discretionary review. The moment of full accountability is now.

II. ISSUES PRESENTED

1. Because the Court of Appeals decision is not in conflict with any decisions of the Court of Appeals or this Court, should this Court deny Petitioners' request for discretionary review?
2. Because the Court of Appeals decision does not implicate a serious question of law under the Washington or U.S. Constitution, should this Court deny Petitioners' request for discretionary review?

III. COUNTERSTATEMENT OF THE CASE

A. Undisputed Facts Regarding Petitioners' Motion Seeking Trial Judge Find "Probable" Perjury.

On June 18, 2018, the one-year anniversary of Charlena Lyles' death and approximately six months before the January 2019 trial date, Petitioners filed a motion asking Judge Spector to make a finding that Officer Anderson "probably committed perjury" while testifying during his discovery deposition. Petitioners contended that Officer Anderson testified falsely when he stated that Ms. Lyles' apartment door was shut behind him in the dynamic seconds when his attention was directed at the unfolding knife attack by Ms. Lyles directed towards him and then towards Officer McNew who was trapped in a blocked area of the kitchen. CP 1433. Additionally,

Petitioners specifically requested that Judge Spector, upon finding probable perjury, refer the matter to the King County Prosecutor's Office for consideration of criminal charges. CP 12. Petitioners solely relied on RCW 9A.72.020; CP 10, 12. Both Petitioners signed the motion. CP 13.

1. Release to Media Before Service on Parties.

Without prior disclosure of their expert or his work product, Petitioners filed this motion to be heard without oral argument six court days from its filing on June 26, 2018. CP 1. The motion came into the hands of the media before being served on Respondents. The docket shows that Petitioners filed their motion at 1:26 PM, and by 1:55 PM a reporter for King 5 News tweeted screen captures of the subject motion as #BREAKING. CP 1236-1239. Ms. Koehler admitted that she immediately notified the press of the motion upon filing. CP 1069-1070; Petition at 5. Petitioners did not serve Respondents until 2:06 PM – allowing the media the opportunity to publish a story before Respondents even knew a motion was pending. CP 117-118; CP 123-127; Slip Opin. at 16. Simply put, Ms. Koehler achieved her purpose of drawing media attention to herself and her motion with no forewarning to Respondents.

2. Release of Video Before Expiration of 30-Day Period.

Crucially, Petitioners' fail to bring their explicit violation of the trial court's protective order to this Court's attention. Counsel for Officer

Anderson received the copy of the written deposition transcript on May 9, 2018 and received the video of the deposition on May 29, 2018. CP 1049, 1051. The 30-day period to designate testimony as confidential from that deposition did not expire until June 28, 2018. Nevertheless, Petitioners filed with the court a copy of Officer Anderson's video deposition in violation of the protective order, despite the fact that the 30-day period for confidential designations had not yet passed. CP 1010. It is undisputed that Respondents never waived its protections and Petitioners did not meet and confer with Respondents before releasing this video. CP 102. And then, Petitioners went as far as furnishing the media with a copy of the motion before serving Respondents. CP 117-118; CP 123-127.

3. Petitioner's Comment in the Public Realm.

On the same day Petitioners filed their frivolous and attention seeking motion, Ms. Koehler posted a tweet which read, "One year ago Charleena Lyles was shot to death in her own home by the police. Today we honor her memory and children by relentlessly fighting to uncover the truth of what happened." CP 100, 1195. Completing the circle of seeking media attention Ms. Koehler, the newsmaker, also retweeted an article by Alex Rozier of King 5 which is titled "BREAKING: On the one-year anniversary of the death of #CharleenaLyles, a motion is filed in the courts saying one of the @SeattlePD officers who shot and killed her committed

perjury." In retweeting the article, Ms. Koehler used hashtags #sayhername #CharleenaLyles. *Id.* Ms. Koehler used hashtags to bring other conversations into the context of a tweet. CP 1195-1196.

Ms. Koehler also retweeted other stories published by King 5 News and Lynsi Burton at the Seattle Post Intelligencer (including a photo of Officer Anderson and a photo of him with his attorneys in court). CP 101. Over the next several days, Ms. Koehler continued tweeting. On June 22, Ms. Koehler retweeted negative press about Respondents' claims that the perjury motion was a stunt. With respect to a retweet of a Seattle PI article, she used a Shakespeare quote: "Me thinks thou dost protest too much" – regarding the arguments made by Respondents in opposition. CP 1196.

4. Response to Petitioners' Motion and Sanctions Notice.

On June 21, 2018, within three days of receiving Petitioners' motion, Respondents timely provided notice of their request for sanctions to Ms. Koehler and Mr. Moore under CR 11. CP 1047. Ms. Koehler acknowledged her receipt of this correspondence. CP 1053.

On June 22, 2019, Respondents filed a response asking the court to deny the motion and to find that Petitioners violated CR 11. Upon filing their reply to Respondents' briefing which included a request for sanctions, Petitioners rested solely on procedural objections that they believed KCLR 7 requires Respondents to file a separate motion on a six-day calendar to

seek sanctions. However, Petitioners failed to cite any language setting forth such a requirement and none exists. Petitioners failed to seek an extension from either Respondents or the Court.

5. June 26, 2018 Order.

On June 26, 2018 the trial court, having reviewed the parties' submissions, made findings, and signed the order denying Petitioners' motion and granting Respondents' CR 11 sanctions motion. CP 1131-1138.

6. Reconsideration and July 26, 2018 Order.

Petitioners moved for reconsideration of the order imposing sanctions. CP 1329. On reconsideration and for the first time, Petitioners made substantive arguments that they should have raised in their initial response. The Court permitted briefing in which Petitioners presented similar arguments presented in this appeal. CP 1154-1169, CP 1171 – 1316. Petitioners' motion for reconsideration consisted of briefing and 146 pages of attachments. Petitioners did not request oral argument.

After reviewing the parties briefing, the Court denied reconsideration, signing a similar order as that signed on June 26th and signed a separate order issuing monetary sanctions against Petitioners in the amount of $24,469.69 that represented the monetary value of the work Respondents were required to respond to Petitioners' motion. CP 1511-1513. No additional sanctions were imposed.

B. Petitioners' Appeal.

Petitioners appealed the trial court's decision to Division One. In a December 30, 2019 unanimous opinion authored by Judge Appelwick, the Court of Appeals affirmed the trial court's order imposing CR 11 sanctions and finding no legal basis for Petitioners' motion. The Court reversed the trial court's evidentiary ruling excluding Petitioners' expert, Mr. Hayes. Petitioners did not seek reconsideration. This petition for review followed.

III. ARGUMENT

A. Standard of Review.

Petitioners bear the burden of establishing that review is warranted under RAP 13.4. Thus, Petitioners must establish that the Court of Appeals' unanimous decision presents a significant question of constitutional interest or an issue of substantial public interests that should be decided by this Court. RAP 13.4; *In re Coats,* 173 Wn.2d 123, 267 P.3d 324 (2011). Petitioners cannot meet their burden.

B. Petitioners Received Due Process.

At no point during the adjudication of their motion, Respondents' sanctions request, or their motion for reconsideration, did Petitioners ever seek an oral argument before the trial court. Slip Opin. at 9. Unsurprisingly, before reaching the Court of Appeals, Petitioners did not seek an opportunity to be heard in open court before Judge Spector on any of the

subjects relevant to their motion.

The timing here is undisputed. Petitioners filed their motion to be heard eight days from the date of filing without oral argument. Even though they did in fact acknowledge and respond to Respondents' sanctions motion, Petitioners argue here as they did at the trial court level that they were denied the opportunity to respond. CP 167. The due process requirements on requests for sanctions are minimal and uncontroverted, simply requiring notice and opportunity to be heard. *Watson v. Maier,* 64 Wn. App. 889, 827 P.2d 311 (1992).

In response to Judge Spector's June 26th Order, Petitioners sought reconsideration. Under KCLR 59, Respondents need not respond to a motion unless the Judge asks for briefing, which Judge Spector did in this case – affording Petitioners additional due process that they were arguably not entitled to. Petitioners' unsupported contention that Judge Spector failed to consider or rule on their motion for reconsideration is meritless.

Petitioners' underlying motion was requested without oral argument. Similarly, motions for reconsideration are heard without oral argument unless called for by the court. LCR 59(a). The July 26, 2018 Order with findings incorporates Petitioners' briefing into the list of documents the trial court considered and addresses Petitioners' concern. CP 1568.

In a motion for reconsideration and again here, Petitioners relied

upon *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 224, 829 P.2d 1099 (1992), which recognizes that inclusion of a request for sanctions and reply brief constitutes notice within the requirements of the due process clause. Providing a chance to respond to the request for sanctions through the submission of a brief or presentation argument is all that due process requires. See, *Id*.; *Spiller v. Ella Smithers Geriatric Center,* 919 F.2d 339 (5th Cir. 1990). Here, Respondents gave written notice in advance of and included the request for sanctions in a responsive pleading, affording Petitioners ample opportunity to address the request in the reply brief, withdraw their motion, or seek leave of the court for additional briefing on the issue. What's more, Respondents' request for sanctions was filed on a Friday, providing Petitioners with two additional days to draft a response.

In *King County Water Dist. No. 90 v. City of Renton,* plaintiff King County requested CR 11 sanctions against the defendant in the reply brief. 88 Wn. App. 214, 231, 944 P.2d 1067 (1997). Defendant was served by mail two days before the court signed an order issuing sanctions. *Id.* Though the order was signed on July 17, it was not entered until July 23, providing several days for the defendant to respond. *Id.* Defendant failed to respond and further failed to move for reconsideration. *Id.* Under these circumstances, the court found that the defendant was provided sufficient notice and opportunity to be heard. *Id.*

Petitioners were on written notice that Respondents were seeking Civil Rule 11 sanctions and that the request was to be included in Respondents' brief on June 21, 2018. CP 1047. Petitioners acknowledged receipt of the notice on the same day. CP 1053. Respondents timely filed a response to Petitioners' motion. CP 92. Petitioners rested solely on procedural objections that KCLR 7 requires parties to file a separate motion on a six-day calendar to seek sanctions. KCLR 7 does not address whether request for sanctions may be brought in a separate motion. Courts have found that no separate motion is necessary. *See In re Marriage of Rich,* 80 Wn. App. 252, 907 P.2d 1234 (1996).

Unlike *Bryant* and *King County*, which held that a sanctions request contained in a reply brief constitutes sufficient notice, Petitioners were provided notice of Respondents' sanctions request via letter before the briefing was filed. Further, unlike the sanctioned parties in *Bryant* and *King County*, Petitioners were afforded an opportunity to respond to the sanctions requested via their reply brief or withdraw their motion. Despite having this opportunity, Petitioners made the strategic decision to not request more time or to substantively address Respondents' request for sanctions. They simply dismissed the lengthy and detailed briefing submitted by Respondents requesting CR 11 sanctions as insignificant. Ms. Koehler also tweeted a sarcastic spin on Shakespeare to emphasize Petitioners' apparent disregard

of the Respondents' request for sanctions. CP 1196.

All that due process affords is notice and an opportunity to be heard. It is undisputed that Petitioners had both here. Petitioners can provide no legal support for their argument that they were entitled to a formal invitation to respond to Respondents' sanctions motion from the trial court. Here, Petitioners did not want to, and strategically chose not to, answer for their actions. This was Petitioners choice, and their choice alone to make.

C. The Court of Appeals Decision Does Not Create an Issue of Substantial Public Interest with Respect to "Sanctionable" Motions Brought Under RCW 9.72.090.

Next, Petitioners self-servingly recharacterize the decision of the Court of Appeals as involving issues of substantial public interest because it is a "novel issue of whether a motion under RCW 9.72.090 regarding possible perjury of a party during a civil deposition should be sanctionable." Petition at 1. In doing so, Petitioners ask this Court to rewrite CR 11 to explicitly excuse them from responsibility for filing a motion that was not well grounded in fact or existing law. That is not a function of this Court, or any other court. The motion was frivolous. Petitioners seek to turn the concept of novelty into a Constitutionally protected banner. The Court of Appeals rejected this and profoundly announced, "No authority supports their action. It was novel, but it was also meritless." Slip Opin. at 23.

Petitioners' hyperbolic and cursory statement of facts to this Court

ignores the root of the trial court's and Court of Appeals' decisions and the undisputed material facts: that Petitioners filed a motion with no legal basis, violated the trial court's protective order when doing so, provided a copy to the media before serving Respondents, and did so with the purpose of garnering media attention. Notably, Petitioners do not seek review of the Court of Appeals finding of substantial evidence in support of the trial court's order or the reasonableness of the sanctions. *See,* Petition.

1. Petitioners asked the court to improperly comment on the evidence.

Throughout their petition for review, Petitioners downplay the nature of the subject motion. Rather than focus on the fact that Petitioners relied solely on Officer Anderson's civil deposition testimony to argue for a criminal referral under the plain language of RCW 9.72.090 which explicitly references a person who has "testified" and "committed perjury in any testimony," Petitioners now recharacterize, and raise for the first time, Officer Anderson's testimony as "false evidence." Petition at 12-13. Petitioners repeated reference to "false evidence" is a red herring, a distinction without a difference. At issue is the testimonial evidence of Officer Anderson's deposition. There is no dispute, as the Court of Appeals aptly noted, that Officer Anderson did not offer false evidence or testimony directly before or to the trial judge in this case. Slip Opin. at 21.

Nonetheless, asking the trial court to make a determination on the veracity of a witness, or as Petitioners proffer here, the nature of testimonial evidence, much less a party, particularly in a public forum as Petitioners have chosen, amounts to an impermissible comment on the evidence. Judges must maintain their appearance of neutrality. "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." *Washington Constitution*, Art. IV, Sec. 16. Indeed. "the statute [RCW 9.72.090] is not an evidentiary rule." Slip Opin. at 22.

Petitioners characterize the strength of their evidence one way for their public audience and another way when they attempt to minimize the repercussions of their filing with the Court. Here, they seek to neutralize and downplay the relief sought by their motion, by arguing they merely filed the motion "to seek the court's assistance and judgment in this matter." The motion and proposed order speak for itself. Petition at 5; CP 1145.

As the Court of Appeals recognized, Petitioners have not come up with a single published case to support their novel yet meritless motion asking a judge to find "probable perjury" with respect to deposition testimony in advance of trial. No civil claim for perjury even exists. *Dexter v. Spokane County Health Dist.,* 76 Wn. App. 372, 884 P.2d 1353 (1994). Nor can Petitioners provide a case with respect to their new argument of "false evidence." While a judge is authorized to refer a matter to a

prosecuting attorney for consideration of perjury charges, the referenced statute indicates that this is limited to circumstances where the witness testifies before the judge, and not at a deposition like the case at hand. Further, it correlates that the same principles apply to false evidence offered before the judge. As the Court of Appeals noted and as any amount of basic research would have revealed, Petitioners' motion was meritless. Slip Opin. at 21. The trial court was well within its right to impose CR 11 sanctions.

2. Petitioners' Lacked Sufficient Evidence to Support Either a Perjury or False Evidence Claim.

Noting the discrepancy between Officer Anderson's testimony and the synchronized video, Petitioners concluded that they presented sufficient information to the Court to support a charge of first-degree perjury under RCW 9A.72.020. CP 10. That is false. Slip Opin. at 20. To sustain a perjury conviction, the questions and answers that support the allegation must demonstrate both that the testifying individual was fully aware of the actual meaning behind the questions and that he knowingly gave untruthful answers to those questions. *State v. Stump*, 73 Wn. App. 625, 628, 870 P.2d 333 (1994). A person who testifies falsely, but in good faith with the honest belief that he or she is telling the truth, is not guilty of perjury. *Id.*

Petitioners lacked evidence demonstrating that Officer Anderson "knew his answer [was] not the truth." *Stump,* 73 Wn. App. at 628. The

Court of Appeals recognized that "[t]he video does not demonstrate this." Recharacterizing Officer Anderson's testimony as "false evidence," does not change the fundamental elements of perjury or RCW 9.72.090. As the Court of Appeals recognized, the plain language of the statute provides that "its purpose is to allow the trial court to protect the integrity of proceedings before it." Slip Opin. at 21. There is no ambiguity in the Court of Appeals' unanimous decision, nor can Petitioners escape the fact that "Anderson had not testified before the trial court or submitted other evidence at the time the motion was made. *Id.*

Whether Petitioners characterize the support for their motion as "testimony" or "false evidence" is irrelevant. Petitioners do not challenge the Court of Appeals' holding that RCW 9.72.090 "does not invite one party to set up another to refer for prosecution." Slip Opin. at 22. Nor do Petitioners challenge the holding that "the statute is not an evidentiary rule." *Id.* Taken Petitioners new arguments at face value, their use of RCW 9.72.090 as a sword to exclude "false" evidence not yet presented to the trial court was improper. Slip Opin. at 22.

D. The Decision Properly Applied RPC 3.6 Where Ms. Koehler's Interactions with the Media Pertained to Materials Filed in Violation of the Trial Court's Protective Order.

Petitioners do not raise or address the following undisputed facts relevant to the trial court and Court of Appeals holdings: Petitioners (1)

provided the motion to the media before Respondents were served (CP 1069-1070); (2) filed materials in violation of the trial court's protective order (Slip Opin. at 16); (3) Ms. Koehler subsequently re-tweeted multiple news articles, some including photographs of Officer Anderson in court, using hashtags for the purpose of spreading the news articles across broader platforms; and (4) Ms. Koehler's tweet with a variant of a Shakespeare quote: "Me thinks thou dost protest too much," (CP 1128) stated to readers that she believes Respondents' vociferous response to Appellants' motion belies Respondents' true assessment of the validity of Petitioners' motion. This comment directly and publicly impugns the credibility of Respondents and their counsel in conclusory fashion. Again, Petitioners seek relief for litigation decisions made independently and by them alone.

Conspicuous for its absence in Petitioners' request for relief, is any acknowledgement of two crucial, undisputed facts underpinning the trial court's sanctions order: (1) that Ms. Koehler, by her own admission, provided the media with a copy of the motion before serving Respondents (CP 1069-1070), and (2) that Petitioners filed materials, specifically portions of Officer Anderson's deposition transcript, in direct violation of the trial court's protective order. CP 15-17; CP 45-72; CP 83; CP 87; CP 91. Compounding this was Petitioners decision to file the motion on the one-year anniversary of Ms. Lyles' death, a date on which Ms. Koehler

knew media coverage would be higher because she had already retweeted a news story from a media reporter and authored a tweet about the anniversary herself. CP 1188-1194; CP 1195-1196. Ms. Koehler also continued to retweet stories posted by the media that day. *Id.* The timing and nature of Petitioners' actions in seeking to garner additional publicity in this case are not coincidental and speak for themselves. Her tweets and retweets are not incidental or innocuous in this instance. Rather, they are intentional strategic acts by a sophisticated attorney that knows how to garner attention and use social media by making news and then reporting on that fact that she had made news.

Petitioners cannot escape culpability under the "safe harbor" provision of RPC 3.6 by simply proclaiming that they referenced "information contained in a public record—in this case the court filings," because the filings violated the trial court's protective order. Petition at 16. As the Court of Appeals recognized, by filing materials in violation of the protective order, Ms. Koehler's tweets were not within the safe harbor. Slip Opin. at 16. Again, what Petitioners have consistently missed in their analysis throughout their appeal and in their petition for review, is that they are the ones that put the information into the public domain without advance notice or explanation to the attorneys for Respondents. This fact continues to bely Petitioners' claim that their only concern was their misguided search

for a false truth—the false claim that that Officer Anderson should be prosecuted for the crime they claim to have believed he committed. Petitioners fail to provide any explanation as to the urgency of this request, why it needed to be made in a public forum, or why it needed to be made in a motion filed on the one-year anniversary of Ms. Lyle's death.

By Petitioners own admission, their motion sought to attack the credibility of Officer Anderson. Petition at 15-16. They cannot dilute this fact by attempting to distance the time of filing of the motion to the trial date. Petition at 16. Ms. Koehler's conduct falls in direct conflict with RPC 3.6 and comment five. Petitioners' motive, motion, and subsequent tweets speak for themselves. Petitioners' actions were calculated with great forethought and explicitly designed to impugn the credibility and reputation of a party in civil litigation. The court is not required to quantify the risk of prejudice because the Petitioners' acts alone were more likely than not to have a material prejudicial effect on the proceeding.

E. Petitioners' First Amendment Rights Were Not Violated.

As a means for justifying their actions, Petitioners again invoke the First Amendment as a shield for the sanctions order. The sanctions order was not issued in a vacuum. Nor were ***the plaintiffs*** punished for filing a motion "well grounded in fact and law." Petition at 18.

As recognized by the Court of Appeals, the trial court never entered

a gag order or a no contact order with respect to the media in this case. Slip Opin. at 30. Thus, Petitioners' reliance on *State v. Bassett,* 128 Wn.2d 612, 911 P.2d 385 (1996) is unfounded. Crucially, the trial court approved a stipulated protective order to prevent the public release of material designated as confidential. It is undisputed that Petitioners violated that order in filing the motion and providing it to the media. *Id.* The trial court never imposed a restraint on Petitioners speech. Rather, it sanctioned Petitioners under CR 11 for violating the protective order.

The trial court entered an order hinging on a series of specific factors resulting in sanctions. The sanctions order was not premised on the sole fact that Ms. Koehler communicated with the media, or even the sole fact that her communications were made with the purpose of materially prejudicing a party, Officer Anderson. Rather, the trial court determined that the motion was unfounded fact and law, inflammatory, intentionally provided to the media before Respondents were served, filed on the anniversary of the death of Ms. Lyles, in addition to many other considerations.

No authority exists to support Petitioners' contentions that their First Amendment rights were violated. Petitioners violated the trial court's protective order and proceeded to openly communicate with the media regarding the motion and its contents. Given the baseless nature of the motion and the inflammatory claims made therein, substantial evidence

supports the trial court's finding that Ms. Koehler's comments were "materially prejudicial in light of the ongoing litigation."

IV. CONCLUSION

The Court of Appeals' unanimous decision properly upholds the longstanding legal principle that a trial court has inherent authority to sanction parties for bad faith conduct including conduct which delays or interrupts litigation or affects the integrity of the court. Petitioners would have this Court believe that the CRs and RPCs simply do not apply to them. The sanctions Petitioners face are not the result of the Court of Appeals' and trial court's correct application of the rules underpinning our judicial system, but of their own strategic decisions. That is not the concern of Respondents, the public, or this Court.

By making their own calculated and strategic litigation decisions to file their motion and not respond to Respondents' sanctions request, Petitioners assumed the liability for their choices. The Court of Appeals got it right: Judge Spector's decision finding that Petitioners violated CR 11 is discretionary and supported by specific findings. This Court should acknowledge that fact and deny review.

Respectfully submitted this 6th day of March, 2020

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CERTIFICATE OF SERVICE

I certify that on the 6th day of March, 2020 I electronically filed the foregoing document with the Clerk of the Court, and caused a true and correct copy to be served on the following in the manner indicated below:

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