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 6

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CERTIFICATE OF MAILING

I hereby certify that on this 6th day of August, 2020, I served the foregoing **PETITIONER'S APPENDIX – VOLUME I** upon the following parties by placing a true and correct copy thereof in the United States Mail in Las Vegas, Nevada with first class postage fully prepaid:

The Honorable Kerry Earley
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1 either one of us not recognizing an attorney client privilege document
2 mixed in with another 80 pages of documents, and then the party
3 recognizing that there is a prejudicial document there cannot under both
4 ethics, as well as our rules of procedure, then go forward and misuse
5 that information.
6 And the questions asked by the Court are the appropriate
7 ones in light of what the Defense knew that they had, and intended to
8 use. There was no calling of attention to that email, Your Honor. I don't
9 know where Ms. Gordon gets the idea that she asks repeated questions
10 about it. She didn't. She asked no questions until she placed the words
11 up on the Elmo, before she sprung it upon us. And the springing of it,
12 which she concedes is the case, is the Defense premeditatedly and
13 intentionally doing so. This -- opposing counsel also stated that Mr. -- or
14 Dr. Debiparshad's race is acquired at depo. One single question was are
15 you -- is your family -- are you from India. I think the answer was yes, or
16 something like that. But at trial, not a single word was asked about that.
17 Plaintiff did not seek upon that. The man is educated in Canada, went to
18 school up, apparently in Canada. There's no comment upon that. There
19 wasn't one question of Dr. Debiparshad that went anywhere near any of
20 those issues. This record is clear of the Plaintiff's bona fides in terms of
21 such a devastating subject matter like that. Furthermore, the Defense is
22 bound to, and as the Plaintiffs to know, under *Lioce* what -- where the
23 line is, and it's a fairly bright line in terms of somebody as -- you know,
24 as astounding as this type of a question and information is this is not a
25 negligent act. This is not something that was not appreciated by the

1 Defense. They intended to use it exactly in the fashion that they did.
2 They just didn't appreciate, I don't think, the -- the predictable
3 response of the Court, and of the Plaintiffs relative to the misuse of this
4 type of explosive information that had no place at trial. Mr. Landess has
5 never placed race as an issue and the Court's asked the question directly
6 of the Defense, do you think that race has a place in this case. And, of
7 course, the answer has to be yes for the Defense, because they're trying
8 to justify their -- their misbehavior. But that's not in, at least our review
9 of the case law, warranted that there cannot be a good faith basis for the
10 use of this document in the fashion they did.
11 Especially understanding that it hadn't been offered by the
12 Plaintiffs at any time. It hadn't been the subject matter of a single
13 question in a single deposition in which there were more than 15
14 depositions taken. It wasn't in -- that wasn't discussed in Mr. Landess'
15 two different days of depositions. It wasn't examined of him on three
16 days of direct and cross examination doing this trial. Not one subject
17 matter came up. This was a gut shot at the end of the case, used in a
18 premeditated way by the Defendant to gain an advantage before the
19 jury. And in doing so, they well beyond crossed the line with the *Lioce*.
20 They created an irreversible prejudice to the Plaintiff. And more
21 importantly, I think, to the administration of justice and to this Court.
22 Thank you, sir.
23 MR. VOGEL: If I may, just briefly, Your Honor, you know
24 evidence of bad acts is always prejudicial. Usually it's in the context of
25 other crimes, violent acts ands things along those lines. But it's always

1 prejudicial, but it's also admissible. And in this case, Your Honor, if this
2 Court is considering granting a mistrial, I would ask the Court to do so
3 after the jury comes back with a verdict. At least in that instance, it
4 would be treated more as a motion for a new trial, and there's still a
5 chance, who knows, I mean the jury could come back in Plaintiff's favor
6 and the issue is moot. But the parties have already spent, as everyone
7 agrees, tens, if not hundreds of thousands of dollars getting to this point
8 now. And to pull the plug at this point, is potentially very prejudicial to
9 all of the litigants involved. I would say the better -- the better course
10 would be to allow the case to go to verdict, or in the alternative, to not
11 release the jury, and allow -- allow the parties to take an emergency writ
12 to the Supreme Court, just to see if they would weigh in on is this
13 something that's overly prejudicial.
14 MR. JIMMERSON: And my response is Plaintiff's motion is
15 simply the Defense should have been more circumspect about this, and
16 thought about this before they created this error in the record.
17 THE COURT: All right. This decision, I'll share with you. It's
18 interesting, because in some ways it's the most difficult decision I've
19 made since I've been a Judge, but in other ways it's the easiest decision
20 I've ever made since I've been a Judge. I'm going to explain in detail
21 my thoughts and make a record as to why I've reached this conclusion.
22 But the Plaintiff's motion for mistrial is granted. At 11:00 I'll bring in the
23 jury and I'm going to excuse me.
24 After they're excused, I will make a record why this is the
25 appropriate and in my view, the only choice that can be made under the

1 circumstances. We'll be back in ten minutes.
2 [Recess at 10:57 a.m., recommencing at 11:05 a.m.]
3 THE COURT: Please bring in the jury.
4 MR. VOGEL: Your Honor, are you going give us an
5 opportunity to speak with the jurors?
6 THE COURT: No. We're going to let them go. I think they've
7 been through enough.
8 THE MARSHAL: Parties rise for presence of the jury.
9 [Jury in at 11:05 a.m.]
10 THE MARSHAL: All present and accounted for.
11 THE COURT: All right. Please have a seat, everyone.
12 Members of the jury, well, welcome back. You might note that your
13 notepads are not with you and that's because of what I'm about to tell
14 you. Before I tell you what I'm going to tell you, however, I do want to
15 look at all of you and let you all know thank you so much for the time
16 that you've spent with us. It'll be a two weeks I know I'll never forget.
17 You as a jury have been very attentive. You've asked wonderful
18 questions.
19 I've learned to not only respect you but actually like you all
20 and you're exactly the way juries should be, I think. Always on time,
21 attentive, good questions. But you can get the feel for where I'm going
22 with this, of course and that is with your notepads not being there and
23 what have you. I guess the best I can say to you is that from time to
24 time -- and it doesn't happen very often. But from time to time, there are
25 things that come to a Court's attention that you have to deal with. In

1 other words, sometimes -- I guess a way to say it is a court and me ad a
2 judge, since this is my court here, you can only deal with the issues that
3 come your way.
4 Often times, they're not created by you whatsoever, but they
5 come your way and you have to deal with them. Never afraid to do that.
6 Sometimes those things can be difficult and they can be time
7 consuming. So that type of thing did come my way. And it wasn't
8 something that the Court created, but nonetheless, the Court has to
9 respect that has to be dealt with. And so I want to let you know that over
10 the last few hours -- obviously you've been waiting out there since 9:00
11 this morning -- I've dealt with some things.
12 And obviously you knew that, because I had my martial
13 update you a couple times and you knew we were working on legal
14 items. I do want to tell you that because of what I dealt with and the
15 decisions that were made, the case, as far as your participation, has been
16 resolved. And so I just want to tell you thank you for your time. It's been
17 wonderful, in my view, to have you here for these couple weeks. I think
18 it's allowable for me to say I'm sorry that we don't get to finish the case
19 with you this week. You're excused. You all take care.
20 [Jury out at 11:09 a.m.]
21 THE COURT: All right. Please have a seat, everyone.
22 Obviously I'm going to stay on the record and well, here's the decision
23 having to deal with obviously granting that motion for mistrial. I said it
24 was the most difficult thing I've done since I've been here and I assure
25 you, it is. Even more difficult than the time I was covering for Abbi Silver

1 and probably the worse child neglect case in the history of the State of
2 Nevada was one that sentenced someone on. I won't go into those facts,
3 but I -- suffice to say that the lawyer presenting the case was Mary Kay
4 Holthus, who's now a judge.
5 And I had to take a couple of breaks, because of the sadness I
6 felt and the difficulty in dealing with what had happened to this child.
7 This is worse than that for me, because in the time I've been here -- and
8 my whole group knows this to be true -- and it -- you know, I don't even
9 know where it came from, probably. Probably just a life of events. To
10 me, the most important part of the process is the jury. And I can't even
11 find the right words to describe how I really feel about those that come
12 in and serve on juries, other than to say I have a tremendous respect for
13 them and the mission that they're tasked with performing.
14 That's why this is difficult, because I really felt -- of course,
15 we all know. We saw what happened here over two weeks. I mean, we
16 celebrated a birthday of one of the jurors. We got so many questions
17 from the jury and they were engaged in the process and they took -- they
18 thought the trial was supposed to end last Friday. And they, you know,
19 took it upon themselves to find a way to give us even up to four more
20 days, through Thursday of this week.
21 Mr. Kirwan reported back and found a babysitter for the
22 week, when he initially didn't anticipate that. And I'm sure there's untold
23 stories as to each one of them, as to what they did to spend two weeks
24 with us and then now find a way to extend it an extra four days. So
25 that's why it's difficult, because I feel bad. I feel really bad that I had to

1 do what I just did with those ten people. But I said it was the easiest
2 choice nonetheless, because it really was in my view.
3 So here's the reason why I had to do what I did and grant
4 this motion for mistrial. The law does talk about this concept of manifest
5 necessity. And case law is sort of repetitive with that notion and there's
6 definitions given of manifest necessity and the cases that talk about the
7 concept of mistrial or even new trial, but in this scenario, mistrial. And I
8 did, in this -- going through the cases this weekend, I came up with what
9 I think are the main definitions of the legal standard that's relevant here,
10 this manifest necessity standard.
11 Manifest necessity is a circumstance, which is of such an
12 overwhelming nature that reaching a fair verdict is impossible. It's a
13 circumstance where an error occurs, which prevents a jury from reaching
14 a verdict. There's a number of cases. Each side, I'm sure will -- has and
15 will find cases having to do with this area of law. But there's an
16 interesting one called *Glover v. Bellagio* found at 125 Nev. 691, where
17 David Wall found himself in an interesting spot, similar to the one that I
18 am in here.
19 But that case stands mostly for the proposition that the trial
20 judge has to have the power to declare a mistrial in appropriate cases.
21 And I think this is the appropriate case. And I really do think that
22 unfortunately, that decision on the merits of whether I should do this or
23 not is rather easy. Though difficult, nonetheless, I think rather easy to
24 get to that point. Thanks a lot. All right. And that starts with the item
25 itself. As to the chronology, as far as I understand it, I think this is a fair

1 assessment of what happened.
2 Prior to trial, of course, there's the discovery process and in
3 that discovery process, it was relevant and necessary to cause
4 Cognotion, the company, practically speaking through its CEO, Jonathan
5 Dariyanani, to disclose employment-based evidence, whether it was the
6 employment contract or information having to do with the stock options
7 or things that may have led to the employment itself or
8 contemporaneous with the employment itself. And if anything, I mean,
9 it's evident to me that that discovery effort on Cognotion's part or Mr.
10 Dariyanani's part was taken pretty seriously, because a number of items
11 were disclosed, including emails and the item in question was in that
12 batch of items disclosed.
13 It's readily apparent and admitted to and so as a finding of
14 fact, I'm certain that though the Plaintiffs endeavored in this discovery
15 course to disclose to the Defense the Cognotion documents and did so --
16 again, disclosing, you know, a vast array of documents, that for reasons
17 that I don't need to know the full extent of, but I would say it's fair to
18 conclude shortness in time, because of the discovery timeline and effort
19 having to do with this damage item, which did take place closer in time
20 to trial, volume, meaning the extent of the volume of the paperwork
21 disclosed, I think in fairness could be something Mr. Jimmerson thinks
22 about off into the future.
23 When you represent lawyers, it is difficult to not allow your
24 client, who's a lawyer, to play a role in things. And it's evident to me
25 that Mr. Dariyanani and Mr. Landess weren't only client and corporate

1 counsel by way of a relationship, but had been friends prior to that time
2 and friends since that time. And it's never been -- it hasn't been
3 mentioned to me and so I'm not just speculating. I wouldn't speculate. I
4 don't want to come up with something, but I think it's reasonable to say,
5 you know, that most likely, Mr. Landess had a hand in helping with the
6 discovery and urging Mr. Dariyanani to, you know, participate and be
7 here and provide documents.
8 And you know, maybe in some ways, there was a review
9 duty that on behalf of the whole Plaintiff team just didn't adequately get
10 done here. Whether it was Mr. Landess or whether it was somebody
11 from either office or the attorneys, it's obvious to me that
12 unfortunately -- I mean, it's okay to make mistakes and admit mistakes is
13 even better than not admitting them. But mistakes can be made. And I
14 think it's real clear that a mistake was made, attributable to the entire
15 Plaintiff team.
16 And that mistake was make sure that somehow, some way,
17 you do know everything specifically that has come about in discovery
18 that could conceptually be used at trial or precluded prior to trial. And
19 that didn't happen and that's a mistake that, again, the mistake was
20 made by the Plaintiffs. So we have the discovery. We have the
21 disclosure. In fact, it's fairly obvious to me that it was a mistake. Again,
22 the mistake being that the Plaintiffs didn't catch that this particular item
23 was in there, because they did bring pretrial motions to preclude Mr.
24 Landess' bankruptcies, gambling debt and litigations.
25 And so it's obvious to me that if the Plaintiffs would have

1 seen this item, they would have likewise brought a pretrial motion to
2 preclude it. Plus, Mr. Jimmerson, to his credit, has said in various
3 context on and off the record that he made -- he, because he took
4 responsibility as I think the lead trial lawyer here, you know, that he
5 made this mistake. Okay.
6 So then what happens from there -- we then start the trial
7 and prior to -- well, prior to trial, actually, page 44 of Exhibit 56 is marked
8 and put into one of the many binders here as Plaintiff's Trial Exhibit 56-
9 00044. And so the Plaintiffs have this as part of thousands of pages of
10 exhibits that I have sitting here to my left, potential exhibits. So it's just
11 sitting in there and the Plaintiffs don't know that it's in there, so it's part
12 of one of their trial exhibits. The trial then progresses and during the
13 trial, closer to the time that the item actually is used, Exhibit 56 is offered
14 in evidence, I believe by the Defense.
15 And when that occurred, the Plaintiffs stipulated or agreed or
16 didn't have an objection and the entire Exhibit 56 was admitted,
17 including this fateful page 44. And 45, but page 44 is where the material
18 appears that's the concern. All right. So now it's an admitted exhibit. At
19 the time of its admission, I'll go so far as to say that the Plaintiff still at
20 that point in time, didn't know that the item actually was in the exhibit.
21 And when I say the item, I mean the actual language of course in
22 question here.
23 So they're still proceeding, up to that point, all the discovery,
24 all the two weeks of trial and agreeing to admit into evidence 56. They
25 still don't know that the burning embers language is in here. All right.

1 Mr. Dariyanani testifies. Mr. Dariyanani does say the things that Ms.
2 Gordon's attributed to him, I mean -- and probably more. But he did say
3 Mr. Landess is a beautiful person, bags of money, trust him with that.
4 He's trustworthy. I would leave my daughter with him. He's
5 trustworthy.
6 And so it is my view that that did open the door to character
7 evidence, where now the Defense in its wisdom, could bring forth
8 evidence to show that Mr. Landess is not so honest. He's not so
9 beautiful or -- you know, his character is now put in question by the
10 Plaintiffs. I do believe that opened the door to that legal ability to bring
11 forth some contrary character evidence. It might not have been just Mr.
12 Dariyanani that brought it up. It could have been Mr. Landess himself
13 during his testimony or for that matter, his daughter. But clearly, Mr.
14 Dariyanani brought it up.
15 So I don't have a problem with that in a legal sense, that the
16 Defense could impeach or attempt to cross-examine on this point. The
17 problem I see with the situation, though, is in my view -- and I don't think
18 there's even any possible potential good faith dispute with this. But I'm
19 only one person. The email itself, I think a reasonable person could
20 conclude only one thing. And that is that the author is racist.
21 "I learned at an early age that skilled labor makes more than
22 unskilled labor, so I got a job in a pool hall on the weekends
23 to supplement my regular job of working in a sweat factory
24 with a lot of Mexicans. I taught myself how to play snooker.
25 I became so good at it that I developed a route in East L.A.,

1 hustling Mexicans, Blacks and rednecks on Fridays, which
2 was usually payday. I learned that it's not a good idea to sell
3 something that you cannot control and protect, a lesson
4 reinforced on in life, when an attorney friend of mine and I
5 bought a truck stop here in Las Vegas, where the Mexican
6 laborers stole everything that wasn't welded to the ground."
7 I'm not saying that as a court, I'm drawing a conclusion that
8 Mr. Landess is racist. But what I am saying is, based upon these two
9 paragraphs, it is clear to me anyway that the author, a reasonable
10 conclusion would be drawn again, that the author of these two
11 paragraphs is racist.
12 So that's the issue. The question for me is, as a matter of
13 law, in this case, which is not an employment discrimination case or
14 anything where the issue of race is clearly an element of the case, can
15 our jury in this civil case consider the issue even with the opening of the
16 door as to character of whether Mr. Landess is a racist?
17 And I think the clear answer to that is no, that that is not a
18 basis upon which this jury should or can decide the verdict. Now I know
19 that the issue having to do with fees and costs regarding the decision I
20 made to grant this mistrial is left for another day because I am going to
21 give an opportunity for the, of course, for the Defense to file a pleading
22 on this, given that the pleading I did receive -- I didn't see it until this
23 morning. It was filed by the Plaintiffs. And so, we'll have to establish
24 that little briefing schedule.
25 But it is apparent to me, you know, especially in light of the

1 court session that we've had here today, that I think that my finding is
2 the Defense had to know that the Plaintiffs made a mistake and did not
3 realize this item was in Exhibit 56.
4 Again, that's evident to me I think reasonably because there
5 were a number of motions in limine which were filed by the Plaintiffs,
6 again, asking to preclude bankruptcies, gambling debt, prior litigations.
7 I think that in conjunction with the aggressiveness that we've
8 had throughout the trial, the zealousness is real clear to me that the
9 Defense had to know this was a mistake made by the Plaintiffs. And
10 again, one of the many pages of Exhibit 56 was this page 44 and the
11 Plaintiffs didn't know about it.
12 So, they took advantage of that mistake and I don't have a
13 criticism in a general sense in taking advantage of mistakes of the other
14 side. Frankly, it happens all the time. That's not the question.
15 And while it may be well intended to cross-examine the CEO
16 with the item that you now have where you know the Plaintiffs made a
17 mistake, they didn't see it. The primary, the only reason why I granted
18 the motion for mistrial was because when putting this up on the ELMO,
19 there was no contemporaneous objection from the Plaintiffs. And I did
20 not sua sponte interject either, probably for the same reason that the
21 Plaintiffs didn't and that is it just -- the timeline is short. It's on the ELMO
22 and it's just really a matter of seconds before a human being, if you're on
23 the jury with that TV set sitting right there in front of you. It's a matter of
24 seconds, literally, you know, one to five seconds and that's it. It's there
25 for them to see.

1 I didn't feel it was my job to sua sponte interject. And here in
2 a little bit I'm going to talk about a legal concept that I think is very
3 relevant to this situation. And when I do that, I am going to talk about
4 how I do understand and sympathize in some ways with the Plaintiff's
5 position and not being able to object to it at the time or not objecting to
6 it at the time.
7 But anyway, the fact of the matter is, when this occurred,
8 even if well intended by the Defense to cross-examine when character is
9 now an issue, respectfully, it's my view that the mistake that then the
10 Defense makes is that they interject the issue of racism into the trial.
11 Once the issue of racism is interjected into the trial and by
12 the way, it does appear to me that even now and I'm not unduly
13 criticizing, but even now, it appears to me that the Defense's position is
14 that the jury can consider the issue of whether Mr. Landess is a racist or
15 not. That I disagree with to the fiber of my existence as a person and a
16 judge.
17 Ms. Brazil is an African-American. Ms. Stidhum is an African-
18 American. The Plaintiffs have stated and for purposes of this I can agree
19 philosophically, although I don't know for sure because I don't, that Mr.
20 Cardoza and Ms. Asuncion is also Hispanic.
21 The shortcoming is me, I've never really seen that kind of
22 stuff much. I don't know why that is. I probably should in today's world
23 more that everybody does. But it's probably because when my dad was
24 a chief of police when I grew up in high school, he had a partner. His
25 partner's name was Tank Smith. And Tank was a black guy, an African-

1 American guy. And he was the salt of the earth.
2 And so, as a child growing up, I saw those two running over
3 the county and doing good stuff. Dinner at our house all the time. I
4 never thought anything about that.
5 When I was -- when you get to be a JAG when you're a
6 lawyer in the service, they send you off to 10 weeks of intense military
7 training at the University of Virginia Law School. Ten weeks. It's the
8 JAG school. And they billet you. You stay in a billeting living
9 arrangement.
10 And there was 109 of us in that class. And my best friend
11 was a guy named Momeesee Mubangu [phonetic]. He was from South
12 Africa. So, he's definitely an African-American by definition. He was my
13 best friend. We went to dinner three or four times a week and we made
14 good friends.
15 And probably halfway through his wife came to town and he
16 wanted to go to dinner with her with me and we did. We met at a
17 restaurant and she was a white woman.
18 And I remember halfway through the dinner because we
19 were friends him remarking to me, you don't notice anything here? And
20 I got to tell you, I really didn't. I just didn't. I just figured people were
21 people, you know.
22 So, I'm not I'm not sure whether Mr. Cardoza, Ms. Asuncion
23 are Hispanic or not. I'm never good at that kind of stuff. But it seems
24 reasonable, I would agree with the Plaintiffs of course, the name and
25 appearance if you want to go with that. Maybe there's some stuff in the

1 biography stuff that we were given. I didn't look at it. But it seems like
2 that's the case.
3 And so, it is my view that since we have two African-
4 American jurors and potentially two Hispanic jurors, given what I do
5 think was a mistake made by the Defense in interjecting race, the issue of
6 Mr. Landess being a racist into the case. Even if well intended to cross-
7 examine, as I said, it is my thought that the Defense should have seen
8 this and done something to deal with it. They should have asked for a
9 sidebar as I tried to talk to Ms. Gordon about or I think it should have
10 dawned upon them that you're now putting the issue of racism into the
11 case in front of a jury that has four members arguably that fall into some
12 of these categories, referenced in this email.
13 By the way, the email, if you were to ask me about offense
14 that could be taken, certainly as Mr. Cardoza, Ms. Asuncion or anyone of
15 heritage of coming from Mexico, they would have to be offended by it.
16 As to the two African-Americans, it's clear to me, because
17 like I told Mr. Vogel, it's the lumping in of a term associated with African-
18 Americans, with the rest, hustling Mexicans, blacks and rednecks. That
19 is clearly an implication that these are, in the author's opinion, sort of the
20 dredges of society who I could easily take advantage of on paydays.
21 And so, I do think that this coming together, this perfect
22 storm of mistakes, the mistake the Plaintiffs made that I have described,
23 the mistake I think that the Defense made in interjecting race into the
24 case. I know the Defense doesn't think it's a mistake because they
25 apparently think that the jury can consider whether Mr. Landess is a

1 racist or not. I have to say that surprises me, but wouldn't be the first
2 time I guess I'll ever be surprised as a judge. But I got to say, that
3 surprises me, which will get to the second half of my decision, which is
4 still to come.
5 But for now, I'm making a specific finding that under all the
6 circumstances that I just described, they do amount to such an
7 overwhelming nature that reaching a fair result is impossible.
8 Further, this error that occurred in my view, how specific -- I
9 am specifically fining it prevents the jury from reaching a verdict that's
10 fair and just under any circumstance. And there's no curable instruction,
11 in my opinion, that could un-ring the bell that's been rung, especially to
12 those four. But let's don't focus only on those four. There's ten people
13 sitting over there and I do think just as a normal human being, one could
14 be offended by the comments made in this email. You don't have to be
15 Hispanic, African-American or I don't know how to say rednecks. I don't
16 know how that fits in. I don't even know what that really is.
17 But in the minimum, you don't have to be a Hispanic or
18 African-American to be offended by this note.
19 So, I feel as though my decision -- well, it was manifestly
20 necessary.
21 Now, over the weekend, I said I did look at some law having
22 to do with this, and that takes me probably as a segue into some of the
23 things that Ms. Gordon and I talked about in the court argument this
24 morning.
25 I asked her a hypothetical. I said, let's assume that you didn't

1 use Exhibit 56, page 44 of Mr. Dariyanani. Well, unless something
2 happened that we wouldn't anticipate that being that somehow the
3 Plaintiffs come to discover that the item is in there and bring it to the
4 Court's attention prior to the Defense trying to use it in some stage of the
5 trial. Now it's in evidence.
6 And I asked that hypothetical question. Let's assume you
7 didn't use it with Dariyanani, but you did use it and put it up on the
8 ELMO in closing argument. It's my view that it's really the same
9 philosophical thought, its use of the item in front of the jury and asking
10 them to draw a conclusion relevant to the verdict based upon it.
11 My view is if that would have happened, if Exhibit 56, which
12 was in evidence, was put up in closing, that under the definition given by
13 the Supreme Court of misconduct in the *Lioce* case, that I think it's likely
14 that that would be seen as misconduct because whether it's with
15 Dariyanani or whether it's in closing or both, the clear -- and now I've
16 heard it in court this morning, it seems like the Defense is still taking this
17 position. They're urging the jury to at least in part, render the verdict
18 based upon race, based upon Mr. Landess being a racist, based upon
19 something that I think is emotional in nature. This is an emotional style
20 piece of evidence.
21 The idea, I think fairly and I'm sure the Defense would
22 disagree with this, but fairly is give us a verdict. Whether it's reducing
23 the damages or give us the whole verdict, because Mr. Landess is a
24 racist. That is impermissible.
25 Even if some universe in some universal sense, if he were a

1 racist and he might deserve something like that because he's a bad
2 person, the law doesn't allow for that in this context. It's not a fair
3 verdict, not a fair trial, not a fair result to decide it because someone
4 happens to be a racist. If it were a racial discrimination case or if race
5 were somehow an issue in the case, things would be different.
6 Now, philosophically, in spending the time over the weekend
7 that I did, I wanted to try to find some law that gave me as a court
8 guidance on what I may do in this situation, because -- and the reason I
9 devoted basically my entire weekend to it was because I felt as though in
10 the eight and a half years I've been here, I'm now being called upon to
11 do, in my view, probably the most important thing I've done because of
12 the respect I have for these people on the jury. They gave us two weeks
13 of their time out of their lives. How could this -- how can anything I do
14 be more important than deciding whether they get to continue or they
15 have to go home and essentially, practically speaking, wasted two weeks
16 with us. We wasted their time.
17 So, in doing so, I have to tell you and I don't want to get all
18 the credit for this, because when I met with Mark Denton for probably it
19 was about two hours, it might have been an hour and 45 minutes. It was
20 in his office. He told me about *Lioce*. I knew about *Lioce* case, but in
21 talking to him philosophically, he said, you know, there's some concepts
22 in that case you might want to look at that could be helpful to you here
23 because *Lioce* was his case. He was the trial judge.
24 And so, that got me to thinking and I did pull and I have it
25 here outlined, and I think that case is illustrative philosophically. We're

1 not talking about obviously closing argument here, but we are talking
2 about nonetheless bringing forth an item of evidence that could cause a
3 concern to be at least considered.
4 And the other nice thing about *Lioce*, a very important thing,
5 is this concept that wait a second, it's an admitted exhibit. In other
6 words, this is unobjected to. And *Lioce* gives us some philosophy and
7 guidance on dealing with the distinction between objected to items and
8 in that case, of course, closing argument, and non-objective to closing
9 argument.
10 The court goes on to talk about something -- I said I'd talk
11 about this, so why I don't just do that right now? In *Lioce*, the idea
12 where I said I do sympathize with Mr. Jimmerson in not objecting when
13 the item first went up on the ELMO.
14 In *Lioce*, the Nevada Supreme Court says,
15 "When a party's objection to an improper argument is
16 sustained and the jury is admonished regarding the
17 argument, that party bears the burden of demonstrating that
18 the objection and admonishment could not cure the
19 misconduct's effect."
20 Okay.
21 They go on to say in the next sentence, though, that they say
22 words consistent with sympathizing with a lawyer who is in the spot now
23 to either object or not object to something that shouldn't be happening
24 in court. They say, "The non-offending attorney," so in this situation
25 that'd be the Plaintiff's side.

1 "The non-offending attorney is placed in a difficult position of
2 having to make objections before the trier of fact, which
3 might cast a negative impression on the attorney and the
4 party the attorney represents emphasizing the improper
5 point."
6 And that's what Mr. Jimmerson said to me, I think last week
7 when we were on the record, because I did ask a question or it came up,
8 why didn't you object to it? And he said words consistent with this idea
9 of, I didn't want to, you know, call further attention to it.
10 And it's clear in *Lioce* and the Nevada Supreme Court
11 sympathizes with that dilemma that a trial lawyer may have when
12 something comes up, the other sides offered something, here it's
13 argument, of course. In our case, it's an exhibit prior to that stage of the
14 trial.
15 But nonetheless, I have to say, I agree that, you know,
16 because I know from my own experience in watching this happen, I felt
17 my heart sink. And I remember thinking, oh boy, and I told you some of
18 the things I immediately thought within the first few seconds.
19 And, you know, should I have said take that down, let's have
20 a sidebar? I wish I would have at a time prior to the jury not seeing it.
21 Or even seeing it quickly and maybe not realizing the full extent of what
22 was in it and then we'd still be here and, you know, we'd be watching the
23 Stan Smith video.
24 But I didn't do that. I think for the same sort of human being,
25 non-reaction over two or three seconds that Mr. Jimmerson did. I have

1 to say. Especially because, again, that's even further evidence that the
2 Plaintiffs didn't know the item was in there.
3 All right. But in *Lioce*, they give some guidance as to
4 unobjected to, they call it unobjected to misconduct and that's in the
5 context of a closing argument.
6 And what the Supreme Court said, so that's what we're
7 talking about here. We're talking about unobjected to -- it's not
8 argument, so I'm not going to go as far as today to say it's misconduct.
9 I've said things consistent with what I think is a respectful criticism of the
10 Defense of, you know, I would -- I got to say, I would think that you look
11 at this and say, well, should we put race into the case? Could that be a
12 concern?
13 And as I take it, the Defense's position is, well, we can and
14 we did. Just like Ms. Gordon argued an hour ago to me. That's just
15 where we disagree. I have to say.
16 But in any event, the guidance from *Lioce* is that even if it's
17 unobjected to, so Exhibit 56 is a Plaintiff's trial exhibit, it's admitted by
18 stipulation and then when the item is put up on ELMO, there's no
19 contemporaneous objection.
20 But I think that this *Lioce* standard is applicable here where
21 the Supreme Court says in that case that it's still a plain error style
22 review.
23 Here's what they say. "The proper standard for the district
24 court," that's me, "to use when deciding in this context a motion for new
25 trial based upon unobjected to attorney misconduct." Now, again, I

1 know this is not a new trial request. This is a mistrial request. But I think
2 that concept is similar, certainly. And I think the philosophy of this case
3 gives guidance to the Court is all I'm saying.
4 So, again, the Supreme Court says,
5 "The proper standard the district courts to use when deciding
6 a motion for new trial based upon unobjected to attorney
7 misconduct is as follows; one, the district court shall first
8 conclude that the failure to object is critical and the district
9 court must treat the attorney misconduct issue as have been
10 waived unless plain error exists."
11 So, there you go. That, I think clearly sends me a message
12 that though the Plaintiffs acquiesced in the admittance of 56 and though
13 the Plaintiffs did not contemporaneously object when Ms. Gordon put
14 the item up, a plain error review still has to be held.
15 In applying the plain error review, the next sentence in *Lioce*
16 says,
17 "In deciding whether there is plain error, the district court
18 must then determine whether the complaining party met its
19 burden of demonstrating that its case is a rare circumstance
20 in which the attorney misconduct amounted to irreparable
21 and fundamental error."
22 Again, that concept of misconduct notwithstanding. It is my
23 specific finding that this did resolved in irreparable and fundamental
24 error, as I have described.
25 The Supreme Court says in the next sentence that, the

1 context of irreparable and fundamental error is, "Error that results in a
2 substantial impairment of justice or denial of fundamental rights such
3 that but for the misconduct, the verdict would have been different."
4 And I get that's in the new trial context, but I think it gives
5 guidance because my view is the dilemma as a judge, this thing first
6 came up as a motion to strike from the Plaintiffs. And I have to say that
7 bell can't be un-rung. That's my opinion.
8 Even if I granted the motion to strike, I don't know what type
9 of contemporaneous curative instruction I could have ever come up with
10 to ask Ms. Stidhum, especially, Ms. Brazil, especially Mr. Cardoza,
11 especially, Ms. Asuncion, especially to now disregard the author's racial
12 discriminatory comments.
13 In addition, you know, sometimes life events happen and I
14 know, we all, as lawyers -- since we deal with fact patterns, and people
15 more than most human beings -- I'm sure most lawyers think man, my
16 life is just different than everybody else's. Well, I can share that with you
17 too, from my perspective as a judge, because I deal with facts and things
18 all the time, but not necessary to my decision, but I have to say it's lost
19 on me that this whole situation is even more magnified given the recent
20 events of the weekend.
21 I mean, think about how strange this is for me too. I'm
22 sitting at home and so my wife is a hard worker. And I told her well,
23 leave me alone all day Saturday. So she goes off to her office in Howard
24 U Center at Marcus & Millichap because she does commercial realty --
25 commercial brokerage, so she goes there all day Saturday and works,

1 and leaves me alone.
2 I was hoping to be done to at least have a Sunday for good
3 health reasons, but unfortunately, that didn't happen, so I talked her into
4 going to yoga and grocery shopping without me yesterday, which she
5 went and did. And all the while, while that's happening, while I'm at
6 home by myself, you know, as I'm on my laptop, and I'm actually half the
7 time corresponding with my law clerk, who was nice enough to work on
8 Saturday with me remotely by emails and such.
9 It comes to my attention that on pretty much every 24/7 news
10 station for the entire weekend there's a story about someone who drove
11 nine hours across Texas -- nine hours across Texas to go to El Paso and
12 picked that place because in the Walmart in El Paso there would be those
13 from Mexico shopping -- that he was going to go shoot and kill, as a hate
14 crime. That's what seemed to be the upshot of that circumstance.
15 Okay. Mr. Landess may take this as a criticism. I don't really
16 mean it that much, but some would argue he drove nine hours to go kill
17 Mexicans in his mind. I'm sure that's what he thought. That's exactly
18 what I'm dealing with in this thing.
19 Okay. Then later that night what happens in Dayton? Are
20 you kidding? Another one. In this situation African Americans are killed.
21 And is that part of another hate-based incident?
22 None of that really matters to this decision, because it is my
23 strong view that in this case racial discrimination can't be a basis upon
24 which this civil jury can give their decision, but it's not lost on me that
25 it's highly likely, unless Mr. Cardoza, and Ms. Asuncion, Ms. Brazil, and

1 Stidhum put their heads in the sand and didn't watch any news, or have
2 a cell phone, or a have a friend, or have a family, or go to church, or do
3 anything, that this is out there to just aggravate what we already have as
4 my view being a big problem.
5 Bottom line is, how in the world can we expect this jury,
6 which is the verse -- and by the way, none of those people are alternates,
7 because we decided before trial that seats 9 and 10 would be the
8 alternates, so they're all four deliberating jurors -- how in the world can
9 we reasonably think that they're going to give a fair verdict and not base
10 the whole decision, at least in part, on the issue of whether Mr. Landess
11 is a racist.
12 That's the basis for the decision. The Plaintiffs can draft the
13 order. And so concludes the most difficult thing I've done since I've
14 been here.
15 Anything else from either side?
16 MR. JIMMERSON: Yes, Your Honor. Relative to the briefing
17 on the cost matter, in light of this, I don't see a need for an expeditious
18 order, or shortening time. Fourteen days from today would be an
19 approximately time for the Defense to file their opposition, and then we
20 would file the reply in the normal course, and you would give us a
21 hearing date sometime about 30 days from now.
22 THE COURT: Well, okay. Mr. Vogel, how much time do you
23 want to respond to this pleading?
24 MR. VOGEL: That's fine. Two weeks is fine. I appreciate it.
25 THE COURT: Okay. Two weeks will be?

1 THE CLERK: Two weeks will be August -- oh, you're going to
2 be gone all that week.
3 THE COURT: That's okay. It's a pleading deadline.
4 THE CLERK: Okay. August 19th.
5 THE COURT: Okay. So the opposition will be due by close of
6 business on August 19th.
7 And then a reply?
8 THE CLERK: A week later August 26th.
9 MR. JIMMERSON: Could we have the following Monday, the
10 29th?
11 THE CLERK: Okay. We'll do it the Tuesday, September 3rd,
12 Labor Day.
13 THE COURT: All right. And then the hearing, we'll probably
14 need a couple of hours for that, given our track record.
15 THE CLERK: You want it on a motion day or on a
16 Wednesday?
17 THE COURT: Well, I need two hours, so either way is fine
18 with me, but it's probably going to be a separate day of a Wednesday.
19 THE CLERK: Okay. Let me see what we have going on here.
20 THE COURT: And of course, the focus of this now is the fees
21 and costs aspect. I granted a mistrial.
22 MR. JIMMERSON: Yes, Your Honor.
23 THE COURT: Although, I do want to want to say that -- I
24 mean, there's always the idea that you can ask for reconsideration, but I
25 mean, to me, the focus really is the fees and costs aspect of the motion.

1 And I want to give some context to that too. I actually made a note here
2 on that. Let me find that note. In covering everything else, I forgot about
3 that one.
4 Oh, yeah. All right. So both sides -- here's my note -- both
5 sides made mistakes. In other words, what I'm saying is, both sides are
6 practically responsible for what happened. To me, the issue remains
7 which side is legally responsible for what happened; in other words, we
8 know the Plaintiffs made a mistake in a definitional sense if you look up
9 the word mistake in the dictionary. You made a mistake.
10 The question is, given what happened, and how it actually
11 happened, is the Defense legally responsible, or is the Plaintiff legally
12 responsible, is it 50/50, or how does that work. So that's a technical
13 point, but in causing a mistrial, is there a standard that applies that I
14 should be made aware of along these lines? Because again, there's no
15 doubt the Plaintiffs made a mistake in not catching the item and stopping
16 its use.
17 The Defense used it, as they did, as we have talked about
18 enough already, but what's the legal standard having to do with
19 responsibility because the statute talks about fees and costs, right, if you
20 cause a mistrial through misconduct, I think is what it says. And so
21 that'll be part and parcel of what we'll have to figure out.
22 But here is Terra (phonetic). So we need two hours for a
23 hearing on this motion for fees and costs having to do with a mistrial.
24 THE CLERK: How far out?
25 THE COURT: Well, what's the last date on there?

1 MR. VOGEL: The 3rd.
2 THE CLERK: September 3rd.
3 THE COURT: After September 3rd.
4 THE CLERK: Okay. So we've got -- you can either do the
5 afternoon of September 10th so 1 or 1:30 start time, or we've got the
6 11th we can either do a 9 to noon or an afternoon setting. Those are the
7 two days we have available.
8 THE COURT: Okay. September 10th or 11th work?
9 MR. JIMMERSON: What day of the week is the 10th, please?
10 THE CLERK: Tuesday is the 10th and Wednesday is the 11th.
11 MR. JIMMERSON: Yeah, we'd prefer the Tuesday the 10th.
12 THE CLERK: We could do a 1:00 start time.
13 THE COURT: How about the Defense? You okay with that?
14 MR. VOGEL: Just checking real quick. Tuesday is definitely
15 better.
16 THE COURT: Okay. Let's use 1:30 on that day and we'll have
17 the whole afternoon then, but my guess is it's a couple of hours given
18 our track record, because most likely I'll come in and I'll give a little
19 summary of the pleadings, and talk about issues, and what have you, put
20 things in context, and then we'll have argument. I mean, the whole thing
21 could be an hour, but it could be more, but we'll start at 1:30 on?
22 THE CLERK: On Tuesday, September 10th.
23 THE COURT: That'll be the hearing.
24 MR. JIMMERSON: All right.
25 THE COURT: Okay. Anything else for today?

1 THE CLERK: The Court hasn't decide on Court's Exhibit 37,
2 because there was an objection by Mr. Vogel, as if it was the same copy
3 given to -- it had to do with -- I think it has to do with some X-rays.
4 MR. VOGEL: Yeah. And that's still in dispute, so --
5 THE CLERK: Okay. So we're just going to leave that
6 unadmitted then, correct? Or how do you want to address that?
7 THE COURT: Well, that's a good question.
8 MR. JIMMERSON: I mean, that's a Court exhibit. That's not
9 an admissibility exhibit. In other words, it's not a Plaintiff or Defense
10 offering it. It's a Court exhibit. Isn't that the binder, Mr. Vogel?
11 MR. VOGEL: It is.
12 MR. JIMMERSON: So we certainly, in the sense of being
13 admissible, we certainly believe that the foundation has been laid for
14 admissibility. I mean, the Court knows what it is. It's the document
15 binder of X-rays delivered by --
16 THE COURT: Here's my question --
17 MR. JIMMERSON: -- the Plaintiffs to Defendant.
18 THE COURT: -- does it matter now anyway?
19 MR. VOGEL: No.
20 THE COURT: I mean, it really doesn't matter.
21 MR. JIMMERSON: No.
22 THE COURT: Because you're going to have a new trial
23 anyway.
24 MR. JIMMERSON: Yes. That's true, Judge.
25 THE COURT: And it'll be decided later. So I just don't --

1 respectfully, I don't know if we need to do anything else on the case --
2 THE CLERK: Okay. I just needed to have an outcome for it.
3 THE COURT: -- at this point. Okay.
4 And then, you know, I don't want to bring up anything ugly,
5 but within the next business day or two, if you could have, you know,
6 somebody come get all these binders out of our courtroom, I'd
7 appreciate it.
8 MR. JIMMERSON: Your Honor, would that be then Plaintiff
9 would obtain the Plaintiff's and Defendant's would obtain Defendant's; is
10 that fair?
11 THE COURT: However you do that --
12 MR. JIMMERSON: Would you agree, Mr. Vogel?
13 MR. VOGEL: Yes.
14 THE COURT: -- you know, is fine. I just would like to have
15 the room, you know, cleaned up.
16 MR. JIMMERSON: We'll, do it this afternoon actually.
17 THE COURT: Okay.
18 THE CLERK: And then I have Exhibit 150 that still needed to
19 be provided the CD from your side, unless you wanted to withdraw that.
20 MR. JIMMERSON: What is 150?
21 MS. POLSELLI: That's that video that was played during
22 Jonathan's testimony.
23 MR. JIMMERSON: Yes, we'll provide you that. I'll say we'll
24 do that.
25 THE CLERK: Okay. And that's it from me.

1 THE COURT: Ms. Gordon.
2 MS. GORDON: Your Honor, if I may. I think that the
3 transcript will bear this out, but I was just asking Mr. Vogel also, I think
4 that what I said was misinterpreted to an intent. I don't want this jury --
5 and never wanted this jury to make a decision based on race. What I
6 was talking about was the procedural propriety of what happened.
7 So to the extent that there is in any way characterizing my
8 action as misconduct, and I think the Court was clear, that that's not
9 what's saying, but I never wanted to interject race. That's what the email
10 said, and that's what we were using as impeachment evidence, so it was
11 not ever my intent, or I would never hope the jury would do that. That
12 was the content of the impeachment evidence that was never objected
13 to, and that was offered by Plaintiff. And we certainly had no reason to
14 think that they made this mistake. I was as surprised as anyone that they
15 didn't object to it. Never would I think that they didn't know what was in
16 their documents. So I just want to make that part clear.
17 It wasn't an ambush bomb sandbag thing. It was
18 impeachment evidence that they gave me and I used it. It wasn't for a
19 bad purpose.
20 THE COURT: All right. I think maybe where we, at this point,
21 disagree, Ms. Gordon -- because, you know, I don't feel good about any
22 of this, and one aspect of not feeling good is towards the lawyers. You
23 know, I don't feel good about what this now creates for all of you. You
24 know, it really bothers me.
25 You know, I've been to -- I know that there are those that

1 don't care what lawyers think when judges make decisions, and some of
2 those people could be judges. I don't know, but I do care. You know,
3 and I feel bad. I feel really bad.
4 And I think where we disagree is, it's just my view that, you
5 know, seeing the, at least the potential impact of what could happen
6 when you put racism in front of a juror is where we part company on this
7 thing. I mean, that's my criticism. It truly is. And, you know, they call it
8 the practice of law, because it is, and you learn in the practice of law.
9 You know, I've always learn, you know, all the time. And it's a good
10 thing to keep learning.
11 And where we probably have a difference of opinion, and
12 where we just part company is I just think that it's one of those things
13 where seeing the impact of what could happen if you put the fact that it
14 looks like Mr. Landess is a racist up in front of a jury in a medical
15 malpractice case. That's where we part company, because obviously,
16 you now know that I really think that that was too much of a bomb that
17 made it impossible now after all the effort we put in to have a fair trial.
18 What else can I tell you?
19 MS. GORDON: No, I understand. I think that the difference is
20 just if you're looking for misconduct, as opposed to mistakes. If you are
21 just -- you're okay with the mistakes that we believe are cumulative on
22 Plaintiff side, this is by no means any, you know, any worse, if it's a
23 mistake, if that's what it is, and it's one, and it's not what have you, but
24 when you're saying responsibility and legal responsibility for what
25 happened, I don't believe that you can, you know, dismiss the multiple

1 mistakes that Plaintiff did make, and if they had not been made, we
2 wouldn't be here right now with maybe not bringing up that this is what
3 this bomb consists of.
4 THE COURT: Okay.
5 MS. GORDON: I think that was my distinction, because it's
6 hard for me to hear the words attorney misconduct, attorney
7 misconduct.
8 THE COURT: Yes.
9 MS. GORDON: I know you were citing a case --
10 THE COURT: I get that. I know.
11 MS. GORDON: -- but that's hard.
12 THE COURT: And that brings up something that maybe
13 should be part of this briefing; and that is, if you look at these -- I used
14 the Lioce case as guidance obviously, and they talk about these
15 arguments that you shouldn't make as "attorney misconduct", and that's
16 an interesting thing, because I don't know if you have to have bad intent
17 to make an argument that amounts to attorney misconduct; in other
18 words, maybe it could be a mistake, you know, you could say something
19 in a closing argument that by definition under the law is misconduct, for
20 purposes of improper closing argument, but we all know that
21 misconduct when it comes to attorneys sometimes is also connoted with
22 ethical misconduct.
23 Well, you know, I know in Lioce referred Mr. Emerson to the
24 bar, because guess who prosecuted Mr. Emerson for, you know, a few
25 days in Reno once upon a time when a guy name Dave Grundy

1 represented him? Me. But anyway, that's an interesting point. It's
2 highly I think possible that certain types of argument to jury could be
3 given without any bad intent, but yet be seen as "misconduct". Certainly,
4 if there was bad intent, that's always misconduct.
5 I told you informally on Friday, Ms. Gordon, and I'm
6 comfortable enough telling you now, I don't get a feeling -- God only
7 knows, and you, but I don't get a feel -- I'll share with you -- that you had
8 some bad, horrible intent. Rather, I think -- what I really think, that both
9 you and Mr. Vogel just didn't fully realize the impact that this could have.
10 That's a mistake. Is it misconduct for purposes of the rule that's in
11 question having to do with attorneys' fees? Maybe looking at the
12 argument cases that likewise use the word misconduct will give
13 guidance as to that, because ultimately I guess I'm going to have -- well, I
14 know I'm going to have to make a decision on this fee and cost request.
15 You know, I'm not -- as I sit here now, and Friday, and over
16 the weekend, and at all times, you know, did I ever say, you know, that
17 Ms. Gordon, what a sinister, evil, you know, I didn't do that. I didn't. I
18 just -- I really felt like actually you were just being -- in your mind, you
19 were being zealous, and you did what you did. I just, again, don't think
20 you appreciated, or Mr. Vogel appreciated, the impact of what was going
21 to happen. And I don't want to take all afternoon, but I do want to spend
22 a couple of minutes saying something else to you now that it comes to
23 mind.
24 Because I want you to know I sympathize with you. Okay. in
25 deciding all these things that you decide as a judge, I can tell you, in my

1 mind, I have these little things I call traps. Every once in a while
2 something comes your way and it's a judicial trap; meaning, at first
3 blush, when you see the item you say, oh, my goodness, I'm definitely
4 going to have to do this. This is the right result. I've got to do this. And
5 every once in a while, because you're not seeing something that's
6 maybe subtle in the law, the truth is, the answer is to do the opposite. I
7 call that a bit of a judicial trap.
8 You read reported decisions? Look at the four to three
9 decision that just came out of the Supreme Court on the issue of the duty
10 of a common carrier bus. That's what I'm talking about. You know, this
11 stuff cannot always be easy.
12 So just so you know -- and I'm glad you brought this up,
13 actually, because I don't want you to leave here thinking oh, my God,
14 you know, the Court thinks I did something unethical, because I don't
15 think that. I don't think that. Rather, what I think is, in your moment of
16 being zealous, you just failed to see -- you and the whole team
17 respectfully, just failed to see the impact that putting Mr. Landess's --
18 putting evidence on that, you know -- and again, I'm not accusing him of
19 anything, but it's -- hey, it is what it is, it's evidence that one could easily
20 draw a conclusion that he's a racist. And I think the failure is not
21 recognizing that now that's interjected in the trial.
22 That's all I can say. Okay.
23 Do you want to say anything else? Or --
24 MS. GORDON: No, that was it. I just didn't want you to --
25 THE COURT: Okay. All right. Anybody else want to say

anything?

MS. GORDON: -- think I wanted them in the --

THE COURT: Okay.

MR. JIMMERSON: Thank you, Judge.

THE COURT: Take care.

MR. JIMMERSON: Appreciate all your staff for all --

[Proceedings adjourned at 12:15 p.m.]

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

John Buckley, CET-623

Court Reporter/Transcriber

Date: August 5, 2019

EXHIBIT 2

EXHIBIT 2

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

RTRAN

Race

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

1 unable at that time to fulfill his job duties as an attorney for Cognotion; is
2 that right?
3 A Well, as an attorney, and the other different functions --
4 Q Okay.
5 A -- that he did for us. That's right.
6 Q I'm going to show you an email from Plaintiff's -- I think it's
7 admitted, but it might still just be --
8 A Uh-huh.
9 Q -- Plaintiff's Proposed Exhibit 56.
10 So you know what? Let me --
11 THE COURT: All right. Is 56 in those?
12 THE CLERK: 56 is not in the book.
13 THE COURT: All right. Not admitted.
14 MS. GORDON: I don't think it's admitted yet. I'm not 100
15 percent sure.
16 THE COURT: Yeah. It's -- I'm sorry. I just want --
17 MR. JIMMERSON: The answer; I would have no objection to
18 that email. I'd just know the date, if I could?
19 MS. GORDON: And I have a view from 56, so --
20 MR. JIMMERSON: All right. I have the exhibit.
21 MS. GORDON: Can I --
22 MR. JIMMERSON: Sorry.
23 MS. GORDON: Can I move to admit Plaintiff's Proposed
24 Exhibit 56?
25 MR. JIMMERSON: No objection, Judge.

1 THE COURT: All right. 56 is admitted.
2 [Plaintiff's Proposed Exhibit 56 admitted into evidence]
3 BY MS. GORDON:
4 Q This is an email dated August 18th, 2018, between -- it looks
5 like from Mr. Landess to Tim -- is that Tim Murray at Cinematic Health?
6 A Yes.
7 Q And copied you on it. And this is after the time period that
8 Mr. Landess was on unpaid leave, correct?
9 A Yes.
10 Q And he's forwarding information about CNA. I'm assuming
11 he's referring to the ReadyCNA product?
12 Q Sending it to Tim so he can take a look at it to see what the
13 status of that product is, and in particular, he's talking about the status of
14 the product as it might be approved in Nevada, correct?
15 A Yes.
16 Q So in August of 2018, Mr. Landess was at least able to
17 perform functions such as this, correct?
18 A He's writing that email, yes.
19 Q Thanks. And you sent the termination letter to Mr. Landess
20 on January 3rd, 2019, right?
21 A Yes.
22 Q And I think you actually attached it. This is Plaintiff's
23 admitted -- I think it's admitted separately. This is from Exhibit 56. You
24 sent him the termination letter as an attachment to an email, correct?
25 A Yes.

1 et cetera, to what the numbers he gave were.
2 A No.
3 Q Mr. Dariyanani, you testified earlier that Mr. Landess is a
4 beautiful person in your mind.
5 A We're all beautiful and flawed. He's beautiful and flawed.
6 Q And you respect him a great deal?
7 A I do.
8 Q And this was, that portion any way is consistent with your
9 impression of Mr. Landess for at least the past five years, I believe you
10 said?
11 A Yeah, and he's had -- he's had tough periods as, you know,
12 as everybody has had. You know, as I've had tough periods.
13 Q And that was before five years ago, correct?
14 A I think so.
15 Q This is -- I'm going to try to blow it up, but this is an email
16 that Mr. Landess sent to you and it's part of admitted Exhibit 56, dated
17 November 15th, 2016. It's quite long, but the part I'm interested in is Mr.
18 Landess appears to be giving a summary of his prior work experience
19 and some experiences that he has gone through in his life.
20 A Uh-huh.
21 Q And the highlighted portion starts, "So I got a job working in
22 a pool hall on weekends." And I'll represent to you, Mr. Landess testified
23 earlier about working in a pool hall.
24 A Uh-huh.
25 Q "To supplement my regular job of working in a sweat factory

1 with a lot of Mexicans, and taught myself how to play Snooker. I
2 became so good at it, that I developed a route in East L.A. hustling
3 Mexicans, blacks, and rednecks on Fridays, which was usually payday.
4 From that lesson, I learned how to use my skill to make money by taking
5 risk, serious risk." When you read this, did that change your impression
6 of Mr. Landess at all?
7 A Not at all. He had told me. I knew -- I knew about Jason's
8 life. I knew that he dropped out of high school. You know, I have people
9 that work at my company that are convicted felons. Look, I believe that
10 everybody is worthy. Mr. Landess was very honest with me about every
11 aspect of his life and I leave my children -- I left my daughter with him.
12 So that's the answer to your question.
13 Q Did he sound apologetic in this email about hustling people
14 before?
15 A I think when you're 70 years old, you reflect on your life, and
16 not all of it's beautiful. Not all of it's beautiful. He doesn't feel like his
17 divorce was beautiful. I think, you know, he doesn't feel like his -- I don't
18 think Mr. Landess would sit here and tell you every moment of his life
19 was great. You know, but I know him to be a person who loves people
20 and cares for them and I feel like I know his heart and that didn't bother
21 me because I -- I know him and I saw that it's reflected back on, you
22 know, what a provincial fool he was at the time, and he was.
23 Q Does it sound to you at all from this email that he's bragging
24 about his past as a hustler, and particularly hustling Mexicans, blacks,
25 and rednecks on payday?

1 A Not at all. I think he feels -- I think he's very circumspect
2 about that whole period of his life. And if you're asking me, like, did I
3 read this as Mr. Landess being a racist and a bragger, I absolutely did
4 not and I don't read it that way now, and I wouldn't have such a person
5 in my employ.
6 Q He talks about a time when he bought a truck stop here in
7 Las Vegas when the Mexican laborer stole everything that wasn't welded
8 to the ground. You still don't take that as being at all a racist comment?
9 A I look at that as him reflecting back on his life and the way
10 that he saw things then, growing up in L.A. the way that he did. I don't
11 think that that -- I don't think it's representative of how -- I think he
12 channeled himself then. I don't think it's representative of who he is
13 now, and it's not who -- it's not the person that I've seen and know.
14 Q Thank you, Mr. Dariyanani. I appreciate it.
15 THE COURT: Thank you, Ms. Gordon.
16 MR. JIMMERSON: Is she done? Okay.
17 THE COURT: Any redirect, Mr. Jimmerson?
18 MR. JIMMERSON: Yeah, very briefly.
19 REDIRECT EXAMINATION
20 BY MR. JIMMERSON:
21 Q The -- this past was Mr. Landess 54 years ago when he was
22 19 years old; is that right?
23 A Yes.
24 Q In your observation, do people change over the course of 54
25 years?

1 A Yes.
2 Q Has Mr. Landess, at any time, and this jury certainly has seen
3 him for two-and-a-half days, ever evidenced any crass views?
4 A You mean of -- he doesn't have -- he has evidenced crass
5 views, but not on a racial basis.
6 Q No, but I'm talking about versus people, human kind, the
7 human condition?
8 A No. He's a very empathetic, kind person. Sometimes he has
9 a potty mouth, but he's a -- he's a very empathetic, kind person.
10 Q Okay.
11 A And he loves people and he cares for them.
12 Q And these emails were 122 pages. You produced them
13 voluntarily, willingly.
14 A Yes.
15 Q And they cover the range of communication between
16 Cognotion on the one hand and Mr. Landess on the other; is that right?
17 A Yes.
18 Q And only one had anything to do with a smidgen of work
19 August of 2018; everything else predated that, right?
20 A That's right.
21 Q And you paid the full $10,000 per month all before the
22 lawsuit was every commenced; isn't that right?
23 A That's right.
24 Q And Mr. Landess has already told us, but Mr. Landess is not
25 owed any money by Cognotion?

1 our plan is for the rest of today then?

2 [Bench conference - not recorded]

3 THE COURT: All right. We're just talking about the schedule

4 to make sure we don't back up anything next week, and we think that the

5 best thing to do now would be to take a comfort break, come back at

6 2:30, so that's a 15-minute break, and then stop at 3:30 today, right. So

7 in other words, we're going to watch one hour of Mr. Smith and then

8 that will be it at that point, then come back and finish up with the video

9 of Mr. Smith on Monday and carry on from there.

10 So a friendly reminder, my prior comments, of course, about

11 not talking about the case or referencing reports of it or forming opinions

12 always apply. A 15-minute comfort break, come back, and we'll watch

13 the video for an hour and then that will be it for today. We'll see you in

14 15 minutes.

15 [Jury out at 2:15 p.m.]

16 THE COURT: All right. We're off the record, and a comfort

17 break.

18 [Recess at 2:15 p.m., recommencing at 3:45 p.m.]

19 THE COURT: All right. During that last break, the reason I

20 took a few extra minutes -- sorry about that -- is, you know, it really is on

21 my mind this whole thing with the passage that was read and I just --

22 you know, first, I want to say this to be sure for the record and for

23 everybody's edification: the motion to strike is denied at this time -- at

24 this time. So I want to be clear that if lawyers file something -- trial brief,

25 law on the point, then you can do that.

1 I do want to share with you that during that last break I really
2 thought only about this. And you know, I don't know what do to do with
3 it. I really don't know what to do with it. I mean, because, you know, I
4 look at the jurors and Ms. Brazil, Ms. Stidhum -- well, they're black, and
5 I'm using the terminology that was in that email, they're black people --
6 African American people, but again, taking the word that is attributed
7 now to Mr. Landess, they're black people.
8 As far as the, you know, comment about Mexicans, I don't
9 know. I frankly, don't really know. You might think this is a little odd,
10 but I don't really even notice any of this stuff. I just, you know -- it's just
11 the way that I was raised probably. You know, I've got the most loving
12 mom. This person that I have as a mom you wouldn't even believe. I
13 oftentimes say to myself, when we all get up to heaven, there she is --
14 and I'm going to say, I knew it, I knew she was a saint, I knew it, but
15 anyway, doesn't matter.
16 I got to tell you, during that break this just -- I mean, it almost
17 -- I don't want to say it made me ill, but it's really starting to percolate in
18 me, you know, because as a judge, you know, I think one of the primary
19 things here is when that verdict comes in I want to be able to say I did
20 everything to make sure justice was had. And I've got to say, I'm not
21 sure we're in a position now that the jury has heard that to be confident
22 in justice. I mean, I've just got to tell you. I don't know what to do with it.
23 I'm not that smart. I'm just not, but I don't know what to do with it, and
24 it's the chronology of what occurred.
25 No criticism -- and I'm going to talk for a minute -- sorry -- no

1 criticism to anybody, and that includes Mr. Jimmerson, but I don't recall
2 there ever being a pretrial motion to preclude it.
3 MR. JIMMERSON: There was not, Judge.
4 THE COURT: No. Okay.
5 So if there would have been, God only knows what I would
6 have done. I mean, I don't know what definitively I'll say what I would
7 have done. I share that most likely I would have precluded it on a theory
8 that under the legal relevancy balancing test, though it might have some
9 relevance to his character, which Mr. Dariyanani put in evidence, I get.
10 As y'all know on the legal relevancy balancing test, if it's too
11 prejudicial, then you, even if relevant, even if probative, you exclude it.
12 So I'm sharing with you that most likely -- and again, I don't know what I
13 would have done. I really don't know, because I don't have a crystal ball
14 looking at the past, but I would have had, of course, as the benefit of
15 pleadings from the lawyers, which I don't have now, and I would have
16 had the benefit of argument from lawyers on the point after pleadings,
17 based upon the law that now comes about in the pleadings, but I did say
18 words consistent with what comes to mind here, and that is, I think it's
19 likelier than highly likely that I would have precluded that, because it just
20 seems to me it has a prejudicial effect that you can't just -- especially in
21 light of the constitution of this jury that you can't get around.
22 So like I said, I don't know what to do about it. I mean, if
23 there motion in limine, then we would have known. And if I would have
24 -- I'm saying it's likely I'd granted it, because most of the -- as I sit here
25 now, feels like that's the right choice, because it's so prejudicial.

1 So that didn't happen, so then we have the trial. Now here
2 comes Exhibit 56. How many pages are in Exhibit 56?
3 MR. JIMMERSON: About 122.
4 THE COURT: 122-page exhibit comes in. I did ask the clerk
5 who offered it. She doesn't keep that kind of record. That's not a
6 criticism of the clerk.
7 MR. JIMMERSON: The Defendant offered it today.
8 THE COURT: But I just was going to say, it's my thought and
9 my recollection now, based upon the back and forth here, so the Defense
10 offers a disclosed, you know, set of documents, disclosed from the
11 Plaintiff to the Defendant -- Exhibit 56 with the items that ultimately end
12 up in Exhibit 56: the 122 pages.
13 So at trial now the Defense says we want to offer 56. I don't
14 remember what context it was offered in, but it was offered, and it was
15 stipulated, and agreed to be admitted. All right. So now it's an admitted
16 exhibit; one of 122 pages, but nonetheless admitted, and then we carry
17 on.
18 After it's admitted, Mr. Dariyanani testifies -- and I'll give --
19 Mr. Vogel made a great point -- in part, what Dariyanani did was he
20 provided some character evidence, is what I would say it would have to
21 fairly be called -- character evidence as to the good attributes of Mr.
22 Landess, and he said some other things too. You know, he said we all
23 had faults, and he said some other things. I don't remember if it was all
24 after the item came up, or before and after, but I would say the fair sum
25 and substance of Dariyanani's comments on this point was that Jason

1 Landess has a good character. And you know, no objection was made
2 by that, by the way, by the Defense when he's offering these good
3 character traits.
4 And so now it's the flow of things, we now have an admitted
5 exhibit that's there, not referenced yet. Now we have a reason to bring
6 up character-type traits, because the Plaintiff has put it in issue through
7 Dariyanani.
8 We then have, of course, that moment in time where Ms.
9 Gordon puts on the ELMO and highlights with a yellow highlighter this
10 paragraph about--
11 MR. JIMMERSON: That I didn't even notice until she just put
12 it up there. What was I going to do, object to an admitted document,
13 suggesting that I'm afraid of it. I was outraged when I read it. I just was
14 -- I was blown away. I was stunned actually.
15 THE COURT: Okay. Well, that gives me further context, as to
16 where I'm going with this at this point. And I've got to say, Mr.
17 Jimmerson. This comes to exactly what I would expect from you, and if I
18 say something you don't want me to say, then you stop me. Okay. But
19 what I would expect from you, based upon all my dealings with you over
20 25 years, and all the time I've been a judge too, is frank candor -- just
21 absolute frank candor with me as an individual and a judge. It's always
22 been that way. You know, whatever word you ever said to me in any
23 context has always been the gospel truth.
24 I mean, without, you know, calling my colleagues, lawyers
25 that worked with me at the bar, or my wife as testimonial witnesses, I've

1 told all those people many times about the level of respect and
2 admiration I have for you. You know, you're in -- to me, you're in the,
3 sort of, the hall of fame, or the Mount Rushmore, you know, of lawyers
4 that I've dealt with in my life. I've got a lot of respect for you. So I say
5 that now because I think what you're really saying doesn't surprise me.
6 And I think what you're really saying is -- and again, interrupt me
7 anytime if you want -- is, well, in a multi-page exhibit, we just didn't see
8 it.
9 MR. JIMMERSON: That's exactly right, Judge. You're 100
10 percent right.
11 THE COURT: Okay. Well, there you go. And you know,
12 nobody is perfect. We all do these things.
13 MR. JIMMERSON: I already said I was mad at myself.
14 THE COURT: I know. You did say that.
15 Okay. So --
16 MR. JIMMERSON: But I think all of us have an ethical
17 obligation to practice law the right way and Kathy Gordon did not do so.
18 MS. GORDON: Your Honor, I would --
19 THE COURT: Okay. Hold on a second, if you don't mind.
20 MS. GORDON: That's smearing.
21 THE COURT: Okay. Go ahead. I'm sorry. I should --
22 MS. GORDON: And truly --
23 THE COURT: -- he's interjected, so you can too.
24 MS. GORDON: -- it's my witness, right? I'm the one who
25 questioned Mr. Dariyanani about it, and I frankly had every right to do

1 so. It was underhanded. This is an exhibit that Plaintiff disclosed during
2 discovery. It's an exhibit that they listed on their trial exhibits.
3 THE COURT: Right. It's a Plaintiff's proposed exhibit.
4 MS. GORDON: Exactly. And --
5 THE COURT: I get it. I see that.
6 MS. GORDON: -- I --
7 THE COURT: It's Plaintiff's proposed 56.
8 MS. GORDON: -- it's unfortunate that there isn't a note from
9 the clerk, because as Mr. Jimmerson will recall, when I asked has it been
10 admitted, you know, do you stipulate to it, he said I thought it already
11 had been, and I also thought it had been, but it hadn't, so I moved for the
12 admission because I had already referred to other emails in there.
13 THE COURT: All right. So --
14 MS. GORDON: And just one second, please, because this
15 has taken on this --
16 THE COURT: Okay. Sure. I didn't mean to interrupt.
17 MS. GORDON: -- scope of about me, and there's no reason
18 for the Court to think that I would do something underhanded by any
19 means, or to try to do that Plaintiff's case. They've disclosed multiple,
20 you know, multi-page exhibits, and I would be shocked if the Court told
21 me that I should have known something on page 300 and something of
22 an exhibit that's been in evidence for however long. That's my
23 responsibility, especially if it's an exhibit that I disclosed.
24 So it was stipulated to. It was admitted. And then when I
25 used it in the impeachment of Mr. Dariyanani's glowing -- I'm just going

1 to wait, because it's really important to me that you hear this, and that I
2 make a good record, because somehow it's become personal that Mr.
3 Jimmerson is Mount Everest --
4 THE COURT: You don't have to worry. I'm listening.
5 MS. GORDON: -- and I'm not, right?
6 THE COURT: I can look through a piece of paper and listen to
7 you at the same time. Go ahead.
8 MS. GORDON: Well, so it was stipulated to. Mr. Jimmerson
9 thought it had previously been stipulated to. I used it to impeach Mr.
10 Dariyanani. I had every right to do that. At least half of his testimony
11 was about the character of Mr. Landess. I understand it. He has a right
12 to say it. I have a right, on behalf of my client, to impeach that, and I did,
13 and I used a document that they disclosed and they didn't object to, and
14 they stipulated to the admission of. That's where this starts and ends,
15 Your Honor.
16 They had all these different occasions to do something about
17 it and they didn't. And I understand what you're saying. It's harmful to
18 them, but harmful things happen in a course of a trial --
19 THE COURT: Okay.
20 MS. GORDON: -- and that's what we're left with. I don't
21 think that there really is any reason to, you know, hope that the Plaintiffs
22 file something and what have you. If that happens, it's fine. I think that
23 we have an extremely clear record, but if this is going to go at all about
24 my credibility for admitting a document, or using a document that was
25 admitted, I have to draw the line. There's no reason to think that at all. I

1 did my job with the exhibit they gave me.
2 THE COURT: Okay. Let me say what the starting point for
3 me on something like this is I don't have a feeling that you did
4 something with some bad intent, bad faith, you know --
5 MS. GORDON: Well, that's what it sounds like. You
6 appreciate them.
7 THE COURT: -- I think that you, as a lawyer, felt as though
8 you had a bit of a bomb here, because obviously you saw the item, and
9 what I think is, most likely the Plaintiffs, for whatever reason, just didn't
10 see it.
11 MS. GORDON: Okay.
12 THE COURT: All right. I get it. That's probably what
13 happened. Okay. And you had, you know -- and when a lawyer has a
14 bomb and it's an admitted into evidence bomb, almost all lawyers are
15 going to use it.
16 MS. GORDON: And no objection when it is used.
17 THE COURT: I get it.
18 MS. GORDON: Right.
19 THE COURT: But here is my concern: is it at this point, too
20 much of a bomb to where it might have went further than blowing up
21 maybe the evidentiary item in question and blew up the whole trial. I
22 mean, that's what I'm worried about at this point. You see what I'm
23 saying? I mean, I can't fault you. I won't. I'll go as far as say, I'm
24 convinced, Ms. Gordon, you're looking at me, you're talking to me, I
25 don't think that you felt like what you were doing was some sort of

1 unethical thing -- okay -- to go that far, but now I have to deal with what
2 did happen under the circumstances. Okay.
3 MS. GORDON: I'm just asking the Court -- I understand that,
4 and I appreciate it. I'm just wondering if perhaps we could that and talk
5 about what happened without talking about how Mr. Jimmerson
6 somehow is above reproach, which clearly is making some kind of
7 distinction about the party who used the document. I don't think --
8 THE COURT: Well --
9 MS. GORDON: -- that's necessary.
10 THE COURT: -- I mentioned those -- you're criticizing what I
11 said. I mentioned it for a reason that I think made sense and that is, I
12 was about to ready to say that I had drawn a conclusion that Mr.
13 Jimmerson just didn't have it in his mind that this item was in one of the
14 122 pages. He might not have seen it, and that's why I mentioned my
15 thoughts about Mr. Jimmerson in that context. Okay.
16 Do you have a problem with what I said about him?
17 MS. GORDON: No. I just wish that we could focus more on
18 the procedural part of it than the personal aspects of the attorneys who
19 did it. I don't have a problem with what you said about Mr. Jimmerson.
20 I think I just took it as perhaps making a distinction.
21 THE COURT: Okay. Well, I mean, if I had dealt with you for
22 25 years, my guess is, consistent with what I've seen with you, I mean,
23 you really do care about what you're doing. It's evident in anybody who
24 watches you as an attorney, you know.
25 MS. GORDON: I think and I just wouldn't do something

1 underhanded like that.

2 THE COURT: I've known you for two weeks.

3 MS. GORDON: It just, it was admitted. It wasn't objected to.

4 It was their exhibit and I used it.

5 THE COURT: All right. So one of the other reasons I brought

6 all that up was, is I look at the pretrial motion practice, the motion in

7 limine practice, that the Plaintiffs asked me to preclude Mr. Landess's

8 gambling history. Remember the $400,000 marker that he had? His

9 bankruptcies, and this other litigation that he was in. They did not ask to

10 preclude this item in question now, so that's further, I think, evidence of

11 the fact that they just missed it. What else can I tell you?

12 So the issue for the Court is this: in a situation where the

13 Plaintiffs, in good faith, miss something like that, but the Defense didn't

14 obviously, then the Defense uses it, I don't want to get into whether it

15 was good or bad faith either, because I don't feel -- I don't feel that you

16 did something with an intent that was bad in an ethical, you can't do this

17 as a lawyer sense.

18 I think what I think is that you felt as though you had a bit of

19 a bomb here, because you had known this was in the exhibit, and you

20 dropped it at an appropriate time, in your view. That all happened.

21 Okay. For me though, as a judge, now presiding over a trial with, you

22 know, two black jurors, and I'm using Mr. Landess's word, that's what he

23 said in the email describing African-Americans -- and I don't know if the

24 other item -- the Mexican item would be relevant to the ethnicity of other

25 jurors, because I'm not good at that kind thing.

1 Does anybody know that?
2 MR. JIMMERSON: Yes, Your Honor. Mr. Cardoza [phonetic]
3 is Hispanic.
4 THE COURT: Okay. All right.
5 MR. JIMMERSON: And Ms. Ascuncion may also be,
6 although, she's not Mexican, I wouldn't think. I would think she might be
7 Filipino, or something like that.
8 THE COURT: Okay. So we have four jurors, potentially, that
9 fall into reasonably, you know, a situation where when they see that,
10 they would be offended, because it has to do with their ethnicity, or their
11 race. We got a problem and I just don't know how to fix it. You know,
12 that's what I did over this last break. I mean, this kind of came and went.
13 This about as big a problem as we could have, because of the way this
14 happened. I mean, it's an admitted exhibit.
15 And what I wanted to say too, I've said it a few times, when
16 Ms. Gordon is using it -- I appreciate what you're saying, Mr. Jimmerson,
17 but you know, you could have said sidebar. You could have just said
18 hold on a second, sidebar. You know, I mean, you could have.
19 MR. LITTLE: But it was put up in front of the jury, Judge,
20 with yellow highlighting on two sentences. I mean, it's there. They're
21 looking right at it.
22 THE COURT: I get it, but at some point, as soon as you
23 realize what's going on, you could say "sidebar", you know; you know?
24 But what I'm trying to say is, here's the construct. All right. Let me put it
25 to you this way, you know, I'm at the judicial college, hypothetically. I'm

1 there, and there's 200-and-some judges in the audience. And maybe I'm
2 part of a panel, presenting. And I say, okay, here's what we have.
3 In pre-trial disclosures, the plaintiffs provide to the defense a
4 number of emails that their client -- that the plaintiff sent. And in one of
5 the emails is a passage where he relates that when he was younger, he
6 learned to play pool. And he hustled Blacks, Mexicans, and rednecks, on
7 payday. And there's an email that says that. And maybe I didn't give the
8 context of the case. I don't need to do that now, but -- and then, for
9 some reason, is -- well, it's disclosed. It's disclosed to the defense. And
10 then it's a -- for some reason, it's in a plaintiff's proposed exhibit, pre-
11 trial and during the trial. In front of the jury, the defense moves to admit
12 it. No objection. It's admitted by stipulation, the whole 122 pages.
13 MR. JIMMERSON: The reason that it is in Plaintiff's list is, in
14 my understanding, is that Mr. Dariyanani provided it to the Defendant.
15 THE COURT: Okay. Well, there you go. And so -- right. He's
16 trying to disclose everything. And he -- even though he's a lawyer, he
17 disclosed that, but he should've probably disclosed everything. And the
18 issue becomes, is it usable or not?
19 MR. JIMMERSON: That's right.
20 THE COURT: Okay. So then, now it's in evidence. And then,
21 not objected to, as entered by the defense. And then when the defense
22 uses it. No objection. And then in retrospect, but in short-time
23 retrospect, I guess you could say, within, I don't know, a half hour after a
24 break, the plaintiffs say, strike it. It's too prejudicial. And then I say to
25 the 200 judges in class there at the college, what do you do? I doubt any

1 one of those 200 judges are going to give the model answer. So I need
2 help on this. I'm just telling you, I have no idea what to do, but I'm
3 sharing with you that, given the jury that we have, and even if it wasn't
4 the jury we have, that's not so significant to me. Although, I have -- I
5 think it does have a higher level of significance when you have people
6 that fall into these -- into what is clearly, at least, you know, without any
7 context being given to it, it's a racial comment.
8 So now you have jurors who could draw a conclusion that
9 he's a racist. And that's why I -- and I'm the one that mentioned it,
10 nobody else did, that's okay -- I mentioned this idea of jury nullification.
11 I realized that that's a concept that usually comes up after a verdict. And
12 it's, you know, a basis for a new trial. You know, if it happens in a
13 criminal case, well, so be it. You cannot do anything about that. But if it
14 happens in a civil case -- because of double jeopardy -- but if it happens
15 in a civil case, it's grounds for a new trial. I just think of -- that
16 philosophy comes to mind here.
17 Do we have a situation that's curable? Should I do anything?
18 Or should I do something? I mean, and it -- you know, without the
19 benefit of further briefing and all that, like I say, most of me, as I sit here,
20 thinks I need to do something. I denied a motion to strike it. I don't
21 know what to do about it. I mean, I -- the --
22 MR. JIMMERSON: Well, why don't we give ourselves the
23 weekend to think about? I did want to mention though that the
24 Defendant's also put, in front of Mark Mills, a PT record, where he said
25 he'd fallen twice, and then ripped it off. And just by his quick brain, he

1 saw the very next entry, which was, I was not hurt. It's just -- I'm very
2 concerned about this. But this is -- this is so much more dimensionally
3 more powerful and more prejudicial than any other parlor tricks.
4 THE COURT: Okay. This is serious.
5 MR. JIMMERSON: This is serious.
6 THE COURT: I do want to say, I'd like to stay away from the
7 idea of lawyers doing things with bad intent. I know, Mr. Jimmerson,
8 you mentioned that a few times. To me, the real issue now is not that.
9 To me, the real issue is, fair trial, jury nullification. We've got something
10 in that may be unduly prejudicial.
11 MR. JIMMERSON: Let's focus on that, Judge.
12 THE COURT: You know, and what to do about that if you
13 were me at this point.
14 MR. JIMMERSON: Yes, sir.
15 THE COURT: I mean, I guess the last thing I'll say -- and I'll
16 shut up for now, then you all can say what you want and we'll see where
17 it goes -- I don't know that it's curable. I've got to tell -- I'm just going to
18 share that with you. I don't know if the fact -- when I mean, "it", that's a
19 pronoun, so let me not use pronouns. I don't know if the situation
20 concerning the fact that we've got this jury that's heard that, is curable.
21 Because even if I came in and said, I grant your motion to strike. Okay. I
22 mean, if Judge Ito said, members of the jury, disregard everything
23 Fuhrman said. I decided to strike it. Okay. I mean, that just comes to
24 mind.
25 MR. JIMMERSON: Yes, sir.

1 THE COURT: How do you unring this kind of bell, is my
2 question. I -- you know, what else can I tell you? I said I'd stop talking.
3 You know, I just guess as more and more goes on, this is just bothering
4 me. But I will stop on this point now. But anybody want to say anything
5 on this point before we do the deposition?
6 MR. JIMMERSON: Your Honor, the Plaintiff reserves his
7 rights. We'll address it on Monday.
8 THE COURT: And by the way, I just did all that without your
9 clients here.
10 MR. JIMMERSON: All right.
11 THE COURT: So I -- nobody stopped me on that, so I
12 assumed their waiving their presence at this point.
13 MR. JIMMERSON: Yeah. He just is tired and went on,
14 Judge.
15 THE COURT: Okay.
16 MR. JIMMERSON: Exhausted.
17 MR. VOGEL: I mean, my only comment would be, you know,
18 and you brought it up earlier, Your Honor, is, you know, this was a
19 Cognotion document. There was a motion to continue trial. That was
20 denied -- proposed and denied. Perhaps if there had been more time,
21 continuance granted, maybe this wouldn't have happened. And again,
22 that goes back on them.
23 MR. JIMMERSON: It doesn't make it right, Judge. I'll just
24 wait until Monday.
25 THE COURT: All right. Well, I said I'd stop, so I will. All

1 right. That takes us to -- oh, not coming on the merits of it anymore, I do
2 want to let you know that I told my law clerk, because I get to have a free
3 lawyer in the job, known as my law clerk, and I told her to do nothing but
4 work on this issue. I'm -- I mean, and she's back there now. All I want to
5 do is see, is there some kind of law -- is there a law that I don't know
6 about that talks about this? I don't' think we're going to find something
7 perfectly on point with the events that did happen, especially, you know,
8 the admitted exhibit. You know, are we going to find a case where the
9 plaintiffs disclosed something like this, they don't see it, defense has it,
10 then it's admitted by stipulation, then it's used and not objected to, and
11 then later albeit contemporaneous, the motion to strike comes up?
12 Or otherwise known as the issue that we now have
13 something unduly prejudicial to potentially cause jury nullification
14 philosophy, you know, in the air. I mean, chances are, she's not going to
15 find something on point, but I am trying to see if I could find something
16 as to something, you know, has something like this ever happened
17 where you have an admitted exhibit and then it comes to light that
18 something in the admitted exhibit is too prejudicial? I think that's all we
19 can hope to find, a case where something was admitted in the course of
20 a trial, and then it became -- hypothetically, it became obvious that it's
21 unduly prejudicial and it's stricken. You have to throw into that that the
22 jury's seen it somewhere along the way, too. So maybe she'll find
23 something. Maybe you'll find something. But I just -- that's how serious
24 I need to take it. I've got her working on it, and I told her I'd give her a
25 comp day if she worked on the weekend on it. But that became not

1 relevant, because she's leaving anyway. She's going to go work for Tony
2 Scrow [phonetic] in a week. And she has to be here all next week to train
3 her replacement, so she doesn't get to get a comp day, I guess. She's a
4 sandwich.
5 Okay, turning to the Stan Smith item.
6 MR. VOGEL: Yes, Your Honor. We are ready to kind of fly
7 through it, if you'd like.
8 THE COURT: Okay, what we're going to probably have to do
9 -- this is a minor point -- we're going to have to lock the courtroom doors
10 because our marshal has to leave. And then she has a final exam in law
11 school to go take. And we don't have anybody to cover, because it's
12 Friday and they're all gone. So I'm going to -- did you lock the door?
13 THE CLERK: Yeah.
14 THE COURT: Okay. So nobody can get in. It's -- you can get
15 out, but you can't get in, so if you -- if somebody wants to get in, they're
16 going to have to call you. Is there anybody you're expecting to come in?
17 MR. JIMMERSON: No, Your Honor.
18 MR. VOGEL: No objection, Your Honor.
19 THE COURT: And we'll let them in. Otherwise, that's it.
20 We're going to be without a marshal. If anybody has a concern about
21 that, then I'll see you later. We'll just leave. I don't have a concern about
22 it.
23 MR. VOGEL: I don't either.
24 MR. JIMMERSON: No, Judge.
25 THE COURT: Okay. So we'll just -- we'll carry on without a

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**

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.

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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

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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

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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

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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,

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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

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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 9 day of ~~August~~ Sept, 2019.

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

Submitted by:
JIMMERSON LAW FIRM, P.C.

9/4/19

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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 Neveada professional limited liability compay 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 NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFF'S MOTION FOR A MISTRIAL

PLEASE TAKE NOTICE that the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFF'S MOTION FOR A MISTRIAL** was entered in the above-entitled matter on the 9th day of September, 2019, a copy of which is attached hereto.

DATED this 9 day of September, 2019.

THE JIMMERSON LAW FIRM, P.C.

JAMES J. JIMMERSON, ESQ.
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Attorney for Plaintiff,
JASON GEORGE LANDESS

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 9th day of September, 2019, I caused to be served a true and correct copy of the foregoing **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFF'S MOTION FOR A MISTRIAL,** as indicated below:

_X_ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada;

_X_ by electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk;

To the individual(s) or attorney(s) listed below at the address, email address, and/or facsimile number indicated below:

S. Brent Vogel, Esq.
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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**

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

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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

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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

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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,

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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

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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 9 day of ~~August,~~ Sept 2019.

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

Submitted by:
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9/4/19
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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 6

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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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1 either one of us not recognizing an attorney client privilege document
2 mixed in with another 80 pages of documents, and then the party
3 recognizing that there is a prejudicial document there cannot under both
4 ethics, as well as our rules of procedure, then go forward and misuse
5 that information.
6 And the questions asked by the Court are the appropriate
7 ones in light of what the Defense knew that they had, and intended to
8 use. There was no calling of attention to that email, Your Honor. I don't
9 know where Ms. Gordon gets the idea that she asks repeated questions
10 about it. She didn't. She asked no questions until she placed the words
11 up on the Elmo, before she sprung it upon us. And the springing of it,
12 which she concedes is the case, is the Defense premeditatedly and
13 intentionally doing so. This -- opposing counsel also stated that Mr. -- or
14 Dr. Debiparshad's race is acquired at depo. One single question was are
15 you -- is your family -- are you from India. I think the answer was yes, or
16 something like that. But at trial, not a single word was asked about that.
17 Plaintiff did not seek upon that. The man is educated in Canada, went to
18 school up, apparently in Canada. There's no comment upon that. There
19 wasn't one question of Dr. Debiparshad that went anywhere near any of
20 those issues. This record is clear of the Plaintiff's bona fides in terms of
21 such a devastating subject matter like that. Furthermore, the Defense is
22 bound to, and as the Plaintiffs to know, under *Lioce* what -- where the
23 line is, and it's a fairly bright line in terms of somebody as -- you know,
24 as astounding as this type of a question and information is this is not a
25 negligent act. This is not something that was not appreciated by the

1 Defense. They intended to use it exactly in the fashion that they did.
2 They just didn't appreciate, I don't think, the -- the predictable
3 response of the Court, and of the Plaintiffs relative to the misuse of this
4 type of explosive information that had no place at trial. Mr. Landess has
5 never placed race as an issue and the Court's asked the question directly
6 of the Defense, do you think that race has a place in this case. And, of
7 course, the answer has to be yes for the Defense, because they're trying
8 to justify their -- their misbehavior. But that's not in, at least our review
9 of the case law, warranted that there cannot be a good faith basis for the
10 use of this document in the fashion they did.
11 Especially understanding that it hadn't been offered by the
12 Plaintiffs at any time. It hadn't been the subject matter of a single
13 question in a single deposition in which there were more than 15
14 depositions taken. It wasn't in -- that wasn't discussed in Mr. Landess'
15 two different days of depositions. It wasn't examined of him on three
16 days of direct and cross examination doing this trial. Not one subject
17 matter came up. This was a gut shot at the end of the case, used in a
18 premeditated way by the Defendant to gain an advantage before the
19 jury. And in doing so, they well beyond crossed the line with the *Lioce*.
20 They created an irreversible prejudice to the Plaintiff. And more
21 importantly, I think, to the administration of justice and to this Court.
22 Thank you, sir.
23 MR. VOGEL: If I may, just briefly, Your Honor, you know
24 evidence of bad acts is always prejudicial. Usually it's in the context of
25 other crimes, violent acts ands things along those lines. But it's always

1 prejudicial, but it's also admissible. And in this case, Your Honor, if this
2 Court is considering granting a mistrial, I would ask the Court to do so
3 after the jury comes back with a verdict. At least in that instance, it
4 would be treated more as a motion for a new trial, and there's still a
5 chance, who knows, I mean the jury could come back in Plaintiff's favor
6 and the issue is moot. But the parties have already spent, as everyone
7 agrees, tens, if not hundreds of thousands of dollars getting to this point
8 now. And to pull the plug at this point, is potentially very prejudicial to
9 all of the litigants involved. I would say the better -- the better course
10 would be to allow the case to go to verdict, or in the alternative, to not
11 release the jury, and allow -- allow the parties to take an emergency writ
12 to the Supreme Court, just to see if they would weigh in on is this
13 something that's overly prejudicial.
14 MR. JIMMERSON: And my response is Plaintiff's motion is
15 simply the Defense should have been more circumspect about this, and
16 thought about this before they created this error in the record.
17 THE COURT: All right. This decision, I'll share with you. It's
18 interesting, because in some ways it's the most difficult decision I've
19 made since I've been a Judge, but in other ways it's the easiest decision
20 I've ever made since I've been a Judge. I'm going to explain in detail
21 my thoughts and make a record as to why I've reached this conclusion.
22 But the Plaintiff's motion for mistrial is granted. At 11:00 I'll bring in the
23 jury and I'm going to excuse me.
24 After they're excused, I will make a record why this is the
25 appropriate and in my view, the only choice that can be made under the

1 circumstances. We'll be back in ten minutes.
2 [Recess at 10:57 a.m., recommencing at 11:05 a.m.]
3 THE COURT: Please bring in the jury.
4 MR. VOGEL: Your Honor, are you going give us an
5 opportunity to speak with the jurors?
6 THE COURT: No. We're going to let them go. I think they've
7 been through enough.
8 THE MARSHAL: Parties rise for presence of the jury.
9 [Jury in at 11:05 a.m.]
10 THE MARSHAL: All present and accounted for.
11 THE COURT: All right. Please have a seat, everyone.
12 Members of the jury, well, welcome back. You might note that your
13 notepads are not with you and that's because of what I'm about to tell
14 you. Before I tell you what I'm going to tell you, however, I do want to
15 look at all of you and let you all know thank you so much for the time
16 that you've spent with us. It'll be a two weeks I know I'll never forget.
17 You as a jury have been very attentive. You've asked wonderful
18 questions.
19 I've learned to not only respect you but actually like you all
20 and you're exactly the way juries should be, I think. Always on time,
21 attentive, good questions. But you can get the feel for where I'm going
22 with this, of course and that is with your notepads not being there and
23 what have you. I guess the best I can say to you is that from time to
24 time -- and it doesn't happen very often. But from time to time, there are
25 things that come to a Court's attention that you have to deal with. In

1 other words, sometimes -- I guess a way to say it is a court and me ad a
2 judge, since this is my court here, you can only deal with the issues that
3 come your way.
4 Often times, they're not created by you whatsoever, but they
5 come your way and you have to deal with them. Never afraid to do that.
6 Sometimes those things can be difficult and they can be time
7 consuming. So that type of thing did come my way. And it wasn't
8 something that the Court created, but nonetheless, the Court has to
9 respect that has to be dealt with. And so I want to let you know that over
10 the last few hours -- obviously you've been waiting out there since 9:00
11 this morning -- I've dealt with some things.
12 And obviously you knew that, because I had my martial
13 update you a couple times and you knew we were working on legal
14 items. I do want to tell you that because of what I dealt with and the
15 decisions that were made, the case, as far as your participation, has been
16 resolved. And so I just want to tell you thank you for your time. It's been
17 wonderful, in my view, to have you here for these couple weeks. I think
18 it's allowable for me to say I'm sorry that we don't get to finish the case
19 with you this week. You're excused. You all take care.
20 [Jury out at 11:09 a.m.]
21 THE COURT: All right. Please have a seat, everyone.
22 Obviously I'm going to stay on the record and well, here's the decision
23 having to deal with obviously granting that motion for mistrial. I said it
24 was the most difficult thing I've done since I've been here and I assure
25 you, it is. Even more difficult than the time I was covering for Abbi Silver

1 and probably the worse child neglect case in the history of the State of
2 Nevada was one that sentenced someone on. I won't go into those facts,
3 but I -- suffice to say that the lawyer presenting the case was Mary Kay
4 Holthus, who's now a judge.
5 And I had to take a couple of breaks, because of the sadness I
6 felt and the difficulty in dealing with what had happened to this child.
7 This is worse than that for me, because in the time I've been here -- and
8 my whole group knows this to be true -- and it -- you know, I don't even
9 know where it came from, probably. Probably just a life of events. To
10 me, the most important part of the process is the jury. And I can't even
11 find the right words to describe how I really feel about those that come
12 in and serve on juries, other than to say I have a tremendous respect for
13 them and the mission that they're tasked with performing.
14 That's why this is difficult, because I really felt -- of course,
15 we all know. We saw what happened here over two weeks. I mean, we
16 celebrated a birthday of one of the jurors. We got so many questions
17 from the jury and they were engaged in the process and they took -- they
18 thought the trial was supposed to end last Friday. And they, you know,
19 took it upon themselves to find a way to give us even up to four more
20 days, through Thursday of this week.
21 Mr. Kirwan reported back and found a babysitter for the
22 week, when he initially didn't anticipate that. And I'm sure there's untold
23 stories as to each one of them, as to what they did to spend two weeks
24 with us and then now find a way to extend it an extra four days. So
25 that's why it's difficult, because I feel bad. I feel really bad that I had to

1 do what I just did with those ten people. But I said it was the easiest
2 choice nonetheless, because it really was in my view.
3 So here's the reason why I had to do what I did and grant
4 this motion for mistrial. The law does talk about this concept of manifest
5 necessity. And case law is sort of repetitive with that notion and there's
6 definitions given of manifest necessity and the cases that talk about the
7 concept of mistrial or even new trial, but in this scenario, mistrial. And I
8 did, in this -- going through the cases this weekend, I came up with what
9 I think are the main definitions of the legal standard that's relevant here,
10 this manifest necessity standard.
11 Manifest necessity is a circumstance, which is of such an
12 overwhelming nature that reaching a fair verdict is impossible. It's a
13 circumstance where an error occurs, which prevents a jury from reaching
14 a verdict. There's a number of cases. Each side, I'm sure will -- has and
15 will find cases having to do with this area of law. But there's an
16 interesting one called *Glover v. Bellagio* found at 125 Nev. 691, where
17 David Wall found himself in an interesting spot, similar to the one that I
18 am in here.
19 But that case stands mostly for the proposition that the trial
20 judge has to have the power to declare a mistrial in appropriate cases.
21 And I think this is the appropriate case. And I really do think that
22 unfortunately, that decision on the merits of whether I should do this or
23 not is rather easy. Though difficult, nonetheless, I think rather easy to
24 get to that point. Thanks a lot. All right. And that starts with the item
25 itself. As to the chronology, as far as I understand it, I think this is a fair

1 assessment of what happened.
2 Prior to trial, of course, there's the discovery process and in
3 that discovery process, it was relevant and necessary to cause
4 Cognotion, the company, practically speaking through its CEO, Jonathan
5 Dariyanani, to disclose employment-based evidence, whether it was the
6 employment contract or information having to do with the stock options
7 or things that may have led to the employment itself or
8 contemporaneous with the employment itself. And if anything, I mean,
9 it's evident to me that that discovery effort on Cognotion's part or Mr.
10 Dariyanani's part was taken pretty seriously, because a number of items
11 were disclosed, including emails and the item in question was in that
12 batch of items disclosed.
13 It's readily apparent and admitted to and so as a finding of
14 fact, I'm certain that though the Plaintiffs endeavored in this discovery
15 course to disclose to the Defense the Cognotion documents and did so --
16 again, disclosing, you know, a vast array of documents, that for reasons
17 that I don't need to know the full extent of, but I would say it's fair to
18 conclude shortness in time, because of the discovery timeline and effort
19 having to do with this damage item, which did take place closer in time
20 to trial, volume, meaning the extent of the volume of the paperwork
21 disclosed, I think in fairness could be something Mr. Jimmerson thinks
22 about off into the future.
23 When you represent lawyers, it is difficult to not allow your
24 client, who's a lawyer, to play a role in things. And it's evident to me
25 that Mr. Dariyanani and Mr. Landess weren't only client and corporate

1 counsel by way of a relationship, but had been friends prior to that time
2 and friends since that time. And it's never been -- it hasn't been
3 mentioned to me and so I'm not just speculating. I wouldn't speculate. I
4 don't want to come up with something, but I think it's reasonable to say,
5 you know, that most likely, Mr. Landess had a hand in helping with the
6 discovery and urging Mr. Dariyanani to, you know, participate and be
7 here and provide documents.
8 And you know, maybe in some ways, there was a review
9 duty that on behalf of the whole Plaintiff team just didn't adequately get
10 done here. Whether it was Mr. Landess or whether it was somebody
11 from either office or the attorneys, it's obvious to me that
12 unfortunately -- I mean, it's okay to make mistakes and admit mistakes is
13 even better than not admitting them. But mistakes can be made. And I
14 think it's real clear that a mistake was made, attributable to the entire
15 Plaintiff team.
16 And that mistake was make sure that somehow, some way,
17 you do know everything specifically that has come about in discovery
18 that could conceptually be used at trial or precluded prior to trial. And
19 that didn't happen and that's a mistake that, again, the mistake was
20 made by the Plaintiffs. So we have the discovery. We have the
21 disclosure. In fact, it's fairly obvious to me that it was a mistake. Again,
22 the mistake being that the Plaintiffs didn't catch that this particular item
23 was in there, because they did bring pretrial motions to preclude Mr.
24 Landess' bankruptcies, gambling debt and litigations.
25 And so it's obvious to me that if the Plaintiffs would have

1 seen this item, they would have likewise brought a pretrial motion to
2 preclude it. Plus, Mr. Jimmerson, to his credit, has said in various
3 context on and off the record that he made -- he, because he took
4 responsibility as I think the lead trial lawyer here, you know, that he
5 made this mistake. Okay.
6 So then what happens from there -- we then start the trial
7 and prior to -- well, prior to trial, actually, page 44 of Exhibit 56 is marked
8 and put into one of the many binders here as Plaintiff's Trial Exhibit 56-
9 00044. And so the Plaintiffs have this as part of thousands of pages of
10 exhibits that I have sitting here to my left, potential exhibits. So it's just
11 sitting in there and the Plaintiffs don't know that it's in there, so it's part
12 of one of their trial exhibits. The trial then progresses and during the
13 trial, closer to the time that the item actually is used, Exhibit 56 is offered
14 in evidence, I believe by the Defense.
15 And when that occurred, the Plaintiffs stipulated or agreed or
16 didn't have an objection and the entire Exhibit 56 was admitted,
17 including this fateful page 44. And 45, but page 44 is where the material
18 appears that's the concern. All right. So now it's an admitted exhibit. At
19 the time of its admission, I'll go so far as to say that the Plaintiff still at
20 that point in time, didn't know that the item actually was in the exhibit.
21 And when I say the item, I mean the actual language of course in
22 question here.
23 So they're still proceeding, up to that point, all the discovery,
24 all the two weeks of trial and agreeing to admit into evidence 56. They
25 still don't know that the burning embers language is in here. All right.

1 Mr. Dariyanani testifies. Mr. Dariyanani does say the things that Ms.
2 Gordon's attributed to him, I mean -- and probably more. But he did say
3 Mr. Landess is a beautiful person, bags of money, trust him with that.
4 He's trustworthy. I would leave my daughter with him. He's
5 trustworthy.
6 And so it is my view that that did open the door to character
7 evidence, where now the Defense in its wisdom, could bring forth
8 evidence to show that Mr. Landess is not so honest. He's not so
9 beautiful or -- you know, his character is now put in question by the
10 Plaintiffs. I do believe that opened the door to that legal ability to bring
11 forth some contrary character evidence. It might not have been just Mr.
12 Dariyanani that brought it up. It could have been Mr. Landess himself
13 during his testimony or for that matter, his daughter. But clearly, Mr.
14 Dariyanani brought it up.
15 So I don't have a problem with that in a legal sense, that the
16 Defense could impeach or attempt to cross-examine on this point. The
17 problem I see with the situation, though, is in my view -- and I don't think
18 there's even any possible potential good faith dispute with this. But I'm
19 only one person. The email itself, I think a reasonable person could
20 conclude only one thing. And that is that the author is racist.
21 "I learned at an early age that skilled labor makes more than
22 unskilled labor, so I got a job in a pool hall on the weekends
23 to supplement my regular job of working in a sweat factory
24 with a lot of Mexicans. I taught myself how to play snooker.
25 I became so good at it that I developed a route in East L.A.,

1 hustling Mexicans, Blacks and rednecks on Fridays, which
2 was usually payday. I learned that it's not a good idea to sell
3 something that you cannot control and protect, a lesson
4 reinforced on in life, when an attorney friend of mine and I
5 bought a truck stop here in Las Vegas, where the Mexican
6 laborers stole everything that wasn't welded to the ground."
7 I'm not saying that as a court, I'm drawing a conclusion that
8 Mr. Landess is racist. But what I am saying is, based upon these two
9 paragraphs, it is clear to me anyway that the author, a reasonable
10 conclusion would be drawn again, that the author of these two
11 paragraphs is racist.
12 So that's the issue. The question for me is, as a matter of
13 law, in this case, which is not an employment discrimination case or
14 anything where the issue of race is clearly an element of the case, can
15 our jury in this civil case consider the issue even with the opening of the
16 door as to character of whether Mr. Landess is a racist?
17 And I think the clear answer to that is no, that that is not a
18 basis upon which this jury should or can decide the verdict. Now I know
19 that the issue having to do with fees and costs regarding the decision I
20 made to grant this mistrial is left for another day because I am going to
21 give an opportunity for the, of course, for the Defense to file a pleading
22 on this, given that the pleading I did receive -- I didn't see it until this
23 morning. It was filed by the Plaintiffs. And so, we'll have to establish
24 that little briefing schedule.
25 But it is apparent to me, you know, especially in light of the

1 court session that we've had here today, that I think that my finding is
2 the Defense had to know that the Plaintiffs made a mistake and did not
3 realize this item was in Exhibit 56.
4 Again, that's evident to me I think reasonably because there
5 were a number of motions in limine which were filed by the Plaintiffs,
6 again, asking to preclude bankruptcies, gambling debt, prior litigations.
7 I think that in conjunction with the aggressiveness that we've
8 had throughout the trial, the zealousness is real clear to me that the
9 Defense had to know this was a mistake made by the Plaintiffs. And
10 again, one of the many pages of Exhibit 56 was this page 44 and the
11 Plaintiffs didn't know about it.
12 So, they took advantage of that mistake and I don't have a
13 criticism in a general sense in taking advantage of mistakes of the other
14 side. Frankly, it happens all the time. That's not the question.
15 And while it may be well intended to cross-examine the CEO
16 with the item that you now have where you know the Plaintiffs made a
17 mistake, they didn't see it. The primary, the only reason why I granted
18 the motion for mistrial was because when putting this up on the ELMO,
19 there was no contemporaneous objection from the Plaintiffs. And I did
20 not sua sponte interject either, probably for the same reason that the
21 Plaintiffs didn't and that is it just -- the timeline is short. It's on the ELMO
22 and it's just really a matter of seconds before a human being, if you're on
23 the jury with that TV set sitting right there in front of you. It's a matter of
24 seconds, literally, you know, one to five seconds and that's it. It's there
25 for them to see.

1 I didn't feel it was my job to sua sponte interject. And here in
2 a little bit I'm going to talk about a legal concept that I think is very
3 relevant to this situation. And when I do that, I am going to talk about
4 how I do understand and sympathize in some ways with the Plaintiff's
5 position and not being able to object to it at the time or not objecting to
6 it at the time.
7 But anyway, the fact of the matter is, when this occurred,
8 even if well intended by the Defense to cross-examine when character is
9 now an issue, respectfully, it's my view that the mistake that then the
10 Defense makes is that they interject the issue of racism into the trial.
11 Once the issue of racism is interjected into the trial and by
12 the way, it does appear to me that even now and I'm not unduly
13 criticizing, but even now, it appears to me that the Defense's position is
14 that the jury can consider the issue of whether Mr. Landess is a racist or
15 not. That I disagree with to the fiber of my existence as a person and a
16 judge.
17 Ms. Brazil is an African-American. Ms. Stidhum is an African-
18 American. The Plaintiffs have stated and for purposes of this I can agree
19 philosophically, although I don't know for sure because I don't, that Mr.
20 Cardoza and Ms. Asuncion is also Hispanic.
21 The shortcoming is me, I've never really seen that kind of
22 stuff much. I don't know why that is. I probably should in today's world
23 more that everybody does. But it's probably because when my dad was
24 a chief of police when I grew up in high school, he had a partner. His
25 partner's name was Tank Smith. And Tank was a black guy, an African-

1 American guy. And he was the salt of the earth.
2 And so, as a child growing up, I saw those two running over
3 the county and doing good stuff. Dinner at our house all the time. I
4 never thought anything about that.
5 When I was -- when you get to be a JAG when you're a
6 lawyer in the service, they send you off to 10 weeks of intense military
7 training at the University of Virginia Law School. Ten weeks. It's the
8 JAG school. And they billet you. You stay in a billeting living
9 arrangement.
10 And there was 109 of us in that class. And my best friend
11 was a guy named Momeesee Mubangu [phonetic]. He was from South
12 Africa. So, he's definitely an African-American by definition. He was my
13 best friend. We went to dinner three or four times a week and we made
14 good friends.
15 And probably halfway through his wife came to town and he
16 wanted to go to dinner with her with me and we did. We met at a
17 restaurant and she was a white woman.
18 And I remember halfway through the dinner because we
19 were friends him remarking to me, you don't notice anything here? And
20 I got to tell you, I really didn't. I just didn't. I just figured people were
21 people, you know.
22 So, I'm not I'm not sure whether Mr. Cardoza, Ms. Asuncion
23 are Hispanic or not. I'm never good at that kind of stuff. But it seems
24 reasonable, I would agree with the Plaintiffs of course, the name and
25 appearance if you want to go with that. Maybe there's some stuff in the

1 biography stuff that we were given. I didn't look at it. But it seems like
2 that's the case.
3 And so, it is my view that since we have two African-
4 American jurors and potentially two Hispanic jurors, given what I do
5 think was a mistake made by the Defense in interjecting race, the issue of
6 Mr. Landess being a racist into the case. Even if well intended to cross-
7 examine, as I said, it is my thought that the Defense should have seen
8 this and done something to deal with it. They should have asked for a
9 sidebar as I tried to talk to Ms. Gordon about or I think it should have
10 dawned upon them that you're now putting the issue of racism into the
11 case in front of a jury that has four members arguably that fall into some
12 of these categories, referenced in this email.
13 By the way, the email, if you were to ask me about offense
14 that could be taken, certainly as Mr. Cardoza, Ms. Asuncion or anyone of
15 heritage of coming from Mexico, they would have to be offended by it.
16 As to the two African-Americans, it's clear to me, because
17 like I told Mr. Vogel, it's the lumping in of a term associated with African-
18 Americans, with the rest, hustling Mexicans, blacks and rednecks. That
19 is clearly an implication that these are, in the author's opinion, sort of the
20 dredges of society who I could easily take advantage of on paydays.
21 And so, I do think that this coming together, this perfect
22 storm of mistakes, the mistake the Plaintiffs made that I have described,
23 the mistake I think that the Defense made in interjecting race into the
24 case. I know the Defense doesn't think it's a mistake because they
25 apparently think that the jury can consider whether Mr. Landess is a

1 racist or not. I have to say that surprises me, but wouldn't be the first
2 time I guess I'll ever be surprised as a judge. But I got to say, that
3 surprises me, which will get to the second half of my decision, which is
4 still to come.
5 But for now, I'm making a specific finding that under all the
6 circumstances that I just described, they do amount to such an
7 overwhelming nature that reaching a fair result is impossible.
8 Further, this error that occurred in my view, how specific -- I
9 am specifically fining it prevents the jury from reaching a verdict that's
10 fair and just under any circumstance. And there's no curable instruction,
11 in my opinion, that could un-ring the bell that's been rung, especially to
12 those four. But let's don't focus only on those four. There's ten people
13 sitting over there and I do think just as a normal human being, one could
14 be offended by the comments made in this email. You don't have to be
15 Hispanic, African-American or I don't know how to say rednecks. I don't
16 know how that fits in. I don't even know what that really is.
17 But in the minimum, you don't have to be a Hispanic or
18 African-American to be offended by this note.
19 So, I feel as though my decision -- well, it was manifestly
20 necessary.
21 Now, over the weekend, I said I did look at some law having
22 to do with this, and that takes me probably as a segue into some of the
23 things that Ms. Gordon and I talked about in the court argument this
24 morning.
25 I asked her a hypothetical. I said, let's assume that you didn't

1 use Exhibit 56, page 44 of Mr. Dariyanani. Well, unless something
2 happened that we wouldn't anticipate that being that somehow the
3 Plaintiffs come to discover that the item is in there and bring it to the
4 Court's attention prior to the Defense trying to use it in some stage of the
5 trial. Now it's in evidence.
6 And I asked that hypothetical question. Let's assume you
7 didn't use it with Dariyanani, but you did use it and put it up on the
8 ELMO in closing argument. It's my view that it's really the same
9 philosophical thought, its use of the item in front of the jury and asking
10 them to draw a conclusion relevant to the verdict based upon it.
11 My view is if that would have happened, if Exhibit 56, which
12 was in evidence, was put up in closing, that under the definition given by
13 the Supreme Court of misconduct in the *Lioce* case, that I think it's likely
14 that that would be seen as misconduct because whether it's with
15 Dariyanani or whether it's in closing or both, the clear -- and now I've
16 heard it in court this morning, it seems like the Defense is still taking this
17 position. They're urging the jury to at least in part, render the verdict
18 based upon race, based upon Mr. Landess being a racist, based upon
19 something that I think is emotional in nature. This is an emotional style
20 piece of evidence.
21 The idea, I think fairly and I'm sure the Defense would
22 disagree with this, but fairly is give us a verdict. Whether it's reducing
23 the damages or give us the whole verdict, because Mr. Landess is a
24 racist. That is impermissible.
25 Even if some universe in some universal sense, if he were a

1 racist and he might deserve something like that because he's a bad
2 person, the law doesn't allow for that in this context. It's not a fair
3 verdict, not a fair trial, not a fair result to decide it because someone
4 happens to be a racist. If it were a racial discrimination case or if race
5 were somehow an issue in the case, things would be different.
6 Now, philosophically, in spending the time over the weekend
7 that I did, I wanted to try to find some law that gave me as a court
8 guidance on what I may do in this situation, because -- and the reason I
9 devoted basically my entire weekend to it was because I felt as though in
10 the eight and a half years I've been here, I'm now being called upon to
11 do, in my view, probably the most important thing I've done because of
12 the respect I have for these people on the jury. They gave us two weeks
13 of their time out of their lives. How could this -- how can anything I do
14 be more important than deciding whether they get to continue or they
15 have to go home and essentially, practically speaking, wasted two weeks
16 with us. We wasted their time.
17 So, in doing so, I have to tell you and I don't want to get all
18 the credit for this, because when I met with Mark Denton for probably it
19 was about two hours, it might have been an hour and 45 minutes. It was
20 in his office. He told me about *Lioce*. I knew about *Lioce* case, but in
21 talking to him philosophically, he said, you know, there's some concepts
22 in that case you might want to look at that could be helpful to you here
23 because *Lioce* was his case. He was the trial judge.
24 And so, that got me to thinking and I did pull and I have it
25 here outlined, and I think that case is illustrative philosophically. We're

1 not talking about obviously closing argument here, but we are talking
2 about nonetheless bringing forth an item of evidence that could cause a
3 concern to be at least considered.
4 And the other nice thing about *Lioce*, a very important thing,
5 is this concept that wait a second, it's an admitted exhibit. In other
6 words, this is unobjected to. And *Lioce* gives us some philosophy and
7 guidance on dealing with the distinction between objected to items and
8 in that case, of course, closing argument, and non-objective to closing
9 argument.
10 The court goes on to talk about something -- I said I'd talk
11 about this, so why I don't just do that right now? In *Lioce*, the idea
12 where I said I do sympathize with Mr. Jimmerson in not objecting when
13 the item first went up on the ELMO.
14 In *Lioce*, the Nevada Supreme Court says,
15 "When a party's objection to an improper argument is
16 sustained and the jury is admonished regarding the
17 argument, that party bears the burden of demonstrating that
18 the objection and admonishment could not cure the
19 misconduct's effect."
20 Okay.
21 They go on to say in the next sentence, though, that they say
22 words consistent with sympathizing with a lawyer who is in the spot now
23 to either object or not object to something that shouldn't be happening
24 in court. They say, "The non-offending attorney," so in this situation
25 that'd be the Plaintiff's side.

1 "The non-offending attorney is placed in a difficult position of
2 having to make objections before the trier of fact, which
3 might cast a negative impression on the attorney and the
4 party the attorney represents emphasizing the improper
5 point."
6 And that's what Mr. Jimmerson said to me, I think last week
7 when we were on the record, because I did ask a question or it came up,
8 why didn't you object to it? And he said words consistent with this idea
9 of, I didn't want to, you know, call further attention to it.
10 And it's clear in *Lioce* and the Nevada Supreme Court
11 sympathizes with that dilemma that a trial lawyer may have when
12 something comes up, the other sides offered something, here it's
13 argument, of course. In our case, it's an exhibit prior to that stage of the
14 trial.
15 But nonetheless, I have to say, I agree that, you know,
16 because I know from my own experience in watching this happen, I felt
17 my heart sink. And I remember thinking, oh boy, and I told you some of
18 the things I immediately thought within the first few seconds.
19 And, you know, should I have said take that down, let's have
20 a sidebar? I wish I would have at a time prior to the jury not seeing it.
21 Or even seeing it quickly and maybe not realizing the full extent of what
22 was in it and then we'd still be here and, you know, we'd be watching the
23 Stan Smith video.
24 But I didn't do that. I think for the same sort of human being,
25 non-reaction over two or three seconds that Mr. Jimmerson did. I have

1 to say. Especially because, again, that's even further evidence that the
2 Plaintiffs didn't know the item was in there.
3 All right. But in *Lioce*, they give some guidance as to
4 unobjected to, they call it unobjected to misconduct and that's in the
5 context of a closing argument.
6 And what the Supreme Court said, so that's what we're
7 talking about here. We're talking about unobjected to -- it's not
8 argument, so I'm not going to go as far as today to say it's misconduct.
9 I've said things consistent with what I think is a respectful criticism of the
10 Defense of, you know, I would -- I got to say, I would think that you look
11 at this and say, well, should we put race into the case? Could that be a
12 concern?
13 And as I take it, the Defense's position is, well, we can and
14 we did. Just like Ms. Gordon argued an hour ago to me. That's just
15 where we disagree. I have to say.
16 But in any event, the guidance from *Lioce* is that even if it's
17 unobjected to, so Exhibit 56 is a Plaintiff's trial exhibit, it's admitted by
18 stipulation and then when the item is put up on ELMO, there's no
19 contemporaneous objection.
20 But I think that this *Lioce* standard is applicable here where
21 the Supreme Court says in that case that it's still a plain error style
22 review.
23 Here's what they say. "The proper standard for the district
24 court," that's me, "to use when deciding in this context a motion for new
25 trial based upon unobjected to attorney misconduct." Now, again, I

1 know this is not a new trial request. This is a mistrial request. But I think
2 that concept is similar, certainly. And I think the philosophy of this case
3 gives guidance to the Court is all I'm saying.
4 So, again, the Supreme Court says,
5 "The proper standard the district courts to use when deciding
6 a motion for new trial based upon unobjected to attorney
7 misconduct is as follows; one, the district court shall first
8 conclude that the failure to object is critical and the district
9 court must treat the attorney misconduct issue as have been
10 waived unless plain error exists."
11 So, there you go. That, I think clearly sends me a message
12 that though the Plaintiffs acquiesced in the admittance of 56 and though
13 the Plaintiffs did not contemporaneously object when Ms. Gordon put
14 the item up, a plain error review still has to be held.
15 In applying the plain error review, the next sentence in *Lioce*
16 says,
17 "In deciding whether there is plain error, the district court
18 must then determine whether the complaining party met its
19 burden of demonstrating that its case is a rare circumstance
20 in which the attorney misconduct amounted to irreparable
21 and fundamental error."
22 Again, that concept of misconduct notwithstanding. It is my
23 specific finding that this did resolved in irreparable and fundamental
24 error, as I have described.
25 The Supreme Court says in the next sentence that, the

1 context of irreparable and fundamental error is, "Error that results in a
2 substantial impairment of justice or denial of fundamental rights such
3 that but for the misconduct, the verdict would have been different."
4 And I get that's in the new trial context, but I think it gives
5 guidance because my view is the dilemma as a judge, this thing first
6 came up as a motion to strike from the Plaintiffs. And I have to say that
7 bell can't be un-rung. That's my opinion.
8 Even if I granted the motion to strike, I don't know what type
9 of contemporaneous curative instruction I could have ever come up with
10 to ask Ms. Stidhum, especially, Ms. Brazil, especially Mr. Cardoza,
11 especially, Ms. Asuncion, especially to now disregard the author's racial
12 discriminatory comments.
13 In addition, you know, sometimes life events happen and I
14 know, we all, as lawyers -- since we deal with fact patterns, and people
15 more than most human beings -- I'm sure most lawyers think man, my
16 life is just different than everybody else's. Well, I can share that with you
17 too, from my perspective as a judge, because I deal with facts and things
18 all the time, but not necessary to my decision, but I have to say it's lost
19 on me that this whole situation is even more magnified given the recent
20 events of the weekend.
21 I mean, think about how strange this is for me too. I'm
22 sitting at home and so my wife is a hard worker. And I told her well,
23 leave me alone all day Saturday. So she goes off to her office in Howard
24 U Center at Marcus & Millichap because she does commercial realty --
25 commercial brokerage, so she goes there all day Saturday and works,

1 and leaves me alone.
2 I was hoping to be done to at least have a Sunday for good
3 health reasons, but unfortunately, that didn't happen, so I talked her into
4 going to yoga and grocery shopping without me yesterday, which she
5 went and did. And all the while, while that's happening, while I'm at
6 home by myself, you know, as I'm on my laptop, and I'm actually half the
7 time corresponding with my law clerk, who was nice enough to work on
8 Saturday with me remotely by emails and such.
9 It comes to my attention that on pretty much every 24/7 news
10 station for the entire weekend there's a story about someone who drove
11 nine hours across Texas -- nine hours across Texas to go to El Paso and
12 picked that place because in the Walmart in El Paso there would be those
13 from Mexico shopping -- that he was going to go shoot and kill, as a hate
14 crime. That's what seemed to be the upshot of that circumstance.
15 Okay. Mr. Landess may take this as a criticism. I don't really
16 mean it that much, but some would argue he drove nine hours to go kill
17 Mexicans in his mind. I'm sure that's what he thought. That's exactly
18 what I'm dealing with in this thing.
19 Okay. Then later that night what happens in Dayton? Are
20 you kidding? Another one. In this situation African Americans are killed.
21 And is that part of another hate-based incident?
22 None of that really matters to this decision, because it is my
23 strong view that in this case racial discrimination can't be a basis upon
24 which this civil jury can give their decision, but it's not lost on me that
25 it's highly likely, unless Mr. Cardoza, and Ms. Asuncion, Ms. Brazil, and

1 Stidhum put their heads in the sand and didn't watch any news, or have
2 a cell phone, or a have a friend, or have a family, or go to church, or do
3 anything, that this is out there to just aggravate what we already have as
4 my view being a big problem.
5 Bottom line is, how in the world can we expect this jury,
6 which is the verse -- and by the way, none of those people are alternates,
7 because we decided before trial that seats 9 and 10 would be the
8 alternates, so they're all four deliberating jurors -- how in the world can
9 we reasonably think that they're going to give a fair verdict and not base
10 the whole decision, at least in part, on the issue of whether Mr. Landess
11 is a racist.
12 That's the basis for the decision. The Plaintiffs can draft the
13 order. And so concludes the most difficult thing I've done since I've
14 been here.
15 Anything else from either side?
16 MR. JIMMERSON: Yes, Your Honor. Relative to the briefing
17 on the cost matter, in light of this, I don't see a need for an expeditious
18 order, or shortening time. Fourteen days from today would be an
19 approximately time for the Defense to file their opposition, and then we
20 would file the reply in the normal course, and you would give us a
21 hearing date sometime about 30 days from now.
22 THE COURT: Well, okay. Mr. Vogel, how much time do you
23 want to respond to this pleading?
24 MR. VOGEL: That's fine. Two weeks is fine. I appreciate it.
25 THE COURT: Okay. Two weeks will be?

1 THE CLERK: Two weeks will be August -- oh, you're going to
2 be gone all that week.
3 THE COURT: That's okay. It's a pleading deadline.
4 THE CLERK: Okay. August 19th.
5 THE COURT: Okay. So the opposition will be due by close of
6 business on August 19th.
7 And then a reply?
8 THE CLERK: A week later August 26th.
9 MR. JIMMERSON: Could we have the following Monday, the
10 29th?
11 THE CLERK: Okay. We'll do it the Tuesday, September 3rd,
12 Labor Day.
13 THE COURT: All right. And then the hearing, we'll probably
14 need a couple of hours for that, given our track record.
15 THE CLERK: You want it on a motion day or on a
16 Wednesday?
17 THE COURT: Well, I need two hours, so either way is fine
18 with me, but it's probably going to be a separate day of a Wednesday.
19 THE CLERK: Okay. Let me see what we have going on here.
20 THE COURT: And of course, the focus of this now is the fees
21 and costs aspect. I granted a mistrial.
22 MR. JIMMERSON: Yes, Your Honor.
23 THE COURT: Although, I do want to want to say that -- I
24 mean, there's always the idea that you can ask for reconsideration, but I
25 mean, to me, the focus really is the fees and costs aspect of the motion.

1 And I want to give some context to that too. I actually made a note here
2 on that. Let me find that note. In covering everything else, I forgot about
3 that one.
4 Oh, yeah. All right. So both sides -- here's my note -- both
5 sides made mistakes. In other words, what I'm saying is, both sides are
6 practically responsible for what happened. To me, the issue remains
7 which side is legally responsible for what happened; in other words, we
8 know the Plaintiffs made a mistake in a definitional sense if you look up
9 the word mistake in the dictionary. You made a mistake.
10 The question is, given what happened, and how it actually
11 happened, is the Defense legally responsible, or is the Plaintiff legally
12 responsible, is it 50/50, or how does that work. So that's a technical
13 point, but in causing a mistrial, is there a standard that applies that I
14 should be made aware of along these lines? Because again, there's no
15 doubt the Plaintiffs made a mistake in not catching the item and stopping
16 its use.
17 The Defense used it, as they did, as we have talked about
18 enough already, but what's the legal standard having to do with
19 responsibility because the statute talks about fees and costs, right, if you
20 cause a mistrial through misconduct, I think is what it says. And so
21 that'll be part and parcel of what we'll have to figure out.
22 But here is Terra (phonetic). So we need two hours for a
23 hearing on this motion for fees and costs having to do with a mistrial.
24 THE CLERK: How far out?
25 THE COURT: Well, what's the last date on there?

1 MR. VOGEL: The 3rd.
2 THE CLERK: September 3rd.
3 THE COURT: After September 3rd.
4 THE CLERK: Okay. So we've got -- you can either do the
5 afternoon of September 10th so 1 or 1:30 start time, or we've got the
6 11th we can either do a 9 to noon or an afternoon setting. Those are the
7 two days we have available.
8 THE COURT: Okay. September 10th or 11th work?
9 MR. JIMMERSON: What day of the week is the 10th, please?
10 THE CLERK: Tuesday is the 10th and Wednesday is the 11th.
11 MR. JIMMERSON: Yeah, we'd prefer the Tuesday the 10th.
12 THE CLERK: We could do a 1:00 start time.
13 THE COURT: How about the Defense? You okay with that?
14 MR. VOGEL: Just checking real quick. Tuesday is definitely
15 better.
16 THE COURT: Okay. Let's use 1:30 on that day and we'll have
17 the whole afternoon then, but my guess is it's a couple of hours given
18 our track record, because most likely I'll come in and I'll give a little
19 summary of the pleadings, and talk about issues, and what have you, put
20 things in context, and then we'll have argument. I mean, the whole thing
21 could be an hour, but it could be more, but we'll start at 1:30 on?
22 THE CLERK: On Tuesday, September 10th.
23 THE COURT: That'll be the hearing.
24 MR. JIMMERSON: All right.
25 THE COURT: Okay. Anything else for today?

1 THE CLERK: The Court hasn't decide on Court's Exhibit 37,
2 because there was an objection by Mr. Vogel, as if it was the same copy
3 given to -- it had to do with -- I think it has to do with some X-rays.
4 MR. VOGEL: Yeah. And that's still in dispute, so --
5 THE CLERK: Okay. So we're just going to leave that
6 unadmitted then, correct? Or how do you want to address that?
7 THE COURT: Well, that's a good question.
8 MR. JIMMERSON: I mean, that's a Court exhibit. That's not
9 an admissibility exhibit. In other words, it's not a Plaintiff or Defense
10 offering it. It's a Court exhibit. Isn't that the binder, Mr. Vogel?
11 MR. VOGEL: It is.
12 MR. JIMMERSON: So we certainly, in the sense of being
13 admissible, we certainly believe that the foundation has been laid for
14 admissibility. I mean, the Court knows what it is. It's the document
15 binder of X-rays delivered by --
16 THE COURT: Here's my question --
17 MR. JIMMERSON: -- the Plaintiffs to Defendant.
18 THE COURT: -- does it matter now anyway?
19 MR. VOGEL: No.
20 THE COURT: I mean, it really doesn't matter.
21 MR. JIMMERSON: No.
22 THE COURT: Because you're going to have a new trial
23 anyway.
24 MR. JIMMERSON: Yes. That's true, Judge.
25 THE COURT: And it'll be decided later. So I just don't --

1 respectfully, I don't know if we need to do anything else on the case --
2 THE CLERK: Okay. I just needed to have an outcome for it.
3 THE COURT: -- at this point. Okay.
4 And then, you know, I don't want to bring up anything ugly,
5 but within the next business day or two, if you could have, you know,
6 somebody come get all these binders out of our courtroom, I'd
7 appreciate it.
8 MR. JIMMERSON: Your Honor, would that be then Plaintiff
9 would obtain the Plaintiff's and Defendant's would obtain Defendant's; is
10 that fair?
11 THE COURT: However you do that --
12 MR. JIMMERSON: Would you agree, Mr. Vogel?
13 MR. VOGEL: Yes.
14 THE COURT: -- you know, is fine. I just would like to have
15 the room, you know, cleaned up.
16 MR. JIMMERSON: We'll, do it this afternoon actually.
17 THE COURT: Okay.
18 THE CLERK: And then I have Exhibit 150 that still needed to
19 be provided the CD from your side, unless you wanted to withdraw that.
20 MR. JIMMERSON: What is 150?
21 MS. POLSELLI: That's that video that was played during
22 Jonathan's testimony.
23 MR. JIMMERSON: Yes, we'll provide you that. I'll say we'll
24 do that.
25 THE CLERK: Okay. And that's it from me.

1 THE COURT: Ms. Gordon.
2 MS. GORDON: Your Honor, if I may. I think that the
3 transcript will bear this out, but I was just asking Mr. Vogel also, I think
4 that what I said was misinterpreted to an intent. I don't want this jury --
5 and never wanted this jury to make a decision based on race. What I
6 was talking about was the procedural propriety of what happened.
7 So to the extent that there is in any way characterizing my
8 action as misconduct, and I think the Court was clear, that that's not
9 what's saying, but I never wanted to interject race. That's what the email
10 said, and that's what we were using as impeachment evidence, so it was
11 not ever my intent, or I would never hope the jury would do that. That
12 was the content of the impeachment evidence that was never objected
13 to, and that was offered by Plaintiff. And we certainly had no reason to
14 think that they made this mistake. I was as surprised as anyone that they
15 didn't object to it. Never would I think that they didn't know what was in
16 their documents. So I just want to make that part clear.
17 It wasn't an ambush bomb sandbag thing. It was
18 impeachment evidence that they gave me and I used it. It wasn't for a
19 bad purpose.
20 THE COURT: All right. I think maybe where we, at this point,
21 disagree, Ms. Gordon -- because, you know, I don't feel good about any
22 of this, and one aspect of not feeling good is towards the lawyers. You
23 know, I don't feel good about what this now creates for all of you. You
24 know, it really bothers me.
25 You know, I've been to -- I know that there are those that

1 don't care what lawyers think when judges make decisions, and some of
2 those people could be judges. I don't know, but I do care. You know,
3 and I feel bad. I feel really bad.
4 And I think where we disagree is, it's just my view that, you
5 know, seeing the, at least the potential impact of what could happen
6 when you put racism in front of a juror is where we part company on this
7 thing. I mean, that's my criticism. It truly is. And, you know, they call it
8 the practice of law, because it is, and you learn in the practice of law.
9 You know, I've always learn, you know, all the time. And it's a good
10 thing to keep learning.
11 And where we probably have a difference of opinion, and
12 where we just part company is I just think that it's one of those things
13 where seeing the impact of what could happen if you put the fact that it
14 looks like Mr. Landess is a racist up in front of a jury in a medical
15 malpractice case. That's where we part company, because obviously,
16 you now know that I really think that that was too much of a bomb that
17 made it impossible now after all the effort we put in to have a fair trial.
18 What else can I tell you?
19 MS. GORDON: No, I understand. I think that the difference is
20 just if you're looking for misconduct, as opposed to mistakes. If you are
21 just -- you're okay with the mistakes that we believe are cumulative on
22 Plaintiff side, this is by no means any, you know, any worse, if it's a
23 mistake, if that's what it is, and it's one, and it's not what have you, but
24 when you're saying responsibility and legal responsibility for what
25 happened, I don't believe that you can, you know, dismiss the multiple

1 mistakes that Plaintiff did make, and if they had not been made, we
2 wouldn't be here right now with maybe not bringing up that this is what
3 this bomb consists of.
4 THE COURT: Okay.
5 MS. GORDON: I think that was my distinction, because it's
6 hard for me to hear the words attorney misconduct, attorney
7 misconduct.
8 THE COURT: Yes.
9 MS. GORDON: I know you were citing a case --
10 THE COURT: I get that. I know.
11 MS. GORDON: -- but that's hard.
12 THE COURT: And that brings up something that maybe
13 should be part of this briefing; and that is, if you look at these -- I used
14 the Lioce case as guidance obviously, and they talk about these
15 arguments that you shouldn't make as "attorney misconduct", and that's
16 an interesting thing, because I don't know if you have to have bad intent
17 to make an argument that amounts to attorney misconduct; in other
18 words, maybe it could be a mistake, you know, you could say something
19 in a closing argument that by definition under the law is misconduct, for
20 purposes of improper closing argument, but we all know that
21 misconduct when it comes to attorneys sometimes is also connoted with
22 ethical misconduct.
23 Well, you know, I know in Lioce referred Mr. Emerson to the
24 bar, because guess who prosecuted Mr. Emerson for, you know, a few
25 days in Reno once upon a time when a guy name Dave Grundy

1 represented him? Me. But anyway, that's an interesting point. It's
2 highly I think possible that certain types of argument to jury could be
3 given without any bad intent, but yet be seen as "misconduct". Certainly,
4 if there was bad intent, that's always misconduct.
5 I told you informally on Friday, Ms. Gordon, and I'm
6 comfortable enough telling you now, I don't get a feeling -- God only
7 knows, and you, but I don't get a feel -- I'll share with you -- that you had
8 some bad, horrible intent. Rather, I think -- what I really think, that both
9 you and Mr. Vogel just didn't fully realize the impact that this could have.
10 That's a mistake. Is it misconduct for purposes of the rule that's in
11 question having to do with attorneys' fees? Maybe looking at the
12 argument cases that likewise use the word misconduct will give
13 guidance as to that, because ultimately I guess I'm going to have -- well, I
14 know I'm going to have to make a decision on this fee and cost request.
15 You know, I'm not -- as I sit here now, and Friday, and over
16 the weekend, and at all times, you know, did I ever say, you know, that
17 Ms. Gordon, what a sinister, evil, you know, I didn't do that. I didn't. I
18 just -- I really felt like actually you were just being -- in your mind, you
19 were being zealous, and you did what you did. I just, again, don't think
20 you appreciated, or Mr. Vogel appreciated, the impact of what was going
21 to happen. And I don't want to take all afternoon, but I do want to spend
22 a couple of minutes saying something else to you now that it comes to
23 mind.
24 Because I want you to know I sympathize with you. Okay. in
25 deciding all these things that you decide as a judge, I can tell you, in my

1 mind, I have these little things I call traps. Every once in a while
2 something comes your way and it's a judicial trap; meaning, at first
3 blush, when you see the item you say, oh, my goodness, I'm definitely
4 going to have to do this. This is the right result. I've got to do this. And
5 every once in a while, because you're not seeing something that's
6 maybe subtle in the law, the truth is, the answer is to do the opposite. I
7 call that a bit of a judicial trap.
8 You read reported decisions? Look at the four to three
9 decision that just came out of the Supreme Court on the issue of the duty
10 of a common carrier bus. That's what I'm talking about. You know, this
11 stuff cannot always be easy.
12 So just so you know -- and I'm glad you brought this up,
13 actually, because I don't want you to leave here thinking oh, my God,
14 you know, the Court thinks I did something unethical, because I don't
15 think that. I don't think that. Rather, what I think is, in your moment of
16 being zealous, you just failed to see -- you and the whole team
17 respectfully, just failed to see the impact that putting Mr. Landess's --
18 putting evidence on that, you know -- and again, I'm not accusing him of
19 anything, but it's -- hey, it is what it is, it's evidence that one could easily
20 draw a conclusion that he's a racist. And I think the failure is not
21 recognizing that now that's interjected in the trial.
22 That's all I can say. Okay.
23 Do you want to say anything else? Or --
24 MS. GORDON: No, that was it. I just didn't want you to --
25 THE COURT: Okay. All right. Anybody else want to say

anything?

MS. GORDON: -- think I wanted them in the --

THE COURT: Okay.

MR. JIMMERSON: Thank you, Judge.

THE COURT: Take care.

MR. JIMMERSON: Appreciate all your staff for all --

[Proceedings adjourned at 12:15 p.m.]

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

John Buckley, CET-623

Court Reporter/Transcriber

Date: August 5, 2019

EXHIBIT 2

EXHIBIT 2

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

RTRAN

Race

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

1 unable at that time to fulfill his job duties as an attorney for Cognotion; is
2 that right?
3 A Well, as an attorney, and the other different functions --
4 Q Okay.
5 A -- that he did for us. That's right.
6 Q I'm going to show you an email from Plaintiff's -- I think it's
7 admitted, but it might still just be --
8 A Uh-huh.
9 Q -- Plaintiff's Proposed Exhibit 56.
10 So you know what? Let me --
11 THE COURT: All right. Is 56 in those?
12 THE CLERK: 56 is not in the book.
13 THE COURT: All right. Not admitted.
14 MS. GORDON: I don't think it's admitted yet. I'm not 100
15 percent sure.
16 THE COURT: Yeah. It's -- I'm sorry. I just want --
17 MR. JIMMERSON: The answer; I would have no objection to
18 that email. I'd just know the date, if I could?
19 MS. GORDON: And I have a view from 56, so --
20 MR. JIMMERSON: All right. I have the exhibit.
21 MS. GORDON: Can I --
22 MR. JIMMERSON: Sorry.
23 MS. GORDON: Can I move to admit Plaintiff's Proposed
24 Exhibit 56?
25 MR. JIMMERSON: No objection, Judge.

1 THE COURT: All right. 56 is admitted.
2 [Plaintiff's Proposed Exhibit 56 admitted into evidence]
3 BY MS. GORDON:
4 Q This is an email dated August 18th, 2018, between -- it looks
5 like from Mr. Landess to Tim -- is that Tim Murray at Cinematic Health?
6 A Yes.
7 Q And copied you on it. And this is after the time period that
8 Mr. Landess was on unpaid leave, correct?
9 A Yes.
10 Q And he's forwarding information about CNA. I'm assuming
11 he's referring to the ReadyCNA product?
12 Q Sending it to Tim so he can take a look at it to see what the
13 status of that product is, and in particular, he's talking about the status of
14 the product as it might be approved in Nevada, correct?
15 A Yes.
16 Q So in August of 2018, Mr. Landess was at least able to
17 perform functions such as this, correct?
18 A He's writing that email, yes.
19 Q Thanks. And you sent the termination letter to Mr. Landess
20 on January 3rd, 2019, right?
21 A Yes.
22 Q And I think you actually attached it. This is Plaintiff's
23 admitted -- I think it's admitted separately. This is from Exhibit 56. You
24 sent him the termination letter as an attachment to an email, correct?
25 A Yes.

1 et cetera, to what the numbers he gave were.
2 A No.
3 Q Mr. Dariyanani, you testified earlier that Mr. Landess is a
4 beautiful person in your mind.
5 A We're all beautiful and flawed. He's beautiful and flawed.
6 Q And you respect him a great deal?
7 A I do.
8 Q And this was, that portion any way is consistent with your
9 impression of Mr. Landess for at least the past five years, I believe you
10 said?
11 A Yeah, and he's had -- he's had tough periods as, you know,
12 as everybody has had. You know, as I've had tough periods.
13 Q And that was before five years ago, correct?
14 A I think so.
15 Q This is -- I'm going to try to blow it up, but this is an email
16 that Mr. Landess sent to you and it's part of admitted Exhibit 56, dated
17 November 15th, 2016. It's quite long, but the part I'm interested in is Mr.
18 Landess appears to be giving a summary of his prior work experience
19 and some experiences that he has gone through in his life.
20 A Uh-huh.
21 Q And the highlighted portion starts, "So I got a job working in
22 a pool hall on weekends." And I'll represent to you, Mr. Landess testified
23 earlier about working in a pool hall.
24 A Uh-huh.
25 Q "To supplement my regular job of working in a sweat factory

1 with a lot of Mexicans, and taught myself how to play Snooker. I
2 became so good at it, that I developed a route in East L.A. hustling
3 Mexicans, blacks, and rednecks on Fridays, which was usually payday.
4 From that lesson, I learned how to use my skill to make money by taking
5 risk, serious risk." When you read this, did that change your impression
6 of Mr. Landess at all?
7 A Not at all. He had told me. I knew -- I knew about Jason's
8 life. I knew that he dropped out of high school. You know, I have people
9 that work at my company that are convicted felons. Look, I believe that
10 everybody is worthy. Mr. Landess was very honest with me about every
11 aspect of his life and I leave my children -- I left my daughter with him.
12 So that's the answer to your question.
13 Q Did he sound apologetic in this email about hustling people
14 before?
15 A I think when you're 70 years old, you reflect on your life, and
16 not all of it's beautiful. Not all of it's beautiful. He doesn't feel like his
17 divorce was beautiful. I think, you know, he doesn't feel like his -- I don't
18 think Mr. Landess would sit here and tell you every moment of his life
19 was great. You know, but I know him to be a person who loves people
20 and cares for them and I feel like I know his heart and that didn't bother
21 me because I -- I know him and I saw that it's reflected back on, you
22 know, what a provincial fool he was at the time, and he was.
23 Q Does it sound to you at all from this email that he's bragging
24 about his past as a hustler, and particularly hustling Mexicans, blacks,
25 and rednecks on payday?

1 A Not at all. I think he feels -- I think he's very circumspect
2 about that whole period of his life. And if you're asking me, like, did I
3 read this as Mr. Landess being a racist and a bragger, I absolutely did
4 not and I don't read it that way now, and I wouldn't have such a person
5 in my employ.
6 Q He talks about a time when he bought a truck stop here in
7 Las Vegas when the Mexican laborer stole everything that wasn't welded
8 to the ground. You still don't take that as being at all a racist comment?
9 A I look at that as him reflecting back on his life and the way
10 that he saw things then, growing up in L.A. the way that he did. I don't
11 think that that -- I don't think it's representative of how -- I think he
12 channeled himself then. I don't think it's representative of who he is
13 now, and it's not who -- it's not the person that I've seen and know.
14 Q Thank you, Mr. Dariyanani. I appreciate it.
15 THE COURT: Thank you, Ms. Gordon.
16 MR. JIMMERSON: Is she done? Okay.
17 THE COURT: Any redirect, Mr. Jimmerson?
18 MR. JIMMERSON: Yeah, very briefly.
19 REDIRECT EXAMINATION
20 BY MR. JIMMERSON:
21 Q The -- this past was Mr. Landess 54 years ago when he was
22 19 years old; is that right?
23 A Yes.
24 Q In your observation, do people change over the course of 54
25 years?

1 A Yes.
2 Q Has Mr. Landess, at any time, and this jury certainly has seen
3 him for two-and-a-half days, ever evidenced any crass views?
4 A You mean of -- he doesn't have -- he has evidenced crass
5 views, but not on a racial basis.
6 Q No, but I'm talking about versus people, human kind, the
7 human condition?
8 A No. He's a very empathetic, kind person. Sometimes he has
9 a potty mouth, but he's a -- he's a very empathetic, kind person.
10 Q Okay.
11 A And he loves people and he cares for them.
12 Q And these emails were 122 pages. You produced them
13 voluntarily, willingly.
14 A Yes.
15 Q And they cover the range of communication between
16 Cognotion on the one hand and Mr. Landess on the other; is that right?
17 A Yes.
18 Q And only one had anything to do with a smidgen of work
19 August of 2018; everything else predated that, right?
20 A That's right.
21 Q And you paid the full $10,000 per month all before the
22 lawsuit was every commenced; isn't that right?
23 A That's right.
24 Q And Mr. Landess has already told us, but Mr. Landess is not
25 owed any money by Cognotion?

1 our plan is for the rest of today then?

2 [Bench conference - not recorded]

3 THE COURT: All right. We're just talking about the schedule

4 to make sure we don't back up anything next week, and we think that the

5 best thing to do now would be to take a comfort break, come back at

6 2:30, so that's a 15-minute break, and then stop at 3:30 today, right. So

7 in other words, we're going to watch one hour of Mr. Smith and then

8 that will be it at that point, then come back and finish up with the video

9 of Mr. Smith on Monday and carry on from there.

10 So a friendly reminder, my prior comments, of course, about

11 not talking about the case or referencing reports of it or forming opinions

12 always apply. A 15-minute comfort break, come back, and we'll watch

13 the video for an hour and then that will be it for today. We'll see you in

14 15 minutes.

15 [Jury out at 2:15 p.m.]

16 THE COURT: All right. We're off the record, and a comfort

17 break.

18 [Recess at 2:15 p.m., recommencing at 3:45 p.m.]

19 THE COURT: All right. During that last break, the reason I

20 took a few extra minutes -- sorry about that -- is, you know, it really is on

21 my mind this whole thing with the passage that was read and I just --

22 you know, first, I want to say this to be sure for the record and for

23 everybody's edification: the motion to strike is denied at this time -- at

24 this time. So I want to be clear that if lawyers file something -- trial brief,

25 law on the point, then you can do that.

1 I do want to share with you that during that last break I really
2 thought only about this. And you know, I don't know what do to do with
3 it. I really don't know what to do with it. I mean, because, you know, I
4 look at the jurors and Ms. Brazil, Ms. Stidhum -- well, they're black, and
5 I'm using the terminology that was in that email, they're black people --
6 African American people, but again, taking the word that is attributed
7 now to Mr. Landess, they're black people.
8 As far as the, you know, comment about Mexicans, I don't
9 know. I frankly, don't really know. You might think this is a little odd,
10 but I don't really even notice any of this stuff. I just, you know -- it's just
11 the way that I was raised probably. You know, I've got the most loving
12 mom. This person that I have as a mom you wouldn't even believe. I
13 oftentimes say to myself, when we all get up to heaven, there she is --
14 and I'm going to say, I knew it, I knew she was a saint, I knew it, but
15 anyway, doesn't matter.
16 I got to tell you, during that break this just -- I mean, it almost
17 -- I don't want to say it made me ill, but it's really starting to percolate in
18 me, you know, because as a judge, you know, I think one of the primary
19 things here is when that verdict comes in I want to be able to say I did
20 everything to make sure justice was had. And I've got to say, I'm not
21 sure we're in a position now that the jury has heard that to be confident
22 in justice. I mean, I've just got to tell you. I don't know what to do with it.
23 I'm not that smart. I'm just not, but I don't know what to do with it, and
24 it's the chronology of what occurred.
25 No criticism -- and I'm going to talk for a minute -- sorry -- no

1 criticism to anybody, and that includes Mr. Jimmerson, but I don't recall
2 there ever being a pretrial motion to preclude it.
3 MR. JIMMERSON: There was not, Judge.
4 THE COURT: No. Okay.
5 So if there would have been, God only knows what I would
6 have done. I mean, I don't know what definitively I'll say what I would
7 have done. I share that most likely I would have precluded it on a theory
8 that under the legal relevancy balancing test, though it might have some
9 relevance to his character, which Mr. Dariyanani put in evidence, I get.
10 As y'all know on the legal relevancy balancing test, if it's too
11 prejudicial, then you, even if relevant, even if probative, you exclude it.
12 So I'm sharing with you that most likely -- and again, I don't know what I
13 would have done. I really don't know, because I don't have a crystal ball
14 looking at the past, but I would have had, of course, as the benefit of
15 pleadings from the lawyers, which I don't have now, and I would have
16 had the benefit of argument from lawyers on the point after pleadings,
17 based upon the law that now comes about in the pleadings, but I did say
18 words consistent with what comes to mind here, and that is, I think it's
19 likelier than highly likely that I would have precluded that, because it just
20 seems to me it has a prejudicial effect that you can't just -- especially in
21 light of the constitution of this jury that you can't get around.
22 So like I said, I don't know what to do about it. I mean, if
23 there motion in limine, then we would have known. And if I would have
24 -- I'm saying it's likely I'd granted it, because most of the -- as I sit here
25 now, feels like that's the right choice, because it's so prejudicial.

1 So that didn't happen, so then we have the trial. Now here
2 comes Exhibit 56. How many pages are in Exhibit 56?
3 MR. JIMMERSON: About 122.
4 THE COURT: 122-page exhibit comes in. I did ask the clerk
5 who offered it. She doesn't keep that kind of record. That's not a
6 criticism of the clerk.
7 MR. JIMMERSON: The Defendant offered it today.
8 THE COURT: But I just was going to say, it's my thought and
9 my recollection now, based upon the back and forth here, so the Defense
10 offers a disclosed, you know, set of documents, disclosed from the
11 Plaintiff to the Defendant -- Exhibit 56 with the items that ultimately end
12 up in Exhibit 56: the 122 pages.
13 So at trial now the Defense says we want to offer 56. I don't
14 remember what context it was offered in, but it was offered, and it was
15 stipulated, and agreed to be admitted. All right. So now it's an admitted
16 exhibit; one of 122 pages, but nonetheless admitted, and then we carry
17 on.
18 After it's admitted, Mr. Dariyanani testifies -- and I'll give --
19 Mr. Vogel made a great point -- in part, what Dariyanani did was he
20 provided some character evidence, is what I would say it would have to
21 fairly be called -- character evidence as to the good attributes of Mr.
22 Landess, and he said some other things too. You know, he said we all
23 had faults, and he said some other things. I don't remember if it was all
24 after the item came up, or before and after, but I would say the fair sum
25 and substance of Dariyanani's comments on this point was that Jason

1 Landess has a good character. And you know, no objection was made
2 by that, by the way, by the Defense when he's offering these good
3 character traits.
4 And so now it's the flow of things, we now have an admitted
5 exhibit that's there, not referenced yet. Now we have a reason to bring
6 up character-type traits, because the Plaintiff has put it in issue through
7 Dariyanani.
8 We then have, of course, that moment in time where Ms.
9 Gordon puts on the ELMO and highlights with a yellow highlighter this
10 paragraph about--
11 MR. JIMMERSON: That I didn't even notice until she just put
12 it up there. What was I going to do, object to an admitted document,
13 suggesting that I'm afraid of it. I was outraged when I read it. I just was
14 -- I was blown away. I was stunned actually.
15 THE COURT: Okay. Well, that gives me further context, as to
16 where I'm going with this at this point. And I've got to say, Mr.
17 Jimmerson. This comes to exactly what I would expect from you, and if I
18 say something you don't want me to say, then you stop me. Okay. But
19 what I would expect from you, based upon all my dealings with you over
20 25 years, and all the time I've been a judge too, is frank candor -- just
21 absolute frank candor with me as an individual and a judge. It's always
22 been that way. You know, whatever word you ever said to me in any
23 context has always been the gospel truth.
24 I mean, without, you know, calling my colleagues, lawyers
25 that worked with me at the bar, or my wife as testimonial witnesses, I've

1 told all those people many times about the level of respect and
2 admiration I have for you. You know, you're in -- to me, you're in the,
3 sort of, the hall of fame, or the Mount Rushmore, you know, of lawyers
4 that I've dealt with in my life. I've got a lot of respect for you. So I say
5 that now because I think what you're really saying doesn't surprise me.
6 And I think what you're really saying is -- and again, interrupt me
7 anytime if you want -- is, well, in a multi-page exhibit, we just didn't see
8 it.
9 MR. JIMMERSON: That's exactly right, Judge. You're 100
10 percent right.
11 THE COURT: Okay. Well, there you go. And you know,
12 nobody is perfect. We all do these things.
13 MR. JIMMERSON: I already said I was mad at myself.
14 THE COURT: I know. You did say that.
15 Okay. So --
16 MR. JIMMERSON: But I think all of us have an ethical
17 obligation to practice law the right way and Kathy Gordon did not do so.
18 MS. GORDON: Your Honor, I would --
19 THE COURT: Okay. Hold on a second, if you don't mind.
20 MS. GORDON: That's smearing.
21 THE COURT: Okay. Go ahead. I'm sorry. I should --
22 MS. GORDON: And truly --
23 THE COURT: -- he's interjected, so you can too.
24 MS. GORDON: -- it's my witness, right? I'm the one who
25 questioned Mr. Dariyanani about it, and I frankly had every right to do

1 so. It was underhanded. This is an exhibit that Plaintiff disclosed during
2 discovery. It's an exhibit that they listed on their trial exhibits.
3 THE COURT: Right. It's a Plaintiff's proposed exhibit.
4 MS. GORDON: Exactly. And --
5 THE COURT: I get it. I see that.
6 MS. GORDON: -- I --
7 THE COURT: It's Plaintiff's proposed 56.
8 MS. GORDON: -- it's unfortunate that there isn't a note from
9 the clerk, because as Mr. Jimmerson will recall, when I asked has it been
10 admitted, you know, do you stipulate to it, he said I thought it already
11 had been, and I also thought it had been, but it hadn't, so I moved for the
12 admission because I had already referred to other emails in there.
13 THE COURT: All right. So --
14 MS. GORDON: And just one second, please, because this
15 has taken on this --
16 THE COURT: Okay. Sure. I didn't mean to interrupt.
17 MS. GORDON: -- scope of about me, and there's no reason
18 for the Court to think that I would do something underhanded by any
19 means, or to try to do that Plaintiff's case. They've disclosed multiple,
20 you know, multi-page exhibits, and I would be shocked if the Court told
21 me that I should have known something on page 300 and something of
22 an exhibit that's been in evidence for however long. That's my
23 responsibility, especially if it's an exhibit that I disclosed.
24 So it was stipulated to. It was admitted. And then when I
25 used it in the impeachment of Mr. Dariyanani's glowing -- I'm just going

1 to wait, because it's really important to me that you hear this, and that I
2 make a good record, because somehow it's become personal that Mr.
3 Jimmerson is Mount Everest --
4 THE COURT: You don't have to worry. I'm listening.
5 MS. GORDON: -- and I'm not, right?
6 THE COURT: I can look through a piece of paper and listen to
7 you at the same time. Go ahead.
8 MS. GORDON: Well, so it was stipulated to. Mr. Jimmerson
9 thought it had previously been stipulated to. I used it to impeach Mr.
10 Dariyanani. I had every right to do that. At least half of his testimony
11 was about the character of Mr. Landess. I understand it. He has a right
12 to say it. I have a right, on behalf of my client, to impeach that, and I did,
13 and I used a document that they disclosed and they didn't object to, and
14 they stipulated to the admission of. That's where this starts and ends,
15 Your Honor.
16 They had all these different occasions to do something about
17 it and they didn't. And I understand what you're saying. It's harmful to
18 them, but harmful things happen in a course of a trial --
19 THE COURT: Okay.
20 MS. GORDON: -- and that's what we're left with. I don't
21 think that there really is any reason to, you know, hope that the Plaintiffs
22 file something and what have you. If that happens, it's fine. I think that
23 we have an extremely clear record, but if this is going to go at all about
24 my credibility for admitting a document, or using a document that was
25 admitted, I have to draw the line. There's no reason to think that at all. I

1 did my job with the exhibit they gave me.
2 THE COURT: Okay. Let me say what the starting point for
3 me on something like this is I don't have a feeling that you did
4 something with some bad intent, bad faith, you know --
5 MS. GORDON: Well, that's what it sounds like. You
6 appreciate them.
7 THE COURT: -- I think that you, as a lawyer, felt as though
8 you had a bit of a bomb here, because obviously you saw the item, and
9 what I think is, most likely the Plaintiffs, for whatever reason, just didn't
10 see it.
11 MS. GORDON: Okay.
12 THE COURT: All right. I get it. That's probably what
13 happened. Okay. And you had, you know -- and when a lawyer has a
14 bomb and it's an admitted into evidence bomb, almost all lawyers are
15 going to use it.
16 MS. GORDON: And no objection when it is used.
17 THE COURT: I get it.
18 MS. GORDON: Right.
19 THE COURT: But here is my concern: is it at this point, too
20 much of a bomb to where it might have went further than blowing up
21 maybe the evidentiary item in question and blew up the whole trial. I
22 mean, that's what I'm worried about at this point. You see what I'm
23 saying? I mean, I can't fault you. I won't. I'll go as far as say, I'm
24 convinced, Ms. Gordon, you're looking at me, you're talking to me, I
25 don't think that you felt like what you were doing was some sort of

1 unethical thing -- okay -- to go that far, but now I have to deal with what
2 did happen under the circumstances. Okay.
3 MS. GORDON: I'm just asking the Court -- I understand that,
4 and I appreciate it. I'm just wondering if perhaps we could that and talk
5 about what happened without talking about how Mr. Jimmerson
6 somehow is above reproach, which clearly is making some kind of
7 distinction about the party who used the document. I don't think --
8 THE COURT: Well --
9 MS. GORDON: -- that's necessary.
10 THE COURT: -- I mentioned those -- you're criticizing what I
11 said. I mentioned it for a reason that I think made sense and that is, I
12 was about to ready to say that I had drawn a conclusion that Mr.
13 Jimmerson just didn't have it in his mind that this item was in one of the
14 122 pages. He might not have seen it, and that's why I mentioned my
15 thoughts about Mr. Jimmerson in that context. Okay.
16 Do you have a problem with what I said about him?
17 MS. GORDON: No. I just wish that we could focus more on
18 the procedural part of it than the personal aspects of the attorneys who
19 did it. I don't have a problem with what you said about Mr. Jimmerson.
20 I think I just took it as perhaps making a distinction.
21 THE COURT: Okay. Well, I mean, if I had dealt with you for
22 25 years, my guess is, consistent with what I've seen with you, I mean,
23 you really do care about what you're doing. It's evident in anybody who
24 watches you as an attorney, you know.
25 MS. GORDON: I think and I just wouldn't do something

1 underhanded like that.

2 THE COURT: I've known you for two weeks.

3 MS. GORDON: It just, it was admitted. It wasn't objected to.

4 It was their exhibit and I used it.

5 THE COURT: All right. So one of the other reasons I brought

6 all that up was, is I look at the pretrial motion practice, the motion in

7 limine practice, that the Plaintiffs asked me to preclude Mr. Landess's

8 gambling history. Remember the $400,000 marker that he had? His

9 bankruptcies, and this other litigation that he was in. They did not ask to

10 preclude this item in question now, so that's further, I think, evidence of

11 the fact that they just missed it. What else can I tell you?

12 So the issue for the Court is this: in a situation where the

13 Plaintiffs, in good faith, miss something like that, but the Defense didn't

14 obviously, then the Defense uses it, I don't want to get into whether it

15 was good or bad faith either, because I don't feel -- I don't feel that you

16 did something with an intent that was bad in an ethical, you can't do this

17 as a lawyer sense.

18 I think what I think is that you felt as though you had a bit of

19 a bomb here, because you had known this was in the exhibit, and you

20 dropped it at an appropriate time, in your view. That all happened.

21 Okay. For me though, as a judge, now presiding over a trial with, you

22 know, two black jurors, and I'm using Mr. Landess's word, that's what he

23 said in the email describing African-Americans -- and I don't know if the

24 other item -- the Mexican item would be relevant to the ethnicity of other

25 jurors, because I'm not good at that kind thing.

1 Does anybody know that?
2 MR. JIMMERSON: Yes, Your Honor. Mr. Cardoza [phonetic]
3 is Hispanic.
4 THE COURT: Okay. All right.
5 MR. JIMMERSON: And Ms. Ascuncion may also be,
6 although, she's not Mexican, I wouldn't think. I would think she might be
7 Filipino, or something like that.
8 THE COURT: Okay. So we have four jurors, potentially, that
9 fall into reasonably, you know, a situation where when they see that,
10 they would be offended, because it has to do with their ethnicity, or their
11 race. We got a problem and I just don't know how to fix it. You know,
12 that's what I did over this last break. I mean, this kind of came and went.
13 This about as big a problem as we could have, because of the way this
14 happened. I mean, it's an admitted exhibit.
15 And what I wanted to say too, I've said it a few times, when
16 Ms. Gordon is using it -- I appreciate what you're saying, Mr. Jimmerson,
17 but you know, you could have said sidebar. You could have just said
18 hold on a second, sidebar. You know, I mean, you could have.
19 MR. LITTLE: But it was put up in front of the jury, Judge,
20 with yellow highlighting on two sentences. I mean, it's there. They're
21 looking right at it.
22 THE COURT: I get it, but at some point, as soon as you
23 realize what's going on, you could say "sidebar", you know; you know?
24 But what I'm trying to say is, here's the construct. All right. Let me put it
25 to you this way, you know, I'm at the judicial college, hypothetically. I'm

1 there, and there's 200-and-some judges in the audience. And maybe I'm
2 part of a panel, presenting. And I say, okay, here's what we have.
3 In pre-trial disclosures, the plaintiffs provide to the defense a
4 number of emails that their client -- that the plaintiff sent. And in one of
5 the emails is a passage where he relates that when he was younger, he
6 learned to play pool. And he hustled Blacks, Mexicans, and rednecks, on
7 payday. And there's an email that says that. And maybe I didn't give the
8 context of the case. I don't need to do that now, but -- and then, for
9 some reason, is -- well, it's disclosed. It's disclosed to the defense. And
10 then it's a -- for some reason, it's in a plaintiff's proposed exhibit, pre-
11 trial and during the trial. In front of the jury, the defense moves to admit
12 it. No objection. It's admitted by stipulation, the whole 122 pages.
13 MR. JIMMERSON: The reason that it is in Plaintiff's list is, in
14 my understanding, is that Mr. Dariyanani provided it to the Defendant.
15 THE COURT: Okay. Well, there you go. And so -- right. He's
16 trying to disclose everything. And he -- even though he's a lawyer, he
17 disclosed that, but he should've probably disclosed everything. And the
18 issue becomes, is it usable or not?
19 MR. JIMMERSON: That's right.
20 THE COURT: Okay. So then, now it's in evidence. And then,
21 not objected to, as entered by the defense. And then when the defense
22 uses it. No objection. And then in retrospect, but in short-time
23 retrospect, I guess you could say, within, I don't know, a half hour after a
24 break, the plaintiffs say, strike it. It's too prejudicial. And then I say to
25 the 200 judges in class there at the college, what do you do? I doubt any

1 one of those 200 judges are going to give the model answer. So I need
2 help on this. I'm just telling you, I have no idea what to do, but I'm
3 sharing with you that, given the jury that we have, and even if it wasn't
4 the jury we have, that's not so significant to me. Although, I have -- I
5 think it does have a higher level of significance when you have people
6 that fall into these -- into what is clearly, at least, you know, without any
7 context being given to it, it's a racial comment.
8 So now you have jurors who could draw a conclusion that
9 he's a racist. And that's why I -- and I'm the one that mentioned it,
10 nobody else did, that's okay -- I mentioned this idea of jury nullification.
11 I realized that that's a concept that usually comes up after a verdict. And
12 it's, you know, a basis for a new trial. You know, if it happens in a
13 criminal case, well, so be it. You cannot do anything about that. But if it
14 happens in a civil case -- because of double jeopardy -- but if it happens
15 in a civil case, it's grounds for a new trial. I just think of -- that
16 philosophy comes to mind here.
17 Do we have a situation that's curable? Should I do anything?
18 Or should I do something? I mean, and it -- you know, without the
19 benefit of further briefing and all that, like I say, most of me, as I sit here,
20 thinks I need to do something. I denied a motion to strike it. I don't
21 know what to do about it. I mean, I -- the --
22 MR. JIMMERSON: Well, why don't we give ourselves the
23 weekend to think about? I did want to mention though that the
24 Defendant's also put, in front of Mark Mills, a PT record, where he said
25 he'd fallen twice, and then ripped it off. And just by his quick brain, he

1 saw the very next entry, which was, I was not hurt. It's just -- I'm very
2 concerned about this. But this is -- this is so much more dimensionally
3 more powerful and more prejudicial than any other parlor tricks.
4 THE COURT: Okay. This is serious.
5 MR. JIMMERSON: This is serious.
6 THE COURT: I do want to say, I'd like to stay away from the
7 idea of lawyers doing things with bad intent. I know, Mr. Jimmerson,
8 you mentioned that a few times. To me, the real issue now is not that.
9 To me, the real issue is, fair trial, jury nullification. We've got something
10 in that may be unduly prejudicial.
11 MR. JIMMERSON: Let's focus on that, Judge.
12 THE COURT: You know, and what to do about that if you
13 were me at this point.
14 MR. JIMMERSON: Yes, sir.
15 THE COURT: I mean, I guess the last thing I'll say -- and I'll
16 shut up for now, then you all can say what you want and we'll see where
17 it goes -- I don't know that it's curable. I've got to tell -- I'm just going to
18 share that with you. I don't know if the fact -- when I mean, "it", that's a
19 pronoun, so let me not use pronouns. I don't know if the situation
20 concerning the fact that we've got this jury that's heard that, is curable.
21 Because even if I came in and said, I grant your motion to strike. Okay. I
22 mean, if Judge Ito said, members of the jury, disregard everything
23 Fuhrman said. I decided to strike it. Okay. I mean, that just comes to
24 mind.
25 MR. JIMMERSON: Yes, sir.

1 THE COURT: How do you unring this kind of bell, is my
2 question. I -- you know, what else can I tell you? I said I'd stop talking.
3 You know, I just guess as more and more goes on, this is just bothering
4 me. But I will stop on this point now. But anybody want to say anything
5 on this point before we do the deposition?
6 MR. JIMMERSON: Your Honor, the Plaintiff reserves his
7 rights. We'll address it on Monday.
8 THE COURT: And by the way, I just did all that without your
9 clients here.
10 MR. JIMMERSON: All right.
11 THE COURT: So I -- nobody stopped me on that, so I
12 assumed their waiving their presence at this point.
13 MR. JIMMERSON: Yeah. He just is tired and went on,
14 Judge.
15 THE COURT: Okay.
16 MR. JIMMERSON: Exhausted.
17 MR. VOGEL: I mean, my only comment would be, you know,
18 and you brought it up earlier, Your Honor, is, you know, this was a
19 Cognotion document. There was a motion to continue trial. That was
20 denied -- proposed and denied. Perhaps if there had been more time,
21 continuance granted, maybe this wouldn't have happened. And again,
22 that goes back on them.
23 MR. JIMMERSON: It doesn't make it right, Judge. I'll just
24 wait until Monday.
25 THE COURT: All right. Well, I said I'd stop, so I will. All

1 right. That takes us to -- oh, not coming on the merits of it anymore, I do
2 want to let you know that I told my law clerk, because I get to have a free
3 lawyer in the job, known as my law clerk, and I told her to do nothing but
4 work on this issue. I'm -- I mean, and she's back there now. All I want to
5 do is see, is there some kind of law -- is there a law that I don't know
6 about that talks about this? I don't' think we're going to find something
7 perfectly on point with the events that did happen, especially, you know,
8 the admitted exhibit. You know, are we going to find a case where the
9 plaintiffs disclosed something like this, they don't see it, defense has it,
10 then it's admitted by stipulation, then it's used and not objected to, and
11 then later albeit contemporaneous, the motion to strike comes up?
12 Or otherwise known as the issue that we now have
13 something unduly prejudicial to potentially cause jury nullification
14 philosophy, you know, in the air. I mean, chances are, she's not going to
15 find something on point, but I am trying to see if I could find something
16 as to something, you know, has something like this ever happened
17 where you have an admitted exhibit and then it comes to light that
18 something in the admitted exhibit is too prejudicial? I think that's all we
19 can hope to find, a case where something was admitted in the course of
20 a trial, and then it became -- hypothetically, it became obvious that it's
21 unduly prejudicial and it's stricken. You have to throw into that that the
22 jury's seen it somewhere along the way, too. So maybe she'll find
23 something. Maybe you'll find something. But I just -- that's how serious
24 I need to take it. I've got her working on it, and I told her I'd give her a
25 comp day if she worked on the weekend on it. But that became not

1 relevant, because she's leaving anyway. She's going to go work for Tony
2 Scrow [phonetic] in a week. And she has to be here all next week to train
3 her replacement, so she doesn't get to get a comp day, I guess. She's a
4 sandwich.
5 Okay, turning to the Stan Smith item.
6 MR. VOGEL: Yes, Your Honor. We are ready to kind of fly
7 through it, if you'd like.
8 THE COURT: Okay, what we're going to probably have to do
9 -- this is a minor point -- we're going to have to lock the courtroom doors
10 because our marshal has to leave. And then she has a final exam in law
11 school to go take. And we don't have anybody to cover, because it's
12 Friday and they're all gone. So I'm going to -- did you lock the door?
13 THE CLERK: Yeah.
14 THE COURT: Okay. So nobody can get in. It's -- you can get
15 out, but you can't get in, so if you -- if somebody wants to get in, they're
16 going to have to call you. Is there anybody you're expecting to come in?
17 MR. JIMMERSON: No, Your Honor.
18 MR. VOGEL: No objection, Your Honor.
19 THE COURT: And we'll let them in. Otherwise, that's it.
20 We're going to be without a marshal. If anybody has a concern about
21 that, then I'll see you later. We'll just leave. I don't have a concern about
22 it.
23 MR. VOGEL: I don't either.
24 MR. JIMMERSON: No, Judge.
25 THE COURT: Okay. So we'll just -- we'll carry on without a

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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**

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.

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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

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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

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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

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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,

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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

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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 9 day of ~~August~~ Sept, 2019.

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

Submitted by:
JIMMERSON LAW FIRM, P.C.

9/4/19

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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 Neveada professional limited liability compay 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 NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFF'S MOTION FOR A MISTRIAL

PLEASE TAKE NOTICE that the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFF'S MOTION FOR A MISTRIAL** was entered in the above-entitled matter on the 9th day of September, 2019, a copy of which is attached hereto.

DATED this 9 day of September, 2019.

THE JIMMERSON LAW FIRM, P.C.

JAMES J. JIMMERSON, ESQ.
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Attorney for Plaintiff,
JASON GEORGE LANDESS

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 9th day of September, 2019, I caused to be served a true and correct copy of the foregoing **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFF'S MOTION FOR A MISTRIAL,** as indicated below:

_X_ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada;

_X_ by electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk;

To the individual(s) or attorney(s) listed below at the address, email address, and/or facsimile number indicated below:

S. Brent Vogel, Esq.
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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**

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

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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

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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

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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,

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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

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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 9 day of ~~August,~~ Sept 2019.

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

Submitted by:
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9/4/19
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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 REPLY IN SUPPORT OF MOTION FOR ATTORNEYS' FEES AND COSTS** **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 Reply in support of his Motion for Attorneys' Fees and Costs (the "Reply"). In his Motion, Plaintiff respectfully requested reasonable attorney fees of $253,383.50 and reasonable costs of $118,606.25 for a total of $371,989.75, limiting the request to the actual costs and fees incurred during the Trial itself, excluding the attorneys' fees and costs that were incurred either before commencement of Trial, or after the mistrial occurred.

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 12th day of September, 2019.

THE JIMMERSON LAW FIRM, PC

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Court must protect Plaintiff from the harmful effects of Defendants' misconduct and award Plaintiff his attorney's fees and costs incurred during the first trial. To do otherwise would punish Plaintiff for Defendants' misconduct by forcing him to incur a second round of expenses that would not have been incurred had Defendants not committed the misconduct that warranted the Court's issuance of a mistrial in the first place.

Defendants deliberately, intentionally, and purposely injected race into a medical malpractice trial for the explicit purpose of inflaming the jury and prejudicing Plaintiff. As this Court has found:

> 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 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 "waiting for Plaintiff to object" and that Plaintiff "did nothing about it," Defendants evidence a consciousness of guilt and of wrongdoing**.

Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial ("FFCL") at 8, ¶ 20 (emphasis supplied). The Court similarly found, "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**." *Id.* at 9, ¶ 22 (emphasis supplied).

Significantly, in their Opposition to Plaintiff's Motion for Fees/Costs (the "Opposition"), **Defendants do not deny that they deliberately injected the issue of race and whether or not Plaintiff is a racist into the trial**. **Instead, they defend their choice to do so!** This is a damning admission by Defendants, one which not only represents an

overt change of position by them, but which also confirms their culpability in causing the mistrial.

As the Court recalls from the oral argument on the Motion for Mistrial on August 5, 2019, Defendants' counsel claimed, "I don't want this jury--and never wanted this jury to make a decision based on race… I never wanted to interject race." **Exhibit 1** at 76:4-9, a true and correct copy of the Recorder's Transcript of Trial-Day 11, attached hereto. The Court expressly disagreed with Defendants' counsel's denial, stating:

> And where we probably have a difference of opinion, and where we just part company is I just think that it's one of those things where seeing the impact of what could happen if you put the fact that it looks like Mr. Landess is a racist up in front of a jury in a medical malpractice case. That's where we part company, because obviously, you now know that I really think that that was too much of a bomb that made it impossible now after all the effort we put in to have a fair trial.

Id. at 77:11-17. Defendants have now completely abandoned any pretense that they did not deliberately inject race into the trial.[1] In light of the same, an award of attorney's fees and costs to Plaintiff is appropriate and necessary.

In their effort to avoid being held accountable for their misconduct at trial, Defendants have waged a scorched-earth campaign against both Plaintiff and this Court that is utterly devoid of merit and which includes further acts of misconduct. For example, as part of their improper effort to disqualify this Court and prevent it from ruling on Plaintiff's Motion for Attorney's Fees[2], Defendants state, "Defendants disagree

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[1] This change in position was previewed in Defendants' Motion to Disqualify the Hon. Rob Bare (the "Motion to Disqualify") where Defendants attempted to chide this Court for its decision in granting the mistrial, stating, "Judge Bare improperly declared a mistrial based on the unfounded and erroneous belief that rebuttal bad character evidence involving racist comments is forbidden." Motion to Disqualify at 23. Such gross mischaracterizations of the facts and the law warrant denial of the Motion to Disqualify, which is still pending as of the date the filing of this Reply (but which, according to Judge Weise, will be decided in advance of the hearing on September 17, 2019). *See* **Exhibit 2** at 23:10-11, a true and correct copy of the Recorder's Transcript of Pending Motions, September 4, 2019, attached hereto.

[2] Defendants' counsel admits in her unsworn Declaration in Support of Order Shortening Time, that the Motion to Disqualify must be heard "prior to the hearing on the outstanding Motions for Attorney's Fees and Costs." *See* Motion to Disqualify at 4. Curiously, Defendants' counsel refers to

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with Judge Bare and believe Caucasian jury members can, **and should**, be equally offended by the racist remarks in Plaintiffs email." Motion to Disqualify at 23 (emphasis supplied). In so doing, Defendants effectively admit that the presentation of the Burning Embers email was designed to offend the jury, which is absolutely improper. *See Nat'l Freight, Inc. v. Snyder*, 191 S.W.3d 416, 424 (Tex. App. 2006) (affirming trial court's exclusion of video evidence likely to offend many jurors); *Wade v. State*, 583 So.2d 965, 967 (Miss. 1991) (reversing judgment because function of nude photographs admitted into evidence was to offend and inflame jury).

Likewise, in the Opposition, Defendants make unjustified and improper disparaging remarks about Plaintiff and his counsel. Specifically, Defendants claim that Plaintiff's position "appears to be a result of paranoia and instability…" Opp. at 10. Such commentary is completely outside the bounds of appropriate advocacy and constitutes additional misconduct. *See*, *e.g.*, *Griffith v. State*, No. 66312, 2016 WL 4546998, at *6, 385 P.3d 580 (table) (Nev. 2016), citing *McGuire v. State,* 100 Nev. 153, 158–59, 677 P.2d 1060, 1064 (1984) ("Disparaging comments constitute misconduct."); *Browning v. State*, 124 Nev. 517, 534, 188 P.3d 60, 72 (2008).

Defendants even go so far as to explicitly blame Plaintiff for Defendants' own introduction of the Burning Embers email and presentation of the same to the jury. Defendants argue, "It is well-past time for Plaintiff to take responsibility for his actions in this matter, including the fact that he purposely caused the mistrial." Opp. at 17. Reading that statement, the Court would think that it was Plaintiff, not Defendants, who introduced the Burning Embers email to the jury.[3]

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outstanding "**Motions** for Attorney's Fees and Costs" (plural) in her Declaration filed on August 23, 2019. However, at that time, only Plaintiff's Motion for Attorney's Fees and Costs had been filed; Defendants' Countermotion for Attorney's Fees and Costs was not filed until August 26, 2019, three (3) days later. Such demonstrable inaccuracies from Defendants in statements made under penalty of perjury are as troubling as they are telling.

[3] Defendants also misstate which litigants are taking responsibility for their actions. Plaintiff's counsel has readily admitted that he should have caught the Burning Embers email before trial—telling this Court "I was mad at myself." By contrast, Defendants have consistently maintained that they acted properly—despite intentionally injecting race into the trial. It is Defendants who need to take responsibility for their actions. Plaintiff has already done so.

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Defendants have lost the plot.

Defendants brazenly assert, "Plaintiff filed the Motion for Mistrial knowing that it was the only way to avoid a very likely defense verdict." Opp. at 3. In making this statement, Defendants are telling on themselves and all but admitting that the Burning Embers email improperly changed the outcome of the trial. Indeed, if a defense verdict was "very likely" in light of the Burning Embers email, the Court was justified in granting the mistrial. Conversely, if a defense verdict was "very likely" without consideration of the Burning Embers email, Defendants would not have intentionally injected race into the case, thereby, at a minimum, creating an issue for appeal. The only reason Defendants would use such radioactive material would be to change the outcome of the trial. The Court correctly observed that before the Burning Embers email was presented to the jury, Plaintiffs were likely to have succeeded in establishing liability, but there was a legitimate doubt as to whether the jury would award all of Plaintiff's claimed damages. As the Court found, "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." FFCL at 5, ¶ 7. The Court enunciated the same in its sworn affidavit submitted to Judge Weise.

Defendants' baseless arguments and assertions are evidence of the frailty of their position in opposing Plaintiff's Motion for Attorney's Fees and Costs. Indeed, Defendants' entire argument that they were entitled to use the Burning Embers email "for any purpose" simply because it was admitted, without contemporaneous objection from Plaintiff,[4] is not supported by <u>any</u> legal authority. Indeed, Defendants provide the

[4] There was a break during trial, during which time Plaintiff's counsel made a motion to strike the offensive document or, alternatively, read the entire "Burning Embers" email to the jury so the inflammatory remarks could be considered in proper context. Plaintiff's counsel specifically advised the Court that he did not know that email was there, and indicated that he was "mad at himself" for the inadvertent admission of the document. He explained that, like the Court, he too was stunned by Defendants' conduct and had to make a split-second decision: he could immediately object and, by doing so, draw more attention to the toxic material; or remain composed and silent and then object outside the presence of the jury. He chose the latter which was the better choice because the damage was irreparable.

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Court with one cite to a Nevada Supreme Court case to support their use of "rebuttal bad character evidence," but they do not cite to the majority opinion—they cite to the dissent! **Defendants' position is not tethered to the law**.

As discussed below, Defendants' use of the Burning Embers email was improper for a multitude of reasons. First, the injection of race into a medical malpractice case that has no racial matters at all is *per se* improper. Second, Plaintiff did not open the door to character evidence to be used during the cross-examination of Mr. Dariyanani. Third, even if Plaintiff did open the door to character evidence, Defendants did not object to the same, which bars Defendants' use of evidence of specific acts of conduct contained in the Burning Embers email on cross-examination. Fourth, Defendants' use of the Burning Embers email was improper as extrinsic evidence may **never** be used on cross-examination concerning character. *See* NRS 50.085(3).

The facts in this case are clear. Defendants intentionally and improperly injected race into the trial requiring the Court to issue a mistrial. As such, Plaintiff is entitled to his attorney's fees and costs pursuant to NRS 18.070(2) and as a sanction for Defendants' misconduct.

What should be particularly concerning to the Court is the direction in which Defendants have been moving on this issue. Initially, Defendants claimed that they thought they were entitled to use the Burning Embers email as rebuttal evidence and were not attempting to inject race into this trial. But since the Court made its decision to issue the mistrial, Defendants have completely retreated from appropriate litigation tactics. They have improperly sought disqualification of this Court; they have maintained legally baseless positions; and they have even resorted to making improper disparaging remarks about Plaintiff and his counsel. As this Court knows, attorneys owe a higher duty to the administration of justice. As stated by the Nevada Supreme Court, "Zealous advocacy is the cornerstone of good lawyering and the bedrock of a just legal system. However, zeal cannot give way to unprofessionalism, noncompliance with court rules, or, most importantly, to violations of the ethical duties of candor to the courts

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and to opposing counsel." *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 96, 127 P.3d 1057, 1067 (2006). Indeed, "[t]his is no matter of rules of fine etiquette. Rather, it is the matter of lawyers as officers of the court conducting themselves in ways that do not impede the work of the courts…" *In re Martinez*, 393 B.R. 27, 36–37 (Bankr. D. Nev. 2008) (citation omitted). The Court should consider the same in rendering its decision on Plaintiff's Motion.

II. LEGAL ARGUMENT

A. Defendants' Use of the Burning Embers Email Was Improper and Constitutes Misconduct

1. Defendants May Not Use an Admitted Exhibit "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 Opposition, 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." Opp. at 14. However, he fails to provide any legal authority to support this position. 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).

Defendants have not been able to provide any legal authority to support their position because it is a flagrant misstatement of the law. 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

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proof so far as it has probative value." *McCormick on Evidence*, § 54, including footnote 1 (7th ed. 2013).[5]

As the Court knows, Nevada recognizes the plain error rule and its function as the outer boundary for the use of admitted evidence. NRS 47.040 specifically codifies the same, providing, "Except as otherwise provided in subsection 2, error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected… **This section does not preclude taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge**." *Id.* (emphasis supplied); *see*, *also*, *Landmark Hotel & Casino, Inc. v. Moore*, 104 Nev. 297, 299, 757 P.2d 361, 362 (1988); *Lioce v. Cohen*, 124 Nev. 1, 19, 174 P.3d 970, 982 (2008).

Despite the foregoing, Defendants repeatedly argue that the Court's consideration of the prejudicial effect of the Burning Embers email was improper, claiming, "the focus on the prejudicial effect of the email (and whether it outweighed the probative value) was improper," and "there is no requirement or justification for the Court to perform an analysis of the email's prejudicial effect versus its probative value." Opp. at 7. Defendants do not offer any legal authority to support these blatantly erroneous statements and nor could they—Nevada law is directly to the contrary. Pursuant to NRS 50.085(3), cross-examination concerning character of a witness may involve inquiry into specific instances of conduct, "subject to the general limitations upon relevant evidence…" *Id.* Additionally, under the plain error standard, the prejudicial effect of the matter in dispute is of paramount concern for the Court's review. *See*, *e.g.*, *Jeremias v. State*, 134 Nev. 46, 51, 412 P.3d 43, 49 (2018) ("a plain error affects a defendant's substantial rights when it causes actual prejudice or a miscarriage of justice."); *Higgs v. State*, 125 Nev. 1043, 23, 222 P.3d 648, 662 (2010); *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008); *Rowland v. State*, 118 Nev. 31, 38, 39

[5] 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).

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P.3d 114, 118 (2002); *Parodi v. Washoe Med. Ctr., Inc.*, 111 Nev. 365, 368, 892 P.2d 588, 590 (1995). Indeed, **where error is patently prejudicial, court intervention *sua sponte* to protect a party's right to a fair trial may be necessary**. The Nevada Supreme Court held the same in *Sipsas v. State*, 102 Nev. 119, 125, 716 P.2d 231, 234-35 (1986), explaining:

> As a general rule, the failure to object, assign misconduct, or request an instruction will preclude review by this court. However, **where the errors are patently prejudicial and inevitably inflame or excite the passions of the jurors against the accused, the general rule does not apply**. In this case, **the prosecutorial misconduct was so prejudicial as to require court intervention *sua sponte* to protect the defendant's right to a fair trial**.

Id. (emphasis supplied). The same is true here, where Defendants argue that the email "can and should" offend the entire jury. *See* Motion to Disqualify at 23. Offending the entire jury was Defendants' specific goal.

Nevada law is clear that an improper use of admitted evidence constitutes misconduct. For example, in *Barrett v. Baird*, 111 Nev. 1496, 1514, 908 P.2d 689, 701 (1995), overruled on other grounds by *Lioce*, 124 Nev. 1, the Nevada Supreme Court, in reversing the judgment and ordering a new trial, found that the misstatement of witness testimony constituted misconduct. *Id.* Similarly, in *Michaels v. Pentair Water Pool & Spa*, 131 Nev. 804, 821, 357 P.3d 387, 399 (Nev. App. 2015), the Nevada Court of Appeals held that counsel's improper connection between admitted evidence and an inapplicable jury instruction constituted attorney misconduct. *Id.* The Court specifically found the same, holding, "Evidence may not, however, be considered for an inadmissible purpose, not may it be used for an improper purpose." FFCL at 13, ¶ 42.

This law is nigh universal. For example, in Texas, "[H]earsay, whether admitted over or without objection, is incompetent, without probative value, and may not be used for any purpose." *Hughes v. State*, 508 S.W.2d 167, 169 (Tex. Civ. App. 1974). In Colorado, "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) (emphasis supplied). In Pennsylvania, "[E]vidence may be

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considered for any purpose ***for which it is competent***." *Morse Boulger Destructor Co. v. Arnoni*, 376 Pa. 57, 65 (Pa. 1954) (emphasis supplied).

The California Court of Appeals in *People v. Pitts*, 273 Cal. Rptr. 757, 835, 223 Cal. App. 3d 606, 746 (Cal. Ct. App. 1990) may provide the most germane analysis on this matter. In *Pitts*, the Court of Appeals explained that an attorney commits misconduct through the improper use of admissible and admitted evidence. There, the case involved the prosecution of alleged child molestation. Despite the obvious admissibility and probative value of the children victims' testimony, the Court of Appeals held that the prosecutor committed misconduct in using that evidence improperly, stating, "**During cross-examination of virtually every defendant who testified, Gindes adopted the technique of rereading the children's testimony**. Although we need not determine whether such a technique is improper per se, **it was carried to abusive extremes in the instant case**." *Id.* (emphasis supplied). The court further held that otherwise proper impeachment efforts were misused to inflame the jury, stating, "If Gindes's purpose was to impeach Norma's opinion of Woodling's abilities, that purpose was achieved once he elicited that she had heard about Woodling from a convicted child molester.[6] Bringing out the Kniffen case by name could only have served to inflame the jury." *Id.*, 273 Cal. Rptr. at 848. The Court further explained, "**The fact that a topic is raised on direct examination and may therefore appropriately be tested on cross-examination, however, does not amount to a license to introduce irrelevant and prejudicial evidence merely because it can be tied to a phrase uttered on direct examination**." *Id.*, 273 Cal. Rptr. at 847 (emphasis supplied).

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

[6] In this case, if Defendants' purpose was to impeach Mr. Dariyanani's opinion of Mr. Landess as a "beautiful person," they achieved that goal when Mr. Dariyanani testified on cross-examination that Plaintiff was a "beautiful and flawed" person. **Exhibit 3** at 161:5, a true and correct copy of Recorder's Transcript of Trial-Day 10, attached hereto. Using the Burning Embers email was therefore unnecessary for such a purpose and could only be used to improperly inflame the jury.

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of inadmissible insurance information into evidence, albeit inadvertently, Defendants' counsel argued that the prejudice caused thereby required granting a new trial. In their opening brief, counsel specifically identified the issue of plain error, stating, "It is within the discretion of the district court to grant a new trial when there has been a showing of plain error of manifest injustice." **Exhibit 4** at 19, a true and correct copy of Appellants' Opening Brief in *Zhang v. Barnes*, attached hereto. 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 only because the exhibit in question was not contained within the appellate record and the Supreme Court could not fully assess the prejudice.

Likewise, in this action, Defendants have demonstrated that they know that admitted evidence may not be used "for any purpose" as they claim. The Court has specifically found that Defendants' statements that they "waited for Plaintiff to object" and that "Plaintiff did nothing about it" "evidence a consciousness of guilt and wrongdoing." FFCL at 8, ¶ 20. Thus, consistent with its prior findings, the Court should find that Defendants know that they cannot use admitted evidence "for any purpose" as demonstrated by their own statements to this Court and their counsel's position taken in *Zhang*. The Court should further find, consistent with the foregoing authority, that admitted evidence **may not** be used for any purpose as Defendants claim. To hold otherwise, would invite rampant misuse of evidence inadvertently admitted by consent without remedy or relief.[7] The law does not allow for such miscarriage of justice.

2. It Was Misconduct for Defendants to Use Race and Suggest Plaintiff is a Racist to Get a Verdict in Their Favor

In addition to wrongfully presenting highlighted portions of the Burning Embers email which called specific attention to the racial groups Plaintiff allegedly "hustled,"

[7] If Defendants were correct, which they are not, any and all evidence inadvertently admitted, no matter how inflammatory, prejudicial, or inappropriate could be used at trial for any purpose, without limitation. Indeed, Defendants' argument would allow for the use and presentation to the jury of nude photographs of an opposing party simply because the opposing party's counsel did not notice that they were part of the exhibit that was admitted. That is not the law.

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Defendants specifically suggested, in front of the jury, that Plaintiff had made racist statements. Defendants' counsel specifically stated, "You still don't take that as being at all a racist comment?" **Exhibit 3** at 163:8. Defendants' actions were completely and utterly improper and constitute misconduct.

The Court has specifically concluded that Defendants improperly injected race into the trial to get a beneficial verdict (either a verdict with reduced damages or an outright defense verdict). As stated in the FFCL, "[I]t 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, 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." *Id.* at 15-16, ¶ 51.

On their face, Defendants' actions constitute improper efforts at jury nullification. As stated by the Nevada Supreme Court, jury nullification is defined as, "[a] jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness." *Lioce*, 124 Nev. at 20.[8] Defendants' efforts to persuade the jury to render a verdict based upon the accusation that Plaintiff is a racist were wholly and completely improper. The Court concluded the same, stating, "It is not a fair verdict, not a fair trial, not a fair result to decide the case because the jury believes someone is a racist, rather than on the merits of the case, particularly since this case is not about race." FFCL at 16, ¶ 52. As stated in *Born v. Eisenman*, 114 Nev. 854, 862, 962 P.2d 1227, 1232 (1998), "Making improper comments by counsel which may

[8] The Nevada Supreme Court's full-throated articulation of the impropriety of attorney efforts at jury nullification is further supported by the California Supreme Court's holding in *People v. Williams*, 25 Cal. 4th 441, 459, 21 P.3d 1209, 1221 (Cal. 2001), where the court stated, "A jury that disregards the law and, instead, reaches a verdict based upon the personal views and beliefs of the jurors violates one of our nation's most basic precepts: that we are a government of laws and not men." *Id.*, *disagreed with on other grounds*, *People v. Barnwell*, 162 P.3d 596 (Cal. 2007).

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prejudice the jury against the other party, his or her counsel, or witnesses, is clearly misconduct by an attorney." *Id.*

Additionally, it is black letter law that the use of race to inflame a jury is particularly and uniquely improper. "Appeals to racial prejudice are of course prohibited… They are universally condemned." *Texas Employers' Ins. Ass'n v. Guerrero*, 800 S.W.2d 859, 862 (Tex. App. 1990) (citation omitted); *Dawson v. Delaware*, 503 U.S. 159 (1992); *People v. Young*, 7 Cal. 5th 905, 945, 445 P.3d 591, 620 (Cal. 2019). Indeed, the improper injection of race into a trial, as Defendants did, creates error on a Constitutional level. As explained in *Young*, the U.S. Constitution:

> does not permit the prosecution to ask the jury to return a particular penalty judgment because the defendant holds offensive beliefs or associates with others who hold the same beliefs…The consequence of this ruling was an evidentiary presentation and set of arguments that focused on the nature of defendant's offensive racist beliefs for the very sake of highlighting their offensiveness.

Id., 445 P.3d at 623;[9] *see*, *also*, *Flanagan v. State*, 109 Nev. 50, 53, 846 P.2d 1053, 1056, (1993) ("Evidence of a constitutionally protected activity is admissible only if it is used for something more than general character evidence"); *In re Berry*, 274 Kan. 336, 353, 50 P.3d 20, 34 (Kan. 2002) (accusations of racism constituted attorney misconduct); *Miller v. State*, 728 S.W.2d 133, 135 (Tex. App. 1987) (accusations of witnesses being racist held to be inappropriate and unreasonable).

Defendants' only defense to their conduct is their claim that "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." Opp. at 14. The frailty of Defendants' argument is demonstrated by, *inter alia*, their failure to provide any independent legal authority for this position, instead relying upon *People*

[9] Defendants do not dispute the application of the *Young* decision in their Opposition (they do not even mention *Young*), thereby conceding the same. *See Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 563, 216 P.3d 788, 793 (2009); *see also* EDCR 2.20(e) ("Failure of the opposing party to serve and file written opposition may be construed as an admission that the motion and/or joinder is meritorious and a consent to granting the same.").

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v. Loker, 44 Cal. 4th 691, 188 P.3d 580 (Cal. 2008), which Plaintiff first cited and which supports Plaintiff. *Id.*, 188 P.3d at 597 (courts "have firmly rejected the notion that any evidence introduced by defendant of his good character will open the door to any and all bad character evidence…"). As demonstrated above, Defendants could not use the Burning Embers email "for any purpose," and, as demonstrated below, Defendants' use of the Burning Embers email was not proper rebuttal character evidence.

3. Plaintiff Did Not Open the Door to Rebuttal Character Evidence

Defendants argue that Plaintiff opened the door to the use of the Burning Embers email when Mr. Dariyanani testified that Plaintiff was a "beautiful person who could be trusted with bags of money." Opp. at 11.[10] This claim is erroneous for several reasons.

First, Mr. Dariyanani testified that Plaintiff could be trusted with bags of money on cross-examination by Defendants' counsel. *See* **Exhibit 3** at 159. Testimony elicited by Defendants on cross-examination does not constitute "opening the door" by Plaintiff. *See*, *e.g.*, *Roever v. State*, 114 Nev. 867, 871, 963 P.2d 503, 505 (1998) ("We reject the State's contention that Roever 'opened the door' to character rebuttal merely by stipulating to the admission of the videotape; it was, in fact, the State that first used the tape in its case-in-chief.").

Second, Plaintiff did not "open the door" to character evidence based upon Mr. Dariyanani's non-responsive answer, including the statement that Plaintiff was a "beautiful person." Mr. Dariyanani's statement that Plaintiff was a "beautiful person" was in response to counsel's questioning, "Was the termination of Mr. Landess a hard decision for Cognotion or for yourself? Please explain why." **Exhibit 3** at 108:21-24.[11] The difficulty in making the decision to terminate Plaintiff does not call for any answer

[10] The Court has found that Plaintiff did "open the door to character evidence" when Mr. Dariyanani testified that Plaintiff was a beautiful person. FFCL at 7, ¶ 15. Plaintiff respectfully disagreed with that conclusion and still respectfully disagrees.

[11] Continuing their pattern of providing the Court with an incomplete picture of the events, Defendants' Exhibit A does not include page 108 from the Reporter's Transcript of Day 10, containing the question Mr. Dariyanani was asked, but contains only page 109, Mr. Dariyanani's answer.

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introducing the character of the Plaintiff and therefore, the witness's answer was non-responsive. As this Court has concluded:

> Mr. Dariyanani's statement that he believed Landess to be a "beautiful person" was a non-respons[ive] response to the preceding question, and was a gratuitous addition to his testimony… An 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.").

FFCL at 12-13, ¶¶ 40-41. This precept is widely-followed. *See Gov't of Virgin Islands v. Grant*, 775 F.2d 508, 512 (3d Cir. 1985) ("[C]lose adherence to the rules serves an important correlative purpose; it guarantees that a defendant can open the door to evidence of his bad character only if he takes **specific and deliberate** steps to prove his good character. A loosening of Rule 405(a) might result in unwary defendants opening themselves to a character attack by testimony not intended to have this result.") (emphasis supplied); *Fitzgerald v. Brown*, 230 N.E.2d 80, 82 (Ill. App. 1967) ("However, while admitting that the mention of insurance in this answer was not responsive to the question, plaintiffs argue that the non-responsive part of the answer could have been stricken on motion of defense counsel (though not on motion of plaintiffs' attorney), and that, since he did not choose to have it stricken, it stands in evidence and opens the door for plaintiffs to pursue the matter further… [P]laintiffs' point is without merit."). *Id.* (citations omitted).

Nevada law is consistent with the foregoing authority. In Nevada, before a party can "open the door" to allow rebuttal evidence the issue must be expressly raised. In *Taylor v. State*, 109 Nev. 849, 854, 858 P.2d 843, 846 (1993), the Nevada Supreme Court explained, "Before an issue can be said to be raised, which would permit the introduction

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of such evidence so obviously prejudicial to the accused, it must have been raised in substance if not in so many words…" *Id.* (citation omitted). Indeed, a direct question calling for testimony on the issue is required before a party may be said to have opened the door to that issue. *See Bomar v. United Resort Hotels, Inc.*, 88 Nev. 344, 346, 497 P.2d 898, 899 (1972). In *Bomar*, counsel asked a direct question which called for the disclosure of subsequent remedial measures, "Has the structure of that area changed since 1955 when you started to work for the Royal Nevada until this time?" Despite the unambiguous call of the question and its putting in issue subsequent remedial measures, the Nevada Supreme Court characterized the questioning as opening the door on the matter, "however slightly." The Nevada Supreme Court stated, "In our view the door was opened, however slightly, and counsel should have been allowed to pursue his cross-examination to contradict or impeach the testimony given by the adversary witness." *Id.* If asking one direct question on an issue only "slightly" opens the door, asking zero direct questions on an issue surely is insufficient to do the same. Plaintiff's counsel's question to Mr. Dariyanani did not call for the disclosure of character evidence and, thus, Plaintiff did not open the door to character testimony. Defendants therefore were not permitted to use the Burning Embers email on cross-examination.

4. Defendants' Use of the Email Constituted Improper Impeachment

Notwithstanding that Plaintiff did not open the door to character evidence, Defendants' use of the Burning Embers email constituted improper impeachment for several reasons. First, despite claiming that the supposed character testimony from Mr. Dariyanani was "improperly prompted" by Plaintiff (Opp. at 7), Defendants did not object to that testimony as improper character evidence (**Exhibit 3** at 109).[12] As such, without objection to the same, Defendants were prohibited from addressing the matter on cross-examination. *See, e.g.*, *People v. Gambos*, 84 Cal. Rptr. 908, 911, 5 Cal. App. 3d 187, 192 (Cal. App. 1970) ("By allowing objectionable evidence to go in without

[12] Defendants objected that a later comment by Mr. Dariyanani lacked foundation, but did not object at all to the supposed character testimony that was provided. *See* **Exhibit 3** at 109.

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objection, the non-objecting party gains no right to the admission of related or additional otherwise inadmissible testimony."); *People v. Steele*, 27 Cal. 4th 1230, 1248 (Cal. 2002). ("Failure to object does, indeed, forfeit the right to raise the issue on appeal. We also agree that a party should not be allowed to take advantage of an obvious mistake to introduce prejudicial evidence."); *Wiggins v. State*, 778 S.W.2d 877, 893 (Tex. App. 1989); *State v. Heath*, 464 Md. 445, 459, 211 A.3d 458, 459 (Md. 2019); *Hous. Auth. of City of Atlanta v. Kolokuris*, 140 S.E.2d 239, 239, 110 Ga. App. 869, 869 (Ga. App. 1965); *State v. Azcuy*, 88AP-529, 1989 WL 36589, at *4 (Ohio App. Apr. 18, 1989); *State v. Edwards*, 278 Neb. 55, 86 (Neb. 2009); *State v. James*, 144 N.J. 538, 554, 677 A.2d 734, 742 (N.J. 1996); *People v. Higgins*, 390 N.E.2d 340, 354, 71 Ill. App. 3d 912, 931 (Ill. App. 1979).

Nevada law is consistent with the foregoing authority and the Court should find that Defendants' failure to object to the statement "beautiful person" barred cross-examination of the same using specific acts of conduct such as those contained in the Burning Embers email. NRS 48.055(1) states, "In all cases in which evidence of character or a trait of character of a person is **admissible**, proof may be made by testimony as to reputation or in the form of an opinion. On cross-examination, inquiry may be made into specific instances of conduct." *Id.* (emphasis supplied). The prerequisite that **admissible** character evidence be introduced before cross-examination may address specific instances of conduct is dispositive on the matter.[13] A timely objection to the questionable testimony ensures that the Court either: (1) deems the testimony admissible, thereby allowing cross-examination on the topic using specific instances of conduct; or (2) sustains the objection, deeming the testimony inadmissible, and issuing any curative instruction as appropriate (therefore, rendering any cross-examination on character unnecessary). Because Defendants did not object to Mr. Dariyanani's testimony that Plaintiff was a "beautiful person," they were not permitted

[13] As the Court knows, character evidence of a witness may not be first introduced using specific instances of conduct, but must be introduced through opinion testimony as to the witness's truthfulness. *See* NRS 50.085.

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to cross-examine using specific instances of conduct such as those contained in the Burning Embers email.

Defendants cite to Justice Shearing's concurring/dissenting opinion in *Taylor v. State*, 109 Nev. 849, 860, 858 P.2d 843 (1993) to support their argument that "Plaintiff opened the door by offering good character evidence; therefore Defendants are entitled to offer rebuttal bad character evidence." Opp. at 7. Defendants' reliance thereon is erroneous and improper. The portion of Justice Shearing's opinion Defendants cite to for support comes from her dissent from the majority's decision and is therefore not a proper legal basis upon which base their Opposition.[14] *See*, *e.g.*, *Whitehead v. Nevada Comm'n on Judicial Discipline*, 111 Nev. 70, 113, 893 P.2d 866, 892 (1995) ("a dissenting opinion does not create law or precedent…"), *superseded on other grounds by constitutional amendment as stated in Mosley v. Nevada Comm'n on Judicial Discipline*, 117 Nev. 371, 22 P.3d 655 (2001).

But even if the portion of Justice Shearing's opinion to which Defendants cite were not from the dissent, it would still not support Defendants. Defendants quote from this opinion the following, "Under the rule of curative admissibility, or the 'opening the door' doctrine, the introduction of inadmissible evidence by one party allows an opponent, in the court's discretion, to introduce evidence on the same issue to rebut any false impression that might have resulted from the earlier admission." Opp. at 7, *quoting U.S. v. Whitworth*, 856 F.2d 1268, 1285 (9th Cir. 1988). Under *Whitworth*, the ability to use rebuttal character evidence is left to "the court's discretion," it is not guaranteed. Here, had Defendants allowed the Court to exercise its discretion before presenting the email to the jury and suggesting Mr. Landess made racist remarks (for example, by having a sidebar discussion with the Court and counsel), the Court would

[14] The majority in *Taylor* held, "the district court erred in permitting the state to present irrelevant and prejudicial testimony indicating that a neighbor girl sat on appellant's lap." *Taylor*, 109 Nev.at 852. Justice Shearing specifically dissented from that holding, stating, "The evidence of a prior allegedly bad act was properly admitted to rebut the implication of witness bias elicited by appellant's counsel. However, in view of the majority's rejection of that view, I concur in the remand of the case to the district court." *Id.* at 855.

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have prevented the improper use of the Burning Embers email. Recognizing the issue, this Court found, "[B]ecause 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." FFCL at 9, ¶ 21. However, Defendants did not do so, and instead chose to use the Burning Embers email in a wholly improper fashion necessitating the mistrial.[15]

Finally, notwithstanding all of the foregoing, Defendants' use of the Burning Embers email was an improper use of extrinsic evidence for impeachment of character testimony in violation of NRS 50.085(3). Defendants defended their use of the email to the Court, stating, "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 think I am allowed to use impeachment evidence… I think that the entirety of the passages from that email is impeachment testimony to the character evidence…" Exhibit 1 at 34:8-21.[16] Defendants reiterated the same in their Motion to Disqualify, stating, "Defendants utilized several emails contained in Plaintiffs proposed Exhibit 56 during the cross examination of Mr. Dariyanani to impeach his testimony regarding Plaintiffs ability to work." *Id.* at 16. Such use of the Burning Embers email is improper.

NRS 50.085(3) states in relevant part, "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crime, **may not be proved by extrinsic evidence**." *Id.* (emphasis supplied). This statute has been strictly enforced. For example, in *Lobato v. State*, 120 Nev. 512,

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[15] The use of a sidebar with the Court is generally expected when a litigant intends to introduce prejudicial rebuttal character evidence of prior bad acts. *See McCormick on Evidence* at § 191 (7th ed. 2013) ("This power of the cross-examiner to reopen old wounds is replete with possibilities for prejudice. Accordingly, certain limitations should be observed… **As a precondition to cross-examination about other wrongs, the prosecutor should reveal outside the hearing of the jury, what his basis is for believing [the] incidents he proposes to ask about**…") (emphasis supplied).

[16] Defendants' counsel repeated this position throughout the oral argument on the motion for mistrial. *See* **Exhibit 1** at 35:25-36:6; 36:17-20; 37:7-10; 39:17-23; 76:9-13; 76:17-18.

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519, 96 P.3d 765, 770 (2004), the Nevada Supreme Court held, "Unless in some way related to the case and admissible on other grounds, **extrinsic prior bad act evidence is always collateral and therefore inadmissible to attack credibility**." *Id.* (emphasis supplied). Similarly, the Nevada Supreme Court in *Roever v. State*, 114 Nev. 867, 872–73, 963 P.2d 503, 506 (1998), held as follows:

> [T]he State alternatively argues that the testimonial evidence in dispute could properly be used to impeach Roever, who testified on her own behalf. We conclude that this argument is without merit because NRS 50.085 permits such impeachment only as it relates to the witness's propensity for truthfulness or untruthfulness… **Any specific acts <u>cannot</u> be raised through extrinsic evidence**. NRS 50.085(3)… Consequently, this evidence, with the exception of some of Phillips' testimony, was not proper impeachment.

Id., (emphasis supplied); *see*, *also*, *Patterson v. State*, 111 Nev. 1525, 1534, 907 P.2d 984, 990 (1995) ("the admission of specific instances of a witness' conduct, other than criminal convictions, **may not be proved by extrinsic evidence**.") (emphasis supplied); *Collman v. State*, 116 Nev. 687, 703, 7 P.3d 426, 436 (2000) ("NRS 50.085(3) permits impeaching a witness on cross-examination with questions about specific acts as long as the impeachment pertains to truthfulness or untruthfulness and **no extrinsic evidence is used**. Impeachment on a collateral matter is not allowed.") (emphasis supplied); *Miller v. State*, 105 Nev. 497, 501, 779 P.2d 87, 90 (1989) ("NRS 50–085(3) permits cross-examination of a witness into specific instances of conduct. However, if the witness denies the past conduct, **extrinsic evidence to disprove the denial is generally not admissible**.") (emphasis supplied); *Rembert v. State*, 104 Nev. 680, 683, 766 P.2d 890, 892 (1988) ("it sought to impeach appellant's credibility with extrinsic evidence on a matter entirely collateral to the issues being decided at trial. In permitting the prosecution to proceed in this manner, the district court erred."). Therefore, Defendants' use of extrinsic evidence such as the Burning Embers email to cross examine Mr. Dariyanani about Plaintiff's character was improper.

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Defendants' claimed entitlement to use the Burning Embers email and to state, in front of the jury, "You still don't take that as being at all a racist comment?" is wrong on every level. Defendants cannot use admitted evidence "for any purpose." Likewise, Defendants cannot seek to persuade a jury to give them a verdict because they may think Plaintiff is a racist. Finally, Defendants were not permitted to cross examine Mr. Dariyanani using the Burning Embers email because: (1) Plaintiff had not opened the door to character evidence; (2) Defendants did not object to Mr. Dariyanani's statement that Plaintiff was a "beautiful person;" and (3) Defendants could not use extrinsic evidence to cross examine on specific instances of conduct under NRS 50,085(3). Defendants' attempts to justify the same are erroneous and should be rejected by the Court.

B. <u>Defendants Were the Legal Cause of the Mistrial</u>

The Court rightly observed that Defendant improperly injected race into the trial through his counsel's use of the Burning Embers Email.[17] In so doing, Defendant caused the mistrial.

The concept of "legal cause" is distinct from a more common understanding of causation. As the Court rightly observed, "while mistakes were made on both sides, the Court must separately determine which side is legally responsible for causing a mistrial." FFCL at 11, ¶ 31; *see*, *also*, **Exhibit 1** at 72:5-7 ("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.").

The Nevada Supreme Court articulated the same in *Anthony Lee R. v. State*, 113 Nev. 1406, 1415 n. 3, 952 P.2d 1, 7 (1997), explaining that the legal cause is not merely what may have contributed to the outcome, but (1) which produces an event, and (2) without which the outcome would not have occurred, stating as follows:

> In saying that substance abuse and other similar problems cannot be said to be a legal cause of criminal misconduct, we

[17] The Court specifically concluded, 'The non-offending attorney,' which in this case would be the Plaintiff's side…" FFCL at 16, ¶ 53.

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> 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).

Id. (emphasis supplied).

Legal causation in the civil arena is the same as described in *Anthony Lee R.* Proximate cause is defined as, "any cause which in natural and continuous sequence, unbroken by any efficient intervening cause, [1] **produces the injury complained of** and [2] **without which the result would not have occurred**." *Goodrich & Pennington Mortg. Fund, Inc. v. J.R. Woolard, Inc.*, 120 Nev. 777, 784, (2004) (emphasis supplied), quoting *Taylor v. Silva*, 96 Nev. 738, 741 (1980).

Applying the foregoing, the Court must conclude that Defendants' actions were the legal cause of the mistrial. As the Court recalls, Defendants: [1] moved the exhibit containing the Burning Embers email into evidence; [2] highlighted the Burning Embers email before presenting it to the jury; [3] put the Burning Embers email on the ELMO without any warning to Plaintiff or the Court that at that moment race was being injected into the trial; [4] specifically and repeatedly identified the racial groups listed in the email, in front of the jury, over the course of three separate questions; and [5] stated in front of the jury, "You still don't take that as being at all a racist comment." *See* **Exhibit 3**, at 144-45, and 161-63. This misconduct satisfies both elements of legal causation: it produced the injury complained of (the improper injection of race necessitating a mistrial), and without which the result would not have occurred (had

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Defendants not committed the aforementioned misconduct, the Burning Embers email and the issue of race would not have been injected into the trial—Plaintiff was never going to use that material at trial[18]).

This analysis is confirmed when the Court considers the determination of legal cause involving multiple potential causes for a result. As explained in *Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010), when there are two potential causes for an injury, legal cause may **not** be found where the alleged cause "operating alone" would **not** have been sufficient to cause the injury. *Id.* ("A substantial-factor causation instruction is appropriate when an injury may have had two causes, either of which, **operating alone**, **would have been sufficient to cause the injury**.") (emphasis supplied, citation omitted). Because Plaintiff's mistakes, operating alone, would not be sufficient to cause the mistrial, the Court should find that Defendants' misconduct was the legal cause of the mistrial.

C. The Court Should Award Plaintiff The Requested Attorney's Fees and Costs Pursuant to NRS 18.070 and the Court's Inherent Authority and Powers

Defendants intentionally and deliberately injected race into the trial and sought to have the jury render a decision based on a belief that Plaintiff is a racist. The Court has repeatedly found the same, stating:

> **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 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 "waiting for Plaintiff to object" and that Plaintiff "did nothing about it,"

[18] Notwithstanding that Plaintiff would never [1] improperly inject race into any trial; and [2] would not introduce such obviously prejudicial material into evidence, Plaintiff's counsel would never have used it because they were unaware of it. As this Court has found, Plaintiff's counsel was unaware of the existence of that the Burning Embers email, until it was put up on the ELMO. *See* FFCL at 6-7, ¶¶ 11, 14 ("Plaintiff did not see or know about the content of that email at page 44 of Exhibit 56…[W]hile Defendant offered a disclosed document that was marked as Plaintiff's exhibit, 79 pages of emails produced by Jonathan Dariyanani directly to Defendant, at the time of the admission, Plaintiff still did not know that email was actually in the exhibit."). Therefore, without knowing of its existence, it is impossible that Plaintiff would have moved the same into evidence and improperly inject race into the trial.

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> **Defendants evidence a consciousness of guilt and of wrongdoing**.

FFCL at 8, ¶ 20 (emphasis supplied). The Court also found, "**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**." FFCL at 9, ¶ 22 (emphasis supplied).

The Court's findings are well-founded. When directly asked by the Court, "So you think that the jury is allowed to consider whether Mr. Landess is a racist?", Defendants' counsel did not say "No" or otherwise respond in the negative. Instead, Defendants' counsel re-asserted that her use of the evidence was permissible, stating as follows:

> 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**.

Exhibit 1 at 34:15-20 (emphasis supplied).

Indeed, as described above, **Defendants do not deny in their Opposition that they deliberately injected the issue of race and whether or not Plaintiff is a racist into the trial**. They even admit that the purpose of introducing the email was to have the jury offended thereby when they state in their Motion to Disqualify, "Defendants disagree with Judge Bare and believe Caucasian jury members can, **and should**, be equally offended by the racist remarks in Plaintiff's email." Motion to Disqualify at 23 (emphasis supplied). Notwithstanding that Judge Bare has found that all of the jurors were irreversibly affected by the material,[19] Defendants' statement that Plaintiff's remarks in the Burning Embers email **should** offend the entire jury is an admission that presentation of the email was knowingly designed to offend the jury, adverselyh impact

[19] This Court found the same, stating, "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." FFCL at 10, ¶ 27.

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their view of Plaintiff, and have them issue a verdict based thereon. As the Court has correctly found, "that is impermissible." **Exhibit 1** at 62:24.

In deliberately injecting matters of race into the trial, Defendants purposely caused the mistrial, which entitles Plaintiff to an award of attorney's fees and costs pursuant to NRS 18.070(2).[20] The term "purposely" is defined as "[i]ntentionally; designedly; consciously; knowingly. An act is done 'purposely' if it is willed, is the product of conscious design, intent or plan that it be done, and is done with awareness of probable consequences." Black's Law Dictionary, 1236 (6th ed. 1990). As the Nevada Supreme Court has clarified, even if the Court were to determine that the events precipitating the mistrial were "unintentional," they still amount to misconduct, and are consistent with the meaning of "purposely," which includes "awareness of probable consequences." *See Lioce*, 124 Nev. at 25. Therefore, because Defendants intentionally injected race into the trial, and surely being aware of the potential consequences thereof,[21] Defendants purposely caused the mistrial, entitling Plaintiff to an award of attorney's fees and costs pursuant to NRS 18.070(2).[22]

Notwithstanding that Plaintiff is entitled to his requested attorney's fees and costs as requested pursuant to NRS 18.070(2), Plaintiff is also entitled to the same as a sanction for Defendants' misconduct in causing the mistrial. The Court's inherent authority provides a second, independent basis to award Plaintiff's requested attorney fees and costs. *See Emerson v. Eighth Judicial Dist. Ct.*, 127 Nev. 672, 680, 263 P.3d 224, 229 (2011) ("This broad discretion permits the district court to issue sanctions for any litigation abuses not specifically proscribed by statute.").

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[20] NRS 18.070(2) states, "A court may impose costs and reasonable attorney's fees against a party or an attorney who, in the judgment of the court, purposely caused a mistrial to occur." *Id.*

[21] "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. State*, 114 Nev. 455, 458 (1998). Indeed, "an attorney is presumed to know the laws and rules of procedure which govern the forms of litigation, the legal remedies, which he selects and pursues…" *Strong v. Sutter County Bd. of Supervisors*, 115 Cal. Rptr. 3d 498, 509–10 (Cal. App. 2010) (citation omitted).

[22] Defendants do not dispute this meaning of purposely or the analysis provided by Plaintiff in the Motion and thereby concede the merits of the same. *See Ozawa*, 125 Nev. at 563.

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Indeed, the sanction to be imposed for misconduct which necessitates a new trial appropriately includes attorney's fees and costs incurred in the original trial. The Nevada Supreme Court held the same in *Emerson*, stating, "We conclude that the district court did not abuse its discretion when it awarded sanctions in the amount of fees and costs incurred by Lioce in the original trial." *Emerson*, 127 Nev. at 681.

Defendants attempt to justify their misconduct and defend against the issuance of sanctions, arguing that Plaintiff also engaged in misconduct. Defendants erroneously claim, "the actions of Plaintiff and his attorneys in this matter, both during discovery and trial, displayed questionable ethics and forced Defendants to expend unnecessary time and expense in an effort to obtain evidence which Plaintiff had—and breached—an affirmative duty to disclose." Opp. at 7-18. Notwithstanding that Defendants are wrong in their claims, their finger pointing not only fails to provide them any excuse for their misconduct, but, also serves as another instance of misconduct. As stated in *Lioce*:

> **We also reject defendants' proffered justification that we must consider the plaintiffs' attorneys' purported misconduct when addressing Emerson's unethical conduct**… More importantly, a court of law is no place to resort to the argument of "he said it first" or "he did it too." Opposing counsel's violations of professional standards should never be the basis for engaging in professional misconduct. Merely because another lawyer allegedly disregards the ethical rules does not give the opposing lawyer the right to also disregard the rules. Further, **asserting that engaging in misconduct because another lawyer is also engaging in misconduct is in and of itself misconduct**.

Id., 124 Nev. at 25-26 (emphasis supplied). The Court should award Plaintiff his attorney's fees and costs and issue further sanctions as appropriate.

Importantly, "[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*, 124 Nev. at 25. While the evidence is clear that Defendants deliberately used the Burning Embers email in a manner which constituted misconduct, even if the Court

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found otherwise, that does not change Plaintiff's entitlement to his attorney's fees and costs. Defendants knowingly and intentionally used an email for the specific purpose of calling Plaintiff a racist in a case that has nothing to do with race. The mistrial that resulted therefrom has done substantial harm to Plaintiff, for which he should be compensated in the form of his attorney's fees and costs.[23]

It is vitally important that the Court award Plaintiff his requested attorney's fees and costs for Defendants' misconduct causing the mistrial. While Defendants' counsel are being paid every month for every hour of work performed and being timely reimbursed for any advanced costs, Plaintiff is not. Indeed, Plaintiff not only must wait for his second trial (delaying the relief to which he is justly entitled), Plaintiff's attorney's time has been wasted by Defendants' misconduct and the costs incurred by Plaintiff will have to be re-incurred for the second trial. The Plaintiff should not have to bear such expense all over again because Defendants acted improperly, requiring this Court to issue a mistrial. *See*, *e.g.*, *Emerson*, 127 Nev. at 681; *Solimeno v. Yonan*, 224 Ariz. 74, 82-83, 227 P.3d 481, 489-490 (Az. App. 2010). Without an award of attorney's fees and costs to Plaintiff, Defendants will have succeeded in further delaying and denying justice for Plaintiff. The Court should award Plaintiff his requested attorney's fees and costs.

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[23] It is important to note that Defendants do not challenge or otherwise dispute the reasonableness of the requested attorney's fees or that the requested costs are taxable. As such, the Court should award Plaintiff the full amount of the same as requested.

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III. CONCLUSION

Defendants' intentional admission of Plaintiff's Exhibit 56 and the sudden presentation of highly prejudicial material to the jury, both audibly and visually, were strategically planned in advance and created a situation that directly led to a mistrial. But for Defendants' improper actions, that mistrial would have never occurred. Therefore, Plaintiff's Motion should be granted, awarding to Plaintiff reasonable attorneys' fees in the sum of $253,383.50 and reasonable costs of $118,606.25 for a total of $371,989.75.

DATED this 12th day of September, 2019.

THE JIMMERSON LAW FIRM, P.C.

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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 12th day of September, 2019, I served a true and correct copy of the foregoing **PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR ATTORNEYS' FEES AND COSTS**, as indicated below:

_X_ by electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk;

To the individual(s) or attorney(s) listed below at the address, email address, and/or facsimile number indicated below:

S. Brent Vogel, Esq.
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/s/ Shahana Polselli
An employee of The Jimmerson Law Firm, P.C.

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EXHIBIT 1

EXHIBIT 1

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

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

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1 Las Vegas, Nevada, Monday, August 5, 2019
2
3 [Case called at 9:10 a.m.]
4 THE COURT: All right. We're on the record and outside the
5 presence of the jury. On Friday, we did have an off the record discussion
6 in the conference room, where I -- and people can make a record, if you
7 want. Any party, any lawyer can make a record as to what we did on
8 Friday in the conference room, if you want. But just to briefly summarize
9 it, I indicated that I had concern about the fact that the jury had seen
10 Exhibit 56, page 00044, the two-page email dated November 15th of 2016
11 from Mr. Landess to Mr. Dariyanani, or at least relevant parts of it.
12 And I indicated that I'd be willing to, as an offer, but not
13 mandatory, I would be willing to help the parties settle your case, if you
14 wanted to or otherwise you all could -- maybe over the weekend or even
15 Monday, which is now, spend time trying to figure out if you want to
16 settle your case. And I said that because it appeared to me that you
17 know, with the amount of time I had to deal with the issue on Friday,
18 which was hours or less, that there was the potentiality of a genuine
19 concern that could lead to a mistrial.
20 So I said that, you know, one way avoid the practicalities of a
21 mistrial, of which one is having a whole new trial again, where we've
22 been here for two weeks, you know, you could settle your case. So let
23 me just stop and see.
24 Is there anything along those lines that anybody wants to
25 do?

1 MR. VOGEL: No. We've discussed it with our client and their
2 position has not changed.
3 THE COURT: Okay. All right. Well then that takes us to the
4 next item which is this. This is a motion for mistrial that looks like it was
5 filed last night, Sunday night or came to the Court's attention sometime
6 around after 10:00 last night, I think. And so I saw it for the first time this
7 morning and that's why I'm a few minutes late coming in, is because I
8 tried to make some sense of the motion. In other words, I just tried to in
9 my mind conceptualize the extent of what was brought up. And so I did
10 that. Now, I, in general, I see what's in the motion for mistrial from the
11 Plaintiffs.
12 Is there an opposition that the Defense has to a mistrial at
13 this point?
14 MR. VOGEL: No. We just saw it this morning as well, so we
15 would need time to --
16 THE COURT: Well, I mean as -- do you intend to oppose the
17 motion or do you --
18 MR. VOGEL: Oh, absolutely. Yes.
19 THE COURT: Okay. So you oppose the idea of a mistrial?
20 MR. VOGEL: We do.
21 THE COURT: Okay. All right. So we have to reconcile that.
22 The jury is here. So that's going to take a little while. So Dominique, I'd
23 like for you to go tell the jury that there's an item that we have to deal
24 with and that I do anticipate that's going to take a little while. So at the
25 earliest, I'd ask them to return outside at 10:00.

1 THE MARSHAL: Okay.
2 THE COURT: All right. The way I see the situation is that
3 really I think there's two essential components to what we need to do
4 now, given that the jury is here and there's a pending motion for mistrial.
5 I think the first item is to determine whether I would grant or not the
6 mistrial itself. The second item, which I did see in the motion, has to do
7 with fees and costs. I mean you could see that in the title on the motion.
8 There's a motion for mistrial and fees/costs filed by the Plaintiffs.
9 So my thought is, and I want counsel to weigh in on this
10 structural procedural thought and tell me if you agree or disagree with
11 my thought. My thought is I should now hear argument from the
12 Plaintiffs and Defendants about whether I should grant the mistrial. I do
13 think that if granted, the other part of the motion, the fees and costs part
14 of it is something that would have to wait until another day, because I
15 think I -- well, I know I would want to give -- unless the Defense doesn't
16 want it, but I'd be shocked if you didn't -- I would give the Defense an
17 opportunity to file a pleading relevant to the fees and costs aspect and
18 then have a hearing off in the future on that, in the event we got to that
19 point of it.
20 In other words, I -- you know, I wouldn't say to the Defense
21 that now as it relates to fees and costs, you have to handle that right now
22 live, when you have a motion than came in at 10:00 Sunday night. Now,
23 that's not to say that I criticize the timing of this. Actually, the contrary. I
24 want you to know Mr. Little, it's true. I appreciate that you spent --
25 someone spent time over the weekend putting this thing together,

1 because I'm sure at some point, I'll tell you about my weekend.
2 And I'll tell you the ten hours -- ten Saturday and then the -- I
3 don't know, probably I had to tone it down or get divorced -- seven
4 yesterday that I spent on this myself. So I have all -- all the items I put
5 together I have here, that I did on my own over the weekend. So I
6 certainly anticipated that this Monday morning was going to be
7 interesting. I did invite, in our informal meeting on Friday, I did invite
8 trial briefs, I think is what I called it.
9 But I certainly invited the idea that certainly lawyers could, if
10 they wanted to turn their attention to providing law on the obvious
11 issues, you could. I mean, the issue became apparent late Friday, so --
12 just by operation of the calendar. You know, you have Saturday and
13 Sunday and then here we are. So it could be that counsel worked on the
14 weekend. Maybe. Maybe not, you know. I did. But that doesn't mean
15 you have to. Sometimes it's good to take a break.
16 But anyway, I appreciate the idea that you put that pleading
17 together and interestingly enough, somewhere in the neighborhood of
18 about 90 percent of it, I came up with on my own. But the extra 10
19 percent, especially one of the cases relevant to the fees and cost aspect I
20 hadn't seen before. So -- but that's left for another day no matter what,
21 because again, unless the Defense tells me now you don't want an
22 opportunity to file anything, the fees and costs aspect will have to wait.
23 So with that, let met just turn it over to counsel. Any
24 comments on anything I've said so far? Because I'm laying out a
25 proposed procedural construct.

1 MR. JIMMERSON: On behalf of the Plaintiff, you know, I
2 know the Court has been accurate in its recitation of events on Friday
3 and Friday afternoon and over the weekend. We did spend collectively,
4 Mr. Little and myself and our respective offices, the weekend, hitting the
5 books first and then writing a motion yesterday. And we thought it
6 important and appropriate to get in our file yesterday, so that the
7 Defense would have the opportunity to read and review and I think we
8 served it around 10:30, 10:45 p.m. last evening and also delivered a copy
9 to the Court at that time.
10 I did want to comment that in terms of making a record, the
11 Court placed both sides on notice in the conference room immediately
12 afterwards relative to the serious nature of the information that was read
13 to the jury, the Court's statement that it was seriously considering a
14 mistrial being granted, placing both parties on notice of the same and
15 eliciting from each side any response that we or opposing counsel would
16 have to the Court's fair comment and observation as to where were at
17 after that.
18 So I think the Court should be complemented and that both
19 sides were given fair notice and opportunity to speak with the Court
20 Friday afternoon, after this terrible set of events was put in place to
21 respond and to gives our viewpoint and that's where that set. We went
22 to work as the Court noted. The Court did, too. And thank you very
23 much in terms of the nature of this. And so there's just a few points that
24 we would make without getting too deeply into the weeds.
25 First, the caselaw in Nevada as well as elsewhere cited in our

1 motion tells us that --
2 THE COURT: Well, Mr. Jimmerson, I'm going to interrupt
3 you for a reason.
4 MR. JIMMERSON: No, no problem.
5 THE COURT: Sorry.
6 MR. JIMMERSON: Yes, sir.
7 THE COURT: I apologize for the interruption --
8 MR. JIMMERSON: Uh-huh.
9 THE COURT: -- but you know, I say that to both sides when I
10 do it sometimes. But I'm just asking right now. I laid out a procedural --
11 MR. JIMMERSON: Oh, I'm sorry. Yes.
12 THE COURT: -- roadmap.
13 MR. JIMMERSON: Yes.
14 THE COURT: Where we handle only the motion for a
15 mistrial, reserve the fees and costs aspect depend -- of course which
16 would be dependent on whether I grant the motion or not --
17 MR. JIMMERSON: Of course.
18 THE COURT: -- for some other time, to give an opportunity
19 to weigh in.
20 MR. JIMMERSON: No -- thank you.
21 THE COURT: So --
22 MR. JIMMERSON: On that basis, we would agree with that.
23 THE COURT: All right. Let me ask Mr. Vogel --
24 MR. JIMMERSON: I think that that --
25 THE COURT: -- and Ms. Gordon.

1 MR. JIMMERSON: -- that that needs to be where that's at.
2 We need to address this issue now and the fees and costs issue can be
3 delayed and give the Defense an even greater opportunity than it's had
4 since all of us have been presented with this together. Thank you, sir.
5 THE COURT: Okay. Mr. Vogel.
6 MR. VOGEL: Thank you. Good morning. We obviously
7 spent quite a bit researching as well. And we do -- we do appreciate you
8 taking us back after Court on Friday and going through it and expressing
9 your willingness to help try to settle this and expressing your view that
10 you know, you felt that things were kind of going Plaintiff's way on this
11 case. We discussed that with our clients and --
12 THE COURT: Well, I didn't actually say things were going
13 Plaintiff's way. I said that on liability, I think -- you know, okay.
14 MR. VOGEL: Yeah.
15 THE COURT: One thing about it is, we've got to be careful,
16 because I want to make sure everybody in the room is going to have
17 adequate time to make their record, but I have to make mine, too,
18 because I don't want any mystery in the record, okay? So if you don't
19 mind, just have a --
20 MR. VOGEL: No, no.
21 THE COURT: -- just have a seat, please. Have a seat, unless
22 you want to stand up for about five minutes or more. Okay, so now it's
23 come up a couple times and so, you know, I just liking making a good
24 court record. And anybody can memorialize things that happen off the
25 record, including me. So if anybody wants to memorialize something

1 that happened off the record, then the answer, as you know is always
2 yes. You can do that and there's no hurry in doing that. But at this
3 point, it seems like I should memorialize what happened on Friday.
4 After the item came up in question -- that is the whole
5 chronology of events, which at some point, let's put that all in the record
6 again, most likely, that led to the jury now hearing from Ms. Gordon
7 reading a couple paragraphs from this email at Exhibit 56, page 44. I
8 offered -- this is -- and so if anybody disagrees with what I say, you're
9 welcome to. You don't have to agree with what I say, if I memorialize
10 something. If you disagree with some description or characterization,
11 you're welcome to say I disagree, that's not what happened. I wouldn't
12 be offended.
13 But this is what I think happened. In my mind, I obviously
14 recognize the issue. To me, it was a rather unique issue, one I haven't
15 really seen before. I've been here eight and a half years. I've declared
16 no mistrials, okay? And so I just felt like well, in my heart of hearts, I
17 really am now for the first time since I've been here, truly thinking wait a
18 second, there's a genuine issue of potential mistrial in my mind as a
19 judge. And of course, that is magnified, because we've been here
20 putting a lot of effort in for a couple weeks, so it's not as though this
21 happens on day 1 or day 2.
22 So in my mind I'm thinking wow, I need to deal with this. I
23 can tell you that in my mind, too, was the idea that the email itself, as we
24 all know and I'm sure we'll talk about, my guess is at least ten times
25 sometime today, but I guess the first time will be right now. You know,

1 the email does reference words, hustling Mexicans, Blacks and rednecks
2 and then later talks about the Mexican laborers stole everything that
3 wasn't welded to the ground. And that, I mean immediately, once -- you
4 know, it took a few minutes for all this to hit.
5 It's not like I knew the pristine, model answer, you know,
6 within seconds or even minutes, contemporaneous with Ms. Gordon,
7 you presenting this to the jury. It look a little while for me to process,
8 okay, what just happened, how'd it happen. It's from an admitted
9 exhibit. Dariyanani did put some character style testimony out. Okay.
10 There's no objection. You know, I mean, it's not as though I had the
11 model, you know, A+ bar exam answer ready to go.
12 So -- but in my mind, I guarantee you -- I'll tell you the first
13 thing that hit me. We got a woman on the jury named Adleen Stidhum.
14 She's African-American. We gave her a birthday card during the trial.
15 We celebrated her birthday during the trial. We gave her cupcakes with
16 the jury and made, I think, a respectful sort of event out of it all. And so
17 the first thing to hit my mind was wow, how could she feel? And then
18 the second thing to hit my mind was, as I recall, Ms. Brazil, who's also
19 African-American, served. I think she served 20 years in the Navy, if I
20 recall that correctly.
21 And I just thought about, you know, what I said early on in
22 my pep talk to the jury, where I talked about the fact that my father
23 served in the Army 27 years and he's buried in Arlington. I think I might
24 even have mentioned that I served as a member of the United States
25 Army JAG Corps, you know, where I signed up for three years and

1 stayed four and a half, because I was a trial lawyer and it was wonderful
2 and I loved it. And so I -- you know, I espouse all the virtues of serving
3 on a jury and what a legitimate call to service this is.
4 And it just -- I felt this feeling of illegitimacy and I felt bad. I
5 mean, I felt bad. So I wanted to have this meeting, because I just felt like
6 well, enough of me as a judge, enough of me as an eight and a half year
7 judge is comfortable with having to recognize we got a problem. It's a
8 big issue. And so I want to do, as I've always done, try to handle things
9 in a way that make sense. You know, whether it was my time at the bar
10 or here, I always try to do things that make sense.
11 You know, whether it was the time that Jack Howard called
12 me at 1:00 in the afternoon and told me that he had a lawyer in his office
13 who was drunk, who showed up to do a deposition at 1:00 in the
14 afternoon on a weekday. And I went over to Jack's office. I drove over
15 there. Sure enough, the lawyer there for the deposition was drunk.
16 Later found out, high on meth. But I took that lawyer home and I put him
17 on my couch.
18 I then called a guy named Mitch Gobiega [phonetic] and I
19 said Mitch, can you come on over to my house. There's something I
20 want you to help me with. He then took that lawyer that day and drove
21 him to a place called Michael's House in Southern California, a five-hour
22 drive from my house. That lawyer stayed in rehab for 30 days, made it
23 through all that and still today, when I see that lawyer, he and I have to
24 spend a moment together and both of us cry. It's happened ten times
25 since I've been a judge. It's weird. Because he made it through.

1 I don't know why that story came to mind, but I can tell you
2 it's the same thing here. It's that same sense of urgency that there's a
3 problem that needs to be dealt with. So I invited this meeting in the jury
4 deliberation room. And when we were back there, I said look, there is a
5 way to avoid the continuing obvious specter of a mistrial and that is
6 optional. Not required. I even mentioned that I thought the old style
7 judges in the old days would get everybody together and say look, you
8 need to settle your case, and essentially, almost order it.
9 But not my style, because ethically, I can't do that. A judge
10 cannot order you to settle your trial, at least in my view, okay? But I can
11 strongly urge it as something that's practical, that makes sense to do,
12 when you know as a judge that there's a serious specter of a potential
13 mistrial in the air now. Especially after two weeks and the obvious effort
14 that now would have to be put in doing another trial. So I -- an optional
15 way offered to give my editorial comments along these lines. And as I
16 took it, the lawyers wanted to hear that.
17 And I think I even said look, if anybody doesn't want to be
18 here or doesn't want to hear these editorial comments, all you need to
19 do is ask and there'll be no hard feelings and we'll go off on our
20 weekend. But the -- as I remember it, the lawyers entertained that and I
21 hope appreciated it, but at least allowed for it or acquiesced in it or
22 wanted it to continue, whichever way you'd like to take it.
23 So I said look, as an option, rather than dealing affirmatively
24 with the mistrial issue that's in the air now in my view, what we could do
25 is I can come in Monday and I'd be willing to sit in the conference room,

1 if it took all day even with the parties. That is, with the lawyers, Mr.
2 Landess and the doctor and you know, the insurance rep or you know,
3 the relevant parties to all this and I'd give you my opinion. I mean, it's a
4 jury trial, so I think I can give my opinion as to the evidence I've seen.
5 But again, I would only do that if everybody wanted me to. And so it
6 was out there for consideration.
7 Now, neither client was in there. So Mr. Landess wasn't with
8 us on Friday and Dr. Debiparshad wasn't there. So of course we all knew
9 that before making any decisions on this, you'd have to consult with
10 your clients and then get back. Over the weekend, actually, one of the
11 criticisms of myself I had that really bothered me was I should have set
12 up a protocol where we all somehow communicated over the weekend
13 on this, but I didn't. So I -- it put in a position where I knew that first
14 thing on Monday morning with the jury here would be this issue.
15 But I do -- I respect and understand, if you know -- if -- and
16 it's really Dr. Debiparshad. If he doesn't want to do this, he's the client. I
17 think he makes that decision. And I have to respect that. I don't hold any
18 bad feelings as to that. You know, if he wanted to reconsider that, I'd
19 give you as much time to talk with counsel as you wanted to here this
20 morning right now even, because I think this mistrial issue is a serious
21 one that has legitimate merit. But I won't make the decision on it
22 ultimately, of course, until I hear from both sides.
23 But in any event, if the parties wanted to, I still would spend
24 as much time as necessary going over what I thought the evidence was
25 and give an opinion as to what could happen. With that said, of course,

1 Got only knows what the jury's going to do. Anybody can give their best
2 estimate and then the opposite can easily happen. But you know, I've
3 been sitting here and I have all this. I don't know, this is probably like
4 you know, 20 some pages of my notes of everything that's happened in
5 the trial. Every witness and the highlights of what they've all done. I
6 could share that.
7 And in our Friday meeting, I think based upon either
8 acquiescence or invitation, the parties did want to hear and I did give a --
9 sort of a -- I think I called it a thumbnail overview or thumbnail sketch of
10 things and I said look -- and again, this is an opinion. And I gave this
11 opinion, because I thought perhaps it would foster taking me up on this.
12 I said look, my guess is that there's more -- there's enough evidence to
13 meet the burden, the preponderance burden on the medical malpractice.
14 I'll tell you Dr. Debiparshad, that's what I said to everybody on Friday.
15 In other words, it's not that I disrespect your position or Dr.
16 Gold's position. It's just that if you were to ask me, I would say to this
17 point, that the medical malpractice itself, though I'm sure you did the
18 best you could and it was well-intended and you didn't do anything
19 intentional to try to harm Mr. Landess, but that's not required in medical
20 malpractice. It's just making a mistake that now, unfortunately, causes
21 some effect. And you know, my view is that Plaintiffs would meet that
22 burden. I didn't give all the reasons for that. I'd be happy to spend time
23 doing that, though.
24 But I also said that I don't think the Plaintiffs would get the
25 home run on their damages. And this is all given with totally

1 discounting and not considering at all this email, of course. I took it from
2 the perspective of, if the jury didn't hear the email, here's how I would
3 evaluate the case. And I just in a general way said I don't think they're
4 going to get the full extent of this stock option item and I further said
5 separate from the stock option item, my thought is that the pain and
6 suffering wouldn't go on until age 80.
7 I don't think the pain and suffering would be more than what
8 the time period from the first to the second surgery, really -- what kind of
9 pain and suffering you have associated with those months. Whatever it
10 is, six months. That was my opinion. So that means that if I were right,
11 the jury would find medical malpractice. They would certainly give some
12 damages related to the past medical bills. They would give some pain
13 and suffering for the six month time period on a theory that had it been
14 done correctly, he would have healed in six months, like he probably has
15 done after the Dr. Fontes surgery. And that is just my best guess as to
16 what would happen.
17 I think on the stock part, that's so nebulous, because there's
18 so many components that go into that, including could he really work or
19 not. But I just think that it's likely that they wouldn't do much. They'd do
20 some, probably, but not much on the stock option part. So what's the
21 ultimate number? I don't know. If I sat down and had a settlement
22 conference, if I were able to do that, I'd probably give you a number. But
23 I think that's what would happen. And that's what I said on Friday, but
24 I've magni -- I gave a little bit more now.
25 But -- so -- and we left the meeting and I -- you know, I take it

1 that the lawyers talked with their clients. And so again, no hard feelings,
2 if we don't do it that way. I offered that, because I felt that was a fair and
3 reasonable approach to the situation. And this is -- I guess I'll stop in just
4 a second. The reason -- I think the main practical reason I felt that was I
5 un -- if there's one thing I am certain about -- certainly not positive about
6 my opinion as to a what a jury may do, but one thing I am absolutely
7 certain about and that is that nobody in the room wants to do this all
8 over again from the beginning, because that would take some time to
9 reschedule the trial, most likely with another department and start all
10 over again.
11 And I'm sure you get the feel for what that mean to go
12 through this whole thing again. So I felt the, you know, the pain
13 associated with that, just from a human perspective, not even to mention
14 this idea of the costs, you know, separate from who's responsible and
15 would I award costs or not. If you have a new trial, one thing's for
16 certain. All those costs, all these attorney's fees, all your time, your time
17 way from two weeks of your practice, all these experts, my guess is
18 they're not going to do it again, unless they're paid again.
19 I don't even know what that would be. Couple hundred
20 thousand just in costs alone? Five hundred thousand dollars in fees and
21 costs? I don't know. And so I'm thinking, you know, why not do
22 something to try to avoid even the potentiality of something like that?
23 And that's why I offered what I offered. So that's it. I made my record.
24 Now we're back to Mr. Vogel as to the --
25 MR. VOGEL: Yes.

1 THE COURT: -- conference on Friday.
2 MR. VOGEL: Yes. Thanks, Judge. And we appreciate it and
3 I -- and I understand your comments on your view on how the evidence
4 came in was a took to talk to our clients with. And that's what we did.
5 We talked to them. We talked to a lot of people. I talked to, you know,
6 much wiser lawyers than I and got their take on it. We talked to a judge.
7 We talked to several people about this. And we appreciate it. And
8 ultimately, based on all the discussions, our review of the law and
9 whatnot, we felt like, look, this is not actually a case for mistrial and that
10 we want to go forward.
11 That was what we came to. But yes, we definitely
12 appreciated your comments on that and I appreciate your setting out
13 how you'd like to handle this right now going forward procedurally, so
14 that's all I wanted to say on that point.
15 THE COURT: All right. Well that takes us then to the -- so I
16 guess there's no reason to revisit the idea of potentially trying to settle
17 your case?
18 MR. VOGEL: If you'd like, we can talk to our clients, but after
19 talking to them this weekend, I don't think that they've changed their
20 mind.
21 THE COURT: All right. Well, we don't know that until you've
22 talked to them, right? So why don't we just go off the record and give
23 you a few moments in the conference room. Do you think that's fair or
24 do -- if you don't want to do that, you don't have to. I'm just --
25 MR. VOGEL: No --

1 THE COURT: I said a lot of things that he's heard now that
2 he --
3 MR. VOGEL: Yeah.
4 THE COURT: -- didn't know on Friday, right -- over the
5 weekend.
6 MR. VOGEL: We're happy to do it.
7 THE COURT: So who knows what'll happen, right?
8 MR. VOGEL: Right.
9 THE COURT: Okay. So let's go off the record and you guys
10 talk with each other and I'll be here. Let me know when you want to
11 resume, okay?
12 MR. VOGEL: Very good. Thank you.
13 [Recess taken from 9:40 a.m. to 11:05 a.m.]
14 THE COURT: Okay. We're back on the record.
15 Mr. Vogel?
16 MR. VOGEL: Yes, Your Honor. We had the opportunity to
17 discuss. We'd still like to move forward with the motion, and hopefully
18 with the rest of the trial.
19 THE COURT: Okay. All right. So the jury's probably back
20 now at 10. So I want to hear this motion. The only thing I can think
21 about, and give me your input, please, counsel, is tell them that it's
22 going to be a while, 11:00. I mean, that's all I can think about at this
23 point. Does anybody have a thought? Have them report back at 11?
24 MR. JIMMERSON: That should be sufficient time for the
25 Plaintiff and Defendant to give them -- give you their views, our views.

1 MR. VOGEL: I agree, Your Honor.
2 THE COURT: Okay. Well, Dominique, let the jury know that
3 -- is it okay if I tell Dominique to tell the jury that everybody in the room
4 appreciates their patience, and we're dealing with something that is
5 going to take more time, and we'd like to have them come back for an
6 update or to come in at 11:00? Is that okay? You think that's fair?
7 MR. JIMMERSON: Plaintiff would stipulate to that, Your
8 Honor. I think that's appropriate.
9 THE COURT: Okay.
10 MR. VOGEL: Yes.
11 THE COURT: You know, I've got to do something to -- I want
12 to let them know that we respect them.
13 So okay, Dominique, let them know that.
14 All right. Plaintiff's motion for mistrial?
15 MR. JIMMERSON: May I please the Court, Your Honor. The
16 reference is made, of course, to Plaintiff's motion for mistrial and for fees
17 and costs filed yesterday at 10:02 p.m. But my argument is not to simply
18 regurgitate that, which you have already read, and which the Court has
19 already studied over the weekend through the efforts. It is to highlight
20 what we believe to be both the law, as well as the very real practical and
21 real setting that we're in, and the consequences that follow.
22 Let me begin by saying that the Plaintiff's case is essentially,
23 you know, three elements. First, is to establish the professional
24 negligence of the Defendant. Second, is to demonstrate the causation
25 that that negligence caused. And third, is the damages that proximally

1 and reasonably flowed from the negligence of the Defendant upon the
2 Plaintiff.
3 Towards that end, witnesses have been introduced now for
4 two weeks. Most of the time I would say in terms of allocating time,
5 speaking to the liability portion of the case, the medicine that was
6 involved, for which we've heard from multiple physicians from the
7 Plaintiff; Dr. Harris, Dr. Fontes, and Dr. Herr. From the Defense, Dr.
8 Debiparshad, and Dr. Gold. So five witnesses who spent a fair amount
9 of time on that.
10 In terms of the damages separate and apart from the
11 testimony of Mr. Landess, Mr. Dariyanani was called Friday morning --
12 last Friday morning, following the completion of Dr. Gold's testimony, to
13 speak to two items. One would be the reasons for his termination, and
14 linking causally the -- his inability mentally and physically to perform his
15 job to the loss of his employment to establish the basis for which both
16 Mr. Landess and Dr. Smith could testify as to the lost wages, past and
17 future. As well as the lost stock options, for which Mr. Dariyanani would
18 speak to the value of the stock options at the time of trial, which is now.
19 The sequence of events, as reflected in the transcript of last
20 Friday, day 10 of trial, reveals that the question that had been asked of
21 Mr. Dariyanani was was it difficult for Cognotion, and/or Mr. Dariyanani
22 individually to terminate Mr. Landess. And he answered yes. And he
23 answered, please explain. And Mr. Dariyanani gave reasons for that,
24 both in terms of being satisfied with Mr. Landess' work, that the
25 termination was not through any fault or personal fault of Mr. Landess in

1 performance, but due to his inability to perform both mentally and
2 physically, to make meetings, to be able to withstand the pain that he
3 was going under, and that that continued from October 2017 through
4 June of 2018, whereupon the necessity of Cognotion to have someone to
5 fulfil this responsibility became so apparent and needy that he was -- a
6 new associate counsel -- or a new general counsel was found by the
7 name of David Kaplan.
8 What led to this -- what's being argued by the Defendant as
9 to the justification is that Mr. Dariyanani was asked by me a question
10 that did not call for in any regard character evidence at all. The question
11 was benign. The question was did you find it difficult -- or did Cognotion
12 find it difficult, or yourself, to terminate Mr. Landess. And he answered
13 yes. Please explain. Mr. Dariyanani's response was in some regards
14 very responsive to the question; in other regards, nonresponsive to the
15 question. The obligation to move to strike testimony that is
16 nonresponsive to the question lies with the Defendant, as well as with
17 the Plaintiff. In the sense, it's a shared responsibility that when a witness
18 responds in a way that in part is responsive, in other ways not, the
19 Defense certainly has that right and obligation to move to strike that.
20 The point in this is just simply first of all, to be accurate in
21 terms of the procedural posture of how we got here. Secondly is to
22 reveal that there was no opening of any door by the Plaintiff to character
23 evidence. Indeed, I think a fair statement can be made, and the Defense
24 don't argue to the contrary, that there was essentially no character
25 evidence offered by the Plaintiff or by the Defendant in this case

1 regarding any of the parties, including the Plaintiff and the Defendant
2 throughout the case.
3 The -- filling in the dates -- filling in the circumstances then
4 upon cross-examination, Defense counsel, Ms. Gordon, sought the
5 introduction of a group exhibit, 122 page Exhibit 56. Plaintiff's proposed
6 exhibit, not yet admitted, from which she sought to read two or three
7 entries from a couple of those emails, of which there was 122 -- 79
8 pages. We have the exhibit here. I don't want to misstate it. I thought it
9 was 122 pages. It began at 487 -- I'm sorry, it started at 56-001, and
10 completed at 56-079. So I guess it's 78 pages. To the extent that I said
11 122, that's a mistake. I guess I was looking at the Bates number on the
12 right. Yeah, it's about 80 pages; 79 pages in length, of which the
13 offensive email is marked, as the Court has noted, Exhibit 56-044 and
14 045, which 044 being read the second and third paragraphs of that email
15 dated Tuesday, November 15th, 2016.
16 And the -- and so character was never an issue in this case. It
17 was never introduced by that. And in terms of character, you typically
18 would have, if you were to have character evidence -- and you see that
19 more in criminal cases than in civil. Character evidence really has no
20 place in civil cases. It would be through opinion testimony, or the like,
21 which was not offered in this case.
22 Now, as to the case law and the circumstances affecting that,
23 this Court has already weighed in and supported by the Plaintiff, as to
24 the radio activity, or the bombshell nature of this information. It starts
25 with one principle. While there was, in terms of a time -- temporal time,

1 maybe five to ten minutes between Defendant's request for admissibility
2 of Exhibit 56, the Plaintiff's granting the same through counsel,
3 specifically myself, and the use of the offensive email, the Plaintiff and
4 counsel was not aware of the content of this one specific email.
5 But more importantly as to the legal principle, the use of
6 inadmissible evidence, even though admitted through inadvertence,
7 mistake, or accident for an improper purpose is clearly improper, wrong,
8 and should not occur. And the case law from the Nevada Supreme
9 Court, as well as several other courts we've cited is very clear. The
10 Court's own research revealed the same.
11 The other part of it is is that the -- both the Nevada Supreme
12 Court and other cases have held that information, or evidence, or
13 comments about race, in particular, are very much explosive, very much
14 bomb-like, and are not capable of being reversed by curative instruction.
15 And that I think is very clear from several cases in several courts
16 throughout the United States. And that is exactly what was done here.
17 Respectfully, the Defense had in mind specifically this
18 examination. They sought the admission of Exhibit 56. They had this
19 particular email at their fingerprints. They prepared to read it. And they
20 placed it onto the ELMO with highlighted language, with the intent of
21 exposing that language to the jury. You know, it's almost as if in cross-
22 examination the question is more important than the answer, because
23 the question is what creates the prejudice that cannot be undone, and
24 which it was effective here.
25 Furthermore, the question is truly a non sequitur. It was truly

1 irrelevant to the testimony of Mr. Dariyanani. The nonresponsive words
2 of he's a beautiful man, as well as having he's both good and
3 [indiscernible], that and flawed, giving a balanced view, would be --
4 would not be the predicate for which to introduce such prejudicial
5 examination and the use of materials that are so prejudicial. I would say
6 as a footnote to this Court, as already stated on Friday of last, that were a
7 motion in limine submitted by the Plaintiff to the Court, or vice-versa
8 where the roles were reversed and the Defense were to seek a motion in
9 limine to preclude the use of the information on either side, the Court
10 would have granted the same -- or likely have granted the same. And
11 that clearly is the case here.
12 The premeditated nature of this examination by the
13 Defendant is clear. And it's -- it cannot be reasonably argued to the
14 contrary that the Defendant did not understand the radioactive nature of
15 the material that they were going to introduce in front of the jury,
16 recognizing that our jury is racially diverse, both in terms of African-
17 Americans, as well as Hispanic jurors, which there are two of each, out of
18 only eight regular jurors, plus two alternates. And I could be missing
19 other overtones. But those were the four most obvious.
20 And so the impact of the --
21 THE COURT: Which four do you think?
22 MR. JIMMERSON: Well, I believe that for African-Americans,
23 Juror Number 2, Ms. Brazil, and Juror Number 5, Ms. Stidhum, are
24 African-American women. And I believe that Juror Number 4 and Juror
25 Number 6, Ms. Asuncion and Mr. Cardoza are both Hispanics.

1 THE COURT: Cardoza is number 7, but okay.
2 MR. JIMMERSON: Is he 7? I thought he was 6. I'm sorry, I
3 thought he was 7. You're right; he is 7. Thank you. He is 7.
4 THE COURT: I just want to make sure. I mean, obviously,
5 I've already said as to Ms. Brazil and Ms. --
6 MR. JIMMERSON: No, no. But I will confirm --
7 THE COURT: I didn't think about that.
8 MR. JIMMERSON: Ms. Asuncion is Juror Number 4.
9 THE COURT: Okay.
10 MR. JIMMERSON: And Mr. Cardoza is Juror Number 7.
11 THE COURT: Right.
12 MR. JIMMERSON: And the case law is also explicit that a
13 curative instruction is in most cases insufficient and not capable of
14 undoing the harm and prejudice that's occurred to a party, in this case,
15 the Plaintiff.
16 May I ask of you, Judge, that your recognition of that, and
17 your, you know, heroic effort to try to save this was noted on Friday
18 afternoon. But my point about the cementing of the prejudice is also
19 accentuated by the fact that two and a half days have passed. You know,
20 if this were on a Tuesday, and you were here Wednesday morning, it'd
21 have a better chance at least in temporal terms, to reverse the prejudice
22 that occurred. Here, the jury went home, and 72 hours have passed.
23 And we're back together now on Monday morning. But that worsens an
24 already ugly and prejudicial and irreversible sort of offense.
25 And the other aspect of it, I would just say is -- it calls upon

1 all of our common collective experience. And I call that upon opposing
2 counsel as well. We all have practiced law for extended periods of time.
3 We all have had life experiences that affect our being, and affect our
4 behavior, and our intellect, and our view of the world. In the courtroom
5 we've had many, many experiences that would guide us to our behavior
6 that we hope is appropriate and reasonable, and certainly ethical, and
7 within the rules.
8 And for the reasons that the Court noted in eight and a half
9 years of the judicial experience of this Court, and my many years of
10 experience, and opposing counsel's many years of experience, this is
11 unprecedented in the sense of the extraordinary way in which a
12 prejudicial piece of evidence that had no business ever to be admitted,
13 and certainly, no business to ever be used, even if it was inadvertently or
14 by accident admitted, can be undone. It's really -- because it's
15 unprecedented, it's hard to point to other fact situations in our court
16 system and in the administration of justice where such a taint could be
17 articulated and explained. And because it is so extraordinary and
18 unprecedented and devastating and outrageous, that mistrial is the only
19 remedy.
20 And may I say that the Court on Friday in the off-the-record
21 discussion, contrary to opposing representations as to what he
22 remembers, my remembrance of the Court was not that the case was
23 going Defendant's way, but the Court saw a mixed result; saw a leaning
24 of the majority of jurors with the Plaintiff, but that the unwillingness, the
25 Court perceived to grant the damages sought by the Plaintiff being a

1 likely result. But again, it's -- we're all speculating; we're not able to read
2 the jurors' minds.
3 But irrespective of that, I don't -- I just point it out because it
4 reminds me of the supreme court ruling about pornography; it's hard to
5 define, but you know when you see it. This is very similar to that. It is
6 hard -- in fact, it's impossible for me to understate the devastating
7 irreversible nature of the prejudice that has been placed upon the
8 Plaintiff. We'll never be able to recover from this. And it appeals to
9 everything that's wrong about humankind, about our responsibilities as
10 lawyers and officers of the court. It truly was inappropriate and just so
11 extreme that it can't be reversed.
12 And as the Court has noted, both sides -- speaking for
13 ourselves, the Plaintiffs, have expended more than $100,000 in out of
14 pocket costs, approaching $150,000. We've all expended a year's effort.
15 And certainly, both sides have worked very, very had to represent their
16 respective clients. So it's not an easy motion to make because, you
17 know, we have invested so much time, energy, emotion, and finances.
18 Mr. Landess is 73 years old. His continued ability to be north of the
19 border and breathing air is not assured. But what is assured is the
20 absolute prejudice and irreversible harm that the Defendant's inquiry has
21 placed upon the Plaintiff, and upon our jury.
22 Thank you, sir.
23 THE COURT: All right. Defense? Ms. Gordon?
24 MS. GORDON: Thank you, Your Honor. We're actually going
25 to be breaking this down between the two of us. I'm going to get on the

1 record the procedural background of what occurred on Friday, and then
2 Mr. Vogel will address some of the arguments made by Mr. Jimmerson.
3 As Mr. Jimmerson said today for the first time, the exhibit is
4 not 122 pages. It's 79 pages. It consists of 23 emails that were produced
5 by Plaintiff during the litigation in this case. I'm sorry, 32 emails total
6 and the email issue used during Mr. Daryanani's cross is the 23rd email
7 in that set. Those were disclosed by Plaintiff on May 29th, 2019 in its
8 12th supplement to the NRCP 16.1 disclosure.
9 That exhibit was later added to Plaintiff's pretrial disclosures,
10 which were amended at least three times. They were paginated by
11 Plaintiff, giving them ample opportunity upon opportunity to know what
12 was in that exhibit, and to familiarize themselves with it, and where they
13 could have, as Your Honor stated on Friday, then filed a motion in limine
14 on it, if they found that prejudicial value was definitely more than any
15 probative value that it may have. Defendant did not disclose that exhibit.
16 That was entirely Plaintiff's exhibit.
17 When Mr. Daryanani was testifying, he gave a lot of
18 character evidence. As Your Honor will remember, he talked a few times
19 about the fact that Plaintiff had -- he was a beautiful person, he testified
20 that he could give Mr. Landess bags of money, and expect that those
21 bags of money would be deposited. He stated a few times that he would
22 leave his daughter with Mr. Landess.
23 This is not an incident of one sentence of character evidence
24 being given by Mr. Daryanani, and I don't believe that Plaintiff's
25 argument that that exact testimony wasn't specifically elicited by

1 Plaintiff, should be well taken because certainly, with a grasp of the
2 evidentiary rules that Mr. Jimmerson and Mr. Little, and Mr. Landess
3 have at this point in their careers, they could have addressed it at the
4 time.
5 They could have approached the bench and said, Your
6 Honor, that sounds like he may have given some character evidence, we
7 don't want to open the door. Mr. Jimmerson could have exerted a little
8 more control over his witness to the extent that Mr. Daryanani would've
9 have been offering such enormous amounts of character evidence, but
10 none of that happened.
11 After that, the Plaintiffs specifically stipulated to the
12 admission of Exhibit 56, and during the cross-examination, I would
13 careful to ensure that Mr. Daryanani had indeed given that character
14 evidence. I didn't immediately cross him on that evidence until the very
15 end. I talked with him at least twice confirming that that was his
16 evidence that he gave. That, Your Honor, gave Plaintiff's counsel
17 another opportunity to perhaps step in. It was very clear that I was
18 confirming character evidence that had been given by Mr. Daryanani.
19 Plaintiff's counsel, if that was not his intention, he could have asked for a
20 sidebar. He could have done a variety of things, Your Honor, at that
21 point, to step in --
22 THE COURT: Okay.
23 MS. GORDON: -- and say, that's not what I intended.
24 THE COURT: Let me interrupt you for a reason to be --
25 MS. GORDON: Sure.

1 THE COURT: -- helpful here. I agree with the Defense that
2 the issue of character was put into the trial by the Plaintiffs, so I do think
3 that the Defense had a reasonable evidentiary ability to offer their own
4 character evidence to try to show -- to impeach Mr. Daryanani, or to
5 bring forth evidence to show that what Mr. Daryanani said about Mr.
6 Landess being a beautiful person, the bags of money, the leaving the
7 daughter, all that that you just mentioned. I agree with you.
8 MS. GORDON: Okay.
9 THE COURT: I mean, I don't think I could be swayed,
10 actually, on that. I mean, I do think that the issue of character was put in,
11 and so I think my concern is not that at all. I do think you had a right to
12 do it. I think the issue becomes the extent to which he did do it, and so
13 let me, in fairness to you, tell you the things that are on my mind that
14 you wouldn't know, and this is a good seg-way for that, I think, right
15 now, and you can take as much time to talk to me as you want.
16 You know, I've had the benefit of this weekend to really think
17 about it and you indicated you talked to a judge. Well, I had two hours
18 with Mark Dunn. Two personal hours in a room with him that I caused to
19 occur because I wanted to talk to a better judge than myself. So I've had
20 a lot of time to think over the weekend, so my thought is, with the item
21 itself, I know I said on Friday in just trying to react to it as a human being
22 and as a judge, that most likely, I would've granted a pretrial motion in
23 limine to preclude this.
24 I'd like to tell you that upon reflection with an opportunity to
25 think which judges should do. It's one hundred percent, absolutely

1 certain, slam dunk easy, I would've granted a motion to preclude the
2 hustling Mexicans, blacks, and rednecks, where the Mexican labor stole
3 everything that wasn't welt to the ground. I would've precluded that.
4 And though not so relevant to this, but since we're having a meaningful
5 discussion, I can tell you that I handed this to Mark Dunn, and the level of
6 shock on his face was pulpable. And I handed it to him only asking him
7 one thing, would you preclude this in a motion in limine.
8 That's how I started it, because I didn't want him to know the
9 full extent of anything else I might have to deal with, and he told me, in
10 no uncertain terms, what I was really already thinking, and that is that
11 you absolutely have to preclude this because the issue of whether or not
12 Mr. Landess is a racist or not is not relevant. And even if it relevant, if
13 character is an issue, that's really -- that's the issue. I mean, race --
14 whether he's a racist or not is not relevant and is prejudicial. It's, I think,
15 clearly what I would have to tell you, and that's the reason I would grant
16 the pretrial motion.
17 So I think it's fair to say, okay, why not ask for a sidebar. I
18 mean, certainly you have the witness in the witness box, Daryanani, and
19 you have the item ready to go up on the ELMO. You could ask for a
20 sidebar to discuss --
21 MS. GORDON: Us?
22 THE COURT: Yes. Us. You could ask for a sidebar to now
23 indicate, I'm going to put this up, or for that matter, consideration
24 could've been given to -- I mean, this is my question. I want to see if you
25 want to answer this, to potentially redacting portions of it, because in a

1 motion in limine, I'll share with you that the proper way to do this would
2 be to say, look, to the extent the Defense might want to use this to show
3 Mr. Landess isn't a beautiful person or otherwise in the event character
4 comes up, you want to use it to rebut character, you could say things
5 like, I got a job working at a pool hall on weekends to supplement my
6 regular job of working in a factory, redacting the word "sweat". Then
7 delete or redact, "with a lot of Mexicans".
8 And then continue with non-redactions. "Taught myself how
9 to play Snooker. I became so good at it I developed a route in East L.A.
10 hustling --", redact "Mexicans, blacks, and rednecks" -- "-- on Fridays,
11 which was usually payday." And then probably redact, "The truck stop
12 Mexican laborers stole everything." And now what you have is you have
13 usable evidence that he was a hustler. He taught himself to play pool,
14 and he hustled people playing pool. Is that an indication of a beautiful
15 person? Usable, admissible, but not overly prejudicial.
16 So that's the something I wanted to at least share with you
17 that I did put down in my notes here -- these are some of my notes over
18 the weekend. I put a note in here asking, what about a sidebar, what
19 about redacting, you know, prejudicial parts of the usable item of
20 evidence. So go ahead, if you want --
21 MS. GORDON: I appreciate that, Your Honor. I think that
22 what that does is it certainly shifts the burden to Defendant, and what, I
23 believe, you're saying is that it's admissible evidence, Your Honor. And
24 as you've stated in this case and I believe in other trials you've had,
25 admissible evidence is used for any purpose, can be used for any

1 purpose, and I don't think that the burden for how prejudicial a piece of
2 evidence that Plaintiff disclosed and stipulated into evidence, the
3 prejudicial nature of it should not be -- have to be addressed by the
4 Defense, and out of curiosity or out of doing their job for them, I don't
5 know, but I know that admissible evidence, it can be used for any
6 purpose.
7 And I know that Plaintiff initially elicited and had
8 impermissible and unethical character evidence. What the Defense is
9 allowed to do in response to that, and what I actually have an ethical
10 duty to my client, a person of color to do, is to use that evidence in
11 impeachment. I'm allowed to do it, I should do it, and I did do it, and
12 they did nothing about it.
13 THE COURT: So you think that the jury is allowed to
14 consider whether Mr. Landess is a racist?
15 MS. GORDON: I think that I am allowed to use impeachment
16 evidence that has not been objected to, and has been admitted into
17 evidence by stipulation. I absolutely think I'm allowed to use it. I should
18 use it on behalf of my client, and the burden should not be shifted to me
19 to assist with eliminating or reducing the prejudicial value of that piece
20 of evidence.
21 Dr. Debiparshad was asked about his race during his
22 deposition. Mr. Daryanani went on for the first 15, 20 minutes of his
23 testimony about his race. It's not new. Motive is always relevant in
24 terms of Mr. Landess' reason for setting up our, you know, view on this
25 case --

1 THE COURT: Um-hum.
2 MS. GORDON: -- setting up Dr. Debiparshad. I don't think
3 it's completely irrelevant, and you know, it hurts. It hurts. I don't care.
4 That's our job, and I'm sorry that it hurts and it's damaging, but it's not
5 so prejudicial that it shouldn't be considered at all. They opened the
6 door, and we're allowed to use it. I have an ethical obligation to use it.
7 We're here, Your Honor, because of a cumulative effect of Plaintiff's
8 errors. They disclosed it, they redisclosed it, they stipulated to its
9 admission, they didn't object to it, they didn't ask for a sidebar at any
10 point.
11 We're here because of their error. Trying to shift the burden
12 for that error to us now, it's absurd. It just is, and trying to make it look
13 like an ethical issue on the Defense side for using this piece of evidence
14 is absurd, as well.
15 THE COURT: All right. Just to be sure, it sounds like what
16 you're saying to me is that, in your view, under all of the circumstances
17 that you've already described or that you otherwise know, that whether
18 Mr. Landess is a racist is something the jury should weigh and it's
19 admittable, and it's evidence that they should consider.
20 MS. GORDON: I think that the entirety of the passages from
21 that email is impeachment testimony to the character evidence that was
22 improperly and unethically elicited by Plaintiff, and I don't know that it's
23 so much exactly what that bad character evidence consists of --
24 THE COURT: Um-hum.
25 MS. GORDON: -- it's bad character evidence that we're

1 allowed to use as impeachment.

2 I don't know, Your Honor, and perhaps you found cases that I
3 did not, but I don't know that there is a subsection under impeachment,
4 and what evidence we can use as impeachment that says, oh you can
5 use impeachment evidence, but you can't if it has to do with race. You
6 can use impeachment evidence, but you can't, if it has to do with -- I
7 don't know. There's no, you know, subsection --

8 THE COURT: Okay, let me take it from a different perspective
9 then. Let's assume you never put that item up in the questioning of Mr.
10 Daryanani. However, it's admitted as Exhibit 56, page 44. Let's further
11 assume that then, the first time you ever use it, is in your closing
12 argument, and you put it up just the same way you did with Mr.
13 Daryanani. I take it you're going to tell me that that's not -- essentially,
14 it's already misconduct under the *Lioce* standard. In other words, you
15 can tell me that, at least in part, you could make a closing argument that
16 Mr. Landess is a racist and the jury ought to consider that.

17 MS. GORDON: I'm saying that respectfully, I don't know that
18 that has anything to do with what we're talking about now, because we
19 were talking about impeachment evidence for someone who improperly
20 gave character evidence, and I was impeaching him.

21 THE COURT: Well, let me explain that. Let me explain. If
22 you're telling me it's impeachment evidence, that means it is evidence,
23 and that means you could argue the evidence. I just think this is a good
24 illustration of the concern. I mean, you and your wisdom used it for
25 impeachment. I get that, but it's evidence. And so I'm just trying to see

1 if you think, since it is evidence, you seem to say and think that the jury
2 can now consider it because you've made a closing argument then using
3 the item.
4 MS. GORDON: I think if someone wanted to argue about the
5 prejudicial nature of that, then they had the duty to bring that to the
6 Court's attention and they didn't, and they didn't over and over and over
7 again. And I am going to speak to you, Your Honor, about what
8 happened in this case, and procedurally what happened is it was used
9 during impeachment, and it was absolutely proper given that they
10 opened the door.
11 THE COURT: Okay, I understand that.
12 MS. GORDON: I'm sorry. I guess I --
13 THE COURT: Let me just try this -- I'm going to try one more
14 thing on this. Let me hypothetically say this. Let's say you're from the
15 jury and you say, members of the jury -- you tell me if you think this is a
16 legitimate argument that you could've made. Members of the jury,
17 you've heard Mr. Daryanani testify that Mr. Landess is a beautiful man,
18 that he would give bags of money to Mr. Landess, that he would leave
19 his daughter with Mr. Landess, but Mr. Landess is a racist.
20 MS. GORDON: And a hustler.
21 THE COURT: Could you make that argument?
22 MS. GORDON: I think I could use that, and as Your Honor
23 has said, it's admitted evidence. I think that I can use it for any purpose,
24 but if it somebody wants to limit that and allow in the hustling and not
25 the racist part of it, then somebody had an obligation to do that.

1 THE COURT: All right.
2 MS. GORDON: And that someone is Plaintiff and he didn't
3 do it.
4 THE COURT: All right. Okay. You want to add anything
5 else --
6 MS. GORDON: I'd like to --
7 THE COURT: -- before you turn it over to Mr. Vogel?
8 MS. GORDON: Yeah, thanks.
9 MR. VOGEL: Thank you, Your Honor. Yeah, curiously absent
10 from their motion is any reference to NRS 48.445 or 055. When you
11 open the door on character evidence, the Defense can then, pursuant to
12 48.0551 on cross-examination, make inquiry to specific instances of
13 conduct, which is exactly what was done in this case. So there's no
14 ethical violation. There's nothing improper about what was done, and as
15 to Ms. Gordon's point, and this Court is fully aware, the evidence was
16 there.
17 THE COURT: That's why -- I didn't cite those statutes, but I
18 looked at them over the weekend. That's why I've given you the opinion
19 that's not going to change, that yes, there was an allowance to now
20 bring up evidence to dispute the character testimony of Mr. Daryanani.
21 No doubt. That's not the issue to me anymore.
22 MR. VOGEL: And --
23 THE COURT: The issue to me is what about, you know, what
24 we have here.
25 MR. VOGEL: Yeah.

1 THE COURT: I mean, for example, you know, there are
2 motions in limine that arguable go to character where I pretrial granted
3 them. You can make an argument that somebody has a $400,000
4 gambling debt, that that goes to their character. You can make an
5 argument that they didn't pay an obligation. It's like writing a check. A
6 casino marker is like writing a check, they didn't pay it, and that goes to
7 their character. They're not honest, but that's precluded, for example.
8 MR. VOGEL: Yeah, and I appreciate that, and they sought to
9 exclude it. In this particular instance, they didn't seek to exclude it. So I
10 think the issue, I think, that the Court is probably struggling with is okay,
11 it's admitted. Is it -- is the probative value of that evidence so overly
12 prejudicial that it has now caused, you know, irreparable damage to this
13 trial?
14 I think, you know, if my understanding of what you're saying
15 is that's your concern in the case law, and maybe you even looked at this
16 case, *Nevada v. Battle* [phonetic], which is a 2015 case, you know, the
17 Court was, you know, struggling with similar issues. And the Court
18 indicated that, you know, this impeachment evidence in that case was
19 admissible because the Plaintiff had opened the door, and the Court
20 found that Battle couldn't establish prejudice because it was his own
21 actions, not the actions of opposing counsel, which open the door to
22 impeachment evidence. So in that case, the Court found that hey, you've
23 opened it, you cannot now claim prejudice.
24 THE COURT: Again, I agree with that. I said character is
25 clearly allowable for the Defense in cross-examination of Daryanani, and

1 for the remainder of the trial. It was put in issue by the Plaintiffs.
2 MR. VOGEL: So --
3 THE COURT: My issue is -- let me put it to you this way.
4 You've been around a while. And I don't mean to, you know, play too
5 much devil's advocate with you or Ms. Gordon. I would do the same
6 with the Plaintiffs. You know, it doesn't matter who's doing it or who I
7 have my questions for, but if I have thoughts going through my mind, I
8 typically like to express them and ask questions about them regardless
9 of which side I'm asking these questions to. In this case, it just happened
10 to be your side under these circumstances.
11 You heard what I said with, you know, these questions I've
12 asked Ms. Gordon, but I mean, wouldn't it occur to the Defense that -- let
13 me put -- let's see if I can say it correctly. You say to yourself, and I
14 agree, okay, character is now an issue.
15 Certainly after Mr. Dariyanani said the things he said that
16 we've now recited a few times, we've got this piece of evidence. Is there
17 a concern that if we just use this admitted piece of evidence, we've now
18 interjected a racial issue into the trial. And -- and if you have that
19 concern, why not do something to at least address it. There would be no
20 harm in that. I mean Mr. Dariyanani is there. She's on cross
21 examination out there. She's got Exhibit 56 in her hand. I mean why not
22 -- I mean did it ever occur that, you know, I used this bar metaphor on
23 Friday, on the court record, that if you're going to drop a character
24 bomb, even if you have the right to do that, is this the type of bomb
25 that's going to blow the whole room up?

1 MR. VOGEL: I see what you're saying. You know, the terms
2 used were Mexicans, black, and rednecks. Those were the terms that
3 were -- were used. And I guess the termination you say are those just
4 inherently racist terms. I guess that's what the Court is struggling with.
5 The only pejorative term in there, you know, I think is rednecks.
6 THE COURT: Well, actually, I don't think that. I think that
7 there's a way you can say Mexican and have it not be taken as a racist
8 comment. I think there's a way you can say black, Black Lives Matter, for
9 example. And not have it be a racist comment. Redneck, I don't know. I
10 think that one is pretty much, every time you say it, it goes in that zone.
11 But to me it's the context of which it is said. I mean it -- they're all
12 lumped together and I think it's the easiest conclusion to draw, if you
13 look at the context in which these two paragraphs come together, they
14 clearly appear to be racist.
15 So it's the context, not just the -- not just the words
16 themselves, it's the context in which they're used.
17 MR. VOGEL: Sure. I mean it's quite clear that he was
18 victimizing certain people. I don't dispute that. The issue comes back to
19 is it so prejudicial as to have destroyed the ability of this jury to rule in --
20 I guess in an unbiased way to where justice is s till being done. And I
21 guess that's what you're struggling with. And our view is this was, you
22 know, character evidence. All character evidence, by its nature is
23 prejudicial. Whether it's glowing, fabulous reviews like Mr. Landess'
24 daughter gave, or whether it's deceiving. By its nature it is -- it is usually
25 much more harmful type of evidence one way or the other.

1 And that's why we were actually quite careful making sure
2 we had the basis to bring it in, between Mr. Dariyanani's testimony, the
3 daughter's testimony, and Dr. Mills' testimony even. We felt that they
4 had opened the door quite wide on character. And that it was perfectly
5 appropriate to use it. We gave them every opportunity to object to it.
6 Ms. Gordon asked repeated questions before coming to that union. And,
7 yet, I guess it -- it comes down to, you're asking could we have done
8 something to try to remove that. I suppose in hindsight I guess we could
9 have. But I don't think we had to. Reason being is they stipulated it in
10 and it was -- when it's really without any sort of objection.
11 So now we're judging it by hindsight. And according to
12 *Nevada vs. Battle*, they can't establish prejudice, because they didn't
13 object to it.
14 THE COURT: Okay, all right. It's your motion, Mr.
15 Jimmerson, you get the last word.
16 MR. JIMMERSON: Thank you, Judge. Let me have those
17 two cups, please. Now the Nevada Supreme Court in *Hylton*,
18 H-Y-L-T-O-N *v. Eighth Judicial District Court*, 103 Nev 418, 423, 743 Pac.
19 2d 622, 626, 1970 Dec. said that a manifest necessity to declare a mistrial
20 may also arise in situations which there is interference with the
21 administration of honest, fair, even-handed justice to either both, or any
22 of the parties to receive. And in *State vs. Wilson*, 404 So.2d 968, 970, La.
23 1981, raises such a sensitive matter that a single appeal to racial
24 prejudice furnishes grounds for a mistrial. And that a mere admonition
25 to the jury to disregard the remark is insufficient in occult.

1 In listening to both opposing counsel's remarks, that of Ms.
2 Gordon and Mr. Vogel, it is abundantly clear from what they didn't argue
3 that we have a conceded fact as to the explosive nature of the remarks,
4 and the prejudicial nature of the remarks. There is not an argument
5 made by either one that this does not warrant a mistrial. There's not a
6 argument made by either one as to the impact that this has had upon our
7 jury. Instead, both focus upon the claim that it is the Plaintiffs' error or
8 the Plaintiffs have opened the door. The Court has indicated that it is
9 pretty well convinced that the Plaintiff did that.
10 I will simply say that if you read the transcript, the question
11 that led to the examination was, "Was it a difficult thing for Cognotion, or
12 yourself, to terminate Mr. Landess?" That in no way, reasonably, would
13 call for the admission of character evidence that Mr. Dariyana -- Mr.
14 Dariyanani responded in the way that he did, in some regards to answer
15 the question, "Yes, it was a difficult thing to do." But they've gone
16 beyond that to talk in terms of Mr. Landess in both positive and negative
17 terms. The Court apparently feels that that is appropriate. But that was
18 not an intention, both by either words, or by conduct with the Plaintiff to
19 open any door about character.
20 Relative to Dr. Mills or Dr. Arambula, they introduced it first,
21 because they went first on that. But they both testified that Mr. Landess
22 was an honest person and that he was self-effacing and didn't
23 exaggerate based upon psychological test results and the MMPI, multi-
24 personal test. That wasn't a character issue. And the daughter, Ms.
25 Lindbloom, did speak about both before and after. How he was before

1 the professional negligence on October 10th of 2017, and afterwards.
2 And yes, he did say -- she did say some very kind and glowing
3 comments about her dad, but that clearly has a place in character
4 evidence. And that also was ten days earlier. It wasn't related to the
5 time. So when you focus upon what was going on Friday, you have the
6 admission by Ms. Gordon that it was an intended piece of evidence.
7 I disagree strongly with the statement repeated questions
8 were asked about the email. Not at all. The email was placed upon the
9 Elmo without a single question or preface whatsoever. And the jury saw
10 those words before a question was asked. And then she asked the
11 question "Is this what Mr. Landess wrote to you?" So the intent to create
12 a prejudice was in presence in the part of the Defense. And what they
13 didn't understand or appreciate, and should have -- reasonably should
14 have, under *Lioce* and relative under the advice of the Court and other
15 decisions was the impact of what they were doing, which is the whole
16 point of our motion.
17 Let's be fair. The Defense sought to introduce a 79 page set
18 of emails. Plaintiff agreed, and 10 or 15 minutes later, they place this
19 email before the jury. Plaintiff did not appreciate the contents of this
20 email, and perhaps should have. But the Defense most certainly did
21 appreciate what they had in their hands and chose to use it. And the
22 excuse that they have that because there was an admission by the
23 Plaintiff reversed the law, which is very clearly stated that if inadmissible
24 evidence is used ostensibly, or if admissible evidence is used for
25 inadmissible purpose, it can be withdrawn. And this is no different than

1 either one of us not recognizing an attorney client privilege document
2 mixed in with another 80 pages of documents, and then the party
3 recognizing that there is a prejudicial document there cannot under both
4 ethics, as well as our rules of procedure, then go forward and misuse
5 that information.
6 And the questions asked by the Court are the appropriate
7 ones in light of what the Defense knew that they had, and intended to
8 use. There was no calling of attention to that email, Your Honor. I don't
9 know where Ms. Gordon gets the idea that she asks repeated questions
10 about it. She didn't. She asked no questions until she placed the words
11 up on the Elmo, before she sprung it upon us. And the springing of it,
12 which she concedes is the case, is the Defense premeditatedly and
13 intentionally doing so. This -- opposing counsel also stated that Mr. -- or
14 Dr. Debiparshad's race is acquired at depo. One single question was are
15 you -- is your family -- are you from India. I think the answer was yes, or
16 something like that. But at trial, not a single word was asked about that.
17 Plaintiff did not seek upon that. The man is educated in Canada, went to
18 school up, apparently in Canada. There's no comment upon that. There
19 wasn't one question of Dr. Debiparshad that went anywhere near any of
20 those issues. This record is clear of the Plaintiff's bona fides in terms of
21 such a devastating subject matter like that. Furthermore, the Defense is
22 bound to, and as the Plaintiffs to know, under *Lioce* what -- where the
23 line is, and it's a fairly bright line in terms of somebody as -- you know,
24 as astounding as this type of a question and information is this is not a
25 negligent act. This is not something that was not appreciated by the

1 Defense. They intended to use it exactly in the fashion that they did.
2 They just didn't appreciate, I don't think, the -- the predictable
3 response of the Court, and of the Plaintiffs relative to the misuse of this
4 type of explosive information that had no place at trial. Mr. Landess has
5 never placed race as an issue and the Court's asked the question directly
6 of the Defense, do you think that race has a place in this case. And, of
7 course, the answer has to be yes for the Defense, because they're trying
8 to justify their -- their misbehavior. But that's not in, at least our review
9 of the case law, warranted that there cannot be a good faith basis for the
10 use of this document in the fashion they did.
11 Especially understanding that it hadn't been offered by the
12 Plaintiffs at any time. It hadn't been the subject matter of a single
13 question in a single deposition in which there were more than 15
14 depositions taken. It wasn't in -- that wasn't discussed in Mr. Landess'
15 two different days of depositions. It wasn't examined of him on three
16 days of direct and cross examination doing this trial. Not one subject
17 matter came up. This was a gut shot at the end of the case, used in a
18 premeditated way by the Defendant to gain an advantage before the
19 jury. And in doing so, they well beyond crossed the line with the *Lioce*.
20 They created an irreversible prejudice to the Plaintiff. And more
21 importantly, I think, to the administration of justice and to this Court.
22 Thank you, sir.
23 MR. VOGEL: If I may, just briefly, Your Honor, you know
24 evidence of bad acts is always prejudicial. Usually it's in the context of
25 other crimes, violent acts ands things along those lines. But it's always

1 prejudicial, but it's also admissible. And in this case, Your Honor, if this
2 Court is considering granting a mistrial, I would ask the Court to do so
3 after the jury comes back with a verdict. At least in that instance, it
4 would be treated more as a motion for a new trial, and there's still a
5 chance, who knows, I mean the jury could come back in Plaintiff's favor
6 and the issue is moot. But the parties have already spent, as everyone
7 agrees, tens, if not hundreds of thousands of dollars getting to this point
8 now. And to pull the plug at this point, is potentially very prejudicial to
9 all of the litigants involved. I would say the better -- the better course
10 would be to allow the case to go to verdict, or in the alternative, to not
11 release the jury, and allow -- allow the parties to take an emergency writ
12 to the Supreme Court, just to see if they would weigh in on is this
13 something that's overly prejudicial.
14 MR. JIMMERSON: And my response is Plaintiff's motion is
15 simply the Defense should have been more circumspect about this, and
16 thought about this before they created this error in the record.
17 THE COURT: All right. This decision, I'll share with you. It's
18 interesting, because in some ways it's the most difficult decision I've
19 made since I've been a Judge, but in other ways it's the easiest decision
20 I've ever made since I've been a Judge. I'm going to explain in detail
21 my thoughts and make a record as to why I've reached this conclusion.
22 But the Plaintiff's motion for mistrial is granted. At 11:00 I'll bring in the
23 jury and I'm going to excuse me.
24 After they're excused, I will make a record why this is the
25 appropriate and in my view, the only choice that can be made under the

1 circumstances. We'll be back in ten minutes.
2 [Recess at 10:57 a.m., recommencing at 11:05 a.m.]
3 THE COURT: Please bring in the jury.
4 MR. VOGEL: Your Honor, are you going give us an
5 opportunity to speak with the jurors?
6 THE COURT: No. We're going to let them go. I think they've
7 been through enough.
8 THE MARSHAL: Parties rise for presence of the jury.
9 [Jury in at 11:05 a.m.]
10 THE MARSHAL: All present and accounted for.
11 THE COURT: All right. Please have a seat, everyone.
12 Members of the jury, well, welcome back. You might note that your
13 notepads are not with you and that's because of what I'm about to tell
14 you. Before I tell you what I'm going to tell you, however, I do want to
15 look at all of you and let you all know thank you so much for the time
16 that you've spent with us. It'll be a two weeks I know I'll never forget.
17 You as a jury have been very attentive. You've asked wonderful
18 questions.
19 I've learned to not only respect you but actually like you all
20 and you're exactly the way juries should be, I think. Always on time,
21 attentive, good questions. But you can get the feel for where I'm going
22 with this, of course and that is with your notepads not being there and
23 what have you. I guess the best I can say to you is that from time to
24 time -- and it doesn't happen very often. But from time to time, there are
25 things that come to a Court's attention that you have to deal with. In

1 other words, sometimes -- I guess a way to say it is a court and me ad a
2 judge, since this is my court here, you can only deal with the issues that
3 come your way.
4 Often times, they're not created by you whatsoever, but they
5 come your way and you have to deal with them. Never afraid to do that.
6 Sometimes those things can be difficult and they can be time
7 consuming. So that type of thing did come my way. And it wasn't
8 something that the Court created, but nonetheless, the Court has to
9 respect that has to be dealt with. And so I want to let you know that over
10 the last few hours -- obviously you've been waiting out there since 9:00
11 this morning -- I've dealt with some things.
12 And obviously you knew that, because I had my martial
13 update you a couple times and you knew we were working on legal
14 items. I do want to tell you that because of what I dealt with and the
15 decisions that were made, the case, as far as your participation, has been
16 resolved. And so I just want to tell you thank you for your time. It's been
17 wonderful, in my view, to have you here for these couple weeks. I think
18 it's allowable for me to say I'm sorry that we don't get to finish the case
19 with you this week. You're excused. You all take care.
20 [Jury out at 11:09 a.m.]
21 THE COURT: All right. Please have a seat, everyone.
22 Obviously I'm going to stay on the record and well, here's the decision
23 having to deal with obviously granting that motion for mistrial. I said it
24 was the most difficult thing I've done since I've been here and I assure
25 you, it is. Even more difficult than the time I was covering for Abbi Silver

1 and probably the worse child neglect case in the history of the State of
2 Nevada was one that sentenced someone on. I won't go into those facts,
3 but I -- suffice to say that the lawyer presenting the case was Mary Kay
4 Holthus, who's now a judge.
5 And I had to take a couple of breaks, because of the sadness I
6 felt and the difficulty in dealing with what had happened to this child.
7 This is worse than that for me, because in the time I've been here -- and
8 my whole group knows this to be true -- and it -- you know, I don't even
9 know where it came from, probably. Probably just a life of events. To
10 me, the most important part of the process is the jury. And I can't even
11 find the right words to describe how I really feel about those that come
12 in and serve on juries, other than to say I have a tremendous respect for
13 them and the mission that they're tasked with performing.
14 That's why this is difficult, because I really felt -- of course,
15 we all know. We saw what happened here over two weeks. I mean, we
16 celebrated a birthday of one of the jurors. We got so many questions
17 from the jury and they were engaged in the process and they took -- they
18 thought the trial was supposed to end last Friday. And they, you know,
19 took it upon themselves to find a way to give us even up to four more
20 days, through Thursday of this week.
21 Mr. Kirwan reported back and found a babysitter for the
22 week, when he initially didn't anticipate that. And I'm sure there's untold
23 stories as to each one of them, as to what they did to spend two weeks
24 with us and then now find a way to extend it an extra four days. So
25 that's why it's difficult, because I feel bad. I feel really bad that I had to

1 do what I just did with those ten people. But I said it was the easiest
2 choice nonetheless, because it really was in my view.
3 So here's the reason why I had to do what I did and grant
4 this motion for mistrial. The law does talk about this concept of manifest
5 necessity. And case law is sort of repetitive with that notion and there's
6 definitions given of manifest necessity and the cases that talk about the
7 concept of mistrial or even new trial, but in this scenario, mistrial. And I
8 did, in this -- going through the cases this weekend, I came up with what
9 I think are the main definitions of the legal standard that's relevant here,
10 this manifest necessity standard.
11 Manifest necessity is a circumstance, which is of such an
12 overwhelming nature that reaching a fair verdict is impossible. It's a
13 circumstance where an error occurs, which prevents a jury from reaching
14 a verdict. There's a number of cases. Each side, I'm sure will -- has and
15 will find cases having to do with this area of law. But there's an
16 interesting one called *Glover v. Bellagio* found at 125 Nev. 691, where
17 David Wall found himself in an interesting spot, similar to the one that I
18 am in here.
19 But that case stands mostly for the proposition that the trial
20 judge has to have the power to declare a mistrial in appropriate cases.
21 And I think this is the appropriate case. And I really do think that
22 unfortunately, that decision on the merits of whether I should do this or
23 not is rather easy. Though difficult, nonetheless, I think rather easy to
24 get to that point. Thanks a lot. All right. And that starts with the item
25 itself. As to the chronology, as far as I understand it, I think this is a fair

1 assessment of what happened.
2 Prior to trial, of course, there's the discovery process and in
3 that discovery process, it was relevant and necessary to cause
4 Cognotion, the company, practically speaking through its CEO, Jonathan
5 Dariyanani, to disclose employment-based evidence, whether it was the
6 employment contract or information having to do with the stock options
7 or things that may have led to the employment itself or
8 contemporaneous with the employment itself. And if anything, I mean,
9 it's evident to me that that discovery effort on Cognotion's part or Mr.
10 Dariyanani's part was taken pretty seriously, because a number of items
11 were disclosed, including emails and the item in question was in that
12 batch of items disclosed.
13 It's readily apparent and admitted to and so as a finding of
14 fact, I'm certain that though the Plaintiffs endeavored in this discovery
15 course to disclose to the Defense the Cognotion documents and did so --
16 again, disclosing, you know, a vast array of documents, that for reasons
17 that I don't need to know the full extent of, but I would say it's fair to
18 conclude shortness in time, because of the discovery timeline and effort
19 having to do with this damage item, which did take place closer in time
20 to trial, volume, meaning the extent of the volume of the paperwork
21 disclosed, I think in fairness could be something Mr. Jimmerson thinks
22 about off into the future.
23 When you represent lawyers, it is difficult to not allow your
24 client, who's a lawyer, to play a role in things. And it's evident to me
25 that Mr. Dariyanani and Mr. Landess weren't only client and corporate

1 counsel by way of a relationship, but had been friends prior to that time
2 and friends since that time. And it's never been -- it hasn't been
3 mentioned to me and so I'm not just speculating. I wouldn't speculate. I
4 don't want to come up with something, but I think it's reasonable to say,
5 you know, that most likely, Mr. Landess had a hand in helping with the
6 discovery and urging Mr. Dariyanani to, you know, participate and be
7 here and provide documents.
8 And you know, maybe in some ways, there was a review
9 duty that on behalf of the whole Plaintiff team just didn't adequately get
10 done here. Whether it was Mr. Landess or whether it was somebody
11 from either office or the attorneys, it's obvious to me that
12 unfortunately -- I mean, it's okay to make mistakes and admit mistakes is
13 even better than not admitting them. But mistakes can be made. And I
14 think it's real clear that a mistake was made, attributable to the entire
15 Plaintiff team.
16 And that mistake was make sure that somehow, some way,
17 you do know everything specifically that has come about in discovery
18 that could conceptually be used at trial or precluded prior to trial. And
19 that didn't happen and that's a mistake that, again, the mistake was
20 made by the Plaintiffs. So we have the discovery. We have the
21 disclosure. In fact, it's fairly obvious to me that it was a mistake. Again,
22 the mistake being that the Plaintiffs didn't catch that this particular item
23 was in there, because they did bring pretrial motions to preclude Mr.
24 Landess' bankruptcies, gambling debt and litigations.
25 And so it's obvious to me that if the Plaintiffs would have

1 seen this item, they would have likewise brought a pretrial motion to
2 preclude it. Plus, Mr. Jimmerson, to his credit, has said in various
3 context on and off the record that he made -- he, because he took
4 responsibility as I think the lead trial lawyer here, you know, that he
5 made this mistake. Okay.
6 So then what happens from there -- we then start the trial
7 and prior to -- well, prior to trial, actually, page 44 of Exhibit 56 is marked
8 and put into one of the many binders here as Plaintiff's Trial Exhibit 56-
9 00044. And so the Plaintiffs have this as part of thousands of pages of
10 exhibits that I have sitting here to my left, potential exhibits. So it's just
11 sitting in there and the Plaintiffs don't know that it's in there, so it's part
12 of one of their trial exhibits. The trial then progresses and during the
13 trial, closer to the time that the item actually is used, Exhibit 56 is offered
14 in evidence, I believe by the Defense.
15 And when that occurred, the Plaintiffs stipulated or agreed or
16 didn't have an objection and the entire Exhibit 56 was admitted,
17 including this fateful page 44. And 45, but page 44 is where the material
18 appears that's the concern. All right. So now it's an admitted exhibit. At
19 the time of its admission, I'll go so far as to say that the Plaintiff still at
20 that point in time, didn't know that the item actually was in the exhibit.
21 And when I say the item, I mean the actual language of course in
22 question here.
23 So they're still proceeding, up to that point, all the discovery,
24 all the two weeks of trial and agreeing to admit into evidence 56. They
25 still don't know that the burning embers language is in here. All right.

1 Mr. Dariyanani testifies. Mr. Dariyanani does say the things that Ms.
2 Gordon's attributed to him, I mean -- and probably more. But he did say
3 Mr. Landess is a beautiful person, bags of money, trust him with that.
4 He's trustworthy. I would leave my daughter with him. He's
5 trustworthy.
6 And so it is my view that that did open the door to character
7 evidence, where now the Defense in its wisdom, could bring forth
8 evidence to show that Mr. Landess is not so honest. He's not so
9 beautiful or -- you know, his character is now put in question by the
10 Plaintiffs. I do believe that opened the door to that legal ability to bring
11 forth some contrary character evidence. It might not have been just Mr.
12 Dariyanani that brought it up. It could have been Mr. Landess himself
13 during his testimony or for that matter, his daughter. But clearly, Mr.
14 Dariyanani brought it up.
15 So I don't have a problem with that in a legal sense, that the
16 Defense could impeach or attempt to cross-examine on this point. The
17 problem I see with the situation, though, is in my view -- and I don't think
18 there's even any possible potential good faith dispute with this. But I'm
19 only one person. The email itself, I think a reasonable person could
20 conclude only one thing. And that is that the author is racist.
21 "I learned at an early age that skilled labor makes more than
22 unskilled labor, so I got a job in a pool hall on the weekends
23 to supplement my regular job of working in a sweat factory
24 with a lot of Mexicans. I taught myself how to play snooker.
25 I became so good at it that I developed a route in East L.A.,

1 hustling Mexicans, Blacks and rednecks on Fridays, which
2 was usually payday. I learned that it's not a good idea to sell
3 something that you cannot control and protect, a lesson
4 reinforced on in life, when an attorney friend of mine and I
5 bought a truck stop here in Las Vegas, where the Mexican
6 laborers stole everything that wasn't welded to the ground."
7 I'm not saying that as a court, I'm drawing a conclusion that
8 Mr. Landess is racist. But what I am saying is, based upon these two
9 paragraphs, it is clear to me anyway that the author, a reasonable
10 conclusion would be drawn again, that the author of these two
11 paragraphs is racist.
12 So that's the issue. The question for me is, as a matter of
13 law, in this case, which is not an employment discrimination case or
14 anything where the issue of race is clearly an element of the case, can
15 our jury in this civil case consider the issue even with the opening of the
16 door as to character of whether Mr. Landess is a racist?
17 And I think the clear answer to that is no, that that is not a
18 basis upon which this jury should or can decide the verdict. Now I know
19 that the issue having to do with fees and costs regarding the decision I
20 made to grant this mistrial is left for another day because I am going to
21 give an opportunity for the, of course, for the Defense to file a pleading
22 on this, given that the pleading I did receive -- I didn't see it until this
23 morning. It was filed by the Plaintiffs. And so, we'll have to establish
24 that little briefing schedule.
25 But it is apparent to me, you know, especially in light of the

1 court session that we've had here today, that I think that my finding is
2 the Defense had to know that the Plaintiffs made a mistake and did not
3 realize this item was in Exhibit 56.
4 Again, that's evident to me I think reasonably because there
5 were a number of motions in limine which were filed by the Plaintiffs,
6 again, asking to preclude bankruptcies, gambling debt, prior litigations.
7 I think that in conjunction with the aggressiveness that we've
8 had throughout the trial, the zealousness is real clear to me that the
9 Defense had to know this was a mistake made by the Plaintiffs. And
10 again, one of the many pages of Exhibit 56 was this page 44 and the
11 Plaintiffs didn't know about it.
12 So, they took advantage of that mistake and I don't have a
13 criticism in a general sense in taking advantage of mistakes of the other
14 side. Frankly, it happens all the time. That's not the question.
15 And while it may be well intended to cross-examine the CEO
16 with the item that you now have where you know the Plaintiffs made a
17 mistake, they didn't see it. The primary, the only reason why I granted
18 the motion for mistrial was because when putting this up on the ELMO,
19 there was no contemporaneous objection from the Plaintiffs. And I did
20 not sua sponte interject either, probably for the same reason that the
21 Plaintiffs didn't and that is it just -- the timeline is short. It's on the ELMO
22 and it's just really a matter of seconds before a human being, if you're on
23 the jury with that TV set sitting right there in front of you. It's a matter of
24 seconds, literally, you know, one to five seconds and that's it. It's there
25 for them to see.

1 I didn't feel it was my job to sua sponte interject. And here in
2 a little bit I'm going to talk about a legal concept that I think is very
3 relevant to this situation. And when I do that, I am going to talk about
4 how I do understand and sympathize in some ways with the Plaintiff's
5 position and not being able to object to it at the time or not objecting to
6 it at the time.
7 But anyway, the fact of the matter is, when this occurred,
8 even if well intended by the Defense to cross-examine when character is
9 now an issue, respectfully, it's my view that the mistake that then the
10 Defense makes is that they interject the issue of racism into the trial.
11 Once the issue of racism is interjected into the trial and by
12 the way, it does appear to me that even now and I'm not unduly
13 criticizing, but even now, it appears to me that the Defense's position is
14 that the jury can consider the issue of whether Mr. Landess is a racist or
15 not. That I disagree with to the fiber of my existence as a person and a
16 judge.
17 Ms. Brazil is an African-American. Ms. Stidhum is an African-
18 American. The Plaintiffs have stated and for purposes of this I can agree
19 philosophically, although I don't know for sure because I don't, that Mr.
20 Cardoza and Ms. Asuncion is also Hispanic.
21 The shortcoming is me, I've never really seen that kind of
22 stuff much. I don't know why that is. I probably should in today's world
23 more that everybody does. But it's probably because when my dad was
24 a chief of police when I grew up in high school, he had a partner. His
25 partner's name was Tank Smith. And Tank was a black guy, an African-

1 American guy. And he was the salt of the earth.
2 And so, as a child growing up, I saw those two running over
3 the county and doing good stuff. Dinner at our house all the time. I
4 never thought anything about that.
5 When I was -- when you get to be a JAG when you're a
6 lawyer in the service, they send you off to 10 weeks of intense military
7 training at the University of Virginia Law School. Ten weeks. It's the
8 JAG school. And they billet you. You stay in a billeting living
9 arrangement.
10 And there was 109 of us in that class. And my best friend
11 was a guy named Momeesee Mubangu [phonetic]. He was from South
12 Africa. So, he's definitely an African-American by definition. He was my
13 best friend. We went to dinner three or four times a week and we made
14 good friends.
15 And probably halfway through his wife came to town and he
16 wanted to go to dinner with her with me and we did. We met at a
17 restaurant and she was a white woman.
18 And I remember halfway through the dinner because we
19 were friends him remarking to me, you don't notice anything here? And
20 I got to tell you, I really didn't. I just didn't. I just figured people were
21 people, you know.
22 So, I'm not I'm not sure whether Mr. Cardoza, Ms. Asuncion
23 are Hispanic or not. I'm never good at that kind of stuff. But it seems
24 reasonable, I would agree with the Plaintiffs of course, the name and
25 appearance if you want to go with that. Maybe there's some stuff in the

1 biography stuff that we were given. I didn't look at it. But it seems like
2 that's the case.
3 And so, it is my view that since we have two African-
4 American jurors and potentially two Hispanic jurors, given what I do
5 think was a mistake made by the Defense in interjecting race, the issue of
6 Mr. Landess being a racist into the case. Even if well intended to cross-
7 examine, as I said, it is my thought that the Defense should have seen
8 this and done something to deal with it. They should have asked for a
9 sidebar as I tried to talk to Ms. Gordon about or I think it should have
10 dawned upon them that you're now putting the issue of racism into the
11 case in front of a jury that has four members arguably that fall into some
12 of these categories, referenced in this email.
13 By the way, the email, if you were to ask me about offense
14 that could be taken, certainly as Mr. Cardoza, Ms. Asuncion or anyone of
15 heritage of coming from Mexico, they would have to be offended by it.
16 As to the two African-Americans, it's clear to me, because
17 like I told Mr. Vogel, it's the lumping in of a term associated with African-
18 Americans, with the rest, hustling Mexicans, blacks and rednecks. That
19 is clearly an implication that these are, in the author's opinion, sort of the
20 dredges of society who I could easily take advantage of on paydays.
21 And so, I do think that this coming together, this perfect
22 storm of mistakes, the mistake the Plaintiffs made that I have described,
23 the mistake I think that the Defense made in interjecting race into the
24 case. I know the Defense doesn't think it's a mistake because they
25 apparently think that the jury can consider whether Mr. Landess is a

1 racist or not. I have to say that surprises me, but wouldn't be the first
2 time I guess I'll ever be surprised as a judge. But I got to say, that
3 surprises me, which will get to the second half of my decision, which is
4 still to come.
5 But for now, I'm making a specific finding that under all the
6 circumstances that I just described, they do amount to such an
7 overwhelming nature that reaching a fair result is impossible.
8 Further, this error that occurred in my view, how specific -- I
9 am specifically fining it prevents the jury from reaching a verdict that's
10 fair and just under any circumstance. And there's no curable instruction,
11 in my opinion, that could un-ring the bell that's been rung, especially to
12 those four. But let's don't focus only on those four. There's ten people
13 sitting over there and I do think just as a normal human being, one could
14 be offended by the comments made in this email. You don't have to be
15 Hispanic, African-American or I don't know how to say rednecks. I don't
16 know how that fits in. I don't even know what that really is.
17 But in the minimum, you don't have to be a Hispanic or
18 African-American to be offended by this note.
19 So, I feel as though my decision -- well, it was manifestly
20 necessary.
21 Now, over the weekend, I said I did look at some law having
22 to do with this, and that takes me probably as a segue into some of the
23 things that Ms. Gordon and I talked about in the court argument this
24 morning.
25 I asked her a hypothetical. I said, let's assume that you didn't

1 use Exhibit 56, page 44 of Mr. Dariyanani. Well, unless something
2 happened that we wouldn't anticipate that being that somehow the
3 Plaintiffs come to discover that the item is in there and bring it to the
4 Court's attention prior to the Defense trying to use it in some stage of the
5 trial. Now it's in evidence.
6 And I asked that hypothetical question. Let's assume you
7 didn't use it with Dariyanani, but you did use it and put it up on the
8 ELMO in closing argument. It's my view that it's really the same
9 philosophical thought, its use of the item in front of the jury and asking
10 them to draw a conclusion relevant to the verdict based upon it.
11 My view is if that would have happened, if Exhibit 56, which
12 was in evidence, was put up in closing, that under the definition given by
13 the Supreme Court of misconduct in the *Lioce* case, that I think it's likely
14 that that would be seen as misconduct because whether it's with
15 Dariyanani or whether it's in closing or both, the clear -- and now I've
16 heard it in court this morning, it seems like the Defense is still taking this
17 position. They're urging the jury to at least in part, render the verdict
18 based upon race, based upon Mr. Landess being a racist, based upon
19 something that I think is emotional in nature. This is an emotional style
20 piece of evidence.
21 The idea, I think fairly and I'm sure the Defense would
22 disagree with this, but fairly is give us a verdict. Whether it's reducing
23 the damages or give us the whole verdict, because Mr. Landess is a
24 racist. That is impermissible.
25 Even if some universe in some universal sense, if he were a

1 racist and he might deserve something like that because he's a bad
2 person, the law doesn't allow for that in this context. It's not a fair
3 verdict, not a fair trial, not a fair result to decide it because someone
4 happens to be a racist. If it were a racial discrimination case or if race
5 were somehow an issue in the case, things would be different.
6 Now, philosophically, in spending the time over the weekend
7 that I did, I wanted to try to find some law that gave me as a court
8 guidance on what I may do in this situation, because -- and the reason I
9 devoted basically my entire weekend to it was because I felt as though in
10 the eight and a half years I've been here, I'm now being called upon to
11 do, in my view, probably the most important thing I've done because of
12 the respect I have for these people on the jury. They gave us two weeks
13 of their time out of their lives. How could this -- how can anything I do
14 be more important than deciding whether they get to continue or they
15 have to go home and essentially, practically speaking, wasted two weeks
16 with us. We wasted their time.
17 So, in doing so, I have to tell you and I don't want to get all
18 the credit for this, because when I met with Mark Denton for probably it
19 was about two hours, it might have been an hour and 45 minutes. It was
20 in his office. He told me about *Lioce*. I knew about *Lioce* case, but in
21 talking to him philosophically, he said, you know, there's some concepts
22 in that case you might want to look at that could be helpful to you here
23 because *Lioce* was his case. He was the trial judge.
24 And so, that got me to thinking and I did pull and I have it
25 here outlined, and I think that case is illustrative philosophically. We're

1 not talking about obviously closing argument here, but we are talking
2 about nonetheless bringing forth an item of evidence that could cause a
3 concern to be at least considered.
4 And the other nice thing about *Lioce*, a very important thing,
5 is this concept that wait a second, it's an admitted exhibit. In other
6 words, this is unobjected to. And *Lioce* gives us some philosophy and
7 guidance on dealing with the distinction between objected to items and
8 in that case, of course, closing argument, and non-objective to closing
9 argument.
10 The court goes on to talk about something -- I said I'd talk
11 about this, so why I don't just do that right now? In *Lioce*, the idea
12 where I said I do sympathize with Mr. Jimmerson in not objecting when
13 the item first went up on the ELMO.
14 In *Lioce*, the Nevada Supreme Court says,
15 "When a party's objection to an improper argument is
16 sustained and the jury is admonished regarding the
17 argument, that party bears the burden of demonstrating that
18 the objection and admonishment could not cure the
19 misconduct's effect."
20 Okay.
21 They go on to say in the next sentence, though, that they say
22 words consistent with sympathizing with a lawyer who is in the spot now
23 to either object or not object to something that shouldn't be happening
24 in court. They say, "The non-offending attorney," so in this situation
25 that'd be the Plaintiff's side.

1 "The non-offending attorney is placed in a difficult position of
2 having to make objections before the trier of fact, which
3 might cast a negative impression on the attorney and the
4 party the attorney represents emphasizing the improper
5 point."
6 And that's what Mr. Jimmerson said to me, I think last week
7 when we were on the record, because I did ask a question or it came up,
8 why didn't you object to it? And he said words consistent with this idea
9 of, I didn't want to, you know, call further attention to it.
10 And it's clear in *Lioce* and the Nevada Supreme Court
11 sympathizes with that dilemma that a trial lawyer may have when
12 something comes up, the other sides offered something, here it's
13 argument, of course. In our case, it's an exhibit prior to that stage of the
14 trial.
15 But nonetheless, I have to say, I agree that, you know,
16 because I know from my own experience in watching this happen, I felt
17 my heart sink. And I remember thinking, oh boy, and I told you some of
18 the things I immediately thought within the first few seconds.
19 And, you know, should I have said take that down, let's have
20 a sidebar? I wish I would have at a time prior to the jury not seeing it.
21 Or even seeing it quickly and maybe not realizing the full extent of what
22 was in it and then we'd still be here and, you know, we'd be watching the
23 Stan Smith video.
24 But I didn't do that. I think for the same sort of human being,
25 non-reaction over two or three seconds that Mr. Jimmerson did. I have

1 to say. Especially because, again, that's even further evidence that the
2 Plaintiffs didn't know the item was in there.
3 All right. But in *Lioce*, they give some guidance as to
4 unobjected to, they call it unobjected to misconduct and that's in the
5 context of a closing argument.
6 And what the Supreme Court said, so that's what we're
7 talking about here. We're talking about unobjected to -- it's not
8 argument, so I'm not going to go as far as today to say it's misconduct.
9 I've said things consistent with what I think is a respectful criticism of the
10 Defense of, you know, I would -- I got to say, I would think that you look
11 at this and say, well, should we put race into the case? Could that be a
12 concern?
13 And as I take it, the Defense's position is, well, we can and
14 we did. Just like Ms. Gordon argued an hour ago to me. That's just
15 where we disagree. I have to say.
16 But in any event, the guidance from *Lioce* is that even if it's
17 unobjected to, so Exhibit 56 is a Plaintiff's trial exhibit, it's admitted by
18 stipulation and then when the item is put up on ELMO, there's no
19 contemporaneous objection.
20 But I think that this *Lioce* standard is applicable here where
21 the Supreme Court says in that case that it's still a plain error style
22 review.
23 Here's what they say. "The proper standard for the district
24 court," that's me, "to use when deciding in this context a motion for new
25 trial based upon unobjected to attorney misconduct." Now, again, I

1 know this is not a new trial request. This is a mistrial request. But I think
2 that concept is similar, certainly. And I think the philosophy of this case
3 gives guidance to the Court is all I'm saying.
4 So, again, the Supreme Court says,
5 "The proper standard the district courts to use when deciding
6 a motion for new trial based upon unobjected to attorney
7 misconduct is as follows; one, the district court shall first
8 conclude that the failure to object is critical and the district
9 court must treat the attorney misconduct issue as have been
10 waived unless plain error exists."
11 So, there you go. That, I think clearly sends me a message
12 that though the Plaintiffs acquiesced in the admittance of 56 and though
13 the Plaintiffs did not contemporaneously object when Ms. Gordon put
14 the item up, a plain error review still has to be held.
15 In applying the plain error review, the next sentence in *Lioce*
16 says,
17 "In deciding whether there is plain error, the district court
18 must then determine whether the complaining party met its
19 burden of demonstrating that its case is a rare circumstance
20 in which the attorney misconduct amounted to irreparable
21 and fundamental error."
22 Again, that concept of misconduct notwithstanding. It is my
23 specific finding that this did resolved in irreparable and fundamental
24 error, as I have described.
25 The Supreme Court says in the next sentence that, the

1 context of irreparable and fundamental error is, "Error that results in a
2 substantial impairment of justice or denial of fundamental rights such
3 that but for the misconduct, the verdict would have been different."
4 And I get that's in the new trial context, but I think it gives
5 guidance because my view is the dilemma as a judge, this thing first
6 came up as a motion to strike from the Plaintiffs. And I have to say that
7 bell can't be un-rung. That's my opinion.
8 Even if I granted the motion to strike, I don't know what type
9 of contemporaneous curative instruction I could have ever come up with
10 to ask Ms. Stidhum, especially, Ms. Brazil, especially Mr. Cardoza,
11 especially, Ms. Asuncion, especially to now disregard the author's racial
12 discriminatory comments.
13 In addition, you know, sometimes life events happen and I
14 know, we all, as lawyers -- since we deal with fact patterns, and people
15 more than most human beings -- I'm sure most lawyers think man, my
16 life is just different than everybody else's. Well, I can share that with you
17 too, from my perspective as a judge, because I deal with facts and things
18 all the time, but not necessary to my decision, but I have to say it's lost
19 on me that this whole situation is even more magnified given the recent
20 events of the weekend.
21 I mean, think about how strange this is for me too. I'm
22 sitting at home and so my wife is a hard worker. And I told her well,
23 leave me alone all day Saturday. So she goes off to her office in Howard
24 U Center at Marcus & Millichap because she does commercial realty --
25 commercial brokerage, so she goes there all day Saturday and works,

1 and leaves me alone.
2 I was hoping to be done to at least have a Sunday for good
3 health reasons, but unfortunately, that didn't happen, so I talked her into
4 going to yoga and grocery shopping without me yesterday, which she
5 went and did. And all the while, while that's happening, while I'm at
6 home by myself, you know, as I'm on my laptop, and I'm actually half the
7 time corresponding with my law clerk, who was nice enough to work on
8 Saturday with me remotely by emails and such.
9 It comes to my attention that on pretty much every 24/7 news
10 station for the entire weekend there's a story about someone who drove
11 nine hours across Texas -- nine hours across Texas to go to El Paso and
12 picked that place because in the Walmart in El Paso there would be those
13 from Mexico shopping -- that he was going to go shoot and kill, as a hate
14 crime. That's what seemed to be the upshot of that circumstance.
15 Okay. Mr. Landess may take this as a criticism. I don't really
16 mean it that much, but some would argue he drove nine hours to go kill
17 Mexicans in his mind. I'm sure that's what he thought. That's exactly
18 what I'm dealing with in this thing.
19 Okay. Then later that night what happens in Dayton? Are
20 you kidding? Another one. In this situation African Americans are killed.
21 And is that part of another hate-based incident?
22 None of that really matters to this decision, because it is my
23 strong view that in this case racial discrimination can't be a basis upon
24 which this civil jury can give their decision, but it's not lost on me that
25 it's highly likely, unless Mr. Cardoza, and Ms. Asuncion, Ms. Brazil, and

1 Stidhum put their heads in the sand and didn't watch any news, or have
2 a cell phone, or a have a friend, or have a family, or go to church, or do
3 anything, that this is out there to just aggravate what we already have as
4 my view being a big problem.
5 Bottom line is, how in the world can we expect this jury,
6 which is the verse -- and by the way, none of those people are alternates,
7 because we decided before trial that seats 9 and 10 would be the
8 alternates, so they're all four deliberating jurors -- how in the world can
9 we reasonably think that they're going to give a fair verdict and not base
10 the whole decision, at least in part, on the issue of whether Mr. Landess
11 is a racist.
12 That's the basis for the decision. The Plaintiffs can draft the
13 order. And so concludes the most difficult thing I've done since I've
14 been here.
15 Anything else from either side?
16 MR. JIMMERSON: Yes, Your Honor. Relative to the briefing
17 on the cost matter, in light of this, I don't see a need for an expeditious
18 order, or shortening time. Fourteen days from today would be an
19 approximately time for the Defense to file their opposition, and then we
20 would file the reply in the normal course, and you would give us a
21 hearing date sometime about 30 days from now.
22 THE COURT: Well, okay. Mr. Vogel, how much time do you
23 want to respond to this pleading?
24 MR. VOGEL: That's fine. Two weeks is fine. I appreciate it.
25 THE COURT: Okay. Two weeks will be?

1 THE CLERK: Two weeks will be August -- oh, you're going to
2 be gone all that week.
3 THE COURT: That's okay. It's a pleading deadline.
4 THE CLERK: Okay. August 19th.
5 THE COURT: Okay. So the opposition will be due by close of
6 business on August 19th.
7 And then a reply?
8 THE CLERK: A week later August 26th.
9 MR. JIMMERSON: Could we have the following Monday, the
10 29th?
11 THE CLERK: Okay. We'll do it the Tuesday, September 3rd,
12 Labor Day.
13 THE COURT: All right. And then the hearing, we'll probably
14 need a couple of hours for that, given our track record.
15 THE CLERK: You want it on a motion day or on a
16 Wednesday?
17 THE COURT: Well, I need two hours, so either way is fine
18 with me, but it's probably going to be a separate day of a Wednesday.
19 THE CLERK: Okay. Let me see what we have going on here.
20 THE COURT: And of course, the focus of this now is the fees
21 and costs aspect. I granted a mistrial.
22 MR. JIMMERSON: Yes, Your Honor.
23 THE COURT: Although, I do want to want to say that -- I
24 mean, there's always the idea that you can ask for reconsideration, but I
25 mean, to me, the focus really is the fees and costs aspect of the motion.

1 And I want to give some context to that too. I actually made a note here
2 on that. Let me find that note. In covering everything else, I forgot about
3 that one.
4 Oh, yeah. All right. So both sides -- here's my note -- both
5 sides made mistakes. In other words, what I'm saying is, both sides are
6 practically responsible for what happened. To me, the issue remains
7 which side is legally responsible for what happened; in other words, we
8 know the Plaintiffs made a mistake in a definitional sense if you look up
9 the word mistake in the dictionary. You made a mistake.
10 The question is, given what happened, and how it actually
11 happened, is the Defense legally responsible, or is the Plaintiff legally
12 responsible, is it 50/50, or how does that work. So that's a technical
13 point, but in causing a mistrial, is there a standard that applies that I
14 should be made aware of along these lines? Because again, there's no
15 doubt the Plaintiffs made a mistake in not catching the item and stopping
16 its use.
17 The Defense used it, as they did, as we have talked about
18 enough already, but what's the legal standard having to do with
19 responsibility because the statute talks about fees and costs, right, if you
20 cause a mistrial through misconduct, I think is what it says. And so
21 that'll be part and parcel of what we'll have to figure out.
22 But here is Terra (phonetic). So we need two hours for a
23 hearing on this motion for fees and costs having to do with a mistrial.
24 THE CLERK: How far out?
25 THE COURT: Well, what's the last date on there?

1 MR. VOGEL: The 3rd.
2 THE CLERK: September 3rd.
3 THE COURT: After September 3rd.
4 THE CLERK: Okay. So we've got -- you can either do the
5 afternoon of September 10th so 1 or 1:30 start time, or we've got the
6 11th we can either do a 9 to noon or an afternoon setting. Those are the
7 two days we have available.
8 THE COURT: Okay. September 10th or 11th work?
9 MR. JIMMERSON: What day of the week is the 10th, please?
10 THE CLERK: Tuesday is the 10th and Wednesday is the 11th.
11 MR. JIMMERSON: Yeah, we'd prefer the Tuesday the 10th.
12 THE CLERK: We could do a 1:00 start time.
13 THE COURT: How about the Defense? You okay with that?
14 MR. VOGEL: Just checking real quick. Tuesday is definitely
15 better.
16 THE COURT: Okay. Let's use 1:30 on that day and we'll have
17 the whole afternoon then, but my guess is it's a couple of hours given
18 our track record, because most likely I'll come in and I'll give a little
19 summary of the pleadings, and talk about issues, and what have you, put
20 things in context, and then we'll have argument. I mean, the whole thing
21 could be an hour, but it could be more, but we'll start at 1:30 on?
22 THE CLERK: On Tuesday, September 10th.
23 THE COURT: That'll be the hearing.
24 MR. JIMMERSON: All right.
25 THE COURT: Okay. Anything else for today?

1 THE CLERK: The Court hasn't decide on Court's Exhibit 37,
2 because there was an objection by Mr. Vogel, as if it was the same copy
3 given to -- it had to do with -- I think it has to do with some X-rays.
4 MR. VOGEL: Yeah. And that's still in dispute, so --
5 THE CLERK: Okay. So we're just going to leave that
6 unadmitted then, correct? Or how do you want to address that?
7 THE COURT: Well, that's a good question.
8 MR. JIMMERSON: I mean, that's a Court exhibit. That's not
9 an admissibility exhibit. In other words, it's not a Plaintiff or Defense
10 offering it. It's a Court exhibit. Isn't that the binder, Mr. Vogel?
11 MR. VOGEL: It is.
12 MR. JIMMERSON: So we certainly, in the sense of being
13 admissible, we certainly believe that the foundation has been laid for
14 admissibility. I mean, the Court knows what it is. It's the document
15 binder of X-rays delivered by --
16 THE COURT: Here's my question --
17 MR. JIMMERSON: -- the Plaintiffs to Defendant.
18 THE COURT: -- does it matter now anyway?
19 MR. VOGEL: No.
20 THE COURT: I mean, it really doesn't matter.
21 MR. JIMMERSON: No.
22 THE COURT: Because you're going to have a new trial
23 anyway.
24 MR. JIMMERSON: Yes. That's true, Judge.
25 THE COURT: And it'll be decided later. So I just don't --

1 respectfully, I don't know if we need to do anything else on the case --
2 THE CLERK: Okay. I just needed to have an outcome for it.
3 THE COURT: -- at this point. Okay.
4 And then, you know, I don't want to bring up anything ugly,
5 but within the next business day or two, if you could have, you know,
6 somebody come get all these binders out of our courtroom, I'd
7 appreciate it.
8 MR. JIMMERSON: Your Honor, would that be then Plaintiff
9 would obtain the Plaintiff's and Defendant's would obtain Defendant's; is
10 that fair?
11 THE COURT: However you do that --
12 MR. JIMMERSON: Would you agree, Mr. Vogel?
13 MR. VOGEL: Yes.
14 THE COURT: -- you know, is fine. I just would like to have
15 the room, you know, cleaned up.
16 MR. JIMMERSON: We'll, do it this afternoon actually.
17 THE COURT: Okay.
18 THE CLERK: And then I have Exhibit 150 that still needed to
19 be provided the CD from your side, unless you wanted to withdraw that.
20 MR. JIMMERSON: What is 150?
21 MS. POLSELLI: That's that video that was played during
22 Jonathan's testimony.
23 MR. JIMMERSON: Yes, we'll provide you that. I'll say we'll
24 do that.
25 THE CLERK: Okay. And that's it from me.

1 THE COURT: Ms. Gordon.
2 MS. GORDON: Your Honor, if I may. I think that the
3 transcript will bear this out, but I was just asking Mr. Vogel also, I think
4 that what I said was misinterpreted to an intent. I don't want this jury --
5 and never wanted this jury to make a decision based on race. What I
6 was talking about was the procedural propriety of what happened.
7 So to the extent that there is in any way characterizing my
8 action as misconduct, and I think the Court was clear, that that's not
9 what's saying, but I never wanted to interject race. That's what the email
10 said, and that's what we were using as impeachment evidence, so it was
11 not ever my intent, or I would never hope the jury would do that. That
12 was the content of the impeachment evidence that was never objected
13 to, and that was offered by Plaintiff. And we certainly had no reason to
14 think that they made this mistake. I was as surprised as anyone that they
15 didn't object to it. Never would I think that they didn't know what was in
16 their documents. So I just want to make that part clear.
17 It wasn't an ambush bomb sandbag thing. It was
18 impeachment evidence that they gave me and I used it. It wasn't for a
19 bad purpose.
20 THE COURT: All right. I think maybe where we, at this point,
21 disagree, Ms. Gordon -- because, you know, I don't feel good about any
22 of this, and one aspect of not feeling good is towards the lawyers. You
23 know, I don't feel good about what this now creates for all of you. You
24 know, it really bothers me.
25 You know, I've been to -- I know that there are those that

1 don't care what lawyers think when judges make decisions, and some of
2 those people could be judges. I don't know, but I do care. You know,
3 and I feel bad. I feel really bad.
4 And I think where we disagree is, it's just my view that, you
5 know, seeing the, at least the potential impact of what could happen
6 when you put racism in front of a juror is where we part company on this
7 thing. I mean, that's my criticism. It truly is. And, you know, they call it
8 the practice of law, because it is, and you learn in the practice of law.
9 You know, I've always learn, you know, all the time. And it's a good
10 thing to keep learning.
11 And where we probably have a difference of opinion, and
12 where we just part company is I just think that it's one of those things
13 where seeing the impact of what could happen if you put the fact that it
14 looks like Mr. Landess is a racist up in front of a jury in a medical
15 malpractice case. That's where we part company, because obviously,
16 you now know that I really think that that was too much of a bomb that
17 made it impossible now after all the effort we put in to have a fair trial.
18 What else can I tell you?
19 MS. GORDON: No, I understand. I think that the difference is
20 just if you're looking for misconduct, as opposed to mistakes. If you are
21 just -- you're okay with the mistakes that we believe are cumulative on
22 Plaintiff side, this is by no means any, you know, any worse, if it's a
23 mistake, if that's what it is, and it's one, and it's not what have you, but
24 when you're saying responsibility and legal responsibility for what
25 happened, I don't believe that you can, you know, dismiss the multiple

1 mistakes that Plaintiff did make, and if they had not been made, we
2 wouldn't be here right now with maybe not bringing up that this is what
3 this bomb consists of.
4 THE COURT: Okay.
5 MS. GORDON: I think that was my distinction, because it's
6 hard for me to hear the words attorney misconduct, attorney
7 misconduct.
8 THE COURT: Yes.
9 MS. GORDON: I know you were citing a case --
10 THE COURT: I get that. I know.
11 MS. GORDON: -- but that's hard.
12 THE COURT: And that brings up something that maybe
13 should be part of this briefing; and that is, if you look at these -- I used
14 the Lioce case as guidance obviously, and they talk about these
15 arguments that you shouldn't make as "attorney misconduct", and that's
16 an interesting thing, because I don't know if you have to have bad intent
17 to make an argument that amounts to attorney misconduct; in other
18 words, maybe it could be a mistake, you know, you could say something
19 in a closing argument that by definition under the law is misconduct, for
20 purposes of improper closing argument, but we all know that
21 misconduct when it comes to attorneys sometimes is also connoted with
22 ethical misconduct.
23 Well, you know, I know in Lioce referred Mr. Emerson to the
24 bar, because guess who prosecuted Mr. Emerson for, you know, a few
25 days in Reno once upon a time when a guy name Dave Grundy

1 represented him? Me. But anyway, that's an interesting point. It's
2 highly I think possible that certain types of argument to jury could be
3 given without any bad intent, but yet be seen as "misconduct". Certainly,
4 if there was bad intent, that's always misconduct.
5 I told you informally on Friday, Ms. Gordon, and I'm
6 comfortable enough telling you now, I don't get a feeling -- God only
7 knows, and you, but I don't get a feel -- I'll share with you -- that you had
8 some bad, horrible intent. Rather, I think -- what I really think, that both
9 you and Mr. Vogel just didn't fully realize the impact that this could have.
10 That's a mistake. Is it misconduct for purposes of the rule that's in
11 question having to do with attorneys' fees? Maybe looking at the
12 argument cases that likewise use the word misconduct will give
13 guidance as to that, because ultimately I guess I'm going to have -- well, I
14 know I'm going to have to make a decision on this fee and cost request.
15 You know, I'm not -- as I sit here now, and Friday, and over
16 the weekend, and at all times, you know, did I ever say, you know, that
17 Ms. Gordon, what a sinister, evil, you know, I didn't do that. I didn't. I
18 just -- I really felt like actually you were just being -- in your mind, you
19 were being zealous, and you did what you did. I just, again, don't think
20 you appreciated, or Mr. Vogel appreciated, the impact of what was going
21 to happen. And I don't want to take all afternoon, but I do want to spend
22 a couple of minutes saying something else to you now that it comes to
23 mind.
24 Because I want you to know I sympathize with you. Okay. in
25 deciding all these things that you decide as a judge, I can tell you, in my

1 mind, I have these little things I call traps. Every once in a while
2 something comes your way and it's a judicial trap; meaning, at first
3 blush, when you see the item you say, oh, my goodness, I'm definitely
4 going to have to do this. This is the right result. I've got to do this. And
5 every once in a while, because you're not seeing something that's
6 maybe subtle in the law, the truth is, the answer is to do the opposite. I
7 call that a bit of a judicial trap.
8 You read reported decisions? Look at the four to three
9 decision that just came out of the Supreme Court on the issue of the duty
10 of a common carrier bus. That's what I'm talking about. You know, this
11 stuff cannot always be easy.
12 So just so you know -- and I'm glad you brought this up,
13 actually, because I don't want you to leave here thinking oh, my God,
14 you know, the Court thinks I did something unethical, because I don't
15 think that. I don't think that. Rather, what I think is, in your moment of
16 being zealous, you just failed to see -- you and the whole team
17 respectfully, just failed to see the impact that putting Mr. Landess's --
18 putting evidence on that, you know -- and again, I'm not accusing him of
19 anything, but it's -- hey, it is what it is, it's evidence that one could easily
20 draw a conclusion that he's a racist. And I think the failure is not
21 recognizing that now that's interjected in the trial.
22 That's all I can say. Okay.
23 Do you want to say anything else? Or --
24 MS. GORDON: No, that was it. I just didn't want you to --
25 THE COURT: Okay. All right. Anybody else want to say

anything?

MS. GORDON: -- think I wanted them in the --

THE COURT: Okay.

MR. JIMMERSON: Thank you, Judge.

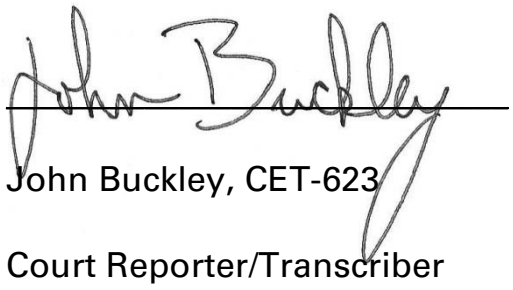
THE COURT: Take care.

MR. JIMMERSON: Appreciate all your staff for all --

[Proceedings adjourned at 12:15 p.m.]

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



John Buckley, CET-623

Court Reporter/Transcriber

Date: August 5, 2019

EXHIBIT 2

EXHIBIT 2

Electronically Filed
9/12/2019 6:25 PM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

JASON LANDESS, Plaintiff, vs. KEVIN DEBIPARSHAD, M.D., ET AL., Defendants.	CASE#: A-18-776896-C DEPT. XXX

BEFORE THE HONORABLE JERRY A. WIESE
DISTRICT COURT JUDGE
WEDNESDAY, SEPTEMBER 4, 2019

RECORDER'S TRANSCRIPT OF PENDING MOTIONS

APPEARANCES:

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

For the Defendants: STEPHEN B. VOGEL, ESQ.
KATHERINE J. GORDON, ESQ.

RECORDED BY: VANESSA MEDINA, COURT RECORDER

1 Las Vegas, Nevada, Wednesday, September 4, 2019
2
3 [Case called at 10:28 a.m.]
4 THE COURT: Good morning, guys. Everybody want to state
5 their appearances?
6 MR. JIMMERSON: Thank you, Judge. Jim Jimmerson on
7 behalf of the Plaintiffs.
8 MR. LITTLE: Good morning, Your Honor. Marty Little from
9 Howard and Howard, also for the Plaintiff.
10 MR. JIMMERSON: The Plaintiff is also present. Jason
11 Landess is present, Your Honor, and our paralegal Shahana Polselli is
12 also present.
13 THE COURT: Good morning.
14 MR. JIMMERSON: Good morning, to the Court and its staff.
15 MR. VOGEL: Good morning, Your Honor, Brent Vogel and
16 Katy Gordon for Dr. Debiparshad. Dr. Debiparshad wanted to be here,
17 but his wife is giving birth today, being induced. So I think he thought
18 that was more important.
19 THE COURT: I guess I can't blame him for that. So this is on
20 for a motion to disqualify Judge Bare. I'm hearing it as a presiding civil
21 judge. I think that the rule actually requires it to go to a presiding judge.
22 It went to Chief Judge Linda Bell first, but apparently, she was on your
23 jury panel --
24 MR. VOGEL: She was.
25 THE COURT: -- for this case. And she felt that that

1 disqualified her, so she sent it to me. I'm going to just tell you up front
2 that there is -- I've looked at all the stuff. So there is an issue with the
3 Recorder's transcript that I wanted to inform you about, if I can find my
4 notes in here. And I don't know if you guys have this in front of you, but
5 jury trial day 10, if you go to page 174 of the transcript. It shows the jury
6 out at 2:15. It says: "Court: All right. We're off the record for a comfort
7 break. Recess at 2:15, recommence at 3:45."
8 Okay. So there's an hour and a half period in there. There
9 was not a hour and a half break. There was actually argument from 2:15
10 to 2:50. At 2:50, you were going to start the video of Stan Smith. That
11 didn't happen and there was -- there was a bench conference at 2:52.
12 The jury was excused at 2:56. There was an additional argument
13 between 2:56 and 3:18. There's another break from 3:18 to 3:45. And
14 then we come back with what is on here.
15 So there is video of that, that I have watched. But it's not
16 part of the transcript, and I don't know why. But we have -- Vanessa did
17 you talk to somebody about trying to make that -- to fix that?
18 THE COURT RECORDER: The recorder was out.
19 THE COURT: The recorder is out. So there's apparently two
20 different places where the video is stored. And one place if I try to watch
21 that, it just jumps to 3:45, which is probably what the transcriptionist
22 dealt with. But there's another place where the video is stored, that I
23 was able to watch it. So I just wanted to make sure you folks knew that
24 the transcript itself is a little bit goofed up. But that being said, I mean I
25 don't have a transcript of the stuff that is missing, but I did watch it.

1 Okay. So I wanted to let you know that that was the case.
2 And I think part of the reason that I did that was because in
3 reading the briefs, I got the impression that it was Judge Bare that came
4 up with the idea that this was improper. Bringing this information in
5 from this email was improper. And that's not the case, because there
6 was an argument and Mr. Jimmerson moved to strike it at the very
7 beginning, back there where that -- the recording didn't result in a
8 transcript.
9 And you guys obviously were there, so you probably
10 remember that better than I do. But I had that question, if it was Judge
11 Bare's idea to begin with. And it appears that Mr. Jimmerson made the
12 motion to strike right off the bat. So it wasn't Judge Bare's idea, but
13 there was discussion about it after that.
14 So with that introduction, I'm happy to hear arguments. But I
15 did want you to know that I had done a little bit of research on that, and
16 there is a little bit of information that probably you don't have in the
17 transcript form, and I don't know why. We're trying to fix that.
18 Otherwise, Mr. Vogel, go ahead.
19 MR. VOGEL: Thank you, Your Honor. And, yeah, obviously
20 these are -- these are tricky motions. And this is actually the first one I've
21 ever been involved with. So, you know, we wanted to step lightly on
22 this. We wanted to provide the Court with as much information as
23 possible, because the standard here is, you know, whether or not, you
24 know, a reasonable person, knowing all the facts would harbor
25 reasonable doubts about a judge, and a judge's impartiality.

1 And we took great pains to go through as much of the
2 transcript as we apparently had, to point out a lot of those issues,
3 because there's a cumulative effect here. It's not just one instance, it's I
4 think we pointed out 10 or 12 separate instances. You know, the key
5 ones being towards the end of the trial. And in particular, you know, the
6 comments, you know, Mr. Jimmerson's and Judge Bare's personal hall
7 of fame, Mount Rushmore attorneys, that everything he tells -- he's told
8 him is the gospel truth. And then shortly after that turns to Dr.
9 Debiparshad and tells him he thinks he committed malpractice.
10 You know, and we attached Dr. Debiparshad's affidavit
11 because he was -- he was shocked, and quite appalled by both of those
12 comments. And, you know, he's the litigant in this case. And he clearly
13 felt that, you know, there was some definite bias here, and it gets
14 compounded on the following -- you know, this all happened on Friday,
15 August 2nd. You know, all this -- all the issues with respect to the
16 burning embers email. Which, as you know, I mean it was admitted into
17 evidence by stipulation, not objected to. Once it's admitted, it can be
18 used for any purpose.
19 But then, you know, the problem gets compounded the
20 following Monday when, you know, a motion to strike -- or a mistrial
21 gets filed at 10:02 p.m. on Sunday, August 4th, and we're not allowed to
22 oppose it. And the Court just rules from the bench that he's granting the
23 mistrial in the face of all of this. And it was -- you know, it was so deeply
24 troubling, because I don't know if you saw in the transcript, we asked the
25 Judge, hey, don't grant the mistrial, please. Let's -- we're almost done

1 with the trial. Let's go -- let's finish the trial. If it's a Defense verdict, you
2 can treat the motion for mistrial, as a motion for a new trial and go from
3 there, but then at least we go through and get the verdict, and we
4 haven't wasted all the time, effort, and money in going through this trial.
5 The second option we gave, which he also rejected was to,
6 you know, let's not -- don't release the jury panel. Allow us to file an
7 emergency writ with the Supreme Court, and let the Supreme Court
8 decide whether or not, you know, the use of this email was something
9 improper and grounds for a mistrial. He took that away from us as well.
10 And when you look at the totality of everything that happened here, I
11 think it's fairly clear that, you know, there's -- a reasonable person could
12 say hey, there's some -- there's some impartiality involved in this.
13 And it gives us no joy to make this motion, but, you know,
14 when you look at everything we've laid out, and you look at the case law,
15 you know, I think that's what happened here. And that really is the basis
16 for the motion without going into -- I don't want to go into a whole
17 bunch of detail about, you know, the nature of the email and what not,
18 but, you know, that's the position we take. And we feel that the case law
19 and the Canon of Judicial Ethics support that.
20 I don't know if you want to add anything on to that?
21 MS. GORDON: No, I think that's it. Thank you.
22 THE COURT: Before I let Mr. Jimmerson respond, I did want
23 to let you guys know, I don't know if you've seen it, I got an amended
24 affidavit from Judge Bare this morning.
25 MR. VOGEL: Yes.

1 THE COURT: Did you guys get that?
2 MR. VOGEL: We did see that.
3 THE COURT: Okay.
4 MR. VOGEL: I think he was just correcting a typo.
5 THE COURT: Yeah, it was just a -- like a one word thing. He
6 said there was -- in paragraph 8, he forgot to put the lack of impartiality.
7 I think that's how I had read it the first time, anyway.
8 MR. VOGEL: Yeah, me, too.
9 THE COURT: So --
10 MR. VOGEL: Yeah, me, too. And I would expect -- you know,
11 I read his affidavit and I -- that's exactly what I expected him to say,
12 because I don't think he was -- I don't think he was doing anything you
13 know, necessarily -- I don't know if it was intentional or not, but I think
14 there is definitely plenty of evidence in the record that, you know, a
15 reasonable person could perceive many of his actions, taken in totality,
16 as being impartial.
17 THE COURT: Okay. Mr. Jimmerson.
18 MR. JIMMERSON: May it please the Court, Your Honor.
19 Respectfully, the motion brought by the Defendants to disqualify Judge
20 Bare should be summarily denied, and the Court should respectfully
21 consider under 18.060 and 18.010 2(b), an award of attorney's fees for
22 the frivolousness of the motion and the mean-spiritedness in which the
23 Defendants offer it.
24 Today they have provided a very timid low-key argument for
25 the Court, which is belied by the words that they use within the motion

1 that this Court has read, And they have in sequence misstated or
2 misrepresented the events involved in this case, in order to shade their
3 motion, or support their motion without giving the Court a complete
4 review of all that took place.
5 And as opposing counsel uses the word, these are tricky
6 motions, they're not tricky motions. They are motions that need to be
7 taken very seriously because they carry with them not only the need for
8 precision, which the Defense has failed to engage in, as the Court has
9 observed, and I will point out today, but, secondly, it carries an ethical
10 influence or makeup with regard to the matter, attacking a jurist of eight
11 and a half years on the bench now. A man who served as an attorney
12 for the JAG Corps, more than a dozen years the State Bar counsel, and
13 after being successfully elected to the bench and reelected, to have tried
14 several cases without complaint.
15 So it's not a tricky motion. It's a motion that must be
16 approached seriously, and with care, and with precision. The Defense
17 failed to do so, which is why I began my remarks by suggesting to the
18 Court that not only should the motion be denied, but the Court should
19 consider attorneys' fees being awarded in favor of the Plaintiff and
20 against the Defendant for the failure of care.
21 You have reviewed the record. You have reviewed the video
22 tape of April 2, 2019.
23 THE COURT: August 2.
24 MR. JIMMERSON: August 2, sorry. Thank you, August 2.
25 When you did so, and you compare it to the Defendants' motion to

1 disqualify, was there any citation in their motion through those three
2 hours of off the record and on the record discussion? Was there any
3 reference that Jim Jimmerson first sought to mis-try the case, by asking
4 the Court, to first strike the comments by opposing counsel and the
5 exhibit that was read to the jury, pre-prepared with yellow highlights?
6 No. Was there any reference to the discussion that Jim Jimmerson was
7 mad at himself, acknowledged that he should never have not objected to
8 the motion to admit the Embers memo, which on its face was so
9 prejudicial and subject to a 48.035 ruling? No.
10 So when you do go to look at the overall record, and you've
11 seen that, you only confirm what the Defendants themselves personally
12 knew, having experienced it and gone through it, but who wrote not a
13 word about it. And it's significant, because as the Court has inquired,
14 how did the issue of the prejudice -- and as the Court mentioned in an
15 earlier case today, not to prejudice -- every lawyer is seeking to
16 prejudice in some ethical matter, the influence of a judge or a jury's
17 determination, but the undo prejudice. The prejudice that taints the
18 ability to have a fair trial.
19 The Defense makes no reference to those events whatsoever.
20 You first see them in my affidavit or declaration submitted in our
21 opposition, and you have our representations confirming it. And maybe
22 there's something to the effect that Plaintiff, when they speak, do their
23 very best to speak like gospel. To be accurate, and fair, and complete,
24 and not careless and incomplete, and by omission, failing to provide the
25 Court what it needs to know to make a fair ruling on such a serious

1 motion.

2 The errors that are seen in the papers conclude right to the
3 reply filed yesterday or the day before yesterday to the Defendant, who
4 miscited the *Ainsworth* case -- miscited the head case. We all remember
5 the *Ainsworth* case, because Justice Gunderson was so vociferous about
6 his criticism of the insurance company's lawyer, but it didn't rise to the
7 level of disqualification.

8 But in the reply points of authorities, the Defense are saying
9 it's the *Hecht* decision. No, *Hecht* had nothing to do with it. *Hecht* had
10 to do with -- if you remember -- and the Court does remember, being
11 here a long time, the attack on Justice Young for making a comment
12 during a campaign setting, as somehow being a basis for disqualifying
13 Justice Young in a later proceeding in the *Hecht* matter.

14 That type of lack of care continues in the affidavit of the
15 Plaintiffs of the Defense counsel, Gordon and Vogel, except for the
16 names, one being Vogel, one being Gordon, the affidavits under 1.235
17 are identical. It also misstated the fact that at the time that they filed this,
18 October -- August 15, that there are competing motions for attorney's
19 fees and costs. On August 15, there were no competing motions. There
20 was the Plaintiff's request filed on August 4, for attorneys' fees and
21 costs, for the Defense being the legal cause for the mistrial that came on
22 day 11 of an 11 day jury trial. Their competing motion, if you wish to call
23 it that, for fees, wasn't filed until August 26th, 2019. And otherwise,
24 those affidavits are identical. So they're not even reviewing their work,
25 to understand the dates and times.

1 That's important because when we reviewed the papers, it is
2 so unfair to Judge Bare -- I'm not just talking about an outstanding jurist,
3 we're talking about somebody who by his style, announces in open court
4 his rationale. When he looks at the rulings, he gives you findings. He
5 makes you sit and listen to him first. And he does so to challenge
6 himself to make sure he understands the issue before the Court -- the
7 case before the Court.
8 Now, but then also to provide, as the Court did today, an
9 opportunity for the attorneys in representing their clients, for the
10 opportunity to respond, to understand where the judge is going. They
11 are well thought out, well researched, and well-articulated rulings, and
12 his view without making a ruling. And that is his style. He does so, I
13 believe -- and I've never discussed it with him -- but I believe because it
14 motivates him, or even compels him to be on top of his cases. To be
15 mindful of the issues, because he's speaking first, having had the
16 opportunity to read the materials on both sides, and he's a reader of all
17 materials, as the Court knows. And he relies upon his talented staff to
18 assist him as well.
19 When you review the orders that are not attached to the
20 motions by the Defendant, you'll find that the orders are well-reasoned.
21 They are thoughtful, and they are citing to cases, they're citing to the
22 evidence adduced. They're citing to the affidavits, or the documents that
23 were discussed during the course of the order. They're not -- and they're
24 very transparent. They're very above board.
25 Secondly, by virtue of his background, and pedigree, and

1 experience, he's very mindful of being very much an honorable,
2 professional, and fair jurist. No one who practices in front of him, would
3 suggest that he has an agenda, or a pre-disposition towards any issue.
4 And I do believe it arises from his background, his upbringing, his life
5 with his family in Pittsburgh, that he tells all jurors about in all of his
6 trials. But it also extends to his work as State Bar counsel, and of having
7 the privilege and good fortune, and he admits so, of being an
8 outstanding jurist in Clark County.
9 So when we make the attacks by the Defendants that we
10 listened to here, we need to be mindful that it is so unfair, and most
11 importantly, untrue, to Judge Bare. I'd like to recite 13 examples of
12 materials you saw, very briefly, of the truth versus the initial
13 presentation or misstatement by the Defendants in their moving papers.
14 They said that Judge Bare offered Plaintiff's counsel an
15 excuse for not-seeing the burning embers email. You've already pointed
16 out, that wasn't true at all. Plaintiff's counsel, through myself,
17 specifically, complained bitterly and vociferously about the introduction
18 of the document. I went so far as to say what I was supposed to do,
19 Judge, argue in front of the jury, the fact that I'm afraid of this memo.
20 Are you going to call further highlight to something that has already
21 been pre-highlighted by Defense counsel? What I believe concerned
22 Judge Bare greatly, was the fact that the document was pre-highlighted.
23 The document was introduced without discussion to the witness without
24 pointing out what it is. Just simply reading it out loud with the
25 [indiscernible].

1 In the affidavits of Catherine Gordon and Brent Vogel, they're
2 identical with exception of the names, that they submitted, in supposed
3 compliance with Supreme Court Rule 1.235, they say we believe that
4 white people should be equally offended by these words, as people of
5 color, or of heritage -- Spanish heritage. That's what they write in each
6 of their two affidavits, knowing full well the impact of the document that
7 they were going to now introduce through prior highlighting to this jury.
8 We agree. We think it is such a racist and improperly -- improper
9 document -- prejudicial document, that under the Nevada Supreme Court
10 ruling, and out of the United States Supreme Court rulings, it is
11 verboten. As a matter of law, it is verboten. It had no place or call. And
12 that is why Judge Bare asked the Defense counsel, on the record, why
13 didn't you approach me about this before you placed it upon the Elmo,
14 where it could not be retrieved. You knew what you had.
15 Opposing counsel, we kept waiting for the Plaintiffs to object.
16 We kept waiting, thinking they were going to object. I would submit,
17 respectfully, that that is consciousness of guilt. Here's consciousness of
18 the Defense's knowledge of wrongdoing. If you thought that you were
19 doing something proper, you wouldn't lay in wait, and you wouldn't
20 answer those questions the way they were answered. The answers are
21 the indictment. The answers are the evidence of the propriety and
22 correctness of Judge Bare's granting of a mistrial. But when you listen
23 to their full argument, it basically is partiality toward the Plaintiff. And I
24 think in some regards, partiality to myself, individually.
25 Why does a Judge take notes? Judge Wiese, why do you

1 take notes during the course of a jury trial? Because you are taking
2 evidence as you understand it. You are forming an opinion, which you
3 don't share with the ladies and gentlemen of the jury, but because you
4 want to be on top of the case. You want to be able to articulate to
5 counsel on each side, and to a reviewing court, and to satisfy your own
6 professional pride and care that what you are observing is taking place,
7 is providing to each side a fair trial. And that's what makes these cases,
8 or these motions so important. They're not tricky business, they are
9 serious business.
10 So what we learn is that it wasn't Judge Bare offering an
11 excuse to Plaintiff's counsel. Plaintiff's counsel moved to strike.
12 Plaintiff's counsel acknowledged that Plaintiff's counsel was unaware of
13 those words, and Plaintiff's counsel said that the words were outrageous
14 all before Judge Bare, and he denied the motion to strike.
15 What we see is what you would see. What any jurist would
16 see, any competent counsel appearing in any courtroom here would see.
17 And that is a growing realization on the part of the Court of the damage
18 that those words had caused, not just to the Plaintiff, but to the process.
19 To the giving of either side a fair trial. And by 5:00 in the afternoon, on
20 Friday, August 2, Judge Bare told both sides that he definitely was
21 concerned that a mistrial may be the proper order.
22 And so you see the growth of maybe a noon or 2:00 time
23 period to 5:00, where notwithstanding my motion to strike being denied,
24 my request for a curative instruction being denied, a realization by the
25 Court that there was no way to rectify the error, the label causation and

1 professional misconduct of the Defendant, himself, and to their counsel.
2 And that led to the Court ordering a mistrial on that following Monday.
3 But how we got there, and what occurred are at the
4 Defendants' feet, and the Defendants, in their motion -- in their
5 declaration say, and they are incredibly, to me, I don't know if the word
6 is arrogant, but they tell you the reason we're filing this motion is
7 because Judge Bare is going to hear in the weeks to follow, a motion for
8 attorney's fees and costs, that the Plaintiffs have sought to be filed
9 against us. And we don't him to be awarding potentially hundreds of
10 thousands of dollars, their words, because he's impartial against us.
11 That's what they swear to in their sworn affidavit.
12 As opposed to Judge Bare, his own words on the record, on
13 August 2 and August 5, about what we've done to this jury is not right.
14 Mr. Kerwin [phonetic] found babysitting in order to be present. Every
15 juror has sacrificed to be here now for the third week, this being day 11,
16 the third Monday the trial had commenced. So there is a qualitative
17 difference and a different viewpoint that I commend Judge Bare for, that
18 you would have, Judge Wiese, because he's looking at it from the
19 administration of justice perspective. He's looking at it from being a fair
20 jurist, providing a fair jury to the benefit of both Plaintiff and Defendant,
21 without predisposition as to how the case must turn out.
22 The second error that the Defense made in their -- the second
23 is they didn't object to the email. We've already corrected that record.
24 We most certainly did object, and I made a long to-do about how -- I
25 mean some experience as a trial lawyer, it might create a more damage,

1 or create a more highlight to an already incendiary piece of evidence that
2 should have never been referenced by the Defendants, by calling its
3 attention and objecting in the presence of the jury, as opposed to waiting
4 to outside the jury and then making the motion to strike, and the like.
5 Again, no reference in their papers about that fact. The third
6 factor. Defendants question --
7 THE COURT: Mr. Jimmerson, let me interrupt you, because
8 I've got a -- I've had a jury sitting outside for --
9 MR. JIMMERSON: I'm sorry.
10 THE COURT: -- about a half hour, and you're on I think 2 or 3
11 of 13.
12 MR. JIMMERSON: I'm on 3, yes.
13 THE COURT: I need you to --
14 MR. JIMMERSON: Thank you. I'll just --
15 THE COURT: -- kind of summarize, it would be good.
16 MR. JIMMERSON: I'll just -- all right. No, thank you, sir. I
17 want to -- I want to call your attention to the standards that you will
18 apply in making your ruling. These are largely ignored in the Plaintiff's --
19 excuse me, in the Defendants' motion and in the reply. They don't speak
20 to you with regard to the *Borne* decision. They don't speak to you with
21 regard to Judge Scalia's decision. They don't speak to you -- to the
22 Nevada Supreme Court's decision of appeals to racial prejudice are, of
23 course, prohibited. They don't speak to the fact that their motion is
24 untimely. They claim partiality to the Plaintiff, and they cite the
25 willingness to the Court by stipulation to set a hearing -- a trial, a year in

1 advance. September 18th, 2018, the hearing date, July 22, 2019 is the
2 beginning day of trial, but they stipulate to it. They complain that.
3 Those rules tell you that if you're concerned about partiality, you have an
4 obligation to bring that motion because otherwise, you're playing both
5 ends against the middle.
6 If I think the jury is going my way, I'll remain quiet. And the
7 minute the case doesn't seem to be going my way, then I'll raise my
8 hand and say that there is a impartiality, or basis for a disqualification.
9 And that type of analysis was not performed by the Defendants. The
10 Court has seen it. The Court has seen our papers, it clearly was
11 untimely. And then if you base it upon the Judicial Canons, as the Court
12 also has reserved under *Togan Dodge* [phonetic] and the other
13 decisions, you have in fact, that there are correct decisions being made.
14 There's a failure, for example, in the papers of the Defense, to tell you
15 about the motion to allow discovery and two depositions within a week
16 of trial, denying our motion to strike two experts that they submitted
17 reports the day before the commencement of trial, and a week before the
18 commencement of trial.
19 They fail to cite the fact that they were allowed to have two
20 extensions of discovery beyond the April 30th time period to June 5th,
21 and then again to July 5th. They fail to cite the fact that two out of the
22 three motions in limine that they lost, but they won one. There's no --
23 there's no suggestion that Judge Bare ever ruled in favor of the Defense
24 if you read their papers. He was balancing all of their views.
25 And we look at the case law with regard to what it takes. All

1 the record -- all their arguments are something that occurred within the
2 court record. They're not complaining about Judge Bare being
3 influenced about reading a newspaper article outside of the courtroom
4 or having a conversation with somebody about Jim Jimmerson being on
5 the Mount Rushmore of expected lawyers, or any of those other things.
6 They're complaining about claims, or events, or decisions of the Court in
7 the course of the inside of the four walls of the courtroom.
8 The Nevada Supreme Court and U.S. Supreme Court have
9 made it very clear that only in the most extraordinary gross situation
10 would there ever be a basis for disqualifying a judge on the basis of the
11 claw decisions, and then they don't even reference the decisions, and
12 they don't cite them or provide them to you, but we've brought them to
13 you, to read those orders. It's quite clear the even-handedness that
14 Judge Bare has provided to both sides. And that's his obligation of
15 even-handedness, his obligation to be fair, and he's discharged his
16 obligation and there's no reference to it.
17 And I'll conclude with this, the *Millen* decision. There is a
18 duty to sit. There is a duty for Judge Wiese and all the judges in our
19 courtroom to take on the tough cases. To make the hard calls, and to do
20 it impassionate, fairly, and with thoughtfulness. This Court should deny
21 this motion and award appropriate sanctions. Thank you, sir.
22 THE COURT: Thank you, Mr. Jimmerson.
23 MS. GORDON: Thank you, Your Honor, just briefly. I think
24 what we just heard is the exact reason that we need this motion granted.
25 And that is there are several things that Mr. Jimmerson just told you and

1 represented as fact that simply are not true.
2 Briefly, the affidavits that Mr. Vogel and I signed absolutely
3 neither one of them reference anything about white people are on a jury,
4 or what have you. They don't say that. Our motion absolutely cites to
5 the fact that Plaintiff did make a verbal motion to strike, and Judge Bare
6 said I don't think that would be a good idea, counsel, to highlight that.
7 And we didn't cite the actual transcript, because you're exactly right. It
8 was odd that it wasn't in there. I remembered that it happened, and so
9 we put it in there. And it was to really highlight the fact that Judge Bare
10 -- Plaintiff may have raised a request for a motion to strike, but that's all
11 they asked for.
12 And it was Judge Bare who absolutely kept going with the
13 idea of how incredibly prejudicial the email was. And again, losing sight
14 of the actual evidentiary issue, which was it was admitted, we could use
15 it for any purpose, it w was rebuttal character evidence, but it didn't
16 matter because that was not his interpretation.
17 But going back to the misstatements by Plaintiff counsel, it's
18 on page 18 that we raise that issue, that he did make the motion to strike.
19 It's all Plaintiff ever asked for until that Sunday night, and we had the
20 back room conference with Judge Bare.
21 The issue about the competing counter-motion for attorney's
22 fees and costs, we told Plaintiff that we were going to be filing a counter-
23 motion. We were in the process of entering into a stip and order to
24 extend the dates. That's a red herring. I don't understand -- there's
25 really no value in bringing that up.

1 We did address the *Borne* holding in our motion. We
2 absolutely addressed the prejudicial effect. It was an enormous part of
3 our motion, whether that's something that the Court should have
4 analyzed, not analyzed.
5 So the problem we have, Your Honor, is that you have an
6 attorney stating things as fact, that are absolutely not fact. It's right here
7 in front of us. And you have a judge who has told everybody that he
8 will accept what that attorney says as the gospel truth. That puts us in
9 an incredibly hard situation.
10 I think that Judge Bare made your decision very, very easy
11 by making those comments, and he had no ill -- you know, purpose in
12 doing that, but throughout the trial it became increasingly obvious that
13 he was going to grant what they wanted. And it was absolutely because
14 of his feelings, I think about Mr. Jimmerson, and maybe the Plaintiff
15 himself. I don't know. But there is no way we were going to be able to
16 get an impartial trial. There's no way Dr. Debiparshad was going to get
17 an impartial trial.
18 The comments made by the Court about him being
19 negligent, and I don't think you did it intentionally. There was no
20 purpose for those comments, and it was shocking to Dr. Debiparshad to
21 have to go back in front of Judge Bare again. He just knows he's not
22 going to be able to get an impartial -- an impartial trial in front of Judge
23 Bare.
24 And the basis -- when you look at the basis for granting the
25 mistrial, obviously, you understand our feelings about that. It was

1 completely wrong. And the motion for fees and costs is going to be
2 coupled with his thoughts on why the mistrial happened. Why he
3 granted it. We need a new set of eyes to look at that issue, because he
4 will not be able to impartially look at that motion and counter-motion for
5 fees and costs, without you know, basing it on these incorrect and
6 improper reasons for granting the mistrial in the first place. I think Brent
7 had something.
8 MR. VOGEL: Yeah, just very briefly, Judge. You know, we
9 stand by -- behind every word in our motion. We set out in great detail,
10 we included Exhibits A through P. For Mr. Jimmerson to get up and say
11 that this was sloppy, not well researched or well cited is obviously
12 wrong. You've seen it. We took great pains to go through every single
13 fact, set it out in detail. In there we cited every relevant case on the
14 issue. We cited the Canons. The ad hominem attacks are frankly just
15 improper. And I think just a, you know, an attempt to, I don't know
16 create favor with the Court. I don't know. But it's just -- it's improper
17 that it's even done in this case. He mis-cited our affidavits.
18 But the bottom line is the Defense did nothing wrong in
19 using this email. It was their exhibit, they stipulated it into evidence,
20 they didn't object at the time. Once it's admitted, it can be used for any
21 purpose. And for them to get up and actually tell this Court that it's
22 verboten to bring up race is absolutely incorrect, a total false statement
23 of the law. You know, I'm going to leave you with that, but it's clear that
24 -- you know, it's clear that Dr. D cannot get a fair trial by Judge Bare.
25 MR. JIMMERSON: Do I have the last word of my reply of the

1 counter-motion, Judge?
2 THE COURT: What's that?
3 MR. JIMMERSON: I just have three comments. Number
4 one, they made this -- their opening statement was they were not
5 allowed to give input as to the mistrial. On August 2, you saw the judge
6 invited all parties to brief, and the Court advised it was going to spend
7 the weekend briefing. And they did not file anything. The Defense chose
8 not to do so, while the Plaintiffs did. And while the Court also worked, it
9 says worked over the weekend.
10 August 5, the Court asked the parties if they had any
11 objection to the procedure, they had none. The Court allowed them to
12 bifurcate the hearing on attorney's fees and costs, separate from the
13 issue on the mistrial. Since you have a jury of 10 people outside in the
14 hallway waiting like you have right now, and they had no objection, and
15 they wanted to go forward, and that's also in the record. So when they
16 say they weren't allowed to file an opposition to the mistrial, that's a
17 misstatement.
18 I would indicate to the Court that the nature of the material
19 introduced left this judge with no choice, but that's not the issue here.
20 The issue is whether or not the judge has the kind of partiality or bias to
21 preclude him from continuing to serve and none of the words by
22 opposing counsel or the brief would suggest a good basis for doing so.
23 Thank you, sir.
24 THE COURT: All right, guys. I've learned over the past
25 number of years that trial judges, we have a dilemma having to voice

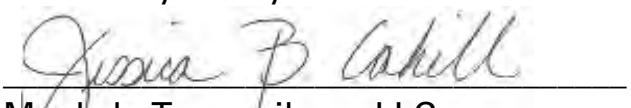
1 our thoughts, and sometimes without the benefit of a long time to
2 prepare and make sure we're saying the exact right thing. So since part
3 of this case deals with Judge Bare's comments, I'm not going to do that
4 and issue a ruling from the Bench today. I'm going to -- I'll write a
5 detailed order for you and explain the basis for my thoughts and put it in
6 writing, so that I have a chance to go back and correct it once or twice, so
7 I can make sure it says what I want it to say before anybody reads it.
8 When is your motion for fees?
9 MR. JIMMERSON: On the 17th, Your Honor.
10 THE COURT: All right. You'll have a decision way before
11 then. I'll work on it in the evenings. I'm in trial for probably the next
12 three or four weeks, but I'll work on it, and I'll get you an order soon.
13 MR. JIMMERSON: I appreciate your time. Thank you so
14 much.
15 MR. VOGEL: Thank you.
16 MS. GORDON: Thank you, Your Honor.
17 THE COURT: Thanks guys.
18 [Proceedings concluded at 11:05 a.m.]
19
20
21 ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-visual recording of the proceeding in the above entitled case to the
22 best of my ability.
23 
24 Maukele Transcribers, LLC
Jessica B. Cahill, Transcriber, CER/CET-708
25

EXHIBIT 3

EXHIBIT 3

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Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

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

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

1 they're legal in nature and I have to deal with them. So we did that.
2 Also, there was a little IT issue. We had to call a guy named
3 Eddie in, from IT, he came in and he helped out, because there's a
4 potentiality that a video might be played, during the course of the next
5 witness' testimony. I think it's about a three-minute video.
6 But we tested it and it was really loud. And so we had to not
7 put you through that. So we had to bring somebody in to get the
8 volume fixed, in the event it's played. I'm not sure it's going to be
9 played but it might be. So we fixed that; so here we are.
10 Mr. Jimmerson, please call your next witness.
11 MR. JIMMERSON: Thank you, Your Honor.
12 Ladies and gentlemen of the jury, we spent the last three
13 days, all of us together as a team, examining the medicine and the
14 liability portion. We're now going to call Mr. Jonathan Dariyanani, the
15 chief executive officer of Cognotion, Jason Landess' former employer, as
16 you recall.
17 Mr. Dariyanani, please.
18 THE COURT: All right. Mr. Dariyanani, when you get to the
19 witness box area, if for just a moment, please, if you could remain
20 standing and turn your attention to our clerk, she'll swear you in.
21 THE WITNESS: Sure.
22 THE CLERK: Raise you right hand.
23 JONATHAN DARIYANANI, PLAINTIFF'S WITNESS, SWORN
24 THE CLERK: Please have a seat and state and spell your
25 name for the record.

1 THE WITNESS: Sure. Jonathan J-O-N-A-T-H-A-N, Ram R-A-
2 M; last name, Dariyanani D-A-R-I-Y-A-N-A-N-I.
3 THE COURT: All right, Mr. Jimmerson.
4 DIRECT EXAMINATION
5 BY MR. JIMMERSON:
6 Q Good morning, Mr. Dariyanani, how are you sir?
7 A Good.
8 Q Thank you for coming to Court this morning. Would you tell
9 us your position with Cognotion, and maybe why you're here, please?
10 A Sure. So I'm the founder and president and CEO.
11 Q Please keep your voice up.
12 A Sure. I'm the founder, president, and CEO of Cognotion, and
13 I'm here to talk about, I think, Mr. Landess' employment and his
14 termination.
15 Q Okay. Thank you. Tell us what is Cognotion, please?
16 A Sure. So Cognotion is a software company, kind of like
17 Netflix for careers. So we make movies that train people to do new jobs,
18 and they watch them, and that trains them in the job, rather than sitting
19 there with a textbook. And employers pay us, per student, sort of like a
20 digital textbook. But they buy a subscription, people watch the movies,
21 and we train them. And so we have clients, like, the American Red
22 Cross, and Panera, and Firestone, the tire shop, and we love it because it
23 takes somebody from minimum wage to 12, 15, $20 an hour. It really
24 changes their life. So I find it very satisfying work.
25 Q All right. Thank you. And first, before you move to that, just

1 give us a bit about your background, including your years here in Las
2 Vegas.
3 A Sure. So I'm originally from Detroit. My dad is a
4 Indian/Indo-Pakistani/Hindu who, like, basically dropped out of school in
5 the 5th grade, and my mom is a, like, Russian/Romanian/German/Jew
6 who grew up in the Detroit suburbs. So I'm, like, a Indo-
7 Pakistani/HinJew. And --
8 Q Is that a mutt?
9 A It's a mutt, yeah. I mean, my poor -- and my kids, my wife is
10 from West Virginia, half Methodist; half Catholic, German, Irish. So my
11 kids are, like, everything. But, yeah, I grew up in Detroit. My mom was a
12 Kindergarten teacher, like, inside Detroit. And my parents lived together
13 until they got divorced when I was about 12, because my dad had, what
14 you would kind of call, like, a schizophrenic episode, and he took out a
15 second mortgage on the house and basically stood on the street corner
16 and gave the money away, to people, in cash. And so, we lost the
17 house, my parents got divorced, and at that time my mom -- Detroit was,
18 like, imploding. There's no jobs anywhere. So, she though, oh, well
19 we'll move to Las Vegas and I'll get a job teaching there, because they're
20 hiring. So my sister and I and my mum, got on a Greyhound bus in
21 1981, and came out to Las Vegas.
22 And, you know, I'll never forget, we were on this bus, and
23 there was woman, named Ruth -- she was about my mum's age at this
24 time, I'd say about maybe 40. And her husband of 20 years got gastric
25 bypass surgery and went from, like, 400 pounds to 200 pounds and got a

1 toupee and he left her for this younger woman. And she was going
2 crazy. So here we are, two days on a Greyhound bus, and I'm 11 years
3 old. In the middle of the desert she starts screaming that everyone's
4 trying to kill her and she gets off the Greyhound bus and starts walking
5 down the side of the road in the middle of the desert. And my mum's,
6 like, go get her. So all the people in the bus waited and I went and got
7 this woman, and 12 hours later we arrived in Las Vegas, and that's pretty
8 much the first time I had ever been here.
9 Q Okay. And how long did you reside in Las Vegas?
10 A We were here for two years; so at first, my mom was really
11 close to starting at Clark County. And then a week before the semester
12 started, there was a hiring freeze, and they delayed for a year. And so,
13 we were in bad shape. We ended up staying at this place at the time, it
14 was called Paradise Resort Inn at Paradise and Harmon. It's now called, I
15 think, Chalet Vegas, across from the Holiday Royale. A 250 square foot,
16 cinder block, one bed, my mum and my sister and I. And there was a
17 woman, an African American woman named Pearly [phonetic]; she had
18 three kids. And she blew her rent money on the slots. And that kind of
19 place, if you don't pay in one day -- thing on the door (indicating), and
20 you're out. And so, for seven months, Pearly -- my mum invited Pearly
21 and her three kids to stay with us. So my mum and I and my sister and
22 Pearly and her three kids lived in that place. And --
23 Q And for how long did the seven of you live there?
24 A Seven months. And my mum babysat -- like, there were
25 women there who were, like, were ladies of the evening. And my mum

1 babysat for them. That's how she made money until the school position
2 opened and we were able to move out of there.
3 And that summer, I'll never forget, so I was going to Roy
4 Martin Junior High, after we left, which is not in a great area. Living at
5 Stewart Plaza Apartments. And I got a scholarship to go to Yale for
6 summer school; so I was 12.
7 And so that same year I went from the cinder block
8 apartment to Yale. And I thought, you know, the only difference
9 between the kids at Yale and the kids at Paradise Resort Inn, were that
10 some had money, some had parental support, and some didn't. So I
11 resolved if I were ever to make something of myself, I would come back
12 here and try to do something to be helpful. And we left Las Vegas in '84
13 because my mom got a job at Fort Irwin, teaching. And that was my --
14 and after that I went to Berkley, undergrad, and then went to Duke Law
15 School.
16 Q All right. And so by training, at least, you went to a college
17 and to law school. Is that right?
18 A Yes.
19 Q And for a period of time after graduating from law school,
20 did you practice law?
21 A I did.
22 Q And what did you do?
23 A So I was a venture capital technology lawyer. For example --
24 Q What does that mean?
25 A That means that we would represent companies that did

1 medical devices, software -- for instance, we represented Stryker, the
2 company that makes the, you know, tibia nail thing that you guys have --
3 there's binder about that. I saw it in the little holding room. So we
4 represented them, we represented Google and Pixar and Apple. I mean,
5 we were the place that Steve Jobs came in with his 50 bucks to
6 incorporate Apple.
7 So it was a lot of having startups, people with ideas and
8 passion, they would come in, and I loved that. I mean, my first company
9 I ever worked on with this company, called Illumina, and they came in
10 and they had raised -- cobbled together, $750,000 to license this genomic
11 sequencing technology from U.C. Berkley. And I handled the whole file
12 myself. I think I had been out of law school for, like, three months. And I
13 remember thinking, this company is really cool. Someday people are
14 going to want to do genetic testing and get a DNA profile. So I went to
15 my wife at the time, who is now my ex. They said I could invest $15,000
16 in this thing; we should invest $15,000 in this thing. She's, like, are you
17 kidding? That's a crazy idea. We're going to invest in Washington
18 Mutual, because that's a stable, safe investment, like, a bank that'll never
19 fail.
20 So, of course, we invested our $15,000 in Washington Mutual
21 which went bankrupt and we lost it all, and the shares of Illumina would
22 have been worth $156 million. So we got divorced but not over that. So
23 anyway, Illumina ended up selling for $5.5 billion, and I got to see how
24 that could happen. That didn't happen with everybody. We had some
25 companies where people put everything in and it went blah (indicating),

1 and they declared bankruptcy and lost it all. And so, I loved that. I got to
2 work on lots of really cool stuff. And then since 2003 I've been, you
3 know, an entrepreneur in this education space.
4 Q Okay. So you knew at least to get out of the law business, I
5 guess, huh?
6 A Yeah, and I would never -- I appreciate the great work you all
7 do, and I am grateful to God every day that I don't have to do it.
8 Q Okay. Thank you. Following your work -- so just in terms of
9 year, when did you cease being a traditional lawyer; working in a law
10 firm.
11 A February of 2000.
12 Q Okay.
13 A It's been a long time. It's either February of 2000 or late in
14 '99, I don't really remember. Sometime around that time.
15 Q So take us now from 2000 to 2019.
16 A So I went and worked at a startup that did x-ray imaging,
17 called DICOM imaging. It was the first startup to automate the software
18 in a dentist office. Because before that you had to have, like, a actual
19 film x-ray. And this was x-rays on computer. And that company sold to
20 Kodak and I did invest my $15,000 in that one. And then it ended up
21 being north, like, I think I sold the stock for, like, $2 million. So I'm 29
22 years old, working at that company. I think I have lots of money and I'm,
23 like, buying the receptionist a used car or whatever.
24 And then the next one I did was a complete disaster. And so,
25 you can't -- I thought I was smart; I wasn't as smart as thought. The next

1 one was doing health, fitness, exercise, nutrition startup with Lindsay
2 Wagner and Dyan Cannon, Ali MacGraw, kind of the Time 50 something.
3 I really liked working with Lindsay Wagner, cause when I was
4 a little kid I watched The Bionic Woman and thought she was really cool,
5 and asked, her, like, in that Adrenalizine episode where you have your
6 twin, and she's, like, taking that stuff, what were you eating? She was,
7 like, pink fudge. It just was, like, such a cool thing from my childhood; so
8 -- but that's -- I just lost. So after that, 2003, I started my first real
9 educational company. And that was the one that I sold to LeapFrog, the
10 children's toy company. So I started it in 2003 and it sold in 2003.
11 Q It has some relation to Cognotion because of the subject
12 matter, the product -- products that are being sold. And so tell us a little
13 bit more about that.
14 A Yeah, so, you know, I had -- the way I came up with -- the
15 company was called FireBook -- is, you know, when I was in law school,
16 like, I wasn't getting parental support or whatever, and Duke was very
17 expensive. And so, I had to work, like, all kinds of jobs. I worked, I was
18 an LSAT instructor, I leased cell phone tower space, I was a waiter at
19 Outback, and -- but you can get a summer clerkship in law school and it
20 pays really well. Of course, what they don't tell you is, they take you out
21 to dinner and pay you really well over the summer, and when you join,
22 you work 3,000 hours a year and never see the light of day. But the
23 summer is all fun, Hootie & The Blowfish and restaurants and all that.
24 So I was making -- I was barely making $1,500 a month
25 working my butt off -- and we got two grand a week being summer