IN THE SUPREME COURT OF THE STATE OF NEVADA

Troy Moats, Petitioner, vs. **The Eighth Judicial District Court of the State of Nevada ex rel the County of Clark and the Honorable Judge Adriana Escobar**, Respondents.	Supreme Court No.: 81912 District Court No.: A-18-769459-C
Troy Burgess, Real Party in Interest.	

PETITIONER'S REPLY TO ANSWER TO PETITION FOR WRIT OF MANDAMUS

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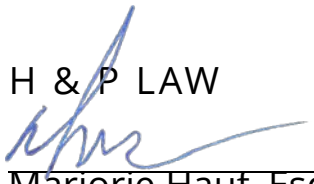
NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal. Appellant Troy Moats is an individual who is represented in district court by H&P Law.

DATED this 5th day of April 2021.

H & P LAW



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A. Rule 35 and NRS 52.380 can be read harmoniously creating the ability for this Court to interpret NRS 52.380 so that it does not violate the separation of powers doctrine.

NRS 52.380 and NRCP 35 can be read harmoniously as they serve entirely different functions.[1] Rule 35 is a procedurally focused on the process of collecting evidence through medical examinations and the preservation of that evidence through recordings and observers when deemed appropriate by the district court.[2] NRS 52.380 is focused on the substantive protections of the interests of injured victims by use of an advocate that is not and cannot be appointed under Rule 35.

Although both the Rule and the Statue use the term "observer," a plain text reading shows that the Rule's "observer" and the Statute's

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[1] *Goldberg v. Eighth Judicial Dist. Court In & For Clark Cty.*, 93 Nev. 614, 617, 572 P.2d 521, 523 (1977) (the judiciary and the legislature can have overlapping functions, provided that each branch can trace it actions to a basic source of power.)

[2] NRCP 35.

"observer" do not have the same defined roles. And each role as defined by the Rule and the Statute cannot be occupied by the same person at the same time. Each "observer" role can exist independently of the other. The Rule does not prohibit the existence of the statutory observer/advocate. The Statute does not prohibit the existence of the rule-based observer/witness.

1. **"Observers" under Rule 35 act procedurally; focused on the collection and preservation of evidence process.**

In 2019, Rule 35 was amended to include Subsections (a)(3) and (a)(4), dealing with court-ordered recordings and court-appointed observers.[3] By their text, Rule 35(a)(3) and (4) refer to "conditions" set by the court, and thus are reflective of the "conditions" requirement in Rule 35(a)(2).[4] Subsections (a)(3) and (a)(4) set the boundaries and limitations of a court's "conditions" under Rule 35(a)(2)(B).[5]

[3] *Compare* NRCP 35 (2019) to any prior version.
[4] *See* NRCP 35(a)(3), NRCP 35(a)(4).
[5] *See* NRCP 35(a).

Under Rule 35(a)(3), the district court may order a recording as a condition of the exam.[6] If the district court orders a recording as a Rule 35(a)(2)(B) condition, the requesting party "must arrange and pay for the recording[,]"[7] The recording has obvious evidentiary value if a dispute arises as to what occurred during the exam.

The Rule recognizes the evidentiary nature of the recording by requiring the recording party to provide the other party a copy of the recording upon written request.[8] Once the court issues its order with recording as a condition of the Rule 35 exam, the recording is mandatory.[9] The non-requesting party can rely that the recording will be arranged for, paid for, and be available as part of discovery. If the requesting party violates the court's order requiring that the evidence, the recording, be made and available to the non-requesting party, presumably the non-requesting party can petition the court for an

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[6] *See* NRCP 35(a)(3).
[7] *See id*.
[8] *See id*.
[9] *Washoe Cty. v. Otto*, 128 Nev. 424, 432, 282 P.3d 719, 725 (2012) ("The word "must" generally imposes a mandatory requirement.").

appropriate remedy. Rule 35(a)(3), by its terms, focuses on the collection, preservation and disclosure of evidence.

Rule 35(a)(4) likewise focuses on evidence in the form of a witness. Under Rule 35(a)(4) the court may appoint a witness to observe the examination.[10] The witness must be nominated by the examinee.[11] However, the court is prohibited from appointing a witness who is the examinee's attorney, employee, or employee of the attorney.[12] This has the effect providing an independent witness with whom the examinee is comfortable but who is less likely to be financially biased or ethically prohibited[13] from testifying at trial. The terms of Rule 35(a)(4) are focused on the creation of an appropriate—evidentiarily unbiased—witness who can testify about what happened during the exam. The Rule 35(a)(4) witness is prohibited from having any role in the exam but that of an observer and "must not in any way interfere, obstruct, or

[10] NRCP 35(a)(4).
[11] NRCP 35(a)(4).
[12] NRCP 35(a)(4).
[13] *See* Nev. R .Prof. C. 3.7.

participate in the examination."[14] Thus, both Rule 35(a)(3) recordings and Rule 35(a)(4) observers act as tools for the preservation of evidence.

Rule 35(a)(4)(B) expressly contemplates that observers may be present in neuropsychological examinations by allowing for a Rule 35(a)(4) observer in a neuropsychological, psychological, or psychiatric examinations upon a showing of good cause.[15] The Rule 35(a)(4) observer is allowed to attend such an examination if the examinee can show "good cause"—though not defined by statute—is generally interpreted to mean a "legally sufficient reason."[16] This consideration of the trial court of weighing the evidentiary value of having the Rule 35 observer/witness in a neuropsychological exam further entrenches the concept that Rule 35 is focused on evidence.

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[14] NRCP 35(a)(4)(C).

[15] NRCP 35(a)(4) explicitly and NRCP 35(a)(3) implicitly.

[16] When a rule requires "good cause" but does not define "good cause", the term "generally been considered as referring to "a legally sufficient ground or reason for a certain action." *In re Lucas*, 53 Cal. 4th 839, 858, 269 P.3d 1160, 1172 (2012); *see also* Good Cause, Black's Law Dictionary 274 (11th ed. 2019) (defining "good cause").

2. NRS 52.380 is a statute that focuses on the substantive protection of the rights of injury victims and not the procedural collection of evidence.

The law in Nevada is clear: recording of in-person oral communication is allowed with the consent of at least one party.[17] NRS 52.380 protects this substantive right in the context of civil litigation.

NRS 52.380 has a wholly different purpose than NRCP 35 and, as such, provides different substantive protections than the evidentiary protections in NRCP 35. NRS 52.380 is drafted and designed to provide protections to injury victims who are ordered to be examined by the representative of the injuring party.[18] The statute protects injury victims

[17] NRS 200.620; NRS 200.650; *Lane v. Allstate Ins. Co.* 114 Nev. 1175 (1998).

[18] *See e.g. Zabkowicz v. West Bend Co.*, 585 F. Supp. 635, 636 (E.D. Wis. 1984) ("[T]he defendants' expert is being engaged to advance the interests of the defendants; clearly, the doctor cannot be considered a neutral in the case."); *see also* (3 Def. App. 928-929). (The president of the Association of Defense Counsel of Nevada during the March 27, 2019 Assembly Judiciary Committee Meeting confirming Assemblyman Edwards' question that the Rule 35 examining "doctor is actually serving as a representative of the defendant").

in all civil cases where a medical examination is ordered,[19] including cases of battery, negligence, sexual violence, cyber bullying, and mental and physical abuse, among other trauma. These victims experience physical and psychological trauma from their experiences and risk revictimization during an exam performed by the hired agent of the victimizer. Regardless of the specific intent of the examiner, the risk of revictimization is a genuine risk to the injured person. The substantive protections under the statute protect the injured victim and apply to all mental and physical examinations ordered by a court during the course of civil litigation.[20]

The statutory observer has three characteristics or powers that are unique to the statute. First, the statutory observer may be the attorney or a representative of the attorney.[21] Second, the statutory observer acts as the victim's advocate. The statutory observer may not participate or

[19] *See* NRS 52.380(7), (applying to all civil cases in which a physical or mental examination is ordered by the court).
[20] NRS 52.380(7).
[21] NRS 52.380(2).

interfere with the exam generally, but has the express authority to suspend the exam to obtain a protective order if the examiner becomes abusive or exceeds the scope of the examination.[22] Third, the statutory observer may make an audio or stenographic recording of the examination, thus providing the examinee the right to record what happens to his or her own person.[23] The powers and characteristics of the statutory observer are focused, not on the collection and preservation of evidence, but on the protection of the examinee.

3. NRS 52.380 and Rule 35 can be read in harmony in favor of the constitutionality of NRS 52.380.

This Court has repeatedly held that it will take every presumption in favor of the constitutionality of a statute and make every attempt to interpret a statute so that it does not conflict with the constitution.[24] Moreover, as this Court stated in 1991, "this court should avoid

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[22] NRS 52.380(4).

[23] NRS 52.380(3).

[24] *E.g. List*, 99 Nev. at 138; *Mangarella v. State*, 117 Nev. 130, 135, 17 P.3d 989, 992 (2001) ([w]henever possible, we must interpret statutes to avoid conflicts with the federal or state constitution").

construing one of its rules of procedure and a statute in a manner which creates a conflict or inconsistency between them."[25]

This Court can harmonize the "good cause" requirement of NRCP 35 with permissions established in NRS 52.380 since the "good cause" requirement only applies where the recording will be used as evidentiary support for a claim or defense. If no "good cause" is found by the Court, the NRS 52.380 recording would then be used for cross examination and impeachment material in deposition or at trial.[26]

NRS 52.380 and Rule 35 can further be harmonized since, the Rule 35 witness is appointed by the court as an NRCP 35(a)(2) condition, and the NRS 52.380 advocate appointed by the examinee or her attorney are two wholly separate people with two different roles. A plain reading of the text of Rule 35 and NRS 52.380 demonstrate that the Rule 35 witness

[25] *Bowyer v. Taack*, 817 P.2d 1176 (1991).

[26] NRS 50.085(3) permitting impeachment of a witness on cross-examination with questions about specific acts as long as the impeachment pertains to truthfulness or untruthfulness.

and the statutory advocate cannot be the same person at the same time.[27]

The Rule 35 witness must be appointed by the court[28] where the statutory advocate is appointed be the examinee or her attorney.[29] The Rule 35 witness cannot be the attorney or the attorney's agent[30] where the statutory advocate expressly can be the attorney or the attorney's appointee.[31] The Rule 35 witness expressly cannot interfere with, participate in or interrupt the exam in any way.[32] The Rule 35 witness is merely an observing witness and cannot be anything more.[33]

The NRS 52.380 advocate is expressly endowed with authority to suspend the exam if the examiner is abusive or exceeds the scope of the

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[27] *In re 12067 Oakland Hills, Las Vegas, Nevada 89141*, 134 Nev. 799, 801, 435 P.3d 672, 675 (Nev. App. 2018) ("As always, the proper place to begin is with the plain text of the relevant statute.").
[28] *See* NRCP 35(a)(4).
[29] *See* NRS 52.380(1) and (2).
[30] *See* NRCP 35(a)(4)
[31] *See* NRS 52.380(2).
[32] *See* NRCP 35(a)(4)(C).
[33] *See* NRCP 35(a)(4).

examination.[34] The NRS 52.380 advocate is expressly empowered to represent and protect the interests of the injury victim.[35] The NRS 52.380 advocate is empowered to make an audio or stenographic recording of the exam where it is not clear that Rule 35 intends the Rule 35(a)(4) witness to make any recording.[36]

Nothing in Rule 35 prohibits an NRS 52.380 victim's advocate. Nothing in NRS 52.380 prohibits the Court from appointing a Rule 35(a)(4) witness or ordering a Rule 35(a)(3) recording. The Rule and the Statute can operate harmoniously without conflict. As such, the separation of powers doctrine is not implicated and the lower court's ruling should be upheld.

B. NRS 52.380 does not need to use the word "substantive" in the statute to create a substantive right but rather this Court should look to the legislative intent of the statute as evidence.

The Nevada Supreme Court recently quoted the Arizona Supreme

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[34] NRS 52.380(4).
[35] *See* NRS 52.380.
[36] *Compare* NRS 52.380(3) *to* NRCP 35(a).

Court case of *Seisinger* in relation to the separation of powers doctrine, noting that determining the distinction between substantive and procedural is part of the separation of powers analysis.[37] The *Seisinger* Court held the Arizona legislature setting the evidentiary standard for medical malpractice cases was substantive, even though rules of evidence are considered procedural. The *Seisinger* Court noted, "the precise dividing line between substance and procedure has proven elusive." [38] Statutes, like rules, "often have both substantive and procedural aspects".[39] "[T]he ultimate question is whether the statute enacts, at least in relevant part, law that effectively 'creates, defines, and regulates rights.'" [40] The *Seisinger* Court held, "Although we maintain plenary power over procedural rules, we do not believe that power precludes the legislature from addressing what it believes to be a serious substantive problem."[41]

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[37] *Hefetz*, 133 Nev. at fn. 5 (*quoting Seisinger*, 203 P.3d at 489).
[38] *Seisinger*, 203 P.3d at 490.
[39] *Id.*
[40] *Id.*
[41] *Id*. at 494.

Like the *Seisinger* Court, Nevada Supreme Court has recognized that the Legislature can create substantive rights that affect the procedure of the court's process and that sometimes those rights only exist within the context of court procedure. In the 1988 case of *Whitlock v. Salmon*, the Nevada Supreme Court addressed a separation of powers conflict between NRCP 47(a)(1966) and NRS 16.030(6). At that time, Rule 47(a) gave the trial judge discretion to prohibit attorneys from conducting *voir dire*.[42] NRS 16.030 (a) affected the judicial discretion by vesting in the attorney the absolute right to conduct *voir dire*.[43] Although there was a clear conflict between the rule and the statute and although the statute clearly affected the court's procedure, the Nevada Supreme Court upheld the statute, stating that "[t]he Legislature thus saw fit to

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[42] NRCP 47 (a) stated at the time: "the court shall conduct the examination of prospective jurors and may permit such supplemental examination by counsel as it deems proper." *Whitlock v. Salmon*, 104 Nev. 24, 26, 752 P.2d 210, 211 (1988) (providing the text).

[43] NRS 16.030 (6) provides: The judge shall conduct the initial examination of prospective jurors and*the parties or their attorneys are entitled to conduct supplemental examinations which must not be unreasonably restricted* (emphasis added).

enthrone the historical practice selectively enjoyed by counsel in most trial proceedings, in a substantive enactment that vouchsafes the right to all counsel in every department of our district courts,"[44] and that "the statute confers a substantive right to reasonable participation in *voir dire* by counsel, and this court will not attempt to abridge or modify a substantive right."[45] The process of *voir dire* exists solely within context of court procedure, but the Nevada Supreme Court found that the legislature intended to confer the right to attorney-conducted *voir dire* as a substantive right, and thus upheld the statute.[46]

Nevada and Arizona are not alone in recognizing that substantive and procedure are not separated by a bright line. Statutes are not exclusively "substantive" or exclusively "procedural." Rather, a substantive statute may contain procedural elements while remaining constitutional. Courts across the country have addressed this

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[44] *Whitlock*, 104 Nev. at 26.

[45] *Id.* (emphasis added).

[46] The *Whitlock* court also noted that the statute was a progression of the judicial trend to allow *voir dire*, however, the Court clearly defined the legislative act as conferring a substantive right. *See Id*.

"intertwining" of substantive and procedural aspects in determining constitutionality. The Utah Supreme Court in 2010, analyzed Utah's "special mitigation" statute, which shifts the burden of claiming a homicidal act was attributable to a mental illness. They held that the statute constitutional, despite the fact that it shifted the burden of proof, which could be considered a procedural issue, in part because "a procedural rule may be so intertwined with a substantive right that the court must view it as substantive."[47]

The Florida Supreme Court, in analyzing the constitutionality of a statute authorizing the recovery of expert fees and the procedure by which they could be recovered, stated as follows:

> Of course, statutes at times may not appear to fall exclusively into either a procedural or substantive classification. We have held that where a statute contains some procedural aspects, but those provisions are so intimately intertwined with the substantive rights created by the statute, that statute will not

[47] *State v. Drej*, 233 P.3d 476, 486 (UT. 2010).

> impermissibly intrude on the practice and procedure of the courts in a constitutional sense, causing a constitutional challenge to fail.[48]

The New York Supreme Court, Appellate Division, explained in detail the gradation between substantive and procedural rights, stating:

> The general rule, of course, is that rules as to burden of proof are remedial and relate to procedure.[49]

However, where the rule as to burden of proof is such that it is inseparably connected with the substantive rights of the parties, the statute should be considered as affecting substantive rights, and should not be applied retrospectively to pending actions. The line of demarcation between a statute affecting substantive rights as opposed to one regulating procedure, is often hard to define. The answer cannot be determined by simply asking whether the outcome of the action might be affected, for rules of evidence or procedure often tend to affect

[48] *Massey v. David*, 979 So. 2d 931, 937 (Fla. 2008).
[49] 8 N.Y. Jur., Conflict of Laws, § 35.

the outcome of actions. Rather, the question to be asked is whether the substantive rights of the parties have been changed.

The gradations between procedure and substantive rights are shown in *Fitzpatrick v. International Ry. Co.* (252 N. Y. 127) (1929). In that case a cause of action for negligence arose in Ontario, Canada, which had a comparative negligence statute. In a suit brought in New York, the court charged that the burden of proving contributory negligence was upon the defendant. The defendant, on appeal, contended that the law of the forum, requiring that plaintiff establish his freedom from contributory negligence, should have been applied, since the rule related to burden of proof and was merely procedural. The court noted the Ontario act did more than touch or affect a matter of procedure, and, despite the plaintiff's contributory negligence, gave a right to recover, such right not being recognized at common law. It concluded that the New York rule on burden of proof had no application to the Ontario statute, since it would materially change the substantive rights of the parties. The court in passing, however, noted (p. 135): "If the Ontario act had merely dealt with

this order of proof or burden of proof, and provided that the defendant, in common-law actions for negligence, had the burden of proving the plaintiff's contributory negligence [contrary to the New York rule that plaintiff has the burden of showing his freedom from contributory negligence], we would have another question. There would then be the same substantial right as at common law, the change merely being in the procedure at the trial or in the burden of proof."[50]

Chapter 52 of the Nevada Revised Statutes, "Documentary and Other Physical Evidence," where NRS 52.380 appears, is an example of this intertwining or gradation. As this Court is aware, the entirety of Nevada's Rules of Evidence is enacted by the Legislature (unlike in many other jurisdictions, including federal court) — a fact that is often confusing to new attorneys and *pro hac vice* litigants.

There is no reason to conclude that NRS Section 52.380 somehow invades the province of the Courts (and is therefore unconstitutional)

[50] *Reardon v. Joffe*, 25 A.D.2d 370, 372 (N.Y.A.D. 1 Dept., 1966).

when the rest of Chapter 52 has remained in effect for as much as four decades without issue.

Thus, as Chapter 52 demonstrates, Nevada's Legislature validly exercises much discretion in making rules that affect how Nevada courts proceed in litigation. In fact, the phrase "the Court shall" appears more than 100 times in the Nevada Revised Statutes—and "[w]hen the Legislature, by statute, authorizes the exercise of an inherent judicial power, the courts may acquiesce out of comity or courtesy[.]"[51] Such a statute generally is unconstitutional *only* if it "attempts to limit or destroy an inherent judicial power[.]"[52]

Like the *Seisinger* Court, the Nevada Supreme Court looks to the legislative intent to determine whether a right conferred by the legislature is substantive. In the 1983 case of *State v. Smith*, the Nevada Supreme Court decided whether NRS 175.011(2) granting of the right to a jury trial was substantive or procedural. The Court looked to the intent

[51] *Blackjack Bonding v. City of Las Vegas Mun. Court*, 116 Nev. 1213, 1220, n.4 (2000).
[52] *Id*. (citing *State v. Second Judicial Dist. Ct*., 116 Nev. 953 (2000)).

of the legislature and determined that the legislature meant the statute to be procedural.[53] Because the legislature intended NRS 175.011(2) to be procedural, it was procedural.[54] This is in accord with *Seisinger* which held that the court's plenary power did not prohibit the "legislature from addressing what it believes to be a serious substantive problem" even though the remedy exists wholly in court procedure.[55]

In this case, the Legislature endowed injury victims with certain rights during litigated medical exams. And while the right to representation, the right to protection from abuse, and the right to record what is happening to one's own person are facially substantive, the Legislative History also shows that the Legislature intended these to be substantive rights. During the course of hearings, Nevada's defense bar argued their opinion that AB 285 was unconstitutional because it was

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[53] *State v. Smith*, 99 Nev. 806, 808–09, 672 P.2d 631, 633 (1983).
[54] *See also Valdez v. Employers Ins. Co. of Nevada*, 123 Nev. 170, 176, 162 P.3d 148, 152 (2007) (looking to legislative intent to determine whether a right is substantive or procedural).
[55] *Seisinger*, 203 P.3d at 490.

procedural.[56] Those advocating for the statute testified that the statute was substantive.[57] With the separation of powers doctrinal issue of procedural vs. substantive front and center, the Legislature passed the bill. Given the context of the bill, the Legislature clearly intended to create a substantive right. To believe otherwise leads to the absurd result the Legislature intended to violate the Nevada Constitution.

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[56] (3 PA 928-929) (Mr. Dane Littlefield testifying before the Senate Judiciary Committee: "In addition, A.B. 285 invites a clear and direct violation of constitutional separation of powers. This is why the plaintiffs' bar is trying to cast this proposed statute as affecting a substantive right rather than a procedural one … If it were to become law, this new statute would directly and inappropriately contradict important parts of the newly amended NRCP and therefore violate the separation of powers doctrine"); (3 PA 998) (Mr. Brad Johnson testifying before the Senate Judiciary Committee: "It is not the Legislative Body that makes procedural rule; however, this bill does not address a substantive law. This bill violates the separation of powers. The state of litigation is not a matter that should be before the Legislative Body").

[57] (3 PA 989) (Mr. Galloway testifying before the Senate Judiciary Committee: "We want to emphasize that alleged victims are forced to undergo medical examinations to become whole again. The victims did not ask to be in this situation. This bill protects fundamental rights. This bill is a substantive law, not just procedural law).

C. Respondent's reliance on *Freteluco* is misplaced because *Freteluco* did not address the separation of powers doctrine, but instead addressed the *Erie* Doctrine.

Respondent's reliance on the Federal District Court case of *Freteluco v. Smith's Food and Drug Centers, Inc.*, 336 F.R.D. 198 (D. Nev. 2020) is flawed. *Freteluco* applied a federal *Erie* doctrine substantive/procedural analysis, which is distinct from Nevada's separation of powers substantive/procedural analysis. In *Freteluco*, the Federal District Court was faced with a dispute over the application of NRS 52.380 and FRCP 35.[58] However, instead addressing the separation of powers question, the district court was faced with an *Erie* Doctrine question.[59] The federal district court declined to engage in an analysis of legislative intent and instead applied an *Erie* Doctrine analysis.[60] As the federal court acknowledged, "Classification of a law as 'substantive' or

[58] *See Freteluco v. Smith's Food & Drug Centers, Inc.*, 336 F.R.D. 198, 202 (D. Nev. 2020).
[59] *Id*.
[60] *Id*.

'procedural' for *Erie* purposes is sometimes a challenging endeavor."[61] The *Freteluco* court ultimately held that federal procedural law applies because the court held that FRCP 35 "is consonant with the Rules Enabling Act, 28 U.S.C. § 2072, and the Constitution, the Federal Rule applies regardless of contrary state law."[62]

Nevada's analysis of substantive law for the purposes of the separation of powers is distinct from the *Erie* doctrine's definition of substantive and procedural law.[63] As discussed above, in *Whitlock v. Salmon* the legislature passed a statute granting parties the right to have counsel conduct *voir dire*, expressly holding that attorney-conducted *voir dire* is a substantive right under a separations of powers analysis.[64] The Nevada Supreme Court noted that Nevada was breaking from the federal practice in doing so.[65] Nevada's separation of powers analysis of

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[61] *Id.* at 202 (*citing Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996)).
[62] *Id.* (*citing Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996)).
[63] *Whitlock v. Salmon*, 104 Nev. 24, 26, 752 P.2d 210, 211 (1988).
[64] *Id*.
[65] *Id.* at 112.

procedural versus substantive conflicts the *Erie* doctrine question. The federal court considers the issue of *voir dire* procedural for *Erie* doctrine purposes.[66]

Because Nevada's definition of substantive law under a separation of powers question is distinct from an *Erie* doctrine analysis, the *Freteluco* court's analysis is misplaced here.

D. Respondent's reliance on *Sibbach v. Wilson & Co*. and *Schlagenhaf v. Holder* is unconvincing because the US Supreme Court addressed Rule 35's constitutionality generally, not whether a legislature can create substantive rights in the context of Rule 35.

Respondent argues that the *Sibbach* and *Schlegenhaf* courts held that Federal Rule of Civil Procedure 35 "is a rule of procedure."[67]

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[66] *Flaming v. Colorado Springs Properties Funds I*, 98 F. App'x 796, 799 (10th Cir. 2004) (holding that federal law supersedes state law on the issue of *voir dire*), *Smith v. Vicorp, Inc.*, 107 F.3d 816, 817 (10th Cir. 1997) (holding the same), *Trinidad v. Am. Airlines, Inc.*, No. 93 CIV. 4430 (SAS), 1996 WL 729851, at *1 (S.D.N.Y. Dec. 18, 1996)("Under the *Erie* doctrine, the selection of jurors is a procedural matter to which federal and not state law applies").

[67] Answer at 16-17.

Petitioner misses the point. No one is disputing whether NRCP is a procedural rule. Unlike the litigants in *Sibbach* and *Schlegenhaf* no one here is challenging the constitutionality of a court generally ordering a medical examination.[68] Rather, the question is whether the Legislature can, and clearly did, create substantive rights within the context of a court-ordered medical examination.

E. The protections provided by NRS 52.380 are quickly becoming the new normal nationally.

The law evolves when the needs of the community change.[69] Respondents argue that since the protections provided in NRS 52.380 are not in the majority, this Court should not attempt to make a harmonious reading of NRCP 35 and NRS 52.380. This argument, however, dismisses the salient evidence showing that NRS 52.380 is

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[68] In *Sibbach v. Wilson & Co.*, a civil litigant challenged the court's constitutional authority to order a medical examination. The United States Supreme Court held that the 1941 version of FRCP 35 was a rule of procedure and thus authorized under the enabling clause. 312 U.S. 1, 11, 61 S. Ct. 422 (1941).

[69] *See Allied Props. v. Jacobsen*, 75 Nev. 369, 377-78, 343 P.2d 1016, 1020-21 (1959).

quickly becoming an accepted standard nationally, and with good reason.

Although not in the majority, states are increasingly adopting and implementing the standard, by statute or court rule, permitting a third party representative during an examination by a physician in civil cases involving personal injuries. More than a third of the states have authorized this standard, including Alaska, California, Arizona, Illinois, Michigan, Pennsylvania, Oklahoma, Washington, Utah, Connecticut, Delaware, Florida, Indiana, Kentucky, Massachusetts, New Jersey, New York, and West Virginia. Additionally, the Fifth Circuit has also recognized the substantive rights set forth in NRS 52.380.[70]

In *Langfeldt-Haaland*, the Supreme Court of Alaska addressed the question whether a party in a civil action has the right to have his attorney present during an examination by a physician hired by his

[70] *Acosta v. Tenneco Oil Co.*, 913 F.2d 205 (5th Cir. 1990).

opponent.[71] The Court turned to the *Houston*[72] opinion, a criminal case, in analyzing the issue. The *Langfeldt-Haaland* Court concluded plaintiff's counsel should have a right to attend a physical or psychiatric examination and that the *Houston* opinion supports its conclusion in several respects: (1) there is a constitutional right to counsel in civil cases arising from the due process clause, and that right to counsel is not co-extensive with the right to counsel in criminal prosecutions, but in the area of compelled examinations, there is no reason to draw a distinction; (2) counsel may observe shortcomings and improprieties in an examination which can be brought out during cross-examination at trial; and (3) although observation may be the primary role of counsel in both criminal and civil cases, counsel may on occasion properly object to questions concerning privileged information. [73] Additionally, the *Langfeldt-Haaland* Court noted that the Rule 35 examination is part of the

[71] *Langfeldt-Haaland v. Saupe Enterprises, Inc.*, 768 P.2d 1144, 1146 (Alaska 1989).
[72] *Houston v. State,* 602 P.2d 784 (Alaska 1979).
[73] *Id*.

litigation process, and parties are, in general, entitled to the protection and advice of counsel when they enter the litigation arena.[74]

The Supreme Court of California addressed the same issue in *Sharff v. Superior Court of City and County of San Francisco*.[75] In *Sharff*, the respondent court made an order directing the plaintiff to submit an oral and physical examination in the absence of the plaintiff's attorney, and stayed further proceedings until the examination was completed.[76] The plaintiff filed a writ of mandamus to compel the Superior Court to allow the plaintiff to proceed to trial without submitting to an examination under the conditions specified in the order.[77] In assessing this issue, the California Supreme Court recognized that while a doctor of an examination should be free to ask questions that may be necessary to enable him to formulate an intelligent opinion regarding the nature and extent of the plaintiff's injuries, the doctor should not be permitted to

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[74] *Id*.
[75] *Sharff v. Superior Ct. of City & Cty. of San Francisco*, 282 P.2d 896, 897 (1955).
[76] *Id*. at 897.
[77] *Id*.

make inquiries into matters not reasonably related to the legitimate scope of the examination.[78] Such an examination poses the possibility that improper questions may be asked by the doctor, and a lay person should not be expected to evaluate the propriety of every question at his peril. [79] Therefore, the California Supreme Court found that the respondent court imposed an unwarranted condition on the plaintiff's right to proceed to trial and issued a writ of mandate directing the respondent court to allow the case to be tried without requiring the plaintiff to submit to a medical examination in the absence of her attorney.[80]

In *McCullough v. Mathews*, the Supreme Court of Oklahoma was presented with the issue whether anything or anyone, other than the party being examined and the physician, should be permitted in the examination room during a medical examination.[81] The Legislature, in

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[78] *Id*.
[79] *Id*.
[80] *Id*.
[81] *Boswell v. Schultz*, 175 P.3d 390, 394 (Okla. 2007)(citing *McCullough v. Mathews*, 918 P.2d 25 (Okl. 1995)).

Oklahoma Statute 3235(B), authorized a party to request conditions for the medical examination and allowed the trial court to impose conditions regarding the examination, but did not specify what "conditions" are permitted.[82] The *McCullough* Court found that there was no restriction in §3235 that prohibited an attorney from being the representative of the person to be examined and, consequently held that an attorney was entitled to serve as a third party representative under the statute.[83] Further, the *McCullough* Court authorized that handwritten notes could be taken during the examination.[84] Based on that holding, the Supreme Court of Oklahoma concluded in *Boswell* that audio recordings should be permitted in such medical examinations.[85]

The Supreme Court of Indiana also reviewed the issue as to whether tape recording conversations in a court-ordered medical examination pursuant to Indiana Trial Rule 35 is permitted.[86] Although

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[82] *Id*.
[83] *Id*.
[84] *Id*.
[85] *Id*.
[86] *Jacob v. Chplin*, 639 N.E.2d 1010, 1011.

the rule was silent with regards to tape recording conversations during the medical examination, the rule did permit the trial court to set the conditions for the examination, upon a showing of good cause.[87] The *Jacob* Court acknowledged that the purpose of the examination is to further the litigation process and that the opinions arrived at by the examiner are intended to aid the trier of fact in assessing damages pertaining to the plaintiff's claims.[88] The statements made by the examinee are intended to aid the examiner in arriving at a proper opinion and are material to the issue of proximate cause.[89] Therefore, the Court held that given the important nature of the examination, both the examiner and examinee should be permitted to choose whether or not to make written notes of the verbal exchange and that both should also be permitted to openly record the verbal exchange by electronic means.[90]

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[87] *Id*. at 1012.
[88] *Id*.
[89] *Id*.
[90] *Id*.

In *Rochen v. Huang*, the Superior Court of Delaware assessed whether an examinee subject to an independent psychiatric examination is permitted to have an observer present during the examination and whether an electronic recording of the examination was permitted.[91] While the Court did not permit plaintiffs' counsel to be present at the examination, the Court did authorize the plaintiffs to be accompanied by a health care practitioner of their choice during the examinations.[92] Further, the Court held that the defendant did not demonstrate any reason why electronic recording of the examinations would obstruct the expert's ability to conduct a fair and complete examination; thus, plaintiffs were permitted to have the examinations recorded.[93]

Several other jurisdictions including Arizona, Michigan, Illinois, Pennsylvania, Washington, Utah, Connecticut, Florida, Kentucky, Massachusetts, New Jersey, New York, West Virginia, and the Fifth Circuit have also adopted and implemented these standards and the

[91] *Rochen v. Huang*, 558 A.2d 1108, 1109 (Del. Super. Ct. 1988).
[92] *Id*. at 110.
[93] *Id*. at 111.

motivations for the changes are substantially similar to those discussed herein.[94]

1. NRS 52.380 was enacted, similar to other states, in order to protect against actual and evidenced abuses in Nevada courts.

The Nevada shift started with a lengthy May/June 2012 AMA Guides Newsletter authored by Dr. Robert Barth, which touts the position that no plaintiff claiming a mental-illness related injury would ever be able to establish legal causation. The Newsletter appears to be Dr. Barth's rally cry to encourage medical legal experts to defy the legal standard of causation and adhere to the medical standard—which Dr. Barth argues will never be satisfied during litigation.

[94] *See* Ariz. R. Civ. P. 35(c); Mich. R. Civ. P. R. 2, 311 (1985); 735 Ill. Comp. Stat. § 5/2 - 1003(d) (2008); Pa. R. Civ. P.4010 (2002); Wa. Super. Ct. R. Civ. Cr. 35 (2001); Utah R. Civ. Proc. R. 35 (1993); *Polcaro v. Daniels*, 2007 WL 1299159 (Conn. Sup. Ct. 2007); *Lunceford v. Florida Central Railroad Co., Inc.*, 728 So.2d 1239, 1241 (Fla. App. 5. Dist. 1999); *Metropolitan Property & Cas. Ins. Co. v. Overstreet*, 103 S.W. 3d 31, 38-40 (Ky. 2003); *Hepburn v. Barr & Barr*, 2006 WL 1711849 (Mass. Sup. Ct. 2006); *B.D. v. Carley*, 704 A.2d 979, 981 (N.J. 1998); *Flow v. Cty. of Oneida*, 34 A.D. 3d 1236 (N.Y. 2006); *State ex rel. Hess v. Henry*, 393 S.E. 2d 666 (W. Va. 1990); *Acosta v. Tenneco Oil Co*., 913 F.2d 205 (5th Cir. 1990).

When using this protocol, evaluators can demonstrate their allegiance to, and adherence to, the scientific tradition of professional health care and **can demonstrate and justify their resistance to the anti-fact bias of the court and administrative systems**.[95]

Since 2015, then-commissioner Bonnie Bulla has been concerned that the state of the community had evolved to the point that Rule 35 exams were being used as nothing more than a tool to bully injured people. In a 2015 hearing transcript surrounding a defendant's motion to compel a Rule 35 exam, then-commissioner Bulla said:

> I think it is being used as a litigation tool and it is not being used for the purpose it is supposed to be, which is really trying to figure out if something's wrong with the Plaintiff and what's related and what is unrelated, and right now it's just -- it's a tool. It's no more

[95] 2012 AMA Guides Newsletter at p.5.

than a -- it's litigation bullying is what it is, with all due respect to my defense friends out there. That's what it is.[96]

The specific need for recording examinations came to light in Nevada following a very disturbing examination conducted Derek Duke, M.D.[97] Dr. Duke, like Dr. Etcoff here, was a very popular defense Rule 35 examiner. In that exam, the plaintiff, Mr. Ribera, recorded the examination without Dr. Duke's knowledge.

In the recording, Dr. Duke essentially argues with the plaintiff and tells him that even a 60-mph crash will not cause the need for back surgery, that the need for back surgery is known within 10 minutes of an incident, and that 99 percent of people who have back surgery are not in motor vehicle crashes.[98] Dr. Duke criticizes Mr. Ribera's

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[96] Recorder's Transcript of Proceedings Yancey Defendants and Goliath Properties LLC's Motion to Compel Independent Medical Examination Before The Honorable Bonnie A. Bulla, Discovery Commissioner Friday, April 3, 2015, as Exhibit 1.

[97] *See* Transcript of Ribera Medical Examination, as Exhibit 2.

[98] See Ribera Transcript at 29:1-25.

treatment as "shocking" and essentially advises Mr. Ribera to stop taking his prescribed medication cold turkey:

> DR. DUKE: And—and pretty much use of long-term, high-dose, you know, morphine, it's just been completely abandoned. And it's shocking that – that you are being managed that way because I can – I would bet any amount of money that no matter what is done, you will not get better as long as you have the drugs on board.
>
> MR. RIBERA: So what's the plan of attack? I mean, what would you do with me?
>
> Dr. Duke: You get rid of the drugs first, and then you get through that. And you know, on opiates for four years, that's a major problem, 'cause your body gets used to it. You get addicted to it so sometimes you have to see an addiction medicine specialist.
>
> MR. RIBERA: Really? I bet you I could quit tomorrow.

DR. DUKE: Boy, I tell you, that would be the best think you ever did.

…

DR. DUKE: So I would-before I committed myself to having my back sliced open again, that's-that the route I would go.

MR. RIBERA: Okay.

DR. DUKE: You know, it's my advice.[99]

Dr. Duke then goes on to offer legal advice to Mr. Ribera by discussing what he views to be "red flags" or problems with Mr. Ribera's lawsuit:

DR. DUKE: The – you know, the—I think part of your – the issue too with your case that's difficult is that – you know, you were seen for a lifting injury at (unintelligible)—at home, you know, right after the car wreck… you know the history changed, and I think that's what's got a red flag raised on your

[99] *See* Ribera Transcript at 19:18-21:16.

> case. And so—and then to – you know, it makes it very difficult, you know – these kinds of things, because it's hard to go back and undo and erase the – the medical record, which says what is say, you know.[100]

Dr. Duke then suggests to Mr. Ribera that he should use his insurance because, presumably, he is going to lose his lawsuit.[101]

Dr. Duke conducted what appeared to be a "de facto deposition" of Mr. Ribera. This is troubling for many reasons because he, like all plaintiffs subjected to Rule 35 exams are allegedly injured, are vulnerable, and are subjecting themselves to a stranger for medical exam under court order. The most troubling thing about a "de facto deposition" is that it is done with none of the safeguards of an actual deposition. These plaintiffs are forced to appear with no witnesses and no legal representation. When there is no record of what questions are asked or what the answers were, discussions such as those on the Ribera

[100] *See* Ribera Transcript, at 21:17-22:11.
[101] *Id*., at 22:12-16.

recording could also be construed as unauthorized communications with a represented party—which is highly inappropriate. Moreover, the examiner's Report becomes the "record" of what occurred during the examination, and it's a doctor's word against the plaintiff's if there is a disagreement as to what actually occurred during the exam. Any such dispute could result in tremendous prejudice to the Plaintiff.

Through NRS 52.380, the law is appropriately evolving to ensure the integrity of the judicial process and safeguard the rights of those injured individuals that lawfully seek adjudication of their injuries.

F. If the Court decides that any portion of NRS 52.380 is unconstitutional, the Court should salvage the unconstitutional portion by considering whether to adopt the standard or by deeming it directory.

Petitioner firmly believes that NRS 52.380 is constitutional. In the event that the Court disagrees, the Court must go through two further steps before striking any conflicting portion. [102] First, the Court

[102] *See List*, 99 Nev. at 138 (stating that the Court will make every effort to find a statute constitutional).

determines whether to voluntarily adopt the conflicting portion of the statute and thus ending the conflict. If the Court declines to adopt the conflicting portions, the Court will deem the conflicting portions as directory only. If the Court deems the statute directory only, the Court should incorporate the directive of the Legislature in the Good Cause analysis of NRCP 35(a)(3) and (4). As mentioned above, "[w]hen the Legislature, by statute, authorizes the exercise of an inherent judicial power, the courts may acquiesce out of comity or courtesy[.]"[103] Such a statute generally is unconstitutional *only* if it "attempts to limit or destroy an inherent judicial power[.]"[104]

In this context, it is only *direct encroachment* on the specific power of the Courts that can overcome the presumption of constitutionality that attaches to enactments of the Legislature.[105]

In *List*, this Court held:

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[103] *Blackjack Bonding*, 116 Nev. at fn. 4.
[104] *Id.* (citing *State v. Second Judicial Dist. Ct*., 116 Nev. 953 (2000)).
[105] *List*, 99 Nev. at 137-38 (1983).

> All acts passed by the Legislature are *presumed to be valid* until the contrary is *clearly established*. [ ] In case of doubt, *every possible presumption will be made in favor of the constitutionality* of a statute, and courts will interfere only when the Constitution is *clearly violated*.[106]

One way this Court has avoided findings of unconstitutionality (while still respecting the respective prerogatives of the co-equal branches) when the Legislature has potentially infringed on the powers of the Courts is to construe the statute at issue as "directory rather than mandatory."[107]

In *Mendoza-Lobos*, this Court analyzed a statute that required the trial court to (1) consider certain factors when imposing a deadly weapons enhancement; and (2) state on the record that it had

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[106] *Id.* (internal citations omitted) (emphases added).

[107] *Mendoza-Lobos v. State*, 125 Nev. 634, 639 (2009) ("When statutory provisions 'relate to judicial functions, they should be regarded as directory only.'") (quoting *State of Nevada v. American Bankers Ins.*, 106 Nev. 880, 883 (1990)).

considered those factors.[108] While this Court noted that these aspects of the statute violated the separation-of-powers doctrine, this Court nonetheless "elect[ed] to abide by the legislative mandate and direct the district courts to comply with the statute."[109]

This Court has also exercised its discretion—even where the statute could not be construed as directory rather than mandatory—to follow the mandate of the Legislature "because it serves [a] laudable goal[.]" [110] This outcome is appropriate under such circumstances because "in construing statutes, 'the first great object of the courts . . . [is] to place such construction upon them as will carry out the manifest purpose of the legislature[.]'"[111]

One such "laudable goal" is "demanding diligence on the part of the litigants[.]"[112] In *Waite*, a limitation on the time permitted for a judicial

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[108] *Id.* at 636.
[109] *Id.* at 639 (noting that "[s]o far as the provisions may relate to judicial functions, they should be regarded as directory only[ ]").
[110] *Id.* at 641.
[111] *Am. Bankers Ins. Co*., 106 Nev. at 882 (quoting *Thomas v. State*, 88 Nev. 382, 384 (1972)).
[112] *Waite*, 69 Nev. at 233-34.

function was construed as mandatory for the litigants, but was deemed directory toward the courts, so as to avoid "an oppression upon the judge's duties of deliberation and of orderly administration of justice."[113]

Likewise, here, the provisions of the Statute establishing the right of the examinee to have an observer present and to have that observer record the examination simply recognize the importance of safeguarding the rights of the examinee in a procedure which the District Court has ordered him to attend. Protecting these rights of a litigant—while permitting the opposing party to intrude to a certain extent on both his personal privacy and his physical integrity, as dictated by the needs of the litigation—is a "laudable goal."[114]

Therefore, in this instance it is appropriate that, rather than finding the Statute unconstitutional even if portions of it are deemed to infringe upon the prerogatives of the Courts, this Court finds that [t]he mandatory aspect of the statutes should, then, be confined to the

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[113] *Id.*

[114] *Cf. Mendoza-Lobos*, 125 Nev. at 641.

individual action required. So far as the provisions may relate to judicial functions, they should be regarded as directory only.[115]

1. This Court should elect to adopt any unconstitutional portions of the statute, thus ending the conflict.

This Court has the option of adopting the protections the Legislature afforded accident victims against adverse forensic medical examiners. In the 2009 case of *Mendoza-Lobos v. State*, the Court was faced with an unconstitutional statute that required the trial court to state on the record that it had considered certain sentencing factors.[116] The Nevada Supreme Court found the statute to be an unconstitutional violation of the separation of powers doctrine, but voluntarily stated, "but we elect to abide by the legislative mandate and direct the district courts to comply with the statute."[117] Here, NRS 52.380 not only represents the will of the Legislature, but it establishes important

[115] *Waite*, 69 Nev. at 324.
[116] *Mendoza-Lobos*, 125 Nev. at 639.
[117] *Id*.

protections for injury victims. As such, this Court should adopt any portions of the statute the Court finds unconstitutional.

2. Any portion this Court does not adopt, the Court should deem that portion directory to be used as part of the good cause analysis under Rule 35(a)(3) and (4).

If *arguendo*, this Court believes any portion of NRS 52.380 is unconstitutional and does not elect to adopt that portion, this Court should deem that portion directory and advisory to the district court. As this Court stated in 1990, "the first great object of the courts…[is] to place such construction upon [statutes] as to carry out the manifest purpose of the legislature"[118] and thus when there is a statute that intrudes on judicial powers, "[p]rior decisions by this court have held that a statute is directory rather than mandatory when the adjudicative function of the court is inherently threatened by legislative intrusion."[119] More recently, this Court has noted, "[o]rdinarily, a statute which intrudes on the

[118] *Am. Bankers Ins. Co.*, 106 Nev. at 882–83.
[119] *Id*.

powers of the judicial branch is construed as directory rather than mandatory."[120]

The intent of the legislature was clear: it intended to give injury victims certain protections in adverse litigious medical examinations.[121] If this Court deems this a non-substantive right and an irreconcilable conflict, this court should consider NRS 52.380 a directive or advisory[122] statement from the legislature, which represents the voice and the will of the People of Nevada, to the court.

II.
CONCLUSION

NRS 52.380 does not violate the separation of powers doctrine because it does not conflict with Rule 35. The protections NRS 52.380 give injury victims are substantive and thus avoid a separation of powers violation.

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[120] *Mendoza-Lobos*, 125 Nev. at 639.
[121] *See generally* NRS 52.380.
[122] Directory statutes are advisory. *Vill. League to Save Incline Assets, Inc. v. State ex rel. Bd. of Equalization*, 124 Nev. 1079, 1086–87, 194 P.3d 1254, 1259 (2008).

To the extent that any portion of NRS 52.380 is found to be in violation of the separation of powers doctrine, the Court should either adopt the provision or deem the provision directory for the purposes of a Rule 35(a)(3) and (4) good cause analysis. For these reasons, Petitioner respectfully asks this Court to uphold the decision of the district court.

DATED this 5th day of April 2021.

H & P LAW

Marjorie L. Hauf, Esq.
Nevada Bar No.: 8111
Matthew G. Pfau, Esq.
Nevada Bar No.: 11439

Attorney for Petitioner,
Troy Moats

CERTIFICATE OF COMPLIANCE

I, Matthew G. Pfau, the undersigned, hereby certify as follows:

1. I have prepared and read this Reply.

2. To the best of my knowledge, information, and belief, the Reply is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of

litigation.

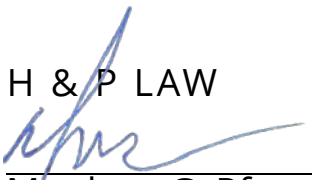
3. This Reply complies with all applicable Nevada Rules of Appellate Procedure, including Rule 28(e), that every assertion in the brief regarding matters in the record be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found.

4. The Reply complies with the formatting requirements of Rule 32(a)(4)-(6) and 32(a)(7), but it does not comply with NRCP 21(a)(6)(d) because it exceeds 15 pages and is more than 7,000 words at 8,089 words of substance. Petitioner has filed a concurrent Motion for Leave to Exceed Page and Word Limits.

5. The Reply is written using 14-point proportional-spaced font called "Open Sans."

DATED this 5th day of April 2021.

H & P LAW



Matthew G. Pfau, Esq.
Nevada Bar No.: 11439

Attorney for Petitioner,
Troy Moats

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of April 2021 service of the foregoing PETITIONER'S REPLY TO ANSWER TO PETITION FOR WRIT OF MANDAMUS) was made by required electronic service and U.S. Mail to the following individuals:

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IN THE SUPREME COURT OF THE STATE OF NEVADA

Troy Moats, Petitioner, vs. **The Eighth Judicial District Court of the State of Nevada ex rel the County of Clark and the Honorable Judge Adriana Escobar**, Respondents.	Supreme Court No.: 81912 District Court No.: A-18-769459-C
Troy Burgess, Real Party in Interest.	

APPENDIX, VOLUME I

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INDEX OF APPENDIX

EXHIBIT “1”

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RTRAN

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

MITCH WILSON, Plaintiff, vs. SCOTT YANCEY, ET AL., Defendants.	CASE NO. A680635 DEPT. 16

BEFORE THE HONORABLE BONNIE A. BULLA, DISCOVERY COMMISSIONER

FRIDAY, APRIL 3, 2015

RECORDER'S TRANSCRIPT OF PROCEEDINGS
YANCEY DEFENDANTS AND GOLIATH PROPERTIES LLC'S MOTION TO COMPEL INDEPENDENT MEDICAL EXAMINATION

APPEARANCES:

For the Plaintiff:	ADAM GANZ, ESQ., JASON LATHER, ESQ.
For the Defendants:	WILLIAM MAUPIN, ESQ.
For Amy Yoncey/Scott Yancey/Goliath:	STACEY A. UPSON, ESQ.

RECORDED BY: FRANCESCA HAAK, COURT RECORDER

Las Vegas, Nevada - Friday, April 3, 2015, 10:30 a.m.

* * * * *

DISCOVERY COMMISSIONER: Wilson.

MR. GANZ: Good morning, Your Honor. Adam Ganz, on behalf of the Plaintiff, Mitch Wilson.

DISCOVERY COMMISSIONER: Good morning.

MR. GANZ: And my associate, Jason Lather.

DISCOVERY COMMISSIONER: Good morning.

MR. LATHER: Good morning. Do you need Bar numbers, or do you --

THE CLERK: You're in the computer.

DISCOVERY COMMISSIONER: You're in the computer, so you're fine.

MS. UPSON: Good morning. Stacey Upson, on behalf of the Yanceys and the Goliath enterprise.

DISCOVERY COMMISSIONER: Good morning.

MR. MAUPIN: Bill Maupin, Bar number 1315.

DISCOVERY COMMISSIONER: And you are here for?

MR. MAUPIN: For the Defendants.

DISCOVERY COMMISSIONER: Thank you. All right. Everyone may have a seat. I'm going to give both sides time to argue, but I felt that it was just important for me to make a couple of preliminary observations and hopefully try to reinforce what I think my role is as Discovery Commissioner.

First of all, I do not have the authority nor will I prevent Dr. Duke from performing Rule 35 exams in the Eighth Judicial District Court; that is not within my purview. I can't make that type of a decision. I have to look at each case individually, and there have been cases where I have disqualified him from performing the Rule 35 exams for

very specific reasons, and there was a case recently I believe either Wednesday or last week -- it all sometimes runs together -- where I allowed him to perform that Rule 35 exam. So I am looking at these issues on a case-by-case basis, and if there are rumors or -- out in the community that I've disqualified this gentleman, that is just not correct. So make sure that you properly indicate what I have done.

Number two, a Rule 35 exam is not a matter of right, nor are Defendants automatically entitled to one. It is within the Court's discretion, and there are some very persuasive language in a case called Storlie, S-T-O-R-L-I-E, versus State Farm, it's 2010 Westlaw 549.0777. It is not reported in F2d, but of course we can cite to those decisions as persuasive authority even though they're not reported, but I can't cite to unreported Supreme Court decisions and neither can you all. So that's just a little bit of a tip for you, and I would highly recommend you read that case.

Number three, a Rule 35 examiner must be free from bias, and this is from the American Medical Association which was actually cited in one of the other cases called Hudson, and the case number for that, if you choose to look it up, is A676211. But what the American Medical Association says is the examiner is independent and must arrive at his or her diagnoses and opinions independently of the referring source, renumeration, others' opinions, or personal bias. The examiner is a medical professional who is not involved in the patient's care, and by not being involved in the patient's care, that means not advocating one way or the other.

Number four, the Court does have the authority to exclude evidence. Now, I can just make a recommendation. The District Court Judge has to turn it into an order by signing the Report and Recommendation. But that includes preventing a Rule 35 examiner from conducting a Rule 35 exam based on bias. And Magistrate Judge Foley persuasively explained in the Pham versus Walmart Stores case, 2012 Westlaw 195.7987; this too is not

reported; and Pham, by the way, is P-H-A-M versus Walmart Stores. And he says in that opinion: A physician who engages in a pattern or practice of providing improper, inflammatory opinions may justify an order barring him from performing a medical exam pursuant -- or medical examination pursuant to Rule 35. The Court, however, will not disqualify -- in this case it was Dr. Cash -- based on a single report in an unrelated case.

So if I was just looking at one other report by Dr. Duke in an unrelated case, that is not sufficient under at least Judge Foley's analysis, and I'm not sure just one report is the standard anyway, but you have to take a look at what is being said and analyze it as it's intended. So clearly one report is not sufficient.

Before proceeding any further, I do want to make sure that I am correct on a couple of facts. Number one, Dr. Duke did not perform a records review on Mr. Wilson in this case, is that correct?

MS. UPSON: Correct.

DISCOVERY COMMISSIONER: Okay. Number two, defense counsel, you have worked with Dr. Duke and he has performed Rule 35 exams for your firm on multiple occasions.

MS. UPSON: Correct.

DISCOVERY COMMISSIONER: Mr. Ganz, your firm has deposed Dr. Duke on multiple occasions involving Plaintiffs where he has performed a Rule 35 exam on your clients.

MR. GANZ: Correct, Your Honor.

DISCOVERY COMMISSIONER: And I don't want to put words in anyone's mouth, but having reviewed some of those transcripts, is it fair to say that there are some -- a little bit of animosity between the Plaintiff's firm and Dr. Duke?

MR. GANZ: It hasn't been brought out in court documents, Your Honor, but I can

tell you that Dr. Duke, and me, and the firms that I've been involved in, have at least a ten- to fifteen-year history of some problems that occurred between former partners of his, between former partners of mine, between issues that were going on with Federal investigations. There's a whole lot of stuff that was going on back in the day, and I think some of that has spilled over into this stuff. I didn't bring any of that stuff out only because I was dealing with specifically the cases that I had presented to you last time were all, if I'm not mistaken, all my cases that I had taken his deposition on.

DISCOVERY COMMISSIONER: But Dr. Duke knows who you are.

MR. GANZ: Oh, I presume so. Yeah, I've -- oh, yeah, absolutely, he knows who I am, I mean, and --

DISCOVERY COMMISSIONER: And he knows you can depose him and take a deposition, at least in one exchange I saw. And I don't think -- and let me just state this. It's very difficult when you're reading a document to know what dynamics are going on. I didn't see -- I mean, Dr. Duke didn't say anything improper. I don't think Plaintiff's counsel said anything improper. But it was definitely a cross-examination.

MS. UPSON: And I would just put for the Court's record in relation to that is when we had the conference call a couple weeks ago on this issue, and you said you thought there were issues with counsel, and I said I wasn't aware, and you said I should talk to Dr. Duke, I did, and Dr. Duke said he has had depositions with him. There's nothing personal in his mind regarding the depositions. He knows Plaintiffs' counsel go after him. It's no different than them or any of the others, and he has no personal animosity one way or the other to any of the Plaintiffs' attorneys in town.

DISCOVERY COMMISSIONER: Thank you. All right. So I need to know what the current condition is of the Plaintiff now --

MR. GANZ: Sure.

DISCOVERY COMMISSIONER: -- 'cause we've spent a couple of months --

MR. GANZ: And I think that's a absolutely great point to start at, Your Honor.

First of all, I need to apologize because I've heard that you've had other hearings, some references, that somehow that I proliferated this particular prior ruling in another one of my cases, and I wanted you to understand that I had nothing to do with it.

My original intent was for my cases and my clients, and that's why I provided information from my cases to you in order to make those decisions. I didn't go out and get hundreds of reports and try to say that he's a bad guy in the community. I try to really focus it on my clients and my cases, so I really want you to understand that that is --

DISCOVERY COMMISSIONER: For the record, the Court's not saying he's a bad guy either. That's not the issue, just as it's not personal animosity from Dr. Duke to the Plaintiffs. It's not personal animosity by the Court to Dr. Duke. The issue is whether or not he should be performing the Rule 35 exam in this case.

MR. GANZ: And --

DISCOVERY COMMISSIONER: Just so we're clear.

MR. GANZ: And here's the --

DISCOVERY COMMISSIONER: Go ahead.

MR. GANZ: -- the facts on that, Judge. They asked to use Dr. Duke. We said no. They filed a motion. We did an opposition. We outlined the stuff, and then we get this reply brief that wasn't heard before the last hearing. And in the reply brief it talks about, well, the client, Mr. Wilson, has not been truthful with this person, has not been truthful with this person, and it's not uncommon that people, you know, doctors can come to those conclusions based upon inconsistent testimony, and so on and so forth. And in her brief she actually said that the causation is ultimately gonna be the issue in this case as it is in many cases with IME doctors, and so on and so forth. What that doesn't do, Your Honor, is it

doesn't put my client's physical condition in controversy, and that's what the point of the Rule 35 exam should be.

Just saying causation doesn't necessarily -- my client's had two major surgeries, neck and low back, already, already had the surgeries, so --

DISCOVERY COMMISSIONER: How is your client doing today?

MR. GANZ: He's doing relatively well, but I do believe, in all candor to the Court, that future damages will be at issue and in controversy. I'm not trying to say that I don't believe that will be. So a limited examination with regard to that by somebody who's unbiased I would have absolutely no qualms with, and that's what I've tried to convey to Ms. Upson on a couple different occasions.

The problem is, Your Honor, is I don't believe that his condition with regards to all the stuff that she wanted to talk about in that reply brief, causation, and whether or not he told this doctor this, and whether or not he told that doctor that, that stuff's not his physical condition at issue and should not be the subject of a Rule 35 examination.

DISCOVERY COMMISSIONER: I agree with you.

MR. GANZ: They could do a records review on that. She's already pretty much written it for him in this -- I don't mean it that way.

DISCOVERY COMMISSIONER: Oh, he writes quite well by himself.

MR. GANZ: My point is the issues have already been well outlined. Those issues are already decided. There's no reason why he needs to put my client in a room by himself and go through a physical examination on those issues and redepose him himself and come up with his own bases for saying that he's inconsistent and add additional evidence to what she's already got for no reason when his physical condition is not at issue. That's the first issue.

The second part of that is exactly what you talked about in the Pham case. It

must be somebody who is unbiased. He's already, in my opinion, biased towards my Plaintiffs in my cases. It's pretty obvious. I haven't had a single issue, and I've showed you just on five, and I didn't go back more than even three or four years. I could show you that his opinions are if they file a lawsuit they have secondary gain issues. Well, how do you explain the pain that they had on that particular day? Well, they have a lawsuit and, therefore, I believe they're just exaggerating those complaints over that period of time.

There is nothing specific about any of my people other than the fact that they filed a lawsuit, and that's what I tried to bring out to Your Honor, and I don't believe that's the appropriate person to put hands on my client.

DISCOVERY COMMISSIONER: Thank you. All right. Do -- would you prefer to hear what I found in my limited review, or would you prefer, Ms. Upson, Mr. Maupin, to make some statements for the record? I'm happy to do it either way.

MR. GANZ: Are they both going to be able to argue, Your Honor? They represent one individual here.

DISCOVERY COMMISSIONER: Well, do you want your associate to argue too? I'll listen to what he has to say as well. I mean, listen, here --

MR. GANZ: I understand.

DISCOVERY COMMISSIONER: Here's --

MR. GANZ: It's a big issue and I understand.

DISCOVERY COMMISSIONER: This is a huge issue, and we've got -- and as I understand it, Mr. Maupin is actually here for Dr. Duke on some level, but he has associated in with the Defendants.

MR. MAUPIN: I am -- just to clarify that, I am here to represent the Defendants in this case.

DISCOVERY COMMISSIONER: Okay.

MR. MAUPIN: I also separately represent Dr. Duke, and I was retained by him to deal with the, primarily, the improper and egregious use of your order in the Thorne case for impeachment in front of a District Court Judge who he persuaded to allow that impeachment with no briefing.

DISCOVERY COMMISSIONER: Well, I really don't know what to say to that other than I think my orders have been very clear that they've been case specific. That's all I can say.

MR. MAUPIN: And I agree with that.

DISCOVERY COMMISSIONER: And that's what is important, and I just said I allowed Dr. Duke to perform a Rule 35 exam within the last week, and I wouldn't strike him. So the issue is this case. That's what it is. And, you know, because of that I was almost hesitant to review -- I have three boxes of these materials, and they weren't provided to me in any meaningful way. The reports weren't stapled together. They weren't divided by year. They didn't point out the reports that found injury and those that didn't. They were just thrown in the boxes. And so I picked one box to review and did not review -- and I declined to review anymore.

MS. UPSON: Can I just make one brief comment?

DISCOVERY COMMISSIONER: Yes.

MS. UPSON: He put those in boxes. They were separated by no injury, soft tissue injury, and more significant injury and our cover letter when they came over -- obviously, I didn't have the box to open them -- but the cover letter said which box was which.

DISCOVERY COMMISSIONER: No, it didn't, and maybe -- I don't know.

MS. UPSON: We had a cover letter that came with this because he told --

DISCOVERY COMMISSIONER: All right. Well, then that is -- then I will take responsibility for that, but I just got the three boxes in my office, that's what I got, with your

cover letter saying these are the three boxes.

And, you know, I find that interesting because I went through what I would call box one and I found no injury and injuries in box one. So I'm not sure how they were divided. I found all different years, Ms. Upson. I found 2011, 2012, 2014, all just put together.

I am going to decline to go through the other boxes. I am telling you though that in box one that I reviewed, I did, in fact, find ten cases where he recommended some form of surgery, and then in the -- there were a certain number of cases where he did not. But you know what? The injury-noninjury really isn't the dispositive issue here, so I'm glad you told me that. I will certainly go back and look at your cover letter. But that's really not the issue here.

The issue is whether or not there's bias or prejudice, and these are -- and I will tell you this is what I looked at. I looked at whether or not in that report, somewhere in that report, there was an indication of secondary gain. That's one thing I looked for. And then the next thing I looked for is whether or not there was some suggestion that the Plaintiff had some psychological issue or psychiatric underlay that is an explanation for the injuries, and the reason I looked at those two things in particular and, again, is because that's what I would consider to be inflammatory under the Federal Court case, and this is why -- because what -- and to Dr. Duke's credit, many times, not every time, but many times he says it could be conscious or subconscious, but that's not really -- it's not about the person being examined. It's about his point of view. It's what he's looking for because we're trying to figure out what his objectivity is.

Now, and also in fairness to Dr. Duke -- and I gave this lecture the other day when I had to clarify my Report and Recommendation in the other case again, although it's clearly in my recommendation what I said -- I see the same Plaintiffs' doctors over and over

and over again. So it is no wonder that on the Rule 35 exams you see the same defense examiners over and over and over again. You know, when I get a time, maybe I'll rewrite Rule 35. I think it is being used as a litigation tool and it is not being used for the purpose it is supposed to be, which is really trying to figure out if something's wrong with the Plaintiff and what's related and what is unrelated, and right now it's just -- it's a tool. It's no more than a -- it's litigation bullying is what it is, with all due respect to my defense friends out there. That's what it is. It's using a rule to bully in litigation and, frankly, I don't think Dr. Duke deserves to be used that way or any other physician, and I think it's the Bar's responsibility to get hold of this Rule and figure out how it should be used because, frankly, it's very distressing to me.

So I reviewed box one, and I'm not sure, Ms. Upson, whether -- I can tell you I did find ten cases that had injury, multiple cases had no causation, some cases had minimal injury, so I'm not sure they were actually divided that way. I'm not disputing what you said. I'm just saying in this box one I found a little bit of both.

So all I'm really concerned about today are the two issues I talked about, whether or not there was secondary gain and whether or not there was some psychological underlay that caused the problem because to me those are the two inflammatory issues. People can have psychiatric or psychological problems ten years ago, but that shouldn't preclude them from recovering ten years later in an auto accident if they're genuinely hurt. But if that's the, you know, if that's the underlying analysis, then that could be a problem. If in cases it's always secondary gain, or that's the reason for the causation, that could be a problem because when juries hear that objectively, oh, they just want money, okay, that's inflammatory, or they're just nuts, or they're acting strange so they can't, you know, really be having all these injuries. That's also inflammatory.

I reviewed 87 -- or, I'm sorry, I apologize. I reviewed 86 cases in box one.

There were more in there, but many of them were duplicative. They had the -- I think I had three reports from the same patient that were exactly alike, and there were a couple reports I wasn't sure were complete, so I didn't want to take a look at those. So the number that I reviewed in this box was 86.

Then what I did was I came up with four categories -- secondary gain; second, minimal treatment; third, no causation; and four, psychological underlay or psychiatric underlay or -- and I also included drug abuse in there because that seemed to go hand-in-hand with the psychological problems, and it may well, in fact, be part of the same problem.

MR. GANZ: What was category number three, Your Honor? I missed it.

DISCOVERY COMMISSIONER: Causation.

MR. GANZ: Causation. Thank you.

DISCOVERY COMMISSIONER: Lack of causation.

The way these reports are written, they're all the same format, which actually was very helpful to me because then I could just go to the discussion section, and I would expect him to follow the same format. That's reasonable, and it makes it easier to follow what he's doing, so I just went to the discussion section.

Of the 86 cases I reviewed, 52 of them had either comments on secondary gain, psychological problem with the Plaintiff or both. I was wondering if over the years it changed, so I looked at these per year, you know, as the more he did, the more he developed this belief that there was secondary gain or psychological overlay, but that's not what I found.

In 2011, for the cases, I reviewed 22 cases total in 2011, and of that 8 cases had some secondary gain, and 9 cases had some underlying psychiatric issue.

And then in 2012 there was only one case that had the secondary gain, and then there were a few cases that had the underlying issue.

In 2013 there were 26 cases, 14 cases had either secondary gain or psychiatric issues mentioned.

And, finally, in 2014, there were 23 cases, 12 of which had secondary gain or psychiatric issues mentioned as the reason why the Plaintiff was not healing or had the problems the Plaintiff had.

Well, that's more than one case, and the substantial majority of the cases that I reviewed mentioned that, and the issue really becomes is that, in and of itself, inflammatory to disqualify Dr. Duke. Even if I say no, in and of itself, it isn't, I still have to go back to this case and look at the context, and this is my concern, and actually, believe it or not, my concern is for the defense -- I know you find that shocking, but it's true, and for Dr. Duke -- because here's what I don't want to have happen after all these discussions we've had, after all the cross-examination that the Plaintiff has done, after Dr. Duke, preparing all these materials and feeling probably not really happy about it, and the discussions that have been ongoing, and the one case that got taken out of context and used in another case, and I -- what I don't want to have happen is I don't want him to be skittish -- I don't like that word. I just can't think of a better word at the moment -- for doing the Rule 35 exam. He needs to be able to do the Rule 35 exam how he sees fit, and he's not going to be able to do it here because he knows what he's up against. And then we devalued his role as the Rule 35 examiner, and in this case, and specifically with this firm and this lawyer they've been going at it with Dr. Duke.

So how is that fair to the Defendant, who you represent, Ms. Upson, or to the Plaintiff, who has to be examined? In this case, I don't think it's fair. I have no problem giving you your Rule 35 exam, but it's not going to be with Dr. Duke in this case for those reasons. And you are welcome to object to my Report and Recommendation, absolutely welcome to.

And I want to make it clear that that does not mean I am striking Dr. Duke in every case. Another case that I allowed him to go forward in, neither the Plaintiffs or the Defendants really had any exposure to him, and everybody was fine with it. We put some parameters in place. Fine. And understand that in terms of the impeachment of all the evidence that's out there, you know, he's a retained expert technically, so he'll have to deal with that on his own, and I'm sure he will. I've heard he's very persuasive in trial, and he obviously has worked very hard over the years in doing these examinations.

So I looked at the totality of the circumstances -- love that phrase -- and I looked at it from what I found in the box of materials, and I, you know, I just took one box at random, and I looked at the briefing again. I looked at the cross-examination in the depositions. I looked at this firm and the fact that this firm has a longstanding history, and I looked at your firm, Ms. Upson. You used him quite a bit.

So I think on balance in this case only I'm going to disqualify him, not -- let's say not disqualify. I'm going to require you to use someone else, not Dr. Duke. But you can have your Rule 35 exam, and you have plenty of time because your initial disclosure is not 'til September, so go find a practitioner if you want your Rule 35 exam.

Now, let me make this clear because you're going to need to add this, Plaintiff's counsel, to the Report and Recommendation. Dr. Duke can testify as an expert in this case.

MR. GANZ: We understand.

DISCOVERY COMMISSIONER: He can testify as a retained expert. I'm not -- that is not within my purview to strike him, and I'm not going to. He is certainly capable of doing that, and, you know what, sadly, he may or may not be right on his, you know, review of the records. I don't know. Seems like you're very confident in your Plaintiff's injuries, and he certainly was injured.

So having said all that, he can testify. He just cannot perform the Rule 35 exam. And the last time I checked, experts can look at materials that are even hearsay, so he could certainly look at the Rule 35 report and make comment on it, and whether or not that that's cumulative evidence is for the Judge to decide, not for me.

Anything further?

MS. UPSON: I have a few comments, but you can go first.

MR. MAUPIN: I am here strictly to address a finding that was made in the Thorne case that got --

DISCOVERY COMMISSIONER: Yeah. I don't think I can do that unless I have counsel present --

MR. MAUPIN: Oh, I'm not asking --

DISCOVERY COMMISSIONER: -- in all that case.

MR. MAUPIN: I'm not representing anybody in the firm. I'm talking about how it got used in another case, and --

DISCOVERY COMMISSIONER: Okay.

MR. MAUPIN: -- I'm not asking you to rule in the other case.

MR. GANZ: You're asking -- she's -- counsel for that case is not here. I don't think he is, number one. Number two, he doesn't have any standing in the Thorne case.

DISCOVERY COMMISSIONER: Yeah.

MR. MAUPIN: I'm not arguing the Thorne case. I'm arguing the effect of this because the Court, this Court, this morning brought up the problem of using this, these -- a bias finding. You didn't make that finding this morning, and, as I understand it -- and I'd like to, in some clarification, might ease all of the controversy over this. As I understand it, the order today is that the motion to have Dr. Duke perform the independent medical examination is denied. We believe that that is the appropriate method by which you should

deal with a motion like this, on a case-by-case basis.

The problem is -- and I understand that you have made no findings of bias because that would end up in a -- if he was actually used as a witness in a case, that would be a subject of cross-examination at the trial as I understand the explanation of the ruling this morning. So the problem has been that this -- the ruling in this other case that he's biased against all Plaintiffs I think has been undermined by the examination this morning, and the transcript of the hearing indicates, of the hearing in front of Judge Bare, over the probative value of the finding in the Thorne case of bias, is pretty egregious.

DISCOVERY COMMISSIONER: Well, again --

MR. MAUPIN: And --

DISCOVERY COMMISSIONER: -- Mr. Maupin, it's not that I -- I don't mean to cut you off, but I just don't feel comfortable talking about that case because I don't have the attorneys here that are present. And I understand the concern about the ruling as it relates to this case, and, again, I looked at the totality of the circumstances here. But I am going to -- you know, a part of what I did look at was the two inflammatory statements, and, you know, and those two I talked about, and they came out in a majority of the one box that I reviewed, and that gave me cause for concern, and it is a bias issue, and I'm not specifically finding in this case that he is bias, but I looked at that, and those are, in my humble opinion in reviewing the case law and looking at his documents, I think that is clearly a problem. I think it is bias and inflammatory.

But I don't want to go there anymore because I am concerned about this Report and Recommendations being misused, and I don't want it misused. It's for this case, and I'm looking at the totality of the circumstances, but I don't want anyone to think that somehow I don't think he's -- I think everything he's doing is okay. I don't think that. I am very concerned that in 50 -- the majority, the substantial majority of the reports, I have these, what

I consider to be, inflammatory. And we don't have to explore it further because it is not alone -- you know, by itself it's not the basis for my ruling, and I don't know how much more clear to say that.

I don't want to be taken -- I can't -- I'm not in a position to understand or defend what happened before that District Court Judge, and I'm not going to do that today because that would be improper. But I understand the concern, so I'm trying to make it really clear, and I do expect to see in the Report and Recommendation section that this ruling is only for this case.

MR. GANZ: But it will include the terms bias, and it will include these issues on those specific cases that you found that raised concern.

DISCOVERY COMMISSIONER: Because that's what I looked at.

MR. GANZ: Exactly.

DISCOVERY COMMISSIONER: That's what I looked at, and I think there is a problem here.

MR. MAUPIN: Well --

DISCOVERY COMMISSIONER: But I don't have to reach the ultimate conclusion today.

MR. MAUPIN: Well, I'm not here to -- my role here is not to litigate the merits of the disqualification in this case. The -- what I am requesting is a statement from the Court that the review of these records is not to be understood that Dr. Duke has a bias or prejudice involving all personal injury Plaintiffs.

DISCOVERY COMMISSIONER: I appreciate what you're saying, but I'm not going to do it, and the reason I'm not going to do it is because it's not -- was not specifically what I addressed today, and I just don't think it's proper. If somebody -- but, you know, part of the problem in that other case, Mr. Maupin, is no one objected to the Report and

Recommendations.

MR. MAUPIN: That is -- then that's a very good point. The reason that there was no objection was that the -- after the ruling, your ruling in the discovery dispute, the lawyers and the principal, as they call themselves -- I think it's the insurer -- decided simply not to use Dr. Duke, hire someone else, and then not challenge the report. No one told -- no one told Dr. Duke anything about this, that his bias was being litigated, until --

DISCOVERY COMMISSIONER: I'm sorry I opened --

MR. MAUPIN: -- after the order --

DISCOVERY COMMISSIONER: -- the door.

MR. MAUPIN: -- was -- no, no -- until after the order approving the DCRR was entered. He has never been asked to contribute to any of this business, and this -- and in that case this has -- this is neither the Court nor Your Honor was given the opportunity to even hear from him, not because of this lawyer here, but because the lawyer that hired him.

DISCOVERY COMMISSIONER: Well, here's my belief. If that's going to be litigated in a evidentiary hearing type format, a District Court Judge has to do that. I'm not -- it's not me. All I'm looking at -- and, again, obviously I am saying he can testify as the retained expert, so I'm not making a ruling on his ability to do that. I'm just looking at, in this case, whether or not he's the proper person, the proper doctor, independent of his qualifications -- we're not talking about that -- independent of his qualifications to perform the Rule 35 exam, and the test is his independence and his bias, and I am concerned that in the majority of the reports I looked at that there were secondary gain issues, psychological underlay that explained all the patient's complaints, and it just was more than one report. And if you have that perception going in because you've prepared so many of the Rule 35 exams and so often you find that, then, yes, I think that rises to the level of potential. I'll say that -- potential bias. But I don't even have to go there completely.

You know, this is not the basis for my decision completely. I'm looking at the totality of the circumstances. But I don't want anyone to walk away thinking I don't think there's a problem here because there is. There is a problem, and it falls into the category of inflammatory statements which the rules say goes to bias. So the bias word is appropriate, but the issue isn't whether he's bias. It just relates to this case. So I guess from that perspective don't put in that he's biased against all personal injury Plaintiffs because I'm not finding that today.

MR. GANZ: Okay.

DISCOVERY COMMISSIONER: Okay. Yes, ma'am.

MS. UPSON: Thank you. I understand the Court's ruling, and I just want to make a couple of comments on the record, obviously, because the Report and Recommendation's coming out. First I want to address the comment about litigation bullying and the defense bar, and is that what is occurring, and is there --

DISCOVERY COMMISSIONER: Well, let me say this clearly. It's on both sides, because I see the same treating doctors on both sides, but we're using the Rule 35 exam I think improperly.

MS. UPSON: But in relation to that, when you look at who's involved in litigation in the community, you do see the same Plaintiff treaters over, and over, and over, and over. In those cases there's not always objective medical evidence regarding an injury, and if there's not objective medical evidence regarding an injury, there has to be some type of cause or analysis of why they may be continuing to complain of subjective complaints.

So the fact that Dr. Duke has put in reports notations regarding secondary gain and psychological issues, that, in and of itself -- and we respectfully disagree with the Court's comment -- doesn't create an inflammatory basis or a bias, and I just want to put on the record why. In every single case that we deal with involving Plaintiffs with the same

doctors you see over and over -- you could say Dr. Cass, Grover, all of those guys -- they, in every single case, address secondary gain issues through their treatment. They do that in the form of Waddell findings. They don't really use the term Waddell findings anymore. They say secondary gain. They look for things that are inconsistent within the records.

DISCOVERY COMMISSIONER: Well, then when I see them before me, I'll take that into account.

MS. UPSON: But that's what has to be looked at here, is if there's a bias or inflammatory statements made by Dr. Duke.

DISCOVERY COMMISSIONER: And I believe that there is, so let me make that very clear, you know, and I don't want to -- I appreciate everybody's position here. But based on what I reviewed -- and that includes the cases that the Plaintiff's counsel submitted to me that they've been involved in --there are two inflammatory and I'm going to say potentially biased problems, and that is the secondary gain issue and the psychological underlay or psychiatric underlay that the patient presents with. And, yes, I do believe those are inflammatory, and I think I found that today.

MS. UPSON: But for the record, in relation to what's inflammatory, what he's doing is a forensic review and he's giving forensic opinions based upon his review. His review and analysis of those particular issues are no different than the analysis of any other doctor in this community. So to say he is somehow bias because it's in some of the reports, if he held a true bias, you would see it in every single report; it's not there, so that --

DISCOVERY COMMISSIONER: Well, because it's not always appropriate. He has found cases where there's been injury, but he has, in a substantial majority of the cases, referred to secondary gain and psychiatric issues in a substantial majority. We're not talking about one or two cases. We're talking in one box, 57. That is substantial, and part of it is because he's done so many of these exams, which brings me back to my concern in this case.

I don't think it's fair for -- to ask him to be the Rule 35 examiner in this case because if it's true, that the Plaintiff is malingering or whatever your defense is on this case -- I don't know what your causation defense is or if he has other issues -- Dr. Duke, to put him in a position of having to decide that with the background would not be fair to him. Do you understand what I'm saying? Because then he would -- would he go, oh, I can't say that. I've got to step back. Just kind of like I feel right now talking about a ruling in another case. Do I need to back down from what I'm doing today because somebody is upset that it was taken out of context? Is he going to have to back down from performing a proper Rule 35 exam because, oh, my gosh, maybe I'll be challenged on my objectivity even though I really believe this person is completely making all this stuff up? That's the problem. And the reason it's a problem in this case is that there's history between your firms and Dr. Duke, and I just think at the end of the day it's not fair to ask the Plaintiff, who chose his lawyer, and was unaware probably of all these other Rule 35 exams, was unaware of them, to ask him to submit now to a Rule 35 exam by an examiner who there is clearly history with this Plaintiffs' firm. That's what concerns me.

MS. UPSON: But then what's gonna happen every single time there's a case with Mr. Ganz, he's gonna use that and say, no, Dr. Duke can't be used. It should be Dr. Duke doing a forensic review, giving forensic opinions. If he then makes an opinion that's completely contrary to what he's done before and he doesn't think that it's there, that's an issue for cross-examination.

DISCOVERY COMMISSIONER: Ms. Upson, I don't know why you're fighting so hard on this, and I appreciate your loyalty to Dr. Duke. But this is a situation that could hurt the Defendant. I would find another Rule 35 examiner without the same concerns. It doesn't mean that you can't use Dr. Duke as your retained expert. But I think the examination needs to be done by somebody else. And, unfortunately, when you are this active in the litigation

community and perform I think -- the last, one of the last motions I had, someone said 375, and I might be off a little bit, but Rule 35 exams, that's a lot. And that's not the test, but when you see the repetitive statements, it's a problem, and I don't want to restate my ruling, so.

MS. UPSON: And I accept. I'll just put two more comments on, and then we'll stop, and we'll just reserve it. My loyalty isn't to Dr. Duke. It's to the process. And what we have in this --

DISCOVERY COMMISSIONER: Mine is too.

MS. UPSON: -- to this community is only so many doctors that do this type of work. You have -- and just by way of example, in the last trial I just had with Dr. Lemper, over the last five years he indicated he's had several thousand patients from Glen Lerner's office, several thousand. We only have a few doctors in this community that do IMEs in relation to the neck and spine, less than five, so they're --

DISCOVERY COMMISSIONER: Well, maybe I'll just start denying all IMEs. Maybe we just won't do any more. You know, with all due respect, I care about the process too, and that's why I'm taking the time with this, because I know how important it is. So please don't think I don't care about the process.

MS. UPSON: I wasn't even implying that. I was just saying I didn't want the Court or the record to reflect that my loyalty was to Dr. Duke. It was to the process of the defense as a whole, and I was not implying that the Court is, in any way, not taking the process just as seriously.

DISCOVERY COMMISSIONER: Okay.

MR. MAUPIN: May I just? This is gonna sound strange coming from one of the parties, but the personal injury litigation system, and not only that, the commercial tort litigation system has -- is obviously a forensic exercise. When a treating physician, however

that physician comes to be retained, is performing clinical functions, but when you take that doctor and put him on the stand, or have him write a report, and then he's -- he or she is asked the question did what you saw in the clinical environment, does it relate to some event that has legal significance, and if you think so, you must so state, to a reasonable degree of medical probability; that is where the clinician switches from the clinician into a forensic witness because that's a forensic exercise. The term reasonable degree of medical probability has absolutely zero meaning in the clinical environment. No doctor ever thinks about that.

Rule 35 is simply a process or defines a process that addresses the fact, that shift from the clinical side to the forensic side, and the idea is to level the playing field. Now, I must say on -- you know, in fairness to Dr. Duke, he's just a -- he's a doctor. He gets called for these exams. The legal significance of the number of exams he's done, I think he's now aware of it because he knows full well he can be cross-examined about all that.

But make no mistake about it. The process that you're engaged in right now about how to use Rule 35, what's the scope of discovery, what's the fairness with regard to how personal injury litigants, both Plaintiffs and Defendants, should be treated is part of a commitment that the Discovery Commissioners have made to this process since the Discovery Commissioner system was invented back in the 1980s. And so there's no question about that the process of developing that balancing test is a difficult one.

And I have to simply state that there is -- one of the considerations in the order today has to do with the fact that the animosity or dynamic between this lawyer and Dr. Duke. It has been said that he has said that Dr. Duke hates all personal injury clients. I want to make sure that, from my interaction with him, Dr. Duke doesn't hate anybody.

DISCOVERY COMMISSIONER: Thank you, Mr. Maupin. Anything further?

MR. GANZ: Very quickly, Your Honor. Procedurally, because there may potentially

be a objection --

DISCOVERY COMMISSIONER: Objection, right.

MR. GANZ: -- to this, can we ask you to preserve what you have been provided until that ruling is done or --

DISCOVERY COMMISSIONER: I was absolutely going to say that.

MR. GANZ: Okay.

DISCOVERY COMMISSIONER: I'm hanging on to everything so that I've marked my box one so it's box one, and candidly, you know, I apologize that I missed I guess the breakdown here, but --

MS. UPSON: If I could interrupt briefly. I got the E-mail from Cathy on the letter. She didn't put it in the letter, so I take back what I said before.

DISCOVERY COMMISSIONER: Okay.

MS. UPSON: But she was supposed to have put in the letter what each box was. We will do a new letter saying what each box was.

DISCOVERY COMMISSIONER: Okay. That's fine. You can. Just send a copy to the Plaintiff so it's not ex parte.

[Counsel conferring off the record - not transcribed]

DISCOVERY COMMISSIONER: And I'll put it with the box, but I -- again, just to give some comfort here to the defense, that really wasn't, you know, my concern because in this box I'm not sure how the breakdown really worked 'cause I found both. I did find there he recommended surgery in several of the cases I looked at, so, you know, I'm not sure how the breakdown worked with this particular box. That's all that I'm saying.

MR. GANZ: Your Honor, the last thing I'd like, if I could, just say is I recognize this put a great strain on you, and I do appreciate you taking the time. I know Ms. Upson does as well, Mr. Maupin as well.

DISCOVERY COMMISSIONER: I know you both do. I understand.

MR. GANZ: This is not easy, and you're being thrown right into the fire; that is hard to make decisions either way. So I appreciate you taking the time, and certainly we will work with them getting an order that all can be content with and make sure we talk about potential bias and also talk about with this specific case, and make sure that that is strictly adhered to.

DISCOVERY COMMISSIONER: And I will be very careful when I review the report. I do want to say this. I think it's all of our responsibility, the bench, the Bar, everybody's responsibility to figure this out because it is very distressing to see the same treating doctors on one side to, as you said, there's a limited pool I guess of Rule 35 examiners. I think I can count, when I was in private practice, I think I can count on one hand the time I did Rule 35 exams. Now, I did a different practice area. I didn't do the automobile. But I have a very wise teacher who really, you know, we used them when we had to, not as a matter of course, and that's where I think we need to change our focus.

But, Plaintiff's counsel, you all have responsibility too. So everybody has responsibility. So on that happy note, have a wonderful weekend. Thank you. Plaintiff's counsel, you prepare my Report and Recommendation.

MR. GANZ: Ten days, is that what you need?

DISCOVERY COMMISSIONER: Ten days. Run it by both Mr. Maupin and Ms. Upson, please, and to approve as to form and content. And the status check for that will be?

THE CLERK: May 8th at 11.

DISCOVERY COMMISSIONER: But don't be here for that, Plaintiff's counsel.

MR. GANZ: We'll get it done.

DISCOVERY COMMISSIONER: Get the homework done. Okay. Great. Thank you very much. Have a nice weekend.

MR. MAUPIN: You have a nice weekend yourself.

[Proceeding concluded at 11:21 a.m.]

* * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-video recording of this proceeding in the above-entitled case.

FRANCESCA HAAK
Court Recorder/Transcriber

EXHIBIT “2”

TRANSCRIPT OF MEDICAL EXAMINATION

Transcribed from

DVD provided by

Richard Johnson, Esq.

Transcribed by: Jennifer A. Clark, RDR, CCR #422

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DR. DUKE: What -- what kind of -- how did you get run in -- or what was the mechanism of the action of the accident?
MR. RIBERA: As -- as far as (unintelligible) --
DR. DUKE: What -- what actually happened during the car wreck?
MR. RIBERA: The -- the vehicle got hit from the side by -- from a vehicle that was coming down going eastbound on Charleston right where the Home Depot there is on Hualapai and Charleston. The inlet that --
DR. DUKE: Uh-huh.
MR. RIBERA: Right where you come out of the parking lot.
DR. DUKE: So the other vehicle got hit, pushed into you --
MR. RIBERA: No. He hit us. We were -- he was blindsided from a vehicle that was turning into the Home Depot parking lot. That's why he was never seen. He was behind him, so he wasn't seen until he was coming out further. And he came and hit the -- hit the -- hit the whole quarter panel side and then spun the whole truck around. And then they deemed it -- they totaled it, I guess.

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DR. DUKE: Did you get knocked out?
MR. RIBERA: Did I get knocked out?
DR. DUKE: Yeah.
MR. RIBERA: No, no.
DR. DUKE: Okay. Did you have a seat belt on?
MR. RIBERA: Did I what?
DR. DUKE: Have a seat belt on?
MR. RIBERA: Yes.
DR. DUKE: Okay. These are just standard questions.
MR. RIBERA: No problem.
DR. DUKE: And did you get taken to the hospital or anything like that?
MR. RIBERA: No.
DR. DUKE: When did you first seek medical attention?
MR. RIBERA: It was a few weeks afterwards is when I first sought medical attention. I thought the pain was just going to go away, and it never did, so that's when I decided to go in when I -- when I couldn't take it no longer.
DR. DUKE: Okay. And now let's -- let's go over -- you -- you had -- you went down to Scottsdale --

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MR. RIBERA: Yes.
DR. DUKE: -- to get some laser spine surgery?
MR. RIBERA: Correct.
DR. DUKE: Which -- which never works.
MR. RIBERA: I had Dr. Flangas say the same thing.
DR. DUKE: We thought about -- we were renaming our office. We were going to rename it to the Laser Spine Institution Correction --
MR. RIBERA: Correction facility.
DR. DUKE: Correction Facility, yeah.
MR. RIBERA: So are you getting a lot of patients back from that?
DR. DUKE: Oh, yeah. Tons.
MR. RIBERA: Do you really? You know, it's funny, 'cause the pain was different when I first went in there. It was -- it was more of a -- it was sharper before the surgery. Like, I mean, I -- well, now I can tolerate sitting down. Before the surgery, I couldn't. I mean, I couldn't sit down more than 15, 20 minutes, and I had to get up. I had to be walking around, and that took the pain away.
DR. DUKE: So what -- what pain were you

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looking to get rid of with laser spine surgery?
MR. RIBERA: Kind of what I'm feeling right now. I thought it was going to be gone completely. I mean, that was (unintelligible) --
DR. DUKE: What exactly are you feeling? I don't know that.
MR. RIBERA: It's kind of a numbness and a burning down right at the tailbone, right -- right at the base, like --
DR. DUKE: In the middle?
MR. RIBERA: Right in that area right in there.
DR. DUKE: Okay. So right in the middle.
MR. RIBERA: Like right down below the -- like, almost like the bottom of the -- the bone. You know, 'cause I guess that's the bottom of your spine right down there.
DR. DUKE: Did you have any leg pain before the laser spine surgery?
MR. RIBERA: No.
DR. DUKE: Did you have any after?
MR. RIBERA: It -- the pain came and went. It -- the left -- the pain in my left leg comes and goes. It doesn't -- it's not there every

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day.
DR. DUKE: When did it start?
MR. RIBERA: It's kind of there every day.
Huh?
DR. DUKE: When did it start?
MR. RIBERA: It started sometime after that, you know. I didn't -- I didn't notice it until I just felt a frequent pain. It was not frequent but just pain that was coming in my left leg, and it would be kind of numbing. And it would last for a week -- it would last anywhere from three or four days to a couple of weeks, and then it would go away.
DR. DUKE: Uh-huh.
MR. RIBERA: And then a month later, it would be back. And to -- you know, you couldn't do this, you couldn't do that and get comfortable. You -- you sit on the couch, elevate it, and just whatever you did --
DR. DUKE: Uh-huh.
MR. RIBERA: -- it wouldn't get -- wouldn't be comfortable. And that's --
DR. DUKE: So the -- the -- the symptoms that you had surgery for at the Laser Spine

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Institute was pain and burning at the base of your spine.
MR. RIBERA: Yes. I didn't notice this until after, and if it was there before, I --
DR. DUKE: How long after?
MR. RIBERA: I can't recall. I -- I really don't -- I really don't know, to be honest with you. You know, like I said, it could have been there before it, and it's still there now and I just never noticed it.
You know, I do have very -- I have -- I have a high tolerance for pain, so when I have pain in my body, I'm usually -- it's at the extreme before I go in.
DR. DUKE: What kind of work do you do?
MR. RIBERA: I'm a serviceman for elevators.
DR. DUKE: Okay. Now, in your -- your -- no neck symptoms, no arm symptoms that you're -- that you're treating for right now; correct?
MR. RIBERA: No arms, but I -- I had a bunch of pain in the back of the neck leading up --
DR. DUKE: Are you relating it to the accident or not? Do you think --

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MR. RIBERA: I think it's attributed to but --
DR. DUKE: Did you make a claim for it, though? Have you sued them for neck symptoms?
MR. RIBERA: Oh, well, just the whole back. I mean, that's part of the back, isn't it?
DR. DUKE: Well, usually people, they sue for their lumbar spine or their cervical spine.
MR. RIBERA: Oh, I mean, I didn't realize -- I mean, I -- I get treatments for that. I get massages for that and stuff like that from -- I've had people come to the house and the entire -- you know, other massage therapists.
DR. DUKE: Let's -- let's go over your --
MR. RIBERA: But -- but not necessarily saying, you know, this is, you know --
DR. DUKE: Okay. Let's go over your current symptoms starting with the most severe.
Number one, what's the most severe symptom you have?
MR. RIBERA: It's -- it's the L4-L5-S1 pain.
DR. DUKE: Let me just -- just tell me what the symptoms are. If you use L4-5, that's a

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diagnosis.
MR. RIBERA: Okay. Well, I just thought from what the doctors say, it's just -- the pain level. Lower back? Is that fair enough?
DR. DUKE: So low back pain.
MR. RIBERA: Yes. That's the more severe.
DR. DUKE: So low back pain is number one. It's kind of like right at the belt line; is that right?
MR. RIBERA: Belt line? No, I think it's below the belt line.
DR. DUKE: Below the belt line.
MR. RIBERA: Yeah.
DR. DUKE: Does it go into the buttocks at all?
MR. RIBERA: Vaguely. I mean, even if -- if it does too much, I really don't notice it 'cause of the -- the spot right at the -- at the base of -- that's where the main burden of the pain is at.
DR. DUKE: So really no buttock pain.
MR. RIBERA: Not really, no.
DR. DUKE: And often do you get the leg pain?

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MR. RIBERA: I would say -- I would say I probably get it once every six weeks to two months, and it lasts for a week or two.
DR. DUKE: What part of the leg does it involve?
MR. RIBERA: What -- only this left leg.
DR. DUKE: (Unintelligible.)
MR. RIBERA: Never the right leg.
DR. DUKE: Pardon me?
MR. RIBERA: It's like right in the -- is this the quad?
DR. DUKE: The top of the thigh?
MR. RIBERA: Yeah, quad area and kind of goes through down here. And then with that at times, I'll get this tingling in my -- I know you guys described as something like needles.
DR. DUKE: Uh-huh.
MR. RIBERA: Pins and needles, that's when I get on -- on -- on the left -- on the left foot area. And then but -- but that that doesn't always come with this. Sometimes this pain is here without that pain. As a matter of fact, when I was out in your lobby waiting, I had the left -- I had the tingling in the left foot.
DR. DUKE: Okay.

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MR. RIBERA: Almost like a numbness, like it's -- almost like it's fallen asleep, but I know -- and I thought that -- there's -- there's no pressure on it. It shouldn't be falling asleep. There's nothing --
DR. DUKE: Okay. Number 2?
MR. RIBERA: That kind of feeling.
DR. DUKE: What's the second most problematic thing? We can -- we can call that 2. What would be number 3?
MR. RIBERA: Okay. The mid back.
DR. DUKE: (Unintelligible.)
MR. RIBERA: And -- and like I said, that's being overshadowed by -- by everything that's happened with the lower back.
DR. DUKE: Okay.
MR. RIBERA: And the neck. I would say that those two things --
DR. DUKE: Okay.
MR. RIBERA: I mean, anytime I move my neck, there's -- I mean, there's -- there's -- it just -- it feels like all the muscles are tight in the neck.
DR. DUKE: What are the --
MR. RIBERA: That's kind of what it

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feels like.
DR. DUKE: What are your -- your current medications include morphine?
MR. RIBERA: Yes.
DR. DUKE: Do you take that every three hours?
MR. RIBERA: Every four to six hours.
DR. DUKE: I mean, that's an outrageous amount. Wow. So --
MR. RIBERA: I probably take about a four a day. So I take one -- and I'm just taking the same thing on Percocet.
DR. DUKE: Who's got you on the drugs?
MR. RIBERA: Dr. Erkulwater.
DR. DUKE: Okay. Wow.
MR. RIBERA: Southern Nevada Pain Center.
DR. DUKE: Do you -- do you know that these are highly, highly addictive?
MR. RIBERA: Uh-huh.
DR. DUKE: How long total have you been on the narcotics?
MR. RIBERA: I switched to the morphine on --
DR. DUKE: Just narcotics in general.

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MR. RIBERA: Oh, shit. From the -- I -- I am going to say since May -- I'm going to say about mid May 2007.
DR. DUKE: Had you ever been on narcotics before?
MR. RIBERA: No, never, never.
DR. DUKE: Never (unintelligible) --
MR. RIBERA: Not that I could remember. I mean, I --
DR. DUKE: (Unintelligible) Long-term use.
MR. RIBERA: Yes, yeah. You know, I'm not a -- I might have gone in for something in the past and I had something that I didn't realize was --
DR. DUKE: Any kind of drug use?
MR. RIBERA: No.
DR. DUKE: Have you ever been through any addictions?
MR. RIBERA: No.
DR. DUKE: Programs?
MR. RIBERA: No (unintelligible).
DR. DUKE: Alcoholism? No alcohol addiction?
MR. RIBERA: No.

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DR. DUKE: And then what about have you ever had a -- you know, a worker's comp claim before?
MR. RIBERA: Worker's comp claim? I don't think so, no.
DR. DUKE: Okay. Yeah, this is just standard stuff.
MR. RIBERA: Yeah, no problem.
DR. DUKE: Just standard stuff.
Any other car wrecks?
MR. RIBERA: I did get in a little fender-bender that I ran -- I ran into a guy ahead of me at a stop light that I -- this is after the accident. It's probably about nine months ago, but it was nothing. It was no --
DR. DUKE: There was (unintelligible) --
MR. RIBERA: -- claim, yeah.
DR. DUKE: Did he claim an injury?
MR. RIBERA: No, no. It was just, like, he didn't even -- you know, it was nothing really -- you know, being honest, you know, to tell you about that, it was just something that I just bumped into the guy on. So yeah, no -- no -- no report was done. He didn't ask for any insurance thing to fix his car or whatever so --

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DR. DUKE: Sure, sure.
MR. RIBERA: You know (unintelligible), you look at the (unintelligible), you see the light's green so you start coasting. Oh, shoot.
DR. DUKE: Right, right.
MR. RIBERA: One of those.
DR. DUKE: Now -- okay. How did you get down to the Laser Spine Institute?
MR. RIBERA: How did I get down?
DR. DUKE: Yeah. I mean, did -- was it -- how were you referred down there?
MR. RIBERA: Oh, oh, oh, oh. Well, a lady at -- a friend of ours, my wife and I, at Choice Center of Las Vegas said that she had surgery from Dr. Perry in Scots -- in Tampa, Florida, and she recommended me just to go take a look at it.
So we did. We did some research online, and I called them up, and they sent me some stuff (unintelligible).
I listened to some of the -- you know, the -- the golfers that are on there. They got the one professional golfer saying, yeah, you know, all his pain went away and all that so -- you know, when you're -- when you're in pain, you're -- you're (unintelligible) to anything at that point to get --

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alleviate the pain and -- and --
DR. DUKE: What -- what percentage of your pain went away with surgery?
MR. RIBERA: It changed. It didn't -- it didn't -- I wouldn't say it went away. It just changed to kind of a --
DR. DUKE: So overall --
MR. RIBERA: Yeah, I would say -- I would say -- well, enough that I can sit down in a chair now and take it for at least an hour before I'm -- I'm -- it's driving me nuts.
DR. DUKE: So would you have done it again? Would you do it again?
MR. RIBERA: Would I do it again? Good question. Knowing what I know right now with the -- with the pain still there, I would say -- I would say no.
I had to pay a lot of money out of my pocket too. That was the screwy thing, 'cause they -- you know, you have to get, you know, med -- what do you call it? Med -- Med Choice. Is that what it's called? Yeah.
DR. DUKE: Yeah. And so --
MR. RIBERA: And a lot of people referred you too, and I just took -- I took another

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route because I didn't hear about you until afterwards (unintelligible). That's how that goes.
DR. DUKE: Let me -- let me check your strength now.
Dr. Flangas is excellent.
MR. RIBERA: Is he?
DR. DUKE: Oh, yeah.
MR. RIBERA: Okay.
DR. DUKE: Let's check your strength out here.
MR. RIBERA: All right.
DR. DUKE: Hold your arms like this real stiff, yeah. Hold it there. Now like this and pull and pull. And push towards me, push, and push. Fingers apart, real far apart, real far apart. Good. Fingers up and pull. And pull.
Then raise up your knees straight up. To the side. Leg straight out like this. Pull your toes back. This side straight out. Pull your toes back. Excellent.
So the strength test is good.
So just any other -- the low back pain, that's really the main thing.
MR. RIBERA: Oh, I'd give anything for it.

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DR. DUKE: Yeah. Do you know that -- how hard it is for your body to get rid of back pain when you're on opiates? Did anybody talk to you about that?
MR. RIBERA: No.
DR. DUKE: It's super hard. And -- and there's a lot of studies that show that being on opiates chronically impairs your body's ability to get rid of aches and pains, low back pain. And there's some studies that suggest that it won't -- that it won't go away once it gets started and you start the opiates.
MR. RIBERA: Why would they --
DR. DUKE: 'Cause it down regulates your opiate receptors. It shuts down your endorphin system.
MR. RIBERA: To heal?
DR. DUKE: Correct.
And it hypersensitizes your body to pain. It also blunts and masks some of the protective things that should be done to help it go away, but since you're on the morphine, those get blocked so you do things you shouldn't do, and then you end up just redamaging it. So it's like shooting up your knee with lidocaine in a -- in a

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football player and having him go out and play anyway, and they end up just wrecking their knee.
MR. RIBERA: Because they don't -- because -- right.
DR. DUKE: They don't feel it.
MR. RIBERA: Because they're not (unintelligible) --
DR. DUKE: Yes.
MR. RIBERA: -- major injury because they don't feel it.
DR. DUKE: Correct.
MR. RIBERA: Right.
DR. DUKE: And so you're doing things you probably shouldn't be doing, movements that are exacerbating the pain, hypersensitization to pain. It -- it is a disaster.
MR. RIBERA: Okay.
DR. DUKE: And -- and pretty much use of long-term, high-dose, you know, morphine, it's just been completely abandoned. And it's shocking that -- that you're being managed that way because I can -- I would bet any amount of money that no matter what is done, you will not get better as long as you have the drugs onboard.
MR. RIBERA: So what's the plan of

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attack? I mean, what would you do with me?
DR. DUKE: You get rid of the drugs first, and then you get through that. And you know, on opiates for four years, that's a major problem, 'cause your body gets used to it. You get addicted to it so sometimes you have to see an addiction medicine specialist.
MR. RIBERA: Really? I bet you I could quit tomorrow.
DR. DUKE: Boy, I tell you, that would be the best thing you ever did.
MR. RIBERA: I -- I would just be in pain, and that would be the part that sucks.
DR. DUKE: Yeah. But -- and the pain would be worse than while you were on it too because, you know, you're hypersensitized to pain, so the pain level goes up. It actually takes, like, three months for it to come down again, and pain levels drop. It takes a while and -- it takes about three months for people to say I'm not in any more pain than whenever I was taking the drugs. By month four, about a hundred percent of people are better than they were taking the drugs.
MR. RIBERA: Really?
DR. DUKE: Yeah.

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MR. RIBERA: So now they're just dealing with that -- that little bit of pain without the drugs.
DR. DUKE: Correct. But it's better. It's better. And I've had innumerable patients, I mean, more than I can count that thought they needed surgery, but we got them off the drugs, and in four months, I don't need surgery, you know. They said I -- my pain is so much better. I thought I needed surgery, but I don't.
MR. RIBERA: Huh.
DR. DUKE: So I would -- before I committed myself to having my back sliced open again, that's -- that's the route I would go.
MR. RIBERA: Okay.
DR. DUKE: You know, it's my advice.
The -- you know, the -- I think part of your -- the issue too with your case that's difficult is that -- and I think what's raised red flags is that I -- you know, you were seen for this lifting injury at (unintelligible) -- at home, you know, right after the car wreck. And then you had several notes that said onset of pain, two weeks ago, like, in -- in mid May, you know, a month after the accident.

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You wrote a letter to Blue Cross/Blue Shield saying that I'm not being treated for a car wreck. I had a lifting injury at home. I was lifting cabinetry. And then it was only later that it switched. You know, the history changed, and I think that's what's got a red flag raised on your case. And so -- and then to -- you know, it makes it very difficult, you know, those -- those kind of things, because it's hard to go back and undo and erase the -- the medical record, which says what it says, you know.

Hopefully you have medical insurance and can cover future treatment as you need it.

MR. RIBERA: Uh-huh.

DR. DUKE: Litigating it is going to be very, very difficult. Just -- just --

MR. RIBERA: How else -- won't the attorneys -- won't the attorneys hash that out because that's what they're there for?

DR. DUKE: Absolutely.

MR. RIBERA: I mean, building cabinets, what -- what -- that's what I was doing at the time -- at the time. Then when they asked me, what -- what were you doing at the time of the injury? I was doing cabinets in the garage when my

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son picked me up so -- and then, you know, we'll let them hash that out.

DR. DUKE: Yeah, absolutely.

MR. RIBERA: Yeah, so --

DR. DUKE: So yeah. It is what it is.

MR. RIBERA: Yeah.

DR. DUKE: So anyway, any -- any other -- you mentioned your current symptoms. You mentioned your -- your current medications, your current, you know, exam.

Oh, can I see the incision they did for that surgery that they did at Laser Spine.

MR. RIBERA: I'm going to assume it's back here somewhere.

DR. DUKE: Okay. So you don't really see anything?

MR. RIBERA: (Unintelligible) It's right in, let's say, where I had that patch at. Maybe right in here?

DR. DUKE: Okay. So it's --

MR. RIBERA: It's small. It was only -- I mean, it's --

DR. DUKE: A little dot.

MR. RIBERA: Yeah, yeah.

All I can remember is I remember they --

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they had -- they brought me in and out of the anesthesia. They talked to me. I -- I remember that. And they would say do you feel anything now and -- and -- and I remember swearing and using foul language like a mad man. And then they would -- I was out, and then they kept doing that back and forth. And I could hear the pinging sound, almost like an MRI kind of a sound. And I don't know if that was just the dissect -- discotomy thing that they were doing, cleaning the disc up around the -- around the thing or what but --

DR. DUKE: They did a plasma disc decompression. Did they tell you that's an experimental procedure, nonstandard?

MR. RIBERA: I know we talked. I know we sat and we talked, and we have a counsel thing. You know, you're up there for five days. You went -- you went there and -- and they sent me up for -- for some x-rays up there because mine weren't correct when they shot. The MRIs were good that I sent up. They could use those.

And then the next day was a consultation with the doctor. I think the third day was the surgery. That was on a Friday.

DR. DUKE: Uh-huh.

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MR. RIBERA: I had to stay over the weekend and come back on the Monday and then be seen -- be seen before I got sent home.

DR. DUKE: Okay.

MR. RIBERA: But I don't know. I mean, it's weird, 'cause all the people that -- it's funny 'cause the people that were all coming out of the surgery, all -- all of them felt better when they came out. I mean, you heard all the stories from all the people that were -- you know, people that were there, like, on their fourth day and they said, oh, I feel great right now and all this horse -- you know. Who knows? I mean --

DR. DUKE: So the -- let me see here.

MR. RIBERA: So you would never go that route; right?

DR. DUKE: No.

Now, you'd had some back pain in your life prior; correct.

MR. RIBERA: Yeah, I've had the basic back stuff where, you know, I've gone to the chiropractors before and then done, you know, maintenance adjustments, you know. I was -- I was currently seeing a chiropractor that I went into, like, four times a year every -- you know, every

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three, four -- three, four months, I'd go get an adjustment just to -- just kind of a maintenance thing, you know.

DR. DUKE: Yeah.

MR. RIBERA: It wasn't like I was going to see him every week because I was -- I was -- you know, 'cause I was injured or whatever. Nothing like that. It was just more -- more maintenance more than anything.

DR. DUKE: Has any --

MR. RIBERA: Kind of like changing the oil.

DR. DUKE: Has -- has anybody told you that any of the imaging studies shows evidence of injury to -- from the car wreck -- car wreck?

MR. RIBERA: Well, Flangas -- Flangas had mentioned to me that he thinks I need surgery.

DR. DUKE: But I mean has anybody said this MRI shows damage from your car wreck?

MR. RIBERA: You know, I don't know if I'm allowed to talk about any of that.

DR. DUKE: Oh, yes, you are. I mean, I -- you know, basically --

MR. RIBERA: This is medical. That is an exam that you're giving on me. I mean --

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DR. DUKE: Right, right, right, right. But what I need to know is what your understanding is of what the films showed to you, you know, what -- how it's been represented to you, you know. I mean, that -- I just thought -- has it been represented to you that -- that the films showed damage from the wreck?

MR. RIBERA: No, it -- again, I don't know, you know. I'm going to, you know, leave that one alone.

DR. DUKE: Is it --

MR. RIBERA: Definitely -- definitely it wasn't done building cabinets in my garage that I've been doing for 25 years, building these kind of cheapo lightweight cabinets. I'll tell you that right now. That's just my opinion. You've been a doctor for how many years? I mean, I've been building cabinets since 1979, you know. I'm not no weekend lawyer guy that doesn't know what he's doing in the garage.

DR. DUKE: Yeah.

MR. RIBERA: You know, it's unfortunate the way I wrote up -- I wrote up the thing, you know, but it is what it is on that -- on that record, you know.

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DR. DUKE: And -- and you know there -- there was multiple other records that -- where you were seen after that where you said that the pain had started, you know, almost exactly to the same date that you had the incident in your house, you know; that basically you'd -- you'd seen several physicians, and to none of them did you relate it to the car wreck at all. Why -- why is that?

MR. RIBERA: I don't know, 'cause the car wreck was pretty brutal.

DR. DUKE: Uh-huh.

MR. RIBERA: I don't know. But building cabinets (unintelligible) -- that's what I was doing for, like, a whole month, you know. But you know, it's like that's my -- you know, I had a, you know, cabinet business in the past. I know what I'm doing. And it's like -- you know, and I know that was -- I know I was doing that at the time of the accident. Yes, that's what I was doing was building cabinets. I also was going to work every day and, you know, mowing my lawn every -- once a week and those standard things in life, you know, doing -- doing the honey-dos around the house.

DR. DUKE: Sure.

MR. RIBERA: You know.

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DR. DUKE: And you realize that 99 percent of people that need back surgery aren't in car wrecks. They -- they're doing the normal things. They're -- they're mowing the grass. They're coughing, sneezing, sitting down. The types of things that people have surgery for are not car wrecks.

MR. RIBERA: Not even getting hit at 60 miles an hour?

DR. DUKE: No. That happens -- whenever people need surgery for that, it's usually instantly that they need it, like within ten minutes. They go to the hospital. They have a broken back. They have a surgery. Almost never does it end up resulting in delaying surgery years down the road. Almost never, because the -- it's either going to damage it, or it's not going to damage it.

And what you have -- what you have MRI findings of is degenerative disc disease, which is from age, genetics, building cabinets, walking, blah, blah, blah. You know, it's not due to acute trauma so --

MR. RIBERA: When it happened, it could have been the straw that broke the camel's back, though.

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DR. DUKE: Yeah. Again, if it -- it breaks it instantly, though, you know, if it -- if it does.
MR. RIBERA: Okay.
DR. DUKE: I will -- I will -- and you're -- let's see. I don't think there's anything else. You've had -- you've had only two to three pain injections?
MR. RIBERA: I think I've had more than that. I think I had two or three just from Dr. Lee. He left the -- he left the practice years ago.
DR. DUKE: Well, have any of them helped you?
MR. RIBERA: They seem like they have. They kind of -- they kind of -- they seem like they -- they -- they lessen it some. Like, I probably need to go back and do it again.
DR. DUKE: Briefly, they help?
MR. RIBERA: Yeah, they seem like they're good for, like, three to six months.
What's your opinion on them?
DR. DUKE: It depends on why you're getting them, you know. That's what really makes the difference there.
MR. RIBERA: What's the purpose of them

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that it's supposed to do?
DR. DUKE: Well, in people that have nerve compression and neuropathic pain, like radiating leg pain, that's what it's for. It never works for back pain.
MR. RIBERA: So it -- it would help this?
DR. DUKE: Well, if -- if you had it more frequently, I would say possibly. But you -- you know, you don't have it that often.
MR. RIBERA: 'Cause my understanding with what Dr. Weiss -- Weiss did, whatever his name is, in LSI in Scottsdale, that the nerve was touching, like, the disc and -- and he would clean up around the disc so the nerve -- or use some sort of a laser to keep the nerve from touching the disc so that that would keep the pain from -- I mean, that was my kind of understanding of it. I don't know.
DR. DUKE: All right. Well, very good.
MR. RIBERA: All right, sir.
DR. DUKE: Yeah, I wish you the very best of luck.
MR. RIBERA: All right.
DR. DUKE: Dr. Flangas is an excellent

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doctor.
MR. RIBERA: Oh, okay.
DR. DUKE: I'd let him operate on me any day.
MR. RIBERA: Would you really?
DR. DUKE: Oh, absolutely.
MR. RIBERA: Good.
DR. DUKE: Yeah, he's got great hands. He's got great hands. He really -- he's one of the best in town for sure.
MR. RIBERA: Oh, good, yeah.
DR. DUKE: Okay.
MR. RIBERA: Yeah.
DR. DUKE: So anyway --
MR. RIBERA: Yeah, he mentioned that 30 -- he said something about if I had surgery that, you know, there would be, like, a 30 percent chance of getting better and a 70 percent chance of staying the same or being worse.
DR. DUKE: Yeah.
MR. RIBERA: I mean, those aren't odds I like to hear.
DR. DUKE: No, no.
MR. RIBERA: You know.
DR. DUKE: But he's being truthful.

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MR. RIBERA: Yeah. That's -- that's why I went to him, 'cause I heard he's a straight-up guy.
DR. DUKE: He's straight -- straight-up, honest guy, yeah.
MR. RIBERA: Yeah.
DR. DUKE: Absolutely he is. Well, I'll take care --
MR. RIBERA: Okay, sir. Thank you for your time.
DR. DUKE: You're very welcome and --
MR. RIBERA: Okay. All right.
DR. DUKE: Just go out to the right. They'll take care of all the paperwork for you.
MR. RIBERA: Okay.
DR. DUKE: Appreciate it. Bye-bye. Take care.
(Unintelligible) Down the hall and then take a left.
MR. RIBERA: All the way down?
DR. DUKE: Yeah.
MR. RIBERA: Okay. See you later.
(End of recording.)

CERTIFICATE OF REPORTER

STATE OF NEVADA)
SS:
COUNTY OF CLARK)

I, Jennifer A. Clark, certified court reporter, do hereby certify that the foregoing transcript constitutes a full, true, and accurate record of the disc provided to me by Richard Johnson.

IN WITNESS WHEREOF, I have hereunto affixed my hand this _____ day of _____, 2011.

_____
Jennifer A. Clark, RDR, CRR, CCR 422

IN THE SUPREME COURT OF THE STATE OF NEVADA

Troy Moats, Petitioner, vs. **The Eighth Judicial District Court of the State of Nevada ex rel the County of Clark and the Honorable Judge Adriana Escobar**, Respondents.	Supreme Court No.: 81912 District Court No.: A-18-769459-C
Troy Burgess, Real Party in Interest.	

PETITIONER'S MOTION TO FILE REPLY IN EXCESS OF NRAP 21(D) LIMITS

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Petitioner, Troy Moats, by and through his attorneys of record, Marjorie L. Hauf, Esq. and Matthew G. Pfau, Esq. hereby moves this Court for Leave to File his Reply to Answer to Petition for Writ of Mandamus exceeding the page and word limits set of in NRAP 21(d), NRAP 27(a) and (d), and NRAP 32(a)(7)(D).

DATED this 5th day of April 2021.

H & P LAW

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Petitioner, TROY MOATS, hereby hereby moves this Court for Leave to File his Reply to Answer to Petition for Writ of Mandamus exceeding the page and word limits set of in NRAP 21(d), NRAP 27(a) and (d), and NRAP 32(a)(7)(D).

Motions to exceed page and word limits will be granted upon showing of diligence and good cause.[1] Good cause is a substantial reason that

[1] *Blandino v. Eighth Judicial Dist. Court of Nev.,* 466 P.3d 539 (Nev. 2020).

affords a legal excuse.[2] In the instant matter, Respondent filed a 31-page Answering Brief, with substantial case law and statutes. Petitioner needed to appropriately address all arguments mentioned therein, including analyzing similar statues across the nation. Such required surpassing the NRAP's word limit.

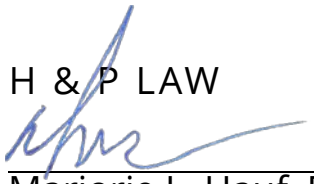
Petitioner attempted to pare down the Reply as necessary, but unfortunately, the history of this case, relevant facts, and applicable law did not permit reducing the word count further. Petitioner's Reply to Answer to Petition for Writ of Mandamus is 8,089 words of body text (excluding the table of contents, table of authorities, and certificate of compliance) and 55 pages in total.

Petitioner hereby requests this Court acknowledge good cause and due diligence to file his Reply to Answer to Petition for Writ of Mandamus more than the Rule limit.

[2] *Brown v. McDaniel*, 130 Nev. 565, 569 (2014)(citing Hathaway v. State, 119 Nev. 248, 252 (2003).

DATED this 5th day of April 2021.

H & P LAW



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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of April 2021 service of the foregoing PETITIONER'S MOTION TO FILE REPLY IN EXCESS OF NRAP 21(D) LIMITS was made by required electronic service and U.S. Mail to the following individuals:

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