IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN PAUL DEBIPARSHAD, M.D., AN INDIVIDUAL; KEVIN P. DEBIPARSHAD PLLC, D/B/A SYNERGY SPINE AND ORTHOPEDICS; DEBIPARSHAD PROFESSIONAL SERVICES, LLC, D/B/A SYNERGY SPINE AND ORTHOPEDICS; ALLEGIANT INSTITUTE INC., A NEVADA DOMESTIC PROFESSIONAL CORPORATION DOING BUSINESS AS ALLEGIANT SPINE INSTITUTE; JASWINDER S. GROVER, M.D., AN INDIVIDUAL; JASWINDER S. GROVER, M.D., LTD., D/B/A NEVADA SPINE CLINIC,.

Petitioner,

v.

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

Respondent,

and

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

Real Party In Interest.

Supreme Court No.:

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

PETITIONER'S APPENDIX TO PETITION FOR WRIT OF MANDAMUS VOLUME 11

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INDEX TO PETITIONERS' APPENDIX – VOLUME I

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

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

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

	Granting Plaintiff's Motion for a Mistrial			
25.	Plaintiff's Opposition to Defendants' Motion for Relief from Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial	03/13/2020	9 10 11	P.App. 1958-2207 P.App. 2208-2457 P.App. 2458-2524
26.	Defendants' Opening Brief Re Competing Orders Granting in part, Denying in part Plaintiff's Motion for Attorney Fees and Costs and Denying Defendants' Countermotion for Attorney Fees and Costs	03/27/2020	11	P.App. 2525-2625
27.	Order Granting Motion for Clarification of September 16, 2019 Order	03/31/2020	11	P.App. 2626-2628
28.	Notice of Entry of Order Granting Motion for Clarification of September 16, 2019 Order	04/01/2020	11	P.App. 2629-2634
29.	Order Granting in part Plaintiff's Motion for Attorneys' Fees and Costs	04/06/2020	11	P.App. 2635-2638
30.	Notice of Entry of Order Granting in part Plaintiff's Motion for Attorneys' Fees and Costs	04/07/2020	11	P.App. 2639-2645

31.	Plaintiff's Response Brief Regarding Order Granting in part Plaintiff's Motion for Attorneys' Fees and Costs, and Motion for Clarification and/or Amendment of the Order Granting in part Plaintiff's Motion for Attorneys' Fees and Costs	04/10/2020	11 12	P.App. 2646-2704 P.App. 2705-2731
32.	Defendants' Reply in support of Opening Brief Re Competing Orders Granting in part, Denying in part Plaintiff's Motion for Attorney Fees and Costs and Denying Defendants' Countermotion for Attorney Fees and Costs	04/23/2020	12	P.App. 2732-2765
33.	Defendants' Reply in support of Motion for Relief from Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial	04/23/2020	12 13	P.App. 2766-2951 P.App. 2952-3042
34.	Errata to Defendants' Reply in support of Motion for Relief from Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial	04/27/2020	13	P.App. 3043-3065
35.	Errata to Defendants' Motion for Relief from Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial	04/27/2020	13	P.App. 3066-3081

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

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

CERTIFICATE OF MAILING

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

The Honorable Kerry Earley
The Eighth Judicial District Court
Regional Justice Center
200 Lewis Avenue
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Respondent

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

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

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

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

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

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

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

SECOND CAUSE OF ACTION

(Against All Defendants)

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

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

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

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

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

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

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

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

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

THIRD CAUSE OF ACTION

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

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

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

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

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

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

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

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

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

FOURTH CAUSE OF ACTION

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

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

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

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

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

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

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

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

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

FIFTH CAUSE OF ACTION

(Against All Defendants)

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

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

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

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

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

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

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

Dated this 2nd day of July, 2018.

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

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Attorneys for Plaintiff

Howard & Howard Attorneys PLLC

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

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

THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. JIMMERSON: Yes.

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

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

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

MS. GORDON: No. It -- sorry.

THE COURT: My view is they can.

MS. GORDON: Oh okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"A Correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Vogel?

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

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

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

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

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

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

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

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

Once the injury is established, proximately caused by the

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

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

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

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

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

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

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

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

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

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

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

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

However, consistent with the idea that Mr. Landess can

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

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

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

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

the stock purchase options are nebulous in some way.

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

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

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

MR. JIMMERSON: Thank you, Judge.

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

[Pause]

THE MARSHAL: They're ready.

THE COURT: Are you ready?

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

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

THE MARSHAL: Parties rise for presence of the jury.

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Steven D. Grierson

DISTRICT COURT
CLARK COUNTY, NEVADA
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JASON GEORGE LANDESS a.k.a. KAY GEORGE LANDESS, as an individual, Plaintiff, vs. KEVIN PAUL DEBIPARSHAD, M.D., Et al. Defendants.	CASE NO.: A776896 DEPT. NO.: XXXII (Matter heard on 9/4/19 in Department XXX) **ORDER**

The above-referenced matter came on for hearing before Judge Jerry Wiese as the Presiding Civil Judge, on the 4th day of September, 2019, with regard to the Defendants' Motion to Disqualify the Honorable Rob Bare. Having reviewed all of the papers and pleadings on file, and having considered the oral argument offered on behalf of the parties, and good cause appearing, the Court enters the following Order.

FACTUAL AND PROCEDURAL HISTORY

This is a professional negligence (medical malpractice) case filed by the Plaintiff, Jason George Landess, against Dr. Kevin Paul Debiparshad and his practice, Synergy Spine and Orthopedics, as well as Nevada Spine Clinic and Centennial Hills Hospital. Plaintiff alleges that Dr. Debiparshad failed to properly reduce a tibia fracture during a 10/10/17 surgery. Claims against Centennial Hills Hospital were resolved shortly before Trial.

This case went to Trial before the Honorable Judge Rob Bare, with a Jury. The Trial began on 7/22/19. The issue of the "burning embers e-mail" and the possibility of a mistrial was raised on trial day 10, (August 2, 2019), a Motion for Mistrial was filed by Plaintiff on the evening of Sunday, 8/4/19, and a mistrial was declared on trial day 11, (August 5, 2019). Defendant has filed a Motion to Disqualify the Honorable Rob Bare, based on alleged actual or implied bias.

Defendants filed their Motion to Disqualify Judge Bare on August 23, 2019, alleging irregularities, improper statements made by Judge Bare during Trial, and

alleging express or implied bias or prejudice. Plaintiff filed his Opposition to the Motion to Disqualify, and Countermotion for Fees and Costs, on August 30, 2019. Both Plaintiff and Defendants each filed Replies on September 3, 2019. Also on September 3, 2019, Judge Bare filed an Affidavit in response to the Motion, pursuant to NRS 1.235(6). (An amended Affidavit was thereafter forwarded to the Court, correcting a typographical error in paragraph 8). On September 9, 2019, a Notice of Entry of Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial, was sent to this Court. Based on the nature of the Motion, it was originally sent to Chief Judge Linda Bell, but due to a conflict, it was reassigned to Presiding Civil Judge, Jerry A. Wiese II, for hearing. The hearing on this Motion took place on Wednesday, September 4, 2019. The Court indicated that a written order would issue.

One of the main issues addressed in the Motion to Disqualify concerns what was referred to as the "Burning Embers" e-mail. During the Trial, when Mr. Dariyanani was on the stand testifying, defense counsel questioned the witness about one of the e-mails contained in Exhibit 56. Exhibit 56 consisted of a number of pages, and contained a number of e-mails. One of the e-mails, referred to as the "Burning Embers" e-mail, contained some language which could be interpreted as racist in nature. The trial testimony occurred as follows:

> Q. Mr. Dariyanani, you testified earlier that Mr. Landess is a beautiful person in your mind.
> A. We're all beautiful and flawed. He's beautiful and flawed.
> Q. And you respect him a great deal?
> A. I do.
>
> Q. This is – I'm going to try to blow it up, but this is an email that Mr. Landess sent to you and it's part of admitted Exhibit 56, dated November 15th, 2016. It's quite long, but the part I'm interested in is Mr. Landess appears to be giving a summary of his prior work experience and some experiences that he has gone through in his life.
> A. Uh-huh.
> Q. And the highlighted portion starts, "So I got a job working in a pool hall on weekends." And I'll represent to you, Mr. Landess testified earlier about working in a pool hall.
> A. Uh-huh.
> Q. ***in a swea*** ***with*** ***a lot*** Snooker. I good at it, t ***t L.A., hustling Mexicans, blacks, and rednecks on Fridays***, which was usually payday. From that lesson, I

learned how to use my skill to make money by taking risk, serious risk." When you read this, did that change your impression of Mr. Landess at all?
A. Not at all . . .

Q. Does it sound to you at all from this email that ***he's bragging about his past as a hustler, and particularly hustling Mexicans, blacks, and rednecks*** on payday?
A. Not at all. I think he feels – I think he's very circumspect about that whole period of his life. And if you're asking me, like, did I read this as Mr. Landess being a racist and a bragger, I absolutely did not and I don't read it that way now, and I wouldn't have such a person in my employ.
Q. He talks about a time when he bought a truck stop here in Las Vegas when the ***Mexican laborer stole everything that wasn't welded to the ground. You still don't take that as being at all a racist comment?***
A. I look at that as him reflecting back on his life and the way that he saw things then, growing up in L.A. the way that he did. I don't think that that – I don't think it's representative of how – I think he channeled himself then. I don't think it's representative of who he is now, and it's not who – it's not the person that I've seen and know.

(See Trial Transcript, Day 10, August 2, 2019, pgs. 161-163 (emphasis added).

Exhibit 56 had apparently been disclosed and/or referenced during discovery on numerous occasions, (although there is some dispute over which party disclosed the e-mails, or if it was Mr. Dariyanani) and there was no Motion in Limine addressing these e-mails, or attempting to keep such evidence from the Jury. It is this Court's understanding that Exhibit 56 was actually admitted into evidence by stipulation of the parties, or at least without objection.

In the Motion to Disqualify Judge Bare, Defendants argue that disqualification is proper because: 1) "the declaration of mistrial was the result of an egregious misapplication of the law by the court, and demonstrated the court's continued pattern of partiality to Plaintiff to the detriment of Defendants throughout the course of the trial;" 2) "the court specifically expressed its favoritism of Plaintiff's counsel on the record, leaving no doubt of Judge Bare's bias toward Plaintiff and inability of Defendants to receive a fair and impartial trial;" and 3) Judge Bare also expressed – both on the record and in private to the parties – his opinion that Defendants were going to be found liable in this matter and strongly suggested Defendants make an offer to settle the case." (See Affidavit of Brent Vogel, attached to the Motion to Disqualify, at paragraphs 3-5).

In the Defendant's Motion to Disqualify Judge Bare, Defendants note that the Court granted Plaintiff's Motion for Preferential Trial Setting, over Defendant's objection; the Court denied each dispositive motion filed by the Defendants; the Court denied the Defendants' Motion to Continue Trial; and the Defendants were provided insufficient time to conduct the discovery needed for a complex medical malpractice case. Defendants believe that these rulings "raised concerns of Judge Bare's possible bias and partiality toward Plaintiff, . . . [but] it was not until trial that Defendants' concerns about Judge Bare's partiality and bias were confirmed." (See Motion to Disqualify at pg. 14).

Defendants were particularly bothered by the following rulings by Judge Bare during trial: 1) He refused Defendants an opportunity to file an Opposition to Plaintiff's Motion for Mistrial; 2) He granted Plaintiff's Motion for Mistrial in the absence of a proper foundation; 3) He allowed Plaintiff to raise two new alleged breaches of the standard of care for the first time during opening statement; and 4) He allowed Plaintiff to claim permanent physical disability in the absence of expert medical testimony.

In Plaintiff's Opposition to the Motion to Disqualify, the Plaintiff suggests that the Court was even-handed in its rulings. Plaintiff argues that the trial date was set "by stipulation" to occur more than a year after the filing of the Complaint, even though a "preference" had been granted. Plaintiff suggests that of the Defendant's three Motions in Limine, two were denied, but one was granted. The Court granted Defendant's Motion to allow additional discovery after the discovery cutoff date. During Trial Judge Bare denied Plaintiff's Motion to Strike the supplemental report of Mr. Kirkendall (which was apparently disclosed the day before Trial). He denied Plaintiff's Motion to strike the testimony of Dr. Debiparshad's expert, Dr. Arambula. Defendants apparently tried several times to allow the jury to see an image on a portal that had not been previously disclosed. The Court denied such request each time, and after Defendants continually referred to such portal, eventually, the Plaintiff made his first request for a mistrial, which was also denied. (Day 8 of Jury trial [July 31, 2019], at pgs. 66-68). Plaintiff argues that there was no impropriety on the part of Judge Bare, but suggests that Defense counsel committed attorney misconduct. (See pg. 8 of Plaintiff's Opposition).

Plaintiff argues that Defendant's claim that Judge Bare didn't provide an opportunity to Defendant to brief the mistrial issue is inaccurate. Plaintiff cites to Judge Bare's statements, "So I want to be clear that if lawyers file something – trial brief, law on the point, then you can do that;" and "I did invite, in our informal meeting on Friday, I did invite trial briefs, I think is what I called it. But I certainly invited the idea that certainly lawyers could, if they wanted to turn their attention to providing law on the obvious issues, you could." (See Trial Transcript of Day 10, at pg. 174, and Day 11, at pg. 6). Further, the Plaintiff points out that after Judge Bare suggested his procedure that would be to hear the Motion for Mistrial (because the jury was waiting in the hall), and give Defense counsel additional time to address the Motion for Fees and Costs, Defense counsel said, "We had the opportunity to discuss. We'd still like to move forward with the motion, and hopefully with the rest of the trial." (See Trial Transcript of Day 11, at pg. 19).

Plaintiff argues that Judge Bare did not try to coerce a settlement as suggested by Defendants; he did not "assist" the Plaintiff's legal research; and the Court did not allow the Plaintiff to raise two new alleged breaches of the standard of care for the first time in opening statements.

Additionally, Plaintiff argues that the Court did not provide Plaintiff's counsel with an excuse for inadvertently stipulating to Exhibit 56. Plaintiff's Opposition Brief references a 1 ½ hour break during trial, which was not on the record. This reviewing Court was able to view the JAVS video recording from that time period, and has now obtained a written transcript of that time period. Plaintiff's counsel is right, that after a break from 2:15-2:33, when Court resumed, Plaintiff's counsel raised the issue with the Court, that he had a problem with the references that Ms. Gordon read from the letter dated November 15, 2016, which was part of Exhibit 56. An argument took place for quite some time with regard to that issue. Plaintiff's counsel suggested that he be able to read another portion of the same e-mail to the jury at that time, which request was denied. The Court did indicate that such a reading would be appropriate during a rebuttal witness or in closing argument. Mr. Jimmerson indicated, "And I'm angry at myself for having allowed the document to come into evidence, but it was a misuse by the Plaintiff and it should be – by the Defendant and it should be stricken." (See

Transcript of Day 10, at revised pg. 180). The Court denied the request to strike the testimony.

Plaintiff argues that Defendant's Motion for Disqualification is untimely pursuant to NRS 1.235, and *Towbin Dodge LLC v. Eighth Judicial Dist. Ct.*, 121 Nev. 251, 112 P.3d 1063 (2005). Plaintiff cites to *Schiller v. Fidelity National Title Insurance Co.*, 444 P.3d 459 (Nev. Unpublished, 2019), which actually cites to the *Towbin Dodge* (published decision), and indicates, "If new grounds for a judge's disqualification are discovered after the time limits in NRS 1.235(1) have passed, then a party may file a motion to disqualify based on Canon 3E as soon as possible after becoming aware of the new information." *Towbin*, at pg. 260. This Court finds that the Defendant's Motion, which was filed August 23, 2019, after the August 5, 2019 mistrial was declared, was not untimely. It could have been filed quicker, but the phrase "as soon as possible," is somewhat vague. The Nevada Supreme Court in *Schiller*, referenced the "as soon as possible" language from the *Towbin* case, as well as the "within a reasonable time," language from NRCP 60(b). Referencing either phrase, this Court finds that the Defendant's Motion in this case was filed timely, and will be considered by the Court.

The granting of a Mistrial after two full weeks of Trial was obviously frustrating and disheartening to all of the parties, as well as the Court. It is not this Court's intent to second-guess the decisions made by Judge Bare, as a Judge has substantial discretion during a Trial to handle issues that arise, in the best way that he or she can.

"A judge is presumed to be impartial, and the party asserting the challenge carries the burden of establishing sufficient factual grounds warranting disqualification." *Las Vegas Sands Corp. v. Eighth Jud. Dist. Ct.*, 2016 WL 2842901 (unpublished, Nev. 2016), citing *Rippo v. State*, 113 Nev. 1239, 1248, 946 P.2d 1017, 1023 (1997). "Nevada has two statutes governing disqualification of district court judges. NRS 1.230 lists substantive grounds for disqualification, and NRS 1.235 sets forth a procedure for disqualifying district court judges." *Towbin Dodge LLC v. Eighth Judicial Dist. Ct.*, 121 Nev. 251, 255, 112 P.3d 1063, 1066 (2005). NRS 1.230 reads as follows:

NRS 1.230 Grounds for disqualifying judges other than Supreme Court justices or judges of the Court of Appeals.

1. A judge shall not act as such in an action or proceeding when the judge entertains actual bias or prejudice for or against one of the parties to the action.

2. A judge shall not act as such in an action or proceeding when implied bias exists in any of the following respects:

(a) When the judge is a party to or interested in the action or proceeding.

(b) When the judge is related to either party by consanguinity or affinity within the third degree.

(c) When the judge has been attorney or counsel for either of the parties in the particular action or proceeding before the court.

(d) When the judge is related to an attorney or counselor for either of the parties by consanguinity or affinity within the third degree. This paragraph does not apply to the presentation of ex parte or uncontested matters, except in fixing fees for an attorney so related to the judge.

3. A judge, upon the judge's own motion, may disqualify himself or herself from acting in any matter upon the ground of actual or implied bias.

4. A judge or court shall not punish for contempt any person who proceeds under the provisions of this chapter for a change of judge in a case.

5. This section does not apply to the arrangement of the calendar or the regulation of the order of business.

NRS 1.235, which sets for the procedure for disqualifying a district court judge, reads in part as follows:

NRS 1.235 Procedure for disqualifying judges other than Supreme Court justices or judges of the Court of Appeals.

1. Any party to an action or proceeding pending in any court other than the Supreme Court or the Court of Appeals, who seeks to disqualify a judge for actual or implied bias or prejudice must file an affidavit specifying the facts upon which the disqualification is sought. The affidavit of a party represented by an attorney must be accompanied by a certificate of the attorney of record that the affidavit is filed in good faith and not interposed for delay. Except as otherwise provided in subsections 2 and 3, the affidavit must be filed:

(a) Not less than 20 days before the date set for trial or hearing of the case; or

(b) Not less than 3 days before the date set for the hearing of any pretrial matter.

2. Except as otherwise provided in this subsection and subsection 3, if a case is not assigned to a judge before the time required under subsection 1 for filing the affidavit, the affidavit must be filed:

(a) Within 10 days after the party or the party's attorney is notified that the case has been assigned to a judge;

(b) Before the hearing of any pretrial matter; or

(c) Before the jury is empaneled, evidence taken or any ruling made in the trial or hearing,

→ whichever occurs first. If the facts upon which disqualification of the judge is sought are not known to the party before the party is notified of the assignment of the judge or before any pretrial hearing is held, the affidavit may be filed not later than the commencement of the trial or hearing of the case.

3. If a case is reassigned to a new judge and the time for filing the affidavit under subsection 1 and paragraph (a) of subsection 2 has expired, the parties have 10 days after notice of the new assignment within which to file the affidavit, and the trial or hearing of the case must be rescheduled for a date after the expiration of the 10-day period unless the parties stipulate to an earlier date.

4. At the time the affidavit is filed, a copy must be served upon the judge sought to be disqualified. Service must be made by delivering the copy to the or by leaving it at the chambers some on of discretion employed t

5. Except as otherwise provided in ction 6, th ge aga whom an affidavit alleging bias or prejudice is filed shall proceed no further with the matter and shall:

(a) If the judge is a district judge, immediately transfer the case to another d nt of the court, e is mo ne of the court in the d r request the ju anothe co e at the trial or hearing er;

(b) is a justice of the peace, a for justice of the peace to preside at the trial or e as pursuant to or as applicable; or

(c) If th pal , immediately arrange for another of tt

ng p ng a written answer with the clerk of the cou 5 j d affi is fi denying any or all o ions co in the avit any additional facts on the n of

ies

(a) If the judge is a district judge, b district in judicial districts having more than one judge, or if the presiding judge of the judicial district is sought to be disqualified, by the judge having the greatest number of ye

(b) If the judge is e peace, by the presiding judge of the justice co courts ng one justice of the , or if the pr is sou o b ed, by the justice peace having the greatest number of years of s e;

(c) If the judge is a muni judge, by the presiding judge of the municipal an one municipal judge, or if the ed, by the municipal judge having the

the Supreme Court.

The Nevada Supreme Court has indicated that "if new grounds for a judge's disqualification are discovered after the time limits in NRS 1.235(1) have passed, then a party may file a motion to disqualify based on Canon 3E as soon as possible after becoming aware of the new information." *Towbin Dodge LLC v. Eighth Judicial Dist. Ct.*, 121 Nev. 251, 260, 112 P.3d 1063, 1069 (2005). In *Schiller v. Fidelity National Title Insurance Co.*, 444 P.3d 459 (Nev. Unpublished, 2019), the Nevada Supreme Court seems to have modified that statement, and indicated that "a party may file a motion to disqualify based on **[the NCJC]** as soon as possible after becoming aware of the new information." (emphasis added). Similarly, the Court held in *PETA v. Bobby Berosini*, 111 Nev. 431, 894 P.2d 337 (1995), overruled on other grounds by *Towbin Dodge*, that "the NCJC is not merely a conduct guide to judges, a violation of which is punishable by discipline. The NCJC also provides substantive grounds for judicial disqualification." *Berosini*, at pg. 435, citing *Ainsworth v. Combined Ins. Co.*, 105 Nev. 237, 775 P.2d 1003 (1989), (additional citations omitted).

It should be noted that "a trial judge has a duty to sit and 'preside to the conclusion of all proceedings, in the absence of some statute, rule of court, ethical standard, or other compelling reason to the contrary," and "A judge shall hear and decide matters assigned to the judge except those in which disqualification is required." *Millen v. Eighth Judicial Dist Ct.*, 122 Nev. 1245, 1253, 148 P.3d 694 (2006). The Nevada Supreme Court has further held that "A judge is presumed to be unbiased, and generally, 'the attitude of a judge toward the attorney for a party is largely irrelevant.'" *Millen* at pg. 1254, citing *Las Vegas Downtown Redev. Agency v. Hecht*, 113 Nev. 632, 635, 940 P.2d 127, 128 (1997). "The general rule of law is that what a judge learns in his official capacity does not result in disqualification." *Kirksey v. State*, 112 Nev. 980, 923 P.2d 1102, citing to *Goldman v. Bryan*, 104 Nev. 644, 764 P.2d 1296 (1988). Additionally, "Because a judge is presumed to be impartial, 'the burden is on the party asserting the challenge to establish sufficient factual grounds warranting disqualification.'" *Ybarra v. State*, 127 Nev. 47, 51, 247 P.3d 269, 272 (2011), citing *Goldman v. Bryan*, 104 Nev. 644, 649, 764 P.2d 1296, 1299 (1988). Finally, the Court has indicated that "disqualification for personal bias requires 'an extreme showing of bias that would permit manipulation of the court and significantly impede the judicial process and the administration of justice.' Generally, disqualification for personal bias

or prejudice or knowledge of disputed facts will depend on the circumstances of each case." *Millen* at pg. 1254-1255, citing *Hecht* at pg. 636.

In the Nevada Code of Judicial Conduct, some terms are defined. "Impartial" is one of those terms, and is defined as follows:

> "Impartial," "impartiality," and "impartially" mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge." (NCJC, Terminology).

Rule 1.2 indicates that "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety." (NCJC, Rule 1.2, Canon 1)

Rule 2.2 reads in part as follows:

> **Rule 2.2. Impartiality and Fairness.** A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.
> [1] To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.
> [2] Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.
> [3] When applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law. Errors of this kind do not violate this Rule.

(NCJC, Rule 2.2, Canon 2)

Rule 2.3 reads in part as follows:

> **Rule 2.3. Bias, Prejudice, and Harassment.**
> (A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.
> (B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.
> (C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including, but not limited to, race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.

(D) The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.

(NCJC, Rule 2.3, Canon 2)

Rule 2.4 reads in part that "A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment." (NCJC, Rule 2.4, Canon 2)

Rule 2.11(A) of the Nevada Rules of Judicial Conduct, indicates that "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned. . ." (NCJC, Rule 2.11, Canon 2). The Comments to this rule contain the following statement: "Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (6) apply."

In the case of *City of Las Vegas Downtown Redevelopment Agency v. Eighth Judicial Dist. Ct.*, 116 Nev. 640, 5 P.3d 1059 (2000), the Nevada Supreme Court addressed a request to recuse Judge Mark Denton from an eminent domain case. The Court referenced NCJC Canon 3(E)(1), which indicated that "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, ..." *Redevelopment Agency* at pg. 644. The Court went on to state the following, "[W]e have held that whether a judge's impartiality can reasonably be questioned is an objective question that this court reviews as a question of law using its independent judgment of the undisputed facts. *Redevelopment Agency*, at pg. 644, citing *In re Varain*, 114 Nev. 1271, 1278, 969 P.2d 305, 310 (1998).

In *People for the Ethical Treatment of Animals (PETA) v. Bobby Berosini,* 111 Nev. 431, 894 P.2d 337 (1995), overruled on other grounds by *Towbin Dodge LLC v. Eighth Judicial Dist Court*, the Nevada Supreme Court similar stated, "the test for whether a judge's impartiality might reasonably be questioned is objective; whether a judge is actually impartial is not material." *Berosini* at pg. 436. The Court referenced NCJC Canon 2, which provided that "a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities," and indicated that "the test

for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." *Berosini* at pg. 435-436. The Court referenced 28 U.S.C. §455(a) a federal statute, designed to promote public confidence in the integrity of the judicial process, and referenced a case which indicated that "The goal of section 455(a) is to ***avoid even the appearance of partiality***." *Berosini* at pg. 436, (emphasis added), citing *Liljeberg v. Health Services Acquisition Corp*, 486 U.S. 847, 108 S.Ct. 2094, 100 L.Ed.2d 855 (1988). Another federal court had stated, "Under §455(a) a judge has a continuing duty to recuse before, during, or, in some circumstances, after a proceeding, if the judge concludes that sufficient factual grounds exist to cause an objective observer reasonably to question the judge's impartiality... The standard is purely objective. The inquiry is limited to outward manifestations and reasonable inferences drawn therefrom." *Berosini,* at pg. 437, citing *United States v. Cooley*, 1 F.3d 985, 992-993 (10th Cir. 1993). The Court in *Berosini,* indicated that the question before the Court was "whether a reasonable person, knowing all the facts, would harbor reasonable doubts about Judge Lehman's impartiality." The Court concluded that they had to grant the motion to disqualify Judge Lehman, "to avoid even the appearance of impropriety and to promote public confidence in the integrity of the judicial process. We conclude that a reasonable person knowing all the facts, would harbor reasonable doubts about Judge Lehman's impartiality." *Berosini*, at pg. 438.

In another Nevada Supreme Court case, the Court stated, "remarks of a judge made in the context of a court proceeding are not considered indicative of improper bias or prejudice unless they show that the judge has closed his or her mind to the presentation of all the evidence." *Schubert v. Eighth Judicial Dist. Ct.*, 128 Nev. 933, 381 P.3d 660 (2012).

In the *Hecht* case, Hecht filed a motion to disqualify Justice Cliff Young from participating in an appellate decision, based on the argument that he allegedly harbored a bias against Hecht's counsel, Kermitt Waters. This alleged bias stemmed from statements made by Justice Young during a Washoe County Bar Association Lunch, during a campaign, where Steve Jones was running against Justice Young. There were comments about campaign financing that Jones had received from Kermitt Waters, and Justice Young suggested that it appeared that Mr. Waters had exceeded

the allowable limit of contributions to Judge Jones. Hecht argued that these statements "amounted to an accusation that Waters had committed a crime, and as such [were] evidence of Justice Young's actual or implied bias toward Waters." *Hecht* at pg. 634.

The Court stated that it has "consistently held that the attitude of a judge toward the attorney for a party is largely irrelevant." *Hecht* at pg. 635. The Court cited to its decision in *Ainsworth v. Combined Ins. Co.*, 105 Nev. 237, 259, 774 P.2d 1003, 1019 (1989), in which the Court held that "generally, an allegation of bias in favor of or against counsel for a litigant states an insufficient ground for disqualification because it is not indicative of extrajudicial bias against the party." The Court indicated that the purpose for that policy was that because Nevada is a small state, with a limited bar membership, it is "inevitable that frequent interactions will occur between the members of the bar and the judiciary." *Hecht* at pg. 635-636. The Court further stated that "we continue to believe that to permit a justice or judge to be disqualified on the basis of bias for or against a litigant's counsel in cases in which there is anything but an extreme showing of bias would permit manipulation of the court and significantly impede the judicial process and the administration of justice." *Id.* While the Canon states that "a judge can be disqualified for animus toward an attorney, situations where such a disqualification has been found are exceedingly rare, and non-existent in Nevada." *Id.*, citing Richard E. Flamm, *Judicial Disqualification* §4.4.4, at 124 (1996). Further, "To warrant judicial disqualification . . . the judge's bias toward the attorney ordinarily must be extreme. Situations in which judges have manifested such extreme bias toward an attorney are exceedingly rare." *Id.*

In *Hecht,* the Court cited to *Valladares v. District Court*, 112 Nev. 79, 910 P.2d 256 (1996), in which Judge Connie Steinheimer's campaign literature was very critical of then District Judge Lew Carnahan. Such letters made disparaging remarks about Carnahan's ethics, honesty, and competency. Steinheimer won the election, and Carnahan appeared as an attorney for a party before her, and requested that she recuse herself. Steinheimer refused, and it was taken to the Supreme Court, which stated that "Judge Steinheimer does not possess an actual or apparent bias against Carnahan and therefore need not recuse herself." *Hecht* at pg. 636, citing *Valladares* at 84.

The Court also cited to *Sonner v. State*, where a prosecutor represented a judge up to the day the prosecutor was to begin trying a death penalty case in front of the judge. The Court held that even though the prosecutor had represented the judge in an unrelated matter, until the day before trial, "there was no reason to conclude that the attorney-client relationship between the judge and the prosecutor in any way affected the judge's ability to be fair and impartial." *Hecht* at pg. 636-637, citing *Sonner v. State*, 112 Nev. 1328, 930 P.2d 707 (1996).

The Court in *Hecht*, indicated that "the facts presented in the case at bar do not rise to anything near the level warranting Justice Young's disqualification. The comments made by Justice Young were off-the-cuff remarks made during an election campaign; and they were not nearly as serious as those made in Ainsworth and Valadares, in which the judges made egregious remarks about counsel for a party, or the situation in Sonner. Justice Young's comments were based upon the information he had received and merely suggested that Waters may have engaged in impropriety. . . .Justice Young's remarks do not show evidence of a bias toward Waters that would mandate Justice Young's disqualification in this matter." *Hecht* at pg. 637. The Court concluded its opinion by stating that "Before a justice or judge can be disqualified because of animus toward a party's attorney, egregious facts must be shown." *Hecht* at pg. 638.

In *Ainsworth v. Combined Ins. Co. of America*, 105 Nev. 237, 774 P.2d 1003 (1989), the Court addressed a motion requesting disqualification of former Chief Justice Gunderson. Combined argued that 1) he had a "disqualifying bias or prejudice for and against the litigants and their counsel;" 2) his impartiality was subject to question so as to create a "disqualifying appearance of impropriety;" and 3) his alleged partiality denied Combined its right to a fair hearing before an impartial tribunal. *Id.*, at 253. Combined argued that the appeal was handled in a manner contrary to the Court's normal procedure, but the Court summarily concluded that the Court followed its normal procedure, and nothing relating to that issue demonstrated any prejudice, bias or appearance or impropriety stemming from an extrajudicial source. *Id.*, at 255-256. Combined argued that during oral argument, Gunderson "(1) 'openly ridiculed' and was uncivil and hostile to Combined and its attorney; (2) 'acted not as a member of an appellate court but as an advocate for the appellant'; (3) 'expressed the opinion that

Combined's very policy was an act of bad faith;' and (4) expressed an 'animus' that was not 'confined to Combined and its counsel but seemingly reached the insurance industry as a whole.'" *Id.*, at 256. The Supreme Court apparently reviewed the recording of the oral argument, and concluded that the arguments were legally insufficient to support the disqualification, but were also belied by the "tone, tenor and substance" of Justice Gunderson's remarks. *Id.*, at pgs. 256-257. The Court held that his conduct was "well within the acceptable boundaries of courtroom exchange." Id., at 257, citing *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1316 (2nd Cir. 1988). The Court held that "Although he may have expressed strong views regarding the separate, additional facts in the record evidencing the oppressive nature of Combined's conduct, his expression of those views at the oral argument exhibited no bias stemming from an extrajudicial source." *Id.* at 257, citing *Goldman v. Bryan*, 104 Nev. 644, --, n. 6, 764 P.2d 1296, 1301 (1988); and citing also to *In re Guardianship of Styer*, 24 Ariz.App. 148, 536 P.2d 717 (1975) "(Although a judge may have a strong opinion on merits of a cause or a strong feeling about the type of litigation involved, the expression of such views does not establish disqualifying bias or prejudice.)" Apparently Justice Gunderson made some comments about Combined and its counsel, which may have indicated a preconceived bias. The Court indicated that "although former Chief Justice Gunderson's response candidly acknowledges that he harbored preconceived, negative impressions respecting the legal abilities of one of Combined's counsel, his response also indicated that those impressions were based upon his perception of counsel's prior 'work product and performance in this court.' Thus, those perceptions constitute neither an extrajudicial, nor a disqualifying bias." *Id.*, at pg. 258, citing *Goldman v. Bryan*, 104 Nev. 644, 764 P.2d 1296 (1988); *In re Cooper* 821 F.2d 833, 838-42 (1st Cir. 1987) (a judge is not required to 'mince words' respecting counsel who appear before him; it is a judge's job to make credibility determinations, and when he does so, he does not thereby become subject, legitimately, to charges of bias.) The Court said, that to whatever extent "Gunderson's response may evidence negative, personal impressions about Combined's counsel, based upon counsel's prior legal associations, his performance on the bar examination or his marital situation, those impressions were formed during the course of his judicial and administrative duties as a Justice and Chief Justice on this court." *Id.*, at pg. 258, citing *United States v. Conforte*, 457

F.Supp. 641, 657 (D.Nev. 1978) (where origin of judge's impressions was inextricably bound up with judicial proceedings, judge's alleged bias did not stem from an extrajudicial source), modified on other grounds, 624 F.2d 869 (9th Cir.), cert denied, 449 U.S. 1012, 101 S.Ct. 568, 66 L.Ed.2d 470 (1980). Finally, the Court stated that "those negative impressions extended only to counsel for the litigant involved, not to the litigant itself. Generally, an allegation of bias in favor of or against counsel for a litigant states an insufficient ground for disqualification because it is not indicative of extrajudicial bias against the party." *Id.*, at pg. 259, citing *In re Petition to Recall Dunleavy*, 104 Nev. 784, 769 P.2d 1271, 1275, citing *Gilbert v. City of Little Rock, Ark.*, 722 F.2d 1390, 1398-99 (8th Cir. 1983), cert denied, 466 U.S. 972, 104 S.Ct. 2347, 80 L.Ed.2d 820 (1984); *Davis v. Board of School Com'rs of Mobile County*, 517 F.2d 1044, 1050 (5th Cir. 1975). Ultimately, the Court found that there was no basis for disqualification of Justice Gunderson.

This Court acknowledges that several of the cases referenced herein, have been reversed or modified for various reasons. This Court believes, however, that the analysis contained in them is still good law, and is helpful and instructive in the present case. This Court further acknowledges that most of the cases cited herein dealt with the Nevada Code of Judicial Conduct which existed prior to the Code's revision in 2009. The Revised Nevada Code of Judicial Conduct became effective January 19, 2010, containing somewhat different language, different section numbers, etc. This Court's reliance on the above-referenced case law, is consistent with the Nevada Supreme Court's recent reference to many of these same cases. In the unpublished case of *Mkhitaryan v. Eighth Judicial Dist. Ct.*, 2016 WL 5957647, 385 P.3d 48 (Nev., 2016, unpublished), the Nevada Supreme Court stated the following analysis:

> Rule 2.7 of the Nevada Code of Judicial Conduct (NCJC), provides that "[a] judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law." Under Rule 2.11(A)(1) of the NCJC, judicial disqualification is required "in any proceeding in which the judge's impartiality might reasonably be questioned, including when the judge has a personal bias or prejudice concerning a party." See also NRS 1.230 ("A judge shall not act as such in an action or proceeding when the judge entertains actual bias or prejudice for or against one of the parties to the action."). ***The test under the NCJC to evaluate whether a judge's impartiality might reasonably be questioned is an objective one – whether a reasonable person knowing all of the facts would harbor reasonable***

> ***doubts about the judge's impartiality.*** See *Ybarra v. State*, 127 Nev. 47, 51, 247 P.3d 269, 272 (201). Disqualification for personal bias requires an extreme showing of bias. *Millen v. Eighth Judicial Dist. Court*, 122 Nev. 1245, 1254, 148 P.3d 694, 701 (2006). Further, this court has generally recognized that bias must stem from an "extrajudicial source," something other than what the judge learned from his or her participation in the case. *Rivero v. Rivero*, 125 Nev. 410, 439, 216 P.3d 213, 233 (2009), and that adverse judicial rulings during the proceedings are not a basis to disqualify a judge. *In re Petition to Recall Dunleavy*, 104 Nev. 784, 789, 769 P.2d 1271, 1275 (1988). . . .

Id., (emphasis added).

In another recent Nevada Court of Appeals decision, also unpublished, the Court set forth the same test in determining whether disqualification was warranted. The Court of Appeals stated, "The test for whether a judge's impartiality might reasonably be questioned is objective and disqualification is required when 'a reasonable person, knowing all the facts, would harbor reasonable doubts about the judges impartiality.'" *Bayouth v. State,* 2018 WL 2489862 (Nev.Ct.of App., 2018, unpublished).

In *Ybarra v. State*, 127 Nev. 47, 247 P.3d 269 (2011), the Nevada Supreme Court again indicated that "the test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." *Ybarra* at pg. 50, citing NCJC Canon 2A. The Court went on to indicate that the issue that needed to be addressed was again, "***whether a reasonable person, knowing all the facts, would harbor reasonable doubts about the judge's impartiality.***" *Ybarra* at pg. 51, (emphasis added), citing *PETA*, 111 Nev. at 438, 894 P.2d at 341 (additional citations omitted). In *Ybarra*, the Court cited to *People v. Booker*, where the Defendant who was charged with a crime, argued that the judge should have been disqualified because he had represented the victim's father in a divorce proceeding, and the appellate court could find no evidence in the record suggesting that the trial judge was biased against the defendant. 224 Ill.App.3d 542, 166 Ill. Dec. 252, 585 N.E.2d 1274, 1284 (1992). Further, a judge in a small town, need not disqualify himself merely because he knows one of the parties. *Ybarra* at pg. 52, citing *Jacobson v. Manfredi*, 100 Nev. 226, 230, 679 P.2d 251, 254 (1984). In Ybarra, the Court concluded that the prior representation by Judge Dobrescue would not cause an objective person reasonably to doubt his impartiality. *Ybarra* at pg. 52.

In analyzing the actions and statements of Judge Bare, as they relate to the pending Motion for Disqualification, this Court will address them as follows:

1) Did Judge Bare's rulings prior to Trial, and during Trial, evidence either an actual or implied bias in favor or against a party, such that disqualification is appropriate?
2) Did Judge Bare refuse to allow the Defendants to formally oppose the Motion for Mistrial, thereby depriving them of procedural and substantive due process, and evidencing an actual implied bias, such that disqualification is appropriate?
3) Did Judge Bare's statements relating to his admiration for Plaintiff's counsel, Mr. Jimmerson, evidence an actual or implied bias, such that disqualification is appropriate?
4) Did Judge Bare's statements relating to the likelihood of the Plaintiff prevailing on the issue of liability, but not recovering all of the damages that were sought, and the discussion regarding possible settlement, during trial, evidence an actual or implied bias, such that disqualification is appropriate?

The Court believes that all of the Defendants' allegations contained in the Motion to Disqualify, can be handled by analysis of the above-referenced issues.

1) Did Judge Bare's rulings prior to Trial, and during Trial, evidence either an actual or implied bias in favor or against a party, such that disqualification is appropriate?

As indicated previously, Defendants argued in their Motion that the Court granted Plaintiff's Motion for Preferential Trial Setting, over Defendant's objection; the Court denied each dispositive motion filed by the Defendants; the Court denied the Defendants' Motion to Continue Trial; and the Defendants were provided insufficient time to conduct the discovery needed for a complex medical malpractice case. Defendants argue that Judge Bare granted Plaintiff's Motion for Mistrial in the absence of a proper foundation; he allowed Plaintiff to raise two new alleged breaches of the standard of care for the first time during opening statement; and he allowed Plaintiff to claim permanent physical disability in the absence of expert medical testimony.

It should be noted that this Court is not called upon to determine whether each of these rulings was correct, or even supported by evidence or foundation. The issue that this Court needs to address is whether Judge Bare's actions evidenced an actual or implied bias in favor of, or against either party.

The Supreme Court has held that the District Courts have discretion in granting or denying motions for preferential trial setting. *Carstarphen v. Milsner*, 128 Nev. 55, 270 P.3d 1251 (2012). The Court has held that it is not an abuse of discretion to deny a motion to continue in some circumstances. *Bongiovi v. Sullivan*, 122 Nev. 556, 138 P.3d 433 (2006). With regard to scheduling, the Supreme Court has indicated that "Setting trial dates and other matters done in the arrangement of a trial court's calendar is within the discretion of that court, and in the absence of arbitrary conduct will not be interfered with by this court." *Carstarphen v. Milsner*, at pg. 59, citing to *Monroe, Ltd. V. Central Telephone Co.*, 91 Nev. 450, 456, 538 P.2d 152, 156 (1975).

Defendants argue that the Court did not provide sufficient time to conduct the discovery needed for this case, but the pleadings indicate otherwise. The Complaint was filed on 6/28/18, and a Motion for Preferential Trial Setting was filed on 7/13/18. On 9/13/18, the Court issued an Order Setting Civil Jury Trial for 7/22/19. The Joint Case Conference Report was filed on 12/11/2018, and in it the parties ***agreed*** that they could complete discovery by April 23, 2019. The Scheduling Order issued by the Discovery Commissioner (based on the dates provided in the JCCR by the parties), set the discovery deadline for April 23, 2019.

With regard to the Defendants' argument that Judge Bare allowed Plaintiff to raise new alleged breaches of the standard of care for the first time during opening statement, this Court is not sufficiently familiar with the specific facts of this case to determine if this actually occurred, or if such decision could arguably be considered to show bias or prejudice. It appears from the pleadings submitted, and the arguments by counsel that it is not so clear that there were two new alleged breaches asserted, but maybe just a description or analysis of the breaches of the standard of care which had already been disclosed. Judge Bare's thorough analysis of the testimony, exhibits, etc., evidence that he clearly considered the Defendants' arguments that these may have been new breaches raised, but after considering all of the evidence, Judge Bare concluded that they were not "new," and the Plaintiffs were on notice of the issue. Judge Bare's discussion of this issue is set forth in Trial Day 3 (July 24, 2019), at pages 32 through 41. Because of Judge Bare's thorough consideration and analysis of the issue, there is no way this Court could conclude anything other than it was a fair and unbiased analysis.

Defendants claim that Judge Bare allowed Plaintiff to claim permanent physical disability in the absence of expert medical testimony. In fact, it is the Defendant's argument that Judge Bare went out of his way to research and find a case that would support his decision to allow Stan Smith, Ph.D., to testify as to Plaintiff's work-related damages. Defendants argue that the case law in Nevada overwhelmingly requires expert testimony establishing proximate causation, before such evidence of damages could be submitted, and there was no expert medical testimony establishing that the claimed injury resulted in the Plaintiff's inability to work, or that the damages were the natural and probable consequence of the alleged negligence. Judge Bare cited to the case of *Sierra Pac. Power Co. v. Anderson*, 77 Nev. 68, 358 P.2d 892 (1961), which supported his decision to allow the evidence to go to the Jury. Judge Bare spent some time explaining this case to the attorneys, provided the attorneys with a copy of the case, and gave them time to review the case before they argued the issue. He further indicated that he had Shephardized the case, and that it was still good law in Nevada. (Trial Day 3 [July 24, 2019], at pages 42 through 45.) Whether or not his decision was correct, or based upon a correct analysis of the law in the State of Nevada is not for this Court to decide. That issue is more appropriately addressed on appeal if a party feels that an error has been made. But clearly, Judge Bare had a valid basis for his decision, supported by a Nevada Supreme Court decision, which he determined to be good Nevada law. This decision alone cannot support a finding of bias or prejudice for or against either party.

Finally, Defendants contend that there was no basis for the Court to grant a Mistrial in this case, and that granting the Mistrial evidenced the Court's bias in favor of Plaintiff's counsel. Specifically, Defendants argue that Judge Bare should not have focused on the "prejudicial effect" of the "Burning Embers" e-mail, and that a prejudicial analysis was not necessary with regard to rebuttal bad character evidence. Second, Defendants argue that Judge Bare ignored the fact that the "Burning Embers" e-mail was admitted evidence, and could be used for any purpose. Third, Defendants argue that Judge Bare failed to consider Plaintiff's cumulative errors in disclosing the "Burning Embers" e-mail, and then failed to object to its use. Finally, Defendants argue that Judge Bare's tortured misapplication of the *Lioche v. Cohen* case, was clearly erroneous.

Plaintiffs contend that the fact that Defendant's counsel put the e-mail on the ELMO, in front of the jury, with the language, "To supplement my regular job of working in a sweat factory with a lot of Mexicans . . . and hustling Mexicans, blacks, and rednecks on Fridays, which was usually payday," already highlighted for the jury to see, is what caused a problem. Plaintiff suggests that the e-mail was put in front of the jury, not to dispute his honesty, or to impeach the testimony that Mr. Landess was a "beautiful" person, but solely to paint Mr. Landess as a "racist." In fact, when asking the witness questions about the e-mail, Defense counsel asked, "You still don't take that as being at all a racist comment?" (See Trial Transcript, Day 10, August 2, 2019, pgs. 162-163). When Plaintiff's counsel raised this issue with the Court, his initial suggestion was to read two additional paragraphs from the same e-mail to the jurors. (See Amended Trial Transcript, Day 10, at pg. 175) He further requested that the question and answer asked by defense counsel be stricken, with an instruction from the judge. *Id.*, at pg. 176. Judge Bare's initial response was a recognition that it was an "admitted" exhibit, that Plaintiff's counsel agreed to admit. *Id.*, at pg. 176-177. The Judge indicated that because it was admitted, whether Ms. Gordon had mentioned it or not, certainly the jury could have seen it because it was admitted. *Id.* Mr. Jimmerson wanted to read the extra two paragraphs of the e-mail to the jury without a witness on the stand and the defense objected. *Id.* The Court indicated that whether or not he would have precluded it prior to it being shown to the jury was moot at that point, but that if it had been brought to his attention before it was shown to the jury, he "probably would have precluded it, because [he felt] as though that's unduly prejudicial." *Id.*, at pg. 178-179. Because it was admitted, the Court indicated that the Plaintiffs could, at a minimum, mention the full text of the letter at some point, at least during closing argument. *Id.* The Defense agreed. *Id.*, at pg. 179. The parties continued to argue, with Mr. Jimmerson indicating that he was "angry at [himself] for having allowed the document to come into evidence," but arguing that it was a "misuse . . . .by the Defendant and it should be stricken." *Id.*, at pg. 180. The Court recognized that the statements made by Mr. Dariyanani about Mr. Landess being a beautiful man constituted character evidence, and it would be appropriate for the Defense to bring up character issues because it had been put at issue through Mr. Dariyanani. *Id.*, at pg. 181, and see Original version of Transcript of Day 10, at pg. 178. The Court further

acknowledged that there was no contemporaneous objection. He said, "So if counsel uses something that's in evidence and brings it to a witness' attention – and there really – I don't think there was much of an objection when that was happening live, either." *Id.*, at pg. 183. Judge Bare made no secret that he probably would have precluded it as prejudicial if it had been presented in a motion in limine. *Id.*, at pg. 183. As the Judge continued to think about what happened, he said, "you know, I'm – this does bother me, I'll tell you. I mean, it really bothers me, . . ." *Id.*, at pg. 183. He stated further, "I mean, it does trouble me that – I mean, what comes to mind is a concern about some sort of indoctrination issue. Jury nullification I think is the term of art in the law. . . . I'd say that there's a – in the air, even if the jury was going to find for the Plaintiff and maybe even go on the higher end of the damage scale, that this could have prevented that, just this alone. I'll share that with you. So I think there's an issue of potential nullification here." *Id.*, at pg. 184. After excusing the jury, the Court made some additional statements in regard to the e-mail that had been testified to by Mr. Dariyanani. He first made it clear that "the motion to strike is denied at this time." Original Transcript of Trial Day 10, August 2, 2019, at pg. 174. He indicated that if the attorneys filed something he would consider it. He also was concerned because he recognized that he had jurors in the panel that were "black" or "Mexican." Judge Bare made the following statement to the attorneys:

> I got to tell you, during that break this just – I mean, it almost – I don't want to say it made me ill, but it's really starting to percolate in me, you know, because as a judge, you know, I think one of the primary things here is when that verdict comes in I want to be able to say I did everything to make sure justice was had. And I've got to say, I'm not sure we're in a position now that the jury has heard that to be confident in justice. I mean, I've just got to tell you. I don't know what to do with it. I'm not that smart . . .

Id., at pg. 175.

Judge Bare continued to talk about the "legal relevancy balancing test," that "if it's too prejudicial then you, even if relevant, even if probative, you exclude it." He further said the following: "So like I said, I don't know what to do about it. I mean, if there [was a] motion in limine, then we would have known. And if I would have – I'm saying it's likely I'd granted it, because most of the – as I sit here now, feels like that's the right choice, because it's so prejudicial." *Id.*, at pg. 176. He went on to say, ". . .So we have four jurors, potentially, that fall into reasonably, you know, a situation where

then they see that, they would be offended, because it has to do with their ethnicity, or their race. We got a problem and I just don't know how to fix it. . ." *Id.*, at pg. 185. Judge Bare recognized that "it's a racial comment," and said, "So now you have jurors who could draw a conclusion that he's a racist." *Id.*, at pg. 187. He continued to be troubled about the e-mail and said, "Do we have a situation that's curable? Should I do anything? Or should I do something? . . . like I say, most of me, as I sit here, thinks I need to do something. I denied a motion to strike it. I don't know what to do about it." *Id.*, at pg. 187.

The following day of Trial, when the attorneys returned to Court and argued the Motion for Mistrial, the Court made clear that he agreed with the Defense that the issue of character had been raised in Trial by the Plaintiff, so the Defense had a reasonable evidentiary ability to offer its own character evidence to impeach Mr. Daryanani. He said that the Defense had the right to do that, it was the extent to which the Defense did it that he was concerned with. See Transcript of Trial Day 11, August 5, 2019, at pg. 31. Judge Bare went on to say that he "slam dunk easy" would have granted a motion to preclude the language "hustling Mexicans, blacks, and rednecks, where the Mexican labor stole everything that wasn't [welded] to the ground." He would have precluded that. *Id.*, at pg. 32. Judge Bare indicated the prior day that the Plaintiff's counsel could have called for a side bar or objected, but on Day 11, he indicated that the Defense attorneys should have called for a side bar before offering the evidence. *Id.*, at pgs. 32-33. Defense counsel argued that because the evidence had been admitted, she should have been allowed to use it as impeachment evidence against Mr. Daryanani. Judge Bare seemed surprised by Ms. Gordon's argument, and asked, "Just to be sure, it sounds like what you're saying to me is that, in your view, under all of the circumstances that you've already described or that you otherwise know, that whether Mr. Landess is a racist is something the jury should weigh and it's [admissible], and it's evidence that they should consider." *Id.*, at pg. 35. Judge Bare then asked if Ms. Gordon thought it would be a Lioce violation if she made a closing argument that Mr. "Landess [was] a racist and that the jury ought to consider that." *Id.*, at pg. 36. Ms. Gordon responded that "I think I could use that, and as Your Honor has said, it's admitted evidence." *Id.*, at pg. 37. The Court indicated that the terms used by Mr.

Landess could have been used in a non-racial manner, but the way that they were used, and the context in which they were used, "clearly appear to be racist." *Id.*, at pg. 41.

Having listened to the arguments of counsel, and expressing his opinions throughout, Judge Bare eventually said, "It's interesting, because in some ways it's the most difficult decision I've made since I've been a Judge, but in other ways it's the easiest decision I've ever made since I've been a Judge . . . But the Plaintiff's motion for mistrial is granted." *Id.*, at pg. 47. Judge Bare thereafter spent a considerable amount of time explaining the basis for his ruling, and concluded with the following:

> None of that really matters to this decision, because it is my strong view that in this case racial discrimination can't be a basis upon which this civil jury can give their decision, but it's not lost on me that it's highly likely, unless Mr. Cardoza, and Ms. Asuncion, Ms. Brazil, and Stidhum put their heads in the sand and didn't watch any news, or have a cell phone, or [] have a friend, or have a family, or go to church, or do anything, that this is out there to just aggravate what we already have as my view being a big problem.
>
> Bottom line is, how in the world can we expect this jury, which is the verse – and by the way, none of these people are alternates, because we decided before trial that seats 9 and 10 would be the alternates, so they're all four deliberating jurors – how in the world can we reasonably think that they're going to give a fair verdict and not base the whole decision, at least in part, on the issue of whether Mr. Landess is a racist.
>
> That's the basis for the decision. The Plaintiffs can draft the order. And so concludes the most difficult thing I've done since I've been here.

Id., at pgs. 69-70.

This Court has included so much of Judge Bare's analysis with regard to the request for Mistrial, because it is clear that he struggled with his decision. He initially denied the Motion to Strike, but then the issue of racial prejudice concerned him to the point that he felt something should be done and he didn't know what to do. This Court finds that he considered the position of both sides, that he did not find it an easy decision to make, but that he made the decision to grant the Mistrial in an attempt to see that "justice" was done. The Supreme Court has held that adverse judicial rulings during the proceedings are not a basis to disqualify a judge. *In re Petition to Recall Dunleavy*, 104 Nev. 784, 789, 769 P.2d 1271, 1275 (1988). This Court's determination is not based on any specific case law, statutes, or actual arguments made by the parties, but this Court finds that Judge Bare's struggle evidenced his attempt to be fair and impartial to all parties, and to see that justice was done.

2) Did Judge Bare refuse to allow the Defendants to formally oppose the Motion for Mistrial, thereby depriving them of procedural and substantive due process, and evidencing an actual implied bias, such that disqualification is appropriate?

There is no dispute that the Plaintiff filed a Motion for Mistrial at or about 10:02 p.m. on Sunday, August 4, 2019. Defendants argue that they had not reviewed the Motion until that morning. Defendants argue that they intended to oppose the Motion, but Judge Bare did not allow time for Defendants to file opposing Points and Authorities, and instead, entertained argument and granted the Motion that morning.

On the morning of August 5, 2019, the following exchange occurred:

> The Court: . . . Is there an opposition that the Defense has to a mistrial at this point?
> Mr. Vogel: No. We just saw it this morning as well, so we would need time to
>
> The Court: Well, I mean as – do you intend to oppose the motion or do you –
> Mr. Vogel: Oh, absolutely. Yes.
> The Court: Okay. So you oppose the idea of a mistrial?
> Mr. Vogel: We do.
> The Court: Okay. All right. So we have to reconcile that. The jury is here. So that's going to take a little while. . .
> . . . .
> The Court: . . . So my thought is, . . . and tell me if you agree or disagree with my thought. My thought is I should now hear argument from the Plaintiffs and Defendants about whether I should grant the mistrial. I do think that if granted, the other part of the motion, the fees and costs part of it is something that would have to wait until another day . . . I would give the Defense an opportunity to file a pleading relevant to the fees and costs aspect and then have a hearing off in the future on that . . .
> . . . . I did invite, in our informal meeting on Friday, I did invite trial briefs, I think is what I called it.
> But I certainly invited the idea that certainly lawyers could, if they wanted to turn their attention to providing law on the obvious issues, you could. I mean, the issue became apparent late Friday, so just by operation of the calendar. . . .

Trial Transcript Day 11, August 5, 2019, at pgs. 5-6.

It went on as follows:

> The Court: But I'm just asking right now. I laid out a procedural –
> . . . .
> The Court: -- roadmap

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

The Court: -- for some other time, to give an opportunity to weigh in

The Court: All right. Let me ask Mr. Vogel –

The Court: -- and Ms. Gordon.

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

Mr. Vogel: . . . . And ultimately, based on all the discussions, our review of the law and whatnot, we felt like, look, ***this is not actually a case for mistrial and that we want to go forward.*** . . .

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

Trial Transcript Day 11, August 5, 2019, at pgs. 8-9, and 18-19 (emphasis added).

Although Mr. Vogel did indicate that he "absolutely" opposed the Motion for Mistrial, he ultimately indicated that he wanted to "move forward with the motion, and hopefully with the rest of the trial." *Id.* The Court did go forward and heard oral argument on the motion, and it was granted, eliminating the need to go forward with the rest of the trial.

Judge Bare could have allowed time for the Defense to prepare a written Opposition with Points and Authorities, but he had a jury waiting in the hallway. As cited previously, "Setting trial dates and other matters done in the arrangement of a trial court's calendar is within the discretion of that court, and in the absence of arbitrary conduct will not be interfered with by this court." *Carstarphen v. Milsner*, at pg. 59, citing to *Monroe, Ltd. V. Central Telephone Co.*, 91 Nev. 450, 456, 538 P.2d 152, 156 (1975). Further, the Nevada Supreme Court has held that adverse judicial rulings during the proceedings are not a basis to disqualify a judge. *In re Petition to Recall Dunleavy*, 104 Nev. 784, 789, 769 P.2d 1271, 1275 (1988). The fact that Judge Bare did

not want to further inconvenience the Jury by sending them home for the day, is not an indication of bias or prejudice for or against a party.

3) Did Judge Bare's statements relating to his admiration for Plaintiff's counsel, Mr. Jimmerson, evidence an actual or implied bias, such that disqualification is appropriate?

During the argument, outside the jury, on Trial Day 10, August 2, 2019, the following exchange took place:

> The Court: . . . . We then have, of course, that moment in time where Ms. Gordon puts on the ELMO and highlights with a yellow highlighter this paragraph about –
> Mr. Jimmerson: That I didn't even notice until she just put it up there. What was I going to do, object to an admitted document, suggesting that I'm afraid of it. I was outraged when I read it. I just was – I was blown away. I was stunned actually.
> The Court: Okay. Well, that gives me further context, as to where I'm going with this at this point. And I've got to say, Mr. Jimmerson. This comes to exactly what I would expect from you, and if I say something you don't want me to say, then you stop me. Okay. But ***what I would expect from you, based upon all my dealings with you over 25 years, and all the time I've been a judge too, is frank candor – just absolute frank candor with me as an individual and a judge.*** It's always been that way. You know, ***whatever word you ever said to me in any context has always been the gospel truth.***
> I mean, without you know, calling my colleagues, lawyers that worked with me at the bar, or my wife as testimonial witnesses, ***I've told all those people many times about the level of respect and admiration I have for you***. You know, you're in – to me, ***you're in the sort of, the hall of fame, or the Mount Rushmore, you know, of lawyers that I've dealt with in my life. I've got a lot of respect for you***. So I say that now because I think what you're really saying doesn't surprise me. And I think what you're really saying is – and again, interrupt me anytime if you want – is, well, in a multi-page exhibit, we just didn't see it.
> Mr. Jimmerson: That's exactly right, Judge. You're 100 percent right.
> The Court: Okay. Well there you go. And you know, nobody is perfect. We all do these things.

Original Transcript of Trial Day 10, August 2, 2019, pages 178-179 (emphasis added).

Clearly, Ms. Gordon thought that Judge Bare was drawing a distinction between counsel, and specifically indicating that he would believe any word from Mr. Jimmerson as the "gospel truth," and suggesting that he didn't have the same level of respect for Ms. Gordon. This understanding is evidenced by the comments she made

following Judge Bare's above-referenced statements. The discussion included the following:

> Ms. Gordon: And just one second, please, because this has taken on this –
> . . . .
> Ms. Gordon: -- scope of ***about me***, and there's no reason for the Court to think that I would do something underhanded by any means, or to try to do that Plaintiff's case. . .
> . . . . – I'm just going to wait, because it's really important to me that you hear this, and that I make a good record, because ***somehow it's become personal that Mr. Jimmerson is Mount Everest -- . . . . -- and I'm not, right?***
> . . . .
> . . . . I think that we have an extremely clear record, but if this is going to go at all ***about my credibility*** for admitting a document, or using a document that was admitted, I have to draw the line. There's no reason to think that at all. I did my job with the exhibit they gave me.
> The Court: . . . I don't have a feeling that you did something with some bad intent, bad faith, you know –
> Ms. Gordon: ***Well, that's what it sounds like. You appreciate them.***
> . . .
> The Court: . . . I mean, I can't fault you. I won't. I'll go as far as say, I'm convinced, Ms. Gordon, you're looking at me, you're talking to me, I don't think that you felt like what you were doing was some sort of unethical thing – okay – to go that far, but now I have to deal with what did happen under the circumstances. Okay.
> Ms. Gordon: I'm just asking the Court – I understand that, and I appreciate it. ***I'm just wondering if perhaps we could that and talk about what happened without talking about how Mr. Jimmerson somehow is above reproach, which clearly is making some kind of distinction about the party who used the document***. I don't think -- . . . – that's necessary.
> . . .
> Ms. Gordon: . . . I just wish we could ***focus more on the procedural part of it than the personal aspects of the attorneys who did it***. I don't have a problem with what you said about Mr. Jimmerson. I think ***I just took it as perhaps making a distinction.***
> The Court: Okay. Well, I mean, ***if I had dealt with you for 25 years***, my guess is, consistent with what I've seen with you, I mean, you really do care about what you're doing. It's evident in anybody who watches you as an attorney, you know.
> Ms. Gordon: I think I just wouldn't do something underhanded like that.
> The Court: ***I've known you for two weeks***.

Original Trial Transcript, Day 10, August 2, 2019, at pgs. 180-184 (emphasis added).

The real question is not whether Ms. Gordon felt like Judge Bare had a bias in favor of Mr. Jimmerson and against her, but "whether a reasonable person, knowing all the facts, would harbor reasonable doubts about the judge's impartiality." *Ybarra* at pg. 51, citing *PETA*, 111 Nev. at 438, 894 P.2d at 341. As cited above, "the attitude of a judge toward the attorney for a party is largely irrelevant," *Hecht* at pg. 635, and "to warrant judicial disqualification . . . the judge's bias toward the attorney ordinarily must be extreme. Situations in which judges have manifested such extreme bias toward an attorney are exceedingly rare." *Id.*, at pgs. 635-636.

In Ainsworth, Justice Gunderson had apparently made some comments about Combined and its counsel, which may have indicated a preconceived bias. The Court indicated that although his statements indicated "preconceived, negative impressions respecting the legal abilities of one of Combined's counsel," his impressions were based upon his experience with that attorney's performance in court. Consequently, the Court held that they did not constitute an extrajudicial, or a disqualifying bias. *Ainsworth*, at pg. 258, citing *Goldman v. Bryan*, 104 Nev. 644, 764 P.2d 1296 (1988). In the present case, Judge Bare has indicated that his impressions of Mr. Jimmerson were formed over a period of 25 years. While some of that impression may have been formed while serving as a judge, Judge Bare specifically indicated that some of that impression was formed prior to becoming a judge. He said, "what I would expect from you, ***based upon all my dealings with you over 25 years, and all the time I've been a judge too,*** is frank candor – just absolute frank candor with me as an individual and a judge. It's always been that way. You know, ***whatever word you ever said to me in any context*** has always been the gospel truth." Original Transcript of Trial Day 10, August 2, 2019, pages 178-179 (emphasis added). Although judges need to make credibility, *Ainsworth,* at pg. 258, when the judge's credibility determination is based on, or stems from an "extrajudicial source," (something other than what the judge learned from his or her participation in the case), *Rivero v. Rivero*, 125 Nev. 410, 439, 216 P.3d 213, 233 (2009), the judge's credibility determination is subject to scrutiny, as the judge's determination may be based upon some kind of bias or prejudice. Judge Bare made clear that his opinions or impressions of Mr. Jimmerson, were formed over a period of 25 years, not just the past 9 years that Judge Bare has been a jurist. Because the Court's impressions of Mr. Jimmerson were

formed, not just during the trial, and not just by the Court acting as a jurist, but over a period of 25 years, and because Judge Bare expressed his admiration of Mr. Jimmerson so emphatically on the record, explaining that he has told colleagues, lawyers he worked with at the bar, and his wife, what great respect and admiration he has for Mr. Jimmerson, it seems reasonable that Ms. Gordon felt like Judge Bare had a bias in favor of Mr. Jimmerson. Even trying to explain his statements, Judge Bare had to acknowledge that his opinions of Mr. Jimmerson were formed over 25 years, and he had only known Ms. Gordon for two weeks.

Based upon the foregoing, this Court must hold that any bias that Judge Bare has in favor of Mr. Jimmerson, stems from an "extrajudicial source," or "something other than what the judge learned from his or her participation in the case." *Rivero v. Rivero*, 125 Nev. 410, 439, 216 P.3d 213, 233 (2009). Judge Bare specifically said that his impressions of Mr. Jimmerson were formed over 25 years, so were not limited to what he had seen and heard during trial, nor were they limited to his time on the bench, but his impressions of Mr. Jimmerson came from an "extrajudicial source."

Judge Bare, in his Amended Affidavit, filed 9/4/19, specifically denies any "bias or lack of impartiality toward either party in this case." See Affidavit at Paragraph 8. With regard to the above-referenced statements, Judge Bare explains as follows:

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

See Judge Bare's Amended Affidavit at Paragraph 10.

Most judges find opportunities to compliment attorneys on their professionalism when such compliments are appropriate, because it fosters professionalism among members of the bar. We like to see attorneys getting along, working together, and complying not only with the requirements of professionalism contained in the Rules and Statutes, but with the spirit of professionalism that allows the Nevada Bar to enjoy the collegiality that we enjoy. Such statements are more than

appropriate, and should be encouraged. The statements made by Judge Bare during the instant Trial, however, were not limited to compliments regarding professionalism.

NCJC 2.11(A) indicates that a Judge should be disqualified if "the judge's impartiality might reasonably be questioned," including when "the judge has a personal bias or prejudice concerning a party or a party's lawyer." Although "it is a judge's job to make credibility determinations," *Ainsworth,* at pg. 258, when a Judge voices his praise of one attorney or one party, at the apparent expense of the opposing attorney or party, "a reasonable person, knowing all the facts, would harbor reasonable doubts about the judge's impartiality." *Ybarra* at pg. 51, citing *PETA*, 111 Nev. at 438, 894 P.2d at 341. In reference to credibility, it would be appropriate for a Judge to state that based on the circumstances in the case, the evidence presented, and the argument provided, the Judge finds one argument more "convincing" than another, or one witness more "credible" than another. It seems, however, that to tell the attorneys that the Judge is going to believe the words of one attorney over another, because "whatever word you ever said to me in any context has always been the gospel truth," results in a "reasonable person" believing that the Judge has a bias in favor of that attorney. When the Judge goes on to state that he has told his family and friends how much he admires one attorney, and that the attorney should be in the "hall of fame" or the "Mount Rushmore" of lawyers, a "reasonable person" would believe that the Judge has a bias in favor of that attorney. As the Nevada Court of Appeals recently stated, "The test for whether a judge's impartiality might reasonably be questioned is objective and ***disqualification is required*** when 'a reasonable person, knowing all the facts, would harbor reasonable doubts about the judges impartiality.'" *Bayouth v. State,* 2018 WL 2489862 (Nev.Ct.of App., 2018, unpublished, [emphasis added]).

This Court gives great weight to Judge Bare's Affidavit, and his explicit denial of any bias or prejudice in favor of or against any party. The Court believes that his decisions throughout the subject Trial were fair, even-handed, and unbiased. Judge Bare struggled with various decisions, listened to argument, researched the law, and appears to have had a valid basis for each decision that he made. This Court cannot find that any of the decisions made by Judge Bare during the Trial of this case evidenced any bias, prejudice, or lack of impartiality. The statements that Judge Bare made, however, on Trial Day 10, August 2, 2019, as set forth above, seemed to indicate

a bias in favor of Mr. Jimmerson. Even if Judge Bare does not have an actual bias in favor of Mr. Jimmerson, "a reasonable person, knowing all the facts, would harbor reasonable doubts about the judge's impartiality." *Ybarra* at pg. 51, citing *PETA*, 111 Nev. at 438, 894 P.2d at 341. "Whether a judge is actually impartial is not material." *Berosini* at pg. 436. Consequently, this Court must find that at least an implied bias exists, and Judge Bare must be disqualified from the present case.[1]

4) Did Judge Bare's statements relating to the likelihood of the Plaintiff prevailing on the issue of liability, but not recovering all of the damages that were sought, and the discussion regarding possible settlement, during trial, evidence an actual or implied bias, such that disqualification is appropriate?

Because the Court has already determined that disqualification is necessary, based on the statements made by Judge Bare, relating to his admiration of Mr. Jimmerson, the Court need not address this final issue. It is sufficient to say that after reviewing the Record, Judge Bare appears to have done everything in his power to try to avoid the need to declare a Mistrial. This Court will not comment on whether Judge Bare's actions in attempting to bring the parties to a settlement complied with the Rules or not, because that is not this Court's function. This Court will state, however, that it respects Judge Bare's efforts in trying to avoid the need for a Mistrial, and it would be good if every judge cared as much about the parties, the process, the sacrifice of the jurors time, and trying to do justice. This Court finds nothing about Judge Bare's attempts to encourage settlement between the parties, or his statements regarding his opinions as to what had occurred during the Trial, that evidenced any bias or prejudice for or against any party or attorney. If a Judge's opinions about a case do not stem from an extrajudicial source, it is not grounds for disqualification, and the opinions he stated clearly stemmed from his observations during Trial. *Ainsworth* at pg. 257; see also *In re Guardianship of Styer*, 24 Ariz.App. 148, 536 P.2d 717 (1975) "(Although a judge may have a strong opinion on merits of a cause or a strong feeling about the type of litigation involved, the expression of such views does not establish disqualifying bias or prejudice.)"

[1] This Court agrees with Concurring Opinion in *Ivey v. Eighth Judicial Dist. Ct.*, 129 Nev. 154, 299 P.3d 354 (2013), wherein the Justices stated, "It is arguably the most significant responsibility of a judge to 'act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and [to] avoid impropriety and the appearance of impropriety."

CONCLUSION.

Although the Defendants alleged various issues, which they believe evidenced Judge Bare's bias in favor of the Plaintiff, or Plaintiff's counsel, this Court finds and concludes that no decision that Judge Bare made during the Trial, including the decision to grant the Motion for Mistrial, supports the disqualification of Judge Bare. This Court finds and concludes that Judge Bare's actions and decisions throughout the Trial were thoughtful, fair, even-handed, and unbiased. A thorough review of the record evidences Judge Bare's struggle with various issues, his willingness to listen to arguments of both counsel, his willingness to ponder and research the law, and his overall desire to see that justice was done for both sides. This Court has no criticism of Judge Bare's rulings, his decisions, the way he handled the Trial, or the way that he treated the parties and attorneys.

The only issue this Court has is with Judge Bare's statements made on Day 10 of the Trial, wherein he expressed his admiration of Mr. Jimmerson, his indication that he would believe every word from Mr. Jimmerson as the "gospel truth," and the statements that he believed Mr. Jimmerson belonged in the "Hall of Fame" and the "Mount Rushmore" of lawyers. These statements seem to indicate a bias in favor of Mr. Jimmerson. Even though Judge Bare denies any actual bias in favor of Mr. Jimmerson, ***"a reasonable person, knowing all the facts, would harbor reasonable doubts about the judge's impartiality."*** *Ybarra* at pg. 51, citing *PETA*, 111 Nev. at 438, 894 P.2d at 341. Consequently, this Court must find that at least an implied bias exists, and Judge Bare must be disqualified from the present case.

Consequently, and good cause appearing,

IT IS HEREBY ORDERED that Defendants' Motion to Disqualify the Honorable Rob Bare is hereby **GRANTED.**

IT IS FURTHER ORDERED that the Clerk's Office is to immediately reassign this matter, randomly, to another District Court Judge, who handles Professional Negligence (Medical Malpractice) cases, so that the pending motions may be heard, and so a new trial date can be set, without further delay.

Dated this 16th day of September, 2019.

ISTRI URT JUDGE
ICIAL DISTRICT COURT
DEPARTMENT XXX

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

KEVIN PAUL DEBIPARSHAD, M.D., an individual; KEVIN P. DEBIPARSHAD PLLC, a Nevada professional limited liability company doing business as SYNERGY SPINE AND ORTHOPEDICS; DEBIPARSHAD PROFESSIONAL SERVICES, LLC, a Nevada professional limited liability company doing business as SYNERGY SPINE AND ORTHOPEDICS; ALLEGIANT INSTITUTE INC., a Nevada domestic professional corporation doing business as ALLEGIANT SPINE INSTITUTE; JASWINDER S. GROVER, M.D., an individual; JASWINDER S. GROVER, M.D. Ltd. doing business as NEVADA SPINE CLINIC; DOES 1-X, inclusive; and ROE CORPORATIONS I-X, inclusive,

Defendants.

CASE NO. A-18-776896-C
Dept. No. 4

DEFENDANTS' OPENING BRIEF RE COMPETING ORDERS GRANTING IN PART, DENYING IN PART PLAINTIFF'S MOTION FOR ATTORNEY FEES AND COSTS AND DENYING DEFENDANTS' COUNTERMOTION FOR ATTORNEY FEES AND COSTS

Date of Hearing: April 30, 2020

Time of Hearing:: 9:00 a.m.

/ / /

COME NOW Defendants, by and through their counsel of record, S. Brent Vogel, Katherine J. Gordon, and Heather Armantrout, hereby file this Opening Brief re Competing Orders Granting in Part, Denying in Part Plaintiff's Motion for Attorney Fees and Costs and Denying Defendants' Countermotion for Attorney Fees and Costs.

This Brief is made and based upon the papers and pleadings on file in this case, the Memorandum of Points and Authorities, the attached exhibits submitted herewith, and any argument at the time of hearing in this matter.

DATED this 27th day of March, 2020

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s/ S. Brent Vogel*

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is a medical malpractice action in which Plaintiff alleges Defendant Kevin Paul Debiparshad, M.D. failed to properly reduce a tibia fracture during surgery on October 10, 2017. The case went to trial, commencing on July 22, 2019. Following ten days of trial, the Honorable Rob Bare granted Plaintiff's request for a mistrial without giving the Defendants an opportunity to file an opposition brief. The parties now find themselves in a dispute over the Order memorializing an award of costs this Court granted as a result of the events surrounding that mistrial. Plaintiff seeks to reduce the Order awarding costs to judgment so that he can execute it immediately. To accomplish that goal, Plaintiff must convince this Court that its award of costs somehow constitutes a final judgment in the case. But such a rush to judgment is inappropriate under the circumstances. What is more, in his haste to collect on his judgment, Plaintiff mischaracterized the record in this matter and misapplied the applicable law.

First, he manipulated language from both this Court's Minute Order and the subsequent, clarifying hearing. He assigned unjustified interpretation to statements made by this Court and by Defense Counsel, obfuscating those statements' clear meanings. He claimed that "Mr. Vogel acknowledged and recognized that the cost Order relating to the mistrial was final and would be reduced to judgment, as he would not need to seek a 'stay of execution' if there was no 'judgment' to execute on[.]"[1] He further insisted that "this Court specifically directed that the Order be submitted first (which should, and does, follow the Court's "Minute Order" of December 13, 2019), followed by the Judgment, after which there would be an automatic 10 day stay which Defendants could seek to extend. Mr. Vogel recognized this as the appropriate procedure."[2] This interpretation operates as a transparent attempt to obscure the fact that the law is not on his side.

Plaintiff also argued that the costs award is "collateral to the issues in the medical

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[1] *See* Letter from James J. Jimmerson to the Honorable Kerry Earley, dated February 28, 2020, attached hereto as Exhibit "A," p. 3.

[2] *Id.*, pp. 3-4.

malpractice case . . .” and that because this Court’s decision to award costs concerned a matter “having nothing to do with the merits of the case going forward[,]” it is final and reducible to judgment.[3] But that argument ignores the fact that neither the award nor the Order granting it is a final judgment under Nevada law. What is more, in the very plausible event of a defense verdict, the costs award at issue would constitute an offset to the fees and costs Defendants would receive under N.R.C.P. 68, rendering the issue of costs very much open until the actual final judgment arrives—namely, the jury’s verdict. Nevertheless, Plaintiff insisted that this Court disregard the lack of legal support for his arguments, offering what amounts to a rhetorical plea to the exigencies of his pocketbook.[4]

Next, he attempted to pass off federal and California state law as applicable in this Nevada state-law case to conceal the fact that no procedural mechanism exists to reduce the interlocutory costs award to final and collectible judgment *under Nevada law*. He quoted cases that concern California state or federal statutes that specifically authorize interlocutory appeal from a sanctions order before a final judgment is entered. But he has not argued that any such statutory or rule-based exception to Nevada’s final-judgment rule is at play here. In fact, he offered no relevant legal justification whatsoever for his assertion that he can immediately execute and collect on the costs award.

Consequently, Defendants respectfully request this Court declare that its Order awarding costs is not reducible to judgment and susceptible to imminent collection under controlling Nevada law.

II. FACTUAL AND PROCEDURAL BACKGROUND

This is a medical malpractice action that went to trial on July 22, 2019. After 10 days of trial, Plaintiff moved for a mistrial, which Judge Bare orally granted on August 5, 2019.

As part of his motion for mistrial, Plaintiff moved for attorney fees and costs under N.R.S.

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[3] *Id.*, p. 1

[4] *Id.*, p. 5.

18.070(2).[5] He argued that Defense counsel purposely caused the mistrial when they presented the so-called "Burning Embers" email—which had already been admitted into evidence with no objection from Plaintiff—as impeachment evidence in response to a witness's testimony asserting Plaintiff's "beautiful" character, which Judge Bare had agreed constituted "character evidence as to the good attributes of Mr. Landess . . . ."[6] Plaintiff insisted that using that email intentionally injected racism into the case, which, he claimed, amounted to attorney misconduct and, consequently, entitled him to an award of attorney's fees and costs.[7] Defendants took issue with that assessment and countermoved for fees and costs on grounds that Plaintiff's own cumulative errors in handling his trial exhibits caused the mistrial.[8] Notwithstanding Defendants' pending Motion to Disqualify, Judge Bare approved and filed Plaintiff's Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial on September 9, 2019, despite Defendants' objections and refusal to sign on. However, Judge Bare did not rule on Plaintiff's request for attorney fees and costs. Indeed, he vacated the hearing on fees and costs from his calendar.[9]

On September 16, 2019, Judge Wiese ruled on Defendants' Motion to Disqualify Judge Bare. Judge Wiese concluded that "[t]he statements that Judge Bare made . . . on Trial Day 10 . . . seemed to indicate a bias in favor of Mr. Jimmerson" and ruled that, consequently, Judge Bare must be disqualified from the case.[10] The case was re-assigned to this Honorable Court on September 17, 2019.

On December 5, 2019, the parties met before this Court and argued the issue of attorney

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[5] *See* Plaintiff's Motion for Mistrial and Fees/Costs, attached hereto as Exhibit "B," p. 12.

[6] *Id.*; Recorder's Transcript of Jury Trial – Day 10, attached hereto as Exhibit "C," p. 177.

[7] *See* Plaintiff's Supplement to Motion for Mistrial and Fees/Costs, attached hereto as Exhibit "D," pp. 12-13.

[8] *See* Defendants' Opposition to Plaintiff's Motion for Fees/Costs and Defendants' Countermotion for Attorney's Fees and Costs Pursuant to N.R.S. §18.070, attached hereto as Exhibit "E," pp. 8-9.

[9] *See* Minute Order, September 16, 2019, attached hereto as Exhibit "F."

[10] *See* Order, attached hereto as Exhibit "G," pp. 31-32.

fees and costs. Ultimately, citing discretion provided under N.R.S. 18.070(2), this Court granted Plaintiff's request for costs but denied his request for attorney fees.[11] This Court tasked Plaintiff with preparing the order granting costs.[12]

On December 17, 2019, the parties appeared before this Court for a status check on progress made toward completing motions in limine and other issues for the new trial. At that status check, Defendants' counsel requested this Court to clarify its position regarding the entity against whom the award of costs had been rendered, Defendants or their counsel.[13] This Court confirmed that it had levied the award against Defendants, not their counsel.[14] Defense counsel then noted that *if* the Court was going to allow Plaintiff to immediately execute judgment on the award of costs, he would seek to stay that execution pending trial.[15] He also raised the notion that the outcome of trial might resolve the issue of execution, specifically stating that, in the event of a defense verdict, there might be an offset, or if Plaintiff prevailed, the award would become part of the judgment. That portion of the hearing proceeded as follows:

MR. VOGEL: Okay. And we haven't discussed it yet, but we would obviously seek to stay execution - -

THE COURT: Sure

MR. VOGEL: - - pending the trial because that - - you know, pending on the outcome of trial, that may resolve the issue, there may be an offset if it's a defense verdict, it may be part of the judgment if it's plaintiff's verdict, *but **if** they're* - -

THE COURT: Okay.

MR. VOGEL: - - *going to be allowed to execute immediately*, then obviously then we've got a - -

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[11] *See* Minute Order, December 13, 2020, attached hereto as Exhibit "H."

[12] *Id.*

[13] *See* Tuesday, December 17, 2019, Recorder's Transcript of Proceedings Status Check, attached hereto as Exhibit "I," p. 12.

[14] *Id.*, pp. 13-14.

[15] *Id.*, p. 14.

THE COURT: You have an issue.

MR. VOGEL: - - *we have to seek a stay* and - -

THE COURT: Have you even addressed that? I didn't - -

MR. VOGEL: we - - we have not discussed it.

MR. JIMMERSON: We - - we haven't discussed it and we certainly would - - would oppose any, you know, effort to stay execution. We would of course request the Court, you know, hear brief - -

THE COURT: Okay, well let's do this.

MR. JIMMERSON: - - you know, receive briefing on the same

THE COURT: Bring that up as another issue of everything so I get a parameter of - - of how I want to do that in fairness because I struggled enough on the defendant and stuff, okay.

MR. VOGEL: Well - -

THE COURT: Bring that - - so right now I - - I haven't signed a judgment, right? I - - I - - or an order?

MR. VOGEL: Right

THE COURT: The order comes before the judgment - -

MR. JIMMERSON: Correct, Your Honor.

THE COURT: - - so then at that time hopefully I'll have a - - I'll - -I'll consider it - -

MR. VOGEL: So - -

THE COURT: - - and maybe even ask you to brief it.

MR. VOGEL: Yeah, so - - so - - yeah, so once an order gets entered, then the NRCP 62 kicks in, there's a 10-day stay - -

THE COURT: Right.

MR. VOGEL: - - and then we'd have to ask this - - either this Court you - - we'd have to ask you - -

THE COURT: To extend the stay or decide what to do.

MR. VOGEL: Yeah.

THE COURT: Then, Mr. Vogel, let it take its course and I'll look at - - I - - I will - -

MR. VOGEL: Okay

THE COURT: - - address - - I prefer to do it that way so that I have a chance to look at it and figure out what I want to do.[16]

Months later, per this Court's earlier instruction, Plaintiff submitted his proposed Order and Judgment Granting in Part Plaintiff's Motion for Attorney's Fees and Costs. Plaintiff took that opportunity to manipulate this Court's ruling awarding him costs relating to the mistrial. Among other liberties Plaintiff took with the Court's language, he added a provision reducing the costs award to judgment, rendering it collectible.[17] Subsequently, Defendants submitted their own draft Order, headed by correspondence to the Court that explained their objection to Plaintiff's draft Order.[18] Defendants' letter also explained why their proposed Order comported with Nevada law and with the December 17, 2019 Court Minutes Plaintiff had provided along with his proposed Order. Defendants' proposed Order included language clarifying that the Order "is not intended to be the final judgment in this case."[19] It further concluded that any execution on the Order must await a final judgment, "at which time the Court will determine offsets, if any, applicable as a result of this order."[20]

Three days later, Plaintiff submitted more correspondence to the Court. In it, he argued that his proposed Order "mirrors this Court's Minute Order, inclusive of its Findings and clearly reciting this Court's actual Order."[21] In a shockingly transparent instance of the pot calling the

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[16] *Id.*, pp. 14-15 (emphasis added).

[17] *See* Plaintiff's draft Order and Judgment Granting in Part Plaintiff's Motion for Attorney's Fees and Costs, attached hereto as Exhibit "J," p. 3. Notably, Plaintiff drafted his Order with the contested provision many weeks after the December 17, 2019 status check when Defense Counsel first raised the issue of a stay of execution. Perhaps Plaintiff was hoping that the Court had forgotten that it had not ruled on the issue of reducing the costs award to judgment, but rather, had specifically indicated its inclination to request briefing on this subject.

[18] *See* Letter and Proposed Order to the Honorable Kerry Earley from S. Brent Vogel, Esq., dated February 25, 2020, attached hereto as Exhibit "K."

[19] *Id.*, p. 5.

[20] *Id.*

[21] *See* Exhibit "A," p. 1.

kettle black, he decried "Defendants' improper efforts to modify the Court's Order,"[22] despite having himself inserted language in his proposed Order that attempted a self-serving end run around the Court's having deferred its ruling on the issue of execution. He also accused Defendants of employing a "gross misstatement of the facts" in their correspondence; the "gross misstatement" seems to consist of 1) Defendants' mistaken reference to Court Minutes from the December 17 status-check hearing as a "Minute Order," and 2) their assertion that those minutes state that the costs award "could be used as an offset," *which is just what those minutes say!*[23] He further argued that the costs award is collateral to the issues in the medical malpractice case and that "[t]here is nothing left open, unfinished, or inconclusive about that award."[24] He went on to cite one federal case that shows that certain interlocutory orders are appealable when the Court's action on a matter is concluded and closed.[25] He also cited language from one California state-law case that stated that a motion for attorney's fees "pertains to a matter which is collateral to the underlying litigation" and thus, is appealable.[26] Plaintiff then complained that Defendants should not be allowed to "arbitrarily rewrite the Court's Order to grant their own request" without following the procedure for staying execution of the judgment—again conveniently forgetting that he attempted the same maneuver but, in his case, without support from this Court's ruling or of a single piece of Nevada law.[27]

Defendants then responded with additional correspondence to this Court that highlighted the factual and legal deficiencies of the case law Plaintiff proffered to support his argument in favor of immediately reducing the costs award to a judgment.[28] Defendants further provided to the

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[22] *Id.*

[23] *See* Exhibit "A," p. 1; Exhibit "K," pp. 1-2.

[24] *See* Exhibit "A," p. 1.

[25] *Id.*, p. 4.

[26] *Id.*

[27] *Id.*, p. 5.

[28] *See* Letter to the Honorable Kerry Earley from S. Brent Vogel, Esq., dated March 2, 2020, attached hereto as Exhibit "L."

Court relevant Nevada cases with holdings opposite to the federal and extrajurisdictional state law cases Plaintiff had offered.[29]

Subsequently, this Court ordered briefing on this matter and set a hearing for April 30, 2020.

III. LEGAL ARGUMENT

A. No Procedural Mechanism Exists for Reducing This Court's Award of Costs to Judgment Allowing Immediate Execution

With his proposed Order, Plaintiff attempts to shoehorn a provision into this Court's Order granting costs, that would reduce the Order to judgment and allow for immediate execution and collection. Nothing in any of the hearing transcripts or minute orders on record in this case supports that provision. Moreover, no Nevada law supports Plaintiff's attempt. To the contrary, Defendants' proposed order is appropriate because it appropriately reflects Nevada law.

1. *The Court's Order Granting Costs is Not a Final Judgment*

> When an action presents more than one claim for relief . . . or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties . . . .
>
> Nev. R. Civ. P. 54(b) (emphasis added).

Under N.R.S. 18.070(2), "[a] court may impose costs and reasonable attorney's fees against a party or an attorney who, in the judgment of the court, purposely caused a mistrial to occur." But the statute is silent as to when such an award is reduced to judgment for purposes of execution and collection. Instead, Nevada adheres to the "final judgment" rule. "[A] final judgment is one that disposes of all the issues presented in the case, and leaves nothing for the future consideration of the court, except for post-judgment issues such as attorney's fees and costs." *Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000). In addition, N.R.C.P. 54(a) provides that a "[j]udgment" includes "any order

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[29] *Id.*

from which an appeal lies." Whether an order or judgment is appealable depends on "what the order or judgment actually does, not what it is called." *Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 445, 874 P.2d 729, 733 (1994) (emphasis omitted); *see Lee*, 116 Nev. at 426-27, 996 P.2d at 417-18; *Taylor v. Barringer*, 75 Nev. 409, 344 P.2d 676 (1959). Nevada Courts have consistently held that only a *post*-judgment order awarding attorney fees and costs is appealable under N.R.A.P 3A(b)(8) (allowing appeal from a special order after final judgment). *Campos-Garcia v. Johnson*, 130 Nev. 610, 611-12, 331 P.3d 890, 890 (2014); *Lee*, 116 Nev. at 426, 996 P.2d at 417 (citing the rule allowing appeal from a special order after final judgment in then-NRAP 3A(b)(2)). But Nevada law does not provide the same procedural mechanism for interlocutory awards of costs that arise as a result of sanctions. *See* N.R.A.P. 3A(b) (enumerating appealable determinations); *see also Taylor Constr. Co. v. Hilton Hotels*, 100 Nev. 207, 678 P.2d 1152 (1984) (pointing out that, generally, an appellate court has jurisdiction to consider appeals only when the appeal is authorized by statute or court rule).

Obviously, an interlocutory Order awarding costs due to Mistrial does not resolve all the issues of the case. It does not even finally resolve any causes of action or any parties, and it therefore cannot be certified as final under Rule 54; and it cannot be considered a "judgment" under Rule 54. Plaintiff attempts to split hairs and argues that this Court's order would resolve all issues regarding the costs award itself, ignoring the fact that costs will be directly at issue at a later point in the case. Plaintiff's interpretation is not supported by Nevada law.

Recently, the Nevada Supreme Court resolved a case involving circumstances much the same as in the instant case. A party attempted to appeal an order awarding fees and costs as sanctions for having filed a motion for order to show cause in a divorce action. *Newman v. Newman*, No. 79800, 455 P.3d 482, 2020 Nev. Unpub. LEXIS 47, *1, (Nev., Jan. 16, 2020). The Court concluded that the challenged order "[did] not affect the rights of the parties arising from the decree of divorce." *Id.* at *1-2. The Court further concluded

that, "[t]hus, the order is not appealable as a special order after final judgment, and no other statute or court rule appears to authorize an appeal from this order." *Id.* (citing *Brown v. MHC Stagecoach, LLC*, 129 Nev. 343, 345, 301 P.3d 850, 851 (2013) for the proposition that the Court may consider only appeals authorized by statute or court rule).

Here, as the Nevada Supreme Court noted, it matters what an Order does, not what it is called. This Court's Order will grant costs as an interlocutory sanction against Defendants for having allegedly caused a mistrial. The costs award in no way affects the rights of the parties arising from the medical malpractice action, meaning it is not appealable as a final judgment. It is also not appealable as a special order after final judgment under N.R.A.P. 3A(b)(8) because costs were not granted in the context of a post-judgment award of costs. Further, no other statute or rule authorizes an appeal from such an Order. In addition, this Court did not impose the costs award as a sanction related to a contempt finding. But even if it had, a contempt order is not independently appealable. *Vaile v. Vaile*, 133 Nev. 213, 217, 396 P.3d, 791, 794-95 (2017) (holding that a contempt finding or sanction is appealable only if included in an order that is itself otherwise independently appealable); *Pengilly v. Rancho Santa Fe Homeowners Ass'n*, 116 Nev. 646, 649, 5 P.3d 569, 571 (2000) ("No rule or statute authorizes an appeal from an order of contempt."); *see also Goudie v. Packard-Keane*, No. 73962, 406 P.3d 959, 2017 WL 5956827 *1 (Nev., Nov. 30, 2017); *Leavitt v. Abbatangelo*, No. 72953, 404 P.3d 422, 2017 WL 4950058 *1 (Nev., Oct. 30, 2017). Therefore, no Nevada law supports the notion that this Court's Order would constitute a final judgment allowing for immediate execution and collection.

Plaintiff argued inapplicable California state case law in an attempt to circumvent Nevada courts' straightforward rulings. He cited *San Bernardino Community Hospital v. Meeks*, a 1986 case from the California Court of Appeals, to suggest that a motion for sanctions "pertains to a matter which is collateral to the underlying litigation" and is therefore appealable "because it is a final order on a collateral matter directing the payment

of money." 187 Cal. App. 3d 457, 462 (1986). But Plaintiff failed to mention that California Code of Civil Procedure § 904.1, that state's rough analog to N.R.A.P. 3A(b), specifically provides for appeal "[f]rom an order directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars ($5,000)." Ca. Code Civ. Proc. § 904.1(a)(12). By contrast, under Nevada law, no such specification exists. In Nevada only *post*-judgment awards of costs and fees are immediately appealable. N.R.A.P. 3A(b)(8).

Plaintiff also quoted equally inapplicable federal law interpreting federal statutes to suggest that the costs award constitutes a final judgment. He offered *Cohen v. Benefit Industrial Loan Corporation*, 337 U.S. 541 (1949) for this proposition. In *Cohen*, a party appealed a federal district court's order refusing to apply a state statute that would have made Plaintiff, "if unsuccessful, liable for . . . attorney's fees of the defense and entitle[d] the corporation to require security for their payment." *Id.* at 534. The *Cohen* Court first reiterated the general rule that appeal is appropriate only "'from all final decisions of the district courts,' except when direct appeal to this Court is provided." *Id*. at 545. It then went on to state that 28 U.S.C. § 1292 allows appeals from certain interlocutory orders "when they have a final and irreparable effect on the rights of the parties." *Id*. The Court finally concluded that the decision "fell in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546.

There are numerous reasons *Cohen* does not apply here. First, it is based upon *federal statutes* in which Congress specifically authorized appellate jurisdiction for certain limited interlocutory orders, and it interprets *federal statutes* that allowed review of a failure to apply a *New Jersey state statute* on an issue collateral yet vital to the case. No such application of federal statutes is appropriate here. Nor does this Court's grant of costs due to mistrial constitute an issue too vital or a right too important to allow appellate

consideration to be deferred until after the case comes to verdict. Next, the *Cohen* Court noted that the issue in dispute was appealable also because it "presents a serious and unsettled question." *Id.* at 547. Otherwise, the Court admitted, "appealability would present a different question." *Id*. Here, the issue in dispute is neither serious nor unsettled. On the contrary, Nevada law is clear regarding when awards of fees and costs may be appealed. Further, here, the costs award does not represent a claim of right separable from the rights asserted in the action. In fact, the issue of costs will once again arise after the jury renders its verdict, depending on which party prevails.

This Order will not be a final judgment under any interpretation of Nevada law. Thus, Plaintiff's proposed Order and his subsequent correspondence arguing otherwise are not supported. Therefore, Defendants respectfully request that this court reject Plaintiff's proposed Order and adopt Defendants' Nevada law-compliant version.

2. *The Award of Costs at Issue Here May Become an Offset to Post-Judgment Fees and Costs under N.R.C.P.68*

Plaintiff falsely accused Defendants of "erroneously" and "inaccurately" reciting the Court Minutes from the December 17, 2019 Status Check hearing as stating that "the costs 'could be used as an offset' . . . ."[30] He then creatively interpreted the language from that section of the hearing transcript. He claimed that "Mr. Vogel acknowledged and recognized that the cost Order relating to the mistrial was final and would be reduced to judgment, as he would not need to seek a 'stay of execution' if there was no 'judgment' to execute on!"[31] He also claimed that this Court "specifically directed that the Order be submitted first . . . followed by the Judgment, after which there would be an automatic 10 day stay which Defendants could seek to extend."[32] These assertions fail to reflect accurately the content of the discussion between Defense Counsel and the Court on December 17, 2019, as well as Nevada law.

---

[30] *See* Exhibit "A," p. 1.

[31] *Id.*, p. 3 (emphasis omitted).

[32] *Id.*, pp. 3-4 (emphases omitted).

N.R.C.P. 68(f) provides that

> [i]f [an] offeree rejects an offer [of judgment] and fails to obtain a more favorable judgment:
>
> (A) the offeree cannot recover any costs, expenses, or attorney fees and may not recover interest for the period after the service of the offer and before the judgment; and
>
> (B) the offeree must pay the offeror's post-offer costs and expenses, including a reasonable sum to cover any expenses incurred by the offeror for each expert witness whose services were reasonably necessary to prepare for and conduct the trial of the case, applicable interest on the judgment from the time of the offer to the time of entry of the judgment and reasonable attorney fees, if any be allowed, actually incurred by the offeror from the time of the offer. If the offeror's attorney is collecting a contingent fee, the amount of any attorney fees awarded to the party for whom the offer is made must be deducted from that contingent fee.

As amply demonstrated above, under Nevada law, this Court's interlocutory Order granting costs due to the mistrial is not final and, thus is not reducible to judgment and susceptible to immediate collection. Defense Counsel's statements during the Status Check hearing discussing stay procedures under N.R.C.P. 62 were not intended to concede that the Order would be a collectible judgment. Rather, he clearly noted that such procedures would follow "*if* . . . [Plaintiff was] going to be allowed to execute immediately . . .," not that he agreed that such an outcome were the proper one.[33] Notably, Defense Counsel preceded that statement with his assertion that "pending on the outcome of trial, that may resolve the issue, there may be an offset if it's a defense verdict . . . ."[34] That assertion reflects the fact that, after the eventual final judgment—the jury's verdict—N.R.C.P. 68 and Nevada statutes dealing with costs will determine which party will owe post-judgment fees and costs. In the event of a Plaintiff verdict, the instant cost award will be incorporated into the judgment. But if the jury returns a Defense verdict, the cost award at issue here will merely offset the fees and costs Defendants will recover.

As a practical matter, to declare the Order final, reducing it to judgment for immediate collection would waste the resources of all participants. Plaintiff will eventually receive the benefit

---

[33] *See* Exhibit "I," p. 14 (emphasis added).

[34] *Id.*

of this Court's Order awarding costs due to the mistrial, whether as part of a final judgment in his favor or as an offset to costs he will owe under N.R.C.P. 68(f) and Nevada costs statutes. But as Defense Counsel noted at the December 17, 2020 hearing, if this Court allowed Plaintiff to execute on the Order immediately, Defendants would be entitled to seek a stay of that execution. Ultimately, delays caused by those proceedings could possibly extend until there would be no meaningful temporal distinction between executing on the subject Order and executing on any post-judgment fees and costs arising from the eventual jury verdict. Moreover, if Plaintiff were allowed to execute on the subject Order now, and then later he received an adverse verdict, Defendants would be forced to attempt to collect from him the amount they had previously paid. Such an exercise is pointless and wasteful, and it risks creating superfluous judgments, which "are unnecessary[,] confuse appellate jurisdiction[,]" and are generally disapproved. *Campos-Garcia*, 130 Nev. at 612, 331 P.3d at 891. Finally, Defendants have been unable to discover any Nevada law addressing this issue, much less supporting Plaintiff's position.

IV. CONCLUSION

Plaintiff has offered no relevant legal rationale for immediately reducing to judgment the Order granting costs arising from the mistrial as Plaintiff urges in his ORDER AND JUDGMENT GRANTING IN PART PLANTIFF'S MOTION FOR ATTORNEYS' FEES AND COSTS. No procedural mechanism exists under Nevada law for doing so. Indeed, no Nevada law supports his arguments whatever. In addition, there is no practical benefit to his request, given that the costs award will eventually inure to Plaintiff's benefit regardless of the outcome at trial—the sole question being what form that benefit will take. Therefore, for the reasons set forth herein, Defendants request this Court adopt Defendants' ORDER GRANTING IN PART, AND DENYING IN PART PLAINTIFF'S MOTION FOR ATTORNEY'S FEES AND COSTS.

DATED this 27th day of March, 2020

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s/ S. Brent Vogel*

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Lewis Brisbois Bisgaard & Smith LLP and that on this 27th day of March, 2020, a true and correct copy of **DEFENDANTS' OPENING BRIEF RE COMPETING ORDERS GRANTING IN PART, DENYING IN PART PLAINTIFF'S MOTION FOR ATTORNEY FEES AND COSTS** was served electronically using the Odyssey File and Serve system and serving all parties with an email-address on record, who have agreed to receive electronic service in this action.

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EXHIBIT ‘A’

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**FAMILY LAW SPECIALIST, NEVADA STATE BAR

February 28, 2020

Honorable Kerry Earley
Eighth Judicial District Court- Dept 4
Regional Justice Center
200 Lewis Avenue
Las Vegas, NV 89101

Re: Jason George Landess v. Kevin Paul Debiparshad, M.D., et al
Case No. A-18-776896-C

Dear Judge Earley:

We are in receipt of Mr. Vogel's proposed Order and cover letter, submitted February 25, 2020. We are compelled to respond, not only to Defendants' improper efforts to modify the Court's Order, but to Defendants' gross misstatement of the facts within counsel's letter.

The **only** "Minute Order" that was issued by this Court was issued on December 13, 2019, which awarded $118,606.25 in costs to Plaintiff, and determined not to award attorneys' fees to Plaintiff. This Minute Order was issued following full briefing and oral argument on December 5, 2019, and it clearly states "Minute Order" on its face. The cost award is, without question, collateral to the issues in the medical malpractice case. There is nothing left open, unfinished or inconclusive about that award. Your Honor made your decision on the fees and costs associated with Defendant being the legal cause the mistrial, having nothing to do with the merits of the case going forward, which makes it closed and concluded. An appellate court would not be "intruding" into Your Honor's decision. It would clearly only be reviewing it for an abuse of discretion, especially since no opposition was filed to the amount of the award.

Our proposed Order mirrors this Court's Minute Order, inclusive of its Findings and clearly reciting this Court's actual Order.

On December 17, 2019, the parties returned to Court for a *Status Check Hearing* regarding trial scheduling, and the setting of a Pretrial Conference. During that hearing, Mr. Vogel raised for the first time, without briefing or prior discussion, the question of whether the Court's judgment was against Defendants or the law firm, and whether the judgment could be "used as an offset." The "Minute Order" to which Mr. Vogel erroneously refers in his letter was **not** a "Minute Order" at all, but simply the Minutes from the Status Check hearing. The recitation therein that the costs "could be used as an offset" was *inaccurate*, as a review of the Transcript from that Status Check hearing clearly shows.

Specifically, the exchange p. 14-15 of the December 17, 2019 Transcript, another copy of which is attached hereto, was as follows:

> MR. VOGEL: Okay. And we haven't discussed it yet, but we would obviously seek to stay execution --
>
> THE COURT: Sure.
>
> MR. VOGEL: -- pending the trial because that -- you know, pending on the outcome of trial, that may resolve the issue, there may be an offset if it's a defense verdict, it may be part of the judgment if it's plaintiff's verdict, but if they're --
>
> THE COURT: Okay.
>
> MR. VOGEL: -- going to be allowed to execute immediately, then obviously then we've got a --
>
> THE COURT: You have an issue.
>
> MR. VOGEL: -- we have to seek a stay and --
>
> THE COURT: Have you even addressed that? I didn't --
>
> MR. VOGEL: We -- we have not discussed it.
>
> MR. JIMMERSON: We -- we haven't discussed it and we certainly would -- would oppose any, you know, effort to stay execution. We would of course request the Court, you know, hear brief --
>
> THE COURT: Okay, well let's do this.
>
> MR. JIMMERSON: -- you know, receive briefing on the same.
>
> **THE COURT: Bring that up as another issue of everything so I get a parameter of -- of how I want to do that in fairness because I struggled enough on the defendant and stuff, okay.**
>
> MR. VOGEL: Well –
>
> **THE COURT: Bring that -- so right now I -- I haven't signed a judgment, right? I -- I -- or an order?**

MR. VOGEL: Right.

THE COURT: The order comes before the judgment --

MR. JIMMERSON: Correct, Your Honor.

THE COURT: -- so then at that time hopefully I'll have a -- I'll -- I'll consider it --

MR. VOGEL: So --

THE COURT: -- and maybe even ask you to brief it.

MR. VOGEL: Yeah, so -- so -- yeah, so once an order gets entered, then the NRCP 62 kicks in, there's a 10-day stay --

THE COURT: Right.

MR. VOGEL: -- and then we'd have to ask this -- either this Court you -- we'd have to ask you --

THE COURT: To extend the stay or decide what to do.

MR. VOGEL: Yeah.

THE COURT: Then, Mr. Vogel, let it take its course and I'll look at -- I -- I will --

MR. VOGEL: Okay.

THE COURT: -- address -- I prefer to do it that way so that I have a chance to look at it and figure out what I want to do. And hopefully that'll give us a chance to do this pretrial conference and get moving too --

MR. VOGEL: Very good.

Clearly, Mr. Vogel acknowledged and recognized that the cost Order relating to the mistrial was final and would be reduced to judgment, as he would not need to seek a "stay of execution" if there was no "judgment" to execute on!

Further, this Court specifically directed that the Order be submitted first (which should, and does, follow the Court's "Minute Order" of December 13, 2019), followed by the Judgment, after which there would be an automatic 10 day stay which Defendants *could*

seek to extend. Mr. Vogel recognized this as the appropriate procedure. The Court indicated that it may request that Defendants brief any such request, to allow the Court to consider the request and to make a determination. We are certain that such "briefing" was not authorized through a unilateral rewriting of the Court's Order to "grant" the Defendant's premature and informal request.

With respect to the legal argument on which Defendants rely, we respectfully disagree with their position. "Unlike a petition for rehearing, a motion for sanctions, like a motion for attorney's fees, pertains to a matter which is collateral to the underlying litigation. (An order awarding sanctions "is appealable 'because it is a final order on a *collateral* matter directing the payment of money.'" (*I. J. Weinrot & Son, Inc. v. Jackson* (1985) 40 Cal.3d 327, 331 [220 Cal.Rptr. 103, 708 P.2d 682], italics added; *see also Bauguess v. Paine* (1978) 22 Cal.3d 626, 634, fn. 3 [150 Cal.Rptr. 461, 586 P.2d 942].)) *San Bernardino Community Hospital v. Meeks*, 187 Cal. App. 3d 457, 462, 231 Cal. Rptr. 673, 675, 1986 Cal. App. LEXIS 2264, *6 (Cal. App. 1986).

The U.S. Supreme Court said this about such a collateral determination:

> At the threshold we are met with the question whether the District Court's order refusing to apply the statute was an appealable one. Title 28 U. S. C. § 1291 provides, as did its predecessors, for appeal only "from all final decisions of the district courts," except when direct appeal to this Court is provided. Section 1292 allows appeals also from certain interlocutory orders, decrees and judgments, not material to this case except as they indicate the purpose to allow appeals from orders other than final judgments when they have a final and irreparable effect on the rights of the parties. It is obvious that, if Congress had allowed appeals only from those final judgments which terminate an action, this order would not be appealable.
>
> **The effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete. Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal. But the District Court's action upon this application was concluded and closed and its decision final in that sense before the appeal was taken.**
>
> *Cohen v. Benefit Indus. Loan Corp.*, 337 U.S. 541, 545-546, 69 S. Ct. 1221, 1225, 93 L. Ed. 1528, 1536, 1949 U.S. LEXIS 2149, *8-9 (U.S. June 20, 1949) (emphasis supplied).

Here, the Defendants were found to have purposely caused the mistrial, and the sanction for those actions was an award of costs to the Plaintiff. The reason that NRS 18.070(2) authorizes the same is to make the Plaintiff whole for the costs he was forced to incur, and will need to incur again, as a result of the mistrial. These costs were advanced by Plaintiff's counsel, and must necessarily be collected now, in order for Plaintiff to afford to retry the case. Frankly, what good is a sanction for causing a mistrial if the injured party cannot collect until after the retrial and the end of the case?

If Defendants desire to seek a stay of execution of the judgment, as they argued on December 17, 2019, they may do so under the procedure allowed by law. But they may not arbitrarily rewrite the Court's Order to grant their own request, without following the same.

Respectfully, the Plaintiff's proposed Order is consistent with the actual Order of this Court, and the Order, as well as the Judgment, should be so entered.

Sincerely,
THE JIMMERSON LAW FIRM, P.C.

James J. Jimmerson, Esq.
JJJ/sp

cc: Martin A. Little, Esq. / Alexander Villamar, Esq.
Katherine J. Gordon, Esq. / S. Brent Vogel, Esq.

EXHIBIT ‘B’

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Attorneys for Defendants

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

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

MOTION FOR MISTRIAL AND FEES/COSTS

HEARING REQUESTED

259 N.W. 194, 196 (Iowa 1935) ("Attorneys have no right to go outside of the record and make . . . remarks and try to inject racial prejudice into a case[.]"). This danger is particularly acute as to the Mexican American and African American members of the jury, who may reasonably find the material at issue to be particularly offensive. Landess has no realistic possibility of obtaining substantial justice under these circumstances, and a mistrial is warranted.

C. The Court Should Award Plaintiff Fees and Costs

Nevada Revised Statute 18.070(2) provides as follows:

> A Court may impose costs and reasonable attorney's fees against a party or an attorney who, in the judgment of the court, purposely caused a mistrial to occur.

Here, Defendants' counsel knew exactly what they were doing. They had the e-mail at issue ready, with the offending sentence highlighted. They were waiting for what they perceived to be an opportunity to shoehorn it into the case, and when such an opportunity arose, they seized upon it. Defendants performed the act which necessitated a mistrial in a calculated and tactical manner, and for their own benefit.

Moreover, this is not the first time that Defendants' counsel has improperly indoctrinated the jury. They had previously misled the jury about the quality of the x-rays that were reviewed showing Landess's broken hardware, and they had improperly informed the jury about the alleged "portal" through which the x-rays were reviewed in spite of a prior order by the court precluding them from doing so. The cumulative effect of these tactics renders the conduct at issue even more egregious, and it strengthens the justification for a mistrial. *See Lioce v. Cohen*, 124 Nev. 1, 15, 174 P.3d 970, 979 (2008).

In preparation and presentation of the Plaintiff's case at trial, Plaintiff's attorneys spent hours of time preparing and conducting their case which are now essentially time wasted. These hours were spent preparing for the testimony of the witnesses, pre-trial interview of witness and medical professionals, drafting direct and cross examination, and being present in Court to present the case. As a result, Plaintiff's counsel was unable to perform other functions or service

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EXHIBIT ‘C’

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

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

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

BEFORE THE HONORABLE ROB BARE
DISTRICT COURT JUDGE
FRIDAY, AUGUST 2, 2019

RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 10

APPEARANCES:

For the Plaintiff:	MARTIN A. LITTLE, ESQ. JAMES J. JIMMERSON, ESQ.
For Defendant Jaswinder S. Grover, MD Ltd:	STEPHEN B. VOGEL, ESQ. KATHERINE J. GORDON, ESQ.

RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER

Case Number: A-18-776896-C

So that didn't happen, so then we have the trial. Now here comes Exhibit 56. How many pages are in Exhibit 56?

MR. JIMMERSON: About 122.

THE COURT: 122-page exhibit comes in. I did ask the clerk who offered it. She doesn't keep that kind of record. That's not a criticism of the clerk.

MR. JIMMERSON: The Defendant offered it today.

THE COURT: But I just was going to say, it's my thought and my recollection now, based upon the back and forth here, so the Defense offers a disclosed, you know, set of documents, disclosed from the Plaintiff to the Defendant -- Exhibit 56 with the items that ultimately end up in Exhibit 56: the 122 pages.

So at trial now the Defense says we want to offer 56. I don't remember what context it was offered in, but it was offered, and it was stipulated, and agreed to be admitted. All right. So now it's an admitted exhibit; one of 122 pages, but nonetheless admitted, and then we carry on.

After it's admitted, Mr. Dariyanani testifies -- and I'll give -- Mr. Vogel made a great point -- in part, what Dariyanani did was he provided some character evidence, is what I would say it would have to fairly be called -- character evidence as to the good attributes of Mr. Landess, and he said some other things too. You know, he said we all had faults, and he said some other things. I don't remember if it was all after the item came up, or before and after, but I would say the fair sum and substance of Dariyanani's comments on this point was that Jason

EXHIBIT ‘D’

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Attorneys for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

JASON GEORGE LANDESS, aka KAY GEORGE LANDESS, an individual, Plaintiff, vs. KEVIN PAUL DEBIPARSHAD, M.D., an individual; KEVIN P. DEBIPARSHAD, PLLC a Nevada professional limited liability company doing business as "SYNERGY SPINE AND ORTHOPEDICS" DEBIPARSHAD PROFESSIONAL SERVICES, LLC, a Nevada professional limited liability company doing business as "SYNERGY SPINE AND ORTHOPEDICS," ALLEGIANT INSTITUTE, INC, a Nevada domestic professional corporation doing business as "ALLEGIANT	**CASE NO.: A-18-776896-C** **DEPT NO.: 32** Courtroom 3C **PLAINTIFF'S SUPPLEMENT TO MOTION FOR MISTRIAL AND FEES/COSTS**

Plaintiff, and to the Court, and nevertheless the Defendants continued to use and inject the email before the jury in the fashion that precluded Plaintiff from being able to effectively respond. Regarding her comment that she doesn't "know that there is a subsection under impeachment, and what evidence we can use as impeachment that says, oh you can use impeachment evidence, but you can't if it has to do with race," Ms. Gordon must not have spent much time looking for cases about this subject because, as the following discussion demonstrates, there are numerous cases that make it crystal clear that what she did was highly improper. In addition, NRS 18.070(2) expressly prohibits an attorney from purposefully causing a mistrial, which is what she did. What is important to note is that the Defendants' counsel Vogel and Gordon, together and separately, in arguing to the Court that they "waited for Plaintiff to object" and that Plaintiff "did nothing about it," evidence a consciousness of guilt, and a consciousness of wrongdoing. That consciousness of wrong doing is proof that Defendants and their counsel were the legal cause of the mistrial.

III. STATEMENT OF ARGUMENT

A. *Prejudicial Comments Made by an Attorney to a Jury Constitutes Misconduct.*

Ms. Gordon read the inflammatory language in front of the jury and then asked Mr. Dariyanani if he thought those comments were racist, the clear intent being to

convince the jury that Plaintiff is a racist[7]. It is universally accepted that an attorney cannot inject the type of racist remarks that Ms. Gordon made into a jury trial in order to prejudice the jury against Plaintiff. "Making improper comments by counsel which may prejudice the jury against the other party, his or her counsel, or witnesses, **is clearly misconduct by an attorney**. Cases that have dealt with similar situations have uniformly condemned such statements as fundamentally prejudicial." *Born v. Eisenman,* 114 Nev. 854, 862, 962 P.2d 1227, 1232, 1998 Nev. LEXIS 105, *15 (1998) (emphasis supplied). "Appeals to racial prejudice are of course prohibited. . . . They are 'universally condemned.' *See* Annotation, *Statement by Counsel Relating to Race, Nationality, or Religion in Civil Action as Prejudicial*, 99 A.L.R.2d 1249, 1254 (1965)." *Texas Employers' Ins. Ass'n v. Guerrero,* 800 S.W.2d 859, 862, 1990 Tex. App. LEXIS 3172, *8 (Ct. App. Tex. 1990) (citation omitted).

Given today's cultural context of racial unrest and violence, Ms. Gordon's conduct is even more reprehensible. One would expect that she watches the news. Almost every week there is some new catastrophe involving racism. For example, the Charleston church shooting in June 2015 was a mass shooting in which a 21-

[7] Ms. Gordon evidently found no pause in making such an incendiary accusation even though she knew that: (1) Plaintiff's adopted son, Justin, sat in the courtroom during the entire trial, and Justin's skin color is much darker than Plaintiff's skin color because Justin's deceased biological father was Iranian; (2) Plaintiff spoke with and consented to Dr. Debiparshad (who Ms. Gordon characterized as a "person of color") operating upon him; and (3) Plaintiff revealed during direct examination that early in his career he took a 2-year sabbatical from the practice of law to help impoverished, indigenous people in such countries as Africa, Haiti, Honduras, and the Philippines. Those facts alone would make Plaintiff one of the most racially tolerant "racists" in modern history.

EXHIBIT ‘E’

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

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

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

Date of Hearing: September 17, 2019

Time of Hearing: 1:30 p.m.

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

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

Dated this 26th day of August 2019.

LEWIS BRISBOIS BISGAARD & SMITH LLP

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

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

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

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

II.
RELEVANT PROCEDURAL BACKGROUND

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

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

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

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

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

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

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

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

[3] *Id* at p. 159.

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

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

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

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

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

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

[7] *Id.*

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

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

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

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

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

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

[10] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III.

LEGAL ARGUMENT

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

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

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"E".

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Plaintiff's Request for Sanctions is Without Merit

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

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

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

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

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IV.

CONCLUSION

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

Dated this 26th day of August 2019.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ S. Brent Vogel
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CERTIFICATE OF SERVICE

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

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EXHIBIT ‘F’

A-18-776896-C

DISTRICT COURT
CLARK COUNTY, NEVADA

Malpractice - Medical/Dental **COURT MINUTES** **September 16, 2019**

A-18-776896-C Jason Landess, Plaintiff(s)
vs.
Kevin Debiparshad, M.D., Defendant(s)

September 16, 2019 3:00 AM Minute Order

HEARD BY: Bare, Rob **COURTROOM:** Chambers

COURT CLERK: Michaela Tapia

JOURNAL ENTRIES

- At the request of Court, for judicial economy, Plaintiff s Motion for Attorneys Fees and Costs and Defendant s Opposition and Countermotion for Attorneys Fees and Costs, currently scheduled for September 17, 2019, are VACATED, pending reassignment to another department.

CLERK'S NOTE: This Minute Order was electronically served to all registered parties for Odyssey File & Serve. /mt

EXHIBIT ‘G’

DISTRICT COURT
CLARK COUNTY, NEVADA
-oOo-

JASON GEORGE LANDESS a.k.a. KAY GEORGE LANDESS, as an individual, Plaintiff, vs. KEVIN PAUL DEBIPARSHAD, M.D., Et al. Defendants.	CASE NO.: A776896 DEPT. NO.: XXXII (Matter heard on 9/4/19 in Department XXX) **ORDER**

The above-referenced matter came on for hearing before Judge Jerry Wiese as the Presiding Civil Judge, on the 4th day of September, 2019, with regard to the Defendants' Motion to Disqualify the Honorable Rob Bare. Having reviewed all of the papers and pleadings on file, and having considered the oral argument offered on behalf of the parties, and good cause appearing, the Court enters the following Order.

FACTUAL AND PROCEDURAL HISTORY

This is a professional negligence (medical malpractice) case filed by the Plaintiff, Jason George Landess, against Dr. Kevin Paul Debiparshad and his practice, Synergy Spine and Orthopedics, as well as Nevada Spine Clinic and Centennial Hills Hospital. Plaintiff alleges that Dr. Debiparshad failed to properly reduce a tibia fracture during a 10/10/17 surgery. Claims against Centennial Hills Hospital were resolved shortly before Trial.

This case went to Trial before the Honorable Judge Rob Bare, with a Jury. The Trial began on 7/22/19. The issue of the "burning embers e-mail" and the possibility of a mistrial was raised on trial day 10, (August 2, 2019), a Motion for Mistrial was filed by Plaintiff on the evening of Sunday, 8/4/19, and a mistrial was declared on trial day 11, (August 5, 2019). Defendant has filed a Motion to Disqualify the Honorable Rob Bare, based on alleged actual or implied bias.

Defendants filed their Motion to Disqualify Judge Bare on August 23, 2019, alleging irregularities, improper statements made by Judge Bare during Trial, and

appropriate, and should be encouraged. The statements made by Judge Bare during the instant Trial, however, were not limited to compliments regarding professionalism.

NCJC 2.11(A) indicates that a Judge should be disqualified if "the judge's impartiality might reasonably be questioned," including when "the judge has a personal bias or prejudice concerning a party or a party's lawyer." Although "it is a judge's job to make credibility determinations," *Ainsworth,* at pg. 258, when a Judge voices his praise of one attorney or one party, at the apparent expense of the opposing attorney or party, "a reasonable person, knowing all the facts, would harbor reasonable doubts about the judge's impartiality." *Ybarra* at pg. 51, citing *PETA*, 111 Nev. at 438, 894 P.2d at 341. In reference to credibility, it would be appropriate for a Judge to state that based on the circumstances in the case, the evidence presented, and the argument provided, the Judge finds one argument more "convincing" than another, or one witness more "credible" than another. It seems, however, that to tell the attorneys that the Judge is going to believe the words of one attorney over another, because "whatever word you ever said to me in any context has always been the gospel truth," results in a "reasonable person" believing that the Judge has a bias in favor of that attorney. When the Judge goes on to state that he has told his family and friends how much he admires one attorney, and that the attorney should be in the "hall of fame" or the "Mount Rushmore" of lawyers, a "reasonable person" would believe that the Judge has a bias in favor of that attorney. As the Nevada Court of Appeals recently stated, "The test for whether a judge's impartiality might reasonably be questioned is objective and ***disqualification is required*** when 'a reasonable person, knowing all the facts, would harbor reasonable doubts about the judges impartiality.'" *Bayouth v. State,* 2018 WL 2489862 (Nev.Ct.of App., 2018, unpublished, [emphasis added]).

This Court gives great weight to Judge Bare's Affidavit, and his explicit denial of any bias or prejudice in favor of or against any party. The Court believes that his decisions throughout the subject Trial were fair, even-handed, and unbiased. Judge Bare struggled with various decisions, listened to argument, researched the law, and appears to have had a valid basis for each decision that he made. This Court cannot find that any of the decisions made by Judge Bare during the Trial of this case evidenced any bias, prejudice, or lack of impartiality. The statements that Judge Bare made, however, on Trial Day 10, August 2, 2019, as set forth above, seemed to indicate

a bias in favor of Mr. Jimmerson. Even if Judge Bare does not have an actual bias in favor of Mr. Jimmerson, "a reasonable person, knowing all the facts, would harbor reasonable doubts about the judge's impartiality." *Ybarra* at pg. 51, citing *PETA*, 111 Nev. at 438, 894 P.2d at 341. "Whether a judge is actually impartial is not material." *Berosini* at pg. 436. Consequently, this Court must find that at least an implied bias exists, and Judge Bare must be disqualified from the present case.[1]

4) Did Judge Bare's statements relating to the likelihood of the Plaintiff prevailing on the issue of liability, but not recovering all of the damages that were sought, and the discussion regarding possible settlement, during trial, evidence an actual or implied bias, such that disqualification is appropriate?

Because the Court has already determined that disqualification is necessary, based on the statements made by Judge Bare, relating to his admiration of Mr. Jimmerson, the Court need not address this final issue. It is sufficient to say that after reviewing the Record, Judge Bare appears to have done everything in his power to try to avoid the need to declare a Mistrial. This Court will not comment on whether Judge Bare's actions in attempting to bring the parties to a settlement complied with the Rules or not, because that is not this Court's function. This Court will state, however, that it respects Judge Bare's efforts in trying to avoid the need for a Mistrial, and it would be good if every judge cared as much about the parties, the process, the sacrifice of the jurors time, and trying to do justice. This Court finds nothing about Judge Bare's attempts to encourage settlement between the parties, or his statements regarding his opinions as to what had occurred during the Trial, that evidenced any bias or prejudice for or against any party or attorney. If a Judge's opinions about a case do not stem from an extrajudicial source, it is not grounds for disqualification, and the opinions he stated clearly stemmed from his observations during Trial. *Ainsworth* at pg. 257; see also *In re Guardianship of Styer*, 24 Ariz.App. 148, 536 P.2d 717 (1975) "(Although a judge may have a strong opinion on merits of a cause or a strong feeling about the type of litigation involved, the expression of such views does not establish disqualifying bias or prejudice.)"

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[1] This Court agrees with Concurring Opinion in *Ivey v. Eighth Judicial Dist. Ct.*, 129 Nev. 154, 299 P.3d 354 (2013), wherein the Justices stated, "It is arguably the most significant responsibility of a judge to 'act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and [to] avoid impropriety and the appearance of impropriety."

EXHIBIT ‘H’

A-18-776896-C Jason Landess, Plaintiff(s)
vs.
Kevin Debiparshad, M.D., Defendant(s)

December 13, 2019 09:00 AM Minute Order

HEARD BY: Earley, Kerry COURTROOM: RJC Courtroom 12D

COURT CLERK: Jacobson, Alice

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

This matter came before the Court on Plaintiff s Motion for Mistrial and Fees/Costs, filed on August 4, 2019 by counsel Martin A. Little, Esq. Defendants Opposition to Plaintiff s Motion for Fees/Costs and Defendants Countermotion for Attorney s Fees and Costs Pursuant to N.R.S. 18.070 was filed on August 26, 2019 by counsel S. Brent Vogel, Esq. Defendants Reply in Support of Countermotion for Attorney s Fees and Costs Pursuant to N.R.S. 18.070 was filed September 12, 2019 by counsel S. Brent Vogel, Esq., and Plaintiff s Reply in Support of Motion for Attorneys Fees and Costs was filed September 12, 2019 by counsel James J. Jimmerson, Esq. and Martin A. Little, Esq. Plaintiff s Supplemental Memorandum of Law Regarding McCorkle Treatise was filed on October 1, 2019 by counsel James J. Jimmerson, Esq. and Martin A. Little, Esq. Pursuant to oral argument on the Motion and Countermotion, the Court stated it would issue a decision upon further review of the pleadings and exhibits.

Having reviewed the matter, including all points, authorities, transcripts and exhibits, as well as oral argument presented by counsel, the Court GRANTS IN PART Plaintiff s Motion for Mistrial and Fees/Costs pursuant to NRS 18.070(2), as part of the Motion regarding mistrial was previously granted. The only issue before this Court is whether the Court should award attorney s fees and impose costs due to the mistrial.

COURT FINDS that the Defendant, pursuant to N.R.S. 18.070(2), purposefully caused the mistrial in this case to occur due to the Defendant knowingly and intentionally injecting into the trial evidence of racism by the use of Exhibit 56, page 44. Defendant s counsel, after examining Mr. Dariyanani regarding the Burning Embers email included in Exhibit 56, specifically asked the witness in follow-up if he thought the comments in the email: You still don t take that as being at all a racist comment? Such evidence of racism was not admissible to prove the Plaintiff s alleged bad character. Further, even though it was admitted without objection, it could only have been used insofar as it did not create plain error. Defendant s counsel is charged with knowing that the injection of such racially inflammatory evidence was improper in the trial. It was reasonably foreseeable to the Defendant that the Court would declare a mistrial due to the Defendant injecting such racially inflammatory evidence.

It is discretionary under N.R.S. 18.070(2) as to whether a court imposes costs and reasonable attorney s fees. The Court has determined that the Plaintiff be awarded reasonable and necessarily incurred costs of $118,606.25 pursuant to N.R.S. 18.070(2). The Court further has determined to not award any attorney s fees to Plaintiff.

Further, the Court DENIES Defendant s Countermotion for Attorney s Fees and Costs.

Counsel for Plaintiff to prepare the Order.

EXHIBIT ‘I’

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Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

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

BEFORE THE HONORABLE KERRY EARLEY,
DISTRICT COURT JUDGE

TUESDAY, DECEMBER 17, 2019

RECORDER'S TRANSCRIPT OF PROCEEDINGS
STATUS CHECK

APPEARANCES:

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

For Defendant Dr. Grover: STEPHEN B. VOGEL, ESQ.
KATHERINE J. GORDON, ESQ.

RECORDED BY: REBECA GOMEZ, COURT RECORDER

Las Vegas, Nevada, Tuesday, December 17, 2019

[Called to order at 9:57 a.m.]

THE COURT: Good morning. All right.

MR. JIMMERSON: Morning, Your Honor.

THE COURT: Good morning. I thought I just heard from you, Mr. Jimmerson.

MR. JIMMERSON: James Jimmerson on behalf --

THE COURT: Okay.

MR. JIMMERSON: -- of Mr. Landess.

MR. LITTLE: Morning, Your Honor. Marty Little --

THE COURT: Good morning.

MR. LITTLE: -- I was co-trial counsel --

THE COURT: Okay, and --

MR. LITTLE: -- for Mr. Landess.

THE COURT: -- Mr. Vogel?

MR. VOGEL: Good morning.

THE COURT: Good morning.

MR. VOGEL: Brent Vogel, 6858, for Dr. --

THE COURT: And Katherine's here. Katherine -- I apologize.

MS. GORDON: Thank you.

THE COURT: Katherine Gordon.

Okay. I -- I got a hold of your request for the pretrial -- here I'll set it I'm just -- I'm not sure what even orders Judge -- I mean, as you know, I got boxes and boxes, you guys. I'm not sure what orders did --

can I ask did he do a -- a whole lot of motions in limine? I don't even know what we're -- because to me I don't know -- I looked at this and I tried very hard to look at the law.

Obviously evidentiary issues that he made at trial I'm not going to necessarily go by because that all depends on how the evidence gets in and stuff like I might disagree on opening the door or not opening the door so I -- I wouldn't do that. I guess I was trying to figure out the extent of what I would be looking at. I know my own experience when I did a retrial, some of the orders that were done before by the other judge were followed, some they didn't agree with so but I don't think we really even talked about the law -- I'm -- I know I'm doing this ahead of time, but I'm trying to get a feel for what -- what -- what it is you want me to look at. Does that make sense?

MS. GORDON: It does, Your Honor, and I think that's what we were trying to get a feel for as early --

THE COURT: For our pretrial -- here's what I did. I can -- I know this is -- I can -- I know you probably don't want these dates but January 2nd or January 3rd or January 10th I can give you to come in and we'll just do this. I just kind of wanted to feel ahead those are the -- otherwise I'm just slammed till then and -- so I don't start another if -- if I get through this trial ever. Are any of those dates okay -- I know it's right after New Year's but it would help me -- you don't want to do that probably.

MR. VOGEL: The 2nd --

MR. JIMMERSON: January 2nd or the 3rd, Your Honor, I

can't do the 10th I'm in trial with Judge Allf.

THE COURT: Okay. Can you do the 2nd or 3rd --

MR. VOGEL: The 2nd or the 3rd are fine.

THE COURT: Okay, great. I know most people don't want to come in then but it gives me a chance to work on this --

MR. JIMMERSON: I think I'm before Your Honor different matter.

THE COURT: Are you?

MR. JIMMERSON: I think so.

THE COURT: Oh good Lord. Okay, I thought we didn't have much. Okay, so which do you want? The -- the 3rd --

MR. VOGEL: The 3rd?

MR. JIMMERSON: No, no, the -- I'm before Your Honor --

THE COURT: On --

MR. JIMMERSON: -- on a different matter on --

THE COURT: On the 2nd.

MR. JIMMERSON: -- on the 2nd.

THE CLERK: No (indiscernible) we don't have anything on the 2nd.

THE COURT: Oh we -- we tried to clear the 2nd for this.

MR. JIMMERSON: Okay. Then -- then I'm -- then I'm here --

THE COURT: For -- I just wanted to clear it so I would have -- first of all, everybody was complaining that I had court then, right? So I thought you guys -- I'm a little up tight against this trial date because I want to give you the trial date so hopefully you would work with me you

wouldn't mind as much so you want the 2nd, the 3rd --

MR. JIMMERSON: Second works.

THE COURT: Second?

MR. VOGEL: Either -- either day is fine.

MS. GORDON: (Indiscernible) fine.

THE COURT: Okay, let's pick the 2nd. Okay.

THE CLERK: This for motion in limines?

THE COURT: No, it's for a pretrial conference.

And I want you to come in and give me some idea -- because I could probably even look -- I mean I'm really -- I know some of the case. I should not say I'm familiar with that's not fair. I only know what I read for everything else so I mean I don't know if some of them are pro forma, you know, motions in limine like don't mention insurance and don't be, you know, follow *Lioce*, all that kind of gar- -- those kind of pro forma did I almost say garbage? That's not politically correct. I've been in trial three weeks. Those kind of things.

Substantive ones like -- I don't know so I don't know your case, but like he did a *Hallmark* hearing and eliminated an expert, I don't know if any of that was done that -- those kind of things are much more substantive --

MS. GORDON: And in the meantime, Your Honor, we're -- we're working together to put together a list of everything that we're stipulating to and then a list of --

THE COURT: Oh perfect.

MS. GORDON: -- what we're -- we're not so --

THE COURT: That would be absolutely perfect because I really really really want to make this trial flow for everybody from the bottom of my heart. In fact, I had one yesterday they thought they opened the door on -- on good character and I told them to come up and luckily they came up to the bench and it was handled. So I'm going to do everything I can to work with both of you that we can have the best opportunity for both of you to -- to do this.

So whatever you want from me, if you give me stipulations, I'll do that, if you -- if there's motions in limine that you disagree with Judge Bare, you know, let me look at them and then decide I -- I -- this law of the case I don't know you guys. I tried to even look it up because I know what happened to me; they followed some and they -- but I just got this, this morning be honest and I'm trying to do jury instructions which now --

MR. JIMMERSON: Your Honor --

THE COURT: -- we're not going to do but --

THE MARSHAL: We may, Judge.

THE COURT: We may?

THE MARSHAL: (Indiscernible) --

THE COURT: I hope so.

MR. JIMMERSON: I --

THE COURT: One of the attorneys is going to the hospital.

MR. VOGEL: Oh no.

MR. JIMMERSON: Oh boy.

MR. VOGEL: Kim?

THE COURT: Don't -- don't --

THE MARSHAL: Trying to keep you posted. I just talked to Debbie.

THE COURT: I'm not talking to the ER.

MR. JIMMERSON: We --

THE MARSHAL: No you're not.

MR. JIMMERSON: The parties have already had one conference --

THE COURT: Yes. Oh, I --

MR. JIMMERSON: I'm sorry.

THE COURT: Tell her yes.

THE MARSHAL: Okay.

THE COURT: I want to do -- please please please please --

THE MARSHAL: Yes.

THE COURT: -- please.

THE MARSHAL: Okay.

THE COURT: Okay?

THE MARSHAL: We will.

THE COURT: I don't -- here's the -- I'm so sorry we -- this trial has been --

THE MARSHAL: Yeah, they --

THE COURT: I don't --

THE MARSHAL: -- they called --

THE COURT: What do we do on closings?

THE MARSHAL: I don't know. Maybe we can reach out. I'll find out.

THE COURT: Okay, will you ask about closings?

Okay, I apologize.

MS. GORDON: Oh that's okay.

THE COURT: This has been one that was supposed to be two weeks, we're now in three weeks and it -- it should be a -- no, maybe you're is, but this one a textbook. In the middle of it the doctor files bankruptcy --

MR. VOGEL: Oh.

THE COURT: -- we have to get an automatic -- I mean it has been -- I've never seen so many issues.

MR. JIMMERSON: Wow.

THE COURT: Look at my staff's like.

MS. GORDON: Yeah.

THE COURT: Now --

MR. JIMMERSON: Your Honor --

THE COURT: It's been crazy. Okay, because now I'm worried about closings. Okay.

MR. JIMMERSON: The parties have already had one conference where we discussed --

THE COURT: Okay.

MR. JIMMERSON: -- preliminarily some of the matters and we've exchanged emails on some of the orders that we're in -- in agreement with --

THE COURT: Okay, that would be great because at least it could limit down and then I could see the type of order, whether it's one

that I feel should be addressed separately or whether I -- you know, it -- I can't -- I felt like when I read this I was in a vacuum. I wasn't really sure -- I didn't want to make a general rule that yes everything Judge Bare ruled -- I know not -- not what happened in trial because trial are very fluid and if he continued things to see or denied it without prejudice to see what happens in trial I -- I would like to look at those so it educates me on knowing what to listen to in trial, because I take a lot of motions in limine to educate me as to what issues will come up so even if I don't grant them because I don't know the context of how it's getting in, I still want to look at those.

Does that make sense because then I -- I keep track of all that so then I have -- I -- I don't want to say red flags, but then I'm very aware to -- when I hear something, I'm -- I'm all over it and say come up, do we have an issue here, why are we offering this because it educates me a lot.

MS. GORDON: And I think --

THE COURT: So I don't want to just say his motions -- I also would like you to tell me why you think it's relevant so I get some focus that you all have but I don't have, because I truly believe the more I'm educated on the issues, the better I'll be to be able to when it -- because as you know it goes real fluid in trial and I need a context that you all have that I'm -- that I'm hoping this pretrial conference could I -- I could use that too. Does that make sense?

MS. GORDON: It does, and I --

THE COURT: So I want a lot of not just motions in limine,

okay?

MR. JIMMERSON: And -- and the -- the parties I will say were -- were quite diligent about not having, as you say, the pro forma we -- we -- we abided by the 2.47, you know, requirement to -- to -- to --

THE COURT: Okay. I didn't know because I get those all the time.

MR. JIMMERSON: -- confer seriously --

THE COURT: Okay.

MR. JIMMERSON: -- and so what -- what you will see will be --

THE COURT: Substantive.

MR. JIMMERSON: -- will be hefty --

THE COURT: Okay.

MR. JIMMERSON: -- matters that Judge Bare handled. My one request, Your Honor, is that because a pretrial conference is after the motions in limine deadline --

THE COURT: I'll just extend it.

MR. JIMMERSON: Okay, and --

THE COURT: I -- I tried to get it as quick as I can because I'm very aware of the motions in limine -- I'll just work with you.

MR. JIMMERSON: And we -- we've already set our 2.47 conference anyway. We're hoping to try to resolve as many matters possible without requiring court intervention, but of course there will be matters that will be brought before you.

THE COURT: No, I -- I'm here to do that. I understand that

completely and I will -- you know, even if I have to do it on a -- a Friday or whatever I need to do. My next trial when this one gets done is the 23rd --

THE CLERK: The 27th of --

THE COURT: -- 27th of January hopefully maybe I don't know. They're fighting too so I don't know. They have a firm trial setting it's on an inadequate security case. And then you're right -- I -- those are such -- you're backed right up to it.

MS. GORDON: And I think by the 2nd we should have a -- a final list in mind of which ones --

THE COURT: Okay. And anything that I can do to help that would facilitate, you know, I'm -- I'm more than -- as you -- more than willing to do or meet with you or anything like that.

Had you already exchanged jury instructions or anything by then? Maybe not.

MS. GORDON: Last --

MR. VOGEL: Well, we had --

THE COURT: Your last trial.

MR. VOGEL: Yeah, we had -- we -- we --

THE COURT: Kind of.

MR. VOGEL: -- we've exchanged but they had not been --

THE COURT: That does -- okay, well that does --

MR. VOGEL: --they had not -- they had not been finalized.

THE COURT: Okay, so that I -- I would start with that. I was just going to say if you had I prefer to hear the evidence that's why we're

-- we were going to do jury instructions today because it doesn't do me any good --till I have the evidence in I don't want to spend time on instructions that --

MR. VOGEL: Don't apply.

THE COURT: -- the evidence didn't even come in on so I was good with that.

Okay, so let's do it January 2nd. Just come to the courtroom and we'll work together at 9:00.

MR. JIMMERSON: Sounds good, Your Honor.

THE COURT: Okay, and anything you meet before I would truly appreciate that would be great. And then I'll read a little bit more on these cases like I said they just gave it to me this morning. But at least give me the parameters what I'm looking at maybe it would make this case law make it a little easier for me to decide too, if you don't mind.

Okay. Terrific. Anything else that you had on? Calendar call. No. Okay.

MR. VOGEL: I don't think so. The only other issue I'd like to raise is in light of your order with respect to the fees and costs --

THE COURT: Right.

MR. VOGEL: -- I wasn't clear is it against me and my firm or is it against the client?

THE COURT: You know what? I was going to -- I -- you know that's a good point.

MR. VOGEL: Because that --

THE COURT: It makes a difference.

MR. VOGEL: -- different things it makes a difference.

MR. JIMMERSON: And -- and, Your Honor, we did not submit the motion pursuant to NRS 7.035 --

THE COURT: You did it for the defendant, did you not -- because I did look at that.

MR. JIMMERSON: Correct --

THE COURT: They never said against the attorney so I did not --

MR. JIMMERSON: (Indiscernible) we -- we did not pursue --

THE COURT: -- make it the firm. So you tell me because that is -- Mr. Vogel, you're right because I sat there all weekend -- you don't want to hear it but trying to figure out --

MR. JIMMERSON: We -- we -- we -- we intentionally did not pursue it pursuant to 7.035 --

THE COURT: Which is the attorneys.

MR. JIMMERSON: -- which -- exactly which would allow for collection against the attorneys.

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

MR. VOGEL: But -- but under 18.070 it allows you the discretion to do attorney or client so -- and that's --

THE COURT: Okay, well I did -- I did client.

MR. VOGEL: Okay.

THE COURT: I did defendant, that's what I meant and I went back and looked under the one you said and I read through all their thing against to see who they were seeking it against. So I did defendant.

MR. VOGEL: Okay.

THE COURT: I did not do the law firm.

MR. VOGEL: Okay. And we haven't discussed it yet, but we would obviously seek to stay execution --

THE COURT: Sure.

MR. VOGEL: -- pending the trial because that -- you know, pending on the outcome of trial, that may resolve the issue, there may be an offset if it's a defense verdict, it may be part of the judgment if it's plaintiff's verdict, but if they're --

THE COURT: Okay.

MR. VOGEL: -- going to be allowed to execute immediately, then obviously then we've got a --

THE COURT: You have an issue.

MR. VOGEL: -- we have to seek a stay and --

THE COURT: Have you even addressed that? I didn't --

MR. VOGEL: We -- we have not discussed it.

MR. JIMMERSON: We -- we haven't discussed it and we certainly would -- would oppose any, you know, effort to stay execution. We would of course request the Court, you know, hear brief --

THE COURT: Okay, well let's do this.

MR. JIMMERSON: -- you know, receive briefing on the same.

THE COURT: Bring that up as another issue of everything so I get a parameter of -- of how I want to do that in fairness because I struggled enough on the defendant and stuff, okay.

MR. VOGEL: Well --

THE COURT: Bring that -- so right now I -- I haven't signed a judgment, right? I -- I -- or an order?

MR. VOGEL: Right.

THE COURT: The order comes before the judgment --

MR. JIMMERSON: Correct, Your Honor.

THE COURT: -- so then at that time hopefully I'll have a -- I'll -- I'll consider it --

MR. VOGEL: So --

THE COURT: -- and maybe even ask you to brief it.

MR. VOGEL: Yeah, so -- so -- yeah, so once an order gets entered, then the NRCP 62 kicks in, there's a 10-day stay --

THE COURT: Right.

MR. VOGEL: -- and then we'd have to ask this -- either this Court you -- we'd have to ask you --

THE COURT: To extend the stay or decide what to do.

MR. VOGEL: Yeah.

THE COURT: Then, Mr. Vogel, let it take its course and I'll look at -- I -- I will --

MR. VOGEL: Okay.

THE COURT: -- address -- I prefer to do it that way so that I have a chance to look at it and figure out what I want to do. And hopefully that'll give us a chance to do this pretrial conference and get moving too --

MR. VOGEL: Very good.

THE COURT: -- which I think is extremely important. Okay?

MR. JIMMERSON: Yes, Your Honor. Thank you.

MR. LITTLE: Thank you.

THE COURT: You're welcome. Okay. January 2nd. Gotcha. All right. That one's done.

[Hearing concluded at 10:09 a.m.]

* * * * * *

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

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

EXHIBIT ‘J’

ORDR

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DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendant.

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

ORDER AND JUDGMENT GRANTING IN PART PLAINTIFF'S MOTION FOR ATTORNEYS' FEES AND COSTS

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This matter having come for before the Court on December 5, 2019, on *Plaintiff's Motion for Mistrial and for Attorneys' Fees and Costs,* filed August 4, 2019, and Defendants' Opposition thereto, and *Countermotion for Attorneys' Fees and Costs Pursuant to NRS 18.070,* filed August 26, 2019, and the supplemental filings by both Plaintiff and Defendant in support of their respective Motions,, Plaintiff Jason George Landess, appearing by and through his counsel of record, James M. Jimmerson, Esq. of The Jimmerson Law Firm, P.C. and Martin A. Little, Esq. of Howard & Howard Attorneys PLLC, Defendants Kevin Paul Debiparshad, M.D., Kevin P. Debiparshad PLLC d/b/a Synergy Spine and Orthopedics, and Debiparshad Professional Services d/b/a Synergy Spine and Orthopedics, Jaswinder S. Grover, M.D., Ltd. d/b/a Nevada Spine Clinic, appearing by and through their counsel of record, S. Brent Vogel, Esq. and Katherine J. Gordon, Esq. of Lewis Brisbois Bisgaard & Smith LLP, and the Court having reviewed the papers and pleadings on file, transcripts, and exhibits, having heard oral argument, and being fully advised in the premises, and good cause appearing:

THE COURT HEREBY FINDS that Plaintiff's Motion for a Mistrial was granted on September 9, 2019, which Order is wholly incorporated herein by reference as if set forth in full. The only issue before this Court is whether the Court should award attorneys' fees and costs due to the mistrial.

THE COURT FURTHER FINDS that the Defendant, pursuant to N.R.S. 18.070(2), purposely caused the mistrial in this case to occur due to the Defendant knowingly and intentionally injecting into the trial evidence of alleged racism by the use of Exhibit 56, page 44. Defendant's counsel, after examining Mr. Dariyanani regarding the "Burning Embers" email included in Exhibit 56, specifically asked the witness in follow-up: "You still don't take that as being at all a racist comment?" Such evidence of racism was not admissible to prove the Plaintiff s alleged bad character. Further, even though it was admitted without objection, it could only have been used insofar as it did not create plain error. Defendant's counsel is charged with knowing that the injection of such racially inflammatory evidence

was improper in the trial. It was reasonably foreseeable to the Defendant that the Court would declare a mistrial due to the Defendant injecting such racially inflammatory evidence.

THE COURT FURTHER FINDS that it is discretionary under N.R.S. 18.070(2) as to whether a court imposes costs and reasonable attorneys' fees. The Court has determined that the Plaintiff be awarded reasonable and necessarily incurred costs of $118,606.25 pursuant to N.R.S. 18.070(2). Defendants did not contend that Plaintiff's requested costs were not reasonable or necessarily incurred or that they were not otherwise taxable.

THE COURT FURTHER FINDS that Defendants did not contend that Plaintiffs' requested attorney's fees were not reasonable under *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345 (1969). That notwithstanding, the Court has determined to not award attorneys' fees to Plaintiff. THE COURT FURTHER FINDS that as Defendants are the legal cause for the mistrial, there is no basis to grant their countermotion for attorneys' fees and costs.

NOW THEREFORE:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Attorneys' Fees and Costs is hereby GRANTED in part. Plaintiff is awarded their reasonable and necessarily incurred costs of $118,606.25 pursuant to N.R.S. 18.070(2). Said sums are reduced to judgment, collectible by any lawful means.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court further has determined to not award any attorneys' fees to Plaintiff.

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THE JIMMERSON LAW FIRM, P.C.
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IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants' Countermotion for Attorneys' Fees and Costs is hereby DENIED.

Dated this _____ day of _____, 2020.

_____
DISTRICT COURT JUDGE

Submitted by:

THE JIMMERSON LAW FIRM, P.C.

_____
James J. Jimmerson, Esq.
Nevada Bar No. 000264
415 South 6th Street, Suite 100
Las Vegas, Nevada 89101

HOWARD & HOWARD ATTORNEYS PLLC
Martin A. Little, Esq.
Alexander Villamar, Esq.
3800 Howard Hughes Pkwy., # 1000
Las Vegas, NV 89169
Attorneys for Plaintiff

Approved as to form and content:

LEWIS BRISBOIS BISGAARD & SMITH LLP

_____
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EXHIBIT ‘K’

LEWIS BRISBOIS BISGAARD & SMITH LLP

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February 25, 2020

File No. 27428.336

Hon. Kerry Earley
Eighth Judicial District Court - Dept. 4
Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89101

Re: Jason Landess v. Kevin Debiparshad, M.D., et al.
Case No. A-18-776896-C

Dear Judge Earley:

We are in receipt of Mr. Landess's counsel's proposed Order and strongly disagree with the arguments he makes therein as they do not comport with the law. As the correspondence he submitted shows, this Court issued a Minute Order entry after the hearing indicating the award of costs would be used as an offset. This is consistent with the Rules of Civil Procedure, and in particular NRCP 54(b). Had the Court made a contempt finding that could have been immediately collectible under the law. But it was not. This award was not a final judgment either as it did not adjudicate all of the pending issues in the case. As such, it cannot be a final judgment susceptible to collection. The Court correctly issued a Minute Order in compliance with the law on orders such as the one at issue. I refused to sign a proposed order that is contrary to the law and this Court's Minute Order ruling.

Attached is the Defendants' proposed Order, which we believe accurately sets out the court's ruling and the controlling law in this instance.

Very truly yours,

/s/ S. Brent Vogel
S. Brent Vogel of
LEWIS BRISBOIS BISGAARD & SMITH LLP

SBV
Enclosure
cc: James Jimmerson, Esq.
Martin Little, Esq.
Katherine Gorder, Esq.

A-18-776896-C

DISTRICT COURT
CLARK COUNTY, NEVADA

Malpractice - Medical/Dental | COURT MINUTES | December 17, 2019

A-18-776896-C Jason Landess, Plaintiff(s)
vs.
Kevin Debiparshad, M.D., Defendant(s)

December 17, 2019 09:00 AM Status Check

HEARD BY: Earley, Kerry COURTROOM: RJC Courtroom 12D

COURT CLERK: Jacobson, Alice

RECORDER: Gomez, Rebeca

REPORTER:

PARTIES PRESENT:

James Joseph Jimmerson, ESQ	Attorney for Plaintiff
Katherine J. Gordon	Attorney for Defendant
Martin A. Little	Attorney for Plaintiff
Stephen B. Vogel	Attorney for Defendant

JOURNAL ENTRIES

Colloquy between the Court and counsel regarding the extent of the re-trial. COURT ORDERED, matter SET for a Pretrial Conference 1/2/20 9:00am. Upon Mr. Vogel's inquiry, COURT ADVISED the Court's Order of Fees/Costs pertained to the client not the law firm and could be used as an offset.

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

CASE NO. A-18-776896-C
Dept. No. 4

ORDER GRANTING IN PART, AND DENYING IN PART PLAINTIFF'S MOTION FOR ATTORNEY'S FEES AND COSTS

This matter came on for hearing on December 5, 2019, on *Plaintiff's Motion for Mistrial and for Attorney's Fees and Costs* and Defendants' Opposition thereto and *Countermotion for Attorney's Fees and Costs Pursuant to NRS 18.070*, Martin A. Little and James J. Jimmerson appeared on behalf of Plaintiff, and S. Brent Vogel and Katherine J. Gordon appeared on behalf of moving Defendants.

This Court, having considered the pleadings and papers on file, heard oral argument, and for other good cause appearing, hereby ORDERS and FINDS as follows:

THE COURT FINDS that the Motion for Mistrial was granted by Judge Bare over Defendants' objections and requests for alternative relief. This Court cannot reconsider this ruling as the jury was released by Judge Bare. The only issue before this Court is whether the Court should award attorney's fees and costs due to the mistrial.

THE COURT FURTHER FINDS based on the record currently before it, pursuant to NRS 18.070, that Defendants purposely caused the mistrial by knowingly asking witness Dariyanani about Plaintiff's Exhibit 56, the "Burning Embers" e-mail, in particular in a follow up question asking the witness: "You still don't take that as being a racist comment?" Based on the record currently before it the Court finds this evidence of Plaintiff's racism was not admissible to prove Plaintiff's bad character. Plaintiff's Exhibit 56 was admitted without objection, however, the Court finds it could only be used if it did not create plain error. The Court finds this evidence created plain error.

IT IS HEREBY ORDERED, ADJUDGED and DECREED that Defendants Kevin Paul Debiparshad, M.D., Kevin P. Debiparshad, PLLC d/b/a Synergy Spine and Orthopedics, Debiparshad Professional Services LLC d/b/a Synergy Spine and Orthopedics, and Jaswinder S. Grover, Ltd doing business as Nevada Spine Clinic's Countermotion for Attorney's fees and Costs is DENIED.

IT IS HEREBY FURTHER ORDERED, ADJUDGED and DECREED that Plaintiff Jason Landess's Motion for Attorney's Fees and Costs is GRANTED IN PART and DENIED IN PART. Plaintiff's Motion for Attorney's Fees is DENIED. Plaintiff's Motion for Costs is GRANTED without prejudice in the amount of $118,606.25 pursuant to NRS 18.070(2). This

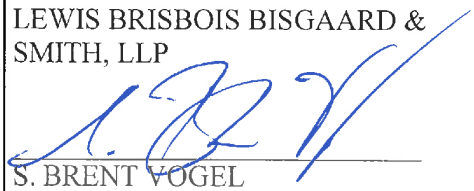
order is not intended to be the final judgment in this case. It cannot be, and is not, certified under NRCP 54(b). No execution may be issued on this order until a final judgment is entered in this case, at which time the Court will determine offsets, if any, applicable as a result of this order.

IT IS SO ORDERED.

DATED this _____ day of February, 2020.

_____
DISTRICT COURT JUDGE

Respectfully Submitted by:
LEWIS BRISBOIS BISGAARD & SMITH, LLP



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Approved as to Form and Content by:
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EXHIBIT ‘L’

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March 2, 2020

File No. 27428.336

Hon. Kerry Earley
Eighth Judicial District Court - Dept. 4
Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89101

Re: Jason Landess v. Kevin Debiparshad, M.D., et al.
Case No. A-18-776896-C

Dear Judge Earley:

We are in receipt of Mr. Landess's counsel's February 28, 2020 letter wherein they misstate the history of the motion at issue as well as the applicable law. In particular, Mr. Jimmerson cites cases that are inapplicable in Nevada. Indeed, he fails to cite any Nevada case law. The reason being is Nevada has a final judgment rule. An appeal can be filed only from a final judgment, unless there is a specific statute or rule authorizing an interlocutory judgment (such as an appeal from an order on a motion for change of venue or an order denying a motion to compel arbitration).

Some other jurisdictions allow interlocutory appeals. The *Cohen* case that Mr. Jimmerson cites is widely referred to in federal law as the *Cohen* doctrine, which allows interlocutory appeals. But the case is based on a specific federal statute that allows such appeals, as indicated in the blocked quote in Mr. Jimmerson's letter. The doctrine is not applicable in Nevada. The California cases he cites are equally inapplicable. They seem to be based on statutory grounds as well—or at least on unique California law allowing interlocutory appeals from sanctions orders. Nevada does not have such law.

Mr. Jimmerson has not cited any Nevada case in which an appellate court allowed an interlocutory appeal from a sanctions order **before the final judgment.** There is Nevada case law supporting the Defendants' position and holding that interlocutory sanctions orders (e.g., imposing attorneys' fees and costs as sanctions) are not independently appealable. Such orders can only be challenged if they are part of an appeal from an otherwise appealable judgment (e.g., a final judgment). Please see the three attached cases.

We maintain our objection to Plaintiff's proposed Order as it does not comply with *Nevada* specific law.

Very truly yours,

/s/ S. Brent Vogel
S. Brent Vogel of
LEWIS BRISBOIS BISGAARD & SMITH LLP

SBV
Enclosure
cc: James Jimmerson, Esq.
Martin Little, Esq.
Katherine Gordon, Esq.

133 Nev. 213
Supreme Court of Nevada.

Robert Scotlund VAILE, Appellant,
v.
Cisilie A. VAILE, n/k/a Cisilie A. Porsboll, Respondent.
Robert Scotlund Vaile, Appellant,
v.
Cisilie A. Vaile, n/k/a Cisilie A. Porsboll, Respondent.

No. 61415, No. 62797
|
FILED JUNE 22, 2017

Synopsis

Background: Following divorce proceeding, the District Court, Clark County, Cheryl B. Moss, J., entered orders awarding ex-wife child support arrearages and penalties and holding ex-husband in contempt. Ex-husband appealed. The Court of Appeals, 2015 WL 9594467, affirmed in relevant part. Ex-husband petitioned for review.

[Holding:] After grant of review, the Supreme Court, en banc, Douglas, J., held that Nevada child support order, rather than competing support order issued in Norway, controlled.

Affirmed.

See also 268 P.3d 1272.

West Headnotes (6)

[1] **Child Support**
International Issues

Norway child support order was a competing order to Nevada child support order, rather than a modification of the Nevada order, and thus correct inquiry in instant Nevada child support proceeding was which order controlled rather than whether Nevada court had modification jurisdiction, where Norway order did not claim to modify the Nevada order. Nev. Rev. St. §§ 130.207, 130.611.

1 Cases that cite this headnote

[2] **Child Support**
International Issues

Nevada child support order, rather than competing support order issued in Norway, controlled in child support arrearage proceeding, where Norway order did not clearly establish Norway's continuing and exclusive jurisdiction, and record did not establish that both ex-wife and ex-husband consented to Norway's continuing and exclusive jurisdiction over the matter. Nev. Rev. St. § 130.207(2).

1 Cases that cite this headnote

[3] **Contempt**
Decisions reviewable

An order that solely concerns contempt is not appealable.

5 Cases that cite this headnote

[4] **Contempt**
Decisions reviewable

If a contempt finding or sanction is included in an order that is otherwise independently appealable, the reviewing court has jurisdiction to hear the contempt challenge on appeal. Nev. R. App. P 3A(b)(8).

8 Cases that cite this headnote

[5] **Child Support**
Decisions reviewable

Appellate court had jurisdiction to hear ex-husband's challenge to contempt findings and sanctions imposed by trial court, even though orders solely concerning contempt were not appealable, where contempt order also included an order determining which of two child support orders controlled. Nev. R. App. P. 3A(b)(8).

6 Cases that cite this headnote

[6] **Child Support**

Assignment of errors and briefs

Reviewing court would decline to consider ex-husband's appellate challenge to contempt findings and sanctions arising from child support order, where ex-husband failed to assert cogent arguments or provide relevant authority in support of his claims.

2 Cases that cite this headnote

**792 Consolidated appeals from district court orders in a child support arrearages matter. Eighth Judicial District Court, Family Court Division, Clark County; Cheryl B. Moss, Judge.

Attorneys and Law Firms

Robert Scotlund Vaile, Wamego, Kansas, in Pro Se.

Willick Law Group and Marshal S. Willick, Las Vegas, for Respondent.

BEFORE THE COURT EN BANC.

OPINION

By the Court, DOUGLAS, J.:

*214 In this appeal, we are asked to consider: (1) whether a Nevada child support order controlled over a Norway order, and (2) whether this court lacks jurisdiction over appellant's challenges to contempt findings. We conclude that pursuant to NRS 130.207, the Nevada child support order controls. We further conclude that this court has jurisdiction over the challenges to contempt findings and sanctions in the order appealed from in Docket No. 61415, but we need not consider them because appellant has failed to assert cogent arguments or provide relevant authority in support of his claims. Thus, we affirm the judgments of the district court.

FACTS AND PROCEDURAL HISTORY

This appeal involves a complex factual background that culminated in a divorce decree entered by a Nevada district court and a dispute over custody of the parties' children. This court first encountered this case in 2000 and resolved the matter in 2002. *See Vaile v. Eighth Judicial Dist. Court (Vaile I)*, 118 Nev. 262, 44 P.3d 506 (2002). Appellant Robert Scotlund Vaile and respondent Cisilie Porsboll were married in Utah in 1990 and filed for divorce in Nevada in 1998. *Id.* at 266–67, 44 P.3d at 509–10. Vaile is a citizen of the United States, while Porsboll is a citizen of Norway. *Id.* at 266, 44 P.3d at 509. Their children habitually resided in Norway. *Id.* at 277, 44 P.3d at 516.

We encountered the case again in 2009 and resolved the matter in 2012. *See Vaile v. Porsboll (Vaile II),* 128 Nev. 27, 268 P.3d 1272 (2012). Following their divorce, the district court entered an order imposing statutory penalties against Vaile due to child support arrearages. *Id.* at 29, 268 P.3d at 1273. "[W]e address[ed] the district court's authority to enforce or modify a child support order that a Nevada district court initially entered," even though "neither the parties nor the children reside[d] in Nevada." *Id.* at 28, 268 P.3d at 1273. Ultimately, we reversed the district court's order and remanded the matter, holding that: (1) the district court lacked subject matter jurisdiction to modify the **793 child support obligation pursuant to the Uniform Interstate Family Support Act (UIFSA), and (2) setting the support obligation at a fixed amount constituted a modification of the support obligation. *Id.* at 33–34, 268 P.3d at 1276–77. However, we noted that because no other jurisdiction had entered an order regarding child support, the order from Nevada controlled. *Id.* at 31, 268 P.3d at 1275. In a footnote, we stated that because the parties alluded to a Norway child support order, "on remand, the district court must determine whether such an order exists and assess its bearing, if any, on the district court's enforcement of the Nevada support order." *215 *Id.* at 31 n.4, 268 P.3d at 1275 n.4. On remand, the district court determined that Norway entered a child support order; however, the court concluded that the Nevada support order controlled because Norway lacked jurisdiction to modify the Nevada order.

These consolidated appeals followed. In Docket No. 61415, Vaile challenges a district court order awarding Porsboll child support arrearages and penalties and reducing them to judgment, as well as finding him in contempt of court. In Docket No. 62797, Vaile challenges an order finding him in default for failure to appear, sanctioning him for violating court orders, and finding him in further contempt of court for failing to pay child support.

On appeal, the court of appeals issued an order, in pertinent part, concluding that Nevada's child support order controlled

over Norway's order. *See Vaile v. Vaile*, Docket Nos. 61415 & 62797 (Order Affirming in Part, Dismissing in Part, Reversing in Part, and Remanding, Dec. 29, 2015). The court further concluded that it lacked jurisdiction to consider Vaile's challenges to his contempt findings. *Id.* On rehearing, the court of appeals clarified its previous order but still affirmed its conclusions that Norway lacked jurisdiction to modify the Nevada decree and the Nevada decree was the controlling child support order. *See Vaile v. Vaile*, Docket Nos. 61415 & 62797 (Order Granting Rehearing in Part, Denying Rehearing in Part, and Affirming, Apr. 14, 2016). Thereafter, Vaile filed a petition for review, which this court granted. *See Vaile v. Vaile*, Docket Nos. 61415 & 62797 (Order Granting Petition for Review, Sept. 22, 2016). This court determined that two issues in the petition warrant review: (1) "whether the Nevada child support order controlled under the appropriate [UIFSA] statute," and (2) "whether the Court of Appeals lacked jurisdiction to consider [Vaile's] challenges to the district court's contempt findings and sanctions." *Id.* [1]

1 As to Vaile's remaining issues that are not addressed in our opinion, we affirm the district court.

DISCUSSION

Whether the Nevada child support order controls

[1] The parties dispute whether the Nevada or Norway child support order controls in this case. According to Vaile, the Norway child support order controls pursuant to NRS 130.207. We disagree and conclude that the Nevada order controls.

The UIFSA, codified in NRS Chapter 130, is a uniform act enacted in all 50 states that "creates a single-order system for child support orders, which is designed so that only one state's support order is effective at any given time." [2] ***216** *Vaile II*, 128 Nev. at 30, 268 P.3d at 1274. "To facilitate this single-order system, UIFSA provides a procedure for identifying the sole viable order, referred to as the controlling order ...." *Id.*

2 NRS 130.105 provides that tribunals in Nevada will apply NRS Chapter 130 to foreign support orders. Further, 42 U.S.C. § 659a(a) (2012) provides that the U.S. government can enter into a reciprocating agreement concerning support orders with a foreign country and the U.S. has, in fact, entered into such an agreement with Norway, *see* Notice of Declaration of Foreign Countries as Reciprocating Countries for the Enforcement of Family Support (Maintenance) Obligations, 79 Fed. Reg. 49,368 (Aug. 20, 2014).

NRS 130.205(1) requires three things in order for Nevada to have continuing and exclusive jurisdiction to modify a child support order: (1) a court in this state issued the order consistent with the laws of this state; (2) the order is the controlling order; and (3) either the state is the residence of one of the ****794** parties or of the child, or the parties have consented to the court's continuing jurisdiction. Thus, even if no party resides in Nevada, "the parties [may] consent in a record or in open court that the tribunal of this State may continue to exercise jurisdiction to modify its order." NRS 130.205(1)(b).

Under two circumstances Nevada may modify a registered child support order from another state. NRS 130.611. The first requires that (1) none of the parties, including the child, reside in the issuing state; (2) the party seeking modification is a nonresident of Nevada; and (3) "[t]he respondent is subject to the personal jurisdiction of the tribunal of this State." NRS 130.611(1)(a). The second requires that (1) Nevada is the child's state of residence or a party is subject to the personal jurisdiction of the tribunal of Nevada, and (2) all parties have consented to Nevada's jurisdiction in the issuing state. NRS 130.611(1)(b).

NRS 130.611 only applies, however, when the tribunal of Nevada attempts to modify another state's child support order. If, on the other hand, two competing child support orders exist, NRS 130.207 will establish which order controls. NRS 130.611(3). Here, the Norway order did not claim to modify the Nevada order. As a result, the requirements for modification jurisdiction pursuant to NRS 130.611 do not apply. Because there were two competing child support orders in this case, the correct inquiry is which order controlled under NRS 130.207.

[2] NRS 130.207(2) determines which child support order controls when both a Nevada court and a foreign country issue child support orders. In relevant part, a tribunal of Nevada with personal jurisdiction shall apply the following specific rules to conclude which order controls: (1) "[i]f only one of the tribunals would have continuing and exclusive jurisdiction under [NRS Chapter 130], the order of that tribunal controls"; (2) "[i]f more than one of the tribunals would have continuing and exclusive jurisdiction, ... an order issued by a tribunal in the current home state of the child controls, or if an order has not been issued in the current home state of the child, the order most recently issued controls"; and

(3) "[i]f none of the tribunals *217 would have continuing and exclusive jurisdiction, ... the tribunal of [Nevada] shall issue a child-support order which controls." NRS 130.207(2)(a)-(c).

Here, Porsboll applied for stipulation of child support in Norway, and an administrative order concerning child support was ultimately issued. However, the order does not clearly establish Norway's continuing and exclusive jurisdiction under NRS Chapter 130. Further, the record does not establish that both parties consented to Norway's continuing and exclusive jurisdiction over this matter. Accordingly, NRS 130.207(2)(a) applies and the Nevada order controls. Thus, while the district court did not apply our procedural analysis, its conclusion was ultimately correct. *See Saavedra–Sandoval v. Wal–Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) ("This court will affirm a district court's order if the district court reached the correct result, even if for the wrong reason."). We affirm on this issue.

Whether this court lacks jurisdiction to consider the contempt challenges

Vaile contends that this court has jurisdiction to consider his challenges to his contempt sanctions because those sanctions arose from the underlying child support order. We agree.

[3] [4] [5] [6] As a preliminary matter, the order appealed from in Docket No. 62797 is not an appealable order because it solely concerns contempt. *See Pengilly v. Rancho Santa Fe Homeowners Ass'n*, 116 Nev. 646, 649, 5 P.3d 569, 571 (2000) (stating that "[n]o rule or statute authorizes an appeal from an order of contempt"). Thus, this court lacks jurisdiction to consider Vaile's challenges to that order. Nevertheless, the order appealed from in Docket No. 61415 pertained to child support and contempt. Pursuant to NRAP 3A(b)(8), Vaile can appeal from a special order entered after a final judgment, including an order determining which child support order controls. *See Lewis v. Lewis*, 132 Nev. ——, 373 P.3d 878, 881 (2016) (considering challenges to contempt findings and sanctions in an order that modified child custody). As a result, if the contempt finding or **795 sanction is included in an order that is otherwise independently appealable, this court has jurisdiction to hear the contempt challenge on appeal. Therefore, Vaile can challenge the contempt findings and sanctions in the order appealed from in Docket No. 61415. However, because Vaile has failed to assert cogent arguments or provide relevant authority in support of his claims, we need not consider his contempt challenges to the order appealed from in Docket No. 61415. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (providing that this court need not consider claims that are not cogently argued or supported by relevant authority).

*CONCLUSION

We conclude that pursuant to NRS 130.207, the Nevada child support order controls. We further conclude that this court has jurisdiction over the challenges to contempt findings and sanctions in the order appealed from in Docket No. 61415, but we need not consider them because Vaile failed to provide cogent arguments or relevant authority in support of his claims. Thus, we affirm the judgments of the district court.

We concur:

Cherry, C.J.

Gibbons, J.

Pickering, J.

Hardesty, J.

Parraguirre, J.

Stiglich, J.

All Citations

133 Nev. 213, 396 P.3d 791

406 P.3d 959 (Table)
Unpublished Disposition
This is an unpublished disposition. See Nevada Rules of Appellate Procedure, Rule 36(c) before citing.
Supreme Court of Nevada.

Ryan Ulysses GOUDIE, Appellant,
v.
Jennifer Margaret PACKARD–KEANE, Respondent.

No. 73962

FILED NOVEMBER 30, 2017

Attorneys and Law Firms

Ryan Ulysses Goudie

Walsh & Friedman, Ltd.

ORDER DISMISSING APPEAL

*1 This is a pro se appeal from several district court orders. Eighth Judicial District Court, Family Court Division, Clark County; Lisa M. Brown, Judge.

Our review of the documents submitted to this court pursuant to NRAP 3(g) and the record on appeal reveals jurisdictional defects. Specifically, it appears that none of the orders designated in the notice of appeal is substantively appealable. *See* NRAP 3A(b).

This court has jurisdiction to consider an appeal only when the appeal is authorized by statute or court rule. *Taylor Constr. Co. v. Hilton Hotels*, 100 Nev. 207, 678 P.2d 1152 (1984). The January 12, 2017, order denying the motion to modify the child's therapy schedule is not an appealable order.

The January 12, 2017, order denying appellant's motion to change custody would be appealable, but the notice of appeal was not filed until September 5, 2017, more than thirty days after service of written notice of entry, and it is therefore untimely. *See* NRAP 4(a)(1); NRAP 26(c).

The July 18, 2017, findings of fact and conclusions of law holding appellant in contempt for violating the mutual behavior order and the August 9, 2017, order awarding attorney fees as a sanction, are not appealable. No statute or court rule provides for an appeal from an order that solely concerns contempt, and attorney fees and costs imposed as a sanction for contempt are not independently appealable. *See Pengilly v. Rancho Santa Fe Homeowners Ass'n,* 116 Nev. 646, 649, 5 P.3d 569, 671 (2000) (recognizing that a contempt order entered in an ancillary proceeding is not appealable); *compare Vaile v. Vaile,* 133 Nev., Adv. Op. 30, 396 P.3d 791, 794 (2017); *and Lewis v. Lewis,* 132 Nev., Adv. Op. 46, 373 P.3d 878, 881 (2016) (considering challenges to contempt findings and sanctions in an order that modified child custody).

We lack jurisdiction, and we therefore

ORDER this appeal DISMISSED. [1]

1 We deny as moot appellant's motion for an extension of time to file the fast track statement.

All Citations

406 P.3d 959 (Table), 2017 WL 5956827

404 P.3d 411 (Table)
Unpublished Disposition
This is an unpublished disposition. See Nevada Rules of Appellate Procedure, Rule 36(c) before citing.
Supreme Court of Nevada.

Susan LEAVITT, f/k/a Susan Abbatangelo, Appellant,
v.
Anthony L. ABBATANGELO, Respondent.

No. 72953

FILED: OCTOBER 30, 2017

Attorneys and Law Firms

Law Offices of Kermitt L. Waters

The Jimmerson Law Firm, P.C.

ORDER DISMISSING APPEAL

This is an appeal from an order imposing attorney fees and costs as sanctions in an amount to be determined for a finding of contempt, directing appellant to comply with previous court orders, and setting a hearing on a further contempt charge. Eighth Judicial District Court, Family Court Division, Clark County; Linda Marquis, Judge.

***1** Our jurisdictional review indicated that the order was not appealable. No statute or court rule permits an appeal from an order holding a party in contempt or imposing attorney fees and costs as a sanction for contempt. In addition, the order appealed from directed further hearing on the amount of attorney fees and costs, and therefore appeared not to be final. This court issued an order to show cause directing appellant to demonstrate this court's jurisdiction.

In response, appellant has filed an amended notice of appeal from the district court's order finally imposing the attorney fees and costs in an amount certain. Finalizing the amount of attorney fees and costs does not solve the fundamental jurisdictional problem. No statute or court rule provides for an appeal from an order that solely concerns contempt, and attorney fees and costs imposed as a sanction for contempt are not independently appealable. *See Pengilly v. Rancho Santa Fe Homeowners Ass'n,* 116 Nev. 646, 649, 5 P.3d 569, 671 (2000) (recognizing that a contempt order entered in an ancillary proceeding is not appealable); *compare Vaile v. Vaile,* 133 Nev., Adv. Op. 30, 396 P.3d 791, 794 (2017); *and Lewis v. Lewis,* 132 Nev., Adv. Op. 46, 373 P.3d 878, 881 (2016) (considering challenges to contempt findings and sanctions in an order that modified child custody).

We lack jurisdiction, and we therefore

ORDER this appeal DISMISSED.

All Citations

404 P.3d 411 (Table), 2017 WL 4950058

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EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

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

BEFORE THE HONORABLE JERRY A. WIESE, II.

Hearing Date: 1/22/20
Hearing Time: 9:00 a.m.

ORDER GRANTING MOTION FOR CLARIFICATION OF SEPTEMBER 16, 2019 ORDER

THIS MATTER having come on for hearing on the 22nd day of January, 2020 on The Jimmerson Law Firm's Motion for Clarification of September 16, 2019 Order

Motion for Trial Setting, James M. Jimmerson, Esq. of The Jimmerson Law Firm, P.C. appearing on behalf of The Jimmerson Law Firm, P.C. and Katherine J. Gordon, Esq. of Lewis Brisbois Bisgaard & Smith LLP, appearing on behalf of Defendants Jaswinder S. Grover, M.D., Jaswinder S. Grover, M.D., Ltd. d/b/a Nevada Spine Clinic, Kevin Paul Debiparshad, M.D., Kevin P. Debiparshad PLLC d/b/a Synergy Spine and Orthopedics, and Debiparshad Professional Services d/b/a Synergy Spine and Orthopedics (collectively, "Defendants"), and the Court having reviewed the papers and pleadings on file herein, and for good cause appearing:

THE COURT FINDS THAT Judge Bare was disqualified because of comments made by Judge Bare in favor of James J. Jimmerson, Esq. which compared Mr. Jimmerson with Defendants' counsel based upon the length of time Judge Bare knew Mr. Jimmerson (25 years) versus Defendants' counsel (two weeks).

THE COURT FURTHER CLARIFIES THAT the basis for disqualification set forth in the September 16, 2019 Order was limited to the comments made by Judge Bare in favor of James J. Jimmerson, Esq. which compared Mr. Jimmerson with Defendants' counsel based upon the length of time Judge Bare knew Mr. Jimmerson versus Defendants' counsel, and for no other reason.

THE COURT FURTHER FINDS THAT the September 16, 2019 Order disqualifying Judge Bare should be construed as being specifically limited to this action only.

THE COURT FURTHER FINDS THAT the September 16, 2019 Order disqualifying Judge Bare should not be construed as supporting the conclusion that one should not reasonably believe that Judge Bare would be impartial in other actions where Mr. Jimmerson appears as counsel.

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/ / /

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THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT the Motion for Clarification of September 16, 2019 Order is granted and that the September 16, 2019 Order disqualifying Judge Bare is clarified as described herein.

Dated this 30TH day of MARCH, 2020.

DISTRICT COURT JUDGE

Submitted by:

JIMMERSON LAW FIRM, P.C.

/s/ James M. Jimmerson, Esq.
James J. Jimmerson, Esq.
Nevada Bar No. 000264
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Las Vegas, Nevada 89101
Attorneys for Plaintiff and The Jimmerson Law Firm, P.C.

Approved as to form and content:

LEWIS BRISBOIS BISGAARD & SMITH LLP

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Katherine J. Gordon, Esq.
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EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

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

NOTICE OF ENTRY OF ORDER

Please take notice that the Order Granting Motion for Clarification of September

/ / /

/ / /

16, 2019 Order was entered in the above-captioned action on March 31, 2020, a copy of which is attached hereto.

Dated this 1st day of April, 2020.

THE JIMMERSON LAW FIRM, P.C.

/s/ James J. Jimmerson, Esq.
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of The Jimmerson Law Firm, P.C. and that on this 1st day of April, 2020, I served a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER**, as indicated below:

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

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

S. Brent Vogel, Esq.
John Orr, Esq.
Katherine Gordon, Esq.
Lewis Brisbois Bisgaard & Smith LLP
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Las Vegas, NV 89118

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

/s/ James M. Jimmerson, Esq.
An employee of The Jimmerson Law Firm, P.C.

ORDR
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EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

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

BEFORE THE HONORABLE JERRY A. WIESE, II.

Hearing Date: 1/22/20
Hearing Time: 9:00 a.m.

ORDER GRANTING MOTION FOR CLARIFICATION OF SEPTEMBER 16, 2019 ORDER

THIS MATTER having come on for hearing on the 22nd day of January, 2020 on The Jimmerson Law Firm's Motion for Clarification of September 16, 2019 Order

Motion for Trial Setting, James M. Jimmerson, Esq. of The Jimmerson Law Firm, P.C. appearing on behalf of The Jimmerson Law Firm, P.C. and Katherine J. Gordon, Esq. of Lewis Brisbois Bisgaard & Smith LLP, appearing on behalf of Defendants Jaswinder S. Grover, M.D., Jaswinder S. Grover, M.D., Ltd. d/b/a Nevada Spine Clinic, Kevin Paul Debiparshad, M.D., Kevin P. Debiparshad PLLC d/b/a Synergy Spine and Orthopedics, and Debiparshad Professional Services d/b/a Synergy Spine and Orthopedics (collectively, "Defendants"), and the Court having reviewed the papers and pleadings on file herein, and for good cause appearing:

THE COURT FINDS THAT Judge Bare was disqualified because of comments made by Judge Bare in favor of James J. Jimmerson, Esq. which compared Mr. Jimmerson with Defendants' counsel based upon the length of time Judge Bare knew Mr. Jimmerson (25 years) versus Defendants' counsel (two weeks).

THE COURT FURTHER CLARIFIES THAT the basis for disqualification set forth in the September 16, 2019 Order was limited to the comments made by Judge Bare in favor of James J. Jimmerson, Esq. which compared Mr. Jimmerson with Defendants' counsel based upon the length of time Judge Bare knew Mr. Jimmerson versus Defendants' counsel, and for no other reason.

THE COURT FURTHER FINDS THAT the September 16, 2019 Order disqualifying Judge Bare should be construed as being specifically limited to this action only.

THE COURT FURTHER FINDS THAT the September 16, 2019 Order disqualifying Judge Bare should not be construed as supporting the conclusion that one should not reasonably believe that Judge Bare would be impartial in other actions where Mr. Jimmerson appears as counsel.

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/ / /

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THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT the Motion for Clarification of September 16, 2019 Order is granted and that the September 16, 2019 Order disqualifying Judge Bare is clarified as described herein.

Dated this 30TH day of MARCH, 2020.

DISTRICT COURT JUDGE

Submitted by:

JIMMERSON LAW FIRM, P.C.

/s/ James M. Jimmerson, Esq.
James J. Jimmerson, Esq.
Nevada Bar No. 000264
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Las Vegas, Nevada 89101
Attorneys for Plaintiff and The Jimmerson Law Firm, P.C.

Approved as to form and content:

LEWIS BRISBOIS BISGAARD & SMITH LLP

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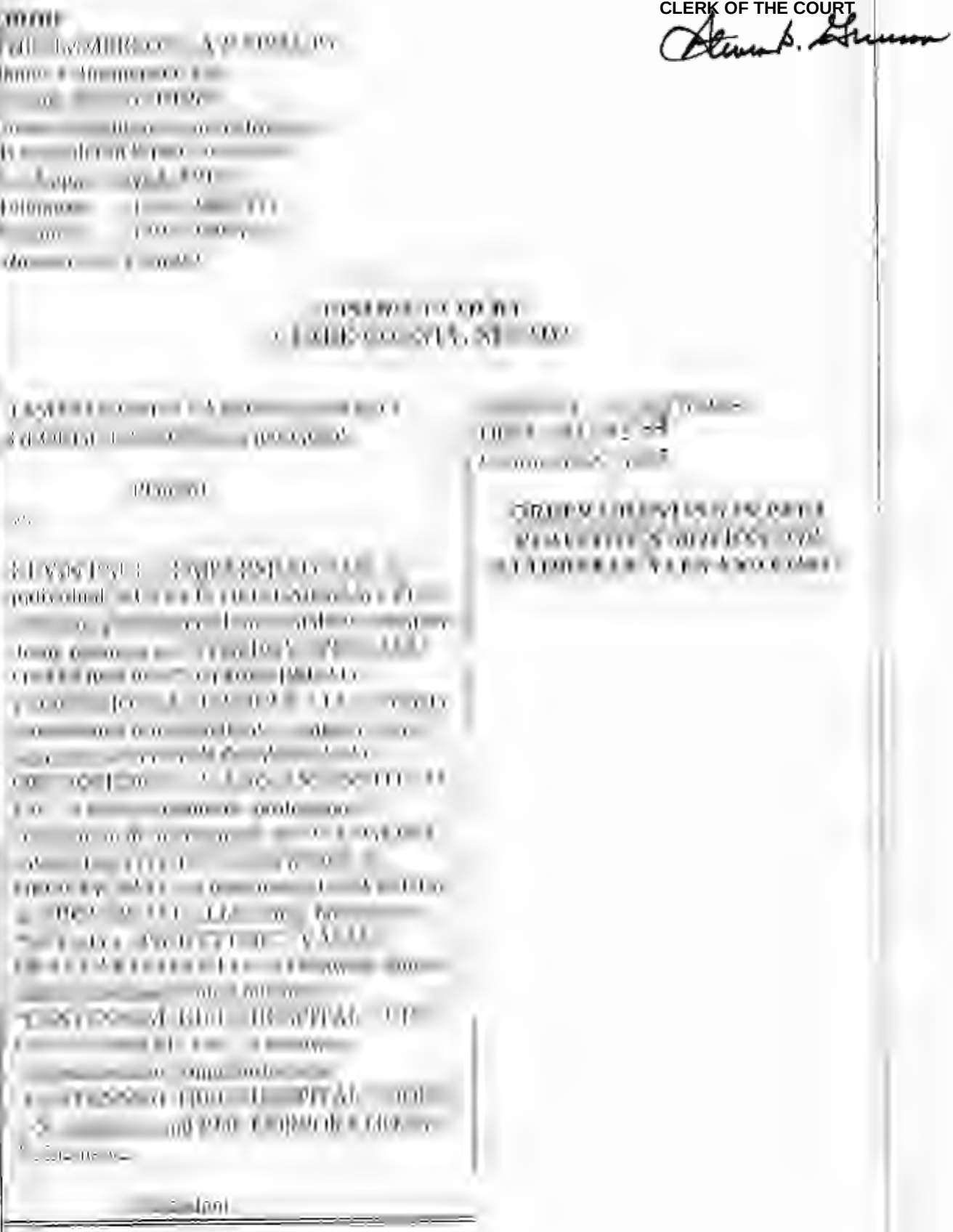

P.App. 2638

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EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

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

NOTICE OF ENTRY OF ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR ATTORNEYS' FEES AND COSTS

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Please take notice that the Order Granting In Part Plaintiff's Motion for Attorneys' Fees and Costs was entered in the above-captioned action on April 7, 2020, a copy of which is attached hereto.

Dated this 7 day of April, 2020.

THE JIMMERSON LAW FIRM, P C

s . Jimmerson, Esq.
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Attorneys for Plaintiff and The Jimmerson Law Firm, P.C.

THE JIMMERSON LAW FIRM, P.C.
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of The Jimmerson Law Firm, P.C. and that on this 7th day of April, 2020, I served a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR ATTORNEYS' FEES AND COSTS**, as indicated below:

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

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

S. Brent Vogel, Esq.
John Orr, Esq.
Katherine Gordon, Esq.
Lewis Brisbois Bisgaard & Smith LLP
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, NV 89118

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

A oyee of The Jimmerson Law Firm, P.C.

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Attorneys for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendant.

CASE NO.: A-18-776896-C
DEPT. NO.: ~~32~~ 4
Courtroom ~~3C~~ 12D

ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR ATTORNEYS' FEES AND COSTS

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This matter having come for before the Court on December 5, 2019, on *Plaintiff's Motion for Mistrial and for Attorneys' Fees and Costs,* filed August 4, 2019, and Defendants' Opposition thereto, and *Countermotion for Attorneys' Fees and Costs Pursuant to NRS 18.070,* filed August 26, 2019, and the supplemental filings by both Plaintiff and Defendant in support of their respective Motions,, Plaintiff Jason George Landess, appearing by and through his counsel of record, James M. Jimmerson, Esq. of The Jimmerson Law Firm, P.C. and Martin A. Little, Esq. of Howard & Howard Attorneys PLLC, Defendants Kevin Paul Debiparshad, M.D., Kevin P. Debiparshad PLLC d/b/a Synergy Spine and Orthopedics, and Debiparshad Professional Services d/b/a Synergy Spine and Orthopedics, Jaswinder S. Grover, M.D., Ltd. d/b/a Nevada Spine Clinic, appearing by and through their counsel of record, S. Brent Vogel, Esq. and Katherine J. Gordon, Esq. of Lewis Brisbois Bisgaard & Smith LLP, and the Court having reviewed the papers and pleadings on file, transcripts, and exhibits, having heard oral argument, and being fully advised in the premises, and good cause appearing:

THE COURT HEREBY FINDS that Plaintiff's Motion for a Mistrial was granted on September 9, 2019, which Order is wholly incorporated herein by reference as if set forth in full. The only issue before this Court is whether the Court should award attorneys' fees and costs due to the mistrial.

THE COURT FURTHER FINDS that the Defendant, pursuant to N.R.S. 18.070(2), purposely caused the mistrial in this case to occur due to the Defendant knowingly and intentionally injecting into the trial evidence of alleged racism by the use of Exhibit 56, page 44. Defendant's counsel, after examining Mr. Dariyanani regarding the "Burning Embers" email included in Exhibit 56, specifically asked the witness in follow-up: "You still don't take that as being at all a racist comment?" Such evidence of racism was not admissible to prove the Plaintiff's alleged bad character. Further, even though it was admitted without objection, it could only have been used insofar as it did not create plain error. Defendant's counsel is charged with knowing that the injection of such racially inflammatory evidence

was improper in the trial. It was reasonably foreseeable to the Defendant that the Court would declare a mistrial due to the Defendant injecting such racially inflammatory evidence.

THE COURT FURTHER FINDS that it is discretionary under N.R.S. 18.070(2) as to whether a court imposes costs and reasonable attorneys' fees. The Court has determined that the Plaintiff be awarded reasonable and necessarily incurred costs of $118,606.25 pursuant to N.R.S. 18.070(2). Defendants did not contend that Plaintiff's requested costs were not reasonable or necessarily incurred or that they were not otherwise taxable.

THE COURT FURTHER FINDS that Defendants did not contend that Plaintiffs' requested attorney's fees were not reasonable under *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345 (1969). That notwithstanding, the Court has determined to not award attorneys' fees to Plaintiff. THE COURT FURTHER FINDS that as Defendants are the legal cause for the mistrial, there is no basis to grant their countermotion for attorneys' fees and costs.

NOW THEREFORE:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Attorneys' Fees and Costs is hereby GRANTED in part. Plaintiff is awarded their reasonable and necessarily incurred costs of $118,606.25 pursuant to N.R.S. 18.070(2).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court further has determined to not award any attorneys' fees to Plaintiff.

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IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants' Countermotion for Attorneys' Fees and osts is hereby DENIED

Dated this 6 day of , 2020.

ISTRI C URT JUDGE

Submitted by:

THE JIMMERSON LAW FIRM, P.C.

s J. immerson, Esq.
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HOWARD & HOWARD ATTORNEYS PLLC
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Alexander Villamar, Esq.
3800 Howard Hughes Pkwy., # 1000
Las Vegas, NV 89169
Attorneys for Plaintiff

Ap roved as to form and content:

LEWIS BRISBOIS BISGAARD & SMITH LLP

Refused to sign

S. Brent Vogel, Esq.
Katherine J. Gordon, Esq.
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Attorneys for Defendants

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A-18-776896-C
Granting in Part PLTFF's Motion for Atty's Costs.

RESP

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EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

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

PLAINTIFF'S RESPONSE BRIEF REGARDING ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR ATTORNEYS' FEES AND COSTS,

AND

MOTION FOR CLARIFICATION AND/OR AMENDMENT OF THE ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR ATTORNEYS' FEES AND COSTS

COMES NOW Plaintiff, Jason Landess ("Plaintiff"), by and through his counsel, James J. Jimmerson, Esq. and James M. Jimmerson, Esq. of The Jimmerson Law Firm, P.C., and Martin A. Little, Esq. of Howard and Howard, PLLC, hereby submits this Response Brief Regarding Order Granting in Part Plaintiff's Motion for Attorney's Fees and Costs, and Motion for Clarification and/or Amendment of the Order Granting in Part Plaintiff's Motion for Attorney's Fees and Costs (the "Response" or the "Motion").

This Response and Motion is made and based upon the papers and pleadings on file in this action, the following memorandum of points and authorities, the exhibits attached hereto, and any argument made by counsel during any hearing on this matter.

DATED this 10th day of April, 2020.

THE JIMMERSON LAW FIRM, P.C

/s/ James J. Jimmerson, Esq.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND STATEMENT OF FACTS

As this Court recalls, this is a medical malpractice action that went to trial in July 2019. On Day 10 of trial, Defendants introduced into evidence the so-called "Burning Embers" email and improperly suggested that Plaintiff was a racist in front of the jury, resulting in the issuance of a mistrial. On April 7, 2020, this Court entered its Order Granting in Part Plaintiff's Motion for Attorney's Fees and Costs (the "Order")[1] which specifically found that Defendants "purposely caused the mistrial in this case to occur due to the Defendant[s] knowingly and intentionally injecting into the trial evidence of alleged racism…" Exhibit 1 at 2, a true and correct copy of the Order Granting in Part Plaintiff's Motion for Attorney's Fees and Costs, attached hereto. As part of the Order, the Court, pursuant to NRS 18.070(2), awarded Plaintiff $118,606.25 in costs. *Id.* at 3. As such, Plaintiff is now entitled to have that $118,606.25 in costs repaid by Defendants and Plaintiff respectfully requests that the Court clarify its Order to require Defendants to pay Plaintiff those costs by a date certain in the immediate future.

As the Court recalls, the Court held a status check on December 17, 2019, just days after the issuance of the Minute Order reflecting the Court's decision as to the competing motions for attorney's fees and costs. At the end of the status check, Defendants' counsel raised the issue of enforcement of the Court's decision to award Plaintiff his costs, stating, "And we haven't discussed it yet, but we would obviously seek to stay execution—" Exhibit 2 at 14:3-4, a true and correct copy of the Recorder's Transcript of Proceedings from December 17, 2019, attached hereto. Counsel had a brief back and forth (with Plaintiff's counsel stating that Plaintiff would oppose any efforts to

[1] The entry of the Order moots Defendants' request that "this court reject Plaintiff's proposed Order and adopt Defendants' Nevada law-compliant version." Br. at 14. Defendants' Opening Brief Re Competing Orders Granting in Part, Denying in Part Plaintiff's Motion for Attorney Fees and Costs and Denying Defendants' Countermotion for Attorney Fees and Costs (the "Opening Brief") is cited herein as "Br. at __."

stay execution) and ultimately the Court declined at that time to get into the details of enforcement of the cost award, stating, "Bring that up as another issue of everything so I get a parameter of -- of how I want to do that.." *Id.* at 14:22-23. The Court suggested that she "maybe [will] even ask [counsel] to brief it," and that she wanted to "have a chance to look at it and figure out what [she] want[ed] to do." *Id.* at 14:9; 14:21.

What was clear from even that brief colloquy—Defendants were looking to delay, if not outright avoid, paying Plaintiff the awarded costs, and Plaintiff was going to oppose such an effort. In resisting enforcement of the Order, Defendants began by falsely claiming that the Court's "Minute Order" stated that any order awarding costs "could be used as an offset" from a later post-judgment award (Defendants admit the same in their Opening Brief). Br. at 9. Defendants' position was admittedly erroneous as the Court's December 13, 2019 Minute Order contained no such offset requirement and the transcript of the hearing confirmed the same. *Id.*

Thereafter, Defendants changed their position to argue that the award of costs was not an appealable order and therefore could not be reduced to judgment. *See* Exhibit 3 at 6-7, a true and correct copy of the February 25, 2020 letter from James J. Jimmerson, Esq. to the Court (*see* the emails from February 13 and 20 enclosed therein), attached hereto. Thereafter, the parties' counsel sent correspondence back and forth between each other and then to the Court disputing whether the cost award could be reduced to judgment. *Id.*; *see also*, Br. Exhibits A, K, L. After receipt of the parties' correspondence, the Court set a briefing schedule.

While these communications were taking place, and Defendants' counsel maintaining that "this award was not a final judgment [ ] as it did not adjudicate all of the pending issues in the case" (Br. at Exhibit K.), Defendants filed their Motion for Relief From Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial on February 28, 2020 (Exhibit 4, a true and correct copy of such "60(b) Motion," attached hereto, without exhibits). In that Motion, Defendants sought relief from the order granting the mistrial pursuant to NRCP 60(b). *Id.* at 2.

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This is significant because the position taken in Defendants' 60(b) Motion flatly contradicts the arguments made by Defendants concerning whether the cost award is a final judgment. The Motion seeks relief from the order granting the mistrial under NRCP 60(b), which is only applicable to final judgments. *See Tupper v. Kroc*, 88 Nev. 483, 484, 500 P.2d 571, 571 (1972) ("Rule 60(b) invests the court with a discretionary power to relieve a party from a final judgment…"). However, if what Defendants represented to the Court about the definition of a final judgment in their February 25, 2020 correspondence were accurate (which it is not)—that an order is not a final judgment if it does not adjudicate all of the pending issues in the case—Defendants have no basis for which to file their 60(b) Motion from the order granting a mistrial because it was not an order that "adjudicate[d] all of the pending issues in the case," and thus not a final order for which NRCP 60(b) relief may be granted. Br. at Exhibit K. And yet Defendants still filed their 60(b) Motion.

Beyond presenting mutually exclusive theories of the definition of final judgment to the Court, in their Opening Brief, Defendants continue to materially misrepresent the procedural history of this case. For example, Defendants attempt to rewrite history by claiming that Plaintiff submitted to the Court an Order and Judgment in a single document (as opposed to a separate order and subsequent judgment), stating, "Months later, per this Court's earlier instruction, Plaintiff submitted his proposed Order and Judgment Granting in Part Plaintiff's Motion for Attorney's Fees and Costs." Br. at 8. However, everything in that statement is false. Plaintiff never submitted to the Court a proposed order and judgment on the motion for attorney's fees. To the contrary, on January 8, 2020 (just over three weeks after the Court issued its minute order on the attorney's fees motion—not "months later" as Defendants alleged), Plaintiff's counsel hand-delivered a copy of the proposed order and judgment to Defendants' counsel.[2] After

[2] Defendants attach a copy of this proposed order and judgment to their Opening Brief (as Exhibit J) as if Plaintiff submitted the same to the Court, but tellingly fail to attach any correspondence evidencing Plaintiff's submission to the Court (which they cannot do because it was never submitted to the Court).

several back and forth communications with Defendants' counsel over the proposal, Plaintiff submitted the proposed order removing the judgment portion to the Court in a letter dated February 25, 2020. Exhibit 3.[3] Later that same day, Defendants submitted their competing order to the Court. *See* Br. at Exhibit K.

Substantively, Defendants' Opening Brief asserts two primary contentions—[1] that the cost award may not be reduced to judgment (claiming that it is not a final order and that it may not be certified as final under NRCP 54(b)); and [2] that the cost award may become an offset to a post-judgment award of attorney's fees and costs under NRCP 68. As detailed herein, neither argument is meritorious. Indeed, Defendants' offset claim is particularly flimsy as Defendants have failed to present to the Court any jurisprudence in support thereof.

However, what is most significant (and certainly most troubling) in Defendants' Opening Brief is the contention that allowing Plaintiff to attempt to execute on the cost sanction would be a waste of resources because Defendants promise to erect every procedural hurdle they can to deny Plaintiff the reimbursement of his costs.[4] Br. at 15-16. In their Opening Brief Defendants brazenly proclaim:

> Reducing [the Order] to judgment for immediate collection would waste the resources of all participants… **if the Court allowed Plaintiff to execute on the Order immediately**, **Defendants would be entitled to seek a stay of that execution**. Ultimately, **delays caused by those proceedings could possibly extend until there would be no meaningful temporal distinction between executing on the subject Order and executing on any post-judgment fees and costs arising from the eventual jury verdict**.

Id. (emphasis supplied). Defendants' argument, stated another way, is that the Court should not consider reducing the cost award to judgment because Defendants will

[3] Conspicuously absent from Defendants' brief is a copy of this February 25, 2020 letter which specifically stated that an order and a judgment were being submitted separately as separate documents.

[4] It is particularly ironic how Defendants attempt to appeal to the preservation of the parties' resources when it was their misconduct that wasted over $118,000.00 of Plaintiff's resources.

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ultimately delay Plaintiff's ability to collect on the award until post-judgment collection efforts commence.

This admission from Defendants must call the Court to action; it must serve as another reminder that Defendants cannot be trusted to act appropriately—that the past is prologue and that the closer Plaintiff gets to trial (and to his opportunity for complete relief), the more desperate, malevolent, and reckless Defendants will be.[5]

As a result of Defendants' conduct, combined with this admission, the Court should clarify or amend the Order to explicitly require Defendants to promptly pay Plaintiff the full amount of the award of sanctions. Rather than reduce the Order to judgment (which, as described below, the Court could do by certifying the same as final under NRCP 54(b)), and open the door for Defendants to further delay Plaintiff's rightful collection of his cost award, the Court can avoid such a delay by simply requiring Defendants' immediate payment of the costs.

As detailed below, it is critical that awards of sanctions be enforced at the time of their issuance and not after the entry of final judgment. Sanctions serve to [1] compensate an innocent party for litigation abuse by his/her opponent; and [2] to deter future misconduct. Delaying the payment or collection of a sanction award defeats both—the victim does not get compensation and the cotemnor is left undeterred. The interest the Court has in seeing the innocent party made whole is particularly strong in cases, like here, where an opponent purposely causes a mistrial, when the victim has their expenditures for trial wasted and their day in court further delayed.

Plaintiff, like the other victims of litigation misconduct leading to a mistrial, has suffered substantial financial harm as a result of Defendants' misconduct. As this Court has found, Plaintiff incurred over $118,000.00 in costs in asserting his claims at trial—monies that Defendants must repay to Plaintiff. However, without Court intervention requiring Defendants to make that payment, Defendants will not only have successfully

[5] Defendants' willingness to maintain two mutually exclusive positions before the Court is just another example of their desperation.

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delayed the adjudication of Plaintiff's claims, but will also have forced him to pay for trial **twice** before getting a verdict even once. As detailed herein, overwhelming authority supports the issuance of an order compelling Defendants to pay the Order **immediately**.

Alternatively, were the Court to prefer to reduce the Order to judgment under NRCP 54(b), the Court may do so, but Defendants have already promised that such action will cause further delay in Plaintiff's collection of the award of sanctions. The Court should avoid such an unjust result and instead order Defendants to pay the sanctions award forthwith.

II. LEGAL ARGUMENT

A. Legal Standard

The Court is well aware that it may construe its own orders as necessary and appropriate. *See*, *e.g.*, *Murphy v. Murphy*, 64 Nev. 440, 449, 183 P.2d 632, 636 (1947) ("It is well settled that a court of general jurisdiction has jurisdiction to construe its judgments and decrees at any time."). Indeed, "[a] district court of the state has inherent power to construe its judgments and decrees for the purpose of removing any ambiguity." *Kishner v. Kishner*, 93 Nev. 220, 225, 562 P.2d 493, 496 (1977). This includes issuing additional orders in furtherance of a prior decree. *See Smith v. Smith*, 100 Nev. 610, 614, 691 P.2d 428, 431 (1984). Similarly, courts have the discretion and power to "amend, correct, resettle, modify, or vacate, as the case may be, an order previously made and entered on a motion in the progress of the cause or proceeding." *Trail v. Faretto*, 91 Nev. 401,403, 536 P.2d 1026, 1027 (1975). Accordingly, Plaintiff respectfully requests that the Court clarify and/or amend the Order to confirm that Defendants are to immediately pay Plaintiff's costs incurred pursuant to NRS 18.070(2).

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B. The Court Should Clarify Its Order to Require Defendants to Immediately Pay the Awarded Costs or, in the Alternative, Certify the Order Under NRCP 54(b)

1. Defendants' Misconduct Cost Plaintiff Over $118,000.00 in Expenses—Funds Necessary to Prosecute His Claims at Trial. The Court Should Clarify Its Order to Command Defendants to Make Payment Immediately.

As a result of Defendants' misconduct during trial, the over $118,000.00 Plaintiff incurred in costs was effectively wasted. In order to proceed to trial for the second time, Plaintiff will have to incur those costs all over again (and now in this difficult economic climate). Defendants should not be able to profit from their misconduct by forcing Plaintiff to have to spend another $118,000.00 just to proceed to trial. Indeed, relief from Defendants' actions can only be achieved from Defendants' reimbursement of Plaintiff's costs **before** the next trial commences. Otherwise, Defendants will have not only successfully delayed Plaintiff's day in court but will have also made it substantially more expensive for Plaintiff to have that day in Court. The purpose of issuing sanctions—to remedy a litigation harm and to deter future misconduct[6]—can only be achieved by compelling Defendants to pay the cost award immediately.

a. The Purpose of Issuing Sanctions is Defeated If Payment Can Be Deferred Until After Judgment on the Merits

Courts across the country have reiterated the need to enforce payment of sanctions contemporaneous with the with the misconduct at issue. The Ninth Circuit held the same in *Matter of Yagman*, 796 F.2d 1165, 1184 (9th Cir. 1986), stating, "In the

[6] The Nevada Supreme Court has repeatedly held that the purpose of sanctions is to be remedial to the innocent party and to deter future misconduct by the offending party. *See Alper v. Eighth Jud. Dist. Ct.*, 131 Nev. 430, 434, 352 P.3d 28, 31 (2015) ("Civil sanctions, on the other hand, are remedial in nature…"); *Jones v. Eighth Jud. Dist. Ct.*, 130 Nev. 493, 499, 330 P.3d 475, 480 (2014) ("[R]emedies like sanctions are available and adequate to address the abusive litigation.") (citation omitted); *Matter of Estate of Herrmann*, 100 Nev. 149, 152, 679 P.2d 246, 247-48 (1984) ("It is also appropriate for us to impose sanctions to deter like dilatory tactics in the future."); *Imperial Palace v. Dawson*, 102 Nev. 88, 92, 715 P.2d 1318, 1321 (1986) ("after taking into account the legal efforts required to protect Dawson's interests, we sanction Imperial Palace $7,500.00 to help defray Dawson's legal expenses."). Indeed, sanctions imposed for misconduct leading to a mistrial are essential to serve both objectives. "The ability to impose such sanctions serves the dual purposes of deterring flagrant misbehavior, particularly where the offending party may have deliberately provoked a mistrial, and compensating the innocent party for the attorney fees incurred during the mistrial." *Persichini v. William Beaumont Hosp.*, 607 N.W.2d 100, 109 (Mich. App. 1999), cited with approval by the Nevada Supreme Court in *Emerson v. Eighth Judicial District Court*, 127 Nev. 672, 680 n. 4, 263 P.3d 224, 229 (2011).

event of discovery abuses and other vexatious pre-trial behavior, for example, sanctions should be levied contemporaneously with the offending misconduct. The benefit provided by the policy of deterrence is lost if the court postpones imposition until the end of the case." *Id.*

The Court in *New York Life Ins. Co. v. Morales*, No. 06CV1022-B(BLM), 2008 WL 11338053, at *2 (S.D. Cal. July 23, 2008) similarly explained the importance of immediate enforcement of sanctions, holding:

> [B]oth the sanctionable behavior and the concrete harm that resulted have already occurred and will not be affected by further developments in the case. As such, there is no benefit to delaying imposition of sanctions. **Postponing the imposition and enforcement of sanctions would, however, increase the risk that the deterrent value of the sanctions would be lost**.

Id. (emphasis supplied).

Likewise, in *Cleveland Hair Clinic, Inc. v. Puig*, 106 F.3d 165, 168 (7th Cir. 1997), the Seventh Circuit held that prompt compliance with a sanctions order was essential. The Court stated, "Swift compliance is especially important when the genesis of the adverse ruling is misconduct in the litigation; **refusal to make amends compounds the infraction**… [E]ven pro se litigants who fail to pay sanctions forfeit their ability to continue litigating." *Id.* (emphasis supplied).

Additionally, the court in *Indus. Aircraft Lodge 707, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. United Techs. Corp., Pratt & Whitney Aircraft Div.*, 104 F.R.D. 471, 473-74 (D. Conn. 1985) explained that prompt enforcement of sanctions is necessary to ensure that the sanctions have the appropriate deterrent effect. The court stated:

> A delay in the execution of a Rule 37 sanctions order will also decrease its deterrence value. **A sanction is most effective as a deterrent if it follows closely on the heels of the offending conduct. The defendant asks the court to characterize the Order as a "tentative" award, subject to modification or vacatur at the time of final judgment. Rule 37(a)(4) does not envisage, much less require, a "tentative" award of costs and**

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> fees. No other discovery sanction available in the federal courts is required to be stayed pending entry of a final judgment… In any event, "tentative" awards would not serve to deter obstructive conduct by litigants in the course of discovery.

Id. (emphasis supplied).

b. The Court May Compel Defendants' Immediate Payment of Sanctions

Contrary to Defendants' arguments in their Opening Brief, enforcement of sanctions for litigation misconduct does not require entry of judgment. As stated in, *United States v. Smith*, 55 F. Supp. 2d 917, 920 (N.D. Ind. 1999), "Plainly, Rule 37 contemplates an interim award, and **does not require the entry of a simple judgment** (as the government asks the court to do). In short, Rule 37 empowers the court to order the payment of money, not to enter a simple judgment…" *Id.* (emphasis supplied). Indeed, Defendants' assertion that Plaintiff should not be able to immediately collect on the award because Defendants may prevail at trial—and in that event would have to attempt to collect the costs from Plaintiff—is without support or merit. The court in *Huizinga v. Genzink Steel Supply & Welding Co.*, No. 1:10-CV-223, 2012 WL 13018642, at *2 (W.D. Mich. June 12, 2012) explained defect in such reasoning as follows:

> **[T]he Court is unaware of any case law, court rule, or established local practice that permits deferring sanction payments until after the ultimate resolution of the litigation on the merits**, absent the parties' agreement to the contrary. Indeed, **adopting such an approach would frustrate the very purpose of Rule 37**, which is to foster compliance with the discovery process by deterring discovery abuses through sanction awards. Defendants' own words graphically illustrate the point: **in refusing to pay the sanctions for the untimely discovery, Defendants simply assert they will eventually win and claim their own sanctions of over $125,000.00. But proper and timely discovery must proceed regardless of who ultimately wins and loses on the merits, and the Rule 37 sanctions serve that purpose only when promptly applied and entered**. Defendants have provided no other justification for delaying payment for more than six months after the Magistrate Judge's Order was entered, and the Court concludes compensating Plaintiff for the enforcement of the Order is appropriate.

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Id. (emphasis supplied).

The Court in *Romero v. Wounded Knee, LLC*, No. CIV. 16-5024-JLV, 2018 WL 4178174, at *4 (D.S.D. Aug. 30, 2018) held similarly, stating, "If a sanctioned party could unilaterally refuse to pay until after the merits of the case were finally resolved, the deterrent and cost-shifting policies of Rule 37 would be eroded or eliminated." *Id.* (citation omitted). Consequently, the Court should find that not only is there no requirement that a final judgment be entered prior to enforcing payment of sanctions, delaying the payment of sanctions in such a fashion is detrimental to the fair administration of justice. An order requiring Defendants' payment should issue.

c. The Importance of Ensuring Prompt Payment of Sanctions is Heightened When the Sanctions are Necessitated by Misconduct Leading to a Mistrial Because the Innocent Party Needs Reimbursement

Decisional authority is replete with holdings that payment of sanctions for misconduct that causes a mistrial is necessary to achieve the sanctions' purpose. As stated in *Persichini*, the imposition of sanctions in this context is specifically designed to "compensat[e] the innocent party for the attorney fees incurred during the mistrial." *Id.*, 607 N.W.2d at 109, cited with approval by the Nevada Supreme Court in *Emerson*, 127 at 680 n. 4. The Ninth Circuit similarly emphasized that the requirement to pay sanctions was particularly appropriate when the sanctions were to compensate for the costs sustained as a result of a mistrial, stating, "The district court's decision to require Ford to pay compensatory sanctions to the court was well within the court's discretion, particularly because the payments were carefully tailored to reimburse the court for those costs that were incurred as a result of the mistrial." *Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1118 (9th Cir. 2005). A similar emphasis on the compensatory nature of sanctions arising from a mistrial is found in *Allied Prop. & Cas. Ins. Co. v. Good*, 919 N.E.2d 144, 155 (Ind. Ct. App. 2009) where the court held, "Sanctions may include compensating the innocent parties for attorney's fees and other expenses incurred

during the mistrial. To hold otherwise would work an injustice against the innocent party." *Id.*

The holding in *Prime Group, Inc. v. O'Neill*, 848 S.W.2d 376, 379 (Tex. App. 1993) is particularly germane on this point. In *Prime Group*, the trial court issued a mistrial as a result of the defendants' misconduct. After granting the mistrial, the trial court awarded $33,624.49 in attorney's fees and costs to plaintiff and required defendants to pay the same in full within 63 days after the entry of the sanctions order. Defendants filed a petition for writ of mandamus, challenging, *inter alia*, the procedure that allowed the district court to require payment of the sanction before the entry of final judgment. The Texas Court of Appeals denied the petition, finding that a stay of the payment of the sanction was not necessary, and the sanctions order was not disturbed. This Court should similarly find that issuing a similar order to require Defendants to pay the sanctions would likewise best compensate Plaintiff from the effects of Defendants' misconduct.

2. The Awarded Sum is Presently Due and Owing and Not Subject to Any Potential Offset

As part of their desperate effort to avoid facing the consequences of their misconduct, Defendants argue, "NRCP 68 and Nevada statutes dealing with costs will determine which party will owe post-judgment fees and costs… [and] the costs award at issue here will merely offset the fees and costs Defendants will recover." Br. at 15. Defendants are in error. Nothing in Nevada law requires Plaintiff to wait until after the second trial to collect his costs from the first. Plaintiff suffered significant harm as a result of Defendants' misconduct and the only appropriate remedy is immediate reimbursement of the costs he incurred in the first trial. Defendants' arguments to the contrary, including their self-serving interpretation of NRCP 68, are utterly devoid of merit.

It is black letter law that the remedial and deterrent purposes of sanctions are only served if payment of the sanctions award is promptly required. *See, e.g., Matter of*

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Yagman, 796 F.2d at 1184 ("In the event of discovery abuses and other vexatious pre-trial behavior, for example, sanctions should be levied contemporaneously with the offending misconduct. The benefit provided by the policy of deterrence is lost if the court postpones imposition until the end of the case."); *Alper*, 131 Nev. at 434 ("Civil sanctions, on the other hand, are remedial in nature…"); *Jones*, 130 Nev. at 499 ("[R]emedies like sanctions are available and adequate to address the abusive litigation.") (citation omitted); *Herrmann*, 100 Nev. at 152 ("It is also appropriate for us to impose sanctions to deter like dilatory tactics in the future."); *Imperial Palace*, 102 Nev. at 92 ("[A]fter taking into account the legal efforts required to protect Dawson's interests, we sanction Imperial Palace $7,500.00 to help defray Dawson's legal expenses.").

Notwithstanding this authority, Defendants would have the Court conclude that the existence of an unaccepted offer of judgment completely prohibits issuance of orders requiring pre-judgment payment of attorney's fees or costs. Defendants cite to portions of NRCP 68(f), providing, "if an offeree rejects an offer of judgment and fails to obtain a more favorable judgment: (A) the offeree cannot recover any costs, expenses, or attorney fees… for the period after service of the offer and before the judgment." Br. at 15. In other words, Defendants' position is that if a defendant serves a plaintiff with an offer of judgment that is rejected, under NRCP 68, that defendant is thereafter immune from having to pay any potential interim awards of fees or costs because the Court does not know if it will have to later invoke NRCP 68's penalties (which may include a denial of the recovery of costs).[7] Defendants' argument has no basis in the law. Indeed, Defendants' construction of NRCP 68 is directly contrary to the purpose of the rule (to

[7] Defendants present the Court with the false hypothetical, "if Plaintiff were allowed to execute on the subject Order now, and then later he received an adverse verdict, Defendants would be forced to attempt to collect from him the amount they had previously paid," as if Plaintiff's entitlement to the cost award in the Order were contingent on prevailing at trial. Br. at 16. Such assertions are erroneous and conspicuously without any decisional authority presented in support thereof.

encourage settlement)[8] and would have the deleterious effect of leaving innocent victims of litigation misconduct without any recourse until after judgment has been entered. Justice delayed would truly be justice denied.

Unsurprisingly, courts have roundly rejected Defendants' interpretation of the offer of judgment rule. In *Elliott v. Progressive Halcyon Ins. Co.*, 222 Or. App. 586, 593-95, 194 P.3d 828, 833-34 (Or. App. 2008), the Oregon Court of Appeals considered whether the plaintiff was still entitled to sanctions for the defendant's violation of certain discovery rules despite the plaintiff not recovering a more favorable judgment than what had been offered by defendant (and therefore being subject to offer of judgment penalties). In holding that the offer of judgment rule had no effect on a prior award of sanctions, the court explained as follows:

> Because plaintiff failed to obtain a judgment more favorable than defendant's offer of judgment, the next question is what, if any, sanction, plaintiff was entitled to recover under ORCP 46 C in light of ORCP 54 E(3)'s bar on the recovery of "costs, prevailing party fees, disbursements, or attorney fees incurred after the date of the offer." Plaintiff acknowledges that both rules speak about "attorney fees," and it is on that basis that defendant contends that ORCP 54 E(3) necessarily limits any attorney fee award that might be available under ORCP 46 C. However, in plaintiff's view, the two rules must be viewed in light of their purposes in order to understand how they relate to each other. As plaintiff correctly contends, the purpose of ORCP 54 E(3) is to encourage settlement and to penalize a plaintiff who takes a matter to trial and prevails, but ultimately recovers less than what, in retrospect, was a reasonable offer of settlement. *See Carlson*, 293 Or. at 503–04, 651 P.2d 710. Viewed in that context, plaintiff asserts, it is clear that the limitations of ORCP 54 E(3) are directed to attorney fees that a prevailing party would otherwise be entitled to recover by judgment (assuming proper pleading and proof under ORCP 68), including attorney fees awarded under a contract, statute, or other source.
>
> In contrast, the sanction available under ORCP 46 C bears no relationship to whether the party has prevailed. The rule's

[8] *See*, *e.g.*, *Mendenhall v. Tassinari*, 133 Nev. 614, 625, 403 P.3d 364, 374 (2017) ("The purpose of an offer of judgment under former NRS 17.115 and NRCP 68 is to facilitate and encourage a settlement...").

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> purpose is to reimburse a party for expenses incurred because of the need to prove facts that were unreasonably denied. *Smo v. Black*, 95 Or. App. 588, 591, 770 P.2d 925 (1989) (purpose of ORCP 46 C is to provide "reimbursements for the expenses necessitated by an unreasonable refusal to admit"); *see Gottenberg v. Westinghouse Electric Corp.*, 142 Or. App. 70, 79, 919 P.2d 521 (1996). A party's entitlement under ORCP 46 C to reimbursement of its expenses depends on proof of the disputed facts and proof of the expenses necessitated by the other party's denial of those facts. The sanction is awarded by order and is thus exempt from the provisions of ORCP 68. ORCP 46 C; ORCP 68 C(1)(b). Thus, plaintiff contends, the attorney fees assessed as a sanction under ORCP 46 C are not attorney fees in the sense encompassed by ORCP 54 E(3), but merely a component of a party's expenses incurred in proving the unreasonably denied facts.
>
> So framed, plaintiff contends, the limitation in ORCP 54 E(3) on awards of costs, disbursements, and attorney fees does not apply to a sanction of expenses, including attorney fees, awarded under ORCP 46 C. We agree with plaintiff's understanding of the interplay of the two rules, which serve very different objectives, and which work together seamlessly when the fees available under ORCP 46 C are viewed in the context of the rule's purpose—that is, to reimburse expenses, *see Smo*, 95 Or. App. at 591, 770 P.2d 925, rather than to award a cost or fee to a prevailing party. We conclude, accordingly, that plaintiff is correct that the limitation stated in ORCP 54 E(3) does not constrain the trial court's ability to impose a sanction under ORCP 46 C for a party's failure to respond to a request for admission.

Id. (emphasis supplied).

The analysis in *Elliott* should confirm what the Court already knows: that an unaccepted offer of judgment does not function as a shield against interim awards of fees or costs resulting from litigation misconduct. Moreover, *Elliott* also conclusively defeats Defendants' claim that NRCP 68 and Nevada's cost statutes require the delay of payment of sanctions to Plaintiff until after judgment has been entered. Indeed, just as this Court's Order was designed to "reimburse a party for expenses incurred," that objective is wholly unrelated to the purpose of awarding costs under NRCP 68 or NRS

18.020, which are directed to the prevailing party at the end of the case. *Id.*[9] Therefore, NRCP 68 and Nevada's cost statutes should have no effect on—and certainly should not interrupt—the prompt reimbursement of Plaintiff's expenses incurred as a result of Defendants' misconduct. To hold otherwise would be to inappropriately render the provisions of NRS 18.070 subordinate to NRCP 68 and NRS 18.020. Accordingly, the Court should find that Plaintiff is entitled to immediate payment of the cost award and issue an order to that effect.

3. The Court May Certify the Order as Final Under NRCP 54(b)

Issuing a clarification to the Order requiring Defendants to immediately reimburse Plaintiff in full for the costs he incurred during the first trial is the most effective and efficient way to make Plaintiff whole. The Defendants' admission that they will use execution proceedings to delay ultimate payment to Plaintiff confirms the same. However, were the Court instead inclined to reduce the Order to judgment, the Court may certify the Order as final under NRCP 54(b). As the Court knows, NRCP 54(b) provides in relevant part:

> Judgment on Multiple Claims or Involving Multiple Parties. When an action presents more than one claim for relief — whether as a claim, counterclaim, crossclaim, or third-party claim — or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.

Id.

The Order is eligible for certification under NRCP 54(b). First, the Order resolves only one of Plaintiff's entitlements to relief, sanctions pursuant to NRS 18.070. Second, the Order is final as it represents the Court's final determination concerning the Defendants' deliberate causing of the mistrial. Third, there is no just reason for delaying

[9] As detailed above, the entitlement to payment of an interim sanctions award is not contingent on the ultimate outcome of the action. *See*, *e.g.*, *Huizinga*, 2012 WL 13018642, at *2 ("But proper and timely discovery must proceed regardless of who ultimately wins and loses on the merits, and the Rule 37 sanctions serve that purpose only when promptly applied and entered.."); *Prime Group*, 848 S.W.2d at 379.

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Plaintiff's collection of the sums owed by Defendants—Plaintiff needs such monies to fund the second trial.

Defendants argue that the Order "cannot be certified as final under Rule 54; and it cannot be considered a 'judgment' under Rule 54." Br. at 11. Defendants are mistaken. The Order definitively and conclusively decided the dispute concerning whether Defendants purposely caused the mistrial, for which Plaintiff would be entitled to a monetary award as compensation for the Defendants' misconduct. This is a final determination over a discrete entitlement to relief for Plaintiff.[10] Defendants attempt to buttress their argument by citing to *Newman v. Newman*, No. 79800, 2020 WL 278787 (Nev. Jan. 16, 2020). However, in *Newman*, the Nevada Supreme Court does not refer to NRCP 54(b) anywhere in the decision and thus should not be relied upon by the Court when interpreting the NRCP 54(b).[11]

More instructive on this topic is the Nevada Supreme Court's decision in *Albany v. Arcata Associates, Inc.*, 106 Nev. 688, 799 P.2d 566 (1990). In *Albany*, the district court issued sanctions and disqualified the defendants' attorney after a conflict of interest between the defendants became apparent during trial. The district court certified its sanctions order as final under NRCP 54(b) as to the attorney and the appeal followed. The Nevada Supreme Court dismissed the appeal finding that because the appellant (the attorney) was not a party to the underlying action the trial court could not certify the order as final under NRCP 54(b). The Supreme Court stated, "Dickerson has no right of appeal because he is not a party to the underlying civil action. Therefore,

---

[10] The discrete nature of the matter at issue further supports the requirement that Defendants immediately pay the sanction. As the court held in *New York Life Ins. Co.*, 2008 WL 11338053, at *2, "[B]oth the sanctionable behavior and the concrete harm that resulted have already occurred and will not be affected by further developments in the case. As such, there is no benefit to delaying imposition of sanctions." *Id*.

[11] *Newman* is persuasive authority supporting Plaintiff's request that the Court clarify its Order to require Defendants to pay the costs by a date certain. Indeed, **the order that was the subject of appeal in *Newman* required the defendant to pay attorney's fees and costs within 90 days of its issuance**. *See* Exhibit 5, a true and correct copy of the Order Regarding Plaintiff's Memorandum of Fees, Costs, and Disbursements Pursuant to July 22, 2019 Order, attached hereto.

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the district court erroneously certified its order as final under NRCP 54(b)." *Albany*, 106 Nev. at 689-90.

Importantly, the Supreme Court did **not** find that the sanctions order would still have been ineligible for NRCP 54(b) certification even if it applied to a party. But that is precisely what Defendants are asserting in their Opening Brief. Substantial federal authority demonstrates that sanctions orders akin to the Order issued by the Court are appropriately certified as final under Fed. R. Civ. P. 54(b). *See New York State Urban Dev. Corp. v. VSL Corp.*, 738 F.2d 61, 64 (2d Cir. 1984) ("district court's order imposing sanctions on plaintiff for its failure to comply with defendants' discovery requests may be subject of appeal if certified under Rule 54(b)." (citation omitted); *Pinal Creek Group v. Newmont Mining Corp.*, No. CV911764, 2008 WL 11339956, at *2 (D. Ariz. Dec. 8, 2008) ("This Court certified the last sanctions order for interlocutory appeal, noting that '[t]he issuance of evidentiary sanctions is significant, yet this Court cannot enter judgment because a trial on the merits on BHP's claim has not gone forward.'"); *Rhino Sports, Inc. v. Sport Court, Inc.*, No. CV021815, 2007 WL 1302745, at *9 (D. Ariz. May 2, 2007) (certifying sanctions order under Fed. R. Civ. P. 54(b)); *Fendi Adele S.R.L. v. Burlington Coat Factory Warehouse Corp.*, 642 F. Supp. 2d 276, 282–83 (S.D.N.Y. 2009) (same).

Plaintiff is entitled to reimbursement of his costs immediately. However, Defendants have made it abundantly clear that despite their misconduct costing Plaintiff over $118,000.00 in expenses during the first trial, **they will do everything in their power to delay the reimbursement of those monies**. They plainly admit that were the Court to enter a judgment on the Order, they would erect every procedural hurdle they could such that, "there would be no meaningful temporal distinction between executing on the subject Order and executing on any post-judgment fees and costs arising from the eventual jury verdict." Br. at 16. Such tactics should not be rewarded. As such, instead of issuing NRCP 54(b) certification and thereby reducing the Order to

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a judgment, the Court should clarify its Order to require Defendants to pay the sanction by a date certain in the immediate future.

III. CONCLUSION

Based upon the foregoing, Plaintiff respectfully requests that the Court clarify its Order to require Defendants to fully satisfy Plaintiff's cost award by a date certain in the immediate future. Alternatively, the Court should certify the Order as final pursuant to NRCP 54(b).

DATED this 10th day of April, 2020.

THE JIMMERSON LAW FIRM, P.C.

/s/ James M. Jimmerson, Esq.
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of The Jimmerson Law Firm, P.C. and that on this 10th day of April, 2020, I served a true and correct copy of the foregoing **Response Brief Regarding Order Granting in Part Plaintiff's Motion for Attorney's Fees and Costs, and Motion for Clarification and/or Amendment of the Order Granting in Part Plaintiff's Motion for Attorney's Fees and Costs**, as indicated below:

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

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

S. Brent Vogel, Esq.
Katherine Gordon, Esq.
Lewis Brisbois Bisgaard & Smith LLP
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/s/ James M. Jimmerson, Esq.
An employee of The Jimmerson Law Firm, P.C.

EXHIBIT 1

EXHIBIT 1

ORDR
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DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendant.

CASE NO.: A-18-776896-C
DEPT. NO.: ~~32~~ 4
Courtroom ~~3C~~ 12D

ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR ATTORNEYS' FEES AND COSTS

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This matter having come for before the Court on December 5, 2019, on *Plaintiff's Motion for Mistrial and for Attorneys' Fees and Costs,* filed August 4, 2019, and Defendants' Opposition thereto, and *Countermotion for Attorneys' Fees and Costs Pursuant to NRS 18.070,* filed August 26, 2019, and the supplemental filings by both Plaintiff and Defendant in support of their respective Motions,, Plaintiff Jason George Landess, appearing by and through his counsel of record, James M. Jimmerson, Esq. of The Jimmerson Law Firm, P.C. and Martin A. Little, Esq. of Howard & Howard Attorneys PLLC, Defendants Kevin Paul Debiparshad, M.D., Kevin P. Debiparshad PLLC d/b/a Synergy Spine and Orthopedics, and Debiparshad Professional Services d/b/a Synergy Spine and Orthopedics, Jaswinder S. Grover, M.D., Ltd. d/b/a Nevada Spine Clinic, appearing by and through their counsel of record, S. Brent Vogel, Esq. and Katherine J. Gordon, Esq. of Lewis Brisbois Bisgaard & Smith LLP, and the Court having reviewed the papers and pleadings on file, transcripts, and exhibits, having heard oral argument, and being fully advised in the premises, and good cause appearing:

THE COURT HEREBY FINDS that Plaintiff's Motion for a Mistrial was granted on September 9, 2019, which Order is wholly incorporated herein by reference as if set forth in full. The only issue before this Court is whether the Court should award attorneys' fees and costs due to the mistrial.

THE COURT FURTHER FINDS that the Defendant, pursuant to N.R.S. 18.070(2), purposely caused the mistrial in this case to occur due to the Defendant knowingly and intentionally injecting into the trial evidence of alleged racism by the use of Exhibit 56, page 44. Defendant's counsel, after examining Mr. Dariyanani regarding the "Burning Embers" email included in Exhibit 56, specifically asked the witness in follow-up: "You still don't take that as being at all a racist comment?" Such evidence of racism was not admissible to prove the Plaintiff's alleged bad character. Further, even though it was admitted without objection, it could only have been used insofar as it did not create plain error. Defendant's counsel is charged with knowing that the injection of such racially inflammatory evidence

was improper in the trial. It was reasonably foreseeable to the Defendant that the Court would declare a mistrial due to the Defendant injecting such racially inflammatory evidence.

THE COURT FURTHER FINDS that it is discretionary under N.R.S. 18.070(2) as to whether a court imposes costs and reasonable attorneys' fees. The Court has determined that the Plaintiff be awarded reasonable and necessarily incurred costs of $118,606.25 pursuant to N.R.S. 18.070(2). Defendants did not contend that Plaintiff's requested costs were not reasonable or necessarily incurred or that they were not otherwise taxable.

THE COURT FURTHER FINDS that Defendants did not contend that Plaintiffs' requested attorney's fees were not reasonable under *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345 (1969). That notwithstanding, the Court has determined to not award attorneys' fees to Plaintiff. THE COURT FURTHER FINDS that as Defendants are the legal cause for the mistrial, there is no basis to grant their countermotion for attorneys' fees and costs.

NOW THEREFORE:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Attorneys' Fees and Costs is hereby GRANTED in part. Plaintiff is awarded their reasonable and necessarily incurred costs of $118,606.25 pursuant to N.R.S. 18.070(2).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court further has determined to not award any attorneys' fees to Plaintiff.

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IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants' Countermotion for Attorneys' Fees and osts is hereby DENIED

Dated this 6 day of , 2020.

ISTRI C URT JUDGE

Submitted by:

THE JIMMERSON LAW FIRM, P.C.

s J. immerson, Esq.
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Ap roved as to form and content:

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Refused to sign

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A-18-776896-C
Granting in Part PLTFF's Motion for Atty's Costs.

EXHIBIT 2

EXHIBIT 2

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Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

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

BEFORE THE HONORABLE KERRY EARLEY,
DISTRICT COURT JUDGE

TUESDAY, DECEMBER 17, 2019

RECORDER'S TRANSCRIPT OF PROCEEDINGS
STATUS CHECK

APPEARANCES:

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

For Defendant Dr. Grover: STEPHEN B. VOGEL, ESQ.
KATHERINE J. GORDON, ESQ.

RECORDED BY: REBECA GOMEZ, COURT RECORDER

Las Vegas, Nevada, Tuesday, December 17, 2019

[Called to order at 9:57 a.m.]

THE COURT: Good morning. All right.

MR. JIMMERSON: Morning, Your Honor.

THE COURT: Good morning. I thought I just heard from you, Mr. Jimmerson.

MR. JIMMERSON: James Jimmerson on behalf --

THE COURT: Okay.

MR. JIMMERSON: -- of Mr. Landess.

MR. LITTLE: Morning, Your Honor. Marty Little --

THE COURT: Good morning.

MR. LITTLE: -- I was co-trial counsel --

THE COURT: Okay, and --

MR. LITTLE: -- for Mr. Landess.

THE COURT: -- Mr. Vogel?

MR. VOGEL: Good morning.

THE COURT: Good morning.

MR. VOGEL: Brent Vogel, 6858, for Dr. --

THE COURT: And Katherine's here. Katherine -- I apologize.

MS. GORDON: Thank you.

THE COURT: Katherine Gordon.

Okay. I -- I got a hold of your request for the pretrial -- here I'll set it I'm just -- I'm not sure what even orders Judge -- I mean, as you know, I got boxes and boxes, you guys. I'm not sure what orders did --

can I ask did he do a -- a whole lot of motions in limine? I don't even know what we're -- because to me I don't know -- I looked at this and I tried very hard to look at the law.

Obviously evidentiary issues that he made at trial I'm not going to necessarily go by because that all depends on how the evidence gets in and stuff like I might disagree on opening the door or not opening the door so I -- I wouldn't do that. I guess I was trying to figure out the extent of what I would be looking at. I know my own experience when I did a retrial, some of the orders that were done before by the other judge were followed, some they didn't agree with so but I don't think we really even talked about the law -- I'm -- I know I'm doing this ahead of time, but I'm trying to get a feel for what -- what -- what it is you want me to look at. Does that make sense?

MS. GORDON: It does, Your Honor, and I think that's what we were trying to get a feel for as early --

THE COURT: For our pretrial -- here's what I did. I can -- I know this is -- I can -- I know you probably don't want these dates but January 2nd or January 3rd or January 10th I can give you to come in and we'll just do this. I just kind of wanted to feel ahead those are the -- otherwise I'm just slammed till then and -- so I don't start another if -- if I get through this trial ever. Are any of those dates okay -- I know it's right after New Year's but it would help me -- you don't want to do that probably.

MR. VOGEL: The 2nd --

MR. JIMMERSON: January 2nd or the 3rd, Your Honor, I

can't do the 10th I'm in trial with Judge Allf.

THE COURT: Okay. Can you do the 2nd or 3rd --

MR. VOGEL: The 2nd or the 3rd are fine.

THE COURT: Okay, great. I know most people don't want to come in then but it gives me a chance to work on this --

MR. JIMMERSON: I think I'm before Your Honor different matter.

THE COURT: Are you?

MR. JIMMERSON: I think so.

THE COURT: Oh good Lord. Okay, I thought we didn't have much. Okay, so which do you want? The -- the 3rd --

MR. VOGEL: The 3rd?

MR. JIMMERSON: No, no, the -- I'm before Your Honor --

THE COURT: On --

MR. JIMMERSON: -- on a different matter on --

THE COURT: On the 2nd.

MR. JIMMERSON: -- on the 2nd.

THE CLERK: No (indiscernible) we don't have anything on the 2nd.

THE COURT: Oh we -- we tried to clear the 2nd for this.

MR. JIMMERSON: Okay. Then -- then I'm -- then I'm here --

THE COURT: For -- I just wanted to clear it so I would have -- first of all, everybody was complaining that I had court then, right? So I thought you guys -- I'm a little up tight against this trial date because I want to give you the trial date so hopefully you would work with me you

wouldn't mind as much so you want the 2nd, the 3rd --

MR. JIMMERSON: Second works.

THE COURT: Second?

MR. VOGEL: Either -- either day is fine.

MS. GORDON: (Indiscernible) fine.

THE COURT: Okay, let's pick the 2nd. Okay.

THE CLERK: This for motion in limines?

THE COURT: No, it's for a pretrial conference.

And I want you to come in and give me some idea -- because I could probably even look -- I mean I'm really -- I know some of the case. I should not say I'm familiar with that's not fair. I only know what I read for everything else so I mean I don't know if some of them are pro forma, you know, motions in limine like don't mention insurance and don't be, you know, follow *Lioce*, all that kind of gar- -- those kind of pro forma did I almost say garbage? That's not politically correct. I've been in trial three weeks. Those kind of things.

Substantive ones like -- I don't know so I don't know your case, but like he did a *Hallmark* hearing and eliminated an expert, I don't know if any of that was done that -- those kind of things are much more substantive --

MS. GORDON: And in the meantime, Your Honor, we're -- we're working together to put together a list of everything that we're stipulating to and then a list of --

THE COURT: Oh perfect.

MS. GORDON: -- what we're -- we're not so --

THE COURT: That would be absolutely perfect because I really really really want to make this trial flow for everybody from the bottom of my heart. In fact, I had one yesterday they thought they opened the door on -- on good character and I told them to come up and luckily they came up to the bench and it was handled. So I'm going to do everything I can to work with both of you that we can have the best opportunity for both of you to -- to do this.

So whatever you want from me, if you give me stipulations, I'll do that, if you -- if there's motions in limine that you disagree with Judge Bare, you know, let me look at them and then decide I -- I -- this law of the case I don't know you guys. I tried to even look it up because I know what happened to me; they followed some and they -- but I just got this, this morning be honest and I'm trying to do jury instructions which now --

MR. JIMMERSON: Your Honor --

THE COURT: -- we're not going to do but --

THE MARSHAL: We may, Judge.

THE COURT: We may?

THE MARSHAL: (Indiscernible) --

THE COURT: I hope so.

MR. JIMMERSON: I --

THE COURT: One of the attorneys is going to the hospital.

MR. VOGEL: Oh no.

MR. JIMMERSON: Oh boy.

MR. VOGEL: Kim?

THE COURT: Don't -- don't --

THE MARSHAL: Trying to keep you posted. I just talked to Debbie.

THE COURT: I'm not talking to the ER.

MR. JIMMERSON: We --

THE MARSHAL: No you're not.

MR. JIMMERSON: The parties have already had one conference --

THE COURT: Yes. Oh, I --

MR. JIMMERSON: I'm sorry.

THE COURT: Tell her yes.

THE MARSHAL: Okay.

THE COURT: I want to do -- please please please please --

THE MARSHAL: Yes.

THE COURT: -- please.

THE MARSHAL: Okay.

THE COURT: Okay?

THE MARSHAL: We will.

THE COURT: I don't -- here's the -- I'm so sorry we -- this trial has been --

THE MARSHAL: Yeah, they --

THE COURT: I don't --

THE MARSHAL: -- they called --

THE COURT: What do we do on closings?

THE MARSHAL: I don't know. Maybe we can reach out. I'll find out.

THE COURT: Okay, will you ask about closings?

Okay, I apologize.

MS. GORDON: Oh that's okay.

THE COURT: This has been one that was supposed to be two weeks, we're now in three weeks and it -- it should be a -- no, maybe you're is, but this one a textbook. In the middle of it the doctor files bankruptcy --

MR. VOGEL: Oh.

THE COURT: -- we have to get an automatic -- I mean it has been -- I've never seen so many issues.

MR. JIMMERSON: Wow.

THE COURT: Look at my staff's like.

MS. GORDON: Yeah.

THE COURT: Now --

MR. JIMMERSON: Your Honor --

THE COURT: It's been crazy. Okay, because now I'm worried about closings. Okay.

MR. JIMMERSON: The parties have already had one conference where we discussed --

THE COURT: Okay.

MR. JIMMERSON: -- preliminarily some of the matters and we've exchanged emails on some of the orders that we're in -- in agreement with --

THE COURT: Okay, that would be great because at least it could limit down and then I could see the type of order, whether it's one

that I feel should be addressed separately or whether I -- you know, it -- I can't -- I felt like when I read this I was in a vacuum. I wasn't really sure -- I didn't want to make a general rule that yes everything Judge Bare ruled -- I know not -- not what happened in trial because trial are very fluid and if he continued things to see or denied it without prejudice to see what happens in trial I -- I would like to look at those so it educates me on knowing what to listen to in trial, because I take a lot of motions in limine to educate me as to what issues will come up so even if I don't grant them because I don't know the context of how it's getting in, I still want to look at those.

Does that make sense because then I -- I keep track of all that so then I have -- I -- I don't want to say red flags, but then I'm very aware to -- when I hear something, I'm -- I'm all over it and say come up, do we have an issue here, why are we offering this because it educates me a lot.

MS. GORDON: And I think --

THE COURT: So I don't want to just say his motions -- I also would like you to tell me why you think it's relevant so I get some focus that you all have but I don't have, because I truly believe the more I'm educated on the issues, the better I'll be to be able to when it -- because as you know it goes real fluid in trial and I need a context that you all have that I'm -- that I'm hoping this pretrial conference could I -- I could use that too. Does that make sense?

MS. GORDON: It does, and I --

THE COURT: So I want a lot of not just motions in limine,

okay?

MR. JIMMERSON: And -- and the -- the parties I will say were -- were quite diligent about not having, as you say, the pro forma we -- we -- we abided by the 2.47, you know, requirement to -- to -- to --

THE COURT: Okay. I didn't know because I get those all the time.

MR. JIMMERSON: -- confer seriously --

THE COURT: Okay.

MR. JIMMERSON: -- and so what -- what you will see will be --

THE COURT: Substantive.

MR. JIMMERSON: -- will be hefty --

THE COURT: Okay.

MR. JIMMERSON: -- matters that Judge Bare handled. My one request, Your Honor, is that because a pretrial conference is after the motions in limine deadline --

THE COURT: I'll just extend it.

MR. JIMMERSON: Okay, and --

THE COURT: I -- I tried to get it as quick as I can because I'm very aware of the motions in limine -- I'll just work with you.

MR. JIMMERSON: And we -- we've already set our 2.47 conference anyway. We're hoping to try to resolve as many matters possible without requiring court intervention, but of course there will be matters that will be brought before you.

THE COURT: No, I -- I'm here to do that. I understand that

completely and I will -- you know, even if I have to do it on a -- a Friday or whatever I need to do. My next trial when this one gets done is the 23rd --

THE CLERK: The 27th of --

THE COURT: -- 27th of January hopefully maybe I don't know. They're fighting too so I don't know. They have a firm trial setting it's on an inadequate security case. And then you're right -- I -- those are such -- you're backed right up to it.

MS. GORDON: And I think by the 2nd we should have a -- a final list in mind of which ones --

THE COURT: Okay. And anything that I can do to help that would facilitate, you know, I'm -- I'm more than -- as you -- more than willing to do or meet with you or anything like that.

Had you already exchanged jury instructions or anything by then? Maybe not.

MS. GORDON: Last --

MR. VOGEL: Well, we had --

THE COURT: Your last trial.

MR. VOGEL: Yeah, we had -- we -- we --

THE COURT: Kind of.

MR. VOGEL: -- we've exchanged but they had not been --

THE COURT: That does -- okay, well that does --

MR. VOGEL: --they had not -- they had not been finalized.

THE COURT: Okay, so that I -- I would start with that. I was just going to say if you had I prefer to hear the evidence that's why we're

-- we were going to do jury instructions today because it doesn't do me any good --till I have the evidence in I don't want to spend time on instructions that --

MR. VOGEL: Don't apply.

THE COURT: -- the evidence didn't even come in on so I was good with that.

Okay, so let's do it January 2nd. Just come to the courtroom and we'll work together at 9:00.

MR. JIMMERSON: Sounds good, Your Honor.

THE COURT: Okay, and anything you meet before I would truly appreciate that would be great. And then I'll read a little bit more on these cases like I said they just gave it to me this morning. But at least give me the parameters what I'm looking at maybe it would make this case law make it a little easier for me to decide too, if you don't mind.

Okay. Terrific. Anything else that you had on? Calendar call. No. Okay.

MR. VOGEL: I don't think so. The only other issue I'd like to raise is in light of your order with respect to the fees and costs --

THE COURT: Right.

MR. VOGEL: -- I wasn't clear is it against me and my firm or is it against the client?

THE COURT: You know what? I was going to -- I -- you know that's a good point.

MR. VOGEL: Because that --

THE COURT: It makes a difference.

MR. VOGEL: -- different things it makes a difference.

MR. JIMMERSON: And -- and, Your Honor, we did not submit the motion pursuant to NRS 7.035 --

THE COURT: You did it for the defendant, did you not -- because I did look at that.

MR. JIMMERSON: Correct --

THE COURT: They never said against the attorney so I did not --

MR. JIMMERSON: (Indiscernible) we -- we did not pursue --

THE COURT: -- make it the firm. So you tell me because that is -- Mr. Vogel, you're right because I sat there all weekend -- you don't want to hear it but trying to figure out --

MR. JIMMERSON: We -- we -- we -- we intentionally did not pursue it pursuant to 7.035 --

THE COURT: Which is the attorneys.

MR. JIMMERSON: -- which -- exactly which would allow for collection against the attorneys.

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

MR. VOGEL: But -- but under 18.070 it allows you the discretion to do attorney or client so -- and that's --

THE COURT: Okay, well I did -- I did client.

MR. VOGEL: Okay.

THE COURT: I did defendant, that's what I meant and I went back and looked under the one you said and I read through all their thing against to see who they were seeking it against. So I did defendant.

MR. VOGEL: Okay.

THE COURT: I did not do the law firm.

MR. VOGEL: Okay. And we haven't discussed it yet, but we would obviously seek to stay execution --

THE COURT: Sure.

MR. VOGEL: -- pending the trial because that -- you know, pending on the outcome of trial, that may resolve the issue, there may be an offset if it's a defense verdict, it may be part of the judgment if it's plaintiff's verdict, but if they're --

THE COURT: Okay.

MR. VOGEL: -- going to be allowed to execute immediately, then obviously then we've got a --

THE COURT: You have an issue.

MR. VOGEL: -- we have to seek a stay and --

THE COURT: Have you even addressed that? I didn't --

MR. VOGEL: We -- we have not discussed it.

MR. JIMMERSON: We -- we haven't discussed it and we certainly would -- would oppose any, you know, effort to stay execution. We would of course request the Court, you know, hear brief --

THE COURT: Okay, well let's do this.

MR. JIMMERSON: -- you know, receive briefing on the same.

THE COURT: Bring that up as another issue of everything so I get a parameter of -- of how I want to do that in fairness because I struggled enough on the defendant and stuff, okay.

MR. VOGEL: Well --

EXHIBIT 3

EXHIBIT 3

THE JIMMERSON LAW FIRM
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

James J. Jimmerson*
James M. Jimmerson
Oksana Markarian, Esq.
Amanda J. Brookhyser, Esq.

*ALSO ADMITTED IN CALIFORNIA
**MEMBER NATIONAL TRIAL LAWYERS
TOP 100 LAWYERS
***MARTINDALE-HUBBELL AV® PREEMINENT
****SUPER LAWYERS BUSINESS LITIGATION
*****STEPHEN HARRIS "BEST LAWYERS"
******RECIPIENT OF THE PRESTIGIOUS ELLIS ISLAND
MEDAL OF HONOR, 2012
*******FELLOW, AMERICAN ACADEMY
OF MATRIMONIAL LAWYERS
********DIPLOMAT, AMERICAN COLLEGE
OF FAMILY TRIAL LAWYERS
*********FAMILY LAW SPECIALIST, NEVADA STATE BAR

February 25, 2020

Honorable Kerry Earley
Eighth Judicial District Court- Dept 4
Regional Justice Center
200 Lewis Avenue
Las Vegas, NV 89101

Re: Jason George Landess v. Kevin Paul Debiparshad, M.D., et al
Case No. A-18-776896-C

Dear Judge Earley:

Enclosed please find for the Court's review and signature the Order Granting in Part Plaintiff's Motion for Attorneys' Fees and Costs.

The Order and Judgment was prepared and delivered to opposing counsel on January 8, 2020 at our hearing, but Defendant's objected, alleging that the Court had "granted an offset." They cited to the Minutes of the December 17, 2019 Hearing, which are attached here. Our own recollection from the December 17, 2019 Hearing was that the request to use the award as an "offset" raised for the first time by Mr. Vogel at that hearing, and vigorously opposed by Mr. Jimmerson, was <u>not</u> granted by the Court, but was a request the Court indicated it may *consider* after the Order was entered.

When we received the Transcript from the December 17, 2019 Hearing, our recollection was confirmed to be correct. The Court indicated that the Order should be submitted, followed by the Judgment, and that the Court may then in due course consider Defendants' request (See attached Transcript pages 14, line 3-p. 15, line 24).

We revised the Order and separated it from the Judgment, and resent to opposing counsel on February 13, 2020. On February 20, 2020, they *still* refused to sign the Order, continuing to argue it should state that the amount "could be used as an offset," despite the Court *specifically* declining to grant that request. A copy of the communication between counsel is attached.

We therefore submit the Order without their signature, and request that the Court promptly enter the same. The Judgment is being separately submitted.

Sincerely,

THE JIMMERSON LAW FIRM, P.C.

/s/ James J. Jimmerson

James J. Jimmerson, Esq.
JJJ/sp

cc: Martin A. Little, Esq. / Alexander Villamar, Esq.
Katherine J. Gordon, Esq. / S. Brent Vogel, Esq.

ORDR

THE JIMMERSON LAW FIRM, P.C.
James J. Jimmerson, Esq.
Nevada Bar No. 000264
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Las Vegas, Nevada 89101
Telephone: (702) 388-7171
Facsimile: (702) 380-6422
Attorneys for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendant.

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

ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR ATTORNEYS' FEES AND COSTS

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

This matter having come for before the Court on December 5, 2019, on *Plaintiff's Motion for Mistrial and for Attorneys' Fees and Costs,* filed August 4, 2019, and Defendants' Opposition thereto, and *Countermotion for Attorneys' Fees and Costs Pursuant to NRS 18.070*, filed August 26, 2019, and the supplemental filings by both Plaintiff and Defendant in support of their respective Motions,, Plaintiff Jason George Landess, appearing by and through his counsel of record, James M. Jimmerson, Esq. of The Jimmerson Law Firm, P.C. and Martin A. Little, Esq. of Howard & Howard Attorneys PLLC, Defendants Kevin Paul Debiparshad, M.D., Kevin P. Debiparshad PLLC d/b/a Synergy Spine and Orthopedics, and Debiparshad Professional Services d/b/a Synergy Spine and Orthopedics, Jaswinder S. Grover, M.D., Ltd. d/b/a Nevada Spine Clinic, appearing by and through their counsel of record, S. Brent Vogel, Esq. and Katherine J. Gordon, Esq. of Lewis Brisbois Bisgaard & Smith LLP, and the Court having reviewed the papers and pleadings on file, transcripts, and exhibits, having heard oral argument, and being fully advised in the premises, and good cause appearing:

THE COURT HEREBY FINDS that Plaintiff's Motion for a Mistrial was granted on September 9, 2019, which Order is wholly incorporated herein by reference as if set forth in full. The only issue before this Court is whether the Court should award attorneys' fees and costs due to the mistrial.

THE COURT FURTHER FINDS that the Defendant, pursuant to N.R.S. 18.070(2), purposely caused the mistrial in this case to occur due to the Defendant knowingly and intentionally injecting into the trial evidence of alleged racism by the use of Exhibit 56, page 44. Defendant's counsel, after examining Mr. Dariyanani regarding the "Burning Embers" email included in Exhibit 56, specifically asked the witness in follow-up: "You still don't take that as being at all a racist comment?" Such evidence of racism was not admissible to prove the Plaintiff's alleged bad character. Further, even though it was admitted without objection, it could only have been used insofar as it did not create plain error. Defendant's counsel is charged with knowing that the injection of such racially inflammatory evidence

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was improper in the trial. It was reasonably foreseeable to the Defendant that the Court would declare a mistrial due to the Defendant injecting such racially inflammatory evidence.

THE COURT FURTHER FINDS that it is discretionary under N.R.S. 18.070(2) as to whether a court imposes costs and reasonable attorneys' fees. The Court has determined that the Plaintiff be awarded reasonable and necessarily incurred costs of $118,606.25 pursuant to N.R.S. 18.070(2). Defendants did not contend that Plaintiff's requested costs were not reasonable or necessarily incurred or that they were not otherwise taxable.

THE COURT FURTHER FINDS that Defendants did not contend that Plaintiffs' requested attorney's fees were not reasonable under *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345 (1969). That notwithstanding, the Court has determined to not award attorneys' fees to Plaintiff. THE COURT FURTHER FINDS that as Defendants are the legal cause for the mistrial, there is no basis to grant their countermotion for attorneys' fees and costs.

NOW THEREFORE:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Attorneys' Fees and Costs is hereby GRANTED in part. Plaintiff is awarded their reasonable and necessarily incurred costs of $118,606.25 pursuant to N.R.S. 18.070(2).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court further has determined to not award any attorneys' fees to Plaintiff.

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///

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IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants' Countermotion for Attorneys' Fees and Costs is hereby DENIED.

Dated this _____ day of , 2020

DISTRICT COURT JUDGE

Submitted by:

THE JIMMERSON LAW FIRM, P.C.

s J. immerson, Esq.
Nevada Bar No. 000264
415 South 6th Street, Suite 100
Las Vegas, Nevada 89101

HOWARD & HOWARD ATTORNEYS PLLC
Martin A. Little, Esq.
Alexander Villamar, Esq.
3800 Howard Hughes Pkwy., # 1000
Las Vegas, NV 89169
Attorneys for Plaintiff

Approved as to form and content:

LEWIS BRISBOIS BISGAARD & SMITH LLP

Refused to sign

S. Brent Vogel, Esq.
Katherine J. Gordon, Esq.
6385 S. Rainbow Boulevard, # 600
Las Vegas, NV 89118
Attorneys for Defendants

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

Shahana Polselli

From: Little, Martin A. <mal@h2law.com>
Sent: Tuesday, February 25, 2020 9:09 AM
To: Vogel, Brent
Cc: Shahana Polselli; Gordon, Katherine; James J. Jimmerson, Esq.; Kim Stewart; James M. Jimmerson, Esq.; Villamar, Alexander
Subject: Re: Landess v Debiparshad

Brent,

We respectfully disagree with your position.

The court SPECIFICALLY did not grant your request that the award could be used as an offset. The minutes from the December 17, 2019 Hearing are wrong. The Transcript from the Hearing confirms our own recollection, that the Court DID NOT GRANT an offset. Rather, the Court indicated that the Order should be submitted, followed by the Judgment, and that the Court would, after the Order, CONSIDER the Defendants' request (see attached at page 14, line 3-p. 15, line 24).

"Unlike a petition for rehearing, a motion for sanctions, like a motion for attorney's fees, pertains to a matter which is collateral to the underlying litigation. (An order awarding sanctions "is appealable 'because it is a final order on a *collateral*matter directing the payment of money.'" (*I. J. Weinrot & Son, Inc. v. Jackson* (1985) 40 Cal.3d 327, 331 [220 Cal.Rptr. 103, 708 P.2d 682], italics added; *see also Bauguess v. Paine* (1978) 22 Cal.3d 626, 634, fn. 3 [150 Cal.Rptr. 461, 586 P.2d 942].)) *San Bernardino Community Hospital v. Meeks*, 187 Cal. App. 3d 457, 462, 231 Cal. Rptr. 673, 675, 1986 Cal. App. LEXIS 2264, *6 (Cal. App. 1986).

The U.S. Supreme Court said this about such a collateral determination:

> At the threshold we are met with the question whether the District Court's order refusing to apply the statute was an appealable one. Title 28 U. S. C. § 1291 provides, as did its predecessors, for appeal only "from all final decisions of the district courts," except when direct appeal to this Court is provided. Section 1292 allows appeals also from certain interlocutory orders, decrees and judgments, not material to this case except as they indicate the purpose to allow appeals from orders other than final judgments when they have a final and irreparable effect on the rights of the parties. It is obvious that, if Congress had allowed appeals only from those final judgments which terminate an action, this order would not be appealable.
>
> **The effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete. Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal. But the District Court's action upon this application was concluded and closed and its decision final in that sense before the appeal was taken.**

Cohen v. Benefit Indus. Loan Corp., 337 U.S. 541, 545-546, 69 S. Ct. 1221, 1225, 93 L. Ed. 1528, 1536, 1949 U.S. LEXIS 2149, *8-9 (U.S. June 20, 1949) (emphasis supplied).

The cost award is without question collateral to the issues in the medical malpractice case. There is nothing left open, unfinished, or inconclusive about that award. Judge Early has made her decision on that, which makes it closed and concluded. An appellate court would not be "intruding" into her decision. It would clearly only be reviewing it for an abuse of discretion, especially since no opposition was filed to the amount of the award. In essence, she's done deciding that matter.

We will submit the order without your signature and copy you on the letter.

(Via mobile — please excuse typos/brevity)

Martin A. Little
Attorney at Law

3800 Howard Hughes Pkwy., Ste. 1000, Las Vegas, NV 89169
E: mal@h2law.com
D: 702.667.4829 C: 702.371.1545 F: 702.567.1568

Bio vCard LinkedIn

oward & Howard
law for business

On Feb 20, 2020, at 11:08 AM, Vogel, Brent <Brent.Vogel@lewisbrisbois.com> wrote:

Mr. Jimmerson and Mr. Little,
After reviewing the proposed order, transcript, minute order and applicable law it is apparent what you seek is contrary to the law and cannot be ordered by the court. You are seeking a final collectible

judgment on a case that is still pending. Pursuant to NRCP 54(b) it is apparent this is not a final order adjudicating all claims and your proposed order violates this rule. The proposed order will need to state that it is NOT a final and collectible judgment and that the amount case be used as an offset. Based on a review the law the only way this order would be collectible at this time is if it were for contempt, which it is not. I ask you to confirm this with your own research as I expect you will find I'm correct. I look forward to hearing from you.

Brent Vogel
<ABOTA_e0d306df-9fd4-443c-be16-b39ddd46facd.png>

<LB-Logo_b33063e3-d0d3-4c7b-932e-d38c34b4fbaf.png>

Partner
Brent.Vogel@lewisbrisbois.com

T: 702.693.4320 F: 702.893.3789

6385 South Rainbow Blvd., Suite 600, Las Vegas, NV 89118 | **LewisBrisbois.com**

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

From: Shahana Polselli [mailto:sp@jimmersonlawfirm.com]
Sent: Thursday, February 13, 2020 5:54 PM
To: Vogel, Brent; Gordon, Katherine
Cc: James J. Jimmerson, Esq.; Kim Stewart; James M. Jimmerson, Esq.; Martin A. Little; Villamar, Alexander
Subject: [EXT] Landess v Debiparshad

External Email

Mr. Vogel and Ms. Gordon:

Mr. Jimmerson asked me to send you the attached revised Order, and separate Judgment, for your review and signature.

Regarding the suggestion that the Court did not reduce the Order to judgment but instead stated it would be an "offset," citing the attached Minutes from the December 17, 2019 Hearing, the Transcript from the Hearing confirms our own recollection, that the Court did not grant an offset. Rather, the Court indicated that the Order should be submitted, followed by the Judgment, and that the Court would, after the Order and then the Judgment were entered, consider the Defendants' request (see attached at page 14, line 3-p. 15, line 24).

Please sign and return the attached, or advise of any changes, by February 21, 2020.

Thank you,

Shahana

Shahana M. Polselli
Senior Case Manager / Senior Paralegal
The Jimmerson Law Firm, P.C.
415 South 6th Street, Suite 100
Las Vegas, Nevada 89101
(702) 388-7171 x 313 (Office)
(702) 380-6413 (Facsimile)
sp@jimmersonlawfirm.com

WWW.JIMMERSONLAWFIRM.COM

A-18-776896-C

DISTRICT COURT
CLARK COUNTY, NEVADA

Malpractice - Medical/Dental **COURT MINUTES** **December 17, 2019**

A-18-776896-C Jason Landess, Plaintiff(s)
vs.
Kevin Debiparshad, M.D., Defendant(s)

December 17, 2019 **09:00 AM** **Status Check**

HEARD BY: Earley, Kerry **COURTROOM:** RJC Courtroom 12D

COURT CLERK: Jacobson, Alice

RECORDER: Gomez, Rebeca

REPORTER:

PARTIES PRESENT:

James Joseph Jimmerson, ESQ	**Attorney for Plaintiff**
Katherine J. Gordon	**Attorney for Defendant**
Martin A. Little	**Attorney for Plaintiff**
Stephen B. Vogel	**Attorney for Defendant**

JOURNAL ENTRIES

Colloquy between the Court and counsel regarding the extent of the re-trial. COURT ORDERED, matter SET for a Pretrial Conference 1/2/20 9:00am. Upon Mr. Vogel's inquiry, COURT ADVISED the Court's Order of Fees/Costs pertained to the client not the law firm and could be used as an offset.

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

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

BEFORE THE HONORABLE KERRY EARLEY,
DISTRICT COURT JUDGE

TUESDAY, DECEMBER 17, 2019

RECORDER'S TRANSCRIPT OF PROCEEDINGS

STATUS CHECK

APPEARANCES:

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

For Defendant Dr. Grover: STEPHEN B. VOGEL, ESQ.
KATHERINE J. GORDON, ESQ.

RECORDED BY: REBECA GOMEZ, COURT RECORDER

-- we were going to do jury instructions today because it doesn't do me any good --till I have the evidence in I don't want to spend time on instructions that --

MR. VOGEL: Don't apply.

THE COURT: -- the evidence didn't even come in on so I was good with that.

Okay, so let's do it January 2nd. Just come to the courtroom and we'll work together at 9:00.

MR. JIMMERSON: Sounds good, Your Honor.

THE COURT: Okay, and anything you meet before I would truly appreciate that would be great. And then I'll read a little bit more on these cases like I said they just gave it to me this morning. But at least give me the parameters what I'm looking at maybe it would make this case law make it a little easier for me to decide too, if you don't mind.

Okay. Terrific. Anything else that you had on? Calendar call. No. Okay.

MR. VOGEL: I don't think so. The only other issue I'd like to raise is in light of your order with respect to the fees and costs --

THE COURT: Right.

MR. VOGEL: -- I wasn't clear is it against me and my firm or is it against the client?

THE COURT: You know what? I was going to -- I -- you know that's a good point.

MR. VOGEL: Because that --

THE COURT: It makes a difference.

MR. VOGEL: -- different things it makes a difference.

MR. JIMMERSON: And -- and, Your Honor, we did not submit the motion pursuant to NRS 7.035 --

THE COURT: You did it for the defendant, did you not -- because I did look at that.

MR. JIMMERSON: Correct --

THE COURT: They never said against the attorney so I did not --

MR. JIMMERSON: (Indiscernible) we -- we did not pursue --

THE COURT: -- make it the firm. So you tell me because that is -- Mr. Vogel, you're right because I sat there all weekend -- you don't want to hear it but trying to figure out --

MR. JIMMERSON: We -- we -- we -- we intentionally did not pursue it pursuant to 7.035 --

THE COURT: Which is the attorneys.

MR. JIMMERSON: -- which -- exactly which would allow for collection against the attorneys.

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

MR. VOGEL: But -- but under 18.070 it allows you the discretion to do attorney or client so -- and that's --

THE COURT: Okay, well I did -- I did client.

MR. VOGEL: Okay.

THE COURT: I did defendant, that's what I meant and I went back and looked under the one you said and I read through all their thing against to see who they were seeking it against. So I did defendant.

MR. VOGEL: Okay.

THE COURT: I did not do the law firm.

MR. VOGEL: Okay. And we haven't discussed it yet, but we would obviously seek to stay execution --

THE COURT: Sure.

MR. VOGEL: -- pending the trial because that -- you know, pending on the outcome of trial, that may resolve the issue, there may be an offset if it's a defense verdict, it may be part of the judgment if it's plaintiff's verdict, but if they're --

THE COURT: Okay.

MR. VOGEL: -- going to be allowed to execute immediately, then obviously then we've got a --

THE COURT: You have an issue.

MR. VOGEL: -- we have to seek a stay and --

THE COURT: Have you even addressed that? I didn't --

MR. VOGEL: We -- we have not discussed it.

MR. JIMMERSON: We -- we haven't discussed it and we certainly would -- would oppose any, you know, effort to stay execution. We would of course request the Court, you know, hear brief --

THE COURT: Okay, well let's do this.

MR. JIMMERSON: -- you know, receive briefing on the same.

THE COURT: Bring that up as another issue of everything so I get a parameter of -- of how I want to do that in fairness because I struggled enough on the defendant and stuff, okay.

MR. VOGEL: Well --

THE COURT: Bring that -- so right now I -- I haven't signed a judgment, right? I -- I -- or an order?

MR. VOGEL: Right.

THE COURT: The order comes before the judgment --

MR. JIMMERSON: Correct, Your Honor.

THE COURT: -- so then at that time hopefully I'll have a -- I'll -- I'll consider it --

MR. VOGEL: So --

THE COURT: -- and maybe even ask you to brief it.

MR. VOGEL: Yeah, so -- so -- yeah, so once an order gets entered, then the NRCP 62 kicks in, there's a 10-day stay --

THE COURT: Right.

MR. VOGEL: -- and then we'd have to ask this -- either this Court you -- we'd have to ask you --

THE COURT: To extend the stay or decide what to do.

MR. VOGEL: Yeah.

THE COURT: Then, Mr. Vogel, let it take its course and I'll look at -- I -- I will --

MR. VOGEL: Okay.

THE COURT: -- address -- I prefer to do it that way so that I have a chance to look at it and figure out what I want to do. And hopefully that'll give us a chance to do this pretrial conference and get moving too --

MR. VOGEL: Very good.

THE COURT: -- which I think is extremely important. Okay?

JUDG

THE JIMMERSON LAW FIRM, P.C.
James J. Jimmerson, Esq.
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Facsimile: (702) 380-6422
Attorneys for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendant.

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

JUDGMENT

THE JIMMERSON LAW FIRM, P.C.
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On December 5, 2019, this matter came on for hearing before the Honorable Judge Kerry Earley on *Plaintiff's Motion for Mistrial and for Attorneys' Fees and Costs,* filed August 4, 2019, and Defendants' Opposition thereto, and *Countermotion for Attorneys' Fees and Costs Pursuant to NRS 18.070*, filed August 26, 2019, and the supplemental filings by both Plaintiff and Defendant in support of their respective Motions. Plaintiff Jason George Landess, appeared by and through his counsel of record, James M. Jimmerson, Esq. of The Jimmerson Law Firm, P.C. and Martin A. Little, Esq. of Howard & Howard Attorneys PLLC, and Defendants Kevin Paul Debiparshad, M.D., Kevin P. Debiparshad PLLC d/b/a Synergy Spine and Orthopedics, and Debiparshad Professional Services d/b/a Synergy Spine and Orthopedics, Jaswinder S. Grover, M.D., Ltd. d/b/a Nevada Spine Clinic, appearing by and through their counsel of record, S. Brent Vogel, Esq. and Katherine J. Gordon, Esq. of Lewis Brisbois Bisgaard & Smith LLP. Plaintiff's Motion for a Mistrial was granted on September 9, 2019, and on December 5, 2019, the Court awarded to Plaintiff their reasonable and necessarily incurred costs of $118,606.25 pursuant to N.R.S. 18.070(2).

NOW, THEREFORE:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that JUDGMENT IS ENTERED against Defendants Kevin Paul Debiparshad, M.D., Kevin P. Debiparshad PLLC d/b/a Synergy Spine and Orthopedics, and Debiparshad Professional Services d/b/a Synergy Spine and Orthopedics, Jaswinder S. Grover, M.D., Ltd. d/b/a Nevada Spine Clinic, and in favor of Plaintiff, in the total sum of $118,605.25, as of December 5, 2019, collectible by any lawful means and bearing legal interest.

Dated this _____ day of _____, 2020.

_____

DISTRICT COURT JUDGE

THE JIMMERSON LAW FIRM, P.C.
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