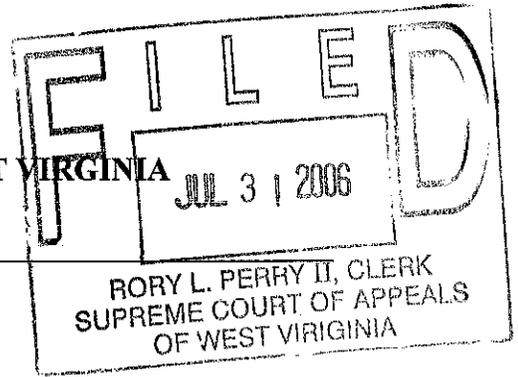


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



CHARLESTON

CASE NO. 33078

PATTY KALANY AND ROBERT KALANY,

PLAINTIFFS BELOW/APPELLEES,

v.

HERMAN CAMPBELL, INDIVIDUALLY AND D/B/A IRENE'S BAR,

DEFENDANT BELOW/APPELLANT.

APPELLANT'S REPLY BRIEF

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II. APPELLANT'S REPLY

A. APPELLANT'S REPLY TO APPELLEES' JURY VERDICT ISSUES

1. The jury's verdict of retaliatory discharge against Herman Campbell was against the plain preponderance of the evidence, contrary to law and must be set aside.

In the **JURY VERDICT ISSUES** portion of Appellees' Response Brief, the Appellees spend significant time discussing factual information regarding the location of Irene's Bar within Ohio County, colorful anecdotes allegedly regarding the Appellant Herman Campbell as well as various alleged factual circumstances pertaining to the use of profanity and physical contact of employees behind the bar at Irene's Bar. However, all of this information is irrelevant. The lower court did not allow any claims of sexual hostile work environment to be presented to the jury. Further, the Appellees admit that foul language and any physical touching behind the bar were believed by the plaintiff to "be a part of the job and that she didn't complain." The Appellees further admit (although incorrectly) that the "jury made a fair decision in refusing to award her on her claim for sexual hostile work environment." See: Appellees' Response Brief at page 3.

As stated in the Appellant's Appeal Brief, at the end of the presentation of evidence, the trial court ruled that the only factual basis for a claim of common law sexual harassment was whether or not the alleged kiss of Patty Kalany by Herman Campbell occurred. (Tr. Vol. II at 207-9.) The jury clearly found that Appellees failed to prove that the alleged kiss occurred. See: Verdict Form, Special Interrogatory No. 1. At trial, other than Ms. Kalany's statement, there was absolutely no direct corroborating evidence from any source or from any person who was present on November 27, 2001 at Irene's Bar when this alleged kiss was to have occurred. Rather, all other witnesses who were in the bar on November 27, 2001, and who testified at the trial,

testified that they did not see the kiss and/or they do not believe that a kiss occurred. (Tr. Vol. II at 213 and 238.).

As the trial court found that Herman Campbell, d/b/a Irene's Bar, did not employ twelve or more persons within the state for twenty or more calendar weeks in the calendar year in which the alleged act of discrimination allegedly occurred or the preceding calendar year, the court held that Herman Campbell was not an employer under the West Virginia Human Rights Act ("HRA") and that no claims under the HRA were applicable or available to the Appellee. (Tr. Vol. II at 207-9.) As a result, the court only allowed the case to proceed under the common law rationale espoused in Williamson v. Greene, 200 W.Va. 421, 490 S.E.2d 23 (1997).

The Williamson case allows for a common law claim of retaliatory discharge. In Williamson, after acknowledging the general West Virginia rule that an employer has an absolute right to discharge an at will employee, this Court indicated that such rule must be tempered "where the employer's motivation for the discharge is to contravene some substantial public policy princip[le]" Syl. Pt. 5, Williamson, 421 S.E.2d at 25 (quoting Syllabus, Harless v. First Nat'l Bank in Fairmont, 162 W.Va. 116, 246 S.E.2d 270 (1978)).

The Williamson court further elaborated that "[t]o identify the sources of public policy for purposes of determining whether a retaliatory discharge has occurred, we look to established precepts in our constitution, legislative enactments, legislatively approved regulations, and judicial opinions." Syl. Pt. 6, Williamson, 490 S.E.2d at 25 (quoting Syl. Pt. 2, Birthisel v. Tri-Cities Health Services, Corp., 188 W.Va. 371, 424 S.E.2d 606 (1992)).

The Williamson court specifically continued with an explanation of this common law retaliatory discharge claim by writing, "[t]he discharged employee may nevertheless maintain a common law claim for retaliatory discharge against the employer based on alleged sex

discrimination or sexual harassment because sex discrimination and sexual harassment in employment contravene the public policy of this State articulated in the West Virginia Human Rights Act, W.Va. Code, 5-11-1, *et seq.*” Syl. Pt. 8, Williamson, 490 S.E.2d at 25.

As stated above and in the Appellant’s initial brief, the lower court determined that the factual issue to determine whether a violation of a “substantial public policy” existed which would allow for a common law retaliatory discharge claim by the Appellee herein was whether or not there was sexual harassment of the Appellee by Herman Campbell. The court specifically identified the factual basis for any such claim as being whether or not there was a kiss that occurred on November 27, 2001. (Tr. Vol. II at 207-9.) In its verdict, the jury found no sexual harassment and thereby found no kiss occurred on November 27, 2001. As the kiss and corresponding claim of sexual harassment was the only basis for a common law retaliatory discharge claim under the rationale of the Williamson case, the court erred in affirming the verdict for the Appellees based upon retaliatory discharge. The jury’s verdict was simply without factual basis and therefore was erroneous as a matter of law. “A verdict or decision which, under the evidence, is contrary to the law governing the case must be set aside.” McCausland v. Jarrell, 136 W.Va. 569, 68 S.E.2d 729 (1951) (citing 66 C.J.S., New Trial, § 68). See: Gates v. Justice, 107 W.Va. 331, 148 S.E. 197 (1929); Jenkins v. Charleston Gen’l Hosp. and Training School, 90 W.Va. 230, 110 S.E. 560 (1922).

Additionally, the verdict was against the plain preponderance of the evidence. The court erred in affirming the verdict for the Appellees based upon retaliatory discharge. When the verdict is against the plain preponderance of the evidence, then the appellate court must set aside the verdict. See: Syl. Pt. 6, Mildred L.M. v. John O.F., 192 W.Va. 345, 452 S.E.2d 436 (1994); Syl. Pt. 2, Stephens v. Bartlett, 118 W.Va. 421, 191 S.E. 550 (1937). “If on review, the evidence

is shown to be legally insufficient to sustain the verdict, it is the obligation of the appellate court to reverse the circuit court and to order judgment for the appellant.” Syl. Pt. 1, in part, Alkire v. First Nat’l Bank of Parsons, 197 W.Va. 122, 475 S.E.2d 122 (1996).

In their Response Brief, Appellees apparently misread or misconstrue the rationale and holding in Williamson. The Appellees assert that a jury can find a claim of retaliatory discharge under the facts and circumstances of this case without a finding of sexual harassment. This is clearly a misreading of Williamson as shown in the Syllabus Points quoted above. Further, in the Appellees’ Response Brief, Appellees misstate the content of Syllabus Point 8 of Williamson when they write that Williamson “provides that ‘sexual harassment’ or ‘retaliation’ are separate and distinct.” See Appellees’ Response Brief at page 3. This is a clear misreading of Syllabus Point 8 of Williamson. A quick review of the pertinent part of Syllabus Point 8 clearly illustrates the mistake.

[T]he discharged employee may nevertheless maintain a common law claim for retaliatory discharge against the employer based on alleged **sex discrimination or sexual harassment** because sex discrimination and sexual harassment in employment contravene the public policy of this State articulated in West Virginia Human Rights Act, W.Va. Code, 5-11-1, *et seq.*

Syl. Pt. 8, Williamson, 490 S.E.2d at 25. (Emphasis added).

Williamson clearly states that in order for a plaintiff to prove a common law retaliatory discharge claim, the plaintiff must prove a violation of a substantial public policy, and in Williamson the violations of substantial public policy were identified as sex discrimination or sexual harassment. In this case, the circuit court held that the only claim that could lead to a finding of a contravention of a substantial public policy sufficient to prove a retaliatory discharge claim was whether or not the plaintiff could prove a sexual harassment claim and, specifically, whether or not Herman Campbell kissed Patty Kalany on November 27, 2001. As stated, the

failure of the Appellee to prove that the kiss occurred, and therefore her sexual harassment claim, requires a subsequent finding that the plaintiff failed to meet her burden of proof to show a contravention of some substantial public policy principle necessary for the common law retaliatory discharge claim under Williamson.

The trial court's denial of the Appellant's Motion for Judgment as a Matter of Law must be set aside. The jury's verdict was contrary to law and was against the plain preponderance of the evidence. Further, the evidence viewed in the light most favorable to the Appellees is legally insufficient to sustain the jury's verdict. Therefore, it is the obligation of this Court to reverse the circuit court and to order judgment for the Appellant. See: McCausland v. Jarrell, 136 W.Va. 569, 68 S.E.2d 729 (1951); Gates v. Justice, 107 W.Va. 331, 148 S.E. 197 (1929); Jenkins v. Charleston Gen'l Hosp. and Training School, 90 W.Va. 230, 110 S.E. 560 (1922); Syl. Pt. 1, Alkire v. First Nat'l Bank of Parsons, 197 W.Va. 122, 475 S.E.2d 122 (1996); Syl. Pt. 6, Mildred L.M. v. John O.F., 192 W.Va. 345, 452 S.E.2d 436 (1994); Syl. Pt. 2, Stephens v. Bartlett, 118 W.Va. 421, 191 S.E. 550 (1937).

2. The verdict form was confusing and contributed to the common law retaliatory discharge award but the trial court should have corrected this error by granting Appellant's motion for judgment as a matter of law.

The verdict form submitted to the court for use in this trial was submitted after discussion, negotiation and input from both parties. To assert that the confusion related to Interrogatory No. 2 on the Verdict Form was solely caused by the Appellant is disingenuous. However, the basis for raising the issue of the ambiguity or incompleteness of Special Interrogatory No. 2 in the Verdict Form is to simply illustrate to this Court that the jury was confused by said Special Interrogatory and that the jury was confused into believing that a complaint by Patty Kalany to her husband about an alleged kiss, a kiss the jury did not believe to

have occurred, was sufficient to find a claim of retaliatory discharge against Herman Campbell. The language of Special Interrogatory No. 2 of the Verdict Form was raised by the Appellant to simply illustrate the confusion that ultimately led to the verdict of retaliatory discharge. In hindsight, if Special Interrogatory No. 2 would have included an instruction indicating that if the jury found no sexual harassment in response to Special Interrogatory No. 1, they could not find retaliatory discharge under Special Interrogatory No. 2, the confusion would have been alleviated.

However, the law is clear in this respect. In order for the Appellees to prove a common law retaliatory discharge claim, they must prove that the motivation for discharge by the employer was to contravene some substantial public policy principle. Syl. Pt. 5, Williamson, 490 S.E.2d at 25. In this case, the only potential substantial public policy principle that was alleged to have been contravened was that of sexual harassment resulting from the alleged kiss. Therefore, the jury's finding of liability for retaliatory discharge when the kiss did not occur is contrary to the common law claim as announced in Williamson v. Greene. The court should have vacated the verdict for retaliatory discharge as violative of West Virginia law, notwithstanding the ambiguous nature of jointly submitted Special Interrogatory No. 2. See: McCausland v. Jarrell, 136 W.Va. 569, 68 S.E.2d 729 (1951); Gates v. Justice, 107 W.Va. 331, 148 S.E. 197 (1929); Jenkins v. Charleston Gen'l Hosp. and Training School, 90 W.Va. 230, 110 S.E. 560 (1922); Syl. Pt. 1, Alkire v. First Nat'l Bank of Parsons, 197 W.Va. 122, 475 S.E.2d 122 (1996); Syl. Pt. 6, Mildred L.M. v. John O.F., 192 W.Va. 345, 452 S.E.2d 436 (1994); Syl. Pt. 2, Stephens v. Bartlett, 118 W.Va. 421, 191 S.E. 550 (1937).

B. APPELLANT'S REPLY TO APPELLEES' ATTORNEY FEE ISSUES

1. The West Virginia Human Rights Act does not violate the Equal Protection clause of the United States and West Virginia Constitutions.

In West Virginia, “courts ordinarily presume that legislation is constitutional” Robinson v. Charleston Area Med. Ctr., 186 W.Va. 720, 726, 414 S.E.2d 877, 883 (1991). If, within the confines of the West Virginia Human Rights Act (“HRA”), employees were treated differently based upon a suspect classification, then the legislative classifications would be subject to strict scrutiny. See: State ex rel. Lambert v. County Comm’n of Boone County, 192 W.Va. 448, 457, 452 S.E.2d 906, 915 (1994). The definition of an employer in the HRA is limited to “any person employing twelve or more persons within the state for twenty or more calendar weeks in the calendar year in which the act of discrimination allegedly took place or the preceding calendar year” W.Va. Code § 5-11-3 (1998). This definition does not create a classification based upon sex, race, national origin or any other suspect classification. Rather, it is based on the number of employees, not their sex, race or national origin.

The definition of employer in the West Virginia Human Rights Act is similar to, though broader than, the definition of employer within the Equal Employment Opportunities subchapter of the Federal Civil Rights Act. The Civil Rights Act, 42 U.S.C.A. § 2000e(b), defines employer as “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year” 42 U.S.C.A. § 2000e(b) (1991). “Congress included the small business exception in Title VII to protect the intimate relationships associated with small employers and to shield them from the heavy costs of defending against discrimination claims. *See* 110 Cong. Rec. S. 13092 (1964) (remarks of Sen. Cotton); 110 Cong. Rec. 13085-88 (June 9, 1964); 110 Cong. Rec. S. 13088 (1964) (remarks of Sen. Humphrey); 110 Cong. Rec. S. 13092-93 (1964) (remarks of Sen. Morse); 110 Cong. R. 6566 (1964); 110 Cong. R. 7212 (remarks of Sen. Clark)” Gottling v. P.R. Inc., 61 P.3d 989, 995, 2002 UT 95 (2002). The employer definition under Title VII of the

Civil Rights Act has never been ruled unconstitutional. Rather, it has been the subject of judicial discussion indicating that the definition meets the rational basis analysis and is a balance between the public policy concerns and the interest and protection of small business. *See Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 174 (4th Cir. 2000); *Butler v. City of Prairie Village, Kansas*, 172 F.3d 736, 744 (10th Cir. 1999); *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1281 (7th Cir. 1995); *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993) ("Congress did not want to burden small entities with the costs associated with litigating discrimination claims.").

The definition of employer under the HRA creates a distinct class of "small employers" (those employers with less than twelve employees), which classification is subject to analysis under the rational basis test. "In the area of . . . economic benefits legislation . . . a classification which is not inherently suspect will satisfy the guarantee of equal protection of the laws if it bears some rational relation to the legitimate state purpose of the Act." *Thomas v. Rutledge*, 167 W.Va. 487, 493-4, 280 S.E.2d 123, 127 (1981) (quoting *Richardson v. Belcher*, 404 U.S. 78, 92 S.Ct. 254, 30 L.Ed.2d 231 (1971)).

There is a rational basis for limiting the term "employer" to "any person employing twelve or more persons within the state for twenty or more calendar weeks in the calendar year in which the act of discrimination allegedly took place or the preceding calendar year . . ." W.Va. Code § 5-11-3 (1998). This limitation encourages small business within the state of West Virginia. This limitation protects small business owners from the costs associated with compliance with the HRA and the costs associated with the administrative procedures and defending against discrimination claims thereunder.

This Court has had many opportunities to consider the constitutionality of the definition

of employer pursuant to West Virginia Code § 5-11-3(d) under the HRA. The Court has never questioned the definition's constitutionality. *See, e.g., Harmon v. Higgins*, 188 W.Va. 709, 426 S.E.2d 344 (1992) (finding that appellant Higgins did not qualify as an "employer" within the meaning of the Act because he did not employ twelve or more persons); *Woodall v. Int'l Bhd. of Elec. Workers, Local 596*, 192 W.Va. 673, 453 S.E.2d 656 (1995) (finding that a labor organization is liable for unlawful discriminatory practices in its capacity as an employer only if it meets the definition of employer set forth in the Act).

There is a rational basis for the limitation of who meets the definition of an employer under the HRA. Thus, the West Virginia Human Rights Act and its definition of employer is constitutional under an equal protection analysis.

2. The trial court erred by applying Sections 5-11-9 and 5-11-13 of the Human Rights Act in awarding attorney's fees to the Appellees under their common law claims.

The trial court's award of attorney's fees must be reversed because the court abused its discretion when it concluded "that attorney's fees and the costs of litigation should be awarded in this case against Herman Campbell, as a statutory 'person' for his reprisal against Patty Kalany for reporting the kiss to her husband, pursuant to W.Va. Code § 5-11-9 and § 5-11-13." See: Order, entered November 15, 2005.

As set forth in the Appellant's Appeal Brief, there are a multitude of reasons why the trial court's application of the Human Rights Act to the post-verdict award of attorney's fees must be reversed. First, the Appellees in their Complaint and Amended Complaint failed to assert that Herman Campbell acted in a capacity other than as an employer of the Appellee for the purposes of the litigation. It cannot be disputed that Mr. Campbell's employment decisions and actions toward Ms. Kalany were performed in his capacity as her employer. A sole proprietor who takes

any employment action, adverse or otherwise, is acting within the employer–employee relationship.

Second, the Appellees in their Complaint and Amended Complaint failed to assert that Herman Campbell’s actions constituted reprisal against the Appellee under the HRA. Reprisal was not asserted, alleged, claimed, noted, referenced or even hinted at until after the conclusion of the trial when the Appellees sought attorney’s fees. It is inequitable for the Appellees to recover fees under a claim not asserted until after the verdict was returned.

Third, during trial, the court correctly ruled that the HRA did not apply to the Appellees’ claims because Herman Campbell was not a statutory employer. Therefore, the entire Act does not apply to either the Appellees’ claims or their request for attorneys fees. The Court’s stated basis for award of attorneys fees is pursuant to the statutory authority granted in a statute that does not apply to the underlying substantive claims.

Fourth, the trial court’s interpretation of W.Va. Code § 5-11-9(7) violates traditional canons of statutory interpretation because it violates the rule against statutory absurdity and the rule against statutory nullity. To hold that this “employer,” who is not subject to the HRA, is a “person” subject to the HRA in order to award costs and attorney’s fees against the employer leads to an absurd, unjust and unreasonable result. Further, this Court has explained that it is “[a] cardinal rule of statutory construction . . . that significance and effect must, if possible, be given to every section, clause, word or part of the statute.” Dunlap v. Friedman’s, Inc., 213 W.Va. 394, 582 S.E.2d 841 (2003), (quoting Syl. Pt. 3, Meadows v. Wal-Mart Stores, Inc., 207 W.Va. 203, 530 S.E.2d 676 (1999)). The trial court’s interpretation of the word “person” within West Virginia Code § 5-11-9(7) nullifies all significance to the words following “person” in subsection 7, *i.e.*, the words “employer, employment agency, labor organization, owner, real estate broker,

real estate salesman or financial institution,” because the trial court’s all-encompassing definition of “person” would include each of those entities. W.Va. Code § 5-11-9(7) (1998).

Finally, the jury, *i.e.*, the finder of fact, did not return a verdict for the Appellee based upon a claim of reprisal. The jury’s verdict found in favor of the Appellees only on their common law claim of retaliatory discharge. As a result, there is no basis in the jury’s verdict for the court’s award of attorney’s fees pursuant to a statute that was inapplicable to the claims.

For these reasons, the trial court’s award of attorney’s fees for reprisal under the Human Rights Act is in error and must be reversed. Where a lower court wrongfully applies an inapplicable statute, the lower court has abused its discretion and this Honorable Court must reverse the order of the lower court. Bartles v. Hinkle, 196 W.Va. 381, 472 S.E.2d 827 (1996) (citing Cox v. State of West Virginia, 194 W.Va. 210, 460 S.E.2d 25 (1995)).

3. The common law of the State of West Virginia does not support an award of attorney fees.

While this issue was also raised in the Appellate Brief, it is worth repeating that the State of West Virginia follows the American Rule with respect to attorney fees. “As a general rule each litigant bears his or her own attorney’s fees absent a contrary rule of court or express statutory or contractual authority for reimbursement.” Syl. Pt. 2, Sally-Mike Properties v. Yokum, 179 W.Va. 48, 365 S.E.2d 246 (1986); Daily Gazette Co., Inc. v. Canady, 175 W.Va. 249, 250, 332 S.E.2d. 262, 263 (1985); 1 S. Speiser, *Attorneys’ Fees* §§ 12:1, 12:3-12:4 (1973). In this case there was no contrary rule of court or express statutory or contractual authority to support an award of attorney fees to the Appellees.

The Appellees cite no West Virginia cases in which attorney fees were awarded under common law claims. They cited two Maryland cases, Molesworth and Montgomery County, in an effort to support their award of fees. However, a review of these out-of-state cases shows that

attorney fees were not awarded under common law claims in either case. Molesworth v. Brandon, 341 MD 621, 672 A.2d 608 (1996); Montgomery County v. Buckman, 333 MD 516, 636 A.2d 448 (1994). Maryland also follows the American Rule regarding attorney fees.

“Generally, in the absence of a fee-shifting statute, the American Rule on awarding attorney’s fees applies in Maryland, *i.e.*, fee-shifting is not permitted; each party is solely responsible for his own attorney’s fees. This is the common law in Maryland.” Footnote 2, Manor Country Club v. Flaa, 387 Md. 297, 300, 874 A.2d 1020, 1022 (2005).

The Appellees mistakenly assert that Williamson v. Greene provides a public policy basis for fee-shifting under a common law claim. Clearly it does not. Rather, the case confirms that employees of a “small employer” may maintain common law claims for retaliatory discharge based on sex discrimination or sexual harassment. Williamson v. Greene, 200 W.Va. 421, 431, 490 S.E.2d 23, 33 (1997). Attorney fees were not awarded to the plaintiff in Williamson.

There is no basis for the award of attorney fees to the Appellees. Further, to the Appellant’s knowledge, there has never been an award of attorney’s fees under a common law claim of retaliatory discharge in West Virginia. “A trial court abuses its discretion if its ruling is based upon an erroneous assessment of the evidence or the law.” Bartles v. Hinkle, 196 W.Va. 381, 472 S.E.2d 827 (1996) (citing Cox v. State of West Virginia, 194 W.Va. 210, 460 S.E.2d 25 (1995)). The lower court’s award was an abuse of discretion and must be reversed.

III. CONCLUSION

Based on the arguments and authorities set forth above and in the Appellate Brief, the trial court erred in denying the Appellant’s Rule 50(b) Motion for Judgment as a Matter of Law as it pertains to the jury’s verdict for the Appellee in the amount of \$7,824.00 for common law retaliatory discharge where the jury found that there was no sexual harassment and sexual

harassment was the only substantial public policy violation asserted as necessary proof of the common law retaliatory discharge pursuant to Williamson v. Greene. Additionally, the trial court erred in awarding costs and attorney's fees of \$60,095.06 under discretionary authority provided by the Human Rights Act where all statutory claims under the Human Rights Act were previously dismissed. Simply put, the trial court abused its discretion by awarding attorney's fees in a common law retaliatory discharge claim.

Wherefore, the Appellant, Herman Campbell, respectfully requests that this Honorable Court REVERSE the August 3, 2005 and November 15, 2005 Orders of the Circuit Court of Ohio County, and all further relief as this Court deems appropriate.

HERMAN CAMPBELL, INDIVIDUALLY AND
D/B/A IRENE'S BAR,
By Counsel

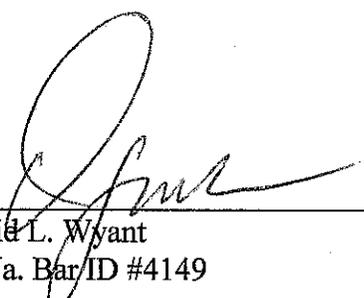


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CERTIFICATE OF SERVICE

Service of the foregoing **APPELLANT'S REPLY BRIEF** was had upon the following
by mailing a true and correct copy herein by United States mail, postage prepaid, on this
29th day of July, 2006:

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