App. Ct. No. 70128-2-I

WASHINGTON SUPREME COURT

LARRY CURRIER, LARRY CURRIER DBA AMERICAN CONTAINER EXPRESS, and AMERICAN CONTAINER EXPRESS, INC.

Plaintiffs/Respondents,

v.

NORTHLAND SERVICES, INC.,

Defendant/Petitioner.

Answer to Petition for Review

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I. Introduction

The issue here is straightforward: were there sufficient facts to support a reasonable belief of prohibited discrimination? If there were, Larry Currier was protected from retaliation for reporting that conduct.

The trial court found sufficient facts, based upon a small nucleus of material facts relating to one incident, and informed by a large network of facts predating that incident. On appeal, facts are viewed in the light most favorable to the prevailing party. *Weyerhaeuser v. Tacoma-Pierce County Health Dep't*, 123 Wn.App. 59, 65, 96 P.3d 460 (2004).

The primary incident involved a Caucasian driver yelling at a Latino driver, "Hey you f**ing[1] Mexican, you know why you have to go to Portland and I don't? Because f**ing Mexicans are good at crossing borders." Op. 3. Plaintiff Larry Currier observed this and formed a reasonable belief this was discriminatory conduct. His perspective was further informed by a history of inappropriate and questionable conduct at Northland Services, Inc. ("NSI"), in part perpetrated or observed and tolerated by NSI dispatchers, who were NSI employees, his immediate supervisors, and responsible for his retaliation-motivated termination.

NSI, and its Amicus Curiae at the Court of Appeals, Association of Washington Business ("AWB"), see this case as an opportunity to redefine

[1] Respondents censor obscenities here and throughout their Answer.

and limit the scope of protections afforded to independent contractors under the Washington protections against discrimination and retaliation.

The issue NSI and AWB want resolved is not before this Court. They essentially argue WLAD never imposes liability for discrimination on an employer for the discriminatory acts of an independent contractor. Some federal courts have done so. Here, whether Washington courts will or do is irrelevant; the relevant issue is whether Larry Currier had either: (a) a reasonable legal belief NSI could be liable under a layperson's understanding of uncharted law through a liberally-construed statute, or (b) a reasonable factual belief from the totality of the circumstances that NSI supervisors were involved in discriminatory conduct. Currier had both reasonable beliefs, and either resolves this case entirely.

Granting this petition for review would put before this Court either a pedestrian factual determination of reasonable belief, or a convoluted limitation on WLAD's protection of independent contractors that Currier has no real interest or investment in arguing – because he only needs to show a reasonable, layperson belief of possible prohibited discrimination at the time of the incident to prevail on his retaliation claim.

In an attempt to create a more convincing record, NSI reframes the facts of this case, rearguing numerous "omitted," pro-NSI facts the trial court did not adopt as true or outright rejected. For this Court to even hear

the case NSI presented in its Petition, this Court would need to overturn numerous record-supported factual determinations by the trial court without any basis to do so, or overturn the appellate standard giving deference to a lower court's factual findings and viewing the facts in the light most favorable to the prevailing party.

II. Statement of the Case

NSI attempts to introduce "omitted" facts in its Petition for Review. Pet. 1. But those NSI-favorable, "omitted" facts were presented and rejected by both the trial court and the Court of Appeals. A Petition is not an appropriate place to retell a failed trial pretense story, or to attempt to blame the victim again.

The facts on appeal are as follows:

A. A small nucleus of facts regarding the incident

Larry Currier, a truck driver and independent contractor for NSI, was standing by and talking to Marcos Martinez, a Latino man driving truck for NSI. Billy Howell, a Caucasian man driving truck for NSI, yelled at Martinez from the NSI dispatch porch,[2] across the shipping yard,

[2] NSI asserts this incident occurred in the freight yard of a *public* terminal. Pet. Rev. 14. The lease agreement with NSI is not part of the record. It was established in the record that Howell was standing on the porch of the NSI dispatch office when he yelled at Martinez. *See* RP 165:1. The inference that NSI was involved due to temporal and geographic

while all three drivers were there for the purpose of receiving work assignments from and working for NSI. Howell yelled at Martinez, "Hey you f**ing Mexican, you know why you have to go to Portland and I don't? Because f**ing Mexicans are good at crossing borders." Op. 3.

NSI claimed that Martinez – who NSI did not call to testify – thought the highly offensive statement was a "joke." *See* RP 167:21-168:4 (Currier). The nature of the statement, and Currier's testimony as to Martinez's physical reaction, strongly indicate otherwise. *See* RP 165:14-15 ("I could just kind of see the blood draining from out of [Martinez's] face.") Regardless of NSI's secondhand account, the language, tone, and Currier's firsthand observations caused Currier to form a reasonable belief these were unwelcome comments expressing discriminatory conduct.

B. The large network of facts informing the incident

There were prior incidents. The involvement and knowledge of NSI's employees in these incidents was repeatedly called into question at trial. Whether NSI was actually involved is irrelevant; the question is whether a reasonable person in Currier's position could believe NSI knew about, permitted, encouraged, and/or took part in discriminatory conduct.

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proximity, and with the implications in Howell's statements, must be drawn in favor of Currier, the prevailing party, on appeal.

As summarized below, a reasonable person could draw such an inference, as Larry Currier did. *See* RP 167:4-7.

Currier previously reported to NSI Yard Supervisor (employee) Tom Vires that racist and sexist speech was broadcast over the citizens band (CB) radio on the frequency used by NSI at the shipping yard. Op. 2; RP 127:21-128:4; 147:9-17. Dispatcher Jim Sleeth, when he had been a NSI driver, also heard such comments. RP 677:17-678:5; 679:3-16.

While Sleeth was an NSI driver (independent contractor) prior to becoming an NSI dispatcher (employee), he suggested to Currier they put on white sheets to scare an African American driver. Op. 2-3; RP 149:19-21; 150:13-22; 151:20-152:4 (Currier).

Terry Mock, another driver, while in the dispatch office, said to two Latino drivers, "Hey, f**ing Mexicans, what do you got for sale? I know you got something for sale because all Mexicans are thieves." Op. 3; RP 158:12-159:8. Patrick Franssen, an NSI dispatcher and employee, was present and did nothing. RP 159:7-8; 265:6-17 (Currier).

C. NSI's "omitted" facts were rejected by the trial court.

The trial court did not adopt NSI's account when it held in favor of Plaintiffs. NSI rewrites the factual record from trial testimony of witnesses who were not only the principle retaliators, but also were repeatedly discredited at trial. *See, e.g.*, CP 391:10-17; 393:24-394:10

(trial court noting the testimony of the two NSI employees responsible for the retaliatory decision contradicted other NSI employees and their own previous sworn statements). The trial court did not adopt NSI's presented evidence as truth; where it mentioned such testimony, the trial court merely noted that it was said, not that it was true. *See* CP 391-394 (e.g. "Sleeth and Franssen testified...," CP 392:21-22; and "According to both Sleeth and Franssen...," CP 393:24-25). NSI's revisionist factual account is irrelevant on appeal. *See Weyerhaeuser*, 123 Wn.App. at 65.

Additional examples of discredited facts NSI reargues here:

• NSI claims: "Currier performed much more slowly than other drivers for the same drayage work" and both drivers and customers complained about Currier. Pet. 2-3. All such claims came through the self-serving testimony of dispatchers Sleeth and Franssen – the two individuals who retaliated against Currier. NSI did not call any customers to testify, provided no documentation to support the alleged complaints, and called only one NSI driver to testify, Percy Dankers, who testified he had no problem with Currier, thought Currier did as good a job as him, and didn't think Currier worked slowly. RP 817:12-14, 21-23. The trial court did not adopt any of the dispatcher's allegations against Currier, and specifically noted the oddity of a total absence of any documentation of customer and driver complaints. CP 394:14-20.

• NSI dispatchers Sleeth and Franssen testified they met with Currier to discuss alleged performance issues prior to terminating his contract. *See* CP 392:6-8. Currier testified that no such meeting occurred. *See* CP 393:20-23; RP 226:20-227:1; 229:9-231:16. In the light most favorable to the prevailing party, no such meeting occurred.

• Sleeth and Franssen were not credible witnesses. The trial court pointed out numerous times where their testimony at trial conflicted with previous sworn accounts they had provided, and the testimony of other NSI witnesses, including Judy McQuade (NSI Quality Assurance Manager) and Percy Dankers (NSI driver). *See, e.g.*, CP 391:11-17; 393:24-394:10. The trial court discussed the dispatchers' lack of credibility extensively. *See* CP 394:13-395:11 (para. 23).

• As it did at trial, NSI blames Currier for trying to start a fight with a driver in the dispatch office. *See* Pet. 3. This incident involved another driver calling Currier a "F***ing N***** lover" and "piece of sh*t." CP 390:18-24; RP 160:10-12 (Currier). The other driver did not testify. The trial court did not find that Currier started a fight.

• As at trial, NSI attempts to justify Currier's termination on heavily disputed issues with his tires, discovered *after* he was terminated. *See* Pet. 4-5. The trial court did not make any findings whether there were problems with his tires, and concluded the allegations were irrelevant to

the termination decision. *See* CP 395:12-21. One example of an allegation was a gouge out of a tire that could have been made *after* Currier parked his truck at the NSI facility; Sleeth discovered the gouge while inspecting Currier's truck post-termination. *See* RP 266:22-268:17. NSI had not inspected drivers' trucks previously. *See* RP 586:21-587:9.

• NSI claims as "omitted" facts that it terminated Currier based upon non-retaliatory reasons. *See* Pet. 5. The trial court disagreed, finding retaliation was a substantial factor – and the Court of Appeals affirmed. CP 394:23-95:11; 398:1-6; Op. 15.

NSI's "omitted" – i.e. rejected – facts have no place in a petition for review or on appeal. *See Weyerhaeuser*, 123 Wn.App. at 65.

III. Argument

A. Retaliation victims do not need perfect legal or factual knowledge of the underlying potential discrimination claim.

To receive protection against retaliation, a victim need only show he or she had a reasonable belief of prohibited discriminatory conduct. *See Estevez v. Faculty Club*, 129 Wn.App. 774, 798, 120 P.3d 579 (2005) (citing *Kahn v. Salerno*, 90 Wn.App. 110, 130, 951 P.2d 321, *review denied*, 136 Wn.2d 1016 (1998)); *Graves v. Dept. of Game*, 76 Wn.App. 705, 887 P.2d 424 (1994) (*citing Gifford v. Atkinson, Topeka & Santa Fe Ry.*, 685 F.2d 1149 (9th Cir. 1982)); *accord* under federal law, *Trent v.*

Valley Electric Assoc. Inc., 41 F.3d 524, 526 (9th Cir. 1994), rejecting *Silver v. KCA, Inc.*, 586 F.2d 138 (9th Cir. 1978). In layman's terms, could an average person believe that what she or he just saw was prohibited discrimination?

The legal arguments NSI raises in its Petition do not alter the fact that Currier, a non-lawyer, had a reasonable belief the conduct he observed was impermissibly discriminatory. Here, someone (a) paid by NSI, (b) present to conduct NSI business, (c) having just spoken to NSI dispatchers (i.e. NSI employees), one of whom had previously made racist comments and the other who had ignored racist comments made in his presence, (d) yelled racist comments from the NSI dispatch porch to a minority, implying the minority received less favorable work assignments because of his minority status.

1. A reasonable person is not a legal clairvoyant.

Accepting NSI's argument – Currier could not have had a reasonable, layperson's belief that what he observed was prohibited discrimination – would require a non-lawyer to know:

• Whether the individuals involved were legally-cognizable as independent contractors, since the label does not mean that person *legally* qualifies as an independent contractor, *see, e.g., Dolan v. King County*, 172 Wn.2d 299, 314, 258 P.3d 20 (2011);

• The legal significance of being an independent contractor under a given law, *see, e.g., Afoa v. Port of Seattle*, 176 Wn.2d 460, 476-77, 296 P.3d 800 (2013) (where the Port's duty to maintain a safe work environment extended to individuals labeled independent contractors);

• Whether, and to what extent, independent contractors have WLAD protection against discrimination. This inquiry requires legal analysis and speculation as to what extent *Marquis v. City of Spokane*, 130 Wn.2d 97, 922 P.2d 43 (1996) provides protection to independent contractors against discrimination under RCW 49.60.030(1), and/or whether additional statutory provisions may be applicable;

• Whether Washington courts will adopt, and to what extent they already have adopted, federal law holding companies liable: for retaliation based upon the acts of independent contractors and others, *see Trent*, 41 F.3d at 526 (finding reasonable belief under federal law for the report of an outside lecturer's sexist language); and directly for the acts of customers and private individuals, *see Galdamez v. Potter*, 415 F. 3d 1015, 1022 (9th Cir. 2005) (*citing Folkerson v. Circus Circus Enters., Inc.*, 107 F. 3d 754, 756 (9th Cir 1997)) (holding a company can be liable for the conduct of a private patron where the company fails to take corrective action against impermissible conduct of which it knew or should have known); and

• Whether, and to what extent, WLAD's statutorily-mandated liberal construction to protect victims of discrimination and retaliation might affect the legal inquiry. *See* RCW 49.60.020.

But a layperson does not hold such sophisticated legal knowledge. *See Moyo v. Gomez*, 40 F.3d 982, 985 (9th Cir. 1994) (consideration of a layperson's reasonable belief must account for the limited legal knowledge a layperson possesses). The purpose of retaliation protection is to permit an individual to report questionable conduct without needing a lawyer and a lawsuit, not to drive individuals to consult a lawyer beforehand. *See Trent*, 41 F.3d at 526-27. Currier had a reasonable, layperson's belief the conduct he observed was prohibited discrimination.

2. A reasonable person is not a factual omniscient.

NSI's view of a reasonable belief would also require the ability to conduct full, instantaneous discovery. NSI argues plaintiffs need to prove the company was involved in potential discriminatory conduct to be protected from retaliation for reporting it, relying on *Silver*, 586 F.2d 138. The Ninth Circuit, however, has since refused to follow *Silver* when considering reasonable belief to invoke retaliation protection, *see Trent*, 41 F.3d at 526, and has even imposed liability on companies for perceived discriminatory conduct of independent contractors and other non-employees, *see Galdamaz*, 415 F.3d at 1022; *Folkerson*, 107 F.3d at 756.

But adopting NSI's legal position, *arguendo*, a reasonable person would have to undertake extensive discovery prior to reporting suspected discrimination to gain protection from retaliation. Here, Currier would have needed to investigate to determine whether Howell, who had just left NSI dispatch, was relaying statements or suggestions from NSI employees. Straightforward interrogation of his supervisors would be futile, since the dispatchers would be unlikely to admit discriminatory involvement. *See Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 186-87, 23 P.3d 440 (2001) (direct, "smoking gun" evidence is rare when attempting to prove motivation crimes), *overruled on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006). And such interrogation of a supervisor would also likely get him fired, and with no protection against retaliation yet existing.

A reasonable belief, based upon known facts and reasonable inferences, does not require full discovery to invoke retaliation protection. *Moyo*, 40 F.3d at 985.

B. A retaliation victim does not need to prove an underlying discrimination claim.

No court requires a person reporting perceived discriminatory conduct to be a legal scholar, legal seer, and factual omniscient, nor does it require the person to prove the underlying discrimination claim. A

reasonable belief based upon observed facts and a common sense view of the law is enough; an actual unlawful employment practice is not required. *See Ellis v. City of Seattle*, 142 Wn.2d 450, 461, 13 P.3d 1065 (2000); *Estevez*, 129 Wn.App. at 798; *Graves*, 76 Wn.App. at 887; *accord* under federal law, *Trent*, 41 F.3d at 526 (rejecting *Silver*, 586 F.2d 138).

C. Even if Currier needed to prove NSI's discriminatory involvement, the record supports his reasonable belief.

NSI inaccurately asserts: "Currier admitted that he knew Northland had not engaged in employment discrimination." Pet. 9 (citing CP 253). That is false: NSI cites this to Plaintiffs' Response to Summary Judgment, which states Plaintiffs' retaliation claim "*isn't* based upon NSI's discrimination," *because* Currier has no need to prove a discrimination claim against NSI to recover for retaliation. CP 253.

NSI argues it had to be involved in reasonably believed discrimination for WLAD to prohibit NSI from terminating Currier for reporting it. *See* Pet. 11. The "reasonable belief" standard has no such requirement. However, even if it did, the record supports a reasonable belief that NSI was involved in the discriminatory conduct:

Just as Howell was leaving dispatch, he yelled a racist statement at Martinez that Martinez received less favorable assignments from NSI based upon race. *See* RP 162:24-167:9.

Currier told McQuade, NSI's Quality Assurance Manager, he didn't report the incident to dispatch (Sleeth and Franssen) because he thought they were part of the problem. RP 163:13-167:13. Previously, Sleeth, then an NSI driver, unsuccessfully encouraged Currier to wear a white hood to scare an African-American driver. RP 149:19-21; 150:13-22; 151:20-152:4. On another occasion, Franssen stood by silently while a Caucasian driver told two Latino drivers that all Mexicans were thieves and demanded to know what they had been stealing. RP 158:6-159:8.

Currier did not make, nor did he need to prove, a discrimination claim at trial; that does not exonerate NSI of discrimination. Actionable discrimination is not a condition precedent to a retaliation claim. Even if Currier needed to provide evidence of NSI involvement – and he does not – the record supports a reasonable belief that NSI dispatch was involved in the discriminatory conduct.

D. The Court of Appeals correctly stated and applied the law.

NSI concedes that the Court of Appeals correctly held retaliation does not require proof of an actual violation of the law. Pet. 8. NSI then incorrectly states the Court of Appeals lowered the standard for reasonable belief to any conduct reasonably viewed as "discriminatory," even if not arguably covered by WLAD. *See* Pet. 8-9.

The Court of Appeals states: "Washington cases have likewise held that a plaintiff need not prove the conduct opposed was in fact discriminatory but need show only that he or she reasonably believed it was discriminatory." Op. 11. The Court of Appeals cites this statement of "reasonable belief" to Washington case law that ties reasonable belief to a layperson's perception of *unlawful* discrimination. Op. 11, n. 29. The Court of Appeals then cites Ninth Circuit decisions for the proposition that reasonable belief should make due allowance for the fact that citizens will have limited knowledge of the legal basis for their claims. *See* Op. 10.

The Court of Appeals then concludes Currier had a reasonable belief the conduct was a discriminatory *practice* – the very word used in RCW 49.60.210(1) tying the discrimination to an unlawful practice. *See* Op. 11. The Court of Appeals did not depart from clearly established law, but rather agreed with the trial court that Currier had a reasonable, layperson's belief what he saw was prohibited discrimination.

E. WLAD language supports a reasonable belief here.

RCW 49.60.210 requires opposition to "any practices forbidden by this chapter." NSI claims Currier must establish discrimination to an unspecified degree of certainty under RCW 49.60.180(3) (the statutory provision prohibiting employment discrimination based upon various protected classes, including race). *See* Pet. 15.

This assertion fails under the law. Currier had a reasonable belief there was discrimination in employment conditions based upon a statement that Martinez was receiving less favorable work assignments because he was Latino, satisfying Currier's reasonable belief of a RCW 49.60.180(3) violation.

And Currier is not limited to the forbidden practices under RCW 49.60.180(3). The opposed practice could be *any* prohibited by the chapter, including the broad rights afforded under RCW 49.60.030(1), where the legislature provided a non-exclusive list of *broadly construed* (RCW 49.60.020) protections. This Court has extended at least some of those protections to independent contractors. *See Marquis*, 130 Wn.2d 97. Any argued uncertainty in the scope of WLAD only further illustrates Currier's layperson belief of prohibited discrimination was reasonable.

NSI next turns to administrative code, urging adoption of the Human Rights Commission's view that legally-cognized independent contractors are not protected under RCW 49.60.180 (unfair employment practices). *See* WAC 162.16.230(1) (Jurisdiction – Independent Contractors).[3] But that provides NSI no support here: (1) Currier's claim is for retaliation, under RCW 49.60.210(1); and (2) HRC knew that, and

[3] HRC specifically recognizes independent contractors are protected under RCW 49.60.030(1)'s general civil rights. WAC 162-16-230(2).

exercised jurisdiction over Currier's claim when he reported it, *see* RP 931:11-932:6.

F. NSI's "unrelated third parties" escape attempt is legally and factually unsupported.

NSI attempts to avoid responsibility by asserting this was all behavior among "unrelated third parties" – presumably, unrelated to NSI. *See* Pet. 11. There is no such loophole here.

As previously discussed, the issue is one of reasonable belief. *See Estevez*, 129 Wn.App. at 798; *Graves*, 76 Wn.App. at 887. Currier had a reasonable belief under the law that what he observed on its face was not permissible, and that he could not be fired for reporting it. Federal law has imposed company liability based upon actions of independent contractors and others. *See Trent*, 41 F.3d at 526; *Galdamaz*, 415 F.3d at 1022.

As previously discussed, Currier had a reasonable factual belief – not only that the statement on its face was discriminatory – but that in the context of previous behavior, NSI dispatchers were likely involved. NSI was not factually "unrelated" to the conduct.

Nor was NSI unrelated to the parties involved. Howell was one of NSI's drivers. NSI hired him, paid him, assigned him his routes, and authorized him to be on NSI's facility. Howell was present for the sole purpose of doing work for NSI, at NSI's request. There was no one else to

report his conduct to: NSI's drivers were mostly, if not entirely, sole owners/operators, just like Currier and Howell. The *only* entity with any control over Howell's conduct, the only entity that could stop Howell from apparent-discriminatory conduct on NSI's facility, was NSI.

This Court previously rejected an invitation to create such a "don't blame me, I just run the place" loophole. *See Afoa*, 176 Wn.2d 460. There, the Port argued it merely granted individuals licenses to operate at its facility, so it could not be responsible for providing a safe work environment. *See id.* at 479. This Court reasoned: "The Port is the only entity with sufficient supervisory and coordinating authority to ensure safety in this complex multiemployer work site. If the Port does not keep Sea-Tac Airport safe for workers, it is difficult to imagine who will." *Id.*

Here, the issue is a non-discriminatory work environment: NSI authorized Howell to be at its facility; solely benefitted from his presence; and was the only entity that could act to stop his abusive conduct.

But the issue is not whether the reasoning of *Afoa* actually extends to discriminatory conduct, but whether Currier had a reasonable belief NSI had some legal responsibility here. If it is arguable among lawyers, it is a reasonable belief for a layperson. *See Moyo*, 40 F.3d at 985.

Despite NSI's protestations that it isn't related to the incident or people involved, every path through the facts supports Currier's reasonable belief, and holds NSI accountable for its retaliatory actions.

G. Public policy favors protecting citizens against retaliation.

NSI cautions this Court about the message the Court of Appeals' opinion sends. But that message is not a new one: businesses cannot terminate individuals for reporting conduct they reasonably perceive is prohibited. That is and has always been the wheelhouse of Washington's protection against retaliation.

Failure to protect Currier against retaliatory termination for opposing outrageous language and conduct at NSI would have a chilling effect against any person who considers reporting such conduct. But frankly, that chilling effect has already occurred: Currier has had to fight against retaliation since his contract was terminated in August 2008, and continues still – because he stood up for a Latino co-worker against racist language and potential discriminatory assignments, at a company who allowed it and whose supervisors may have been participants.

To the average citizen, this case sends a message: stand up, and risk over six years of hard-fought litigation before justice is done, if it is done. In the meantime, try to manage with whatever pieces of a career

you have left. Unfortunately for Larry Currier, there were none – and he and his family suffered for it.

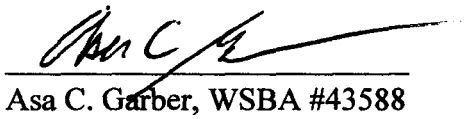
IV. Fee Request

Counsel for Respondents request their costs and attorneys' fees for answering the Petition for Review, under RAP 18.1(j).

V. Conclusion

The facts and law here support the decisions of the trial court and Court of Appeals. Even if this Court took review of this case and narrowed the retaliation protections currently available to Washington citizens, the factual record here would *still* support Currier's recovery by supporting a reasonable, layperson's belief: of the law at the time of reporting; of all the facts as Currier observed them (including the discriminatory implications of the reported statements); and of possible involvement of NSI dispatchers in the incident, based upon previous statements, conduct, and the nature and location of Howell's comments. Review would not change the factually focused resolution of this case. There is nothing in this case that warrants review under RAP 13.4.

DATED September 30, 2014.



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Certificate of Service

I hereby certify that a true and correct copy of Answer to Petition for Review was served on counsel for Appellant by placing it today in the United States mail, first class postage prepaid, addressed to:

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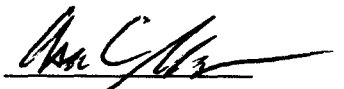

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