IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY, NEVADA

IRVING TORREMORO; AND KEOLIS TRANSIT SERVICES, LLC,

Petitioners,

vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ERIKA D. BALLOU, DISTRICT JUDGE,

Respondents.

and

LAMONT COMPTON,

Real Party in Interest.

Supreme Court Case No. 83596

District Court Case No. A777320

Real Party in Interest Lamont Compton's Answer to Writ

With Supporting Points and Authorities

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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 so the judges of this court may evaluate possible disqualification or recusal. Real Party in Interest Lamont Compton is an individual residing in the State of Nevada, and there is no parent corporation or publicly held company that owns 10% or more of their stock. Law firms who have appeared or are expected to appear for Petitioners are Joseph A. Gutierrez, Esq., and Stephen G. Clough, Esq. of MAIER GUTIERREZ & ASSOCIATES.

DATED this 13th day of January 2022.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

NEVADA RULES OF CIVIL PROCEDURE

OTHER AUTHORITIES

ISSUES PRESENTED

1. Whether this Court should consider the Petition for Writ of Mandamus or whether Petitioner has a "plain, speedy and adequate remedy in the ordinary course of law" by way of an appeal from a final judgment.

2. Whether the district court "clearly abused its discretion" when it allowed the substitution of Dr. Raimundo Leon in place of Dr. Jeffrey Gross, under NRCP 37(c) and NRCP 16(b)(4).

3. Whether the district court "clearly abused its discretion" when it re-opened discovery for the limited purpose of replacing Dr. Gross.

STATEMENT OF THE CASE

A. Factual Background Necessary to Understand the Issues Presented

This matter stems from the significant injuries sustained by real party in interest, Lamont Compton ("Compton"), as a result of a motor vehicle collision that occurred on November 4, 2017.[1] Petitioner Irving Torremoro ("Torremoro") caused the collision while operating a bus owned by Petitioner Keolis Transit Services, LLC ("Keolis", collectively "Petitioners").[2] After the collision, Compton treated with Dr. Jeffrey Gross, who is a neurosurgeon focusing his practice on neck and back issues, as well as brain and head injuries. On January 23, 2018, an indictment was filed,

[1] App0001-6.
[2] *Id*.

under seal, against Dr. Gross in the state of California. On July 16, 2020, Dr. Gross pled guilty to conspiracy to commit honest services mail and wire fraud.[3] The guilty plea agreement was also filed under seal.[4] Compton was not aware of Dr. Gross' guilty plea until April 21, 2021, after the seal was lifted, and after Dr. Gross pled guilty and was sentenced to prison.[5] Once Compton became aware of Dr. Gross' guilty plea and sentencing, he promptly moved the district court on June 29, 2021 to substitute Dr. Gross, who was his expert and treating physician.[6]

On or about April 21, 2021, Compton's counsel learned that Dr. Gross, pled guilty to conspiracy to commit honest services mail and wire fraud in California. Dr. Gross' conviction was originally sealed from the public and was not unsealed and made public until in or about April 2021. Had Compton's counsel and/or Compton known that Dr. Gross would plead guilty or be sentenced, Dr. Gross would not have retained or designated as a witness in this case.

On May 21, 2021, Dr. Gross was sentenced to 15 months in prison. Compton's counsel learned of Dr. Gross' prison sentence on May 24, 2021, after reading a news article about the prison sentence. Upon learning of Dr. Gross' plea and sentence, Compton's counsel contacted defense counsel and scheduled a meet

[3] App0093-0118.
[4] *Id*. at 92-93.
[5] App0079, at ¶4.
[6] App0077-180.

and confer to discuss these issues and the timing of trial before bringing the motion to substitute Dr. Gross. Petitioner's counsel, Michael Lowry, Esq., and Compton's counsel, Joseph A. Gutierrez, Esq. conducted the meet and confer call on June 24, and June 28, 2021. During that call, Mr. Lowry informed Compton's counsel that he could not consent to the substitution of Dr. Gross as an expert and Compton would be required to file a motion with the court.

The district court granted the motion to substitute, finding that it was substantially justified, which is now the subject of Petitioners' instant Petition for Writ of Mandamus.[7]

B. Procedural Background Necessary to Understand the Issues Presented

Compton's Complaint was filed on July 6, 2018.[8] The original scheduling order provided that expert disclosures were due October 9, 2019 and the close of discovery was January 7, 2020.[9] On November 6, 2019, the parties filed a stipulation and order to extend discovery deadlines and continue the trial date.[10] The reasons for extending the deadlines were: (1) Compton's extensive medical history which resulted in a large volume of treatment and billing records from

[7] App0207-212.
[8] App0001-6.
[9] COMPTON000001-2.
[10] COMPTON000003-5.

numerous providers; and (2) Petitioners' expert advised Petitioners he would be out of the country for the upcoming weeks and would be unable to review the large volume of treatment and billing records by the expert disclosure deadline.[11] Pursuant to this stipulation and order, the new expert disclosure deadline was December 9, 2019, and the close of discovery was March 7, 2020.[12]

On March 6, 2020, Compton filed his motion in limine No. 11 to exclude any testimony related to any prior or pending litigation against his expert, Dr. Gross.[13] Although said motion in limine was set to be heard on May 19, 2020, the district court held a status check on May 12, 2020 wherein the court reset the trial date to November 16, 2020 and continued all hearings on the pending motions to July 21, 2020, then again to July 28, 2020. The court granted Compton's Motion in Limine No. 11 at the July 28, 2020 hearing, and entered its order regarding all pending motions on August 8, 2020.[14] Regarding Compton's Motion in Limine No. 11, the court concluded in its order that "the evidence Defendants' present is more prejudicial than probative."[15]

On June 29, 2021, Compton filed his motion to substitute Compton's expert

[11] *Id*.
[12] Id.
[13] App0013-27.
[14] App0068-76.
[15] Id.

and treating physician, Dr. Gross.[16] In said motion, Compton's counsel stated in his affidavit that "[o]n or about April 21, 2021, I learned that Dr. Gross, plaintiff's treating physician and retained medical expert witness, pled guilty to conspiracy to commit honest services mail and wire fraud in California. Dr. Gross' conviction was originally sealed from the public and was not unsealed and made public until [on] or about April 2021."[17]

Compton moved to substitute experts under NRCP 37(c) because the failure to disclose Dr. Leon as an expert witness was "substantially justified and harmless."[18] Compton further moved to substitute experts under NRCP 16(b)(4), which allows the district court to modify its scheduling order "for good cause."[19] Indeed, under the section setting forth the applicable legal standard, Compton explained that courts have generally approached motions to substitute experts after the deadline in one of two ways:

> Either they construe the motion as a motion to amend the court's scheduling order under Rule 16(b) of the Federal Rules of Civil Procedure or they construe the motion as an untimely designation under Rule 26(a) of the Federal Rules of Civil Procedure and determine whether to sanction the untimely disclosure under Rule 37(c) of the Federal Rules of Civil Procedure.[20]

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[16] App0077-180.
[17] App0079, at ¶4.
[18] App0084; see also NRCP 37(c).
[19] *Id*.; *see also* NRCP16(b)(4).
[20] Id. citing *In re Northrop Grumman Corp. ERISA Litig*., No. CV 06-06213-AB (JCx), 2016 U.S. Dist. LEXIS 185126, at *5-6 (C.D. Cal. Apr. 7, 2016) comparing *Fidelity Nat'l Finc., Inc. v. Nat'l Union Fire Ins. Co*., 308 F.R.D 649, 652 (S.D. Cal.

In the Motion, Compton made clear that Dr. Gross' conviction will severely and unfairly prejudice Compton as Dr. Gross was Compton's treating physician and his only medical expert witness.[21] Compton further argued justification and good cause because Dr. Gross would most likely be unavailable for trial as he was to be incarcerated for 15 months.[22]

In turn, Compton proffered Dr. Raimundo Leon as the substituted expert and argued the substitution is "harmless" because Dr. Leon will not exceed the scope of Dr. Gross' opinions, such that he will not comment upon other body parts, will not provide substantially new or unrelated testimony or opinions, and will not increase Compton's damages.[23] Moreover, Compton will make Dr. Leon available for a deposition and he will be available at trial for cross-examination about his opinions and Compton's treatment.[24]

On July 16, 2021, the district court entered its order granting Plaintiff's Motion to Substitute Plaintiff's Expert and Treating Physician Witness Jeffrey Gross, M.D., finding that: (1) the request to substitute Dr. Jeffrey Gross is

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2015) and *Park v. CAS Enterprises, Inc*., No. 08-cv-00385, 2009 U.S. Dist. LEXIS 108160, 2009 WL 4057888, at *2-3 (S.D. Cal. Nov. 18, 2009) with Nijjar v. Gen. Star Indem. Co., No. 12-cv-08148, 2014 U.S. Dist. LEXIS 8722, 2014 WL 271630, at *2 (C.D. Cal. Jan. 2014).

[21] App0077-180.

[22] Id.

[23] App0085.

[24] Id.

substantially justified; (2) the harm to Compton is outweighed by any harm to Petitioners; and (3) Compton had no knowledge of the status of the criminal case as it was under seal until [on] or about April 2021.[25] In the district court's July 16, 2021 Order, the Court ordered that: (1) discovery shall be reopened for the limited purpose of replacing Dr. Gross only, and (2) no other discovery is permitted.[26] Petitioners then filed the instant Petition for Writ of Mandamus on October 8, 2021.

SUMMARY OF THE ARGUMENT

The Petition for Writ of Mandamus must be denied because: (1) Petitioners already have a "plain, speedy and adequate remedy in the ordinary course of law" by way of an appeal from a final judgment; (2) the district court did not "clearly abuse its discretion," and it applied the proper legal standard, when it allowed the substitution of Dr. Raimundo Leon in place of Dr. Jeffrey Gross, under NRCP 37(c) and NRCP 16(b)(4); and (3) the district court did not "clearly abuse its discretion" when it re-opened discovery for the limited purpose of replacing Dr. Gross to ease any potential prejudice.

In addressing motions to substitute experts, the relevant jurisprudence allows courts to either construe the motion as a motion to amend the court's scheduling

[25] App207-212.
[26] *Id*.

order under Rule 16(b), or they may construe the motion as an untimely designation under Rule 26(a) and whether to sanction the untimely disclosure under Rule 37(c).

Here, the district court properly considered both NRCP 37(c), finding that the substitution was "substantially justified" based on the circumstances, including that Compton's counsel did not become aware of Dr. Gross' criminal conviction until April 2021, and also NRCP 16(b), finding good cause existed to modify its scheduling order and re-open discovery for the limited purpose of replacing Dr. Gross. Therefore, the district court did not clearly abuse its discretion regarding this discovery issue, and there is no controlling law which needs clarification. Accordingly, the Petition for Writ of Mandamus must be denied.

ARGUMENT

A. THIS COURT SHOULD NOT CONSIDER THE PETITION FOR WRIT OF MANDAMUS BECAUSE PETITIONERS HAVE A PLAIN, SPEEDY AND ADEQUATE REMEDY IN THE ORDINARY COURSE OF LAW

"Writs of mandamus [] are extraordinary remedies and are available [only] when the petitioner has no 'plain, speedy and adequate remedy in the ordinary course of law.' The right to immediately appeal or even to appeal in the future, after a final judgment is ultimately entered, will generally constitute an adequate and speedy

legal remedy precluding writ relief."[27]

Here, Petitioners fail to factually set forth why their right to an appeal after a final judgment does not constitute an adequate and speedy legal remedy. Although Petitioners claim this issue needs clarification of "controlling law" on a standard for re-opening discovery and/or continuing trial, however, such controlling law is already in place and abundantly clear. Indeed, the instant matter is a discovery issue and "[d]iscovery matters are within the district court's sound discretion."[28] Petitioner cites to *Williams v. Eighth Judicial District Court* to support their claim that there is no other adequate remedy, however, *Williams* is inapplicable because it addressed whether a particular expert could testify as to causation and whether alternative causation theories need to be to a reasonable degree of probability.[29]

Unlike the case at bar, the *Williams* case stemmed from thousands of people who were at risk of contracting hepatitis C at an endoscopy clinic.[30] As a matter of first impression, the *Williams* Court addressed the scope and degree of medical expert testimony, generally.[31] Clearly, the general scope and degree to which a medical expert may testify is an important issue of law and needed clarification.

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[27] *D.R. Horton, Inc. v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark*, 123 Nev. 468, 474, 168 P.3d 731, 736 (2007) quoting NRS 34.170; *see also Pan v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark*, 120 Nev. 222, 224, 88 P.3d 840, 841 (2004).
[28] *Matter of Adoption of Minor Child*, 118 Nev. 962, 968, 60 P.3d 485, 489 (2002).
[29] *Williams v. Dist. Ct.*, 127 Nev. 518, 262 P.3d 360 (2011).
[30] Id.
[31] Id.

Moreover, two district courts issued contrasting decisions surrounding the issues presented in *Williams*. Unlike *Williams*, here, we are not dealing with experts generally, but rather one individual expert, Dr. Gross. Unlike *Williams*, the questions here are entirely discovery related: first, whether it was an abuse of the district court's discretion to allow Compton to substitute Dr. Gross for Dr. Raimundo Leon after he became aware of Dr. Gross' felony conviction in California; and second, whether the district court abused its discretion by reopening discovery for the limited purpose of substituting Dr. Gross. As far as Compton's counsel is aware, each court dealing with this discovery issue has granted similar motions to substitute.

Moreover, because discovery issues depend heavily on factual circumstances, there can be no uniform discovery ruling regarding these or similar issues – hence the district court's broad discretion. Therefore, there is no issue of law needing clarification and Petitioners have an adequate remedy at law in the form of an appeal after a final judgment.

B. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT ALLOWED THE SUBSTITUTION OF DR. LEON IN PLACE OF DR. GROSS UNDER NRCP 37(C) AND NRCP 16(B)(4)

1. Petitioner's argument that the district court's factual findings are clearly erroneous is without merit and confuses the issues

Petitioners argue that the district court's factual finding that "Plaintiff had no

knowledge of the status of the criminal case as it was under seal until in or about April 2021" is clearly erroneous because "Compton was aware of Dr. Gross' ***pending*** criminal case no later than March 6, 2020 when he filed motion in limine 11."[32] Petitioners further argue "[i]t is ***likely*** Compton had knowledge of the case at some point before that to prepare the motion."[33] However, this argument confuses the issues because Compton's motion in limine no. 11 was about Dr. Gross' *pending* indictment – not his conviction or guilty plea. Compton did not become aware of Dr. Gross' ***conviction*** until April 2021.

It is axiomatic to our justice system that parties are innocent until proven guilty.[34] Accordingly, the indictment against Dr. Gross was inadmissible in the present action.[35] While an indictment is inadmissible, a conviction is entirely different, especially when it relates to crimes of moral turpitude. Because Dr. Gross was only *charged,* and not convicted, Compton continued treating with Dr. Gross and designated him as an expert/treating physician. There was no information accessible to Compton that indicated Dr. Gross was going to be convicted and

[32] *See* Petition for Writ of Mandamus, p. 8:6-9. (emphasis added).
[33] Id. (emphasis added).
[34] *See e.g. Haywood v. State*, 107 Nev. 285, 288 (1991) ("The rule that one is innocent until proven guilty means that a defendant is entitled to not only the presumption of innocence, but also to indicia of innocence.").
[35] *See e.g. Arbaugh v. Dir., Patuxent Inst*., 27 Md. App. 662, 666, 341 A.2d 812, 815 (1975) ("The general rule is that evidence of pending criminal charges is not admissible in either a criminal or civil case.").

sentenced after he was charged. Accordingly, Compton could not have raised this issue prior to the discovery deadline. Now, Petitioners want this Court to use Dr. Gross' indictment as a way to punish Compton and claim that Compton could have reasonably foreseen Dr. Gross would be convicted and sentenced for the charges against him. This violates due process rights and should not be used against Compton who had no control over Dr. Gross's criminal case or its outcome.

Further, knowledge of allegations against Dr. Gross does not mean Dr. Gross would have been convicted and ultimately unavailable to testify at trial. Compton's counsel submitted an affidavit providing that he did not become aware of Dr. Gross' conviction/guilty plea until April 21, 2021.[36] As soon as Compton's counsel became aware, Compton promptly filed a motion to substitute.[37] As such, the district court's factual findings were not clearly erroneous.

2. <u>Petitioners' arguments surrounding "litigation strategy" can be summarily dismissed.</u>

Petitioners argue that "[b]oth parties placed their bets on Dr. Gross" and that the district court's order shifted the consequences onto Torremoro.[38] This argument is nonsensical as Dr. Gross was Compton's treating physician following the subject collision. Petitioners' reliance upon Dr. Gross' conviction is not trial strategy – it is

[36] App0079, at ¶4.
[37] App0077-180.
[38] *See* Petition for Writ of Mandamus, p. 13:10.

happenstance. Indeed, Petitioners took no action in furtherance of their supposed trial strategy; they simply hoped someone would be convicted of a crime because it *might* help their case. When their hopes fell flat after the district court allowed the substitution of Dr. Gross so that the case would be tried on its merits, they filed the instant petition. This does not amount to unfair prejudice and does not represent a shifting of "consequences" as Dr. Gross' criminal case is wholly unrelated to the underlying motor vehicle collision.

3. <u>The district court correctly analyzed Compton's motion to substitute under NRCP 37(c) and NRCP 16(b)(4).</u>

In Compton's motion to substitute, he indicated that courts typically employ one or both of the following approaches in instances where a party moves to substitute an expert:

> Either they construe the motion as a motion to amend the court's scheduling order under Rule 16(b) of the Federal Rules of Civil Procedure or they construe the motion as an untimely designation under Rule 26(a) of the Federal Rules of Civil Procedure and determine whether to sanction the untimely disclosure under Rule 37(c) of the Federal Rules of Civil Procedure. *Compare Fidelity Nat'l Finc., Inc. v. Nat'l Union Fire Ins. Co.*, 308 F.R.D 649, 652 (S.D. Cal. 2015) and *Park v. CAS Enterprises, Inc.*, No. 08-cv-00385, 2009 U.S. Dist. LEXIS 108160, 2009 WL 4057888, at *2-3 (S.D. Cal. Nov. 18, 2009) with *Nijjar v. Gen. Star Indem. Co*., No. 12-cv-08148, 2014 U.S. Dist. LEXIS 8722, 2014 WL 271630, at *2 (C.D. Cal. Jan. 2014).[39]

[39] App0084 citing *In re Northrop Grumman Corp. ERISA Litig*., No. CV 06-06213-AB (JCx), 2016 U.S. Dist. LEXIS 185126, at *5-6 (C.D. Cal. Apr. 7, 2016).

NRCP 37(c)(1) provides, in pertinent part, "[i]f a party fails to provide information or identify a witness as required by Rule 16.1(a)(1) … or 26(e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, **unless the failure was substantially justified or is harmless**."[40] Compton argued, and the district court agreed, that replacing Dr. Gross at that stage of the matter was substantially justified and was completely harmless to Petitioners.[41] Indeed, the substitution was substantially justified because Compton only recently learned that Dr. Gross pled guilty, was sentenced to prison, and was likely unavailable for trial.[42]

Compton further argued the substitution is harmless because Dr. Leon's testimony will not exceed the scope of Dr. Gross' opinions and testimony, and Compton's future cost estimates will not increase.[43] In addition, if the trial were to be continued, Petitioners would have time to depose Dr. Leon and obtain rebuttal expert opinions. As such, Petitioners will not be ambushed by any new or changed opinions at trial.[44] Compton further argued it would be beneficial to both Compton and Petitioners if Dr. Gross were substituted because Petitioners would have the

[40] NRCP 37(c) (emphasis added).
[41] App0084; App0207-212.
[42] *Id*.
[43] App0077-180.
[44] *Id*.

opportunity to cross-examine Dr. Leon at trial.[45] Substituting experts eliminates prejudice to Compton before the jury regarding the unrelated misconduct of Dr. Gross.[46]

Regarding the court's analysis under NRCP 16(B)(4), the rule provides "[a] schedul[ing order] may be modified by the court for good cause."[47] Further, "[d]iscovery matters are within the district court's sound discretion," and the Supreme Court "will not disturb a district court's ruling regarding discovery unless the court has clearly abused its discretion."[48]

Compton argued good cause existed to modify the scheduling order and allow Compton to designate Dr. Leon as his medical expert because such highly prejudicial testimony from Dr. Gross would only serve to unfairly and irreparably harm Compton's case, even though Dr. Gross' conviction has no relation to Compton's case.[49] A jury would be unable to ignore this bias when making their determinations at trial, which is unduly prejudicial to Compton and impedes the notion that a jury should be fair and impartial.[50]

The district court applied the proper standard of review in making its ruling

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[45] *Id*.
[46] *Id*.
[47] NRCP 16(B)(4).
[48] *Club Vista Fin. Servs. v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228 (2012).
[49] App0077-180.
[50] *Id*.

based on the following legal authority:

Similar to Dr. Gross, the expert in *Lincoln Nat'l Life Ins. Co. v. Transamerica Fin. Life Ins. Co*, was convicted of embezzlement and sentenced to 15 months in prison.[51] Although not a Nevada case, *Lincoln* was helpful and instructive in deciding this matter. In *Lincoln*, the court ordered the parties to reach an agreement about substituting a new expert but the parties were unable to agree.[52] The court relied upon FRCP 16(b)'s good cause standard to determine that substitution of the original expert was proper after the deadline to disclose experts.[53] The court explained that good cause means "despite that party's diligence, the time table could not reasonably have been met."[54] The Court found that good cause existed because the expert would be incarcerated and unavailable for trial.[55] This is precisely the substantial justification that existed in the instant matter.

Next, in *Stone Brewing Co., LLC v. MillerCoors LLC*, the court explained that courts use Rule 16(b)'s "good cause" standard when a party moves to designate a new expert after the deadline has passed.[56] The *Stone Brewing* Court explained the

[51] *Lincoln Nat'l Life Ins. Co. v. Transamerica Fin. Life Ins. Co.*, No. 1:04-CV-396, 2010 U.S. Dist. LEXIS 103744, at *1 (N.D. Ind. Sep. 30, 2010).
[52] Id. at *5
[53] Id.
[54] Id. at *6.
[55] Id. at *8.
[56] *Stone Brewing Co., LLC v. MillerCoors LLC*, No. 3:18-cv-00331-BEN-LL, 2021 U.S. Dist. LEXIS 66859, at *3-4 (S.D. Cal. Apr. 5, 2021).

inquiry "primarily considers the diligence of the party seeking the amendment" and "the focus of the inquiry is upon the moving party's reasons for seeking the modification."[57] In *Stone Brewing*, the moving party indicated their originally designated expert was unable to testify due to COVID-19 concerns.[58] However, the moving party made clear that the new expert's testimony would be based on the original expert's opinions.[59] The court reasoned that the moving party was diligent and had good cause to request substitution because their belief that their expert would be available to testify at trial was based upon the party's knowledge at that time, as COVID was an ever-changing situation.[60]

Similar to the case at bar, the *Stone Brewing* Court reasoned that there was no prejudice to the non-moving party because the new expert's testimony was rooted in the original expert's opinions, the new expert can be cross-examined at trial, and the new expert's supplemental opinions were based on new evidence.[61] The court also allowed the non-moving party to depose the new expert and provide any necessary discovery at the moving party's expense to ease any prejudice that the non-moving party may suffer.[62]

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[57] *Id*. citing *Johnson v. Mammoth Recreations, Inc*., 975 F.2d 604, 609 (9th Cir. 1992).
[58] Id. at *3.
[59] Id.
[60] Id. at *5.
[61] Id. at *7.
[62] Id. at *7-8.

Like the moving party in *Stone Brewing*, Compton was unaware Dr. Gross was going to be convicted and unavailable at trial at the time he was designated. Once Compton learned that Dr. Gross pled guilty ***and*** that Dr. Gross was to be incarcerated for 15 months in prison, Compton conferred with defense counsel on how to address this issue in light of the pending trial date. ***Both sides agreed to continue trial*** so this issue could be resolved by the district court. Thus, Compton conferred with opposing counsel regarding the issue, counsel agreed to move the trial and have the District Court determine the issue and Compton timely filed the motion to substitute.

Finally, in *Rebel Communs., LLC v. Virgin Valley Water Dist.*, the court allowed substitution of an expert where the original expert became unavailable.[63] Although not perfectly aligned with the facts of this matter, *Rebel* is a Nevada case.

In *Rebel*, the moving party timely disclosed its expert.[64] However, after disclosing the expert, the expert left his firm and became unavailable for trial.[65] The moving party informed the other parties that it intended to substitute the expert with another expert from the same firm who would testify from the same report as the original expert, but never formally disclosed the new expert.[66] The court granted the

[63] *Rebel Communs., LLC v. Virgin Valley Water Dist*., No. 2:10-CV-0513-LRH-GWF, 2015 U.S. Dist. LEXIS 123197, at *2 (D. Nev. Sep. 12, 2015).
[64] Id.
[65] Id. at *6.
[66] Id. at *3.

moving party's motion to substitute their expert so long as he was properly disclosed because the other parties were already aware of the opinions to which he would testify.[67]

The *Rebel* court further reasoned that the timeliness of disclosing the new expert was inapplicable because the moving party had disclosed the original expert in a timely fashion.[68] The court cited to *Green v. City and County of San Francisco*, No. 10-cv-2649, 2015 U.S. Dist. LEXIS 46102, 2015 WL 1738025, at *4 (N.D. Cal. Apr. 8, 2015) and *Nat'l R.R. Passenger Cory. v. ExpressTrak, LLC*, No. 02-1773, 2006 U.S. Dist. LEXIS 67642, 2006 WL 2711533, at *4 (D.D.C. Sept. 21, 2006), for the proposition that the moving party was timely because they had originally timely complied with the scheduling order and disclosure requirements and substitution was necessary.[69]

Therefore, based on the foregoing, the district court considered and analyzed the proper legal standard in making its determinations. The case law cited above further shows that the controlling law is already in place, abundantly clear, and thus there is no need for clarification. Accordingly, the Petition must be denied.

C. THE DISTRICT COURT DID NOT "CLEARLY ABUSE ITS DISCRETION" WHEN IT RE-OPENED DISCOVERY FOR THE LIMITED PURPOSE OF REPLACING DR.

[67] Id. at *5.
[68] Id. at *6.
[69] Id.

GROSS.

As noted above, NRCP 16(B)(4) provides "[a] schedul[ing order] may be modified by the court for good cause."[70] Further, "[d]iscovery matters are within the district court's sound discretion," and the Supreme Court "will not disturb a district court's ruling regarding discovery unless the court has clearly abused its discretion."[71] "Good Cause" is defined as '[a] legally sufficient reason.' Good cause is often the burden placed on a litigant to show why a request should be granted or an action excused."[72]

Based on the foregoing, and which Respondent incorporates by reference here, the district court appropriately found good cause to modify its scheduling order because Compton did not learn of Dr. Gross' conviction until April 2021. The district court then eased any prejudice to Petitioners by re-opening discovery for the limited purpose of substituting Dr. Gross. Therefore, the district court did not clearly abuse its discretion in determining a discovery matter and this Court should not disturb its order.

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[70] NRCP 16(B)(4).
[71] *Club Vista Fin. Servs. v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228 (2012).
[72] *See* Black's Law Dictionary.

CONCLUSION

Based on the foregoing, Respondent respectfully requests this Court deny the Petition for Writ of Mandamus because: (1) Petitioners already have a "plain, speedy and adequate remedy in the ordinary course of law" by way of an appeal from a final judgment; (2) the district court did not "clearly abuse its discretion," and it applied the proper legal standard, when it allowed the substitution of Dr. Raimundo Leon in place of Dr. Jeffrey Gross, under NRCP 37(c) and NRCP 16(b)(4); and (3) the district court did not "clearly abuse its discretion" when it re-opened discovery for the limited purpose of replacing Dr. Gross to ease any potential prejudice.

CERTIFICATE OF COMPLIANCE PURSUANT TO NRAP 28.2

I hereby certify that I have read this Answer, 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 Rules of Appellate Procedure, and in particular, NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I further 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman. I further certify that this brief complies

with the type-volume limitation of NRAP 32(a)(7) in that it contains 4,629 words. 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 12th day of January 2022

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Lamont Compton

CERTIFICATE OF SERVICE

I certify that on the 13th day of January 2022 this document was electronically filed with the Nevada Supreme Court. Electronic service of the foregoing: **REAL PARTY IN INTEREST LAMONT COMPTON'S ANSWER TO WRIT** shall be made in accordance with the Master Service List as follows:

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DATED this 13th day of January 2022.

/s/ Brandon Lopipero
An Employee of MAIER GUTIERREZ & ASSOCIATES