**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 9

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## CERTIFICATE OF MAILING

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

The Honorable Kerry Earley
The Eighth Judicial District Court
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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' MOTION FOR RELIEF FROM FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFF'S MOTION FOR A MISTRIAL**

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' Motion for Relief From Findings of Fact, Conclusions of

Law, and Order Granting Plaintiff's Motion for a Mistrial.

This Opposition 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 13th day of March, 2020.

HOWARD & HOWARD ATTORNEYS PLLC

*/s/Alexander Villamar*

By: _____

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## MEMORANDUM OF POINTS AND AUTHORITIES

## I.

## INTRODUCTION

Plaintiff vigorously opposed the continuance of the trial in part because he knew that it would provide eight more months for Defendants to file more frivolous motions like this one, thereby creating more needless work for Plaintiff's counsel and for the Court. Such fatuous motions have been a hallmark of Defendants' strategy from the outset. Defendants' counsel strained the limits of Judge Bare's patience with such tactics, culminating in a mistrial because of Katherine Gordon's ("Ms. Gordon") misconduct regarding intentionally injecting highly inflammable material into the deliberative process. Unfortunately, with a fresh forum to operate in, the beat goes on.

Characterizing the Subject Motion as "frivolous" and "fatuous" is not magniloquence or hyperbole. It is a perfectly accurate description of a motion that defies logic and common sense; one that ignores not only this Court's recent explanation of the Court's position on attempting to function as a reviewing court for another District Court Judge, but contravenes black letter law on several fronts.

For example—and as explained and documented with legal authorities in greater detail below—this Motion to essentially impose a gag order on Plaintiff and his counsel is fatally flawed because:

(1) The Motion is founded *solely* upon NRCP Rule 60(b), which affords a litigant relief only from a "final" order, judgment, or proceeding; but an order granting a mistrial is by its very nature an interlocutory order because it envisions further judicial proceedings—namely, another trial;

(2) By its clear and express language, relief under Rule 60 only applies to "judgments, orders, or proceedings." Judge Rob Bare's Findings of Fact (which is the only thing

from which Defendants seek relief) is not a judgment, order, or proceeding. Relief under Rule 60 does not thus apply to findings of fact. And Defendants' counsel surely knows that because they just provided to this Court a recent unpublished decision from the Nevada Supreme Court, and they highlighted the language that clearly states that findings of fact are not appealable;

(3) This Court recently explained to Defendants' counsel that District Court Judges with concurrent jurisdiction are precluded by law from arbitrarily functioning as reviewing judges for other District Court Judges, noting that there is legal authority to that effect and that this Court recently dealt with that very issue. That rule of law is rudimentary and easily discoverable;

(4) Defendants essentially seek a gag order from this Court prohibiting Plaintiff and his counsel from "relying upon, citing, or using" any of the language contained in Judge Bare's Findings of Fact. Such a gag order on trial participants is unconstitutional, not to mention unenforceable; and

(5) Courts are not in the business of issuing futile and meaningless orders. The entry of an order is indeed a ministerial act memorializing the rendered order. The failure to reduce an order, and factual findings supporting that order, to writing for entry upon the court records does not erase the historical fact of the actual order and findings made by a judge exercising his or her discretion. Even if this Court were to ignore all of the aforementioned legal reasons for summarily denying this Motion and grant Defendants' request to strike Judge Bare's signature from his Order and Findings of Facts, that would not invalidate his actual order and findings rendered *before* the Defendants' Motion for Disqualification was filed. If that were to occur, Plaintiff and his counsel could simply rely upon, cite to, and use the language of that order and findings contained in the trial transcripts. They could also cite to this Court's identical findings

in the December 13, 2019 Minute Order granting $118,606.25 in costs to Plaintiff as a sanction for Ms. Gordon's misconduct by intentionally and purposefully causing a mistrial. So the granting of Defendants' spurious Motion would therefore accomplish nothing, other than invite Defendants to make more frivolous and fatuous motions.

The Motion is replete with misstatement of facts. One of the most glaring examples is Defendants' ongoing, plaintive complaint that Judge Bare did not give them an adequate opportunity to respond to Plaintiff's mistrial motion. While that prevarication is tangential to the dispositive issues, Plaintiff nevertheless herein provides a detailed explanation of what really transpired so that this Court can witness first-hand such underhanded tactics—the hope being that the Court will forthwith put a stop to it.

## II.

## STATEMENT OF RELEVANT FACTS

The continued criticism and disparagement of Judge Bare may provide some titillating catharsis to Defendants' counsel. But they succeeded in disqualifying him. So that chapter is over. Plaintiff thus elects to not dignify their ongoing smear campaign against Judge Bare with a response. Suffice it to say that it is a sad day in Nevada jurisprudence if a judge is subject to disqualification and stigmatization for complimenting an attorney.

The only relevant facts are the procedural events involving Judge Bare's rendering and subsequent memorialization of his Order, Findings of Fact, and Conclusions of Law (hereinafter the "Order & FOF"), together with this Court's issuance of its Minute Order of December 13, 2019.

After Ms. Gordon irreparably infected the proceedings with her racial comments and questions, Judge Bare excused the jury for the weekend and, after expressing his deep concern for what had just happened, denied Plaintiff's motion to strike Ms. Gordon's comments. The

jury was excused for the weekend. On Sunday, August 4, 2019, Plaintiff filed a motion for mistrial and for fees and costs.

On Monday, August 5, 2019, Judge Bare granted Plaintiff's mistrial motion and consumed 70 pages of trial transcript[1] articulating a basis for that decision.

Defendants filed a Motion to Disqualify Judge Bare on August 23, 2019, just short of three weeks after Judge Bare rendered the Order & FOF.

The memorialized Order & FOF that was provided to Defense counsel, which they refused to sign, carefully tracked Judge Bare's oral rulings and findings from the August 5th hearing and was thus submitted to Judge Bare's court on September 4, 2019. Judge Bare signed it on September 9, 2019; and it was filed the same day, along with three other orders. Interestingly, one of those three orders was an order denying Plaintiff's motion to strike certain last-minute disclosures and to strike the supplemental report of one of Defendants' witnesses, Stuart Miles.

Defendants' motion to disqualify was granted; and the case was thus reassigned to this Court on September 17, 2019. To date, this Court has initially set the case for retrial; heard and ruled upon Plaintiff's motion for attorney's fees and costs; and reset the case for trial commencing August 17, 2020. The Court has before it the Subject Motion and competing orders regarding the awarding of $118,606.25 in costs to Plaintiff as a sanction for Ms. Gordon's misconduct by intentionally and purposefully causing a mistrial.

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[1] August 5, 2019, Transcript of Jury Trial (Exhibit 1).

## III.

## ARGUMENT

**A. NRCP Rule 60(b) Only Provides Relief from a "Final" Order, Judgment or Proceeding. And Judge Bare's Order & FOF is Interlocutory.**

Defendants' Motion states that they "move under N.R.C.P. 60(b) for relief from the Court's Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial filed on September 9, 2019."[2] Nevada's rule is modeled after, and almost identical to, F.R.C.P. Rule 60. And "[f]ederal cases interpreting the Federal Rules of Civil Procedure 'are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts.'"[3]

By its express language, Rule 60(b)'s provides: "On motion and just terms, the court may relieve a party or its legal representative from a **final** judgment, order, or proceeding . . . ."[4] Subparagraph 4 of that rule states that one form of relief is to declare a judgment void, which is *precisely* what Defendants are asking this Court to do with Judge Bare's Order & FOF. Defendants cannot thus argue that they are seeking some form of relief other than that afforded by Rule 60(b).

The Order & FOF[5] is styled: "Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for Mistrial." It is thus indisputable that Defendants seek an order from this Court ruling that the Order & FOF is void. That, however, is impermissible because "[r]ule 60(b) is applicable only to 'final' judgments."[6] And, precisely on point: "**The granting**

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[2] Subject Motion at p.2, lines 2-4. *See also* p. 14, lines 20-21.

[3] *Exec. Mgmt. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 2002 Nev. LEXIS 5, *15 (2002), *citing Las Vegas Novelty v. Fernandez*, 106 Nev. 113, 119, 1990 Nev. LEXIS 15, *11 (1990).

[4] *Id.* (emphasis supplied).

[5] Exhibit C to the Subject Motion.

[6] *Lowe v. McGraw-Hill Cos.*, 361 F.3d 335, 343, 2004 U.S. App. LEXIS 4815, *21 (7th Cir. 2004); *Phillips v. Sheriff of Cook Cnty.*, 828 F.3d 541, 559 (7th Cir. 2016) (Rule 60(b) is, by its terms, limited to final judgments or orders, and it is not applicable to interlocutory orders); *Kapco Mfg. Co. v. C & O Enterprises, Inc.*, 773 F.2d 151, 153-54 (7th Cir. 1985); *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 880 (9th Cir.

**of a motion for a mistrial is not a final order which terminates the litigation on the merits and leaves nothing to be done but to enforce by execution what has been determined.**"[7]

Citing Professors Wright and Miller, Our High Court recently acknowledged that an order vacating a judgment ordering a new trial is an interlocutory order and not appealable. The Court endorsed this statement found in Wright & Miller: "An order that vacates a judgment and sets the stage for further trial court proceedings is not final."[8] The same is true for an order issued under authority of Rule 60(b) for vacating a trial due to fraud: "The district court's order granting Fallini's NRCP 60(b) motion for fraud upon the court was interlocutory and not appealable."[9]

There is no functional difference between orders issued under purported authority of Rule 60(b) for vacating a trial for fraud upon the court or one granting a motion for a mistrial. They both envision a future trial. Indeed, the Order & FOF expressly declares that more things had to be done—namely, the rescheduling of a trial and the determination of a motion for fees and costs. So it is virtually impossible to argue in good faith that the Order & FOF is not an interlocutory order. And that deficiency alone is absolutely dispositive of this Motion.

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2000); *Greene v. Union Mutual Life Ins. Co. of America*, 764 F.2d 19, 22 (1st Cir. 1985). *See, generally*, 12 Moore's Federal Practice - Civil § 60.23 at p.4.

[7] *Esneault v. Waterman S.S. Corp.*, 449 F.2d 1296, 1297, 1971 U.S. App. LEXIS 7423, *1 (5th Cir. 1971) (emphasis supplied); *Fox v. Lewis*, 344 S.W.2d 731, 734, 1961 Tex. App. LEXIS 2167, *3-4 (Tex. App. 1961) ("[An] order declaring a mistrial is an interlocutory order and not appealable." *Id.* at 734, *3-4); *Fielder v. Chandler*, 131 So. 3d 630, 2013 Ala. Civ. App. LEXIS 101 (Ct. App. Ala. 2013) ("An order granting a mistrial . . . is an interlocutory order." *Id.* at fn. 3).

[8] *TRP Int'l, Inc. v. Proimtu MMI LLC*, 391 P.3d 763, 765, 2017 Nev. LEXIS 23, *4 (2017), *quoting* Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3916 (2d ed. 1992 and Supp. 2017).

[9] *Estate of Adams v. Fallini*, 386 P.3d 621, 624, 2016 Nev. LEXIS 724, *4 (2016).

**B. NRCP Rule 60(b) Only Provides Relief from a "Final" Order, Judgment or Proceeding. It Does Not Provide Relief from Findings of Fact. And Defendants' Counsel Know It. Yet They Filed This Frivolous Motion Anyway.**

Defendants are compelled to admit that this Court cannot re-empanel the jury and put the parties back to *status quo ante*. That is no concession because it is patently obvious. So they gravitate instead to the Findings of Fact, urging this Court to void the Order and, by doing so, automatically void the underpinnings of the Order. In other words, if they cannot effectively challenge the Order, then just attack the Findings of Fact. That, however, is an even more specious argument than the first because, without question, Defendants' counsel know better.

And here is why they do: After this case was reassigned, this Court asked the parties to try and narrow the issues by stipulating to what previous rulings by Judge Bare would stand. Defendants, however, would not stipulate to *anything* of substance, claiming that the granting of a mistrial effectively "erased" all of Judge Bare's prior rulings and that they were therefore entitled to relitigate everything.

That disagreement prompted a Status Hearing on December 17, 2019. At that hearing, Defendants' counsel, Brent Vogel ("Mr. Vogel), first raised the issue of offset regarding the $118,606.25 in costs that this Court awarded to Plaintiff. The Court noted that that issue was not then before the Court and urged Mr. Vogel to bring it up later when considering such matters as whether or not a judgment should be entered and whether or not a stay of execution would issue.

However, on February 25, 2020, Defendants submitted a proposed order regarding the December 17th hearing under cover of a letter that disingenuously represented that this Court had entered a "Minute Order" declaring that the $118,606.25 sanctions award was subject to offset. Appalled over such a fabrication, Plaintiff's counsel, James Jimmerson ("Mr. Jimmerson"), immediately prepared and submitted a letter, with attachments, dated February

28, 2020[10] to the Court, explaining what had actually transpired at the December 17th hearing. Mr. Jimmerson also submitted a competing order regarding that hearing.

On March 2, 2020, Mr. Vogel submitted another letter[11] to this Court expounding upon Nevada's "final judgment rule." He explained how in Nevada only final—not interlocutory—orders are appealable. And he attached, and highlighted, three Nevada cases he alleged supported his position.

Ironically, one of those Nevada Supreme Court cases, *Goudie v. Packard-Keane*,[12] held that, "The July 18, 2017, findings of fact and conclusions of law holding appellant in contempt for violating the mutual behavior order and the August 9, 2017, order awarding attorney fees as a sanction, are not appealable."[13] Putting that in context, Defendants' counsel currently has before this Court letters and pleadings that are wholly inconsistent on the issue of finality. Regarding the sanctions order, Defendants' counsel urges this Court to not enter a judgment because it is not final, claiming it is interlocutory. But when the shoe is on the other foot, he claims that Judge Bare's Order & FOF, which is *clearly* interlocutory, is final and thus subject to challenge under Rule 60(b).

The *Goudie* decision makes it absolutely clear findings of fact and conclusions of law are not final determinations subject to challenge by a reviewing court. And that decision is in accord with this more recent ruling from Our High Court: "The findings of fact and recommendations entered by the district court on April 3, 2019, is not a final judgment because it contemplates further dispositional proceedings."[14] Judge Bare's Order & FOF likewise contemplated further dispositional proceeds, one of which has already occurred in this Court:

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[10] Exhibit 2.
[11] Exhibit 3.
[12] 2017 Nev. Unpub. LEXIS 1085, 406 P.3d 959 (an unpublished disposition, Docket No. 73962, November 30, 2017).
[13] *Id.* at *1.
[14] *In re G. L.*, 2019 Nev. Unpub. LEXIS 1082, *1, 449 P.3d 473 (an unpublished disposition, Docket No. 79287, September 30, 2019).

the motion for fees and costs. It is therefore absurd to characterize the Order & FOF as a "final" judicial determination.

This Court understands this issue and carefully explained it to Defendants' counsel at the December 5, 2019 hearing on the motion for fees and costs. Towards the end of that hearing, Defendants' counsel interjected the notion that, due to the mistrial, this Court was free to revisit, reject, and/or revise Judge Bare's Findings of Fact at will. This Court disagreed:

> THE COURT: Okay, so wait a minute, are you saying to me I'm not bound by these finding of -- how could I -- how could I possibly say that? This is what the judge signed. Whether you agree with it or not, is it not signed by him? I'm -- now I'm confused.
>
> MR. VOGEL: Your Honor, you're not bound by any of the orders that Judge Bare signed.
>
> THE COURT: **Yes I am**.
>
> MR. VOGEL: No, you're –
>
> THE COURT: **It's -- it's the precedent of the case. I've actually seen research on –**
>
> MR. VOGEL: Your Honor, I -- I can cite to you right now –
>
> THE COURT: **I -- I disagree**.

*P. 67, lines 1-12 of Recorder's Transcript of Proceedings on December 5, 2019* (exhibit 4) (emphasis supplied).

Defendants' counsel was provided with the Plaintiff's draft of the Order, Findings of Fact, and Conclusions of Law before it was submitted to Judge Bare. But they refused to sign it. And they opted to not submit a competing Order, Findings of Fact, and Conclusions of Law, choosing instead to file the Motion for Disqualification. Notwithstanding the foregoing, Ms. Gordon weighed in with an argument at that same hearing that Defendants were prejudiced because Judge Bare purportedly just rubber-stamped Plaintiff's proposed document, implying

that Judge Bare abandoned his judicial duties to review and understand what he was signing. This Court animatedly reacted to that offensive suggestion as follows:

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

*P. 68, line 23 thru p.69, line 11 of Recorder's Transcript of Proceedings on December 5, 2019* (exhibit 4).

Towards the end of the hearing, the Court made it crystal clear that it was going to review relevant Nevada case law and decide the issue of sanctions based on the Court's own conclusions without changing anything Judge Bare said or did:

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

*P. 114, lines 11-15 of Recorder's Transcript of Proceedings on December 5, 2019* (exhibit 4) (emphasis supplied).

And that is exactly what this Court did, resulting in the December 13, 2019, Minute Order, which in pertinent part reads "that the Defendant, pursuant to N.R.S. 18.070(2), purposefully caused the mistrial in this case to occur due to the Defendant knowingly and intentionally injecting into the trial evidence of racism by the use of Exhibit 56, page 44." *Id.*

There is no meaningful distinction between Judge Bare's finding that Defendants and their counsel possessed a consciousness of wrongdoing that led to his finding that they were the legal cause of the mistrial, and this Court's independent finding that Defendants purposefully caused the mistrial due to the same basic mindset.

Yet despite those two independent, comparable conclusions by two very competent jurists, Defendants and their counsel have ignored all of the forgoing admonitions by this Court, as well as the relevant legal authorities, so they could file one more frivolous and fatuous motion. In doing so, they incredibly urge this Court to do what it recently said it would not do (delve into and change Judge Bare's findings and conclusions), and to also do what it cannot as a matter of law do (serve as a reviewing court over another District Court Judge, which is explained in the next following point).

**C. A District Court Judge Does Not Have Jurisdiction To Serve As A Reviewing Court For Another District Court Judge.**

The Subject Motion requests that this Court invalidate Judge Bare's Order & FOF by declaring it void so that Plaintiff and his counsel can no longer rely upon, cite to, or use it. That would involve examining the record and applying the law to essentially rebuke Judge Bare by setting aside the Order & FOF. That, however, is beyond the power of a court with concurrent jurisdiction. How Defendants' counsel can in good faith make such a request when numerous cases decided by the Nevada Supreme Court prohibit such action is beyond comprehension: "Ordinarily, one district court lacks jurisdiction to review the acts of other district courts."[15] "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**. *See* Nev. Const. art. 6, § 6; NRS 3.220; *Warden v. Owens*, 93 Nev. 255, 563 P.2d 81 (1977)."[16] Citing to

[15] *Maiola v. State*, 120 Nev. 671, 676, 2004 Nev. LEXIS 101, *11 (2004).
[16] *Rohlfing v. Second Judicial Dist. Court*, 106 Nev. 902, 906, 1990 Nev. LEXIS 164, *7 (1990) (emphasis supplied).

*Rolfing*, Our High Court stated: "[A] true example of conflicting jurisdiction arises when one district court judge, equal in jurisdiction to another, attempts to overrule another district judge's prior determination **purporting to nullify the force and effect of the prior judge's decision**."[17]

And in explaining its *Rolfing* decision with language directly on point, Our High Court stated: "We . . . concluded in *Rohlfing* that a district judge had exceeded his jurisdiction when he, *sua sponte*, **entered an order declaring another judge's order void**."[18] After reviewing still another relevant case[19], the Court further explained that, "Thus, under the above cases, one **district court generally cannot set aside another district court's order**."[20] Yet that is *precisely* what Defendants are unapologetically asking this Court to do.

A perfect illustration of the impropriety of one district court attempting to function as a reviewing court for another district court is Defendants' paradoxical citation to the California case of *Christie v. City of El Centro,* 37 Cal. Rptr. 3d 718, 725 (Cal. Ct. App. 2006). While that case indeed discusses what a trial judge may or may not do once disqualified, what is most notable is that it is the *California Court of Appeals* conducting a review of the trial court's decisions, *not another trial court judge*. That case, therefore, is completely supportive of all the aforementioned decisions of Our High Court.

Again, this single point is completely dispositive of the Subject Motion.

**D. Defendants' Reliance Upon N.R.S. § 1.235 is Misplaced Because the Honorable Judge Jerry E. Weiss, II Did Not Disqualify Judge Bare Under that Statute.**

Defendants' entire argument is premised upon the language in N.R.S. § 1.235(5), which provides that after an affidavit of prejudice is filed pursuant to that statute "the judge against whom an affidavit alleging bias or prejudice is filed shall proceed no further with the matter

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[17] *Colwell v. State*, 112 Nev. 807, 813, 1996 Nev. LEXIS 99, *11 (1996) (emphasis supplied).
[18] *State Eng'r v. Sustacha*, 108 Nev. 223, 225, 1992 Nev. LEXIS 50, *4-5 (1992) (emphasis supplied).
[19] *Warden, Nev. State Prison v. Owens*, 93 Nev. 255, 1977 Nev. LEXIS 529 (1977).
[20] *State Eng'r, supra,* at 226, *5 (emphasis supplied).

and shall [reassign the case]." *Id.* However, Ms. Gordon's and Mr. Vogel's Affidavits and Certificates In Compliance With N.R.S. 1.235 filed in connection with the motion to disqualify were superfluous, irrelevant documents because that statute requires that any motion filed must be filed "(a) Not less than 20 days before the date set for trial or hearing the case; or (b) Not less than 3 days before the date set for the hearing of any pretrial matter." *Id.* at subparagraph 1.

Based upon equitable considerations, in 1997 the Nevada Supreme Court in *Oren v. Department of Human Resources*, 113 Nev. 594, 1997 Nev. LEXIS 65 (1997) upheld a late filing of a motion for disqualification under § 1.235(1). But that decision was overruled by Our High Court in *Towbin Dodge, L.L.C. v. Eighth Judicial Dist.*, 121 Nev. 251, 2005 Nev. LEXIS 31 (2005) ("[O]ur decision in *Matter of Parental Rights as to Oren* is overruled to the extent that it held the disqualification affidavit in that case timely under NRS 1.235. *Id.* at 261). Now, all such motions must be filed in accordance with the timelines contained in § 1.235(1). Defendants' motion to disqualify Judge Bare, *filed after a mistrial*, was therefore untimely under that statute. *Towbin Dodge* at 256.

Nevertheless, "[I]f new grounds for a judge's disqualification are discovered after the time limits in NRS 1.235(1) have passed, then a party may file a motion to disqualify based on [the NCJC] as soon as possible after becoming aware of the new information."[21] Defendants' counsel obviously knew that their motion was untimely under authority of § 1.235, which is why they instead filed their motion under authority of Nevada's Code of Judicial Conduct: "Defendants seek disqualification of Judge Bare premised on his violation of N.C.J.C. 1.2, 2.2, and 2.11."[22]

Moreover, Judge Weiss disqualified Judge Bare not under § 1.235, but under N.C.J.C 2.11 because, although he found no evidence of actual bias or impropriety, he determined that

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[21] *Schiller v. Fid. Nat'l Title Ins. Co.*, 2019 Nev. Unpub. LEXIS 805, *10-11 (Filed July 15, 2019) (unpublished disposition and emphasis original), citing to *Towbin Dodge* at 260.

[22] P.21, lines 27-28 of Defendants' Motion to Disqualify Judge Bare attached hereto as Exhibit 5.

Judge Bare's compliment of Ms. Jimmerson created a situation where the theoretical "reasonable person" hearing that compliment would harbor reasonable doubts about Judge Bare's impartiality, thus finding "implied bias."[23]

There is nothing in the Nevada Cannons of Judicial Conduct that grafts the statutory language, or specific procedures, of § 1.235 into those Cannons. Defendants are simply trying to bootstrap § 1.235's procedures (which govern pre-trial motions) into a post-trial motion under Nevada's Cannons of Judicial Conduct.

**E. Judge Bare's Reduction of Judicial Determinations to Writing Done Before Defendants Filed the Motion to Disqualify Was a Ministerial Act.**

But even if this Court were to ignore all the above-stated legal reasons for denying this Subject Motion, and opt instead to delve into Judge Bare's conduct, all the Court would find is that after Defendants filed their Motion Judge Bare: (1) Reduced prior judicial determinations to writing; (2) Took the hearing for attorney's fees and costs off calendar; and, (3) Filed an Affidavit and an Amended Affidavit under authority of § 1.235(6) in connection with the motion to disqualify. The first two are ministerial (or "housekeeping") acts. The post-disqualification-motion action is statutorily authorized if this Court believes § 1.235 has any relevance whatsoever.

Defendants acknowledge that even under a § 1.235 analysis a filed affidavit of prejudice does not prohibit a judge from performing "housekeeping" tasks. That, in fact, is stated quite clearly by Our High Court in *In re A Writ of Prohibition Or in the Alternative for a Writ of Mandamus* ("*Whitehead*"), 920 P.2d 491, 1996 Nev. LEXIS 1545 (1996) ("[A] disqualified judge may not issue any orders or rulings other than of a 'housekeeping' nature in a case in which he or she is disqualified." *Id.* at 503, *43). Without citing any authority to support their

[23] P.33 of Judge Weiss' Order disqualifying Judge Bare attached hereto as Exhibit 6. *See also* p.31 of that Order which makes is clear that Judge Weiss' ruling was based upon N.C.J.C 2.11.

position, Defendants cavalierly conclude that, "Judge Bare's Order cannot be interpreted as a "housekeeping" matter as allowed by the *Whitehead* Court."[24]

However, that is not true. In discussing this very issue, the Supreme Court of Virginia recently explained the difference between the rendering of a judgment and the ministerial act of entering that judgment on the record: "The 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."[25] Judge Bare thus "rendered" his decision on the Order & FOF when he carefully explained the basis of his ruling and orally pronounced that ruling on August 5, 2019, approximately 3 weeks before Defendants filed their motion to disqualify Judge Bare. Judge Bare's entry of the document memorializing his ruling and findings is nothing more than a ministerial (or, to use the *Whitehead's* Court word, "housekeeping") act. A disqualified judge may indeed sign orders that "[are] ministerial or [contain] no discretionary element."[26]

That is the only logical option. For if the converse were true and, for example, a judgment or a final order was actually rendered but was not, for whatever reason, reduced to writing, that would mean there would be no judgment or final order. That would give rise to ludicrous appeals, such as a criminal being convicted by a jury for robbery but able to appeal

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[24] Subject Motion at p.14, lines 10-11.

[25] *Lewis v. Commonwealth*, 295 Va. 454, 465, 2018 Va. LEXIS 64, *13 (2018) (citation to other Virginia decisions omitted).

[26] *In re Estate of Risovi*, 429 N.W.2d 404, 407, 1988 N.D. LEXIS 248, *11 (1988). The Supreme Court of North Dakota cited to this language from *American Jurisprudence*: "**Disqualification of a judge to hear and decide a case suspends his powers only so far as discretionary action in the case is concerned. Thus, the disqualification of a judge to hear and determine a cause does not prevent him from making orders that are purely formal in character, or from performing merely ministerial duties in no way connected with the trial**, such as arranging the calendar or regulating the order of business. Under this view, he is not disqualified from certifying to a transcript of a judgment rendered by his predecessor, or administering an oath. He may make such formal orders as are necessary to the maturing or the progress of the cause, or to bring the suit to a hearing and determination before a qualified judge, or another court having the jurisdiction, and may carry out the provisions of an order of remand from a higher tribunal." Am. Jur. 2nd *Judges* § 230 (emphasis supplied).

and overturn that conviction if the judge presiding over the case inadvertently failed to sign the judgment of conviction. The Virginia Supreme Court addressed this anomaly in *Lewis*: "Courts prefer written orders memorializing judgments in other cases for their evidentiary value, but they are not required when the judgment can be established by other proof."[27]

The "other proof" would be something like the transcript or video recording of the proceeding. So in this case, if this Court were to grant Defendants' request and declare the written Order & FOF void, that order would not extinguish the reality of Judge Bare's rendering and oral pronouncement of his Order & FOF on August 5, 2019. In order to perfectly accomplish what Defendants are requesting, this Court would have to travel back in time to keep Judge Bare from exercising and articulating his rulings, which obviously is absurd.

The point is that on August 5, 2019—long before Defendants filed their motion to disqualify and even longer before Judge Weiss determined that Judge Bare created an appearance of impropriety by complimenting Mr. Jimmerson—Judge Bare exercised his judicial discretion and not only declared a mistrial, but went to great lengths to explain his findings and reasons for doing so. The *only* way Defendants' motion would have any traction would be for them to be able to demonstrate what Judge Bare signed on September 9, 2019, substantially deviated from his oral pronouncements from the bench. But that cannot do that because the written Order & FOF track the transcript.

In addition, Our High Court has ruled that, "The district court's oral pronouncement from the bench, the clerk's minute order, and even an unfiled written order are ineffective for any purpose and cannot be appealed."[28] So should this Court grant Defendants' request to declare Judge Bare's written Order & FOF void, how do Defendants think they can then appeal

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[27] *Lewis, supra,* at 465, 14.
[28] *Rust v. Clark County Sch. Dist.*, 103 Nev. 686, 689, 1987 Nev. LEXIS 1888, *4 (1987).

his decision to declare a mistrial if all that is left is Judge Bare's oral pronouncement? Moreover, if Judge Bare's mistrial order is declared void, then what authority did this Court have to proceed with a hearing for fees and costs related to that mistrial or even reschedule another trial? These questions simply demonstrate the nonsensical nature of Defendants' Subject Motion.

**F. The Order Defendants Seek Would Be Futile and Unenforceable.**

"The law does not require a person to do an impossible thing."[29] And courts certainly are not in the business of issuing futile and unenforceable orders. Yet the Subject Motion requests that this Court enter an order preventing Plaintiff and his counsel from "relying up, citing to, or using" Judge Bare's Order & FOF by declaring it void. It is essentially a request for a gag order.

But how does declaring Judge Bare's written Order & FOF void prevent Plaintiff and his counsel from relying upon, citing to, or using Judge Bare's oral pronouncements memorialized in the trial transcript? Would this Court also declare Judge Bare's oral pronouncements void? Would this Court, for example, also seal the trial transcript and forbid Plaintiff and his counsel to look at it? If so, how would that prevent them from simply relying upon, citing to, or using *this Court's* comparable findings regarding the $118,606.25 sanctions Order? What exact words and/or phrases would they be prevented from relying up, citing to, or using? How long would that prior restraint on speech last? What would they have to do or say in order to be in violation of this Court's order? Quite simply, how could such a vague—and patently unconstitutional—order be enforced?

Fortunately, this Court need not spend more wasted time on such puzzling issues because the Subject Motion is fatally defective on anyone of a number of grounds described

[29] *First Nat'l Bank v. Meyers*, 40 Nev. 284, 292, 1916 Nev. LEXIS 56, *15 (1916).

above. Plaintiff nevertheless is compelled to point these things out to highlight the frivolous and fatuous nature of the Subject Motion.

**G. In For a Penny, In For a Pound.**

In conclusion, as the renowned American writer, poet laureate Seanan McGuire wrote: "Forgive them for their little dreams; They know not what they ask."[30] That quotation nicely frames Defendants' apparent indifference to the far-reaching legal ramifications of what they are asking this Court to do. For example, since void means void, any order issued on the premise that whatever actions Judge Bare took after he complimented Mr. Jimmerson on August 2, 2019 were *void ab initio*, would mean that not only was his mistrial order invalid, but also all other orders he signed the same day would be void including, but not limited to, the order denying Plaintiff's motion to exclude late-filed exhibits and the motion to strike the first supplemental report of Defendants' key medical expert, Dr. Miles Gold. After all, how could this Court invalidate one order Judge Bare entered on the record on September 9, 2019 without invalidating *all* orders entered that same day?

Secondly, if Judge Bare's mistrial order is declared a nullity, how then can this Court's sanction order for costs stand if this Court enters an order stating that legally a mistrial never occurred?

Thirdly, how would that order impact Judge Weiss' disqualification order? Why should Judge Bare be disqualified for making a complimentary statement if there is no legal consequence (the granting of a mistrial) resulting from that statement?

Fourthly, as briefly mentioned above, in order to fully accomplish what Defendants are seeking—namely, the inability of Plaintiff to rely upon, cite to, or use Judge Bare's Order & FOF—is this Court going to also order the trial transcripts sealed?

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[30] Poem *Masquerade* by Seanan McGuire (Written December, 2008).

Fifthly, since Ms. Gordon is disturbed over Plaintiff's previous citation to her misconduct described by Judge Bare, would this Court allay her worries by ordering that Plaintiff and his counsel are also prohibited from relying upon, citing to, or using such language contained in *this Court's* December 13, 2019 Minute Order as follows: "Defendants' counsel is charged with knowing that the injection of such racially inflammatory evidence was improper in the trial." How is that language any less damning than Judge Bare's language? Ms. Gordon may choose to deflect and embellish all she wants, but according to Our High Court in *Lioce* and *Emerson* attorney misconduct is attorney misconduct despite the absence of specific intent.

Finally, how do the Defendants intend to appeal Judge Bare's mistrial order if this Court voids that Order & FOF? After all, as noted above, oral orders are not appealable in Nevada. And that is all that would be left if Judge Bare's written order is stricken from the record.

These issues further underscore the frivolous and fatuous nature of the Subject Motion.

## III.

## CONCLUSION

For the foregoing reasons, Defendants' Motion should be denied in its entirety.

Dated this 13th day of March, 2020.

**HOWARD & HOWARD ATTORNEYS PLLC**

*/s/Alexander Villamar*

By: _____

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***Attorneys for Plaintiff***

## CERTIFICATE OF SERVICE

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

On this day I served the **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR RELIEF FROM FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFF'S MOTION FOR A MISTRIAL** 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:

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*d/b/a Synergy Spine and Orthopedics, and*
*Jaswinder S. Grover, M.D., Ltd. dba Nevada Spine Clinic*

I certify under penalty of perjury that the foregoing is true and correct, and that I executed this Certificate of Service on March 13, 2020, at Las Vegas, Nevada.

*/s/ Jill M. Berghammer*

An Employee of Howard & Howard Attorneys PLLC

# EXHIBIT 1

# EXHIBIT 1

Electronically Filed
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Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

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|---|---|
| JASON LANDESS,<br>Plaintiff(s),<br>vs.<br>KEVIN DEBIPARSHAD, M.D.,<br>Defendant(s). | CASE#: A-18-776896-C<br>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.<br>JAMES J. JIMMERSON, ESQ. |
| For Defendant Jaswinder S. Grover, MD Ltd: | STEPHEN B. VOGEL, ESQ.<br>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 2

# EXHIBIT 2

THE JIMMERSON LAW FIRM
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

James J. Jimmerson*
James M. Jimmerson
Ofelia Markarian, Esq.
Amanda J. Brookhyser, Esq.

*ALSO ADMITTED IN CALIFORNIA
**MEMBER, NATIONAL TRIAL LAWYERS TOP 100 LAWYERS
***MARTINDALE-HUBBELL "AV" PREEMINENT
**SUPER LAWYERS BUSINESS LITIGATION
**STEPHEN NAIFEH "BEST LAWYERS"
**RECIPIENT OF THE PRESTIGIOUS ELLIS ISLAND MEDAL OF HONOR, 2012
**FELLOW, AMERICAN ACADEMY OF MATRIMONIAL LAWYERS
**DIPLOMAT, AMERICAN COLLEGE OF FAMILY TRIAL LAWYERS
**FAMILY LAW SPECIALIST, NEVADA STATE BAR

February 28, 2020

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

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

Dear Judge Earley:

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

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

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

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

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

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

MR. VOGEL: Right.

**THE COURT: The order comes before the judgment --**

MR. JIMMERSON: Correct, Your Honor.

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

MR. VOGEL: So --

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

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

THE COURT: Right.

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

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

MR. VOGEL: Yeah.

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

MR. VOGEL: Okay.

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

MR. VOGEL: Very good.

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

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

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

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

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

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

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

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

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

Sincerely,
THE JIMMERSON LAW FIRM, P.C.

James J. Jimmerson, Esq.
JJJ/sp

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

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

**December 13, 2019** **09:00 AM** **Minute Order**

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

**COURT CLERK:** Jacobson, Alice

**RECORDER:**

**REPORTER:**

**PARTIES PRESENT:**

**JOURNAL ENTRIES**

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

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

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

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

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

Counsel for Plaintiff to prepare the Order.

**DISTRICT COURT**
**CLARK COUNTY, NEVADA**

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

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

**December 17, 2019** **09:00 AM** **Status Check**

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

**COURT CLERK:** Jacobson, Alice

**RECORDER:** Gomez, Rebeca

**REPORTER:**

**PARTIES PRESENT:**

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

**JOURNAL ENTRIES**

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

Electronically Filed
1/29/2020 6:16 PM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

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

BEFORE THE HONORABLE KERRY EARLEY,
DISTRICT COURT JUDGE

TUESDAY, DECEMBER 17, 2019

***RECORDER'S TRANSCRIPT OF PROCEEDINGS***
***STATUS CHECK***

APPEARANCES:

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

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

RECORDED BY: REBECA GOMEZ, COURT RECORDER

Las Vegas, Nevada, Tuesday, December 17, 2019

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

THE COURT: Good morning. All right.

MR. JIMMERSON: Morning, Your Honor.

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

MR. JIMMERSON: James Jimmerson on behalf --

THE COURT: Okay.

MR. JIMMERSON: -- of Mr. Landess.

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

THE COURT: Good morning.

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

THE COURT: Okay, and --

MR. LITTLE: -- for Mr. Landess.

THE COURT: -- Mr. Vogel?

MR. VOGEL: Good morning.

THE COURT: Good morning.

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

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

MS. GORDON: Thank you.

THE COURT: Katherine Gordon.

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

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

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

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

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

MR. VOGEL: The 2nd --

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

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

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

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

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

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

THE COURT: Are you?

MR. JIMMERSON: I think so.

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

MR. VOGEL: The 3rd?

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

THE COURT: On --

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

THE COURT: On the 2nd.

MR. JIMMERSON: -- on the 2nd.

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

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

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

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

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

MR. JIMMERSON: Second works.

THE COURT: Second?

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

MS. GORDON: (Indiscernible) fine.

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

THE CLERK: This for motion in limines?

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

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

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

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

THE COURT: Oh perfect.

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

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

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

MR. JIMMERSON: Your Honor --

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

THE MARSHAL: We may, Judge.

THE COURT: We may?

THE MARSHAL: (Indiscernible) --

THE COURT: I hope so.

MR. JIMMERSON: I --

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

MR. VOGEL: Oh no.

MR. JIMMERSON: Oh boy.

MR. VOGEL: Kim?

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

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

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

MR. JIMMERSON: We --

THE MARSHAL: No you're not.

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

THE COURT: Yes. Oh, I --

MR. JIMMERSON: I'm sorry.

THE COURT: Tell her yes.

THE MARSHAL: Okay.

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

THE MARSHAL: Yes.

THE COURT: -- please.

THE MARSHAL: Okay.

THE COURT: Okay?

THE MARSHAL: We will.

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

THE MARSHAL: Yeah, they --

THE COURT: I don't --

THE MARSHAL: -- they called --

THE COURT: What do we do on closings?

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

THE COURT: Okay, will you ask about closings?

Okay, I apologize.

MS. GORDON: Oh that's okay.

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

MR. VOGEL: Oh.

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

MR. JIMMERSON: Wow.

THE COURT: Look at my staff's like.

MS. GORDON: Yeah.

THE COURT: Now --

MR. JIMMERSON: Your Honor --

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

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

THE COURT: Okay.

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

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

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

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

MS. GORDON: And I think --

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

MS. GORDON: It does, and I --

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

okay?

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

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

MR. JIMMERSON: -- confer seriously --

THE COURT: Okay.

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

THE COURT: Substantive.

MR. JIMMERSON: -- will be hefty --

THE COURT: Okay.

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

THE COURT: I'll just extend it.

MR. JIMMERSON: Okay, and --

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

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

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

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

THE CLERK: The 27th of --

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

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

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

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

MS. GORDON: Last --

MR. VOGEL: Well, we had --

THE COURT: Your last trial.

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

THE COURT: Kind of.

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

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

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

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

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

MR. VOGEL: Don't apply.

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

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

MR. JIMMERSON: Sounds good, Your Honor.

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

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

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

THE COURT: Right.

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

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

MR. VOGEL: Because that --

THE COURT: It makes a difference.

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

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

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

MR. JIMMERSON: Correct --

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

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

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

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

THE COURT: Which is the attorneys.

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

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

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

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

MR. VOGEL: Okay.

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

MR. VOGEL: Okay.

THE COURT: I did not do the law firm.

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

THE COURT: Sure.

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

THE COURT: Okay.

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

THE COURT: You have an issue.

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

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

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

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

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

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

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

MR. VOGEL: Well --

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

MR. VOGEL: Right.

THE COURT: The order comes before the judgment --

MR. JIMMERSON: Correct, Your Honor.

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

MR. VOGEL: So --

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

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

THE COURT: Right.

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

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

MR. VOGEL: Yeah.

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

MR. VOGEL: Okay.

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

MR. VOGEL: Very good.

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

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

MR. LITTLE: Thank you.

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

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

* * * * * *

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

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

# EXHIBIT 3

# EXHIBIT 3

LEWIS BRISBOIS

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March 2, 2020

File No 27428.336

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

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

Dear Judge Earley:

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

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

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

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

Very truly yours,

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

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

133 Nev. 213
Supreme Court of Nevada.

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

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

**Synopsis**

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

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

Affirmed.

See also 268 P.3d 1272.

West Headnotes (6)

[1] **Child Support**
International Issues

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

1 Cases that cite this headnote

[2] **Child Support**
International Issues

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

1 Cases that cite this headnote

[3] **Contempt**
Decisions reviewable

An order that solely concerns contempt is not appealable.

5 Cases that cite this headnote

[4] **Contempt**
Decisions reviewable

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

8 Cases that cite this headnote

[5] **Child Support**
Decisions reviewable

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

6 Cases that cite this headnote

[6] **Child Support**
Assignment of errors and briefs

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

2 Cases that cite this headnote

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

**Attorneys and Law Firms**

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

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

BEFORE THE COURT EN BANC.

*OPINION*

By the Court, DOUGLAS, J.:

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

*FACTS AND PROCEDURAL HISTORY*

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

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

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

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

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

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

## *DISCUSSION*

*Whether the Nevada child support order controls*

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

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

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

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

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

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

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

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

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

*Whether this court lacks jurisdiction to consider the contempt challenges*

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

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

## *CONCLUSION

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

We concur:

Cherry, C.J.

Gibbons, J.

Pickering, J.

Hardesty, J.

Parraguirre, J.

Stiglich, J.

**All Citations**

133 Nev. 213, 396 P.3d 791

End of Document

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

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

No. 73962
FILED NOVEMBER 30, 2017

**Attorneys and Law Firms**

Ryan Ulysses Goudie

Walsh & Friedman, Ltd.

*ORDER DISMISSING APPEAL*

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

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

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

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

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

We lack jurisdiction, and we therefore

ORDER this appeal DISMISSED. [1]

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

**All Citations**

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

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

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

No. 72953
|
FILED: OCTOBER 30, 2017

**Attorneys and Law Firms**

Law Offices of Kermitt L. Waters

The Jimmerson Law Firm, P.C.

*ORDER DISMISSING APPEAL*

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

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

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

We lack jurisdiction, and we therefore

ORDER this appeal DISMISSED.

**All Citations**

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

# EXHIBIT 4

# EXHIBIT 4

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

**RTRAN**

DISTRICT COURT

CLARK COUNTY, NEVADA

JASON LANDESS,

Plaintiff,

vs.

KEVIN DEBIPARSHAD, ET AL.,

Defendants.

CASE#: A-18-776896-C

DEPT. IV

BEFORE THE HONORABLE KERRY EARLEY,
DISTRICT COURT JUDGE

THURSDAY, DECEMBER 5, 2019

***RECORDER'S TRANSCRIPT OF PROCEEDINGS***

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

APPEARANCES:

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

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

RECORDED BY: REBECA GOMEZ, COURT RECORDER

Las Vegas, Nevada, Thursday, December 5, 2019

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

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

MR. JIMMERSON: Understand, Your Honor.

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

MR. JIMMERSON: Debiparshad, Your Honor.

MR. VOGEL: Debiparshad.

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

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

THE COURT: Okay.

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

THE COURT: Okay. All right.

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

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

THE CLERK: Yes.

THE COURT: Okay.

MR. JIMMERSON: -- and my Bar number is 264.

MR. JAMES JIMMERSON: 1255 -- 12599, Your Honor.

MR. JIMMERSON: Mr. Little?

MR. LITTLE: 7067.

THE COURT: Okay.

MR. JIMMERSON: And also note the presence of --

THE COURT: All right.

MR. JIMMERSON: -- the Plaintiff, Jason Landess as being present as well.

THE COURT: Okay.

MR. VOGEL: Good morning, Your Honor.

THE COURT: Yes.

MR. VOGEL: Brent Vogel and Katherine Gordon on behalf of Dr. Debiparshad.

THE COURT: Okay. All right. So what I have is plaintiff's motion for attorney's fees and costs and then defendants did their countermotion for attorney's fees and costs. Okay. And further I -- I've read everything in the notebooks, I read the order by Judge Wiese that granted the mistrial, so I'm ready to go. Once again I'm -- I'm sorry this happened. This -- this -- this is tough.

Okay. I'm ready so I'm going to let plaintiffs go first. It's their motion for attorney's fees and costs. I looked at the legal standard that you're asking for it under is NRS 18.070 Subsection 2 or also you're saying that the -- that a court has an inherent power under the *Emerson* case, and there's some other cases that support that too, that costs and attorney's fees can be granted by a court or given by a court for -- as a

sanction for a litigation.

MR. JIMMERSON: That's correct, Your Honor.

THE COURT: Correct?

MR. JIMMERSON: That's correct.

THE COURT: Okay. I've got -- okay. Because I always want to start with my standard and what I'm looking at.

MR. JIMMERSON: There are two separate bases as the Court noted --

THE COURT: Yes. Okay.

MR. JIMMERSON: -- NRS 18.070 Sub 2 and the *Lioce versus Eighth Judicial District Court* and *Emerson versus Eighth* --

THE COURT: Right.

MR. JIMMERSON: -- *Judicial District Court* cases, and for purposes of the calculation of attorney's fees and costs, we have stayed within the parameters of the *Emerson* case in particular. That is to say we only sought to seek from you an award of attorney's fees and costs that begin on the first day of trial and conclude on the last morning of trial which was Monday morning, August 5, 2019. We don't ask for any attorney's fees or costs incurred prior to the first day of trial, nor after the court declared the mistrial approximately noon on Monday, the August 5, 2019.

THE COURT: Okay, I -- I did take note of that.

MR. JIMMERSON: And that is what the measure in the *Emerson* case used --

THE COURT: It says that.

MR. JIMMERSON: -- as its damages --

THE COURT: I agree with that. I read the *Emerson* case and I agree with you.

MR. JIMMERSON: And --

THE COURT: So you're not asking for all your prep and everything before --

MR. JIMMERSON: That's right.

THE COURT: -- and neither are they asking for it on their countermotion so you're both on the same page on that and I agree with that.

MR. JIMMERSON: That's right, and just to complete that, the fees for that time period were $253,383.50 and the out-of-pocket costs $118,608.25 --

THE COURT: Oh I have $606.25. Did I --

MR. JIMMERSON: Six hundred six dollars. One eighteen six-oh-six --

THE COURT: Right, okay.

MR. JIMMERSON: -- point two five for a total of 371,989.70.

THE COURT: Correct. I have that.

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

First, with the Court, and I know because I've worked with the Court before that the Court has read the documents that you say you have done and --

THE COURT: I --

MR. JIMMERSON: -- I -- I just would ask you to call your

attention to the findings of fact and conclusions of law and order granting plaintiff's motion for a mistrial --

THE COURT: Okay. But let me --

MR. JIMMERSON: -- filed stamped on September 9th of 2019, entered by --

THE COURT: Okay.

MR. JIMMERSON: -- Judge Bare. This order was --

THE COURT: I thought Judge Wiese wrote the order. Did he just -- I -- I --

MR. VOGEL: He -- he wrote the order disqualifying Judge Bare.

THE COURT: Oh that's right. Okay, I'm so sorry I read it all -- thank you. Okay.

MR. JIMMERSON: No problem. And -- and --

THE COURT: I got it. Yes.

MR. JIMMERSON: -- and the -- the --

THE COURT: When he granted the mistrial.

MR. JIMMERSON: That's right.

THE COURT: Okay.

MR. JIMMERSON: And then Judge Wiese in granting the defendants' motion for change of counsel or motion to disqualify --

THE COURT: Judge Bare.

MR. JIMMERSON: -- Judge Bare nevertheless affirmed the --

THE COURT: Correct.

MR. JIMMERSON: -- or the findings of fact conclusions of law

that you have before you --

THE COURT: And that's why it was in my head because I -- he went through it just as much in Judge Wiese so that's --

MR. JIMMERSON: That's right.

THE COURT: -- what I reviewed again. Okay, I -- thank you for --

MR. JIMMERSON: And as part of his analyzing the defendants' challenge of Judge Bare and the allegation that Judge Bare was not fair to the parties, he went back and looked at all of the key underlying orders and found that Judge Bare had acted properly and within his bounds of discretion and in accordance with the law as Judge Wiese determined to be.

THE COURT: Okay. All right.

MR. JIMMERSON: But it's important for you to as a bedrock to know what Judge Bare as a -- as essentially affirmed by Judge Wiese found in the findings because it bears upon the issue of essentially liability granting one of the two motions --

THE COURT: Well, who was the cause of the mistrial. Yes.

MR. JIMMERSON: Exactly.

THE COURT: Okay.

MR. JIMMERSON: And the way that Judge Bare structured it and you'll see it also by Judge Wiese, who was the legal cause of the mistrial being granted -- being requested by the plaintiff and granted by the judge.

THE COURT: Okay. I agree with that.

MR. JIMMERSON: And that is I think a fundamental issue that you will have to decide to grant on either motions that are --

THE COURT: Correct.

MR. JIMMERSON: -- that are competing motions before you. All right. The significant highlights and I'm not -- they're extensive, there's more than 50 findings of fact conclusions of law here and order so I'm not going to go through all of them by any means, but I -- there's a couple that are I think --

THE COURT: Okay.

MR. JIMMERSON: -- more significant. And again because of the welter of papers that both sides supplied to you and because of the sizable amount of money involved, both parties have expended a good deal of time and effort to articulate their positions.

At paragraph 20, the court made a specific finding that by virtue of communications and -- and discussions on the record and off the record but transcripts we provided as exhibits to our motion, it is clear the court finds that Ms. Gordon and Mr. Vogel, counsel, of Lewis Brisbois on behalf of Dr. Debiparshad, recognized -- or that their actions were intentional to use the burning -- we call the burning --

THE COURT: Burning embers I -- I --

MR. JIMMERSON: -- embers email. And so you understand just again for illustrative purposes, Exhibit 56 Proposed is -- is a document of 79 pages in length --

THE COURT: Yeah, I -- I think I put down seventy -- I thought I put down 121 --

MR. JIMMERSON: Seventy-five.

THE COURT: -- but it doesn't matter.

MR. JIMMERSON: It was Bate stamped beginning at 56001 --

THE COURT: Okay.

MR. JIMMERSON: -- and the last page that's Bate stamped --

THE COURT: I have 122 pages. Did I do that wrong?

MR. JIMMERSON: -- is 560079.

THE COURT: Okay.

MR. JIMMERSON: So there's 79 pages --

THE COURT: Seventy-nine pages, okay.

MR. JIMMERSON: And --

THE COURT: My understanding these came via subpoena from his employer?

MR. JIMMERSON: Correct.

THE COURT: Okay.

MR. JIMMERSON: And page 44 and 45 are the two page burning embers email that is the subject matter of the court's granting the motion for mistrial. So when you hear both opposing counsel and us in our papers say Exhibit 56, page 44, we're referring --

THE COURT: I'll get it.

MR. JIMMERSON: -- to the same document and I have also brought a copy of that email for you separately in addition to, you know, the overall exhibit, but it was Bate stamps number 56 dash --

THE COURT: Okay.

MR. JIMMERSON: -- 44 and 45.

THE COURT: Okay.

MR. JIMMERSON: All right.

THE COURT: Okay, so you told me to look at paragraph 20.

MR. JIMMERSON: Right.

THE COURT: Thank you for giving this I have --

MR. JIMMERSON: So as part --

THE COURT: -- I have your papers all over.

MR. JIMMERSON: Right. Let me just begin by saying paragraph 18 --

THE COURT: Eighteen. Okay, I -- I put down 20 but I'm with you.

MR. JIMMERSON: Right, on -- and we'll go to 20 next is --

THE COURT: Okay.

MR. JIMMERSON: -- the court -- one -- one of the -- one of the -- one of the factors I think Judge Bare fairly stated -- was looking at was how did the introduction of the burning embers exhibit which had the allegations that Mr. or the evidence that the defendants tried to introduce the jury that Mr. Landess was a racist, how did it come to be. And by virtue of both examining counsel for the defendant as evidenced by the transcript and of course by the actual actions of the defendant in terms of having the document admitted into evidence and its use of it --

THE COURT: Right.

MR. JIMMERSON: -- the court at paragraph 18 found --

THE COURT: Okay.

MR. JIMMERSON: -- that the -- that the defendants and their counsel in particular knew of that which they were doing. In other words, what they were doing was an intentional act on their part to have this document shown to the jury. The court specifically --

THE COURT: Well, wasn't it put on the ELMO or something like that --

MR. JIMMERSON: That's right.

THE COURT: -- or the overhead? So I --

MR. JIMMERSON: That's right. The court found that is evident the defendants had to know that the defendant had made a mistake and did not realize this item was in Exhibit 56, particularly because of the motions in limine that were filed by the plaintiff to preclude other character evidence in conjunction with the aggressiveness and zealousness of counsel throughout the trial. The email was one of the many pages of Exhibit 56 and the plaintiffs did not know about it.

Then paragraph 18 --

THE COURT: Okay, so Judge Bare finds that in his opinion the defendants had to know that the plaintiff -- okay.

MR. JIMMERSON: That's right. And paragraph 19, the next one just said defendants took advantage of that mistake. Plaintiff's confirmed that he did not know the email at page 44 was -- was a --

THE COURT: Oh.

MR. JIMMERSON: -- was in the group of 79 --

THE COURT: You're right --

MR. JIMMERSON: -- pages of emails in Exhibit 56 which otherwise all related to Cognotion, which was the former employer's name --

THE COURT: No he's the employer, okay.

MR. JIMMERSON: -- and that the same was inadvertently admitted. Once the email was admitted and before the jury, plaintiff could not object in front of the jury without calling further attention to the email, and because it had been admitted -- because had been admitted.

And the way that was admitted just so you understand is Ms. Gordon inquired of myself in the presence of the jury I like to introduce Exhibit 56, do you have any objections, and I said no.

THE COURT: And you said no objection.

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

THE COURT: I got the impression the whole exhibit was put into evidence at one time.

MR. JIMMERSON: That's correct. And -- and --

THE COURT: Okay. I got it right. All right.

MR. JIMMERSON: -- most of the exhibit, the 79 pages, speak to financial matters, compensation matters, employer-employee matters as opposed to this particular email --

THE COURT: Which would have been relevant to the lost wages issues in --

MR. JIMMERSON: Precisely.

THE COURT: Okay.

MR. JIMMERSON: In this email if you read the whole

document, I -- I think a fair and summary would be Mr. Landess is writing to his employer, Mr. Dariani [sic throughout] who is the representative of the employer, Cognotion, how thrilled he was and how grateful he was to have this job and it is a cathartic email where he writes about how tough life was for him when he was 19 and he was got good at -- at pool or -- or I guess it was --

[Colloquy between counsel]

MR. JIMMERSON: Snooker, right. And that he, quote, hustled Mexicans, Blacks and rednecks or Mexicans --

THE COURT: No, I -- I've -- I --

MR. JIMMERSON: -- those words.

THE COURT: -- I read it.

MR. JIMMERSON: All right. And he also refers to his daughter, talked about his tough times and he talked about how grateful is have the job. Really it's, candidly, irrelevant to anything having to do with causation of the -- the tibia being improperly or professionally negligently --

THE COURT: Well I don't think they're even --

MR. JIMMERSON: -- installed.

THE COURT: -- trying to argue that, they're -- what they're saying --

MR. JIMMERSON: No, no, no, but I'm just saying to --

THE COURT: -- is the opening of the door on the -- on the character evidence.

MR. JIMMERSON: Agree. Okay --

THE COURT: I -- I -- I -- I truly --

MR. JIMMERSON: You're hip to that. Then you're hip to it is fine. You got it.

THE COURT: I got the issues.

MR. JIMMERSON: All right, yes you do.

THE COURT: I -- I read this stuff at least three times --

MR. JIMMERSON: All right.

THE COURT: -- and it is -- it is harder I -- I -- it is more difficult for a new judge to be given this. Not my -- I didn't --

MR. JIMMERSON: No, you sure didn't.

THE COURT: -- ask to have this motion, I didn't sit through the trial, I only can bring myself up with the best of what you gave me --

MR. JIMMERSON: Well --

THE COURT: -- and having done trials for a long time so I -- I understand how --

MR. JIMMERSON: You drew the short straw, Judge, is true. Okay. And so --

THE COURT: I don't know, story of my life here.

MR. JIMMERSON: -- once the highlight -- just continuing the same finding 19, line 7, once the highlighted --

THE COURT: Okay.

MR. JIMMERSON: -- language was put before the jury there was no contemporaneous objection from plaintiff, nor sua sponte interjection from the court --

THE COURT: So this was a finding by Judge Bare saying hey

based on -- because if you look at the case law in Nevada, they really do defer to the trial judge. That's why even if I got the short straw or what, I can only do the best I can -- it's just like --

MR. JIMMERSON: Agree.

THE COURT: -- your other -- you know if I don't -- not at the deposition I don't -- it's hard to do credibility when you don't get to see the witness, you don't get to understand where they're -- so --

MR. JIMMERSON: The Supreme Court of Nevada is very clear that that's why they --

THE COURT: No, I read two cases on it.

MR. JIMMERSON: -- they defer to the trial court is true --

THE COURT: Right, I -- I wish someone had looked at that but --

MR. JIMMERSON: -- for those very reasons that they're there to see what's going on. And so it says --

THE COURT: So I do understand I'm doing the best I can so please understand I -- all I can do so that was his finding --

MR. JIMMERSON: Right.

THE COURT: -- because I did --

MR. JIMMERSON: And so and then he says --

THE COURT: -- by Judge Bare --

MR. JIMMERSON: That's right.

THE COURT: -- as he's sitting there as trial judge he's saying once the highlighted language was put before the jury there was no contemporaneous objection from plaintiff, nor sua sponte interjection

from the court --

MR. JIMMERSON: That could --

THE COURT: -- that could remedy --

MR. JIMMERSON: -- that could remedy --

THE COURT: -- as a matter of --

MR. JIMMERSON: You have it before you.

THE COURT: -- as in a matter of seconds the words were there for the jury. Okay.

MR. JIMMERSON: That's right.

THE COURT: Okay, I was --

MR. JIMMERSON: All right.

THE COURT: -- I'm of course looking at this going what was the -- what was happening with the court, I get that.

MR. JIMMERSON: And --

THE COURT: Okay.

MR. JIMMERSON: -- although, you know, opposing counsel and I can -- you know, we can mince words on small things, there's essentially five elements of the intentional behavior on part of the defendant. One was they moved the exhibit, Exhibit 56, into evidence and they knew that it contained page 44 and 45. They -- as I mentioned, they asked for my objection -- my -- my position in front of the jury --

THE COURT: Yeah.

MR. JIMMERSON: -- and I said no objection.

Number two, prior to introducing the document they highlighted the burning embers email before presenting it to the jury with

yellow highlight.

Third, they put the burning embers email on the ELMO showing the yellow highlight and the yellow highlight referenced the offensive words about hustling Mexicans --

THE COURT: No, I --

MR. JIMMERSON: -- Blacks and rednecks and another section involving if I -- if it wasn't tied down, the Mexicans would have stole it from me. That's two paragraphs one after another. So that was a second item that they did. The third as I --

THE COURT: If it wasn't welded to the ground.

MR. JIMMERSON: No, that's right. They put the burning embers email on the ELMO without any warning to the court or to ourselves and at that moment that race was going to be introduced into the trial.

The fourth thing they did is they specifically and repeatedly identified the racial groups listed in the email, as I've just referenced to you, in two different sections; Mexicans, Blacks and rednecks, and then another section, Mexicans stealing everything not bolted down. And they did so in front of the -- by questioning Mr. Dariani in three questions, so it was three times that they referenced this.

And the fifth thing that they did that was inappropriate was they stated in front of the jury, quote, referring to Mr. Dariani, you still don't take that as being at least -- excuse me, you -- you still don't take that as being at all a racist comment?

THE COURT: Right.

MR. JIMMERSON: And we attached Exhibit 3 which is the transcript of the --

THE COURT: Right.

MR. JIMMERSON: -- examination of Mr. Dariani --

THE COURT: I saw that.

MR. JIMMERSON: -- by Ms. Gordon at page 144 --

THE COURT: Okay.

MR. JIMMERSON: -- and 161 --

THE COURT: So the questioning went you -- at the end, you, which is defense counsel saying to -- is it Dariani? None of these --

MR. JIMMERSON: Dariyanani, Dariyanani is how I pronounce it.

THE COURT: Phonetics, Dariyanani saying he talks about a time when he brought a truck stop -- bought a truck stop here in Las Vegas and when the Mexican laborers stole everything that wasn't welded to the ground and that was a quote from the -- I don't know where you got burning embers but it's -- burning embers, doesn't matter, and then you still don't take that as being at all a racist comment.

MR. JIMMERSON: That's right.

THE COURT: I -- I did note that.

MR. JIMMERSON: There's a -- there's a couple of points about that. First it certainly is evident that the defense, through counsel, knew that they were introducing race into the case because --

THE COURT: Okay.

MR. JIMMERSON: -- they asked the question in the form that

they chose to ask it --

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

MR. JIMMERSON: -- you don't consider it to be racist.

THE COURT: -- noted that.

MR. JIMMERSON: And just so you understand, burning embers is the name of the email that --

THE COURT: Oh, okay. Can you show it -- I couldn't figure out burning -- I know that's --

MR. VOGEL: It's the subject line.

MS. GORDON: It's the -- it's a title that he gave it.

MR. JIMMERSON: It's a subject line of the email.

THE COURT: Okay, can I -- I know it's silly but I keep -- I like to do word association and I couldn't figure out how the Mexicans and -- and all this was burning embers. It actually says that.

MR. JIMMERSON: And if I -- I'm going to also give you Exhibit 56 -- you can just take --

MR. VOGEL: It's just Exhibit 56?

MR. JIMMERSON: That's all it is.

THE COURT: The whole thing, yeah I --

MR. JIMMERSON: The whole thing, yes, Your Honor.

THE COURT: Okay.

MR. JIMMERSON: Now when you look at the --

THE COURT: And once again I got corrected it's how many pages?

MR. JIMMERSON: Seventy-nine.

THE COURT: Seventy-nine. I don't know where I --

MR. JIMMERSON: Would you look at the first paragraph you'll see how the title burning embers comes about.

THE COURT: Yeah. Okay, I --

MR. JIMMERSON: It's the second sentence: As far back as I can remember, there's been this burning desire inside of me to make something out of what resources were at my disposal --

THE COURT: Okay.

MR. JIMMERSON: -- and so that's why he called it burning embers.

THE COURT: Okay.

MR. JIMMERSON: All right.

THE COURT: I -- I know it's kind of a collateral issue, but I -- I was trying to --

MR. JIMMERSON: It -- it is collateral, Judge, it's true.

THE COURT: -- trying to put things in context and I couldn't figure out the -- thank you, that makes sense.

MR. JIMMERSON: All right.

THE COURT: I -- I for some reason didn't pick up the top line there. Okay.

MR. JIMMERSON: All right, so --

THE COURT: And it also puts it all in context.

MR. JIMMERSON: That's right. And then --

THE COURT: Okay, I -- I do want this.

MR. JIMMERSON: -- the -- the next finding of fact --

THE COURT: Okay.

MR. JIMMERSON: -- that Judge Bare makes -- and I don't know if you ever had the opportunity or privilege to sit in front of Judge Bare like we do, you know, waiting for --

THE COURT: I have not, I --

MR. JIMMERSON: -- your case come up --

THE COURT: -- I had motions in front of him, I did not do a trial in front of Judge Bare --

MR. JIMMERSON: And --

THE COURT: -- that I recall. I don't think I did.

MR. JIMMERSON: -- he has a -- he has a style of --

THE COURT: Okay.

MR. JIMMERSON: -- kind of telling you in advance what he's thinking and then he invites you to essentially challenge what he has to say if what he's saying is at odds with what your --

THE COURT: Okay.

MR. JIMMERSON: -- position is. It's sort of a -- a conversational type of approach where -- which is helpful to the counsel because you at least know where he's thinking or leaning and then you're able to focus your arguments to try to talk him out of it so to speak if he's --

THE COURT: No.

MR. JIMMERSON: -- against you or appears to be against you --

THE COURT: See with me I ask questions so you have to

figure out where I'm coming from.

MR. JIMMERSON: Right. Right.

THE COURT: I -- I --

MR. JIMMERSON: But either way it's helpful because you're sending --

THE COURT: I'm more the Stu Bell type.

MR. JIMMERSON: -- signals to the --

THE COURT: Right. No, I get it.

MR. JIMMERSON: -- lawyers and the lawyers therefore have an opportunity to do their job as advocates to --

THE COURT: To at least understand the --

MR. JIMMERSON: -- advance their client's position. That's right.

THE COURT: Okay. All right. I --

MR. JIMMERSON: All right.

THE COURT: -- I do know that about Judge --

MR. JIMMERSON: And so -- and so a lot of these findings you'll find are going to be literally summaries of dialogue --

THE COURT: When I read it I was --

MR. JIMMERSON: -- between the judge and parties.

THE COURT: -- I did find it different from what I usually see in findings.

MR. JIMMERSON: Right.

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

MR. JIMMERSON: And so that's why you have in these

findings --

THE COURT: I -- I agree.

MR. JIMMERSON: -- they're -- they're actual quotes in the transcripts repeatedly throughout --

THE COURT: Yeah, I saw that.

MR. JIMMERSON: All right. So now paragraph 20 --

THE COURT: And they're quotes with the transcript page, okay.

MR. JIMMERSON: -- is one of the key findings here as relates to your review of this record. Indeed during the off-the-record discussion --

THE COURT: Off-record discussion.

MR. JIMMERSON: -- on August 2, 2019 when Mr. Jimmerson initially moved to strike the email, Ms. Gordon stated that she, quote, kept waiting, end of quote, for the plaintiff to object to the use of 56, page 44, and quote, when the plaintiff did not object, end of quote, the defendant then went forward to use the email.

Mr. Vogel echoed that sentiment on Monday, August 5, 2019, stating, quote, we gave them every opportunity to object to it. Ms. Gordon asked repeated questions before coming to that union and I -- and I -- excuse me, and yet I guess it -- it comes down to when you -- when you're asking could we have done something to try to remove that, I suppose in hindsight yes, I -- I -- excuse me, I suppose in hindsight I guess we could have, but I don't think we had to. Transcript page 42, lines 5 through 9:

The defendants' statements have led the court to believe that the defendants knew that their use of exhibit was objectionable and would be objectionable to the plaintiff and possibly to the court, and nevertheless the defendants continued to use and inject the email before the jury in the fashion that precluded plaintiff from being able to effectively respond. In arguing to the court that they, quote, waited for defendant to object and that plaintiff --

THE COURT: For plaintiff to object.

MR. JIMMERSON: Plaintiff to object and that plaintiff did nothing about it --

THE COURT: About it.

MR. JIMMERSON: -- defendants evidence a consciousness of guilt and of wrongdoing. That conscious wrongdoing suggests that defendant and their counsel were the legal cause of the mistrial. And I point that out because as you have cited, Judge, that is certainly one of the central questions you will resolve as resolving the competing motions --

THE COURT: No, I --

MR. JIMMERSON: -- before you --

THE COURT: Yes.

MR. JIMMERSON: -- in terms of who caused this mistrial and what expenses and costs should flow from the party who is the offending party.

The court also at -- if I could just -- just go on to two more, paragraph 22 the court says when asked whether defendants believed

that the jury could consider whether Mr. Landess is a racist, Ms. Gordon replied that she believed she is, quote, allowed to use impeachment evidence that has not been objected to and has been admitted into evidence by stipulation, end of quote. And it's true I did not object, but it wasn't a stipulation. I don't know that's a word matter, but I'm just saying to you that's what occurred. That, quote, the burden should not be shifted, end of quote, to defendant to assist with eliminating or reducing the prejudicial value of that piece of evidence, and that motive is always relevant in terms of Mr. Landess' reason for setting -- settling -- setting up --

THE COURT: What does that mean? What is his reason for setting up? I wasn't quite sure I understood that.

MR. JIMMERSON: In a separate part of the case --

THE COURT: Okay.

MR. JIMMERSON: -- unrelated to this --

THE COURT: I appreciate because --

MR. JIMMERSON: -- Mr. Landess after seeing the doctor three or four occasions and feeling a great deal of pain and instability in his leg in December of 2017 went to see another doctor, a Dr. Her [phonetic] and then a Dr. Fonce [phonetic] in February of 2017.

THE COURT: Okay, for like a second opinion --

MR. JIMMERSON: Second opinion.

THE COURT: -- on what's going on, okay.

MR. JIMMERSON: In those two opinions, they both told him that a terrible job had been done --

THE COURT: Okay.

MR. JIMMERSON: -- to his leg and so he went to Dr. Debiparshad in March of that year, essentially 15 or 20 days later and recorded their conversation -- excuse me, did not record. Went to see the doctor and didn't tell him that he -- didn't tell Dr. Debiparshad that he --

THE COURT: What the other opinions were.

MR. JIMMERSON: -- other opinions were and --

THE COURT: Okay. Okay.

MR. JIMMERSON: -- they -- the defendants argued in front of the jury that they -- that Mr. Landess was setting him up --

THE COURT: Okay. I appreciate because I read it and I -- I -- I was not --

MR. JIMMERSON: Right.

THE COURT: -- at the trial for almost two weeks so --

MR. JIMMERSON: Right.

THE COURT: -- once again it makes --

MR. JIMMERSON: And --

THE COURT: Thank you.

MR. JIMMERSON: And --

THE COURT: I didn't know what that meant. I put a question mark here, okay.

MR. JIMMERSON: Right, and this is not relative to this motion today. It had to do for example that Dr. Debiparshad did not reveal to the plaintiff broken screws in his leg, other things, so this is

where Mr. Landess had developed a --

THE COURT: Okay.

MR. JIMMERSON: -- a concern --

THE COURT: Okay, but you explained to me what the setting up just I --

MR. JIMMERSON: That's -- so that's what it means in these -- in this context.

THE COURT: -- I didn't have the context and I didn't know what that meant.

MR. JIMMERSON: That's my understanding. If Mr. Vogel and --

THE COURT: And I'll --

MR. JIMMERSON: -- Ms. Gordon have a different understanding --

THE COURT: Okay.

MR. JIMMERSON: -- they can say so but that's --

THE COURT: Okay.

MR. JIMMERSON: -- my reason for those --

THE COURT: Okay.

MR. JIMMERSON: -- Mr. Vogel's words.

THE COURT: Defendants in defendants' view --

MR. JIMMERSON: Defendants in defendants' view --

THE COURT: -- terms.

MR. JIMMERSON: -- of the case. The defendant confirms that when Mr. Landess is a racist is something the jury should weigh;

that it is admissible and it is evidence that they should consider. Defendants' counsel made it clear to the court defendants' knowing and intentional use of Exhibits 56, page 44.

THE COURT: Okay.

MR. JIMMERSON: And Judge Bare did this, made these findings in part because he knows as part of this, motion request for fees and costs was being -- had already been filed on August 4th, Sunday night.

THE COURT: I saw that.

MR. JIMMERSON: He chose to bifurcate the proceeding --

THE COURT: I -- I -- I figured procedurally that's how it happened.

MR. JIMMERSON: -- and -- and -- and put off the dollars until actually today but put off the dollars till later which --

THE COURT: Well and then he got --

MR. JIMMERSON: -- which then -- which then, exactly, got extended by virtue that --

THE COURT: I -- I -- I -- I figured out the history because I thought --

MR. JIMMERSON: But because he had a jury in the waiting room --

THE COURT: Yeah. Right.

MR. JIMMERSON: -- he had to make a call --

THE COURT: And I understand --

MR. JIMMERSON: -- about mistrial or not.

THE COURT: That's why I said I'm in a difficult position but I deal with the record I have and understand why --

MR. JIMMERSON: Right.

THE COURT: -- a trial judge has a -- has insight more than someone who's not there.

MR. JIMMERSON: Right. And one --

THE COURT: That was the -- my only point of saying that.

MR. JIMMERSON: And in all the papers you've read I think --

THE COURT: I read it --

MR. JIMMERSON: -- a central question that is being argued by both sides and with of course exactly opposite results, but the central question is -- as you've already identified is who was the legal cause the mistrial --

THE COURT: Yes.

MR. JIMMERSON: -- but a corollary to that is the position of the defense to try to defend their behavior has changed. In their remarks on the transcript on August 5, Mr. Vogel claims that there was no intent to introduce race into the record, but after in the briefing he abandons that pretense and acknowledges that race was intentionally to be introduced in the trial and they think they have the right to do that.

So one of the fundamental legal issues you will need to decide on either side is their position the defendant said four times I've got the page and -- page and line numbers where they say it. In their opposition and countermotion at page 7, they argue, quote, to the burning embers email was admitted evidence which under Nevada law can be used for

any purpose.

At page 14 of the same brief they say, quote, defendants' use of plaintiff's burning embers email was justified and proper as rebuttal character evidence as an admitted piece of evidence that can be used for any purpose, end of quote.

In both of those citations --

THE COURT: No, I -- their position was -- their position is once something is admitted into evidence you can use it for any purpose --

MR. JIMMERSON: Correct.

THE COURT: --whatso- I -- I --

MR. JIMMERSON: You got it. Okay.

THE COURT: I -- I got that.

MR. JIMMERSON: Note that both statements and throughout all their papers they don't cite a single case --

THE COURT: Right.

MR. JIMMERSON: -- to support that proposition.

THE COURT: And you've cited Wiggins on Evidence and McCormick on -- I --

MR. JIMMERSON: I cited NRS 47.030, the plain evidence doctrine, the Nevada Supreme Court decision repeatedly on plain evidence even --

MR. JAMES JIMMERSON: Plain error.

MR. JIMMERSON: Plain error, I say plain evidence, plain -- plain error doctrine.

THE COURT: Plain error.

MR. JIMMERSON: The point being that even when counsel inadvertently or intentionally as the case may be -- in this case was inadvertent -- doesn't object to the admission of evidence, okay, if the introduction of that evidence would cause plain error, the --

THE COURT: You can't do it.

MR. JIMMERSON: -- the -- the trial court has every right to strike it or take other remedy and most the times of course it's mistrial or new trial. That's the context we see it most of the time. And there's all kinds Nevada Supreme Court and authority across the country, so I'm just going to say to a central issue for you to resolve is whether or not the defendants' argument that they because I did not object to the admission of the exhibit --

THE COURT: That then waived them to be able to --

MR. JIMMERSON: -- they can use it for any purpose, including introducing --

THE COURT: I got that.

MR. JIMMERSON: -- an irrelevant issue like -- and prejudicial issue like race.

THE COURT: Okay. I -- I got that is an issue that the --

MR. JIMMERSON: All right.

THE COURT: -- failure to -- that your failure to object waived then any objections you would have regarding any other issue --

MR. JIMMERSON: Correct.

THE COURT: -- once it's admitted I -- I -- I got that is --

MR. JIMMERSON: There is no --

THE COURT: -- I understood that is an issue that's --

MR. JIMMERSON: There's no case law cited by defendant and I found no case law to support that. Because -- because there's always the exception if you will, or the limitation if you will, that you can't complete -- you can't commit plain error. You can't knowingly do something that you know is improper and will lead to in this case either jury nullification or as the court found manifest necessity to declare a mistrial.

THE COURT: Mistrial.

MR. JIMMERSON: You just -- you know, it's a rare case, admittedly, it doesn't happen every day, but you -- you're limited that evidence even if somebody doesn't object has to be competent, has to be relevant and can't be more prejudicial than probative. It's barred by 48.035 which is the corollary to --

THE COURT: Those are all the safeguards we have under the --

MR. JIMMERSON: Precisely.

THE COURT: -- evidence --

MR. JIMMERSON: So all I'm going to say to you --

THE COURT: -- code.

MR. JIMMERSON: -- is that I -- I -- another reason that the court -- Judge Bare came down with the findings he did is he concluded that the arguments being advanced by the defense were not well taken under the law and not supported by the law or by the facts. Nor are they

in the briefs that you see before you supported by any case law that has been cited by the defendants.

And in the one case that they suggest might be helpful to them with regard to using character evidence, it's *Taylor versus State*, they cite the dissenting opinion of Justice Shearing, they don't cite the majority rule. Otherwise they don't have any of the cases that suggest and they have no explanation for example to NRS 50.085 Sub 3 that says extrinsic evidence can't be used no matter what.

But neither here nor there, I just say to you that's one or two of the most overarching rule -- issues you'll have to resolve however you choose to resolve this motion and countermotion before you.

So now then the page -- paragraph 24 of the same page, page 9 of the findings, in the court's view, even if well intended by the defendants and -- and understand, maybe it's just person I like, but Judge Bare is not somebody who's scalp hunting. He's just not a judge who's finger pointing at either side. He's working with counsel, he has to work with them again tomorrow on another case, so he's just not -- he doesn't have a demeanor to be cross in that sense so he's willing to give Ms. Gordon and Mr. Vogel the benefit of the doubt maybe did not have an intent to -- to create this mistrial, but it's still misconduct. You know, you don't have to be guilty of unethical conduct by the state bar to nevertheless be guilty of misconduct that leads to a mistrial and the cost incurred by that.

So in paragraph 24 the judge says in the court's view, even if well intended by the defendants to cross-examine when character is

now an issue, the defendants made a mistake in now interjecting the issue of racism into the trial. Even now it appears to be court -- it appears to the court that the defendants' position is that the jury can consider the issue of whether Mr. Landess is a racist or not. With that the court disagrees with the defendants to the fiber of his existence as a person and as a judge. Ms. Brazille [phonetic] is an African-American. She -- these are jurors' names.

THE COURT: I -- I -- okay.

MR. JIMMERSON: Ms. Steedum [phonetic] is an African-American. Upon information and belief, Mr. Cardoza and Miss Asuncion, A-s-u-n-c-i-o-n, are Hispanic.

THE COURT: Hispanic.

MR. JIMMERSON: Since we have two African-American jurors and potentially two Hispanic jurors, defendants' interjection the issue of Mr. Landess's allegedly being a racist to the case was improper.

And just to jump ahead to a finding of fact on -- on that issue, if I could just find it quickly. It's the one was impermissible.

Yeah. The finding of fact -- I've got it. The finding of fact and conclusion of law which is in the conclusion of law section is at page 15 and it's number --

THE COURT: Okay.

MR. JIMMERSON: -- 51. The court -- you know, one's a finding of fact, the corollary or matching conclusion of law number 51 at page 15 begins: The court provided the example that if Exhibit 56 which was in evidence was put up in closing, that under the definition given by

the Supreme Court of misconduct in the *Lioce* case, that likely that -- that would be seen as misconduct. Whether is with Mr. Dariyanani or whether is in closing argument, or both, it is clear the defendants are urging the jury to at least in part render their verdict based upon race, based upon Mr. Landess's allegedly being a racist, based upon something that is emotional nature. The -- the idea fairly was to ask the jury to give the defendants their verdict whether it is whole verdict or reducing damages because Mr. Landess is allegedly a racist. That is impermissible.

So this again is -- and he discusses *Lioce* and *Emerson* and other case law that he finds relevant here, but that again I think is essential to the court's findings that Judge Wiese affirmed as being appropriate and which led to the order granting mistrial which by the way, as the judge revealed to all of us, was the first mistrial he's granted in his eight and a half years tenure on the bench.

All right. So then at number 29 just last the last sentence, it is the court's strong view that racial discrimination cannot be a basis upon which the civil jury can give their decision regardless, but certainly the events that we can aggravate the situation.

When you look at the case law and it's aggregated in a -- in a annotation by McCorkle, by the Nevada Supreme Court and across the nation, the -- the concept is if the conduct is so aggressive and so brazen and so impermissible that it renders the necessity to grant a mistrial, then, you know, that obviously is impermissible even if as in this case the offending evidence was not objected to by plaintiff's counsel at

trial because the plain error doctrine because of the limitations that are available on character evidence even if it were permitted and we actually --

THE COURT: Also there's the issue on opening the door on character evidence.

MR. JIMMERSON: That's right.

THE COURT: That's a whole -- I mean I -- I took apart as best I could what happened in evidence wise as to how this -- I got the end result but I -- the Court did try to go back to see how this door was open or if the door was open or --

MR. JIMMERSON: Correct.

THE COURT: -- who could have done what.

MR. JIMMERSON: The court -- the court --

THE COURT: Obviously it's a learning experience --

MR. JIMMERSON: Right.

THE COURT: -- for all of us but --

MR. JIMMERSON: I think it's a fair statement that the court disagreed with us and felt that the plaintiff, our side, had -- had opened the door to character evidence, but I will say and so we're -- we're -- listen, we're limited to what the judge says.

THE COURT: I know.

MR. JIMMERSON: I -- I can't embrace the judge --

THE COURT: I've --

MR. JIMMERSON: -- in -- in -- in 27 findings and disagree as to one so I accept what he said.

THE COURT: I -- I just wanted to bring that up --

MR. JIMMERSON: Right.

THE COURT: -- because I -- I did notice that when I did mine separately then I looked at his order --

MR. JIMMERSON: Right.

THE COURT: -- Judge Bare who was there and I have to defer --

MR. JIMMERSON: Right. But the judge at that point --

THE COURT: -- made his findings of fact and conclusions of law, I agree.

MR. JIMMERSON: Yeah. Right.

THE COURT: What I would have done doesn't -- is irrelevant.

MR. JIMMERSON: The -- the court though did note within the conclusions of law however that what the defendants and the -- the way that the defendants used this prejudicial evidence --

THE COURT: Used the evidence.

MR. JIMMERSON: -- was improper --

THE COURT: Right.

MR. JIMMERSON: -- even if the plaintiff had opened the door and now to follow your --

THE COURT: Yeah.

MR. JIMMERSON: -- suggestion --

THE COURT: Yeah.

MR. JIMMERSON: -- the manner in which this occurred was the employer's representative, Mr. Dariyanani, President of Cognotion,

was on the witness stand. He -- part of the reason for his being on the witness stand is part of the damages plaintiff is seeking is the lost earnings of being terminated when Mr. Dariani after waiting maybe a year --

THE COURT: Because of his surgery, I know.

MR. JIMMERSON: -- couldn't have Mr. Landess perform his duties so that -- that's a basis for --

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

MR. JIMMERSON: All right.

THE COURT: -- I actually read the context and --

MR. JIMMERSON: And the --

THE COURT: -- and I got that it was gratuitous -- I think gratuitous comments but it was comments --

MR. JIMMERSON: Nonresponsive would be a fair way --

THE COURT: I guess not responsive, but --

MR. JIMMERSON: Right, or gratuitous.

THE COURT: -- it was what he felt he wanted to say --

MR. JIMMERSON: He was a beautiful person and then Ms. Gordon got him to acknowledge he was a beautiful but flawed person. But -- but in any event, that was the context in which --

THE COURT: No, I -- I --

MR. JIMMERSON: -- it came down.

THE COURT: -- I did read context but --

MR. JIMMERSON: Right.

THE COURT: -- once again, I know that I -- I had the findings

fact and conclusions of law that -- that were already entered in this case and --

MR. JIMMERSON: Right.

THE COURT: -- that's what those are -- those are --

MR. JIMMERSON: And at paragraph 39 and 40 --

THE COURT: Thirty- --

MR. JIMMERSON: -- of the findings fact conclusions of law the court addresses the how -- how the character evidence was --

THE COURT: I --

MR. JIMMERSON: -- introduced by the defendant. There's a couple things. First, the defendant didn't object to the nonresponsive answer that Mr. Dariani gave to Ms. Gordon when he says she's -- he's a beautiful person or beautiful and then she followed up and said well he's a beautiful and flawed person, and the -- there's case law we provided to you that would strongly suggest that if you don't object to a nonresponsive answer that you cannot then find that to be opening the door on the issue of character --

THE COURT: But I can't rule on that --

MR. JIMMERSON: That's right. Correct. That's right.

THE COURT: I unfortunately spent some time doing that and, you know --

MR. JIMMERSON: Right.

THE COURT: -- I'm ready for another trial. I got -- but I -- I'm -- I watch evidence very -- I try to watch evidence --

MR. JIMMERSON: Exactly.

THE COURT: -- very carefully as best I can as you people have tried cases here as you know. So I did and then I realized no, I looked at -- I have -- I'm -- I've gotten a couple other cases like summary judgments where another judge has done a findings of fact and conclusions of law even if I potentially would not have done it that way, that was not my right to change it I had -- because then they did summary judgments based on something -- but I -- I'm -- I'm familiar with the case law that is a finding of fact and conclusion --

MR. JIMMERSON: That's right.

THE COURT: -- of law that is precedent in this case.

MR. JIMMERSON: That's right.

THE COURT: So --

MR. JIMMERSON: And at --

THE COURT: -- not that I wasted any time because it's good for me to even know everything as best I can but yes I know that.

MR. JIMMERSON: All right. And at paragraph 40 it began line --

THE COURT: Paragraph what, 40?

MR. JIMMERSON: Paragraph 40.

THE COURT: I -- I don't know why we --

MR. JIMMERSON: This is conclusion of law now 40 after the findings. He said, moreover, character evidence is generally inadmissible in civil cases, citing a case, and a party may open the door to character evidence when he chooses to place his own good character at issue. However --

THE COURT: Right.

MR. JIMMERSON: -- an inadvertent or nonresponsive answer by a witness that invokes the party's good character does not automatically put his character at issue so as to open the door to character evidence, citing the *Montgomery versus State* decision from Georgia. And then there's other cases citing including McCormick on Evidence. And --

THE COURT: Right. And most of this is --

MR. JIMMERSON: -- that's that.

THE COURT: -- done in the criminal setting.

MR. JIMMERSON: That's right.

THE COURT: I had this come up in my criminal trials when I did all the motions on prior bad acts trying to introduce so I am familiar with the case law on prior bad acts and what character and -- and --

MR. JIMMERSON: And any issue --

THE COURT: -- you can't -- and opening the door or if you have a question that someone has opened the door, you can do an offer of proof --

MR. JIMMERSON: Right.

THE COURT: -- before the court which is many times they do in criminal situations because a mistrial there by the state is --

MR. JIMMERSON: And as the court noted the --

THE COURT: -- double jeopardy and it has some real significance so I've learned a lot of this through that. So I -- I understand the case law.

MR. JIMMERSON: In paragraph 41, Mr. Dariani statement that he believed Landess to be a beautiful person --

THE COURT: Be a beautiful person.

MR. JIMMERSON: -- was a nonresponse response --

THE COURT: Okay.

MR. JIMMERSON: -- to a preceding question and was a gratuitous addition to his testimony so your recollection of gratuitous is correct, Judge.

THE COURT: Okay, well --

MR. JIMMERSON: The judge used that. If defendants wanted the jury to disregard this statement, their remedy was a simple motion to strike, see *Wiggins* holding the motion to strike, and not introduction of rebuttal evidence was proper nonresponsive statement from a witness attesting to a party's good character.

And so you had the issue. So in the end, the court concluded as I just read to you in that paragraph number 51, the -- the choice to use race intentionally by the defense through -- the defendant through his counsel and present throughout the trial was the insurance company's risk manager sat there and we concealed that person's relationship to the insurance company by agreement so the jury would see the woman there. She was introduced as an assistant to the defense counsel and that was that, but all I'm trying to say is --

THE COURT: Okay. And I understand that happens a lot because they're monitoring the trial. I understand that.

MR. JIMMERSON: That's exactly right. And so -- so they

participated in this actively and the court ultimately concluded as I've already read to you that defendants were the legal cause of the necessity to have a mistrial.

THE COURT: For the mistrial.

MR. JIMMERSON: That's right. Okay.

THE COURT: And he ruled that way and that was his --

MR. JIMMERSON: I -- I like to just --

THE COURT: -- his legal conclusion.

MR. JIMMERSON: I -- I like to just call to your attention --

[Colloquy between counsel]

MR. JIMMERSON: There are -- I would say -- argue that another basis upon which you should grant the motion, another reason for doing so in addition to the many we've already proffered to you through the papers and to in our oral argument is that the defendants either intentionally or inadvertently have misstated both events during the trial as well as arguments and I just go through a half a dozen of those --

THE COURT: Misstate I -- do it again Mr. Jimmerson, misstated through --

MR. JIMMERSON: Misstated the record of what occurred before Judge Bare --

THE COURT: Oh.

MR. JIMMERSON: -- let me begin by saying. At page 6 of their brief they claim that I waited a long time to object to Ms. Gordon's introduction of the document, use of it, the highlighting and the ELMO

and the rest. I raised a motion to strike at the break -- the first break following the --

THE COURT: The introduction of the evidence.

MR. JIMMERSON: -- the discussion with the witness and that's referenced in the court's finding and acknowledged by all parties. So I did so as immediately as I could without calling it in front of the jury's attention. That was at page 6 of their brief.

Page 7 their brief they argue that they didn't have an opportunity to fairly analyze our motion for mistrial. On the Friday of August 2 the judge says I'm seriously considering granting a mistrial. In fact he called counsel back to a jury room to discuss the potential of is there any way resolve this matter because I really am not sure how I'm going to rule, but I am thinking mistrial is the way to go.

So we all knew it was so we filed our motion for mistrial on Sunday night. Both parties were invited to brief -- Mr. Vogel said he spent the weekend briefing but he didn't file anything. And on Monday, the 5th, Mr. Vogel advised the court that he was prepared to move forward with the matter and argue the -- a motion mistrial on August 5. In his papers he suggest that he didn't have that opportunity, but on the record in the transcript of August 5, he did in fact advise the court he's willing to proceed and obviously he argued against the mistrial.

Page -- I already mentioned to you page 7 the proposition that you can use it for any purpose without authority I've already made note to you. And no authority has ever been supplied to you throughout this extensive briefing by both sides to support the defendants' argument

that they can use a document for any purpose irrespective whether or not it was admitted or not.

Contrary to the brief at page 8 they suggest that the defendants provided the burning embers email. We had set it up as the exhibit you have, 56, 79 pages, but the documents were obtained directly from the Cognotion to Mr. Orr --

THE COURT: Through subpoena.

MR. JIMMERSON: -- partner of Mr. Vogel and Ms. Gordon, or partner associate don't -- don't know, but through their offices directly without running through the plaintiff's or any of plaintiff's counsel.

And page 11 I think is one of the -- the grossest misstatements that I want to call to your attention. In their brief at page 11, lines 17 through 20, this is what Mr. Vogel writes as the signing party to the brief: Defendants did not anticipate utilizing the email at trial. That's Exhibit 56, page 44.

THE COURT: Right, I -- I know what the burning embers is, okay.

MR. JIMMERSON: Defendants did not anticipate utilizing the email at trial. It was not until Mr. Dariyanani offered improper character evidence describing plaintiff as a beautiful person who could be trusted with bags of money that defendants were entitled to raise the email as rebuttal character evidence, citing page 11 of their brief, lines 17 through 20.

That is a misrepresentation. It is demonstrably [phonetic] false because --

THE COURT: Yeah.

MR. JIMMERSON: -- the defendants offered Exhibit 56 into evidence before ever asking Mr. Dariani a single question about the ember --

THE COURT: So did you stipulate to let 56 in before Mr. Dariani even testified?

MR. JIMMERSON: No.

THE COURT: Okay. I didn't -- okay.

MR. JIMMERSON: I -- I finished the direct examination.

THE COURT: Right.

MR. JIMMERSON: Ms. Gordon was conducting the -- the -- began the --

THE COURT: Cross.

MR. JIMMERSON: -- examination and she asked me in front of the jury and in front of the judge would I stipulate to Exhibit 56.

THE COURT: Okay, so that's what I thought happened, okay.

MR. JIMMERSON: Right. That's right.

THE COURT: Okay, so --

MR. JIMMERSON: And no question been passed to him.

Defendants' counsel then been [phonetic] examining Mr. Dariani questions about Exhibit 56, page 44. Defendants' counsel then elicit Mr. Dariani's testimony that, quote, I'd give him bags of cash and tell him to count it and deposit. This is Ms. Gordon asking Mr. Dariani who then gives a response. And shortly thereafter defendants' counsel flipped to page 44 of Exhibit 56 containing the burning embers email

which is already highlighted by defense counsel and placed on the ELMO. Again, she put it on the ELMO like I'm here --

THE COURT: No, I -- I --

MR. JIMMERSON: -- witness on the witness stand and then turns to him and asks him three questions about it.

All I'm saying to you is that they -- they didn't highlight in the five minutes or three minutes --

THE COURT: No, I understand they -- they --

MR. JIMMERSON: They had it pre-prepared they knew --

THE COURT: -- they felt if the door was opened --

MR. JIMMERSON: That's right.

THE COURT: -- and there were several comments by them they were aware of it I mean --

MR. JIMMERSON: Correct.

THE COURT: -- the findings of fact that it was there. Whether it could be admissible would depend on trial and how what happened at trial it was their interpretation --

MR. JIMMERSON: Right. But it wasn't -- it wasn't --

THE COURT: -- that he opened the door by those gratuitous comments and they were ready to use it --

MR. JIMMERSON: Yes.

THE COURT: -- if they thought I mean --

MR. JIMMERSON: That's right.

THE COURT: -- like I said I went through the evidence but I can't do that.

MR. JIMMERSON: Right.

THE COURT: That's not what I can do right now, I can only deal with what Judge Bare --

MR. JIMMERSON: But -- but the --

THE COURT: -- ruled and but --

MR. JIMMERSON: -- the -- the misrepresentation --

THE COURT: -- I would --

MR. JIMMERSON: -- the -- is the -- the defendants did not anticipate utilizing the email --

THE COURT: Right.

MR. JIMMERSON: -- at trial. They had already pre-highlighted it, they had it ready and --

THE COURT: Okay.

MR. JIMMERSON: -- just like you said, if the conditions came in, then they intended on using it. Got it.

THE COURT: Okay.

MR. JIMMERSON: All right.

THE COURT: They were -- I -- I -- I --

MR. JIMMERSON: All right.

THE COURT: -- I think they would agree.

MR. JIMMERSON: Okay, so now -- let me just finish on this -- a few more points I'll sit down. And the court by virtue of her -- his questioning of Ms. Gordon and Mr. Vogel elicit the fact that the -- by their asking the question don't you think that this speaks about his racism that they understood --

THE COURT: No, that is -- I -- I picked that up immediately --

MR. JIMMERSON: Okay. Very good. All right. In terms of misrepresentations, this is --

THE COURT: Because the word racist was used in the question, I --

MR. JIMMERSON: Right.

MR. VOGEL: Actually no.

MS. GORDON: No. No. No.

MR. VOGEL: It was brought up by Mr. Dariyanani.

THE COURT: It's not in the transcript that way?

MS. GORDON: He -- he raised -- he said racist first, Mr. Dariyanani did.

THE COURT: But you used it in the question to him.

MR. JIMMERSON: Correct.

MS. GORDON: No, he --

MR. VOGEL: In the follow up.

MS. GORDON: In the follow-up question.

MR. JIMMERSON: That's true.

MS. GORDON: He said it first.

THE COURT: Okay. All right.

MR. JIMMERSON: And that's --

THE COURT: Hold on -- let me understand. He said -- where did Mr. Dariann [phonetic] say he was a -- what -- tell me -- let --

MR. JIMMERSON: Right.

THE COURT: -- somebody just tell me the context.

MR. JIMMERSON: Let Ms. Gordon tell is fine.

THE COURT: Okay, because once again I'm -- I -- not being there I'm -- I'm trying to get the context because I was extremely surprised that the word don't you think that comment is racist --

MR. JIMMERSON: Right.

THE COURT: -- is pretty blatant.

MS. GORDON: So Mr. Dariyanani was explaining his interpretation of the email. No one ever --

THE COURT: Oh, so the email was already up there?

MR. JIMMERSON: Yes.

MS. GORDON: He said I -- I don't think that Mr. Landess was trying to be racist or -- or anything --

THE COURT: Okay.

MS. GORDON: -- else and then afterward then we talked about the second then because he brought up racist. I never brought up racist or anything --

THE COURT: But that wasn't your intent when you put that on the ELMO?

MS. GORDON: Don't -- don't --

THE COURT: What did you think that was going to be?

MS. GORDON: Don't forget I primarily talked about hustling people and do --

THE COURT: Well, I --

MS. GORDON: -- and hustling people on -- on payday. It wasn't just about whether he was talking about Blacks or Mexicans or

rednecks --

THE COURT: No, I --

MS. GORDON: -- but I was definitely not the first to use the word racist. Mr. Dariyanani said I don't take it as being --

THE COURT: And --

MS. GORDON: -- racist and then I read the second part of the email about things being welded down and I said so you still don't take that as being racist and so I --

THE COURT: Okay.

MS. GORDON: -- he said it first. I didn't say it first.

MR. JIMMERSON: Okay --

THE COURT: And you're -- you're going to tell me that you never intended that that was the inference from bringing in that language from the burning embers? What did you think it was applicable to?

MS. GORDON: The inference was, Your Honor, that it was in rebuttal to the character evidence --

THE COURT: No, I understand that but what did --

MS. GORDON: -- that he was a -- a beautiful person.

THE COURT: I understand I -- I get character. Believe me I get --

MS. GORDON: Right.

THE COURT: My question is what did you -- and I can't rule this because it was already ruled honestly by Judge Bare, but what I'm looking -- what did you feel the reasonable -- because it's reasonable inference you -- let's start first what did you think Mr. Dariani or whatever

was going to think when you showed him that email, what did you want from him when you showed him that?

MS. GORDON: He --

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

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

THE COURT: Okay, so --

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

THE COURT: Okay.

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

THE COURT: No, those were his gratuitous comments.

MS. GORDON: Absolutely.

THE COURT: That was not --

MS. GORDON: And then we --

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

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

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

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

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

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

MR. JIMMERSON: All right.

MS. GORDON: Thanks.

THE COURT: Okay, I --

MR. JIMMERSON: If I could --

THE COURT: -- I got it.

MR. JIMMERSON: -- I respectfully --

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

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

THE COURT: Okay.

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

THE COURT: Okay.

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

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

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

MR. JIMMERSON: You got it. Exhibit --

THE COURT: -- many times. Okay.

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

THE COURT: Okay.

MR. JIMMERSON: -- did he sound --

THE COURT: Start again, sorry?

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

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

MR. JIMMERSON: Right.

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

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

THE COURT: Okay.

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

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

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

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

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

MR. JIMMERSON: That's right.

THE COURT: -- an inference, okay.

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

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

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

THE COURT: Okay.

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

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

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

THE COURT: I --

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

Thank you, Mr. Dariani, I appreciate it.

THE COURT: Okay.

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

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

MR. JIMMERSON: Right.

THE COURT: Okay, and so --

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

you know.

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

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

What plaintiff did was not object to Exhibit 59 --

MR. JAMES JIMMERSON: Fifty-six.

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

THE COURT: I know which one.

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

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

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

THE COURT: That was one question --

MR. JIMMERSON: -- that group.

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

MR. JIMMERSON: No.

THE COURT: -- used at trial?

MR. JIMMERSON: No.

MS. GORDON: That's absolutely --

MR. VOGEL: Absolutely there were.

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

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

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

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

MR. JIMMERSON: Do you mean Exhibit --

THE COURT: Okay.

MR. JIMMERSON: -- 44? Page 44?

THE COURT: No.

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

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

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

MR. VOGEL: -- and many were.

MR. JIMMERSON: That's true.

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

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

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

MR. JIMMERSON: No.

THE COURT: Once again -- okay.

MR. JIMMERSON: No there were other exhibits --

THE COURT: Okay.

MR. JIMMERSON: -- introduced because --

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

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

THE COURT: Well no, because they --

MR. JIMMERSON: Right.

THE COURT: -- would be relevant I --

MR. JIMMERSON: That's right.

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

MR. JIMMERSON: Right.

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

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

THE COURT: Other than these.

MR. JIMMERSON: That's right.

THE COURT: I understand that.

MR. JIMMERSON: All right.

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

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

THE COURT: Well I thought --

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

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

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

I also want you to --

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

MR. JIMMERSON: Right.

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

MR. JIMMERSON: Right.

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

MR. JIMMERSON: Right.

THE COURT: -- of intent.

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

THE COURT: No, I --

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

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

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

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

MR. JIMMERSON: Right.

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

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

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

MR. JIMMERSON: That's right.

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

MR. JIMMERSON: But it still amounts to misconduct.

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

MR. JIMMERSON: It still amounts to misconduct.

THE COURT: No, I --

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

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

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

MR. JIMMERSON: That's right.

THE COURT: I -- I read all that.

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

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

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

[Colloquy between counsel]

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

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

THE COURT: Plain error.

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

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

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

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

MR. JIMMERSON: Because --

THE COURT: -- they get their fees anyway?

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

have to spend a new $118,000 --

THE COURT: No.

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

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

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

THE COURT: Okay. Thank you. All right.

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

THE COURT: Certainly.

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

THE COURT: Right.

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

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

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

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

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

THE COURT: But it's in here.

MS. GORDON: Correct.

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

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

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

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

THE COURT: Yes I am.

MR. VOGEL: No, you're --

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

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

THE COURT: I -- I disagree.

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

THE COURT: Right.

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

THE COURT: What cases say that?

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

THE COURT: Is it in your brief?

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

MS. GORDON: Pretrial conference.

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

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

MR. JIMMERSON: It was filed yesterday.

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

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

MR. VOGEL: Correct, and he was disqualified.

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

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

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

MR. JIMMERSON: Factually --

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

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

MR. JIMMERSON: If I --

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

MS. GORDON: Right.

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

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

MS. GORDON: And that's --

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

MS. GORDON: That's a different issue.

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

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

THE COURT: Yes, I agree.

MR. VOGEL: That's --

MR. JIMMERSON: We --

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

THE COURT: That's a totally different issue.

MR. JIMMERSON: We --

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

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

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

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

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

THE COURT: Okay.

MR. VOGEL: -- of the case --

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

MR. VOGEL: -- and --

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

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

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

MR. VOGEL: Well --

THE COURT: -- three times and I --

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

THE COURT: Okay, because --

MR. VOGEL: -- addressing in this --

MR. JIMMERSON: If --

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

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

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

THE COURT: Maybe I'm --

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

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

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

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

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

MR. VOGEL: His --

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

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

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

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

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

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

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

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

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

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

THE COURT: It was one of those --

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

THE COURT: I read it.

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

THE COURT: And he said Judge Bare did --

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

THE COURT: No, I --

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

THE COURT: Okay.

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

THE COURT: (Indiscernible) thank you.

MR. VOGEL: -- the appearance of bias.

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

MR. VOGEL: But --

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

MR. VOGEL: But with respect --

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

MR. VOGEL: But --

THE COURT: -- to me is --

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

THE COURT: Okay. Okay.

MR. VOGEL: -- 22 Nevada 304 --

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

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

THE COURT: Just one second.

MR. JIMMERSON: Okay.

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

mean binding this would be --

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

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

MR. VOGEL: No.

THE COURT: -- I'm not doing.

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

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

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

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

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

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

MR. VOGEL: Okay.

THE COURT: Okay.

MR. VOGEL: Okay.

THE COURT: So because he --

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

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

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

MR. VOGEL: And we're not --

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

MR. VOGEL: Okay.

THE COURT: What I -- okay.

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

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

MR. VOGEL: Context, sure.

THE COURT: Does that make sense?

MR. VOGEL: It does.

MS. GORDON: Yes.

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

MS. GORDON: There's a distinction.

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

MR. VOGEL: Yeah --

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

MR. VOGEL: Yes.

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

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

THE COURT: Okay, that's fine.

MR. VOGEL: -- and --

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

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

THE COURT: I absolutely do.

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

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

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

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

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

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

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

MR. VOGEL: Yeah.

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

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

THE COURT: Okay.

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

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

MR. VOGEL: So --

MS. GORDON: It's just --

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

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

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

THE COURT: Okay.

MR. JIMMERSON: -- the defendants made --

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

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

THE COURT: I -- I saw that.

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

THE COURT: But here's my --

MR. JIMMERSON: -- and later then --

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

MR. JIMMERSON: Now with regard to --

THE COURT: Okay.

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

THE COURT: Of course.

MR. JIMMERSON: -- department and --

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

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

THE COURT: -- I get that.

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

THE COURT: This case.

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

THE COURT: Okay.

MR. JIMMERSON: -- 2018 decision --

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

MR. JIMMERSON: Yeah.

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

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

THE COURT: Just tell --

MR. JIMMERSON: -- page 4 --

THE COURT: Of?

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

THE COURT: Of plaintiff's reply.

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

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

MR. JIMMERSON: -- filed October 1.

THE COURT: Okay, why don't --

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

THE COURT: Okay.

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

THE COURT: Hold on.

MR. JIMMERSON: I could approach the bench --

THE COURT: Defendants' supplemental filed --

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

THE COURT: I --

MR. JIMMERSON: Here you are, Judge.

THE COURT: I --

THE CLERK: It should --

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

MR. JIMMERSON: Right.

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

MR. JIMMERSON: And that was filed --

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

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

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

THE COURT: Okay, that's --

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

THE COURT: Okay.

MS. GORDON: -- wasn't --

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

MS. GORDON: -- allowed.

THE COURT: I apologize.

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

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

MS. GORDON: Okay.

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

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

MR. JIMMERSON: Page 4, yes.

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

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

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

MR. JIMMERSON: Right. Paragraph --

THE COURT: Footnote.

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

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

THE COURT: Okay.

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

THE COURT: Okay.

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

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

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

plenty of opportunity to make modifications --

THE COURT: Okay.

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

THE COURT: Okay.

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

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

MR. JIMMERSON: That's right.

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

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

THE COURT: I saw that too.

MR. JIMMERSON: Okay.

MS. GORDON: And I think --

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

MR. JIMMERSON: I think that's fair.

MS. GORDON: That's exactly right.

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

MR. JIMMERSON: I think that's fair.

THE COURT: -- I get it.

MS. GORDON: Yes. And --

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

THE COURT: Is that fair?

MR. JIMMERSON: I do.

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

MS. GORDON: And that was a distinction --

THE COURT: -- that makes me feel better.

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

THE COURT: Okay, that's fine.

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

THE COURT: Right, which --

MS. GORDON: The issue was --

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

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

THE COURT: No. No.

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

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

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

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

THE COURT: No. I agree with you there.

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

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

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

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

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

THE COURT: Sure.

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

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

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

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

MS. GORDON: Right. So that intention --

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

MS. GORDON: Yes.

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

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

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

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

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

MS. GORDON: Well --

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

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

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

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

MS. GORDON: Right.

THE COURT: You didn't intend --

MS. GORDON: No --

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

MS. GORDON: Yes.

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

MS. GORDON: No, but if you --

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

MS. GORDON: Absolutely.

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

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

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

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

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

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

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

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

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

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

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

MR. JIMMERSON: Fifty years ago.

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

MR. JIMMERSON: Fifty years ago.

THE COURT: No.

MS. GORDON: But --

THE COURT: Let me -- I --

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

THE COURT: Okay.

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

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

MS. GORDON: I --

THE COURT: I assume you did.

MS. GORDON: I do. I absolutely do.

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

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

THE COURT: Oh don't --

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

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

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

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

MR. VOGEL: But it goes deeper than that.

Go ahead.

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

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

THE COURT: You knew it was in there.

MS. GORDON: Yes.

THE COURT: Okay.

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

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

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

THE COURT: That he was a beautiful person.

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

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

MR. VOGEL: It's --

THE COURT: Okay.

MS. GORDON: Go ahead. Sorry.

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

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

THE COURT: They didn't --

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

UNIDENTIFIED SPEAKER: Yep.

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

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

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

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

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

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

MR. JIMMERSON: But -- just be accurate.

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

THE COURT: No, I know what character --

MR. VOGEL: So --

THE COURT: -- evidence is.

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

THE COURT: It didn't do what?

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

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

MS. GORDON: He said --

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

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

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

MR. VOGEL: He's --

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

MR. VOGEL: He's a lawyer.

THE COURT: He --

MR. VOGEL: He's a lawyer.

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

MR. VOGEL: Well, he's --

THE COURT: -- is he a professional witness?

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

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

MR. VOGEL: Well, the --

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

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

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

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

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

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

MR. VOGEL: Yeah.

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

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

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

THE COURT: Okay.

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

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

MR. JIMMERSON: It says 19.

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

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

MR. VOGEL: Well --

THE COURT: Well --

MR. VOGEL: -- yes and no.

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

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

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

appropriate?

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

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

THE COURT: Right.

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

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

MR. VOGEL: Well the --

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

MR. JIMMERSON: Four cases.

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

MS. GORDON: And here we are --

MR. VOGEL: -- four trials.

MS. GORDON: Here we are --

THE COURT: I'm sorry?

MR. VOGEL: It talks about --

MS. GORDON: Sorry.

MR. VOGEL: -- four trials.

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

MS. GORDON: Right. Yeah.

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

know, however the Supreme Court did it.

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

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

MS. GORDON: I --

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

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

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

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

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

MS. GORDON: But that --

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

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

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

MS. GORDON: Absolutely.

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

MS. GORDON: And --

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

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

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

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

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

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

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

THE COURT: Right.

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

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

MS. GORDON: Right.

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

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

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

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

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

MS. GORDON: I --

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

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

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

THE COURT: Okay.

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

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

MS. GORDON: Yes.

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

MS. GORDON: No, I -- no.

THE COURT: You did not know that?

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

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

MS. GORDON: And you --

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

door, but --

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

THE COURT: So what is that inference from there?

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

THE COURT: Oh.

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

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

MS. GORDON: No.

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

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

MS. GORDON: So --

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

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

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

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

THE COURT: Because it's different.

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

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

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

MS. GORDON: Yes.

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

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

MS. GORDON: Right.

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

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

THE COURT: Correct?

MS. GORDON: Right.

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

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

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

MS. GORDON: Right.

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

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

THE COURT: That's frustrating.

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

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

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

THE COURT: Yeah.

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

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

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

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

MS. GORDON: Right.

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

MS. GORDON: Yes.

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

MS. GORDON: And we would of course --

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

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

MS. GORDON: No, we appreciate --

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

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

racist is --

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

THE COURT: Right, but --

MS. GORDON: Right.

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

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

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

MS. GORDON: Right, so I --

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

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

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

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

MS. GORDON: So I --

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

MS. GORDON: Right.

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

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

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

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

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

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

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

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

MS. GORDON: Right.

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

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

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

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

MS. GORDON: Right.

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

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

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

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

THE COURT: No, I got it.

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

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

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

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

MS. GORDON: Especially for the amount --

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

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