

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRYAN PHILLIP BONHAM,

Appellant/Cross-Respondent,

vs.

STATE OF NEVADA ex rel.
NEVADA DEPARTMENT OF
CORRECTIONS, CHARLES
DANIELS, TIM GARRETT, and
CARTER POTTER,

Respondents/Cross-Appellants.

Supreme Court No. 86217
District Court No.: A208251
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**RESPONDENTS/CROSS-APPELLANTS' ANSWERING BRIEF
AND OPENING BRIEF ON CROSS APPEAL**

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Respondents/Cross-Appellants

*State of Nevada ex rel. Nevada Department of Corrections, Charles
Daniels, Tim Garrett, and Carter Potter*

I. DISCLOSURE STATEMENT

The undersigned counsel of record certifies that Respondents/Cross-Appellants State of Nevada ex rel. Nevada Department of Corrections, Charles Daniels, Tim Garrett, and Carter Potter are not persons or entities described in NRAP 26.1(a) that must be disclosed.

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IV. JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Nev. R. App. P. 3A(b). Notice of Entry of Findings of fact, Conclusions of Law and Judgment was filed and served on February 15, 2023. Appellant/Cross-Respondent timely filed a notice of appeal on March 6, 2023. 4-ROA-928. Respondents-Cross-Appellants timely filed a notice of appeal on March 20, 2023. The notices of appeal are therefore timely pursuant to Nev. R. App. P. 4(a) and 26(c).

V. ROUTING STATEMENT

This matter involves an appeal from a judgment, exclusive of interest, attorney fees, and costs, of \$250,000 or less in a tort case, which is a case category that is presumptively assigned to the Nevada Court of Appeals under Nev. R. App. P. 17(b)(5).

VI. STATEMENT OF THE ISSUES

A. Whether Bonham may resurrect the federal civil rights claims in his complaint when the Nevada Court of Appeals, in a prior appeal in this case, affirmed the district court's order granting the Defendants' motion for summary judgment on those claims.

B. Whether the district court erred by entering judgment in favor of Bonham on his claim that \$16.00 was improperly deducted from his inmate account when that amount was not subject to the cap for repayment of expenses NDOC previously incurred because the

deductions were for postage and copy costs that Bonham was actually authorizing and incurring.

C. Whether the district court abused its discretion when striking Bonham's Second Amended Complaint when Bonham unilaterally filed the complaint without the district court's permission and without serving the complaint on Defendants.

VII. STATEMENT OF CASE

On October 15, 2020, Plaintiff Bryan Bonham filed a civil rights complaint alleging that Defendants State of Nevada ex rel. Nevada Department of Corrections, Charles Daniels, Tim Garrett, and Carter Potter violated the Fourth, Fifth, and Fourteenth Amendment of the United States Constitution by deducting \$136.00, instead of \$120.00, from a \$150.00 deposit to Bonham's inmate account. 1-ROA-1-6. The district court granted Defendants' motion for summary judgment on the claims in Bonham's complaint in an order entered on August 6, 2021. 3-ROA-507-18.

The Nevada Court of Appeals affirmed in part and reversed in part. 3-ROA-524-31. The Court of Appeals held that the State of Nevada and NDOC are not persons for purposes of a § 1983 [civil rights] claim." 3-ROA-526, COA Order at 3. The Court also held that Defendants "Daniels, Garrett, and Potter were not involved in managing the funds in Bonham's inmate account." 3-ROA-526, COA

Order at 3. The Court therefore held that “the district court did not error in granting [Defendants’] motion for summary judgment” on Bonham’s § 1983 [civil rights] claims. 3-ROA-526, COA Order at 3. The Court, however, held that “Bonham could arguably seek relief by bringing state-law based claims” under NRS 41.0322(1). 3-ROA-527-29, COA Order at 4-6. The Court therefore reversed in part and remanded for the district court to consider whether Bonham “present[ed] a state law claim” and “whether there was evidence in the record to support such claims.” 3-ROA-529-30, COA Order at 6-7.

On April 26, 2022, Bonham filed a “Second Amended Complaint” without moving to amend his complaint or securing permission from the district court. In an order entered on February 3, 2023, the district court properly granted Defendants’ motion to strike Bonham’s Second Amended Complaint because the complaint was filed “without service and without permission from this Court.” 4-ROA-882-86.

Previously, in an order entered May 17, 2022, the district court noted the remand of the Court of Appeals, and ordered Bonham to file a supplemental brief on Defendants’ motion to dismiss by July 4, 2022, and Defendants to file a reply by September 3, 2022. 3-ROA-538-42. On July 1, 2022, Bonham filed his supplemental brief. 3-ROA-554-718. Bonham’s supplemental brief, however, did not have anything to do with establishing a state law claim under NRS 41.0322(1). Instead,

Bonham reasserted the federal civil rights claims rejected by the Court of Appeals, and asserted claims found in his Second Amended Complaint that was eventually stricken. 3-ROA-554-603. On September 2, 2023, Defendants filed their supplemental reply in support of their motion to dismiss or in the alternative for summary judgment. 4-ROA-741-49. In their supplemental reply, Defendants established, as a matter of law, that all deductions from the \$150.00 deposited in Bonham's inmate account were properly deducted. 4-ROA-742-45. The district court, however, improperly held an evidentiary hearing on Defendants' motion, and entered judgment on October 16, 2023, in favor of Bonham "in the total amount of \$9.00," against NDOC, to be paid in "Bonham's prison trust account," even though Defendants had not yet answered Bonham's complaint. 4-ROA-908-14. This appeal and cross-appeal followed.

VIII. STATEMENT OF FACTS

On January 8, 2020, at 07:00:23 am, Linda Conry deposited \$150.00 in Bonham's inmate trust account. *See* 1-ROA-3, Complaint at 3:7-8; 2-ROA-255, Motion to Dismiss (MTD) Ex. A; 3-ROA-607, Plaintiff's (Pl.) Ex. Immediately, at the same time, 14 charges in the total amount of \$75.00 (or 50% of the \$150.00) were deducted for legal copies, as allowed by NDOC AR 285.05(1) and NRS 209.246(3)(b). *See* 1-ROA-3, Complaint at 3:7-11; 2-ROA-255-56, MTD Ex. A; 4-ROA-607-

08, Pl. Ex.; *see also* 2-ROA-314, NDOC AR 285.05(1) (permitting deduction “from any money deposited in an inmate’s individual Trust Account from any source other than wages” of “50% for costs incurred by the Department on behalf of the inmate per NRS 209.246”); NRS 209.246(3)(b) (providing for the repayment of “[p]hotocopying of personal documents and legal documents”). Also immediately, \$15 (or 10% of the \$150.00) was deducted from Bonham’s inmates savings account as permitted by NDOC AR 258.05(2) (2-ROA-315), providing a 10% deduction “for credit to the inmate’s interest bearing savings account.” *See* 1-ROA-3, Complaint at 3:7-10; 2-ROA-256, MTD Ex. A; 3-ROA-608, Pl. Ex. Also immediately, \$30 (or 20% of \$150.00) was deducted for Bonham’s filing fee, as allowed by NDOC AR 258.05(3) (2-ROA-315), providing a 20% deduction “towards a court for filing fee.” *See* 1-ROA-3, Complaint at 3:7-9; 2-ROA-255, MTD Ex. A; 3-ROA-607, Pl. Ex. Accordingly, \$120.00 was properly deducted from the \$150.00 deposited Bonham’s account pursuant to NDOC AR 258.05, leaving \$30.00 in his account.

After the \$150.00 was deposited on January 8, 2020, at 07:00:23 am, however, Bonham authorized and incurred three postage charges between 4:19 p.m. on January 8, 2020, and 4:39 p.m. on January 13, 2020, in the amounts of \$7.85, \$0.50, and \$0.65, for a total amount of \$9.00, leaving \$21.00 in Bonham’s inmate account. *See* 1-ROA-4,

Complaint at 4:5; 2-ROA-256, MTD Ex. A; 2-ROA-333, MTD Ex. C; 3-ROA-667, Pl. Ex. This \$9.00, therefore was not repayment under NDOC AR 258.05, but were subsequent postal charges that Bonham was authorizing and incurring under NDOC AR 258.01(1)(B)(1) and NDOC AR 258.13. *See* 1-ROA-4, Complaint at 4:5; 2-ROA-256, MTD Ex. A; 3-ROA-667, P. Ex.; *see also* 2-ROA-309, NDOC AR 258.01(1)(B)(1) (providing that an “inmate may spend funds from [his Trust 2] account”); 2-ROA-323-24, NDOC AR 258.13 (providing for the transfer of inmate funds for charges). Similarly, all subsequent charges after January 13, 2020, through March 26, 2020, were not repayments under NDOC AR 258.05, but were subsequent postal or copy costs Bonham was authorizing and incurring under NDOC AR 258.01(1)(b)(1) and NDOC AR 258.13. *See* 1-ROA-4, Complaint at 4:5-9; 2-ROA-256, MTD Ex. A; 2-ROA-333, MTD Ex. C; 3-ROA-667, Pl. Ex.

Bonham does not dispute that he authorized these subsequent postage and copy charges between 4:19 p.m. on January 8, 2020, through March 26, 2020. 1-ROA-1-6, Complaint. Thus, these postage and copy costs were not deducted as repayment costs already incurred by NDOC under NDOC AR 258.05(1), and did not violate the regulation. Bonham therefore has and cannot demonstrate that these funds were improperly taken under Nevada law.

IX. SUMMARY OF ARGUMENT

Bonham's appeal has no merit whatsoever. The majority of Bonham's Opening Brief seeks to resurrect his federal civil rights claims, even though the Nevada Court of Appeals affirmed the district court's grant of summary judgment in favor of Defendants on those claims. As a matter of law, that decision continues to foreclose Bonham from asserting those claims in this appeal.

Moreover, even though the district court entered a \$9.00 judgment in favor of Bonham, he was entitled to nothing under Nevada law. Bonham admits that NDOC properly deducted \$120.00, from the \$150.00 deposited in his inmate account, pursuant to NDOC AR 285.05, which provides caps for repayment of costs previously incurred by NDOC on behalf of Bonham. The additional \$16.00 deducted from his inmate account, which Bonham challenges in his complaint, is not subject to NDOC AR 285.05, because those deductions were not for repayment of expenses NDOC previously incurred, but were for postage and copy costs that Bonham was actually authorizing and incurring. Accordingly, because the deductions from his inmate account were proper, Bonham's state law claims, to the extent any exist, have no merit. Accordingly, the district court should have dismissed Bonham's Nevada law claims, or in the alternative granted Defendants' motion for summary judgment.

Finally, the district court did not abuse its discretion when granting Defendants’ motion to strike Bonham’s second amended complaint. Bonham filed the second amended complaint without any permission from the district court and without serving the complaint on Defendants. Without an order permitting Bonham to amend the complaint, his unilateral filing of an amended complaint was properly stricken.

Accordingly, this Court should reject Bonham’s appeal, uphold Defendants’ cross-appeal, and reverse the district court’s order granting a \$9.00 judgment against Defendants. The Court should remand with instruction that the district court dismiss Bonham’s complaint, or in the alternative grant Defendants’ motion for summary judgment on any and all Nevada law claims that may be alleged in Bonham’s complaint.

X. ARGUMENT

A. Standard of Review

In *Fausto v. Sanchez-Flores*, 137 Nev. 113, 114, 482 P.3d 677, 679, (2021), this Court held that orders ruling on motions to dismiss and motions for summary judgment are reviewed de novo. In *Johnson v. Travelers Ins. Co.*, 89 Nev. 467, 472, 515 P.2d 68, 71 (1973), this Court held that, to avoid dismissal, the “complaint must . . . allege facts sufficient to establish all necessary elements of the claim for relief.” “[B]are allegation is not enough,” but plaintiff’s “complaint must set

forth sufficient facts to establish all necessary elements of a claim for relief.” *Conway v. Circus Circus Casinos, Inc.*, 116 Nev. 870, 873-75, 8 P.3d 837, 839-40 (2000). When ruling on a motion to dismiss, the court “must look at the substance of the claims, not just the labels used in the . . . complaint.” *Nevada Power Co. v. Eighth Judicial Dist. Court of Nevada ex rel. Cty. of Clark*, 120 Nev. 948, 960, 102 P.3d 578, 586 (2004). Where the complaint fails to state facts which are “legally sufficient to constitute the elements of the claim asserted,” the complaint should be dismissed. *Sanchez ex rel. Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 823, 829, 221 P.3d 1276, 1280 (2009).

“However, when the district court is presented with and does not exclude matters outside the pleadings in making its decision, the motion must be treated as one for summary judgment.” *Fausto*, 137 Nev. at 114, 482 P.3d at 679. In *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005), this Court held that “[s]ummary judgment is appropriate under NRCP 56 when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law.” “The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant.” *Id.* “While the pleadings and

other proof must be construed in a light most favorable to the nonmoving party, that party bears the burden to do more than simply show that there is some metaphysical doubt as to the operative facts in order to avoid summary judgment being entered in the moving party's favor." *Id.* at 732, 121 P.3d at 1031. When the "nonmoving party will bear the burden of persuasion at trial, the party moving for summary judgment may satisfy the burden of production by either (1) submitting evidence that negates an essential element of the nonmoving party's claim, or (2) pointing out that there is an absence of evidence to support the nonmoving party's case." *Cuzze v. Univ. & Cmty. Coll. Sys. of Nevada*, 123 Nev. 598, 602–03, 172 P.3d 131, 134 (2007). "The nonmoving party must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him." *Wood*, 121 Nev. at 731, 121 P.3d at 1031. To "defeat the motion for summary judgment, the nonmoving party must submit admissible evidence to show a genuine issue of material fact." *In re Cay Clubs*, 130 Nev. 920, 935, 340 P.3d 563, 573 (2014). Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Nevada State Education Ass'n v. Clark County Educ. Ass'n*, 137 Nev. Adv. Op. 8, 482 P.3d 665, 671 (2021).

“The nonmoving party is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture.” *Wood*, 121 Nev. at 731, 121 P.3d at 1031.

B. Bonham’s Federal Civil Rights Claims Are Barred by the Nevada Court of Appeals’ Mandate

The Nevada Court of Appeals affirmed summary judgment in favor of Defendants on all of Bonham’s federal civil rights claims asserted in his complaint, and remanded only to consider whether his complaint alleged a claim under Nevada law, and whether Bonham submitted sufficient evidence in the record to avoid summary judgment as to any Nevada law claim which had been sufficiently alleged. 3-ROA-527-29, COA Order at 4-6. In the majority of his Opening Brief, however, Bonham improperly attempts resurrect his federal civil rights claims. *See* Opening Brief at 4-18.

In *State Engineer v. Eureka Cnty.*, 133 Nev. 557, 559, 402 P.3d 1249, 1251 (2017), this Court held that where “an appellate court deciding an appeal states a principal or rule of law, necessary to the decision, the principal or rule becomes the law of the case and must be adhered to throughout its subsequent progress both in the lower court and upon subsequent appeal.” As the Court of Appeals has already determined that Bonham’s federal civil rights claims have no merit, Bonham is barred from raising those claims again in this appeal.

C. The District Court Erred when Entering Judgment in Favor of Bonham in the Amount of \$9.00, because the Amounts Deducted from Bonham’s Inmate Account Were Proper

In his complaint, Bonham concedes that \$120.00 was properly deducted from the \$150.00 deposited by Linda Conry on January 8, 2020, at 7:00:23 am. *See* 1-ROA-3-4, Complaint at 3:7-13, 4:1-4; *see also* 2-ROA-255-56, MTD Ex. A; 3-ROA-607-08, Pl. Ex. Bonham, however, wrongly alleges that copy and postage costs he authorized and incurred after January 8, 2020, at 7:00:23 am, through March 26, 2020, should not have been deducted. *See* 1-ROA-3-4, Complaint at 3:7-13, 4:1-9; *see also* 2-ROA-255-56, MTD Ex. A; 3-ROA-607-08, Pl. Ex. Bonham does not dispute that he voluntarily authorized these postal and copy costs. *See* 1-ROA-1-6, Complaint; 2-ROA-333, MTD Ex. C. Instead, Bonham mistakenly asserts that only 50% of the \$150.00 deposited could be deducted for copy and postage costs, under NRS 209.246 and NDOC AR 258.05. *See* 1-ROA-3-4, Complaint at 3:21-24, 4:1-2.

NRS 209.246, however, does not cap the amount that an inmate must pay out of a deposit for copy and postage costs. NRS 209.246(3) (emphasis added), however, expressly permits the NDOC Director, with approval of the Board, to “establish by regulation criteria for a reasonable deduction from money credited to the account of an offender to . . . *[r]epay* the costs incurred by the Department on behalf of the offender for [p]ostage” and for “[p]hotocopying.” NDOC AR 258.05(1)

permits deduction “from any money deposited in an inmate’s individual Trust Account from any source other than wages” of “50% ***for costs incurred by the Department*** on behalf of the inmate per NRS 209.246.” 2-ROA-314, NDOC AR 258.05. In other words, the 50% cap applies only to repayment costs that had already been “incurred by” NDOC, not to the subsequent costs for postage and copies that the inmate may authorize in the future.

Bonham’s complaint acknowledges that each challenged charges to his inmate account occurred after the \$150.00 deposit (1-ROA-4, Complaint at 4:5-9), and therefore were not repayment for costs incurred by NDOC, but were simply postage and copy costs that Bonham was authorizing and incurring. 2-ROA-333, MTD Ex. C. These charges, therefore, are not subject to the 50% cap of NDOC AR 258.05(1) as alleged by Bonham in his complaint, and therefore were properly deducted from Bonham’s inmate account.

Even though the amounts deducted from Bonham’s inmate account were proper, the district court, after an evidentiary hearing, entered judgment in favor of Bonham against NDOC in the amount of \$9.00. 4-ROA-910, 913, Judgment at 1:20-21, 4:2-5. In doing so the district court erred.

First, holding an evidentiary hearing was improper, especially when Defendants had not yet answered Bonham’s complaint. On

remand, the district court was to determine whether Bonham's complaint would survive a Defendants' motion to dismiss, which alternatively requested summary judgment. 3-ROA-529, COA Order at 6. Holding an evidentiary hearing on a motion to dismiss or a motion for summary judgment is improper. *See Fausto*, 137 Nev. at 114, 482 P.3d at 679 (holding that when a district court considers matters outside pleadings, a motion to dismiss "must be treated as one for summary judgment"); *Berry v. State*, 131 Nev. 957, 968, 363 P.3d 1148, 1156 (2015) (recognizing that conducting an evidentiary hearing on a motion for summary judgment would be improper).

Second, and more importantly, Bonham's complaint fails to state a claim under Nevada law. NRS 41.0322 provides that after exhausting administrative remedies, a "person who is or was in the custody of the Department of Corrections may not proceed with any action against the Department or any of its agents, former officers, employees or contractors to recover compensation for the loss of the person's personal property, property damage, personal injuries or any other claim arising out of a tort pursuant to NRS 41.031." As already set forth, however, Bonham did not lose any personal property as all deductions from his inmate account were proper. "Moreover, an act, to be a conversion, must be essentially tortious; a conversion imports an unlawful act, or an act which cannot be justified or excused in law." *See Wantz v.*

Redfield, 74 Nev. 196, 198, 326 P.2d 413, 414 (1958). Bonham’s allegation that NDOC did not follow NDOC AR 258 fails to meet the elements of conversion. Bonham has not alleged facts showing that NDOC committed an unlawful act because the charges to Bonham’s inmate account were not prohibited by NDOC AR 258, but were indisputably authorized and incurred by Bonham. See 2-ROA-333; MTD Ex. C. The individual Defendants certainly cannot be held liable because the Court of Appeal already determined that they “were not involved in managing the funds in Bonham’s inmate account.” 3-ROA-526. Order at 3. Accordingly, the district court erred in failing to dismiss Bonham’s complaint, or in the alternative erred by not granting summary judgment in favor of Defendants.

D. The District Court Properly Struck Bonham’s Complaint Because He Did Not Move to Amend

In an order entered on February 3, 2023, the district court granted Defendants’ motion to strike Bonham’s second amended complaint because it was “filed without service and without permission from this Court.” 4-ROA-885, Order at 2:1-7. In his Opening Brief, Bonham does not dispute that he failed to seek permission to file an amended complaint, that the district court never granted permission to file an amended complaint, or that he failed to serve the amended complaint on Defendants. Accordingly, the district court did not abuse its

discretion when striking Bonham’s Second Amended Complaint. *See Csomos v. Venetian Casino Resort, LLC*, 127 Nev. 1128, 373 P.3d 907 (2011) (holding “[w]ithout an order permitting [plaintiff] to amend the complaint, his unilateral filing of an amended complaint was improper”); *Washoe Medical Ctr. v. Second Judicial Dist. Court of State of Nev. ex rel. Cnty. of Washoe*, 122 Nev. 1298, 1304–06, 148 P.3d 790, 794–95, (2006) (holding that district court erred when denying motion to strike amended complaint that was improperly filed); *Weir v. Washoe Hardware & Supply Co.*, 31 Nev. 528, 104 P. 19, 20 (1909) (explaining that a party “must comply with the rules of the court allowing amendments,” and cannot “complain[] of a right denied him” to amend, “when he has not as yet properly applied for the same”); *see also Reggio v. Eighth Judicial Dist. Court in & for Cnty. of Clark*, 139 Nev. Adv. Op. 4, 525 P.3d 350, 353 (2023) (explaining that the Nevada Supreme Court “review[s] a district court’s decision to grant or deny a motion to strike for abuse of discretion”).

XI. CONCLUSION

For the reasons set forth above, this Court should reject Bonham’s appeal, uphold Defendants’ Cross Appeal, and reverse the district court’s order granting a \$9.00 judgment against Defendants. The Court should remand with instruction that the district court dismiss Bonham’s complaint, or in the alternative grant Defendants’ motion for

summary judgment on any and all Nevada law claims that may be alleged in Bonham's complaint.

XII. CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of Nev. R. App. P. 32(a)(4), the typeface requirements of Nev. R. App. P. 32(a)(5) and the type style requirements of Nev. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, font size 14-point, Century Schoolbook.

I further certify that this brief complies with the page- or type-volume limitations of Nev. R. App. P. 32(a)(7) because, excluding the parts of the brief exempted by Nev. R. App. P. 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 3590 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular Nev. R. App. P. 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be

subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Respectfully submitted August 10, 2023.

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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on August 10, 2023, I served true and correct copy of the foregoing **RESPONDENTS/CROSS-APPELLANTS' ANSWERING BRIEF AND OPENING BRIEF ON CROSS APPEAL** by First-Class U.S. Mail, postage prepaid, addressed to the following:

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/s/ Jennifer N. Briones

An employee of the office
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