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STATE OF WASHINGTON
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NO. 89377-2

SUPREME COURT OF THE STATE OF WASHINGTON

KATHRYN SCRIVENER,

Appellant,

v.

CLARK COLLEGE,

Respondent.

PETITIONER
Supplemental Brief of ~~Appellant~~ - Kathryn Scrivener

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 ORIGINAL

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I. STATEMENT OF THE CASE

In the fall of 2005, at 53 years old, Appellant applied for two open tenure-track teaching positions in Respondent's English Department, where she had been teaching full time on a year-by-year basis as a temporary English instructor since 1999. *CP 106*. She was one of the top applicants for the positions, and hers was one of four names forwarded in a May 4, 2006 memo from the Screening Committee to the final decision-maker, then-President R. Wayne Branch for a final interview with him and his acting Vice President of Instruction, Sylvia Thornburg. *CP 8, 32*. Appellant was a more experienced instructor than either of the younger applicants hired, having taught at four different colleges since 1993, *CP 46-57*, and met every one of the qualifications listed as "desirable" on the recruitment announcement for the positions. *CP 37*.

Both of the individuals hired to fill the positions were under 40, had not taught as long as Appellant, and did not possess the "computer assisted and/or distance education" experience identified as desirable in the position posting. *CP 46-57*. Appellant interviewed with President Branch and Vice President Thornburg on May 11, 2006. President Branch indulged in some inappropriate "clowning" during Appellant's interview, making her feel that he was not taking her seriously. *CP 107*. That same

day, shortly after Appellant's interview, the College informed her that it had selected two much younger applicants for the positions and that both had accepted. *CP 101.*

Respondent filled 16 faculty positions in 2005-06; four temporary and 12 tenure-track positions. While three of the hires for the four temporary positions were 40 years old or over, only four of the 12 hires for the more desirable tenure track positions were 40 or over. *CP 43-44.*

During the hiring process for the tenure-track English instructor positions, President R. Wayne Branch, the final decision-maker for the hires, announced in his State of the College address that Clark College had a "glaring need" for "younger talent" under 40 on the faculty and that "employing people [outside the over 40 age group] who bring different perspectives will only benefit our college and community." *CP 24.* This speech was provided to a live audience, and disseminated on-line to the entire college community.

President Branch also made public comments against posting any minimum experience requirements for the applicants for the tenure-track positions, opening up the positions to younger applicants. *CP 109-110.*

Appellant brought a claim of age discrimination against Clark College under the Washington Law Against Discrimination ("WLAD").

The College moved for summary judgment which the trial court granted and the Court of Appeals affirmed.

II. ARGUMENT

A. The lower courts erred by failing to apply the substantial factor test at summary judgment.

The plaintiff's task at the summary judgment stage is limited to showing that a reasonable trier of fact, taking all reasonable inferences in favor of plaintiff, could – though not necessarily would – draw the inference that age was a substantial factor in the decision. *See Rice v. Offshore Systems, Inc.*, 167 Wn.App. 77, 90, 272 P.3d 865 (2012). Plaintiff need not prove that age is the only or even the primary reason for a challenged employment decision. A discriminatory motive is deemed to have caused an adverse employment action if that motive was a *substantial factor* in bringing about that action, even if the action would have occurred without that motive. *See* WPI 330.01.01(substantial factor standard in employment discrimination is not only or main factor); WPI 15.02; *Wilmot v. Kaiser Aluminum and Chemical Corp.*, 118 Wash.2d 46, 70-72, 821 P.2d 18 (1991). Thus, a discriminatory motive can be a substantial factor for an adverse employment action “even if the result would have occurred without it.” *See id.* The substantial factor test is *not*

a “sole or principal motivation” requirement. *Burchfiel v. Boeing Corp.*, 149 Wn.App. 468, 482, 205 P.3d 145, *rev. den’d*, 166 Wn.2d 1038 (2009).

The substantial factor test is used in discrimination cases because:

1) proof of the employer’s motivation may be difficult for the employee to obtain, since the employer is not apt to announce unlawful discrimination as his motive; and 2) “public policy considerations strongly favor eradication of discrimination.” *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn.App. 383, 420, 161 P.3d 406 (2007); *see also Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 309-310, 898 P.2d 284 (1995) (setting forth the ultimate burden in a discrimination case); *Wilmot*, 118 Wn.2d at 71 (rejecting the “determinative factor” test); *Allison v. Housing Authority of City of Seattle*, 118 Wash.2d 79, 94, 821 P.2d 34 (1991)(noting that the substantial factor standard is based more on policy considerations than the “but for” test). The legislature codified these sentiments in the WLAD. “The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof.” RCW 49.60.020.

The lower courts erred by effectively applying an “only factor” test, requiring Appellant to prove that age was the only factor in her not being hired for an English instructor tenure-track position. The appropriate

standard at trial, or at summary judgment under direct proof or the *McDonnell Douglas*¹ approach, is the substantial factor test: whether, by a preponderance of the evidence, the protected characteristic was a substantial factor in an adverse employment action. *See Mackay*, 127 Wn.2d at 310; *Rice*, 167 Wn.App. at 90 (applying the substantial factor test to *McDonnell Douglas* analysis at summary judgment).

The Court of Appeals applied the *McDonnell Douglas* burden-shifting analysis to this case; eliminated relevant evidence from Appellant's case (i.e. President Branch's statements) by labeling them "stray remarks" and according them no weight (discussed below); then refused to apply the substantial factor standard and concluded that Appellant had not disproved Respondent's proffered reasons for not hiring her. *See Scrivener v. Clark College*, 176 Wn.App. 405, 309 P.3d 613 (2013). Division II misstated the standard, erroneously holding the substantial evidence standard only applies to a plaintiff's burden of persuasion at trial, not to her burden of production to survive summary judgment.

Such an approach is contrary to the law, *see Rice*, 167 Wn.App. at 90, and the mandate of liberal construction of the statute to achieve its

¹ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)

purpose, *see* RCW 49.60.010; .020. It also leads to absurd results: by requiring a plaintiff to meet a higher evidentiary burden under *McDonnell Douglas* at summary judgment than that imposed at trial, cases with sufficient evidence to prevail at trial would be eliminated at the summary judgment stage. The *McDonnell Douglas* model was provided as an accommodation to plaintiffs to prove their cases when they lacked direct evidence, since direct evidence in cases of discriminatory animus are rare. *See, e.g., Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 179-80, 23 P.3d 440 (2001). It is not, nor has it ever been, intended to be used as a bar to throw out meritorious cases at summary judgment.

B. The Court of Appeals erred in concluding that Appellant did not meet her burden of proof.

On summary judgment, plaintiff had to show by a preponderance of the evidence that a reasonable jury could conclude that age discrimination was a substantial factor in her not being hired for a tenured position. *See Rice*, 167 Wn.App. at 90. The court must consider all evidence submitted and all reasonable inferences from them in the light most favorable to the nonmoving party. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993).

Appellant met this burden. President Branch stated that the College had a “glaring need” for younger employees. *CP 24*. He sought to lower experience requirements, which would allow younger applicants to fulfill that goal, *CP 109-10*, two thirds of the tenure track positions he filled in 2005-06 were hires younger than 40. *CP 43-44*. This included the instant case, where he hired two younger applicants over Appellant for tenured English instructor positions, despite Appellant having more experience and satisfying targeted skills which the younger applicants did not. *CP 46-57*.

As discussed below, the Court of Appeals erred by discounting the President’s statements as “stray remarks,” ignoring and discounting other evidence, and impermissibly sitting as trier of fact at summary judgment.

- 1. The lower courts erred by labeling probative evidence as a “stray remark,” ignoring it, and usurping the role of the jury.**

The Court of Appeals viewed President Branch’s statement, that there was a “glaring need” for “younger talent,” as a “stray comment” which did not give rise to an inference of discriminatory intent. *Scrivener*, 176 Wn.App. at 415. The court held the statement announcing an on-going need to hire younger applicants made in the annual State of the College speech by the primary decision-maker for the challenged hiring

during the applicant screening process and three months before he made the final hiring decision, was a stray remark “that does not give rise to an inference of discriminatory intent and cannot demonstrate pretext.”

Scrivener at 416.

To qualify as a “stray remark,” a comment must be so far removed from the act that *no* reasonable jury could conclude the comment was evidence of discriminatory intent. *See E.E.O.C. v. Pape Lift, Inc.*, 115 F.3d 676, 683 (9th Cir. 1997). That is not the situation in this case.

A discriminatory inference is particularly likely where, as here, a decision-maker in the challenged action made the statement. *See, e.g., Shelley v. Geren*, 666 F.3d 599, 610 (9th Cir. 2012) (finding that an inquiry about the plaintiff’s retirement date by two managers who had influence over the challenged hiring decisions supported an inference that the employer’s proffered explanation for its hiring decision was a pretext for age discrimination); *Beshears v. Asbill*, 930 F.2d 1348, 1354 (8th Cir. 1991) (finding age discrimination when executives who actively participated in the challenged employment decisions made several age-related comments such as, “older employees have problems adapting to changes and to new policies.”); *see also Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 387-88, 128 S.Ct. 1140 (2008) (Even evidence

of discrimination on the part of supervisors *other than the plaintiff's direct supervisor* may be probative and admissible, and “[r]elevance and prejudice under Rules 401 and 403 are determined in the context of the facts and arguments in a particular case, and thus are generally not amenable to broad *per se* rules.”)

Courts have criticized reliance on the moniker “stray remarks” in excluding probative evidence, with courts de facto sitting as the trier of fact at summary judgment by weighing evidence impermissibly. *See generally Reid v. Google*, 50 Cal.4th 512, 540, 235 P.3d 988 (2010) (providing an extensive discussion and rejection of the confused federal “stray remarks” doctrine). This is of particular concern where, as here, a court weighs comments in isolation, without viewing the remarks in light of the full circumstances and other evidence. *See id.*

Here, the College president announced he wanted younger hires in a key annual speech given during the period that the screening committee was reviewing applications for the two tenure English professor positions at issue in this case. *CP 24, 32*. Before he gave the speech, prior to the posting of the notices for the two tenure English professor positions at issue in this case, he sought to have the experience requirements lowered for applicants, allowing for younger applicants. *See CP 109-110*. Then,

as the final decision-maker for hiring those two tenure English professor positions, he chose two candidates who were younger than 40 years old – with less teaching experience, and none of the desired “distance learning” experience – over then 53-year-old Appellant, who had the valued distance learning experience and had been teaching at Clark College six years longer than the most experienced successful applicant. *CP 106; CP 46-57*. A reasonable jury could conclude President Branch’s pro-youth statement, in the context of the surrounding facts, was evidence of discrimination against older applicants.

The Court of Appeals improperly discarded relevant evidence by labeling it a “stray remark.” Such a label does not trump or supersede court rules. Under ER 401, the primary decision-maker’s announcement of the on-going need to hire younger employees has a tendency to make the likelihood of him favoring younger applicants over older, based upon age, more probable. As relevant evidence, it is admissible. ER 402.

Instead, the lower courts weighed the evidence, invading the dominion of the jury, and resolved the material factual conflicts at summary judgment. But the trial court is not permitted to weigh the evidence in ruling on summary judgment. *Fleming v. Smith*, 64 Wn.2d 181, 185, 390 P.2d 990 (1964); *accord Anderson v. Liberty Lobby, Inc.*,

477 U.S. 242, 249, 106 S.Ct. 2505 (1966) (“[A]t the summary judgment stage the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.”)

If the president had said the college needed to hire more men, and then proceeded to do so, and failed to hire women who were more qualified and experienced, it is inconceivable that could be construed as an irrelevant, “stray remark”. Likewise, if the president had said there was a need to hire more Caucasians, then did so, and failed to higher African-Americans who were more qualified and experienced, how could that be an irrelevant, “stray remark”? In this context, it is even more clear that the president’s similar statement that he saw a need to hire more younger faculty followed by his hiring younger applicants over the more experience Appellant could not be an irrelevant “stray remark.”

The Court of Appeals erred in disregarding the president’s statement and summary judgment was inappropriate.

2. Respondent’s shifting justifications and other evidence raise an inference of pretext which cannot be resolved at summary judgment.

Clark College has presented shifting and conflicting non-discriminatory accounts of what it considered in its hiring. “Fundamentally

different justifications for an employer's action would give rise to a genuine issue of fact with respect to pretext since they suggest the possibility that neither of the official reasons was the true reason."

Washington v. Garrett, 10 F.3d 1421, 1434 (9th Cir. 1993); accord *Renz v. Spokane Eye Clinic, P.S.*, 114 Wash.App. 611, 623, 60 P.3d 106 (2002) (citing *Sellsted v. Wash. Mut. Sav. Bank*, 69 Wn.App. 852, 860, 851 P.2d 716 (1993)) ("Multiple, incompatible reasons may support an inference that none of the reasons given is the real reason. . . Such inconsistencies cannot be resolved at the summary judgment stage.")

Here, Clark College denied that age played *any* role in its hiring decisions. *CP 84* (Respondent's Motion and Memorandum in Support of Summary Judgment); Respondent's Answering Brief, p. 24. Respondent asserted that its touted desire to increase diversity in age – i.e. increasing the number of young employees – was not a consideration in hiring two applicants under 40 years of age instead of Appellant, who was over 50.

Then, in its Response to the Petition for Review, Respondent states that employers like Clark College can, and indeed should, direct recruiting efforts to foster diversity. *See id.* at 14-15. But if Respondent had an *age* diversity policy, as established by President Branch in his remarks in the "State of College" address about seeking younger employees, then age was

a factor in its recruitment and hiring decisions. Indeed, any intent on the part of Respondent to “increase . . . generational diversity” amounts to an acknowledgment of an impermissible consideration of age.

Furthermore, in his declaration in support of Respondent’s summary judgment motion, President Branch states that the choice of who to hire was based on who was the “best fit.” *CP 4*. Such an ambiguous assertion permits the reasonable inference that age may well have been a substantial factor in deciding who was the “best fit,” in light of Branch’s earlier statements. Branch also stated in support of summary judgment that long term and succession planning were important duties of his position as College President, similarly opening the door to the reasonable inference that age was a consideration in hiring decisions. *CP 3-4*.

Based upon the evidence at summary judgment and taking all inferences in favor of Appellant, a reasonable jury could conclude that age was a substantial factor leading to Appellant not being hired for a tenured position. Respondent’s shifting justifications give rise to a genuine issue of fact with respect to pretext, which makes summary judgment inappropriate.

3. **The lower courts erred by forcing analysis under the *McDonnell Douglas* burden-shifting standard.**

The ultimate issue in a discrimination case is whether the plaintiff “meet[s] his or her burden of production in any way that yields evidence from which a rational trier of fact could find unlawful discrimination by a preponderance of the evidence.” *Parsons v. St. Joseph’s Hosp. and Health Care Center*, 70 Wn.App. 804, 809, 856 P.2d 702 (1993). In forcing analysis into the *McDonnell Douglas* model, the lower courts committed three more errors: (a) by imposing the outdated distinction between direct and indirect evidence that forced Plaintiff into the *McDonnell Douglas* model; (b) by ignoring the direct evidence in this case that removes it from *McDonnell Douglas* even under that outdated distinction; and (c) by holding that Appellant did not produce sufficient evidence to avoid summary judgment under *McDonnell Douglas*.

a. **Distinctions between direct and indirect evidence do not alter a plaintiff’s ultimate burden of proof.**

Appellant should not have been limited to navigating the *McDonnell Douglas* burden-shifting option to avoid summary judgment. The *McDonnell Douglas* model for meeting the requirements at summary judgment exists not to impose further requirements and roadblock

plaintiffs, but to provide an alternative method by which a plaintiff can satisfy her evidentiary burden in cases where that burden is inherently difficult to prove. A plaintiff can satisfy her burden any way the evidence provides, and how evidence is labeled or what model is used should not block otherwise viable cases. *See Parsons*, 70 Wn.App. at 809 (setting forth the ultimate evidentiary burden).

In *Hill* and *Kastanis*, the Washington Supreme Court required all cases with direct evidence to satisfy the “direct evidence method” and all cases with only indirect evidence to satisfy the *McDonnell Douglas* method. *See Hill*, 144 Wn.2d at 180; *Kastanis v. Educational Employees Credit Union*, 122 Wn.2d 483, 491, 859 P.2d 26 (1993). This distinction was inspired by the federal law at that time, which distinguished between direct and indirect evidence, essentially holding direct evidence to be more probative than indirect evidence. *See generally Costa v. Desert Palace, Inc.*, 299 F.3d 838, 851-54 (9th Cir. 2002), *aff’d* 529 U.S. 90 (2003) (providing a detailed history of circuit views on direct versus circumstantial evidence).

But attempts to distinguish and label direct and indirect evidence became a “quagmire that defie[d] characterization,” and the Ninth Circuit stopped the futile and inconsistent inquiry entirely. *Id.* at 851, 853-54.

The inquiry is simply whether the evidence as a whole is sufficient to meet the relevant burden of proof. Here, that inquiry is whether a reasonable jury could conclude from all the evidence that age played a substantial factor in Appellant not being hired. *See Parsons*, 70 Wn.App. at 809.

Outside of *Hill* and *Kastanis*, which were inspired by this subsequently-debunked federal jurisprudence, Washington law makes no distinction between the probative value of direct and indirect evidence. At trial, juries are routinely instructed: “The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.” WPIC 1.03.

Instructively, the automatic application of the *McDonnell Douglas* path when there is not “direct evidence” has been explicitly rejected by the Ninth Circuit in *Costa*, in which the Court found that “nothing compels the parties to invoke the *McDonnell Douglas* presumption.” 299 F.3d at 855; *see also Vasquez v. County of Los Angeles*, 349 F.3d 634, 640 (9th Cir. 2003) (“A plaintiff hoping to avoid summary judgment can offer *direct or circumstantial evidence that gives rise to an inference of discriminatory intent*, or she can follow the three-step path charted in *McDonnell Douglas*.”) (Emphasis added.)

Washington should adopt the Ninth Circuit's refocus of the burden of proof in discrimination claims to the ultimate issue and cut the Gordian Knot of labeling evidence. This interpretation is consistent with the Washington legislature's mandate of liberal construction of the statute to effectuate its purpose: to eliminate and prevent discrimination, because it "threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state." RCW 49.60.010; RCW 49.60.020. It would be antithetical to this mandate to balance a plaintiff's protections on an artificial and convoluted distinction between direct and indirect evidence.

b. Even applying the artificial direct-indirect distinction, Appellant need not satisfy *McDonnell Douglas* because she produced direct evidence.

As above, this Court should abandon strained attempts to label evidence as direct or indirect and should remove that unnecessary hurdle which risks thwarting meritorious discrimination claims.

If the Court does not do so, under the current *Hill* and *Kastanis* construction, *McDonnell Douglas* is reserved for situations where a plaintiff lacks direct evidence. *See Hill*, 144 Wn.2d at 180; *Kastanis*, 122 Wn.2d at 491. And there was direct evidence here.

Even “direct evidence” will generally require some level of inference, and definitions of direct evidence that eliminate all need for inference are artificial. For example, even a highly probative statement like “you’re fired, old man” still requires a jury to infer the epithet was a causal factor in the termination. *See Tyler v. Bethlehem Steel Corp.*, 958 F. 2d 1176, 1185 (2d Cir. 1992).

Here, President Branch stated he believed Clark College had a “glaring need” for “younger talent.” *CP 24*. This was uttered shortly after he argued that there should be no minimum experience requirements for the tenured positions, and before he made his final decision to hire younger applicants instead of Appellant. *CP 101*. This statement is direct evidence that, for the primary decision-maker, age was a consideration in hiring, and one a reasonable jury could conclude infected the hiring process for the positions at issue.

Because Appellant presented direct evidence, the lower courts erred by evaluating Appellant’s case under *McDonnell Douglas* rather than the “direct evidence” method. *See Hill*, 144 Wn.2d at 180; *Kastanis*, 122 Wn.2d at 491.

c. **Even under *McDonnell Douglas*,
Appellant met her burden of proof at
summary judgment.**

McDonnell Douglas is a burden-shifting model. After plaintiff establishes a prima facie case and the defendant asserts a non-discriminatory reason, as was the case here, the burden-shifting scheme drops away. *See Kastanis*, 122 Wn.2d at 491. ² The inquiry shifts to the ultimate burden on summary judgment: viewing the evidence in the light most favorable to the plaintiff and taking all reasonable inferences in the plaintiff's favor, whether a reasonable jury could conclude that age was a substantial factor in not hiring the plaintiff. *See Rice*, 167 Wn.App. at 90. As previously discussed, there was sufficient evidence, and reasonable inferences from that evidence, for a reasonable jury to conclude that age was one consideration – a substantial factor – in not hiring Appellant. This material factual dispute rendered summary judgment impermissible.

² Once the defendant has articulated a non-discriminatory reason, the plaintiff then has an opportunity to challenge the legitimacy of that proffered non-discriminatory reason, through additional evidence and/or based upon the evidence already provided to establish a prima facie case. *Id.* This step of the analysis is often referred to as the “pretext prong,” but a plaintiff is not required to disprove any proffered reason for the challenged decision; she must only produce “sufficient evidence to support a reasonable inference that a discriminatory . . . motive was a substantial factor in [the challenged employment decision]—pretext.” *Rice*, 167 Wash.App. at 90.

III. CONCLUSION

The Court of Appeals erred in affirming the trial court's dismissal of Appellant's age discrimination claim at summary judgment. There are numerous grounds upon which reversal is appropriate. The Court of Appeals erred: (1) by failing to apply "substantial factor" analysis when applying the *McDonnell Douglas* model; (2) by dismissing relevant and very probative evidence as "stray remarks;" (3) by applying the direct versus indirect evidence distinction to force Appellant into the *McDonnell Douglas* model; (4) by misapplying that distinction and ignoring direct evidence; and (5) by acting as trier of fact, dismissing a case where there was sufficient evidence, and inference, for a reasonable jury to conclude age was a substantial factor in the hiring decisions here.

DATED February 10, 2014.

Respectfully submitted,



Sue-Dee McCulloch
Attorney for Appellant
WSBA #32667

CERTIFICATE OF SERVICE

I certify that on February 10, 2014, I caused a true and correct copy of the foregoing to be served on the following via the means indicated:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 10th day of February, 2014.

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Attachments: Appellant's Supplemental Brief - Case No. 89377-2.pdf

Dear Clerk,

Attached please find for filing Appellant's Supplemental Brief in the above matter.

Thank you for your professional courtesies in this matter.

Breon E. McMullin

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From: Breon McMullin [mailto:bmcnullin@sdmlaw.net]

Sent: Thursday, February 06, 2014 4:58 PM

To: 'SUPREME@COURTS.WA.GOV'

Cc: 'Higginbotham, Breanne (ATG)'; 'Kornmann, Melissa (ATG)'; 'Lynch, Mike (ATG)'; 'Washington, Cathy (ATG)'; 'Sue-Del McCulloch'; 'Lanese, Christopher (ATG)'; 'jneedlel@wolfenet.com'

Subject: Scrivener v. Clark College, Supreme Ct. No. 89377-2

Dear Clerk,

Attached please find our motion to Extend Time to File Supplemental Briefs and Certificate of Service in the above matter for filing.

Thank you for your professional courtesies in this matter.

Breon E. McMullin

Legal Assistant to Sue-Del McCulloch

Law Offices of Sue-Del McCulloch LLC
111 SW Columbia Street, Suite 1010

Portland, Oregon 97201
phone: 503-221-9706
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