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NO. 64403-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

FARMERS INSURANCE COMPANY OF WASHINGTON, as subrogee
for PAUL MOLDON,

Appellant

v.

D SQUARE ENERGY SYSTEMS, INC., et al,

Respondent/Cross-Appellant

**REPLY BRIEF AND RESPONSE TO CROSS-APPEAL OF
APPELLANT FARMERS INSURANCE COMPANY OF
WASHINGTON as subrogee for PAUL MOLDON**

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ORIGINAL

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**I. SUMMARY OF RESPONSE TO CROSS-APPEAL AND
REPLY ON APPEAL**

The appeal and cross-appeal involve essentially the same issue: what duties are owed by a generator service company which solicits a maintenance contract with a customer confined to a wheelchair and thus unable to visit the generator. D Square Energy Systems Inc. (“D Square”) claims that it has no duty to warn its customers about anything when doing a “basic service tune-up,” despite testimony of D Square’s owner, Don Dunavent, that service technicians are trained to identify obvious dangers and should warn customers about them. D Square argues that a “mere service technician” cannot be expected to understand that piling highly flammable materials next to a generator emitting exhaust at a temperature of 800 degrees is a hazard and that it cannot be expected to have its technicians read or understand the manuals provided by the manufacturer because they service many different types of generators and would have to read numerous manuals to become familiar with the safety requirements for the different generators

These arguments should be rejected. Under Washington law, the duty of care is a question of law to be determined by the court and is not dependent on what is actually done by a particular business or even by a particular industry when the practice of the industry is negligent. At a

minimum, a service company soliciting a maintenance contract to service a generator should be held to have a duty to warn the consumer of dangerous conditions such as flammable materials within the safety zone required by the manufacturer and to be familiar with basic concepts such as whether a generator is UL 2200 compliant. The trial court correctly held that D Square had a duty to warn Paul Moldon. However, the court erred in finding as a matter of law that failing to warn that stacking cedar near the exhaust, and the siting of the generator itself, violated the manufacturer's 3 foot safety zone and were potential fire hazards. Had Mr. Cislo been adequately trained and aware of the manufacturer's setback requirements, this fire never would have happened. The order on summary judgment should be reversed and this case should be remanded for trial on the merits.

II. RESPONSE TO CROSS APPELLANT ISSUE NUMBER APPEAL AND REPLY ON APPEAL

A. D Square had a duty to warn Paul Moldon of potential fire hazards

D Square correctly states that the existence of a duty is a question of law to be determined by the court, relying on *Hansen v. Friend*, 118 Wn.2d 476, 479, 824 P.2d 483 (1992). D Square errs, however, in arguing that the testimony of owner Don Dunavent that "there is no legal duty in the generator maintenance business to warn" is determinative on this

issue.”(brief at 28). The standard of care for any particular business or individual is not determined by what is generally done, but by what should be done. It is the court, not the individual business owner, that determines the appropriate standard of care.

In *Helling v. Carey*, 83 Wash.2d 514, 518-19, 519 P.2d 981 (1974), the trial court entered summary judgment in favor of the defendant ophthalmologist because the expert evidence established that it was the standard of practice for the profession not to give a routine glaucoma test to patients under the age of 40. The *Helling* court noted that the test was simple, inexpensive, and safe, and found a duty to administer the test to patients under 40 years old as a matter of law. The court stated:

Justice Holmes stated in *Texas & Pac. Ry. v. Behymer*, 189 U.S. 468, 470, 23 S.Ct. 622, 623, 47 L.Ed. 905 (1903):

What usually is done may be evidence of what ought to be done, but *what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.*

In *The T. J. Hooper*, 60 F.2d 737, on page 740 (2d Cir. 1932), Justice Hand stated:

(I)n most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. *It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.* (Italics ours.)

In *Helling*, plaintiff's glaucoma could have been diagnosed in time to prevent blindness simply by giving an inexpensive, safe test. Paul Moldon's catastrophic fire could have been prevented simply by telling him that there were combustibles within the three foot safety zone which presented a significant fire risk. This warning is not only simple, but free, except for the few moments necessary to deliver the information. It is undisputed that moving the cedar farther away from the generator would have prevented this fire. Mr. Moldon testified that he would not have allowed the cedar shingles to be stacked so close to the generator had he known that it was a fire hazard. Additionally, if Paul Moldon had been warned that the generator was too close to the house and garage, the scope of the fire could have been greatly reduced.

A service company soliciting ongoing maintenance contracts should not be allowed to plead ignorance of applicable safety codes such as UL 2200, or to argue that its "mere" service technicians cannot be expected to understand esoteric concepts such as the fact that cedar too close to 800 degree exhaust is a fire hazard.

Don Dunavent testified that Washington adopted UL 2200 in 2001 CP 758. He assumed that generators installed after that time would be UL 2200 compliant, leading to his testimony that he wouldn't be concerned about cedar next to a generator because he assumed it would be UL 2200

compliant. Had Mr. Dunavent taken the time to acquaint his technicians with UL 2200 or other applicable regulations,¹ Mr. Cislo would have realized that the Magnum generator lacked a UL 2200 sticker² and been alerted to the need to consult the Magnum manual for any special safety or set-back requirements. Lacking that knowledge, he ignored the danger presented by having a house, a garage, and two woodpiles within the 3 foot safety zone.

D Square knew, or should have known, that Paul Moldon was in a wheelchair and would not be able to inspect or maintain the generator and thus was relying on D Square's expertise, not only for an oil change, but for information about any and all problems and hazards. The form used by D Square includes a line for just such information. If D Square intended to do nothing but change the oil and disregard all safety issues, it should not have mislead its customers by including a line for recommendations and comments. D Square's cavalier attitude that its technicians need not be familiar with the manufacturer's required set-backs, UL 2200, or anything else other than how to change the oil and filter, does not set the applicable standard of care.

¹ When asked about UL 2200 and NFPT 70 at his deposition, Tim Cislo answered "what's these things?" CP 599-600

² The Magnum generator was not UL certified and did not have a UL 2200 sticker. CP 784, CP 769.

Ranger Ins. Co. v. Pierce County, 164 Wash.2d 545, 553-554, 192 P.3d 886, 890 (2008) followed *Helling* in holding that the Pierce County Clerk's office potentially breached a duty to the plaintiff despite an unopposed declaration submitted by defendant stating that all regular procedures and routines were followed. The Court reasoned:

...a simple statement indicating an individual acted according to the customs of the industry is not always determinative. [quotation and citation to *Helling* omitted]...*McAllister's declaration, asserting the Pierce County clerk acted according to the custom in its industry, does not establish the applicable standard of care as a matter of law.*

(emphasis added). The court went on to hold that summary judgment was inappropriate because a reasonable jury could find in favor of the plaintiff despite defendant Pierce County's assertion that it followed its usual procedures regarding verifying bonds issued by the plaintiff insurer.

Similarly, in *Dickinson v. Edwards*, 105 Wash.2d 457, 476, 716 P.2d 814, 824 (1986), the Supreme Court found a question of fact as to an employer's liability for damages caused by overconsumption of alcohol at a company party, despite contrary evidence on the alleged standard of care, stating:

Not only was Kaiser in the position to foresee the potential hazards of its own conviviality, the means by which the firm could exercise its control over its less responsible employees were ready at hand. It could have instructed Red Lion Inn to monitor more closely the guests' consumption, or hired others to do that

monitoring. If Kaiser felt that it did not have the expertise to detect intoxication in its employees it could have hired others with that expertise (e.g., off-duty police officers) and written that expense off as a business deduction as well as they did the cost of the alcohol and other related expenses. It could also have rented a machine to test blood alcohol as employees left the party. Finally, it could have provided intoxicated guests with alternate transportation so they would not have to drive home.

The simplicity and relative inexpensiveness of some of these steps suggest a duty in much the same manner that the existence of the simple glaucoma test led us to find the failure to routinely use it to be negligence, even though that was not then the standard of the profession. *Helling) v. Carey*, 83 Wash.2d 514, 518-19, 519 P.2d 981 (1974). *Where the burden of prevention is small compared to the probability and magnitude of the foreseeable harm, the failure to provide the preventative measures cannot be excused.* See *The T.J. Hooper*,)60 F.2d 737, 740 (2d Cir.1932).

(emphasis added).

The “burden of prevention” in the instant case was small indeed compared to the risk of a catastrophic fire, a fire which could have caused deaths as well as significant property damage. Basic training for the technicians, alerting them to the set-back requirements for the various types of generators D Square undertook to service, coupled with a requirement that technicians report observed fire hazards, is all that would have been required to prevent this fire.

D Square’s oft repeated protest that there were no cedar shingles directly under the generator exhaust at the time of the service visit is a red herring. Even D Square likely would not argue that the technician must

see an actual fire before having any obligation to notify the homeowner of a fire hazard. The issue is not whether the cedar shingles were directly under the exhaust at the time of the service call, but whether there were hazardous conditions about which Mr. Cislo should have warned Paul Moldon. The cedar shingles were within the 3 foot safety zone, as were the garage and the house. There was a duty to warn of these significant fire hazards as a matter of law. At a minimum, these fire hazards, which were established by the evidence, create an issue of fact about whether Mr. Cislo should have warned Mr. Moldon, making summary judgment inappropriate.

B. The trial court correctly held that D Square assumed a duty to warn of open and obvious hazards

The trial court held as a matter of law on the first motion that D Square “assumed a duty to warn of obvious danger/hazards and that the manual also is evidence of the duty required...” CP 178. This ruling was correct as a matter of law based on D Square’s own testimony presented as evidence on the motion and should be affirmed.

Don Dunavent testified in answers to interrogatories and at his deposition, that his technicians are trained to warn customers about “obvious dangers” such as “lawn chairs on generators, hoses, you know, all kinds of—if they’ve got them too close to doors or windows ...” CP

66. It is clear from the context of Mr. Dunavent's testimony that he expects his technicians to warn about any type of hazards on or near the generator, not just lawn chairs on top of the generator, as D Square implies in its brief. Mr. Dunavent agreed that these hazards "could involve either personal safety issues or fire issues or even electrical issues if it was obvious." CP 66. Ironically, Mr. Dunavent also commented that he would warn a customer about a generator "in the middle of a woodpile." CP 573. This generator essentially was in the middle of a woodpile, with a woodpile on the left and the cedar shingles on the right.

The form presented to clients for signature includes a line for recommendations/comments, leading customers to believe that more than just an oil change is being offered as part of the maintenance contract. The Magnum manual, as the court noted in its order, is evidence of the standard of care regarding set-back requirements. It is undisputed that the generator was too close to the house and the garage: 9 inches from one and 3 inches from the other. It is admitted that this would have been clear to the technician at the time of the service visit. Yet, in spite of Mr. Dunavent's testimony that his technicians are expected to warn about such matters, Mr. Cislo said nothing to Mr. Moldon. D Square assumed the duty of warning its clients about safety issues and is liable for negligently failing to do so.

UL 2200 is significant primarily because Mr. Dunavent testified that he would assume that any generator was UL 2200 compliant and that cedar siding near a UL 2200 compliant generator would not start a fire. CP 571. As is noted above, Mr. Dunavent knew that UL 2200 was adopted by the State of Washington in 2001. CP 767. D Square relied on Mr. Dunavent's testimony in arguing that "wood stacked near the generator was not an obvious hazard." (Brief at 29). Magnum's concerns about UL 2200 are not relevant to the issues before the Court on this appeal as the issue is whether D Square's technicians, allegedly trained by Mr. Dunavent, should have been aware of UL 2200 which Mr. Dunavent believed to be the applicable standard. If the head of a company relies on UL 2200 certification as the basis for his belief that kindling next to a generator is safe, then he should make his technicians aware of the need for a UL 2200 sticker certifying the generator is UL 2200 compliant.

The inference from Mr. Dunavent's testimony, which must be made in favor of the non-moving party, is that it cannot be assumed that wood near a non-UL 2200 compliant generator is safe. Given that the Magnum generator did not have a UL 2200 sticker, there was no basis for assuming that it was safe to stack kindling next to it, or to have it within 3 inches of a flammable structure. Had Mr. Cislo been familiar with UL 2200, as was Mr. Dunavent, he would have known the absence of a UL

2200 sticker was cause for further inquiry about the appropriate set-backs, given that it was known to D-Square that different generators require different set-backs.

C. There was sufficient evidence to create questions of fact precluding summary judgment.

D Square did not assign error to the trial court's finding that the Magnum manual was evidence of the standard of care for D Square's technicians. Even if it had assigned error, the trial court's ruling would be reviewed, and affirmed, under the abuse of discretion standard. *State v. Stenson*, 132 Wash.2d 668, 701, 940 P.2d 1239 (1997). A trial court abuses its discretion when its decision "is manifestly unreasonable or based upon untenable grounds or reasons." *Id.* A trial court's decision is manifestly unreasonable if it "adopts a view "that no reasonable person would take. *In re Pers. Restraint of Duncan*, 167 Wash.2d 398, 402-03, 219 P.3d 666 (2009).

The trial court's finding that the Magnum manual is evidence of the standard of care was not an abuse of discretion. It is eminently reasonable to view the manufacturer's safety instructions as evidence of safe generator operation and maintenance. The manual makes clear that fire, property damage, and even death can result from placing combustibles within the 3 foot safety zone. D Square's own expert agreed

that the fire would not have happened if the woodpile was outside that safety zone. The trial court correctly found the Magnum manual to be evidence of the standard of care. Given this evidence alone, there was sufficient evidence of the applicable standard of care to create a question of fact precluding dismissal on summary judgment.

However, this was not the only evidence on standard of care. Mr. Dunavent testified, as noted, that he trains his technicians to identify safety issues and warn customers about them. It is undisputed that the generator was too close to the cedar shingles, the house, and the garage. It is equally undisputed that Mr. Cislo did not warn about these hazards. At minimum, this presents a question of fact about breach of duty which should be resolved by the finder of fact.

D. Richard Carman's theory is based on speculation and conjecture and is not conclusive evidence that there was no safety risk at the time of Mr. Cislo's inspection

D Square claims that there was no evidence of a safety hazard in 2008 because there was no evidence that there were cedar shingles under the generator at the time of Mr. Cislo's service call. This is not the standard for determining whether there is a question of fact about the existence of a safety issue in 2008. Additionally, D Square emphasizes certain aspects of Mr. Cislo's testimony at the expense of other portions of the same testimony. D Square would have this court believe that there was

essentially a thoroughfare between the generator and the cedar shingles which Mr. Cislo “walked through” to service the generator. Mr. Cislo’s own testimony, however, was that he had to “worm his way” to the generator to reach the bolts. A reasonable inference from that testimony is that there was barely enough room to “worm” between the cedar shingles and the generator, which could be substantially less than the 18 inches posited by Richard Carman. Mr. Cisco also testified, honestly enough, that he remembered very little about the size, location or composition of the woodpile. He had a vague memory of blue tape, but could not say that all of the shingles were in taped bundles, or indeed, that the materials by the generator were shingles. He was definite only that they were wood.

Mr. Carman’s testimony, quoted by D Square as if it were fact, is based on conjecture and is not admissible evidence of where the cedar shingles were located before the fire or of the distance between the shingles and the generator exhaust pipe. Mr. Carman’s theory is premised on measurements taken at the scene months after the fire. Not a single witness testified that the cedar shingles were stacked on a plastic pallet at any time before the fire, or that the pallet had not been moved in the course of fire-fighting efforts. Even if the shingles were on the pallet prior to the fire, there is no evidence establishing that all of the shingles were on the pallet or that there were not additional shingles piled or stacked next to

the pallet, putting them within a foot or less of the generator exhaust pipe. Mr. Cisco could have “wormed past” cedar shingles stacked next to the generator. He certainly did not testify that there were no shingles stacked next to the plastic pallet, or that there was a plastic pallet in place at all.

Mr. Carman’s measurements may be accurate as to conditions months after the fire, and more months after the service call, but shed no light on the location of the cedar shingles at the time of the service call or the fire. Expert testimony based on speculation and conjecture is not admissible on summary judgment and should not be given any weight by the court.

Davidson v. Municipality of Metropolitan Seattle, 43 Wash.App. 569, 575, 719 P.2d 569, 573 rev. denied 106 Wn.2d 1009 (1986). Expert opinion not founded on the facts of the case is not useful to the trier of fact and should not be admitted. *Id.*

As the moving party, D Square is not entitled to the benefit of any inferences in its favor. The only inference to be made from Mr. Cislo’s testimony is that the wood was very close to the generator. There is no evidence that the wood was “safely stacked,” only that it might have been “neatly stacked.” Mr. Cislo could not remember anything about how the wood was stacked, how high it was stacked, or if it was all bundled. His testimony does not establish that the wood was “safely stacked.”

Nothing in the record or common sense establishes that “neat” and “safe” are synonyms. A stack of wood could appear to be “neat” or tidy, yet be stacked in a way that presents a danger of collapsing. Nothing in Mr. Carman’s testimony establishes his knowledge or expertise in what “mere” service technicians should or do know. And there is a dearth of evidence that Mr. Cislo inspected the woodpile to determine it was “safely stacked.” Indeed, the evidence and inferences therefrom are to the contrary. Without knowledge that the shingles were “safely stacked” and immovable, Mr. Cislo should have warned the homeowner about the danger of stacking shingles near the generator.

D Square represented, by the act of soliciting and obtaining a maintenance contract, that it had expertise regarding maintenance, expertise the typical homeowner does not possess. Its technicians knew, or should have known, of the risks presented by having flammables within the safety zone. Failure to warn the homeowner of this danger was negligence.

D Square’s entire position is essentially that it has no duty to train its technicians to recognize the most obvious of fire hazards or even to acquaint its technicians with any information about the generators it contracts to service. Far from being a “snide comment,” the statement that D Square has made a business decision not to have its technicians read the

manufacturer's manuals—the same manual found by the court to be evidence of the standard of care—is based on Don Dunavent's own testimony. He chooses not to have technicians read manufacturer's manuals because it would take too long given the number and type of machines they service. In contrast, Mr. Dunavent testified that he would expect his technicians to warn homeowners about something like a gas or coolant leak because "that's how we make money." CP 66. He said "we look for things that we can fix...It's called up-selling and that's not a bad thing." CP 66. D Square cannot make any money by warning about flammable materials inside the safety zone and thus apparently feels no need to warn about that problem. D Square is certainly entitled to make any business decision it chooses, but must bear the logical consequences flowing from the choices it makes.

E. D Square failed to meet its burden of establishing absence of a dispute of material fact

D Square incorrectly claims that it was entitled to summary judgment because it met its burden of coming forward with evidence that it did not violate any duty to warn Paul Moldon. (Brief at 36). This is true only when there are no disputed facts. "Once the moving party has met its burden, the burden shifts to the nonmoving party to present admissible evidence demonstrating the existence of a genuine issue of material fact."

Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.
162 Wash.2d 59, 70, 170 P.3d 10, 15 - 16 (2007) However, as was demonstrated in the opening brief and in the discussion above, there are disputed material facts which should have precluded the grant of summary judgment. This does not have to be, as D Square alleges, evidence that the cedar was under the generator at the time of the service call. Evidence that the pile was too close to the generator, collapsed toward the generator, was too close to the house and garage, and was within the three foot safety zone, all contradicted the evidence offered by D Square. Two experts provided evidence that the shingles near the generator were a fire hazard. The fact that one of the experts has not been deposed does not render his report either inadmissible or irrelevant. These conflicting expert opinions are another question of fact precluding summary judgment.

The claim that “Farmers failed to come forward with evidence that Tim Cislo failed to warn about placing combustibles three feet from the generator” (brief at 45) is simply wrong. In answer to interrogatories, D Square stated that no combustibles were observed within 10 feet of the generator. CP 439. D Square also answered that it had no duty to warn Mr. Moldon that he should keep combustibles away from the generator. CP 445. In answer to interrogatory 15, requesting information on training given to D Square employees regarding fire safety and warning to owners,

D Square answered “If we see an obvious hazard we will bring it to the owner’s attention and hope the owner will remedy the hazard. In this case when we serviced the generator 2 months before the fire there was no hazard visible.” CP 446-7. Mr. Cislo testified he did not mention any fire hazards to Mr. Moldon. CP 604, deposition p. 40 lines 10-12. This is all evidence that Mr. Cislo did not warn Mr. Moldon about flammable material within the 3 foot safety zone.

The Magnum manual, accepted by the court as evidence of the standard of care, required a three foot safety clearance. It is undisputed that there were flammable materials inside that safety zone. It is undisputed a warning would have prevented the fire. Given this evidence, there clearly are questions of fact which should be resolved by the finder of fact, not by the court on summary judgment.

F. Paragraph 12 of Carman’s declaration should have been stricken for lack of foundation

D Square argues that fire expert Richard Carman was qualified, by virtue of his knowledge about his own training and experience, to testify about what a reasonable generator technician should know about the flammability of cedar shingles next to a hot exhaust pipe. Nothing in Mr. Carman’s qualifications, however, indicates a familiarity with standards for generator technician training standards or of the knowledge of the

average person about the flammability of cedar shingles. The record does show that cedar is often used as kindling. The average person certainly knows, without the benefit of Mr. Carman's fire training, that kindling burns when in proximity to a heat source.

Whether or not plaintiff offered controverting expert testimony on the knowledge of the average technician is irrelevant to determining the admissibility of Mr. Carman's opinion testimony. The admissibility of Mr. Carman's testimony must be judged on its own merits and the foundation for the testimony must be apparent from the testimony itself. An expert must stay within the area of his expertise. See *McBroom v. Orner*, 64 Wash.2d 887, 889, 395 P.2d 95, 11 A.L.R.3d 914 (1964); *Sehlin v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 38 Wash.App. 125, 132-33, 686 P.2d 492, *review denied*, 102 Wash.2d 1022 (1984) (trial court did not err by refusing to allow railroad worker to testify as expert where no effort was made to lay sufficient foundation to qualify the witness as to proper methods of rerailing railroad cars); cf. *Boeing Co. v. Sierracin Corp.* 108 Wash.2d 38, 50-51, 738 P.2d 665 (1987) (court did not err in excluding testimony of engineer who had almost no experience with reverse engineering of the type needed). There is no foundation establishing Mr. Carman's qualifications to testify about the knowledge of the average layperson about combustibility of cedar shingles, nor any

basis for his speculation that the average person would not understand that a woodpile can tumble over. Without such foundation, it was error to admit paragraph 12 of Mr. Carman's declaration.

In any case, it is irrelevant what Tim Cislo did or did not know about the flammability of kindling next to an 800 degree exhaust pipe. The issue before the court was the knowledge of the reasonably prudent technician. A reasonably prudent technician should be aware of fire hazards, including the problem of stacking flammable materials within the manufacturer's suggested safety zone. Had Mr. Cislo read the Magnum manual, he would have been aware of the dangers. Failure to require the technicians to be familiar with the safety hazards associated with the machines they contracted to service was a breach of the standard of care and a basis for imposing liability on D Square.

III. CONCLUSION

D Square's second motion for summary judgment should have been denied. A service company with a maintenance contract for a potentially dangerous machine like a generator has a duty as a matter of law to warn its customers about fire hazards such as violating the manufacturer's safety zone. D Square's opinion that it is entitled to have its technicians wear blinders and look only at the specific item they are servicing at the moment is belied by the testimony of its own president

that technicians are expected to warn homeowners of obvious hazards. The kindling piled near the generator was just such a hazard. At a minimum, there are questions of fact about the location and placement of the cedar, and conflicting expert testimony, which should have precluded summary judgment. The cross appeal should be denied, the order granting summary judgment reversed, and this matter should be remanded for trial on the merits.

DATED this 7th day of July, 2010.

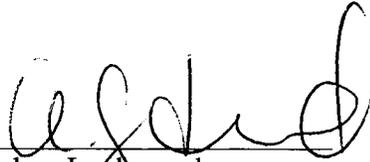
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Executed on this 7th day of July, 2010, at Seattle, Washington.

**I declare under penalty of perjury under the laws of the State
of Washington that the above is true and correct.**



Andrea Lockwood
Legal Secretary to Nancy K.
McCoid