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 12

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CERTIFICATE OF MAILING

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

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EXHIBIT 4

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

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

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

HEARING REQUESTED

Date of Hearing:

Time of Hearing::

/ / /

COME NOW Defendants, by and through their counsel of record, S. Brent Vogel and Katherine J. Gordon, and hereby move under N.R.C.P. 60(b) for relief from the Court's Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial filed on September 9, 2019.

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

DATED this 28th day of February, 2020

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s/ S. Brent Vogel*

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

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

During trial, Judge Bare made comments that exhibited bias in favor of Plaintiff's counsel, James Jimmerson, Esq. Specifically, on Friday August 2, 2019 (trial day 10), during discussions regarding evidence contained in an exhibit offered by Plaintiff that was ultimately damaging to Plaintiff's case, but had been stipulated into evidence without objection, Judge Bare stated the following on the record:

> THE COURT: Okay. Well, that gives me further context, as to where I'm going with this at this point. And I've got to say, Mr. Jimmerson. This comes to exactly what I would expect from you, and if I say something you don't want me to say, then you stop me. Okay. But what I would expect from you, based upon all my dealings with you over 25 years, and all the time I've been a judge too, is frank candor -- just absolute frank candor with me as an individual and a judge. It's always been that way. You know, ***whatever word you ever said to me in any context has always been the gospel truth.***
>
> I mean, without, you know, calling my colleagues, lawyers that worked with me at the bar, or my wife as testimonial witnesses, I've told all those people many times about the level of respect and admiration I have for you. ***You know, you're in -- to me, you're in the, sort of, the hall of fame, or the Mount Rushmore, you know,***

> ***of lawyers that I've dealt with in my life.*** I've got a lot of respect for you. So I say that now because I think what you're really saying doesn't surprise me. And I think what you're really saying is -- and again, interrupt me anytime if you want -- is, well, in a multi-page exhibit, we just didn't see it.[1]

The following Sunday at 10:02 p.m., Plaintiff filed a Motion for Mistrial. The next court day, Judge Bare orally granted Plaintiff's Motion without allowing Defendants an opportunity to file opposing Points and Authorities. The jury was then discharged, and Judge Bare ordered Plaintiff's counsel to draft the Order granting mistrial. Defendants later successfully moved to disqualify Judge Bare from the case.[2] On September 9, 2019, after Defendants moved to disqualify him but before Judge Wiese rendered his decision on disqualification, Judge Bare filed without revision the draft Order granting mistrial, which Plaintiff had submitted to the Court over Defendants' objection.

Defendants now move for relief from Judge Bare's Order granting mistrial. The Order is void given that it was rendered 7 days after Defendants moved to disqualify Judge Bare. Further, the Order is riddled with inaccuracies and misstatements. Defendants acknowledge that much of the practical effect of the void Order cannot be remedied in this case; the jury cannot be recalled and trial resumed. However, the effect of the Order continues to be felt in other ways; including without limitation, the extent to which Plaintiff continues to rely on—and cite to—the misstatements contained in the Order in furtherance of his position on other issues, such as Plaintiff's request for attorney's fees and costs and upcoming motions *in limine*. At a minimum, Defendants respectfully request this Court prohibit Plaintiff from using the Order's self-serving

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

[2] Defendants filed their Motion to Disqualify on August 23, 2019. Plaintiff opposed that Motion on August 30, 2019, and Defendants replied on September 3, 2019. Judge Wiese heard the matter on September 4, 2019 and filed his order disqualifying Judge Bare on September 16, 2019.

language in support of future proceedings leading to trial.

II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

During trial, Plaintiff called witness Johnathan Dariyanani, the President of Plaintiff's former employer Cognotion, Inc. Mr. Dariyanani provided glowing testimony regarding Plaintiff, including improper character evidence. More particularly, Mr. Dariyanani testified that Plaintiff was a "beautiful person" who could be "trusted with bags of money."[3] During Defendants' cross examination of Mr. Dariyanani, and in direct response to his improper character evidence, Defendants utilized an email written by Plaintiff and sent to Mr. Dariyanani in 2016. Plaintiff had titled the email "Burning Embers".

The "Burning Embers" email was initially disclosed by Plaintiff within his 12th N.R.C.P. 16.1 Supplement along with other emails between Plaintiff and employees of Cognotion. (Bates stamped P00440-453 and P00479-513). The emails were disclosed again by Plaintiff in his Pre-Trial Disclosures, and for a third time as an identified trial exhibit (marked by Plaintiff as Plaintiff's proposed trial exhibit No. 56). Plaintiff's proposed Exhibit 56 consisted of 21 emails, and was a total of 49 pages. Only 24 of the 49 pages included substantive text from emails. Not only did Plaintiff disclose the emails in Exhibit 56, including the "Burning Embers" email on several occasions, he did not file a motion in limine, or otherwise request that the Court preclude or limit the use of any of the emails during trial.

Defendants utilized several emails contained in Plaintiff's proposed Exhibit 56 during cross examination of Mr. Dariyanani. Before using the emails, Defendants moved to admit Plaintiff's proposed Exhibit 56 into evidence. Plaintiff stipulated to its admission.[4] Defendants introduced the "Burning Embers" email as rebuttal character evidence in direct response to Mr. Dariyanani's testimony that Plaintiff was a beautiful and trustworthy person. The email began: "Lying in bed this morning I rewound my life…" It continued with Plaintiff (70 years old at the

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[3] *See* Trial Transcript, Day 11, attached hereto as Exhibit "B," pp. 31 and 55,

[4] Exhibit "A," p. 144.

time) providing a summary of past jobs and the significance of each. In the second and third paragraphs of the "Burning Embers" email, Plaintiff wrote:

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

Plaintiff did not object to Defendants' use of the "Burning Embers" email during the cross examination of Mr. Dariyanani. Plaintiff conducted Mr. Dariyanani's re-direct examination and attempted rehabilitation. Mr. Dariyanani was then excused and Judge Bare called a break for the jury. Once the jury was outside the courtroom, Plaintiff's counsel requested that the Court strike the testimony regarding the "Burning Embers" email. Judge Bare denied the request.[5]

However, Judge Bare was clearly affected by the potential damage to Plaintiff's case

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[5] *Id.*, p. 187.

caused by the opinions and admissions contained in Plaintiff's "Burning Embers" email. Although there were no pending objections or further requests for relief regarding the email, Judge Bare continually raised the issue of the potentially damaging email on his own through the end of the day. First, Judge Bare offered—sua sponte—excuses for Plaintiff counsel having "missed" the existence of the "Burning Embers" and corresponding failures of Plaintiff to timely object to its use.[6] Judge Bare then interjected gratuitous compliments about Plaintiff's counsel—including that Plaintiff's counsel tells only the "gospel truth" and that he was in Judge Bare's personal "hall of fame or Mount Rushmore" of attorneys.[7] He also declared himself "trouble[d]" and "bother[ed]" that use of the unfavorable emails could influence the jury and potentially lead to nullification.[8]

Judge Bare's final act in support of Plaintiff that day was to request an impromptu conference with all counsel to take place in an empty jury room. During the conference, Judge Bare strongly suggested the parties consider settling the matter. He further provided his unsolicited opinion that the jury would likely find in favor of Plaintiff. Counsel agreed to speak to their clients about Judge Bare's opinions and return on Monday for the continuation of trial.

On Sunday, August 4, 2019, at 10:02 p.m., Plaintiff filed a Motion for Mistrial and Request for Attorney's Fees and Costs based on Defendants' use of the stipulated-into-evidence "Burning Embers" email as rebuttal character evidence during the cross examination of Mr. Dariyanani. Neither Defendants nor Judge Bare saw the Motion until the following morning when trial was set to resume at 9:00 a.m. Nevertheless, Judge Bare allowed no time for Defendants to file opposing Points and Authorities and, instead, entertained argument and granted the Motion that morning.[9] He ordered Plaintiff to draft the Order granting the Motion.[10] Judge Bare stated he required further briefing on the issue of Plaintiff's requested Attorney's Fees and Costs and set a

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[6] *Id.*, p. 179.
[7] *Id.*, pp. 178-79.
[8] *Id.*, pp. 183-84.
[9] *See* Exhibit "B," p. 47.
[10] *Id.*, p. 70.

hearing for September 10, 2019.[11]

On August 23, Defendants filed a Motion to Disqualify Judge Bare, citing the multiple irregularities in his rulings, his flawed and improper grant of mistrial, and his clearly biased statements favoring Plaintiff's counsel. Defendants argued that Judge Bare's actions rendered a fair and impartial trial impossible, thus warranting disqualification. The Motion was transferred to Judge Wiese for determination who scheduled a hearing on the Motion for September 4, 2019.

More than a week after Defendants filed their Motion to Disqualify Judge Bare, Plaintiff forwarded a proposed draft Order granting the mistrial to Defendants' counsel for review. The proposed Order, which was 19 pages long and consisted of 32 separate paragraphs of proffered "findings," as well as 28 paragraphs of "conclusions of law," was riddled with inaccuracies and misstatements. One glaring area of inaccuracy and over-statement are paragraphs 18-20,[12] which

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[11] *Id.*, p. 73.

[12] *See* Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial, attached hereto as Exhibit "C."

Plaintiff, through Judge Bare, made the following statements:

> 18. The Court finds that it is evident that Defendants had to know that the Plaintiff made a mistake and did not realize this item was in Exhibit 56 particularly because of the motions in limine that were filed by Plaintiff to preclude other character evidence, in conjunction with the aggressiveness and zealousness of counsel throughout the trial. The email was one of the many pages of Exhibit 56 and the Plaintiff did not know about it.
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> 19. Defendants took advantage of that mistake . . . Once the email was admitted and before the jury, Plaintiff could not object in front of the jury without further calling attention to the email, and because it had been admitted. Once the highlighted language was put before the jury, there was not contemporaneous objection from Plaintiff, nor sua sponte interjection from the Court, that could remedy it . . . .
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> 20. The Defendants' statements have led the court to believe that the Defendants knew that their use of the Exhibit was objectionable, and would be objectionable to the Plaintiff, and possibly to the Court, and nevertheless the Defendants continued to use and inject the email before the jury in the fashion that precluded Plaintiff from being able to effectively respond. In arguing to the Court that they "waited for Plaintiff to object" and that Plaintiff "did nothing about it," Defendants evidence a consciousness of guilt and of wrongdoing. That consciousness of wrongdoing suggests that Defendants and their counsel were the legal cause of the mistrial.

essentially provide a basis for the Court to award Plaintiff his requested attorney's fees and costs, despite the fact Judge Bare specifically declined to rule on the fees and costs, and instead requested briefing and set a new hearing date. For these reasons, coupled with the fact Defendants had already filed the Motion for Disqualification, defense counsel declined to approve the draft order.

On September 4, 2019 Plaintiff submitted his draft Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial to Judge Bare. On September 9, 2019, Judge Bare signed Plaintiff's proposed draft, and it was filed on the same day.[13] **Judge Bare signed the proposed Order in disregard of the blatant and over-reaching misstatements contained therein, and despite the pending Motion to Disqualify him from the proceedings**.[14]

One week later, on September 16, Judge Wiese granted Defendants' Motion to Disqualify Judge Bare. In his Order, Judge Wiese noted that he was "not called upon to determine whether each of [Judge Bare's] rulings was correct, or even supported by evidence or foundation" but rather to "address whether Judge Bare's actions evidenced an actual or implied bias in favor of, or against either party."[15] Judge Wiese concluded that Judge Bare's laudatory statements about Mr. Jimmerson demonstrated impressions that had been formed not just during trial or in his capacity as a judge; rather, they came from "extrajudicial source[s]." He further noted that Judge Bare's statements regarding Mr. Jimmerson were "not limited to compliments regarding professionalism."[16] Ultimately, Judge Wiese stated that "to tell the attorneys that the Judge is going to believe the words of one attorney over another, because 'whatever word you ever said to me in any context has always been the gospel truth,' results in a 'reasonable person' believing that the Judge has a bias in favor of that attorney."[17] He went on to conclude that "[t]he statements that

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[13] *See Id.*

[14] Judge Bare was clearly aware of the pending Motion to Disqualify because he filed an Affidavit in Response to the Motion on September 3, 2019, and an Amended Affidavit the next day.

[15] Order, attached hereto as Exhibit "D," p. 18.

[16] *Id.*, pp. 30-31.

[17] *Id.*, p. 31.

Judge Bare made . . . on Trial Day 10 . . . seemed to indicate a bias in favor of Mr. Jimmerson" and to rule that, consequently, Judge Bare must be disqualified from the case.[18]

The case was subsequently transferred to this Honorable Court. Following the transfer, Plaintiff has employed the self-serving language contained in Judge Bare's post-Motion to Disqualify Order at every opportunity. Not surprisingly, Plaintiff highlighted multiple portions of the Order before this Court during the December 5, 2019 hearing on the parties' competing Motions for Attorney's Fees and Costs. Plaintiff cited those "findings" which—if taken as true—could provide a basis for Plaintiff's requested fees and costs.

The obvious problem with the highlighted portions of the Order is the fact Judge Bare never made those particular findings (to the contrary, the Judge stated a need for briefing on the issue of fees and costs and scheduled a later court hearing to address the matter). Plaintiff included the over-reaching language in the Order solely for later use during the argument on requested fees and costs, which he did. Plaintiff further felt confident that Judge Bare would sign the inflated Order in light of Defendants' recently filed Motion to Disqualify Judge Bare.

Curiously, on September 16, 2019, Judge Bare *did* remove from his calendar the hearing on the parties' competing Motions for Attorney Fees and Costs. Judge Bare cited Defendants' pending Motion to Disqualify as the reason for removal, thus displaying an appreciation for potential jurisdictional changes and concomitant need to cease signing and filing Orders.[19] It remains unknown why Judge Bare did not apply this same rationale and caution before signing Plaintiff's inflated proposed Order granting the mistrial (which was submitted for Judge Bare's review *after* Defendants filed their Motion to Disqualify, and was signed *after* Judge Wiese's hearing on the Motion to Disqualify).

The extent to which Plaintiff will continue relying on the language contained in Judge Bare's multi-page Order is only now becoming clear. Plaintiff has already demonstrated to this

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[18] *Id.*, pp. 31-32.

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

Court and Defendants an unfettered willingness to cite portions of the subject Order as early and often as possible. The Order is nothing more than a lengthy wish list of Plaintiff's positions regarding the mistrial, nearly all of which was never addressed by Judge Bare. Plaintiff took clear advantage of the timeframe during which Judge Bare was asked to review the Order, knowing he was aware of the pending Motion to Disqualify.

As set forth below, the circumstances surrounding Plaintiff's proposed Order—most importantly the intervening disqualification of Judge Bare—render the Order void and, at a minimum, Plaintiff should be precluded from relying on the "findings of fact" therein in support of future pre-trial and trial motion work.

III. LEGAL ARGUMENT

A. Applicable Law

1. *Nevada Rule of Civil Procedure 60*

Nevada Rule of Civil Procedure 60(b) governs occasions when a party may seek relief from a final judgment, order, or proceeding. The Rule provides:

> the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

A motion under N.R.C.P. 60(b) must be brought "within a reasonable time — and for reasons (1), (2), and (3) no more than 6 months after the date of the proceeding or the date of

service of written notice of entry of the judgment or order, whichever date is later." N.R.C.P. 60(c)(1). This motion is timely filed per the rule.

1. Effect of Disqualification on Subsequent Proceedings

A judge has a duty to uphold and apply the law, and to perform judicial duties fairly and impartially. N.C.J.C. 2.2 Indeed, the fair and impartial exercise of justice is a fundamental requirement, without which no legal matter should proceed. Further, "[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety." N.C.J.C. 1.2. To that end, a judge shall not act in an action when either actual or implied bias exists. N.R.S. 1.230(1-2).

Moreover, "[u]nder Rule 2.11(A)(1) of the NCJC, judicial disqualification is required in any proceeding in which the judge's impartiality might reasonably be questioned, including when the judge has a personal bias or prejudice concerning a party." *Mkhitaryan v. Eighth Judicial Dist. Court*, 2016 Nev. Unpub. LEXIS 859, *2-3, 385 P.3d 48 (citing N.C.J.C. 2.11) (internal quotation marks omitted).

> A challenge to an assigned judge for want of impartiality presents an issue of constitutional dimension which must be resolved and the rule memorialized of record . . . nor is a judge free to proceed with the case until the challenge stands overruled of record following a judicial inquiry into the issue. . . .

Miller Dollarhide, P.C. v. Tal, 163 P.3d 548, 552 (Okla. 2007). Under N.R.S. 1.235(1), a party seeking disqualification must file an affidavit specifying the facts upon which the disqualification is sought, and the affidavit must be accompanied by a certificate of the attorney of record that the affidavit is filed in good faith and not interposed for delay. Then, "[e]xcept as otherwise provided . . . the judge against whom an affidavit alleging bias or prejudice is filed *shall proceed no further with the matter* . . . " except to "immediately transfer the case to another department of the court . . . ." N.R.S. 1.235(5) (emphasis added). "The authorities are uniform,

indeed it is black letter law that a disqualified judge may not issue any orders or rulings other than of a 'housekeeping' nature in a case in which he or she is disqualified." *Whitehead v. Nevada Comm'n on Judicial Discipline*, 920 P.2d 491, 503 1996 Nev. LEXIS 1545, *43.

What is more, "[t]hat the actions of a district judge, disqualified by statute, are not voidable merely, but void, has long been the rule in this state." *Hoff v. Eighth Judicial Dist. Court*, 79 Nev. 108, 110, 378 P.2d 977, 978 (1963) (citing *Frevert v. Swift*, 19 Nev. 363, 11 P. 273 (1886); *see Rossco Holdings, Inc. v. Bank of Am.*, 58 Cal. Rptr. 3d 141, 148-49 (Cal. Ct. App. 2007) ("Orders made by a disqualified judge are void."); *see also People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd.*, 111 Nev. 431, 439, 894 P.2d 337, 342 (1995) (overruled on other grounds in *Towbin Dodge, L.L.C. v. Eighth Judicial Dist.*, 121 Nev. 251, 112 P.3d 1063 (2005)) (granting rehearing and withdrawing its prior opinion after concluding that it must disqualify a judge who sat on the Court in place of a missing Justice when it was determined the visiting judge sat on the board or an organization that had an interest in the case.) "[D]isqualification occurs when the facts creating disqualification arise, not when the disqualification is established." *Christie v. City of El Centro*, 37 Cal. Rptr. 3d 718, 725 (Cal. Ct. App 2006). "[I]t is the fact of disqualification that controls, not subsequent judicial action on that disqualification." *Id.*

B. Judge Bare's Order Granting Mistrial is Void and Must Be Set Aside

Defendants are entitled to relief from Judge Bare's Order granting mistrial under N.R.C.P. 60(b)(6)'s catch-all provision because the Order was void when Judge Bare filed it. First, Judge Bare made his glowing statements praising Plaintiff's counsel on August 2, 2019, day 10 of the original trial. Of Judge Bare's many actions showing his partiality in favor of Plaintiffs, both before and during trial, it was those admiring statements that Judge Wiese eventually concluded constituted disqualifying acts. From the moment Judge Bare made those statements, as noted in *Christie v. City of El Centro*, disqualification occurred. Thus, Judge Bare's subsequent actions were void. Judge Bare ruled on Plaintiff's Motion on August 5, 2019, three days after making the disqualifying statements. Consequently, the Order was void, both when the ruling was made and

when the Order was eventually filed more than a month later.

But even if this Court should decline to follow guidance from the California court, the Order granting mistrial was still void. Nevada law clearly directs that, once Defendants filed their Motion to disqualify him, Judge Bare must proceed no further with the matter except to immediately transfer the case to another department. N.R.S. 1.235(5). He was no longer empowered to perform any judicial functions. But even in the face of that clear prohibition, Judge Bare accepted, signed and filed Plaintiff's self-serving Order. That action was performed contrary to Nevada law, which voids the Order; any and all subsequent use of the void Order is likewise contrary to law.

Moreover, Judge Bare's Order cannot be interpreted as a "housekeeping" matter as allowed by the *Whitehead* Court. Reversing the grant of the Mistrial is not possible. Once Judge Bare dismissed the jury, over Defendants' objections and offers of more reasonable alternative courses of action, the trial was over. The multi-page Order, with 60 paragraphs serving to incorporate every theory espoused by Plaintiff regarding the mistrial and its subsequent effect on Plaintiff's request for fees and costs clearly exceeds the boundaries of a simple housekeeping Order. As a result, it is void.

The circumstances of this case throw the wisdom of N.R.S. 1.235(5) into sharp relief and demonstrate the precise reason a disqualified judge's orders are void. A judge under scrutiny for possible bias or prejudice should not be given the opportunity to effectuate an overly damaging or harmful Order against the party seeking disqualification. Accordingly, relief from that Order is justified and required in this matter under N.R.C.P. 60(b)(6) and the case law.

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IV. CONCLUSION

For the reasons set forth herein, Defendants request this Court grant relief from Judge Bare's Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial and prohibit Plaintiff from further use of language from the Order in subsequent proceedings in this matter.

DATED this 28th day of February, 2020

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s/ S. Brent Vogel*

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Lewis Brisbois Bisgaard & Smith LLP and that on this 28th day of February, 2020, a true and correct copy of **DEFENDANTS' MOTION FOR RELIEF FROM FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFF'S MOTION FOR A MISTRIAL** was served electronically using the Odyssey File and Serve system and serving all parties with an email-address on record, who have agreed to receive electronic service in this action.

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EXHIBIT 5

EXHIBIT 5

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DISTRICT COURT
CLARK COUNTY, NEVADA

LYNDA ELIZABETH NEWMAN,

Plaintiff,

v.

CHARLES ADAM NEWMAN,

Defendant.

CASE NO.: D-17-553689-D
DEPT NO.: J

FAMILY DIVISION

ORDER REGARDING PLAINTIFF'S MEMORANDUM OF FEES, COSTS, AND DISBURSEMENTS PURSUANT TO JULY 22, 2019 ORDER

The Court, in review of its Notice of Entry of Order Regarding Defendant's Motion for Order to Show Cause, Plaintiff's Motion to Strike, Opposition and Countermotion for Sanctions entered July 22, 2019, and Plaintiff, LYNDA NEWMAN's ("Lynda") Memorandum of Fees, Costs, and Disbursements filed on August 1, 2019, Defendant, CHARLES NEWMAN ("Charles") not having filed a response, which was due on or before

August 12, 2019, having reviewed the pleadings on file, and good cause therefore, the Court hereby Finds and Orders as follows:

THE COURT HEREBY FINDS that Lynda requests that the Court enter an order directing Charles to pay all of Lynda's reasonable attorney's fees and costs that she has incurred relating to his Motions for an Order to Show Cause, filed April 6, 2019, including his motions to Strike Plaintiff's pleadings related to her response to his Motion.

THE COURT FURTHER FINDS that as indicated in the July 22, 2019 Order ("Order"), Charles's Motion violated the local rules, which he had previously been admonished to follow and comply. Yet, he continues to file pleadings in violation of the local court rules.

THE COURT FURTHER FINDS that Defendant's Motion stated bare recitations to the law, failed to make a prima facia showing of contempt, and failed to provide any evidence to support his claims for contempt. Thus, the Court denied Defendant's Motion and granted Plaintiff's Countermotion for Sanctions.

THE COURT FURTHER FINDS that there was no basis for an Order to Show Cause, Defendant's Motion was brought in bad faith, is frivolous, and purposefully multiplied the proceedings, increasing costs for Lynda.

THE COURT FURTHER FINDS that Lynda is the prevailing party. Thus, the court directed Lynda to file a Memorandum of Fees and Costs within ten days.

THE COURT FURTHER FINDS that Charles's had ten (10) days to oppose the Memorandum, and that his Opposition was due on or before August 12, 2019. The Court further finds that as of August 28, 2019, Charles has neither filed an Opposition with this Court or served an opposition on Lynda's counsel.

THE COURT FURTHER FINDS that a request for an order directing another party to pay attorney's fees must be based upon statute, rule or contractual provision. *See, e.g, Rowland v. Lepire*, 99 Nev. 308, 662 P.2d 1332 (1983). NRS 18.010 states that:

> 1. The compensation of an attorney and counselor for his or her services is governed by agreement, express or implied, which is not restrained by law.
> 2. In addition to the cases where an allowance is authorized by specific statute, the court may make an allowance of attorney's fees to a prevailing party:
>
> (a) When the prevailing party has not recovered more than $20,000; or
> (b) ***Without regard to the recovery sought, when the court finds that the claim***, counterclaim, cross-claim or third-party complaint or defense of the opposing party ***was brought or maintained without reasonable ground or to harass the prevailing party***. The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations. It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public.
>
> 3. In awarding attorney's fees, the court may pronounce its decision on the fees at the conclusion of the trial or special proceeding without written motion and with or without presentation of additional evidence.
> 4. Subsections 2 and 3 do not apply to any action arising out of a written instrument or agreement which entitles the prevailing party to an award of reasonable attorney's fees.

NRS 18.010 [emphasis added]. In *Miller v. Wilfong*, 121 Nev. 619, 621, 119 P.3d 727, 730 (2005), the Court stated:

> THE COURT FURTHER FINDS that in *Miller v. Wilfong,* the Court held that
>
> Second, while it is within the trial court's discretion to determine the reasonable amount of attorney fees under a statute or rule, in exercising that discretion, the court must evaluate the factors set forth in *Brunzell v. Golden Gate National Bank*. Under *Brunzell*, when courts determine the appropriate fee to award in civil cases, they must consider various factors, including the qualities of the advocate, the character and difficulty of the work performed, the work actually performed by the attorney, and the result obtained. We take this opportunity to clarify our jurisprudence in family law cases to require trial courts to evaluate the *Brunzell* factors when deciding attorney fee awards. Additionally, in *Wright v. Osburn*, ***this court stated that family law trial courts must also consider the disparity in income of the parties when awarding fees.*** Therefore, parties seeking attorney fees in family law cases must support their fee request with affidavits or other evidence that meets the factors in *Brunzell* and *Wright*.

Miller v. Wilfong, 121 Nev. 619, 623-24, 119 P.3d 727, 730 (2005) [emphasis added].

THE COURT FURTHER FINDS that Lynda seeks reimbursement of attorney's fees in this matter for having to file her Opposition(s), Countermotion(s), and additional Ex Parte Requests as the prevailing party and under the criteria set forth in *Miller v. Wilfong*, 121 Nev. 619, 119 P.3d 727 (2005).

THE COURT FURTHER FINDS that with regard to fees, the Supreme Court has adopted "well known basic elements," which in addition to hourly time schedules kept by the attorney, are to be considered in determining the reasonable value of an attorney's services qualities, commonly referred to as the *Brunzell* factors.

a) Quality of the Advocate: his ability, his training, education, experience, professional standing and skill. This factor logically addresses the rate at which counsel charges for services. A skilled and experienced attorney can justify an hourly rate greater than an attorney with less skill and experience. A party may contend that a rate is either reasonable or excessive in the market based upon the education, skill and experience of an attorney, or lack thereof.

Radford J. Smith, Chartered, is A/V rated firm. The attorneys have litigated almost every aspect of Nevada family law during the course of their respective careers. Its senior attorney, and the lead attorney in the present case, Radford J. Smith, Esq. has practiced family law for over 30 years, and is a Nevada Board Certified Family Law Specialist. He has written and lectured extensively in the field of Family Law for the National Business Institute and the State Bar of Nevada, including a yearly presentation at the "Advanced Family Law Seminar" conducted at the end of each calendar year. Mr. Smith's rate of $500 per hour is reasonable based on his experience and qualifications. His associate who has worked on this matter, Kimberly A. Stutzman, Esq. is a graduate of the Golden Gate University School of Law. She received a Specialization Certificate in Family Law and Intellectual Property upon graduation. She has exclusively practiced family law in the three years that she has been licensed in Nevada. She is also licensed in the state of California. Her rate of $250 per hour is reasonable based on her qualifications, experience and quality of work performed in this matter.

b) The Character of the Work to be Done – its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation. The "character of the work" goes to whether the fee charged was commensurate to the "difficulty, intricacy and importance" of the issues raised. Lynda incurred the fees and costs addressed above due to Charles's meritless motions and actions. Lynda's counsel worked diligently to prosecute her Oppositions and Countermotions in this case and defend against Defendant's vexatious claims.

c) The Work Actually Performed by the Lawyer – the skill, time and attention given to the work. Lynda's counsel submits that the work done in this case was performed in a competent and professional matter. The fees incurred were commensurate to the work performed. Attached here to as Exhibits "1" is the redacted bill history for fees and costs incurred as a result of responding to the Motion for an Order to Show Cause. The calculation of the fees incurred based off of the redacted invoices is also included with the Bill History. Also included herein is Unsworn Declaration of undersigned counsel, Kimberly A. Stutzman, Esq.

d) The Result: Whether the attorney was successful and what benefits were derived. The Court granted Lynda's Oppositions and Countermotions and denied Charles's Motions. The results demonstrate a success on the merits of the case. As of the date of filing this Memorandum of Fees and costs, Lynda has incurred approximately $4,692.10 in

attorney's fees and costs ($4,335.00 in fees and $357.10 in costs). *See* Exhibit "1" to Plaintiff's Memorandum of Fees and Costs, filed August 1, 2019.

THE COURT FURTHER FINDS that the aforementioned fees and costs in the amount of $4,692.10 were calculated using the billing entries related to responding to Charles's Motions for an Order to Show Cause and his subsequent supplements and Motions to Strike Lynda's Ex Parte Requests related to her Opposition.

THEREFORE, based on the foregoing,

IT IS HEREBY ORDERED that Plaintiff's Memorandum of Fees, Costs, and Disbursements, filed on August 1, 2019 is GRANTED.

IT IS FURTHER ORDERED that Charles shall pay attorney's fees and costs to Lynda the amount of $4,557 dollars and — cents ($ 4557 . 00).

IT IS FURTHER ORDERED that Charles shall pay Lynda within 90 days of the Notice of Entry of this Order.

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IT IS FURTHER ORDERED that if said amount is not paid within the timeframe above, the monies shall accrue interest at the legal interest rate and shall be REDUCED TO JUDGMENT and collectable by all legal means.

DATED THIS 4 day of Sept, 2019.

Rena G. Hughes
DISTRICT COURT JUDGE

RENA G. HUGHES

Submitted by:

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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. 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

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 and Katherine J. Gordon, and hereby submit their 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.

This Reply is made and based on the Memorandum of Points and Authorities, the papers and pleadings on file herein, and such oral argument as requested by the Court.

DATED this 23rd day of April, 2020

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s/ S. Brent Vogel*

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

A statement attributed to Victor Hugo is relevant in this case: "strong and bitter words indicate a weak cause." It is any counsel's duty to advocate zealously and vigorously for his or her client. However, Plaintiff's counsel takes that axiom to unnecessary and counterproductive extremes in Plaintiff's Response Brief and Motion for Clarification and/or Amendment (hereinafter "Response"). Plaintiff uses his Response to impugn Defendants' and their counsel's ethics and motives at every turn, using vitriolic language that has become, unfortunately, all too familiar in this case. He attacks Defendants as "desperate, malevolent, and reckless[;]" insists that "they cannot be trusted to act appropriately[;]" and issues a dramatic "call . . . to action," by which he demands that this Court bypass the issue of reducing the Order for costs altogether and simply require Defendants to pay the costs award immediately. (Response, at p. 7). Again, as has become dismayingly familiar, Plaintiff twists and misinterprets language from Defendants' filings to suit his false narrative that Defendants and their counsel are untrustworthy. He accuses Defendants of misstating this case's procedural history, ironically relying on inaccurate interpretations of Defendants' statement of facts. He claims that Defendants have filed "frivolous" motions in this matter, meaning Defendants' Motion for Relief from Plaintiff's Findings of Fact, Conclusions of Law, and Order Granting Mistrial (hereinafter "Order")—the same Order Judge Bare approved, signed, and rendered *after* Defendants had made a credible motion to disqualify him for bias and mere days before Judge Wiese granted it on grounds that Judge Bare's statements in favor of Plaintiff's Counsel would cause a reasonable person to question his impartiality. But in attacking Defendants for filing their Motion for Relief, he ignores that his own mischaracterizations of the facts in that Order and use of that self-serving language in subsequent proceedings left Defendants with no choice but to seek relief from it.

Plaintiff also accuses Defendants of "brazenly" threatening to "erect every procedural hurdle they can to deny Plaintiff the reimbursement of his costs." (Response, at p. 6). However, the "procedural hurdle" he so histrionically decries is built into N.R.C.P. 62. Stay of the judgment

would be automatically imposed if the costs award were reduced to judgment; any further stays would be at the discretion of this court. Thus it requires a certain devious creativity to distort Defendants' highlighting the impracticality inherent in reducing the costs award to judgment for immediate execution and to transmogrify it into evidence that Defendants are "desperate, malevolent, . . . reckless[,]" and untrustworthy. Moreover, Plaintiff denounces Defendants for using ostensibly inconsistent legal reasoning in the two filings with regard to whether the order at issue is "final." However, Defendants' reasoning is not inconsistent, as Defendants' Reply in Support of Motion for Relief from the Court's Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial elucidates. But even if it were, Plaintiff's is equally so, given that his arguments are virtual mirror images of Defendants', but without benefit of being based in valid legal principles. This is presumably why he introduced in his response an entirely new theory, insisting he can hopscotch over his original argument for reducing this Court's award of costs to judgment for immediate execution in favor of requiring Defendants pay the award immediately. Finally, Plaintiff continues his practice of citing case law to which he attaches interpretations that are questionable at best, outright mischaracterizations at worst. Plaintiff's practice of intentionally misstating the law cannot be allowed to stand. It seems clear that if anyone involved in this case is desperate or reckless, it is not Defendants.

This Court cannot disregard the law, which is what would be required to find in favor of Plaintiffs in this matter. Thus, Defendants respectfully request this Court deny Plaintiff's demand to either reduce the costs award to judgment for immediate execution or, in the alternative, require immediate payment of the award.

II. STATEMENT OF FACTS[1]

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.

[1] Defendants provided relevant citations to the record with their Opening Brief. To prevent duplication of effort and reduce copying, Defendants do not repeat those citations here.

18.070(2). 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 . . . ." 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. On September 16, 2019, Judge Wiese ruled that Judge Bare must be disqualified from the case. Among his other findings, 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." The case was re-assigned to this Honorable Court the next day.

On December 5, 2019, the parties met before this Court and argued the issue of attorney 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. This Court tasked Plaintiff with preparing the order granting costs.

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 hearing, Defense counsel noted that if the Court were going to allow Plaintiff to immediately execute judgment on the award of costs, he would seek to stay that execution pending trial. 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. This Court declined to decide the issue at that time and indicated that it would request briefing on the subject.

Per this Court's instruction, Plaintiff submitted his proposed Order and Judgment Granting in Part Plaintiff's Motion for Attorney's Fees and Costs, to which he had added a provision

reducing the costs award to judgment, rendering it collectible.[2] Subsequently, Defendants submitted their own draft Order, headed by correspondence to the Court that explained their objection to Plaintiff's draft Order, which included language clarifying that any execution on the Order must await a final judgment, providing for any applicable offsets.

Three days later, Plaintiff submitted more correspondence to the Court. Plaintiff 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—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. 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. Subsequently, this Court ordered briefing on this matter and set a hearing for April 30, 2020.[3]

III. LEGAL ARGUMENT

Plaintiff insists that this Court should require Defendants to pay the costs award immediately instead of reducing the award to judgment for immediate execution as he originally requested. Next, he argues that the costs award is not subject to any potential offset under either N.R.C.P. 68 or N.R.S. 18.020. Finally, he contends that this Court can certify the costs award under N.R.C.P. 54 and reduce it to judgment for immediate execution, notwithstanding his claim

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[2] Plaintiff accuses Defendants of misstating this case's procedural history, specifically singling out this assertion. He claims that "Plaintiff never submitted to the Court a proposed order and judgment on the motion for attorney's fees." (Response, at p. 5). However, Plaintiff indeed submitted a document entitled "Order and Judgment Granting in Part Plaintiff's Motion for Attorney's Fees and Costs," (provided to this Court as Exhibit "J" of Defendants' Opening Brief.) If that document had not been submitted to Defendants, Defendants would not have been able to produce it as Exhibit "J."

[3] Plaintiff also complains that "Defendants' 60(b) Motion flatly contradicts the arguments made by Defendants concerning whether the cost award is a final judgment." (Response, at p. 5). No contradiction of reasoning exists between Defendants' two related filings, as Defendants' Reply in Support of Motion for Relief from Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial makes abundantly clear.

that it is unnecessary to do so. But each of those arguments fails to comport with the law and consequently, is fatally flawed.

A. The Costs Award is Not a Final Judgment Certifiable under N.R.C.P. 54(b)

Plaintiff appears to have given up on his original argument that he is entitled to certification of the costs award under N.R.C.P. 54(b). He makes a half-hearted effort to salvage that argument by citing case law that he claims suggests otherwise. But this attempt is unavailing. His interpretation of N.R.C.P. 54 is faulty and not in accord with the Rule's language.

> 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).

Plaintiff states that "the Order resolves only one of Plaintiff's entitlements to relief, sanctions pursuant to N.R.S. 18.070." But N.R.C.P. 54(b) provides that "the court may direct entry of a final judgment as to one or more, but fewer than all, *claims* . . . ." (emphasis added). Plaintiff's request for costs is not one of the *claims* asserted in this medical malpractice case. Thus, his misleading interpretation notwithstanding, Plaintiff's argument fails to satisfy the clear requirement of the Rule.

In addition, Plaintiff displays throughout his Response a pattern of slipshod or at times, outright deceptive legal citation; his arguments regarding N.R.C.P. 54 certification exemplify that pattern. As a preliminary observation, Plaintiff asks this Court to disregard a recent Nevada case that is directly on point, *Newman*,[4] and instead cites a 30-year-old case, *Albany v. Arcata*

[4] Plaintiff suggests that *Newman* bolsters his point that this Court should require Defendants to pay the costs award immediately without resort to certification under N.R.C.P. 54(b) because the challenged Order in that case included a date by which the sanctions must be paid. (Response, at p. 18 n. 11). That argument holds no water given that the Supreme Court concluded the Order was unappealable as not affecting the rights of the parties arising from the underlying matter, the decree of divorce, and thus, did not rule on the propriety of any aspect of the Order, including timing of payment. *Newman v. Newman,* No. 79800, 455 P.3d 482, 2020 Nev. Unpub. LEXIS 47, *1, (Nev., Jan. 16, 2020). If Plaintiff is suggesting that a Family Court Order somehow has more (footnote continued)

Association, that is actually damaging to his analysis. First, he attempts to downplay the fact that the *Albany* Court held that the trial court could not certify the order as final under N.R.C.P. 54(b). *Albany v. Arcata Ass'n*, 106 Nev. 688, 690, 799 P.2d 566, 567 (1990). In a clever feat of rhetorical sleight of hand, he attempts to convince this Court that the more important ruling is one the *Albany* Court never made: whether "the sanctions order would still have been ineligible for N.R.C.P. 54(b) certification even if it applied to a party." (Response, at p. 19:3-5). Citing a case for what it did not say is an interesting feat of legal gymnastics. By that logic the Court also did not conclude that the sanctioned party kidnapped the Lindbergh Baby, and conjecturing otherwise is only slightly more absurd than the exercise Plaintiff suggests is essential to the analysis. Further, he glosses over the Court's statement that "[w]here no statutory authority to appeal is granted, no right to appeal exists[,]" which directly supports Defendants' argument that the costs award is not a final judgment suitable for 54(b) certification. *Albany*, 106 Nev. at 690, 799 P.2d at 567.

Because no mechanism under Nevada law exists to support his argument for certification under N.R.C.P. 54, Plaintiff relies on extrajurisdictional federal law to support his argument. However, the federal law he cites is similarly unfavorable to his argument.

Plaintiff cites "*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).)" (Response, at p. 19) "Citation omitted" is an illuminating and calculated omission here. The case omitted, *Cromaglass Corp. v. Ferm*, held that the sanctions imposed do not constitute a final order appealable by statute. 500 F.2d 601, 604-05 (1974) ("It is clear that these sanctions do not represent a 'final order,' appealable as of right under 28 U.S.C. § 1291. Assuming the order to be 'final' with respect to the claims involved . . ., it adjudicates fewer than all the claims raised in the complaint." (emphasis added)). Plaintiff's omission is significant indeed.

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persuasive value than the Supreme Court decision interpreting it, he offers no case law to support that notion.

In addition, citing *Pinal Creek Group v. Newmont Mining Corp.*, Plaintiff pulls one sentence out of the facts section that sounds as if it might support his argument. (Response, at p. 19). But the case actually holds the opposite; the Court denied the motion for entry of judgment of sanctions under F.R.C.P. 54(b). No. 91-1764 PHX DAE (MEA), 2008 U.S. Dist. LEXIS 129033, *10-11 (D. Ariz. Dec. 8, 2008). In fact, the case language Plaintiff cites directly contradicts his argument. (Response, at p. 19 ("[Y]et this Court cannot enter judgment *because a trial on the merits on BHP's claim has not gone forward*." (emphasis added))). This will not be the last time Plaintiff resorts to this tactic of cherry picking language from cases that ultimately do not support his claims.

Plaintiff goes on to suggest that *Rhino Sports, Inc. v. Sport Court, Inc.* constitutes an instance where a court "certify[ied] sanctions order under Fed. R. Civ. P. 54(b)." (Response, at p. 19). That language is deceptive because while the court did mention Rule 54(b), it did so in refusing to grant sanctions. A party moved "to show cause why [the opposing parties] should not be held in contempt of court . . . and for sanctions." No. CV021815, 2007 U.S. Dist. LEXIS 32970, *6 (D. Ariz. May 2, 2007). The Court ultimately denied the motion to show cause and for sanctions; it certified as final under F.R.C.P. 54(b) its *denial* of sanctions. *Id.* at *30. Finally, Plaintiff cites yet another inapposite case regarding contempt sanctions, *Fendi Adele S.R.L. v. Burlington Coat Factory Warehouse Corp.*, 642 F. Supp. 2d 276 (S.D.N.Y. Aug. 10 2009). The court concluded that certification was appropriate because its decision as to the amount of sanctions and fees and costs was a final decision on the relevant claim at issue: namely an injunction violation. *Id.* at 282-83. It appears Plaintiff did not expect counsel or the Court to review the cases he cited.

Here, the award of costs does not end the action as to any of Plaintiff's claims, as N.R.C.P. 54(b) requires. Nor does the costs award in any way affect the rights of the parties arising from the medical malpractice action, meaning it is not appealable as a final judgment. The Wyoming Supreme Court recently agreed with that conclusion, ruling that a district court's orders granting a mistrial and awarding costs and fees were not appealable orders. *Miller v. Beyer*, 329 P.3d 956,

962 (Wyo. 2014). In that medical malpractice action, the first trial ended in mistrial when counsel asked a question that described the decedent as a "drug addict." *Id.* at 960. The Court concluded that

> "[w]hile the question of the mistrial may have been settled once the court issued its order awarding costs and fees, that issue was only one discrete part of the controversy. The parties' controversy would not be fully determined on the merits until after the second trial. The orders declaring a mistrial and awarding costs and fees thus did not determine the action or prevent a judgment as required by Rule 1.05(a), and a ruling that the mistrial orders were immediately appealable would necessarily result in the type of fragmentary appeals and piecemeal decisions that Rule 1.05 was intended to avoid."

Id. at 962 (interpreting Wyoming's Rule identifying an "appealable order"). Similarly, here, the controversy will not be fully determined until after trial on the merits. Thus, to certify the costs award under N.R.C.P. 54(b) would result in "fragmentary" and "piecemeal" decisions. This is especially true given that N.R.C.P. 68 and N.R.S. 18.020 provide potential offsets to the award, worsening the risk for such incomplete decisions. Further, the costs award is 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; no other statute or rule authorizes an appeal from such an Order. *Brown v. MHC Stagecoach*, LLC, 129 Nev. 343, 345, 301 P.3d 850, 851 (2013) (stating that the Court may consider only appeals authorized by statute or court rule).

The Order granting costs will not be a final judgment under any interpretation of Nevada law. Thus, it is not certifiable under N.R.C.P. 54(b).

B. The Costs Award is Subject to Potential Offset under N.R.C.P. 68 and N.R.S. 18.020

Plaintiff argues that no offset of costs is available under N.R.C.P. 68. (Response, at p. 13). First, he regurgitates case citations he placed in an earlier footnote that he claims support his assertion that the costs award is immediately payable without resort to certification under N.R.C.P. 54(b), falsely calling them "black letter law." (Response, at p. 13-14). But Defendants explain in detail below in section C why each of those cases is inapposite and actually damage his arguments, one of them stunningly so. He then attempts to suggest that N.R.C.P. 68 does not do what it clearly does: prevent a party who rejects an offer of judgment and then does worse than

that offer at trial from recovering fees and costs and require that party to pay the fees and costs of the other party. N.R.C.P. 68(f)(1)(A-B). In furtherance of that effort, Plaintiff grossly misstates Defendants' arguments, even going so far as to invent an argument Defendant never made. Finally, Plaintiff cites a lengthy excerpt from *Elliott v. Progressive Halcyon Insurance Company*, festooned with much bold and underlined text, to support his statement that "courts have roundly rejected Defendants' interpretation of the offer of judgment rule." (Response, at p. 15). But that case does nothing of the sort.

In *Elliott*, the Oregon Court of Appeals was tasked with evaluating whether a plaintiff who had prevailed at trial but had received a damages award of less than the defendant's pre-trial offer of judgment was nonetheless entitled to repayment of expenses incurred in proving facts that the Defendant had failed to admit during discovery. 194 P.3d 828, 831-32 (Or. Ct. App. 2008). The Court performed a detailed analysis of the interplay between two statutes, ORCP 54E(3) and ORCP 46C, much of which Plaintiff here reproduces in full.[5] The *Elliott* Court then determined that the sanctions award had erroneously been used by the lower court to inflate the Plaintiff's trial recovery, making it seem that the plaintiff had recovered more than the amount of the offer of judgment. *Id*. at 833. The Court clarified that "[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."[6] *Id*. The Court then concluded that "ORCP 54E(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*. at 834. It ruled that, thus, the Plaintiff was entitled to repayment of the expenses incurred for proving the fact the defendant failed to

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[5] ORCP 54E(3) is roughly analogous to N.R.C.P. 68(f)(1), and ORCP 46C corresponds to N.R.C.P. 37(c)(2), which sets forth the penalties for failing to admit a fact requested in an N.R.C.P. 36 request for admission.

[6] Plaintiff emphasized a sentence from the *Elliott* decision that reads as follows: "The sanction is awarded by order and is thus exempt from the provisions of ORCP 68. ORCP 46 C; ORCP 68 C(1)(b)." Elliott, 194 P.3d at 833. However, ORCP 68 does not correspond to N.R.C.P. 68; it is a Rule governing the "Award of and entry of judgment for attorney fees and costs and disbursements," to which there appears to be no Nevada analog.

admit—notwithstanding that the plaintiff had failed to do better at trial than the offer of judgment. *Id*. at 833.

As is his wont, Plaintiff misstates the reasoning in *Elliott* and overstates its influence on the instant analysis. He claims that it "conclusively defeats Defendants' claim that N.R.C.P. 68 and Nevada's cost statutes require the delay of payment of sanctions to Plaintiff until after judgment has been entered." (Response, at p. 16). But the sanctions in *Elliott* were awarded *after* the conclusion of trial de novo following arbitration. *Elliott*, 194 P.3d at 831. Consequently, no discussion of the timing of payment of sanctions occurred. In fact, the Court specifically limited its ruling to resolving the question of whether sanctions imposed for failure to admit a fact that is later proved at trial may be awarded regardless of whether the party to whom it was awarded prevailed at trial, which is not at issue in this case. As noted, the *Elliott* Court stated that "ORCP 54E(3) does not constrain the trial court's ability to impose a sanction under ORCP 46C for a party's failure to respond to a request for admission." *Id*. at 834. Plaintiff highlights that language, seemingly to emphasize Defendants' wrongheaded embrace of the notion that "an unaccepted offer of judgment . . . function[s] as a shield against interim awards of fees or costs resulting from litigation misconduct." (Response, at p. 16). Predictably, Defendants have never suggested anything of the sort, Plaintiff's contrary suggestion notwithstanding.

Indeed, Plaintiff blatantly mischaracterizes Defendants' arguments. Defendants have never "claim[ed] that N.R.C.P. 68 and [N.R.S. 18.020] require delay of payment of sanctions to Plaintiff until after judgment has been entered." Plaintiff distorts Defendants' argument further, deliberately omitting parts of its analysis, erroneously paraphrasing it to suit his purpose. He claims that "Defendants cite to portions of NCRP 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." (Response, at p. 14). The problems with this statement are legion, starting with the fact that it is simply inaccurate. It cherry picks from Defendants' argument, citing one portion and leaving out others. It suggests that Defendants either do not know that N.R.C.P. 68(f)(1) has two parts or

that they intentionally failed to cite to them both. But even a cursory perusal of Defendants' Opening Brief shows that on the very page Plaintiff cites, Defendants cite both provisions of subsection one.

Plaintiff then creates a fictitious argument and attempts to force it into Defendants' mouths. He states, "In other words, Defendants' position is that if a defendant serves a plaintiff with an offer of judgment that is rejected, under N.R.C.P. 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 N.R.C.P. 68's penalties (which may include a denial of the recovery of costs)." (Response, at p. 14). That manufactured paraphrase bears no resemblance to reality; at no time have Defendants argued that they are immune from paying the costs award. Defendants merely state the obvious 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.

(Defendants' Opening Brief, at p. 15).

Finally, Defendants in no way argued, nor have they ever suggested that they "promise to erect every procedural hurdle they can to deny Plaintiff the reimbursement of his costs." (Response, at p. 6). As previously, repeatedly stated, Defendants do not wish to deny reimbursement; they wish merely to await the final judgment on the merits in case a Defense verdict presents an offset of costs. Nor do Defendants subordinate N.R.S. 18.070 to N.R.C.P. 68 and N.R.S. 18.020 as Plaintiff argues. Familiarly, Plaintiff himself endeavors to do the very thing he accuses Defendants of doing: prioritize one statute over another. Defendants' solution harmonizes the rule and statutes. To force Defendants to pay the costs award is pointless and wasteful, and it risks creating superfluous judgments, which "are unnecessary[,] confuse appellate jurisdiction[,]" and are generally disapproved. *Campos-Garcia v. Johnson*, 130 Nev. 610, 612, 331 P.3d 890, 891 (2014).

Plaintiff insists that Defendants' practical argument in favor of awaiting final resolution of

the case to execute judgment on the costs award somehow constitutes evidence that Defendants are untrustworthy, desperate, malevolent, and reckless. (Response, at p. 7). But that hysterical interpretation is unjustified by the facts of the case. Indeed, to promote it, Plaintiff has manufactured and relied on readily disprovable misstatements. In the end, nothing in law or logic prevents the course Defendants suggest. Therefore, this Court should deny Plaintiff's Motion for Clarification and/or Amendment on this issue.

C. No Relevant Legal Authority Requires This Court to Order its Costs Award Immediately Payable.

Plaintiff argues that this Court should order Defendants to pay the costs award immediately without resort to certification of the judgment under N.R.C.P. 54(b). (Response, at pp. 9, 17). He cites to a deluge of cases purporting to support his arguments, including numerous extrajurisdictional cases and a few from Nevada. But his interpretations of those cases strain credulity. That he must resort to such disingenuous case treatment shows that he is acutely aware that the law is not on his side.

1. The Purpose of Sanctions is Not Defeated if Payment of the Costs Award is Deferred until after Final Judgment

Plaintiff cites voluminous case law in an effort to convince this Court that "the purpose of issuing sanctions—to remedy a litigation harm and to deter future misconduct—can only be achieved by compelling Defendants to pay the cost award immediately." (Response at p. 9). But first, he employs a sizeable footnote containing several Nevada cases and one case from Michigan to support the preliminary proposition that "the purpose of sanctions is to be remedial to the innocent party and to deter future misconduct by the offending party." (Opposition, at p. 9 n. 6). But each of those cases is inapposite, and in one instance, stunningly disadvantageous to his argument.

First, Plaintiff cites *Alper v. Eighth Judicial District Court*, and quotes the following language: "Civil sanctions, on the other hand, are remedial in nature . . . ." 131 Nev. 430, 434, 352 P.3d 28, 31 (2015). Plaintiff cuts the quote off there, obscuring the fact that the remedial sanctions at issue in *Alper* were contempt sanctions and that the resulting analysis offers no support to his argument. The full quote is as follows:

> Civil [contempt] sanctions, on the other hand, are remedial in nature, as the sanctions are intended to benefit a party by coercing or compelling the contemnor's future compliance, not punishing them for past bad acts. Moreover, a civil contempt order is indeterminate or conditional; the contemnor's compliance is all that is sought and with that compliance comes the termination of any sanctions imposed.

Id. (quoting *Rodriguez v. Eighth Judicial Dist. Court*, 120 Nev. 798, 805, 102 P.3d 41, 46 (2004)). The *Alper* Court's analysis relates to the differences between criminal and civil contempt sanctions, highlighting the fact that only criminal contempt sanctions are intended as punitive and that civil contempt is "considered to be coercive and avoidable through obedience." *Id*. (quoting *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 827 (1994)).

Next, Plaintiff cites *Jones v. Eighth Judicial District Court*, for the proposition that "remedies like sanctions are available and adequate to address the abusive litigation." 130 Nev. 493, 499, 330 P.3d 475, 480 (2014). In *Jones*, The Nevada Supreme Court overturned a lower court's ruling that deemed a pro se criminal complainant a "vexatious litigant" and restricted him from filing any further documents challenging his judgment of conviction without leave from the Chief Judge. *Id*. at 496-97, 330 P.3d at 478. The Court noted that the district court must "consider whether there are other, less onerous sanctions available to curb the repetitive or abusive activities[,]" and quoted another case in parenthetical, articulating the Court's "general reluctance to impose restrictive orders when standard *remedies like sanctions are available and adequate to address the abusive litigation*." *Id*. at 499, 330 P.3d at 480 (quoting *Jordan v. Dep't of Motor Vehicles & Public Safety*, 121 Nev. 44, 60, 110 P.3d 30, 42 (2005)(emphasis added)). Again, here, Plaintiff surgically extracts part of a sentence that sounds good in isolation but when regarded in context, does not support his argument.

Plaintiff continues his misleading use of Nevada case law in citing *In re Estate of Herrmann* and *Imperial Palace v. Dawson*. In the former, the Supreme Court upheld an award of attorney fees as a sanction for counsel's having filed a groundless petition for rehearing, which the Court identified as "dilatory tactics." *In re Estate of Herrmann*, 100 Nev. 149, 152, 679 P.2d 246, 248 (1984). Similarly, the *Imperial Palace* Court identified abusive delay tactics used by an employer to subvert its responsibility to comply with the Nevada Industrial Insurance Act and to

defy multiple rulings by hearing and appeals officers, thereby denying for more than a year an injured worker's benefits under Worker's Compensation. 102 Nev. 88, 91, 715 P.2d 1318, 1320 (1986). In both cases, the Court grounded its sanction awards in NRAP 38, the Rule of Appellate Procedure governing frivolous civil appeals. *Herrmann*, 100 Nev. at 152, 679 P.2d at 247; *Imperial Palace*, 102 Nev. at 92, 715 P.2d at 1320.

Plaintiff transparently attempts to shoehorn the terms "delay" and "dilatory" into these proceedings as often as possible in an attempt to inoculate the Court with the erroneous impression that Defendants are improperly attempting to delay or avoid paying the costs award. However, here, no such impermissible delaying tactics are at play, nor is the issue of filing frivolous civil appeals. Even so, Plaintiff continues his strategy of distracting from the true issue: whether the costs award may be reduced to judgment and immediately executed.

Finally, Plaintiff inexplicably cites *Persichini v. William Beaumont Hospital*., 607 N.W.2d 100 (Mich. Ct. App. 1999). Despite knowing perfectly well that no court involved in this matter has ever concluded that Defense Counsel intentionally provoked the mistrial, Plaintiff quotes the following language from the Michigan Court of Appeals. "The ability to impose [attorney fees] 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." *Id*. at 109. Perhaps Plaintiff hoped that this Court would stop reading at that point in the case because language in the following paragraph is most illuminating and devastating to his argument. The *Persichini* Court goes on to interpret *Benmark*, in which the Michigan Supreme Court overtly "stated that the plaintiff could recover the 'costs incurred on account of such mistrial <u>*only in event she recovers judgment upon new trial*</u>.'" *Id.* (Emphasis added). The Court also noted that "[t]his Court has subsequently cited *Benmark* in holding that a trial court *cannot assess costs immediately following the grant of a mistrial, but must await the final disposition of the case*." *Id*.(emphasis added). Plaintiff also claims that the Nevada Supreme Court cited *Persichini* "with approval" in *Emerson v. Eighth Judicial District Court*, 127 Nev. 672, 263 P. 3d 224, (2011) (Response, p. 9, n. 6). While true that the Nevada

Court cited *Persichini*, it was only to highlight the principle that a trial court has inherent power to impose sanctions. *Emerson*, 127 Nev. at 680 n. 4, 263 P. 3d at 229 n.4 ("Other jurisdictions have similarly concluded that a district court has inherent power to impose sanctions.") Accordingly, not only does *Persichini* not support his argument, it actively refutes it.

Likewise, Plaintiff employs creative interpretations of the cases that he cites to support his argument that the purpose of sanctions is defeated if payment is deferred until judgment on the merits. To start, he cites one isolated passage from *Brown v. Baden (In re Yagman)*, thereby removing all nuance from the Court's analysis, as well as overlooking the Court's eventual conclusion. In *Yagman*, the Ninth Circuit addressed a lower court's lump-sum grant of attorney fees under F.R.C.P. 11 and the local rule as sanction for the plaintiff's counsel's various misconduct throughout the case, including discovery abuses and other means of multiplying the proceedings. 796 F.2d 1165, 1182 (9th Cir. 1986). The Court indeed noted that under certain circumstances, "sanctions should be levied contemporaneously with the offending misconduct." *Id*. at 1184. It cited specifically the need to place attorneys on notice of their misconduct and the possible liability appertaining to it. *Id*. However, in the very next sentence, the Court expressed its preference for "reserv[ing] final judgment, fixing the amount of the sanctions, until the conclusion of the hearing or trial . . . ." *Id*. The Court identified the benefit of such a scheme, as it "permits the court to consider, in fixing the amount, the subsequent conduct of counsel and does not divert an attorney from the representation of his client." *Id*. The Court went on to reason that "[t]he circumstances presented in each situation will, quite naturally, be unique and may vary widely. To a certain extent, the optimum timing of the sanctions award will depend on those circumstances[,]" while still "mold[ing] its sanctions in each case so as to best implement [the] policy [of deterrence]." *Id*.

Defendants point out that here, much as the *Yagman* Court emphasizes, circumstances militate for deferring enforcement of the costs award. In the event of a Defense verdict, the instant award will offset the fees and costs Defendants will recover under N.R.C.P. 68 and N.R.S. 18.020. If Plaintiffs prevail, the costs award will become part of the judgment. Logic suggests the wisdom

of such a course. 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 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.

Next, Plaintiff cherry picks seemingly helpful language from two cases wherein attorneys incurred sanctions for discovery violations. In *New York Life Insurance Company v. Morales*, a court imposed sanctions on counsel when he knowingly violated the court's scheduling order without good cause by conducting his client's deposition after the deadline had expired. No. 06cv1022-B(BLM), LEXIS 128721 *5 (S. D. Cal, Jul. 23, 2008). The Court concluded that "[i]n this case, [it] does not find it appropriate to delay the imposition of sanctions." *Id*. The Court reasoned that other parties "incurred substantial legal fees as a result of opposing counsel's conduct because their attorney undertook significant pretrial legal work that now will have to be redone to incorporate discovery and legal arguments related to [the late-taken] deposition." *Id*. The Court further reasoned that there was no benefit to delay in imposing sanctions for the unjustified discovery violation because "both the sanctionable behavior and the concrete harm that resulted have already occurred and will not be affected by further developments in the case[ ]" and because the deterrent value of discovery sanctions would be diluted if not imposed immediately. *Id*.

Plaintiff next cites *Cleveland Hair Clinic v. Puig*, where an attorney was held in contempt after refusing to pay a sanction imposed on him and his firm for misconduct. 106 F.3d 165, 166 (7th Cir. 1997). The lower court added a daily fine until the attorney paid the underlying sanction. *Id*. The Seventh Circuit ruled that the attorney's appeal of the sanction was frivolous and ordered him to show cause why he should not have to pay a $10,000 fine in addition to the unpaid award and fines imposed in the lower court. *Id*. at 168. In addition, the court emphasized the importance of sanctioned *attorneys* complying with such rulings, which Plaintiff omitted from his citation with a strategically placed ellipsis.

> A lawyer dismayed by an adverse ruling must obey, however much he disagrees with its wisdom. Swift compliance is especially important when the genesis of the adverse ruling is misconduct in

> the litigation; refusal to make amends compounds the infraction. *It is intolerable for a member of this court's bar to thumb his nose at the judicial system [by refusing to pay sanctions for misconduct]*. We have held that even pro se litigants who fail to pay sanctions forfeit their ability to continue litigating.

Id. (emphasis added)

Plaintiff also cites a 35-year-old case from the federal District Court of Connecticut that dealt with an award of sanctions under F.R.C.P. 37 where the sanctioned party "ask[ed] the court to characterize the Order as a 'tentative' award, subject to modification or vacatur at the time of final judgment." *Industrial Aircraft Lodge 707, etc. v. United Technologies Corp., Pratt & Whitney Aircraft Div.*, 104 F.R.D. 471, 473 (D. Conn. 1985). The court explained that discovery sanctions under the Rule are intended "to deter parties from pressing frivolous requests for or objections to discovery." *Id*.

Again, Plaintiff ignores parts of the citation and analysis that are inconvenient to his argument. Here, the sanctions did not arise from discovery violations, and counsel were not held in contempt as in both *Morales* and *Puig*. Also, counsel has not incurred the sanction and certainly has not been ordered to pay any kind of daily increasing sanction that he has steadfastly refused to pay. Moreover, as declared clearly in their Opening Brief, and reiterated here repeatedly, Defendants do not seek to avoid paying the sanction. They merely point out that payment should be deferred until it is clear whether there will be an offset under N.R.C.P. 68 and N.R.S. 18.020.

That said, even if the passages Plaintiff cited were applicable, they fail to account for the caution the Ninth Circuit articulated in *Yagman*—to consider the circumstances underlying the imposition of sanctions in setting the timing of execution. Notably, in insisting that sanctions lose their deterrent value if not imposed immediately, Plaintiff repeatedly cites to cases where egregious discovery violations, which bear an inherent risk for repetition, resulted in discovery sanctions under F.R.C.P. 37. But here, the costs award was not imposed due to ongoing and pervasive litigation abuses by Defendants. Rather, it was levied because of one isolated event that this Court concluded constituted the legal cause of mistrial in the aborted first trial. Unlike discovery violations, by its very nature, mistrial is not subject to repetition. Further, Defendants do not request this Court to reconsider having imposed the cost award as in *Industrial Aircraft Lodge*

707; Defendants question only the timing of execution of that award. Thus, Plaintiff's ostensible rationale for immediate imposition and execution of sanctions, deterrence, is inapplicable here.

What is more, even if Plaintiff had cited applicable cases to support his claims that immediate enforcement is required for its deterrence value, the costs award could never serve as a more potent deterrent to misconduct than the mistrial itself. After ten days of trial, the trial was progressing smoothly and heading for a likely Defense verdict; the mistrial came as a bitter disappointment to Defendants. Plaintiff's ham-handed hint that Defendants intentionally caused the mistrial in an attempt to "delay[] Plaintiff's day in court" is offensive and contrary to the facts. (Response, at p. 9)

2. *Plaintiff Continues His Use of Inapposite Case Law to Suggest that the Costs Award Need Not be Reduced to Judgment and Rather Can Simply be Imposed.*

Plaintiff suggests that "[n]othing in Nevada law requires Plaintiff to wait until after the second trial to collect his costs from the first." (Response, at p. 13). However, it is a longstanding legal principle that "[a] mistrial is equivalent to no trial; it is a nugatory proceeding." *Carlson v. Locatelli*, 109 Nev. 257, 260, 849 P.2d 313, 315 (1993). There was no trial, thus no trial costs are immediately collectible. Also, for every case Plaintiff cites where the court granted fees and costs after the mistrial, another court waited until after the retrial to impose fees and costs.

Plaintiff offers extrajurisdictional, federal case law to bolster his argument, but he cites only to cases where the sanctions were imposed under F.R.C.P. 37 for discovery violations. Plaintiff cites *United States v. Smith* to suggest that "enforcement of sanctions for litigation misconduct does not require entry of judgment." (Response, at p. 11). But as usual, Plaintiff extracts a single statement that sounds pertinent in isolation but falls apart on further examination. The *Smith* Court analyzed an award granted under F.R.C.P. 37 and compared it to an "interim award" under Title VII of the Civil Rights Act or the Freedom of Information Act. 55 F. Supp. 2d 917, 919-20 (N.D. Ind. 1998). To credit Plaintiff's virtually non-existent analysis of this case, this Court would have to ignore that two sets of federal legislation and an inapposite federal Rule—none of which pertains to the issue at play here—separate that analysis from this Court's ruling under N.R.S. 18.070. That link is so extenuated as to have no persuasive value.

Huizinga v. Gezink Steel Supply & Welding Co. most closely approximates helpful, persuasive law of any Plaintiff has cited.[7] The Court stated that, in the F.R.C.P. 37 context, "deferring sanction payments . . . would frustrate the very purpose of Rule 37, which is to foster compliance with the discovery process by deterring discovery abuses through sanction awards." No. 1:10-CV-223, 2012 U.S. Dist. LEXIS 200283, *2-3 (W.D. Mich. Jun. 12, 2012). But as noted above, the circumstances underlying discovery violations subject to sanctions under F.R.C.P. 37 differ materially from those arising from a mistrial. Defendants were not engaged in discovery violations attempting to subvert or multiply the proper litigation process. What is more, the Court noted that "[b]oth enforcement provisions (and indeed, Rule 37 as a whole) supply a mechanism for the Court to keep the discovery process moving smoothly by deterring discovery abuses and shifting the economic costs of substantially unjustified discovery practice to the offending party." *Id*. at *2-3. But N.R.S. 18.070 provides no such mechanism; indeed the statute is not intended to lubricate the litigation process as F.R.C.P. 37 is, quite understandably, because the two situations are not similar. Mistrial is not susceptible to frequent recurrence as discovery violations are. Certainly not when mistrial was not intentionally caused, as was the case here.

Notably, courts have taken the opposite view and have held that immediate payment of sanctions is inappropriate or unnecessary. In a medical malpractice case, a witness violated a motion in limine, resulting in mistrial. "After the second trial concluded, the district court issued its Order RE: Costs and Fees, where it awarded . . . costs as a matter of right, . . . discretionary costs, and . . . attorney fees for the mistrial." *Ballard v. Kerr*, 378 P.3d 464, 507 (Idaho 2016). It is worth noting that costs were not awarded until after trial even though "the district court concluded that the mistrial was triggered as a result of deliberate misconduct which came out of the direct violation of an in limine order." *Id.* Indeed, in *Persichini*, the Michigan Court of Appeals, interpreting that state's Supreme Court precedent, ruled that "a trial court cannot assess costs

[7] Plaintiff also cites to *Romero v. Wounded Knee, LLC*, a case similarly involving F.R.C.P. 37 sanctions. No. CIV. 16-5024-JLV, 2018 WL 4178174, at *4 (D.S.D. Aug. 30, 2018). But the passage Plaintiff reproduces at p. 11 of his Response is merely a parenthetical quotation of *Huizinga.*

immediately following the grant of a mistrial, but must await the final disposition of the case." 607 N.W.2d at 109. Further, in another case Plaintiff cites, the disputed sanctions were awarded after the conclusion of trial de novo following arbitration. *Elliott*, 194 P.3d at 831.

In sum, courts have reached differing conclusions on timing of imposing and executing sanction awards. Thus, the issue is not settled as Plaintiff suggests.

3. *Mistrial Offers no More Compelling Reason for Early Execution of Sanctions Than Other Sanctionable Conduct.*

Again, Plaintiff resorts to inapposite case law to press his argument that somehow mistrial poses a special need to impose and execute on sanctions arising from it. First, he cites to *Persichini*, which actively contradicts his argument as amply noted above. Then he invokes the Ninth Circuit to suggest "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 . . . ." (Response, at p. 12). But as usual, the case contains both more and less information than Plaintiff suggests.

In *Lasar v. Ford Motor Co.*, an attorney violated pretrial orders in limine excluding certain information about the plaintiff when he implied in his opening statement that plaintiff had consumed alcohol and was not wearing his seatbelt during a rollover accident. 399 F.3d 1101, 1105 (9th Cir. 2005). The court concluded that no curative instruction would overcome the prejudice of the opening statement and so granted a mistrial. *Id.* at 1106. Citing "an intentional effort, reckless and in bad faith . . . to ignore the court's orders . . . [,]" the court imposed monetary sanctions on both the defendant and his counsel, including costs to the court for the cost of empaneling the jury. *Id.* at 1106-07. In addition, the court held the attorney in contempt for violating the motion in limine, and revoked his *pro hac vice* status for the motion in limine violations as well as for having failed to disclose a prior contempt citation on his *pro hac vice* application. *Id*. at 1108. The defendant then settled with the plaintiff, and the court dismissed the case with prejudice. *Id.* Pertinent to this analysis, the Ninth Circuit upheld the award of costs to the court to reimburse for the cost of empaneling the jury, which obviously occurred after the final judgment. *Id.* at 1118. Thus, the Court did not reach the issue of when a court should impose and allow sanctions for causing mistrial. Also notable, the costs at issue in *Lasar* were payable to the

court to reimburse it for having empaneled a jury, not to any litigant.

Plaintiff also cites *Allied Property & Casualty Insurance Company v. Good*, another auto accident case where a court declared mistrial and imposed monetary sanctions for multiple violations of motions in limine. 919 N.E.2d 144, 150-51 (Ind. Ct. App. 2009). The court found that those violations "appear[ed] to be an intentional harpoon thrown into this proceeding." *Id*. at 151. Defendant appealed the fees and costs awards under Indiana's appellate rule allowing interlocutory appeals from orders requiring the payment of money. *Id*.; Indiana Appellate Rule 14(A)(1). Thus, the sanctions were stayed pending appeal. *Id*. In the meantime, Plaintiffs won at trial and were awarded fees and costs. *Id*. The Indiana Court noted that "the trial court has the power to impose sanctions against a party or attorney who engages in egregious misconduct that causes a mistrial[,]" namely, "intentional, reckless, or negligent conduct by the party or attorney." *Id*. at 155. The Court then concluded that evidence showed that the defendant intentionally violated the order in limine and consequently, its conduct was "egregious." *Id*. at 156. Again. The Court does not address the issue of timing of execution of a monetary sanction.

Finally, Plaintiff cites *Prime Group, Inc. v. O'Neill*, where a lower court granted mistrial and imposed monetary sanctions on Defendants because a material witness was unexpectedly unavailable. 848 S.W.2d 376, 377-78 (Tex. App. 1993). Plaintiff here suggests that *Prime Group, Inc.* is "particularly germane" and should persuade this court that "issuing a similar order to require Defendants to pay the sanctions would likewise best compensate Plaintiff from the effects of Defendants' misconduct." (Response, at p. 13). However, it is unclear how that case is helpful because, as with most of Plaintiff's other citations, the *Prime Group, Inc.* Court did not rule on the merits of any of the matters relating to either the grant of sanctions or the timing of payment. *Id*. at 379. Rather, it merely concluded that appeal provided the sanctioned party an adequate remedy, hence it declined to issue a writ of mandamus and to stay the payment of sanctions. *Id*. In fact, far from suggesting that courts should unyieldingly order immediate payment of sanctions, the Court identified a situation when deferring payment of monetary sanctions would be appropriate, if payment would prevent the sanctioned party from continuing litigation. *Id*.

Unsurprisingly, these cases contain buzz words that plaintiff seizes on to support his argument, however, they are inapposite or inappropriate for several reasons. First, there seems to be no end to the ways Plaintiff will attempt to imply that Defense Counsel provoked the mistrial at issue here in bad faith; even through his choice of case law citations. No court has ever concluded that Defense Counsel intentionally *provoked* the mistrial.[8] Second, *Persichini* alone of Plaintiff's cited cases concerned itself with the timing of sanctions and the payment thereof, stating unequivocally that sanctions *should not* be levied until after final judgment on the merits. The other citations involved sanctions awarded after cases closed and final judgments entered, unlike here where the trial remains to be held. Finally, Defendants do not dispute the Court's authority to award costs for the mistrial or the soundness of the compensatory rationale for those sanctions. The sole question here remains whether the costs award may be reduced to judgment under N.R.C.P. 54 and/or whether Defendants can be compelled to pay the award immediately.

Plaintiff suggests that he risks being unable to afford to go to trial if the costs award is not paid immediately. Plaintiff also claims the mistrial has made it more expensive to try the case. But that is not true. The amount expended will eventually be the same as without the mistrial, regardless of when the reimbursement occurs. Moreover, he does not demonstrate that he will incur additional pre-trial expenses such that immediate payment is necessary to address that issue. On the contrary, nothing has changed in the case; only the waiting period before trial has been extended. Unlike in *Morales*, Plaintiff will have to incur no new discovery costs before trial, and no new information has emerged as a result of the mistrial. The only new expense is the Motion in Limine Plaintiff filed to exclude the "Burning Embers" email from being produced at trial and

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[8] "[O]f course you wouldn't want a mistrial. No one wants a mistrial, right? That -- that's -- they didn't want a mistrial and you didn't want a mistrial." (Recorder's Transcript of Proceedings Plaintiff's Motion for Fees/Costs and Defendants' Countermotion for Attorney's Fees and Costs, p. 89, attached hereto as Exhibit "A.") "[A]nd I don't think -- I would not find that you intentionally wanted a mistrial, I -- I understand his argument, I don't -- I -- no one wants a mistrial . . . ." (Exhibit "A," p. 113.) "I don't get a feel -- I'll share with you -- that you had some bad, horrible intent. Rather, I think -- what I really think, that both you and Mr. Vogel just didn't fully realize the impact that this could have. That's a mistake." (Recorder's Transcript of Jury Trial Day 11, p. 79, attached hereto as Exhibit "B.")

actual trial-related expenses, such as court reporters and expert witnesses. Those expenses will be included in the reckoning of costs that will be subject to N.R.C.P. 68 and N.R.S. 18.020. If Plaintiff prevails, those costs will be added to the costs already incurred and will be subject to judgment. If Plaintiff loses at trial or prevails but the amount awarded does not exceed his offer of judgment, he will pay Defendants their fees and costs minus the costs award imposed by this Court for the mistrial.

Plaintiff has offered no relevant legal rationale for requiring immediate payment of the award of costs arising from the mistrial. Therefore, this Court should deny Plaintiff's Countermotion.

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IV. CONCLUSION

No procedural mechanism exists under Nevada law requiring immediate payment of the costs award. Indeed, no relevant law supports any of his arguments whatsoever. 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 defer payment of its costs award until after final judgment on the merits, thereby denying Plaintiff's Motion for Clarification and/or Amendment of the Order Granting in Part Plaintiff's Motion for Attorney's Fees and Costs.

DATED this 23rd day of April, 2020

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s/ S. Brent Vogel*

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CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I certify that I am an employee of Lewis Brisbois Bisgaard & Smith LLP and that on this 23rd day of April, 2020, a true and correct copy of **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** 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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3/6/2020 11:40 AM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

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

BEFORE THE HONORABLE KERRY EARLEY,
DISTRICT COURT JUDGE

THURSDAY, DECEMBER 5, 2019

RECORDER'S TRANSCRIPT OF PROCEEDINGS

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

APPEARANCES:

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

RECORDED BY: REBECA GOMEZ, COURT RECORDER

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

MS. GORDON: Right.

THE COURT: You didn't intend --

MS. GORDON: No --

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

MS. GORDON: Yes.

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

MS. GORDON: No, but if you --

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

MS. GORDON: Absolutely.

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

THE COURT: I do. Okay.

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

THE COURT: It's --

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

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

MS. GORDON: Absolutely.

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

MS. GORDON: No, absolutely.

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

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

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

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

EXHIBIT ‘B’

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Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

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

BEFORE THE HONORABLE ROB BARE
DISTRICT COURT JUDGE
MONDAY, AUGUST 5, 2019

RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 11

APPEARANCES:

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

RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER

Case Number: A-18-776896-C

represented him? Me. But anyway, that's an interesting point. It's highly I think possible that certain types of argument to jury could be given without any bad intent, but yet be seen as "misconduct". Certainly, if there was bad intent, that's always misconduct.

I told you informally on Friday, Ms. Gordon, and I'm comfortable enough telling you now, I don't get a feeling -- God only knows, and you, but I don't get a feel -- I'll share with you -- that you had some bad, horrible intent. Rather, I think -- what I really think, that both you and Mr. Vogel just didn't fully realize the impact that this could have. That's a mistake. Is it misconduct for purposes of the rule that's in question having to do with attorneys' fees? Maybe looking at the argument cases that likewise use the word misconduct will give guidance as to that, because ultimately I guess I'm going to have -- well, I know I'm going to have to make a decision on this fee and cost request.

You know, I'm not -- as I sit here now, and Friday, and over the weekend, and at all times, you know, did I ever say, you know, that Ms. Gordon, what a sinister, evil, you know, I didn't do that. I didn't. I just -- I really felt like actually you were just being -- in your mind, you were being zealous, and you did what you did. I just, again, don't think you appreciated, or Mr. Vogel appreciated, the impact of what was going to happen. And I don't want to take all afternoon, but I do want to spend a couple of minutes saying something else to you now that it comes to mind.

Because I want you to know I sympathize with you. Okay. in deciding all these things that you decide as a judge, I can tell you, in my

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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' REPLY IN SUPPORT OF MOTION FOR RELIEF FROM FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFF'S MOTION FOR A MISTRIAL

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 and Katherine J. Gordon, and hereby submit their Reply Points and Authorities to move under N.R.C.P. 60(b) for Relief from the Court's Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial filed on September 9, 2019.

This Reply is made and based on the Memorandum of Points and Authorities, the papers and pleadings on file herein, and such oral argument as requested by the Court.

DATED this 23rd day of April, 2020

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s/ S. Brent Vogel*

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff attacks Defendants and this Motion for Relief from Order (hereinafter "Motion") on the most technical of grounds, namely that Defendants brought the Motion via an improper procedural vehicle because Judge Bare's Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial (hereinafter "Order") is not a final judgment under N.R.C.P. 60(b). But Judge Bare's Order is void, thus, Rule 60 applies. Moreover, jurisdiction over this matter vested in this Honorable Court when Judge Bare was disqualified and the case reassigned. Thus, even if this Court should conclude that Rule 60(b) does not provide relief, this Court has inherent power to reconsider, revise, or amend the Order as long as the district court retains jurisdiction over the matter. Plaintiff also argues that under no circumstances may a district court amend a ruling rendered by another district judge. That notion contradicts both law and logic. Judge Bare's Order is void because it was rendered after the disqualifying event occurred and after Defendants moved to disqualify him; it is also obviously, provably inaccurate. A court is not bound by a void, factually inaccurate ruling merely because it was rendered by a predecessor judge whose jurisdiction would otherwise be considered coextensive—certainly not under the unusual circumstances of this case, where the predecessor judge was *disqualified for bias*.

Plaintiff also falsely maintains that in rendering his order, Judge Bare merely committed his oral pronouncements from the bench into written form, a "housekeeping" duty or "ministerial act" appropriate even to a disqualified judge. However, the record unequivocally shows that many findings of fact and conclusions of law contained within the Order are not to be found in the transcript of Judge Bare's oral pronouncements. Accordingly, one of two things must be true. Either Plaintiff manipulated Judge Bare's language in drafting the Order to advantage him in future proceedings, such as his motion for attorney fees and costs; or Plaintiff, and through him Judge Bare, drafted a substantive document reflecting legal notions and facts that Judge Bare would have included but simply did not speak aloud from the bench. Either scenario obviates that the Order may not stand as currently written; either this Court cannot countenance an Order

riddled with self-serving inaccuracies, or it cannot endure the fiction that the Order constitutes the product of a mere "ministerial" act.

Finally, Plaintiff claims that Defendants request would lead to a "futile and unenforceable" order. He further describes a scenario in which the entire case would fall in like a house of cards if this Court provided relief from Judge Bare's void order. However, Plaintiff's desperate and overly dramatic argument is unsupported by legal authority and contradicted by simple logic.

To maintain public faith in the judiciary, courts are often called upon to take difficult decisions. Just such a decision is required here. Plaintiff has used Judge Bare's void, inaccurate and self-serving Order to his material advantage in subsequent proceedings in this matter. That injustice must not be allowed to continue. Accordingly, Defendants respectfully request this Court provide relief from Judge Bare's Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial.

II. STATEMENT OF FACTS

As this Court is aware, this matter arises from a complaint of alleged medical malpractice. The case proceeded through discovery and to trial. As part of discovery, the now-infamous "Burning Embers" email was initially disclosed by Plaintiff within his 12th N.R.C.P. 16.1 Supplement along with other emails between Plaintiff and employees of Cognotion. (Bates stamped P00440-453 and P00479-513). The emails were disclosed again by Plaintiff in his Pre-Trial Disclosures, and for a third time as an identified trial exhibit (marked by Plaintiff as Plaintiff's proposed trial exhibit No. 56). Defendants introduced the "Burning Embers" email at trial as rebuttal character evidence in direct response to witness testimony that Plaintiff was a beautiful and trustworthy person. Plaintiff's Counsel requested that the Court strike the testimony regarding the "Burning Embers" email. Judge Bare denied the request.

The following Sunday, August 4, 2019 at 10:02 p.m., Plaintiff filed a Motion for Mistrial and Request for Attorney's Fees and Costs based on Defendants' use of the "Burning Embers" email. Neither Defendants nor Judge Bare saw the Motion until the following morning when trial was set to resume at 9:00 a.m. Nevertheless, Judge Bare allowed no time for Defendants to file

opposing Points and Authorities and, instead, entertained argument and granted the Motion that morning. In so doing, Judge Bare rendered findings supporting his grant of mistrial. He ordered Plaintiff to draft the Order granting the Motion.

On August 23, 2019 Defendants filed a Motion to Disqualify Judge Bare, citing the multiple irregularities in his rulings, his flawed and improper grant of mistrial, and clearly biased statements favoring Plaintiff's Counsel made on day 10 of the trial. Defendants argued that Judge Bare's actions rendered a fair and impartial trial impossible, thus warranting disqualification. The Motion was transferred to Judge Wiese for determination. Judge Wiese held a hearing on the Motion on September 4, 2019.

More than a week after Defendants filed their Motion to Disqualify Judge Bare and pending Judge Wiese's decision on disqualification, Plaintiff forwarded a proposed draft Order granting the mistrial to Defendants' counsel for review. The proposed Order, which was 18 pages long and consisted of 32 separate paragraphs of "findings," as well as 28 paragraphs of "conclusions of law," contained the following inaccuracies and statements not supported by the transcript of Judge Bare's oral findings.

Findings of Fact Not Supported:[1]

¶19: "…and the same was inadvertently admitted." Judge Bare never made this statement. He referred frequently to Plaintiff's mistakes in not knowing the email was in his exhibits, (pp. 52-54), but he did not find the email was an inadvertently or wrongly admitted exhibit.

¶20: the first full sentence discussing the "off the record discussion on August 2, 2019." This is not part of Judge Bare's decision, and he never referenced it on trial day 11.

¶20: In his Opposition to Defendants' Motion for Relief (hereinafter "Opposition"), Plaintiff renews the notion of "Judge Bare's finding that Defendants and their counsel possessed a consciousness of wrongdoing that led to his finding that they were the legal cause of the mistrial, and this Court's independent finding that Defendants purposefully caused the mistrial due to the

[1] Page numbers refer to the transcript of trial day 11, attached hereto as Exhibit "A"; paragraph numbers refer to the Order, attached hereto as Exhibit "B."

same basic mindset." (Opposition, at p. 13). He takes that notion from ¶20, the sentence beginning: "The Defendants' statements have led the Court to believe…" The remainder of this paragraph is *entirely fabricate*d. This is the most egregious of Plaintiff's self-serving additions to the Order because Judge Bare never made any of the statements attributed to him, namely, "Defendants evidenced a consciousness of guilt and wrongdoing," or that such "consciousness suggests that Defendants were the legal cause of the mistrial." To the contrary, the "legal cause of the mistrial" is solely related to a request for fees and costs, and Judge Bare stated on several occasions that fees and costs needed to be fully briefed and decided at a later date. *See* p. 72: "but what's the legal standard having to do with the responsibility because the statute talks about fees and costs, right, if you cause a mistrial through misconduct, I think is what it says. And so that'll be part and parcel of what we'll have to figure out." Accordingly, not only did Judge Bare *not* make the "legal cause" finding set forth in the Order, he specifically stated it was a determination for a later date. *See* p. 72: "So we need two hours for a hearing on this motion for fees and costs having to do with a mistrial."

¶22: the sentence beginning "The Defendant confirms that whether Landess is a racist is something the jury should weigh, that it is admissible, and is evidence that they consider . . . ." Defense Counsel never made this statement.

¶29: The judge did talk about the events on the news that weekend, but he stated on p. 69, "None of that really matters to this decision."

Conclusions of Law Not Supported:

¶¶40 and 41: regarding character evidence. This was not discussed by the Court with the exception of his numerous comments that Plaintiff opened the door to character evidence. *See* pp. 31, 55. Plaintiff's Counsel attempted to argue that the door was not opened because the character evidence was provided by a witness in a non-responsive answer to a question. *See* p.22. But Judge Bare did not agree. So, the language in this paragraph was never discussed by the court and is contrary to its finding regarding character evidence.

¶¶43 and 44: Judge Bare never discussed waiver under any context. Failure to object was

discussed only in conjunction with the Court's analysis of *Lioce*. *See* pp. 64-66. None of the language set forth in ¶44 was discussed or considered by the court.

¶45: regarding "misconduct and inflammatory statements from opposing counsel." Judge Bare did not make this finding. To the contrary, he specifically stated, "I'm not going to go as far as today to say it's misconduct." *See* p. 66. And when Judge Bare quoted *Lioce* (which, ironically is premised on a finding of misconduct, although Judge Bare did not acknowledge that), he stated, "Again, that concept of misconduct notwithstanding." *See* p. 67. So, not only is the statement in ¶45 unsupported, it directly contradicts Judge Bare's finding.

¶¶47 and 48: nothing in this paragraph was discussed by the Court. Although Judge Bare would likely agree with these holdings, they were neither discussed nor cited during the mistrial discussion.

For these reasons, coupled with the fact Defendants had already filed their Motion for Disqualification, Defense Counsel declined to approve the draft order. On September 4, 2019 Plaintiff submitted his draft Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial to Judge Bare. On September 9, 2019, Judge Bare signed Plaintiff's proposed draft, and it was filed on the same day. One week later, on September 16, Judge Wiese granted Defendants' Motion to Disqualify Judge Bare. Among other findings, 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 to rule that, consequently, Judge Bare must be disqualified from the case.[2]

The case was subsequently reassigned to this Honorable Court. Following the transfer, Plaintiff has employed the self-serving language contained in Judge Bare's post-Motion-to-

[2] Judge Wiese has since clarified his decision to disqualify Judge Bare and noted that it was based on "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 . . . ." He further stated that "one should not reasonably believe that Judge Bare would [not] be impartial in other actions where Mr. Jimmerson appears as counsel." (Order Granting Motion for Clarification of September 16, 2019 Order, p. 2, attached hereto as Exhibit "C.") In so clarifying, Judge Wiese did not withdraw any of the findings from his Order disqualifying Judge Bare.

Disqualify Order at every opportunity. Specifically, Plaintiff included the over-reaching language in the Order solely for later use during the argument on requested fees and costs, which he did. This Court subsequently granted Plaintiff's Motion for Costs, concluding that Defendants were the "legal cause for the mistrial." (Order Granting in Part Plaintiff's Motion for Attorney's Fees and Costs, p. 3, attached hereto as Exhibit "D").

Plaintiff's opposition to Defendants' Motion for Relief boils down to the following arguments: 1) N.R.C.P. 60(b) does not afford relief from Judge Bare's Order; 2) N.R.C.P. 60(b) does not afford relief from findings of fact; 3) district courts may not act as reviewing courts for other district courts; and 4) Judge Bare's Order was merely the product of a ministerial act, committing his oral ruling to writing. Not surprisingly, Plaintiff relies on inapposite legal authority to press his arguments as well as a misleading recitation of facts, even employing a creative interpretation of this Court's on-the-record statements from the December 5, 2019 hearing on attorney fees and costs. In the final analysis, Judge Bare's Order is void, and it is within this Court's authority to say so. Plaintiff must not be allowed to profit further from an Order that should never have been rendered, especially not one that mischaracterizes and misstates the facts.

III. LEGAL ARGUMENT

A. This Court May Provide Relief from Judge Bare's Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial

"A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer . . . ." N.C.J.C. 2.11(A)(1). Moreover, a judge is obliged "not to hear or decide matters in which disqualification is required . . . regardless of whether a motion to disqualify is filed." N.C.J.C. 2.11, Comment 2.

> A challenge to an assigned judge for want of impartiality presents an issue of constitutional dimension which must be resolved and the rule memorialized of record . . . nor is a judge free to proceed with the case until the challenge stands overruled of record following a judicial inquiry into the issue. . . .

Miller Dollarhide, P.C. v. Tal, 163 P.3d 548, 552 (Okla. 2007).

Plaintiff argues that N.R.C.P. 60(b) does not afford relief from Judge Bare's Order. That assertion is incorrect. But even if it were correct, this Court may still provide the relief Defendants seek under its inherent authority to reconsider, revise, or amend orders in matters within its jurisdiction, as this case is. Plaintiff also argues that N.R.S. 1.235 is the improper procedural vehicle for disqualification in this case. However, Defendants based their arguments for disqualification on N.C.J.C. 2.11 and invoked N.R.S. 1.235 as offering a framework for procedures necessary after a judge is disqualified. Thus, Plaintiffs contrary arguments are unavailing.

1. *This Court may Reconsider, Revise, or Amend Orders Previously Rendered in this Case, Whether under N.R.C.P. 60(b) or its Plenary Authority.*

Plaintiff argues that N.R.C.P. 60(b) does not provide Defendants' requested relief from Judge Bare's Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial because the Order is not a final judgment as contemplated by the Rule. (Opposition, at pp. 7-8). From this statement, it is clear that Plaintiff's entire argument on this issue revolves around his understanding that Defendants brought their Motion for Relief on grounds that Judge Bare's Order is a final, appealable judgment. He argues, accordingly that

> Defendants' counsel currently has before this Court letters and pleadings that are wholly inconsistent on the issue of finality. Regarding the sanctions order, Defendants' counsel urges this Court to not enter a judgment because it is not final, claiming it is interlocutory. But when the shoe is on the other foot, he claims that Judge Bare's [Order], which is clearly interlocutory, is final and thus subject to challenge under Rule 60(b).

(Opposition, at p. 10).

Plaintiff also contends in purely conclusory fashion that Defendants' Motion amounts to an attack on the findings of fact contained within Judge Bare's Order and that Rule 60(b) does not provide for relief from findings of fact. (Opposition, at p. 9). Defendants assert, with ample evidence, that many of the findings of fact in the Order are incorrect or otherwise do not reflect Judge Bare's findings. But Plaintiff is incorrect as to his former assertion; Defendants argue that Judge Bare's written order was not only factually incorrect, it was void, as will be discussed in Section IIIB below. Moreover, Plaintiff provides neither argument nor legal authority to support

his claim that findings of fact are immune to challenge. Therefore, this Court need not consider those arguments. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n. 38, 130 P.3d 1280, 1288 n.38 (2006) (stating that courts need not consider claims not cogently argued or supported by relevant authority).

Defendants based their request for relief in part on an analysis of N.R.C.P. 60(b)'s plain language, which suggests that "final" modifies "judgment," not "order" or "proceeding." The advisory committee notes discussing N.R.C.P. 60(b) are silent as to whether "final" must be extended past the separating comma to modify "order." Nevada authority is similarly unhelpful because cases interpreting N.R.C.P. 60(b) overwhelmingly discuss final judgments rather than orders. Therefore, a plausible plain-language interpretation of N.R.C.P. 60(b) led Defendants to conclude that "orders" are subject to relief under the Rule as independent from "final judgments." *State DHHS v. Samantha Inc.*, 133 Nev. 809, 815, 407 P.3d 327, 331 (2017) (citing 2A Norman J. Singer & Shambie Singer, Sutherland Statutory Construction § 47.23 (7th ed. 2014) (under the canon of construction expressio unius est exclusio alterius, courts should infer that omissions were purposeful)). Plaintiff provides various cases interpreting Federal Rule of Civil Procedure 60(b) that seem to confirm that the *federal rule* applies "final" to "order" as well as "judgment." (Opposition, at p. 7, n. 6). Plaintiff insists that, thus, Defendants' reliance here on Rule 60 is "wholly inconsistent" with the arguments in its briefing regarding the parties' competing orders granting costs. (Opposition, at p. 10). However, it was never Defendants' intent to imply, nor does their Motion suggest, that Judge Bare's Order is a final judgment on all issues in this matter. Simply put, N.R.C.P. 60(b)(4) allows relief from "void judgments," and Defendants' position is clearly supported on that ground.

"A district court can 'reconsider' final judgments or appealable interlocutory orders under Federal Rules of Civil Procedure 59(e) (governing motions to alter or amend judgments) and 60(b) (governing motions for relief from a final judgment)." *Thomas v. Cty. of Sonoma*, No. 17-cv-00245-LB, 2017 U.S. Dist. LEXIS 89219, *3 (N.D. Cal Jun. 9, 2017) citing *Balla v. Idaho Bd. of Corr.*, 869 F.2d 461, 466-67 (9th Cir. 1989). "Reconsideration is appropriate when (1) the court is

presented with newly discovered evidence, (2) the underlying decision was in clear error or manifestly unjust, or (3) there is an intervening change in controlling law. There may also be other, highly unusual circumstances warranting reconsideration." *Id*. (internal citations omitted).

Here, a highly unusual circumstance warrants reconsideration under N.R.C.P. 60(b)(4) and (6). The Order is void, having been rendered after the trial judge made disqualifying statements and after Defendants moved to disqualify him due to bias. *Christie v. City of El Centro*, 37 Cal. Rptr. 3d 718, 725 (Cal. Ct. App 2006). ("[D]isqualification occurs when the facts creating disqualification arise, not when the disqualification is established.") Judge Bare was therefore not entitled to render the Order, and it was void when entered.

What is more, even if Rule 60(b) did not apply here, "the law is well-established that a district court has plenary authority over an interlocutory order, and the court has the inherent power to reconsider, revise or amend the order, without regard to the limitations of Rules 59 and 60." *Koerschner v. Budge*, 3:05-cv-00587-ECR-VPC, 2009 U.S. Dist. LEXIS 130272, *10 (D. Nev. July 30, 2009); *see Jackson v. Jackson*, 111 Nev. 1551, 1552, 907 P.2d 990, 991 (1995) (concluding that a court had jurisdiction to review and modify a child support award under the proper statute regardless of the requesting party's inaccurate citation to N.R.C.P. 60(b)); N.R.C.P. 54(b) ("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 and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities."). Furthermore, "[a]s long as a district court has jurisdiction over a case, then it possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient." *City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 889 (9th Cir. 2001); *Greene v. Union Mut. Life Ins. Co.*, 764 F.2d 19, 22 (1st Cir. 1985)(reasoning that the Court has "the inherent power . . . to afford such relief from interlocutory judgments . . . as justice requires."); *Longstreth v. Copple*, 189 F.R.D. 401, 403, (N.D. Iowa Oct. 22, 1999) ("Notwithstanding, courts retain the power to reconsider and revise an interlocutory order, such as an order denying summary judgment, up until the time a

final judgment is entered.").

Moreover, there has been no appeal of any issue in this case. Therefore, no law of the case has been established, and this Honorable Court is not bound by the prior Court's pre-trial and trial rulings. This is especially true as this matter involves a retrial following a declared mistrial. A mistrial is a "nugatory proceeding" returning parties to their original positions. *Carlson v. Locatelli*, 109 Nev. 257, 260, 849 P.2d 313 (1993), citing 58 Am. Jur. 2d New Trial §10 (2d ed. 1989). "There can be no prior binding evidentiary rulings when defendant is tried again following a mistrial. When the trial court declares a mistrial, 'in legal contemplation there has been no trial.'" *State v. Harris*, 198 N.C. App. 371, 376 (2009)(citing *State v. Sanders*, 496 S.E.2d 568, 576 (N.C. 1998). The Nevada Supreme Court agrees and specifically held in *Byford v. State*, 116 Nev. 215, 232, 994 P.2d 700 (2000) that a trial court ruling does not constitute the law of the case.

Here, this Court has inherent power to reconsider, rescind, or modify Judge Bare's Order. While Defendants appreciate this Court's caution with regard to reviewing another district court judge's rulings, as will be discussed further in Section IIIA2 below, this Court has not been divested of its jurisdiction to reconsider orders in this case simply because those orders were rendered by another district court judge. In his Opposition, Plaintiff inserted an excerpt from the transcript of this Court's December 5, 2019 hearing on attorney fees and costs, suggesting that it articulated this Court's final word on whether this Court was entitled to "revisit, reject, and/or revise Judge Bare's Findings of Fact at will . . . ." (Opposition, at p. 11). The excerpt, quoting page 67 of the transcript, suggests that this Court decided conclusively that it is bound by Judge Bare's prior rulings. But after more discussion on the subject, this Court clarified its earlier statement.

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

(Recorder's Transcript of Proceedings on December 5, 2019, at pp. 77-78, attached hereto as Exhibit "E" (emphasis added)). Plaintiff also quoted this Court as definitively deciding that "I'm not changing anything, you know, that Judge Bare did or anything I will look—okay." (Opposition, at p. 12 (quoting Exhibit "E," at p. 114)). But taken in context, it is clear that this Court was discussing its role as fact finder regarding potential misconduct for purposes of deciding whether to award fees and costs. (Exhibit "E," at pp.113-14). Yet Plaintiff still suggests that this snippet he quoted somehow proves that this Court handed down an iron-clad ruling that it would not "delve into and change Judge Bare's findings and conclusions." (Opposition, at p. 13). Even if that had been this Court's ruling, nothing in the discussion of fact finding regarding Plaintiff's Motion for fees and costs precludes this court from making the *legal* ruling that Judge Bare's Order is void.

2. *This Court does not Lack Jurisdiction to Review Judge Bare's Order.*

On a related matter, Plaintiff contends that this Court may not review the disputed Order because to do so is "beyond the power of a court with concurrent jurisdiction." (Opposition, at p. 13). Plaintiff cites isolated language from several Nevada cases, but scratch the surface of those decisions, and it becomes clear that each is predicated on factual or legal grounds that renders it inapposite to this discussion. Plaintiff suggests that "numerous cases decided by the Nevada Supreme Court prohibit" this Court from reviewing Judge Bare's Order, as if those cases unequivocally proscribe one district court from reviewing an order from another. (Opposition, at p. 13). Yet the cases concede that such action is "ordinarily" or "generally" prohibited. That qualified language demonstrates that circumstances exist when a district court may review an order entered by another judge in the same case.

It is difficult to think of a circumstance where such review would be more appropriate than in the instant case. Indeed, Plaintiff cites to no authority wherein the Supreme Court prohibited a successor judge from reviewing a challenged decision that had been rendered by a disqualified predecessor—certainly not when that predecessor had openly expressed bias in favor of one party's counsel to the detriment of the other as in this case. Instead, the cases Plaintiff cites all

reveal similar flaws in his arguments. Each case involves situations where one district court rendered orders that it was entitled to make, and another court later voided, vacated, or otherwise overruled those valid orders.

"[W]hether the order of a disqualified judge is considered void or voidable, it is clear that it is only the disqualified judge who cannot act; the court retains jurisdiction over the subject matter. *Rossco Holdings, Inc. v. Bank of America,* 58 Cal. Rptr. 3d 141, 148 (Cal. Ct. App. 2007).

Plaintiff cites *Rohlfing v. Second Judicial District Court,* a criminal case in which a judge voided an order dismissing a criminal information previously rendered by another judge. 106 Nev. 902, 904, 803 P.2d 659, 661 (1990). The Supreme court noted that "because of the rotating procedure for assignment of judges in criminal matters in the second judicial district, [the other judge]'s order [voiding the order dismissing the information] was clearly inappropriate." *Id* at 907, 803 P.2d at 663. The original judge had been authorized to render the ruling, and only the court's procedure prevented him from continuing with the case.[3]

Plaintiff also cites a pair of cases whose rulings are even more extenuated from the circumstances at issue here. In both cases, courts invalidated rulings from entirely different judicial districts. In *State Engineer v. Sustacha,*, a court in one Nevada Judicial District voided orders rendered in another Judicial District. 108 Nev. 223, 225, 826 P.2d 959, 960 (1992). Similarly, in *Warden v. Owens*, the Supreme Court reversed a district court order granting relief from another district court's order. 93 Nev. 255, 563 P.2d 81 (1977). A man convicted of murder and sentenced in the Eighth Judicial District failed to appeal that conviction but instead petitioned the First Judicial District for a writ of habeas corpus. *Id*. at 256, 563 P.2d at 81-82. The *Owens* Court held that "[i]n habeas corpus proceedings, a district court may not order relief which is

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[3] Plaintiff also cites to *Colwell v. State*, to suggest that "a true example of conflicting jurisdiction arises when one district court judge, equal in jurisdiction to another, attempts to overrule another district judge's prior determination purporting to nullify the force and effect of the prior judge's decision." 112 Nev. 807, 813, 919 P.2d 403, 407 (1996). However, the language Plaintiff quotes comes from a parenthetical explaining *Rohlfing* intended to demonstrate that the court's "three-judge panel procedure does not interfere with judicial power or district court jurisdiction as those concepts are understood." *Id.*

beyond its power or authority" and concluded that "[t]he First Judicial District had no jurisdiction to vacate the other court's valid judgment of conviction . . . ." *Id.*

Unlike the cases cited and explained above, *Rossco Holdings, Inc. v. Bank of America* is directly on point. In *Rossco Holdings*, the trial court judge that succeeded a disqualified judge voided an order compelling arbitration that the predecessor judge had made at a time when he was disqualified. The successor concluded that "a judge's disqualification arises when the facts of disqualification exist, not when the judge becomes aware that those facts constitute a legal basis for disqualification . . . ." 58 Cal. Rptr. 3d at 146-47. The successor court also vacated the arbitration award arising from the void order compelling arbitration. *Id.* at 147.

In its ruling, the Appeals Court later emphasized that "[disqualification statutes] are intended to ensure public confidence in the judiciary and to protect the right of the litigants to a fair and impartial adjudicator." *Id.* at 150; *see* N.C.J.C. 1.2. Notably, the Appeals Court did not question whether the successor judge had jurisdiction to reconsider his predecessor's order. In fact, the Court went so far as to clarify that "we are not indicating that [the disqualified judge]'s order compelling arbitration should be upheld if it is determined that [he] acted correctly when he granted the motion to compel arbitration. The law is clear that a disqualified judge's orders are void, regardless of whether they happen to have been legally correct." *Id.* But regarding the arbitration *award*, it held that "when the *only* act of the disqualified judge was to send the parties to an alternative process in which the disqualified judge had no input whatsoever, the result of the alternative process should not be vacated solely by virtue of the judge's disqualification." *Id.* The Court then remanded the case to the successor judge and instructed him to determine whether the arbitration was tainted by the disqualified judge and to vacate the award if that taint had occurred or if other grounds warranted it. *Id.*

Here, unlike in the otherwise inapposite Nevada cases Plaintiff cited, Judge Bare's Order is not a valid order he was entitled to render. Defendants had moved to disqualify Judge Bare, and Judge Bare had made the disqualifying statements, both before he accepted and signed Plaintiff's factually inaccurate Order. Consequently, that Order was void and should never have been

rendered at all. What is more, under the N.C.J.C.'s requirements, it was incumbent upon him not to render any rulings that could be seen as tainted by bias. *See* N.C.J.C. 2.11, Comment 2 ("A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed."); N.C.J.C. 1.2 ("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.") Further, as in *Rossco Holdings*, there is no question that this Court has jurisdiction to review the disputed Order. The relevant inquiry concerns whether the Order was tainted by the bias that resulted in Judge Bare's disqualification, and it is within this Court's jurisdiction to make that determination.

3. *N.R.S. 1.235(5) Provides a Proper Procedural Framework for Judicial Disqualification*

Plaintiff again employs a purely technical argument to bolster his case. He claims that because N.R.S. 1.235 governs pretrial disqualifications, it should not apply here. However, he acknowledges that Defendants "filed their motion under authority of Nevada's Code of judicial Conduct . . . ." (Opposition, at p. 15). He then goes on to cite *Towbin Dodge, LLC v. Eighth Judicial District* for the principle that "if new grounds for a judge's disqualification are discovered after the time limits in N.R.S. 1.235(1) have passed, then a party may file a motion to disqualify based on [the N.C.J.C.] as soon as possible after becoming award of the new information." (Opposition, at p. 15 (quoting *Schiller v. Fid. Nat'l Title Ins. Co.*, 2019 Nev. Unpub. LEXIS 805, *10-11 (Jul. 15, 2019))). But that analysis fails to tell the whole story.

The Supreme Court in *Towbin Dodge* conceded that no statutory procedure existed under which to seek disqualification based on the N.C.J.C. 121 Nev. 251, 258, 112 P.3d 1063, 1068 (2005). It went on to adopt federal disqualification procedure, except as federal law allows the challenged judge to hear the disqualification motion. *Id.* at 260, 112 P.3d at 1069. Even so, *Towbin Dodge* still did not clarify what acts a trial judge may or may not perform while awaiting a disqualification ruling. Later in *Lioce v. Cohen*, the Supreme Court invoked N.R.S. 1.235 when advising "that a party desiring to disqualify a judge in district court 'must file an affidavit

specifying the facts upon which the disqualification is sought." 124 Nev. 1, 25 n. 44, 174 P.3d 970, 985 n. 44 (2008). Notably, the Court gave that guidance even though that case involved the grant of a new trial, indicating that the ostensible grounds for disqualification had likely occurred at some time after the time limits specified in N.R.S. 1.235. *Id.*

While N.R.S. 1.235 specifically governs pre-trial motions for disqualification, it provides helpful guidance to fill in the holes left by legal interpretations of N.C.J.C. and indeed, within the Judicial Code itself. The circumstances of this case throw the wisdom of N.R.S. 1.235(5) and the N.C.J.C. into sharp relief and demonstrate the precise reason a disqualified judge's orders are void. They also raise a fundamental question: how is it possible to "promote[ ] public confidence in the independence, integrity, and impartiality of the judiciary and [to] avoid impropriety and the appearance of impropriety[ ]" if a judge is allowed to continue to rule in cases where he or she is subject to a disqualification motion? N.C.J.C. 1.2. Here, Defendants had moved to disqualify Judge Bare more than two weeks before he entered his Order, all the while being on notice that his biased behavior was on review before Judge Wiese. In fact, a mere week after he filed his order, he was deemed and recognized to be disqualified and this case reassigned.[4]

Moreover, as in *Rossco Holdings*, here, Judge Bare's Order was clearly tainted by bias. Plaintiff argues that Judge Bare merely memorialized in writing his oral pronouncements from the bench. But as was amply demonstrated above, the Order that Plaintiff submitted and Judge Bare approved and signed, contained multiple inconsistencies from and outright fabrications to Judge Bare's oral statements. Those inconsistent and fabricated statements potentially impacted this Court's ruling on Plaintiff's request for fees and costs. To cite only one example, Plaintiff insists that "[t]here is no meaningful distinction between Judge Bare's finding that Defendants and their counsel possessed a consciousness of wrongdoing that led to his finding that they were the legal cause of the mistrial, and this court's independent finding that Defendants purposefully caused the mistrial due to the same basic mindset." (Opposition, at p. 13). But Judge Bare never reached that

[4] It seems that Judge Bare himself considered N.R.S. 1.235 applicable, given that he provided not one but two affidavits in response to Defendants' Motion to Disqualify, as the statute provides.

conclusion. To the contrary, the issue of "legal cause of the mistrial" relates solely to the request for fees and costs, and Judge Bare stated on several occasions that fees and costs needed to be fully briefed and decided at a later date. Notably, he stated that "what's the legal standard having to do with the responsibility because the statute talks about fees and costs, right, if you cause a mistrial through misconduct, I think is what it says. And so that'll be part and parcel of what we'll have to figure out." (Exhibit "A," at p. 72). Clearly, not only did Judge Bare not make the statement regarding Defense Counsel's "consciousness of wrongdoing," he also did not make the "legal cause" finding as set forth in the Order, specifically stating it was a determination for a later date. Yet he signed Plaintiff's draft Order, factual inaccuracy unaddressed and unremediated.

It is true that neither the N.C.J.C. nor Nevada case law specifies a procedure to address what a court may do once a motion for disqualification has been filed after a mistrial has been declared. However, even a cursory review of the Judicial Code reveals the need for a procedure that effectuates the goals of "promoting confidence in the judiciary" and "performing the duties of judicial office impartially." N.R.S. 1.235, with its requirement that a judge against whom allegations of bias or prejudice have been levied proceed no further with the matter, provides just such an appropriate procedure. Otherwise, what is to stop a judge from rendering judgments that disadvantage, whether overtly or inadvertently, a party for moving to disqualify? What is to stop a judge from entering a judgment containing inaccuracies that benefit the other party, as occurred here? These situations can be avoided by seeking the safe harbor provided by N.R.S. 1.235, by taking the steps necessary to remove even the appearance that a proceeding or a ruling is infected by bias.

B. Judge Bare's Order is Void and Must be Set Aside.

There can be no question as to the invalidity of Judge Bare's Order. Nevada law is clear on the matter.

"That the actions of a district judge, disqualified by statute, are not voidable merely, but void, has long been the rule in this state." *Hoff v. Eighth Judicial Dist. Court*, 79 Nev. 108, 110, 378 P.2d 977, 978 (1963) (citing *Frevert v. Swift*, 19 Nev. 363, 11 P. 273 (1886); *see Rossco*

Holdings, 58 Cal. Rptr. 3d at 148-49 ("Orders made by a disqualified judge are void."); *see also People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd.*, 111 Nev. 431, 439, 894 P.2d 337, 342 (1995) (overruled on other grounds in *Towbin Dodge*, 121 Nev. 251, 112 P.3d 1063 (granting rehearing and withdrawing its prior opinion after concluding that it must disqualify a judge who sat on the Court in place of a missing Justice when it was determined the visiting judge sat on the board or an organization that had an interest in the case.) "[D]isqualification occurs when the facts creating disqualification arise, not when the disqualification is established." *Christie v. City of El Centro*, 37 Cal. Rptr. 3d 718, 725 (Cal. Ct. App 2006). "[I]t is the fact of disqualification that controls, not subsequent judicial action on that disqualification." *Id.*

"[A] judge who is disqualified to try the cause is only authorized to make such formal orders as may be necessary for the arrangement of the calendar, or regulation of the order of business, so that the cause can be tried, or judicial acts relating thereto performed, by a judge who is qualified to try the cause." *Frevert*, 19 Nev. at 364, 11 P. at 273. "[U]nder the statute quoted, the respondent judge was disqualified from presiding at the petitioner's arraignment and as his orders at the arraignment were accordingly void, the same are hereby vacated." *Hoff*, 79 Nev. at 113, 378 P.2d at 979.

1. *Rendering the Order Does Not Constitute a Mere "Ministerial Act."*

Plaintiff does not dispute that Judge Bare's Order is void. Instead, he argues that in entering his Order, Judge Bare was simply performing a "ministerial act," which would be permissible even by a disqualified judge. This assertion is absurd on its face. Plaintiff downplays the importance of the act of rendering a written order so he can place it on the same substantive level as taking a hearing for attorney fees and costs off the court calendar. (Opposition, at p. 16). Further, Plaintiff inexplicably argues that "reduc[ing] prior judicial determinations to writing" resulting in an 18-page, 60-paragraph order is somehow a "housekeeping" task. (Opposition, at p. 16). However, it is clear to anyone who read the Order that it was a document of substance requiring extensive review of the record and the trial transcript, even if that transcript was not faithfully echoed.

Plaintiff cites to *In re Estate of Risovi,* a North Dakota case that he insists demonstrates that reviewing and approving his Order is a mere ministerial duty. The *Risovi* Court states that "[o]rders [that] had been ministerial or had contained no discretionary element" are appropriate for signature by a disqualified judge." 429 N.W.2d 404, 407 (N.D. 1988). The Court then provides a list of supposedly ministerial duties, such as

> certifying to a transcript of a judgment rendered by his predecessor, or administering an oath. He may make such formal orders as are necessary to the maturing or the progress of the cause, or to bring the suit to a hearing and determination before a qualified judge, or another court having the jurisdiction, and may carry out the provisions of an order of remand from a higher tribunal

Id. at 407 n. 4.

Plaintiff also cites to a Virginia case that purportedly highlights "the difference between rendering of a judgment and the ministerial act of entering that judgment on the record." (Opposition, at p.17). However, here, as is often true with the cases Plaintiff cites, there is something wrong with the analysis he attempts to promote. In *Lewis v. Commonwealth*, the Virginia Supreme Court affirmed a judgment of conviction even though the trial court waited 11 days after rendering judgment at trial to enter its written judgment. 813 S.E.2d 732, 739 (Va. 2018). The order contained the date of conviction and the finding of guilty, which the Court determined was sufficient to prove the fact of conviction. *Id*.

Here, the Order Plaintiff wrote, and Judge Bare reviewed and approved in no way approximates the housekeeping duties listed in *Risovi*. To determine whether an Order accurately reflects the mind of the judge who renders it is undoubtedly "connected with the trial" and requires "discretionary action." Nor is it a document containing merely the date of conviction and the verdict as in *Lewis*. Instead, it is a document containing 18 pages and 60 paragraphs of substantive information. Moreover, if as Plaintiff insists, the Order truly merely memorializes an oral judgment, questions arise regarding the inconsistencies between the transcript containing those oral pronouncements and the language found in the eventual Order. But regardless of the cause or source of those inconsistencies, Judge Bare approved, signed, and rendered that significantly

substantive document, which is no mere "housekeeping" act by any calculation.

2. *Plaintiff's Futility Argument is Supported by Neither Law Nor Logic.*

Plaintiff conjures up a scenario in which voiding Judge Bare's Order would result in the complete negation of all proceedings that succeeded the rendering of that Order. He also raises the specter of constitutional violations of free speech. But that scare tactic is so facially insincere, Plaintiff doesn't bother to offer argument to support it. Indeed, he deploys First Amendment buzzwords such as "prior restraint of speech," but he fails to cite a single case where a court's declaring an order void constituted a First Amendment violation. He further questions whether declaring the Order void would prevent him from referring to Judge Bare's oral pronouncements from the trial transcript. Such a question strikes Defendants as especially ironic given that Plaintiff embellished several of Judge Bare's oral pronouncements and entirely manufactured others for inclusion in his draft Order, which forms the foundation of Defendants' Motion for Relief. If Plaintiff had not behaved more cleverly than was good for him in drafting the Order for Judge Bare's signature and in subsequently, strategically deploying it to his benefit, the parties would not now be arguing this issue, occupying the attention of the Court at this sober time.

This Court cannot counteract the effect of the mistrial; Defendants have never suggested as much. However, this Court can remediate the effect of the void Order arising from it. At a minimum, Plaintiff's self-serving additions to and manipulations of Judge Bare's oral statements must not be allowed to stand, thereby preventing Plaintiff from continuing to use them to unfairly undermine Defendants' position in this case.

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IV. CONCLUSION

This Court is not bound by a void Order. Thus, whether under N.R.C.P. 60(b) or its inherent authority, this Court may revise, rescind, or reconsider Judge Bare's void Order. Therefore, for the reasons set forth herein, Defendants request this Court grant relief from Judge Bare's Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial.

DATED this 23rd day of April, 2020

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s/ S. Brent Vogel*

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CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I certify that I am an employee of Lewis Brisbois Bisgaard & Smith LLP and that on this 23rd day of April, 2020, a true and correct copy of **DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR RELIEF FROM FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFF'S MOTION FOR A MISTRIAL** was served electronically using the Odyssey File and Serve system and serving all parties with an email-address on record, who have agreed to receive electronic service in this action.

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EXHIBIT ‘A’

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

BEFORE THE HONORABLE ROB BARE
DISTRICT COURT JUDGE
MONDAY, AUGUST 5, 2019

RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 11

APPEARANCES:

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

RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER

Case Number: A-18-776896-C

INDEX

Las Vegas, Nevada, Monday, August 5, 2019

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

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

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

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

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

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

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

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

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

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

MR. VOGEL: Oh, absolutely. Yes.

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

MR. VOGEL: We do.

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

THE MARSHAL: Okay.

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

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

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

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

And I'll tell you the ten hours -- ten Saturday and then the -- I don't know, probably I had to tone it down or get divorced -- seven yesterday that I spent on this myself. So I have all -- all the items I put together I have here, that I did on my own over the weekend. So I certainly anticipated that this Monday morning was going to be interesting. I did invite, in our informal meeting on Friday, I did invite trial briefs, I think is what I called it.

But I certainly invited the idea that certainly lawyers could, if they wanted to turn their attention to providing law on the obvious issues, you could. I mean, the issue became apparent late Friday, so -- just by operation of the calendar. You know, you have Saturday and Sunday and then here we are. So it could be that counsel worked on the weekend. Maybe. Maybe not, you know. I did. But that doesn't mean you have to. Sometimes it's good to take a break.

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

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

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

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

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

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

motion tells us that --

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

MR. JIMMERSON: No, no problem.

THE COURT: Sorry.

MR. JIMMERSON: Yes, sir.

THE COURT: I apologize for the interruption --

MR. JIMMERSON: Uh-huh.

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

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

THE COURT: -- roadmap.

MR. JIMMERSON: Yes.

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

MR. JIMMERSON: Of course.

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

MR. JIMMERSON: No -- thank you.

THE COURT: So --

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

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

MR. JIMMERSON: I think that that --

THE COURT: -- and Ms. Gordon.

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

THE COURT: Okay. Mr. Vogel.

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

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

MR. VOGEL: Yeah.

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

MR. VOGEL: No, no.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And I think I even said look, if anybody doesn't want to be here or doesn't want to hear these editorial comments, all you need to do is ask and there'll be no hard feelings and we'll go off on our weekend. But the -- as I remember it, the lawyers entertained that and I hope appreciated it, but at least allowed for it or acquiesced in it or wanted it to continue, whichever way you'd like to take it.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. VOGEL: Yes.

THE COURT: -- conference on Friday.

MR. VOGEL: Yes. Thanks, Judge. And we appreciate it and I -- and I understand your comments on your view on how the evidence came in was a took to talk to our clients with. And that's what we did. We talked to them. We talked to a lot of people. I talked to, you know, much wiser lawyers than I and got their take on it. We talked to a judge. We talked to several people about this. And we appreciate it. And ultimately, based on all the discussions, our review of the law and whatnot, we felt like, look, this is not actually a case for mistrial and that we want to go forward.

That was what we came to. But yes, we definitely appreciated your comments on that and I appreciate your setting out how you'd like to handle this right now going forward procedurally, so that's all I wanted to say on that point.

THE COURT: All right. Well that takes us then to the -- so I guess there's no reason to revisit the idea of potentially trying to settle your case?

MR. VOGEL: If you'd like, we can talk to our clients, but after talking to them this weekend, I don't think that they've changed their mind.

THE COURT: All right. Well, we don't know that until you've talked to them, right? So why don't we just go off the record and give you a few moments in the conference room. Do you think that's fair or do -- if you don't want to do that, you don't have to. I'm just --

MR. VOGEL: No --

THE COURT: I said a lot of things that he's heard now that he --

MR. VOGEL: Yeah.

THE COURT: -- didn't know on Friday, right -- over the weekend.

MR. VOGEL: We're happy to do it.

THE COURT: So who knows what'll happen, right?

MR. VOGEL: Right.

THE COURT: Okay. So let's go off the record and you guys talk with each other and I'll be here. Let me know when you want to resume, okay?

MR. VOGEL: Very good. Thank you.

[Recess taken from 9:40 a.m. to 11:05 a.m.]

THE COURT: Okay. We're back on the record.

Mr. Vogel?

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

THE COURT: Okay. All right. So the jury's probably back now at 10. So I want to hear this motion. The only thing I can think about, and give me your input, please, counsel, is tell them that it's going to be a while, 11:00. I mean, that's all I can think about at this point. Does anybody have a thought? Have them report back at 11?

MR. JIMMERSON: That should be sufficient time for the Plaintiff and Defendant to give them -- give you their views, our views.

MR. VOGEL: I agree, Your Honor.

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

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

THE COURT: Okay.

MR. VOGEL: Yes.

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

So okay, Dominique, let them know that.

All right. Plaintiff's motion for mistrial?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And so the impact of the --

THE COURT: Which four do you think?

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

THE COURT: Cardoza is number 7, but okay.

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

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

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

THE COURT: I didn't think about that.

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

THE COURT: Okay.

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

THE COURT: Right.

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

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

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

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

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

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

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

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

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

Thank you, sir.

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay.

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

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

MS. GORDON: Sure.

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

MS. GORDON: Okay.

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

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

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

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

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

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

MS. GORDON: Us?

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

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

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

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

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

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

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

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

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

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

THE COURT: Um-hum.

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

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

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

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

THE COURT: Um-hum.

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

allowed to use as impeachment.

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

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

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

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

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

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

THE COURT: Okay, I understand that.

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

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

MS. GORDON: And a hustler.

THE COURT: Could you make that argument?

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

THE COURT: All right.

MS. GORDON: And that someone is Plaintiff and he didn't do it.

THE COURT: All right. Okay. You want to add anything else --

MS. GORDON: I'd like to --

THE COURT: -- before you turn it over to Mr. Vogel?

MS. GORDON: Yeah, thanks.

MR. VOGEL: Thank you, Your Honor. Yeah, curiously absent from their motion is any reference to NRS 48.445 or 055. When you open the door on character evidence, the Defense can then, pursuant to 48.0551 on cross-examination, make inquiry to specific instances of conduct, which is exactly what was done in this case. So there's no ethical violation. There's nothing improper about what was done, and as to Ms. Gordon's point, and this Court is fully aware, the evidence was there.

THE COURT: That's why -- I didn't cite those statutes, but I looked at them over the weekend. That's why I've given you the opinion that's not going to change, that yes, there was an allowance to now bring up evidence to dispute the character testimony of Mr. Daryanani. No doubt. That's not the issue to me anymore.

MR. VOGEL: And --

THE COURT: The issue to me is what about, you know, what we have here.

MR. VOGEL: Yeah.

THE COURT: I mean, for example, you know, there are motions in limine that arguable go to character where I pretrial granted them. You can make an argument that somebody has a $400,000 gambling debt, that that goes to their character. You can make an argument that they didn't pay an obligation. It's like writing a check. A casino marker is like writing a check, they didn't pay it, and that goes to their character. They're not honest, but that's precluded, for example.

MR. VOGEL: Yeah, and I appreciate that, and they sought to exclude it. In this particular instance, they didn't seek to exclude it. So I think the issue, I think, that the Court is probably struggling with is okay, it's admitted. Is it -- is the probative value of that evidence so overly prejudicial that it has now caused, you know, irreparable damage to this trial?

I think, you know, if my understanding of what you're saying is that's your concern in the case law, and maybe you even looked at this case, *Nevada v. Battle* [phonetic], which is a 2015 case, you know, the Court was, you know, struggling with similar issues. And the Court indicated that, you know, this impeachment evidence in that case was admissible because the Plaintiff had opened the door, and the Court found that Battle couldn't establish prejudice because it was his own actions, not the actions of opposing counsel, which open the door to impeachment evidence. So in that case, the Court found that hey, you've opened it, you cannot now claim prejudice.

THE COURT: Again, I agree with that. I said character is clearly allowable for the Defense in cross-examination of Daryanani, and

for the remainder of the trial. It was put in issue by the Plaintiffs.

MR. VOGEL: So --

THE COURT: My issue is -- let me put it to you this way. You've been around a while. And I don't mean to, you know, play too much devil's advocate with you or Ms. Gordon. I would do the same with the Plaintiffs. You know, it doesn't matter who's doing it or who I have my questions for, but if I have thoughts going through my mind, I typically like to express them and ask questions about them regardless of which side I'm asking these questions to. In this case, it just happened to be your side under these circumstances.

You heard what I said with, you know, these questions I've asked Ms. Gordon, but I mean, wouldn't it occur to the Defense that -- let me put -- let's see if I can say it correctly. You say to yourself, and I agree, okay, character is now an issue.

Certainly after Mr. Dariyanani said the things he said that we've now recited a few times, we've got this piece of evidence. Is there a concern that if we just use this admitted piece of evidence, we've now interjected a racial issue into the trial. And -- and if you have that concern, why not do something to at least address it. There would be no harm in that. I mean Mr. Dariyanani is there. She's on cross examination out there. She's got Exhibit 56 in her hand. I mean why not -- I mean did it ever occur that, you know, I used this bar metaphor on Friday, on the court record, that if you're going to drop a character bomb, even if you have the right to do that, is this the type of bomb that's going to blow the whole room up?

MR. VOGEL: I see what you're saying. You know, the terms used were Mexicans, black, and rednecks. Those were the terms that were -- were used. And I guess the termination you say are those just inherently racist terms. I guess that's what the Court is struggling with. The only pejorative term in there, you know, I think is rednecks.

THE COURT: Well, actually, I don't think that. I think that there's a way you can say Mexican and have it not be taken as a racist comment. I think there's a way you can say black, Black Lives Matter, for example. And not have it be a racist comment. Redneck, I don't know. I think that one is pretty much, every time you say it, it goes in that zone. But to me it's the context of which it is said. I mean it -- they're all lumped together and I think it's the easiest conclusion to draw, if you look at the context in which these two paragraphs come together, they clearly appear to be racist.

So it's the context, not just the -- not just the words themselves, it's the context in which they're used.

MR. VOGEL: Sure. I mean it's quite clear that he was victimizing certain people. I don't dispute that. The issue comes back to is it so prejudicial as to have destroyed the ability of this jury to rule in -- I guess in an unbiased way to where justice is s till being done. And I guess that's what you're struggling with. And our view is this was, you know, character evidence. All character evidence, by its nature is prejudicial. Whether it's glowing, fabulous reviews like Mr. Landess' daughter gave, or whether it's deceiving. By its nature it is -- it is usually much more harmful type of evidence one way or the other.

And that's why we were actually quite careful making sure we had the basis to bring it in, between Mr. Dariyanani's testimony, the daughter's testimony, and Dr. Mills' testimony even. We felt that they had opened the door quite wide on character. And that it was perfectly appropriate to use it. We gave them every opportunity to object to it. Ms. Gordon asked repeated questions before coming to that union. And, yet, I guess it -- it comes down to, you're asking could we have done something to try to remove that. I suppose in hindsight I guess we could have. But I don't think we had to. Reason being is they stipulated it in and it was -- when it's really without any sort of objection.

So now we're judging it by hindsight. And according to *Nevada vs. Battle*, they can't establish prejudice, because they didn't object to it.

THE COURT: Okay, all right. It's your motion, Mr. Jimmerson, you get the last word.

MR. JIMMERSON: Thank you, Judge. Let me have those two cups, please. Now the Nevada Supreme Court in *Hylton*, H-Y-L-T-O-N *v. Eighth Judicial District Court*, 103 Nev 418, 423, 743 Pac. 2d 622, 626, 1970 Dec. said that a manifest necessity to declare a mistrial may also arise in situations which there is interference with the administration of honest, fair, even-handed justice to either both, or any of the parties to receive. And in *State vs. Wilson*, 404 So.2d 968, 970, La. 1981, raises such a sensitive matter that a single appeal to racial prejudice furnishes grounds for a mistrial. And that a mere admonition to the jury to disregard the remark is insufficient in occult.

In listening to both opposing counsel's remarks, that of Ms. Gordon and Mr. Vogel, it is abundantly clear from what they didn't argue that we have a conceded fact as to the explosive nature of the remarks, and the prejudicial nature of the remarks. There is not an argument made by either one that this does not warrant a mistrial. There's not a argument made by either one as to the impact that this has had upon our jury. Instead, both focus upon the claim that it is the Plaintiffs' error or the Plaintiffs have opened the door. The Court has indicated that it is pretty well convinced that the Plaintiff did that.

I will simply say that if you read the transcript, the question that led to the examination was, "Was it a difficult thing for Cognotion, or yourself, to terminate Mr. Landess?" That in no way, reasonably, would call for the admission of character evidence that Mr. Dariyana -- Mr. Dariyanani responded in the way that he did, in some regards to answer the question, "Yes, it was a difficult thing to do." But they've gone beyond that to talk in terms of Mr. Landess in both positive and negative terms. The Court apparently feels that that is appropriate. But that was not an intention, both by either words, or by conduct with the Plaintiff to open any door about character.

Relative to Dr. Mills or Dr. Arambula, they introduced it first, because they went first on that. But they both testified that Mr. Landess was an honest person and that he was self-effacing and didn't exaggerate based upon psychological test results and the MMPI, multi-personal test. That wasn't a character issue. And the daughter, Ms. Lindbloom, did speak about both before and after. How he was before

the professional negligence on October 10th of 2017, and afterwards. And yes, he did say -- she did say some very kind and glowing comments about her dad, but that clearly has a place in character evidence. And that also was ten days earlier. It wasn't related to the time. So when you focus upon what was going on Friday, you have the admission by Ms. Gordon that it was an intended piece of evidence.

I disagree strongly with the statement repeated questions were asked about the email. Not at all. The email was placed upon the Elmo without a single question or preface whatsoever. And the jury saw those words before a question was asked. And then she asked the question "Is this what Mr. Landess wrote to you?" So the intent to create a prejudice was in presence in the part of the Defense. And what they didn't understand or appreciate, and should have -- reasonably should have, under *Lioce* and relative under the advice of the Court and other decisions was the impact of what they were doing, which is the whole point of our motion.

Let's be fair. The Defense sought to introduce a 79 page set of emails. Plaintiff agreed, and 10 or 15 minutes later, they place this email before the jury. Plaintiff did not appreciate the contents of this email, and perhaps should have. But the Defense most certainly did appreciate what they had in their hands and chose to use it. And the excuse that they have that because there was an admission by the Plaintiff reversed the law, which is very clearly stated that if inadmissible evidence is used ostensibly, or if admissible evidence is used for inadmissible purpose, it can be withdrawn. And this is no different than

either one of us not recognizing an attorney client privilege document mixed in with another 80 pages of documents, and then the party recognizing that there is a prejudicial document there cannot under both ethics, as well as our rules of procedure, then go forward and misuse that information.

And the questions asked by the Court are the appropriate ones in light of what the Defense knew that they had, and intended to use. There was no calling of attention to that email, Your Honor. I don't know where Ms. Gordon gets the idea that she asks repeated questions about it. She didn't. She asked no questions until she placed the words up on the Elmo, before she sprung it upon us. And the springing of it, which she concedes is the case, is the Defense premeditatedly and intentionally doing so. This -- opposing counsel also stated that Mr. -- or Dr. Debiparshad's race is acquired at depo. One single question was are you -- is your family -- are you from India. I think the answer was yes, or something like that. But at trial, not a single word was asked about that. Plaintiff did not seek upon that. The man is educated in Canada, went to school up, apparently in Canada. There's no comment upon that. There wasn't one question of Dr. Debiparshad that went anywhere near any of those issues. This record is clear of the Plaintiff's bona fides in terms of such a devastating subject matter like that. Furthermore, the Defense is bound to, and as the Plaintiffs to know, under *Lioce* what -- where the line is, and it's a fairly bright line in terms of somebody as -- you know, as astounding as this type of a question and information is this is not a negligent act. This is not something that was not appreciated by the

Defense. They intended to use it exactly in the fashion that they did.

They just didn't appreciate, I don't think, the -- the predictable response of the Court, and of the Plaintiffs relative to the misuse of this type of explosive information that had no place at trial. Mr. Landess has never placed race as an issue and the Court's asked the question directly of the Defense, do you think that race has a place in this case. And, of course, the answer has to be yes for the Defense, because they're trying to justify their -- their misbehavior. But that's not in, at least our review of the case law, warranted that there cannot be a good faith basis for the use of this document in the fashion they did.

Especially understanding that it hadn't been offered by the Plaintiffs at any time. It hadn't been the subject matter of a single question in a single deposition in which there were more than 15 depositions taken. It wasn't in -- that wasn't discussed in Mr. Landess' two different days of depositions. It wasn't examined of him on three days of direct and cross examination doing this trial. Not one subject matter came up. This was a gut shot at the end of the case, used in a premeditated way by the Defendant to gain an advantage before the jury. And in doing so, they well beyond crossed the line with the *Lioce*. They created an irreversible prejudice to the Plaintiff. And more importantly, I think, to the administration of justice and to this Court.

Thank you, sir.

MR. VOGEL: If I may, just briefly, Your Honor, you know evidence of bad acts is always prejudicial. Usually it's in the context of other crimes, violent acts ands things along those lines. But it's always

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

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

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

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

circumstances. We'll be back in ten minutes.

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

THE COURT: Please bring in the jury.

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

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

THE MARSHAL: Parties rise for presence of the jury.

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

THE MARSHAL: All present and accounted for.

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

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

other words, sometimes -- I guess a way to say it is a court and me ad a judge, since this is my court here, you can only deal with the issues that come your way.

Often times, they're not created by you whatsoever, but they come your way and you have to deal with them. Never afraid to do that. Sometimes those things can be difficult and they can be time consuming. So that type of thing did come my way. And it wasn't something that the Court created, but nonetheless, the Court has to respect that has to be dealt with. And so I want to let you know that over the last few hours -- obviously you've been waiting out there since 9:00 this morning -- I've dealt with some things.

And obviously you knew that, because I had my martial update you a couple times and you knew we were working on legal items. I do want to tell you that because of what I dealt with and the decisions that were made, the case, as far as your participation, has been resolved. And so I just want to tell you thank you for your time. It's been wonderful, in my view, to have you here for these couple weeks. I think it's allowable for me to say I'm sorry that we don't get to finish the case with you this week. You're excused. You all take care.

[Jury out at 11:09 a.m.]

THE COURT: All right. Please have a seat, everyone. Obviously I'm going to stay on the record and well, here's the decision having to deal with obviously granting that motion for mistrial. I said it was the most difficult thing I've done since I've been here and I assure you, it is. Even more difficult than the time I was covering for Abbi Silver

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

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

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

Mr. Kirwan reported back and found a babysitter for the week, when he initially didn't anticipate that. And I'm sure there's untold stories as to each one of them, as to what they did to spend two weeks with us and then now find a way to extend it an extra four days. So that's why it's difficult, because I feel bad. I feel really bad that I had to

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

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

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

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

assessment of what happened.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

hustling Mexicans, Blacks and rednecks on Fridays, which was usually payday. I learned that it's not a good idea to sell something that you cannot control and protect, a lesson reinforced 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."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

American guy. And he was the salt of the earth.

And so, as a child growing up, I saw those two running over the county and doing good stuff. Dinner at our house all the time. I never thought anything about that.

When I was -- when you get to be a JAG when you're a lawyer in the service, they send you off to 10 weeks of intense military training at the University of Virginia Law School. Ten weeks. It's the JAG school. And they billet you. You stay in a billeting living arrangement.

And there was 109 of us in that class. And my best friend was a guy named Momeesee Mubangu [phonetic]. He was from South Africa. So, he's definitely an African-American by definition. He was my best friend. We went to dinner three or four times a week and we made good friends.

And probably halfway through his wife came to town and he wanted to go to dinner with her with me and we did. We met at a restaurant and she was a white woman.

And I remember halfway through the dinner because we were friends him remarking to me, you don't notice anything here? And I got to tell you, I really didn't. I just didn't. I just figured people were people, you know.

So, I'm not I'm not sure whether Mr. Cardoza, Ms. Asuncion are Hispanic or not. I'm never good at that kind of stuff. But it seems reasonable, I would agree with the Plaintiffs of course, the name and appearance if you want to go with that. Maybe there's some stuff in the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

racist and he might deserve something like that because he's a bad person, the law doesn't allow for that in this context. It's not a fair verdict, not a fair trial, not a fair result to decide it because someone happens to be a racist. If it were a racial discrimination case or if race were somehow an issue in the case, things would be different.

Now, philosophically, in spending the time over the weekend that I did, I wanted to try to find some law that gave me as a court guidance on what I may do in this situation, because -- and the reason I devoted basically my entire weekend to it was because I felt as though in the eight and a half years I've been here, I'm now being called upon to do, in my view, probably the most important thing I've done because of the respect I have for these people on the jury. They gave us two weeks of their time out of their lives. How could this -- how can anything I do be more important than deciding whether they get to continue or they have to go home and essentially, practically speaking, wasted two weeks with us. We wasted their time.

So, in doing so, I have to tell you and I don't want to get all the credit for this, because when I met with Mark Denton for probably it was about two hours, it might have been an hour and 45 minutes. It was in his office. He told me about *Lioce*. I knew about *Lioce* case, but in talking to him philosophically, he said, you know, there's some concepts in that case you might want to look at that could be helpful to you here because *Lioce* was his case. He was the trial judge.

And so, that got me to thinking and I did pull and I have it here outlined, and I think that case is illustrative philosophically. We're

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

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

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

In *Lioce*, the Nevada Supreme Court says,

> "When a party's objection to an improper argument is sustained and the jury is admonished regarding the argument, that party bears the burden of demonstrating that the objection and admonishment could not cure the misconduct's effect."

Okay.

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

"The non-offending attorney is placed in a difficult position of having to make objections before the trier of fact, which might cast a negative impression on the attorney and the party the attorney represents emphasizing the improper point."

And that's what Mr. Jimmerson said to me, I think last week when we were on the record, because I did ask a question or it came up, why didn't you object to it? And he said words consistent with this idea of, I didn't want to, you know, call further attention to it.

And it's clear in *Lioce* and the Nevada Supreme Court sympathizes with that dilemma that a trial lawyer may have when something comes up, the other sides offered something, here it's argument, of course. In our case, it's an exhibit prior to that stage of the trial.

But nonetheless, I have to say, I agree that, you know, because I know from my own experience in watching this happen, I felt my heart sink. And I remember thinking, oh boy, and I told you some of the things I immediately thought within the first few seconds.

And, you know, should I have said take that down, let's have a sidebar? I wish I would have at a time prior to the jury not seeing it. Or even seeing it quickly and maybe not realizing the full extent of what was in it and then we'd still be here and, you know, we'd be watching the Stan Smith video.

But I didn't do that. I think for the same sort of human being, non-reaction over two or three seconds that Mr. Jimmerson did. I have

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

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

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

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

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

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

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

know this is not a new trial request. This is a mistrial request. But I think that concept is similar, certainly. And I think the philosophy of this case gives guidance to the Court is all I'm saying.

So, again, the Supreme Court says,

"The proper standard the district courts to use when deciding a motion for new trial based upon unobjected to attorney misconduct is as follows; one, the district court shall first conclude that the failure to object is critical and the district court must treat the attorney misconduct issue as have been waived unless plain error exists."

So, there you go. That, I think clearly sends me a message that though the Plaintiffs acquiesced in the admittance of 56 and though the Plaintiffs did not contemporaneously object when Ms. Gordon put the item up, a plain error review still has to be held.

In applying the plain error review, the next sentence in *Lioce* says,

"In deciding whether there is plain error, the district court must then determine whether the complaining party met its burden of demonstrating that its case is a rare circumstance in which the attorney misconduct amounted to irreparable and fundamental error."

Again, that concept of misconduct notwithstanding. It is my specific finding that this did resolved in irreparable and fundamental error, as I have described.

The Supreme Court says in the next sentence that, the

context of irreparable and fundamental error is, "Error that results in a substantial impairment of justice or denial of fundamental rights such that but for the misconduct, the verdict would have been different."

And I get that's in the new trial context, but I think it gives guidance because my view is the dilemma as a judge, this thing first came up as a motion to strike from the Plaintiffs. And I have to say that bell can't be un-rung. That's my opinion.

Even if I granted the motion to strike, I don't know what type of contemporaneous curative instruction I could have ever come up with to ask Ms. Stidhum, especially, Ms. Brazil, especially Mr. Cardoza, especially, Ms. Asuncion, especially to now disregard the author's racial discriminatory comments.

In addition, you know, sometimes life events happen and I know, we all, as lawyers -- since we deal with fact patterns, and people more than most human beings -- I'm sure most lawyers think man, my life is just different than everybody else's. Well, I can share that with you too, from my perspective as a judge, because I deal with facts and things all the time, but not necessary to my decision, but I have to say it's lost on me that this whole situation is even more magnified given the recent events of the weekend.

I mean, think about how strange this is for me too. I'm sitting at home and so my wife is a hard worker. And I told her well, leave me alone all day Saturday. So she goes off to her office in Howard U Center at Marcus & Millichap because she does commercial realty -- commercial brokerage, so she goes there all day Saturday and works,

and leaves me alone.

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

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

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

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

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 a have a friend, or have a family, or go to church, or do anything, that this is out there to just aggravate what we already have as my view being a big problem.

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

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

Anything else from either side?

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

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

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

THE COURT: Okay. Two weeks will be?

THE CLERK: Two weeks will be August -- oh, you're going to be gone all that week.

THE COURT: That's okay. It's a pleading deadline.

THE CLERK: Okay. August 19th.

THE COURT: Okay. So the opposition will be due by close of business on August 19th.

And then a reply?

THE CLERK: A week later August 26th.

MR. JIMMERSON: Could we have the following Monday, the 29th?

THE CLERK: Okay. We'll do it the Tuesday, September 3rd, Labor Day.

THE COURT: All right. And then the hearing, we'll probably need a couple of hours for that, given our track record.

THE CLERK: You want it on a motion day or on a Wednesday?

THE COURT: Well, I need two hours, so either way is fine with me, but it's probably going to be a separate day of a Wednesday.

THE CLERK: Okay. Let me see what we have going on here.

THE COURT: And of course, the focus of this now is the fees and costs aspect. I granted a mistrial.

MR. JIMMERSON: Yes, Your Honor.

THE COURT: Although, I do want to want to say that -- I mean, there's always the idea that you can ask for reconsideration, but I mean, to me, the focus really is the fees and costs aspect of the motion.

And I want to give some context to that too. I actually made a note here on that. Let me find that note. In covering everything else, I forgot about that one.

Oh, yeah. All right. So both sides -- here's my note -- both sides made mistakes. In other words, what I'm saying is, both sides are practically responsible for what happened. To me, the issue remains which side is legally responsible for what happened; in other words, we know the Plaintiffs made a mistake in a definitional sense if you look up the word mistake in the dictionary. You made a mistake.

The question is, given what happened, and how it actually happened, is the Defense legally responsible, or is the Plaintiff legally responsible, is it 50/50, or how does that work. So that's a technical point, but in causing a mistrial, is there a standard that applies that I should be made aware of along these lines? Because again, there's no doubt the Plaintiffs made a mistake in not catching the item and stopping its use.

The Defense used it, as they did, as we have talked about enough already, but what's the legal standard having to do with responsibility because the statute talks about fees and costs, right, if you cause a mistrial through misconduct, I think is what it says. And so that'll be part and parcel of what we'll have to figure out.

But here is Terra (phonetic). So we need two hours for a hearing on this motion for fees and costs having to do with a mistrial.

THE CLERK: How far out?

THE COURT: Well, what's the last date on there?

MR. VOGEL: The 3rd.

THE CLERK: September 3rd.

THE COURT: After September 3rd.

THE CLERK: Okay. So we've got -- you can either do the afternoon of September 10th so 1 or 1:30 start time, or we've got the 11th we can either do a 9 to noon or an afternoon setting. Those are the two days we have available.

THE COURT: Okay. September 10th or 11th work?

MR. JIMMERSON: What day of the week is the 10th, please?

THE CLERK: Tuesday is the 10th and Wednesday is the 11th.

MR. JIMMERSON: Yeah, we'd prefer the Tuesday the 10th.

THE CLERK: We could do a 1:00 start time.

THE COURT: How about the Defense? You okay with that?

MR. VOGEL: Just checking real quick. Tuesday is definitely better.

THE COURT: Okay. Let's use 1:30 on that day and we'll have the whole afternoon then, but my guess is it's a couple of hours given our track record, because most likely I'll come in and I'll give a little summary of the pleadings, and talk about issues, and what have you, put things in context, and then we'll have argument. I mean, the whole thing could be an hour, but it could be more, but we'll start at 1:30 on?

THE CLERK: On Tuesday, September 10th.

THE COURT: That'll be the hearing.

MR. JIMMERSON: All right.

THE COURT: Okay. Anything else for today?

THE CLERK: The Court hasn't decide on Court's Exhibit 37, because there was an objection by Mr. Vogel, as if it was the same copy given to -- it had to do with -- I think it has to do with some X-rays.

MR. VOGEL: Yeah. And that's still in dispute, so --

THE CLERK: Okay. So we're just going to leave that unadmitted then, correct? Or how do you want to address that?

THE COURT: Well, that's a good question.

MR. JIMMERSON: I mean, that's a Court exhibit. That's not an admissibility exhibit. In other words, it's not a Plaintiff or Defense offering it. It's a Court exhibit. Isn't that the binder, Mr. Vogel?

MR. VOGEL: It is.

MR. JIMMERSON: So we certainly, in the sense of being admissible, we certainly believe that the foundation has been laid for admissibility. I mean, the Court knows what it is. It's the document binder of X-rays delivered by --

THE COURT: Here's my question --

MR. JIMMERSON: -- the Plaintiffs to Defendant.

THE COURT: -- does it matter now anyway?

MR. VOGEL: No.

THE COURT: I mean, it really doesn't matter.

MR. JIMMERSON: No.

THE COURT: Because you're going to have a new trial anyway.

MR. JIMMERSON: Yes. That's true, Judge.

THE COURT: And it'll be decided later. So I just don't --

respectfully, I don't know if we need to do anything else on the case --

THE CLERK: Okay. I just needed to have an outcome for it.

THE COURT: -- at this point. Okay.

And then, you know, I don't want to bring up anything ugly, but within the next business day or two, if you could have, you know, somebody come get all these binders out of our courtroom, I'd appreciate it.

MR. JIMMERSON: Your Honor, would that be then Plaintiff would obtain the Plaintiff's and Defendant's would obtain Defendant's; is that fair?

THE COURT: However you do that --

MR. JIMMERSON: Would you agree, Mr. Vogel?

MR. VOGEL: Yes.

THE COURT: -- you know, is fine. I just would like to have the room, you know, cleaned up.

MR. JIMMERSON: We'll, do it this afternoon actually.

THE COURT: Okay.

THE CLERK: And then I have Exhibit 150 that still needed to be provided the CD from your side, unless you wanted to withdraw that.

MR. JIMMERSON: What is 150?

MS. POLSELLI: That's that video that was played during Jonathan's testimony.

MR. JIMMERSON: Yes, we'll provide you that. I'll say we'll do that.

THE CLERK: Okay. And that's it from me.

THE COURT: Ms. Gordon.

MS. GORDON: Your Honor, if I may. I think that the transcript will bear this out, but I was just asking Mr. Vogel also, I think that what I said was misinterpreted to an intent. I don't want this jury -- and never wanted this jury to make a decision based on race. What I was talking about was the procedural propriety of what happened.

So to the extent that there is in any way characterizing my action as misconduct, and I think the Court was clear, that that's not what's saying, but I never wanted to interject race. That's what the email said, and that's what we were using as impeachment evidence, so it was not ever my intent, or I would never hope the jury would do that. That was the content of the impeachment evidence that was never objected to, and that was offered by Plaintiff. And we certainly had no reason to think that they made this mistake. I was as surprised as anyone that they didn't object to it. Never would I think that they didn't know what was in their documents. So I just want to make that part clear.

It wasn't an ambush bomb sandbag thing. It was impeachment evidence that they gave me and I used it. It wasn't for a bad purpose.

THE COURT: All right. I think maybe where we, at this point, disagree, Ms. Gordon -- because, you know, I don't feel good about any of this, and one aspect of not feeling good is towards the lawyers. You know, I don't feel good about what this now creates for all of you. You know, it really bothers me.

You know, I've been to -- I know that there are those that

don't care what lawyers think when judges make decisions, and some of those people could be judges. I don't know, but I do care. You know, and I feel bad. I feel really bad.

And I think where we disagree is, it's just my view that, you know, seeing the, at least the potential impact of what could happen when you put racism in front of a juror is where we part company on this thing. I mean, that's my criticism. It truly is. And, you know, they call it the practice of law, because it is, and you learn in the practice of law. You know, I've always learn, you know, all the time. And it's a good thing to keep learning.

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

MS. GORDON: No, I understand. I think that the difference is just if you're looking for misconduct, as opposed to mistakes. If you are just -- you're okay with the mistakes that we believe are cumulative on Plaintiff side, this is by no means any, you know, any worse, if it's a mistake, if that's what it is, and it's one, and it's not what have you, but when you're saying responsibility and legal responsibility for what happened, I don't believe that you can, you know, dismiss the multiple

mistakes that Plaintiff did make, and if they had not been made, we wouldn't be here right now with maybe not bringing up that this is what this bomb consists of.

THE COURT: Okay.

MS. GORDON: I think that was my distinction, because it's hard for me to hear the words attorney misconduct, attorney misconduct.

THE COURT: Yes.

MS. GORDON: I know you were citing a case --

THE COURT: I get that. I know.

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

THE COURT: And that brings up something that maybe should be part of this briefing; and that is, if you look at these -- I used the Lioce case as guidance obviously, and they talk about these arguments that you shouldn't make as "attorney misconduct", and that's an interesting thing, because I don't know if you have to have bad intent to make an argument that amounts to attorney misconduct; in other words, maybe it could be a mistake, you know, you could say something in a closing argument that by definition under the law is misconduct, for purposes of improper closing argument, but we all know that misconduct when it comes to attorneys sometimes is also connoted with ethical misconduct.

Well, you know, I know in Lioce referred Mr. Emerson to the bar, because guess who prosecuted Mr. Emerson for, you know, a few days in Reno once upon a time when a guy name Dave Grundy

represented him? Me. But anyway, that's an interesting point. It's highly I think possible that certain types of argument to jury could be given without any bad intent, but yet be seen as "misconduct". Certainly, if there was bad intent, that's always misconduct.

I told you informally on Friday, Ms. Gordon, and I'm comfortable enough telling you now, I don't get a feeling -- God only knows, and you, but I don't get a feel -- I'll share with you -- that you had some bad, horrible intent. Rather, I think -- what I really think, that both you and Mr. Vogel just didn't fully realize the impact that this could have. That's a mistake. Is it misconduct for purposes of the rule that's in question having to do with attorneys' fees? Maybe looking at the argument cases that likewise use the word misconduct will give guidance as to that, because ultimately I guess I'm going to have -- well, I know I'm going to have to make a decision on this fee and cost request.

You know, I'm not -- as I sit here now, and Friday, and over the weekend, and at all times, you know, did I ever say, you know, that Ms. Gordon, what a sinister, evil, you know, I didn't do that. I didn't. I just -- I really felt like actually you were just being -- in your mind, you were being zealous, and you did what you did. I just, again, don't think you appreciated, or Mr. Vogel appreciated, the impact of what was going to happen. And I don't want to take all afternoon, but I do want to spend a couple of minutes saying something else to you now that it comes to mind.

Because I want you to know I sympathize with you. Okay. in deciding all these things that you decide as a judge, I can tell you, in my

mind, I have these little things I call traps. Every once in a while something comes your way and it's a judicial trap; meaning, at first blush, when you see the item you say, oh, my goodness, I'm definitely going to have to do this. This is the right result. I've got to do this. And every once in a while, because you're not seeing something that's maybe subtle in the law, the truth is, the answer is to do the opposite. I call that a bit of a judicial trap.

You read reported decisions? Look at the four to three decision that just came out of the Supreme Court on the issue of the duty of a common carrier bus. That's what I'm talking about. You know, this stuff cannot always be easy.

So just so you know -- and I'm glad you brought this up, actually, because I don't want you to leave here thinking oh, my God, you know, the Court thinks I did something unethical, because I don't think that. I don't think that. Rather, what I think is, in your moment of being zealous, you just failed to see -- you and the whole team respectfully, just failed to see the impact that putting Mr. Landess's -- putting evidence on that, you know -- and again, I'm not accusing him of anything, but it's -- hey, it is what it is, it's evidence that one could easily draw a conclusion that he's a racist. And I think the failure is not recognizing that now that's interjected in the trial.

That's all I can say. Okay.

Do you want to say anything else? Or --

MS. GORDON: No, that was it. I just didn't want you to --

THE COURT: Okay. All right. Anybody else want to say

anything?

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

THE COURT: Okay.

MR. JIMMERSON: Thank you, Judge.

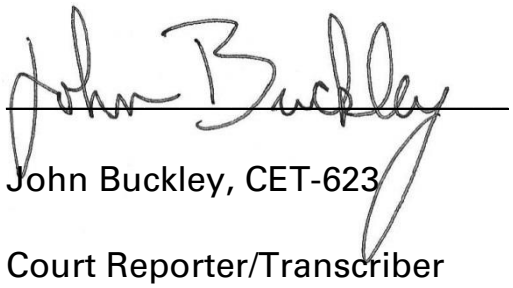
THE COURT: Take care.

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

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

* * * * *

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



John Buckley, CET-623

Court Reporter/Transcriber

Date: August 5, 2019

EXHIBIT ‘B’

FFCL
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DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

KEVIN PAUL DEBIPARSHAD, M.D, an individual; KEVIN P. DEBIPARSHAD, PLLC, a Nevada professional limited liability company doing business as "SYNERGY SPINE AND ORTHOPEDICS"; DEBIPARSHAD PROFESSIONAL SERVICES, LLC a Nevada professional limited liability company doing business as "SYNERGY SPINE AND ORTHOPEDICS"; ALLEGIANT INSTITUTE INC., a Nevada domestic professional corporation doing business as "ALLEGIANT SPINE INSTITUTE"; JASWINDER S. GROVER, M.D., an individual; JASWINDER S. GROVER, M.D., Ltd., doing business

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

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

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as "NEVADA SPINE CLINIC"; VALLEY HEALTH SYSTEM, LLC, a Delaware limited liability company doing business as "CENTENNIAL HILLS HOSPITAL"; UHS OF DELAWARE, INC., a Delaware corporation also doing business as "CENTENNIAL HILLS HOSPITAL"; DOES 1-X, inclusive; and ROE CORPORATIONS I-X, inclusive,

Defendant.

****

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

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

FINDINGS OF FACT

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

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

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

Q And you respect him a great deal?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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ORDER

NOW, THEREFORE:

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

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

Dated this 9 day of Sept August, 2019.

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

Submitted by:
JIMMERSON LAW FIRM, P.C.

9/4/19

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EXHIBIT ‘C’

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

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 A M

Submitted by:

JIMMERSON LAW FIRM, P.C.

/s/ James M. Jimmerson, Esq.
James J. Jimmerson, Esq.
Nevada Bar No. 000264
415 South 6th Street, Suite 100
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

/s/ S. Brent Vogel, Esq.
S. Brent Vogel, Esq.
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Attorneys for Defendants

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EXHIBIT ‘D’

ORDR

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 Costs is hereby DENIED.

Dated this 6 day of March, 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

Refused to sign

S. Brent Vogel, Esq.
Katherine J. Gordon, Esq.
6385 S. Rainbow Boulevard, # 600
Las Vegas, NV 89118
Attorneys for Defendants

A-18-776896-C
Granting in Part PLTFF's Motion for Attys' Fees & Costs.

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EXHIBIT ‘E’

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

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

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

BEFORE THE HONORABLE KERRY EARLEY,
DISTRICT COURT JUDGE

THURSDAY, DECEMBER 5, 2019

RECORDER'S TRANSCRIPT OF PROCEEDINGS

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

APPEARANCES:

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

RECORDED BY: REBECA GOMEZ, COURT RECORDER

Las Vegas, Nevada, Thursday, December 5, 2019

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

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

MR. JIMMERSON: Understand, Your Honor.

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

MR. JIMMERSON: Debiparshad, Your Honor.

MR. VOGEL: Debiparshad.

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

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

THE COURT: Okay.

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

THE COURT: Okay. All right.

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

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

THE CLERK: Yes.

THE COURT: Okay.

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

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

MR. JIMMERSON: Mr. Little?

MR. LITTLE: 7067.

THE COURT: Okay.

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

THE COURT: All right.

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

THE COURT: Okay.

MR. VOGEL: Good morning, Your Honor.

THE COURT: Yes.

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

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

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

sanction for a litigation.

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

THE COURT: Correct?

MR. JIMMERSON: That's correct.

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

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

THE COURT: Yes. Okay.

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

THE COURT: Right.

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

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

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

THE COURT: It says that.

MR. JIMMERSON: -- as its damages --

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

MR. JIMMERSON: And --

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

MR. JIMMERSON: That's right.

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

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

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

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

THE COURT: Right, okay.

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

THE COURT: Correct. I have that.

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

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

THE COURT: I --

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

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

THE COURT: Okay. But let me --

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

THE COURT: Okay.

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

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

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

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

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

THE COURT: I got it. Yes.

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

THE COURT: When he granted the mistrial.

MR. JIMMERSON: That's right.

THE COURT: Okay.

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

THE COURT: Judge Bare.

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

THE COURT: Correct.

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

that you have before you --

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

MR. JIMMERSON: That's right.

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

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

THE COURT: Okay. All right.

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

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

MR. JIMMERSON: Exactly.

THE COURT: Okay.

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

THE COURT: Okay. I agree with that.

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

THE COURT: Correct.

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

THE COURT: Okay.

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

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

THE COURT: Burning embers I -- I --

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

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

MR. JIMMERSON: Seventy-five.

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

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

THE COURT: Okay.

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

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

MR. JIMMERSON: -- is 560079.

THE COURT: Okay.

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

THE COURT: Seventy-nine pages, okay.

MR. JIMMERSON: And --

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

MR. JIMMERSON: Correct.

THE COURT: Okay.

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

THE COURT: I'll get it.

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

THE COURT: Okay.

MR. JIMMERSON: -- 44 and 45.

THE COURT: Okay.

MR. JIMMERSON: All right.

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

MR. JIMMERSON: Right.

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

MR. JIMMERSON: So as part --

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

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

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

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

THE COURT: Okay.

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

THE COURT: Right.

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

THE COURT: Okay.

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

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

MR. JIMMERSON: That's right.

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

MR. JIMMERSON: That's right. The court found that is evident the defendants had to know that the defendant had made a mistake and did not realize this item was in Exhibit 56, particularly because of the motions in limine that were filed by the plaintiff to preclude other character evidence in conjunction with the aggressiveness and zealousness of counsel throughout the trial. The email was one of the many pages of Exhibit 56 and the plaintiffs did not know about it.

Then paragraph 18 --

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

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

THE COURT: Oh.

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

THE COURT: You're right --

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

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

MR. JIMMERSON: -- and that the same was inadvertently admitted. Once the email was admitted and before the jury, plaintiff could not object in front of the jury without calling further attention to the email, and because it had been admitted -- because had been admitted.

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

THE COURT: And you said no objection.

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

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

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

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

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

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

MR. JIMMERSON: Precisely.

THE COURT: Okay.

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

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

[Colloquy between counsel]

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

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

MR. JIMMERSON: -- those words.

THE COURT: -- I read it.

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

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

MR. JIMMERSON: -- installed.

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

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

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

MR. JIMMERSON: Agree. Okay --

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

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

THE COURT: I got the issues.

MR. JIMMERSON: All right, yes you do.

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

MR. JIMMERSON: All right.

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

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

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

MR. JIMMERSON: Well --

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

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

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

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

THE COURT: Okay.

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

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

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

MR. JIMMERSON: Agree.

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

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

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

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

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

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

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

MR. JIMMERSON: Right.

THE COURT: -- because I did --

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

THE COURT: -- by Judge Bare --

MR. JIMMERSON: That's right.

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

from the court --

MR. JIMMERSON: That could --

THE COURT: -- that could remedy --

MR. JIMMERSON: -- that could remedy --

THE COURT: -- as a matter of --

MR. JIMMERSON: You have it before you.

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

MR. JIMMERSON: That's right.

THE COURT: Okay, I was --

MR. JIMMERSON: All right.

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

MR. JIMMERSON: And --

THE COURT: Okay.

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

THE COURT: Yeah.

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

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

yellow highlight.

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

THE COURT: No, I --

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

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

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

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

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

THE COURT: Right.

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

THE COURT: Right.

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

THE COURT: I saw that.

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

THE COURT: Okay.

MR. JIMMERSON: -- and 161 --

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

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

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

MR. JIMMERSON: That's right.

THE COURT: I -- I did note that.

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

THE COURT: Okay.

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

they chose to ask it --

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

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

THE COURT: -- noted that.

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

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

MR. VOGEL: It's the subject line.

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

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

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

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

MR. VOGEL: It's just Exhibit 56?

MR. JIMMERSON: That's all it is.

THE COURT: The whole thing, yeah I --

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

THE COURT: Okay.

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

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

MR. JIMMERSON: Seventy-nine.

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

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

THE COURT: Yeah. Okay, I --

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

THE COURT: Okay.

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

THE COURT: Okay.

MR. JIMMERSON: All right.

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

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

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

MR. JIMMERSON: All right.

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

MR. JIMMERSON: All right, so --

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

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

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

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

THE COURT: Okay.

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

THE COURT: I have not, I --

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

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

MR. JIMMERSON: And --

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

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

THE COURT: Okay.

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

THE COURT: Okay.

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

THE COURT: No.

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

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

figure out where I'm coming from.

MR. JIMMERSON: Right. Right.

THE COURT: I -- I --

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

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

MR. JIMMERSON: -- signals to the --

THE COURT: Right. No, I get it.

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

THE COURT: To at least understand the --

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

THE COURT: Okay. All right. I --

MR. JIMMERSON: All right.

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

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

THE COURT: When I read it I was --

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

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

MR. JIMMERSON: Right.

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

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

findings --

THE COURT: I -- I agree.

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

THE COURT: Yeah, I saw that.

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

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

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

THE COURT: Off-record discussion.

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

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

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

THE COURT: For plaintiff to object.

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

THE COURT: About it.

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

THE COURT: No, I --

MR. JIMMERSON: -- before you --

THE COURT: Yes.

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

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

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

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

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

THE COURT: Okay.

MR. JIMMERSON: -- unrelated to this --

THE COURT: I appreciate because --

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

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

MR. JIMMERSON: Second opinion.

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

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

THE COURT: Okay.

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

THE COURT: What the other opinions were.

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

THE COURT: Okay. Okay.

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

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

MR. JIMMERSON: Right.

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

MR. JIMMERSON: Right.

THE COURT: -- once again it makes --

MR. JIMMERSON: And --

THE COURT: Thank you.

MR. JIMMERSON: And --

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

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

where Mr. Landess had developed a --

THE COURT: Okay.

MR. JIMMERSON: -- a concern --

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

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

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

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

THE COURT: And I'll --

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

THE COURT: Okay.

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

THE COURT: Okay.

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

THE COURT: Okay.

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

THE COURT: Defendants in defendants' view --

MR. JIMMERSON: Defendants in defendants' view --

THE COURT: -- terms.

MR. JIMMERSON: -- of the case. The defendant confirms that when Mr. Landess is a racist is something the jury should weigh;

that it is admissible and it is evidence that they should consider. Defendants' counsel made it clear to the court defendants' knowing and intentional use of Exhibits 56, page 44.

THE COURT: Okay.

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

THE COURT: I saw that.

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

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

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

THE COURT: Well and then he got --

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

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

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

THE COURT: Yeah. Right.

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

THE COURT: And I understand --

MR. JIMMERSON: -- about mistrial or not.

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

MR. JIMMERSON: Right.

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

MR. JIMMERSON: Right. And one --

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

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

THE COURT: I read it --

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

THE COURT: Yes.

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

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

any purpose.

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

In both of those citations --

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

MR. JIMMERSON: Correct.

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

MR. JIMMERSON: You got it. Okay.

THE COURT: I -- I got that.

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

THE COURT: Right.

MR. JIMMERSON: -- to support that proposition.

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

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

MR. JAMES JIMMERSON: Plain error.

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

THE COURT: Plain error.

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

THE COURT: You can't do it.

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

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

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

THE COURT: I got that.

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

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

MR. JIMMERSON: All right.

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

MR. JIMMERSON: Correct.

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

MR. JIMMERSON: There is no --

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

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

THE COURT: Mistrial.

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

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

MR. JIMMERSON: Precisely.

THE COURT: -- evidence --

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

THE COURT: -- code.

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

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

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

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

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

So in paragraph 24 the judge says in the court's view, even if well intended by the defendants to cross-examine when character is

now an issue, the defendants made a mistake in now interjecting the issue of racism into the trial. Even now it appears to be court -- it appears to the court that the defendants' position is that the jury can consider the issue of whether Mr. Landess is a racist or not. With that the court disagrees with the defendants to the fiber of his existence as a person and as a judge. Ms. Brazille [phonetic] is an African-American. She -- these are jurors' names.

THE COURT: I -- I -- okay.

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

THE COURT: Hispanic.

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

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

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

THE COURT: Okay.

MR. JIMMERSON: -- 51. The court -- you know, one's a finding of fact, the corollary or matching conclusion of law number 51 at page 15 begins: The court provided the example that if Exhibit 56 which was in evidence was put up in closing, that under the definition given by

the Supreme Court of misconduct in the *Lioce* case, that likely that -- that would be seen as misconduct. Whether is with Mr. Dariyanani or whether is in closing argument, or both, it is clear the defendants are urging the jury to at least in part render their verdict based upon race, based upon Mr. Landess's allegedly being a racist, based upon something that is emotional nature. The -- the idea fairly was to ask the jury to give the defendants their verdict whether it is whole verdict or reducing damages because Mr. Landess is allegedly a racist. That is impermissible.

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

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

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

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

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

MR. JIMMERSON: That's right.

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

MR. JIMMERSON: Correct.

THE COURT: -- who could have done what.

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

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

MR. JIMMERSON: Right.

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

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

THE COURT: I know.

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

THE COURT: I've --

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

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

MR. JIMMERSON: Right.

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

MR. JIMMERSON: Right.

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

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

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

MR. JIMMERSON: Yeah. Right.

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

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

THE COURT: Used the evidence.

MR. JIMMERSON: -- was improper --

THE COURT: Right.

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

THE COURT: Yeah.

MR. JIMMERSON: -- suggestion --

THE COURT: Yeah.

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

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

THE COURT: Because of his surgery, I know.

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

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

MR. JIMMERSON: All right.

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

MR. JIMMERSON: And the --

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

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

THE COURT: I guess not responsive, but --

MR. JIMMERSON: Right, or gratuitous.

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

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

THE COURT: No, I -- I --

MR. JIMMERSON: -- it came down.

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

MR. JIMMERSON: Right.

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

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

MR. JIMMERSON: Right.

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

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

THE COURT: Thirty- --

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

THE COURT: I --

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

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

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

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

MR. JIMMERSON: Right.

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

MR. JIMMERSON: Exactly.

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

MR. JIMMERSON: That's right.

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

MR. JIMMERSON: That's right.

THE COURT: So --

MR. JIMMERSON: And at --

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

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

THE COURT: Paragraph what, 40?

MR. JIMMERSON: Paragraph 40.

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

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

THE COURT: Right.

MR. JIMMERSON: -- an inadvertent or nonresponsive answer by a witness that invokes the party's good character does not automatically put his character at issue so as to open the door to character evidence, citing the *Montgomery versus State* decision from Georgia. And then there's other cases citing including McCormick on Evidence. And --

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

MR. JIMMERSON: -- that's that.

THE COURT: -- done in the criminal setting.

MR. JIMMERSON: That's right.

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

MR. JIMMERSON: And any issue --

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

MR. JIMMERSON: Right.

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

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

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

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

THE COURT: Be a beautiful person.

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

THE COURT: Okay.

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

THE COURT: Okay, well --

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

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

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

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

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

THE COURT: For the mistrial.

MR. JIMMERSON: That's right. Okay.

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

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

THE COURT: -- his legal conclusion.

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

[Colloquy between counsel]

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

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

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

THE COURT: Oh.

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

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

THE COURT: The introduction of the evidence.

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

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

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

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

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

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

THE COURT: Through subpoena.

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

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

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

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

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

THE COURT: Yeah.

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

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

MR. JIMMERSON: No.

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

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

THE COURT: Right.

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

THE COURT: Cross.

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

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

MR. JIMMERSON: Right. That's right.

THE COURT: Okay, so --

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

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

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

THE COURT: No, I -- I --

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

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

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

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

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

MR. JIMMERSON: That's right.

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

MR. JIMMERSON: Correct.

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

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

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

MR. JIMMERSON: Yes.

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

MR. JIMMERSON: That's right.

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

MR. JIMMERSON: Right.

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

MR. JIMMERSON: But -- but the --

THE COURT: -- ruled and but --

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

THE COURT: -- I would --

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

THE COURT: Right.

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

THE COURT: Okay.

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

THE COURT: Okay.

MR. JIMMERSON: All right.

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

MR. JIMMERSON: All right.

THE COURT: -- I think they would agree.

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

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

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

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

MR. JIMMERSON: Right.

MR. VOGEL: Actually no.

MS. GORDON: No. No. No.

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

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

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

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

MR. JIMMERSON: Correct.

MS. GORDON: No, he --

MR. VOGEL: In the follow up.

MS. GORDON: In the follow-up question.

MR. JIMMERSON: That's true.

MS. GORDON: He said it first.

THE COURT: Okay. All right.

MR. JIMMERSON: And that's --

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

MR. JIMMERSON: Right.

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

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

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

MR. JIMMERSON: Right.

THE COURT: -- is pretty blatant.

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

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

MR. JIMMERSON: Yes.

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

THE COURT: Okay.

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

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

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

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

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

THE COURT: Well, I --

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

rednecks --

THE COURT: No, I --

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

THE COURT: And --

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

THE COURT: Okay.

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

MR. JIMMERSON: Okay --

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

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

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

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

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

MS. GORDON: Right.

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