

No. 65372-5-I

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

MARK LITCHFIELD, on behalf of himself and all other similarly
situated,

Petitioners/Cross-Respondents/Plaintiffs,

v.

KPMG LLP,

Respondent/Cross-Petitioner/Defendant.

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TG*

**AMICUS CURIAE BRIEF OF WASHINGTON
SOCIETY OF CERTIFIED PUBLIC ACCOUNTANTS**

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I. INTRODUCTION

The Washington Society of Certified Public Accountants (“the Society”) is a professional association dedicated to the needs of certified public accountants (“CPAs”) in the state of Washington and to those accountants who are attempting to obtain the CPA designation. Its membership consists of both accountants who are licensed as CPAs and accountants who are pursuing that designation. In the Society’s view, both licensed and non-licensed accountants on audit engagement teams who are engaged in applying their advanced knowledge of accounting principles to the evaluation of financial records are professionals. In that process, such accountants apply both judgment and discretion to the task at hand.

The case at hand challenges these principles: Class Petitioners’ question whether accountants who are not licensed as CPAs are providing professional services when they perform work on audit engagement teams. This question has been raised in connection with the interpretation of Washington’s Minimum Wage Act (“MWA”), Ch. 49.46 RCW and the overtime exemption in the MWA for professionals, RCW 49.46.010(5)(c).

In the Society’s view, the trial court below correctly concluded in its March 1, 2010 order that accountants need not be licensed as CPAs in order to qualify for the professional exemption, but the court erred in

subsequently ruling that accountants performing audit work with less than 2,000 hours of prior audit experience cannot qualify for the professional exemption. In reaching this last conclusion, the trial court has made two major mistakes that are of direct concern to the Society. First, the trial court has imported into the MWA certain concepts and language from the Public Accountancy Act (“the Accountancy Act”), Ch. 18.04 RCW, when it is clear that those concepts and principles were established for a purpose entirely unrelated to the MWA. The MWA and its implementing regulations, not the Accountancy Act, establish the standard for eligibility for the professional exemption from the MWA. Second, the trial court’s rationale fails to account for the knowledge, judgment, and discretion that all accountants participating in audit work contribute to the audit process. The trial court’s April 22, 2010 ruling misapplies the Accountancy Act, creates anomalous and arbitrary distinctions within the accounting profession, and incorrectly concludes that first-year accountants on audit engagement teams are non-professional “assistants.” The Society requests this Court to reverse that ruling.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The Society is a voluntary professional society with approximately 10,000 members. This number includes 7,800 CPAs licensed in Washington, as well as accountants who are pursuing a CPA license,

college students, accounting educators at the college level, retired and former-CPAs, and non-CPA senior support staff who work in public accounting firms under the direction of a licensed CPA. The Society has provided services for over one hundred years to CPAs in academia, government, business, non-profit organizations, and public accounting firms. The Society's mission is to serve the public and the professional needs of CPAs. It does so by promoting high professional standards in the accounting profession in Washington, providing continuing professional education and consumer education, and monitoring and participating in initiatives and legislation affecting public accounting.

The Society has an interest in this matter because its membership includes first-year accountants who are not yet CPAs. The Society also has an interest because the trial court relied for this decision upon the CPA licensing requirements set out in the Accountancy Act, and the implementing regulations promulgated by the Washington State Board of Accountancy (the "Board of Accountancy"). These licensure requirements govern who qualifies as a CPA in Washington. These requirements do not address whether accountants who are not CPAs are "professionals" for purposes of the MWA exemption.

III. STATEMENT OF THE CASE

This case concerns the professional exemption under the MWA

and how that exemption should be applied to an accountant. However, to the extent that a recitation of the facts of this case is necessary, the Society adopts by reference the Statement of the Case set forth in Respondent KPMG's brief.

IV. ARGUMENT

A. **The Trial Court Correctly Ruled That Accountants Who Are Not CPAs Can Be Exempt Professionals.**

The trial court properly rejected Class Petitioners' argument that only accountants performing audit work who are CPAs are exempt professionals under the MWA. The CPA licensure requirements set out in the Accountancy Act have no bearing on whether an accountant (whether or not performing audit work) qualifies as an exempt professional for the purposes of the MWA.

1. **The Accountancy Act Is a Separate Statutory Scheme from the MWA and Has a Distinctly Different Purpose.**

The MWA and the Accountancy Act serve fundamentally different purposes. The MWA is part of a comprehensive statutory scheme regarding minimum standards for working conditions, wages, and the payment of wages standards. *See, e.g.*, RCW Title 49, "Labor Regulation" and the MWA, Ch. 49.46 RCW. The purpose of the MWA is to establish minimum standards of employment and to encourage employment opportunities within Washington State. RCW 49.46.005; *see also Bostain*

v. Food Express, Inc., 159 Wn.2d 700, 712, 153 P.3d 846 (2007) (“... the legislature’s policy declaration in RCW 49.46.005 describes the purpose of the MWA and speaks to the importance of minimum wage protections for Washington employees in order to encourage Washington employment opportunities”).

To that end, the MWA requires employers to pay a minimum wage and overtime to their employees unless the employee is a type excluded by the statute. RCW 49.46.010(5)(c). Both the MWA and the federal Fair Labor Standards Act (“FLSA”) exempt individuals engaged in a “bona fide . . . professional capacity” from minimum wage and overtime provisions. RCW 49.46.010(5)(c); 29 U.S.C. § 213(a)(1). Professionals are exempt because the work they perform is not the type of work that would further the purposes of either the MWA or the FLSA. As the U.S. Department of Labor (“DOL”) explained:

The legislative history indicates that the [FLSA] section 13(a)(1) exemptions were premised on the belief that the workers exempted typically earned salaries well above the minimum wage, and they were presumed to enjoy other compensatory privileges such as above average fringe benefits and better opportunities for advancement, setting them apart from the nonexempt workers entitled to overtime pay. Further, the type of work they performed was difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week, making compliance with the overtime provisions difficult and generally precluding the potential job expansion intended by the FLSA’s time-and-a-half overtime premium.

“Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,” Final Rule, 69 Fed. Reg. 22122, 22123-24 (April 23, 2004).

The Accountancy Act is not part of Washington’s comprehensive wage and hour statutory scheme. Instead, it is a professional licensing statute, located within RCW Title 18, “Businesses and Professions.” The purpose of the Accountancy Act is to promote public confidence in financial records that have been audited by certified public accountants:

- (1) It is the policy of this state and the purpose of this chapter:
 - (a) To promote the dependability of information which is used for guidance in financial transactions . . . ; and
 - (b) To protect the public interest

RCW 18.04.015.

The Board of Accountancy is the state agency charged with implementing the Accountancy Act. WAC 4-30-020. Consistent with the stated purpose of the Accountancy Act, the Board of Accountancy is “a consumer protection agency that initially qualifies and continues to monitor the professional performance and ethical behavior of Certified Public Accountants (CPAs).” See <http://www.cpaboard.wa.gov>; see also WAC 4-30-020.

Given that the Accountancy Act is an entirely separate statutory scheme from the MWA, its provisions simply have no bearing on whether

the professional exemption from the MWA applies to an accountant who is not a CPA.

2. The Accountancy Act Establishes Licensing Requirements for CPAs, but Does Not Preclude Accountants Who Are Not CPAs from Providing Audit Services.

a. The Accountancy Act Governs Licensure of Public Accountants, Not “Auditors.”

Class Petitioners erroneously assume throughout their brief that a specialized profession of “auditors” exists. *See, e.g.*, Brief of Class Petitioners at p. 13 (asserting that the Accountancy Act governs “the minimum requirements for the professional practice of auditing”) and p. 20 (asserting that auditing is “a very specialized form of professional work”). Consequently, Class Petitioners argue that accountants performing audit services are not professionals unless they satisfy specialized licensing rules that do not apply to other accountants. *Id.* at 17, 21.

Class Petitioners are wrong. “Auditors” are members of the public accounting profession. The Accountancy Act does not license “auditors” to practice “auditing.” Instead, the Act governs requirements for “a license to practice public accounting.” RCW 18.04.105(1). It provides that an accountant who satisfies the three “E’s” – the requirements of education, experience and passage of an examination – earns a license to

represent himself or herself as a CPA. RCW 18.04.105(1)(b). The Act is consistent with licensing requirements nationally. Indeed, one of the Act's stated purposes is to "assure to the greatest extent possible that certified public accountants from Washington State are substantially equivalent with certified public accountants in other states" RCW 18.04.015(2).

Audit experience in a public accounting firm is not required to earn a CPA license. An accountant can gain experience for a CPA license "[t]hrough the use of accounting, issuing reports on financial statements, management advisory, financial advisory, tax, tax advisory, or consulting skills." RCW 18.04.105(1)(d)(i) (emphasis added). A licensure candidate's experience should demonstrate the opportunity to use a range of skills "generally used in business and accounting and auditing" which include, but are not limited to "accounting for transactions, budgeting, data analysis, internal auditing, preparation of reports to taxing authorities, controllership functions, and financial analysis, performance auditing and similar skills." WAC 4-30-070(2)(c). These skills can be gained through employment with industry, government, academia, or a public accounting firm. WAC 4-30-70(1). The purpose of the experience requirement is to demonstrate the following seven broad competencies:

- (a) Knowledge of the Public Accountancy Act and related board rules applicable to licensed persons in the state of Washington;
- (b) Assess the achievement of an entity's objectives;

- (c) Develop documentation and sufficient data to support analysis and conclusions;
- (d) Understand transaction streams and information systems;
- (e) Assess risk and design appropriate procedures;
- (f) Make decisions, solve problems, and think critically in the context of analysis; and
- (g) Communicate scope of work, findings and conclusions effectively.

WAC 4-30-070(3). None of these competencies are specific to “auditors.”

Moreover, these competency requirements demonstrate that licensure candidates – who, by definition, are accountants who are not yet CPAs – are required to obtain experience in varied, intellectual work that consistently requires the exercise of discretion and judgment.

In short, Washington licenses CPAs. It does not license “auditors.” The profession of “auditing” is Class Petitioners’ creation alone.

b. The Accountancy Act Does Not Require Accountants to Obtain a CPA License in Order to Practice Public Accounting.

Consistent with its statutory purpose of consumer protection, the Accountancy Act does not require an individual to first obtain a CPA license to legally practice as an accountant in Washington. Instead, the Act provides that a CPA license is required for an individual to “hold himself or herself out to the public or assume or use the designation of ‘certified public accountant’” RCW 18.04.345(2). This requirement

exists to maintain the investing public's confidence in audited financial statements, and to that end, to ensure that CPAs are licensed and abide by a strict code of ethics. *See, e.g.*, RCW 18.04.105; RCW 18.04.295; and WAC 4-30-40.

The Accountancy Act specifically provides that accountants who are not CPAs can provide accounting services, including audit services; they are prohibited only from representing to the public that they are CPAs:

Nothing in this chapter prohibits any individual not holding a license and not qualified for the practice privileges authorized by subsection (2) of this section from serving as an employee of a firm licensed under RCW 18.04.195 and 18.04.215. However, the employee shall not issue any compilation, review, audit, or examination report on financial or other information over his or her name.

RCW 18.04.350(1). Pursuant to this statute, an employee can perform his or her duties (including auditing services) for a licensed CPA firm, as long as the unlicensed employee does not issue audit opinions over his or her name.¹

3. Under the MWA, Accountants Who Are Not CPAs and Who Perform Audit Services Are Properly Classified as Exempt Professionals.

The MWA, not the Accountancy Act, provides the standard for

¹ It is misleading to argue, as Class Petitioners do, that it is a crime for an unlicensed individual to practice as an auditor. Brief of Class Petitioners at 18. It is only a crime for an unlicensed individual to issue audit opinions over his or her name or to hold himself or herself out as a CPA. RCW 18.04.370(1).

eligibility for the professional exemption. The exemption turns on whether accountants regularly exercise their discretion and judgment in applying their knowledge of sophisticated accounting principles as members of audit engagement teams. The accounting profession considers accountants who perform audit services to be doing the type of work that would qualify for the professional exemption, regardless of whether they are licensed as CPAs.

The MWA does not define the term “employed in [a] bona fide . . . professional capacity.” RCW 49.46.010(5)(c). However, the MWA grants the Department of Labor and Industries (“DLI”) authority to “define[] and delimit[]” the term. *Id.* Under DLI’s definition, an employee qualifies for the professional exemption under the MWA if the employee is compensated “on a salary or fee basis” and his or her primary duty consists of the performance of work (1) “requiring knowledge of an advanced type in a field of science or learning,” which (2) “includes work requiring the consistent exercise of discretion and judgment” WAC 296-128-530(5).

DLI recognizes that accountants possess the advanced, specialized knowledge of a learned profession. *See* DLI Employment Standards, “Exemption from Minimum Wage and Overtime Requirements for Professional Positions, Administrative Policy ESA 9.5 at 4 (“Policy ESA

9.5”) (July 24, 2005) (“Generally speaking the requisite knowledge which meet the requirement for a prolonged course of specialized intellectual instruction and study include nursing, accounting, actuarial computation, engineering”). The DOL has reached the same conclusion. *See*, former 29 C.F.R. § 541.301(e)(1) (2003) (“Generally speaking the professions which meet the requirement for a prolonged course of specialized intellectual instruction and study include law, medicine, nursing, accounting, . . . and so forth.”).² Class Petitioners, like other accountants hired by KPMG and as is custom in the industry, have obtained a college degree in accounting and related fields. CP 1348 (Declaration of Robert Carlile, ¶ 18).

DLI recognizes that CPAs are exempt professionals in all but unusual cases. Policy ESA 9.5 at 5. DLI also recognizes that an accountant who is not a CPA qualifies for the professional exemption if his or her duties include the consistent exercise of discretion and judgment. *Id.* As the agency tasked with administering the MWA, DLI’s recognition that accountants who are not CPAs may be exempt professionals is entitled to deference. *See Silverstreak, Inc. v. Dep’t of*

² Prior to August 2004, the MWA regulations regarding exemptions were identical in many parts to the federal regulations. Policy ESA 9.5 at 3. The federal regulations were amended in 2004. *Id.* DLI relies upon interpretations of the pre-2004 federal regulations where identical. *Id.*

Labor & Industries, 159 Wn.2d 868, 884-85, 154 P.3d 891 (2007) “[t]his court has made clear that we will give great deference to an agency’s interpretation of its own properly promulgated regulations”).

Accountants who are not yet CPAs, but who perform audit work, use discretion and judgment to apply their specialized academic knowledge to particular circumstances. *See, e.g.*, CP 1378-81, 1386 (Declaration of K. Handley, ¶¶ 38-47) and CP 1409 (Declaration of E. Larsen, ¶ 10). Such accountants use professional judgment in their daily work, including planning audit procedures, evaluating and testing the reasonableness of client estimates, and research analyzing complex accounting and audit issues. *See, e.g.*, CP 1425-29 (Declaration of K. Blair, ¶¶ 14-21); CP 1435-36 (Declaration of T. Crawford, ¶¶ 13, 14).

Professional standards of conduct require all members of an engagement team to exercise independent judgment. They do not differentiate between a first-year accountant on an audit engagement team and a second-year accountant with a CPA license on that same team. Both state and national professional standards mandate that all accountants serving on an audit engagement team, from the signing audit partner down to the newest audit associate, perform their work with independence, due professional care, and professional skepticism. The Board of Accountancy’s professional standards of independence, judgment and

honesty apply to all accountants performing services, regardless of licensure status and the type of accounting service provided:

When offering or performing services, licensees, CPA-Inactive certificate holders, nonlicensee firm owners, and employees of such persons must:

- Remain honest and objective;
- Not misrepresent facts;
- Not subordinate their judgment to others; and
- Remain free of conflicts of interest

WAC 4-30-40. Similarly, WAC 4-30-046 prohibits such accountants, regardless of licensure status, from performing any professional service unless they can perform that work with professional competence. The Board of Accountancy also requires CPAs and accountants who are not CPAs alike to comply with national professional standards promulgated by the federal government or national organizations:

Licensees, . . . CPA-Inactive certificate holders, CPA firms, nonlicensee firm owners, and employees of such persons must comply with rules, regulations, and professional standards promulgated by the appropriate bodies for each service undertaken. However, if the requirements found in the professional standards listed in this section differ from the requirements found in specific board rules, board rules prevail.

WAC 4-30-48 (emphasis added; listing the requisite standards promulgated by national authoritative bodies). As demonstrated by these standards, the accounting profession considers accountants to be “professionals” even though they may still be accumulating the experience needed to qualify as CPAs.

In sum, a CPA license is not required to practice as an accountant, or to exercise professional judgment or discretion in providing auditing services. The Court should reject the arbitrary licensure rule urged by Class Petitioners and affirm the trial court's March 1 Order.

B. The Trial Court Erred in Ruling That First-Year Accountants Without CPAs on Audit Engagement Teams Are Not Exempt Professionals Until Completion of One Year of “On the Job Audit Work-Training Experience.”

1. The Trial Court Erred by Importing the Accountancy Act's Experience Requirement into the MWA.

Although the trial court properly ruled that an accountant did not need a CPA license to qualify for the professional exemption under the MWA, it erred in ruling that first-year accountants without CPA licenses on audit engagement teams are not exempt professionals until they complete 2,000 hours of “on-the-job audit work-training experience.” CP 2349. The trial court ruled that this experience together with the bachelor's degree specified in WAC 4-25-710 was part of the “minimal educational requirements” for audit associates. *Id.* The trial court based this ruling upon the Board of Accountancy's requirement that CPA candidates obtain 2,000 hours of experience in certain broad competency areas before the CPA license is awarded. WAC 4-30-070. This ruling is incorrect for a number of reasons.

First, the trial court's importation of the experience requirement for

a CPA license into the MWA is entirely without precedent. No Washington decision has expressly or implicitly ruled that the Accountancy Act has any bearing whatsoever on whether accountants are exempt from the MWA. Further, there is no precedent that permits use of one statute to interpret an entirely separate and unrelated statute.

Second, DLI has already addressed the question of whether accountants without CPA licenses may qualify for the professional exemption under the MWA. The trial court should have deferred to DLI's interpretation of its own regulations. *Silverstreak*, 159 Wn.2d at 885. It did not do so. Instead, it created from whole cloth an "on-the-job audit work-training" requirement for the professional exemption, applicable only to accountants performing audit services.

Third, neither the Accountancy Act nor its regulations require 2,000 hours of *audit* experience. Instead, CPA candidates can satisfy the experience requirement by performing a variety of accounting services. *See* RCW 18.04.105(1)(d)(i); WAC 4-30-070. It makes no sense to impose a prior audit experience requirement on first-year accountants performing audit services based on a statute that, by its very terms, governs the licensing of *accountants*, not auditors, and does not require *audit* experience to earn a license.

Fourth, the trial court's imposition of an additional educational

requirement upon accountants performing audit services is contrary to the Accountancy Act. The Act itself delineates between education and experience. *Compare* RCW 18.04.105(1)(b) (the Board of Accountancy shall establish educational standards) with RCW 18.04.105(1)(d) (requiring one year of experience). Each is a separate and distinct requirement under the Act; experience does not satisfy the education requirement, and education does not satisfy the experience requirement. *Id.* No basis exists under the Act for a rule that requires experience to complete the educational requirement.

2. The Accounting Profession Considers First-Year Accountants Performing Audit Services to Be Professionals, Not “Apprentices” or “Trainees.”

No professional standard or rule prescribes the work that a first-year accountant on an audit engagement team may or may not perform. The accounting profession does not consider these accountants to be “apprentices” or “trainees.” Like other members of the audit engagement team, they perform tasks requiring the application of sophisticated accounting concepts to complex facts and the exercise of judgment.

Class Petitioners point to a professional standard, AU 311.02, as support for their argument that audit associates are “assistants” subject to supervision by an “auditor.” Brief of Class Petitioners at 21. This misuses the language of this standard which states:

The auditor with final responsibility for the audit may delegate portions of the planning and supervision of the audit to other firm personnel. For purposes of this section, (a) firm personnel other than the auditor with final responsibility for the audit are referred to as *assistants* and (b) the term *auditor* refers to either the auditor with final responsibility for the audit or assistants.

AU 311.02, “Planning and Supervision” (emphasis in original). *See* Appendix of Respondent KPMG, at App. 76, attaching AU 311. AU 311.02 required the auditor with final responsibility to supervise all accountants in the engagement team hierarchy, from the next-senior partner to the newest audit associate. AU 311 has been superseded by the Public Company Accounting Oversight Board (“PCAOB”) Auditing Standard No. 10. *See* PCAOB Auditing Standard No. 10.³ Like AU 311, this standard assigns responsibility to the “engagement partner” for proper supervision of the members of the engagement team. *Id.* It also holds each member of the engagement team responsible for raising issues of concern, regardless of the experience of the team member:

Note: In applying due professional care in accordance with AU Sec. 230, each engagement team member has a responsibility to bring to the attention of appropriate persons, disagreements or concerns the engagement team member might have with respect to accounting or auditing issues that he or she believes are of significance to the financial statements or the auditor’s report regardless of how those disagreements or concerns may have

³ PCAOB Auditing Standard No. 10 is located at http://pcaobus.org/Standards/Auditing/Pages/Auditing_Standard_10.aspx. The PCAOB is a nonprofit corporation established by Congress to oversee the audits of public companies (<http://pcaobus.org/About/Pages/default.aspx>).

arisen.

Id. PCAOB Standard No. 10 demonstrates the point made earlier: professional standards do not change based on the experience or licensure of an accountant. All accountants on an audit engagement team are subject to supervision, and must comply with professional standards.

3. The Trial Court’s “On-the-Job Audit Work-Training Experience” Requirement Will Create Arbitrary Discrimination and Public Confusion.

The trial court’s ruling singles out first-year accountants performing audit services and requires them to complete an “on-the-job audit work-training experience” before they are deemed exempt professionals under the MWA. Under this ruling, two unlicensed accountants with identical educational backgrounds performing jobs of very similar complexity would be treated differently. For example, a first-year accountant performing tax services would be exempt as a professional. A first-year accountant providing audit services, however, would not be an exempt professional until he or she had completed the “minimal educational requirement” of 2,000 hours of audit experience. Indeed, under this ruling, the same person loses or gains exempt status depending on the nature of the engagement (*e.g.*, tax, audit, budget, etc.) even though neither the MWA nor the Accountancy Act makes any such distinction. A first-year accountant is not exempt while performing audit

services, but is exempt if he or she then provides tax services. This arbitrary distinction completely fails to account for the responsibility of the accountant in both tasks to apply the specialized knowledge of accounting and to exercise independence and judgment in the process.

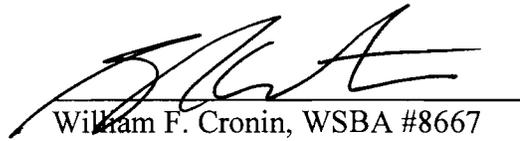
The Society is also concerned that the trial court's ruling inaccurately describes to the public the nature of work performed by first year accountants on audit engagement teams. The trial court mischaracterizes such accountants as non-professional "assistants" when, in fact, such accountants consistently perform work that involves the use of discretion and judgment in the application of sophisticated accounting knowledge to analysis of financial statements and financial procedures. Consequently, the trial court's ruling unfortunately trivializes the work performed by first-year accountants on audit engagement teams, and may undermine public confidence in the work of these professionals.

V. CONCLUSION

For the reasons stated above, the Society respectfully requests that the Court affirm the trial court's March 1, 2010 Order and reverse the trial court's April 22, 2010 Order.

Respectfully Submitted this 6th day of May, 2011.

CORR CRONIN MICHELSON
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A handwritten signature in black ink, appearing to read 'W. Cronin', is written over a horizontal line.

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Attorneys for Washington Society of
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CERTIFICATE OF SERVICE

The undersigned hereby declares as follows:

I am employed at Corr Cronin Michelson Baumgardner & Preece LLP, attorneys for Washington Society of Certified Public Accountants herein.

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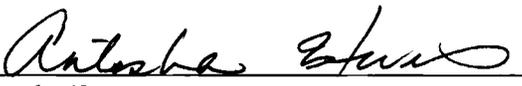
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