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 14

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INDEX TO PETITIONERS' APPENDIX – VOLUME I

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

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

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

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

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

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

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

CERTIFICATE OF MAILING

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

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

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

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

AND

REQUEST FOR ATTORNEY'S FEES

Plaintiff Jason G. Landess a.k.a. Kay George Landess ("Plaintiff"), by and through his counsel of record, Howard & Howard Attorneys PLLC and The Jimmerson Law Firm, P.C., files his Opposition to Defendants Kevin Paul Debiparshad, M.D., et al's Motion for

Reconsideration of Order Denying Defendants' Motion for Relief From Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial, and Request for Attorney's Fees.

This Opposition and Countermotion is made and based upon the pleadings on file herein, the Points and Authorities set forth below, and those matters to be considered by the Court at the hearing hereof.

DATED this 23rd day of June, 2020.

HOWARD & HOWARD ATTORNEYS PLLC

/s/Martin A. Little

By: _____

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Defendants' Motion for Reconsideration ("Reconsideration Motion") is nothing but a rogue document because Defendants have failed to comply with the facial requirements of either NRCP 60 or EDCR 2.24. In Nevada, a motion for reconsideration cannot be filed merely because a party disagrees with a court's decision. A motion for reconsideration must be brought pursuant to one of two rules: NRCP 60 or EDCR 2.24. A motion for reconsideration may be brought pursuant to NRCP 60 only if the movant seeks reconsideration based upon certain enumerated grounds, such as, for example, an intervening change in the law or "newly discovered evidence," neither of which is presented in the Reconsideration Motion. A motion for reconsideration may be brought pursuant to FDCR 2.24 only upon "leave of the Court." (EDCR 2.24(a): "No motion once heard and disposed of may be renewed in the same cause . . . unless by leave of court granted upon motion therefor"). The Defendants have not filed a motion seeking such leave, and leave has not been granted by this Court.

The Reconsideration Motion is also patently frivolous because this Court clearly—and accurately—stated in the Order denying Defendants' Motion for Relief From Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial ("Original Motion") that: "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."[1] There is nothing ambiguous about that statement. And even a first-year law student understands that it is improper and futile, and

[1] P. 4, lines 3-7 of this Court's Order filed June 1, 2020 (**Exhibit 1**).

a complete waste of everyone's time, to ask a court to do that which the court is powerless to do. Yet here we are with still another frivolous and fatuous motion, which will continue unabated until Defendants are forced to pay a price for filing these inane and irresponsible pleadings.

This Reconsideration Motion should thus be summarily denied without argument and taken off calendar pursuant to EDCR 2.23(c) & (d). Plaintiff should also be awarded a reasonable sum for his attorney's fees in having to respond to this Reconsideration Motion.

II.

PROCEDURAL POSTURE

The Order denying the Original Motion was entered and served electronically upon all parties on June 1, 2020. Since Defendants have not included any new evidence or cited to any new rule of law in their Reconsideration Motion, NRCP 60 is unavailing. That leaves EDCR 2.24. However, under that Local Rule an aggrieved party "must file a motion for such relief within 14 days after service of written notice of the order . . . unless the time is shortened or enlarged by order."[2] That 14-day time period has now elapsed and was not enlarged by order. Defendants can, however, now attempt to seek appellate review of this Court's Order by way of writ if they so choose.

III.

STANDARD OF LAW

In addition to the procedural prerequisites for filing a motion for reconsideration described above, the Nevada Supreme Court has provided sound guidance to trial courts when faced with such disfavored motions. For example, in *Moore v. Las Vegas,*[3] the Court held that "**[o]nly in very rare instances** in which new issues of fact or law are raised supporting a ruling

[2] EDCR 2.24 (b).
[3] 92 Nev. 402, 1976 Nev. LEXIS 617 (1976) (emphasis supplied).

contrary to the ruling already reached should a motion for rehearing be granted."[4] This reticence to reconsider earlier judicial pronouncements prevents the re-litigation of settled issues in a case, thus protecting the expectations of parties, ensuring uniformity of decisions, and promoting judicial efficiency.

The recent unpublished decision of our high court in *Peddie v. Spot Devices, Inc.*[5] provides a compelling example of this judicial restraint—especially when, as here, one district court judge is asked to review the decision of another district court judge. In *Peddie*, the defendants filed a motion for partial summary judgment. Due to an unavoidable absence, the presiding district court judge, the Honorable David A. Hardy, did not hear and decide the motion for partial summary judgment. Instead, Senior Judge Steven Elliot heard the motion for partial summary judgment, and rendered a decision granting the motion in Judge Hardy's absence.

Defendants then filed a motion for reconsideration, which was heard by Judge Hardy. Judge Hardy stated on the record during argument that he "believed that the grant of partial summary judgment by Judge Elliot was 'clearly erroneous, because of the fact questions at issue.'"[6] Judge Hardy nevertheless denied the motion for reconsideration. Affirming on appeal (and citing favorably to the *Masonry & Tile Contrs. v. Jolley, Urga & Wirth Ass'n*[7] case that Defendants rely upon in their Reconsideration Motion), our high court nevertheless refused to reverse Judge Hardy's decision by stating: **"[A] judge's ability to revise another judge's order is circumscribed."[8]** This ruling is in complete harmony with Judge Wiese's and this Court's decisions on the same subject, *even though in Peddie the reviewing district court judge actually stated on the record that he thought the decision of the original judge was "clearly*

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[4] *Id*. at 405, *4.
[5] 2018 Nev. Unpub. LEXIS 901(an unpublished disposition, Docket No. 72721, October 2, 2018).
[6] *Id*. at *21.
[7] 113 Nev. 737, 1997 Nev. LEXIS 83 (1997).
[8] *Peddie v. Spot Devices, Inc.* at *21 (emphasis supplied).

erroneous." Neither Judge Wiese nor this Court has made such a finding regarding Judge Bare's rulings. And, as the following analysis will demonstrate, there certainly is no grounds for this Court to find that its June 1, 2020 Order was clearly erroneous.

IV.

ARGUMENT

A. Free-The-Day-Document.

This Reconsideration Motion is a sham, a pseudo-pleading cobbled loosely together by cutting and pasting from a template without any serious consideration given to the content. It is a classic insurance-defense, free-the-day document—a document that is quickly thrown together from archives and for which a whole day's work is billed to the insurance company client, thereby freeing the day to attend to other matters. It is the combined product of high tech and low ethics; and it is toxic to the current administration of justice, because these bogus pleadings clog the system with disruptive detritus and drain the time and creative efforts of the judiciary.

As proof, one need look no further than this concluding sentence from Section I of the Reconsideration Motion: "Accordingly, Defendants respectfully request this Court reconsider its Order and **enter judgment in favor of Defendants**." (Reconsideration Motion, p. 4, lines 11-12, emphasis supplied.) That statement is totally nonsensical for obvious reasons. It is clearly language taken from some other pleading dealing with the entry of a judgment. The only appropriate response to that request is to call it absurd, which it is. But it illustrates the complete lack of merit to this Reconsideration Motion.

B. Absence of Jurisdiction.

As further evidence of absurdity, what conceivable reason exists to justify asking this Court to reconsider its Order denying the Motion when the Court made it crystal clear in its Order that the Court lacks jurisdiction to review and invalidate Judge Bare's Order declaring a

mistrial? For example, for the sake of argument, what if the Court were to agree with the Defendants that it should not have agreed with the reasoning of the Virginia Supreme Court in *Lewis v. Commonwealth* and that, in the Court's view, Judge Bare did not include perfect language in his Order, Findings of Fact, and Conclusions of Law? Even if that outlandish event were to occur, it would effectively **accomplish nothing** if the Court is powerless to invalidate Judge Bare's Order, which it is.

The Defendants surely know that because this is what their Reconsideration Motion says about this Court's ruling on jurisdiction: **Absolutely nothing**. And that is because the Defendants are unable to cite to any authority contrary to the Nevada cases that Plaintiff cited in his Opposition to the Original Motion and that the Court cited in its Order, such as *Rohlfing v. Second Judicial Dist. Court In & For Cty. of Washoe*;[9] *Warden, Nev. State Prison v. Owens*;[10] and *State Eng'r v. Sustacha*.[11]

This whole exercise is thus much ado about nothing.

C. *Lewis v. Commonwealth*.

Defendants provide two grounds for this Court to reverse its ruling on the Original Motion. "First, the ruling is founded on inapposite, extrajurisdictional [sic] authority." (Reconsideration Motion at p. 5, lines 26-27.) That, not surprisingly, is a misstatement of fact, because this is what the Court actually said about the ruling of the Virginia Supreme Court in *Lewis v. Commonwealth*: "THE COURT agrees with the reasoning of the Supreme Court of Virginia . . . ." (**Exhibit 1** at p. 3, line 12.) Agreeing with someone is wholly different from blindly adopting their point of view. And one court "agreeing with" the reasoning of other

[9] 106 Nev. 902 (1990).
[10] 93 Nev. 255, 1977 Nev. LEXIS 529 (1977).
[11] 108 Nev. 223, 225, 1992 Nev. LEXIS 50, *4-5 (1992).

courts is the common nomenclature of American jurisprudence, including the U.S. Supreme Court: "We agree with the decisions of these courts."[12]

This Court is not an empty vessel waiting for a litigant to fill it with information to form a foundation for its rulings. Instead, this Court thinks, reasons, and has a wealth of experience in the law that provides the raw material for the foundation of its decisions. The Court does not need to import ideas from another jurisdiction to arrive at a decision because the Court has its own opinions and ideas, including about whether or not the signing of an order or judgment is a housekeeping matter. Without those opinions and ideas, the Court would be unable to "agree" with the Virginia Supreme Court. And the fact that the Court "agreed" with the reasoning of the Virginia Supreme Court presupposes that the Court embraced the view expressed in the Court's Order *before* it ever considered the language contained in *Lewis v. Commonwealth*. All the language from that case did was supply confirmation to the Court of the soundness of its own viewpoint on the matter. It is therefore impossible that the Court's ruling on that point was solely "founded on inapposite, extrajurisdictional [sic] authority." And it is an insult to the Court to suggest otherwise.

D. <u>Judge Bare's Written Order Tracked His Oral Pronouncements</u>.

Defendants' second grounds for this Reconsideration Motion is their recurring, plaintive complaint that Judge Bare's written Order "contained numerous misstatements of fact and erroneous conclusions of law" (Reconsideration Motion at p. 6, line 19), and that he essentially abandoned his post by arbitrarily signing a proposed order submitted to him by Plaintiff's counsel that bears no resemblance to Judge Bare's oral pronouncements.

First of all, if that is true (which it is not), then why didn't Defendants either submit their own competing order to Judge Bare after being supplied with a copy of Plaintiff's

[12] *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 6, 1985 U.S. LEXIS 135, *7 (1985); *Daniels v. MSPB*, 832 F.3d 1049, 2016 U.S. App. LEXIS 14602 (9th Cir. 2016) ("On this point, we agree with the decisions of the Federal Circuit and the Board." *Id*. at *1055, *15).

proposed order several days in advance of Judge Bare's signing of that proposed order, or, alternatively, challenge the entry of that Order by way of an extraordinary writ?

Secondly, what is the relevance of this argument if this Court is powerless to invalidate Judge Bare's Order?

Thirdly, that argument is just plain wrong, as the following comparison of a select number of Judge Bare's oral pronouncements to the written language in his Order demonstrate:

> 1. ¶ 4 of the Findings of Fact and Conclusions of Law ("FOFCOL"): "After this exchange [about racially inflammatory language contained in the Burning Embers email] sank in with the Court, the Court knew it had to deal with this issue. The Court realized that there was an African-American woman on the jury named Adleen Stidhum to whom the parties gave a birthday card during the trial, celebrating her birthday with cupcakes. The Court immediately imagined how she would feel, as well as the other jurors of African-American and/or Hispanic descent."
>
> 1(a). Judge Bare's supportive comments contained in the Official Trial Transcript of August 5, 2019 (**Exhibit 2**): "So—but in my mind, I guarantee you—I'll tell you the first thing that hit me. We got a woman on the jury named Adleen Stidhum. She's African-American. We gave her a birthday card during the trial. We celebrated her birthday during the trial. We gave her cupcakes with the jury and made, I think, a respectful sort of event out of it all. And so the first thing to hit my mind was wow, how could she feel?" **Exhibit 2** at p. 11, lines 12-17.
>
> 2. ¶ 5 of the FOFCOL: "The Court noted that if there had been a motion in limine to preclude the email, the Court would have precluded it as prejudicial. Even under a legal relevancy balancing test, though it might have some relevance as to Plaintiff's character, it would be excluded as prejudicial even if probative or relevant."
>
> 2(a). Judge Bare's supportive comments contained in **Exhibit 2**: "I would say as a footnote to this Court, as already stated on Friday of last, that were a motion in limine submitted by the Plaintiff to the Court, or vice-versa where the roles were reversed and the Defense were to seek a motion in limine to preclude the use of the information on either side, the Court would have granted the same—or likely have granted the same. And that clearly is the case here." **Exhibit 2** at p. 25, lines 5-11.

3. ¶ 11 of the FOFCOL: "It is readily apparent and admitted to, and specifically a finding of fact of this Court, that though the Plaintiff endeavored in the discovery process to disclose to the Defendants the Cognotion documents, and did so, it is fair to conclude that due to the shortness of the discovery timeline and the last minute effort having to do with this damage item, which did take place closer in time to Trial, as well as the extent of the volume of the paperwork disclosed, that Plaintiff did not see or know about the content of that email at page 44 of Exhibit 56. This is also likely due to the fact that the represented party, and Mr. Dariyanani, are both also lawyers, and it would be reasonable for Plaintiff's counsel to presume that they had reviewed the documents. Either way, it is clear to the Court that there was a mistake made in failing to notice the document and inadvertently disclosing it and not objecting to it."

3(a). Judge Bare's supportive comments contained in **Exhibit 2**: "It's readily apparent and admitted to and so as a finding of fact, I'm certain that though the Plaintiffs endeavored in this discovery course to disclose to the Defense the Cognotion documents and did so—again, disclosing, you know, a vast array of documents, that for reasons that I don't need to know the full extent of, but I would say it's fair to conclude shortness in time, because of the discovery timeline and effort having to do with this damage item, which did take place closer in time to trial, volume, meaning the extent of the volume of the paperwork disclosed, I think in fairness could be something Mr. Jimmerson thinks about into the future." **Exhibit 2** at p. 52, lines 13-22.

4. ¶ 18 of the FOFCOL: "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."

4(a). Judge Bare's supportive comments contained in **Exhibit 2**: "I think that in conjunction with the aggressiveness that we've had throughout the trial, the zealousness is real clear to me that the Defense had to know this was a mistake made by the Plaintiffs. And again, one of the many pages of Exhibit 56 was this page 44 and the Plaintiffs didn't know about it." **Exhibit 2** at p. 57, lines 7-11.

5. ¶ 18 of the FOFCOL: "Defendants took advantage of that mistake. Plaintiff confirms that he did not know the email at page 44 was in the group of 79 pages of emails in Exhibit 56, which otherwise all related to Cognotion, and that the same was inadvertently admitted. Once the email was admitted and before the jury, Plaintiff could not object in front of the jury without further calling attention to the email, and because it had been admitted. Once the highlighted

language was put before the jury, there was no contemporaneous objection from Plaintiff, nor *sua sponte* interjection from the Court, that could remedy it, as in a matter of seconds, the words were there for the jury to see.

5(a). Judge Bare's supportive comments contained in **Exhibit 2**: "So, they took advantage of that mistake and I don't have a criticism in a general sense in taking advantage of mistakes of the other side. Frankly, it happens all the time. That's not the question.

And while it may be well intended to cross-examine the CEO with the item that you now have where you know the Plaintiffs made a mistake, they didn't see it. The primary, the only reason why I granted the motion for mistrial was because when putting this up on the ELMO, there was no contemporaneous objection from the Plaintiffs. And I did not *sua sponte* interject either, probably for the same reason that the Plaintiffs didn't and that is it just—the timeline is short. It's on the ELMO and it's just really a matter of seconds before a human being, if you're on the jury with that TV set sitting right there in front of you. It's a matter of seconds, literally, you know, one to five seconds and that's it. It's there for them to see." **Exhibit 2** at p. 57, lines 12-25.

Those are just random samples. The same exercise could be done for all of the FOFCOL. But the result would be the same—namely, that each paragraph contained in the FOFCOL is supported by the record and not, as the Defendants would lead the Court to believe, the product of some self-serving fantasy conjured up by Plaintiff's counsel and then mysteriously foisted upon Judge Bare for his signature.

E. <u>Request for Attorney's Fees for Having to Oppose Defendants' Frivolous Motion</u>.

The Court has authority to award attorney fees where "defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party." NRS 18.010(b).[13]

This court has already denied Defendants' Motion for Relief From Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial. Defendants' Motion for Reconsideration of the Court's denial of their original Motion is just another in a long line of specious motions and billing exercises filed for the purpose of harassing Plaintiff, wasting of

[13] If awarded, Plaintiff's counsel will submit an affidavit setting forth the amount of fees and costs incurred herein.

the court's time and judicial resources, and to cause Plaintiff and his attorneys to expend time and effort in addressing the same. As outlined above in great detail, Defendants' Motion is little more than a cut and paste job employing boilerplate language borrowed from some other motion, and blatantly disregards this court's ruling by vexatiously attempting to relitigate it in bad faith and without any valid basis in law or fact. Based on the foregoing, Plaintiff respectfully requests that he be awarded his fees and costs incurred herein pursuant to NRS 18.010.

V.

CONCLUSION

The Reconsideration Motion is facially defective on procedural grounds and has no substantive merit for the reasons described above. Plaintiff therefore requests that the Court deny the motion and award attorney's fees as sanctions for Defendants' bad-faith filing.

Dated this 23rd day of June, 2020.

HOWARD & HOWARD ATTORNEYS PLLC

/s/Martin A. Little

By: _____

Martin A. Little, Esq.
Alexander Villamar, Esq.
3800 Howard Hughes Pkwy, Suite 1000
Las Vegas, Nevada 89169
Telephone No. (702) 257-1483
Facsimile No. (702) 567-1568
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I am employed in the County of Clark, State of Nevada, am over the age of 18 years and not a party to this action. My business address is 3800 Howard Hughes Parkway, Suite 1000, Las Vegas, NV 89169.

On this 23rd day of June, 2020, I served the **PLAINTIFF'S OPPOSITION TO DEFENDANTS KEVIN PAUL DEBIPARSHAD, M.D., ET AL.'S MOTION FOR RECONSIDERATION OF ORDER DENYING DEFENDANTS' MOTION FOR RELIEF FROM FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFF'S MOTION FOR A MISTRIAL AND REQUEST FOR ATTORNEY'S FEES** on all parties in this action or proceeding electronically with the Clerk of the Court via the Odyssey E-File and Serve system, which will cause this document to be served upon the following counsel of record:

James J. Jimmerson, Esq.
The Jimmerson Law Firm, P.C.
415 South Sixth Street, Suite 100
Las Vegas, NV 89101
Attorneys for Plaintiff

S. Brent Vogel, Esq.
John Orr, Esq.
Lewis Brisbois Bisgaard & Smith LLP
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, NV 89118
Attorneys for Defendants

I certify under penalty of perjury that the foregoing is true and correct, and that I executed this Certificate of Service on June 23, 2020, at Las Vegas, Nevada.

/s/ Jill M. Berghammer

An Employee of Howard & Howard Attorneys PLLC

EXHIBIT 1

EXHIBIT 1

Electronically Filed
6/1/2020 11:08 AM
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
Judicial Executive Assistant

EXHIBIT 2

EXHIBIT 2

Electronically Filed
8/6/2019 9:15 AM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

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

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

RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 11

APPEARANCES:

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

RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER

Case Number: A-18-776896-C

INDEX

Las Vegas, Nevada, Monday, August 5, 2019

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

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

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

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

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

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

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

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

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

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

MR. VOGEL: Oh, absolutely. Yes.

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

MR. VOGEL: We do.

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

THE MARSHAL: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

motion tells us that --

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

MR. JIMMERSON: No, no problem.

THE COURT: Sorry.

MR. JIMMERSON: Yes, sir.

THE COURT: I apologize for the interruption --

MR. JIMMERSON: Uh-huh.

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

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

THE COURT: -- roadmap.

MR. JIMMERSON: Yes.

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

MR. JIMMERSON: Of course.

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

MR. JIMMERSON: No -- thank you.

THE COURT: So --

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

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

MR. JIMMERSON: I think that that --

THE COURT: -- and Ms. Gordon.

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

THE COURT: Okay. Mr. Vogel.

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

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

MR. VOGEL: Yeah.

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

MR. VOGEL: No, no.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. VOGEL: Yes.

THE COURT: -- conference on Friday.

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

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

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

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

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

MR. VOGEL: No --

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

MR. VOGEL: Yeah.

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

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

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

MR. VOGEL: Right.

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

MR. VOGEL: Very good. Thank you.

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

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

Mr. Vogel?

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

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

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

MR. VOGEL: I agree, Your Honor.

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

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

THE COURT: Okay.

MR. VOGEL: Yes.

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

So okay, Dominique, let them know that.

All right. Plaintiff's motion for mistrial?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And so the impact of the --

THE COURT: Which four do you think?

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

THE COURT: Cardoza is number 7, but okay.

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

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

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

THE COURT: I didn't think about that.

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

THE COURT: Okay.

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

THE COURT: Right.

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

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

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

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

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

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

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

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

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

Thank you, sir.

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay.

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

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

MS. GORDON: Sure.

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

MS. GORDON: Okay.

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

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

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

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

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

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

MS. GORDON: Us?

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

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

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

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

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

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

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

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

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

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

THE COURT: Um-hum.

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

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

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

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

THE COURT: Um-hum.

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

allowed to use as impeachment.

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

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

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

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

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

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

THE COURT: Okay, I understand that.

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

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

MS. GORDON: And a hustler.

THE COURT: Could you make that argument?

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

THE COURT: All right.

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

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

MS. GORDON: I'd like to --

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

MS. GORDON: Yeah, thanks.

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

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

MR. VOGEL: And --

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

MR. VOGEL: Yeah.

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

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

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

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

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

MR. VOGEL: So --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you, sir.

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

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

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

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

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

circumstances. We'll be back in ten minutes.

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

THE COURT: Please bring in the jury.

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

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

THE MARSHAL: Parties rise for presence of the jury.

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

THE MARSHAL: All present and accounted for.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

assessment of what happened.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In *Lioce*, the Nevada Supreme Court says,

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

Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

So, again, the Supreme Court says,

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

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

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

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

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

The Supreme Court says in the next sentence that, the

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

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

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

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

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

and leaves me alone.

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

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

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

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

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

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

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

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

Anything else from either side?

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

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

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

THE COURT: Okay. Two weeks will be?

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

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

THE CLERK: Okay. August 19th.

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

And then a reply?

THE CLERK: A week later August 26th.

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

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

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

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

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

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

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

MR. JIMMERSON: Yes, Your Honor.

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

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

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

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

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

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

THE CLERK: How far out?

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

MR. VOGEL: The 3rd.

THE CLERK: September 3rd.

THE COURT: After September 3rd.

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

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

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

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

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

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

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

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

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

THE CLERK: On Tuesday, September 10th.

THE COURT: That'll be the hearing.

MR. JIMMERSON: All right.

THE COURT: Okay. Anything else for today?

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

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

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

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

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

MR. VOGEL: It is.

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

THE COURT: Here's my question --

MR. JIMMERSON: -- the Plaintiffs to Defendant.

THE COURT: -- does it matter now anyway?

MR. VOGEL: No.

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

MR. JIMMERSON: No.

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

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

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

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

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

THE COURT: -- at this point. Okay.

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

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

THE COURT: However you do that --

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

MR. VOGEL: Yes.

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

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

THE COURT: Okay.

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

MR. JIMMERSON: What is 150?

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

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

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

THE COURT: Ms. Gordon.

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay.

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

THE COURT: Yes.

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

THE COURT: I get that. I know.

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

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

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

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

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

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

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

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

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

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

That's all I can say. Okay.

Do you want to say anything else? Or --

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

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

anything?

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

THE COURT: Okay.

MR. JIMMERSON: Thank you, Judge.

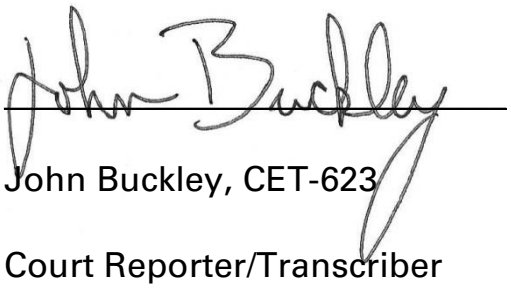
THE COURT: Take care.

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

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

* * * * *

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



John Buckley, CET-623

Court Reporter/Transcriber

Date: August 5, 2019

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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 REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER DENYING DEFENDANTS' MOTION FOR RELIEF FROM FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFF'S MOTION FOR A MISTRIAL and OPPOSITION TO PLAINTIFF'S REQUEST FOR ATTORNEY FEES

Date of Hearing: July 14, 2020

Time of Hearing: 12:00 p.m.

/ / /

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 REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER DENYING DEFENDANTS' MOTION FOR RELIEF FROM FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFF'S MOTION FOR A MISTRIAL and OPPOSITION TO PLAINTIFF'S REQUEST FOR ATTORNEY FEES 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 7th day of July, 2020

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s/ S. Brent Vogel*

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff has employed unseemly behavior at various times during the course of this litigation. His Opposition to Defendants' Motion for Relief from Order and his Response Brief and Motion for Clarification and/or Amendment resorted to ad hominem attacks, impugning counsel's motives with abandon. He called Defendants and their counsel "desperate, malevolent, and reckless[;]" and insisted that "they cannot be trusted to act appropriately." (Response Brief, at p. 7). Even with that performance in recent memory, here, Plaintiff takes his behavior to a new level, coming perilously close to violating the Nevada State Oath of Attorney with the accusations made in his Opposition to the instant Motion.[1] ("Opposition"). He insults Defendants and their counsel in the most uncivil terms. He accuses counsel of cheating their client by cutting and pasting the instant Motion together to "free the day" while charging for a full day's work, the apparent "product of high tech and low ethics." (Opposition, at p. 6). He also insists that the instant Motion is "improper and futile, and a complete waste of everyone's time," unworthy of "even a first-year law student." (Opposition, at p. 3). Plaintiff then argues, utterly in contravention of easily verifiable facts, that Defendants brought their Motion absent a proper procedural vehicle. (Opposition, at p. 4). Moreover, (ironically given his complaint that the instant Motion is a waste of everybody's time), Plaintiff fills two single-spaced pages with "evidence" to refute an argument Defendants never made; namely, that Judge Bare's eventual order "bears no resemblance to [his] oral pronouncements." (Opposition, at p. 8).

Finally, Plaintiff adds to his Opposition a baseless motion for attorney fees. Plaintiff has moved for attorney fees twice during this litigation, so far, unsuccessfully.[2] His repeated demands

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[1] "I will conduct myself in a civil and professional manner, whether dealing with clients, opposing parties and counsel . . . ."
https://www.nvbar.org/wp- content/uploads/Oath%20of%20Attorney_0.pdf.

[2] (1) Motion for Mistrial and Fees/Costs filed August 4, 2019; (2) Plaintiff's Opposition to Defendants Kevin Paul Debiparshad, M.D., et al.'s Motion for Reconsideration of Order Denying Defendants' Motion for Relief from Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial and Request for Attorney's Fees filed June 23, 2020.

for attorney fees represent a transparent attempt to intimidate Defendants and their counsel from exercising the right to try to remediate what Defendants reasonably believe was an erroneous ruling from the Court. What is worse, here, Plaintiff's request for fees is entirely unsupported by proper authority. In fact, a lack of relevant authority is a theme throughout Plaintiff's Opposition.

Plaintiff's Opposition, replete with deficiencies and outright inaccuracies—to say nothing of incivility utterly unbecoming a member of the bar in good standing—attempts, but fails, to distract from Defendants' reasonable and fully supported legal and factual arguments in favor of reconsideration.

II. STATEMENT OF FACTS/PROCEDURAL HISTORY

The facts of this case are well known to this Court by now. After ten days, the original trial was stopped by mistrial. Defendants then moved to disqualify Judge Bare on grounds of the bias he demonstrated by his statements in favor of Plaintiff's counsel during the mistrial proceeding. 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. Defense Counsel declined to approve the draft order. On September 4, 2019 Plaintiff submitted his draft Order to Judge Bare, which Judge Bare signed and filed, unaltered, five days later. One week after that, 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. 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 order he had rendered previously. (Order at p. 3:16-18). In support, this Court cited a Virginia case, *Lewis v. Commonwealth*, 813 S.E.2d 732, 737 (Va. 2018) (quoting *Haskins v. Haskins*, 41 S.E.2d 25, 31 (Va. 1947), 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." 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 moved this Court to reconsider that decision on grounds that the authority it relied on was inapplicable to this case and that a material argument was not addressed, resulting in a clearly erroneous ruling. Plaintiff opposed that Motion. Defendants now file this Reply in Support of their Motion for Reconsideration of Order and Opposition to Plaintiff's Request for Attorney Fees.

III. LEGAL ARGUMENT

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"). In their Motion for Reconsideration, Defendants respectfully demonstrated that this Court's Order denying Defendants' Motion for Relief was clearly erroneous. Plaintiff now responds to that Motion but without raising any cogent contrary argument whatsoever. He attacks Defendants' Motion for Reconsideration on procedural and substantive grounds, but he fails at both attempts. He also includes a baseless request for attorney fees, which also fails because it is not founded on proper legal authority and is without any factual basis.

A. Defendants' Motion for Reconsideration was Procedurally Proper

Plaintiff claims that Defendants untimely filed their Motion for Reconsideration and did so without a proper procedural mechanism. (Opposition, at p. 4). His reasoning for raising this claim is unclear because it is so easily disproved. He insists that Defendants' sole available procedural vehicle is found within E.D.C.R. 2.24. (Opposition, at p. 4). Defendants indeed cited E.D.C.R. 2.24. (Motion, at p. 4). Further, Plaintiff points out that E.D.C.R. 2.24 allows a party 14 days to file a

Motion for Reconsideration from the date of written notice of the subject Order. (Opposition, at p. 4).[3] Notice of entry of the order was served on June 1, 2020. Plaintiff asserts that "[t]hat 14-day time period has *now* elapsed and was not enlarged by order." (Opposition, at p. 4 (emphasis added)). Plaintiff is correct that, as of the time he filed his Opposition, June 23, 2020, the 14-day time period had indeed passed. However, Defendants filed their Motion for Reconsideration on June 9, 2020, *eight days* after service of notice of entry of this Court's Order, well within the 14 days E.D.C.R. 2.24 requires. Accordingly, Defendants' Motion was procedurally proper in every way.

B. This Court is Entitled to Reconsider its Order

Plaintiff next seems to argue that this Court may not reconsider its Order, although he bases that argument on an erroneous "Standard of Law," faulty legal reasoning, and inapposite legal authority. He claims that the Nevada Supreme Court "has provided sound guidance to trial courts when faced with . . . disfavored [motions for reconsideration]. (Opposition, at p. 4). He then cites a case from 1976, *Moore v. Las Vegas*, to suggest that "[o]nly in very rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached should a motion for rehearing be granted." 92 Nev. 402, 405, 551 P.2d 244, 246 (1976). The *Moore* Court identified "District Rule 27" as support for its ruling. The same rule, now styled "District Court Rule 19," states as follows.

> When an application or petition for any writ or order shall have been made to a district judge and is pending or has been denied by such judge, the same application or motion shall not again be made to the same or another district judge, except upon the consent in writing of the judge to whom the application or motion was first made.

D.C.R. 19. In *Moore*, a judge had denied summary judgment and rehearing in a personal injury case. 92 Nev. at 404, 551 P.2d at 245. Between the filing of the motion for rehearing and a second rehearing motion, the judge lost his bid for reelection; accordingly a new judge heard and granted both the second motion for rehearing and summary judgment on the original matter. *Id.* The Supreme Court noted that then-Rule 27 was intended to prevent "judge shopping," or filing the same matter with a different judge hoping to get a different, favorable outcome, but it did not apply when

[3] E.D.C.R. 2.24(b).

the case became reassigned because of some external event such as loss of reelection. *Id*. at 405, 551 P.2d at 246.

Here, *Moore* is factually distinguishable, as is the Rule it cited. Defendants have not engaged in judge shopping. Nor have they filed the same document before two different judges hoping for a different, more favorable outcome. Instead, Defendants moved this Court to reconsider its Order using both proper procedure, as noted above, and strong substantive support.

The other case Plaintiff cites is equally inexplicable and inapplicable. He cites *Peddie v. Spot Devices, Inc.* presumably to argue, yet again, that this Court lacks jurisdiction to issue relief from Judge Bare's Findings of Fact and Conclusions of Law, because that case otherwise has nothing to do with the matter at hand. (Opposition, at p 5-6). He cites the Supreme Court's statement that "a judge's ability to revise another judge's order is circumscribed." No. 72721, 2018 Nev. Unpub. LEXIS 901, *21, 427 P.3d 125 (Nev. 2018) (citing *Masonry and Tile v. Jolly, Urga & Wirth*, 113 Nev. 737, 941 P.2d 486 (1997)). But "circumscribed" does not mean "precluded." Indeed, the *Peddie* Court cited both NRCP 54(b) ("Under NRCP 54(b), a district court has authority to review and revise a judgment before it enters judgment adjudicating the rights of all the parties.") and *Jolley Urga* ("A district court may reconsider a previously decided issue if substantially different evidence is introduced or the decision is clearly erroneous.") to illustrate circumstances when such ability is allowed. 2018 Nev. Unpub. LEXIS 901, at *21, 427 P.3d at 125.

Not unsurprisingly, Plaintiff conveniently omitted language from that case that undermines his original premise, that Judge Bare's oral pronouncements provided the substance of his Order, which the actual filed Order merely memorialized. The *Peddie* Court reminded us that "this court has repeatedly held that a district court's oral pronouncement from the bench is 'ineffective for any purpose.'" 2018 Nev. Unpub. LEXIS 901, at *22, 427 P.3d 125. That statement bodes ill for Plaintiff on multiple levels, not least because Judge Bare should never have filed his Order in the first place, given that the improper, ultimately disqualifying statements he made voided the Order. Clearly, Plaintiff has nothing to argue here, and so he cherry picks from inapposite authority that, in fact, undermines his arguments.

C. This Court's Order was Clearly Erroneous

Plaintiff takes issue with Defendants' grounds for its Motion for Reconsideration, but as is true throughout his Opposition, he fails to provide cogent support or legal authority for his arguments.[4]

1. *Lewis v. Commonwealth* is Inapposite

First, Plaintiff disputes Defendants' contention that *Lewis v. Commonwealth* is inapposite and therefore, constitutes an inappropriate basis on which to have founded this Court's Order denying Defendants' Motion for Relief. But he does not dispute or even address Defendants' analysis demonstrating how that case is inapposite. Instead, he parses this Court's language, inexplicably arguing that this Court did not *adopt* the Virginia court's reasoning, it merely *agreed* with it. (Opposition, at p. 7). Regardless of whether there is a meaningful distinction between "agreeing" with legal authority and "adopting" it, this Court relied on the *Lewis* Court's reasoning as support for its own decision. Defendant contends that reasoning did not apply under the circumstances of this case and urged this Court to reconsider its decision accordingly.

Plaintiff fails to reveal any flaw in Defendants' argument regarding *Lewis*. Instead, he continues his usual pattern of deflection and distraction by suggesting, albeit without evidentiary support of any kind, that this Court had "embraced the view expressed in the Court's Order before it ever considered the language contained in *Lewis v. Commonwealth*." (Opposition, at p. 8). That argument bears not at all on any of the issues before this Court. But even if it did, it is wholly unsupported by relevant authority, or any authority at all. Therefore, for multiple reasons, this Court need not consider it. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330, 130 P.3d 1280, 1288, 2006 (noting that Courts need not consider claims not cogently argued or supported by relevant

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[4] Plaintiff renders two additional pointless arguments, although to what purpose, it is not clear. First, he claims that Defendants' Motion for Reconsideration is a "free-the-day" document, a chance for Defense Counsel to bill their clients for doing no work. (Opposition, at p. 6). That offensive assertion is not borne out by the analysis and applicable legal authority contained within Defendant's Motion. Nor is it relevant to his Opposition, except to reveal, once again, his longstanding game plan—to attack and insult in an attempt to distract from the fact that his legal arguments are baseless. Second, he argues, without the benefit of a single legal citation, that this Court is "powerless to invalidate Judge Bare's Order." (Opposition, at p. 7). Surely, that is the matter under discussion in Defendant's Motion as well as the original Motion for Relief, Plaintiff's conclusory assertion notwithstanding.

authority.)

2. This Court's Order Misapprehended or Disregarded a Material Issue

Similarly, Plaintiff fails to provide cogent argument against the substance of Defendants' argument that this Court's Order disregarded a material fact, namely, that Judge Bare's written Order contained numerous misstatements of fact and erroneous conclusions of law that Judge Bare never made in his oral pronouncements regarding the mistrial. Instead, Plaintiff relies on a straw-man argument to distract from that very real issue.

In response to Defendant's argument that Judge Bare's Order contained misstatements of fact and erroneous conclusions of law, Plaintiff counters with a "random sample" of findings of fact and conclusions of law from the Order that track Judge Bare's oral pronouncements. (Opposition, at p. 9-11). But that resort to logical fallacy serves only to show the weakness of Plaintiff's arguments. Defendants never asserted that *all* the findings of fact and conclusions of law contained within Judge Bare's Order were erroneous. Rather, Defendants contend that the written Order contains significant inaccuracies and misstatements that Judge Bare never made in his oral pronouncements, and that Plaintiff has unfairly deployed the self-serving language from that Order at crucial points in this litigation, to Defendants' detriment.[5] Tellingly, Plaintiff does not refute or

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[5] Defendants enumerated the inaccurate/misstated findings of fact and conclusions of law in their Errata to Reply to Motion for Relief from Order. Please see below a small selection of those misstatements. 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."

¶20: In his Opposition to Defendants' Motion for Relief, 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 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 (footnote continued)

attempt to correct Defendants' proof that the Order contained inaccuracies and misstatements. He merely attempts to cover it up by highlighting instances where Judge Bare's oral pronouncements and the written Order happened to be consistent. This sleight of hand may be clever, but it is unavailing.

Plaintiff's baseless arguments notwithstanding, this Court's Order employed inapposite legal authority and misapprehended or disregarded that material fact. Defendants have amply demonstrated those facts, and nothing Plaintiff has argued here refutes them. Thus, the instant Motion is well-founded, and its arguments in favor of reconsideration are grounded in proper substance. Therefore, Defendants respectfully request this Court reconsider its Order denying Defendants' Motion for Relief from Order.

D. Plaintiff Fails to Support His Request for Attorney Fees with Relevant Legal Authority

Plaintiff argues that "[t]he Court has authority to award attorney fees where 'defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party.'" (Opposition, at p. 11 (citing "N.R.S. 18.010(b)").[6] He further claims that "Defendants' Motion for Reconsideration of the Court's denial of their original Motion is just another in a long line of specious motions and billing exercises filed for the purpose of harassing Plaintiff . . . ." Leaving aside Plaintiff's additional, unsubstantiated attack on Defense Counsel's honesty and

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motion for fees and costs having to do with a mistrial."

¶¶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.

¶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.

[6] Defendants assume Plaintiff's citation to "N.R.S. 18.010(b)" was merely a typographical error and therefore, base their following arguments on analysis of N.R.S. 18.010(2)(b).

ethics, his request for attorney fees fails both in procedure and substance.

The decision to award attorney fees is within the trial court's discretion. *Bergmann v. Boyce*, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993). N.R.S. 18.010(2)(b) provides for attorney fees to a prevailing party "[w]ithout regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party."

> In the end, the scope of N.R.S. 18.010(2)(b) is defined not by a few words taken from isolated cases, but rather by the words of the statute itself. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012) (noting that "[t]he words of a governing text are of paramount concern"). The ultimate inquiry under N.R.S. 18.010(2)(b) is whether a claim or defense was brought or maintained "without reasonable ground or to harass the prevailing party," with the stated goal of "deter [ring] frivolous or vexatious claims and defenses," What matters is whether the proceedings were initiated or defended "with improper motives or without reasonable grounds."

Las Vegas Metro. Police Dep't v. Anderson, 134 Nev. 799, 804, 435 P.3d 672, 677 (Nev. Ct. App. 2018). "A claim is groundless if 'the allegations in the complaint . . . are not supported by any credible evidence *at trial*.'" *Allianz Ins. Co. v. Gagnon,* 109 Nev. 990, 996, 860 P.2d 720, 724 (1993) (emphasis added) (quoting *Western United Realty, Inc. v. Isaacs*, 679 P.2d 1063, 1069 (Colo. 1984)); *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1354, 971 P.2d 383, 387 (1998) (reversing a grant of attorney fees and ruling that a losing claim was not filed without reasonable ground or to harass the prevailing party because the claim was viable at the time it was filed).

Plaintiff's request for attorney fees is groundless, founded on improper statutory authority. In fact, his argument based on N.R.S. 18.010(2) fails on all levels. First, Plaintiff is not a "prevailing party" for purposes of N.R.S. 18.010. Second, Defendants' Motion for Reconsideration is neither a claim nor a defense brought or maintained without reasonable ground or to harass Plaintiff.

The Nevada Supreme Court stated that a party cannot be considered a prevailing party under N.R.S. 18.010 where the action has not "proceeded to judgment." *Works v. Kuhn,* 103 Nev. 65, 68, 732 P.2d 1373, 1376 (1987), disapproved of on other grounds by *Sandy Valley Assocs. v. Sky Ranch*

Estates Owners Ass'n, 117 Nev. 948, 35 P.3d 964 (2001). Further, the Court noted "that to merit prevailing party status, the party must have gained a 'material alteration' of the parties' legal relationship through litigation." *145 East Harmon II Trust v. Residences at MGM Grand - Tower A Owner's Ass'n*, 136 Nev. Adv. Rep. 14, 460 P.3d 455, 458 (2020) (citing *Carter v. Inc. Vill. of Ocean Beach*, 759 F.3d 159, 165 (2d Cir. 2014)) (upholding a fee award because the dismissal with prejudice was substantively a judgment on the merits, and the association was the prevailing party for purposes of the statutes).

Here, Plaintiff is not a prevailing party. This proceeding has not ended in a final judgment; trial is yet to come. Plaintiff merely succeeded on a Motion for Relief from Order. Moreover, there has been no "material alteration" of the parties' legal relationship through litigation. Thus, Plaintiff is not a prevailing party for purposes of N.R.S. 18.010, and his request for attorney fees fails on that basis alone.

Next, Defendants' Motion for Relief from Order does not qualify as a claim or defense for purposes of N.R.S. 18.010. As the Nevada Court of Appeals noted, "[w]hat matters is whether the proceedings were *initiated* or *defended* 'with improper motives or without reasonable grounds.'" *Anderson*, 134 Nev. at 804, 435 P.3d at 677 Here, Plaintiff requests fees for having to oppose Defendants' Motion for Reconsideration. It appears that not even Plaintiff believes that the instant Motion constitutes a claim or defense because he does not argue that it does. Moreover, nothing about Defendants' Motion was improper, was brought or maintained without reasonable ground, or was intended to harass Plaintiff. To the contrary, Defendants brought their Motion based on the good-faith belief that the Court made an erroneous ruling and from a sincere desire to rectify that error.

If anyone has filed a frivolous motion in this matter, it is Plaintiff with his improper, unfounded request for attorney fees. Indeed, as noted above, he has repeatedly moved for attorney fees during this litigation, previously unsuccessfully. This latest request is overtly meritless; Plaintiff did not even bother to cite a proper standard under which to bring it. Instead, his bluster is nothing more than an all-too-familiar attempt to intimidate Defendants and discourage them from asserting

proper, good-faith arguments such as in the instant Motion.

IV. CONCLUSION

Notwithstanding Plaintiff's contrary claims, this Court has the authority to reconsider its rulings any time prior to final judgment. Defendants contend that the authority on which this Court relied in its Order was inapposite. Further, a material argument was not addressed in this Court's ruling. As a result, the Order is clearly erroneous. What is more, Plaintiff has not demonstrated that he is entitled to attorney fees. Therefore, Defendants respectfully request this Court reconsider its Order and deny Plaintiff's request for attorney fees.

DATED this 7th day of July, 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 7th day of July, 2020, a true and correct copy of **DEFENDANTS KEVIN PAUL DEBIPARSHAD, M.D., ET AL.'S REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER DENYING DEFENDANTS' MOTION FOR RELIEF FROM FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFF'S MOTION FOR A MISTRIAL and OPPOSITION TO PLAINTIFF'S REQUEST FOR ATTORNEY FEES** was served electronically using the Odyssey File and Serve system and serving all parties with an email-address on record, who have agreed to receive electronic service in this action.

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EXHIBIT ‘A’

Electronically Filed
8/6/2019 9:15 AM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

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

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

RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 11

APPEARANCES:

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

RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER

Case Number: A-18-776896-C

INDEX

Las Vegas, Nevada, Monday, August 5, 2019

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

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

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

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

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

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

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

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

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

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

MR. VOGEL: Oh, absolutely. Yes.

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

MR. VOGEL: We do.

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

THE MARSHAL: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

motion tells us that --

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

MR. JIMMERSON: No, no problem.

THE COURT: Sorry.

MR. JIMMERSON: Yes, sir.

THE COURT: I apologize for the interruption --

MR. JIMMERSON: Uh-huh.

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

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

THE COURT: -- roadmap.

MR. JIMMERSON: Yes.

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

MR. JIMMERSON: Of course.

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

MR. JIMMERSON: No -- thank you.

THE COURT: So --

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

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

MR. JIMMERSON: I think that that --

THE COURT: -- and Ms. Gordon.

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

THE COURT: Okay. Mr. Vogel.

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

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

MR. VOGEL: Yeah.

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

MR. VOGEL: No, no.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. VOGEL: Yes.

THE COURT: -- conference on Friday.

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

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

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

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

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

MR. VOGEL: No --

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

MR. VOGEL: Yeah.

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

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

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

MR. VOGEL: Right.

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

MR. VOGEL: Very good. Thank you.

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

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

Mr. Vogel?

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

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

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

MR. VOGEL: I agree, Your Honor.

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

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

THE COURT: Okay.

MR. VOGEL: Yes.

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

So okay, Dominique, let them know that.

All right. Plaintiff's motion for mistrial?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And so the impact of the --

THE COURT: Which four do you think?

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

THE COURT: Cardoza is number 7, but okay.

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

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

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

THE COURT: I didn't think about that.

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

THE COURT: Okay.

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

THE COURT: Right.

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

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

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

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

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

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

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

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

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

Thank you, sir.

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay.

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

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

MS. GORDON: Sure.

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

MS. GORDON: Okay.

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

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

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

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

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

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

MS. GORDON: Us?

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

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

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

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

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

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

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

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

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

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

THE COURT: Um-hum.

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

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

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

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

THE COURT: Um-hum.

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

allowed to use as impeachment.

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

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

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

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

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

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

THE COURT: Okay, I understand that.

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

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

MS. GORDON: And a hustler.

THE COURT: Could you make that argument?

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

THE COURT: All right.

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

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

MS. GORDON: I'd like to --

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

MS. GORDON: Yeah, thanks.

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

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

MR. VOGEL: And --

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

MR. VOGEL: Yeah.

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

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

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

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

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

MR. VOGEL: So --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you, sir.

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

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

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

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

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

circumstances. We'll be back in ten minutes.

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

THE COURT: Please bring in the jury.

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

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

THE MARSHAL: Parties rise for presence of the jury.

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

THE MARSHAL: All present and accounted for.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

assessment of what happened.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In *Lioce*, the Nevada Supreme Court says,

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

Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

So, again, the Supreme Court says,

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

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

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

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

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

The Supreme Court says in the next sentence that, the

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

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

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

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

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

and leaves me alone.

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

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

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

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

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

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

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

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

Anything else from either side?

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

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

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

THE COURT: Okay. Two weeks will be?

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

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

THE CLERK: Okay. August 19th.

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

And then a reply?

THE CLERK: A week later August 26th.

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

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

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

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

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

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

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

MR. JIMMERSON: Yes, Your Honor.

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

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

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

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

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

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

THE CLERK: How far out?

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

MR. VOGEL: The 3rd.

THE CLERK: September 3rd.

THE COURT: After September 3rd.

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

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

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

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

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

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

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

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

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

THE CLERK: On Tuesday, September 10th.

THE COURT: That'll be the hearing.

MR. JIMMERSON: All right.

THE COURT: Okay. Anything else for today?

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

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

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

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

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

MR. VOGEL: It is.

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

THE COURT: Here's my question --

MR. JIMMERSON: -- the Plaintiffs to Defendant.

THE COURT: -- does it matter now anyway?

MR. VOGEL: No.

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

MR. JIMMERSON: No.

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

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

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

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

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

THE COURT: -- at this point. Okay.

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

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

THE COURT: However you do that --

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

MR. VOGEL: Yes.

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

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

THE COURT: Okay.

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

MR. JIMMERSON: What is 150?

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

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

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

THE COURT: Ms. Gordon.

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay.

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

THE COURT: Yes.

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

THE COURT: I get that. I know.

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

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

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

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

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

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

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

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

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

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

That's all I can say. Okay.

Do you want to say anything else? Or --

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

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

anything?

MS. GORDON: -- think I wanted them in the --

THE COURT: Okay.

MR. JIMMERSON: Thank you, Judge.

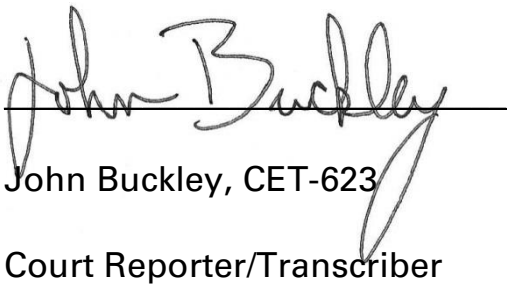
THE COURT: Take care.

MR. JIMMERSON: Appreciate all your staff for all --

[Proceedings adjourned at 12:15 p.m.]

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



John Buckley, CET-623

Court Reporter/Transcriber

Date: August 5, 2019

EXHIBIT ‘B’

FFCL
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DISTRICT COURT
CLARK COUNTY, NEVADA

JASON GEORGE LANDESS, a/k/a KAY GEORGE LANDESS, an individual,

Plaintiff,

vs.

KEVIN PAUL DEBIPARSHAD, M.D, an individual; KEVIN P. DEBIPARSHAD, PLLC, a Nevada professional limited liability company doing business as "SYNERGY SPINE AND ORTHOPEDICS"; DEBIPARSHAD PROFESSIONAL SERVICES, LLC a Nevada professional limited liability company doing business as "SYNERGY SPINE AND ORTHOPEDICS"; ALLEGIANT INSTITUTE INC., a Nevada domestic professional corporation doing business as "ALLEGIANT SPINE INSTITUTE"; JASWINDER S. GROVER, M.D., an individual; JASWINDER S. GROVER, M.D., Ltd., doing business

CASE NO.: A-18-776896-C
DEPT. NO.: 32
Courtroom 3C

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFF'S MOTION FOR A MISTRIAL

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as "NEVADA SPINE CLINIC"; VALLEY HEALTH SYSTEM, LLC, a Delaware limited liability company doing business as "CENTENNIAL HILLS HOSPITAL"; UHS OF DELAWARE, INC., a Delaware corporation also doing business as "CENTENNIAL HILLS HOSPITAL"; DOES 1-X, inclusive; and ROE CORPORATIONS I-X, inclusive,

Defendant.

****

This matter having come for before the Court on August 5, 2019, on *Plaintiff's Motion for Mistrial;* Plaintiff Jason George Landess, appeared by and through his counsel of record, Martin A. Little, Esq. of Howard & Howard Attorneys PLLC, and James J. Jimmerson, Esq. of Jimmerson Law Firm, P.C. Defendants Kevin Paul Debiparshad, M.D., Kevin P. Debiparshad PLLC d/b/a Synergy Spine and Orthopedics, and Debiparshad Professional Services d/b/a Synergy Spine and Orthopedics, Jaswinder S. Grover, M.D., Ltd. d/b/a Nevada Spine Clinic, appeared by and through their counsel of record, S. Brent Vogel, Esq. and Katherine J. Gordon, Esq. of Lewis Brisbois Bisgaard & Smith LLP.

The Court having reviewed the papers and pleadings on file, having heard oral argument, and being fully advised in the premises, and good cause appearing, hereby Finds, Concludes, and Orders as follows:

FINDINGS OF FACT

1. On Friday, August 2, 2019, during the cross-examination of Plaintiff's witness, Jonathan Dariyanani, counsel for Defendant, Ms. Gordon moved to admit Plaintiff's Exhibit 56, emails produced to Defendant by Jonathan Dariyanani. After Plaintiff made no objection, Ms. Gordon read a highlighted portion from a November 2016 email, at Exhibit 56, page 44.

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2. Specifically, the following questions were asked at Tr. 161:3-162:8:

Q Mr. Dariyanani, you testified earlier that Mr. Landess is a beautiful person in your mind.

Q And you respect him a great deal?

Q And this was, that portion anyway, is consistent with your impression of Mr. Landess for at least the past five years, I believe you said?

Q This is -- I'm going to try to blow it up, but this is an email that Mr. Landess sent to you and it's part of admitted Exhibit 56, dated November 15th, 2016. It's quite long, but the part I'm interested in is Mr. Landess appears to be giving a summary of his prior work experience and some experiences that he has gone through in his life.

Q And the highlighted portion starts, "So I got a job working in a pool hall on weekends." And I'll represent to you, Mr. Landess testified earlier about working in a pool hall.

Q "To supplement my regular job of working in a sweat factory with a lot of Mexicans, and taught myself how to play Snooker. I became so good at it, that I developed a route in East L.A. hustling Mexicans, blacks, and rednecks on Fridays, which was usually payday. From that lesson, I learned how to use my skill to make money by taking risk, serious risk." When you read this, did that change your impression of Mr. Landess at all?

Q Did he sound apologetic in this email about hustling people before?

Q Does it sound to you at all from this email that he's bragging about his past as a hustler, and particularly hustling Mexicans, blacks, and rednecks on payday?

Q He talks about a time when he bought a truck stop here in Las Vegas when the Mexican laborer stole everything that wasn't welded to the ground. You still don't take that as being at all a racist comment?

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3. Immediately following the testimony, outside the presence of the jury, Plaintiff's counsel moved to strike the email and testimony, and placed on the record its concerns that Plaintiff would no longer be able to obtain a fair and unbiased verdict. The Motion to strike was denied, and the Court indicated that counsel could file a trial brief on the issue, but the Court remained concerned that with what the jury had heard, the Court could not be confident in justice being served.

4. After this exchange sank in with the Court, the Court knew it had to deal with this issue. The Court realized that there was an African-American woman on the jury named Adleen Stidhum to whom the parties gave a birthday card during the trial, celebrating her birthday with cupcakes. The Court immediately imagined how she would feel, as well as the other jurors of African-American and/or Hispanic descent.

5. The Court noted that if there had been a motion in limine to preclude the email, the Court would have precluded it as prejudicial. Even under a legal relevancy balancing test, though it might have some relevance as to Plaintiff's character, it would be excluded as prejudicial even if probative or relevant.

6. The Court was concerned regarding how to resolve the situation when Plaintiff, in good faith, did not know that email was in the exhibit that was stipulated to, and Defendants knew and used the email. The Court does not believe Ms. Gordon used the email with an intent to be unethical, but the effect of the same remained a problem that must be resolved.

7. It was enough of an issue that the Court had an off the record meeting with counsel on Friday evening, discussing the same with the parties and exploring whether there was any possibility of settling the case, with a serious specter of a potential mistrial in the air, particularly after two weeks of

substantial effort and cost. The Court offered its comments and thoughts with respect to the case and offered to assist with settlement discussions if the parties desired to pursue the same. The Court offered its belief that Plaintiff had proved its case as to negligence, but that Plaintiff likely would not be awarded all of the damages he was seeking, particularly relating to stock options. The Court noted the costs that were associated with the Trial, and that in the event of a mistrial, those costs, including experts, would need to be incurred again.

8. Plaintiff filed a formal Motion for Mistrial and for Attorneys' Fees and Costs on August 4, 2019, and the Court heard argument from both sides on August 5, 2019 before issuing these Findings.

9. Neither of the parties was present at Friday's conference, and ultimately, Defendant declined to entertain settlement.

10. Factually, prior to trial during the discovery process, it was relevant and necessary to cause Cognotion, the company, through its CEO, Jonathan Dariyanani, to disclose employment-based evidence, whether it was the employment contract or information having to do with the stock options or things that may have led to the employment itself or contemporaneous with the employment itself. It is evident to the Court that that discovery effort on Cognotion's/Mr. Dariyanani's part was taken seriously, because a number of items were disclosed, including emails and the item in question, which was apparently in that batch of items disclosed.

11. It is readily apparent and admitted to, and specifically a finding of fact of this Court, that though the Plaintiff endeavored in the discovery process to disclose to the Defendants the Cognotion documents, and did so, it is fair to conclude that due to the shortness of the discovery timeline and the last minute effort having to do with this damage item, which did take place closer in time to Trial, as well as the extent of the volume of the paperwork disclosed, that

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Plaintiff did not see or know about the content of that email at page 44 of Exhibit 56. This is also likely due to the fact that the represented party, and Mr. Dariyanani, are both also lawyers, and it would be reasonable for Plaintiff's counsel to presume that they had reviewed the documents. Either way, it is clear to the Court that there was a mistake made in failing to notice the document and inadvertently disclosing it and not objecting to it.

12. It is further clear to the Court that the admission of the document was inadvertent because Plaintiff did bring pretrial motions to preclude Mr. Landess' bankruptcies, gambling debt, and litigations as other character evidence. It is clear to the Court that if Plaintiff would have seen this email, he would likewise have brought a pretrial Motion to exclude it.

13. Upon reflection, the Court would have, one hundred percent, absolutely certain, granted a motion in limine to preclude the email referencing "hustling Mexicans, blacks, and rednecks," and where "the Mexican labor stole everything that wasn't welt to the ground." The issue of whether or not Mr. Landess is a racist or not is not relevant, and even if it relevant, if character is an issue, whether he is a racist or not, is more prejudicial than probative. NRS 48.035.

14. When Trial commenced, however, Exhibit 56 was marked and put into one of the many volumes of binders as Plaintiff's Trial Exhibit 56, including page 56-00044, which was part of thousands of pages of potential exhibits submitted by Plaintiff. That exhibit was then offered not by the Plaintiff, but rather by the Defendants, without objection by the Plaintiff to the admission of the entire Exhibit 56, including pages 44-45, on day 10 of the Trial, Friday, August 2, 2019. The Court finds that while Defendant offered a disclosed document that was marked as a Plaintiff's exhibit, 79 pages of emails produced

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by Jonathan Dariyanani directly to Defendant, at the time of the admission, Plaintiff still did not know that email was actually in the exhibit.

15. When Mr. Dariyanani testified, he did testify that Plaintiff was a "beautiful but flawed" person, and that he was trustworthy. The Court finds that did open the door to character evidence, as the issue of character was put into the trial by the Plaintiff. Thus, the Defendants had the ability to offer their own character evidence to try to impeach Mr. Daryanani. The issue, however, was the extent to which that was done and the prejudice Defendant's actions caused.

16. By the email itself, a reasonable person could conclude only one thing, which is that is that the author is racist. The Court is not drawing a conclusion that Mr. Landess is racist, but based upon the words of the email read to the jury, a reasonable conclusion would be drawn that the author of these two paragraphs is racist.

17. The question for the Court, as a matter of law, is whether in this case, which is not an employment discrimination case or anything where the issue of race is clearly an element of the case, can the jury in this civil case consider the issue, even with the opening of the door as to character, of whether Mr. Landess is a racist? The Court finds that the clear answer to that is no, that that is not a basis upon which this jury should or can decide the verdict.

18. The Court finds that it is evident that Defendants had to know that the Plaintiff made a mistake and did not realize this item was in Exhibit 56, particularly because of the motions in limine that were filed by Plaintiff to preclude other character evidence, in conjunction with the aggressiveness and zealousness of counsel throughout the trial. The email was one of the many pages of Exhibit 56 and the Plaintiff did not know about it.

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19. Defendants took advantage of that mistake. Plaintiff confirms that he did not know the email at page 44 was in the group of 79 pages of emails in Exhibit 56, which otherwise all related to Cognotion, and that the same was inadvertently admitted. Once the email was admitted and before the jury, Plaintiff could not object in front of the jury without further calling attention to the email, and because it had been admitted. Once the highlighted language was put before the jury, there was no contemporaneous objection from Plaintiff, nor *sua sponte* interjection from the Court, that could remedy it, as in a matter of seconds, the words were there for the jury to see.

20. Indeed, during the off the record discussion on August 2, 2019, when Mr. Jimmerson initially moved to strike the email, Ms. Gordon stated that she "kept waiting" for the Plaintiff to object to her use of Exhibit 56, page 44, and "when the Plaintiff did not object," the Defendant then went forward to use the email. Mr. Vogel echoed that sentiment on Monday, August 5, 2019, stating "We gave them every opportunity to object to it. Ms. Gordon asked repeated questions before coming to that union. And, yet, I guess it -- it comes down to, you're asking could we have done something to try to remove that. I suppose in hindsight I guess we could have. But I don't think we had to." *Tr. 42:5-9.* The Defendants' statements have led the Court to believe that the Defendants knew that their use of the Exhibit was objectionable, and would be objectionable to the Plaintiff, and possibly to the Court, and nevertheless the Defendants continued to use and inject the email before the jury in the fashion that precluded Plaintiff from being able to effectively respond. In arguing to the Court that they "waited for Plaintiff to object" and that Plaintiff "did nothing about it," Defendants evidence a consciousness of guilt and of wrongdoing. That consciousness of wrongdoing suggests that Defendants and their counsel were the legal cause of the mistrial.

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21. The Court finds that because of the prejudicial nature of the document, Defendants could have asked for a sidebar to discuss the email before showing it to the jury, or redacted the inflammatory words, which may have resulted in usable, admissible, but not overly prejudicial, evidence.

22. When asked whether Defendants believe that the jury could consider whether Mr. Landess is a racist, Ms. Gordon replied that she believes she is "allowed to use impeachment evidence that has not been objected to, and has been admitted into evidence by stipulation," that the "burden should not be shifted" to Defendant "to assist with eliminating or reducing the prejudicial value of that piece of evidence," and that "motive is always relevant in terms of Mr. Landess' reason for setting up" Defendants in Defendants' view of the case. The Defendant confirms that whether Mr. Landess is a racist is something the jury should weigh, that it is admissible, and it is evidence that they should consider. Defendants' counsel made it clear to the Court Defendants' knowing and intentional use of Exhibit 56, page 44.

23. The Court finds that if the document, admitted as Exhibit 56, page 44, where not used with Mr. Dariyanani, but instead was used in closing argument and put before the jury, it would clearly be considered misconduct under the *Lioce* standard. The Court express concerns that using this admitted piece of evidence, Defendant has now interjected a racial issue into the trial.

24. In the Court's view, even if well-intended by the Defendants to cross-examine when character is now an issue, the Defendants made a mistake in now interjecting the issue of racism into the trial. Even now, it appears to the Court that the Defendants' position is that the jury can consider the issue of whether Mr. Landess is a racist or not. With that, the Court disagrees with the Defendants to the fiber of its existence as a person and a judge. Ms. Brazil is an African-American. Ms. Stidhum is an African-American. Upon information

and belief, Mr. Cardoza and Ms. Asuncion are Hispanic. Since we have two African-American jurors and potentially two Hispanic jurors, Defendants' interjecting the issue of Mr. Landess allegedly being a racist into the case was improper.

25. The Court makes a specific finding that under all the circumstances that described hereinabove, they do amount to such an overwhelming nature that reaching a fair result is impossible.

26. The Court further specifically finds that this error prevents the jury from reaching a verdict that is fair and just under any circumstance.

27. The Court further specifically finds that there is no curable instruction which could un-ring the bell that has been rung, especially as to those four jurors, but really with all ten jurors.

28. The Court finds that this decision was, as a result, "manifestly necessary" under the meaning of the law.

29. The Court finds that the fact that the jury has now sat with these comments for the weekend, and particularly in light of the events of this past weekend, with news reports of an individual who drove nine hours across Texas to go to El Paso to kill Mexicans, followed by a shooting in Dayton, Ohio where African Americans were killed, only heightens the need for a mistrial. While these recent events do not focus upon the Court's ruling, the similarity of race and its prejudicial effect cannot be underestimated. It is the Court's strong view that racial discrimination cannot be a basis upon which this civil jury can give their decision regardless, but certainly the events of the weekend aggravated the situation.

30. The Court does not reasonably think that under the circumstances, the jury can give a fair verdict and not base the decision, at least in part, on the issue of whether Mr. Landess is a racist.

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31. While mistakes were made on both sides, the Court must separately determine which side is legally responsible for causing a mistrial, for purposes of considering Plaintiff's request for attorneys' fees and costs. That issue must be separately briefed, with a separate hearing held. Plaintiff made a mistake in not catching the item and stopping its use, but the Defendants made a mistake in using it.

32. If any if these Findings of Fact are more appropriately a Conclusion of Law, so shall they be deemed.

CONCLUSIONS OF LAW

33. The decision to grant a mistrial is within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *Khoury v. Seastrand*, 132 Nev. Adv. Op. 52, 377 P.3d 81, 86 (2016).

34. "A defendant's request for a mistrial may be granted for any number of reasons where some prejudice occurs that prevents the defendant from receiving a fair trial." *Rudin v. State,* 120 Nev. 121, 144, 86 P.3d 572, 587 (2004).

35. A district court may also declare a mistrial sua sponte where inherently prejudicial conduct occurs during the proceedings. See *Baker v. State,* 89 Nev. 87, 88, 506 P.2d 1261, 1261 (1973).

36. The Nevada Supreme Court has held that "[g]reat deference is due a trial judge's decision to declare a mistrial based on his assessment of the prejudicial impact of improper argument on the jury." *Glover v. Eighth Judicial Dist. Court of State ex rel. County of Clark*, 125 Nev. 691, 703, 220 P.3d 684, 693 (2009), as corrected on denial of reh'g (Feb. 17, 2010).

37. This is so "[b]ecause the trial judge is in the advantageous position of listening to the tone and tenor of the arguments and observes the trial presentation firsthand, the trial judge is in the best position to assess the impact

on the jury." *Moore v. State*, 67281, 2015 WL 4503341, at *2 (Nev. App. July 17, 2015) (citing Glover, 165 Nev. at 703, 220 P.3d at 693); see also *Payne v. Fiesta Corp.,* 543 S.W.3d 109, 123 (Mo. Ct. App. 2018) ("We recognize that the trial court is better positioned to assess the prejudicial effect that improper evidence has on the jury.").

38. The Nevada Supreme Court in *Hylton v. Eighth Judicial District* Court, 103 Nev 418, 423, 743 P. 2d 622, 626 (1970) said that a "manifest necessity" to declare a mistrial may arise in situations which there is interference with the administration of honest, fair, even-handed justice to either both, or any of the parties to receive.

39. Only relevant evidence is admissible. "Relevant evidence means evidence which has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." *NRS 48.015*. Here, Defendant's suggestion that Landess is a racist has absolutely no bearing on any fact of consequence in this medical malpractice case. Even if this suggestion had some conceivable relevance, its probative value would be far outweighed by the unfair prejudice that it presents. *See NRS 48.035(1).*

40. Moreover, "character evidence is generally inadmissible in civil cases." *In re Janac*, 407 B.R. 540, 548 (Bankr. S.D.N.Y. 2009). A party may open the door to character evidence when he chooses to place his own good character at issue. *See Newman v. State,* 129 Nev. 222, 235, 298 P.3d 1171, 1180 (2013). However, "[a]n inadvertent or nonresponsive answer by a witness that invokes the [party's] good character . . . does not automatically put his character at issue so as to open the door to character evidence." *Montgomery v. State,* 828 S.E.2d 620, 624 (Ga. Ct. App. 2019) (citing Christopher B. Mueller et al., FEDERAL EVIDENCE § 4:43 (4th ed. updated July 2018) ("It seems

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that if a . . .witness gives a nonresponsive answer that contains an endorsement of the good character of the defendant . . . the [opposing party] should not be allowed to exploit this situation by cross-examining on bad acts or offering other negative character evidence.").

41. Mr. Dariyanani's statement that he believed Landess to be a "beautiful person" was a non-response response to the preceding question, and was a gratuitous addition to his testimony. If Defendants wanted the jury to disregard this statement, their remedy was a simple motion to strike. See *Wiggins v. State*, 778 S.W.2d 877, 892 (Tex. App. 1989) (holding that motion to strike—and not introduction of rebuttal evidence—was proper non-responsive statement from witness attesting to party's good character).

42. Evidence which is admitted may generally be considered for any legal purpose for which it is admissible[.]" *Westland Nursing Home, Inc. v. Benson*, 517 P.2d 862, 866 (Colo App. 1974); see also *Morse Boulger Destructor Co. v. Arnoni,* 376 Pa. 57, 65 (1954) ("[E]vidence may be considered for any purpose for which it is competent."). Evidence may not, however, be considered for an inadmissible purpose, nor may it be used for an improper purpose. Irrelevant evidence is never admissible, and using irrelevant evidence for the sole purpose of causing unfair prejudice is improper.

43. "Waiver requires the intentional relinquishment of a known right." *Nevada Yellow Cab Corp. v. District Court*, 123 Nev. 44, 49, 152 P.3d 737, 740 (2007). "[T]o be effective, a waiver must occur with full knowledge of all material facts." *State, Univ. & Cmty. Coll. Sys. v. Sutton*, 120 Nev. 972, 987, 103 P.3d 8, 18 (2004).

44. In *State v. White,* 678 S.E.2d 33, 37 (W. Va. 2009), the Court concluded that "counsel's failure to object to the introduction of R.C.'s statement cannot be characterized as a knowing and intentional waiver. The

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Appellant's counsel contends that he was unaware of the existence of the final page upon which the reference was contained. In his brief to this Court, Appellant's counsel theorized that the inadvertent admission was likely caused by a clerical error and contends that the copy of the victim statement in Appellant's counsel's file did not include a final page. For purposes of this discussion and based upon the record before this Court, we accept the declaration of Appellant's counsel regarding his lack of knowledge of the existence of the reference to Appellant's status as a sex offender. Assuming such veracity of Appellant's counsel, we must acknowledge that one cannot knowingly and intentionally waive something of which one has no knowledge. *Id., citing State v. Layton,* 189 W.Va. 470, 432 S.E.2d 740 (1993)(with regard to waiver of a right to be present at trial, "the defendant could not waive what he did not know had occurred." 189 W.Va. at 500, 432 S.E.2d at 770).

45. A mistrial is necessary where unfair prejudice is so drastic that a curative instruction cannot correct the damage. *Pope v. Babick*, 178 Cal. Rptr. 3d 42, 50 (2014). In particular, misconduct and inflammatory statements from opposing counsel are sufficient basis for granting a new trial where the district court concludes that they create substantial bias in the jury. See, e.g., *Lioce v. Cohen,* 124 Nev. 1, 17, 174 P.3d 970, 980 (2008); *Commil USA, LLC v. Cisco Sys., Inc.*, 720 F.3d 1361, 1370 (Fed. Cir. 2013), vacated in part on other grounds, 135 S. Ct. 1920 (2015).

46. The appellate court additionally reasoned that it would not substitute its judgment for that of the district court, "whose on-the-scene assessment of the prejudicial effect, if any, carries considerable weight." *Id.* at 1371 (citing *United States v. Munoz*, 150 F.3d 401, 415 (5th Cir.1998).

47. Raising irrelevant and improper character evidence at issue taints the entire trial. *Coastal Oil & Gas Corp. v. Garza Energy Tr.*, 268 S.W.3d 1,

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26 (Tex. 2008) (affirming grant of new trial where a memorandum referencing "illiterate Mexicans" was "never used . . . in any relevant way [except] to create unfair prejudice.").

48. *State vs. Wilson*, 404 So.2d 968, 970, La. 1981, holds that where a party's reference to race raises such a sensitive matter that a single appeal to racial prejudice furnishes grounds for a mistrial, a mere admonition to the jury to disregard the remark is insufficient.

49. The caselaw is repetitive with that notion of "manifest necessity," defined in cases that talk about the concept of mistrial or even new trial, as "a circumstance, which is of such an overwhelming nature that reaching a fair verdict is impossible. It is a circumstance where an error occurs, which prevents a jury from reaching a verdict." *See, e.g. Glover v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, 125 Nev. 691, 220 P.3d 684 (2009), as corrected on denial of reh'g (Feb. 17, 2010). That case stands mostly for the proposition that the trial judge has to have the power to declare a mistrial in appropriate cases. The Court finds that this is the appropriate case, which is an easy decision for this Court on the merits, though the decision itself was difficult.

50. The Court finds that *Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008) further provides guidance to the Court with respect to evidence that was not objected to.

51. The Court provided the example that if Exhibit 56, which was in evidence, was put up in closing, that under the definition given by the Supreme Court of misconduct in the *Lioce* case, that likely that that would be seen as misconduct. Whether it is with Mr. Dariyanani or whether it is in closing argument, or both, it is clear that Defendants are urging the jury to at least in part, render the verdict based upon race, based upon Mr. Landess allegedly being a racist, based upon something that is emotional in nature. The idea,

fairly, was to ask the jury to give the Defendants the verdict, whether it is the whole verdict or reducing damages, because Mr. Landess is allegedly a racist. That is impermissible.

52. Even if true, the law does not allow for that in this context. It is not a fair verdict, not a fair trial, not a fair result to decide the case because the jury believes someone is racist, rather than on the merits of the case, particularly since this case is not about race.

53. The *Lioce* case is instructive regarding the concept of unobjected to evidence, in this case being the admitted exhibit. There, the Nevada Supreme Court said "When a party's objection to an improper argument is sustained and the jury is admonished regarding the argument, that party bears the burden of demonstrating that the objection and admonishment could not cure the misconduct's effect." The Court continues, "The non-offending attorney," which in this case would be the Plaintiff's side, "is placed in a difficult position of having to make objections before the trier of fact, which might cast a negative impression on the attorney and the party the attorney represents emphasizing the improper point." This is consistent with Mr. Jimmerson's explanation about why the document was not objected to after it was put up before the jury.

54. While this is a request for a mistrial and not a new trial, the *Lioce* case provides guidance as to unobjected to evidence. The Nevada Supreme Court said "The proper standard for the district court to use when deciding in this context a motion for new trial based upon unobjected to attorney misconduct, is as follows: 1) the district court shall first conclude that the failure to object is critical and the district court must treat the attorney misconduct issue as have been waived unless plain error exists." In this case, though the Plaintiff acquiesced in the admittance of Exhibit 56, and though the Plaintiff did not

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contemporaneously object when Ms. Gordon put the item up, a plain error review still has to be held.

55. *Lioce* states: "In deciding whether there is plain error, the district court must then determine whether the complaining party met its burden of demonstrating that its case is a rare circumstance in which the attorney misconduct amounted to irreparable and fundamental error." Here, it is the Court's specific finding that this did result in irreparable and fundamental error.

56. The Supreme Court continued that irreparable and fundamental error is, "Error that results in a substantial impairment of justice or denial of fundamental rights such that but for the misconduct, the verdict would have been different." The Court finds that this provides guidance, and that this bell is one that cannot be unrung. Even if the Court had granted a motion to strike, there is no curative instruction which would cause the jury, particularly the four members earlier referenced, to now disregard the author's racial discriminatory comments.

57. With *Lioce* as guidance, which discusses arguments that should not be made as "attorney misconduct," you do not have to have bad intent to make an argument that amounts to attorney misconduct. It could be a mistake where counsel says something in a closing argument that by definition under the law is misconduct, for purposes of an improper closing argument, without it being ethical misconduct. Here, the impact of putting up evidence that implies that Mr. Landess is a racist in front of a jury in a medical malpractice case makes it impossible now, after all the effort, to have a fair trial.

58. "A claim of misconduct cannot be defended with an argument that the misconduct was unintentional. Either deliberate or unintentional misconduct can require that a party receive a new trial. The relevant inquiry is what impact the misconduct had on the trial, not whether the attorney intended

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the misconduct." Lioce v. Cohen, 124 Nev. 1, 25, 174 P.3d 970, 985, 2008 Nev. LEXIS 1, *44 (2008).

59. In *Lioce,* Mr. Emerson was referred to the bar, and in *Lioce,* as well as *Emerson v. Eighth Judicial District Court,* 127 Nev. 672, 263 P.3d 224 (2011), the Supreme Court noted that argument could be given without any bad intent, but yet be seen as "misconduct" if it makes a fair verdict impossible. The Court does not believe that Defendant's counsel, here, had bad intent, but did not fully realize the impact their actions could have on the fair disposition of the case.

60. If any if these Conclusions of Law are more appropriately a Finding of Fact, so shall they be deemed.

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ORDER

NOW, THEREFORE:

IT IS HEREBY ORDERED that *Plaintiff's Motion for Mistrial* is hereby GRANTED. The jury is dismissed, and a new Trial shall be scheduled.

IT IS FURTHER ORDERED that Plaintiff's Motion for Attorneys' Fees and Costs is hereby deferred until hearing on September 10, 2019 at 1:30 p.m. Defendants shall have until August 19, 2019 to file an Opposition to Plaintiff's request for attorneys' fees and costs, and Plaintiff shall have until September 3, 2019 to file a Reply.

Dated this 9 day of Sept, 2019.

DISTRICT COURT JUDGE
ROB BARE
JUDGE, DISTRICT COURT, DEPARTMENT 32

Submitted by:
JIMMERSON LAW FIRM, P.C.

9/4/19

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Attorneys for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

JASON GEORGE LANDESS, a/k/a KAY GEORGE LANDESS, an individual,

Plaintiff,

vs.

KEVIN PAUL DEBIPARSHAD, M.D, an individual; KEVIN P. DEBIPARSHAD, PLLC, a Nevada professional limited liability company doing business as "SYNERGY SPINE AND ORTHOPEDICS"; DEBIPARSHAD PROFESSIONAL SERVICES, LLC a Nevada professional limited liability company doing business as "SYNERGY SPINE AND ORTHOPEDICS"; ALLEGIANT INSTITUTE INC., a Nevada domestic professional corporation doing business as "ALLEGIANT SPINE INSTITUTE"; JASWINDER S. GROVER, M.D., an individual; JASWINDER S. GROVER, M.D., Ltd., doing business as "NEVADA SPINE CLINIC"; VALLEY HEALTH SYSTEM, LLC, a Delaware limited liability company doing business as "CENTENNIAL HILLS HOSPITAL"; UHS OF DELAWARE, INC., a Delaware corporation also doing business as "CENTENNIAL HILLS HOSPITAL"; DOES 1-X, inclusive; and ROE CORPORATIONS I-X, inclusive,

Defendant.

CASE NO.: A-18-776896-C
DEPT. NO.: IV
Courtroom 12D

ORDER CLARIFYING PRIOR "ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR ATTORNEYS' FEES AND COSTS"

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This matter having come for before the Court on the parties' respective briefing on the Court's prior *Order Granting In Part Plaintiff's Motion for Attorney's Fees and Costs,* and *Plaintiff's Motion for Clarification and/or Amendment of the Order Granting in Part Plaintiff's Motion for Attorney's Fees and Costs*, filed March 27, 2020, April 10, 2020, and April 23, 2020, and the Court having advised on April 27, 2020 that it was vacating the hearing on the matter scheduled for April 30, 2020 due to Covid-19 and having taken the issue under submission to be decided on the papers, and the Court having reviewed the papers and pleadings on file, Briefs, transcripts, and exhibits, and being fully advised in the premises, and good cause appearing:

NOW THEREFORE:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Clarification and/or Amendment for Attorneys' Fees and Costs is hereby GRANTED.

IT IS FURTHER ORDERED that the reasonable and necessarily incurred costs of $118,606.25 awarded to Plaintiff was against Defendants, and not against the law firm of Defendants.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants shall pay to Plaintiff on or before July __, 2020, the sum of $118,606.25, in good funds, plus interest from April 7, 2020 to the date of payment. Upon being paid, Plaintiff in turn can then pay the costs associated with the retrial in this matter or reimburse himself, as the case may be.

Dated this _____ day of July, 2020.

Dated this 23rd day of July, 2020

DISTRICT COURT JUDGE

3E9 827 3B71 796D
Kerry Earley
District Court Judge

Respectfully Submitted:

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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Jason Landess, Plaintiff(s) vs. Kevin Debiparshad, M.D., Defendant(s)	CASE NO: A-18-776896-C DEPT. NO. Department 4

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 7/23/2020

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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 CLARIFYING PRIOR "ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR ATTORNEYS' FEES AND COSTS"

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Please take notice that an Order Clarifying Prior "Order Granting in Part Plaintiff's Motion for Attorneys' Fees and Costs" was entered in the above-captioned action on July 23, 2020 a copy of which is attached hereto.

Dated this 24th day of July, 2020.

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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 24 day of July, 2020, I served a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER CLARIFYING PRIOR "ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR ATTORNEYS' FEES AND COSTS"**, as indicated below:

_X_ by electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk;

To the individual(s) or attorney(s) listed below at the address, email address, and/or facsimile number indicated below:

S. Brent Vogel, Esq.
John Orr, Esq.
Katherine Gordon, Esq.
Lewis Brisbois Bisgaard & Smith LLP
6385 S. Rainbow Boulevard, Suite 600
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Attorneys for Defendants, Kevin Paul Debiparshad, M.D., Kevin P. Debiparshad PLLC d/b/a Synergy Spine and Orthopedics, Debiparshad Professional Services d/b/a Synergy Spine and Orthopedics, and Jaswinder S. Grover, M.D., Ltd. dba Nevada Spine Clinic

An employee of The Jimmerson Law Firm, P.C.

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DISTRICT COURT
CLARK COUNTY, NEVADA

JASON GEORGE LANDESS, a/k/a KAY GEORGE LANDESS, an individual,

Plaintiff,

vs.

KEVIN PAUL DEBIPARSHAD, M.D, an individual; KEVIN P. DEBIPARSHAD, PLLC, a Nevada professional limited liability company doing business as "SYNERGY SPINE AND ORTHOPEDICS"; DEBIPARSHAD PROFESSIONAL SERVICES, LLC a Nevada professional limited liability company doing business as "SYNERGY SPINE AND ORTHOPEDICS"; ALLEGIANT INSTITUTE INC., a Nevada domestic professional corporation doing business as "ALLEGIANT SPINE INSTITUTE"; JASWINDER S. GROVER, M.D., an individual; JASWINDER S. GROVER, M.D., Ltd., doing business as "NEVADA SPINE CLINIC"; VALLEY HEALTH SYSTEM, LLC, a Delaware limited liability company doing business as "CENTENNIAL HILLS HOSPITAL"; UHS OF DELAWARE, INC., a Delaware corporation also doing business as "CENTENNIAL HILLS HOSPITAL"; DOES 1-X, inclusive; and ROE CORPORATIONS I-X, inclusive,

Defendant.

CASE NO.: A-18-776896-C
DEPT. NO.: IV
Courtroom 12D

ORDER CLARIFYING PRIOR "ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR ATTORNEYS' FEES AND COSTS"

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Case Number: A-18-776896-C

This matter having come for before the Court on the parties' respective briefing on the Court's prior *Order Granting In Part Plaintiff's Motion for Attorney's Fees and Costs,* and *Plaintiff's Motion for Clarification and/or Amendment of the Order Granting in Part Plaintiff's Motion for Attorney's Fees and Costs*, filed March 27, 2020, April 10, 2020, and April 23, 2020, and the Court having advised on April 27, 2020 that it was vacating the hearing on the matter scheduled for April 30, 2020 due to Covid-19 and having taken the issue under submission to be decided on the papers, and the Court having reviewed the papers and pleadings on file, Briefs, transcripts, and exhibits, and being fully advised in the premises, and good cause appearing:

NOW THEREFORE:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Clarification and/or Amendment for Attorneys' Fees and Costs is hereby GRANTED.

IT IS FURTHER ORDERED that the reasonable and necessarily incurred costs of $118,606.25 awarded to Plaintiff was against Defendants, and not against the law firm of Defendants.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants shall pay to Plaintiff on or before July __, 2020, the sum of $118,606.25, in good funds, plus interest from April 7, 2020 to the date of payment. Upon being paid, Plaintiff in turn can then pay the costs associated with the retrial in this matter or reimburse himself, as the case may be.

Dated this _____ day of July, 2020.

Dated this 23rd day of July, 2020

DISTRICT COURT JUDGE

3E9 827 3B71 796D
Kerry Earley
District Court Judge

Respectfully Submitted:

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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Jason Landess, Plaintiff(s)	CASE NO: A-18-776896-C
vs.	DEPT. NO. Department 4
Kevin Debiparshad, M.D., Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

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DISTRICT COURT

CLARK COUNTY, NEVADA

JASON GEORGE LANDESS a.k.a. KAY GEORGE LANDESS, as an individual,

Plaintiff,

vs.

KEVIN PAUL DEBIPARSHAD, M.D., an individual; KEVIN P. DEBIPARSHAD PLLC, a Nevada professional limited liability company doing business as "SYNERGY SPINE AND ORTHOPEDICS", DEBIPARSHAD PROFESSIONAL SERVICES LLC, a Nevada professional limited liability company doing business as "SYNERGY SPINE AND ORTHOPEDICS", ALLEGIANT INSTITUTE INC. a Nevada domestic professional corporation doing business as "ALLEGIANT SPINE INSTITUTE"; JASWINDER S. GROVER, M.D. an individual; JASWINDER S. GROVER, M.D. Ltd doing business as "NEVADA SPINE CLINIC"; VALLEY HEALTH SYSTEM LLC, a Delaware limited liability company doing business as "CENTENNIAL HILLS HOSPITAL", UHS OF DELAWARE, INC. a Delaware corporation also doing business as "CENTENNIAL HILLS HOSPITAL", DOES 1-X, inclusive; and ROE CORPORATIONS I-X, inclusive,

Defendants.

CASE NO. A-18-776896-C
Dept. No. 32

ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATION AND ORDER DENYING PLAINTIFF'S COUNTERMOTION FOR ATTORNEY'S FEES

LEWIS BRISBOIS BISGAARD & SMITH LLP ATTORNEYS AT LAW

This matter came before the Court on 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, filed on June 9, 2020; and Plaintiff's Opposition to Defendants' Kevin Paul Debiparshad, M.D., et al.'s Motion for Reconsideration of Order Denying Defendants' Motion for Relief from Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial and Request for Attorney's Fees, filed on June 23, 2020.

This Court, having reviewed the matter, including all points and authorities and exhibits hereby DENIES Defendants' Motion for Reconsideration, and DENIES Plaintiff's Countermotion for Attorney's Fees, based on the following:

E.D.C.R. 2.24(b) states that a party seeking reconsideration of a ruling of the court must file a motion for such relief within 14 days after service of written notice of the order. A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous. *Masonry & Tile Contractors Assn of S. Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 7471, 941 P.2d 486, 489 (1997). Only in very rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached should a motion for rehearing be granted. *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976).

THE COURT FINDS that Defendants have not raised any new issues of fact or law, have not introduced substantially different evidence, and this Court's prior decision is not clearly erroneous. Therefore, there is no legal basis to grant Defendants' Motion for Reconsideration.

Attorney fees are discretionary. *County of Clark v. Blanchard Constr. Co.*, 98 Nev. 488, 492, 653 P.2d 1217, 1220 (1982). A party may seek attorney fees when allowed by an agreement, rule, or statute. *O'Connell v. Wynn Las Vegas*, LLC, 134 Nev. 550, 429 P.3d 664 (2018). Attorney fees are not recoverable absent a statute, rule or contractual provision to the contrary. *Rowland v. Lepire*, 99 Nev. 308, 315, 662 P.2d 1332, 136 (1983) citing *Locken v. Locken*, 98 Nev. 369, 650 P.2d 803 (1982); *Von Ehrensmann v. Lee*, 98 Nev. 335, 647 P. 2d 377 (1982).

THE COURT FINDS there is no legal basis to award Plaintiff attorney fees.

Therefore, IT IS HEREBY ORDERED that Defendants' Motion for Reconsideration is DENIED. IT IS HEREBY FURTHER ORDERED that Plaintiff's Countermotion for Attorney's Fees is DENIED.

IT IS SO ORDERED.

DATED this _____ day of August, 2020,

Dated this 5th day of August, 2020

DISTRICT COURT JUDGE
37A 0FE 6B2D FAE5
Kerry Earley
District Court Judge

Respectfully Submitted by:
LEWIS BRISBOIS BISGAARD & SMITH, LLP

/s/ S. Brent Vogel
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Approved as to Form and Content by:

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