

NO. 33366-0-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

BYRON WILLIAMS,

Respondent,

v.

DAVID D. DAVIES, et. al.,

Appellants.

BRIEF OF RESPONDENT

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INTRODUCTION

David Davies' appeal is based entirely on one alleged evidentiary error, to which Davies did not object, failing to give the trial court notice or opportunity to cure, and depriving Pastor Byron Williams of any chance to respond. Davies waived review and the Court should affirm.

Davies claims that the trial court committed reversible error when it read the parties' depositions after counsel used the depositions to impeach the parties. Although the trial court repeatedly told counsel it had read the depositions – one time months before it entered findings of fact – Davies did not object.

In failing to object, Davies acquiesced in the trial court's reading of the depositions, until he lost. Now he asks this Court to fix an alleged error he did nothing to prevent himself. Davies waived review and this Court should decline to address the issue and affirm.

Should the Court address the substantive merits, a trial judge in a bench trial does not abuse its discretion by considering the parties' depositions when counsel used the depositions to impeach the parties, and no party objects to the court's reliance on the depositions.

RESTATEMENT OF ISSUES

1. Should the Court decline review and affirm, where Davies' entire appeal is based on the trial court having read the parties' depositions, and although the court repeatedly told counsel it had read the parties' depositions, Davies did not object or otherwise call the alleged error to the court's attention?

2. May a court in a bench trial consider the parties' depositions where (1) no statute, rule, or case-law prevents the court from doing so; (2) counsel used the depositions at trial; and (3) no one objected to the court's use of the depositions?

3. Did the trial court properly award Williams the full cost of both parties' depositions, where the court considered the depositions to reach its decision?

RESPONSIVE STATEMENT OF THE CASE

Davies does not assign error to any of the findings of fact (BA 1) and they are thus verities on appeal.¹ The following summary is taken from the findings.²

¹ *Musselman v. Dep't of Soc. & Health Services*, 132 Wn. App. 841, 846, 134 P.3d 248 (2006).

² Williams files this brief although we have not been able to obtain a complete transcript despite our efforts. If additional record is filed, Williams may file a supplemental brief.

Following a bench trial, Pastor Williams prevailed in his claim for negligent and/or intentional infliction of emotional distress. Pastor Williams' claim was based on Davies having shown him the body of Kyle Barker, a teen-aged suicide victim Pastor Williams had coached and mentored at church, lying on the examining table at Davies' funeral home, completely naked, his chest and head cavities open, ribs removed, and organs visible. CP 238, F/F 2b; CP 238-44, F/F 3.

A. Prior to the viewing of Barker's body, Davies and Williams had an altercation that left Davies angry.

Prior to the viewing of Barker's body, Davies and Williams had a "significant encounter" that the trial court found relevant to this case. CP 237, F/F 2a. Davies is a mortician and shareholder in his family's funeral home. CP 238, F/F 3a. Pastor Williams is a junior high youth pastor (CP 232, F/F 1f) and police department chaplain. CP 240, F/F 3k. Sometime before viewing Barker's body, Pastor Williams had participated in a funeral service for a different youth at Davies' funeral home. CP 237, F/F 2a. During the service, Williams asked Davies to bring some attending youths into the chapel because it appeared that they could not hear the service. *Id.* Pastor Williams' request "angered" Davies, who

testified that he felt that Pastor Williams had “overstep[ed] the bounds of his (Mr. Davies’) authority.” *Id.*

Although Davies testified that he did not remember this incident when Pastor Williams returned to Davies’ funeral home to view Barker’s body, the trial court found that Davies’ was not credible. CP 237, F/F 2a. The court expressly found that there was a correlation between Davies’ “sentiments about the ambit of his authority” and the condition in which he left Barker’s body for Pastor Williams to view. *Id.*

B. Davies was upset that Pastor Williams was involved in determining whether Barker’s body was suitable for the family to view.

Pastor Williams became involved in funeral arrangements for Barker at the family’s request. CP 238, F/F 2c. Barker committed suicide by shooting himself in the head with his brother’s gun. CP 237-238, F/F 2b & 2c; CP 244, F/F 3x. Barker’s brother, who discovered his body, asked his parents if he could view Barker’s body “in a different state.” CP 238, F/F 2c. Pastor Bakke, whom the family had also asked to help with the funeral arrangements, talked to Davies about whether Barker’s body could be made suitable to view. *Id.* To facilitate the final decision on viewability, Pastor Williams called the medical examiner’s office, who told him

that Barker's body was "probably viewable" if the gunshot wound could be covered. *Id.*

Davies believed that the viewability of Barker's body was entirely his decision. CP 238, F/F 2d; CP 239, F/F 3e. He was upset that the M.E. had offered F/F 2d; an opinion on viewability and felt that Pastor Williams was again overstepping his boundaries. *Id.* Davies felt that it was not Pastor Williams' place to discuss viewability with the family. CP 239, F/F 3e.

C. Davies examined Barker's naked body in front of Williams, exposing Barker's chest and skull cavities and removing and cutting internal organs.

The next day, Davies called Pastor Williams and asked him to come to the funeral home immediately. CP 240, F/F 3h. Davies believed that Barker's body was not viewable (CP 240, F/F 3i) and decided to "help Pastor Williams from one professional to another." CP 239, F/F 3e. Davies wanted to show Pastor Williams that Davies was not "lying" about viewability and that "sometimes things like (eyes) (which are windows to the soul) could not be fixed." CP 243, F/F 3s.

When Pastor Williams arrived, Debbie Davies-Shank, Davies' sister and an employee, escorted him to the preparation room, per Davies' instructions. CP 241, F/F 3m. Davies had never

before asked anyone to enter the preparation room while a body was on an examining table in his 24 years as a mortician. CP 240, F/F 3l. Davies knew that it is a violation to do so. *Id.*

When Pastor Williams and Davies-Shank arrived at the preparation room door, Pastor Williams told Davies-Shank, “if this involves seeing [Barker’s] body, I’m a little squeamish.” CP 241, F/F 3n. Davies-Shank said nothing and motioned Pastor Williams into the preparation room. *Id.* The door did not open completely as it was partially blocked, which made it impossible for Pastor Williams to see inside until he had entered the preparation room. CP 241, F/F 3o. Once inside, Pastor Williams saw that the door had been blocked by an open casket containing the body of an elderly woman with her face partially made up. *Id.* Pastor Williams next saw Davies, dressed in protective embalmer’s clothing, standing over Barker’s “fully exposed and naked body lying on the examining table.” CP 242, F/F 3o.

Barker’s chest cavity was open and Davies had removed his rib cage and breast plate, which was lying on the examining table next to Barker’s body. CP 242, F/F 3p. Barker’s head cavity was also open, and his head was in a pool of blood. *Id.* As Williams looked on, Davies began removing Barker’s internal organs and cut

his intestines. *Id.* Davies “casually” mentioned that Barker’s tongue and brain had been removed during the autopsy and stated “and they say this body is viewable.” *Id.* Although Davies disputes some of these allegations (CP 242, F/F 3p) the trial court found that Williams’ account was credible (CP 243, F/F 3u) and Davies’ was not. CP 244, F/F 3x.

Although he was “justifiably horrified” at the “macabre display,” Pastor Williams tried to focus on viewability and asked Davies’ questions to that end. CP 242, F/F 3p. Davies opined that Barker’s body could not be made viewable for the Barker family, and Pastor Williams told him that he still disagreed. CP 243, F/F 3r. Davies remarked that he could not fix the body, adding that Barker had suffered for two minutes after he shot himself. CP 243, F/F 3s & 3t.

D. During a State investigation, Davies signed “Stipulated Findings” that Williams’ account of the prep room incident was accurate.

Upon a co-worker’s advice, Pastor Williams wrote a letter the next day to the State Department of Licensing, Business and Professions Division, Funeral and Cemetery Unit. CP 244, F/F 3z. The lead investigator was Dennis McPhee, a licensed embalmer how had worked as a funeral director for 13 years before becoming

a State investigator. CP 244, F/F 4a. McPhee testified about inconsistencies in Davies' testimony, and the trial court expressly found that McPhee's testimony assisted the court in determining credibility. CP 245, F/F 4a.

During the investigation, Davies was asked several times whether Pastor Williams' account was credible and responded "I think it is." CP 245, F/F 4b. According to McPhee, Davies admitted that that Williams' account was accurate and then seemed "relieved." *Id.* Davies subsequently signed "Stipulated Findings" acknowledging that Pastor Williams' account of what happened in the prep room was accurate." *Id.* Although Davies testified that he was coerced into signing the stipulated findings during McPhee's investigation, the trial court found that his "assertion of coercion [was] not credible." CP 245-46, F/F 4b.

E. Procedural History.

Testimony concluded on October 19, 2004, and the trial court issued an oral ruling on liability 10 days later. 10/29/04 RP 3.³ The court reserved ruling on damages. *Id.* at 3-4. Very near the

³ The Report of Proceedings begins new pagination for the hearings, so Williams uses dates to avoid confusion.

beginning of her oral ruling, the trial court told counsel that she had read Davies' deposition:

But let's just go back and deal with the facts. It appears to me that Mr. Davies although – and I read his deposition as well

Id. at 7. In fact, the court made a number of references to having read different documents before it. *Id.* at 9, 10, 12, 16-17. Following the court's ruling, Davies' counsel asked many questions about the findings (*id.* 18-31), even clarifying that the court was adopting Williams' account of the prep room incident. *Id.* at 22. Counsel never claimed that the trial court should not have read Davies' deposition (or anything else). *Id.* 18-31

In January 2005, the parties presented findings, and about one month later, the court reconvened to adopt findings after the parties had worked through them. 02/07/05 RP 3. The trial court again said she had read Davies' deposition. *Id.* at 44-45. Although counsel took issue with the trial court's finding that Davies was not credible, he never claimed that the trial court should not have read Davies' deposition to assess credibility:

[COUNSEL]: Interesting part is you found [Williams] credible and [Davies] not credible, which I still don't get, Your Honor, but that's an issue for a different judge.

THE COURT: Your guy certainly had some issues there.

[COUNSEL]: He did. He did, Your Honor.

THE COURT: Let's be honest.

Id. at 45. While Davies correctly states the trial court entered two findings that Williams' account was credible and Davies' was not (BA 5-6), Davies did not challenge these findings. BA 1.

The trial court again told counsel – four times – that she read Davies' (and Williams') depositions during a May 2005 hearing on the cost bill. 05/13/2005 RP 4. The trial court clearly stated that she had read the parties' depositions to clear up any discrepancies in their testimony:

I will tell you that I read both Mr. Davies['] and Mr. Williams['] deposition[s] because there were various conflicts in the stories and testimony . . . there were some . . . purported discrepanc[ies] with regards to what was told to the investigator and so I did read them for that purpose. . . . [T]he Court found it very helpful to read them in their entirety rather than piecemeal so I can get a flavor I read them actually in [*sic*] route to Brazil.

Id. Davies still did not do anything to notify the trial court that he believed the court had erred in considering the depositions. *Id.*

RESPONSIVE ARGUMENT

A. Davies waived review where he failed to object to the only error he alleges on appeal, depriving the trial court of any notice or opportunity to cure.

The issue presented by Davies' appeal is fairly summarized as follows: in a bench trial, may the judge consider the parties'

depositions to sort out discrepancies in their testimony, when the depositions were in the court file and used at trial. BA 1. Davies incorrectly states that the trial court read the parties' depositions "without notice or opportunity to object to either party" (*id.*) but the trial court told the parties it had read their depositions, twice before the entry of findings and judgment (10/29/04 RP 7; 02/07/05 RP 44-45) and again during the hearing on the cost bill. 05/13/2005 RP 4. Davies did nothing. He did not object or otherwise call the court's attention to the alleged error, make an offer of proof, or move for a mistrial. Davies' failure to act deprived Williams of an opportunity to respond and the trial court of an opportunity to cure the alleged error. Davies thus waived review and the Court should affirm.

Under ER 103, a party "cannot appeal" from an evidentiary ruling unless he objected at trial. ***State v. Avendano-Lopez***, 79 Wn. App. 706, 710, 904 P.2d 324 (1995), *rev. denied*, 129 Wn.2d 1007 (1996). The objection must be timely and specific. ***Avendano-Lopez***, 79 Wn. App. at 710 (citing ER 103). RAP 2.5(a) permits the Court to refuse to review any alleged error to which the party asserting the error failed to object under ER 103 during trial. 79 Wn. App. at 710.

Together, ER 103 and RAP 2.5 serve two important purposes: judicial economy and fairness. **Avendano-Lopez**, 79 Wn. App. at 710. These rules require a party to give the trial court notice and opportunity to cure the alleged error, “thereby avoiding unnecessary appeals and retrials.” 79 Wn. App. at 710 (citing **Smith v. Shannon**, 100 Wn.2d 26, 37, 666 P.2d 351 (1983)). These rules also promote “fairness to the opposing party:”

“the opposing parties should have an opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level, rather than facing newly-asserted error or new theories and issues for the first time on appeal.”

79 Wn. App. at 710 (quoting Lewis H. Orland & Karl B. Tegland, 2 WASH. PRACTICE 483 (4th ed. 1991)).

Although the trial court repeatedly informed Davies that it had reviewed the parties’ depositions, he did not call any alleged error to the trial court’s attention. He waived any error. **State v. Newbern**, 95 Wn. App. 277, 291, 975 P.2d 1041, *rev. denied*, 138 Wn.2d 1018 (1999) (“find[ing] no error” where the appellant failed to object to an evidentiary ruling and thus waived review); **Avendano-Lopez**, 79 Wn. App. at 710.

Davies’ claim that he did not have an opportunity to object to the trial court having read the parties’ depositions is false. BR 10.

The court told the parties it had reviewed their depositions, and

Davies did not object:

- ◆ Davies first became aware that the trial court had read his deposition in October 2004, months before the trial court entered findings and a judgment. 10/29/04 RP 1. Davies did not object or do anything to bring any alleged error to the court's attention. *Id.* 18-31.
- ◆ During a subsequent hearing, the trial court again referenced reading Davies' deposition, and Davies again did nothing. 02/07/05 RP 44-45.
- ◆ During a May 2005 hearing on the cost bill, the court told counsel that she had read both parties' depositions, explaining that she had done so to clear up discrepancies in their testimony. 05/13/2005 RP 4. Davies again did nothing. *Id.*

Davies' silence deprived the trial court of any opportunity to cure the error he alleges. ***Avendano-Lopez***, 79 Wn. App. at 710.

Davies claims that by reading the parties' depositions, the trial court deprived him of the opportunity to cross examine, object to the admissibility of the depositions, and rebut or explain the deposition testimony. BR 10. But if Davies had brought this alleged error to the trial court's attention, then the court could have given Davies the opportunity to do any of these things. For example, Davies could have re-called Williams for cross examination or re-called Davies to explain deposition testimony. He could have argued that the depositions were entirely inadmissible or raised specific

objections to parts of the depositions. He did not do so, and still has not presented any specific objections to any portion of the depositions. BR 10-12.

Further, if Davies had raised the error he alleges before the trial court, Williams would have had the opportunity to respond. ***Avendano-Lopez***, 79 Wn. App. at 710. Williams could have simply moved to admit Davies' deposition, which would have been admissible "for any purpose." CR 32(a)(2); ***Young v. Liddington***, 50 Wn.2d 78, 80, 309 P.2d 761 (1957).

Davies' argument that the Court should remand to a different judge is also waived. BR 11-12. Upon learning that the trial judge had reviewed the depositions, Davies did not move for a mistrial or ask the judge to recuse. A party must move to disqualify a trial judge at trial to preserve the issue for appellate review. ***In re Marriage of Wallace***, 111 Wn. App. 697, 705, 45 P.3d 1131 (2002), *rev. denied*, 148 Wn.2d 1011 (2003). Thus, this issue is waived as well.⁴

⁴ The merits of this issue are discussed below.

In sum, Davies waived the only error he raises. He did not give the trial court or counsel any chance to fix the error he claims, and this Court should decline review.

B. The trial court was within its broad discretion in considering the parties' depositions, where they were used during trial and neither party objected to their use.

As discussed above, Davies' entire appeal is based on an allegation of error that he waived. The Court should decline to review the issue and end its inquiry here. If the Court chooses to consider the merits, it should also affirm. A trial judge conducting a bench trial does not abuse her discretion by considering the parties' depositions when (1) no statute, rule, or case prevents the court from considering the depositions; (2) they were used during trial; and (3) no party objected to the court's consideration of the depositions.

The Brief of Appellant does not address the standard of review, or cite any case that is directly on point.⁵ Williams has not found controlling case-law directly addressing the issue before the

⁵ Although he does not address the standard of review, Davies suggests that this case is governed by the rule that a trial judge sitting on a case involving a property dispute commits reversible error when he visits the property, without the parties' knowledge or consent, to investigate its own theory of the case. BA 9-12. These inapposite cases are addressed below.

Court: a trial court's discretion to consider the parties' depositions in a bench trial, where the depositions are part of the court record and were used at trial. It is too late for Davies to address this point in a reply brief. The Court should apply the abuse of discretion standard of review, which applies when the Court reviews a trial court ruling admitting deposition testimony. **Hendrickson v. King County**, 101 Wn. App. 258, 265, 2 P.3d 1006 (2000).

Davies' argument begins with the incorrect assumption that the parties' depositions were "extrinsic evidence." BA 8-9. Davies defines extrinsic evidence as "any information that is outside all the evidence admitted at trial." BA 8-9 (citing **Richards v. Overlake Hosp. Med. Ctr.**, 59 Wn. App. 266, 270, 796 P.2d 737 (1990), *rev. denied*, 116 Wn.2d 1014 (1991)). **Richards**, however, is inapposite. The issue in **Richards** was whether a juror committed misconduct by considering allegedly "extrinsic evidence." There, the juror suggested to other jurors that the plaintiff's prenatal injuries were caused by her mother's flu during pregnancy, not medical negligence, after reviewing medical records and discovering that the mother was ill during pregnancy. **Richards**, 59 Wn. App. at 269. The court held that the juror had not considered

extrinsic evidence – the medical records were part of the record and a doctor had testified about the mother’s illness. *Id.* at 274.

Davies incorrectly assumes that the depositions were “extrinsic evidence.” BA 9. In Washington, there is no requirement that a deposition be published to be used for impeachment purposes. Karl B. Tegland, 3A WASH. PRACTICE at 699 (5th ed. 2006)). Rather, the current civil rules have done away with the notion of publishing, and counsel who intends to use a deposition at trial must simply file it with the court. *Id.* In other words, the parties’ depositions were part of the trial court’s file. *Id.* Thus, the depositions cannot be “extrinsic evidence.”⁶

Davies next cites the following cases to support his argument that a trial court may not consider “extrinsic evidence” to corroborate or discredit a witness’s testimony: ***Carlson v. City of Bellevue***, 73 Wn.2d 41, 47, 435 P.2d 957 (1968); ***Christensen v.***

⁶ Davies also incorrectly assumes that the parties’ depositions were inadmissible. BA 9, 10. But an adverse party may use the other parties’ deposition at trial “for any purpose.” CR 32(a)(2); ***Young v. Liddington***, 50 Wn.2d 78, 80, 309 P.2d 761 (1957). Had Williams been on notice that Davies objected to the use of the depositions, he could have offered Davies’ deposition into evidence. *Id.* Further, contrary to Davies’ claim (BA 10), the deposition of a party opponent is not hearsay when offered against the party. ER 801(d)(2).

Gensman, 53 Wn.2d 313, 318, 333 P.2d 658 (1958); **Elston v. McGlauffin**, 79 Wash. 355, 140 P. 396 (1914); **O’Sullivan v. Scott**, 25 Wn. App. 430, 432, 607 P.2d 1246 (1980). BA 9, 11. Each of these cases is inapposite – they all involve a property issue in which the trial court visited the site to collect extrinsic evidence.

Elston is a case for damages from a landslide caused by negligent construction of an apartment building on an abutting lot. **Elston**, 79 Wash. at 356. There, the trial judge went to the property during trial, without either party’s knowledge, and “made an independent investigation.” 79 Wash. at 357. But the landslide occurred 2.5 years before the court visited the property, and by the time of the court’s visit, “walls had been rebuilt and the property practically restored.” *Id.* Further, the trial judge’s disagreement with expert witness Thompson’s testimony was based on the judge’s previous experience with Thompson, where the judge’s bulkhead and residence slid onto a neighboring lot. *Id.* at 357-58.

The **Elston** Court reversed, holding that the judge’s independent investigation and past experience resulted in an unfair trial. 79 Wash. at 358-59. Specifically, the Court held that the trial judge had impermissibly developed his own theory of the case,

based on a preconceived notion of the facts, which lead him to reject Thompson's testimony (*id*):

The language of the court makes it most likely that, however honest his intention, his view was not made for the purpose of clearing any doubt that may have been in his mind, but to verify a theory of his own and a preconceived notion of physical facts. It is clear that, because of former experiences and independent investigations, he had an unconscious prejudice against the testimony of Mr. Thompson. This is indicated by the whole tenor of his remarks, and his rejection of Mr. Thompson's theories in toto, . . .

In **O'Sullivan**, the trial court visited the property even though one of the parties expressly objected. **O'Sullivan**, 25 Wn. App. at 432. There, one party provided the trial court with a sworn statement that he had cut his hedges in compliance with the court's previous order. 25 Wn. App. at 431-32. Although he opposed a site visit, the court viewed the yard and found that he had not complied with the court's order. *Id.* The appellate court reversed, holding that no evidence contradicted the party's sworn statement other than the objectionable site visit. *Id.*⁷

These cases are inapposite. As discussed above, unlike the property at issue in **Elston** and **O'Sullivan**, the parties' depositions

⁷ The remaining cases do not indicate whether the parties had knowledge that the court had visited the affected properties.

were not “extrinsic evidence” – they were part of the court record. Counsel used the depositions at trial to impeach the parties and the trial court told the parties that it had considered the depositions for the similar purpose of clarifying any discrepancies in their testimony. 05/13/05 RP 4. The trial court did not develop its own theory of the case and consider something that was not before it to test its theory – it simply reviewed depositions used at trial. Looking at a deposition that is part of the court file to clear up discrepancies in testimony is a far cry from visiting a parcel of real property to pursue an independent legal theory, without the parties’ knowledge, or over a party’s objection.

Moreover, Davies cites no rule, statute, or case that is on point. It cannot be an abuse of discretion for a trial court to consider the parties’ depositions that are part of the court file and were used at trial, when there is no law preventing the court from doing so and the parties – aware that the court has considered the depositions – do not object.

Davies next asks the Court to remand to a different judge. BR 11-12. This issue is waived (*supra* § A) and has no merit in any event. In a bench trial, the Court presumes that the trial court will disregard inadvisable evidence. ***State v. Read***, 147 Wn.2d 238,

245-46, 53 P.3d 26 (2002). This presumption applies because trial courts must consider inadmissible evidence to rule. **Read**, 147 Wn.2d at 245. If the Court reverses and remands, there is no reason to remand to a different judge because the Court must presume the trial judge will disregard any inadmissible evidence. *Id.*

Finally, Davies' argument that the trial court erred in awarding the full cost of the parties' depositions stands only if the Court holds that the trial court committed reversible error in reading the depositions. BA 12. The trial court awarded the full cost of the depositions because it relied on them in reaching its decision. BA 12; 05/13/05 RP 4. A trial court has discretion to award full deposition costs when it considers the depositions to reach its decision. **Herried v. Pierce County Pub. Transp. Benefit Auth. Corp.**, 90 Wn. App. 468, 476, 957 P.2d 767, *rev. denied*, 136 Wn.2d 1005 (1998). Since the trial court had discretion to consider the depositions, it also had discretion to award costs. **Herried**, 90 Wn. App. at 476.

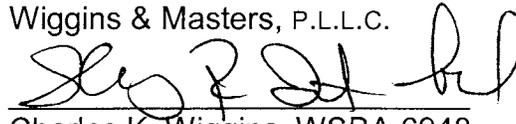
CONCLUSION

The Court should decline to address the issue presented on appeal because Davies waived appellate review by failing to bring

the alleged error to the trial court's attention, depriving the court of any opportunity to cure. Should the Court reach the merits, it should affirm because the trial judge sitting in a bench trial did not abuse her discretion by considering the parties' depositions, which were part of the court record and were used at trial, where there is no law preventing her from doing so, and Davies did not object.

DATED this 14 day of July 2006.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **BRIEF OF RESPONDENT** postage prepaid, via U.S. mail on the 14th day of July 2006, to the following counsel of record at the following addresses:

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