

IN THE SUPREME COURT OF OHIO

STATE, *ex rel.* ASSOCIATED BUILDERS
& CONTRACTORS OF CENTRAL OHIO,
et al.,

Plaintiffs-Appellants,

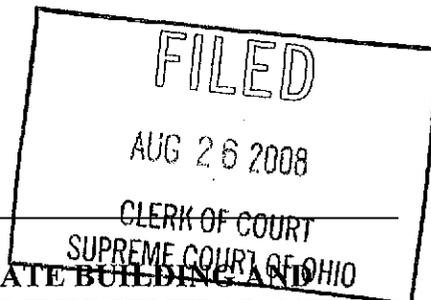
v.

FRANKLIN COUNTY BOARD OF
COMMISSIONERS, *et al.*,

Defendants-Appellees.

Case No. 08-1478

On Appeal from the Court of Appeals for
Franklin County, Tenth Appellate District,
Case No. 08AP-301



**MEMORANDUM OF *AMICI CURIAE*, THE OHIO STATE BUILDING AND
CONSTRUCTION TRADES COUNCIL AND THE COLUMBUS/CENTRAL OHIO
BUILDING & CONSTRUCTION TRADES COUNCIL, IN RESPONSE TO
APPELLANTS' MEMORANDUM IN SUPPORT OF JURISDICTION**

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STATEMENT OF LACK OF PUBLIC OR GREAT GENERAL INTEREST

The Ohio State Building and Construction Trades Council, AFL-CIO ("Council"), is a statewide organization representing construction trades unions throughout the State of Ohio. There are approximately 100,000 union construction tradesmen engaged in construction throughout the state. The Columbus/Central Ohio Building & Construction Trades Council, AFL-CIO, is the Local Council representing construction trades unions throughout Central Ohio.

The Council and its Local Councils are responsible for protecting the interests of construction tradesmen and tradeswomen throughout the state. They carry out that responsibility by, *inter alia*, participating as *amici curiae* on a variety of issues in cases pending in courts across the state. This Court has long recognized the Council's interest by accepting the Council's *amicus* briefs in cases dealing with competitive bidding¹ and the prevailing wage law.²

Contrary to the Plaintiffs-Appellants' arguments in this case, the Court of Appeals for Franklin County, Tenth Appellate District, simply deferred to the Franklin County Commissioners' well-recognized discretion in awarding competitively-bid contracts. Plaintiffs-Appellants would have this Court substitute its judgment for the Commissioners' judgment as to which bid was the "lowest and *best*" for the painting contract on the county's new baseball

¹See *U.S. Corrections Corp. v. Ohio Dep't of Indus. Relations* (1995), 73 Ohio St.3d 210 (1995); *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgt. Dist.* (1995), 73 Ohio St.3d 590; and *Plumbers & Steamfitters Local Union 83 v. Union Local School Dist. Bd. of Educ.* (1999), 86 Ohio St.3d 318.

²See *State, ex rel. Evans v. Moore* (1982), 69 Ohio St.2d 88; *State v. Buckeye Elec. Co.* (1984), 12 Ohio St.3d 252; *State, ex rel. Harris v. Williams* (1985), 18 Ohio St.3d 198; *Harris v. Van Hoose* (1990), 49 Ohio St.3d 24; *Episcopal Retirement Homes, Inc. v. Ohio Dep't of Indus. Relations* (1990), 55 Ohio St.3d 704; *Ohio Asphalt Paving, Inc. v. Ohio Dep't of Indus. Relations* (1991), 60 Ohio St.3d 719; *Harris v. Atlas Single Ply Sys., Inc.* (1991), 64 Ohio St.3d 171; and *Sheet Metal Workers' Int'l Ass'n, Local Union 33 v. Mohawk Mechanical, Inc.*, 86 Ohio St.3d 611 (1999).

stadium. *Amici Curiae* maintain that the Commissioners properly exercised their discretion in this case by rejecting the low bidder for, *inter alia*, its long and repeated history of significant violations of the Ohio prevailing wage law, R.C. Chapter 4115. Both the trial court and the Court of Appeals properly refused to interfere with the Commissioners' exercise of their discretion, and this Court should, therefore, decline to exercise jurisdiction over this case.

Although Plaintiffs-Appellants now attempt to make this case appear of the utmost importance by injecting, for the first time in this litigation, "critical" constitutional arguments, this case is, in reality, nothing more than a "disappointed bidder" case. The Painting Company bid on, but was not awarded, a public construction contract. In rejecting its bid, Franklin County relied upon the company's well-documented history of violating state law on previous public construction contracts. The County was entitled to rely on this history in rejecting the Painting Company's bid, regardless of whether the County had previously adopted quality contracting standards expressly advising potential bidders that their prior non-compliance with the law would be considered when evaluating their bids.

Under standards clearly announced by Franklin County prior to bidding, the Painting Company's bid was determined to not be the "lowest and best." The County, therefore, properly exercised its discretion in awarding the contract to another bidder. Despite newly-formulated constitutional arguments, Plaintiffs-Appellants' assertions boil down to nothing more than a claim that it should have been awarded a contract that went to another bidder. Such trivial arguments should not provide the basis for this Court's exercise of its discretionary jurisdiction.

STATEMENT OF THE CASE AND THE FACTS

On April 9, 2002, the Franklin County Board of Commissioners, with the stated purpose of ensuring "that the County's contractors are compliant with the law, financially stable, and

capable of executing construction contracts in a competent and professional manner," Franklin County Resolution No. 421-02 (April 9, 2002), adopted Resolution Nos. 421-02 and 422-02 which set forth "qualitative criteria" under which the County would evaluate future bids for construction contracts. Among the criteria was the following requirement:

Bidder certifies that Bidder has not been debarred from public contracts or found by the state (after all appeals) to have violated prevailing wage laws more than three times in a two-year period in the last ten years.

Franklin County Resolution No. 421-02 at ¶ 5.

On June 13, 2006, the Commissioners adopted Resolution No. 476-06 in which they determined that enforcement of quality contracting standards would foster the goals of "expediting the construction process," promote "fair and quality employment practices," and "create a safer construction site" on the Huntington Park project. Franklin County Resolution No. 476-06 (June 13, 2006). It therefore reaffirmed the qualitative criteria contained in Resolution Nos. 421-02 and 422-02 "as bid conditions which will bind all parties working on the Huntington Park construction project including contractors and subcontractors of whatever tier."

Id.

Consistent with Resolution Nos. 421-02, 422-02, and 476-06, the "Project Manual for Bids to Perform Huntington Park" ("Project Manual") contained the following:

8.2.1 The Contract will be awarded to the lowest and best Bidder as determined in the discretion of the County or all bids will be rejected in accordance with the following procedures:

* * *

8.2.3 In determining whether a Bidder is best, factors to be considered include, without limitation:

* * *

8.2.3.4 The conduct and performance of the Bidder on previous contracts, *which shall include*, without limitation, *compliance with prevailing wage laws* and equal opportunity requirements;

* * *

8.2.4 The Construction Manager shall obtain from the lowest responsive Bidder any information the Project Representative deems appropriate to the consideration of factors showing that such Bidder's bid is best, including without limitation the following:

* * *

8.2.4.15 *Information that the Bidder has not been debarred from public contracts or found by the state (after all appeals) to have violated prevailing wage laws more than three times in a two-year period in the last ten years.*

* * *

Project Manual at 13-15 (emphasis added).

In October, 2007, the Commissioners advertised Huntington Park Bid Package No. 3, which included the painting contract. Both the Painting Company and the W.F. Bolin Company ("Bolin") submitted bids for the painting contract. The Painting Company's bid was the lower of the two bids.

Consistent with Resolution Nos. 421-02, 422-02, and 476-06 and the Project Manual, the County conducted an investigation of the Painting Company and its bid to determine whether it was the best bid. As part of its investigation, the County contacted the Ohio Department of Commerce, Bureau of Wage and Hour ("Department"), to inquire with regard to the Painting Company's history of compliance with the prevailing wage law, R.C. Chapter 4115. The investigation revealed, *inter alia*, that the Painting Company violated the prevailing wage law no fewer than eight times during the relevant time period.³ Based upon its investigation, the Commissioners rejected the Painting Company's bid, specifically citing its history of prevailing wage violations. On March 4, 2008, following the Painting Company's bid protest, the

³Although the Painting Company attempts to characterize its prevailing wage violations as minor or clerical errors, a review of the record reveals that many of the violations were of a serious nature and involved improperly reporting that numerous individuals were "apprentices," and thereby paid at a lower rate of wages, when such individuals were not, in fact, enrolled in an apprenticeship program registered with the Ohio Apprenticeship Council.

Commissioners reaffirmed their rejection of the company's bid on the Huntington Park painting contract.

The Painting Company and the Associated Builders and Contractors of Central Ohio (collectively, "Plaintiffs") commenced this case on March 5, 2008 against the Franklin County Board of Commissioners and the three individual Commissioners. In their complaint, Plaintiffs asserted a variety of claims alleging that the Commissioners abused their discretion in awarding the competitively-bid painting contract on Huntington Park, Franklin County's new baseball stadium, to a bidder other than the Painting Company.

The trial court accelerated proceedings in the case, and a trial on the merits was conducted on March 24 & 25, 2008. On March 31, 2008, the trial court issued its *Decision of the Court Following Trial on the Merits and Final Judgment* ("Trial Court Decision") in which it rejected each of Plaintiffs' claims, dismissed the complaint, and entered final judgment in favor of the Commissioners. The Court of Appeals for Franklin County, Tenth Appellate District, affirmed. *State ex rel. Associated Builders & Contractors of Cent. Ohio v. Franklin County Bd. of Comm'rs* (Franklin App. June 13, 2008), No. 08AP-301, 2008-Ohio- 2870. Plaintiffs now seek the review of this Court.

ARGUMENT

Amici Curiae's Proposition of Law No. 1:

AN UNSUCCESSFUL BIDDER DOES NOT HAVE A CONSTITUTIONALLY-PROTECTED PROPERTY OR LIBERTY INTEREST IN A PUBLIC CONTRACT.

Plaintiffs first assert that the Commissioners' rejection of the Painting Company's bid on the Huntington Park Project constituted an unconstitutional violation of the company's procedural due process rights. This argument was not raised in the courts below, and is,

therefore, beyond the scope of this Court's review. In any event, the argument is utterly without merit and should not serve as a basis for this Court's exercise of its discretionary jurisdiction.

"It is an established rule of long standing in this state that a constitutional question, either in a civil or criminal action, can not be raised in the Supreme Court unless it was presented and urged in the courts below." *State v. Phillips* (1971), 27 Ohio St.2d 294, 302 (citations omitted). See also *Danis Clarkco Landfill Co. v. Clark County Solid Waste Mgt. Dist.* (1995), 73 Ohio St.3d 590, 598 (constitutional arguments not raised below are waived).

Plaintiffs concede that they did not raise their procedural due process arguments in the courts below. Appellants' Memorandum at 9-10. Nevertheless, Plaintiffs assert that this Court may address the argument because they did argue below that the quality contracting standards were unconstitutionally vague. As Plaintiffs acknowledge, however, their void for vagueness and due process arguments are distinct attacks on the County's quality contracting standards, and they unquestionably failed to raise their due process argument in either the trial or appellate court. Accordingly, they are foreclosed from raising it now. See *Nichols v. Hinckley Township Bd. of Zoning Appeals* (Medina App. 2001), 145 Ohio App.3d 417, 422 (constitutional arguments waived if not raised in court below, even if party had argued that ordinance was unconstitutional on other grounds).

Even if the Court were to address this issue, it must determine that Plaintiffs' arguments are without merit. In addressing a claimed deprivation of procedural due process, a court "first asks whether there exists a liberty or property interest which has been interfered with by the State" *Kentucky Dep't of Corrections v. Thompson* (1989), 490 U.S. 454, 460-61 (citations omitted). See also *State ex rel. Horvath v. State Teachers Retirement Bd.* (1998), 83 Ohio St.3d 67, 73, 1998-Ohio-424, *cert. denied* (1999), 525 U.S. 1179. This Court has

repeatedly concluded that, where a public authority has discretion to award contracts to the "lowest and best bidder," bidders do not have a property interest in the award of a public contract. *Cleveland Constr., Inc. v. City of Cincinnati*, 118 Ohio St.3d 283, 2008-Ohio-2337. Indeed, Plaintiffs do not claim that the Painting Company has a property interest in the award of the Huntington Park painting contract.

Nor can Plaintiffs legitimately claim that the damage to the Painting Company's reputation deprived them of a liberty interest. Plaintiffs properly note that a contractor's liberty interest is implicated only when the denial of the right to bid on government contracts "is based on charges of fraud and dishonesty." *Transco Security, Inc. of Ohio v. Freeman* (6th Cir.), 639 F.2d 318, 321, *cert. denied* (1981), 454 U.S. 820.

In this case, the Painting Company has not been deprived of a right to bid on, and be awarded, public contracts. Rather, it was simply denied the painting contract on the Huntington Park project because it did not satisfy Franklin County's quality contracting standards. Moreover, the denial of that contract was not premised upon charges of "fraud and dishonesty." Rather, it was premised on the fact that the Department determined that the Painting Company violated the prevailing wage law. Such determinations do not require a finding of fraud or dishonesty.⁴ Accordingly, the Painting Company's liberty interest in its reputation has not been implicated. See *Sekermestrovich v. Jones* (6th Cir. 1994), 25 F.3d 1050, 1994 WL 198195 at *2 (unpublished) ("Nor does the case fall within the narrow exception to the *Transco* rule The

⁴The prevailing wage law provides that contractors found to have intentionally violated the law are debarred from bidding on and being awarded public contracts for a specified period of time. R.C. 4115.13(D); R.C. 4115.133. The prevailing wage law itself provides an administrative procedure—including judicial review—for contractors to challenge the finding of an intentional violation. R.C. 4115.13.

suspension letter in the record, on its face, charges [the contractor] with current and previous failures to conform to contract specifications, not with fraud or dishonesty. Inasmuch as the plaintiffs were not deprived of a constitutionally protected interest by the city's refusal to accept future bids, their claim that they were denied due process in this regard is moot.").

Finally, Plaintiffs also argue that the due process clause prohibits the Commissioners from considering the Department of Commerce's determinations against the Painting Company because those determinations were "based on an investigation without a hearing." Memorandum in Support at 6. Plaintiffs premise this aspect of their constitutional argument on this Court's decision in *State, ex rel. Harris v. Williams* (1985), 18 Ohio St.3d 198, in which the Court held that similar determinations were not *adjudications* from which a contractor could appeal pursuant to R.C. Chapter 119. In making this argument, Plaintiffs completely mischaracterize this Court's decision in *State, ex rel. Harris*.

In *Harris*, this Court held only that:

For purposes of resolving this case, we hold that where the department makes a determination after an investigation without a hearing under R.C. 4115.13 that an employer has paid less than the prevailing wage, which determination creates a right to sue under R.C. 4115.10, it is not an adjudication under R.C. 119.01(D) and is thus not subject to appeal.

State, ex rel. Harris, 18 Ohio St.3d at 202. The Court did not hold, as Plaintiffs suggest, that the Department's determinations were without any force or effect. Indeed, the Court noted that the determinations were made at the conclusion of the Department's investigation and afforded the underpaid employee the right to sue to recover the prevailing wages to which the employee was entitled. The Court did not address, or even suggest, that public authorities could not consider such determinations as part of the contractor's history of compliance or noncompliance with the prevailing wage law.

Moreover, Plaintiffs' assertion that the Painting Company was not afforded the opportunity for a hearing on the determinations is ludicrous. If the a contractor disputes the Department's findings, it may simply choose not to pay back wages and penalties. Either the affected employee(s) or the Department would then commence suit to recover the underpayment and penalties, see R.C. 4115.10, and the contractor would be afforded the all the due process rights normally afforded civil litigants, including a trial on the merits of the claims in which the plaintiffs—the underpaid employee(s) or the Department—would have the burden of proof. The Painting Company was afforded the right to a hearing; it simply chose not to avail itself of that right. For the foregoing reasons, Plaintiffs' due process arguments should not serve as the foundation for the exercise of this Court's discretionary jurisdiction.

Amici Curiae's Proposition of Law No. 2:

THE PREVAILING WAGE LAW DOES NOT PREEMPT A LOCAL GOVERNMENT'S ADOPTION AND USE OF QUALITY CONTRACTING CRITERIA TO EVALUATE BIDS ON PUBLIC CONSTRUCTION CONTRACTS.

Without citing any relevant authority, Plaintiffs argue that the County's quality contracting standards—or at least the standard relating to prevailing wages—are preempted by the prevailing wage law. Plaintiffs assert that the County's standards are "a de facto debarment rule" that conflicts with the debarment provisions of the prevailing wage law. Memorandum in Support at 10. Both the trial court and the court of appeals properly rejected this argument, and Plaintiffs have offered no reason for this Court to disturb the lower courts' determination.

Nothing in R.C. Chapter 4115 indicates that public authorities may not consider a contractor's history of compliance with the prevailing wage law in evaluating whether bidders on

public construction contracts have submitted the "lowest and best" bid. On the contrary, several courts have expressly ruled that Ohio public authorities may indeed consider such history.

In *State, ex rel Navratil v. Medina County Comm'rs* (Medina App. 1995), 2 Wage & Hour Cas.2d 1643, *appeal denied* (1996), 75 Ohio St.3d 1412, the court noted that the apparent low bidder had previously been "cited for not paying the prevailing wage to some of its employees on a construction contract," but had settled the determinations. The low bidder asserted, *inter alia*, that rejecting its bid effectively debarred it from performing construction work for the county and was, therefore, preempted by the prevailing wage law's debarment provisions. The Court rejected this argument:

[S]tate authorities confirmed that [the contractor] had been cited for violating the law on several occasions. The commissioners were concerned that this pattern of alleged prevailing wage violations indicated [the contractor] might not perform the work according to specifications. The board was not prohibiting [the contractor] from contracting with the county; it merely decided not to award the plumbing contract to [the contractor] this time. As noted above, the board has broad discretion to consider all relevant factors, including prevailing wage violations, when determining which contractor is the "lowest and best."

State, ex rel. Navratil, 2 Wage & Hour Cas.2d at 1646. See also *Steingass Mechanical Contracting, Inc. v. Warrensville Heights Bd. of Educ.* (Cuyahoga App. 2003), 151 Ohio App.3d 321, 2003-Ohio-28 (school board did not abuse its discretion in rejecting apparent low bidder on a construction contract after its review of a "fact book" that detailed, *inter alia*, the contractor's "problems . . . following prevailing wage laws").

The Court of Appeals herein reached the same conclusion:

Appellants assert that, since the state has debarment provisions that disqualify bidders on the basis of past prevailing wage disputes, Franklin County could not create a harsher standard when considering its own bids. Appellants are unable to point to any provision in R.C. Chapter 4115 that prohibits public authorities from considering a contractor's history of compliance or non-compliance with prevailing wage law when considering which bid is the lowest

and best for a particular job. To the contrary, at least two Ohio courts have considered comparable exclusions for contractors not otherwise debarred from public bidding under state law, and found no prohibition to such heightened standards. Because we can find neither authority nor rationale that establishes a conflict between Franklin County's reliance on past prevailing wage violations to exclude a contractor and the state's general scheme of prevailing wage regulation, we find that Sec. 8.2.4.15 is not invalid on this basis.

State ex rel. Associated Builders & Contractors of Cent. Ohio, 2008-Ohio- 2870 at ¶ 15n (citations omitted). See also Trial Court Decision at 7 ("The Commissioners do not debar contractors from doing business with any agency of state or local government, as R.C. 4115.133 does, rather, the Commissioners' standards operate to define with which contractors Franklin County desires to do business."). The Court of Appeals was unquestionably correct, and this Court should decline to exercise jurisdiction over this case.

Amici Curiae's Proposition of Law No. 3:

A CIVIL LITIGATION SETTLEMENT AGREEMENT DOES NOT ABSOLVE A CONTRACTOR OF ITS PRIOR VIOLATIONS OF THE PREVAILING WAGE LAW.

Plaintiffs' also assert that the Painting Company's settlement of litigation involving its prevailing wage violations somehow insulated it from the Department's determinations of violations. This assertion is ludicrous.

As noted above, when an administrative complaint alleging a violation of the prevailing wage law is filed, the Department conducts an investigation. Following the investigation, the Department makes a determination on whether the contractor has violated the law. Once a determination is issued, and a violation is found, the contractor may pay the amount of back wages and penalties owed, and the matter is concluded. If the contractor disputes the violation, and therefore refuses to pay, the affected employees may commence suit to collect the unpaid wages, and if the employee does not commence an action, the Department of Commerce is

statutorily required to commence an action for collection of the unpaid wages and penalties.

Harris v. Van Hoose (1990), 49 Ohio St.3d 24.

This is precisely what happened with regard to the Painting Company's violations. It refused to pay the back wages and penalties set forth in the Department's determinations. Accordingly, the Department commenced suit against the Painting Company in Union County to collect those amounts. In an effort to avoid further litigation costs, the parties ultimately agreed to settle the litigation. Significantly, the settlement agreement did not require the Department to withdraw or rescind its determinations.

The agreement did provide that it was "not to be construed and does not constitute an admission of liability or wrongdoing on the part of The Painting Company." Plaintiffs attempt to somehow twist this non-admission of liability on its part into an admission on the Department's part that no violations occurred. Notwithstanding the eventual settlement of the collection action, however, the Department did indeed determine that the Painting Company violated the prevailing wage law on numerous occasions. The settlement agreement did not result in the withdrawal or rescission of those determinations. The Commissioners, therefore, properly determined that the Painting Company failed to satisfy the County's quality contracting criteria. Plaintiffs' argument that the settlement agreement somehow absolves the Painting Company of all responsibility for its violations, and that the Commissioners are, therefore, prohibited from considering those violations, is simply without any legal or factual support.

Amici Curiae's Proposition of Law No. 4:

A PUBLIC AUTHORITIES' USE OF QUALITY CONTRACTING STANDARDS IN DETERMINING WHICH BIDDER HAS SUBMITTED THE "LOWEST AND BEST" BID DOES NOT CONSTITUTE THE USE OF AN UNANNOUNCED BID CRITERION.

Plaintiffs attempt to avoid the application of the County's prevailing wage criterion by asserting that it is an "unannounced" criterion. This argument is without merit.

Initially, it must be observed that ¶ 5 of Resolution No. 421-02, as embodied in ¶ 8.2.4.15 of the Project Manual, cannot legitimately be considered "unannounced." Indeed, it was contained in Resolution No. 421-02, and was reaffirmed in Resolution No. 476-06, which dealt with the Huntington Park project in particular. It was then contained in the Huntington Park Project Manual, which was made available to all bidders. Paragraph 8.2.4.15 of the Project Manual can hardly, therefore, be considered "unannounced."

Nevertheless, Plaintiffs assert that the Commissioners applied ¶ 5 of Resolution No. 421-02, as embodied in ¶ 8.2.4.15 of the Project Manual, in such a way as to constitute an "unannounced criterion." Once again, however, Plaintiffs have altered their argument in an attempt to raise an issue not previously raised. In the courts below, Plaintiffs argued that the County's quality contracting standard could only be read to apply to "intentional" violations of the prevailing wage law, and that the Commissioners' consideration of allegedly non-intentional violations constituted the impermissible use of an unannounced bid criterion. Having lost that argument, see *State ex rel. Associated Builders & Contractors of Cent. Ohio*, 2008-Ohio- 2870 at ¶¶ 16-17, Plaintiffs now assert that that the Commissioners used an "unannounced criterion" by considering the Department's determinations at all because such the findings contained in those

determinations were made following the Department's investigation, but not after a hearing. Plaintiffs have not previously made this argument, and this Court should not now address it.

In any event, Plaintiffs' new argument is without merit and contrary to the plain wording of the criterion. The criterion provides that a bidder must provide "[i]nformation that the Bidder has not been debarred from public contracts *or* found by the state (after all appeals) to have violated prevailing wage laws more than three times in a two-year period in the last ten years." (emphasis added). The criterion does not provide that only findings made following a hearing may be considered. As noted above, the prevailing wage law provides a avenue for challenging the Department's determination, but the Painting Company chose not to avail itself of that process. It cannot now proceed as if it never violated the law in the first instance. Accordingly, this Court should decline to exercise jurisdiction over this case.

CONCLUSION

For the foregoing reasons, and for the reasons stated by Defendants-Appellees, *Amici Curiae* the Ohio State Building and Construction Trades Council, AFL-CIO and the Columbus/Central Ohio Building & Construction Trades Council, AFL-CIO, respectfully urges this Court to decline to exercise jurisdiction over this case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was sent via regular U.S.

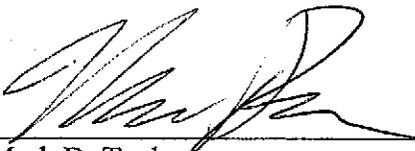
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