

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.

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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 III

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APPENDIX TO PETITIONERS' MOTION TO STAY PROCEEDINGS
VOLUME III

NUMBER	DOCUMENT	BATES NUMBER
4.	Plaintiff's Opposition to Defendants' Motion to Stay Case Pending Writ of Mandamus and Counter-Motion for Attorney's Fees and Costs filed in District Court on 04/30/2021	MOT-404-550
5.	Defendants' Reply to Motion to Stay Case Pending Writ of Mandamus and Opposition to Plaintiff's Counter-Motion for Attorney's Fees and Costs filed in District Court on 05/14/2021	MOT-551-562
6.	District Court Minutes of 05/27/2021 Hearing	MOT-563-564
7.	Email dated 06/10/2021 and proposed Order	MOT-565-574
8.	Email dated 06/24/2021	MOT-575-576

DATED this 2nd day of July, 2021.

/s/ Felicia Galati, Esq.

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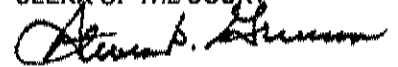
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14 *Joshua Green*

DISTRICT COURT
CLARK COUNTY, NEVADA

15 **Joshua Green**, an individual,

16 Plaintiff,

17 vs.

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

24 Defendants.

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

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

- and -

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

26 Cross-Claimant,

27 vs.

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

**Counter-motion for Attorney's
Fees and Costs**

Hearing date: May 20, 2021
Hearing time: 9:00 a.m.

1 Cross-Defendants.
2
3 **Mario S. Gonzalez**, an individual;
4
5 Third-Party Plaintiff,
6
7 vs.
8 **BBQ Guys Manufacturing, LLC dba**
9 **Blaze Outdoor Products.**, a foreign
10 corporation; **Home Depot USA, Inc.**,
11 a foreign corporation; **KSUN**
12 **Manufacturing.** a foreign
13 corporation; Does 200 through 300
14 inclusive; and ROE Corporation 301
15 through 400;
16 Third-Party Defendants.
17
18 **Ferrellgas, Inc.**, a foreign
19 corporation;
20 Counter-Claimant,
21 vs.
22 **Mario S. Gonzalez**, an individual;
23 DOES 1 through 100 inclusive; and
24 ROE Corporations 101 through 200;
25 Counter-Defendants
26
27 **Carl J. Kleisner**, an individual;
28 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 and Countermotion for Attorney's Fees and Costs.

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 are abusing this Court with their unnecessary, improper motions. Defendants filed their previous Motion to Stay without any points and authorities. This Court properly denied the motion under EDCR 2.20.¹ Then, Defendants violated a Court order by filing a late Reply in Support. Plaintiff's counsel had to attend a hearing on Defendants' previous Motion to Stay, wasting both this Court's time and resources and their own. Defendants are required to pay sanctions for their failure to adhere to the rules of this Court.² Did they refile this one then with points and authorities?

¹ EDCR 2.20(i).

² EDCR 7.60.

1 Finally, it is crucial to note, that Defendants continue to argue irrelevant
2 and wholly inaccurate points regarding Plaintiff's counsel, H&P Law's filing of
3 a Motion to Stay before Judge Adrianna Escobar in a separate matter, *Moats v.*
4 *Burgess*.³ First, the instant matter is not before Judge Escobar; Josh's case is
5 entirely separate from the *Moats* case and what Plaintiff's counsel may or may
6 not have done in that District Court level case has no bearing on this Court. It
7 is, quietly frankly, bizarre Defendants keep bringing it up.

8 More importantly, Defendants' argument "Plaintiff's attorneys (H&P Law)
9 filed a 'Motion to Stay Troy Moats' Rule 35 Examination Pending Writ of
10 Mandamus' consisting solely of an Affidavit without any points and
11 authorities"⁴ is not even true. H&P Law did in fact file a Motion to Stay Troy
12 Moats' Rule 35 Examination, but they briefed the *Fritz Hansen* factors in such.⁵
13 Plaintiff's counsel then sent the Motion on Order of Shortening Time to
14 Department 14 to be set for a hearing.⁶ Notably, an entire 10-page motion was
15 attached to that email.⁷ Again, H&P Law is aware Defendant's —"they did it
16 first argument" is entirely irrelevant. H&P Law is only mentioning this to clarify
17 the record because Defendants repeatedly attempt to parallel the *Moats* case
18 with this matter.

19 20 II.

21 Law and Argument

22 Because Defendants previously filed an improper Motion to Stay Case
23 Pending Writ of Mandamus,⁸ this Court is familiar with the circumstances

24
25 ³ See Defs. Mot. to Stay at 3:14-19.

26 ⁴ *Id.* at 3:14-17.

27 ⁵ See Motion to Stay Troy Moats' Rule 35 Examination Pending Writ of Mandamus on Order of
Shortening Time dated October 1, 2020, as Exhibit 1.

28 ⁶ See Email to Department 14 dated October 1, 2020, as Exhibit 2.

⁷ *Id.* and Exhibit 1.

⁸ See Defs. Mot. to Stay Case on OST, filed on 4/7/21 on file with this Court.

surrounding such. Specifically, Plaintiff, Joshua Green, already briefed the relevant *Fritz Hansen*⁹ factors in his Opposition filed on April 9th.¹⁰ But Josh will still explore those again below.

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.¹¹

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

Defendants filed a Writ of Mandamus on March 26th.¹² Concurrently, they filed a Motion to File Writ in Excess of NRAP 21(D) Limits.¹³ The Nevada Supreme Court denied that motion on April 20th,¹⁴ which means their writ was effectively rejected. Josh does acknowledge that Defendants have since re-filed their Petition for Writ of Mandamus on April 21st¹⁵ but the Nevada Supreme Court has not yet accepted Defendants Writ nor directed Real Party in Interest to answer. As discussed in the previous motion-work and above, the Nevada Supreme Court has *Moats v. Dist. Ct.*¹⁶ and *Lyft v. Davis*¹⁷ before them which

⁹ *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

¹⁰ See Pltffs. Opp. to Mot. to Case, filed on 4/9/21 on file with this Court.

¹¹ *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

¹² See Defendants' Petition for Writ of Manadamus, as Exhibit 3.

¹³ See Motion to File Writ Petition in Excess of NRAP 21(D) Limits, as Exhibit 4.

¹⁴ See Order Denying Motion dated April 20, 2021, as Exhibit 5.

¹⁵ See Petition for Writ of Mandamus dated April 21, 2021, as Exhibit 6.

¹⁶ *Moats v. Dis. Ct. (Burgess)* Docket 81912.

¹⁷ *Lyft, Inc. v. Dis. Ct. (Davls)* Docket 82148.

1 explore NRS 52.380 and NRCP 35. Because the Nevada Supreme Court has two
2 separate writs concurrently on this issue, Defendants' writ may be denied
3 pending resolution of either *Moats* or *Lyft*.

4 Further, the purpose Defendants' Writ will *not* be defeated if this case
5 continues. Defendants Writ solely explores NRS 52.380 and NRCP 35.
6 Therefore, the *only* procedural posture that is affected is Plaintiff, Joshua
7 Green's pending Defense Medical Examination. Although it has not yet been
8 noticed, the parties have already tentatively scheduled Josh's Rule 35
9 Examination for July 21st—**96 days** from the day of filing their motion to stay.¹⁸
10 *Moats* or *Lyft* may very well be resolved in that significant time frame.

11 Defendants blanket statement "the NRCP 35 psychological examination
12 relates to all Plaintiff's claims and damages"¹⁹ does not make it so. In fact,
13 there is no substantial justification for staying the case in its entirety.
14 Defendants cannot muster any evidence that supports why outstanding
15 discovery, including (amongst other things), disclosure of Ferrellgas'
16 nationwide incident reports,²⁰ percipient witness depositions,²¹ and expert
17 depositions²² will defeat their Writ's purpose. None of that discovery even
18 remotely affects the pending Defense Medical Examination. Defendants are
19 clearly just making yet *another* last-ditch effort to delay this case.

20
21 **B. Petitioners do not experience any harm or injury if the stay is denied.**

22 Again, the *only* issues briefed in Defendants Writ are the conflict between
23 NRS 52.380 and NRCP 35 and defining "good cause" for an observer or audio
24

25 ¹⁸ See Email to Gregorio Silva, Esq. dated March 30, 2021, as Exhibit 7.

26 ¹⁹ See Defs. Mot. to Stay at 7:2-3.

27 ²⁰ See Amended Discovery Commissioner's Report and Recommendations, a draft of which
was sent to the Discovery Commissioner on April 19th, as Exhibit 8.

28 ²¹ Plaintiff's counsel has noticed the deposition of Ferrellgas employee, Sam Brown set to take
place June 16, 2021.

²² The parties have multiple outstanding requests for depositions of experts.

1 recording under NRCP 35.²³ Defendants Writ does not seek to address any
2 other discovery disputes, procedural posture, statutory rights, etc. There is no
3 harm in continuing discovery on all other matters outside the Defense Medical
4 Examination.

5 In their motion, Defendants argue—without providing substantial
6 justification—“the NRCP 35 Examination is relevant to all Plaintiff’s claims and
7 damages.”²⁴ Josh’s Second Amended Complaint asserts claims for Negligence,
8 Negligent Training, Negligent Maintenance, Negligent Supervision, and
9 Punitive Damages.²⁵ The Defense Medical Examination seeks to undermine
10 Josh’s causation and damages associated with these claims; however, it does
11 not speak to the elements of duty and breach. There is still *substantial*
12 discovery pending that will assist a trier of fact on these issues and absolutely
13 no harm in pursuing it while Defendants await their Rule 35 Examination.

14
15 **C. Respondent, Josh, will be irreparably harmed by the stay.**

16 Thus far, Defendants have filed three separate motions to extend
17 discovery, forced a Settlement Conference despite Plaintiff’s counsel’s
18 representations it would not be meaningful since it was well established that
19 the parties vastly differed on their valuations of the case, filed a repeat Motion
20 to Dismiss after this Court had already adjudicated on the issue of Plaintiff’s
21 Negligent, Training, Maintenance and Supervision claims, refused to
22 participate in discovery requests in good faith, and most recently, filed an
23 improper affidavit labeled a motion. Now, they have re-filed their Motion to
24 Stay and it is just their latest installment in delaying this matter. Defendants
25 want this Court to enter an order staying **an entire case** while the Nevada
26

27 ²³ Exhibit 2.

28 ²⁴ See Defs. Mot. at 8:68.

²⁵ Second. Amend. Compl.

1 Supreme Court decides a yet unaccepted writ related to NRS 52.380 and NRC
 2 35. Such *undeniably* causes Josh irreparable harm. He will be forced to halt *all*
 3 discovery for potentially months. Discovery on matters that are entirely
 4 **irrelevant** to the Defense Medical Examination.

5 The first rule of Nevada Civil Procedure is that the rules "shall be construed
 6 and administered to secure the just, speedy, and inexpensive determination
 7 of every action."²⁶ The second listed rule of the Eighth Judicial District Court
 8 Rules reads similarly: These rules "must be liberally construed to secure the
 9 proper and efficient administration of the business and affairs of the court and
 10 to promote and facilitate the administration of justice."²⁷ There is nothing just,
 11 speedy, inexpensive, proper, or efficient about staying Josh's case pending
 12 resolution of the Writ. That will cause inexcusable delay and further bar Josh
 13 from recovering for the *horrific* injuries he sustained from Defendants' actions.

14 What should be clear to this Court is that Defendants wish to block Josh
 15 from obtaining the nationwide incident reports ordered by the Discovery
 16 Commissioner²⁸ and conducting depositions they presume will be detrimental
 17 to their case.²⁹ That is the only logical explanation for attempting to halt all
 18 discovery based on an unaccepted writ and an examination more than three
 19 months away.

20
 21 **D. Petitioners are unlikely to prevail on their Writ.**

22 The parties have already briefed this issue *ad nauseum*. Defendants filed a
 23
 24

25 ²⁶ N.R.C.P. 1.

26 ²⁷ EDCR 1.10. The first listed rule, 1.01, dictates how the rules are to be known, cited, and abbreviated.

27 ²⁸ Exhibit 9.

28 ²⁹ Plaintiff noticed the deposition of Ferrellgas safety manager, Sam Brown, to take place on June 16th. While it is merely conjecture at this time, Plaintiff suspects Mr. Brown's testimony will assist his case.

1 Motion to Compel Rule 35 Examination on October 26th.³⁰ The Discovery
2 Commissioner recommended Josh appear for a psychological Rule 35 Exam,
3 but also recommended an observer be present and audio recording pursuant
4 to NRS 52.380. Defendants objected to this recommendation.³¹ This Court
5 then affirmed the Discovery Commissioner's Report and Recommendations.³²
6 In its order, this Court states good cause exists to permit Josh to have an
7 observer present and audio record the examination.

8 In response, Defendants filed a Motion for Reconsideration to this Court's
9 March 2, 2021 Order.³³ Josh then articulated an Opposition, outlining that
10 good cause is inherent in an adversarial Rule 35 examination, NRS 52.380
11 presents a substantive right, and that NRCP 35 and NRS 52.380 can be read in
12 harmony.³⁴ This Court denied Defendants' Motion for Reconsideration on
13 April 27th. The Order is still forthcoming.

14 To avoid redundancy, Josh requests this Court refer to the six months of
15 briefing on this issue. Those arguments—and the fact that this Court has
16 ordered an observer and audio recording now **four times**—represent that
17 Defendants will be unlikely to prevail on their Writ.

18 19 III.

20 **Countermotion for Attorney's Fees and Costs**

21 This Court "may impose upon an attorney or a party any and all sanctions,
22 under the facts of the case, be reasonable including the imposition of fines,
23 costs or attorney's fees when an attorney or party without just cause...so
24 multiplies the proceedings in a case as to increase costs unreasonably and

25 ³⁰ See Defs. Mot. to Compel filed on 10/26/20 on file with this Court.

26 ³¹ See Defs. Obj. to Discovery Commissioner filed on 1/5/2021 on file with this Court.

27 ³² See Order Denying Defendants' Objections to Discovery Commissioner's Reports and
Recommendations dated March 2, 2021, as Exhibit 10.

28 ³³ See Defs. Mot. for Reconsideration filed on 3/26/20 on file with this Court.

³⁴ See Pliffs. Opp. to Mot. for Reconsideration filed on 4/9/21 on file with this Court.

vexatiously," "fails or refuses to comply with these rules," or "fails or refuses to comply with any order of a judge of the court."³⁵

A. Defendants are unreasonably and vexatiously increasing costs in this case.

Instead of simply noticing Josh's Defense Medical Examination, Defendants have already filed four separate motions and delayed this case by six months. Additionally, they filed their Motion to Stay Case Pending Writ of Mandamus on Order of Shortening Time consisting of sole affidavit without any points and authorities. Josh then made a timely a proper objection to Defendants' prior motion, but still appeared for the hearing on April 15th. Drafting an opposition and preparing for the hearing on Defendants' motion surmounted to time and money spent by Josh's counsel.

Defendants then filed the instant motion the following day. That means Josh's counsel will have to appear and prepare for *yet another* hearing because Defendants did not familiarize themselves with even the most basic rules of this Court. Sanctions are appropriate.

B. Defendants failed to adhere to the rules and orders of this Court.

Again, Defendants previous "motion" was a single affidavit without any points or authorities. Per EDCR 2.20 motions must be fully briefed with points and authorities to be considered.³⁶ Motions with the absence of such memorandums will "construed that the motion is not meritorious."³⁷

³⁵ EDCR 7.60.

³⁶ EDCR 2.20(i).

³⁷ EDCR 2.20(c).

After Josh filed his Opposition, Defendants filed their Reply in Support on April 14th in direct violation of a Court order:

ORDER SHORTENING TIME

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

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

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

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

Opposition must be filed and served by 5:00 p.m. on April 9, 2021

Reply must be filed and served by noon on April 13, 2021


THE HONORABLE JUDGE JOANNA S. KISHNER

Defendants have repeatedly exhibited to this Court that they do not follow its rules or orders. Despite three separate firms supposedly reviewing and contributing to these motions, appears they do not even follow the most basic principles of this Court. Sanctions are appropriate to remind Defendants the rules exist for a reason.

1. Fees should be considered using the Lodestar method.

My agreement with Josh was to litigate this case on a 40% contingency rate. In determining an appropriate measure of fees for contingency cases, courts utilize the Lodestar Method. The Lodestar method derives a figure from the

product of a reasonable hourly rate and a reasonable amount of time spent.³⁸

I take cases on both a contingency and an hourly rate; Although this case is a contingency case, my hourly rate for litigation cases is now \$700. I bill my paralegals out at \$145 hourly. Based on the attached invoice, the total would be \$5,117.50 in fees.³⁹ The costs would be the Odyssey charge to file this Opposition and the Notice of Entry of Order Denying Motion to Stay, totaling \$7.00.⁴⁰

To determine the reasonableness of the fees to be awarded, the Court must analyze the following factors:

- The qualities of the advocate: his ability, training, education, experience, professional standing, and skill;
- The character of the work to be done: its difficulty, intricacy, importance, the time and skill required, the responsibility imposed, and the prominence and character of the parties where they affect the importance of the litigation;
- The work actually performed by the lawyer: the skill, time, and attention given to the work; and
- The result: whether the attorney was successful and what benefits were derived.⁴¹

No one element should predominate or be given undue weight.⁴²

³⁸ *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 864 n. 98, 124 P.3d 530, 549 n. 98 (2005) (citing *Herbst v. Humana Health Ins. of Nevada*, 105 Nev. 586, 590, 781 P.2d 762, 764 (1989)).

³⁹ See Attorney's fees invoice, attached as Exhibit 9.

⁴⁰ Odyssey File and Serve charges \$3.50 per filing.

⁴¹ *Brunzell v. Golden State Nat. Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969); see also *Miller v. Wilfong*, 121 Nev. 619, 623–24, 119 P.3d 727, 730 (2005).

⁴² *Brunzell*, 85 Nev. at 349, 455 P.2d at 33.

a. Qualities of the advocate: his ability, training, education, experience, professional standing, and skill.

I have over ten years' experience as a litigator. I have litigated numerous injury cases on behalf of plaintiffs.⁴³ I am also an adjunct professor at the University of Nevada Las Vegas⁴⁴ teaching Torts, Contracts, Nevada Practice and Procedure, and Legal Research and Writing to paralegal candidates in the university's renowned paralegal certificate program. I am a Partner at H&P Law, a successful personal injury firm. I am also a member of good standing of the Nevada Bar and California Bar. My skill should also be evident from my work product.

b. The character of the work to be done: its difficulty, intricacy, importance, the time and skill required, the responsibility imposed, and the prominence and character of the parties where they affect the importance of the litigation.

Any litigation requires specialized knowledge. This issue primarily required a review of the Rules of Practice for the Eighth Judicial District Court and *Fritz Hansen* factors. While I am familiar with both, because Defendants have failed to adhere to the rules on multiple occasions, a thorough review was necessary. Preparing a motion like this takes more time than skill, though it still requires a knowledge of procedure that must be learned.

c. The work actually performed by the lawyer: the skill, time, and attention given to the work.

This was not an overly complicated issue. It was relatively straightforward,

⁴³ An Odyssey search with my bar number reveals about 50 injury cases where I have been the first-chair attorney in the last four years.

⁴⁴ See <http://continuingeducation.unlv.edu/bio/matthew-pfau>.

1 in fact. However, it still required skill and time. To properly prepare for this
2 motion, I had to review the Eighth Judicial District Court and *Fritz Hansen*
3 factors.

4
5 **d. The result: whether the attorney was successful and what**
6 **benefits were derived.**

7 Presuming this motion is granted, and I am successful, Defendants will
8 carefully consider their motions before they file them. They will also recognize
9 it is important to adhere to both the rules and orders of this Court.


10 All of the *Brunzell* factors weigh in favor of awarding the entire fees
11 requested totaling \$5,117.50 in fees and \$7.00 costs.

12
13
14 **IV.**
15 **Conclusion**

16 Based on the foregoing and for good cause appearing thereof, Plaintiff
17 respectfully requests this Court deny Defendants' Motion to Stay Case Pending
18 Writ of Mandamus and grant his Countermotion for Attorney's Fees and Costs.

19 DATED this 30th day of April 2021.

H & P LAW

20 
21 Marjorie Hauf, Esq.
22 Nevada Bar No.: 8111
23 Matthew G. Pfau, Esq.
24 Nevada Bar No.: 11439

25 Attorneys for Plaintiff,
26 *Joshua Green*

HP LAW

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EXHIBIT "1"

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13 Attorneys for Plaintiff,
14 *Troy Moats*

15 DISTRICT COURT
16 CLARK COUNTY, NEVADA

17 * * *

18 **Troy Moats**, an individual,
19
20 Plaintiff,
21
22 vs.

Case No.: A-18-769459-C
Dept. No.: XIV

23 **Troy Burgess**, an individual; Does I
24 through X, inclusive and Roe Business
25 Entities I through X, inclusive

26 Defendants.

**Motion to Stay Troy Moats'
Rule 35 Examination Pending
Writ of Mandamus**

**ON ORDER OF SHORTENING
TIME**

HEARING REQUESTED

27 **Affidavit of Marjorie L. Hauf, Esq.**

28 STATE OF NEVADA

COUNTY OF CLARK

I, Marjorie L. Hauf, Esq., being first duly sworn, states as follows:

1. I am an attorney licensed to practice law in the State of Nevada and represent
Plaintiff, Troy Moats, in the matter of *Moats v. Burgess*, Eighth Judicial District Court,

1 Case No.: A-18-769459-C.

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

5 3. On May 28, 2020, the Discovery Commissioner recommended a Rule 35
6 Psychological Examination of Plaintiff, Troy Moats. The Discovery Commissioner
7 scheduled a Status Check for the parties to discuss parameters for the Rule 35
8 Examination. Prior to the Status Check, the parties stipulated to 29 of 31
9 parameters.¹ The parties remained disputed on two parameters: (1) Troy Moats will
10 be permitted to audio record the examination and (2) Troy Moats will be
11 accompanied by a silent observer during the examination.

12 4. During the July 31, 2020 Status Check, the Honorable Discovery Commissioner
13 recommended Mr. Moats be accompanied by an independent observer and be
14 permitted to audio record his October 12-13 neuropsychological examination.²
15 Defendant filed an Objection to this Recommendation.³

16 5. Defendant's Objection came before this Court on September 29, 2020. This
17 Court reversed the Discovery Commissioner's recommendation, determining that
18 under NRC 35, Mr. Moats may not audio record the psychological examination nor
19 be accompanied by an observer.

20 6. It is my position this ruling contradicts the substantive right afforded to my
21 client in NRS 52.380. My office will be filing a file a Writ of Mandamus regarding this
22 issue.

23 7. Mr. Moats's Rule 35 Psychological Examination is currently scheduled for
24 October 12-13, 2020. If this Examination moves forward prior to resolution of the
25 Writ of Mandamus, Mr. Moats's rights will be irreparably harmed.

26
27 ¹ See Proposed Stipulation and Order Regarding Rule 35 Examination Parameters, as Exhibit 1.

28 ² See Discovery Commissioner's Report and Recommendations at 3:18-19, as Exhibit 2.

³ Defs. Objection.

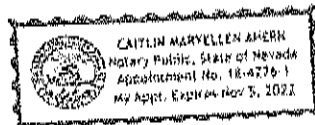
1 8. This court therefore need Issue an Order to Stay Mr. Moats's Rule 35
2 Examination pending the Writ.

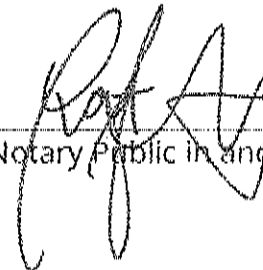
3 9. Pursuant to EDCR 2.26, this Motion to Stay is filed on Order of Shortening Time
4 as Mr. Moats's Rule 35 Examination is currently scheduled for October 12-13, 2020
5 and this matter need be resolved prior.

6 I declare under penalty of perjury that the information in this declaration is true.

7
8 
MARJORIE L. HAUF, ESQ.

9 Signed and sworn to before me on
10 1 October 2020
by Marjorie L. Hauf, Esq.



15
16
17 
18 Notary Public in and for above state
19
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HP LAW
HP

Order Shortening Time

For good cause appearing therefore and to the satisfaction of the court, it is hereby ORDERED that Plaintiff's Motion to Stay Troy Moats' Rule 35 Examination Pending Writ of Mandamus on Order of Shortening Time will be heard in Department 14 on the ____ day of _____ 2020.

DATED this ____ day of October 2020.

DISTRICT COURT JUDGE

Respectfully submitted by:

H & P LAW

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

Attorneys for Plaintiff,
Troy Moats

I.

Procedural History

Plaintiff, Troy Moats ("Mr. Moats") filed his Complaint against Defendant, Troy Burgess ("Mr. Burgess") for Negligence and Negligence Per Se on February 13, 2018. Discovery between the parties thereafter commenced. This discovery included extensive depositions—including Plaintiff, Defendant, percipient witnesses, and Mr. Moats' treating physicians and collection of Mr. Moats' medical records by both parties. Discovery closed on September 3, 2019.

Unfortunately, an oversight by Plaintiff's counsel led to a failure to disclose Mr. Moats' medical records and discovery was reopened for the limited purpose related to such. Mr. Burgess ultimately filed a Motion to Compel the Rule 35 Examination of Mr. Moats, to which the Discovery Commissioner recommended. The Discovery Commissioner further requested the parties attempt to resolve the parameters of the Rule 35 Examination prior to a Status Check on July 31, 2020.

The parties stipulated to 29 of 31 parameters for Mr. Moats' Rule 35 Examination, but were ultimately contested on two parameters:⁴

1. Troy Moats will be permitted to audio record the examination.
2. Troy Moats will be accompanied by a silent observer during the examination.

During the July 31, 2020 Status Check, the Honorable Discovery Commissioner recommended Mr. Moats be accompanied by an independent observer and be permitted to audio record his October 12–13 neuropsychological examination.⁵ The Discovery Commissioner made this ruling in deference to NRS 52.380, as "affects the substantive right inherent in a physical examination."⁶

⁴ Exhibit 1.

⁵ See Discovery Commissioner's Report and Recommendations at 3:18–19, as Exhibit 2.

⁶ *Id.*

Defendant filed an Objection to Commissioner Truman's recommendation and requested a de novo before this Court.⁷ On September 29, 2020, this Court reversed Commissioner Truman's recommendation, determining that under NRC 35, Mr. Moats may not audio record the psychological examination nor be accompanied by an observer. This ruling directly violates NRS 52.390. While an Order has not yet been entered, it is assumed Defense counsel will do so soon.

Mr. Moats' Rule 35 Examination is currently scheduled for October 12-13 with Lewis Etcoff, Ph.D.

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.⁸

A. The purpose of the writ will be defeated if the stay is not granted.

Plaintiff's Writ of Mandamus will address the clear conflict between NRS 52.380 and NRC 35. If Mr. Moats' Rule 35 Examination goes forward on October 12-13th, he will essentially waive his statutory right to audio record the Rule 35 and have an observer present.⁹ Mr. Moats cannot go back and "undo" the Rule 35 *after* the

⁷ Defs. Objection.

⁸ *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

⁹ NRS 52.380.

1 completion of the writ. Requiring Mr. Moats to appear for his October 12–13th
2 Rule 35 will frustrate the purpose of his Writ and rendered it useless.

3
4 **B. Petitioner, Mr. Moats, will face irreparably harm and be unduly prejudiced**
5 **if the stay is denied.**

6 Mr. Moats’ Rule 35 Examination is scheduled to begin on October 12th—only 12
7 days from the date of the filing of this Motion. Ordering Mr. Moats to appear for this
8 Rule 35 Examination barring him from audio recording the examination and without
9 an observer contradicts the inherent right provided through NRS 52.380.

10 Plaintiff’s counsel will only permit *one* Rule 35 Examination, so the harm of
11 pursuing the October 12–13 exam is evident. Again, Mr. Moats cannot go back and
12 “undo” the Rule 35. Even if Plaintiff’s counsel did agree to conduct another Rule 35
13 following completion of the Writ, it is assumed Defense counsel will object to the
14 results and seek to only include the Rule 35 conducting *without* the audio recording
15 and observer. So, if the October 12–13th exam goes forward without Mr. Moats’
16 statutory right to audio record and bring an observer, he will be unable to quantify
17 the examination or benefit from any of the safeguards imposed through
18 NRS 52.380. This clearly meets the irreparably harm standard.

19
20 **C. Respondent, Mr. Burgess, will not be irreparably harmed by a stay.**

21 The most harm Mr. Burgess will face is a slight inconvenience in rescheduling the
22 Rule 35 Examination. That does not constitute irreparable harm or injury. Mr. Moats
23 fully intends to appear for the Rule 35 pending resolution of the Writ, so the Defense
24 will eventually be afforded the opportunity to get the exam on the record.

25 And this case is set for trial to begin on a five-week stack on August 2, 2021.¹⁰
26 With a trial date nearly a year in the future, Mr. Burgess certainly has enough time
27

28 ¹⁰ See Stipulation and Order to Extend Discovery Deadlines at 7:10–11, as Exhibit 3.

to reschedule the Rule 35 Examination.

D. Because NRS 52.380 creates a substantive right, Petitioner is likely to prevail on the merits of the Writ.

Despite this Court's ruling, 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 legislature. *Goldberg v. District Court, supra*. We have held that the legislature may not enact a procedural statute that conflicts with a pre-existing procedural rule, without violating the doctrine of separation of powers, and that such a statute is of no effect. *Lindauer v. Allen*, 85 Nev. 430, 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).¹¹

This relationship defines the judiciary as the right to govern procedures, while legislature has the exclusive right to govern **substance** of the law. This distinction is strictly afforded in the Separation of Powers doctrine—recognized in the Nevada State Constitution.¹² *State v. Connery* clearly defines the legislature as controlling when it conflicts with a pre-existing procedural rule.¹³

Further, this issue is ripe for determination before the Supreme Court. In the instant matter alone, Commissioner Truman acknowledged "there is a clear conflict between NRS 52.380 and NRCP 35, and this conflict **need be addressed by a high court.**"¹⁴ Plaintiff's counsel suspects similar incidents exist. The Supreme Court need consider this issue ripe for determination. Therefore, Petitioner is likely to succeed.

¹¹ *State v. Connery*, 99 Nev. 342, 661 P.2d 1298, 1983 Nev. LEXIS 441.

¹² *Berkson v. Lepome*, 126 Nev. 492, 245 P.3d 560, 2010 Nev. LEXIS 50, 126 Nev. Adv. Rep. 46.

¹³ *Id.*

¹⁴ Exhibit 2 at 3:11-13.

III.

Conclusion

Based on the foregoing, Mr. Moats respectfully requests this Court issue an Order Granting a Stay on Rule 35 Examination currently scheduled for October 12-13th pending the decision on a Writ of Mandamus. Mr. Moats further requests this Court bar Defendant from noticing the Rule 35 Examination until the resolution of his pending appeal.

DATED this 1st day of October 2020.

H & P LAW

/s/ Marjorie Hauf, Esq.

Marjorie Hauf, Esq.

Nevada Bar No.: 8111

Matthew G. Pfau, Esq.

Nevada Bar No.: 11439

Attorneys for Plaintiff,
Troy Moats

Certificate of Service

I hereby certify that on the 1st day of October 2020, service of the foregoing **Motion to Stay Troy Moats' Rule 35 Examination Pending Writ of Mandamus ON ORDER OF SHORTENING TIME** was made by required electronic service to the following individuals:

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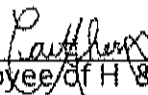

An Employee of H & P LAW

EXHIBIT "2"

From: [Cait Ahern](#)
To: DC14Inbox@ClarkCountyCourts.us
Cc: [Matt Pfau](#); [Marjorie Hauf](#)
Subject: Moats v. Burgess - A-18-769459-C - Ex Parte Order on Shortening Time to Hear Plaintiff's Motion to Stay
Date: Thursday, October 01, 2020 8:54:00 AM
Attachments: [image001.png](#)
[20201001 Motion to Stay DME.pdf](#)
[20201001 Motion to Stay DME.docx](#)

Good morning Department 14,

Attached to this email is a Proposed Ex Parte Order Shortening Time to Hear Plaintiff's Motion to Stay Troy Moats' Rule 35 Examination Pending Writ of Mandamus. It is attached in both PDF and word format.

Because this is an ex parte order, opposing counsel is *not* CC'd on this correspondence.

Thank you,

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



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Litigation Paralegal
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MOT431

EXHIBIT "3"

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

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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.

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DATED this 26th day of March, 2021.

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PETITION FOR WRIT OF MANDAMUS

TO: THE HONORABLE SUPREME COURT OF THE STATE OF NEVADA

Pursuant to NRAP 21, Defendants/Petitioners FERRELLGAS, INC., MARIO GONZALEZ and CARL KLEISNER ("Defendants"), by and through their undersigned counsel, hereby petition this Court for an extraordinary writ of mandamus: (1) compelling the district court to comply with Nevada Rule of Civil Procedure (NRCP) 35(a)(4)(A)(ii) and NRCP 35(a)(3) and grant its Objection; (2) compelling the district court to issue an order denying Plaintiff the presence of an observer at and 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 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 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. Freteluc 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. Etcoff 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. Etcoff and the State of Nevada Board of Psychological Examiners 10/1/18 letter and relied on Freteluco to support the denial of an observer and audio recording, none of which was disputed.

The Rules of Civil Procedure are designed to be tools to elicit the truth. To routinely require the presence of an observer and an audio recording during an adverse psychological/neuropsychological examination would thrust the adversary process itself into the psychologist's examining room, which would only institutionalize discovery abuse, convert adverse medical examiners into advocates, and shift the forum of the controversy from the courtroom to the physician's examination room. 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.

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DATED this 26th day of March, 2021.

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DATED this 26th day of March, 2021.

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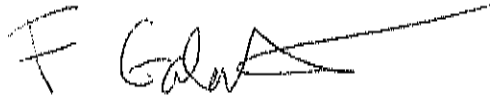
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VERIFICATION

STATE OF NEVADA)
) SS:
COUNTY OF CLARK)

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

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

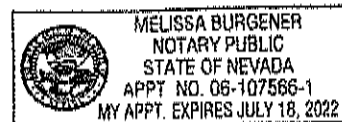


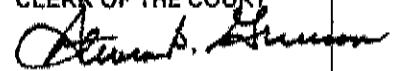
FELICIA GALATI

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



Notary Public in and for said
County and State





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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

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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

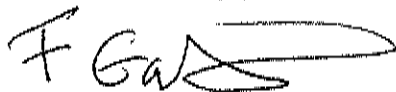
10 DATED this 1 day of ~~September~~, 2019.

11 *Oct 1*

12
13 
14 DISTRICT COURT JUDGE
15

16 Respectfully submitted by:

17 OLSON, CANNON, GORMLEY
18 ANGULO & STOBERSKI

19 
20

21 FELICIA GALATI, ESQ.
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27
28

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(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 26th day of March, 2021.

/s/ Felicia Galati, Esq.

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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:

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/s/ Erika Parker

An Employee of OLSON CANNON GORMLEY
& STOBERSKI

EXHIBIT "4"

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.

CASE NO.

Electronically Filed
Mar 26 2021 04:23 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

DISTRICT COURT CASE NO.

A-19-795381-C

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MOTION TO FILE WRIT PETITION IN EXCESS OF NRAP 21(D) LIMITS

COME NOW Defendants Ferrellgas, Inc., by and through Felicia Galati, Esq. of Olson Cannon Gormley & Stoberski and Michael C. McMullen, Esq. of Baker, Sterchi, Cowden & Rice, LLC, Carl J. Kleisner, by and through Gina Gilbert Winspear, Esq. of Dennett Winspear, LLP, and Mario Gonzalez, by and through James P.C. Silvestri, Esq. and Steven M. Goldstein, Esq. of Pyatt Silvestri, and hereby submit their Motion for leave to file their Writ exceeding the page and/or word limits set out in NRAP 21(d), NRAP 27(a) and (d), and NRAP 32(a)(7)(D). “[S]uch motions “will be granted only upon a showing of diligence and good cause.” Blandino v. Eighth Jud. Dist. Ct. in & for Cty. of Clark, 466 P.3d 539 (Nev. 2020) citing NRAP 32(a)(7)(D)(i). This Court granted such a motion in Blandino and indicated such motions will not be granted in the future absent a showing of diligence and good cause. Id. at 542.

This case has a long and complicated history involving many motions, supplemental filings, various court hearings, telephonic conferences among the parties and Discovery Commissioner, two Discovery Commissioner Reports and Recommendations, an Objection, and various hearing transcripts. As such, the basic factual and procedural background is complicated. In addition, the issues here relate to the newly enacted NRCP 35 and NRS 52.380, their detailed legislative history including the Nevada Board of Psychological Examiners’ statement to this Court

regarding psychological examinations, the fact that NRCP 35 and NRS 52.380 have not been considered before and the lack of related case law requiring more detailed argument, the pending Moats v. Dist. Ct. (Burgess), Case No. 81912, Writ, and six discrete issues supporting the abuse of discretion and waiver at issue here: (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; (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; (3) the District Court Clearly Abused Its Discretion In Accepting Plaintiff's NRCP 35 Nullification Argument; (4) Plaintiff Waived Any Good Cause Argument; (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; and (6) The District Court's Ruling Creates An Unfair Advantage For Plaintiff That Irreparably, Extremely and Unfairly Prejudices Defendants. Also, this case is different from Moats in that it involved the district court's application of NRCP 35(a)(4)(A)(i) and (ii) and NRCP 35(a)(3), and the good cause standards, also requiring separate argument. In addition, the standard of review here relates to discovery issues, which is different than other standards and more varied, therefore,

requiring more argument and case citation to support the Writ. Finally, there are three Defendants filing the Writ, represented by three sets of attorneys with related signature blocks taking up additional space.

Defendants did their level best to pare down the Writ, but there are just too many issues and critical facts essential to a careful consideration of this matter in this multi-million dollars damages case. For the reasons stated herein, Defendants respectfully request they be allowed to file their 35-page Writ as is, consisting of 10,923 words – which exceeds the page limit by 20 pages, and/or the word limit, by 3,923 words. Defendants note that a word count of the Petition from page 1 to 34 just above the signature blocks indicates 8,806 words – 1,806 pages over the Rule limit. Based on all the above, there is diligence and good cause supporting this request and Defendants respectfully request they be allowed to file the oversized Writ.

RESPECTFULLY SUBMITTED this 26th day of March, 2021.

/s/ Felicia Galati, Esq.

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DATED this 26th day of March, 2021.

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DATED this 26th day of March, 2021.

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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 **MOTION TO FILE WRIT PETITION IN EXCESS OF NRAP 21(D) LIMITS** by electronic service through the Nevada Supreme Court's website, (or, if necessary, by U.S. Mail, first class, postage pre-paid), upon the following:

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EXHIBIT "5"

IN THE SUPREME COURT OF THE STATE OF NEVADA

FERRELLGAS, INC., A FOREIGN
CORPORATION; MARIO GONZALEZ;
AND CARL KLEISNER,
Petitioners,

vs.

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

Respondents,

and

JOSHUA GREEN, AN INDIVIDUAL,
Real Party in Interest.

No. 82670

FILED

APR 20 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Yarrow
DEPUTY CLERK

ORDER DENYING MOTION


Petitioners have filed a motion to exceed the page or word limitation on their petition for a writ of mandamus. At 34 pages, and consisting of 10,923 words, the submitted petition greatly exceeds the length allowed. See NRAP 21(d) (providing that absent leave of this court, a petition may not exceed 15 pages or 7,000 words).

This court "looks with disfavor on motions to exceed the applicable page limit or type-volume limitation, and therefore, permission to exceed the page limit or type-volume limitation will not be routinely granted." NRAP 32(a)(7)(D)(i). Having considered the motion and the submitted petition, this court is not convinced that petitioners have demonstrated "diligence and good cause" warranting the filing of such a lengthy petition. See *id.* ("A motion to file a brief that exceeds the applicable

page limit or type-volume limitation will be granted only upon a showing of diligence and good cause."). Accordingly, the motion is denied.

The clerk shall strike the petition filed on March 26, 2021. Petitioners shall have 21 days from the date of this order to file a petition that complies with the page or type-volume limitations of NRAP 21(d) and is significantly more concise.

It is so ORDERED.

, C.J.
Hardesty

cc: Hon. Joanna Kishner, District Judge
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Eighth District Court Clerk

EXHIBIT "6"

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.

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Clerk of Supreme Court

CASE NO.

DISTRICT COURT CASE NO.
A-19-795381-C

PETITION FOR WRIT OF MANDAMUS

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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 of the law firm Pyatt Silvestri in the District Court and in this Court.

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

DATED this 21st day of April, 2021

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PETITION FOR WRIT OF MANDAMUS

TO: THE HONORABLE SUPREME COURT OF THE STATE OF NEVADA

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

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

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

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

I. JURISDICTION

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

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

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

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

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

III. INTRODUCTION

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

IV. STATEMENT OF THE ISSUES

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

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

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

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

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

V. SUMMARY OF THE ARGUMENT

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

VII. ARGUMENT

A. MANDAMUS IS THE APPROPRIATE RELIEF

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

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

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

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

B. NRCP 35

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

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

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

C. The District Court Abused Its Discretion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Plaintiff Waived Any Good Cause Argument

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The district court ordered:

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

Therefore, mandamus is appropriate.

VIII. CONCLUSION AND RELIEF SOUGHT.

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

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

RESPECTFULLY SUBMITTED this 21st day of April, 2021.

/s/ Felicia Galati, Esq.

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DATED this 21st day of April, 2021.

/s/ Gina Gilbert Winspear, Esq.

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DATED this 21st day of April, 2021.

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VERIFICATION

STATE OF NEVADA)
) SS:
COUNTY OF CLARK)


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

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

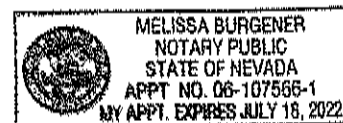


FELICIA GALATI

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



Notary Public in and for said
County and State



NRAP 28.2 CERTIFICATE OF COMPLIANCE

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

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

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

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///

///

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

DATED this 21st day of April, 2021.

/s/ Felicia Galati, Esq.

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Attorneys for Petitioner

CERTIFICATE OF SERVICE

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

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Honorable Judge Joanna S. Kishner
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/s/ Erika Parker

An Employee of OLSON CANNON GORMLEY
& STOBERSKI

EXHIBIT "7"

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

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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. Ferrellgas et al; Proposed Order on Status Hearing

Good morning all:

MOT529

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:

BS Baker Sterchi
CR Cowden & Rice LLC



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

MOT530

EXHIBIT "8"

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13 Attorneys for Plaintiff,
 14 *Joshua Green*

DISTRICT COURT
 CLARK COUNTY, NEVADA

* * *

15 **Joshua Green**, an individual,

16 Plaintiff,

17 vs.

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

23 Defendants.

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

25 Cross-Claimant,

26 vs.

27 **Ferrellgas, Inc.**, a foreign corporation;
 28 **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

**Amended 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
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 & STOBERSKI 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 DENNETT
WINSPEAR

This Amended Discovery Commissioner's Report and Recommendations corrects the April 15, 2021 previously e-filed and served report and recommendations. That draft was inadvertently sent to the Discovery Commissioner and was missing pertinent language agreed upon by the parties.

Amended/corrected information appears in bold.

I.

Findings

Plaintiff initially requested Defendant, Ferrellgas, Inc. to produce incident reports for all injuries attributed to exploding gas lines at Ferrellgas customer properties

1 nationwide on July 31, 2020. Defendant, Ferrellgas served their response objecting
2 to the request as: (1) seeking information that is not likely to lead to the discovery of
3 admissible information; (2) overbroad and seeking information not relevant to any
4 of the issues of the litigation and beyond the scope of relevant discovery under
5 Nevada Rules of Civil Procedure 26; (3) creating an undue burden disproportionate
6 to the needs of the case; (4) unduly burdensome and overbroad as it was not
7 reasonably limited in time, not limited to incidents that occurred in a reasonable
8 geographical area, and not limited to incidents substantially similar to the allegations
9 of Plaintiff's Complaint; and (5) required Ferrellgas to make legal conclusions as to
10 the cause of injuries.

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

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

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

14 Plaintiff argues his case involves an explosion of Ferrellgas gas line at the property
15 of Defendant, Mario Gonzalez. Plaintiff states a Ferrellgas technician inspected Mr.
16 Gonzalez's home on two separate occasions prior to the explosion. Plaintiff further
17 argues during the deposition of the 30(b)(6) representative for Ferrellgas, the
18 designee revealed under Ferrellgas policies and procedures the gas system should
19 have been marked unsafe for use.

20 Defendant, Ferrellgas argued the requested discovery would require an undue
21 burden from Ferrellgas disproportionate to the needs of the case. Counsel
22 presented an affidavit from Ferrellgas Director of Risk Management, Staci Short,
23 affirming that these records are not maintained in an electronic system and would
24 require a manual search of customer files. Ferrellgas produced an affidavit from
25 Ferrellgas' Director of Risk Management detailing that (1) Ferrellgas does not
26 maintain a computer system with all customer records for the period of June 18,
27 2013 through June 18, 2018; (2) Ferrellgas does not have an electronic database that
28 allows Ferrellgas to search incident records to identify any alleged cause of an

1 incident; (3) to attempt to comply with Plaintiff's request for production, Ferrellgas
2 would have to retrieve the paper file of all incident records from a given year, and
3 have one or more persons manually review those incidents to locate responsive
4 materials; and (5) that Ms. Short estimates it would take more than 100 hours of
5 labor to retrieve and review all nationwide incident records for a given year.
6 Ferrellgas also argues that incident reports at other customers' properties are not
7 relevant to the claims and issues of this litigation. Ferrellgas also argues the request
8 is overboard and should be limited to similar incidents. Ferrellgas also argues the
9 request is overbroad and should be geographically and time limited.

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

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

17 Upon renewed motion, Plaintiff argues the single page previously disclosed by
18 Ferrellgas appears to be missing pertinent information, such as the nature of the
19 incident. **Further, it** does not include the specific address, and does not include the
20 name of the Ferrellgas technician involved with the incident, etc. **Plaintiff in oral**
21 **argument, to support this belief, pointed to** the documents disclosed in his own
22 matter, such as "Oracle Resolution Reports" and a "Detailed Case Report."

23 Additionally, Mr. Green states that nationwide reports are proportional and
24 relevant to the needs of this case, specifically due to his claims for Negligent Hiring,
25 Training, Maintenance, and Supervision and Punitive Damages. Further, Mr. Green
26 contends that precedent exists for the disclosure of nationwide reports for
27 companies that operate under nationwide policies and procedures, such as
28 Ferrellgas.

1 Ferrellgas maintains that nationwide reports create an undue burden
2 disproportionate to the needs of the case. Nationwide incident records are not
3 relevant to Plaintiff's claim regarding causation of the incident at Defendant
4 Gonzalez's residence. Ferrellgas also argues that Plaintiff's experts do not opine that
5 Ferrellgas' training and supervision policies do not fall below standards of the
6 propane industry. Ferrellgas contends the case law cited by Plaintiff in his renewed
7 motion are not controlling on this Court. Ferrellgas contends this case is
8 distinguishable from the case law cited by Plaintiff in his renewed motion because
9 the incidents at issue in the cases cited by Plaintiff occurred on property owned and
10 controlled by the Defendant being compelled to produce records. In response to
11 Plaintiff's claim that the previously produced report was deficient, Ferrellgas
12 demonstrated that the report contained the information Plaintiff claimed was
13 missing.

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

16 This Court clarified the previous order to state Ferrellgas must disclose any
17 incidents, events, or occurrences of outdoor gas grill system explosions for
18 residential propane customers **(excluding tanks less than 10 gallons) causing**
19 **injury to persons or property damage in the Grand Canyon region where**
20 **litigation was filed for five years prior to this incident. For each such event,**
21 **Ferrellgas must disclose the incident report or other written documentation**
22 **that sets forth the details and circumstances of the event that caused damage**
23 **to injury or property.**

24 This Court also orders Ferrellgas to include any incidents, events or occurrences
25 **of outdoor gas grill system fires and explosions which caused injury to person**
26 **or property damage at any residential bulk propane customers' property**
27 **(excluding tanks less than 10 gallons) nationwide that resulted in litigation for the**
28 five years preceding June 18, 2018. These may be limited to only cases in which a

1 lawsuit was filed but should still include the incident report or other written
2 documentation that sets forth the details and circumstances of the event that
3 caused damage to injury or property. Counsel for Ferrellgas is instructed to
4 provide a privilege log for any attorney-work product or communications that
5 have been redacted and not disclosed.

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

10 II.

11 Recommendations

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

15 IT IS FURTHER RECOMMENDED that that Ferrellgas shall disclose incidents,
16 events or occurrences of outdoor gas grill system fires or explosions which
17 caused injury to person or property damage at any residential propane
18 customers' property (excluding tanks less than 10 gallons) nationwide that
19 resulted in litigation for the five years preceding June 18, 2018. For each such event,
20 Ferrellgas must disclose the incident report or other written documentation
21 that sets forth the details and circumstances of the event that caused damage
22 to injury or property.

23 IT IS FURTHER RECOMMENDED that any incidents, events, or occurrences
24 of outdoor gas system explosions or fires for residential propane customers
25 (excluding tanks less than 10 gallons) causing injury to persons or property
26 damage in the Grand Canyon region where litigation was filed for five years prior to
27 this incident (June 18, 2013-June 18, 2018). For each such event, Ferrellgas must
28 disclose the incident report or other written documentation that sets forth the

1 details and circumstances of the event that caused damage to injury or
2 property.

3 IT IS FURTHER RECOMMENDED that Ferrellgas is not required to produce
4 attorney client privileged information **but must provide a privilege log for any**
5 **materials that have been redacted and not disclosed.**

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

8 IT IS FURTHER RECOMMENDED that Ferrellgas' request for relief under EDCR
9 2.34(e) is GRANTED.

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

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

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

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

19

20 DATED this ____ day of April 2021.

21

22

23

24

25

26

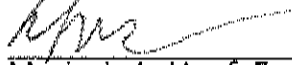
27

28

DISCOVERY COMMISSIONER

1 Respectfully submitted by:

2 H & P LAW

3 

4 Marjorie L. Hauf, Esq.
5 Nevada Bar No.: 8111
6 Matthew G. Pfau, Esq.
7 Nevada Bar No.: 11439

8 Attorneys for Plaintiff,
9 *Joshua Green*

10 Approved as to form and content:

11 BAKER STERCHI COWDEN & RICE

12 /s/ Gregorio Silva, Esq.
13 Michael McMullen, Esq.
14 Admitted Pro Hac Vice
15 Gregorio Silva, Esq.
16 Nevada Bar No.: 13583

17 Attorneys for Defendant,
18 *Ferrellgas, Inc.*

19 PYATT SILVERSTRI

20 /s/ Steven M. Goldstein, Esq.
21 James P.C. Silvestri, Esq.
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23 Steven M. Goldstein, Esq.
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27 T: 702-477-0088

28 Attorneys for Defendant,
Mario S. Gonzalez

1 DENNETT WINSPEAR, LLP

2
3 /s/ Gina Gilbert Winspear, Esq.

4 Gina Gilbert Winspear, Esq.

5 Nevada Bar No.: 005552

6 3301 North Buffalo Drive, Suite 195

7 Las Vegas, Nevada 89129

8 T: 702-829-1100

9 Attorney for Defendant,

10 Carl J. Kleisner

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HP H&P LAW

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 Amended 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.
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Matthew G. Pfau, Esq.
Nevada Bar No.: 11439
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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 Amended 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
foreign corporation; **KSUN**
10 **Manufacturing**, a foreign corporation;
Does 200 through 300 inclusive; and ROE
11 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

From: Gregorio V. Silva
To: Cait Ahern; Matthew G. Pfau; Marjorie Hauf
Cc: Michael C. McMullen; "Felicia Galati"; Steven Goldstein; Gina Winspear; Paula Timmons; Ashley Marchant; Alondra Reynolds
Subject: RE: A-19-795381-C - DCRR - Green v. Ferrellgas, Inc. et al
Date: Monday, April 19, 2021 2:06:31 PM
Attachments: [image001.png](#)
[LinkedIn_bc645570-8bb3-41d0-a5f3-6991dc68d02b.png](#)
[Twitter_254c7b86-b1e2-484b-bfe7-4f64c323fdf2.png](#)
[Facebook_578f246a-2a0e-4bca-b3f3-4bf719b7aa20.png](#)

Ms. Ahern,

This draft appears to have all of the revisions from the previous version properly bolded. Thank you for adding the explanation for the Amended Report and Recommendation.

From: Cait Ahern <cahern@CourtRoomProven.com>
Sent: Monday, April 19, 2021 3:41 PM
To: Gregorio V. Silva <gsilva@bscr-law.com>; Matthew G. Pfau <mpfau@CourtRoomProven.com>; Marjorie Hauf <Mhauf@CourtRoomProven.com>
Cc: Michael C. McMullen <mmcmullen@bscr-law.com>; 'Felicia Galati' <fgalati@ocgas.com>; Steven Goldstein <sgoldstein@pyattsilvestri.com>; Gina Winspear <gwinspear@dennettwinspear.com>; Paula Timmons <ptimmons@dennettwinspear.com>; Ashley Marchant <amarchant@dennettwinspear.com>; Alondra Reynolds <areynolds@pyattsilvestri.com>
Subject: [EXTERNAL SENDER] RE: A-19-795381-C - DCRR - Green v. Ferrellgas, Inc. et al

Mr. Silva,

Please let me know if this draft will suffice.

Thank you for your help.

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



Cait Ahern
Litigation Paralegal
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From: Gregorio V. Silva <gsilva@bscr-law.com>
Sent: Monday, April 19, 2021 11:29 AM
To: Cait Ahern <cahern@CourtRoomProven.com>; Matthew G. Pfau <mpfau@CourtRoomProven.com>; Marjorie Hauf <Mhauf@CourtRoomProven.com>

MOT546

From: Steven Goldstein
To: Cait Ahern; Gregorio V. Silva; Matthew G. Pfau; Marjorie Hauf
Cc: Michael C. McMullen; "Felicia Galati"; Gina Winspear; Paula Timmons; Ashley Marchant; Alondra Reynolds
Subject: RE: A-19-795381-C - DCRR - Green v. Ferrellgas, Inc. et al
Date: Monday, April 19, 2021 9:37:42 AM
Attachments: image012.png

Hi Cait,

I will defer to Ferrellgas' counsel since this matter is between his client and yours. If they agree to the changes, then I will approve for use my e-signature.

Kindest regards,

Steven M. Goldstein, Esq.



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From: Cait Ahern <cahern@CourtRoomProven.com>
Sent: Monday, April 19, 2021 9:20 AM
To: Gregorio V. Silva <gsilva@bscr-law.com>; Matthew G. Pfau <mpfau@CourtRoomProven.com>; Marjorie Hauf <Mhauf@CourtRoomProven.com>
Cc: Michael C. McMullen <mmcmullen@bscr-law.com>; 'Felicia Galati' <fgalati@ocgas.com>; Steven Goldstein <sgoldstein@pyattsilvestri.com>; Gina Winspear <gwinspear@dennettwinspear.com>; Paula Timmons <ptimmons@dennettwinspear.com>; Ashley Marchant <amarchant@dennettwinspear.com>; Alondra Reynolds <areynolds@pyattsilvestri.com>
Subject: RE: A-19-795381-C - DCRR - Green v. Ferrellgas, Inc. et al

Good morning all,

I called the Discovery Commissioner's office and they asked for us to submit the correct order titled an Amended Discovery Commissioner's Report and Recommendations and bold the changed information. I believe the attached order reflects all bolded changes, but if I am missing something please let me know. Please then authorize your electronic signature.

Again, I apologize for this mishap and appreciate your understanding.

MOT547

From: [Gina Winspear](#)
To: [Cait Ahern](#); [Gregorio V. Silva](#); [Matthew G. Pfau](#); [Marjorie Hauf](#)
Cc: [Michael C. McMullen](#); ["Felicia Galati"](#); [Steven Goldstein](#); [Paula Timmons](#); [Ashley Marchant](#); [Alondra Reynolds](#)
Subject: RE: A-19-795381-C - DCRR - Green v. Ferrellgas, Inc. et al
Date: Monday, April 19, 2021 10:11:21 AM
Attachments: [image012.png](#)

Good morning,

As I advised the Discovery Commissioner at the time of the hearing, my client does not have a position in this particular dispute. Similarly, I do not have a position as to the content of the proposed order/amended order. If agreement can be reached between Plaintiff's counsel and counsel for Ferrellgas on language for a proposed order, I will be glad to agree to allow my electronic signature to be included.

Gina

GINA WINSPEAR, ESQ.
702.839.1100



From: Cait Ahern <cahern@CourtRoomProven.com>
Sent: Monday, April 19, 2021 9:20 AM
To: Gregorio V. Silva <gsilva@bscr-law.com>; Matthew G. Pfau <mpfau@CourtRoomProven.com>; Marjorie Hauf <Mhauf@CourtRoomProven.com>
Cc: Michael C. McMullen <mmcmullen@bscr-law.com>; 'Felicia Galati' <fgalati@ocgas.com>; Steven Goldstein <sgoldstein@pyattsilvestri.com>; Gina Winspear <gwinspear@dennettwinspear.com>; Paula Timmons <ptimmons@dennettwinspear.com>; Ashley Marchant <amarchant@dennettwinspear.com>; Alondra Reynolds <areynolds@pyattsilvestri.com>
Subject: RE: A-19-795381-C - DCRR - Green v. Ferrellgas, Inc. et al

Good morning all,

I called the Discovery Commissioner's office and they asked for us to submit the correct order titled an Amended Discovery Commissioner's Report and Recommendations and bold the changed information. I believe the attached order reflects all bolded changes, but if I am missing something please let me know. Please then authorize your electronic signature.

Again, I apologize for this mishap and appreciate your understanding.

Thank you,

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

MOT548

EXHIBIT "9"

INVOICE

Green v. Ferrellgas et al

[illegible]

MOT550

Steven D. Grierson

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5 Attorney for Defendant
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12 Attorney for Defendant
FERRELLGAS, INC.
13

14 DISTRICT COURT

15 CLARK COUNTY, NEVADA

16 JOSHUA GREEN;

17 Plaintiff,

18 vs.

19 FERRELLGAS, INC. et al.,

20 Defendants.

21 AND RELATED ACTIONS
22
23
24
25
26
27
28

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

DEFENDANTS' REPLY IN SUPPORT OF
MOTION TO STAY CASE PENDING WRIT
OF MANDAMUS

AND

OPPOSITION TO PLAINTIFF'S
COUNTER-MOTION FOR ATTORNEY'S
FEES AND COSTS

HEARING DATE: 5/27/2021

HEARING TIME: 1 P.M.

Law Offices of
OLSON CANNON GORMLEY & STOBERSKI
A Professional Corporation
9950 West Cheyenne Avenue
Las Vegas, Nevada 89129
(702) 384-4012 Fax (702) 383-0701

COME NOW Defendants FERRELLGAS, INC., MARIO GONZALEZ and CARL KLEISNER, by and through their attorneys of record, and hereby submit their Reply in Support of Motion To Stay Case Pending Writ Of Mandamus and Opposition to Plaintiff's Counter-Motion for Attorney's Fees and Costs. This Reply and Opposition are made and based upon all papers, pleadings and records on file herein, the attached Points and Authorities, and such oral argument, testimony and evidence as the Court may entertain.

POINTS AND AUTHORITIES

I.

INTRODUCTION

This Court should grant Defendants' Motion to stay the entire case because a stay pending resolution of the Writ promotes judicial efficiency. Furthermore, all Parties have previously stipulated to the Court that the remaining discovery deadlines and trial date are unquestionably tied to resolution of the issue presented to the Nevada Supreme Court.

The Court should deny Plaintiff's Counter-Motion for attorney's fees and costs. Plaintiff's counsel acknowledges that the arguments presented in opposing the Motion to Stay were previously briefed; thus, Plaintiff's contention that substantial time was spent researching and drafting the current Opposition is mistaken.

II.

REPLY TO PLAINTIFF'S INTRODUCTION

Before seeking a stay, Defendants requested Plaintiff agree to the same on multiple occasions. Plaintiff's counsel made no efforts to discuss withdrawal of the prior Motion to Stay. While Defendants acknowledge the prior Motion did not comply with EDCR 2.20, it does not amount to an abuse of the Court's process. As Defendants advised the Court during the hearing,

1 they attempted to comply with the Court's Reply deadline, but were not able to do so. Plaintiff's
2 Counter-Motion for sanctions under EDCR 7.60 should bring to the Court's attention that
3 Plaintiff's counsel failed to appear for the hearing at the scheduled time and did not appear until
4 counsel for Defendants reached out as a courtesy.¹

5
6 Defendants provided the Court with the procedural history of the *Moats* matter to bring to
7 the Court's attention the fact that the Nevada Supreme Court has been asked to look at multiple
8 issues regarding the recent revisions to NRCP 35. The only materials available through the Court's
9 online docket regarding the *Moats* Motion to Stay were the file stamped Motion provided by
10 Defendants, which is limited to the affidavit, and contains no points and authorities.

11 III.

12 LEGAL ARGUMENT

13 A. A Stay of the Entire Case Conserves Judicial Resources and Promotes the Just, 14 Speedy, and Inexpensive Determination of This Action

15
16 Plaintiff mischaracterizes Defendants' Writ and mistakenly asserts the purpose of the Writ
17 will not be defeated if this case continues without a stay. *See* Plaintiff's Opposition at pg. 5. The
18 issues in both *Moats* and *Lyft* pertain to the conflict between NRS 52.380 and NRCP 35.² Those
19 are not the issues here. The issues on Defendants' Writ relate to the good cause standards in NRCP
20 35(a)(4)(A)(ii) and NRCP 35(a)(3) – which are beyond the scope of *Moats* and *Lyft*. Therefore,
21 the Nevada Supreme Court would not have to rule on Defendants' issues in either of the pending
22 Writs because it, generally, does not rule on issues beyond the scope of a writ. *Gardner on Behalf*
23
24
25
26

27 ¹ See Email correspondence to Matt Pfau dated April 15, 2021 and attached hereto as
Exhibit A.

28 ² See Plaintiff's Opposition, p. 4.

1 of L.G. v. Dist. Ct., 133 Nev. 730, 731, 405 P.3d 651, 653 (2017) citing Pan v. Dist. Ct., 120 Nev.
2 222, 229, 88 P.3d 840, 844 (2004) (“Our review in a writ proceeding is limited to the argument
3 and documents provided by the parties.”)
4

5 But for the need to conduct a neuropsychological examination on Plaintiff, discovery in
6 this matter would have closed on April 23, 2021, and the trial would have remained on the August
7 2, 2021 trial stack. At the March 15, 2021 status hearing, the Parties agreed that Defendants
8 should be given 60 days to complete their Rule 35 expert report after the examination occurs,
9 that Plaintiff should then be given 30 days to produce a rebuttal report, and then discovery should
10 close 30 days after that. Staying this matter ensures all discovery will be completed within a set
11 number of days, whereas, denying the stay will result in ongoing discovery for an unknown
12 number of days.
13

14 The Parties do not dispute that Defendants’ Rule 35 neuropsychological examination
15 should not occur until after the Supreme Court resolves Defendants’ Writ. The Parties have
16 previously presented to the Court that approximately 120 days of discovery is needed after
17 Defendants Rule 35 neuropsychological examination occurs. The timing of completing
18 discovery centers on Defendants Rule 35 neuropsychological examination. As detailed in
19 Plaintiff’s Opposition, Rules 1 and 2 of the Nevada Rules of Civil Procedure detail an intent to
20 use judicial resources efficiently to facilitate justice. *See* Plaintiff’s Opposition at pg. 8. A stay
21 of the entire case preserves judicial resources and promotes the just, speedy and inexpensive
22 resolution of this matter, because a stay limits the time of ongoing discovery for all parties.
23
24

25 Plaintiff will not be harmed by a stay of the entire case. There is no dispute that
26 Defendants will suffer irreparable harmed if forced to conduct their Rule 35 neuropsychological
27 examination before the Nevada Supreme Court resolves Defendants’ Writ.
28

1 **B. Staving the Entire Case Does Not Irreparably Harm Plaintiff**

2 Despite his acknowledgment of the time needed to complete discovery after Defendants'
3 Rule 35 examination occurs, Plaintiff nonsensically argues that staying the entire case will delay
4 resolution. Plaintiff identifies only the delay in resolution to support his assertion of irreparable
5 harm from a stay. The Nevada Supreme Court has unequivocally stated a mere delay in pursuing
6 discovery and litigation does not constitute irreparable harm. *See Mikohn Gaming Corp. v.*
7 *McCrea*, 120 Nev. 248, 253, 89 P.3d 36, 39 (2004). Therefore, this Court should reject Plaintiff's
8 delay argument.
9

10 Plaintiff misremembers the factual history of this case in his Opposition. Plaintiff failed to
11 timely disclose his ongoing psychological treatment for four months, causing a need for
12 Defendants to seek an extension of discovery deadlines. Defendants jointly filed only a single
13 request to extend discovery dates in this matter. Ferrellgas filed a second Motion to extend after
14 Plaintiff's untimely disclosure of future medical treatment as a category of damages, which
15 Ferrellgas orally withdrew as moot given the Court's granting of Defendants' joint Motion to
16 Extend.
17

18 During the mandatory Rule 16 conference, the Court ordered the parties to participate in a
19 settlement conference or mediation no later than October 29, 2020. The Court's Order to
20 participate in a settlement conference resulted from representations from all counsel, including
21 Plaintiff's counsel Matt Pfau, that the same would benefit resolution of the case. When Defendants
22 sought to make arrangements to comply with the Court's Order, Plaintiff refused. Plaintiff did not
23 seek relief from the Court's Order to participate in a settlement conference, so Ferrellgas sought to
24 compel compliance with the Court's Order rather than refuse to comply as Plaintiff did.
25
26
27
28

1 The delays in this case have been the direct result of Plaintiff's own actions and inactions.
2 Regardless, delay does not constitute irreparable harm, and Plaintiff makes no other claim of harm.
3 As such, the Court should grant Defendants' request to stay this matter.
4

5 **C. Plaintiff's Opposition Demonstrates the Supreme Court Will Likely Provide**
6 **Guidance on Rule 35's "Good Cause" Requirements for an Observer**

7 In his Opposition, Plaintiff details that the Discovery Commissioner recommended
8 Plaintiff appear for a psychological Rule 35 examination, but also recommended that Plaintiff
9 be allowed to have an observer present and make an audio recording of the examination under
10 NRS 52.380. See Plaintiff's Opposition at pg. 9. Plaintiff then argues good cause is inherent in
11 an adversarial examination, which is every Rule 35 examination. Plaintiff's argument
12 contradicts the plain language of Rule 35.
13

14 The Nevada Supreme Court enacted the current NRCP 35 effective January 1, 2019. In
15 short order, the Nevada Supreme Court has accepted multiple Writs on issues relating to NRS
16 52.380 and NRCP 35, which entail a serious separation of powers issue. Defendants filed their
17 Writ regarding the good cause standards in NRCP 35(a)(4)(A)(ii) and NRCP 35(a)(3). In the
18 short lifespan of NRCP 35 three writs have been filed, demonstrating a need for direction from
19 the Nevada Supreme Court on how District Courts should interpret and enforce the new Rule.
20

21 While there is no predicting what the Nevada Supreme Court will do as to Defendants'
22 Writ, the uncertainty does not support a denial of the stay request. It is clear that NRCP 35
23 requires clarification on many fronts and issues. Thus, at a minimum, the Nevada Supreme Court
24 will likely accept the Writ. Defendants' Writ raises important issues of law that require
25 clarification. Consideration of judicial economy and administration of justice weigh in favor of
26 granting both the Writ, regarding the good cause standards for the presence of an observer at and
27
28

1 allowing an audio recording of NRCP 35 psychological examinations, and Defendants' request
2 to stay this matter pending resolution of the same.

3
4 IV.

5 **OPPOSITION TO PLAINTIFF'S COUNTER-MOTION FOR ATTORNEY'S FEES AND**
6 **COSTS**

7 Defendants have gone above and beyond in cooperating in the litigation process in this
8 case and have not acted vexatious in any regard. As detailed above, Plaintiff's counsel failed to
9 appear at the scheduled time for the hearing on the initial motion, and Defendants contacted
10 Plaintiff, as a professional courtesy, rather than asking the Court to sanction counsel's failure.
11 Plaintiff acknowledges that the arguments presented in his opposition were previously briefed but
12 argues that he had to spend substantial time opposing and briefing Defendants' current motion.

13
14 Defendants do not believe Plaintiff's counsel has demonstrated entitlement to any
15 attorney's fees, and certainly has not demonstrated that this Court should approve a \$700 hourly
16 fee under the Lodestar method. Plaintiff does not cite any Nevada caselaw where any Nevada
17 Court has approved such a high amount. Furthermore, Plaintiff concedes that his Opposition
18 was not a difficult or intricate brief, and that the issue is not complicated. As such, Plaintiff has
19 failed to demonstrate any factor that would merit a \$700 hourly fee. Plaintiff also acknowledges
20 that the Opposition did not require any specialized knowledge, beyond that generally required
21 for litigation.
22

23
24 Plaintiff's contention that he had to spend substantial time preparing this Opposition is
25 mistaken, as the Opposition simply regurgitates, in many sections verbatim, the arguments
26 previously presented by Plaintiff's counsel. By way of specific example, in Plaintiff's Law and
27 Argument section the paragraph beginning "a party may seek..." is copied exactly from
28

1 Plaintiff's previous Opposition. With regard to the Law and Argument subsection A, the only
2 revisions to Plaintiff's previous briefing relate to the status of Defendants' Writ. By way of
3 further specific example, Plaintiff's subsection titled "Petitioners do not experience any harm
4 or injury if the stay is denied" is a verbatim copy of the same section from Plaintiff's previous
5 brief.
6

7 As Plaintiff's counsel has taken this matter on a contingency fee, the Court should
8 recognize that compensation for the instant motion will be included in any contingency fee
9 obtained at the end of litigation; if Plaintiff's Opposition increases the value of Plaintiff's case,
10 then counsel's payment for this Motion will be reflected in the increased contingency payment.
11 As such, the Court should deny Plaintiff's request for attorney's fees.
12

13 V.

14 CONCLUSION

15 Defendants respectfully request this Court grant their Motion and stay the entire case
16 pending the Nevada Supreme Court's determination on Defendants' Writ because the object of
17 the Writ will be defeated if the stay is denied, Defendants will suffer irreparable or serious injury
18 if the stay is denied, Plaintiff will not suffer irreparable or serious injury if the stay is granted
19 because discovery will only be delayed not denied, and Defendants are likely to prevail on the
20 merits in the appeal.
21

22 DATED this 14th day of May, 2021.
23

24 */s/ Felicia Galati, Esq.*

25 FELICIA GALATI, ESQ.
26 Nevada Bar No. 007341
27 OLSON CANNON GORMLEY & STOBERSKI
28 9950 West Cheyenne Avenue
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2400 Pershing Road, Suite 500
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mmcmullen@bscr-law.com
Attorneys for Defendant
FERRELLGAS, INC.

DATED this 14th day of May, 2021.

/s/ Gina Gilbert Winspear, Esq.

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3301 N. Buffalo Drive, Suite 195
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gwinspear@dennettwinspear.com
Attorneys for Defendant
CARL J. KLEISNER

DATED this 14th day of May, 2021.

/s/ Steven M. Goldstein, Esq.

James P.C. Silvestri, Esq.
Nevada Bar No. 3603
Steven M. Goldstein, Esq.
Nevada Bar No. 6318
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Attorneys for Defendant
MARIO S. GONZALEZ

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CERTIFICATE OF SERVICE

On the 14th day of May, 2021, the undersigned, an employee of Olson Cannon Gormley & Stoberski, hereby served a true copy of **DEFENDANTS' REPLY IN SUPPORT OF MOTION TO STAY CASE PENDING WRIT OF MANDAMUS AND OPPOSITION TO COUNTER-MOTION FOR ATTORNEYS' FEES AND COSTS** 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.
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Attorneys for Plaintiff

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Attorneys for Defendant
CARL J. KLEISNER

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Attorneys for Defendant
MARIO S. GONZALEZ

/s/ Melissa Burgener
An Employee of Olson Cannon Gormley
& Stoberksi

EXHIBIT A

Melissa Burgener

From: Gregorio V. Silva <gsilva@bscr-law.com>
Sent: Thursday, April 15, 2021 9:19 AM
To: 'Matthew G. Pfau'; Marjorie Hauf; 'jwilson@courtroomproven.com'; Cait Ahern
Cc: Steven Goldstein; Gina Winspear; Felicia Galati; Michael C. McMullen
Subject: Green v. Ferrellgas; Hearing this morning

Importance: High

Counsel:

Hearing on Defendants Motion to Stay was set for 9:00 a.m. this morning. The Court attempted to call this matter but did not have any one from Plaintiff's counsel present. All other counsel are present on the Blue Jeans hearing. Please advise if you will be appearing?

Gregorio V. Silva
Baker Sterchi Cowden & Rice LLC

Kansas City, MO 64108
p: 816.471.2121 f:

 Baker Sterchi
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.

A-19-795381-C Joshua Green, Plaintiff(s)
vs.
Ferrelgas, Inc., Defendant(s)

May 27, 2021 01:00 PM All Pending Motions

HEARD BY: Kishner, Joanna S. COURTROOM: RJC Courtroom 12B

COURT CLERK: Hansen-McDowell, Kathryn

RECORDER: Corcoran, Lara

REPORTER:

PARTIES PRESENT:

Adam Ganz	Attorney for Plaintiff
Felicia Galati	Attorney for Counter Claimant, Cross Claimant, Cross Defendant, Defendant
Gina Gilbert Winspear	Attorney for Counter Claimant, Cross Defendant, Defendant
Gregorio Silva, ESQ	Attorney for Counter Claimant, Cross Claimant, Cross Defendant, Defendant
Steven M. Goldstein	Attorney for Counter Defendant, Cross Claimant, Cross Defendant, Defendant, Third Party Plaintiff

JOURNAL ENTRIES

PLAINTIFF, JOSHUA GREEN'S OPPOSITION TO DEFENDANTS MOTION TO STAY CASE PENDING WRIT OF MANDAMUS - AND - COUNTERMOTION FOR ATTORNEY'S FEES AND COSTS . . . PLAINTIFF JOSHUA GREEN'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON JOINT AND SEVERAL LIABILITY . . . DEFENDANT'S MOTION TO STAY CASE PENDING WRIT OF MANDAMUS

Court stated it was aware of the Supreme Court's order on 05/20/2021 for an answer and advised procedurally it was unsure if it could hear the Motions since they was a pending Motion for Stay. Mr. Ganz requested the Court hear the Plaintiff's Motion for Partial Summary Judgment first. Mr. Silva had no objection to whichever order the Court wanted to address the Motions; stating it was not their intention to stay Plaintiff's Motion for Partial Summary Judgment. Arguments by Mr. Ganz and Mr. Silva regarding the Motion for Partial Summary Judgment. COURT stated its FINDINGS and ORDERED, Plaintiff's Motion for Partial Summary Judgment DENIED WITHOUT PREJUDICE.

As to Defendant's Motion to Stay Case, Court stated its inclination was that the Court was precluded by EDCR 2.24 from hearing the Motion as a re-hearing on a motion. Court stated it thought it was clear in its prior Order, dated 5/3/2021, that parties were to make sure they were in compliance with the EDCR. Court stated procedurally it did not see how it could hear the Motion as it violates EDCR 2.24 on its face, the Motion does not met the standards even as a motion for reconsideration; substantively it did not see good cause for the entire case to be stayed therefore it was inclined to deny the Motion. Mr. Silva argued that the Court was not precluded by EDCR 2.24 as the Court did not hear the Motion substantively last time as the Motion was denied based on procedural issues therefore he would like the Motion to go

forward and be heard. Arguments by Mr. Silva, Mr. Ganz and Ms. Galati regarding the Motion to Stay Case. COURT stated its FINDINGS and FURTHER ORDERED, Defendant's Motion to Stay Case DENIED and DENIED stay on Rule (35) exam. Arguments by counsel regarding Plaintiff's Countermotion for Attorney's Costs and Fees. COURT stated its FINDINGS and ADDITIONALLY ORDERED, Countermotion GRANTED, Defendant's sanctioned, \$700.00 AWARDED to Plaintiff against Defendants to be paid within 30 days. Mr. Silva to prepare the Order regarding the Plaintiff's Motion for Partial Summary Judgment and Mr. Ganz to prepare a detailed order regarding Defendant's Motion to Stay Case and the Plaintiff's Countermotion.

Colloquy regarding pending hearing on Objection to Discovery Commissioner's Report. COURT ORDERED, Objection to Commissioner's Report SET on 6/8/2021 and noted if a party was not participating they did not have to appear.

06/08/2021 1:00 PM OBJECTION TO DISCOVERY COMMISSIONER'S REPORT

Karla Livingston

From: Cait Ahern <cahern@CourtRoomProven.com>
Sent: Thursday, June 10, 2021 3:16 PM
To: DC31Inbox@ClarkCountyCourts.us
Cc: Matthew G. Pfau; Marjorie Hauf; Gregorio V. Silva; Michael C. McMullen; Deborah L. Parker; Deborah (Deb) A. Ries; Felicia Galati; Karla Livingston; Steven Goldstein; Alondra Reynolds; Gina Winspear; Paula Timmons; Ashley Marchant; Nolan Oller; Reino Graves
Subject: A-19-795381-C - ORDR - Green v. Ferrelgas, Inc. et al
Attachments: ORD.006.Denying Defendants Motion to Stay and Grant Motion for Fees.pdf;
ORD.006.Denying Defendants Motion to Stay and Grant Motion for Fees.docx

Good afternoon Department 31,

Attached to this email is a proposed Order Denying Defendants' Motion to Stay Case and Granting in Part Plaintiff's Countermotion for Attorney's Fees and Costs. It is attached in both Word and PDF format.

Opposing counsels are CC'd on this correspondence to avoid any ex parte communications.

Thank you,

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



Cait Ahern
Litigation Paralegal
8950 W Tropicana Ave, #1
Las Vegas, Nevada 89147
702 598 4529 TEL
702 598 3626 FAX
www.courtroomproven.com



lawrulerleadid:C169-

1 **ORDR**
 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*

DISTRICT COURT
 CLARK COUNTY, NEVADA

15 **Joshua Green**, an individual,
 16
 17 Plaintiff,
 18 vs.

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

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

**Order Denying Defendants' Motion
 to Stay Case and Granting in Part
 Plaintiff's Countermotion for
 Attorney's Fees and Costs**

25 **Mario S. Gonzalez**, an individual;
 26
 27 Cross-Claimant,
 28 vs.

Hearing date: May 27, 2021
 Hearing time: 1:00 p.m.

29 **Ferrellgas, Inc.**, a foreign corporation;
 30 **Carl J. Kleisner**, an individual; DOES 1
 31 through 100 inclusive; and ROE
 32 Corporations 101 through 200;
 33 Cross-Defendants.

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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.

Defendants, Ferrellgas, Inc. ("Ferrellgas"), Mario S. Gonzalez ("Mr. Gonzalez") and Carl J. Kleisner ("Mr. Kleisner") first filed a Motion to Stay Case Pending Writ of Mandamus on Order of Shortening Time on April 16, 2021. Plaintiff, Joshua Green ("Mr. Green") filed his Opposition to Defendants' Motion to Stay Case Pending Writ of Mandamus and a Countermotion for Fees and Costs on April 30, 2021. Defendants filed their Reply in Support of Motion to Stay Case and Opposition to Plaintiff's Countermotion on May 14, 2021.

This matter came before the Honorable Judge Joanna Kishner on May 27, 2021. All parties either having been heard or having the opportunity to be heard, this Court enters in the following findings and order:

I.

Findings of Fact and Conclusions of Law

On March 26, 2021, Defendants filed an affidavit, improperly labeled a motion, requesting to stay the instant matter pending a Writ of Mandamus. Mr. Green objected to that affidavit under EDCR 2.20, and this Court denied that request accordingly. Then, Defendants refiled their Motion to Stay Case Pending Writ of Mandamus. In which, Defendants requested the entire case be stayed pending resolution of Defendants' Writ Petition relating to a Rule 35 Neuropsychological Examination. Defendants state the NRCP 35 examination is pertinent to all Mr. Green's alleged claims and damages because Plaintiff disclosed one damages computations for all claims and damages.. Defendants further contend they meet the applicable *Fritz Hansen* factors, namely (1) the object of their Writ will be defeated if a stay is denied, (2) they will be irreparably harmed if the stay is denied, (3) Mr. Green will not be irreparably harmed, and (4) they are likely to prevail on the writ. Defendants further contend staying the entire matter would preserve judicial

resources and promote efficiency in this matter. Defendants argued in the alternative that the Court should grant a Stay of Defendants' Rule 35 Neuropsychological Examination because the object of Defendants Writ, whether Plaintiff demonstrated good cause under Rule 35 to have an observer present, would be defeated if Defendants were forced to proceed with the examination before resolution of the Writ Petition. Defendants further argued that they will suffer irreparable harm if forced to proceed with the Rule 35 Neuropsychological examination, because Dr. Lewis Etcoff will not perform the full evaluation he recommends with an observer present.

Mr. Green argues this Court is already aware of the instant matter because of Defendants previously filed affidavit, but Mr. Green reiterates the *Fritz Hansen* factors as appropriate. Specifically, Mr. Green contends that the only matter directly affected by Defendants' Writ is Mr. Green's NRCP 35 Examination, and thus, staying the entire case will irreparably harm Plaintiff and unnecessarily delay this matter.

Mr. Green also states he is entitled to attorney's fees and costs due to Defendants' unreasonably increasing the proceedings and costs in this case, failure to comply with court rules, and failure to comply with previous court orders. Mr. Green requests that under *Brunzell* this Court enter attorney's fees and costs.

This Court analyzes the *Fritz Hansen* factors and denies Defendants' motion, stating there is no good cause to stay the entire case. This Court further states Mr. Green is entitled to attorney's fees under EDCR 7.60; Defendants repeatedly failed to follow the rules of this Court as it pertains to the instant motion, including failing to include points and authorities in their initial motion, causing a frivolous and unnecessary hearing, and failing to comply to the Court order on the Order Shortening Time. This Court considered the *Brunzell* factors, however, does not grant the full amount of sanctions requested by Plaintiff and determines that \$700 is a reasonable under *O'Connell v. Wynn*. Defendants are severally responsible for paying this sanction.

II.

Order

IT IS THEREFORE ORDERED that Defendants' Motion to Stay Case Pending Writ of Mandamus is DENIED.

IT IS FURTHER ORDERED that Plaintiff's Countermotion for Attorney's Fees and Costs is GRANTED IN PART.

IT IS FURTHER ORDERED that Defendants are required to pay Mr. Green's counsel \$700 within 30 days. Defendants are severally responsible for paying this sanction.

IT IS SO ORDERED.

DISTRICT COURT JUDGE

Respectfully submitted by:

DATED this 10 day of June 2021.

H & P LAW

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

Attorneys for Plaintiff,
Joshua Green

Approved as to form and content:

DATED this 10 day of June 2021.

BAKER STERCHI COWDEN & RICE

/s/ Gregorio Silva, Esq.
Michael McMullen, Esq.
Admitted Pro Hac Vice
Gregorio Silva, Esq.
Nevada Bar No.: 13583

Attorney for Defendant,
Ferrellgas, Inc.

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DATED this 10 day of June 2021.

PYATT SILVESTRI

/s/ Steven M. Goldstein, Esq.
James P.C. Silvestri, Esq.
Nevada Bar No.: 3603
Steven M. Goldstein, Esq.
Nevada Bar No.: 006318

Attorneys for Defendant,
Mario S. Gonzalez

DATED this 10 day of June 2021.

DENNETT WINSPEAR

/s/ Gina Gilbert Winspear, Esq.
Gina Gilbert Winspear, Esq.
Nevada Bar No.: 005552

Attorney for Defendant,
Carl J. Kleisner

From: [Gregorio V. Silva](#)
To: [Steven Goldstein](#)
Cc: [Cait Ahern](#); [Adam Ganz](#); [Matthew G. Pfau](#); [Felicia Galati](#); [Michael C. McMullen](#); [Gina Winspear](#); [Marjorie Hauf](#); [Nolan Oller](#); [Deborah L. Parker](#); [Deborah \(Deb\) A. Rice](#); klivingston@ccgas.com; [Alondra Reynolds](#); [Paula Timmons](#); [Ashley Marchant](#); [Reino Graves](#)
Subject: Re: [EXTERNAL SENDER] RE: Green v. Ferrellgas et al - Order Denying Defendants' Motion to Stay and Granting for Fees
Date: Thursday, June 10, 2021 2:58:17 PM
Attachments: [image002.png](#)
[image008.png](#)
[image018.png](#)
[LinkedIn_bc645570-8bb3-41d0-a5f3-5991dc68d02b.png](#)
[Twitter_254c7b86-b1e2-484b-bfe7-4f64c323fd72.png](#)
[Facebook_578f246a-2a0a-4bca-b3f3-4bf719b7aa20.png](#)

Ms. Ahern,

You can add my electronic signature as well.

Sent from my iPhone

Gregorio V. Silva
Baker Sterchi Cowden & Rice LLC

Kansas City, MO 64108
p: 816.471.2121 f:

 Baker Sterchi
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

On Jun 10, 2021, at 5:56 PM, Steven Goldstein <sgoldstein@pyattsilvestri.com> wrote:

Cait,

You can add my signature to this order.

Kindest regards,

Steven M. Goldstein, Esq.

<[image001.jpg](#)>

701 Bridger Avenue, Suite 600

MOT572

From: Steven Goldstein
To: Cait Ahern; Gregorio V. Silva; Adam Ganz; Matthew G. Pfau; Felicia Galati; Michael C. McMullen; Gina Winspear
Cc: Marjorie Hauf; Nolan Oller; Deborah L. Parker; Deborah (Deb) A. Ries; klivingston@ocgas.com; Alondra Reynolds; Paula Timmons; Ashley Marchant; Reino Graves
Subject: RE: Green v. Ferrellgas et al - Order Denying Defendants' Motion to Stay and Granting for Fees
Date: Thursday, June 10, 2021 2:56:54 PM
Attachments: [image002.png](#)
[image008.png](#)
[image018.png](#)

Cait,

You can add my signature to this order.

Kindest regards,

Steven M. Goldstein, Esq.



PYATT SILVESTRI
A PROFESSIONAL LAW CORPORATION

701 Bridger Avenue, Suite 600
Las Vegas, Nevada 89101
Telephone: (702) 383-6000
Facsimile: (702) 477-0088

sgoldstein@pyattsilvestri.com
www.pyattsilvestri.com

From: Cait Ahern <cahern@CourtRoomProven.com>
Sent: Thursday, June 10, 2021 2:50 PM
To: Gregorio V. Silva <gsilva@bscr-law.com>; Adam Ganz <Aganz@GanzHauf.com>; Matthew G. Pfau <mpfau@CourtRoomProven.com>; Felicia Galati <fgalati@ocgas.com>; Michael C. McMullen <mmcmullen@bscr-law.com>; Steven Goldstein <sgoldstein@pyattsilvestri.com>; Gina Winspear <gwinspear@dennettwinspear.com>
Cc: Marjorie Hauf <Mhauf@CourtRoomProven.com>; Nolan Oller <noller@CourtRoomProven.com>; Deborah L. Parker <dparker@bscr-law.com>; Deborah (Deb) A. Ries <dries@bscr-law.com>; klivingston@ocgas.com; Alondra Reynolds <areynolds@pyattsilvestri.com>; Paula Timmons <ptimmons@dennettwinspear.com>; Ashley Marchant <amarchant@dennettwinspear.com>; Reino Graves <rgraves@CourtRoomProven.com>
Subject: RE: Green v. Ferrellgas et al - Order Denying Defendants' Motion to Stay and Granting for Fees

Mr. Silva,

The attached order accepts all Ferrellgas' proposed changes and also removes "jointly." The order now reads: "Defendants are severally responsible for paying this sanction."

MOT573

From: [Gina Winspear](#)
To: [Cait Ahern](#); [Gregorio V. Silva](#); [Adam Ganz](#); [Matthew G. Pfau](#); [Felicia Galati](#); [Michael C. McMullen](#); [Steven Goldstein](#)
Cc: [Marjorie Hauf](#); [Nolan Oiler](#); [Deborah L. Parker](#); [Deborah \(Deb\) A. Ries](#); [klivingston@ocgas.com](#); [Alondra Reynolds](#); [Paula Timmons](#); [Ashley Marchant](#); [Reino Graves](#)
Subject: RE: Green v. Ferrellgas et al - Order Denying Defendants' Motion to Stay and Granting for Fees
Date: Thursday, June 10, 2021 2:50:57 PM
Attachments: [image002.png](#)
[image008.png](#)
[image018.png](#)

Hi Cait,

You may include my electronic signature.

Thanks,
Gina

GINA WINSPEAR, ESQ.
702.839.1100



From: Cait Ahern <cahern@CourtRoomProven.com>
Sent: Thursday, June 10, 2021 2:50 PM
To: Gregorio V. Silva <gsilva@bscr-law.com>; Adam Ganz <Aganz@GanzHauf.com>; Matthew G. Pfau <mpfau@CourtRoomProven.com>; Felicia Galati <fgalati@ocgas.com>; Michael C. McMullen <mmcmullen@bscr-law.com>; Steven Goldstein <sgoldstein@pyattsilvestri.com>; Gina Winspear <gwinspear@dennettwinspear.com>
Cc: Marjorie Hauf <Mhauf@CourtRoomProven.com>; Nolan Oiler <noller@CourtRoomProven.com>; Deborah L. Parker <dparker@bscr-law.com>; Deborah (Deb) A. Ries <dries@bscr-law.com>; klivingston@ocgas.com; Alondra Reynolds <areynolds@pyattsilvestri.com>; Paula Timmons <ptimmons@dennettwinspear.com>; Ashley Marchant <amarchant@dennettwinspear.com>; Reino Graves <rgraves@CourtRoomProven.com>
Subject: RE: Green v. Ferrellgas et al - Order Denying Defendants' Motion to Stay and Granting for Fees

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Please advise if you are agreeable to authorizing your electronic signature.

Thank you!

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

MOT574

Karla Livingston

From: Cait Ahern <cahern@CourtRoomProven.com>
Sent: Thursday, June 24, 2021 3:43 PM
To: DC31Inbox@ClarkCountyCourts.us
Cc: Matthew G. Pfau; Marjorie Hauf; Gregorio V. Silva; Michael C. McMullen; Deborah L. Parker; Deborah (Deb) A. Ries; Felicia Galati; Karla Livingston; Steven Goldstein; Alondra Reynolds; Gina Winspear; Paula Timmons; Ashley Marchant; Reino Graves
Subject: RE: A-19-795381-C - ORDR - Green v. Ferrellgas, Inc. et al
Attachments: ORD.006.Denying Defendants Motion to Stay and Grant Motion for Fees.pdf;
ORD.006.Denying Defendants Motion to Stay and Grant Motion for Fees.docx

Good afternoon Department 31,

I am following up on the status of the proposed Order Denying Defendants' Motion to Stay Case and Granting in Part Plaintiff's Countermotion for Attorney's Fees and Costs. It was submit on June 10th.

Opposing counsels are CC'd on this correspondence to avoid any ex parte communications.

Thank you,

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Cait Ahern
Litigation Paralegal
8950 W Tropicana Ave, #1
Las Vegas, Nevada 89147
702 598 4529 TEL
702 598 3628 FAX
www.courtroomproven.com



From: Cait Ahern
Sent: Thursday, June 10, 2021 3:16 PM
To: DC31Inbox@ClarkCountyCourts.us
Cc: Matthew G. Pfau <mpfau@CourtRoomProven.com>; Marjorie Hauf <Mhauf@CourtRoomProven.com>; Gregorio V. Silva <gsilva@bscr-law.com>; 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>; klivingston@ocgas.com; Steven Goldstein <sgoldstein@pyattsilvestri.com>; Alondra Reynolds <areynolds@pyattsilvestri.com>; Gina Winspear <gwinspear@dennettwinspear.com>; Paula Timmons <ptimmons@dennettwinspear.com>; Ashley Marchant <amarchant@dennettwinspear.com>; Nolan Oller <noller@CourtRoomProven.com>; Reino Graves <rgraves@CourtRoomProven.com>
Subject: A-19-795381-C - ORDR - Green v. Ferrellgas, Inc. et al

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Thank you,

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702 598 3626 FAX
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lawrulerleadid:C169-