

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

BARRY JAMES RIVES, M.D.; and  
LAPAROSCOPIC SURGERY OF NEVADA,  
LLC,

Appellants/Cross-Respondents,

vs.

TITINA FARRIS and PATRICK FARRIS,

Respondents/Cross-Appellants.

Case No. 80271

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Oct 13 2020 10:26 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

BARRY JAMES RIVES, M.D.; and  
LAPAROSCOPIC SURGERY OF NEVADA,  
LLC,

Appellants,

vs.

TITINA FARRIS and PATRICK FARRIS,

Respondents.

Case No. 81052

**MOTION FOR PERMISSION TO FILE BRIEF IN EXCESS OF  
TYPE-VOLUME LIMITATION (INCLUDING DECLARATION OF  
COUNSEL AND CERTIFICATE OF COMPLIANCE)**

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**MOTION FOR PERMISSION TO FILE BRIEF IN EXCESS OF TYPE-  
VOLUME LIMITATION (INCLUDING DECLARATION OF COUNSEL  
AND CERTIFICATE OF COMPLIANCE)**

Pursuant to NRAP 32(a)(7)(D), appellants move for permission to file an opening brief in excess of the 14,000 word-count limitation in NRAP 32(a)(7)(A)(ii). The proposed brief is 18,619 words.

**Procedural requirements are satisfied**

As required by NRAP 32(a)(7)(D)(ii) and (iii), this motion is accompanied by: (1) a declaration of counsel stating the reasons for the motion and the number of additional words requested; (2) a certificate as required by NRAP 32(a)(9)(C) as to the word count; and (3) a single copy of the brief that appellants propose to file (e-filed separately).

**Argument**

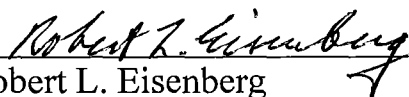
Extraordinary cases can justify long briefs. The additional words requested for the opening brief in the present case are warranted when this case is compared to other cases in which courts have permitted appellate briefs in excess of size limitations. For example, in *Evans v. State*, 117 Nev. 609, 642, 28 P.3d 498, 520 (2001), there were numerous appellate issues, including issues dealing with statutory applications and constitutional law. This court allowed the appellant to file an

opening brief of 120 pages and a reply brief of 54 pages, which at that time were “far in excess of the normal 30-page limit for briefs.” *Id.*

*See also McConnell v. Federal Election Com’n*, 539 U.S. 938 (2003) (complex election case; Solicitor General allowed to file 140-page brief); *Penry v. Texas*, 515 U.S. 1304 (1995) (noting that appellant’s brief in state appellate court was 375 pages long, and state’s brief was 248 pages long); *Fusari v. Steinberg*, 419 U.S. 379, 390 (1974) (Burger, C.J., concurring; noting that appellee’s brief was 122 pages long).

The accompanying declaration of counsel describes the record in the present case, the issues in the appeal, and significant efforts to reduce the size of the proposed brief. For the reasons set forth in this motion and the accompanying declaration of counsel, appellants request permission to file the opening brief consisting of 18,619 words.

Dated: October 13, 2020

  
Robert L. Eisenberg

**DECLARATION OF ROBERT L. EISENBERG [NRAP 32(a)(7)(D)(ii)]**

Pursuant to NRAP 32(a)(7)(D)(ii), Robert L. Eisenberg, counsel for appellants, hereby submits the following declaration stating the reasons for the motion and the number of additional words requested.

Appellants respectfully contend that this case is sufficiently extraordinary and compelling to justify the proposed brief that is 18,619 words in length. This is an appeal from a judgment in a medical malpractice case arising out of a patient's complications after surgery. The procedural background and the medical facts of the case are complicated and intricate. The case was vigorously contested by both sides before and during trial. There were numerous pretrial motions, motions during trial, trial briefs, and post-trial motions—consisting of thousands of pages for the appendix. There were at least 12 different hearings—other than hearings conducted during the trial—each with its own transcript. The hearing transcripts consist of several hundred pages.

The jury trial lasted 14 days. In addition to numerous lay witnesses, the trial included testimony by approximately 12 professionals (including treating physicians, retained experts, life-care planners, and economists). The trial transcript is contained in 14 volumes of the appendix, consisting of nearly 3,000 pages. The total appendix is 31 volumes with approximately 6,900 pages.

The jury returned a verdict of more than \$13.6 million. With statutory reductions applicable in medical malpractice cases, and with prejudgment interest, the total judgment was approximately \$6.4 million. Post-trial matters involving attorneys' fees, costs and additional interest resulted in another \$1.1 million added

to the judgment, for a total judgment of approximately \$7.5 million. Appellants have posted a supersedeas bond of nearly \$8.6 million for the stay pending appeal.<sup>1</sup>

This case should be recognized as an extremely important case, not just because of the size of the judgment and the size of the record, but also because the appeal raises important legal issues that have broad statewide significance. For example, this appeal involves the so-called reptile trial tactic, which is when a plaintiff's attorney attempts to obtain a huge verdict by appealing to a jury's basic survival instincts—motivated by fear. The tactic attempts to convince jurors that their own safety is at risk, and that a large verdict for the plaintiff will make them safer. The tactic has gained nationwide popularity among personal injury attorneys who represent plaintiffs, and it is gaining popularity in Nevada. But the tactic is also very controversial. The legitimacy of the reptile tactic is an issue of first impression in Nevada, with far-reaching impact for all personal injury litigation—not just medical malpractice cases. To assist this court in deciding the issue correctly, the factual and legal bases for the issue need to be developed thoroughly in the brief.

This case also involves an important issue of statewide significance in Nevada medical malpractice litigation. The issue deals with federal preemption of Nevada's

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<sup>1</sup> Respondents have a cross-appeal in which they are attacking the statutory medical malpractice reductions that were applied to the judgment, amounting to several million dollars.

statutory protections for doctors in such litigation. These protections, including a change in the collateral source rule in medical malpractice cases, were enacted by Nevada citizens in a statewide ballot measure in 2004. This appeal involves the extent to which the federal Employee Retirement Income Security Act (ERISA) has the effect of preempting Nevada's collateral source changes for malpractice cases, and thereby voiding those statutory provisions. This appeal also involves significant questions involving how federal preemption should be analyzed in this context, and the critical question of who has the burden on a preemption question. Because of the high importance of this issue for numerous medical malpractice cases in Nevada, the opening brief needs to provide a full, thorough discussion of the facts and the law.

This appeal also involves an extremely important issue regarding the extent to which a defendant doctor's involvement as a defendant in another malpractice case—dealing with a different patient—can be admitted into evidence against the doctor. Here, the district court allowed the jury to hear evidence regarding another patient's surgery and litigation against appellant Dr. Rives, including the fact that the other patient in the other case had her feet amputated. This is an extremely important and precedent-setting issue, going far beyond this specific appeal, and potentially extending to medical malpractice litigation statewide. The issue has a related issue involving discovery disputes dealing with disclosure of the other case.

These issues have complex factual backgrounds that need to be developed fully in the brief, with extensive analysis of precedent-setting legal authorities.

The proposed opening brief also deals with several other issues that involve important consequences for the parties, and potentially for other litigants across the state in personal injury cases generally, particularly in medical malpractice cases—such as an issue involving discovery disclosures and the scope of rebuttal expert testimony. These issues relate to multiple experts in this case, with the circumstances needing to be explained for each such expert, thereby requiring adequate discussions in the opening brief.

The appeal also involves an award of attorneys' fees in excess of \$800,000. The district court awarded fees based on an NRCP 68 offer of judgment. But the district court alternatively awarded the fees as a sanction for six different alleged categories of conduct. Legitimacy of the fee award requires separate discussions of Rule 68 factors as well as discussions of all six alleged categories of conduct that the district court used as an alternative basis for the fee award.

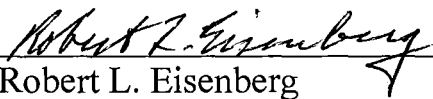
When this appeal was filed, trial counsel and appellate counsel identified approximately 30 prejudicial errors by the district court. After painstaking efforts, we reduced the number of issues significantly for the docketing statement. And after further efforts, we have now reduced the number of issues even more. We are presenting ten issues (plus various sub-issues) in the proposed opening brief. We

have been forced to abandon other issues we believe were very legitimate appellate issues relating to erroneous evidentiary and procedural rulings, which we believe denied Dr. Rives a fair trial.

After having reduced the number of issues being raised, the undersigned appellate counsel prepared a draft opening brief. Counsel then spent countless hours editing and cutting the brief to the extent possible, including elimination of some issues and contentions, and cutting factual discussions and legal arguments—resulting in elimination of thousands of words. The undersigned counsel then worked with an associate attorney in his firm, and with trial counsel, in an effort to reduce the size of the brief even more, without adversely impacting its quality. These second-cut edits eliminated more than 1,000 additional words. We respectfully submit that further cutting will affect the brief's quality and the analyses in the brief, thereby impacting the court's ability to evaluate arguments and to reach the correct decisions on the issues presented.

Accordingly, the undersigned counsel submits that these reasons justify permission for filing the opening brief consisting of 18,619 words.

Dated: October 13, 2020

  
Robert L. Eisenberg



## CERTIFICATE OF COMPLIANCE [NRAP 32(a)(7)(D)(ii)]

This certificate of compliance accompanies appellants' motion requesting enlargement of the word-count limit for the opening brief, as required by NRAP 32(a)(7)(D)(ii). The certificate is also attached to the proposed brief being submitted with the motion.

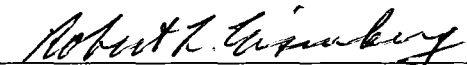
1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman type style.

**2. I have filed a motion for permission to exceed the word-count limit for this brief.** I certify that, using the computation guidelines in NRAP 32(a)(7)(C), this brief contains 18,619 words. Therefore, if the motion is granted, the brief will comply with Rule 32.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of appellate procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to page and volume number, if any, of the transcript or appendix where

the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: October 13, 2020

  
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## **CERTIFICATE OF SERVICE**

I certify that I am an employee of LEMONS, GRUNDY & EISENBERG and that on this date the foregoing **Motion for Permission to File Brief in Excess of Type-Volume Limitation (Including Declaration of Counsel and Certificate of Compliance)** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

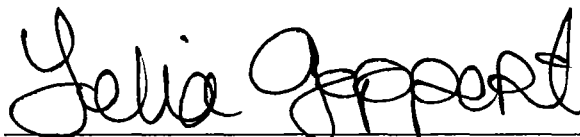
George Hand  
Tara Clark Newberry  
Kimball Jones  
Jacob Leavitt  
Micah Echols  
Thomas Doyle

I further certify that on this date I served a copy of the foregoing by depositing a true and correct copy, postage prepaid via U.S. mail to:

Aimee Clark Newberry  
810 Durango Drive, Suite 102  
Las Vegas, NV 8145  
(702) 608-4232  
[al@szs.com](mailto:al@szs.com)

Dated this 13 day of October, 2020.

LEMONS, GRUNDY & EISENBERG



An employee of Lemons, Grundy & Eisenberg