

IN THE SUPREME COURT OF THE STATE OF NEVADA

FERRELLGAS, INC. a foreign
corporation,

Petitioner,

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
Jul 07 2021 03:17 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

CASE NO. 82670

DISTRICT COURT CASE NO.

A-19-795381-C

APPENDIX TO PETITIONERS' MOTION TO STAY PROCEEDINGS

VOLUME II

FELICIA GALATI, ESQ.
Nevada Bar No. 007341
OLSON CANNON GORMLEY
& STOBERSKI
9950 West Cheyenne Avenue
Las Vegas, NV 89129
and

MICHAEL C. MCMULLEN, ESQ.
Missouri Bar No. 33211
GREGORIO V. SILVA, ESQ.
Nevada No. 13583
BAKER, STERCHI, COWDEN
& RICE, LLC
2400 Pershing Road, Suite 500
Kansas City, MO 64108
Attorneys for Petitioner FERRELLGAS, INC.

GINA GILBERT WINSPEAR, ESQ.
Nevada Bar No. 005552
DENNETT WINSPEAR, LLP
3301 N. Buffalo Drive, Suite 195
Las Vegas, Nevada 89129
Attorneys for CARL J. KLEISNER

JAMES P.C. SILVESTRI, ESQ.
Nevada Bar No. 3603
STEVEN M. GOLDSTEIN, ESQ.
Nevada Bar No. 6318
701 Bridger Avenue, Suite 600
Las Vegas, Nevada 89101
Attorneys for MARIO GONZALEZ

APPENDIX TO PETITIONERS' MOTION TO STAY PROCEEDINGS

VOLUME II

NUMBER	DOCUMENT	BATES NUMBER
3.	Defendants' Motion to Stay Case Pending Writ of Mandamus filed in district court on 04/16/2021	MOT-248-403

DATED this 2nd day of July, 2021.

/s/ Felicia Galati, Esq.

FELICIA GALATI, ESQ.
Nevada Bar No. 007341
OLSON CANNON GORMLEY &
STOBERSKI
9950 West Cheyenne Avenue
Las Vegas, NV 89129
fgalati@ocgas.com
and

MICHAEL C. MCMULLEN, ESQ.
Missouri Bar No. 33211
GREGORIO V. SILVA, ESQ.
Nevada Bar No. 13583
BAKER, STERCHI, COWDEN & RICE
2400 Pershing Road, Suite 500
Kansas City, MO 64108
mmcmullen@bscr-law.com
Attorneys for Petitioner
FERRELLGAS, INC.

<i>Lund v. Eighth Jud. Dist. Ct.</i> , 127 Nev. 358, 255 P.3d 280 (2011)	12
<i>Nevada Ass'n Servs. v. Eighth Jud. Dist. Ct.</i> , 130 Nev. 949, 338 P.3d 1250 (2014)	13
<i>Oxbow Constr., LLC v. Eighth Jud. Dist. Ct.</i> , 130 Nev. 867, 335 P.3d 1234 (2014)	13
<i>Sibbach v. Wilson & Co.</i> , 312 U.S. 1, 61 S. Ct. 422 (1941)	28
<i>Smolko v. Unimark Lowboy Trans.</i> , 327 F.R.D. 59 (M.D. Pa. 2018)	29
<i>State v. Connery</i> , 99 Nev. 342, 661 P.2d 1298 (1983)	11, 24, 25, 28
<i>State v. Merialdo</i> , 70 Nev. 322, 268 P.2d 922 (1954)	23
<i>State of Nevada v. Eighth Jud. Dist. Ct.</i> , 116 Nev. 127, 994 P.2d 692 (2000)	14
<i>Stefan v. Trinity Trucking</i> , 275 F.R.D. 248 (N.D. Ohio 2011)	29
<i>Whitlock v. Salmon</i> , 104 Nev. 24, 752 P.2d 210 (1988)	24, 26, 27
<i>Zamora v. Price</i> , 125 Nev. 388, 213 P.3d 490 (2009)	14

Constitution, Rules, Regulations and Statutes

Nevada Constitution, Art. 3	22
Nevada Constitution, Art. 6	23
NAC 641.234	17
NRAP 17	2
NRAP 21	3
NRCP 35	Passim
NRS 2.120	24
NRS 17.117	5
NRS 34.010	3
NRS 34.150	3
NRS 34.320	3
NRS 52.380	Passim
FRCP 21	28

Miscellaneous

No. ADKT 0522	16
---------------------	----

I.

INTRODUCTION

Following nearly two years of analysis and consideration of public commentary, comprehensive amendments to the Nevada Rules of Civil Procedure (“NRCP”), which were developed by the Nevada Supreme Court and its authorized committee, became effective on March 1, 2019. Approximately three months later, the Nevada Legislature approved A.B. 285, codified as NRS 52.380, which significantly altered the Court’s amendments to NRCP 35, the rule that governs “Physical and Mental Examinations” conducted during the course of civil discovery. Because NRS 52.380 alters the rules of civil procedure, it impermissibly violates the separation of powers doctrine. It is therefore unconstitutional and unenforceable.

In the instant case, petitioner and defendant, Lyft, Inc., sought and obtained a discovery commissioner recommendation to obtain physical and mental examinations (one by a neuropsychologist) of the real party in interest, plaintiff Kalena Davis. The Clark County discovery commissioner, however, recommended that the examination proceed with the conditions imposed by NRS 52.380, including the allowance of Davis’ attorney as an observer, and a recording, even though Davis presented no good cause for these conditions as required by NRCP 35. Because these conditions and the recommendation are contrary to NRCP 35,

and effectively preclude the neuropsychological examination, Petitioner filed an objection with the district court, which was summarily overruled without a hearing.

The district courts in Clark County are now issuing differing and inconsistent rulings on this conflict between the statute and the rule, creating uncertainty and unpredictability in the legal community. Further litigation regarding the differences between the statute and the rule will undoubtedly continue if not clarified by the Court. Writ relief is accordingly required to resolve this conflict between the statute and rule, and to clarify the constitutional question of law and provide guidance for the district courts and Nevada litigants.

II.

ROUTING STATEMENT

This petition should be retained by the Supreme Court pursuant to NRAP 17(a)(7) (“Disputes between branches of government ...”), NRAP 17(a)(11) (“Matters raising as a principal issue a question of first impression involving the United States or Nevada Constitutions ...”) and NRAP 17(a)(12) (“Matters raising as a principal issue a question of statewide public importance ...”).

III.

RELIEF SOUGHT

Petitioner seeks a writ of mandamus pursuant to NRAP 21 and NRS 34.150 *et seq.* In the alternative, Petitioner seeks a writ of certiorari or review pursuant to NRS 34.010 *et seq.* or a writ of prohibition pursuant to NRS 34.320 *et seq.*¹ This petition is supported by the memorandum of points and authorities and declaration set forth below, the concurrently filed Appendix and the records of the district court.

IV.

ISSUE PRESENTED

Whether NRS 52.380, which alters several of the critical procedural aspects of physical and mental examinations conducted during civil litigation pursuant to NRCP 35, and which now effectively precludes neuropsychological and psychological examinations in Nevada, violates the separation of powers doctrine under the Nevada Constitution.

¹ The issuing court may determine which type of writ is most appropriate. *See, e.g., Club Vista Financial Servs. v. Eighth Jud. Dist. Ct.*, 128 Nev. 224, 228 n. 6, 276 P.3d 246 (2012).

V.

FACTS NECESSARY TO UNDERSTAND ISSUES PRESENTED

A. The Accident

This case arises out of an automobile-motorcycle accident. Underlying defendant Adam Bridewell (“Bridewell”), while utilizing the Lyft ridesharing application and transporting two passengers, was yielding to oncoming traffic with a green light at an intersection. (Petitioner’s Appendix [“App.”] at 4).² Plaintiff and real party in interest, Kalena Davis (“Davis”), while traveling alone on a motorcycle, was allegedly splitting the lanes of travel on eastbound Russell Road. (*Id.*) Bridewell, believing the intersection was clear, attempted to complete his left turn. (*Id.*) Davis entered the intersection and crashed into the right, passenger-side door of Bridewell’s vehicle. (*Id.*) Davis was ejected from his motorcycle and suffered significant injuries. (*Id.*)

Liability for the accident is disputed. Bridewell maintains that Davis ran a red light on eastbound Russell Road. (*Id.*) Davis maintains that there were no vehicles ahead of him in his lane of traffic, and that he had a yellow light, when he

² Citations to the Appendix are designated by volume and page number (e.g., 1 App. 4).

entered the intersection. (1 App. 26:24-25).³

B. The NRCP 35 Motion Proceedings

Petitioner has retained neuropsychologist Thomas Kinsora, Ph.D., vocational rehabilitation counselor Aubrey Corwin, M.S. and physical medicine and rehabilitation specialist David Fish, M.D. as expert witnesses. (1 App. 6-7). In October 2019, Petitioner sought to schedule physical and mental examinations of Davis with all three of these expert witnesses pursuant to NRCP 35. (1 App. 3:18-19). Davis' counsel requested the opportunity to provide terms and conditions in connection with the examinations, but failed to provide specific requests.

Petitioner therefore was forced to file a motion to compel the Rule 35 examinations. (1 App. 1). Davis opposed the motion. (1 App. 25). With respect to the proposed medical examination by Dr. Fish, Davis did not object to the examination, but requested a series of conditions pursuant to NRCP 35, including that an observer "that is not the Plaintiff's attorney and is not employed by the Plaintiff or the Plaintiff's attorney," and that the examination be audio recorded. (1 App. 35). With respect to the proposed neuropsychological examination by Dr. Kinsora, Davis argued, among other things, that Dr. Kinsora's examination be audio recorded, but he did not request an observer. (1 App. 38-39). Regarding the

³ Davis has no memory of the accident, including whether his light at the intersection was green, yellow or red, or whether he was moving in between other stopped vehicles when he entered the intersection. (1 App. 5:21-28, 27:5).

proposed vocational rehabilitation examination by Ms. Corwin, Davis argued, among other things, for an audio recording and for the presence of an observer that is not the Plaintiff's attorney. (1 App. 41). Notably, Davis did not cite NRS 52.380 in his opposition (and his requests were initially consistent with NRCP 35).

In Lyft's reply, counsel provided more details of the extensive efforts made to schedule the Rule 35 examinations since October 2019, including the fact that Davis' counsel had agreed to provide a proposed stipulation with requested conditions, but that Davis' counsel failed to provide this stipulation, thereby necessitating the motion to compel. (1 App. 45-47). Lyft also reiterated why good cause existed for each of the three proposed Rule 35 examinations based on Davis' own allegations and computation of damages. (1 App. 48-52).

With respect to the conditions proposed by Davis, Lyft reminded the discovery commissioner that NRCP 35 provides for the recording of examinations, but only upon a showing of good cause. (1 App. 50:17 [citing NRCP 35(a)(3)]). Davis did not articulate, let alone demonstrate, good cause in his opposition. (1 App. 50:19-21). Regarding Davis' request for an observer during the examinations, Lyft noted NRCP 35's requirement that a party seeking an observer must "identify the observer and state his or her relationship to the party being examined." (1 App. 50:26-28 [citing NRCP 35(a)(4)]). Davis did not identify any particular proposed observer in his opposition. (1 App. 51:1-2). Finally, Lyft also highlighted NRCP

35's prohibition against observers for neuropsychological examinations, unless the court orders otherwise based on good cause. (1 App. 51:3-7 [citing NRCP 35(a)(4)(B)]). Davis proffered no such good cause in his opposition. (1 App. 51:8-12).

At the hearing on February 13, 2020, the discovery commissioner found that good cause existed for the requested medical, neuropsychological and vocational rehabilitation examinations. (1 App. 94:11-20, 98:8-13). Additionally, however, the discovery commissioner, *sua sponte*, raised the issue of A.B. 285, which is now codified as NRS 52.380. (1 App. 87:8-9). *Davis' counsel first learned of this statute at the hearing*, and, based on this newly acquired knowledge, expressed his desire to personally attend the examinations. (1 App. 99:13-20). The parties and the discovery commissioner then discussed the interplay between NRS 52.380 and NRCP 35, and the discovery commissioner stated her belief that the statute governs. (1 App. 105:6). Given the uncertainty as to whether Lyft's expert witnesses would accept the new parameters imposed by NRS 52.380, the discovery commissioner concluded that the parameters and conditions for the examinations would be discussed at the next status check hearing. (1 App. 105:21-25).

In the Discovery Commissioner's first report and recommendation, filed on March 3, 2020, the discovery commissioner concluded that Lyft's requests for the three NRCP 35 examinations by Dr. Fish, Dr. Kinsora and Ms. Corwin are

reasonable and warranted given Davis' claims of orthopedic injuries and future treatment, traumatic brain injury and future treatment and future lost wages. (1 App. 109-110). Regarding conditions for the examinations, the discovery commissioner found that an observer could attend the medical examination with Dr. Fish pursuant to SB 285, and that the exam could be audio recorded. (1 App. 110, 114). With respect to the neuropsychological and vocational rehabilitation exams, the discovery commissioner concluded that the conditions were "to be determined by the parties." (1 App. 111:4-5).

At the next hearing, the discovery commissioner requested supplemental briefing by the parties regarding the differences between A.B. 285 (NRS 52.380) and NRCP 35. (1 App. 135:16-19). Notably, with respect to the interplay between the statute and the rule, the discovery commissioner stated: "And this is – *this is likely an issue that's ultimately going to have to be decided by the supreme court because there is a discrepancy or a disparity between the language of the two.*" (1 App. 136:20-22 [emphasis added]).

Petitioner filed its "Brief on Rule 35 Examinations and NRS 52.380" on March 20, 2020. (1 App. 142). Petitioner highlighted the differences between the rule and the statute, and detailed that NRCP 35 should control over NRS 52.380 based on Nevada's separation of powers principles and jurisprudence. (1 App. 147-154). Specifically, because NRCP 35 was enacted as part of the Nevada Supreme

Court's statutory authority to enact procedural rules, the Legislature cannot enact conflicting procedural rules. (1 App. 153-54).

Davis filed "Plaintiff's Brief regarding NRCP 35 and NRS Section 52.380" on April 6, 2020. (2 App. 456). Davis argued the alterations to the Rule 35 examination conditions provided by NRS 52.380 are valid because they provide substantive rights. (2 App. 458-460).

At the next hearing on April 9, 2020, the discovery commissioner recommended that the requirements of the statute should be applied, meaning that Davis was entitled to an observer during examinations, and the examinations could be recorded, all without any showing of good cause as required by NRCP 35. (3 App. at 535). The discovery commissioner first noted that "there's obviously a contradiction between the rule and the statute, as everyone is well aware." (3 App. 539:12-14). The discovery commissioner explained: "[W]hile I understand that the Supreme Court has the authority, and it's within their purview certainly to draft rules that apply to procedure, statutes that are substantive in nature can control." (3 App. 539:16-19).

While acknowledging that "[t]here are compelling arguments on both side[s]," the discovery commissioner further concluded: "But in this case, I believe that the statute, the way it is written, creates rights and expands substantive rights under Rule 35 – or that would apply to the Rule 35 examinations." (3 App. 539:20-

540:2). The discovery commissioner further concluded: “**I understand that that may affect whether or not certain experts may perform examinations or serve as experts in a case.** But I think that that is what is allowed under the statute.” (3 App. 540:21-25 [emphasis added]).

The discovery commissioner notably also reiterated the need for appellate court intervention: “I will say that I think that this is an issue that likely needs further – **we need further direction from our appellate courts on.** But this as I indicated initially, **this may well be a case that would warrant that.**” (3 App. 544:13-17 [emphasis added]).

In the second Discovery Commissioner Report and Recommendations, filed on August 18, 2020 (the “DCRR”), the discovery commissioner noted the following conflicts between NRCP 35 (the “Rule”) and NRS 52.380 (the “Statute”):

- (a) whether a party’s attorney, or a representative of that attorney, may serve as an observer during the examination (which is barred by the Rule but permitted by the Statute);
- (b) whether a party may have an observer during a neuropsychological, psychological, or psychiatric examination without making a showing of “good cause” (which showing is also required by the Rule but not required by the Statute); and
- (c) whether the observer may record the examination without making a showing of “good cause” (which showing is required by the Rule but not required by the Statute).

(3 App. 556:12-21). The discovery commissioner concluded that “[e]ach of these conflicts is irreconcilable, such that it is not possible to construe the Rule and the Statute in harmony.” (3 App. 556:21-22).

The discovery commissioner also noted that “[a] single question is presented here: whether the Statute is procedural or substantive. If the Statute is substantive, the Statute governs where a conflict arises. If the Statute is procedural, it is unconstitutional (and therefore superseded by the Rule) to the extent that the Statute is both procedural and in conflict with the Rule.” (3 App. 557:15-18 [emphasis in original]). The discovery commissioner further explained that, “[u]nder Nevada law, the judiciary has the exclusive prerogative to make rules governing its own procedures, while the Legislature has the exclusive prerogative to enact statutes governing the substance of the law.” (3 App. 557:3-6 [citing *State v. Connery*, 99 Nev. 342, 345 (1983)] [emphasis in original]).

Accordingly, the discovery commissioner recommended that, during any NRCP 35 examination, including any neuropsychological examination, Davis would be permitted to have an observer present, including Davis’ attorney or that attorney’s representative, and that any examination could be recorded. (3 App. 558:14-559:7).

Petitioner filed an objection to the DCRR on August 31, 2020. (3 App. 561). Davis filed an opposition to the objection, and Petitioner filed a reply. (5 App.

1046; 6 App. 1381). The district court did not hear oral argument or issue any substantive ruling. Rather, in its “Order re: Discover Commissioner’s Report and Recommendations,” filed on September 18, 2020, the district court affirmed and adopted the DCRR on the check-box form. (6 App. 1391).

VI.

POINTS AND AUTHORITIES

- A. Writ relief is appropriate and necessary to resolve an unsettled and recurring conflict of law that implicates Constitutional separation of powers principles.

Nevada appellate courts are empowered to issue writ relief when the petitioner lacks a “plain, speedy and adequate remedy at law.” *See, e.g., Beazer Homes Holding Corp. v. Eighth Jud. Dist. Ct.*, 128 Nev. 723, 730, 291 P.3d 128 (2012) (petition for writ of mandate granted and district court ordered to comply with civil procedure rule). Whether an appeal is a sufficiently adequate and speedy remedy is determined in each particular case by considering a number of factors, “including the underlying proceedings’ status, the types of issues raised in the writ petition, and whether a future appeal will permit this court to meaningfully review the issues presented.” *Id.* (finding that petitioner lacked plain, speedy and adequate remedy at law when petition raised important issues of law and public policy and other cases involved the same disputed issues); *see also Lund v. Eighth Jud. Dist. Ct.*, 127 Nev. 358, 363, 255 P.3d 280 (2011) (writ relief warranted when a legal

error significantly affects the course of the litigation and the aggrieved party should not have to wait until final judgment to correct the error).

The promotion of judicial economy is another important factor in determining the availability of writ relief. *See Beazer*, 128 Nev. at 730 (judicial economy promoted when ruling on petition would affect many other cases pending throughout the state). In further promoting the interests of sound judicial economy and administration, writ review is accordingly warranted **when needed to clarify significant and recurring questions of law that may affect other cases**. *See Badger v. Eighth Jud. Dist. Ct.*, 132 Nev. 396, 401, 373 P.3d 89 (2016); *Nevada Ass'n Servs. v. Eighth Jud. Dist. Ct.*, 130 Nev. 949, 954, 338 P.3d 1250 (2014); *Oxbow Constr., LLC v. Eighth Jud. Dist. Ct.*, 130 Nev. 867, 872, 335 P.3d 1234 (2014).

Though extraordinary relief is generally not available to review discovery orders, **“where an important issue of law needs clarification** and public policy is served by this court’s invocation of its original jurisdiction, . . . consideration of a petition for extraordinary relief may be justified.” *Diaz v. Eighth Jud. Dist. Ct.*, 116 Nev. 88, 93, 993 P.2d 50 (2000) (emphasis added); *see also Club Vista*, 128 Nev. at 228 (discovery orders may be reviewed on writ petitions when challenged order is likely to cause irreparable harm).

Similarly, writ relief is also appropriate to resolve a split of authority among the lower courts on issues of statewide concern. *See, e.g., State of Nevada v. Eighth Jud. Dist. Ct.*, 116 Nev. 127, 134, 994 P.2d 692 (2000). Under these circumstances, when issues of law require clarification, the standard of review is de novo. *Beazer Homes*, 128 Nev. at 730. The constitutionality of a statute is a question of law that is reviewed de novo. *See Zamora v. Price*, 125 Nev. 388, 391, 213 P.3d 490 (2009).

Here, as detailed below, NRS 52.380, which became effective approximately six months after the latest amendments to NRCP 35 were enacted by the Nevada Supreme Court, creates several conflicts relating to the procedures for physical and mental examinations conducted during the course of litigation pursuant to the Nevada Rules of Civil Procedure. Indeed, in this case, the Clark County discovery commissioner acknowledged the need for appellate court intervention on this important and recurring issue. (1 App. 136:20-22; 3 App. 544:13-17).

Moreover, this issue will continue to recur throughout the state, as physical and mental examinations are a critical procedural component of personal injury cases. In this regard, a “circuit split” of sorts has already emerged, as different departments in Clark County have issued divergent rulings as to whether the

statute or rule provide the controlling procedure.⁴

Accordingly, writ relief is necessary to resolve the recurring conflict of law and provide guidance to Nevada district courts and litigants.

B. NRCP 35, and not NRS 52.380, governs physical and mental examinations conducted during civil discovery because the statute unconstitutionally infringes on the Nevada Supreme Court's power to enact civil procedure rules.

As detailed below, the Legislature's enactment of NRS 52.380 just months after the Nevada Supreme Court amended NRCP 35, was an unconstitutional violation of the separation of powers doctrine.

1. The Court amended NRCP 35 to provide for recording and observers under limited circumstances.

The Nevada Supreme Court significantly amended the Nevada Rules of Civil Procedure in 2019.⁵ The amended version of NRCP 35 ("Physical and Mental Examinations"), effective March 1, 2019, was designed to provide a comprehensive procedural framework for the conducting of physical and mental examinations in civil litigation. The rule now provides, in salient part, that "[t]he

⁴ In contrast to the instant proceedings, a different department in Clark County has concluded that the Rule prevails over the Statute. *See Troy Moats v. Troy Burgess*, Clark County District Court, Case No. A-18-769459-C (Department 14). On October 9, 2020, plaintiff in that matter filed a writ petition. *See Troy Moats v. Eighth Jud. Dist. Ct.*, Case No. 81912.

⁵ *See* No. ADKT 0522, Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, filed on December 31, 2018.

court where the action is pending may order a party whose mental or physical condition . . . is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner.” NRCP 35(a)(1). “The order must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it ...” NRCP 35(a)(2)(B).

As part of the 2019 amendments, the Court added provisions relating to the procedures for a party seeking recordings of examinations and observers. The amendment relating to recording provides: “On request of a party or the examiner, the court may, *for good cause shown*, require as a condition of the examination that the examination be audio recorded.” NRCP 35(a)(3) (emphasis added).⁶

Regarding observers, the amended rule provides: “The party against whom an examination is sought may request as a condition of the examination to have an observer present at the examination. When making the request, the party must identify the observer and state his or her relationship to the party being examined. *The observer may not be the party's attorney or anyone employed by the party or the party's attorney.*” NRCP 35(a)(4) (emphasis added). The amended rule further clarifies that “[t]he party may not have any observer present for a

⁶ “A generalized fear that the examiner might distort or inaccurately report what occurs at the examination is not sufficient to establish good cause to audio record the examination.” NRCP 35, Advisory Committee Note – 2019 Amendment – Subsection (a).

neuropsychological, psychological, or psychiatric examination, unless the court orders otherwise for good cause shown.” NRC 35(a)(4)(B).

The Court enacted these amendments after nearly two years of careful investigation and analysis through a specially formed committee. During this time, the committee received public comments, including comments and letters from health care professionals, which lead to the prohibition against observers for neuropsychological examinations. This prohibition exists for numerous reasons.

For example, according to Thomas Kinsora, Ph.D. (Petitioner’s retained neuropsychologist in this case), “[a]llowing a non-neuropsychologist, particularly an attorney, access to protected test material through third party observation, or direct access to raw test data, a) violates the neuropsychologist’s ethical guidelines and the published positions of professional organizations, b) goes against the stated position of the Nevada Board of Psychological Examiners, c) violates NAC 641.234,⁷ d) presents a risk to public safety, e) diminishes the value of test results, f) diminishes the usefulness of the neuropsychologist to the trier of fact, and g) diminishes the viability of the neuropsychologist by denying him/her the tools necessary to conduct valid assessments.” (1 App. 155-156, 248-250; 2 App. 251-

⁷ This regulation, among other things, prohibits psychologists and licensed behavior analysts from publicly reproducing or describing psychological tests or other assessment procedures in a manner which may invalidate the tests or procedures. NAC 641.234(2).

258).

The Nevada Board of Psychological Examiners offered the following in a letter to the Nevada Supreme Court provided in connection with proposed amendments to NRCP 35: “In the interest of protecting the needs of the public, it is the position of the Nevada Board of Psychological Examiners that allowing third-party observers, monitors, and/or electronic recording equipment during psychological and neuropsychological evaluations *poses a significant threat to public safety.*” (2 App. 260 [emphasis added]). The Board further advised the Court that “[o]bservation, monitoring, and recording can significantly alter the credibility and validity of results obtained during psychological and neuropsychological medical evaluations, as well as forensic evaluations completed for judicial proceedings.” (*Id.*) “Research indicates that the presence of observers, monitors and recorders during patient clinical interviews and evaluations directly impacts patient behavior and performance such that patients may avoid disclosing crucial information essential to diagnosis and clinical recommendations.” (*Id.*)

The Nevada Psychological Association issued similar guidance and warnings to the Court. (2 App. 271-272). Indeed, this Association maintains that, if observation and recording of examinations were permitted, *“no licensed psychologist in the State of Nevada would be able to conduct psychological and/or neuropsychological” examinations* because these conditions would lead to

decreased patient disclosure, compromised validity of testing, social facilitation and observer effects (i.e., patients may respond differently when they know they are being observed), compromised test security (which could adversely affect future examinations of other patients). (*Id.* [emphasis added]).

2. The Legislature enacted NRS 52.380 in response to the Court's amendments to NRCP 35.

In response to the 2019 amendments to NRCP 35, the Nevada Legislature enacted A.B. 285, codified as NRS 52.380, which is vaguely entitled "Attendance by observer." The provision is located in Chapter 52 of the Nevada Revised Statutes (titled "Documentary and Other Physical Evidence"). The statute, which became effective on October 1, 2019 - approximately seven months after the amendments to NRCP 35 took effect - provides, in salient part:

1. An observer may attend an examination⁸ but shall not participate in or disrupt the examination.
2. The observer attending the examination pursuant to subsection 1 may be:
 - (a) An attorney of an examinee or party producing the examinee; or

⁸ As used in this section, "'Examination' means a mental or physical examination ordered by a court for the purpose of discovery in a civil action." NRS 52.380(7)(a). Though the Legislature curiously does not reference NRCP 35 in the statute, it presumably intended to include Rule 35 within the scope of this definition, as there is no other rule or law authorizing such examinations in civil discovery.

- (b) A designated representative of the attorney, if:
 - (1) The attorney of the examinee or party producing the examinee, in writing, authorizes the designated representative to act on behalf of the attorney during the examination; and
 - (2) The designated representative presents the authorization to the examiner before the commencement of the examination.

- 3. The observer attending the examination pursuant to subsection 1 may make an audio or stenographic recording of the examination.

NRS 52.380(1)-(3). The statute further authorizes both observers and examiners to suspend the examination under specified circumstances. *See* NRS 52.380(4)-(5).

In other words, contrary to NRCP 35, the statute permits (1) an examinee's attorney to observe the examination; (2) an observer for neuropsychological or psychological examinations without requiring any showing of good cause; and (3) recording of the examination without requiring a showing of good cause. It is unclear how the Legislature reconciled these provisions with the concerns raised by the Nevada Board of Psychological Examiners, the Nevada Psychological Association and practitioners such as Dr. Kinsora. (1 App. 155-156, 248-250; 2 App. 251-260, 271-272).

3. The Nevada Constitution establishes a separation of powers between the Legislative and Judicial departments.

The Nevada Constitution provides that “[t]he powers of the Government of the State of Nevada shall be divided into three separate departments, - the Legislative, - the Executive and the Judicial; and **no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others**, except in the cases herein expressly directed or permitted in this constitution.” Nevada Constitution, Art. 3, § 1 (emphasis added).

This Section provides the Constitutional basis for the “separation of powers doctrine,” which “is the most important foundation for preserving and protecting liberty by preventing the accumulation of power in any one branch of government.” *Berkson v. Lepome*, 126 Nev. 492, 498, 245 P.3d 560, 564 (2010); *see also Goldberg v. Eighth Jud. Dist. Ct.*, 93 Nev. 614, 615, 572 P.2d 521 (1977) (“It is fundamental to our system of government that the separate powers granted the executive, legislative and judicial departments be exercised without intrusion.”. The Court has recognized that “[t]he division of powers *is probably the most important single principle of government declaring and guaranteeing the liberties of the people.*” *Galloway v. Truesdell*, 83 Nev. 13, 18, 422 P.2d 237 (1967) (emphasis added).

4. The Nevada Supreme Court is authorized to establish rules for civil litigation, and has repeatedly struck down statutes that conflict with these rules.

The Nevada Constitution further provides that “[t]he judicial power of this State is vested in a court system, comprising a Supreme Court, a court of appeals, district courts and justices of the peace.” Nevada Constitution, Art. 6, § 1. “‘Judicial Power’ is the capability or potential capacity to exercise a judicial function. That is, ‘Judicial Power’ is the authority to hear and determine justiciable controversies.” *Galloway*, 83 Nev. at 20. “Judicial function includes the right to exercise any lesser power that can be subsumed under, or is included as an integral part of, the broader heading of ‘Judicial Power’; that is, any power or authority that is inherent or incidental to a judicial function is properly within the realm of judicial power, as described above.” *Id.*

Pursuant to this constitutional judicial power, the Nevada Supreme Court has the authority to regulate civil litigation by adopting rules regulating civil practice and procedure:

The Supreme Court, by rules adopted and published from time to time, shall regulate original and appellate civil practice and procedure, including, without limitation, pleadings, motions, writs, notices and forms of process, in judicial proceedings in all courts of the State, for the purpose of simplifying the same and of promoting the speedy determination of litigation upon its merits. Such rules shall not abridge, enlarge or modify any substantive right and shall not be inconsistent with the constitution of the State of Nevada.

NRS 2.120(2); *see also Berkson, supra*, 126 Nev. at 499 (“The judiciary is entrusted with rule-making and other incidental powers reasonable and necessary to carry out the duties required for the administration of justice and to economically and fairly manage litigation.”).

Under the separation of powers doctrine, “it is clear that the judiciary, as a coequal branch of government, has inherent powers to administer its affairs, which include rule-making and other incidental powers reasonable and necessary to carry out the duties required for the administration of justice. **Any infringement by the legislature upon such power is in degradation of our tripartite system of government and strictly prohibited.**” *Goldberg, supra*, 93 Nev. at 616-617 (citations omitted) (emphasis added). “[T]he inherent power of the judicial department to make rules is not only reasonable and necessary, but absolutely essential to the effective and efficient administration of our judicial system, and it **is our obligation to insure that such power is in no manner diminished or compromised by the legislature.**” *Goldberg*, 93 Nev. at 617 (denying writ petition by attorney seeking to attend district court’s rule-making meeting regarding selection and duties of jurors) (emphasis added); *see also State v. Merialdo*, 70 Nev. 322, 326, 268 P.2d 922 (1954) (“Nothing can be clearer than that, under our constitutional provision, our courts possess **the entire body of the intrinsic judicial power of the state.** This being so, neither the legislative nor the

executive branches of the government may assume to exercise any part of that judicial power, and **the district court cannot be directed or controlled or impeded in its functions by either of those branches.**”) (emphasis added).

The Nevada Supreme Court has repeatedly applied these separation of powers principles to conflicts between statutes and rules. *See Berkson, supra*, 126 Nev. 492; *Whitlock v. Salmon*, 104 Nev. 24, 752 P.2d 210 (1988); *State v. Connery*, 99 Nev. 342, 661 P.2d 1298 (1983); *Lindauer v. Allen*, 85 Nev. 430, 456 P.2d 851 (1969).

In *Lindauer*, the Court confronted a conflict between NRCP 41(e), which mandates dismissal if a plaintiff fails to bring an action to trial within five years, and former NRS 14.150, which changed the time for mandatory dismissal from five years to seven years. *Lindauer*, 85 Nev. at 432. Based on Article 3, Section 1 of the Nevada Constitution, the Court explained that “when a statute attempts to limit or destroy an inherent power of the courts, that statute must fail.” *Id.* at 434. “When this court adopted NRCP 41(e) it was consistent with the Nevada Constitution and the laws of the state, and when the legislature later enacted NRS 14.150, it not only indulged in an unconstitutional act but attempted to diminish the effect of NRS 2.120 in an area where it was powerless to act.” *Id.* at 435. Accordingly, the rule prevailed over the former statute. *Id.*

In *Connery*, the Court confronted a conflict between NRAP 4(b), which provides, for criminal cases, that appeals must be filed within 30 days after the entry of the judgment or order being appealed, and a statute which required appeals to be taken within 30 days after “rendition” of the judgment or order. *Connery*, 99 Nev. at 344. Because the State filed its appeal later than 30 days after the district court’s oral “rendition” of its ruling, but within 30 days of the entry of the order as permitted by NRAP 4(b), the conflict between the statute and the rule was implicated. The Court again determined that the rule prevailed over the statute, reasoning that “[t]he judiciary has the inherent power to govern its own procedures, and this power includes the right to promulgate rules of appellate procedure as provided by law.” *Connery*, 99 Nev. at 345 (citing NRS 2.120 and *Goldberg, supra*, 93 Nev. 614).

“Although such rules may not conflict with the state constitution or ‘abridge, enlarge or modify any substantive right,’ NRS 2.120, the authority of the judiciary to promulgate procedural rules is independent of legislative power, and may not be diminished or compromised by the legislature.” *Id.* at 345. Accordingly, **“the legislature may not enact a procedural statute that conflicts with a pre-existing procedural rule, without violating the doctrine of separation of powers.”** *Id.* at 345 (citing *Lindauer, supra*, 85 Nev. 430) (emphasis added). **“[S]uch a statute is of no effect.”** *Id.* (Emphasis added). In other words, the rules

of procedure enacted by the Court supersede procedural statutes relating to judicial functions, “so long as the rule does not conflict with the state constitution or alter a substantive right.” *Id.*

In *Whitlock*, the Court confronted an apparent conflict between NRS 16.030(6), which permits the parties to directly conduct *voir dire* at trial, and NRCP 47(a), which arguably provides district courts with discretion to deny parties the ability to directly examine potential jurors. The Court held that the statute was not a “legislative encroachment on judicial prerogatives” because, though it implicated trial procedure, the statute, importantly, “**does not interfere with procedure to a point of disruption or attempted abrogation of an existing court rule.**” *Whitlock*, 104 Nev. at 26 (emphasis added).

Most recently, in *Berkson, supra*, this Court held that a statute permitting a plaintiff whose judgment is reversed on appeal with the right to file new action within one year (NRS 11.340) unconstitutionally interferes with the judiciary’s authority to manage the litigation process. *Berkson*, 126 Nev. at 501. The Court accordingly struck the statute as unconstitutional on separation of powers grounds. *Id.* “In addition to the constitutionally mandated bases for keeping separate those inherent powers of the judiciary, leaving control of court rules and the administration of justice to the judiciary, and thereby placing the responsibility for the system’s continued effectiveness with those most familiar with the latest issues

and the experience and flexibility to more quickly bring into effect workable solutions and amendments, makes good sense.” *Id.* at 500.

5. NRS 52.380 violates the separation of powers doctrine because it is procedural, not substantive.

The net effect of the authorities discussed above is that rules of civil procedure promulgated by the Nevada Supreme Court prevail over conflicting statutes enacted by the Legislature, so long as the rule does not conflict with the Constitution, or abridge, enlarge or modify any substantive right. *See Connery, supra*, 99 Nev. at 345. Accordingly, “the legislature may not enact a procedural statute that conflicts with a pre-existing procedural rule, without violating the doctrine of separation of powers.” *Id.* This prohibition is especially pronounced when a statute “interfere[s] with procedure to a point of disruption,” or constitutes an “attempted abrogation of an existing court rule.” *See Whitlock, supra*, 104 Nev. at 26.

The conflict here has already been resolved by federal courts in the context of construing FRCP 35, which is the federal equivalent to NRCP 35.⁹ Specifically, **the United States Supreme Court has recognized and held that FRCP 35 is a**

⁹ FRCP 35 contains the same general authorizing language as NRCP 35, as it provides: “The court where the action is pending may order a party whose mental or physical condition . . . is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner.” FRCP 35(a)(1). FRCP 35 also contains the same good cause requirement as NRCP 35. FRCP 35 contains no provisions for recording or observing.

rule of procedure. See *Sibbach v. Wilson & Co.*, 312 U.S. 1, 11, 61 S. Ct. 422 (1941). In *Sibbach*, the injured plaintiff refused defendant's request for a medical examination pursuant to FRCP 35, arguing that the rule implicates substantive rights, and was therefore not within the Supreme Court's rulemaking authority. The Court explained that "[t]he test must be whether a rule really regulates procedure, -- the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Id.* at 14. Based on this standard, the Court concluded that FRCP 35 was procedural, and therefore enforceable pursuant to the Court's rulemaking authority. *Id.*

Fast forward nearly 80 years later, in a thorough and detailed opinion issued just a few months ago, the Nevada federal court concluded that NRS 52.380 is procedural, not substantive. See *Freteluco v. Smith's Food & Drug Ctrs.*, 2020 U.S. Dist. LEXIS 113217 at *7-*12 (D. Nev. June 29, 2020). In adjudicating precisely the same conflict between NRS 52.380 and FRCP 35 that is at issue here, the court concluded that "whether an observer is present in the neuropsychological examination of Plaintiff *is not substantive, but is procedural*. That is, NRS 52.380 *sets forth procedures* applicable to observers who may attend independent medical examinations." *Id.* at *10-*11 (emphasis added).

The court reasoned, consistent with *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) and its progeny, that the provisions of NRS 52.380 “are not ‘outcome’ or case determinative, but instead reflect a ‘procedural preference.’” *Id.* at *11 (citing *Flack v. Nutribullet, LLC*, 333 F.R.D. 508, 517 (C.D. Cal. 2019), *Smolko v. Unimark Lowboy Trans.*, 327 F.R.D. 59, 63 (M.D. Pa. 2018) and *Stefan v. Trinity Trucking*, 275 F.R.D. 248, 250 (N.D. Ohio 2011)).

The court in *Freteluco* continued: “By specifying that the court may determine ‘the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it,’ Fed. R. Civ. P. 35(a)(2)(B), Rule 35 *consigns the procedures to be used in conducting these examinations to the sound discretion of the court*, an approach that is consistent with the general guidance of the rules which provide that issues relating to the scope of discovery rest in the sound discretion of the [c]ourt.” *Id.* at *11-*12 (quoting *Smolko*, 327 F.R.D. at 61) (emphasis added).

With respect to the statute, the court in *Freteluco* explained that “NRS 52.380 *sets forth process* allowed under Nevada Rules of Evidence applicable to an examination under Nev. R. Civ. P. 35, *and is not a substantive law* the application of which overrides existing federal law found in Fed. R. Civ. P. 35(a)(2) that grants this Court the authority to enter an order specifying the ‘time, place, manner, conditions, and scope of the examination’” *Id.* at *12 (emphasis

added).

The court in *Freteluco* went on to conclude that the plaintiff failed to establish good cause to overcome the majority rule excluding third parties from Rule 35 examinations. *Id.* at *12-*14. In so concluding, like the Nevada Board of Psychological Examiners and the Nevada Psychological Association counseled in its comments to this Court, the federal court articulated many of the concerns associated with observers: “The introduction of a third party changes the nature of the proceeding, much in the way that television coverage of events qualitatively changes what occurs in front of the camera.” *Id.* at *13.

“Courts 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.” *Id.* at *13 (quoting *Flack*, 333 F.R.D. at 518)). “[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.* at *14.

Still another federal court has recognized that FRCP 35 is “**unquestionably** a rule of procedure.” *Durmishi v. Nat’l Cas. Co.*, 720 F. Supp. 2d 862, 876 (E.D. Mich. 2010). FRCP 35’s “purpose is to regulate access to proof through different modes of discovery during the course of litigation. **It does not prescribe rights or remedies. Instead, it merely sets forth a process for obtaining information that might bear on a matter in controversy.**” *Id.* (emphasis added).

VII.

CONCLUSION

As detailed above, NRS 52.380 is an unconstitutional rule of procedure. It violates the separation of powers doctrine, and is therefore of no effect. NRCP 35 occupies the field and governs physical and mental examinations in Nevada. The Court should therefore grant this petition and issue a writ of mandamus compelling the district court to (1) sustain Petitioner’s objections to the discovery commissioner’s report and recommendation, dated August 18, 2020 (3 App. 555); and (2) order that the Rule 35 examinations permitted by the discovery commissioner proceed without any recording, and without any observers, as Davis never presented any good cause for either the recording or the presence of any observers.

The Court should also take the opportunity to clarify that NRS 52.380 is procedural, and that it constitutes an unconstitutional violation of the separation of powers doctrine. The statute therefore has no force and effect with respect to medical and physical examinations in civil litigation, which are controlled entirely by NRCP 35.

DATED this 2nd day of December, 2020.

LEWIS BRISBOIS BISGAARD & SMITH

By /s/ Jeffrey D. Olster
Jeffrey D. Olster
Nevada Bar No. 8864
Jeff.Olster@lewisbrisbois.com
Jason G. Revzin
Nevada Bar No. 8629
Jason.Revzin@lewisbrisbois.com
Blake A. Doerr
Nevada Bar No. 9001
Blake.Doerr@lewisbrisbois.com
Lewis Brisbois Bisgaard & Smith LLP
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Attorneys for Petitioner
LYFT, INC.

SUPPORTING DECLARATION

I, Jeffrey D. Olster, declare and state as follows:

1. I am an attorney duly licensed to practice before all courts of the State of Nevada. I make this declaration pursuant to NRAP 21(a)(5), NRS 34.170, NRS 34.030 and NRS 34.330. My office represents petitioner Lyft, Inc. in this matter. As such, I have personal knowledge of the following.

2. As detailed above, Petitioner maintains that writ review is warranted on the legal grounds that NRS 52.380 conflicts with NRCP 35.

3. The documents contained in the concurrently filed Appendix are true and correct copies of the salient district court record to the best of my knowledge, information and belief.

I declare under penalty of perjury under the laws of the State of the Nevada that the foregoing is true and correct.

Dated this 2nd day of December, 2020.

/s/ Jeffrey D. Olster
Jeffrey D. Olster

ATTORNEY CERTIFICATE PURSUANT TO NRAP 28.2

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

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains **6,969** words.

3. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by 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 the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 2nd day of December, 2020.

LEWIS BRISBOIS BISGAARD & SMITH

By /s/ Jeffrey D. Olster
Jeffrey D. Olster
Nevada Bar No. 8864
Jeff.Olster@lewisbrisbois.com
Jason G. Revzin
Nevada Bar No. 8629
Jason.Revzin@lewisbrisbois.com
Blake A. Doerr
Nevada Bar No. 9001
Blake.Doerr@lewisbrisbois.com
Lewis Brisbois Bisgaard & Smith LLP
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Attorneys for Petitioner
LYFT, INC.

CERTIFICATE OF SERVICE

I certify that I am an employee of Lewis Brisbois Bisgaard & Smith LLP, and that on this 2nd day of December, 2020, I did cause a true copy of the foregoing **PETITION FOR WRIT OF MANDAMUS** to be served via the Court's electronic filing and service system ("E-Flex") to all parties on the current service list:

Jared R. Richards
Dustin E. Birch
CLEAR COUNSEL LAW GROUP
1671 W. Horizon Ridge Pkwy., Ste. 200
Las Vegas, Nevada 89012
Tel: (702) 476-5900
Fax: (702) 924-0709
Email: jared@clearcounsel.com
dustin@clearcounsel.com
*Attorneys for Plaintiff/Real Party in
Interest Kalena Davis*

James E. Harper
Justin Gourley
HARPER SELIM
1707 Village Center Circle, Suite 140
Las Vegas, Nevada 89134
Tel: (702) 948-9240
Fax: (702) 778-6600
Email: eservice@harperselim.com
*Attorneys for Defendant Adam Deron
Bridewell*

Hon. Mark R. Denton
Eighth Judicial District Court
200 Lewis Avenue
Las Vegas, Nevada 89155
Respondent Court

By /s/ Heidi Davis
An Employee of Lewis Brisbois Bisgaard
& Smith LLP

EXHIBIT L

MOT287

IN THE SUPREME COURT OF THE STATE OF NEVADA

LYFT, INC.,
Petitioner,
vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE
MARK R. DENTON, DISTRICT JUDGE,
Respondents,
and
KALENA DAVIS,
Real Party in Interest.

No. 82148

FILED

DEC 31 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER DIRECTING ANSWER

This original petition for a writ of mandamus challenges a district court order overruling an objection to the discovery commissioner's recommendation that real party in interest's counsel be allowed to observe and record an NRCP 35 examination.

Having reviewed the petition, it appears that an answer may assist this court in resolving this matter. Therefore, real party in interest, on behalf of respondents, shall have 28 days from the date of this order to file and serve an answer, including authorities, against issuance of the requested writ. In addition to addressing the merits of the petition in his answer, real party in interest should also address the propriety of writ relief.

Petitioner shall have 14 days from service of the answer to file and serve any reply.

It is so ORDERED.

Pickering, A.C.J.
Pickering

Hardesty, J.
Hardesty

Silver, J.
Silver

cc: Hon. Mark R. Denton, District Judge
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Clear Counsel Law Group
Eighth District Court Clerk

EXHIBIT M

Heather S. Smith
CLERK OF THE COURT

1 **SAO**
Jared R. Richards, Esq.
2 Nevada Bar No. 11254
Dustin E. Birch, Esq.
3 Nevada Bar No. 10517
CLEAR COUNSEL LAW GROUP
4 1671 W. Horizon Ridge Parkway, Suite 200
Henderson, NV 89012
5 (702) 476-5900
(702) 924-0709 (Fax)
6 jared@clearcounsel.com
dustin@clearcounsel.com
7 *Attorneys for Plaintiff*
8 *Kalena Davis*

9 DISTRICT COURT
10 CLARK COUNTY, NEVADA

11 KALENA DAVIS,

12 Plaintiff,

13 vs.

CASE NO: A-18-777455-C

DEPT. NO: XIII

14 ADAM DERON BRIDEWELL, an
15 individual; LYFT, INC., a foreign
16 corporation; THE HERTZ CORPORATION,
a foreign corporation; DOE OWNERS I
17 through X, and ROE LEGAL ENTITIES I
through X, inclusive,

18 Defendants.

19 **STIPULATION AND ORDER TO STAY DISCOVERY DEADLINES AND TRIAL ORDER**

20 IT IS HEREBY STIPULATED, by and between Plaintiff KALENA DAVIS, through his attorneys
21 of record, CLEAR COUNSEL LAW GROUP, and Defendants ADAM DERON BRIDEWELL, through his
22 attorneys HARPER | SELIM, LYFT, INC., and THE HERTZ CORPORATION, by and through their
23 attorneys of record LEWIS BRISBOIS BISGAARD & SMITH, LLP, that the deadlines governed by the
24 current trial order and the current discovery scheduling order shall be stayed pending the outcome of the
25 Petition for Writ of Mandamus filed by Defendant Lyft, Inc. with the Nevada Supreme Court on December
26 2, 2020.

27 Because this resolves Defendant Lyft's pending Motion to Stay and Defendant Bridewell's joinder
28

1 thereto, the parties stipulate that that motion and associated briefing be withdrawn.

2 DATED this 7th day of January 2021

DATED this 7th day of January 2021

3 CLEAR COUNSEL LAW GROUP

HARPER | SELIM

4 /s/ Jared R. Richards

/s/ Justin Gourley

5 _____
6 Jared R. Richards, Esq.
7 Nevada Bar No. 11254
8 Dustin E. Birch, Esq.
9 Nevada Bar No. 10517
10 1671 W. Horizon Ridge Pkwy, Suite 200
11 Henderson, NV 89012
12 *Attorneys for Plaintiff Kalena Davis*

James E. Harper, Esq.
Nevada Bar No. 9822
Justin Gourley, Esq.
Nevada Bar No. 11976
1707 Village Center Circle, Suite 140
Las Vegas, NV 89134
Attorneys for Defendant Adam Deron Bridewell

13 DATED this 7th day of January 2021


14 LEWIS BRISBOIS BISGAARD & SMITH, LLP

15 /s/ Blake A. Doerr

16 _____
17 Matthew A. Cavanaugh, Esq.
18 Nevada Bar No. 11077
19 Blake A. Doerr, Esq.
20 Nevada Bar No. 9001
21 6385 S. Rainbow Boulevard, Suite 600
22 Las Vegas, NV 89118
23 *Attorneys for Defendant Lyft, Inc. and The Hertz*
24 *Corporation*

Dated this 7th day of January, 2021

25 IT IS SO FURTHER ORDERED.



26 Respectfully submitted by:

98B EF9 109A AA7A
Mark R. Denton
District Court Judge

27 CLEAR COUNSEL LAW GROUP

28 /s/ Jared R. Richards

Jared R. Richards, Esq.
Nevada Bar No. 11254
Dustin E. Birch, Esq.
Nevada Bar No. 10517
1617 W. Horizon Ridge Parkway, Suite 200
Henderson, NV 89012
Attorneys for Plaintiff Kalena Davis

Terri Szostek

To: Jared Richards
Subject: RE: Davis v. Bridewell

From: Justin Gourley <justin@harperselim.com>
Sent: Wednesday, January 6, 2021 9:04 AM
To: Doerr, Blake <Blake.Doerr@lewisbrisbois.com>; Jared Richards <jared@clearcounsel.com>
Cc: Revzin, Jason <Jason.Revzin@lewisbrisbois.com>
Subject: RE: Davis v. Bridewell

[EXTERNAL]
Jared,

You can affix mine as well.

Thanks,
JUSTIN GOURLEY, ESQ.
HARPER | SELIM
1935 Village Center Circle
Las Vegas, Nevada 89134
P: (702) 948-9240
F: (702) 778-6600
E: justin@harperselim.com

From: Doerr, Blake <Blake.Doerr@lewisbrisbois.com>
Sent: Wednesday, January 6, 2021 8:54 AM
To: Jared Richards <jared@clearcounsel.com>
Cc: Revzin, Jason <Jason.Revzin@lewisbrisbois.com>; Justin Gourley <justin@harperselim.com>
Subject: RE: Davis v. Bridewell

Jared,
You may affix my e-signature to the stip.
Blake



Blake A. Doerr
Partner
Blake.Doerr@lewisbrisbois.com
T: 702.693.4302 F: 702.893.3789

6385 South Rainbow Blvd., Suite 600, Las Vegas, NV 89118 | LewisBrisbois.com

Representing clients from coast to coast. View our locations nationwide.

This e-mail may contain or attach privileged, confidential or protected information intended only for the use of the intended recipient. If you are not the

1 CSERV

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA

4
5
6 Kalena Davis, Plaintiff(s)

CASE NO: A-18-777455-C

7 vs.

DEPT. NO. Department 13

8 Adam Bridewell, Defendant(s)
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Stipulation and Order was served via the court's electronic eFile system
13 to all recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 1/7/2021

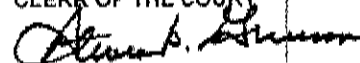
15 Karen Berk	kmb@thorndal.com
16 Lorrie Johnson	ldj@thorndal.com
17 Michael Hetey	mch@thorndal.com
18 Meghan Goodwin	mmg@thorndal.com
19 Master Calendar	calendar@thorndal.com
20 Jason Revzin	jason.revzin@lewisbrisbois.com
21 Terri Szostek	terri@clearcounsel.com
22 Jared Richards	jared@clearcounsel.com
23 Stefanie Mitchell	sdm@thorndal.com
24 Blake Doerr	blake.doerr@lewisbrisbois.com
25 Carrie Dunham	carrie.dunham@lewisbrisbois.com

26
27
28
MOT294

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Justin Gourley	eservice@harperselim.com
Beth Raymond	beth@clearcounsel.com
John Yurasits	john@clearcounsel.com
Dustin Birch	dustin@clearcounsel.com
Abigail Prince	abigail.prince@lewisbrisbois.com
Case Filings	casefilings@clearcounsel.com
Shea Billadeau	shea@clearcounsel.com
Billi Montijo	billi.montijo@lewisbrisbois.com
Noah Cicero	noah@clearcounsel.com

EXHIBIT N



1 **DCRR**
2 FELICIA GALATI, ESQ.
3 Nevada Bar No. 007341
4 OLSON CANNON GORMLEY & STOBERSKI
5 9950 West Cheyenne Avenue
6 Las Vegas, NV 89129
7 Phone: 702-384-4012
8 Fax: 702-383-0701
9 fgalati@ocgas.com
10 Attorney for Defendant
11 FERRELLGAS, INC.

12 MICHAEL C. MCMULLEN, ESQ.
13 Missouri Bar No. 33211 *Pro Hac Vice*
14 GREGORIO V. SILVA, ESQ.
15 Nevada Bar No. 13583
16 BAKER, STERCHI, COWDEN & RICE, LLC
17 2400 Pershing Road, Suite 500
18 Kansas City, MO 64108
19 Phone: 816-474-2121
20 Fax: 816-474-0288
21 mmcmullen@bscr-law.com
22 gsilva@bscr-law.com
23 Attorneys for Defendant
24 FERRELLGAS, INC.

15 DISTRICT COURT

16 CLARK COUNTY, NEVADA

17 JOSHUA GREEN;

18 Plaintiff,

19 vs.

20 FERRELLGAS, INC. et al.,

21 Defendants.

CASE NO.: A-19-795381-C
DEPT NO.: XXXI

Discovery Commissioner's Report and
Recommendations

22
23 AND RELATED ACTIONS
24
25
26
27
28

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

Time of Hearing: 9:00 a.m.

Attorneys for Defendant Ferrellgas, Inc.: Gregorio V. Silva, Esq. of BAKER STERCHI
COWDEN & RICE and Felicia Galati, Esq. of OLSON CANNON GORMLEY &
STOBERSKI

Attorney for Defendant Carl Kleisner: Gina Winspear, Esq. of DENNETT WINSPEAR.

1. FINDINGS

- 2

1 7. Nevada Revised Statute 52.380 provides the right to have an observer attend a
2 mental or physical examination, but precludes an observer from participating in or disrupting
3 a mental or physical examination.
4

5 8. There is a clear conflict between the language of NRCP 35 and NRS 52.380.

6 9. The Court is tasked with reading NRCP 35 in conjunction with NRS 52.380.

7 10. The Court finds that under NRS 52.380 Plaintiff will be allowed to have an
8 observer present during any psychological or neuropsychological examination in this matter.
9

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

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

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

16 14. The Court will not limit Defendants' examiner from inquiring generally into
17 Plaintiff's pre-incident mental condition, but the examiner can only discuss treatment for
18 Plaintiff's mental health treatment for the five years prior to the incident.
19

20 15. The Court will not limit Defendants' examiner from inquiring generally into
21 Plaintiff's pre-incident physical condition.
22

23 16. The Court will not limit inquiries by Defendants' examiner into Plaintiff's
24 current conditions, symptoms, and complaints that are issue in this litigation.

25 17. The Court will not preclude Defendants' examiner from inquiring if Plaintiff
26 has a past or current history of an inability to focus.
27
28

1 18. The Court will not preclude Defendants' examiner from inquiring if Plaintiff
2 has a history of memory issues.

3 19. The Court will not preclude Defendants' examiner from inquiring if Plaintiff
4 had any prior mental conditions.

5 20. The Court will not preclude Defendants' examiner from inquiring generally
6 about Plaintiff's life before the incident including education, work and training.

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

9 22. The Court will not allow Defendants' examiner to conduct a second deposition
10 regarding liability related to the incident.

11 23. With regard to the incident, the Court will allow Defendants' examiner to
12 question Plaintiff regarding what occurred on the day of the incident from the time of the flash
13 fire forward.

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

16 25. Defendant argues that Plaintiff's Rule 16.1 disclosures and medical records do
17 not align with the contentions of Plaintiff's counsel regarding neurological injuries and a
18 traumatic brain injury allegation.

19 26. The Parties dispute what type of Rule 35 examination is warranted in this case.

20 27. If Plaintiff is claiming a loss of focus and memory loss, the Commissioner will
21 allow a neuropsychological examination.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

IT IS THEREFORE RECOMMENDED that Defendants' Motion to Order an NRCP
35 Examination is GRANTED in part and DENIED in part.

IT IS FURTHER RECOMMENDED that Plaintiff shall be Ordered to appear for a Rule 35 examination at the office of Dr. Lewis Etcoff.

IT IS FURTHER RECOMMENDED that Plaintiff be allowed to have an observer present during the Rule 35 examination pursuant to NRS 52.380.

IT IS FURTHER RECOMMENDED that Plaintiff be allowed to have an audio recording made of the Rule 35 examination pursuant to NRS 52.380.

IT IS FURTHER RECOMMENDED that Defendants' examiner shall be allowed to inquire into Plaintiff's mental condition before the incident, and Plaintiff's general physical condition before the incident. The examiner may inquire as to Plaintiff's medical treatment for the five years prior to the incident.

IT IS FURTHER RECOMMENDED that Defendants' examiner shall be allowed to inquire into Plaintiff's life events prior to and after the incident.


IT IS FURTHER RECOMMENDED that Defendants' examiner shall be allowed to inquire into Plaintiff's mental and physical condition since the incident occurred.

IT IS FURTHER RECOMMENDED that Defendants' examiner shall be allowed to inquire into Plaintiff's history with regard to inability to focus and memory issues.

IT IS FURTHER RECOMMENDED that the parties shall appear before the Discovery Commissioner on December 10, 2020 at 10:00 a.m. to resolve the issue of whether Plaintiff is alleging neurological issues related to this incident.

1 The Discovery Commissioner met with counsel and discussed the issues noted
2 above. Having reviewed the materials offered in support of this recommendation, she
3 hereby submits the above recommendations.

4
5 DATED this 21st day of December 2020.



DISCOVERY COMMISSIONER

7
8 Submitted by
9 BAKER STERCHI COWDEN & RICE

10 /s/ Gregorio V. Silva

GREGORIO V. SILVA, ESQ.

Nevada Bar No. 13583

BAKER, STERCHI, COWDEN & RICE, LLC

2400 Pershing Road, Suite 500

Kansas City, MO 64108

13 Approved as to form and content

14 H&P Law

15 /s/ Matt G. Pfau

Matt G. Pfau, ESQ.

Nevada Bar No. 11439

H&P Law

Attorneys for Plaintiff,

Joshua Green

19 DENNETT WINSPEAR

20 /s/ Gina Winspear

Gina Gilbert Winspear, ESQ.

Nevada Bar No. 5552

Dennett Winspear

Attorney for Defendant

Carl J. Kleisner

24 PYATT, SILVESTRI

25 /s/ Steven M. Goldstein

Steven M. Goldstein, ESQ.

Nevada Bar No. 6318

Pyatt Silvestri

Attorneys for Defendant

Mario Gonzalez

1 NOTICE

2 Pursuant to NRCP 16.3(c)(2), you are hereby notified that within fourteen (14) days after
3 being served with a report any party may file and serve written objections to the
4 recommendations. Written authorities may be filed with objections, but are not
5 mandatory. If written authorities are filed, any other party may file and serve responding
6 authorities within seven (7) days after being served with objections.

7 **Objection time will expire on** Jan 5th 2021 ~~2020~~

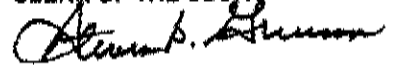
8 A copy of the foregoing Discovery Commissioner's Report was:

9 Electronically filed and served counsel on Oct. 22nd, 2020, Pursuant to
10 N.E.F.C.R. Rule 9.

11 By Natilib Simonette
12 COMMISSIONER DESIGNEE
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

FELICIA GALATI, ESQ.

EXHIBIT O



1 **OPP**

2 Marjorie L. Hauf, Esq.
3 Nevada Bar No.: 8111
4 Matthew G. Pfau, Esq.
5 Nevada Bar No.: 11439
6 H&P LAW
7 8950 W Tropicana Ave., #1
8 Las Vegas, NV 89147
9 702 598 4529 TEL
10 702 598 3626 FAX
11 mhauf@courtroomproven.com
12 mpfau@courtroomproven.com

13 Attorneys for Plaintiff,
14 *Joshua Green*

15 DISTRICT COURT
16 CLARK COUNTY, NEVADA

17 * * *

18 **Joshua Green**, an individual,

19 Plaintiff,

20 vs.

21 **Ferrellgas, Inc.**, a foreign
22 corporation; **Mario S. Gonzales**, an
23 individual; **Carl J. Kleisner**, an
24 individual; Does 1 through XXX,
25 inclusive and Roes Business Entities 1
26 through XXX, inclusive

27 Defendants.

28 **Mario S. Gonzalez**, an individual;

Cross-Claimant,

vs.

Ferrellgas, Inc., a foreign
corporation; **Carl J. Kleisner**, an
individual; DOES 1 through 100
inclusive; and ROE Corporations 101
through 200;

Case No.: A-19-795381-C
Dept. No.: XXXI

**Plaintiff, Joshua Green's Opposition
to Defendants' Motion to Stay Case
Pending Writ of Mandamus on
Order of Shortening Time**

Hearing date: April 15, 2021
Hearing time: 9:00 a.m.

MOT305

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Cross-Defendants.

Mario S. Gonzalez, an individual;

Third-Party Plaintiff,

vs.

BBQ Guys Manufacturing, LLC dba Blaze Outdoor Products., a foreign corporation; **Home Depot USA, Inc.**, a foreign corporation; **KSUN Manufacturing**, a foreign corporation; Does 200 through 300 inclusive; and ROE Corporation 301 through 400;

Third-Party Defendants.

Ferrellgas, Inc., a foreign corporation;

Counter-Claimant,

vs.

Mario S. Gonzalez, an individual; DOES 1 through 100 inclusive; and ROE Corporations 101 through 200;

Counter-Defendants

Carl J. Kleisner, an individual;

Counter-Claimant,

vs.

Mario S. Gonzalez, an individual;
DOES 1 through 100 inclusive; and
ROE Corporations 101 through 200;

Counter-Defendants.

Plaintiff, Joshua Green, through his attorneys of record, Marjorie L. Hauf, Esq. and Matthew G. Pfau, Esq. of H & P LAW, hereby files this Opposition to Defendants' Motion to Stay Case Pending Writ of Mandamus on Order of Shortening Time.

This Opposition is made and based upon the pleadings and papers on file herein, the following Memorandum of Points and Authorities, and upon all oral argument which may be entertained at the time of the hearing of this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

Introduction

Defendants filed a single affidavit¹ improperly titled as a Motion. As Defendants and this Court are aware, per EDCR 2.20 motions must be fully briefed with points and authorities to be considered.² Motions with the absence of such memorandums will "construed that the motion is not meritorious."³ Because Defendants failed to present any actual arguments, the obvious course is denying their motion; however, Plaintiff will address the *Fritz Hansen* factors in anticipation of Defendants arguments in their reply on

¹ See Defendants' Motion to Stay Case Pending Writ of Mandamus on Order of Shortening Time, as Exhibit 1. This motion is void of points and authorities and appears to consist of only an Affidavit of Felecia Galati, Esq.

² EDCR 2.20(i).

³ EDCR 2.20(c).

the same.

II.

Law and Argument

A party may seek stay in the District Court pending an appeal or writ. In determining if an issue is ripe for Stay, the Court generally determines the following factors: (1) whether the object of the appeal or writ petition will be defeated if the stay is denied (2) whether appellant/petitioner will suffer irreparable or serious injury if the stay is denied (3) whether respondent/real party in interest will suffer irreparable or serious injury if the stay is granted; and (4) whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition.⁴

A. The purpose of Defendants' writ will not be defeated.

Defendants filed a Writ of Mandamus on March 26th.⁵ The Nevada Supreme Court has not yet accepted Defendants Writ nor directed Real Party in Interest to answer. As Defendants discussed in their affidavit,⁶ the Nevada Supreme Court already has the *Moats v. Eighth Judicial District Court* on their docket addressing this issue. Plaintiff's counsel is also aware *Lyft v. Davis*,⁷ which also explores the conflict between NRS 52.380 and NRCP 35. Because the Nevada Supreme Court has two separate writs concurrently on this issue, Defendants' writ may be denied pending resolution of either *Moats* or *Lyft*.

Further, the purpose Defendants' Writ will *not* be defeated if this case continues. Defendants Writ solely explores NRS 52.380 and NRCP 35.

⁴ *Fritz Hansen A/S v. Eighth Judicial Dist. Court*, 116 Nev. 650, 6 P.3d 982, 2000 Nev. LEXIS 87, 116 Nev. Adv. Rep. 76

⁵ See Defendants' Petition for Writ of Manadamus, as Exhibit 2.

⁶ Exhibit 1 at 3:12-17.

⁷ *Lyft, Inc. v. Dis. Ct. (Davis)* Docket 82148.

Therefore, the *only* procedural posture that is affected is Plaintiff, Joshua Green's pending Defense Medical Examination. Although it has not yet been noticed, the parties have already tentatively scheduled Josh's Rule 35 Examination for July 21st—**117 days** from the day of filing their motion to stay.⁸ *Moats* or *Lyft* may very well be resolved in that significant time frame.

There is no substantial justification for staying the case in its entirety. Defendants cannot muster any evidence that supports why outstanding discovery, including (amongst other things), disclosure of Ferrellgas' nationwide incident reports,⁹ percipient witness depositions,¹⁰ and expert depositions¹¹ will defeat their Writ's purpose. None of that discovery even remotely affects the pending Defense Medical Examination. In fact, to even attempt to argue it does would be entirely nonsensical. Defendants are clearly just making yet *another* last-ditch effort to delay this case.

B. Petitioners do not experience any harm or injury if the stay is denied.

Again, the *only* issues briefed in Defendants Writ are the conflict between NRS 52.380 and NRCP 35 and defining "good cause" for an observer or audio recording under NRCP 35.¹² Defendants Writ does not seek to address any other discovery disputes, procedural posture, statutory rights, etc. There is no harm in continuing discovery on all other matters outside the Defense Medical Examination.

In her affidavit, Ms. Galati claims—without providing any justification—"the

⁸ See Email to Gregorio Silva, Esq. dated March 30, 2021, as Exhibit 3.

⁹ See Letter to Discovery Commissioner dated March 24, 2021, as Exhibit 4. This letter includes a proposed Discovery Commissioner's Report and Recommendations that requires Ferrellgas to disclose nationwide incident reports. Ferrellgas refused to sign, and the matter is pending an teleconference with Commissioner Truman.

¹⁰ Plaintiff's counsel has noticed the deposition of Ferrellgas employee, Sam Brown set to take place April 28, 2021.

¹¹ The parties have multiple outstanding requests for depositions of experts.

¹² Exhibit 2.

1 NRCP 35 Examination is relevant to all Plaintiff's claims and damages."¹³ Josh's
2 Second Amended Complaint asserts claims for Negligence, Negligent Training,
3 Negligent Maintenance, Negligent Supervision, and Punitive Damages.¹⁴ The
4 Defense Medical Examination seeks to undermine Josh's causation and
5 damages associated with these claims; however, it does not speak to the
6 elements of duty and breach. There is still *substantial* discovery pending that
7 will assist a trier of fact on these issues and absolutely no harm in pursuing it
8 while Defendants await their Rule 35 Examination.

9
10 **C. Respondent, Josh, will be irreparably harmed by the stay.**

11 Thus far, Defendants have filed three separate motions to extend
12 discovery, forced a Settlement Conference despite Plaintiff's counsel's
13 representations it would not be meaningful since it was well established that
14 the parties vastly differed on their valuations of the case, filed a repeat Motion
15 to Dismiss after this Court had already adjudicated on the issue of Plaintiff's
16 Negligent, Training, Maintenance and Supervision claims, and refused to
17 participate in discovery requests in good faith. The instant motion is
18 Defendants' latest installment in delaying this matter. Defendants want this
19 Court to enter an order staying **an entire case** while the Nevada Supreme
20 Court adheres to the NRS 52.380 and NRCP 35. Such *undeniably* causes Josh
21 irreparable harm. He will be forced to halt *all* discovery for potentially months.
22 Discovery on matters that are entirely **irrelevant** to the Defense Medical
23 Examination.

24 The first rule of Nevada Civil Procedure is that the rules "shall be construed
25 and administered to secure the just, speedy, and inexpensive determination
26

27 _____
28 ¹³ Exhibit 1.

¹⁴ Second. Amend. Compl.

of every action.”¹⁵ The second listed rule of the Eighth Judicial District Court Rules reads similarly: These rules “must be liberally construed to secure the proper and efficient administration of the business and affairs of the court and to promote and facilitate the administration of justice.”¹⁶ There is nothing just, speedy, inexpensive, proper, or efficient about staying Josh’s case pending resolution of the Writ. That will cause inexcusable delay and further bar Josh from recovering for the *horrific* injuries he sustained from Defendants’ actions.

What should be clear to this Court is that Defendants wish to block Josh from obtaining the nationwide incident reports ordered by the Discovery Commissioner¹⁷ and conducting depositions they presume will be detrimental to their case.¹⁸ That is the only logical explanation for attempting to halt all discovery based on an unaccepted writ and an examination more than three months away.

D. NRS 52.380 creates a substantive right and Petitioners are unlikely to prevail on their Writ.

NRS 52.380 is representative of a substantive, inherent right under Nevada law. This is evidenced through the Nevada Supreme Court’s depiction of the relationship between court rules and statutes:

The judiciary has the inherent power to govern its own procedures, and this power includes the right to promulgate rules of appellate procedure as provided by law. NRS 2.120; *Goldberg v. District Court*, 93 Nev. 614, 572 P.2d 521 (1977). Although such rules may not conflict with the state constitution or “abridge, enlarge or modify any substantive right,” NRS 2.120, the authority of the judiciary to promulgate procedural rules is independent of legislative power, and may not be diminished or compromised by the

¹⁵ N.R.C.P. 1.

¹⁶ EDCR 1.10. The first listed rule, 1.01, dictates how the rules are to be known, cited, and abbreviated.

¹⁷ Exhibit 4.

¹⁸ Plaintiff noticed the deposition of Ferrellgas safety manager, Sam Brown, to take place on April 28th. While it is merely conjecture at this time, Plaintiff suspects Mr. Brown’s testimony will assist his case.

1 legislature. *Goldberg v. District Court, supra*. We have held that the
2 legislature may not enact a procedural statute that conflicts with a pre-
3 existing procedural rule, without violating the doctrine of separation of
4 powers, and that such a statute is of no effect. *Lindauer v. Allen*, 85 Nev. 430,
5 456 P.2d 851 (1969). Furthermore, where, as here, a rule of procedure is
promulgated in conflict with a pre-existing procedural statute, the rule
supersedes the statute and controls. See *State v. Griffith*, 539 P.2d 604
(Idaho 1975); *State v. Doe*, 566 P.2d 117 (N.M. Ct.App. 1977). See also *Page v.*
Clark, 592 P.2d 792 (Colo. 1979).¹⁹

6 This relationship defines the judiciary as the right to govern procedures,
7 while legislature has the exclusive right to govern **substance** of the law. This
8 distinction is strictly afforded in the Separation of Powers
9 doctrine—recognized in the Nevada State Constitution.²⁰ *State v. Connery*
10 defines the legislature as controlling when it conflicts with a pre-existing
11 procedural rule.²¹

12 Further, this Court appropriately addressed “good cause” in its March 2nd
13 order. The nature of a Rule 35 Exam is inherently adversarial. Rule 35 Exams
14 are conducted at the request of Defense firms; they are performed by doctors
15 chosen and *paid* by the Defense. Defense Medical doctors often admit there
16 is no doctor-patient relationship between examiner and examinee. A Florida
17 court recognized that these exams are less like a “medical patient seeing [their]
18 doctor” and “more akin to a litigant attending a deposition.”²² This Court does
19 not force litigants to attend depositions without representation. They are
20 afforded to *right* to be protected by their attorney. So, the analogy is clear.
21 “Good cause” inherently exists when an adversarial doctor is examining a
22 litigant. Petitioners are unlikely to succeed on their Writ.

23
24
25
26 ¹⁹ *State v. Connery*, 99 Nev. 342, 661 P.2d 1298, 1983 Nev. LEXIS 441.

27 ²⁰ *Berkson v. Lepome*, 126 Nev. 492, 245 P.3d 560, 2010 Nev. LEXIS 50, 126 Nev. Adv. Rep. 46.

28 ²¹ *Id.*

²² *Davanzo v. Carnival Cruise Lines*, 2014 U.S. Dist. LEXIS 49061, 2014 AMC 1361, 2014 WL 1385729.

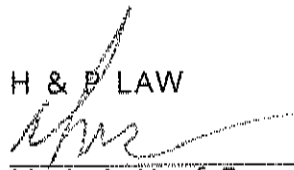
1
2
3 **III.**

4 **Conclusion**

5 Based on the foregoing, Plaintiff respectfully requests this Court deny
6 Defendants' Motion to Stay Case Pending Writ of Mandamus on Order of
7 Shortening Time.

8 DATED this 9th day of April 2021.

H & P LAW

9 
10 Marjorie Hauf, Esq.
11 Nevada Bar No.: 8111
12 Matthew G. Pfau, Esq.
13 Nevada Bar No.: 11439

14 Attorneys for Plaintiff,
15 Joshua Green

Certificate of Service

I hereby certify that on the 9th day of April 2021, service of the foregoing
Plaintiff, Joshua Green's Opposition to Defendants' Motion to Stay Case
Pending Writ of Mandamus on Order of Shortening Time was made by
 required electronic service to the following individuals:

Felicia Galati, Esq.
 Nevada Bar No.: 007341
 OLSON, CANNON, GORMLEY,
 ANGULO & STROBERSKI
 9950 West Cheyenne Avenue
 Las Vegas, Nevada 89129
 T: 702-384-4012; and
 Michael McMullen, Esq.
 BAKER STERCHI COWDEN & RICE
 2400 Pershing Road, Suite 500
 Kansas City, Missouri 64108
 T: 816-474-2121

James P.C. Silvestri, Esq.
 Nevada Bar No.: 3603
 Steven M. Goldstein, Esq.
 Nevada Bar No.: 006318
 PYATT SILVERSTRI
 700 Bridger Avenue, Suite 600
 Las Vegas, Nevada 89101
 Tel: 702-477-0088

Attorneys for Defendant,
Mario S. Gonzalez

Attorneys for Defendant,
Ferrellgas, Inc.

Gina Gilbert Winspear, Esq.
 Nevada Bar No.: 005552
 DENNETT WINSPEAR, LLP
 3301 North Buffalo Drive, Suite 195
 Las Vegas, Nevada 89129
 T: 702-839-1100

Attorney for Defendant,
Carl J. Kleisner

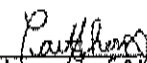
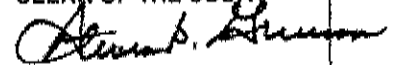

 An Employee of H & P LAW

EXHIBIT "1"



1 FELICIA GALATI, ESQ.
Nevada Bar No. 007341
2 OLSON CANNON GORMLEY & STOBERSKI
9950 West Cheyenne Avenue
3 Las Vegas, NV 89129
Phone: 702-384-4012
4 Fax: 702-383-0701
fgalati@ocgas.com
5 Attorney for Defendant
FERRELLGAS, INC.

6
7 MICHAEL C. MCMULLEN, ESQ.
Missouri Bar No. 33211
8 BAKER, STERCHI, COWDEN & RICE, LLC
2400 Pershing Road, Suite 500
9 Kansas City, MO 64108
Phone: 816-471-2121
10 Fax: 816-472-0288
mcmullen@bscr-law.com
11 Attorney for Defendant
FERRELLGAS, INC.

12 DISTRICT COURT

Hearing Date: April 15, 2021

13 CLARK COUNTY, NEVADA

Hearing Time: 9:00 a.m.

14 JOSHUA GREEN;

15 Plaintiff,

16 vs.

17 FERRELLGAS, INC. et al.,

18 Defendants.

CASE NO.: A-19-795381-C
DEPT NO.: XXXI

19 DEFENDANTS' MOTION TO STAY
20 CASE PENDING WRIT OF
21 MANDAMUS ON AN ORDER
22 SHORTENING TIME

(HEARING REQUESTED)

23 AND RELATED ACTIONS

24 COME NOW Defendants FERRELLGAS, INC., MARIO GONZALEZ and CARL
25 KLEISNER, by and through their attorneys of record, and hereby submit their Motion To Stay
26 Case Pending Writ Of Mandamus On An Order Shortening Time. This Motion is made and based
27 upon all papers, pleadings and records on file herein, the attached Points and Authorities, and
28 such oral argument, testimony and evidence as the Court may entertain.

AFFIDAVIT OF FELICIA GALATI, ESQ.

STATE OF NEVADA)
)
COUNTY OF CLARK)

FELICIA GALATI, ESQ., being first duly sworn, deposes and states:

1. Affiant is a shareholder of the law firm of Olson Cannon Gormley & Stoberski and is duly licensed to practice law before all the Courts in the State of Nevada.

2. Affiant is one of the attorneys representing the interests of Defendant Ferrellgas, Inc. in Green v. Ferrellgas, Inc., et al., Case No. A-19-795381-C.

3. The facts set forth in this affidavit are known to me personally, or are based upon my information and belief, and if called to do so, I would competently testify under oath regarding the same.

4. On December 22, 2020, the Discovery Commissioner recommended an NRCP 35 Psychological Examination of Plaintiff Joshua Green and determined, pursuant to NRS 52.380, that: (1) Plaintiff will be permitted to have an observer at the Examination; and (2) Plaintiff will be allowed to audio record the Examination.

5. On January 12, 2021, the Discovery Commissioner issued further recommendations consistent with the above.

6. Defendants' Objection came before this Court for hearing on January 28, 2021. On March 2, 2021, this Court entered an Order denying the Objection and affirming the two Discovery Commissioner Reports and Recommendations dated December 22, 2020 and January 12, 2021 as modified finding Plaintiff established good cause for an observer at and an audio recording of the NRCP 35 pursuant to NRCP 35(a)(4)(A)(ii) and NRCP 35(a)(3). This Court also ordered that the NRCP 35 Examination occur on March 3, 2021, the next day, which could not be done.

1 7. Defendants respectfully believe that this Court's March 2, 2021 Order is clearly
2 erroneous and are filing a file a Writ of Mandamus in the Nevada Supreme Court regarding
3 the same.

4 8. Rebuttal expert disclosures are due on March 30, 2021. Discovery closes on April
5 23, 2021. The current trial date is set for August 2, 2021. If the Examination moves forward
6 prior to resolution of the Writ of Mandamus, Defendants will be irreparably harmed. On
7 3/23/2021, the parties attended a hearing and this Court extended the above deadlines, which
8 will be the subject of a new order. However, the Writ likely will not be decided by the date of
9 the new deadline for the Rule 35 Examination considering briefing deadlines.

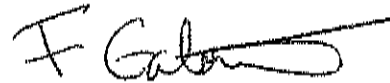
10 9. Based on all the above, Defendants request this Court issue an Order staying this
11 case in its entirety because the NRCP 35 Examination is relevant to all Plaintiff's claims and
12 damages. Even if this case were to proceed piecemeal, it would not get very far since the NRCP
13 35 Examination cannot be done until the Nevada Supreme Court decides the Writ. Fortunately,
14 Moats v. Dist. Ct. (Burgess), Case No. 81912, also pertaining to NRCP 35 and NRS 52.380
15 issues regarding the presence of an observer and an audio recording of the examination, has been
16 pending before the Nevada Supreme Court since October 9, 2020. Some briefs have been filed
17 therein. The reply brief was due on March 22, 2021. As such, the Nevada Supreme Court is
18 aware of the issues relating to NRCP 35 and will likely consider them in Moats prior to this
19 matter. Depending on the scope of the Nevada Supreme Court's determination in Moats, the
20 issues herein might be addressed prior to the time full briefing might be made in this matter.
21 Therefore, a stay of the entire case is appropriate.

22 10. Pursuant to EDCR 2.26, this Motion to Stay is filed on Order of Shortening Time
23 given the impossibility of performing the NRCP 35 Examination and/or meeting the related
24

1 discovery deadlines indicated above given the Writ of Mandamus and necessary resolution of
2 the same.

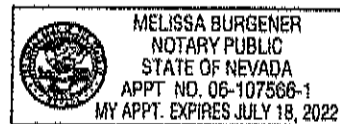
3 FURTHER AFFIANT SAITH NAUGHT.

4 DATED this 26th day of March, 2021.

5
6 

7 FELICIA GALATI

8 SUBSCRIBED AND SWORN to before
9 me this 26th day of March, 2021.



11 NOTARY PUBLIC in and for said
12 COUNTY AND STATE

13 ORDER SHORTENING TIME

14 For good cause appearing, therefore and to the satisfaction of the court, it is hereby
15 ORDERED that:

16 _____ Defendants' Motion to Stay this case is granted pending the Writ of
17 Mandamus on an Order Shortening Time; OR

18 ☒ Defendants' Motion to Stay this case will be heard on April 15,
19 2021 at 9:00 a.m. ~~xxx~~ on an order shortening time.

20
21 IT IS SO ORDERED this 7th day of ~~March~~ ^{April}, 2021.

22 Opposition must be filed and
23 served by 5:00 p.m. on
24 April 9, 2021
25 Reply must be filed and served
26 by noon on April 13, 2021

27 
28 THE HONORABLE JUDGE JOANNA S. KISHNER

1 DATED this 26th day of March, 2021.

/s/ Felicia Galati, Esq.

FELICIA GALATI, ESQ.
Nevada Bar No. 007341
OLSON CANNON GORMLEY &
STOBERSKI
9950 West Cheyenne Avenue
Las Vegas, NV 89129
fgalati@ocgas.com
Attorneys for Petitioner
FERRELLGAS, INC.
and
MICHAEL C. MCMULLEN, ESQ.
Missouri Bar No. 33211
BAKER, STERCHI, COWDEN & RICE,
LLC
2400 Pershing Road, Suite 500
Kansas City, MO 64108
mmcmullen@bscr-law.com
Attorneys for Petitioner

14 DATED this 26th day of March, 2021.

/s/ Gina Gilbert Winspear, Esq.

GINA GILBERT WINSPEAR, ESQ.
Nevada Bar No.: 005552
DENNETT WINSPEAR, LLP
3301 N. Buffalo Drive, Suite 195
Las Vegas, Nevada 89129
gwinspear@dennettwinspear.com
Attorneys for Defendant
CARL J. KLEISNER

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DATED this 26th day of March, 2021.

/s/ Steven M. Goldstein, Esq.

James P.C. Silvestri, Esq.
Nevada Bar No. 3603
Steven M. Goldstein, Esq.
Nevada Bar No. 6318
PYATT SILVESTRI
701 Bridger Avenue, Suite 600
Las Vegas, Nevada 89101
jsilvestri@pyattsilvestri.com
sgoldstein@pyattsilvestri.com
Attorneys for Defendant
MARIO S. GONZALEZ

Law Offices of
OLSON CANNON GORMLEY & STOBERSKI
A Professional Corporation
9950 West Cheyenne Avenue
Las Vegas, Nevada 89129
(702) 384-4012 Fax (702) 383-8781

CERTIFICATE OF SERVICE

On the 26th day of March, 2021, the undersigned, an employee of Olson Cannon Gormley & Stoberski, hereby served a true copy of **MOTION TO STAY CASE PENDING WRIT OF MANDAMUS ON AN ORDER SHORTENING TIME** to the parties listed below via the EFP Program, pursuant to the Court's Electronic Filing Service Order (Administrative Order 14-2) effective June 1, 2014, and or mailed:

Matthew G. Pfau, Esq.
Marjorie L. Hauf, Esq.
H&P LAW
8950 W. Tropicana Avd., #1
Las Vegas, NV 89147
mpfau@courtroomproven.com
mhauf@courtroomproven.com
Attorneys for Plaintiff

Gina Gilbert Winspear Esq.
DENNETT WINSPEAR, LLP
3301 N. Buffalo Drive, Suite 195
Las Vegas, Nevada 89129
gwinspear@dennettwinspear.com
Attorneys for Defendant
CARL J. KLEISNER

James P.C. Silvestri, Esq.
Steven M. Goldstein, Esq.
PYATT SILVESTRI
701 Bridger Avenue, Suite 600
Las Vegas, Nevada 89101
jsilvestri@pyattsilvestri.com
sgoldstein@pyattsilvestri.com
Attorneys for Defendant
MARIO S. GONZALEZ

/s/ Erika Parker

An Employee of Olson Cannon Gormley
& Stoberksi

EXHIBIT "2"

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
Mar 26 2021 04:22 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

CASE NO.

DISTRICT COURT CASE NO.

A-19-795381-C

PETITION FOR WRIT OF MANDAMUS

FELICIA GALATI, ESQ.
Nevada Bar No. 007341
OLSON CANNON GORMLEY
& STOBERSKI
9950 West Cheyenne Avenue
Las Vegas, NV 89129

and

MICHAEL C. MCMULLEN, ESQ.
Missouri Bar No. 33211
GREGORIO V. SILVA, ESQ.
Nevada No. 13583
BAKER, STERCHI, COWDEN
& RICE, LLC
2400 Pershing Road, Suite 500
Kansas City, MO 64108
Attorneys for Petitioner FERRELLGAS, INC.

GINA GILBERT WINSPEAR, ESQ.
Nevada Bar No. 005552
DENNETT WINSPEAR, LLP
3301 N. Buffalo Drive, Suite 195
Las Vegas, Nevada 89129
Attorneys for CARL J. KLEISNER

JAMES P.C. SILVESTRI, ESQ.
Nevada Bar No. 3603
STEVEN M. GOLDSTEIN, ESQ.
Nevada Bar No. 6318
701 Bridger Avenue, Suite 600
Las Vegas, Nevada 89101
Attorneys for MARIO GONZALEZ

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 SUSAN SCANN,
DISTRICT JUDGE,

and

JOSHUA GREEN, an individual,

Respondents.

CASE NO.

DISTRICT COURT CASE NO.

A-19-795381-C

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 James P.C. Silvestri, Esq. of the law firm H&P Law in the District Court and in this Court.

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

DATED this 26th day of March, 2021

/s/ Felicia Galati, Esq.

FELICIA GALATI, ESQ.
Nevada Bar No. 007341
OLSON CANNON GORMLEY &
STOBERSKI
9950 West Cheyenne Avenue
Las Vegas, NV 89129
fgalati@ocgas.com

and

MICHAEL C. MCMULLEN, ESQ.
Missouri Bar No. 33211
BAKER, STERCHI, COWDEN & RICE,
LLC
2400 Pershing Road, Suite 500
Kansas City, MO 64108
mmcmullen@bscr-law.com
Attorneys for Petitioner
FERRELLGAS, INC.

DATED this 26th day of March, 2021.

/s/ Steven M. Goldstein

STEVEN M. GOLDSTEIN, ESQ.
sgoldstein@pyattsilvestri.com
PYATT SILVESTRI
701 Bridger Avenue, Suite 600
Las Vegas, Nevada 89101
Attorneys for Defendant
MARIO S. GONZALEZ

DATED this 26th day of March, 2021.

/s/ Gina Gilbert Winspear, Esq.

GINA GILBERT WINSPEAR, ESQ.
gwinspear@dennettwinspear.com
DENNETT WINSPEAR, LLP
3301 N. Buffalo Drive, Suite 195
Las Vegas, Nevada 89129
Attorneys for Defendant
CARL J. KLEISNER

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
PETITION FOR WRIT OF MANDAMUS.....	1
I. JURISDICTION.....	3
II. ROUTING STATEMENT NRAP 17(a)(12) and NRAP 21(a)(1).....	5
III. INTRODUCTION.....	6
IV. STATEMENT OF THE ISSUES.....	7
V. STATEMENT OF THE CASE.....	7
A. FACTUAL AND PROCEDURAL BACKGROUND.....	7
VI. SUMMARY OF THE ARGUMENT.....	12
VII. ARGUMENT.....	12
A. MANDAMUS IS THE APPROPRIATE RELIEF.....	12
B. NRCP 35.....	16
C. NRS 52.380.....	19
D. THE DISTRICT COURT ABUSED ITS DISCRETION.....	20
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.....	21

2.	The District Court Clearly Abused Its Discretion In Conducting The Good Cause Analysis And Allowing The Presence Of An Observer At And An Audio Recording Of the NRCP 35 Psychological/Neuropsychological Examination.....	22
3.	The District Court Clearly Abused Its Discretion In Accepting Plaintiff's NRCP 35 Nullification Argument.....	26
4.	Plaintiff Waived Any Good Cause Argument.....	29
5.	The District Court Clearly Abused Its Discretion By Conditioning The NRCP Examination On The Requirement That Dr. Etcoff Or Any Other Licensed Psychologist/Neuropsychologist Violate The Rules And Ethics Of His Profession.....	30
6.	The District Court's Ruling Creates An Unfair Advantage For Plaintiff That Irreparably, Extremely and Unfairly Prejudices Defendants.....	31
VIII. CONCLUSION AND RELIEF SOUGHT.....		33

TABLE OF AUTHORITIES

Cases

<u>Achrem v. Expressway Plaza Ltd.</u> , 112 Nev. 737, 742, 917 P.2d 447, 450 (1996)	29
<u>Aspen Fin. Servs., Inc. v. Eighth Judicial Dist. Court</u> , 129 Nev. 878, 882, 313 P.3d 875, 878 (2013)	13
<u>Bates v. Chronister</u> , 100 Nev. 675, 682, 691 P.2d 865, 870 (1984)	29
<u>Bradley v. Romeo</u> , 102 Nev. 103, 105, 716 P.2d 227, 228 (1986).....	30
<u>Cannon v. Taylor</u> , 88 Nev. 89, 92, 493 P.2d 1313, 1314-15 (1972).....	29
<u>Chowdhury v. NLVH, Inc.</u> , 111 Nev. 560, 562-63, 893 P.2d 385, 387 (1995).....	29
<u>Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Court</u> , 128 Nev. Adv. Op. 21, 276 P.3d 246, 249 (2012)....	13
<u>Dezzani v. Kern & Assocs., Ltd.</u> , 134 Nev. 61, 65, 412 P.3d 56, 60 (2018)	29
<u>Double Diamond v. Dist. Ct.</u> , 131 Nev. Adv. Op. 57, 354 P.3d 641, 647. (2015).....	14
<u>Dresser Industries, Inc.</u> , 972 F.2d 540, 543 (5 th Cir. 1992).....	15
<u>D.R. Horton, Inc. v. Eighth Judicial Dist. Court</u> , 123 Nev. 468, 474, 168 P.3d 731, 736 (2007).....	13
<u>Executive Mgmt., Ltd. v. Ticor Title Ins. Co.</u> , 118 Nev. 46, 53, 38 P.3d 872, 876 (2002).....	21
<u>Flack v. Nutribullet, L.L.C.</u> , 333 F.R.D. 508, 513 (C.D. Cal. 2019)	22

<u>Franco v. Boston Scientific Corp.</u> , 2006 WL 3065580, at *1 (N.D. Cal. Oct. 27, 2006).....	23, 25
<u>Freteluco v. Smith's Food & Drug Centers, Inc.</u> , 336 F.R.D. 198, 202, 203 (D. Nev. 2020).....	20, 21, 22, 23, 26
<u>Gavin v. Hilton Worldwide, Inc.</u> , 291 F.R.D. 161, 165 (N.D. Cal. 2013).....	23, 25
<u>Hyde & Drath v. Baker</u> , 24 F.3d 1162, 1166 (9th Cir.1994).....	14
<u>Kapral v. Jordan</u> , 133 Nev. 1037 (Nev. App. 2017)	30
<u>Las Vegas Sands Corp. v. Eighth Judicial Dist. Court</u> , 130 Nev. Adv. Op. 61, 331 P.3d 876, 878–79 (2014).....	14
<u>Moats v. Dist. Ct. (Burgess)</u> , Case No. 81912.....	1, 2, 6, 34
<u>Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Court</u> , 132 Nev. 784, 788, 383 P.3d 246, 248 (2016).....	13
<u>Okada v. Eighth Judicial Dist. Court in & for Cty. of Clark</u> , 134 Nev. 6, 8–9, 408 P.3d 566, 569 (2018).....	12
<u>Okada v. Eighth Judicial Dist. Court in & for Cty. of Clark</u> , 131 Nev. 834, 839–40, 359 P.3d 1106, 1110–11 (2015).....	13, 14
<u>Schlagenhauf v. Holder</u> , 379 U.S. 104, 118-19, 85 S.Ct. 234-35 (1964)...	22, 23, 25
<u>Smolko v. Unimark Lowboy Trans.</u> , 327 F.R.D. 59, 63 (M.D. Penn. 2018).....	22
<u>State v. Barren</u> , 128 Nev. Adv. Op 31, 279 P.3d 182, 184 (2012).....	15
<u>Unified Sewerage Agency v. Jelco, Inc.</u> , 646 F.2d 1339, 1342, n. 1 (9 th Cir. 1981).....	15
<u>Valley Health Sys., LLC v. Eighth Judicial Dist. Court</u> , 127 Nev. 167, 171, 252 P.3d 676, 678 (2011).....	13, 14

<u>Williams v. Zellhoefer</u> , 89 Nev. 579, 580, 517 P.2d 789, 789 (1973).....	30
---	----

Rules

NRAP 17(a)(12).....	5
NRAP 21.....	1
NRAP 21(a)(1).....	5
NRAP 21(a)(5).....	37
NRCP 35.....1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 33, 34	
NRCP 35(a).....	18
NRCP 35(a)(3)..... 1, 2, 4, 5, 7, 11, 12, 14, 15, 19, 25, 26, 27, 28, 33, 34	
NRCP 35(a)(4)(A)(ii).....1, 2, 4, 5, 7, 11, 12, 14, 15,18, 19, 25, 26, 27, 28, 33, 34	

Statutes

NRS 52.380.....	1, 2, 3, 4, 5, 6, 9, 10, 11, 19, 20, 21, 24, 29
NRS 15.010.....	37

Other Authorities

Article 6, Section 4 of the Nevada Constitution.....	3
--	---

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 denying 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 the district court case until this Court decides the above issues and/or Moats v. Dist. Ct. (Burgess), Case No. 81912, relating to the conflict between NRCP 35 and NRS 52.380 as to examinations, and the applicable good cause standards under NRCP 35.

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 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, 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. 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 is a clear conflict between NRCP 35 and NRS 52.380 regarding whether an observer and audio recording are permitted during a court ordered psychological/neuropsychological evaluation and when. The Respondent district court correctly ordered that NRCP 35 is the controlling authority on these issues, but erroneously ordered that Plaintiff may have an observer present and may audio record the NRCP 35 psychological/neuropsychological examination on March 3, 2020. The district court's March 2, 2021 Order is not supported by any evidence establishing "good cause" for the presence of an observer and/or allowing an audio recording, which is required by NRCP 35(a)(4)(A)(ii) and NRCP 35(a)(3).

Also, this Court is currently considering the clear conflict between NRCP 35 and NRS 52.380 in Moats, supra on a Writ Petition filed by the same Plaintiff's counsel. There are two conflicting district court decisions regarding the attendance of an

observer and making an audio recording of the examination -- one applying NRCP 35 and the other applying NRS 52.380. The March 2, 2021 Order in this case improperly applies NRCP 35's good cause exceptions making this issue ripe of this Court's determination. 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. Rebuttal expert disclosures are due on March 30, 2021 pursuant to the parties' stipulation to be submitted to this court. Discovery closes on April 23, 2021. The current trial date is set for August 2, 2021.

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 its March 2, 2021 Order denying Defendants' Objections and affirming as modified the Discovery Commissioner Reports and Recommendations (DCRR) dated December 22, 2020, and January 12, 2021 regarding Defendants' Motion To Compel an NRCP 35. 6 Appendix (App.) 1177-85. The district court found:

In their pleadings and at the hearings, Plaintiff had presented both NRCP 35 and NRS 52.380 to the Discovery Commissioner in support of his requests. Based on the evidence presented and the specific facts of this case, the Court finds that the Recommendations in both the December 22nd and January 12th DCRRs are supported; and thus, are AFFIRMED. The pleadings set forth why there is good cause to allow the recommended pre-exam and exam procedures

as well as the breadth and scope of the exam and information to be inquired about.

Specifically, NRCP 35(a)(4)(A)(ii) and NRCP 35(a)(3) have been met in this case considering the nature of the claims presented, the lack of medical provider-patient relationship, and the other facts presented. Given the Court has found that the good cause provisions of NRCP 35 apply, and this provision allows the relief requested by Plaintiff regarding an observer and memorialization of the examination, the Court need not address an alternative basis. Accordingly, the Court finds that the Recommendations are supported by NRCP 35's good cause exception and applicable law. Thus, the DCRRs are modified to reflect affirmance of the Recommendations, but that the basis of the affirmance is NRCP 35. This Court need not and does not make any findings regarding the interplay, or lack thereof, between NRCP 35 and NRS 52.380 as the relief sought in the instant case is supported by the evidence of good cause presented pursuant to NRCP 35.

6 App. 1182-83. The district court – applying NRCP 35(a)(4)(A)(ii) and NRCP 35(a)(3) – affirmed the DCRRs finding but did so based on Plaintiff apparently establishing good cause for the presence of an observer and for an audio recording. 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. In addition, 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, the circumstances of this matter reveal that there will be irreparable harm to Defendants, parties and the public if this Court does not exercise its discretion. NRCP 35

examinations are a critical and regular aspect of civil litigation and the related good cause standards needs to be defined for the district court, parties and the public.

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

Pursuant to NRAP 17(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 these issues.

The Respondent district court erroneously ordered that, under NRCP 35(a)(4)(A)(ii) and NRCP 35(a)(3), Plaintiff demonstrated good cause to and may have an observer present at and may audio record the neuropsychological examination on March 3, 2021. Different judges within the Eighth Judicial District Court have made conflicting rulings on the same subject, under NRCP 35 and NRS

52.380, making this issue ripe for the Supreme Court's determination. See Moats, supra. 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 of NRCP 35. Also, depending on this Court's determination of the issues, this case potentially implicates issues regarding a conflict of law between the application of NRCP 35 and NRS 52.380 (one requiring good cause and the other not for the presence of an observer and for an audio recording to be made), which raises a separation of powers issue, this Petition should be heard and decided by the Supreme Court.

III. INTRODUCTION

The district court's March 2, 2021 Order denying Defendants' Objection to the Discovery Commissioner's Reports and Recommendations entered on 12/22/2020 and 1/12/2021 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 multi-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. STATEMENT OF THE CASE

A. FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of an alleged failure of a flexible gas hose which resulted in an explosion/fire on June 18, 2018. The issues before this Court relate to the presence of an observer at and the audio recording of the NRCP 35

psychological/neuropsychological examination. The relevant facts regarding this case are as follows.

On June 14, 2019, Plaintiff Joshua Green filed a First Amended Complaint against Defendants Ferrellgas, Inc., Mario Gonzalez and Carl Kleisner alleging negligence claims. 1 App. 1-8. On January 11, 2021, Plaintiff filed a Second Amended Complaint alleging the same claims against Defendants and adding negligent training, negligent maintenance and negligent supervision claims against Defendant Ferrellgas, Inc. 6 App. 1108-19.

On October 26, 2020, Defendants filed a Motion to Compel an NRCP 35 Exam because Plaintiff admits that he has made his mental condition an issue in this case by alleging he suffered from PTSD as a result of the flashfire and has memory and concentration issues. 1 App. 9-68. The parties agree a psychological examination is in order but disagree as to the scope of the examination and other particulars. On November 9, 2020, Plaintiff filed an Opposition thereto requesting that he be allowed to have an observer present and make an audio recording of the examination. 1 App. 69-204. On November 12, 2020, Defendants filed a Reply thereto. 2 App. 205-58. On November 19, 2020, the Discovery Commissioner held a hearing on the Motion and granted and denied the Motion. 2 App. 259-80. On December 7, 2020, Plaintiff filed an unauthorized Supplemental Brief. 2 App. 281-407. On December 9, 2020, Defendants filed a Supplemental Brief responding

thereto. 3 App. 408-77. On December 10, 2020, the parties attended a follow-up hearing regarding the scope of the examination, for which a separate report and recommendation would be issued. 3 App. 478-93. On December 16, 2020, the Discovery Commissioner conducted a telephonic hearing with the parties on various outstanding issues relating to the Motion. On December 22, 2020, the DCRR regarding the November 19, 2020 hearing was e-filed and served. 3 App. 494-500.

The Honorable Discovery Commissioner recommended Plaintiff appear for a NRCP 35 Examination consistent with the following parameters:

IT IS FURTHER RECOMMENDED that Plaintiff shall be Ordered to appear for a Rule 35 Examination at the office of Dr. Lewis Etkoff.

IT IS FURTHER RECOMMENDED that Plaintiff be allowed to have an observer present during the Rule 35 examination pursuant to NRS 52.380.

IT IS FURTHER RECOMMENDED that Plaintiff be allowed to have an audio recording made of the Rule 35 examination pursuant to NRS 52.380.

IT IS FURTHER RECOMMENDED that Defendants' examiner shall be allowed to inquire into Plaintiff's mental condition before the incident, and Plaintiff's general physical condition before the incident. The examiner may inquire as to Plaintiff's medical treatment for five years prior to the incident.

IT IS FURTHER RECOMMENDED that Defendants' examiner shall be allowed to inquire into Plaintiff's life events prior to and after the incident.

IT IS FURTHER RECOMMENDED that Defendants' examiner shall be allowed to inquire into Plaintiff's mental and physical condition since the incident occurred.

IT IS FURTHER RECOMMENDED that Defendants' examiner shall be allowed to inquire into Plaintiff's history with regard to inability to focus and memory issues. 3 App. 498.

On January 5, 2021, Defendants filed their Objection to the DCRR dated 12/22/20. 4 App. 501 to 5 App. 1016. On January 11, 2021, Plaintiff filed his Reply thereto. 6 App. 1017-1107. On January 12, 2021, the DCRR regarding the December 10, 2020 hearing was e-filed which, consistent with the December 22, 2020 DCRR, allowed Plaintiff to have an observer at and make audio recording of the NRCP 35 psychological/neuropsychological examination pursuant to NRS 52.380. 6 App. 1120-25. On January 19, 2021, Defendants filed their Supplement objecting to the DCRR e-filed on January 12, 2021. 6 App. 1126-37.

On January 28, 2021, the district court conducted a hearing on the Objection orally ruling:

The Court is going to find in this case the good faith exception does apply. And the Court does find that it does apply because the nature of the relationship between how the claims were presented, the nature of the fact that this is not a doctor-patient proceeding that is occurring and for the facts presented in the opposition, or the response to the objection, I'm sorry, the Discovery Commissioner's report and recommendation...

So [video interference] the Court does not mean to address the argument of the parties on whether or not there is a direct conflict between the rule and the statute in this specific case because the Court found that even the rule allows the good faith exception, and so therefore the Court doesn't need to address if there could be viewed as a conflict because it would not apply in this case between the rule and the statute. 6 App. 1162-63.

On March 2, 2021, the district court entered its Order denying Defendants' Objections and affirming as modified the two DCRRs regarding the NRCP 35 Exam; and ordered Plaintiff to appear on March 3, 2021 for the NRCP 35 Exam. 6 App. 1177-85. The district court found:

In their pleadings and at the hearings, Plaintiff had presented both NRCP 35 and NRS 52.380 to the Discovery Commissioner in support of his requests. Based on the evidence presented and the specific facts of this case, the Court finds that the Recommendations in both the December 22nd and January 12th DCRRs are supported; and thus, are AFFIRMED. The pleadings set forth why there is good cause to allow the recommended pre-exam and exam procedures as well as the breadth and scope of the exam and information to be inquired about.

Specifically, NRCP 35(a)(4)(A)(ii) and NRCP 35(a)(3) have been met in this case considering the nature of the claims presented, the lack of medical provider-patient relationship, and the other facts presented. Given the Court has found that the good cause provisions of NRCP 35 apply, and this provision allows the relief requested by Plaintiff regarding an observer and memorialization of the examination, the Court need not address an alternative basis. Accordingly, the Court finds that the Recommendations are supported by NRCP 35's good cause exception and applicable law. Thus, the DCRRs are modified to reflect affirmance of the Recommendations, but that the basis of the affirmance is NRCP 35. This Court need not and does not make any findings regarding the interplay, or lack thereof, between NRCP 35 and NRS 52.380 as the relief sought in the instant case is supported by the evidence of good cause presented pursuant to NRCP 35. 6 App. 1182.

The Court:

AFFIRMED in part and modified in part....both the December 22, 2020 and the January 12, 2020 DCRRs...

IT IS FURTHER ORDERED that Mr. Green will be permitted to have an observer present during the Rule 35 examination pursuant to NRCP 35(a)(4)(A)(ii).

IT IS FURTHER ORDERED that Mr. Green will be permitted to have an audio recording made of the Rule 35 examination pursuant to NRCP 35(a)(4)(A)(ii). 6 App. 1183-84.

On March 23, 2021, Defendants filed a Motion for Reconsideration of the district court's March 2, 2021 Order, and a Motion to Stay this case.

VI. SUMMARY OF THE ARGUMENT

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 and allowing the presence of an observer at and an audio recording of the psychological/neuropsychological examination is clearly erroneous, including because the district court did not consider appropriate good cause factors established by this Court in other matters, the United States District Court, Nevada, and/or the United States Supreme Court; and because there was no evidence, let alone substantial evidence, to support the district court's findings of good cause.

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. Eighth Judicial Dist. Court in & for Cty. of Clark, 134 Nev. 6, 8–9, 408 P.3d 566, 569 (2018). Mandamus is an extraordinary remedy, available only when there is no

“plain, speedy and adequate remedy in the ordinary course of law.” Id. at 9 citing NRS 34.170; D.R. Horton, Inc. v. Eighth Judicial Dist. Court, 123 Nev. 468, 474, 168 P.3d 731, 736 (2007). This Court has recognized that the availability of a direct appeal from a final judgment may not always be an adequate and speedy remedy. Id. citing D.R. Horton, 123 Nev. at 474–75, 168 P.3d at 736 (“Whether a future appeal is sufficiently adequate and speedy necessarily turns on the underlying proceedings’ status, the types of issues raised in the writ petition, and whether a future appeal will permit this court to meaningfully review the issues presented.”). Thus, 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. citing Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Court, 132 Nev. 784, 788, 383 P.3d 246, 248 (2016); Aspen Fin. Servs., Inc. v. Eighth Judicial Dist. Court, 129 Nev. 878, 882, 313 P.3d 875, 878 (2013) (exercising discretion to entertain a discovery-related writ petition because it “provides a unique opportunity to define the precise parameters of a statutory privilege that this court has not previously interpreted”). “A writ of mandamus may be issued to compel the district court to vacate or modify a discovery order.” Okada v. Eighth Jud. Dist. Ct., 131 Nev. 834, 839–40, 359 P.3d 1106, 1110–11 (2015) citing Valley Health Sys., LLC v. Eighth Judicial Dist. Court, 127 Nev. 167, 171, 252 P.3d 676, 678 (2011). While, generally, “[d]iscovery matters are within the district court’s sound discretion, and

we will not disturb a district court's ruling regarding discovery unless the court has clearly abused its discretion.” Id. citing Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Court, 128 Nev. Adv. Op. 21, 276 P.3d 246, 249 (2012); Hyde & Drath v. Baker, 24 F.3d 1162, 1166 (9th Cir.1994). “[W]e generally will not exercise our discretion to review discovery orders through [writ petitions], unless the challenged discovery order is one that is likely to cause irreparable harm. Id. at 839-40 citing Club Vista, supra. “Nevertheless, in certain cases, consideration of a writ petition raising a discovery issue may be appropriate if an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction.” Id. at 840 citing Las Vegas Sands Corp. v. Eighth Judicial Dist. Court, 130 Nev. Adv. Op. 61, 331 P.3d 876, 878–79 (2014). Mandamus is also available to immediately correct an error that will wreak irreparable harm. Double Diamond v. Dist. Ct., 131 Nev. Adv. Op. 57, 354 P.3d 641, 647. (2015).

In Okada, this Court exercised its discretion to consider the petition because it raised important issues of law that needed clarification – the correct legal standards on a motion for a protective order – which had not previously been considered. 131 Nev. at 840. The same is true here. NRCP 35, in its current form effective January 2019, prohibits the presence of an observer at a neuropsychological, psychological, or psychiatric examination and prohibits an audio recording of the same – both except for good cause shown. NRCP 35(a)(4)(A)(i) and (ii); NRCP 35(a)(3). There

are no cases from this Court establishing the correct standards under the newly enacted NRCP 35(a)(4)(A)(i) and (ii); NRCP 35(a)(3) and as to good cause. Therefore, clarification is needed.

Although generally, this Court reviews a district court's decision regarding a petition for a writ of mandamus for an abuse of discretion, to the extent the petition depends on statutory interpretation, a question of law, the review is *de novo*. State v. Barren, 128 Nev. Adv. Op 31, 279 P.3d 182, 184 (2012). Since this case involves the interpretation of NRCP 35, which this Court enacted, that is a question of law which should be reviewed *de novo*. See, e.g., Dresser Industries, Inc., 972 F.2d 540, 543 (5th Cir. 1992) citing in part Unified Sewerage Agency v. Jelco, Inc., 646 F.2d 1339, 1342, n. 1 (9th Cir. 1981).

This Court should exercise its discretion by accepting this Petition because it raises extremely important issues regarding NRCP 35, psychological/neuropsychological examinations and the related good cause standards. Without this Court's intervention, irreparable harm will continue to be done to parties having to face these issues, which will impact the public trust in the scrupulous administration of justice. Also, clarification is needed regarding important issues of law regarding the good cause standards in NRCP 35. Simply put, this Petition involves important and critical precedential issues of statewide significance regarding psychological/neuropsychological examinations. The district

court, attorneys, parties, Defendants 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.

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 its position as follows:

In the interest of protecting the needs of the public, it is the position of the Nevada Board of Psychological Examiners that allowing third-party observers, monitors, and/or electronic recording equipment during psychological and neuropsychological evaluations poses a significant threat to public safety. Observation, monitoring, and recording can significantly alter the credibility and validity of results obtained during psychological and neuropsychological medical evaluations, as well as forensic evaluations completed for judicial proceedings. Research indicates that the presence of observers, monitors and recorders during patient clinical interviews and evaluations directly impacts patient behavior and performance such that patients may avoid disclosing crucial information essential to diagnosis and clinical recommendations. Additionally, (neuro)psychological tests and measures are developed and standardized under highly controlled conditions. Observation, monitoring, and recording of these tests is not part of the standardization. Observation, monitoring, and recording of psychological assessment components (i.e., testing) of evaluations may distort patient task performance, such that patient weaknesses and strengths are exaggerated, yielding inaccurate or invalid test data. Furthermore, research highlights that this impact on performance is independent of method of observation. In other words, there is no "good" or "safe" way to observe, monitor, or record such (neuro)psychological evaluations without impacting and potentially

invalidating the evaluation. Ultimately, deviations from standardized administration procedures compromise the validity of the data collected and compromise the psychologist's ability to compare test results to normative data. This increases the potential for inaccurate test results and erroneous diagnostic conclusions, thus impacting reliability of results and future treatment for the patient. In addition, the risk of secured testing and assessment procedures being released to non-Psychologists poses risk to the public in that exposure of the test and assessment confidentiality can undermine their future validity and utility. 5 App. 1016.

Thereafter and effective January 1, 2019, this Court enacted NRCP 35 (Physical and Mental examinations), which provides:

(a) Order for examination.

(1) *In General.* The court where the action is pending may order a party whose mental or physical condition...is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in the party's custody or under the party's legal control.

(2) *Motion and Notice; Contents of the Order.*

(A) The order may be made only on motion for **good cause** and on notice to all parties and the person to be examined.

(B) The order must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it. The examination must take place in an appropriate professional setting in the judicial district in which the action is pending, unless otherwise agreed by the parties or ordered by the court.

(3) *Recording the examination.* On request of a party or the examiner, the court may, for **good cause shown**, require as a condition of the examination that the examination be audio recorded. The party or examiner who requests the audio recording must arrange and pay for the recording and provide a copy of the recording on written request. The examiner and all persons present must be notified before the examination begins that it is being recorded.

(4) *Observers at the examination.* The party against whom an examination is sought may request as a condition of the examination to have an observer present at the examination. When making the request, the party must identify the observer and state his or her relationship to the party being examined. The observer may not be the party's attorney or anyone employed by the party or the party's attorney.

- (A) The party may have one observer present for the examination, unless:**
(i) the examination is a neuropsychological, psychological, or psychiatric examination; or
(ii) the court orders otherwise for good cause shown.
(B) The party may not have any observer present for a neuropsychological, psychological, or psychiatric examination, unless the court orders otherwise for good cause shown.
(C) An observer must not in any way interfere, obstruct, or participate in the examination. (Emphasis added.)

NRCP 35(a) expressly addresses audio recording and attendance by an observer at court-ordered physical and mental examinations. A court may for good cause shown direct that an examination be audio recorded. A generalized fear that the examiner might distort or inaccurately report what occurs at the examination is not sufficient to establish good cause to audio record the examination. In addition, a party whose examination is ordered may have an observer present, typically a family member or trusted companion, provided the party identifies the observer and his or her relationship to the party in time for that information to be included in the examination order. However, psychological and 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, to be granted for good cause shown. This Court made clear – in enacting NRCP 35(a)(4)(A)(i) – that no observer may be present for a neuropsychological, psychological, or psychiatric examination consistent with the Nevada Board of Psychological Examiners' position statement. However, an observer may be present

if the court orders otherwise for good cause shown. NRCp 35(a)(4)(A)(ii). Also, no audio recording may be made unless the court so orders also for good cause shown. NRCp 35(a)(3).

C. NRS 52.380

In October 2019 – about 9 months after this Court enacted the current NRCp 35 – the Nevada Legislature enacted, NRS 52.380, which provides:

1. **An observer may attend an examination** but shall not participate in or disrupt the examination.
2. The observer attending the examination pursuant to subsection 1 may be:
 - (a) An attorney of an examinee or party producing the examinee; or
 - (b) A designated representative of the attorney, if:
 - (1) The attorney of the examinee or party producing the examinee, in writing, authorizes the designated representative to act on behalf of the attorney during the examination; and
 - (2) The designated representative presents the authorization to the examiner before the commencement of the examination.
3. **The observer attending the examination pursuant to subsection 1 may make an audio or stenographic recording of the examination.**
4. The observer attending the examination pursuant to subsection 1 may suspend the examination if an examiner:
 - (a) Becomes abusive towards an examinee; or
 - (b) Exceeds the scope of the examination, including, without limitation, engaging in unauthorized diagnostics, tests or procedures.
5. An examiner may suspend the examination if the observer attending the examination pursuant to subsection 1 disrupts or attempts to participate in the examination.
6. If the examination is suspended pursuant to subsection 4 or 5, the party ordered to produce the examinee may move for a protective order pursuant to the Nevada Rules of Civil Procedure.
7. As used in this section:

(a) “examination” means a mental or physical examination ordered by a court for the purpose of discovery in a civil action . . . (Emphasis added.)

Notably, this Statute is found in Title 4. Witnesses and Evidence, Chapter 52. Documentary and Other Physical Evidence, Mental or Physical Examination – thereby indicating it is procedural, not substantive. In any case, Plaintiffs’ bar and/or the Nevada Justice Association (NJA) testified at a Meeting of the Assembly Committee on Judiciary, 18th Sess. (March 27, 2019), to persuade this Court to adopt some of the above into NRCP 35, which this Court rejected. Freteluco v. Smith's Food & Drug Centers, Inc., 336 F.R.D. 198, 202 (D. Nev. 2020). Thereafter, the Nevada Legislature enacted NRS 52.380. There is a clear conflict between NRCP 35 and NRS 52.380 as to an observer attending a neuropsychological or psychological examination, and an audio recording being made of the same which has caused the district court to enter inconsistent orders as to NRCP 35 examinations. 3 App. 496. Defendants, the district court, parties and the public need this Court to resolve that conflict and determine the appropriate good cause standards for NRCP 35 and apply them hereto.

D. The District Court Abused Its Discretion

Applying the *de novo* standard to interpreting 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 the facts and circumstances of, or similar to this case. However, there is relevant legislative history regarding the recent amendment of NRCP 35, and a United States District Court decision – Freteluco, supra – the only decision in this jurisdiction regarding the conflict between NRCP 35 and NRS 52.380, which also considered the good cause standard. “Federal cases interpreting the Federal Rules of Civil Procedure are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts.” 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 simply applied NRCP 35 without citation to any authority, including in its good cause determination, although it referred to the standard in oral argument as one of “good faith.” In any case, the district court manifestly abused its discretion in ignoring Freteluco, this Court’s decisions regarding good cause as to other Rules, and/or the United States Supreme Court’s decisions regarding good cause; and in improperly interpreting and/or applying NRCP 35 as it did. As such, the district court’s decision is not supported by any law or other authority aside from the language of NRCP 35. Therefore, mandamus is appropriate.

2. **The District Court Clearly Abused Its Discretion In Conducting The Good Cause Analysis And Allowing The Presence Of An Observer At And An Audio Recording Of The NRCP 35 Psychological/Neuropsychological Examination**

In Fretehuco, the United States District Court adopted and applied the “good cause” standard 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. The court explained that 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 which the examination...that good cause exists for ordering each particular examination.” Id. (Emphasis added.) To determine whether the “good cause” requirement of Rule 35 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. Oct. 27, 2006). Accordingly:

Rule 35...requires discriminating application by the trial judge, who must decide, as an initial matter in every case, whether the party requesting a mental or physical examination or examinations has adequately demonstrated the existence of the Rule's requirements of 'in controversy' and 'good cause,' which requirements, as the Court of Appeals in this case itself recognized, are necessarily related. 321 F.2d, at 51. This does not, of course, mean that the movant must prove his case on the merits in order to meet the requirements for a mental or physical examination. Nor does it mean that an evidentiary hearing is required in all cases. This may be necessary in some cases, but in other cases the showing could be made by affidavits or other usual methods short of a hearing. It does mean, though, that the movant must produce sufficient information, by whatever means, so that the district judge can fulfill his function mandated by the Rule.

Schlagenhauf, 379 U.S. at 118–19, 85 S. Ct. at 243–45 (emphasis added).

Mental and physical examinations are only to be ordered upon a discriminating application by the district judge of the limitations prescribed by the Rule. 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). The parties agree an NRCP 35 psychological examination is in order based on Plaintiff's alleged damages.

In Freteluco, the plaintiff failed to meet her burden. 336 F.R.D. at 203. The court determined 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. Etkoff has ever been or, in this case, will be

abusive to someone he is examining. Id. at 204. There was also nothing to support the conclusion that Dr. Etcoff would go beyond the agreed upon testing he had disclosed. Id. Accordingly, 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. Id. Thus, the court did not permit an observer to be present at the examination. Id.

The same is true here. In his Opposition to the Motion and his Reply to the Objection, and before the Discovery Commissioner, Plaintiff did not argue there was “good cause” under NRCP 35 for him to have an observer present and be able to make an audio recording at either of the hearings before the Discovery Commissioner, and the Discovery Commissioner made no ruling relating thereto. 1 App. 69-204, 2 App. 259-80, 3 App. 478-93 and 494-500, 6 App. 1017-1107 and 1120-50. Rather, 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... Under the statute, the examinee now has the right to record the examination, the right to have an observer present irrespective of the type of examination... 1 App. 74, 76-78, 80, 6 App. 1025-26.

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. 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. None of the above goes to and/or establishes good cause for the presence of an observer and/or an audio recording. Therefore, Plaintiff failed to meet his burden of establishing good cause for an observer and/or audio recording, and the district court erred in finding Plaintiff had met his burden.

Furthermore, the March 2, 2021 Order is contrary to law because it fails to apply or misapplies NRCP 35(a)(4)(A)(ii) and NRCP 35(a)(3)'s good cause requirements, which are not met by "mere conclusory allegations" and require 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. Considering the relevant good cause factors, Plaintiff plans to prove his claim through testimony of his expert, Dr. Elliott, and Plaintiff claims ongoing neuropsychological damages, including memory and confusion issues. Flack, supra citing Gavin, supra; Franco, supra. Plaintiff submitted no affidavits or other evidence supporting his argument for the district court to fulfill its obligation to perform the 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. To accept Plaintiff's argument is to effectively

disregard the requirements of NRCP 35(a)(4)(A)(ii) and NRCP 35(a)(3) enacted by this Court. Finally, Defendants presented two affidavits from Dr. Etkoff 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. In sum, 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 at 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 a circuitous, nonsensical NRCP 35 nullification argument that renders

NRCP 35 completely meaningless, and ultimately caused confusion and/or resulted in the district court making a clearly erroneous ruling.

To support his request for an observer and an audio recording, Plaintiff argued there is no doctor-patient relationship between him and Dr. Etcoff. 5 App. 1157. That argument fails and is a red herring. NRCP 35 allows an opposing party's expert to conduct a physical and/or mental examination where the plaintiff puts his physical and/or mental condition at issue. An NRCP 35 examination – by definition – will always be done by an opposing party's expert. Thus, there will never be a doctor-patient relationship in these examinations such that it is of no consequence. Critically, neither NRCP 35 nor any case says anything about that. That argument is irrelevant. This Court clearly was aware of that. In enacting NRCP 35 as it is – providing there can be no observer or audio recording unless the party requesting it establishes good cause for the same – the argument made by Plaintiff did nothing but confuse the district court and/or caused it to make a clearly erroneous ruling. The unsupported argument, most certainly, does not establish the good cause required by the NRCP 35. If that argument is accepted, it nullifies NRCP 35 and the requirements that there can be no observer or audio recording without the requesting party establishing good cause because such examinations will never involve a doctor-patient relationship. The result of accepting that argument is there will always be an observer at and/or an audio recording at every such examination,

which nullifies NRCP 35(a)(4)(A)(i) and (ii); and NRCP 35(a)(3). Therefore, the district court's related decision is clearly erroneous.

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." 6 App, 1182. None of the above is one of the "good cause" Rule 35 factors that may be considered. See p. 22-26, supra. It is unclear what the district Court means by "the nature of the claims presented." If the district court was referring to the claims plead, at the time of the Objection hearing those were negligence claims. 1 App. 1-8. If the district court was referring to Plaintiff's damages claims, he admitted he made his mental condition an issue since he is alleging suffering from PTSD and an inability to focus and memory issues. 3 App. 495-97. The parties agree a psychological examination is in order, and the only dispute was whether an observer could be present at and an audio recording could be made of the examination. Therefore, the above is not determinative of the good cause issues.

Also, "the lack of medical provider-patient relationship" is not a factor to be considered nor is there any authority for it to be considered on the good cause issue, including because it would essentially require an observer at every NRCP 35 exam, which is irrelevant and nullifies NRCP 35. Finally, it is unclear what the district court means by "the other facts presented." Based on Plaintiff's papers, exhibits and

argument, there is nothing to support good cause. See Sections 2 and 3, supra. 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); Cannon v. Taylor, 88 Nev. 89, 92, 493 P.2d 1313, 1314-15 (1972). 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) citing Bates v. Chronister, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) (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.

While the district court has discretion to consider other issues to prevent plain error, considering good cause on the facts of this case was not about preventing plain

error because Plaintiff submitted no evidence to support such an argument and failed to meet his burden. See, e.g., Kapral v. Jordan, 133 Nev. 1037 (Nev. App. 2017) citing Williams v. Zellhoefer, 89 Nev. 579, 580, 517 P.2d 789, 789 (1973); Bradley v. Romeo, 102 Nev. 103, 105, 716 P.2d 227, 228 (1986) (holding that this court will consider relevant issues *sua sponte* to prevent plain error). Therefore, Plaintiff waived this argument and mandamus is appropriate.

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 prohibiting the same absent good cause. The district court's order requires Dr. Etcoff, and any licensed psychologist/neuropsychologist, to violate their professional and ethical rules. In the sworn and undisputed testimony of Dr. Etcoff:

4. ...I am enjoined by the Nevada State Board of Psychological Examiners; the American Psychological Association; professional neuropsychological associations such as the National Academy of Neuropsychology, the American Board of Professional Neuropsychology, and the American Board of Clinical Neuropsychology; including the Nevada Psychological Association from allowing third party observers to observe, take notes, or audiotape copyrighted psychological and neuropsychological tests for test security, validity issues, and protection of the public (see 2020 attached letters from the Nevada State Board of Psychological Examiners and Nevada Psychological Association).

5. Consistent with my professional and ethical obligations as a Nevada Licensed Psychologist and Fellow of the National Academy of Neuropsychology, I will not allow third party observers or audiotaping of the administration of either clinical psychological or neuropsychological tests and measures in clinical or Court-ordered forensic evaluations. 5 App. 1013.

Based on the above, 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. The district court's Order does not shield Dr. Etcoff from professional discipline and/or sanction as it has no authority to control the Nevada State Board of Psychological Examiners, the American Psychological Association, the National Academy of Neuropsychology, the American Board of Professional Neuropsychology, the American Board of Clinical Neuropsychology, and the Nevada Psychological Association. 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 any observer present and/or any audio recording being made. Pursuant to this Court's Order, Defendants' expert, Dr. Etcoff, does not have the same benefit of conducting his examination of Plaintiff in as similar

circumstances as possible given the nature of the examination. This examination will already be encumbered by the inherent fact that 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. Etcoff must do so with an observer present and an audio recording being made – and the examination becomes further, unnecessarily, and unfairly prejudicially encumbered. The Nevada Board of Psychological Examiners indicated, and this Court accepted that:

[o]bservation, monitoring, and recording can significantly alter the credibility and validity of results obtained during psychological and neuropsychological medical evaluations, as well as forensic evaluations completed for judicial proceedings. Research indicates that the presence of observers, monitors and recorders during patient clinical interviews and evaluations directly impacts patient behavior and performance such that patients may avoid disclosing crucial information essential to diagnosis and clinical recommendations. Additionally, (neuro)psychological tests and measures are developed and standardized under highly controlled conditions. Observation, monitoring, and recording of these tests is not part of the standardization. Observation, monitoring, and recording of psychological assessment components (i.e., testing) of evaluations may distort patient task performance, such that patient weaknesses and strengths are exaggerated, yielding inaccurate or invalid test data. Furthermore, research highlights that this impact on performance is independent of method of observation. In other words, there is no "good" or "safe" way to observe, monitor, or record such (neuro)psychological evaluations without impacting and potentially invalidating the evaluation. Ultimately, deviations from standardized administration procedures compromise the validity of the data collected and compromise the psychologist's ability to compare test results to normative data. This increases the potential for inaccurate test results and erroneous diagnostic conclusions, thus impacting reliability of results and future treatment for the patient. In addition, the risk of secured testing and assessment procedures being released to non-Psychologists poses risk to the public in that exposure of the test and assessment confidentiality can undermine their future validity and utility. 5 App. 1016.

Given the Order allows an observer and audio recording, Dr. Etcoff's examination and related opinions will no doubt be subject to challenge by Plaintiff based on the above. Defendants are already fighting an uphill battle because Dr. Elliott has had thirteen opportunities, and no doubt will have more, to examine and treat Plaintiff without an observer and/or audio recording, which Defendants accept they cannot obtain. While Defendants understand that is a fact of any case, they should not be so prejudiced when Plaintiff failed to meet his burden as required by NRCP 35(a)(4)(A)(ii) and NRCP 35(a)(3). Not only is that unfair and not a level playing field from the get-go, but it 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 multimillion dollar damages. Requiring that Defendants can only have an NRCP 35 examination if an observer is present, an audio recording is made, 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. Therefore, mandamus is appropriate.

VIII. CONCLUSION AND RELIEF SOUGHT.

Based on the foregoing, Petitioners respectfully requests 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 at and an audio recording of the NRCP 35 psychological/neuropsychological examination without citation to any authority beyond the NRCP 35 supporting that and, in the complete absence of any evidence establishing good cause; accepting an NRCP 35 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 Moats, supra.

RESPECTFULLY SUBMITTED this 26th day of March, 2021.

/s/ Felicia Galati, Esq.

FELICIA GALATI, ESQ.
Nevada Bar No. 007341
OLSON CANNON GORMLEY &
STOBERSKI
9950 West Cheyenne Avenue
Las Vegas, NV 89129
fgalati@ocgas.com

and

MICHAEL C. MCMULLEN, ESQ.
Missouri Bar No. 33211
BAKER, STERCHI, COWDEN & RICE,
LLC
GREGORIO V. SILVA, ESQ.
Nevada Bar No. 13583
2400 Pershing Road, Suite 500
Kansas City, MO 64108
mmcmullen@bscr-law.com
gsilva@bscr-law.com
Attorneys for Petitioner
FERRELLGAS, INC.

DATED this 26th day of March, 2021.

/s/ Gina Gilbert Winspear, Esq.

GINA GILBERT WINSPEAR, ESQ.
Nevada Bar No.: 005552
DENNETT WINSPEAR, LLP
3301 N. Buffalo Drive, Suite 195
Las Vegas, Nevada 89129
gwinspear@dennettwinspear.com
Attorneys for Defendant
CARL J. KLEISNER

DATED this 26th day of March, 2021.

/s/ Steven M. Goldstein, Esq.

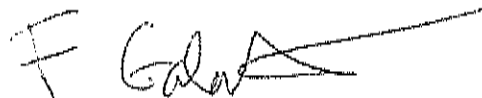
James P.C. Silvestri, Esq.
Nevada Bar No. 3603
Steven M. Goldstein, Esq.
Nevada Bar No. 6318
PYATT SILVESTRI
701 Bridger Avenue, Suite 600
Las Vegas, Nevada 89101
jsilvestri@pyattsilvestri.com
sgoldstein@pyattsilvestri.com
Attorneys for Defendant
MARIO S. GONZALEZ

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.

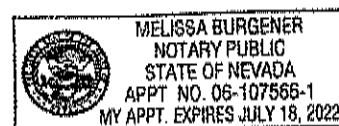


FELICIA GALATI

SUBSCRIBED and SWORN to before
me on this 26th day of March, 2021.



Notary Public in and for said
County and State



Steven D. Grierson

1 FELICIA GALATI, ESQ.
2 Nevada Bar No. 007341
3 OLSON, CANNON, GORMLEY
4 ANGULO & STOBERSKI
5 9950 West Cheyenne Avenue
6 Las Vegas, NV 89129
7 Phone: 702-384-4012
8 Fax: 702-383-0701
9 fgalati@ocgas.com

10 Attorney for Defendant
11 FERRELLGAS, INC.

12 DISTRICT COURT
13 CLARK COUNTY, NEVADA

14 JOSHUA GREEN, an individual

15 Plaintiff,

16 v.

17 FERRELLGAS, INC., a foreign corporation;
18 MARIO S. GONZALES, an individual; CARL
19 J. KLEISNER, an individual, DOES I through
20 X, DOE employees I through X, and Roe
21 business entities I through X,

22 Defendants.

CASE NO. A-19-795381-C
DEPT. NO. XXXI

ORDER GRANTING MOTION TO
ASSOCIATE COUNSEL MICHAEL C.
MCMULLEN, ESQ. UNDER NEVADA
SUPREME COURT RULE 42

23 This matter having been set and/or come on for hearing on the 27th day of September,
24 2019, in Chambers, in Department XXXI before the Honorable Judge Joanna S. Kishner on
25 Defendant Ferrellgas' Motion to Associate Counsel ("Motion") under Nevada Supreme Court
26 Rule 42, together with a Verified Application for Association of Counsel, Certificates of Good
27 Standing, and State Bar of Nevada Statement, said application having been noticed, and the
28


Law Offices of
OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI
A Professional Corporation
9950 West Cheyenne Avenue
Las Vegas, Nevada 89129
(702) 364-4012 Telexcel (702) 381-0781

1 Court having reviewed the Motion and no opposition being filed thereto, and good cause
2 appearing therefor,

3 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant
4 Ferrellgas' Motion is hereby GRANTED with prejudice, pursuant to EDCR 2.20(e), because no
5 opposition has been filed and that may be construed as an admission that the Motion is
6 meritorious and a consent to granting the same, and Michael C. McMullen, Esq. is hereby
7 admitted to practice in the above-entitled Court for the purposed of the above-entitled matter
8 only.
9

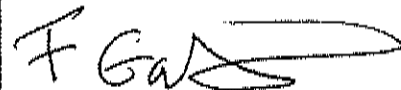
10 DATED this 1 day of ~~September~~, 2019.

October

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DISTRICT COURT JUDGE

Respectfully submitted by:

OLSON, CANNON, GORMLEY
ANGULO & STOBERSKI



FELICIA GALATI, ESQ.
Nevada Bar No. 007341
9950 West Cheyenne Avenue
Las Vegas, Nevada 89129
Attorneys for Defendant
FERRELLGAS, INC.

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 type-volume limitations of NRAP 32(a)(4)-(6) and (7)(A)&(C), but does not comply with NRAP 21(a)(6)(d) because it exceeds 15 pages and is more than 7,000 words. Petitioners are filing a motion for leave to exceed the page and/or word limits.

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(c)(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

///

///

///

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

DATED this 26th day of March, 2021.

/s/ Felicia Galati, Esq.

FELICIA GALATI, ESQ.

Nevada Bar No. 007341

OLSON CANNON GORMLEY &
STOBERSKI

9950 West Cheyenne Avenue

Las Vegas, NV 89129

fgalati@ocgas.com

Attorneys for Petitioner

FERRELLGAS, INC.

and

MICHAEL C. MCMULLEN, ESQ.

Missouri Bar No. 33211

BAKER, STERCHI, COWDEN & RICE,
LLC

2400 Pershing Road, Suite 500

Kansas City, MO 64108

mmcmullen@bscr-law.com

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of March, 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:

Matthew G. Pfau, Esq.
Marjorie L. Hauf, Esq.
H&P LAW
8950 W. Tropicana Avd., #1
Las Vegas, NV 89147
mpfau@courtroomproven.com
mhauf@courtroomproven.com
Attorneys for Plaintiff

Gina Gilbert Winspear Esq.
DENNETT WINSPEAR, LLP
3301 N. Buffalo Drive, Suite 195
Las Vegas, Nevada 89129
gwinspear@dennettwinspear.com
Attorneys for Defendant,
CARL J. KLEISNER

James P.C. Silvestri, Esq.
Steven M. Goldstein, Esq.
PYATT SILVESTRI
701 Bridger Avenue, Suite 600
Las Vegas, Nevada 89101
jsilvestri@pyattsilvestri.com
sgoldstein@pyattsilvestri.com
Attorneys for Defendant,
MARIO S. GONZALEZ

Honorable Judge Joanna S. Kishner
Eighth Judicial District Court
Department 31
200 Lewis Avenue
Las Vegas, NV 89155

/s/ Erika Parker

An Employee of OLSON CANNON GORMLEY
& STOBERSKI

EXHIBIT "3"

From: Matthew G. Pfau
To: Gregorio V. Silva; Cait Ahern; Marjorie Hauf; Steven Goldstein; "Alondra Reynolds"; Gina Winspear; Brent Quist; Paula Timmons; Ashley Marchant
Cc: Michael C. McMullen; Deborah L. Parker; Deborah (Deb) A. Ries; "Felicia Galati"; "Erika Parker"
Subject: Re: Green v. Ferrelgas et al; Proposed Order on Status Hearing
Date: Tuesday, March 30, 2021 9:16:29 AM
Attachments: [image001.png](#)
[image008.png](#)
[image009.png](#)
[image010.png](#)

Thanks Gregorio,

You have my permission to add my electronic signature to this proposed Order.

Josh has confirmed that he is available on the 21st since your previous communications stated that you only wanted one day for the exam given the DCRR parameters set on the examination.

Matt

We are excited to announce Matt Pfau Law Group has merged with Ganz & Hauf! Please note our new name.



Matthew G. Pfau, Esq.
Partner
8950 W Tropicana Ave, #1
Las Vegas, Nevada 89147
702 598 4529 TEL
702 598 3626 FAX
www.courtroomproven.com



From: Gregorio V. Silva <gsilva@bscr-law.com>

Date: Tuesday, March 30, 2021 at 7:40 AM

To: Matthew G. Pfau <mpfau@CourtRoomProven.com>, Cait Ahern <cahern@CourtRoomProven.com>, Marjorie Hauf <Mhauf@CourtRoomProven.com>, Steven Goldstein <sgoldstein@pyattsilvestri.com>, 'Alondra Reynolds' <areynolds@pyattsilvestri.com>, Gina Winspear <gwinspear@dennettwinspear.com>, Brent Quist <bquist@dennettwinspear.com>, Paula Timmons <ptimmons@dennettwinspear.com>, Ashley Marchant <amarchant@dennettwinspear.com>

Cc: Michael C. McMullen <mmcmullen@bscr-law.com>, Deborah L. Parker <dparker@bscr-law.com>, Deborah (Deb) A. Ries <dries@bscr-law.com>, 'Felicia Galati' <fgalati@ocgas.com>, 'Erika Parker' <eparker@ocgas.com>

Subject: Green v. Ferrelgas et al; Proposed Order on Status Hearing

Good morning all:

MOT376

Attached for your consideration is a proposed Order Extending Discovery Deadlines. Please let me know of any comments or proposed revisions at your earliest convenience.

Matt have you confirmed the tentative July 21 and 22 dates work for the IME of Plaintiff?

Gregorio V. Silva
Baker Sterchi Cowden & Rice LLC

Kansas City, MO 64108
p: 816.471.2121 f:

ES | Baker Sterchi
CR | Cowden & Rice LLC



This communication and any attached file(s) are intended only for the person or entity to which it is addressed and may contain information that is privileged, confidential or otherwise protected from disclosure. Dissemination, distribution, forwarding or copying of the contents of this communication, the information herein or hereto attached is prohibited, except by the intended recipient, an employee or agent responsible for delivering the message to the intended recipient. If you have received this communication in error, please notify the sender via e-mail or at the phone number provided in the signature block to this message. Thank you.

This email has been scanned for viruses and malware by **Mimecast**.

MOT377

EXHIBIT "4"



MARJORIE HAUF, ESQ. *†
MATTHEW G. PFAU, ESQ.*‡
ADAM GANZ, ESQ. *†‡
CARA XIDIS, ESQ. *
JUSTIN WILSON, ESQ.*†
BRE'AHN WILLIAMS, ESQ. *

8950 W TROPICANA AVE
SUITE 1
LAS VEGAS, NEVADA 89147

3041 W HORIZON RIDGE PKWY
SUITE 135
HENDERSON, NEVADA 89052

702 598 4529 TEL
702 598 3626 FAX

www.courtroomproven.com

* Licensed in Nevada
† Licensed in Arizona
‡ Licensed in California
† Licensed in Kansas
‡ Of Counsel

March 24, 2021

Via Email: DiscoveryInbox@clarkcountycourts.us

REGIONAL JUSTICE CENTER
Attn: Discovery Commissioner
200 Lewis Avenue
Las Vegas, Nevada 89155

Re: Green v. Ferrellgas, Inc., Gonzalez
and Kleisner
Case No: A-19-795381-C

Commissioner Truman,

Attached to this letter is Plaintiff, Joshua Green's proposed Discovery Commissioner Report and Recommendations following the March 9, 2021 hearing on the same. After multiple drafts, the parties could not agree on the substance of the order.

I discussed this matter with Ferrellgas, Inc.'s attorney, Gregorio Silva on March 23rd. Mr. Silva indicated he wanted to include "bulk" customers as to the order for the Grand Canyon region. I expressed my position that was not this Court's ruling, and instead "bulk" only pertained to the disclosure of nationwide reports.

After our conversation, Mr. Silva indicated that he wanted to revert the proposed DCRR to remove some of the previously agreed upon changes. For this reason, you will see more substantial differences between Mr. Silva's proposed DCRR and the one accompanying this letter.

MOT379

If you wish to discuss this matter further, please do not hesitate to contact my office.

Sincerely,



Matthew G. Pfau, Esq.

CC: Gregorio Silva, Esq.
Steven Goldstein, Esq.
Gina Winspear, Esq.

EXHIBIT "1"

DCRR

Marjorie L. Hauf, Esq.
Nevada Bar No.: 8111
Matthew G. Pfau, Esq.
Nevada Bar No.: 11439
H&P LAW
8950 W Tropicana Ave., #1
Las Vegas, NV 89147
702 598 4529 TEL
702 598 3626 FAX
mhauf@courtroomproven.com
mpfau@courtroomproven.com

Attorneys for Plaintiff,
Joshua Green

DISTRICT COURT
CLARK COUNTY, NEVADA

* * *

Joshua Green, an individual,

Plaintiff,

vs.

Ferrellgas, Inc., a foreign corporation;
Mario S. Gonzales, an individual; **Carl J. Kleisner**, an individual; Does I through
XXX, inclusive and Roes Business Entities
I through XXX, inclusive

Defendants.

Case No.: A-19-795381-C
Dept. No.: XXXI

**Discovery Commissioner's Report
and Recommendations**

Hearing date: March 9, 2021
Hearing time: 9:30 a.m.

Mario S. Gonzalez, an individual;

Cross-Claimant,

vs.

Ferrellgas, Inc., a foreign corporation;
Carl J. Kleisner, an individual; DOES 1
through 100 inclusive; and ROE
Corporations 101 through 200;

Cross-Defendants.



1
2 **Mario S. Gonzalez**, an individual;

3 Third-Party Plaintiff,
4

5 vs.
6

7 **BBQ Guys Manufacturing, LLC dba**
8 **Blaze Outdoor Products.**, a foreign
9 corporation; **Home Depot USA, Inc.**, a
10 foreign corporation; **KSUN**
11 **Manufacturing**, a foreign corporation;
Does 200 through 300 inclusive; and
ROE Corporation 301 through 400;

12 Third-Party Defendants.
13

14 **Ferrellgas, Inc.**, a foreign corporation;

15 Counter-Claimant,
16

17 vs.
18

19 **Mario S. Gonzalez**, an individual; DOES
20 1 through 100 inclusive; and ROE
Corporations 101 through 200;

21 Counter-Defendants
22

23 **Carl J. Kleisner**, an individual;

24 Counter-Claimant,
25

26 vs.
27

28 **Mario S. Gonzalez**, an individual; DOES
1 through 100 inclusive; and ROE
Corporations 101 through 200;

Counter-Defendants.

Hearing Date: March 9, 2021

Hearing Time: 9:30 a.m.

Attorney for Plaintiff: Marjorie L. Hauf, Esq. of H & P LAW

Attorneys for Defendant, Ferrellgas, Inc.: Felicia Galati, Esq. of OLSON, CANNON, GORMLEY & STROBERSKI and Gregorio Silva, Esq. of BAKER, STERCHI, COWDEN & RICE, LLC

Attorney for Defendant, Mario S. Gonzalez: Steven Goldstein, Esq. of PYATT SILVESTRI

Attorney for Defendant, Carl J. Kleisner: Brent Quist, Esq. of DENETT WINSPEAR

I.

Findings

Plaintiff initially requested Defendant, Ferrellgas, Inc. to produce incident reports for all injuries attributed to exploding gas lines at Ferrellgas customer properties nationwide on July 31, 2020. Defendant, Ferrellgas served their response objecting to the request as: (1) seeking information that is not likely to lead to the discovery of admissible information; (2) overbroad and seeking information not relevant to any of the issues of the litigation and beyond the scope of relevant discovery under Nevada Rules of Civil Procedure 26; (3) creating an undue burden disproportionate to the needs of the case; (4) unduly burdensome and overbroad as it was not

1 reasonably limited in time, not limited to incidents that occurred in a reasonable
2 geographical area, and not limited to incidents substantially similar to the allegations
3 of Plaintiff's Complaint; and (5) required Ferrellgas to make legal conclusions as to
4 the cause of injuries.

5 In response, Plaintiff filed a Motion to Compel on September 16, 2020.

6 Defendant filed their Opposition to Motion to Compel on September 30, 2020.

7 Plaintiff filed his Reply in Support of Motion to Compel on October 13, 2020.

8 Plaintiff argues his case involves an explosion of Ferrellgas gas line at the property
9 of Defendant, Mario Gonzalez. Plaintiff states a Ferrellgas technician inspected Mr.
10 Gonzalez's home on two separate occasions prior to the explosion. Plaintiff further
11 argues during the deposition of the 30(b)(6) representatives for Ferrellgas, the
12 designee revealed under Ferrellgas policies and procedures the gas system should
13 have been marked unsafe for use.

14 Defendant, Ferrellgas argued the requested discovery would require an undue
15 burden from Ferrellgas disproportionate to the needs of the case. Counsel
16 presented an affidavit from Ferrellgas Director of Risk Management, Staci Short,
17 affirming that these records are not maintained in an electronic system and would
18 require a manual search of customer files. Ferrellgas produced an affidavit from
19 Ferrellgas' Director of Risk Management detailing that (1) Ferrellgas does not
20 maintain a computer system with all customer records for the period of June 18,
21 2013 through June 18, 2018; (2) Ferrellgas does not have an electronic database that
22 allows Ferrellgas to search incident records to identify any alleged cause of an
23 incident; (3) to attempt to comply with Plaintiff's request for production, Ferrellgas
24 would have to retrieve the paper file of all incident records from a given year, and
25 have one or more persons manually review those incidents to locate responsive
26 materials; and (5) that Ms. Short estimates it would take more than 100 hours of
27 labor to retrieve and review all nationwide incident records for a given year.
28 Ferrellgas also argues that incident reports at other customers' properties are not

1 relevant to the claims and issues of this litigation. Ferrellgas also argues the request
2 is overboard and should be limited to similar incidents. Ferrellgas also argues the
3 request is overbroad and should be geographically and time limited.

4 This matter initially came before this Court on October 20, 2020. At that time, the
5 Discovery Commissioner recommended disclosure of all incident reports related to
6 fires and explosions resulting from any part of the gas system on residential bulk
7 customers' property causing injury to persons or property in the Grand Canyon area
8 for the five years preceding Plaintiff's incident (June 18, 2013 – June 18, 2018).

9 Ferrellgas argues that they complied with the Discovery Commissioner's
10 Recommendation on December 17, 2020.

11 Upon renewed motion, Plaintiff argues the single page previously disclosed by
12 Ferrellgas appears to be missing pertinent information, such as the nature of the
13 incident, does not include the specific address, does not include the name of the
14 Ferrellgas technician involved with the incident, etc. To support this belief, Mr. Green
15 points to the documents disclosed in his own matter, such as "Oracle Resolution
16 Reports" and a "Detailed Case Report."

17 Additionally, Mr. Green states that nationwide reports are proportional and
18 relevant to the needs of this case, specifically due to his claims for Negligent Hiring,
19 Training, Maintenance, and Supervision and Punitive Damages. Further, Mr. Green
20 contends that precedent exists for the disclosure of nationwide reports for
21 companies that operate under nationwide policies and procedures, such as
22 Ferrellgas.

23 Ferrellgas maintains that nationwide reports create an undue burden
24 disproportionate to the needs of the case. Nationwide incident records are not
25 relevant to Plaintiff's claim regarding causation of the incident at Defendant
26 Gonzalez's residence. Ferrellgas also argues that Plaintiff's experts do not opine that
27 Ferrellgas' training and supervision policies do not fall below standards of the
28 propane industry. Ferrellgas contends the case law cited by Plaintiff in his renewed

1 motion are not controlling on this Court. Ferrellgas contends this case is
2 distinguishable from the case law cited by Plaintiff in his renewed motion because
3 the incidents at issue in the cases cited by Plaintiff occurred on property owned and
4 controlled by the Defendant being compelled to produce records. In response to
5 Plaintiff's claim that the previously produced report was deficient, Ferrellgas
6 demonstrated that the report contained the information Plaintiff claimed was
7 missing.

8 Ferrellgas argues that Plaintiff's counsel failed to meet and confer pursuant to
9 EDCR 2.34 prior to filing the instant motion.

10 This Court clarified the previous order to state Ferrellgas must disclose any
11 incidents, events, or occurrences of outdoor gas grill system explosions for
12 residential propane customers (persons and property) in the Grand Canyon region
13 where litigation was filed for five years prior to this incident must be provided. This
14 specifically means all written documents, communications, case details, reports, and
15 demands in conjunction with any injuries to persons and property occurring from an
16 outdoor gas system for residential propane customers.

17 This Court also orders Ferrellgas to include any incidents, events or occurrences
18 of outdoor gas grill system fires and explosions which caused injury to person or
19 property at any residential bulk propane customers' property nationwide that
20 resulted in litigation for the five years preceding June 18, 2018. These may be limited
21 to only cases in which a lawsuit was filed, but should still include all written all written
22 documents, communications, case details, and reports. Counsel for Ferrellgas is
23 instructed to provide a privilege log for any attorney-work product or
24 communications included.

25 Ferrellgas requested relief pursuant to EDCR 2.34(e) to stay the time to respond
26 to the Discovery Commissioner's Order until after filing and service of a Notice of
27 Entry of any Order by the District Court on this issue.

28

II.

Recommendations

IT IS THEREFORE RECOMMENDED that Plaintiff's Motion to Compel Discovery from Defendant, Ferrellgas, Inc. and For Attorney's Fees and Costs is GRANTED IN PART and DENIED IN PART.

IT IS FURTHER RECOMMENDED that that Ferrellgas shall disclose incidents, events or occurrences of outdoor gas grill system fires or explosions which caused injury to person or property at any residential bulk propane customers' property nationwide that resulted in litigation for the five years preceding June 18, 2018. This includes all written documents, communications, case details, reports, and demands.

IT IS FURTHER RECOMMENDED that any incidents, events, or occurrences of outdoor gas system explosions or fires for residential propane customers (persons and property) in the Grand Canyon region where litigation was filed for five years prior to this incident (June 18, 2013-June 18, 2018). This includes all written documents, communications, case details, reports, and demands.

IT IS FURTHER RECOMMENDED that Ferrellgas is not required to produce attorney client privileged information, but must provide a privilege log for any materials withheld.

IT IS FURTHER RECOMMENDED that Ferrellgas should respond to this request within 21 days.

IT IS FURTHER RECOMMENDED that Ferrellgas' request for relief under EDCR 2.34(e) is GRANTED.

IT IS FURTHER RECOMMENDED that Ferrellgas time to respond shall not begin running until after Notice of Entry of Order of any Order of the District Court.

IT IS FURTHER RECOMMENDED that Plaintiff's Motion for Attorney's Fees and Costs is DENIED.

1 IT IS FURTHER RECOMMENDED that Defendant's Countermotion to Strike for
2 Failure to Comply with EDCR 2.34 is DENIED.

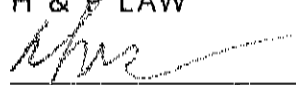
3
4 The Discovery Commissioner met with counsels for Plaintiffs and Defendants and
5 discussed the issues noted above. Having reviewed the materials offered in support
6 of this recommendation, she hereby submits the above recommendations.

7
8 DATED this ____ day of March 2021.

9
10 _____
DISCOVERY COMMISSIONER

11 Respectfully submitted by:

12 H & P LAW

13 
14 _____
Marjorie L. Hauf, Esq.
Nevada Bar No.: 8111
15 Matthew G. Pfau, Esq.
Nevada Bar No.: 11439

16
17 Attorneys for Plaintiff,
Joshua Green

18
19 Approved as to form and content:

20
21 DATED this ____ day of March 2021.

BAKER STERCHI COWDEN & RICE

22 Refused Signature

23 _____
Michael McMullen, Esq.
Admitted Pro Hac Vice
24 Gregorio Silva, Esq.
Nevada Bar No.: 13583

25 Attorneys for Defendant,
26 *Ferrellgas, Inc.*



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PYATT SILVERSTRI

James P.C. Silvestri, Esq.
Nevada Bar No.: 3603
Steven M. Goldstein, Esq.
Nevada Bar No.: 006318
700 Bridger Avenue, Suite 600
Las Vegas, Nevada 89101
T: 702-477-0088

Attorneys for Defendant,
Mario S. Gonzalez

DENNETT WINSPEAR, LLP

Gina Gilbert Winspear, Esq.
Nevada Bar No.: 005552
3301 North Buffalo Drive, Suite 195
Las Vegas, Nevada 89129
T: 702-829-1100

Attorney for Defendant,
Carl J. Kleisner

Notice

Pursuant to N.R.C.P. 16.1(c)(2), you are hereby notified that within fourteen (14) days after being served with a report any party may file and serve written objections to the recommendations. Written authorities may be filed with objections but are not mandatory. If written authorities are filed, any other party may file and serve responding authorities within seven (7) days after being served with objections.

Objection with expire on ____ day of _____ 2021.

A copy of the foregoing Discovery Commissioner's Report was:

____ Mailed to Plaintiff's & Defendant's at the following addresses on the ____ day of _____ 2021.

____ Placed in the folder of Plaintiff's & Defendant's counsel in the Clerk's office on the ____ day of _____ 2021.

____ Electronically served counsel on the ____ day of _____ 2021 pursuant to N.E.F.C.R. Rule 9.

COMMISSIONER DESIGNEE

ORDR

Marjorie L. Hauf, Esq.
Nevada Bar No.: 8111
Matthew G. Pfau, Esq.
Nevada Bar No.: 11439
H&P LAW
8950 W Tropicana Ave., #1
Las Vegas, NV 89147
702 598 4529 TEL
702 598 3626 FAX
mhauf@courtroomproven.com
mpfau@courtroomproven.com

Attorneys for Plaintiff,
Joshua Green

DISTRICT COURT
CLARK COUNTY, NEVADA

* * *

Joshua Green, an individual,

Plaintiff,
vs.

Ferrellgas, Inc., a foreign corporation;
Mario S. Gonzales, an individual; **Carl J. Kleisner**, an individual; Does I through XXX, inclusive and Roes Business Entities I through XXX, inclusive

Defendants.

Mario S. Gonzalez, an individual;

Cross-Claimant,
vs.

Ferrellgas, Inc., a foreign corporation;
Carl J. Kleisner, an individual; DOES 1 through 100 inclusive; and ROE Corporations 101 through 200;

Cross-Defendants.

Case No.: A-19-795381-C
Dept. No.: XXXI

**Order on Discovery Commissioner's
Report and Recommendations**

Hearing date: March 9, 2021
Hearing time: 9:30 a.m.



1
2 **Mario S. Gonzalez**, an individual;

3 Third-Party Plaintiff,
4

5 vs.
6

7 **BBQ Guys Manufacturing, LLC dba**
8 **Blaze Outdoor Products.**, a foreign
9 corporation; **Home Depot USA, Inc.**, a
10 foreign corporation; **KSUN**
11 **Manufacturing**, a foreign corporation;
Does 200 through 300 inclusive; and ROE
Corporation 301 through 400;

12 Third-Party Defendants.
13

14 **Ferrellgas, Inc.**, a foreign corporation;

15 Counter-Claimant,
16

17 vs.
18

19 **Mario S. Gonzalez**, an individual; DOES 1
through 100 inclusive; and ROE
Corporations 101 through 200;

20 Counter-Defendants
21

22 **Carl J. Kleisner**, an individual;

23 Counter-Claimant,
24

25 vs.
26

27 **Mario S. Gonzalez**, an individual; DOES 1
through 100 inclusive; and ROE
Corporations 101 through 200;
28

Counter-Defendants.

Order

The Court, having reviewed the above report and recommendations prepared by the Discovery Commissioner and,

___ No timely objections having been filed,

___ After reviewing the objections to the Report and Recommendations and good causing appearing,

* * *

AND

___ It is hereby ordered the Discovery Commissioner's Report and Recommendations are affirmed and adopted.

___ It is hereby ordered the Discovery Commissioner's Report and Recommendations are affirmed and adopted as modified in the following manner. (attached hereto)

___ It is hereby that this matter is remanded to the Discovery Commissioner for reconsideration or further action.

___ It is hereby ordered that a hearing on the Discovery Commissioner's Report and Recommendations is set for _____, 2021 at __:__a.m.

DATED this ____ day of _____ 2021.

DISTRICT COURT JUDGE

EXHIBIT P

Case Information: 81912

Short Caption: MOATS VS. DIST. CT. (BURGESS)
Lower Court Case(s): Clark Co. - Eighth Judicial District - A769459
Disqualifications:
Replacement:
To SP/Judge:
Oral Argument:
Submission Date:

Court: Supreme Court
Classification: Original Proceeding - Civil - Mandamus/Other
Case Status: To Screening
Panel Assigned: Panel
SP Status:
Oral Argument Location:
How Submitted:

+ Party Information**Docket Entries**

Date	Type	Description	Pending?	Document
10/09/2020	Filing Fee	Filing fee paid, E-Payment \$250.00 from Matthew G. Plau. (SC)		
10/09/2020	Petition/Writ	Filed Petition For a Writ of Mandamus or Other Extraordinary Relief. (SC)	Y	<u>20-37173</u>
10/09/2020	Appendix	Filed Appendix to Petition for Writ. (SC)		<u>20-37175</u>
10/09/2020	Notice/Incoming	Filed Notice of Association of Counsel. (SC)		<u>20-37177</u>
10/20/2020	Notice/Incoming	Filed Notice of Appearance for Amicus Counsel (In Support of Petitioner). (SC)		<u>20-38440</u>
10/22/2020	Motion	Filed Motion to Extend Time Motion for Extension to File Amicus Brief of the Nevada Justice Association. (First Request) (SC)		<u>20-38799</u>
10/28/2020	Order/Procedural	Filed Order. Attorneys Micah S. Echols of Claggett & Sykes Law Firm and Thomas W. Stewart of The Powell Law Firm have filed a notice of appearance as counsel for the Nevada Justice Association (NJA), and a motion for an extension of time to file an amicus brief on behalf of petitioner. If NJA intends to file an amicus brief, it must first file a motion for leave to file an amicus brief, accompanied by the proposed brief. NJA shall have 30 days from the date of this order to file and serve a motion for leave to file an amicus brief. (SC)		<u>20-39406</u>
11/29/2020	Motion	Filed Motion for Leave to File Amicus Brief of the Nevada Justice Association. (SC)		<u>20-43180</u>
11/29/2020	Brief	Filed Amicus Curiae Brief of the Nevada Justice Association. (In Support of Petitioner) (SC)		<u>20-43181</u>

12/16/2020	Order/Procedural	Filed Order Directing Answer and Granting Amicus Motion. Answer due: 28 days. We also grant the Nevada Justice Association's motion for leave to file an amicus brief in support of petitioner. (SC)	<u>20-455339</u>
01/07/2021	Order/Procedural	Filed Order. The clerk of this court shall return, unfiled, the letter from the Nevada Psychological Association addressed to the justices of this court, the letter addressed to The Honorable Judge Togliatti, and the proposed "Brief of Amici Curiae", received on December 21, 2020. (SC)	<u>21-00391</u>
01/12/2021	Motion	Filed Real Party in Interest's Motion to Extend Time to file Answering Brief. (SC)	<u>21-01026</u>
01/15/2021	Order/Procedural	Filed Order Granting Motion. Real party in interest shall have until February 12, 2021, to file and serve the answer. (SC)	<u>21-01422</u>
02/12/2021	Notice/Incoming	Filed Real Party in Interest's Notice of Association of Counsel for Andrew D. Smith. (SC)	<u>21-04373</u>
02/12/2021	Motion	Filed Real Party in Interest's Motion to Extend Time to File Answer to Writ. (SC)	<u>21-04374</u>
02/17/2021	Order/Procedural	Filed Order Granting Motion. Attorney Andrew D. Smith of Warner & Sherrod has filed a notice of appearance as counsel for real party in interest. The clerk of this court shall add Mr. Smith to the service list. Real party in interest shall have until February 26, 2021, to file and serve the answer. (SC)	<u>21-04651</u>
02/26/2021	Motion	Filed Real Party in Interest's Motion to Extend the Answering Brief Deadline. (SC)	<u>21-05856</u>
03/05/2021	Motion	Filed Real Party in Interest's Motion to Extend Time to File the Answer to Writ. (SC)	<u>21-06580</u>
03/06/2021	Brief	Filed Real Party in Interest's Answer to Writ. (SC)	<u>21-06581</u>
03/06/2021	Appendix	Filed Real Party in Interest's Appendix to Answer to Writ. (SC)	<u>21-06582</u>
03/10/2021	Order/Procedural	Filed Order Granting Motions. Real party in interest's motions for extensions of time to file the answer to the petition are granted. The answer and an appendix were filed March 6, 2021. Petitioner shall have until March 22, 2021, to file and serve a reply in support of petition, if deemed necessary. (SC)	<u>21-06963</u>
03/12/2021	Notice/Incoming	Filed Notice of Appearance of Amicus Curiae Las Vegas Defense Lawyers in Support of The Real Party in Interest. (SC)	<u>21-07239</u>
03/12/2021	Motion	Filed Motion by the Las Vegas Defense Lawyers for Leave to File Brief as Amicus Curiae in Support of The Real Party in Interest's Answer to Writ of Mandamus. (SC)	<u>21-07240</u>
03/12/2021	Brief	Filed Amicus Curiae Brief of the Las Vegas Defense Lawyers. (SC)	<u>21-07242</u>
03/19/2021	Motion	Filed Petitioner's Motion to Extend Reply in Support of Petition Deadline (First Request). (SC)	<u>21-08046</u>
04/01/2021	Order/Procedural	Filed Order Granting Motion. The motion filed by the Las Vegas Defense Lawyers (LVDL) for leave to file an amicus brief in support of real party in interest is granted. The amicus brief was filed on March 12, 2021. The clerk of this court shall add attorney Karissa K. Mack and Lincoln, Gustafson & Cercos, LLP, to the docket and service list as counsel for amicus LVDL. Petitioner's motion for an extension of time to file a reply in support of the petition is granted. Reply due: April 5, 2021. (SC)	<u>21-09495</u>
04/05/2021	Brief	Filed Petitioner's Reply to Answer to Petition for Writ of Mandamus. (SC)	<u>21-09799</u>
04/05/2021	Motion	Filed Petitioner's Motion to File Reply in Excess of NRAP 21(D) Limits. (SC)	<u>21-09805</u>

04/13/2021

Order/Procedural

Filed Order Granting Motion. Petitioner has filed a motion for leave to file a reply in support of the petition in excess of the type-volume limitations. The motion is granted. The reply was filed on April 5, 2021. (SC)

21-10624

EXHIBIT Q

Case Information: 82148	
Short Caption:	LYFT, INC. VS. DIST. CT. (DAVIS)
Lower Court Case(s):	Clark Co. - Eighth Judicial District - A77455
Disqualifications:	
Replacement:	
To SP/Judge:	
Oral Argument:	
Submission Date:	
Court:	Supreme Court
Classification:	Original Proceeding - Civil - Mandamus
Case Status:	To Screening
Panel Assigned:	Panel
SP Status:	
Oral Argument Location:	
How Submitted:	

± Party Information

± Due Items

Docket Entries			
Date	Type	Description	Pending? Document
12/02/2020	Filing Fee	Filing fee paid. E-Payment \$250.00 from Jeffrey D. Olsier. (SC)	
12/02/2020	Petition/Writ	Filed Petition for Writ of Mandamus. (SC)	Y 20-43638
12/02/2020	Appendix	Filed Appendix to Petition for Writ - Volume 1. (SC)	20-43639
12/02/2020	Appendix	Filed Appendix to Petition for Writ - Volume 2. (SC)	20-43640
12/02/2020	Appendix	Filed Appendix to Petition for Writ - Volume 3. (SC)	20-43641
12/02/2020	Appendix	Filed Appendix to Petition for Writ - Volume 4. (SC)	20-43642
12/02/2020	Appendix	Filed Appendix to Petition for Writ - Volume 5. (SC)	20-43643
12/02/2020	Appendix	Filed Appendix to Petition for Writ - Volume 6. (SC)	20-43644
12/31/2020	Order/Procedural	Filed Order/Answer Writ Petition. Answer due: 28 days. Petitioner shall have 14 days from service of the answer to file and serve any reply. (SC)	20-43639
01/26/2021	Order/Clerk's	Filed Order Granting Extension Per Telephonic Request. Real party in interest's answer to the petition for writ of mandamus due: February 11, 2021. (SC)	21-02331

02/11/2021	Brief	Filed Real Party in Interest's Answer to Writ Petition. (STRECKEN PER 4/12/21 ORDER). (SC)	<u>21-05346</u>
02/23/2021	Order/Clerk's	Filed Order Granting Telephonic Extension. Petitioner's Reply due: March 12, 2021. (SC)	<u>21-05346</u>
03/12/2021	Petition/Writ	Filed Petitioner's Reply to Answer to Petition for Writ of Habeas. (SC)	<u>21-07221</u>
04/02/2021	Order/Procedural	Filed Order Striking Answer. Real party in interest Kelona Davis's answer fails to comply with NRAP 21(d) because it contains 11,418 words. Further, Davis failed to file a motion to exceed the pagetype-volume limit. See NRAP 21(d). Accordingly, we strike her answer, which was filed on February 11, 2021. Davis shall have 14 days from the date of this order to file either a brief that complies with the NRAP 21(d) or a motion to exceed the pagetype-volume limit that complies with NRAP 32(a)(7)(D). (SC)	<u>21-10452</u>

[Combined Case View](#)

EXHIBIT R

NEVADA SUPREME COURT CLERK'S OFFICE

Report: Annual Pending Caseload by Case Category

Period: January - December 2020

	Beginning Pending	Filed	Reinstated	Petition for Review	Disposed	Transferred to COA	Other ¹	End Pending
Appeals								
Civil Appeal	875	858	27	62	895	294	3	630
Criminal Appeal	723	734	4	31	415	655	4	418
Total All Appeals	1598	1592	31	93	1,310	949	7	1048
Other Cases								
Bar Matter	20	80	0	0	80	0	0	20
Original Proceeding	75	293	3	16	259	73	0	55
Other Matters	6	5	0	0	5	0	0	6
Total Other Cases	101	378	3	16	344	73	0	81
Total All Cases	1699	1970	34	109	1,654	1,022	7	1129

¹ Includes cases closed without a disposition or cases that have been reclassified.