8-14-2017

Safaris Unlimited, LLC v. Von Jones Appellant's Brief Dckt. 44914

IN THE SUPREME COURT OF THE STATE OF IDAHO

SAFARIS UNLIMITED, a Georgia limited liability company, Plaintiff/Respondent, vs. MIKE VON JONES, Defendant/Appellant.	Supreme Court Docket No. 44914-2017 Twin Falls County No. CV-2013-2706

APPELLANT'S OPENING BRIEF

Appeal from the District Court of the Fifth Judicial District
for Twin Falls County Case No. CV-2013-2706
Honorable Randy J. Stoker, District Judge presiding.

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TABLE OF CASES AND AUTHORITIES

COMES NOW, the Appellant MIKE VON JONES ("Jones"), by and through his counsel of record, Theodore R. Larsen, of the firm Williams, Meservy and Lothspeich, LLP and hereby submits his opening brief as follows:

STATEMENT OF THE CASE

This matter comes before this Court for a second time. This time following a jury trial on the merits of the matter. This matter was previously before the Court on appeal following a grant of summary judgment in Plaintiff's, Safaris Unlimited, LLC, ("Safaris") favor. In Idaho Supreme Court Case Docket No. 42614, 2015 Opinion No. 70, this Court reversed the Trial Court's decision granting summary judgment in favor of Safaris. In its decision on that matter, This Court set forth the factual and procedural background of the case up to that point. There is no need to restate the factual and procedural background here.

Following remand back to the District Court, Safaris filed a First Amended Complaint on April 11, 2016. R. Vol. I, p. 22-32[1]. On May 2, 2016, Jones filed an Answer and Jury Trial Demand. R. 33-35. A number of pre-trial motions were filed but the matter ultimately proceeded to a three-day jury trial on January 11 – 13, 2017. Tr. Vol. I, P. 2, L. 10-15.[2]

At trial, Safaris called three witnesses: Graham Hingeston, Derek Adams, and Jennifer Ryan. Tr. 3, 6. Mr. Hingeston was the first witness called by Safaris. Tr..113, L. 22. Hingeston described

1 All references to the Record are to Vol. I as there is only one volume of the Record. Thus, to shorten the citation and for ease of reading, reference to Vol. I will be omitted.

2 All references to the Transcript are to Vol. I as there is only one volume of the Transcript. Thus, to shorten the citation and for ease of reading, reference to Vol. I will be omitted.

himself as having lived in Zimbabwe his entire life. Tr.114, L. 9. He further stated he was the Managing Director of HHK Safaris (Pvt.) ("HHK"). Tr.115, L.5-9. Hingeston described in general terms how a safari with HHK is usually carried out. Tr. 115, L. 16-127, L.1. Included in that general description was a description of a document known as a "TR2" document. Tr. 118, L.2–22. Mr. Hingeston described the document as one required by the Zimbabwe Government akin to a permit to hunt in the national parks. *Id*. Mr. Hingeston further explained the document admitted as Exhibit 35 was a TR2 and that it was the TR2 used in this particular case.

Hingeston described the relationship between HHK and Safaris as a "exclusive contractual arrangement" to provide "hunting safaris and even nonhunting safaris for their clients…" Tr. 123, L. 22-25. Hingeston stated he, on behalf of HHK, works closely with Safaris to book safaris for their mutual clients. Tr. 125, L. 13 – 127, L. 1. Hingeston stated there is generally a written agreement with the client and that safaris are generally paid for prior to a client being accepted. *Id*.

Hingeston recalled that he first met Jones in January 2010 at a Safari's Club International ("SCI") convention where Jones purchased a safari hunt that had been donated to the convention by Safaris and HHK. Tr. 127, L. 6–20. A number of emails relating to the 2010 hunt were admitted that showed Jones, Hingeston and representatives of Safaris all corresponded in order to book the details of Jones' 2010 hunt with Safaris and HHK. Tr. 127, L. 4-130, L. 13; Exhibits 4-9. The vast majority of the emails exchanged in relation to the 2010 hunt copied representatives of both Safaris and HHK. *Id*.

Hingeston testified Jones was successful on the 2010 hunt but Jones was unhappy with the elephant he took and he had some complaints relative to the size of the trophy obtained. Tr. 131, L. 17-132, L. 10.

Hingeston testified that despite Jones' complaints about the 2010 hunt, in 2011, Jones again purchased a donated safari through Safaris and HHK. Tr. 136, L. 17-138, L.17. The 2011 hunt was booked in a manner very similar to how the 2010 hunt was booked. *Id*. Jones went on the 2011 hunt and had no complaints. Tr. 138, L. 18 – 139, L. 14.

Admitted into evidence were two cashiers checks, one from 2010 and one from 2011 showing Jones paid Safaris Unlimited for each hunt. Exhibits 2 and 17. Moreover, Hingeston testified Jones was invoiced by Safaris and paid Safaris for both hunts. Tr. 139, L. 8 – 14.

Having established the general basis for how Safaris and HHK do business, Hingeston next testified about the 2012 hunt, which formed the basis of the present matter. Tr. 139, L. 15. Hingeston testified that Jones reached out to him via email to begin scheduling the 2012 hunt. Tr. 139, L. 20-21; Ex. 24. Details for the 2012 hunt were planned and finalized between Jones and HHK with no involvement from Safaris. *See* Tr. 295, L. 25-300, L. 22.

Hingeston testified he believed Safaris and Jones had an agreement for Jones to pay Safaris for the 2012 hunt booked with HHK directly. Tr. 149, L. 10-25. Hingeston's belief was based on an invoice admitted as Exhibit 34.

On cross examination, Hingeston acknowledged the 2012 hunt differed from the 2010 and 2011 hunts because Safaris was not involved in the booking of the 2012 hunt. Tr. 164, L. 16-170, L.20. In fact, Hingeston admitted at no time during the booking of the 2012 hunt did he involve

Jennifer Ryan or any representative of Safaris. *Id*. On the contrary, the booking of the hunt was handled by Jules Meredith, an employee of HHK, not Safaris. Tr. 171, L. 1-174, L. 14. In response to the question, "Okay. Is it fair to say that in 2012 Safaris Unlimited did not, in fact, book the hunt for Jones?," Hingeston responded, "This is correct. He booked directly." Tr. 175, L. 7-9.

Despite a lack of emails or other written communications, on redirect examination, Hingeston stated Safaris must have been involved to generate the invoice that became Exhibit 34. Tr. 195, L. 12-15.

Following Hingeston's testimony, Derek Adams was called to testify. Tr. 199, L. 8. Adams provided lengthy testimony regarding the three hunts, 2010, 2011, and 2012, when he accompanied Jones as his professional hunter. Most relevant to this appeal is that Adams testified regarding Exhibit 34. Tr. 221, L. 16 – 230, L.19. Adams testified he is familiar with Exhibit 34; that it makes up part of the "client file" and it is one he always takes to camp with him to fill out with the client. Tr. 221, L. 16-22. He testified all the handwriting on Exhibit 34 is his handwriting. Tr. 221, L. 23-25. Initially he testified that he was 100% certain Jules Meredith prepared Exhibit 34. Tr. 222, L.4-9. The next day he testified he didn't actually know who prepared Exhibit 34. Tr. 229, L.11-230, L.9.

Adams testified the signature at the bottom of the Exhibit 34 was the signature of Jones and that he witnessed Jones sign the same. Tr. 222, L.10 – 223, L. 13.

The Plaintiff's final witness was Jennifer Ryan. Tr. 264, L.19. Ms. Ryan is the General Manager of Safaris and is located in Georgia. Tr. 265, L.6-19. Ryan provided similar testimony in many respects regarding the general nature of Safari's business and the 2010 and 2011 hunts. She testified the general practice is for a client to contact her first and the she contacts HHK to book a hunt. Tr. 265, L.22-267, L.22. In fact Ryan testified, "Q: How are those clients handled, then? Do those clients go through Safaris Unlimited? A: Yes. Every one of them." Tr. 267, L.20-22. She acknowledged on cross-examination, however, that the 2012 hunt was handled very differently and she had no involvement with booking the 2012 hunt. Tr. 295, L. 25-300, L. 22. Ryan's testimony was inconsistent as to Hingeston's authority to act on behalf of Safaris:

> Q: Okay. Is Mr. Hingeston authorized to act as the representative of Safaris Unlimited when it comes to booking safaris?
> A: No, not of Safaris Unlimited.
> Q: Okay. And what I mean by that is, if he is speaking with a client, is he authorized to give them details concerning what the hunt would be, to figure out dates?
> A: Oh, yes, yes.
> Q: Okay. And then normally what would happen after that point?
> A: And then it normally comes back to me to collect the deposit and do the money side of it.

Tr. 269, L. 8-20. Ryan stopped short of saying Hingeston was authorized to book a hunt on behalf of Safaris. *Id*.

Ryan's testimony was also inconsistent with regard to her involvement with the 2012 hunt. While she admitted on cross-examination that she had nothing to do with the booking, (Tr. 295, L. 25 – 300, L. 22.) she also testified she produced an invoice admitted as Exhibit 34 (the "Invoice"). Tr. 285, L.24-286, L.13.

Ryan agreed on cross-examination that HHK was not an agent of Safaris but an independent contractor. Tr. 302, L.13-18.

Plaintiff rested after finishing Ryan's testimony. The only defense witness called to offer testimony was the Defendant, Jones. Tr. 322, L.14. Like the other witnesses, Jones provided background testimony relevant to claims and defenses not part of this appeal. Regarding the 2012 hunt, Jones testified he received an email from Adams asking him if he wanted to come hunt in 2012. Tr. 326, L. 13-327, L. 18. Defendant's Exhibit 209 is an email from Derek Adams inviting Jones and others to come hunt in 2012. Thus, unlike the prior hunts, this one was marketed to Jones by someone other than Safaris.

Jones testified that after communicating with Adams, he reached out directly to Hingeston to begin booking a hunt in 2012. Tr. 327, L. 12-328, L.17. Jones testified he never had any contact with any representative of Safaris prior to the 2012 hunt. Tr. 328, L.18-21. Exhibit 24 shows Jones and Hingeston negotiated all details of the 2012 hunt without any involvement with Safaris. Tr. 332, L.8-16. Defendant's Exhibit 202 shows that Jules Meredith, an employee of HHK, also assisted with booking the 2012 hunt. Tr. 332, L.21-333, L.334, L.6. Mr. Jones was at all times relevant to the 2012 hunt under the impression that he was dealing with HHK solely. *Id.*

Jones was asked to recall his memory as it related to Exhibit 34. Tr. 349, L.5-21. Jones denied signing the same. *Id.* Jones testified the camp was in such turmoil due to several circumstances and Adams had overlooked sitting down with Jones to sign the same. Tr. 349, L.22-

350, L.2. Jones was asked to compare the signature on Exhibit 34 with the signature on Exhibit 35. Jones testified the signatures looked similar but neither one looked like his signature. Tr. 350, L.12-20.

Jones was also asked to compare the signatures on Exhibits 34 and 35 with the signature on Exhibit 2. Included in Exhibit 2 is a cashiers check that Jones admitted was signed by him to pay for the 2010 hunt. Tr. 350, L21-351, L.24.

On cross-examination, Safaris sought to admit three documents, Exhibits 38, 39 and 40/40(a). Tr. 437, L.20-464, L.21. The documents were offered for the sole purpose of providing other signatures, purportedly by Mr. Jones, for the purpose of giving the jury other samples to compare. Exhibits 38 and 39 were admitted without objection.

The admission of Exhibit 40 was met with objection from Jones. Tr. 445, L.7-461, L.13. Jones objected to the fact the document had not been disclosed in discovery or on a pre-trial list of exhibits. Tr. 446, L.10-17. Jones objected to the prejudicial nature of the proposed exhibit. Tr. 446, L.18-24.

The Trial Court overruled the objection based on non-disclosure, stating that the document was created on January 3, 2017 and "here we are January the 12th. This document was purportedly signed nine days ago." Tr. 451, L.11-452, L.2. It was decided the document would be redacted. Tr. 453, L.10-13.

Before bringing the jury back in, Jones made an additional objection that it was improper, under the circumstances, to put the jury in the position of making a determination based on signature samples. Tr. 455, L.4-16. The Trial Court responded, "I disagree with that. I think they're in a

position of making a fact finding in this case. It's not a question of expert testimony or lay witness testimony. Nobody's testifying that this is Mr. Jones' signature other than Mr. Jones himself, which I presume he will say in open court in front of the jury. I don't agree with that analysis, and I stand by my ruling." Tr. 455, L. 17-24.

Jones made one final objection to Exhibit 40, which was that the redaction of the document left Jones without a real ability to rehabilitate his testimony by explaining why the signature may differ in appearance from other samples. Tr. 460, L.16-461, L9. The Court again overruled the objection, without providing any analysis. Tr. 461, L.10-11.

When the jury returned, Jones was provided with the redacted version (Exhibit 40), whereas before he had been looking at the full version (Exhibit 40a). Tr. 462, L.1-22. Jones had difficulty stating whether the signature on Exhibit 40 was his signature. *Id*. After a short time, the Trial Court broke in and began cross-examining Jones. The following exchange took place:

> THE COURT: Mr. Jones, the question is very simple. Is that or is that not your signature, yes or no?
> THE WITNESS: It –
> THE COURT: No, I don't want an explanation. I want a yes-or-no answer to that question.
> THE WITNESS: It's not the way I sign it, but it might be.
> THE COURT: This is not the question, sir. I want to give you one more opportunity to answer the Court's direct question.
> THE WITNESS: Okay.
> THE COURT: I'm getting tired of this –
> THE WITNESS: I suspect –
> THE COURT: Be quiet.

> THE WITNESS: Thank you.
> THE COURT: Is that or is that not your signature? Yes or no?
> THE WITNESS: Yes.
> THE COURT: Thank you.
> THE WITNESS: If it came off the document I think it did.
> THE COURT: Mr. Gadd?
> . . .
> THE COURT: Need to instruct the jury on something, Mr. Gadd.
> Ladies and gentlemen, this document, when you see it is, it is a signature line and date. It is part of another document, okay? We redacted that document because it has things on it that have nothing to do with this case, okay? And in order not to prejudice you about something that has nothing to do with this case, I made the attorneys take the irrelevant stuff off. So what you're looking at is simply a signature and a date, and Mr. Jones' testimony, *I'm sorry I got a little rough with you, Mr. Jones, but he's now admitted that's his signature. The purpose of that, counsel will tell you what purposes as they argue this case to you*.

Tr. 462:17-464:20 (emphasis added).

Following Mr. Jones testimony, some brief rebuttal was offered and then the matter was argued and submitted to the jury. Ultimately, the jury found that Jones had made a direct contract with Safaris and that he was liable to them for the full amount of $26,040.00. For the reasons stated below, Jones appeals from the jury verdict.

ISSUES PRESENTED ON APPEAL

1. Did the District Court err in admitting Exhibit 40 over Defendant's objection?

2. Did the District Court prejudice the jury against Defendant by angrily cross-examining the Defendant in front of the jury?

3. Was it err to give Instruction 13?

4. Is an award of attorney fees appropriate?

ARGUMENT

Jones did not receive a fair trial in this matter because Exhibit 40 was erroneously admitted and because the Trial Court's angry questioning of Mr. Jones on cross examination was improper and prejudicial. For these reasons, Mr. Jones is entitled to a new trial.

A. THE DISTRICT COURT COMMITTED ERROR IN ADMITTING EXHIBIT 40.

Extreme and unusual circumstances surround the admission of Plaintiff's Exhibits 40 and 40(a) such that admitting the document was in error by the Trial Court. Vacation of the jury verdict and remand for a new trial is required.

The fact finder is allowed to compare authenticated exemplars of the subject's handwriting. *US v. Aytes*, 896 F.2d 1370, 1376 (9th Cir. 1990). Under normal circumstances, a jury may make handwriting comparisons. *US v. Jenkins*, 785 F.2d 1387, 1395 (9th Cir. 1986). The exception to the general rule is for "extreme or unusual circumstances." *Id*. Extreme or unusual circumstances "involve situations where the authenticity of the handwriting is the primary issue in the case." *Id*.

Most cases discussing the issue indicate that the potential for harm is significantly mitigated by effective rebuttal testimony, "effective rebuttal lessens the danger that jurors will assign improper weight to their comparisons of handwriting samples." *US v. Clifford*, 704 F.2d 86, 91 (3rd Cir. 1983). Thus, in cases where effective rebuttal cannot be made, extreme and unusual circumstances exist.

This case involves extreme and unusual circumstances. First, the signature on the bottom of Exhibit 34 was a central issue. Exhibit 34 was an invoice from Safaris. Safaris claimed Jones signed the invoice, which formed a significant basis of its argument that Jones made a contract

directly with Safaris for the 2012 hunt. Jones denied signing the invoice. Thus authentication of the signature at the bottom of Exhibit 34 was a central issue.

During direct examination, Mr. Jones was asked to also look at the signature on Exhibit 2, which was a cashiers check and which Jones admitted was his signature. He was asked to compare the signature on Exhibit 34 with the signature on Exhibit 2. He indicated the one on Exhibit 2 looked more like his signature.

On cross-examination, the Trial Court admitted exhibits 38, 39, 40 and 40(a) for the purpose of comparing the signature on those documents with the other signatures on documents in the record. Jones did not object to the admission of Exhibits 38 and 39 as they were documents already part of the Court's file. Jones did, however, strenuously object to the admission of Exhibit 40 and 40(a). It is the circumstances surrounding that document that are extreme and unusual.

Exhibit 40 is a "Reissuance of Temporary Protection Order and Notice of Hearing" against Jones in an unrelated matter. The contents of the document are irrelevant and prejudicial. For that reason, the Trial Court redacted all but the signature and date. Redaction was required by the rules of evidence. Redaction, however, left Jones with no ability to effectively offer rebuttal testimony. For instance, Jones could not explain that his signature was hasty and hurried as he signed the document in a frustrated and emotional state following a hearing on a petition for a protection order without providing the jury with the very prejudicial evidence that redaction of the document was meant to mitigate. The Trial Court was indifferent at best to this argument when the objection was raised at trial. The absence of opportunity to effectively rebut potential inferences drawn from Exhibit 40 constitutes an extreme and unusual circumstance.

Other unusual circumstances surround the admission of Exhibit 40. As the document indicates, it was signed on January 3, 2017, or just nine days before it was admitted as evidence into the trial. Thus, it was obviously not a document disclosed in discovery or listed on Safaris' pre-trial list of exhibits. The document should have been excluded based on the Trial Court's own pre-trial order but was not. Moreover, the document was cumulative. Safaris had already admitted Exhibits 38 and 39 for the purpose of allowing the jury to compare signatures. Under the circumstances, the admission of Exhibit 40 was unnecessary and it should have been excluded. In addition, a petition for a protection order should have been a sealed case and should not have been accessible by Safaris on the spur of the moment as it was.

Perhaps the most extreme and unusual circumstance surrounding the admission of Exhibit 40 was the Trial Court's questioning of Jones regarding his signature. Following a conference outside the presence of the jury where Jones was shown the entire document (Exhibit 40(a)) and acknowledged seeing it before and "scratching on it," (Tr. 454, L.4-9) the jury was brought back into the courtroom. Mr. Jones was handed Exhibit 40 (the redacted version of Exhibit 40(a)) and the following exchange took place:

> Q: Mr. Jones, is that your signature on Exhibit 40?
> A: It didn't look like my signature but could be.
> Q: Mr. Jones, I just need a yes or no. Is that your signature?
> A: I don't know what the document is.

> THE COURT: Mr. Jones, the question is very simple. Is that or is that not your signature, yes or no?
> THE WITNESS: It –
> THE COURT: No, I don't want an explanation. I want a yes-or-no answer to that question.
> THE WITNESS: It's not the way I sign it, but it might be.
> THE COURT: This is not the question, sir. I want to give you one more opportunity to answer the Court's direct question.
> THE WITNESS: Okay.
> THE COURT: I'm getting tired of this –
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Tr. 462:17 – 464:20 (emphasis added).

The foregoing exchange was improper on more than one level. But it contributed to the extreme and unusual circumstances surrounding the admission of Exhibit 40. For all of the foregoing circumstances discussed, Exhibit 40 should have been excluded. Its admission was in error and a sufficient basis for This Court to vacate the jury verdict in this case.

B. THE DISTRICT COURT'S QUESTIONING OF THE DEFENDANT CONSTITUTES A PROCEDURAL DUE PROCESS VIOLATION.

The right to procedural due process guaranteed under both the Idaho and United States Constitutions "requires that a person involved in the judicial process be given meaningful notice and a meaningful opportunity to be heard." *Markham v. Anderton*, 118 Idaho 856, 860, 801 P.2d 565, 569 (1990) *citing Rudd v. Rudd*, 105 Idaho 112, 115, 666 P.2d 639, 642 (1983). The trial court is vested with discretion to conduct the trial in a manner that will maintain dignity and integrity of the court room "and to achieve the orderly and expeditious disposition of cases." *Talbot v. Ames Const.*, 127 Idaho 648 (1995). In doing so, "courts should be careful to refrain from saying anything in the presence of the jury which might improperly influence them, counsel should be equally careful not to provoke remarks of a prejudicial character." *McShane v. Quillin*, 47 Idaho 542, __, 277 P. 554, 561 (1929).

When the trial court questions or cross-examines the defendant, it sets the tone for the jury and runs the risk of depriving the defendant of a fair trial. *Livant v. Adams*, 17 A.D.2d 784, 784 (N.Y. App. Div. 1962). The court in that case stated, "the brief but derogatory cross-examination by the court of defendant-appellant and, perhaps, of one of this defendant's witnesses, openly evinced disbelief in the testimony…The trial, therefore, was not fair." *Id*.

In questioning a witness or making any remarks, the trial court must refrain from casting any doubt on the credibility of the witness or claims made by a party. *State Highway Com. v. Kenan Oil Co.*, 131 S.E.2d 665, 666 (N.C. 1963). The court in that case recognized the judge did not

necessarily intend to impugn the credibility of the defendant or the witnesses. The court, however, ordered a new trial, stating:

> It is clear to us that the able and conscientious trial judge meant to be stating a contention of the defendant. However, the jurors were nowhere so informed and they undoubtedly interpreted the statement, when considered along with his reference to Mr. Hornaday's evidence, to mean that the judge thought Kenan's evaluation of the damage too high. There are so many hazards to judicial navigation that even the most circumspect navigator can avoid them all.
> *Id*.

In the present case, the Trial Court's questioning of Jones regarding his signature on Exhibit 40 deprived Jones of a fair trial. Like in *Kenan Oil* and *Livant*, the nature of the questioning cast doubt on the Jones' credibility as it made it seem as though he was intentionally dodging a direct answer on whether or not it was his signature on the document. Moreover, the Judge's tone of voice and body language, which are not communicated well in a written transcript, evidenced anger and frustration with Jones.

Although the Judge may have only wanted an efficient answer to the question, like the judge in *Kenan Oil*, he achieved such efficiency in an improper and prejudicial manner. Vacation of the jury verdict and a remand for a new trial, therefore, is warranted to provide Jones with a fair trial.

C. INSTRUCTION 13 WAS IMPROPER.

While Instruction 13 may be a proper statement of the law, it was improper in this case in that it was not supported by the evidence. The evidence overwhelmingly stated that Hingeston was an independent contractor, not an agent of Safaris. While the evidence showed that Hingeston was authorized to quote prices, it stopped short of establishing that he was authorized to book hunts on behalf of Safaris. Thus, instructing the jury that a person can be an independent contractor in some

respects and an agent in others was misleading given the evidence offered in this case. Moreover, the instruction was material as the jury found that a contract between Safaris and Jones existed. The only possible theory supporting such a verdict is that Hingeston had authority to contract with Jones on Safari's behalf. There is no evidence in the record supporting such a conclusion. The instruction, therefore was offered in error.

D. ATTORNEY FEES

Safaris was awarded attorney fees following trial pursuant to Idaho Code § 12-120(1). To the extent this matter is sent back for a new trial, Safaris will no longer be the prevailing party and an award of fees would no longer be appropriate. Moreover, Jones would be entitled to costs on appeal. As the matter would remain undetermined, an award of fees would be inappropriate. Costs on appeal, however, pursuant to Rule 40 should be awarded to Jones.

CONCLUSION

For the foregoing reasons, Jones did not receive a fair trial and the jury verdict should be reversed and remanded to the District Court.

RESPECTFULLY SUBMITTED this 14th day of August, 2017.

WILLIAMS, MESERVY & LOTHSPEICH, LLP

THEODORE R. LARSEN
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 14th day of August, 2017, I caused to be served two copies the foregoing document as follows:

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THEODORE R. LARSEN