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 13

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CERTIFICATE OF MAILING

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

The Honorable Kerry Earley
The Eighth Judicial District Court
Regional Justice Center
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was going to think when you showed him that email, what did you want from him when you showed him that?

MS. GORDON: He --

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

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

THE COURT: Okay, so --

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

THE COURT: Okay.

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

THE COURT: No, those were his gratuitous comments.

MS. GORDON: Absolutely.

THE COURT: That was not --

MS. GORDON: And then we --

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

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

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

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

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

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

MR. JIMMERSON: All right.

MS. GORDON: Thanks.

THE COURT: Okay, I --

MR. JIMMERSON: If I could --

THE COURT: -- I got it.

MR. JIMMERSON: -- I respectfully --

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

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

THE COURT: Okay.

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

THE COURT: Okay.

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

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

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

MR. JIMMERSON: You got it. Exhibit --

THE COURT: -- many times. Okay.

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

THE COURT: Okay.

MR. JIMMERSON: -- did he sound --

THE COURT: Start again, sorry?

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

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

MR. JIMMERSON: Right.

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

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

THE COURT: Okay.

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

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

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

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

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

MR. JIMMERSON: That's right.

THE COURT: -- an inference, okay.

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

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

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

THE COURT: Okay.

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

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

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

THE COURT: I --

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

Thank you, Mr. Dariani, I appreciate it.

THE COURT: Okay.

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

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

MR. JIMMERSON: Right.

THE COURT: Okay, and so --

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

you know.

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

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

What plaintiff did was not object to Exhibit 59 --

MR. JAMES JIMMERSON: Fifty-six.

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

THE COURT: I know which one.

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

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

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

THE COURT: That was one question --

MR. JIMMERSON: -- that group.

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

MR. JIMMERSON: No.

THE COURT: -- used at trial?

MR. JIMMERSON: No.

MS. GORDON: That's absolutely --

MR. VOGEL: Absolutely there were.

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

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

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

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

MR. JIMMERSON: Do you mean Exhibit --

THE COURT: Okay.

MR. JIMMERSON: -- 44? Page 44?

THE COURT: No.

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

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

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

MR. VOGEL: -- and many were.

MR. JIMMERSON: That's true.

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

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

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

MR. JIMMERSON: No.

THE COURT: Once again -- okay.

MR. JIMMERSON: No there were other exhibits --

THE COURT: Okay.

MR. JIMMERSON: -- introduced because --

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

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

THE COURT: Well no, because they --

MR. JIMMERSON: Right.

THE COURT: -- would be relevant I --

MR. JIMMERSON: That's right.

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

MR. JIMMERSON: Right.

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

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

THE COURT: Other than these.

MR. JIMMERSON: That's right.

THE COURT: I understand that.

MR. JIMMERSON: All right.

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

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

THE COURT: Well I thought --

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

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

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

I also want you to --

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

MR. JIMMERSON: Right.

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

MR. JIMMERSON: Right.

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

MR. JIMMERSON: Right.

THE COURT: -- of intent.

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

THE COURT: No, I --

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

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

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

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

MR. JIMMERSON: Right.

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

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

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

MR. JIMMERSON: That's right.

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

MR. JIMMERSON: But it still amounts to misconduct.

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

MR. JIMMERSON: It still amounts to misconduct.

THE COURT: No, I --

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

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

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

MR. JIMMERSON: That's right.

THE COURT: I -- I read all that.

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

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

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

[Colloquy between counsel]

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

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

THE COURT: Plain error.

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

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

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

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

MR. JIMMERSON: Because --

THE COURT: -- they get their fees anyway?

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

have to spend a new $118,000 --

THE COURT: No.

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

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

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

THE COURT: Okay. Thank you. All right.

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

THE COURT: Certainly.

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

THE COURT: Right.

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

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

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

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

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

THE COURT: But it's in here.

MS. GORDON: Correct.

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

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

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

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

THE COURT: Yes I am.

MR. VOGEL: No, you're --

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

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

THE COURT: I -- I disagree.

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

THE COURT: Right.

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

THE COURT: What cases say that?

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

THE COURT: Is it in your brief?

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

MS. GORDON: Pretrial conference.

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

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

MR. JIMMERSON: It was filed yesterday.

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

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

MR. VOGEL: Correct, and he was disqualified.

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

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

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

MR. JIMMERSON: Factually --

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

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

MR. JIMMERSON: If I --

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

MS. GORDON: Right.

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

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

MS. GORDON: And that's --

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

MS. GORDON: That's a different issue.

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

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

THE COURT: Yes, I agree.

MR. VOGEL: That's --

MR. JIMMERSON: We --

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

THE COURT: That's a totally different issue.

MR. JIMMERSON: We --

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

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

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

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

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

THE COURT: Okay.

MR. VOGEL: -- of the case --

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

MR. VOGEL: -- and --

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

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

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

MR. VOGEL: Well --

THE COURT: -- three times and I --

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

THE COURT: Okay, because --

MR. VOGEL: -- addressing in this --

MR. JIMMERSON: If --

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

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

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

THE COURT: Maybe I'm --

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

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

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

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

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

MR. VOGEL: His --

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

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

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

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

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

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

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

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

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

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

THE COURT: It was one of those --

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

THE COURT: I read it.

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

THE COURT: And he said Judge Bare did --

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

THE COURT: No, I --

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

THE COURT: Okay.

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

THE COURT: (Indiscernible) thank you.

MR. VOGEL: -- the appearance of bias.

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

MR. VOGEL: But --

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

MR. VOGEL: But with respect --

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

MR. VOGEL: But --

THE COURT: -- to me is --

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

THE COURT: Okay. Okay.

MR. VOGEL: -- 22 Nevada 304 --

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

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

THE COURT: Just one second.

MR. JIMMERSON: Okay.

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

mean binding this would be --

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

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

MR. VOGEL: No.

THE COURT: -- I'm not doing.

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

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

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

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

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

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

MR. VOGEL: Okay.

THE COURT: Okay.

MR. VOGEL: Okay.

THE COURT: So because he --

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

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

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

MR. VOGEL: And we're not --

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

MR. VOGEL: Okay.

THE COURT: What I -- okay.

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

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

MR. VOGEL: Context, sure.

THE COURT: Does that make sense?

MR. VOGEL: It does.

MS. GORDON: Yes.

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

MS. GORDON: There's a distinction.

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

MR. VOGEL: Yeah --

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

MR. VOGEL: Yes.

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

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

THE COURT: Okay, that's fine.

MR. VOGEL: -- and --

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

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

THE COURT: I absolutely do.

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

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

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

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

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

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

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

MR. VOGEL: Yeah.

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

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

THE COURT: Okay.

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

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

MR. VOGEL: So --

MS. GORDON: It's just --

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

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

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

THE COURT: Okay.

MR. JIMMERSON: -- the defendants made --

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

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

THE COURT: I -- I saw that.

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

THE COURT: But here's my --

MR. JIMMERSON: -- and later then --

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

MR. JIMMERSON: Now with regard to --

THE COURT: Okay.

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

THE COURT: Of course.

MR. JIMMERSON: -- department and --

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

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

THE COURT: -- I get that.

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

THE COURT: This case.

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

THE COURT: Okay.

MR. JIMMERSON: -- 2018 decision --

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

MR. JIMMERSON: Yeah.

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

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

THE COURT: Just tell --

MR. JIMMERSON: -- page 4 --

THE COURT: Of?

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

THE COURT: Of plaintiff's reply.

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

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

MR. JIMMERSON: -- filed October 1.

THE COURT: Okay, why don't --

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

THE COURT: Okay.

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

THE COURT: Hold on.

MR. JIMMERSON: I could approach the bench --

THE COURT: Defendants' supplemental filed --

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

THE COURT: I --

MR. JIMMERSON: Here you are, Judge.

THE COURT: I --

THE CLERK: It should --

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

MR. JIMMERSON: Right.

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

MR. JIMMERSON: And that was filed --

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

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

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

THE COURT: Okay, that's --

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

THE COURT: Okay.

MS. GORDON: -- wasn't --

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

MS. GORDON: -- allowed.

THE COURT: I apologize.

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

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

MS. GORDON: Okay.

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

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

MR. JIMMERSON: Page 4, yes.

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

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

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

MR. JIMMERSON: Right. Paragraph --

THE COURT: Footnote.

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

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

THE COURT: Okay.

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

THE COURT: Okay.

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

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

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

plenty of opportunity to make modifications --

THE COURT: Okay.

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

THE COURT: Okay.

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

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

MR. JIMMERSON: That's right.

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

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

THE COURT: I saw that too.

MR. JIMMERSON: Okay.

MS. GORDON: And I think --

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

MR. JIMMERSON: I think that's fair.

MS. GORDON: That's exactly right.

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

MR. JIMMERSON: I think that's fair.

THE COURT: -- I get it.

MS. GORDON: Yes. And --

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

THE COURT: Is that fair?

MR. JIMMERSON: I do.

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

MS. GORDON: And that was a distinction --

THE COURT: -- that makes me feel better.

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

THE COURT: Okay, that's fine.

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

THE COURT: Right, which --

MS. GORDON: The issue was --

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

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

THE COURT: No. No.

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

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

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

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

THE COURT: No. I agree with you there.

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

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

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

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

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

THE COURT: Sure.

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

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

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

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

MS. GORDON: Right. So that intention --

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

MS. GORDON: Yes.

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

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

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

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

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

MS. GORDON: Well --

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

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

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

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

MS. GORDON: Right.

THE COURT: You didn't intend --

MS. GORDON: No --

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

MS. GORDON: Yes.

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

MS. GORDON: No, but if you --

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

MS. GORDON: Absolutely.

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

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

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

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

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

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

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

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

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

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

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

MR. JIMMERSON: Fifty years ago.

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

MR. JIMMERSON: Fifty years ago.

THE COURT: No.

MS. GORDON: But --

THE COURT: Let me -- I --

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

THE COURT: Okay.

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

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

MS. GORDON: I --

THE COURT: I assume you did.

MS. GORDON: I do. I absolutely do.

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

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

THE COURT: Oh don't --

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

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

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

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

MR. VOGEL: But it goes deeper than that.

Go ahead.

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

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

THE COURT: You knew it was in there.

MS. GORDON: Yes.

THE COURT: Okay.

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

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

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

THE COURT: That he was a beautiful person.

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

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

MR. VOGEL: It's --

THE COURT: Okay.

MS. GORDON: Go ahead. Sorry.

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

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

THE COURT: They didn't --

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

UNIDENTIFIED SPEAKER: Yep.

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

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

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

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

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

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

MR. JIMMERSON: But -- just be accurate.

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

THE COURT: No, I know what character --

MR. VOGEL: So --

THE COURT: -- evidence is.

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

THE COURT: It didn't do what?

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

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

MS. GORDON: He said --

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

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

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

MR. VOGEL: He's --

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

MR. VOGEL: He's a lawyer.

THE COURT: He --

MR. VOGEL: He's a lawyer.

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

MR. VOGEL: Well, he's --

THE COURT: -- is he a professional witness?

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

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

MR. VOGEL: Well, the --

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

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

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

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

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

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

MR. VOGEL: Yeah.

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

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

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

THE COURT: Okay.

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

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

MR. JIMMERSON: It says 19.

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

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

MR. VOGEL: Well --

THE COURT: Well --

MR. VOGEL: -- yes and no.

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

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

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

appropriate?

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

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

THE COURT: Right.

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

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

MR. VOGEL: Well the --

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

MR. JIMMERSON: Four cases.

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

MS. GORDON: And here we are --

MR. VOGEL: -- four trials.

MS. GORDON: Here we are --

THE COURT: I'm sorry?

MR. VOGEL: It talks about --

MS. GORDON: Sorry.

MR. VOGEL: -- four trials.

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

MS. GORDON: Right. Yeah.

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

know, however the Supreme Court did it.

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

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

MS. GORDON: I --

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

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

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

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

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

MS. GORDON: But that --

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

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

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

MS. GORDON: Absolutely.

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

MS. GORDON: And --

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

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

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

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

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

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

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

THE COURT: Right.

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

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

MS. GORDON: Right.

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

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

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

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

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

MS. GORDON: I --

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

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

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

THE COURT: Okay.

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

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

MS. GORDON: Yes.

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

MS. GORDON: No, I -- no.

THE COURT: You did not know that?

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

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

MS. GORDON: And you --

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

door, but --

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

THE COURT: So what is that inference from there?

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

THE COURT: Oh.

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

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

MS. GORDON: No.

THE COURT: Why not? Because that's your remedy. You're saying he didn't object -- why didn't you do a motion to -- especially with what you're telling me, you watched him, he was an advocate, he was there just waiting to do it. To me, you would have been listening to his

comments. Why didn't you do a motion --

MS. GORDON: So --

THE COURT: -- to strike? That was your tactical decision.

MS. GORDON: Going back to the question of the misconduct --

MR. VOGEL: We -- we did make several objections.

MS. GORDON: Yes, and going back to the -- to the issue of -- of the misconduct that's necessary, why -- why are -- are we saddled with the fact that we didn't object to that any more so than plaintiff --

THE COURT: Because it's different.

MS. GORDON: -- is when he didn't object?

THE COURT: Ms. -- he didn't know. I have to believe he didn't know because he -- I assume this side didn't know because who would -- you had to have not known that was in there. There is no way that any attorney -- in fact he even said he didn't know, didn't Mr. Jimmerson? Okay.

He did not know. You can't object to something you don't know. Okay. So I get -- I understand why he didn't object. That's a whole issue whether he should have. I -- I get that completely, right? You know, you're supposed to know what's in you -- your -- in your exhibits. You're supposed to know, you know, what you stipulate --

MS. GORDON: Yes.

THE COURT: -- well he didn't stipulate, he just didn't object. I get that. But you knew what was there. You knew you were using it. So that is my question when -- when he came out with those gratuitous

remarks which I -- yeah, it was -- and you knew -- you chose not to. You didn't have to object. Correct?

MS. GORDON: Right.

THE COURT: That was your tactical decision. So then do you not think you took somewhat of a risk as to whether the judge would or would not decide whether that was opening the door because you had no ruling from anybody.

MS. GORDON: Right, but we do now --

THE COURT: Correct?

MS. GORDON: Right.

THE COURT: You -- you -- you know, you had no ruling so then let's say you did it and then Judge Bare immediately says wait a minute, it's -- let's -- it's my opinion those comments were not opening the door, then what would have happened?

MS. GORDON: I don't know, but that's not what happened. He did find that --

THE COURT: I know, but I have to look at in terms of what -- as far as misconduct --

MS. GORDON: Right.

THE COURT: -- what you know as a lawyer should have happened.

MS. GORDON: And I think what's overriding --

THE COURT: That's frustrating.

MS. GORDON: -- is that we're having this discussion and it's -- and -- and it -- we could talk --

THE COURT: Yeah, I -- I -- and you're right and I'm left with this misconduct standard which is difficult.

MS. GORDON: -- a really long time about that. That's not obvious misconduct. Here we -- you know --

THE COURT: Yeah.

MS. GORDON: -- here we are, we have all these briefs and we -- we could talk for a very long time about it. I feel strongly that we were correct in doing so. Judge Bare was -- who was sitting there, it wasn't just in his findings and [sic] fact and conclusions of law, he also said it on the record --

THE COURT: And what did he say, you were appropriate?

MS. GORDON: He said that he does find that the plaintiffs did open the door to character evidence and that we were allowed to then present rebuttal character evidence in response to that.

THE COURT: But what was his next comment about the type of rebuttal character evidence you let in? He was so strong that this was so -- I mean he gave a mistrial on it.

MS. GORDON: Right.

THE COURT: He -- he -- and that's a high standard --

MS. GORDON: Yes.

THE COURT: -- you guys, let's be honest. If you thought -- and that's why I said I -- I'm -- he made the ruling I -- I'm not -- I'm not --

MS. GORDON: And we would of course --

THE COURT: -- this new trial we're not -- I have -- I'll -- I watch evidence. Any -- I can be wrong too I -- you know, and maybe I'm

more cautious on offers of proof and stuff that that's but -- and I'm not -- but -- but even if it's opened the -- it's not just opening the door and I'm past that because I'm -- that's what Judge -- it's the type of character evidence that you did that he felt rose to the level to grant -- and that's all it was, you guys. There was nothing else other than the burning embers email. He didn't -- and sometimes they come it's cumulative -- oh I'm so -- this is very important so I'm sorry I'm taking time because I --

MS. GORDON: No, we appreciate --

THE COURT: -- and I need to pick your brains because I wasn't there and I don't want to feel like I -- I can't decide this in a -- but, you know, sometimes -- like Emerson's basically, you did this and then you did this and then you -- because a lot of the mistrials the ones I -- I've had a couple, it's -- it's called cumulative -- okay, one thing you maybe got away with and two things you maybe got away with, but you know, you start it's the cumulative effect.

In fact, Judge Bare's probably I -- I -- I can't -- I can't think that there would be something with just one issue that would grant a mistrial, but obviously that was his -- it was the type of evidence that you -- that was the issue and you felt that this evidence was appropriate using the Mexicans and, you know, which are obviously referring to a race, no question about it. In fact, the witness used the word racial and that's -- I wasn't even surprised after you told me how it happened because I -- I had to -- I had to figure out what you were inferring from it. He used -- said I'm not being racist and then you just followed up by using the racist so even though he used the word, your follow-up was saying well then

racist is --

MS. GORDON: Because he -- yeah, he just told the --

THE COURT: Right, but --

MS. GORDON: Right.

THE COURT: -- but what is the inference -- what is this jury supposed to decide from you saying well don't you think this is racist? Do you not think you're inferring to this jury this guy's -- what did you think you were inferring -- okay, let me do it this -- what was the trier of fact supposed to reasonably infer from your follow-up question, you don't think this is racist?

MS. GORDON: He had just told the jury that he didn't think it was --

THE COURT: I -- I don't want to hear that I -- I get that, I get the context. What I'm asking you, you -- every question you ask at trial has to be relevant evidence for this jury to do a reasonable inference. Do you agree with me there? Because they're the trier of fact.

MS. GORDON: Right, so I --

THE COURT: Okay. So your follow-up question to him, you don't think this email is racist -- even though he used the word, in fact it was an inappropriate term, someone maybe could a motion to strike and tell him -- but that didn't happen either. I wasn't there, that didn't happen either, okay. I'm not redoing -- but your follow-up question is an independent basis. You can't just say well, if someone blurts out you're -- defendant you're guilty, you don't get to follow up in your next question well don't you think -- and when I -- that's inappropriate -- you don't think

he's guilty now -- you can't do that, you -- what was your intent as your reasonable inference of that question is well don't you think this email and you used the word racist. What did you want this jury to infer from that other than he's a racist so he's not a good person? That's the -- is that not the only reasonable -- what did you -- what did you have a good faith basis to think this jury was -- was to hear that?

MS. GORDON: After -- I'm following up on what he just told the jury --

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

MS. GORDON: So I --

THE COURT: But what I'm trying to explain to you -- even if they make an inappropriate comment -- we can go back to opening the door.

MS. GORDON: Right.

THE COURT: Even if a witness and I don't care if he's an attorney, I don't care if he was trying to help Mr. -- I -- you're following up. Every one of your questions has to have a good faith basis. I get it's a follow-up and -- and he opened the door, but why -- what did you want this jury to infer by your follow-up question of don't you think -- you don't even think -- whatever it was, I wrote it all down here, is racist? What were you inferring to this jury?

MS. GORDON: I was -- I was -- as you keep saying, I was following up on what he had just said. I don't know --

THE COURT: Well, but what was the answer supposed to infer to the jury? He doesn't think that's racist so how about this racist?

You just doubled down on your -- on -- you just doubled down to me on an inappropriate comment.

MS. GORDON: No, it just -- it just keeps going back, Your Honor, to he's not the person that Mr. Dariyanani kept telling the jury he was.

THE COURT: That could be. I'm -- I'm not the -- he could be --

MS. GORDON: I -- I didn't care if that email --

THE COURT: -- a complete liar up here, you guys. I can't do his credibility, do you know what I'm --

MS. GORDON: Right.

THE COURT: I understand why maybe you thought wait a minute, he's -- and we all -- you know, sometimes they're advocates more than they are -- they're not independent percipient witnesses. I understand what you're inferring. You felt that and --

MS. GORDON: In terms of whether it was gratuitous as opposed to elicited --

THE COURT: -- and I'll -- maybe at the next trial I'll watch that I -- I get that and hopefully the trier of fact -- but that question standing alone is what really I don't understand -- even if a witness says something inappropriate, I -- I do understand why he thought that because the first time I looked at it, I thought this is obviously saying he's a racist because he only hustles -- and -- I guess this is on the record I -- I'm even uncomfortable but I get -- I -- I mean, you know, I get it, you know, and if things aren't welded down, the inference is Mexicans

will steal -- I -- I -- that's -- that's racist so that's why he answered the way he did --

MS. GORDON: Right.

THE COURT: -- because he knew by you asking about that email, you're trying to infer to this jury it's racist.

So then your follow-up well you don't think -- to me is almost -- maybe I'm wrong, maybe that's the context, but when I look at it, that just doubles the error of interjecting race in front of this jury and that's what Judge Bare felt was enough to even give a mistrial. That -- that's my concern on the -- I don't think you intentionally -- I don't think anybody went -- I don't think he intentionally missed an exhibit. I'm sure he's been kicking himself in the hiney on -- you know, no -- we've all made mistakes at trial, you know, trial is such dynamic, you know, thing and I always try to emphasize to people -- like just on medical records recently, they had insurance everywhere, you guys, they had both stipulated. I'm going great, did anybody look at these exhibits before you brought them to my clerk?

I just go through them now because it is hard. There's a lot of things that go on and a lot of piece of paper and I wish people had a little more realized you know whatever you put in evidence that jury gets to go back there and look at all that stuff and if you really aren't going to use it or you really don't think it's something the jury needs to look at, let's look at some of these things we're all -- I -- I even do it myself now I go wait a minute, this jury isn't going to go back with 5,000 records, are you going to use them? Are you going to explain everything --

MS. GORDON: This was -- this is 79 pages. Your Honor, this was -- this is a --

THE COURT: No, I got it.

MS. GORDON: -- little less excusable in terms of --

THE COURT: No, I -- I -- I'm not --

MS. GORDON: -- you know, missing it. So when we're --

THE COURT: I -- I'm not excusing his mistake. I -- I'm -- I'm -- I'm not. I can't focus -- I did focus on that because it's in fairness of what happened to your side to decide misconduct. Believe me as you can see I have, I -- I -- I guess the best way to say is I need to put it in fair context and I'm not excusing that it didn't --

MS. GORDON: Especially for the amount --

THE COURT: -- and I -- I -- there was no offers of proof, there was no objections I -- there was quite a few things that -- it's kind of like what happens in a tragedy have you ever noticed, you guys, it's not one thing that went wrong, but it's one thing and then the next thing and then it's almost, Ms. Gordon, like a domino unfortunately. It's just not one -- and if you look at this, it wasn't just one thing I -- that resulted in this. I actually -- I lined them all up trying to figure out so what happened to me? And I mean that nicely. I mean a lot of this is a lesson learned for a trial judge and I tend to be a little more assertive if -- if I hear something in testimony, I try to be more preventative -- because I listen to -- a lot of judges don't and they don't feel it's their position so I'm -- you know, as they said, Judge Bare's different, I don't know --

MS. GORDON: And to prevent where we are now, right,

because now --

THE COURT: Right.

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

THE COURT: Oh no, I --

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

THE COURT: No, I --

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

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

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

THE COURT: I under- --

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

THE COURT: I do. Okay.

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

THE COURT: It's --

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

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

MS. GORDON: Absolutely.

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

MS. GORDON: No, absolutely.

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

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

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

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

THE COURT: Well, okay.

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

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

MS. GORDON: Yes.

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

MS. GORDON: I --

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

MS. GORDON: Just -- just quickly.

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

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

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

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

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

MS. GORDON: -- McCormick on Evidence the edition --

THE COURT: Yes. I would like that. Is that on plain error?

MR. VOGEL: This is the section that they cited in their brief, Section 54 from --

THE COURT: Okay, is it on plain error? Or is it on the -- opening the door that ship has sailed --

MR. VOGEL: It's --

THE COURT: -- as far as I --

MR. VOGEL: No, no, no.

MS. GORDON: No, it's --

MR. VOGEL: It's --

THE COURT: Okay.

MS. GORDON: May I approach?

MR. VOGEL: It's --

THE COURT: No, I -- no problem.

MS. GORDON: Thanks.

MR. VOGEL: It's -- it's on the use of admitted evidence.

THE COURT: On the use of admitted evidence.

MS. GORDON: Plaintiff keeps saying that -- that there was no case law cited or anything to that effect for our statement that once it's admitted into evidence --

THE COURT: Well I -- I looked more on the plain error doctrine --

MS. GORDON: Sure.

THE COURT: -- here in Nevada.

MR. VOGEL: So they kept arguing we didn't cite any cases. Well turns out, and if you look at the note, there really isn't any cases. It's axiomatic and --

THE COURT: Do it again, it's actually?

MR. VOGEL: It's axiomatic.

MS. GORDON: Axiomatic.

MR. VOGEL: Admitted --

THE COURT: Oh.

MR. VOGEL: -- admitted evidence can be used at trial. I --

THE COURT: But not for any purpose.

MR. VOGEL: Well actually, if you take a look at the note --

THE COURT: Well then how do you -- how do you reconcile that with the plain error cases?

MR. VOGEL: If you -- if you take a look at the note --

THE COURT: I will.

MR. VOGEL: -- you -- you still --

THE COURT: The note?

MR. VOGEL: Yeah.

THE COURT: The footnote?

MR. VOGEL: No, it's the actual note, it's --

THE COURT: Okay.

MR. VOGEL: -- and it's only a two paragraph note. This is the one that they cited to you in support --

THE COURT: Okay, that's fine. I'll --

MR. VOGEL: -- in support of their position that hey there's --

THE COURT: Did you -- have you -- okay. That's fine.

MR. VOGEL: -- because they -- they've misstated it.

THE COURT: Okay.

MR. JIMMERSON: Then may please the Court I'll just begin with that and I'll sit down a minute. This was cited by us in our brief.

THE COURT: Which is -- this McCormick?

MR. JIMMERSON: Yes.

THE COURT: Okay.

MR. JIMMERSON: It was not cited by the defense in any of their briefs. Would you please look at the top of page 2?

THE COURT: Of this what he just gave me --

MR. JIMMERSON: Yes.

THE COURT: -- I can do that.

MR. JIMMERSON: Footnote 1 --

THE COURT: Footnote --

MR. JIMMERSON: -- this generalization is subject to the plain error rule, see Section 52.

MR. VOGEL: Yeah.

MS. GORDON: We're -- we're not contesting that.

THE COURT: Didn't I just say plain error?

MS. GORDON: Yes.

MR. JIMMERSON: You did, Judge.

MS. GORDON: But -- but because it didn't cite the -- the entire -- right.

MR. VOGEL: Yeah.

THE COURT: Okay, okay, okay, okay I -- I --

MR. JIMMERSON: All I can do is --

THE COURT: -- I put plain error. I'm okay now.

MR. JIMMERSON: -- quote chapter and verse --

THE COURT: Okay.

MR. JIMMERSON: -- I give you the document --

THE COURT: Okay.

MR. JIMMERSON: -- that's it. They did not.

THE COURT: Okay. I did research on -- okay.

MR. JIMMERSON: I have five points and --

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

MR. JIMMERSON: -- they're very brief.

THE COURT: -- this is very -- I'm sorry it was such a --

MR. JIMMERSON: No problem.

THE COURT: -- rough day. I tried to get you --

MR. JIMMERSON: They're entitled their full day and there's a lot at stake, no doubt.

THE COURT: No.

MR. JIMMERSON: Let me begin by saying number one --

THE COURT: No.

MR. JIMMERSON: -- that the concept of what you indicated of sidebar and how you conduct yourself, Judge Bare said the same thing. Returning to his finding fact and conclusions of law number 21 --

THE COURT: Okay. Okay.

MR. JIMMERSON: -- which is at page 9 of the findings, he

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

THE COURT: Oh.

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

THE COURT: That's for --

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

THE COURT: Okay.

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

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

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

THE COURT: I'm not --

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

THE COURT: Okay.

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

THE COURT: Okay.

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

THE COURT: Okay.

MR. JIMMERSON: -- that I want to make clear is because I think the Judge is on the right point.

THE COURT: All right.

MR. JIMMERSON: The -- the -- the intentional nature to use this inflammatory bomb as the judge described the term, bomb, is reflected also in the motion to disqualify filed by defendants that was heard by Judge Wiese. We cited it in our reply brief at page 4 and 5 --

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

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

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

MR. JIMMERSON: No. No.

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

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

THE COURT: Okay.

MR. JAMES JIMMERSON: September 12.

MR. JIMMERSON: -- September 12.

THE COURT: Okay. I --

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

THE COURT: I know but --

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

THE COURT: No, there's a lot.

MR. JIMMERSON: -- that this is what the defense counsel wrote in the motion to -- with to recuse or disqualify and it begins at the

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

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

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

Point number three, the court has indicated its findings relative

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

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

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

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

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

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

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

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

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

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

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

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

Twenty-eight --

THE COURT: Well that --

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

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

MR. JIMMERSON: All right.

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

MR. JIMMERSON: Correct.

THE COURT: -- or to --

MR. JIMMERSON: So --

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

MR. JIMMERSON: Right. So now 25 --

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

MS. GORDON: Mistrial.

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

THE COURT: Yes, I understand that.

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

THE COURT: Okay.

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

THE COURT: Causation of? Of --

MR. JIMMERSON: Did they cause the mistrial.

THE COURT: The legal cause of the --

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

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

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

THE COURT: Correct.

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

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

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

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

THE COURT: Right.

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

THE COURT: No, I --

MR. JIMMERSON: -- page 44 --

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

MR. JIMMERSON: Well --

MS. GORDON: It's not.

MR. JIMMERSON: -- produce the document.

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

MS. GORDON: That's not true.

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

MS. GORDON: It's not true.

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

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

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

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

MR. JIMMERSON: Right.

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

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

THE COURT: It legally caused the mistrial. Correct.

MR. JIMMERSON: That is what caused the mistrial.

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

Hold on, let me finish.

MS. GORDON: Oh sorry.

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

MR. JIMMERSON: That's right.

THE COURT: That's what you're trying to hook up.

MR. JIMMERSON: That is what I'm --

THE COURT: I look at it as Ms. -- so if it's the legal cause, then I should fine attorney's fees.

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

THE COURT: Okay.

MR. JIMMERSON: -- part of that analysis --

THE COURT: As opposed to the misconduct because --

MR. JIMMERSON: Part of that analysis exactly that word. You got it. You just nailed it.

THE COURT: I --

MR. JIMMERSON: Okay. Whether you use 18.070 Sub 3 that uses purposely caused --

THE COURT: Right, or --

MR. JIMMERSON: -- or you use *Lioce* and *Emerson* --

THE COURT: Right.

MR. JIMMERSON: -- you are on misconduct. That is what you would find --

THE COURT: Okay.

MR. JIMMERSON: -- to make an award of any amount, whether it's $5 or the amount that's being requested.

THE COURT: I -- okay.

MR. JIMMERSON: So we would urge upon you that based upon this record that it would be entirely appropriate indeed compelled

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

THE COURT: Of the mistrial.

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

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

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

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

THE COURT: Oh --

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

THE COURT: Okay.

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

THE COURT: Okay.

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

THE COURT: No.

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

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

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

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

THE COURT: They were talking about authorities.

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

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

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

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

THE COURT: Okay.

MR. JIMMERSON: Thank you, Judge.

MS. GORDON: Briefly?

THE COURT: It's fine.

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

THE COURT: Right, no --

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

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

MS. GORDON: Absolutely.

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

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

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

MR. JIMMERSON: Sure do.

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

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

THE COURT: Okay.

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

THE COURT: Okay.

MS. GORDON: -- before my --

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

MS. GORDON: Sure.

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

MS. GORDON: And -- and plaintiff --

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

MS. GORDON: Sure.

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

standards I -- I --

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

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

MS. GORDON: Sure.

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

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

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

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

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

MS. GORDON: Absolutely. Yes.

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

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

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

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

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

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

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

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

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

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

MR. JIMMERSON: Thank you, Judge.

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

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

MR. JIMMERSON: Understood.

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

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

THE COURT: You said you filed it yesterday?

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

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

MR. JIMMERSON: Agreed.

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

MR. JIMMERSON: How does mid-January look?

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

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

me what you want.

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

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

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

MR. VOGEL: We have not.

MR. JIMMERSON: -- certainly do that.

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

MR. JAMES JIMMERSON: Correct, Your Honor.

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

MR. VOGEL: Right.

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

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

MR. JIMMERSON: Would --

THE COURT: So maybe we should do --

MR. JIMMERSON: How does -- how does week of the 13th look to you all?

[Colloquy between counsel]

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

[Colloquy between counsel]

MR. JAMES JIMMERSON: Your Honor?

[Colloquy between the Court and the clerk]

THE COURT: Yes.

MR. JAMES JIMMERSON: We have motions limine due the 27th of this month under the 45-day rule --

THE COURT: Okay.

MR. JAMES JIMMERSON: -- so either have a conference before then to make -- to meet that or --

THE COURT: Or I'll fix the deadline.

MR. JAMES JIMMERSON: If -- if the Court would extend the deadline, I --

THE COURT: I will. It just depends on how many -- I don't know how many you had before, I don't know.

MR. JIMMERSON: We'll be able to meet though before the 27th. That won't be --

THE COURT: Of December. You two can meet --

MR. JIMMERSON: Right.

THE COURT: -- because that's fine and then -- then I'll extend if you decide there's only a few -- I'll -- I don't mind doing motions in limine later than the date is what you're saying. I don't hold people to those dates if it helps work on the trial.

MR. JAMES JIMMERSON: Would it -- would it make sense then, Your Honor, for us to put a status check in one or two weeks --

THE COURT: Sure.

MR. JAMES JIMMERSON: -- so that we can report to the Court exactly --

THE COURT: I think that would be great.

MS. GORDON: Yeah.

MR. JAMES JIMMERSON: -- what if any agreement has been reached and then a briefing schedule if necessary for any --

THE COURT: I think that's perfect so let's do a -- where are on status check?

THE CLERK: Yeah (indiscernible) the 17th --

THE COURT: How about December 17th? What is today, 5th? Yeah, today's the -- can you do a status check December 17th at 9 a.m.?

[Colloquy between the Court and the clerk]

MR. JAMES JIMMERSON: Yes, Your Honor, we'll -- we'll be in front of your --

THE COURT: Or anything --

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

THE COURT: Okay.

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

THE COURT: Okay.

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

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

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

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

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

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

THE COURT: Yes.

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

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

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

MR. JAMES JIMMERSON: Nine I think.

MS. GORDON: Nine.

THE COURT: Nine o'clock.

MR. JIMMERSON: Very good.

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

MR. VOGEL: Thank you, Your Honor.

MR. JIMMERSON: All right, thank you Judge.

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

THE CLERK: On Monday.

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

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

THE CLERK: Okay.

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

MS. GORDON: Okay.

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

MR. JIMMERSON: All right.

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

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

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

MR. JAMES JIMMERSON: Thank --

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

MR. JIMMERSON: Thank you, Judge.

MS. GORDON: Thank you.

MR. VOGEL: Thank you, Your Honor.

THE COURT: You're welcome.

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

THE COURT: Is that Mr. Landess?

THE PLAINTIFF: Yes.

MR. JIMMERSON: It is.

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

THE PLAINTIFF: It's been quite a while.

THE COURT: It's been a long time.

THE PLAINTIFF: But --

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

THE PLAINTIFF: And --

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

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

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

MR. JIMMERSON: Counsel, thank you so much.

MS. GORDON: Thanks you guys.

MR. JAMES JIMMERSON: Thank you, Your Honor.

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

* * * * * *

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

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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

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

Date of Hearing: April 30, 2020

Time of Hearing: 9:00 a.m.

/ / /

Defendants, by and through their counsel of record, S. Brent Vogel and Katherine J. Gordon hereby submit an Errata to their 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 filed on September 9, 2019. The original document contains inadvertent error of fact located on pp. 5:10 and 7:11; this errata corrects that error.

DATED this 27th 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.

Just over a week before 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 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 same basic mindset." (Opposition, at p. 13). He takes that notion from ¶20, the sentence

[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."

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, 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-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.

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[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.

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 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.*

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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.*

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 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

[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.

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 27th 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 27th day of April, 2020, a true and correct copy of **ERRATA TO DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR RELIEF FROM FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFF'S MOTION FOR A MISTRIAL** 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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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

ERRATA TO 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: April 30, 2020

Time of Hearing: 9:00

/ / /

Defendants, by and through their counsel of record, S. Brent Vogel and Katherine J. Gordon hereby submit an Errata to their Motion 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. The original document contains inadvertent error of fact located on p. 8:7 and 9:3; this Errata corrects that error.

DATED this 27th day of April, 2020

LEWIS BRISBOIS BISGAARD & SMITH LLP

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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.

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

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

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

Plaintiff, through Judge Bare, made the following statements:

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

essentially provide a basis for the Court to award Plaintiff his requested attorney's fees and costs, despite the fact Judge Bare specifically declined to rule on the fees and costs, and instead requested briefing and set a new hearing date. For these reasons, 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 Judge Bare made . . . on Trial Day 10 . . . seemed to indicate a bias in favor of Mr. Jimmerson"

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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.

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 Court and Defendants an unfettered willingness to cite portions of the subject Order as early and

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

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

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 27th day of April, 2020

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s/ S. Brent Vogel*

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Lewis Brisbois Bisgaard & Smith LLP and that on this 27th day of April, 2020, a true and correct copy of **ERRATA TO 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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Steven D. Grierson
CLERK OF THE COURT

ORDR

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

JASON GEORGE LANDESS a.k.a. KAY GEORGE LANDESS, an Individual

Plaintiff(s),

vs.

KEVIN PAUL DEBIPARSHAD, M.D., et al.,

Defendants(s).

Case No.: A-18-776896-C
Dept. No.: IV

ORDER

THIS MATTER came before the Court on Defendants' Motion for Relief from Findings of Fact, Conclusions of Law and Order Granting Plaintiff's Motion for a Mistrial filed on February 28, 2020; Plaintiff's Opposition to Defendants' Motion for Relief from Findings of Fact, Conclusions of Law and Order Granting Plaintiff's Motion for a Mistrial filed on March 13, 2020; Defendant's Reply in Support of Motion for Relief from Findings of Fact, Conclusions of Law and Order Granting Plaintiff's Motion for a Mistrial filed on April 23, 2020; and the Errata to Defendants' Motion for Relief for Findings of Fact, Conclusions of Law and Order Granting Plaintiff's Motion for a Mistrial filed on April 27, 2020.

THE COURT after reviewing this matter, including all points and authorities, and exhibits, and good cause appearing hereby DENIES Defendants' Motion for Relief from Findings of Fact, Conclusions of Law and Order Granting Plaintiff's Motion for a Mistrial, based on the following:

Following the events[1] that occurred on the tenth day of trial, on August 2, 2019, concerning the "burning embers e-mail," Plaintiff filed a Motion for Mistrial on August 4, 2019. The next morning on August 5, 2019, the Honorable Rob Bare held a hearing, in court, outside the presence of

[1] The issues concerning the email are an extensive part of the record herein and will not be recounted in this order.

the jury, on the Motion for Mistrial. After lengthy oral argument by counsel for both parties, the Honorable Rob Bare granted the Plaintiff's Motion for Mistrial. On August 23, 2019, Defendants filed a Motion to Disqualify the Honorable Rob Bare on Order Shortening Time. On September 4, 2019, the Honorable Jerry Wiese presided over the court hearing regarding Defendants' Motion to Disqualify the Honorable Rob Bare. The Honorable Jerry Wiese granted the Motion to Disqualify on September 16, 2019.

Defendants now seek relief from the Honorable Rob Bare's Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial, which was granted on August 5, 2019. Defendants previously argued an objection to the granting of the Mistrial before the Honorable Jerry Wiese, who stated "[t]he granting of a Mistrial after two full weeks of Trial was obviously frustrating and disheartening to all of the parties, as well as the Court. It is not this Court's intent to second-guess the decisions made by Judge Bare…"[2]

In the present motion, Defendants argue that NRS 1.235(5), which states in relevant part that "the judge against whom an affidavit alleging bias or prejudice is filed shall proceed no further with the matter and shall […] immediately transfer the case to another department of the court…" prohibited the Honorable Rob Bare from filing any order regarding his previous decisions on the case once Defendants filed their Motion to Disqualify.

"It is clear that if the affidavit of prejudice was timely filed, the respondent judge was thereby deprived of all discretion in the matter and it became his statutory duty to proceed no further in the action and to assign the case to another judge as provided by law." *State ex rel. McMahan v. First Judicial Dist. Court*, 78 Nev. 314, 316, 371 P.2d 831, 833 (1962). A district court judge "lost power to do anything further in the case except to transfer the action to another judge" upon the proper filing of an affidavit of prejudice. *State ex rel. Sisson v. Georgetta*, 78 Nev. 176, 180, 370 P.2d 672, 674 (1962). When "affidavit of prejudice was not untimely filed … the respondent judge was therefore deprived of all discretion in the matter and it was his statutory duty to proceed no further in the action other than to assign it to another judge as provided by law." *State ex rel. Moore v. Fourth Judicial*

[2] See Order filed September 16, 2019, p. 6.

Dist. Court, 77 Nev. 357, 360, 364 P.2d 1073, 1075 (1961).

However, "[t]he rendition of a judgment must be distinguished from its entry on the court records. The rendition of a judgment duly pronounced is the judicial act of the court, and the entry or recording of the instrument memorializing the judgment "does not constitute an integral part of, and should not be confused with, the judgment itself." *Lewis v. Commonwealth*, 295 Va. 454, 465, 813 S.E.2d 732, 737 (2018) citing *Jefferson v. Commonwealth*, 269 Va. 136, 139, 607 S.E.2d 107, 109 (2005) (quoting *Rollins v. Bazile*, 205 Va. 613, 617, 139 S.E.2d 114, 117 (1964)). "A judgment is the determination by a court of the rights of the parties, as those rights presently exist, upon matters submitted to it in an action or proceeding. A written order or decree endorsed by the judge is but evidence of what the court has decided." *Id*. citing *Haskins v. Haskins*, 185 Va. 1001, 1012, 41 S.E.2d 25, 31 (1947).

THE COURT agrees with the reasoning of the Supreme Court of Virginia and FINDS that the Honorable Rob Bare made the judicial determination that there were valid legal grounds to grant the Motion for Mistrial, and therefore rendered the decision to grant the mistrial at the hearing held on August 5, 2019. Therefore, the Honorable Rob Bare rendered his decision to grant the mistrial and dismiss the jury on August 5, 2019. The filing and the entry of the order on September 9, 2019 memorialized the judicial decision and order previously rendered on August 5, 2019.

As a result, the Honorable Rob Bare, indeed could sign the Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial at a later date because there was no discretionary element and it was instead a ministerial housekeeping act.

In addition, N.R.S. 3.220 states in part that "district judges shall possess equal coextensive and concurrent jurisdiction and power." The Nevada Supreme Court has consistently held that "the district courts of this state have equal and coextensive jurisdiction; therefore, the various district courts lack jurisdiction to review the acts of other district courts." *State v. Sustacha*, 108 Nev. 223, 225, 826 P.2d 959, 960 (1992) quoting *Rohlfing v. District Court,* 106 Nev. 902, 906, 803 P.2d 659, 662 (1990). Therefore, "one district court generally cannot set aside another district court's order." *Id.* at 226. *See also Rohlfing v. Second Judicial Dist. Court In & For Cty. of Washoe*, 106

Nev. 902, 907, 803 P.2d 659, 663 (1990) (holding that district judge "exceeded his jurisdiction when he declared void" another judge's order).

Therefore, as previously noted by the Honorable Jerry Wiese, this Court does not have the jurisdiction to review, set aside, or second guess an order, findings of fact, and/or conclusions of law made by another district court judge. The substantive basis for the Honorable Rob Bare's decision must be addressed by an appellate court. Defendant's proper remedy in this instance was to file a writ pursuant to N.R.S. Chapter 34 and N.R.A.P. 21.

Therefore, **IT IS HEREBY ORDERED** that Defendants' Motion for Relief from Findings of Fact, Conclusions of Law and Order Granting Plaintiff's Motion for a Mistrial is DENIED.

IT IS SO ORDERED.

DATED this 1st day of June, 2020.

Kerry Earley
District Court Judge, Dept. IV

CERTIFICATE OF SERVICE

I hereby certify that on or about the date e-filed, a copy of this Order was electronically served and/or placed in the attorney's folders maintained by the Clerk of the Court and/or transmitted via facsimile, email and/or mailed, postage prepaid, by United States mail to the proper parties as follows:

_____
Deborah Boyer
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EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

JASON GEORGE LANDESS, aka KAY GEORGE LANDESS, an individual, Plaintiff, vs. KEVIN PAUL DEBIPARSHAD, M.D., an individual; KEVIN P. DEBIPARSHAD, PLLC a Nevada professional limited liability company doing business as "SYNERGY SPINE AND ORTHOPEDICS" DEBIPARSHAD PROFESSIONAL SERVICES, LLC, a Nevada professional limited liability company doing business as "SYNERGY SPINE AND ORTHOPEDICS," ALLEGIANT INSTITUTE, INC, a Nevada domestic professional corporation doing business as "ALLEGIANT SPINE INSTITUTE," JASWINDER S. GROVER, M.D. an individual; JASWINDER S. GROVER, M.D. LTD, doing business as "NEVADA SPINE CLINIC." VALLEY HEALTH SYSTEM, LLC a Delaware limited liability company doing business as "CENTENNIAL HILLS HOSPITAL," UHS OF DELAWARE, INC., a Delaware corporation also doing business as "CENTENNIAL HILLS HOSPITAL," DOES I-X, inclusive, and ROE CORPORATIONS I-X, inclusive, Defendants.	**CASE NO.: A-18-776896-C** **DEPT NO.: IV**

NOTICE OF ENTRY OF ORDER DENYING DEFENDANTS' MOTION FOR RELIEF FROM FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING PLAINTIFF'S MOTION FOR A MISTRIAL FILED ON FEBRUARY 28, 2020

THE JIMMERSON LAW FIRM, P.C.
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(702) 388-7171 – fax (702) 387-1167

Please take notice that an Order Denying Defendants' Motion For Relief From Findings Of Fact, Conclusions Of Law And Order Granting Plaintiff's Motion For A Mistrial Filed On February 28, 2020 was entered in the above-captioned action on June 1, 2020, a copy of which is attached hereto.

Dated this 1 day of June, 2020.

THE JIMMERSON LAW FIRM, P.C.

6/1/20

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of The Jimmerson Law Firm, P.C. and that on this 1st day of June, 2020, I served a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER DENYING DEFENDANTS' MOTION FOR RELIEF FROM FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING PLAINTIFF'S MOTION FOR A MISTRIAL FILED ON FEBRUARY 28, 2020**, as indicated below:

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

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

S. Brent Vogel, Esq.
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ORDR

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

JASON GEORGE LANDESS a.k.a. KAY GEORGE LANDESS, an Individual

Plaintiff(s),

vs.

KEVIN PAUL DEBIPARSHAD, M.D., et al.,

Defendants(s).

Case No.: A-18-776896-C
Dept. No.: IV

ORDER

THIS MATTER came before the Court on Defendants' Motion for Relief from Findings of Fact, Conclusions of Law and Order Granting Plaintiff's Motion for a Mistrial filed on February 28, 2020; Plaintiff's Opposition to Defendants' Motion for Relief from Findings of Fact, Conclusions of Law and Order Granting Plaintiff's Motion for a Mistrial filed on March 13, 2020; Defendant's Reply in Support of Motion for Relief from Findings of Fact, Conclusions of Law and Order Granting Plaintiff's Motion for a Mistrial filed on April 23, 2020; and the Errata to Defendants' Motion for Relief for Findings of Fact, Conclusions of Law and Order Granting Plaintiff's Motion for a Mistrial filed on April 27, 2020.

THE COURT after reviewing this matter, including all points and authorities, and exhibits, and good cause appearing hereby DENIES Defendants' Motion for Relief from Findings of Fact, Conclusions of Law and Order Granting Plaintiff's Motion for a Mistrial, based on the following:

Following the events[1] that occurred on the tenth day of trial, on August 2, 2019, concerning the "burning embers e-mail," Plaintiff filed a Motion for Mistrial on August 4, 2019. The next morning on August 5, 2019, the Honorable Rob Bare held a hearing, in court, outside the presence of

[1] The issues concerning the email are an extensive part of the record herein and will not be recounted in this order.

the jury, on the Motion for Mistrial. After lengthy oral argument by counsel for both parties, the Honorable Rob Bare granted the Plaintiff's Motion for Mistrial. On August 23, 2019, Defendants filed a Motion to Disqualify the Honorable Rob Bare on Order Shortening Time. On September 4, 2019, the Honorable Jerry Wiese presided over the court hearing regarding Defendants' Motion to Disqualify the Honorable Rob Bare. The Honorable Jerry Wiese granted the Motion to Disqualify on September 16, 2019.

Defendants now seek relief from the Honorable Rob Bare's Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial, which was granted on August 5, 2019. Defendants previously argued an objection to the granting of the Mistrial before the Honorable Jerry Wiese, who stated "[t]he granting of a Mistrial after two full weeks of Trial was obviously frustrating and disheartening to all of the parties, as well as the Court. It is not this Court's intent to second-guess the decisions made by Judge Bare..."[2]

In the present motion, Defendants argue that NRS 1.235(5), which states in relevant part that "the judge against whom an affidavit alleging bias or prejudice is filed shall proceed no further with the matter and shall [...] immediately transfer the case to another department of the court..." prohibited the Honorable Rob Bare from filing any order regarding his previous decisions on the case once Defendants filed their Motion to Disqualify.

"It is clear that if the affidavit of prejudice was timely filed, the respondent judge was thereby deprived of all discretion in the matter and it became his statutory duty to proceed no further in the action and to assign the case to another judge as provided by law." *State ex rel. McMahan v. First Judicial Dist. Court*, 78 Nev. 314, 316, 371 P.2d 831, 833 (1962). A district court judge "lost power to do anything further in the case except to transfer the action to another judge" upon the proper filing of an affidavit of prejudice. *State ex rel. Sisson v. Georgetta*, 78 Nev. 176, 180, 370 P.2d 672, 674 (1962). When "affidavit of prejudice was not untimely filed ... the respondent judge was therefore deprived of all discretion in the matter and it was his statutory duty to proceed no further in the action other than to assign it to another judge as provided by law." *State ex rel. Moore v. Fourth Judicial*

[2] See Order filed September 16, 2019, p. 6.

Dist. Court, 77 Nev. 357, 360, 364 P.2d 1073, 1075 (1961).

However, "[t]he rendition of a judgment must be distinguished from its entry on the court records. The rendition of a judgment duly pronounced is the judicial act of the court, and the entry or recording of the instrument memorializing the judgment "does not constitute an integral part of, and should not be confused with, the judgment itself." *Lewis v. Commonwealth*, 295 Va. 454, 465, 813 S.E.2d 732, 737 (2018) citing *Jefferson v. Commonwealth*, 269 Va. 136, 139, 607 S.E.2d 107, 109 (2005) (quoting *Rollins v. Bazile*, 205 Va. 613, 617, 139 S.E.2d 114, 117 (1964)). "A judgment is the determination by a court of the rights of the parties, as those rights presently exist, upon matters submitted to it in an action or proceeding. A written order or decree endorsed by the judge is but evidence of what the court has decided." *Id.* citing *Haskins v. Haskins*, 185 Va. 1001, 1012, 41 S.E.2d 25, 31 (1947).

THE COURT agrees with the reasoning of the Supreme Court of Virginia and FINDS that the Honorable Rob Bare made the judicial determination that there were valid legal grounds to grant the Motion for Mistrial, and therefore rendered the decision to grant the mistrial at the hearing held on August 5, 2019. Therefore, the Honorable Rob Bare rendered his decision to grant the mistrial and dismiss the jury on August 5, 2019. The filing and the entry of the order on September 9, 2019 memorialized the judicial decision and order previously rendered on August 5, 2019.

As a result, the Honorable Rob Bare, indeed could sign the Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial at a later date because there was no discretionary element and it was instead a ministerial housekeeping act.

In addition, N.R.S. 3.220 states in part that "district judges shall possess equal coextensive and concurrent jurisdiction and power." The Nevada Supreme Court has consistently held that "the district courts of this state have equal and coextensive jurisdiction; therefore, the various district courts lack jurisdiction to review the acts of other district courts." *State v. Sustacha*, 108 Nev. 223, 225, 826 P.2d 959, 960 (1992) quoting *Rohlfing v. District Court,* 106 Nev. 902, 906, 803 P.2d 659, 662 (1990). Therefore, "one district court generally cannot set aside another district court's order." *Id.* at 226. *See also Rohlfing v. Second Judicial Dist. Court In & For Cty. of Washoe*, 106

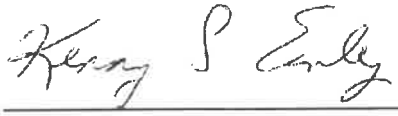
Nev. 902, 907, 803 P.2d 659, 663 (1990) (holding that district judge "exceeded his jurisdiction when he declared void" another judge's order).

Therefore, as previously noted by the Honorable Jerry Wiese, this Court does not have the jurisdiction to review, set aside, or second guess an order, findings of fact, and/or conclusions of law made by another district court judge. The substantive basis for the Honorable Rob Bare's decision must be addressed by an appellate court. Defendant's proper remedy in this instance was to file a writ pursuant to N.R.S. Chapter 34 and N.R.A.P. 21.

Therefore, **IT IS HEREBY ORDERED** that Defendants' Motion for Relief from Findings of Fact, Conclusions of Law and Order Granting Plaintiff's Motion for a Mistrial is DENIED.

IT IS SO ORDERED.

DATED this 1st day of June, 2020.



Kerry Earley
District Court Judge, Dept. IV

CERTIFICATE OF SERVICE

I hereby certify that on or about the date e-filed, a copy of this Order was electronically served and/or placed in the attorney's folders maintained by the Clerk of the Court and/or transmitted via facsimile, email and/or mailed, postage prepaid, by United States mail to the proper parties as follows:

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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 KEVIN PAUL DEBIPARSHAD, M.D., ET AL.'S MOTION FOR RECONSIDERATION OF ORDER DENYING DEFENDANTS' MOTION FOR RELIEF FROM FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFF'S MOTION FOR A MISTRIAL

HEARING REQUESTED

/ / /

COME NOW Defendants KEVIN PAUL DEBIPARSHAD, M.D., et al., by and through their attorneys of record, LEWIS BRISBOIS BISGAARD & SMITH LLP, and file their MOTION FOR RECONSIDERATION OF ORDER DENYING DEFENDANTS' MOTION FOR RELIEF FROM FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFF'S MOTION FOR A MISTRIAL based upon the papers and pleadings on file herein, the following Memorandum of Points and Authorities, and any oral argument allowed by the Court during a hearing of this matter.

DATED this 9th day of June, 2020

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s/ S. Brent Vogel*

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MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS/PROCEDURAL HISTORY

As this Court is aware, this matter arises from a complaint of alleged medical malpractice. The case proceeded through discovery and to trial. After ten days, the trial culminated in the Honorable Rob Bare's oral ruling of mistrial. Defendants later moved to disqualify Judge Bare on grounds of bias. Just over a week before Defendants filed their Motion to Disqualify, Plaintiff forwarded a draft Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial to defense 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 multiple inaccuracies and statements not supported by the transcript of Judge Bare's oral findings.[1] Defense Counsel declined to approve the draft order. On September 4, 2019 Plaintiff submitted his draft Order 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 for implied bias.

The case was subsequently reassigned to this Honorable Court. Following the transfer, Defendants moved this Court for relief from Judge Bare's Order granting mistrial. Defendants demonstrated that Judge Bare's Order was void because he had rendered it after making the statements that led to his disqualification from the case, and thus, he was not empowered to sign and file that void Order. Defendants also highlighted that Plaintiff has employed the inaccurate, unsupported, self-serving language contained in Judge Bare's Order to Plaintiff's advantage at every opportunity, including in his motion for fees and costs. This Court denied Defendants' Motion. In its Order, this Court concluded that Judge Bare had ruled orally on mistrial in court and that his subsequent signing and filing the written Order merely memorialized the decision and

[1] Defendants addressed this issue, including the improper use to which Plaintiff's counsel has put these unsupported findings and conclusions, in both their original Motion for Relief from Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial, (pp. 8-11) and in their Reply in Support of that document (pp. 17-18). Defendants detailed the specific inaccuracies and unsupported statements in pages 5-7 of their Reply.

order he had rendered previously. (Order at p. 3:16-18). In support, this Court cited Virginia law, which articulated the notion that rendition of a judgment is distinct from its entry on the court record and that the "written order or decree endorsed by the judge is but evidence of what the court has decided." *Lewis v. Commonwealth*, 813 S.E.2d 732, 737 (Va. 2018) (quoting *Haskins v. Haskins*, 41 S.E.2d 25, 31 (Va. 1947). This Court also noted that signing and filing the written Order granting mistrial was merely "a ministerial housekeeping act" with "no discretionary element." (Order at p. 3:20-21).

Defendants contend that the authority on which this Court relied in reaching its decision was inapplicable to this case. Further, a material argument was not addressed in this Court's ruling. As a result, the Order denying Defendants' Motion for Relief is clearly erroneous. Accordingly, Defendants respectfully request this Court reconsider its Order and enter judgment in favor of Defendants.

II. LEGAL ARGUMENT

A. This Court is Authorized to Reconsider, Amend, and Make Additional Findings at Any Time Prior to Final Judgment.

This Court has the inherent authority to reconsider its rulings any time prior to final judgment. N.R.C.P. 54(b) (allowing a court to revise any order or other decision at any time before the entry of a final judgment, provided the order or decision adjudicates fewer than all of the claims or the rights and liabilities of all the parties); E.D.C.R. 2.24; *see Barry v. Lindner*, 119 Nev. 661, 670, 81 P.3d 537 (2003) ("[T]he district court may at any time before the entry of a final judgment, revise orders . . . ."); *Rust v. Clark County Sch. Dist.*, 103 Nev. 686, 688, 747 P.2d 1380 (1987) ("Prior to the entry of a final judgment the district court remains free to reconsider and issue a written judgment different from its oral pronouncement."); *Gibbs v. Giles*, 96 Nev. 243, 245, 607 P.2d 118 (1980) ("Unless and until an order is appealed, the district court retains jurisdiction to reconsider the matter."); *Harvey's Wagon Wheel, Inc. v. MacSween*, 96 Nev. 215, 217-18, 606 P.2d 1095 (1980) (ruling that a district court did not abuse its discretion in reconsidering motion because, "[a]lthough the facts and the law were unchanged, the judge was

more familiar with case by the time the second motion was heard, and he was persuaded by the rationale of the newly cited authority."); *Trail v. Faretto*, 91 Nev. 401, 403, 536 P.2d 1026 (1975) ("[A] court may, for sufficient cause shown, amend, correct, resettle, modify, or vacate . . . an order previously made and entered on motion in the progress of the cause or proceeding.").

The Nevada Rules of Civil Procedure also empower this court to amend and supplement its findings. *See* NRCP 52(b) ("On a party's motion filed no later than 28 days after service of written notice of entry of judgment, the court may amend its findings -- or make additional findings -- and may amend the judgment accordingly.") This procedural vehicle is important because a district court's findings must be sufficient to indicate the factual bases for the court's ultimate conclusions. *Bing Constr. Co. v. Vasey-Scott Engineering Co.*, 100 Nev. 72, 73, 674 P.2d 1107 (1984); *Lagrange Construction v. Del E. Webb Corp.*, 83 Nev. 524, 529, 435 P.2d 515 (1967) (district court's findings not sufficiently specific with respect to contract offer, acceptance and terms).

B. This Court's Order Should be Reconsidered Because it is Clearly Erroneous.

A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous. *Masonry & Tile Contrs. v. Jolley, Urga & Wirth Ass'n*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997) (citing *Little Earth of United Tribes v. Department of Housing*, 807 F.2d 1433, 1441 (8th Cir. 1986)) (upholding a district court's reconsideration of a predecessor judge's ruling and its determination that the ruling was "clearly erroneous"); *see Select Portfolio Servicing v. Dunmire*, No. 77251, 2020 Nev. Unpub. LEXIS 118, *3-4, 456 P.3d 255 (Nev. Jan. 27, 2020) (ruling that a district court had properly concluded that a genuine issue of material fact existed, contrary to its earlier grant of summary judgment, and thus, did not abuse its discretion for granting reconsideration).

Defendants respectfully request this Court reconsider its ruling denying Defendants' Motion for Relief from the Court's Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial on grounds that it is clearly erroneous. First, the ruling is founded on inapposite, extrajurisdictional authority. 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 Supreme Court noted that "Courts prefer written orders memorializing judgments in other cases for their evidentiary value, but they are not required when the judgment can be established by other proof." *Id.* at 738. The eventual written order indicated the date of conviction and the finding of guilty, which the Court determined was sufficient to prove the fact of misdemeanor conviction. *Id.* at 739.

Given the facts of the instant case, reliance on the Virginia authority is misplaced, resulting in an erroneous ruling. Defendants acknowledge that under the circumstances set forth in *Lewis*, a straightforward misdemeanor conviction following bench trial, there was no question as to the content of the judge's ruling. The court found Lewis guilty, pronounced the same from the bench, then later entered an order memorializing as much. Dissimilarly, here, Judge Bare's pronouncement from the bench differed significantly from the written Order. Indeed, here, Judge Bare's Order contained matters that were not before the court, thus it would have been impossible for him to rule on them. The Order also contained misstatements of fact, which Judge Bare apparently overlooked or approved when signing and filing the Order. Therefore, given these material dissimilarities, the *Lewis* Court's conclusions are an inappropriate basis on which to have founded this Court's Order denying Defendants' Motion for Relief.

Relatedly, this Court's Order misapprehended or disregarded a material issue. As noted, Judge Bare's Order contained numerous misstatements of fact and erroneous conclusions of law. In addition, it addressed matters not before Judge Bare when he made his oral pronouncement granting Plaintiff's Motion for mistrial. These same erroneous findings of fact and conclusions of law comprise the substance of the Order from which Defendants sought relief. However, this Court did not address these material issues. This issue remains of grave importance given Plaintiff's counsel's exhibited propensity to rely upon those portions of the written Order that were not before Judge Bare to begin with. Thus, in addition to the use of inapposite legal authority, this issue renders this Court's Order clearly erroneous and, therefore, subject to reconsideration.

III. CONCLUSION

Nevada law invests this Court with inherent authority to reconsider its rulings any time prior to final judgment. Defendants contend that the authority on which this Court relied in reaching its decision was inapposite. Further, a material argument was not addressed in this Court's ruling. As a result, the Order denying Defendants' Motion for Relief is clearly erroneous. Therefore, Defendants respectfully request this Court reconsider its Order.

DATED this 9th day of June, 2020

LEWIS BRISBOIS BISGAARD & SMITH LLP

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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 9th day of June, 2020, a true and correct copy of **DEFENDANTS KEVIN PAUL DEBIPARSHAD, M.D., ET AL.'S MOTION FOR RECONSIDERATION OF ORDER DENYING DEFENDANTS' MOTION FOR RELIEF FROM FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFF'S MOTION FOR A MISTRIAL** 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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