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,

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.

Supreme Court No.: 81596

District Court No.: A-18-776896-C

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

S. BRENT VOGEL
Nevada Bar No. 6858
KATHERINE GORDON
Nevada Bar No. 5813
Lewis Brisbois Bisgaard & Smith LLP
6385 South Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
702-893-3383
ATTORNEYS FOR PETITIONERS

ROBERT L. EISENBERG
Nevada Bar No. 0950
rle@lge.net
Lemons, Grundy & Eisenberg
6005 Plumas Street, Third Floor
Reno, Nevada 89519
775-786-6868
ATTORNEYS FOR PETITIONERS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTORY AUTHORITIES

RULES AND REGULATIONS

ADDITIONAL AUTHORITIES

Pursuant to permission granted in this court's order of August 26, 2020, Petitioner hereby submits the following Reply in support of the Petition for writ of mandamus.

ARGUMENT

Throughout his Answer to the instant petition, Landess attempts to reframe the issues Petitioners raised and to put words in their mouths and in the mouths of their counsel. Landess spends much of his word allotment on a manufactured issue: namely, whether Petitioners' petition constituted an attempt to overturn Judge Bare's grant of mistrial. Petitioners were never given the opportunity to file points and authorities challenging the midnight filed motion for mistrial. Nevertheless, Petitioners have always understood "that much of the practical effect of the void [Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for a Mistrial] cannot be remedied in this case; the jury cannot be recalled and trial resumed." (13P.App. 3069). The reason Petitioners sought relief from the erroneous order because it became clear that Landess would not scruple to put it to use in unfairly disadvantaging them.

Landess's contrary contentions notwithstanding, the issue here is not whether Judge Bare should have granted the mistrial. Discussion of the merits of the mistrial is relevant only insofar as it demonstrates how improper it was for Judge Bare to have signed and filed his FOF—replete as it was with inaccuracies, misstatements,

and fabrications—and for Landess to have used it to disadvantage Petitioners in subsequent matters.

The only issues that remain are (1) whether Respondent erred by denying Petitioners relief from Judge Bare's written order; and (2) whether Respondent abused her discretion by granting Landess's motion for costs. The rest, including Landess's unfounded suggestion that the principle of laches somehow bars Petitioners from bringing this petition, are red herrings clearly intended to distract from the real issues.

I. Respondent Erred by Denying Relief from Judge Bare's Written Order.

A. Standard Of Review

A district court has inherent power to "amend, correct, resettle, modify, or vacate, as the case may be, an order previously made and entered on motion in the progress of the cause or proceeding." *Trail v. Faretto*, 91 Nev. 401, 403, 536 P.2d 1026, 1027 (1975). In addition, a district court may reconsider a previously decided issue if that decision was "clearly erroneous." *Masonry & Tile Contractors Ass'n v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997).

B. The District Court had Jurisdiction to Review Judge Bare's Void FOF

Respondent erroneously concluded that she lacked authority to "review, set aside, or second guess an order . . . made by another district court judge." (13P.App.

3085). But that principle is far from carved in stone. Landess quoted *Rohlfing v. Second Judicial Dist. Court*, 106 Nev. 902, P.2d 659 (1990), to suggest that under no circumstances may one district court review an order from another court. (Ans. at 5). In fact, the legal authority Landess cites in support of that notion contains significant qualifiers. He notes that "[o]rdinarily, one district court lacks jurisdiction to review the acts of other district courts" and "one district court generally cannot set aside another district court's order." (Ans. at 4, quoting *Maiola v. State*, 120 Nev. 671, 676, 99 P.3d 227, 230 2004) and *State Eng'r v. Sustacha*, 108 Nev. 223, 226, 826 P.2d 959, 961 (1992)). Yet the cases concede that such action is "*ordinarily*" or "*generally*" prohibited. That qualified language demonstrates that circumstances can very well exist when a district court may review an order entered by another judge in the same case.

Here, Respondent, and now Landess in answer, fail to acknowledge that Judge Bare's FOF was void because it was rendered after the disqualifying event occurred and while the motion to disqualify him was still pending.

No court should be bound by a void, factually inaccurate order merely because it was rendered by a predecessor judge whose jurisdiction would otherwise be considered coextensive—certainly not under the unusual circumstances of this case. Here, the order violated a statute because it was rendered while the motion to disqualify was still pending, and where the predecessor judge was later found to have

been disqualified for bias. NRS 1.235(5)

Respondent relied on language from two Nevada cases to support her conclusion that she lacked authority to overturn or even review Judge Bare's void FOF. (13P.App. 3092-93). Landess's answer also relies on those cases. (Ans. at 5). But Respondent misapprehended factual differences that render those cases inapposite. Further, Respondent ignored California authority directly on point.

Respondent and Landess cite *Rohlfing v. Second Judicial District Court*, a criminal case in which a judge voided an order dismissing a criminal information previously rendered by another judge. (13P.App 3092-93 (quoting 106 Nev. 902, 904, 803 P.2d 659, 661 (1990))). In *Rohlfing*, the Nevada Supreme Court noted that "because of the rotating procedure for assignment of judges in criminal matters in the second judicial district, [the other judge]'s order [voiding the order dismissing the information] was clearly inappropriate." *Id.* at 907, 803 P.2d at 663. The original judge had been authorized to render the ruling, and only the court's procedure prevented him from continuing with the case. Respondent and Landess also cite *State Engineer v. Sustacha*, in which a court in one Nevada Judicial District voided orders rendered in an entirely different Judicial District. 108 Nev. 223, 225, 826 P.2d 959, 960 (1992).

Unlike the cases cited and stated above, *Rossco Holdings v. Bank of America*, 58 Cal. Rptr. 3d 141 (Cal. Ct. App. 2007), is directly on point. In *Rossco Holdings*,

the trial court judge that succeeded a disqualified judge voided an order compelling arbitration that the predecessor judge had made at a time when he was disqualified. 58 Cal. Rptr. 3d at 146-47. The successor court also vacated the arbitration award arising from the void order compelling arbitration. *Id*. at 147.

The appeals court later emphasized that "[disqualification statutes] are intended to ensure public confidence in the judiciary and to protect the right of the litigants to a fair and impartial adjudicator." *Id*. at 150; *see* N.C.J.C. 1.2. Notably, the Court did not question whether the successor judge had jurisdiction to reconsider his predecessor's order. In fact, the Court went so far as to state that "[t]he law is clear that a disqualified judge's orders are void, regardless of whether they happen to have been legally correct." *Rossco Holdings*. 58 Cal. Rptr. 3d at 152.

Here, unlike in the otherwise inapposite Nevada cases Respondent and Landess cited, Judge Bare's tainted FOF is not a valid order he was entitled to render. Petitioners had moved to disqualify Judge Bare, and Judge Bare had already made his extremely biased disqualifying statements, before he accepted and signed Landess's Counsel's factually inaccurate and grossly embellished FOF. Consequently, that FOF should never have been rendered at all by Judge Bare. What is more, under the N.C.J.C.'s requirements, it was incumbent upon him not to render any rulings that could be seen as tainted by bias. *See* N.C.J.C. 2.11, Comment 2 ("A judge's obligation not to hear or decide matters in which disqualification is required

applies regardless of whether a motion to disqualify is filed."). Further, as in *Rossco Holdings*, there is no question that Respondent subsequently had jurisdiction to review Judge Bare's invalid FOF. The relevant inquiry concerns whether the FOF was tainted by the bias that resulted in Judge Bare's disqualification. Therefore, Respondent's contrary ruling was erroneous.

C. Petitioners Employed the N.C.J.C. and NRS 1.235 as a Reasonable Framework for Disqualification

Landess argues that "Defendants' reliance upon NRS 1.235 is misplaced because Judge Wiese did not disqualify Judge Bare under that statute." (Ans. at 6). That argument is completely beside the point. Landess acknowledges that Defendants "filed their motion under authority of Nevada's Code of judicial Conduct . . . ." (Ans. at 7). He goes on to invoke *Towbin Dodge, LLC v. Eighth Judicial District*, 121 Nev. 251, 258, 112 P.3d 1063, 1068 (2005), for the principle that "if 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." (at 7 (quoting *Schiller v. Fid. Nat'l Title Ins. Co.*, 2019 Nev. Unpub. LEXIS 805, *10-11 (Jul. 15, 2019))). But that analysis fails to tell the whole story. Moreover, that argument fails to address the fundamental question at issue here: what should a judge *be allowed to do* once he has disqualified himself by acts of bias, actual or implied

(and once a motion for disqualification has been filed)?

If Landess had his way, no mechanism would exist to limit the actions of a judge even if his or her actions were overtly biased, provided that biased behavior occurred sometime within 20 days of trial or three days of a pre-trial hearing. NRS 1.235(1)(a-b). So what happens when, as here, a judge demonstrates bias in trial? As the *Towbin Dodge* Court acknowledged, no statutory procedure exists under which to seek disqualification based on N.C.J.C. 121 Nev. at, 258, 112 P.3d at 1068. Moreover, *Towbin Dodge* did not clarify what acts a trial judge may or may not perform while awaiting a disqualification ruling.

Those questions must be answered now, and the clear answer is that the judge must perform no actions requiring judicial discretion until the motion to disqualify is resolved.

D. Filing Judge Bare's Written Order was not a Mere Ministerial Act

Landess downplays the importance of the act of rendering a written order so he can place it on the same substantive level as taking a matter off calendar. (Ans. at 9). Landess also inexplicably argues that "reduc[ing] prior judicial determinations to writing" resulting in an 18-page, 60-paragraph order is somehow nothing more than a "housekeeping" task. (Ans. at 9).

Landess attempts to convince this Court that "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 . . . .” (Ans. at 10). In doing so, Landess apparently hopes this court will ignore the notion, longstanding in Nevada, that a district court’s oral pronouncement from the bench is “**ineffective for any purpose**.” *Rust v. Clark County School Dist.*, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987)(emphasis added). Judge Bare may well have “carefully explained the basis of his ruling” after he offered his biased statements on behalf of Landess’s counsel. However, in Nevada, no judicial ruling can have any force unless it is written and rendered.

Landess further contends that “[t]he 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.” (Ans. at 12). But Defendants have done precisely that, repeatedly.

Landess directs this court to his opposition to Petitioners’ Motion for Reconsideration, which purports to refute Petitioners’ claim that “Judge Bare’s written order ‘contained numerous misstatements of fact and erroneous conclusions of law . . .’ and that he essentially abandoned his post by arbitrarily signing a proposed order submitted to him by Plaintiff’s counsel that bears no resemblance to Judge Bare’s oral pronouncements.” (Ans. at 12); (14 P.App. 3110). He then insists that “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." (Ans. at 12). In that opposition, Landess offered a "comparison of a *select number* of Judge Bare's oral pronouncements to the written language in his Order . . ." (14P.App. 3110 (emphasis added)). Landess then compared material from Paragraphs 4, 5, 11, and 18 of the FOF and suggested that "the same exercise could be done for all of the FOFCL." (14P.App. 3113).

Notably, Landess did not perform that exercise. Instead, he stopped his analysis of the FOF just before the most egregious of the fabrications occurring therein. As amply explained in the Petition, Paragraph 20 of the FOF contains an easily disprovable, yet ultimately damaging fabrication.[1](Petition, at 7-8). That falsehood, and Landess's shameless use of it, contributed directly to Respondent's granting nearly $120,000 in costs. But the misstatements do not stop at Paragraph 20. Rather, Petitioners have enumerated and thoroughly explained those of Judge Bare's findings of fact and conclusions of law not supported by the record, including in Paragraphs 19, 20, 22, 29, 40-41, 43-45, and 47-48. (13P.App. 3047-49). Thus,

[1] Paragraph 20 states that the defendant's statements and actions regarding its use of the "Bare Embers" email as a trial exhibit showed a "consciousness of guilt and of wrongdoing" and "[t]hat consciousness of wrongdoing suggests that Defendants and their counsel were the legal cause of the mistrial." Judge Bare never made that statement. Instead, he deferred any discussion on the legal cause of the mistrial until the anticipated hearing on Landess's motion for fees and costs. (3P.App. 0481; 3P.App. 0531).

by Landess's own metric, the Petition indeed has "traction" and clearly establishes that rendering his FOF required "discretionary action" from Judge Bare. (Ans. at 10 n. 12 quoting *In re Estate of Risovi*, 429 N.W.2d 404, 407 (N.D. 1988)). Thus, that action does not qualify as a ministerial or housekeeping act and, as such, is not an action a disqualified judge has legal authority to take.

Therefore, for all the reasons explained above, Petitioners respectfully request this Court grant their Petition for writ of mandamus on grounds that Respondent erred in denying Petitioners relief from Judge Bare's Findings of Fact, Conclusions of Law.

II. Respondent Abused Her Discretion by Granting Landess's Motion for Costs

In his Answer, Landess returns to a favorite tactic: to demonize defense counsel Katherine Gordon as calculating, lying in wait for any opportunity to reveal Landess as a racist to the jury. Landess employs this tactic ostensibly to show that Judge Bare properly granted mistrial. (Ans. at 14). Landess's ongoing efforts at character assassination notwithstanding, this argument is a mere feint. Rather, Landess impugns Ms. Gordon's character in an attempt to demonstrate that defense counsel possessed the mental state required to justify an award of costs under NRS 18.070. (Ans. at 14). But Landess, and Respondent, misinterpreted that statute and imported into it an unjustified meaning.

A. Legal Standard

"A court may impose costs and reasonable attorney's fees against a party or an attorney who. . . *purposely caused a mistrial to occur*." NRS 18.070(2) (emphasis added). When a statute is clear and unambiguous, courts should give effect to the plain and ordinary meaning of the statute's words. *Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010).

B. Intent to Cause a Mistrial is Necessary to Impose Sanctions under NRS 18.070(2)

In one breath, Landess characterizes as "relevant" certain "Nevada case law" that discusses the deterrent value of mistrial-related sanctions. (Ans. at 15). He then cites a Michigan case identifying "flagrant misbehavior, particularly where the offending party may have deliberately provoked a mistrial" as justifying such sanctions. (Ans. at 15 quoting *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)).

Then in the next breath, Landess suggests that "bad intent" is not necessary to establish that an attorney has acted "purposefully" for purposes of NRS 18.070. (Ans. at 15). Instead, Landess urges that the mere intent to do the act that led to the mistrial fulfills that standard. (Ans. at 16). He suggests that this Court's decision in *Lioce v. Cohen* "supports Plaintiff's position that the lawyer need not know that they

are committing misconduct in order to be sanctioned." (Ans. at 16). He then takes a stunning logical leap and concludes, in the context of sanctions, "[a] lawyer can thus purposefully do an act that leads to a mistrial without having bad intent." (Ans. at 16; emphasis deleted).

Landess leapfrogs over the obvious flaw in his argument: misconduct justifying a new trial is not the same as purposeful behavior under NRS 18.070. *See Lioce v. Cohen*, 124 Nev. 1, 14, 174 P.3d 970, 978 (2008) ("[T]hese appeals raise the issue of which standards district courts are to apply when deciding motions for a new trial based on attorney misconduct). In evaluating motions for new trials, the *Lioce* court concluded that "[e]ither 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." *Id.* at 25, 174 P.3d at 985.[2] Logic dictates that the impact misconduct had on a trial is the proper consideration in deciding whether to grant *a new trial*. Indeed, that issue rightly concerns whether counsel's conduct had an irreparably deleterious impact on trial proceedings, rendering that verdict unreliable. *See id*. at 17-18, 174 P.3d at 980-81 ("When the district court finds that the objection and admonishment were

[2] In the Petition, Petitioners inadvertently cited to *Lioce v. Cohen*, 122 Nev. 1377, 1400, 149 P.3d 916, 931 (2006), which was vacated. (Petition, at 24). The correct citation is *Lioce v. Cohen*, 124 Nev. 1, 25, 174 P.3d 970, 985 (2008), which contains language identical in both cases. Petitioners apologize for this error.

insufficient to remove the attorney misconduct's effect, a new trial is warranted."). That remains true regardless of the intent behind the misconduct—at least in the context of a motion for a new trial.

By contrast, intent cannot be extricated from consideration of whether to sanction an attorney for causing a mistrial. First, NRS 18.070(2)'s language plainly requires intent to cause the mistrial. The statute provides that "[a] court may impose costs and reasonable attorney's fees against a party or an attorney who. . . *purposely caused a mistrial to occur*." "Purposely" is defined as "[i]ntentionally; designedly." Purposely, *Ballentine's Law Dictionary* (2010). Even in the case Landess himself cited (Ans. at 24), *Persichini v, Wm. Beaumont Hosp.*, 607 N.W.2d 100 (Mich. App. 1999), the court specifically referenced "flagrant behavior" and considered whether counsel "may have *deliberately provoked*" the mistrial. 607 N.W.2d at 109 (emphasis added). That analysis is overtly based in the intent to cause the mistrial. Thus, a plain reading of the statute's language, as well as related case authority, makes clear that sanctions may only be imposed against a party or attorney who *intentionally* caused a mistrial to occur.[3]

[3] Landess accuses Petitioners of misrepresenting the legislative history of 18.070. (Ans. at 18). He claims Petitioners "trie[d] to hedge their bet . . . ," (Ans. at 18) which actually means that Petitioners carefully analyzed the legislative materials and reported accordingly. Landess also asserts nefarious intent on Petitioners' part that he cannot establish. (Ans. at 18). Nevertheless, no misrepresentation occurred. Petitioners accurately pointed out that legislators "contemplated punishing conduct that is intended to cause a mistrial" when deliberating their amendments to Chapter

C. Mere Intent to Do an Act That Leads to Mistrial Does Not Warrant Sanction under NRS 18.070(2)

Landess, unsatisfied with the plain, easily interpreted language the statute contains, offers a new standard for imposing statutory sanctions. Without providing a single shred of legal authority to support abandoning the clear statutory language, Landess contends that, instead, "all that is needed is that the attorney knowingly act improperly (intending to do what is done, not necessarily intending to break the rules)." (Ans. at 16). Then, he weakens the requirements of his proposed standard even further, stating that sanctions are appropriate against one who is merely "the primary moving force behind actions or events that lead a court to declare a mistrial." (Ans. at 16). The distance between "purposely caused a mistrial" and "primary moving force" is untenably great.

The Answer's interpretation of the statute would essentially remove the word "purposely." This Court should reject such an interpretation. *See Berberich v. Bank of America*, 136 Nev. 93, 95, 460 P.3d 440, 442 (2020) (in considering a statute's plain meaning, courts should give effect to every word in the statute; no word should be ignored or given no consequence).

Landess also suggests "it is incongruous for [Petitioners] to attempt to graft bad-mind concepts applied in criminal cases to court-administered procedural

18. (Petition, p. 18).

mechanisms." (Ans. at 19). He then proceeds to do just that. (Ans. at 19-20).

Landess identifies "four bad-mind categories" and then suggests that to require intent to purposely cause a mistrial for sanctions to lie under NRS 18.070(2) would impose a "specific intent" standard. (Ans. at 19-20). He also complains that "it would be virtually impossible for Plaintiff to prove that Defendants/or their attorneys specifically intended to cause a mistrial . . . ." (Ans. at 20). But Landess overstates the matter. Several objective criteria could be examined for that purpose. First, the reviewing judge could consider the progress of the trial. For example, if a party or counsel engaged in conduct resulting in mistrial at a crucial juncture at trial, such as after particularly unfavorable witness testimony or judicial rulings, intent to cause a mistrial could be inferred. Second, the reviewing judge could consider the severity or flagrancy of the action. Inadvertent failure to remove a page from an exhibit could result in mistrial but would likely not suggest intent to cause a mistrial; whereas repeated violations of motions in limine or trial rulings might signal otherwise.

Landess then suggests this Court import a general-intent standard on the meaning of "purposefully" under NRS 18.070. (Ans. at 20). He contends that "it's like the shooter who fires into a crowd with no particular victim in mind." (Ans. at 20). Leaving aside the absurdity of Landess's proposal to shoehorn a criminal standard into a purely civil matter almost immediately after claiming Petitioners

improperly did so, there is simply no justification in law or logic to adopt any of Landess's far-fetched proposals. The statute stands on its own.

In this case, no amount of debating skill can establish that the defense attorneys "purposely" caused the mistrial, as the statute requires. Judge Bare, who had personally observed everything that happened at trial, correctly concluded, in speaking to defense counsel: "Rather, I think -- what I really think, that both you and Mr. Vogel just didn't fully realize the impact that this [using the email] could have. That's a mistake." (3P.App. 554:8-10). Judge Bare also found: "I just, again, don't think you appreciated, or Mr. Vogel appreciated, the impact of what was going to happen." (3P.App. 554:19-21). Even the Respondent district court, in the subsequent proceedings, also correctly stated the following to defense counsel: "You didn't intend … 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." (8P.App. 1816:5-9).

As a prerequisite to imposing sanctions, the statute requires the attorney to have "purposely" caused the mistrial. That undeniably did not occur. The sanctions award here can only be upheld with a strained and unsupportable interpretation of the statute. which is exactly what Landess is proposing. The Court should reject his interpretation, and the Court should apply the statute as it is written.

D. The Court Need Not Rely on its Inherent Authority to Impose Sanctions for Having Purposely Caused a Mistrial

Landess insists that NRS 18.070 does not limit the court's "discretionary authority to impose sanctions independent of any similar statutory authority." (Ans. at 23). He suggests that "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." (Ans. at 23 citing *Emerson v. Eighth Judicial District Court*, 127 Nev. 672, 680, 263 P.3d 224, 229 (2011)). More precisely, the *Emerson* Court permitted district courts to "issue sanctions for any litigation abuses **not specifically proscribed by statute**[,]" such as professional misconduct at trial.[4] *Emerson*, 127 Nev. at 680, 263 at 229 (emphasis added)(internal quotation omitted).

Here, Plaintiff's inherent-authority argument might hold more water if there were not a statute directly on point. As noted, NRS 18.070(2) provides that "[a] court may impose costs and reasonable attorney's fees against a party or an attorney who. . . purposely caused a mistrial to occur." Thus, Respondent did not need to invoke her inherent authority to sanction. Moreover, it is true that Respondent overtly stated that she was "looking [sic] it under the *Emerson Lioce* misconduct not intentional."

[4] No judge has concluded that Counsel's use of the email amounted to professional misconduct, not even Judge Bare. (3P.App. 0554).

(8P.App. 1841) It is also true that Respondent likely, and wrongly, imported that judge-made standard into her analysis of a matter governed by a specific statute. However, ultimately, the statute prevails. Here, Respondent invoked the statute,[5] but she failed to follow it.

E. Public Policy Rejects Landess's Interpretation of NRS 18.070(2)

Landess's proposed interpretation of the statute fails as a matter of public and judicial policy. As this case makes painfully clear, even innocent actions can potentially lead to mistrial, especially if the judge declaring the mistrial manifests open bias in favor of opposing counsel. That said, even Judge Bare concluded that defense counsel "just didn't fully realize the impact that [using the email exhibit] could have. That's a mistake." (3P.App. 0554). If the statute allowed sanctions for costs for innocent mistakes or for acting merely as the "primary moving force" behind the actions leading to mistrial, regardless of the intent behind that action, parties and their attorneys would be at constant risk of incurring sanctions.

Moreover, to adopt Landess's strained interpretation of "purposefully caused," this court not only would have to disregard the plain language of the statute but also to ignore the rationale behind imposing sanctions: "to command obedience

[5] "[P]ursuant to NRS 18.070(2), [Defendant] purposely caused the mistrial in this case to occur . . . ." (11P.App. 2643). Respondent "awarded [Landess] their reasonable and necessarily incurred costs of $118,606.25 pursuant to NRS 18.070(2)." (11P.App. 2644).

to the judiciary and to deter and punish those who abuse the judicial process." *Emerson*, 127 Nev. at 678, 263 P.3d at 228. Landess spends two pages of his Answer insisting that Petitioners and their counsel "incredulously" represent themselves as "the victim." (Ans. at 20-22). This analysis operates as an opportunity to attack defense counsel and to enumerate their manifold alleged abuses. But here, defense counsel's actions reached nowhere near the level of an abuse of the judicial process. Indeed, Landess undercuts his argument that only the intent to perform the act should be considered by relentlessly focusing on defense counsel's supposed nefarious, intentional behavior. (Ans. at p. 20).

Landess attacks defense counsel for obtaining, and duly disclosing to Landess's counsel, documents necessary to address the issue of Landess's employment and the supposedly lost stock options, which Jonathan Dariyanani—Landess's former employer and friend—provided to defense counsel shortly before trial began. (Ans. at 20); (1P.App. 0130-31, 140, 142, 181).

At trial, Counsel moved to admit an exhibit containing those documents, among which was the so-called "Burning Embers" email, to which **Landess's counsel stipulated**. (1P.App. 0173). Landess paints defense counsel as breathlessly awaiting any opportunity to use the Burning Embers email. (Ans. at 21). In fact, he claims that they "carefully plotted to wait until Dariyanani said something

complementary about Plaintiff before" employing the stipulated-to exhibit.[6] (Ans. at 21). But defense counsel cannot have known that Dariyanani would make any such complimentary statements. Moreover, it would have been inappropriate to use impeachment evidence before the witness opened the door with statements constituting character evidence.

Indeed, use of the exhibit made sense in the context of that testimony. The witness had testified that Landess was a "beautiful" person and indicated that he was trustworthy.[7] (1P.App. 0188, 0190). The witness having opened the door to impeachment on his impressions of Landess's trustworthiness, defense counsel offered evidence in the form of an email in which Landess explained that he had once supplemented his income by "hustling" people, playing a game called "Snooker." (1P.App. 0190). The people he hustled happened to be "Mexicans, blacks, and rednecks . . . ." (1P.App. 0190). Defense counsel made no reference to the people's race until the witness himself raised the issue. Rather, she discussed

[6] Landess makes much of the fact that some of the text of the "Burning Embers" email appeared before the jury highlighted in yellow, as if to suggest that defense counsel were attempting to call to the jury's attention his statements regarding racial minorities. (Ans. at 21). Landess's point might be better taken if not for the fact that the entire passage, with its discussion of his "hustling" people, was highlighted, not the words "Mexicans, blacks, and rednecks." (1P.App. 0190:21- 191:6).

[7] The Petition mistakenly stated that the character testimony was given on direct examination. (Petition at 2). Rather, the testimony mentioned here was given on cross examination. Petitioners apologize for that error.

only the "hustling" aspect, which was relevant to Landess's trustworthiness.[8] The witness quickly volunteered that he did not perceive "Mr. Landess being a racist and a bragger." (1P.App. 0192). Only after the witness raised the issue of racism, defense counsel challenged him and asked, "He talks [in the email] about a time when he bought a truck stop here in Las Vegas when the Mexican laborer stole everything that wasn't welded to the ground. You still don't take that as being at all a racist comment?" (1P.App. 0192). Landess's trial counsel never objected to that exchange.

Landess also states that "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 it that were further evidence showing a motive for defense counsel to "change the outcome of the trial." (Ans. at 22). First, it was not the judge's place to make that statement. The opinion of a biased judge as to the strength of a favorite local lawyer's case cannot be used to indicate that the defense case was going badly. Second, there is no evidence that the trial was going poorly for the Defendant before Counsel employed the Burning Embers email to obtain a mistrial; indeed, defense counsel made it clear that they did not want a mistrial. (3P.App. 521:23-522:13; 8P.App. 1813:13-20). To punish

[8] "Did he sound apologetic in this email about hustling people before?"; "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?"

Petitioners for their counsel's having employed a legitimate litigation strategy—involving a stipulated exhibit—stretches the deterrent rationale for sanctions beyond its breaking point.

Therefore, for all the reasons explained above, Petitioners respectfully request this Court grant their Petition for writ of mandamus on grounds that Respondent abused her discretion in granting costs to Landess.

III. Laches Does Not Apply

Landess contends that the writ petition is barred by the doctrine of laches. (Ans. at 25.) He argues that Petitioners were "sitting on their rights for almost a full year," and that Petitioners should have filed the writ petition and moved for a stay "right after Judge Bare entered the Order." (Ans. at 25-26).

A. Laches Factors

A writ of mandamus is subject to the doctrine of laches. *Building & Constr. Trades v. Pub. Works*, 108 Nev. 605, 611, 836 P.2d 633, 637 (1992). In deciding whether laches applies, this court considers: (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 the delay caused prejudice to the respondent. *Id.* Landess has failed to satisfy any of these factors. Additionally, laches only applies when "especially strong circumstances"

exist (where the statute of limitations has not run). *Id.* There are no especially strong circumstances here.

B. Petitioners are not Guilty of Laches.

Petitioners did everything possible—as quickly as possible—to assert their challenges and to protect their rights. Judge Bare made his glowing comments about Jimmerson—demonstrating the grounds for subsequent disqualification—on the tenth trial day. On the next trial day (after the weekend), when Judge Bare was considering a mistrial, defense counsel pleaded with the judge to wait until after a verdict, to avoid wasting all the time and money spent on the trial. (3P.App. 522:1-11.) Alternatively, defense counsel requested the judge not to release the jury, but instead, to "allow the parties to take an emergency writ to the Supreme Court" on the issue. (3P.App. 522:9-13.) Judge Bare refused. He granted the mistrial and discharged the jurors. (3P.App. 522-23). The discharged jurors could not be called back again for the trial. Thus, the judge effectively insulated himself from appellate review of the mistrial—precluding any potential for proceeding with the same jury, even if Petitioners had filed an immediate writ petition.

On August 23, 2019, only a few days after the mistrial, Petitioners filed their motion to disqualify Judge Bare, based upon his rather stunning comments from the bench favoring Jimmerson (Landess' counsel). (3P.App. 587). The motion was assigned to Judge Wiese, but on September 9, 2019, before Judge Wiese could rule

on the motion, Judge Bare signed and filed the written order granting the mistrial. (6P.App. 1290). The order contained numerous important findings that Judge Bare had not made previously at trial, as discussed above.

On September 16, 2019, Judge Wiese granted the disqualification, and the case was reassigned to Judge Earley. (7P.App. 1657); (8P.App. 1727). Previously, at trial, Landess had filed a motion for costs and attorneys' fees relating to the mistrial. (2P.App. 245); (3P.App. 557). Petitioners filed a countermotion for costs and fees. (4P.App. 848). The parties stipulated to extend deadlines relating to the motion. (4P.App. 837). Judge Early eventually granted the motion, in part, on April 6, 2020. (11P.App. 2635).[9]

In the meantime, Petitioners moved for relief from Judge Bare's improper written mistrial order. (8P.App. 1870). Among other things, Petitioners contended that Judge Bare's order was void because he entered it while the disqualification motion was still pending, and the order improperly included significant matters beyond his oral ruling at trial.[10] (8P.App. 1870-84). Judge Earley denied the motion for relief on June 1, 2020. (13P.App. 3082).

[9] The order at 11P.App. 2635 (April 6, 2020) is blurred. But a duplicate of the order was filed the next day, and it is located at 11P.App. 2642-45.

[10] The motion did not seek to overturn the mistrial itself. (8P.App. 1883:10-13 (recognizing that reversing the mistrial was not possible because Judge Bare had discharged the jury)). The motion did, however, attack Judge Bare's subsequent written mistrial order.

Petitioners then promptly filed a motion for reconsideration of Judge Earley's order denying relief from Judge Bare's written order granting the mistrial. (13P.App. 3095). Among other things, Petitioners argued that denial of relief was clearly erroneous, and that the district court had misapprehended material issues and facts. (13P.App. 3099-3100). On July 23, 2020, Judge Earley filed an order clarifying her prior order awarding more than $118,000 in fees and costs against Petitioners. (14P.App. 3320). And on August 5, 2020, the judge denied Petitioners' motion for reconsideration. (14P.App. 3331). **Petitioners filed their mandamus petition only five days later on August 10, 2020.**

In these circumstances, Petitioners promptly asserted their rights and did not unreasonably delay with writ proceeding. They appropriately attempted to exhaust all avenues in the district court for asserting their position regarding invalidity of Judge Bare's order. They filed their mandamus petition in this court within days after entry of the last orders of the district court. Moreover, any delays in the district court resulted from regular processing of motions, as well as the unusual proceedings involving Judge Bare's conduct and his order. And Landess has demonstrated no irreparable prejudice from any alleged delay in filing the writ petition. The trial was going to be rescheduled due to the mistrial, and the district courts were closed for civil trials anyway—due to the pandemic—during almost all of 2020.

C. Cases Landess Cites are Inapplicable

Landess relies on various cases for his laches contention. He relies on *Building & Constr. Trades, supra,* as an example of laches applying to a one-month delay. (Ans. at 25, fn. 14, 15). That case is completely inapplicable. The petitioner filed a writ petition in the district court challenging a public works contract **after construction already started**. This court affirmed the district court's denial of a writ, applying laches due to the unexplained delay that would have caused significant prejudice regarding the project. *Id.* at 610-11, 836 P.2d at 636-37.

Landess relies on three other laches cases. (Ans. at 26, fn. 16). First, he cites *State v. Eighth Judicial Dist. Court*, 116 Nev. 127, 994 P.2d 692 (2000), as an example of laches applying to an 11-month delay between the district court's order and the supreme court writ petition. (Ans. at 26, fn. 16). Landess ignores the fact that the opinion dealt with six consolidated petitions. This court applied laches to the petition with an 11-month delay between the district court order and the writ petition, but the court declined to apply laches to the other five petitions, which all had delays of five to six months after the challenged orders. (*Id.* at fn. 5).

Second, Landess cites *Vistana Condo. Owners v. Eighth Judicial Dist. Court*, 2016 WL 1567146 (Nev.; April 15, 2016; No. 68595; unpublished). In *Vistana*, the district court denied a motion to dismiss, but the petitioner delayed six months before filing a motion for reconsideration, then filed the writ petition more than three

months after denial of reconsideration. In dicta—after already reciting another ground for denial of the petition—this court noted that the delays militated against extraordinary relief. *Id.* at *1.

And third, Landess cites *Turner v. Eighth Judicial Dist. Court*, 2019 WL 1787317 (Nev.; April 23, 2019; No. 78525; unpublished), which involved a pro se petitioner's one-year delay between the challenged decision and the writ petition. The record was unclear about what had transpired in the interim, and the opinion did not indicate that the petitioner offered any excuse for the delay.

None of these decisions establish laches in the present case. Here, Petitioners acted promptly, challenging Judge Bare's written order as soon as possible. Petitioners filed the petition in this court only days after the district court's orders imposing sanctions and denying reconsideration. There was no prejudice from this extremely short delay. This court should reject Landess's laches argument.

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CONCLUSION

For all the reasons in the Petition and this Reply, the court should grant a writ of mandamus ordering Respondent to vacate its order awarding sanctions and its order denying relief from Judge Bare's written order granting the mistrial.

Dated this 22nd day of January, 2021

/s/ S. Brent Vogel
S. BRENT VOGEL
Nevada Bar No. 6858
KATHERINE GORDON
Nevada Bar No. 5813
Lewis Brisbois Bisgaard & Smith LLP
6385 South Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
702-893-3383
ATTORNEYS FOR PETITIONERS

/s/ Robert L. Eisenberg
ROBERT L. EISENBERG
Nevada Bar No. 0950
rle@lge.net
Lemons, Grundy & Eisenberg
6005 Plumas Street, Third Floor
Reno, Nevada 89519
775-786-6868
ATTORNEYS FOR PETITIONERS

CERTIFICATE OF COMPLIANCE

1. Pursuant to NRAP 21(e), I hereby certify that this reply complies with NRAP 32(a)(9) and the formatting requirements of NRAP 32(a), including the fact that this petition has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman type style.

2. I further certify that this reply complies with the word-count limitation of NRAP 21(d), because, using the computation guidelines in NRAP 32(a)(7)(C), and not counting the cover, tables and certificates, it contains 6,502 words.

Dated this 22nd day of January, 2021

By:/s/ *S. Brent Vogel*
S. Brent Vogel, Esq.
6385 S. Rainbow Boulevard
Suite 600
Las Vegas, Nevada 89118
702.893.3383
Attorneys for Petitioner

CERTIFICATE OF MAILING

I hereby certify that on this 22nd day of January, 2021, I served the foregoing **REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS** upon the following parties by placing a true and correct copy thereof in the United States Mail in Las Vegas, Nevada with first class postage fully prepaid:

The Honorable Kerry Earley
The Eighth Judicial District Court
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89101
Respondent

James J. Jimmerson, Esq.
JIMMERSON LAW FIRM, PC
415 S. 6th Street, Suite 100
Las Vegas, Nevada 89101
Tel: 702.388.7171
Fax: 702.380.6422
jimmerson@jimmersonlawfirm.com
Attorneys For the Real Parties in Interest

Martin A. Little, Esq.
Alexander Villamar, Esq.
HOWARD & HOWARD, ATTORNEYS, PLLC
3800 Howard Hughes Parkway, Suite 1000
Las Vegas, NV 89169
Tel: 702.257.1483
Fax: 702.567.1568
mal@h2law.com
av@h2law.com
Attorneys For the Real Parties in Interest

By */s/ Roya Rokni*
An Employee of LEWIS BRISBOIS BISGAARD & SMITH LLP