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NO. \_\_\_\_\_

IN THE SUPREME COURT OF WASHINGTON STATE

Court of Appeals No. ~~61033-9-1~~ 62033-9

**FILED**  
OCT 07 2009  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON

MAUREEN BLAIR, and  
KENNETH E. BLAIR,

Petitioners,

v.

TA-SEATTLE EAST #176  
dba TRAVELCENTERS OF AMERICA,

Respondents

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STATE OF WASHINGTON

PETITION FOR REVIEW

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## IDENTITY OF PETITIONERS & CITATION TO COURT OF APPEALS DECISION

Maureen and Kenneth Blair, appellants below, petition for review of the Court of Appeal's published decision in *Blair v. TA-Seattle East #176*, Washington State Court of Appeals No. 62033-9-1 (June 29, 2009) and of its Order Denying Motion for Reconsideration (September 3, 2009).

### INTRODUCTION

This petition arises from a relatively simple slip-and-fall case that went terribly wrong. The appellate decision at issue affirms the ultimate sanctions – striking witnesses and dismissing a case – based on a tardy witness disclosure. The trial court first struck over half of the Blairs' witnesses. Although the Blairs reserved the right to call witnesses that the defendants disclosed – including all of Maureen Blair's treating physicians – the trial court later refused to allow them to testify and dismissed the Blairs' case on the ground that they had no experts to opine about causation and damages.

The trial court did not enter findings on willfulness or prejudice, and did not explicitly consider lesser sanctions. It simply visited the ultimate sanction upon the Blairs without explanation. The resulting decision conflicts with numerous decisions of this Court and others. It is also unjust. This Court should grant review.

## ISSUES PRESENTED FOR REVIEW

1. Under *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997) and its progeny, does the trial court abuse its discretion in inflicting the severest sanctions (witness exclusion and case dismissal) where it makes only conclusory findings on willfulness and prejudice, and makes no record that it explicitly considered lesser sanctions?

2. Did the trial court abuse its discretion in imposing the severest sanctions, where plaintiffs' counsel has plainly stated on the record that any missed deadlines were solely due to "turmoil" and "transition" in his office, rather than client action or inaction?

3. May plaintiffs reserve the right to call witnesses disclosed by the defense, including all of the plaintiffs' treating physicians?

If yes, must the plaintiffs provide additional expert testimony, where plaintiffs' treating physicians will testify as fact witnesses that to a reasonable medical probability the defendant's negligence caused the plaintiff's injuries?

If no, do the treating physicians' (or IME doctors') written reports stating that to a reasonable medical probability the defendant's negligence caused the plaintiff's injuries provide sufficient evidence of causation to avoid summary judgment?

## STATEMENT OF THE CASE

- A. Maureen Blair slipped and fell in a gasoline spill at a truck stop, lighting up a pre-existing condition, requiring a complete hip replacement, and ultimately preventing her from returning to work.**

On May 12, 2003, Maureen Blair, an experienced commercial truck driver in her early 50s, stopped for refueling at respondents' truck stop off Interstate 90 in North Bend, Washington. Op. at 2;<sup>1</sup> CP 362. She slipped and fell in a puddle of gasoline spilled near the pumps. Op. at 2; CP 362-63. As employees rushed to clean up the spill, the truck-stop manager became angry, demanding "why wasn't this cleaned up before like I told you?" CP 363.

This fall lit up Ms. Blair's pre-existing condition – degenerative hip arthritis – of which she was previously unaware. Op. at 2; CP 336-37. Her injuries became increasingly painful over the ensuing months. Op. at 2; CP 336, 346. While she fought it, she eventually had to stop driving a truck due to constant pain. CP 336, 345. This was a job she truly loved and had intended to continue into her late 60s. CP 337.

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<sup>1</sup> Although the Blairs appealed from a summary judgment dismissing their case, the appellate opinion failed to take the facts in the light most favorable to them. See, e.g., CR 56. This Statement corrects that error.

After her injury, Ms. Blair had cortisone shots, which would ease her pain for about a week. CP 346-47. She took various other medications to ease her "really bad" pain. CP 347. She had a great deal of trouble sleeping. CP 347. She saw a chiropractor, but then lost motion in her hip, and was unable to abduct her legs, so her doctor took her off work. CP 347. She could barely walk half-a-block, had to hang onto the railing to make it down the stairs, and could not tie her own shoes. CP 347.

Within three months following her injury, a doctor told Blair that she needed a total hip replacement. CP 348. An MRI showed that the fall had bruised her bone into the marrow and caused fluid in her hip joint. CP 348. An orthopedist concluded "that the proximate cause of Ms. Blair's need for surgery of the left hip is due to" her May 2003 slip and fall. CP 355.

Blair had a total hip replacement in February 2005. CP 338. Subsequent "independent medical exams" concluded that "to a reasonable medical probability" the fall caused the need for this major surgery. CP 338-40. Indeed, once she became fixed and stable, the IME doctor stated that as to "her current impairment, I think one fourth is due to the preexisting condition and three fourths related to the" slip and fall in May 2003. CP 342.

Sadly, while the IME doctor stated, "I admire Ms. Blair's desire and determination to return to her truck driving job (a little unusual in my experience), I think it is unrealistic based on her capacity[,] specifically the need to climb up into the truck cab on a frequent basis and the requirement of long sitting." CP 342. The Blairs brought suit against the truck stop's owners on May 10, 2006. CP 361-62.

**B. The Blairs' counsel missed deadlines due to "turmoil" and "transition" in his office, sought a continuance that was denied based on opposing counsel's representation that there was "adequate time to prepare," and provided a late disclosure of possible primary witnesses that reserved the right to call the defendants' witnesses.**

Also on May 10, 2006, the trial court issued a standard-form case-scheduling order under former King County Local Rule 4. Op. at 2; CP 367-71. This order required a possible-primary-witness disclosure by May 21, 2007, an additional-possible-witness disclosure by July 2, 2007, and imposed a discovery cut-off date of September 4, 2007. CP 369. Trial was scheduled for October 22, 2007. *Id.*

On May 21, 2007, the truck stop's counsel provided a disclosure of possible primary witnesses. CP 83-92. This disclosure included all of Ms. Blair's treating physicians, including

their addresses and phone numbers. CP 86-89. Among these are the doctors noted above who opined based on a reasonable medical probability that the truck-stop fall caused Ms. Blair's pain and suffering. *Compare* CP 88 *with* CP 336-42. The truck stop's witness disclosure also reserved "the right to call as witnesses at trial any primary or rebuttal witnesses, including expert witnesses, disclosed by Plaintiff . . . ." CP 90.

On May 25, 2007, the Blairs' counsel sent the truck stop's counsel a letter briefly explaining his difficulties in contacting witnesses – they were mostly nomadic long-haul truckers or former employees of the truck stop – and listing 17 possible primary witnesses. CP 133-34. Due to the difficulties in contacting these witnesses, however, this list failed to provide the detail required under former KCLR 26(b). *Op.* at 2. The Blairs' counsel said that he would provide a proper disclosure "next week." CP 133.

On June 14, 2007, the Blairs' counsel brought a motion to continue the trial date. CP 169-70. Counsel attributed the need for this continuance to the "turmoil" and "transition" in his office. CP 128-29. Counsel had agreed to buy-out his retiring senior partner and the building they were in, and had made moves to expand his business, but then the former partner changed his mind and

reentered a different law practice, throwing counsel's office into turmoil, and suddenly leaving him to handle a very heavy caseload. CP 129. Counsel also lost an associate and staff support during this time. CP 129-30.

On July 11, 2007, the truck stop's counsel objected to any continuance on the ground that notwithstanding any "turmoil" in the Blairs' counsel's office (which the truck stop contended was not a sufficient ground for a continuance) the "parties have adequate time to conduct discovery needed to prepare this" "straightforward slip and fall case" before the September 4 discovery cutoff and October 22, 2007 trial date. CP 1. The trial court denied the continuance request without explanation. CP 15-16.

Also on July 11, 2007, the Blairs' counsel provided the truck stop's counsel with a detailed disclosure of possible primary witnesses, listing 15 possible witnesses for trial. CP 136-41. For 11 of these witnesses, counsel provided addresses and phone numbers, together with a brief description of their anticipated testimony. CP 137-41. For the other four, counsel provided a business address and brief description of their testimony. *Id.* Two of the witnesses were defendants' employees listed as the first two witnesses on the defendants' prior disclosure. *Compare* CP 85

*with* CP 140. Using the same language that the truck stop's disclosure had used, the Blairs' disclosure also reserved "the right to call as witnesses at trial any primary or rebuttal witnesses, including expert witnesses, disclosed by Defendant . . . ." CP 140.

**C. The trial court struck over half of the Blairs' late-disclosed witnesses and sanctioned them \$750, refused to allow them to rely on the defendants' own disclosure of Ms. Blair's treating physicians, and then dismissed the Blairs' case for lack of expert causation evidence.**

The truck stop moved to strike the Blairs' witness disclosure as untimely, scheduling the hearing for August 13, 2007, a month after receiving the disclosure, relying on KCLR 26(b)(4), which prohibits calling undisclosed witnesses unless the trial court so permits for good cause. CP 17-25. The Blairs' counsel explained the delays (as above), noting that since opposing counsel's July 11 statement that he had "adequate time" to conduct discovery, this was his first suggestion that the late primary-witness disclosure was prejudicial to the truck stop. CP 128-31.

The trial court granted the truck stop's motion by striking more than half of the Blairs' listed witnesses:

Witness #11 on Plaintiff's Disclosure of Possible Primary Witnesses is stricken. Of the remaining 14 witnesses, plaintiff shall select 7 to be called as witnesses and notify defendant by August 17, 2007 which 7 are to be called. The motion to strike 7 of the 14 witnesses is granted.

CP 217. The trial court further sanctioned the Blairs \$750. *Id.* This order does not include any findings as to willfulness, lesser sanctions, or prejudice, or explain the basis of the ruling. *Id.*

As ordered, on August 17, 2007, the Blairs submitted their amended disclosure of seven possible primary witnesses, in “addition to witnesses listed and identified by Defendants . . . .” CP 439. The truck stop’s counsel immediately objected that the Blairs could not call witnesses identified in the truck stop’s disclosure, despite the Blairs’ express reservation of the right to do so in their earlier disclosure in language identical to the truck stop’s own reservation. CP 444. After discussions between counsel, the Blairs moved to “clarify” the vague August 13 order to ensure that their reservation was valid. CP 226-34. The trial court denied the motion to clarify, again without comment or findings. CP 256-57.

The truck stop then moved to dismiss the Blairs’ case for lack of medical testimony, setting the motion to be heard on the first day of trial, October 22, 2007. CP 280. The truck stop failed to specify any rule authorizing its motion, where a summary judgment motion would be untimely under the scheduling order (CP 369, setting dispositive motions cutoff at October 8, 2007), and a motion for judgment as a matter of law may be raised only after “a party

has been fully heard,” which the Blairs were not. CR 50. The truck stop nonetheless argued that the Blairs could not meet their burden of proof “without presenting testimony from Blair’s treating physicians . . . that her claimed injuries are related to the fall . . . and that her medical bills are reasonable and necessary.” CP 281.

The Blairs responded that they had sufficient evidence of causation and damages, including (a) Ms. Blair’s testimony that the fall caused her injuries and that her pre-existing condition was asymptomatic prior to her fall; and (b) her physicians’ medical records stating that to a reasonable medical probability the fall caused her severe pain and suffering and surgery. CP 291-301. Any question of limiting damages through claims that the damages are not wholly attributable to the fall would be the defendants’ burden to bear. *Id.*

Nonetheless, the trial court dismissed the Blairs’ case. CP 307-09. Like all of the trial court’s other orders in this case, this one too fails to state any rule or reasoning as grounds for the dismissal. *Id.* It effectively strikes not only over half of the Blairs’ witnesses, but also their reservation as to the defense witnesses. It again fails to address willfulness, lesser sanctions, or prejudice to the truck stop. *Id.*

**D. Division One affirmed without findings supporting willfulness and prejudice, or a record explicitly considering lesser sanctions, expressly disagreeing with Division Three.**

The appellate court affirmed. Despite the absence of any findings and the Blairs' counsel's clear explanations as to why he failed to meet disclosure deadlines, the appellate court flatly stated that the Blairs were "unable to provide any legitimate reason for that failure." Op. at 4. It thus deemed the Blairs' violation of the scheduling order willful, and found no abuse of discretion.

The appellate court expressly disagreed with and refused to follow Division Three's decision holding that the trial court must consider on the record the factors this Court promulgated in *Burnet, supra*. Op. at 5 n.9 (citing *Peluso v. Barton Auto Dealerships, Inc.*, 138 Wn. App. 65, 69, 155 P.3d 978 (2007)). The appellate court relied on *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 132 P.3d 155 (2006), but as further discussed below, that decision involved solely imposition of monetary sanctions, not the most severe sanctions – striking witnesses and dismissing for lack of testimony from those very witnesses.

On the issue of whether the Blairs could call the treating physicians disclosed by the truck stop, the appellate court

erroneously concluded that the Blairs “would have [their] ‘reservation of rights’ convert an adversary’s nonexpert witness into an expert without complying with the rules.” Op. at 7. Rather, the Blairs would call the treating physicians as fact witnesses – proximate cause is a question of fact. This issue is fully discussed in the briefing below and in the motion for reconsideration.

### **WHY THIS COURT SHOULD GRANT REVIEW**

This Court should grant review under RAP 13.4(b) – on every ground. The appellate decision conflicts with the letter and spirit of *Burnet* (and other decisions of this Court) by imposing the severest sanctions on the Blairs without making a record that it explicitly considered willfulness, lesser sanctions or prejudice. RAP 13.4(b)(1). For the same reasons, the appellate decision conflicts with Division Three’s *Peluso*, *supra*, and also with decisions from Division Two. RAP 13.4(b)(2). The appellate decision affirms a trial court decision denying the Blairs’ constitutional rights to due process and trial by jury without the merest hint of the trial court’s justification for imposing the severest possible sanctions. RAP 13.4(b)(3). The appellate decision thus involves issues of substantial public interest that should be determined by this Court. RAP 13.4(b)(4). The Court should grant review and reverse.

A. **The appellate decision conflicts with both the letter and the spirit of *Burnet* and its progeny. RAP 13.4(b)(1).**

This Court long ago recognized that “it is an abuse of discretion to exclude testimony as a sanction absent any showing of intentional nondisclosure, willful violation of a court order, or other unconscionable conduct.” *Fred Hutchinson Cancer Research Center v. Holman*, 107 Wn.2d 693, 706-07, 732 P.2d 974 (1987) (quoting *Smith v. Sturm, Ruger & Co.*, 39 Wn. App. 740, 750, 695 P.2d 600, *rev. denied*, 103 Wn.2d 1041 (1985); accord *Lampard v. Roth*, 38 Wn. App. 198, 202, 684 P.2d 1353 (1984)). In *Fred Hutchinson*, plaintiff’s expert was not disclosed until the Friday before trial was to begin. 107 Wn.2d at 706. The defendant had agreed to a last-minute witness update, but asserted severe prejudice from this late disclosure. *Id.* The trial court found no willful non-disclosure and allowed the testimony. This Court affirmed. 107 Wn.2d at 707.

Building on *Fred Hutchinson*, this Court held in *Burnet* that when a trial court “chooses one of the harsher remedies allowable under CR 37(b) . . . it must be apparent from the record that the trial court **explicitly considered** whether a lesser sanction would probably have sufficed,’ and whether it found that the disobedient

party's refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent's ability to prepare for trial." *Burnet*, 131 Wn.2d at 494 (quoting *Snedigar v. Hodderson*, 53 Wn. App. 476, 487, 768 P.2d 1 (1989) (citing to due process considerations outlined in *Associated Mortg. Investors v. G.P. Kent Constr. Co.*, 15 Wn. App. 223, 227-28, 548 P.2d 558, rev. denied, 87 Wn.2d 1006 (1976)), rev'd in part, 114 Wn.2d 153, 786 P.2d 781 (1990)) (emphasis added).

This Court then found an abuse of discretion where, as here, the trial court entered the harshest sanctions without express *Burnet* findings in *Rivers v. Wash. State Conf. of Mason Contrs.*, 145 Wn.2d 674, 696, 41 P.3d 1175 (2002) (emphasis added):

The record in this case indicates that Petitioner manifested a somewhat casual disregard for the rules of discovery and her obligation to comply with the orders of the court under those rules. Whether she should be subject to the drastic sanction of dismissal cannot be determined under the limited language used by the trial court in its order of dismissal. Before resorting to the sanction of dismissal, **the trial court must clearly indicate on the record that it has considered less harsh sanctions under CR 37. Its failure to do so constitutes an abuse of discretion.**

The Court remanded for entry of specific findings on the record regarding willful and deliberate violations, substantial prejudice, and lesser sanctions (*id.* at 700, emphasis added):

We remand to the trial court for a new determination whether the complaint should be dismissed, **with specific findings on the record** (1) whether Petitioner's failure to obey discovery orders and case event schedule deadlines was willful or deliberate; (2) whether Petitioner's actions substantially prejudiced Respondent's ability to prepare for trial; and (3) whether the court considered less severe sanctions than dismissal before resorting to the drastic remedy of dismissal.

Despite this controlling authority, here the appellate court relied on this Court's decision in *Mayer, supra*, which is plainly inapposite. Opinion at 5. *Mayer* concerned lesser sanctions, not the harshest sanctions of excluding witnesses and then dismissing the case for lack of those very witnesses. Indeed, it expressly distinguished *Burnet* on that very ground (156 Wn.2d at 690):

[W]e reverse the Court of Appeals and hold that the reference in *Burnet* to the "harsher remedies allowable under CR 37(b)" applies to such remedies as **dismissal . . . and the exclusion of testimony – sanctions that affect a party's ability to present its case** – but does not encompass monetary compensatory sanctions under CR 26(g) or CR 37(b)(2). 131 Wn.2d at 494 (quoting *Snedigar*, 53 Wn. App. at 487); see, e.g., *Rivers*, *supra*,] 145 Wn.2d [at ] 686 . . . (requiring that *Burnet* factors be considered on the record "[w]hen a trial court imposes *dismissal or default* in a proceeding as a sanction for violation of a discovery order" (emphasis added)).

The *Burnet/Rivers* line of cases – not *Mayer* – is controlling where, as here, the trial court imposes the harshest sanctions of exclusion of witnesses and dismissal. Indeed, Division One itself

recently explained this in *Petters v. Williamson & Assocs., Inc.*, 151 Wn. App. 154, 171, 210 P.3d 1048 (2009):

*Mayer* did not overrule *Burnet*. Rather, it declined to extend *Burnet* to CR 26(g) sanctions, as opposed to CR 37(b)(2) sanctions. *Mayer*, 156 Wn.2d at 688-89. . . . [T]his case involves CR 37(b)(2) sanctions, so (by *Mayer*'s own terms) *Burnet* provides the appropriate analysis.

This Court should accept review to resolve this blatant conflict with its own controlling authority.

**B. Division One's decision conflicts with several other appellate-court decisions. RAP 13.4(b)(2).**

As noted, Division One itself noted its conflict with Division Three's *Peluso*. Op. at 5 n.9. There, the trial court granted the plaintiff a second continuance because recent surgery had made it impossible for her to attend the trial, but maintained the original discovery cutoff, refusing to allow testimony about the surgery from witnesses not previously disclosed. The jury returned a defense verdict. Division Three reversed due to the absence of *Burnet* findings: the trial court "made no findings that a lesser sanction was not available, or that the violation here was willful, or that substantial prejudice resulted . . . ." *Peluso*, 138 Wn. App. at 70-71. Division Three expressly noted the well settled nature of this requirement (*id.* at 69):

We generally review a trial judge's management of a trial for abuse of discretion. **Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.**, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993); **MacKay v. MacKay**, 55 Wn.2d 344, 347 P.2d 1062 (1959). But decisions that preclude a party from calling an expert as a sanction for discovery violations are different. **Fred Hutchinson Cancer Research Ctr. v. Holman**, 107 Wn.2d 693, 706, 732 P.2d 974 (1987). The standard is more rigorous. *Id.* And while we might question such a limitation on a trial judge's traditional authority to manage his or her courtroom, the difference is now well ensconced in Washington law.

Similarly, Division Two has repeatedly held that the trial court must make willfulness and prejudice findings, and explicitly consider whether lesser sanctions would probably have sufficed. See, e.g., **Magana v. Hyundai Motor Am.**, 141 Wn. App. 495, 511, 170 P.3d 1165 (2007), *rev. granted*, 164 Wn.2d 1020 (2008); **Casper v. Esteb Enters.**, 119 Wn. App. 759, 768-69, 82 P.3d 1223 (2004); **Smith v. Behr Process Corp.**, 113 Wn. App. 306, 324-25, 54 P.3d 665 (2002). Indeed, according to Lexis, **Burnet** has expressly been followed 19 times, and cited over 100 times. In quite a number of those (often unpublished) cases, the appellate courts have reversed for lack of explicit consideration of lesser sanctions, as in this case.

Indeed, this Division One decision even conflicts with another decision from Division One, **Johnson v. Horizon**

*Fisheries, LLC*, 148 Wn. App. 628, 638-39, 201 P.3d 346 (2009), which (citing *Rivers*) held that the “trial court must indicate on the record that it has considered sanctions less harsh than dismissal.” But there, unlike here, the trial court did explicitly consider (and reject) lesser sanctions than dismissal. 148 Wn. App. at 641.

In short, this appellate decision is badly out of step with the other Divisions, and even with other panels in Division One, which properly follow this Court’s precedent. This Court should accept review, reverse, and remand for trial.

**C. The appellate decision denies the Blairs’ fundamental rights to due process and trial by jury. RAP 13.4(b)(3).**

Permitting dismissal based on an absence of witnesses who were excluded as a discovery sanction, but with nary a single factual finding supporting conclusory statements of willfulness, prejudice and no lesser sanctions, violates the Blairs’ fundamental right to due process. As discussed above, this and other courts have repeatedly held that due process requires more than mere conclusory, boilerplate assertions on these factors before depriving parties of their right to trial by jury. At a minimum, there must be a clear record that the trial court explicitly considered whether lesser sanctions would probably suffice.

That is particularly important where, as here, the trial court harshly sanctioned the Blairs for their counsel's failure to comply with the case schedule by cutting their witness list in half. The trial court went even further, essentially striking the Blairs' reservation of the right to call the truck stop's witnesses (identical to the truck stop's own reservation). But nowhere did the trial court even attempt to explain why such enormous sanctions were both necessary and insufficient. All of this leaves the Blairs with a profound sense of arbitrary injustice. Justice is blind, not mute.

The Court should grant review, reverse, and remand for trial.

**D. This petition involves issues of substantial public interest this Court should determine. RAP 13.4(b)(4).**

For all of the reasons stated above, this petition involves issues of substantial public interest that this Court should determine. In a certain sense, this appellate decision is readily viewed as an invitation – if not a challenge – to this Court to accept review and address whether trial courts really do abuse their discretion (*i.e.*, act on untenable grounds or for untenable reasons) when they impose harsh sanctions like excluding witnesses and then dismissing the case, without explicitly considering the *Burnet* factors. This Court should accept the challenge by accepting

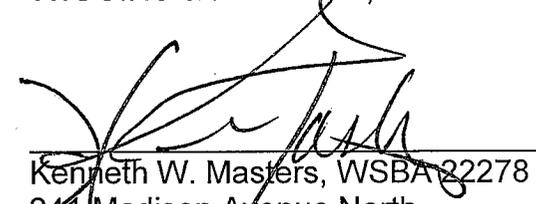
review, reaffirming that its precedents mean exactly what the say, reversing this unjust and unnecessarily harsh decision, and remanding to give the Blairs their day in court.

**CONCLUSION**

For the reasons stated above, this Court should grant review, reverse, and remand for trial.

RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of September, 2009.

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**CERTIFICATE OF SERVICE BY MAIL**

I certify that I mailed, or caused to be mailed, a copy of the foregoing **PETITION FOR REVIEW** postage prepaid, via U.S. mail on the 25 day of SEPTEMBER, 2009, to the following counsel of record at the following addresses:

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