IN THE SUPERIOR COURT OF THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

C. K.,)
)
Plaintiff,)
)
vs.)
)
STATE OF ALASKA, ET AL.,)
)
Defendants.)
_____)
Case No. 3AN-08-00000

DECISION ON RECORD

BY THE HONORABLE JACK SMITH

Tuesday, January 13, 2009

PROCEEDINGS

THE COURT: This is 08-00000 CI, K. versus State of Alaska, Department of Administration, Division of Retirement and Benefits, and this is an appeal from the Office of Administrative Hearings.

This is the ruling of the court on this appeal. First, the parties are advised this will be an oral ruling. I will not submit this or reduce this to writing. We will send you a copy of the CD of this proceeding and a copy of the log notes.

A brief summary of facts: Appellant is a life long resident of P. H., Alaska. The administrative law judge found English is her first language. In 1989, appellant married M. W. Mr. W. began working for the North Slope Borough on approximately May 5, 1989.

This position made him eligible for medical and retirement benefits from the State of Alaska through the Public Employees Retirement System, PERS.

In 1999, Mr. W. applied for early retirement under PERS. He was retired effective December 1st, 1999. On his retirement application, Mr. W. could choose from one of five available benefit options for his retirement pay.

He selected the level income option. This option could not be selected if a survivor option had been selected, and, therefore, a waiver from the spouse was required to select it.

Appellant signed that waiver on March 25, 1999. Mr. W.'s retirement benefits were paid out based on this option. At the time of his retirement, Mr. W. was in litigation with his employer alleging that they had failed to offer him a supervisory position in 1998 based on racial discrimination.

That suit settled in July of 2005 and part of the settlement was an alteration of Mr. W.'s retirement date to September 1st, 2003 with various financial adjustments as if he had worked for the North Slope Borough through August 31, 2003.

These adjustments were made within the context of the level income option. Mr. W. died in October of 2005. His PERS benefits were ended that month with him having received a total of $139,922.97. Following her husband's death, appellant contacted the Alaska Department of Administration, Division of Retirement and Benefits to inquire about receiving his, Mr. W.'s retirement and medical benefits as his surviving spouse.

On November 17, 2005, the division sent a letter to appellant informing her that her medical coverage was terminated and that the October retirement check Mr. W. received was the final benefit payable under the PERS program.

That decision was based on Mr. W.'s selection of the level income option and appellant signed waiver. Appellant appealed that decision to the administrator of the division. The administrator upheld the denial of benefits to appellant.

Appellant then appealed the administrator's decision to the office of administrative hearings. The matter was assigned to an administrative law judge and the hearing was held before the ALJ, the administrative law judge, on June 21st and 22 of 2007.

On February 11, 2008, the ALJ adopted a final decision and order upholding the administrator's decision denying benefits to appellant. The administrative law judge stated that as a threshold matter, Ms. K. contends that she had a constitutionally protected right to survivor benefits at the time she signed the waiver and any procedure, such as the PERS waiver procedure, under which she might be divested of that right must be accurate and thorough enough to meet a special standard devised by the U.S. Supreme Court in Matthews versus Eldridge and endorsed by the Alaska Supreme Court in Hilbers versus Municipality of Anchorage.

The cite for Matthews versus Eldridge is 424 U.S. 319. It's a 1976 case from the Supreme Court. The cite for Hilbers versus Municipality of Anchorage is 611 P2d 31, an Alaska Supreme Court case from 1980.

The administrative law judge found that appellant's argument failed because at the time she signed the waiver appellant had no vested constitutional right to survivor benefits. The ALJ found that at the time appellant signed her waiver Mr. W. had an important vested constitutionally protected right to confer survivor benefits; however, appellant did not at

that time have a vested right to receive benefits from the PERS system.

Therefore, the ALJ found the special Matthews test for procedures to divest someone of constitutional rights did not apply. Appellant also contended that she did not subjectively intend to waive a survivor option.

While she acknowledged that she knew she was waiving something, it was her testimony that she thought she was only waiving her medical and dental coverage. The ALJ concluded that without evidence that appellant communicated this to PERS, it had no legal relevance.

The ALJ found appellant's waiver was governed by the general principles applicable to contracts. In that analysis, it is the objective intent of the parties it controls and the contract cannot be defeated by the subjective intent of one of the parties. See Howard versus First National Bank of Anchorage at 596 P2d 1164, a 1979 case.

Appellant argued that her waiver was invalid because the waiver itself was confusing and unclear. However, the ALJ rejected this argument finding that the language of the waiver was reasonably clear in describing the right and in indicating that it was being given up. The ALJ concluded that this met the standard for determining an effective waiver.

See Lash versus George W. Lash basic retirement plan 870 F sub 336, a Southern District of Florida case from 1994.

The ALJ also briefly discussed W.'s 2005 settlement concluding that it did not effect his 1999 election of the level income option. The ALJ recognized that there was mixed evidence regarding whether W.'s application as a whole expressed an intent to select the LIO. The ALJ therefore elected a preponderance of the evidence standard of proof as appropriate.

Relying on the standard, the ALJ concluded that it was more likely than not that W.'s application for retirement benefits represented an election of the level income option. Appellant has now appealed to this court.

The court notes oral argument was not requested. The issues on appeal, as identified by the parties, are as follows:

Appellant identified the issues on appeal as whether the office of administrative hearings erred when it determined that appellant's survivor benefits were not constitutionally protected.

Second, whether the office of administrative hearings erred when it determined that Mr. W. and Ms. K. contended to knowingly waive their rights to survivor benefits.

Third, whether the office of administrative hearings utilized the wrong standard of proof in determining whether Mr. W. elected a survivor benefit.

Fourth, whether the office of administrative hearings erred when it determined that the division's application for retirement and spousal waiver forms were not ambiguous,

confusing and misleading.

Fifth, whether the office of administrative hearings erred in relying upon inadmissible evidence to determine that Mr. W. was a sophisticated individual and understood the nature of the benefits which he selected.

The captions in appellant's opening brief place these issues into four concerns which appellee identified as follows:

One, whether the office of administrative hearing properly concluded that Mr. W.'s constitutionally recognize contract rights to retirement benefits as opposed to the benefits themselves were not conveyable;

Whether the office of administrative hearings properly concluded that Ms. K., the spouse of a former PERS employee, did not possess her own constitutional right to retirement benefits and that the PERS retirement forms were objectively clear;

Three, whether Ms. K.'s arguments regards mutual assent and mistake of contract are misplaced because Ms. K. manifested her intent to waive her spousal rights by signing explicit waiver and the terms of the waiver squarely place the risk of mistake on her;

And, four, whether it was within the discretion of the office of administrative hearing to admit hearsay evidence regarding Mr. W. that was offered by both parties.

A legal analysis of these issues is as follows:

First, judicial review of administrative orders. AS 4462 560 provides for review of final administrative order. It provides in part judicial review by the superior court of a final administrative order may be had by filing a notice of appeal in accordance with the applicable rules of the court governing appeals in civil matters.

The standard of judicial review for administrative appeals is actually at four different levels. For questions of fact, the court asks whether those findings are supported by such relevant evidence as a reasonable mind might accept or support a conclusion.

See Collin versus Arctic Builders, Inc. at 31 P3rd 1286, an Alaska Supreme Court case from 2001. For questions of law utilizing agency expertise, the court uses the reasonable basis test. For those questions, the court merely seeks to determine whether the agency's decision is supported by the facts and has a reasonable basis in law, even if it may not agree with the agency's ultimate determination.

See C.H. Kelly Trust versus Municipality of Anchorage, Board of Equalization at 909 P2d 1381, Alaska Supreme Court 1996 case.

For questions of law where no agency expertise is necessary, the court employees the substitution of judgment test. Application of this standard permits a reviewing court to substitute its own judgment for that of the agency, even if the agency's decision had a reasonable basis in law.

See the Alaska Center for the Environment versus Rue at 95 P3rd 924, an Alaska Supreme Court case from 2004.

Finally, for administrative regulations, the reasonable and not arbitrary test is used. This means that a court will defer to the agency's interpretation, unless it is plainly erroneous and inconsistent with the regulation. See Estate of Basargin versus State Commercial Fisheries Entry Commission at 31 P3rd 796, another Alaska Supreme Court case from 2001.

Turning to the first issue that was identified by the parties dealing with Mr. W.'s constitutional rights, appellant argues that W. had a constitutionally protected right to provide survivor benefits to her and that the office of administrative hearings erred in evaluating the risk of an erroneous deprivation of this right.

Specifically the OAH erred in not applying the Matthews test previously discussed. Appellee counters by arguing that appellant has no standing to raise violation of W.'s constitutional rights. Appellant responds by arguing that any claim as to standing was waived for failure to raise it before the ALJ.

Although appellant's claims regarding appellee's failure to raise the argument before the ALJ are technically correct, the failure to raise the argument does not bar this court from applying the principle that one does not have standing to assert the constitutional claims of another because the ALJ

limited the issues before the court by the preliminary ruling that the hearing that was being held by the ALJ was on the single issue of the intent and significance of Mr. W.'s elections.

And the final order of the ALJ, in discussing the applicability of Matthews as to appellant's constitutional rights, indicated that, quote, "At the time Ms. K. signed her waiver, Mr. W. had an important vested constitutionally protected right to confer survivor benefits.

Ms. K. however did not at that time have a vested right to receive benefits from the PERS system. The special Matthews versus Eldridge test for procedures to divest someone of such a right therefore does not apply," end quote.

Appellee reasonably argues that this language indicates that the ALJ determined that the rights of PERS employees are separate and distinct from the rights of their spouses, and that the constitutional rights belonged exclusively to Mr. W. and were not conveyable to appellant.

Therefore, the Matthews test did not apply. So while appellee may not have raised the issue of standing below, the ALJ implicitly ruled that out.

Was that determination accurate? Asserting a violation of another party's constitutional rights is related to the standing of that party. Whether Mr. W. had the right to convey his constitutionally recognized rights to appellant and whether she had standing to assert a violation of Mr. W.'s rights are legal questions not involving agency expertise.

Therefore, a substitution of judgment analysis will be utilized to review these decisions by the ALJ. Neither party is disputing that Mr. W. had a constitutionally protected right to provide survivor benefits to appellant. Appellant argues those rights have been violated in this case and that she has standing to assert them.

The Alaska Supreme Court has held that a third party cannot assert a violation of another's constitutional rights except in a few limited exceptions. In Waring versus State, a 670 P2d 357 Alaska Supreme Court case from 1983, the court noted that the federal rule is that a defendant cannot under any circumstances assert the violation of a co-defendants Fourth Amendment rights.

However, given the facts of that case, the court held that the purposes of the exclusionary rule deterring misconduct and preserving judicial integrity required the exclusion of evidence when police knowingly and intentionally violate a co-defendant's rights.

Therefore, the court carved out two exceptions to the general rule holding that a defendant has standing to assert the violation of a co-defendant's Fourth Amendment rights if he or she can show, one, that a police officer obtained the evidence as a result of gross or shocking misconduct, or, two, that the officer deliberately violated a co-defendant's rights.

However, the court expressly refused to extend this analysis to cases involving other parties other than co-

defendants. This general rule and the limited exceptions to it have been applied in numerous cases in Alaska. The general rule prohibiting third parties from asserting violations of another's constitutional rights has been applied in circumstances not involving criminal cases and co-defendants in a number of non-Alaska cases, but not in an Alaska case that this court can find.

The Supreme Court of New York reversed an order of the family court partly due to the fact that the family court had, quote, eschewed its judicial role by raising, then deciding the alleged infringement of rights purportedly belonging to the child. The court held, it is well established, that a third party may not assert the alleged violation of another's constitutional rights. See In the Matter of Harriott, II, 292 Atlantic District 2nd 92, a New York case from 2002. See also Munk versus Teeter, a 1992 Westlaw 1681 2nd Circuit Court of California from 1992 decision that held that a plaintiff had no standing to assert a violation of another person's right to privacy.

And Akinaka versus Disciplinary Board of Hawaii Supreme Court at 979 P2d 1077, which stated Akinaka, or any complainant for that matter, has no standing to participate in a disciplinary process because one does not have standing to assert a violation of rights belonging to another since the person entitled to a right is the only one who can be directly injured by its deprivation.

Given the general rule, even if the court were to allow appellant to claim standing to assert of violation of Mr. W.'s constitutional rights, she should only be allowed to assert such a violation of Mr. W.'s rights if some conduct amounting to gross or shocking misconduct occurred which would place her within the realm of recognized exceptions.

Appellant fails to allege any conduct which would meet the standard and the file does not contain any evidence of such conduct. Appellant's claim properly falls under the general rule and she cannot assert the violations of Mr. W.'s -- the alleged violations of Mr. W.'s constitutional rights.

The administrative law judge correctly determined that appellant did not share the same rights as her husband. Therefore, it was not an error for him to refuse to apply the Matthews test to Mr. W.'s election. Appellant had no standing to assert Mr. W.'s rights or claim that they had been violated.

The second issue is appellant's constitutional rights. First, whether or not the PERS retirement forms were ambiguous is a factual question requiring use of the substantial evidence test. Under that test, the ALJ's decision that the forms were objectively clear should be upheld if those findings are supported by such relevant evidence as a reasonable mind might accept to support that conclusion.

In examining the PERS forms, specifically the waiver signed by appellant, the ALJ concluded that the form and waiver were reasonably clear in each necessary respect. His

findings were, first, the form reasonably explained the right appellant was giving up. The ALJ found that the form was very clear in categorizing three options as survivor options.

If none of these boxes was checked, it was clear the applicant was not selecting a survivor option. The instruction above the spousal waiver on the form labeled, quote, "IMPORTANT," all in caps, end quote, stated that all benefits, including medical coverage, will cease upon the death of the applicant if a survivor option is not selected.

The ALJ concluded that this language, coupled with the language contained in the spousal waiver adequately alerted appellant that this waiver was about the selection of an option determining the right to receive benefits upon death of the applicant.

Second, the ALJ determined that the waiver affirmatively informed appellant that a right was being given up. The waiver states that the spouse, quote, "freely waives entitlement to continuing survivor benefits upon death of the named applicant," end quote.

Finally, the ALJ addressed appellant's claims that an inconsistency in the form invalidated her waiver. The alleged inconsistency was that Mr. W. checked the box for a non-survivor option, but then entered his wife's information in the box for name of survivor recipient.

The ALJ concluded that while this information was unnecessary because a non-survivor option had been selected, the appearance of a name in the box does not create uncertainty as to what the waiver was about or whether it was a waiver.

The ALJ found the way the form was designed the entry reads unremarkably as an identification of who the potential survivor is who would be filling out the waiver on the form.

There is substantial evidence to support the ALJ's conclusion that the PERS forms and waiver were objectively clear.

Second -- or the second issue under this area is whether appellant had a vested right in the survivor benefits and whether that right was violated. Because this is a legal question not involving agency expertise, the substitution of judgment standard will be used in the analysis.

Appellant cites several cases as supporting her argument that a spouse has a vested right, an interest in survivor benefits. However, the cited cases were decided in the realm of marital property distribution upon divorce and neither case addressed whether the spouse had a vested right in the benefits.

What the cases did hold was that, for purposes of divorce, spouses are presumptively entitled to survivor benefits because they are an intrinsic part of the retirement benefits earned during marriage. In fact, the court in Tanghe versus Tanghe at 115 P3rd 567, indicated that the spouse would have no

vested right to the benefits in full after the employee spouse's death.

The court stated, "The income streams in the present case will have value for Jackie only if Gary dies before she does. This type of survivor benefit resembles a non-vested pension because one party bears all the risk that the benefit may never be realized," end quote. That's from Tanghe at page 570.

No case in Alaska was found that has directly addressed the vesting of rights and survivor benefits. However, another Ninth Circuit Court has had the opportunity to address this issue.

In Thurston versus Judge's Retirement Plan, the Arizona Supreme Court held that a spouse's right to survivor benefits did not vest until the employee spouse's death. This case is at 876 P2d 545, Arizona case from 1994.

The court stated in that case, quote, "Judge Thurston did not have a surviving spouse until he died. Therefore, the surviving spouse benefits did not become the property of a particular person until his death in 1989. At his death, and only at his death, the benefits became the property of his then ascertainable widow. Before that time, they were not vested," and this is Thurston, end quote.

The ALJ did not err in holding that at the time she signed the waiver appellant did not have a vested right to receive benefits from the PERS system.

Appellant's right to the survivor benefits did not vest until Mr. W.'s death. Therefore, the ALJ did not err in refusing to apply the Matthews test for procedures to divest someone of a constitutional right because appellant had no such right at the time she signed the waiver of survivor benefits.

The third issue appellant asserts is that her waiver is invalid because the contract lacked mutual assent and because there was a unilateral mistake on her part as to what rights she was waiving. Because this is a legal question not involving agency expertise, the substitution of judgment standard provides the analysis this court must employ.

Appellant argues that there was no mutual assent and therefore there cannot be a valid contract. Appellant claims that there was no mutual assent because at the time she signed the waiver, she believes she was waiving her right to dental and vision coverage only.

Mutual assent is an elementary requirement for a binding contract. See State versus Fairbanks North Star Borough School District at 621 P2d 1329, an Alaska Supreme Court case from 1981.

It is equally elementary that mutual assent can be found in the objective meaning of the words used. Because the contract is assessed under an objective standard, if a party objectively manifested an intention to be bound by the terms of a contract, that assent cannot be defeated by evidence of the party's unexpressed reservations or subjective contrary

intentions. See Dutton versus State at 970 P2d 925, an Alaska Supreme Court case from 1999.

A party cannot rely on its subjective intent to defeat the existence of a contract if its words and actions objectively and reasonably lead another to believe a contract had been entered. Again, see Munn versus Thorton at 956 P2nd 1213, an Alaska Supreme Court case from 1998.

Appellant's argument regarding mutual assent must fail because her subjective intent is irrelevant. When appellant signed, notarized and returned the waiver to the division, this was an objective manifestation of her intent to be bound by the terms of the waiver and the division was correct in treating it as such.

It was not an error for the ALJ to deem her subjective intent irrelevant and define that a valid waiver existed.

Appellant also argues that her waiver was invalid because, similar to the argument above, she made a mistake in signing the waiver. She asserts she believed she was only waiving her right to dental and vision coverage.

Appellant argues that based on this unilateral mistake the contract waiver may be voided. Appellee correctly argues that any mistake on appellant's part is irrelevant because she bore the risk of mistake.

A contract may be voidable because of a mistake of one party as to a basic assumption when the mistake is known to

the other party or is due to the fault of the other party. That's from Still versus Cunningham, 94 P3rd 1104, an Alaska Supreme Court case from 2004 citing the restatement section of contracts at section 153.

The restatement also states that a contract may be voidable where the effect of the mistake is such that enforcement of the contract would be unconscionable. Based on the facts of this case, appellant's mistake will not make the contract voidable.

The division had no reason to know of the mistake, nor was it at fault for the mistake. Furthermore, it does not appear that the effect of the mistake is such that enforcement of the contract or waiver would be unconscionable. Even if the above were not true, and this court found that the mistake made enforcement unconscionable or that the mistake was the fault of the division's forms, although it's discussed above, the ALJ's determination that the forms were objectively clear should not be overturned, appellant's argument would still fail because she bore the risk of the mistake.

The restatement of contracts at section 153 indicates the mistake of one party does not make the contract voidable if that party bore the risk of a mistake. See, for example, Dickerson versus Williams at 956 P2d 458, an Alaska Supreme Court case from 1998 that stated, "A party who makes a unilateral mistake as to a basic assumption on which the contract

was made may void the contract if she did not bear the risk of the mistake," end quote.

The restatement of contracts sets out when a party bears the risk of a mistake in section 154. There are three acknowledged bases for allocating risk of mistake. The first, one bears the risk of mistake if the contract allocates that risk to her.

Second, a party bears the risk of a mistake when he is aware at the time the contract is made that he has only limited knowledge with respect to the facts to which the mistake relates, but treats his limited knowledge as sufficient.

And third, if the contract does not allocate the risk of mistake and neither party bears the risk due to conscious ignorance a party bears the risk of mistake when the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.

Again, those are from the restatement section of contracts section 154. The first basis for allocating the risk of mistake is not applicable here because the waiver signed by the appellant is silent as to who bears the risk of any mistake.

However, the second basis supports a finding that the appellant bore the risk of any mistake. At the time that appellant signed the waiver, it is uncontested based on her own testimony that she had only limited knowledge regarding what she was waiving.

Appellant asserts that a unilateral mistake occurred because she thought she was waiving dental and vision coverage, not survivor benefits. Appellant was aware that she had only limited knowledge about what the waiver entailed and she chose to treat her limited knowledge as sufficient.

The facts indicate that appellant and Mr. W. did not discuss Mr. W.'s financial affairs in detail prior to his retirement. Furthermore, appellant testified that she did not understand survivor options until after Mr. W. had retired.

Also, at numerous times in her testimony, the appellant stated that Mr. W. completed the forms himself and that she did not read the majority of them. Finally, when Mr. W. retired, he was given the opportunity to request more information on certain aspects of his retirement benefits and although he requested information on one topic, he checked "no" when asked if he needed additional information on survivor benefit options and rights.

Even if the second basis did not support her signing the risk of this alleged mistake to appellant, the case law states when allocating risk among parties, the court will consider the purposes of the parties and will have recourse to its own general knowledge of human behavior and bargain transactions.

The court has broad discretion in determining when to deny relief to a mistaken contracting party under the theory that a party bore the risk of the mistake.

See Wasser and Winters Company versus Richie Brother Auctioneers, Inc. at 185 P3rd 73, an Alaska Supreme Court case from 2008.

It seems fair to say that the information about what rights were being waived was of great importance to appellant while of lesser importance of appellee, so under the facts of this case, the risk of mistake should be assigned to the appellant.

Because appellant has not met the requirements for voiding a contract due to unilateral mistake, and in any event, would bear the risk of any mistake, her waiver is valid and the ALJ did not err in holding so.

Finally, issue four was the appellant's argument that the ALJ erred in relying on inadmissible evidence in the form of a web page article that was allegedly written by Mr. W.

Because this is a legal question, not involving agency expertise, this court will again use the substitution of judgment standard for review.

The cases cited by appellant do not discuss the admissibility of hearsay in the context of an administrative hearing. The rules regarding hearsay in administrative hearings are much more relaxed than in a formal judicial proceeding.

The strict rules of evidence governing admissibility of hearsay in judicial proceedings do not apply to administrative proceedings. Unless the hearsay evidence is inherently unreliable, an award will not be set aside merely

because evidence is offered and accepted which would be excluded in a court of law.

See Racine versus State Department of Transportation and Public Facilities at 663 P2d 555, an Alaska Supreme Court case from 1983.

This rule is set out in AS 4462 460(d) where the statute states, quote, "The hearing need not be conducted according to technical rules relating to evidence and witnesses. Relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of a common law or statutory rule that makes improper the admission of the evidence or over objection in a civil action.

Hearsay evidence may be used to supplement or explain direct evidence, but is not sufficient by itself to support a finding unless it will be admissible over objection in a civil action."

Based on this, the ALJ did not err in admitting the evidence of the internet article. Because it was an administrative hearing, the ALJ was entitled to admit the evidence as long as it was relevant and a responsible person would rely on it.

In this case, the ALJ relied on the article in determining that Mr. W. had more likely than not understood what he was doing when he elected the level income option without survivor benefits.

Because the article indicated that Mr. W. had excellent literacy skills and had done extensive preparation in starting his online business, that was of the subject of the article, the article was relevant to determining that Mr. W. understood the forms when he completed them and took time and care in completing them.

There was ample evidence in the article to indicate that it had in fact been written by Mr. W. The article referenced his business, his family, his wife's nickname and other facts that would indicate that Mr. W. was the author.

Furthermore, the article was only used to supplement other evidence of Mr. W.'s intent in making his elections. Among the other facts, the ALJ also considered the fact that Mr. W. signed and included the separate retirement benefits election level income option form, the fact that he submitted a spouse's waiver, and the fact that he did not request additional information on survivor benefits.

Furthermore, the article was not admitted for the truth of the matter asserted in it, but to illustrate Mr. W.'s literacy skills. Therefore, it would not have been objectionable on a hearsay objection in a civil action.

The article was not hearsay, was not relied on by itself to support a finding, was relevant and it was of such a nature that a responsible person would have relied on it for the basis on which it was used. Therefore, it was within the discretion of the ALJ to admit and rely on this evidence, and the

ALJ did not commit error in doing so.

For the reasons stated, the appeal in this case is denied.

We'll be off record.

TRANSCRIBER'S CERTIFICATE

I, SONJA L. REEVES, hereby certify that the foregoing pages numbered 1 through 30 are a true, accurate and complete transcript of proceedings in Case No. 3AN-08-05774 transcribed by me from a copy of the electronic sound recording to the best of my knowledge and ability.

4 Feb 09 *Signed*

DATE SONJA L. REEVES, TRANSCRIBER

[This document has been modified to conform to technical standards for publication.]