IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN PAUL DEBIPARSHAD, M.D., an individual; KEVIN P. DEBIPARSHAD PLLC, d/b/a SYNERGY SPINE AND ORTHOPEDICS; DEBIPARSHAD PROFESSIONAL SERVICES, LLC, d/b/a SYNERGY SPINE AND ORTHOPEDICS; ALLEGIANT INSTITUTE INC., a Nevada domestic professional corporation doing business as ALLEGIANT SPINE INSTITUTE; JASWINDER S. GROVER, M.D., an individual; JASWINDER S. GROVER, M.D., Ltd., d/b/a NEVADA SPINE CLINIC,

Petitioners,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, COUNTY OF CLARK, AND THE HONORABLE JUDGE KERRY EARLEY

Respondents,

and

JASON GEORGE LANDESS a.k.a. KAY GEORGE LANDESS

Real Party In Interest.

Supreme Court No.:

District Court No.: A-18-776896-C

PETITION FOR WRIT OF MANDAMUS

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the justices of this court may evaluate possible disqualification or recusal.

1. All parent corporations and publicly-held companies owning 10 percent or more of the party's stock: None

2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court: Lewis Brisbois Bisgaard & Smith LLP; Lemons, Grundy & Eisenberg.

3. If litigant is using a pseudonym, the litigant's true name: N/A

DATED: August 6, 2020.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

State Statutory Authorities

State Rules and Regulations

Additional Authorities

RELIEF SOUGHT

Petitioners hereby petition for a writ of mandamus requiring the district court to vacate its order of April 6, 2020, and subsequent related orders, in the case of Landess v. Debiparshad, et al, Clark County Case No. A-18-776896-C. The orders awarded costs sanctions against Petitioners and approved a prior order issued by another judge, who was disqualified in the case.

This petition is based upon the ground that the district court's orders are without legal and factual bases, and Respondent manifestly abused her discretion by issuing the orders. This petition is also based upon the ground that Petitioners do not have a plain, speedy and adequate remedy in the ordinary course of law.

ROUTING STATEMENT

The supreme court should retain this petition under NRAP 17(a)(11-12), because it raises important questions involving power of judges to act while motions to disqualify are pending, and the validity of a disqualified judge's prior orders; and the petition raises a question of statewide importance and first impression regarding NRS 18.070(2).

ISSUES PRESENTED

1. Whether the district court manifestly abused its discretion by upholding an Order issued by a predecessor judge who was disqualified for bias.

2. Whether the district court erred by erroneously interpreting NRS 18.070.

STATEMENT OF FACTS

This is a medical malpractice action in which Real Party in Interest, Plaintiff Landess, alleges Petitioners, Defendant Dr. Debiparshad and his related entities, failed to properly reduce a fracture during surgery in October 2017. [1P.App. 0001-0029]. The case was rushed to trial commencing on July 22, 2019, with Judge Rob Bare, following only six months of discovery, pursuant to Landess's request for preferential trial setting. Following two weeks of trial, Judge Bare granted a mistrial.

A. Trial Proceedings

On Friday August 2, 2019 (trial day 10), in direct examination, a plaintiff's character witness described Landess's "beautiful" character and articulated his utter faith in Landess's trustworthiness. [1P.App. 0188, 190]. In response, for purposes of impeachment, Petitioners presented an exhibit containing an email—written, disclosed, and **stipulated into evidence** without objection by Landess—that called into question that supposedly impeccable character. [1P.App. 0190-91]. Landess's so-called "Burning Embers" email recounted his history of playing a game called "Snooker," and "hustling Mexicans, blacks, and rednecks on Fridays, which was usually payday." [1P.App. 0191]. Landess's counsel did not object to Defense Counsel's use of the email. The witness quickly volunteered that he did not perceive "Mr. Landess being a racist and a bragger." [1P.App. 0192]. After the

witness raised the issue of racism, Defense Counsel challenged him and asked, "He talks [in the email] about a time when he bought a truck stop here in Las Vegas when the Mexican laborer stole everything that wasn't welded to the ground. You still don't take that as being at all a racist comment?" [1P.App. 0192].

Landess's counsel did not object to the exhibit or to Defense Counsel's question at the time, nor did he ask to approach the bench for a sidebar. Later, he moved to strike the email, which Judge Bare denied. [1P.App. 0203]. However, Judge Bare was clearly affected by the potential damage to Landess's case caused by Landess's own opinions and statements contained in the "Burning Embers" email. First, Judge Bare offered—*sua sponte*—excuses for Landess's counsel having "missed" the existence of the email and corresponding failures of Landess to timely object to its use. [1P.App. 0205-07]. Judge Bare then interjected gratuitous glowing compliments about Landess's counsel, stating on the record:

> THE COURT: Okay. Well, that gives me further context, as to where I'm going with this at this point. And I've got to say, Mr. Jimmerson. This comes to exactly what I would expect from you, and if I say something you don't want me to say, then you stop me. Okay. But what I would expect from you, based upon all my dealings with you over 25 years, and all the time I've been a judge too, is frank candor -- just absolute frank candor with me as an individual and a judge. It's always been that way. You know, *whatever word you ever said to me in any context has always been the gospel truth.*
>
> I mean, without, you know, calling my colleagues, lawyers that worked with me at the bar, or my wife as

> testimonial witnesses, *I've told all those people many times about the level of respect and admiration I have for you. You know, you're in -- to me, you're in the, sort of, the hall of fame, or the Mount Rushmore, you know, of lawyers that I've dealt with in my life.* I've got a lot of respect for you.

[1P.App. 0207-08(emphasis added)].

The following Sunday at 10:02 p.m., Landess filed his Motion for Mistrial and Fees/Costs. [motion for mistrial]. The next court day, Judge Bare orally granted Landess's motion without allowing Petitioners an opportunity to file opposing points and authorities. [3P.App. 0523]. The jury was then discharged, and Judge Bare ordered Landess's counsel to draft the order granting mistrial. [3P.App. 0545]. Judge Bare stated he required further briefing on the issue of Landess's requested attorney fees and costs and set a hearing for September 10, 2019, which the parties later stipulated to continue. [3P.App. 0548; 4P.App. 0837-40].

B. Post-trial Proceedings

On August 23, 2019, Petitioners filed a motion to disqualify Judge Bare, citing the multiple irregularities in his rulings, his flawed and improper grant of mistrial, and his clear bias and statements favoring Landess's counsel. [3P.App. 0587]. The motion was transferred to Judge Wiese for determination. [7P.App. 1657].

Just over a week before Petitioners filed their motion to disqualify Judge

Bare, Landess forwarded a proposed draft order granting mistrial to Petitioners' counsel for review. The proposed order—19 pages long and consisting of 32 separate paragraphs of proffered "findings," as well as 28 paragraphs of "conclusions of law"—was riddled with inaccuracies and misstatements.[1] Because of those inaccuracies and misstatements, Defense Counsel declined to approve the draft order.

On September 4, 2019, Judge Wiese heard Petitioners' Motion to Disqualify Judge Bare. [7P.App. 1657]. That same day, Landess submitted his draft Findings of Fact, Conclusions of Law, Order Granting Plaintiff's Motion for a Mistrial ["FOF"] **to Judge Bare** for approval and signature. [6P.App. 1308]. Also on September 4, 2019, Judge Bare filed an affidavit pursuant to NRS 1.235, claiming a lack of bias and impartiality.[2] [5P.App. 1164]. Five days later, weeks after Petitioners moved to disqualify him but before Judge Wiese rendered a decision on disqualification, Judge Bare signed and filed Landess's draft Order granting mistrial without addressing or revising any of the misstatements or inaccuracies it contained. [6P.App. 1290-1308].

One week after that, on September 16, 2019, Judge Wiese granted

[1] Petitioners discovered 12 discrete, identifiable misstatements, inaccuracies, or fabrications within Judge Bare's FOF. Petitioners enumerated and explained them in detail in their Reply in Support of their Motion for Relief, pp. 5-7. [13P.App. 3047-3049]. For the sake of brevity, Petitioners do not reproduce them in full here.

[2] Judge Bare filed his original affidavit on September 3, 2019. His amended affidavit was filed the next day.

Petitioners' motion to disqualify Judge Bare. [7P.App. 1657-1690]. Judge Wiese concluded that Judge Bare's extremely laudatory statements about Jimmerson demonstrated impressions that had been formed not just during trial or in his capacity as a judge; rather, they came from "extrajudicial source[s]." [7P.App. 1686]. He further noted that Judge Bare's statements regarding Jimmerson were "not limited to compliments regarding professionalism." [7P.App. 1686-87]. Ultimately, Judge Wiese stated that "to tell the attorneys that the Judge is going to believe the words of one attorney over another, because 'whatever word you ever said to me in any context has always been the gospel truth,' results in a 'reasonable person' believing that the Judge has a bias in favor of that attorney." [7P.App. 1687]. He went on to conclude that "[t]he statements that Judge Bare made . . . on Trial Day 10 . . . seemed to indicate a bias in favor of Mr. Jimmerson" and to rule that, consequently, Judge Bare must be disqualified from the case. [7P.App. 1687-88]. That same day, Judge Bare vacated the hearing on Landess's motion for attorney fees and costs. [7P.App. 1656]

The case was subsequently reassigned to Respondent, Judge Earley. [8P.App. 1727]. Respondent later held a hearing on Landess's motion for fees and costs. [8P.App. 1727]. In that hearing, Landess's counsel repeatedly relied upon and quoted from Judge Bare's FOF. He suggested to Respondent that "it's important for you to as a bedrock to know what Judge Bare as a -- as essentially

affirmed by Judge Wiese found in the findings because it bears upon the issue of essentially liability granting one of the two motions . . . .” [8P.App. 1734].

Among Landess’s counsel’s many references to misstatements included in the FOF, perhaps the most egregious relates to paragraph 20. The finding at issue highlighted Petitioners’ counsel’s purported “consciousness of guilt and of wrongdoing,” which, as Landess’s Counsel admitted, pertained to “one of the key findings here as relates to [Respondent’s] review of this record.” [8P.App. 1750-51]. Counsel quoted the following passage directly from Judge Bare’s FOF:

> The defendants’ statements have led the court to believe that the defendants knew that their use of the exhibit was objectionable, and would be objectionable to the plaintiff, and possibly to the court, and nevertheless the defendants continued to use and inject the email before the jury in the fashion that precluded plaintiff from being able to effectively respond. In arguing to the Court that they quote waited for plaintiff to object and that plaintiff . . . did nothing about it, . . . defendants evidence a consciousness of guilt and of wrongdoing. That consciousness of wrongdoing suggests that Defendants and their counsel were the legal cause of the mistrial.

[8P.App. 1751]. Counsel then reminded Respondent that “that is certainly one of the central questions you will resolve as resolving the competing motions . . . in terms of who caused this mistrial and what expenses and costs should flow from the party who is the offending party.” [8P.App. 1751]. The insurmountable problem with those statements is that they arose from a demonstrable falsehood. Judge Bare did not say the language Landess’s Counsel inserted into paragraph 20

of the Order. Far from it, Judge Bare deferred any discussion on the legal cause of the mistrial until the anticipated hearing on Landess's motion for fees and costs—a hearing that never occurred because Judge Bare was disqualified before it could take place. [3P.App. 0481; 3P.App. 0531].

On April 6, 2020, Respondent entered an order finding that Defense Counsel purposely caused the mistrial by using the stipulated email and by asking a follow-up question (to which no objection was made). [11P.App. 2636]. Respondent ordered Petitioners to pay sanctions consisting of Landess's costs, pursuant to NRS 18.070(2), in the amount of $118,606.25. [11P.App. 2637].

Petitioners moved for Respondent to grant relief from Judge Bare's FOF ("Motion for Relief"). [13P.App. 3066]. Respondent denied Petitioners' motion, concluding that Judge Bare had ruled orally on mistrial in court and that his subsequent signing and filing the written Order merely memorialized the decision he had rendered at trial. [13P.App. 3084]. Respondent also concluded that "this Court does not have the jurisdiction to review, set aside, or second guess an order, findings of fact, and/or conclusions of law made by another district court judge." [13P.App. 3085]. Finally, Respondent observed that "[t]he substantive basis for the Honorable Rob Bare's decision must be addressed by an appellate court. **Defendant's proper remedy in this instance was to file a writ** pursuant to N.R.S. Chapter 34 and N.R.A.P. 21." [13P.App. 3085 (emphasis added)].

Petitioners moved Respondent to reconsider her "clearly erroneous" denial of Petitioners' Motion for Relief, but Respondent denied that Motion as well. [13P.App. 3095; 14P.App. 3331]. An order entered on July 23, 2020, stated that the $118,606.25 sanction payment needed to be made "on or before July __,2020." [14P.App. 3321] The date was left blank. Petitioners have requested a stay of the payment pending this writ proceeding and have offered a supersedeas bond in the amount of $121,728.23 (calculated as $118,606.25 plus six months of interest). As of the present time, the district court has not ruled on the stay motion.

ARGUMENT

A. Writ relief is appropriate

1. Mandamus principles

Mandamus compels the performance of an act which the law requires, or controls an arbitrary or capricious exercise of discretion. NRS 34.160; *Borger v. District Court*, 120 Nev. 1021, 1025, 102 P.3d 600, 603 (2004). Mandamus is appropriate where a petition raises important legal issues likely to be the subject of litigation within the Nevada court system. *Borger*, 120 Nev. at 1025-26.

Writ relief is available where (1) no factual dispute exists, and the district court is obligated to take certain action, or (2) an important issue of law needs clarification, and considerations of sound judicial economy and administration militate in favor of granting the petition. *Beazer Homes Nevada, Inc. v. District*

Court, 120 Nev. 575, 579, 97 P.3d 1132 (2004). This court will entertain a writ petition where an important issue of law needs to be decided. *Civil Service Comm'n v. District Court*, 118 Nev. 186, 188-89, 42 P.3d 268, 270 (2002).

Extraordinary relief is available where the petitioner has no plain, speedy and adequate remedy in the ordinary course of law. *State v. District Court*, 116 Nev. 953, 957, 11 P.3d 1209, 1211 (2000). The question of whether an appeal after a final judgment is an adequate remedy includes consideration of "whether a future appeal will permit this court to meaningfully review the issues presented." *Rolf Jensen & Assoc. v. District Court*, 128 Nev. 441, 444, 282 P.3d 743, 746 (2012). Here, the interlocutory costs award requires immediate payment, and it is equivalent to an award of sanctions or contempt. There is no right to an appeal from such an order. NRAP 3A.

Mandamus is available for review of an interlocutory order requiring payment of sanctions. The case of *Pengilly v. Rancho Santa Fe Homeowners Ass'n*, 116 Nev. 646, 649-50, 5 P.3d 569, 571 (2000) was a direct appeal from order imposing sanctions for the petitioners' failure to abide by a settlement agreement. This court dismissed the appeal because no statute or rule authorizes an appeal from such an order. The court held: "Whether the contempt sanction is imposed on a non-party or a party, **the proper way to challenge it is through a writ petition.**" *Id.* fn. 2 (emphasis added). *See also City of Sparks v. Second*

Judicial Dist. Ct., 112 Nev. 952, 920 P.2d 1014 (1996) (district court imposed sanctions for failing to comply with conditional settlement agreement; mandamus issued); *Jensen v. Eighth Judicial Dist. Ct.*, 2020 WL 3603278 (Nev., July 1, 2020; No. 80481; unpublished) (mandamus issued for award of fees and costs sanctions).

The interlocutory costs-sanctions order in this case was based upon the mistrial. Mandamus is available in this context. In *Boyack v. Eighth Judicial Dist. Ct.*, 2019 WL 1877402, *2-3 (Nev., April 25, 2019; No. 75522; unpublished), the district court granted a mistrial and imposed a sanction based upon defense counsel's misconduct. This court held that mandamus was appropriate for review of the order.

2. All of these principles apply here.

In the present case, all of these principles weigh heavily in favor of this mandamus petition. This petition presents an important issue of statewide significance involving the extent to which a judge may enter orders after a party has filed a motion for disqualification. Although a statute prohibits such orders, Judge Bare and Respondent believed it was appropriate for Judge Bare to issue his comprehensive mistrial order while the motion to disqualify (which was eventually **granted**) was still pending. Clarification on this issue is critical.

This petition also presents a significant issue involving the extent to which subsequent district judges had authority to review orders that Judge Bare issued

before Judge Wiese entered the disqualification order. Judge Bare's strong personal opinions favoring attorney Jimmerson—which Judge Bare indicated date back at least 25 years—should have called into question all of Judge Bare's orders, not just the mistrial order. Yet the subsequent judges have given the orders full force and effect.

This case also presents an issue of first impression, with statewide significance, regarding NRS 18.070(2) (allowing imposition of costs relating to a mistrial). This subsection was enacted in 1977, and there are no published opinions dealing with scope and interpretation of the statute.

This petition also satisfies the requirement for the lack of an adequate remedy at law. The multiple cases cited above show that interlocutory sanctions-type orders are appropriately reviewed in writ proceedings. There is no right to appeal from the interlocutory sanctions order, even though the district court has required the $118,606.25 costs-sanctions to be paid now. If the payment to Landess is made now, the money will be distributed (as Landess has stated on the record). And if the orders are eventually reversed, it will likely be impossible to collect reimbursement from Landess. *See Maheu v. Eighth Judicial Dist. Ct.*, 88 Nev. 26, 50, 493 P.2d 709, 724 (1972) (Mowbray, J., dissenting; recognizing cases where extraordinary writs were issued to stop enforcement of contempt orders until they could be reviewed, "because otherwise the appeal(s) would have been moot").

Petitioners respectfully contend that all relevant factors militate in favor of entertaining the petition.[3]

B. Respondent Erred by Denying Relief from Judge Bare's Written Order.

The Respondent district court abused its discretion in denying Petitioners' Motion for Relief on multiple fronts. First, Respondent ignored the fact that Judge Bare's Order should never have been filed in the first place. Next, the court erroneously concluded that Judge Bare was entitled to file his written Order granting mistrial because he had decided that issue orally at trial, and his subsequent written Order merely memorialized the oral decision. [13P.App. 3084]. Finally, the court concluded that "this Court does not have the jurisdiction to review, set aside, or second guess an order, findings of fact, and/or conclusions of law made by another district court judge." [13P.App. 3085]. These findings and conclusions constitute a manifest abuse of discretion, and thus, Respondent's order denying relief should be vacated.

1. Standard Of Review

A district court has inherent power to "amend, correct, resettle, modify, or vacate, as the case may be, an order previously made and entered on motion in the

[3] As noted above, Respondent expressly recognized: "Defendant's proper remedy in this instance [is] to file a writ pursuant to N.R.S. Chapter 34 and N.R.A.P. 21." [13P.App. 3085].

progress of the cause or proceeding." *Trail v. Faretto*, 91 Nev. 401, 403, 536 P.2d 1026, 1027 (1975). In addition, a district court may reconsider a previously decided issue if that decision was "clearly erroneous." *Masonry & Tile Contractors Ass'n v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997).

2. Judge Bare Should Never Have Rendered His Order Due to His Obvious Disqualifying Bias and While the Motion to Disqualify was Pending.

"A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety." NCJC 1.2. To that end, a judge shall not act in an action when either actual or implied bias exists. NRS 1.230(1-2). In fact, "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality *might reasonably be questioned*, including [when] the judge has a personal bias or prejudice concerning a party or a party's lawyer . . . ." NCJC 2.11(A)(1) (emphasis added); *Mkhitaryan v. Eighth Judicial Dist. Court*, 2016 WL 5957647, *2 (Nev. Unpub., October 13, 2016; No. 71177) (citing NCJC 2.11) (internal quotation marks omitted). Moreover, a judge is obliged "not to hear or decide matters in which disqualification is required . . . regardless of whether a motion to disqualify is filed." NCJC 2.11, Comment 2

Under NRS 1.235, "[e]xcept as otherwise provided . . . [a] judge against

whom an affidavit alleging bias or prejudice is filed **shall proceed no further with the matter** . . . " except to "immediately transfer the case to another department of the court . . . ." NRS 1.235(5)(emphasis added).What is more, "[t]hat the actions of a district judge, disqualified by statute, are not voidable merely, but void, has long been the rule in this state." *Hoff v. Eighth Judicial Dist. Court*, 79 Nev. 108, 110, 378 P.2d 977, 978 (1963) (citing *Frevert v. Swift*, 19 Nev. 363, 11 P. 273 (1886)); *see Rossco Holdings, Inc. v. Bank of Am.*, 58 Cal. Rptr. 3d 141, 148 (Cal. Ct. App. 2007) ("Orders made by a disqualified judge are void."). "[D]isqualification occurs when the facts creating disqualification arise, not when the disqualification is established." *Christie v. City of El Centro*, 37 Cal. Rptr. 3d 718, 725 (Cal. Ct. App 2006). "[I]t is the fact of disqualification that controls, not subsequent judicial action on that disqualification." *Id.*

Thus, Nevada law clearly directs that, once Petitioners filed their Motion to disqualify him, Judge Bare was obliged to proceed no further with the matter except to immediately transfer the case to another department. NRS 1.235(5). Indeed, Judge Bare himself acknowledged being bound by the statute's requirements. [5P.App. 1165 ("I understand that, pursuant to NRS 1.235(6), a 'judge may challenge an affidavit alleging bias or prejudice by filing a written answer . . . .'")]. While NRS 1.235 specifically governs pre-trial motions for disqualification, it provides helpful guidance to fill in the holes left by legal

interpretations of NCJC and indeed, within the Judicial Code itself.

The circumstances of this case demonstrate the precise reason a disqualified judge's orders are void. Here, Petitioners had moved to disqualify Judge Bare more than two weeks before he signed and entered his FOF; all the while, Judge Bare was on notice that his biased behavior was on review before Judge Wiese. In fact, a mere week after he filed his order, he was deemed disqualified and this case reassigned. Even so, Judge Bare filed an Order clearly permeated with bias favoring Landess's counsel, to Petitioners' severe and ongoing detriment. All of which raises a fundamental question: how is it possible to "promote[ ] public confidence in the independence, integrity, and impartiality of the judiciary and [to] avoid impropriety and the appearance of impropriety[ ]" if a judge is allowed to continue to make important rulings in cases where he or she is subject to a pending disqualification motion? NCJC 1.2.

3. Judge Bare's Written Order did not Merely Memorialize the Oral Decision at Trial.

In denying Petitioners' Motion for Relief, Respondent found that Judge Bare had ruled on mistrial orally, and that his subsequent signing and filing the written Order merely memorialized the oral decision he had rendered previously. (Order at p. 3:16-18). In support, Respondent cited Virginia law, which articulated the notion that rendition of a judgment is distinct from its entry on the court record and that

the "written order or decree endorsed by the judge is but evidence of what the court has decided." *Lewis v. Commonwealth*, 813 S.E.2d 732, 737 (Va. 2018). In *Lewis*, where a conviction followed a bench trial, there was no question as to the content of the judge's ruling. The court found Lewis guilty, pronounced that finding from the bench, then later entered an order memorializing as much. *Id.* at 739. In such a straightforward situation, the *Lewis* court's ruling made sense. However, given the facts here, the district court's reliance on the Virginia authority was misplaced.

In Nevada, unlike Virginia, a district court's oral pronouncement from the bench is "**ineffective for any purpose**." *Rust v. Clark County School Dist.*, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987)(emphasis added). Even if such pronouncements carried any weight, here, Judge Bare's statements from the bench differed significantly from his written Order. The Order contained numerous important findings and conclusions that Judge Bare could not have rendered given that they purported to resolve issues not before him when he granted the mistrial at trial. Significantly, here, Paragraph 20 of Judge Bare's FOF found Petitioners' supposed "consciousness of guilt" and concluded that they were the legal cause of the mistrial. However, Judge Bare specifically avoided discussing matters pertaining to Landess's motion for fees and costs on trial day 11, including whether Petitioners were the legal cause of the mistrial. He decided instead to postpone that issue until Petitioners could file opposing points and authorities.

Therefore, Judge Bare could not possibly have ruled on the issue of legal cause as his subsequent written Order incorrectly indicated.

Respondent also noted that Judge Bare's signing and filing the written Order granting mistrial was merely "a ministerial housekeeping act" with "no discretionary element." [13P.App. 3084]. This was demonstrably wrong. As a point of contrast, on the day that Judge Wiese disqualified him, Judge Bare filed a minute order vacating the hearing on Landess's motion for fees and costs. To remove a hearing from his calendar on a matter that was no longer in his judicial department is obviously nothing more than a housekeeping matter or a ministerial act. *Frevert*, 19 Nev. at 364, 11 P. at 273 (stating that a disqualified judge may make necessary arrangement of calendar for judge who will try the case).

Rather, here, the FOF Landess's Counsel wrote, and Judge Bare reviewed and approved while the motion to disqualify Judge Bare was still pending, in no way approximates a mere housekeeping duty. To determine whether an order accurately reflects the mind of the judge who renders it undoubtedly requires "discretionary action." Nor is it a document containing merely the date of conviction and the verdict as in *Lewis*. Instead, it is a document containing 18 pages and 60 paragraphs of substantive findings and rulings. Moreover, if, as Respondent found, the FOF truly merely memorializes an oral judgment, questions arise regarding the inconsistencies between the transcript containing those oral

pronouncements and the actual language found in Judge Bare's subsequent written FOF. But regardless of the cause or source of those inconsistencies, Judge Bare approved, signed, and rendered that significantly substantive document, which is no mere "housekeeping" act by any calculation.

4. Respondent did not Lack Jurisdiction to Review Judge Bare's Order.

Finally, Respondent erroneously concluded that she lacked authority to "review, set aside, or second guess an order . . . made by another district court judge." [13P.App. 3085]. Judge Bare's FOF was void because it was rendered after the disqualifying event occurred and while the motion to disqualify him was still pending. No court should be bound by a void, factually inaccurate Order merely because it was rendered by a predecessor judge whose jurisdiction would otherwise be considered coextensive—certainly not under the unusual circumstances of this case, where the Order was rendered in violation of a statute because it was rendered while the motion to disqualify was still pending, and where the predecessor judge was found to have been disqualified for bias.

Respondent relied on language from two Nevada cases to support her conclusion that she lacked authority to overturn or even review Judge Bare's void FOF. But Respondent misapprehended factual differences that render those cases inapposite. In addition, Respondent ignored California authority directly on point.

Respondent cited *Rohlfing v. Second Judicial District Court*, a criminal case in which a judge voided an order dismissing a criminal information previously rendered by another judge. 106 Nev. 902, 904, 803 P.2d 659, 661 (1990). The Supreme Court noted that "because of the rotating procedure for assignment of judges in criminal matters in the second judicial district, [the other judge]'s order [voiding the order dismissing the information] was clearly inappropriate." *Id.* at 907, 803 P.2d at 663. The original judge had been authorized to render the ruling, and only the court's procedure prevented him from continuing with the case. Respondent also cited *State Engineer v. Sustacha*, in which a court in one Nevada Judicial District voided orders rendered in another Judicial District. 108 Nev. 223, 225, 826 P.2d 959, 960 (1992).

Unlike the cases cited and explained above, *Rossco Holdings, supra,* is directly on point. In *Rossco Holdings,* the trial court judge that succeeded a disqualified judge voided an order compelling arbitration that the predecessor judge had made at a time when he was disqualified. 58 Cal. Rptr. 3d at 146-47. The successor court also vacated the arbitration award arising from the void order compelling arbitration. *Id*. at 147.

The Appeals Court later emphasized that "[disqualification statutes] are intended to ensure public confidence in the judiciary and to protect the right of the litigants to a fair and impartial adjudicator." *Id*. at 150; see NCJC 1.2. Notably, the

Appeals Court did not question whether the successor judge had jurisdiction to reconsider his predecessor's order. In fact, the Court went so far as to state that "[t]he law is clear that a disqualified judge's orders are void, regardless of whether they happen to have been legally correct." *Id*. at 152.

Here, unlike in the otherwise inapposite Nevada cases Respondent cited, Judge Bare's tainted FOF is not a valid order he was entitled to render. Petitioners had moved to disqualify Judge Bare, and Judge Bare had already made his extremely biased disqualifying statements, before he accepted and signed Landess's Counsel's factually inaccurate and grossly embellished FOF. Consequently, that FOF should never have been rendered at all by Judge Bare. What is more, under the NCJC's requirements, it was incumbent upon him not to render any rulings that could be seen as tainted by bias. See NCJC 2.11, Comment 2 ("A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed."). Further, as in *Rossco Holdings*, there is no question that Respondent subsequently had jurisdiction to review Judge Bare's invalid FOF. The relevant inquiry concerns whether the FOF was tainted by the bias that resulted in Judge Bare's disqualification. Therefore, Respondent's contrary ruling was erroneous.

C. Respondent Abused Her Discretion by Granting Landess's Motion for Costs When the Grant was Based on an Erroneous

Interpretation of NRS 18.070.

In granting Landess's motion for costs, Respondent continued the pattern of erroneous rulings in this case, despite being provided multiple opportunities to chart the proper course. Respondent's ruling relies entirely on the premise that Defense Counsel "purposely caused the mistrial in this case to occur due to the Defendant knowingly and intentionally injecting into the trial evidence of alleged racism by the use of [the "Burning Embers" email]." [11P.App. 2636]. Citing discretion under NRS 18.070, Respondent granted costs but denied attorney fees. [11P.App. 2637]. However, those findings rest on a faulty foundation—a baseless interpretation of NRS 18.070.

Respondent quoted some of the words in the statute in finding that Petitioners "purposely caused the mistrial." But Respondent misapplied the facts and employed an improper legal standard. Further, the findings are justified neither by the statute's language nor by the intent of those who drafted it. Finally, given that no legal authority interpreting NRS 18.070 exists, guidance from sister states' statutes demonstrates that the costs sanction award was unfounded. In the end, NRS 18.070 speaks for itself. Petitioners did not purposely cause the mistrial. Therefore, the order granting costs must be vacated.

1. Standard of Review

Statutory interpretation is a question of law subject to review de novo. *See*

Las Vegas Sands Corp. v. Eighth Judicial Dist. Court of Nev., 130 Nev. 643, 650, 331 P.3d 905, 909 (2014). "When a statute is clear on its face, we will not look beyond the statute's plain language." *Wheble, P.A.-C v. Eighth Judicial Dist. Court*, 128 Nev. 119, 122, 272 P.3d 134, 136 (2012). But if the language of a statute is ambiguous, "it is the duty of this court to select the construction that will best give effect to the intent of the legislature." *Smith v. Crown Fin. Servs. of Am.*, 111 Nev. 277, 284, 890 P.2d 769, 774 (1995)).

2. Respondent Misapplied Facts and Employed an Incorrect Legal Standard.

Respondent found that Petitioners "purposely caused the mistrial in this case to occur due to the Defendant knowingly and intentionally injecting into the trial evidence of alleged racism. . . . " [11P.App. 2636]. Respondent further found that "[i]t was reasonably foreseeable to the Defendant that the Court would declare a mistrial due to the Defendant injecting such racially inflammatory evidence." [11P.App. 2636-37]. But a reasonable-foreseeability standard is not at play here. Respondent misinterpreted the mental state necessary under the statute to warrant an award of costs; a party must "purposely" cause the mistrial.

In addition, Respondent appears to have shoehorned the standard required to warrant a new trial based on attorney misconduct into this mistrial fees and costs matter. Respondent did not find that Petitioners' Counsel intended to cause a

mistrial by using the email at trial. Indeed, no judge involved in this case has concluded that Petitioners' Counsel used the email for the purpose of causing a mistrial; the reverse is true. Judge Bare stated, "Rather, I think -- what I really think, that both you and Mr. Vogel just didn't fully realize the impact that this could have. That's a mistake." [3P.App. 0554 (deferring finding on misconduct until future hearing)]. Respondent also noted, "of course you wouldn't want a mistrial. No one wants a mistrial, right? . . . they didn't want a mistrial and you didn't want a mistrial." [8P.App. 1816]. Nevertheless, in the hearing on the motion for fees and costs, Respondent invoked the standard of intent required to grant a new trial based on attorney misconduct as articulated in *Lioce v. Cohen*, 122 Nev. 1377, 1401, 149 P.3d 916, 931 (2006). [8P.App. 1816-17 ("I don't think [Emerson] intended to cause a mistrial, but the Supreme Court looks at it and goes wait a minute, based on the case law, this is wrong, this is misconduct is – that's the standard I'm looking at it.")]. Notably, Respondent did not invoke *Lioce* in her order granting costs. But Respondent's finding that the intent to use the email at trial itself satisfies the "purposely caused" requirement amply demonstrates that she employed that standard.

It made sense for the *Lioce* Court to conclude that the intent behind misconduct was of no matter in determining whether to grant a new trial. Indeed, unintentional misconduct can permeate a proceeding and influence the jury's

passion and prejudice just as easily as intentional misconduct. *Id.* at 1400, 149 P.3d at 931. Here, no judge has concluded that Counsel's use of the email amounted to misconduct, not even Judge Bare. [3P.App. 0554]. Nor does that judge-made standard apply to this matter, governed as it is by statute. It is therefore, inappropriate for Respondent to have so clearly based her ruling on the standard for determining whether misconduct occurred. Instead, the proper analysis should have been whether Counsel intended to cause a mistrial when he referred the witness to an email already admitted into evidence, and when he asked a legitimate follow-up question to the witness's statement about the email.

3. NRS 18.070's Plain Language Does Not Support Respondent's Findings and Conclusion.

NRS 18.070(2) provides that "[a] court may impose costs and reasonable attorney's fees against a party or an attorney who. . . *purposely caused* a mistrial to occur." Unfortunately, no cases have interpreted the statute to offer guidance as to what state of mind the word "purposely" means in this context. However, a common-sense interpretation of the statute's plain language suggests *intent to cause the mistrial* is required.

There is only one logical meaning to the phrase "purposely caused," and thus, the language is clear and unambiguous. "Purposely" means "Intentionally; designedly." *Purposely*, *Ballentine's Law Dictionary* (2010). Hence, to have

"purposely caused" the mistrial requires that Petitioners *intended to cause* the mistrial. Here, as noted above, no one has suggested that Defense Counsel's use of the email at trial was intended to cause the mistrial, or even that doing so constituted misconduct. Unlike in attorney-misconduct cases, it is not sufficient under NRS 18.070 for the party merely to have intended the conduct that led to the mistrial. Consequently, here, under the statute's plain language, and because all agree that neither Petitioners nor their counsel intended to cause the mistrial, the award of costs is inappropriate.

Even if this Court should conclude that the operative statutory language is ambiguous, the legislative history behind the statute's enactment militates in favor of vacating the costs award.

NRS 18.070 was amended in 1977 to include section 2, the provision at issue in this case. S.B. 263, 1977 p. 775. It has not been amended or revised since. Although the legislative deliberations do not specifically address the provision in the bill that would eventually become NRS 18.070(2), it gives guidance as to the Legislature's thinking when it amended Chapter 18 to include 18.070(2). In deliberations surrounding S.B.263, senators raised the specter of attorneys who "take[] the trial to the point which approximate (sic) the ceiling on fees and then **deliberately cause[] a mistrial so that [they] can end the trial**."[4] Thus, it is clear

[4] Assembly Judiciary committee minutes, S.B. 263, April 21, 1977 (emphasis

that when the legislators were discussing amendments to the existing law regulating attorney fees, they contemplated punishing conduct that is intended to cause a mistrial, such as where a party's case is going poorly at trial, and the party wants a mistrial in order to obtain a second chance to win the case.[5]

Whether by the statute's plain language or by considering its legislative history, statutory interpretation leads to only one conclusion. To warrant an award of fees and/or costs under NRS 18.070, the sanctioned party must have intended to cause the mistrial. As this case makes painfully clear, even the most innocent actions can potentially lead to mistrial, especially if the judge declaring the mistrial manifests open bias in favor of opposing counsel. If the statute allowed sanctions for costs for virtually any action that resulted in mistrial, regardless of the reason for that action, parties and their attorneys would be at constant risk of incurring sanctions. That circumstance would chill zealous advocacy without any corresponding benefit. Moreover, that scenario comports with neither the language of the statute nor the intent behind its drafting.

4. A Discussion of Other States' Statutes Supports Vacating the Costs Award.

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added).

[5] There is not a shred of evidence that the defense case was going poorly at trial and that Petitioners' counsel was hoping to cause a mistrial in order to obtain a second trial. Neither Landess nor any of the judges in this case have ever suggested this possibility.

Few states have statutes providing for attorney fees and costs in the event of a mistrial. None use NRS 18.070's exact language. But a discussion of some similar statutes is illuminating.

South Dakota law provides that "[w]hen a motion for mistrial is made successfully in any civil action, the court may impose against the party *intentionally causing* the mistrial . . . such other costs as may be appropriate." S.D. Codified Laws § 15-17-16.1. In the only case to interpret that statute, the South Dakota Supreme Court held that "reckless misconduct was insufficient to satisfy the intentional requirement" of the statute. *Eccleston v. State Farm Mut. Auto. Ins. Co.*, 587 N.W.2d 580, 584 (S.D. 1998). The *Eccleston* Court affirmed a trial court's denial of fees and costs when defense counsel neglected to sufficiently edit a deposition video to comport with a motion in limine prohibiting certain testimony that had been elicited in the deposition. *Id*. at 583. The trial court, and subsequently the Supreme Court determined that the Defendant had acted recklessly but without the intent necessary to impose costs and fees. *Id*.

The South Dakota statute closely approximates NRS 18.070, with its language requiring a party to have intentionally caused the mistrial before fees and costs can be granted. Here, Petitioners' Counsel's behavior was more like the reckless conduct in *Eccleston* if indeed, the comparison is apt at all (which it is not). Because the initial impetus for introducing the evidence—countering

Landess's own witness when Landess opened the door to character evidence—was permissible, and the witness himself discussed race, nothing in that exchange demonstrates that Petitioners injected race into the trial. Thus, the conduct at issue was not reckless at all. Therefore, Petitioners should be even less liable for costs than the party in *Eccleston* against whom costs were ultimately *not* imposed.

CONCLUSION

As is clearly outlined in this petition, the district court manifestly abused its discretion by denying Petitioners' amply supported Motion for Relief and by entering its unfounded order awarding nearly $120,000 in costs against them—all as punishment for referring to an exhibit that had been stipulated into evidence and asking a question to which no objection was raised. Extraordinary relief is appropriate to remedy the district court's orders. For the reasons asserted above, Petitioners respectfully request this Court to issue a writ of mandamus compelling

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Respondent to 1) vacate its order awarding sanctions costs against Petitioners under the mistrial statute, and 2) vacate its order denying Petitioners' Motion for Relief to the extent that the order enables Landess and his counsel to employ the FOF's biased, inaccurate, unsupported findings of fact and conclusions of law.

Dated this 6th day of August, 2020

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CERTIFICATE OF COMPLIANCE

1. Pursuant to NRAP 21(e), I hereby certify that this petition complies with NRAP 32(a)(9) and the formatting requirements of NRAP 32(a), including the fact that this petition has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman type style.

2. I further certify that this brief complies with the word-count limitation of NRAP 21(d), because, using the computation guidelines in NRAP 32(a)(7)(C), it contains 6,971 words.

Dated this 6th day of August, 2020.

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CERTIFICATE OF MAILING

I hereby certify that on this 6th day of August, 2020, I served the foregoing **PETITION FOR WRIT OF MANDAMUS** upon the following parties by placing a true and correct copy thereof in the United States Mail in Las Vegas, Nevada with first class postage fully prepaid:

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