

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 38699-2-II

THE COURT OF APPEALS, DIVISION II

State of Washington

COLLEEN EDWARDS

v.

BARBARA LE DUC

RESPONSE BRIEF

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Court Rules

ER 614(b) 14

RULE ER 614
CALLING AND INTERROGATION OF WITNESSES
BY COURT

(a) Calling by Court. The court may, on its own motion where necessary in the interests of justice or on motion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by Court. The court may interrogate witnesses, whether called by itself or by a party; provided, however, that in trials before a jury, the court's questioning must be cautiously guarded so as not to constitute a comment on the evidence.

(c) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

[Adopted effective April 2, 1979.]

COUNTER-STATEMENT OF THE CASE

Standard of Review

Ms. Edwards agrees that a denial of motions for new trial or remittitur is reviewed for abuse of discretion. See defense brief at page 8 “Standard of Review.”

Ms. Edwards also agrees that allegations of improper judicial comment are reviewed de novo. See defense brief at page 8 “Standard of Review.”

Important Facts

We all agree that this case involves a motor vehicle wreck occurring on November 5, 1995.

The defense interprets its own client’s testimony to indicate the crash created “moderate damage to their respective front and rear bumper areas,” and “not strong enough to throw off the two dogs riding in the back seat of plaintiff’s car.” Brief at page 2.

It’s not clear what the point is about injury to the dogs. Ms. Edwards was driving a **Volvo**, not a pick-up truck with dogs in the

back. We agree the dogs were not thrown from the vehicle.

However, the testimony of witnesses on the extent of damages was:

Q (By Ms. Edwards) Okay. Go ahead. What did you notice about the automobile after the accident?

A It was scrunched up. I don't recall. I cannot recall precise measurements. It took a big shot in the rear. It was scrunched up. It's a Volvo. It's a sound automobile and it was scrunched up.

See Dennis Edwards' testimony, TR 82, line 7 – 12. And, further:

Q (By Ms. Edwards) Did you have any other things that come to mind while you took a little break there?

A No, I mean it was, you know, the car was not driveable, you know, it was – it was crunched, that's the extent of my recollection of that automobile.

...

Q Was it just a little bump in the rear?

A No, no, no, there was part of bumper [sic] was sticking out and the top part of the car was – the top part of the trunk had been shoved forward, I'm not sure I can remember how far, but noticeably so that the shocks that hold – there's a five mile a hour pumper or something on the back of it, that part was – the frame for that was still back there and the rest of the stuff had moved forward and crunched up and sprung out the doors. And I mean it basically ripped the body structure off of the frame and it scrunched that whole cab, kind of it sprung the doors out and moved it forward.

TR 82 – 83,

So, the jury almost certainly had something in mind about the impact more than it causing mere “moderate damage” as asserted in the Opening Brief.

The defense asserts that “Plaintiff indicated immediately after the accident that she was not injured.” However, that comes from a reading of Ms. LeDuc’s deposition, not from an admission at trial by Ms. Edwards; the jury naturally was free to disbelieve that statement by the defendant. And, even accepting as true this alleged admission at the time of the wreck, it’s essentially irrelevant because there was abundant testimony, including testimony by medical providers, linking substantial injuries to the wreck on a more probable than not basis. *See e.g.* testimony of Dr. Stephen Davis at TR 362, lines 9 - 14 (“Q: (by Ms. Edwards) More probably than not cognitively – oh, boy. More probable than not do you believe that I have sustained cognitive injury during the motor vehicle accident of 1995? A: On a more probable than not basis I believe that you have, yes.”) *See also* Dr. Davis’ testimony at TR 391, lines 12 – 23. (Q: (by Ms. Edwards) Dr. Davis as a result of the 1995 accident is it more probable than not that I sustained . . . is it more probable than not that I received more cervical strain injury? [objection by Ms. Bloomfield overruled] A: Yes. I believe that you

sustained cervical sprain strain injuries in the motor vehicle accident of 1995.)

In sum, the defense obviously wants to paint the picture of a minor “fender-bender,” which clearly is not a fair picture of the evidence at trial.

We all agree that Ms. Edwards has had numerous prior medical problems, all as outlined by the defendant at pages 3 of the opening brief. However, all of this is simply to show that Ms. Edwards had plenty of reason to be more susceptible to injury than an average, healthy person.

Following the recitation of pre-existing problems, the defendant’s brief asserts that Dr. Overfeld, Dr. Schwartz, Dr. Delyanis, and Dr. Rubenstein all held the opinion “that plaintiff’s pseudo-seizures were psychological in nature.” The defendant goes on to assert that: “In fact, Dr. Delyanis expressly told plaintiff in 1999 that in his opinion, the auto accident was insufficient to have exacerbated her pre-existing conditions,” and “Dr. Delyanis also said the accident did not cause her seizures.” However, this is all frankly misleading.

Neither Dr. Overfeld, Dr. Schwartz, Dr. Delyanis, nor Dr. Rubenstein ever testified at the trial. These doctors were called neither by the plaintiff, nor by the defendant; so obviously, these

doctors did **not** offer the stated opinions under oath for the jury to consider.

Instead, these “opinions” constitute the assertion of counsel for the defense during cross-examination, and as the court knows, counsel’s statements are not evidence.

More importantly, the core assertion by the defense: the propriety of these doctor’s opinions were rejected by the actual witnesses.

So, for example, the following colloquy occurred with Dr. Davis:

Q (By Ms. Bloomfield) So you disagree with Dr. Overfield, the neurologist, Dr. Delyanis, neurologist, Dr. Schwartz, neurologist, Dr. Waltman, primary treater, and Dr. Rubenstein, neurologist, that these seizures are pseudo-seizures rather than real seizures?

[objection interposed by Ms. Edwards and overruled]

A I remember the question. Yeah, I do not think that the seizures are pseudo-seizures.

Q And you wouldn’t defer to the neurological and medical experts in these areas on that assessment, you think your naturopathic opinion is the ultimate word on that issue?

A Well, as I understand it there are other medical professionals and neurologists who feel that these seizures are not pseudo-seizures.

The point, of course, is that the Opening Brief really mis-states the case, implying that cross-examination by counsel is testimony about facts.

In the end, no one knows precisely what Drs. Overfield, Delyanis, Schwartz, or Rubenstein really held as opinions because they were never called to testify. And, if indeed they held medical opinions helpful to the defense, one would have expected the defense to call them to the witness stand.

Dr. Waltman *was* called to the witness stand by Ms. Edwards, and his actual testimony on the subject of pseudo-seizures was:

Typically when we talk about people having seizures we either talk about them having grandmal seizure, involving the whole body, or petitemal seizures, just being specific little areas. There are people who have what we call atypical seizures, who have unusual neurological events, usually the same, that don't quite fit into the system. And when the neurologists do EEG, they do brain wave studies to see if these are epileptic seizures or not. And if the brain wave activity doesn't correlate with the movement or the seizure activity, they call those non-epileptic seizures, meaning these are not true epileptic seizures. We don't know what they are. I call them atypical, that's, as a lot of my colleagues do, other people call them pseudo-seizures, meaning not real seizures.

I think between the two terms my preference is to call these atypical because the implication of pseudo-seizures is that people are faking the seizures and that's often not the case. So an atypical seizure is a more neutral term. It doesn't explain why, but it basically, to me, or to

someone like me, it says this person is having repeated neurological episodes that are not typical of standard seizure activity.

See TR at 521.

In fact, witnesses at the trial very emphatically rejected the suggested opinion of doctors who did not testify. For example, this exchange occurred with Dr. Waltman:

Q (By Ms. Edwards) In February. And what were his recommendations?

A Dr. Delyanis, the note that I have here, Dr. Delyanis said she [Ms. Edwards] does not have seizures but is depressed and should be on antidepressant medication.

Q And did you concur with that?

A Not really. I did not.

TR at 512- 13.

At the conclusion of Dr. Waltman's direct examination, the following colloquy occurred:

THE COURT: All right. Ms. Bloomfield?

MS. BLOOMFIELD: No cross, your honor.

TR at 528. Whereupon, Ms. Edwards rested her case.

The main point of all this being that the court must not accept uncritically the defendants **Statement of the Case**. Often, the defense reports as fact, what are merely assertions by defense counsel. And, of course, the commentary of counsel is not testimony. Moreover, given the verdict, certainly defense counsel's commentary was not accepted as fact by the jury.

The defense did not call to the witness stand many, many doctors. The defense lawyer ***implied*** via cross-examination questioning that these doctors held opinions supporting the defense case, but the doctors themselves never were called to actually testify.

So, the defense Statement of the Case is filled with what appear to be statements of fact, that just aren't supported by the evidence.

For example, the last full paragraph of page 4 says this: "Dr. Waltman testified generally about plaintiff's physical ailments before the accident, but he was not asked and did not attribute any of her current injuries to the accident." The brief cites page 658 of the transcript. However, page 658 is part of the defense lawyer's ***closing argument***. In fact, Dr. Waltman provided interesting

context to other testimony and because he was not asked specifically to correlate problems with the 1995 wreck, he neither attributed nor discounted the connection. The implication in defendant's brief that he "did not" attribute injuries to the accident is thus really misleading.

Ms. Edwards takes no issue with the defendant's recitation of procedural matters as set out at page 5-6 of the Opening Brief.

LAW and ARGUMENT

As any judge or lawyer knows, the conduct of a jury trial with a pro se litigant who is unschooled in the intricacies of evidence and trial practice is a difficult and arduous task. The heavy responsibility of ensuring a fair trial in such a situation rests directly on the trial judge. The buck stops there. There is no law that requires a litigant to have a lawyer. The lawyer for the opposing side cannot be expected to advise the opposing party who is pro se. The judge cannot presume to represent the pro se party. In order that the trial proceed with fairness, however, the judge finds that he must explain matters that would normally not require explanation and must point out rules and procedures that would normally not require pointing out. Such an undertaking requires patience, skill and understanding on the part of the trial judge with an overriding view of a fair trial for both sides.

...

The [parties are] entitled to a fair trial, not one that is error free. If it appears that an error has not affected the outcome below or if it can be seen from the entire record that no injury was done, the judgment is not to be disturbed

- Oko v. Rogers¹

All parties agree that Judges in Washington are not permitted to “comment on the evidence.” However, while all such comment is prohibited, a new trial is warranted only if the complaining party was prejudiced by it. Blackburn v. Groce, 46 Wn.2d 529, 536, 283 P.2d 115 (1955); see State v. Richard, 4 Wn. App. 415, 424, 482 P.2d 343 (1971).

¹ 125 Ill. App. 3d 720, 723-24, 466 N.E. 2d 658 (1984).

In addition, the case of Jones v. Halvorson-Berg, 69 Wn. App. 117, 127, 847 P.2d 945, (review denied, 122 Wn.2d 1019) (1993) tells us that “As to the remarks by the trial judge made outside the presence of the jury, they are harmless.” Citing State v. Studebaker, 67 Wn.2d 980, 984, 410 P.2d 913 (1966).

Beginning at page 16, part 2(a), the defense complains about various comments made when the jury was not present. Assuming, without agreeing, that any of this constituted “comments on the evidence,” there is no showing for how this influenced the jury or how the defense was prejudiced. Indeed, being a discussion outside the presence of the jury, obviously this discussion did not influence the jury or prejudice the defense in any way. This commentary therefore cannot be the basis for a new trial.

A judge is not prohibited from questioning witnesses or reframing questions for pro se litigants.

Citing Pliler v. Ford, 542 U.S. 225, 124 S. Ct. 2441, 159 L. Ed. 2d 338 (2004), the defense asserts that a judge is prohibited from “assisting” a pro se litigant.

Obviously, there is a fine line between “assisting” and moving the trial along by preventing a pro se from flailing around

and simply sustaining a host of form objections, leaving a pro se litigant to endlessly rephrase questions.

Setting that issue aside, however, Pliler simply does not stand for the proposition asserted by the defense.

The case involved defective, or arguably defective, federal habeas petitions. The 9th Circuit ruled that a proper dismissal of the petitions required specific warnings be given to the petitioner before dismissing. On review, the Supreme Court held that no such warnings need be given inasmuch as the courts are not required to provide a pro se with legal advice:

The District Court also committed prejudicial error, according to the Ninth Circuit, for failing to inform respondent that AEDPA's 1-year statute of limitations had run on both of his petitions and that, consequently, he would be barred from refiling his petitions in federal court if he failed to amend them or if he chose to dismiss the petitions without prejudice in order to exhaust the unexhausted claims. Under the Court of Appeals' view, the District Court "definitively, although not intentionally," misled respondent by telling him that if he chose the first option, the dismissal would be without prejudice. *Ibid.* The Court of Appeals concluded that respondent should have been told that, because AEDPA's statute of limitations had run with respect to his claims, a dismissal without prejudice would effectively result in a dismissal with prejudice unless equitable tolling applied.

Pliler, 542 U.S. at 226. To which, the Supreme Court answered:

Without addressing the propriety of this stay-and-abeyance procedure, we hold that federal district judges are not required to give pro se litigants these two warnings. District judges have no obligation to act as counsel or paralegal to pro se litigants. In *McKaskle v. Wiggins*, 465 U. S. 168, 183-184 (1984), the Court stated that “[a] defendant does not have a constitutional right to receive personal instruction from the trial judge on courtroom procedure” and that “the Constitution [does not] require judges to take over chores for a pro se defendant that would normally be attended to by trained counsel as a matter of course.” See also *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U. S. 152,

Id. at 227.

Pliler stands for the proposition that a judge is not **obligated** to advise a *pro se* litigant; it does not indicate that reframing questions for efficiency is a violation of law; nor does it indicate that reframing questions for efficiency is an impermissible “comment on th evidence.”

Certainly, it’s not unheard of for judges in Washington State to actually dismiss a jury and give **lawyers** some guidance about how to get more quickly to the issue at hand. This is a natural consequence of the judge’s need and ability to conserve resources by arranging for the presentation of evidence in an efficient and expeditious fashion.

Indeed, wholly aside from reframing questions, the court may even question witnesses. The court's questions simply have to

be phrased in a manner that does not convey court's attitude towards the merits of the cause. Dennis v. McArthur, 23 Wn.2d 33, 38, 158 P.2d 644 (1945); Risely v. Moberg, 69 Wn.2d 560, 419 P.2d 151 (1966), and cases cited and discussed. See also State v. Brown, 31 Wn.2d 475, 197 P.2d 590 (1948). And see ER 614(b).

In this case, the judge did reframe some questions (or suggest ways to do that) and the judge did ask some questions. That alone, however, without some showing about how the structure of the questions implies a belief about **facts**, is insufficient to constitute a “comment on the evidence.”²

At its core, the defense argument relating to the framing of questions amounts to an argument that somehow they are entitled to a jury's being kept **uninformed** because of a *pro se*'s ignorance about how to frame questions. And yet, RPC 304(e) indicates that a lawyer shall not, in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence. Suppressing pertinent evidence by relying on a

² The defendant cites Risely v. Moberg, at page 38 for the proposition that it's improper for the court to “take over” questioning. That's not at all what Risely says. The Risely case involved questions by the judge that assumed, or implied, the existence of causation and damages. Indeed, in denying a motion for new trial, the Risely trial judge indicated “It is true, as defendants contend, that the questions as posed assumed as a fact that plaintiff had suffered injuries as a result of the collision.” This was deemed improper questioning because the judge's questions implied that certain elements of the case had been conclusively proven, but the *mere* questioning of witnesses is not *per se* improper. ER 614(b). In this case, there is no showing, nor any real argument for why

pro se's technical ignorance is really an argument for misleading the jury, and that's not proper.

Ms. LeDuc cites (at page 33) Casper v. Esteb Enters., Inc., 119 Wash.App. 759, 82 P.3d 1223 (2004) for the proposition that "repeated reminders about how to properly testify constituted an impermissible comment on the evidence." That, however, is not what Casper says.

The Casper case affirmed a big judgment for plaintiff, and did so despite the fact that the judge actually provided trial

testimony:

At trial, the judge corrected or answered several times for Esteb when he tried to testify to matters covered by the CR 30(b)(6) orders. For example, when the Caspers' counsel asked Esteb, "Pursuant to an order of the Court, your answer to the question, 'Do you know how much your house cost?' is, 'I don't know'; correct?" 13-A Report of Proceedings (RP) at 1207. When Esteb replied, "I'm not going to say that," the court stated: "Pursuant to a court order, that ['I don't know'] is his response." 13-A RP at 1207-08. When Esteb answered that he did have a breakdown for his engineering counterclaim, the court stated, "By the order of the Court, he does not have a breakdown for that." 13-B RP at 1265. The court made similar statements during cross-examination of Esteb on EEI's counterclaim and during Esteb's attempts to testify about his Casper profit and the difference between draws taken and amounts spent.

On re-cross about the same topics, Esteb gestured for the court to answer for him. The court answered for Esteb that it was "[c]orrect" that Esteb did not know the amount of overhead or indirect expenses and the difference between the draws and amounts spent on the Casper project. 13-B RP at 1323.

the questions *as posed* assumed or implied any element of the case had already been proved, or why the questions *as posed* were improper in any fashion.

Casper, 119 Wn. App. at 765-66.

Notwithstanding the judge's *testimony*, plaintiff's jury verdict was affirmed because Estab was not offering fair answers and trying essentially to mislead the jury. On appeal, this was deemed "invited error," and the verdict affirmed.

Whatever Casper stands for, it's not the proposition asserted by the defense. Indeed, the case stands for the non-controversial proposition that judges are charged with moving cases along without undue attention to form so long as the presentation of *facts* is fair and unbiased.

Here, while there is objection to the judge's commentary about the form of questions, there is no evidence or argument to show that the judge in any way commented on the *substance* of answers or made known directly or indirectly the court's belief as to the *facts* of the case.

Comments by a litigant in closing are not "comments on the evidence" by the court.

Ms. LeDuc complains beginning at page 37 that Ms. Edwards' claim about being assisted made in closing argument to the jury somehow prove that the court violated constitutional

provisions prohibiting comment on evidence by the court.

However, very obviously, Ms. Edwards' closing commentary can't be deemed an unconstitutional "comment on the evidence" by the court.

If there is a violation of constitutional magnitude, it has to be a result of something the court itself said, not something said by Ms. Edwards to the jury.

Moreover, while the defense highlights Ms. Edwards' statement that "I'm not a attorney, correct, I'm also a plaintiff, correct." It would be patently obvious to the jury that Ms. Edwards was not an attorney, because she made the same point in her opening remarks. TR 51, lines 1-4. And, in the end, whether she is, or is not, an attorney, and whether Ms. Edwards personally felt the court provided assistance, are all matters irrelevant to any issue on appeal.

The question is not whether Ms. Edwards felt she was assisted, but whether the court's "assistance," if any, rose to the level of an impermissible comment on the evidence.

There is nothing to justify remittitur.

While the defendant complains somewhat about the amount of medical specials discussed and possibly awarded by the jury, the

verdict form, to which the defense never objected has only a single amount. CP 26. The specials are not segregated. *Id.* It's therefore impossible to know whether the jury awarded any special damages, and accordingly it's impossible to find that the jury's award of special damages was the result of "passion and prejudice" sufficient to justify remittitur.

In the defense motion for remittitur, it's argued that "In light of the amount of special damages proven, defendant proposes that an award of no more than \$25,000-\$40,000 could possibly have been appropriate to compensate plaintiff for her proven medial [sic] expenses and connected general damages."

As to that, first no law, nor any principal of equity is suggested to support the idea that somehow the amount of special damages somehow limits the proper amount of general damages awarded.

Second, while only limited special damages were discussed at the trial, in large part that was a result of pre-trial rulings on permitted evidence resulting from defects in discovery responses. See TR 8, line 16 to TR 14, line 14 (excluding all wage-loss claims).

In addition, the \$25,000-\$40,000 award number is supported by absolutely no evidence; it's just a bare assertion of

counsel.³ In short, the defendant is just asking the court to substitute its judgment for that of the jury.

Before passion or prejudice can justify reduction of a jury verdict, it must be of such manifest clarity as to make it unmistakable. Bingaman v. Grays Harbor Cmty. Hosp., 103 Wash.2d 831, 836, 699 P.2d 1230 (1985).

Bingaman also counsels:

If a jury's verdict is tainted by passion or prejudice, or is otherwise excessive, both the trial court and the appellate court have the power to reduce the award or order a new trial. Because of the favored position of the trial court, it is accorded room for the exercise of its sound discretion in such situations. The trial court sees and hears the witnesses, jurors, parties, counsel and bystanders; it can evaluate at first hand such things as candor, sincerity, demeanor, intelligence and any surrounding incidents. The appellate court, on the other hand, is tied to the written record and partly for that reason rarely exercises this power.

Bingaman, 103 Wn. 2d at 835.

In evaluating that standard the comments of the very experienced trial judge seem particularly important:

You know what I think? I think that this is one of the greatest examples in my tenure on here that I have seen for justice. It was unbelievable how this thing proceeded, on both sides. Both sides did their job. I don't think it is because of me or you, the defense, but, what the jury understood.

³ It seems worth pointing out that the defendant argued in her motion for remittitur "As a final point, the amount of \$100,000 is particularly suspect. Whatever amount of special damages the jury might have found were amounts with odd dollars and cents. . . . it is unrealistic that the combination of special and general damages would add up to a number as neat as \$100,000." CP 161 at lines 14 – 20. Ironically, the defense suggests substituting a different round number.

...

It was, in my mind, an example of justice being served through the eyes of 12 people, well and true, wanting to see the system function. And it functioned without one side being really trained in anything other than in honesty and being genuine about what was happening, even, as I said, to the point where, if she asked the question and the objection was sustained, she would apologize because she didn't want to trample on procedure and what our rules are. She wanted to be fair to both sides. And the defense wanted to be fair, too.

...

And I just concluded along the way, over these years, that she felt justice had been served and that satisfied her.

...

I'm just going to leave it in the hands of where it began, which is the jury.

That's the commentary of the very experienced trial judge who witnessed everything that transpired. Against that, with nothing more than the written record, it would seem highly improper for this court to conclude that the jury was motivated by improper passion and prejudice with "such manifest clarity as to make it unmistakable."

The verdict of a jury does not carry its own death warrant solely by reason of its size. Kramer v. Portland-Seattle Auto Freight, Inc., 43 Wn.2d 386, 394, 261 P.2d 692 (1953).

Accordingly, this court should defer to the trial judge's determination that a reduction is not appropriate.

The equitable principal of laches justifies denial of this appeal.

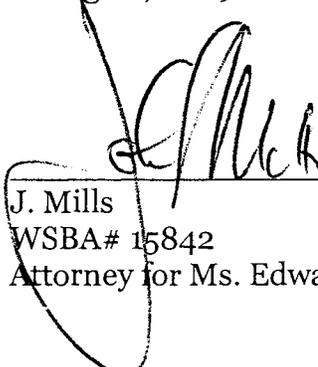
Here, Ms. Edwards adopts by reference all of the arguments presented in her Motion on the Merits (treated by the Commissioner as a Motion to Dismiss), and set out in her Motion to Modify the Commissioner's ruling of July 1, 2009, and her motion to supplement the record, all of which have been previously filed with the court.

For reasons set out in those motions, and because it's been nearly a decade since the first trial, and almost fourteen years after the November 1995 car wreck around which this case centers, it's too late to possibly grant a new trial that would be fair to plaintiff.

CONCLUSION

The jury's verdict, and the trial court's decision to deny motions for new trial and for remittitur should be affirmed.

DATED this 14th day of August, 2009.



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Attorney for Ms. Edwards

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 STATE OF WASHINGTON
 BY DM
 DEPUTY

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

COLLEEN EDWARDS,

Plaintiff,

Cause No: 38699-2-II

vs.

Service Declaration

BARBARA LE DUC,

Defendant.

DECLARATION OF SERVICE

I declare under penalty of perjury of the State of Washington that the following is true:

I am now and at all times herein mentioned a legal and permanent resident of the United States and the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to testify as a witness.

On August 14, 2009 I caused to be served by 1) deposit in the U.S. Mail postage prepaid one copy of the following document to the parties listed below:

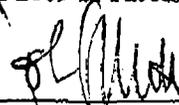
1. Ms. Edwards' Response Brief

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