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,.

Petitioner,

v.

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

Respondent,

and

JASON GEORGE LANDESS A.K.A. KAY GEORGE LANDESS

Real Party In Interest.

Supreme Court No.:

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

PETITIONER'S APPENDIX TO PETITION FOR WRIT OF MANDAMUS VOLUME 4

S. BRENT VOGEL
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KATHERINE J. GORDON
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CERTIFICATE OF MAILING

I hereby certify that on this 6th day of August, 2020, I served the foregoing **PETITIONER'S APPENDIX – VOLUME I** 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:

The Honorable Kerry Earley
The Eighth Judicial District Court
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89101
Respondent

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/s/ *Johana Whitbeck*
An employee of LEWIS BRISBOIS BISGAARD & SMITH, LLP

a guesstimate, I would have to measure this 80 percent apposition. If you look at the picture on 35 which is the A.P., again, you probably have more like 85 percent apposition. I mean, the fault that I'm getting at is not the apposition, it's the alignment.

Q. So the angle?

A. Correct.

Q. So you have no criticism of the apposition?

A. Had he reduced the fracture, you probably would have had more apposition. If you look at -- Dr. Fontes...

Q. Fontes?

A. ...Fontes' X rays that were done after the fact, he has a hundred percent apposition; so in this -- I've been involved now with what's called the butterfly irrelevant fragment where you really have trouble controlling the fracture. Here this was pretty much a garden variety, hey, you have a fractured tibia, which I don't want to make light of. I mean, they're usually oblique. Usually they don't go into valgus and this was reducible, and he didn't -- with the C-arm he wasn't able to, you know, reduce that. And it was proven when he went to the office later on that it wasn't reduced. And there are lots of techniques you can use, actually incise over the fracture so you can see it directly and

reduce it under direct vision. You pass the rod. You can use blocking screws. You can guide the rod by sort of visually go over by it, putting a little screw in it for a while to measure it where you want it to be.

Q. And I appreciate that. Still, my question is you don't have criticism on the standard of care related to the apposition; is that correct?

A. Correct.

Q. Okay.

A. I'm sorry.

Q. No, that's okay.

Now, because you're giving opinions on standard of care, kind of a standard question is, how do you define standard of care?

A. Your community's standard in the community, certainly Las Vegas and those of the country, and I believe of the country because we have national meetings that you mentioned before we started this where we all get together and talk about how you're supposed to do it.

Q. That's the national standard, but my question was more specific as to what is your definition of what the standard of care means?

A. Well, any good doctor, even the best doctors can have bad things happen to them. And so it doesn't

either dynamize it if it's straight, take the screw out, or try the stimulator, Vaset's silver (phonetic) in Pennsylvania to see if that helps. Again, low risk things. So I'm not -- broken screw, the non-union, you could -- if you're really going to push the limit, maybe it's related to the angulation because it wasn't -- it didn't get compressive forces. I'm not trying to push that. I'm basically saying it wasn't nailed properly. It wasn't picked up at the time and then lastly when it was picked up, it wasn't acted on. And that's why I have everything on this little packet. All the other points I would -- then you guys have it.

Q. So, your criticisms, it wasn't nailed properly initially, and once it was discovered that it was out of alignment, he didn't act promptly?

A. The Academy --

Q. Did I got that right?

A. Correct.

Q. Hold on.

A. Okay.

Q. Did I summarize your opinions correctly there?

A. Yes, sir.

Q. Are there any other opinions other than those that you're offering in this case.

A. Those are the three, yes.

Q. So, again, I only got two. Not nailed properly. And --

A. They didn't do an image while he was -- they should have done an X ray in the O.R.

Q. Okay. So one, not nailed properly. Two, should have done X ray in the O.R. Three, not acted upon once they realized it out of alignment.

A. Sure.

Q. Is that all of the opinions?

A. Those are all of the opinions.

Q. With respect to the third one, not acted upon quickly. Are you saying the October 25th, 2017 office visit, should have taken him back to surgery then?

A. Yes. And that's why I have that paragraph which I have alluded to.

Q. Is that the one in the article?

A. Yes, sir.

Q. For a gentleman like Mr. Landess at the time, how long would you expect him to take to heal had everything been done the way that you believe it should have been done?

A. The healing -- well, physiologically and then the quality of life varies on each person. I tell people when I see them, I say, you're out of your life. And the -- again, I take care of mostly attorneys and

PLAINTIFF'S INITIAL EXPERT DISCLOSURE

EXHIBIT 1

Expert Report of Denis Harris, M.D.

CASE NO.: A-18-776896-C

Denis Harris, MD

Document	Records Review
Patient Name	Jason Landess
Date of Injury	10/9/2017
Claimant DOB	4/21/1946

Records reviewed

Operative report, 10/11/2017
Initial post surgical x-rays, 10/25/2017
Desert Orthopaedic Center, 2/15/2018 - 4/3/2018
Dr. Debiparshad, Synergy Spine & Orthopedics, 3/1/2018
X-rays after the second surgery, 4/28/2018

Summary of records

On 10/9/2017 Mr. Landess suffered a closed fracture of his left tibia while driving a golf cart and catching his leg on a 4x4. He was transported by ambulance to the emergency care unit at Centennial Hills Hospital in Las Vegas. X-rays were taken and he was diagnosed as having a closed displaced fracture of proximal tibia.

The following day, 10/10/2017, Dr. Debiparshad manipulated the fracture and inserted a locking rod to fix the fracture's position. Postoperative x-rays included for this review show a tibial fracture fixed with a non anatomical valgus deformity and 85% apposition.

Despite surgery, Mr. Landess continued to complain of pain and deformity in the left leg. He sought a second opinion and on 2/15/2018 was seen by Dr. Fontes who found the fracture had not healed and recommended repeat surgery.

Dr. Debiparshad also confirmed the fracture had not healed in his note of 3/1/2018.

On 4/3/2018 Mr. Landess underwent removal of the hardware in his left leg. The fracture was manipulated to an anatomic alignment, grafted and stabilized with a new locking rod. Post op x-rays showed anatomic restoration at the fracture site with no abnormal angulation and 100% apposition.

Discussion

3301 New Mexico Ave NW Suite 346 Washington DC 20016 Phone: (202) 362-4787 Fax: (202) 595-7810 Email: denisharris@me.com

Mr. Landess suffered a proximal tibial fracture that was treated by Dr. Debiparshad with manipulation and intramedullary fixation. It is my opinion to a reasonable degree of medical probability that Dr. Debiparshad did not adequately reduce the fracture resulting in subsequent angular deformity which required a second surgery.

Legal Testimony 2014 - 2019

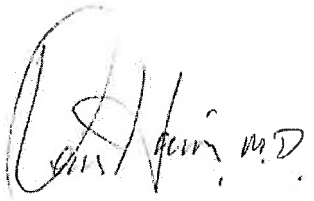
Frazier v Crowe	Prince George's County, Maryland	Trial	2015
Ortega v Bond	Prince George's County, Maryland	Deposition	2017
Pranger v Woodward	Washington, DC	Deposition	2017
Hope Foster v Quick Livick	Washington, DC	Deposition	2017
Raub v American Airline	Eastern District of Pennsylvania	Deposition	2017

CONFLICT OF INTEREST

I certify that I do not accept compensation for review activities that is dependent in any way on the specific outcome of the case. To the best of my knowledge I was not involved with the specific episode of care prior to referral of the cast for review. I do not have a material professional, familial, or financial conflict of interest (financial conflict of interest if defined as ownership interest of great the 5%) regarding any of the following: the referring entity; the insurance issuer or group health plan that is the subject of the review (I do not have a contract to provide health care services to enrollees of the health benefit plan of the insurance issuer or group health plan that is the subject of this review); the covered person whose treatment is the subject of the review and the covered person's authorized representative, if applicable; any officer, director or management employed of the insurance issuer that is the subject of the review; any group health plan administrator, plan fiduciary, or plan employee; the health care provider, the health care provider's medical group or independent practice association recommending the health care service or treatment that is the subject of the review; the facility at which the recommended health care service of treatment would be provided; (I do not have staff privileges at the facility where the recommended where the recommended health care service or treatment would be provided if the insurance issuer's or group health plan's previous non-certification is reversed) or the developer or manufacturer of the principle drug, device, procedure or other therapy being recommended for the covered person whose treatment is the subject of the review.

This attestation certifies that the examiner named below has the appropriate scope of licensure or certification that typically manages the medical condition, procedure, treatment or issue under review and has current, relevant experience and/or knowledge to render a determination for the case under review.

PHYSICIAN



Denis R. Harris, MD
Board Certified Orthopedist
District of Columbia License MD6466

Denis Harris, MD

January 28, 2019

Martin Little, Esq..
3800 Howard Hughes Pkwy
Unit 1000
Las Vegas, NV 89169

Re: Jason Landess v. Kevin P. Debiparshad, M.D., et al.

Dear Mr. Little:

I would like to reply to Dr. Gold's letter of January 22, 2019.

The error I fault in Dr. Debiparshad's treatment was in not adequately reducing the fracture. Postoperative x-rays showed a valgus and rotatory malalignment which should not have been accepted at the time of the initial surgery.

Dr. Gold states that this malalignment was acceptable but I would take issue with that. I feel Dr. Debiparshad deviated from the usual standard of care in not adequately reducing the fracture.

Note that after Mr. Landess' second surgery, which I feel was indicated, x-rays do show appropriate alignment. Again this should have been obtained at the time of the first surgery.

Sincerely,

Denis Harris, M.D.

3301 New Mexico Ave NW Suite 346 Washington DC 20016 Phone: (202) 362-4787 Fax: (202) 595-7810 Email: denisharris@me.com

Denis Harris, MD

February 6, 2019

Martin Little, Esq..
3800 Howard Hughes Pkwy
Unit 1000
Las Vegas, NV 89169

Re: Jason Landess v. Kevin P. Debiparshad, M.D., et al.

Dear Mr. Little:

I would like to reply to Dr. Gold's letter of January 22, 2019 and add to my previous letter of January 28, 2019.

The error I fault in Dr. Debiparshad's treatment was in not adequately reducing the fracture. Postoperative x-rays showed a valgus and rotatory malalignment which should not have been accepted at the time of the initial surgery.

Dr. Gold states that this malalignment was acceptable but I would take issue with that. I feel Dr. Debiparshad deviated from the usual standard of care in not adequately reducing the fracture. At the time of surgery, only c-arm images were obtained and these images were localized to small areas of the tibia to check passage of the rod. No films from his hospitalization included the entire tibia which should have been used to check alignment.

Note that after Mr. Landess' second surgery, which I feel was indicated, x-rays do show appropriate alignment. Again this should have been obtained at the time of the first surgery.

Sincerely,

Denis Harris, M.D.

3301 New Mexico Ave NW Suite 346 Washington DC 20016 Phone: (202) 362-4787 Fax: (202) 595-7810 Email: denisharris@me.com

KNEE & SPORTS MEDICINE CENTER OF NEVADA

JOHN E. HERR, M.D.
Diplomate, American Board of Orthopedic Surgery

Arthroscopic Surgery
Total Joint Replacement
Sports Medicine

ORTHOPEDIC SURGERY

JASON LANDESS
February 12, 2018

HISTORY: Jason Landess is a 71-year-old retired attorney who came in today for an evaluation of his left leg. Jason states that he fractured his left tibia while riding in a golf cart on or about October 9, 2017. Jason states that he had his left leg outside of the cart at which time the cart passed an object immediately next to the cart which caught his left foot and externally rotated his left lower extremity. At this time Jason experienced acute onset of pain in his left shin.

On October 11, 2017 Jason underwent an IM nailing of the left tibia by Kevin Debiparshad, M.D. This rod was locked statically. Jason has been followed as an outpatient by Dr. Debiparshad over the last 4 months. Jason came in today for a 2nd opinion regarding his left leg. Jason is concerned about the step off deformity which he has anteriorly at the level of the fracture site along with increased bowing of his left lower extremity. Jason also continues to experience weightbearing pain in the proximal portion of his left tibia.

PHYSICAL EXAMINATION: Jason walks with a tentative gait favoring the left lower extremity. The neurovascular status left lower extremity is intact. There is an obvious step-off deformity over the anterior aspect of the left leg at the junction of the proximal and middle one thirds of the left tibia. There is a slight varus alignment of the left tibia. There is good knee motion and good left ankle motion. There is tenderness at the level of the fracture site.

X-RAYS: X-rays of the left tibia/fibula were obtained today in our office. These x-rays demonstrate the placement of a statically locked IM rod in the left tibia. There is a transverse fracture at the junction of the proximal and middle one thirds of the left tibia. On the AP x-ray there is approximately 5° of varus angulation at the fracture site and on the lateral view there is approximately 25° of apex anterior angulation. There are signs of callus formation at the fracture site but the fracture is clearly not healed.

IMPRESSION:

1. PERSISTENT ANGULAR DEFORMITY OF THE LEFT LEG AT THE FRACTURE SITE AT THE JUNCTION OF THE PROXIMAL AND MIDDLE ONE THIRDS OF THE LEFT TIBIA WITH DELAYED HEALING.

RECOMMENDATIONS: I am concerned about the position of the left tibia. I am not convinced that the current position of the left tibia is acceptable. I have recommended that Jason be evaluated by Roger Fontes, M.D., an orthopedic surgeon that specializes in this type of fracture management. The possibility exists that Jason will need a revision IM rodding to correct the angular deformity of the left tibia versus removal of the rod and placement of a metallic plate. I have spoken with Dr. Fontes' office and Jason will be seen by Dr. Fontes on February 14, 2018.

JOHN HERR, M.D.

4425 S. Pecos Road • Suite #1 • Las Vegas, Nevada 89121 • (702) 435-3535 • FAX (702) 435-1324

IV: Is it displaced?

Once you have an idea of where it is and what type of fracture it is, you need to be able to describe what it looks like.

Fracture displacement describes what has happened to the bone during the fracture. In general, when describing a fracture, the body is assumed to be in the anatomic position and the injury is then described in terms of the distal component displacement in relation to the proximal component.

Displacement can include one or more of:

- angulation
- translation
- rotation
- distraction or impaction

Fracture angulation describes a specific type of fracture displacement where the normal axis of the bone has been altered such that the distal portion of the bone points off in a different direction. Angulation is described using words like:

- dorsal/palmar
- varus/valgus
- radial/ulnar

Fracture translation (also called **translocation**) describes the movement of fractured bones away from each other. In some cases, people will just use the term displacement to describe translation.
However, displacement should really be used as a broad term that refers to angulation, translation and rotation.

Translation can be described using the width of the bone as context, e.g. translation of 25% of the width of the bone. If translation exceeds the width of the bone, it can be described as being 'off-ended'.

Fracture rotation describes one type of fracture displacement where there has been a rotation of the distal fracture fragment in relation to the proximal portion. It is often difficult to see on an x-ray, but relatively simple to determine on clinical examination.

Rotation of a fracture may be very important to function, e.g. rotation in a metacarpal fracture may result in significant disability if the fracture isn't reduced appropriately. It is most easily seen when looking at the orientation of the joints above and below a fracture.

Exhibit M

Gordon, Katherine

From: Shahana Polselli <sp@jimmersonlawfirm.com>
Sent: Tuesday, July 23, 2019 9:59 PM
To: robbare32@gmail.com
Cc: James J. Jimmerson, Esq.; Little, Martin A.; Kim Stewart; Gomez, Karen R.; Orr, John; Gordon, Katherine; Vogel, Brent; Moser, Tara; Savage, Colleen LC
Subject: [EXT] Landess v Debiparshad
Attachments: Plaintiff's Submission 10 pm 07.23.19.pdf

Importance: High

External Email

Judge Bare:

Attached please find Plaintiff's Submission of Documents as discussed this afternoon.

Shahana

Shahana M. Polselli
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Attorneys for Plaintiff

EIGHTH DISTRICT COURT

CLARK COUNTY, NEVADA

JASON GEORGE LANDESS, aka KAY GEORGE LANDESS, an individual, Plaintiff, vs. KEVIN PAUL DEBIPARSHAD, M.D., an individual; KEVIN P. DEBIPARSHAD, PLLC a Nevada professional limited liability company doing business as "SYNERGY SPINE AND ORTHOPEDICS" DEBIPARSHAD PROFESSIONAL SERVICES, LLC, a Nevada professional limited liability company doing business as "SYNERGY SPINE AND ORTHOPEDICS," ALLEGIANT INSTITUTE, INC, a Nevada domestic professional corporation doing	**CASE NO.: A-18-776896-C** **DEPT NO.: 32**

business as "ALLEGIANT SPINE INSTITUTE," JASWINDER S. GROVER, M.D. an individual; JASWINDER S. GROVER, M.D. LTD, doing business as "NEVADA SPINE CLINIC." VALLEY HEALTH SYSTEM, LLC a Delaware limited liability company doing business as "CENTENNIAL HILLS HOSPITAL," UHS OF DELAWARE, INC., a Delaware corporation also doing business as "CENTENNIAL HILLS HOSPITAL," DOES I-X, inclusive, and ROE CORPORATIONS I-X, inclusive,

Defendants.

PLAINTIFF'S SUBMISSION OF DOCUMENTS TO REFUTE DEFENDANT'S CLAIM OF SURPRISE REGARDING ALIGNMENT, TRANSLATION/TWIST/ROTATIONAL DEFORMITH AND DISTRACTION/GAP

COMES NOW, Plaintiff Jason G. Landess a.k.a. Kay George Landess ("Plaintiff"), by and through his counsel, Howard & Howard Attorneys PLLC and The Jimmerson Law Firm, P.C., and hereby submits these documents requested by the Court.

Respectfully, Defendant, KEVIN DEBIPARSHAD, and his counsel have made a gross misrepresentation to the Court during proceedings in the afternoon of July 23, 2019, wherein he claims "no notice" or unawareness that bent/crooked alignment, cliff/translations/rotational deformity, and distraction/gap between the top of the tibia and the bottom of the tibia at the fracture point.

The documents attached hereto reveal the awareness and active discussion by Defendant through his own testimony, the testimony of his expert, Stuart Gold, the examination of Plaintiff's expert, Dennis Harris, the multiple reports of Dr. Dennis Harris, MD, Plaintiff's expert, the medical records of John Herr, MD, and the medical records and deposition of Roger Fontes, MD, the specific notification by Plaintiff to Defendnat during Voir Dire on Monday, July 22, 2019, wherein the

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Plaintiff's counsel Mr. Jimmerson advised the jury of these issues. This tripartite failure of Dr. Debiparshad's failure during surgery was again restated within Plaintiff's slides, delivered to the Defendant in accordance with the Court's Order approximately 1 hour before Plaintiff's counsel began his opening statement, **without any objection** to that slide (The Court will recall that objections were raised to describing Stuart Gold as a "professional expert," but made no objection or reference to slides 25 and 62, which spoke directly to these three failings on the part of Dr. Debiparshad.

Because of time constraints, the documents are attached hereto, as follows, without discussion. The Court's attention is brought to the yellow highlighted sections of the same. Beginning with the First Amended Complaint dated July 2, 2018, through the completion of Roger Fontes Deposition on June 13, 2019, discussion was held and questions were asked and reports were made regarding each of these three failings.

1. February 6, 2019 Supplemental Report of Dennis Harris
2. Dennis Harris Records Review Report
3. Transcript Jury Trial Day 1- P. 40
4. Slide from opening powerpoint provided to counsel an hour in advance.
5. Stuart Gold Deposition Testimony p. 63, 64, 66, 67
6. Fontes Deposition Transcript p. 32, 33
7. Debiparshad Deposition p. 236
8. John Herr February 12, 2018 Report
9. Orthopedic Trauma Association Powerpoint on Relationship of Translation to Malrotation
10. Ortho Bullets discussing Rotational Malalignment Standard relied upon by Dr. Harris in his deposition

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11. Plaintiff's Second Supplement to Rebuttal Expert Disclosure identifying Dr. Herr as a "Treating Expert" whom Defendant chose not to depose

12. First Amended Complaint

DATED this 23rd day of July, 2019.

THE JIMMERSON LAW FIRM

JAMES J. JIMMERSON, ESQ.
Nevada Bar No.: 000264
415 South 6th Street, Suite 100
Las Vegas, Nevada 89101
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EXHIBIT 1

EXHIBIT 1

Denis Harris, MD

February 6, 2019

Martin Little, Esq..
3800 Howard Hughes Pkwy
Unit 1000
Las Vegas, NV 89169

Re: Jason Landess v. Kevin P. Debiparshad, M.D., et al.

Dear Mr. Little:

I would like to reply to Dr. Gold's letter of January 22, 2019 and add to my previous letter of January 28, 2019.

The error I fault in Dr. Debiparshad's treatment was in not adequately reducing the fracture. Postoperative x-rays showed a valgus and rotatory malalignment which should not have been accepted at the time of the initial surgery.

Dr. Gold states that this malalignment was acceptable but I would take issue with that. I feel Dr. Debiparshad deviated from the usual standard of care in not adequately reducing the fracture. At the time of surgery, only c-arm images were obtained and these images were localized to small areas of the tibia to check passage of the rod. No films from his hospitalization included the entire tibia which should have been used to check alignment.

Note that after Mr. Landess' second surgery, which I feel was indicated, x-rays do show appropriate alignment. Again this should have been obtained at the time of the first surgery.

Sincerely,

Denis Harris, M.D.

3301 New Mexico Ave NW Suite 346 Washington DC 20016 Phone: (202) 362-4787 Fax: (202) 595-7810 Email: denisharris@me.com

EXHIBIT 2

EXHIBIT 2

Denis Harris, MD

Document	Records Review
Patient Name	Jason Landess
Date of Injury	10/9/2017
Claimant DOB	4/21/1946

Records reviewed

Operative report, 10/11/2017
Initial post surgical x-rays, 10/25/2017
Desert Orthopaedic Center, 2/15/2018 - 4/3/2018
Dr. Debiparshad, Synergy Spine & Orthopedics, 3/1/2018
X-rays after the second surgery, 4/28/2018

Summary of records

On 10/9/2017 Mr. Landess suffered a closed fracture of his left tibia while driving a golf cart and catching his leg on a 4x4. He was transported by ambulance to the emergency care unit at Centennial Hills Hospital in Las Vegas. X-rays were taken and he was diagnosed as having a closed displaced fracture of proximal tibia.

The following day, 10/10/2017, Dr. Debiparshad manipulated the fracture and inserted a locking rod to fix the fracture's position. Postoperative x-rays included for this review show a tibial fracture fixed with a non anatomical valgus deformity and 85% apposition.

Despite surgery, Mr. Landess continued to complain of pain and deformity in the left leg. He sought a second opinion and on 2/15/2018 was seen by Dr. Fontes who found the fracture had not healed and recommended repeat surgery.

Dr. Debiparshad also confirmed the fracture had not healed in his note of 3/1/2018.

On 4/3/2018 Mr. Landess underwent removal of the hardware in his left leg. The fracture was manipulated to an anatomic alignment, grafted and stabilized with a new locking rod. Post op x-rays showed anatomic restoration at the fracture site with no abnormal angulation and 100% apposition.

Discussion

3301 New Mexico Ave NW Suite 346 Washington DC 20016 Phone: (202) 362-4787 Fax: (202) 595-7810 Email: denisharris@me.com

Mr. Landess suffered a proximal tibial fracture that was treated by Dr. Debiparshad with manipulation and intramedullary fixation. It is my opinion to a reasonable degree of medical probability that Dr. Debiparshad did not adequately reduce the fracture resulting in subsequent angular deformity which required a second surgery.

Legal Testimony 2014 - 2019

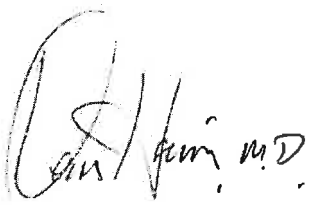
Frazier v Crowe	Prince George's County, Maryland	Trial	2015
Ortega v Bond	Prince George's County, Maryland	Deposition	2017
Pranger v Woodward	Washington, DC	Deposition	2017
Hope Foster v Quick Livick	Washington, DC	Deposition	2017
Raub v American Airline	Eastern District of Pennsylvania	Deposition	2017

CONFLICT OF INTEREST

I certify that I do not accept compensation for review activities that is dependent in any way on the specific outcome of the case. To the best of my knowledge I was not involved with the specific episode of care prior to referral of the cast for review. I do not have a material professional, familial, or financial conflict of interest (financial conflict of interest if defined as ownership interest of great the 5%) regarding any of the following: the referring entity; the insurance issuer or group health plan that is the subject of the review (I do not have a contract to provide health care services to enrollees of the health benefit plan of the insurance issuer or group health plan that is the subject of this review); the covered person whose treatment is the subject of the review and the covered person's authorized representative, if applicable; any officer, director or management employed of the insurance issuer that is the subject of the review; any group health plan administrator, plan fiduciary, or plan employee; the health care provider, the health care provider's medical group or independent practice association recommending the health care service or treatment that is the subject of the review; the facility at which the recommended health care service of treatment would be provided; (I do not have staff privileges at the facility where the recommended where the recommended health care service or treatment would be provided if the insurance issuer's or group health plan's previous non-certification is reversed) or the developer or manufacturer of the principle drug, device, procedure or other therapy being recommended for the covered person whose treatment is the subject of the review.

This attestation certifies that the examiner named below has the appropriate scope of licensure or certification that typically manages the medical condition, procedure, treatment or issue under review and has current, relevant experience and/or knowledge to render a determination for the case under review.

PHYSICIAN



Denis R. Harris, MD
Board Certified Orthopedist
District of Columbia License MD6466

EXHIBIT 3

EXHIBIT 3

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Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

JASON GEORGE LANDESS a.k.a. KAY GEORGE LANDESS, as an individual, Plaintiff, vs. KEVIN PAUL DEBIPARSHAD, MD, an individual; KEVIN P DEBIPARSHAD PLLC, a Nevada professional limited liability company doing business as "SYNERGY SPINE AND ORTHOPEDICS"; DEBIPARSHAD PROFESSIONAL SERVICES LLC, a Nevada professional limited liability company doing business as "SYNERGY SPINE AND ORTHOPEDICS"; ALLEGIANT INSTITUTE INC., a Nevada domestic professional corporation doing business as "ALLEGIANT SPINE INSTITUTE"; JASWINDER S. GROVER, MD, an individual; JASWINDER S. GROVER, M.D., Ltd doing business as "NEVADA SPINE CLINIC"; VALLEY HEALTH SYSTEM LLC, a Delaware limited liability company doing business as "CENTENNIAL HILLS HOSPITAL"; UHS OF DELAWARE, INC., a Delaware corporation also doing business as "CENTENNIAL HILLS HOSPITAL"; DOES 1-X, inclusive; and ROE CORPORATIONS I-X, inclusive,	CASE#: A-18-776896-C DEPT. XXXII

Defendant.

BEFORE THE HONORABLE ROB BARE
DISTRICT COURT JUDGE
MONDAY, JULY 22, 2019

RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 1

APPEARANCES:

For the Plaintiff:	MARTIN A. LITTLE , ESQ. JAMES J. JIMMERSON, ESQ.
For Defendants Kevin Paul Debiparshad, M.D., Kevin P Debiparshad PLLC dba Synergy Spine, and Debiparshad Professional Services LLC dba Synergy Spine and Orthopedics:	S. BRENT VOGEL, ESQ. KATHERINE J. GORDON, ESQ.
For Defendants Valley Health System, LLC dba Centennial Hills Hospital and UHS of Delaware, Inc. dba Centennial Hills Hospital:	MICHAEL J. SHANNON, ESQ. MARJORIE E. KRATSAS, ESQ. KENNETH M. WEBSTER, ESQ. MICHAEL E. PRANGLE, ESQ.

RECORDED BY: JESSICA KILPATRICK, COURT RECORDER

you. And did you want me to speak to our case, or how did you want me to speak?

THE COURT: Yeah, if you wanted to give a brief overview of the case from your prospective.

MR. JIMMERSON: I'll do that. Thank you, Judge. On October 9, 2017 Jason Landess suffered a freak accident playing golf, driving a golf cart, and he snapped his left tibia. The left tibia is the major bone that you and I recall, the shinbone of his left leg. Now when you look straight on to a person's leg, you see the tibia which is the thick strong bone, and then to the left line, two the right [indiscernible] is the fibula. There's two bones that run paralegal from the knee down to the ankle. It snapped to about a third way down from the knee. So, if you would imagine the full length from your knee to your ankle, about a third way down that bone had snapped right in half. And you can see that was a jagged split between the top, and the bottom.

A day later October 10th, 2017, he was raised to the hospital, and he had -- then was operated upon by Kevin Debiparshad on October 10, 2017 with the intent to be realigned, property align, the tibia bond with itself, and to allow it to be able to heal in the normal course. It was a rather relatively straight forward operation, lasted less than two hours, and occurred on October 10th. If you read the testimony of Dr. Debiparshad, he will tell you that he did a near perfect job. He did so, usually a tibia nail and screw set, hardware of screws and nail that literally go right down to the bone marrow of your leg, joining the tendon to it. First, join the bottom part of the tibia with the top with

screws on the top of the knee, and the bottom of the knee in order to have a better lineup.

We intend to demonstrate to you ladies and gentlemen through both lay and expert testimony that Dr. Debiparshad reported the nature of the case was not true. That he failed the law of the standard of care by causing the leg to be crook, and not straightly aligned, in addition to that deformity, causing a rotation to occur to the bottom half of the leg, bone, the tibia, so that the top fell over the top of it, looking like a cliff overhang.

And thirdly he failed to join the bottom of the leg to the top -- the bottom of bone to the top of the bone, causing a gap to occur, preventing the leg from ever healing. This resulted in tremendous pain and suffering, and ultimately Mr. Landess reported to his second opinion to two other doctors, Dr. Herr and Dr. Fontes on two separate meetings, for each of them, without the need to even look at an X-ray. Go by physically observing Jason walking into the office, or stumbling into the office, but there was a mild alignment of the tibia bone. This resulted in Jason undergoing extensive surgery performed by Roger Fontes on April 3rd, 2018. And, or which he then, as recovered, and that surgery went well, but I got another six months time. The failure of Dr. Debiparshad to meet his standard of care resulted in a instability of Jason's leg, which caused a windshield effect. He started out knocked knee, and ended up bow legged. As a result of that -- screws on the top were broken, as a result to that, he suffered tremendous pain and suffering, and as a result of the delay, and the proper alignment of his

EXHIBIT 4

EXHIBIT 4

Dr. Debiparshad's Initial Breaches of the Standard of Care

- Malalignment = "Crooked"
- Overhang/Rotation = "Twisted"
- Distraction = "Gap"

EXHIBIT 5

EXHIBIT 5

of the surgeon is to provide the maximum anatomic reduction of the fracture fragments and to maintain them in that position with some form of stable fixation or nailing because the bone heals better if the fracture is precisely or firmly put together?

Does that make sense?

A. I would rephrase this only because I know you're struggling through this, and you're not really a medical person, so that's okay.

The term we use is mechanical axis alignment within appropriate range. It's rare, if ever, particularly with nails, that we get things anatomic. So, it happens, but it happens rarely. It's easier to get something anatomic with a plate, depending on the fracture pattern.

But the reason why we use nails when we can is because mechanically it ends up being more stable for a longer period of time than a plate. That's one aspect.

The second aspect is that, also, it allows us not to open up the fracture site, if we can get it within a reasonable anatomical and acceptable alignment because it, therefore, helps speed up the process of healing.

When we open a fracture as much as we may want to, it provides you with two other much bigger potential

complications: One is infection; and two is actually a delay in the healing, because you have now disrupted the fracture hematoma, which has significant growth factors within it.

And so, that is why we accept things that aren't anatomic when we are doing a closed intramedullary nailing.

Q. So, the surgeon is weighing certain factors when he is deciding whether to stay closed or go open?

A. That's exactly right.

Q. In your report on Page 2, Paragraph One, you state that the intraoperative films revealed an acceptable reduction.

Is that the same opinion as Paragraph Four, where you say the malalignment was acceptable and within the standard of care for a complex oblique tibial fracture?

A. Again, and what I was referring to here that malalignment is really that translation, okay, more so than any angular malalignment.

Q. So, when you say "an acceptable reduction," you're referring to both the translation and the malalignment?

A. Right. Again, that, to me, the mal -- I was kind of surprised that they were going after the

malalignment more than even talking about the translation. So, they're both acceptable, and they're both, you know, minimal.

Q. And what intraoperative films were you referring to that revealed an acceptable reduction?

A. The fluoro shots.

Q. The C-arms?

A. Yeah. These ones aren't marked with numbers; if you want to mark them specifically, so you have them.

Q. Let's mark that as the next in line.

A. Do you have them, or do you want to use these?

Q. Yeah, let's use those.

A. Is that all right, Kate?

MS. GORDON: Yes. You can have them.

THE WITNESS: So, here's -- let's talk about those two, talk about that. This isn't all of them, unfortunately. Here it is, actually. Hang on.

Q. BY MR. LITTLE: Doctor, the C-arms that you gave me we're going to mark as Exhibit 8, and I'll put some numbering on the bottom, just to number the pages.

(Exhibit No. 8 marked for identification.)

A. Why don't you put letters so we won't be confused.

Q. Okay. Start with A. Exhibit 8 has Films A through E in it.

Can you explain why you felt those intraoperative images to reveal an adequate reduction.

A. So, the only one that really actually shows some displacement is the lateral view of the fracture reduction, which, again, all it shows is the slight translation of the two fragments.

Q. So, "displacement" is another word for this translation idea that you're talking about or concept?

A. Yeah, but it would be anterior translation displacement, and so you can -- we'll call it "displacement."

So, that shows that there is slight translation or displacement.

Q. That's Film A; yes?

A. As well.

B, okay, again, as another example, I took this because here's a good AP of the knee, all right, and as opposed to what Dr. Harris said that the nail was put in on the medial side, it shows you that the nail was put in directly down the middle on the AP.

The next picture, C, is the AP view of the reduction, and, again, here the AP-view reduction shows a minimal amount of valgus but well within the standard, as you look at the alignment of the proximal segment, which is up here, and the distal segment, which is here.

So, this, again, on the fluoro, is giving you the same view that shows an adequate AP reduction.

Q. Did you measure any of the valgus deformity on any of the films in Exhibit 8?

A. Again, so, this is less than five degrees.

Q. Did you measure that or eyeballing it?

A. With a goniometer.

Q. So, you did measure it using the goniometer?

A. Yes.

D is actually the same as C, so -- and here we go -- and E, so we actually -- you don't need D and E if you want to just dump D and E because they're just duplicates.

Just A, B, and C.

Q. So, what did you base your opinion on that the procedure revealed an acceptable reduction or a slight malalignment other than the intraoperative X-rays?

A. Well, the postoperative X-rays are, you know, obviously helpful because --

Q. Anything else?

A. They are, you know, the longer films, but they don't really show anything different than what the fluoro X-rays showed.

Q. Are you able to measure the malalignment equally on the C-arm images in Exhibit 8 as you are on

the long-view images that we have talked about earlier?

A. No. It's easier to do them on the long films, no question, but, again, that's where, again, you have to -- when we're in the operating room using fluoro and looking at the leg clinically, it's something really that far off you're going to -- you're going to see it clinically, not just radiographically.

Q. Did you come up with the same degree of angulation on both the C-arms as you did on the long view?

A. If you use the correct AP view, you do. If you use the oblique view, you don't.

Q. How do you define an acceptable reduction for this type of injury?

A. Again, acceptable reduction is less than 25 percent translation, less than ten degrees of valgus or varus.

Q. So, unacceptable would be above those degrees?

A. Correct.

And, again, it depends on the fracture pattern. You know, everybody expects and thinks that we can get things perfect. The bottom line is we can't, and nobody does, as anything in life, and so you get it within the best acceptable range that it's feasibly possible.

Q. Are there any peer-reviewed articles,

literature, publications that discuss the standards that you're talking about in terms of translation and malalignment?

A. Somewhere, but, again, I don't -- you know, I don't read that stuff anymore.

So, this is what -- again, we talk about these in conferences, and we talk about this, you know, this particular fracture pattern, that it's difficult in getting the reduction.

Q. Has the maximum degree of angulation or malalignment decreased over the years as improvements in technology and technique have advanced?

A. Actually, the techniques are better in holding it, you know, the way this is done with a suprapatellar nail or semi-extended position, which, again, is something that, you know, Dr. Harris never did because he wasn't practicing when it became the vogue, which is really the last seven years.

And it makes it a little easier to hold and maintain the reduction than when we used to do it infrapatellar, when you have to flex the kneel, and that would then cause an increase in the deforming forces that we're trying to prevent.

So, you know -- so, those things have come into vogue and made things easier.

But it's still, again, a difficult pattern to hold and maintain reduced and do it all closed, and I'm sure if this wasn't as acceptable as it was, then other measures would have been taken at the time of the first operation.

Q. I apologize. Just so I'm clear, what degree of varus/valgus malalignment would not be acceptable for this type of procedure?

A. More than ten degrees.

Q. And what degree of varus/valgus deformity is an indication for surgery?

A. Again, you have to -- to redo something, you know, would require both a significant clinical situation, you know, and an unacceptable amount of malalignment, again.

So, this, you know, this -- you know, again, this is in a few degrees of varus, which is fine by the time it's healing.

Q. Can you explain the consequences to a patient if the reduction is not properly performed and there's too much malalignment or translation?

A. It usually still heals, but it will potentially end up with an altered gait pattern or issues at the knee or the ankle because it changes the direction of the forces.

EXHIBIT 6

EXHIBIT 6

DISTRICT COURT

CLARK COUNTY, NEVADA

JASON GEORGE LANDESS a.k.a. KAY GEORGE LANDESS, as an individual,

Plaintiff,

v.

KEVIN PAUL DEBIPARSHAD, MD, an individual; KEVIN P. DEBIPARSHAD PLLC, a Nevada professional limited liability company doing business as "SYNERGY SPINE AND ORTHOPEDICS", DEBIPARSHAD PROFESSIONAL SERVICES LLC, a Nevada professional limited liability company doing business as "SYNERGY SPINE AND ORTHOPEDICS"; ALLEGIANT INSTITUTE INC., a Nevada domestic professional corporation doing business as "ALLEGIANT SPINE INSTITUTE";

_____

.....

.....

CASE NO. A-18-776896-C
DEPT. NO. 24

DEPOSITION OF

ROGER FONTES, M.D.

THURSDAY, JUNE 6, 2019

LAS VEGAS, NEVADA

Reported By Kele R. Smith, NV CCR No. 672, CA CSR No. 13405

Job No. 549384

Page 30

A. As I said, malunions and nonunion tibias and revision surgeries are -- I wouldn't say they're common, but they're not uncommon.

BY MR. ORR:

Q. In your experience, they're known risks. Is that correct?

MR. JIMMERSON: Same objection. Move to strike.

A. They are known risks.

BY MR. ORR:

Q. Based on your treatment and recollection of Mr. Landess, did he present any risk factors to make his chances of nonunion more likely?

A. So I think the two that stand out to me are the fact that he has a fracture near the top of his tibia, so at one end or the other. That can create challenges. And he's a big guy. So those two, to me, stand out as issues that can increase his risk of nonunion.

Q. If Mr. Landess had been treated for cancer in the past, would that make a nonunion more likely as well?

A. If you were actively being treated, potentially, with chemotherapy or other agents. If you've been irradiated in this area. Something that would compromise this specific thing. Distant history of cancer, it's harder to draw a confusion. I'm not really

Page 31

aware of any sound scientific evidence that would present a risk.

Q. Would being osteoporotic make a nonunion more likely?

A. Yes. Osteoporosis goes back to the mechanical fixation challenge. The better the bone, the more purchase you get from screws and rods and things. So if you have very, very poor bone quality, your mechanical fixation is compromised, and it can lead to a higher risk of nonunion or malunion.

Q. Your diagnosis of Mr. Landess was he had a nonunion. Correct?

A. Yes.

Q. You would disagree with any suggestion that he had a malunion. Is that correct?

MR. JIMMERSON: Objection. Calls for expert witness opinion, and you're trying to turn this man into a witness, which is inappropriate. Calls for a legal conclusion.

You can answer.

A. If the -- the question was do I think he has a nonunion? He had a nonunion. He does not have a malunion.

BY MR. ORR:

Q. Okay. And that's my -- I guess you kind of

Page 32

answered it. If someone stated that he had a malunion, you would disagree with that. Correct?

A. Right.

MR. JIMMERSON: Same objection. Move to strike.

BY MR. ORR:

Q. Can you explain to me as if you were explaining to a layperson -- and you are explaining it to a layperson -- what the relationship between angulation or the alignment of a fixation and nonunion is?

A. Yeah. So the -- surgeons endeavor to make fractures as close to anatomically positioned as they can when they do a surgery. There are fairly broad parameters that can be acceptable for alignment. We don't have to be perfect, which is good because there's often -- that's not always possible. And there are certain fractures that having -- during the course of the surgery, positioning the fracture in a certain nonanatomic way can increase the risk of it not healing.

One example would be the proximal femur. So the top of the femur has a certain angle to it, and if the surgeon doesn't restore that angle accurately, it can increase the rate of it not healing. If a fracture is left with big gaps, for example, where the bone is really distracted and there's a big defect there, that

Page 33

can lead to increased risk of nonhealing. As a general rule in the tibia, I don't think that small angulations directly interfere or correlate with nonunion risk.

Q. Okay. When you are doing a tibial nailing -- and I'm talking about your practice, you know, how you like to do things -- is there a certain -- is there a certain amount of degree -- I guess is there a degree. Kind of a margin of error you're working with, you'd like to get it within so many degrees of?

A. Right.

Q. And what are kind of the constraints you're working with in your experience?

MR. JIMMERSON: Objection. Calls for expert witness testimony and legal conclusion, which this witness was not retained by either side.

You may answer, Dr. Fontes.

THE WITNESS: No problem.

A. In general, 5 degrees in what's called the coronal plane, so that's side to side. Also varus/valgus. And 10 degrees sagittal plane AP angle is generally considered acceptable.

BY MR. ORR:

Q. Okay. And you personally, do you have a specific custom or practice on how you like to measure the coronal plane and the --

EXHIBIT 7

EXHIBIT 7

Dr. D Dep

malalignment.

MR. JIMMERSON: Is his answer yes?

Q. Is that yes?

MS. GORDON: His answer is his answer.

BY MR. LITTLE:

Q. And how would you define "significant malalignment" in this context?

A. Similar to what we discussed prior, various changes in the alignment of the fracture itself.

Q. By what degree?

A. I mean, if there's a substantial amount of varus, like over 10 degrees, like we talked about, or valgus deformity over 10 degrees, you know, anterior/posterior deformity of more than -- sorry, an anterior -- like a flexion/extension deformity more than 10 degrees, a rotational deformity of 10 degrees.

Q. Taken as a whole, you don't read his report to say that he's fixing an alignment problem that you created?

MS. GORDON: Objection. Asked and answered. And you are asking him to speculate. And he's answered it a few times as much as he is able to, no matter how many times you ask it.

A. No.

EXHIBIT 8

EXHIBIT 8

KNEE SPORTS MEDICINE CENTER OF NEVADA

JOHN E. HERR, M.D.
Diplomate, American Board of Orthopedic Surgery

Arthroscopic Surgery
Total Joint Replacement
Sports Medicine

ORTHOPEDIC SURGERY

JASON LANDESS
February 12, 2018

HISTORY: Jason Landess is a 71-year-old retired attorney who came in today for an evaluation of his left leg. Jason states that he fractured his left tibia while riding in a golf cart on or about October 9, 2017. Jason states that he had his left leg outside of the cart at which time the cart passed an object immediately next to the cart which caught his left foot and externally rotated his left lower extremity. At this time Jason experienced acute onset of pain in his left shin.

On October 11, 2017 Jason underwent an IM nailing of the left tibia by Kevin Debiparshad, M.D. This rod was locked statically. Jason has been followed as an outpatient by Dr. Debiparshad over the last 4 months. Jason came in today for a 2nd opinion regarding his left leg. Jason is concerned about the step off deformity which he has anteriorly at the level of the fracture site along with increased bowing of his left lower extremity. Jason also continues to experience weightbearing pain in the proximal portion of his left tibia.

PHYSICAL EXAMINATION: Jason walks with a tentative gait favoring the left lower extremity. The neurovascular status left lower extremity is intact. There is an obvious step-off deformity over the anterior aspect of the left leg at the junction of the proximal and middle one thirds of the left tibia. There is a slight varus alignment of the left tibia. There is good knee motion and good left ankle motion. There is tenderness at the level of the fracture site.

X-RAYS: X-rays of the left tibia/fibula were obtained today in our office. These x-rays demonstrate the placement of a statically locked IM rod in the left tibia. There is a transverse fracture at the junction of the proximal and middle one thirds of the left tibia. On the AP x-ray there is approximately 5° of varus angulation at the fracture site and on the lateral view there is approximately 25° of apex anterior angulation. There are signs of callus formation at the fracture site but the fracture is clearly not healed.

IMPRESSION:

1. PERSISTENT ANGULAR DEFORMITY OF THE LEFT LEG AT THE FRACTURE SITE AT THE JUNCTION OF THE PROXIMAL AND MIDDLE ONE THIRDS OF THE LEFT TIBIA WITH DELAYED HEALING.

RECOMMENDATIONS: I am concerned about the position of the left tibia. I am not convinced that the current position of the left tibia is acceptable. I have recommended that Jason be evaluated by Roger Fontes, M.D., an orthopedic surgeon that specializes in this type of fracture management. The possibility exists that Jason will need a revision IM rodding to correct the angular deformity of the left tibia versus removal of the rod and placement of a metallic plate. I have spoken with Dr. Fontes' office and Jason will be seen by Dr. Fontes on February 14, 2018.

JOHN HERR, M.D.

4020 S. Rancho Road • Suite #1 • Las Vegas, Nevada 89121 • (702) 435-3535 • FAX (702) 435-1324

EXHIBIT 9

EXHIBIT 9

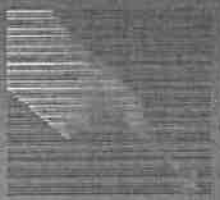
ORTHOPAEDIC TRAUMA ASSOCIATION

2017 Resident Advanced Trauma Techniques Course

COMPLICATIONS / CHALLENGES

MALUNIONS/DEFORMITY

What is a Malunion?



- Definition: a fracture that has healed in a nonanatomic (i.e. deformed) position
- Must know normal parameters for limb alignment to determine if deformity exists
- Thorough clinical & radiographic evaluation is paramount

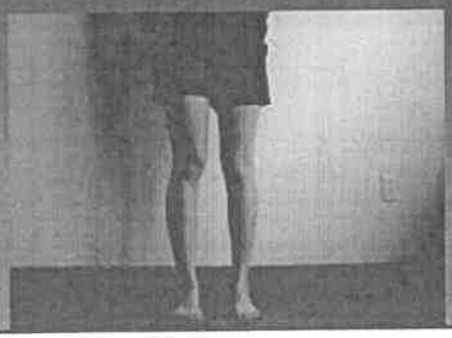
Relationship Of Translation To Mal-rotation

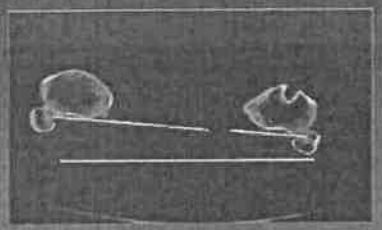
- With any translational deformity.....
  there *almost* ALWAYS is a
  COMPENSATORY mal rotation

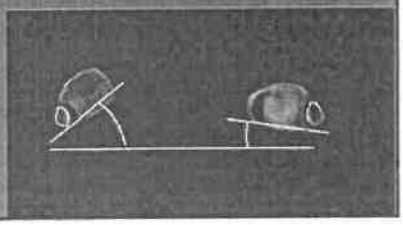
Especially in the tibia!!...perform a thorough clinical exam to include evaluation of rotation

Deformity Evaluation

- Rotation
  - Exam (rotational profile)
  - CT







FRONTAL PLANE ALIGNMENT
ANGULATION ASSESSMENT

- Any time you see a translational deformity.....on plain x-ray.....
  - There has to be some degree of MAL ROTATIONAL component
  - Determined with clinical exam or CT

Types of Deformities

- ANGULATION
- MALROTATION
  - CT EVALUATION
  - CLINICAL DETERMINATION
- LEG LENGTH DESCREPANCY
  - CT / SCANOGRAM
- TRANSLATION
  - RELATIVE ALIGNMENT
  - MEDULLARY CANALS

EXHIBIT 10

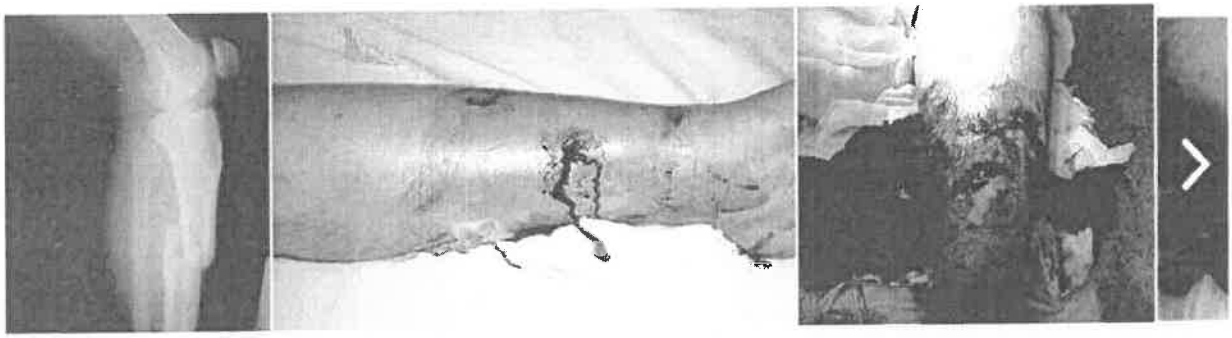
EXHIBIT 10

Updated: 10/30/2018 73

Tibial Shaft Fractures

Ujash Sheth Joshua Blomberg Jan Szatkowski

TOPIC	QUESTIONS	EVIDENCE	VIDEOS	CASES	TECHNIQUES
Review Topic	60	77	12	59	1



Introduction

- Proximal third-tibia fractures
- Epidemiology
  - most common long bone fx
  - account for 4% of all fx seen in the Medicare population
- Mechanism
  - low energy fx pattern
    - result of torsional injury
    - indirect trauma results in spiral fx
    - fibula fx at different level
    - Tscherne grade 0 / I soft tissue injury
  - high energy fx pattern
    - direct forces often result in wedge or short oblique fx and sometimes significant comminution
    - fibula fx at same level
    - severe soft tissue injury
      - Tscherne II / III
      - open fx
- Associated conditions
  - soft tissue injury (open wounds)
    - critical to outcome
  - compartment syndrome
  - bone loss
  - ipsilateral skeletal injury
    - extension to the tibial plateau or plafond
    - posterior malleolar fracture
      - most commonly associated with spiral distal third tibia fracture

        - tibial n.
        - saphenous n.
    - pulse
        - dorsalis pedis
        - posterior tibial
            - be sure to check contralateral side

Imaging

- Radiographs
    - recommended views
        - full length AP and lateral views of affected tibia
        - AP, lateral and oblique views of ipsilateral knee and ankle
- CT
    - indications
        - intra-articular fracture extension or suspicion of joint involvement
        - CT ankle for spiral distal third tibia fracture
            - to exclude posterior malleolar fracture

Treatment of Closed Tibia Fractures

- Nonoperative
    - **closed reduction / cast immobilization**
        - indications
            - closed low energy fxs with acceptable alignment
                - < 5 degrees varus-valgus angulation
                - < 10 degrees anterior/posterior angulation
                - > 50% cortical apposition
                - < 1 cm shortening
                - < 10 degrees rotational malalignment
                - if displaced perform closed reduction under general anesthesia
            - certain patients who may be non-ambulatory (ie. paralyzed), or those unfit for surgery
        - technique
            - place in long leg cast and convert to functional (patellar tendon bearing) brace at 4 weeks
        - outcomes
            - high success rate if acceptable alignment maintained
            - risk of shortening with oblique fracture patterns
                - mean shortening is 4 mm
            - risk of varus malunion with midshaft tibia fractures and an intact fibula
            - non-union occurs in 1.1% of patients treated with closed reduction
- Operative
    - **external fixation**
        - indications
            - can be useful for proximal or distal metaphyseal fxs
        - complications

EXHIBIT 11

EXHIBIT 11

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HOWARD & HOWARD ATTORNEYS PLLC
Martin A. Little, Esq.
Nevada Bar No. 7067
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Nevada Bar No. 9927
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3800 Howard Hughes Parkway, Suite 1000
Las Vegas, Nevada 89169
Tel: 702 257-1483
Fax: 702 567-1568
Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

JASON GEORGE LANDESS a.k.a. KAY GEORGE LANDESS, an individual,

Plaintiff,

vs.

KEVIN PAUL DEBIPARSHAD, MD, an individual; KEVIN P DEBIPARSHAD PLLC, a Nevada professional limited liability company doing business as "SYNERGY SPINE AND ORTHOPEDICS"; DEBIPARSHAD PROFESSIONAL SERVICES LLC, a Nevada professional limited liability company doing business as "SYNERGY SPINE AND ORTHOPEDICS"; ALLEGIANT INSTITUTE INC., a Nevada domestic professional corporation doing business as "ALLEGIANT SPINE INSTITUTE"; JASWINDER S. GROVER, MD, an individual; JASWINDER S. GROVER, M.D., Ltd doing business as "NEVADA SPINE CLINIC"; VALLEY HEALTH SYSTEM LLC, a Delaware limited liability company doing business as "CENTENNIAL HILLS HOSPITAL"; UHS OF DELAWARE, INC., a Delaware corporation also doing business as "CENTENNIAL HILLS HOSPITAL"; DOES 1-X, inclusive; and ROE CORPORATIONS I-X, inclusive,

Defendants.

CASE NO.: A-18-776896-C
DEPT. NO.: XXXII

PLAINTIFF'S SECOND SUPPLEMENT TO REBUTTAL EXPERT DISCLOSURE

Case Number: A-18-776896-C

COMES NOW, Plaintiff, JASON GEORGE LANDESS a.k.a. KAY GEORGE LANDESS, by and through his attorneys, HOWARD & HOWARD ATTORNEYS PLLC, and hereby lists the following information with respect to each person whom Plaintiff expects to call as a rebuttal expert witness at the time of trial in the above-captioned matter in accordance with the informational requirements of Rule 26(b)(4) and 26(e)(1) and (2) of the Nevada Rules of Civil Procedure

A. Retained Experts:

1. Denis Harris, M.D.
   3301 New Mexico Avenue NW, Suite 346
   Washington, DC 20016
   (202) 362-4787

Dr. Harris is a Board Certified Orthopaedic Surgeon. He has been in private practice since 1980 and is affiliated with Sibley Memorial Hospital in Washington, D.C., and Johns Hopkins Medicine in Baltimore, Maryland. Dr. Harris' testimony will include, but not be limited to, his opinion and conclusions concerning his review of Mr. Landess' medical records and his interview of Mr. Landess; the standard of care for orthopedic surgery as practiced in the United States of America; Defendants' violations of and the deviations from the standard of care; the causation of Mr. Landess' injuries and damages, including but not limited to the angular deformity which resulted from Dr. Debiparshad's failure to adequately reduce Mr. Landess' proximal tibial fracture, which required a second surgery. Dr. Harris will also rebut the opinions of Defendants' expert, Stuart M. Gold, M.D., including without limitation, the standard of care regarding Dr. Debiparshad's surgery to reduce Mr. Landess' fracture and acceptance of a malalignment at the time of his initial surgery; the second surgery was indicated, and x-rays show appropriate alignment after the second surgery.

The exhibits to be used as a summary of or support for Dr. Harris' opinions are documents which are listed in or attached to his Report. Dr. Harris' Rebuttal Report dated January 28, 2019, and his supplemental Rebuttal Report dated February 6, 2019, are attached hereto collectively as Exhibit 1. A copy of Dr. Harris' *Curriculum Vitae*, Fee Schedule, and list of cases where he has testified at trial or in deposition were produced in Plaintiff's Initial Expert Disclosure served on January 23, 2019.

2. Eleanor Kenney, RN, Ph.D.
   3301 New Mexico Avenue NW, Suite 346
   Washington, DC 20016
   (202) 362-4787

Dr. Kenney holds a Master's Degree in Nursing from the University of California, Los Angeles, and a Ph.D. in Higher and Professional Education from the University of Southern California. She is a nationally certified Emergency Nurse and also holds other nursing certifications including Basic and Advanced Cardiac Life Support, Pediatric Advanced Life Support, and Trauma Nursing. Dr. Kenney has been a practicing nurse since 1966, and an educator since 1974. She has taught licensed vocational nursing students, registered nursing students, graduate nurses and emergency medical services personnel.

Dr. Kenney's testimony will include, but not be limited to, her opinion and conclusions concerning her review of Mr. Landess' medical records and her interview of Mr. Landess; the standard of care for nurses as practiced in the United States of America; Defendants' violations of hospital policies and the deviations from the standard of care; and, the causation of Mr. Landess' damages, including without limitation, his emotional distress and pain and suffering as of result of his interactions with nursing staff on 10/11/17 following his request to leave their care, and the unreasonable physical restraint. Dr. Kenney will also rebut the opinions of

Defendants' expert, Erike Schwelnus, DNP, including without limitation, whether the standard of care was met in connection with the nursing staff's interaction with Plaintiff.

The exhibits to be used as a summary of or support for Dr. Kenney's' opinions are documents which are listed in her Report. Dr. Kenney's Rebuttal Report dated February 22, 2019, is attached hereto as Exhibit 2. A copy of Dr. Kenney's *Curriculum Vitae*, Fee Schedule, and list of cases where she has testified at trial or in deposition are attached hereto collectively as Exhibit 3. **Dr. Kenney's Supplemental Rebuttal Report dated May 31, 2019, is attached hereto as Exhibit 4.**

B. **Non-Retained Experts**

TREATING PHYSICIAN HEALTH CARE PROVIDERS / NON-RETAINED EXPERTS: This provider may give expert opinions in written reports and/or testimony regarding the mechanism and/or causation of Plaintiff Jason Landess' injuries, his diagnosis, treatment, and prognosis; the effects of Plaintiff's permanent disability, pain, suffering, anxiety, loss of enjoyment of life and physical and mental restrictions resulting therefrom. This provider is also expected to testify consistent with his/her examination of Plaintiff, the medical records related to the treatment of the Plaintiff for the subject incident, and any medical history and records for other incidents, before or after the subject incident having relevance to this action. The facts and opinions to which this provider is expected to testify include any and all facts and opinions in the said medical records and medical history of Plaintiff and that the medical treatment the Plaintiff received was reasonable, necessary, and caused by the incident set forth in the Complaint; that the Plaintiff may require future treatment that is also caused by the subject incident, and is expected to consist of ***orthopedic treatment.*** This provider is expected to give expert opinions regarding any facts and opinions that would respond to or rebut the opinions, testimony and evidence offered by Defendants and their respective lay and expert witnesses disclosed by any party in this action, whether in a written report or other documentary evidence, or provided as testimony. This provider is also expected to give expert opinions regarding Plaintiff's diminished work life expectancy, work capacity, and/or life expectancy which are the result of the subject incident. This expert is expected to give expert opinions regarding the appropriateness and value of any treatment rendered to Plaintiff by any of her other healthcare providers; the appropriateness and value of any diagnostic testing, including psychological and neuropsychological testing, performed on the Plaintiff, as well as the findings and assessments made by other healthcare providers, as well as his/her own opinion regarding any test and the findings/diagnosis; future treatment which Plaintiff may need; and any other opinion that may be based on the healthcare provider's experience and/or recommendations made by any other healthcare provider, and/or based upon any diagnostic test, and/or his/her review of any of Plaintiff's medical records from Plaintiff's date of birth to present, that was made during Plaintiff's course of treatment; Plaintiff's damages; any other healthcare provider's report or

testimony; any expert's report or testimony. This provider's testimony and opinions will consist of the reasonableness and necessity of the past, present and future medical treatment rendered or to be rendered by any healthcare provider; the causation of the necessity for past, present and future medical treatment caused by the subject incident; the reasonableness of the costs associated with such past, present and future medical treatment; and that they were and are related to the subject incident; the authenticity of medical records, the cost of medical care, and whether those medical costs fall within ordinary and customary charges in the community, for similar medical care and treatment. This provider is hereby designated as a non-retained treating physician/healthcare provider expert witness. Additionally, as a treating physician, Plaintiff reserves the right to supplement this designation in the event Plaintiff's treatment is continuing and ongoing beyond the date of this designation:

1. Roger Fontes, M.D.
   Desert Orthopedic Center
   2800 East Desert Inn Road
   Las Vegas, NV 89121
   702-731-1616

The *Curriculum Vitae* and Fee Schedule for Dr. Fontes have been produced in a Supplement to Early Case Conference Disclosure of Documents and Witnesses.

2. John Herr, M.D.
   4425 South Pecos Road, Suite 1
   Las Vegas, NV 89121

The *Curriculum Vitae* and Fee Schedule for Dr. Herr have been produced in a Supplement to Early Case Conference Disclosure of Documents and Witnesses.

The following treating physicians, healthcare providers and therapists may give expert opinions in written reports and/or testify regarding the mechanism and/or causation of Plaintiff's injuries, his/her diagnosis, treatment, and prognosis; the effect of Plaintiff's injuries on present and future employment, and Plaintiff's potential loss of earning capacity and loss of earnings; the appropriateness and value of any treatment rendered to Plaintiff by any of his other healthcare providers; the appropriateness and value of any diagnostic testing, including psychological and neuropsychological testing, performed on the Plaintiff, as well as the findings and assessments made by other healthcare providers, as well as his/her own opinion regarding any test and the findings/diagnosis; future treatment which Plaintiff may need; and any other opinion that may be based on the healthcare provider's experience and/or recommendations

made by any other healthcare provider, and/or based upon any diagnostic test, and/or his/her review of any of Plaintiff's medical records from Plaintiff's date of birth to present, that was made during Plaintiff's course of treatment; Plaintiffs' damages; any other healthcare provider's report or testimony; any expert's report or testimony. Their testimony and opinions will consist of the reasonableness and necessity of the past, present and future medical treatment rendered or to be rendered by any healthcare provider; the causation of the necessity for past, present and future medical treatment caused by the subject incident; and the reasonableness of the costs associated with such past, present and future medical treatment. Their opinions shall include the authenticity of medical records, the cost of medical care, and whether those medical costs fall within ordinary and customary charges in the community, for similar medical care and treatment:

1. Person With Knowledge/Custodian of Records
American Medical Response
PO Box 745774
Los Angeles, CA 90074

2. Person With Knowledge/Custodian of Records and Billing
University Medical Center of Southern Nevada
1800 W. Charleston Blvd.
Las Vegas, NV 89102

3. Person With Knowledge/Custodian of Records
Nevada Spine Clinic/Allegiant Institute/Allegiant Spine Institute
7140 Smoke Ranch Road, Suite 150
Las Vegas, NV 89128

4. Person With Knowledge/Custodian of Records
Synergy Spine & Orthopedics
870 Seven Hills Drive, Suite 103
Henderson, NV 89052

5. Person with Knowledge/Custodian of Records
John Herr, M.D.
4425 S. Pecos Road, Suite 1
Las Vegas, NV 89121

6. Person With Knowledge/Custodian of Records

Desert Orthopedic Center/Institute of Orthopedic Surgery
Roger Fontes, M.D.
2800 East Desert Inn Road, Suite 100
Las Vegas NV 89121
702-731-1616

7. Person with Knowledge/Custodian of Records
St. Rose Dominican Hospital – de Lima Campus
102 E. Lake Mead Parkway
Henderson, NV 89015

8. Person with Knowledge/Custodian of Records
St. Rose Dominican Hospital-de Lima Billing
4129 East Van Buren Street, c/o Optum 360
Phoenix, AZ 85008

9. Person with Knowledge/Custodian of Records
Fyzical Therapy and Balance Centers
3820 South Jones Boulevard
Las Vegas, NV 89103

10. Person with Knowledge/Custodian of Records
Forte Family Practice
4845 South Rainbow Boulevard
Las Vegas, NV 89118

Plaintiff reserves the right to call any and all expert witnesses which he may hereafter select as the need arises during the course of this litigation. Plaintiff further reserves the right to supplement this witness list if any other witnesses become known to him as this litigation progresses and as other witnesses are discovered or located.

Plaintiffs also reserve the right to call any and all of Defendants' proposed witnesses, or any other witnesses of same who become known to Plaintiff as this litigation progresses and as other witnesses are discovered or located.

Finally, Plaintiff reserves the right to call rebuttal and/or impeachment witnesses; to call the records custodian for any person(s) or institution(s) to which there is an objection concerning authenticity; and to call any and all witnesses of any other party in this matter.

Plaintiff reserves the right to supplement this designation of expert witness list as discovery proceeds and to call any witness identified by any party. Plaintiff further reserves right to supplement this designation of expert witness list as discovery proceeds to call any witness identified for purposes of impeachment/rebuttal.

Plaintiff anticipates that he may require testimony from any and all custodians of records which is necessary to authenticate documents which cannot be stipulated to regarding admissibility by the parties herein.

Dated this 3rd day of June, 2019.

HOWARD & HOWARD ATTORNEYS PLLC

/s/ Martin A. Little

By: _____

Martin A. Little, Esq.
Alexander Villamar, Esq.
3800 Howard Hughes Pkwy, Suite 1000
Las Vegas, Nevada 89169
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I am employed in the County of Clark, State of Nevada, am over the age of 18 years and not a party to this action. My business address is 3800 Howard Hughes Parkway, Suite 1000, Las Vegas, NV 89169.

On this day I served the **PLAINTIFF'S SECOND SUPPLEMENT TO REBUTTAL EXPERT DISCLOSURE** on all parties in this action or proceeding electronically with the Clerk of the Court via the Odyssey E-File and Serve system, which will cause this document to be served upon the following counsel of record:

S. Brent Vogel, Esq.
Katherine J. Gordon, Esq.
Lewis Brisbois Bisgaard & Smith LLP
6385 S. Rainbow Blvd., Suite 600
Las Vegas, NV 89118
Attorneys for Defendants,
Kevin P. Debiparshad PLLC d/b/a
Synergy Spine and Orthepedics, and
Debiparshad Professional Services
d/b/a Synergy Spine and Orthopedics,
Attorneys for Jaswinder S. Grover, M.D., and
Jaswinder S. Grover, M.D., Ltd. dba Nevada
Spine Clinic

Kenneth M Webster, Esq.
Marjorie E. Kratsas, Esq.
Hall Prangle & Schoonveld, LLC
1160 N. Town Center Drive, Ste. 200
Las Vegas, NV 89144
Attorneys for Defendants,
Valley Health System, LLC d/b/a
Centennial Hills Hospital

///

///

I certify under penalty of perjury that the foregoing is true and correct, and that I executed this Certificate of Service on June 3, 2019, at Las Vegas, Nevada.

/s/ Karen R. Gomez

An Employee of Howard & Howard Attorneys PLLC

4811-2852-3160.1

EXHIBIT 4

EXHIBIT 12

EXHIBIT 12

ACOM
HOWARD & HOWARD ATTORNEYS PLLC
Martin A. Little, Esq.
Nevada Bar No. 7067
E-mail: mal@h2law.com
Alexander Villamar, Esq.
Nevada Bar No. 9927
E-mail: av@h2law.com
3800 Howard Hughes Parkway, Suite 1000
Las Vegas, Nevada 89169
Tel: 702 257-1483
Fax: 702 567-1568
Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

JASON GEORGE LANDESS a.k.a. KAY GEORGE LANDESS, an individual,

Plaintiff,

vs.

KEVIN PAUL DEBIPARSHAD, MD, an individual; KEVIN P DEBIPARSHAD PLLC, a Nevada professional limited liability company doing business as "SYNERGY SPINE AND ORTHOPEDICS"; DEBIPARSHAD PROFESSIONAL SERVICES LLC, a Nevada professional limited liability company doing business as "SYNERGY SPINE AND ORTHOPEDICS"; ALLEGIANT INSTITUTE INC., a Nevada domestic professional corporation doing business as "ALLEGIANT SPINE INSTITUTE"; JASWINDER S. GROVER, MD, an individual; JASWINDER S. GROVER, M.D., Ltd doing business as "NEVADA SPINE CLINIC"; VALLEY HEALTH SYSTEM LLC, a Delaware limited liability company doing business as "CENTENNIAL HILLS HOSPITAL"; UHS OF DELAWARE, INC., a Delaware corporation also doing business as "CENTENNIAL HILLS HOSPITAL"; DOES 1-X, inclusive; and ROE CORPORATIONS I-X, inclusive,

Defendants.

CASE NO.: A-18-776896-C
DEPT. NO.: 24

FIRST AMENDED COMPLAINT FOR MEDICAL MALPRACTICE

Arbitration Exempt: Medical Malpractice

Jury Demanded

COMES NOW, Plaintiff JASON GEORGE LANDESS a.k.a. KAY GEORGE LANDESS, by and through his attorney of record, MARTIN A. LITTLE, ESQ. of the law firm HOWARD & HOWARD ATTORNEYS, PLLC, and for his causes of action against the Defendants and each of them, complains and alleges as follows:

1. At all times relevant hereto, Plaintiff JASON GEORGE LANDESS a.k.a. KAY GEORGE LANDESS (hereinafter "Plaintiff") was and is a resident of Clark County, Nevada.

2. Defendant KEVIN PAUL DEBIPARSHAD, M.D. (hereinafter "DR. DEBIPARSHAD"), upon information and belief, is and was at relevant times hereto, a resident of Clark County, Nevada, and licensed to practice medicine in the State of Nevada, pursuant to NRS 630 and 449. DR. DEBIPARSHAD holds himself out as competent in the area of orthopaedic surgery.

3. Upon information and belief, at all relevant times, Defendant KEVIN P DEBIPARSHAD PLLC, doing business as "SYNERGY SPINE AND ORTHOPEDICS", was and is a Nevada professional limited liability company doing business as a medical provider, pursuant to NRS Chapter 449, and is vicariously liable for its employees, physicians, radiologists, nurses, technicians, agents and/or servants and their actions, who are unknown and sued herein as DOE Defendants, and is being sued as an ostensible agency, vicarious liability, negligent hiring, training, supervision and corporate negligence.

4. Upon information and belief, at all relevant times, Defendant DEBIPARSHAD PROFESSIONAL SERVICES LLC, doing business as "SYNERGY SPINE AND ORTHOPEDICS", was and is a Nevada professional limited liability company doing business as a medical provider, pursuant to NRS Chapter 449, and is vicariously liable for its employees,

physicians, radiologists, nurses, technicians, agents and/or servants and their actions, who are unknown and sued herein as DOE Defendants, and is being sued as an ostensible agency, vicarious liability, negligent hiring, training, supervision and corporate negligence.

5. Upon information and belief, at all relevant times, Defendant ALLEGIANT INSTITUTE INC., doing business as "ALLEGIANT SPINE INSTITUTE," was and is a Nevada domestic professional corporation doing business as a medical provider, pursuant to NRS Chapter 449, and is vicariously liable for its employees, physicians, radiologists, nurses, technicians, agents and/or servants and their actions, who are unknown and sued herein as DOE Defendants, and is being sued as an ostensible agency, vicarious liability, negligent hiring, training, supervision and corporate negligence.

6. Defendant JASWINDER S. GROVER, M.D. (hereinafter "DR. GROVER"), upon information and belief, is and was at relevant times hereto, a resident of Clark County, Nevada, and licensed to practice medicine in the State of Nevada, pursuant to NRS 630 and 449. DR. GROVER holds himself out as competent in the area of orthopaedic surgery.

7. Upon information and belief, at all relevant times, JASWINDER S. GROVER, M.D., Ltd, doing business as "NEVADA SPINE CLINIC", was and is a foreign limited liability company doing business as a medical provider, pursuant to NRS Chapter 449, and is vicariously liable for its employees, physicians, radiologists, nurses, technicians, agents and/or servants and their actions, who are unknown and sued herein as DOE Defendants, and is being sued as an ostensible agency, vicarious liability, negligent hiring, training, supervision and corporate negligence.

8. Upon information and belief, at all relevant times, Defendant VALLEY HEALTH SYSTEM LLC ("Valley Health"), doing business as "CENTENNIAL HILLS

HOSPITAL," was and is a Delaware limited liability company doing business as a medical provider, pursuant to NRS Chapter 449, and is vicariously liable for its employees, physicians, radiologists, nurses, technicians, agents and/or servants and their actions, who are unknown and sued herein as DOE Defendants, and is being sued as an ostensible agency, vicarious liability, negligent hiring, training, supervision and corporate negligence.

9. Upon information and belief, at all relevant times, Defendant UHS OF DELAWARE, INC. ("UHS"), doing business as "CENTENNIAL HILLS HOSPITAL," was and is a Delaware corporation doing business as a medical provider, pursuant to NRS Chapter 449, and is vicariously liable for its employees, physicians, radiologists, nurses, technicians, agents and/or servants and their actions, who are unknown and sued herein as DOE Defendants, and is being sued as an ostensible agency, vicarious liability, negligent hiring, training, supervision and corporate negligence.

10. At all times relevant, the Defendants, DOES I through X, inclusive, were working at Centennial Hills Hospital or Nevada Spine Clinic on October 10, 2017 or assisting in performing the surgery wherein DR. DEBIPARSHAD performed a closed reduction on Plaintiff's left tibia, inserted a tibial nail, and placed proximal and distal locking screws, which caused injury which was not recognized or diagnosed until February 2018 and addressed with corrective surgery until April 2018. DOE Defendants are being sued under the theory of vicarious liability and ostensible agency, for the negligence of its employees, agents, contractors and subcontractors, physicians, nurses, administrators, health care providers, attendants, physician's assistants, radiologists, technicians, therapists, contractors and subcontractors and/or medical personnel holding themselves out as duly licensed to practice their professions under and by virtue of the laws of the State of Nevada, and were and are now

engaged in the practice of their professions in the State of Nevada; that the DOE Defendants include physicians, nurses, technicians, or other medical providers that treated Plaintiff, and during the course and scope of their care and treatment of Plaintiff are responsible in some manner for the injuries and damages to the Plaintiff alleged herein and are liable upon respondent superior and for the negligent hiring, training and supervision of the physicians, staff, nurses, and employees who were involved in the treatment of Plaintiff; that the true names, identities, or capacities, whether individual, corporate, associate, or otherwise, of the Defendants, DOES I through X, inclusive, are presently unknown to the Plaintiff, who therefore sues said Defendants by such fictitious names; and that when the true names and capacities of such Defendants become known, Plaintiff will ask leave of this Court to amend this Complaint to insert the true names, identities, and capacities, together with proper charges and allegations.

11. At all times relevant, Defendants, ROE CORPORATIONS I through X, inclusive, were and now are corporations, firms, partnerships, agency, associations, other medical entities, other medical providers involved in the care, treatment, diagnosis, surgery, and/or other provision of medical care to the plaintiff herein; that the Plaintiff is informed and believe and therefore allege that each of the Defendants sued herein as ROE CORPORATIONS are responsible in some manner for the injuries and damages to the Plaintiff alleged herein and are liable upon respondent superior and for the negligent hiring, training and supervision of the physicians, staff, nurses, and employees who were involved in the treatment of Plaintiff; that Plaintiff is unable to identify the true names of the DOE and ROE Defendants and, pursuant to NRCP 10(a) and *Nurenberger Hercules-Werke GMBH v. Virostek*, 107 Nev. 873, 822 P.2d 1100 (1991), uses and relies upon DOE and ROE designations; and when the true identify or

name(s) is/are discovered, Plaintiff will move to amend the pleading to properly name said defendants.

12. At all times relevant hereto, the Defendants, and each of them, were the agents, directors, servants, employers, co-owners/joint venturers, and alter egos of each other and of their co-Defendants, and were acting within the course, purpose, and scope of their employment, agency, ownership, and/or joint ventures and by reason of such relationships, the Defendants, and each of them, are vicariously and jointly and severally responsible and liable for the acts or omissions of the co-Defendants.

13. The acts, omissions and breaches of the applicable standard of care by Defendants, and each of them, occurred in Clark County, Nevada. Accordingly, this Court has venue and jurisdiction over the parties and the subject matter of this case.

GENERAL ALLEGATIONS

14. Plaintiff was involved in a golf-cart accident on October 9, 2017, causing injury to his left leg. He was transported by AMR Ambulance to the emergency care unit at Centennial Hills Hospital ("CHH") in Las Vegas. X-rays were taken and he was diagnosed as having a closed traumatic displaced fracture of proximal end of tibia with swelling. He was then admitted. Various tests and exams were performed, with Mr. Landess being cleared for surgery.

15. Physicians employed by CHH notified DR. DEBIPARSHAD, who recommended a posterior splint and stated that he would see Plaintiff the next morning.

16. On October 10, 2017, Plaintiff was taken to pre-op. DR. DEBIPARSHAD introduced himself, advising that he had examined the X-rays and determined that a closed reduction internal fixation would be the most suitable surgical solution. Plaintiff asked DR. DEBIPARSHAD how many of those procedures he had performed, with DR. DEBIPARSHAD responding, "Thousands. This is my specialty. In fact, I have invented new techniques and procedures for this particular surgery." Plaintiff urged DR. DEBIPARSHAD to do his best because he wanted to soon return to his passion of golfing. DR. DEBIPARSHAD replied, "I understand. My wife is a scratch golfer." DR. DEBIPARSHAD further stated, "Don't worry. I recently treated an NBA player for last year's championship team. You're in good hands." Neither DR. DEBIPARSHAD nor anyone else at CHH informed Plaintiff that DR. DEBIPARSHAD was not employed by CHH. DR. DEBIPARSHAD arranged for Plaintiff to visit him at the Nevada Spine Clinic two weeks after the surgery.

17. Dr. Debiparshad that same day performed a closed reduction on Plaintiff's left tibia, inserted a tibial nail, and placed proximal and distal locking screws.

18. During the surgery on Plaintiff's left tibia at CHH on October 10, 2017, DR. DEBIPARSHAD and/or DOE Defendants failed to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by misaligning the tibia when inserting the tibial nail and failing to properly reduce the fracture. *See*, **Exhibit 1.**

19. By failing to use reasonable care, skill and knowledge, an ensuing mal-union occurred and Plaintiff was thus directly harmed, as is evidenced in part by the need for a second surgery on April 3, 2018 to correct the problem. *See*, **Exhibit 1.**

20. To a reasonable degree of medical certainty, DR. DEBIPARSHAD and/or DOE Defendants breached the standard of care relating to that initial orthopaedic surgery. *See*, **Exhibit 1.**

21. The Sworn Declaration of Denis R. Harris, M.D., attached hereto as **Exhibit 1,** which supports the allegations in the Complaint as required by NRS 41A.170 is hereby adopted and incorporated as though set forth fully herein.

22. Following surgery, DR. DEBIPARSHAD instructed CHH's physical therapy services to have Plaintiff attempt to stand upright and attempt to walk a short distance with a hand walker. DR. DEBIPARSHAD also informed Plaintiff that if he was able to walk a short distance with the help of a walker that he saw no reason why Plaintiff could not check out of the hospital the day following surgery.

23. During the morning of October 11, 2017, two representatives of CHH's physical therapy department visited Plaintiff in his room and helped him stand upright and walk a short distance with a walker. That department and CHH's occupational therapy then cleared Plaintiff for discharge.

24. Plaintiff thus requested of the charge nurse, Karen M. Buttner ("Ms. Buttner"), that she remove the IV and arrange for a wheelchair so that Plaintiff could leave the hospital.

25. Ms. Buttner, however, refused to do so, which was extremely upsetting to Plaintiff. She insisted that it was too soon for Plaintiff to leave the hospital and urged Plaintiff to consult with CHH's staff doctor, Fawad Ahmed, M.D. ("Dr. Ahmed"). She also told Plaintiff and his two sons that if Plaintiff left CHH without Dr. Ahmed's approval that Medicare would not pay for any of the past medical bills relating to the leg surgery and hospitalization.

26. Ms. Buttner told Plaintiff that morning that she spoke with Dr. Ahmed, who agreed to see Plaintiff before noon. Plaintiff thus reluctantly agreed to wait for Dr. Ahmed.

27. When Dr. Ahmed did not visit Plaintiff by 1 p.m., Plaintiff again insisted that Ms. Buttner disconnect Plaintiff's IV and arrange for wheelchair transportation outside of the hospital. But again Ms. Buttner refused and told Plaintiff that she had spoken with the charge nurse who confirmed that Medicare would not pay medical bills if Plaintiff left the hospital against medical advice. She urged Plaintiff to wait for Dr. Ahmed, stating that he would visit Plaintiff by no later than 3 p.m.

28. Extremely distressed, Plaintiff called his youngest son, Justin Landess ("Justin"), and instructed him to borrow his friend's wheelchair and come to the hospital, which he did.

29. When Dr. Ahmed did not visit Plaintiff by 3 p.m., Plaintiff again insisted that Ms. Buttner disconnect Plaintiff's IV so Plaintiff could leave. And once again she refused to do so, forcing Plaintiff to have to remove his taped-down IV.

30. To further dissuade Plaintiff from checking out of the hospital, Ms. Buttner called Plaintiff's eldest son, Steve Landess ("Steve"), and urged him to try to prevent Plaintiff from checking out of the hospital, telling him that Medicare would not pay for past medical bills if Plaintiff did leave without the approval of Dr. Ahmed.

31. At about 3 p.m. Plaintiff then had Justin help him into the wheelchair Justin had brought and instructed Justin to wheel him out of the hospital.

32. At that point, Ms. Buttner and another nurse stood side-by-side in front of the wheelchair blocking Plaintiff's and Justin's exit from the room, again telling Plaintiff that he could not leave and, that if he did, he would have to first sign a hospital form.

33. By then Plaintiff (who was heavily medicated due to the surgery) was confused, frightened, and outraged. Plaintiff thus told them that CHH was supposed to be a hospital, not a prison, and insisted that they get out of his way so he could leave and go home as had been authorized by everyone except the mysteriously absent Dr. Ahmed.

34. Plaintiff then signed CHH's irrelevant form and had Justin take him home without CHH providing any prescriptions or even informing Plaintiff that he would not be given any for his pain.

35. Plaintiff first visited DR. DEBIPARSHAD at the Nevada Spine Clinic located at 8930 W. Sunset Rd., Ste. 350, Las Vegas, NV 89148 on October 25, 2017. He was accompanied by his ex-wife, Carolyn Landess ("Carolyn"). X-rays were taken; Plaintiff spoke with DR. DEBIPARSHAD (with Carolyn present), who said he had looked at the X-rays and everything was fine; and DR. DEBIPARSHAD said he would arrange for Plaintiff to obtain a bone-stimulation machine to help with healing. He also recommended that Plaintiff commence physical therapy, which he did.

36. Plaintiff, accompanied by Carolyn, again visited DR. DEBIPARSHAD at the Nevada Spine Clinic on November 22, 2017. X-rays were taken. Plaintiff then inquired about the irregular jutting portion of the proximal portion of the fractured tibia, stating that it did not look symmetrical to him. DR. DEBIPARSHAD's explanation was that the proximal portion of the fracture had a larger interior cavity, thereby allowing for the inserted tibial nail to move around more than at the lower portion of the tibia. He assured Plaintiff that he had looked at the X-rays and everything was fine. Plaintiff mentioned that he had not heard from anyone about the bone-stimulation machine. DR. DEBIPARSHAD said he would take care of it.

37. Plaintiff, accompanied by Carolyn, again visited DR. DEBIPARSHAD at the Nevada Spine Clinic on December 20, 2017. X-rays were taken. Plaintiff then complained that he was feeling a clicking or slight shifting at the proximal site of the surgery. DR. DEBIPARSHAD dismissed the complaint, stating that he had just looked at the X-rays and that everything was in order. Moreover, he stated that the tibial nail and locking screws were so strong and secure that it would be impossible for them to move or shift.

38. However, according to Plaintiff's medical records, as of December 20, 2017 the proximal locking screw had sheared in half, which is clearly visible on the X-rays of that same date.

39. At that office visit Plaintiff informed DR. DEBIPARSHAD that since he had not heard from anyone about the bone-stimulation machine, that he had called DR. DEBIPARSHAD's staff and complained. DR. DEBIPARSHAD once again said he would make sure that someone would call, which never happened.

40. Plaintiff, again accompanied by Carolyn, visited DR. DEBIPARSHAD at the Nevada Spine Clinic on January 31, 2018. X-rays were once again taken. And at this office visit Plaintiff more forcefully complained that he was feeling a clicking or slight shifting at the proximal site of the surgery. But, once again, that complaint was ignored. Instead, Plaintiff's complaint about not having heard anything about the bone-stimulation machine fell on deaf ears. And, once again, nothing was said about the failed hardware.

41. Rather than improve, Plaintiff's condition steadily deteriorated to the point that he could no longer endure the pain from physical therapy. Also, when Plaintiff attempted to put weight on the left leg it would ominously bow out sideways, causing immense paid.

42. Plaintiff thus visited orthopaedic surgeon John E. Herr, M.D. ("Dr. Herr") on February 12, 2018, seeking a second opinion. Dr. Herr took X-rays and discussed them with Plaintiff. Dr. Herr stated that there were some severe problems that were beyond his skill level, and that he would arrange for Plaintiff to see orthopaedic surgeon, Roger Fontes, M.D. ("Dr. Fontes").

43. Plaintiff met with Dr. Fontes on February 15, 2018. Dr. Fontes took X-rays and then explained the misalignment, the nonunion, and pointed out the broken hardware. He advised Plaintiff that the only way to obtain a union of the fracture was through a corrective surgery.

44. On or about February 20, DR. DEBIPARSHAD's staff called Plaintiff to explain that he had left the Nevada Spine Clinic to open his own practice in Henderson, Nevada. They invited Plaintiff to visit DR. DEBIPARSHAD at his new office on March 1, 2018. Plaintiff accepted.

45. When Plaintiff arrived at DR. DEBIPARSHAD's new office, they directed Plaintiff to go around the corner to a Quick Care unit to have more X-rays taken since DR. DEBIPARSHAD did not yet have such equipment installed in his new office. Plaintiff then immediately returned to DR. DEBIPARSHAD's office and met with DR. DEBIPARSHAD.

46. Plaintiff intentionally said nothing to DR. DEBIPARSHAD about his meeting with Dr. Fontes, hoping that DR. DEBIPARSHAD would acknowledge the mal-alignment and failed hardware. But instead DR. DEBIPARSHAD told Plaintiff that his slow healing was due to his advanced age and recommended that Plaintiff keep taking pain medication and come back again in 45 days. The next day his assistant, Ron, called Plaintiff and said that DR. DEBIPARSHAD had examined the March 1st X-rays and did not see anything that concerned

him. He then told Plaintiff that he would call the representative about the bone-stimulation machine and personally deliver Plaintiff's pain medication prescription to Plaintiff's pharmacy.

47. Dr. Fontes performed corrective surgery on Plaintiff on April 3, 2018. Plaintiff was in the operating room for approximately 4.5 hours. It was a complicated and painful surgery.

48. To the best of Plaintiff's knowledge and belief, his medical bills since the October 10, 2017 surgery exceed $150,000.

49. According to Plaintiff's medical records, Plaintiff suffered, and continues to suffer, from multiple complications as a result of Defendants' negligence, which required multiple diagnostic studies, multiple procedures and surgeries, and further hospitalization. Plaintiff has also lost considerable income from not being able to engage in his normal professional practice of law. In addition, Plaintiff is expected to require future care and treatment over the course of his life which will require continuing medical care and treatment, physicians, medications, and reasonable costs associated with such care and treatment.

FIRST CAUSE OF ACTION

MEDICAL MALPRACTICE

(Against All Defendants)

50. Plaintiff hereby adopts and incorporates by reference each and every allegation in each and every preceding paragraph of this Complaint, and **Exhibit 1** attached hereto, as though fully set forth herein at length.

51. Defendants and DOE and ROE Defendants, and each of them, are providers of health care as set forth in NRS 41A.017.

52. Defendants and DOE and ROE Defendants had a duty to exercise reasonable care in their treatment of Plaintiff consistent with the degree of skill and learning possessed by other physicians, radiologists, contractors, independent contractors, nurses, employees and medical personnel who specialize in the field of medicine and practicing in or around the community and caused injury to Plaintiff when he underwent a medical procedure performed by Defendants and DOE and ROE Defendants which fell below the applicable standard of care in the community. *See*, **Exhibit 1.**

53. At all times mentioned herein, Defendants and DOE and ROE Defendants, and each of them, knew, or in the exercise of reasonable care, should have known, that providing medical care and treatment was of such a nature that if not properly given, it would likely injure the person to whom it is given.

54. Defendants, and DOE and ROE Defendants, breached their duty by failing to comply with the existing standards of medical care required under the circumstances and in failing to identify, diagnose, treat, intervene, alter treatment, offer appropriate treatment modalities, monitor, protect and properly have measures in place to protect Plaintiff while under Defendants' care and treatment. Accordingly, they were negligent in their failing to provide adequate care and treatment for Plaintiff. *See*, **Exhibit 1.**

55. Defendants and DOE and ROE Defendants failed to appreciate, adequately document, inform, have in place protective measures, failed to supervise and failed to intervene in providing adequate care, supervision, monitoring, care and treatment of Plaintiff despite

knowing or reasonably should have known that the failure to reduce Plaintiff's fracture would result in serious damages and injury to Plaintiff. *See*, **Exhibit 1.**

56. Defendants' and DOE and ROE Defendants' conduct as described above was a substantial factor in causing Plaintiff's injury, complications and medical condition, which otherwise would not have occurred and as such, subsequent complications would not have occurred and will more than likely continue to occur in the future.

57. That as a further result of Defendants' and DOE and ROE Defendants' negligent acts and/or omissions, Plaintiff has suffered damages including, but not limited to, emotional distress; pain and suffering; and medical damages in accordance with the recovery allowed him in an amount in excess of Fifteen Thousand Dollars ($15,000).

58. As a direct and approximate result of the conduct of Defendants, Plaintiff has suffered special damages in an amount in excess of Fifteen Thousand Dollars ($15,000).

59. As a direct and proximate result of the conduct of Defendants and DOE and ROE Defendants, Plaintiff has suffered general damages, including willful conscious disregard in an amount in excess of Fifteen Thousand Dollars ($15,000).

60. That as a result of Defendants' and DOE and ROE Defendants' negligence and grossly negligent acts and/or omissions, Plaintiff suffered and continues to suffer from a prolonged and unnecessary medical course including additional surgeries, prolonged hospitalizations, and future surgeries which may require additional assistive devices and potentially future devices if there are any complications during the any future surgery, and the likelihood of future medical complications and/or treatment in an amount in excess of Fifteen Thousand Dollars ($15,000).

61. As a further direct and proximate result of Defendants' and DOE and ROE Defendants' conduct, Plaintiff was compelled to retain the services of attorneys in this matter, and are therefore entitled to reasonable attorney's fees and costs therein.

SECOND CAUSE OF ACTION

CORPORATE NEGLIGENCE/VICARIOUS LIABILITY/ NEGLIGENT HIRING TRAINING AND SUPERVISION

(Against All Defendants)

62. Plaintiff hereby adopts and incorporates by reference each and every allegation in each and every preceding paragraph of this Complaint, and **Exhibit 1** attached hereto, as though fully set forth herein at length.

63. Defendants and ROE Corporations are vicariously liable for damages resulting from its employees, independent contractors, DOES I-X, physicians, radiologists, nurses, employees therapist, assistants, nurses, agents and/or servants' negligent actions against Plaintiff during the course and scope of their employment and/or agency relationship and are ostensibly liable for the negligent hiring, training and supervision of DOE Defendants.

64. Defendants and ROE Corporations negligently hired, trained and supervised Defendants and their agents, employees and negligently supervised outside staff not affiliated with Defendants' agency/entity and by and through their employees, doctors agents and/or servants breached their duty of care to Plaintiff as set forth above and herein.

65. Defendants and ROE Corporations are liable for their employees, agents and/or servants' breach of care and as a result of Defendants' and ROE Corporation's negligence.

66. Plaintiff suffered injuries and will continue to suffer injuries in the future including, but not limited to, additional medical procedures, hospitalizations, medications, the

possibility of surgical intervention and/or devices to cope with pain if Plaintiff's condition continues and/or worsens.

67. As a result of Defendants' and ROE Corporation's negligence, Plaintiff incurred medical and hospital expenses in excess of Fifteen Thousand Dollars ($15,000), and Plaintiff will continue to incur these expenses in the future, including but not limited to future care and treatment, surgical intervention and therapy in an amount in excess of Fifteen Thousand Dollars ($15,000).

68. As a further result of Defendants' and ROE Corporation's breach, Plaintiff incurred great pain and suffering, mental anguish, emotional distress and inconvenience in an amount in excess of Fifteen Thousand Dollars ($15,000).

69. That as a further result of Defendants' and ROE Corporation's negligent acts and/or omissions, Plaintiff was forced to retain the services of attorneys in this matter and therefore, seek reimbursement for attorneys' fees and costs.

THIRD CAUSE OF ACTION

FALSE IMPRISONMENT

(Against Defendants Valley Health System LLC & UHS of Delaware, Inc.)

70. Plaintiff hereby adopts and incorporates by reference each and every allegation in each and every preceding paragraph of this Complaint, and **Exhibit 1** attached hereto, as though fully set forth herein at length.

71. Defendants Valley Health and UHS (both doing business as "Centennial Hills Hospital") violated Plaintiff's personal liberty by simultaneously threatening and physically constraining and detaining Plaintiff from approximately 9 a.m. to 3 p.m. on October 11, 2017.

The threats consisted of Defendants Valley Health's and UHS's employees and agents telling Plaintiff that his medical insurance would not pay for past medical services rendered to Plaintiff while he was a patient at Centennial Hills Hospital if he left the hospital against medical advice, which threats were combined with the physical restraint of refusing to disconnect Plaintiff from his IV after Plaintiff made repeated requests to do so. Defendants Valley Health's and UHS's employees and agents also tried to block Plaintiff from exiting the premises in his wheelchair.

72. Defendants knew, or should have known, that they had no lawful authority to detain Plaintiff in the hospital and that he was free to come and go as he pleased.

73. Plaintiff is entitled to compensation for all the natural and probable consequences of the false imprisonment, including injury to his feelings from humiliation, indignity and disgrace to the person, and physical suffering.

74. In acting as they did, Defendants Valley Health and UHS recklessly, knowingly, willfully and intentionally acted in conscious disregard of Plaintiff's rights. Defendants Valley Health's and UHS's employees' and agents' conduct was despicable and vexatious, has subjected Plaintiff to oppression, and thus warrants an award of punitive and exemplary damages.

75. That as a result of Defendants Valley Health's and UHS's employees' and agents' intentional acts and/or omissions, Plaintiff has suffered damages including, but not limited to, emotional distress; pain and suffering; and medical damages in accordance with the recovery allowed him in an amount in excess of Fifteen Thousand Dollars ($15,000).

76. That as a further result of Defendants Valley Health's and UHS's employees' and agents' intentional acts and/or omissions, Plaintiff was forced to retain the services of attorneys in this matter and therefore, seek reimbursement for attorneys' fees and costs.

FOURTH CAUSE OF ACTION

CONSUMER FRAUD AND DECEPTIVE TRADE PRACTICES PURSUANT TO NRS §§ 41.600, 598.0915, *Et. Seq.*

(Against Defendants Valley Health System LLC & UHS of Delaware, Inc.)

77. Plaintiff hereby adopts and incorporates by reference each and every allegation in each and every preceding paragraph of this Complaint, and **Exhibit 1** attached hereto, as though fully set forth herein at length.

78. When Plaintiff insisted upon leaving Centennial Hills Hospital on October 11, 2017, Defendants Valley Health's and UHS's employees and agents aggressively attempted to dissuade and prevent him from doing so in order to keep him in the hospital so those Defendants could bill Plaintiff's insurance companies more money for unnecessary services and care. They falsely represented to Plaintiff and to Plaintiff's two sons, Steve and Justin, that if Plaintiff left the hospital without first obtaining clearance and approval from Dr. Ahmed, Plaintiff's insurance companies, including Medicare, would not pay for any of the past medical bills relating to the leg surgery and hospitalization. They further represented that Plaintiff could not physically leave the hospital against medical advice unless he first signed a hospital form that was presented to him as he was being wheeled out by his son, Justin.

79. Those representations are patently false. And due to the circumstances surrounding those false representations, they were also deliberately disturbing, coercive and

oppressive. By employing such a deceptive practice regarding the goods and services Centennial Hills Hospital provided to Plaintiff (and continues to provide to the public), Defendants Valley Health's and UHS's employees and agents knew or had reason to know that such representations were false or misleading. They thus knowingly made false representations in a transaction governed by Nevada's consumer fraud and deceptive trade practices laws (NRS § 592.0915(15)); knowingly stated that further medical services were needed when no such services were actually needed (NRS § 592.092 (3)); knowingly misrepresented Plaintiff's legal rights, obligations or remedies in connection with the patient/hospital transaction (NRS § 592.092 (8)); and used coercion, duress and/or intimidation in connection with the patient/hospital transaction (NRS § 592.0923 (4)).

80. Those wrongful actions violated NRS §§ 41.600 and 598.0915, *et. seq.* They also expose Defendants Valley Health and UHS to the recovery of damages, potential punitive damages and Plaintiff's recovery of his attorney's fees under NRS §§ 598.0933 & 598.0977.

81. In acting as they did, Defendants Valley Health and UHS recklessly, knowingly, willfully and intentionally acted in conscious disregard of Plaintiff's rights. Defendants Valley Health's and UHS's employees' and agents' conduct was despicable and vexatious, has subjected Plaintiff to oppression, and thus warrants an award of punitive and exemplary damages.

82. That as a result of Defendants Valley Health's and UHS's employees' and agents' intentional acts and/or omissions, Plaintiff has suffered damages including, but not limited to, emotional distress; pain and suffering; and medical damages in accordance with the recovery allowed him in an amount in excess of Fifteen Thousand Dollars ($15,000).

83. That as a further result of Defendants Valley Health's and UHS's employees' and agents' intentional acts and/or omissions, Plaintiff was forced to retain the services of attorneys in this matter and therefore, seek reimbursement for attorneys' fees and costs.

FIFTH CAUSE OF ACTION

ELDER ABUSE PUSUANT TO NRS §§ 598.0933, 598.0977 & 41.1395

(Against All Defendants)

84. Plaintiff hereby adopts and incorporates by reference each and every allegation in each and every preceding paragraph of this Complaint, and **Exhibit 1** attached hereto, as though fully set forth herein at length.

85. Plaintiff is 72 years old. He is thus an "elderly person" as defined by NRS §§ 598.0933 & 598.0977. He is also an "older person" as defined by NRS § 41.1395(4)(d).

86. Plaintiff suffered an injury caused by Defendants' unjustified and willful infliction of pain, injury or mental anguish.

87. Accordingly, Defendants are liable for two times Plaintiff's actual damages, potential punitive damage, and attorney's fees and costs.

WHEREFORE, Plaintiff prays for relief from the Defendants and ROE Corporations, and each of them, as follows:

1. For general damages in an amount in excess of Fifteen Thousand Dollars ($15,000);
2. For special damages in an amount in excess of Fifteen Thousand Dollars ($15,000);
3. For punitive damages from Defendants Valley Health and UHS;
4. For a doubling of intentional tort damages pursuant to NRS 41.1395;

5. For pre-judgment and pos-judgment interest at the highest rate allowed by law;
6. For Plaintiff's costs and disbursements of this suit;
7. For reasonable attorneys' fees incurred herein; and
8. For such other and further relief as this Court may deem just and equitable in the premises.

Dated this 2nd day of July, 2018.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b) of the Nevada Rules of Civil Procedure, Plaintiff demands a trial by jury in this action.

HOWARD & HOWARD ATTORNEYS PLLC

#14496

By: _____ FOR

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Attorneys for Plaintiff

EXHIBIT 1

Exhibit N

So when -- we asked him at the end, have we asked you, Doctor, every criticism you have in this case? Yes. Let me break down the three that I heard one more time. Is that it? Yes. Do you have anything else to add? No. What -- there's nothing else that we can do, Your Honor.

Apposition is not rotation. Rotation is this magic word they're trying to hang their hat on now. It's improper. Rotation is a degree; it's not a percent. Translation is a percent. They're not the same thing.

THE COURT: Okay.

MS. GORDON: And what Mr. Jimmerson tells you today about his understanding of it, he doesn't have an expert to say I appreciate that. I believe that Mr. Jimmerson believes that. But with all due respect, he's wrong. And he doesn't have an expert to say it. And this jury, Your Honor, can only hear what an expert has to say about it. We don't want to hear again, as with the lost wages, what Mr. Jimmerson says about it, what Mr. Dariyanani, what Justin, what everybody else says about it. It's clear; you need an expert. Let's move forward with what this case has always been about.

THE COURT: All right. Well, I want to say, Ms. Gordon, I do respect and appreciate your efforts in this regard. And at the end of the day, you certainly made a good court record on it and perfected your position for any potential appeal. And that's part of what you should do as a trial lawyer, so I think that's good practice.

I can tell you only until really this morning, you know, did I

start to really think this is what the answer to this really is. So that shows that this was a good faith -- in my view, a good faith line of argument that you brought forth. I understand your position, and I respect the points that you've made.

However, I am going to disagree with you. I look at this as again, a motion from the Defense at the time it was brought to at least in part ask me to preclude or strike the second and third bullet points that we've talked about. That's denied. Those bullet points I think were fairly represented in an opening statement by the Plaintiffs as items that they'll have evidence that produce and show relevant to the standard of care breach that they allege.

Another way to look at this though, as I've indicated, is that this has a more significant, I think, overall potential effect. It's not just a motion to strike two bullet points on page 25 of 70 slides. Practically speaking, if I were to do that, then the Court would be making a finding that there's no disclosure of the two bullet points in question in a professional medical malpractice negligence case, that it is unfair that there's not been notice to the Defense, they're sort of ambushed or surprised, that now at trial there's going to be an effort by the Plaintiffs to put on evidence of overhang, apposition, translation, distraction, or gap.

And so in that regard, I have to say, though I've indicated I respect the Defense's position, Ms. Gordon, that you've brought forth, it is my finding that there has been adequate disclosure and notice of both of those bullet points and the items that they depict fairly. And so here's

why I say that. Dr. Harris did provide a report on February 6th of 2019. And in that report, Dr. Harris indicates there's a valgus and rotary malalignment. And that goes with the first bullet point, of course, malalignment. But he goes on to say in that February 6th report that his criticism in a professional sense of Dr. Debiparshad was that Dr. Debiparshad did not adequately reduce the fracture.

Then he goes on to give other reasons. Those C-arm images, that were like those little round images, as opposed to a more comprehensive x-ray was part of the criticism as well; not so relevant to the mainline point that we're dealing with on these bullet points.

But anyway, February 6th, Harris -- Dr. Harris does say that his opinion is not adequately reducing the fracture. That starts, I think, in my mind an inquiry as to what is meant by not adequately reducing the fracture. Is it just malalignment, or is it overhang, apposition, translation, gap, distraction? Fair point. The genesis of the motion from the Defense, no doubt, fair point.

If that's all I had, I'd be inclined to agree because it's at a minimum confusing. But there's a lot more to consider. And that, I think, does start with Dr. Harris himself. And to me, this is the most important item that in my view clearly leads me to make the decision that I'm making. If you look at Dr. Harris' record review, he does say in that record review that after Dr. Debiparshad's attempt to reduce the fracture, that there's an 85 percent apposition. Apposition. He then indicates after the second surgery there's a 100 percent apposition. That is the second bullet point.

He goes on to say in his record review, it is my opinion that Dr. Debiparshad did not adequately reduce the fracture, resulting in subsequent angular deformity, which required a second surgery. So there's another medical term of art; angular deformity. That is taken, if you look at this record review, directly as a conclusion to the 85 percent apposition of Dr. Debiparshad, and the 100 percent apposition after the second surgery.

So clearly, to me it's Dr. Harris' opinion that the angular deformity that was corrected in the second surgery remedied the 85 percent apposition and made it a 100 percent apposition. So clearly, that's notice that apposition was a concern from Dr. Harris, which again, I think is fairly part of the second bullet point, overhang, cliff, translation, apposition. So you do have Dr. Harris giving a we need to fix the apposition opinion, calling it angular deformity, as well.

It goes on. Dr. Fontes, in his deposition -- and this really just goes to the issue of whether the Defense had notice of the professional malpractice claims and the extent of what failure to reduce a fracture includes in the evidence in the case. So Dr. Fontes in his deposition says, if a fracture is left with big gaps -- gaps; third bullet point, gap. Dr. Fontes, if a fracture is left with big gaps, for example, where the bone is really distracted and there's a big defect there, then that can lead to an increased risk of non-healing. That is consistent with the Plaintiff's theory that we have a failure to adequately reduce the fracture from Dr. Fontes, who as I understand it -- isn't he the surgeon that fixed the problem?

MR. JIMMERSON: Yes.

THE COURT: So he's a treating -- and he's reluctant to even do anything. He's just here to fix a leg. But Dr. Fontes uses the word "big gaps". And again, that's something that is clearly part of the case from the surgeon that corrected the problem.

And then, Dr. Debiparshad, I have to say there's a part of what he said in his own words that I think supports my decision here, respectfully. If you look at Dr. Debiparshad's deposition, he's asked to define significant malalignment. So that's what he's asked to define in his deposition under oath. And his answer is in part -- and this is Dr. Debiparshad -- the finding of significant malalignment in a professional sense. He's -- this is in his capacity as a doctor. It's an expert style opinion. My view is that when doctors come into court and they're sued, that they can testify on their own behalf as experts, assuming they're still licensed, and he is.

So he's at his deposition, again, asked to define significant malalignment. And what does he say? He says -- here's his answer, "varus or valgus deformity over 10 degrees, a rotational deformity". Rotational. Second bullet point, rotation. Dr. Debiparshad says rotation. That's bullet point two. The Plaintiffs can adopt him if they so desire, on that point.

MS. GORDON: No. It -- sorry.

THE COURT: My view is they can.

MS. GORDON: Oh okay.

THE COURT: You can make a -- you can take it up if you

want. But I think that what the licensed Defendant doctor says in his deposition goes to the standard of care and can be used as evidence regarding standard of care opinions.

Next, we have Dr. Herr, who's a non-retained expert treating physician. I agree with the point that he would have to give an opinion in his care and treatment within that course to be used, unless he goes further and becomes now a retained expert. Then he has to do independent reports consistent with the FCH 1 case; Fiesta Palms some people call that.

But anyway, my view is it's clear from Dr. Herr's records they did an exam during the course and scope of treatment. And in that exam he says in his exam note, this is -- it's obvious is what Dr. Herr says, a step-off deformity. I'm comfortable drawing a conclusion, especially in light of seeing all the x-rays that I saw yesterday in the opening from Mr. Jimmerson, when he described it as a cliff, I think when Dr. Herr describes it as a step-off deformity, that's the same thing, clearly. What is that? That is apposition. That is overhang. That is the second bullet point. It can be used by the Plaintiffs to support that theory.

Dr. Herr says 25 degree of apex anterior angulation not healed. He goes on to say that's not acceptable and will need a revision or second surgery. So that's an opinion from Dr. Herr during the course and scope of treatment that the 25 degree apex anterior angulation step-off deformity is not acceptable. Evidence of professional malpractice. It's up to the jury to figure out.

And then, going back to Dr. Harris, he did give a January

28th report. And again, he mentions things in that report consistent with rotation, which is the second bullet point. In the January 28th report of Dr. Harris he says, Dr. Debiparshad's error is not adequately reducing the fracture. He goes on to mention that after the corrective surgery, if you will, the x-rays showed a valgus and rotary malalignment, which should not have been accepted at the time of the initial surgery. I mean, that's what Dr. Harris says. So again, using the word rotary or rotation is clearly within a Dr. Harris report.

And he goes on in that January 28th report to say after the second surgery, then you have an appropriate alignment consistent with this idea that the fracture was not adequately reduced, and that included a rotary malalignment problem. Rotation, again, second bullet point.

In addition to all that, it's my view fairly that even with doctors, and lawyers, and I can tell you with judges, at least one, it is fairly confusing, I think, in a way that makes sense. I like to make sense of things. That doesn't mean I would bet my life on my decision. But I guarantee you, I use sense in trying to make it. It's my view that all of us, and yes, doctors, too, can have some reasonable confusion, interrelation between all these terms.

I know that the Defense's position is they're so distinguishable. I think in part I agree with that; they are distinguishable in the clinical medical sense. I mean, malalignment is what it is. Apposition, translation, overhang, is what it is, and gap is what it is. But I do think because all these items, the malalignment, the apposition, translation, overhang, and the gap between, all ultimately do relate

because they all relate to what a doctor has to do in dealing with an extensive tibia fracture to reduce that extensive tibia fracture, that it's reasonable for all concerned, lawyers, doctors, judges, to sometimes interrelate, or even confuse the terms in some ways because they all go back to the root effort that doctors have in this area, and that is to reduce a difficult, painful, serious tibia fracture, and that is evident to me from some sources. One is the medical literature itself that's been provided to me, that talks about displacement, including one or more of angulation, translation, rotation, distraction, impaction. The items that I got from the Plaintiff do the same thing. At times, confusing me even, and I'm sure doctors, sometimes, do the same thing.

It's evident to me, as I already said, that it's possible for lawyers to do that, and I read the passage. I don't need to read it again, that even in Dr. Harris' deposition, it seems that there's, at least at a minimum -- I'm not going to relate confusion, because I can't put myself in a lawyer's brain to know whether they were actually confused or not -- but it's certainly interrelated where you look at translation being called to question, and Dr. Harris then saying, oh, you're talking about alignment apposition, and lawyer saying, right.

You know, interrelation of these terms, I think, happens. In the medical literature, I think in practice, and what have you, and that's, again, reasonable for the reasons that I've stated.

All right. That leaves, of course -- but I have to tell you at least at one point in the process, probably around 10:32 last night, I looked at this and I said, you know, there's a smoking gun in favor of the

Defendant, and maybe from that point for the next 10 minutes, I'm thinking, you know, Ms. Gordon has got a heck of a point here. Because if you look at page 38 of Dr. Harris' transcript, of his depo, line 24 onto page 39, if taken just that, it seems clear that you have is the main line expert for the Plaintiff saying, I have no criticism in a professional sense of apposition. That is what those lines say.

"Q You don't have any criticism to standard of care related to apposition, is that correct?

"A Correct.

THE COURT: Fertile ground for cross-examination, certainly. I do think that -- well, what I really think is that it's dangerous for courts to take one or two sentences out of a deposition and out of all the other evidence in a case, and say, that's it, that's the smoking gun, and it's definitive of all points on this issue. You know, Mr. Jimmerson answered my question by saying, well, it's by itself, you know, he's really meaning that by itself, he doesn't have a criticism of acquisition, but it's, you know -- and I said, well do you think he could explain it, and Mr. Jimmerson said, well, I think so.

And I think that opportunity will present itself, and we'll see what happens, but I don't know that that's such a smoking gun that it ends the issue. Well, I have to say, I know it's not because I'm making the decision that I'm making. It's certainly something that looks really good for the Defendant, but I think it's important, as I did, to take it and put it in conjunction with all the other evidence, most of which that I wanted to mention, I did mention now.

Exhibit O

regarding Plaintiff's work-related damages based upon the absence of proximate causation.

There is something I want to do on that, and you'll see what I'm up to, and once I do this, you'll see that it's probably good we'll have a break in that motion, give counsel a time to react to what I've done. And so here's how that goes. And I know you'll take notes, because I think what I'm going to tell you, nobody has ever heard of before, but if you have heard of it, well then you'll tell me at some point, I'm sure, but here's how I want to do this.

Again, what I want to do is let you know that I'm going to do what I'm going to do. Jury at 10:30, we're going to be ready for. So we'll resume this motion at some convenient time, but there's something that you might not know about that I want to mention, so here's how it goes.

God rest his soul, but there once was a guy named Andrew V. Anderson. He's probably dead. I think he was 42 years old in 1957. That would make about 104 now. There's a cliché in life probably that sort of comes to mind, you know, about, you know, once you're dead, nobody remembers what you do. Something like that, but Andrew V. Anderson is going to live on a little bit here, because let me tell you the story about Andrew V. Anderson.

He was a fireman in Reno, and on February 5th, 1957, he was told by his superior to investigate the smell of gas on North Sierra Street in Reno, Nevada. And being the diligent fireman that Andrew V. Anderson was in 1957, he went on over to North Sierra Street. He went

from building to building in the area, and he investigated an odor of gas. As a fireman, he recognized that this odor of gas over on North Sierra Street was substantial, and so he took it upon himself to warn occupants in the area to vacate, get out of the area, there's a lot of gas here.

Ten minutes later, unfortunately, a major explosion occurred in the area where Fireman Anderson was. It was an explosion of great magnitude. It destroys the substantial parts of two city blocks in downtown Reno, and it killed several people instantly. As a fireman, he was injured, and ultimately brought a lawsuit that resulted in Supreme Court of Nevada case, *Sierra Pacific Power Company v. Andrew V. Anderson*. That's *77 Nev. 68 1961.*

The Supreme Court indicates some further facts and guidance in that case, which I have copies of for everybody to distribute when I'm done. You'll have time to look at it. The Supreme Court of Nevada in 1961, and we shepardized it and it's good law, goes on to say that Mr. Anderson was confined to the hospital for three weeks after being in this explosion and surviving it, but like Mr. Landess, after being treated, he returned to his employment with the fire department for a period of time.

Like Mr. Landess, the fire department in Reno decided that despite his efforts of returning to work as a fireman, that because of his physical injuries, he could no longer be a fireman, and he was involuntarily retired in 1958 by the Reno Fire Department. Sounds familiar. Sounds like something Cognition did.

The Judge at that trial gave an instruction, number 30, to the

jury to decide Fireman Anderson's case, and that was brought up as the third contention of error in the appeal that the Nevada Supreme Court dealt with. In that regard, the appellants urged that the trial court was wrong in giving instruction number 30 in the Anderson case, which permitted the jury to pass upon the claim loss of future earnings because the position taken was that that loss of future earnings that involuntary retirement was not supported in the evidence by expert medical opinions.

The claim issue on appeal, this third contention that the Court had to deal with was where the appellants say the claimed item of damage was uncertain and not supported by medical testimony or opinion. The Supreme Court 1961 said that evidence in the record indicated that Respondent became unfit for his duties as a fireman, that the Respondent testified at trial, and so did Fire Chief Karl Evans. That would've been really weird if that would've been a guy named Darren Som [phonetic], but it wasn't. It was a guy named Fire Chief Karl Evans.

Karl Evans, the Fire Chief, testified of impairment, and there was evidence in the record form a doctor, T.C. Harper, that of course this physical impairment being in the explosion, his right hand was severely injured. So there was medical evidence of the injury itself, just like we have medical evidence of the injury itself here.

Anyway, Respondent and Fire Chief, Karl Evans, testified that Fireman Anderson was unfit to further be a fireman leading to his involuntary retirement or resignation. Such being the evidence, the Nevada Supreme Court says, it then became the right of the jury to

determine whether or not Respondents earning capacity had been impaired. To what extent, and to accord such evidence, the significance, and weight they saw fit. I don't think I could've ever said it better than that. That's the right of the jury.

The stored or impaired earning capacity within life expectancy is the proper item of damage. The jury must take into consideration in passing upon this item of damage, the fact that the person has no education or preparation or pursuit different than that which he was engaged, and no longer able to follow. Okay. So it's up to the jury to figure out, under all of the circumstances, whether the loss of earning capacity, the loss of employment or ability to be a fireman, loss of ability to be a lawyer, it's up to the jury.

And they end by saying, the jury was properly instructed on this point of law. So obviously, I'm finding that to be rather compelling because it seems to be as on point as we could find.

So Dominique if you could come on over here, please, and gather these up. Here's copies of the case, Andrew V. Anderson, for all of the lawyers.

MS. GORDON: And Your Honor, did you want me to respond to that before --

THE COURT: Well, it's five minutes until our jury is here. I'd like to have everybody reserve. We'll take this back up. Everybody will have a chance to see the Andrew V. Anderson case that I just gave you my view on, and we'll take it up.

So let's take a -- what I want to do is take a comfort break so

Exhibit P

Mr. Vogel?

MR. VOGEL: Yes, Your Honor. Thank you. I'm pretty confident I'm arguing our motion, and it had to do with whether or not this type of testimony can come in without some sort of medical expert support, and I think the case law 41A.100 all indicates, you can't claim this, you know, this disability upon which Dr. Smith bases a lot of his proximate, you know, a lot of the damages, without having expert medical testimony to support it.

You can't say this guy has got a 60 to 80 percent disability rating, and then come up with a number for it without the expert medical testimony. That's what the case law in NRS 41A.100 indicates. That's what I thought we were arguing. Thank you.

THE COURT: All right. In the area of medical malpractice, of course, probably more than any area of law in Nevada, expert testimony is required, probably if you really looked at everything that could seemingly come up in medical malpractice cases, to the tune of 80 to 90 percent of the time, you've got to have medical expert testimony.

I mean, it starts with the idea that the complaint is void as a matter of law, if you don't have the requisite 41A affidavit of merit attached to it. And in order to support elements of negligence, you've got to have, of course, expert medical testimony evidence to support your case. Same way with defending the case. If you so choose to present evidence and defense from a medical point of view, you've got to have expert style doctors to do that. You can certainly try to adopt treating physicians, and it is my view that as a Defendant, a doctor who's

licensed can defend themselves, and offer up expert style opinions in defending themselves. That's my view on that.

So that shows you that, again, in the area of law that we're dealing with, that the case we're dealing with, that we see this required in so many parts, components, tentacles of these types of cases. The question before the Court, however, is whether that requirement goes as far as the earning capacity, loss of ability to work for a loss of wages type of claim. And I do think that there's an element to this consistent with this Anderson case where it's clear to me that you do not need expert style testimony to support in a proximate cause sense, loss of earning capacity.

And so here's what I mean by that. Certainly, you do need, and the Plaintiffs will have to show enough to get through that hurdle. You do need experts to support the elements of their professional negligence cause of action, including, they would have to show through evidence that there was injury caused from the medical malpractice. Some sort of injury related to, in this situation, failing to adequately reduce the fracture.

Assuming they do that, and that's what the experts are required to do, but once they do that, if they were to meet the burden to establish injury in that context, it's then, in my view, the jury's provenance to determine whether that injury, based upon the total of the evidence in the case, which does not necessarily have to be specifically a doctor saying, look, I'm giving an opinion that he couldn't work.

Once the injury is established, proximately caused by the

medical malpractice, injury being if leg were set right, you wouldn't have this set of injury that led -- at a minimum, led to the second surgery. Lay testimony, including the testimony of Mr. Landess himself, can be used alone, in my view, to then support, once injury has been established by using experts, whether the injury in a proximate causation sense, in a natural flow, consequential, led to him not being able to work, not having earning capacity as a lawyer anymore for Cognotion. That then is, I think, as the Anderson case says it best, it's the right of the jury to do that, and you don't have to have an expert for that component of things.

In Nevada, issues of proximate cause are considered issues of fact and not of law, and are referred to the jury to resolve. That comes to us from a case called *Nehls, N-E-H-L-S, v. Leonard*, Nevada Supreme Court 1981. The Sierra Pacific case that I did give you, I think that case makes it absolutely crystal clear that you don't need to have expert testimony regarding the element that I described having to do with lack of earning capacity.

Now, the Court clearly in the Anderson case spells out that when the Judge gave this instruction number 30, that that was within -- it was consistent with the law, and the claim that it was not consistent with the law that the Court dealt with in that case was the Appellant claim that this item is uncertain, because it's not supported by medical testimony or opinion.

So that's exactly right on point with what I'm being requested -- the reason I'm being requested to rule for the Defendants. And so I think it's right on point and controlling on me, actually. And I

know that the Anderson case does mention that Dr. Harper and Dr. Sargent did provide some medical testimony in the case, but I think that is tantamount to what we have here, frankly, that I anticipate the Plaintiffs will at least attempt to do, and may be able to do. And that is, they have doctors, whether it's retained experts or treating doctors that are going to testify that the tibia wasn't reduced correctly, and that then caused the need for a second surgery.

Frankly, I think implicit in that is the idea that there's some injury theory being, if you had done it right, we wouldn't need a second surgery. I think that's a fair injury. So if the Plaintiffs meet that, to me, that's the same as what Dr. Harper and Dr. Sargent did in the Anderson case. In other words, they're doctors testifying as to an injury.

Here, I agree. The Plaintiffs have to at least support the injury claim by expert testimony, but again, taking it from there to you couldn't work anymore, that is a factual issue, and they can consider both. They can consider whatever medical testimony they do here, which happens to also coincide with the evidence supporting the negligence claim. And they can consider Mr. Landess and Mr. Dariyanani and others who then provide further evidence of that.

It's not lost on me, too, that, I mean, respectfully, I think there's sort of a commonsense element to this in that -- I'm comfortable saying this, and this is separate and distinct from anything I need to make the decision that I've said so far. It's related to sort of what I've said, but you know, if the Plaintiffs are correct -- and that's an if, that's a hypothetical -- if they're correct, and there was medical malpractice, and

this leg wasn't set right, and it took a while for Mr. Landess to go through life, discover that, discover that, and then remedy it with a second surgery.

You know, it just seems consistent with the idea we do see in this area of law when you see issues come up where there's a question as to whether you're an expert or not. Expert testimony is required when it requires a jury to find a fact beyond the common knowledge of laypersons.

It is my thought that a layperson doesn't really need to have a doctor indicate -- again, if a juror, reasonable juror, finds that there was medical malpractice here, and that the leg wasn't set right, and it took a while for Mr. Landess to come to know that, and then had to get a second surgery, to me, the pain and suffering, hedonic damages, whether you could work or not because of all of it, that's within the common knowledge of laypeople, and so you don't need an expert on that basis, as well, in my view.

As to the entire motion, just to make sure I consistency reconcile it, this does flow from some prior court activity, so I want to take an opportunity at least to reiterate that for the order. Again, economist Smith cannot -- because he's not a doctor, he cannot give an impairment rating or say anything that anybody could reasonably interpret as his view that somehow out there, there's an impairment rating, because there's not, as I understand it, from a medical perspective.

However, consistent with the idea that Mr. Landess can

provide his opinion as to whether he could work or not, and Mr. Dariyanani could, too, in my view, because he's the employer who had a close relationship with his lawyer, I think Mr. Smith can indicate that he is assuming. Experts can give -- be given assumptions, and they can then give opinions based upon assumptions reasonably given to them.

There's a jury instruction, in fact, as I recall it now, it says something along the lines of an expert has been asked a hypothetical. Keep in mind the opinion is only as good as a factual premise, which is the base of the assumption made. So it's clear experts can be given assumptions or hypotheticals, and asked to give opinions on it, and that's what this is.

I think that's really what this is. It's Mr. Landess giving his opinion, albeit as someone who, in my view, probably knows better than anybody ever will, his opinion as to how he's impaired. And so if he says to an economist, whose duty is to give an opinion as to value of loss of stock purchase options, I think Mr. Landess can do that. I think he can say to his soon expert that's working on his side that I'd like for you to operate with the assumption that I've got 60 to 80 percent impairment, and Smith could give an opinion based upon that, but just to reiterate, I don't think I've yet said definitively that Smith can go as far as offering up all of these opinions.

Rather, I've indicated that the Hallmark style foundation has to be met. I said that, and I'm reiterating it again because it has come up that nonetheless, separate and distinct from the proximate cause analysis, which I've now provided, but nonetheless, in a Hallmark sense,

the stock purchase options are nebulous in some way.

In other words, just trying to figure out their value, it's been suggested under the Hallmark case where it talks about conjecture speculation, not having an adequate bases, methodology, that sort of thing. And I want to say, I've left it open.

The Plaintiffs do have, I think, the burden of production is what it is. They've got to produce by way of foundation and presenting Smith, that he demonstrates a foundation under Hallmark to where his opinions are not speculative, they're not conjecture, they're not guesswork that they can be relied upon by the jury as passing Muster under Hallmark, essentially.

So that's still something that's required, but with all that said, the motion to exclude the opinion of Stan Smith regarding Plaintiff's work-related damages based upon the absence of proximate cause, for all these reasons, is denied, and that means the Plaintiffs can prepare the order.

MR. JIMMERSON: Thank you, Judge.

THE COURT: All right. Let's check on the jury.

[Pause]

THE MARSHAL: They're ready.

THE COURT: Are you ready?

THE MARSHAL: Yeah. I was just opening this real quick.

THE COURT: Okay. All right. I'm told of course the jury's here. So let's bring them in and continue on.

THE MARSHAL: Parties rise for presence of the jury.

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DISTRICT COURT

CLARK COUNTY, NEVADA

JASON GEORGE LANDESS a.k.a. KAY GEORGE LANDESS, as an individual;

Plaintiff,

vs.

KEVIN PAUL DEBIPARSHAD, M.D., an individual; KEVIN P. DEBIPARSHAD PLLC, a Nevada professional limited liability company doing business as "SYNERGY SPINE AND ORTHOPEDICS"; DEBIPARSHAD PROFESSIONAL SERVICES LLC, a Nevada professional limited liability company doing business as "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. doing business as "NEVADA SPINE CLINIC"; VALLEY HEALTH SYSTEM LLC, a Delaware limited liability company doing business as "CENTENNIAL HILLS HOSPITAL"; UHS OF DELAWARE, INC., a Delaware corporation also doing business as "CENTINNIAL HILLS HOSPITAL"; DOES 1-X, inclusive; and ROE CORPORATIONS I-X, inclusive,

Defendants.

Case No. A-18-776896-C
Dept. No. 32

STIPULATION AND ORDER TO EXTEND DEADLINES FOR THE PARTIES' MOTIONS FOR ATTORNEYS' FEES AND COSTS

COME NOW Defendants Kevin Paul Debiparshad, M.D., Kevin P.

LEWIS BRISBOIS BISGAARD & SMITH LLP ATTORNEYS AT LAW

Debiparshad, PLLC, d/b/a Synergy Spine and Orthopedics, Debiparshad Professional Services, LLC d/b/a Synergy Spine and Orthopedics, and Jaswinder S. Grover, M.D., Ltd. doing business as "Nevada Spine Clinic" ("Defendants"), by and through their counsel of record, S. Brent Vogel and Katherine J. Gordon of Lewis Brisbois Bisgaard & Smith LLP, and Plaintiff Jason George Landess a.k.a. Kay George Landess, by and through his counsel of record, Martin A. Little of Howard & Howard, Attorneys, PLLC and James J. Jimmerson of Jimmerson Law Firm, PC, and hereby stipulate that the deadline for Defendants' Opposition to Plaintiff's Motion for Attorneys' Fees and Costs and Defendants' Countermotion for Attorneys' Fees and Costs shall be extended to Monday, August 26, 2019. Further, Plaintiff's Reply to Defendants' Opposition to Plaintiff's Motion for Attorneys' Fees and Plaintiff's Opposition to Defendants' Countermotion for Attorneys' Fees and Costs Motion for Attorneys' Fees and Costs shall be extended to Wednesday, September 4, 2019. Defendants' Reply to Plaintiff's Opposition to Defendants' Countermotion for Attorneys' Fees and Costs shall be due five (5) days before the rescheduled hearing.

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The parties also request that the hearing on the pending Motions be rescheduled.

Dated this 21 day of Aug., 2019.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: _____
D. Brent Vogel, Esq.
Nevada Bar No. 06858
Katherine L. Gordon
Nevada Bar No. 05818
John M. Orr, Esq.
Nevada Bar No. 14251
Attorneys for Defendants

Dated this 26 day of August, 2019.

HOWARD & HOWARD, ATTORNEYS, PLLC
and/or JIMMERSON LAW FIRM, PC

By: _____ *
Martin A. Little, Esq.
Nevada Bar No. 07067
James J. Jimmerson, Esq.
Nevada Bar No. 00264
Attorneys for Plaintiff

* See my email 8/26/19.

ORDER

IT IS SO ORDERED.

IT IS ALSO ORDERED that the Parties' Motions for Attorneys' Fees and Costs shall be re-scheduled to be heard in front of Department 32 on the 17th day of September, 2019, at the hour of 1:30 p.m.

Dated this 22nd day of ~~June~~ August, 2019.

DISTRICT COURT JUDGE
ROB BARE
JUDGE, DISTRICT COURT, DEPARTMENT 32

Respectfully submitted by:

LEWIS BRISBOIS BISGAARD & SMITH LLP

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DISTRICT COURT

CLARK COUNTY, NEVADA

JASON GEORGE LANDESS a.k.a. KAY GEORGE LANDESS, as an individual;,

Plaintiff,

vs.

KEVIN PAUL DEBIPARSHAD, M.D., an individual; KEVIN P. DEBIPARSHAD PLLC, a Nevada professional limited liability company doing business as "SYNERGY SPINE AND ORTHOPEDICS", DEBIPARSHAD PROFESSIONAL SERVICES LLC, a Nevada professional limited liability company doing business as "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 doing business as "NEVADA SPINE CLINIC"; VALLEY HEALTH SYSTEM LLC, a Delaware limited liability company doing business as "CENTENNIAL HILLS HOSPITAL", UHS OF DELAWARE, INC. a Delaware corporation also doing business as "CENTINNIAL HILLS HOSPITAL", DOES 1-X, inclusive; and ROE CORPORATIONS I-X, inclusive,

Defendants.

CASE NO. A-18-776896-C
Dept. No.: 32

NOTICE OF ENTRY OF STIPULATION AND ORDER TO EXTEND DEADLINES FOR THE PARTIES' MOTIONS FOR ATTORNEYS' FEES AND COSTS

PLEASE TAKE NOTICE that the STIPULATION AND ORDER TO EXTEND DEADLINES FOR THE PARTIES' MOTIONS FOR ATTORNEYS' FEES AND COSTS was entered with the Court in the above-captioned matter on the 23rd day of August 2019, a copy of which is attached hereto.

DATED this 23rd day of August, 2019

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ *Katherine J. Gordon*

S. BRENT VOGEL
Nevada Bar No. 006858
KATHERINE J. GORDON
Nevada Bar No. 5813
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Tel. 702.893.3383
Attorneys for Defendants Kevin Paul Debiparshad, M.D., Kevin P. Debiparshad, PLLC, d/b/a Synergy Spine and Orthopedics, Debiparshad Professional Services, LLC d/b/a Synergy Spine and Orthopedics, and Jaswinder S. Grover, M.D., Ltd. doing business as "Nevada Spine Clinic"

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of August 2019, a true and correct copy of **NOTICE OF ENTRY OF STIPULATION AND ORDER TO EXTEND DEADLINES FOR THE PARTIES' MOTIONS FOR ATTORNEYS' FEES AND COSTS** was served by electronically filing with the Clerk of the Court, using the Odyssey File and Serve system, and serving all parties with an email-address on record, who have agreed to receive Electronic Service in this action.

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By /s/ Johana Whitbeck
Johana Whitbeck, an Employee of LEWIS BRISBOIS BISGAARD & SMITH LLP

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DISTRICT COURT

CLARK COUNTY, NEVADA

JASON GEORGE LANDESS a.k.a. KAY GEORGE LANDESS, as an individual;

Plaintiff,

vs.

KEVIN PAUL DEBIPARSHAD, M.D., an individual; KEVIN P. DEBIPARSHAD PLLC, a Nevada professional limited liability company doing business as "SYNERGY SPINE AND ORTHOPEDICS"; DEBIPARSHAD PROFESSIONAL SERVICES LLC, a Nevada professional limited liability company doing business as "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. doing business as "NEVADA SPINE CLINIC"; VALLEY HEALTH SYSTEM LLC, a Delaware limited liability company doing business as "CENTENNIAL HILLS HOSPITAL"; UHS OF DELAWARE, INC., a Delaware corporation also doing business as "CENTINNIAL HILLS HOSPITAL"; DOES 1-X, inclusive; and ROE CORPORATIONS I-X, inclusive,

Defendants.

Case No. A-18-776896-C
Dept. No. 32

STIPULATION AND ORDER TO EXTEND DEADLINES FOR THE PARTIES' MOTIONS FOR ATTORNEYS' FEES AND COSTS

COME NOW Defendants Kevin Paul Debiparshad, M.D., Kevin P.

Debiparshad, PLLC, d/b/a Synergy Spine and Orthopedics, Debiparshad Professional Services, LLC d/b/a Synergy Spine and Orthopedics, and Jaswinder S. Grover, M.D., Ltd. doing business as "Nevada Spine Clinic" ("Defendants"), by and through their counsel of record, S. Brent Vogel and Katherine J. Gordon of Lewis Brisbois Bisgaard & Smith LLP, and Plaintiff Jason George Landess a.k.a. Kay George Landess, by and through his counsel of record, Martin A. Little of Howard & Howard, Attorneys, PLLC and James J. Jimmerson of Jimmerson Law Firm, PC, and hereby stipulate that the deadline for Defendants' Opposition to Plaintiff's Motion for Attorneys' Fees and Costs and Defendants' Countermotion for Attorneys' Fees and Costs shall be extended to Monday, August 26, 2019. Further, Plaintiff's Reply to Defendants' Opposition to Plaintiff's Motion for Attorneys' Fees and Plaintiff's Opposition to Defendants' Countermotion for Attorneys' Fees and Costs Motion for Attorneys' Fees and Costs shall be extended to Wednesday, September 4, 2019. Defendants' Reply to Plaintiff's Opposition to Defendants' Countermotion for Attorneys' Fees and Costs shall be due five (5) days before the rescheduled hearing.

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The parties also request that the hearing on the pending Motions be rescheduled.

Dated this 21 day of Aug., 2019.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: _____
S. Brent Vogel, Esq.
Nevada Bar No. 06858
Katherine L. Gordon
Nevada Bar No. 05818
John M. Orr, Esq.
Nevada Bar No. 14251
Attorneys for Defendants

Dated this 26 day of August, 2019.

HOWARD & HOWARD, ATTORNEYS, PLLC
and/or JIMMERSON LAW FIRM, PC

By: _____ *
Martin A. Little, Esq.
Nevada Bar No. 07067
James J. Jimmerson, Esq.
Nevada Bar No. 00264
Attorneys for Plaintiff

* See my email 8/20/19.

ORDER

IT IS SO ORDERED.

IT IS ALSO ORDERED that the Parties' Motions for Attorneys' Fees and Costs shall be re-scheduled to be heard in front of Department 32 on the 17th day of September, 2019, at the hour of 1:30 p.m.

Dated this 22nd day of ~~June~~ August, 2019.

DISTRICT COURT JUDGE
ROB BARE
JUDGE, DISTRICT COURT, DEPARTMENT 32

Respectfully submitted by:

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: _____
S. Brent Vogel, Esq.
Nevada Bar No. 06858
Katherine J. Gordon
Nevada Bar No. 05818
John M. Orr, Esq.
Nevada Bar No. 14251
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DISTRICT COURT

CLARK COUNTY, NEVADA

JASON GEORGE LANDESS a.k.a. KAY GEORGE LANDESS, as an individual,

Plaintiff,

vs.

KEVIN PAUL DEBIPARSHAD, M.D., an individual; KEVIN P. DEBIPARSHAD PLLC, a Nevada professional limited liability company doing business as "SYNERGY SPINE AND ORTHOPEDICS", DEBIPARSHAD PROFESSIONAL SERVICES LLC, a Nevada professional limited liability company doing business as "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 doing business as "NEVADA SPINE CLINIC"; VALLEY HEALTH SYSTEM LLC, a Delaware limited liability company doing business as "CENTENNIAL HILLS HOSPITAL", UHS OF DELAWARE, INC. a Delaware corporation also doing business as "CENTINNIAL HILLS HOSPITAL", DOES 1-X, inclusive; and ROE CORPORATIONS I-X, inclusive,

Defendants.

CASE NO. A-18-776896-C
Dept. No. 32

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR FEES/COSTS AND DEFENDANTS' COUNTERMOTION FOR ATTORNEY'S FEES AND COSTS PURSUANT TO N.R.S. §18.070____

Date of Hearing: September 17, 2019

Time of Hearing: 1:30 p.m.

COME NOW Defendants, by and through their counsel of record, S. Brent Vogel and Katherine J. Gordon, and hereby oppose Plaintiff's Motion for Fees/Costs and submit their Countermotion for Attorneys' Fees and Costs Pursuant to N.R.S. §18.070.

This Motion is made and based on the Memorandum of Points and Authorities, the papers and pleadings on file herein, and such oral argument at the time of the hearing on this matter.

Dated this 26th day of August 2019.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ S. Brent Vogel
S. BRENT VOGEL
Nevada Bar No. 6858
KATHERINE J. GORDON
Nevada Bar No. 5813
Attorneys for Defendants Kevin Paul Debiparshad, M.D., Kevin P. Debiparshad, PLLC d/b/a Synergy Spine and Orthopedics, Debiparshad Professional Services, LLC d/b/a Synergy Spine and Orthopedics, and Jaswinder S. Grover, M.D., Ltd. d/b/a Nevada Spine Clinic

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is a medical malpractice action in which Plaintiff alleges Defendant Dr. Debiparshad failed to properly reduce a tibia fracture during surgery on October 10, 2017. Trial commenced on July 22, 2019 and ended on August 2, 2019 with Judge Bare granting Plaintiff's Motion for Mistrial. Plaintiffs now move for an award of attorney's fees and costs on the claimed basis Defendants caused the mistrial. The exact opposite is true: Plaintiff's actions and cumulative errors caused the mistrial. Blame for the resulting mistrial lies solidly, and solely, with Plaintiff. Plaintiff certainly has no basis to argue that Defendants purposefully caused the mistrial, as required by N.R.S. §18.070.

As set forth in detail below, the mistrial in this matter was absolutely unwarranted. Plaintiff filed the Motion for Mistrial knowing that it was the only way to avoid a very likely defense verdict. Plaintiff purposefully caused a mistrial and is responsible for reimbursement of Defendants' attorney's fees and costs.

II.

RELEVANT PROCEDURAL BACKGROUND

During the last full day of trial, Plaintiff called witness Jonathan Dariyanani to the stand. Mr. Dariyanani is the President and CEO of Cognotion, Inc., the company where Plaintiff was working in October 2017 when he underwent tibia repair surgery by Dr. Debiparshad. Plaintiff was terminated from Cognotion 15 months later, in January 2019. Plaintiff claimed his termination was the result of a physical and mental disability/impairment caused by the tibia repair surgery.

Despite the termination, Plaintiff and Mr. Dariyanani remained close friends.[1] In response to Plaintiff counsel's direct examination, Mr. Dariyanani offered testimony that Plaintiff was a "beautiful person" who "is still supporting his ex-wife after 22 years and doesn't have to, and he

[1] *See* Trial Transcript, Day 10, p. 99, attached hereto as Exhibit "A".

cares", constituting improper good character evidence pursuant to N.R.S. 48.045(1)(evidence of a person's character or a trait of his or her character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion).[2] Mr. Dariyanani's good character testimony was expanded during Defendants' cross examination wherein he would "leave [his] children with [Plaintiff]" and would "give [Plaintiff] a bag of cash and tell him to count it and deposit it."[3]

Because Plaintiff opened the door to character evidence, Defendants were entitled to rebut his testimony with negative character evidence. Plaintiff provided rebuttal character evidence during discovery consisting of emails between Plaintiff and other employees at Cognotion dated between 2016 and 2018. The emails were initially produced by Mr. Dariyanani in response to a subpoena issued by Defendants. More particularly, Mr. Dariyanani forwarded an email to defense counsel on April 22, 2019 with an attached zip drive containing several employment documents, including the emails.[4] Mr. Dariyanani copied Plaintiff's counsel on the email.

Plaintiff disclosed the emails in his 12th N.R.C.P. 16.1 Supplement to Early Case Conference Disclosure of Documents on May 16, 2019 (Bates stamped P00440-453 and P00479-513). The emails were disclosed again by Plaintiff in his Pre-Trial Disclosures, and for a third time as an identified trial exhibit (marked by Plaintiff as proposed trial exhibit No. 56). Not only did Plaintiff disclose the emails in Exhibit 56 on several occasions, he did not file a *motion in limine*, or otherwise request that the Court preclude or limit the use of the emails during trial.

Plaintiff's Exhibit 56 also included an email from Plaintiff to Mr. Dariyanani dated November 15, 2016 (Bates stamped P00487-88). Plaintiff titled the email "Burning Embers". The email began: "Lying in bed this morning I rewound my life…" It continued with Plaintiff (70 years old at the time) providing a summary of past jobs and the significance of each. In the second

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[2] *Id.* at p. 109.

[3] *Id* at p. 159.

[4] *See* email from Mr. Dariyanani to John Orr, Esq., dated April 22, 2019, attached hereto as Exhibit "B".

and third paragraphs of the "Burning Embers" email, Plaintiff wrote to the witness on the stand, Mr. Dariyanani:

> I learned at an early age that skilled labor makes more than unskilled labor. So I got a job working in a pool hall on the weekends to supplement my regular job of working in a sweat factory with a lot of Mexicans and taught myself how to play snooker. **I became so good at it that I developed a route in East L.A. hustling Mexicans, blacks, and rednecks on Fridays, which was usually payday**. From that lesson, I learned how to use my skill to make money by taking risk, serious risk.
>
> When I went to Thailand, I took a suitcase full of colored sun glasses to sell. They were a huge success. But one day in a bar a young Thai pretended to be interested in talking to me while his friends behind my back stole all my merchandize. From that lesson I learned that it's not a good idea to sell something that you cannot control and protect, a lesson reinforced later on in life when an attorney friend of mine and **I bought a truck stop here in Las Vegas where the Mexican laborers stole everything that wasn't welded to the ground**.[5]

Defense counsel showed the "Burning Embers" email to Mr. Dariyanani during cross examination and asked if his glowing opinions of Plaintiff's character—as relayed to the jury earlier—were affected by the content of the email when he received it in November 2016 (particularly the portions set forth above in bold).[6] Mr. Dariyanani testified that his opinions were not negatively affected.[7]

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[5] *See* Exhibit "C", Bates stamped pages P00487-88.

[6] *See* Exhibit "A", pp. 161-63.

[7] *Id.*

Prior to the use of the emails during Mr. Dariyanani's cross examination, Defendants moved to admit Plaintiff's proposed Exhibit 56 into evidence. Plaintiff stipulated to its admission. Plaintiff also did not object to Defendants' use of the "Burning Embers" email during the cross-examination of Mr. Dariyanani (which was previously admitted into evidence by stipulation).

After Mr. Dariyanani was excused, Judge Bare ordered a comfort break for the jury. During the break, Judge Bare told the parties he had concerns regarding his perception of prejudicial effect of the "Burning Embers" email. Judge Bare raised the issue of Plaintiff's failure to object to the email, but then volunteered to Plaintiff the excuse that his counsel likely "just didn't see [the email]" in the "multi-page exhibit". [8]

The only relief requested by Plaintiff—which occurred after Judge Bare raised his concerns—was to strike the testimony concerning the email. Judge Bare told Plaintiff that might only draw further attention to the email, and he denied Plaintiff's request. No further request or motion was made by Plaintiff that day regarding Defendants' stipulated and un-objected to use of the email.

On Sunday, August 4, 2019, at 10:02 p.m., Plaintiff filed a Motion for Mistrial based on Defendants' use of the "Burning Embers" email during the cross examination of Mr. Dariyanani. Defendants did not see the Motion until the following morning when trial was set to resume at 9:00 a.m. Judge Bare also had not reviewed the Motion until that morning. He raised the issue of the Motion immediately with the parties, outside the presence of the jury, and asked if Defendants intended to oppose it.[9] Defense counsel stated he "absolutely" intended to oppose the Motion but needed time to file the brief.[10] Defense counsel also suggested the Court allow the matter to proceed through jury verdict because trial was at least 80% completed with only three witnesses and closing arguments remaining. [11] Should the jury return with a verdict for Defendants, Plaintiff

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[8] *Id.* at p. 179.

[9] *See* Trial Transcript, Day 11, p. 4, attached hereto as Exhibit "D".

[10] *Id.*

[11] *Id.* at p. 18-19 and 46-47.

could raise the use of the "Burning Embers" on appeal. Defendants strenuously objected to a mistrial (and would have set forth a detailed analysis if provided an opportunity to file a written Opposition to the Motion). However, Judge Bare entertained argument and granted the Motion that morning.

Although the Court agreed with Defendants that the "issue of character was put into the trial by the Plaintiffs [sic]", and that Defendants "had a reasonable evidentiary ability to offer their own character evidence" to rebut Mr. Dariyanani's proffered good character testimony, he felt it was manifest necessity on behalf of the Court to declare a mistrial.[12]

The manifest necessity referenced by Judge Bare was based on his opinion that the prejudicial effect of the "Burning Embers" email outweighed its probative effect. However, the focus on the prejudicial effect of the email (and whether it outweighed the probative value) was improper. Defendants did not seek to admit the email pursuant to one of the exceptions set forth in N.R.S. 48.045(2)(evidence of other crimes, wrongs or acts may be admissible as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident). Defendants used the email as rebuttal bad character evidence during the cross examination of a witness whom Plaintiff had improperly prompted to offer good character evidence. Character evidence, by its very nature, is prejudicial. Further, the "Burning Embers" email was *admitted evidence*, which under Nevada law can be used for any purpose.

Under these circumstances, there is no requirement or justification for the Court to perform an analysis of the email's prejudicial effect versus its probative value. Plaintiff opened the door by offering good character evidence; therefore, Defendants are entitled to offer rebuttal bad character evidence. *See Taylor v. State*, 109 Nev. 849, 860, 858 P.2d 843 (1993)(Shearing, J., concurring in part and dissenting in part)(under the rule of curative admissibility, or the opening of the door doctrine "the introduction of inadmissible evidence by one party allows an opponent, in the court's discretion, to introduce evidence on the same issue to rebut any false impression that

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[12] *Id.* at pp. 31, 47 and 55.

might have resulting from the earlier admission")(*quoting United States v. Whitworth*, 856 F.2d 1268, 1285 (9th Cir. 1988)).

Judge Bare also failed to take into consideration Plaintiff's cumulative errors in disclosing the "Burning Embers" email and subsequently failing to object to its use (including disclosing the email on multiple occasions, failing to limit the use of the email during trial, stipulating to the admission of the email, and failing to object when Defendants used the email during Mr. Dariyanani's cross examination).

Despite Plaintiff's cumulative errors regarding the email, and the fact it was used properly by Defendants as rebuttal bad character evidence, Plaintiff currently argues that Defendants purposefully caused the mistrial and are, therefore, responsible for reimbursing Plaintiff his attorney's fees and costs incurred in trial. The arguments contained in Plaintiff's Motion for Fees/Costs, and proffered supportive case authority, are entirely without merit.

Plaintiff's theories of Defendants' actions are overflowing with overtones of conspiracies and alleged evil intent. It is telling that Plaintiff quickly dismissed his own obvious and fundamental failings regarding the Burning Embers email, while at the same time spinning complicated fantasies of Defendants' behavior.

A comparison of Plaintiff's and Defendants' actions concerning the mistrial is as follows:

Plaintiff	**Defendants**
1. Obtained the "Burning Embers" email in a zip drive from Plaintiff witness, Jonathan Dariyanani during discovery	1. Used the "Burning Embers" email during the cross-examination of Jonathan Dariyanani as rebuttal character evidence
2. Disclosed the "Burning Embers" email in his 12th NRCP 16.1 Supplement	

3. Failed to filed a motion *in limine* or other pleading to limit or preclude use of the "Burning Embers" email during trial

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4. Disclosed the "Burning Embers" email in his Proposed Trial Exhibits

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5. Disclosed the "Burning Embers" email in his Trial Exhibits, specifically Exhibit 56

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6. Improperly elicited good character evidence from Jonathan Dariyanani regarding Plaintiff

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7. Stipulated to admission of the "Burning Embers" email

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8. Failed to object during Defendants' use of the "Burning Embers" email

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In complete disregard of above disproportionate listing, Plaintiff currently insists *he* is entitled to reimbursement of his trial-based attorney's fees and costs from Defendants. To support this irrational conclusion, Plaintiff offers the following contrived tale of the events surrounding Defendants' use of the "Burning Embers" email:

> …Plaintiff on July 1, 2019 filed and served a Trial Exhibit List, with the packet of documents containing the Burning Embers letter listed as proposed Exhibit 56. Of critical note, Dr.

Debiparshad's counsel then on July 1st *knew* that Plaintiff had mistakenly listed an unredacted, highly-prejudicial, explosive document as one of his trial exhibits, and also knew beyond any shadow of a doubt that Plaintiff's counsel would never, ever, under any circumstances, introduce that unreacted document into evidence.

But, as demonstrated by past events, the Defense wanted the jury to read that letter—their proverbial smoking gun—in the worst way. They just needed to figure out a way to divert blame away from them to avoid being sanctioned by the Court should things spiral out of control, which it [sic] did. So they devised a surreptitious plan…

First, they waited until *one day before trial* to file their own Fifth Amended Trial Exhibit List to see if Plaintiff caught the mistake.[13] When Plaintiff failed to file a last-minute motion *in limine* or amend his list, the Defense filed their own exhibit list, **intentionally omitting any reference whatsoever to the radioactive Burning Embers letter** that they were anxious to selectively read to the jury. In an effort to hedge their bet, they did however list two other emails contained in that 79-page packet of documents—Defense Exhibits 463 & 464. That unequivocally demonstrates that the Defense lawyers carefully parsed through that packed and culled out and listed two less explosive documents that they perhaps would introduce at trial.

[13] While none of Plaintiff's story makes sense, this particular line is especially curious. How would the fact Defendants' Trial Exhibit List did not contain the "Burning Embers" email somehow work to "see if Plaintiff caught the mistake"?

> Having finessed Mr. Jimmerson to stipulate to the admission of one of his own client's exhibits that the record clearly shows he was unfamiliar with, Ms. Gordon then sets up her coup de grâce with the Burning Embers letter by asking questions about a few insignificant documents in that same exhibit, with the prejudicial blow saved for last by suddenly projecting the highlighted inflammatory language upon the television screen for emphasis as she asks the following nuclear questions…[14]

Plaintiff's story is illogical, rife with fantastical descriptions ("coup de grâce", "surreptitious", "radioactive", "smoking gun", "explosive document", and "nuclear questions"), and is more akin to a suspense novel than legal brief. It is, most certainly, a work of fiction. At its core, Plaintiff's argument finds fault with the fact Defendants did their due diligence and were familiar with the parties' proposed trial exhibits, while Plaintiff was not. Plaintiff should be embarrassed by his admitted lack of knowledge (of *his own* proposed trial exhibit), as opposed to vilifying Defendants for demonstrating diligence and familiarity with the trial documents.

Plaintiff's criticism of the fact Defendants did not disclose the "Burning Embers" in their proposed trial exhibits is equally illogical. Defendants did not anticipate utilizing the email at trial. It was not until Mr. Dariyanani offered improper character evidence describing Plaintiff as a "beautiful person" who could be trusted with "bags of money" that Defendants were entitled to raise the email as rebuttal character evidence.

Plaintiff's statement in the Supplemental motion that Defendants asked Mr. Dariyanani "questions about a few insignificant documents in that same exhibit" is also incorrect. The documents described by Plaintiff as "insignificant" were other emails between Plaintiff and Mr. Dariyanani which: (1) established that Plaintiff improperly suggested to Mr. Dariyanani how to testify during his deposition to ensure his testimony "corroborated" Plaintiff's testimony[15]; and (2)

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[14] *See* Plaintiff's Supplement to Motion for Mistrial and Fees/Costs, pp. 6-7.

[15] *See* Email from Plaintiff to Jonathan Dariyanani, dated April 5, 2019, attached hereto as Exhibit (footnote continued)

revealed that Plaintiff wrongfully interfered with, and limited, Defendants' ability to obtain Plaintiff's employment records from Mr. Dariyanani and Cognotion[16]. The emails which establish Plaintiff's questionable ethical behavior during the discovery process cannot be deemed "insignificant" and certainly were not raised by Defendants solely to deflect an approaching "explosive" document.

The false narrative presented by Plaintiff regarding Defendants' alleged malevolent behavior is beyond unpersuasive. It appears to be the product of paranoia and instability and is, frankly, concerning.[17] Equally concerning is the ease with which Plaintiff absolves himself of any responsibility: (1) to know his own trial exhibits; (2) to request that the Court limit or preclude use of the "Burning Embers" email; (3) to avoid improperly injecting character evidence into his witnesses' testimony; and (4) to object to any perceived improper use of the "Burning Embers" email (which had already been stipulated into evidence!). Plaintiff accepts zero responsibility for his actions/inactions which led to the use of an email *he had written*, as rebuttal character evidence. Plaintiff should not be rewarded for these cumulative failures—and refusal to acknowledge the same—through reimbursement of his expended trial attorney's fees and costs.

III.

LEGAL ARGUMENT

A. Applicable Law Regarding Attorneys' Fees and Costs under N.R.S. §18.070

Nevada Revised Statute §18.070 provides "[a] court may impost costs and reasonable attorney's fees against a party or attorney who, in the judgment of the court, purposefully caused a mistrial to occur." The statute's use of the word "may" confers discretion, not a mandate, on the

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"E".

[16] *See* Email chain between Plaintiff, Jonathan Dariyanani, and John Truehart (Financial Manager of Cognotion), dated July 10, 2018 to July 18, 2018, attached hereto as Exhibit "F".

[17] As with other documents filed with the Court in this matter, Defendants strongly suspect that Plaintiff himself (an attorney) authored, or at a minimum co-authored, his Supplement to Motion for Mistrial and Fees/Costs. This suspicion is premised on the prevalence of personal attacks on defense counsel and unnecessary vitriol that is typically absent in professional/impersonal legal writing.

Court to award attorneys' fees and costs if it is found that a party purposefully caused a mistrial. *Brewery Arts Center v. State Bd. Of Examiners*, 108 Nev. 1050, 1054, 843 P.2d 369 (1992)("in statutes, 'may' is permissive and 'shall' is mandatory)(internal citations omitted).

Although Plaintiff requests fees and costs under N.R.S. §18.070, he failed to present any supportive legal authority in his Motion or Supplement thereto. Plaintiff's citation to *Born v. Eisenman*, 114 Nev. 854, 862, 962 P.2d 1227 is misplaced. The issue in *Born* was improper comments made by the plaintiff's attorney within the hearing of the jury. The attorney was overheard calling co-counsel "lying sons of bitches" and an opposing expert a "whore". *Id.* at 1232. The *Born* Court understandably condemned this behavior and held such comments were fundamentally prejudicial. However, the Court ultimately could not issue a ruling regarding the improper comments because, similar to the current case, no contemporaneous objections were made by opposing counsel. *Id.* The Court also had insufficient information to conclude whether the entirety of the comments were actually made by the attorney and/or heard by the jury.

The *Born* decision is inapplicable to the instant case. There were no improper comments made by Defendants. Defendants utilized a piece of evidence, proposed by and stipulated into evidence by Plaintiff, as rebuttal character evidence after Plaintiff's witness improperly injected good character evidence into his testimony. The facts are entirely dissimilar to those in *Born*.

Plaintiff also misapplies, and misquotes, a selection from "Annotation, *Statement by Counsel Relating to Race, Nationality, or Religion in Civil Actions as Prejudicial*", 99 A.L.R.2d 1249, 1254 (1965). Plaintiff intentionally omitted the full citation which reads:

> A statement by counsel, in the trial of a civil action, relating to the race, nationality, or religion of a party or witness, or of some other person or group involved in the transaction or matter our of which the action arose, or of counsel in the case, or relating to race, nationality, or religion generally, if irrelevant and unjustified and calculated or tending to arouse racial, national, or religious prejudice or feeling, is universally condemned, and has in many cases been held, in the absence of effective corrective action,

> prejudicial to the opposing party, so as to warrant or require the declaration of a mistrial, the granting of a new trial, or the reversal of a judgment. (Emphasis added).

Plaintiff purposefully omitted the portion of the quote which limits the universal condemnation to *unjustified* circumstances. Defendants' use of Plaintiff's Burning Embers email was justified and proper as rebuttal character evidence and as an admitted piece of evidence that can be used for any purpose. Plaintiff also omitted the follow-up language in the A.L.R. *Statement* which provides:

> [A] statement of the kind in question is not necessarily or invariably improper or prejudicial. It may be justified as having a legitimate bearing on the issues, merits, or testimony, or on the ground that it was made only for the purpose of illustrating a point, or identifying the person referred to, or that it had been provoked by, or was made in retaliation of, a statement or argument of opposing counsel, or that the matter had otherwise been previously brought into the case by or at the instance of the opposing party or counsel, or without objection of his part; or it may be a merely insignificant or innocuous incident of the trial, or was not of such a nature as to calculated, or as having a tendency, to arouse racial, national, or religious prejudice. (Emphasis added).

Defendants' use of the "Burning Embers" email, and Plaintiff's admission therein that he previously hustled black, Mexican, and rednecks on payday, was provoked by Mr. Dariyanani's improper character evidence that Plaintiff was a beautiful and trustworthy person. The email contained statements by Plaintiff that illustrate a person who is neither beautiful nor trustworthy. The email was also directly e-mailed to the witness who provided the improper character evidence. This situation falls squarely within the above language of the A.L.R. article; *i.e.* a statement of the kind in question is not necessarily improper or prejudicial if made only for the purpose of illustrating a point, if provoked by or made in retaliation of a statement or argument of

opposing counsel, or was previously brought into the case by or at the instance of the opposing party or counsel.

Plaintiff's reliance on *Texas Employers' Ins. Ass'n v. Guerrero,* 800 S.W.2d 859, 862 (Ct. App. Tex. 1990) and *Hylton v. Eighth Judicial Dist. Ct., Dep't IV,* 103 Nev. 418, 423, 743 P.2d 622 (1987) is similarly unpersuasive. In *Guerrero*, the Court found fault with an attorney's appeal to the jury for ethnic unity, which is inapplicable to the instant matter. The *Hylton* decision addressed the unavailability of a crucial witness as constituting manifest necessity of the court to declare a mistrial. These facts also fail to support any arguments contained in Plaintiff's Motion or Supplement.

Plaintiff's attempt to characterize Defendants' use of the "Burning Embers" email as violative of a universal prohibition on evidence that contains racial comments also fails and is a false statement of the law. No such universal prohibition exists. Plaintiff cannot espouse an alleged wrongdoing committed by Defendants yet ignore the specific circumstances surrounding the accusation.

Plaintiff's Motion also ignores the fact the "Burning Embers" email was admitted into evidence, by stipulation, prior to its use by Defendants. Conversely, Plaintiff cites cases which address the *admissibility* of general character evidence. *See Dawson v. Delaware*, 503 U.S. 159 (1992) and *Flanagan v. State*, 109 Nev. 50, 53, 846 P.2d 1053 (1993). Defendants did not seek, or move, to admit Plaintiff's proposed "Burning Embers" email over an objection or by arguing the email was admissible evidence under the rules of evidence. The email had already been admitted by stipulation and it was properly used as rebuttal character evidence.

Finally, Plaintiff's reliance on *People v. Loker*, 44 Cal. 4th 691, 709, 188 P.3d 580 (2008) is also mistaken. The *Loker* holding actually supports Defendants' position that use of the "Burning Embers" email was proper as rebuttal character evidence. *Loker* involved character evidence provided during the penalty phase of a criminal defendant's trial. The Court held:

> The scope of proper rebuttal is determined by the breadth and generality of the direct evidence. If the testimony is 'not limited to any singular incident, personality trait, or aspect of [the

> defendant's] background,' but 'paint[s] an overall picture of an honest, intelligent, well-behaved, and sociable person incompatible with a violent or antisocial character,' rebuttal evidence of similarly broad scope is warranted. *Id.* (citing *People v. Mitcham*, 1 Cal. 4th 1027, 1072, 824 P.2d 1277 (1992).

The *Loker* Court also stated that if the initial character evidence is specific in nature, for example that the defendant suffered abuse in childhood, the door is not opened to rebuttal character evidence of any scope.

> When a witness does 'not testify generally to defendant's good character or to his general reputation for lawful behaviors, but instead testifie[s] only to a number of adverse circumstances that defendant experienced in his early childhood,' it is error to 'permit the prosecution to go beyond these aspects of defendant's background and to introduce evidence of a course of misconduct that defendant had engaged in throughout his teenage years that did not relate to mitigating evidence presented on direct examination. *Id.* (citing *People v. Ramirez*, 50 Cal. 3d 1158, 1193, 791 P.2d 965 (1990).

The holding of *Loker* is directly contrary to Plaintiff's position. The character evidence improperly injected by Plaintiff's witness, Mr. Dariyanani, was very broad in scope and consisted of general statements regarding Plaintiff's good character; *i.e.* testifying that Plaintiff is a beautiful person, who can be trusted with bags of money. It did not concern specific circumstances or events. Therefore, the scope of allowable rebuttal character evidence is equally broad, which easily includes the "Burning Embers" email.

None of the cases cited by Plaintiff support his request for attorney's fees and costs pursuant to N.R.S. §18.070. There is no evidence to suggest that Defendants purposefully caused the subject mistrial. To the contrary, Defendants requested that the Court allow the matter to proceed through jury verdict. There is also an absence of evidence that Defendants' actions of

utilizing the "Burning Embers" email was improper or caused the mistrial. Under these circumstances, Plaintiff is not entitled to an award of fees and costs.

B. Defendants are Entitled to Attorney's Fees and Costs Because Plaintiff's Multiple Mistakes Caused the Mistrial

As set forth in the listing above, Plaintiff committed multiple errors which led to the mistrial in this matter. Unlike the alleged action of Defendants, Plaintiff's mistakes are fundamental and uncontested. Plaintiff does not deny that he: (1) disclosed the "Burning Embers" email on multiple occasions; (2) failed to move, *in limine* to limit or preclude the use of the email; (3) proposed the email in his trial exhibit number 56, (4) stipulated to the admission of the email into evidence; and (5) failed to object to Defendants' use of the email during the cross examination of Mr. Dariyanani.

Plaintiff's disregard of his multiple mistakes, and contemporaneous contention that Defendants' caused the mistrial, is myopic and entirely unconvincing. At a minimum, Defendants had and continue to have a good faith belief their action in utilizing the "Burning Embers" email was completely appropriate and proper. By contrast, Plaintiff has offered no excuse for his admitted failures. If blame is to be placed on one of the parties for causing the mistrial, it rests soundly and solely with Plaintiff. Simply stated, in the absence of Plaintiff's numerous failures with regard to the email, the mistrial would not have occurred.

It is well-past time for Plaintiff to take responsibility for his actions in this matter, including the fact he purposefully caused the mistrial. He committed several preliminary and basic mistakes and then requested the mistrial to avoid a possible defense verdict. Under these circumstances, Defendant is entitled to reimbursement of their attorney's fees and costs incurred during the two week trial pursuant to N.R.S. §18.070.

C. Plaintiff's Request for Sanctions is Without Merit

Plaintiff alternatively argues that he is entitled to attorney's fees and costs pursuant to the Court's inherent power to sanction attorney misconduct. No basis exists for this request. To the contrary, the actions of Plaintiff and his attorneys in this matter, during both discovery and trial, displayed questionable ethics and forced Defendants to expend unnecessary time and expense in

an effort to obtain evidence which Plaintiff had—and breached—an affirmative duty to disclose.

For Plaintiff to argue attorney misconduct based on Defendants' single—and proper—act of using Plaintiff's disclosed and admitted email as rebuttal character evidence is the very definition of irony. Plaintiff goes so far as to describe himself in his Supplemental Motion as the "innocent party" and Defendants as having committed "flagrant misbehavior". To the contrary, the sole conveyors of "misbehavior" in this matter were Plaintiff and his counsel. Plaintiff was so accustomed to the judge sanctioning his behavior and granting virtually any request, no matter how improper, that he was simply shocked when Defendants raised evidence which harmed his case. His shock manifested in a request for mistrial, which was far to readily granted less than twelve hours after it was filed and without the opportunity for Defendants to file any opposing brief. Plaintiff's misguided indignation now presents as a baseless motion for reimbursement of his attorney's fees and costs.

Plaintiff is not an "innocent party" and there was no flagrant misbehavior on behalf of Defendants for which sanctions are necessary. As set forth in detail above, Plaintiff's multiple mistakes caused the circumstances surrounding the mistrial. Those mistakes, coupled with Plaintiff's questionable discovery and trial tactics, militate in favor of denying Plaintiff's current Motion, and alternatively granting Defendants' Countermotion for Attorney's Fees and Costs.

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IV.

CONCLUSION

For the reasons set forth herein, Defendants request the Court deny Plaintiff's Motion for Fees/Costs and grant Defendants' Countermotion for Attorney's Fees and Costs Pursuant to N.R.S. §18.070.

Dated this 26th day of August 2019.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ S. Brent Vogel
S. BRENT VOGEL
Nevada Bar No. 6858
KATHERINE J. GORDON
Nevada Bar No. 5813
Attorneys for Defendants Kevin Paul Debiparshad, M.D., Kevin P. Debiparshad, PLLC d/b/a Synergy Spine and Orthopedics, Debiparshad Professional Services, LLC d/b/a Synergy Spine and Orthopedics, and Jaswinder S. Grover, M.D., Ltd. d/b/a Nevada Spine Clinic

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August 2019, a true and correct copy of **DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR FEES/COSTS AND DEFENDANTS' COUNTERMOTION FOR ATTORNEY'S FEES AND COSTS PURSUANT TO N.R.S. §18.070** was served by electronically filing with the Clerk of the Court, using the Odyssey File and Serve system, and serving all parties with an email-address on record, who have agreed to receive Electronic Service in this action.

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By /s/ *Sharlei Bennett*
Sharlei Bennett, an Employee of
LEWIS BRISBOIS BISGAARD & SMITH LLP

Exhibit A

Exhibit A

Cognotion has more than half of its advisors/consultants are over 65, because I think tech companies like mine normally only hire people under 30. And I think they don't know what they're doing. And I love having people that have some lived experience. So I particularly enjoy working with -- you know, my closest circle of advisors are all people over 65. And I really respected Mr. Landess. I would say initially in our relationship, as he was a mentor to me and then, later, you know, I became his boss and I hired him. But yeah, I respected his skills. He's a great lawyer. But even more than a lawyer, you know, he's very -- he's incredibly emotionally intelligent, creative, visionary, giving person.

Q And so, would it be a fair state that in addition to your employer/employee relationship, you, on behalf of Cognotion and he for himself, that you're also a friend of his?

A Oh, no. I wouldn't say a -- I would say a very good friend. Like I am his close friend.

Q All right. Thank you. And then did there come a time when you formally retained Mr. Landess?

A Yeah. I think December of '15, roughly.

Q Let me show you what's been already admitted into evidence as Exhibit 46, Cognotion offer of employment, dated December 18, 2015.

MR. JIMMERSON: Would you put it up on the board, please? The ladies and gentlemen of the jury have seen this once before, I believe.

///

BY MR. JIMMERSON:

qualities and bad qualities, right. So if you ask Mr. Landess to tell you Little Red Riding Hood, after three days you wouldn't get to the wolf, but he's also a beautiful person who, like, is still supporting his ex-wife after 22 years and doesn't have to, and he cares. And we do our courses, the number one -- so you know, we have General Casey and the cardiologist on the ACC Board of Governors, and the number one speaker consistently is Mr. Landess. And I cared about him as a person, and I feel like he was genuinely wronged. I mean, I don't -- you know, to me, no one could have done a better job in physical therapy, and yet, you know, from my perspective, because of essentially the same neglect I see of elder people in the work that I do in day-to-day basis, here we are. And so --

MS. GORDON: Objection, Your Honor. There's no foundation for that comment.

MR. JIMMERSON: This is you. I -- I haven't offered any foundation and this is just him being responsive to the question pending.

THE COURT: All right. My thought is this is his perception based upon his friendship and dealings with Mr. Landess that he observed reasonably, so I think it's fair.

MR. JIMMERSON: Thank you.

THE COURT: I think a lay witness can give this kind of testimony, so go ahead.

BY MR. JIMMERSON:

Q You may continue.

A Yeah, so that was hard because I didn't feel like he did

protective order in place, I was under confidentiality obligations to my partners, and when you all finally got me a protective order, I gave it to you.

Q You were okay with Cognotion disclosing the documents that Mr. Landess felt okay disclosing, but nothing beyond that; is that your testimony?

A My testimony is I did not want anything to come into a public record that I thought was damaging, and I guess if your question is did I trust Mr. Landess' judgment and discretion even as an ex-employee not to release anything that would be harmful to us, the answer is, yes, and I still trust him to this day.

Q Even though he was no longer part of Cognotion, correct?

A I'd leave my children with Mr. Landess. I'd give him a bag of cash and tell him to count it and deposit it.

Q The -- working with Mr. Landess during this litigation process extended to April of this year. This is again part of admitted Exhibit 56. It's an email from Mr. Landess to you dated April 5th, 2019, and it was, I'll represent to you, after Mr. Landess was deposed and before you were deposed.

A Uh-huh.

Q And the beginning of the email states,

"But in an effort to avoid the nightmare of having to reconstruct exactly how I was paid monthly, here's what I said in my deposition. I was paid $10,000 a month. Some of it subtracted from investor payments and got sent to

et cetera, to what the numbers he gave were.

A No.

Q Mr. Dariyanani, you testified earlier that Mr. Landess is a beautiful person in your mind.

A We're all beautiful and flawed. He's beautiful and flawed.

Q And you respect him a great deal?

A I do.

Q And this was, that portion any way is consistent with your impression of Mr. Landess for at least the past five years, I believe you said?

A Yeah, and he's had -- he's had tough periods as, you know, as everybody has had. You know, as I've had tough periods.

Q And that was before five years ago, correct?

A I think so.

Q This is -- I'm going to try to blow it up, but this is an email that Mr. Landess sent to you and it's part of admitted Exhibit 56, dated November 15th, 2016. It's quite long, but the part I'm interested in is Mr. Landess appears to be giving a summary of his prior work experience and some experiences that he has gone through in his life.

A Uh-huh.

Q And the highlighted portion starts, "So I got a job working in a pool hall on weekends." And I'll represent to you, Mr. Landess testified earlier about working in a pool hall.

A Uh-huh.

Q "To supplement my regular job of working in a sweat factory

with a lot of Mexicans, and taught myself how to play Snooker. I became so good at it, that I developed a route in East L.A. hustling Mexicans, blacks, and rednecks on Fridays, which was usually payday. From that lesson, I learned how to use my skill to make money by taking risk, serious risk." When you read this, did that change your impression of Mr. Landess at all?

A Not at all. He had told me. I knew -- I knew about Jason's life. I knew that he dropped out of high school. You know, I have people that work at my company that are convicted felons. Look, I believe that everybody is worthy. Mr. Landess was very honest with me about every aspect of his life and I leave my children -- I left my daughter with him. So that's the answer to your question.

Q Did he sound apologetic in this email about hustling people before?

A I think when you're 70 years old, you reflect on your life, and not all of it's beautiful. Not all of it's beautiful. He doesn't feel like his divorce was beautiful. I think, you know, he doesn't feel like his -- I don't think Mr. Landess would sit here and tell you every moment of his life was great. You know, but I know him to be a person who loves people and cares for them and I feel like I know his heart and that didn't bother me because I -- I know him and I saw that it's reflected back on, you know, what a provincial fool he was at the time, and he was.

Q Does it sound to you at all from this email that he's bragging about his past as a hustler, and particularly hustling Mexicans, blacks, and rednecks on payday?

A Not at all. I think he feels -- I think he's very circumspect about that whole period of his life. And if you're asking me, like, did I read this as Mr. Landess being a racist and a bragger, I absolutely did not and I don't read it that way now, and I wouldn't have such a person in my employ.

Q He talks 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?

A I look at that as him reflecting back on his life and the way that he saw things then, growing up in L.A. the way that he did. I don't think that that -- I don't think it's representative of how -- I think he channeled himself then. I don't think it's representative of who he is now, and it's not who -- it's not the person that I've seen and know.

Q Thank you, Mr. Dariyanani. I appreciate it.

THE COURT: Thank you, Ms. Gordon.

MR. JIMMERSON: Is she done? Okay.

THE COURT: Any redirect, Mr. Jimmerson?

MR. JIMMERSON: Yeah, very briefly.

REDIRECT EXAMINATION

BY MR. JIMMERSON:

Q The -- this past was Mr. Landess 54 years ago when he was 19 years old; is that right?

A Yes.

Q In your observation, do people change over the course of 54 years?

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. So I say that now because I think what you're really saying doesn't surprise me. And I think what you're really saying is -- and again, interrupt me anytime if you want -- is, well, in a multi-page exhibit, we just didn't see it.

MR. JIMMERSON: That's exactly right, Judge. You're 100 percent right.

THE COURT: Okay. Well, there you go. And you know, nobody is perfect. We all do these things.

MR. JIMMERSON: I already said I was mad at myself.

THE COURT: I know. You did say that.

Okay. So --

MR. JIMMERSON: But I think all of us have an ethical obligation to practice law the right way and Kathy Gordon did not do so.

MS. GORDON: Your Honor, I would --

THE COURT: Okay. Hold on a second, if you don't mind.

MS. GORDON: That's smearing.

THE COURT: Okay. Go ahead. I'm sorry. I should --

MS. GORDON: And truly --

THE COURT: -- he's interjected, so you can too.

MS. GORDON: -- it's my witness, right? I'm the one who questioned Mr. Dariyanani about it, and I frankly had every right to do

Exhibit B

Exhibit B

Orr, John

From:	Jonathan Dariyanani <jonathan@cognotion.com>
Sent:	Monday, April 22, 2019 2:15 PM
To:	Orr, John
Cc:	Jonathan Dariyanani; James J. Jimmerson, Esq.; mal@h2law.com; mshannon@hpslaw.com; mkratsas@hpslaw.com; netienne@hpslaw.com; Harris, Adrina
Subject:	Re: [EXT] Re: Landess Matter

Dear Mr. Orr,

Thank you for your reply. I will hold 4/30 tentatively until I hear back from you. Regarding the document production you requested, I went through the books and records of Cognotion and have prepared the document production which I believe to be responsive to your request that you made to me via telephone on Thursday, April 11, 2019. Cognotion is specifically invoking attorney-client privilege with respect to the legal advice Mr. Landess rendered to us under his engagement. We have attempted to provide you with the broadest possible response without waving our privilege.

You indicated in our conversation that you would keep the materials that we are supplying to you confidential and that they would not appear in any public record or public exhibit or otherwise be accessible to the public. I expect that you will abide by this representation. The materials that you are being supplied with are of a highly confidential nature and could do significant damage to Cognotion if they were improperly disclosed. If there is material in this production that you would like to make public, I expect to be notified in advance and to have the opportunity to seek a protective order from such disclosure, as many of these documents are governed by applicable confidentiality agreements.

You will find below a link where you can download the document production. By accessing the link, you agree to abide by your representations regarding confidentiality given to me on our call of April 11, 2019.

I have included in the production a video asset where Mr. Landess appears as faculty in our Certified Nurse Assistant course. He appears at the 1:30 mark in the video entitled S01.A01.L01 Close Up_Meet Your Faculty.mp4. I am not sure if this material is something that you are interested in, but it is clearly not privileged. If you'd like to review all of the video footage where Mr. Landess appears in the course, I could arrange that, but the footage is not organized by instructor, so someone would have to go through the course and pull Mr. Landess's footage, which I am willing to do if you'd like.

It has taken significant Cognotion resources to supply you with the requested production. Thank you for amending your subpoena to narrow down to the materials which you requested. While we have every desire to cooperate in good-faith with your efforts to represent your client and evaluate Mr. Landess's claims fairly, our cooperation is predicated upon your good faith attempt to seek information only reasonably relevant to your inquiry and should not be considered a waiver of objections to this production.

Please let me know when you can confirm 4/30 for the deposition, who will be attending live and via telephone and what time you'd like to get started and I can supply you with the address and if you will need a speakerphone available, which I can supply.

Best regards,

Jonathan Dariyanani
President and CEO
Cognotion, Inc.

Jason Landess Discovery.zip

On Mon, Apr 22, 2019 at 3:04 PM Orr, John <John.Orr@lewisbrisbois.com> wrote:
Jonathan

Thank you for reaching out. We could do April 30. I just need to confirm that this works with all other counsel. We also need to make sure we have all of the records before we proceed with the deposition. Let's tentatively plan for 4/30. I will confirm with everyone if that works. When do you anticipate disclosing the records ? Thank you.

Thank you.

Sent from my iPhone

LEWIS BRISBOIS

John M. Orr
Attorney
John.Orr@lewisbrisbois.com

T: 702.693.4352 F: 702.893.3789

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Representing clients from coast to coast. View our locations nationwide.

On Apr 22, 2019, at 10:43 AM, Jonathan Dariyanani <jonathan@cognotion.com> wrote:

External Email

Dear Mr. Orr:
I haven't received a response to the email that I sent below on Wednesday, April 17, 2019. Please reply as I have kept these dates open for you.
Thank you,
Jonathan

On Wed, Apr 17, 2019 at 1:20 PM Jonathan Dariyanani <jonathan@cognotion.com> wrote:
Dear Mr. Orr:

I am writing to follow-up on our conversation of Thursday of last week. You requested some documents from me for the malpractice case involving Jason Landess. I will provide our document response to you on Monday, as I have been out of the office on business this week. My intention is to upload those documents to Dropbox and send you a link that you can use to download them.

As to scheduling my deposition, I have the following dates available. You offered to take the deposition at my house, if that would be more convenient for me. I think it would as I have been traveling a lot lately and I'd rather be at home. Here are the dates I can offer:

April 29 or April 30
May 10.

Please let me know if any of these dates work for you. We live in Virginia, approximately 50 miles from Washington DC. Reagan National Airport (Washington National) is the best airport to fly into.

If this isn't convenient for you, I can New York City on May 6, as I have to be in town for a business dinner that night.

Best regards,
--
Jonathan Dariyanani
President
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Tel USA +1 540-841-0226
Fax USA +1 415-358-5548
Email: jonathan@cognotion.com

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Exhibit C

Exhibit C

Gmail Jonathan Dariyanani <jdariyanani@gmail.com>

Burning Embers

Jason Landess <jland702@cox.net> Tue, Nov 15, 2016 at 12:07 PM
To: Jonathan Dariyanani <jonathan@cognotion.com>

Lying in bed this morning I rewound my life and counted the mountains I've climbed or, in most cases dealing with entrepreneurialism, attempted to climb. As far back as I can remember there's been this burning desire inside of me to make something out of what resources were at my disposal. When you're young and poor it's walking a mile to a donut shop to get a canvas bag full of donut packages so you can walk door-to-door selling them for a quarter and make a nickel. From that lesson I learned about profit sharing and what manual labor is all about. The same was true with my paper route and making and selling customized jewelry from corks, glue, and sequins.

I learned at an early age that skilled labor makes more than unskilled labor. So I got a job working in a pool hall on the weekends to supplement my regular job of working in a sweat factory with a lot of Mexicans and taught myself how to play snooker. I became so good at it that I developed a route in East L.A. hustling Mexicans, blacks, and rednecks on Fridays, which was usually payday. From that lesson I learned how to use my skill to make money by taking risk, serious risk.

When I went to Thailand, I took a suitcase full of colored sun glasses to sell. They were a huge success. But one day in a bar a young Thai pretended to be interested in talking to me while his friends behind my back stole all my merchandize. From that lesson I learned that it's not a good idea to sell something that you cannot control and protect, a lesson reinforced later on in life when an attorney friend of mine and I bought a truck stop here in Las Vegas where the Mexican laborers stole everything that wasn't welded to the ground.

But even though I became an attorney and got a good job working as a Deputy District Attorney, those embers of wanting to build something still burned inside of me. So Tim and I put a little partnership together and started building custom houses. We loved it; but our wives hated it. Tim's wife was so bothered by it that she insisted he stop doing business with me, which to my deep disappointment he did. Shortly thereafter I moved to Las Vegas with Carolyn and my young family.

Back then you had to be a resident of Nevada for a year before you could take the Bar. So I set out finding a piece of property to rezone and develop. My wife hated it. But after about 10 months I flipped a 5-acre piece of ground for $100,000 profit, big money in those days. I was so proud, and so was Larry Speiser, my former law-school classmate and law partner. But not one word of congratulations from Carolyn. From that lesson I learned that I had the skill and fortitude to push a project through to success despite having a lot of outside resistance. But if you really have no one to celebrate your successes with, what good are they? That lesson was reinforced the night I came home from court after winning the case against Dr. Gordon and Marilyn Miglin and had no one to celebrate with.

That desire to build something successful was what caused me to embrace Dr. Gordon's invention and serve as the company's president for two years until my office was burglarized. From that lesson I learned that no matter how skillful and clever you are, you truly just cannot do a good deal with a bad man—in my case several bad men and one naïve woman. I also again experienced the toxicity of greed. Finally, after five long years of litigation and prevailing, I learned that life really isn't worth living if you don't stand up for yourself and your family when you're pushed to the wall. Liking who you are as a man makes all the other hardships in life more bearable.

Having by that time learned those lessons made it easy to just turn and walk away from Mike Macris. I was prepared to do that even if I didn't break even.

So then at about 66 years old my enterprizing friend Jonathan sat in my living room and painted a verbal dream of a start-up education company. The idea was to build something—what that would be was not that clear. But something marketable, edgy, cool, and novel. And once again those embers started to burn inside me. Now four years later look where that dream is.

What I realized this morning is that my life's journey has prepared me to be a good component of the Cognotion endeavor. Those many painful failures sowed the seed of a success that was impossible to foresee at the time. Although I'm old and limited at times in the amount of energy I have, what I lack there is offset by many insights and skills The Lord has cultivated in me over those many years. I am thus this morning MOST grateful to be alive, to be who I am, and to have the privilege of being a part of this remarkable journey. And what excites me the most is the best is yet to come.

Thank you my dear friend for the dream you had and for letting me be a part of it.

Jason

Exhibit D

Exhibit D

MR. VOGEL: No. We've discussed it with our client and their position has not changed.

THE COURT: Okay. All right. Well then that takes us to the next item which is this. This is a motion for mistrial that looks like it was filed last night, Sunday night or came to the Court's attention sometime around after 10:00 last night, I think. And so I saw it for the first time this morning and that's why I'm a few minutes late coming in, is because I tried to make some sense of the motion. In other words, I just tried to in my mind conceptualize the extent of what was brought up. And so I did that. Now, I, in general, I see what's in the motion for mistrial from the Plaintiffs.

Is there an opposition that the Defense has to a mistrial at this point?

MR. VOGEL: No. We just saw it this morning as well, so we would need time to --

THE COURT: Well, I mean as -- do you intend to oppose the motion or do you --

MR. VOGEL: Oh, absolutely. Yes.

THE COURT: Okay. So you oppose the idea of a mistrial?

MR. VOGEL: We do.

THE COURT: Okay. All right. So we have to reconcile that. The jury is here. So that's going to take a little while. So Dominique, I'd like for you to go tell the jury that there's an item that we have to deal with and that I do anticipate that's going to take a little while. So at the earliest, I'd ask them to return outside at 10:00.

THE COURT: -- conference on Friday.

MR. VOGEL: Yes. Thanks, Judge. And we appreciate it and I -- and I understand your comments on your view on how the evidence came in was a took to talk to our clients with. And that's what we did. We talked to them. We talked to a lot of people. I talked to, you know, much wiser lawyers than I and got their take on it. We talked to a judge. We talked to several people about this. And we appreciate it. And ultimately, based on all the discussions, our review of the law and whatnot, we felt like, look, this is not actually a case for mistrial and that we want to go forward.

That was what we came to. But yes, we definitely appreciated your comments on that and I appreciate your setting out how you'd like to handle this right now going forward procedurally, so that's all I wanted to say on that point.

THE COURT: All right. Well that takes us then to the -- so I guess there's no reason to revisit the idea of potentially trying to settle your case?

MR. VOGEL: If you'd like, we can talk to our clients, but after talking to them this weekend, I don't think that they've changed their mind.

THE COURT: All right. Well, we don't know that until you've talked to them, right? So why don't we just go off the record and give you a few moments in the conference room. Do you think that's fair or do -- if you don't want to do that, you don't have to. I'm just --

MR. VOGEL: No --

THE COURT: I said a lot of things that he's heard now that he --

MR. VOGEL: Yeah.

THE COURT: -- didn't know on Friday, right -- over the weekend.

MR. VOGEL: We're happy to do it.

THE COURT: So who knows what'll happen, right?

MR. VOGEL: Right.

THE COURT: Okay. So let's go off the record and you guys talk with each other and I'll be here. Let me know when you want to resume, okay?

MR. VOGEL: Very good. Thank you.

[Recess taken from 9:40 a.m. to 11:05 a.m.]

THE COURT: Okay. We're back on the record.

Mr. Vogel?

MR. VOGEL: Yes, Your Honor. We had the opportunity to discuss. We'd still like to move forward with the motion, and hopefully with the rest of the trial.

THE COURT: Okay. All right. So the jury's probably back now at 10. So I want to hear this motion. The only thing I can think about, and give me your input, please, counsel, is tell them that it's going to be a while, 11:00. I mean, that's all I can think about at this point. Does anybody have a thought? Have them report back at 11?

MR. JIMMERSON: That should be sufficient time for the Plaintiff and Defendant to give them -- give you their views, our views.

THE COURT: -- helpful here. I agree with the Defense that the issue of character was put into the trial by the Plaintiffs, so I do think that the Defense had a reasonable evidentiary ability to offer their own character evidence to try to show -- to impeach Mr. Daryanani, or to bring forth evidence to show that what Mr. Daryanani said about Mr. Landess being a beautiful person, the bags of money, the leaving the daughter, all that that you just mentioned. I agree with you.

MS. GORDON: Okay.

THE COURT: I mean, I don't think I could be swayed, actually, on that. I mean, I do think that the issue of character was put in, and so I think my concern is not that at all. I do think you had a right to do it. I think the issue becomes the extent to which he did do it, and so let me, in fairness to you, tell you the things that are on my mind that you wouldn't know, and this is a good seg-way for that, I think, right now, and you can take as much time to talk to me as you want.

You know, I've had the benefit of this weekend to really think about it and you indicated you talked to a judge. Well, I had two hours with Mark Dunn. Two personal hours in a room with him that I caused to occur because I wanted to talk to a better judge than myself. So I've had a lot of time to think over the weekend, so my thought is, with the item itself, I know I said on Friday in just trying to react to it as a human being and as a judge, that most likely, I would've granted a pretrial motion in limine to preclude this.

I'd like to tell you that upon reflection with an opportunity to think which judges should do. It's one hundred percent, absolutely

Defense. They intended to use it exactly in the fashion that they did.

They just didn't appreciate, I don't think, the -- the predictable response of the Court, and of the Plaintiffs relative to the misuse of this type of explosive information that had no place at trial. Mr. Landess has never placed race as an issue and the Court's asked the question directly of the Defense, do you think that race has a place in this case. And, of course, the answer has to be yes for the Defense, because they're trying to justify their -- their misbehavior. But that's not in, at least our review of the case law, warranted that there cannot be a good faith basis for the use of this document in the fashion they did.

Especially understanding that it hadn't been offered by the Plaintiffs at any time. It hadn't been the subject matter of a single question in a single deposition in which there were more than 15 depositions taken. It wasn't in -- that wasn't discussed in Mr. Landess' two different days of depositions. It wasn't examined of him on three days of direct and cross examination doing this trial. Not one subject matter came up. This was a gut shot at the end of the case, used in a premeditated way by the Defendant to gain an advantage before the jury. And in doing so, they well beyond crossed the line with the *Lioce*. They created an irreversible prejudice to the Plaintiff. And more importantly, I think, to the administration of justice and to this Court.

Thank you, sir.

MR. VOGEL: If I may, just briefly, Your Honor, you know evidence of bad acts is always prejudicial. Usually it's in the context of other crimes, violent acts ands things along those lines. But it's always

prejudicial, but it's also admissible. And in this case, Your Honor, if this Court is considering granting a mistrial, I would ask the Court to do so after the jury comes back with a verdict. At least in that instance, it would be treated more as a motion for a new trial, and there's still a chance, who knows, I mean the jury could come back in Plaintiff's favor and the issue is moot. But the parties have already spent, as everyone agrees, tens, if not hundreds of thousands of dollars getting to this point now. And to pull the plug at this point, is potentially very prejudicial to all of the litigants involved. I would say the better -- the better course would be to allow the case to go to verdict, or in the alternative, to not release the jury, and allow -- allow the parties to take an emergency writ to the Supreme Court, just to see if they would weigh in on is this something that's overly prejudicial.

MR. JIMMERSON: And my response is Plaintiff's motion is simply the Defense should have been more circumspect about this, and thought about this before they created this error in the record.

THE COURT: All right. This decision, I'll share with you. It's interesting, because in some ways it's the most difficult decision I've made since I've been a Judge, but in other ways it's the easiest decision I've ever made since I've been a Judge. I'm going to explain in detail my thoughts and make a record as to why I've reached this conclusion. But the Plaintiff's motion for mistrial is granted. At 11:00 I'll bring in the jury and I'm going to excuse me.

After they're excused, I will make a record why this is the appropriate and in my view, the only choice that can be made under the

Mr. Dariyanani testifies. Mr. Dariyanani does say the things that Ms. Gordon's attributed to him, I mean -- and probably more. But he did say Mr. Landess is a beautiful person, bags of money, trust him with that. He's trustworthy. I would leave my daughter with him. He's trustworthy.

And so it is my view that that did open the door to character evidence, where now the Defense in its wisdom, could bring forth evidence to show that Mr. Landess is not so honest. He's not so beautiful or -- you know, his character is now put in question by the Plaintiffs. I do believe that opened the door to that legal ability to bring forth some contrary character evidence. It might not have been just Mr. Dariyanani that brought it up. It could have been Mr. Landess himself during his testimony or for that matter, his daughter. But clearly, Mr. Dariyanani brought it up.

So I don't have a problem with that in a legal sense, that the Defense could impeach or attempt to cross-examine on this point. The problem I see with the situation, though, is in my view -- and I don't think there's even any possible potential good faith dispute with this. But I'm only one person. The email itself, I think a reasonable person could conclude only one thing. And that is that the author is racist.

> "I learned at an early age that skilled labor makes more than unskilled labor, so I got a job in a pool hall on the weekends to supplement my regular job of working in a sweat factory with a lot of Mexicans. I taught myself how to play snooker. I became so good at it that I developed a route in East L.A.,

Exhibit E

Exhibit E

Gmail Jonathan Dariyanani <jdariyanani@gmail.com>

From Jason

1 message

Jason Landess <jland702@cox.net> Fri, Apr 5, 2019 at 1:03 PM
To: Jonathan Dariyanani <jonathan@cognotion.com>

Jonathan:

But in an effort to avoid the nightmare of having to reconstruct exactly how I was paid monthly, here's what I said at my deposition: I was paid $10,000 per month. Some of it was subtracted from investor payments and not sent to Cognotion, just to have Cognotion turn around and send it back to me. Some of that was then loaned to Cognotion interest-free to help the company and I elected to defer those loaned monies to claim as wages when Cognotion repaid the loan in early 2018 when ReThink invested in CHE.

When that happened in early 2018, Cognotion paid me all accrued salary and all the money I had loaned to Cognotion. From Cognotion's perspective, $50k of the 3/21/2018 $100k payment was loan repayment by Cognotion (which is true) and $50k was payment of accrued salary to me, which is also true.

But from my perspective, the whole $100k was income to be reported on my 2018 return in September of this year, with $50k of it being deferred income. I did that because the tax rates are more favorable in 2018, which is also true.

So to support the entire $300k that Cognotion has paid me in wages, I've produced the attached documents:

- 2016 1099 from Cognotion for $85k
- 2017 1099 from Cognotion for $75k
- 3/21/2018 wire for $100k from Cognotion, which underneath the redaction says $50k is for salary and $50k for loan repayment (I sent Michael an unredacted copy, which he they may produce at their deposition)
- 1/12/2018 wire for $10k from Cognotion, which I told Michael Lindbloom was all wages ($5k for 2017 arrearages and $5k towards 2018)
- 5/3/2018 wire for $30k from Cognotion for 2018 wages

That totals $300k and jibes with what Cognotion has sent me in the 2016 & 2017 1099's, the attached letter John sent to Dropbox stating I was paid $90k in wages in 2018 (which has been produced to the defense), me treating the whole $100k from 3/21/2018 as 2018 income, the other two 2018 wires totaling $40k, and what I reported on, and will report on, my tax returns.

So in terms of corroboration, all you need to do from your end is produce the 2016 & 2017 1099's, John's letter, and the matching 3/21/2018 wire from Cognotion's bank, $50k of which from Cognotion's perspective was loan repayment but which from my side of the table was deferred income. That totals $300k.

If they want to debate the nuance of me treating the $50k as income and Cognotion treating it as a loan, so be it; because it's a nothing-burger. And certainly Cognotion has properly characterized all its distributions to me as Cognotion sees and booked them.

The absolute truth is Cognotion paid me $10k per month in salary from January 2016 thru June 2018.

6 attachments

Exhibit 5.pdf
105K

Exhibit 1.pdf
69K

Exhibit 2.pdf
310K

Exhibit 3.pdf
109K

Exhibit 4.pdf
116K

Letter from John Truehart.pdf
68K

Exhibit F

Exhibit F

Gmail Jonathan Dariyanani <jdariyanani@gmail.com>

457987-002 for: Jason Landess (AKA - Kay George Landess)

John Truehart <john@cognotion.com> Wed, Jul 18, 2018 at 4:11 PM
To: Jason Landess <jland702@cox.net>
Cc: Jonathan Dariyanani <jonathan@cognotion.com>

Jason,

Thanks for the clarification. The letter that you attached was sent.

Regards,

John

John Truehart
Finance Manager
Cognotion, Inc.
244 Fifth Avenue
C254
New York, NY 10001
john@cognotion.com
(917) 847-2553

On Thu, Jul 12, 2018 at 7:04 PM, Jason Landess <jland702@cox.net> wrote:

> John,
>
> You are correct. I think I muddled things, for which I apologize.
>
> Just to keep things straight, let me bring the accounting to date.
>
> Attached hereto is my letter to you dated February 22, 2018, which brought my accounting to date as of that date. I don't think we have any disagreements over that. So as of 02/22/2018 Cognotion had paid me a total of $65,000 in salary for 2017, leaving a balance of $55,000. It however still owed $50,000 of a non-interest bearing loan for $100,000. The first $50,000 of that loan was repaid on 12/13/2017.
>
> When Cognotion was paid from the ReThink financing in March 2018, $100,000 was paid to me on 03/21/2018. $50,000 of that was to pay off the balance of the loan; and the other $50,000 was credited against my accrued salary, leaving a balance due to me of $25,000 as of 02/28/2018.
>
> Then on 04/30/2018 I deposited $73,000 into Cognotion's account. That was James Austin's final payment for his stock.
>
> On 05/03/2018, Cognotion paid me $30,000. That was credited against my salary, leaving a balance due to me of $15,000 as of April 30, 2018. That is the most recent payment I've received from Cognotion.
>
> Hence, as of June 30, 2018, Cognotion owes me $35,000.

Let me know if you disagree with this and, if so, why. If not, this will be the starting point of any discussions we have on this subject in the future.

I have thus revised the letter to accord with these numbers.

Regards,

Jason G. Landess, Esq.

7054 Big Springs Court

Las Vegas, NV 89113

Phone: 702-232-3913

Fax: 702-248-4122

Email: Jland702@cox.net

From: John Truehart [mailto:john@cognotion.com]
Sent: Thursday, July 12, 2018 2:43 PM
To: Jason Landess; Jonathan Dariyanani
Subject: Re: 457987-002 for: Jason Landess (AKA - Kay George Landess)

Jason,

I understand that we have the obligation to pay you $120k for 2017. However, I'm not sure if we should state that we paid you that amount, as that seems to state that we actually paid that amount of cash during the year?

Thanks,

John

John Truehart

Finance Manager

Cognotion, Inc.

244 Fifth Avenue

C254

New York, NY 10001

john@cognotion.com

(917) 847-2553

On Thu, Jul 12, 2018 at 5:38 PM, Jason Landess <jland702@cox.net> wrote:

John,

This is a more accurate accounting statement. Please notarize the document and forward to my legal counsel.

Thank you!

Regards,

Jason G. Landess, Esq.

From: John Truehart [mailto:john@cognotion.com]
Sent: Thursday, July 12, 2018 1:37 PM
To: jland702
Subject: Re: 457987-002 for: Jason Landess (AKA - Kay George Landess)

Jason,

Please see the attached. I put down what we paid you in each year for your services, regardless of when the payment was for. Feel free to make whatever changes you want and I can sign the letter and I can get the form notarized on Monday.

Regards,

John

John Truehart

Finance Manager

Cognotion, Inc.

244 Fifth Avenue

C254

New York, NY 10001

john@cognotion.com

(917) 847-2553

On Thu, Jul 12, 2018 at 2:56 PM, jland702 <jland702@cox.net> wrote:

Technically, I have been paid $35000 so far this year. The other $5000 is the balance due from 2017.

Jason

Sent from my Verizon, Samsung Galaxy smartphone

-------- Original message --------

From: John Truehart <john@cognotion.com>

Date: 7/12/18 10:39 AM (GMT-08:00)

To: Jason Landess <jland702@cox.net>

Subject: Re: 457987-002 for: Jason Landess (AKA - Kay George Landess)

Jason,

So then we paid you $40,000 for fees this year, not $80,000?

Regards,

John

John Truehart

Finance Manager

Cognotion, Inc.

244 Fifth Avenue

C254

New York, NY 10001

john@cognotion.com

(917) 847-2553

On Thu, Jul 12, 2018 at 12:55 PM, Jason Landess <jland702@cox.net> wrote:

John,

The whole $100k paid on 3/21 was a loan repayment. The other two were salary payments.

Jason

From: John Truehart [mailto:john@cognotion.com]
Sent: Thursday, July 12, 2018 9:14 AM
To: Jason Landess
Subject: Re: 457987-002 for: Jason Landess (AKA - Kay George Landess)

Jason,

I'm thinking that we should just tell them the amounts that were paid to you, ignoring what's owed, unless you need that. I'm showing that we made the following payments to you in 2018:

1/12 $10,000

3/21 $100,000 ($50,000 of this was a loan repayment)

5/2 $30,000

Was $10,000 out of the above also a loan repayment?

Thanks,

John Truehart

Finance Manager

Cognotion, Inc.

244 Fifth Avenue

C254

New York, NY 10001

john@cognotion.com

(917) 847-2553

On Wed, Jul 11, 2018 at 12:00 AM, Jason Landess <jland702@cox.net> wrote:

John,

Just send them information for 2017 and 2018. My records show that I was paid $65,000 in 2017, and $80,000 so far in 2018 ($55,000 of that making up for the 2017 deficiency).

So I have been paid $25,000 so far in 2018 and am thus owed a total of $45,000 through 07/31/2018.

Regards,

Jason G. Landess, Esq.

From: John Truehart [mailto:john@cognotion.com]
Sent: Tuesday, July 10, 2018 1:29 PM
To: Jonathan Dariyanani
Cc: Jason Landess
Subject: Re: 457987-002 for: Jason Landess (AKA - Kay George Landess)

Sure, Jonathan. Jason, I never received any email or anything from ProDox, but please let me know how you want to proceed.

Thanks,

John

John Truehart

Finance Manager

Cognotion, Inc.

244 Fifth Avenue

C254

New York, NY 10001

john@cognotion.com

(917) 847-2553

On Tue, Jul 10, 2018 at 4:24 PM, Jonathan Dariyanani <jonathan@cognotion.com> wrote:

John,

Please work with Jason to respond to this request.

Thanks!

J

---------- Forwarded message ---------
From: Tina M. Super <tmsuper@prodox.net>
Date: Mon, Jul 9, 2018 at 10:48 AM
Subject: 457987-002 for: Jason Landess (AKA - Kay George Landess)
To: jonathan@cognotion.com <jonathan@cognotion.com>

Hi Jonathan,

We emailed a legal request for employee/payroll records on a person named: Jason Landess (AKA - Kay George Landess) on 6/12/18.

Can you please provide the status of this request?

Thank you for your attention to this matter.

Tina Super

Error! Filename not specified.

Office (602) 889-3487

Fax (702) 870-2945

--

Sent from Gmail Mobile...please excuse booboos and terse incomprehensibility! Jonathan Dariyanani 540-841-0226

OPPC
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Fax No: (702) 567-1568
mal@h2law.com
av@h2law.com
Attorneys for Plaintiff

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

JASON GEORGE LANDESS, aka KAY GEORGE LANDESS, an individual,

Plaintiff,

vs.

KEVIN PAUL DEBIPARSHAD, M.D., an individual; KEVIN P. DEBIPARSHAD, PLLC a Nevada professional limited liability company doing business as "SYNERGY SPINE AND ORTHOPEDICS" DEBIPARSHAD PROFESSIONAL SERVICES, LLC, a Nevada professional limited liability company doing business as "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, doing business as "NEVADA SPINE CLINIC." VALLEY HEALTH SYSTEM, LLC a Delaware limited liability company doing business as "CENTENNIAL HILLS HOSPITAL," UHS OF DELAWARE, INC., a Delaware corporation also doing business as "CENTENNIAL HILLS HOSPITAL," DOES I-X, inclusive, and ROE CORPORATIONS I-X, inclusive,

Defendants.

CASE NO.: A-18-776896-C
DEPT NO.: 32

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISQUALIFY THE HONORABLE ROB BARE ON ORDER SHORTENING TIME, AND COUNTERMOTION FOR ATTORNEYS' FEES AND COSTS

Date: 9/4/19
Time: 9:00 a.m.
Dept 30- Courtroom 14A

Plaintiff Jason G. Landess a.k.a. Kay George Landess ("Plaintiff"), by and through his counsel, The Jimmerson Law Firm, P.C. and Howard & Howard Attorneys PLLC, hereby submits this Opposition to Defendants' Motion to Disqualify the Honorable Rob Bare and Countermotion for Attorneys' Fees and Costs.

This Opposition and Countermotion is made and based upon the papers and pleadings on file, the memorandum of points and authorities attached hereto, and any oral argument the Court may entertain at the time of the hearing on this matter.

DATED this 30th day of August, 2019.

THE JIMMERSON LAW FIRM, PC

/s/ James J. Jimmerson, Esq.
JAMES J. JIMMERSON, ESQ. #264
415 South 6th Street, Suite 100
Las Vegas, Nevada 89101

HOWARD & HOWARD ATTORNEYS, PLLC
Martin A. Little, Esq. #7067
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant Dr. Kevin Debiparshad's ("Dr. Debiparshad") Motion to Disqualify the Honorable Rob Bare is a frivolous, reckless, *ad hominem* attack against one of the most fair, impartial, distinguished and capable jurists to ever occupy the bench in Clark County. It is a privilege to practice before him. Defendants' Motion is completely devoid of merit, and is nothing more than a strategic attempt to intimidate Judge Bare in advance of the hearing on Plaintiff's Motion for Attorney's Fees and Costs against Defendants for Defendants' misconduct that led to the order of mistrial on August 5, 2019, now set for September 17, 2019. Due to Defendants' egregious professional misconduct that led to Judge Bare granting the first mistrial in his 8.5 years on the bench—a decision he characterized as the "hardest, yet easiest decision I ever made"—Dr. Debiparshad and his counsel are now facing the possibility of being held liable for hundreds of thousands of dollars in fees and costs and other sanctions for purposefully causing a jury mistrial after two weeks of trial. In a strategic and retaliatory course of conduct, Defendants have, unfortunately, decided to employ the desperate nuclear option of personally attacking Judge Bare, in the hope that his gracious and dignified nature will prompt him to be lenient when he considers awarding fees and costs, and other sanctions, to Plaintiff on September 17, 2019.

To accomplish this, Defendants have now escalated their invective and unscrupulous course of conduct by filing a Motion that is legally unsound, stylistically obnoxious, and replete with gross exaggerations and downright prevarications. It is, at its core, factually inaccurate and contains glaring omissions and misrepresentations which emphasize its frivolousness. It is not a carefully drawn document.

As just one example, in his introduction, Dr. Debiparshad quotes a select, out-of-context portion of the Transcript from Trial, Day 10 focusing upon the Court's kind words to Mr. Jimmerson and claiming it "centered on Judge Bare offering Plaintiff counsel an excuse for his failure to object to the use of an admitted document." But he intentionally omitted the portions

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of the Transcripts that demolish his claims, as further cited below, namely (1) that there was a 1 ½ hour break *during Trial*, during which time Plaintiff's counsel made the actual motion to strike the offensive document or other remedy, specifically advised the Court *they did not know* that email was there, indicated counsel was "mad at himself,"[1] for the *inadvertent* admission of the document, where Defense counsel stated they "kept waiting" for Plaintiff to object, and where the Court expressed concerns that jury nullification had occurred;[2] (2) that upon reconvening thereafter, the Court struggled with what the appropriate remedy was to "make sure justice was had. And I've got to say, I'm not sure we're in a position now that the jury has heard that to be confident in justice;"[3] and (3) that *immediately* before the portion of the Transcript quoted by Defendants, Mr. Jimmerson explicitly stated that when Ms. Gordon placed the document before the jury on the ELMO, having already highlighted those sentences, that he "didn't even notice until she just put it up there. What was I going to do, object to an admitted document, suggesting that I'm afraid of it? I was outraged when I read it."[4] Clearly, the Court was *repeating* Mr. Jimmerson's prior statements, not "offering an excuse," as Defendants falsely misrepresent. Defendants' intentional omission of these key facts is revulsive. Further, when the Court specifically *asked* Ms. Gordon whether she had a problem with the words the Court had said about Mr. Jimmerson, she replied:

> "**No.** I just wish that we could focus more on the procedural part of it than the personal aspects of the attorneys who did it. **I don't have a problem with what you said about Mr. Jimmerson. I think I just took it as perhaps making a distinction.**"

Recorder's Transcript of Trial-Day 10, p.183, lines 16-20 (Emphasis added). (**Exhibit 5**). The Court promptly reassured Ms. Gordon that it was not, and viewed her as a lawyer who "cared." *Id.*

[1] Indeed, it is apparent in reading the quoted portions of the Transcript that there was an off the record discussion during which the motion to strike was made and these comments occurred, as Mr. Jimmerson, *on* the record, stated "I already said I was mad at myself," and the Court agreed "I know, you did say that." *Exhibit 3 at p. 179, lines 13-14.*
[2] *Recorder's Transcript of Trial-Day 10*, p.174, lines 15-18, showing the parties were off the record from 2:15 p.m. until 3:45 p.m., at which time Judge Bare formally put on the record that he denied the motion to strike at this time but "if the lawyers file something—trial brief, law on the point, then you can do that," (**Exhibit 1**) and p. 185, line 25-187, line 21. (**Exhibit 2**)
[3] *Recorder's Transcript of Trial-Day 10*, p.175, lines 16-22. (**Exhibit 3**)
[4] *Recorder's Transcript of Trial-Day 10*, p.178, lines 8-14. (**Exhibit 4**)

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With these blatant misrepresentations, which continue with Defendants claims regarding the after-hours meeting, pretrial and trial rulings, and the argument on the motion for a mistrial, this Motion is so patently spurious that this Court should simply deny it without oral argument pursuant to Local Rule 2.23(c). If it declines to do so, however, then the facts unquestionably support a denial on the merits, and the retention of this fine jurist on this case. It also merits an imposition of attorneys' fees and costs against the Defendants for their sponsoring this spurious attack on an honorable jurist.

II. PROCEDURAL BACKGROUND

Plaintiff filed this medical malpractice case on June 28, 2018, amended his Complaint on July 2, 2018, and promptly sought a preferential trial setting on July 13, 2018. On September 12, 2018, **by stipulation**, the parties agreed to a firm trial setting of July 22, 2018-**more than a year after the filing of the Complaint**—based upon Judge Bare's preference to grant the same to "elderly litigants."[5] On October 9, 2018, Judge Bare ruled on several motions. Between then and trial, Judge Bare heard and ruled upon several other motions, such as a motion to continue trial, motion for summary judgment,[6] and (in July 2019) several motions *in limine*.

Contrary to Defendants' claims, the Court was even-handed in its rulings. Plaintiff only filed four (4) Motions in Limine, and two of them *were not even opposed* by Defendants! There was were no Motions in Limine filed by Plaintiff pertaining to Dr. Debiparshad at all. Conversely, there were three (3) Motions in Limine filed by Dr. Debiparshad, two of which were denied, and one of which (relating to Mr. Landess' hip surgery) *was granted.* Likewise, the Court granted Defendants' motion—*on June 13, 2019, after discovery cutoff*—to allow additional discovery from Cognotion on Plaintiff's wage-loss and stock options claims, despite the fact that Defendants had narrowed the scope of their own Subpoena in April, 2019. In reality, Dr. Debiparshad's claim that they "tried, without success between February and May 2019 to obtain the evidence and documents necessary to properly evaluate Plaintiff's lost wage/earning capacity/stock options claims" is patently false, in light of their own narrowing of the discovery

[5] *See, e.g.*, Order filed June 28, 2019.
[6] The vast majority of the dispositive Motions were filed by co-Defendant CHH as to other claims, and NOT by Dr. Debiparshad.

requested of non-party, Cognotion, and Mr. Dariyanani's repeated cooperation with their request. *See, e.g.,* emails with Jonathan Dariyanani (**Exhibit 6**). In fact, Mr. Dariyanani provided documents, including, apparently, the "Burning Embers" email which led to the mistrial, *directly to the Defendants*.

Trial commenced on July 22nd as scheduled, and Judge Bare, likewise, made rulings during trial in favor of Defendants as well as Plaintiff. For example, despite the fact that Judge Bare had required any supplemental expert report of their expert, Kevin Kirkendall, to be "filed by no later than July 5, 2019," Judge Bare denied Plaintiffs' Motion to Strike the supplemental report of Mr. Kirkendall *which was not disclosed until after 9:00 p.m. the literal day before Trial,* prejudicing the Plaintiff, whose expert was in China, was testifying by deposition, and could not respond. Likewise, Judge Bare denied Plaintiff's Motion to strike the testimony of Dr. Debiparshad's last-minute retained expert, Dr. Arambula, who was previously a witness for former Defendant CHH, whose testimony went far beyond the scope of his report (which had focused upon the CHH claims), and who did not give any opinion to a "reasonable degree of medical certainty." Dr. Debiparshad's specific claims about Judge Bare's trial rulings, as discussed below, are false and/or exaggerated, and Judge Bare's rulings were supported by thoughtful, detailed findings recited on the record.[7]

During Trial, as Plaintiff was making his case, Defendants resorted to using dirty tricks to try and poison the jury and prejudice Plaintiff. First, they disclosed a supplemental expert report at 9:06 pm on July 21, 2019, the night before Trial commenced. Then, on Day 7, Dr. Debiparshad, during his testimony, attempted to show the jury an image on a portal that had **never been disclosed to Plaintiff.**[8] After a sidebar, the Court ruled that Defendants could not use the portal. *Id. at p. 162, line 3.* Despite that ruling, Dr. Debiparshad **again** offered to the jury to allow them to view the image on the portal, prompting the Court to advise the jury he had

[7] *See*, e.g., draft *Order Denying Motion to Strike Slide 25 and to Preclude of Limit Plaintiff's Expert Dr. Harris From Testifying as to the Breach of Standard of Care Regarding Rotation, Translation/Apposition and/or Distraction of the Fracture Site* (**Exhibit 7)**, draft *Order Regarding Defendants' Use of Portal During Trial* (**Exhibit 8**), and draft *Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial* (**Exhibit 9**). *See, also,* Transcript From Trial- Day 3, p. 32-41,

[8] *Recorder's Transcript of Trial-Day 7*, at p.161, lines 12-25. (**Exhibit 10**)

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ruled they could not do so. *Id. at p. 178, lines 14-20.* The Court, outside the presence of the jury, made a lengthy record of his reasons for denying the request, that it was non-disclosed evidence, and that under a legal relevancy balancing test, it was too confusing to the jury. *Id. at p. 214, line 16-221, line 6.*

Third, the following day, at a sidebar, Defense counsel indicated she wanted to "make a record" objecting to the ruling, and the Court reiterated that the portal could not be shown to the jury. Completely ignoring this ruling, Dr. Debiparshad, personally, raised the portal images to the jury **again** for a third time.[9]

Fourth, to make matters worse, Defense counsel, on the record and before the jury, again "renewed" their request "to allow the jury to see" the portal image, forcing the Plaintiff to object in front of the jury and the Judge to deny the request in front of the jury. *Id. at p. 61, line 17-p. 62, line 1.* This left the jury with the undeniable impression that Plaintiff was attempting to prevent the jury from receiving evidence or was concealing something, which prompted Plaintiff's first request for a mistrial. *Id. at p. 66, line 25-p. 79, line 11.* The Court ***denied*** Plaintiff's request and chose to give a "curative instruction" instead. *Id. at p. 79, line 15-p. 84, line 13.*

Fifth, during the testimony of Plaintiff's expert, Dr. Mills, who testified about his own mental evaluation of Mr. Landess, Defendants put in front of the jury—again only highlighting a small portion—a medical record reflecting that Mr. Landess answered "yes" to whether he had fallen two or more times in the past year, attempting to make it relevant to Dr. Mills' testimony.[10] However, Dr. Mills noted that Defense counsel had pulled the document away too quickly and failed to highlight the question immediately after, whether Mr. Landess was injured, to which he had replied "no." *Id. at p. 38, lines 4-10.* Later, Defendants' expert, Stuart Gold, also testified that it was not likely that Mr. Landess had suffered an event or fall that would adversely affect Ms. Landess' leg. *See, e.g. Recorder's Transcript of Trial-Day 10, p. 58-59.*

[9] *Recorder's Transcript of Trial-Day 8,* at p.50, lines 4-5. (**Exhibit 11**)
[10] *Recorder's Transcript of Trial-Day 9,* at p.37, line 16-p. 38, line3. (**Exhibit 12**)

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Sixth, prior to Mr. Dariyanani's testimony, outside the presence of the jury, Defendants objected to any testimony from him regarding the current value of Cognotion, and the Court ruled that while Defendants' prior request to admit any new Cognotion *documents* had been granted, Mr. Dariyanani, as the CEO, could fairly testify about the value and what the company was doing.[11] Despite the Court's explicit ruling, Defense counsel **again** raised the same objection **in the presence of the jury,** allowing the jury to believe Plaintiff was trying to disclose new information "for the first time during trial." *Id. at p. 116, lines 16-18.* Defense counsel did all they could to run roughshod on Judge Bare's Orders and rulings.

Finally, the trial ended in a mistrial two weeks later when Defendants purposefully infected the proceedings with inflammatory racial material they *knew* Plaintiff had missed (and "kept waiting" for Plaintiff to object to). The Court should note that despite their new complaints about Judge Bare's alleged partiality, until now, Dr. Debiparshad has never filed any challenges against Judge Bare.

III. MISTRIAL

On page 17 of the Motion, Dr. Debiparshad describes the racial comments Ms. Gordon read to the jury that led to the mistrial. Yet, conveniently omitted, is *how* such material was presented to the jury, and *why*: to intentionally cause the jury to conclude that Mr. Landess was a racist, in order to secure a defense verdict. Indeed, Defendants' counsel did not simply attempt to rebut Mr. Dariyanani's statement that Mr. Landess was "a beautiful person" (testimony that was non-responsively and superfluously volunteered by Mr. Dariyanani and not elicited as character evidence by Plaintiff). If that was the case, she would have simply stopped when Mr. Dariyanani *amended his answer* and said that Mr. Landess was "beautiful and flawed." *Recorder's Transcript of Trial-Day 10*, p.161-163, at p. 161, lines 3-5 (**Exhibit 14**). She did not. Instead, she placed the email on the ELMO, in front of the jury, with the paragraph "To supplement my regular job of working in a sweat factory with a lot of Mexicans.." and "hustling

[11] *Recorder's Transcript of Trial-Day 10,* at p.65, line 11-p. 69 lines 4. (**Exhibit 13**)

Mexicans, blacks, and rednecks on Fridays, which was usually payday" **already highlighted for the jury to see.**

Nor was the point of her questioning to demonstrate that Mr. Landess was not "honest" (in response to testimony about "bags of money" and trusting Mr. Landess with his children, which Defense counsel elicited).[12] While she did ask a question about "hustling," **she re-emphasized *race* twice**, without provocation, during her questioning:

> "Does it sound to you at all from this email that he's bragging about his past as a hustler, **and particularly hustling Mexicans, blacks and rednecks on payday?"**
>
> "He talks 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?"**

Id. at p. 162, lines 23-25; 163, lines 6-8. Indeed, during the oral argument on the Motion for Mistrial, the statements of Defendants' counsel led the Court to conclude that "the Defense is still taking this position. They're urging the jury to at least in part, render the verdict based upon race, based upon Mr. Landess being a racist…." *Recorder's Transcript of Trial- Day 11* at p. 35, lines 15-25; p. 58, lines 11-16; p. 60, line 21-61, line 7; p. 62, lines 16-20 (**Exhibit 15)**.

Defendants, in their attempt to deflect from their own conduct and to twist the narrative to fit their new agenda, even misstate basic facts, and minimize their own actions that led to the mistrial.[13] For example, Defendants state that "during discovery, *Plaintiff* disclosed a set of emails between Plaintiff and other employees at Cognotion" that were "first disclosed by Plaintiff in his 12th NRCP 16.1 Supplement…on May 16, 2019." That is factually inaccurate. The emails were first disclosed **by Mr. Dariyanani directly to Defendants in April, 2019.** *See, e.g., Exhibit 6.* They were only batestamped and formally put in Plaintiff's disclosure by Howard & Howard because they had been provided, along with thousands of other pages of documents, to Plaintiff's expert, Stan Smith, and Plaintiff's counsel believed that all of the emails had to do with Plaintiff's work at Cognotion. It was only because Plaintiff, in good faith given Defendants' request to explore the wage-loss claim, stipulated *carte blanche* to admit *all* Cognotion-related documents—even those not produced by Mr. Dariyanani until July 3rd and July 8th—that the

[12] *See, e.g., Defendants' Exhibit F.*
[13] *See* Plaintiff's Motion for Mistrial, filed August 4, 2019, incorporated herein as if set forth in full.

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email was missed. Indeed, when Defense counsel moved to admit Exhibit 56 *in toto*, it was apparent that Plaintiff's counsel did not know it contained the "Burning Embers" email and believed it to be Cognotion-related, as his response was "I would have no objection to that email. I'd just like to know the date, if I could?"[14]

Also conveniently omitted in the Motion is any reference to Nevada law concerning how highly improper it is to inject such prejudicial comments into a jury trial that has nothing to do with racial prejudice. This is what the Nevada Supreme Court, and other courts, have said about that: It is universally accepted that an attorney cannot inject the type of racist remarks that Ms. Gordon made into a jury trial in order to prejudice the jury against the Plaintiff. "Making improper comments by counsel which may prejudice the jury against the other party, his or her counsel, or witnesses, **is clearly misconduct by an attorney**. Cases that have dealt with similar situations have uniformly condemned such statements as fundamentally prejudicial." *Born v. Eisenman*, 114 Nev. 854, 862, 962 P.2d 1227, 1232, 1998 Nev. LEXIS 105, *15 (1998) (emphasis supplied). "Appeals to racial prejudice are of course prohibited...They are 'universally condemned.' *See* Annotation, *Statement by Counsel Relating to Race, Nationality, or Religion in Civil Action as Prejudicial*, 99 A.L.R.2d 1249, 1254 (1965)." *Texas Employers' Ins. Ass'n v. Guerrero*, 800 S.W.2d 859, 862, 1990 Tex. App. LEXIS 3172, *8 (Ct. App. Tex. 1990) (citation omitted).

And our high court explained the obligation of the trial court when such misconduct occurs: "When such conduct is brought to the district court's attention by objection or motion for a mistrial, it is incumbent upon the district court to determine whether the remark was made and heard by the jury. . . . [I]f there is a reasonable indication that prejudice may have occurred to one party, **the district court is obligated to declare a mistrial**. **Of course, the matter should be referred by the district court to the State Bar of Nevada pursuant to Canon 3(D)(2) of the Nevada Code of Judicial Conduct, if an attorney has committed misconduct in his or her courtroom**." *Born* at 862, *16 (emphasis supplied). "Manifest necessity to declare a mistrial

[14] *Recorder's Transcript of Trial-Day 10*, at p. 144, lines 14-18. (**Exhibit 16**)

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may also arise in situations in which there is an interference with 'the administration of honest, fair, even-handed justice to either, both, or any of the parties to the proceeding." *Hylton v. Eighth Judicial Dist. Court, Dep't IV*, 103 Nev. 418, 423, 743 P.2d 622, 626, 1987 Nev. LEXIS 1660, *11 (1987), citing to *People v. Clark*, 705 P.2d 1017, 1019 (Colo. Ct. App. 1985).

That blanket prohibition also applies to impeachment evidence, especially in a case totally unrelated to race or racial discrimination. First, by statute not all relevant evidence is admissible: "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." NRS § 48.035(1). Second, courts "have firmly rejected the notion that any evidence introduced by defendant of his 'good character' will open the door to any and all 'bad character' evidence . . . ." *People v. Loker*, 44 Cal. 4th 691, 709, 188 P.3d 580, 597, 2008 Cal. LEXIS 9275, *26 (Ct. App. Cal. 2008). And, most importantly, our high court over two decades ago adopted this bright-line rule for the use of racist evidence for impeachment: "From [the United States Supreme Court case of *Dawson v. Delaware*, 503 U.S. 159 (1992)], we derive the following rule: Evidence of a constitutionally protected activity **is admissible only if it is used for something more than general character evidence**." *Flanagan v. State*, 109 Nev. 50, 53, 846 P.2d 1053, 1056, 1993 Nev. LEXIS 10, *5 (1993) (emphasis supplied).

In *Dawson*, the United States Supreme Court held that the State violated Dawson's First and Fourteenth Amendment rights by admitting evidence of Dawson's membership in the Aryan Brotherhood. Hence, in *Flanagan* the State was not allowed to impeach the defendants' character with evidence that they believed in witchcraft. As incongruous as it seems, in this country the radical views held by a racist/While Nationalist are constitutionally protected and, thus, cannot *ever* be used as general character evidence against the person holding such views. Hence, by electing to use the Burning Embers email to try and prove to the jury that Plaintiff is not a beautiful person because he is a purported racist, Ms. Gordon blew up the trial.

Indeed, just a few weeks ago the California Supreme Court issued its decision in *People v. Young*, 2019 Cal. LEXIS 5332, 2019 WL 3331305 (2019), which addressed the same issue of

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the use of racist evidence to prove bad character. The prosecutor openly and repeatedly invited the jury to do precisely what the law does not allow: to weigh the offensive and reprehensible nature of defendant's abstract beliefs as a racist in determining whether to impose the death penalty. In criticizing the use that evidence, the court, citing to both *Dawson* and *Flanagan*, stated: "[E]vidence of a defendant's racist beliefs is not relevant if offered merely to show the moral reprehensibility of the beliefs themselves—which is to say, evidence of the defendant's abstract beliefs is not competent general character evidence." *Id*. at *77.

Defendants intentionally and defiantly ignored the *Born* bright-line rule and therefore engaged in professional misconduct that obligated Judge Bare to not only as a matter of law declare a mistrial, but to also have to deal with the issues of attorney fees and referral of Defendants' counsel to the State Bar. That ominous prospect is undoubtedly why this Hail-Mary Motion was filed. If properly following the law is a basis to disqualify a judge, then there is no hope for the American judicial system.

IV. DESPERATION

The adage that "desperate people do desperate things" is true. Plaintiff is not being rhetorical or hyperbolic about the desperation and anger being exhibited by Defendants and their counsel. Those emotions ooze from almost every paragraph of the Motion, with such indecorous remarks and unrestrained accusations as: "A determination of Judge Bare's particular purpose for waxing poetic about Plaintiff's counsel to the point of being obsequious is unnecessary for purposes of the current Motion." (p.10, lines 21-23); "Judge Bare and Plaintiff were seemingly of the same mind to rush the matter to mistrial . . . ." (p.19, lines 9-10); "Plaintiff (sic) counsel was allowed to argue without interruption." (p.24, line 19); "Perhaps because Plaintiff was unable to provide adequate legal authority in opposition to Defendants' Motion, Judge Bare assisted in this process and conducted his own legal research." (p.29, lines 12-13); "Judge Bare's stated opinion that Plaintiff's counsel tells only the 'gospel truth' and is worthy of representation on Mount Rushmore . . . ." (p.32, lines 9-10); and, astonishingly, "**Judge Bare had to ignore clearly established Nevada law solely in an effort to please Plaintiff and Plaintiff's counsel**."

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(p.30, lines 5-6, emphasis supplied). Those types of injudicious comments about one of the most capable, honest, hard-working jurists on the bench[15]—a gentleman who served his country as a JAG Officer and this community for many years as State Bar Counsel—is not only unbecoming, it is unquestionably unethical: "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge . . . ." *Nev. Rules of Prof'l Conduct 8.2(a).* This Court should not tolerate this type of professional misconduct. At the very least, the Court should summarily dismiss the Motion.

V. FACTUAL INACCURACIES

Dr. Debiparshad needlessly and improperly vented his anger and disappointment with a slanted view of some of Judge Bare's rulings. Other than to highlight a few of the more glaring misstatements of fact contained in that cathartic diatribe, Plaintiff elects to avoid wasting this Court's time rebutting all of those rulings because, as the legal discussion below explains, a judge cannot be disqualified based upon his or her judicial rulings. That is especially true when those rulings do not rely upon an extrajudicial source and the chief complaint involves a judge's purported attitude towards a litigant's attorney. Invariably, such complaints are proper grounds for appeal, not for disqualification. However, as an example of the misstatements in Defendants' Motion, Plaintiff submits the following:

A. *Defendants' False Claim that Judge Bare Didn't Give Dr. Debiparshad a Fair Chance to Brief the Mistrial Issue.*

Dr. Debiparshad states that he was "clearly prejudiced" by the "inability" to file any sort of opposition to the mistrial motion. (Motion, p.19, lines 9-16.) That is not true. After Ms. Gordon irreparably infected the proceedings with her racial comments and questions, Judge Bare excused the jury for the weekend and, after expressing his deep concern for what had just happened, denied Plaintiff's motion to strike and invited counsel for **both parties** to submit a brief before the jury returned on Monday:

> All right. During that last break, the reason I took a few extra minutes -- sorry about that -- is, you know, it really is on my mind this whole thing with the passage that was read and I just -- you know, first, I want to say this to be sure for the record and for everybody's

[15] In 2013, the *Las Vegas Review-Journal* survey reveals that eighty percent of respondents voted in favor of keeping Judge Bare on the bench. The average vote in favor of retention for all 88 judges evaluated was 71 percent.

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> edification: the motion to strike is denied at this time -- at this time. **So I want to be clear that if lawyers file something -- trial brief, law on the point, then you can do that**.

Recorder's Transcript of Trial-Day 10, p.174, lines 19-25 (**Exhibit 1**) (emphasis supplied).

Judge Bare then spent the entire weekend working on this issue, including asking his law clerk to work on Saturday. Plaintiff's counsel did the same independently of the Court. And on Monday morning he hearkened back to his invitation to all counsel on Friday to do the same and submit briefs:

> And I'll tell you the ten hours -- ten Saturday and then the -- I don't know, probably I had to tone it down or get divorced -- seven yesterday that I spent on this myself. So I have all -- all the items I put together I have here, that I did on my own over the weekend. So I certainly anticipated that this Monday morning was going to be interesting. **I did invite, in our informal meeting on Friday, I did invite trial briefs, I think is what I called it. But I certainly invited the idea that certainly lawyers could, if they wanted to turn their attention to providing law on the obvious issues, you could**.

Recorder's Transcript of Trial-Day 11, p.6, lines 2-11 (**Exhibit 17**) (emphasis supplied).

Plaintiff's counsel accepted the invitation and filed a motion on Sunday evening, with Dr. Debiparshad's counsel being served upon filing. Judge Bare and his law clerk also worked feverishly over the weekend. Dr. Debiparshad's counsel, however, **submitted nothing**. If they now think that briefing would have made a difference for their client, then they too should have accepted Judge Bare's invitation. But to fail to produce any work product to the Court, and now claim they never had the time, opportunity, and/or ability to submit briefing on the issue and that Judge Bare is to blame for it is, as the record unequivocally proves, just preposterous and patently false.

It is worth noting, that at the beginning of the hearing on August 5, 2019, the Court asked both parties to weigh in on his proposed "structural procedural thought" on how the motion for mistrial should be argued, and specifically offered Defendants time to file briefing on Plaintiff's request for attorneys' fees and costs, separate from the immediate mistrial issue.[16] Neither party objected to Judge Bare's suggested procedure. In fact, after going off the record and speaking with their client, Defense counsel said:

> "We had the opportunity to discuss. **We'd still like to move forward with the motion**, and hopefully with the rest of Trial."

[16] *Recorder's Transcript of Trial-Day 11*, at p.5-6. (**Exhibit 18**)

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Recorder's Transcript of Trial-Day 11, at p. 19, lines 16-18 (Emphasis added). (**Exhibit 19**). Having agreed to argue the mistrial Motion that day, and having been granted additional time to brief Plaintiff's request for fees and costs, Defendants cannot now fairly argue an "inability" to respond.

B. ***Defendant's False Claim That Judge Bare Tried to Coerce a Settlement.***

Dr. Debiparshad also states that during the Friday afternoon off-the-record meeting in the conference room, "Judge Bare's concern was so great that he advised the parties they should strongly consider settling the case in order to avoid a mistrial." (Motion, p.11, lines 5-7.) In other words, Defendants claim that Judge Bare was allegedly using the possibility of declaring a mistrial as a bludgeon to force Dr. Debiparshad to settle with Plaintiff. As the attached Declarations of Plaintiff's counsel James Jimmerson (**Exhibit 20)** and Martin Little (**Exhibit 21**) demonstrate, that too is patently false. In fact, when Defendants argued that Monday that Judge Bare had suggested the case was "going Plaintiff's way," Judge Bare corrected him to make an extensive record of the off-the-record meeting on Friday.[17] Judge Bare specifically noted, with respect to his opinion, which Defendant now falsely claims was unsolicited:

> "And I think I even said look, if anybody doesn't want to be here or doesn't want to hear these editorial comments, all you need to do is ask and there'll be no hard feelings and we'll go off on our weekend. But the—as I remember it, the lawyers entertained that and I hope appreciated it, but at least allowed for it or acquiesced in it for wanted it to continue, whichever way you'd like to take it."

Id. at p. 13, lines 17-22.

> "And in our Friday meeting, I think based upon either acquiescence or invitation, the parties did want to hear and I did give a—sort of a—I think I called it a thumbnail overview or thumbnail sketch of things and I said look—again, this is an opinion."[18]

Id. at page 15, lines 7-10.

Indeed, following Judge Bare's record, Defendants neither disputed what had occurred, nor objected to Judge Bare's comments. In fact, Mr. Vogel explicitly and

[17] *Recorder's Transcript of Trial-Day 11*, at p. 8-18 (**Exhibit 22**). Also, contrary to Defendants' false claim that Mr. Jimmerson was able to argue uninterrupted while Defendants' counsel was interrupted by the Court, Judge Bare actually *did* interrupt Mr. Jimmerson's argument. *Id. at p. 8, lines 2-3*

[18] A "thumbnail overview" or "thumbnail sketch" is what the Defendants within their motion to disqualify characterize as "coercing" a settlement. This is reckless indeed, and completely false.

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repeatedly said that Defendants **appreciated** Judge Bare's comments and proffered view, which was discussed with their client. *Id. at p. 18, lines 2-14.*

C. *Defendant's False Claim That Judge Bare "Assisted" Plaintiff's Legal Research*.

Dr. Debiparshad further states that when he filed a supplemental motion to prevent Plaintiff from having his expert testify about wage losses due to an alleged absence of proximate cause, that "Plaintiff failed to cite any legal authority from Nevada (or any state west of the Mississippi River") and, therefore, "Judge Bare assisted in this process and conducted his own legal research." (Motion, p.29, lines 8-13). Dr. Debiparshad also states that Plaintiff's opposition only cited to "a single case from West Virginia," (*Id*.) which is also untrue.

As proof, Plaintiff's Opposition to that Supplemental Opposition is attached as **Exhibit 23**. In addition to the West Virginia case, these are the authorities Plaintiff cited to on page 5 of that Supplemental Opposition:

- *Nehls v. Leonard*, 97 Nev. 325, 328, 1981 Nev. LEXIS 523, *5 (1981);
- *Castro v. Poulton*, 2016 U.S. Dist. LEXIS 178734, *7 (D. Nev. 2016);
- *Murphy v. Southern Pac. Co.*, 31 Nev. 120, 149, 1909 Nev. LEXIS 11, *52 (1909);
- Sedgwick, Damages § 111 (8th ed.); and
- 5C M.J. DAMAGES § 13 (2019).

Obviously, Nevada is west of the Mississippi River.

Regarding the criticism about Judge Bare doing his own legal research on the mistrial issue, that is a silly and fatuous complaint because that is what competent and conscientious judges do. It is what Judge Wiese does! That is why they have law clerks. In fact, Judge Bare, in discussing that Friday, on the record, the Court's concerns about jury nullification and need for additional law on the issue, explicitly advised the parties that he intended to have this research completed over the weekend so that the issue could be addressed that Monday, irrespective of whether either side chose to submit a legal brief. *Recorder's Transcript of Trial-Day 10*, at p.190, line 1-191, line 4. (**Exhibit 24**)

D. *Defendant's False Claim That the Court Allowed Plaintiff to Raise Two New Alleged Breaches of the Standard of Care for the First Time During Opening Statement.*

Among many procedural irregularities that permeated the Trial, the Court allowed Defendants to interrupt Plaintiff's case in chief with an oral motion by Defendants to strike

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"Slide 25" of Plaintiff's Opening Statement, which outlined Dr. Debiparshad's breaches by failing to properly reduce the fracture, resulting in Rotation, Translation/Apposition and Distraction of the Fracture Site. Defendants themselves considered a mistrial then. The Court allowed both sides to brief the issue overnight, which both sides did, and the following day, issued a detailed ruling, outlining specific findings, in support of its denial of Defendants' Motion. *Recorder's Transcript of Trial-Day 3*, at p.32-41 (**Exhibit 25**). *See, also, Exhibit 7.* Defendants' claim that this was raised in opening argument for the first time, and they had no notice of these claims, is patently false, as supported by the evidence and these findings.[19]

E. *Defendant's False Claim That the Court Provided Plaintiff's Counsel With an "Excuse" For Inadvertently Stipulating to Exhibit 56.*

As outlined hereinabove, Defendants' claim that Judge Bare offered Plaintiff an excuse for inadvertently stipulating to the admission of Exhibit 56 is patently false. During the 1 ½ hour break *during Trial*, which was, unfortunately, off the record (and not referenced by the Defendants within their Motion), Plaintiff's counsel made the formal motion to strike the document (referenced by the Court when they went back on the record) or for some other remedy, specifically advised the Court *they did not know* that email was there, and indicated counsel was "mad at himself" for the *inadvertent* admission of the document. Defense counsel, during that conversation, stated they "kept waiting" for Plaintiff to object, and the Court expressed concerns that jury nullification had occurred. *Immediately* before the portion of the Transcript quoted by Defendants, Mr. Jimmerson reiterated his comments off the record, including that when Ms. Gordon placed the document before the jury on the ELMO, having already highlighted those sentences, that he "didn't even notice until she just put it up there. What was I going to do, object to an admitted document, suggesting that I'm afraid of it? I was outraged when I read it."[20] Clearly, the Court was *repeating* Mr. Jimmerson's prior statements, not "offering an excuse."

[19] This Court's review of the Findings and Orders entered by Judge Bare in the underlying case provides ample evidence of the thoughtful, reasoned and fair rulings of Judge Bare. The merits of each motion were thoroughly addressed by the Court. *See, e.g., Exhibits 7-9, and the other Orders on file herein.*

[20] *Recorder's Transcript of Trial-Day 10*, p.178, lines 8-14. (**Exhibit 4**)

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Plaintiff could expound upon several other exaggerations and prevarications contained in the Motion, but the point is made: Dr. Debiparshad's Motion is not only legally deficient; it is also founded upon multiple factual mischaracterizations. Of critical importance is that in the context of a motion to disqualify, what an attorney alleges against the judge must be meticulously accurate and meet even a higher standard than that provided by Rule 11: "The novelty in Rule 11 as recently amended is to require that statements in pleadings and other papers filed in court be substantiated by the lawyer (or litigant) signing the paper...A far older principle, however, requires that lawyers who make statements to courts under oath concerning the conduct of fellow lawyers and judges and other participants in the administration of justice **be scrupulous regarding the accuracy of those statements**."[21] That was not done here.

VI. HYPOCRISY & INCONGRUITY

Having now described just a few instances of the disingenuous that Dr. Debiparshad's counsel has displayed throughout this case, and before turning to the legal argument, it is fitting and proper at this juncture to point out opposing counsels' hypocrisy and the incongruity of their vicious attack upon Judge Bare's impeccable integrity.

A. *Hypocrisy.*

When Judge Bare referred to Mount Rushmore, he was obviously using metaphor to express his respect for Mr. Jimmerson, which evolved from a professional association spanning 25 years. The use of that metaphor was simply designed to paint a word picture, the same as if Judge Bare had said that Mr. Jimmerson was a "shining star" or "solid as a rock." And Judge Bare's use of that metaphor is at the core of Dr. Debiparshad's complaint.

Yet Dr. Debiparshad used **exactly** the same metaphor to illustrate his point to this Court by stating that Judge Bare thinks Mr. Jimmerson "is worthy of representation on Mount Rushmore." (Motion, p.32, line10). That, of course, is not what Judge Bare actually said[22]. But opposing counsel coined that phrase to paint a word picture of **extreme bias**; whereas, Judge

[21] *In re Kelly*, 808 F.2d 549, 552, 1986 U.S. App. LEXIS 36463, *8-9 (7th Cir. 1986).

[22] Judge Bare said Mr. Jimmerson was "in the, sort of, hall of fame, or the Mount Rushmore, you know, of lawyers that I've dealt with in my life."

Bare used that metaphor to paint a picture of **professional respect**. Two different objectives—same metaphor. Opposing counsels' use of that metaphor is perfectly acceptable; but Judge Bare's use of it is not. That is paradimical hypocrisy.

A. *Incongruity.*

Dr. Debiparshad's mischaracterization of Judge Bare as a biased, scheming, conspiratorial, obsequious, minority-preferential jurist is so untrue that words just fail to describe the outrageousness of such remarks. Perhaps the best way to explain the contrast in character between Dr. Debiparshad and his counsel and Judge Bare—i.e., the incongruity between what is nothing more than self-serving allegations and what is real—is this illuminating remark from Judge Bare immediately after he declared a mistrial:

> Mr. Kirwan [a juror] reported back and found a babysitter for the week, when he initially didn't anticipate that. And I'm sure there's untold stories as to each one of them, as to what they did to spend two weeks with us and then now find a way to extend it an extra four days. So that's why it's difficult, because I feel bad. I feel really bad that I had to do what I just did with those ten people. But I said it was the easiest choice nonetheless, because it really was in my view.

Recorder's Transcript of Trial-Day 11, p.50, line 21 thru p.51, line 2 (**Exhibit** 2**6**).

Compare the above statement at Trial by Judge Bare, with the below telling statement of what Dr. Debiparshad and his counsel are most troubled about over the mistrial:

> Judge Bare is currently slated to decide the parties' competing Motions for Attorneys' Fees and Costs related to the mistrial. Each Motion requests hundreds of thousands dollars (sic) in fees and costs. Given the lack of foundation to grant a mistrial in the first place, coupled with Judge Bare's exhibited bias and partiality, Defendants understandably seek to disqualify Judge Bare prior to a ruling on the outstanding Motions.

(Motion, p.33, lines 1-5).

Concern for the jurors vs. concern for money. Concern for the administration of justice vs. concern over personal exposure to liability for purposefully causing a mistrial. Selflessness vs. self. That says it all.

…

…

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VII. ARGUMENT

The Motion is ambiguous because it is unclear whether Dr. Debiparshad is seeking disqualification pursuant to just Nevada's Judicial Cannons, or also NRS §§ 1.230 & 1.235. Neither is availing to Defendants, but out of an abundance of caution, Plaintiff will address both.

A. *Legal Standard.*

A motion to disqualify a judge is not just another procedural or evidentiary motion. "It is a direct attack on one of the basic principles of our judicial system, the impartiality of trial courts. If such a motion is made when a case is close to trial, it necessarily calls into question the administration of justice. And the making of such a motion impacts unfavorably upon the public's perception of the administration of justice."[23] The test for whether a judge's impartiality might reasonably be questioned is objective and courts must decide whether a reasonable person, knowing all the facts, would harbor reasonable doubts about a judge's impartiality.[24] A judge is presumed to be impartial, and the burden is on the party asserting the challenge to establish sufficient factual grounds warranting disqualification.[25] The Nevada Supreme Court has stated "rulings and actions of a judge during the course of official judicial proceedings do not establish legally cognizable grounds for disqualification."[26] "The personal bias necessary to disqualify must 'stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.'"[27] With respect to attorneys, the attitude of a judge toward the attorney for a party is largely irrelevant and an insufficient ground for disqualification because generally it is not indicative of extrajudicial bias against the party.[28] To warrant disqualification, the judge's bias toward an attorney ordinarily must be extreme.[29]

…

[23] *In re Order to Show Cause*, 741 F. Supp. 1379, 1381, 1990 U.S. Dist. LEXIS 10447, *5 (D. Ca. 1990).
[24] *Ybarra v. State*, 127 Nev. 47, 50-51 (2011); NCJC 2.11(A).
[25] *Ybarra,* 127 Nev. at 51.
[26] *In re Pet. to Recall Dunleavy, 104 Nev. 784, 790 (1988).*
[27] *Id*. at 790, citing to *United States v. Beneke*, 449 F.2d 1259, 1260-61 (8th Cir. 1971) citing *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966).
[28] *Las Vegas Downtown Redevelopment Agency v. Hecht*, 113 Nev. 632, 635 (1997).
[29] *Id*. at 636.

B. *Dr. Debiparshad's Challenge Pursuant to NRS §§ 1.230 & 1.235 is Untimely*.

Ms. Gordon's and Mr. Vogel's Affidavits and Certificates In Compliance With N.R.S. 1.235 are irrelevant because that statute requires that any motion filed must be filed "(a) Not less than 20 days before the date set for trial or hearing the case; or (b) Not less than 3 days before the date set for the hearing of any pretrial matter." *Id*. at subparagraph 1. Based upon equitable considerations, in 1997 the Nevada Supreme Court in *Oren v. Department of Human Resources*, 113 Nev. 594, 1997 Nev. LEXIS 65 (1997) upheld a late filing of a motion for disqualification under § 1.235(1). However, that decision was overruled by our high court in *Towbin Dodge, L.L.C. v. Eighth Judicial Dist.*, 121 Nev. 251, 2005 Nev. LEXIS 31 (2005) ("[O]ur decision in *Matter of Parental Rights as to Oren* is overruled to the extent that it held the disqualification affidavit in that case timely under NRS 1.235. *Id*. at 261). Now, all such motions must be filed in accordance with the timelines contained in § 1.235(1). This Motion, filed after a mistrial, is therefore untimely. *Towbin Dodge* at 256. As set forth below, it is also without merit substantively as well.

C. *Dr. Debiparshad's Challenge Pursuant to the Nevada Code of Judicial Conduct ("NCJC) is also Unavailing, Procedurally and Substantively.*

1. **Timeliness**.

"[I]f new grounds for a judge's disqualification are discovered after the time limits in NRS 1.235(1) have passed, then a party may file a motion to disqualify based on [the NCJC] *as soon as possible* after becoming aware of the new information."[30] Here, Dr. Debiparshad waited until long after he claims to have discovered Judge Bare's alleged bias to file the disqualification motion. And even then he contends that after the time period elapsed for filing under § 1.235(1), he discovered nothing "new," but just more of the same alleged bias he admits to having recognized as far back as September 2018 when Judge Bare, *pursuant to the stipulation of the parties*,[31] set a firm trial date of July 22, 2019.

[30] *Schiller v. Fid. Nat'l Title Ins. Co.*, 2019 Nev. Unpub. LEXIS 805, *10-11 (Filed July 15, 2019) (unpublished disposition and emphasis original), citing to *Towbin Dodge* at 260.

[31] Plaintiff, who was 72 when the action was commenced, filed a motion for a preferential trial setting pursuant to NRS 16.025, which was heard on September 11, 2018. Subparagraph 3 of that statute provides that if a motion is granted, "The court **shall** set a date for the trial of the action that is not more than 120 days after the hearing on the

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Dr. Debiparshad claims that Judge Bare demonstrated bias in favor of Plaintiff when: (1) He agreed to a preferential trial setting as early as September 2018, because granting that motion "raised concerns of Judge Bare's possible bias and partiality towards Plaintiff." (Motion p.14, line 6). (2) He denied Defendant's motion to continue the trial on June 13, 2019 (Motion, p.14). And, (3) When he allegedly exhibited bias and prejudice in favor of Plaintiff during "pre-trial litigation." (Motion, p.9, line 8). Dr. Debiparshad claims that Judge Bare's alleged bias did not become "grossly evident" until trial (Motion, p.32, line 8). And he contends it culminated in becoming "undeniable" when Judge Bare granted a mistrial (*Id*.). There was thus, according to Dr. Debiparshad, a "sliding scale" of bias starting in September 2018 and ending with the mistrial in August 2019. Notably, the bias never changed in **type** (always being alleged attitudinal favoritism towards Plaintiff and his counsel), but only in **degree**.

As the Nevada Supreme Court stated just last month in *Schiller*, *supra*, fn10, when citing to their earlier decision in *Towbin Dodge*, a motion for disqualification must be filed as soon as possible to avoid forum shopping and the needless waste of judicial resources. For if disqualification may be raised at any time, a lawyer is then encouraged to delay making a disqualification motion as long as possible if he believes that there is any chance that he will win at trial. If he loses, he can always claim the judge was disqualified and get a new trial.

In *Schiller*, the appellant, Schiller, alleged he was entitled to relief from a judgment or order under NRCP Rule 60(b) because the judge failed to disclose his marriage to a Douglas County representative who Schiller claimed publicly accosted him at a community meeting. But our high court disagreed because: "Schiller had *constructive notice* of the presiding judge's marriage from the outset of the case—the Douglas County representative and the judge had the same last name, and their marriage was a matter of public record. Because Schiller **had the information he claims warrants disqualification since the beginning of the case**, and because

motion." *Id*. Dr. Debiparshad vigorously objected to such a short setting. Hence, in order to accommodate Dr. Debiparshad's request for more time for discovery, Plaintiff agreed to waive that statutory right by stipulating to a firm trial date in July 2019. And the suggestion that Judge Bare displayed favoritism by specially accommodating Plaintiff and his legal counsel with an expedited setting is belied by this statement Judge Bare made at that hearing: "I do want to say that -- I think people do know this about our department and that is that when we have somebody who is 70 years or older, **I mean, we always try to find a way to give them a preferential trial setting**." *Transcript of September 11, 2018 Hearing*, p.6, lines 22-25 (**Exhibit 27**) (emphasis supplied).

he did not seek disqualification until after the court entered a final judgment in the matter, Schiller did not move to disqualify the presiding judge ...'as soon as possible,' as is required by *Towbin Dodge*." *Schiller* at 11 (emphasis supplied).

Likewise, Dr. Debiparshad had the information he claims warrants disqualification (Judge Bare's alleged bias) since the beginning of the case. But, unlike Schiller who had constructive notice from public records, Dr. Debiparshad, through his counsel (if you assume, *arguendo*, the Defendants' false allegation), had **actual notice** from his counsel's repeated appearances before Judge Bare on highly-contested matters. He cannot therefore credibly argue that such alleged bias eluded him. All he can rationally say is that the bias was not that concerning to begin with, but became increasingly more intolerable until Defendants and their counsel finally blew up his case due to their professional misconduct.

That procrastination, however, does not invoke the special circumstances envisioned by our high court when they announced the alternative procedure (a motion under the NCJC) in *Towbin Dodge* and cited to *Travelers Ins. Co. v. Liljeberg Enters.*, 38 F.3d 1404, 1994 U.S. App. LEXIS 32923 (5th Cir. 1994). The *Travelers Ins. Co.* Court in pertinent part ruled: "[I]t is well-settled that—for obvious reasons—one seeking disqualification must do so at the earliest moment after knowledge of the facts demonstrating the basis for such disqualification." *Id*. at 1410, *14; *Ainsworth v. Combined Ins. Co.*, 105 Nev. 237 (1989) ("We have previously held that time limitations on a challenge to a district judge's impartiality are not extended for litigants who knew or should have known the necessary facts at an earlier date." *Id*. at 259), *abrogated on other grounds by Powers v. United Servs. Auto. Ass'n*, 114 Nev. 690, 705 (1998).

By Dr. Debiparshad's own account, the "earliest possible moment" that he was made aware of Judge Bare's alleged bias was September 11, 2018—an attitude he claims became incrementally more noticeable every time there was a contested hearing. Surely a party cannot drag their feet until they are literally overwhelmed by, or absolutely, 100% sure about, the information upon which a disqualification motion is based. Yet that is Dr. Debiparshad's untenable position.

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Marking matters even worse for Dr. Debiparshad, the Motion is not founded upon the discovery of any "new grounds"[32] as required by our high court in *Towbin Dodge* at 260. For example, Dr. Debiparshad did not suddenly discover that Judge Bare's child was married to someone related to Plaintiff or his counsel, or that he had a financial interest in some business owned by Plaintiff or his counsel, or that Plaintiff had made some abnormally-high contribution to Judge Bare's re-election campaign. Instead, Dr. Debiparshad, his malpractice carrier, and his counsel decided to suppress their misgivings about Judge Bare's alleged bias while waiting anxiously to see whether the decision at trial would go in their favor. To allow him to now complain would only countenance and encourage unacceptable inefficiency in the judicial process.

In short, by electing to wait until Defendants engaged in professional misconduct by purposefully causing a mistrial and is now facing substantial sanctions for doing so, Dr. Debiparshad has waived his right to seek Judge Bare's disqualification. The mere fact that a decision was reached contrary to Dr. Debiparshad's interest cannot justify such a delinquent and deficient claim of bias, no matter how tenaciously his counsel gropes for ways to reverse their well-earned misfortune.

2. **Judicial Rulings**.

Dr. Debiparshad's Motion is not only procedurally deficient, it also fails substantively because the Motion is not premised on any extrajudicial source. The entire Motion is based upon events occurring within the four walls of Judge Bare's courtroom. And, as the following discussion will demonstrate, that is an insufficient basis for disqualification.

Before our high court's decision in *People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd.*, 111 Nev. 431, 1995 Nev. LEXIS 36 (1995), the only option for disqualifying a

[32] "'New grounds,' however, means a different set of facts, not a new legal theory or subsequent caselaw." *September Winds Motor Coach v. Medical Mut. of Ohio*, 2005 U.S. Dist. LEXIS 14982, *5 (D. Ohio 2005). Dr. Debiparshad discovered the "fact" of Judge Bare's alleged bias in September 2018, and claims that over time he became more convinced that what he initially discovered was true—namely, that Judge Bare was biased. There is thus nothing "new" that he and his counsel discovered that constitutes separate grounds for this Motion. And, as the discussion herein demonstrates, as a matter of law the "new grounds" cannot simply be more adverse rulings not based on any extrajudicial source.

judge was by filing a motion under § 1.235. Yet even then, the Nevada Supreme Court made it crystal clear that a disqualification motion cannot be based solely on the rulings and actions of a judge during judicial proceedings: "[R]ulings and actions of a judge during the course of official judicial proceedings do not establish legally cognizable grounds for disqualification...The personal bias necessary to disqualify **must** 'stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.'"[33]

The *P.E.T.A.* Court, however, judicially legislated a new, supplemental option in those situations when cognizable grounds for disqualification are discovered only after the time period in subsection 1 of § 1.235 has passed. That option is a motion pursuant to Nevada's Judicial Cannons. The Nevada Supreme Court in *Towbin Dodge* acknowledged that option; noted that NCJC 2.11 is substantially similar to 28 U.S.C. 455; and concluded that "the federal procedure provides a convenient method for enforcing [NCJC 2.11] in situations when NRS 1.235 does not apply." *Towbin Dodge* at 256.

Liteky v. United States, 510 U.S. 540 (1994) is the landmark case for interpretation of 28 U.S.C. 455. Even Dr. Debiparshad cited to that case in the Motion (p.31, line 10) because it has been cited by thousands of decisions, including by our high court. Regarding disqualification based upon judicial rulings in the federal system, Justice Scalia wrote: **"[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion**...In and of themselves (i.e., apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved."[34] Following that decision, our high court stated: "[Appellant] also asserts that the justices of this court have demonstrated actual bias through their rulings in his appeals. We have specifically held that a judge is not disqualified merely because of his or her judicial rulings...The United States Supreme Court has recently reiterated that 'judicial rulings alone almost never constitute

[33] *In re Petition to Recall Dunleavy*, 104 Nev. 784, 789-790, 1988 Nev. LEXIS 459, *11-12 (1988) (citation omitted and emphasis supplied).
[34] *Liteky* at 555 (citation omitted and emphasis supplied).

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[a] valid basis for a bias or partiality motion.' *Liteky v. United States,* 510 U.S. 540, 114 S. Ct. 1147, 1157, 127 L. Ed. 2d 474 (1994). Consequently, [Appellant's] contention is meritless."[35]

The Motion is predicated **entirely** upon Judge Bare's pre-trial and trial rulings without any reference whatsoever to extrajudicial sources. Both Nevada and federal case law teach that such rulings are an insufficient basis for a disqualification motion.

3. **Judicial Attitude Towards Attorney**.

Federal and Nevada courts have also clearly announced that a judge's statement of bias in favor of, or against, a litigant's attorney is irrelevant and an insufficient basis for a disqualification motion. In fact, the Nevada Supreme Court in *City of Las Vegas Downtown Redevelopment Agency v. Hecht*, 113 Nev. 632, 1997 Nev. LEXIS 74 (1997) noted that, "While [NCJC 2.11(A)(1)] states that a judge can be disqualified for animus toward an attorney, situations where such a disqualification has been found are exceedingly rare, **and non-existent in Nevada**."[36]

In *Liteky*, Justice Scalia provided this lucid explanation: "[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. . . . Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration—remain immune."[37]

Logically, the obverse of that should be true, thereby immunizing judges from making expressions of tolerance, satisfaction, respect and even high praise, for such statements readily contribute to the administration of justice and are also within the bounds of what imperfect men

[35] *Allum v. Valley Bank*, 112 Nev. 591, 594, 1996 Nev. LEXIS 69, *5-6 (1996) (citations omitted).
[36] *Id*. at 636, *6 (emphasis supplied).
[37] *Liteky* at 555-556 (citation omitted and emphasis original).

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and women sometimes display. Indeed, surely Justice Scalia would agree that colorful positive remarks of a judge about an attorney should be protected at least as much as harsh negative statements, if not more so.

Nevada's Supreme Court has consistently ruled in harmony with Justice Scalia's sentiments. For example, in *In re Petition to Recall Dunleavy*, 104 Nev. 784, 1988 Nev. LEXIS 459 (1988) our high court stated: "[A]n allegation of bias in favor or against an attorney for a litigant generally states an insufficient ground for disqualification because 'it is not indicative of extrajudicial bias against a "party."'. . . In a small state such as Nevada, with a concomitantly limited bar membership, it is inevitable that frequent interactions will occur between the members of the bar and the judiciary. Thus, allegations of bias based upon a judge's associations with counsel for a litigant pose a particularly onerous potential for impeding the dispensation of justice."[38] Judge Bare stated that he has known Mr. Jimmerson for 25 years and respects him professionally. Professional respect is not a basis to disqualify a judge.

One year later the Nevada Supreme Court reiterated that view in *Ainsworth v. Combined Ins. Co.*, 105 Nev. 237, 1989 Nev. LEXIS 54 (1989): "Generally, an allegation of bias in favor of or against counsel for a litigant states an insufficient ground for disqualification because it is not indicative of extrajudicial bias against the party."[39] That case involved affirmance of a punitive damage award of $6,000,000 against an insurance company. A petition for rehearing and a motion to disqualify former Chief Justice Elmer Gunderson were filed based upon Justice Gunderson's participation in the previous decisions in the case. The chief objection was alleged bias **due to Justice Gunderson having openly ridiculed the insurance company's attorney in court, referring to him in a motion as a "loser" or "losing lawyer" approximately 130 times, and admitting to entering the case with a preconceived negative impression of that attorney**. The Court denied the denied the motion to disqualify and the petition for rehearing.[40]

If Justice Gunderson's calling an insurance company's attorney a "loser" 130 times in open court and hearing the matter with a preconceived attitude of negativity towards that attorney

[38] *Id*. at 790-791, *13-14 (citation omitted).
[39] *Id*. at 259, *41.
[40] *City of Las Vegas Downtown Redevelopment Agency v. Hecht*, 113 Nev. 632 fn1 (1997).

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is insufficient for disqualification, Judge Bare's single statement of confidence in, and respect for, Mr. Jimmerson is beyond any doubt an insufficient basis for disqualification. That statement is so innocuous compared to Justice Gunderson's voluminous criticisms and preconceived attitude of negativity that it is not even in the same universe. Moreover, as our high court explained: "[If a] party could successfully challenge a judge based upon allegations of bias against [a] party's attorney, it 'would bid fair to decimate the bench' and lawyers, once in a controversy with a judge, 'would have a license under which the judge would serve at their will.'"[41]

VIII. CONCLUSION

Dr. Debiparshad's Motion is an odious, *ad hominem* attack upon Judge Bare. It is strategically designed to minimize exposure for sanctions relating to professional misconduct. It is unmeritorious procedurally because it is untimely. And it is defective substantively for the reasons described above.

The Motion should thus be summarily denied, and attorneys' fees and costs associated with this response should be awarded to Plaintiff.[42]

DATED this 30th day of August, 2019.

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[41] *In re Petition to Recall Dunleavy*, 104 Nev. 784, 790, 1988 Nev. LEXIS 459, *14 (1988) (quoting *Davis v. Board of School Comm'rs of Mobile County*, 517 F.2d 1044, 1050 (5th Cir. 1975).
[42] Plaintiff will submit redacted billing, along with the *Brunzell* analysis, if the Court is inclined to grant the same.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of The Jimmerson Law Firm, P.C. and that on this 30th day of August, 2019, I served a true and correct copy of the foregoing **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISQUALIFY THE HONORABLE ROB BARE ON ORDER SHORTENING TIME AND COUNTERMOTION FOR ATTORNEYS' FEES AND COSTS**, as indicated below:

_X_ by electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk;

To the individual(s) or attorney(s) listed below at the address, email address, and/or facsimile number indicated below:

S. Brent Vogel, Esq.
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/s/ Shahana Polselli
An employee of The Jimmerson Law Firm, P.C.

EXHIBIT 1

EXHIBIT 1

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RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

JASON LANDESS,

Plaintiff(s),

vs.

KEVIN DEBIPARSHAD, M.D.,

Defendant(s).

CASE#: A-18-776896-C

DEPT. XXXII

BEFORE THE HONORABLE ROB BARE
DISTRICT COURT JUDGE
FRIDAY, AUGUST 2, 2019

RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 10

APPEARANCES:

For the Plaintiff: MARTIN A. LITTLE, ESQ.
JAMES J. JIMMERSON, ESQ.

For Defendant Jaswinder S. Grover, MD Ltd: STEPHEN B. VOGEL, ESQ.
KATHERINE J. GORDON, ESQ.

RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER

our plan is for the rest of today then?

[Bench conference - not recorded]

THE COURT: All right. We're just talking about the schedule to make sure we don't back up anything next week, and we think that the best thing to do now would be to take a comfort break, come back at 2:30, so that's a 15-minute break, and then stop at 3:30 today, right. So in other words, we're going to watch one hour of Mr. Smith and then that will be it at that point, then come back and finish up with the video of Mr. Smith on Monday and carry on from there.

So a friendly reminder, my prior comments, of course, about not talking about the case or referencing reports of it or forming opinions always apply. A 15-minute comfort break, come back, and we'll watch the video for an hour and then that will be it for today. We'll see you in 15 minutes.

[Jury out at 2:15 p.m.]

THE COURT: All right. We're off the record, and a comfort break.

[Recess at 2:15 p.m., recommencing at 3:45 p.m.]

THE COURT: All right. During that last break, the reason I took a few extra minutes -- sorry about that -- is, you know, it really is on my mind this whole thing with the passage that was read and I just -- you know, first, I want to say this to be sure for the record and for everybody's edification: the motion to strike is denied at this time -- at this time. So I want to be clear that if lawyers file something -- trial brief, law on the point, then you can do that.

EXHIBIT 2

EXHIBIT 2

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

JASON LANDESS,

Plaintiff(s),

vs.

KEVIN DEBIPARSHAD, M.D.,

Defendant(s).

CASE#: A-18-776896-C

DEPT. XXXII

BEFORE THE HONORABLE ROB BARE
DISTRICT COURT JUDGE
FRIDAY, AUGUST 2, 2019

RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 10

APPEARANCES:

For the Plaintiff: MARTIN A. LITTLE, ESQ.
JAMES J. JIMMERSON, ESQ.

For Defendant Jaswinder S. Grover, MD Ltd: STEPHEN B. VOGEL, ESQ.
KATHERINE J. GORDON, ESQ.

RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER

Does anybody know that?

MR. JIMMERSON: Yes, Your Honor. Mr. Cardoza [phonetic] is Hispanic.

THE COURT: Okay. All right.

MR. JIMMERSON: And Ms. Ascuncion may also be, although, she's not Mexican, I wouldn't think. I would think she might be Filipino, or something like that.

THE COURT: Okay. So we have four jurors, potentially, that fall into reasonably, you know, a situation where when they see that, they would be offended, because it has to do with their ethnicity, or their race. We got a problem and I just don't know how to fix it. You know, that's what I did over this last break. I mean, this kind of came and went. This about as big a problem as we could have, because of the way this happened. I mean, it's an admitted exhibit.

And what I wanted to say too, I've said it a few times, when Ms. Gordon is using it -- I appreciate what you're saying, Mr. Jimmerson, but you know, you could have said sidebar. You could have just said hold on a second, sidebar. You know, I mean, you could have.

MR. LITTLE: But it was put up in front of the jury, Judge, with yellow highlighting on two sentences. I mean, it's there. They're looking right at it.

THE COURT: I get it, but at some point, as soon as you realize what's going on, you could say "sidebar", you know; you know? But what I'm trying to say is, here's the construct. All right. Let me put it to you this way, you know, I'm at the judicial college, hypothetically. I'm

there, and there's 200-and-some judges in the audience. And maybe I'm part of a panel, presenting. And I say, okay, here's what we have.

In pre-trial disclosures, the plaintiffs provide to the defense a number of emails that their client -- that the plaintiff sent. And in one of the emails is a passage where he relates that when he was younger, he learned to play pool. And he hustled Blacks, Mexicans, and rednecks, on payday. And there's an email that says that. And maybe I didn't give the context of the case. I don't need to do that now, but -- and then, for some reason, is -- well, it's disclosed. It's disclosed to the defense. And then it's a -- for some reason, it's in a plaintiff's proposed exhibit, pre-trial and during the trial. In front of the jury, the defense moves to admit it. No objection. It's admitted by stipulation, the whole 122 pages.

MR. JIMMERSON: The reason that it is in Plaintiff's list is, in my understanding, is that Mr. Dariyanani provided it to the Defendant.

THE COURT: Okay. Well, there you go. And so -- right. He's trying to disclose everything. And he -- even though he's a lawyer, he disclosed that, but he should've probably disclosed everything. And the issue becomes, is it usable or not?

MR. JIMMERSON: That's right.

THE COURT: Okay. So then, now it's in evidence. And then, not objected to, as entered by the defense. And then when the defense uses it. No objection. And then in retrospect, but in short-time retrospect, I guess you could say, within, I don't know, a half hour after a break, the plaintiffs say, strike it. It's too prejudicial. And then I say to the 200 judges in class there at the college, what do you do? I doubt any

one of those 200 judges are going to give the model answer. So I need help on this. I'm just telling you, I have no idea what to do, but I'm sharing with you that, given the jury that we have, and even if it wasn't the jury we have, that's not so significant to me. Although, I have -- I think it does have a higher level of significance when you have people that fall into these -- into what is clearly, at least, you know, without any context being given to it, it's a racial comment.

So now you have jurors who could draw a conclusion that he's a racist. And that's why I -- and I'm the one that mentioned it, nobody else did, that's okay -- I mentioned this idea of jury nullification. I realized that that's a concept that usually comes up after a verdict. And it's, you know, a basis for a new trial. You know, if it happens in a criminal case, well, so be it. You cannot do anything about that. But if it happens in a civil case -- because of double jeopardy -- but if it happens in a civil case, it's grounds for a new trial. I just think of -- that philosophy comes to mind here.

Do we have a situation that's curable? Should I do anything? Or should I do something? I mean, and it -- you know, without the benefit of further briefing and all that, like I say, most of me, as I sit here, thinks I need to do something. I denied a motion to strike it. I don't know what to do about it. I mean, I -- the --

MR. JIMMERSON: Well, why don't we give ourselves the weekend to think about? I did want to mention though that the Defendant's also put, in front of Mark Mills, a PT record, where he said he'd fallen twice, and then ripped it off. And just by his quick brain, he

EXHIBIT 3

EXHIBIT 3

Electronically Filed
8/5/2019 8:49 AM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

JASON LANDESS,

Plaintiff(s),

vs.

KEVIN DEBIPARSHAD, M.D.,

Defendant(s).

CASE#: A-18-776896-C

DEPT. XXXII

BEFORE THE HONORABLE ROB BARE
DISTRICT COURT JUDGE
FRIDAY, AUGUST 2, 2019

RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 10

APPEARANCES:

For the Plaintiff: MARTIN A. LITTLE, ESQ.
JAMES J. JIMMERSON, ESQ.

For Defendant Jaswinder S. Grover, MD Ltd: STEPHEN B. VOGEL, ESQ.
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RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER

I do want to share with you that during that last break I really thought only about this. And you know, I don't know what do to do with it. I really don't know what to do with it. I mean, because, you know, I look at the jurors and Ms. Brazil, Ms. Stidhum -- well, they're black, and I'm using the terminology that was in that email, they're black people -- African American people, but again, taking the word that is attributed now to Mr. Landess, they're black people.

As far as the, you know, comment about Mexicans, I don't know. I frankly, don't really know. You might think this is a little odd, but I don't really even notice any of this stuff. I just, you know -- it's just the way that I was raised probably. You know, I've got the most loving mom. This person that I have as a mom you wouldn't even believe. I oftentimes say to myself, when we all get up to heaven, there she is -- and I'm going to say, I knew it, I knew she was a saint, I knew it, but anyway, doesn't matter.

I got to tell you, during that break this just -- I mean, it almost -- I don't want to say it made me ill, but it's really starting to percolate in me, you know, because as a judge, you know, I think one of the primary things here is when that verdict comes in I want to be able to say I did everything to make sure justice was had. And I've got to say, I'm not sure we're in a position now that the jury has heard that to be confident in justice. I mean, I've just got to tell you. I don't know what to do with it. I'm not that smart. I'm just not, but I don't know what to do with it, and it's the chronology of what occurred.

No criticism -- and I'm going to talk for a minute -- sorry -- no

EXHIBIT 4

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Electronically Filed
8/5/2019 8:49 AM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

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Landess has a good character. And you know, no objection was made by that, by the way, by the Defense when he's offering these good character traits.

And so now it's the flow of things, we now have an admitted exhibit that's there, not referenced yet. Now we have a reason to bring up character-type traits, because the Plaintiff has put it in issue through Dariyanani.

We then have, of course, that moment in time where Ms. Gordon puts on the ELMO and highlights with a yellow highlighter this paragraph about--

MR. JIMMERSON: That I didn't even notice until she just put it up there. What was I going to do, object to an admitted document, suggesting that I'm afraid of it. I was outraged when I read it. I just was -- I was blown away. I was stunned actually.

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. So I say that now because I think what you're really saying doesn't surprise me. And I think what you're really saying is -- and again, interrupt me anytime if you want -- is, well, in a multi-page exhibit, we just didn't see it.

MR. JIMMERSON: That's exactly right, Judge. You're 100 percent right.

THE COURT: Okay. Well, there you go. And you know, nobody is perfect. We all do these things.

MR. JIMMERSON: I already said I was mad at myself.

THE COURT: I know. You did say that.

Okay. So --

MR. JIMMERSON: But I think all of us have an ethical obligation to practice law the right way and Kathy Gordon did not do so.

MS. GORDON: Your Honor, I would --

THE COURT: Okay. Hold on a second, if you don't mind.

MS. GORDON: That's smearing.

THE COURT: Okay. Go ahead. I'm sorry. I should --

MS. GORDON: And truly --

THE COURT: -- he's interjected, so you can too.

MS. GORDON: -- it's my witness, right? I'm the one who questioned Mr. Dariyanani about it, and I frankly had every right to do

EXHIBIT 5

EXHIBIT 5

RTRAN

DISTRICT COURT

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Defendant(s).

CASE#: A-18-776896-C

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FRIDAY, AUGUST 2, 2019

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KATHERINE J. GORDON, ESQ.

RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER

unethical thing -- okay -- to go that far, but now I have to deal with what did happen under the circumstances. Okay.

MS. GORDON: I'm just asking the Court -- I understand that, and I appreciate it. I'm just wondering if perhaps we could that and talk about what happened without talking about how Mr. Jimmerson somehow is above reproach, which clearly is making some kind of distinction about the party who used the document. I don't think --

THE COURT: Well --

MS. GORDON: -- that's necessary.

THE COURT: -- I mentioned those -- you're criticizing what I said. I mentioned it for a reason that I think made sense and that is, I was about to ready to say that I had drawn a conclusion that Mr. Jimmerson just didn't have it in his mind that this item was in one of the 122 pages. He might not have seen it, and that's why I mentioned my thoughts about Mr. Jimmerson in that context. Okay.

Do you have a problem with what I said about him?

MS. GORDON: No. I just wish that we could focus more on the procedural part of it than the personal aspects of the attorneys who did it. I don't have a problem with what you said about Mr. Jimmerson. I think I just took it as perhaps making a distinction.

THE COURT: Okay. Well, I mean, if I had dealt with you for 25 years, my guess is, consistent with what I've seen with you, I mean, you really do care about what you're doing. It's evident in anybody who watches you as an attorney, you know.

MS. GORDON: I think and I just wouldn't do something

EXHIBIT 6

EXHIBIT 6

Cognotion, Inc., the former employer of Jason Landess. I understand that you are his counsel.

As you know, I am not a party to this action. Nevertheless, I have tried to cooperate as much as possible. I booked a non-refundable ticket and non-refundable hotel stay at a cost of approximately $1000 and cleared my calendar for 2 days on April 15-16 per the request of the attorneys in this matter. No one has reimbursed me for that. That deposition was cancelled by the attorneys. I was then asked to reschedule.

On Wednesday, April 17, 2019, I circulated potential dates that I had cleared on my calendar for a subsequent deposition. You were included on that email, but chose not to indicate your availability or otherwise reply. Mr. Orr has indicated he will accommodate my schedule and take the deposition at my home in Virginia on 4/30/19. Either you, an associate of yours or another lawyer working on the case may appear telephonically or in person, but I will be sitting for Mr. Orr's deposition at that time.

As the deposition will be taken on East Coast time, if we began at 9:00 AM or 10:00 AM , you could appear telephonically and probably make your other deposition, as this is 6:00 AM or 7:00 AM Las Vegas time.

Best regards,
Jonathan Dariyanani
President and CEO
Cognotion, Inc.

On Mon, Apr 22, 2019 at 7:53 PM Little, Martin A. <MAL@h2law.com<mailto:MAL@h2law.com>> wrote:
What other days are there? I have another deposition on 4/30

(Via mobile — please excuse typos/brevity)

Martin A. Little<mailto:mal@h2law.com<mailto:mal@h2law.com>>
Attorney at Law

3800 Howard Hughes Pkwy., Ste. 1000, Las Vegas, NV 89169
E: mal@h2law.com<mailto:mal@h2law.com><mailto:mal@h2law.com<mailto:mal@h2law.com>>
D: 702.667.4829<tel:702.667.4829> C: 702.371.1545<tel:702.371.1545> F: 702.567.1568<tel:702.567.1568>

[cid:hh_logo_af5babf3-df15-4b32-8849-94aa3d24375e.png]<https://howardandhoward.com/>

On Apr 22, 2019, at 2:15 PM, Jonathan Dariyanani <jonathan@cognotion.com<mailto:jonathan@cognotion.com><mailto:jonathan@cognotion.com<mailto:jonathan@cognotion.com>>> wrote:

Dear Mr. Orr,

Thank you for your reply. I will hold 4/30 tentatively until I hear back from you. Regarding the document production you requested, I went through the books and records of Cognotion and have prepared the document production which I believe to be responsive to your request that you made to me via telephone on Thursday, April 11, 2019. Cognotion is specifically invoking attorney-client privilege with respect to the legal advice Mr. Landess rendered to us under his engagement. We have attempted to provide you with the broadest possible response without waving our privilege.

You indicated in our conversation that you would keep the materials that we are supplying to you confidential and that they would not appear in any public record or public exhibit or otherwise be accessible to the public. I expect that you will abide by this representation. The materials that you are being supplied with are of a highly confidential nature and could do significant damage to Cognotion if they were improperly disclosed. If there is material in this production that you would like to make public, I expect to be notified in advance and to have the opportunity to seek a protective order from such disclosure, as many of these documents are governed by applicable confidentiality agreements.

You will find below a link where you can download the document production. By accessing the link, you agree to abide by your representations regarding confidentiality given to me on our call of April 11, 2019.

I have included in the production a video asset where Mr. Landess appears as faculty in our Certified Nurse Assistant course. He appears at the 1:30 mark in the video entitled S01.A01.L01 Close Up_Meet Your Faculty.mp4. I am not sure if this material is something that you are interested in, but it is clearly not privileged. If you'd like to review all of the video footage where Mr. Landess appears in the course, I could arrange that, but the footage is not organized by instructor, so someone would have to go through the course and pull Mr. Landess's footage, which I am willing to do if you'd like.

It has taken significant Cognotion resources to supply you with the requested production. Thank you for amending your subpoena to narrow down to the materials which you requested. While we have every desire to cooperate in good-faith with your efforts to represent your client and evaluate Mr. Landess's claims fairly, our cooperation is predicated upon your good faith attempt to seek information only reasonably relevant to your inquiry and should not be considered a waiver of objections to this production.

Please let me know when you can confirm 4/30 for the deposition, who will be attending live and via telephone and what time you'd like to get started and I can supply you with the address and if you will need a speakerphone available, which I can supply.

Best regards,

Jonathan Dariyanani
President and CEO
Cognotion, Inc.
[https://ssl.gstatic.com/docs/doclist/images/icon_10_generic_list.png] Jason Landess Discovery.zip<https://t.sidekickopen05.com/s1t/c/5/f18dQhb0S7lC8dDMPbW2n0x6l2B9nMJN7t5XZsfDc_-N2zhFTldDWpjW1q0JJx56dvHWf3Gmb9v02?t=https%3A%2F%2Fdrive.google.com%2Ffile%2Fd%2F1OYsjeZpJN2vcAVctCPZJ2YhGPIta1pRE%2Fview%3Fusp%3Ddrive_web&si=5071928980668416&pi=e444965f-f0f0-4d52-975b-d3b5a62b3165>

On Mon, Apr 22, 2019 at 3:04 PM Orr, John
<John.Orr@lewisbrisbois.com<mailto:John.Orr@lewisbrisbois.com><mailto:John.Orr@lewisbrisbois.com<mailto:John.Orr@lewisbrisbois.com>>> wrote:
Jonathan

Thank you for reaching out. We could do April 30. I just need to confirm that this works with all other counsel. We also need to make sure we have all of the records before we proceed with the deposition. Let's tentatively plan for 4/30. I will confirm with everyone if that works. When do you anticipate disclosing the records ? Thank you.

Thank you.

Sent from my iPhone

[cid:LB-Logo_7c9c5bd0-0a1e-47b8-a3b1-a4b5cdfed8fa.png] John M.
Orr<https://t.sidekickopen05.com/s1t/c/5/f18dQhb0S7lC8dDMPbW2n0x6l2B9nMJN7t5XZsfDc_-N2zhFTldDWpjW1q0JJx56dvHWf3Gmb9v02?t=http%3A%2F%2Flewisbrisbois.com%2Fattorneys%2Forr-john&si=5071928980668416&pi=e444965f-f0f0-4d52-975b-d3b5a62b3165>
Attorney
John.Orr@lewisbrisbois.com<mailto:John.Orr@lewisbrisbois.com><mailto:John.Orr@lewisbrisbois.com<mailto:John.Orr@lewisbrisbois.com>>

T: 702.693.4352 F: 702.893.3789

6385 South Rainbow Blvd., Suite 600, Las Vegas, NV
89118 | LewisBrisbois.com<http://LewisBrisbois.com><http://lewisbrisbois.com/>

Representing clients from coast to coast. View our locations
nationwide.<https://t.sidekickopen05.com/s1t/c/5/f18dQhb0S7lC8dDMPbW2n0x6l2B9nMJN7t5XZsfDc_-N2zhFTldDWpjW1q0JJx56dvHWf3Gmb9v02?t=http%3A%2F%2Flewisbrisbois.com%2Fabout%2Flocations&si=5071928980668416&pi=e444965f-f0f0-4d52-975b-d3b5a62b3165>

On Apr 22, 2019, at 10:43 AM, Jonathan Dariyanani
<jonathan@cognotion.com<mailto:jonathan@cognotion.com><mailto:jonathan@cognotion.com<mailto:jonathan@cognotion.com>>> wrote:

External Email

Dear Mr. Orr:
I haven't received a response to the email that I sent below on Wednesday, April 17, 2019. Please reply as I

have kept these dates open for you.
Thank you,
Jonathan

On Wed, Apr 17, 2019 at 1:20 PM Jonathan Dariyanani <jonathan@cognotion.com<mailto:jonathan@cognotion.com><mailto:jonathan@cognotion.com<mailto:jonathan@cognotion.com>>> wrote:
Dear Mr. Orr:
I am writing to follow-up on our conversation of Thursday of last week. You requested some documents from me for the malpractice case involving Jason Landess. I will provide our document response to you on Monday, as I have been out of the office on business this week. My intention is to upload those documents to Dropbox and send you a link that you can use to download them.

As to scheduling my deposition, I have the following dates available. You offered to take the deposition at my house, if that would be more convenient for me. I think it would as I have been traveling a lot lately and I'd rather be at home. Here are the dates I can offer:

April 29 or April 30
May 10.

Please let me know if any of these dates work for you. We live in Virginia, approximately 50 miles from Washington DC. Reagan National Airport (Washington National) is the best airport to fly into.

If this isn't convenient for you, I can New York City on May 6, as I have to be in town for a business dinner that night.

Best regards,
--
Jonathan Dariyanani
President
Cognotion, Inc.
Tel USA +1 540-841-0226
Fax USA +1 415-358-5548
Email:
jonathan@cognotion.com<mailto:jonathan@cognotion.com><mailto:jonathan@cognotion.com<mailto:jonathan@cognotion.com>>

--
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Email:
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President
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Fax USA +1 415-358-5548
Email: jonathan@cognotion.com<mailto:jonathan@cognotion.com>

Spam
Phish/Fraud
Not spam
Forget previous vote

Shahana Polselli

From:	James J. Jimmerson, Esq.
Sent:	Monday, May 06, 2019 3:13 PM
To:	'mshannon@hpslaw.com'; 'john.orr@lewisbrisbois.com'
Cc:	Villamar, Alexander; Little, Martin A.; Shahana Polselli; Ofelia Markarian, Esq; Kim Stewart
Subject:	FW: Additional Materials
Attachments:	Jason Landess 1099 2018.pdf; Jason Landess Payment Activity 2017-2018.xls; Jason Landess - Wire activity - chase.com.pdf; Jason Landess - Payment Activity - chase.com.pdf

All:

I received a copy of this email from Mr. Dariyanani sent to Mr. Orr. I am sending it to all counsel with the attached enclosures.

JJJ

James J. Jimmerson, Esq.
Member, National Trial Lawyers Top 100 Lawyers
Martindale-Hubbell "AV" Preeminent Lawyers
Super Lawyers Business Litigation
Stephen Naifeh "Best Lawyers"
Recipient of the prestigious Ellis Island Medal of Honor, 2012
Fellow, American Academy of Matrimonial Lawyers
Diplomat, American College of Family Trial Lawyers
Family Law Specialist, Nevada State Bar
WWW.JIMMERSONLAWFIRM.COM
415 South Sixth Street, Suite 100
Las Vegas, NV 89101
P: (702) 388-7171
F: (702) 380-6422

PLEASE BE ADVISED that due to my Court schedule and the volume of emails I receive daily, I am unable to read the majority of my emails on a daily basis. Therefore, your email is not deemed by our firm as being "received" by me unless I respond to the same, nor does it constitute service on, or notification to, our firm. Unless your email is of a personal/private nature to me, please copy my Legal Assistant, Kim Stewart, at ks@jimmersonlawfirm.com AND any other Associates or Paralegals at our firm associated with your case on all emails to ensure receipt. For personal emails, a follow up by telephone may be appropriate and necessary. I apologize for this inconvenience. Thank you for your cooperation.

From: Jonathan Dariyanani [mailto:jonathan@cognotion.com]
Sent: Monday, May 06, 2019 9:21 AM
To: Orr, John <John.Orr@lewisbrisbois.com>; James J. Jimmerson, Esq. <jjj@jimmersonlawfirm.com>; Little, Martin A. <mal@h2law.com>
Subject: Additional Materials

Mr. Orr,
Good Morning. I requested the additional materials you asked for in my deposition from our CFO. Please find them attached.

Best regards,

--
Jonathan Dariyanani
President
Cognotion, Inc.
Tel USA +1 540-841-0226
Fax USA +1 415-358-5548
Email: jonathan@cognotion.com

Shahana Polselli

From: Kim Stewart
Sent: Thursday, May 30, 2019 12:13 PM
To: Shahana Polselli
Subject: FW: Document Request

Kimberly R. Stewart
The Jimmerson Law Firm, P.C.

From: Jonathan Dariyanani <jonathan@cognotion.com>
Sent: Thursday, May 30, 2019 12:12 PM
To: James J. Jimmerson, Esq. <jjj@jimmersonlawfirm.com>; Kim Stewart <ks@jimmersonlawfirm.com>; Little, Martin A. <mal@h2law.com>
Subject: Fwd: Document Request

---------- Forwarded message ---------
From: **Orr, John** <John.Orr@lewisbrisbois.com>
Date: Thu, May 30, 2019 at 2:04 PM
Subject: Document Request
To: Jonathan Dariyanani <jonathan@cognotion.com>, John Truehart <john@cognotion.com>
CC: Vogel, Brent <Brent.Vogel@lewisbrisbois.com>, Gordon, Katherine <Katherine.Gordon@lewisbrisbois.com>

Mr. Dariyanani

I hope you are well. In the subpoena that we served on Cognotion, we requested

A complete copy of Cognotion, Inc. file pertaining to JASON GEORGE LANDESS a.k.a. KAY GEORGE LANDESS, DOB: 04/21/1946, including but not limited to, all employment files, wage statements, job descriptions, **stock option agreements**, including but not limited to, computer data, correspondence, emails, texts, social media posts/comments/ correspondence, and/or any and all other documentation which may be related to JASON GEORGE LANDESS a.k.a KAY GEORGE LANDESS, contained within the files of COGNOTION, INC.

Mr. Landess offer of employment also references an option grant contract between Cognotion and Mr. Landess. Could you provide me with a copy of this contract as soon as possible? Could you also provide me with a custodian or records affidavit stating that all responsive documents pursuant to the subpoena have been disclosed to us? Thank you. Please let me know if you have any questions. Thank you.

LEWIS BRISBOIS

John M. Orr
Attorney
John.Orr@lewisbrisbois.com

T: 702.693.4352 F: 702.893.3789

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From: Jonathan Dariyanani [mailto:jonathan@cognotion.com]
Sent: Tuesday, April 30, 2019 10:56 AM
To: John Truehart; Orr, John; Little, Martin A.; James J. Jimmerson, Esq.
Subject: [EXT] Document Request

External Email

John,

I hope you are doing well. We have a document request for the lawsuit that Jason Landess is involved in. Please prepare the following documents for the attorneys:

1. Jason's 2018 1099 Form

2. Wire transfers/bank transfers or ACH transfers to Jason for as far back as the Chase system will go (I think this is 2 years).

3. Any expense reimbursement paperwork you have.

4. Any loan payment/repayment records we have between Jason and Cognotion.

5. Our ledger/journal entries showing how much he was paid in our system.

I know that we have other things we are working on, but I'd like to get this information to the lawyers by this Friday. Call me if you have any questions.

Thanks,

J

--

Jonathan Dariyanani

President

Cognotion, Inc.
Tel USA +1 540-841-0226
Fax USA +1 415-358-5548
Email: jonathan@cognotion.com

--
Sent from Gmail Mobile...please excuse errors.
Jonathan Dariyanani
President and CEO
Cognotion, Inc.
540-841-0226

From: Jonathan Dariyanani <jonathan@cognotion.com>
Date: June 1, 2019 at 5:11:21 AM PDT
To: "Orr, John" <John.Orr@lewisbrisbois.com>, "James J. Jimmerson, Esq." <jjj@jimmersonlawfirm.com>, "Little, Martin A." <mal@h2law.com>
Cc: Jonathan Dariyanani <jonathan@cognotion.com>, John Truehart <john@cognotion.com>, "Vogel, Brent" <Brent.Vogel@lewisbrisbois.com>, "Gordon, Katherine" <Katherine.Gordon@lewisbrisbois.com>
Subject: Re: Document Request

Dear Mr. Orr,

Thank you for your email of yesterday, May 29, 2019. As you know, I am not a party to this action, which I understand to be a medical malpractice action on behalf of Jason Landess. I also reside outside of Nevada, in Virginia. I am the President, founder and CEO of Cognotion, Inc., a closely held, private software company that trains health care professionals with a focus on treating our elders with care and dignity and preventing elder abuse. In fact, when healthcare institutions have been found to be systematically abusing elderly patients, regulators require them to undertake training like Cognotion training to prevent such abuse. Mr. Landess was my former Senior Legal Counsel until the company terminated him in December, 2018.

As you know, Mr. Landess was injured in 2017 and was incompetently operated on by Dr. Deviparshad, who then systematically covered up his incompetence so that Mr. Landess avoidably missed months of work at my company and endured avoidable pain and suffering and avoidable injuries. Through no fault of his own, Mr. Landess was unable to perform his duties at Cognotion long after a competently performed operation would have had him back to work. He was also lied to by Dr. Deviparshad and was, therefore, unable to inform Cognotion accurately regarding his time for recovery. Due to Dr. Deviparshad's malfeasance, Mr. Landess was placed on unpaid leave by our company in the summer of 2018 and was terminated at the end of 2018, as he was unable to perform his duties. Had Dr. Deviparshad performed the surgery competently or at least informed Mr. Landess promptly of the failure of the surgery, Mr. Landess could have taken immediate countermeasures and would still be working at Cognotion today. He was never given this opportunity.

I know what the loss of this job has cost Mr. Landess. I know the way that our society neglects elders. I have seen the cases of the doctors who walk past an elderly patient, delirious with pain, with their flesh rotting from a gangrenous pressure ulcer and how those doctors callously throw a prescription for opiates at those patients without taking even a few minutes to assess the cause of their pain-because many doctors view our elderly as disposable, their time as worthless and their lives as nearly over. But Mr. Landess had so much left to give. That's why we waited nearly a year for him and were so reluctant to replace him. But he has been replaced, through no fault of his own, and he is not coming back to Cognotion. However, I do have unique insight into the substantial economic damages Mr. Landess has suffered as a result of his termination.

You are to be commended for trying to get to the bottom of those damages and to bring this case to a fair and just resolution. Even though I am not a party to this case, I feel terrible about how the hospital and their doctor treated Mr. Landess and so I have taken time out of my schedule, incurred expense and been responsive to your requests, despite the fact that I am running a software company and have three small children at home to raise.

On March 22, 2019, through attorneys Martin Little and Jim Jimmerson, you reached out to me to see if I would be willing to be deposed in this case. I indicated that I would and made myself available anytime during the first two weeks in April. You confirmed my deposition in Las Vegas on April 15, 2019. I purchased a non-refundable plane ticket and a non-refundable hotel room to attend this deposition and cleared my calendar for two days. You cancelled the deposition on April 10, 2019 and failed to reimburse me for my expenses. I called you promptly within 24 hours after you cancelled the deposition to reschedule. In that conversation of April 11, 2019, you and I agreed to the documents you required and you agreed to narrow the scope of your request. I wrote you on April 17, 2019 offering you additional dates for deposition in April and May, including at my home in Virginia. You did not respond. I then followed-up with you on Monday, April, 22, 2019 via email, to which email you replied and we agreed on a deposition date of April 30, 2019 at my home in Virginia. On April 25, 2019, I produced the documents in your revised request. In fact, in the cover letter I included contained the following language:

"It has taken significant Cognotion resources to supply you with the requested production. Thank you for amending your subpoena to narrow down to the materials which you requested. While we have every desire to cooperate in good-faith with your efforts to represent your client and evaluate Mr. Landess's claims fairly, our cooperation is predicated upon your good faith attempt to seek information only reasonably relevant to your inquiry and should not be considered a waiver of objections to this production."

I received no reply whatsoever to my production of April 25, 2019. At the conclusion of my deposition on April 30, 2019, you requested additional documentation which required further efforts on the part of Cognotion, myself, and my CFO. I supplied those additional documents to you on May 6, 2019. I did not receive any other requests or reply of any kind. On May 30, 2019, you wrote me again asking for additional documents, including an affidavit from our custodian of records that we produced everything required by your original subpoena. This is disappointing because you and I had an agreement that you would narrow your subpoena request and I would produce those documents we discussed on our call, as confirmed by my letter of April 25, 2019. Nevertheless, I am willing to continue to be helpful and responsive. However, I cannot send you the affidavit you are requesting, because that was not our agreement. I am happy to send you an affidavit indicating that we have provided all the documents responsive to your narrowed request.

You are also asking for additional documentation regarding our stock option program, which would include board of directors minutes and information from our internal program that tracks stock option awards. Out of consideration for Mr. Landess and a desire that his claim be evaluated fairly, I am willing to respond to your third document request and provide those documents, however, at this point I need you to sign the attached proposed protective order, which I have signed on behalf of Cognotion. This is something you indicated you would do in

our phone conversation of April 11, 2019 and it would be improper for me to release these records without such a protective order in place. If you require changes to the proposed order, I am happy to accommodate you. I will send you these referenced documents within 72 hours of receipt of a file stamped copy of a signed protective order.

Please let me know if there is anything else I can do to be of service.

Best regards,
Jonathan Dariyanani
President and CEO
Cognotion, Inc.

Shahana Polselli

From: Kim Stewart
Sent: Thursday, July 11, 2019 11:17 AM
To: James J. Jimmerson, Esq.; Jim Jimmerson; James M. Jimmerson, Esq.; Ofelia Markarian, Esq; Carol.Bentley20@gmail.com; bentleylorene@icloud.com; Shahana Polselli
Subject: FW: [EXTERNAL] Re: [EXT] Landess Matter
Attachments: Cognotion 2018 PL PDF.pdf; Cognotion 2016 2017 Balance Sheet PDF.pdf; Cognotion 2018 Balance Sheet PDF.pdf; Cognotion 2016 2017 PL.pdf

Kimberly R. Stewart
The Jimmerson Law Firm, P.C.

From: Jonathan Dariyanani <jonathan@cognotion.com>
Sent: Thursday, July 11, 2019 11:07 AM
To: Jonathan Dariyanani <jonathan@cognotion.com>
Cc: Orr, John <John.Orr@lewisbrisbois.com>; Gordon, Katherine <Katherine.Gordon@lewisbrisbois.com>; Harris, Adrina <Adrina.Harris@lewisbrisbois.com>; James J. Jimmerson, Esq. <jjj@jimmersonlawfirm.com>; Little, Martin A. <mal@h2law.com>; Marjorie E. Kratsas <mkratsas@hpslaw.com>; Michael Shannon <mshannon@hpslaw.com>; Vogel, Brent <Brent.Vogel@lewisbrisbois.com>
Subject: Re: [EXTERNAL] Re: [EXT] Landess Matter

Dear Mr. Orr:
I hope you are having a good day. Please find attached the Cognotion 2016, 2017, and 2018 financial statements attached. We do not prepare cash flow statements. This concludes our production related to your 4th and final document request.

Very best regards,
Jonathan Dariyanani

On Thu, Jul 11, 2019 at 10:04 AM Jonathan Dariyanani <jonathan@cognotion.com> wrote:

> My apologies-I've been in meetings-I'll send them when I'm back at the office in two hours.
>
> Best regards,
> Jonathan
>
> On Thu, Jul 11, 2019 at 9:22 AM Orr, John <John.Orr@lewisbrisbois.com> wrote:
>
> > Good morning, Mr. Dariyanani
> >
> > I wanted to follow-up with you on the status of the Cognotion financials. Thank you.
> >
> > **From:** Jonathan Dariyanani [mailto:jonathan@cognotion.com]
> > **Sent:** Monday, July 08, 2019 11:26 AM

To: Orr, John
Cc: Jonathan Dariyanani; Gordon, Katherine; Harris, Adrina; James J. Jimmerson, Esq.; Little, Martin A.; Marjorie E. Kratsas; Michael Shannon; Vogel, Brent
Subject: Re: [EXTERNAL] Re: [EXT] Landess Matter

Dear Mr. Orr,

Thank you for your email of July 3 and I hope you had a good holiday. I am attaching all of the documents to this email that I agreed to provide you, with the exception of the Cognotion Financial Statements. Our CFO is in Europe and arrives back in the US today. I will ask him to provide the Cognotion financial statements you requested no later than tomorrow COB. However, included in the attached documents are the Cinematic Health Financial Statements responsive to your request.

Per my previous email to you, once you receive the Cognotion financial statements that will complete our 4th and final document request from you.

Very best regards,

Jonathan Dariyanani

On Wed, Jul 3, 2019 at 6:05 PM Orr, John <John.Orr@lewisbrisbois.com> wrote:

Mr. Dariyanani

The executed protective order is attached. Please forward the responsive documents as soon as possible. Thank you.

From: Jonathan Dariyanani [mailto:jonathan@cognotion.com]
Sent: Tuesday, June 25, 2019 4:30 PM
To: Orr, John
Cc: Jonathan Dariyanani; Gordon, Katherine; Harris, Adrina; James J. Jimmerson, Esq.; Little, Martin A.; Marjorie E. Kratsas; Michael Shannon; Vogel, Brent
Subject: [EXTERNAL] Re: [EXT] Landess Matter

Mr. Orr,

Thank you for your email. Please provide me with a copy of the order after the Judge has signed it and I am happy to supply the documents referenced in my previous letter.

Best regards,
Jonathan

On Sat, Jun 22, 2019 at 9:52 AM Orr, John <John.Orr@lewisbrisbois.com> wrote:

> Mr. Dariyanani
>
> Thank you for your cooperation.
>
> The stipulated protective order has been signed by all parties. We will be sending it to the Court on Monday. I have attached all parties signatures. I can't imagine the Court will have an issue with the order, and it may take it a few days to sign the order. If you would be willing to disclose the documents before the Court signs off, it may expedite things. If you would prefer to wait, I understand. Either way, I appreciate your cooperation. Please let me know if you have any questions. Have a nice weekend.
>
> ---
>
> **From:** Jonathan Dariyanani [mailto:jonathan@cognotion.com]
> **Sent:** Friday, June 21, 2019 3:43 PM
> **To:** Orr, John
> **Cc:** Gordon, Katherine; Harris, Adrina; James J. Jimmerson, Esq.; Jonathan Dariyanani; Little, Martin A.; Marjorie E. Kratsas; Michael Shannon; Vogel, Brent
> **Subject:** Re: [EXT] Landess Matter
>
> Dear Mr. Orr:
>
> Thank you for your email of Wednesday. I am happy to provide the documents that I agreed to send you under the conditions of my last email as soon as I receive the filed copy of the order approving the confidentiality agreement per my last letter to you.

With respect to CHE, Mr. Murray, the CEO, has declined to provide the financial statements for CHE. However, as I have a copy, I will include it in my production.

I do not believe there will be any costs for you.

Best regards,

Jonathan

On Wed, Jun 19, 2019 at 11:43 PM Orr, John <John.Orr@lewisbrisbois.com> wrote:

Mr. Dariyanani

I hope you had a Happy Father's day, as well. Your continued professional courtesy and patience is deeply appreciated. I will prepare a confidentiality agreement as you outlined. I have circulated a stipulation and proposed order regarding the initial confidentiality agreement and will provide the filed copy to you once the court signs it.

With regard to CHE, I am a bit confused about your statement that "Mr. Landess was never employed there and never had any duties there." You testified at your deposition that "Cinematic is owned 80 percent by Cognotion, right, we operate it as a division, if you will, of Cognotion. So I, you know, didn't make any distinction in tasking Mr. Landess between Cognotion or Cinematic. So he did work both, effectively, since Cinematic is really just our healthcare business." I hope you can understand that our desire to view CHE's financials is based on Mr. Landess' representation that the value of Cognotion is based in part on the value of CHE. I appreciate and understand your frustration with the repeated requests. , but this information is vital for all parties to evaluate Mr. Landess' wage loss claim.

Could you please provide me with some type of estimate regarding the cost of this production? I am unclear what legal fees and accounting fees you are referring to. I want to make sure I have a clear understanding of these costs. Thank you, again, for your cooperation. I look forward to hearing back from you.

John M. Orr
Attorney
John.Orr@lewisbrisbois.com

T: 702.693.4352 F: 702.893.3789

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From: Jonathan Dariyanani [mailto:jonathan@cognotion.com]
Sent: Sunday, June 16, 2019 6:23 PM
To: Orr, John; Little, Martin A.; James J. Jimmerson, Esq.
Subject: [EXT] Landess Matter

External Email

Dear Mr. Orr:

I hope you had a happy Father's Day. I am in receipt of your email of yesterday, June 15, 2019, to Mr. Little. As I am traveling throughout the week, this is really the only time I have to respond thoughtfully to your email.

Despite being a non-party to this action, I have done everything I can to extend every courtesy to you and to be accommodating to you. With respect to your 3rd document request of May 29, 2019, I indicated that I would provide the documents you requested within 72 hours of your providing me with a signed confidentiality order that had been filed with the court. I understand you provided a copy of the confidentiality agreement to Mr. Little with your signature. Please provide me with a file stamped, fully executed copy of the agreement and a court order approving the agreement and I will be happy to supply the documents.

As to your fourth request, dated yesterday, June 15, 2019, it is hard for me not to view this request as made in bad faith. Given that you were supposed to be narrowing the scope of your requests, not broadening them, I find the additional material never mentioned in three previous requests to be very troubling. I can't help but evaluate your expanded request in the light of your conduct to date. For example, I have been informed by the attorneys for Mr. Landess that you represented to the court last week that Mr. Landess's termination letter was dated January 3, 2018 and that Mr. Landess had known of his termination since then. I am extremely disappointed that you would make such a misrepresentation, given that you were told in deposition testimony as well as in my signed declaration that the date was a typo and the proper date was January 3, 2019.

You have had several months to make requests. Each time you make a separate request, it burdens me, my staff and our counsel to respond. As a non-party witness who is voluntarily cooperating, we are entitled to some consideration for the burden and costs of multiple productions. This is especially true given that you could have requested this information from us in the original subpoena or in any of your previous requests. Furthermore, Cinematic Health Education is not a party to this action. Mr. Landess was never employed there and never had any duties there. Cognotion is only a partial owner of Cinematic Health Education. Now you are requesting that I involve another party in this action who may, themselves, be subject to continued requests or bad faith behavior, even if they do voluntarily comply, as I have done.

Why would ask another management team to voluntarily be subjected to this treatment or ask Mr. Murray, the CEO of Cinematic Health, to undertake any effort or expense when you haven't even reimbursed me for my flight or hotel for the deposition that you scheduled and cancelled and when you haven't shown the slightest consideration for my time? This is in spite of my having invited you into my home, returned your calls promptly and responded to your every request, which is not a courtesy you have extended to me.

Nevertheless, I will provide the documents that exist that are relevant to your fourth request, but only under the following conditions:

1. You will need to enter into a signed confidentiality agreement with Cinematic Health Education that is filed with and approved by the court. You will need to draft this agreement as I do not have time to have it done. Please supply it to me and I will forward it to Cinematic Health for their consideration.

2. You will need to pay any legal fees or accounting fees required by Cinematic Health with regard to your requested production in advance.

3. You will need to confirm, in a signed letter, that this request is the last request you will make of me, Cognotion or Cinematic Health.

I have gone out of my way to accommodate you, including for the deposition you cancelled, to provide you documents on three separate occasions and to allow my deposition to be taken at my home. In addition, provided the conditions above are satisfied, I am willing to provide documents to you for the fourth time and to make myself available for a third time for a one hour telephonic deposition prior to trial at my convenience. At this point, I estimate that I have spent more than 100 hours of my time, voluntarily, on your requests and I simply cannot allow this to continue indefinitely.

Very best regards,

--

Jonathan Dariyanani

President

Cognotion, Inc.
Tel USA +1 540-841-0226
Fax USA +1 415-358-5548
Email: jonathan@cognotion.com

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Sent from Gmail Mobile...please excuse errors.
Jonathan Dariyanani
President and CEO
Cognotion, Inc.
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--

Jonathan Dariyanani

President

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Fax USA +1 415-358-5548
Email: jonathan@cognotion.com

--

Jonathan Dariyanani

EXHIBIT 7

EXHIBIT 7