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 5

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INDEX TO PETITIONERS' APPENDIX – VOLUME I

Number	Document	Date	Vol.	Page Nos.
1.	First Amended Complaint for Medical Malpractice	07/05/2018	1	P.App. 0001-0029
2.	Recorder's Transcript of Jury Trial – Day 10	08/02/2019	1	P.App. 0030-0244
3.	Motion for Mistrial and Fees/Costs	08/04/2019	2	P.App. 0245-0475
4.	Recorder's Transcript of Jury Trial – Day 11	08/05/2019	3	P.App. 0476-0556
5.	Plaintiff's Supplement to Motion for Mistrial and Fees/Costs	08/13/2019	3	P.App. 0557-0586
6.	Defendants' Motion to Disqualify the Honorable Rob Bare on Order Shortening Time	08/23/2019	3 4	P.App. 0587-0726 P.App. 0727-0836
7.	Stipulation and Order to Extend Deadlines for the Parties' Motions for Attorneys' Fees and Costs	08/23/2019	4	P.App. 0837-0840
8.	Notice of Entry of Stipulation and Order to Extend Deadlines for the Parties' Motions for Attorneys' Fees and Costs	08/23/2019	4	P.App. 0841-0847
9.	Defendants' Opposition to Plaintiff's Motion for Fees/Costs and Defendants' Countermotion for Attorney's	08/26/2019	4	P.App. 0848-0903

	Fees and Costs Pursuant to N.R.S. §18.070			
10.	Plaintiff's Opposition to Defendants' Motion to Disqualify the Honorable Rob Bare on Order Shortening Time, and Countermotion for Attorneys' Fees and Costs	08/30/2019	4 5	P.App. 0904-0976 P.App. 0977-1149
11.	Plaintiff's Reply Regarding Defendants' Motion to Disqualify the Honorable Rob Bare on Order Shortening Time, and Countermotion for Attorneys' Fees and Costs	09/03/2019	5	P.App. 1150-1153
12.	Defendants' Reply in Support of Motion to Disqualify the Honorable Rob Bare on Order Shortening Time	09/03/2019	5	P.App. 1154-1163
13.	Amended Affidavit of Rob Bare	09/04/2019	5	P.App. 1164-1167
14.	Plaintiff's Opposition to Countermotion for Attorneys' Fees and Costs Pursuant to NRS 18.070	09/06/2019	5 6	P.App. 1168-1226 P.App. 1227-1289
15.	Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial	09/09/2019	6	P.App. 1290-1308

16.	Notice of Entry of Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial	09/09/2019	6	P.App. 1309-1330
17.	Plaintiff's Reply in support of Motion for Attorneys' Fees and Costs	09/12/2019	6 7	P.App. 1331-1476 P.App. 1477-1646
18.	Defendants' Reply in Support of Countermotion for Attorney's Fees and Costs Pursuant to N.R.S. §18.070	09/12/2019	7	P.App. 1647-1655
19.	Minute Order: Plaintiff's Motion for Attorneys Fees and Costs and Defendants Opposition and Countermotion for Attorneys Fees and Costs	09/16/2019	7	P.App. 1656
20.	Order	09/16/2019	7	P.App. 1657-1690
21.	Notice of Entry of Order: Order	09/16/2019	7	P.App. 1691-1726
22.	Notice of Department Reassignment	09/17/2019	8	P.App. 1727
23.	Recorder's Transcript of Proceedings: Plaintiff's Motion for Fees/Costs and Defendants' Countermotion for Attorney's Fees and Costs	12/05/2019	8	P.App. 1728-1869
24.	Defendants' Motion for Relief from Findings of Fact, Conclusions of Law, and Order	02/28/2020	8	P.App. 1870-1957

	Granting Plaintiff's Motion for a Mistrial			
25.	Plaintiff's Opposition to Defendants' Motion for Relief from Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial	03/13/2020	9 10 11	P.App. 1958-2208 P.App. 2209-2459 P.App. 2460-2524
26.	Defendants' Opening Brief Re Competing Orders Granting in part, Denying in part Plaintiff's Motion for Attorney Fees and Costs and Denying Defendants' Countermotion for Attorney Fees and Costs	03/27/2020	11	P.App. 2525-2625
27.	Order Granting Motion for Clarification of September 16, 2019 Order	03/31/2020	11	P.App. 2626-2628
28.	Notice of Entry of Order Granting Motion for Clarification of September 16, 2019 Order	04/01/2020	11	P.App. 2629-2634
29.	Order Granting in part Plaintiff's Motion for Attorneys' Fees and Costs	04/06/2020	11	P.App. 2635-2638
30.	Notice of Entry of Order Granting in part Plaintiff's Motion for Attorneys' Fees and Costs	04/07/2020	11	P.App. 2639-2645

31.	Plaintiff's Response Brief Regarding Order Granting in part Plaintiff's Motion for Attorneys' Fees and Costs, and Motion for Clarification and/or Amendment of the Order Granting in part Plaintiff's Motion for Attorneys' Fees and Costs	04/10/2020	11 12	P.App. 2646-2700 P.App. 2701-2731
32.	Defendants' Reply in support of Opening Brief Re Competing Orders Granting in part, Denying in part Plaintiff's Motion for Attorney Fees and Costs and Denying Defendants' Countermotion for Attorney Fees and Costs	04/23/2020	12	P.App. 2732-2765
33.	Defendants' Reply in support of Motion for Relief from Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial	04/23/2020	12 13	P.App. 2766-2951 P.App. 2952-3042
34.	Errata to Defendants' Reply in support of Motion for Relief from Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial	04/27/2020	13	P.App. 3043-3065
35.	Errata to Defendants' Motion for Relief from Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial	04/27/2020	13	P.App. 3066-3081

36.	Order: Denying Defendants' Motion for Relief from Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial, Filed on February 28, 2020	06/01/2020	13	P.App. 3082-3086
37.	Notice of Entry of Order Denying Defendants' Motion for Relief from Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial, Filed on February 28, 2020	06/01/2020	13	P.App. 3087-3094
38.	Defendants Kevin Paul Debiparshad, M.D., et al's Motion for Reconsideration of Order Denying Defendants' Motion for Relief from Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial	06/09/2020	13	P.App. 3095-3102
39.	Plaintiff's Opposition to Defendants Kevin Paul Debiparshad, M.D., et al's Motion for Reconsideration of Order Denying Defendants' Motion for Relief from Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial and Request for Attorney's Fees	06/23/2020	14	P.App. 3103-3203

40.	Defendants Kevin Paul Debiparshad, M.D., et al's Reply in Support of Motion for Reconsideration of Order Denying Defendants' Motion for Relief from Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial and Opposition to Plaintiff's Request for Attorney Fees	07/07/2020	14	P.App. 3204-3319
41.	Order Clarifying Prior "Order Granting in part Plaintiff's Motion for Attorneys' Fees and Costs"	07/23/2020	14	P.App. 3320-3323
42.	Notice of Entry of Order Clarifying Prior "Order Granting in part Plaintiff's Motion for Attorneys' Fees and Costs"	07/24/2020	14	P.App. 3324-3330
43.	Order Denying Defendants' Motion for Reconsideration and Order Denying Plaintiff's Countermotion for Attorney's Fees	08/05/2020	14	P.App. 3331-3333

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
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Respondent

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DISTRICT COURT
CLARK COUNTY, NEVADA
****

JASON GEORGE LANDESS, a/k/a 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 1-X, inclusive; and ROE CORPORATIONS I-X, inclusive,

Defendant.

CASE NO.: A-18-776896-C
DEPT. NO.: 32
Courtroom 3C

ORDER DENYING DEFENDANTS KEVIN PAUL DEBIPARSHAD, M.D. AND KEVIN P. DEBIPARSHAD, PLLC'S ORAL MOTION TO STRIKE SLIDE 25 AND TO PRECLUDE OR 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

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This matter was raised by Defendants following Plaintiff's opening statement, briefed by the parties that evening, and heard by the Court on July 24, 2019. Defendants sought to exclude reference to rotational deformity, translation/apposition, and distraction/gap, as being a breach of the standard of care by Dr. Debiparshad. It was Defendants' position that those three alleged breaches were not timely raised during the course of litigation and were not supported by expert medical testimony. It was Plaintiff's position that these breaches arose from De. Debiparshad's general failure to reduce the fracture properly in accordance with the standard of care, as supported by Plaintiff's retained and treating experts.

Plaintiff Jason George Landess, appeared by and through his counsel of record, Martin A. Little, Esq. of Howard & Howard Attorneys PLLC, and James J. Jimmerson, Esq. of Jimmerson Law Firm, P.C. Defendants Kevin Paul Debiparshad, M.D., Kevin P. Debiparshad PLLC d/b/a Synergy Spine and Orthopedics, and Debiparshad Professional Services d/b/a Synergy Spine and Orthopedics, Jaswinder S. Grover, M.D., Jaswinder S. Grover, M.D., Ltd. d/b/a Nevada Spine Clinic appeared by and through their counsel of record, S. Brent Vogel, Esq., and Katherine J. Gordon, Esq. of Lewis Brisbois Bisgaard & Smith LLP.

The Court having entertained Defendant's oral Motion, and Plaintiff's opposition thereto, and having reviewed the documents and briefing provided by both parties, and being fully advised in the premises, and good cause appearing, hereby Finds and Orders as follows:

FINDINGS:

The Court views Motion as one to ask it to preclude or strike the second and third bullet points in Slide 25 of Plaintiff's Opening Slides. The Court Finds that those bullet points were fairly represented in an opening statement by Plaintiff, based on Plaintiff's offers of proof, as items on which Plaintiff will have evidentiary support, relevant to the standard of care breach that Plaintiff alleges. The Court finds Defendants had notice of these allegations. There is no evidence of unfair notice, ambush or surprise that there will be an

effort to present evidence of an overhang, apposition, translation, distraction, or gap. The Court Finds that there has been adequate disclosure and notice of those bullet points and the items that they depict fairly.

More particularly, the Court stated its reasoning as follows: Dr. Harris did provide a report on February 6, 2019, in which he indicated that there was a valgus and rotary malalignment, which goes with the first bullet point. However, Dr. Harris then goes on to say in that February 6, 2019 report that his criticism in a professional sense of Dr. Debiparshad was that Dr. Debiparshad did not adequately reduce the fracture. Such opinion raises the question as to what is meant by not adequately reducing the fracture, whether that is just malalignment, or whether it includes overhang, apposition, translation, gap or distraction. While that question, by itself, may raise confusion, this Court has much more to consider.

It is clear that in Dr. Harris' record review, Dr. Harris stated that after Dr. Debiparshad's attempt to reduce the fracture, there was an 85% apposition. He then indicated that after the second surgery there was a 100% apposition. That is the second bullet point in Plaintiff's opening argument.

Dr. Harris further stated in his record review that it is his opinion that Dr. Debiparshad did not adequately reduce the fracture, resulting in subsequent angular deformity, which required a second surgery. That is taken directly as a conclusion to the 85% apposition of Dr. Debiparshad and the 100%v apposition after the second surgery. It is clear to the Court that it is Dr. Harris' opinion that the angular deformity that was corrected in the second surgery remedied the 85% apposition and made it a 100% apposition, clearly providing notice that apposition was a concern from Dr. Harris. The Court finds that is fairly part of the second bullet point: overhang, cliff, translation, apposition. Dr. Harris gave an opinion that the apposition needed to be fixed, calling it an angular deformity as well.

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Further, Dr. Fontes, in his deposition, stated that if a fracture is left with big gaps, for example, where the bone is really distracted and there is a big defect there, that it can lead to an increased risk of non-healing. This testimony speaks directly to "gap," the third bullet point and evidences that Defendants had fair notice of gap as a breach of the standard of care. That is consistent with Plaintiff's theory that Dr. Debiparshad's failure to adequately reduce the fracture resulted in "big gaps," and this is something that is clearly part of the case from the surgeon that corrected the problem.

Additionally, Dr. Debiparshad in his own words, when he is asked to define significant malalignment at his deposition, under oath, answered in part regarding the finding of a significant malalignment, "varus or valgus deformity over 10 degrees, a rotational deformity." Dr. Debiparshad himself used the word "rotational," going to the second bullet point, "rotation." Dr. Debiparshad provided this testimony in his capacity as a doctor, as an expert-style opinion. Plaintiff can, in the Court's view, adopt him if they so desire on that point. 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.

Further, Dr. Herr, who is a non-retained expert treating physician, indicated in his records that he did an exam during the course and scope of treatment. In his exam note of February 12, 2018, Dr. Herr obviously noted a "step off deformity." That, to the Court, clearly references the apposition, the overhang, the second bullet point. That note can also be used by the Plaintiff to support that theory.

Dr. Herr also stated there was a 25 degree of apex anterior angulation, not healed, and went on to say that was not acceptable, and would need a revision or second surgery. That is 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, therefore evidence of professional malpractice, which is up to the jury to figure out.

Dr. Harris also provided a January 28, 2019 report which mentioned things consistent with rotation, the second bullet point, including that Dr. Debiparshad's error is

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not adequately reducing the fracture, going on to state that after the corrective surgery, the x-rays showed a valgus and rotary malalignment, which should not have been accepted at the time of the initial surgery. Again, use of the word "rotary" or "rotation" is clearly within a Dr. Harris report. Dr. Harris continued in the January 28, 2019 report to state that after the second surgery, there was an appropriate alignment consistent with the idea that the fracture was not adequately reduced, and that included a rotary malalignment problem. Again, this speaks to the second bullet point, rotation.

Finally, it is the Court's view, all the doctors appear to have some reasonable confusion and interrelation between all of these terms. All of these items, the malalignment, the apposition, translation, overhang, and the gap between, all ultimately do relate to what a doctor has to do in dealing with a tibia fracture, and to reduce that tibia fracture. Thus, it is reasonable for all concerned to sometimes interrelate, or even confuse the terms in some ways. The medical literature itself that has been provided to the Court that talks about displacement, including more or more of angulation, translation, rotation, distraction, impaction. Even during Dr. Harris' deposition, at least at a minimum, there was a question about translation, and Dr. Harris asked whether the lawyer was talking about "alignment and apposition," and the Defendants' lawyer responded "right." The interrelation of these terms happens, and it reasonable for the reasons stated by the Court.

Regarding Defendant's citation to Dr. Harris' deposition transcript at page 39, line 24, where he was asked "You don't have any criticism to standard of care related to apposition, is that correct?" and replied "Correct," while it may be fertile ground for cross-examination, the Court Finds that it is dangerous for courts to take one or two sentences out of a deposition and out of all the other evidence in a case, and accept it as definitive of all points on this issue. The Court Finds that it is important to take such statements in conjunction with all the other evidence, as mentioned by the Court.

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NOW, THEREFORE:

IT IS HEREBY ORDERED Defendant's oral Motion in Limine To Strike Slide 25 And To Preclude Or 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, claiming failure of prior adequate notice, is hereby DENIED for the reasons outlined hereinabove.

Dated this _____ day of August, 2019.

_____
DISTRICT COURT JUDGE

Submitted by:
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EXHIBIT 8

EXHIBIT 8

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DISTRICT COURT
CLARK COUNTY, NEVADA

JASON GEORGE LANDESS, a/k/a 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

CASE NO.: A-18-776896-C
DEPT. NO.: 32
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ORDER REGARDING DEFENDANTS' USE OF PORTAL AT TRIAL

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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,

Defendant.

****

This matter having come for before the Court on July 30, 2019 and July 31, 2019, on Defendants' request to show X-Rays on a portal to the jury, and Plaintiff's oral request for a Mistrial based upon Defendants' request, in front of the jury, to demonstrate a portal which had not been disclosed to Plaintiff; Plaintiff Jason George Landess, appearing by and through his counsel of record, Martin A. Little, Esq. of Howard & Howard Attorneys PLLC, and James J. Jimmerson, Esq. of Jimmerson Law Firm, P.C.; Defendants Kevin Paul Debiparshad, M.D., Kevin P. Debiparshad PLLC d/b/a Synergy Spine and Orthopedics, and Debiparshad Professional Services d/b/a Synergy Spine and Orthopedics, and Jaswinder S. Grover, M.D., Ltd. d/b/a Nevada Spine Clinic, appearing by and through their counsel of record, S. Brent Vogel, Esq. and Katherine J. Gordon, Esq. of Lewis Brisbois Bisgaard & Smith LLP; and the Court having heard the arguments of counsel, and being fully advised in the premises, and good cause appearing, hereby Finds and Orders as follows:

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FINDINGS

1. On July 30, 2019, during cross-examination of Defendant Kevin Debiparshad regarding the March 1, 2018 x-rays he reviewed, the following exchange occurred at Tr. 161:12-25:

> Q [by Mr. Vogel, Esq., Counsel for Defendants] And how did you access those images?
>
> A Through the portal. So we have them, you know, as he said when he came in the server was down, I think when he came in or something, and so it's like an online portal that we can log into. A lot of the radiology companies have a similar type of portal where you can log in remotely in your office and still be able to access information.
>
> Q So you just need an internet connection?
>
> A Yes.
>
> Q So we can do that right now?
>
> A Yeah. We can do it now.
>
> Q All right. We'd like to do that, can we switch it over to this side.
>
> MR. LITTLE: Your Honor, may we have a sidebar, please.

2. At sidebar, Plaintiff's counsel objected to showing the jury the portal, which had never been seen by the Plaintiff or disclosed prior to Trial. The objection was sustained and the Court ruled that the jury would not be shown the portal.

3. When questioning of Defendant continued despite the Court's ruling, Defendant again told the jury "We have the portal, if you want to look at them." *Tr. 178:14-15.* This required the Court to state to the jury "Hold on a second. In fairness to that, members of the jury, I made the decision that we're not going to look at that portal. That was my decision." *Tr. 178:17-20.*

4. Thereafter, outside the presence of the jury, the Court made a record of its decision of preclude the use of the portal and the reasons therefore.

5. The first reason the Court precluded the use of the portal was that it was tangible evidence, not disclosed prior to Trial.

6. NRCP 16.1 (a)(2) requires each party to provide a written disclosure of their experts and the contents of the expert's testimonies including the information each expert considers in forming an opinion, well in advance of trial. Here, Defendants did ask Dr. Debiparshad be qualified as an expert, there was no objection to that, and he was recognized and certified qualified as an expert in front of the jury. Even if Dr. Debiparshad is viewed as a treating physician like a Plaintiff's treating physician would be, even under treating physician analysis, there has to be some disclosure of items in medical records, reports or otherwise that would be used at Trial.

7. Here, clearly, whatever would come up on the portal was something, in the Court's view, that was reasonably anticipated well ahead of the Trial. Dr. Debiparshad's position as to why he could not see screws, for example, in early generation X-rays was because the X-ray was allegedly not so clear on the portal what he used. It was something the Defendants would have known about.

8. The Nevada Supreme Court says that 16.1 (a)(2) serves to place all parties on an even playing field and prevent trial by ambush or unfair surprise. The history concerning that rule reveals that one concern behind the rule was to prevent physicians from offering undisclosed opinions based upon evidence that had not been admitted or disclosed. *See FCH1, LLC v. Rodriguez*, 130 Nev. 425, 435, 335 P.3d 183, 190 (2014). Here, as what was on the portal could have been disclosed in a way in discovery, and it was not, it must be precluded.

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9. Separate and distinct from that, the Court precluded use of the portal under a legal relevancy balancing test. Under the legal relevancy balancing test, the Court finds that use of the portal could potentially be confusing to the jury. The jury has been presented with many versions of X-rays in here, so to now, in the middle of the trial, present a new, separate and distinct additional, version to consider is unduly prejudicial and/or confusing, and therefore not legally relevant.

10. Following this ruling on the record, on July 31, 2019, the testimony of Dr. Debiparshad resumed, and in response to a question from Plaintiff's counsel about whether he would have disclosed the broken screws to Mr. Landess, had he seen them, Dr. Debiparshad answered "Yeah. And I believe I didn't see them. I mean, I've looked at that portal, which we weren't able to bring up." *Tr. 50:4-5.*

11. Counsel at one point had a sidebar with the Court, during which Ms. Gordon indicated she "wanted to make a record" objecting to the Court's decision not to allow the jury to see the portal. The request was, again, denied by the Court for the reasons stated on the record the day before.

12. The Court then read questions from the jury of Dr. Debiparshad. Reading Dr. Debiparshad's March 1, 2018 note, the juror asked "What dated X-ray was used to support the notes?" Before Dr. Debiparshad could answer, his counsel, Ms. Gordon stated, in the presence of the jury:

> "Your Honor, if I may, just briefly before Dr. Debiparshad answers the question, I would like to renew our request, at this time, to allow the jury to see the March 1, 2018 image through the portal so that they can see what Dr. Debiparshad was seeing. It sounds to me as though they really would like to know what it is that he was looking at."

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This required Plaintiff's counsel to object in front of the jury, and the Court to respond "And that'll be the same decision I've made before. We can make a for-the-record on it later." *Tr. 61:17-62:1.*

13. Following the conclusion of Dr. Debiparshad's testimony, Plaintiff's counsel formally protested vigorously to the comments of Ms. Gordon in the presence of the jury in light of the Court's decision precluding the use of the portal the previous day and again at sidebar. Counsel expressed his concern that "it was clearly intended to violate the Court's instruction, and it is the unmistakable impression to the jury that the Plaintiffs are afraid of the evidence, or have, in some way, done something to hide from the evidence or to take some action to communicate to the jury that we have taken some action to prevent them from receiving the evidence, all of which is false and prejudicial to the Plaintiff, because it is the Defendant's failure to comply with Rule 16.1 that led to the Court's ruling last night."

14. Counsel noted that the Plaintiff has done nothing inappropriate or wrong, and they're not responsible at all for the Court's ruling or for the fact that the Court precluded Defendants from offering this evidence, and argued that it was so prejudicial that Plaintiff was asking the Court to declare a mistrial of this matter, and allow the parties to commence a new jury selection a week from Monday.

15. The Court denied Plaintiff's request for a mistrial but ruled that a contemporaneous instruction as appropriate. The Court gave such instruction to the jury indicating that its decision to preclude view of the portal was for legal reasons, and it was not to be held against either party. *Tr. 79:15-84:13.*

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ORDER

NOW, THEREFORE:

IT IS HEREBY ORDERED that Defendant's request to show X-Rays on the portal to the jury is hereby DENIED for the reasons outlined above.

IT IS FURTHER ORDERED that Plaintiff's oral request for a Mistrial based upon Defendants' request, in front of the jury, to demonstrate a portal which had not been disclosed to Plaintiff is hereby DENIED for the reasons outlined above. However, the Court shall give a curative instruction to the jury advising that it was the Court's decision, not to be held against either party in this matter, for legal reasons.

Dated this _____ day of August, 2019.

DISTRICT COURT JUDGE

Submitted by:
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EXHIBIT 9

EXHIBIT 9

FFCL
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DISTRICT COURT
CLARK COUNTY, NEVADA

JASON GEORGE LANDESS, a/k/a 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

CASE NO.: A-18-776896-C
DEPT. NO.: 32
Courtroom 3C

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFF'S MOTION FOR A MISTRIAL

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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,

Defendant.

****

This matter having come for before the Court on August 5, 2019, on *Plaintiff's Motion for Mistrial;* Plaintiff Jason George Landess, appeared by and through his counsel of record, Martin A. Little, Esq. of Howard & Howard Attorneys PLLC, and James J. Jimmerson, Esq. of Jimmerson Law Firm, P.C. Defendants Kevin Paul Debiparshad, M.D., Kevin P. Debiparshad PLLC d/b/a Synergy Spine and Orthopedics, and Debiparshad Professional Services d/b/a Synergy Spine and Orthopedics, Jaswinder S. Grover, M.D., Ltd. d/b/a Nevada Spine Clinic, appeared by and through their counsel of record, S. Brent Vogel, Esq. and Katherine J. Gordon, Esq. of Lewis Brisbois Bisgaard & Smith LLP.

The Court having reviewed the papers and pleadings on file, having heard oral argument, and being fully advised in the premises, and good cause appearing, hereby Finds, Concludes, and Orders as follows:

FINDINGS OF FACT

1. On Friday, August 2, 2019, during the cross-examination of Plaintiff's witness, Jonathan Dariyanani, counsel for Defendant, Ms. Gordon moved to admit Plaintiff's Exhibit 56, emails produced to Defendant by Jonathan Dariyanani. After Plaintiff made no objection, Ms. Gordon read a highlighted portion from a November 2016 email, at Exhibit 56, page 44.

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2. Specifically, the following questions were asked at Tr. 161:3-162:8:

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

Q And you respect him a great deal?

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

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.

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.

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?

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

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?

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?

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3. Immediately following the testimony, outside the presence of the jury, Plaintiff's counsel moved to strike the email and testimony, and placed on the record its concerns that Plaintiff would no longer be able to obtain a fair and unbiased verdict. The Motion to strike was denied, and the Court indicated that counsel could file a trial brief on the issue, but the Court remained concerned that with what the jury had heard, the Court could not be confident in justice being served.

4. After this exchange sank in with the Court, the Court knew it had to deal with this issue. The Court realized that there was an African-American woman on the jury named Adleen Stidhum to whom the parties gave a birthday card during the trial, celebrating her birthday with cupcakes. The Court immediately imagined how she would feel, as well as the other jurors of African-American and/or Hispanic descent.

5. The Court noted that if there had been a motion in limine to preclude the email, the Court would have precluded it as prejudicial. Even under a legal relevancy balancing test, though it might have some relevance as to Plaintiff's character, it would be excluded as prejudicial even if probative or relevant.

6. The Court was concerned regarding how to resolve the situation when Plaintiff, in good faith, did not know that email was in the exhibit that was stipulated to, and Defendants knew and used the email. The Court does not believe Ms. Gordon used the email with an intent to be unethical, but the effect of the same remained a problem that must be resolved.

7. It was enough of an issue that the Court had an off the record meeting with counsel on Friday evening, discussing the same with the parties and exploring whether there was any possibility of settling the case, with a serious specter of a potential mistrial in the air, particularly after two weeks of

substantial effort and cost. The Court offered its comments and thoughts with respect to the case and offered to assist with settlement discussions if the parties desired to pursue the same. The Court offered its belief that Plaintiff had proved its case as to negligence, but that Plaintiff likely would not be awarded all of the damages he was seeking, particularly relating to stock options. The Court noted the costs that were associated with the Trial, and that in the event of a mistrial, those costs, including experts, would need to be incurred again.

8. Plaintiff filed a formal Motion for Mistrial and for Attorneys' Fees and Costs on August 4, 2019, and the Court heard argument from both sides on August 5, 2019 before issuing these Findings.

9. Neither of the parties was present at Friday's conference, and ultimately, Defendant declined to entertain settlement.

10. Factually, prior to trial during the discovery process, it was relevant and necessary to cause Cognotion, the company, through its CEO, Jonathan Dariyanani, to disclose employment-based evidence, whether it was the employment contract or information having to do with the stock options or things that may have led to the employment itself or contemporaneous with the employment itself. It is evident to the Court that that discovery effort on Cognotion's/Mr. Dariyanani's part was taken seriously, because a number of items were disclosed, including emails and the item in question, which was apparently in that batch of items disclosed.

11. It is readily apparent and admitted to, and specifically a finding of fact of this Court, that though the Plaintiff endeavored in the discovery process to disclose to the Defendants the Cognotion documents, and did so, it is fair to conclude that due to the shortness of the discovery timeline and the last minute effort having to do with this damage item, which did take place closer in time to Trial, as well as the extent of the volume of the paperwork disclosed, that

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Plaintiff did not see or know about the content of that email at page 44 of Exhibit 56. This is also likely due to the fact that the represented party, and Mr. Dariyanani, are both also lawyers, and it would be reasonable for Plaintiff's counsel to presume that they had reviewed the documents. Either way, it is clear to the Court that there was a mistake made in failing to notice the document and inadvertently disclosing it and not objecting to it.

12. It is further clear to the Court that the admission of the document was inadvertent because Plaintiff did bring pretrial motions to preclude Mr. Landess' bankruptcies, gambling debt, and litigations as other character evidence. It is clear to the Court that if Plaintiff would have seen this email, he would likewise have brought a pretrial Motion to exclude it.

13. Upon reflection, the Court would have, one hundred percent, absolutely certain, granted a motion in limine to preclude the email referencing "hustling Mexicans, blacks, and rednecks," and where "the Mexican labor stole everything that wasn't welt to the ground." The issue of whether or not Mr. Landess is a racist or not is not relevant, and even if it relevant, if character is an issue, whether he is a racist or not, is more prejudicial than probative. NRS 48.035.

14. When Trial commenced, however, Exhibit 56 was marked and put into one of the many volumes of binders as Plaintiff's Trial Exhibit 56, including page 56-00044, which was part of thousands of pages of potential exhibits submitted by Plaintiff. That exhibit was then offered not by the Plaintiff, but rather by the Defendants, without objection by the Plaintiff to the admission of the entire Exhibit 56, including pages 44-45, on day 10 of the Trial, Friday, August 2, 2019. The Court finds that while Defendant offered a disclosed document that was marked as a Plaintiff's exhibit, 79 pages of emails produced

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by Jonathan Dariyanani directly to Defendant, at the time of the admission, Plaintiff still did not know that email was actually in the exhibit.

15. When Mr. Dariyanani testified, he did testify that Plaintiff was a "beautiful but flawed" person, and that he was trustworthy. The Court finds that did open the door to character evidence, as the issue of character was put into the trial by the Plaintiff. Thus, the Defendants had the ability to offer their own character evidence to try to impeach Mr. Daryanani. The issue, however, was the extent to which that was done and the prejudice Defendant's actions caused.

16. By the email itself, a reasonable person could conclude only one thing, which is that is that the author is racist. The Court is not drawing a conclusion that Mr. Landess is racist, but based upon the words of the email read to the jury, a reasonable conclusion would be drawn that the author of these two paragraphs is racist.

17. The question for the Court, as a matter of law, is whether in this case, which is not an employment discrimination case or anything where the issue of race is clearly an element of the case, can the jury in this civil case consider the issue, even with the opening of the door as to character, of whether Mr. Landess is a racist? The Court finds that the clear answer to that is no, that that is not a basis upon which this jury should or can decide the verdict.

18. The Court finds that it is evident that Defendants had to know that the Plaintiff made a mistake and did not realize this item was in Exhibit 56, particularly because of the motions in limine that were filed by Plaintiff to preclude other character evidence, in conjunction with the aggressiveness and zealousness of counsel throughout the trial. The email was one of the many pages of Exhibit 56 and the Plaintiff did not know about it.

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19. Defendants took advantage of that mistake. Plaintiff confirms that he did not know the email at page 44 was in the group of 79 pages of emails in Exhibit 56, which otherwise all related to Cognotion, and that the same was inadvertently admitted. Once the email was admitted and before the jury, Plaintiff could not object in front of the jury without further calling attention to the email, and because it had been admitted. Once the highlighted language was put before the jury, there was no contemporaneous objection from Plaintiff, nor *sua sponte* interjection from the Court, that could remedy it, as in a matter of seconds, the words were there for the jury to see.

20. Indeed, during the off the record discussion on August 2, 2019, when Mr. Jimmerson initially moved to strike the email, Ms. Gordon stated that she "kept waiting" for the Plaintiff to object to her use of Exhibit 56, page 44, and "when the Plaintiff did not object," the Defendant then went forward to use the email. Mr. Vogel echoed that sentiment on Monday, August 5, 2019, stating "We gave them every opportunity to object to it. Ms. Gordon asked repeated questions before coming to that union. And, yet, I guess it -- it comes down to, you're asking could we have done something to try to remove that. I suppose in hindsight I guess we could have. But I don't think we had to." *Tr. 42:5-9.* The Defendants' statements have led the Court to believe that the Defendants knew that their use of the Exhibit was objectionable, and would be objectionable to the Plaintiff, and possibly to the Court, and nevertheless the Defendants continued to use and inject the email before the jury in the fashion that precluded Plaintiff from being able to effectively respond. In arguing to the Court that they "waited for Plaintiff to object" and that Plaintiff "did nothing about it," Defendants evidence a consciousness of guilt and of wrongdoing. That consciousness of wrongdoing suggests that Defendants and their counsel were the legal cause of the mistrial.

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21. The Court finds that because of the prejudicial nature of the document, Defendants could have asked for a sidebar to discuss the email before showing it to the jury, or redacted the inflammatory words, which may have resulted in usable, admissible, but not overly prejudicial, evidence.

22. When asked whether Defendants believe that the jury could consider whether Mr. Landess is a racist, Ms. Gordon replied that she believes she is "allowed to use impeachment evidence that has not been objected to, and has been admitted into evidence by stipulation," that the "burden should not be shifted" to Defendant "to assist with eliminating or reducing the prejudicial value of that piece of evidence," and that "motive is always relevant in terms of Mr. Landess' reason for setting up" Defendants in Defendants' view of the case. The Defendant confirms that whether Mr. Landess is a racist is something the jury should weigh, that it is admissible, and it is evidence that they should consider. Defendants' counsel made it clear to the Court Defendants' knowing and intentional use of Exhibit 56, page 44.

23. The Court finds that if the document, admitted as Exhibit 56, page 44, where not used with Mr. Dariyanani, but instead was used in closing argument and put before the jury, it would clearly be considered misconduct under the *Lioce* standard. The Court express concerns that using this admitted piece of evidence, Defendant has now interjected a racial issue into the trial.

24. In the Court's view, even if well-intended by the Defendants to cross-examine when character is now an issue, the Defendants made a mistake in now interjecting the issue of racism into the trial. Even now, it appears to the Court that the Defendants' position is that the jury can consider the issue of whether Mr. Landess is a racist or not. With that, the Court disagrees with the Defendants to the fiber of its existence as a person and a judge. Ms. Brazil is an African-American. Ms. Stidhum is an African-American. Upon information

and belief, Mr. Cardoza and Ms. Asuncion are Hispanic. Since we have two African-American jurors and potentially two Hispanic jurors, Defendants' interjecting the issue of Mr. Landess allegedly being a racist into the case was improper.

25. The Court makes a specific finding that under all the circumstances that described hereinabove, they do amount to such an overwhelming nature that reaching a fair result is impossible.

26. The Court further specifically finds that this error prevents the jury from reaching a verdict that is fair and just under any circumstance.

27. The Court further specifically finds that there is no curable instruction which could un-ring the bell that has been rung, especially as to those four jurors, but really with all ten jurors.

28. The Court finds that this decision was, as a result, "manifestly necessary" under the meaning of the law.

29. The Court finds that the fact that the jury has now sat with these comments for the weekend, and particularly in light of the events of this past weekend, with news reports of an individual who drove nine hours across Texas to go to El Paso to kill Mexicans, followed by a shooting in Dayton, Ohio where African Americans were killed, only heightens the need for a mistrial. While these recent events do not focus upon the Court's ruling, the similarity of race and its prejudicial effect cannot be underestimated. It is the Court's strong view that racial discrimination cannot be a basis upon which this civil jury can give their decision regardless, but certainly the events of the weekend aggravated the situation.

30. The Court does not reasonably think that under the circumstances, the jury can give a fair verdict and not base the decision, at least in part, on the issue of whether Mr. Landess is a racist.

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31. While mistakes were made on both sides, the Court must separately determine which side is legally responsible for causing a mistrial, for purposes of considering Plaintiff's request for attorneys' fees and costs. That issue must be separately briefed, with a separate hearing held. Plaintiff made a mistake in not catching the item and stopping its use, but the Defendants made a mistake in using it.

32. If any if these Findings of Fact are more appropriately a Conclusion of Law, so shall they be deemed.

CONCLUSIONS OF LAW

33. The decision to grant a mistrial is within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *Khoury v. Seastrand*, 132 Nev. Adv. Op. 52, 377 P.3d 81, 86 (2016).

34. "A defendant's request for a mistrial may be granted for any number of reasons where some prejudice occurs that prevents the defendant from receiving a fair trial." *Rudin v. State,* 120 Nev. 121, 144, 86 P.3d 572, 587 (2004).

35. A district court may also declare a mistrial sua sponte where inherently prejudicial conduct occurs during the proceedings. See *Baker v. State,* 89 Nev. 87, 88, 506 P.2d 1261, 1261 (1973).

36. The Nevada Supreme Court has held that "[g]reat deference is due a trial judge's decision to declare a mistrial based on his assessment of the prejudicial impact of improper argument on the jury." *Glover v. Eighth Judicial Dist. Court of State ex rel. County of Clark*, 125 Nev. 691, 703, 220 P.3d 684, 693 (2009), as corrected on denial of reh'g (Feb. 17, 2010).

37. This is so "[b]ecause the trial judge is in the advantageous position of listening to the tone and tenor of the arguments and observes the trial presentation firsthand, the trial judge is in the best position to assess the impact

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on the jury." *Moore v. State*, 67281, 2015 WL 4503341, at *2 (Nev. App. July 17, 2015) (citing Glover, 165 Nev. at 703, 220 P.3d at 693); see also *Payne v. Fiesta Corp.,* 543 S.W.3d 109, 123 (Mo. Ct. App. 2018) ("We recognize that the trial court is better positioned to assess the prejudicial effect that improper evidence has on the jury.").

38. The Nevada Supreme Court in *Hylton v. Eighth Judicial District* Court, 103 Nev 418, 423, 743 P. 2d 622, 626 (1970) said that a "manifest necessity" to declare a mistrial may arise in situations which there is interference with the administration of honest, fair, even-handed justice to either both, or any of the parties to receive.

39. Only relevant evidence is admissible. "Relevant evidence means evidence which has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." *NRS 48.015*. Here, Defendant's suggestion that Landess is a racist has absolutely no bearing on any fact of consequence in this medical malpractice case. Even if this suggestion had some conceivable relevance, its probative value would be far outweighed by the unfair prejudice that it presents. *See NRS 48.035(1).*

40. Moreover, "character evidence is generally inadmissible in civil cases." *In re Janac*, 407 B.R. 540, 548 (Bankr. S.D.N.Y. 2009). A party may open the door to character evidence when he chooses to place his own good character at issue. *See Newman v. State,* 129 Nev. 222, 235, 298 P.3d 1171, 1180 (2013). However, "[a]n inadvertent or nonresponsive answer by a witness that invokes the [party's] good character . . . does not automatically put his character at issue so as to open the door to character evidence." *Montgomery v. State,* 828 S.E.2d 620, 624 (Ga. Ct. App. 2019) (citing Christopher B. Mueller et al., FEDERAL EVIDENCE § 4:43 (4th ed. updated July 2018) ("It seems

that if a . . .witness gives a nonresponsive answer that contains an endorsement of the good character of the defendant . . . the [opposing party] should not be allowed to exploit this situation by cross-examining on bad acts or offering other negative character evidence.").

41. Mr. Dariyanani's statement that he believed Landess to be a "beautiful person" was a non-response response to the preceding question, and was a gratuitous addition to his testimony. If Defendants wanted the jury to disregard this statement, their remedy was a simple motion to strike. See *Wiggins v. State*, 778 S.W.2d 877, 892 (Tex. App. 1989) (holding that motion to strike—and not introduction of rebuttal evidence—was proper non-responsive statement from witness attesting to party's good character).

42. Evidence which is admitted may generally be considered for any legal purpose for which it is admissible[.]" *Westland Nursing Home, Inc. v. Benson*, 517 P.2d 862, 866 (Colo App. 1974); see also *Morse Boulger Destructor Co. v. Arnoni,* 376 Pa. 57, 65 (1954) ("[E]vidence may be considered for any purpose for which it is competent."). Evidence may not, however, be considered for an inadmissible purpose, nor may it be used for an improper purpose. Irrelevant evidence is never admissible, and using irrelevant evidence for the sole purpose of causing unfair prejudice is improper.

43. "Waiver requires the intentional relinquishment of a known right." *Nevada Yellow Cab Corp. v. District Court*, 123 Nev. 44, 49, 152 P.3d 737, 740 (2007). "[T]o be effective, a waiver must occur with full knowledge of all material facts." *State, Univ. & Cmty. Coll. Sys. v. Sutton*, 120 Nev. 972, 987, 103 P.3d 8, 18 (2004).

44. In *State v. White,* 678 S.E.2d 33, 37 (W. Va. 2009), the Court concluded that "counsel's failure to object to the introduction of R.C.'s statement cannot be characterized as a knowing and intentional waiver. The

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Appellant's counsel contends that he was unaware of the existence of the final page upon which the reference was contained. In his brief to this Court, Appellant's counsel theorized that the inadvertent admission was likely caused by a clerical error and contends that the copy of the victim statement in Appellant's counsel's file did not include a final page. For purposes of this discussion and based upon the record before this Court, we accept the declaration of Appellant's counsel regarding his lack of knowledge of the existence of the reference to Appellant's status as a sex offender. Assuming such veracity of Appellant's counsel, we must acknowledge that one cannot knowingly and intentionally waive something of which one has no knowledge. *Id., citing State v. Layton,* 189 W.Va. 470, 432 S.E.2d 740 (1993)(with regard to waiver of a right to be present at trial, "the defendant could not waive what he did not know had occurred." 189 W.Va. at 500, 432 S.E.2d at 770).

45. A mistrial is necessary where unfair prejudice is so drastic that a curative instruction cannot correct the damage. *Pope v. Babick*, 178 Cal. Rptr. 3d 42, 50 (2014). In particular, misconduct and inflammatory statements from opposing counsel are sufficient basis for granting a new trial where the district court concludes that they create substantial bias in the jury. See, e.g., *Lioce v. Cohen,* 124 Nev. 1, 17, 174 P.3d 970, 980 (2008); *Commil USA, LLC v. Cisco Sys., Inc.*, 720 F.3d 1361, 1370 (Fed. Cir. 2013), vacated in part on other grounds, 135 S. Ct. 1920 (2015).

46. The appellate court additionally reasoned that it would not substitute its judgment for that of the district court, "whose on-the-scene assessment of the prejudicial effect, if any, carries considerable weight." *Id.* at 1371 (citing *United States v. Munoz*, 150 F.3d 401, 415 (5th Cir.1998).

47. Raising irrelevant and improper character evidence at issue taints the entire trial. *Coastal Oil & Gas Corp. v. Garza Energy Tr.*, 268 S.W.3d 1,

26 (Tex. 2008) (affirming grant of new trial where a memorandum referencing "illiterate Mexicans" was "never used . . . in any relevant way [except] to create unfair prejudice.").

48. *State vs. Wilson*, 404 So.2d 968, 970, La. 1981, holds that where a party's reference to race raises such a sensitive matter that a single appeal to racial prejudice furnishes grounds for a mistrial, a mere admonition to the jury to disregard the remark is insufficient.

49. The caselaw is repetitive with that notion of "manifest necessity," defined in cases that talk about the concept of mistrial or even new trial, as "a circumstance, which is of such an overwhelming nature that reaching a fair verdict is impossible. It is a circumstance where an error occurs, which prevents a jury from reaching a verdict." *See, e.g. Glover v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, 125 Nev. 691, 220 P.3d 684 (2009), as corrected on denial of reh'g (Feb. 17, 2010). That case stands mostly for the proposition that the trial judge has to have the power to declare a mistrial in appropriate cases. The Court finds that this is the appropriate case, which is an easy decision for this Court on the merits, though the decision itself was difficult.

50. The Court finds that *Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008) further provides guidance to the Court with respect to evidence that was not objected to.

51. The Court provided the example that if Exhibit 56, which was in evidence, was put up in closing, that under the definition given by the Supreme Court of misconduct in the *Lioce* case, that likely that that would be seen as misconduct. Whether it is with Mr. Dariyanani or whether it is in closing argument, or both, it is clear that Defendants are urging the jury to at least in part, render the verdict based upon race, based upon Mr. Landess allegedly being a racist, based upon something that is emotional in nature. The idea,

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fairly, was to ask the jury to give the Defendants the verdict, whether it is the whole verdict or reducing damages, because Mr. Landess is allegedly a racist. That is impermissible.

52. Even if true, the law does not allow for that in this context. It is not a fair verdict, not a fair trial, not a fair result to decide the case because the jury believes someone is racist, rather than on the merits of the case, particularly since this case is not about race.

53. The *Lioce* case is instructive regarding the concept of unobjected to evidence, in this case being the admitted exhibit. There, the Nevada Supreme Court said "When a party's objection to an improper argument is sustained and the jury is admonished regarding the argument, that party bears the burden of demonstrating that the objection and admonishment could not cure the misconduct's effect." The Court continues, "The non-offending attorney," which in this case would be the Plaintiff's side, "is placed in a difficult position of having to make objections before the trier of fact, which might cast a negative impression on the attorney and the party the attorney represents emphasizing the improper point." This is consistent with Mr. Jimmerson's explanation about why the document was not objected to after it was put up before the jury.

54. While this is a request for a mistrial and not a new trial, the *Lioce* case provides guidance as to unobjected to evidence. The Nevada Supreme Court said "The proper standard for the district court to use when deciding in this context a motion for new trial based upon unobjected to attorney misconduct, is as follows: 1) the district court shall first conclude that the failure to object is critical and the district court must treat the attorney misconduct issue as have been waived unless plain error exists." In this case, though the Plaintiff acquiesced in the admittance of Exhibit 56, and though the Plaintiff did not

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contemporaneously object when Ms. Gordon put the item up, a plain error review still has to be held.

55. *Lioce* states: "In deciding whether there is plain error, the district court must then determine whether the complaining party met its burden of demonstrating that its case is a rare circumstance in which the attorney misconduct amounted to irreparable and fundamental error." Here, it is the Court's specific finding that this did result in irreparable and fundamental error.

56. The Supreme Court continued that irreparable and fundamental error is, "Error that results in a substantial impairment of justice or denial of fundamental rights such that but for the misconduct, the verdict would have been different." The Court finds that this provides guidance, and that this bell is one that cannot be unrung. Even if the Court had granted a motion to strike, there is no curative instruction which would cause the jury, particularly the four members earlier referenced, to now disregard the author's racial discriminatory comments.

57. With *Lioce* as guidance, which discusses arguments that should not be made as "attorney misconduct," you do not have to have bad intent to make an argument that amounts to attorney misconduct. It could be a mistake where counsel says something in a closing argument that by definition under the law is misconduct, for purposes of an improper closing argument, without it being ethical misconduct. Here, the impact of putting up evidence that implies that Mr. Landess is a racist in front of a jury in a medical malpractice case makes it impossible now, after all the effort, to have a fair trial.

58. "A claim of misconduct cannot be defended with an argument that the misconduct was unintentional. Either deliberate or unintentional misconduct can require that a party receive a new trial. The relevant inquiry is what impact the misconduct had on the trial, not whether the attorney intended

the misconduct." Lioce v. Cohen, 124 Nev. 1, 25, 174 P.3d 970, 985, 2008 Nev. LEXIS 1, *44 (2008).

59. In *Lioce,* Mr. Emerson was referred to the bar, and in *Lioce,* as well as *Emerson v. Eighth Judicial District Court,* 127 Nev. 672, 263 P.3d 224 (2011), the Supreme Court noted that argument could be given without any bad intent, but yet be seen as "misconduct" if it makes a fair verdict impossible. The Court does not believe that Defendant's counsel, here, had bad intent, but did not fully realize the impact their actions could have on the fair disposition of the case.

60. If any if these Conclusions of Law are more appropriately a Finding of Fact, so shall they be deemed.

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ORDER

NOW, THEREFORE:

IT IS HEREBY ORDERED that *Plaintiff's Motion for Mistrial* is hereby GRANTED. The jury is dismissed, and a new Trial shall be scheduled.

IT IS FURTHER ORDERED that Plaintiff's Motion for Attorneys' Fees and Costs is hereby deferred until hearing on September 10, 2019 at 1:30 p.m. Defendants shall have until August 19, 2019 to file an Opposition to Plaintiff's request for attorneys' fees and costs, and Plaintiff shall have until September 3, 2019 to file a Reply.

Dated this _____ day of August, 2019.

DISTRICT COURT JUDGE

Submitted by:
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EXHIBIT 10

EXHIBIT 10

RTRAN

Portal - 1

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
TUESDAY, JULY 30 2019

RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 7

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.

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Q And in fact, they actually accused you of trying to suborn perjury from Mr. Tricoli about a phone call; do you recall that?

A Sure.

Q And I think you indicated that you pulled up the images from Advanced Surgeon Care last night?

A Yes.

Q All right. And you say they look better than these photocopies of what was done?

A Yes. They look better than that photocopy.

Q Do they look anything like this?

A No, they're not -- no.

Q And how did you access those images?

A Through the portal. So we have them, you know, as he said when he came in the server was down, I think when he came in or something, and so it's like an online portal that we can log into. A lot of the radiology companies have a similar type of portal where you can log in remotely in your office and still be able to access information.

Q So you just need an internet connection?

A Yes.

Q So we can do that right now?

A Yeah. We can do it now.

Q All right.

MR. VOGEL: We'd like to do that, can we switch it over to this side.

MR. LITTLE: Your Honor, may we have a sidebar, please.

THE COURT: Sure.

[Bench conference - not recorded]

THE COURT: All right. Move to something else.

BY MR. VOGEL:

Q So when you open up on the internet portal, do they look like this?

A No.

Q And when [indiscernible] did they look closer to this?

A They did. You can see a little bit more detail in them, because that's kind of greened out, from I guess the printing of them, but they didn't look like those. I think the [indiscernible] it captured image that is non-modifiable. I even tried to modify them with contrast, and they aren't able to be modified.

Q And when was the first time you saw these images?

A Here in the trial.

Q Here in the trial?

A Correct.

Q For the first time?

A Yes.

Q You said you haven't spoken with Mr. Tricoli in over a month?

A Yes.

Q And is it your understanding that he called Mr. Landess shortly after seeing these images?

MR. LITTLE: Objection. Hearsay, Your Honor.

MR. VOGEL: Objection. Incomplete hypothetical.

MR. JIMMERSON: He's an expert.

THE COURT: I think it's fair under the circumstances.

THE WITNESS: I suppose it's possible.

BY MR. LITTLE:

Q Possible? You heard Dr. Harris' testimony and he used the boxes as an example. If you don't put something straight together and you put it together crooked, there's going to be more pressure on the hardware and the screws, correct?

A My issue with that is the contrary is also true, meaning that you cannot perfectly align the tibia and the screws will still break.

Q And you wouldn't know in this case because you were looking at poor quality images, right?

A I mean, at that interface, it was. We have the portal, if you want to look at them.

Q You said -- I understood you to say that --

THE COURT: Hold on a second. In fairness to that, members of the jury, I made the decision that we're not going to do that for a legal reason. Maybe after the trial, I'll explain, but we're not going to look at that portal. Go ahead. That was my decision. Go ahead, Mr. Little.

MR. LITTLE: Thank you, Your Honor.

BY MR. LITTLE:

Q Doctor, I understood you to say -- correct me if I'm wrong -- that you don't Dr. Fontes and haven't spoken to him?

A I mean, I see him. I think at Southern Hills is where he is

and distinct from what I've said so far, that in my view opened the door as a legal allowance to use it in any event and that Dr. Debiparshad was asked questions and he did testify regarding Dr. Fontes' opinions and what have you. And that this deposition passage was a clear medical opinion, relevant material to the case from Dr. Fontes.

As if that's not enough, separate and distinct from all that, I find that the jury previously in various parts of the trial heard at least part of what was referenced in that passage, in any event, by way of the medical evidence. Other experts, for example, where it was brought to their attention what Dr. Fontes said and what his opinions were, including, I think at least part of the item that was put up.

So, for all those reasons, I allowed for the use of Dr. Fontes' deposition passage. And so, does anyone make a record on that?

MR. JIMMERSON: Plaintiff has nothing further, Judge.

MR. VOGEL: No, Your Honor.

THE COURT: Okay. Next, we have the portal issue to reconcile. There was a point in time in Dr. Debiparshad's testimony, obviously, where Mr. Vogel in his discretion and his wisdom decided to attempt to call up on his laptop here in court, as I understood that, Mr. Vogel. You were going to use your laptop, the one that's presently in front of you, as I understand it.

MR. VOGEL: Correct.

THE COURT: And you were going to bring up this portal that's been testified to where Dr. Debiparshad, at least the relevant part, has previously testified that one of the reasons why the images he dealt

with were blurry or unusable -- he didn't say blurry, but they were not clear. I'm just paraphrasing it. I don't remember what his exactly words were, but I think we all get the gist of it.

That he's testified, Dr. Debiparshad, that the portal images weren't that clear. Okay. And so, I think that given that there's been this back and forth that we spent a lot of time on, given a big blow up of X-rays that Mr. Vogel used in the opening and then all these different generation versions of X-rays that happen to take place on the pathway of treatment of Mr. Landess.

So, we have all these different generations of X-rays. You know, we have the original break from October 9th. We have the one right after the surgery or we have the C-arms during the surgery. And then every time he went to a doctor, somebody takes X-rays, which is probably what they're always going to do.

So, we have all these different X-rays along the way. And then we have post-op from Dr. Fontes and everything else. So anyway, the idea, I think was let's pull up the portal and let's look at what Dr. Debiparshad consistent with his testimony would say is on this portal.

And this, I think, also goes to the idea that it came up that Dr. Debiparshad looked at the photo last night even. And the idea is, if any -- I guess, Mr. Vogel, clearly the idea was, well, let's look at the portal and you'll see that they're blurry or they're not clear as some of the pictures, perhaps as the Plaintiffs had produced.

And we had a sidebar as the Plaintiff objected to that effort that, you know, that the demonstration or whatever you want to call that

effort to pull up the portal on Mr. Vogel's laptop. And I agreed that this was not something we were going to do. And so, I precluded it.

And the reason I precluded it is mainly based upon -- there's two reasons I precluded it. The main reason is my view is that's non-disclosed evidence. Tangible non-disclosed prior to trial evidence.

And so, in the middle of the trial, my view is the rules would preclude the use of non-disclosed tangible style evidence such as this.

Rule 16.1(a)(2) requires each party to provide a written disclosure of their experts. In this situation, you did ask the Dr. Debiparshad be qualified as an expert. There was no objection to that. He was recognized and certified qualified as an expert in front of the jury.

Anyway, 16.1(a)(2) requires each party provide a written disclosure of their experts and the contents of the expert's testimonies including the information each expert considers in forming an opinion well in advance of trial.

And even if Dr. Debiparshad is viewed as a treating physician like a Plaintiff's treating physician would be, even under treating physician analysis, there has to be some disclosure of items in medical records, reports or otherwise that would be used at trial.

Here, clearly, whatever would come up on the portal was something, in my view, that was reasonably anticipated well ahead of the trial. As we all knew that Dr. Debiparshad's position as to why he couldn't see screws, for example, in early generation X-rays was because the X-ray was not so clear on the portal what he used.

So, it's not -- it clearly has been something that I think

reasonably the Defense in this situation would have known about.

The Nevada Supreme Court says that 16.1(a)(2) serves to place all parties on an even playing field and prevent trial by ambush or unfair surprise.

And they mention that the history concerning that rule reveals that one concern behind the rule was to prevent physicians from offering undisclosed opinions based upon evidence that had not been admitted or disclosed. And that they talk in the *FCH1* case, the Nevada Supreme Court does of these concepts.

So that's one -- that's the main line reason why I felt as though since this is not disclosed, what was on the portal could have been disclosed in a way in discovery, in some printout basis or some other basis, you could have shown what you would think would come up if we were to look at the portal images prior to trial.

Separate and distinct from that, not even necessary to it, but for the record, I have another reason I'm not going to -- I did not allow for that. And that's because legal relevancy balancing test. Under the legal relevancy balancing test, which is relevancy, I find that it potentially to the level of discomfort for me enough to now say what I'm saying would be confusing to the jury in any event.

So, it's not legally relevant in a balancing sense. That it's unduly, prejudicial and or confusing. And what I mean by that is my thought is we've got a lot of generation versions of X-rays in here. So, in the middle of the trial, now we're going to come up with a new separate and distinct additional, I don't know what version it is, 8, 9, another

generation version of X-rays for them to look at.

And I guess what I'm really trying to say, let me see if I can say this clearly for the record. The idea was to use a laptop that happens to be the one that's in front of Mr. Vogel. I don't know if it's his, but I'll show you to the Defense. It's a defense laptop in front of Mr. Vogel.

And so, now we're talking about going on the Internet, pulling up from the Internet this portal on this laptop. And to me, I don't think there is any way to say that what we now see in an open courtroom on a laptop that happens to be here in the courtroom, how could that -- I have a concern that would be fairly consistent with what the doctor would have in his office or under whatever circumstance he pulled it up on his office computer or what have you.

I realize he could testify potentially to that, but then handing it around to the jury in this room on a laptop, to me, it just creates confusion. And I don't think it's legally relevant or I should preclude it for that reason too. It just seemed a bit too confusing or drawn out for all the reasons I've just mentioned.

Not necessary for my decision, because the only thing I needed to say was it was non-disclosed. But, you know, I got to make my records too because I don't know, you know, what the appellate court may look at or not look at.

So that's my decision on that. Anybody want to be heard on that item?

MR. JIMMERSON: On behalf of the Plaintiff, Judge, just one additional factor.

THE COURT: Okay.

MR. JIMMERSON: I'm sorry. I'm going to stay silent. Thank you.

THE COURT: Okay.

MR. VOGEL: Yes, Your Honor. Thank you. First of all, it was disclosed. Dr. Debiparshad referenced it in his deposition testimony and we have disclosed his records, which were a printout of his electronic records, which were the images that they've blown up as Exhibit 148.

THE COURT: Sorry for the interruption. Please try to forgive me for interrupting, but I have a right to do that, I think as a judge. I don't mean to do it rudely or for no reason, but that just reminded me of something however. I did offer at sidebar, and you can comment on this, but I offered that you could use those items. It's not as though I precluded those.

The only think I precluded was this demonstration of now using the laptop. So, I did say that if you have disclosed images, it would be the ones that Dr. Debiparshad would say, hey, this is exactly what I saw in the portal. I did say you could use those. Of course.

I was just talking about the live laptop idea. But go ahead.

MR. VOGEL: So, they were disclosed. They were on notice that the access was going to be in the portal. The actual images were disclosed. The portal is those images just a different format. That's the only difference.

And it's also in response to their attack in calling him a liar that these somehow look different. And it's very easy to pull it up and

look at it through the Internet on this computer or any other computer that, you know, the Court would want to use. Doesn't have to be this one. It could be anyone that's connected to the Internet.

And it's also because they disclosed these images, the clear ones, off a CD right before trial. They were not timely disclosed. The ones that they disclosed before trial were in Exhibit 8, and I believe Ms. Gordon was explaining that a little bit when we were up at sidebar.

The images that were disclosed by Plaintiffs from Advanced Urgent Care looked like these. This is what we had notice of. Nothing different. It wasn't until July 17th that we get these different images.

So, I think in light of their extreme attack on Dr. Debiparshad's character in this case and his veracity, I think it's perfectly appropriate for him because they were on notice to just pull it up. Look at it. I think it's perfectly appropriate under these circumstances in light of the discovery and history in this case.

MS. GORDON: I would add also, and I'm sorry, Your Honor. But Plaintiffs also accused Dr. D of playing with those images from his portal. I forget what they said, doctoring them or what terminology they used, but they did accuse him of that as well.

And if you were to look at them on the portal, then you can see that what they accused him of doing, it's not possible. So, I don't know how that can be confusing or what have you. Given the big deal that Plaintiffs made, this would be a way to put that issue to rest.

I understand that you're saying there are a bunch of other X-rays, but this is really important. They have constantly attacked his

credibility and what have you and this would be a way to put it to bed.

So, I think Dr. Debiparshad has a clear right to show them what it was that he was looking at. I don't know how that can be prejudicial or confusing.

THE COURT: All right. Well, I made my record. You're welcome to disagree and make yours which you've done. Do the Plaintiffs want to say anything on this?

MR. JIMMERSON: Yes, Judge. There was no disclosure by pretrial of use of the portal. That's the simple one. Number 2, Exhibit 148 in evidence, that Dr. Debiparshad indicated was not a true reflection of what the portal would have shown.

Number 3, you did allow the doctor to testify about what the portal X-ray would show without the actual tangible document.

Number 4, the true X-rays from March 1 were disclosed in April of 2019 in our I think eight disclosure. I may have that number wrong, but it was April.

And the X-rays were stipulated into evidence by the Defense and Plaintiffs at the commencement of trial. So, it's a very different situation.

THE COURT: Okay. That's the record on that item and the decision has been made. A couple other things, not major, but, you know, here's the thing, I mean, I'm not trying to say that I feel I'm being disrespected here. So, I'm not saying that.

But if a judge tells you there is a concern about something and then the same things keep happening, at some point, if you're a

EXHIBIT 11

EXHIBIT 11

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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
WEDNESDAY, JULY 31 2019

RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 8

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.

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going to happen first.

Q Well, Doctor, you testified that if you saw the broken screws, you would've disclosed them to my client?

A Yeah. And I believe I didn't see them. I mean, I've looked at that portal, which we weren't able to bring up. But I still can't see them, and that's my position.

Q And the fair assumption then when you issued this March 1st report and sent it to my client in June, that you had not gone back and looked at either the December 20th or the January 31st x-rays, correct?

A I don't think -- I don't know if I have a copy of those images. I would have access to them because they were taken from inside my previous clinic.

Q Well, presumably had you gone back and looked at either December 20th or the January 31st x-rays before you authored your March 1st report, you would not have indicated no hardware failure, correct?

A I mean, I may have added to that the addition of those screws proximally being sheared. But it wouldn't have changed my management.

Q Doctor, there was a discussion of this being a trauma type situation. It wasn't a truly emergent situation in that the patient came in on October 9th, and he didn't have his surgery until almost a full 24 hours later on October 10th, correct?

A I mean, that's not untypical for a trauma scenario. So --

Q Well --

UNIDENTIFIED SPEAKER: Sequela.

UNIDENTIFIED SPEAKER: Sequela.

THE COURT: "'Displaced, commuted fracture of shaft of left tibia subsequent encounter for closed fracture with nonunion. The patient with a left tibial fracture, still no bone reunion. Note, restimulating the bone to allow for adequate healing, possibly even grafting the area to allow for adequate healing of the area.' What dated X-ray was used to support the notes?"

So that's how the whole thing goes.

THE WITNESS: Okay.

THE COURT: I mean, and one thing I can do is give you the question again.

THE WITNESS: Sure. I think I got most of it.

THE COURT: Okay. So there you go.

THE WITNESS: Okay. So --

THE COURT: And then --

MS. GORDON: Your Honor, if I may, just briefly before Dr. Debiparshad answers the question. I would like to renew our request, at this time, to allow the jury to see the March 1st, 2018 image through the portal so that they can see what Dr. Debiparshad was seeing. It sounds to me as though they really would like to know what it is that he was looking at.

THE COURT: Okay. Understood.

MR. LITTLE: Same objections, Your Honor.

THE COURT: Okay. And that'll be the same decision I've

made before. We can make a for-the-record on it later.

But let's go and answer this question.

THE WITNESS: Okay.

THE COURT: It looks like what's happened is, on the screen, the item that's in the -- the call of the question is there, the --

THE WITNESS: Yes.

THE COURT: -- medical note.

THE WITNESS: Okay. So it looks like --

THE COURT: It looks like -- I'm sorry to interrupt you.

THE WITNESS: Yeah.

THE COURT: It looks like that's Exhibit 9.

In Exhibit 9, page 2. So that would be an alternative. If you want to see the hardcopy, we can give you Exhibit 9, page 2, or you can use the screen.

THE WITNESS: I can use the screen, I think.

THE COURT: Okay.

THE WITNESS: So -- so part of this has to do with coding, when we see patients, I guess, when you actually code for the different things, you can see there's a -- there's a big, long number there, like 782.252S. And --

UNIDENTIFIED SPEAKER: Can they expand it?

THE WITNESS: Can they make it bigger, like, for -- the assessment part, maybe? Maybe just the assessment and the -- the other lower part?

UNIDENTIFIED SPEAKER: Okay. On the ELMO maybe?

And then probably "grafting the area". So basically taking bone from another area, kind of what Dr. Fontes did. He took it from a femur and he stuffed it in the area. I think I showed you on the X-rays, that cloud of bone that you put in the area. So you want to graft it with bone, and potentially, we'll graft it with other bone substitutes, like BMP would be a good option for this particular case.

THE COURT: I'm going to take that question back.

All right. Any other questions from the jury at this stage?

Counsel, any follow-ups based upon this last question?

MR. JIMMESON: No, Your Honor.

MR. LITTLE: No, Your Honor.

THE COURT: All right. Doctor, thank you so much for your testimony. You're excused. You can, of course, have a seat with your counsel.

And members of the jury, of course, this is a time to take our morning comfort break. So we'll take that break. And of course, I always have to tell you, respectfully, please do not talk to each other or anyone else on any subject connected with the trial. Please do not consult any reports of the case, and please form no opinions on any subject connected with the trial until the end of it.

Have a nice comfort break. We'll be back at 11:00.

[Jury out at 10:46]

THE COURT: Okay, off the record. 11:00.

[Recess at 10:47 a.m., recommencing at 11:02 a.m.]

MR. JIMMERSON: On behalf of the Plaintiff, I want to protest

vigorously to the comments by the Defense, particularly, counsel for Dr. Debiparshad, Ms. Gordon, who violated this Court's order last evening with regard to the Court's decision that the portal view, that has now only come up last night and would not be shown to the jury -- that was very clear.

Today, in the last 20 or 30 minutes, the last juror asked the last question, and the counsel went to the bench. Ms. Gordon said words to the effect, "I want to make a record, Your Honor, objecting to last night's ruling." The Court responded, I've already made my ruling, and you know, everything will stay the same. Then they left the bench and returned to their respective counsel tables.

The Judge asked the last juror's question. The witness was in the midst of answering the question, or in this case, not even answering the question, but he was responding or speaking, and Ms. Gordon stood up and stated that Your Honor, I'd like to ask the Court to allow the jury to see the portal view, knowing that that comment was premeditated, it was intentional, and it was knowingly a violation of the Court's order of last night, and of the Court's reminder of the Court's order last night, again, at sidebar just prior to asking the question.

So it was clearly intended to violate the Court's instruction. And it is the unmistakable impression to the jury that the Plaintiffs are afraid of the evidence, or have, in some way, done something to hide from the evidence or to take some action to communicate to the jury that we have taken some action to prevent them from receiving the evidence. All of which is false and prejudicial to the Plaintiff, because it is the

Defendant's failure to comply with Rule 16.1 that led to the Court's ruling last night, and it has nothing to do with it. The Plaintiffs have done nothing inappropriate or wrong, and they're not responsible at all. The Plaintiff is not responsible at all for the Court's ruling or for the fact that the Defense have precluded them offering as evidence.

This is so prejudicial, Your Honor, that I am asking the Court to declare a mistrial of this matter, and allow us to commence a new jury selection a week from Monday. If the Court chooses not to grant this, and I do believe the Court should, then I have a proposed instruction to render now to the jury, and then place it in writing, and then render it again at time of submission of the jury instructions to the jury, prior to final arguments and the rendition, but I believe that the prejudice is irresponsible, and the mischief by this Defendant, through counsel, intentional and premeditated, and totally inexcusable and prejudicial to the Plaintiff. Thank you.

THE COURT: All right. You said you have a draft of some sort of instruction?

MR. JIMMERSON: I do.

THE COURT: Can I see it please after you show it Ms. Gordon?

MR. JIMMERSON: You won't be able to read it. I'll show it to opposing counsel so I'm not trying to submit something they didn't see.

THE COURT: What'd you say?

MR. JIMMERSON: I have an objection on the Defense side.

It looks like a --

THE COURT: Okay. Let me -- it's in your handwriting, yeah?

MR. JIMMERSON: Is that --

THE COURT: Okay. Can I just take a look?

MR. JIMMERSON: I can read it out loud, though.

THE COURT: Yeah. I've seen this and there's no way anybody but you can probably read it, so --

MR. JIMMERSON: I agree.

THE COURT: -- would you please read the item?

MR. JIMMERSON: Yes.

THE COURT: And before we do that, Dominique, I'd like you to go let the jury know there's a -- that we're in here, we're working on something that's come up, and we appreciate their patience, we'll be with them soon.

MR. JIMMERSON: Absolutely.

THE COURT: Okay. Go ahead.

MR. JIMMERSON: Thank you. Alternatively to a mistrial being granted would be the suggestions I've had just three minutes or so to prepare. This is my idea.

You are instructed, ladies and gentlemen of the jury, that the Court -- that it was improper for the Defendant, through his counsel, to request of the jury to look at the portal view. Reasons of which should not concern you. The Court has already ruled that the portal view shall not be tendered to the jury as it would be inappropriate and confusing to the jury. The decision of the Court to not show this portal view is

through no fault of the Plaintiff, and is as a result of, of course, a ruling based upon errors of the Defendant, or words to that effect.

THE COURT: Okay. All right. Ms. Gordon?

MS. GORDON: Thank you, Your Honor. Three issues. First, there was no court order. It was a court ruling at that time, and the court ruling was based upon circumstances of yesterday, and the landscape today has changed. We were responding to jury questions. The jury questions, several of them, but indeed the last one, had to do with what image was Dr. Debiparshad looking at when he prepared his contemporaneous March 1st, 2018 office note.

And under those changed circumstances, we believe that it was important, again, for the jury to actually see the portal view. And when we were up at the bench, we discussed it to an extent, and the Court invited the Defendant to ask you to reconsider, and that is indeed what I did. Asking you to perhaps allow us to show it.

To the extent that it overlapped with the ruling that you had last night, it was just a request to reconsider it. And it wasn't in order, Your Honor. There's nothing improper. There's no violation of an order. There's new evidence, there's new questions that the jury was asking, and again, the landscape has changed, causing Defendant to believe it's even more important under these new circumstances and jury questions for them to see that.

To the extent that the proposed jury instruction states that it was improper move by Defendants, it's not true. It's simply asking the Court to allow a piece of evidence. It's no different than it was yesterday

when the circumstances -- when we tried to have the jury look at it yesterday. We're trying to have the jury look at it again today. It's not improper, Your Honor. It's something that we believe is very important in this case. So it was by no means an attempt to discredit an order of this Court. It was just to address the jury questions.

MR. JIMMERSON: There are two or three comments that I have that the Court could then weigh in. The brazenness, the absolute disrespect for the Court and the administration of justice, we're saying these words, "There was no violation of the Court's order." Apparently referencing the fact that your end orders last night have not yet been reduced to writing. Evidence of arrogance or a contempt towards the Court, and that is [indiscernible] and totally unjustified, and sanctionable.

Secondly, the words of Ms. Gordon at the sidebar was, "I want to make a record." The Court stated, "I've already ruled." She knows and the Defense knows that to make a record, is to do so outside of the presence of the jury. Instead, she strategically, intentionally chose to make her record in the presence of the jury, knowing the Court's ruling last night, and knowing the Court's ruling today.

And then to say to you, remarkably, stunningly, astoundingly, there's no -- by doing so, there's no violation of the court order is evidence as to a kind of cuteness and gamesmanship that Dr. Debiparshad through counsel is engaging to the prejudice of the Plaintiff, and to the prejudice of this jury and these court proceedings. They're making a mockery of this trial and of this Court's ruling, and I want the record -- and I'm not raising my voice, but I want the record to be very

clear, I find this behavior to be totally improper.

THE COURT: Anything else?

MS. GORDON: And Your Honor, of course we completely disagree and I'm offended by that to call my actions an attempt to be cute or what have you. I renewed a request to admit evidence. That's what it was because the circumstances had changed based upon the jury questions. It was not an afront to the Court by any means.

I think that our conduct during this entire trial shows that we have nothing but respect for the Court, despite any disagreements that may have come up, and by no means is that supposed to be offensive or rude at all. No more so than us not making any kind of a big deal about, you know, Mr. Jimmerson's comments that he made under his breath that the jury could hear.

We could -- you want to take those two situations and talk about, you know, not appreciating the importance of a courtroom setting or what is proper behavior. That's the epitome of improper behavior, Your Honor. We raised it with you. You addressed it. You made sure that we were, you know, satisfied with you addressing it, and we moved on. That's what this is. We asked you to admit evidence, or at least allow the jury to see evidence based upon the change of the landscape.

There's absolutely no way that that request can be viewed as an attempt at cuteness or rudeness to the Court. It's not an [indiscernible] that was intended by any means. It's something that the Defendants feel strongly about, and it was time to ask for that evidence to possibly be shown again. The Court said no and we --

THE COURT: Okay.

MS. GORDON: -- moved on.

THE COURT: All right.

MR. JIMMERSON: And then they asked it in front of the jury. That wasn't a mistake, Judge. The mythical allegation that I have winced or said words that the jury allegedly could hear isn't -- just has of course nothing to do -- one has nothing to do with the other, and certainly, that hasn't been suggested. That's not even in the same room. We're talking about them telling you that your ruling, and then they know to do it outside the Court, and then they choose to do so in front of the jury, and they know exactly what they're doing, Judge. It's totally improper.

THE COURT: Okay.

MS. GORDON: I had to ask for admission at the time while it was in progress, so I don't understand that argument by Plaintiff at all.

THE COURT: All right. Let me go ahead and give the ruling on this Plaintiff motion for mistrial. It's denied with an appropriate agreement, though, on my part that the denial of this would necessitate a contemporaneous instruction. I think a contemporaneous instruction now, which I'll give when the jury comes back in, would make it such that the underlying basis, or the potential basis for a mistrial, that being the jury having the inability to provide a fair and just verdict, would be still in place. I mean, if I give an appropriate contemporaneous instruction, I think that's the way to handle this.

Now, I did previously tell the jury when I decided to not allow for this portal use -- I'm sure you recall this happening yesterday with the

laptop that Mr. Vogel had in front of him -- I said things, and I'm paraphrasing myself, but I think it's fair to say I said things consistent with this being my decision, and that I could explain even the legal reason behind it after the trial was over to the jury. I mean, I said something like that to them as a courtesy to them, which I think expressly says to them, or at a minimum implicitly says to them that the decision is a legal decision that I don't want to involve them with. The jury, in my view, doesn't need to know the legal reason why I precluded stopped the misuse of the portal. So now it's come up again.

I do respect that based upon jury questions, wanting to look at x-rays, in the book some of the x-rays being given to the jury, the boards on x-rays, the revisiting of x-ray issues in various ways. I mean, it's been a primary focus of the entire lawsuit, of course. I can see -- I have to say, I can see where Defense counsel, given their theory -- which again, I thought they did know about, fairly ahead of the start of the trial -- this theory that, look, our client, Dr. Debiparshad, looked at a portal at these x-rays.

And so that when he looked at the portal, they were less clear for whatever reason then they could've otherwise perhaps been, but certainly, the idea was I think the Defense knew long before the trial started that their client would testify by way of explanation in a fair sense and light most favorable to Dr. Debiparshad, of course, that he looked at a portal, saw the x-rays on the portal, and because of the transmission or the quality of what now comes up on this portal, the screws aren't able to be seen clearly. The broken screws, what have you, and so that's

what he's said here, and I think the Defense knew that for some period of time.

But nonetheless, it does lead me to say, I respect that the Defense would want to now pull up on a laptop or a computer the portal item, and show what -- the attempt would be, of course, to try to show that this is what Dr. Debiparshad saw on the portal, and so the jury can make of it what they want with their own eyes. I get that, and frankly, that seems to me that that would've been something that the Defense might want to do and would -- now, the problem with this in my view -- and I know the Defense disagrees with me -- is that there's plenty of notice, it's a material issue in the case, no doubt. I mean, Dr. Debiparshad has stated that it was the portal version of the x-rays that led him to not be able to, perhaps, see as much as he otherwise would've seen in other generation type x-rays.

The problem, and the only reason really -- well, I gave two reasons. I gave a legal relevancy reason, too, and I'll stand by that, but I said that wasn't even necessary to get to the decision because the primary legal reason for my preclusion of this use of the portal was lack of disclosure before trial, because evidence -- tangible, affirmative, material evidence -- does have to be disclosed before trial. And if you don't disclose it, the law is really strong in my mind, and from the Nevada Supreme Court as I referenced in my prior order, that you have to disclose it or you can't use it. And I know there's a case, Pizarro-Ortego, it talks about issues of justification or it's harmless.

Neither one of those apply in this scenario, by the way, in my

view, because again, I think the Defense had a reasonable notice that they may intend to try to show the actual portal x-rays. And it would've been relatively easy in my view, and if the Defense still can show me some disclosure document, then what is essentially a motion to reconsider, I could entertain that, but I would have to have a disclosure document from the Defense well ahead of trial that clearly demonstrates or demonstrates within reason, even, that in trial, you intend to use the portal and x-rays. The clear notice of that would be by pulling up the portal, so that there would be pretrial notice to the Plaintiffs that this is going to happen and they could prepare and otherwise deal with it. That's why the rule exists.

As I've proceeded on with this, I have not been shown by the Defense any sort of pretrial disclosure that talks about use in front of the jury or at trial of the portal itself. Rather, what's happened is there's been various generation copies of x-rays and I have said to the Defense before, and I can reiterate again, but this will probably be about the tenth time, but that's okay, that you can use, and you have used copies of x-rays that are on blow-ups, that are on exhibit books, that are otherwise on discs, you know, whatever it may be that's in the evidence that was disclosed. So it would be that the portal style x-rays are in existence. It is my understanding that you showed them at opening even.

So it's not as though that you're precluded from using them. There are items that you could present, and your client has testified that the ones that were used in opening are not exactly the same as what he did see in the portal, that they're blurrier or less clear than the portal, but

what was in the portal was not as good as some of the other x-rays, so the jury does have context upon which to draw a conclusion as what was on the portal from disclosed evidence.

Now, procedurally, what happened here? We did have a sidebar, no doubt, and it was not the first time, actually, at sidebar that Ms. Gordon had asked me to reconsider this decision on the portals. It's come up a few times in the questioning from the jury, and our little sidebars having to do with dealing with those questions. Now, when we were at sidebar, you said I invited the motion for reconsideration. Okay. I did mention that Court could reconsider, so you took that as an invitation. So be it, but I don't think I said something consistent with the idea to bring that back up in front of the jury, again.

I don't think as a matter of law that there's a tentative law that says that you cannot, in front of the jury, ask for a reconsideration of the evidentiary ruling that happened earlier in the trial. I think you can. However, I would also provide a fair editorial comment in this regard. It is my view that the better practice, at a minimum, would not be to make a motion for reconsideration on something in front of the jury because I do agree with Mr. Jimmerson's general philosophical argument that now, this does in front of the jury, create an appearance at a minimum. This is my paraphrasing of Mr. Jimmerson's comments, of course. It creates an appearance that now the Defense wants to do something, probably to further assist the jury, probably consistent with their questions which continue to mention x-rays, but somehow, the Plaintiffs are doing something to impede that. So that's where the

contemporaneous instruction has to come in. I need to say something to the jury so that they don't, because they shouldn't put fault on either side, Plaintiff or the Defendant, for this idea that we're not going to involve ourselves with the portal demonstration because that was not disclosed pretrial by the deponent of that, which in this situation is the Defense.

So one last thing on this. Ms. Gordon had indicated that the landscape has changed. I have to tell you, in my view, it doesn't matter how much the landscape changes on this point, unless both parties want to stipulate and agree to have this portal demonstration occur, because you can always agree to do something that neither side disclosed before trial, but if either side, in this case the Plaintiffs, object to it, then because it wasn't disclosed -- not landscaped, it has nothing to do with landscape or what's happening in the trial. It's one and one thing only. It has to be disclosed before the trial. Was it disclosed? As far as I see it, no. Therefore, can't be used unless parties agree, nonetheless, to use it mutually, which they haven't.

So I will give a contemporaneous instruction. I'm not going to say that what Ms. Gordon did was improper, but I am going to reiterate, the main point I want to make to the jury is that I made a decision to not use the portal or show the portal or do a demonstration along those lines, and they shouldn't blame either party for them. In other words, it's not the fault of the Plaintiff or the Defendant that that's not going to happen. That it's based upon a legal decision that, in my view, is the correct decision.

I'll say that in a very generic, general sense, and again, I'll tell him that I'll, you know -- you know, if I can or if I -- I will explain later the reason for that. In other words, explain the law, but during the course of the trial, they shouldn't be concerned about the law, just like I told them with objections. They shouldn't be worried about what is hearsay and what the underlying legal basis for things would be. So I'll say a bunch of stuff about that, and I'll do it in a way that I think cures the problem, and I did say the word problem because I agree with Mr. Jimmerson. I think there is a bit of a problem in the air here, but I also think it can be remedied, as I expect jurors to follow all my instructions and listen to me. And so I'll fix it and we'll move on. So let's bring in the jury.

THE MARSHAL: Parties rise for the presence of the jury.

[Jury in at 11:27 a.m.]

THE MARSHAL: All present and accounted for.

THE COURT: All right, thanks a lot. And please have a seat and relax everyone. All right, members of the jury I have to tell you that, I think consistent, actually, with the fact that so many of you have been engaged in the process to a level of asking so many questions, that I think it's fair to say that we all get a feel that isn't a jury trial an interesting event, just from the point of the human brain and what's necessary, thought process, the fluid flow of things. And it's because of the importance of it, and it's also because of the effort put in by so many people in the room that care, including you, of course, as demonstrated by your questions and the lawyers who, on behalf of their clients, take various positions.

And for me, it's an extremely fun and interesting mental exercise, in that sometimes you never really know what you're going to have to deal with when you -- when your alarm goes off in the morning, and you're making your coffee and all that. So I do want to tell you, of course, I told you to be back here at 11:00. It's now 11:00 -- close to 11:30. I -- as I want to do, I had our Marshal, Dominque, go out and tell you that we're now working on something, that perhaps wasn't anticipated -- it was not anticipated. And so that back and forth has taken place. And I hope you understand that does happen. And that sort of high level event that we're all involved with here as a team. Right? This jury trial.

So it has resulted in an instruction, in my view, that I should give you now, contemporaneous with the issues that we've dealt with. And so this is a result of the time that we've been spending in here. So it's important, and as with all the instructions I give you, pretrial, and in writing at the end of the trial, what have you, and along the way, respectfully I expect, and I know you will follow my instructions. So here's the instruction that I think is important, that I have to give you at this time.

The concept, or issue, of potential use of a portal, you might recall the idea of a portal that Dr. Debiparshad used to look at some x-rays in the case. In general, you, of course, recall that issue, that testimony, that item. You probably also recall that, I think it was yesterday, but previously, I told you at the time where it looked like perhaps we could look at the portal. There was a laptop in front of Mr.

Vogel. This came up in court, and I -- I did make a decision that we were not going to pull up the portal and look at that, or have the demonstration or the -- the calling up on the portal, whichever way you want to characterize this. You know, I made a decision that we were not going to look at the portal, pull up x-rays and go from there, if you will.

And I know that right prior to the last break, there was a request made for me to reconsider that. And so I have entertained that. And it is my decision to again reiterate that we're not going to pull up the portal, and we're not going to go through that process in any way, shape, or form, by way of pulling up live the portal, and using a laptop, perhaps, or a computer to do that. And so here's the perhaps most important part of this, it is essential. Please do not assign any fault to either party, or any of the lawyers as to this. I'm not under the impression, necessarily that you are forming any fault-based opinions as it would pertain to either party or any of the lawyers. But if -- if you were, I don't want you to do that. In other words, please assign no fault whatsoever to the Plaintiffs, the Plaintiff, the Plaintiff's lawyers, or the Defendant, or the Defendant's lawyers as to the fact that we are not going to go through and look at this portal.

That was my decision, and my decision alone. In fact, as far as I'm concerned, it doesn't matter which party ultimately may or may not have brought that up in front of you, or to my attention. It doesn't matter. We know it was the Defense, because you saw that happen. But hypothetically, if it had been the Plaintiffs, it doesn't matter. The point of this is please assign no fault to either the Plaintiffs, their lawyers, the

Defendant, his lawyers, well, Plaintiff and his lawyer, Defendant and their lawyers, to either side, having to do with this, because in the trial process that I've described now, I don't know, in a trial like this, a couple of weeks, 500 - 1,000 decisions I make, somewhere along the way. Of course, there's a handful of those, probably that, you know, it takes a while to get through. This is probably one -- one of those handful, but it's important to tell you again. It was my decision. And it was based upon law. So, you know, I told you before, probably in the beginning of the trial, even really early on, in the pretrial instructions that, for example, when lawyers make objections, or say things to the Court, to urge, maybe the admittance of evidence, or the allowance to do something, or question or an answer, should or should not be either asked or given, that sort of thing, objections. That they should give me a legal reason underneath their objection. Just for my use, my edification, you know. I gave you an example, where a lawyer might say objection, hearsay. And I told you, don't worry about the hearsay. Don't worry about what is hearsay, and try to wrap your head around that.

And that's because I told you, and I think you have a really good feel for it now, that you're the most important ones in here, because your -- your job is the sacred one, because you decide the facts of the case. You decide the facts of the case. You decide the verdict of the case. But it's the facts of the case that ultimately you decide. And that's why you're the most important ones.

My job pales in comparison with your duty and your mission as jurors. My job is to decide the law. So it's not your job to decide the

law. And that's a good thing, right? You can depend upon me for the law. So that's consistent with this idea that I don't want to explain to you at this point, because I don't -- it would be confusing and not necessary really as to what the legal reason was for my decision to not look at this portal.

I did tell you yesterday, and I'll reiterate now that if we have the opportunity, I would explain to you after the trial the reason for this. I'll give you the legal basis for it. And it might take a little bit, but I would explain the law, in my view, that I applied, to make the decision that we're not going to look at this portal. That's my decision. And I say if we have the opportunity I would explain that to you. We -- in the time I've been here, I always like to, for about a half hour, on average, meet with the jury after the trial, with just the lawyers. Just me and the lawyers. There have been a few where we haven't done that because a verdict came in on a Friday at 6:00 or 7:00, or even later. And though maybe it would have been good to meet and talk, to learn, I just made a decision that you gave us enough, and I let juries go. Okay. So if you come in with a verdict late on Friday, for example, if that happens, it could be at a minimum I'd give you the option to either stay for a little bit or not. Or I might just say if I get a feel that it's been a whole -- it's been enough, I'll let you go.

So, but I'd say 90 percent of the time we meet with the jurors and we talk to them. And it's mainly done from a perspective of respect. And it's a critiquing thing for us. I'd rather have you tell us what we could do better, so that the next time around, the lawyers and the Court

could do better. But at the same time, I do like to take that as an opportunity to explain questions that you posed, that I didn't ask, and explain the legal reason why I didn't ask them. Because you don't know that when I tell you at the time I'm not going to ask that question. On the rare occasions, as it shows, that I don't ask your questions.

Same thing here. I will explain to you the reason for this decision about not using the portal. Again, that's just my decision. And I'll explain it to you. But the full upshot, and I'm almost done, but again, I want to just make sure that you don't hold it against either party that we're not going to watch this portal.

And I think you get that, I think that's fair under all the circumstances. And so now we'll move on, and now I'll ask the Plaintiffs to call their next witness.

MR. JIMMERSON: Thank you, so much, Judge.

And my first opportunity to say good morning, but now it's almost lunch. So welcomed you on, only one day away, very special day. We liked to have, and privileged, because he's been so patient to wait for us, Dr. Robert Fontes to the witness stand, Your Honor.

THE COURT: All right, Dr. Fontes, if you'd come on up here to the witness box area. And when you arrive there, if you could remain standing just voluntarily. You're certainly welcome to put your binders down. But if you'd turn your attention to Alice, our Clerk, she'll swear you in.

ROGER FONTES, JR., PLAINTIFF'S WITNESS, SWORN

THE CLERK: Please state your name and spell it for the

EXHIBIT 12

EXHIBIT 12

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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
THURSDAY, AUGUST 1, 2019

RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 9

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.
JOHN M. ORR, ESQ.

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time I presume means he can exercise maybe once a week like that or twice a week like that. So you know, pain -- most pain is sort of intermittent fortunately. And I don't think it particularly would affect my opinion one way or the other.

Q All right. If you read number 26, and I'll --

A I see that.

Q -- try to zoom in. "How confident are you that you can control and manage most of your health problems?" And Mr. Landess he was confident as of February 20th, 2018. Would you have expected -- this confidence in his being able to manage his health problems, do you think that would have been reflected on the MMPI results at all?

A Well, he's a relatively confident guy, and that generally inures to his benefit. But I would have predicted he would have said somewhat confident, but I don't know, and it doesn't -- it doesn't trouble me much one way or the other.

Q Okay. Number 19 asked if he had fallen two or more times in the past year. He said yes. And that's actually just followed up on the last page.

MS. GORDON: And for the record, I apologize, it's Exhibit 14, but pages 20 through 22.

BY MS. GORDON:

Q This is the last page, and it has a fall risk assessment. And the question is -- because I know it's super tiny -- "Have you fallen in the past 12 months?" "Yes." "Number of falls?" I believe that says two. If Mr. Landess had fallen between the October 2017 surgery and this

checkup in February 2018, do you think that that is something you would have wanted to know in terms of administering this test to see what his pain and suffering was and what caused the pain and suffering?

A Well, look, I mean, you always like to know more. You -- you clipped it away. But I think --

Q I'm sorry.

A -- that the follow-up question was, "Were you injured?" And he says, "No." Or maybe that was the second portion of it. But is that correct? Yeah. And the, "Injuries due to fall." And you don't have it highlighted. But he says, "No." So if he wasn't injured, although I would have liked to have known about it, I don't think it would have affected my opinion very much.

Q And, Dr. Mills, are you familiar with the ethical principles and code of conduct for psychologists?

A Well, I'm not a psychologist. I'm a psychiatrist.

Q Okay.

A And so I have some familiarity with them. I have supervised a number of psychologists at vary points in my career. But I don't have kind of familiarity with those principles than I do with AMA, American Medical Association, principles or psychiatric principles.

Q You agreed earlier in your deposition that those same principles would apply to you as a psychiatrist though, correct?

A I don't think I've been deposed in this matter, ma'am. You mean my testimony?

Q Right. And your -- well, in your deposition testimony.

EXHIBIT 13

EXHIBIT 13

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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.

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THE COURT: But be aware that you can, and the other side might, and then you might want to change it, too. It's the nature of what we have here with these x-rays. I just want to make sure I say that to you.

MR. VOGEL: Okay.

THE COURT: Okay.

MR. JIMMERSON: Thank you, Judge.

THE COURT: All right. Have a nice comfortable break.

[Recess at 9:42 a.m., recommencing at 10:03 a.m.]

THE COURT: All right. On the record then. Ms. Gordon.

MS. GORDON: I have a couple of issues, Your Honor, I would like to bring up before Mr. Dariyanani testifies. The first is to renew our objection. I'm not sure that it was ever fully resolved. Want to renew our objection to any testimony by Mr. Dariyanani regarding events that had occurred within the past, you know, couple of weeks. I would say any time after he produced the documentation of the value of Cognotion, which was, I think a couple of weeks before trial.

THE COURT: Okay.

MS. GORDON: So under the *FCH1* case, that has been, you know, referred to many times in this trial, a couple with Your Honor's statement that if it's not disclosed before trial, you can't use it. And that was, I think most recently about Defendant's request to use the portal to show the March 1st, 2018 x-rays. And my argument is certainly that should be applicable to the evidence that Defendants would like to show also. And in this case, it would be much more prejudicial, because we

don't have any way to verify that information. We can't confirm it. We can't conduct any discovery on it, and it would really just be a free for all for Plaintiff to come in here and say we know we showed you profit and loss statements that show a negative value of the company, but let us tell you what happened in this past, you know, week, week and a half.

THE COURT: Okay.

MS. GORDON: Your Honor, said you wouldn't accept any documentation of it, and I appreciate that. But I think that should also go to testimony by people.

THE COURT: Okay.

MS. GORDON: Especially Mr. Dariyanani, because he is purporting himself to a disinterested third party, as opposed to Plaintiff who I -- I could cross examine on the issue.

THE COURT: All right. I understand that. Do you have another item?

MS. GORDON: I do.

THE COURT: Okay, let me -- if you would be willing to hold that second item.

MS. GORDON: Sure.

THE COURT: Let's just deal with the first one. Mr. -- or Plaintiffs do you have a position on --

MR. JIMMERSON: This is the first I'm hearing it. But this is what I understand is the request, is that Mr. Dariyanani not speak to any events or updates beyond July 11th, the date that he produced the documents before. And based upon our earlier conversation early this

week, there will be no new documents introduced at all. Period. I mean that was what I understood to be --

THE COURT: Okay.

MR. JIMMERSON: -- a consent --

THE COURT: Okay.

MR. JIMMERSON: -- so both of which are acceptable to us.

THE COURT: All right, let me go ahead and reconcile this first item. You're correct, and that refreshes my memory on this, but it's not like it needed a lot of refreshing going on. I did say that documents that aren't disclosed can't be used. So in other words, you know, in the event there's a more recent contract or something going on by way of dealings Cognotion has in the works, then the documents that support that, unless both sides decide to admit them, even upon reviewing them, but upon any objection, they'll not used. Cannot be used, because my view is they would have to be disclosed.

However, I do think that the issue as to the ongoing success in a financial way, or lack thereof, in a financial way of Cognotion is part of the case. I mean it really is part of the case. And nobody, I think, reasonably could control that here we are on August 2nd, 2019. So I think Mr. Dariyanani can talk about what -- from the beginning of time that Cognotion existed until today, August 2nd, of 2019, you know, the company, and as I understand it, it's a, you know, start up, you know, kind of a novel type company. And I heard testimony that initially it's expected that these type of companies lose money for a while, and then they get to a point where they don't. You know, and these stock options

were ones that go off into the future.

So the bottom line is I do think that Mr. Dariyanani can testify in his view as the CEO of, you know, person most knowledgeable of Cognotion, as he sits here on August 2nd, 2019, where the company is, how he would value his own company, and talk about the stock options. I mean he's well aware of the stock options that were given and lost, frankly, to the Plaintiff in this case. So I think he can testify as to his opinions on all this. I just, again, in trying to balance the fairness on this, and apply the law that I think applies.

Standalone documents of some new contract or deal in the works, I would prevent that, unless both sides look at them and want to use them. So I know that's not what you want to hear. I can tell by your physical reaction.

MS. GORDON: No, I'm trying to --

THE COURT: But I -- you know, as a Judge, you know, I think you all know, you've got to make calls on things as they -- as they come up. And I really think that the correct call, you know, 272 for me here, on this item, is that Mr. Dariyanani can testify about the financial wellbeing, or lack thereof, what's in the works, all relevant to the stock option issue in the case. I think he can testify, give his opinion on it. And I do -- I do understand there's a potentiality he might say, you know, yesterday, you know, this happened, and I'm working on this, I'm working on that. Well, I mean nobody, again, can control we're here on August 2nd. I'm trying to find a fair accommodation to this. You know, if something happens that I now have to further deal with, well, so be it. I mean but going into

his testimony, the best call I can make, again, is that he can testify about, he's a CEO, he can testify. But I did allow for depositions right up until the time of trial for him, you know. And that was in fairness because of all this, you know.

But anyway, I think I said enough on that -- on that point. What's your next point?

MS. GORDON: That when Plaintiff was testifying, a jury member asked him if he had any current shares or stocks of Cognotion and he said that yes, he had 80,000 shares of stock.

THE COURT: Okay.

MS. GORDON: And we did not -- we raised the issue of wanting additional information about it. And then there was just kind of like a stalemate for a second. I think we didn't know where to go or what to do with it. And -- and it's my memory that it was tabled, to an extent.

So I plan to, in my cross examination, seek from Mr. Dariyanani additional information about that.

THE COURT: Okay, that's --

MS. GORDON: Because we've not forgotten about that.

THE COURT: -- I think that's fair.

MR. JIMMERSON: About what please?

THE COURT: About that --

MS. GORDON: The 80,000 shares of Cognotion that Plaintiff currently owns.

MR. JIMMERSON: I do apologize.

MS. GORDON: Okay.

officer and major shareholder of the value of Cognotion?

A I mean, shares of Cognotion today or do I think that they will be worth in the near term?

Q How would I say both. I'd like the jury to hear both.

A I think shares of Cognotion today are worth between 37 and .50 cents, and I expect, as do the investors who are paying that much, that they'll be worth 2 to $3 within the next two years.

Q Okay. Mr. Landess indicated it was his view that they were worth about $1 now or in the near future, right?

A It depends on how you define the near future.

Q All right. So let's break it down. You said it's worth 37 to .50 cents now. Please tell us why.

A Well, I'll give you some datapoints. We -- people are sending us, and we got a check last week from our largest investor at 37 cents a share.

MS. GORDON: And, Your Honor, I'm going to renew my objection that this is all new information and we object to Mr. Dariyanani bringing this testimony now for the first time during trial.

MR. JIMMERSON: Okay.

THE COURT: All right. I'm going to allow for the question and answer, as I think it is relevant to the value of the Cognotion share price.

So go ahead.

THE WITNESS: Your Honor, may I -- can I just interject something for --

EXHIBIT 14

EXHIBIT 14

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8/5/2019 8:49 AM
Steven D. Grierson
CLERK OF THE COURT

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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.

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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?

EXHIBIT 15

EXHIBIT 15

Electronically Filed
8/6/2019 9:15 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
MONDAY, AUGUST 5, 2019

RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 11

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.

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THE COURT: Um-hum.

MS. GORDON: -- setting up Dr. Debiparshad. I don't think it's completely irrelevant, and you know, it hurts. It hurts. I don't care. That's our job, and I'm sorry that it hurts and it's damaging, but it's not so prejudicial that it shouldn't be considered at all. They opened the door, and we're allowed to use it. I have an ethical obligation to use it. We're here, Your Honor, because of a cumulative effect of Plaintiff's errors. They disclosed it, they redisclosed it, they stipulated to its admission, they didn't object to it, they didn't ask for a sidebar at any point.

We're here because of their error. Trying to shift the burden for that error to us now, it's absurd. It just is, and trying to make it look like an ethical issue on the Defense side for using this piece of evidence is absurd, as well.

THE COURT: All right. Just to be sure, it sounds like what you're saying to me is that, in your view, under all of the circumstances that you've already described or that you otherwise know, that whether Mr. Landess is a racist is something the jury should weigh and it's admittable, and it's evidence that they should consider.

MS. GORDON: I think that the entirety of the passages from that email is impeachment testimony to the character evidence that was improperly and unethically elicited by Plaintiff, and I don't know that it's so much exactly what that bad character evidence consists of --

THE COURT: Um-hum.

MS. GORDON: -- it's bad character evidence that we're

I didn't feel it was my job to sua sponte interject. And here in a little bit I'm going to talk about a legal concept that I think is very relevant to this situation. And when I do that, I am going to talk about how I do understand and sympathize in some ways with the Plaintiff's position and not being able to object to it at the time or not objecting to it at the time.

But anyway, the fact of the matter is, when this occurred, even if well intended by the Defense to cross-examine when character is now an issue, respectfully, it's my view that the mistake that then the Defense makes is that they interject the issue of racism into the trial.

Once the issue of racism is interjected into the trial and by the way, it does appear to me that even now and I'm not unduly criticizing, but even now, it appears to me that the Defense's position is that the jury can consider the issue of whether Mr. Landess is a racist or not. That I disagree with to the fiber of my existence as a person and a judge.

Ms. Brazil is an African-American. Ms. Stidhum is an African-American. The Plaintiffs have stated and for purposes of this I can agree philosophically, although I don't know for sure because I don't, that Mr. Cardoza and Ms. Asuncion is also Hispanic.

The shortcoming is me, I've never really seen that kind of stuff much. I don't know why that is. I probably should in today's world more that everybody does. But it's probably because when my dad was a chief of police when I grew up in high school, he had a partner. His partner's name was Tank Smith. And Tank was a black guy, an African-

biography stuff that we were given. I didn't look at it. But it seems like that's the case.

And so, it is my view that since we have two African-American jurors and potentially two Hispanic jurors, given what I do think was a mistake made by the Defense in interjecting race, the issue of Mr. Landess being a racist into the case. Even if well intended to cross-examine, as I said, it is my thought that the Defense should have seen this and done something to deal with it. They should have asked for a sidebar as I tried to talk to Ms. Gordon about or I think it should have dawned upon them that you're now putting the issue of racism into the case in front of a jury that has four members arguably that fall into some of these categories, referenced in this email.

By the way, the email, if you were to ask me about offense that could be taken, certainly as Mr. Cardoza, Ms. Asuncion or anyone of heritage of coming from Mexico, they would have to be offended by it.

As to the two African-Americans, it's clear to me, because like I told Mr. Vogel, it's the lumping in of a term associated with African-Americans, with the rest, hustling Mexicans, blacks and rednecks. That is clearly an implication that these are, in the author's opinion, sort of the dredges of society who I could easily take advantage of on paydays.

And so, I do think that this coming together, this perfect storm of mistakes, the mistake the Plaintiffs made that I have described, the mistake I think that the Defense made in interjecting race into the case. I know the Defense doesn't think it's a mistake because they apparently think that the jury can consider whether Mr. Landess is a

racist or not. I have to say that surprises me, but wouldn't be the first time I guess I'll ever be surprised as a judge. But I got to say, that surprises me, which will get to the second half of my decision, which is still to come.

But for now, I'm making a specific finding that under all the circumstances that I just described, they do amount to such an overwhelming nature that reaching a fair result is impossible.

Further, this error that occurred in my view, how specific -- I am specifically fining it prevents the jury from reaching a verdict that's fair and just under any circumstance. And there's no curable instruction, in my opinion, that could un-ring the bell that's been rung, especially to those four. But let's don't focus only on those four. There's ten people sitting over there and I do think just as a normal human being, one could be offended by the comments made in this email. You don't have to be Hispanic, African-American or I don't know how to say rednecks. I don't know how that fits in. I don't even know what that really is.

But in the minimum, you don't have to be a Hispanic or African-American to be offended by this note.

So, I feel as though my decision -- well, it was manifestly necessary.

Now, over the weekend, I said I did look at some law having to do with this, and that takes me probably as a segue into some of the things that Ms. Gordon and I talked about in the court argument this morning.

I asked her a hypothetical. I said, let's assume that you didn't

use Exhibit 56, page 44 of Mr. Dariyanani. Well, unless something happened that we wouldn't anticipate that being that somehow the Plaintiffs come to discover that the item is in there and bring it to the Court's attention prior to the Defense trying to use it in some stage of the trial. Now it's in evidence.

And I asked that hypothetical question. Let's assume you didn't use it with Dariyanani, but you did use it and put it up on the ELMO in closing argument. It's my view that it's really the same philosophical thought, its use of the item in front of the jury and asking them to draw a conclusion relevant to the verdict based upon it.

My view is if that would have happened, if Exhibit 56, which was in evidence, was put up in closing, that under the definition given by the Supreme Court of misconduct in the *Lioce* case, that I think it's likely that that would be seen as misconduct because whether it's with Dariyanani or whether it's in closing or both, the clear -- and now I've heard it in court this morning, it seems like 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, based upon something that I think is emotional in nature. This is an emotional style piece of evidence.

The idea, I think fairly and I'm sure the Defense would disagree with this, but fairly is give us a verdict. Whether it's reducing the damages or give us the whole verdict, because Mr. Landess is a racist. That is impermissible.

Even if some universe in some universal sense, if he were a

EXHIBIT 16

EXHIBIT 16

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8/5/2019 8:49 AM
Steven D. Grierson
CLERK OF THE COURT

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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

unable at that time to fulfill his job duties as an attorney for Cognotion; is that right?

A Well, as an attorney, and the other different functions --

Q Okay.

A -- that he did for us. That's right.

Q I'm going to show you an email from Plaintiff's -- I think it's admitted, but it might still just be --

A Uh-huh.

Q -- Plaintiff's Proposed Exhibit 56.

So you know what? Let me --

THE COURT: All right. Is 56 in those?

THE CLERK: 56 is not in the book.

THE COURT: All right. Not admitted.

MS. GORDON: I don't think it's admitted yet. I'm not 100 percent sure.

THE COURT: Yeah. It's -- I'm sorry. I just want --

MR. JIMMERSON: The answer; I would have no objection to that email. I'd just know the date, if I could?

MS. GORDON: And I have a view from 56, so --

MR. JIMMERSON: All right. I have the exhibit.

MS. GORDON: Can I --

MR. JIMMERSON: Sorry.

MS. GORDON: Can I move to admit Plaintiff's Proposed Exhibit 56?

MR. JIMMERSON: No objection, Judge.

EXHIBIT 17

EXHIBIT 17

Electronically Filed
8/6/2019 9:15 AM
Steven D. Grierson
CLERK OF THE COURT

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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
MONDAY, AUGUST 5, 2019

RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 11

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

Case Number: A-18-776896-C

because I'm sure at some point, I'll tell you about my weekend.

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. I mean, the issue became apparent late Friday, so -- just by operation of the calendar. You know, you have Saturday and Sunday and then here we are. So it could be that counsel worked on the weekend. Maybe. Maybe not, you know. I did. But that doesn't mean you have to. Sometimes it's good to take a break.

But anyway, I appreciate the idea that you put that pleading together and interestingly enough, somewhere in the neighborhood of about 90 percent of it, I came up with on my own. But the extra 10 percent, especially one of the cases relevant to the fees and cost aspect I hadn't seen before. So -- but that's left for another day no matter what, because again, unless the Defense tells me now you don't want an opportunity to file anything, the fees and costs aspect will have to wait.

So with that, let met just turn it over to counsel. Any comments on anything I've said so far? Because I'm laying out a proposed procedural construct.

EXHIBIT 18

EXHIBIT 18

Electronically Filed
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Steven D. Grierson
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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
MONDAY, AUGUST 5, 2019

RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 11

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

Case Number: A-18-776896-C

THE MARSHAL: Okay.

THE COURT: All right. The way I see the situation is that really I think there's two essential components to what we need to do now, given that the jury is here and there's a pending motion for mistrial. I think the first item is to determine whether I would grant or not the mistrial itself. The second item, which I did see in the motion, has to do with fees and costs. I mean you could see that in the title on the motion. There's a motion for mistrial and fees/costs filed by the Plaintiffs.

So my thought is, and I want counsel to weigh in on this structural procedural thought and tell me if you agree or disagree with my thought. My thought is I should now hear argument from the Plaintiffs and Defendants about whether I should grant the mistrial. I do think that if granted, the other part of the motion, the fees and costs part of it is something that would have to wait until another day, because I think I -- well, I know I would want to give -- unless the Defense doesn't want it, but I'd be shocked if you didn't -- I would give the Defense an opportunity to file a pleading relevant to the fees and costs aspect and then have a hearing off in the future on that, in the event we got to that point of it.

In other words, I -- you know, I wouldn't say to the Defense that now as it relates to fees and costs, you have to handle that right now live, when you have a motion than came in at 10:00 Sunday night. Now, that's not to say that I criticize the timing of this. Actually, the contrary. I want you to know Mr. Little, it's true. I appreciate that you spent -- someone spent time over the weekend putting this thing together,

because I'm sure at some point, I'll tell you about my weekend.

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.

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EXHIBIT 19

EXHIBIT 19

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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
MONDAY, AUGUST 5, 2019

RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 11

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

Case Number: A-18-776896-C

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.

EXHIBIT 20

EXHIBIT 20

THE JIMMERSON LAW FIRM, P.C.
415 South Sixth Street, Suite 100, Las Vegas, Nevada 89101
(702) 388-7171 – fax (702) 387-1167

DECLARATION OF JAMES J. JIMMERSON, ESQ.,

James J. Jimmerson, Esq., pursuant to NRS 53.045, declares under penalty of perjury, as follows:

1) I am an attorney duly licensed to practice law in the State of Nevada and the Principal and Senior Partner of The Jimmerson Law Firm, P.C., and one of the counsel for the Plaintiff in this matter. I have personal knowledge of the facts contained herein and am competent to testify thereto, except for those matters stated upon information and belief, and to those matters, a reasonable basis exists to believe they are true.

2) That to the best of my recollection, Defendants, at no time, made a record or complained to Judge Bare about alleged partiality of the Court to one side or the other. The Court ruled in favor of both Plaintiff and Defendants on various motions brought before the Court. Judge Bare granted the motion for preferential trial setting due to his preference to grant the same to "elderly litigants," as he later articulated. Plaintiff only filed four (4) Motions in Limine, and two of them were not even opposed by Defendants. There 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.

3) Likewise, the Court granted Defendants' motion—on June 13, 2019, after discovery cutoff—to allow additional discovery from Cognotion on Plaintiff's wage-loss claim, despite the fact that Defendants had narrowed the scope of their own Subpoena in communications with Mr. Dariyanani in April, 2019. In fact, Mr. Dariyanani, then and earlier, provided documents, including, apparently, the "Burning Embers" email which led to the mistrial, directly to the Defendants.

4) The Court also denied Plaintiff's Motion to strike the supplemental expert report of Kevin Kirkendall, which was only produced after 9 pm the night before Trial commenced, despite the fact that Plaintiff's expert, Stan Smith, was unable to respond. This decision strongly favored Defendants.

5) That the admission of the "Burning Embers" email within Exhibit 56 was inadvertent and Plaintiff's counsel did not know the content of that email. By the time the highlighted language was before the jury, it was too late to object, in our view, without calling further attention to the words within the email.

6) That on Friday, August 2, 2019, following the cross-examination of Jonathan Dariyanani, when the Court recessed for lunch and went off the record, I raised an objection and made a motion to strike or for some other remedy regarding opposing counsel having put the issue of race before the jury. During that off-the-record discussion outside the presence of the jury, I specifically advised that I did not know that the "Burning Embers" email was contained within the emails that comprised Exhibit 56, such that we had inadvertently stipulated to its admission with the other Cognotion-related emails, and that I was mad at myself about it. Defense counsel stated during that discussion that they "kept waiting" for Plaintiff to object but we did not. Judge Bare expressed concerns about jury nullification, before we all broke for a very short lunch.

7) When we returned, before the jury reconvened, Judge Bare then formally put on the record that he had denied the motion to strike but was concerned and unclear about what the remedy was. I repeated my off-the-record statement that I had not noticed the email until it was already before the jury, with those sentences highlighted, and that I was mad at myself. Judge Bare did not "offer" an "excuse" to Plaintiff for inadvertently stipulating to the admission of that email. Clearly, had Plaintiff realized that email, which Jonathan Dariyanani disclosed directly to Defendants, was in there, it would not have been included in Exhibit 56 and a Motion in Limine would have been filed to preclude it, along with all of the other Motions in Limine which were filed to preclude improper character evidence (i.e., Mr. Landess' gambling and past lawsuits, and his son's arrests).

8) When Judge Bare expressed his kind words about respecting me, and Ms. Gordon made a comment about it, Judge Bare asked her whether she had any

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problem with the words he had stated. She responded in the negative. Her only concern was whether Judge Bare was saying that to "make a distinction" between me and herself, to which Judge Bare responded that he was not.

9) Later that afternoon, I attended a late-afternoon off-the-record meeting in the back conference room of the Court, next to Judge's Chambers, with co-counsel, Martin A. Little, Esq. of Howard & Howard Attorneys, and opposing counsel, Katherine Gordon, Esq. and J. Brent Vogel, Esq. of Lewis Brisbois Bisgaard & Smith, LLP, and the Honorable Rob Bare. This 15-20 minute meeting occurred at Judge Bare's suggestion and invitation, which invitation was accepted by both Plaintiff's and Defendants' counsel. Judge Bare was clear that any of us could leave at any time, and that he would only provide his opinions if neither side objected, which neither side did.

10) During that meeting, Judge Bare was explicit to advise counsel on both sides that the possibility of declaring a mistrial was on his mind, and that he considered the conduct of the Defendants in utilizing the "Burning Embers" email to be prejudicial to the Plaintiff, warranting his consideration of granting Plaintiff's request for a mistrial. During the conference, the Judge discussed with counsel on both sides the seriousness of the issue, and the prejudice that the Defendants' utilization of the email of November 15, 2016 has had upon the jury trial and upon the racially diverse jurors themselves.

11) During said conference, Judge Bare invited input from both Plaintiff's and Defendants' counsel. Plaintiff's counsel advised that the words of the Court would certainly be communicated to their client, Mr. Landess, and Mr. Vogel, speaking on behalf of himself and Ms. Gordon, stated that they, too, would communicate the Court's words to their clients, and to the insurance company representative who was attending the trial. I observed Defendants' counsel doing so following the meeting with Judge Bare.

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12) Judge Bare advised that as one alternative, the parties could, if they chose, discuss between themselves settlement of the case at this time or over the weekend, prior to the Court having decided its ruling on the Plaintiff's motion for a mistrial. The Court offered its view—which was accepted and articulated to be appreciated by both sides-that this case was hotly contested between the parties, that there was evidence supporting each party's position, and that the Court's present view, at that time, suggested that, based on the competent evidence adduced, the jury may favor the Plaintiff on the issue of liability, but that the jury may favor the Defendants on damages and that Plaintiff would not likely, in his view, obtain the sizeable verdict he was seeking. The Court was clear that this was his view only, and certainly did not represent either party's view, or the jury's view of the evidence adduced.

13) Judge Bare stated that he appreciated each party's participation in the conference, and he concluded the conference with counsel, inviting both sides again to file any briefing on the issue over the weekend, and advising that he intended to research the issue further himself to determine whether a mistrial was appropriate, irrespective of whether we chose to do so. His concern was to ensure that a fair verdict could be rendered by this jury. Indeed, in light of Plaintiff's earlier request for a preferential trial setting, any continuance of the trial was not something Plaintiff desired or caused. However, Plaintiff concluded, as the Court later did, that obtaining a fair verdict, free of passion and prejudice, could not be obtained given the improper introduction of race into this medical malpractice case by Defendants.

14) This incident was the most recent of a series of actions of the Defendants during Trial that Plaintiff viewed as improper, which were raised during the Trial.

15) The exhibits attached hereto, including the transcript citations, are true and correct to the best of my knowledge, and authentic copies of those documents kept in our files.

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I declare that the foregoing is true and correct under penalty of perjury under the laws of the State of Nevada.

Dated this 30 day of August, 2019.

8/30/19

JAMES J. JIMMERSON, ESQ.

THE JIMMERSON LAW FIRM, P.C.
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EXHIBIT 21

EXHIBIT 21

DECLARATION OF MARTIN A. LITTLE, ESQ.

Martin A. Little, Esq., pursuant to NRS 53.045, declares under penalty of perjury, as follows:

1) I am an attorney duly licensed to practice law in the State of Nevada and Partner of Howard & Howard Attorneys PLLC, and one of the counsel for the Plaintiff in this matter. I have personal knowledge of the matters contained herein and am competent to testify thereto, except for those matters stated upon information and belief, and to those matters, a reasonable basis exists to believe they are true.

2) I never heard Defendants' counsel make any record or complaint to Judge Bare about alleged partiality of the Court to one side or the other. In fact, Judge Bare's rulings were not one-sided. The Court ruled in favor of both Plaintiff and Defendants on various motions brought before the Court, as set forth in this supporting opposition.

3) The admission of the "Burning Embers" email within Exhibit 56 was inadvertent and Plaintiff's counsel did not know the content of that email. By the time the highlighted language was before the jury, it was too late to object, in our view, without calling further attention to the words within the email.

4) On Friday, August 2, 2019, following the cross-examination of Jonathan Dariyanani, when the Court recessed for lunch and went off the record, Mr. Jimmerson raised an objection and made a motion to strike or for some other remedy regarding opposing counsel having put the inflammatory issue of race before the jury. During that off-the-record discussion outside the presence of the jury, Mr Jimmerson specifically advised that he did not know that the "Burning Embers" email was contained within the emails that comprised Exhibit 56, such that we had inadvertently stipulated to its admission with the other Cognotion-related emails, and that he was mad at himself about it. Defense counsel stated during that discussion that they "kept waiting" for Plaintiff to object but we did not. Judge Bare expressed concerns about jury nullification, before we all broke for a very short lunch.

5) When we returned, before the jury reconvened, Judge Bare then formally put on the record that he had denied the motion to strike but was concerned and unclear about what the remedy was. Judge Bare did not "offer" an "excuse" to Plaintiff for inadvertently stipulating to the admission of that email. Clearly, had Plaintiff realized that email, which Jonathan Dariyanani disclosed directly to Defendants, was in there, it would not have been included in Exhibit 56 and a Motion in Limine would have been filed to preclude it, along with all of the other Motions in Limine which were filed to preclude improper character evidence (i.e., Mr. Landess' gambling and past lawsuits, and his son's arrests).

6) Later that afternoon, I attended a late-afternoon off-the-record meeting in the back conference room of the Court, next to Judge's Chambers, with Mr. Jimmerson, and opposing counsel, Katherine Gordon, Esq. and J. Brent Vogel, Esq. of Lewis Brisbois Bisgaard & Smith, LLP, and the Honorable Rob Bare. This 15-20 minute meeting occurred at Judge Bare's suggestion and invitation, which invitation was accepted by both Plaintiff's and Defendants' counsel. Judge Bare was clear that any of us could leave at any time, and that he would only provide his opinions if neither side objected, which neither side did. In fact, my take was that Defendants' counsel welcomed Judge Bare's comments.

7) During that meeting, Judge Bare was explicit to advise counsel on both sides that the possibility of declaring a mistrial was on his mind, and that he considered the use of the "Burning Embers" email to be prejudicial to the Plaintiff, warranting his consideration of granting Plaintiff's request for a mistrial.

8) During said conference, Judge Bare invited input from both Plaintiff's and Defendants' counsel. Plaintiff's counsel advised that the words of the Court would certainly be communicated to their client, Mr. Landess, and Mr. Vogel, speaking on behalf of himself and Ms. Gordon, stated that they, too, would communicate the Court's words to their clients, and to the insurance company representative who was attending the trial. I observed Defendants' counsel doing so following the meeting with Judge Bare.

9) Judge Bare advised that as one alternative, the parties could, if they chose, discuss between themselves settlement of the case at this time or over the weekend, prior to the Court having decided its ruling on the Plaintiff's motion for a mistrial. The Court said if the parties

didn't object, and thought it might help, it was prepared to offer its view of the evidence. Both sides expressed a desire for the Court to discuss its take on the evidence—which was accepted and articulated to be appreciated by both sides-that this case was hotly contested between the parties, that there was evidence supporting each party's position, and that the Court's present view, at that time, suggested that, based on the competent evidence adduced, the jury may favor the Plaintiff on the issue of liability, but that the jury may favor the Defendants on damages and that Plaintiff would not likely, in his view, obtain the sizeable verdict he was seeking. The Court was clear that this was his view only, and certainly did not represent either party's view, or the jury's view of the evidence adduced.

10) Judge Bare stated that he appreciated each party's participation in the conference, and he concluded the conference with counsel, inviting both sides again to file any briefing on the issue over the weekend, and advising that he intended to research the issue further himself to determine whether a mistrial was appropriate, irrespective of whether we chose to do so. His concern was to ensure that a fair verdict could be rendered by this jury.

11) This incident was the most recent of a series of actions of the Defendants during Trial that Plaintiff viewed as improper, which were raised during the Trial. Another seriously improper act was Ms. Gordon drawing the juries attention to the "portal" issue despite previously being admonished at least twice by the Court that it was not going to be allowed to be presented to the jury.

I declare that the foregoing is true and correct under penalty of perjury under the laws of the State of Nevada.

Dated this 29 day of August, 2019.

MARTIN A. LITTLE, ESQ.

EXHIBIT 22

EXHIBIT 22

Electronically Filed
8/6/2019 9:15 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
MONDAY, AUGUST 5, 2019

RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 11

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

motion tells us that --

THE COURT: Well, Mr. Jimmerson, I'm going to interrupt you for a reason.

MR. JIMMERSON: No, no problem.

THE COURT: Sorry.

MR. JIMMERSON: Yes, sir.

THE COURT: I apologize for the interruption --

MR. JIMMERSON: Uh-huh.

THE COURT: -- but you know, I say that to both sides when I do it sometimes. But I'm just asking right now. I laid out a procedural --

MR. JIMMERSON: Oh, I'm sorry. Yes.

THE COURT: -- roadmap.

MR. JIMMERSON: Yes.

THE COURT: Where we handle only the motion for a mistrial, reserve the fees and costs aspect depend -- of course which would be dependent on whether I grant the motion or not --

MR. JIMMERSON: Of course.

THE COURT: -- for some other time, to give an opportunity to weigh in.

MR. JIMMERSON: No -- thank you.

THE COURT: So --

MR. JIMMERSON: On that basis, we would agree with that.

THE COURT: All right. Let me ask Mr. Vogel --

MR. JIMMERSON: I think that that --

THE COURT: -- and Ms. Gordon.

MR. JIMMERSON: -- that that needs to be where that's at. We need to address this issue now and the fees and costs issue can be delayed and give the Defense an even greater opportunity than it's had since all of us have been presented with this together. Thank you, sir.

THE COURT: Okay. Mr. Vogel.

MR. VOGEL: Thank you. Good morning. We obviously spent quite a bit researching as well. And we do -- we do appreciate you taking us back after Court on Friday and going through it and expressing your willingness to help try to settle this and expressing your view that you know, you felt that things were kind of going Plaintiff's way on this case. We discussed that with our clients and --

THE COURT: Well, I didn't actually say things were going Plaintiff's way. I said that on liability, I think -- you know, okay.

MR. VOGEL: Yeah.

THE COURT: One thing about it is, we've got to be careful, because I want to make sure everybody in the room is going to have adequate time to make their record, but I have to make mine, too, because I don't want any mystery in the record, okay? So if you don't mind, just have a --

MR. VOGEL: No, no.

THE COURT: -- just have a seat, please. Have a seat, unless you want to stand up for about five minutes or more. Okay, so now it's come up a couple times and so, you know, I just liking making a good court record. And anybody can memorialize things that happen off the record, including me. So if anybody wants to memorialize something

that happened off the record, then the answer, as you know is always yes. You can do that and there's no hurry in doing that. But at this point, it seems like I should memorialize what happened on Friday.

After the item came up in question -- that is the whole chronology of events, which at some point, let's put that all in the record again, most likely, that led to the jury now hearing from Ms. Gordon reading a couple paragraphs from this email at Exhibit 56, page 44. I offered -- this is -- and so if anybody disagrees with what I say, you're welcome to. You don't have to agree with what I say, if I memorialize something. If you disagree with some description or characterization, you're welcome to say I disagree, that's not what happened. I wouldn't be offended.

But this is what I think happened. In my mind, I obviously recognize the issue. To me, it was a rather unique issue, one I haven't really seen before. I've been here eight and a half years. I've declared no mistrials, okay? And so I just felt like well, in my heart of hearts, I really am now for the first time since I've been here, truly thinking wait a second, there's a genuine issue of potential mistrial in my mind as a judge. And of course, that is magnified, because we've been here putting a lot of effort in for a couple weeks, so it's not as though this happens on day 1 or day 2.

So in my mind I'm thinking wow, I need to deal with this. I can tell you that in my mind, too, was the idea that the email itself, as we all know and I'm sure we'll talk about, my guess is at least ten times sometime today, but I guess the first time will be right now. You know,

the email does reference words, hustling Mexicans, Blacks and rednecks and then later talks about the Mexican laborers stole everything that wasn't welded to the ground. And that, I mean immediately, once -- you know, it took a few minutes for all this to hit.

It's not like I knew the pristine, model answer, you know, within seconds or even minutes, contemporaneous with Ms. Gordon, you presenting this to the jury. It look a little while for me to process, okay, what just happened, how'd it happen. It's from an admitted exhibit. Dariyanani did put some character style testimony out. Okay. There's no objection. You know, I mean, it's not as though I had the model, you know, A+ bar exam answer ready to go.

So -- but in my mind, I guarantee you -- I'll tell you the first thing that hit me. We got a woman on the jury named Adleen Stidhum. She's African-American. We gave her a birthday card during the trial. We celebrated her birthday during the trial. We gave her cupcakes with the jury and made, I think, a respectful sort of event out of it all. And so the first thing to hit my mind was wow, how could she feel? And then the second thing to hit my mind was, as I recall, Ms. Brazil, who's also African-American, served. I think she served 20 years in the Navy, if I recall that correctly.

And I just thought about, you know, what I said early on in my pep talk to the jury, where I talked about the fact that my father served in the Army 27 years and he's buried in Arlington. I think I might even have mentioned that I served as a member of the United States Army JAG Corps, you know, where I signed up for three years and

stayed four and a half, because I was a trial lawyer and it was wonderful and I loved it. And so I -- you know, I espouse all the virtues of serving on a jury and what a legitimate call to service this is.

And it just -- I felt this feeling of illegitimacy and I felt bad. I mean, I felt bad. So I wanted to have this meeting, because I just felt like well, enough of me as a judge, enough of me as an eight and a half year judge is comfortable with having to recognize we got a problem. It's a big issue. And so I want to do, as I've always done, try to handle things in a way that make sense. You know, whether it was my time at the bar or here, I always try to do things that make sense.

You know, whether it was the time that Jack Howard called me at 1:00 in the afternoon and told me that he had a lawyer in his office who was drunk, who showed up to do a deposition at 1:00 in the afternoon on a weekday. And I went over to Jack's office. I drove over there. Sure enough, the lawyer there for the deposition was drunk. Later found out, high on meth. But I took that lawyer home and I put him on my couch.

I then called a guy named Mitch Gobiega [phonetic] and I said Mitch, can you come on over to my house. There's something I want you to help me with. He then took that lawyer that day and drove him to a place called Michael's House in Southern California, a five-hour drive from my house. That lawyer stayed in rehab for 30 days, made it through all that and still today, when I see that lawyer, he and I have to spend a moment together and both of us cry. It's happened ten times since I've been a judge. It's weird. Because he made it through.

I don't know why that story came to mind, but I can tell you it's the same thing here. It's that same sense of urgency that there's a problem that needs to be dealt with. So I invited this meeting in the jury deliberation room. And when we were back there, I said look, there is a way to avoid the continuing obvious specter of a mistrial and that is optional. Not required. I even mentioned that I thought the old style judges in the old days would get everybody together and say look, you need to settle your case, and essentially, almost order it.

But not my style, because ethically, I can't do that. A judge cannot order you to settle your trial, at least in my view, okay? But I can strongly urge it as something that's practical, that makes sense to do, when you know as a judge that there's a serious specter of a potential mistrial in the air now. Especially after two weeks and the obvious effort that now would have to be put in doing another trial. So I -- an optional way offered to give my editorial comments along these lines. And as I took it, the lawyers wanted to hear that.

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 or wanted it to continue, whichever way you'd like to take it.

So I said look, as an option, rather than dealing affirmatively with the mistrial issue that's in the air now in my view, what we could do is I can come in Monday and I'd be willing to sit in the conference room,

if it took all day even with the parties. That is, with the lawyers, Mr. Landess and the doctor and you know, the insurance rep or you know, the relevant parties to all this and I'd give you my opinion. I mean, it's a jury trial, so I think I can give my opinion as to the evidence I've seen. But again, I would only do that if everybody wanted me to. And so it was out there for consideration.

Now, neither client was in there. So Mr. Landess wasn't with us on Friday and Dr. Debiparshad wasn't there. So of course we all knew that before making any decisions on this, you'd have to consult with your clients and then get back. Over the weekend, actually, one of the criticisms of myself I had that really bothered me was I should have set up a protocol where we all somehow communicated over the weekend on this, but I didn't. So I -- it put in a position where I knew that first thing on Monday morning with the jury here would be this issue.

But I do -- I respect and understand, if you know -- if -- and it's really Dr. Debiparshad. If he doesn't want to do this, he's the client. I think he makes that decision. And I have to respect that. I don't hold any bad feelings as to that. You know, if he wanted to reconsider that, I'd give you as much time to talk with counsel as you wanted to here this morning right now even, because I think this mistrial issue is a serious one that has legitimate merit. But I won't make the decision on it ultimately, of course, until I hear from both sides.

But in any event, if the parties wanted to, I still would spend as much time as necessary going over what I thought the evidence was and give an opinion as to what could happen. With that said, of course,

Got only knows what the jury's going to do. Anybody can give their best estimate and then the opposite can easily happen. But you know, I've been sitting here and I have all this. I don't know, this is probably like you know, 20 some pages of my notes of everything that's happened in the trial. Every witness and the highlights of what they've all done. I could share that.

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 -- and again, this is an opinion. And I gave this opinion, because I thought perhaps it would foster taking me up on this. I said look, my guess is that there's more -- there's enough evidence to meet the burden, the preponderance burden on the medical malpractice. I'll tell you Dr. Debiparshad, that's what I said to everybody on Friday.

In other words, it's not that I disrespect your position or Dr. Gold's position. It's just that if you were to ask me, I would say to this point, that the medical malpractice itself, though I'm sure you did the best you could and it was well-intended and you didn't do anything intentional to try to harm Mr. Landess, but that's not required in medical malpractice. It's just making a mistake that now, unfortunately, causes some effect. And you know, my view is that Plaintiffs would meet that burden. I didn't give all the reasons for that. I'd be happy to spend time doing that, though.

But I also said that I don't think the Plaintiffs would get the home run on their damages. And this is all given with totally

discounting and not considering at all this email, of course. I took it from the perspective of, if the jury didn't hear the email, here's how I would evaluate the case. And I just in a general way said I don't think they're going to get the full extent of this stock option item and I further said separate from the stock option item, my thought is that the pain and suffering wouldn't go on until age 80.

I don't think the pain and suffering would be more than what the time period from the first to the second surgery, really -- what kind of pain and suffering you have associated with those months. Whatever it is, six months. That was my opinion. So that means that if I were right, the jury would find medical malpractice. They would certainly give some damages related to the past medical bills. They would give some pain and suffering for the six month time period on a theory that had it been done correctly, he would have healed in six months, like he probably has done after the Dr. Fontes surgery. And that is just my best guess as to what would happen.

I think on the stock part, that's so nebulous, because there's so many components that go into that, including could he really work or not. But I just think that it's likely that they wouldn't do much. They'd do some, probably, but not much on the stock option part. So what's the ultimate number? I don't know. If I sat down and had a settlement conference, if I were able to do that, I'd probably give you a number. But I think that's what would happen. And that's what I said on Friday, but I've magni -- I gave a little bit more now.

But -- so -- and we left the meeting and I -- you know, I take it

that the lawyers talked with their clients. And so again, no hard feelings, if we don't do it that way. I offered that, because I felt that was a fair and reasonable approach to the situation. And this is -- I guess I'll stop in just a second. The reason -- I think the main practical reason I felt that was I un -- if there's one thing I am certain about -- certainly not positive about my opinion as to a what a jury may do, but one thing I am absolutely certain about and that is that nobody in the room wants to do this all over again from the beginning, because that would take some time to reschedule the trial, most likely with another department and start all over again.

And I'm sure you get the feel for what that mean to go through this whole thing again. So I felt the, you know, the pain associated with that, just from a human perspective, not even to mention this idea of the costs, you know, separate from who's responsible and would I award costs or not. If you have a new trial, one thing's for certain. All those costs, all these attorney's fees, all your time, your time way from two weeks of your practice, all these experts, my guess is they're not going to do it again, unless they're paid again.

I don't even know what that would be. Couple hundred thousand just in costs alone? Five hundred thousand dollars in fees and costs? I don't know. And so I'm thinking, you know, why not do something to try to avoid even the potentiality of something like that? And that's why I offered what I offered. So that's it. I made my record. Now we're back to Mr. Vogel as to the --

MR. VOGEL: Yes.

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 --

EXHIBIT 23

EXHIBIT 23

Electronically Filed
7/22/2019 9:50 AM
Steven D. Grierson
CLERK OF THE COURT

OML
Martin A. Little, Esq., NV Bar No. 7067
Alexander Villamar, Esq., NV Bar No. 9927
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Telephone: (702) 257-1483
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E-Mail: mal@h2law.com; av@h2law.com
Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

JASON GEORGE LANDESS, a.k.a 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 1-X, inclusive; and ROE CORPORATIONS I-X, inclusive,

Defendants.

CASE NO.: A-18-776896-C

DEPT NO.: XXXII

PLAINTIFF'S OPPOSITION TO DEFENDANTS KEVIN PAUL DEBIPARSHAD, M.D., KEVIN P. DEBIPARSHAD PLLC d/b/a SYNERGY SPINE AND ORTHOPEDICS, DEBIPARSHAD PROFESSIONAL SERVICES d/b/a SYNERGY SPINE AND ORTHOPEDICS, and JASWINDER S. GROVER, M.D., Ltd doing business as NEVADA SPINE CLINIC'S SUPPLEMENTAL MOTION IN LIMINE TO EXCLUDE THE OPINIONS OF STAN SMITH, Ph.D. REGARDING PLAINTIFF'S WORK-RELATED DAMAGES BASED ON THE ABSENCE OF PROXIMATE CAUSATION

Case Number: A-18-776896-C

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., hereby files his Opposition to 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, Ltd doing business as Nevada Spine Clinic's Supplemental Motion in Limine to Exclude the Opinions of Stan Smith, Ph.D. Regarding Plaintiff's Work-Related Damages Based on the Absence of Proximate Causation.

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

DATED this 22 day of July, 2019.

HOWARD & HOWARD ATTORNEYS PLLC

By: _____

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

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I.

INTRODUCTION

During the July 16, 2019 hearing on various motions *in liminie*, the Court indeed invited **instructive briefing** on the issue of probable cause as it relates to damages arising out of Cognotion, Inc.'s ("Cognotion") termination of Plaintiff's employment in December 2018. The Court did not, however, invite Dr. Debiparshad ("Dr. D.") to file another, post-deadline[1] motion *in liminie*. And the Court also did not extend the time for doing so. Nevertheless, Dr. D. was so encouraged by this Court's *sua sponte* inquiry that he filed this Motion and simultaneously threatened to sue Cognotion for contribution by sending a threatening letter to one of Plaintiff's key witnesses, Jonathan Dariyanani.

Dr. D. thus now argues that: (1) Plaintiff cannot recover damages for loss of earnings and/or loss of earning capacity unless he produces expert medical testimony demonstrating that he is permanently impaired or disabled to such an extent that he can no longer practice law; and, (2) Plaintiff cannot prove proximate cause regarding his economic damages unless he produces expert medical testimony to establish causation. Both of those arguments are fatally flawed.

But before addressing those unpersuasive arguments, Plaintiff will respond to the Court's inquiry of whether or not Cognotion was legally prohibited from terminating Plaintiff.

II.

ARGUMENT

A. Cognotion was Legally Entitled to Terminate Plaintiff.

The Court expressed concern about the legality of Cognotion's actions, noting that

[1] This Court's September 12, 2018 Order (**Exhibit 1**) regarding trial states that all motions *in liminie* must be filed no later than 45 days before trial. This Motion was filed **3 days before trial**. For that reason alone the Court should deny the Motion as untimely.

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disabled persons were sometimes subject to protection by law. The Court, for example, noted that even judges are protected by such laws, as evidenced by the handicap accommodations installed in the courtroom. And that is true for public employers and private employers with 15 or more employees.

But under the federal Americans with Disabilities Act (42 U.S.C. § 12101 *et seq.*) private businesses with fewer than 15 employees are not subject to the employment provisions of the ADA. (42 USCS § 12111(5)(A)). Moreover, a covered employer does not have to provide a reasonable accommodation that would cause an "undue hardship." Undue hardship is defined as an action requiring significant difficulty or expense when considered in light of factors such as an organization's size, financial resources, and the nature and structure of its operation. The same limitations apply under Nevada's Fair Employment Practices Act. (NRS 613.310 *et seq.*)

Jonathan Dariyanani's Declaration attached as **Exhibit 2** demonstrates, however, that Cognotion is exempt from those federal and state employment-discrimination laws and, even if it was not, that Plaintiff's continued employment would have imposed an undue hardship upon the company.

Hence, the answer to the Court's question is: No, Cognotion was under no legal obligation to provide further reasonable accommodations to Plaintiff. Mr. Dariyanani clearly went the extra mile—and then some. His termination cannot therefore prevent the jury from considering whether Plaintiff's termination and the loss of his stock options is a direct consequence of Dr. D.'s negligently-inflicted injury and can be proven to a reasonable degree of certainty to have a lasting, permanent future effect upon Plaintiff. If the jury answers that question in the affirmative, then Dr. Stan Smith's economic calculations can aid them in

affixing damages.

B. Proximate Cause is a Jury Issue in Nevada.

"In Nevada, issues of negligence and proximate cause are considered issues of fact and not of law, and thus they are for the jury to resolve." *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).

C. Permanent Disability.

Plaintiff is entitled to recover damages that are logically connected, albeit indirectly, to the injury itself. *Murphy v. Southern Pac. Co.*, 31 Nev. 120, 149, 1909 Nev. LEXIS 11, *52 (1909) (Medical expenses and the loss of a "business situation" 'are perhaps direct results of the illness caused by the battery, but they are the **indirect results of the battery itself.**' *Citing* to Sedgwick, Damages § 111 (8th ed.) (emphasis supplied). And plaintiff may recover for the loss of future wages that are a direct consequence of an injury, without showing that the injury itself was permanent. "The test applicable to future damages has never required that the injury sustained by a plaintiff in a personal injury case be permanent in nature or result in permanent impairment to the person in order to qualify for recovery of future damages." 5C M.J. DAMAGES § 13 (2019).

This fundamental rule of allowing recovery of lost future income or wages without the plaintiff being permanently impaired was analyzed in depth by the highest court in West Virginia in the substantially similar case of *Cook v. Cook*, 216 W. Va. 353, 2004 W. Va. LEXIS 169 (2004). In that case, the plaintiff was involved in an automobile accident. At the time of the accident she was an active member of the Air National Guard. As a victim of negligence, she sought to recover, among other damages, future Air National Guard wages

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and benefits that she allegedly lost as a result of the driver's negligence, because she claimed that she was involuntarily discharged from the Air National Guard and also became ineligible for reenlistment. The trial court concluded that under West Virginia law proof of a permanent medical injury was an essential prerequisite to sustain a claim for lost future wages and benefits. On appeal, the West Virginia High Court found that the trial court unduly relied on the permanent physical nature of the alleged physical injury in describing the type of evidence needed to establish a reasonable degree of certainty under the future damages test. The reasoning was as follows:

> Were we to follow Appellee's suggestion that the direct injury sustained due to negligence must be a permanent injury, we would be undermining this long-accepted principle of recovery of damages. By limiting recovery of future damages to such permanent injuries, we would be denying the possibility of recovering future damages in situations where a person suffers an injury with temporary or short-duration medical impairment that may readily be proven to have a permanent or reasonably certain future consequence based on some level of recovery within a specific time period. To be made whole with respect to future damages in such cases, a plaintiff would be compelled to delay a trial on the issue of damages until all loss had been actually sustained. Such a resolution is manifestly impractical if not wholly impossible. It can be said that the very reason for the theory of allowing future damages to be proven with reasonable certainty arises from the need to avoid such impractical and impossible results while still providing a whole recovery.

Id. at, 358, *14.

Likewise, it would be highly impractical, if not impossible, to require Plaintiff to delay suing Dr. D. until all possible damages were sustained. And there is no logic in restricting recovery to just those who have suffered a permanent impairment or disability, which is why Dr. D. has been unable to cite to any such authority involving a plaintiff who was actively employed at the time of injury. It is one thing to require permanent disability for a plaintiff who is a ten-year-old boy who suffers irreparable brain injury; but it is entirely different when an employed professional is victimized and loses his or her unique employment and attendant

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benefits which can be readily measured by an economist like Dr. Smith.

D. Proximate Cause and Expert Testimony.

Dr. D. has conflated the proximate cause required to establish professional negligence with the proximate cause related to determining whether the injury is causally related to the future loss of income. Expert testimony is indeed usually vital to proving the former. And Plaintiff has supplied such evidence through his expert witness, Dr. Denis Harris, a Co-Chair of Orthopaedics at John Hopkins. But expert medical testimony is not mandatory for proving relational damages. As the *Cook* Court stated: "We have determined that a permanent physical impairment is not the only type of lasting consequence which will sustain an award of future damages, including future earnings . . . . **The relevant evidence of a lasting or permanent consequence is determined by the nature of the consequence and does not necessarily involve medical evidence** . . . ." *Id.* at 361, *25 (emphasis supplied).

And summing up what type of evidence is sufficient, the *Cook* Court explained: "Where an injury is of such a character as to be obvious, the effects of which are reasonably common knowledge, it is competent to prove future damages either by lay testimony from the injured party or others who have viewed his injuries, or by expert testimony, or, from both lay and expert testimony, so long as the proof adduced thereby is to a degree of reasonable certainty."

Dr. D's argument that Plaintiff needs to have still another expert medical witness to prove that Cognotion's decision to terminate Plaintiff was causally related to the professional negligence thus makes no sense, because no competent doctor is going to provide such testimony. The best person to explain why Cognotion terminated Plaintiff is Mr. Dariyanani. And, as revealed by his attached Declaration, he is fully qualified and prepared to do that at

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trial. The jury can then decide whether that termination is to a reasonable degree of certainty connected to the professional negligence.

III.

CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that Defendants' Motion be denied in its entirety.

DATED this 22 day of July, 2019

HOWARD & HOWARD ATTORNEYS PLLC

By: _____

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

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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 the 22 day of July, 2019, I served the foregoing Plaintiff's Opposition to Defendants' Supplemental Motion in Limine to Exclude the Opinions of Stan Smith, Ph.D. Regarding Plaintiff's Work-Related Damages Based on the Absence of Proximate Causation 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:

James J. Jimmerson, Esq.
The Jimmerson Law Firm, P.C.
415 South Sixth Street, Suite 100
Las Vegas, NV 89101
Attorneys for Plaintiff

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

Kenneth M. Webster, Esq.
Michael Shannon, Esq.
Marjorie E. Kratsas, Esq.
Hall Prangle & Schoonveld, LLC
1160 N. Town Center Drive, Ste 200
Las Vegas, NV 89144
Attorneys for Defendant,
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 July 22, 2019 at Las Vegas, Nevada.

An Employee of HOWARD & HOWARD ATTORNEYS PLLC

Howard & Howard Attorneys PLLC
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EXHIBIT 1

DISTRICT COURT

CLARK COUNTY, NEVADA

Jason Landess, Plaintiff(s) Vs. Kevin Debiparshad, M.D. Defendant(s)	)	Case No. A776896 Dept No. 32

ORDER SETTING CIVIL JURY TRIAL, PRE-TRIAL/CALENDAR CALL

IT IS HEREBY ORDERED THAT:

A. The above entitled case is set **for a firm trial on Monday, July 22, 2019**, at **9:00 a.m.**

B. A Pre-Trial/Calendar Call with the designated attorney and/or parties in proper person will be held on **Thursday, June 13, 2019, at 11:00** A.M. As a courtesy to counsel and parties, please note that Calendar Call for Department 32 is scheduled to be held in **courtroom 3C**, however, please check courthouse monitors for any change in location.

C. The Pre-trial Memorandum must be filed prior to the Pre-Trial/Calendar Call, with a courtesy copy delivered to Department 32 Chambers. All parties, (Attorneys and parties in Proper Person) must comply with EDCR 2.67.

D. All discovery deadlines, deadlines for filing dispositive motions and motions to amend the pleadings or add parties are controlled by the previously issued Scheduling Order.

E. Pursuant to EDCR 2.35, a motion to continue trial due to any discovery issues or deadlines must be made before the Discovery Commissioner.

F. Pursuant to EDCR 2.47, all motions in limine to exclude or admit evidence must be in writing and filed not less than **45 days** prior to the date set for trial and must be heard not less than

14 days prior to trial.

Orders shortening time will not be signed except in extreme emergencies and an upcoming trial date is not considered an extreme emergency in this context.

Failure of the designated trial attorney or any party appearing in proper person to appear for any court appearances or to comply with this Order shall result in any of the following: (1) dismissal of the action (2) default judgment; (3) monetary sanctions; (4) vacation of trial date; and/or any other appropriate remedy or sanction.

Counsel must advise the Court immediately when the case settles or is otherwise resolved prior to trial. A Stipulation which terminates a case by dismissal shall also indicate whether a Scheduling Order has been filed and if a trial date has been set, and the date of that trial. A copy should be given to Chambers.

DATED: September 12, 2018

Rob Bare
Judge, District Court, Department 32

CERTIFICATE OF SERVICE

I hereby certify that on or about the date e-filed, this document was e-served, mailed, or a copy of this Order was placed in the attorney's folder, or mailed to the proper person as follows:

Martin Little, Esq.
Alexander Villamar, Esq.
James Jimmerson, Esq.
Katherine Gordon, Esq.
Stephen Vogel, Esq.
Start Taylor, Esq.
Marjorie Kratsas, Esq.
Kenneth Webster, Esq.

Tara Moser
Judicial Executive Assistant

EXHIBIT 2

Jonathan Dariyanani
President and CEO
Cognotion, Inc.
244 5th Avenue, Suite C254
New York, NY 10001

SWORN DECLARATION OF JONATHAN DARIYANANI

1. I, Jonathan Dariyanani, do swear and affirm under penalty of perjury that I am personally knowledgeable and competent to testify to the matters contained in this declaration and that the statements I make within this declaration are true to the best of my knowledge and belief. This Declaration is submitted in support of Jason Landess' Opposition to Dr. Kevin Debiparshad's Motion *in Liminie*.

2. I am the duly appointed President and CEO of Cognotion, Inc., a corporation formed in August, 2013, together with its subsidiaries and affiliates ("Cognotion"). Cognotion is a software company that builds workplace training solutions in health care, hospitality training and customer service.

3. I received the attached letter from S. Brent Vogel, defense counsel in a medical malpractice lawsuit brought by Jason Landess. I interpreted the letter as an improper communication to a non-party witness in this case and an effort to intimidate me from testifying regarding Mr. Landess' damages in the case.

4. I understand that the court in the above case has questions regarding the circumstances of Mr. Landess' termination from Cognotion. This Declaration provides some information regarding the circumstances of Mr. Landess' termination from Cognotion and the reasons therefore.

5. Cognotion has fewer than 15 employees and never had more than 15 employees since inception. Mr. Landess had done an outstanding job in his role at Cognotion until the time of the surgery performed by Dr. Debiparshad. Subsequent to the surgery and a period of recuperation, we attempted to re-integrate Mr. Landess back into the workplace.

6. During that time, which would be the winter and spring of 2018, I held business meetings with Mr. Landess where he was forced to urinate in a bottle because he couldn't get up from the table. I carried his wheelchair myself on multiple occasions, including taking it in and out of his trunk, walking to the parking lot to retrieve his car, fetching his crutches for him, getting water for him, and allowing him to lean on me as we walked. I arranged for company meetings in Las Vegas and made all the attendees fly to Las Vegas in order to accommodate Mr. Landess, only to have Mr. Landess unable to attend due to pain and the mental impact of pain killers. I sat on the couch next to Mr. Landess where he had defecated and helped clean it up. I watched in meetings with clients as he told the clients that he was in so much pain that he begged for death, and then left the meeting because he could not endure the pain.

7. Cognotion paid Mr. Landess when he was unable to perform a fraction of his duties for 8 months. I drafted complaints that Mr. Landess was required to draft. Other staff did his duties as best they could. Cognotion arranged a day-long meeting in Las Vegas that staff flew in to attend in order to accommodate Mr. Landess. Mr. Landess had to leave after 45 minutes due to being so distressed and upset. He couldn't appear on film for our courses, as was required. He couldn't lead our trainings, as was required, due to his pain, the impacts of his medication, and his distress. And yet we moved Heaven and earth to accommodate him. I didn't terminate Mr. Landess because he was in a wheelchair. I would have happily pushed his wheelchair for as long as it took. I terminated him because trying to further accommodate him would have been an unreasonable and undue hardship on the company.

8. In short, I terminated Mr. Landess from Cognotion in December 2018 because he was no longer psychologically, mentally, or emotionally fit for duty and the Company was forced to hire a replacement Senior Advisor/Senior Counsel.

9. Cognotion has a commitment to accommodating employees and contractors with special needs and has hired employees with dwarfism, wheel-chair bound, and with minimal legs. We have veteran employees who served our country and who have PTSD. We have had staff who were bi-polar, ADHD, and had alcoholism. We supported two employees with gender dysphoria, including accommodating them through gender reassignment surgery. Cognotion has had staff members over 70 years old.

10. It is therefore untrue that Cognotion unlawfully discriminated against Mr. Landess, or anyone else for that matter.

I declare under penalty of perjury of the laws of the State of Nevada that the foregoing is true and correct.

By: Jonathan Dariyanani 7/22/2019

Jonathan Dariyanani, Declarant Date

LEWIS BRISBOIS

LEWIS BRISBOIS BISGAARD & SMITH LLP

S. Brent Vogel
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Brent.Vogel@lewisbrisbois.com
Direct: 702.693.4320

July 17, 2019

File No. 27428.336

VIA E-MAIL

Jonathan Dariyanani
President and CEO
Cognotion, Inc.

E-Mail: jonathan@cognotion.com

Re: Jason George Landess v. Kevin Debiparshad, et al.
Eighth Judicial District Court, Clark County, Nevada
Case No. A-18-776896-C

Dear Mr. Dariyanani:

As you know, we represent Kevin Debiparshad, M.D., Synergy Spine and Orthopedics and Nevada Spine Clinic ("Debiparshad defendants") in the above-entitled action.

Mr. Landess filed his lawsuit in July 2018 and has received a preferential trial setting for this coming Monday, July 22, 2019. Mr. Landess alleges in the lawsuit that the Debiparshad defendants were negligent in the performance of a closed reduction of left tibia with insertion of tibial nail and placement of proximal and distal locking screws. Mr. Landess was terminated from his position as Cognotion's legal counsel despite the lack of any medically supported brain injury or allegation. The evidence in the case indicates he was able to continue to function as an attorney and did so for his other clients. Mr. Landess' termination by Cognotion was clearly based on his temporary physical impairments related to his recovery from his two left tibia surgeries and an unrelated right hip surgery in violation of Cognotion's obligations to make reasonable accommodations under applicable law, including but not limited to the ADA.

We are writing to put you on notice, that in the event that the Debiparshad defendants are found liable for this claim or choose to settle the matter, they may seek a contribution from Cognotion with respect to any amount they pay.

Very truly yours,

S. Brent Vogel of
LEWIS BRISBOIS BISGAARD & SMITH LLP

EXHIBIT 24

EXHIBIT 24

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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.
KATHERINE J. GORDON, ESQ.

RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER

right. That takes us to -- oh, not coming on the merits of it anymore, I do want to let you know that I told my law clerk, because I get to have a free lawyer in the job, known as my law clerk, and I told her to do nothing but work on this issue. I'm -- I mean, and she's back there now. All I want to do is see, is there some kind of law -- is there a law that I don't know about that talks about this? I don't' think we're going to find something perfectly on point with the events that did happen, especially, you know, the admitted exhibit. You know, are we going to find a case where the plaintiffs disclosed something like this, they don't see it, defense has it, then it's admitted by stipulation, then it's used and not objected to, and then later albeit contemporaneous, the motion to strike comes up?

Or otherwise known as the issue that we now have something unduly prejudicial to potentially cause jury nullification philosophy, you know, in the air. I mean, chances are, she's not going to find something on point, but I am trying to see if I could find something as to something, you know, has something like this ever happened where you have an admitted exhibit and then it comes to light that something in the admitted exhibit is too prejudicial? I think that's all we can hope to find, a case where something was admitted in the course of a trial, and then it became -- hypothetically, it became obvious that it's unduly prejudicial and it's stricken. You have to throw into that that the jury's seen it somewhere along the way, too. So maybe she'll find something. Maybe you'll find something. But I just -- that's how serious I need to take it. I've got her working on it, and I told her I'd give her a comp day if she worked on the weekend on it. But that became not

relevant, because she's leaving anyway. She's going to go work for Tony Scrow [phonetic] in a week. And she has to be here all next week to train her replacement, so she doesn't get to get a comp day, I guess. She's a sandwich.

Okay, turning to the Stan Smith item.

MR. VOGEL: Yes, Your Honor. We are ready to kind of fly through it, if you'd like.

THE COURT: Okay, what we're going to probably have to do -- this is a minor point -- we're going to have to lock the courtroom doors because our marshal has to leave. And then she has a final exam in law school to go take. And we don't have anybody to cover, because it's Friday and they're all gone. So I'm going to -- did you lock the door?

THE CLERK: Yeah.

THE COURT: Okay. So nobody can get in. It's -- you can get out, but you can't get in, so if you -- if somebody wants to get in, they're going to have to call you. Is there anybody you're expecting to come in?

MR. JIMMERSON: No, Your Honor.

MR. VOGEL: No objection, Your Honor.

THE COURT: And we'll let them in. Otherwise, that's it. We're going to be without a marshal. If anybody has a concern about that, then I'll see you later. We'll just leave. I don't have a concern about it.

MR. VOGEL: I don't either.

MR. JIMMERSON: No, Judge.

THE COURT: Okay. So we'll just -- we'll carry on without a

EXHIBIT 25

EXHIBIT 25

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Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

JASON LANDESS, Plaintiff, vs. KEVIN DEBIPARSHAD, M.D., Defendant.	CASE#: A-18-776896-C DEPT. XXXII

BEFORE THE HONORABLE ROB BARE
DISTRICT COURT JUDGE
WEDNESDAY, JULY 24, 2019

RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 3

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

Case Number: A-18-776896-C

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.

And that's it. That's my record on it, and so the entire motion is denied, and that takes us to the next motion that we have to deal with. And I don't think we have enough time to deal with the next one, but there is something I need to do, and the fact that we only have 15 minutes probably works to our benefit.

So I'm going to segue into the next motion, and the next motion -- I don't think you need to do an order, by the way, on what I just did, but if somebody -- if you want to Plaintiffs, you can do an independent order. It's all over the court record.

MS. GORDON: We definitely need an order, so if they want to prepare it and run it past us, but I -- and I need the transcript as quickly as possible, because we're not procedurally where to go at this point, but we need that --

THE COURT: Okay.

MS. GORDON: -- right away, based on that explanation.

THE COURT: All right. No problem.

MR. JIMMERSON: And the transcript would help us prepare the order, as well.

THE COURT: All right. So who's going to prepare the order then?

MR. JIMMERSON: I will, and I'll submit it to the Court and opposing counsel. We always do, but we'll have the transcript tonight by about 8:00 or so.

THE COURT: Okay. Now I want to at least start to proceed with the next Defense motion to exclude the opinions of Stan Smith

EXHIBIT 26

EXHIBIT 26

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Steven D. Grierson
CLERK OF THE COURT

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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
MONDAY, AUGUST 5, 2019

RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 11

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

Case Number: A-18-776896-C

and probably the worse child neglect case in the history of the State of Nevada was one that sentenced someone on. I won't go into those facts, but I -- suffice to say that the lawyer presenting the case was Mary Kay Holthus, who's now a judge.

And I had to take a couple of breaks, because of the sadness I felt and the difficulty in dealing with what had happened to this child. This is worse than that for me, because in the time I've been here -- and my whole group knows this to be true -- and it -- you know, I don't even know where it came from, probably. Probably just a life of events. To me, the most important part of the process is the jury. And I can't even find the right words to describe how I really feel about those that come in and serve on juries, other than to say I have a tremendous respect for them and the mission that they're tasked with performing.

That's why this is difficult, because I really felt -- of course, we all know. We saw what happened here over two weeks. I mean, we celebrated a birthday of one of the jurors. We got so many questions from the jury and they were engaged in the process and they took -- they thought the trial was supposed to end last Friday. And they, you know, took it upon themselves to find a way to give us even up to four more days, through Thursday of this week.

Mr. Kirwan 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.

So here's the reason why I had to do what I did and grant this motion for mistrial. The law does talk about this concept of manifest necessity. And case law is sort of repetitive with that notion and there's definitions given of manifest necessity and the cases that talk about the concept of mistrial or even new trial, but in this scenario, mistrial. And I did, in this -- going through the cases this weekend, I came up with what I think are the main definitions of the legal standard that's relevant here, this manifest necessity standard.

Manifest necessity is a circumstance, which is of such an overwhelming nature that reaching a fair verdict is impossible. It's a circumstance where an error occurs, which prevents a jury from reaching a verdict. There's a number of cases. Each side, I'm sure will -- has and will find cases having to do with this area of law. But there's an interesting one called *Glover v. Bellagio* found at 125 Nev. 691, where David Wall found himself in an interesting spot, similar to the one that I am in here.

But that case stands mostly for the proposition that the trial judge has to have the power to declare a mistrial in appropriate cases. And I think this is the appropriate case. And I really do think that unfortunately, that decision on the merits of whether I should do this or not is rather easy. Though difficult, nonetheless, I think rather easy to get to that point. Thanks a lot. All right. And that starts with the item itself. As to the chronology, as far as I understand it, I think this is a fair

EXHIBIT 27

EXHIBIT 27

TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

JASON GEORGE LANDESS, Plaintiff, vs. KEVIN DEBIPARSHAD, M.D., ET AL., Defendants.	CASE NO. A-18-776896 DEPT. NO. XXXII **Transcript of Proceedings**

BEFORE THE HONORABLE ROB BARE, DISTRICT COURT JUDGE

ALL PENDING MOTIONS

TUESDAY, SEPTEMBER 11, 2018

APPEARANCES:

For the Plaintiff: MARTIN A. LITTLE, ESQ.
JAMES JIMMERSON, ESQ.

For the Defendants: STUART J. TAYLOR, ESQ.
KATHERINE J. GORDON, ESQ.
MARJORIE E. KRATSAS, ESQ.

RECORDED BY: CARRIE HANSEN, DISTRICT COURT
TRANSCRIBED BY: KRISTEN LUNKWITZ

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

MS. KRATSAS: Thank you, Your Honor.

THE COURT: Okay. So we'll just continue this until October 9th.

THE LAW CLERK: October 9th at 1:30.

THE COURT: 1:30.

MR. JIMMERSON: Could we also at 1:30 -- could we also ask the Court to -- in trying to compromise the Motion for Preferential Setting, what would your trial date look like in the first week of May?

THE COURT: In May. Okay. Let's check that. How much time do you need, Mr. Jimmerson, for this trial?

MR. JIMMERSON: In talking to opposing counsel, I would say probably eight days.

THE COURT: All right. So it's two --

MR. JIMMERSON: Six days.

THE COURT: Let's just say two weeks. Do we know when we have a two-week time frame? If you need to get Sarah, that's fine. We may have to spend a moment looking at that.

[Pause in proceedings]

THE COURT: Well, while we're waiting to figure that out, 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. So,

RPLY
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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 REPLY REGARDING 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 brief Reply to Defendants' Motion to Disqualify the Honorable Rob Bare and Countermotion for Attorneys' Fees and Costs.

This Reply 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 3 day of September, 2019.

THE JIMMERSON LAW FIRM, PC

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MEMORANDUM OF POINTS AND AUTHORITIES

Dr. Debiparshad complains about Plaintiff's outrage over his dishonest antics. Yet he continues to do so, even with this Court.

For example, on page 25 of his Opposition, Plaintiff cites to *Ainsworth v. Combined Ins. Co.*, 105 Nev. 237, 1989 Nev. LEXIS 54 (1989), pointing out **Justice Gunderson's** 130 "loser" remarks referenced by our high court in footnote 1 in *City of Las Vegas Downtown Redevelopment Agency v. Hecht*, 113 Nev. 632 (1997) ("*Hecht*"), a case involving an attempt to disqualify **Justice Cliff Young** for having made an off-the-cuff remark during an election.

Incredibly, in his Reply, Dr. Debiparshad attempts to discount Justice Gunderson's voluminous criticisms in *Ainsworth* by stating that Plaintiff's "reliance on *Hecht* is misplaced," (Reply, p. 6, lines 3-4), when Plaintiff was not relying upon the ruling in that case at all! Plaintiff's Opposition makes it unequivocally clear that Plaintiff was instead relying upon, and citing to, Justice Gunderson's heated remarks and the Nevada Supreme Court's ruling in *Ainsworth*. To misdirect this Court away from that apposite ruling, Dr. Debiparshad, however, either intentionally (or through gross incompetence) ignored *Ainsworth* by improperly drawing this Court's attention to the facts of *Hecht*, **a case involving an attempt to disqualify Justice Young on facts totally unrelated to the attempt to disqualify Justice Gunderson in *Ainsworth*.**

That is exactly the type of misconduct that Plaintiff has repeatedly complained about—and rightly so, and why attorneys' fees and costs should be awarded to Plaintiff.

DATED this 3 day of September, 2019.

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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 3rd day of September, 2019, I served a true and correct copy of the foregoing **PLAINTIFF'S REPLY 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:

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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' REPLY IN SUPPORT OF MOTION TO DISQUALIFY THE HONORABLE ROB BARE ON ORDER SHORTENING TIME

Hearing Date: September 4, 2019
Hearing Dept.: 30
Hearing Time: 9:00 a.m.

COME NOW Defendants, by and through their counsel of record, S. Brent Vogel and Katherine J. Gordon, and hereby file their Reply in Support of the Motion to Disqualify the Honorable Rob Bare pursuant to N.R.S. 1.235 and Nevada Code of Judicial Conduct (N.C.J.C.) Canons 1 and 2 on the grounds that Judge Bare has actual or implied bias or prejudice, and his impartiality is reasonably questioned.

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

Dated this 3rd day of September, 2019.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ S. Brent Vogel

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Mr. Landess appears to have written the Opposition to this Motion to Disqualify. The Opposition is replete with personal attacks against Dr. Debiparshad's counsel rather than cogent legal argument, which is at odds with the professional and cordial dealings defense counsel has had with plaintiff's counsel throughout the litigation. Counsel understands that Mr. Landess is likely embarrassed by his distasteful statements to Mr. Dariyanani, but the vitriol expressed in his Opposition goes beyond what is reasonable and is unprofessional. The Opposition is also full of misquotes and misstatements of the law and record in an apparent effort to distract this Court from the actual issue before it. That is, that Judge Bare's actions clearly demonstrate actual or implied (i.e., perceived) bias in favor of Plaintiff or his counsel to Dr. Debiparshad's detriment.

Mr. Landess' Opposition glosses over the obvious and ignores Judge Bare's unequivocal statements:

> 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.[1]

There is no need to go over all the additional evidence of potential/perceived bias set out in the Motion as any litigant standing in Dr. Debiparshad's shoes after hearing these statements from the trial judge would be extremely concerned that they are not getting a fair trial. Indeed, Dr. Debiparshad states as much in his affidavit. Judge Bare's comments would clearly cause a reasonable person, in this case Dr. Debiparshad and his counsel, to question his impartiality in this case. Judge Bare is a very good and hard working judge, but these comments, along with all the other evidence set out in the Motion, went too far. Therefore, disqualification and reassignment to another judge is necessary pursuant the N.C.J.C., and applicable case law.

II.

LEGAL ARGUMENT

A. Applicable Law Regarding Disqualification

Plaintiff's Opposition claims the Motion for Disqualification was "untimely" as it wasn't filed 20 days before trial or 3 days before pretrial matter. (Opposition at 19:1-5). This is a ludicrous argument that ignores the fact grounds for disqualification can arise at any time,

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[1] *See* Trial Transcript, Day 10, pp. 178-79, attached as Exhibit "A" to the Motion (emphasis added).

including during trial. That is case here.

Plaintiff cites to *Oren v. Dept. of Human Resources,* 113 Nev. 593 (1997) overruled by *Towbin Dodge, LLC v. Eighth Jud. Dist. Ct.*, 121 Nev. 251 (2005) for the proposition the Motion was untimely. First, both cases dealt with a pretrial Motion to Disqualify, not one where the clear bases for disqualification arose during trial. Second, and more importantly, *Towbin's* actual ruling applies to the facts of this case. In *Towbin* the Nevada Supreme Court looked to federal law in addressing the timing of Motions to Disqualify and unequivocally stated "We conclude that the federal procedure provides a convenient method for enforcing Canon 3E in situations when N.R.S. 1.235 does not apply. Thus, **if new grounds for a judge's disqualification are discovered after the time limits in N.R.S. 1.235(1) have passed, then a party may file a motion to disqualify based on Canon 3E as soon as possible after becoming aware of the new information**." *Id.* at 260. (Emphasis added.) In this matter the Motion was timely and properly filed.

Plaintiff next argues the Motion was untimely because Dr. Debiparshad took the time to set out the background and context of Judge Bare's rulings going back to early in the case. Plaintiff seems to ignore the fact that context and a relevant procedure history are required to demonstrate the grounds for such a Motion. It appears Plaintiff is arguing that the Motion should have been filed sooner and a litigant only gets one bite at the apple after any perceived bias. If that were the case there would never be grounds for a Motion to Disqualify. Dr. Debiparshad went to great lengths to set out the multiple bases for the Motion which ultimately culminated with Judge Bare's statements about Mr. Jimmerson being on the Mt. Rushmore of attorneys in his eyes and the improper grant of a Mistrial. It was at that point where the threshold was crossed and a clear basis for a Motion to Disqualify was established. *See Ibara v. State,* 127 Nev. 47 (2011) *citing PETA v. Bobby Berosini, Ltd.*, 111 Nev. 431 (1995), *overruled on other grounds by Towbin Dodge, LLC v. Dist. Ct.*, 121 Nev. 251 (2005) ("Ultimately we must decide 'whether a reasonable person, **knowing all the facts**, would harbor reasonable doubts about [the judge's] impartiality.'")(Emphasis added.)

This Motion was not brought lightly. One assumes that Judge Bare would like to take back some of his statements, but the bell cannot be unrung. The actual or perceived bias is permanently

in the record and it is Defendants' burden in bringing this Motion to set out the pertinent facts for this Court.

Plaintiff's reliance on *City of Las Vegas Downtown Redevelopment Agency v. Hecht*, 113 Nev. 632 (1997) is also misplaced. As an initial matter, the Court in *Hecht* was operating under the old Code of Judicial Conduct, which was replaced in 2010. Second, the issues involved in *Hecht* were related to statements made during the judicial election process. ("The facts presented in the case at bar do not rise to anything near the level warranting Justice Young's disqualification. The comments made by Justice Young were off-the-cuff remarks made during an election campaign;") *Id.* At 636. Third, Judge Bare's comments about Mr. Jimmerson are not the only evidence of actual or perceived bias set out in the Motion.

Front and center in N.C.J.C. 2.11 is the maxim "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned…" Dr. Debiparshad's Motion sets out several factual points that cumulatively demonstrate that a reasonable person would question impartiality. It may be that Judge Bare can be impartial or feels he has been impartial. That, however, is not the standard. The standard is an objective one.

The Nevada Supreme Court stated in *Ybarra v. State*, 127 Nev. 47 (2011):

> The NCJC "provides substantive grounds for judicial disqualification." (citation omitted). Two provisions are relevant here. First, NCJC Cannon 2A provides that "[a] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Commentary accompanying that provision explains that "**[t]he test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired**." Second, NCJC Canon 3E provides that "[a] judge shall disqualify himself . . . in a proceeding in which the judge's impartiality might reasonably

> be questioned," although none of the specific grounds for disqualification enumerated in that Canon apply here. Both provisions address the importance of impartiality. (Emphasis added.)

It is also important to reiterate that a judge has a duty to uphold and apply the law, and to perform judicial duties fairly and impartially. N.C.J.C. 2.2 "Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences." *Id.* at Cmt. 1. Thus, actual impartiality need not be show, but rather *perceived* partiality is justification for disqualification.

"A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety." N.C.J.C. 1.2. The appearance of impropriety occurs whenever "the conduct would create in reasonable minds a perception that the judge violated the Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge." *Id.* at Cmt. 5. Here, the cumulative effect of Judge Bare's actions culminating in the "Mt. Rushmore" and "gospel truth" comments raises—and surpasses—the reasonable perception of impartiality.

To avoid even the appearance of impropriety, a Nevada judge "shall disqualify himself or herself in any proceeding in which the judge's impartiality might be reasonably questioned…" N.C.J.C. 2.11(A). "Whether a judge's impartiality can reasonably be questioned is an objective question that this court reviews as a matter of law using its independent judgment of the undisputed facts." *City of Las Vegas Downtown Redevelopment Agency v. Eighth Judicial Dist. Court*, 116 Nev. 640, 644, 5 P.3d 1059 (2000).

The judge's actual impartiality or bias is not the issue. *People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd.*, 111 Nev. 431, 438, 894 P.2d 337 (1995)(overruled on other grounds by *Towbin Dodge, LLC v. Eighth Judicial Dist. Court*, 121 Nev. 251, 112 P.3d 1063 (2005)). Instead, the Court must decide "whether a reasonable person, knowing all the facts, would harbor reasonable doubts about [a judge's] impartiality." *Id.* The Nevada Supreme Court

recognized that "an opinion formed by a judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, constitutes a basis for a bias or partiality motion where the opinion displays 'a deep-seated favoritism or antagonism that would make fair judgment impossible.'" *Kirksey v. State*, 112 Nev. 980, 1007, 923 P.2d 1102 (1996)(*citing Liteky v. United States*, 510 U.S. 540 (1994)).

Defendants seek disqualification of Judge Bare premised on N.C.J.C. 1.2, 2.2 and 2.11. A reasonable person can easily find that Judge Bare has not acted at all times in a manner that promotes public confidence in the independence and impartiality of the judiciary, and he has not avoided impropriety or the appearance of impropriety. Judge Bare's impartiality is reasonably questioned by Defendants based on his exhibited personal bias as set out in the evidence provided in the Motion.

At the very least, Judge Bare's actions "would create in reasonable minds a perception that the judge violated the Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge" which constitutes the appearance of impropriety according to N.C.J.C. 1.2. A reasonable person in Dr. Debiparshad's position would certainly harbor doubts about Judge Bare's impartiality. Under these circumstances, Judge Bare's disqualification is appropriate.

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 in fees and costs. Given the lack of foundation to grant the mistrial in the first place, coupled with Judge Bare's exhibited bias and partiality, whether actual or perceived, Defendants understandably seek to disqualify Judge Bare prior to a ruling on the outstanding Motions or in a new trial. It is critical that the outstanding Motions be heard by an impartial and unbiased judicial officer.

C. <u>Plaintiff's Request for Attorney's Fees Should be Denied.</u>

Plaintiff's countermotion for attorney's fees and costs is another frivolous overreach. Dr. Debiparshad's Motion is well founded in the law and the facts and should be granted.

/ / /

/ / /

III.

CONCLUSION

For the reasons set forth herein, Defendants request the Court grant its Motion to Disqualify Judge Bare and reassign this matter to a new Department.

Dated this 3rd day of September, 2019.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ S. Brent Vogel

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of September 2019, a true and correct copy of **DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISQUALIFY THE HONORABLE ROB BARE ON ORDER SHORTENING TIME** 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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COURTESY COPY VIA MESSENGER

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

AFFIDAVIT

DISTRICT COURT

CLARK COUNTY, NEVADA

****

JASON LANDESS,

Plaintiff,

vs.

KEVIN DEBIPARSHAD, M.D.,

Defendant.

CASE NO.: A-18-776896-C

DEPT. NO. 32

AMENDED AFFIDAVIT OF ROB BARE

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

The purpose of this amended affidavit is to correct a grammatical error in paragraph 8.

I, Rob Bare, state and affirm as follows:

1. I am the presiding judge in case A-18-776896-C; Jason Landess vs. Kevin Debiparshad, M.D.

2. On August 23, 2019, Defendant's counsel, Katherine J. Gordon, Esq. and S. Brent Vogel. Esq., filed Affidavits seeking my disqualification pursuant to NRS 1.235, due to their views concerning issues relevant to the Mistrial that was ultimately declared on August 5, 2019, in the underlying matter.

3. Defendant's counsel filed the Motion to Disqualify on August 23, 2019. I understand that, pursuant to N.R.S. 1.235(6), a "judge may challenge an affidavit alleging bias or prejudice by filing a written answer with the clerk of the court within 5 judicial days."

4. It appears that an affidavit from me may have been due on August 30, 2019, and that my affidavit herein is potentially filed after the 5-day period.

5. However, I respectfully request that my Affidavit be considered, even if filed after the deadline.

6. I was in Europe at the time that Defendant's counsel filed the underlying Motion and only returned to Las Vegas the evening of September 1, 2019. As a result, today, September 3, 2019, is the first judicial day after the deadline that I have any opportunity to respond.

7. If my Affidavit is considered, I would like to affirm the following:

8. Simply put, with respect to the merits, I deny, because I know it is untrue, that I have any bias or lack of impartiality towards either party in this case.

9. The decisions that I made in this case have been made to the best of my ability and consistent with Nevada law.

10. As to my comments with regard to Mr. Jimmerson, brought forth in the underlying Motion, I do not view such comments inappropriate in any way. Rather, in my view, it is proper for a judge to compliment a lawyer for professionalism if a judge chooses to do so and, if in doing so, also mentions respect for the lawyer, it is also appropriate. It is a part, and has been consistently a part, of my practice with attorneys, for both plaintiffs and defendants alike, to thank attorneys for their professionalism. In fact, I have also complimented Defense counsel in front of their client.

11. As to my opinion regarding potential settlement between the parties, any comments made by me to counsel were appropriate because they were in an

effort to find a solution to the obvious issue that could and, ultimately did, lead to mistrial, as well as to potentially save the parties from costs and fees associated with retrial.

12. I explained to both parties that I always keep an open mind as to the merits of the case. However, there was an obvious specter of potential mistrial in the air. My opinions were solely in an effort to see if the parties would be open to an alternative way of handling the issue, nothing more.

13. As to the meeting in a conference room, both parties were informed that this was an effort by me to help and that they did not have to attend if they did not want to.

14. To the extent I made any comment with respect to the jury potentially finding for Plaintiff, I gave my opinion based upon what the parties presented in their cases up to that point in time, using the preponderance of the evidence standard of more likely than not. Further, in this regard, I mentioned that the lost wages claim may fall in the Defendant's favor. Again, these comments were only in an effort to help the parties avoid the potentiality of a looming mistrial.

I declare under penalty of perjury under the laws of the State of Nevada the foregoing is true and correct.

DATED this 4th day of September, 2019.

Rob Bare
Judge, District Court, Department 32

CERTIFICATE OF SERVICE

I hereby certify that on the date e-filed, this Order was either electronically served, pursuant to N.E.F.C.R. Rule 9, to all registered parties in the Eighth Judicial District Court Electronic Filing System, or faxed, or emailed to the following:

Katherine J. Gordon, Esq.
S. Brent Vogel, Esq.
James J. Jimmerson, Esq.
Martin Little, Esq.
Alexander Vilamar, Esq.

Dated this 4th day of September, 2019.

Tara Moser
Judicial Executive Assistant, Dept. 32

OPPS

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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

Courtroom 3C

PLAINTIFF'S OPPOSITION TO COUNTERMOTION FOR ATTORNEYS' FEES AND COSTS PURSUANT TO NRS 18.070

Date: 9/17/19
Time: 1:30 p.m.

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' Countermotion for Attorneys' Fees and Costs Pursuant to NRS 18.070 (the "Opposition").[1]

This Opposition 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 6th day of September, 2019.

THE JIMMERSON LAW FIRM, PC

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[1] Plaintiff will submit his Reply in Support of his Motion for Attorney's Fees five days before the hearing on this matter in accordance with EDCR 2.20.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

During the oral argument on Plaintiff's Motion for a Mistrial and for Attorney's Fees and Costs, the Court explained that it needed further briefing on which party was the legal cause of the mistrial. The Court stated, "In other words, what I'm saying is, both sides are practically responsible for what happened. To me, the issue remains **which side is legally responsible for what happened**." *See* Exhibit 1 at 72:5-7, a true and accurate copy of the *Recorder's Transcript of Trial-Day 11*, attached hereto (emphasis supplied). Dr. Debiparshad claims that Plaintiff was the cause of the mistrial and seeks attorney's fees pursuant to NRS 18.070. Dr. Debiparshad is wrong and the Countermotion for Attorney's Fees and Costs Pursuant to NRS 18.070 (the "Countermotion") should be denied.

The Court issued the mistrial because Dr. Debiparshad injected race into the trial. The Court specifically stated as follows:

> I do think that this coming together, this perfect storm of mistakes, the mistake the Plaintiffs made that I have described**, the mistake I think that the Defense made in interjecting race into the case. I know the Defense doesn't think it's a mistake because they apparently think that the jury can consider whether Mr. Landess is a racist or not**.[2] I have to say that surprises me, but

[2] Dr. Debiparshad maintains that the introduction of the Burning Embers email into evidence was permissible, arguing, "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." Countermotion at 14. Defendant has offered no legal authority to support this

> wouldn't be the first time I guess I'll ever be surprised as a judge. But I got to say, that surprises me, which will get to the second half of my decision, which is still to come. But for now, **I'm making a specific finding that under all the circumstances that I just described, they do amount to such an overwhelming nature that reaching a fair result is impossible**.

Id. at 60:21-61:7 (emphasis supplied). Indeed, the Court further found that Dr. Debiparshad not only injected race into the trial, but did so to persuade the jury to give the verdict to Dr. Debiparshad. The Court stated:

> [I]t seems like 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, based upon something that I think is emotional in nature. This is an emotional style piece of evidence. The idea, I think fairly and I'm sure the Defense would disagree with this, but fairly is **give us a verdict. Whether it's reducing the damages or give us the whole verdict, because Mr. Landess is a racist**. **That is impermissible**.

Id. at 62:16-24 (emphasis supplied).

As the Court recalls, Dr. Debiparshad's counsel, not Plaintiff, moved the exhibit containing the Burning Embers email (the exhibit was 79 pages long) into evidence. It was Dr. Debiparshad's counsel, not Plaintiff, that highlighted the Burning Embers email before presenting it to the jury. It was Dr. Debiparshad's counsel, not Plaintiff, that put the Burning Embers email on the ELMO without any warning to Plaintiff or the Court that at that moment race was being injected

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erroneous contention. Indeed, the law is to the contrary and does not allow for the use of admitted evidence for any purpose.

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into the trial. *See* Exhibit 2, at 144-45, and 161-62, a true and correct copy of an excerpt of the *Recorder's Transcript of Trial-Day 10*, attached hereto.

It was at the precise moment when Dr. Debiparshad's counsel put the highlighted Burning Embers email on the ELMO that a fair trial was no longer possible. As the Court stated, "I have to say, I agree that, you know, because **I know from my own experience in watching this happen, I felt my heart sink. And I remember thinking, oh boy, and I told you some of the things I immediately thought within the first few seconds**." Exhibit 1 at 65:15-18 (emphasis supplied).

Dr. Debiparshad attempts to shift blame for the mistrial on to Plaintiff, arguing:

> [Plaintiff]: (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.

Countermotion at 17. Notwithstanding that the foregoing is a gross mischaracterization and misstatement of the events, **none of these acts or omissions Dr. Debiparshad attributed to Plaintiff put the Burning Embers email on the ELMO or caused the Court's heart to sink when the words contained therein were presented to everyone in court that day**. It was Dr.

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Debiparshad who injected race into this case and it was Dr. Debiparshad that caused the mistrial.

Dr. Debiparshad's position is akin to arguing that the Secret Service would be the cause of an assassination because it did not take certain precautions that could have prevented a shooting. The argument is preposterous on its face and is a naked effort to deflect from his responsibility for injecting race into the trial, resulting in the mistrial. The Court should reject the same and deny the Countermotion.

In addition to denying the Motion because Plaintiff did not cause the mistrial, the Countermotion should be denied because Plaintiff certainly did not "purposely" cause the mistrial, which is what NRS 18.070 requires to permit an award of attorney's fees and costs thereunder. Indeed, the Court has found that Plaintiff did not know about the content of the Burning Embers email even after it was admitted into evidence. The Court stated, "So now it's an admitted exhibit. At the time of its admission, I'll go so far as to say that the Plaintiff still at that point in time, didn't know that the item actually was in the exhibit. And when I say the item, I mean the actual language of course in question here." Exhibit 1 at 54:18-22.[3] Because the Plaintiff did not know of the racial statements contained

[3] Dr. Debiparshad's Countermotion does not challenge this fact and, in fact, characterizes Plaintiff's acts and omissions with regard to the Burning Embers email as "mistakes" and "errors." Countermotion at 17 ("Plaintiff committed multiple errors which led to the mistrial…").

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within the Burning Embers email, even after it was admitted, Plaintiff could not have "purposely" injected race into the trial and cause the mistrial.

Finally, Dr Debiparshad's Countermotion should be denied as it is facially defective. It does not contain: (1) affidavits or other evidence supporting any award of attorney's fees and costs; and (2) does not present the Court with any analysis of the factors in *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349–350, 455 P.2d 31, 33 (1969), both of which are mandatory prerequisites to an award of attorney's fees and costs. The Countermotion should be denied.

II. LEGAL ARGUMENT

A. Dr. Debiparshad is Wrong in His Claim that Evidence, Once Admitted, May Be Used for Any Purpose

Dr. Debiparshad has repeatedly argued that he was permitted to use the Burning Embers email because, as admitted evidence, it could be used for any purpose. In his Countermotion, he states, "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." Countermotion at 14. However, he fails to provide any legal authority to support this position (and he has failed to do so in every brief he has made this argument). For this reason alone, the Court should reject it. *See Otak Nevada, L.L.C. v. Eight Jud. Dist. Ct.*, 129 Nev. 799, 807 n. 6, 312 P.3d 491, 497 n. 6 (2013).

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Furthermore, the Court should reject this argument because it is wrong. Evidence, once admitted, even if it is admitted without objection, may only be used insofar as it does not create "plain error" and may only be used as far as it has probative value. As explained in *McCormick On Evidence*, "[A] failure to make sufficient objection to incompetent evidence waives any ground of complaint as to the admission of evidence. This generalization is subject to the 'plain error' rule…. The fact that it was inadmissible does not prevent its use as proof so far as it has probative value." McCormick on Evidence, § 54 (7th ed. 2013).[4]

As the Court knows, Nevada recognizes the plain error rule. In *Landmark Hotel & Casino, Inc. v. Moore*, 104 Nev. 297, 299, 757 P.2d 361, 362 (1988), the Nevada Supreme Court stated, "Even if this issue were raised for the first time on appeal, insists Landmark, granting Wilgar and Horton's NRCP 41(b) motions was plain error, which this court may consider even in the absence of an objection below if it is so substantial as to result in a miscarriage of justice." *Id.*; *see, also Lioce v. Cohen*, 124 Nev. 1, 19, 174 P.3d 970, 982 (2008) ("the district court shall first conclude that the failure to object is critical and the district court must treat the attorney misconduct issue as having been waived, unless plain error exists.").[5]

[4] The Nevada Supreme Court has repeatedly relied on *McCormick On Evidence* in rendering its decisions. *See, e.g.*, *Roever v. State*, 114 Nev. 867, 963 P.2d 503 (1998); *Thomas v. Hardwick*, 126 Nev. 142, 231 P.3d 1111 (2010); *Richmond v. State*, 118 Nev. 924, 59 P.3d 1249 (2002).

[5] Defendants' counsel understands the limitation on the use of admitted evidence. Their appeal of the denial of the motion for a new trial in *Zhang v. Barnes*, No. 67219, 2016 WL 4926325 (Nev. 2016) confirms the same. Despite consenting to the admission of inadmissible insurance

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The Court should find, consistent with the foregoing authority, that admitted evidence may not be used for any purpose as Defendant claims. To hold otherwise, would invite rampant misuse of evidence inadvertently admitted by consent without remedy or relief. The law does not allow for such miscarriage of justice.

B. Dr. Debiparshad Injected Race into the Trial and Caused the Mistrial

The Court rightly observed that Defendant improperly injected race into the trial through his counsel's use of the Burning Embers Email. In so doing, Defendant caused the mistrial.

For the purpose of determining the "legal cause" of a mistrial, the relevant line of inquiry is was it reasonably foreseeable that the Court would declare a mistrial due to the injection of such racially-inflammatory material into the jury's deliberations. The Nevada Supreme Court has defined proximate cause as "'any cause which in natural [foreseeable] and continuous sequence, unbroken by any efficient intervening cause, produces the injury complained of and without which the result would not have occurred.'" *Goodrich & Pennington Mortg. Fund, Inc.*

information into evidence, Defendants' counsel argued that the prejudice caused thereby required granting a new trial. The Nevada Supreme Court agreed that such evidence could potentially cause sufficient prejudice to necessitate a new trial, but affirmed the district court's decision because the exhibit in question was not contained within the appellate record and the Supreme Court could not fully assess the prejudice.

v. J.R. Woolard, Inc., 120 Nev. 777, 784, (2004), quoting *Taylor v. Silva*, 96 Nev. 738, 741 (1980).[6]

All of the acts or omissions of Plaintiff were not, "operating alone," sufficient to cause the mistrial. Nothing Plaintiff did put the Burning Embers email before the jury, or otherwise injected race into the Trial. That was Dr. Debiparshad's counsel and Dr. Debiparshad's counsel alone. Because Defendants' counsel is charged with knowing that injection of race is improper, the conscious decision to introduce the Burning Embers email requires the Court to find that Dr. Debiparshad's counsel caused the mistrial, not Plaintiff. "Everyone is presumed to know the law, and this presumption is not even rebuttable[.]" *See Smith v. State*, 38 Nev. 477, 481 (1915). That particularly applies to officers of the court. *Pray v.*

[6] This definition is consistent with the universal meaning and understanding of "but for cause," which is defined as "The cause without which the event could not have occurred." Black's Law Dictionary (10th ed. 2014). Other Nevada Supreme Court authority further confirms that the key determination when facing the prospect of multiple causes of an injury is **whether the cause "operating alone, would have been sufficient to cause the injury."** *See Johnson v. Egtedar*, 112 Nev. 428, 435, 915 P.2d 271, 276 (1996) (emphasis supplied); *see, also, Anthony Lee R. v. State*, 113 Nev. 1406, 1415, 952 P.2d 1, 7 (1997) ("In saying that substance abuse and other similar problems cannot be said to be a legal cause of criminal misconduct, we must note that the concept of "cause" is a broad one indeed and that in certain contexts it could be said that drug abuse "caused" a crime in the sense that "but for" drug abuse a given crime would not have been committed. William C. Burton's Legal Thesaurus 65–66 (1980) gives such diverse meaning to the verb "cause" as "contributed to," "bring about," "engender," "foment," "give occasion for," "incite," "influence," and "stimulate." Strictly speaking then, it may not be entirely accurate to make the blanket statement that drug abuse cannot be the cause of criminal acts because drug abuse may very well contribute to, give occasion for or influence criminal activity. Still, we stand by our statement that, as a matter of law, the cause in fact of criminal conduct, as stated in the text, is the free-will decision of the juvenile offender, cause in fact being "that particular cause which produces an event and without which the event would not have occurred." Black's Law Dictionary 201 (5th ed.1979).").

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State, 114 Nev. 455, 458 (1998). Ms. Gordon is a partner at her firm, not a first-year associate. She knew that that evidence was radioactive. That is why she and Mr. Vogel were so, in their words, "careful" before presenting it to the jury. She is thus charged with knowing that the use of racially-charged evidence to influence a jury in any type of case, criminal or civil, is universally condemned. *See Flanagan v. State*, 109 Nev. 50, 53 (1993); *Born v. Eisenman*, 114 Nev. 854, 862 (1998).

C. <u>Plaintiff Did Not Purposely Cause the Mistrial</u>

Notwithstanding that Defendant was the cause of the mistrial, the Court certainly cannot conclude that Plaintiff "purposely" caused the mistrial. As the Court has already found, Plaintiff did not know about the content of the Burning Embers email even after it was admitted into evidence. The Court stated, "So now it's an admitted exhibit. At the time of its admission, I'll go so far as to say that the Plaintiff still at that point in time, didn't know that the item actually was in the exhibit. And when I say the item, I mean the actual language of course in question here." Exhibit 1 at 54:18-22. Because the Plaintiff did not know of the racial statements contained within the Burning Embers email, ***even after it was admitted***, Plaintiff could not have "purposely" injected race into the trial and cause the mistrial. Thus, the Court should deny the Countermotion.

…

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D. <u>The Countermotion Fails to Include the Requisite Evidence and *Brunzell* Analysis for an Award of Attorney's Fees and Costs</u>

In addition to denying the Countermotion for the reasons listed above, the Court should find that the Countermotion is facially defective[7] and deny the same. First, Dr. Debiparshad fails to include any affidavit or other evidence that is required to accompany a motion for attorney's fees and costs. *See* NRCP 54(d)(2)(B) (requiring motions for attorney fees to be supported by counsel's affidavit swearing that the fees were reasonable and actually and necessarily incurred); *O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. Adv. Op. 7, 429 P.3d 664, 673 n. 6 (Nev. App. 2018) ("[I]n addition to any other potential evidence the district court may consider, O'Connell and other parties should provide district courts with affidavits or verified pleadings when seeking attorney fees awards."). Likewise, the Countermotion fails to include any analysis of the *Brunzell* factors, which is required for the Court to issue an award of attorney's fees and costs. *Id*. As such, the Countermotion should be denied.

…

[7] Dr. Debiparshad's Countermotion for attorneys' fees and costs is frivolous because the Defendant is the person responsible for causing the mistrial. He is the legal cause. *See NRS 18.070.* The superficial and vacuous nature of the countermotion is further highlighted by the absence of any affidavit or declaration, or legal analysis, that is required under *Brunzell v. Golden Gate Nat'l Bank,* 85 Nev. 345, 349–350, 455 P.2d 31, 33 (1969). Any effort, now, to cure this fatal flaw by Defendant in his Reply to his Countermotion should be stricken by the Court, because of the unfair prejudice it imposes upon the Plaintiff, and because the Plaintiff has no opportunity to further Reply to Defendants' Countermotion.

III. CONCLUSION

For the reasons articulated herein, the Court should find that Dr. Debiparshad caused the mistrial and deny the Countermotion.

DATED this 6th day of September, 2019.

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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 6th day of September, 2019, I caused to be served a true and correct copy of the foregoing **PLAINTIFF'S OPPOSITION TO COUNTERMOTION FOR ATTORNEYS' FEES AND COSTS PURSUANT TO NRS 18.070**, 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:

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/s/ Shahana Polselli
An employee of The Jimmerson Law Firm, P.C.

EXHIBIT 1

EXHIBIT 1

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
MONDAY, AUGUST 5, 2019

RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 11

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

INDEX

Las Vegas, Nevada, Monday, August 5, 2019

[Case called at 9:10 a.m.]

THE COURT: All right. We're on the record and outside the presence of the jury. On Friday, we did have an off the record discussion in the conference room, where I -- and people can make a record, if you want. Any party, any lawyer can make a record as to what we did on Friday in the conference room, if you want. But just to briefly summarize it, I indicated that I had concern about the fact that the jury had seen Exhibit 56, page 00044, the two-page email dated November 15th of 2016 from Mr. Landess to Mr. Dariyanani, or at least relevant parts of it.

And I indicated that I'd be willing to, as an offer, but not mandatory, I would be willing to help the parties settle your case, if you wanted to or otherwise you all could -- maybe over the weekend or even Monday, which is now, spend time trying to figure out if you want to settle your case. And I said that because it appeared to me that you know, with the amount of time I had to deal with the issue on Friday, which was hours or less, that there was the potentiality of a genuine concern that could lead to a mistrial.

So I said that, you know, one way avoid the practicalities of a mistrial, of which one is having a whole new trial again, where we've been here for two weeks, you know, you could settle your case. So let me just stop and see.

Is there anything along those lines that anybody wants to do?

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 MARSHAL: Okay.

THE COURT: All right. The way I see the situation is that really I think there's two essential components to what we need to do now, given that the jury is here and there's a pending motion for mistrial. I think the first item is to determine whether I would grant or not the mistrial itself. The second item, which I did see in the motion, has to do with fees and costs. I mean you could see that in the title on the motion. There's a motion for mistrial and fees/costs filed by the Plaintiffs.

So my thought is, and I want counsel to weigh in on this structural procedural thought and tell me if you agree or disagree with my thought. My thought is I should now hear argument from the Plaintiffs and Defendants about whether I should grant the mistrial. I do think that if granted, the other part of the motion, the fees and costs part of it is something that would have to wait until another day, because I think I -- well, I know I would want to give -- unless the Defense doesn't want it, but I'd be shocked if you didn't -- I would give the Defense an opportunity to file a pleading relevant to the fees and costs aspect and then have a hearing off in the future on that, in the event we got to that point of it.

In other words, I -- you know, I wouldn't say to the Defense that now as it relates to fees and costs, you have to handle that right now live, when you have a motion than came in at 10:00 Sunday night. Now, that's not to say that I criticize the timing of this. Actually, the contrary. I want you to know Mr. Little, it's true. I appreciate that you spent -- someone spent time over the weekend putting this thing together,

because I'm sure at some point, I'll tell you about my weekend.

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. I mean, the issue became apparent late Friday, so -- just by operation of the calendar. You know, you have Saturday and Sunday and then here we are. So it could be that counsel worked on the weekend. Maybe. Maybe not, you know. I did. But that doesn't mean you have to. Sometimes it's good to take a break.

But anyway, I appreciate the idea that you put that pleading together and interestingly enough, somewhere in the neighborhood of about 90 percent of it, I came up with on my own. But the extra 10 percent, especially one of the cases relevant to the fees and cost aspect I hadn't seen before. So -- but that's left for another day no matter what, because again, unless the Defense tells me now you don't want an opportunity to file anything, the fees and costs aspect will have to wait.

So with that, let met just turn it over to counsel. Any comments on anything I've said so far? Because I'm laying out a proposed procedural construct.

MR. JIMMERSON: On behalf of the Plaintiff, you know, I know the Court has been accurate in its recitation of events on Friday and Friday afternoon and over the weekend. We did spend collectively, Mr. Little and myself and our respective offices, the weekend, hitting the books first and then writing a motion yesterday. And we thought it important and appropriate to get in our file yesterday, so that the Defense would have the opportunity to read and review and I think we served it around 10:30, 10:45 p.m. last evening and also delivered a copy to the Court at that time.

I did want to comment that in terms of making a record, the Court placed both sides on notice in the conference room immediately afterwards relative to the serious nature of the information that was read to the jury, the Court's statement that it was seriously considering a mistrial being granted, placing both parties on notice of the same and eliciting from each side any response that we or opposing counsel would have to the Court's fair comment and observation as to where were at after that.

So I think the Court should be complemented and that both sides were given fair notice and opportunity to speak with the Court Friday afternoon, after this terrible set of events was put in place to respond and to gives our viewpoint and that's where that set. We went to work as the Court noted. The Court did, too. And thank you very much in terms of the nature of this. And so there's just a few points that we would make without getting too deeply into the weeds.

First, the caselaw in Nevada as well as elsewhere cited in our

motion tells us that --

THE COURT: Well, Mr. Jimmerson, I'm going to interrupt you for a reason.

MR. JIMMERSON: No, no problem.

THE COURT: Sorry.

MR. JIMMERSON: Yes, sir.

THE COURT: I apologize for the interruption --

MR. JIMMERSON: Uh-huh.

THE COURT: -- but you know, I say that to both sides when I do it sometimes. But I'm just asking right now. I laid out a procedural --

MR. JIMMERSON: Oh, I'm sorry. Yes.

THE COURT: -- roadmap.

MR. JIMMERSON: Yes.

THE COURT: Where we handle only the motion for a mistrial, reserve the fees and costs aspect depend -- of course which would be dependent on whether I grant the motion or not --

MR. JIMMERSON: Of course.

THE COURT: -- for some other time, to give an opportunity to weigh in.

MR. JIMMERSON: No -- thank you.

THE COURT: So --

MR. JIMMERSON: On that basis, we would agree with that.

THE COURT: All right. Let me ask Mr. Vogel --

MR. JIMMERSON: I think that that --

THE COURT: -- and Ms. Gordon.

MR. JIMMERSON: -- that that needs to be where that's at. We need to address this issue now and the fees and costs issue can be delayed and give the Defense an even greater opportunity than it's had since all of us have been presented with this together. Thank you, sir.

THE COURT: Okay. Mr. Vogel.

MR. VOGEL: Thank you. Good morning. We obviously spent quite a bit researching as well. And we do -- we do appreciate you taking us back after Court on Friday and going through it and expressing your willingness to help try to settle this and expressing your view that you know, you felt that things were kind of going Plaintiff's way on this case. We discussed that with our clients and --

THE COURT: Well, I didn't actually say things were going Plaintiff's way. I said that on liability, I think -- you know, okay.

MR. VOGEL: Yeah.

THE COURT: One thing about it is, we've got to be careful, because I want to make sure everybody in the room is going to have adequate time to make their record, but I have to make mine, too, because I don't want any mystery in the record, okay? So if you don't mind, just have a --

MR. VOGEL: No, no.

THE COURT: -- just have a seat, please. Have a seat, unless you want to stand up for about five minutes or more. Okay, so now it's come up a couple times and so, you know, I just liking making a good court record. And anybody can memorialize things that happen off the record, including me. So if anybody wants to memorialize something

that happened off the record, then the answer, as you know is always yes. You can do that and there's no hurry in doing that. But at this point, it seems like I should memorialize what happened on Friday.

After the item came up in question -- that is the whole chronology of events, which at some point, let's put that all in the record again, most likely, that led to the jury now hearing from Ms. Gordon reading a couple paragraphs from this email at Exhibit 56, page 44. I offered -- this is -- and so if anybody disagrees with what I say, you're welcome to. You don't have to agree with what I say, if I memorialize something. If you disagree with some description or characterization, you're welcome to say I disagree, that's not what happened. I wouldn't be offended.

But this is what I think happened. In my mind, I obviously recognize the issue. To me, it was a rather unique issue, one I haven't really seen before. I've been here eight and a half years. I've declared no mistrials, okay? And so I just felt like well, in my heart of hearts, I really am now for the first time since I've been here, truly thinking wait a second, there's a genuine issue of potential mistrial in my mind as a judge. And of course, that is magnified, because we've been here putting a lot of effort in for a couple weeks, so it's not as though this happens on day 1 or day 2.

So in my mind I'm thinking wow, I need to deal with this. I can tell you that in my mind, too, was the idea that the email itself, as we all know and I'm sure we'll talk about, my guess is at least ten times sometime today, but I guess the first time will be right now. You know,

the email does reference words, hustling Mexicans, Blacks and rednecks and then later talks about the Mexican laborers stole everything that wasn't welded to the ground. And that, I mean immediately, once -- you know, it took a few minutes for all this to hit.

It's not like I knew the pristine, model answer, you know, within seconds or even minutes, contemporaneous with Ms. Gordon, you presenting this to the jury. It look a little while for me to process, okay, what just happened, how'd it happen. It's from an admitted exhibit. Dariyanani did put some character style testimony out. Okay. There's no objection. You know, I mean, it's not as though I had the model, you know, A+ bar exam answer ready to go.

So -- but in my mind, I guarantee you -- I'll tell you the first thing that hit me. We got a woman on the jury named Adleen Stidhum. She's African-American. We gave her a birthday card during the trial. We celebrated her birthday during the trial. We gave her cupcakes with the jury and made, I think, a respectful sort of event out of it all. And so the first thing to hit my mind was wow, how could she feel? And then the second thing to hit my mind was, as I recall, Ms. Brazil, who's also African-American, served. I think she served 20 years in the Navy, if I recall that correctly.

And I just thought about, you know, what I said early on in my pep talk to the jury, where I talked about the fact that my father served in the Army 27 years and he's buried in Arlington. I think I might even have mentioned that I served as a member of the United States Army JAG Corps, you know, where I signed up for three years and

stayed four and a half, because I was a trial lawyer and it was wonderful and I loved it. And so I -- you know, I espouse all the virtues of serving on a jury and what a legitimate call to service this is.

And it just -- I felt this feeling of illegitimacy and I felt bad. I mean, I felt bad. So I wanted to have this meeting, because I just felt like well, enough of me as a judge, enough of me as an eight and a half year judge is comfortable with having to recognize we got a problem. It's a big issue. And so I want to do, as I've always done, try to handle things in a way that make sense. You know, whether it was my time at the bar or here, I always try to do things that make sense.

You know, whether it was the time that Jack Howard called me at 1:00 in the afternoon and told me that he had a lawyer in his office who was drunk, who showed up to do a deposition at 1:00 in the afternoon on a weekday. And I went over to Jack's office. I drove over there. Sure enough, the lawyer there for the deposition was drunk. Later found out, high on meth. But I took that lawyer home and I put him on my couch.

I then called a guy named Mitch Gobiega [phonetic] and I said Mitch, can you come on over to my house. There's something I want you to help me with. He then took that lawyer that day and drove him to a place called Michael's House in Southern California, a five-hour drive from my house. That lawyer stayed in rehab for 30 days, made it through all that and still today, when I see that lawyer, he and I have to spend a moment together and both of us cry. It's happened ten times since I've been a judge. It's weird. Because he made it through.

I don't know why that story came to mind, but I can tell you it's the same thing here. It's that same sense of urgency that there's a problem that needs to be dealt with. So I invited this meeting in the jury deliberation room. And when we were back there, I said look, there is a way to avoid the continuing obvious specter of a mistrial and that is optional. Not required. I even mentioned that I thought the old style judges in the old days would get everybody together and say look, you need to settle your case, and essentially, almost order it.

But not my style, because ethically, I can't do that. A judge cannot order you to settle your trial, at least in my view, okay? But I can strongly urge it as something that's practical, that makes sense to do, when you know as a judge that there's a serious specter of a potential mistrial in the air now. Especially after two weeks and the obvious effort that now would have to be put in doing another trial. So I -- an optional way offered to give my editorial comments along these lines. And as I took it, the lawyers wanted to hear that.

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 or wanted it to continue, whichever way you'd like to take it.

So I said look, as an option, rather than dealing affirmatively with the mistrial issue that's in the air now in my view, what we could do is I can come in Monday and I'd be willing to sit in the conference room,

if it took all day even with the parties. That is, with the lawyers, Mr. Landess and the doctor and you know, the insurance rep or you know, the relevant parties to all this and I'd give you my opinion. I mean, it's a jury trial, so I think I can give my opinion as to the evidence I've seen. But again, I would only do that if everybody wanted me to. And so it was out there for consideration.

Now, neither client was in there. So Mr. Landess wasn't with us on Friday and Dr. Debiparshad wasn't there. So of course we all knew that before making any decisions on this, you'd have to consult with your clients and then get back. Over the weekend, actually, one of the criticisms of myself I had that really bothered me was I should have set up a protocol where we all somehow communicated over the weekend on this, but I didn't. So I -- it put in a position where I knew that first thing on Monday morning with the jury here would be this issue.

But I do -- I respect and understand, if you know -- if -- and it's really Dr. Debiparshad. If he doesn't want to do this, he's the client. I think he makes that decision. And I have to respect that. I don't hold any bad feelings as to that. You know, if he wanted to reconsider that, I'd give you as much time to talk with counsel as you wanted to here this morning right now even, because I think this mistrial issue is a serious one that has legitimate merit. But I won't make the decision on it ultimately, of course, until I hear from both sides.

But in any event, if the parties wanted to, I still would spend as much time as necessary going over what I thought the evidence was and give an opinion as to what could happen. With that said, of course,

Got only knows what the jury's going to do. Anybody can give their best estimate and then the opposite can easily happen. But you know, I've been sitting here and I have all this. I don't know, this is probably like you know, 20 some pages of my notes of everything that's happened in the trial. Every witness and the highlights of what they've all done. I could share that.

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 -- and again, this is an opinion. And I gave this opinion, because I thought perhaps it would foster taking me up on this. I said look, my guess is that there's more -- there's enough evidence to meet the burden, the preponderance burden on the medical malpractice. I'll tell you Dr. Debiparshad, that's what I said to everybody on Friday.

In other words, it's not that I disrespect your position or Dr. Gold's position. It's just that if you were to ask me, I would say to this point, that the medical malpractice itself, though I'm sure you did the best you could and it was well-intended and you didn't do anything intentional to try to harm Mr. Landess, but that's not required in medical malpractice. It's just making a mistake that now, unfortunately, causes some effect. And you know, my view is that Plaintiffs would meet that burden. I didn't give all the reasons for that. I'd be happy to spend time doing that, though.

But I also said that I don't think the Plaintiffs would get the home run on their damages. And this is all given with totally

discounting and not considering at all this email, of course. I took it from the perspective of, if the jury didn't hear the email, here's how I would evaluate the case. And I just in a general way said I don't think they're going to get the full extent of this stock option item and I further said separate from the stock option item, my thought is that the pain and suffering wouldn't go on until age 80.

I don't think the pain and suffering would be more than what the time period from the first to the second surgery, really -- what kind of pain and suffering you have associated with those months. Whatever it is, six months. That was my opinion. So that means that if I were right, the jury would find medical malpractice. They would certainly give some damages related to the past medical bills. They would give some pain and suffering for the six month time period on a theory that had it been done correctly, he would have healed in six months, like he probably has done after the Dr. Fontes surgery. And that is just my best guess as to what would happen.

I think on the stock part, that's so nebulous, because there's so many components that go into that, including could he really work or not. But I just think that it's likely that they wouldn't do much. They'd do some, probably, but not much on the stock option part. So what's the ultimate number? I don't know. If I sat down and had a settlement conference, if I were able to do that, I'd probably give you a number. But I think that's what would happen. And that's what I said on Friday, but I've magni -- I gave a little bit more now.

But -- so -- and we left the meeting and I -- you know, I take it

that the lawyers talked with their clients. And so again, no hard feelings, if we don't do it that way. I offered that, because I felt that was a fair and reasonable approach to the situation. And this is -- I guess I'll stop in just a second. The reason -- I think the main practical reason I felt that was I un -- if there's one thing I am certain about -- certainly not positive about my opinion as to a what a jury may do, but one thing I am absolutely certain about and that is that nobody in the room wants to do this all over again from the beginning, because that would take some time to reschedule the trial, most likely with another department and start all over again.

And I'm sure you get the feel for what that mean to go through this whole thing again. So I felt the, you know, the pain associated with that, just from a human perspective, not even to mention this idea of the costs, you know, separate from who's responsible and would I award costs or not. If you have a new trial, one thing's for certain. All those costs, all these attorney's fees, all your time, your time way from two weeks of your practice, all these experts, my guess is they're not going to do it again, unless they're paid again.

I don't even know what that would be. Couple hundred thousand just in costs alone? Five hundred thousand dollars in fees and costs? I don't know. And so I'm thinking, you know, why not do something to try to avoid even the potentiality of something like that? And that's why I offered what I offered. So that's it. I made my record. Now we're back to Mr. Vogel as to the --

MR. VOGEL: Yes.

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.

MR. VOGEL: I agree, Your Honor.

THE COURT: Okay. Well, Dominique, let the jury know that -- is it okay if I tell Dominique to tell the jury that everybody in the room appreciates their patience, and we're dealing with something that is going to take more time, and we'd like to have them come back for an update or to come in at 11:00? Is that okay? You think that's fair?

MR. JIMMERSON: Plaintiff would stipulate to that, Your Honor. I think that's appropriate.

THE COURT: Okay.

MR. VOGEL: Yes.

THE COURT: You know, I've got to do something to -- I want to let them know that we respect them.

So okay, Dominique, let them know that.

All right. Plaintiff's motion for mistrial?

MR. JIMMERSON: May I please the Court, Your Honor. The reference is made, of course, to Plaintiff's motion for mistrial and for fees and costs filed yesterday at 10:02 p.m. But my argument is not to simply regurgitate that, which you have already read, and which the Court has already studied over the weekend through the efforts. It is to highlight what we believe to be both the law, as well as the very real practical and real setting that we're in, and the consequences that follow.

Let me begin by saying that the Plaintiff's case is essentially, you know, three elements. First, is to establish the professional negligence of the Defendant. Second, is to demonstrate the causation that that negligence caused. And third, is the damages that proximally

and reasonably flowed from the negligence of the Defendant upon the Plaintiff.

Towards that end, witnesses have been introduced now for two weeks. Most of the time I would say in terms of allocating time, speaking to the liability portion of the case, the medicine that was involved, for which we've heard from multiple physicians from the Plaintiff; Dr. Harris, Dr. Fontes, and Dr. Herr. From the Defense, Dr. Debiparshad, and Dr. Gold. So five witnesses who spent a fair amount of time on that.

In terms of the damages separate and apart from the testimony of Mr. Landess, Mr. Dariyanani was called Friday morning -- last Friday morning, following the completion of Dr. Gold's testimony, to speak to two items. One would be the reasons for his termination, and linking causally the -- his inability mentally and physically to perform his job to the loss of his employment to establish the basis for which both Mr. Landess and Dr. Smith could testify as to the lost wages, past and future. As well as the lost stock options, for which Mr. Dariyanani would speak to the value of the stock options at the time of trial, which is now.

The sequence of events, as reflected in the transcript of last Friday, day 10 of trial, reveals that the question that had been asked of Mr. Dariyanani was was it difficult for Cognotion, and/or Mr. Dariyanani individually to terminate Mr. Landess. And he answered yes. And he answered, please explain. And Mr. Dariyanani gave reasons for that, both in terms of being satisfied with Mr. Landess' work, that the termination was not through any fault or personal fault of Mr. Landess in

performance, but due to his inability to perform both mentally and physically, to make meetings, to be able to withstand the pain that he was going under, and that that continued from October 2017 through June of 2018, whereupon the necessity of Cognotion to have someone to fulfil this responsibility became so apparent and needy that he was -- a new associate counsel -- or a new general counsel was found by the name of David Kaplan.

What led to this -- what's being argued by the Defendant as to the justification is that Mr. Dariyanani was asked by me a question that did not call for in any regard character evidence at all. The question was benign. The question was did you find it difficult -- or did Cognotion find it difficult, or yourself, to terminate Mr. Landess. And he answered yes. Please explain. Mr. Dariyanani's response was in some regards very responsive to the question; in other regards, nonresponsive to the question. The obligation to move to strike testimony that is nonresponsive to the question lies with the Defendant, as well as with the Plaintiff. In the sense, it's a shared responsibility that when a witness responds in a way that in part is responsive, in other ways not, the Defense certainly has that right and obligation to move to strike that.

The point in this is just simply first of all, to be accurate in terms of the procedural posture of how we got here. Secondly is to reveal that there was no opening of any door by the Plaintiff to character evidence. Indeed, I think a fair statement can be made, and the Defense don't argue to the contrary, that there was essentially no character evidence offered by the Plaintiff or by the Defendant in this case

regarding any of the parties, including the Plaintiff and the Defendant throughout the case.

The -- filling in the dates -- filling in the circumstances then upon cross-examination, Defense counsel, Ms. Gordon, sought the introduction of a group exhibit, 122 page Exhibit 56. Plaintiff's proposed exhibit, not yet admitted, from which she sought to read two or three entries from a couple of those emails, of which there was 122 -- 79 pages. We have the exhibit here. I don't want to misstate it. I thought it was 122 pages. It began at 487 -- I'm sorry, it started at 56-001, and completed at 56-079. So I guess it's 78 pages. To the extent that I said 122, that's a mistake. I guess I was looking at the Bates number on the right. Yeah, it's about 80 pages; 79 pages in length, of which the offensive email is marked, as the Court has noted, Exhibit 56-044 and 045, which 044 being read the second and third paragraphs of that email dated Tuesday, November 15th, 2016.

And the -- and so character was never an issue in this case. It was never introduced by that. And in terms of character, you typically would have, if you were to have character evidence -- and you see that more in criminal cases than in civil. Character evidence really has no place in civil cases. It would be through opinion testimony, or the like, which was not offered in this case.

Now, as to the case law and the circumstances affecting that, this Court has already weighed in and supported by the Plaintiff, as to the radio activity, or the bombshell nature of this information. It starts with one principle. While there was, in terms of a time -- temporal time,

maybe five to ten minutes between Defendant's request for admissibility of Exhibit 56, the Plaintiff's granting the same through counsel, specifically myself, and the use of the offensive email, the Plaintiff and counsel was not aware of the content of this one specific email.

But more importantly as to the legal principle, the use of inadmissible evidence, even though admitted through inadvertence, mistake, or accident for an improper purpose is clearly improper, wrong, and should not occur. And the case law from the Nevada Supreme Court, as well as several other courts we've cited is very clear. The Court's own research revealed the same.

The other part of it is is that the -- both the Nevada Supreme Court and other cases have held that information, or evidence, or comments about race, in particular, are very much explosive, very much bomb-like, and are not capable of being reversed by curative instruction. And that I think is very clear from several cases in several courts throughout the United States. And that is exactly what was done here.

Respectfully, the Defense had in mind specifically this examination. They sought the admission of Exhibit 56. They had this particular email at their fingerprints. They prepared to read it. And they placed it onto the ELMO with highlighted language, with the intent of exposing that language to the jury. You know, it's almost as if in cross-examination the question is more important than the answer, because the question is what creates the prejudice that cannot be undone, and which it was effective here.

Furthermore, the question is truly a non sequitur. It was truly

irrelevant to the testimony of Mr. Dariyanani. The nonresponsive words of he's a beautiful man, as well as having he's both good and [indiscernible], that and flawed, giving a balanced view, would be -- would not be the predicate for which to introduce such prejudicial examination and the use of materials that are so prejudicial. I would say as a footnote to this Court, as already stated on Friday of last, that were a motion in limine submitted by the Plaintiff to the Court, or vice-versa where the roles were reversed and the Defense were to seek a motion in limine to preclude the use of the information on either side, the Court would have granted the same -- or likely have granted the same. And that clearly is the case here.

The premeditated nature of this examination by the Defendant is clear. And it's -- it cannot be reasonably argued to the contrary that the Defendant did not understand the radioactive nature of the material that they were going to introduce in front of the jury, recognizing that our jury is racially diverse, both in terms of African-Americans, as well as Hispanic jurors, which there are two of each, out of only eight regular jurors, plus two alternates. And I could be missing other overtones. But those were the four most obvious.

And so the impact of the --

THE COURT: Which four do you think?

MR. JIMMERSON: Well, I believe that for African-Americans, Juror Number 2, Ms. Brazil, and Juror Number 5, Ms. Stidhum, are African-American women. And I believe that Juror Number 4 and Juror Number 6, Ms. Asuncion and Mr. Cardoza are both Hispanics.

THE COURT: Cardoza is number 7, but okay.

MR. JIMMERSON: Is he 7? I thought he was 6. I'm sorry, I thought he was 7. You're right; he is 7. Thank you. He is 7.

THE COURT: I just want to make sure. I mean, obviously, I've already said as to Ms. Brazil and Ms. --

MR. JIMMERSON: No, no. But I will confirm --

THE COURT: I didn't think about that.

MR. JIMMERSON: Ms. Asuncion is Juror Number 4.

THE COURT: Okay.

MR. JIMMERSON: And Mr. Cardoza is Juror Number 7.

THE COURT: Right.

MR. JIMMERSON: And the case law is also explicit that a curative instruction is in most cases insufficient and not capable of undoing the harm and prejudice that's occurred to a party, in this case, the Plaintiff.

May I ask of you, Judge, that your recognition of that, and your, you know, heroic effort to try to save this was noted on Friday afternoon. But my point about the cementing of the prejudice is also accentuated by the fact that two and a half days have passed. You know, if this were on a Tuesday, and you were here Wednesday morning, it'd have a better chance at least in temporal terms, to reverse the prejudice that occurred. Here, the jury went home, and 72 hours have passed. And we're back together now on Monday morning. But that worsens an already ugly and prejudicial and irreversible sort of offense.

And the other aspect of it, I would just say is -- it calls upon

all of our common collective experience. And I call that upon opposing counsel as well. We all have practiced law for extended periods of time. We all have had life experiences that affect our being, and affect our behavior, and our intellect, and our view of the world. In the courtroom we've had many, many experiences that would guide us to our behavior that we hope is appropriate and reasonable, and certainly ethical, and within the rules.

And for the reasons that the Court noted in eight and a half years of the judicial experience of this Court, and my many years of experience, and opposing counsel's many years of experience, this is unprecedented in the sense of the extraordinary way in which a prejudicial piece of evidence that had no business ever to be admitted, and certainly, no business to ever be used, even if it was inadvertently or by accident admitted, can be undone. It's really -- because it's unprecedented, it's hard to point to other fact situations in our court system and in the administration of justice where such a taint could be articulated and explained. And because it is so extraordinary and unprecedented and devastating and outrageous, that mistrial is the only remedy.

And may I say that the Court on Friday in the off-the-record discussion, contrary to opposing representations as to what he remembers, my remembrance of the Court was not that the case was going Defendant's way, but the Court saw a mixed result; saw a leaning of the majority of jurors with the Plaintiff, but that the unwillingness, the Court perceived to grant the damages sought by the Plaintiff being a

likely result. But again, it's -- we're all speculating; we're not able to read the jurors' minds.

But irrespective of that, I don't -- I just point it out because it reminds me of the supreme court ruling about pornography; it's hard to define, but you know when you see it. This is very similar to that. It is hard -- in fact, it's impossible for me to understate the devastating irreversible nature of the prejudice that has been placed upon the Plaintiff. We'll never be able to recover from this. And it appeals to everything that's wrong about humankind, about our responsibilities as lawyers and officers of the court. It truly was inappropriate and just so extreme that it can't be reversed.

And as the Court has noted, both sides -- speaking for ourselves, the Plaintiffs, have expended more than $100,000 in out of pocket costs, approaching $150,000. We've all expended a year's effort. And certainly, both sides have worked very, very had to represent their respective clients. So it's not an easy motion to make because, you know, we have invested so much time, energy, emotion, and finances. Mr. Landess is 73 years old. His continued ability to be north of the border and breathing air is not assured. But what is assured is the absolute prejudice and irreversible harm that the Defendant's inquiry has placed upon the Plaintiff, and upon our jury.

Thank you, sir.

THE COURT: All right. Defense? Ms. Gordon?

MS. GORDON: Thank you, Your Honor. We're actually going to be breaking this down between the two of us. I'm going to get on the

record the procedural background of what occurred on Friday, and then Mr. Vogel will address some of the arguments made by Mr. Jimmerson.

As Mr. Jimmerson said today for the first time, the exhibit is not 122 pages. It's 79 pages. It consists of 23 emails that were produced by Plaintiff during the litigation in this case. I'm sorry, 32 emails total and the email issue used during Mr. Daryanani's cross is the 23rd email in that set. Those were disclosed by Plaintiff on May 29th, 2019 in its 12th supplement to the NRCP 16.1 disclosure.

That exhibit was later added to Plaintiff's pretrial disclosures, which were amended at least three times. They were paginated by Plaintiff, giving them ample opportunity upon opportunity to know what was in that exhibit, and to familiarize themselves with it, and where they could have, as Your Honor stated on Friday, then filed a motion in limine on it, if they found that prejudicial value was definitely more than any probative value that it may have. Defendant did not disclose that exhibit. That was entirely Plaintiff's exhibit.

When Mr. Daryanani was testifying, he gave a lot of character evidence. As Your Honor will remember, he talked a few times about the fact that Plaintiff had -- he was a beautiful person, he testified that he could give Mr. Landess bags of money, and expect that those bags of money would be deposited. He stated a few times that he would leave his daughter with Mr. Landess.

This is not an incident of one sentence of character evidence being given by Mr. Daryanani, and I don't believe that Plaintiff's argument that that exact testimony wasn't specifically elicited by

Plaintiff, should be well taken because certainly, with a grasp of the evidentiary rules that Mr. Jimmerson and Mr. Little, and Mr. Landess have at this point in their careers, they could have addressed it at the time.

They could have approached the bench and said, Your Honor, that sounds like he may have given some character evidence, we don't want to open the door. Mr. Jimmerson could have exerted a little more control over his witness to the extent that Mr. Daryanani would've have been offering such enormous amounts of character evidence, but none of that happened.

After that, the Plaintiffs specifically stipulated to the admission of Exhibit 56, and during the cross-examination, I would careful to ensure that Mr. Daryanani had indeed given that character evidence. I didn't immediately cross him on that evidence until the very end. I talked with him at least twice confirming that that was his evidence that he gave. That, Your Honor, gave Plaintiff's counsel another opportunity to perhaps step in. It was very clear that I was confirming character evidence that had been given by Mr. Daryanani. Plaintiff's counsel, if that was not his intention, he could have asked for a sidebar. He could have done a variety of things, Your Honor, at that point, to step in --

THE COURT: Okay.

MS. GORDON: -- and say, that's not what I intended.

THE COURT: Let me interrupt you for a reason to be --

MS. GORDON: Sure.

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

certain, slam dunk easy, I would've granted a motion to preclude the hustling Mexicans, blacks, and rednecks, where the Mexican labor stole everything that wasn't welt to the ground. I would've precluded that. And though not so relevant to this, but since we're having a meaningful discussion, I can tell you that I handed this to Mark Dunn, and the level of shock on his face was pulpable. And I handed it to him only asking him one thing, would you preclude this in a motion in limine.

That's how I started it, because I didn't want him to know the full extent of anything else I might have to deal with, and he told me, in no uncertain terms, what I was really already thinking, and that is that you absolutely have to preclude this because the issue of whether or not Mr. Landess is a racist or not is not relevant. And even if it relevant, if character is an issue, that's really -- that's the issue. I mean, race -- whether he's a racist or not is not relevant and is prejudicial. It's, I think, clearly what I would have to tell you, and that's the reason I would grant the pretrial motion.

So I think it's fair to say, okay, why not ask for a sidebar. I mean, certainly you have the witness in the witness box, Daryanani, and you have the item ready to go up on the ELMO. You could ask for a sidebar to discuss --

MS. GORDON: Us?

THE COURT: Yes. Us. You could ask for a sidebar to now indicate, I'm going to put this up, or for that matter, consideration could've been given to -- I mean, this is my question. I want to see if you want to answer this, to potentially redacting portions of it, because in a

motion in limine, I'll share with you that the proper way to do this would be to say, look, to the extent the Defense might want to use this to show Mr. Landess isn't a beautiful person or otherwise in the event character comes up, you want to use it to rebut character, you could say things like, I got a job working at a pool hall on weekends to supplement my regular job of working in a factory, redacting the word "sweat". Then delete or redact, "with a lot of Mexicans".

And then continue with non-redactions. "Taught myself how to play Snooker. I became so good at it I developed a route in East L.A. hustling --", redact "Mexicans, blacks, and rednecks" -- "-- on Fridays, which was usually payday." And then probably redact, "The truck stop Mexican laborers stole everything." And now what you have is you have usable evidence that he was a hustler. He taught himself to play pool, and he hustled people playing pool. Is that an indication of a beautiful person? Usable, admissible, but not overly prejudicial.

So that's the something I wanted to at least share with you that I did put down in my notes here -- these are some of my notes over the weekend. I put a note in here asking, what about a sidebar, what about redacting, you know, prejudicial parts of the usable item of evidence. So go ahead, if you want --

MS. GORDON: I appreciate that, Your Honor. I think that what that does is it certainly shifts the burden to Defendant, and what, I believe, you're saying is that it's admissible evidence, Your Honor. And as you've stated in this case and I believe in other trials you've had, admissible evidence is used for any purpose, can be used for any

purpose, and I don't think that the burden for how prejudicial a piece of evidence that Plaintiff disclosed and stipulated into evidence, the prejudicial nature of it should not be -- have to be addressed by the Defense, and out of curiosity or out of doing their job for them, I don't know, but I know that admissible evidence, it can be used for any purpose.

And I know that Plaintiff initially elicited and had impermissible and unethical character evidence. What the Defense is allowed to do in response to that, and what I actually have an ethical duty to my client, a person of color to do, is to use that evidence in impeachment. I'm allowed to do it, I should do it, and I did do it, and they did nothing about it.

THE COURT: So you think that the jury is allowed to consider whether Mr. Landess is a racist?

MS. GORDON: I think that I am allowed to use impeachment evidence that has not been objected to, and has been admitted into evidence by stipulation. I absolutely think I'm allowed to use it. I should use it on behalf of my client, and the burden should not be shifted to me to assist with eliminating or reducing the prejudicial value of that piece of evidence.

Dr. Debiparshad was asked about his race during his deposition. Mr. Daryanani went on for the first 15, 20 minutes of his testimony about his race. It's not new. Motive is always relevant in terms of Mr. Landess' reason for setting up our, you know, view on this case --

THE COURT: Um-hum.

MS. GORDON: -- setting up Dr. Debiparshad. I don't think it's completely irrelevant, and you know, it hurts. It hurts. I don't care. That's our job, and I'm sorry that it hurts and it's damaging, but it's not so prejudicial that it shouldn't be considered at all. They opened the door, and we're allowed to use it. I have an ethical obligation to use it. We're here, Your Honor, because of a cumulative effect of Plaintiff's errors. They disclosed it, they redisclosed it, they stipulated to its admission, they didn't object to it, they didn't ask for a sidebar at any point.

We're here because of their error. Trying to shift the burden for that error to us now, it's absurd. It just is, and trying to make it look like an ethical issue on the Defense side for using this piece of evidence is absurd, as well.

THE COURT: All right. Just to be sure, it sounds like what you're saying to me is that, in your view, under all of the circumstances that you've already described or that you otherwise know, that whether Mr. Landess is a racist is something the jury should weigh and it's admittable, and it's evidence that they should consider.

MS. GORDON: I think that the entirety of the passages from that email is impeachment testimony to the character evidence that was improperly and unethically elicited by Plaintiff, and I don't know that it's so much exactly what that bad character evidence consists of --

THE COURT: Um-hum.

MS. GORDON: -- it's bad character evidence that we're

allowed to use as impeachment.

I don't know, Your Honor, and perhaps you found cases that I did not, but I don't know that there is a subsection under impeachment, and what evidence we can use as impeachment that says, oh you can use impeachment evidence, but you can't if it has to do with race. You can use impeachment evidence, but you can't, if it has to do with -- I don't know. There's no, you know, subsection --

THE COURT: Okay, let me take it from a different perspective then. Let's assume you never put that item up in the questioning of Mr. Daryanani. However, it's admitted as Exhibit 56, page 44. Let's further assume that then, the first time you ever use it, is in your closing argument, and you put it up just the same way you did with Mr. Daryanani. I take it you're going to tell me that that's not -- essentially, it's already misconduct under the *Lioce* standard. In other words, you can tell me that, at least in part, you could make a closing argument that Mr. Landess is a racist and the jury ought to consider that.

MS. GORDON: I'm saying that respectfully, I don't know that that has anything to do with what we're talking about now, because we were talking about impeachment evidence for someone who improperly gave character evidence, and I was impeaching him.

THE COURT: Well, let me explain that. Let me explain. If you're telling me it's impeachment evidence, that means it is evidence, and that means you could argue the evidence. I just think this is a good illustration of the concern. I mean, you and your wisdom used it for impeachment. I get that, but it's evidence. And so I'm just trying to see

if you think, since it is evidence, you seem to say and think that the jury can now consider it because you've made a closing argument then using the item.

MS. GORDON: I think if someone wanted to argue about the prejudicial nature of that, then they had the duty to bring that to the Court's attention and they didn't, and they didn't over and over and over again. And I am going to speak to you, Your Honor, about what happened in this case, and procedurally what happened is it was used during impeachment, and it was absolutely proper given that they opened the door.

THE COURT: Okay, I understand that.

MS. GORDON: I'm sorry. I guess I --

THE COURT: Let me just try this -- I'm going to try one more thing on this. Let me hypothetically say this. Let's say you're from the jury and you say, members of the jury -- you tell me if you think this is a legitimate argument that you could've made. Members of the jury, you've heard Mr. Daryanani testify that Mr. Landess is a beautiful man, that he would give bags of money to Mr. Landess, that he would leave his daughter with Mr. Landess, but Mr. Landess is a racist.

MS. GORDON: And a hustler.

THE COURT: Could you make that argument?

MS. GORDON: I think I could use that, and as Your Honor has said, it's admitted evidence. I think that I can use it for any purpose, but if it somebody wants to limit that and allow in the hustling and not the racist part of it, then somebody had an obligation to do that.

THE COURT: All right.

MS. GORDON: And that someone is Plaintiff and he didn't do it.

THE COURT: All right. Okay. You want to add anything else --

MS. GORDON: I'd like to --

THE COURT: -- before you turn it over to Mr. Vogel?

MS. GORDON: Yeah, thanks.

MR. VOGEL: Thank you, Your Honor. Yeah, curiously absent from their motion is any reference to NRS 48.445 or 055. When you open the door on character evidence, the Defense can then, pursuant to 48.0551 on cross-examination, make inquiry to specific instances of conduct, which is exactly what was done in this case. So there's no ethical violation. There's nothing improper about what was done, and as to Ms. Gordon's point, and this Court is fully aware, the evidence was there.

THE COURT: That's why -- I didn't cite those statutes, but I looked at them over the weekend. That's why I've given you the opinion that's not going to change, that yes, there was an allowance to now bring up evidence to dispute the character testimony of Mr. Daryanani. No doubt. That's not the issue to me anymore.

MR. VOGEL: And --

THE COURT: The issue to me is what about, you know, what we have here.

MR. VOGEL: Yeah.

THE COURT: I mean, for example, you know, there are motions in limine that arguable go to character where I pretrial granted them. You can make an argument that somebody has a $400,000 gambling debt, that that goes to their character. You can make an argument that they didn't pay an obligation. It's like writing a check. A casino marker is like writing a check, they didn't pay it, and that goes to their character. They're not honest, but that's precluded, for example.

MR. VOGEL: Yeah, and I appreciate that, and they sought to exclude it. In this particular instance, they didn't seek to exclude it. So I think the issue, I think, that the Court is probably struggling with is okay, it's admitted. Is it -- is the probative value of that evidence so overly prejudicial that it has now caused, you know, irreparable damage to this trial?

I think, you know, if my understanding of what you're saying is that's your concern in the case law, and maybe you even looked at this case, *Nevada v. Battle* [phonetic], which is a 2015 case, you know, the Court was, you know, struggling with similar issues. And the Court indicated that, you know, this impeachment evidence in that case was admissible because the Plaintiff had opened the door, and the Court found that Battle couldn't establish prejudice because it was his own actions, not the actions of opposing counsel, which open the door to impeachment evidence. So in that case, the Court found that hey, you've opened it, you cannot now claim prejudice.

THE COURT: Again, I agree with that. I said character is clearly allowable for the Defense in cross-examination of Daryanani, and

for the remainder of the trial. It was put in issue by the Plaintiffs.

MR. VOGEL: So --

THE COURT: My issue is -- let me put it to you this way. You've been around a while. And I don't mean to, you know, play too much devil's advocate with you or Ms. Gordon. I would do the same with the Plaintiffs. You know, it doesn't matter who's doing it or who I have my questions for, but if I have thoughts going through my mind, I typically like to express them and ask questions about them regardless of which side I'm asking these questions to. In this case, it just happened to be your side under these circumstances.

You heard what I said with, you know, these questions I've asked Ms. Gordon, but I mean, wouldn't it occur to the Defense that -- let me put -- let's see if I can say it correctly. You say to yourself, and I agree, okay, character is now an issue.

Certainly after Mr. Dariyanani said the things he said that we've now recited a few times, we've got this piece of evidence. Is there a concern that if we just use this admitted piece of evidence, we've now interjected a racial issue into the trial. And -- and if you have that concern, why not do something to at least address it. There would be no harm in that. I mean Mr. Dariyanani is there. She's on cross examination out there. She's got Exhibit 56 in her hand. I mean why not -- I mean did it ever occur that, you know, I used this bar metaphor on Friday, on the court record, that if you're going to drop a character bomb, even if you have the right to do that, is this the type of bomb that's going to blow the whole room up?

MR. VOGEL: I see what you're saying. You know, the terms used were Mexicans, black, and rednecks. Those were the terms that were -- were used. And I guess the termination you say are those just inherently racist terms. I guess that's what the Court is struggling with. The only pejorative term in there, you know, I think is rednecks.

THE COURT: Well, actually, I don't think that. I think that there's a way you can say Mexican and have it not be taken as a racist comment. I think there's a way you can say black, Black Lives Matter, for example. And not have it be a racist comment. Redneck, I don't know. I think that one is pretty much, every time you say it, it goes in that zone. But to me it's the context of which it is said. I mean it -- they're all lumped together and I think it's the easiest conclusion to draw, if you look at the context in which these two paragraphs come together, they clearly appear to be racist.

So it's the context, not just the -- not just the words themselves, it's the context in which they're used.

MR. VOGEL: Sure. I mean it's quite clear that he was victimizing certain people. I don't dispute that. The issue comes back to is it so prejudicial as to have destroyed the ability of this jury to rule in -- I guess in an unbiased way to where justice is s till being done. And I guess that's what you're struggling with. And our view is this was, you know, character evidence. All character evidence, by its nature is prejudicial. Whether it's glowing, fabulous reviews like Mr. Landess' daughter gave, or whether it's deceiving. By its nature it is -- it is usually much more harmful type of evidence one way or the other.

And that's why we were actually quite careful making sure we had the basis to bring it in, between Mr. Dariyanani's testimony, the daughter's testimony, and Dr. Mills' testimony even. We felt that they had opened the door quite wide on character. And that it was perfectly appropriate to use it. We gave them every opportunity to object to it. Ms. Gordon asked repeated questions before coming to that union. And, yet, I guess it -- it comes down to, you're asking could we have done something to try to remove that. I suppose in hindsight I guess we could have. But I don't think we had to. Reason being is they stipulated it in and it was -- when it's really without any sort of objection.

So now we're judging it by hindsight. And according to *Nevada vs. Battle*, they can't establish prejudice, because they didn't object to it.

THE COURT: Okay, all right. It's your motion, Mr. Jimmerson, you get the last word.

MR. JIMMERSON: Thank you, Judge. Let me have those two cups, please. Now the Nevada Supreme Court in *Hylton*, H-Y-L-T-O-N *v. Eighth Judicial District Court*, 103 Nev 418, 423, 743 Pac. 2d 622, 626, 1970 Dec. said that a manifest necessity to declare a mistrial may also arise in situations which there is interference with the administration of honest, fair, even-handed justice to either both, or any of the parties to receive. And in *State vs. Wilson*, 404 So.2d 968, 970, La. 1981, raises such a sensitive matter that a single appeal to racial prejudice furnishes grounds for a mistrial. And that a mere admonition to the jury to disregard the remark is insufficient in occult.

In listening to both opposing counsel's remarks, that of Ms. Gordon and Mr. Vogel, it is abundantly clear from what they didn't argue that we have a conceded fact as to the explosive nature of the remarks, and the prejudicial nature of the remarks. There is not an argument made by either one that this does not warrant a mistrial. There's not a argument made by either one as to the impact that this has had upon our jury. Instead, both focus upon the claim that it is the Plaintiffs' error or the Plaintiffs have opened the door. The Court has indicated that it is pretty well convinced that the Plaintiff did that.

I will simply say that if you read the transcript, the question that led to the examination was, "Was it a difficult thing for Cognotion, or yourself, to terminate Mr. Landess?" That in no way, reasonably, would call for the admission of character evidence that Mr. Dariyana -- Mr. Dariyanani responded in the way that he did, in some regards to answer the question, "Yes, it was a difficult thing to do." But they've gone beyond that to talk in terms of Mr. Landess in both positive and negative terms. The Court apparently feels that that is appropriate. But that was not an intention, both by either words, or by conduct with the Plaintiff to open any door about character.

Relative to Dr. Mills or Dr. Arambula, they introduced it first, because they went first on that. But they both testified that Mr. Landess was an honest person and that he was self-effacing and didn't exaggerate based upon psychological test results and the MMPI, multi-personal test. That wasn't a character issue. And the daughter, Ms. Lindbloom, did speak about both before and after. How he was before

the professional negligence on October 10th of 2017, and afterwards. And yes, he did say -- she did say some very kind and glowing comments about her dad, but that clearly has a place in character evidence. And that also was ten days earlier. It wasn't related to the time. So when you focus upon what was going on Friday, you have the admission by Ms. Gordon that it was an intended piece of evidence.

I disagree strongly with the statement repeated questions were asked about the email. Not at all. The email was placed upon the Elmo without a single question or preface whatsoever. And the jury saw those words before a question was asked. And then she asked the question "Is this what Mr. Landess wrote to you?" So the intent to create a prejudice was in presence in the part of the Defense. And what they didn't understand or appreciate, and should have -- reasonably should have, under *Lioce* and relative under the advice of the Court and other decisions was the impact of what they were doing, which is the whole point of our motion.

Let's be fair. The Defense sought to introduce a 79 page set of emails. Plaintiff agreed, and 10 or 15 minutes later, they place this email before the jury. Plaintiff did not appreciate the contents of this email, and perhaps should have. But the Defense most certainly did appreciate what they had in their hands and chose to use it. And the excuse that they have that because there was an admission by the Plaintiff reversed the law, which is very clearly stated that if inadmissible evidence is used ostensibly, or if admissible evidence is used for inadmissible purpose, it can be withdrawn. And this is no different than