

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

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

Petitioners,

vs.

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,

Respondents.

Supreme Court No. 82670

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DISTRICT COURT CASE
NO. A-19-79581-0
Elizabeth A. Brown
Clerk of Supreme Court

PETITIONERS' MOTION TO STAY PROCEEDINGS

COME NOW Petitioners FERRELLGAS, INC., MARIO GONZALEZ and CARL KLEISNER (collectively "Petitioners"), by and through their attorneys of record, and hereby respectfully submit their Motion To Stay Proceedings ("Motion") asking this Court to stay the district court proceedings pursuant to Nevada Rule of Appellate Procedure (NRAP) 8 pending this Court's consideration and determination of Petitioners' Writ of Mandamus.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL AND PROCEDURAL BACKGROUND

This action arises out of a built-in barbecue grill flashfire in the outdoor kitchen of Petitioner Mario Gonzalez. Real Party in Interest Joshua Green/Plaintiff alleges he suffered injuries while operating the barbecue when a flashfire occurred. On 4/21/2021, Petitioners filed their Writ Of Mandamus as to the district court's order regarding Dr. Lewis Etcoff, Petitioners' Expert. Dr. Etcoff is currently holding 7/19/2021, 7/20/2021 and 7/21/2021 for Plaintiff's psychological/neuropsychological examination under NRCP 35.¹ The district court established 7/31/2021 as the current deadline for the NRCP 35 examination to occur.² On 6/17/2021, Plaintiff filed his Answer to Petitioners' Writ. Petitioners' Reply Brief thereto is due on 7/20/2021.³ This Court currently has three other pending Writs relating to NRCP 35 and/or NRS 52.380 issues.⁴

On 4/16/2021, Petitioners filed a Motion to Stay Case Pending Writ of

¹ Affidavit of Felicia Galati, ¶ 3, Petitioners' Appendix at 1 MOT-1.

² Id.; Order, Petitioners' Appendix at 1 MOT-9-10.

³ Id. at ¶ 4, at 1 MOT-1-2.

⁴ Id. at ¶ 5, at 1 MOT-2; Moats v. Dist. Court, Case No. 81912; Lyft, Inc v. Dist. Court, Case No. 82148; Yusi v. Dist. Court, Case No. 82625.

Mandamus in the district court.⁵ On 4/30/2021, Plaintiff filed an Opposition thereto.⁶ On 5/14/2021, Petitioners filed a Reply thereto.⁷ On 5/27/2021, the district court conducted a hearing and denied Petitioners' Motion to Stay finding: (1) the object of the Writ Petition would not be defeated because Defendants can proceed with the NRCP 35 examination either way; (2) further delay of this matter would constitute serious injury to Plaintiff and referring to his PTSD; (3) Defendants are not likely to prevail on the merits of the Writ; and (4) the Motion was premature given the examination was not scheduled to occur until July, and there was no telling what the Supreme Court will do with the Writ two months from when the hearing occurred.⁸ On 6/10/2021, the Parties submitted the proposed order denying Petitioners' Motion per the Court's oral decision.⁹ On 6/24/2021, Plaintiff inquired about the status of the proposed order.¹⁰ To date, no formal Order has been entered.¹¹ Petitioners are filing this Motion now so as not to require an emergency motion and burden Plaintiff

⁵ Id. at ¶ 6; Motion to Stay, Petitioners' Appendix at 1 MOT-2 and 17-250; 2 MOT 251-403. This was Petitioners' second Motion to Stay. The district court denied Petitioners' first Motion to Stay on procedural grounds. Petitioners are not submitting all those papers because they are not relevant, unnecessary to a determination of the issues here and not to burden this Court with the related hundreds of pages of papers. NRAP 8(a)(2)(B)(iii).

⁶ Id.; Opposition, Petitioners' Appendix at 1 MOT-2 and 2 MOT-404-451 and 3 MOT-452-550.

⁷ Id.; Reply Petitioners' Appendix at 1 MOT-2 and 3 MOT-551-62.

⁸ Id. at ¶ 7; Minutes Petitioners' Appendix at 1 MOT-2-3 and 3 MOT-563-64.

⁹ Id. at ¶ 8; Email Petitioners' Appendix at 1 MOT-3 and 3 MOT-565-74.

¹⁰ Id. at ¶ 9; Email Petitioners' Appendix at 1 MOT-3 and 3 MOT-575-76.

¹¹ Id.

and/or this Court.¹² NRAP 27(e).

II. LEGAL STANDARD

Pursuant to NRAP 8(a)(2), a motion to stay district court proceedings may be made to this Court. Pursuant to NRAP 8(a)(2)(D)(c):

Stays in Civil Cases Not Involving Child Custody. In deciding whether issue a stay or injunction, the Supreme Court or Court of Appeals will generally consider the following factors: (1) whether the object of the appeal or writ petition will be defeated if the stay or injunction is denied; (2) whether appellant/petitioner will suffer irreparable or serious injury if the stay or injunction is denied; (3) whether respondent/real party in interest will suffer irreparable or serious injury if the stay or injunction is granted; and (4) whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition...

This Court has “not indicated that any one factor carries more weight than the others, although Fritz Hansen A/S v. District Court[, 116 Nev. 650, 6 P.3d 982 (2000),] recognizes that if one or two factors are especially strong, they may counterbalance other weak factors.” Mikohn Gaming Corp. v. McCrea, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004).

III. LEGAL ARGUMENT

In Mikohn, supra, this Court granted a stay on appeal from an order refusing to compel arbitration that necessarily reflected the unique policies and purposes of arbitration and the interlocutory nature of the appeal such that the first stay factor

¹² Id. at ¶ 10, at 1 MOT-3.

took on added significance and generally warranted a stay of the trial court proceedings pending resolution of the appeal. While the other stay factors remained relevant, absent a strong showing that the appeal lacked merit or that irreparable harm would result if a stay was granted, this Court held a stay should issue to avoid defeating the object of the appeal. Id. at 251-52. The same is true here. Applying Mikohn, this Court should grant Petitioners' Motion.

A. The Object Of The Writ Will Be Defeated If The Stay Is Denied

The Writ pertains to Plaintiff's NRCP 35 psychological/neuropsychological examination, and whether an observer and a recording are allowed at the examination as currently required by the district court's order. 6 Petitioners' Appendix ("App."), 1177-85. NRCP 35 prohibits an observer and/or recording in a psychological examination absent good cause. NRCP 35(a)(4)(A)(ii); NRCP 35(a)(3); NRCP 35(a)(4)(B). Petitioners assert there was no and/or insufficient evidence to support a good cause finding for the same. If the stay is denied, the object of Petitioners' Writ will be defeated procedurally and substantively because Petitioners' expert will be forced to conduct the psychological examination with an observer and recording thereby 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. As such and absent a strong showing that the Writ lacks merit or that irreparable harm would result if a stay is granted, a stay should issue until the Writ is decided to avoid defeating the object of the appeal. Mikohn, supra.

B. Petitioners Will Suffer Irreparable Or Serious Injury If The Stay Is Denied

NRCP 35 examinations are a critical and regular aspect of civil litigation. Plaintiff's NRCP 35 psychological/neuropsychological examination is Petitioners' one and only opportunity to conduct a fair NRCP 35 examination in defense of this case wherein Plaintiff seeks over \$5 million in damages and to respond to Plaintiff's expert, Dr. Michael Elliott, and Plaintiff who allege neuropsychological damages, including an inability to focus, memory issues, PTSD and a potential traumatic brain injury. 3 App. 495-97. The Discovery Commissioner held "If he's 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. Dr. Etcoff's affidavit states:

...Joshua Green claims attention, concentration, and memory disturbance and PTSD-like symptoms following the subject accident. I would like to administer the Wechsler Memory Scale — IV to measure attention, concentration, and memory functioning. I would also like to administer a performance validity test, the Word Memory Test, to measure Mr. Green's effort. The Wechsler Memory Scale — IV would be administered exactly the way it has been developed and normed with only the test administrator and Mr. Green in the room. To allow an audio recording or a third party observer during administration would irreparably damage the validity and reliability of the test results and make it impossible for me to form professional opinions made to a reasonable degree of clinical or neuropsychological probability. 5 App. 1013-14.

If Petitioners are required to conduct the NRCP 35 examination as ordered by the district court – with an observer and a recording – Dr. Etcoff must open himself up to professional and ethical discipline (5 App. 1013); and the presence of an observer and a recording will impact the test results and Dr. Etcoff's opinions thereby will subject to inappropriate challenge. 5 App. 1016; Fretelucio v. Smith's Food & Drug Centers, Inc., 336 F.R.D. 198, 204 (D. Nev. 2020) (“The introduction of a third party is necessarily distracting to the examiner and the examinee, and clearly heightens an already adversarial process into one that is simply more so...Smolko [v. Unimark Lowboy Trans., LLC.], 327 F.R.D. [59,] at 61-62...[T]he presence of a third party introduces ‘a degree of artificiality to the examination that would be inconsistent with the applicable professional standard.” Id.); Flack v. Nutribullet, L.L.C., 333 F.R.D. 508, 518 (C.D. Cal. 2019) (“[C]ourts are often

reluctant to permit a third party or recording device out of concern that the intrusion would “(1) potentially invalidate the examination results; (2) fail to provide a ‘level playing field,’ as plaintiff was not required to tape record his examinations with his own health care providers; and (3) inject a greater degree of the adversary process into an evaluation that is to be neutral.”) As such, Dr. Etcoff’s opinion would not meet the Hallmark v. Eldridge standards for admissibility and, therefore, Petitioners would be without any expert opinion necessary to defend this action. 124 Nev. 492, 500-502, 189 P.3d 646, 651 (2008) (the assistance requirement). Based on the above, requiring that Petitioners can only have an NRCP 35 psychological/neuropsychological examination with an observer and a recording, is tantamount to denying Petitioners the examination that all agree they are entitled to on the facts of this case.

C. Real Party In Interest Will Not Suffer Irreparable Or Serious Injury If The Stay Is Granted

Plaintiff will not suffer irreparable or serious injury if the stay is granted.

Although irreparable or serious harm remains part of the stay analysis, this factor will not generally play a significant role in the decision whether to issue a stay. Normally, the only cognizant harm threatened to the parties is increased litigation costs and delay. We have previously explained that litigation costs, even if potentially substantial, are not irreparable harm.¹¹ Similarly, a mere delay in pursuing discovery and litigation normally does not constitute irreparable harm.¹² Of course, in certain cases, a party may face actual irreparable harm, and in such cases the likelihood of irreparable harm should be considered in the stay analysis. Neither Mikohn nor McCrea have demonstrated irreparable or serious harm

in this case.

Mikohn, 120 Nev. at 253, 89 P.3d at 39 (emphasis added). Here, Plaintiff will only experience delay in pursuing discovery and litigation, but he will not be prevented from doing the discovery he chooses to do, which is not irreparable harm. Therefore, any claimed delay by Plaintiff to oppose the stay fails. In addition, the parties have been engaged in vigorous and substantial discovery, including taking 17 depositions, issuing initial and multiple supplemental NRCP 16.1 disclosures, conducting two site inspections and expert testing, and responding to various sets of written discovery as detailed in the Affidavit of Felicia Galati.¹³

D. Petitioners Are Likely To Prevail On The Merits Of The Writ Petition

Effective 1/1/2019, the Nevada Supreme Court enacted NRCP 35 prohibiting the presence of an observer at and a recording of psychological/neuropsychological examinations absent good cause. NRCP 35(a)(3); NRCP 35(a)(4)(A)(ii) and (B). Petitioners' Writ raises important issues of law regarding the good cause standards for an observer and recording of NRCP 35 psychological examinations, which is confirmed by this Court's acceptance of four Writs on this Rule and acceptance of the American Board of Professional Neuropsychology (ABN) Amicus Brief.¹⁴ At

¹³ See Affidavit of Felicia Galati, ¶ 11, Petitioners' Appendix at 1 MOT-3-5.

¹⁴ See Moats v. Dist. Court, Case No. 81912; Lyft, Inc v. Dist. Court, Case No. 82148; Yusi v. Dist. Court, Case No. 82625; ABN Amicus Brief, filed on 4/15/2021 in Yusi.

this time, Petitioners' Writ is not fully briefed and, as such, the merits are unclear, but Petitioners believe they will prevail. Accordingly, this Court should grant a stay, which would serve the interests of judicial economy. Id. at 254, 40 (granting/extending a stay where the merits were unclear, the court could not determine without a full appellate review of the record, if Mikohn's appeal was likely to succeed, and Mikohn would be forced to spend money and time preparing for trial, thus potentially losing the benefits of arbitration).

IV. CONCLUSION

IN ACCORDANCE WITH THE FOREGOING, Petitioners respectfully request this Court grant their Motion To Stay the district court proceedings because the object of the Writ – the NRCP 35 psychological/neuropsychological examination and related scope – will be defeated if the stay is denied; Petitioners will suffer irreparable or serious injury if the stay is denied; Plaintiff will not suffer irreparable or serious injury if the stay is granted; and it is unknown if Petitioners are likely to prevail on the merits in the Writ and/or they are likely to prevail thereon.

DATED this 2nd day of July, 2021.

DATED this 2nd day of June, 2021.

/s/ Felicia Galati, Esq.

/s/Gina Gilbert Winspear, Esq.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of July, 2021, I sent via e-mail a true and correct copy of the above and foregoing **PETITIONERS' MOTION TO STAY PROCEEDINGS** 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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