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DISTRICT COURT

CLARK COUNTY, NEVADA

CARL THOMPSON,

Plaintiff,

v.

PLAYLAND INTERNATIONAL, INC., et al.,

Defendants.

CASE NO.: A-14-697688-C
DEPT NO.: XV

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER GRANTING ORAL MOTION FOR A MISTRIAL

On September 14, 2017, at the end of voir dire, plaintiff moved for a mistrial based upon the misconduct of Edward Boyack, defense counsel for Lamplight Village @ Centennial Springs Homeowners Association. The Court heard additional argument the next day (September 15), after which the Court granted a mistrial upon finding that Mr. Boyack's questions and comments materially prejudiced the jury against the plaintiff in a manner that could not be remedied by a curative instruction or admonition.

FINDINGS OF FACT

1. On September 14, 2017, the parties were engaged in day two of jury selection. At 12:06 pm,[1] plaintiff's counsel asked the prospective jury to indicate if they believed the parties were "starting in the same spot." (Tr. Vol. I at 61:16–18.) All but two prospective jurors indicated that the parties were equal in their minds. Plaintiff's counsel then inquired of one of those two jurors ("Chet") as to why he had had a bias toward one of the parties.

2. Chet raised the issue of the reptile theory of his own volition, and stated that he had discovered a bias:

[1] The time stamps throughout this order were extracted from the Court's recorded video of the proceedings.

Hon. Joe Hardy
District Court
Department XV

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> CHET NICHOLS: [I]f you recall yesterday, I was the last person you asked what my passion was. If you ask me on an intellectual level, passion is behavioral economics. So, I'm sensing, based on the line of questioning, the way that things will be framed, you're familiar with the reptile brain strategy?
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> * * *
>
> I just I feel it coming on. . . . And that's creating a bias for me.

(Tr. Vol. I at 62:5–15.)

3. It was clear that Chet reviewed the facts overnight after the first day of jury selection, which created in him a bias against plaintiff:

> MR. CLAGGETT [Plaintiff's counsel]: Okay, against who [are you biased]?"
> CHET NICHOLS: Plaintiff, because I can only imagine I would rather have a strictly rational argument. And I -- I'd be the perfect juror for a criminal trial . . . [o]n that basis. But in a civil trial where I see that the reptile brain strategy, it bothers me.

(*Id.* at 62:16-23.)

4. For the purpose of this order, it is irrelevant what the actual meaning of the reptile theory is. First, it is unclear if, and this Court need not rule on, whether plaintiff's counsel was employing such a strategy. Second, all that is relevant here is what the jurors thought the theory entailed.[2]

5. Effectively, Chet informed the jury pool that he believed plaintiff's counsel was improperly employing a strategy to manipulate their emotions without regard for the evidence.

6. After the exchange with Chet, plaintiff's counsel requested a sidebar. There, plaintiff's counsel appropriately requested that Chet be excused for cause. The Court agreed that good cause had been shown and excused Chet.

7. At the sidebar, Mr. Boyack, counsel for the defense, objected to the excusal and requested that he be permitted further follow-up on the issue. The Court informed counsel that it would be inappropriate to pursue the topic raised by Chet, stating, "We don't want to go down that road."

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[2] In fact, just hearing the name "reptile brain theory" elicits negative comparisons to slithering reptiles. *See Aidini v. Costco Wholesale Corp.*, No. 2:15-cv-00505-APG-GWF, 2017 U.S. Dist. Lexis 55863 (D. Nev. Apr. 12, 2017) (repeatedly using snake-related puns in an opinion concerning the permissibility of employing reptile brain theory in trial).

8. After Chet's excusal, at 4:25 pm, Mr. Boyack directed a question to another prospective juror ("Harlan"). Harlan admitted that he had not been paying attention:

HARLAN: Ah, I was thinking about Chet's reptile egg theory. I can't get over that. I'm still laughing about it.

(Tr. Vol. II at 120:21–23; Video of Proceedings, Sept. 14, 2017 at 4:25 pm [hereinafter Video].)[3]

9. Prior to Harlan's statement, another prospective juror, Conchita, opined that a judgment against Toyota in a previous high-profile case was deserved because Toyota was lying and greedy:

> CONCHITA HOLLMAN: Toyota's a good -- good thing. Do you remember Toyota? When all those crashes were happening and they went, oh no, nothing's wrong.
>
> * * *
>
> Everything's perfect. That highway patrolman was the first one killed. I think he got $11 million, he deserved it. And his family was with him.
>
> * * *
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> And then when they got busted, when they kept lying, I was happy.
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> * * *
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> I was happy! And the federal government got them for billions of dollars. Yes.
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> * * *
>
> [I]f people lie, greed -- they deserve everything they're gonna get.

(Tr. Vol. II at 42:8–43:1.)

10. In response to Harlan's statement, regarding "Chet's reptile egg theory," Mr. Boyack responded by indicating that Conchita's comments—which suggested that damage awards tend to deter defendants—could help satisfy Harlan's curiosity:

MR. BOYACK: Yeah, well, we got Conchita here to fill that in.

(*Id.* at 120:24; Video at 4:25 pm.)[4] This implied that the "reptile egg theory" was somehow tied to lying and greed.

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[3] The transcript has this statement as: "I was thinking about Chet's reptile eggs here. I can't get over that. I still can't --" It does not reflect Harlan's statement saying "I'm still laughing about it." A review of the court video shows the transcript to be in error on this point.

[4] The transcript shows Mr. Boyack's statement to be: "I've got *the key* here to fill that in." (Emphasis added). The video shows that Mr. Boyack said "Conchita" and not "the key."

11. Though the Court had previously warned counsel that any further follow-up on the issue would be inappropriate, Mr. Boyack raised the issue near the end of the day (at 4:44 pm). This time he labeled it the "reptilian brain theory of trial advocacy," *dredging up* several unfortunate comments heard during the day:

> MR. BOYACK: You heard Chet here, right, talk about the reptilian brain theory, whatever that was. I'm gonna ask you this question, because Chet brought it up. Who here knows what the reptilian brain theory of trial advocacy is?

(Tr. Vol. II at 138:9–13.) No prospective juror raised their hand in response to Mr. Boyack's question. Mr. Boyack's statement is the first comment to the jury directly associating a "reptile brain" theory with trial advocacy. Mr. Boyack continued with a clear intent to inspire curiosity about the concept and distrust of plaintiff's counsel:

> MR. BOYACK: You don't know what the heck Chet's talking about?
> UNIDENTIFIED JUROR #1: No, but I'm gonna look it up when I get home.[5]
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> * * *
>
> MR. BOYACK: I respect that. I just wanted to ask that question. ***I know it's the 800-pound gorilla.***
>
> * * *
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> UNIDENTIFIED JUROR #2: Can I use it? I don't know what it is.
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> * * *
>
> UNIDENTIFIED JUROR #3: Are you going to tell us what it is or --
> MR. BOYACK: No, I'm not. ***I'd love to, though***. [Slyly]

(*Id.* at 138:13–139:6 (emphasis added); Video at 4:44 pm.)

12. It was Mr. Boyack's comments that made the issue the "800 pound gorilla" in the room by improperly insinuating something damaging to plaintiff's case was being withheld from the panel. To make matters worse, Mr. Boyack tacitly encouraged the jurors to conduct independent research. For example, when one prospective juror told Mr. Boyack he intended to look up reptile brain theory when he got home, Mr. Boyack responded, "I respect that." (*Id.* at 138:18.)

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[5] The transcript incorrectly transcribes this statement as: "No. He wanted to get home." The video shows this to be in error. In fact, court immediately reminded that juror of the admonition concerning independent research: "So remember the admonition." (*Id.* 138:17.)

13. The follow-up question asked by Mr. Boyack was not an issue in a vacuum. When provided with context, Mr. Boyack's question was key in light of Chet's excusal for cause and the prior statements of Chet, Conchita, and Harlan.

14. The cumulative effect of these above exchanges was to suggest to the prospective jury that plaintiff's counsel was employing a devious strategy to manipulate the emotions of the jury. Mr. Boyack's comment—indicating that he wished he could tell them about the "reptile brain theory"—implied that either the plaintiff or the court was hiding something from the jurors, and that it would somehow reflect poorly on plaintiff's counsel.[6]

15. Furthermore, Mr. Boyack's remarks effectively *encouraged* the jurors to look into "reptile theory."

16. Mr. Boyack's statements, combined with the previous statements of jurors, poisoned the well and irrevocably tainted the prospective jurors.

17. After the jury was excused for the day, plaintiff's counsel moved for a mistrial. In oral argument, Mr. Boyack was unable to articulate any legitimate reason for asking the jurors about reptile brain theory:

> THE COURT: [W]hat was your follow-up question?
> MR. BOYACK: There was no follow-up question.

(*Id.* at 143:24–25.) Instead, Mr. Boyack engaged in self-righteous deflection:

> MR. BOYACK: [I]t's interesting, because you'd think Plaintiffs would want to ask about it. You'd think they would want people to respond . . . .

(*Id.* at 144:24–145–1.)

18. Mr. Boyack went on to imply that plaintiff's counsel must be ashamed of his trial advocacy:

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[6] Plaintiff's counsel did not object to Mr. Boyack's voir dire immediately. However, this is not fatal to their oral motion for a mistrial—particularly because an objection would have only reinforced the false implication that plaintiff's counsel had something to hide and was attempting to manipulate the jury. *See Lioce v. Cohen*, 124 Nev. 1, 18, 174 P.3d 970, 981 (2008) (noting that sometimes by objecting "the nonoffending attorney is placed in the difficult position of having to make repeated objections before the trier of fact, which might cast a negative impression on the attorney and the party the attorney represents, emphasizing the improper point"). Unobjected-to misconduct may constitute grounds for a mistrial if proceeding with the trial would result in plain error. *Id.* at 18, 174 P.3d at 981–82. As shown herein, it would have been plain error to allow the trial to proceed after defense counsel's misconduct.

> MR. BOYACK: [A]pparently plaintiffs are obviously pretty upset about it, which I'm not really sure why their trial strategy and it being mentioned is so upsetting. It's kind of rather interesting.

(*Id.* at 152:13–16.) Thus, defense counsel betrayed that he was purposefully raising an issue he thought would embarrass plaintiff's counsel for no articulable reason.

19. Though the Court ruled that the jurors' knowledge of any "reptile brain theory" was not relevant, Mr. Boyack continued to assert that it was:

> MR. BOYACK: [T]he problem here is that it comes up from jurors. It's perfectly relevant -- it comes up twice from jurors. It's perfectly relevant. The Court --
> THE COURT: Well, it's not relevant at all. That's why we excused Mr. Chet.
> MR. BOYACK: It's relevant to ask the other jurors if they know about it once two jurors have mentioned it. . . . I think it's totally permissible. It's relevant.

(*Id.* at 144:10–24.)

20. In continued oral argument on the motion for a mistrial the following morning (Sept. 15, 2017), Mr. Boyack recognized that his conduct disparaged plaintiff's counsel:

> THE COURT: So by saying that, though, aren't you disparaging counsel's trust or?
> MR. BOYACK: Absolutely, Your Honor . . . . We are disparaging what they are doing . . . .

(Sept. 15 Tr. at 21:12–17.)

21. Mr. Boyack went on to assert not only that his disparagement of plaintiff's potential trial techniques was proper, but also ***that he intended to continue*** such disparagement:

> MR. BOYACK: Because in my closing -- because I don't want any allegations or problems, I'm going to quote portions of my closing argument where I'm going to ask this court to approve it and I'm going to talk to them about the reptilian trial theory . . . .
>
> * * *
>
> And I have a right to do that. And I have a right to do it in closing argument.

(*Id.* at 22:22–23:9.) Mr. Boyack's representations that he would continue disparagement of plaintiff's counsel during closing arguments—in spite of the Court's instruction that any aspersion of plaintiff's counsel or his lawful litigation tactics—made the possibility of salvaging the trial more difficult.

22. Mr. Boyack did not acknowledge or, perhaps more dangerous, truly did not comprehend that disparagement of an opposing attorney's permissible rhetoric constitutes misconduct.

23. In addition to evaluating and accounting for the actual spoken words during voir dire, the Court also reviewed the relevant portions of the video recording, in particular Mr. Boyack's comments and questions in context of the entire voir dire proceeding prior to making the decision to declare a mistrial. The Court also considered the demeanors and tones of Mr. Boyack and the prospective jurors. The Court finds the context, comments, questions, demeanors, and tones all support its decision to declare a mistrial.

CONCLUSIONS OF LAW

24. Attorney misconduct may necessitate a mistrial when such misconduct "carrie[s] the risk of impermissibly tainting the jury." *Glover v. Eighth Judicial Dist. Court*, 125 Nev. 691, 711, 220 P.3d 684, 698 (2009), *as corrected on denial of reh'g* (Feb. 17, 2010); *see* NRCP 59(a) (stating that "[m]isconduct of the jury or prevailing party" is grounds for a new trial); *Gunderson v. D.R. Horton, Inc.*, 130 Nev. Adv. Op. 9, 319 P.3d 606, 611 (2014) ("[T]he district court may grant a new trial if the prevailing party committed misconduct that affected the aggrieved party's substantial rights.").

25. Disparaging comments about the opposing attorney "have absolutely no place in a courtroom, and clearly constitute misconduct." *McGuire v. State*, 100 Nev. 153, 157, 677 P.2d 1060, 1064 (1984).

26. "[I]t is not only improper to disparage defense counsel personally, but also to disparage legitimate defense tactics." *Butler*, 120 Nev. at 898, 102 P.3d at 84.

27. The disparagement need not be express or obvious to constitute misconduct. *Id.* at 899, 102 P.3d at 85 (2004). Rather, a party "is not permitted to disparage [opposing] counsel and [their] tactics through the *use of cleverly crafted rhetoric*." *Id.* (emphasis added).

28. For example, in *McGuire*, the Nevada Supreme Court observed that similarly snide remarks "clearly constitute misconduct":

> During the course of trial, [the prosecutor] repeatedly made disparaging and uncalled-for remarks pertaining to defense counsel's ability to carry out the required functions of an attorney. For example, during [the prosecutor's] direct examination of the victim, [the prosecutor] asked her if appellant had an erection at the time of the assault. The witness answered. "I guess he did." Defense counsel then objected and moved to strike the answer, apparently on the ground that the "guess" constituted speculation. In response to defense counsel's seemingly legitimate objection, [the prosecutor] then said: "How do you strike an erection?" We can discern no purpose for the statement other than as an attempt to belittle defense counsel in front of the jury. Other examples appear throughout the trial transcript. ***Disparaging comments have absolutely no place in a courtroom, and clearly constitute misconduct.***

McGuire, 100 Nev. at 157, 677 P.2d at 1063–64 (emphasis added).

29. In *Butler*, which informs the Court's decision here, the prosecutor committed attorney misconduct when he disparaged the legitimate tactics of defense counsel:

> Here, the State used many adjectives and analogies in these remarks that portrayed [the defense's] presentation of mitigating evidence and defense tactics as a dirty technique in an attempt to fool and distract the jury, implying that [defense] counsel acted unethically in his defense—this was a form of disparagement of counsel. [The defendant] not only has a legal right, but his counsel have an ethical duty, to present all evidence in mitigation of a death sentence. The presentation of mitigating evidence during the penalty phase is essentially the heart of a defense. The State is not permitted to disparage [defense] counsel and defense tactics through the use of cleverly crafted rhetoric. We conclude that the State's remarks were improper.

Butler, 120 Nev. at 898–99, 102 P.3d at 84–85.

30. Mr. Boyack's comments here were similarly intended to imply plaintiff's counsel was employing "a dirty technique in an attempt to fool and distract the jury." Thus, the comments were improper and constitute attorney misconduct.

31. The danger of disparaging opposing counsel is that jurors may decide the case based on their impression of the *messenger* rather than the *message* (i.e., the evidence):

> There is a possibility that the jurors, observing counsel's misbehavior, will come to distrust and dislike the attorney and will transfer that distrust and dislike to the defendant. If the jury's verdict was driven largely by a distrust and dislike of trial counsel, then the defendant has been prejudiced.

State v. Santana-Ruiz, 167 P.3d 1038, 1045 (Utah 2007).

32. Juror Chet's unprompted influential comments about the "reptile brain" insinuated that plaintiff's counsel was attempting to manipulate, and perhaps even to deceive, the prospective

jurors by appealing to emotion. Mr. Boyack revived the "reptile" discussion in order to emphasize this same point.

33. Certainly, counsel must not inflame emotions; a jury may not render a verdict based upon passion and prejudice. *Harris v. Zee*, 87 Nev. 309, 312, 486 P.2d 490, 492 (1971). That does not mean, however, that jurors must act robotically. Some degree of emotional response is expected, and it is not improper for an attorney to draw upon the emotional experience of the jurors:

> A trial lawyer's job, after all, is to present his client's case in the most sympathetic light consistent with the evidence. Using some degree of emotionally charged language during closing argument in a civil case is a well-accepted tactic in American courtrooms.

Settlegoode, 371 F.3d at 518.

34. Indeed, some decisions require the jurors to assess the emotional impact of a party's conduct. For example, in deciding if a plaintiff has proved a claim of intentional infliction of emotional distress, the jury must first determine if "[t]he plaintiff suffered severe or extreme emotional distress." Nevada Jury Instructions – Civil 2011 Edition Inst. 6IT.6. Jurors could not make this assessment without drawing on their own emotional experience. Similarly, jurors are frequently asked to award damages for "[t]he physical and mental pain, suffering, [and] anguish" of the plaintiff. *Id.* at 5PID.1. This again requires the jury to assess an emotional component.

35. Mr. Boyack disparaged plaintiff's counsel's legitimate tactics and, in turn, plaintiff. Though this disparagement may not have been overt, it was nevertheless accomplished "through the use of cleverly crafted rhetoric." *See Butler*, 120 Nev. at 898, 102 P.3d at 84. This disparagement constituted attorney misconduct that not only "carried the risk of impermissibly tainting the jury," *Glover*, 125 Nev. at 711, 220 P.3d at 698, but likely did taint the jury.

36. And, Mr. Boyack's purpose appeared to be to encourage the jury to render a verdict based upon their distrust of plaintiff's counsel, and not based upon the evidence. This is impermissible jury nullification, defined as

> [a] jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness.

1 *Lioce*, 124 Nev. at 20, 174 P.3d at 982–83 (alteration in original) (quoting Black's Law Dictionary
2 (8th ed.2004)).

3 37. A trial judge has discretion to determine if any potential harm necessitates a mistrial.
4 *Williamson v. Sheriff, Clark Cty.*, 89 Nev. 507, 509, 515 P.2d 1028, 1029 (1973). This is especially
5 true when the analysis involves evaluating members of the jury. *Cf. Boonsong Jitnan v. Oliver*, 127
6 Nev. 424, 431, 254 P.3d 623, 628 (2011) ("[T]he district court enjoys 'broad discretion,' as it 'is
7 better able to view a prospective juror's demeanor than a subsequent reviewing court.'" (quoting
8 *Leonard v. State*, 117 Nev. 53, 67, 17 P.3d 397, 406 (2001))).

9 38. Here, Chet's comments standing alone, may not have been grounds for a mistrial;
10 however, defense counsel's repeated allusions to his comments created incurable error. Mr.
11 Boyack's emphasis on Chet's comments inexcusably created the impression that plaintiff and the
12 court were hiding something that would be potentially damaging to plaintiff's case. *See Gunderson*,
13 130 Nev. Adv. Op. 9, 319 P.3d at 612 ("[A]lthough specific instances of misconduct alone might
14 have been curable by objection and admonishment, the effect of persistent or repeated misconduct
15 might be incurable.").

16 39. Furthermore, an attorney cannot escape misconduct by later referring to unsolicited
17 statements of a non-attorney in the proceeding that, if made by the attorney, would have constituted
18 attorney misconduct, e.g.:

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> The prosecutor's improper argument is not defensible by the fact that the complainant herself first raised her religious beliefs in her own testimony, without the prosecutor eliciting them. Where a prosecutor goes beyond these unsolicited references and engages in improper conduct, ***the fact that the original references were not elicited by the prosecutor does not preclude a finding of misconduct.***

23 *People v. Leshaj*, 249 Mich. App. 417, 422, 641 N.W.2d 872, 876 (2002) (emphasis added).

24 40. A mistrial is warranted where a curative instruction would only further exacerbate the
25 problem. *Com. v. Martin*, 27 Pa. D. & C.3d 178, 185 (Pa. Com. Pl. 1981) (holding that a new trial
26 was necessary because "adequate curative instructions were not possible without making matters
27 worse").
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41. In this case, there was no remedy available that could adequately untaint the prospective jury panel, and there was no way for the Court to know whether they would be affected subconsciously throughout the trial.

42. Despite a request from the Court for such, no proposed curative instruction was offered by Mr. Boyack, and the Court could not fathom any kind of curative instruction that would remedy the damage that had been done. Any such instruction would only increase the curiosity of the jury and increase the likelihood that the prospective jurors would engage in further non-permissible independent research.

43. Nor could the prospective jurors be independently interviewed to ascertain the effect of the discussions on them. First, the same result would occur, *i.e.*, their curiosity would only be increased. Second, prospective jurors may be unwilling to admit that their understanding of so-called "reptile" theories has biased them against plaintiff's counsel. Finally, prospective jurors may not even be aware of the bias in them, created by the discussions of the theory, *i.e.*, the bias may be subconscious. So, any statement by a juror—that she was not prejudiced by defense counsel's conduct—could not be trusted. *See Weber v. State*, 121 Nev. 554, 581, 119 P.3d 107, 125 (2005) (observing that "[d]etached language considered alone is not sufficient to establish that a juror can be fair").

44. Even if no prospective jurors were to conduct independent research, the harm had already been done. The prospective jury was left with the impression that plaintiff's counsel was employing some nefarious technique to manipulate them. This impression is sufficient to create improper bias against plaintiff.

45. Because no curative instruction or action could be taken to remove the taint from the jury, it was manifestly necessary and in the interest of justice to order a mistrial.

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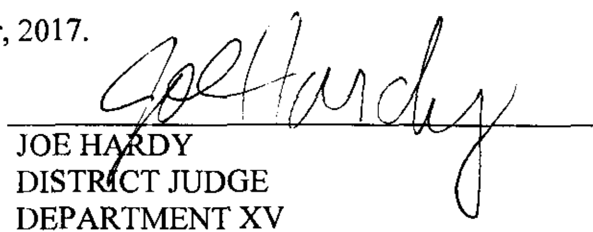
ORDER

For the foregoing reasons, the oral motion for a mistrial is GRANTED.

DATED this 30th day of November, 2017.



JOE HARDY
DISTRICT JUDGE
DEPARTMENT XV

CERTIFICATE OF SERVICE

I hereby certify that on or about the date filed, a copy of the foregoing was electronically served as follows:

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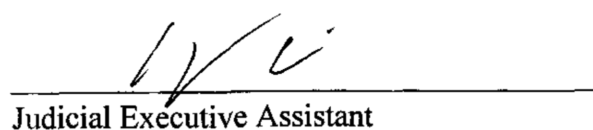

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