

In The Supreme Court Of Texas

JUDY TOOKE AND EVERETT TOOKE D/B/A
TOOKE & SONS AND D/B/A NATURES WAY ORGANIC LANDSCAPE,
Petitioners

V.

CITY OF MEXIA, TEXAS,
Respondent

On Petition for Review From
The Court of Appeals
Tenth District, Waco, Texas

**AMICI CURIAE BRIEF OF ANTHONY ARREDONDO, ET AL,
DAVID S. MARTIN, ET AL, AND GEORGE G. PARKER, ET AL,
IN SUPPORT OF PETITION FOR REVIEW OF
JUDY TOOKE AND EVERETT TOOKE D/B/A
TOOKE & SONS AND D/B/A NATURES WAY ORGANIC LANDSCAPE**

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**STATEMENT OF INTEREST OF AMICI CURIAE AND
DISCLOSURE OF SOURCE OF FEE TO BE PAID FOR PREPARING BRIEF**

A. Identification of Amici Curiae

Amici Curiae, Anthony Arredondo, Charles S. Swaner, Joseph M. Betzel, James M. Stovall, Lisa M. Clayton, Kenneth L. Foreman, Elmer J. Davis, Jace P. Sepulvado, Brian Caton, Robert L. Rogers, Tim Q. Rose, George J. Tomasovic, James M. Craft, Jr., David T. Chase, Howard R. Russell and Danny Watson (the “Arredondo Amici”), are employed by the City of Dallas, Texas (the “City”) as sworn members of its fire fighter and rescue force. The Arredondo Amici, along with 879 other members of the City's fire fighter and rescue force, and 772 sworn members of the City's police department, are parties to four (4) back-pay cases filed against the City in Collin County¹.

Amici Curiae, David S. Martin, James A. Braddock, Obie Cartmill, Robert Dale Martin and O. J. (Jay) Adair (the “Martin Amici”), are employed by the City as sworn members of its fire fighter and rescue force. The Martin Amici are the class representatives for a class of fire fighters that exceeds 2,500 active and/or retired sworn members of the City's fire fighter and rescue force, and are parties to a back-pay case filed against the City in

¹No. 199-00697-94, Kenneth E. Albert, et al v. The City of Dallas, Texas; No. 199-00200-95, Kevin Michael Willis, et al v. The City of Dallas, Texas; No. 199-00624-95, David L. Barber, et al vs. The City of Dallas, Texas; and No. 199-01743-99, Anthony Arredondo, et al v. The City of Dallas, Texas.

Rockwall County².

²1-95-506, David S. Martin, et al v. The City of Dallas, Texas.

Amici Curiae, George G. Parker, Joe M. Gunn, Stephen W. Toth, Nathan L. Trammell and Todd A. Stratman (the “Parker Amici”), are employed by the City as sworn members of its police department. The Parker Amici are the class representatives for a class of police officers that exceeds 5,150 active and/or retired sworn members of the City's police department, and are parties to a back-pay case filed against the City in Rockwall County³.

The claims of the Arredondo Amici, the Martin Amici, and the Parker Amici arose by virtue of the City's failure to comply with a binding pay referendum passed by the City's voters in 1979. The claims for back pay have been brought as breach of contract cases.

The Arredondo Amici, the Martin Amici, and the Parker Amici shall hereinafter be collectively referred to as the “Fire Fighters and Police Officers”.

B. Statement of Interest

³1-95-107, George G. Parker, et al v. The City of Dallas, Texas.

After almost nine years of litigation with the Fire Fighters and Police Officers, the City filed a plea to the jurisdiction in each of the six cases in the trial court, claiming to have sovereign or governmental immunity from suit. In response, the Fire Fighters and Police Officers alleged that §51.075 of the Texas Local Government Code (“§51.075”) and the “sue and be sued” provisions of the Dallas City Charter constituted a waiver of the City's immunity from suit. The Fire Fighters and Police Officers also alleged that, by filing and pursuing counterclaims in each of the six cases, the City had waived its immunity from suit. The trial court in each case agreed with the Fire Fighters and Police Officers, and denied the City's pleas. The City took interlocutory appeals pursuant to §51.014(8) of the Texas Civil Practice and Remedies Code to the Court of Appeals for the Fifth District of Texas at Dallas.⁴ All six cases were submitted together to the Court of Appeals and are now awaiting a decision.

In the City's appeals, the City cited that portion of the Court of Appeals' opinion in the instant case which held that the “plead and be impleaded” language of §51.075 does not constitute an express waiver of a City's immunity from suit. City of Mexia v. Tooke, et al, 115 S.W.3d 618, 622 (Tex.App.-Waco 2003, pet. gtd.). This portion of the Court's opinion is contrary to every reported decision and numerous other legal authorities that have construed §51.075 in the context of breach of contract cases against home-rule municipalities.

⁴No. 05-03-01297-CV, The City of Dallas v. Kenneth E. Albert, et al; No. 05-03-01298-CV, The City of Dallas v. David L. Barber, et al; No. 05-03-01299-CV, The City of Dallas v. Anthony Arredondo, et al; No. 05-03-01300-CV, The City of Dallas v. Kevin Michael Willis, et al; No. 05-03-01310-CV, The City of Dallas v. David S. Martin, et al; and No. 05-03-01334-CV, The City of Dallas v. George G. Parker, et al.

The Fire Fighters and Police Officers file this Amici Curiae brief to support Petitioners' argument that the Court of Appeals' opinion on this issue is erroneous and to point out to this Honorable Court that if the Court of Appeals' opinion is not reversed, many private individuals such as the Petitioners, the Fire Fighters and the Police Officers, who provide needed goods and services to cities will be denied the ability to enforce the cities' obligations to pay for those goods and services.

C. Disclosure of Source of Fee

Any fees to be received by the law firm of Boyd·Veigel, P.C. in connection with the preparation of this brief will be paid by the Arredondo Amici. Any fees to be received by the law firm of Robert Lyon & Association and the law firm of Lyon, Gorsky, Baskett, Haring & Gilbert in connection with the preparation of this brief will be paid by the Martin Amici and the Parker Amici. The Petitioners have not participated in any way in the funding of this brief.

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF INTEREST OF AMICI CURIAE AND DISCLOSURE OF SOURCE OF FEE TO BE PAID FOR PREPARING BRIEF	i
INDEX OF AUTHORITIES	vi
STATEMENT OF THE CASE	2
STATEMENT OF JURISDICTION	3
ISSUE PRESENTED FOR REVIEW	4
STATEMENT OF FACTS	5
SUMMARY OF THE ARGUMENT	6
ARGUMENT	7
A. Consent To Sue	7
B. Clear And Unambiguous Standard	8
C. Reversing The Opinion Of The Court of Appeals Will Promote General Commerce Between Governmental Agencies And Commercial Or Private Entities	12
CONCLUSION	14
PRAYER	15
CERTIFICATE OF SERVICE	16

INDEX OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<u>Avmanco v. City of Grand Prairie</u> , 835 S.W.2d 160 (Tex.App.-Ft. Worth 1992, writ dism'd.)	7, 9
<u>City of Garland v. Shierk</u> , 2000 W.L. 721502 at *2 (Tex.App.-Dallas 2000, pet. den'd.) (not designated for publication)	7, 9
<u>City of Houston v. Clear Channel Outdoor, Inc.</u> , ____ S.W.3d ____, 2004 W.L. 63561 (Tex.App.-Houston [14th Dist.] January 15, 2004, no pet.)	6-8
<u>City of La Porte v. Barfield</u> , 898 S.W.2d 288 (Tex. 1995)	12
<u>City of Mexia v. Tooke, et al</u> , 115 S.W.3d 618 (Tex.App.-Waco 2003, pet. gtd.) iii, 6-8	
<u>Ex Parte Harrell</u> , 542 S.W.2d 169 (Tex.Crim.App. 1976)	11
<u>Goerlitz v. City of Midland</u> . 101 S.W.3d 573 (Tex.App.-El Paso 2003, pet. filed)	7, 9
<u>Knowles v. City of Granbury</u> , 953 S.W.2d 19 (Tex.App.-Ft. Worth 1997, writ den'd.) 78	
<u>Missouri Pacific R.R. v. Brownsville Navigation Dist.</u> , 453 S.W.2d 812 (Tex. 1970) 468, 12	
<u>People v. Clarke</u> , 9 N.Y. 349 (Ct.App. 1853)	9
<u>Texas Natural Resource Commission v. IT-Davy</u> , 74 S.W.3d 849 (Tex. 2002)	11
<u>University of Texas Medical Branch at Galveston v. U.S.</u> , 557 F.2d 438 (5th Cir. 1997)	11
<u>Webb v. City of Dallas</u> , 314 F.3d 787 (5th Cir. 2002)	7, 9
<u>Statutes And Rules:</u>	
<u>Acts</u> , 1987, 70th Leg. Ch. 149, §51 (1987)	11

<u>Statutes And Rules (Cont'd.):</u>	<u>Page</u>
Texas Civil Practice & Remedies Code, §51.014(8)	ii
Texas Local Government Code, §51.013	10
Texas Local Government Code, §51.033	10
Texas Local Government Code, §51.075	ii-4, 6-8, 10, 12, 14
Texas Rules of Appellate Procedures, Rule 11	1

<u>Text and Treatises:</u>	<u>Page</u>
22 Texas Practice, <u>Municipal Law & Practice</u> §2.02 (1999)	9
52 Tex.Jur. 3d, <u>Municipal Corporations</u> §478 (1999)	9
A. Burrell, <u>Burrell’s Law Dictionary</u> 45 (1987)	9
B. Pope, <u>Pope’s Legal Definitions</u> 712 (1919)	10
<u>Black’s Law Dictionary</u> 888 (5th Ed. 1968)	9
Curzon, <u>A Dictionary of Law</u> 179 (2nd Ed. 1983)	10
F. Stimson, <u>Stimson’s Law Dictionary</u> 213 (1911)	10
J. Ballantine, <u>Ballantine’s Law Dictionary</u> 587 (1969)	10
J. Bouvier, <u>2 Bouvier’s Law Dictionary</u> 1510 (1914)	9
M. Radin, <u>Radin Law Dictionary</u> 157 (1970)	10
<u>Mozeley & Whiteley’s Law Dictionary</u> 228 (10th Ed. 1911)	10
R. Rothenberg, <u>The Plain Language Law Dictionary</u> 167 (1981)	10
S. Kling, <u>The Legal Encyclopedic Dictionary</u> 278 (1970)	10
W. Baldwin, <u>Baldwin’s Pocket Law Dictionary</u> 100 (1982)	10
W. Cochran, <u>Cochran’s Law Lexicon</u> 147 (Pocket Ed. 1924)	10

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V.

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**AMICI CURIAE BRIEF OF ANTHONY ARREDONDO, ET AL,
DAVID S. MARTIN, ET AL, AND GEORGE G. PARKER, ET AL,
IN SUPPORT PETITION FOR REVIEW OF
JUDY TOOKE AND EVERETT TOOKE D/B/A
TOOKE & SONS AND D/B/A NATURES WAY ORGANIC LANDSCAPING**

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

Pursuant to Tex.R.App.P. 11, the Fire Fighters and Police Officers submit this Amici Curiae Brief in support of Petitioners, Judy Tooke and Everett Tooke d/b/a Tooke & Sons and d/b/a Natures Way Organic Landscaping, and would respectfully show the Court as follows:

STATEMENT OF THE CASE

The Fire Fighters and Police Officers adopt the statement of the case of the Petitioners, Judy Tooke and Everett Tooke d/b/a Tooke & Sons and d/b/a Natures Way Organic Landscaping.

STATEMENT OF JURISDICTION

The Fire Fighters and Police Officers adopt the Statement of Jurisdiction of Petitioners, Judy Tooke and Everett Tooke d/b/a Tooke & Sons and d/b/a Natures Way Organic Landscaping.

ISSUE PRESENTED FOR REVIEW

In its opinion, the Court of Appeals correctly recognized the continued soundness of Missouri Pacific R.R. v. Brownsville Navigation Dist., 453 S.W.2d 812 (Tex. 1970), which held that statutory language providing that a political subdivision may “sue and be sued” provides the requisite clarity to establish a waiver of immunity from suit. However, the Court erred when it failed to apply the rule of Missouri Pacific to §51.075. Instead, the Waco Court held that the “plead and be impleaded” language of §51.075 does not constitute a legislative waiver of a home-rule municipality’s waiver from suit. The Court of Appeals’ opinion on this issue contradicts utterly every Texas decision that has construed §51.075 in the context of a breach of contract case, including the most recent Texas Court of Appeals opinion on this issue.

STATEMENT OF FACTS

The Fire Fighters and Police Officers adopt the facts as recited in the opinion of the Court of Appeals in this case.

SUMMARY OF THE ARGUMENT

In holding the Petitioners' breach of contract claim against the City was barred by sovereign immunity, the Court of Appeals, in its discussion of §51.075, concluded that §51.075 does not constitute a legislative waiver of a home-rule municipality's immunity from suit. Tooke, Id. at 622.

The Court's ruling is at odds with this Court's decision in Missouri-Pacific R.R. v. Brownsville Navigation District, Supra, and contradicts every decision that has construed §51.075 in the context of a breach of contract case. Moreover, the Court of Appeals' opinion construing §51.075 has been expressly disapproved by the most recent Texas Court of Appeals' opinion on the issue, which held that §51.075 constitutes a general waiver of a home-rule municipality's immunity from suit. City of Houston v. Clear Channel Outdoor, Inc., ____ S.W.3d ____, 2004 W.L. 63561 (Tex.App.-Houston [14th Dist.] January 15, 2004, no pet.).

ARGUMENT

A. Consent to Sue

Section 51.075 provides that a home-rule municipality may “plead and be impleaded” in any court. In breach of contract cases against home-rule municipalities, this language has consistently been held to effect a legislative waiver of a city’s immunity from suit. Knowles v. City of Granbury, 953 S.W.2d 19, 23 (Tex.App.-Ft. Worth 1997, writ den’d.); Avmanco v. City of Grand Prairie, 835 S.W.2d 160, 165 (Tex.App.-Ft. Worth 1992, writ dismiss’d.); City of Garland v. Shierk, 2000 W.L. 721502 at *2 (Tex.App.-Dallas 2000, pet. den’d.) (not designated for publication); Goerlitz v. City of Midland, 101 S.W.3d 573 (Tex.App.-El Paso 2003, pet. filed); City of Houston v. Clear Channel Outdoor, Inc., Supra.

This interpretation has also been followed and approved by the United States Court of Appeals for the Fifth Circuit in the recent case of Webb v. City of Dallas, 314 F.3d 787, 793-96 (5th Cir. 2002).

In the instant case, the Waco Court of Appeals cited this Court’s prior opinion in Missouri Pacific, which held that statutory “sue or be sued” language provides the requisite clarity to establish a waiver of immunity from suit. Tooke, Id. at 621. However, the Court strangely concluded that the similar “plead and be impleaded” language of §51.075 does not effect a corresponding waiver of immunity from suit. Tooke, Id. at 622. The Court of Appeals reasoned that because “sue and be sued” and “plead and be impleaded” are often used in statutes side by side, they must be accorded different meanings. Noting that the Supreme Court had never specifically ruled upon the “plead and be impleaded” language, the

Tooke Court concluded that the phrase did not constitute a “clear and unambiguous” waiver of immunity from suit. Id. at 622. As mentioned above, The Court specifically cites the Supreme Court's ruling in Missouri Pacific, adheres to it as binding Supreme Court authority, but distinguishes it by noting that it does not specifically construe the “plead and be impleaded” language of §51.075.

No other court that has construed §51.075 has made such a semantical distinction. As a matter of fact, the most recent Texas Court of Appeals’ opinion on the issue has expressly rejected it. In Clear Channel, Supra, the Houston Court of Appeals for the Fourteenth District rejected Tooke's attempted distinction between “sue and be sued” and “plead and be impleaded” language. The Clear Channel Court reasoned: “[T]hough experts attribute different meanings to the words ‘plea’ and ‘sue’, in laymen's terms, they mean the same thing.” Clear Channel, Supra at *4. Finding no meaningful difference in the two phrases, the Clear Channel Court felt “*compelled to follow the Texas Supreme Court's interpretation in [Missouri Pacific] especially considering that the Texas Supreme Court passed up the opportunity to revisit and change its decision.*” Id. at *4.

B. Clear and Unambiguous Standard

The distinction made by the Waco Court between “sue and be sued” and “plead and be impleaded” is also refuted by previous Court decisions and other legal authorities that have considered §51.075 in the context of a breach of contract case. See Knowles v. City of Granbury, Supra at 23: “*Because the Local Government Code [§51.075] and Granbury’s Charter provide that the City may be sued, its immunity from suit is also waived*”; Avmanco,

Supra at 165: “the state ... have enacted legislation [§51.075] providing their respective consents to suits against the City”; Webb, Supra at 796: “Express legislation [§51.075] provides that the city may be sued”; Shierk, Supra: (plead and be impleaded language of §51.075 “similar” to sue and be sued statutes); Goerlitz, Supra at 579: “Because the Local Government Code [§51.075] and the City Charter provide that Appellee may be sued, its immunity from suit is also waived”; 22 Texas Practice, Municipal Law & Practice §2.02 (1999): “There has never been any question about the capacity of Texas municipalities to both sue and be sued. The original legislation for both general law and home rule cities so provided. ... These statutory declarations that cities can be sued would seem to blunt any assertion that cities have any immunity from suit, as does the state. ... A city’s capacity to sue and be sued is generally no different than other litigates [sic] ...”; 52 Tex.Jur. 3d Municipal Corporations §478 (1999): “A home-rule municipality was subject to suit for breach of contract, since the statute authorizing it to sue and be sued [§51.075] ... gave consent to the suit and waived the municipality’s immunity from suit”. (Emphasis added).

Resort to common legal lexicon also belies any distinction between “sue” and “implead”. See, e.g., People v. Clarke, 9 N.Y. 349, 368 (Ct.App. 1853) (implead means to sue or prosecute by due course of law); J. Bouvier, 2 Bouvier’s Law Dictionary 1510 (1914) (implead means to sue or prosecute by due course of law); Black’s Law Dictionary 888 (5th Ed. 1968) (implead means to sue or prosecute by due course of law); A. Burrell, Burrell’s Law Dictionary 45 (1987) (implead means to sue or prosecute by due course of law); W. Cochran, Cochran’s Law Lexicon 147 (Pocket Ed. 1924) (implead means to sue, to

prosecute). S. Kling, The Legal Encyclopedic Dictionary 278 (1970) (implead means to sue or prosecute by due course of law); B. Pope, Pope's Legal Definitions 712 (1919) (implead means to sue or prosecute in course of law); R. Rothenberg, The Plain Language Law Dictionary 167 (1981) (implead means to sue, to bring into court); Curzon, A Dictionary of Law 179 (2nd Ed. 1983) (implead means to sue or prosecute); Mozeley & Whiteley's Law Dictionary 228 (10th Ed. 1911) (implead means to sue or prosecute); W. Baldwin, Baldwin's Pocket Law Dictionary 100 (1982) (implead means to sue or prosecute by due course of law); J. Ballantine, Ballantine's Law Dictionary 587 (1969) (implead means to sue, to make a person a party to an action); M. Radin, Radin Law Dictionary 157 (1970) (implead in general means to bring or prosecute a suit or action); F. Stimson, Stimson's Law Dictionary 213 (1911) (implead means to sue).

The subtle differences between the language found in §§51.013 and 51.033 of the Texas Local Government Code and the language of §51.075 does not support the Waco Court's conclusion that these sections should be accorded different meanings.⁵ These provisions of the Local Government Code were enacted by three widely-separated

⁵See Tex.Loc.Gov't.Code Ann. §51.013 (authorizing Type A General Law Cities to "answer and be answered in any matter". The phrase does not appear in §§51.033 or 51.075). Common sense suggests that the Court has read more into the slight distinctions between these three sections than is explainable by any legislative purpose or reason.

Legislatures convened under three different Texas constitutions.⁶ Given the distinct histories of these sections, it is not surprising that each does not incorporate the rigidly parallel language that might be expected if each had been simultaneously enacted by the same legislature. As each of these sections was separately adopted under historically distinct circumstances, there is no basis to consider them *in pari materia* as implied by the Court's ruling. See Ex Parte Harrell, 542 S.W.2d 169, 172 (Tex.Crim.App. 1976). In comparing the different language of the sections, the Court apparently misapprehended that all three sections were originally enacted in 1987. The 1987 legislation simply codified each pre-existing iteration of these sections into the Local Government Code intending a recodification only, with no substantive changes. See Acts, 1987, 70th Leg. Ch. 149, §51 (1987).

This Court recognizes that the Legislature knows how to clearly and unambiguously waive sovereign immunity from suit. Texas Natural Resource Commission v. IT-Davy, 74 S.W.3d 849 (Tex. 2002). Yet every statute must be construed with the gloss of its time. University of Texas Medical Branch at Galveston v. U.S., 557 F.2d 438, 455 (5th Cir. 1997). Ascribing to the 1913 Legislature a perfect cognizance of the doctrine of sovereign immunity as it has been subsequently developed and expressed expands this maxim beyond its logical or useful limits.

⁶Tex.Loc.Gov't.Code Ann. §51.013, originally enacted by the 14th Legislature on March 15, 1875 [*See* 3, Sayles, Early Laws of Texas (1871-1876), Art. 4113, §1A (1888)]; Tex.Loc.Gov't.Code Ann. §51.033, originally enacted by the 7th Legislature on January 27, 1858 [*See* 4 Gammell, Laws of Texas, 7th Leg. General Laws 1858, Ch. 61, §9 (1898)]; and Tex.Loc.Gov't.Code Ann. §51.075, originally enacted by the 33rd Legislature on April 7, 1913 [*See* 4 Gammell, Laws of Texas, 33rd Leg. Reg.Sess. 1913, Ch. 147 §4 (Supp. Vol. 1913-1915)].

Finally, this Honorable Court has previously determined that the clear and unambiguous standard cannot be so rigidly applied as to disregard the obvious intent of the Legislature. City of La Porte v. Barfield, 898 S.W.2d 288, 292 (Tex. 1995). Perfect clarity is not required even in determining whether governmental immunity has been waived. Id. A pragmatic examination of legislative intent reveals that there would be no useful purpose for enacting §51.075, unless the Legislature quite plainly intended a waiver of immunity from suit. See Missouri Pacific, Supra at 813.

C. Reversing the Opinion of the Court of Appeals Will Promote General Commerce Between Governmental Agencies and Commercial or Private Entities

In today's modern society, local, state and federal agencies contract with commercial entities and private individuals such as the Tookes on a daily basis. These agencies could not function without countless day-to-day contractual dealings with private parties. It is safe to assume that these agencies expect these private parties to honor their obligations and the agencies can and do, many times, seek redress from the courts when they fail to do so. Similarly, it should only be fair that these contracting parties should expect governmental agencies to honor their obligations and to have judicial recourse when those agencies fail to do so.

In this case, the City of Mexia's interpretation of §51.075, if accepted by this Court, would discourage and might altogether eliminate the willingness of private individuals and entities from dealing with governmental agencies. Under the City's view of the law, there would be nothing to prohibit governmental agencies from solving budgetary shortfalls by

such means as suspending payments to city employees, terminating payments on bond obligations and refusing to pay vendors for goods and services accepted by the agencies, all without any consequences for doing so. In other words, all governmental agencies could enforce the contractual obligations they choose, while being left insulated from suit for contractual obligations they wish to ignore. Under this theory, the courthouse doors would be closed to anyone having a legitimate contractual dispute with a governmental agency, with the end result being that no one would be willing to provide the agencies with needed goods and services. This, of course, would be a ludicrous and unreasonable result, and one which this Court can help avoid by reversing the decision of the Court below.

CONCLUSION

In view of the overwhelming abundance of legal authority construing the words “plead and be impleaded” and similar “sue and be sued” language in legislative enactments, the Fire Fighters and Police Officers submit that the court below erred when it concluded that §51.075 does not constitute a legislative waiver of Mexia’s sovereign immunity from suit.

PRAYER

The Fire Fighters and Police Officers pray this Honorable Court to reverse the opinion of the Court of Appeals and affirm the decision of the trial court.

Respectfully submitted,

BILL BOYD

ROBERT C. LYON

CERTIFICATE OF SERVICE

I, BILL BOYD, attorney for the Arredondo Amici Curiae, do hereby certify that a true and correct copy of the foregoing has been delivered to the following attorneys of record in this case, by depositing same with the United States Mail, postage prepaid, Certified Mail, Return Receipt Requested, addressed to said attorneys at the addresses shown below, on this the _____ day of April, 2004.

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