

IN THE SUPREME COURT OF THE STATE OF NEVADA

FERRELLGAS, INC. a foreign  
corporation, MARIO GONZALEZ  
and CARL KLEISNER,

Petitioners,

v.

EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF  
NEVADA IN AND FOR THE  
COUNTY OF CLARK; THE  
HONORABLE JOANNA S.  
KISHNER, DISTRICT JUDGE,

and

JOSHUA GREEN, an individual,

Respondents.

Electronically Filed  
Apr 21 2021 04:11 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

CASE NO.

DISTRICT COURT CASE NO.

A-19-795381-C

**PETITION FOR WRIT OF MANDAMUS**

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

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DISTRICT JUDGE,

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JOSHUA GREEN, an individual,

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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 justices of this court may evaluate possible disqualification or recusal.

1. All parent corporations and publicly held companies owning 10 percent or more of the party's stock: FERRELL COMPANIES, INC., is the sole shareholder of 100% of the stock issued by FERRELLGAS, INC.

2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an

administrative agency) or are expected to appear in this court: Olson Cannon Gormley & Stoberski; and Baker, Sterchi, Cowden & Rice.

3. If litigant is using a pseudonym, the litigant's true name: Petitioner FERRELLGAS, INC. Otherwise, there is no pseudonym.

4. MARIO GONZALEZ is an individual, and represented by Steven Goldstein, Esq., and of the law firm Pyatt Silvestri in the District Court and in this Court.

5. CARL KLEISNER is an individual, and represented by Gina Gilbert Winspear, Esq., and of the law firm Dennett Winspear, LLP in the District Court and in this Court.

DATED this 21st day of April, 2021

*/s/ Felicia Galati, Esq.*

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## **PETITION FOR WRIT OF MANDAMUS**

TO: THE HONORABLE SUPREME COURT OF THE STATE OF NEVADA

Pursuant to NRAP 21, Defendants/Petitioners FERRELLGAS, INC., MARIO GONZALEZ and CARL KLEISNER (“Defendants”), by and through their undersigned counsel, hereby petition this Court for an extraordinary writ of mandamus: (1) compelling the district court to comply with Nevada Rule of Civil Procedure (NRCP) 35(a)(4)(A)(ii) and NRCP 35(a)(3) and grant its Objection; (2) compelling the district court to issue an order denying Plaintiff the presence of an observer at and allowing an audio recording of his psychological/neuropsychological examination for his failure to meet his burden of establishing good cause under NRCP 35(a)(4)(A)(ii) and NRCP 35(a)(3); (3) establishing the applicable good cause standards for NRCP 35(a)(4)(A)(ii) and NRCP 35(a)(3); and (4) staying the district court case until this Court decides the above issues.

This Petition is based upon the grounds that the district court’s March 2, 2021 Order Denying Defendants’ Objections To Discovery Commissioner’s Reports And Recommendations Dated December 22, 2020, And January 12, 2021; And Affirming As Modified The Discovery Commissioner’s Reports And Recommendations (DCRRs) Granting In Part And Denying In Part Defendants’

Motion To Compel An NRCP 35 Exam (March 2, 2021 Order) was made without any legal and/or factual basis or evidence establishing good cause, and in violation of NRCP 35(a)(4)(A)(ii) and NRCP 35(a)(3), thereby constituting a clearly erroneous decision and a clear abuse of discretion. NRCP 35(a)(4)(B) is also relevant.

This Petition is also based upon the ground that Petitioners have no plain, speedy and adequate remedy in the ordinary course of law, including because this is Defendants' one and only opportunity to conduct a psychological/neuropsychological examination of Plaintiff in defense of this action. In addition, this Petition raises important issues of law that require clarification, and considerations of sound judicial economy and administration militate in favor of granting the Petition. There are three other Writs before this Court relating to NRCP 35 and/or NRS 52.380. Moats v. Dist. Ct. (Burgess), Case No. 81912; Lyft v. Dist. Ct. (Burgess), Case No. 82148, Yusi v. Dist. Ct. (Burgess), Case No. 82625. If this Court does not exercise its discretion in this matter, irreparable harm will be done to Defendants, and the public trust in the scrupulous administration of justice. Defendants' Rule 35 Examination of Plaintiff is currently set for 7/21/2021 and the related disclosure is due on 9/22/2021. Discovery closes on December 1, 2021. The current trial date is set for March 21, 2022.

## **I. JURISDICTION**

This Court has original jurisdiction pursuant to Article 6, Section 4 of the Nevada Constitution. Respondent The Honorable Joanna S. Kishner (“district court”) was the duly appointed, acting and qualified Judge of Department XXXI of the Eighth Judicial District Court of the State of Nevada in and for the County of Clark. On March 2, 2021, this district court entered an Order denying Defendants’ Objections finding there is good cause under NRCP 35(a)(4)(A)(ii) and NRCP 35(a)(3) for an observer and an audio recording of Plaintiff’s NRCP 35 Examination. 6 Appendix (App.) 1177-85. Respectfully, that decision is clearly erroneous because there was no evidence, let alone substantial evidence, to support that decision. Defendants have no plain, speedy, or adequate remedy at law. Important issues of law require clarification regarding the good cause standards under NRCP 35(a)(4)(A)(ii) and NRCP 35(a)(3), such that public policy is served by the Supreme Court’s invocation of its original jurisdiction. Finally, there will be irreparable harm to Defendants, parties and the public if this Court does not exercise its discretion because NRCP 35 examinations are a critical and regular aspect of civil litigation and the related good cause standards needs to be defined.

## **II. ROUTING STATEMENT NRAP 17(a)(12) and NRAP 21(a)(1)**

Pursuant to NRAP17(a)(12) and NRAP 21(a)(1), this matter is presumptively retained by the Supreme Court because it invokes the original jurisdiction of this

Court seeking a writ of mandamus for matters not presumptively assigned to the Court of Appeals. Also, this Petition raises as a principal issue a question of statewide public importance and an issue upon which there is a conflict between district court decisions as to whether NRCP 35 or NRS 52.380 applies regarding whether an observer can be present at and an audio recording can be made during a court ordered psychological/neuropsychological examination; and the related good cause standards under NRCP 35(a)(4)(A)(ii) and NRCP 35(a)(3). NRAP 17(a)(12). As such, jurisdiction over this matter is retained by the Nevada Supreme Court. There is no existing authority vested in the Nevada Court of Appeals which would permit the Court of Appeals to address this issue.

The Respondent district court erroneously ordered that, under NRCP 35(a)(4)(A)(ii) and NRCP 35(a)(3), Plaintiff demonstrated good cause for an observer and an audio recording of his NRCP 35 Examination. Different judges within the Eighth Judicial District Court have made conflicting rulings on the same subject, under NRCP 35 and/or NRS 52.380, making this issue ripe for the Supreme Court's determination. The district court, Defendants, parties and the public need to know what the law is as to NRCP 35 psychological/neuropsychological examinations and the related good cause standards. This Petition should be heard and decided by the Supreme Court.

### **III. INTRODUCTION**

The district court's March 2, 2021 Order is clearly erroneous because it is not based on the evidence on file; and it irrevocably, permanently and unfairly prejudices Defendants as to their one and only opportunity to defend this action through the psychological/neuropsychological examination of Plaintiff in a case where Plaintiff seeks over \$5 million dollars in damages.

### **IV. STATEMENT OF THE ISSUES**

1. Whether the district court committed error in finding that Plaintiff is entitled to have an observer at his NRCP 35 psychological/neuropsychological examination under NRCP 35(a)(4)(A)(ii).

2. Whether the district court committed error in finding that Plaintiff is entitled to have an audio recording of his NRCP 35 psychological/neuropsychological examination under NRCP 35(a)(3).

3. Whether the district court committed error in finding that Plaintiff met his burden of establishing good cause for an observer at his NRCP 35 psychological/neuropsychological examination under NRCP 35(a)(4)(A)(ii).

4. Whether the district court committed error in finding that Plaintiff met his burden of establishing good cause for an audio recording of his NRCP 35 psychological/neuropsychological examination under NRCP 35(a)(3).

The issues presented to this Court are discrete and have never been previously considered in the context of the facts of this case and the current NRCP 35

## **V. SUMMARY OF THE ARGUMENT**

The parties agree an NRCP 35 psychological/neuropsychological examination is in order based on Plaintiff's alleged damages. The district court's March 2, 2021 Order finding Plaintiff established good cause under NRCP 35(a)(4)(A)(ii) and NRCP 35(a)(3) for an observer and an audio recording at the psychological/neuropsychological examination is clearly erroneous, including because the district court did not consider appropriate good cause factors, and because there was no evidence, let alone substantial evidence, to support its findings of good cause. Also, Plaintiff failed to respond to Defendants' good cause argument before the Discovery Commissioner and, thereby, waived it.

## **VII. ARGUMENT**

### **A. MANDAMUS IS THE APPROPRIATE RELIEF**

"A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station, or to control a manifest abuse or an arbitrary or capricious exercise of discretion." Okada v. Dist. Court, 134 Nev. 6, 8–9, 408 P.3d 566, 569 (2018). Mandamus is an extraordinary remedy only when there is no "plain, speedy and adequate remedy in the ordinary course of law." Id. at 9 citing NRS 34.170. Consideration of a writ petition may be

appropriate “when an important issue of law needs clarification and sound judicial economy and administration favor the granting of the petition.” Id. This Court has accepted discovery-related writs: where they “provide...a unique opportunity to define the precise parameters of a statutory privilege that this court has not previously interpreted”, Aspen Fin. Servs., Inc. v. Dist. Court, 129 Nev. 878, 882, 313 P.3d 875, 878 (2013); where the district court has clearly abused its discretion, Okada v. Dist. Ct., 131 Nev. 834, 839–40, 359 P.3d 1106, 1110–11 (2015); where the challenged discovery order is one that is likely to cause irreparable harm or to correct an error that will wreak irreparable harm, , Id.; Double Diamond v. Dist. Ct., 131 Nev. Adv. Op. 57, 354 P.3d 641, 647 (2015); and if an important issue of law needs clarification, including the correct legal standard, and public policy is served thereby, Id. at 840. There are no cases from this Court establishing the correct standard under NRCP 35(a)(4)(A)(i) and (ii); NRCP 35(a)(3) and as to good cause. Therefore, clarification is needed. Also, this Writ raises extremely important issues regarding NRCP 35, psychological/neuropsychological examinations and the related good cause standards. Without this Court’s intervention, irreparable harm will be done to Defendants and other parties having to face these issues impacting the public trust in the scrupulous administration of justice. This Petition involves important and critical precedential issues of statewide significance regarding psychological/neuropsychological examinations. The district court, Defendants,

attorneys, parties and the public should have a clear understanding of what is allowed and not allowed and when in court-ordered psychological/neuropsychological examinations, and how that is to be determined.

Since this case involves the interpretation of NRCP 35, this court reviews legal questions such as this one *de novo*. Cotter v. Dist. Ct., 134 Nev. 247, 250, 416 P.3d 228, 232 (2018); Dresser Industries, Inc., 972 F.2d 540, 543 (5<sup>th</sup> Cir. 1992). To the extent this Court considers a statutory interpretation of NRS 52.380, the review also is *de novo*. State v. Barren, 128 Nev. Adv. Op 31, 279 P.3d 182, 184 (2012). This Court should exercise its discretion and accept this Petition.

**B. NRCP 35**

This Petition deals with fundamental aspects of our legal system and requires this Court's clarification regarding NRCP 35 on very important court-ordered psychological/neuropsychological examinations. NRCP 35 came into existence over 50 years ago. In 2018, prior to amending NRCP 35 – a rule of civil procedure – this Court invited public comment. On October 1, 2018, the Nevada Board of Psychological Examiners submitted a statement regarding the significant threat to public safety of allowing observers and/or recording of psychological/neuropsychological evaluations, including significantly altering the credibility and validity of results obtained, directly impacting behavior and performance causing non-disclosure of crucial information, distorting patient



task performance causing weaknesses and strengths to be exaggerated, yielding inaccurate or invalid test data, compromising the psychologist's ability to compare test results to normative data increasing the potential for inaccurate test results and erroneous diagnostic conclusions, thus impacting reliability of results. 5 App. 1016.

Effective January 1, 2019, this Court enacted the current NRCP 35 allowing the audio recording of an examination “for good cause shown [,]” and prohibiting an observer at a psychological/neuropsychological examination unless “good cause [is] shown.” NRCP 35(a)(3); NRCP 35(a)(4)(A)(ii) and (B). A generalized fear that the examiner might distort or inaccurately report what occurs at the examination is not sufficient to establish good cause for an audio recording. Psychological/neuropsychological examinations raise subtler questions of influence and confidential and proprietary testing materials that make it appropriate to condition the attendance of an observer on court permission for good cause shown.

**C. The District Court Abused Its Discretion**

Applying the *de novo* and/or abuse of discretion standard to interpreting and applying NRCP 35, it is clear the district court clearly abused its discretion as follows.

1. **The District Court Clearly Abused Its Discretion By Failing to Consider Persuasive Federal Authority and/or Any Other Legal Authority To Support Its Decision**

There are no decisions from this Court applying NRCP 35 to facts and circumstances similar to this case. However, there is relevant legislative history regarding the recent amendment of NRCP 35, and a United States District Court of Nevada decision – Freteluco v. Smith's Food & Drug Centers, Inc., 336 F.R.D. 198 (D. Nev. 2020), which is “strong persuasive authority.” Executive Mgmt., Ltd. v. Ticor Title Ins. Co., 118 Nev. 46, 53, 38 P.3d 872, 876 (2002). The district court completely ignored Freteluco and applied NRCP 35 without citation to any authority. The district court thereby manifestly abused its discretion. Therefore, the district court’s decision is not supported by any law or other authority aside from the language of NRCP 35 and mandamus is appropriate.

2. **The District Court Clearly Abused Its Discretion In Conducting The Good Cause Analysis For An Observer And An Audio Recording**

In Freteluco, the United States District Court adopted and applied the “good cause” standard, in part established by the United States Supreme Court. 336 F.R.D. at 204 citing Flack v. Nutribullet, L.L.C., 333 F.R.D. 508, 513 (C.D. Cal. 2019) citing Schlagenhauf v. Holder, 379 U.S. 104, 85 S.Ct. 234 (1964) and Smolko v. Unimark Lowboy Trans., 327 F.R.D. 59, 63 (M.D. Penn. 2018). In establishing the standards for district courts deciding whether to compel a Rule 35 examination, the

United States Supreme Court determined that the “good cause” requirement of Rule 35 “is not a mere formality but is a plainly expressed limitation on the use of...Rule 35.” Schlagenhauf, 379 U.S. at 118, 85 S. Ct. at 242. Rule 35's “good cause” requirements are not met by “mere conclusory allegations of the pleadings – nor by mere relevance to the case – but require an affirmative showing by the movant that each condition as to...the examination...that good cause exists for ordering each particular examination.” Id. To determine whether the “good cause” requirement is satisfied, several factors may be considered, including: (1) the possibility of obtaining desired information by other means; (2) whether plaintiff plans to prove her claim through testimony of expert witnesses; (3) whether the desired materials are relevant; and (4) whether plaintiff claims ongoing emotional distress. Flack, supra citing Gavin v. Hilton Worldwide, Inc., 291 F.R.D. 161, 165 (N.D. Cal. 2013); accord Franco v. Boston Scientific Corp., 2006 WL 3065580, at \*1 (N.D. Cal.). Rule 35 requires a discriminating application by the trial judge as to whether the requesting party has demonstrated the Rule's requirements, which could be made by affidavits or other methods. Schlagenhauf, 379 U.S. at 118–19, 85 S. Ct. at 243–45. “To hold otherwise would mean that such examinations could be ordered routinely in automobile accident cases. The plain language of Rule 35 precludes such an untoward result.” Id. at 121–22, 244 (emphasis added).

In Freteluco, the plaintiff failed to meet her burden. 336 F.R.D. at 203. There was nothing extraordinary or out of the ordinary that suggested a third-party observer was appropriate, and nothing was presented to the court that supported a concern that Dr. Etcoff has ever been or will be abusive to someone he is examining. Id. at 204. The court ruled the plaintiff failed to provide the court with any evidence or information, other than generic concerns, warranting an observer at the Rule 35 examination and denied that request.

The same is true here. Plaintiff did not argue there was “good cause” for an observer or an audio recording in his papers or at any hearings before the Discovery Commissioner, and no related ruling was made. 1 App. 69-204, 2 App. 259-80, 3 App. 478-93 and 494-500, 6 App. 1017-1107 and 1120-50. Instead, Plaintiff argued that NRS 52.380 created substantive rights and “[t]he examinee is no longer required to “request” an observer, to show good cause for recording the examination, to show good cause to have an observer at particular types of examinations...” 1 App. 74, 76-78, 80, 6 App. 1025-26 (emphasis added).

Furthermore, none of the evidence Plaintiff submitted establishes good cause for his request for an observer and audio recording to support a deviation from NRCP 35’s plain language prohibiting the same at a psychological/neuropsychological examination. Plaintiff’s Opposition and Reply to the Objection were supported only by: (1) Dr. Michael Elliott’s medical records; (2) Letter to Defense Counsel; (3)

Letter to Plaintiff's Counsel; (4) Dr. Etcoff curriculum vitae; (5) Plaintiff's deposition (Vol. I); (6) Plaintiff's deposition (Vol. II); (7) video of explosion; (8) DCRR dated 12/22/2020; and (9) Judge Denton Order and Notice of Entry. 1 App. 69-204, 6 App. 1017-1107. Therefore, Plaintiff failed to meet his burden of establishing good cause and the district court erred in finding Plaintiff had met his burden.

Also, the March 2, 2021 Order is contrary to law because it fails to apply or misapplies NRCP 35(a)(4)(A)(ii)'s good cause requirement, which is not met by "mere conclusory allegations" and requires an affirmative showing by Plaintiff that there is good cause for each condition of the examination. Schlagenhauf, 379 U.S. at 118, 85 S. Ct. at 242. Plaintiff submitted no affidavits or other evidence supporting his argument for the district court to fulfill its obligation to perform a discriminating application mandated by NRCP 35(a)(4)(A)(ii) and NRCP 35(a)(3). Schlagenhauf, 379 U.S. at 118–19, 85 S. Ct. at 243–45. Defendants, however, presented two affidavits from Dr. Etcoff and the State of Nevada Board of Psychological Examiners 10/1/18 letter, and relied on Freteluco to support the denial of an observer and audio recording, none of which was disputed.

The Rules of Civil Procedure are designed to be tools to elicit the truth. To routinely require the presence of an observer and an audio recording during an adverse psychological/neuropsychological examination would thrust the adversary

process itself into the psychologist's examining room, which would only institutionalize discovery abuse, convert adverse medical examiners into advocates, and shift the forum of the controversy from the courtroom to the physician's examination room. There is no evidence of good cause, let alone substantial evidence, i.e., "evidence that a reasonable mind might accept as adequate to support a conclusion," that Plaintiff is entitled to an observer and an audio recording of the NRCP 35 examination – and there is undisputed evidence to not allow that. Therefore, mandamus is appropriate.

**3. The District Court Clearly Abused Its Discretion In Accepting Plaintiff's NRCP 35 Nullification Argument**

At the Objection hearing, the district Court *sua sponte* raised the issue of "good faith," presumably good cause. 6 App. 1155, 1162-63. In response thereto, Plaintiff made an NRCP 35 nullification argument that there is no doctor-patient relationship between him and Dr. Etcoff. 5 App. 1157. NRCP 35 allows an opposing party's expert to conduct a psychological/neuropsychological examination where the plaintiff puts his mental condition at issue and – by definition – that will always be done by an opposing party's expert such that there will never be a doctor-patient relationship. Neither NRCP 35 nor any case says anything about that. The district court erred in accepting that argument to establish the good cause required by NRCP 35. The result of that is there will always be an observer and/or an audio recording, which nullifies NRCP 35(a)(4)(A)(i) and (ii); and NRCP 35(a)(3).

Also, the district court's 3/2/2021 Order allowed an observer and audio recording based on "the nature of the claims presented, the lack of medical provider-patient relationship, and the other facts presented[,]” which is not one of the “good cause” Rule 35 factors that may be considered. 6 App, 1182; see p. 10-12, supra. The claims plead were negligence claims. 1 App. 1-8. Plaintiff's papers, exhibits and argument do not establish good cause. None of the above is determinative of the good cause issues. Therefore, mandamus is appropriate.

#### **4. Plaintiff Waived Any Good Cause Argument**

“Points or contentions not raised in the original hearing cannot be maintained or considered on rehearing.” Achrem v. Expressway Plaza Ltd., 112 Nev. 737, 742, 917 P.2d 447, 450 (1996) citing Chowdhury v. NLVH, Inc., 111 Nev. 560, 562-63, 893 P.2d 385, 387 (1995). Defendants raised the issue of and requirement for good cause in their Motion to Compel and Reply. 1 App. 17, 2 App. 209. Plaintiff failed to respond thereto in his Opposition or Reply to the Objection and made no good cause argument before the Discovery Commissioner. Therefore, he waived any related argument. 1 App. 69-204, 2 App. 259-80, 3 App. 478-93, 6 App. 1017-1107. Dezzani v. Kern & Assocs., Ltd., 134 Nev. 61, 65, 412 P.3d 56, 60 (2018) (treating the failure to respond to the opposing party's arguments as a confession of error). Here, the Discovery Commissioner made no rulings on NRCP 35's good cause

exception and, instead, applied NRS 52.380 as Plaintiff urged her to do. 3 App. 494-500, 6 App. 112--25. As such, Plaintiff waived any related argument.

**5. The District Court Clearly Abused Its Discretion By Conditioning The NRCP 35 Examination On The Requirement That Dr. Etcoff Or Any Other Licensed Psychologist/Neuropsychologist Violate The Rules And Ethics Of His Profession**

The Nevada Board of Psychological Examiners has indicated its position regarding the issues and problems with the presence of an observer and an audio recording, which this Court accepted in enacting NRCP 35 as is, and the American Board of Professional Neuropsychology (ABN) recently echoed those concerns in Yusi v. Dist. Ct., Case No. 82625. See p. 8, supra. The district court's order requires Dr. Etcoff, and any licensed psychologist/neuropsychologist, to violate their professional and ethical rules, which is supported by Dr. Etcoff's sworn and undisputed testimony, the State of Nevada Board of Psychological Examiners and the ABN. 5 App. 1013. Therefore, Dr. Etcoff and/or any other licensed psychologist/neuropsychologist must violate the Rules of his profession and ethics, thereby opening himself to personal professional discipline and/or sanction. As such, the Order essentially prohibits Defendants from getting an NRCP 35 examination here because no licensed psychologist/neuropsychologist is going to take those risks. Therefore, mandamus is appropriate.



6. **The District Court's Ruling Creates An Unfair Advantage For Plaintiff That Irreparably, Extremely and Unfairly Prejudices Defendants**

Plaintiff's expert, Dr. Elliott, had the benefit and advantage of examining and treating Plaintiff without an observer or an audio recording. While Defendants understand that is a fact of any case, they should not be so prejudiced here when Plaintiff failed to meet his burden. The examination will already be encumbered because there is no doctor-patient relationship and Plaintiff knows he is being examined by Defendants' expert, which could impact his case and damages. Add to that – that Dr. Etkoff must do so with an observer and an audio recording – and the examination becomes further, unnecessarily, and unfairly prejudicially encumbered because it will significantly alter the credibility and validity of results obtained, directly impact behavior and performance causing non-disclosure of crucial information, distort patient task performance causing weaknesses and strengths to be exaggerated, yield inaccurate or invalid test data, compromise the psychologist's ability to compare test results to normative data increasing the potential for inaccurate test results and erroneous diagnostic conclusions, thus impacting reliability of results. 5 App. 1016. Thus, Dr. Etkoff's examination and related opinions will be subject to additional challenge by Plaintiff based on the above. Defendants are already fighting an uphill battle because Dr. Elliott has had 13 visits and will have more with Plaintiff. Requiring an observer and recording is unfair

here, not a level playing field, and further irreparably, extremely, and unfairly prejudices Defendants without any basis therefor. This is Defendants' one and only opportunity to conduct a fair NRCP 35 examination in defense of this case wherein Plaintiff seeks over \$5 million in damages. Requiring that Defendants can only have an NRCP 35 examination with an observer, an audio recording, and if Dr. Etcoff is willing to expose himself to professional and ethical discipline and/or sanctions relating thereto is tantamount to denying Defendants the examination that all agree they are entitled to on the facts of this case.

In addition, Plaintiff's Expert Dr. Elliott and Plaintiff allege neuropsychological damages, including an inability to focus, memory issues, PTSD and a potential traumatic brain injury. 3 App. 495-97. The Discovery Commissioner indicated:

**If he's [(Plaintiff)] claiming an inability to focus and memory issues, then I'm going to allow a neuropsychological evaluation because those are symptoms that are related to a neuropsychological claim. If he is going to continue memory issues and an inability to focus, then I think that that calls into question cognitive difficulties, and I will allow Dr. -- or the examiner, whoever it ends up being, to address that. 2 App. 271.**

Plaintiff asserts he has PTSD and anxiety, which is causing memory and concentration issues and cognitive difficulties. 2 App. 271, 277-78; 3 App. 483-84. The Discovery Commissioner determined:

10. The Court finds that under NRS 52.380 Plaintiff will be allowed to have an observer present during any psychological or neuropsychological examination in this matter.

11. The Court finds that under NRS 52.380 Plaintiff will be allowed to make an audio recording of any psychological or neuropsychological examination in this matter.

12. A Rule 35 mental examination regarding psychological issues or neuropsychological issues is somewhat more involved than what would be allowed for a physical examination.

13. Plaintiff has put his past mental and physical condition at issue in this litigation...

**21. The Court will allow Defendants' examiner to ask questions that are reasonably part of neuropsychological evaluation...**

24. Plaintiff's counsel contends that Plaintiff is not claiming neuropsychological injuries or a traumatic brain injury as a result of this incident...

**27. If Plaintiff is claiming a loss of focus and memory loss, the Commissioner will allow a neuropsychological examination.** 2 App. 496-97 (emphasis added).

The district court ordered:

IT IS FURTHER ORDERED that Defendants shall provide a list of the testing Dr. Etcoff will conduct during the **neuropsychological exam** two weeks before the Rule 35 Examination. 6 App. 1184 (emphasis added).

Therefore, mandamus is appropriate.

#### **VIII. CONCLUSION AND RELIEF SOUGHT.**

Based on the foregoing, Petitioners request this Court issue a Writ of Mandamus. Respectfully, Respondent unreasonably abused its discretion and committed clear error by ordering that Plaintiff is permitted to have an observer and an audio recording of the NRCP 35 psychological/neuropsychological

examination without citation to any authority beyond NRCP 35, in the complete absence of any evidence establishing good cause, accepting an NRCP nullification argument, and despite Plaintiff's waiver of that argument. Accordingly, a Writ of Mandamus should issue: (1) compelling the district court to comply with NRCP 35(a)(4)(A)(ii) and NRCP 35(a)(3) and grant its Objection; (2) compelling the district court to issue an order denying Plaintiff the presence of an observer at and allowing an audio recording of his psychological/neuropsychological examination for his failure to meet his burden of establishing good cause under NRCP 35(a)(4)(A)(ii) and NRCP 35(a)(3); (3) establishing the applicable good cause standards for NRCP 35(a)(4)(A)(ii) and NRCP 35(a)(3) and how they are met; and (4) staying this case until this Court decides the above issues and/or the three other related pending Writs in Moats, supra, Lyft, supra and Yusi, supra.

RESPECTFULLY SUBMITTED this 21st day of April, 2021.

*/s/ Felicia Galati, Esq.*

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DATED this 21st day of April, 2021.

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**VERIFICATION**

STATE OF NEVADA    )  
                                  )    SS:  
COUNTY OF CLARK    )


Felicia Galati, being first duly sworn, deposes and says:

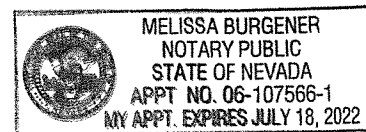
That she is an attorney at law duly licensed in the State of Nevada and the attorney for FERRELLGAS, INC. in the above-entitled matter; that she makes this Verification pursuant to NRS 15.010 and NRAP 21(a)(5) for the reason that the facts are within the knowledge of affiant; that she has read the above and foregoing PETITION FOR WRIT OF MANDAMUS, knows the contents thereof, and that the same is true of her own knowledge, except as to those matters therein stated on information and belief, and as to those matters she believes them to be true; and she further states that the exhibits contained in the required Appendix accompanying this Petition are true, correct and accurate copies of those papers filed with the Eighth Judicial District Court in Case A-19-795381-C.



\_\_\_\_\_  
FELICIA GALATI

SUBSCRIBED and SWORN to before  
me on this 21<sup>st</sup> day of April, 2021.

  
\_\_\_\_\_  
Notary Public in and for said  
County and State



## **NRAP 28.2 CERTIFICATE OF COMPLIANCE**

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman, size 14 font.

2. I further certify that this Petition complies with the page- or type-volume limitations of NRAP 32(a)(4)-(6) and (7)(A) &(C) and NRAP 21(d) because, although it exceeds 15 pages, is it 6,322 words.

3. Finally, I hereby certify that I have read this Petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in

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the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 21st day of April, 2021.

*/s/ Felicia Galati, Esq.*

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## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 21st day of April, 2021, I sent via e-mail a true and correct copy of the above and foregoing **PETITION FOR WRIT OF MANDAMUS** by electronic service through the Nevada Supreme Court's website, (or, if necessary, by U.S. Mail, first class, postage pre-paid), upon the following:

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