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 8

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CERTIFICATE OF MAILING

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

The Honorable Kerry Earley
The Eighth Judicial District Court
Regional Justice Center
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Electronically Filed
9/17/2019 4:10 PM
Steven D. Grierson
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
****

Jason Landess, Plaintiff(s) vs. Kevin Debiparshad, M.D., Defendant(s)	Case No.: A-18-776896-C Department 4

NOTICE OF DEPARTMENT REASSIGNMENT

NOTICE IS HEREBY GIVEN that the above-entitled action has been randomly reassigned to Judge Kerry Earley.

☒ This reassignment is due to: order filed 9/16/19.

ANY TRIAL DATE AND ASSOCIATED TRIAL HEARINGS STAND BUT MAY BE RESET BY THE NEW DEPARTMENT.

Any motions or hearings presently scheduled in the FORMER department will be heard by the NEW department as set forth below.

Motion for Trial Setting, Motion for Fees and Costs and related Countermotion, on 10/03/2019, at 9:00 AM.

PLEASE INCLUDE THE NEW DEPARTMENT NUMBER ON ALL FUTURE FILINGS.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Heather Kordenbrock
Heather Kordenbrock, Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that this 17th day of September, 2019

☒ The foregoing Notice of Department Reassignment was electronically served to all registered parties for case number A-18-776896-C.

/s/ Heather Kordenbrock
Heather Kordenbrock, Deputy Clerk of the Court

Electronically Filed
3/6/2020 11:40 AM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

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

BEFORE THE HONORABLE KERRY EARLEY,
DISTRICT COURT JUDGE

THURSDAY, DECEMBER 5, 2019

RECORDER'S TRANSCRIPT OF PROCEEDINGS

PLAINTIFF'S MOTION FOR FEES/COSTS AND DEFENDANTS' COUNTERMOTION FOR ATTORNEY'S FEES AND COSTS

APPEARANCES:

For the Plaintiff:	JAMES J. JIMMERSON, ESQ. JAMES M. JIMMERSON, ESQ. MARTIN A. LITTLE, ESQ.
For Defendant Dr. Debiparshad:	STEPHEN B. VOGEL, ESQ. KATHERINE J. GORDON, ESQ.

RECORDED BY: REBECA GOMEZ, COURT RECORDER

Las Vegas, Nevada, Thursday, December 5, 2019

[Called to order at 10:43 a.m.]

THE COURT: Okay, counsel give your -- sorry, thank you for the -- I don't know, it just seems like some -- some calendars I get a lot of substance and others I get easy, so apologize. It's how --

MR. JIMMERSON: Understand, Your Honor.

THE COURT: -- kind of how it gets -- and I set this one trying to get you on. Okay, everybody give your appearance for the record Case A776896, Jason Landess versus Kevin -- how do you say the doctor's name?

MR. JIMMERSON: Debiparshad, Your Honor.

MR. VOGEL: Debiparshad.

THE COURT: Debiparshad. Okay, so just phonetically. Got it. Okay.

MR. JIMMERSON: May it please Your Honor, Jim Jimmerson and James Jimmerson, The Jimmerson Law Firm --

THE COURT: Okay.

MR. JIMMERSON: -- Martin Little of Howard & Howard --

THE COURT: Okay. All right.

MR. JIMMERSON: -- are present on behalf of the plaintiff --

THE COURT: Do you have their Bar numbers? You're --

THE CLERK: Yes.

THE COURT: Okay.

MR. JIMMERSON: -- and my Bar number is 264.

MR. JAMES JIMMERSON: 1255 -- 12599, Your Honor.

MR. JIMMERSON: Mr. Little?

MR. LITTLE: 7067.

THE COURT: Okay.

MR. JIMMERSON: And also note the presence of --

THE COURT: All right.

MR. JIMMERSON: -- the Plaintiff, Jason Landess as being present as well.

THE COURT: Okay.

MR. VOGEL: Good morning, Your Honor.

THE COURT: Yes.

MR. VOGEL: Brent Vogel and Katherine Gordon on behalf of Dr. Debiparshad.

THE COURT: Okay. All right. So what I have is plaintiff's motion for attorney's fees and costs and then defendants did their countermotion for attorney's fees and costs. Okay. And further I -- I've read everything in the notebooks, I read the order by Judge Wiese that granted the mistrial, so I'm ready to go. Once again I'm -- I'm sorry this happened. This -- this -- this is tough.

Okay. I'm ready so I'm going to let plaintiffs go first. It's their motion for attorney's fees and costs. I looked at the legal standard that you're asking for it under is NRS 18.070 Subsection 2 or also you're saying that the -- that a court has an inherent power under the *Emerson* case, and there's some other cases that support that too, that costs and attorney's fees can be granted by a court or given by a court for -- as a

sanction for a litigation.

MR. JIMMERSON: That's correct, Your Honor.

THE COURT: Correct?

MR. JIMMERSON: That's correct.

THE COURT: Okay. I've got -- okay. Because I always want to start with my standard and what I'm looking at.

MR. JIMMERSON: There are two separate bases as the Court noted --

THE COURT: Yes. Okay.

MR. JIMMERSON: -- NRS 18.070 Sub 2 and the *Lioce versus Eighth Judicial District Court* and *Emerson versus Eighth* --

THE COURT: Right.

MR. JIMMERSON: -- *Judicial District Court* cases, and for purposes of the calculation of attorney's fees and costs, we have stayed within the parameters of the *Emerson* case in particular. That is to say we only sought to seek from you an award of attorney's fees and costs that begin on the first day of trial and conclude on the last morning of trial which was Monday morning, August 5, 2019. We don't ask for any attorney's fees or costs incurred prior to the first day of trial, nor after the court declared the mistrial approximately noon on Monday, the August 5, 2019.

THE COURT: Okay, I -- I did take note of that.

MR. JIMMERSON: And that is what the measure in the *Emerson* case used --

THE COURT: It says that.

MR. JIMMERSON: -- as its damages --

THE COURT: I agree with that. I read the *Emerson* case and I agree with you.

MR. JIMMERSON: And --

THE COURT: So you're not asking for all your prep and everything before --

MR. JIMMERSON: That's right.

THE COURT: -- and neither are they asking for it on their countermotion so you're both on the same page on that and I agree with that.

MR. JIMMERSON: That's right, and just to complete that, the fees for that time period were $253,383.50 and the out-of-pocket costs $118,608.25 --

THE COURT: Oh I have $606.25. Did I --

MR. JIMMERSON: Six hundred six dollars. One eighteen six-oh-six --

THE COURT: Right, okay.

MR. JIMMERSON: -- point two five for a total of 371,989.70.

THE COURT: Correct. I have that.

MR. JIMMERSON: All right, thank you. All right.

First, with the Court, and I know because I've worked with the Court before that the Court has read the documents that you say you have done and --

THE COURT: I --

MR. JIMMERSON: -- I -- I just would ask you to call your

attention to the findings of fact and conclusions of law and order granting plaintiff's motion for a mistrial --

THE COURT: Okay. But let me --

MR. JIMMERSON: -- filed stamped on September 9th of 2019, entered by --

THE COURT: Okay.

MR. JIMMERSON: -- Judge Bare. This order was --

THE COURT: I thought Judge Wiese wrote the order. Did he just -- I -- I --

MR. VOGEL: He -- he wrote the order disqualifying Judge Bare.

THE COURT: Oh that's right. Okay, I'm so sorry I read it all -- thank you. Okay.

MR. JIMMERSON: No problem. And -- and --

THE COURT: I got it. Yes.

MR. JIMMERSON: -- and the -- the --

THE COURT: When he granted the mistrial.

MR. JIMMERSON: That's right.

THE COURT: Okay.

MR. JIMMERSON: And then Judge Wiese in granting the defendants' motion for change of counsel or motion to disqualify --

THE COURT: Judge Bare.

MR. JIMMERSON: -- Judge Bare nevertheless affirmed the --

THE COURT: Correct.

MR. JIMMERSON: -- or the findings of fact conclusions of law

that you have before you --

THE COURT: And that's why it was in my head because I -- he went through it just as much in Judge Wiese so that's --

MR. JIMMERSON: That's right.

THE COURT: -- what I reviewed again. Okay, I -- thank you for --

MR. JIMMERSON: And as part of his analyzing the defendants' challenge of Judge Bare and the allegation that Judge Bare was not fair to the parties, he went back and looked at all of the key underlying orders and found that Judge Bare had acted properly and within his bounds of discretion and in accordance with the law as Judge Wiese determined to be.

THE COURT: Okay. All right.

MR. JIMMERSON: But it's important for you to as a bedrock to know what Judge Bare as a -- as essentially affirmed by Judge Wiese found in the findings because it bears upon the issue of essentially liability granting one of the two motions --

THE COURT: Well, who was the cause of the mistrial. Yes.

MR. JIMMERSON: Exactly.

THE COURT: Okay.

MR. JIMMERSON: And the way that Judge Bare structured it and you'll see it also by Judge Wiese, who was the legal cause of the mistrial being granted -- being requested by the plaintiff and granted by the judge.

THE COURT: Okay. I agree with that.

MR. JIMMERSON: And that is I think a fundamental issue that you will have to decide to grant on either motions that are --

THE COURT: Correct.

MR. JIMMERSON: -- that are competing motions before you. All right. The significant highlights and I'm not -- they're extensive, there's more than 50 findings of fact conclusions of law here and order so I'm not going to go through all of them by any means, but I -- there's a couple that are I think --

THE COURT: Okay.

MR. JIMMERSON: -- more significant. And again because of the welter of papers that both sides supplied to you and because of the sizable amount of money involved, both parties have expended a good deal of time and effort to articulate their positions.

At paragraph 20, the court made a specific finding that by virtue of communications and -- and discussions on the record and off the record but transcripts we provided as exhibits to our motion, it is clear the court finds that Ms. Gordon and Mr. Vogel, counsel, of Lewis Brisbois on behalf of Dr. Debiparshad, recognized -- or that their actions were intentional to use the burning -- we call the burning --

THE COURT: Burning embers I -- I --

MR. JIMMERSON: -- embers email. And so you understand just again for illustrative purposes, Exhibit 56 Proposed is -- is a document of 79 pages in length --

THE COURT: Yeah, I -- I think I put down seventy -- I thought I put down 121 --

MR. JIMMERSON: Seventy-five.

THE COURT: -- but it doesn't matter.

MR. JIMMERSON: It was Bate stamped beginning at 56001 --

THE COURT: Okay.

MR. JIMMERSON: -- and the last page that's Bate stamped --

THE COURT: I have 122 pages. Did I do that wrong?

MR. JIMMERSON: -- is 560079.

THE COURT: Okay.

MR. JIMMERSON: So there's 79 pages --

THE COURT: Seventy-nine pages, okay.

MR. JIMMERSON: And --

THE COURT: My understanding these came via subpoena from his employer?

MR. JIMMERSON: Correct.

THE COURT: Okay.

MR. JIMMERSON: And page 44 and 45 are the two page burning embers email that is the subject matter of the court's granting the motion for mistrial. So when you hear both opposing counsel and us in our papers say Exhibit 56, page 44, we're referring --

THE COURT: I'll get it.

MR. JIMMERSON: -- to the same document and I have also brought a copy of that email for you separately in addition to, you know, the overall exhibit, but it was Bate stamps number 56 dash --

THE COURT: Okay.

MR. JIMMERSON: -- 44 and 45.

THE COURT: Okay.

MR. JIMMERSON: All right.

THE COURT: Okay, so you told me to look at paragraph 20.

MR. JIMMERSON: Right.

THE COURT: Thank you for giving this I have --

MR. JIMMERSON: So as part --

THE COURT: -- I have your papers all over.

MR. JIMMERSON: Right. Let me just begin by saying paragraph 18 --

THE COURT: Eighteen. Okay, I -- I put down 20 but I'm with you.

MR. JIMMERSON: Right, on -- and we'll go to 20 next is --

THE COURT: Okay.

MR. JIMMERSON: -- the court -- one -- one of the -- one of the -- one of the factors I think Judge Bare fairly stated -- was looking at was how did the introduction of the burning embers exhibit which had the allegations that Mr. or the evidence that the defendants tried to introduce the jury that Mr. Landess was a racist, how did it come to be. And by virtue of both examining counsel for the defendant as evidenced by the transcript and of course by the actual actions of the defendant in terms of having the document admitted into evidence and its use of it --

THE COURT: Right.

MR. JIMMERSON: -- the court at paragraph 18 found --

THE COURT: Okay.

MR. JIMMERSON: -- that the -- that the defendants and their counsel in particular knew of that which they were doing. In other words, what they were doing was an intentional act on their part to have this document shown to the jury. The court specifically --

THE COURT: Well, wasn't it put on the ELMO or something like that --

MR. JIMMERSON: That's right.

THE COURT: -- or the overhead? So I --

MR. JIMMERSON: That's right. The court found that is evident the defendants had to know that the defendant had made a mistake and did not realize this item was in Exhibit 56, particularly because of the motions in limine that were filed by the 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 plaintiffs did not know about it.

Then paragraph 18 --

THE COURT: Okay, so Judge Bare finds that in his opinion the defendants had to know that the plaintiff -- okay.

MR. JIMMERSON: That's right. And paragraph 19, the next one just said defendants took advantage of that mistake. Plaintiff's confirmed that he did not know the email at page 44 was -- was a --

THE COURT: Oh.

MR. JIMMERSON: -- was in the group of 79 --

THE COURT: You're right --

MR. JIMMERSON: -- pages of emails in Exhibit 56 which otherwise all related to Cognotion, which was the former employer's name --

THE COURT: No he's the employer, okay.

MR. JIMMERSON: -- 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 calling further attention to the email, and because it had been admitted -- because had been admitted.

And the way that was admitted just so you understand is Ms. Gordon inquired of myself in the presence of the jury I like to introduce Exhibit 56, do you have any objections, and I said no.

THE COURT: And you said no objection.

MR. JIMMERSON: That's right. Then --

THE COURT: I got the impression the whole exhibit was put into evidence at one time.

MR. JIMMERSON: That's correct. And -- and --

THE COURT: Okay. I got it right. All right.

MR. JIMMERSON: -- most of the exhibit, the 79 pages, speak to financial matters, compensation matters, employer-employee matters as opposed to this particular email --

THE COURT: Which would have been relevant to the lost wages issues in --

MR. JIMMERSON: Precisely.

THE COURT: Okay.

MR. JIMMERSON: In this email if you read the whole

document, I -- I think a fair and summary would be Mr. Landess is writing to his employer, Mr. Dariani [sic throughout] who is the representative of the employer, Cognotion, how thrilled he was and how grateful he was to have this job and it is a cathartic email where he writes about how tough life was for him when he was 19 and he was got good at -- at pool or -- or I guess it was --

[Colloquy between counsel]

MR. JIMMERSON: Snooker, right. And that he, quote, hustled Mexicans, Blacks and rednecks or Mexicans --

THE COURT: No, I -- I've -- I --

MR. JIMMERSON: -- those words.

THE COURT: -- I read it.

MR. JIMMERSON: All right. And he also refers to his daughter, talked about his tough times and he talked about how grateful is have the job. Really it's, candidly, irrelevant to anything having to do with causation of the -- the tibia being improperly or professionally negligently --

THE COURT: Well I don't think they're even --

MR. JIMMERSON: -- installed.

THE COURT: -- trying to argue that, they're -- what they're saying --

MR. JIMMERSON: No, no, no, but I'm just saying to --

THE COURT: -- is the opening of the door on the -- on the character evidence.

MR. JIMMERSON: Agree. Okay --

THE COURT: I -- I -- I -- I truly --

MR. JIMMERSON: You're hip to that. Then you're hip to it is fine. You got it.

THE COURT: I got the issues.

MR. JIMMERSON: All right, yes you do.

THE COURT: I -- I read this stuff at least three times --

MR. JIMMERSON: All right.

THE COURT: -- and it is -- it is harder I -- I -- it is more difficult for a new judge to be given this. Not my -- I didn't --

MR. JIMMERSON: No, you sure didn't.

THE COURT: -- ask to have this motion, I didn't sit through the trial, I only can bring myself up with the best of what you gave me --

MR. JIMMERSON: Well --

THE COURT: -- and having done trials for a long time so I -- I understand how --

MR. JIMMERSON: You drew the short straw, Judge, is true. Okay. And so --

THE COURT: I don't know, story of my life here.

MR. JIMMERSON: -- once the highlight -- just continuing the same finding 19, line 7, once the highlighted --

THE COURT: Okay.

MR. JIMMERSON: -- language was put before the jury there was no contemporaneous objection from plaintiff, nor sua sponte interjection from the court --

THE COURT: So this was a finding by Judge Bare saying hey

based on -- because if you look at the case law in Nevada, they really do defer to the trial judge. That's why even if I got the short straw or what, I can only do the best I can -- it's just like --

MR. JIMMERSON: Agree.

THE COURT: -- your other -- you know if I don't -- not at the deposition I don't -- it's hard to do credibility when you don't get to see the witness, you don't get to understand where they're -- so --

MR. JIMMERSON: The Supreme Court of Nevada is very clear that that's why they --

THE COURT: No, I read two cases on it.

MR. JIMMERSON: -- they defer to the trial court is true --

THE COURT: Right, I -- I wish someone had looked at that but --

MR. JIMMERSON: -- for those very reasons that they're there to see what's going on. And so it says --

THE COURT: So I do understand I'm doing the best I can so please understand I -- all I can do so that was his finding --

MR. JIMMERSON: Right.

THE COURT: -- because I did --

MR. JIMMERSON: And so and then he says --

THE COURT: -- by Judge Bare --

MR. JIMMERSON: That's right.

THE COURT: -- as he's sitting there as trial judge he's saying once the highlighted language was put before the jury there was no contemporaneous objection from plaintiff, nor sua sponte interjection

from the court --

MR. JIMMERSON: That could --

THE COURT: -- that could remedy --

MR. JIMMERSON: -- that could remedy --

THE COURT: -- as a matter of --

MR. JIMMERSON: You have it before you.

THE COURT: -- as in a matter of seconds the words were there for the jury. Okay.

MR. JIMMERSON: That's right.

THE COURT: Okay, I was --

MR. JIMMERSON: All right.

THE COURT: -- I'm of course looking at this going what was the -- what was happening with the court, I get that.

MR. JIMMERSON: And --

THE COURT: Okay.

MR. JIMMERSON: -- although, you know, opposing counsel and I can -- you know, we can mince words on small things, there's essentially five elements of the intentional behavior on part of the defendant. One was they moved the exhibit, Exhibit 56, into evidence and they knew that it contained page 44 and 45. They -- as I mentioned, they asked for my objection -- my -- my position in front of the jury --

THE COURT: Yeah.

MR. JIMMERSON: -- and I said no objection.

Number two, prior to introducing the document they highlighted the burning embers email before presenting it to the jury with

yellow highlight.

Third, they put the burning embers email on the ELMO showing the yellow highlight and the yellow highlight referenced the offensive words about hustling Mexicans --

THE COURT: No, I --

MR. JIMMERSON: -- Blacks and rednecks and another section involving if I -- if it wasn't tied down, the Mexicans would have stole it from me. That's two paragraphs one after another. So that was a second item that they did. The third as I --

THE COURT: If it wasn't welded to the ground.

MR. JIMMERSON: No, that's right. They put the burning embers email on the ELMO without any warning to the court or to ourselves and at that moment that race was going to be introduced into the trial.

The fourth thing they did is they specifically and repeatedly identified the racial groups listed in the email, as I've just referenced to you, in two different sections; Mexicans, Blacks and rednecks, and then another section, Mexicans stealing everything not bolted down. And they did so in front of the -- by questioning Mr. Dariani in three questions, so it was three times that they referenced this.

And the fifth thing that they did that was inappropriate was they stated in front of the jury, quote, referring to Mr. Dariani, you still don't take that as being at least -- excuse me, you -- you still don't take that as being at all a racist comment?

THE COURT: Right.

MR. JIMMERSON: And we attached Exhibit 3 which is the transcript of the --

THE COURT: Right.

MR. JIMMERSON: -- examination of Mr. Dariani --

THE COURT: I saw that.

MR. JIMMERSON: -- by Ms. Gordon at page 144 --

THE COURT: Okay.

MR. JIMMERSON: -- and 161 --

THE COURT: So the questioning went you -- at the end, you, which is defense counsel saying to -- is it Dariani? None of these --

MR. JIMMERSON: Dariyanani, Dariyanani is how I pronounce it.

THE COURT: Phonetics, Dariyanani saying he talks about a time when he brought a truck stop -- bought a truck stop here in Las Vegas and when the Mexican laborers stole everything that wasn't welded to the ground and that was a quote from the -- I don't know where you got burning embers but it's -- burning embers, doesn't matter, and then you still don't take that as being at all a racist comment.

MR. JIMMERSON: That's right.

THE COURT: I -- I did note that.

MR. JIMMERSON: There's a -- there's a couple of points about that. First it certainly is evident that the defense, through counsel, knew that they were introducing race into the case because --

THE COURT: Okay.

MR. JIMMERSON: -- they asked the question in the form that

they chose to ask it --

THE COURT: No, I -- I -- I --

MR. JIMMERSON: -- you don't consider it to be racist.

THE COURT: -- noted that.

MR. JIMMERSON: And just so you understand, burning embers is the name of the email that --

THE COURT: Oh, okay. Can you show it -- I couldn't figure out burning -- I know that's --

MR. VOGEL: It's the subject line.

MS. GORDON: It's the -- it's a title that he gave it.

MR. JIMMERSON: It's a subject line of the email.

THE COURT: Okay, can I -- I know it's silly but I keep -- I like to do word association and I couldn't figure out how the Mexicans and -- and all this was burning embers. It actually says that.

MR. JIMMERSON: And if I -- I'm going to also give you Exhibit 56 -- you can just take --

MR. VOGEL: It's just Exhibit 56?

MR. JIMMERSON: That's all it is.

THE COURT: The whole thing, yeah I --

MR. JIMMERSON: The whole thing, yes, Your Honor.

THE COURT: Okay.

MR. JIMMERSON: Now when you look at the --

THE COURT: And once again I got corrected it's how many pages?

MR. JIMMERSON: Seventy-nine.

THE COURT: Seventy-nine. I don't know where I --

MR. JIMMERSON: Would you look at the first paragraph you'll see how the title burning embers comes about.

THE COURT: Yeah. Okay, I --

MR. JIMMERSON: It's the second sentence: As far back as I can remember, there's been this burning desire inside of me to make something out of what resources were at my disposal --

THE COURT: Okay.

MR. JIMMERSON: -- and so that's why he called it burning embers.

THE COURT: Okay.

MR. JIMMERSON: All right.

THE COURT: I -- I know it's kind of a collateral issue, but I -- I was trying to --

MR. JIMMERSON: It -- it is collateral, Judge, it's true.

THE COURT: -- trying to put things in context and I couldn't figure out the -- thank you, that makes sense.

MR. JIMMERSON: All right.

THE COURT: I -- I for some reason didn't pick up the top line there. Okay.

MR. JIMMERSON: All right, so --

THE COURT: And it also puts it all in context.

MR. JIMMERSON: That's right. And then --

THE COURT: Okay, I -- I do want this.

MR. JIMMERSON: -- the -- the next finding of fact --

THE COURT: Okay.

MR. JIMMERSON: -- that Judge Bare makes -- and I don't know if you ever had the opportunity or privilege to sit in front of Judge Bare like we do, you know, waiting for --

THE COURT: I have not, I --

MR. JIMMERSON: -- your case come up --

THE COURT: -- I had motions in front of him, I did not do a trial in front of Judge Bare --

MR. JIMMERSON: And --

THE COURT: -- that I recall. I don't think I did.

MR. JIMMERSON: -- he has a -- he has a style of --

THE COURT: Okay.

MR. JIMMERSON: -- kind of telling you in advance what he's thinking and then he invites you to essentially challenge what he has to say if what he's saying is at odds with what your --

THE COURT: Okay.

MR. JIMMERSON: -- position is. It's sort of a -- a conversational type of approach where -- which is helpful to the counsel because you at least know where he's thinking or leaning and then you're able to focus your arguments to try to talk him out of it so to speak if he's --

THE COURT: No.

MR. JIMMERSON: -- against you or appears to be against you --

THE COURT: See with me I ask questions so you have to

figure out where I'm coming from.

MR. JIMMERSON: Right. Right.

THE COURT: I -- I --

MR. JIMMERSON: But either way it's helpful because you're sending --

THE COURT: I'm more the Stu Bell type.

MR. JIMMERSON: -- signals to the --

THE COURT: Right. No, I get it.

MR. JIMMERSON: -- lawyers and the lawyers therefore have an opportunity to do their job as advocates to --

THE COURT: To at least understand the --

MR. JIMMERSON: -- advance their client's position. That's right.

THE COURT: Okay. All right. I --

MR. JIMMERSON: All right.

THE COURT: -- I do know that about Judge --

MR. JIMMERSON: And so -- and so a lot of these findings you'll find are going to be literally summaries of dialogue --

THE COURT: When I read it I was --

MR. JIMMERSON: -- between the judge and parties.

THE COURT: -- I did find it different from what I usually see in findings.

MR. JIMMERSON: Right.

THE COURT: I -- I -- I'm --

MR. JIMMERSON: And so that's why you have in these

findings --

THE COURT: I -- I agree.

MR. JIMMERSON: -- they're -- they're actual quotes in the transcripts repeatedly throughout --

THE COURT: Yeah, I saw that.

MR. JIMMERSON: All right. So now paragraph 20 --

THE COURT: And they're quotes with the transcript page, okay.

MR. JIMMERSON: -- is one of the key findings here as relates to your review of this record. Indeed during the off-the-record discussion --

THE COURT: Off-record discussion.

MR. JIMMERSON: -- on August 2, 2019 when Mr. Jimmerson initially moved to strike the email, Ms. Gordon stated that she, quote, kept waiting, end of quote, for the plaintiff to object to the use of 56, page 44, and quote, when the plaintiff did not object, end of quote, the defendant then went forward to use the email.

Mr. Vogel echoed that sentiment on Monday, August 5, 2019, stating, quote, we gave them every opportunity to object to it. Ms. Gordon asked repeated questions before coming to that union and I -- and I -- excuse me, and yet I guess it -- it comes down to when you -- when you're asking could we have done something to try to remove that, I suppose in hindsight yes, I -- I -- excuse me, I suppose in hindsight I guess we could have, but I don't think we had to. Transcript page 42, lines 5 through 9:

The defendants' statements have led the court to believe that the defendants knew that their use of exhibit was objectionable and would be objectionable to the plaintiff and possibly to the court, and nevertheless the defendants continued to use and inject the email before the jury in the fashion that precluded plaintiff from being able to effectively respond. In arguing to the court that they, quote, waited for defendant to object and that plaintiff --

THE COURT: For plaintiff to object.

MR. JIMMERSON: Plaintiff to object and that plaintiff did nothing about it --

THE COURT: About it.

MR. JIMMERSON: -- defendants evidence a consciousness of guilt and of wrongdoing. That conscious wrongdoing suggests that defendant and their counsel were the legal cause of the mistrial. And I point that out because as you have cited, Judge, that is certainly one of the central questions you will resolve as resolving the competing motions --

THE COURT: No, I --

MR. JIMMERSON: -- before you --

THE COURT: Yes.

MR. JIMMERSON: -- in terms of who caused this mistrial and what expenses and costs should flow from the party who is the offending party.

The court also at -- if I could just -- just go on to two more, paragraph 22 the court says when asked whether defendants believed

that the jury could consider whether Mr. Landess is a racist, Ms. Gordon replied that she believed she is, quote, allowed to use impeachment evidence that has not been objected to and has been admitted into evidence by stipulation, end of quote. And it's true I did not object, but it wasn't a stipulation. I don't know that's a word matter, but I'm just saying to you that's what occurred. That, quote, the burden should not be shifted, end of quote, 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 -- settling -- setting up --

THE COURT: What does that mean? What is his reason for setting up? I wasn't quite sure I understood that.

MR. JIMMERSON: In a separate part of the case --

THE COURT: Okay.

MR. JIMMERSON: -- unrelated to this --

THE COURT: I appreciate because --

MR. JIMMERSON: -- Mr. Landess after seeing the doctor three or four occasions and feeling a great deal of pain and instability in his leg in December of 2017 went to see another doctor, a Dr. Her [phonetic] and then a Dr. Fonce [phonetic] in February of 2017.

THE COURT: Okay, for like a second opinion --

MR. JIMMERSON: Second opinion.

THE COURT: -- on what's going on, okay.

MR. JIMMERSON: In those two opinions, they both told him that a terrible job had been done --

THE COURT: Okay.

MR. JIMMERSON: -- to his leg and so he went to Dr. Debiparshad in March of that year, essentially 15 or 20 days later and recorded their conversation -- excuse me, did not record. Went to see the doctor and didn't tell him that he -- didn't tell Dr. Debiparshad that he --

THE COURT: What the other opinions were.

MR. JIMMERSON: -- other opinions were and --

THE COURT: Okay. Okay.

MR. JIMMERSON: -- they -- the defendants argued in front of the jury that they -- that Mr. Landess was setting him up --

THE COURT: Okay. I appreciate because I read it and I -- I -- I was not --

MR. JIMMERSON: Right.

THE COURT: -- at the trial for almost two weeks so --

MR. JIMMERSON: Right.

THE COURT: -- once again it makes --

MR. JIMMERSON: And --

THE COURT: Thank you.

MR. JIMMERSON: And --

THE COURT: I didn't know what that meant. I put a question mark here, okay.

MR. JIMMERSON: Right, and this is not relative to this motion today. It had to do for example that Dr. Debiparshad did not reveal to the plaintiff broken screws in his leg, other things, so this is

where Mr. Landess had developed a --

THE COURT: Okay.

MR. JIMMERSON: -- a concern --

THE COURT: Okay, but you explained to me what the setting up just I --

MR. JIMMERSON: That's -- so that's what it means in these -- in this context.

THE COURT: -- I didn't have the context and I didn't know what that meant.

MR. JIMMERSON: That's my understanding. If Mr. Vogel and --

THE COURT: And I'll --

MR. JIMMERSON: -- Ms. Gordon have a different understanding --

THE COURT: Okay.

MR. JIMMERSON: -- they can say so but that's --

THE COURT: Okay.

MR. JIMMERSON: -- my reason for those --

THE COURT: Okay.

MR. JIMMERSON: -- Mr. Vogel's words.

THE COURT: Defendants in defendants' view --

MR. JIMMERSON: Defendants in defendants' view --

THE COURT: -- terms.

MR. JIMMERSON: -- of the case. The defendant confirms that when 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 Exhibits 56, page 44.

THE COURT: Okay.

MR. JIMMERSON: And Judge Bare did this, made these findings in part because he knows as part of this, motion request for fees and costs was being -- had already been filed on August 4th, Sunday night.

THE COURT: I saw that.

MR. JIMMERSON: He chose to bifurcate the proceeding --

THE COURT: I -- I -- I figured procedurally that's how it happened.

MR. JIMMERSON: -- and -- and -- and put off the dollars until actually today but put off the dollars till later which --

THE COURT: Well and then he got --

MR. JIMMERSON: -- which then -- which then, exactly, got extended by virtue that --

THE COURT: I -- I -- I -- I figured out the history because I thought --

MR. JIMMERSON: But because he had a jury in the waiting room --

THE COURT: Yeah. Right.

MR. JIMMERSON: -- he had to make a call --

THE COURT: And I understand --

MR. JIMMERSON: -- about mistrial or not.

THE COURT: That's why I said I'm in a difficult position but I deal with the record I have and understand why --

MR. JIMMERSON: Right.

THE COURT: -- a trial judge has a -- has insight more than someone who's not there.

MR. JIMMERSON: Right. And one --

THE COURT: That was the -- my only point of saying that.

MR. JIMMERSON: And in all the papers you've read I think --

THE COURT: I read it --

MR. JIMMERSON: -- a central question that is being argued by both sides and with of course exactly opposite results, but the central question is -- as you've already identified is who was the legal cause the mistrial --

THE COURT: Yes.

MR. JIMMERSON: -- but a corollary to that is the position of the defense to try to defend their behavior has changed. In their remarks on the transcript on August 5, Mr. Vogel claims that there was no intent to introduce race into the record, but after in the briefing he abandons that pretense and acknowledges that race was intentionally to be introduced in the trial and they think they have the right to do that.

So one of the fundamental legal issues you will need to decide on either side is their position the defendant said four times I've got the page and -- page and line numbers where they say it. In their opposition and countermotion at page 7, they argue, quote, to the burning embers email was admitted evidence which under Nevada law can be used for

any purpose.

At page 14 of the same brief they say, quote, defendants' use of plaintiff's burning embers email was justified and proper as rebuttal character evidence as an admitted piece of evidence that can be used for any purpose, end of quote.

In both of those citations --

THE COURT: No, I -- their position was -- their position is once something is admitted into evidence you can use it for any purpose --

MR. JIMMERSON: Correct.

THE COURT: --whatso- I -- I --

MR. JIMMERSON: You got it. Okay.

THE COURT: I -- I got that.

MR. JIMMERSON: Note that both statements and throughout all their papers they don't cite a single case --

THE COURT: Right.

MR. JIMMERSON: -- to support that proposition.

THE COURT: And you've cited Wiggins on Evidence and McCormick on -- I --

MR. JIMMERSON: I cited NRS 47.030, the plain evidence doctrine, the Nevada Supreme Court decision repeatedly on plain evidence even --

MR. JAMES JIMMERSON: Plain error.

MR. JIMMERSON: Plain error, I say plain evidence, plain -- plain error doctrine.

THE COURT: Plain error.

MR. JIMMERSON: The point being that even when counsel inadvertently or intentionally as the case may be -- in this case was inadvertent -- doesn't object to the admission of evidence, okay, if the introduction of that evidence would cause plain error, the --

THE COURT: You can't do it.

MR. JIMMERSON: -- the -- the trial court has every right to strike it or take other remedy and most the times of course it's mistrial or new trial. That's the context we see it most of the time. And there's all kinds Nevada Supreme Court and authority across the country, so I'm just going to say to a central issue for you to resolve is whether or not the defendants' argument that they because I did not object to the admission of the exhibit --

THE COURT: That then waived them to be able to --

MR. JIMMERSON: -- they can use it for any purpose, including introducing --

THE COURT: I got that.

MR. JIMMERSON: -- an irrelevant issue like -- and prejudicial issue like race.

THE COURT: Okay. I -- I got that is an issue that the --

MR. JIMMERSON: All right.

THE COURT: -- failure to -- that your failure to object waived then any objections you would have regarding any other issue --

MR. JIMMERSON: Correct.

THE COURT: -- once it's admitted I -- I -- I got that is --

MR. JIMMERSON: There is no --

THE COURT: -- I understood that is an issue that's --

MR. JIMMERSON: There's no case law cited by defendant and I found no case law to support that. Because -- because there's always the exception if you will, or the limitation if you will, that you can't complete -- you can't commit plain error. You can't knowingly do something that you know is improper and will lead to in this case either jury nullification or as the court found manifest necessity to declare a mistrial.

THE COURT: Mistrial.

MR. JIMMERSON: You just -- you know, it's a rare case, admittedly, it doesn't happen every day, but you -- you're limited that evidence even if somebody doesn't object has to be competent, has to be relevant and can't be more prejudicial than probative. It's barred by 48.035 which is the corollary to --

THE COURT: Those are all the safeguards we have under the --

MR. JIMMERSON: Precisely.

THE COURT: -- evidence --

MR. JIMMERSON: So all I'm going to say to you --

THE COURT: -- code.

MR. JIMMERSON: -- is that I -- I -- another reason that the court -- Judge Bare came down with the findings he did is he concluded that the arguments being advanced by the defense were not well taken under the law and not supported by the law or by the facts. Nor are they

in the briefs that you see before you supported by any case law that has been cited by the defendants.

And in the one case that they suggest might be helpful to them with regard to using character evidence, it's *Taylor versus State*, they cite the dissenting opinion of Justice Shearing, they don't cite the majority rule. Otherwise they don't have any of the cases that suggest and they have no explanation for example to NRS 50.085 Sub 3 that says extrinsic evidence can't be used no matter what.

But neither here nor there, I just say to you that's one or two of the most overarching rule -- issues you'll have to resolve however you choose to resolve this motion and countermotion before you.

So now then the page -- paragraph 24 of the same page, page 9 of the findings, in the court's view, even if well intended by the defendants and -- and understand, maybe it's just person I like, but Judge Bare is not somebody who's scalp hunting. He's just not a judge who's finger pointing at either side. He's working with counsel, he has to work with them again tomorrow on another case, so he's just not -- he doesn't have a demeanor to be cross in that sense so he's willing to give Ms. Gordon and Mr. Vogel the benefit of the doubt maybe did not have an intent to -- to create this mistrial, but it's still misconduct. You know, you don't have to be guilty of unethical conduct by the state bar to nevertheless be guilty of misconduct that leads to a mistrial and the cost incurred by that.

So in paragraph 24 the judge says 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 be court -- 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 his existence as a person and as a judge. Ms. Brazille [phonetic] is an African-American. She -- these are jurors' names.

THE COURT: I -- I -- okay.

MR. JIMMERSON: Ms. Steedum [phonetic] is an African-American. Upon information and belief, Mr. Cardoza and Miss Asuncion, A-s-u-n-c-i-o-n, are Hispanic.

THE COURT: Hispanic.

MR. JIMMERSON: Since we have two African-American jurors and potentially two Hispanic jurors, defendants' interjection the issue of Mr. Landess's allegedly being a racist to the case was improper.

And just to jump ahead to a finding of fact on -- on that issue, if I could just find it quickly. It's the one was impermissible.

Yeah. The finding of fact -- I've got it. The finding of fact and conclusion of law which is in the conclusion of law section is at page 15 and it's number --

THE COURT: Okay.

MR. JIMMERSON: -- 51. The court -- you know, one's a finding of fact, the corollary or matching conclusion of law number 51 at page 15 begins: 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 is with Mr. Dariyanani or whether is in closing argument, or both, it is clear the defendants are urging the jury to at least in part render their verdict based upon race, based upon Mr. Landess's allegedly being a racist, based upon something that is emotional nature. The -- the idea fairly was to ask the jury to give the defendants their verdict whether it is whole verdict or reducing damages because Mr. Landess is allegedly a racist. That is impermissible.

So this again is -- and he discusses *Lioce* and *Emerson* and other case law that he finds relevant here, but that again I think is essential to the court's findings that Judge Wiese affirmed as being appropriate and which led to the order granting mistrial which by the way, as the judge revealed to all of us, was the first mistrial he's granted in his eight and a half years tenure on the bench.

All right. So then at number 29 just last the last sentence, it is the court's strong view that racial discrimination cannot be a basis upon which the civil jury can give their decision regardless, but certainly the events that we can aggravate the situation.

When you look at the case law and it's aggregated in a -- in a annotation by McCorkle, by the Nevada Supreme Court and across the nation, the -- the concept is if the conduct is so aggressive and so brazen and so impermissible that it renders the necessity to grant a mistrial, then, you know, that obviously is impermissible even if as in this case the offending evidence was not objected to by plaintiff's counsel at

trial because the plain error doctrine because of the limitations that are available on character evidence even if it were permitted and we actually --

THE COURT: Also there's the issue on opening the door on character evidence.

MR. JIMMERSON: That's right.

THE COURT: That's a whole -- I mean I -- I took apart as best I could what happened in evidence wise as to how this -- I got the end result but I -- the Court did try to go back to see how this door was open or if the door was open or --

MR. JIMMERSON: Correct.

THE COURT: -- who could have done what.

MR. JIMMERSON: The court -- the court --

THE COURT: Obviously it's a learning experience --

MR. JIMMERSON: Right.

THE COURT: -- for all of us but --

MR. JIMMERSON: I think it's a fair statement that the court disagreed with us and felt that the plaintiff, our side, had -- had opened the door to character evidence, but I will say and so we're -- we're -- listen, we're limited to what the judge says.

THE COURT: I know.

MR. JIMMERSON: I -- I can't embrace the judge --

THE COURT: I've --

MR. JIMMERSON: -- in -- in -- in 27 findings and disagree as to one so I accept what he said.

THE COURT: I -- I just wanted to bring that up --

MR. JIMMERSON: Right.

THE COURT: -- because I -- I did notice that when I did mine separately then I looked at his order --

MR. JIMMERSON: Right.

THE COURT: -- Judge Bare who was there and I have to defer --

MR. JIMMERSON: Right. But the judge at that point --

THE COURT: -- made his findings of fact and conclusions of law, I agree.

MR. JIMMERSON: Yeah. Right.

THE COURT: What I would have done doesn't -- is irrelevant.

MR. JIMMERSON: The -- the court though did note within the conclusions of law however that what the defendants and the -- the way that the defendants used this prejudicial evidence --

THE COURT: Used the evidence.

MR. JIMMERSON: -- was improper --

THE COURT: Right.

MR. JIMMERSON: -- even if the plaintiff had opened the door and now to follow your --

THE COURT: Yeah.

MR. JIMMERSON: -- suggestion --

THE COURT: Yeah.

MR. JIMMERSON: -- the manner in which this occurred was the employer's representative, Mr. Dariyanani, President of Cognotion,

was on the witness stand. He -- part of the reason for his being on the witness stand is part of the damages plaintiff is seeking is the lost earnings of being terminated when Mr. Dariani after waiting maybe a year --

THE COURT: Because of his surgery, I know.

MR. JIMMERSON: -- couldn't have Mr. Landess perform his duties so that -- that's a basis for --

THE COURT: No, I -- I -- I --

MR. JIMMERSON: All right.

THE COURT: -- I actually read the context and --

MR. JIMMERSON: And the --

THE COURT: -- and I got that it was gratuitous -- I think gratuitous comments but it was comments --

MR. JIMMERSON: Nonresponsive would be a fair way --

THE COURT: I guess not responsive, but --

MR. JIMMERSON: Right, or gratuitous.

THE COURT: -- it was what he felt he wanted to say --

MR. JIMMERSON: He was a beautiful person and then Ms. Gordon got him to acknowledge he was a beautiful but flawed person. But -- but in any event, that was the context in which --

THE COURT: No, I -- I --

MR. JIMMERSON: -- it came down.

THE COURT: -- I did read context but --

MR. JIMMERSON: Right.

THE COURT: -- once again, I know that I -- I had the findings

fact and conclusions of law that -- that were already entered in this case and --

MR. JIMMERSON: Right.

THE COURT: -- that's what those are -- those are --

MR. JIMMERSON: And at paragraph 39 and 40 --

THE COURT: Thirty- --

MR. JIMMERSON: -- of the findings fact conclusions of law the court addresses the how -- how the character evidence was --

THE COURT: I --

MR. JIMMERSON: -- introduced by the defendant. There's a couple things. First, the defendant didn't object to the nonresponsive answer that Mr. Dariani gave to Ms. Gordon when he says she's -- he's a beautiful person or beautiful and then she followed up and said well he's a beautiful and flawed person, and the -- there's case law we provided to you that would strongly suggest that if you don't object to a nonresponsive answer that you cannot then find that to be opening the door on the issue of character --

THE COURT: But I can't rule on that --

MR. JIMMERSON: That's right. Correct. That's right.

THE COURT: I unfortunately spent some time doing that and, you know --

MR. JIMMERSON: Right.

THE COURT: -- I'm ready for another trial. I got -- but I -- I'm -- I watch evidence very -- I try to watch evidence --

MR. JIMMERSON: Exactly.

THE COURT: -- very carefully as best I can as you people have tried cases here as you know. So I did and then I realized no, I looked at -- I have -- I'm -- I've gotten a couple other cases like summary judgments where another judge has done a findings of fact and conclusions of law even if I potentially would not have done it that way, that was not my right to change it I had -- because then they did summary judgments based on something -- but I -- I'm -- I'm familiar with the case law that is a finding of fact and conclusion --

MR. JIMMERSON: That's right.

THE COURT: -- of law that is precedent in this case.

MR. JIMMERSON: That's right.

THE COURT: So --

MR. JIMMERSON: And at --

THE COURT: -- not that I wasted any time because it's good for me to even know everything as best I can but yes I know that.

MR. JIMMERSON: All right. And at paragraph 40 it began line --

THE COURT: Paragraph what, 40?

MR. JIMMERSON: Paragraph 40.

THE COURT: I -- I don't know why we --

MR. JIMMERSON: This is conclusion of law now 40 after the findings. He said, moreover, character evidence is generally inadmissible in civil cases, citing a case, and a party may open the door to character evidence when he chooses to place his own good character at issue. However --

THE COURT: Right.

MR. JIMMERSON: -- 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, citing the *Montgomery versus State* decision from Georgia. And then there's other cases citing including McCormick on Evidence. And --

THE COURT: Right. And most of this is --

MR. JIMMERSON: -- that's that.

THE COURT: -- done in the criminal setting.

MR. JIMMERSON: That's right.

THE COURT: I had this come up in my criminal trials when I did all the motions on prior bad acts trying to introduce so I am familiar with the case law on prior bad acts and what character and -- and --

MR. JIMMERSON: And any issue --

THE COURT: -- you can't -- and opening the door or if you have a question that someone has opened the door, you can do an offer of proof --

MR. JIMMERSON: Right.

THE COURT: -- before the court which is many times they do in criminal situations because a mistrial there by the state is --

MR. JIMMERSON: And as the court noted the --

THE COURT: -- double jeopardy and it has some real significance so I've learned a lot of this through that. So I -- I understand the case law.

MR. JIMMERSON: In paragraph 41, Mr. Dariani statement that he believed Landess to be a beautiful person --

THE COURT: Be a beautiful person.

MR. JIMMERSON: -- was a nonresponse response --

THE COURT: Okay.

MR. JIMMERSON: -- to a preceding question and was a gratuitous addition to his testimony so your recollection of gratuitous is correct, Judge.

THE COURT: Okay, well --

MR. JIMMERSON: The judge used that. If defendants wanted the jury to disregard this statement, their remedy was a simple motion to strike, see *Wiggins* holding the motion to strike, and not introduction of rebuttal evidence was proper nonresponsive statement from a witness attesting to a party's good character.

And so you had the issue. So in the end, the court concluded as I just read to you in that paragraph number 51, the -- the choice to use race intentionally by the defense through -- the defendant through his counsel and present throughout the trial was the insurance company's risk manager sat there and we concealed that person's relationship to the insurance company by agreement so the jury would see the woman there. She was introduced as an assistant to the defense counsel and that was that, but all I'm trying to say is --

THE COURT: Okay. And I understand that happens a lot because they're monitoring the trial. I understand that.

MR. JIMMERSON: That's exactly right. And so -- so they

participated in this actively and the court ultimately concluded as I've already read to you that defendants were the legal cause of the necessity to have a mistrial.

THE COURT: For the mistrial.

MR. JIMMERSON: That's right. Okay.

THE COURT: And he ruled that way and that was his --

MR. JIMMERSON: I -- I like to just --

THE COURT: -- his legal conclusion.

MR. JIMMERSON: I -- I like to just call to your attention --

[Colloquy between counsel]

MR. JIMMERSON: There are -- I would say -- argue that another basis upon which you should grant the motion, another reason for doing so in addition to the many we've already proffered to you through the papers and to in our oral argument is that the defendants either intentionally or inadvertently have misstated both events during the trial as well as arguments and I just go through a half a dozen of those --

THE COURT: Misstate I -- do it again Mr. Jimmerson, misstated through --

MR. JIMMERSON: Misstated the record of what occurred before Judge Bare --

THE COURT: Oh.

MR. JIMMERSON: -- let me begin by saying. At page 6 of their brief they claim that I waited a long time to object to Ms. Gordon's introduction of the document, use of it, the highlighting and the ELMO

and the rest. I raised a motion to strike at the break -- the first break following the --

THE COURT: The introduction of the evidence.

MR. JIMMERSON: -- the discussion with the witness and that's referenced in the court's finding and acknowledged by all parties. So I did so as immediately as I could without calling it in front of the jury's attention. That was at page 6 of their brief.

Page 7 their brief they argue that they didn't have an opportunity to fairly analyze our motion for mistrial. On the Friday of August 2 the judge says I'm seriously considering granting a mistrial. In fact he called counsel back to a jury room to discuss the potential of is there any way resolve this matter because I really am not sure how I'm going to rule, but I am thinking mistrial is the way to go.

So we all knew it was so we filed our motion for mistrial on Sunday night. Both parties were invited to brief -- Mr. Vogel said he spent the weekend briefing but he didn't file anything. And on Monday, the 5th, Mr. Vogel advised the court that he was prepared to move forward with the matter and argue the -- a motion mistrial on August 5. In his papers he suggest that he didn't have that opportunity, but on the record in the transcript of August 5, he did in fact advise the court he's willing to proceed and obviously he argued against the mistrial.

Page -- I already mentioned to you page 7 the proposition that you can use it for any purpose without authority I've already made note to you. And no authority has ever been supplied to you throughout this extensive briefing by both sides to support the defendants' argument

that they can use a document for any purpose irrespective whether or not it was admitted or not.

Contrary to the brief at page 8 they suggest that the defendants provided the burning embers email. We had set it up as the exhibit you have, 56, 79 pages, but the documents were obtained directly from the Cognotion to Mr. Orr --

THE COURT: Through subpoena.

MR. JIMMERSON: -- partner of Mr. Vogel and Ms. Gordon, or partner associate don't -- don't know, but through their offices directly without running through the plaintiff's or any of plaintiff's counsel.

And page 11 I think is one of the -- the grossest misstatements that I want to call to your attention. In their brief at page 11, lines 17 through 20, this is what Mr. Vogel writes as the signing party to the brief: Defendants did not anticipate utilizing the email at trial. That's Exhibit 56, page 44.

THE COURT: Right, I -- I know what the burning embers is, okay.

MR. JIMMERSON: Defendants did not anticipate utilizing the email at trial. It was not until Mr. Dariyanani offered improper character evidence describing plaintiff as a beautiful person who could be trusted with bags of money that defendants were entitled to raise the email as rebuttal character evidence, citing page 11 of their brief, lines 17 through 20.

That is a misrepresentation. It is demonstrably [phonetic] false because --

THE COURT: Yeah.

MR. JIMMERSON: -- the defendants offered Exhibit 56 into evidence before ever asking Mr. Dariani a single question about the ember --

THE COURT: So did you stipulate to let 56 in before Mr. Dariani even testified?

MR. JIMMERSON: No.

THE COURT: Okay. I didn't -- okay.

MR. JIMMERSON: I -- I finished the direct examination.

THE COURT: Right.

MR. JIMMERSON: Ms. Gordon was conducting the -- the -- began the --

THE COURT: Cross.

MR. JIMMERSON: -- examination and she asked me in front of the jury and in front of the judge would I stipulate to Exhibit 56.

THE COURT: Okay, so that's what I thought happened, okay.

MR. JIMMERSON: Right. That's right.

THE COURT: Okay, so --

MR. JIMMERSON: And no question been passed to him.

Defendants' counsel then been [phonetic] examining Mr. Dariani questions about Exhibit 56, page 44. Defendants' counsel then elicit Mr. Dariani's testimony that, quote, I'd give him bags of cash and tell him to count it and deposit. This is Ms. Gordon asking Mr. Dariani who then gives a response. And shortly thereafter defendants' counsel flipped to page 44 of Exhibit 56 containing the burning embers email

which is already highlighted by defense counsel and placed on the ELMO. Again, she put it on the ELMO like I'm here --

THE COURT: No, I -- I --

MR. JIMMERSON: -- witness on the witness stand and then turns to him and asks him three questions about it.

All I'm saying to you is that they -- they didn't highlight in the five minutes or three minutes --

THE COURT: No, I understand they -- they --

MR. JIMMERSON: They had it pre-prepared they knew --

THE COURT: -- they felt if the door was opened --

MR. JIMMERSON: That's right.

THE COURT: -- and there were several comments by them they were aware of it I mean --

MR. JIMMERSON: Correct.

THE COURT: -- the findings of fact that it was there. Whether it could be admissible would depend on trial and how what happened at trial it was their interpretation --

MR. JIMMERSON: Right. But it wasn't -- it wasn't --

THE COURT: -- that he opened the door by those gratuitous comments and they were ready to use it --

MR. JIMMERSON: Yes.

THE COURT: -- if they thought I mean --

MR. JIMMERSON: That's right.

THE COURT: -- like I said I went through the evidence but I can't do that.

MR. JIMMERSON: Right.

THE COURT: That's not what I can do right now, I can only deal with what Judge Bare --

MR. JIMMERSON: But -- but the --

THE COURT: -- ruled and but --

MR. JIMMERSON: -- the -- the misrepresentation --

THE COURT: -- I would --

MR. JIMMERSON: -- the -- is the -- the defendants did not anticipate utilizing the email --

THE COURT: Right.

MR. JIMMERSON: -- at trial. They had already pre-highlighted it, they had it ready and --

THE COURT: Okay.

MR. JIMMERSON: -- just like you said, if the conditions came in, then they intended on using it. Got it.

THE COURT: Okay.

MR. JIMMERSON: All right.

THE COURT: They were -- I -- I -- I --

MR. JIMMERSON: All right.

THE COURT: -- I think they would agree.

MR. JIMMERSON: Okay, so now -- let me just finish on this -- a few more points I'll sit down. And the court by virtue of her -- his questioning of Ms. Gordon and Mr. Vogel elicit the fact that the -- by their asking the question don't you think that this speaks about his racism that they understood --

THE COURT: No, that is -- I -- I picked that up immediately --

MR. JIMMERSON: Okay. Very good. All right. In terms of misrepresentations, this is --

THE COURT: Because the word racist was used in the question, I --

MR. JIMMERSON: Right.

MR. VOGEL: Actually no.

MS. GORDON: No. No. No.

MR. VOGEL: It was brought up by Mr. Dariyanani.

THE COURT: It's not in the transcript that way?

MS. GORDON: He -- he raised -- he said racist first, Mr. Dariyanani did.

THE COURT: But you used it in the question to him.

MR. JIMMERSON: Correct.

MS. GORDON: No, he --

MR. VOGEL: In the follow up.

MS. GORDON: In the follow-up question.

MR. JIMMERSON: That's true.

MS. GORDON: He said it first.

THE COURT: Okay. All right.

MR. JIMMERSON: And that's --

THE COURT: Hold on -- let me understand. He said -- where did Mr. Dariann [phonetic] say he was a -- what -- tell me -- let --

MR. JIMMERSON: Right.

THE COURT: -- somebody just tell me the context.

MR. JIMMERSON: Let Ms. Gordon tell is fine.

THE COURT: Okay, because once again I'm -- I -- not being there I'm -- I'm trying to get the context because I was extremely surprised that the word don't you think that comment is racist --

MR. JIMMERSON: Right.

THE COURT: -- is pretty blatant.

MS. GORDON: So Mr. Dariyanani was explaining his interpretation of the email. No one ever --

THE COURT: Oh, so the email was already up there?

MR. JIMMERSON: Yes.

MS. GORDON: He said I -- I don't think that Mr. Landess was trying to be racist or -- or anything --

THE COURT: Okay.

MS. GORDON: -- else and then afterward then we talked about the second then because he brought up racist. I never brought up racist or anything --

THE COURT: But that wasn't your intent when you put that on the ELMO?

MS. GORDON: Don't -- don't --

THE COURT: What did you think that was going to be?

MS. GORDON: Don't forget I primarily talked about hustling people and do --

THE COURT: Well, I --

MS. GORDON: -- and hustling people on -- on payday. It wasn't just about whether he was talking about Blacks or Mexicans or

rednecks --

THE COURT: No, I --

MS. GORDON: -- but I was definitely not the first to use the word racist. Mr. Dariyanani said I don't take it as being --

THE COURT: And --

MS. GORDON: -- racist and then I read the second part of the email about things being welded down and I said so you still don't take that as being racist and so I --

THE COURT: Okay.

MS. GORDON: -- he said it first. I didn't say it first.

MR. JIMMERSON: Okay --

THE COURT: And you're -- you're going to tell me that you never intended that that was the inference from bringing in that language from the burning embers? What did you think it was applicable to?

MS. GORDON: The inference was, Your Honor, that it was in rebuttal to the character evidence --

THE COURT: No, I understand that but what did --

MS. GORDON: -- that he was a -- a beautiful person.

THE COURT: I understand I -- I get character. Believe me I get --

MS. GORDON: Right.

THE COURT: My question is what did you -- and I can't rule this because it was already ruled honestly by Judge Bare, but what I'm looking -- what did you feel the reasonable -- because it's reasonable inference you -- let's start first what did you think Mr. Dariani or whatever

was going to think when you showed him that email, what did you want from him when you showed him that?

MS. GORDON: He --

THE COURT: What were you asking that was relevant to this jury as to what Mr. -- why he should be commenting on the burning embers email?

MS. GORDON: Because he had just told the jury that Mr. Landess was this beautiful, noble and trustworthy person --

THE COURT: Okay, so --

MS. GORDON: -- so then I was entitled to use Mr. Landess's specific email that was sent to Mr. Dariyanani to say did you still then after reading this think that he was a beautiful, trustworthy --

THE COURT: Okay.

MS. GORDON: -- person. It falls under this huge umbrella that Mr. Dariyanani brought up in improper character evidence he's a beautiful, trustworthy, noble person who can be, you know, trusted with money, kids and what have you. It wasn't to --

THE COURT: No, those were his gratuitous comments.

MS. GORDON: Absolutely.

THE COURT: That was not --

MS. GORDON: And then we --

THE COURT: I'm not doing the evidence -- I can't do it. I wish I had been but that's the evidence, okay.

MS. GORDON: So there was no specific intent --

THE COURT: So what you followed up because he the -- the

witness was feeling or at least he felt like what you were inferring from that email is that it was racist, that's why he -- I have assume Mr. Dariani is an intelligent person. He was feeling that's what you were inferring from it or -- and that's why he made the comment it's not racist.

MS. GORDON: And then I followed up on that --

THE COURT: Okay, so then you followed up well read some little bit more, don't you think that's all racist. Okay. I got it.

MR. JIMMERSON: All right.

MS. GORDON: Thanks.

THE COURT: Okay, I --

MR. JIMMERSON: If I could --

THE COURT: -- I got it.

MR. JIMMERSON: -- I respectfully --

THE COURT: No because I wasn't there I --

MR. JIMMERSON: -- I need to correct Ms. Gordon.

THE COURT: Okay.

MR. JIMMERSON: Mr. Dariani never used the term trustworthy. I have the page and line number and I like to ask you just confirm it is page 162 and 163 of the reporter's transcript of the day 10 of trial, Plaintiff's Exhibit A to our motion for fees and allowances (indiscernible) fees and costs. I like to read it to you and then like -- I'll give it to you. This is exactly the context in which it was.

THE COURT: Okay.

MR. JIMMERSON: The document has now been placed upon the ELMO without a question being asked. Then being asked is then

the examination begins at 162: And as relates to this subject matter and to --

THE COURT: Okay, so what's sitting up on the ELMO which is the highlighted portions of what I've read --

MR. JIMMERSON: You got it. Exhibit --

THE COURT: -- many times. Okay.

MR. JIMMERSON: Okay. So here's the question beginning line 13 --

THE COURT: Okay.

MR. JIMMERSON: -- did he sound --

THE COURT: Start again, sorry?

MR. JIMMERSON: Did he sound apologetic in his email -- in this email about hustling people before?

THE COURT: Why is that relevant? Okay, nevermind --

MR. JIMMERSON: Right.

THE COURT: -- just give it to me. I'm just trying to figure out --

MR. JIMMERSON: I think -- I think when you're 70 years old you -- this is Mr. Dariani's answer --

THE COURT: Okay.

MR. JIMMERSON: -- I think when you're 70 years old you reflect on your life and not -- not all of it is beautiful, not all of it is beautiful. He doesn't feel like his divorce was beautiful. I think, you know, he thinks feels like -- I don't think Mr. Landess would sit here and tell you every moment of his life was great, you know, but I know him to

be a person who loves people and cares for them and I feel like I know his heart and that he didn't bother me and that -- that didn't bother me because I know him and I saw that as a -- as reflected back on, you know, what a perventional [phonetic] fool he was at the time, and he was.

Ms. Gordon: 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?

Answer: Not at all. I think he feels -- I think he's very circumspect about that whole period of his life and if you're asking me like did I read this as Mr. Landess being a racist and a bragger, I absolutely did not --

THE COURT: Okay. That's what I thought the context is what she was asking to see --

MR. JIMMERSON: That's right.

THE COURT: -- an inference, okay.

MR. JIMMERSON: So Ms. Gordon is correct. He used the word racist first in response to her question --

THE COURT: Right. Because that was what he thought was being -- okay.

MR. JIMMERSON: That's right based upon what he thought she was eliciting from him.

THE COURT: Okay.

MR. JIMMERSON: I absolutely did not and I don't read that any way now and I wouldn't have such a person in my employ.

Question by Ms. Gordon: He talks about a time when he bought a truck stop here in Las Vegas when the Mexican laborers stole everything that wasn't welded to the ground. You still don't think -- take that as being at all racist comment?

Answer: I look at this at [sic] him reflecting back on his life -- by the way, Jason was 19 this time period.

THE COURT: I --

MR. JIMMERSON: And the way that he saw things growing up in LA the -- the way that he did. I don't think that that -- I don't think it's representative of how I think it (indiscernible) himself then. I don't think it's representative who he is now and it is not who -- it's not the person that I've seen and know.

Thank you, Mr. Dariani, I appreciate it.

THE COURT: Okay.

MR. JIMMERSON: And that was it. So let me bring up so those two --

THE COURT: Do you mind, yeah, because -- I appreciate it.

MR. JIMMERSON: Right.

THE COURT: Okay, and so --

MR. JIMMERSON: Again just -- just to correct the record, Mr. Dariani did not use the word trustworthy. And indeed when you look at the character evidence that's really where you have even in the -- and in criminal cases the issue of using character evidence is on trustworthiness, honesty, particularly as it relates in the criminal cases. You don't see it in civil cases very often. It's very limited in civil cases as

you know.

All right. Another -- another valuation -- I pointed out two of the major issues, a third is you have is of course the countermotion, the converse of my advancing to you that you should grant our motion as we request it is of course deny the countermotion.

The primary argument by the defense for why our motion should be denied and their countermotion should be granted and you're certainly going to hear from them today, but if you read their brief, they -- at page 17, they argue that, quote, it is well past time -- I'm reading now page 17 of their opposition filed in the 26th of -- of August of this year. 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, end of quote.

What plaintiff did was not object to Exhibit 59 --

MR. JAMES JIMMERSON: Fifty-six.

MR. JIMMERSON: Excuse me, 56 I said -- Exhibit 56 --

THE COURT: I know which one.

MR. JIMMERSON: -- which included page 44. That is the sum total of what plaintiff did or did not do. To have you grant the countermotion, you would need to find as the defendants argue, that you -- that the plaintiff purposely caused the mistrial. That was a proposition that Judge Bare just had no patience with and he advised Mr. Vogel and Ms. Gordon of the same. That was something that he disagreed with. That's why he went so far as to be discrete in describing legal cause.

You know, I appreciate and as he finds his last finding of fact,

I think it's number 56, both parties made mistakes. Mr. Jimmerson should have maybe filed a motion in limine which I would have granted. Mr. Jimmerson should have objected to the exhibit at least as relates to those two pages because there certainly were other exhibits within the document that were clearly relevant and not objectionable. And indeed could argue that there were certain sentences within this email that could possibly be relevant and not prejudicial, but the ones that were chosen and the only ones that were asked about in the entire lengthy email by Ms. Gordon were those two paragraphs about hustling --

THE COURT: That was one question --

MR. JIMMERSON: -- that group.

THE COURT: -- were there any other -- out of this Exhibit 56, were there any other pages --

MR. JIMMERSON: No.

THE COURT: -- used at trial?

MR. JIMMERSON: No.

MS. GORDON: That's absolutely --

MR. VOGEL: Absolutely there were.

MS. GORDON: -- not true. Yes there were.

THE COURT: Okay, so now -- you guys now I have a --

MR. JIMMERSON: No you -- excuse me, we --

MS. GORDON: There were three or four emails before that.

MR. JIMMERSON: Do you mean Exhibit --

THE COURT: Okay.

MR. JIMMERSON: -- 44? Page 44?

THE COURT: No.

MR. JIMMERSON: No those the only questions were asked about Exhibit 44 was about the two offending paragraphs hustling --

MR. VOGEL: No. The question was when -- was any other pages used out of this exhibit --

MR. JIMMERSON: Oh the whole exhibit? Yes, there were.

MR. VOGEL: -- and many were.

MR. JIMMERSON: That's true.

THE COURT: Okay, just wanted to make sure --

MR. JIMMERSON: Sorry, I misunderstood. If that's what you asked, I apologize.

THE COURT: Okay, that's what I was -- I --

MR. JIMMERSON: No.

THE COURT: Once again -- okay.

MR. JIMMERSON: No there were other exhibits --

THE COURT: Okay.

MR. JIMMERSON: -- introduced because --

THE COURT: Okay. I -- I understand --

MR. JIMMERSON: -- they have to do with employment and they have to do with the damages.

THE COURT: Well no, because they --

MR. JIMMERSON: Right.

THE COURT: -- would be relevant I --

MR. JIMMERSON: That's right.

THE COURT: Okay. That's what I thought --

MR. JIMMERSON: Right.

THE COURT: -- by looking at it because it would make --

MR. JIMMERSON: But no other questions were elicited about page 44 and 45 except the two --

THE COURT: Other than these.

MR. JIMMERSON: That's right.

THE COURT: I understand that.

MR. JIMMERSON: All right.

THE COURT: Okay, thank you for helping me because like I said I'm --

MR. JIMMERSON: So then -- so then you -- you again there -- therefore an issue you will be I guess compelled to resolve is as the defense argue, on this record, is that the plaintiff who purposely called [sic] the mistrial.

THE COURT: Well I thought --

MR. JIMMERSON: I would just simply say that on this record and in light of the findings of fact conclusions of law by the judge, just making the argument evidences a desperate aspect on the part of the defense and Dr. Debiparshad because such an argument is so devoid of merit and absolutely without factual basis that to me that evidences the frailty of the defense's position and why the plaintiff's motion is meritorious and why the defense countermotion is not, but I wanted to call that to the Court's attention.

Throughout the course of their briefing as I indicated, Mr. Vogel on August 5 represented the judge he had no intent of introducing

race. I think when they went back to their offices after the motion mistrial had been granted orally and before the findings been entered, they recognized that that was, you know, not a -- an honest statement, not a fair statement of their position and so in the briefing they abandoned that and they say yes, and we have the right to use it for the reasons I've indicated even though they don't have any case law to support that.

I also want you to --

THE COURT: I think they were presenting it to explain why they felt like they against the attorney's fees and costs --

MR. JIMMERSON: Right.

THE COURT: -- didn't intentional cause --

MR. JIMMERSON: Right.

THE COURT: -- a mistrial, I think -- I took it as all going to the definition --

MR. JIMMERSON: Right.

THE COURT: -- of intent.

MR. JIMMERSON: But -- but the court in the end as you see in the findings --

THE COURT: No, I --

MR. JIMMERSON: -- does find that he -- they did so intentionally and in their briefing they acknowledged that it was intentional, they simply say that they had the right to do it. Again that's a fundamental issue that you will decide.

I -- I wanted to note that misconduct is a -- is a broad subject

matter that you will ascertain, but both -- Nevada Supreme Court has repeatedly cases both *Lioce* and *Emerson* and others -- another case called Barn Barnhard [phonetic] you -- you -- you can not have an intent to commit misconduct but still be held accountable for fees and allowance -- for fees and costs under 18.070 Sub 3. You can be of course intentional to do so as in this case. You may not have bad intent. You may honestly think that you have the right to use for any purpose notwithstanding the statute on plain error, 47.030 --

THE COURT: It's almost saying they have a good faith belief that --

MR. JIMMERSON: Right.

THE COURT: -- you know, everybody has a different understanding of the law --

MR. JIMMERSON: Right. But I -- I --

THE COURT: -- is what you're saying it's -- it happens --

MR. JIMMERSON: That's right.

THE COURT: -- in criminal cases a lot as you know --

MR. JIMMERSON: But it still amounts to misconduct.

THE COURT: -- it's an intent of a crime.

MR. JIMMERSON: It still amounts to misconduct.

THE COURT: No, I --

MR. JIMMERSON: But I -- but I also want to say that I am able to just by coincidence impeach that allegation on part of the defendant. In a case called *Zhang* that we cite in our papers, *Zhang versus Barnes*, the -- a lawyer -- both lawyers, plaintiff and defense

lawyers inadvertently admitted documents that included the insurance coverage in -- in a PI case.

THE COURT: It's one Mr. Vogel was involved in?

MR. JIMMERSON: That's right.

THE COURT: I -- I read all that.

MR. JIMMERSON: He then filed an appeal. He was the signing party to the appellate brief which argued, as we argued before Judge Bare, the plain error doctrine. And this is a 2016 case. So the defense well knew that the proposition that once a document is admitted it's usable for any purpose was not the law as recently as two and a half years earlier when he wrote his opening brief to the Nevada Supreme Court urging the -- a new trial to be granted because of the inadvertent admission of the insurance doctrine.

I only say that because and not to embarrass counsel, but all of us can make mistakes and all of us can make mistakes inadvertently. Here the defendants' is worse because it wasn't a mistake, they intentionally injected race into this trial. They did so to win this case, to earn a defense verdict or to reduce the size of the plaintiff's verdict in the case. That was their motive and that was found by Judge Bare.

So they can't reasonably argue to you that they thought that was the law because they are on record knowing that it's not the law and that there's no absolutes and --

[Colloquy between counsel]

MR. JIMMERSON: And the Nevada Supreme Court agreed with Mr. -- Mr. Vogel that the introduction -- the inadvertent introduction

of the insurance policy could very well lead to a --

THE COURT: Plain error.

MR. JIMMERSON: -- new trial, but defense counsel failed to include within the huge record in *Zhang* the insurance policy, the exhibit that was introduced inadvertently to the jury, and Supreme Court therefore affirmed it didn't grant. But their commentary made it clear that this absolutely can be a basis for a new trial, but because you didn't supply us with the crucial document we can't measure the extent of prejudice. So I would simply indicate that by virtue of that, the defense in 2018 while we're trying this case well knew that their proposition of law was faulty and without merit.

You -- the reasonableness of our fees and costs are evidenced by two affidavits of Mr. Little and myself, our respective firms. The costs have 29 subparts to all the exhibits and I just say -- conclude with what I discussed public policy. The Court is not ignorant to the realities of these cases, these cases on plaintiff's side are taken on contingent fees, they're taking on hourly by the defense to the insurance carrier.

In this case, if you were to deny the -- plaintiff's motion, you would be rewarding the defense that the risk of a mistrial is worth it. Here --

THE COURT: Explain that -- oh, because --

MR. JIMMERSON: Because --

THE COURT: -- they get their fees anyway?

MR. JIMMERSON: Right, and because we're now going to

have to spend a new $118,000 --

THE COURT: No.

MR. JIMMERSON: -- in expert witness costs, not to mention the huge amount of hours and time that we spend.

So there's a public policy as to what is the message that we as a -- as a court and we as lawyers who have a greater duty to administration of justice than we do to our clients. And believe me I have a great deal of -- of committed -- commitment and dedication to my client, but I have a greater duty to you and to our administration of justice and so I simply say that from a public policy point of view, as we argue in our papers, the granting of our motion is the only reasonable result from that position, separate and apart from the facts, the law and the rest of it, and that is because to do otherwise or to mitigate our claim of dollars in any significant regard would be to reward the risk of maybe the judge doesn't grant the new trial, maybe is a slap on the hand but we then maybe get a defense verdict if that be the case. But because Judge Bare was so, as you see in his findings, outraged by the brazenness of the defense and the positions they took, he granted this mistrial, the only one he's granted.

So for all those reasons we would ask you to favorably consider our motion and grant the same in the amount requested. Thank you, ma'am.

THE COURT: Okay. Thank you. All right.

MS. GORDON: I'm going to start, Your Honor, just briefly --

THE COURT: Certainly.

MS. GORDON: -- so I can address the issue of the findings fact and conclusions of law upon which plaintiff relies so very heavily and that this Court is -- is taking into consideration.

THE COURT: Right.

MS. GORDON: The issue of attorney's fees and costs was not decided by Judge --

THE COURT: Oh I -- I don't think it was.

MS. GORDON: -- by Judge Bare. The -- the legal cause of the trial was not decided by Judge Bare despite --

THE COURT: The legal cause of the mistrial was not decided?

MS. GORDON: Yes, correct. Despite the fact that plaintiff counsel put that very gratuitous and self-serving language in the order --

THE COURT: But it's in here.

MS. GORDON: Correct.

THE COURT: Yeah, I -- I have to -- I -- I understand and I assume you proposed -- I would assume you proposed your objections to this finding of fact and conclusions of law, correct?

MS. GORDON: And he -- the judge had taken this hearing off calendar. And despite the fact that the hearing on attorney's fees and costs had been taken off calendar by the judge because we filed our motion to disqualify, despite that, despite the fact Judge Bare said on the last day of trial I need legal briefing on the issue of the legal cause of the mistrial and I will set a hearing for that and that hearing never took place, arguments were never --

THE COURT: Okay, so wait a minute, are you saying to me I'm not bound by these finding of -- how could I -- how could I possibly say that? This is what the judge signed. Whether you agree with it or not, is it not signed by him? I'm -- now I'm confused.

MR. VOGEL: Your Honor, you're not bound by any of the orders that Judge Bare signed.

THE COURT: Yes I am.

MR. VOGEL: No, you're --

THE COURT: It's -- it's the precedent of the case. I've actually seen research on --

MR. VOGEL: Your Honor, I -- I can cite to you right now --

THE COURT: I -- I disagree.

MR. VOGEL: -- I can cite to you now probably 10 Nevada cases. The only way you have law of the case, present [sic] in the case --

THE COURT: Right.

MR. VOGEL: -- is from the appellate court. There's been no appellate court in this case, there's been no ruling from an appellate court in this case --

THE COURT: What cases say that?

MR. VOGEL: I will -- may I approach, Your Honor? I will give you -- I will give you --

THE COURT: Is it in your brief?

MR. VOGEL: It's -- it's in our request for --

MS. GORDON: Pretrial conference.

MR. VOGEL: -- pretrial conference that we --

THE COURT: Well how would I look at that on this motion you guys?

MR. JIMMERSON: It was filed yesterday.

MR. VOGEL: Your Honor, it's -- it's not related to this motion and you know and frankly, Your Honor, it's -- the -- it's -- it's irrelevant. You are not bound by his rulings by Nevada case law. May I -- may I approach? I will show you a huge string cite that supports that.

THE COURT: Okay, well just tell me what it is. I don't have time now I -- I -- I pick -- my jury's coming back at 1:00. My frustration is I've had this several times before and I had case law that says you can't change this, but I think the bigger issue I have, Mr. Vogel, to be honest, is the trial judge and if you look at all the Nevada case law says the trial judge is the one that they have -- they have the knowledge and watching everything -- that case law that I'm very familiar with that's why -- understand where I am. That's why I wish they had -- so the reason he didn't do this attorney's fees and cost is because you filed a motion disqualify him before he could hear it?

MR. VOGEL: Correct, and he was disqualified.

MS. GORDON: Right. And so he did not those -- those findings of fact and conclusions of law that talk about the legal cause for the mistrial were put in there by -- by plaintiff counsel --

THE COURT: Don't -- don't do that, don't -- don't argue that, okay, because he signed it. Do not argue that. That -- that -- Ms. Gordon, that's wrong. If you objected to it just because he put it -- the

judge signed it. Unless you're saying Judge Bare didn't read it and we know to go Judge Bare and say this isn't what I mean, if you want to attack this and say this isn't the order whether I have to -- then you need -- you need to go to Judge Bare. That's an improper argument to say to me well just because he put it in -- Judge Bare signed it and decide it. Okay? If you had an objection, I'm sure Judge Bare has the same as this department, they propose an order, you agree or disagree and findings of fact and then you propose one. It's up to Judge Bare based on his intention on what he feels the appropriate findings of fact and conclusions of law to pick what order he think is appropriate, so I think that's an improper argument and I -- I think that's unfair.

MR. JIMMERSON: Factually --

THE COURT: And I'm not going to go back and call Judge Bare unless you -- now the next step whether I'm bound by it or not is another issue because I have seen case law where I have and I've had several findings of fact, you know, because I get a lot of cases, I don't know how I get -- but I get a lot of cases that are in different stages and I've had findings of facts and conclusions of law then of course after another judge, not me, signed it and there -- then they did summary judgments and said I was bound on these findings of fact and conclusions of law, and I had case law on that so if you now have one saying they -- I don't know because I can tell you it just happened to me last year because once again even -- even if I would have disagreed on the finding facts and conclusions of law, that was not my position, it was the law of the case and it was briefed extensively.

That's why I'm very surprised at what Mr. Vogel's saying to me now because I went back and actually looked, you know, when I saw this because -- and I'm not one to say how I would rule on opening the door or -- or anything. The only reason I looked at that because that would go to the intentional aspect which of course is relevant to this, but --

MR. JIMMERSON: If I --

THE COURT: -- this is the order. Whether I have to -- am bound by it, I certainly at least under Nevada law am bound by his findings of fact as far as what -- not bound, but I certainly should give precedent to it --

MS. GORDON: Right.

THE COURT: -- since he was the trial judge. Let me put it that way.

MR. JIMMERSON: If the Court please, I like to correct --

MS. GORDON: And that's --

MR. VOGEL: That's -- that's a -- that is a different --

MS. GORDON: That's a different issue.

MR. VOGEL: -- that's a different issue --

MR. JIMMERSON: Mr. Vogel, could I correct the record?

THE COURT: Yes, I agree.

MR. VOGEL: That's --

MR. JIMMERSON: We --

MR. VOGEL: -- that's a different issue --

THE COURT: That's a totally different issue.

MR. JIMMERSON: We --

MR. VOGEL: -- and that there's plenty of case law out there that says there's deference to be given to the trial judge --

THE COURT: No, there's no question. You and I all know that.

MR. VOGEL: Yes, I -- I absolutely agree on that.

THE COURT: No -- no one can argue with that.

MR. VOGEL: However, it is not the law --

THE COURT: Okay.

MR. VOGEL: -- of the case --

THE COURT: I have not heard that if you --

MR. VOGEL: -- and --

THE COURT: -- I will tell you I had case law in my other case that's not true so I think that is something that maybe needs to be briefed -- you obviously -- it was not -- Mr. Vogel, if it had been in here, I read every --

MR. VOGEL: Well, Your Honor, it's --

THE COURT: -- not that I'm not supposed to, but I read everything about --

MR. VOGEL: Well --

THE COURT: -- three times and I --

MR. VOGEL: Well thing is it wasn't an issue that we anticipated with respect to this particular motion, it had to do with all the other pretrial motions for the upcoming trial that's what we were --

THE COURT: Okay, because --

MR. VOGEL: -- addressing in this --

MR. JIMMERSON: If --

MR. VOGEL: -- and that all of the -- all the rulings made by Judge Bare before our position being need -- need to be --

THE COURT: But you don't think that the motion for attorney's fees and costs from a mistrial isn't relevant to why you got the mistrial? How could you say that would not be something that would be relevant? Because the motion for a mistrial is even a higher standard, correct? In some respects -- at least I would think, I don't know. I mean I get --

MR. VOGEL: I think we were -- we may be talking at cross-purposes here --

THE COURT: Maybe I'm --

MR. VOGEL: -- because what I -- what I'm -- all -- because all I was saying is you are not bound by his rulings. I -- I'm not saying you throw them --

THE COURT: Well I -- I -- I'm --

MR. VOGEL: -- I'm not throwing -- I'm not --

THE COURT: Well I'm bound by I can give you -- I can't not give you a mistrial. What you're saying is I may not be bound by his findings of fact and conclusions of law.

MS. GORDON: About the attorneys and fees and --

MR. VOGEL: His --

THE COURT: I'm -- I'm not. I'm --

MR. VOGEL: Yeah, that's -- and --

THE COURT: -- I'm -- I'm not but his finding -- you don't think I'm bound by his findings of fact as to what happened because this is a lot -- this is a lot more factual than most --

MR. VOGEL: No -- no, I -- I -- I don't particularly because he was disqualified, Your Honor.

THE COURT: Oh, no, now -- now -- now we're getting into a can of worms. You're now saying that because he was --

MR. VOGEL: Right. That's -- that's -- that's only one --

THE COURT: --- but if you read Judge Wiese's --

MR. VOGEL: -- that's only one issue --

THE COURT: -- he didn't find that he did anything wrong, he did not -- he disqualified him and I don't know what the language is but it was -- it wasn't out an abundance of caution but it was one of those things -- do you remember?

MR. VOGEL: You understand I -- I'm sure you know it's an --

THE COURT: It was one of those --

MR. VOGEL: -- extremely high burden to disqualify a judge and Judge Wiese did a very nice job going through addressing --

THE COURT: I read it.

MR. VOGEL: -- each of the arguments he -- that we made and of course we had --

THE COURT: And he said Judge Bare did --

MR. VOGEL: -- and of course we had to make every possible argument --

THE COURT: No, I --

MR. VOGEL: -- and -- and the one that he seized upon was the --

THE COURT: Okay.

MR. VOGEL: -- appearance of -- the appearance of --

THE COURT: (Indiscernible) thank you.

MR. VOGEL: -- the appearance of bias.

THE COURT: Right, I -- I -- I -- obviously --

MR. VOGEL: But --

THE COURT: -- I've read everything I could --

MR. VOGEL: But with respect --

THE COURT: -- but what you're saying --

MR. VOGEL: But --

THE COURT: -- to me is --

MR. VOGEL: But with respect to law of the case, Nevada law is quite clear what would bind a trial judge is only an order from an appellate court saying this is now the law of the case and that starts with *Wright versus Carson* --

THE COURT: Okay. Okay.

MR. VOGEL: -- 22 Nevada 304 --

THE COURT: But here's -- I guess we're misunderstanding.

MR. JIMMERSON: Judge, could I be briefly heard just --

THE COURT: Just one second.

MR. JIMMERSON: Okay.

THE COURT: I want to make sure I'm -- you know, because I -- when you say bind, you're saying I have to follow the law. Well, I

mean binding this would be --

MR. VOGEL: You're -- you're not --

THE COURT: -- I'm not doing a new motion for mistrial --

MR. VOGEL: No.

THE COURT: -- I'm not doing.

MR. VOGEL: That's -- that's --

THE COURT: I'm not going to be bound --

MR. VOGEL: No, that's not what I'm saying.

THE COURT: -- on the new things. I absolutely agree with that --

MR. VOGEL: That's not what I'm -- okay.

THE COURT: -- because I've taken other trials --

MR. VOGEL: Okay.

THE COURT: Okay.

MR. VOGEL: Okay.

THE COURT: So because he --

MR. VOGEL: We're on -- we're on the same page.

THE COURT: Right. So if he says I would -- I might do something different on character evidence whether -- or what opening the door means or anything like that. I'm not bound by his -- if -- let -- let me give a hypothetical. Okay? So let's say at trial this man gives another -- another comment about a -- I'm just doing a hypothetical, okay? This is just hypothetical. I -- Judge Bare thought of it one way. I would look at that possibly different. I -- so you're right I would not -- because he made comments here and he has a right to do I'm not --

please don't think I'm criticizing him because this is, you know, we all --

MR. VOGEL: And we're not --

THE COURT: -- but I'm not bound by that, you're right, I -- if -- if something comes up on character, I know how I would handle it. As soon as I even hear it, well you're approaching the bench and I'm saying I would have done it as soon as he made that -- finished and said approach the bench, we have an issue now. Are you going to -- how are we going to handle it because I know not -- you can't put in those kind of -- I knew it was gratuitous -- and once again it's happened in -- it seems to happen more in criminal trials because they're always trying to make the defendant not -- you know, a good person or those type of comments. I'll be honest I've not seen in civil, but -- you're right because he -- he made findings in here on whether he felt it opened the door and stuff. I'm not bound by that. If that's what -- I agree with that.

MR. VOGEL: Okay.

THE COURT: What I -- okay.

MR. VOGEL: Yes, we're on the same page.

THE COURT: Then we're on the same page, but as far as he factually on what he said occurred, I do look at that because he was there and I wasn't. Like you helped me on I was trying to figure out how -- you know, that's -- that's what puts me in a tougher context how that racist comment -- how you made your follow up because I needed to know that --

MR. VOGEL: Context, sure.

THE COURT: Does that make sense?

MR. VOGEL: It does.

MS. GORDON: Yes.

THE COURT: But as far as his findings of what he factually determined, I feel I am bound which is what I used in my other case because if those facts are determined as a matter of law, then if they apply to another -- which happened to me, they did a summary judgment then of course based on these findings of fact that I would not necessarily feel would have been appropriate, I looked at the case law and I was bound. Now I decided a new legal issue on my own I'm not bound by that based on those findings of fact.

MS. GORDON: There's a distinction.

THE COURT: Does -- am I -- am --

MR. VOGEL: Yeah --

THE COURT: -- am I clear what I'm saying?

MR. VOGEL: Yes.

THE COURT: Okay, so we're on the same page.

MR. VOGEL: I think we're on the same page and --

THE COURT: Okay, that's fine.

MR. VOGEL: -- and --

THE COURT: I -- I agree with that totally.

MR. VOGEL: -- and with respect to his findings of fact you -- you have other sources as well --

THE COURT: I absolutely do.

MR. VOGEL: -- including the transcript and --

THE COURT: Right. They are not facts that I'm now -- I

balance facts, I -- I -- I line them up like I do -- I line up facts this way and I line up facts that way. I'm not saying because those are there they have a higher precedent. The only thing I am saying is I have to give them deference under the case law as far as facts that occurred during trial if there's no -- if -- if you're saying something occurred differently as to he was there -- the judge was observing. I do give them deference, but as you and I know based on the -- are they binding in that I can't look at any of your facts? Absolutely not. Does that make sense?

MR. VOGEL: Yeah, I -- I --

THE COURT: I -- I still look at both way --

MR. VOGEL: Yeah, I -- yeah, I --

THE COURT: -- and I do have to determine factually this intentional because that's -- this intentional or whether the -- if it was misconduct, how the case law -- I do have to interpret that so I think we're on the same --

MR. VOGEL: Yeah.

THE COURT: -- page I -- I misunderstood.

MR. VOGEL: Right, and -- and there isn't a --

THE COURT: Okay.

MR. VOGEL: -- huge dispute as to what -- as to what happened here.

THE COURT: No, I -- I don't think there is --

MR. VOGEL: So --

MS. GORDON: It's just --

THE COURT: -- to be very honest I -- I -- I -- as opposed to

other cases, I did not find a huge dispute here's what occurred -- I did not understand your context and I did -- that was one of my questions on how that racist comment -- after you said it, I assumed it was probably what -- exactly what happened. I was able to figure that out, but yes. Okay, so we're on the same page. Okay.

MR. JIMMERSON: If it please the Court, I just like to correct the record --

THE COURT: Okay.

MR. JIMMERSON: -- the defendants made --

THE COURT: Correct the -- okay. That's --

MR. JIMMERSON: -- in this regard. The findings of fact conclusion law and order were submitted by us, okay, as the practice in Clark County to Mr. Vogel and Ms. Gordon before it was submitted to the judge. They refused to sign it. It was then signed by the judge. They at no time offered a competing order. At no time did they offer an objection. Their only response to the order being entered was they earlier filed a motion to recuse the judge. That was the pending the motion -- I submitted the order. The motion recuse came on file. They didn't object or quite often you'll see the order says refused to sign.

THE COURT: I -- I saw that.

MR. JIMMERSON: Judge Bare signed that and was entered. And then later --

THE COURT: But here's my --

MR. JIMMERSON: -- and later then --

THE COURT: Okay, that's -- that's -- that's --

MR. JIMMERSON: Now with regard to --

THE COURT: Okay.

MR. JIMMERSON: -- the law of the case there are two branches. First the law of the case, one branch, is an appellate court's orders become the law of the case to the underlying course [sic] --

THE COURT: Of course.

MR. JIMMERSON: -- department and --

THE COURT: When it comes down if they tell us to do something we follow it I --

MR. JIMMERSON: Okay, and -- and in a most --

THE COURT: -- I get that.

MR. JIMMERSON: -- in a most recent case which we've cited to you in the plaintiff's supplemental memorandum points authority to October 1 filed before you pending with regard to this motion --

THE COURT: This case.

MR. JIMMERSON: -- is *Regent versus -- Regent at Town Centre versus Oxbow Construction* which is a very recent case it's Westlaw 2431690, a --

THE COURT: Okay.

MR. JIMMERSON: -- 2018 decision --

THE COURT: I apologize, will you tell me where it is --

MR. JIMMERSON: Yeah.

THE COURT: -- in my notebook here? It's your --

MR. JIMMERSON: Yeah, it's page 4 --

THE COURT: Just tell --

MR. JIMMERSON: -- page 4 --

THE COURT: Of?

MR. JIMMERSON: -- footnote 5 of plaintiff's --

THE COURT: Of plaintiff's reply.

MR. JIMMERSON: -- supplemental -- supplemental memorandum of law --

THE COURT: Oh supplemental, okay, hold on, I got -- I got -- I -- no?

MR. JIMMERSON: -- filed October 1.

THE COURT: Okay, why don't --

MR. JIMMERSON: Full title is Plaintiff's Supplemental Memorandum of Law Regarding McCorkle Treatise.

THE COURT: Okay.

UNIDENTIFIED SPEAKER: Here's a copy for you to bring --

THE COURT: Hold on.

MR. JIMMERSON: I could approach the bench --

THE COURT: Defendants' supplemental filed --

THE CLERK: I'm (indiscernible) right now. I don't know.

THE COURT: I --

MR. JIMMERSON: Here you are, Judge.

THE COURT: I --

THE CLERK: It should --

THE COURT: I had -- the last one I have in my thing was defendants' supplemental --

MR. JIMMERSON: Right.

THE COURT: -- which was filed 9/26 --

MR. JIMMERSON: And that was filed --

MS. GORDON: We did a motion to strike --

MR. JIMMERSON: -- that was filed four days later.

MS. GORDON: -- that supplement which might be why --

THE COURT: Okay, that's --

MS. GORDON: -- because it was untimely and -- and --

THE COURT: Okay.

MS. GORDON: -- wasn't --

THE COURT: Well I can look at it now I --

MS. GORDON: -- allowed.

THE COURT: I apologize.

MS. GORDON: And Your Honor, if I may because --

THE COURT: Okay, let me -- let him finish and then I'll -- I'll -- Ms. Gordon, then I'll --

MS. GORDON: Okay.

MR. JIMMERSON: If you'll turn to page 4 of that brief footnote 5, I just gave you the cite --

THE COURT: Page 4 I -- Mr. -- I'm sorry, I'm --

MR. JIMMERSON: Page 4, yes.

THE COURT: Two. Okay, I gotcha. Where we at?

MR. JIMMERSON: Paragraph 5. Defendants' efforts to argue that --

THE COURT: Oh, in sub- -- subnote here, okay.

MR. JIMMERSON: Right. Paragraph --

THE COURT: Footnote.

MR. JIMMERSON: -- footnote 5. Defendants' efforts to argue that they were permitted to inject race into the trial are misplaced. Judge Bare has already ruled that defendants' actions were impermissible, citing the findings of fact I've gone over with you, paragraph 51. That decision is law of the case and may not be disturbed. See *Regent at Town Centre Homeowners' Association versus Oxbow Construction* with a citation there you have, Westlaw 2431690, Nevada 2018, and I quote what the cite there is. Generally a district court judge decision in a case becomes the law of the case and cannot be overruled by a coequal successor judge, end of quote.

And sometimes other cases will use as Mr. Vogel correctly notes is a deference standard. Anyway you'll look at the case --

THE COURT: Okay.

MR. JIMMERSON: -- and we can debate it as to whether or not Judge Bare's prior rulings are binding upon you. We certainly would urge that the very least they should be given deference. Whether they're absolutely --

THE COURT: Okay.

MR. JIMMERSON: -- binding or not we can discuss it --

THE COURT: All right, I didn't --

MR. JIMMERSON: -- but it's not relevant for today's hearing as both plaintiffs and defendants acknowledge because the findings are the findings and there's no doubt that the judge intentionally chose to sign the order we had. He had plenty of time. The defense were given

plenty of opportunity to make modifications --

THE COURT: Okay.

MR. JIMMERSON: -- suggest changes, suggest or offer a competing order --

THE COURT: Okay.

MR. JIMMERSON: -- none of which they did. So I just want to correct that record --

THE COURT: And I certainly understand he didn't make the decision on the motion for attorney's fees and costs.

MR. JIMMERSON: That's right.

THE COURT: I do have the same facts that -- that were used to do obviously the motion to disqualify and the motion for mistrial, I have the same plateau of facts.

MR. JIMMERSON: And you also have the benefit of Judge Weise went back to look at the findings of fact conclusions of law and found his rulings to be appropriate.

THE COURT: I saw that too.

MR. JIMMERSON: Okay.

MS. GORDON: And I think --

THE COURT: But -- but that's -- but that was more the legal rulings as opposed to the factual --

MR. JIMMERSON: I think that's fair.

MS. GORDON: That's exactly right.

THE COURT: I'm a trier of fact today --

MR. JIMMERSON: I think that's fair.

THE COURT: -- I get it.

MS. GORDON: Yes. And --

MR. JIMMERSON: I think that's fair as I think it's a fair --

THE COURT: Is that fair?

MR. JIMMERSON: I do.

THE COURT: Okay, because I appreciate you working because I'm -- I'm trying to sift through this to be fair and so that I -- I get I'm the trier of fact like on the -- I -- I -- I get that. Okay. I'm on the same page then --

MS. GORDON: And that was a distinction --

THE COURT: -- that makes me feel better.

MS. GORDON: Your Honor, that -- that was all the findings of fact --

THE COURT: Okay, that's fine.

MS. GORDON: -- you give them deference that makes perfect sense to me.

THE COURT: Right, which --

MS. GORDON: The issue was --

THE COURT: -- is what I was doing in the first place, okay.

MS. GORDON: I'm sorry, the issue --

THE COURT: No. No.

MS. GORDON: -- was in hearing plaintiff counsel's argument was the binding effect of the conclusion of law about the legal --

THE COURT: Right. No. You're right.

MS. GORDON: -- cause of the mistrial which was not heard

by Judge Bare. So it's our position you have --

THE COURT: No. I agree with you there.

MS. GORDON: Okay. You have a lot more information.

THE COURT: Okay, and I appreciate everybody -- like once again, you guys are at a disadvantage over this poor Court -- not this poor Court but trying to put things in context which is why these motions should be heard by that judge, but I -- I -- okay. You know, I -- I get it and all I can do is ask you the context because that helps me very much.

MS. GORDON: Absolu- -- it's about intention, Your Honor, and -- and you're --

THE COURT: Right, I -- I'm --

MS. GORDON: -- exactly right and I think that you can see from the record there was absolutely no intention on defendants' behalf to cause a mistrial. We didn't want the mistrial. We argued against a mistrial. That was not our intent. We were 80 percent through trial. Mr. Vogel asked the judge can we go to verdict, can we take this up --

THE COURT: Sure.

MS. GORDON: -- on a writ? We did not want a mistrial by any means. We did not intend to use the email that was disclosed by plaintiffs and identified by plaintiff --

THE COURT: You didn't intend to use it?

MS. GORDON: I mean before the character evidence was --

THE COURT: I -- no, I get all that.

MS. GORDON: Right. So that intention --

THE COURT: So you did intend to use the thing. Okay. There's no question you -- you put it up and you did.

MS. GORDON: Yes.

THE COURT: I think what the difference is did you -- in my opinion, did you commit any kind of misconduct because that to me you -- did you -- was that misconduct? I mean was that wait a minute, how can you think -- you had to do two things in your -- your mind. You had to first decide okay, this man opened the door by his comments. That was never briefed. No one did an offer of proof. That usually happens in trial guys. I mean no offense, but, you know, I don't know what -- what happened here, but if -- if -- at least the way I try -- I learned evidence and maybe, you know, I don't know, but when something like that happens -- character evidence is big deal. There is no question, you know, that is very limited and I -- I know from all the cases I've done you have to be very careful with it. It's the first thing that'll get you reversed in criminal. Let me tell you, you let in prior bad acts or character evidence, that's the first thing the Nevada Supreme Court so I -- I am familiar.

Okay, so what usually happens is when and in -- he's not the first witness who, you know, we all can prep witnesses and they still say what they say with our best working with them up on the stand, but what I usually would expect from attorneys is, Your Honor, let's approach after that. Hey, we -- they just opened the door. Character evidence, look what he just said. Judge Bare, I want to do an offer of proof right now. Before I cross-examine this witness, here's what he said. He just

put -- the plaintiff's by putting that witness on and what he said opened the door.

MS. GORDON: And we have the court's finding that that did -- that he did open the door.

THE COURT: Yeah, but you don't want me to do those findings for some reasons for others, but --

MS. GORDON: Well --

THE COURT: -- finding -- that's his legal decision. I'm not bound by that. Okay, so you got to -- be careful here because I'm really good about facts and -- I agree, would I have -- I would not have necessarily agreed with that. That's neither here nor there. Okay, that's once again as I said to Mr. Jimmerson and I agree I'm not bound so in this next trial, don't be -- I'll -- I'll tell you right now if anything like that -- you better do an offer of proof because I want the -- because you can't unring that bell and we all know how serious character evidence is, at least as it should be.

Okay. That didn't happen that -- that -- I can't do anything about that, but -- and then you're left with the position that of he found legally, you know, no one wants to unring -- you know, no one stood up on the other side and said, Your Honor, we just want to make sure Mr. Dariani or whatever made this comment, we want to make sure here that nothing -- we didn’t open the door -- none of that was done I -- I went through my whole I -- I get that, that's not a decision I get to make now or who -- that didn't happen, okay?

But my biggest concern is you -- you did intentionally put it up.

There's no question. Now the intent for the attorney's fees is more the intent did you legally was your intent to cause a mistrial. Then it goes to -- right?

MS. GORDON: Right.

THE COURT: You didn't intend --

MS. GORDON: No --

THE COURT: -- of course you wouldn't want a mistrial. No one wants a mistrial, right? That -- that's -- they didn't want a mistrial and you didn't want a mistrial. I'm -- I'm looking at more did -- now the -- the cases that talk about -- because you don't have to have an intent. I don't think you thought we have a problem with this jury, this is going poorly in this case, you know, the -- we need to get -- I -- no -- I did not -- I would not find that. I don't -- and they're not suggesting that. What the intent is, is more, okay, did you have the good faith as an attorney to do what you did at that stage of the trial. I'm -- I'm putting it -- because that goes with a misconduct and if you read the *Lioce* case --

MS. GORDON: Yes.

THE COURT: -- he didn't mean to get a mistrial, he -- Emerson was up there --

MS. GORDON: No, but if you --

THE COURT: -- saying what he had said in many trials --

MS. GORDON: Absolutely.

THE COURT: -- four -- I don't know how many trials, but I heard that same argument by Mr. Emerson and no one -- nothing happened so I don't think he intended to cause a mistrial, but the

Supreme Court looks at it and goes wait a minute, based on the case law, this is wrong, this is misconduct is -- that's the standard I'm looking at it.

MS. GORDON: Absolutely, and if you look --

THE COURT: Okay, so tell me why you felt -- why you -- why -- okay. Here's what I really want: Why did you think, and you put it throughout your papers, that once something's admitted into evidence that you feel you can use that for any purpose in spite of the plain error law -- error rule, in spite of -- you both know you don't put racist comments in. That -- that is not -- you -- you would never say it was a -- on your own that's -- race is not something is -- that even goes ever admissible even if it is for some purpose -- sometimes it is on identification of defendants, you know, in -- in a criminal trial, as you can imagine, that you have -- that a judge has to deal with that race issue there's very strict parameters.

Why did you -- because you -- I mean you didn't think it was racist until -- till the defendant the -- the witness said it was racist? I guess I'm trying to figure out why did -- you felt it was relative character evidence and what was the jury supposed to infer that this plaintiff was based on those comments?

MS. GORDON: That he was not the beautiful person that Mr. Dariyanani had just said a few times in front of the --

THE COURT: Well I don't even know what a beautiful person is. That's so -- well --

MS. GORDON: Well I don't either, Your Honor, but we -- we

had this -- we had this email that shows that he may not be this beautiful person --

THE COURT: Okay, and why -- why -- why is it -- why was he not a beautiful person because he --

MS. GORDON: Because he hustled people for money on their payday.

MR. JIMMERSON: Fifty years ago.

MS. GORDON: That's why he's not -- sure.

MR. JIMMERSON: Fifty years ago.

THE COURT: No.

MS. GORDON: But --

THE COURT: Let me -- I --

MS. GORDON: -- but -- but that's why.

THE COURT: Okay.

MS. GORDON: And you know, we had this document --

THE COURT: And -- okay, why and you felt like that -- that comment opened the door.

MS. GORDON: I --

THE COURT: I assume you did.

MS. GORDON: I do. I absolutely do.

THE COURT: Okay, and you didn't think you should mention it to the judge or do anything, right? You just --

MS. GORDON: Your Honor, it had been -- it was -- it was admitted, it was their document that they --

THE COURT: Oh don't --

MS. GORDON: -- disclosed and it was -- it had been --

THE COURT: No, they didn't disclose it. It was given by subpoena, right?

MS. GORDON: No. It was given by subpoena and then they disclosed it. They disclosed it in --

THE COURT: Okay, so what? That's fine. I mean -- okay.

MR. VOGEL: But it goes deeper than that.

Go ahead.

THE COURT: You knew that was in there, correct?

MS. GORDON: Well no, what I was -- I --

THE COURT: You knew it was in there.

MS. GORDON: Yes.

THE COURT: Okay.

MS. GORDON: We did and -- and --

THE COURT: And you did not feel it was appropriate saying hey, this is some -- this is -- may be something that's -- even at the very minimum more prejudicial than probative. At the very very minimum if it came in that -- that a judge should determine it's more prejudicial -- you didn't think, right? You didn't give the court or anybody a chance -- and I get he may -- didn't do I -- I get that the other side did not object. I -- I understand that. But when you're analyzing it as a -- to me as an officer of the court you looked at that and thought that's appropriate for character evidence?

MS. GORDON: Given what -- what had been testified to --

THE COURT: That he was a beautiful person.

MS. GORDON: And trustworthy and people trust him with bags of money and -- and everything else --

THE COURT: No. I don't know about the trustworthy he showed they didn't -- okay.

MR. VOGEL: It's --

THE COURT: Okay.

MS. GORDON: Go ahead. Sorry.

MR. VOGEL: -- it's -- it's in -- it's in the record. He talked about how he was -- he would have trusted him with bags of money, he would have trusted with -- with his children. So that was all the -- part of the character evidence that they offered and --

MR. JAMES JIMMERSON: No, they didn't. The --

THE COURT: They didn't --

MR. JAMES JIMMERSON: The bags of money was on cross.

UNIDENTIFIED SPEAKER: Yep.

MR. VOGEL: It's -- it's --

MR. JAMES JIMMERSON: The bags of money comment was on cross-examination, Your Honor.

MR. JIMMERSON: We -- we gave you the quotation -- questions --

THE COURT: Yeah, I -- I'll -- I'll find it but --

MR. JIMMERSON: -- the bags of money are by Ms. Gordon.

MR. VOGEL: It's -- it's still all evidence that was offered by the witness --

MR. JIMMERSON: But -- just be accurate.

MR. VOGEL: -- showing what a great person he was, he's beautiful, he's trustworthy. His words, I would trust him with bags of money, I trust him with my children. That's character evidence, Your Honor.

THE COURT: No, I know what character --

MR. VOGEL: So --

THE COURT: -- evidence is.

MR. VOGEL: Yeah. That's all character evidence. And the email at issue it didn't -- it didn't use pejoratives. It didn't --

THE COURT: It didn't do what?

MR. VOGEL: It didn't use pejoratives, it said Blacks. It didn't use -- it didn't use a racial slur. It said Mexicans. It didn't use another racial slur. I mean arguably the only slur was rednecks, which I don't think most rednecks are offended by. So yes, when we -- when we weighed this, we felt they had opened the door to the use of that email and that the statements in there if -- if it had said if it had racially -- if had racial slurs in there, we wouldn't have used it.

THE COURT: She used the word racist. She followed up on his words say don't you think it's --

MS. GORDON: He said --

MR. VOGEL: He -- he -- he said --

THE COURT: Yeah, but you -- you know as an officer of the court even if he gratuitously said racist, do you think it was appropriate her to follow up, you don't think this is racist? Oh my goodness, I -- that's pretty tough to me. That's pretty tough, Mr. Vogel, to say that she

didn't jump on -- I mean this is a percipient witness. This is not somebody who's a professional witness, not an expert -- and obviously he's mouthy I --

MR. VOGEL: He's --

THE COURT: -- I could get that by his answers, you know?

MR. VOGEL: He's a lawyer.

THE COURT: He --

MR. VOGEL: He's a lawyer.

THE COURT: Okay? What does that have -- I mean he's --

MR. VOGEL: Well, he's --

THE COURT: -- is he a professional witness?

MR. VOGEL: I don't know if he's a professional witness or not, but he -- he's a lawyer --

THE COURT: Okay. All right, we'll argue about everything so I'm not about to do that, but my answer is he knew what you were inferring. I got it before I even knew the context. The inference from the embers is that he's a racist. I don't know how other than well, judge, we said -- the inference is he's not a beautiful person.

MR. VOGEL: Well, the --

THE COURT: I don't even know what that means. That's such a general, silly comment I don't even know -- that he's not trustworthy because he was a --

MR. VOGEL: Well, the real -- the real inference was that he -- he liked to hustle people on payday.

THE COURT: Okay, and what does that have to do with if -- if

-- okay, let's -- let's just take it the way you want if -- let me finish.

MR. VOGEL: Beautiful -- beautiful, trustworthy people don't hustle people.

THE COURT: If he likes to hustle people, that means he's not a good person?

MR. VOGEL: Yeah.

THE COURT: Okay. And how about time frame on it? How long ago was that?

MR. VOGEL: I don't know. It doesn't say what the time frame was.

MR. JIMMERSON: It says he was 19, Judge.

THE COURT: Okay.

MR. JIMMERSON: He's 70 years old now.

MR. VOGEL: It says that in the email that he was 19?

MR. JIMMERSON: It says 19.

MR. VOGEL: Oh. Then I -- then I -- then I apologize.

THE COURT: Okay, because you do know character evidence and bad acts can only go back at the most 10 years and all that. You do know all the case law, right?

MR. VOGEL: Well --

THE COURT: Well --

MR. VOGEL: -- yes and no.

THE COURT: Yes, well -- that's just my -- okay.

MS. GORDON: And I think, Your Honor, just to follow up --

THE COURT: So you honestly in your heart felt that that was

appropriate?

MR. VOGEL: Under the circumstances, yes, Your Honor.

MS. GORDON: And that's the -- the level of -- of -- of misconduct if -- if talking about the *Lioce* case --

THE COURT: Right.

MS. GORDON: -- and -- and Phil's cases that that is obvious improper argument and other cases that talk about --

THE COURT: Well I -- here's the point: Phil Emerson had done it for what, at least --

MR. VOGEL: Well the --

THE COURT: -- four or five trials. If it was so obvious in --

MR. JIMMERSON: Four cases.

MR. VOGEL: Yeah, the -- the *Lioce* case talks about --

MS. GORDON: And here we are --

MR. VOGEL: -- four trials.

MS. GORDON: Here we are --

THE COURT: I'm sorry?

MR. VOGEL: It talks about --

MS. GORDON: Sorry.

MR. VOGEL: -- four trials.

THE COURT: That's what I thought because --

MS. GORDON: Right. Yeah.

THE COURT: -- I can tell you I heard it once at trial. If that was such obvious, how did he get away with it in all these courtrooms for at least I -- maybe that was more the cumulative too I -- I -- you

know, however the Supreme Court did it.

MS. GORDON: But other cases, Your Honor, talking about the -- the level of misconduct that has to support the manifest necessity of a mistrial and then your attorney's fees and costs on top of that are issues like the closing argument that -- that Mr. Emerson, you know, had or attorneys consistently referring to facts that they know don't exist or consistently referring to evidence that they know is not going to come in or doesn't exist. Here we are arguing at length about whether that was proper or not rebuttal character evidence and what could have been done, what should have been done in terms -- it's not obvious. It's not obvious and it's not the level of misconduct that a court has to find to support the manifest necessity of the mistrial --

THE COURT: Okay, explain to me why you felt you were waiting for Mr. Jimmerson to object if you didn't think it was objectionable.

MS. GORDON: I --

THE COURT: I -- I put down as one note that just glared out to me and that came out in several context, if you were waiting for him to object or -- why did you think it was objectionable?

MS. GORDON: I wasn't saying that he would be successful on his objection --

THE COURT: No. No. I didn't say that. I asked why did you think he -- did you think he would have a good faith ground to object? Because -- I mean did you think that?

MS. GORDON: I -- I would have --

THE COURT: Did it cross your mind that maybe this might be objectionable, that this could be more prejudicial than -- did anything like that or hey once that door's open we can -- first of all you can't -- I don't -- I don't feel you can use under the plain error if something's -- because things happen in trial I -- I try to watch exhibits, but let me tell you, you aren't the first ones that they put in all these exhibits and I'll go through them and go there's insurance papers here -- like Mr. Vogel's, you know, there's -- it's -- it's shocking to me how many when big bundles of things come in people actually don't look through it but why --

MS. GORDON: But that --

THE COURT: -- answer me that if you thought it was objectionable or -- did you?

MS. GORDON: I'm not saying that it was something I think that he would have been successful on objecting to, I just would have --

THE COURT: Okay, what would have been your -- you thought you would be successful because he opened the door he's a beautiful person --

MS. GORDON: Absolutely.

THE COURT: -- even though it was gratuitous, even though there's case law which I assume, you know, you were aware of the case law on opening the door whether it's a gratuitous comment regarding elicited testimony you must have known that.

MS. GORDON: And --

THE COURT: So you knew this was a gratuitous comment -- even though they put him up, they didn't ask him character to open the

door, correct? So you knew it was a gratuitous comment and you knew that case law, correct?

MS. GORDON: And I would have expected that plaintiff knew his documents, knew it was in there and I --

THE COURT: No. I'm not asking that --

MS. GORDON: -- but I would have expected him to object and then we would have had that conversation that Your Honor is talking about at sidebar, wait a minute, you know what --

THE COURT: Okay. So you caught him not knowing what --

MS. GORDON: -- but it never happened, Your Honor.

THE COURT: Right.

MS. GORDON: It never ever happened. He -- he disclosed it, he -- he identified it as a trial exhibit, he then didn't object to the use of it and he didn't ask for a -- a mistrial --

THE COURT: But he didn't even know it was there.

MS. GORDON: Right.

THE COURT: You can't object and he's --

MS. GORDON: Well he knew after it was put on the ELMO and used --

THE COURT: Right, but then he's limited to what can he do --

MS. GORDON: -- he still didn't object.

THE COURT: What is he going to do at that point in front of the jury?

MS. GORDON: I --

THE COURT: What -- what is he going to do? You can't.

That's just like highlighting it. I'm -- I get -- but my -- I want to -- I really -- this is what I really am interested in knowing: If you felt it was objectionable, you were just waiting to see if -- if he objected, if he didn't then you had the greenlight to go forward.

MS. GORDON: And that's not -- I did not say that it was objectionable, I --

THE COURT: Okay.

MS. GORDON: -- I anticipated that plaintiff counsel would have objected or said -- or said something --

THE COURT: Okay, so you knew there were issues. You knew there was issues on whether --

MS. GORDON: Yes.

THE COURT: -- the door had been open. I assume --

MS. GORDON: No, I -- no.

THE COURT: You did not know that?

MS. GORDON: No. I didn't think that there was an issue whether or not the door had been open --

THE COURT: Why? You do not know the difference between a gratuitous comment -- the case law and when they offer -- they offered it if -- if Mr. Jimmerson had said what's he like as a person, what's his -- you know, was he a beautiful person or, you know, in fact isn't he a friend he leaves his kids and I don't -- what'd you say, bags of money in fact he -- he --

MS. GORDON: And you --

THE COURT: -- if he -- if he did that, oh my -- that opens the

door, but --

MS. GORDON: When you take his testimony as a whole, Your Honor, and -- and -- and what an advocate this person was and how he had worked with plaintiff to siphon the documents that would be -- one of the emails that was used before this one in Exhibit 56 were emails between plaintiff and Mr. Dariyanani about what plaintiff testified to in his deposition so this is all I need you to say and emails between Mr. Dariyanani and plaintiff about what documents will be produced he was --

THE COURT: So what is that inference from there?

MS. GORDON: He's -- he was an advocate. I don't think that you can --

THE COURT: Oh.

MS. GORDON: -- characterize this -- these character evidence comments as purely happenstance or gratuitous. He was such an advocate, Your Honor, he knew exactly what he was saying, exactly what he was saying and he said it over and over again so you can't say it's just gratuitous --

THE COURT: Okay, and you did a motion to strike when he said it, right? Immediately.

MS. GORDON: No.

THE COURT: Why not? Because that's your remedy. You're saying he didn't object -- why didn't you do a motion to -- especially with what you're telling me, you watched him, he was an advocate, he was there just waiting to do it. To me, you would have been listening to his

comments. Why didn't you do a motion --

MS. GORDON: So --

THE COURT: -- to strike? That was your tactical decision.

MS. GORDON: Going back to the question of the misconduct --

MR. VOGEL: We -- we did make several objections.

MS. GORDON: Yes, and going back to the -- to the issue of -- of the misconduct that's necessary, why -- why are -- are we saddled with the fact that we didn't object to that any more so than plaintiff --

THE COURT: Because it's different.

MS. GORDON: -- is when he didn't object?

THE COURT: Ms. -- he didn't know. I have to believe he didn't know because he -- I assume this side didn't know because who would -- you had to have not known that was in there. There is no way that any attorney -- in fact he even said he didn't know, didn't Mr. Jimmerson? Okay.

He did not know. You can't object to something you don't know. Okay. So I get -- I understand why he didn't object. That's a whole issue whether he should have. I -- I get that completely, right? You know, you're supposed to know what's in you -- your -- in your exhibits. You're supposed to know, you know, what you stipulate --

MS. GORDON: Yes.

THE COURT: -- well he didn't stipulate, he just didn't object. I get that. But you knew what was there. You knew you were using it. So that is my question when -- when he came out with those gratuitous

remarks which I -- yeah, it was -- and you knew -- you chose not to. You didn't have to object. Correct?

MS. GORDON: Right.

THE COURT: That was your tactical decision. So then do you not think you took somewhat of a risk as to whether the judge would or would not decide whether that was opening the door because you had no ruling from anybody.

MS. GORDON: Right, but we do now --

THE COURT: Correct?

MS. GORDON: Right.

THE COURT: You -- you -- you know, you had no ruling so then let's say you did it and then Judge Bare immediately says wait a minute, it's -- let's -- it's my opinion those comments were not opening the door, then what would have happened?

MS. GORDON: I don't know, but that's not what happened. He did find that --

THE COURT: I know, but I have to look at in terms of what -- as far as misconduct --

MS. GORDON: Right.

THE COURT: -- what you know as a lawyer should have happened.

MS. GORDON: And I think what's overriding --

THE COURT: That's frustrating.

MS. GORDON: -- is that we're having this discussion and it's -- and -- and it -- we could talk --

THE COURT: Yeah, I -- I -- and you're right and I'm left with this misconduct standard which is difficult.

MS. GORDON: -- a really long time about that. That's not obvious misconduct. Here we -- you know --

THE COURT: Yeah.

MS. GORDON: -- here we are, we have all these briefs and we -- we could talk for a very long time about it. I feel strongly that we were correct in doing so. Judge Bare was -- who was sitting there, it wasn't just in his findings and [sic] fact and conclusions of law, he also said it on the record --

THE COURT: And what did he say, you were appropriate?

MS. GORDON: He said that he does find that the plaintiffs did open the door to character evidence and that we were allowed to then present rebuttal character evidence in response to that.

THE COURT: But what was his next comment about the type of rebuttal character evidence you let in? He was so strong that this was so -- I mean he gave a mistrial on it.

MS. GORDON: Right.

THE COURT: He -- he -- and that's a high standard --

MS. GORDON: Yes.

THE COURT: -- you guys, let's be honest. If you thought -- and that's why I said I -- I'm -- he made the ruling I -- I'm not -- I'm not --

MS. GORDON: And we would of course --

THE COURT: -- this new trial we're not -- I have -- I'll -- I watch evidence. Any -- I can be wrong too I -- you know, and maybe I'm

more cautious on offers of proof and stuff that that's but -- and I'm not -- but -- but even if it's opened the -- it's not just opening the door and I'm past that because I'm -- that's what Judge -- it's the type of character evidence that you did that he felt rose to the level to grant -- and that's all it was, you guys. There was nothing else other than the burning embers email. He didn't -- and sometimes they come it's cumulative -- oh I'm so -- this is very important so I'm sorry I'm taking time because I --

MS. GORDON: No, we appreciate --

THE COURT: -- and I need to pick your brains because I wasn't there and I don't want to feel like I -- I can't decide this in a -- but, you know, sometimes -- like Emerson's basically, you did this and then you did this and then you -- because a lot of the mistrials the ones I -- I've had a couple, it's -- it's called cumulative -- okay, one thing you maybe got away with and two things you maybe got away with, but you know, you start it's the cumulative effect.

In fact, Judge Bare's probably I -- I -- I can't -- I can't think that there would be something with just one issue that would grant a mistrial, but obviously that was his -- it was the type of evidence that you -- that was the issue and you felt that this evidence was appropriate using the Mexicans and, you know, which are obviously referring to a race, no question about it. In fact, the witness used the word racial and that's -- I wasn't even surprised after you told me how it happened because I -- I had to -- I had to figure out what you were inferring from it. He used -- said I'm not being racist and then you just followed up by using the racist so even though he used the word, your follow-up was saying well then

racist is --

MS. GORDON: Because he -- yeah, he just told the --

THE COURT: Right, but --

MS. GORDON: Right.

THE COURT: -- but what is the inference -- what is this jury supposed to decide from you saying well don't you think this is racist? Do you not think you're inferring to this jury this guy's -- what did you think you were inferring -- okay, let me do it this -- what was the trier of fact supposed to reasonably infer from your follow-up question, you don't think this is racist?

MS. GORDON: He had just told the jury that he didn't think it was --

THE COURT: I -- I don't want to hear that I -- I get that, I get the context. What I'm asking you, you -- every question you ask at trial has to be relevant evidence for this jury to do a reasonable inference. Do you agree with me there? Because they're the trier of fact.

MS. GORDON: Right, so I --

THE COURT: Okay. So your follow-up question to him, you don't think this email is racist -- even though he used the word, in fact it was an inappropriate term, someone maybe could a motion to strike and tell him -- but that didn't happen either. I wasn't there, that didn't happen either, okay. I'm not redoing -- but your follow-up question is an independent basis. You can't just say well, if someone blurts out you're -- defendant you're guilty, you don't get to follow up in your next question well don't you think -- and when I -- that's inappropriate -- you don't think

he's guilty now -- you can't do that, you -- what was your intent as your reasonable inference of that question is well don't you think this email and you used the word racist. What did you want this jury to infer from that other than he's a racist so he's not a good person? That's the -- is that not the only reasonable -- what did you -- what did you have a good faith basis to think this jury was -- was to hear that?

MS. GORDON: After -- I'm following up on what he just told the jury --

THE COURT: I -- I -- I'm not --

MS. GORDON: So I --

THE COURT: But what I'm trying to explain to you -- even if they make an inappropriate comment -- we can go back to opening the door.

MS. GORDON: Right.

THE COURT: Even if a witness and I don't care if he's an attorney, I don't care if he was trying to help Mr. -- I -- you're following up. Every one of your questions has to have a good faith basis. I get it's a follow-up and -- and he opened the door, but why -- what did you want this jury to infer by your follow-up question of don't you think -- you don't even think -- whatever it was, I wrote it all down here, is racist? What were you inferring to this jury?

MS. GORDON: I was -- I was -- as you keep saying, I was following up on what he had just said. I don't know --

THE COURT: Well, but what was the answer supposed to infer to the jury? He doesn't think that's racist so how about this racist?

You just doubled down on your -- on -- you just doubled down to me on an inappropriate comment.

MS. GORDON: No, it just -- it just keeps going back, Your Honor, to he's not the person that Mr. Dariyanani kept telling the jury he was.

THE COURT: That could be. I'm -- I'm not the -- he could be --

MS. GORDON: I -- I didn't care if that email --

THE COURT: -- a complete liar up here, you guys. I can't do his credibility, do you know what I'm --

MS. GORDON: Right.

THE COURT: I understand why maybe you thought wait a minute, he's -- and we all -- you know, sometimes they're advocates more than they are -- they're not independent percipient witnesses. I understand what you're inferring. You felt that and --

MS. GORDON: In terms of whether it was gratuitous as opposed to elicited --

THE COURT: -- and I'll -- maybe at the next trial I'll watch that I -- I get that and hopefully the trier of fact -- but that question standing alone is what really I don't understand -- even if a witness says something inappropriate, I -- I do understand why he thought that because the first time I looked at it, I thought this is obviously saying he's a racist because he only hustles -- and -- I guess this is on the record I -- I'm even uncomfortable but I get -- I -- I mean, you know, I get it, you know, and if things aren't welded down, the inference is Mexicans

will steal -- I -- I -- that's -- that's racist so that's why he answered the way he did --

MS. GORDON: Right.

THE COURT: -- because he knew by you asking about that email, you're trying to infer to this jury it's racist.

So then your follow-up well you don't think -- to me is almost -- maybe I'm wrong, maybe that's the context, but when I look at it, that just doubles the error of interjecting race in front of this jury and that's what Judge Bare felt was enough to even give a mistrial. That -- that's my concern on the -- I don't think you intentionally -- I don't think anybody went -- I don't think he intentionally missed an exhibit. I'm sure he's been kicking himself in the hiney on -- you know, no -- we've all made mistakes at trial, you know, trial is such dynamic, you know, thing and I always try to emphasize to people -- like just on medical records recently, they had insurance everywhere, you guys, they had both stipulated. I'm going great, did anybody look at these exhibits before you brought them to my clerk?

I just go through them now because it is hard. There's a lot of things that go on and a lot of piece of paper and I wish people had a little more realized you know whatever you put in evidence that jury gets to go back there and look at all that stuff and if you really aren't going to use it or you really don't think it's something the jury needs to look at, let's look at some of these things we're all -- I -- I even do it myself now I go wait a minute, this jury isn't going to go back with 5,000 records, are you going to use them? Are you going to explain everything --

MS. GORDON: This was -- this is 79 pages. Your Honor, this was -- this is a --

THE COURT: No, I got it.

MS. GORDON: -- little less excusable in terms of --

THE COURT: No, I -- I -- I'm not --

MS. GORDON: -- you know, missing it. So when we're --

THE COURT: I -- I'm not excusing his mistake. I -- I'm -- I'm -- I'm not. I can't focus -- I did focus on that because it's in fairness of what happened to your side to decide misconduct. Believe me as you can see I have, I -- I -- I guess the best way to say is I need to put it in fair context and I'm not excusing that it didn't --

MS. GORDON: Especially for the amount --

THE COURT: -- and I -- I -- there was no offers of proof, there was no objections I -- there was quite a few things that -- it's kind of like what happens in a tragedy have you ever noticed, you guys, it's not one thing that went wrong, but it's one thing and then the next thing and then it's almost, Ms. Gordon, like a domino unfortunately. It's just not one -- and if you look at this, it wasn't just one thing I -- that resulted in this. I actually -- I lined them all up trying to figure out so what happened to me? And I mean that nicely. I mean a lot of this is a lesson learned for a trial judge and I tend to be a little more assertive if -- if I hear something in testimony, I try to be more preventative -- because I listen to -- a lot of judges don't and they don't feel it's their position so I'm -- you know, as they said, Judge Bare's different, I don't know --

MS. GORDON: And to prevent where we are now, right,

because now --

THE COURT: Right.

MS. GORDON: -- we have two weeks and a day that are gone and we're starting over again --

THE COURT: Oh no, I --

MS. GORDON: -- and -- and before someone asks for hundreds of thousands of dollars --

THE COURT: No, I --

MS. GORDON: -- based on alleged misconduct, then -- and especially when there's this kind of academic discussion going on as to whether it was even improper or not, you can't get to that level of it actually being a misconduct that is based on attorneys making obviously improper argument in front of a jury. This was not obvious. I think we had a very good faith basis for using that email that had been admitted into evidence. It's not just that it wasn't objected to, again it was their exhibit, so when you're looking at granting fees and costs associated with a mistrial, you can't lose sight of this being a very difficult decision as to whether that underlying evidentiary ruling was -- was correct. I think we were -- we were correct.

THE COURT: No, I'm not even looking at that. I think --

MS. GORDON: I understand -- of course I understand plaintiff's arguments --

THE COURT: I under- --

MS. GORDON: -- I understand the Court's questions and -- and analysis, and -- and I think you understand ours -- ours as well.

THE COURT: I do. Okay.

MS. GORDON: It's a -- it's a tough issue and -- and under those circumstances --

THE COURT: It's --

MS. GORDON: -- it's not clear there was no -- we didn't want the mistrial. As Mr. Jimmerson said, you can't award them for, you know, resulting in a mistrial. We didn't want it. Trial was going quite well. We didn't want the mistrial at all. It was almost over. We wanted it to go to verdict, we wanted to have this discussion later. Let's let it go to verdict and then if there's still an issue --

THE COURT: But that was within Judge Bare's --

MS. GORDON: Absolutely.

THE COURT: -- decision I can't -- I mean --

MS. GORDON: No, absolutely.

THE COURT: I can't go over any of that. All I can do is the findings. Yeah, you did -- well, no, but -- okay. At least I told you at least I had the facts right which is what I was trying to do on my other -- to make sure I understand all the facts --

MS. GORDON: And I think, Your Honor --

THE COURT: -- and I don't think -- I would not find that you intentionally wanted a mistrial, I -- I understand his argument, I don't -- I -- no one wants a mistrial at that --

MS. GORDON: But it wasn't intentional to -- to put into evidence something that we thought was improper either. So there's -- that intention that you and I keep --

THE COURT: Well, okay.

MS. GORDON: -- talking about that was lacking as well.

THE COURT: But I'm looking it under the *Emerson Lioce* misconduct not intentional. I don't think -- and don't -- I -- I'm looking at it that way. Okay, absolutely. That's why I read *Emerson* again and I read the Phil -- and I read the *Lioce* case. That's I -- I don't -- you're a good trial attorney, Mr. Jimmerson's a good trial attorney, we got here because of things that happened. I -- and it's not my point to find fault. Does that make --

MS. GORDON: Yes.

THE COURT: I will tell you but it's my -- my position to try to look at the facts and see if I feel that there was under the *Emerson* or *Lioce* any misconduct that could -- that deserves sanction. That's -- that's -- that's my goal. And I'm not changing anything, you know, that Judge Bare did or anything I will look -- okay. At least I'm on the right page I do appreciate --

MS. GORDON: I --

THE COURT: Yes, do you have something else you want to give me?

MS. GORDON: Just -- just quickly.

THE COURT: No. No. It's okay.

MS. GORDON: Your Honor, we wanted to -- to --

THE COURT: They're not coming till 1:30, right?

MS. GORDON: Okay. Just give a copy of --

THE COURT: We -- I got till 1:30. I apologize to my staff.

MS. GORDON: -- McCormick on Evidence the edition --

THE COURT: Yes. I would like that. Is that on plain error?

MR. VOGEL: This is the section that they cited in their brief, Section 54 from --

THE COURT: Okay, is it on plain error? Or is it on the -- opening the door that ship has sailed --

MR. VOGEL: It's --

THE COURT: -- as far as I --

MR. VOGEL: No, no, no.

MS. GORDON: No, it's --

MR. VOGEL: It's --

THE COURT: Okay.

MS. GORDON: May I approach?

MR. VOGEL: It's --

THE COURT: No, I -- no problem.

MS. GORDON: Thanks.

MR. VOGEL: It's -- it's on the use of admitted evidence.

THE COURT: On the use of admitted evidence.

MS. GORDON: Plaintiff keeps saying that -- that there was no case law cited or anything to that effect for our statement that once it's admitted into evidence --

THE COURT: Well I -- I looked more on the plain error doctrine --

MS. GORDON: Sure.

THE COURT: -- here in Nevada.

MR. VOGEL: So they kept arguing we didn't cite any cases. Well turns out, and if you look at the note, there really isn't any cases. It's axiomatic and --

THE COURT: Do it again, it's actually?

MR. VOGEL: It's axiomatic.

MS. GORDON: Axiomatic.

MR. VOGEL: Admitted --

THE COURT: Oh.

MR. VOGEL: -- admitted evidence can be used at trial. I --

THE COURT: But not for any purpose.

MR. VOGEL: Well actually, if you take a look at the note --

THE COURT: Well then how do you -- how do you reconcile that with the plain error cases?

MR. VOGEL: If you -- if you take a look at the note --

THE COURT: I will.

MR. VOGEL: -- you -- you still --

THE COURT: The note?

MR. VOGEL: Yeah.

THE COURT: The footnote?

MR. VOGEL: No, it's the actual note, it's --

THE COURT: Okay.

MR. VOGEL: -- and it's only a two paragraph note. This is the one that they cited to you in support --

THE COURT: Okay, that's fine. I'll --

MR. VOGEL: -- in support of their position that hey there's --

THE COURT: Did you -- have you -- okay. That's fine.

MR. VOGEL: -- because they -- they've misstated it.

THE COURT: Okay.

MR. JIMMERSON: Then may please the Court I'll just begin with that and I'll sit down a minute. This was cited by us in our brief.

THE COURT: Which is -- this McCormick?

MR. JIMMERSON: Yes.

THE COURT: Okay.

MR. JIMMERSON: It was not cited by the defense in any of their briefs. Would you please look at the top of page 2?

THE COURT: Of this what he just gave me --

MR. JIMMERSON: Yes.

THE COURT: -- I can do that.

MR. JIMMERSON: Footnote 1 --

THE COURT: Footnote --

MR. JIMMERSON: -- this generalization is subject to the plain error rule, see Section 52.

MR. VOGEL: Yeah.

MS. GORDON: We're -- we're not contesting that.

THE COURT: Didn't I just say plain error?

MS. GORDON: Yes.

MR. JIMMERSON: You did, Judge.

MS. GORDON: But -- but because it didn't cite the -- the entire -- right.

MR. VOGEL: Yeah.

THE COURT: Okay, okay, okay, okay I -- I --

MR. JIMMERSON: All I can do is --

THE COURT: -- I put plain error. I'm okay now.

MR. JIMMERSON: -- quote chapter and verse --

THE COURT: Okay.

MR. JIMMERSON: -- I give you the document --

THE COURT: Okay.

MR. JIMMERSON: -- that's it. They did not.

THE COURT: Okay. I did research on -- okay.

MR. JIMMERSON: I have five points and --

THE COURT: Okay, that's fine you --

MR. JIMMERSON: -- they're very brief.

THE COURT: -- this is very -- I'm sorry it was such a --

MR. JIMMERSON: No problem.

THE COURT: -- rough day. I tried to get you --

MR. JIMMERSON: They're entitled their full day and there's a lot at stake, no doubt.

THE COURT: No.

MR. JIMMERSON: Let me begin by saying number one --

THE COURT: No.

MR. JIMMERSON: -- that the concept of what you indicated of sidebar and how you conduct yourself, Judge Bare said the same thing. Returning to his finding fact and conclusions of law number 21 --

THE COURT: Okay. Okay.

MR. JIMMERSON: -- which is at page 9 of the findings, he

says paragraph 21: The court finds that because of the prejudicial nature of the document --

THE COURT: Oh.

MR. JIMMERSON: -- defendants could have asked --

THE COURT: That's for --

MR. JIMMERSON: -- 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.

THE COURT: Okay.

MR. JIMMERSON: Okay. Our reply brief filed on the 9th of September has a paragraph -- excuse me, has a footnote 15 that specifically points to that as a remedy and it is absolutely consistent with your practice that if you have --

THE COURT: Well, I had it in my notes here I -- I was trying to figure out how -- honestly is a learn for me too so since we're redoing this trial, I -- I don't want anything that --

MR. JIMMERSON: Right, and so I just would say that we --

THE COURT: I'm not --

MR. JIMMERSON: -- also in our brief --

THE COURT: Okay.

MR. JIMMERSON: -- pointed out that when you have this kind of a matter you are obliged to make offers of proof or have sidebar (indiscernible) you move forward so that was number one. Number --

THE COURT: Okay.

MR. JIMMERSON: -- my point number two --

THE COURT: Okay.

MR. JIMMERSON: -- that I want to make clear is because I think the Judge is on the right point.

THE COURT: All right.

MR. JIMMERSON: The -- the -- the intentional nature to use this inflammatory bomb as the judge described the term, bomb, is reflected also in the motion to disqualify filed by defendants that was heard by Judge Wiese. We cited it in our reply brief at page 4 and 5 --

THE COURT: Okay, is that the -- is that the where --

MR. JIMMERSON: -- and the reply brief is -- is submitted --

THE COURT: Is that the one you filed in October?

MR. JIMMERSON: No. No.

THE COURT: Okay, the -- the original one because --

MR. JIMMERSON: The reply was the original reply of --

THE COURT: Okay.

MR. JAMES JIMMERSON: September 12.

MR. JIMMERSON: -- September 12.

THE COURT: Okay. I --

MR. JIMMERSON: I -- I know you read it.

THE COURT: I know but --

MR. JIMMERSON: I just wanted to refresh the Court's recollection --

THE COURT: No, there's a lot.

MR. JIMMERSON: -- that this is what the defense counsel wrote in the motion to -- with to recuse or disqualify and it begins at the

bottom of page 4, line 21 and goes to the top two lines of page 5, lines 1 and 2. They write the following: Defendants -- quote, defendants disagree with Judge Bare and believe Caucasian jury members can and should, and they put the words and should in bold, be equally offended by the racist remarks of -- in plaintiff's email, end of quote.

So there's no doubt as Judge Bare indicated in the repartee between Ms. Gordon and -- and himself and Mr. Vogel himself that there was the intent on the part of defendant to use this and they understood that the explosive nature of it was racial by determination. Regardless of whether Mr. -- Mr. Landess 51 years ago was considered a racist or not, or allegedly a racist, they knew what they had when they used it and in the motion to disqualify they go so far as to say it's just not the two African-American women who are on the -- or the two Hispanic people on the jury, all four the other -- six of the other jurors who were Caucasian would be equally offended as being racist.

So they knew what they had in their hands and they knew what they were intentionally using and that was what so offensive the judge and when you remember the events of Friday, the 5th -- excuse me, Friday, the 2nd of August, and Monday, the 5th, it's like -- it's like an awakening. It's like, you know, you -- you -- you're -- maybe you're shot and you just think that it's a little bit of a red hole and then you realize that you are mortally wounded. He saw that this case was mortally wounded by the actions the defendant, and that was I wanted to call the Court's attention.

Point number three, the court has indicated its findings relative

to causation -- causation is crucial here. You have at paragraph 20, which I already referenced to the Court, that defendants -- I've read this to you. I'm not going to read it again, but if -- to pick it up midstream at line 19, page 8 of the findings: 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 a 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 suggest that defendants and their counsel were the legal cause of the mistrial --

THE COURT: Right, and I -- I -- I underlined the suggest I --

MR. JIMMERSON: Right. So he's --

THE COURT: -- he wasn't making the ruling I got that.

MR. JIMMERSON: Right. Now, look -- but I asked you combine that with the other findings that follow at page 10, two pages later beginning with finding number 25 through 28. I think they're very helpful to you.

Twenty-five: The court makes a specific finding that under all of the circumstances -- well let me begin by 24 because all the circumstances is defined. So 24 the court talks about in the court's view even if well intended by the defendants to cross-examine when -- 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 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 defendant to the fiber of his existence in person as a judge. Mr. Brazille -- Ms. Brazille is an African-American, Ms. Steedum [phonetic] was an African-American upon information and belief, and it goes on. And the court says this was improper.

Now let's focus on 25 and -- through 28, the specific short findings. Number 25: The court makes a specific finding that under all of the circumstances, and the circumstances are interjection the issue of Mr. Landess allegedly being a racist. You see it right at line 3 and 4. So we know what the judge is referring to, he's referring to the statement defendants interjecting the issue of Mr. Landess allegedly being a racist (indiscernible) was improper.

So now 25 the court continues: The court makes a specific finding that under all the circumstances that was described here and above they do amount to such an overwhelming nature that reaching a fair result is impossible.

Twenty-six: The court further specifically finds that this err prevents the juror -- the jury from reaching a verdict that is fair and just under any circumstances.

Twenty-seven: The court further specifically finds that there is no curable instruction which could unring the bell that has been rung, especially as to these four jurors but really as to all 10 jurors. And Mr. Vogel and Ms. Gordon agree by their motion disqualify the judge that

Caucasians would be equally offended and find Mr. Landess to be a racist. So they understood the dynamic, incendiary bomb that was being introduced by them.

Twenty-eight --

THE COURT: Well that --

MR. JIMMERSON: -- the court finds that this decision was as result manifestly necessary under the meaning of the law, which is the case law that warrants the granting of a -- of a new trial.

THE COURT: No, I -- I understand the -- he's doing --

MR. JIMMERSON: All right.

THE COURT: -- these findings to -- to justify --

MR. JIMMERSON: Correct.

THE COURT: -- or to --

MR. JIMMERSON: So --

THE COURT: -- show his basis for the mistrial --

MR. JIMMERSON: Right. So now 25 --

THE COURT: -- because it's a very --

MS. GORDON: Mistrial.

MR. JIMMERSON: Yes. So now my -- my fifth --

THE COURT: Yes, I understand that.

MR. JIMMERSON: All right, my -- my fourth point then --

THE COURT: Okay.

MR. JIMMERSON: -- is on causation which has not been addressed orally, has been addressed extensively by us in our papers.

THE COURT: Causation of? Of --

MR. JIMMERSON: Did they cause the mistrial.

THE COURT: The legal cause of the --

MR. JIMMERSON: Did the actions the defendants -- the legal cause, that's right. And we speak to it in our briefs and the reply brief at page 24 and 25 has a lot of the good case law the case wanted to review that with the Court.

But as a part of that -- we analyze and provide to you the case law. There's two types of causation. One is if there's a one-person actor, you know? And the case law that's the standard, as we cite at page 23 of our reply brief filed September 9th, legal causation in the civil arena is the same as described in *Anthony Lee versus Anthony Lee R*. Proximate cause is defined as any cause which is natural and continuous sequence, unbroken by any efficient intervening cause; one, produces the injury complained of and two, without which the result would not have occurred, citing the *Goodrich* [phonetic] decision.

So both parties are taking the position by the briefing that it's the other party is the cause of the --

THE COURT: Correct.

MR. JIMMERSON: -- of the -- of the mistrial. With these findings, there's only one party that is legally the cause of this mistrial and that is the defendant through their actions you've seen here as found by Judge Bare in terms of specific findings.

I also concluded -- also provided to you the other branch of causation which you'll find at page 24 of our brief which has to do with well what happens if you have possible two actors who might be the

cause and the case law we cite is provided to you in *Wyeth versus Rowatt*, a Nevada Supreme Court decision, 126 Nevada 446, which says this: A -- when you have multiple actors, a substantial factor causation, when you have two possible parties who are perpetrating the cause, instruction is appropriate when an injury that has had two causes either of which operating alone would have been sufficient to cause the injury.

If you were to conclude that there were two possible actors, plaintiff or defendant, who to have possibly caused this mistrial, who operating alone would have caused it? What did the plaintiff do to cause anything? We didn't object to the admission of exhibit --

THE COURT: Right.

MR. JIMMERSON: Beginning, middle and end. We would never have introduced it to the jury, we would never had it pre-highlighted as the defendant did before they ever came to court that day -- by the way, the only page in the entire 79 pages of Exhibit 56 that were highlighted was that one page --

THE COURT: No, I --

MR. JIMMERSON: -- page 44 --

MS. GORDON: That -- that's not true.

MR. JIMMERSON: Well --

MS. GORDON: It's not.

MR. JIMMERSON: -- produce the document.

That was highlighted. It was the only one that was placed on the ELMO in front of Dariyanani --

MS. GORDON: That's not true.

MR. JIMMERSON: There -- that was the only one that was highlighted that was read to the jury --

MS. GORDON: It's not true.

MR. JIMMERSON: -- in that fashion and we did nothing to cause it to be shown to the jury. And I reviewed with you before the five separate elements. I won't repeat them all again, but they knew about it.

THE COURT: No, I -- I -- I know --

MR. JIMMERSON: They had highlighted it. They placed it on the ELMO. They placed on ELMO before they asked a question. Then they asked the question --

THE COURT: What -- what you're saying is she intentionally used it. She said yes, I intentionally used it --

MR. JIMMERSON: Right.

THE COURT: -- but that's not the --

MR. JIMMERSON: But that is the same as causing it. In other words, when you consider that coupled to the findings, that is what caused it when you ask us all --

THE COURT: It legally caused the mistrial. Correct.

MR. JIMMERSON: That is what caused the mistrial.

THE COURT: Okay, so now am I to hook up the legal cause of the mistrial means then that's the legal cause --

Hold on, let me finish.

MS. GORDON: Oh sorry.

THE COURT: -- the attorney's fees and costs?

MR. JIMMERSON: That's right.

THE COURT: That's what you're trying to hook up.

MR. JIMMERSON: That is what I'm --

THE COURT: I look at it as Ms. -- so if it's the legal cause, then I should fine attorney's fees.

MR. JIMMERSON: That's right. Now --

THE COURT: Okay.

MR. JIMMERSON: -- part of that analysis --

THE COURT: As opposed to the misconduct because --

MR. JIMMERSON: Part of that analysis exactly that word. You got it. You just nailed it.

THE COURT: I --

MR. JIMMERSON: Okay. Whether you use 18.070 Sub 3 that uses purposely caused --

THE COURT: Right, or --

MR. JIMMERSON: -- or you use *Lioce* and *Emerson* --

THE COURT: Right.

MR. JIMMERSON: -- you are on misconduct. That is what you would find --

THE COURT: Okay.

MR. JIMMERSON: -- to make an award of any amount, whether it's $5 or the amount that's being requested.

THE COURT: I -- okay.

MR. JIMMERSON: So we would urge upon you that based upon this record that it would be entirely appropriate indeed compelled

by preponderance of the evidence that the defendants and their actions are the legal cause or the cause --

THE COURT: Of the mistrial.

MR. JIMMERSON: -- of the mistrial for which attorney's fees and costs should be awarded.

THE COURT: Okay. Or under *Emerson* --

MR. JIMMERSON: There is no other alternative provided by the defendant. There -- the -- the concept that we didn't object and therefore we caused the judge to grant the mistrial isn't in a single finding, isn't in a single record. They can't point to a single case to suggest that. There's no basis for that.

So what they're now retreating to today that I hear is even a new wrinkle which is we didn't intend to cause it, we're not bad people, therefore you should let us escape from the costs that are going to destroy the plaintiff by virtue of having to rehire the experts, have them call back in not to mention all the loss of attorney's fees and it's simply a matter of an objective finding. This is not an easy motion.

THE COURT: Oh --

MR. JIMMERSON: It is not a happy motion. It is a motion that does have some significant dire consequences on both parties, but it's also a matter of sound public policy and what's appropriate and what's a natural legal causation --

THE COURT: Okay.

MR. JIMMERSON: -- and consequence of their actions.

THE COURT: Okay.

MR. JIMMERSON: And the fifth point I wanted to say result is there's one other tipoff here that -- that what I'm saying may be the way to go and that is this: You asked Ms. Gordon five times the same question, what was the purpose for you doing what you did, and she didn't answer any of the five times and then she went over and whispered to Mr. Vogel like he was going to provide the answer. When Ms. Gordon was in front of his jury, in front of Judge Bare, in front of us, what she had in mind is within her knowledge. She's chosen today to not give you a response to that question. Again, it's one factor.

THE COURT: No.

MR. JIMMERSON: It can be big or can be small, but it's something you need to consider because it gives an overall view especially for a judge like yourself as a successor judge as to what was going on, on August 5 of -- August 2, 2019 for you to consider. And that I think is significant for the Court to consider.

And then the last point I just simply conclude with this: Have they -- we talked about we heard them say scholarship. What scholarship? They haven't given you the name of a case --

MS. GORDON: I have no idea what he's talking about.

MR. JIMMERSON: They haven't given you name of a case --

THE COURT: They were talking about authorities.

MR. JIMMERSON: -- that would allow them -- that would allow them to do what they did.

When you go back to your chambers and you work with your staff and you think long and hard about this, what authority was I

provided by the defendant that would allow me to justify their behavior and to have them not pay the fees and costs that they've imposed upon the plaintiff? Not a single case they provided to you by case citation or like that would give that and that's because there is none.

It is the unique and despicable nature of race, national origin and religion that those subject matters by general are just verboten in the courtroom unless your case by claim or nature or defense requires that evidence. And that's why in the nature of a medical malpractice case, a professional negligence case, it is so off the wall, it is so outrageous that it causes a good judge, Judge Bare to say it's something from the very fiber of my heart that I can't agree with.

THE COURT: Okay.

MR. JIMMERSON: Thank you, Judge.

MS. GORDON: Briefly?

THE COURT: It's fine.

MS. GORDON: You -- you hit the nail on the head, Your Honor. They're conflating the legal cause of the mistrial with attorney's fees and costs and what's necessary for you to find that it's the -- the -- the language is right there in the statute --

THE COURT: Right, no --

MS. GORDON: -- purposely, purposely, purposely --

THE COURT: And that's why I started off my argument --

MS. GORDON: Absolutely.

THE COURT: -- there's two standards. I think that's why -- when I started today I --

MS. GORDON: You're exactly right. No --

THE COURT: -- Ms. Gordon, I'm very aware of the two standards. That's why -- I'm very aware of that, okay. At least I got it, right? I am aware of that.

MR. JIMMERSON: Sure do.

THE COURT: I know there's two standards and -- and --

MS. GORDON: To the extent that that, Your Honor, because I have a very clear memory of my cross-examination of Mr. Dariyanani, there were I can think top of my head at least two emails that were used from Exhibit 56 --

THE COURT: Okay.

MS. GORDON: -- before that. They absolutely were highlighted in preparation for my questioning --

THE COURT: Okay.

MS. GORDON: -- before my --

THE COURT: And honestly I don't take -- it was the only one --

MS. GORDON: Sure.

THE COURT: -- I -- that -- that --

MS. GORDON: And -- and plaintiff --

THE COURT: -- honestly has not a lot of significance. This email stands alone --

MS. GORDON: Sure.

THE COURT: -- in my mind as to whether you had the good faith belief or whether -- whether it comes under either of those

standards I -- I --

MS. GORDON: And the fact it was highlighted is --

THE COURT: -- I hear a lot of extraneous things -- highlight but it's what happened with this specific email is what --

MS. GORDON: Sure.

THE COURT: -- I'm focusing on. I understand that. And I know there's going to be different recollections. I mean I can't even remember what happened picking a jury yesterday very well so in some respects I -- I understand that completely. Does that make sense on --

MS. GORDON: It does but to the extent that they're --

THE COURT: -- and I understand when things gets --

MS. GORDON: -- trying to -- to highlight certain things that happened before or not in --

THE COURT: They're trying to make it more significant than you think it should be. I get it.

MS. GORDON: Absolutely. Yes.

THE COURT: I get it and I -- it's my job and hopefully I do it well is to try to put it in context and make it the significance it -- I get it, it stands alone. Whether it's 200 pages -- I get -- I -- I understand all that.

Okay. Here's what I'm going to do -- I'm taking that other one home over the weekend, but I think I know what -- I know time is of the essence and it took me a while to put it on because I had to read all -- all this I'm not -- and the other thing I want to tell you -- I know it's getting late I got a jury -- I have you on February 20th. I set another one that's going to be a firm trial setting so it can go if -- if my other one butts up --

have a little flexibility if I have to have three or four days in between. I'm trying to stack firm -- not stack. I'm trying to do firm trial settings that go. This one's going. I mean --

MR. JIMMERSON: Just to help you, it's February 10, Judge.

THE COURT: February 10th. Okay, hold on. I've got you February 2nd here.

THE CLERK: Yeah, it shows February 10th on my --

THE COURT: Okay, hold on, hold on. You're right. I'm sorry, Robocker's [phonetic] my -- is my -- I have too many cases you guys. It is February 10.

Okay, I started -- I'm starting Salazar versus Sportsman -- you heard them argue before about prior crimes and all that stuff, that's that case. That starts 1/27. They told me two weeks should be enough. I start getting a little discouraged because they're still fighting over how many crimes who -- how many people were -- so I just wanted you to know I have another firm trial setting so give me a little leeway. I'll let you know if it's two or three days -- but I'm -- I'm putting them right next to each other. I just wanted to let --

MR. JIMMERSON: Could we -- could both sides have the name so we could track it along with you?

THE COURT: Yes you can. It's Salazar, S-a-l-a-z-a-r, versus Sportsman and they -- I've given -- A728471, it's a death case of someone got stabbed at a --

MR. JIMMERSON: Thank you, Judge.

THE COURT: -- the Sportsman's place on -- so yeah, could

you -- so if it looks like where I'm at or call my court and so oh my gosh, it took them a week to pick a -- I think they'll be okay, but you know, everything goes longer than I think.

MR. JIMMERSON: Understood.

THE COURT: I just wanted to be on the record so you have that too. And when are those other motions set for you filed?

MR. JIMMERSON: Nothing's set that we saw. I don't know (indiscernible) can you tell us --

THE COURT: You said you filed it yesterday?

MS. GORDON: We did and -- and it's a request for a pretrial conference so it's just whether Your Honor sets it for a particular day and -- and it's all just focused on the binding effect of the pretrial and trial rulings.

THE COURT: Okay, well we probably need to do that.

MR. JIMMERSON: Agreed.

THE COURT: Let's -- let's do it before --

MR. JIMMERSON: How does mid-January look?

THE COURT: Let me get -- yeah -- let me -- do it before my January 27th because they've got to quit fighting about things. I've got to be down to the bottom line what those two can fight about on Salazar. It's just one of those -- it's just a, you know, it's one of those tough cases, you know, inadequate security and those are always fact tough.

Do you want to pick a date looking at my calendar or do you want to come in like -- you want to come into the court -- do you want it a hearing or do you want it to come into my -- do you want it on the -- tell

me what you want.

MS. GORDON: We just wanted to the best way that the Court wants to address that really important issue in terms of motions in limine, the extent to which the -- the prior orders of the court will be binding on -- on this --

THE COURT: Were there extensive -- see I don't know anything -- extensive motions in limine -- are there extensive -- okay. Have you all met to decide which one of those -- are there some that you don't want to go --

MR. JIMMERSON: We've not met but we can --

MR. VOGEL: We have not.

MR. JIMMERSON: -- certainly do that.

THE COURT: Okay. If you -- anything you can do I'm more than -- I -- I agree because I had a -- a trial that got reversed and the new trial judge did not go with the other trial judge's motions in limine, but we agreed on some and some we didn't so if you could do that to -- instead of just doing in a vacuum, that would help me out on -- on -- on what I would have to rule on since we get a pretty -- this is a quick trial date -- I'm in trial right -- yeah is quick trial date considering my calendar. If you could do that, I -- I would be glad to then say okay, here's where we're at and then if you -- because then I -- my decision on that would decide if you have to refile your motions in limine, right, and then --

MR. JAMES JIMMERSON: Correct, Your Honor.

THE COURT: -- and I'd have to read them and start over again.

MR. VOGEL: Right.

MS. GORDON: And that's why we --

THE COURT: I don't want to say first batch but over again.

MR. JIMMERSON: Would --

THE COURT: So maybe we should do --

MR. JIMMERSON: How does -- how does week of the 13th look to you all?

[Colloquy between counsel]

THE COURT: What? You guys come up with a date just --

[Colloquy between counsel]

MR. JAMES JIMMERSON: Your Honor?

[Colloquy between the Court and the clerk]

THE COURT: Yes.

MR. JAMES JIMMERSON: We have motions limine due the 27th of this month under the 45-day rule --

THE COURT: Okay.

MR. JAMES JIMMERSON: -- so either have a conference before then to make -- to meet that or --

THE COURT: Or I'll fix the deadline.

MR. JAMES JIMMERSON: If -- if the Court would extend the deadline, I --

THE COURT: I will. It just depends on how many -- I don't know how many you had before, I don't know.

MR. JIMMERSON: We'll be able to meet though before the 27th. That won't be --

THE COURT: Of December. You two can meet --

MR. JIMMERSON: Right.

THE COURT: -- because that's fine and then -- then I'll extend if you decide there's only a few -- I'll -- I don't mind doing motions in limine later than the date is what you're saying. I don't hold people to those dates if it helps work on the trial.

MR. JAMES JIMMERSON: Would it -- would it make sense then, Your Honor, for us to put a status check in one or two weeks --

THE COURT: Sure.

MR. JAMES JIMMERSON: -- so that we can report to the Court exactly --

THE COURT: I think that would be great.

MS. GORDON: Yeah.

MR. JAMES JIMMERSON: -- what if any agreement has been reached and then a briefing schedule if necessary for any --

THE COURT: I think that's perfect so let's do a -- where are on status check?

THE CLERK: Yeah (indiscernible) the 17th --

THE COURT: How about December 17th? What is today, 5th? Yeah, today's the -- can you do a status check December 17th at 9 a.m.?

[Colloquy between the Court and the clerk]

MR. JAMES JIMMERSON: Yes, Your Honor, we'll -- we'll be in front of your --

THE COURT: Or anything --

MR. JAMES JIMMERSON: -- we'll be in front of this Court on a different matter --

THE COURT: Okay.

MR. JAMES JIMMERSON: -- on that date so we'll be in front of --

THE COURT: Okay.

MR. JAMES JIMMERSON: -- we'll be in front of you anyway so --

THE COURT: Okay, that's fine. Can you do -- Mr. Vogel, Ms. Gordon, can you do the 17th?

MR. VOGEL: I will be in a mediation but can you?

MS. GORDON: I can -- I can be here.

THE COURT: Okay. Let's do that. I -- I like the idea of -- better than any other conferences because you keep me informed, like that's why I got into these discovery issues on the other one because I wanted to keep it going quicker --

MS. GORDON: And better to know as early as --

THE COURT: Yes.

MS. GORDON: -- possible what's going to happen.

THE COURT: Yes. So it's realistic --

MR. JIMMERSON: What -- what time would you say, Your Honor?

MR. JAMES JIMMERSON: Nine I think.

MS. GORDON: Nine.

THE COURT: Nine o'clock.

MR. JIMMERSON: Very good.

THE COURT: And I'll do it for -- so can we get it on the calendar? Okay. Yes, absolutely.

MR. VOGEL: Thank you, Your Honor.

MR. JIMMERSON: All right, thank you Judge.

THE COURT: And here's what I'm going to do, I'm going to put this -- what did I just put the other one? I'm --

THE CLERK: On Monday.

THE COURT: On a -- what I do is instead of -- I just put it on my chambers calendar for a decision. So I'll go ahead and put it -- I'm going to do that other -- I'm going to do the Arbuckle [phonetic] thing this weekend to go back and look at some more evidence.

So I can probably do it because I -- put it on for whatever Monday is I'll take this too.

THE CLERK: Okay.

THE COURT: I know what I -- I know what I want to look -- I mean I -- I do things quicker because I don't want to reinvent the wheel here and I've spent too much time but I -- I will -- what I will do is I will do a minute order by Monday.

MS. GORDON: Okay.

THE COURT: And I'll make sure I look at -- I'm pretty such what I want but I wanted to make sure.

MR. JIMMERSON: All right.

THE COURT: On these like this I like to look one more time to make sure I'm -- I want to go where I want to go and --

MR. JIMMERSON: On behalf of Mr. Landess and our team, thank you.

THE COURT: I appreciate everybody's briefing I'm -- from the bottom my heart I'm sorry this happened, but I look forward to a trial with you does that make sense?

MR. JAMES JIMMERSON: Thank --

THE COURT: And -- and -- and getting things worked out. Okay?

MR. JIMMERSON: Thank you, Judge.

MS. GORDON: Thank you.

MR. VOGEL: Thank you, Your Honor.

THE COURT: You're welcome.

MR. JAMES JIMMERSON: Thank you very much, Your Honor.

THE COURT: Is that Mr. Landess?

THE PLAINTIFF: Yes.

MR. JIMMERSON: It is.

THE COURT: I thought so. We had done -- I don't know years ago we had some kind of case I don't know what it was --

THE PLAINTIFF: It's been quite a while.

THE COURT: It's been a long time.

THE PLAINTIFF: But --

THE COURT: I'm -- I'm a lot older but I remember I was a young attorney and you were --

THE PLAINTIFF: And --

THE COURT: -- very smart and very gracious so good luck.

THE PLAINTIFF: Thank you. I look forward to working with you.

THE COURT: Okay, and I -- I admire all you counsel. I do. I hope you know that. I think you know that.

MR. JIMMERSON: Counsel, thank you so much.

MS. GORDON: Thanks you guys.

MR. JAMES JIMMERSON: Thank you, Your Honor.

[Hearing concluded at 1:03 p.m.]

* * * * * *

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

Tracy A. Gegenheimer, CER-282, CET-282
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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

KEVIN PAUL DEBIPARSHAD, M.D., an individual; KEVIN P. DEBIPARSHAD PLLC, a Nevada professional limited liability company doing business as SYNERGY SPINE AND ORTHOPEDICS; DEBIPARSHAD PROFESSIONAL SERVICES, LLC, a Nevada professional limited liability company doing business as SYNERGY SPINE AND ORTHOPEDICS; ALLEGIANT INSTITUTE INC., a Nevada domestic professional corporation doing business as ALLEGIANT SPINE INSTITUTE; JASWINDER S. GROVER, M.D., an individual; JASWINDER S. GROVER, M.D. Ltd. doing business as NEVADA SPINE CLINIC; DOES 1-X, inclusive; and ROE CORPORATIONS I-X, inclusive,

Defendants.

CASE NO. A-18-776896-C
Dept. No. 4

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

HEARING REQUESTED

Date of Hearing:

Time of Hearing::

/ / /

COME NOW Defendants, by and through their counsel of record, S. Brent Vogel and Katherine J. Gordon, and hereby move under N.R.C.P. 60(b) for relief from the Court's Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial filed on September 9, 2019.

This Motion is made and based upon the papers and pleadings on file in this case, the Memorandum of Points and Authorities, the attached exhibits submitted herewith, and any argument at the time of hearing in this matter.

DATED this 28th day of February, 2020

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s/ S. Brent Vogel*

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is a medical malpractice action in which Plaintiff alleges Defendant Dr. Debiparshad failed to properly reduce a tibia fracture during surgery on October 10, 2017. The case was rushed to trial commencing on July 22, 2019, following only six (6) months of discovery, pursuant to Plaintiff's Preferential Trial Setting. Following two weeks of trial, Judge Bare granted Plaintiff's request for a mistrial.

During trial, Judge Bare made comments that exhibited bias in favor of Plaintiff's counsel, James Jimmerson, Esq. Specifically, on Friday August 2, 2019 (trial day 10), during discussions regarding evidence contained in an exhibit offered by Plaintiff that was ultimately damaging to Plaintiff's case, but had been stipulated into evidence without objection, Judge Bare stated the following on the record:

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

> ***of lawyers that I've dealt with in my life.*** I've got a lot of respect for you. So I say that now because I think what you're really saying doesn't surprise me. And I think what you're really saying is -- and again, interrupt me anytime if you want -- is, well, in a multi-page exhibit, we just didn't see it.[1]

The following Sunday at 10:02 p.m., Plaintiff filed a Motion for Mistrial. The next court day, Judge Bare orally granted Plaintiff's Motion without allowing Defendants an opportunity to file opposing Points and Authorities. The jury was then discharged, and Judge Bare ordered Plaintiff's counsel to draft the Order granting mistrial. Defendants later successfully moved to disqualify Judge Bare from the case.[2] On September 9, 2019, after Defendants moved to disqualify him but before Judge Wiese rendered his decision on disqualification, Judge Bare filed without revision the draft Order granting mistrial, which Plaintiff had submitted to the Court over Defendants' objection.

Defendants now move for relief from Judge Bare's Order granting mistrial. The Order is void given that it was rendered 7 days after Defendants moved to disqualify Judge Bare. Further, the Order is riddled with inaccuracies and misstatements. Defendants acknowledge that much of the practical effect of the void Order cannot be remedied in this case; the jury cannot be recalled and trial resumed. However, the effect of the Order continues to be felt in other ways; including without limitation, the extent to which Plaintiff continues to rely on—and cite to—the misstatements contained in the Order in furtherance of his position on other issues, such as Plaintiff's request for attorney's fees and costs and upcoming motions *in limine*. At a minimum, Defendants respectfully request this Court prohibit Plaintiff from using the Order's self-serving

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

[2] Defendants filed their Motion to Disqualify on August 23, 2019. Plaintiff opposed that Motion on August 30, 2019, and Defendants replied on September 3, 2019. Judge Wiese heard the matter on September 4, 2019 and filed his order disqualifying Judge Bare on September 16, 2019.

language in support of future proceedings leading to trial.

II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

During trial, Plaintiff called witness Johnathan Dariyanani, the President of Plaintiff's former employer Cognotion, Inc. Mr. Dariyanani provided glowing testimony regarding Plaintiff, including improper character evidence. More particularly, Mr. Dariyanani testified that Plaintiff was a "beautiful person" who could be "trusted with bags of money."[3] During Defendants' cross examination of Mr. Dariyanani, and in direct response to his improper character evidence, Defendants utilized an email written by Plaintiff and sent to Mr. Dariyanani in 2016. Plaintiff had titled the email "Burning Embers".

The "Burning Embers" email was initially disclosed by Plaintiff within his 12th N.R.C.P. 16.1 Supplement along with other emails between Plaintiff and employees of Cognotion. (Bates stamped P00440-453 and P00479-513). The emails were disclosed again by Plaintiff in his Pre-Trial Disclosures, and for a third time as an identified trial exhibit (marked by Plaintiff as Plaintiff's proposed trial exhibit No. 56). Plaintiff's proposed Exhibit 56 consisted of 21 emails, and was a total of 49 pages. Only 24 of the 49 pages included substantive text from emails. Not only did Plaintiff disclose the emails in Exhibit 56, including the "Burning Embers" email on several occasions, he did not file a motion in limine, or otherwise request that the Court preclude or limit the use of any of the emails during trial.

Defendants utilized several emails contained in Plaintiff's proposed Exhibit 56 during cross examination of Mr. Dariyanani. Before using the emails, Defendants moved to admit Plaintiff's proposed Exhibit 56 into evidence. Plaintiff stipulated to its admission.[4] Defendants introduced the "Burning Embers" email as rebuttal character evidence in direct response to Mr. Dariyanani's testimony that Plaintiff was a beautiful and trustworthy person. The email began: "Lying in bed this morning I rewound my life…" It continued with Plaintiff (70 years old at the

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[3] *See* Trial Transcript, Day 11, attached hereto as Exhibit "B," pp. 31 and 55,

[4] Exhibit "A," p. 144.

time) providing a summary of past jobs and the significance of each. In the second and third paragraphs of the "Burning Embers" email, Plaintiff wrote:

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

Plaintiff did not object to Defendants' use of the "Burning Embers" email during the cross examination of Mr. Dariyanani. Plaintiff conducted Mr. Dariyanani's re-direct examination and attempted rehabilitation. Mr. Dariyanani was then excused and Judge Bare called a break for the jury. Once the jury was outside the courtroom, Plaintiff's counsel requested that the Court strike the testimony regarding the "Burning Embers" email. Judge Bare denied the request.[5]

However, Judge Bare was clearly affected by the potential damage to Plaintiff's case

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[5] *Id.*, p. 187.

caused by the opinions and admissions contained in Plaintiff's "Burning Embers" email. Although there were no pending objections or further requests for relief regarding the email, Judge Bare continually raised the issue of the potentially damaging email on his own through the end of the day. First, Judge Bare offered—sua sponte—excuses for Plaintiff counsel having "missed" the existence of the "Burning Embers" and corresponding failures of Plaintiff to timely object to its use.[6] Judge Bare then interjected gratuitous compliments about Plaintiff's counsel—including that Plaintiff's counsel tells only the "gospel truth" and that he was in Judge Bare's personal "hall of fame or Mount Rushmore" of attorneys.[7] He also declared himself "trouble[d]" and "bother[ed]" that use of the unfavorable emails could influence the jury and potentially lead to nullification.[8]

Judge Bare's final act in support of Plaintiff that day was to request an impromptu conference with all counsel to take place in an empty jury room. During the conference, Judge Bare strongly suggested the parties consider settling the matter. He further provided his unsolicited opinion that the jury would likely find in favor of Plaintiff. Counsel agreed to speak to their clients about Judge Bare's opinions and return on Monday for the continuation of trial.

On Sunday, August 4, 2019, at 10:02 p.m., Plaintiff filed a Motion for Mistrial and Request for Attorney's Fees and Costs based on Defendants' use of the stipulated-into-evidence "Burning Embers" email as rebuttal character evidence during the cross examination of Mr. Dariyanani. Neither Defendants nor Judge Bare saw the Motion until the following morning when trial was set to resume at 9:00 a.m. Nevertheless, Judge Bare allowed no time for Defendants to file opposing Points and Authorities and, instead, entertained argument and granted the Motion that morning.[9] He ordered Plaintiff to draft the Order granting the Motion.[10] Judge Bare stated he required further briefing on the issue of Plaintiff's requested Attorney's Fees and Costs and set a

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[6] *Id.*, p. 179.
[7] *Id.*, pp. 178-79.
[8] *Id.*, pp. 183-84.
[9] *See* Exhibit "B," p. 47.
[10] *Id.*, p. 70.

hearing for September 10, 2019.[11]

On August 23, Defendants filed a Motion to Disqualify Judge Bare, citing the multiple irregularities in his rulings, his flawed and improper grant of mistrial, and his clearly biased statements favoring Plaintiff's counsel. Defendants argued that Judge Bare's actions rendered a fair and impartial trial impossible, thus warranting disqualification. The Motion was transferred to Judge Wiese for determination who scheduled a hearing on the Motion for September 4, 2019.

More than a week after Defendants filed their Motion to Disqualify Judge Bare, Plaintiff forwarded a proposed draft Order granting the mistrial to Defendants' counsel for review. The proposed Order, which was 19 pages long and consisted of 32 separate paragraphs of proffered "findings," as well as 28 paragraphs of "conclusions of law," was riddled with inaccuracies and misstatements. One glaring area of inaccuracy and over-statement are paragraphs 18-20,[12] which

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[11] *Id.*, p. 73.

[12] *See* Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial, attached hereto as Exhibit "C."

Plaintiff, through Judge Bare, made the following statements:

> 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.
>
> 19. Defendants took advantage of that mistake . . . 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 not contemporaneous objection from Plaintiff, nor sua sponte interjection from the Court, that could remedy it . . . .
>
> 20. 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.

essentially provide a basis for the Court to award Plaintiff his requested attorney's fees and costs, despite the fact Judge Bare specifically declined to rule on the fees and costs, and instead requested briefing and set a new hearing date. For these reasons, coupled with the fact Defendants had already filed the Motion for Disqualification, defense counsel declined to approve the draft order.

On September 4, 2019 Plaintiff submitted his draft Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial to Judge Bare. On September 9, 2019, Judge Bare signed Plaintiff's proposed draft, and it was filed on the same day.[13] **Judge Bare signed the proposed Order in disregard of the blatant and over-reaching misstatements contained therein, and despite the pending Motion to Disqualify him from the proceedings**.[14]

One week later, on September 16, Judge Wiese granted Defendants' Motion to Disqualify Judge Bare. In his Order, Judge Wiese noted that he was "not called upon to determine whether each of [Judge Bare's] rulings was correct, or even supported by evidence or foundation" but rather to "address whether Judge Bare's actions evidenced an actual or implied bias in favor of, or against either party."[15] Judge Wiese concluded that Judge Bare's laudatory statements about Mr. Jimmerson demonstrated impressions that had been formed not just during trial or in his capacity as a judge; rather, they came from "extrajudicial source[s]." He further noted that Judge Bare's statements regarding Mr. Jimmerson were "not limited to compliments regarding professionalism."[16] Ultimately, Judge Wiese stated that "to tell the attorneys that the Judge is going to believe the words of one attorney over another, because 'whatever word you ever said to me in any context has always been the gospel truth,' results in a 'reasonable person' believing that the Judge has a bias in favor of that attorney."[17] He went on to conclude that "[t]he statements that

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[13] *See Id.*

[14] Judge Bare was clearly aware of the pending Motion to Disqualify because he filed an Affidavit in Response to the Motion on September 3, 2019, and an Amended Affidavit the next day.

[15] Order, attached hereto as Exhibit "D," p. 18.

[16] *Id.*, pp. 30-31.

[17] *Id.*, p. 31.

Judge Bare made . . . on Trial Day 10 . . . seemed to indicate a bias in favor of Mr. Jimmerson" and to rule that, consequently, Judge Bare must be disqualified from the case.[18]

The case was subsequently transferred to this Honorable Court. Following the transfer, Plaintiff has employed the self-serving language contained in Judge Bare's post-Motion to Disqualify Order at every opportunity. Not surprisingly, Plaintiff highlighted multiple portions of the Order before this Court during the December 5, 2019 hearing on the parties' competing Motions for Attorney's Fees and Costs. Plaintiff cited those "findings" which—if taken as true—could provide a basis for Plaintiff's requested fees and costs.

The obvious problem with the highlighted portions of the Order is the fact Judge Bare never made those particular findings (to the contrary, the Judge stated a need for briefing on the issue of fees and costs and scheduled a later court hearing to address the matter). Plaintiff included the over-reaching language in the Order solely for later use during the argument on requested fees and costs, which he did. Plaintiff further felt confident that Judge Bare would sign the inflated Order in light of Defendants' recently filed Motion to Disqualify Judge Bare.

Curiously, on September 16, 2019, Judge Bare *did* remove from his calendar the hearing on the parties' competing Motions for Attorney Fees and Costs. Judge Bare cited Defendants' pending Motion to Disqualify as the reason for removal, thus displaying an appreciation for potential jurisdictional changes and concomitant need to cease signing and filing Orders.[19] It remains unknown why Judge Bare did not apply this same rationale and caution before signing Plaintiff's inflated proposed Order granting the mistrial (which was submitted for Judge Bare's review *after* Defendants filed their Motion to Disqualify, and was signed *after* Judge Wiese's hearing on the Motion to Disqualify).

The extent to which Plaintiff will continue relying on the language contained in Judge Bare's multi-page Order is only now becoming clear. Plaintiff has already demonstrated to this

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[18] *Id.*, pp. 31-32.

[19] *See* Minute Order, September 16, 2019, attached hereto as Exhibit "E."

Court and Defendants an unfettered willingness to cite portions of the subject Order as early and often as possible. The Order is nothing more than a lengthy wish list of Plaintiff's positions regarding the mistrial, nearly all of which was never addressed by Judge Bare. Plaintiff took clear advantage of the timeframe during which Judge Bare was asked to review the Order, knowing he was aware of the pending Motion to Disqualify.

As set forth below, the circumstances surrounding Plaintiff's proposed Order—most importantly the intervening disqualification of Judge Bare—render the Order void and, at a minimum, Plaintiff should be precluded from relying on the "findings of fact" therein in support of future pre-trial and trial motion work.

III. LEGAL ARGUMENT

A. Applicable Law

1. *Nevada Rule of Civil Procedure 60*

Nevada Rule of Civil Procedure 60(b) governs occasions when a party may seek relief from a final judgment, order, or proceeding. The Rule provides:

> the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

A motion under N.R.C.P. 60(b) must be brought "within a reasonable time — and for reasons (1), (2), and (3) no more than 6 months after the date of the proceeding or the date of

service of written notice of entry of the judgment or order, whichever date is later." N.R.C.P. 60(c)(1). This motion is timely filed per the rule.

1. Effect of Disqualification on Subsequent Proceedings

A judge has a duty to uphold and apply the law, and to perform judicial duties fairly and impartially. N.C.J.C. 2.2 Indeed, the fair and impartial exercise of justice is a fundamental requirement, without which no legal matter should proceed. Further, "[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety." N.C.J.C. 1.2. To that end, a judge shall not act in an action when either actual or implied bias exists. N.R.S. 1.230(1-2).

Moreover, "[u]nder Rule 2.11(A)(1) of the NCJC, judicial disqualification is required in any proceeding in which the judge's impartiality might reasonably be questioned, including when the judge has a personal bias or prejudice concerning a party." *Mkhitaryan v. Eighth Judicial Dist. Court*, 2016 Nev. Unpub. LEXIS 859, *2-3, 385 P.3d 48 (citing N.C.J.C. 2.11) (internal quotation marks omitted).

> A challenge to an assigned judge for want of impartiality presents an issue of constitutional dimension which must be resolved and the rule memorialized of record . . . nor is a judge free to proceed with the case until the challenge stands overruled of record following a judicial inquiry into the issue. . . .

Miller Dollarhide, P.C. v. Tal, 163 P.3d 548, 552 (Okla. 2007). Under N.R.S. 1.235(1), a party seeking disqualification must file an affidavit specifying the facts upon which the disqualification is sought, and the affidavit must be accompanied by a certificate of the attorney of record that the affidavit is filed in good faith and not interposed for delay. Then, "[e]xcept as otherwise provided . . . the judge against whom an affidavit alleging bias or prejudice is filed *shall proceed no further with the matter* . . . " except to "immediately transfer the case to another department of the court . . . ." N.R.S. 1.235(5) (emphasis added). "The authorities are uniform,

indeed it is black letter law that a disqualified judge may not issue any orders or rulings other than of a 'housekeeping' nature in a case in which he or she is disqualified." *Whitehead v. Nevada Comm'n on Judicial Discipline*, 920 P.2d 491, 503 1996 Nev. LEXIS 1545, *43.

What is more, "[t]hat the actions of a district judge, disqualified by statute, are not voidable merely, but void, has long been the rule in this state." *Hoff v. Eighth Judicial Dist. Court*, 79 Nev. 108, 110, 378 P.2d 977, 978 (1963) (citing *Frevert v. Swift*, 19 Nev. 363, 11 P. 273 (1886); *see Rossco Holdings, Inc. v. Bank of Am.*, 58 Cal. Rptr. 3d 141, 148-49 (Cal. Ct. App. 2007) ("Orders made by a disqualified judge are void."); *see also People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd.*, 111 Nev. 431, 439, 894 P.2d 337, 342 (1995) (overruled on other grounds in *Towbin Dodge, L.L.C. v. Eighth Judicial Dist.*, 121 Nev. 251, 112 P.3d 1063 (2005)) (granting rehearing and withdrawing its prior opinion after concluding that it must disqualify a judge who sat on the Court in place of a missing Justice when it was determined the visiting judge sat on the board or an organization that had an interest in the case.) "[D]isqualification occurs when the facts creating disqualification arise, not when the disqualification is established." *Christie v. City of El Centro*, 37 Cal. Rptr. 3d 718, 725 (Cal. Ct. App 2006). "[I]t is the fact of disqualification that controls, not subsequent judicial action on that disqualification." *Id.*

B. Judge Bare's Order Granting Mistrial is Void and Must Be Set Aside

Defendants are entitled to relief from Judge Bare's Order granting mistrial under N.R.C.P. 60(b)(6)'s catch-all provision because the Order was void when Judge Bare filed it. First, Judge Bare made his glowing statements praising Plaintiff's counsel on August 2, 2019, day 10 of the original trial. Of Judge Bare's many actions showing his partiality in favor of Plaintiffs, both before and during trial, it was those admiring statements that Judge Wiese eventually concluded constituted disqualifying acts. From the moment Judge Bare made those statements, as noted in *Christie v. City of El Centro*, disqualification occurred. Thus, Judge Bare's subsequent actions were void. Judge Bare ruled on Plaintiff's Motion on August 5, 2019, three days after making the disqualifying statements. Consequently, the Order was void, both when the ruling was made and

when the Order was eventually filed more than a month later.

But even if this Court should decline to follow guidance from the California court, the Order granting mistrial was still void. Nevada law clearly directs that, once Defendants filed their Motion to disqualify him, Judge Bare must proceed no further with the matter except to immediately transfer the case to another department. N.R.S. 1.235(5). He was no longer empowered to perform any judicial functions. But even in the face of that clear prohibition, Judge Bare accepted, signed and filed Plaintiff's self-serving Order. That action was performed contrary to Nevada law, which voids the Order; any and all subsequent use of the void Order is likewise contrary to law.

Moreover, Judge Bare's Order cannot be interpreted as a "housekeeping" matter as allowed by the *Whitehead* Court. Reversing the grant of the Mistrial is not possible. Once Judge Bare dismissed the jury, over Defendants' objections and offers of more reasonable alternative courses of action, the trial was over. The multi-page Order, with 60 paragraphs serving to incorporate every theory espoused by Plaintiff regarding the mistrial and its subsequent effect on Plaintiff's request for fees and costs clearly exceeds the boundaries of a simple housekeeping Order. As a result, it is void.

The circumstances of this case throw the wisdom of N.R.S. 1.235(5) into sharp relief and demonstrate the precise reason a disqualified judge's orders are void. A judge under scrutiny for possible bias or prejudice should not be given the opportunity to effectuate an overly damaging or harmful Order against the party seeking disqualification. Accordingly, relief from that Order is justified and required in this matter under N.R.C.P. 60(b)(6) and the case law.

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IV. CONCLUSION

For the reasons set forth herein, Defendants request this Court grant relief from Judge Bare's Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial and prohibit Plaintiff from further use of language from the Order in subsequent proceedings in this matter.

DATED this 28th day of February, 2020

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s/ S. Brent Vogel*

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Lewis Brisbois Bisgaard & Smith LLP and that on this 28th day of February, 2020, a true and correct copy of **DEFENDANTS' MOTION FOR RELIEF FROM FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFF'S MOTION FOR A MISTRIAL** was served electronically using the Odyssey File and Serve system and serving all parties with an email-address on record, who have agreed to receive electronic service in this action.

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By /s/ *Johana Whitbeck*
Johana Whitbeck, an Employee of
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Exhibit A

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

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

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

BEFORE THE HONORABLE ROB BARE
DISTRICT COURT JUDGE
FRIDAY, AUGUST 2, 2019

RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 10

APPEARANCES:

For the Plaintiff:	MARTIN A. LITTLE, ESQ. JAMES J. JIMMERSON, ESQ.
For Defendant Jaswinder S. Grover, MD Ltd:	STEPHEN B. VOGEL, ESQ. KATHERINE J. GORDON, ESQ.

RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER

Case Number: A-18-776896-C

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

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

Q Okay.

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

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

A Uh-huh.

Q -- Plaintiff's Proposed Exhibit 56.

So you know what? Let me --

THE COURT: All right. Is 56 in those?

THE CLERK: 56 is not in the book.

THE COURT: All right. Not admitted.

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

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

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

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

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

MS. GORDON: Can I --

MR. JIMMERSON: Sorry.

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

MR. JIMMERSON: No objection, Judge.

Landess has a good character. And you know, no objection was made by that, by the way, by the Defense when he's offering these good character traits.

And so now it's the flow of things, we now have an admitted exhibit that's there, not referenced yet. Now we have a reason to bring up character-type traits, because the Plaintiff has put it in issue through Dariyanani.

We then have, of course, that moment in time where Ms. Gordon puts on the ELMO and highlights with a yellow highlighter this paragraph about--

MR. JIMMERSON: That I didn't even notice until she just put it up there. What was I going to do, object to an admitted document, suggesting that I'm afraid of it. I was outraged when I read it. I just was -- I was blown away. I was stunned actually.

THE COURT: Okay. Well, that gives me further context, as to where I'm going with this at this point. And I've got to say, Mr. Jimmerson. This comes to exactly what I would expect from you, and if I say something you don't want me to say, then you stop me. Okay. But what I would expect from you, based upon all my dealings with you over 25 years, and all the time I've been a judge too, is frank candor -- just absolute frank candor with me as an individual and a judge. It's always been that way. You know, whatever word you ever said to me in any context has always been the gospel truth.

I mean, without, you know, calling my colleagues, lawyers that worked with me at the bar, or my wife as testimonial witnesses, I've

told all those people many times about the level of respect and admiration I have for you. You know, you're in -- to me, you're in the, sort of, the hall of fame, or the Mount Rushmore, you know, of lawyers that I've dealt with in my life. I've got a lot of respect for you. So I say that now because I think what you're really saying doesn't surprise me. And I think what you're really saying is -- and again, interrupt me anytime if you want -- is, well, in a multi-page exhibit, we just didn't see it.

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

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

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

THE COURT: I know. You did say that.

Okay. So --

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

MS. GORDON: Your Honor, I would --

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

MS. GORDON: That's smearing.

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

MS. GORDON: And truly --

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

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

unethical thing -- okay -- to go that far, but now I have to deal with what did happen under the circumstances. Okay.

MS. GORDON: I'm just asking the Court -- I understand that, and I appreciate it. I'm just wondering if perhaps we could that and talk about what happened without talking about how Mr. Jimmerson somehow is above reproach, which clearly is making some kind of distinction about the party who used the document. I don't think --

THE COURT: Well --

MS. GORDON: -- that's necessary.

THE COURT: -- I mentioned those -- you're criticizing what I said. I mentioned it for a reason that I think made sense and that is, I was about to ready to say that I had drawn a conclusion that Mr. Jimmerson just didn't have it in his mind that this item was in one of the 122 pages. He might not have seen it, and that's why I mentioned my thoughts about Mr. Jimmerson in that context. Okay.

Do you have a problem with what I said about him?

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

THE COURT: Okay. Well, I mean, if I had dealt with you for 25 years, my guess is, consistent with what I've seen with you, I mean, you really do care about what you're doing. It's evident in anybody who watches you as an attorney, you know.

MS. GORDON: I think and I just wouldn't do something

underhanded like that.

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

MS. GORDON: It just, it was admitted. It wasn't objected to. It was their exhibit and I used it.

THE COURT: All right. So one of the other reasons I brought all that up was, is I look at the pretrial motion practice, the motion in limine practice, that the Plaintiffs asked me to preclude Mr. Landess's gambling history. Remember the $400,000 marker that he had? His bankruptcies, and this other litigation that he was in. They did not ask to preclude this item in question now, so that's further, I think, evidence of the fact that they just missed it. What else can I tell you?

So the issue for the Court is this: in a situation where the Plaintiffs, in good faith, miss something like that, but the Defense didn't obviously, then the Defense uses it, I don't want to get into whether it was good or bad faith either, because I don't feel -- I don't feel that you did something with an intent that was bad in an ethical, you can't do this as a lawyer sense.

I think what I think is that you felt as though you had a bit of a bomb here, because you had known this was in the exhibit, and you dropped it at an appropriate time, in your view. That all happened. Okay. For me though, as a judge, now presiding over a trial with, you know, two black jurors, and I'm using Mr. Landess's word, that's what he said in the email describing African-Americans -- and I don't know if the other item -- the Mexican item would be relevant to the ethnicity of other jurors, because I'm not good at that kind thing.

one of those 200 judges are going to give the model answer. So I need help on this. I'm just telling you, I have no idea what to do, but I'm sharing with you that, given the jury that we have, and even if it wasn't the jury we have, that's not so significant to me. Although, I have -- I think it does have a higher level of significance when you have people that fall into these -- into what is clearly, at least, you know, without any context being given to it, it's a racial comment.

So now you have jurors who could draw a conclusion that he's a racist. And that's why I -- and I'm the one that mentioned it, nobody else did, that's okay -- I mentioned this idea of jury nullification. I realized that that's a concept that usually comes up after a verdict. And it's, you know, a basis for a new trial. You know, if it happens in a criminal case, well, so be it. You cannot do anything about that. But if it happens in a civil case -- because of double jeopardy -- but if it happens in a civil case, it's grounds for a new trial. I just think of -- that philosophy comes to mind here.

Do we have a situation that's curable? Should I do anything? Or should I do something? I mean, and it -- you know, without the benefit of further briefing and all that, like I say, most of me, as I sit here, thinks I need to do something. I denied a motion to strike it. I don't know what to do about it. I mean, I -- the --

MR. JIMMERSON: Well, why don't we give ourselves the weekend to think about? I did want to mention though that the Defendant's also put, in front of Mark Mills, a PT record, where he said he'd fallen twice, and then ripped it off. And just by his quick brain, he

Exhibit B

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

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

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

BEFORE THE HONORABLE ROB BARE
DISTRICT COURT JUDGE
MONDAY, AUGUST 5, 2019

RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 11

APPEARANCES:

For the Plaintiff:	MARTIN A. LITTLE, ESQ. JAMES J. JIMMERSON, ESQ.
For Defendant Jaswinder S. Grover, MD Ltd:	STEPHEN B. VOGEL, ESQ. KATHERINE J. GORDON, ESQ.

RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER

Case Number: A-18-776896-C

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

MS. GORDON: Okay.

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

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

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

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

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

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

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

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

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

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

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

Stidhum put their heads in the sand and didn't watch any news, or have a cell phone, or a have a friend, or have a family, or go to church, or do anything, that this is out there to just aggravate what we already have as my view being a big problem.

Bottom line is, how in the world can we expect this jury, which is the verse -- and by the way, none of those people are alternates, because we decided before trial that seats 9 and 10 would be the alternates, so they're all four deliberating jurors -- how in the world can we reasonably think that they're going to give a fair verdict and not base the whole decision, at least in part, on the issue of whether Mr. Landess is a racist.

That's the basis for the decision. The Plaintiffs can draft the order. And so concludes the most difficult thing I've done since I've been here.

Anything else from either side?

MR. JIMMERSON: Yes, Your Honor. Relative to the briefing on the cost matter, in light of this, I don't see a need for an expeditious order, or shortening time. Fourteen days from today would be an approximately time for the Defense to file their opposition, and then we would file the reply in the normal course, and you would give us a hearing date sometime about 30 days from now.

THE COURT: Well, okay. Mr. Vogel, how much time do you want to respond to this pleading?

MR. VOGEL: That's fine. Two weeks is fine. I appreciate it.

THE COURT: Okay. Two weeks will be?

MR. VOGEL: The 3rd.

THE CLERK: September 3rd.

THE COURT: After September 3rd.

THE CLERK: Okay. So we've got -- you can either do the afternoon of September 10th so 1 or 1:30 start time, or we've got the 11th we can either do a 9 to noon or an afternoon setting. Those are the two days we have available.

THE COURT: Okay. September 10th or 11th work?

MR. JIMMERSON: What day of the week is the 10th, please?

THE CLERK: Tuesday is the 10th and Wednesday is the 11th.

MR. JIMMERSON: Yeah, we'd prefer the Tuesday the 10th.

THE CLERK: We could do a 1:00 start time.

THE COURT: How about the Defense? You okay with that?

MR. VOGEL: Just checking real quick. Tuesday is definitely better.

THE COURT: Okay. Let's use 1:30 on that day and we'll have the whole afternoon then, but my guess is it's a couple of hours given our track record, because most likely I'll come in and I'll give a little summary of the pleadings, and talk about issues, and what have you, put things in context, and then we'll have argument. I mean, the whole thing could be an hour, but it could be more, but we'll start at 1:30 on?

THE CLERK: On Tuesday, September 10th.

THE COURT: That'll be the hearing.

MR. JIMMERSON: All right.

THE COURT: Okay. Anything else for today?

Exhibit C

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

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

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.

THE JIMMERSON LAW FIRM, P.C.
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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

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

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,

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 Sept August, 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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REFUSED TO SIGN

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Exhibit D

DISTRICT COURT
CLARK COUNTY, NEVADA
-oOo-

JASON GEORGE LANDESS a.k.a. KAY GEORGE LANDESS, as an individual, Plaintiff, vs. KEVIN PAUL DEBIPARSHAD, M.D., Et al. Defendants.	CASE NO.: A776896 DEPT. NO.: XXXII (Matter heard on 9/4/19 in Department XXX) **ORDER**

The above-referenced matter came on for hearing before Judge Jerry Wiese as the Presiding Civil Judge, on the 4th day of September, 2019, with regard to the Defendants' Motion to Disqualify the Honorable Rob Bare. Having reviewed all of the papers and pleadings on file, and having considered the oral argument offered on behalf of the parties, and good cause appearing, the Court enters the following Order.

FACTUAL AND PROCEDURAL HISTORY

This is a professional negligence (medical malpractice) case filed by the Plaintiff, Jason George Landess, against Dr. Kevin Paul Debiparshad and his practice, Synergy Spine and Orthopedics, as well as Nevada Spine Clinic and Centennial Hills Hospital. Plaintiff alleges that Dr. Debiparshad failed to properly reduce a tibia fracture during a 10/10/17 surgery. Claims against Centennial Hills Hospital were resolved shortly before Trial.

This case went to Trial before the Honorable Judge Rob Bare, with a Jury. The Trial began on 7/22/19. The issue of the "burning embers e-mail" and the possibility of a mistrial was raised on trial day 10, (August 2, 2019), a Motion for Mistrial was filed by Plaintiff on the evening of Sunday, 8/4/19, and a mistrial was declared on trial day 11, (August 5, 2019). Defendant has filed a Motion to Disqualify the Honorable Rob Bare, based on alleged actual or implied bias.

Defendants filed their Motion to Disqualify Judge Bare on August 23, 2019, alleging irregularities, improper statements made by Judge Bare during Trial, and

alleging express or implied bias or prejudice. Plaintiff filed his Opposition to the Motion to Disqualify, and Countermotion for Fees and Costs, on August 30, 2019. Both Plaintiff and Defendants each filed Replies on September 3, 2019. Also on September 3, 2019, Judge Bare filed an Affidavit in response to the Motion, pursuant to NRS 1.235(6). (An amended Affidavit was thereafter forwarded to the Court, correcting a typographical error in paragraph 8). On September 9, 2019, a Notice of Entry of Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial, was sent to this Court. Based on the nature of the Motion, it was originally sent to Chief Judge Linda Bell, but due to a conflict, it was reassigned to Presiding Civil Judge, Jerry A. Wiese II, for hearing. The hearing on this Motion took place on Wednesday, September 4, 2019. The Court indicated that a written order would issue.

One of the main issues addressed in the Motion to Disqualify concerns what was referred to as the "Burning Embers" e-mail. During the Trial, when Mr. Dariyanani was on the stand testifying, defense counsel questioned the witness about one of the e-mails contained in Exhibit 56. Exhibit 56 consisted of a number of pages, and contained a number of e-mails. One of the e-mails, referred to as the "Burning Embers" e-mail, contained some language which could be interpreted as racist in nature. The trial testimony occurred as follows:

> Q. Mr. Dariyanani, you testified earlier that Mr. Landess is a beautiful person in your mind.
> A. We're all beautiful and flawed. He's beautiful and flawed.
> Q. And you respect him a great deal?
> A. I do.
> . . . .
> Q. This is – I'm going to try to blow it up, but this is an email that Mr. Landess sent to you and it's part of admitted Exhibit 56, dated November 15th, 2016. It's quite long, but the part I'm interested in is Mr. Landess appears to be giving a summary of his prior work experience and some experiences that he has gone through in his life.
> A. Uh-huh.
> Q. And the highlighted portion starts, "So I got a job working in a pool hall on weekends." And I'll represent to you, Mr. Landess testified earlier about working in a pool hall.
> A. Uh-huh.
> Q. "To supplement my regular job of ***working in a sweat factory, with a lot of Mexicans***, and taught myself how to play Snooker. I became so good at it, that ***I developed a route in East L.A., hustling Mexicans, blacks, and rednecks on Fridays***, which was usually payday. From that lesson, I

learned how to use my skill to make money by taking risk, serious risk." When you read this, did that change your impression of Mr. Landess at all?
A. Not at all . . .
. . . .
Q. Does it sound to you at all from this email that ***he's bragging about his past as a hustler, and particularly hustling Mexicans, blacks, and rednecks*** on payday?
A. Not at all. I think he feels – I think he's very circumspect about that whole period of his life. And if you're asking me, like, did I read this as Mr. Landess being a racist and a bragger, I absolutely did not and I don't read it that way now, and I wouldn't have such a person in my employ.
Q. He talks about a time when he bought a truck stop here in Las Vegas when the ***Mexican laborer stole everything that wasn't welded to the ground. You still don't take that as being at all a racist comment?***
A. I look at that as him reflecting back on his life and the way that he saw things then, growing up in L.A. the way that he did. I don't think that that – I don't think it's representative of how – I think he channeled himself then. I don't think it's representative of who he is now, and it's not who – it's not the person that I've seen and know.

(See Trial Transcript, Day 10, August 2, 2019, pgs. 161-163 (emphasis added).

Exhibit 56 had apparently been disclosed and/or referenced during discovery on numerous occasions, (although there is some dispute over which party disclosed the e-mails, or if it was Mr. Dariyanani) and there was no Motion in Limine addressing these e-mails, or attempting to keep such evidence from the Jury. It is this Court's understanding that Exhibit 56 was actually admitted into evidence by stipulation of the parties, or at least without objection.

In the Motion to Disqualify Judge Bare, Defendants argue that disqualification is proper because: 1) "the declaration of mistrial was the result of an egregious misapplication of the law by the court, and demonstrated the court's continued pattern of partiality to Plaintiff to the detriment of Defendants throughout the course of the trial;" 2) "the court specifically expressed its favoritism of Plaintiff's counsel on the record, leaving no doubt of Judge Bare's bias toward Plaintiff and inability of Defendants to receive a fair and impartial trial;" and 3) Judge Bare also expressed – both on the record and in private to the parties – his opinion that Defendants were going to be found liable in this matter and strongly suggested Defendants make an offer to settle the case." (See Affidavit of Brent Vogel, attached to the Motion to Disqualify, at paragraphs 3-5).

In the Defendant's Motion to Disqualify Judge Bare, Defendants note that the Court granted Plaintiff's Motion for Preferential Trial Setting, over Defendant's objection; the Court denied each dispositive motion filed by the Defendants; the Court denied the Defendants' Motion to Continue Trial; and the Defendants were provided insufficient time to conduct the discovery needed for a complex medical malpractice case. Defendants believe that these rulings "raised concerns of Judge Bare's possible bias and partiality toward Plaintiff, . . . [but] it was not until trial that Defendants' concerns about Judge Bare's partiality and bias were confirmed." (See Motion to Disqualify at pg. 14).

Defendants were particularly bothered by the following rulings by Judge Bare during trial: 1) He refused Defendants an opportunity to file an Opposition to Plaintiff's Motion for Mistrial; 2) He granted Plaintiff's Motion for Mistrial in the absence of a proper foundation; 3) He allowed Plaintiff to raise two new alleged breaches of the standard of care for the first time during opening statement; and 4) He allowed Plaintiff to claim permanent physical disability in the absence of expert medical testimony.

In Plaintiff's Opposition to the Motion to Disqualify, the Plaintiff suggests that the Court was even-handed in its rulings. Plaintiff argues that the trial date was set "by stipulation" to occur more than a year after the filing of the Complaint, even though a "preference" had been granted. Plaintiff suggests that of the Defendant's three Motions in Limine, two were denied, but one was granted. The Court granted Defendant's Motion to allow additional discovery after the discovery cutoff date. During Trial Judge Bare denied Plaintiff's Motion to Strike the supplemental report of Mr. Kirkendall (which was apparently disclosed the day before Trial). He denied Plaintiff's Motion to strike the testimony of Dr. Debiparshad's expert, Dr. Arambula. Defendants apparently tried several times to allow the jury to see an image on a portal that had not been previously disclosed. The Court denied such request each time, and after Defendants continually referred to such portal, eventually, the Plaintiff made his first request for a mistrial, which was also denied. (Day 8 of Jury trial [July 31, 2019], at pgs. 66-68). Plaintiff argues that there was no impropriety on the part of Judge Bare, but suggests that Defense counsel committed attorney misconduct. (See pg. 8 of Plaintiff's Opposition).

Plaintiff argues that Defendant's claim that Judge Bare didn't provide an opportunity to Defendant to brief the mistrial issue is inaccurate. Plaintiff cites to Judge Bare's statements, "So I want to be clear that if lawyers file something – trial brief, law on the point, then you can do that;" and "I did invite, in our informal meeting on Friday, I did invite trial briefs, I think is what I called it. But I certainly invited the idea that certainly lawyers could, if they wanted to turn their attention to providing law on the obvious issues, you could." (See Trial Transcript of Day 10, at pg. 174, and Day 11, at pg. 6). Further, the Plaintiff points out that after Judge Bare suggested his procedure that would be to hear the Motion for Mistrial (because the jury was waiting in the hall), and give Defense counsel additional time to address the Motion for Fees and Costs, Defense counsel said, "We had the opportunity to discuss. We'd still like to move forward with the motion, and hopefully with the rest of the trial." (See Trial Transcript of Day 11, at pg. 19).

Plaintiff argues that Judge Bare did not try to coerce a settlement as suggested by Defendants; he did not "assist" the Plaintiff's legal research; and the Court did not allow the Plaintiff to raise two new alleged breaches of the standard of care for the first time in opening statements.

Additionally, Plaintiff argues that the Court did not provide Plaintiff's counsel with an excuse for inadvertently stipulating to Exhibit 56. Plaintiff's Opposition Brief references a 1 ½ hour break during trial, which was not on the record. This reviewing Court was able to view the JAVS video recording from that time period, and has now obtained a written transcript of that time period. Plaintiff's counsel is right, that after a break from 2:15-2:33, when Court resumed, Plaintiff's counsel raised the issue with the Court, that he had a problem with the references that Ms. Gordon read from the letter dated November 15, 2016, which was part of Exhibit 56. An argument took place for quite some time with regard to that issue. Plaintiff's counsel suggested that he be able to read another portion of the same e-mail to the jury at that time, which request was denied. The Court did indicate that such a reading would be appropriate during a rebuttal witness or in closing argument. Mr. Jimmerson indicated, "And I'm angry at myself for having allowed the document to come into evidence, but it was a misuse by the Plaintiff and it should be – by the Defendant and it should be stricken." (See

Transcript of Day 10, at revised pg. 180). The Court denied the request to strike the testimony.

Plaintiff argues that Defendant's Motion for Disqualification is untimely pursuant to NRS 1.235, and *Towbin Dodge LLC v. Eighth Judicial Dist. Ct.*, 121 Nev. 251, 112 P.3d 1063 (2005). Plaintiff cites to *Schiller v. Fidelity National Title Insurance Co.*, 444 P.3d 459 (Nev. Unpublished, 2019), which actually cites to the *Towbin Dodge* (published decision), and indicates, "If new grounds for a judge's disqualification are discovered after the time limits in NRS 1.235(1) have passed, then a party may file a motion to disqualify based on Canon 3E as soon as possible after becoming aware of the new information." *Towbin*, at pg. 260. This Court finds that the Defendant's Motion, which was filed August 23, 2019, after the August 5, 2019 mistrial was declared, was not untimely. It could have been filed quicker, but the phrase "as soon as possible," is somewhat vague. The Nevada Supreme Court in *Schiller*, referenced the "as soon as possible" language from the *Towbin* case, as well as the "within a reasonable time," language from NRCP 60(b). Referencing either phrase, this Court finds that the Defendant's Motion in this case was filed timely, and will be considered by the Court.

The granting of a Mistrial after two full weeks of Trial was obviously frustrating and disheartening to all of the parties, as well as the Court. It is not this Court's intent to second-guess the decisions made by Judge Bare, as a Judge has substantial discretion during a Trial to handle issues that arise, in the best way that he or she can.

LEGAL AUTHORITY

"A judge is presumed to be impartial, and the party asserting the challenge carries the burden of establishing sufficient factual grounds warranting disqualification." *Las Vegas Sands Corp. v. Eighth Jud. Dist. Ct.*, 2016 WL 2842901 (unpublished, Nev. 2016), citing *Rippo v. State*, 113 Nev. 1239, 1248, 946 P.2d 1017, 1023 (1997). "Nevada has two statutes governing disqualification of district court judges. NRS 1.230 lists substantive grounds for disqualification, and NRS 1.235 sets forth a procedure for disqualifying district court judges." *Towbin Dodge LLC v. Eighth Judicial Dist. Ct.*, 121 Nev. 251, 255, 112 P.3d 1063, 1066 (2005). NRS 1.230 reads as follows:

NRS 1.230 Grounds for disqualifying judges other than Supreme Court justices or judges of the Court of Appeals.

1. A judge shall not act as such in an action or proceeding when the judge entertains actual bias or prejudice for or against one of the parties to the action.

2. A judge shall not act as such in an action or proceeding when implied bias exists in any of the following respects:

(a) When the judge is a party to or interested in the action or proceeding.

(b) When the judge is related to either party by consanguinity or affinity within the third degree.

(c) When the judge has been attorney or counsel for either of the parties in the particular action or proceeding before the court.

(d) When the judge is related to an attorney or counselor for either of the parties by consanguinity or affinity within the third degree. This paragraph does not apply to the presentation of ex parte or uncontested matters, except in fixing fees for an attorney so related to the judge.

3. A judge, upon the judge's own motion, may disqualify himself or herself from acting in any matter upon the ground of actual or implied bias.

4. A judge or court shall not punish for contempt any person who proceeds under the provisions of this chapter for a change of judge in a case.

5. This section does not apply to the arrangement of the calendar or the regulation of the order of business.

NRS 1.235, which sets for the procedure for disqualifying a district court judge, reads in part as follows:

NRS 1.235 Procedure for disqualifying judges other than Supreme Court justices or judges of the Court of Appeals.

1. Any party to an action or proceeding pending in any court other than the Supreme Court or the Court of Appeals, who seeks to disqualify a judge for actual or implied bias or prejudice must file an affidavit specifying the facts upon which the disqualification is sought. The affidavit of a party represented by an attorney must be accompanied by a certificate of the attorney of record that the affidavit is filed in good faith and not interposed for delay. Except as otherwise provided in subsections 2 and 3, the affidavit must be filed:

(a) Not less than 20 days before the date set for trial or hearing of the case; or

(b) Not less than 3 days before the date set for the hearing of any pretrial matter.

2. Except as otherwise provided in this subsection and subsection 3, if a case is not assigned to a judge before the time required under subsection 1 for filing the affidavit, the affidavit must be filed:

(a) Within 10 days after the party or the party's attorney is notified that the case has been assigned to a judge;

(b) Before the hearing of any pretrial matter; or

(c) Before the jury is empaneled, evidence taken or any ruling made in the trial or hearing,

→ whichever occurs first. If the facts upon which disqualification of the judge is sought are not known to the party before the party is notified of the assignment of the judge or before any pretrial hearing is held, the affidavit may be filed not later than the commencement of the trial or hearing of the case.

3. If a case is reassigned to a new judge and the time for filing the affidavit under subsection 1 and paragraph (a) of subsection 2 has expired, the parties have 10 days after notice of the new assignment within which to file the affidavit, and the trial or hearing of the case must be rescheduled for a date after the expiration of the 10-day period unless the parties stipulate to an earlier date.

4. At the time the affidavit is filed, a copy must be served upon the judge sought to be disqualified. Service must be made by delivering the copy to the judge personally or by leaving it at the judge's chambers with some person of suitable age and discretion employed therein.

5. Except as otherwise provided in subsection 6, the judge against whom an affidavit alleging bias or prejudice is filed shall proceed no further with the matter and shall:

(a) If the judge is a district judge, immediately transfer the case to another department of the court, if there is more than one department of the court in the district, or request the judge of another district court to preside at the trial or hearing of the matter;

(b) If the judge is a justice of the peace, immediately arrange for another justice of the peace to preside at the trial or hearing of the matter as provided pursuant to NRS 4.032, 4.340 or 4.345, as applicable; or

(c) If the judge is a municipal judge, immediately arrange for another municipal judge to preside at the trial or hearing of the matter as provided pursuant to NRS 5.023 or 5.024, as applicable.

6. A judge may challenge an affidavit alleging bias or prejudice by filing a written answer with the clerk of the court within 5 judicial days after the affidavit is filed, admitting or denying any or all of the allegations contained in the affidavit and setting forth any additional facts which bear on the question of the judge's disqualification. The question of the judge's disqualification must thereupon be heard and determined by another judge agreed upon by the parties or, if they are unable to agree, by a judge appointed:

(a) If the judge is a district judge, by the presiding judge of the judicial district in judicial districts having more than one judge, or if the presiding judge of the judicial district is sought to be disqualified, by the judge having the greatest number of years of service;

(b) If the judge is a justice of the peace, by the presiding judge of the justice court in justice courts having more than one justice of the peace, or if the presiding judge is sought to be disqualified, by the justice of the peace having the greatest number of years of service;

(c) If the judge is a municipal judge, by the presiding judge of the municipal court in municipal courts having more than one municipal judge, or if the presiding judge is sought to be disqualified, by the municipal judge having the greatest number of years of service; or

(d) If there is no presiding judge, by the Supreme Court.

The Nevada Supreme Court has indicated that "if new grounds for a judge's disqualification are discovered after the time limits in NRS 1.235(1) have passed, then a party may file a motion to disqualify based on Canon 3E as soon as possible after becoming aware of the new information." *Towbin Dodge LLC v. Eighth Judicial Dist. Ct.*, 121 Nev. 251, 260, 112 P.3d 1063, 1069 (2005). In *Schiller v. Fidelity National Title Insurance Co.*, 444 P.3d 459 (Nev. Unpublished, 2019), the Nevada Supreme Court seems to have modified that statement, and indicated that "a party may file a motion to disqualify based on **[the NCJC]** as soon as possible after becoming aware of the new information." (emphasis added). Similarly, the Court held in *PETA v. Bobby Berosini*, 111 Nev. 431, 894 P.2d 337 (1995), overruled on other grounds by *Towbin Dodge*, that "the NCJC is not merely a conduct guide to judges, a violation of which is punishable by discipline. The NCJC also provides substantive grounds for judicial disqualification." *Berosini*, at pg. 435, citing *Ainsworth v. Combined Ins. Co.*, 105 Nev. 237, 775 P.2d 1003 (1989), (additional citations omitted).

It should be noted that "a trial judge has a duty to sit and 'preside to the conclusion of all proceedings, in the absence of some statute, rule of court, ethical standard, or other compelling reason to the contrary," and "A judge shall hear and decide matters assigned to the judge except those in which disqualification is required." *Millen v. Eighth Judicial Dist Ct.*, 122 Nev. 1245, 1253, 148 P.3d 694 (2006). The Nevada Supreme Court has further held that "A judge is presumed to be unbiased, and generally, 'the attitude of a judge toward the attorney for a party is largely irrelevant.'" *Millen* at pg. 1254, citing *Las Vegas Downtown Redev. Agency v. Hecht*, 113 Nev. 632, 635, 940 P.2d 127, 128 (1997). "The general rule of law is that what a judge learns in his official capacity does not result in disqualification." *Kirksey v. State*, 112 Nev. 980, 923 P.2d 1102, citing to *Goldman v. Bryan*, 104 Nev. 644, 764 P.2d 1296 (1988). Additionally, "Because a judge is presumed to be impartial, 'the burden is on the party asserting the challenge to establish sufficient factual grounds warranting disqualification.'" *Ybarra v. State*, 127 Nev. 47, 51, 247 P.3d 269, 272 (2011), citing *Goldman v. Bryan*, 104 Nev. 644, 649, 764 P.2d 1296, 1299 (1988). Finally, the Court has indicated that "disqualification for personal bias requires 'an extreme showing of bias that would permit manipulation of the court and significantly impede the judicial process and the administration of justice.' Generally, disqualification for personal bias

or prejudice or knowledge of disputed facts will depend on the circumstances of each case." *Millen* at pg. 1254-1255, citing *Hecht* at pg. 636.

In the Nevada Code of Judicial Conduct, some terms are defined. "Impartial" is one of those terms, and is defined as follows:

> "Impartial," "impartiality," and "impartially" mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge." (NCJC, Terminology).

Rule 1.2 indicates that "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety." (NCJC, Rule 1.2, Canon 1)

Rule 2.2 reads in part as follows:

> **Rule 2.2. Impartiality and Fairness**. A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.
> [1] To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.
> [2] Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.
> [3] When applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law. Errors of this kind do not violate this Rule.
> . . . .

(NCJC, Rule 2.2, Canon 2)

Rule 2.3 reads in part as follows:

> **Rule 2.3. Bias, Prejudice, and Harassment**.
> (A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.
> (B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.
> (C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including, but not limited to, race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.

(D) The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.

(NCJC, Rule 2.3, Canon 2)

Rule 2.4 reads in part that "A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment." (NCJC, Rule 2.4, Canon 2)

Rule 2.11(A) of the Nevada Rules of Judicial Conduct, indicates that "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned. . ." (NCJC, Rule 2.11, Canon 2). The Comments to this rule contain the following statement: "Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (6) apply."

In the case of *City of Las Vegas Downtown Redevelopment Agency v. Eighth Judicial Dist. Ct.*, 116 Nev. 640, 5 P.3d 1059 (2000), the Nevada Supreme Court addressed a request to recuse Judge Mark Denton from an eminent domain case. The Court referenced NCJC Canon 3(E)(1), which indicated that "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, ..." *Redevelopment Agency* at pg. 644. The Court went on to state the following, "[W]e have held that whether a judge's impartiality can reasonably be questioned is an objective question that this court reviews as a question of law using its independent judgment of the undisputed facts. *Redevelopment Agency*, at pg. 644, citing *In re Varain*, 114 Nev. 1271, 1278, 969 P.2d 305, 310 (1998).

In *People for the Ethical Treatment of Animals (PETA) v. Bobby Berosini,* 111 Nev. 431, 894 P.2d 337 (1995), overruled on other grounds by *Towbin Dodge LLC v. Eighth Judicial Dist Court*, the Nevada Supreme Court similar stated, "the test for whether a judge's impartiality might reasonably be questioned is objective; whether a judge is actually impartial is not material." *Berosini* at pg. 436. The Court referenced NCJC Canon 2, which provided that "a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities," and indicated that "the test

for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." *Berosini* at pg. 435-436. The Court referenced 28 U.S.C. §455(a) a federal statute, designed to promote public confidence in the integrity of the judicial process, and referenced a case which indicated that "The goal of section 455(a) is to ***avoid even the appearance of partiality***." *Berosini* at pg. 436, (emphasis added), citing *Liljeberg v. Health Services Acquisition Corp*, 486 U.S. 847, 108 S.Ct. 2094, 100 L.Ed.2d 855 (1988). Another federal court had stated, "Under §455(a) a judge has a continuing duty to recuse before, during, or, in some circumstances, after a proceeding, if the judge concludes that sufficient factual grounds exist to cause an objective observer reasonably to question the judge's impartiality... The standard is purely objective. The inquiry is limited to outward manifestations and reasonable inferences drawn therefrom." *Berosini,* at pg. 437, citing *United States v. Cooley*, 1 F.3d 985, 992-993 (10th Cir. 1993). The Court in *Berosini,* indicated that the question before the Court was "whether a reasonable person, knowing all the facts, would harbor reasonable doubts about Judge Lehman's impartiality." The Court concluded that they had to grant the motion to disqualify Judge Lehman, "to avoid even the appearance of impropriety and to promote public confidence in the integrity of the judicial process. We conclude that a reasonable person knowing all the facts, would harbor reasonable doubts about Judge Lehman's impartiality." *Berosini*, at pg. 438.

In another Nevada Supreme Court case, the Court stated, "remarks of a judge made in the context of a court proceeding are not considered indicative of improper bias or prejudice unless they show that the judge has closed his or her mind to the presentation of all the evidence." *Schubert v. Eighth Judicial Dist. Ct.*, 128 Nev. 933, 381 P.3d 660 (2012).

In the *Hecht* case, Hecht filed a motion to disqualify Justice Cliff Young from participating in an appellate decision, based on the argument that he allegedly harbored a bias against Hecht's counsel, Kermitt Waters. This alleged bias stemmed from statements made by Justice Young during a Washoe County Bar Association Lunch, during a campaign, where Steve Jones was running against Justice Young. There were comments about campaign financing that Jones had received from Kermitt Waters, and Justice Young suggested that it appeared that Mr. Waters had exceeded

the allowable limit of contributions to Judge Jones. Hecht argued that these statements "amounted to an accusation that Waters had committed a crime, and as such [were] evidence of Justice Young's actual or implied bias toward Waters." *Hecht* at pg. 634.

The Court stated that it has "consistently held that the attitude of a judge toward the attorney for a party is largely irrelevant." *Hecht* at pg. 635. The Court cited to its decision in *Ainsworth v. Combined Ins. Co.*, 105 Nev. 237, 259, 774 P.2d 1003, 1019 (1989), in which the Court held that "generally, an allegation of bias in favor of or against counsel for a litigant states an insufficient ground for disqualification because it is not indicative of extrajudicial bias against the party." The Court indicated that the purpose for that policy was that because Nevada is a small state, with a limited bar membership, it is "inevitable that frequent interactions will occur between the members of the bar and the judiciary." *Hecht* at pg. 635-636. The Court further stated that "we continue to believe that to permit a justice or judge to be disqualified on the basis of bias for or against a litigant's counsel in cases in which there is anything but an extreme showing of bias would permit manipulation of the court and significantly impede the judicial process and the administration of justice." *Id.* While the Canon states that "a judge can be disqualified for animus toward an attorney, situations where such a disqualification has been found are exceedingly rare, and non-existent in Nevada." *Id.*, citing Richard E. Flamm, *Judicial Disqualification* §4.4.4, at 124 (1996). Further, "To warrant judicial disqualification . . . the judge's bias toward the attorney ordinarily must be extreme. Situations in which judges have manifested such extreme bias toward an attorney are exceedingly rare." *Id.*

In *Hecht,* the Court cited to *Valladares v. District Court*, 112 Nev. 79, 910 P.2d 256 (1996), in which Judge Connie Steinheimer's campaign literature was very critical of then District Judge Lew Carnahan. Such letters made disparaging remarks about Carnahan's ethics, honesty, and competency. Steinheimer won the election, and Carnahan appeared as an attorney for a party before her, and requested that she recuse herself. Steinheimer refused, and it was taken to the Supreme Court, which stated that "Judge Steinheimer does not possess an actual or apparent bias against Carnahan and therefore need not recuse herself." *Hecht* at pg. 636, citing *Valladares* at 84.

The Court also cited to *Sonner v. State*, where a prosecutor represented a judge up to the day the prosecutor was to begin trying a death penalty case in front of the judge. The Court held that even though the prosecutor had represented the judge in an unrelated matter, until the day before trial, "there was no reason to conclude that the attorney-client relationship between the judge and the prosecutor in any way affected the judge's ability to be fair and impartial." *Hecht* at pg. 636-637, citing *Sonner v. State*, 112 Nev. 1328, 930 P.2d 707 (1996).

The Court in *Hecht*, indicated that "the facts presented in the case at bar do not rise to anything near the level warranting Justice Young's disqualification. The comments made by Justice Young were off-the-cuff remarks made during an election campaign; and they were not nearly as serious as those made in Ainsworth and Valadares, in which the judges made egregious remarks about counsel for a party, or the situation in Sonner. Justice Young's comments were based upon the information he had received and merely suggested that Waters may have engaged in impropriety. . . .Justice Young's remarks do not show evidence of a bias toward Waters that would mandate Justice Young's disqualification in this matter." *Hecht* at pg. 637. The Court concluded its opinion by stating that "Before a justice or judge can be disqualified because of animus toward a party's attorney, egregious facts must be shown." *Hecht* at pg. 638.

In *Ainsworth v. Combined Ins. Co. of America*, 105 Nev. 237, 774 P.2d 1003 (1989), the Court addressed a motion requesting disqualification of former Chief Justice Gunderson. Combined argued that 1) he had a "disqualifying bias or prejudice for and against the litigants and their counsel;" 2) his impartiality was subject to question so as to create a "disqualifying appearance of impropriety;" and 3) his alleged partiality denied Combined its right to a fair hearing before an impartial tribunal. *Id.*, at 253. Combined argued that the appeal was handled in a manner contrary to the Court's normal procedure, but the Court summarily concluded that the Court followed its normal procedure, and nothing relating to that issue demonstrated any prejudice, bias or appearance or impropriety stemming from an extrajudicial source. *Id.*, at 255-256. Combined argued that during oral argument, Gunderson "(1) 'openly ridiculed' and was uncivil and hostile to Combined and its attorney; (2) 'acted not as a member of an appellate court but as an advocate for the appellant'; (3) 'expressed the opinion that

Combined's very policy was an act of bad faith;' and (4) expressed an 'animus' that was not 'confined to Combined and its counsel but seemingly reached the insurance industry as a whole.'" *Id.*, at 256. The Supreme Court apparently reviewed the recording of the oral argument, and concluded that the arguments were legally insufficient to support the disqualification, but were also belied by the "tone, tenor and substance" of Justice Gunderson's remarks. *Id.*, at pgs. 256-257. The Court held that his conduct was "well within the acceptable boundaries of courtroom exchange." Id., at 257, citing *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1316 (2nd Cir. 1988). The Court held that "Although he may have expressed strong views regarding the separate, additional facts in the record evidencing the oppressive nature of Combined's conduct, his expression of those views at the oral argument exhibited no bias stemming from an extrajudicial source." *Id.* at 257, citing *Goldman v. Bryan*, 104 Nev. 644, --, n. 6, 764 P.2d 1296, 1301 (1988); and citing also to *In re Guardianship of Styer*, 24 Ariz.App. 148, 536 P.2d 717 (1975) "(Although a judge may have a strong opinion on merits of a cause or a strong feeling about the type of litigation involved, the expression of such views does not establish disqualifying bias or prejudice.)" Apparently Justice Gunderson made some comments about Combined and its counsel, which may have indicated a preconceived bias. The Court indicated that "although former Chief Justice Gunderson's response candidly acknowledges that he harbored preconceived, negative impressions respecting the legal abilities of one of Combined's counsel, his response also indicated that those impressions were based upon his perception of counsel's prior 'work product and performance in this court.' Thus, those perceptions constitute neither an extrajudicial, nor a disqualifying bias." *Id.*, at pg. 258, citing *Goldman v. Bryan*, 104 Nev. 644, 764 P.2d 1296 (1988); *In re Cooper* 821 F.2d 833, 838-42 (1st Cir. 1987) (a judge is not required to 'mince words' respecting counsel who appear before him; it is a judge's job to make credibility determinations, and when he does so, he does not thereby become subject, legitimately, to charges of bias.) The Court said, that to whatever extent "Gunderson's response may evidence negative, personal impressions about Combined's counsel, based upon counsel's prior legal associations, his performance on the bar examination or his marital situation, those impressions were formed during the course of his judicial and administrative duties as a Justice and Chief Justice on this court." *Id.*, at pg. 258, citing *United States v. Conforte*, 457

F.Supp. 641, 657 (D.Nev. 1978) (where origin of judge's impressions was inextricably bound up with judicial proceedings, judge's alleged bias did not stem from an extrajudicial source), modified on other grounds, 624 F.2d 869 (9th Cir.), cert denied, 449 U.S. 1012, 101 S.Ct. 568, 66 L.Ed.2d 470 (1980). Finally, the Court stated that "those negative impressions extended only to counsel for the litigant involved, not to the litigant itself. Generally, an allegation of bias in favor of or against counsel for a litigant states an insufficient ground for disqualification because it is not indicative of extrajudicial bias against the party." *Id.*, at pg. 259, citing *In re Petition to Recall Dunleavy*, 104 Nev. 784, 769 P.2d 1271, 1275, citing *Gilbert v. City of Little Rock, Ark.*, 722 F.2d 1390, 1398-99 (8th Cir. 1983), cert denied, 466 U.S. 972, 104 S.Ct. 2347, 80 L.Ed.2d 820 (1984); *Davis v. Board of School Com'rs of Mobile County*, 517 F.2d 1044, 1050 (5th Cir. 1975). Ultimately, the Court found that there was no basis for disqualification of Justice Gunderson.

This Court acknowledges that several of the cases referenced herein, have been reversed or modified for various reasons. This Court believes, however, that the analysis contained in them is still good law, and is helpful and instructive in the present case. This Court further acknowledges that most of the cases cited herein dealt with the Nevada Code of Judicial Conduct which existed prior to the Code's revision in 2009. The Revised Nevada Code of Judicial Conduct became effective January 19, 2010, containing somewhat different language, different section numbers, etc. This Court's reliance on the above-referenced case law, is consistent with the Nevada Supreme Court's recent reference to many of these same cases. In the unpublished case of *Mkhitaryan v. Eighth Judicial Dist. Ct.*, 2016 WL 5957647, 385 P.3d 48 (Nev., 2016, unpublished), the Nevada Supreme Court stated the following analysis:

> Rule 2.7 of the Nevada Code of Judicial Conduct (NCJC), provides that "[a] judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law." Under Rule 2.11(A)(1) of the NCJC, judicial disqualification is required "in any proceeding in which the judge's impartiality might reasonably be questioned, including when the judge has a personal bias or prejudice concerning a party." See also NRS 1.230 ("A judge shall not act as such in an action or proceeding when the judge entertains actual bias or prejudice for or against one of the parties to the action."). ***The test under the NCJC to evaluate whether a judge's impartiality might reasonably be questioned is an objective one – whether a reasonable person knowing all of the facts would harbor reasonable***

> ***doubts about the judge's impartiality.*** See *Ybarra v. State*, 127 Nev. 47, 51, 247 P.3d 269, 272 (201). Disqualification for personal bias requires an extreme showing of bias. *Millen v. Eighth Judicial Dist. Court*, 122 Nev. 1245, 1254, 148 P.3d 694, 701 (2006). Further, this court has generally recognized that bias must stem from an "extrajudicial source," something other than what the judge learned from his or her participation in the case. *Rivero v. Rivero*, 125 Nev. 410, 439, 216 P.3d 213, 233 (2009), and that adverse judicial rulings during the proceedings are not a basis to disqualify a judge. *In re Petition to Recall Dunleavy*, 104 Nev. 784, 789, 769 P.2d 1271, 1275 (1988). . . .

Id., (emphasis added).

In another recent Nevada Court of Appeals decision, also unpublished, the Court set forth the same test in determining whether disqualification was warranted. The Court of Appeals stated, "The test for whether a judge's impartiality might reasonably be questioned is objective and disqualification is required when 'a reasonable person, knowing all the facts, would harbor reasonable doubts about the judges impartiality.'" *Bayouth v. State,* 2018 WL 2489862 (Nev.Ct.of App., 2018, unpublished).

In *Ybarra v. State,* 127 Nev. 47, 247 P.3d 269 (2011), the Nevada Supreme Court again indicated that "the test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." *Ybarra* at pg. 50, citing NCJC Canon 2A. The Court went on to indicate that the issue that needed to be addressed was again, "***whether a reasonable person, knowing all the facts, would harbor reasonable doubts about the judge's impartiality***." *Ybarra* at pg. 51, (emphasis added), citing *PETA*, 111 Nev. at 438, 894 P.2d at 341 (additional citations omitted). In *Ybarra*, the Court cited to *People v. Booker*, where the Defendant who was charged with a crime, argued that the judge should have been disqualified because he had represented the victim's father in a divorce proceeding, and the appellate court could find no evidence in the record suggesting that the trial judge was biased against the defendant. 224 Ill.App.3d 542, 166 Ill. Dec. 252, 585 N.E.2d 1274, 1284 (1992). Further, a judge in a small town, need not disqualify himself merely because he knows one of the parties. *Ybarra* at pg. 52, citing *Jacobson v. Manfredi*, 100 Nev. 226, 230, 679 P.2d 251, 254 (1984). In Ybarra, the Court concluded that the prior representation by Judge Dobrescue would not cause an objective person reasonably to doubt his impartiality. *Ybarra* at pg. 52.

LEGAL ANALYSIS.

In analyzing the actions and statements of Judge Bare, as they relate to the pending Motion for Disqualification, this Court will address them as follows:

1) Did Judge Bare's rulings prior to Trial, and during Trial, evidence either an actual or implied bias in favor or against a party, such that disqualification is appropriate?
2) Did Judge Bare refuse to allow the Defendants to formally oppose the Motion for Mistrial, thereby depriving them of procedural and substantive due process, and evidencing an actual implied bias, such that disqualification is appropriate?
3) Did Judge Bare's statements relating to his admiration for Plaintiff's counsel, Mr. Jimmerson, evidence an actual or implied bias, such that disqualification is appropriate?
4) Did Judge Bare's statements relating to the likelihood of the Plaintiff prevailing on the issue of liability, but not recovering all of the damages that were sought, and the discussion regarding possible settlement, during trial, evidence an actual or implied bias, such that disqualification is appropriate?

The Court believes that all of the Defendants' allegations contained in the Motion to Disqualify, can be handled by analysis of the above-referenced issues.

1) Did Judge Bare's rulings prior to Trial, and during Trial, evidence either an actual or implied bias in favor or against a party, such that disqualification is appropriate?

As indicated previously, Defendants argued in their Motion that the Court granted Plaintiff's Motion for Preferential Trial Setting, over Defendant's objection; the Court denied each dispositive motion filed by the Defendants; the Court denied the Defendants' Motion to Continue Trial; and the Defendants were provided insufficient time to conduct the discovery needed for a complex medical malpractice case. Defendants argue that Judge Bare granted Plaintiff's Motion for Mistrial in the absence of a proper foundation; he allowed Plaintiff to raise two new alleged breaches of the standard of care for the first time during opening statement; and he allowed Plaintiff to claim permanent physical disability in the absence of expert medical testimony.

It should be noted that this Court is not called upon to determine whether each of these rulings was correct, or even supported by evidence or foundation. The issue that this Court needs to address is whether Judge Bare's actions evidenced an actual or implied bias in favor of, or against either party.

The Supreme Court has held that the District Courts have discretion in granting or denying motions for preferential trial setting. *Carstarphen v. Milsner*, 128 Nev. 55, 270 P.3d 1251 (2012). The Court has held that it is not an abuse of discretion to deny a motion to continue in some circumstances. *Bongiovi v. Sullivan*, 122 Nev. 556, 138 P.3d 433 (2006). With regard to scheduling, the Supreme Court has indicated that "Setting trial dates and other matters done in the arrangement of a trial court's calendar is within the discretion of that court, and in the absence of arbitrary conduct will not be interfered with by this court." *Carstarphen v. Milsner*, at pg. 59, citing to *Monroe, Ltd. V. Central Telephone Co.*, 91 Nev. 450, 456, 538 P.2d 152, 156 (1975).

Defendants argue that the Court did not provide sufficient time to conduct the discovery needed for this case, but the pleadings indicate otherwise. The Complaint was filed on 6/28/18, and a Motion for Preferential Trial Setting was filed on 7/13/18. On 9/13/18, the Court issued an Order Setting Civil Jury Trial for 7/22/19. The Joint Case Conference Report was filed on 12/11/2018, and in it the parties ***agreed*** that they could complete discovery by April 23, 2019. The Scheduling Order issued by the Discovery Commissioner (based on the dates provided in the JCCR by the parties), set the discovery deadline for April 23, 2019.

With regard to the Defendants' argument that Judge Bare allowed Plaintiff to raise new alleged breaches of the standard of care for the first time during opening statement, this Court is not sufficiently familiar with the specific facts of this case to determine if this actually occurred, or if such decision could arguably be considered to show bias or prejudice. It appears from the pleadings submitted, and the arguments by counsel that it is not so clear that there were two new alleged breaches asserted, but maybe just a description or analysis of the breaches of the standard of care which had already been disclosed. Judge Bare's thorough analysis of the testimony, exhibits, etc., evidence that he clearly considered the Defendants' arguments that these may have been new breaches raised, but after considering all of the evidence, Judge Bare concluded that they were not "new," and the Plaintiffs were on notice of the issue. Judge Bare's discussion of this issue is set forth in Trial Day 3 (July 24, 2019), at pages 32 through 41. Because of Judge Bare's thorough consideration and analysis of the issue, there is no way this Court could conclude anything other than it was a fair and unbiased analysis.

Defendants claim that Judge Bare allowed Plaintiff to claim permanent physical disability in the absence of expert medical testimony. In fact, it is the Defendant's argument that Judge Bare went out of his way to research and find a case that would support his decision to allow Stan Smith, Ph.D., to testify as to Plaintiff's work-related damages. Defendants argue that the case law in Nevada overwhelmingly requires expert testimony establishing proximate causation, before such evidence of damages could be submitted, and there was no expert medical testimony establishing that the claimed injury resulted in the Plaintiff's inability to work, or that the damages were the natural and probable consequence of the alleged negligence. Judge Bare cited to the case of *Sierra Pac. Power Co. v. Anderson*, 77 Nev. 68, 358 P.2d 892 (1961), which supported his decision to allow the evidence to go to the Jury. Judge Bare spent some time explaining this case to the attorneys, provided the attorneys with a copy of the case, and gave them time to review the case before they argued the issue. He further indicated that he had Shephardized the case, and that it was still good law in Nevada. (Trial Day 3 [July 24, 2019], at pages 42 through 45.) Whether or not his decision was correct, or based upon a correct analysis of the law in the State of Nevada is not for this Court to decide. That issue is more appropriately addressed on appeal if a party feels that an error has been made. But clearly, Judge Bare had a valid basis for his decision, supported by a Nevada Supreme Court decision, which he determined to be good Nevada law. This decision alone cannot support a finding of bias or prejudice for or against either party.

Finally, Defendants contend that there was no basis for the Court to grant a Mistrial in this case, and that granting the Mistrial evidenced the Court's bias in favor of Plaintiff's counsel. Specifically, Defendants argue that Judge Bare should not have focused on the "prejudicial effect" of the "Burning Embers" e-mail, and that a prejudicial analysis was not necessary with regard to rebuttal bad character evidence. Second, Defendants argue that Judge Bare ignored the fact that the "Burning Embers" e-mail was admitted evidence, and could be used for any purpose. Third, Defendants argue that Judge Bare failed to consider Plaintiff's cumulative errors in disclosing the "Burning Embers" e-mail, and then failed to object to its use. Finally, Defendants argue that Judge Bare's tortured misapplication of the *Lioche v. Cohen* case, was clearly erroneous.

Plaintiffs contend that the fact that Defendant's counsel put the e-mail on the ELMO, in front of the jury, with the language, "To supplement my regular job of working in a sweat factory with a lot of Mexicans . . . and hustling Mexicans, blacks, and rednecks on Fridays, which was usually payday," already highlighted for the jury to see, is what caused a problem. Plaintiff suggests that the e-mail was put in front of the jury, not to dispute his honesty, or to impeach the testimony that Mr. Landess was a "beautiful" person, but solely to paint Mr. Landess as a "racist." In fact, when asking the witness questions about the e-mail, Defense counsel asked, "You still don't take that as being at all a racist comment?" (See Trial Transcript, Day 10, August 2, 2019, pgs. 162-163). When Plaintiff's counsel raised this issue with the Court, his initial suggestion was to read two additional paragraphs from the same e-mail to the jurors. (See Amended Trial Transcript, Day 10, at pg. 175) He further requested that the question and answer asked by defense counsel be stricken, with an instruction from the judge. *Id.*, at pg. 176. Judge Bare's initial response was a recognition that it was an "admitted" exhibit, that Plaintiff's counsel agreed to admit. *Id.*, at pg. 176-177. The Judge indicated that because it was admitted, whether Ms. Gordon had mentioned it or not, certainly the jury could have seen it because it was admitted. *Id.* Mr. Jimmerson wanted to read the extra two paragraphs of the e-mail to the jury without a witness on the stand and the defense objected. *Id.* The Court indicated that whether or not he would have precluded it prior to it being shown to the jury was moot at that point, but that if it had been brought to his attention before it was shown to the jury, he "probably would have precluded it, because [he felt] as though that's unduly prejudicial." *Id.*, at pg. 178-179. Because it was admitted, the Court indicated that the Plaintiffs could, at a minimum, mention the full text of the letter at some point, at least during closing argument. *Id.* The Defense agreed. *Id.*, at pg. 179. The parties continued to argue, with Mr. Jimmerson indicating that he was "angry at [himself] for having allowed the document to come into evidence," but arguing that it was a "misuse . . . .by the Defendant and it should be stricken." *Id.*, at pg. 180. The Court recognized that the statements made by Mr. Dariyanani about Mr. Landess being a beautiful man constituted character evidence, and it would be appropriate for the Defense to bring up character issues because it had been put at issue through Mr. Dariyanani. *Id.*, at pg. 181, and see Original version of Transcript of Day 10, at pg. 178. The Court further

acknowledged that there was no contemporaneous objection. He said, "So if counsel uses something that's in evidence and brings it to a witness' attention – and there really – I don't think there was much of an objection when that was happening live, either." *Id.*, at pg. 183. Judge Bare made no secret that he probably would have precluded it as prejudicial if it had been presented in a motion in limine. *Id.*, at pg. 183. As the Judge continued to think about what happened, he said, "you know, I'm – this does bother me, I'll tell you. I mean, it really bothers me, . . ." *Id.*, at pg. 183. He stated further, "I mean, it does trouble me that – I mean, what comes to mind is a concern about some sort of indoctrination issue. Jury nullification I think is the term of art in the law. . . . I'd say that there's a – in the air, even if the jury was going to find for the Plaintiff and maybe even go on the higher end of the damage scale, that this could have prevented that, just this alone. I'll share that with you. So I think there's an issue of potential nullification here." *Id.*, at pg. 184. After excusing the jury, the Court made some additional statements in regard to the e-mail that had been testified to by Mr. Dariyanani. He first made it clear that "the motion to strike is denied at this time." Original Transcript of Trial Day 10, August 2, 2019, at pg. 174. He indicated that if the attorneys filed something he would consider it. He also was concerned because he recognized that he had jurors in the panel that were "black" or "Mexican." Judge Bare made the following statement to the attorneys:

> I got to tell you, during that break this just – I mean, it almost – I don't want to say it made me ill, but it's really starting to percolate in me, you know, because as a judge, you know, I think one of the primary things here is when that verdict comes in I want to be able to say I did everything to make sure justice was had. And I've got to say, I'm not sure we're in a position now that the jury has heard that to be confident in justice. I mean, I've just got to tell you. I don't know what to do with it. I'm not that smart . . .

Id., at pg. 175.

Judge Bare continued to talk about the "legal relevancy balancing test," that "if it's too prejudicial then you, even if relevant, even if probative, you exclude it." He further said the following: "So like I said, I don't know what to do about it. I mean, if there [was a] motion in limine, then we would have known. And if I would have – I'm saying it's likely I'd granted it, because most of the – as I sit here now, feels like that's the right choice, because it's so prejudicial." *Id.*, at pg. 176. He went on to say, ". . .So we have four jurors, potentially, that fall into reasonably, you know, a situation where

then they see that, they would be offended, because it has to do with their ethnicity, or their race. We got a problem and I just don't know how to fix it. . ." *Id.*, at pg. 185. Judge Bare recognized that "it's a racial comment," and said, "So now you have jurors who could draw a conclusion that he's a racist." *Id.*, at pg. 187. He continued to be troubled about the e-mail and said, "Do we have a situation that's curable? Should I do anything? Or should I do something? . . . like I say, most of me, as I sit here, thinks I need to do something. I denied a motion to strike it. I don't know what to do about it." *Id.*, at pg. 187.

The following day of Trial, when the attorneys returned to Court and argued the Motion for Mistrial, the Court made clear that he agreed with the Defense that the issue of character had been raised in Trial by the Plaintiff, so the Defense had a reasonable evidentiary ability to offer its own character evidence to impeach Mr. Daryanani. He said that the Defense had the right to do that, it was the extent to which the Defense did it that he was concerned with. See Transcript of Trial Day 11, August 5, 2019, at pg. 31. Judge Bare went on to say that he "slam dunk easy" would have granted a motion to preclude the language "hustling Mexicans, blacks, and rednecks, where the Mexican labor stole everything that wasn't [welded] to the ground." He would have precluded that. *Id.*, at pg. 32. Judge Bare indicated the prior day that the Plaintiff's counsel could have called for a side bar or objected, but on Day 11, he indicated that the Defense attorneys should have called for a side bar before offering the evidence. *Id.*, at pgs. 32-33. Defense counsel argued that because the evidence had been admitted, she should have been allowed to use it as impeachment evidence against Mr. Daryanani. Judge Bare seemed surprised by Ms. Gordon's argument, and asked, "Just to be sure, it sounds like what you're saying to me is that, in your view, under all of the circumstances that you've already described or that you otherwise know, that whether Mr. Landess is a racist is something the jury should weigh and it's [admissible], and it's evidence that they should consider." *Id.*, at pg. 35. Judge Bare then asked if Ms. Gordon thought it would be a Lioce violation if she made a closing argument that Mr. "Landess [was] a racist and that the jury ought to consider that." *Id.*, at pg. 36. Ms. Gordon responded that "I think I could use that, and as Your Honor has said, it's admitted evidence." *Id.*, at pg. 37. The Court indicated that the terms used by Mr.

Landess could have been used in a non-racial manner, but the way that they were used, and the context in which they were used, "clearly appear to be racist." *Id.*, at pg. 41.

Having listened to the arguments of counsel, and expressing his opinions throughout, Judge Bare eventually said, "It's interesting, because in some ways it's the most difficult decision I've made since I've been a Judge, but in other ways it's the easiest decision I've ever made since I've been a Judge . . . But the Plaintiff's motion for mistrial is granted." *Id.*, at pg. 47. Judge Bare thereafter spent a considerable amount of time explaining the basis for his ruling, and concluded with the following:

> None of that really matters to this decision, because it is my strong view that in this case racial discrimination can't be a basis upon which this civil jury can give their decision, but it's not lost on me that it's highly likely, unless Mr. Cardoza, and Ms. Asuncion, Ms. Brazil, and Stidhum put their heads in the sand and didn't watch any news, or have a cell phone, or [] have a friend, or have a family, or go to church, or do anything, that this is out there to just aggravate what we already have as my view being a big problem.
>
> Bottom line is, how in the world can we expect this jury, which is the verse – and by the way, none of these people are alternates, because we decided before trial that seats 9 and 10 would be the alternates, so they're all four deliberating jurors – how in the world can we reasonably think that they're going to give a fair verdict and not base the whole decision, at least in part, on the issue of whether Mr. Landess is a racist.
>
> That's the basis for the decision. The Plaintiffs can draft the order. And so concludes the most difficult thing I've done since I've been here.

Id., at pgs. 69-70.

This Court has included so much of Judge Bare's analysis with regard to the request for Mistrial, because it is clear that he struggled with his decision. He initially denied the Motion to Strike, but then the issue of racial prejudice concerned him to the point that he felt something should be done and he didn't know what to do. This Court finds that he considered the position of both sides, that he did not find it an easy decision to make, but that he made the decision to grant the Mistrial in an attempt to see that "justice" was done. The Supreme Court has held that adverse judicial rulings during the proceedings are not a basis to disqualify a judge. *In re Petition to Recall Dunleavy*, 104 Nev. 784, 789, 769 P.2d 1271, 1275 (1988). This Court's determination is not based on any specific case law, statutes, or actual arguments made by the parties, but this Court finds that Judge Bare's struggle evidenced his attempt to be fair and impartial to all parties, and to see that justice was done.

2) Did Judge Bare refuse to allow the Defendants to formally oppose the Motion for Mistrial, thereby depriving them of procedural and substantive due process, and evidencing an actual implied bias, such that disqualification is appropriate?

There is no dispute that the Plaintiff filed a Motion for Mistrial at or about 10:02 p.m. on Sunday, August 4, 2019. Defendants argue that they had not reviewed the Motion until that morning. Defendants argue that they intended to oppose the Motion, but Judge Bare did not allow time for Defendants to file opposing Points and Authorities, and instead, entertained argument and granted the Motion that morning.

On the morning of August 5, 2019, the following exchange occurred:

> The Court: . . . Is there an opposition that the Defense has to a mistrial at this point?
> Mr. Vogel: No. We just saw it this morning as well, so we would need time to –
> The Court: Well, I mean as – do you intend to oppose the motion or do you –
> Mr. Vogel: Oh, absolutely. Yes.
> The Court: Okay. So you oppose the idea of a mistrial?
> Mr. Vogel: We do.
> The Court: Okay. All right. So we have to reconcile that. The jury is here. So that's going to take a little while. . .
> . . . .
> The Court: . . . So my thought is, . . . and tell me if you agree or disagree with my thought. My thought is I should now hear argument from the Plaintiffs and Defendants about whether I should grant the mistrial. I do think that if granted, the other part of the motion, the fees and costs part of it is something that would have to wait until another day . . . I would give the Defense an opportunity to file a pleading relevant to the fees and costs aspect and then have a hearing off in the future on that . . .
> . . . . I did invite, in our informal meeting on Friday, I did invite trial briefs, I think is what I called it.
> But I certainly invited the idea that certainly lawyers could, if they wanted to turn their attention to providing law on the obvious issues, you could. I mean, the issue became apparent late Friday, so just by operation of the calendar. . . .

Trial Transcript Day 11, August 5, 2019, at pgs. 5-6.

It went on as follows:

> The Court: . . . But I'm just asking right now. I laid out a procedural –
> . . . .
> The Court: -- roadmap.
> . . . .

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

. . . .

The Court: -- for some other time, to give an opportunity to weigh in.

. . . .

The Court: All right. Let me ask Mr. Vogel –

. . . .

The Court: -- and Ms. Gordon.

. . . .

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

. . . .

Mr. Vogel: . . . . And ultimately, based on all the discussions, our review of the law and whatnot, we felt like, look, ***this is not actually a case for mistrial and that we want to go forward. . . .***

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

Trial Transcript Day 11, August 5, 2019, at pgs. 8-9, and 18-19 (emphasis added).

Although Mr. Vogel did indicate that he "absolutely" opposed the Motion for Mistrial, he ultimately indicated that he wanted to "move forward with the motion, and hopefully with the rest of the trial." *Id.* The Court did go forward and heard oral argument on the motion, and it was granted, eliminating the need to go forward with the rest of the trial.

Judge Bare could have allowed time for the Defense to prepare a written Opposition with Points and Authorities, but he had a jury waiting in the hallway. As cited previously, "Setting trial dates and other matters done in the arrangement of a trial court's calendar is within the discretion of that court, and in the absence of arbitrary conduct will not be interfered with by this court." *Carstarphen v. Milsner*, at pg. 59, citing to *Monroe, Ltd. V. Central Telephone Co.,* 91 Nev. 450, 456, 538 P.2d 152, 156 (1975). Further, the Nevada Supreme Court has held that adverse judicial rulings during the proceedings are not a basis to disqualify a judge. *In re Petition to Recall Dunleavy*, 104 Nev. 784, 789, 769 P.2d 1271, 1275 (1988). The fact that Judge Bare did

not want to further inconvenience the Jury by sending them home for the day, is not an indication of bias or prejudice for or against a party.

3) Did Judge Bare's statements relating to his admiration for Plaintiff's counsel, Mr. Jimmerson, evidence an actual or implied bias, such that disqualification is appropriate?

During the argument, outside the jury, on Trial Day 10, August 2, 2019, the following exchange took place:

> The Court: . . . . We then have, of course, that moment in time where Ms. Gordon puts on the ELMO and highlights with a yellow highlighter this paragraph about –
> Mr. Jimmerson: That I didn't even notice until she just put it up there. What was I going to do, object to an admitted document, suggesting that I'm afraid of it. I was outraged when I read it. I just was – I was blown away. I was stunned actually.
> The Court: Okay. Well, that gives me further context, as to where I'm going with this at this point. And I've got to say, Mr. Jimmerson. This comes to exactly what I would expect from you, and if I say something you don't want me to say, then you stop me. Okay. But ***what I would expect from you, based upon all my dealings with you over 25 years, and all the time I've been a judge too, is frank candor – just absolute frank candor with me as an individual and a judge.*** It's always been that way. You know, ***whatever word you ever said to me in any context has always been the gospel truth.***
> I mean, without you know, calling my colleagues, lawyers that worked with me at the bar, or my wife as testimonial witnesses, ***I've told all those people many times about the level of respect and admiration I have for you.*** You know, you're in – to me, ***you're in the sort of, the hall of fame, or the Mount Rushmore, you know, of lawyers that I've dealt with in my life. I've got a lot of respect for you.*** So I say that now because I think what you're really saying doesn't surprise me. And I think what you're really saying is – and again, interrupt me anytime if you want – is, well, in a multi-page exhibit, we just didn't see it.
> Mr. Jimmerson: That's exactly right, Judge. You're 100 percent right.
> The Court: Okay. Well there you go. And you know, nobody is perfect. We all do these things.

Original Transcript of Trial Day 10, August 2, 2019, pages 178-179 (emphasis added).

Clearly, Ms. Gordon thought that Judge Bare was drawing a distinction between counsel, and specifically indicating that he would believe any word from Mr. Jimmerson as the "gospel truth," and suggesting that he didn't have the same level of respect for Ms. Gordon. This understanding is evidenced by the comments she made

following Judge Bare's above-referenced statements. The discussion included the following:

> Ms. Gordon: And just one second, please, because this has taken on this –
> . . . .
> Ms. Gordon: -- scope of ***about me***, and there's no reason for the Court to think that I would do something underhanded by any means, or to try to do that Plaintiff's case. . .
> . . . . – I'm just going to wait, because it's really important to me that you hear this, and that I make a good record, because ***somehow it's become personal that Mr. Jimmerson is Mount Everest -- . . . . -- and I'm not, right?***
> . . . .
> . . . . I think that we have an extremely clear record, but if this is going to go at all ***about my credibility*** for admitting a document, or using a document that was admitted, I have to draw the line. There's no reason to think that at all. I did my job with the exhibit they gave me.
> The Court: . . . I don't have a feeling that you did something with some bad intent, bad faith, you know –
> Ms. Gordon: ***Well, that's what it sounds like. You appreciate them.***
> . . .
> The Court: . . . I mean, I can't fault you. I won't. I'll go as far as say, I'm convinced, Ms. Gordon, you're looking at me, you're talking to me, I don't think that you felt like what you were doing was some sort of unethical thing – okay – to go that far, but now I have to deal with what did happen under the circumstances. Okay.
> Ms. Gordon: I'm just asking the Court – I understand that, and I appreciate it. ***I'm just wondering if perhaps we could that and talk about what happened without talking about how Mr. Jimmerson somehow is above reproach, which clearly is making some kind of distinction about the party who used the document***. I don't think -- . . . – that's necessary.
> . . .
> Ms. Gordon: . . . I just wish we could ***focus more on the procedural part of it than the personal aspects of the attorneys who did it***. I don't have a problem with what you said about Mr. Jimmerson. I think ***I just took it as perhaps making a distinction.***
> The Court: Okay. Well, I mean, ***if I had dealt with you for 25 years***, my guess is, consistent with what I've seen with you, I mean, you really do care about what you're doing. It's evident in anybody who watches you as an attorney, you know.
> Ms. Gordon: I think I just wouldn't do something underhanded like that.
> The Court: ***I've known you for two weeks***.

Original Trial Transcript, Day 10, August 2, 2019, at pgs. 180-184 (emphasis added).

The real question is not whether Ms. Gordon felt like Judge Bare had a bias in favor of Mr. Jimmerson and against her, but "whether a reasonable person, knowing all the facts, would harbor reasonable doubts about the judge's impartiality." *Ybarra* at pg. 51, citing *PETA*, 111 Nev. at 438, 894 P.2d at 341. As cited above, "the attitude of a judge toward the attorney for a party is largely irrelevant," *Hecht* at pg. 635, and "to warrant judicial disqualification . . . the judge's bias toward the attorney ordinarily must be extreme. Situations in which judges have manifested such extreme bias toward an attorney are exceedingly rare." *Id.*, at pgs. 635-636.

In Ainsworth, Justice Gunderson had apparently made some comments about Combined and its counsel, which may have indicated a preconceived bias. The Court indicated that although his statements indicated "preconceived, negative impressions respecting the legal abilities of one of Combined's counsel," his impressions were based upon his experience with that attorney's performance in court. Consequently, the Court held that they did not constitute an extrajudicial, or a disqualifying bias. *Ainsworth*, at pg. 258, citing *Goldman v. Bryan*, 104 Nev. 644, 764 P.2d 1296 (1988). In the present case, Judge Bare has indicated that his impressions of Mr. Jimmerson were formed over a period of 25 years. While some of that impression may have been formed while serving as a judge, Judge Bare specifically indicated that some of that impression was formed prior to becoming a judge. He said, "what I would expect from you, ***based upon all my dealings with you over 25 years, and all the time I've been a judge too,*** is frank candor – just absolute frank candor with me as an individual and a judge. It's always been that way. You know, ***whatever word you ever said to me in any context*** has always been the gospel truth." Original Transcript of Trial Day 10, August 2, 2019, pages 178-179 (emphasis added). Although judges need to make credibility, *Ainsworth,* at pg. 258, when the judge's credibility determination is based on, or stems from an "extrajudicial source," (something other than what the judge learned from his or her participation in the case), *Rivero v. Rivero*, 125 Nev. 410, 439, 216 P.3d 213, 233 (2009), the judge's credibility determination is subject to scrutiny, as the judge's determination may be based upon some kind of bias or prejudice. Judge Bare made clear that his opinions or impressions of Mr. Jimmerson, were formed over a period of 25 years, not just the past 9 years that Judge Bare has been a jurist. Because the Court's impressions of Mr. Jimmerson were

formed, not just during the trial, and not just by the Court acting as a jurist, but over a period of 25 years, and because Judge Bare expressed his admiration of Mr. Jimmerson so emphatically on the record, explaining that he has told colleagues, lawyers he worked with at the bar, and his wife, what great respect and admiration he has for Mr. Jimmerson, it seems reasonable that Ms. Gordon felt like Judge Bare had a bias in favor of Mr. Jimmerson. Even trying to explain his statements, Judge Bare had to acknowledge that his opinions of Mr. Jimmerson were formed over 25 years, and he had only known Ms. Gordon for two weeks.

Based upon the foregoing, this Court must hold that any bias that Judge Bare has in favor of Mr. Jimmerson, stems from an "extrajudicial source," or "something other than what the judge learned from his or her participation in the case." *Rivero v. Rivero*, 125 Nev. 410, 439, 216 P.3d 213, 233 (2009). Judge Bare specifically said that his impressions of Mr. Jimmerson were formed over 25 years, so were not limited to what he had seen and heard during trial, nor were they limited to his time on the bench, but his impressions of Mr. Jimmerson came from an "extrajudicial source."

Judge Bare, in his Amended Affidavit, filed 9/4/19, specifically denies any "bias or lack of impartiality toward either party in this case." See Affidavit at Paragraph 8. With regard to the above-referenced statements, Judge Bare explains as follows:

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

See Judge Bare's Amended Affidavit at Paragraph 10.

Most judges find opportunities to compliment attorneys on their professionalism when such compliments are appropriate, because it fosters professionalism among members of the bar. We like to see attorneys getting along, working together, and complying not only with the requirements of professionalism contained in the Rules and Statutes, but with the spirit of professionalism that allows the Nevada Bar to enjoy the collegiality that we enjoy. Such statements are more than

appropriate, and should be encouraged. The statements made by Judge Bare during the instant Trial, however, were not limited to compliments regarding professionalism.

NCJC 2.11(A) indicates that a Judge should be disqualified if "the judge's impartiality might reasonably be questioned," including when "the judge has a personal bias or prejudice concerning a party or a party's lawyer." Although "it is a judge's job to make credibility determinations," *Ainsworth,* at pg. 258, when a Judge voices his praise of one attorney or one party, at the apparent expense of the opposing attorney or party, "a reasonable person, knowing all the facts, would harbor reasonable doubts about the judge's impartiality." *Ybarra* at pg. 51, citing *PETA*, 111 Nev. at 438, 894 P.2d at 341. In reference to credibility, it would be appropriate for a Judge to state that based on the circumstances in the case, the evidence presented, and the argument provided, the Judge finds one argument more "convincing" than another, or one witness more "credible" than another. It seems, however, that to tell the attorneys that the Judge is going to believe the words of one attorney over another, because "whatever word you ever said to me in any context has always been the gospel truth," results in a "reasonable person" believing that the Judge has a bias in favor of that attorney. When the Judge goes on to state that he has told his family and friends how much he admires one attorney, and that the attorney should be in the "hall of fame" or the "Mount Rushmore" of lawyers, a "reasonable person" would believe that the Judge has a bias in favor of that attorney. As the Nevada Court of Appeals recently stated, "The test for whether a judge's impartiality might reasonably be questioned is objective and ***disqualification is required*** when 'a reasonable person, knowing all the facts, would harbor reasonable doubts about the judges impartiality.'" *Bayouth v. State,* 2018 WL 2489862 (Nev.Ct.of App., 2018, unpublished, [emphasis added]).

This Court gives great weight to Judge Bare's Affidavit, and his explicit denial of any bias or prejudice in favor of or against any party. The Court believes that his decisions throughout the subject Trial were fair, even-handed, and unbiased. Judge Bare struggled with various decisions, listened to argument, researched the law, and appears to have had a valid basis for each decision that he made. This Court cannot find that any of the decisions made by Judge Bare during the Trial of this case evidenced any bias, prejudice, or lack of impartiality. The statements that Judge Bare made, however, on Trial Day 10, August 2, 2019, as set forth above, seemed to indicate

a bias in favor of Mr. Jimmerson. Even if Judge Bare does not have an actual bias in favor of Mr. Jimmerson, "a reasonable person, knowing all the facts, would harbor reasonable doubts about the judge's impartiality." *Ybarra* at pg. 51, citing *PETA*, 111 Nev. at 438, 894 P.2d at 341. "Whether a judge is actually impartial is not material." *Berosini* at pg. 436. Consequently, this Court must find that at least an implied bias exists, and Judge Bare must be disqualified from the present case.[1]

4) Did Judge Bare's statements relating to the likelihood of the Plaintiff prevailing on the issue of liability, but not recovering all of the damages that were sought, and the discussion regarding possible settlement, during trial, evidence an actual or implied bias, such that disqualification is appropriate?

Because the Court has already determined that disqualification is necessary, based on the statements made by Judge Bare, relating to his admiration of Mr. Jimmerson, the Court need not address this final issue. It is sufficient to say that after reviewing the Record, Judge Bare appears to have done everything in his power to try to avoid the need to declare a Mistrial. This Court will not comment on whether Judge Bare's actions in attempting to bring the parties to a settlement complied with the Rules or not, because that is not this Court's function. This Court will state, however, that it respects Judge Bare's efforts in trying to avoid the need for a Mistrial, and it would be good if every judge cared as much about the parties, the process, the sacrifice of the jurors time, and trying to do justice. This Court finds nothing about Judge Bare's attempts to encourage settlement between the parties, or his statements regarding his opinions as to what had occurred during the Trial, that evidenced any bias or prejudice for or against any party or attorney. If a Judge's opinions about a case do not stem from an extrajudicial source, it is not grounds for disqualification, and the opinions he stated clearly stemmed from his observations during Trial. *Ainsworth* at pg. 257; see also *In re Guardianship of Styer*, 24 Ariz.App. 148, 536 P.2d 717 (1975) "(Although a judge may have a strong opinion on merits of a cause or a strong feeling about the type of litigation involved, the expression of such views does not establish disqualifying bias or prejudice.)"

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[1] This Court agrees with Concurring Opinion in *Ivey v. Eighth Judicial Dist. Ct.*, 129 Nev. 154, 299 P.3d 354 (2013), wherein the Justices stated, "It is arguably the most significant responsibility of a judge to 'act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and [to] avoid impropriety and the appearance of impropriety."

CONCLUSION.

Although the Defendants alleged various issues, which they believe evidenced Judge Bare's bias in favor of the Plaintiff, or Plaintiff's counsel, this Court finds and concludes that no decision that Judge Bare made during the Trial, including the decision to grant the Motion for Mistrial, supports the disqualification of Judge Bare. This Court finds and concludes that Judge Bare's actions and decisions throughout the Trial were thoughtful, fair, even-handed, and unbiased. A thorough review of the record evidences Judge Bare's struggle with various issues, his willingness to listen to arguments of both counsel, his willingness to ponder and research the law, and his overall desire to see that justice was done for both sides. This Court has no criticism of Judge Bare's rulings, his decisions, the way he handled the Trial, or the way that he treated the parties and attorneys.

The only issue this Court has is with Judge Bare's statements made on Day 10 of the Trial, wherein he expressed his admiration of Mr. Jimmerson, his indication that he would believe every word from Mr. Jimmerson as the "gospel truth," and the statements that he believed Mr. Jimmerson belonged in the "Hall of Fame" and the "Mount Rushmore" of lawyers. These statements seem to indicate a bias in favor of Mr. Jimmerson. Even though Judge Bare denies any actual bias in favor of Mr. Jimmerson, ***"a reasonable person, knowing all the facts, would harbor reasonable doubts about the judge's impartiality."*** *Ybarra* at pg. 51, citing *PETA*, 111 Nev. at 438, 894 P.2d at 341. Consequently, this Court must find that at least an implied bias exists, and Judge Bare must be disqualified from the present case.

Consequently, and good cause appearing,

IT IS HEREBY ORDERED that Defendants' Motion to Disqualify the Honorable Rob Bare is hereby **GRANTED.**

. . . .

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. . . .

IT IS FURTHER ORDERED that the Clerk's Office is to immediately reassign this matter, randomly, to another District Court Judge, who handles Professional Negligence (Medical Malpractice) cases, so that the pending motions may be heard, and so a new trial date can be set, without further delay.

Dated this 16th day of September, 2019.

JERRY A. WIESE II
DISTRICT COURT JUDGE
EIGHTH JUDICIAL DISTRICT COURT
DEPARTMENT XXX

Exhibit E

A-18-776896-C

DISTRICT COURT
CLARK COUNTY, NEVADA

Malpractice - Medical/Dental **COURT MINUTES** **September 16, 2019**

A-18-776896-C Jason Landess, Plaintiff(s)
vs.
Kevin Debiparshad, M.D., Defendant(s)

September 16, 2019 3:00 AM Minute Order

HEARD BY: Bare, Rob **COURTROOM:** Chambers

COURT CLERK: Michaela Tapia

JOURNAL ENTRIES

- At the request of Court, for judicial economy, Plaintiff s Motion for Attorneys Fees and Costs and Defendant s Opposition and Countermotion for Attorneys Fees and Costs, currently scheduled for September 17, 2019, are VACATED, pending reassignment to another department.

CLERK'S NOTE: This Minute Order was electronically served to all registered parties for Odyssey File & Serve. /mt