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COURT OF APPEALS, STATE OF COLORADO Colorado State Judicial Building 2 East 14th Avenue, Denver, Colorado 80203	
Appeal from District Court, Arapahoe County State of Colorado TRIAL JUDGE: Judge Robert Russell TRIAL COURT CASE NO.: 05 DR 1286	
In re Marriage of: **Respondent/Appellant:** S.B. [redacted] **Petitioner/Appellee:** R.B. [redacted]	▲ **COURT USE ONLY** ▲
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ANSWER BRIEF

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STATEMENT OF ISSUES

I. Whether the trial court correctly prohibited Mother from relitigating the issue of the daughter's emancipation when that issue was previously decided in the dissolution of marriage proceedings.

II. Whether the record supported the trial court's award of attorneys fees and costs to Husband under either C.R.S. §13-17-102 or C.R.S. §14-10-119.

STATEMENT OF THE CASE

This is an appeal in a post-decree dissolution of marriage action where Mother has appealed from the Order Re: Emancipation of [redacted] which had the effect of denying Mother's Verified Motion for Modification of Child Support Order.

STATEMENT OF FACTS

The parties' twenty-six year marriage was dissolved by entry of a Decree of Dissolution of Marriage on September 26, 2006. (Vol. 1, pp. 196-198). The parties' Separation Agreement was incorporated into the Decree of Dissolution of Marriage. (Vol. 1, pp. 173-190). Two daughters were born to the parties during their marriage, C. [redacted] (d/o/b [redacted] 1986) and A. [redacted] (d/o/b

[redacted]/1989). At the time the Decree was entered, [redacted] was 20 years old and [redacted] was 17 years old.

During the dissolution of marriage proceedings, the parties' youngest daughter A. [redacted] lived with Father and was supported primarily by Father. (Vol. 4, pg. 68, ll. 11-24). The parties' eldest daughter, C. [redacted] lived independently in an apartment on her own, despite her bipolar diagnosis. (Vol. 4, pg. 12, ll. 1-2; pp. 56-57) She was employed at Father's business and received additional financial support from Father. (Vol. 4, pg. 12, 1-21; pg. 58, ll. 1-5). Father testified that although C. [redacted] was not financially independent, she was planning on attending college. (Vol. 4, pp. 72-73).

Although the Petition requested that the Court enter orders regarding child support, (Vol. 1, pg. 15) Father never sought child support from Mother, and Mother never sought child support from Father. However, Father did request that the court consider his support of both daughters when determining his maintenance obligation to Mother. (Vol. 4, pg. 98, ll. 10-25). Throughout the litigation, Mother opposed the trial court's consideration of Father's voluntary support of C. [redacted]. (Vol. 4, pg. 96, ll. 12-17).

The issue of C. [redacted]'s emancipation was addressed numerous times during the dissolution of marriage proceedings. On June 29, 2005, a Status Conference

was held by the magistrate. Counsel for Mother was ordered to prepare the form of Order from the Status Conference. (Vol. 2, pg. 314). Such Order was filed with the court on August 16, 2005, was signed by the magistrate on September 17, 2005, and provided "the parties' oldest daughter C. [redacted] is emancipated." (Vol. 1, pg. 61). Although the Order informed both parties of their right to seek review of the Magistrate's Order, neither party sought review of any provisions, including the finding that C. [redacted] was emancipated.

A Temporary Orders hearing was held on August 15, 2005. (Vol. 4). The magistrate entered written orders following the hearing. (Vol. 1, pp. 68-72). Neither party sought review of the magistrate's Temporary Orders. The magistrate entered the following relevant findings:

> "3. . . . The parties' oldest child is now over 19 years of age, and although the Magistrate finds that the child has a disability due to her bipolar condition such that she is not capable of support [sic] herself financially at this time and is also residing in an apartment paid for by father, it is not appropriate to address parenting time in connection with this child, due to her age.
>
> . . . .
>
> 4. As to decision-making regarding the youngest child, the Magistrate . . . orders that the parties shall make major decisions regarding the child together.
>
> . . . .
>
> 9. As to the ability of husband to meet his needs while meeting those of the spouse seeking maintenance, . . . *the parties' unemancipated child* resides primarily at [husband's] residence. . . . Husband does have the responsibility of supporting both children of

the parties, and the Magistrate finds the oldest child has a disability under which she is not capable of supporting herself fully at this time. Although a specific child support amount to be paid by wife is not being sought by husband at this time, it is appropriate for the Magistrate to consider father's expenditures for the children as bearing upon the financial resources available to the parties. . . ." (emphasis added) (Vol. 1, pp. 69-70).

Contrary to Mother's assertion in her Opening Brief (pp. 2, 6 and 9), the Magistrate's Temporary Orders did not impose on Father an obligation to pay support for [redacted]. Rather, the Temporary Orders merely recognized Father's decision to provide support for [redacted] as a result of her lack of capability to be "supporting herself fully." And, of greatest significance, the Temporary Orders reflect that the parties only had one unemancipated daughter, [redacted]. Accordingly, the Temporary Orders did not modify the Interim Order which found that [redacted] was emancipated.

Thereafter, the parties engaged in mediation and settled all Permanent Orders issues in their dissolution proceeding by way of a fully executed Separation Agreement. (Vol. 1, pp. 173-190). The parties' Separation Agreement contained the following relevant provisions:

> Paragraph 2.1: ". . . inasmuch as their daughter, [redacted], has reached the age of 19, the provisions contained in this Parenting Plan will pertain to their minor daughter, [redacted], only."
>
> Paragraph 4.1: Child Support Obligation. The parties acknowledge the provisions of C.R.S. §14-10-115 pertaining to the guidelines for

child support. We further acknowledge that given the parties respective incomes, the expenses for the educational expenses for [redacted] and the parenting schedule, that a specific child support payment from one parent to the other is not warranted nor in [redacted]'s best interests. In lieu of such payments, the parties agree to the provisions contained herein.

Paragraph 4.2: We agree that Wife shall pay 35% of [redacted] expenses for enrollment in the program and room and board at Outback Therapeutic Expeditions for May 2006. Husband shall pay the remainder of [redacted]'s expenses associated with her participation in the Outback program and for such other expenses as are necessary for [redacted].

Paragraph 4.4: Medical Insurance and Extraordinary Medical Expense Husband shall maintain in full force and effect the current or substantially similar medical insurance coverage for the children for as long as they or either of them is eligible for coverage under the terms of the policy. . . .

Paragraph 8.3: Dependency Exemptions, Tax Credits and Filing Status: Husband shall be entitled to claim "head of household" status in regards to the care of [redacted]. Further, Husband shall be entitled to claim both children as dependency exemptions. However, in the event that he does not benefit from claiming one or either child as a dependent, Wife shall be entitled to do so.

The terms of the parties' Separation Agreement were arrived at through mediation. However, when it was time to draft the Separation Agreement, the parties encountered some difficulty regarding the specific terms that would be included in the Separation Agreement. The parties submitted their disputes to the mediator, who was given arbitration authority to resolve the issues of the drafting

of disputed provisions. (Vol. 1, pp. 163-171). Two disputed provisions are relevant to this appeal.

First, Father requested a provision that both parties be supportive of the daughters' relationships with the parents' significant others. Mother objected to such a provision arguing that '[redacted] is an adult and [redacted] is approaching adult hood and will likely form their own opinions about "significant others" being included in their parents [sic] lives." (Vol. 1, pg. 165). The Arbiter resolved the issue by making the finding that "[redacted] is 20 years of age and [redacted] is 17 years of age." (Vol. 1, pg. 165). Apparently persuaded that the provision had no bearing on [redacted] due to her age, the Arbiter then went on to discuss the appropriateness of such a provision with respect to [redacted] alone. (Vol. 1, pg. 165).

> Second, Father requested the inclusion of the following provision:
>
> "The parties agree that their daughter [redacted], although having reached the age of 19, remains at least in part dependent upon her parents. At this time the parties are not making additional financial allocations between them concerning any appropriate support for [redacted]." (Vol. 1, pp. 167-168).

Mother stated her objection to including this provision in the Separation Agreement as follows:

> "This provision was again not agreed to by [Mother]. It is uncertain what the purpose of this language is intended to accomplish, but if it implies that [Mother] acquiesces that [redacted] is not emancipated and therefore, is entitled to ongoing child support, it should be noted

that [redacted] is not only over 19 years of age, she has been living independently for some time and has been employed by [Father's] surgical practice." (Vol. 2, pg. 438).

The Arbiter rejected Father's proposed language and found that "[w]hile the parties did discuss the costs of [redacted] support, they did not reach any agreement relating to a division of those costs nor inclusion of a provision in their Separation Agreement stating that [redacted] was currently "dependent" upon her parents. (Vol. 1, pg. 168). Accordingly, the Arbiter rejected the proposed provision.

Counsel for Mother prepared the Decree of Dissolution of Marriage that was signed by the court. The Decree provided that "All provisions regarding *the child* are in the best interests of the children including residence, decision making and parenting time provisions. The parenting plan is incorporated in this decree. . . [a]ny support order entered will become part of this decree." (emphasis added) (Vol. 1, pg. 197).

The post-decree proceedings commenced on September 12, 2007 when Mother filed her Verified Motion for Modification of Child Support Order. (Vol. 1, pp. 199-203). At the time, [redacted] was over 21 year of age. Mother requested that the court "modify the existing child support order to provide for [redacted] support." (Vol. 1, pg. 202). Mother also requested a support order be entered for

A.
[redacted], (Vol. 1, pg. 200), but Mother subsequently withdrew her request with respect to A. [redacted]. (Vol. 2, pg. 477).

Father objected to imposition of a child support obligation for C [redacted] on the grounds that she was emancipated at the time the Decree of Dissolution of Marriage was entered. (Vol. 1, pp. 213-222). Father further requested that Mother's request for child support for C [redacted] be dismissed pursuant to C.R.C.P. 12(c) which allows for judgment on the pleadings. (Vol. 1, pp. 234-239). Father requested that Mother be ordered to pay his attorneys fees and costs for filing a frivolous motion. (Vol. 1, pp. 237-238).

A recorded status conference was held on January 8, 2008 by the magistrate on Mother's request to establish child support for C [redacted]. (Vol. 5). At the conclusion of the status conference, the magistrate referred the matter for a telephone status conference with the district court judge to determine "whether a hearing should be set as to whether the oldest child is emancipated or not, or has become – unemancipated or was ever emancipated and whether any prior finding of the Court is binding on that." (Vol. 5, pg. 17, ll. 3-6). Counsel for Mother inquired as to the nature of the telephone conference with the district court judge, to which the magistrate responded "it will probably consist primarily of setting a hearing unless he decides to go ahead and simply . . . address the motions. . . he

may decide that it is appropriate to simply address the motions at that point, after hearing from counsel." (Vol. 5, pp. 22-23). Counsel for Mother did not object to this procedure. (Vol. 5, pg. 23, l. 3).

The district court judge conducted two unrecorded status conferences, on February 5, 2008 and March 6, 2008. At the February 5th conference, the judge requested additional time to review the transcript of the Temporary Orders hearing. (Vol. 2. pg. 315). At the March 6th conference, the court entered an oral ruling confirming [redacted] emancipation, and instructed counsel for Father to prepare the written order. (Vol. 1, pg. 481). Mother appeals from that Order Re: Emancipation of [redacted] and the Order of May 1, 2008, requiring Mother to pay Father $7,198.04 in attorneys fees. (Vol. 3, pg. 541).

SUMMARY OF ARGUMENT

The law in Colorado is clear. The Uniform Dissolution of Marriage Act does not provide for the support of a child who is emancipated at the age of majority and later becomes disabled. Therefore, in assessing Mother's Motion for Modification of Child Support, the trial court first was required to determine whether the parties' eldest child, [redacted] was emancipated at the time the Decree of Dissolution of Marriage was entered. [redacted]'s emancipation was at issue during the dissolution of marriage proceedings. Mother argued that

[redacted] was emancipated and obtained an Order from the magistrate declaring [redacted] emancipated. That determination was never modified and no orders were entered for [redacted]'s ongoing support at the time the Decree was entered. Accordingly, the doctrine of claim preclusion (res judicata) prohibits Mother in a post-decree proceeding from seeking a new determination concerning [redacted] emancipation. Accordingly, it was not error for the trial court to determine that [redacted] was previously emancipated, and not entitled to future child support.

A trial court's award of attorneys fees and costs is reviewed for an abuse of discretion. Here, Father requested an award of attorneys fees pursuant to C.R.S. §13-17-102 and C.R.S. §14-10-119. Because grounds existed for an award under both statutes, there is no basis for reversing the trial court's award of fees to Father. Additionally, to the extent that there were any deficiencies in the trial court's order regarding attorneys fees, Mother invited such error, and cannot now complain that those deficiencies require reversal on appeal.

ARGUMENT

I. THE TRIAL COURT CORRECTLY PROHIBITED MOTHER FROM RELITIGATING THE ISSUE OF THE ELDEST DAUGHTER'S EMANCIPATION WHEN THAT ISSUE WAS PREVIOUSLY DECIDED IN THE DISSOLUTION OF MARRIAGE PROCEEDINGS

The law in Colorado regarding the availability of child support for a disabled child is clear. The Uniform Dissolution of Marriage Act does not provide for the support of a child who is emancipated at the age of majority and later becomes disabled. Koltay v. Koltay, 667 P.2d 1374, fn. 2 (Colo. 1983). This rule of law is consistent with that of a majority of jurisdictions. See Filippone v. Lee, 304 N.J. Super. 301, 700 A.2d 384 (1997); Counts v. Hospitality Employees, 518 N.W.2d 358 (Iowa 1994); Ray v. Riggens, 164 Ind. App. 314, 328 N.E.2d 248 (1975); Cohn v. Cohn, 123 N.M. 85, 934 P.2d 279 (N.M. App. 1997); Towery v. Towery, 285 Ark. 113, 685 S.W.2d 155 (1985); and Elliott v. Bretherick, 555 So.2d 1109 (Ala. App. 1989). Here, the issue of C [redacted]'s emancipation was addressed by 1) the Interim Orders of June 29, 2005, 2) Temporary Orders, and 3) the parties' Separation Agreement which was incorporated into the Decree. All three documents were consistent with a finding that C [redacted] was emancipated at age nineteen. The Interim Orders specifically stated that C [redacted] was emancipated. (Vol. 1, pg. 61). The Temporary Orders refer to A [redacted] as the only unemancipated

child, (Vol. 1, pg. 70) and, based on Mother's insistence, the Separation Agreement did not provide for child support for [redacted], nor did it make reference to [redacted] having a disability. (Vol. 1, pp. 173-190).

Claim preclusion, formerly known as res judicata, works to preclude the relitigation of matters that have already been decided, as well as matters that could have been raised in a prior proceeding, but were not. Lobato v. Taylor, 70 P.3d 1152 (Colo. 2003). The doctrine holds that an existing judgment is conclusive of the rights of the parties in any subsequent suit on the same claim. Pomeroy v. Waitkus, 183 Colo. 344, 517 P.2d 396 (1974). Claim preclusion protects litigants from the burden of relitigating an identical issue with the same party. Argus Real Estate, Inc., v. E-470 Public Highway Authority, 109 P.3d 604 (Colo. 2005).

Mother now argues that [redacted] was not emancipated at age nineteen because the Separation Agreement did not specifically state that [redacted] was emancipated. However, Mother's allegation that [redacted] failed to emancipate at the statutory age of nineteen was an issue that could have been litigated at the time of Permanent Orders, and should have been litigated if either parent thought that [redacted] was entitled to an award of child support. See C.R.S. §14-10-115(2).[1]

[1] C.R.S. §14-10-115(2) provides, "In a preceding for dissolution of marriage, . . . the court may order either or both parents owing a duty of support to a child of the marriage to pay an amount reasonable or necessary for his support.

Thus, the doctrine of claim preclusion barred Mother from bringing a post-decree action seeking to establish that [redacted] was not emancipated at the time of entry of the Decree of Dissolution of Marriage.

The trial court properly concluded that [redacted] was emancipated and not entitled to support. While the question of emancipation is a question of law, the facts and circumstances of each case must be considered in determining whether the legal standards for emancipation have been established. In re the Marriage of Robinson, 629 P.2d 1069 (Colo. 1981) (emancipation occurs when by express or implied agreement between a child and a parent, a child who is capable of providing for his own care and support undertakes to leave his parents' home, earn his own living and do as he wishes with his earnings); see also Tencza v. Aetna Casualty and Surety Company, 111 Ariz. 226, 527 P.2d 97 (1974) (whether there has been an actual emancipation is a question of fact). Here, the legal conclusion that [redacted] was emancipated was supported by the record. In addition to the unchallenged Interim Orders which provided for [redacted]'s emancipation, (Vol. 1, pg. 61), evidence was presented during the dissolution proceedings which supported a finding of emancipation. Specifically, there was testimony that [redacted] was employed earning between $7.00 and $8.00 per hour, (Vol. 4, pg.

58, ll. 6-14) lived independently in an apartment of her own, (Vol. 4, pg. 12, ll. 1-3 and pp. 56-57) and planned on attending college (Vol. 4, pp. 72-73).

The Uniform Dissolution of Marriage Act does not provide for child support for a child that is disabled after emancipation. Koltay, *supra*. Accordingly, the trial court's conclusion that [redacted] was emancipated conclusively resolved the issues presented by Mother's Verified Motion for Modification of Child Support Order, regardless of whether [redacted] was disabled at the time Mother filed her Motion for Modification of Child Support.

Moreover, Mother's Verified Motion for Modification of Child Support erroneously relied on two statutory provisions to support her request to establish child support for [redacted]. First, Mother relied on C.R.S. §14-10-115(13)(a)(II) in support of her position that the court could establish child support for [redacted] as a result of her alleged mental disability. However, that statutory subsection only provides for the continuation of child support beyond the age of nineteen if a child is mentally or physically disabled. See In re the Marriage of Salas, 868 P.2d 1180 (Colo. App. 1994) (if an order for support of a minor child *exists*, then a request for its *continuation* may be made after the child has reached the presumed age of emancipation) (emphasis added). Here, there was never a child support ordered for [redacted] either prior to her nineteenth birthday, at the time the Decree of

Dissolution of Marriage was entered, or even in the two years following her nineteenth birthday. Because there was no existing child support obligation for [redacted], there was no child support obligation that could be continued past her nineteenth birthday.

Secondly, Mother sought to "modify" the child support order to establish a support order for [redacted] pursuant to C.R.S. §14-10-122 based upon a change of circumstances, namely Catherine's alleged worsening mental health. Mother's reliance on C.R.S. §14-10-122 was misplaced in two respects. Pursuant to Koltay, child support for a child over the age of majority is only available if that child suffered from a disabling condition prior to attainment of the age of majority. Here, Mother sought a modification on the basis that [redacted]'s mental health had deteriorated after her nineteenth birthday.[2] (Vol. 1, pp. 200-201).

Additionally, C.R.S. §14-10-122(2) provides that provision for the support of a child are terminated by emancipation of the child, "unless otherwise agreed in writing or expressly provided in the decree." Here, there was no agreement in writing between the parties that [redacted] was eligible for support after age

[2] Mother also filed a probate proceeding in September 2007 seeking to have Catherine, then age 21, declared an "incapacitated person" and for Mother to be appointed her Guardian pursuant to C.R.S. §15-14-301. (Vol. 2, pp. 260-272). Of significance, an "incapacitated person" is defined as "an individual *other than a minor*, who . . . lacks the ability to satisfy essential requirements for physical health, safety, or self-care. . . ." C.R.S. §15-14-102(5) (emphasis added). This Petition was never granted.

nineteen and there was no provision in the Decree of Dissolution of Marriage providing for child support for [redacted] after age nineteen. Accordingly, rather than providing Mother with legal authority for the establishment of a child support award for [redacted], C.R.S. §14-10-122 actually eliminated the possibility of the establishment of a child support order for [redacted] because it makes clear that such an order is only available if the Decree of Dissolution specifically provided for support after age nineteen. Here, the Decree of Dissolution did not contain any provision providing for support for [redacted]. (Vol. 1, pp. 196-198).

Once a child is emancipated, a subsequent disability cannot serve to revive a parent's duty to support that child. Here, the record and the doctrine of claim preclusion support the trial court's appropriate conclusion that [redacted] was emancipated. Accordingly, the trial court's Order Re: Emancipation of [redacted] should be affirmed on appeal.

II. THE RECORD SUPPORTS THE TRIAL COURT'S AWARD OF ATTORNEYS FEES AND COSTS UNDER EITHER C.R.S. §13-17-102 OR C.R.S. §14-10-119.

A judge can assess attorney fees if an attorney or party brings an action or defends an action "that lacked substantial justification." C.R.S. § 13-17-102(4). An action "lacks substantial justification" if it is "substantially frivolous, substantially groundless, or substantially vexatious." Id. An appellate court must

review an award of attorney fees under an abuse of discretion standard and can only reverse a trial court's finding if it is not supported by the evidence. Spring Creek Ranchers Ass'n, Inc. v. McNichols, 165 P.3d 244 (Colo. 2007). An award of attorneys fees under C.R.S. §13-17-102 is warranted where the record reveals that a party continued to relitigate a settled issue. Id.

Here, Mother attempted to relitigate the issue of [redacted]'s emancipation even though that matter had been resolved through the Interim Orders, Temporary Orders and the Separation Agreement. Further, Mother's attempt to establish child support for a previously emancipated child was contrary to established Colorado law. See Koltay, *supra*. Additionally, Father sought an award of attorneys fees incurred in defending against Mother's request for child support for the younger child, a child who lived with Father and did not spend any significant parenting time with Mother. (Vol. 2, pg. 448). These circumstances, discussed at length in Father's Motion for Attorneys Fees, support the trial court's award of fees.

Additionally, in the course of the determination of the emancipation issue, the court had the opportunity to review the financial circumstances of the parties. It was uncontroverted that Mother received $12,000 per month in maintenance from Father and that Father had provided the majority of the younger daughter's

support since the parties separated. (Vol. 3, pp. 520-521). These circumstances support the award of attorneys fees to Father pursuant to C.R.S. §14-10-119.

Mother now complains that the trial court's order awarding attorneys fees to Father did not specify the basis for the award of attorneys fees. (Opening Brief at pp. 11-12). This argument cannot form the basis of a reversal by this court because any deficiencies in the trial court's findings were invited by Mother. The doctrine of invited error provides that a party may not complain on appeal of an error that he has invited or injected into the case. Horton v. Suthers, 43 P.3d 611 (Colo. 2002). The doctrine of invited error prevents a party from inducing an erroneous ruling and then later seeking to profit from that error. The doctrine is intended to promote judicial economy and integrity by allocating appropriate responsibility for the inducement of error. Horton, *supra*, citing Roberts v. Consolidation Coal Co., 208 W.Va. 218, 539 S.E. 2d 478 (2000).

Here, the order for attorneys fees that was signed by the judge did not specify the basis of the award. (Vol. 2, pg. 489). Therefore, Father filed a Motion for Amendment of Findings Pursuant to C.R.C.P. 59(a)(3), requesting that the trial court enter a more expansive order detailing the basis for the award of fees. (Vol. 3, pp. 551-555). Mother objected to the trial court entering orders clarifying the basis for the award. (Vol. 3, pp. 564-565). Accordingly, because Mother argued

in the trial court below that the trial court should not be allowed to make additional findings to support the award of attorneys fees, she should not be allowed now to argue that the lack of sufficient findings warrants reversal of the award of attorneys fees.

Because the record on appeal supports an award of attorneys fees and costs pursuant to both C.R.S. §13-17-102 and C.R.S. §14-10-119, the award of attorneys fees to Father did not constitute an abuse of discretion and should not be reversed on appeal.

CONCLUSION

Throughout the initial dissolution of marriage proceeding, Mother successfully argued that the parties' eldest daughter was emancipated and that the Court should not enter any orders for her support. As a result, orders were entered confirming [redacted]'s emancipation, and no orders were entered for her support. Two years after entry of the Decree of Dissolution of Marriage, Mother sought to have a child support order established for [redacted] on the basis that she was disabled and incapable of supporting herself. The trial court rejected this attempt to relitigate [redacted]'s emancipation and ordered Mother to pay a portion of Father's attorneys fees and costs. Mother's request to establish a support order for a previously emancipated child was not supported by the law or the facts of this

case. Accordingly, the trial court's orders regarding [redacted] emancipation and the award of attorneys fees to Father were supported in law and fact. They cannot be reversed on appeal.

Respectfully submitted this 26th day of November, 2008.

MARIE AVERY MOSES

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of November, 2008, I have caused to be sent via United States mail, first class mail, postage prepaid, a true and correct copy of the foregoing **ANSWER BRIEF** addressed to the following:

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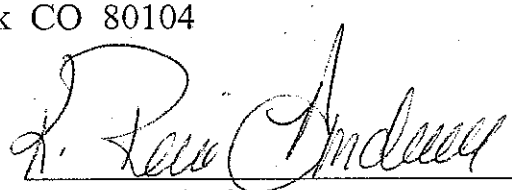

K. Renee Anderson