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

4 FELICE J. FIORE and SPEED VEGAS, LLC,

5
6 Petitioners,

7 v.

8 THE EIGHTH JUDICIAL DISTRICT COURT of the
9 State of Nevada, in and for County of Clark; and THE
10 HONORABLE NANCY L. ALLF, District Judge,

11 Respondents,

12 and

13
14 ESTATE OF GIL BEN-KELY by ANTONELLA BEN-
15 KELY as the duly appointed representative of the Estate
16 and as the widow and heir of Decedent GIL BEN-
17 KELY; SHON BEN-KELY, son and heir of decedent
18 GIL BEN-KELY; NATHALIE BEN-KELY-SCOTT,
19 daughter and heir of the decedent GIL BEN-KELY;
20 GWENDOLYN WARD, as personal representative of
21 the ESTATE OF CRAIG SHERWOOD, deceased;
22 GWENDOLYN WARD, individually and as the
surviving spouse of CRAIG SHERWOOD, deceased;
GWENDOLYN WARD, as mother and natural guardian
of ZANE SHERWOOD, surviving minor child of
CRAIG SHERWOOD, deceased,

23 Real Parties in Interest.

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Apr 11 2022 01:56 p.m.
Elizabeth A. Brown
District Court Case
Clerk of Supreme Court
Nos.:
A-17-757614-C and
A-18-779648-C

**BEN-KELY
RESPONDENTS'
OPPOSITION TO
PETITIONER'S
MOTION FOR STAY**

24 WILLIAM R. BRENSKE (SBN 1806); JENNIFER R. ANDREEVSKI (SBN 9095)
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Nathalie Ben-Kely, Real Parties in Interest*

**BEN-KELY RESPONDENTS' OPPOSITION TO PETITIONER'S MOTION
FOR STAY**

In Petitioner's Motion for Stay, Petitioner postulates that District Court Judge Nancy Allf does not understand NRCP 41(e). Judge Allf never intimated she does not know a stay would toll the Five-Year-Rule. The reason a stay would place Plaintiffs at risk of having their case dismissed pursuant to NRCP 41(e) is the inherent difficulties involved in setting a lengthy trial when the Five-Year-Rule is about to run. Plaintiffs filed their Complaint on June 28, 2017. As such, there is just over two months left to bring this case to trial. If a stay is granted and Petitioner's writ is denied, the District Court will have just over two months to get the case tried from the date of remand.

The trial in this case is expected to take one month to try. To set a lengthy trial on short notice is likely impossible and would result in dismissal of Plaintiff's claims pursuant to NRCP 41(e). So, while a stay *would* toll the ticking of the NRCP 41(e) clock, it would place the Court and the parties in a position where obtaining a new timely trial date would be virtually impossible.

Judicial resources are spread incredibly thin. Judge Allf fills her calendar to facilitate the administration of justice to the residents of Nevada. She would have to postpone other trials to free up her docket for a five week trial after a potential remand. That was Judge Allf's concern. She is not ignorant of the fact that staying

1 a case tolls NRCP 41(e); instead, she is keenly aware of how difficult it is to place a
2 five week trial on her docket.

3
4 Petitioner also misrepresents the facts of the case in his motion. While the
5 case does involve a fatal single-vehicle collision with defective Lamborghini
6 Aventador on the Speed Vegas track, Mr. Fiore was not a “one-time lessor.” Mr.
7 Fiore entered into a *commercial lease* of his Lamborghini with Speed Vegas
8 whereby Mr. Fiore received a percentage of every single lap purchased by Speed
9 Vegas customers. Specifically, patrons of Speed Vegas spent upwards of \$100 for
10 every single lap they wanted to drive around the Speed Vegas track in Mr. Fiore’s
11 vehicle. Mr. Fiore’s commercial lease with Speed Vegas gave him a portion of
12 every single sale. He did not enter into a conventional, one-time lease, whereby
13 Speed Vegas paid him a sum certain every month to use his vehicle; he entered into
14 a commercial lease whereby the more his vehicle was used, the more money he
15 would make.
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20 Petitioner also insinuates the parties do not have a current trial setting. This
21 is not true. On April 1, 2022, an Order Setting Firm Civil Jury Trial was entered by
22 the Court setting trial on a firm setting for five weeks, from May 9, 2022 through
23 June 10, 2022.
24

25 The factors to consider when determining whether to grant a stay are: "(1)
26 whether the object of the appeal will be defeated if the stay is denied; (2) whether
27 appellant will suffer irreparable or serious injury if the stay is denied; (3) whether
28

respondent will suffer irreparable or serious injury if the stay is granted; and (4) whether appellant is likely to prevail on the merits in the appeal." Mikohn Gaming Corp. v. McCrea, 120 Nev. 248, 251 (2004). Based on an analysis of these factors, Petitioner's request to stay this trial setting should be denied.

Whether the Object of the Appeal Will be Defeated if the Stay is Denied

Appellant's writ petition asks this Court to require the district court to grant its previously denied Motion for Summary Judgment. Denying Appellant's request for stay will in no way affect his petition. He is asking this Court to find he is not responsible under a theory of product liability. If this Court agrees with him, Respondents' product liability claims can be dismissed before or after trial. If this Court disagrees, then the parties will potentially have a verdict on the issue. The object of the appeal will not be defeated if a stay is not granted. In fact, if this Court were to agree with Appellant, then a stay would be required on any interlocutory appeal of a Motion to Dismiss or Motion for Summary Judgment – which is certainly not the case.

In Mikohn, this Court analyzed a question of whether an Arbitration Clause applied. There, this Court found the object of the appeal would be defeated if a stay was not granted – because the purpose of arbitration clauses is to reduce the cost and time associated with trials. This is wholly different from the question at hand. The only thing that would change if Appellant's appeal is granted is Mr. Fiore will

1 not need to bear the expense of trial. That is a monetary concern and the object of
2 the appeal will be preserved even if a stay is not granted.

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4 **Whether Appellant Will Suffer Irreparable or**
5 **Serious Injury if the Stay is Denied**

6 If the stay is denied, Mr. Fiore and Speed Vegas will simply have to continue
7 on with the litigation. Litigating a case does not constitute irreparable or serious
8 injury. In fact, in Mikohn, this Court indicated: "We have previously explained that
9 litigation costs, even if potentially substantial, are not irreparable harm." Mikohn at
10 253. "Irreparable harm" is an injury that cannot be cured with compensatory
11 damages – such as the sale of a home at a trustee's sale. Hansen v. Eighth Judicial
12 Dist. Ct., 116 Nev. 650, 658 (2000). Going through a trial – even if needlessly –
13 does not constitute irreparable harm.
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16 **Whether Respondent Will Suffer Irreparable or**
17 **Serious Injury if the Stay is Granted**

18 While a delay in a case usually does not constitute irreparable harm for the
19 party opposing a stay, in this case it could. The Ben-Kely Plaintiffs filed their
20 Complaint on June 28, 2017. NRCP 41(e) mandates dismissal of a case if it is not
21 brought to trial within five years. As such, the five-year rule runs on June 28, 2022.
22 Currently, the parties have a trial date that complies with NRCP 41(e). Although
23 the five-year rule would be tolled if a stay were granted, the parties and Court
24 would be forced to set a five week trial on short notice if a stay were granted and
25 the case were ultimately remanded back to the District Court. Setting and preparing
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1 for a trial on short notice, especially with court congestion and the number of
2 lawyers and witnesses involved would be difficult, if not impossible. This would
3 put Plaintiffs/Respondents at risk of not bringing their case to trial in a timely
4 manner and would risk having the case dismissed.
5

6 **Likelihood of Success on Merits of Appeal**
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8 Mr. Fiore is not likely to succeed on the merits of its appeal. Although this
9 Court ordered briefs on his appeal, this does not necessarily mean this Court is
10 inclined to grant relief. "A writ of mandamus is available to compel the
11 performance of an act that the law requires as a duty from an office, trust, or station
12 or to control an arbitrary or capricious exercise of discretion. Writ relief is not
13 available, however, when an adequate and speedy legal remedy exists." Int'l Game
14 Tech., Inc. v. Second Judicial Dist. Ct., 124 Nev. 193, 195 (2008). Typically, an
15 appeal from a final judgment "constitutes an adequate and speedy legal remedy,
16 [and the Nevada Supreme Court] generally decline[s] to consider writ petitions that
17 challenge interlocutory district court orders denying motions to dismiss." Int'l Game
18 Tech at 197. Here, should the jury find against Mr. Fiore, he can obtain relief with
19 a proper appeal. Given an adequate and speedy legal remedy exists, Mr. Fiore's
20 writ petition is likely to be denied.
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1 Appellant will not suffer irreparable injury and the object of his appeal will
2 not be defeated if a stay is denied. After an analysis of the Mikohn factors, it is
3 clear Appellant's Motion for Stay should be denied.
4

5 DATED this 11th day of April, 2022.
6

7
8 /s/ William R. Brenske, Esq.

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CERTIFICATE OF SERVICE

I certify that on April 11, 2022, I submitted the foregoing “Motion for Stay Pending Writ Petition” for filing via the Court’s eFlex electronic filing system.

Electronic notification will be sent to the following:

☐ BY ELECTRONIC SERVICE: by electronically filing and serving the foregoing document with the Eighth Judicial District Court's electronic filing system:

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