Case No. 81596

IN THE SUPREME COURT 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,

Petitioners,

v.

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

Respondents,

and

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

Real Party In Interest.

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Lower Court No. A-18-776896

ANSWER TO PETITION FOR WRIT OF MANDAMUS

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NRAP 26.1 DISCLOSURE

THE UNDERSIGNED counsel of record certify that the following are persons as described in NRAP 26.1(a) and must be disclosed:

1. Real party in interest Jason Landess is an individual.

2. The following law firms have appeared for the real party in interest: Howard & Howard Attorneys PLLC and The Jimmerson Law Firm.

These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

DATED: December 9, 2020.

HOWARD & HOWARD ATTORNEYS PLLC

By: *Martin A. Little*
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ISSUES PRESENTED

1. Whether Judge Earley abused her discretion by not declaring Judge Bare's mistrial order void, where Judge Bare simply memorialized his substantive oral decision to a written order after Defendants moved to disqualify him, but before he was disqualified.

2. Whether Judge Earley abused her discretion in awarding Plaintiff costs, but not fees, under NRS 18.070.

3. Whether the Petition is barred by laches.

STATEMENT OF FACTS

A. Prologue.

Defendants Dr. Debiparshad and his related entities (hereafter "Defendants") inexplicably waited almost a year after Judge Bare granted a mistrial before filing this Writ, which is replete with misstatements of fact and law (including misleading this Court by deliberately misquoting the legislative history of NRS 18.070). Even more perplexing, Defendants sidestep any meaningful discussion of the merits of the grant of a mistrial—which was independently reviewed and endorsed by two subsequent District Court Judges. Incredibly, Defendants go so far as to deny injecting race into this trial, and even claim to be the victim—saying they are being "punished for referring to [the Burning Embers e-mail] that was stipulated into evidence and asking a question to which no objection was raised." *See* Petition, p. 29.

The only victim in this case is Plaintiff, Jason Landess ("Plaintiff"), who is now forced to re-incur significant costs and attorneys' fees because Defendants created plain error by purposely injecting race into a medical malpractice trial.

B. Proceedings After Mistrial.

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. [1 P.App. 203]. Contrary to Defendants' claims that Judge Bare offered "sua sponte" excuses [Writ, p. 9] for having missed the email, Judge Bare merely *repeated* what counsel had stated earlier on the record, which Judge Wiese confirmed. [7 P.App. 1661] He also invited both counsel into Chambers after the proceedings to discuss the issue, and invited *both* sides to Brief the issue or file any motions they felt appropriate. [3 P.App. 0478] Thus, on Sunday, August 4, 2019, Plaintiff filed a Motion for Mistrial and for Fees and Costs. [3 P.App. 479].

On Monday, August 5, 2019, Judge Bare granted Plaintiff's mistrial motion and consumed 70 pages of trial transcript articulating a basis for that decision. [3 P. App. 476-556]. Contrary to Defendants' claims that the motion was granted "without allowing Petitioners an opportunity" to oppose it [Writ, p. 10], Judge Bare asked both sides how they wanted to proceed, and Defendants' counsel (*after* the comments about Plaintiff's counsel that were since complained about) indicated they wanted "to move forward with the motion, and hopefully with the rest of the trial." [3 P.App.479; 493-494.] Notably, Defendants did **not** ask Judge Bare to recuse himself based on his comments about counsel the previous Friday, or ask him not to complete the Trial, or ask him not to rule upon the Motion for Mistrial.

Defendants filed a motion to disqualify Judge Bare on August 23, 2019, just short of three weeks after Judge Bare rendered his decision. [3 P. App 557-586].

Before Defendants filed their disqualification motion, Plaintiff sent them a draft Findings of Fact and Conclusions of Law ("FOFCOL"), which they refused to sign, which carefully tracked Judge Bare's oral rulings and findings from August 5th – *see* "Judge Bare's Written Order Tracked His Oral Pronouncements" at 14 P.App. 3110- 3113 - and was thus submitted to Judge Bare on September 4, 2019. [9 P.App. 1963]. Judge Bare signed it on September 9, 2019; and it was filed the same day, along with three other orders (including one denying Plaintiff's motion to strike certain last-minute disclosures, and one to strike the supplemental report of one of Defendants' witnesses).

Defendants' disqualification motion sought to have a different Judge decide the motion for attorneys' fees and costs and at retrial, and complained about multiple Trial orders. They did not object to the proposed FOFCOL that had been drafted or seek to preclude Judge Bare from signing it. Defendants' disqualification motion was subsequently granted (but not for actual bias), but Judge Wiese found no merit to Defendants' claims regarding Judge Bare's Orders. The case was reassigned to Judge Earley on September 17, 2019, who subsequently heard and denied Defendants' motion for relief from the FOFCOL, along with a motion for reconsideration thereof. Judge Earley awarded Plaintiff costs, but not attorneys' fees, stemming from the mistrial.

ARGUMENT

I. JUDGE EARLEY DID NOT ABUSE HER DISCRETION IN NOT VOIDING THE MISTRIAL ORDER.

Defendants contend that Judge Earley abused her discretion and ask this Court to vacate her order denying relief from Judge Bare's mistrial order. The reality is Defendants wanted an independent review of Judge Bare's mistrial order. They got it not only from Judge Earley, but also Judge Wiese in his disqualification order. [7 P.App. 1725] Defendants lost, and their procedural attacks on Judge Earley's orders are unavailing.

A. The District Court Does Not Have Jurisdiction to Serve as a Reviewing Court for Another District Court Judge.

Judge Earley clearly—and accurately—stated in her order that:

> As previously noted by the Honorable Jerry Wiese, this Court does not have the jurisdiction to review, set aside, or second guess an order, findings of fact, and/or conclusions of law made by another district court judge. **The substantive basis for the Honorable Rob Bare's decision must be addressed by an appellate court.** [13 P.App. 3093].

There is nothing ambiguous or incorrect about that statement. How Defendants' counsel can in good faith make such a request when numerous cases decided by this Court prohibit such action is beyond comprehension: "Ordinarily, one district court lacks jurisdiction to review the acts of other district courts."[1] "The

[1] *Maiola v. State*, 120 Nev. 671, 676, 2004 Nev. LEXIS 101, *11 (2004).

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)."[2] Citing to *Rohlfing*, 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."**[3]

And in explaining its *Rohlfing* decision with language directly on point, this 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."**[4] After reviewing still another relevant case,[5] the Court further explained that, "Thus, under the above cases, one **district court generally cannot set aside another district court's order."**[6] Yet that is *precisely* what Defendants unapologetically asked Judge Earley to do.

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[2] *Rohlfing v. Second Judicial Dist. Court,* 106 Nev. 902, 906, 1990 Nev. LEXIS 164, *7 (1990) (emphasis supplied).
[3] *Colwell v. State*, 112 Nev. 807, 813, 1996 Nev. LEXIS 99, *11 (1996) (emphasis supplied).
[4] *State Eng'r v. Sustacha*, 108 Nev. 223, 225, 1992 Nev. LEXIS 50, *4-5 (1992) (emphasis supplied).
[5] *Warden, Nev. State Prison v. Owens*, 93 Nev. 255, 1977 Nev. LEXIS 529 (1977).
[6] *State Eng'r, supra*, at 226, *5 (emphasis supplied).

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 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 this Court.

Rather than address the merits of Judge Bare's Mistrial Order, Defendants resort to inaccurate and irresponsible arguments like this.

B. Defendants' Reliance Upon NRS 1.235 is Misplaced Because Judge Wiese Did Not Disqualify Judge Bare Under That Statute.

Defendants' entire argument is premised upon the language in NRS 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 and shall [reassign the case]." *Id*. However, Ms. Gordon's and Mr. Vogel's Affidavits and Certificates In Compliance with NRS 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 this 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 N.C.J.C.] as soon as possible after becoming aware of the new information.[7] 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

[7] *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.

disqualification of Judge Bare premised on his violation of N.C.J.C. 1.2, 2.2, and 2.11."[8]

Moreover, Judge Wiese 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 Judge Bare's compliment of Mr. 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."[9]

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 pretrial motions) into a post-trial motion under Nevada's Cannons of Judicial Conduct.

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[8] [3 P. App. 617].
[9] [7 P. App. 1723, 1725].

C. Judge Bare's Reduction of Judicial Determinations Made Before Defendants Filed the Motion to Disqualify to Writing was a Ministerial Act.

Even if this Court were to ignore all the above-stated legal reasons for denying this Writ, 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 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 this 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 position, Defendants cavalierly conclude that, "Judge Bare's Order cannot be interpreted as a "housekeeping" matter as allowed by the *Whitehead* Court."[10]

[10] [8 P.App. 1883, lines 10-11].

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."[11] 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 three 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."[12]

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

[12] *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

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 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."[13]

The "other proof" would be something like the transcript of the proceeding. Here, if this Court were to grant Defendants' request and declare the mistrial order void, that order would not extinguish the reality of Judge Bare's rendering an oral pronouncement of his written order 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.

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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. 2d Judges § 230 (emphasis supplied).

[13] *Lewis, supra*, at 465, 14.

The point is that on August 5, 2019—long before Defendants filed their motion to disqualify and even longer before Judge Wiese 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' writ 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. They cannot do that because, as previously noted, the written Order tracks the transcript, including the 12 specific "objections" (eventually) identified. *See* "Judge Bare's Written Order Tracked His Oral Pronouncements" at 14 P.App. 3110- 3113.

II. JUDGE BARE WAS WITHIN HIS DISCRETION IN GRANTING A MISTRIAL.

The attack upon Judge Earley's order is a subterfuge. Defendants' intent is to invalidate Judge Bare's mistrial Order. Defendants' "form over substance" arguments, however, clearly miss the boat since it was well within Judge Bare's discretion to grant a mistrial.

The issues relevant to this medical malpractice case are those related to Defendants' treatment of Landess, and Landess' resulting damages. His character is completely irrelevant, as are his views on race. Defendants nevertheless presented evidence on this point, and they knew exactly what they were doing: They had the

exhibit ready with the relevant language highlighted, and they questioned Landess' former employer, Jonathan Dariyanani ("Dariyanani"), about whether he believed that the highlighted language constituted "racist comment[s]." The only potential impact of this line of questioning is to persuade the jury that Landess is a racist, which may in turn affect the jury's adjudication of his case based on irrelevant information. This is nothing short of an invitation for jury nullification, and it cannot be undone through a curative instruction.

A. Legal Standard.

The decision to grant a mistrial is within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *Khoury v. Seastrand,* 132 Nev. Adv. Op. 52, 377 P.3d 81, 86 (2016). "A defendant's request for a mistrial may be granted for any number of reasons where some prejudice occurs that prevents the defendant from receiving a fair trial." *Rudin v. State,* 120 Nev. 121, 144, 86 P.3d 572, 587 (2004). A district court may also declare a mistrial *sua sponte* where inherently prejudicial conduct occurs during the proceedings. *See Baker v. State,* 89 Nev. 87, 88, 506 P.2d 1261, 1261 (1973).

And this Court explained the obligation of the trial court when such misconduct occurs: "When such conduct is brought to the district court's attention by objection or motion for a mistrial, it is incumbent upon the district court to determine whether the remark was made and heard by the jury. . . . [I]f there is a

reasonable indication that prejudice may have occurred to one party, **the district court is obligated to declare a mistrial**. "Manifest necessity to declare a mistrial may also arise in situations in which there is an interference with 'the administration of honest, fair, even-handed justice to either, both, or any of the parties to the proceeding.'" *Hylton v. Eighth Judicial Dist. Court*, Dep't IV, 103 Nev. 418, 423, 743 P.2d 622, 626, 1987 Nev. LEXIS 1660, *11 (1987), citing to *People v. Clark*, 705 P.2d 1017, 1019 (Colo. Ct. App. 1985).

Ms. Gordon therefore engaged in conduct that obligated Judge Bare to, as a matter of law, declare a mistrial.

III. THE DEFENSE PURPOSELY CAUSED A MISTRIAL AS PROHIBITED BY NRS 18.070(2).

NRS 18.070(2) provides that a court may impose costs and reasonable attorneys' fees "against a party or an attorney who, in the judgment of the court, purposefully caused a mistrial to occur." Here, Defendants' counsel knew exactly what they were doing. They had the email at issue ready, with the offending sentence highlighted. They were waiting for what they perceived to be an opportunity to shoehorn it into the case, and when such an opportunity arose, they seized upon it. Defendants intentionally performed the act which necessitated a mistrial in a calculated and tactical manner, and for their own benefit.

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A. Sanctions Imposed for Misconduct Leading to a Mistrial are Well Established in Nevada.

Nevada case law regarding the importance of deterring misconduct by compelling the immediate payment of sanctions is relevant. Indeed, sanctions imposed for misconduct leading to mistrial are essential to serve the dual objectives of making the innocent party whole and to deter future misconduct by the offending party: "[t]he ability to impose such sanctions serves the dual purposes of deterring flagrant misbehavior, **particularly where the offending party may have deliberately provoked a mistrial**, and compensating the innocent party for the attorneys' fees incurred during the mistrial." *Persichini v. Wm. Beaumont Hosp.*, 607 N.W.2d 100, 109 (Mich. App. 1999), cited with approval by the Nevada Supreme Court in *Emerson v. Eighth Judicial District Court*, 127 Nev. 672, 680 n.4 (2011).

B. A Lawyer Can Purposefully do an Act that Leads to a Mistrial Without Having Bad Intent.

The term "purposely" is defined as "[i]ntentionally; designedly; consciously; knowingly. An act is done 'purposely' if it is willed, is the product of conscious design, intent or plan that it be done, and is done with awareness of probable consequences." BLACK'S LAW DICTIONARY, 1236 (6th ed. 1990). As this Court has clarified, even if the court were to somehow determine that the events precipitating the mistrial were "unintentional," they still amount to misconduct, and are consistent

with the BLACK'S LAW DICTIONARY, definition of "purposely," which includes "awareness of probable consequences." *See Lioce v. Cohen*, 124 Nev. 1, 25, 174 P.3d 970, 985 (2008).

The *Lioce* decision supports Plaintiff's position that the lawyer need not know that they are committing misconduct in order to be sanctioned. **A lawyer can thus purposefully do an act that leads to a mistrial without having bad intent.** All that is needed is that the attorney knowingly act improperly (intending to do what is done, not necessarily intending to break the rules). "**A claim of misconduct cannot be defended with an argument that the misconduct was unintentional. Either deliberate or unintentional misconduct can require that a party receive a new trial. The relevant inquiry is what impact the misconduct had on the trial, not whether the attorney intended the misconduct.**" *Lioce v. Cohen*, 124 Nev. 1, 25, 174 P.3d 970, 985, 2008 Nev. LEXIS 1, *44 (2008). Of equal importance, the language of NRS 18.070(2) cannot possibly mean that a party and/or an attorney must be the sole causational link between the actions giving rise to the mistrial and the mistrial itself because only the trial court has the power to declare a mistrial. In other words, the statute automatically includes the assumption that something happens that prompts a court to exercise its power to declare a mistrial.

A logical and reasonable interpretation of that statute then is that a party and/or an attorney who is the primary moving force behind actions or events that

lead a court to declare a mistrial may be ordered to pay the costs and attorney's fees. And that is what happened here: Ms. Gordon in the matter of a few seconds took it upon herself to burn down the village. As she stated, she did what she did because she thought she was duty-bound to do so. But, as the above-cited authorities teach, she was sorely mistaken. And Nevada courts have long recognized the maxim that one cannot "unring a bell." *See Zana v. State,* 125 Nev. 541, 545-546, 216 P.3d 244, 247 (2009).

The Defense may in fact have anticipated that a heated reaction from Plaintiff and/or Judge Bare would draw a cautionary instruction. What they did not, however, anticipate was that Judge Bare would view that suggestion as tantamount to throwing a skunk into the jury box and then asking the jury to disregard the smell. One thing is for sure though: they were certainly aware of the probable consequences of their actions as evidenced by the extreme and unusual measures they employed to distance themselves from the bomb they unilaterally exploded.

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C. Defendants Misrepresent the Legislative History of NRS 18.070(2).

In their Writ, Defendants state the following about the purported legislative history of NRS 18.070(2):

> NRS 18.070 was amended in 1977 to include section 2, the provision at issue in this case. S.B. 263, 1977 p. 775. It has not been amended or revised since. Although the legislative deliberations do not specifically address the provision in the bill that would eventually become NRS 18.070(2), it gives guidance as to the Legislature's thinking when it amended Chapter 18 to include 18.070(2). In deliberations surrounding S.B. 263, senators raised the specter of attorneys who "take the trial to the point which approximate [sic] the ceiling on fees and then **deliberately cause[] a mistrial so that [they] can end the trial.**" Thus, it is clear that when the legislatures were discussing amendments to the existing law regulating attorneys' fees, they contemplated punishing conduct that is intended to cause a mistrial, such as where a party's case is going poorly at trial, and the party wants a mistrial in order to obtain a second chance to win the case.

As has become a pattern in this case, Defendants are once again misrepresenting the law. Indeed, defense counsel carefully tries to hedge their bet, but their intent is clear: they crafted this paragraph to suggest that Senator Close was talking about § 18.070(2) and that the intent was to make the threshold "deliberate" (*i.e.*, specific intent) before a court could award fees or costs under that statute.

However, this quotation is taken out of context, as evidenced from the entire relevant entry in the Legislative Minutes:

> Senator Close then explained to the Committee **the portion of the bill which provides for proration of fees** in the case of an attorney who takes the trial to the point which approximate the ceiling on fees and

then deliberately causes a mistrial so that he can end the trial. (Emphasis supplied). [1 RP.App. 1-51.]

As one can see, Senator Close was talking about a portion of the bill that allowed the Court to penalize and prorate fees against an attorney who essentially abandons his client. He wasn't at all talking about a court awarding fees or costs to a party on one side of the case who is harmed by an attorney and/or party on the other side who purposely causes a mistrial. And it is clear he was not discussing § 18.070(2). It is thus apples and oranges; yet Defendants disingenuously put this before this Court as support for their arguments.

D. A Reasonable Interpretation of NRS 18.070(2) is That a Party/Attorney Must Intend to do the Improper Acts That Eventually Lead to a Mistrial.

First of all, although a mistrial can occur in either a criminal or civil case, the actual event of a mistrial is not a crime. It is a procedural device designed to avoid injustice in any type of case. Accordingly, it is incongruous for Defendants to attempt to graft bad-mind concepts applied in criminal cases to court-administered procedural mechanisms.

Secondly, there are essentially "four bad-mind" categories: (1) negligence; (2) recklessness; (3) general intent; and (4) specific intent. Plaintiff is not aware of (and Defendants not cited to) any procedural mechanisms related to sanctions that require premeditated conduct. And in the present context, it would be virtually impossible for Plaintiff to prove that Defendants/or their attorneys specifically

intended to cause a mistrial because they were incapable of producing that outcome on their own accord. Indeed, the *trial court* is the only one with the power and means to declare a mistrial. So how could any aggrieved party ever prove specific intent to cause a mistrial when a party and/or attorney on the other side cannot, without help from the court, accomplish the intended act? That is just an unreasonable interpretation of the statute.

A reasonable interpretation, consistent with the definition of "purposeful" discussed above, is that a party and/or attorney must intend to do the improper acts that eventually lead to a mistrial. This is more akin to general intent in a criminal context. It's like the shooter who fires into a crowd with no particular victim in mind. He's guilty of second-degree murder because he intended to do the act which actually led to the death of someone in the crowd. But he's not guilty of first-degree murder.

E. Defendants' Claim That They are the Victim is Incredulous.

During argument on the mistrial motion, Ms. Gordon constantly tried to point the finger of blame at the Plaintiff, repeatedly exclaiming that Plaintiff "disclosed" the documents she used to derail the trial. However, Dariyanani sent a 79-page packet of documents directly to Defendants' counsel, John Orr, of which the Burning Embers email was 2 pages. They are the ones who therefore requested and surfaced that document. They are the ones who strategically opted not to list their smoking

gun as a trial exhibit to divert attention away from them. They are the ones who in advance highlighted the inflammatory language in yellow for the jury to see. They are the ones who manipulated the admission of those documents by casually pretending to not know whether or not Plaintiffs' Exhibit 56 had been admitted into evidence. They are the ones who elected to put everything at risk by not having a bench conference before igniting that bomb. They are the ones who carefully plotted to wait until Dariyanani said something complementary about Plaintiff before exploding that bomb. And they are the ones who then stood there with a straight face and tried to escape culpability for their outrageous, intentional acts by ridiculously pointing the finger of blame at Plaintiff for "disclosing" those documents in his 12th 16.1 disclosure.

Nothing Plaintiff did put the Burning Embers email before the jury, or otherwise injected race into the Trial. That was Defendants' counsel and Defendants' counsel alone. Because Defendants' counsel was charged with knowing that injection of race is improper, the conscious decision to produce the Burning Embers email requires both Judge Bare and Judge Earley to find that Defendants' counsel purposely caused the mistrial, which they did. "Everyone is presumed to know the law, and this presumption is not even rebuttable[.]" *See Smith v. State*, 38 Nev. 477, 481 (1915). That particularly applies to officers of the court. *Pray v. State*, 114 Nev. 455, 458 (1998). Ms. Gordon is a partner at her firm, not a

first-year associate. She knew that the evidence was radioactive. That is why she and Mr. Vogel were so, in their words, "careful" before presenting it to the jury. She is thus charged with knowing that the use of racially-charged evidence to influence a jury in any type of a case, criminal or civil, is universally condemned. *See Flanagan v. State*, 109 Nev. 50, 53 (1993); *Born v. Eisenman*, 144 Nev. 854, 862 (1998).

Importantly, the only reason Defendants would use such radioactive material would be to change the outcome of the trial. Judge Bare correctly observed that before the Burning Embers email was presented to the jury, Plaintiff was likely to have succeeded in establishing liability, but there was a legitimate doubt as to whether the jury would award all of Plaintiff's claimed damages. As Judge Bare found, "[t]he Court offered its belief that Plaintiff had proved its case as to negligence, but that Plaintiff likely would not be awarded all of the damages he was seeking, particularly relating to stock options." [6 P.App. 1290-1308, at 5, ¶ 7]. Judge Bare enunciated the same in his sworn Affidavit submitted to Judge Wiese.

In short, there is no question that Defendants purposely caused the mistrial and Judge Earley was well within her discretion in awarding costs to Plaintiff.

IV. NRS 18.070 DOES NOT LIMIT THE DISTRICT COURT'S DISCRETIONARY AUTHORITY TO IMPOSE SANCTIONS.

Defendants argue that NRS 18.070 governs and precludes sanctions because Plaintiff has not demonstrated that defense counsel purposefully caused a mistrial.

But the district court's discretionary authority to impose sanctions exists independent of any similar statutory authority. *See Emerson v. Dist. Ct.*, 127 Nev. 672, 680, 263 P.3d 224, 229 (2011) ("This broad discretion permits the district court to issue sanctions for any 'litigation abuses not specifically proscribed by statute.'") (citing *Young v. Johnny Ribeiro Building*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990)); *N. Am. Properties v. McCarran Int'l Airport*, No. 61997, 2016 WL 699864, at *2 (Nev. Feb. 19, 2016) (unpublished) ("District courts in Nevada may sanction abusive litigation practices through their inherent powers"); *Mahban v. MGM Grand Hotels, Inc.*, 100 Nev. 593, 597, 691 P.2d 421, 424 (1984) ("[W]e have not so limited the power of the courts of this state to seek and do equity."). The United States Supreme Court has determined that a federal district court has the inherent power to impose attorney fees as sanctions. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46, 62, 111 S. Ct. 2123 (1991); *see Couch v. Private Diagnostic Clinic*, 554 S.E.2d 356, 362-364 (N.C. App. 2001) (applying *Chambers* to state trial courts). Notably, the stated purpose of the court's inherent authority to issue sanctions is when there are litigation abuses, but the particular language of a statute or rule does not perfectly fit the situation. *See Emerson*, 127 Nev. at 680, 263 P.3d at 229. The reason behind the Court's inherent authority focuses on "the infinite variety of misconduct and of aggravating and mitigating factors." *Id.*, 127 Nev. at 681, 263 P.3d at 230 (*citing Matter of Disciplinary Pro. Against Noble*, 100 Wash.2d 88, 667 P.2d 608, 612

(1983)). "The ability to impose such sanctions serves the dual purposes of deterring flagrant misbehavior... and compensating the innocent party for the attorney fees incurred during the mistrial." *Persichini v. Wm. Beaumont Hosp.*, 607 N.W.2d 100, 109 (Mich. App. Ct. 1999).

A plain reading of NRS 18.070 addresses a specific situation (*i.e.*, purposefully causing a mistrial) and provides authority in that situation for the court to award sanctions. Although Judge Earley correctly awarded costs under NRS 18.070, reading that statute to preclude sanctions in other situations—such as where an attorney engages in misconduct that causes a mistrial—would then rob the court of its discretion to issue sanctions to compensate a party harmed by misconduct. To read the statute in a way that precludes sanctions in this type of situation would allow attorneys to engage in misconduct, all the while claiming to have no intent to cause a mistrial, without fear of repercussion. This would be an absurd reading of the statute and ignores the case law saying that courts have discretion to allow sanctions for professional misconduct at trial. **Indeed, Judge Earley clearly stated at the hearing that she was deciding whether Defendants' conduct was sanctionable under *Emerson* or *Lioce*.** [8 P.App. 1841]. Therefore, both NRS 18.070(2) and the district court's inherent authority to award Plaintiff's requested costs justify the cost award that was entered.

/ / /

V. THE PETITION IS BARRED BY THE AFFIRMATIVE DEFENSE OF LACHES.

As noted above, Defendants' admitted primary objective in filing the writ is to invalidate Judge Bare's mistrial order. Yet they failed to register a complaint with this Court until **almost a year later** when they filed the instant Writ. And Plaintiff did absolutely nothing to interfere with their right to do so.

This is the guidance provided by the Nevada Supreme Court regarding the affirmative defense of laches when dealing with a writ of mandamus: "In deciding whether the doctrine should be applied to preclude consideration of a petition for a writ of mandamus, a court must determine: (1) whether there was an inexcusable delay in seeking the petition, (2) whether an implied waiver arose from the petitioner's knowing acquiescence in existing conditions, and (3) whether there were circumstances causing prejudice to the respondent."[14]

Applying that criteria to this case, what plausible excuse do the Defendants have for sitting on their rights for almost a full year if they have believed all along that Judge Bare's Order was void? After all, this did not just dawn on them. And there are Nevada cases finding laches applies for as little as one month[15] when the

[14] *Building & Constr. Trades v. Public Works*, 108 Nev. 605, 611, 1992 Nev. LEXIS 130, *9 (1992).
[15] *Id.* at *10-11.

petitioner has knowledge of alleged impropriety and fails to act on that knowledge, let alone a year.[16]

Secondly, due to Defendants' knowledge of Judge Bare's alleged wrongful conduct in entering the mistrial order, they impliedly waived this complaint by sitting on their rights and acquiescing in existing in what they deem to be unfavorable conditions while litigating such motions as one to remove Judge Bare, one relating to future trial management by Judge Earley, and one for attorneys' fees and costs against Plaintiff. Each one of those motions changed the dynamics of the case.

Thirdly, circumstances materially changed while Defendants have been silent. For example, Plaintiff has been prejudiced by not being able to defend Defendants' complaint about Judge Bare **before** he was removed rather than after. There is clearly nothing that prevented them from filing a writ right after Judge Bare entered the Order and moving for a stay of proceedings until the appellate court decided the

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[16] *Nevada v. Eighth Judicial Dist. Court of State*, 116 Nev. 127, 2000 Nev. LEXIS 13 (2000) ("Applying the factors set forth in Buckholt, we conclude that only the eleven-month delay in the filing of the petition docketed in this court as Docket No. 32937 warrants imposition of the doctrine of laches to preclude consideration of the petition." *Id.* at 135, *12 & emphasis supplied); *Vistana Condo. Owners Ass'n v. Eighth Judicial Dist. Court*, 2016 Nev. Unpub. LEXIS 253, 132 Nev. 1041 (filed April 15, 2016) (unpublished disposition) ("[Petitioner's nearly year-long delay in seeking mandamus militates against extraordinary writ relief." *Id.* at *4 & emphasis supplied); *Turner v. Eighth Judicial Dist. Court*, 2019 Nev. Unpub. LEXIS 491, 439 P.3d 396 (filed April 23, 2019) (unpublished disposition) (writ of mandamus denied because petitioner filed "more than one year ago." *Id.* at *1).

issue. How is it now fair that Defendants get to roll the dice for **11 months** and then seek relief after things suddenly do not go their way? In addition, Plaintiff has incurred an enormous amount of fees and costs while Defendants have been exploiting the system.

The equities on this factor thus also weigh overwhelmingly in favor of Plaintiff.

CONCLUSION

The District Court did not abuse its discretion. Accordingly, the Writ should be denied.

DATED this 9th day of December, 2020.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word Office 365 with a proportionally spaced typeface in 14-point, double-spaced Times New Roman font.

2. I further certify that this brief complies with the word-count limitation of NRAP 21(d), because, using the computation guidelines in NRAP 32(a)(7)(C), it contains 6,940 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

DATED this 9th day of December, 2020.

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CERTIFICATE OF SERVICE

I certify that on December 9, 2020, I submitted the foregoing ANSWER TO PETITION FOR WRIT OF MANDAMUS for filing via the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, at Las Vegas, Nevada, addressed as follows:

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