

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. ~~EC-18-016816~~ Filed
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**PETITIONER'S APPENDIX TO PETITION FOR WRIT OF MANDAMUS
VOLUME 10**

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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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1 because now --

2 THE COURT: Right.

3 MS. GORDON: -- we have two weeks and a day that are
4 gone and we're starting over again --

5 THE COURT: Oh no, I --

6 MS. GORDON: -- and -- and before someone asks for
7 hundreds of thousands of dollars --

8 THE COURT: No, I --

9 MS. GORDON: -- based on alleged misconduct, then -- and
10 especially when there's this kind of academic discussion going on as to
11 whether it was even improper or not, you can't get to that level of it
12 actually being a misconduct that is based on attorneys making obviously
13 improper argument in front of a jury. This was not obvious. I think we
14 had a very good faith basis for using that email that had been admitted
15 into evidence. It's not just that it wasn't objected to, again it was their
16 exhibit, so when you're looking at granting fees and costs associated
17 with a mistrial, you can't lose sight of this being a very difficult decision
18 as to whether that underlying evidentiary ruling was -- was correct. I
19 think we were -- we were correct.

20 THE COURT: No, I'm not even looking at that. I think --

21 MS. GORDON: I understand -- of course I understand
22 plaintiff's arguments --

23 THE COURT: I under- --

24 MS. GORDON: -- I understand the Court's questions and --
25 and analysis, and -- and I think you understand ours -- ours as well.

1 THE COURT: I do. Okay.

2 MS. GORDON: It's a -- it's a tough issue and -- and under
3 those circumstances --

4 THE COURT: It's --

5 MS. GORDON: -- it's not clear there was no -- we didn't want
6 the mistrial. As Mr. Jimmerson said, you can't award them for, you
7 know, resulting in a mistrial. We didn't want it. Trial was going quite
8 well. We didn't want the mistrial at all. It was almost over. We wanted it
9 to go to verdict, we wanted to have this discussion later. Let's let it go to
10 verdict and then if there's still an issue --

11 THE COURT: But that was within Judge Bare's --

12 MS. GORDON: Absolutely.

13 THE COURT: -- decision I can't -- I mean --

14 MS. GORDON: No, absolutely.

15 THE COURT: I can't go over any of that. All I can do is the
16 findings. Yeah, you did -- well, no, but -- okay. At least I told you at
17 least I had the facts right which is what I was trying to do on my other --
18 to make sure I understand all the facts --

19 MS. GORDON: And I think, Your Honor --

20 THE COURT: -- and I don't think -- I would not find that you
21 intentionally wanted a mistrial, I -- I understand his argument, I don't -- I
22 -- no one wants a mistrial at that --

23 MS. GORDON: But it wasn't intentional to -- to put into
24 evidence something that we thought was improper either. So there's --
25 that intention that you and I keep --

1 THE COURT: Well, okay.

2 MS. GORDON: -- talking about that was lacking as well.

3 THE COURT: But I'm looking it under the *Emerson Lioce*
4 misconduct not intentional. I don't think -- and don't -- I -- I'm looking at it
5 that way. Okay, absolutely. That's why I read *Emerson* again and I
6 read the Phil -- and I read the *Lioce* case. That's I -- I don't -- you're a
7 good trial attorney, Mr. Jimmerson's a good trial attorney, we got here
8 because of things that happened. I -- and it's not my point to find fault.
9 Does that make --

10 MS. GORDON: Yes.

11 THE COURT: I will tell you but it's my -- my position to try to
12 look at the facts and see if I feel that there was under the *Emerson* or
13 *Lioce* any misconduct that could -- that deserves sanction. That's --
14 that's -- that's my goal. And I'm not changing anything, you know, that
15 Judge Bare did or anything I will look -- okay. At least I'm on the right
16 page I do appreciate --

17 MS. GORDON: I --

18 THE COURT: Yes, do you have something else you want to
19 give me?

20 MS. GORDON: Just -- just quickly.

21 THE COURT: No. No. It's okay.

22 MS. GORDON: Your Honor, we wanted to -- to --

23 THE COURT: They're not coming till 1:30, right?

24 MS. GORDON: Okay. Just give a copy of --

25 THE COURT: We -- I got till 1:30. I apologize to my staff.

1 MS. GORDON: -- McCormick on Evidence the edition --
2 THE COURT: Yes. I would like that. Is that on plain error?
3 MR. VOGEL: This is the section that they cited in their brief,
4 Section 54 from --
5 THE COURT: Okay, is it on plain error? Or is it on the --
6 opening the door that ship has sailed --
7 MR. VOGEL: It's --
8 THE COURT: -- as far as I --
9 MR. VOGEL: No, no, no.
10 MS. GORDON: No, it's --
11 MR. VOGEL: It's --
12 THE COURT: Okay.
13 MS. GORDON: May I approach?
14 MR. VOGEL: It's --
15 THE COURT: No, I -- no problem.
16 MS. GORDON: Thanks.
17 MR. VOGEL: It's -- it's on the use of admitted evidence.
18 THE COURT: On the use of admitted evidence.
19 MS. GORDON: Plaintiff keeps saying that -- that there was no
20 case law cited or anything to that effect for our statement that once it's
21 admitted into evidence --
22 THE COURT: Well I -- I looked more on the plain error
23 doctrine --
24 MS. GORDON: Sure.
25 THE COURT: -- here in Nevada.

1 MR. VOGEL: So they kept arguing we didn't cite any cases.
2 Well turns out, and if you look at the note, there really isn't any cases.
3 It's axiomatic and --
4 THE COURT: Do it again, it's actually?
5 MR. VOGEL: It's axiomatic.
6 MS. GORDON: Axiomatic.
7 MR. VOGEL: Admitted --
8 THE COURT: Oh.
9 MR. VOGEL: -- admitted evidence can be used at trial. I --
10 THE COURT: But not for any purpose.
11 MR. VOGEL: Well actually, if you take a look at the note --
12 THE COURT: Well then how do you -- how do you reconcile
13 that with the plain error cases?
14 MR. VOGEL: If you -- if you take a look at the note --
15 THE COURT: I will.
16 MR. VOGEL: -- you -- you still --
17 THE COURT: The note?
18 MR. VOGEL: Yeah.
19 THE COURT: The footnote?
20 MR. VOGEL: No, it's the actual note, it's --
21 THE COURT: Okay.
22 MR. VOGEL: -- and it's only a two paragraph note. This is
23 the one that they cited to you in support --
24 THE COURT: Okay, that's fine. I'll --
25 MR. VOGEL: -- in support of their position that hey there's --

1 THE COURT: Did you -- have you -- okay. That's fine.
2 MR. VOGEL: -- because they -- they've misstated it.
3 THE COURT: Okay.
4 MR. JIMMERSON: Then may please the Court I'll just begin
5 with that and I'll sit down a minute. This was cited by us in our brief.
6 THE COURT: Which is -- this McCormick?
7 MR. JIMMERSON: Yes.
8 THE COURT: Okay.
9 MR. JIMMERSON: It was not cited by the defense in any of
10 their briefs. Would you please look at the top of page 2?
11 THE COURT: Of this what he just gave me --
12 MR. JIMMERSON: Yes.
13 THE COURT: -- I can do that.
14 MR. JIMMERSON: Footnote 1 --
15 THE COURT: Footnote --
16 MR. JIMMERSON: -- this generalization is subject to the plain
17 error rule, see Section 52.
18 MR. VOGEL: Yeah.
19 MS. GORDON: We're -- we're not contesting that.
20 THE COURT: Didn't I just say plain error?
21 MS. GORDON: Yes.
22 MR. JIMMERSON: You did, Judge.
23 MS. GORDON: But -- but because it didn't cite the -- the
24 entire -- right.
25 MR. VOGEL: Yeah.

1 THE COURT: Okay, okay, okay, okay I -- I --
2 MR. JIMMERSON: All I can do is --
3 THE COURT: -- I put plain error. I'm okay now.
4 MR. JIMMERSON: -- quote chapter and verse --
5 THE COURT: Okay.
6 MR. JIMMERSON: -- I give you the document --
7 THE COURT: Okay.
8 MR. JIMMERSON: -- that's it. They did not.
9 THE COURT: Okay. I did research on -- okay.
10 MR. JIMMERSON: I have five points and --
11 THE COURT: Okay, that's fine you --
12 MR. JIMMERSON: -- they're very brief.
13 THE COURT: -- this is very -- I'm sorry it was such a --
14 MR. JIMMERSON: No problem.
15 THE COURT: -- rough day. I tried to get you --
16 MR. JIMMERSON: They're entitled their full day and there's a
17 lot at stake, no doubt.
18 THE COURT: No.
19 MR. JIMMERSON: Let me begin by saying number one --
20 THE COURT: No.
21 MR. JIMMERSON: -- that the concept of what you indicated
22 of sidebar and how you conduct yourself, Judge Bare said the same
23 thing. Returning to his finding fact and conclusions of law number 21 --
24 THE COURT: Okay. Okay.
25 MR. JIMMERSON: -- which is at page 9 of the findings, he

1 says paragraph 21: The court finds that because of the prejudicial
2 nature of the document --

3 THE COURT: Oh.

4 MR. JIMMERSON: -- defendants could have asked --

5 THE COURT: That's for --

6 MR. JIMMERSON: -- for a sidebar to discuss the email before
7 showing it to the jury or redacted the inflammatory words which may
8 have resulted in usable admissible, but not overly prejudicial evidence.

9 THE COURT: Okay.

10 MR. JIMMERSON: Okay. Our reply brief filed on the 9th of
11 September has a paragraph -- excuse me, has a footnote 15 that
12 specifically points to that as a remedy and it is absolutely consistent with
13 your practice that if you have --

14 THE COURT: Well, I had it in my notes here I -- I was trying
15 to figure out how -- honestly is a learn for me too so since we're redoing
16 this trial, I -- I don't want anything that --

17 MR. JIMMERSON: Right, and so I just would say that we --

18 THE COURT: I'm not --

19 MR. JIMMERSON: -- also in our brief --

20 THE COURT: Okay.

21 MR. JIMMERSON: -- pointed out that when you have this
22 kind of a matter you are obliged to make offers of proof or have sidebar
23 (indiscernible) you move forward so that was number one. Number --

24 THE COURT: Okay.

25 MR. JIMMERSON: -- my point number two --

1 THE COURT: Okay.

2 MR. JIMMERSON: -- that I want to make clear is because I

3 think the Judge is on the right point.

4 THE COURT: All right.

5 MR. JIMMERSON: The -- the -- the intentional nature to use

6 this inflammatory bomb as the judge described the term, bomb, is

7 reflected also in the motion to disqualify filed by defendants that was

8 heard by Judge Wiese. We cited it in our reply brief at page 4 and 5 --

9 THE COURT: Okay, is that the -- is that the where --

10 MR. JIMMERSON: -- and the reply brief is -- is submitted --

11 THE COURT: Is that the one you filed in October?

12 MR. JIMMERSON: No. No.

13 THE COURT: Okay, the -- the original one because --

14 MR. JIMMERSON: The reply was the original reply of --

15 THE COURT: Okay.

16 MR. JAMES JIMMERSON: September 12.

17 MR. JIMMERSON: -- September 12.

18 THE COURT: Okay. I --

19 MR. JIMMERSON: I -- I know you read it.

20 THE COURT: I know but --

21 MR. JIMMERSON: I just wanted to refresh the Court's

22 recollection --

23 THE COURT: No, there's a lot.

24 MR. JIMMERSON: -- that this is what the defense counsel

25 wrote in the motion to -- with to recuse or disqualify and it begins at the

1 bottom of page 4, line 21 and goes to the top two lines of page 5, lines 1
2 and 2. They write the following: Defendants -- quote, defendants
3 disagree with Judge Bare and believe Caucasian jury members can and
4 should, and they put the words and should in bold, be equally offended
5 by the racist remarks of -- in plaintiff's email, end of quote.

6 So there's no doubt as Judge Bare indicated in the repartee
7 between Ms. Gordon and -- and himself and Mr. Vogel himself that there
8 was the intent on the part of defendant to use this and they understood
9 that the explosive nature of it was racial by determination. Regardless
10 of whether Mr. -- Mr. Landess 51 years ago was considered a racist or
11 not, or allegedly a racist, they knew what they had when they used it and
12 in the motion to disqualify they go so far as to say it's just not the two
13 African-American women who are on the -- or the two Hispanic people
14 on the jury, all four the other -- six of the other jurors who were
15 Caucasian would be equally offended as being racist.

16 So they knew what they had in their hands and they knew
17 what they were intentionally using and that was what so offensive the
18 judge and when you remember the events of Friday, the 5th -- excuse
19 me, Friday, the 2nd of August, and Monday, the 5th, it's like -- it's like an
20 awakening. It's like, you know, you -- you -- you're -- maybe you're shot
21 and you just think that it's a little bit of a red hole and then you realize
22 that you are mortally wounded. He saw that this case was mortally
23 wounded by the actions the defendant, and that was I wanted to call the
24 Court's attention.

25 Point number three, the court has indicated its findings relative

1 to causation -- causation is crucial here. You have at paragraph 20,
2 which I already referenced to the Court, that defendants -- I've read this
3 to you. I'm not going to read it again, but if -- to pick it up midstream at
4 line 19, page 8 of the findings: The defendants' statements have led the
5 court to believe that the defendants knew that their use of the exhibit
6 was objectionable and would be objectionable to the plaintiff and
7 possibly to the court, and nevertheless the defendants continued to use
8 and inject the email before the jury in a fashion that precluded plaintiff
9 from being able to effectively respond. In arguing to the court that they
10 waited for plaintiff to object and that plaintiff did nothing about it,
11 defendants evidence a consciousness of guilt and of wrongdoing. That
12 consciousness of wrongdoing suggest that defendants and their counsel
13 were the legal cause of the mistrial --

14 THE COURT: Right, and I -- I -- I underlined the suggest I --

15 MR. JIMMERSON: Right. So he's --

16 THE COURT: -- he wasn't making the ruling I got that.

17 MR. JIMMERSON: Right. Now, look -- but I asked you
18 combine that with the other findings that follow at page 10, two pages
19 later beginning with finding number 25 through 28. I think they're very
20 helpful to you.

21 Twenty-five: The court makes a specific finding that under all
22 of the circumstances -- well let me begin by 24 because all the
23 circumstances is defined. So 24 the court talks about in the court's view
24 even if well intended by the defendants to cross-examine when -- when
25 character is now an issue, the defendants made a mistake in now

1 interjecting the issue of racism into the trial. Even now it appears to the
2 court the defendants' position is that the jury can consider the issue of
3 whether Mr. Landess is a racist or not. With that the court disagrees
4 with the defendant to the fiber of his existence in person as a judge. Mr.
5 Brazille -- Ms. Brazille is an African-American, Ms. Steedum [phonetic]
6 was an African-American upon information and belief, and it goes on.
7 And the court says this was improper.

8 Now let's focus on 25 and -- through 28, the specific short
9 findings. Number 25: The court makes a specific finding that under all
10 of the circumstances, and the circumstances are interjection the issue of
11 Mr. Landess allegedly being a racist. You see it right at line 3 and 4. So
12 we know what the judge is referring to, he's referring to the statement
13 defendants interjecting the issue of Mr. Landess allegedly being a racist
14 (indiscernible) was improper.

15 So now 25 the court continues: The court makes a specific
16 finding that under all the circumstances that was described here and
17 above they do amount to such an overwhelming nature that reaching a
18 fair result is impossible.

19 Twenty-six: The court further specifically finds that this err
20 prevents the juror -- the jury from reaching a verdict that is fair and just
21 under any circumstances.

22 Twenty-seven: The court further specifically finds that there is
23 no curable instruction which could unring the bell that has been rung,
24 especially as to these four jurors but really as to all 10 jurors. And Mr.
25 Vogel and Ms. Gordon agree by their motion disqualify the judge that

1 Caucasians would be equally offended and find Mr. Landess to be a
2 racist. So they understood the dynamic, incendiary bomb that was
3 being introduced by them.

4 Twenty-eight --

5 THE COURT: Well that --

6 MR. JIMMERSON: -- the court finds that this decision was as
7 result manifestly necessary under the meaning of the law, which is the
8 case law that warrants the granting of a -- of a new trial.

9 THE COURT: No, I -- I understand the -- he's doing --

10 MR. JIMMERSON: All right.

11 THE COURT: -- these findings to -- to justify --

12 MR. JIMMERSON: Correct.

13 THE COURT: -- or to --

14 MR. JIMMERSON: So --

15 THE COURT: -- show his basis for the mistrial --

16 MR. JIMMERSON: Right. So now 25 --

17 THE COURT: -- because it's a very --

18 MS. GORDON: Mistrial.

19 MR. JIMMERSON: Yes. So now my -- my fifth --

20 THE COURT: Yes, I understand that.

21 MR. JIMMERSON: All right, my -- my fourth point then --

22 THE COURT: Okay.

23 MR. JIMMERSON: -- is on causation which has not been
24 addressed orally, has been addressed extensively by us in our papers.

25 THE COURT: Causation of? Of --

1 MR. JIMMERSON: Did they cause the mistrial.

2 THE COURT: The legal cause of the --

3 MR. JIMMERSON: Did the actions the defendants -- the legal
4 cause, that's right. And we speak to it in our briefs and the reply brief at
5 page 24 and 25 has a lot of the good case law the case wanted to
6 review that with the Court.

7 But as a part of that -- we analyze and provide to you the case
8 law. There's two types of causation. One is if there's a one-person
9 actor, you know? And the case law that's the standard, as we cite at
10 page 23 of our reply brief filed September 9th, legal causation in the civil
11 arena is the same as described in *Anthony Lee versus Anthony Lee R.*
12 Proximate cause is defined as any cause which is natural and
13 continuous sequence, unbroken by any efficient intervening cause; one,
14 produces the injury complained of and two, without which the result
15 would not have occurred, citing the *Goodrich* [phonetic] decision.

16 So both parties are taking the position by the briefing that it's
17 the other party is the cause of the --

18 THE COURT: Correct.

19 MR. JIMMERSON: -- of the -- of the mistrial. With these
20 findings, there's only one party that is legally the cause of this mistrial
21 and that is the defendant through their actions you've seen here as
22 found by Judge Bare in terms of specific findings.

23 I also concluded -- also provided to you the other branch of
24 causation which you'll find at page 24 of our brief which has to do with
25 well what happens if you have possible two actors who might be the

1 cause and the case law we cite is provided to you in *Wyeth versus*
2 *Rowatt*, a Nevada Supreme Court decision, 126 Nevada 446, which
3 says this: A -- when you have multiple actors, a substantial factor
4 causation, when you have two possible parties who are perpetrating the
5 cause, instruction is appropriate when an injury that has had two causes
6 either of which operating alone would have been sufficient to cause the
7 injury.

8 If you were to conclude that there were two possible actors,
9 plaintiff or defendant, who to have possibly caused this mistrial, who
10 operating alone would have caused it? What did the plaintiff do to cause
11 anything? We didn't object to the admission of exhibit --

12 THE COURT: Right.

13 MR. JIMMERSON: Beginning, middle and end. We would
14 never have introduced it to the jury, we would never had it
15 pre-highlighted as the defendant did before they ever came to court that
16 day -- by the way, the only page in the entire 79 pages of Exhibit 56 that
17 were highlighted was that one page --

18 THE COURT: No, I --

19 MR. JIMMERSON: -- page 44 --

20 MS. GORDON: That -- that's not true.

21 MR. JIMMERSON: Well --

22 MS. GORDON: It's not.

23 MR. JIMMERSON: -- produce the document.

24 That was highlighted. It was the only one that was placed on
25 the ELMO in front of Dariyanani --

1 MS. GORDON: That's not true.

2 MR. JIMMERSON: There -- that was the only one that was
3 highlighted that was read to the jury --

4 MS. GORDON: It's not true.

5 MR. JIMMERSON: -- in that fashion and we did nothing to
6 cause it to be shown to the jury. And I reviewed with you before the five
7 separate elements. I won't repeat them all again, but they knew about it.

8 THE COURT: No, I -- I -- I know --

9 MR. JIMMERSON: They had highlighted it. They placed it on
10 the ELMO. They placed on ELMO before they asked a question. Then
11 they asked the question --

12 THE COURT: What -- what you're saying is she intentionally
13 used it. She said yes, I intentionally used it --

14 MR. JIMMERSON: Right.

15 THE COURT: -- but that's not the --

16 MR. JIMMERSON: But that is the same as causing it. In
17 other words, when you consider that coupled to the findings, that is what
18 caused it when you ask us all --

19 THE COURT: It legally caused the mistrial. Correct.

20 MR. JIMMERSON: That is what caused the mistrial.

21 THE COURT: Okay, so now am I to hook up the legal cause
22 of the mistrial means then that's the legal cause --

23 Hold on, let me finish.

24 MS. GORDON: Oh sorry.

25 THE COURT: -- the attorney's fees and costs?

1 MR. JIMMERSON: That's right.
2 THE COURT: That's what you're trying to hook up.
3 MR. JIMMERSON: That is what I'm --
4 THE COURT: I look at it as Ms. -- so if it's the legal cause,
5 then I should fine attorney's fees.
6 MR. JIMMERSON: That's right. Now --
7 THE COURT: Okay.
8 MR. JIMMERSON: -- part of that analysis --
9 THE COURT: As opposed to the misconduct because --
10 MR. JIMMERSON: Part of that analysis exactly that word.
11 You got it. You just nailed it.
12 THE COURT: I --
13 MR. JIMMERSON: Okay. Whether you use 18.070 Sub 3
14 that uses purposely caused --
15 THE COURT: Right, or --
16 MR. JIMMERSON: -- or you use *Lioce* and *Emerson* --
17 THE COURT: Right.
18 MR. JIMMERSON: -- you are on misconduct. That is what
19 you would find --
20 THE COURT: Okay.
21 MR. JIMMERSON: -- to make an award of any amount,
22 whether it's \$5 or the amount that's being requested.
23 THE COURT: I -- okay.
24 MR. JIMMERSON: So we would urge upon you that based
25 upon this record that it would be entirely appropriate indeed compelled

1 by preponderance of the evidence that the defendants and their actions
2 are the legal cause or the cause --

3 THE COURT: Of the mistrial.

4 MR. JIMMERSON: -- of the mistrial for which attorney's fees
5 and costs should be awarded.

6 THE COURT: Okay. Or under *Emerson* --

7 MR. JIMMERSON: There is no other alternative provided by
8 the defendant. There -- the -- the concept that we didn't object and
9 therefore we caused the judge to grant the mistrial isn't in a single
10 finding, isn't in a single record. They can't point to a single case to
11 suggest that. There's no basis for that.

12 So what they're now retreating to today that I hear is even a
13 new wrinkle which is we didn't intend to cause it, we're not bad people,
14 therefore you should let us escape from the costs that are going to
15 destroy the plaintiff by virtue of having to rehire the experts, have them
16 call back in not to mention all the loss of attorney's fees and it's simply a
17 matter of an objective finding. This is not an easy motion.

18 THE COURT: Oh --

19 MR. JIMMERSON: It is not a happy motion. It is a motion
20 that does have some significant dire consequences on both parties, but
21 it's also a matter of sound public policy and what's appropriate and
22 what's a natural legal causation --

23 THE COURT: Okay.

24 MR. JIMMERSON: -- and consequence of their actions.

25 THE COURT: Okay.

1 MR. JIMMERSON: And the fifth point I wanted to say result is
2 there's one other tipoff here that -- that what I'm saying may be the way
3 to go and that is this: You asked Ms. Gordon five times the same
4 question, what was the purpose for you doing what you did, and she
5 didn't answer any of the five times and then she went over and
6 whispered to Mr. Vogel like he was going to provide the answer. When
7 Ms. Gordon was in front of his jury, in front of Judge Bare, in front of us,
8 what she had in mind is within her knowledge. She's chosen today to
9 not give you a response to that question. Again, it's one factor.

10 THE COURT: No.

11 MR. JIMMERSON: It can be big or can be small, but it's
12 something you need to consider because it gives an overall view
13 especially for a judge like yourself as a successor judge as to what was
14 going on, on August 5 of -- August 2, 2019 for you to consider. And that
15 I think is significant for the Court to consider.

16 And then the last point I just simply conclude with this: Have
17 they -- we talked about we heard them say scholarship. What
18 scholarship? They haven't given you the name of a case --

19 MS. GORDON: I have no idea what he's talking about.

20 MR. JIMMERSON: They haven't given you name of a case --

21 THE COURT: They were talking about authorities.

22 MR. JIMMERSON: -- that would allow them -- that would
23 allow them to do what they did.

24 When you go back to your chambers and you work with your
25 staff and you think long and hard about this, what authority was I

1 provided by the defendant that would allow me to justify their behavior
2 and to have them not pay the fees and costs that they've imposed upon
3 the plaintiff? Not a single case they provided to you by case citation or
4 like that would give that and that's because there is none.

5 It is the unique and despicable nature of race, national origin
6 and religion that those subject matters by general are just verboten in
7 the courtroom unless your case by claim or nature or defense requires
8 that evidence. And that's why in the nature of a medical malpractice
9 case, a professional negligence case, it is so off the wall, it is so
10 outrageous that it causes a good judge, Judge Bare to say it's
11 something from the very fiber of my heart that I can't agree with.

12 THE COURT: Okay.

13 MR. JIMMERSON: Thank you, Judge.

14 MS. GORDON: Briefly?

15 THE COURT: It's fine.

16 MS. GORDON: You -- you hit the nail on the head, Your
17 Honor. They're conflating the legal cause of the mistrial with attorney's
18 fees and costs and what's necessary for you to find that it's the -- the --
19 the language is right there in the statute --

20 THE COURT: Right, no --

21 MS. GORDON: -- purposely, purposely, purposely --

22 THE COURT: And that's why I started off my argument --

23 MS. GORDON: Absolutely.

24 THE COURT: -- there's two standards. I think that's why --
25 when I started today I --

1 MS. GORDON: You're exactly right. No --

2 THE COURT: -- Ms. Gordon, I'm very aware of the two
3 standards. That's why -- I'm very aware of that, okay. At least I got it,
4 right? I am aware of that.

5 MR. JIMMERSON: Sure do.

6 THE COURT: I know there's two standards and -- and --

7 MS. GORDON: To the extent that that, Your Honor, because
8 I have a very clear memory of my cross-examination of Mr. Dariyanani,
9 there were I can think top of my head at least two emails that were used
10 from Exhibit 56 --

11 THE COURT: Okay.

12 MS. GORDON: -- before that. They absolutely were
13 highlighted in preparation for my questioning --

14 THE COURT: Okay.

15 MS. GORDON: -- before my --

16 THE COURT: And honestly I don't take -- it was the only
17 one --

18 MS. GORDON: Sure.

19 THE COURT: -- I -- that -- that --

20 MS. GORDON: And -- and plaintiff --

21 THE COURT: -- honestly has not a lot of significance. This
22 email stands alone --

23 MS. GORDON: Sure.

24 THE COURT: -- in my mind as to whether you had the good
25 faith belief or whether -- whether it comes under either of those

1 standards I -- I --

2 MS. GORDON: And the fact it was highlighted is --

3 THE COURT: -- I hear a lot of extraneous things -- highlight
4 but it's what happened with this specific email is what --

5 MS. GORDON: Sure.

6 THE COURT: -- I'm focusing on. I understand that. And I
7 know there's going to be different recollections. I mean I can't even
8 remember what happened picking a jury yesterday very well so in some
9 respects I -- I understand that completely. Does that make sense on --

10 MS. GORDON: It does but to the extent that they're --

11 THE COURT: -- and I understand when things gets --

12 MS. GORDON: -- trying to -- to highlight certain things that
13 happened before or not in --

14 THE COURT: They're trying to make it more significant than
15 you think it should be. I get it.

16 MS. GORDON: Absolutely. Yes.

17 THE COURT: I get it and I -- it's my job and hopefully I do it
18 well is to try to put it in context and make it the significance it -- I get it, it
19 stands alone. Whether it's 200 pages -- I get -- I -- I understand all that.

20 Okay. Here's what I'm going to do -- I'm taking that other one
21 home over the weekend, but I think I know what -- I know time is of the
22 essence and it took me a while to put it on because I had to read all -- all
23 this I'm not -- and the other thing I want to tell you -- I know it's getting
24 late I got a jury -- I have you on February 20th. I set another one that's
25 going to be a firm trial setting so it can go if -- if my other one butts up --

1 have a little flexibility if I have to have three or four days in between. I'm
2 trying to stack firm -- not stack. I'm trying to do firm trial settings that go.
3 This one's going. I mean --

4 MR. JIMMERSON: Just to help you, it's February 10, Judge.

5 THE COURT: February 10th. Okay, hold on. I've got you
6 February 2nd here.

7 THE CLERK: Yeah, it shows February 10th on my --

8 THE COURT: Okay, hold on, hold on. You're right. I'm sorry,
9 Robocker's [phonetic] my -- is my -- I have too many cases you guys. It
10 is February 10.

11 Okay, I started -- I'm starting Salazar versus Sportsman -- you
12 heard them argue before about prior crimes and all that stuff, that's that
13 case. That starts 1/27. They told me two weeks should be enough. I
14 start getting a little discouraged because they're still fighting over how
15 many crimes who -- how many people were -- so I just wanted you to
16 know I have another firm trial setting so give me a little leeway. I'll let
17 you know if it's two or three days -- but I'm -- I'm putting them right next
18 to each other. I just wanted to let --

19 MR. JIMMERSON: Could we -- could both sides have the
20 name so we could track it along with you?

21 THE COURT: Yes you can. It's Salazar, S-a-l-a-z-a-r, versus
22 Sportsman and they -- I've given -- A728471, it's a death case of
23 someone got stabbed at a --

24 MR. JIMMERSON: Thank you, Judge.

25 THE COURT: -- the Sportsman's place on -- so yeah, could

1 you -- so if it looks like where I'm at or call my court and so oh my gosh,
2 it took them a week to pick a -- I think they'll be okay, but you know,
3 everything goes longer than I think.

4 MR. JIMMERSON: Understood.

5 THE COURT: I just wanted to be on the record so you have
6 that too. And when are those other motions set for you filed?

7 MR. JIMMERSON: Nothing's set that we saw. I don't know
8 (indiscernible) can you tell us --

9 THE COURT: You said you filed it yesterday?

10 MS. GORDON: We did and -- and it's a request for a pretrial
11 conference so it's just whether Your Honor sets it for a particular day
12 and -- and it's all just focused on the binding effect of the pretrial and
13 trial rulings.

14 THE COURT: Okay, well we probably need to do that.

15 MR. JIMMERSON: Agreed.

16 THE COURT: Let's -- let's do it before --

17 MR. JIMMERSON: How does mid-January look?

18 THE COURT: Let me get -- yeah -- let me -- do it before my
19 January 27th because they've got to quit fighting about things. I've got
20 to be down to the bottom line what those two can fight about on Salazar.
21 It's just one of those -- it's just a, you know, it's one of those tough
22 cases, you know, inadequate security and those are always fact tough.

23 Do you want to pick a date looking at my calendar or do you
24 want to come in like -- you want to come into the court -- do you want it a
25 hearing or do you want it to come into my -- do you want it on the -- tell

1 me what you want.

2 MS. GORDON: We just wanted to the best way that the Court
3 wants to address that really important issue in terms of motions in
4 limine, the extent to which the -- the prior orders of the court will be
5 binding on -- on this --

6 THE COURT: Were there extensive -- see I don't know
7 anything -- extensive motions in limine -- are there extensive -- okay.
8 Have you all met to decide which one of those -- are there some that
9 you don't want to go --

10 MR. JIMMERSON: We've not met but we can --

11 MR. VOGEL: We have not.

12 MR. JIMMERSON: -- certainly do that.

13 THE COURT: Okay. If you -- anything you can do I'm more
14 than -- I -- I agree because I had a -- a trial that got reversed and the
15 new trial judge did not go with the other trial judge's motions in limine,
16 but we agreed on some and some we didn't so if you could do that to --
17 instead of just doing in a vacuum, that would help me out on -- on -- on
18 what I would have to rule on since we get a pretty -- this is a quick trial
19 date -- I'm in trial right -- yeah is quick trial date considering my calendar.
20 If you could do that, I -- I would be glad to then say okay, here's where
21 we're at and then if you -- because then I -- my decision on that would
22 decide if you have to refile your motions in limine, right, and then --

23 MR. JAMES JIMMERSON: Correct, Your Honor.

24 THE COURT: -- and I'd have to read them and start over
25 again.

1 MR. VOGEL: Right.

2 MS. GORDON: And that's why we --

3 THE COURT: I don't want to say first batch but over again.

4 MR. JIMMERSON: Would --

5 THE COURT: So maybe we should do --

6 MR. JIMMERSON: How does -- how does week of the 13th

7 look to you all?

8 [Colloquy between counsel]

9 THE COURT: What? You guys come up with a date just --

10 [Colloquy between counsel]

11 MR. JAMES JIMMERSON: Your Honor?

12 [Colloquy between the Court and the clerk]

13 THE COURT: Yes.

14 MR. JAMES JIMMERSON: We have motions limine due the

15 27th of this month under the 45-day rule --

16 THE COURT: Okay.

17 MR. JAMES JIMMERSON: -- so either have a conference

18 before then to make -- to meet that or --

19 THE COURT: Or I'll fix the deadline.

20 MR. JAMES JIMMERSON: If -- if the Court would extend the

21 deadline, I --

22 THE COURT: I will. It just depends on how many -- I don't

23 know how many you had before, I don't know.

24 MR. JIMMERSON: We'll be able to meet though before the

25 27th. That won't be --

1 THE COURT: Of December. You two can meet --
2 MR. JIMMERSON: Right.
3 THE COURT: -- because that's fine and then -- then I'll
4 extend if you decide there's only a few -- I'll -- I don't mind doing motions
5 in limine later than the date is what you're saying. I don't hold people to
6 those dates if it helps work on the trial.
7 MR. JAMES JIMMERSON: Would it -- would it make sense
8 then, Your Honor, for us to put a status check in one or two weeks --
9 THE COURT: Sure.
10 MR. JAMES JIMMERSON: -- so that we can report to the
11 Court exactly --
12 THE COURT: I think that would be great.
13 MS. GORDON: Yeah.
14 MR. JAMES JIMMERSON: -- what if any agreement has
15 been reached and then a briefing schedule if necessary for any --
16 THE COURT: I think that's perfect so let's do a -- where are
17 on status check?
18 THE CLERK: Yeah (indiscernible) the 17th --
19 THE COURT: How about December 17th? What is today,
20 5th? Yeah, today's the -- can you do a status check December 17th at 9
21 a.m.?
22 [Colloquy between the Court and the clerk]
23 MR. JAMES JIMMERSON: Yes, Your Honor, we'll -- we'll be
24 in front of your --
25 THE COURT: Or anything --

1 MR. JAMES JIMMERSON: -- we'll be in front of this Court on
2 a different matter --

3 THE COURT: Okay.

4 MR. JAMES JIMMERSON: -- on that date so we'll be in front
5 of --

6 THE COURT: Okay.

7 MR. JAMES JIMMERSON: -- we'll be in front of you anyway
8 so --

9 THE COURT: Okay, that's fine. Can you do -- Mr. Vogel, Ms.
10 Gordon, can you do the 17th?

11 MR. VOGEL: I will be in a mediation but can you?

12 MS. GORDON: I can -- I can be here.

13 THE COURT: Okay. Let's do that. I -- I like the idea of --
14 better than any other conferences because you keep me informed, like
15 that's why I got into these discovery issues on the other one because I
16 wanted to keep it going quicker --

17 MS. GORDON: And better to know as early as --

18 THE COURT: Yes.

19 MS. GORDON: -- possible what's going to happen.

20 THE COURT: Yes. So it's realistic --

21 MR. JIMMERSON: What -- what time would you say, Your
22 Honor?

23 MR. JAMES JIMMERSON: Nine I think.

24 MS. GORDON: Nine.

25 THE COURT: Nine o'clock.

1 MR. JIMMERSON: Very good.

2 THE COURT: And I'll do it for -- so can we get it on the
3 calendar? Okay. Yes, absolutely.

4 MR. VOGEL: Thank you, Your Honor.

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

6 THE COURT: And here's what I'm going to do, I'm going to
7 put this -- what did I just put the other one? I'm --

8 THE CLERK: On Monday.

9 THE COURT: On a -- what I do is instead of -- I just put it on
10 my chambers calendar for a decision. So I'll go ahead and put it -- I'm
11 going to do that other -- I'm going to do the Arbuckle [phonetic] thing this
12 weekend to go back and look at some more evidence.

13 So I can probably do it because I -- put it on for whatever
14 Monday is I'll take this too.

15 THE CLERK: Okay.

16 THE COURT: I know what I -- I know what I want to look -- I
17 mean I -- I do things quicker because I don't want to reinvent the wheel
18 here and I've spent too much time but I -- I will -- what I will do is I will do
19 a minute order by Monday.

20 MS. GORDON: Okay.

21 THE COURT: And I'll make sure I look at -- I'm pretty such
22 what I want but I wanted to make sure.

23 MR. JIMMERSON: All right.

24 THE COURT: On these like this I like to look one more time
25 to make sure I'm -- I want to go where I want to go and --

1 MR. JIMMERSON: On behalf of Mr. Landess and our team,
2 thank you.

3 THE COURT: I appreciate everybody's briefing I'm -- from the
4 bottom my heart I'm sorry this happened, but I look forward to a trial with
5 you does that make sense?

6 MR. JAMES JIMMERSON: Thank --

7 THE COURT: And -- and -- and getting things worked out.
8 Okay?

9 MR. JIMMERSON: Thank you, Judge.

10 MS. GORDON: Thank you.

11 MR. VOGEL: Thank you, Your Honor.

12 THE COURT: You're welcome.

13 MR. JAMES JIMMERSON: Thank you very much, Your
14 Honor.

15 THE COURT: Is that Mr. Landess?

16 THE PLAINTIFF: Yes.

17 MR. JIMMERSON: It is.

18 THE COURT: I thought so. We had done -- I don't know
19 years ago we had some kind of case I don't know what it was --

20 THE PLAINTIFF: It's been quite a while.

21 THE COURT: It's been a long time.

22 THE PLAINTIFF: But --

23 THE COURT: I'm -- I'm a lot older but I remember I was a
24 young attorney and you were --

25 THE PLAINTIFF: And --

1 THE COURT: -- very smart and very gracious so good luck.

2 THE PLAINTIFF: Thank you. I look forward to working with
3 you.

4 THE COURT: Okay, and I -- I admire all you counsel. I do. I
5 hope you know that. I think you know that.

6 MR. JIMMERSON: Counsel, thank you so much.

7 MS. GORDON: Thanks you guys.

8 MR. JAMES JIMMERSON: Thank you, Your Honor.

9 [Hearing concluded at 1:03 p.m.]

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

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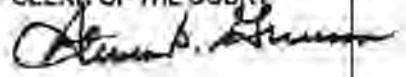

Tracy A. Gegenheimer, CER-282, CET-282
Court Recorder/Transcriber

EXHIBIT 5

EXHIBIT 5



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DISTRICT COURT

CLARK COUNTY, NEVADA

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

13 Plaintiff,

14 vs.

15 KEVIN PAUL DEBIPARSHAD, M.D., an
individual; KEVIN P. DEBIPARSHAD PLLC,
16 a Nevada professional limited liability
company doing business as "SYNERGY
17 SPINE AND ORTHOPEDICS",
DEBIPARSHAD PROFESSIONAL
18 SERVICES LLC, a Nevada professional
limited liability company doing business as
19 "SYNERGY SPINE AND ORTHOPEDICS",
ALLEGIANT INSTITUTE INC. a Nevada
20 domestic professional corporation doing
business as "ALLEGIANT SPINE
21 INSTITUTE"; JASWINDER S. GROVER,
M.D. an individual; JASWINDER S.
22 GROVER, M.D. Ltd doing business as
"NEVADA SPINE CLINIC"; VALLEY
23 HEALTH SYSTEM LLC, a Delaware limited
liability company doing business as
24 "CENTENNIAL HILLS HOSPITAL", UHS
OF DELAWARE, INC. a Delaware
25 corporation also doing business as
"CENTINNIAL HILLS HOSPITAL", DOES
26 1-X, inclusive; and ROE CORPORATIONS I-
X, inclusive,

27 Defendants.
28

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

**DEFENDANTS' MOTION TO
DISQUALIFY THE HONORABLE
ROB BARE ON ORDER SHORTENING
TIME**

**TO BE HEARD BEFORE
DEPARTMENT**


Date of Hearing:

9/4/19

Time of Hearing::

9 AM



AUG 23 2019


LEWIS
BRISBOIS
BISGAARD
& SMITH LLP
ATTORNEYS AT LAW

4845-4661-8273.1

i

1 COME NOW Defendants, by and through their counsel of record, S. Brent Vogel and
2 Katherine J. Gordon, and hereby move to disqualify the Honorable Rob Bare pursuant to N.R.S.
3 1.235 and Nevada Code of Judicial Conduct (N.C.J.C.) Canons 1 and 2 on the grounds that Judge
4 Bare has actual or implied bias or prejudice, and his impartiality is reasonably questioned.

5 This Motion is made and based on the Memorandum of Points and Authorities, the
6 Certifications and Affidavits of S. Brent Vogel and Katherine J. Gordon, the papers and pleadings
7 on file herein, and such oral argument at the time of the hearing on this matter.

8 Dated this 16th day of August 2019.

9 LEWIS BRISBOIS BISGAARD & SMITH LLP

10

11

By /s/ Katherine J. Gordon

12

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ORDER SHORTENING TIME

FOR GOOD CAUSE APPEARING, IT IS HEREBY ORDERED that the time and date for the hearing on **DEFENDANTS' MOTION TO DISQUALIFY THE HONORABLE ROB BARE** is hereby shortened to the 4th day of September, 2019 at the hour of 9 AM a.m., or as soon thereafter as counsel may be heard in Department HH, courtroom 14A

DATED this ____ day of August, 2019


DISTRICT COURT JUDGE

Respectfully submitted by:

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ Katherine J. Gordon

S. BRENT VOGEL

Nevada Bar No. 006858

KATHERINE J. GORDON

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Attorneys for Defendants Kevin Paul Debiparshad, M.D., Kevin P. Debiparshad, PLLC d/b/a Synergy Spine and Orthopedics, Debiparshad Professional Services, LLC d/b/a Synergy Spine and Orthopedics, and Jaswinder S. Grover, M.D., Ltd. d/b/a Nevada Spine Clinic

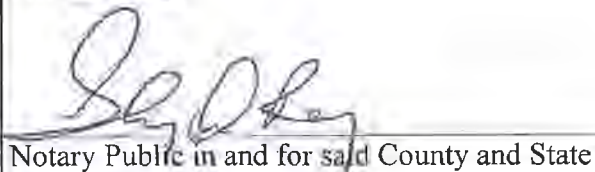
1 7. This Affidavit and Certificate is filed in good faith and not interposed for the
2 purposes of delay.

3 FURTHER AFFIDANT SAYETH NAUGHT

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S. BRENT VOGEL

SUBSCRIBED AND SWORN to before me
this 15th day of August 2019.


Notary Public in and for said County and State



1 AFFIDAVIT AND CERTIFICATE OF KATHERINE J. GORDON

2 IN COMPLIANCE WITH N.R.S. 1.235

3 STATE OF NEVADA)
4) ss.
5 COUNTY OF CLARK)

6 KATHERINE J. GORDON, being first duly sworn, deposes and states:

7 1. I am an attorney duly licensed to practice law in the State of Nevada and an Equity
8 Partner with Lewis Brisbois Bisgaard & Smith LLP, counsel of record for Defendants in the
9 above-entitled matter. This Affidavit and Certificate are made and based upon my personal
10 knowledge and I am competent to testify to the matters contained herein;

11 2. Trial in this matter commenced on July 22, 2019 and resulted in a mistrial being
12 declared by Judge Bare on August 5, 2019;

13 3. The declaration of mistrial was the result of an egregious misapplication of the law
14 by the court, and demonstrated the court's continued pattern of partiality to Plaintiff to the
15 detriment of Defendants throughout the course of the trial;

16 4. The court specifically expressed its favoritism of Plaintiff's counsel on the record,
17 leaving no doubt of Judge Bare's bias toward Plaintiff and inability of Defendants to receive a fair
18 and impartial trial;

19 5. Judge Bare also expressed—both on the record and in private to the parties—his
20 opinion that Defendants were going to be found liable in this matter and strongly suggested
21 Defendants make an offer to settle the case;

22 6. The parties have pending competing Motions for Fees and Costs. In order to
23 remove the appearance of partiality, and in an effort to ensure Defendants obtain a fair hearing,
24 Defendants respectfully request this case be reassigned to another Department prior to the hearing,
25 and for all continued action in this matter, including re-trial; and

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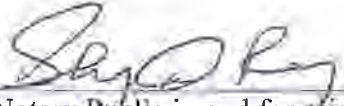
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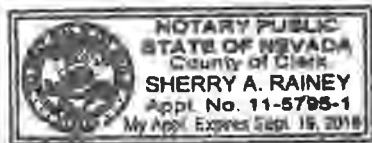
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KATHERINE J. GORDON

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this 15th day of August 2019.


Notary Public in and for said County and State



1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 This is a medical malpractice action in which Plaintiff alleges Defendant Dr. Debiparshad
4 failed to properly reduce a tibia fracture during surgery on October 10, 2017. The case was rushed
5 to trial commencing on July 22, 2019, following only six (6) months of discovery, pursuant to
6 Plaintiff's Preferential Trial Setting. Following two weeks of trial, Judge Bare granted Plaintiff's
7 request for a mistrial in the absence of any proper basis to do so.

8 During both pre-trial litigation and trial, Judge Bare exhibited bias and prejudice in favor
9 of Plaintiff, to the detriment of Defendants who were ultimately denied their right to a fair trial
10 held before an impartial judicial officer. Specific instances of Judge Bare's bias are set forth in
11 detail below. However, the most obvious evidence of his partiality concerning Plaintiff, who is a
12 lawyer, and Plaintiff's lawyer (Jim Jimmerson) warrants immediate citation as it, taken alone,
13 supports the instant Motion for Disqualification.

14 During discussions regarding evidence contained in an exhibit offered by Plaintiff that
15 was ultimately damaging to Plaintiff's case, but was stipulated into evidence without objection,
16 Judge Bare stated the following on the record¹:

17 THE COURT: Okay. Well, that gives me further
18 context, as to where I'm going with this at this point. And I've
19 got to say, Mr. Jimmerson. This comes to exactly what I would
20 expect from you, and if I say something you don't want me to
21 say, then you stop me. Okay. But what I would expect from you,
22 based upon all my dealings with you over 25 years, and all the
23 time I've been a judge too, is frank candor -- just absolute frank
24 candor with me as an individual and a judge. It's always been

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27 ¹ This particular portion of the discussion centered on Judge Bare offering Plaintiff counsel an
28 excuse for his failure to object to the use of an admitted document during cross examination of a
witness.

1 that way. You know, whatever word you ever said to me in
2 any context has always been the gospel truth.

3 I mean, without, you know, calling my colleagues, lawyers
4 that worked with me at the bar, or my wife as testimonial witnesses,
5 I've told all those people many times about the level of respect
6 and admiration I have for you. You know, you're in -- to me,
7 you're in the, sort of, the hall of fame, or the Mount
8 Rushmore, you know, of lawyers that I've dealt with in my
9 life. I've got a lot of respect for you. So I say that now because I
10 think what you're really saying doesn't surprise me. And I think
11 what you're really saying is -- and again, interrupt me anytime if
12 you want -- is, well, in a multi-page exhibit, we just didn't see it.

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

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

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

18 THE COURT: I know. You did say that.²

19 It does not matter whether Judge Bare shared his opinions of Plaintiff's counsel in an
20 attempt to excuse Plaintiff's procedural error, or to draw a distinction between his appreciation for
21 Plaintiff's counsel as opposed to defense counsel, or both. A determination of Judge Bare's
22 particular purpose for waxing poetic about Plaintiff's counsel to the point of being obsequious is
23 unnecessary for purposes of the current Motion. It is enough that Judge Bare made these
24 comments which would clearly cause a reasonable person, in this case Dr. Debiparshad and his
25 counsel, to question his impartiality.

26
27 ² See Trial Transcript, Day 10, pp. 178-79, attached hereto as Exhibit "A" (emphasis added)
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1 Following the above statements by Judge Bare, he asked the parties' attorneys to
2 participate in a meeting with him "off the record" in a conference room located behind the
3 courtroom. During the meeting, Judge Bare communicated his substantial concern regarding the
4 potential damage to Plaintiff's case resulting from Defendants' recent—and entirely proper—use
5 of an admitted document during the cross examination of one of Plaintiff's witnesses. Judge
6 Bare's concern was so great that he advised the parties they should strongly consider settling the
7 case in order to avoid a mistrial. His suggestion of settlement to Defendants included his
8 proffered opinion that malpractice had been proven by Plaintiff and the jury was likely going to
9 award damages against Defendants.

10 Judge Bare invited the parties to file motions over the weekend (clearly implying a
11 potential Motion for Mistrial by Plaintiff). Plaintiff filed a Motion for Mistrial on Sunday, August
12 4, 2019 at 10:02 p.m. Judge Bare granted Plaintiff's Motion the following court day, without
13 allowing Defendants an opportunity to file opposing Points and Authorities.

14 During argument regarding the requested mistrial, defense counsel attempted to place
15 portions of the back room meeting discussions on the record. Judge Bare immediately interrupted
16 defense counsel and prevented him from speaking.³ However, Judge Bare ultimately placed many
17 of the important aspects of the discussion on the record himself. He admitted telling the parties
18 during meeting that he thought liability had been established. He then reiterated this opinion on
19 the record and stated there was "enough evidence to meet the burden, the preponderance burden
20 on the medical malpractice."⁴ Judge Bare turned directly to Dr. Debiparshad and stated:

21 In other words, it's not that I disrespect your position or Dr. Gold's
22 [Defendants' orthopedic surgeon expert witness] position. It's just
23 that if you were to ask me, I would say to this point, that the medical
24 malpractice itself, though I'm sure you did the best you could and it
25 was well-intended and you didn't do anything intentional to try and

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27 ³ See Trial Transcript, Day 11, p. 9, attached hereto as Exhibit "B" (emphasis added).

28 ⁴ See Trial Transcript, Day 11, pp. 15-17, attached hereto as Exhibit "C".

1 harm [Plaintiff], but that's not required in medical malpractice. It's just
2 making a mistake that now, unfortunately, causes some effect. And
3 you know, my view is that Plaintiffs [sic] would meet that burden. I
4 didn't give all the reasons for that. I'd be happy to spend time doing
5 that, though.⁵

6 Defendants could not disagree more strenuously with Judge Bare's interpretation of the
7 evidence and his opinion that Plaintiff had met his burden of proof.⁶ More concerning, however,
8 was Dr. Debiparshad's reaction to this insulting—and entirely unrequested⁷—opinion being
9 proffered by a Judge who is expected to be impartial and unbiased. Dr. Debiparshad and his
10 retained expert Dr. Gold (who is recognized as one of the top 10 tibia surgeons in the world)
11 vigorously disagree that Dr. Debiparshad made a “mistake”. Dr. Debiparshad was stunned by the
12 Court's comments and understandably offended.⁸

13 Judge Bare's glowing testimonial of Plaintiff counsel, his volunteered opinion that Dr.
14 Debiparshad breached the standard of care, and his many rulings before and during trial (set forth
15 in detail below) all display a deep-seated favoritism of Plaintiff which nullifies Defendants'
16 expectation that Judge Bare can render fair judgment. Under these circumstances, Judge Bare
17 should be disqualified from any further proceedings in this matter.

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23 ⁵ *Id.* (Emphasis added).

24 ⁶ Interestingly, Judge Bare denied Defendants' request to speak with the jurors after the mistrial
was granted. The jury would certainly have been able to shed light on the accuracy of Judge
Bare's opinions regarding the likelihood of a malpractice finding and award of damages.

25 ⁷ During the back room meeting, Judge Bare offered numerous times to share his opinion
26 regarding liability and damages. Defense counsel never accepted these offers. However, Judge
Bare ultimately voiced his opinions at Plaintiff counsel's urging.

27 ⁸ See Declaration of Kevin Debiparshad, M.D. in Support of Motion to Disqualify the Honorable
28 Rob Bare, attached hereto as Exhibit “D”.

1 II.

2 FACTUAL AND PROCEDURAL BACKGROUND

3 A. Pre-Trial Procedural Background

4 Plaintiff filed an Amended Complaint against Dr. Debiparshad, his current practice
5 (Synergy Spine and Orthopedics), his prior employer (Nevada Spine Clinic), and Centennial Hills
6 Hospital on July 2, 2018. The claims against Centennial Hills Hospital included false
7 imprisonment, elder abuse, and deceptive trade practices based on Plaintiff leaving the hospital
8 early Against Medical Advice.⁹

9 On July 13, 2018, Plaintiff filed a Motion for Preferential Trial Setting pursuant to N.R.S.
10 16.025 on the stated bases that he is: (1) over the age of 70; and (2) suffers from illnesses and
11 conditions that raise a substantial medical doubt Plaintiff will survive more than six months.
12 Defendants opposed the Motion for Preferential Trial Setting based upon the absence of required
13 clear and convincing medical evidence that Plaintiff suffers from any illness or condition that
14 could end his life, especially not within the statute's stated six month timeframe.¹⁰ However, the
15 Court was in favor of providing Plaintiff the preferential trial date and, on September 13, 2018, the
16 Court set a firm trial date of July 22, 2019.

17 Dispositive motions were filed by Defendants in July and August 2018, but were not heard
18 by Judge Bare until October 2018. Judge Bare denied each dispositive motion filed by
19 Defendants. The Joint Case Conference Report was not filed until December 11, 2018. The
20 Scheduling Order was filed on December 14, 2018 and provided for a discovery cut-off date of
21 April 23, 2019 (allowing for only four (4) months of discovery). The Scheduling Order also
22 provided for initial expert disclosures to be served on January 23, 2019 (allowing for slightly more
23 than one month of discovery prior to initial disclosures). The discovery deadline was ultimately
24 extended until June 3, 2019, which provided for a total of six (6) months of discovery in a

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26 ⁹ A settlement was reached between Plaintiff and Centennial Hills Hospital approximately one
week before trial commenced.

27 ¹⁰ Defendants' skepticism was confirmed four months later when Plaintiff submitted the initial
28 expert report of his economist which supported a wage loss claim for Plaintiff until the age of 85.

1 complicated medical malpractice case.

2 Several of the medical records available to Defendants during the early stages of discovery
3 indicated that Plaintiff was retired. However, when initial expert disclosures were served on
4 January 23, 2019, Defendants learned Plaintiff was claiming millions of dollars in damages based
5 on alleged lost wages, loss of earning capacity and loss of the value of stock options. Defendants
6 tried without success between February and May 2019 to obtain the evidence and documents
7 necessary to properly evaluate Plaintiff's lost wage/earning capacity/stock option claims.

8 Based on the limited access to evidence regarding Plaintiff's lost wage/earning
9 capacity/stock option claims, Defendants filed a Motion to Continue Trial which was denied by
10 the Court on June 13, 2019. Judge Bare ruled that a trial continuance (of any unspecified length),
11 would result in "significant prejudice" to Plaintiff. He allowed, however, for limited additional
12 discovery concerning Plaintiff's wage loss claims to take place until 21 days before the start of
13 trial. This provided for only 18 additional days of discovery regarding Plaintiff's multi-million
14 dollar damage claim.

15 Judge Bare's granting of Plaintiff's Motion for Preferential Trial Setting in the absence of
16 clear and convincing medical evidence, coupled with his disregard for the prejudicial effect on
17 Defendants of being unable to fully and adequately defend against Plaintiff's multi-million dollar
18 wage loss claims, raised concerns of Judge Bare's possible bias and partiality toward Plaintiff.
19 This is especially true when Plaintiff's supposed need for a preferential trial setting was quickly
20 dispelled by his subsequent claim for work-related damages through the age of 85. At the least,
21 Judge Bare should have acknowledged the fallacy of Plaintiff's need for an expedited trial and
22 provided Defendants with adequate time for discovery. However, it was not until trial that
23 Defendants' concerns about Judge Bare's partiality and bias were confirmed.

24 **B. Judge Bare's Trial Rulings**

25 Trial commenced on July 22, 2019. It lasted two weeks until, on Monday, August 5, 2019,
26 Judge Bare granted Plaintiff's Motion for Mistrial. Throughout trial, Judge Bare's rulings were
27 issued with obvious bias and favoritism toward Plaintiff, and often included a gross misapplication
28 of the law in order to hold in favor of Plaintiff. Below is a brief summary of the most egregious

1 and prejudicial rulings by Judge Bare.

2 1. **Judge Bare Refused Defendants an Opportunity to File an Opposition**
3 **to Plaintiff's Motion for Mistrial**

4 On Friday, August 2, 2019, Plaintiff called witness Jonathan Dariyanani to the stand. Mr.
5 Dariyanani is the President and CEO of Cognotion, Inc., the company where Plaintiff was working
6 in October 2017 when he underwent tibia repair surgery by Dr. Debiparshad. Plaintiff was
7 terminated from Cognotion 15 months later, in January 2019. Plaintiff claimed his termination
8 was the result of a physical and mental disability/impairment caused by the tibia repair surgery.

9 Despite the termination, Plaintiff and Mr. Dariyanani remained close friends.¹¹ In response
10 to Plaintiff counsel's direct examination, Mr. Dariyanani offered testimony that Plaintiff was a
11 "beautiful person" who "is still supporting his ex-wife after 22 years and doesn't have to, and he
12 cares", constituting improper good character evidence pursuant to N.R.S. 48.045(1)(evidence of a
13 person's character or a trait of his or her character is not admissible for the purpose of proving that
14 the person acted in conformity therewith on a particular occasion).¹² Mr. Dariyanani's good
15 character testimony was expanded during Defendants' cross examination wherein he would "leave
16 [his] children with [Plaintiff]" and would "give [Plaintiff] a bag of cash and tell him to count it
17 and deposit it."¹³

18 Because Plaintiff had opened the door to character evidence, Defendants were entitled to
19 rebut his testimony with negative character evidence. Defendants did not have to look far for this
20 rebuttal evidence.

21 During discovery, Plaintiff disclosed a set of emails between Plaintiff and other employees
22 at Cognotion, Inc. dated between 2016 and 2018. The emails were first disclosed by Plaintiff in
23 his 12th N.R.C.P. 16.1 Supplement to Early Case Conference Disclosure of Documents on May 16,
24 2019 (Bates stamped P00440-453 and P00479-513). The emails were disclosed again by Plaintiff
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26 ¹¹ See Trial Transcript, Day 10, p. 99, attached hereto as Exhibit "E".

27 ¹² *Id.* at p. 109.

28 ¹³ See Trial Transcript, Day 10, p. 159, attached hereto as Exhibit "F".

1 in his Pre-Trial Disclosures, and for a third time as an identified trial exhibit (marked by Plaintiff
2 as proposed trial exhibit No. 56). Plaintiff's proposed Exhibit 56 consisted of 21 emails, and was
3 a total of 49 pages.¹⁴ Twenty-five of these pages were either blank or lengthy print outs from
4 travel websites. Only 24 of the 49 pages included substantive text from emails.¹⁵

5 Not only did Plaintiff disclose the emails in Exhibit 56 on several occasions, he did not file
6 a Motion in Limine, or otherwise request that the Court preclude or limit the use of any of the
7 emails during trial.

8 Defendants utilized several emails contained in Plaintiff's proposed Exhibit 56 during the
9 cross examination of Mr. Dariyanani to impeach his testimony regarding Plaintiff's ability to
10 work. Emails from Exhibit 56 were also used to reveal the collusion between Plaintiff and Mr.
11 Dariyanani regarding Mr. Dariyanani's deposition testimony in April 2019, and to establish that
12 Cognotion allowed Plaintiff to dictate the scope of Cognotion documents disclosed to Defendants
13 during the current litigation (thus resulting in Defendants' difficulty in obtaining Plaintiff's work-
14 related documents).

15 Prior to the use of the emails during Mr. Dariyanani's cross examination, Defendants
16 moved to admit Plaintiff's proposed Exhibit 56 into evidence. Plaintiff stipulated to its admission.

17 Plaintiff's Exhibit 56 also included an email from Plaintiff to Mr. Dariyanani dated
18 November 15, 2016 (Bates stamped P00487-88). Plaintiff titled the email "Burning Embers".

19
20 ¹⁴ Plaintiff initially informed the Court that Exhibit 56 was 122 pages. He later told the Court it
was 79 pages based on Plaintiff's Trial Exhibit Bates stamping of 56-001 to 56-079.

21 The pre-trial disclosures produced to Defendants for Plaintiff's proposed Exhibit 56 was only
22 49 pages and consisted of Bates stamped documents P00440-453 and P00479-513. Plaintiff's
Third Amended Trial Exhibit List also referenced Exhibit 56 as consisting of "Emails to and from
23 Jason Landess", Bates stamped P00440-453 and P00479-513 (the actual documents that were
produced for Exhibit 56 are Bates stamped P00441-454 and P00479-513).

24 Defendants no longer have a copy of Plaintiff's trial exhibits and cannot verify the number of
25 pages in Plaintiff's Exhibit 56 to the extent those differed from Plaintiff's pre-trial disclosures
submitted to Defendants. During oral argument on August 5, 2019, when Defendants still had
26 access to Exhibit 56, Defendants referenced the fact Exhibit 56 consisted of 79 pages and included
32 emails. However, the number of pages in Exhibit 56—whether it is 49 pages or 79 pages—is
not so vast that Plaintiff should be readily excused from knowing its contents.

27 ¹⁵ See Plaintiff's Third Amended Trial Exhibit List attached hereto as Exhibit "G" and proposed
28 Exhibit No. 56, attached hereto as Exhibit "H".

1 The email began: "Lying in bed this morning I rewound my life..." It continued with Plaintiff (70
2 years old at the time) providing a summary of past jobs and the significance of each. In the second
3 and third paragraphs of the "Burning Embers" email, Plaintiff wrote to the witness on the stand,
4 Mr. Dariyanani:

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

13 When I went to Thailand, I took a suitcase full of colored sun
14 glasses to sell. They were a huge success. But one day in a bar a
15 young Thai pretended to be interested in talking to me while his
16 friends behind my back stole all my merchandize. From that lesson
17 I learned that it's not a good idea to sell something that you cannot
18 control and protect, a lesson reinforced later on in life when an
19 attorney friend of mine and **I bought a truck stop here in Las**
20 **Vegas where the Mexican laborers stole everything that wasn't**
21 **welded to the ground.**¹⁶

22 Defense counsel showed the "Burning Embers" email to Mr. Dariyanani during cross
23 examination and asked if his glowing opinions of Plaintiff's character—as relayed to the jury
24 earlier—were affected by the content of the email when he received it in November 2016
25 (particularly the portions set forth above in bold).¹⁷ Mr. Dariyanani testified that his opinions

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27 ¹⁶ See Exhibit "H", Bates stamped pages P00487-88.

28 ¹⁷ See Trial Transcript, Day 10, pp. 161-63, attached hereto as Exhibit "I".

1 were not negatively affected.¹⁸

2 Plaintiff did not object to Defendants' use of the "Burning Embers" email (which was
3 previously admitted into evidence by stipulation).

4 After Mr. Dariyanani was excused, Judge Bare ordered a comfort break for the jury.
5 During the break, Judge Bare told the parties he had concerns regarding his perception of
6 prejudicial effect of the "Burning Embers" email. Judge Bare raised the issue of Plaintiff's failure
7 to object to the email, but then, stunningly, he volunteered to Plaintiff the excuse that his counsel
8 likely "just didn't see [the email]" in the "multi-page exhibit".¹⁹ He went on to say Plaintiff's
9 prior Motions in Limine to exclude his bankruptcies and gambling debt "are evidence of the fact
10 they just missed it."²⁰ Judge Bare also stated that Plaintiff missed the document "in good faith".²¹
11 *Plaintiff had not yet even made this argument to the Court*; Judge Bare was making—and then
12 accepting—his own arguments on behalf of Plaintiff.

13 This is the same discussion wherein Judge Bare made his gratuitous compliments about
14 Plaintiff's counsel, including that Plaintiff's counsel only tells the "gospel truth" and that he was
15 in Judge Bare's personal "hall of fame or Mount Rushmore" of attorneys.²²

16 Plaintiff requested the testimony concerning the email be stricken. Judge Bare told
17 Plaintiff that might only draw further attention to the email, and he denied Plaintiff's request. No
18 further request or motion was made by Plaintiff that day regarding Defendants' stipulated and un-
19 objected to use of the email. However, after the jury was excused for the day, Judge Bare called
20 the attorneys into the back room meeting, detailed above, to discuss possible settlement and
21 offered his opinion that the jury would find malpractice and award damages.

22 On Sunday, August 4, 2019, at 10:02 p.m., Plaintiff filed a Motion for Mistrial based on
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24 ¹⁸ *Id.*

25 ¹⁹ *See* Exhibit "A", p. 179.

26 ²⁰ *Id.* at p. 184.

27 ²¹ *Id.*

28 ²² *Id.* at pp. 178-79.

1 Defendants' use of the stipulated into evidence "Burning Embers" email during the cross
2 examination of Mr. Dariyanani. Defendants did not see the Motion until the following morning
3 when trial was set to resume at 9:00 a.m. Judge Bare also had not reviewed the Motion until that
4 morning. He raised the issue of the Motion immediately with the parties, outside the presence of
5 the jury, and asked if Defendants intended to oppose it.²³ Defense counsel stated he "absolutely"
6 intended to oppose the Motion but needed time to file the brief.²⁴ Judge Bare did not allow time
7 for Defendants to file opposing Points and Authorities and, alternatively, entertained argument and
8 granted the Motion that morning.

9 Defendants were clearly prejudiced by the inability to file an Opposition to Plaintiff's
10 Motion for Mistrial. Judge Bare and Plaintiff were seemingly of the same mind to rush the matter
11 to mistrial, despite the late filing of the Motion and critical nature of properly evaluating the
12 parties' positions. At the time Plaintiff filed his Motion for Mistrial, the parties and Court had
13 spent over two weeks in trial, including the expense of producing multiple expert witnesses. The
14 trial itself was at least 80% completed, with only three witnesses and closing arguments
15 remaining. Under these circumstances, it was certainly incumbent upon Judge Bare to allow
16 Defendants adequate time to respond to Plaintiff's Motion, which he failed to do.

17 2. Judge Bare Granted Plaintiff's Motion for Mistrial in the Absence of
18 Proper Foundation

19 The Court agreed with Defendants that the "issue of character was put into the trial by the
20 Plaintiffs [sic]."²⁵ The Court also agreed that Defendants "had a reasonable evidentiary ability to
21 offer their own character evidence" to rebut Mr. Dariyanani's proffered good character testimony
22 that Plaintiff was a beautiful person and could be trusted with bags of money.²⁶ However, Judge
23 Bare also stated he would have likely precluded use of some portions the "Burning Embers" email
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25 ²³ See Trial Transcript, Day 11, p. 4, attached hereto as Exhibit "J".

26 ²⁴ *Id.*

27 ²⁵ See Trial Transcript, Day 11, pp. 31 and 55, attached hereto as Exhibit "K"

28 ²⁶ *Id.*

1 if Plaintiff had filed a Motion in Limine (to exclude his own exhibit).²⁷

2 Judge Bare mentioned that he discussed the matter with Judge Mark Denton for two hours
3 and that Judge Denton agreed the email, and whether its author is a racist, was likely not
4 relevant.²⁸ Based on Judge Bare's clearly erroneous perception that the matter reached the level of
5 manifest necessity on behalf of the Court, he granted the requested mistrial.²⁹ Judge Bare's
6 interpretation of the manifest necessity centered on his perception of prejudicial effect to Plaintiff
7 from Defendants' use of the "Burning Embers" email, including the fact two of the jurors were
8 African American and two were possibly Hispanic.³⁰

9 Judge Bare's basis for granting the mistrial was patently erroneous and improper. First, his
10 focus on the prejudicial effect of the "Burning Embers" email was misplaced. It is not necessary
11 to conduct an analysis of prejudicial effect versus probative value of rebuttal bad character
12 evidence (which, by its very nature, is prejudicial). Judge Bare also incorrectly ignored the fact
13 the "Burning Embers" email was *admitted evidence*, which under Nevada law *can be used for any*
14 *purpose*. Second, in evaluating the propriety of Plaintiff's requested mistrial, Judge Bare failed to
15 take into consideration Plaintiff's cumulative errors in disclosing the "Burning Embers" email and
16 subsequently failing to object to its use. Third, Judge Bare's tortured (mis)application of the
17 holding in *Lioche v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008) to the facts of this matter was clearly
18 erroneous.

19 a. Bad Character Rebuttal Evidence is Not Subject to a Probative Value versus
20 Prejudicial Effect Analysis

21 Judge Bare's focus on whether the "Burning Embers" email was relevant, and further
22 whether its prejudicial effect outweighed its probative value, is misplaced and inapplicable to the
23 facts of this manner. That analysis would only be appropriate if Defendants sought to introduce

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25 ²⁷ *Id.* at pp. 31-32.

26 ²⁸ *Id.* at p. 32.

27 ²⁹ *Id.* at p. 47.

28 ³⁰ *Id.* at pp. 51, 60, and 69-70.

1 the email and admit it into evidence pursuant to one of the exceptions set forth in N.R.S.
2 48.045(2)(evidence of other crimes, wrongs or acts may be admissible as proof of motive,
3 opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident).
4 “Before admitting prior bad act evidence, the district court must determine whether the evidence
5 is relevant and proven by clear and convincing evidence. Additionally, the evidence is
6 inadmissible ‘if its probative value is substantially outweighed by the danger of unfair prejudice.’”
7 *Bongiovi v. Sullivan*, 122 Nev. 556, 575, 138 P.3d 433 (2006)(quoting *Taylor v. Thunder*, 116
8 Nev. 968, 973, 13 P.3d 43 (2000)(emphasis added).

9 However, in the instant matter, Defendants used the email as rebuttal bad character
10 evidence during the cross examination of a witness whom Plaintiff had improperly prompted to
11 offer good character evidence. Under these circumstances, there is no requirement or justification
12 for the Court to perform an analysis of the email’s prejudicial effect versus its probative value.
13 Plaintiff opened the door by offering good character evidence, therefore, Defendants are entitled to
14 offer rebuttal bad character evidence. See *Taylor v. State*, 109 Nev. 849, 860, 858 P.2d 843
15 (1993)(Shearing, J., concurring in part and dissenting in part)(under the rule of curative
16 admissibility, or the opening of the door doctrine “the introduction of inadmissible evidence by
17 one party allows an opponent, in the court’s discretion, to introduce evidence on the same issue to
18 rebut any false impression that might have resulting from the earlier admission”)(quoting *United*
19 *States v. Whitworth*, 856 F.2d 1268, 1285 (9th Cir. 1988)).

20 Similarly, in *Western Show Co. Inc. v. Mix*, 173 A. 183, 184 (Pa. 1934), the Pennsylvania
21 Supreme Court stated:

22 The injection by (appellant) of the ‘irrelevant and collateral
23 matter’ into the case left plaintiff but a single choice. It had either to
24 offer no evidence in answer to it. and thereby risk its possible effect
25 on the jury, which it had no way of measuring; or it could offer the
26 rebutting evidence and take the risk of reversal because of the
27 doctrine now advanced by appellant. No court of justice should put a
28 litigant to such an alternative; rather, it should permit him, by means

1 of contradictory evidence he had on hand, to rebut, as far as he could,
2 the erroneous evidence elicited by his antagonist. Anything short of
3 this would not even savor of fairness.

4 Also, an inquiry regarding the admissibility of the “Burning Embers” email was not
5 necessary because it had already been admitted by stipulation. It is axiomatic that, *absent any*
6 *limitations applied by the Court, admitted evidence may be used for any purpose.* This finding
7 alone should have ended the Court’s analysis of Plaintiff’s Motion for Mistrial.

8 Further, all character evidence, whether good or bad, is prejudicial by its very nature.
9 Notably, Judge Bare was not concerned with the prejudicial effect of Mr. Dariyanani’s testimony
10 that Plaintiff was a “beautiful person” who can be trusted with bags of money. Judge Bare was
11 equally undisturbed by the prejudicial effect to Defendants of the testimony of Plaintiff’s daughter
12 which was improperly filled with flattering character evidence of her father.

13 Judge Bare’s flawed interpretation of the underlying evidentiary issue was highlighted by
14 his suggestion that Defendants should have requested a sidebar meeting before using the “Burning
15 Embers” email to allow Plaintiff counsel and the Court the opportunity to redact certain prejudicial
16 portions of the email (according to Judge Bare, he would have redacted Plaintiff’s racist
17 statements, but allowed Plaintiff’s statements about hustling people on payday to remain).³¹ There
18 is no legal authority to support this suggested course of action. Rebuttal character evidence is not
19 subject to a sliding scale of prejudicial effect analysis to determine whether it can be used and/or
20 whether certain portions of the evidence should be redacted.

21 Judge Bare also based his decision to grant the mistrial on the fact the jury in this matter
22 included two African American and possibly two Hispanic members. According to Judge Bare,
23 the prejudicial effect of the racist comments in Plaintiff’s email was heightened based on the
24 particular racial constitution of the jury. Under this flawed analysis, if the jury had consisted of all
25 Caucasian members, the “Burning Embers” email may not have been considered so prejudicial

27 ³¹ *Id.* at p. 32-33.
28

1 and, perhaps, a mistrial could have been avoided. Defendants disagree with Judge Bare and
2 believe Caucasian jury members can, and should, be equally offended by the racist remarks in
3 Plaintiff's email. There is no authority to support Judge Bare's position that the particular
4 constitution of a jury, including the jury members' race, needs to be taken into consideration for a
5 determination of the potential prejudicial effect of rebuttal character evidence. Again, it must be
6 pointed out that bad character evidence is supposed to be harmful to the party it is offered against.
7 Judge Bare improperly declared a mistrial based on the unfounded and erroneous belief that
8 rebuttal bad character evidence involving racist comments is forbidden.

9 b. Judge Bare Completely Excused and Failed to Consider Plaintiff's Multiple Errors
10 in Disclosing the Email and Failing to Object to its Use During Trial

11 As set forth above, Plaintiff repeatedly disclosed the "Burning Embers" email prior to trial
12 and as a proposed trial exhibit. Plaintiff did not attempt to limit the use of the email within a
13 Motion in Limine and, conversely, stipulated to its admission into evidence. Plaintiff also did not
14 object to Defendants' use of the email as rebuttal character evidence during the cross examination
15 of Mr. Dariyanani. However, these cumulative errors by Plaintiff did not affect the Court's
16 decision to grant the mistrial based on Defendants' use of the email.

17 To the contrary, Judge Bare gratuitously raised the possibility that Plaintiff's counsel
18 simply missed the existence of the email in Plaintiff's multiple disclosures and trial exhibits.
19 While Judge Bare at one point described Plaintiff's failure to notice the email as a mistake
20 attributable to the entire Plaintiff team, he quickly negated any effect this mistake may have on
21 determining the propriety of a mistrial.³²

22 Shockingly, instead of holding Plaintiff accountable for failing to know the contents of his
23 own trial exhibits, Judge Bare stated *Defendants* must have known "Plaintiffs [sic] made a mistake
24 and did not realize [the "Burning Embers" email] was in Exhibit 56" based on the "zealousness"
25 otherwise shown by Plaintiff's counsel throughout the trial.³³ He further stated Defendants "took

26
27 ³² *Id.* at p. 53

28 ³³ *Id.* at p. 57

1 advantage of that mistake.”³⁴ Judge Bare’s attempt to place blame on Defendants for Plaintiff’s
2 mistake, and hold Defendants to an entirely different standard than Plaintiff, is yet another
3 example of his clear bias toward Plaintiff.

4 Judge Bare also raised the expedited nature of the discovery process as an excuse for
5 Plaintiff’s oversight.³⁵ The irony of this excuse was not lost on Defendants in light of Judge
6 Bare’s earlier denial of Defendants’ Motion to Continue Trial based on Judge Bare’s belief that
7 any continuance would result in supposed, but unidentified, undue prejudice to Plaintiff. Judge
8 Bare’s mindset regarding prejudice in this matter is simple: Plaintiff is capable of suffering from
9 it, but Defendants are not. This is the very definition of impartiality.

10 Plaintiff’s cumulative errors regarding the “Burning Embers” email are not irrelevant or
11 otherwise superfluous to an analysis of whether a mistrial is warranted. Likewise, Plaintiff should
12 be held accountable for initially opening the door to character evidence. Judge Bare readily
13 excused and overlooked the entirety of Plaintiff’s actions in causing the circumstances which
14 resulted in the mistrial. For this reason, Defendants are particularly—and understandably—
15 concerned about Judge Bare’s ability to fairly and impartially rule on the parties’ outstanding
16 Motions for Attorneys’ Fees and Costs.

17 c. Judge Bare’s Forced Application of the *Lioche v. Cohen* Holding was Improper

18 Judge Bare continually interrupted Defendants’ argument in opposition to the requested
19 mistrial. By contrast, Plaintiff counsel was allowed to argue without interruption. With his
20 interruptions, Judge Bare repeatedly asked that Defendants address a hypothetical situation
21 wherein Defendants attempted to use the “Burning Embers” email for the first time during closing
22 argument (as opposed to during the cross examination of Mr. Dariyanani).³⁶ Judge Bare wanted to
23 know if Defendants believed such a hypothetical situation would be appropriate.³⁷ In response,

24
25 ³⁴ *Id.*

26 ³⁵ *Id.* at p. 52.

27 ³⁶ *Id.* at pp. 34-37

28 ³⁷ *Id.*

1 Defendants respectfully requested to alternatively address the circumstances that occurred in this
2 case; *i.e.* the use of rebuttal bad character evidence (which was admitted by stipulation) during
3 cross examination of Plaintiff's witness who offered good character evidence.³⁸

4 Judge Bare did not appear particularly interested in Defendants' proffered argument. He
5 seemed focused on misapplying the holding of *Lioche v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008)
6 wherein the Nevada Supreme Court upheld the plaintiffs' right to a new trial based on the defense
7 attorney's misconduct in interjecting improper argument during closings. However, the facts of
8 *Lioche* are clearly inapplicable to this matter.³⁹

9 Judge Bare also incorrectly assumed that because Defendants believed it was proper to use
10 the "Burning Embers" email, Defendants also believed it would be proper for the jury to decide
11 this case on the basis that Plaintiff is a racist.⁴⁰ That is not Defendants' position. Perhaps if Judge
12 Bare had allowed Defendants to prepare an Opposition to Plaintiff's Motion for Mistrial, or
13 provided Defendants an opportunity to argue uninterrupted, he would have gleaned a better
14 understanding of Defendants' position.

15 **3. Judge Bare Allowed Plaintiff to Raise Two New Alleged Breaches of the**
16 **Standard of Care for the First Time During Opening Statement**

17 The fact Judge Bare granted Plaintiff's Motion for Mistrial, in the absence of any
18 appropriate basis, is the most egregious example of Judge Bare's bias toward Plaintiff. However,
19 other instances of Judge Bare's favoritism—and manifestation of his belief that Defendants were
20 not worthy of protection from clear prejudice when it would benefit Plaintiff—also occurred
21 earlier during trial.

22 Plaintiff gave his opening statement on July 23, 2019. During his opening statement,
23 Plaintiff informed the jury that Dr. Debiparshad breached the standard of care in failing to
24 properly reduce the tibia fracture. More specifically, Plaintiff stated Dr. Debiparshad's breach was

25
26 ³⁸ *Id.* at p. 36.

27 ³⁹ *Id.* at pp. 62, 64, and 66.

28 ⁴⁰ *Id.* at p. 35, 60-62, and 66.

1 evidenced by: (1) malalignment; (2) translation (a resulting cliff-like appearance of the two pieces
2 of repaired bone); and (3) gapping (a space between the two pieces of repaired bone).

3 However, during the pendency of the case, Plaintiff had only claimed that Dr.
4 Debiparshad's alleged malpractice was based on a malalignment of the fracture. Plaintiff had
5 never before claimed that malpractice was evidenced by resulting translation and/or gapping. To
6 the contrary, the expert witness reports of Plaintiff's orthopedic surgeon expert witness, Denis
7 Harris, M.D., were limited to a discussion of the *alignment* of the fracture repair. Dr. Harris also
8 specifically testified during his deposition that he had no criticism regarding the resulting
9 translation (also referred to as apposition) of the fracture repair. He further confirmed on several
10 occasions during his deposition that he had no criticism of Dr. Debiparshad's fracture repair
11 beyond the alleged malalignment.

12 Following Plaintiff's opening statement, and outside the presence of the jury, counsel for
13 Defendants objected to Plaintiff raising two new alleged breaches of the standard of care for the
14 first time during his opening statement. Because it was the end of the day, Judge Bare asked that
15 the parties submit documents that evening that revealed the scope of Plaintiff's previously alleged
16 breach of the standard of care to assist Judge Bare in resolving Defendants' objection. Defendants
17 submitted Plaintiff's expert reports and excerpts from the deposition of Dr. Harris.⁴¹

18 Plaintiff submitted excerpts from the deposition of Dr. Debiparshad wherein the concept of
19 translation of a fracture was discussed generally (not with regard to the fracture repair in the
20 instant case), the deposition of Roger Fontes, M.D. wherein the concept of translation was
21 discussed generally (not with regard to the fracture repair that occurred in the instant case), and
22 Plaintiff's expert reports.⁴² Plaintiff failed to submit any documentation from the case that showed
23 he had previously alleged that any resulting translation or gapping of the fracture site constituted
24 breaches of the standard of care.

25 ///

26
27 ⁴¹ See Defendants' submission to Judge Bare dated July 23, 2019, attached hereto as Exhibit "L".

28 ⁴² See Plaintiff's submission to Judge Bare dated July 23, 2019, attached hereto as Exhibit "M".

1 The following morning, Judge Bare heard additional argument of the parties on the issue of
2 whether Plaintiff could properly argue the two new alleged breaches of the standard of care.
3 Defendants again highlighted the absence of these claims during litigation and the prejudicial
4 effect of being forced to defend two new claims for the first time during trial. Plaintiff argued that
5 Defendants had adequate notice of the allegations by virtue of the terms “translation” and
6 “apposition” being discussed—as general topics—during depositions. Not surprisingly, Judge
7 Bare agreed with Plaintiff.

8 In addition to agreeing that Defendants somehow had notice of the new allegations, Judge
9 Bare also stated the different terminology of fracture displacement (alignment, translation,
10 apposition, rotation and distraction (gapping)) was interrelated and/or confusing.⁴³ Therefore,
11 according to Judge Bare, because Plaintiff had raised one particular allegation regarding
12 *alignment*, Defendants should have known that Plaintiff may raise other allegations concerning
13 *translation* and *gapping* given the interrelated and confusing nature of the terms.⁴⁴

14 Judge Bare’s rationalization is directly contrary to the science of fracture displacement.
15 The terms are not so interrelated that finding fault with one automatically includes criticisms
16 regarding the others. Indeed, the finding of an alleged malalignment (measured in degrees) versus
17 too much translation (measured in percentages) involves the application of completely different
18 measurements and standards. The terms are also not confusing. At the least, Judge Bare should
19 have refrained from attributing confusion of fracture termination to Plaintiff’s orthopedic surgery
20 expert witness, Dr. Harris.

21 Because of Judge Bare’s ruling regarding the newly alleged breaches of the standard of
22 care, Defendants were forced to defend two new theories of liability for the first time during trial.
23 The ruling was factually and legally unsupported, and resulted in clear prejudice to Defendants. It
24 is clear Judge Bare based the crucial ruling on his partiality and bias toward Plaintiff, as opposed
25 to an impartial analysis of the issue.

26 ⁴³ See Trial Transcript, Day 3, 32-40, attached hereto as Exhibit “N”.

27 ⁴⁴ *Id.*

1 4. Judge Bare Allowed Plaintiff to Claim Permanent Physical Disability in
2 the Absence of Expert Medical Testimony

3 Defendants filed a Motion in Limine to exclude certain opinions of Plaintiff's economist
4 expert, Stan Smith, Ph.D., as too speculative. On July 19, 2019, Defendants filed a Supplemental
5 Motion to exclude Dr. Smith's opinions regarding Plaintiff's work-related damages based on the
6 absence of proximate causation. The Supplemental Motion argued that Plaintiff may not maintain
7 a claim for damages premised upon an alleged disability/impairment that affects his ability to
8 work in the absence of required proximate causation evidence; *i.e.* expert medical testimony.

9 Defendants' Supplement was supported by clear Nevada law which provides that a
10 plaintiff must establish proximate causation by showing the claimed injury is the natural and
11 probable consequence of the negligence. *Yamaha Motor Co. v. Arnoult*, 114 Nev. 233, 238, 955
12 P.2d 661 (1998). Nevada law also clearly states that medical malpractice matters require expert
13 medical testimony to make this showing. *Bronneke v. Rutherford*, 120 Nev. 230, 235, 89 P.3d 4
14 (2004). This rule is further set forth in Nevada Revised Statute 41A.100 which requires the use of
15 expert medical testimony to prove causation in medical malpractice cases.⁴⁵

16 Defendants' Supplement also provided citations to case authority in *each* of the remaining
17 49 states which all require that proximate causation be established by expert medical testimony
18 when the issues are medically complex and outside the common knowledge of lay witnesses.

19 In the instant matter, no qualified medical expert opined that Dr. Debiparshad's alleged
20 negligence caused Plaintiff to suffer an impairment or disability—at any time—that limited
21 Plaintiff's ability to practice law. Plaintiff's expert economist merely accepted Plaintiff's
22 statement that he is currently 60-80% disabled and is not able to work.

23 ///

24
25 ⁴⁵ N.R.S. 41A.100(1) states "Liability for personal injury or death is not imposed upon any
26 provider of health care based on alleged negligence in the performance of that care unless
27 evidence consisting of expert medical testimony, material from recognized medical texts or
28 treatises or the regulations of the licensed medical facility wherein the alleged negligence occurred
is presented to demonstrate the alleged deviation from the accepted standard of care in the specific
circumstances of the case and to prove causation of the alleged personal injury or death."

1 Defendants further informed the Court that Plaintiff's anticipated lay witness testimony
2 (from Plaintiff's prior employer) regarding Plaintiff's perceived inability to work was insufficient
3 to prove either the *existence* of a recognized impairment/disability, or what *caused* the
4 impairment/disability. Based on the lack of proper proximate causation evidence, Defendants
5 requested the Court preclude Plaintiff from submitting his multi-million dollar claim for damages
6 premised upon lost wage/loss of earning capacity.

7 Plaintiff opposed Defendants' Supplemental Motion by citing to a single case from West
8 Virginia. Plaintiff failed to cite any legal authority from Nevada (or any state west of the
9 Mississippi River) to support his position that expert medical testimony was not required to
10 support his claim for damages premised upon an alleged disability that renders him unable to
11 work.

12 Perhaps because Plaintiff was unable to provide adequate legal authority in opposition to
13 Defendants' Motion, Judge Bare assisted in this process and conducted his own legal research.
14 Judge Bare ultimately located a Nevada Supreme Court case from 1961 (issued decades before the
15 enactment of N.R.S. Chapter 41A which governs medical malpractice cases). He provided the
16 case citation to the parties, *Sierra Pac. Power Co. v. Anderson*, 77 Nev. 68, 358 P.2d 892 (1961),
17 and stated his belief the holding supported Plaintiff's position. Judge Bare provided a lengthy
18 summary of the facts of the case and invited the parties to review the decision for arguments to be
19 held the next day.⁴⁶

20 The Motion was argued the following morning. Defendants argued the applicable Nevada
21 law cited in their Supplement. Defendants also respectfully highlighted the distinctions between
22 the holding of *Sierra Pac. Power v. Anderson* and the facts of the current matter, including the fact
23 the plaintiff in *Anderson* presented expert medical testimony in support of his claimed disability.
24 Plaintiff argued the holding of the single West Virginia case and his belief that lay witness
25 testimony is sufficient to support a claim for lost wages premised upon a physical disability.

27 ⁴⁶ See Trial Transcript, Day 3, pp. 42-45, attached hereto as Exhibit "O".
28

Ultimately, and not surprisingly by this point in the trial, Judge Bare could not be dissuaded from ruling in favor of Plaintiff, despite the abundance of Nevada law holding otherwise.⁴⁷ Judge Bare's denial of Defendants' Motion allowed Plaintiff to present a claim for millions of dollars in damages in the absence of required proximate causation evidence. In order to arrive at this decision, Judge Bare had to ignore clearly established Nevada law solely in an effort to please Plaintiff and Plaintiff's counsel.

III.

LEGAL ARGUMENT

A. Applicable Law Regarding Disqualification

A judge has a duty to uphold and apply the law, and to perform judicial duties fairly and impartially. N.C.J.C. 2.2 “Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences.” *Id.* at Cmt. 1. Thus, not just actual impartiality, but *perceived* partiality is justification for disqualification.

“A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety.” N.C.J.C. 1.2. The appearance of impropriety occurs whenever “the conduct would create in reasonable minds a perception that the judge violated the Code or engaged in other conduct that reflects adversely on the judge’s honesty, impartiality, temperament, or fitness to serve as a judge.” *Id.* at Cmt. 5.

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

⁴⁷ See Trial Transcript, Day 4, pp. 10-16, attached hereto as Exhibit “P”

1 The judge's actual impartiality or bias is not the issue. *People for the Ethical Treatment of*
2 *Animals v. Bobby Berosini, Ltd.*, 111 Nev. 431, 438, 894 P.2d 337 (1995)(overruled on other
3 grounds by *Towbin Dodge, LLC v. Eighth Judicial Dist. Court*, 121 Nev. 251, 112 P.3d 1063
4 (2005)). Instead, the Court must decide "whether a reasonable person, knowing all the facts,
5 would harbor reasonable doubts about [a judge's] impartiality." *Id.* The Nevada Supreme Court
6 recognized that "an opinion formed by a judge on the basis of facts introduced or events occurring
7 in the course of the current proceedings, or of prior proceedings, constitutes a basis for a bias or
8 partiality motion where the opinion displays 'a deep-seated favoritism or antagonism that would
9 make fair judgment impossible.'" *Kirksey v. State*, 112 Nev. 980, 1007, 923 P.2d 1102
10 (1996)(citing *Liteky v. United States*, 510 U.S. 540 (1994)).

11 Pursuant to N.R.S. 1.235(1), the party seeking disqualification must file an affidavit
12 specifying the facts upon which the disqualification is sought, and the affidavit must be
13 accompanied by a certificate of the attorney of record that the affidavit is filed in good faith and
14 not interposed for delay. Normally, the motion for disqualification must be filed not less than 20
15 days before the date set for trial or hearing the case, or three days before the date set for the
16 hearing of any pretrial matter. N.R.S. 1.235(1)(a)-(b). However, a party may seek disqualification
17 when the grounds underlying the disqualification are not discovered, or could not have reasonably
18 been discovered, until after the deadlines imposed by Section 1.235. *Towbin Dodge, LLC*, 121
19 Nev. at 260. ("If new grounds for a judge's disqualification are discovered after the time limits in
20 N.R.S. 1.235(1) have passed, then a party may file a motion to disqualify based on Canon 3E as
21 soon as possible after becoming aware of the new information.")

22 Canon 3E (Rule 2.11 of the N.C.J.C.) provides, in pertinent part, "[a] judge shall disqualify
23 himself or herself in a proceeding in which the judge's impartiality might reasonably be
24 questioned" including but not limited to when "[t]he judge has a personal bias or prejudice
25 concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in a
26 proceeding."

27 Defendants seek disqualification of Judge Bare premised on his violation of N.C.J.C. 1.2,
28 2.2 and 2.11. Judge Bare has not acted at all times in a manner that promotes public confidence in

1 the independence, integrity, and impartiality of the judiciary, and he has not avoided impropriety
2 or the appearance of impropriety. Judge Bare's impartiality is reasonably questioned by
3 Defendants based on his exhibited personal bias toward Plaintiff and Plaintiff's counsel.

4 **B. Judge Bare Must be Disqualified Based on Actual and Perceived Impartiality**

5 Judge Bare's insistence that the case proceed to trial so quickly (despite the obvious
6 prejudice to Defendant), and his denial of nearly every pre-trial motion filed by Defendants, raised
7 concerns about his partiality. However, his obvious bias toward Plaintiff and Plaintiff's counsel
8 was not grossly evident until the trial. The bias became undeniable upon the granting of Plaintiff's
9 request for a mistrial. Judge Bare's stated opinion that Plaintiff's counsel tells only the "gospel
10 truth" and is worthy of representation on Mount Rushmore leaves no doubt that he has formed "an
11 opinion...on the basis of facts introduced or events occurring in the court of the current
12 proceedings, or of prior proceedings" that "displays a deep-seated favoritism...that would make
13 fair judgment impossible." When a judge forms these opinions—and especially when he feels it is
14 appropriate to state such opinions on the record—sufficient grounds exist to seek disqualification
15 of the judge. *See Kirksey v. State*, 112 Nev. at 1007.

16 Judge Bare has violated section 1.2 of the Nevada Code of Judicial Conduct which
17 mandates that a judge act, at all times, "in a manner that promotes public confidence in the
18 independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the
19 appearance of impropriety." N.C.J.C. 1.2. Defendants have lost all confidence in Judge Bare's
20 independence and impartiality in this matter. He has failed to avoid impropriety or even the
21 appearance of impropriety. To the contrary, Judge Bare broadcast his impartial opinions of
22 Plaintiff's counsel on the record.

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

1 Judge Bare is currently slated to decide the parties' competing Motions for Attorneys' Fees
2 and Costs related to the mistrial. Each Motion requests hundreds of thousands dollars in fees and
3 costs. Given the lack of foundation to grant the mistrial in the first place, coupled with Judge
4 Bare's exhibited bias and partiality, Defendants understandably seek to disqualify Judge Bare
5 prior to a ruling on the outstanding Motions. It is critical that the outstanding Motions be heard by
6 an impartial and unbiased judicial officer.

7 **IV.**

8 **CONCLUSION**

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

11 Dated this 16th day of August 2019.

12 LEWIS BRISBOIS BISGAARD & SMITH LLP

13
14 By /s/ Katherine J. Gordon

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26 *Orthopedics, and Jaswinder S. Grover, M.D.,*
27 *Ltd. d/b/a Nevada Spine Clinic*
28

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 23rd day of August 2019, a true and correct copy
3 of **DEFENDANTS' MOTION TO DISQUALIFY THE HONORABLE ROB BARE ON**
4 **ORDER SHORTENING TIME** was served by electronically filing with the Clerk of the Court,
5 using the Odyssey File and Serve system, and serving all parties with an email-address on record,
6 who have agreed to receive Electronic Service in this action.

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18 **COURTESY COPY VIA MESSENGER**

18 By /s/ Johana Whitbeck
19 Johana Whitbeck, an Employee of
20 LEWIS BRISBOIS BISGAARD & SMITH LLP
21
22
23
24
25
26
27
28

Exhibit A

1 Landess has a good character. And you know, no objection was made
2 by that, by the way, by the Defense when he's offering these good
3 character traits.

4 And so now it's the flow of things, we now have an admitted
5 exhibit that's there, not referenced yet. Now we have a reason to bring
6 up character-type traits, because the Plaintiff has put it in issue through
7 Dariyanani.

8 We then have, of course, that moment in time where Ms.
9 Gordon puts on the ELMO and highlights with a yellow highlighter this
10 paragraph about--

11 MR. JIMMERSON: That I didn't even notice until she just put
12 it up there. What was I going to do, object to an admitted document,
13 suggesting that I'm afraid of it. I was outraged when I read it. I just was
14 -- I was blown away. I was stunned actually.

15 THE COURT: Okay. Well, that gives me further context, as to
16 where I'm going with this at this point. And I've got to say, Mr.
17 Jimmerson. This comes to exactly what I would expect from you, and if I
18 say something you don't want me to say, then you stop me. Okay. But
19 what I would expect from you, based upon all my dealings with you over
20 25 years, and all the time I've been a judge too, is frank candor -- just
21 absolute frank candor with me as an individual and a judge. It's always
22 been that way. You know, whatever word you ever said to me in any
23 context has always been the gospel truth.

24 I mean, without, you know, calling my colleagues, lawyers
25 that worked with me at the bar, or my wife as testimonial witnesses, I've

1 told all those people many times about the level of respect and
2 admiration I have for you. You know, you're in -- to me, you're in the,
3 sort of, the hall of fame, or the Mount Rushmore, you know, of lawyers
4 that I've dealt with in my life. I've got a lot of respect for you. So I say
5 that now because I think what you're really saying doesn't surprise me.
6 And I think what you're really saying is -- and again, interrupt me
7 anytime if you want -- is, well, in a multi-page exhibit, we just didn't see
8 it.

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

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

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

14 THE COURT: I know. You did say that.

15 Okay. So --

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

18 MS. GORDON: Your Honor, I would --

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

20 MS. GORDON: That's smearing.

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

22 MS. GORDON: And truly --

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

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

1 underhanded like that.

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

3 MS. GORDON: It just, it was admitted. It wasn't objected to.
4 It was their exhibit and I used it.

5 THE COURT: All right. So one of the other reasons I brought
6 all that up was, is I look at the pretrial motion practice, the motion in
7 limine practice, that the Plaintiffs asked me to preclude Mr. Landess's
8 gambling history. Remember the \$400,000 marker that he had? His
9 bankruptcies, and this other litigation that he was in. They did not ask to
10 preclude this item in question now, so that's further, I think, evidence of
11 the fact that they just missed it. What else can I tell you?

12 So the issue for the Court is this: in a situation where the
13 Plaintiffs, in good faith, miss something like that, but the Defense didn't
14 obviously, then the Defense uses it, I don't want to get into whether it
15 was good or bad faith either, because I don't feel -- I don't feel that you
16 did something with an intent that was bad in an ethical, you can't do this
17 as a lawyer sense.

18 I think what I think is that you felt as though you had a bit of
19 a bomb here, because you had known this was in the exhibit, and you
20 dropped it at an appropriate time, in your view. That all happened.
21 Okay. For me though, as a judge, now presiding over a trial with, you
22 know, two black jurors, and I'm using Mr. Landess's word, that's what he
23 said in the email describing African-Americans -- and I don't know if the
24 other item -- the Mexican item would be relevant to the ethnicity of other
25 jurors, because I'm not good at that kind thing.

Exhibit B

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

5 THE COURT: Okay. Mr. Vogel.

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

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

14 MR. VOGEL: Yeah.

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

20 MR. VOGEL: No, no.

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

Exhibit C

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

7 And in our Friday meeting, I think based upon either
8 acquiescence or invitation, the parties did want to hear and I did give a --
9 sort of a -- I think I called it a thumbnail overview or thumbnail sketch of
10 things and I said look -- and again, this is an opinion. And I gave this
11 opinion, because I thought perhaps it would foster taking me up on this.
12 I said look, my guess is that there's more -- there's enough evidence to
13 meet the burden, the preponderance burden on the medical malpractice.
14 I'll tell you Dr. Debiparshad, that's what I said to everybody on Friday.

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

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

Exhibit D

1 **DECLARATION OF KEVIN P. DEBIPARSHAD, M.D. IN SUPPORT OF MOTION TO**
2 **DISQUALIFY THE HONORABLE ROB BARE**

3 1. I am a licensed physician in the state of Nevada and specialize in orthopedic
4 surgery. I am a named Defendant in this matter and my counsel of record is Lewis Brisbois
5 Bisgaard & Smith LLP. This Declaration is made and based upon my personal knowledge and I
6 am competent to testify to the matters contained herein;

7 2. Plaintiff alleges that I fell below the applicable standard of care when I surgically
8 repaired Plaintiff's fractured tibia on October 10, 2017. I strongly deny this allegation;

9 3. Trial started on July 22, 2019 and ended more than two weeks later, on August 5,
10 2019, when Judge Bare granted Plaintiff's request for a mistrial;

11 4. During the final day of trial, Judge Bare told the parties that he personally believed
12 Plaintiff had met his burden of proof to establish a claim of medical malpractice against me. He
13 also stated his belief that the jury would likely award damages against me. More particularly,
14 Judge Bare stated he believed that I "did the best [I] could" and "didn't do anything intentional to
15 try and harm [Plaintiff]", but that I had made a "mistake" in my rendering of care and treatment of
16 Plaintiff which resulted in "some effect";

17 5. At first, I was surprised by Judge Bare's statements because I had not heard anyone
18 ask him for his opinion and it did not seem relevant to any discussions taking place at the time. I
19 was then stunned by the content of his statement that I had made a "mistake" in my care and
20 treatment of Plaintiff. I could not disagree more with this opinion. No part of my care and
21 treatment of Plaintiff fell below the standard of care;

22 6. Given the disparity of qualifications and testimony provided by the parties' expert
23 witnesses, Judge Bare's opinion that Plaintiff had somehow proven malpractice to the jury made
24 absolutely no sense to me. It was almost as though Judge Bare and I must have been sitting
25 through two entirely different trials for him to arrive at his opinions;

26 7. As a person of color, I was also insulted by Judge Bare's decision to grant a
27 mistrial because the jury was made aware of Plaintiff's email wherein he makes racial comments.
28 Several of Plaintiff's witnesses had testified about Plaintiff's good character. It seems they should

1 also be able to consider contrary evidence, such as that contained in the email, that shows Plaintiff
2 may not have such a great character;

3 8. Judge Bare seemed committed to protecting Plaintiff from his own racial
4 comments, to the point of granting a mistrial after two weeks of trial (during which I essentially
5 closed my medical practice to attend trial). Again, as a person of color, I found Judge Bare's
6 protection of Plaintiff, and his racial comments, particularly offensive;

7 9. During trial, I heard Judge Bare: (1) make awkward flattering comments about
8 Plaintiff's counsel, Mr. Jimmerson; (2) rule in favor of Plaintiff again and again, even when the
9 ruling made no sense such as when Judge Bare stated the medical terminology for proper tibia
10 reduction is interrelated and confusing; (3) offer excuses for Plaintiff's counsel regarding
11 counsel's failure to know the content of his own trial documents; and (4) interrupt my attorneys
12 when they were arguing, or read papers while they were arguing, which did not occur when
13 Plaintiff's attorneys were arguing; and

14 10. Based on what I observed during trial, I strongly question Judge Bare's
15 impartiality. I do not reasonably believe Judge Bare is able to fairly preside over this case, or that
16 I could have a fair trial if he remained the judge. For that reason, I believe he should be
17 disqualified and a new judge appointed.

18 I declare under the penalty of perjury that the foregoing is true and correct.

19 Dated this 18th day of August 2019.

20
21 
22 KEVIN P. DEBIPARSHAD, M.D.
23
24
25
26
27
28

Exhibit E

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

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

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

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

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

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

21 MR. JIMMERSON: Would you put it up on the board, please?

22 The ladies and gentlemen of the jury have seen this once before, I
23 believe.

24 ///

25 BY MR. JIMMERSON:

1 qualities and bad qualities, right. So if you ask Mr. Landess to tell you
2 Little Red Riding Hood, after three days you wouldn't get to the wolf, but
3 he's also a beautiful person who, like, is still supporting his ex-wife after
4 22 years and doesn't have to, and he cares. And we do our courses, the
5 number one -- so you know, we have General Casey and the cardiologist
6 on the ACC Board of Governors, and the number one speaker
7 consistently is Mr. Landess. And I cared about him as a person, and I
8 feel like he was genuinely wronged. I mean, I don't -- you know, to me,
9 no one could have done a better job in physical therapy, and yet, you
10 know, from my perspective, because of essentially the same neglect I
11 see of elder people in the work that I do in day-to-day basis, here we are.
12 And so --

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

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

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

20 MR. JIMMERSON: Thank you.

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

23 BY MR. JIMMERSON:

24 Q You may continue.

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

Exhibit F

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

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

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

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

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

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

20 A Uh-huh.

21 Q And the beginning of the email states,
22 "But in an effort to avoid the nightmare of having to
23 reconstruct exactly how I was paid monthly, here's what I
24 said in my deposition. I was paid \$10,000 a month. Some of
25 it subtracted from investor payments and got sent to

Exhibit G

PLAINTIFF'S THIRD AMENDED TRIAL EXHIBIT LIST

PLAINTIFF: Jason George Landess aka
Kay George Landess
DEFENDANT: Kevin Paul Debiparshad, MD
DEFENDANT: Jaswinder Grover, MD, et al
DEFENDANT: Valley Health System, et al

PLAINTIFFS' ATTORNEY: Martin A. Little
DEFENDANT'S ATTORNEY: S. Brent Vogel
DEFENDANTS' ATTORNEY: S. Brent Vogel
DEFENDANTS' ATTORNEY: Kenneth M. Webster

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

EX NO	DESCRIPTION	BATES NUMBER	DATE OFFERED	OBJECTION	DATE ADMITTED
51	Cinematic Health Education executed documents, Bylaws, Certificate of Incorporation, Stock Ledger	P00266-P00387			
52.	CNA Skills Guideline	P00388-P00389			
53.	Cognition letters to Jason Landess	P00390-P00393			
54	Excel spreadsheet (ContinuEdSpreadsheet)	P00394-P00436			
55.	Cover Memorandum for Spreadsheet Regarding CNA CEU in Nevada	P00437-P00439			
56.	Emails to and from Jason Landess	P00440-P00453; P00479-P00513			
57	Cinematic Health Education, Inc. Action by Written Consent of the Board of Directors in Lieu of Organizational Meeting dated March 15, 2018	P00226-P00284			
58.	Cognition - Series Pre-Seed Preferred Stock Investment Agreement dated March 20, 2018	P00309-P00332			
59	Exhibit 1 (2017 1099), Exhibit 2 (2016 1099), Exhibit 3 (redacted Bank of America statement showing 3/21/18 wire from Cognition), Exhibit 4 (redacted Bank of America statement showing 1/12/18 wire from Cognition), Exhibit 5 (redacted Bank of America statement showing 5/3/18 wire from Cognition)	P000454-P00478			
60.	Accounting summary, letter and email between Jason Landess and John Truehart regarding income and salary and attachments (Cognition letter dated July 12, 2018, regarding salary paid to Jason Landess in 2017 and 2018; ProDox request for Cognition employment and payroll records regarding Jason Landess)	P00514-P00539			
61.	SME Lawyer questions for CNA	P00540			
62.	Video - "Close Up - Meet Your Faculty"	P00541			
63.	Email from Jonathan Dariyanani to John Orr. Esq. dated 6/1/19. Bates labeled	P001751-P001753			
64.	ACH Payment to Jason Landess on March 18, 2019, Chase for Business account	P00220			

Exhibit H

From Jason

Sun, Jun 10, 2018 at 10:41 PM

Thanks!



Jonathan Dariyanani <jdariyanani@gmail.com>

(no subject)**Jason Landess** <jland702@cox.net>

Sat, Aug 18, 2018 at 8:17 PM

To: tim@cinematichealtheducation.com

Cc: Jonathan Dariyanani <jonathan@cognotion.com>, justin@cognotion.com

Hi Tim—

Jonathan asked me to forward the attached documents to you so you can see what we've done so far to map out CNA assets for obtaining state approval for being a provider for CNA continuing education in Nevada. If this template is acceptable, we can do the same for other states.

Although every state differs in its specific requirements, they all follow the same general pattern of a combination of classroom and clinical subjects. As you can see from my Memo, Nevada requires 24 hours of training within the past two years of employment.

The training has to fall within the purview of the attached "CNA Skills Guidelines." Other states' guidelines may slightly vary, with states like California, Illinois, Texas, etc., having more stringent requirements.


For submitting an application in Nevada, you just need to submit a one-hour sample of your curriculum with an application. The person submitting the application has to be a registered nurse.

The hard part was to break out various video vignettes and catalogue the content, with appropriate video links for each one. You can see from the attached spreadsheet that Justin and Riley have done that for numerous subjects. Now all Justin and Riley need to do is insert the corresponding Nevada skill alongside each vignette, which could easily be done for every state. I told them to hold off doing that for Nevada until we've obtained some feedback from you.

Let me know if you think we're headed in the right direction. Obviously, this is still a bit rough because it's the first draft.

Regards,

Jason G Landess

3 attachments **ContinuEdSpreadsheet_5-Aug-2018.xlsx**
45K **COVER MEMORANDUM FOR SPREADSHEET REGARDING CNA CEU IN NEVADA.DOCX**
18K **CNA skills guidelines.pdf**
55K**P00442**

4/22/2019

Gmail - (no subject)

P00443



Jonathan Dariyanani <jdariyanani@gmail.com>

FW: From Jason Landess, Esq. re Cognotion, Inc.

Jason Landess <jland702@cox.net>
To: Jonathan Dariyanani <jonathan@cognotion.com>

Wed, Aug 30, 2017 at 2:20 PM

FYI.....

From: Jason Landess [mailto:jland702@cox.net]
Sent: Wednesday, August 30, 2017 11:20 AM
To: 'mjwu@cpe.state.nv.us'
Subject: From Jason Landess, Esq. re Cognotion, Inc.

Ms. Wu:

Good morning! About a week ago you were gracious enough to speak at length with me about licensing for my client, Cognotion, Inc. (<http://www.cognotion.com/>). I forwarded the application to my client and explained that the first step would be to attend a pre-application seminar.

While my client is exploring that option, they asked me to inquire of you if you would know of any licensed schools that, due perhaps to limited resources or other constraints, may be good candidates for a joint venture with Cognotion. They would provide the structure; and Cognotion would provide its unique curriculum and financial assistance. It could easily be a win/win situation.

Your thoughts?

Regards,

Jason G. Landess, Esq.
Senior Counsel for Cognotion, Inc.

Jason G. Landess, Esq.
7054 Big Springs Court
Las Vegas, NV 89113
Phone: 702-232-3913
Fax: 702-248-4122
Email: Jland702@cox.net

P00444

4/22/2019

Gmail - FW: From Jason Landess, Esq. re Cognotion, Inc.

<https://mail.google.com/mail/u/0?ik=339ff1ff2df&view=pt&search=all&permmsgid=msg-f%3A1577181225453699384&simpl=msg-f%3A1577181225453699384>

2/2

P00445

P.App. 2297

4/22/2019

Gmail - From Jason Landess

mail

Jonathan Dariyanani <jdariyanani@gmail.com>

From Jason Landess

Jason Landess <jland702@cox.net>

Wed, Dec 23, 2015 at 5:34 PM

To: Michael Goldberg <michael@cognotion.com>, Jonathan Dariyanani <jonathan@cognotion.com>

Michael

My engagement agreement includes Cognotion paying for my monthly LexisNexis at \$220. I forgot to include that in the invoice I just sent you earlier today. Right now I need that service. If I don't need it in the future, I'll let you know so you can subtract that amount from my monthly payment.

And should I incur any reimbursable expenses, I'll submit a statement to you.

Thanks!

Jason

<https://mail.google.com/mail/u/0/?ik=339f1d2d1&view=pt&asrch=all&permmsgid=msg-f%3A1521389513315305736&siml=msg-f%3A1521389513315305736>

1/1

P00440



Jonathan Dariyanani <jdariyanani@gmail.com>

Payment

Jonathan Dariyanani <jonathan@cognotion.com>

Tue, May 17, 2016 at 9:38 AM

To: Michael Goldberg <michael@cognotion.com>, Jason Landess <jland702@cox.net>

Michael,
Please ACH Jason his \$10,000 for April today.

Thanks,
J

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



Jonathan Dariyanani <jdariyanani@gmail.com>

Invoice/Balance

jland702 <jland702@cox.net>

Fri, Oct 27, 2017 at 2:37 PM

To: Jonathan Dariyanani <jonathan@cognotion.com>, John Truehart <john@cognotion.com>

John/Jonathan:

If my services were terminated effective October 31st, Cognition would owe me \$45,000. I am presently paid thru June 15th.

Jason

Sent from my Verizon, Samsung Galaxy smartphone

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

From: Jonathan Dariyanani <jonathan@cognotion.com>

Date: 10/27/17 10:54 AM (GMT-08:00)

To: Jason Landess <jland702@cox.net>, John Truehart <john@cognotion.com>

Subject: Invoice/Balance

Jason,

I am preparing the closing schedules for Rick Segal of what we owe. Can you make sure that you and John are in agreement about the balance owed to you at as it would be on October 31, 2017 and send me that number?

Thanks!

Jonathan Dariyanani

President

Cognition, Inc.

Tel USA +1 540-841-0226

Fax USA +1 415-358-5548

Email: jonathan@cognotion.com



Jonathan Dariyanani <jdariyanani@gmail.com>

457987-002

Sara N. McCall <snmccall@prodox.net>
To: "Jonathan@cognotion.com" <jonathan@cognotion.com>


Tue, Jun 12, 2018 at 10:50 AM

Hello,

Please see attached request and let me know if you have any questions.

Thank you,

Sara N McCall
ProDox LLC
2450 W Osborn Rd
Phoenix, AZ 85015
Ph#: 602-322-0200 ext 3436
Fax#: 602-322-0111

 **Orders_20180612071626.pdf**
121K



Jonathan Dariyanani <jdariyanani@gmail.com>

From Jason

1 message

Jason Landess <jland702@cox.net>

Fri, Apr 5, 2019 at 1:03 PM

To: Jonathan Dariyanani <jonathan@cognotion.com>

Jonathan:

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

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

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

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

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

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

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

<http://mail.google.com/mail/u/0/?ik=3391162d7&view=pt&search=all&permthid=thrads-153A16299443204107187B&siml=ms-153A16299443204107187B>

1/2

P00449

4/22/2019

Gmail - From Jason

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

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

6 attachments



Exhibit 5.pdf
105K



Exhibit 1.pdf
69K



Exhibit 2.pdf
310K



Exhibit 3.pdf
109K



Exhibit 4.pdf
116K



Letter from John Truehart.pdf
68K



Jonathan Dariyanani <jdariyanani@gmail.com>

Termination Letter

Jonathan Dariyanani <jonathan@cognotion.com>
To: Jason Landess <jland702@cox.net>
Bcc: 843937@bcc.hubspot.com

Thu, Jan 3, 2019 at 3:34 PM

Jason,

It is with a heavy heart that I must send you the attached termination letter. I wish you health and prosperity and I hope that you are able to recover fully from this terrible situation.

My apologies and I hope things improve in the future for you,

--

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



Cognotion Landess Termination Letter 1-3-18.pdf
68K



Jonathan Dariyanani <jdariyanani@gmail.com>

Jason's Payment

Jonathan Dariyanani <jonathan@cognotion.com>

Fri, Jan 29, 2016 at 5:24 PM

To: Jason Landess <jland702@cox.net>, Michael Goldberg <michael@cognotion.com>

Michael,
Please initiate an ACH payment to Jason Landess on Monday for his \$10,000 for January.

Thanks!

Jonathan Dariyanani
President

Tel USA +1 540-841-0226
Fax USA +1 415-358-5548
Email: jonathan@cognotion.com



Jonathan Dariyanani <jdariyanani@gmail.com>

Wire February 2016 fee

1 message

Michael Goldberg <michael@cognotion.com>

Fri, Apr 15, 2016 at 3:11 PM

To: Jason Landess <jland702@cox.net>, Jonathan Dariyanani <jonathan@cognotion.com>

Jason,

Attached, please see the confirmation of the \$10,000 wire we sent to you today.

**Account Details**

Wire to Jason Personal (...3731)

Wire from PLAT BUS CHECKING (...3865)

Wire Details - Sent

Wire amount 10000.00 U.S. Dollars (USD)

Scheduled On 04/15/2016 at 03:05 PM ET

Wire date 04/15/2016

Message to recipient February 2016 Cognotion

Message/instructions to recipient bank February 2016 Cognotion

Memo February 2016 Cognotion

Transaction number 4994486434

End reference number N/A

Status In Transit

Submitted by Administrator on 4/15/2016 3:05:41 PM

Last modified by Administrator on 4/15/2016 3:05:41 PM

Approved by Not Available

Best,

Michael Goldberg
Chief Financial Officer
335 Madison Avenue, 16th floor
New York, NY 10017
www.cognotion.com
O: 347 692 0640
M: 917 805 9153

P00454

From: Jason Landess
To: "John Truehart"
Cc: "Jonathan Danyapian"
Subject: From Jason Landess
Date: Thursday, February 22, 2018 12:20:00 PM

John,

To bring the accounting for me up to date, you will recall that you agreed that as of October 31, 2017 I was owed \$45,000 by Cognotion. Since then the only payments I have received from Cognotion is \$50,000 on 12/13/2017 and \$10,000 on 1/12/2018.

The \$10,000 is for accrued salary. The \$50,000 is for a partial loan repayment, which Jonathan will explain to you.

Hence, what I will be owed in accrued salary as of 2/28/2018 is \$75,000. That is for all work done from July 15, 2015 through February 28, 2018.

That number also reconciles with the tax statement you just sent showing Cognotion paid me \$65,000 in salary in 2017. It should have been \$120,000. So you just subtract the \$65,000 from the \$120,000, and add the balance of \$55,000 to the \$20,000 for the first two months of 2018.

Regards,

Jason G. Landess, Esq

P00479



Jonathan Dariyanani <jdariyanani@gmail.com>

Delta Itinerary

Jonathan Dariyanani <jonathan@cognotion.com>
To: Jason Landess <jland702@cox.net>

Thu, Apr 14, 2016 at 6:23 PM

Jonathan Dariyanani
President

Tel USA +1 540-841-0226
Fax USA +1 415-358-5548
Email: jonathan@cognotion.com

 **Jason Flight Augusta.pdf**
143K



LAS > AGS

Las Vegas, NV to Augusta, GA
SAT, 16 APR 2016 - MON, 18 APR 2016

FLIGHT CONFIRMATION # **G2NS80**

ANY **PRIORITY** | ROUND TRIP | PASSENGER



FLIGHTS

FLIGHT **DL 1402**

SAT, 16 APR 2016

2 DAYS FROM DEPARTURE

LAS > ATL

ON TIME

SEAT: 4C

DEPART: **1:15 PM**

ARRIVE: **8:10 PM**

FIRST (A)

TERMINAL 1

DOMESTIC TERM: SOUTH

MEAL SERVICE: Lunch
In-Flight services and amenities
may vary and are subject to change.

Find Sky Club Locations:
McCormick - LAS
Hartsfield-Jackson Atlanta Intl - ATL

Airport Map - LAS | ATL

Aircraft: Boeing 757
Flight Time: 3HR 55M
On Time % 100
Miles Flown: 1242

BAGGAGE & SERVICE FEES

LAYOVER IN ATLANTA, GA - 1HR 30M

FLIGHT **DL 806**

SAT, 16 APR 2016

2 DAYS FROM DEPARTURE

ATL > AGS

ON TIME

SEAT: 3B

DEPART: **10:05 PM**

ARRIVE: **11:01 PM**

FIRST (A)

MEAL SERVICE: No Meal

In-Flight services and amenities
may vary and are subject to change.

Find Sky Club Locations:
Hartsfield-Jackson Atlanta Intl - ATL
Dusty Field - AGS

Airport Map - ATL | AGS

Aircraft: Boeing 717-200
Flight Time: 55M
On Time % N/A
Miles Flown: 143

BAGGAGE & SERVICE FEES

FLIGHT **DL 5193** Operated by: ExpressJet (DBA Delta Connection)

MON, 18 APR 2016

4 DAYS FROM DEPARTURE

AGS > ATL

ON TIME

SEAT: 2C

DEPART: **5:27 PM**

ARRIVE: **6:35 PM**

FIRST (A)

MEAL SERVICE: No Meal

In-Flight services and amenities
may vary and are subject to change.

Find Sky Club Locations:
Dusty Field - AGS
Hartsfield-Jackson Atlanta Intl - ATL

Airport Map - AGS | ATL

Aircraft: CRJ 900
Flight Time: 1HR 2M
On Time % N/A
Miles Flown: 143

BAGGAGE & SERVICE FEES

LAYOVER IN ATLANTA, GA - 1HR 30M

FLIGHT **DL 1100**

MON, 18 APR 2016

4 DAYS FROM DEPARTURE

ATL > LAS

ON TIME

SEAT: 4B

DEPART: **8:05 PM**

ARRIVE: **9:41 PM**

FIRST (A)

MEAL SERVICE: Snack

In-Flight services and amenities
may vary and are subject to change.

Find Sky Club Locations:
Hartsfield-Jackson Atlanta Intl - ATL
McCormick - LAS

Airport Map - ATL | LAS

Aircraft: Boeing 737-900
Flight Time: 4HR 15M
On Time % N/A
Miles Flown: 1742

BAGGAGE & SERVICE FEES

P00481



PASSENGER INFORMATION

	NAME	FLIGHT	SEATS	TRIP EXTRAS	SPECIAL REQUESTS
1	KAY LANDESS eTicket # 0067762016306	LAS > ATL	First (A) 4C		
		ATL > AGS	First (A) 3B		
		AGS > ATL	First (A) 2C		
		ATL > LAS	First (A) 4B		

Complete Delta Air Lines Baggage Information
Baggage fees will be assessed at the time you check in.

Final baggage fees will be assessed and charged at time of check-in. Baggage fees may change by class of service or frequent flyer status. All prices are (USD) unless otherwise noted. If your itinerary qualifies for Trip Insurance, you will be able to add it before you purchase your ticket.
Delta Changes & Cancellations Policy | This Ticket is Changeable | Non-refundable | Fees May Apply

P00482



Jonathan Dariyanani <jdariyanani@gmail.com>

Your priceline itinerary for New York, NY - Tuesday, May 03, 2016 (Itinerary# 110-610-943-40)

Priceline Customer Service <hotel@trans.priceline.com>
Reply-To: no-reply@priceline.com
To: JONATHAN@firebook.com

Mon, May 2, 2016 at 4:14 PM

To view this email as web page, go [here](#)

Your Hotel Reservation for Tuesday, May 03, 2016

Priceline Trip Number: 110-610-943-40

To view your full itinerary, click [here](#).

Check-in:	Tuesday, May 03, 2016 (03:00 PM)
Check-out:	Thursday, May 05, 2016 (12:00 PM)
Hotel Address	102 North End Avenue New York NY, 10281, United States
Hotel Phone Number:	212-945-0100
Number of Rooms:	1 Room
Reservation Name:	Room 1: Kay Landess
Hotel Confirmation Number:	3246784388
Room Type:	1 King Bed - Accessible Suite With River View

[See Hotel Details](#)[Map/Directions](#)**P00483**

4/22/2019

Gmail - Your priceline itinerary for New York, NY - Tuesday, May 03, 2016 (Itinerary# 110-610-943-40)

Max 2 guests. Hotels may charge for additional guests.

[See all Policies](#)

[Sign in any of 6 languages](#)
[Sign in any of 6 languages](#)

Billing Name: Jonathan Dariyanani

Room Price: \$383.00/night

Number of rooms: 1 Room

Number of nights: 2 Nights

Room Subtotal: \$766.00

Taxes & Fees: \$178.40

Total Charged: \$944.40
Paid in full

Prices are in USD

Charges will be from "Priceline.com"

[View all Rental Cars](#)

[View all Rental Cars](#)

Pick-up: Tue May 03 - 12:00 PM

[Change Search](#)

Drop-off: Thu May 05 - 12:00 PM

Location: Newark Liberty Intl Airport (EWR)

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 **AVIS**  **Budget**  **Hertz**  **Alamo**  **Sixt**

**\$14**/day

Compact Car
Nissan Versa or similar†



4 2 auto ac

**\$14**/day

Economy Car
Kia Rio or similar†



4 2 auto ac

**\$16**/day

Mid-Size Car
Dodge Avenger or similar†



5 2 auto ac

Prices are **per day** in USDDon't see something you like? See [More Cars](#)

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From Anywhere Else
+1 212 444-0022

Confirmation Number
3246784388



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This is a transactional email from priceline.com LLC - 800 Connecticut Ave. Norwalk, CT 06854



Jonathan Dariyanani <jdariyanani@gmail.com>

Burning Embers

Jason Landess <jland702@cox.net>

Tue, Nov 15, 2016 at 12:07 PM

To: Jonathan Dariyanani <jonathan@cognotion.com>

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

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

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

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

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

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

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

P00487

4/22/2019

Gmail - Burning Embers

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

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

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

Jason



Jonathan Dariyanani <jdariyanani@gmail.com>

missing 2016 payment

Jonathan Dariyanani <jonathan@cognotion.com>
To: Michael Goldberg <michael@cognotion.com>

Fri, Feb 10, 2017 at 5:32 PM

Yes

On Fri, Feb 10, 2017 at 4:51 PM Michael Goldberg <michael@cognotion.com> wrote:
Jonathan,

Just to clarify, according to our conversation about Jason's \$50k loan, we would have paid two separate \$10,000 interest payments on it...one in August 2016 and one in January 2017 for a total of \$20,000 on \$50,000. Is that correct?

Thanks,
Michael

----- Forwarded message -----

From: **Jason Landess** <jland702@cox.net>
Date: Tue, Feb 7, 2017 at 3:37 PM
Subject: RE: missing 2016 payment
To: Michael Goldberg <michael@cognotion.com>
Cc: Dariyanani Jonathan <jonathan@cognotion.com>

Michael:

I have gone through my bank statements and compiled the attached accounting. I believe this is accurate. To answer your question, yes I did receive a \$10K advance from Jonathan on 8/15/2016. You'll see that included in the attached document in bold. And, yes, you should send me an amended 1099 for a total of \$85K instead of \$75K.

Let me know if your records reflect anything different. Sorry if I did anything to create any confusion.

Thanks!

Jason

From: Michael Goldberg [mailto:michael@cognotion.com]
Sent: Monday, February 06, 2017 2:40 PM
To: Jason Landess
Cc: Dariyanani Jonathan
Subject: missing 2016 payment

Jason,

4/22/2019

Gmail - missing 2016 payment

I am reviewing some emails and year end accounting and noticed that Jonathan wrote me the following:

"I advanced to Jason Landess \$10,000 on 8/13/16 toward his balance. I asked him to send you an email confirmation to that effect."

I don't have a record of this email from you and therefore it was not properly accounted for in 2016. Can you please confirm that you did in fact receive this \$10,000 and that we should apply this to your outstanding balance and likely issue you a revised 1099 for 2016 to include this amount.

Thanks,

--
Michael Goldberg
Chief Financial Officer
New York, NY
www.cognotion.com
O: 347 692 0640
M: 917 805 9153

--
Michael Goldberg
Chief Financial Officer
New York, NY
www.cognotion.com
O: 347 692 0640
M: 917 805 9153

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



Jonathan Dariyanani <jdariyanani@gmail.com>

Lawyer for Filming-Introduction

3 messages

Jonathan Dariyanani <jonathan@cognotion.com>

Tue, May 3, 2016 at 4:44 PM

To: Philip Price <philip@cognotion.com>, Jason Landess <jland702@cox.net>, Joanna Schneier <joanna@cognotion.com>, Doug Lynch <doug@cognotion.com>, Mark J Mills <mjmillsjdmd@gmail.com>

Jason,

Please meet Phil Price, who is at the core of our learning team and has been the heart and soul of this project. Phil will be doing the filming of you tomorrow afternoon. I wanted to put the two of you in contact so that you can communicate directly regarding tomorrow.

I expect that Phil will want you to arrive at noon and then start your filming at around 3:00 PM. You should be done by 5:00 PM. The address where the filming takes place is 29 Tiffany Place, Apartment 6G, Brooklyn, NY which is right near the Brooklyn Navy Yard in the Cobble Hill neighborhood. It should take you no more than 20 minutes to get there. It is 3.6 miles away by taxi.

Phil-meet Jason Landess, a lawyer of extraordinary integrity and ability who has been doing complex civil litigation for more than 30 years and who has tried dozens of cases. He is also a dear friend, shareholder of Cognotion, has been our counsel and is the person who referred us to the amazing Dr. Mark Mills. I know he will be a dynamic and engaging resource for our learners.

Jason's cell number is 702-232-3913. Phil's cell number is 202-669-4411.

Phil, please feel free to send in advance by email at questions to Jason that you think might help him to think about his session.

Thanks to Jason for doing this!

Warmest regards,
Jonathan

--

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

Philip Price <philip@cognotion.com>

Tue, May 3, 2016 at 5:10 PM

To: Jonathan Dariyanani <jonathan@cognotion.com>

Cc: Jason Landess <jland702@cox.net>, Joanna Schneier <joanna@cognotion.com>, Doug Lynch <doug@cognotion.com>, Mark J Mills <mjmillsjdmd@gmail.com>

Hello Jason,

It is a pleasure to meet you (virtually)! Attached is a draft of the questions that we will cover tomorrow. We can certainly add/subtract or modify these depending on your thoughts/reaction and experience. Ideally, these should get us started.

I think a 12 PM call time is great!

Please let me know if you have questions.

I am looking forward to meeting you in person tomorrow!

Phil

[Quoted text hidden]

<https://mail.google.com/mail/u/0?ik=339f1ff2df&view=pt&search=all&permthid=thread-f%3A1533341337388795196&simpl=msg-f%3A1533341337388795196&s...> 1/2

P00491

 **SME Lawyer.docx**
95K

Philip Price <philip@cognotion.com>

Thu, May 5, 2016 at 7:49 AM

To: Jason Landess <jland702@cox.net>

Cc: Doug Lynch <doug@cognotion.com>, Mark J Mills <mjmillsjdmd@gmail.com>, Joanna Schneier <joanna@cognotion.com>, Jonathan Dariyanani <jonathan@cognotion.com>

Jason -

Thanks so much for sharing your time and wisdom with us yesterday. We got some great footage, which will be really helpful to our participants. I hope that your trip back home is uneventful (and does not involve delays!)

Thanks again!

Phil

[Quoted text hidden]



Jonathan Dariyanani <jdariyanani@gmail.com>

From Jason Landess re Cognogtion

John Truehart <john@cognotion.com>
To: Jason Landess <jland702@cox.net>
Cc: Jonathan Dariyanani <jonathan@cognotion.com>

Fri, Jul 14, 2017 at 1:17 PM

OK, thanks very much, Jason.

Have a great weekend!

John

On Fri, Jul 14, 2017 at 1:15 PM, Jason Landess <jland702@cox.net> wrote:

John:

Today \$100,000 credited to my account from Fred Hallier's payment for his stock subscription. I am withholding \$20,000 of that as payment against my account and depositing the rest into Cognotion's account in a few hours. That will bring my account current through May 31st. Since I have been operating on a net-30 basis from the date of my engagement (January 1, 2016), the only amount due and owing to me today from Cognotion would be for June 2017, which I anticipate will be dealt with on August 1st.

Regards,

Jason G. Landess, Esq.



Jonathan Dariyanani <jdariyanani@gmail.com>

Our Off Site

Jonathan Dariyanani <jonathan@cognotion.com>

Wed, Jul 5, 2017 at 6:30 PM

To: Eliza Tutellier <etutellier@gmail.com>, Patrick Hughes <phughes@centralrecovery.com>, Jason Landess <jland702@cox.net>, "warnerkona@hotmail.com" <warnerkona@hotmail.com>, dennis brooks <Dennis@cognotion.com>, Jo Schneier <jo@cognotion.com>

Hello Team! Dennis and I are excited to meet y'all in Las Vegas for our two day offsite. We will be arriving late Friday night and leaving Monday morning, so we will have all day Sat and Sun to meet. I haven't yet found a venue, but I will shortly! I haven't determined if Jo will be joining us, but she and I will work on that and let you know shortly. Jason will probably join for dinner Saturday night but may not join during the day. I'm still working on Vance's travel.

Here is the proposed schedule:

10:00 AM through to the end of dinner on Saturday, July 8.

10:00 AM through to the end of dinner on Sunday, July 9.

Please let me know if this works for you. I am very excited and have been doing lots of reading!

Can't wait!

--

Jonathan Dariyanani

President

Cognotion, Inc.

Tel USA +1 540-841-0226

Fax USA +1 415-358-5548

Email: jonathan@cognotion.com

P00494



Jonathan Dariyanani <jdariyanani@gmail.com>

Regulatory Counsel

Jonathan Dariyanani <jonathan@cognotion.com>

Fri, Aug 26, 2016 at 6:04 PM

To: Jason Landess <jland702@cox.net>, Stephen Stocksdale <Stephen@cognotion.com>, Joanna Schneier <jjoanna@cognotion.com>

Jason and Stephen,

As you know, Jason is our dear friend, supporter, strategist and enormously talented regulatory counsel. He has handled CMS fraud cases as well as numerous administrative proceedings over his 40 year career as a CNA, entrepreneur and litigator. He has done great regulatory work for us on ReadyCNA but he's about to dive in with a vengeance, starting with Iowa and Indiana.

After Labor Day, I'd like to get together with him, you, Mary and Lori to map out a 50 state approval plan.

In the meantime, please Jason and Stephen, work together to make sure we are nailing the regulatory issues.

Joanna and I are proud to have you both as our team mates. Please get on the phone together ASAP and begun your collaboration.

Warmest regards,
Jonathan and Joanna

--

Sent from Gmail Mobile...please excuse booboos and terse incomprehensibility!

Jonathan Dariyanani
540-841-0226



Jonathan Dariyanani <jdariyanani@gmail.com>

FW: Hotel info

Jason Landess <jland702@cox.net>
To: Dariyanani Jonathan <jonathan@cognotion.com>

Mon, Feb 13, 2017 at 3:08 PM

Can you book me for the nights of the 21st and the 22nd at this hotel?.....Thanks!

So excited about the baby! 

From: Dennis Brooks [mailto:dennis@cognotion.com]
Sent: Monday, February 13, 2017 11:27 AM
To: jland702@cox.net
Subject: Hotel info

Sheraton San Diego Hotel and Marina

1380 Harbor Island Drive San Diego CA, 92101, United States

619-291-2900

Check in: Feb 21

Check out: Feb 23

Confirmation number:

792006284

—
Dennis Brooks

Vice President of Sales

COGNOTION

Mobile/Text: 502.639.3848

Email: dennis@cognotion.com



Jonathan Dariyanani <jdariyanani@gmail.com>

Orbitz travel confirmation - Jan 15 - (Itin# 7235183277027)

Orbitz <support@mailor.orbitz.com>
Reply-To: support@mailor.orbitz.com
To: jonathan@firebook.com

Fri, Jan 6, 2017 at 7:43 PM

**Thanks!**

Your reservation is booked and confirmed. There is no need to call us to reconfirm this reservation.

Helena

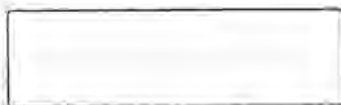
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P00497

- Remember to bring your itinerary and government-issued photo ID for airport check-in and security.

Contact the airline to confirm:

- specific seat assignments
- special meals
- frequent flyer point awards
- special assistance requests

Flight overview**Travel dates**

Jan 15, 2017 - Jan 17, 2017

Itinerary #

7235183277027

Your reservation is booked and confirmed. There is no need to call us to reconfirm this reservation.

Confirmation

HCGYL2 (Delta)

Booking ID

ZM22M7

Ticket #

0067982881367 (Kay Landess)

[Change or cancel this reservation](#)**✈️ Departure Sun, Jan 15**

Delta 959

Las Vegas (LAS)

4:50PM

Terminal: 1

**Salt Lake City (SLC)**

7:15PM

Terminal: 2

Cabin: Economy / Coach (M)

1h 25m duration

Seat: 08A | Confirm or change seats with the airline*

🕒 1h 1m stop Salt Lake City (SLC)

Delta 4783 operated by SKYWEST DBA DELTA CONNECTION

Salt Lake City (SLC)

8:16PM

Terminal: 2

**Helena (HLN)**

9:57PM

Cabin: Economy / Coach (M)

1h 41m duration

Seat: 13B | Confirm or change seats with the airline***Total Duration**

4h 7m

✈️ **Return** Tue, Jan 17

Delta 4714 operated by SKYWEST DBA DELTA CONNECTION

Helena (HLN)

1:11PM

**Salt Lake City (SLC)**

2:39PM

Terminal: 2

Cabin: Economy / Coach (K)

1h 28m duration

Seat: 12B | Confirm or change seats with the airline*

🕒 2h 20m stop Salt Lake City (SLC)

Delta 244

Salt Lake City (SLC)

4:59PM

Terminal: 2

**Las Vegas (LAS)**

5:24PM

Terminal: 1

Cabin: Economy / Coach (K)

1h 25m duration

Seat: 25E | Confirm or change seats with the airline***Total Duration**

5h 13m

Traveler(s)

Kay Landess

No frequent flyer details provided

Frequent flyer and special assistance requests should be confirmed directly with the airline.

Price summary



Traveler 1: Adult \$897.60

\$8.98 in Orbucks
for this trip

Flight: \$792.56

See all your rewards

Taxes and Fees: \$105.04

Flight Total: \$897.60

All prices are quoted in USD

Travel protection

You have not bought travel protection.

Additional information

Additional fees

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5/6

P00501

4/22/2019

Gmail - Orbitz travel confirmation - Jan 15 - (Itin# 7235183277027)

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<https://mail.google.com/mail/u/0/?ik=139110201&y=emph&search=0&permmsgid=msg-dmvr-153A1533824417385614609&simlitemp=153A1533824417385614609>

P00502



Jonathan Dariyanani <jdariyanani@gmail.com>

Orbitz travel confirmation - Jan 15 - (Itin# 7235182696982)

Orbitz <support@mailor.orbitz.com>
Reply-To: support@mailor.orbitz.com
To: jonathan@firebook.com

Fri, Jan 6, 2017 at 7:31 PM

**Thanks!**

Your reservation is confirmed. No need to call to reconfirm.

Best Western Premier Helena Great Northern Hotel, Helena

Jan 15, 2017 - Jan 17, 2017

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**Hotel overview****Best Western Premier Helena
Great Northern Hotel**

835 Great Northern Boulevard, Helena,
MT, 59601-3315 United States of
America

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Jan 15, 2017 - Jan 17, 2017

Itinerary #

7235182696982

<https://mail.google.com/mail/u/0/?ik=339f1f2d1&view=pt&search=all&permmsgid=msg-f%3A1555824310376500048&simpl=msg-f%3A1555824310376500048>

1/5

P00503

Check-in and Check-out

Check-in time
3:00 PM

Check-out time
noon

Check-in policies

Check-in time starts at 3:00 PM
Minimum check-in age is 21
Your room/unit will be guaranteed for late arrival.

Special instructions

24-hour airport shuttle service is available. Contact the property in advance to get details.

Room 1

Guests

Reserved for Jonathan Ram Dariyanani
1 adult

Room

Standard Room, 2 Queen Beds, Non
Smoking, Refrigerator & Microwave -
Flexible Rate

Included amenities

Full Breakfast, Free High-Speed Internet

Room requests

2 queen beds
Non-smoking room

Room 2

Guests

Reserved for Kay George Landess
1 adult

Room

Standard Room, 2 Queen Beds, Non
Smoking, Refrigerator & Microwave -
Flexible Rate

Included amenities

Full Breakfast, Free High-Speed Internet

Room requests

2 queen beds
Non-smoking room

Room 3

Guests

Reserved for Vance Walle
1 adult

Room

Standard Room, 2 Queen Beds, Non
Smoking, Refrigerator & Microwave -

Included amenities

Full Breakfast, Free High-Speed Internet

Flexible Rate

Room requests

2 queen beds

Non-smoking room

Price summary



\$26.33 in Orbucks
for this trip

Price breakdown

Room 1 price: \$292.51

2 nights: \$135.74 avg./night

1/15/2017 \$128.22

1/16/2017 \$143.25

Taxes & fees : \$21.04

Room 2 price: \$292.51

2 nights: \$135.74 avg./night

1/15/2017 \$128.22

1/16/2017 \$143.25

Taxes & fees : \$21.04

Room 3 price: \$292.51

2 nights: \$135.74 avg./night

1/15/2017 \$128.22

1/16/2017 \$143.25

Taxes & fees : \$21.04

Total \$877.53

Collected by Orbitz

Unless specified otherwise, rates are quoted in US dollars.

Additional hotel fees

The below fees and deposits only apply if they are not included in your selected room rate.

The following fees and deposits are charged by the property at time of service, check-in, or check-out.

- Pet fee: USD 15.00 per pet, per night

The above list may not be comprehensive. Fees and deposits may not include tax and are subject to change.

Rules and restrictions

Cancellations and changes

We understand that sometimes plans fall through. We do not charge a cancel or change fee. When the property charges such fees in accordance with its own policies, the cost will be passed on to you. Best Western Premier Helena Great Northern Hotel charges the following cancellation and change fees.

Cancellations or changes made after 4:00PM (Mountain Daylight Time (US & Canada)) on Jan 15, 2017 or no-shows are subject to a hotel fee equal to the first nights rate plus taxes and fees.

In the case of multiple rooms booked together, fees charged by the hotel apply to each room that is canceled or changed.

Pricing and Payment

Hotel fees

The price above DOES NOT include any applicable hotel service fees, charges for optional incidentals (such as minibar snacks or telephone calls), or regulatory surcharges. The hotel will assess these fees, charges, and surcharges upon check-out.

Pricing

Your credit card is charged the total cost at time of purchase. Prices and room/unit availability are not guaranteed until full payment is received.

Some properties request that we wait to submit guest names until 7 days prior to check in. In such a case, your room/unit is reserved, but your name is not yet on file with the property.

Guest Charges and Room Capacity

Base rate is for 1 guest.

Total maximum number of guests per room/unit is 4.

Maximum number of adults per room/unit is 4.

Maximum number of children per room/unit is 3.

This property considers guests aged 18 and under, at time of travel, to be children.

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Jonathan Dariyanani <jdariyanani@gmail.com>

Flight reservation (BVZ9IB) | 16OCT16 | LAS-SDF | Landess/Kay

Southwest Airlines <SouthwestAirlines@luv.southwest.com>
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Confirmation Date: 10/12/2016

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LANDESS/KAY	Join or Add #	5262455541485	Oct 12, 2017	5343

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Date	Flight	Departure/Arrival
Sun Oct 16	2895	Depart LAS VEGAS, NV (LAS) on Southwest Airlines at 10:50 AM Arrive in LOUISVILLE, KY (SDF) at 5:20 PM Travel Time 3 hrs 30 mins Anytime



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✈️ AIR - BVZ9IB

Base Fare	\$ 534.31
Excess Taxes	\$ 43.67
Segment Fee	\$ 4.00
Passenger Facility Charge	\$ 4.50
September 11th Security Fee	\$ 5.60
Total Air Cost	\$ 588.48

Payment Information

Payment Type: Visa XXXXXXXXXXXX9758
Date: Oct 12, 2016
Payment Amount: \$588.48

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Jonathan Dariyanani <jdariyanani@gmail.com>

Flight reservation (BT19IZ) | 18OCT16 | SDF-LAS | Landess/Kay

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 To: jonathan@firebook.com

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Confirmation Date: 10/12/2016

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LANDESS/KAY	Join or Add #	5262455542299	Oct 12, 2017	5343

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Date	Flight	Departure/Arrival
Tue Oct 18	2805	Depart LOUISVILLE, KY (SDF) on Southwest Airlines at 5:20 PM Arrive in LAS VEGAS, NV (LAS) at 6:20 PM Travel Time 4 hrs 0 mins Anytime



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AIR - BT191Z

Base Fare	\$ 534.31
Excise Taxes	\$ 40.07
Segment Fee	\$ 4.00
Passenger Facility Charge	\$ 1.00
September 11th Security Fee	\$ 5.60
Total Air Cost	\$ 584.98

Payment Information

Payment Type: Visa XXXXXXXXXXXX9758
Date: Oct 12, 2016
Payment Amount: \$584.98

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Gmail - Flight reservation (BT19IZ) | 18OCT16 | SDF-LAS | Landess/Kay

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Exhibit I

1 et cetera, to what the numbers he gave were.

2 A No.

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

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

6 Q And you respect him a great deal?

7 A I do.

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

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

13 Q And that was before five years ago, correct?

14 A I think so.

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

20 A Uh-huh.

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

24 A Uh-huh.

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

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

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

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

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

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

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

6 Q He talks about a time when he bought a truck stop here in
7 Las Vegas when the Mexican laborer stole everything that wasn't welded
8 to the ground. You still don't take that as being at all a racist comment?

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

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

15 THE COURT: Thank you, Ms. Gordon.

16 MR. JIMMERSON: Is she done? Okay.

17 THE COURT: Any redirect, Mr. Jimmerson?

18 MR. JIMMERSON: Yeah, very briefly.

19 REDIRECT EXAMINATION

20 BY MR. JIMMERSON:

21 Q The -- this past was Mr. Landess 54 years ago when he was
22 19 years old; is that right?

23 A Yes.

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

Exhibit J

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

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

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

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

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

18 MR. VOGEL: Oh, absolutely. Yes.

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

20 MR. VOGEL: We do.

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

Exhibit K

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

5 They could have approached the bench and said, Your
6 Honor, that sounds like he may have given some character evidence, we
7 don't want to open the door. Mr. Jimmerson could have exerted a little
8 more control over his witness to the extent that Mr. Daryanani would've
9 have been offering such enormous amounts of character evidence, but
10 none of that happened.

11 After that, the Plaintiffs specifically stipulated to the
12 admission of Exhibit 56, and during the cross-examination, I would
13 careful to ensure that Mr. Daryanani had indeed given that character
14 evidence. I didn't immediately cross him on that evidence until the very
15 end. I talked with him at least twice confirming that that was his
16 evidence that he gave. That, Your Honor, gave Plaintiff's counsel
17 another opportunity to perhaps step in. It was very clear that I was
18 confirming character evidence that had been given by Mr. Daryanani.
19 Plaintiff's counsel, if that was not his intention, he could have asked for a
20 sidebar. He could have done a variety of things, Your Honor, at that
21 point, to step in --

22 THE COURT: Okay.

23 MS. GORDON: -- and say, that's not what I intended.

24 THE COURT: Let me interrupt you for a reason to be --

25 MS. GORDON: Sure.

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

8 MS. GORDON: Okay.

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

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

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

1 certain, slam dunk easy, I would've granted a motion to preclude the
2 hustling Mexicans, blacks, and rednecks, where the Mexican labor stole
3 everything that wasn't welt to the ground. I would've precluded that.
4 And though not so relevant to this, but since we're having a meaningful
5 discussion, I can tell you that I handed this to Mark Dunn, and the level of
6 shock on his face was pulpable. And I handed it to him only asking him
7 one thing, would you preclude this in a motion in limine.

8 That's how I started it, because I didn't want him to know the
9 full extent of anything else I might have to deal with, and he told me, in
10 no uncertain terms, what I was really already thinking, and that is that
11 you absolutely have to preclude this because the issue of whether or not
12 Mr. Landess is a racist or not is not relevant. And even if it relevant, if
13 character is an issue, that's really -- that's the issue. I mean, race --
14 whether he's a racist or not is not relevant and is prejudicial. It's, I think,
15 clearly what I would have to tell you, and that's the reason I would grant
16 the pretrial motion.

17 So I think it's fair to say, okay, why not ask for a sidebar. I
18 mean, certainly you have the witness in the witness box, Daryanani, and
19 you have the item ready to go up on the ELMO. You could ask for a
20 sidebar to discuss --

21 MS. GORDON: Us?

22 THE COURT: Yes. Us. You could ask for a sidebar to now
23 indicate, I'm going to put this up, or for that matter, consideration
24 could've been given to -- I mean, this is my question. I want to see if you
25 want to answer this, to potentially redacting portions of it, because in a

1 motion in limine, I'll share with you that the proper way to do this would
2 be to say, look, to the extent the Defense might want to use this to show
3 Mr. Landess isn't a beautiful person or otherwise in the event character
4 comes up, you want to use it to rebut character, you could say things
5 like, I got a job working at a pool hall on weekends to supplement my
6 regular job of working in a factory, redacting the word "sweat". Then
7 delete or redact, "with a lot of Mexicans".

8 And then continue with non-redactions. "Taught myself how
9 to play Snooker. I became so good at it I developed a route in East L.A.
10 hustling --", redact "Mexicans, blacks, and rednecks" -- "-- on Fridays,
11 which was usually payday." And then probably redact, "The truck stop
12 Mexican laborers stole everything." And now what you have is you have
13 usable evidence that he was a hustler. He taught himself to play pool,
14 and he hustled people playing pool. Is that an indication of a beautiful
15 person? Usable, admissible, but not overly prejudicial.

16 So that's the something I wanted to at least share with you
17 that I did put down in my notes here -- these are some of my notes over
18 the weekend. I put a note in here asking, what about a sidebar, what
19 about redacting, you know, prejudicial parts of the usable item of
20 evidence. So go ahead, if you want --

21 MS. GORDON: I appreciate that, Your Honor. I think that
22 what that does is it certainly shifts the burden to Defendant, and what, I
23 believe, you're saying is that it's admissible evidence, Your Honor. And
24 as you've stated in this case and I believe in other trials you've had,
25 admissible evidence is used for any purpose, can be used for any

1 purpose, and I don't think that the burden for how prejudicial a piece of
2 evidence that Plaintiff disclosed and stipulated into evidence, the
3 prejudicial nature of it should not be -- have to be addressed by the
4 Defense, and out of curiosity or out of doing their job for them, I don't
5 know, but I know that admissible evidence, it can be used for any
6 purpose.

7 And I know that Plaintiff initially elicited and had
8 impermissible and unethical character evidence. What the Defense is
9 allowed to do in response to that, and what I actually have an ethical
10 duty to my client, a person of color to do, is to use that evidence in
11 impeachment. I'm allowed to do it, I should do it, and I did do it, and
12 they did nothing about it.

13 THE COURT: So you think that the jury is allowed to
14 consider whether Mr. Landess is a racist?

15 MS. GORDON: I think that I am allowed to use impeachment
16 evidence that has not been objected to, and has been admitted into
17 evidence by stipulation. I absolutely think I'm allowed to use it. I should
18 use it on behalf of my client, and the burden should not be shifted to me
19 to assist with eliminating or reducing the prejudicial value of that piece
20 of evidence.

21 Dr. Debiparshad was asked about his race during his
22 deposition. Mr. Daryanani went on for the first 15, 20 minutes of his
23 testimony about his race. It's not new. Motive is always relevant in
24 terms of Mr. Landess' reason for setting up our, you know, view on this
25 case --

1 THE COURT: Um-hum.

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

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

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

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

24 THE COURT: Um-hum.

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

1 allowed to use as impeachment.

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

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

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

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

1 if you think, since it is evidence, you seem to say and think that the jury
2 can now consider it because you've made a closing argument then using
3 the item.

4 MS. GORDON: I think if someone wanted to argue about the
5 prejudicial nature of that, then they had the duty to bring that to the
6 Court's attention and they didn't, and they didn't over and over and over
7 again. And I am going to speak to you, Your Honor, about what
8 happened in this case, and procedurally what happened is it was used
9 during impeachment, and it was absolutely proper given that they
10 opened the door.

11 THE COURT: Okay, I understand that.

12 MS. GORDON: I'm sorry. I guess I --

13 THE COURT: Let me just try this -- I'm going to try one more
14 thing on this. Let me hypothetically say this. Let's say you're from the
15 jury and you say, members of the jury -- you tell me if you think this is a
16 legitimate argument that you could've made. Members of the jury,
17 you've heard Mr. Daryanani testify that Mr. Landess is a beautiful man,
18 that he would give bags of money to Mr. Landess, that he would leave
19 his daughter with Mr. Landess, but Mr. Landess is a racist.

20 MS. GORDON: And a hustler.

21 THE COURT: Could you make that argument?

22 MS. GORDON: I think I could use that, and as Your Honor
23 has said, it's admitted evidence. I think that I can use it for any purpose,
24 but if it somebody wants to limit that and allow in the hustling and not
25 the racist part of it, then somebody had an obligation to do that.

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

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

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

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

1 circumstances. We'll be back in ten minutes.

2 [Recess at 10:57 a.m., recommencing at 11:05 a.m.]

3 THE COURT: Please bring in the jury.

4 MR. VOGEL: Your Honor, are you going give us an
5 opportunity to speak with the jurors?

6 THE COURT: No. We're going to let them go. I think they've
7 been through enough.

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

9 [Jury in at 11:05 a.m.]

10 THE MARSHAL: All present and accounted for.

11 THE COURT: All right. Please have a seat, everyone.

12 Members of the jury, well, welcome back. You might note that your
13 notepads are not with you and that's because of what I'm about to tell
14 you. Before I tell you what I'm going to tell you, however, I do want to
15 look at all of you and let you all know thank you so much for the time
16 that you've spent with us. It'll be a two weeks I know I'll never forget.
17 You as a jury have been very attentive. You've asked wonderful
18 questions.

19 I've learned to not only respect you but actually like you all
20 and you're exactly the way juries should be, I think. Always on time,
21 attentive, good questions. But you can get the feel for where I'm going
22 with this, of course and that is with your notepads not being there and
23 what have you. I guess the best I can say to you is that from time to
24 time -- and it doesn't happen very often. But from time to time, there are
25 things that come to a Court's attention that you have to deal with. In

1 do what I just did with those ten people. But I said it was the easiest
2 choice nonetheless, because it really was in my view.

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

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

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

1 assessment of what happened.

2 Prior to trial, of course, there's the discovery process and in
3 that discovery process, it was relevant and necessary to cause
4 Cognotion, the company, practically speaking through its CEO, Jonathan
5 Dariyanani, to disclose employment-based evidence, whether it was the
6 employment contract or information having to do with the stock options
7 or things that may have led to the employment itself or
8 contemporaneous with the employment itself. And if anything, I mean,
9 it's evident to me that that discovery effort on Cognotion's part or Mr.
10 Dariyanani's part was taken pretty seriously, because a number of items
11 were disclosed, including emails and the item in question was in that
12 batch of items disclosed.

13 It's readily apparent and admitted to and so as a finding of
14 fact, I'm certain that though the Plaintiffs endeavored in this discovery
15 course to disclose to the Defense the Cognotion documents and did so --
16 again, disclosing, you know, a vast array of documents, that for reasons
17 that I don't need to know the full extent of, but I would say it's fair to
18 conclude shortness in time, because of the discovery timeline and effort
19 having to do with this damage item, which did take place closer in time
20 to trial, volume, meaning the extent of the volume of the paperwork
21 disclosed, I think in fairness could be something Mr. Jimmerson thinks
22 about off into the future.

23 When you represent lawyers, it is difficult to not allow your
24 client, who's a lawyer, to play a role in things. And it's evident to me
25 that Mr. Dariyanani and Mr. Landess weren't only client and corporate

1 counsel by way of a relationship, but had been friends prior to that time
2 and friends since that time. And it's never been -- it hasn't been
3 mentioned to me and so I'm not just speculating. I wouldn't speculate. I
4 don't want to come up with something, but I think it's reasonable to say,
5 you know, that most likely, Mr. Landess had a hand in helping with the
6 discovery and urging Mr. Dariyanani to, you know, participate and be
7 here and provide documents.

8 And you know, maybe in some ways, there was a review
9 duty that on behalf of the whole Plaintiff team just didn't adequately get
10 done here. Whether it was Mr. Landess or whether it was somebody
11 from either office or the attorneys, it's obvious to me that
12 unfortunately -- I mean, it's okay to make mistakes and admit mistakes is
13 even better than not admitting them. But mistakes can be made. And I
14 think it's real clear that a mistake was made, attributable to the entire
15 Plaintiff team.

16 And that mistake was make sure that somehow, some way,
17 you do know everything specifically that has come about in discovery
18 that could conceptually be used at trial or precluded prior to trial. And
19 that didn't happen and that's a mistake that, again, the mistake was
20 made by the Plaintiffs. So we have the discovery. We have the
21 disclosure. In fact, it's fairly obvious to me that it was a mistake. Again,
22 the mistake being that the Plaintiffs didn't catch that this particular item
23 was in there, because they did bring pretrial motions to preclude Mr.
24 Landess' bankruptcies, gambling debt and litigations.

25 And so it's obvious to me that if the Plaintiffs would have

1 seen this item, they would have likewise brought a pretrial motion to
2 preclude it. Plus, Mr. Jimmerson, to his credit, has said in various
3 context on and off the record that he made -- he, because he took
4 responsibility as I think the lead trial lawyer here, you know, that he
5 made this mistake. Okay.

6 So then what happens from there -- we then start the trial
7 and prior to -- well, prior to trial, actually, page 44 of Exhibit 56 is marked
8 and put into one of the many binders here as Plaintiff's Trial Exhibit 56-
9 00044. And so the Plaintiffs have this as part of thousands of pages of
10 exhibits that I have sitting here to my left, potential exhibits. So it's just
11 sitting in there and the Plaintiffs don't know that it's in there, so it's part
12 of one of their trial exhibits. The trial then progresses and during the
13 trial, closer to the time that the item actually is used, Exhibit 56 is offered
14 in evidence, I believe by the Defense.

15 And when that occurred, the Plaintiffs stipulated or agreed or
16 didn't have an objection and the entire Exhibit 56 was admitted,
17 including this fateful page 44. And 45, but page 44 is where the material
18 appears that's the concern. All right. So now it's an admitted exhibit. At
19 the time of its admission, I'll go so far as to say that the Plaintiff still at
20 that point in time, didn't know that the item actually was in the exhibit.
21 And when I say the item, I mean the actual language of course in
22 question here.

23 So they're still proceeding, up to that point, all the discovery,
24 all the two weeks of trial and agreeing to admit into evidence 56. They
25 still don't know that the burning embers language is in here. All right.

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

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

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

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

1 hustling Mexicans, Blacks and rednecks on Fridays, which
2 was usually payday. I learned that it's not a good idea to sell
3 something that you cannot control and protect, a lesson
4 reinforced on in life, when an attorney friend of mine and I
5 bought a truck stop here in Las Vegas, where the Mexican
6 laborers stole everything that wasn't welded to the ground."

7 I'm not saying that as a court, I'm drawing a conclusion that
8 Mr. Landess is racist. But what I am saying is, based upon these two
9 paragraphs, it is clear to me anyway that the author, a reasonable
10 conclusion would be drawn again, that the author of these two
11 paragraphs is racist.

12 So that's the issue. The question for me is, as a matter of
13 law, in this case, which is not an employment discrimination case or
14 anything where the issue of race is clearly an element of the case, can
15 our jury in this civil case consider the issue even with the opening of the
16 door as to character of whether Mr. Landess is a racist?

17 And I think the clear answer to that is no, that that is not a
18 basis upon which this jury should or can decide the verdict. Now I know
19 that the issue having to do with fees and costs regarding the decision I
20 made to grant this mistrial is left for another day because I am going to
21 give an opportunity for the, of course, for the Defense to file a pleading
22 on this, given that the pleading I did receive -- I didn't see it until this
23 morning. It was filed by the Plaintiffs. And so, we'll have to establish
24 that little briefing schedule.

25 But it is apparent to me, you know, especially in light of the

1 court session that we've had here today, that I think that my finding is
2 the Defense had to know that the Plaintiffs made a mistake and did not
3 realize this item was in Exhibit 56.

4 Again, that's evident to me I think reasonably because there
5 were a number of motions in limine which were filed by the Plaintiffs,
6 again, asking to preclude bankruptcies, gambling debt, prior litigations.

7 I think that in conjunction with the aggressiveness that we've
8 had throughout the trial, the zealousness is real clear to me that the
9 Defense had to know this was a mistake made by the Plaintiffs. And
10 again, one of the many pages of Exhibit 56 was this page 44 and the
11 Plaintiffs didn't know about it.

12 So, they took advantage of that mistake and I don't have a
13 criticism in a general sense in taking advantage of mistakes of the other
14 side. Frankly, it happens all the time. That's not the question.

15 And while it may be well intended to cross-examine the CEO
16 with the item that you now have where you know the Plaintiffs made a
17 mistake, they didn't see it. The primary, the only reason why I granted
18 the motion for mistrial was because when putting this up on the ELMO,
19 there was no contemporaneous objection from the Plaintiffs. And I did
20 not sua sponte interject either, probably for the same reason that the
21 Plaintiffs didn't and that is it just -- the timeline is short. It's on the ELMO
22 and it's just really a matter of seconds before a human being, if you're on
23 the jury with that TV set sitting right there in front of you. It's a matter of
24 seconds, literally, you know, one to five seconds and that's it. It's there
25 for them to see.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11 My view is if that would have happened, if Exhibit 56, which
12 was in evidence, was put up in closing, that under the definition given by
13 the Supreme Court of misconduct in the *Lioce* case, that I think it's likely
14 that that would be seen as misconduct because whether it's with
15 Dariyanani or whether it's in closing or both, the clear -- and now I've
16 heard it in court this morning, it seems like the Defense is still taking this
17 position. They're urging the jury to at least in part, render the verdict
18 based upon race, based upon Mr. Landess being a racist, based upon
19 something that I think is emotional in nature. This is an emotional style
20 piece of evidence.

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

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

1 not talking about obviously closing argument here, but we are talking
2 about nonetheless bringing forth an item of evidence that could cause a
3 concern to be at least considered.

4 And the other nice thing about *Lioce*, a very important thing,
5 is this concept that wait a second, it's an admitted exhibit. In other
6 words, this is unobjected to. And *Lioce* gives us some philosophy and
7 guidance on dealing with the distinction between objected to items and
8 in that case, of course, closing argument, and non-objective to closing
9 argument.

10 The court goes on to talk about something -- I said I'd talk
11 about this, so why I don't just do that right now? In *Lioce*, the idea
12 where I said I do sympathize with Mr. Jimmerson in not objecting when
13 the item first went up on the ELMO.

14 In *Lioce*, the Nevada Supreme Court says,
15 "When a party's objection to an improper argument is
16 sustained and the jury is admonished regarding the
17 argument, that party bears the burden of demonstrating that
18 the objection and admonishment could not cure the
19 misconduct's effect."

20 Okay.

21 They go on to say in the next sentence, though, that they say
22 words consistent with sympathizing with a lawyer who is in the spot now
23 to either object or not object to something that shouldn't be happening
24 in court. They say, "The non-offending attorney," so in this situation
25 that'd be the Plaintiff's side.

1 to say. Especially because, again, that's even further evidence that the
2 Plaintiffs didn't know the item was in there.

3 All right. But in *Lioce*, they give some guidance as to
4 unobjected to, they call it unobjected to misconduct and that's in the
5 context of a closing argument.

6 And what the Supreme Court said, so that's what we're
7 talking about here. We're talking about unobjected to -- it's not
8 argument, so I'm not going to go as far as today to say it's misconduct.
9 I've said things consistent with what I think is a respectful criticism of the
10 Defense of, you know, I would -- I got to say, I would think that you look
11 at this and say, well, should we put race into the case? Could that be a
12 concern?

13 And as I take it, the Defense's position is, well, we can and
14 we did. Just like Ms. Gordon argued an hour ago to me. That's just
15 where we disagree. I have to say.

16 But in any event, the guidance from *Lioce* is that even if it's
17 unobjected to, so Exhibit 56 is a Plaintiff's trial exhibit, it's admitted by
18 stipulation and then when the item is put up on ELMO, there's no
19 contemporaneous objection.

20 But I think that this *Lioce* standard is applicable here where
21 the Supreme Court says in that case that it's still a plain error style
22 review.

23 Here's what they say. "The proper standard for the district
24 court," that's me, "to use when deciding in this context a motion for new
25 trial based upon unobjected to attorney misconduct." Now, again, I

1 and leaves me alone.

2 I was hoping to be done to at least have a Sunday for good
3 health reasons, but unfortunately, that didn't happen, so I talked her into
4 going to yoga and grocery shopping without me yesterday, which she
5 went and did. And all the while, while that's happening, while I'm at
6 home by myself, you know, as I'm on my laptop, and I'm actually half the
7 time corresponding with my law clerk, who was nice enough to work on
8 Saturday with me remotely by emails and such.

9 It comes to my attention that on pretty much every 24/7 news
10 station for the entire weekend there's a story about someone who drove
11 nine hours across Texas -- nine hours across Texas to go to El Paso and
12 picked that place because in the Walmart in El Paso there would be those
13 from Mexico shopping -- that he was going to go shoot and kill, as a hate
14 crime. That's what seemed to be the upshot of that circumstance.

15 Okay. Mr. Landess may take this as a criticism. I don't really
16 mean it that much, but some would argue he drove nine hours to go kill
17 Mexicans in his mind. I'm sure that's what he thought. That's exactly
18 what I'm dealing with in this thing.

19 Okay. Then later that night what happens in Dayton? Are
20 you kidding? Another one. In this situation African Americans are killed.
21 And is that part of another hate-based incident?

22 None of that really matters to this decision, because it is my
23 strong view that in this case racial discrimination can't be a basis upon
24 which this civil jury can give their decision, but it's not lost on me that
25 it's highly likely, unless Mr. Cardoza, and Ms. Asuncion, Ms. Brazil, and

1 Stidhum put their heads in the sand and didn't watch any news, or have
2 a cell phone, or a have a friend, or have a family, or go to church, or do
3 anything, that this is out there to just aggravate what we already have as
4 my view being a big problem.

5 Bottom line is, how in the world can we expect this jury,
6 which is the verse -- and by the way, none of those people are alternates,
7 because we decided before trial that seats 9 and 10 would be the
8 alternates, so they're all four deliberating jurors -- how in the world can
9 we reasonably think that they're going to give a fair verdict and not base
10 the whole decision, at least in part, on the issue of whether Mr. Landess
11 is a racist.

12 That's the basis for the decision. The Plaintiffs can draft the
13 order. And so concludes the most difficult thing I've done since I've
14 been here.

15 Anything else from either side?

16 MR. JIMMERSON: Yes, Your Honor. Relative to the briefing
17 on the cost matter, in light of this, I don't see a need for an expeditious
18 order, or shortening time. Fourteen days from today would be an
19 approximately time for the Defense to file their opposition, and then we
20 would file the reply in the normal course, and you would give us a
21 hearing date sometime about 30 days from now.

22 THE COURT: Well, okay. Mr. Vogel, how much time do you
23 want to respond to this pleading?

24 MR. VOGEL: That's fine. Two weeks is fine. I appreciate it.

25 THE COURT: Okay. Two weeks will be?

Exhibit L

Gordon, Katherine

From: Gordon, Katherine
Sent: Tuesday, July 23, 2019 10:16 PM
To: Gordon, Katherine
Subject: FW: Landess v. Debiparshad, et al.; Case No. A-18-776896-C
Attachments: Extractions from Dr. Harris' deposition re no criticisms on apposition.pdf; Dr. Harris initial report.pdf; Dr. Harris' first rebuttal report.pdf; Dr. Harris' second rebuttal report.pdf; Dr. Herr's evaluation record.pdf; Fracture displacement definitions.pdf

Katherine J. Gordon
Partner
Las Vegas Rainbow
702.693.4336 or x7024336

From: Gordon, Katherine
Sent: Tuesday, July 23, 2019 10:02 PM
To: 'robbare32@gmail.com'
Cc: Vogel, Brent; 'Little, Martin A.'; jji@jimmersonlawfirm.com
Subject: Landess v. Debiparshad, et al.; Case No. A-18-776896-C

Judge Bare:

We appreciate the opportunity to provide the documents we believe will be helpful to your determination of whether Plaintiff provided Dr. Debiparshad with notice of a claim (with the required expert medical opinion) that the degree of translation/apposition following Plaintiff's surgery by Dr. Debiparshad is evidence of a breach of the standard of care.

As you will see, Plaintiff's orthopedic surgery expert witness, Denis Harris, M.D., did not raise translation/apposition, or rotation, as a criticism during his deposition. To the contrary, Dr. Harris specifically testified he had no criticism regarding apposition. Dr. Herr's evaluation report also fails to address either translation, apposition, or rotation. The entirety of criticism in this matter involves alignment, not translation (the "cliff" or overhang shown on the x-rays as described by Plaintiff during his opening statement.

We have also attached general definitions for your consideration.

Thank you-



Katherine J. Gordon

Partner

Katherine.Gordon@lewisbrisbois.com

T: 702.693.4336 F: 702.366.9563

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

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In the Matter Of:
Landess, Jason vs Debiparshad, M.D.

DENIS ROBERT HARRIS, M.D. ROUGH DRAFT

March 14, 2019

Job Number: 525645

1 years I have some experience and also have read a bunch
2 of books, and which books, I mean, there are multiple
3 over the years. And we have M & M, Morbidity and
4 Mortaility conferences monthly and you want to keep the
5 standard of care, and to do that you review all the
6 cases and if you see this and we talk about it, we
7 meaning the faculty of Sibley and Hopkins, and try to
8 teach the residents saying this is wrong.

9 Q. So what do you estimate the degree of angle in
10 in this case to be?

11 A. I tried it at least five or six times and it's
12 a little above ten degrees. It's probably 11 but I got
13 from 10 to 12 degrees of angulation.

14 Q. And how do you come up with that figure?

15 A. I had protractor and, you know, there are ways
16 to measure, you can eyeball it. You can draw a line
17 across the tibial plateau and go 90 degrees to that.
18 You can look at the tibial spines and each one of
19 these -- that's why we've got different numbers.

20 Q. Which film did you use to --

21 A. The film that I showed you on page.

22 Q. Thirty-five?

23 A. Thirty-five.

24 Q. Did you do the same measurements on any of the
25 other films?

1 A. No, I mean, when you're doing a fracture, one
2 of the other I things you teach is that you always look
3 for the worst case scenario; so if I have -- my paper's
4 bent. When I look at it and somebody, you won't see the
5 bend, so you see the one angle that looks perfect,
6 that's not the one you measure. You look for the worst
7 one, and this was the worst one that I could find.

8 Q. So my question was, okay, that was the worst
9 one that you can find. Did you do this measurement on
10 any other films that may have been useful to you?

11 A. No.

12 Q. For the record, the film on page 35 is dated
13 --

14 A. That's the 25th. I will state it because it's
15 not showing in the picture. That's the first office
16 visit.

17 Q. So, looking at it, it's about 10 or 12
18 degrees; so in looking at the films, is there a certain
19 amount of percentage of translation that also exists in
20 those films in your opinion?

21 A. If you are talking -- you're talking about
22 alignment, apposition and alignment.

23 Q. Right.

24 A. Apposition and alignment. Apposition, if you
25 look at at the lateral on page 33, I guess that would be

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

6 Q. So the angle?

7 A. Correct.

8 Q. So you have no criticism of the apposition?

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

12 Q. Fontes?

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

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

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

8 A. Correct.

9 Q. Okay.

10 A. I'm sorry.

11 Q. No, that's okay.

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

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

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

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

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

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

16 A. The Academy --

17 **Q. Did I got that right?**

18 A. Correct.

19 **Q. Hold on.**

20 A. Okay.

21 **Q. Did I summarize your opinions correctly there?**

22 A. Yes, sir.

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

25 A. Those are the three, yes.

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

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

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

8 A. Sure.

9 Q. Is that all of the opinions?

10 A. Those are all of the opinions.

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

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

16 Q. Is that the one in the article?

17 A. Yes, sir.

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

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

PLAINTIFF'S INITIAL EXPERT DISCLOSURE

EXHIBIT 1

Expert Report of Denis Harris, M.D.

CASE NO.: A-18-776896-C

Denis Harris, MD

Document Records Review

Patient Name Jason Landess

Date of Injury 10/9/2017

Claimant DOB 4/21/1946

Records reviewed

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

Summary of records

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

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

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

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

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

Discussion

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

Legal Testimony 2014 - 2019

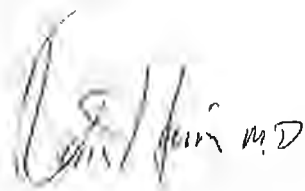
Frazier v Crowe	Prince George's County, Maryland	Trial	2015
Ortega v Bond	Prince George's County, Maryland	Deposition	2017
Pranger v Woodward	Washington, DC	Deposition	2017
Hope Foster v Quick Livick	Washington, DC	Deposition	2017
Raub v American Airline	Eastern District of Pennsylvania	Deposition	2017

CONFLICT OF INTEREST

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

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

PHYSICIAN

A handwritten signature in black ink, appearing to read "Denis Harris MD". The signature is cursive and somewhat stylized, with the letters "D", "H", and "M" being particularly prominent.

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

Denis Harris, MD

January 28, 2019

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

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

Dear Mr. Little:

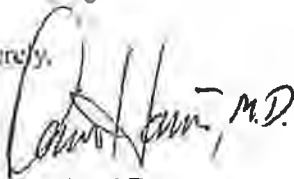
I would like to reply to Dr. Gold's letter of January 22, 2019.

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

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

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

Sincerely,



Denis Harris, M.D.

Denis Harris, MD

February 6, 2019

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

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

Dear Mr. Little:

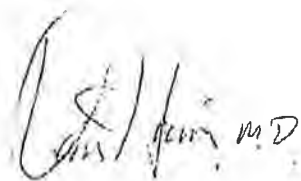
I would like to reply to Dr. Gold's letter of January 22, 2019 and add to my previous letter of January 28, 2019.

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

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

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

Sincerely,



Denis Harris, M.D.



JOHN E. HERR, M.D.
Diplomate, American Board
of Orthopedic Surgery
Arthroscopic Surgery
Total Joint Replacement
Sports Medicine

ORTHOPEDIC SURGERY

JASON LANDESS
February 12, 2018

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

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

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

X-RAYS: X-rays of the left tibia/fibula were obtained today in our office. These x-rays demonstrate the placement of a statically locked IM rod in the left tibia. There is a transverse fracture at the junction of the proximal and middle one thirds of the left tibia. On the AP view there is a step-off deformity of approximately 1 cm. On the lateral view there is a step-off deformity of approximately 1 cm. There are signs of callus formation at the fracture site but the fracture is clearly not healed.

IMPRESSION:
TRANSVERSE FRACTURE OF THE LEFT LEG AT THE FRACTURE SITE AT THE JUNCTION OF THE PROXIMAL AND MIDDLE ONE THIRDS OF THE LEFT TIBIA WITH DELAYED HEALING.

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


JOHN HERR, M.D.

IV: Is it displaced?

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

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

Displacement can include one or more of:

- angulation
- translation
- rotation
- distraction or impaction

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

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

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

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

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

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

Exhibit M

Gordon, Katherine

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

External Email

Judge Bare:

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

Shahana

Shahana M. Polselli
Senior Case Manager / Senior Paralegal
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9 *Attorneys for Plaintiff*

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11 Nevada Bar No. 7067
12 Alexander Vilamar, Esq.
13 Nevada Bar No.: 9927
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15 3800 Howard Hughes Parkway, Suite 1000
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18 Fax No: (702) 567-1568
19 mal@h2law.com
20 h2law.com
21 *Attorneys for Plaintiff*

22 EIGHTH DISTRICT COURT

23 CLARK COUNTY, NEVADA

24 JASON GEORGE LANDESS, aka KAY GEORGE CASE NO.: A-18-776896-C
25 LANDESS, an individual, DEPT NO.: 32

26 Plaintiff,

27 vs.

28 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

1 business as "ALLEGIAN SPINE INSTITUTE,"
2 JASWINDER S. GROVER, M.D. an individual;
3 JASWINDER S. GROVER, M.D. LTD, doing
4 business as "NEVADA SPINE CLINIC." VALLEY
5 HEALTH SYSTEM, LLC a Delaware limited
6 liability company doing business as "CENTENNIAL
7 HILLS HOSPITAL," UHS OF DELAWARE, INC., a
8 Delaware corporation also doing business as
9 "CENTENNIAL HILLS HOSPITAL," DOES I-X,
10 inclusive, and ROE CORPORATIONS I-X,
11 inclusive,

12 Defendants

13
14 **PLAINTIFF'S SUBMISSION OF DOCUMENTS TO REFUTE**
15 **DEFENDANT'S CLAIM OF SURPRISE REGARDING ALIGNMENT,**
16 **TRANSLATION/TWIST/ROTATIONAL DEFORMITY AND**
17 **DISTRACTION/GAP**

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

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

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

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

9 Because of time constraints, the documents are attached hereto, as follows,
10 without discussion. The Court's attention is brought to the yellow highlighted
11 sections of the same. Beginning with the First Amended Complaint dated July 2,
12 2018, through the completion of Roger Fontes Deposition on June 13, 2019,
13 discussion was held and questions were asked and reports were made regarding each
14 of these three failings.

- 15 1. February 6, 2019 Supplemental Report of Dennis Harris
- 16 2. Dennis Harris Records Review Report
- 17 3. Transcript Jury Trial Day 1- P. 40
- 18 4. Slide from opening powerpoint provided to counsel an hour in
19 advance.
- 20 5. Stuart Gold Deposition Testimony p. 63, 64, 66, 67
- 21 6. Fontes Deposition Transcript p. 32, 33
- 22 7. Debiparshad Deposition p. 236
- 23 8. John Herr February 12, 2018 Report
- 24 9. Orthopedic Trauma Association Powerpoint on Relationship of
25 Translation to Malrotation
- 26 10. Ortho Bullets discussing Rotational Malalignment Standards
27 relied upon by Dr. Harris in his deposition
- 28

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

4 12.First Amended Complaint

5 DATED this 23rd day of July, 2019.

6 THE JIMMERSON LAW FIRM
7

8
9
10 JAMES J. JIMMERSON, ESQ.
Nevada Bar No.: 000264
415 South 6th Street, Suite 100
11 Las Vegas, Nevada 89101
12 *Attorneys for Plaintiff*

13 Martin A. Little, Esq.
14 Nevada Bar No. 7067
Alexander Vilamar, Esq.
15 Nevada Bar No.: 9927
16 HOWARD & HOWARD ATTORNEYS, PLLC
3800 Howard Hughes Parkway, Suite 1000
17 Las Vegas, Nevada 89169
18 *Attorneys for Plaintiff*
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EXHIBIT 1

EXHIBIT 1

Denis Harris, MD

February 6, 2019

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

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

Dear Mr. Little:

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

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

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

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

Sincerely,

A handwritten signature in black ink, appearing to read "Denis Harris, M.D.", with a stylized flourish at the end.

Denis Harris, M.D.

EXHIBIT 2

EXHIBIT 2

Denis Harris, MD

Document Records Review

Patient Name Jason Landess

Date of Injury 10/9/2017

Claimant DOB 4/21/1946

Records reviewed

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

Summary of records

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

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

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

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

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

Discussion

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

Legal Testimony 2014 - 2019

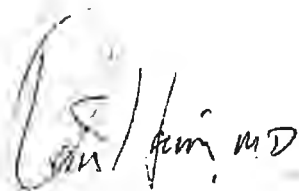
Frazier v Crowe	Prince George's County, Maryland	Trial	2015
Ortega v Bond	Prince George's County, Maryland	Deposition	2017
Pranger v Woodward	Washington, DC	Deposition	2017
Hope Foster v Quick Livick	Washington, DC	Deposition	2017
Raub v American Airline	Eastern District of Pennsylvania	Deposition	2017

CONFLICT OF INTEREST

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

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

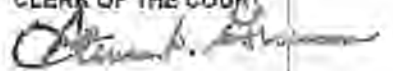
PHYSICIAN

A handwritten signature in black ink, appearing to read "D. Harris, MD". The signature is stylized with a large, looped initial "D" and a clear "Harris, MD" following it.

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

EXHIBIT 3

EXHIBIT 3



1 RTRAN

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5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7 JASON GEORGE LANDESS a.k.a.
8 KAY GEORGE LANDESS, as an
9 individual,

10 Plaintiff,

11 vs.

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

CASE#: A-18-776896-C
DEPT. XXXII

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

RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 1

APPEARANCES:

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

For Defendants Kevin Paul S. BRENT VOGEL, ESQ.
Debiparshad, M.D., Kevin P KATHERINE J. GORDON, ESQ.
Debiparshad PLLC dba
Synergy Spine, and
Debiparshad Professional
Services LLC dba Synergy
Spine and Orthopedics:

For Defendants Valley MICHAEL J. SHANNON, ESQ.
Health System, LLC dba MARJORIE E. KRATSAS, ESQ.
Centennial Hills Hospital and KENNETH M. WEBSTER, ESQ.
UHS of Delaware, Inc. dba MICHAEL E. PRANGLE, ESQ.
Centennial Hills Hospital:

RECORDED BY: JESSICA KILPATRICK, COURT RECORDER

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

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

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

16 A day later October 10th, 2017, he was raised to the hospital,
17 and he had -- then was operated upon by Kevin Debiparshad on October
18 10, 2017 with the intent to be realigned, property align, the tibia bond
19 with itself, and to allow it to be able to heal in the normal course. It was
20 a rather relatively straight forward operation, lasted less than two hours,
21 and occurred on October 10th. If you read the testimony of Dr.
22 Debiparshad, he will tell you that he did a near perfect job. He did so,
23 usually a tibia nail and screw set, hardware of screws and nail that
24 literally go right down to the bone marrow of your leg, joining the
25 tendon to it. First, join the bottom part of the tibia with the top with

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

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

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

EXHIBIT 4

EXHIBIT 4

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

© Malalignment = “Crooked”

✓ Overhang/Rotation = “Twisted”

© Distraction = “Gap”

EXHIBIT 5

EXHIBIT 5

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

6 Does that make sense?

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

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

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

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

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

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

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

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

10 A. That's exactly right.

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

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

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

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

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

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

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

6 A. The fluoro shots.

7 Q. The C-arms?

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

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

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

12 Q. Yeah, let's use those.

13 A. Is that all right, Kate?

14 MS. GORDON: Yes. You can have them.

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

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

(Exhibit No. 8 marked for identification.)

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

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

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

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

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

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

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

14 Q. That's Film A; yes?

15 A. As well.

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

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

Page 66

Page 66

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

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

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

6 Q. Did you measure that or eyeballing it?

7 A. With a goniometer.

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

9 A. Yes.

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

14 Just A, B, and C.

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

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

20 Q. Anything else?

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

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

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

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

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

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

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

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

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

Page 67

Page 67

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

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

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

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

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

15 A. Again, acceptable reduction is less than
16 25 percent translation, less than ten degrees of valgus
17 or varus.

18 Q. So, unacceptable would be above those degrees?

19 A. Correct.

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

25 Q. Are there any peer-reviewed articles,

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

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

9 A. More than ten degrees.

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

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

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

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

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

EXHIBIT 6

EXHIBIT 6

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DISTRICT COURT
CLARK COUNTY, NEVADA

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

v.

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

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

DEPOSITION OF
ROGER FONTES, M.D.
THURSDAY, JUNE 6, 2019
LAS VEGAS, NEVADA

Reported By Kele R. Smith, NV CCR No. 672, CA CSR No.
13405
Job No. 549384

Page 30

1 A. As I said, malunions and nonunion tibias and
 2 revision surgeries are -- I wouldn't say they're common,
 3 but they're not uncommon.
 4 BY MR. ORR:
 5 Q. In your experience, they're known risks. Is that
 6 correct?
 7 MR. JIMMERSON: Same objection. Move to
 8 strike.
 9 A. They are known risks.
 10 BY MR. ORR:
 11 Q. Based on your treatment and recollection of
 12 Mr. Landess, did he present any risk factors to make his
 13 chances of nonunion more likely?
 14 A. So I think the two that stand out to me are the
 15 fact that he has a fracture near the top of his tibia,
 16 so at one end or the other. That can create challenges.
 17 And he's a big guy. So those two, to me, stand out as
 18 issues that can increase his risk of nonunion.
 19 Q. If Mr. Landess had been treated for cancer in the
 20 past, would that make a nonunion more likely as well?
 21 A. If you were actively being treated, potentially,
 22 with chemotherapy or other agents. If you've been
 23 irradiated in this area. Something that would
 24 compromise this specific thing. Distant history of
 25 cancer, it's harder to draw a confusion. I'm not really

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1 answered it. If someone stated that he had a malunion,
 2 you would disagree with that. Correct?
 3 A. Right.
 4 MR. JIMMERSON: Same objection. Move to
 5 strike.
 6 BY MR. ORR:
 7 Q. Can you explain to me as if you were explaining
 8 to a layperson -- and you are explaining it to a
 9 layperson -- what the relationship between angulation or
 10 the alignment of a fixation and nonunion is?
 11 A. Yeah. So the -- surgeons endeavor to make
 12 fractures as close to anatomically positioned as they
 13 can when they do a surgery. There are fairly broad
 14 parameters that can be acceptable for alignment. We
 15 don't have to be perfect, which is good because there's
 16 often -- that's not always possible. And there are
 17 certain fractures that having -- during the course of
 18 the surgery, positioning the fracture in a certain
 19 nonanatomic way can increase the risk of it not healing.
 20 One example would be the proximal femur. So the
 21 top of the femur has a certain angle to it, and if the
 22 surgeon doesn't restore that angle accurately, it can
 23 increase the rate of it not healing. If a fracture is
 24 left with big gaps, for example, where the bone is
 25 ... distracted and there's a big defect there, that

Page 31

1 aware of any sound scientific evidence that would
 2 present a risk.
 3 Q. Would being osteoporotic make a nonunion more
 4 likely?
 5 A. Yes. Osteoporosis goes back to the mechanical
 6 fixation challenge. The better the bone, the more
 7 purchase you get from screws and rods and things. So if
 8 you have very, very poor bone quality, your mechanical
 9 fixation is compromised, and it can lead to a higher
 10 risk of nonunion or malunion.
 11 Q. Your diagnosis of Mr. Landess was he had a
 12 nonunion. Correct?
 13 A. Yes.
 14 Q. You would disagree with any suggestion that he
 15 had a malunion. Is that correct?
 16 MR. JIMMERSON: Objection. Calls for expert
 17 witness opinion, and you're trying to turn this man into
 18 a witness, which is inappropriate. Calls for a legal
 19 conclusion.
 20 You can answer.
 21 A. If the -- the question was do I think he has a
 22 nonunion? He had a nonunion. He does not have a
 23 malunion.
 24 BY MR. ORR:
 25 Q. Okay. And that's my -- I guess you kind of

Page 33

1 can lead to increased risk of nonhealing. As a general
 2 rule in the tibia, I don't think that small angulations
 3 directly interfere or correlate with nonunion risk.
 4 Q. Okay. When you are doing a tibial nailing -- and
 5 I'm talking about your practice, you know, how you like
 6 to do things -- is there a certain -- is there a certain
 7 amount of degree -- I guess is there a degree. Kind of
 8 a margin of error you're working with, you'd like to get
 9 it within so many degrees of?
 10 A. Right.
 11 Q. And what are kind of the constraints you're
 12 working with in your experience?
 13 MR. JIMMERSON: Objection. Calls for expert
 14 witness testimony and legal conclusion, which this
 15 witness was not retained by either side.
 16 You may answer, Dr. Fontes.
 17 THE WITNESS: No problem.
 18 A. In general, 5 degrees in what's called the
 19 coronal plane, so that's side to side. Also
 20 varus/valgus. And 10 degrees sagittal plane AP angle is
 21 generally considered acceptable.
 22 BY MR. ORR:
 23 Q. Okay. And you personally, do you have a specific
 24 custom or practice on how you like to measure the
 25 coronal plane and the --

EXHIBIT 7

EXHIBIT 7

27, 2019

Pages 234..237

Page 236

malalignment.

MR. JIMMERSON: Is his answer yes?

Q. Is that yes?

MS. GORDON: His answer is his answer.

BY MR. LITTLE:

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

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

Q. By what degree?

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

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

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

A. No.

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EXHIBIT 8

EXHIBIT 8



JOHN E. HERR, M.D.
Diplomate, American Board
of Orthopedic Surgery
Arthroscopic Surgery
Total Joint Replacement
Sports Medicine

ORTHOPEDIC SURGERY

JASON LANDESS
February 12, 2018

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

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


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

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

IMPRESSION:

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

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


JOHN E. HERR, M.D.

4420 S. Polaris Road • Suite 401 • Las Vegas, Nevada 89121 • (702) 435-3535 • FAX (702) 435-1324

JEHM 00008

PLTF.TR.EX. 7-00009

P.App. 2423

EXHIBIT 9

EXHIBIT 9



2017 Resident Advanced Trauma Techniques Course COMPLICATIONS / CHALLENGES *MALUNIONS/DEFORMITY*

What is a Malunion?

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



Relationship Of Translation To Mal-rotation

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

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

Deformity Evaluation

- Rotation
 - ☐ Exam (rotational profile)
 - ☐ CT



FRONTAL PLANE ALIGNMENT ANGULATION ASSESSMENT

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

Types of Deformities

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



EXHIBIT 10

EXHIBIT 10

Updated: 10/30/2018

73

Tibial Shaft Fractures

Ujash Sheth Joshua Blomberg Jan Szaikowski

TOPIC
Review Topic

QUESTIONS
60

EVIDENCE

VIDEOS
12

CASES
59

TECHNIQUES
1



Introduction

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

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

Imaging

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

Treatment of Closed Tibia Fractures

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

EXHIBIT 11

EXHIBIT 11

HOWARD & HOWARD ATTORNEYS PLLC

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

DISTRICT COURT

CLARK COUNTY, NEVADA

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

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

Plaintiff,

vs.

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

Defendants.

**PLAINTIFF'S SECOND
SUPPLEMENT TO REBUTTAL
EXPERT DISCLOSURE**

Howard & Howard Attorneys PLLC

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

7
8 **A. Retained Experts:**

9 1. Denis Harris, M.D.
10 3301 New Mexico Avenue NW, Suite 346
11 Washington, DC 20016
(202) 362-4787

12
13 Dr. Harris is a Board Certified Orthopaedic Surgeon. He has been in private practice
14 since 1980 and is affiliated with Sibley Memorial Hospital in Washington, D.C., and Johns
15 Hopkins Medicine in Baltimore, Maryland. Dr. Harris' testimony will include, but not be limited
16 to, his opinion and conclusions concerning his review of Mr. Landess' medical records and his
17 interview of Mr. Landess; the standard of care for orthopedic surgery as practiced in the United
18 States of America; Defendants' violations of and the deviations from the standard of care; the
19 causation of Mr. Landess' injuries and damages, including but not limited to the angular
20 deformity which resulted from Dr. Debiparshad's failure to adequately reduce Mr. Landess'
21 proximal tibial fracture, which required a second surgery. Dr. Harris will also rebut the opinions
22 of Defendants' expert, Stuart M. Gold, M.D., including without limitation, the standard of care
23 regarding Dr. Debiparshad's surgery to reduce Mr. Landess' fracture and acceptance of a
24 malalignment at the time of his initial surgery; the second surgery was indicated, and x-rays show
25 appropriate alignment after the second surgery.
26
27
28

1 The exhibits to be used as a summary of or support for Dr. Harris' opinions are documents
2 which are listed in or attached to his Report. Dr. Harris' Rebuttal Report dated January 28, 2019,
3 and his supplemental Rebuttal Report dated February 6, 2019, are attached hereto collectively as
4 Exhibit 1. A copy of Dr. Harris' *Curriculum Vitae*, Fee Schedule, and list of cases where he has
5 testified at trial or in deposition were produced in Plaintiff's Initial Expert Disclosure served on
6 January 23, 2019.
7

8 2. Eleanor Kenney, RN, Ph.D.
9 3301 New Mexico Avenue NW, Suite 346
10 Washington, DC 20016
11 (202) 362-4787

12 Dr. Kenney holds a Master's Degree in Nursing from the University of California, Los
13 Angeles, and a Ph.D. in Higher and Professional Education from the University of Southern
14 California. She is a nationally certified Emergency Nurse and also holds other nursing
15 certifications including Basic and Advanced Cardiac Life Support, Pediatric Advanced Life
16 Support, and Trauma Nursing. Dr. Kenney has been a practicing nurse since 1966, and an
17 educator since 1974. She has taught licensed vocational nursing students, registered nursing
18 students, graduate nurses and emergency medical services personnel.
19

20 Dr. Kenney's testimony will include, but not be limited to, her opinion and conclusions
21 concerning her review of Mr. Landess' medical records and her interview of Mr. Landess; the
22 standard of care for nurses as practiced in the United States of America; Defendants' violations
23 of hospital policies and the deviations from the standard of care; and, the causation of Mr.
24 Landess' damages, including without limitation, his emotional distress and pain and suffering as
25 of result of his interactions with nursing staff on 10/11/17 following his request to leave their
26 care, and the unreasonable physical restraint. Dr. Kenney will also rebut the opinions of
27
28

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

3 The exhibits to be used as a summary of or support for Dr. Kenney's' opinions are
4 documents which are listed in her Report. Dr. Kenney's Rebuttal Report dated February 22,
5 2019, is attached hereto as Exhibit 2. A copy of Dr. Kenney's *Curriculum Vitae*, Fee Schedule,
6 and list of cases where she has testified at trial or in deposition are attached hereto collectively
7 as Exhibit 3. **Dr. Kenney's Supplemental Rebuttal Report dated May 31, 2019, is attached**
8 **hereto as Exhibit 4.**
9

10 B. Non-Retained Experts

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

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

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

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

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

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

18 The following treating physicians, healthcare providers and therapists may give expert
19 opinions in written reports and/or testify regarding the mechanism and/or causation of Plaintiff's
20 injuries, his/her diagnosis, treatment, and prognosis; the effect of Plaintiff's injuries on present
21 and future employment, and Plaintiff's potential loss of earning capacity and loss of earnings;
22 the appropriateness and value of any treatment rendered to Plaintiff by any of his other
23 healthcare providers; the appropriateness and value of any diagnostic testing, including
24 psychological and neuropsychological testing, performed on the Plaintiff, as well as the findings
25 and assessments made by other healthcare providers, as well as his/her own opinion regarding
26 any test and the findings/diagnosis; future treatment which Plaintiff may need; and any other
27 opinion that may be based on the healthcare provider's experience and/or recommendations
28

1 made by any other healthcare provider, and/or based upon any diagnostic test, and/or his/her
2 review of any of Plaintiff's medical records from Plaintiff's date of birth to present, that was
3 made during Plaintiff's course of treatment; Plaintiffs' damages; any other healthcare provider's
4 report or testimony; any expert's report or testimony. Their testimony and opinions will consist
5 of the reasonableness and necessity of the past, present and future medical treatment rendered
6 or to be rendered by any healthcare provider; the causation of the necessity for past, present and
7 future medical treatment caused by the subject incident; and the reasonableness of the costs
8 associated with such past, present and future medical treatment. Their opinions shall include
9 the authenticity of medical records, the cost of medical care, and whether those medical costs
10 fall within ordinary and customary charges in the community, for similar medical care and
11 treatment:
12

- 13 1. Person With Knowledge/Custodian of Records
14 American Medical Response
15 PO Box 745774
Los Angeles, CA 90074
- 16 2. Person With Knowledge/Custodian of Records and Billing
17 University Medical Center of Southern Nevada
18 1800 W. Charleston Blvd.
Las Vegas, NV 89102
- 19 3. Person With Knowledge/Custodian of Records
20 Nevada Spine Clinic/Allegiant Institute/Allegiant Spine Institute
21 7140 Smoke Ranch Road, Suite 150
Las Vegas, NV 89128
- 22 4. Person With Knowledge/Custodian of Records
23 Synergy Spine & Orthopedics
24 870 Seven Hills Drive, Suite 103
Henderson, NV 89052
- 25 5. Person with Knowledge/Custodian of Records
26 John Herr, M.D.
27 4425 S. Pecos Road, Suite 1
Las Vegas, NV 89121
- 28 6. Person With Knowledge/Custodian of Records

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

7. Person with Knowledge/Custodian of Records
St. Rose Dominican Hospital – de Lima Campus
102 E. Lake Mead Parkway
Henderson, NV 89015
8. Person with Knowledge/Custodian of Records
St. Rose Dominican Hospital-de Lima Billing
4129 East Van Buren Street, c/o Optum 360
Phoenix, AZ 85008
9. Person with Knowledge/Custodian of Records
Fyzical Therapy and Balancc Centers
3820 South Jones Boulevard
Las Vegas, NV 89103
10. Person with Knowledge/Custodian of Records
Forte Family Practice
4845 South Rainbow Boulevard
Las Vegas, NV 89118

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

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

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

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

5
6 Plaintiff anticipates that he may require testimony from any and all custodians of records
7 which is necessary to authenticate documents which cannot be stipulated to regarding
8 admissibility by the parties herein.

9 Dated this 3rd day of June, 2019.

10 **HOWARD & HOWARD ATTORNEYS PLLC**

11 */s/ Martin A. Little*

12 By: _____

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

CERTIFICATE OF SERVICE

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

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

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

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

///

///

1 I certify under penalty of perjury that the foregoing is true and correct, and that I executed
2 this Certificate of Service on June 3, 2019, at Las Vegas, Nevada.
3
4

5 /s/ Karen R. Gomez
6

7 An Employee of Howard & Howard Attorneys PLLC
8

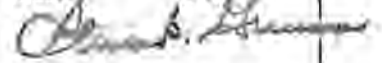
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EXHIBIT 4

EXHIBIT 12

EXHIBIT 12



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

DISTRICT COURT
CLARK COUNTY, NEVADA

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

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

12 Plaintiff,

13 vs.

14 KEVIN PAUL DEBIPARSHAD, MD, an
15 individual; KEVIN P DEBIPARSHAD PLLC, a
16 Nevada professional limited liability company
17 doing business as "SYNERGY SPINE AND
18 ORTHOPEDICS"; DEBIPARSHAD
19 PROFESSIONAL SERVICES LLC, a Nevada
20 professional limited liability company doing
21 business as "SYNERGY SPINE AND
22 ORTHOPEDICS"; ALLEGIANT INSTITUTE
23 INC., a Nevada domestic professional
24 corporation doing business as "ALLEGIANT
25 SPINE INSTITUTE"; JASWINDER S.
26 GROVER, MD, an individual; JASWINDER S.
27 GROVER, M.D., Ltd doing business as
28 "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 1-X, inclusive,

Defendants.

FIRST AMENDED
COMPLAINT FOR MEDICAL
MALPRACTICE

*Arbitration Exempt:
Medical Malpractice*

Jury Demanded

1 COMES NOW, Plaintiff JASON GEORGE LANDESS a.k.a. KAY GEORGE
2 LANDESS, by and through his attorney of record, MARTIN A. LITTLE, ESQ. of the law firm
3 HOWARD & HOWARD ATTORNEYS, PLLC, and for his causes of action against the
4 Defendants and each of them, complains and alleges as follows:
5

6 1. At all times relevant hereto, Plaintiff JASON GEORGE LANDESS a.k.a. KAY
7 GEORGE LANDESS (hereinafter "Plaintiff") was and is a resident of Clark County, Nevada.
8

9 2. Defendant KEVIN PAUL DEBIPARSHAD, M.D. (hereinafter "DR.
10 DEBIPARSHAD"), upon information and belief, is and was at relevant times hereto, a resident
11 of Clark County, Nevada, and licensed to practice medicine in the State of Nevada, pursuant to
12 NRS 630 and 449. DR. DEBIPARSHAD holds himself out as competent in the area of
13 orthopaedic surgery.
14

15 3. Upon information and belief, at all relevant times, Defendant KEVIN P
16 DEBIPARSHAD PLLC, doing business as "SYNERGY SPINE AND ORTHOPEDICS", was
17 and is a Nevada professional limited liability company doing business as a medical provider,
18 pursuant to NRS Chapter 449, and is vicariously liable for its employees, physicians,
19 radiologists, nurses, technicians, agents and/or servants and their actions, who are unknown and
20 sued herein as DOE Defendants, and is being sued as an ostensible agency, vicarious liability,
21 negligent hiring, training, supervision and corporate negligence.
22

23 4. Upon information and belief, at all relevant times, Defendant DEBIPARSHAD
24 PROFESSIONAL SERVICES LLC, doing business as "SYNERGY SPINE AND
25 ORTHOPEDICS", was and is a Nevada professional limited liability company doing business
26 as a medical provider, pursuant to NRS Chapter 449, and is vicariously liable for its employees,
27
28

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

4
5 5. Upon information and belief, at all relevant times, Defendant ALLEGIANT
6 INSTITUTE INC., doing business as "ALLEGIANT SPINE INSTITUTE," was and is a
7 Nevada domestic professional corporation doing business as a medical provider, pursuant to
8 NRS Chapter 449, and is vicariously liable for its employees, physicians, radiologists, nurses,
9 technicians, agents and/or servants and their actions, who are unknown and sued herein as DOE
10 Defendants, and is being sued as an ostensible agency, vicarious liability, negligent hiring,
11 training, supervision and corporate negligence.
12

13 6. Defendant JASWINDER S. GROVER, M.D. (hereinafter "DR. GROVER"),
14 upon information and belief, is and was at relevant times hereto, a resident of Clark County,
15 Nevada, and licensed to practice medicine in the State of Nevada, pursuant to NRS 630 and
16 449. DR. GROVER holds himself out as competent in the area of orthopaedic surgery.
17

18 7. Upon information and belief, at all relevant times, JASWINDER S. GROVER,
19 M.D., Ltd, doing business as "NEVADA SPINE CLINIC", was and is a foreign limited
20 liability company doing business as a medical provider, pursuant to NRS Chapter 449, and is
21 vicariously liable for its employees, physicians, radiologists, nurses, technicians, agents and/or
22 servants and their actions, who are unknown and sued herein as DOE Defendants, and is being
23 sued as an ostensible agency, vicarious liability, negligent hiring, training, supervision and
24 corporate negligence.
25

26 8. Upon information and belief, at all relevant times, Defendant VALLEY
27 HEALTH SYSTEM LLC ("Valley Health"), doing business as "CENTENNIAL HILLS
28

1 HOSPITAL," was and is a Delaware limited liability company doing business as a medical
2 provider, pursuant to NRS Chapter 449, and is vicariously liable for its employees, physicians,
3 radiologists, nurses, technicians, agents and/or servants and their actions, who are unknown and
4 sued herein as DOE Defendants, and is being sued as an ostensible agency, vicarious liability,
5 negligent hiring, training, supervision and corporate negligence.
6

7 9. Upon information and belief, at all relevant times, Defendant UHS OF
8 DELAWARE, INC. ("UHS"), doing business as "CENTENNIAL HILLS HOSPITAL," was
9 and is a Delaware corporation doing business as a medical provider, pursuant to NRS Chapter
10 449, and is vicariously liable for its employees, physicians, radiologists, nurses, technicians,
11 agents and/or servants and their actions, who are unknown and sued herein as DOE Defendants,
12 and is being sued as an ostensible agency, vicarious liability, negligent hiring, training,
13 supervision and corporate negligence.
14

15 10. At all times relevant, the Defendants, DOES I through X, inclusive, were
16 working at Centennial Hills Hospital or Nevada Spine Clinic on October 10, 2017 or assisting
17 in performing the surgery wherein DR. DEBIPARSHAD performed a closed reduction on
18 Plaintiff's left tibia, inserted a tibial nail, and placed proximal and distal locking screws, which
19 caused injury which was not recognized or diagnosed until February 2018 and addressed with
20 corrective surgery until April 2018. DOE Defendants are being sued under the theory of
21 vicarious liability and ostensible agency, for the negligence of its employees, agents,
22 contractors and subcontractors, physicians, nurses, administrators, health care providers,
23 attendants, physician's assistants, radiologists, technicians, therapists, contractors and
24 subcontractors and/or medical personnel holding themselves out as duly licensed to practice
25 their professions under and by virtue of the laws of the State of Nevada, and were and are now
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1 engaged in the practice of their professions in the State of Nevada; that the DOE Defendants
2 include physicians, nurses, technicians, or other medical providers that treated Plaintiff, and
3 during the course and scope of their care and treatment of Plaintiff are responsible in some
4 manner for the injuries and damages to the Plaintiff alleged herein and are liable upon
5 respondent superior and for the negligent hiring, training and supervision of the physicians,
6 staff, nurses, and employees who were involved in the treatment of Plaintiff; that the true
7 names, identities, or capacities, whether individual, corporate, associate, or otherwise, of the
8 Defendants, DOES I through X, inclusive, are presently unknown to the Plaintiff, who
9 therefore sues said Defendants by such fictitious names; and that when the true names and
10 capacities of such Defendants become known, Plaintiff will ask leave of this Court to amend
11 this Complaint to insert the true names, identities, and capacities, together with proper charges
12 and allegations.

13
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15 11. At all times relevant, Defendants, ROE CORPORATIONS I through X,
16 inclusive, were and now are corporations, firms, partnerships, agency, associations, other
17 medical entities, other medical providers involved in the care, treatment, diagnosis, surgery,
18 and/or other provision of medical care to the plaintiff herein; that the Plaintiff is informed and
19 believe and therefore allege that each of the Defendants sued herein as ROE CORPORATIONS
20 are responsible in some manner for the injuries and damages to the Plaintiff alleged herein and
21 are liable upon respondent superior and for the negligent hiring, training and supervision of the
22 physicians, staff, nurses, and employees who were involved in the treatment of Plaintiff; that
23 Plaintiff is unable to identify the true names of the DOE and ROE Defendants and, pursuant to
24 NRCPP 10(a) and *Nuremberger Hercules-Werke GMBH v. Virotek*, 107 Nev. 873, 822 P.2d
25 1100 (1991), uses and relies upon DOE and ROE designations; and when the true identify or
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1 name(s) is/are discovered, Plaintiff will move to amend the pleading to properly name said
2 defendants.

3 12. At all times relevant hereto, the Defendants, and each of them, were the agents,
4 directors, servants, employers, co-owners/joint venturers, and alter egos of each other and of
5 their co-Defendants, and were acting within the course, purpose, and scope of their
6 employment, agency, ownership, and/or joint ventures and by reason of such relationships, the
7 Defendants, and each of them, are vicariously and jointly and severally responsible and liable
8 for the acts or omissions of the co-Defendants.
9

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

14 GENERAL ALLEGATIONS
15

16 14. Plaintiff was involved in a golf-cart accident on October 9, 2017, causing injury
17 to his left leg. He was transported by AMR Ambulance to the emergency care unit at
18 Centennial Hills Hospital ("CHH") in Las Vegas. X-rays were taken and he was diagnosed as
19 having a closed traumatic displaced fracture of proximal end of tibia with swelling. He was
20 then admitted. Various tests and exams were performed, with Mr. Landess being cleared for
21 surgery.
22

23 15. Physicians employed by CHH notified DR. DEBIPARSHAD, who
24 recommended a posterior splint and stated that he would see Plaintiff the next morning.
25
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28

1 16. On October 10, 2017, Plaintiff was taken to pre-op. DR. DEBIPARSHAD
2 introduced himself, advising that he had examined the X-rays and determined that a closed
3 reduction internal fixation would be the most suitable surgical solution. Plaintiff asked DR.
4 DEBIPARSHAD how many of those procedures he had performed, with DR. DEBIPARSHAD
5 responding, "Thousands. This is my specialty. In fact, I have invented new techniques and
6 procedures for this particular surgery." Plaintiff urged DR. DEBIPARSHAD to do his best
7 because he wanted to soon return to his passion of golfing. DR. DEBIPARSHAD replied, "I
8 understand. My wife is a scratch golfer." DR. DEBIPARSHAD further stated, "Don't worry. I
9 recently treated an NBA player for last year's championship team. You're in good hands."
10 Neither DR. DEBIPARSHAD nor anyone else at CHH informed Plaintiff that DR.
11 DEBIPARSHAD was not employed by CHH. DR. DEBIPARSHAD arranged for Plaintiff to
12 visit him at the Nevada Spine Clinic two weeks after the surgery.
13
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15

16 17. Dr. Debiparshad that same day performed a closed reduction on Plaintiff's left
17 tibia, inserted a tibial nail, and placed proximal and distal locking screws.
18

19 18. During the surgery on Plaintiff's left tibia at CHH on October 10, 2017, DR.
20 DEBIPARSHAD and/or DOE Defendants failed to use the reasonable care, skill or knowledge
21 ordinarily used under similar circumstances by misaligning the tibia when inserting the tibial
22 nail and failing to properly reduce the fracture. *See, Exhibit 1.*
23

24 19. By failing to use reasonable care, skill and knowledge, an ensuing mal-union
25 occurred and Plaintiff was thus directly harmed, as is evidenced in part by the need for a second
26 surgery on April 3, 2018 to correct the problem. *See, Exhibit 1.*
27
28

1 20. To a reasonable degree of medical certainty, DR. DEBIPARSHAD and/or DOE
2 Defendants breached the standard of care relating to that initial orthopaedic surgery. *See*,
3 **Exhibit 1.**
4

5 21. The Sworn Declaration of Denis R. Harris, M.D., attached hereto as **Exhibit 1**,
6 which supports the allegations in the Complaint as required by NRS 41A.170 is hereby adopted
7 and incorporated as though set forth fully herein.
8

9 22. Following surgery, DR. DEBIPARSHAD instructed CHH's physical therapy
10 services to have Plaintiff attempt to stand upright and attempt to walk a short distance with a
11 hand walker. DR. DEBIPARSHAD also informed Plaintiff that if he was able to walk a short
12 distance with the help of a walker that he saw no reason why Plaintiff could not check out of
13 the hospital the day following surgery.
14

15 23. During the morning of October 11, 2017, two representatives of CHH's physical
16 therapy department visited Plaintiff in his room and helped him stand upright and walk a short
17 distance with a walker. That department and CHH's occupational therapy then cleared Plaintiff
18 for discharge.
19

20 24. Plaintiff thus requested of the charge nurse, Karen M. Buttner ("Ms. Buttner"),
21 that she remove the IV and arrange for a wheelchair so that Plaintiff could leave the hospital.
22

23 25. Ms. Buttner, however, refused to do so, which was extremely upsetting to
24 Plaintiff. She insisted that it was too soon for Plaintiff to leave the hospital and urged Plaintiff
25 to consult with CHH's staff doctor, Fawad Ahmed, M.D. ("Dr. Ahmed"). She also told Plaintiff
26 and his two sons that if Plaintiff left CHH without Dr. Ahmed's approval that Medicare would
27 not pay for any of the past medical bills relating to the leg surgery and hospitalization.
28

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

3 27. When Dr. Ahmed did not visit Plaintiff by 1 p.m., Plaintiff again insisted that
4 Ms. Buttner disconnect Plaintiff's IV and arrange for wheelchair transportation outside of the
5 hospital. But again Ms. Buttner refused and told Plaintiff that she had spoken with the charge
6 nurse who confirmed that Medicare would not pay medical bills if Plaintiff left the hospital
7 against medical advice. She urged Plaintiff to wait for Dr. Ahmed, stating that he would visit
8 Plaintiff by no later than 3 p.m.
9

10 28. Extremely distressed, Plaintiff called his youngest son, Justin Landess
11 ("Justin"), and instructed him to borrow his friend's wheelchair and come to the hospital, which
12 he did.
13

14 29. When Dr. Ahmed did not visit Plaintiff by 3 p.m., Plaintiff again insisted that
15 Ms. Buttner disconnect Plaintiff's IV so Plaintiff could leave. And once again she refused to do
16 so, forcing Plaintiff to have to remove his taped-down IV.
17

18 30. To further dissuade Plaintiff from checking out of the hospital, Ms. Buttner
19 called Plaintiff's eldest son, Steve Landess ("Steve"), and urged him to try to prevent Plaintiff
20 from checking out of the hospital, telling him that Medicare would not pay for past medical
21 bills if Plaintiff did leave without the approval of Dr. Ahmed.
22

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

25 32. At that point, Ms. Buttner and another nurse stood side-by-side in front of the
26 wheelchair blocking Plaintiff's and Justin's exit from the room, again telling Plaintiff that he
27 could not leave and, that if he did, he would have to first sign a hospital form.
28

1 33. By then Plaintiff (who was heavily medicated due to the surgery) was confused,
2 frightened, and outraged. Plaintiff thus told them that CHH was supposed to be a hospital, not a
3 prison, and insisted that they get out of his way so he could leave and go home as had been
4 authorized by everyone except the mysteriously absent Dr. Ahmed.
5

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

9 35. Plaintiff first visited DR. DEBIPARSHAD at the Nevada Spine Clinic located at
10 8930 W. Sunset Rd., Ste. 350, Las Vegas, NV 89148 on October 25, 2017. He was
11 accompanied by his ex-wife, Carolyn Landess ("Carolyn"). X-rays were taken; Plaintiff spoke
12 with DR. DEBIPARSHAD (with Carolyn present), who said he had looked at the X-rays and
13 everything was fine; and DR. DEBIPARSHAD said he would arrange for Plaintiff to obtain a
14 bone-stimulation machine to help with healing. He also recommended that Plaintiff commence
15 physical therapy, which he did.
16

17 36. Plaintiff, accompanied by Carolyn, again visited DR. DEBIPARSHAD at the
18 Nevada Spine Clinic on November 22, 2017. X-rays were taken. Plaintiff then inquired about
19 the irregular jutting portion of the proximal portion of the fractured tibia, stating that it did not
20 look symmetrical to him. DR. DEBIPARSHAD's explanation was that the proximal portion of
21 the fracture had a larger interior cavity, thereby allowing for the inserted tibial nail to move
22 around more than at the lower portion of the tibia. He assured Plaintiff that he had looked at the
23 X-rays and everything was fine. Plaintiff mentioned that he had not heard from anyone about
24 the bone-stimulation machine. DR. DEBIPARSHAD said he would take care of it.
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1 37. Plaintiff, accompanied by Carolyn, again visited DR. DEBIPARSHAD at the
2 Nevada Spine Clinic on December 20, 2017. X-rays were taken. Plaintiff then complained that
3 he was feeling a clicking or slight shifting at the proximal site of the surgery. DR.
4 DEBIPARSHAD dismissed the complaint, stating that he had just looked at the X-rays and that
5 everything was in order. Moreover, he stated that the tibial nail and locking screws were so
6 strong and secure that it would be impossible for them to move or shift.
7

8 38. However, according to Plaintiff's medical records, as of December 20, 2017 the
9 proximal locking screw had sheared in half, which is clearly visible on the X-rays of that same
10 date.
11

12 39. At that office visit Plaintiff informed DR. DEBIPARSHAD that since he had not
13 heard from anyone about the bone-stimulation machine, that he had called DR.
14 DEBIPARSHAD's staff and complained. DR. DEBIPARSHAD once again said he would
15 make sure that someone would call, which never happened.
16

17 40. Plaintiff, again accompanied by Carolyn, visited DR. DEBIPARSHAD at the
18 Nevada Spine Clinic on January 31, 2018. X-rays were once again taken. And at this office
19 visit Plaintiff more forcefully complained that he was feeling a clicking or slight shifting at the
20 proximal site of the surgery. But, once again, that complaint was ignored. Instead, Plaintiff's
21 complaint about not having heard anything about the bone-stimulation machine fell on deaf
22 ears. And, once again, nothing was said about the failed hardware.
23

24 41. Rather than improve, Plaintiff's condition steadily deteriorated to the point that
25 he could no longer endure the pain from physical therapy. Also, when Plaintiff attempted to put
26 weight on the left leg it would ominously bow out sideways, causing immense pain.
27
28

1 42. Plaintiff thus visited orthopaedic surgeon John E. Herr, M.D. ("Dr. Herr") on
2 February 12, 2018, seeking a second opinion. Dr. Herr took X-rays and discussed them with
3 Plaintiff. Dr. Herr stated that there were some severe problems that were beyond his skill level,
4 and that he would arrange for Plaintiff to see orthopaedic surgeon, Roger Fontes, M.D. ("Dr.
5 Fontes").
6

7 43. Plaintiff met with Dr. Fontes on February 15, 2018. Dr. Fontes took X-rays and
8 then explained the misalignment, the nonunion, and pointed out the broken hardware. He
9 advised Plaintiff that the only way to obtain a union of the fracture was through a corrective
10 surgery.
11

12 44. On or about February 20, DR. DEBIPARSHAD's staff called Plaintiff to
13 explain that he had left the Nevada Spine Clinic to open his own practice in Henderson,
14 Nevada. They invited Plaintiff to visit DR. DEBIPARSHAD at his new office on March 1,
15 2018. Plaintiff accepted.
16

17 45. When Plaintiff arrived at DR. DEBIPARSHAD's new office, they directed
18 Plaintiff to go around the corner to a Quick Care unit to have more X-rays taken since DR.
19 DEBIPARSHAD did not yet have such equipment installed in his new office. Plaintiff then
20 immediately returned to DR. DEBIPARSHAD's office and met with DR. DEBIPARSHAD.
21

22 46. Plaintiff intentionally said nothing to DR. DEBIPARSHAD about his meeting
23 with Dr. Fontes, hoping that DR. DEBIPARSHAD would acknowledge the mal-alignment and
24 failed hardware. But instead DR. DEBIPARSHAD told Plaintiff that his slow healing was due
25 to his advanced age and recommended that Plaintiff keep taking pain medication and come
26 back again in 45 days. The next day his assistant, Ron, called Plaintiff and said that DR.
27 DEBIPARSHAD had examined the March 1st X-rays and did not see anything that concerned
28

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

3 47. Dr. Fontes performed corrective surgery on Plaintiff on April 3, 2018. Plaintiff
4 was in the operating room for approximately 4.5 hours. It was a complicated and painful
5 surgery.
6

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

9 49. According to Plaintiff's medical records, Plaintiff suffered, and continues to
10 suffer, from multiple complications as a result of Defendants' negligence, which required
11 multiple diagnostic studies, multiple procedures and surgeries, and further hospitalization.
12 Plaintiff has also lost considerable income from not being able to engage in his normal
13 professional practice of law. In addition, Plaintiff is expected to require future care and
14 treatment over the course of his life which will require continuing medical care and treatment,
15 physicians, medications, and reasonable costs associated with such care and treatment.
16
17

18 **FIRST CAUSE OF ACTION**

19 **MEDICAL MALPRACTICE**

20 **(Against All Defendants)**

21 50. Plaintiff hereby adopts and incorporates by reference each and every allegation
22 in each and every preceding paragraph of this Complaint, and Exhibit 1 attached hereto, as
23 though fully set forth herein at length.
24

25 51. Defendants and DOE and ROE Defendants, and each of them, are providers of
26 health care as set forth in NRS 41A.017.
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1 52. Defendants and DOE and ROE Defendants had a duty to exercise reasonable
2 care in their treatment of Plaintiff consistent with the degree of skill and learning possessed by
3 other physicians, radiologists, contractors, independent contractors, nurses, employees and
4 medical personnel who specialize in the field of medicine and practicing in or around the
5 community and caused injury to Plaintiff when he underwent a medical procedure performed
6 by Defendants and DOE and ROE Defendants which fell below the applicable standard of care
7 in the community. *See, Exhibit 1.*
8

9
10 53. At all times mentioned herein, Defendants and DOE and ROE Defendants, and
11 each of them, knew, or in the exercise of reasonable care, should have known, that providing
12 medical care and treatment was of such a nature that if not properly given, it would likely injure
13 the person to whom it is given.
14

15 54. Defendants, and DOE and ROE Defendants, breached their duty by failing to
16 comply with the existing standards of medical care required under the circumstances and in
17 failing to identify, diagnose, treat, intervene, alter treatment, offer appropriate treatment
18 modalities, monitor, protect and properly have measures in place to protect Plaintiff while
19 under Defendants' care and treatment. Accordingly, they were negligent in their failing to
20 provide adequate care and treatment for Plaintiff. *See, Exhibit 1.*
21
22

23 55. Defendants and DOE and ROE Defendants failed to appreciate, adequately
24 document, inform, have in place protective measures, failed to supervise and failed to intervene
25 in providing adequate care, supervision, monitoring, care and treatment of Plaintiff despite
26
27
28