

**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. 82670

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A-19-795381-C

**PETITIONERS' REPLY BRIEF**

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**PETITIONERS'/DEFENDANTS' REPLY TO REAL PARTY IN  
INTEREST'S/PLAINTIFF'S ANSWER TO PETITIONERS' WRIT OF  
MANDAMUS**

**I. INTRODUCTION**

Defendants' Writ Petition accepted by this Court pertains to the March 2, 2021 Order issued by The Honorable Joanna S. Kishner ("district court"), which is based on NRCP 35(a)(3) and 35(a)(4)(A)(ii) – not NRS 52.380. (6 App. 1177-84). That Order and the proper related record preceding it defines the scope of this Court's review.

Plaintiff's Answer to Defendants' Writ (Answer/Ans.) largely is based on: (1) waived arguments; (2) little, if any, citation to case law relevant to the specific issues; (3) citation to nonbinding case law; (4) citation to a nonbinding order from another district court case regarding Dr. Derek Duke (2 ANS BRIEF 242-76); (5) citation to a report from another case without identifying the case and/or providing the complete report and thereby potentially violating HIPAA and any protective order that might be in place there (Ans. at 23); (6) citation to three depositions of Dr. Etcoff from other cases and, thereby potentially violating HIPAA and/or any protective order that might be in place there and misrepresenting that testimony as indicated herein (Ans. at 14, 22; 1 ANS BRIEF 9-114, 139-71, 198-241); (7) citation to a transcript of a proceeding from another case and an NRCP 35 examination, thereby potentially violating HIPAA and/or any protective order that

might be in place there and misrepresenting that testimony (Ans. at 17-22, 29; 1 ANS BRIEF 115-30, 172-97); and (8) ignoring other relevant case law, including persuasive federal case law regarding NRCP 35, and this Court's expansion of the waiver rule. As such, those arguments cannot be considered, and Defendants' related Writ arguments are unopposed and warrant mandamus. Even if this Court considers Plaintiff's improper arguments and Appendix documents, they fail for the reasons stated herein.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

The following is undisputed:

(1) Plaintiff alleges PTSD symptoms, depression, stress, exhaustion, anxiety and ongoing emotional distress (Ans. at 9, 26; 2 ANS BRIEF<sup>1</sup> 317); and memory issues, confusion/inability to focus, cognitive difficulties and a potential traumatic brain injury (2 App. 271, 277-78; 3 App. 483-84; 495-97);

(2) Plaintiff's Expert, Dr. Michael Elliott, will testify regarding his treatment of Plaintiff for psychological issues and/or conditions (Ans. at 24);

(3) Plaintiff has preexisting conditions established by his own testimony and/or Dr. Elliott's records as follows: (a) Plaintiff was diagnosed with a learning disability that caused problems with processing information and expressing the things he thinks (2 ANS BRIEF 307-08, at pp. 12-14); (b) he has epilepsy and

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<sup>1</sup> Plaintiff's Appendix.

other health issues that prevented him from working the long restaurant hours he was accustomed to working (2 ANS BRIEF 313-14, at pp. 36-38); (c) he had psychological problems before the incident, for which he saw a therapist (2 ANS BRIEF 315, at p. 44); (d) he was psychologically troubled by his reduced involvement at Skinny Fats and that experience made him a very negative person for which he treated with a Shaman in the months prior to the incident (2 ANS BRIEF 315-16, at p. 44-47); (e) he complained of depression and negativity just before the incident (2 ANS BRIEF 316-17, at p. 48-50); (f) he had financial issues leading up to the incident, and has repeatedly discussed anxiety arising from financial duress with Dr. Elliott (2 ANS BRIEF 323, at pp. 75-76); (g) he suffered from headaches both before and after the accident (2 ANS BRIEF 353, at p. 194-96); (h) in the months leading up to the incident, he was seeing his Shaman to help him get past psychological problems he was having related to business situations (2 ANS BRIEF 475-76, at p. 286-90); and (i) Dr. Elliott and Plaintiff allege neuropsychological damages, including an inability to focus, memory issues, PTSD and anxiety, which is causing memory and concentration issues and cognitive difficulties, and a potential traumatic brain injury (2 App. 233, 244-52, 271, 277-78, 390-97; 3 App. 483-84, 495-97; 1 ANS BRIEF 474 at p.282 and 475 at p. 284); and

(4) a psychological examination is proper in this case. (Ans. at 9).



Based on the above, **a neuropsychological examination is at issue here.**

The Honorable Discovery Commissioner made related indications as follows:

[i]f 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.

Then, the Discovery Commissioner recommended:

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...

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. 3 App. 496-97.

Also, the district court ordered:

IT IS FURTHER ORDERED that Defendants shall provide a list of the testing Dr. [Lewis] Etkoff [(Defendants' Expert)] will conduct during the neuropsychological exam two weeks before the Rule 35 Examination. 6 App. 1184.

Plaintiff's Appendix contains many documents that were not raised before the Discovery Commissioner – Plaintiff's Appendix Documents 1-10 and 15-17 (1 ANS BRIEF 1-241 and 2 ANS BRIEF 242-302, 3 ANS BRIEF 491-553) – which

are irrelevant to the issues here. Document 8 (1 ANS BRIEF 242-76) is not cited in Plaintiff's Appendix Document 17 (2 ANS BRIEF 543-553) is not Plaintiff's Medical Records from Michael and Associates, as indicated in the Plaintiff's Index of Appendix, but an article entitled "Patient Comfort With Audio or Video Recording Of Their Psychotherapy Sessions..." As such, Documents 1-10 and 15-17 should not be considered. Even if this Court considers them, they fail.

### **III. STANDARD OF REVIEW**

The parties agree that – since this case involves the interpretation of NRC 35 – this court reviews such legal questions *de novo*. (Ans. at 10). However, many of Plaintiff's arguments are waived and cannot be considered. "A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." Valley Health Sys., LLC v. Dist. Ct., 127 Nev. 167, 172, 252 P.3d 676, 679 (2011) citing Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981); Wolff v. Wolff, 112 Nev. 1355, 1363–64, 929 P.2d 916, 921 (1996). "[T]his principle is equally applicable where...an issue is first heard by the discovery commissioner and then submitted to the district court for approval." Valley Health Sys., LLC, supra.

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## **IV. ARGUMENT**

### **A. Plaintiff Waived And/Or Conceded Various Arguments**

Plaintiff waived the following arguments not raised before the Discovery Commissioner:

(1) good cause for an observer and/or an audio recording under NRCP 35(a)(3); 35(a)(4)(A)(i) and (ii); and 35(a)(4)(B)<sup>2</sup> (Ans. at 11-13) because Plaintiff did not argue that in his papers or at any hearings before the Discovery Commissioner, and no related recommendation was made there (1 App. 69-204, 2 App. 259-80, 3 App. 478-93 and 494-500, 6 App. 1017-1107 and 1120-25);

(2) an audio recording and observer are the only means to obtain actual data of the Rule 35 psychological examination (Ans. at 16-24) first raised in Plaintiff's Opposition to Defendants' Motion for Reconsideration<sup>3</sup> filed on April 9, 2021 long after the March 2, 2021 Order at issue here (7 App.<sup>4</sup> 1192-96, 1210-35; 8 App. 1391-1464);

(3) the desired materials are relevant for impeachment (Ans. at 24-26) first raised in Plaintiff's Opposition to Reconsideration (7 App. 1196-97, 1206);

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<sup>2</sup> The Honorable district court did not rely on NRCP 35(a)(4)(A)(i) or NRCP 35(a)(4)(B), but Defendants are citing it because they believe it is applicable and relevant.

<sup>3</sup> Plaintiff's Opposition to Reconsideration.

<sup>4</sup> Petitioners' Supplemental Appendix.

(4) NRCP 35 is inherently adversarial (Ans. at 28-30) first raised by Plaintiff to the district court in his Reply to Defendants' Objection filed on January 11, 2021 (6 App. 1028);

(5) Plaintiff's psychotherapy treatment sessions argument for an audio recording and observer where the patient consents to the same with his treater (Ans. at 31-34) first raised in Plaintiff's Opposition to Reconsideration. (7 App. 1200-02; 8 App. 1528-39). This also is irrelevant because all agree Plaintiff is not Dr. Etcoff's patient and Dr. Etcoff is not Plaintiff' treater. (Ans. at 11) Furthermore, the article is from Professional Psychology: Research and Practice 2016 and every page is specifically marked – “This document is copyrighted by the American Psychological Association or one of its allied publishers. This article is intended solely for the personal use of the individual user and is not to be disseminated broadly.” (2 ANS BRIEF 292-302);

(6) NRCP 35 and NRS 52.380 can be read harmoniously (Ans. at 6, 11, 36-44), first raised first raised in Plaintiff's Opposition to Reconsideration (7 App. 1203-08), which is belied by the Discovery Commissioner's finding that “[t]here is a conflict between the language of NRCP 35 and NRS 52.380” (3 App. 496), and the district court Order at issue is not based on that Statute (6 App. 1177-85). If this Court decides to consider NRS 52.380 and Plaintiff's related argument, Defendants respectfully request an opportunity to supplement their briefing

because they could not address Plaintiff's related 9-page argument (Ans. at 36-44) given the applicable Reply Brief page limits;

(7) Plaintiff's improper and speculative attack of Dr. Etcoff as biased based on other district court cases, their findings, depositions in other cases of Dr. Etcoff and Dr. Duke, and an audio recording of Dr. Duke (Ans. at 14, 16-26; 7 App. 1192-95; 8 App. 1391-1464) and Plaintiff's misrepresentation of Dr. Etcoff's testimony – both first made in Plaintiff's Opposition to Reconsideration, and before Dr. Etcoff has issued any opinions here and completely ignoring Plaintiff's own testimony regarding pre-existing conditions and Dr. Elliott's records regarding the same<sup>5</sup> (7 App. 1198-99, 1201-06, 1210-1362; 8 App. 1363-1464, 1524-1539);

(8) Plaintiff's NRS 200.620, NRS 200.650 and related cases argument that Nevada law allows the recording of an in-person communication with the consent of one party made for the first time in Plaintiff's Opposition to Reconsideration (Ans. at 34, 39; 7 App. 1202, 1204); and

(9) Plaintiff's "good cause is inherent in Rule 35 examinations" because there is no "doctor-patient relationship" (Ans. at 9, 11-14) rule nullification argument(s) first made at the January 28, 2021 Objection hearing before the district court (6 App. 1157).

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<sup>5</sup> See, pp. 2-3, supra.

Therefore, all the above arguments are waived. Valley Health Sys., LLC, supra.

Any issues Plaintiff might have with Dr. Etcoff's opinions and/or report, which have yet to be formed and/or issued, are purely speculative and more properly the subject of Plaintiff taking his deposition, cross-examining him at trial, Dr. Elliott's rebuttal report and deposition and trial testimony, and any pretrial motions. Therefore, none of the above are relevant and should be considered.

Plaintiff made no underlying and/or Answer argument regarding the following and, therefore, Defendants' related argument is unopposed and, thereby, conceded: (1) Freteluco v. Smith's Food & Drug Centers, Inc., 336 F.R.D. 198 (D. Nev. 2020) (Petition (Pet.) at 10-14); and (2) 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 (Pet. at 16). Based on all the above, mandamus is appropriate.

**B. Plaintiff's Rule Nullification Arguments Fail**

Plaintiff's argument that "good cause is inherent in Rule 35 examinations" because there is no "doctor-patient relationship" are rule nullifications argument and, therefore, fail. (Ans. at 9, 11-14). Plaintiff made this argument for the first time at the Objection hearing. (6 App. 1157). As such, it cannot be considered.

Furthermore, NRCP 35 allows an opposing party's expert to conduct a psychological/neuropsychological examination where the plaintiff puts his mental condition at issue, which – by definition – will always be done by an opposing party's expert such that there will never be a doctor-patient relationship in such examinations. The district court clearly erred in accepting that argument to establish the good cause required by NRCP 35 because the result is that there will always be an observer and/or an audio recording, which nullifies NRCP 35(a)(3); 35(a)(4)(A)(i) and (ii); NRCP 35(a)(4)(B). (6 App 1182).

NRCP 35 should be applied uniformly on its plain language and interpreted to secure equal and exact justice binding and obligatory upon all litigants. Construing NRCP 35 to mandate nullification as a matter of course would violate the requirement that the Nevada Rules of Civil Procedure “be construed to secure the just, speedy, and inexpensive determination of every action.” NRCP 1; Las Vegas Novelty, Inc. v. Fernandez, 106 Nev. 113, 119, 787 P.2d 772, 776 (1990) (as to NRCP 65(d)). Based on all the above, mandamus is appropriate

Plaintiff's adversarial process argument is also a nullification argument because it would require an observer and recording at every NRCP 35 examination. (Ans. at 9, 14, 28-30). This Court should be hesitant – absent a compelling reason – to condition an NRCP 35 examination upon restrictions which will foster a greater degree of advocacy in the conduct of such examinations than

is, already, unavoidably present. Tomlin v. Holecek, 150 F.R.D. 628, 633 (D. Minn. 1993). Otherwise, it would endorse, if not promote, the infusion of the adversary process into the psychologist's examining room to an extent which is inconsistent with the just, speedy, and inexpensive resolution of civil disputes, and with the dictates of Rule 35. Id. at 633–34.

Plaintiff's reliance on Davanzo v. Carnival Cruise Lines, 2014 WL 1385729 (S.D. Fla.), without any page citation, is misplaced, because it is not binding. Furthermore, in Davanzo there was "...well-established Florida law that a plaintiff 'has a right to have a third party observer at his medical examination...' " Id. at \*3 quoting Bacallao v. Dauphin, 963 So.2d 962, 967 (Fla. Dist. Ct. App. 2007) (quoting U.S. Sec. Ins. Co. v. Cimino, 754 So.2d 697, 701 (Fla.2000) (adopting the holdings of several Florida appellate courts based on Fla.R.Civ.P. 1.360)), which does not apply here. Furthermore, the Davanzo court applied the majority view in the federal district courts that exclude third parties and recording equipment from Fed.R.Civ.P. 35 examinations and held Davanzo's attorney may not attend Davanzo's examination and Davanzo may not videotape the examination. Here, there is no right to have an observer and a recording at a psychological examination under NRCP 35(a)(3), 35(a)(4)(A)(i) and (ii), and 35(a)(4)(B), and those Rules prohibit the same absent good cause. Therefore, Davanzo is inapposite.



Furthermore, the Order at issue does not relate to NRS 52.380 and, therefore, Plaintiff's related argument should not be considered.

Defendants request this Court establish the good cause requirements of NRCP 35 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 v. Holder, 379 U.S. 104, 118, 85 S. Ct. 234, 242 (1964). Plaintiff submitted no affidavits or other evidence supporting his argument for the Discovery Commissioner and/or district court to fulfill its obligation to perform the discriminating application mandated by NRCP 35(a)(3), 35(a)(4)(A)(i) and (ii), and 35(a)(4)(B). Id. at 118–19, 243–45. Defendants, however, presented to the Discovery Commissioner and/or district court various literature on the negative effects of an observer and/or a recording, two affidavits from Dr. Etcoff, and the State of Nevada Board of Psychological Examiners 10/1/18 letter regarding the negative impact of an observer and audio recording that this Court apparently accepted in enacting NRCP 35; and relied on Fretelucio to support the denial of an observer and audio recording, none of which was disputed. 1 App. 23-68; 5 App. 1010-16. In any case, it was Plaintiff's burden to establish good cause under NRCP 35 for an observer and audio recording.

Plaintiff citing Schlagenhauf, without page citation, argues "the pleadings alone" establish good cause, which misrepresents the United States Supreme

Court's finding. (Ans. at 27). There, the Court was referring to good cause for a physical or mental examination, i.e., a pleading asserting physical or mental injury establishes good cause for a physical or mental examination, which Plaintiff agrees is not the issue here. (Ans. at 27); Id. at 119, 243. That does not establish good cause for an observer and/or recording at the NRCP 35 psychological/neuropsychological examination. Based on all the above, mandamus is appropriate.

**C. NRCP 35's Good Cause Standard Should Be Determined In Accordance With Its Plain Language, Freteluco And/or Other Federal and United States Supreme Court Decisions**

NRCP 35 is the initial starting point for the determination of this Writ. After receiving public comment – including the 10/1/18 Nevada Board of Psychological Examiners statement regarding negative issues associated with observers and recording of psychological examinations – this Court enacted NRCP 35 which provides that an observer and recording of a psychological/neuropsychological examination are not permitted in four places of that Rule unless “good cause [is] shown[,]” thereby indicating the importance thereof. NRCP 35(a)(3); 35(a)(4)(A)(i) and (ii); 35(a)(4)(B).

The Freteluco court applied the majority rule adopted by federal courts that exclude third parties from observing psychiatric examinations. 336 F.R.D. at 203 citing Flack v. Nutribullet, L.L.C., 333 F.R.D. 508, 517 (C.D. Cal. 2019) citing

Smolko v. Unimark Lowby Trans., LLC, 327 F.R.D. 59, 61 (M.D.Penn, 2018)

holding:

[c]ourts are often reluctant to permit a third party or recording device out of concern that the intrusion would (1) potentially invalidate the examination results; (2) fail to provide a level playing field[ ] as plaintiff was not required to tape record his examinations with his own health care providers; and (3) inject a greater degree of the adversary process into an evaluation that is to be neutral.

Id. at 204 citing Flack, 333 F.R.D. at 518. Some of the concerns summarized above accurately reflected why the court found that a third party should not be allowed to participate. Id. The introduction of a third party is necessarily distracting to the examiner and the examinee, and clearly heightens an already adversarial process into one that is simply more so. Id. citing Smolko, 327 F.R.D., at 61-62. Also, the presence of a third party introduces “a degree of artificiality to the examination that would be inconsistent with the applicable professional standard.” Id. citing Smolko, *supra*.

The Fretelucio court went on to consider if it were to adopt the middle road approach taken by some federal courts, which requires the party seeking to have an observer present at an examination to demonstrate “good cause for the request,” and determined the plaintiff failed to meet that standard. Id. citing Tarte v. United States, 249 F.R.D. 856 (S.D. Fla. 2008); Smolko, 327 F.R.D., at 62. Evaluating the case and the plaintiff’s arguments, the court held there was nothing extraordinary or out of the ordinary that suggested a third-party observer was appropriate. Id.

There was nothing presented to the court that supported a concern that Dr. Etcoff had ever been or would be abusive to someone he is examining. Id. There was also nothing to support the conclusion that Dr. Etcoff would go beyond the agreed upon testing. Id. The court found that the plaintiff failed to provide any evidence or information, other than generic concerns, warranting an observer at the Rule 35 examination and, accordingly, would not permit an observer to be present at the examination. Id.

As Fretelucio, supra and another court have held, Rule 35 is “a forthright attempt to provide a ‘level playing field’ between the parties in their respective efforts to appraise the Plaintiff’s psychological state.” Tomlin, 150 F.R.D. at 632. Plaintiff’s desire to have a recording to rebut or potentially impeach Dr. Etcoff is speculative and not a valid reason for ordering a recording of the exam. Newman v. San Joaquin Delta Cty. Coll. Dist., 272 F.R.D. 505, 515 n. 10 (E.D. Cal. 2011). The reasons for denying an observer and recording are particularly important here due to: (1) the special nature of psychological/neuropsychological examination requires direct and unimpeded one-on-one communication without external interference or intrusion; (2) in contrast to depositions and other forms of discovery, Rule 35 expert examinations are not intended to be adversarial; (3) fairness dictates that if defense counsel cannot be present when a plaintiff is interviewed by an expert who will testify at trial on his behalf, then an observer

cannot be present when plaintiff is examined by a defendant's expert; and (4) any concerns with distortions or inaccuracies by the examining expert can be addressed through traditional methods of impeachment and cross-examination. King v. Deming, 2020 WL 4369702, at \*3 (D. Mass. July 30, 2020); J.H. by Harris v. Williamson Cty., 2017 WL 11476385, at \*2 (M.D. Tenn. Oct. 26, 2017); Cabana v. Forcier, 200 F. R. D. 9, 12 (D. Mass., 2001) (quoting Baba –Ali v. City of New York, 1995 WL 753904, at \*3, (S. D. N. Y., Dec. 19, 1995)).

Plaintiff made no good cause argument and none of the evidence he submitted to the Discovery Commissioner establishes good cause for an observer and audio recording to support a deviation from NRCP 35's plain language prohibiting the same at the psychological/neuropsychological examination. Plaintiff's Opposition to the Motion to Compel 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) Discovery Commissioner Report and Recommendation dated 12/22/2020; and (9) Judge Denton Order and Notice of Entry. (1 App. 69-204, 6 App. 1017-1107). At most, Plaintiff relied on generic concerns and speculation, as in Freteluco, and things not relevant to the good cause issue – none of which establishes good cause under the relevant NRCPs and/or any related case law.

Therefore, Plaintiff failed to meet his burden of establishing good cause and the district court clearly erred in finding otherwise. 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, thereby establishing no observer and/or recording should be allowed here. Even if this Court determines Defendants' evidence fails, it does not matter because Plaintiff has the "good cause" burden.

Also, even if this Court considers what Plaintiff now offers to support his request for an observer and a recording, it fails. Plaintiff presents nothing more than speculation and a generalized fear that Dr. Etcoff might distort or inaccurately report what occurs at the examination, which is not sufficient to establish good cause for an observer or 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. Plaintiff relies on and cites a purported portion of one of Dr. Etcoff's reports allegedly regarding secondary gain, untruthfulness or malingering without providing the complete report to Defendants and/or any Court, which he raised for the first time in his Opposition to Reconsideration. (7 App 1195-96, 1210-35, 1284-1362; 8 App. 1363-1417).

Plaintiff also misrepresents and/or ignores parts of the Dr. Etcoff testimony he relies on. For example, Dr. Etcoff testified malingering is in the DSM-5 and 4; identifies the essential feature of malingering, and it should be strongly suspected if a combination of four factors is present. (7 App 1233 at pp. 85-87). In that case, all Dr. Etcoff said was that there was a possibility of malingering. (7 App. 1225 at p. 54). Therefore, the above does not support Plaintiff's argument, cannot be considered because it is not evidence in this action, cannot be properly evaluated on its own because Defendants and this Court do not know the entire case facts, evidence and/or rulings to address it and, most importantly, it does not establish "implicated bias," (7 App 1196) as to Dr. Etcoff, whom Plaintiff concedes can perform the NRCP 35 examination, to require an observer and/or recording.

Plaintiff argues Flack is moot because there is no dispute there is good cause for an NRCP 35 examination. (Ans. at 14-15) Defendants agree there is no issue an NRCP psychological/neuropsychological is required here. However, Plaintiff incorrectly further argues Flack did not address issues of recording or observation of the examination. (Ans. at 15) The Flack court denied the plaintiff a third-party observer because the plaintiff failed to present evidence to warrant the intrusion of one in her physical or mental examinations, holding that:

[t]here is nothing before the Court to suggest that the standard safeguards available to a plaintiff in a Rule 35 examination – the physician's report, deposition and cross-examination of the physician, contrary expert

evidence, and motions to exclude evidence improperly obtained during the examination – will not be sufficient to address Plaintiff’s concerns.

333 F.R.D. at 518. The same is true here.

Plaintiff also argues:

he met the good cause standards set forth in Flack: (1) the possibility of obtaining desired information by other means (2) whether plaintiff plans to prove [their] claim through testimony of expert witnesses (3) whether the desired materials are relevant and (4) whether plaintiff claims ongoing emotional distress. (Ans. at 16)

However, those are the standards “[t]o determine whether the “good cause” requirement of Rule 35 is satisfied” (Id. at 513), which is irrelevant, not the good cause standards for an observer or a recording. Id. at 518. Therefore, none of Plaintiff’s related argument should be considered. (Ans. at 16-26). Based on all the above, mandamus is appropriate.

Finally, even if this Court considers Plaintiff’s NRS 200.620 and NRS 200.650 argument, it is a *non sequitur* and otherwise fails. Those Statutes pertain to crimes. Just because it is not a crime to record an in-person communication with the consent of one party, does not mean that it can be done in the context of an NRCP 35 psychological/neuropsychological examination in the face of the Rule’s prohibition of the same. This Court controls the scope of discovery through the Nevada Rules of Civil Procedure (NRCP), including NRCP 35(a)(3), 35(a)(4)(A)(i) and (ii), and 35(a)(4)(B), which prohibit an observer and a recording at a psychological/neuropsychological examination unless good cause is shown.



The Discovery Commissioner and district court have the discretion to impose limits on discovery and the scope of NRCP 35 examinations. Plaintiff is not free to surreptitiously record the psychological/neuropsychological examination because a recording is prohibited absent good cause. Instead, Plaintiff or an examiner must make that “...request, [and] the court may, for good cause shown, require as a condition of the examination that the examination be audio recorded.” NRCP 35(a)(3). Thus, Plaintiff cannot record the examination without a court order allowing it and Plaintiff’s related NRS 200.620 and NRS 200.650 argument is irrelevant and fails. Based on all the above, mandamus is appropriate.

**D. Plaintiff Has Other Sources of Data For The NRCP 35 Examination**

Plaintiff baldly and speculatively argues an audio recording and observer are the only means to obtain actual data for the examination (Ans. at 16-24), which is belied by various NRCPs that provide adequate safeguards to ensure a fair NRCP 35 examination and litigation in this adversarial litigation process. General concerns about actual distortion or inaccuracies can be addressed through ample traditional methods of impeachment and cross-examination, including: (1) Plaintiff’s testimony about the examination; (2) reading Dr. Etcoff’s report; (3) deposing Dr. Etcoff; (4) issuing any related subpoenas; (5) cross-examination of Dr. Etcoff at trial; (6) Dr. Elliott’s rebuttal report; and (7) Dr. Elliott’s examination in chief at trial regarding Dr. Etcoff’s opinions. See, e.g., NRCP 16.1(a)(2)(B),

NRCP 26(b)(4)(A) and NRCP 45. See, e.g., Flack, supra (“there are ‘other, less drastic means of addressing...[ general concerns for an observer and/or recording], including the provision of a Rule 35 examination report to the plaintiff for review; the opportunity for plaintiff to depose the physician, cross-examine the physician at trial, and introduce contrary expert evidence; and the opportunity to seek exclusion of evidence improperly obtained during the examination from trial”) citing Smolko, 327 F.R.D. at 63 citing Tarte, 249 F.R.D. at 859. Also, as in Freteluco, 336 F.R.D. at 200, Plaintiff’s attorney agreed that Dr. Etcoff could provide any testing data directly to Plaintiff’s psychologist without providing the same to counsel due to copyright and patient confidentiality concerns. 1 App. 11, 80, 95. As such, Plaintiff will have additional evidence, aside from what he can obtain under the above-cited NRCPs, to make any appropriate motion for exclusion and/or sanctions as needed. Id. at 204.

Defendants do not get to have an observer at and/or audio recording of Plaintiff’s various appointments with his Expert Dr. Elliott who has already done what Plaintiff’s counsel asserts needs to be protected against with an observer, i.e., Dr. Elliott has opined that:

Patient’s scores on instruments yielded valid profiles on across all three instruments and indicate that Mr. Green gave his best effort. However, the instruments also suggest that Mr. Green may be underreporting his symptoms and that interpretation of his results may need to be modulated upward to more accurately reflect his present psychological functioning.

Continued treatment and follow-up psychological testing is recommended to further analyze the severity of his stress injury. 1 App. 91.

Thus, there is no level playing field to begin with. Requiring an observer and a recording at Defendants' Expert's examination will harm the equal footing NRCP 35 seeks to create. These concerns only become enhanced in a mental-health examination when rapport and confidences become much more important to the success of the examination. Parks v. Vincent, 2015 WL 1534112, at \*4 (W.D. Ky.)

The litigation process should not be made more unlevel and/or provide more advantages to Plaintiff such that Defendants are left with nothing to defend themselves. The procedure established by NRCP 35 promotes a discovery of the truth for the jury to consider as appropriate and, as such, NRCP 35 should be applied as enacted and not nullified. Most importantly, there is real evidence from Plaintiff and/or Dr. Elliott of pre-existing conditions. See, pp. 2-3, supra. An expert's opinions regarding undisputed pre-existing conditions are not biased or prejudicial to a plaintiff if the expert has a foundation and evidence for his opinions.

Therefore, mandamus is appropriate.

**E. 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/or treating Plaintiff without an observer or an audio recording. While Defendants understand and accept that is a fact of any case, they should not be

further prejudiced here when Plaintiff failed to meet his NRCP 35 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, and compromise the psychologist's ability to compare test results to normative data increasing the potential for inaccurate test results and erroneous diagnostic conclusions – thereby impacting the reliability of results. 5 App. 1016. Thus, Dr. Etcoff's examination and related opinions improperly and/or unfairly will be subject to additional challenge by Plaintiff based on the above. Defendants are already fighting an uphill battle because Dr. Elliott has had approximately 13 visits and will have more with Plaintiff. (See, e.g., 2 App. 233, 244-52, 390-97; 1 ANS BRIEF 474 at p.282, 475 at p. 284; 8 App. 1524-28). Requiring an observer and a 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 and audio recording, thereby skewing the data/results, 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. That is not fair. Therefore, mandamus is appropriate.

## **V. CONCLUSION**

Based on the foregoing, Defendants respectfully request this Court issue a Writ of Mandamus. Respectfully, the district court abused its discretion and committed clear error by ordering that Plaintiff is permitted to have an observer and an audio recording at the NRCP 35 psychological/neuropsychological examination, including without citation to any authority beyond NRCP 35, in the absence of any evidence establishing good cause, accepting NRCP 35 nullification argument(s), and despite Plaintiff's waiver of good cause. Accordingly, a Writ of Mandamus should issue compelling the district court to enter an order denying Plaintiff the presence of an observer at and denying Plaintiff an audio recording of his psychological/neuropsychological examination for his failure to meet his burden of establishing good cause under NRCP 35(a)(3), NRCP 35(a)(4)(A)(i) and (ii), and 35(a)(4)(B).

RESPECTFULLY SUBMITTED  
this 20<sup>th</sup> day of July, 2021.

*/s/ Felicia Galati, Esq.*

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**VERIFICATION**

STATE OF NEVADA     )  
                                      ) §  
COUNTY OF CLARK    )

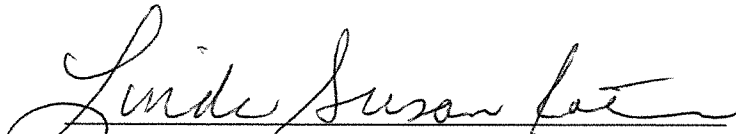
Felicia Galati, being first duly sworn, deposes and says:

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 PETITIONER'S REPLY BRIEF, 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.

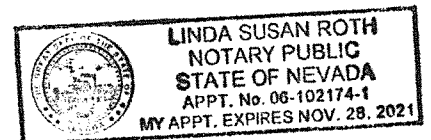


\_\_\_\_\_  
FELICIA GALATI

SUBSCRIBED and SWORN to before  
me on this 20<sup>th</sup> day of July, 2021.



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





## **NRAP 28.2 CERTIFICATE OF COMPLIANCE**

1. I hereby certify that this Reply 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 Reply Brief 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 6,948 words.

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

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

DATED this 20<sup>th</sup> day of July, 2021.

*/s/ Felicia Galati, Esq.*

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 20th day of July, 2021, I sent via e-mail a true and correct copy of the above and foregoing **PETITIONERS' REPLY BRIEF** 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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