

IN THE SUPREME COURT OF THE STATE OF NEVADA

DANA FORTE, D.O., LTD., a Nevada
limited company dba FORTE FAMILY
PRACTICE and JOSEPH EAFRATE,
PA-C,

Petitioners,

v.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA
ex rel. THE COUNTY OF CLARK, AND
THE HONORABLE JUDGE MONICA
TRUJILLO,

Respondent,

and

CESAR HOSTIA,

Real Party In Interest.

Supreme Court No.:

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District Court No. A-18-783435-C
Elizabeth A. Brown
Clerk of Supreme Court

PETITION FOR WRIT OF MANDAMUS

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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 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: None
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: Lewis Brisbois Bisgaard & Smith LLP; Anderson & Broyles
3. If litigant is using a pseudonym, the litigant's true name: N/A

DATED: May 25, 2022.

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RELIEF SOUGHT

Petitioners (“Defendants”) hereby petition for a writ of mandamus requiring the District Court to vacate its orders of February 17, 2022¹ and May 11, 2022², in the case of Cesar Hostia v. Dana Forte, D.O., Ltd., a Nevada limited company dba Forte Family Practice, et al., Clark County Case No. A-18-783435-C. The order of February 17, 2022 order granted the motion of Real Party in Interest (“Plaintiff”) to extend expert disclosure deadlines in the above entitled matter, and the order of May 11, 2022 and served with notice of entry on May 13, 2022 denied Defendants’ motion for reconsideration of the earlier order based upon the District Court’s misapplication and misreading of EDCR 2.35.

This petition is based upon the ground that the Respondent’s (“District Court”) order is without legal and factual bases, and the District Court manifestly abused its discretion by granting Plaintiff’s motion to extend expert disclosure deadlines and denying Defendants’ motion for reconsideration of same. This petition is also based upon the ground that Petitioner does not have a plain, speedy and adequate remedy in the ordinary course of law.

¹ Appendix, pp. 63-70

² Appendix, pp. 151-158

ROUTING STATEMENT

This matter is presumptively assigned to the Nevada Court of Appeals pursuant NRAP 17(b)(13). The Petition for Writ of Mandamus (“Petition”) raises as a principal issue a challenge to a discovery order.

The Petition raises the issues of (1) whether EDCR 2.35 requires that a motion to extend discovery deadlines be made at least twenty-one (21) days prior to the expiration of the specific deadline for which an extension is being sought; (2) if EDCR 2.35 requires said motion to extend be made in the aforementioned timeframe, does the failure to demonstrate excusable neglect require denial of said motion; (3) whether Plaintiff demonstrated good cause for the extension. These issues have been raised throughout this Petition.

ISSUES PRESENTED

1. Does EDCR 2.35 require that a motion to extend discovery deadlines be made at least twenty-one (21) days prior to the expiration of the deadline for which an extension is being sought?
2. If a motion to extend a discovery deadline is not made within the aforementioned timeframe, does the moving party's failure to demonstrate excusable neglect require the District Court to deny the motion for that extension?
3. Did the Plaintiff offer good cause why the extension should be granted in light of the circumstances giving rise to the motion?

INTRODUCTION

Defendants respectfully petition this Court for the issuance of a Writ of Mandamus pursuant to Nev. Rev. Stat. § 34.150 et seq., Nev. R. App. P. 21 and Nev. Const. art. VI, § 4, directing Respondent to issue an Order denying Plaintiff's Motion to Extend Expert Disclosure Deadlines and granting Defendants' Motion for Reconsideration of same due to Plaintiff's failure to comply with EDCR 2.35 and the District Court's improper interpretation of that very rule, i.e., that Plaintiff failed to articulate any excusable neglect in not moving for the relief sought within 21 days of the deadline for doing so, coupled with Plaintiff's failure to demonstrate good cause for the extension given that it was Plaintiff's counsel which caused the very emergency for which he sought judicial relief.

A. Procedural History

This is an action commenced on October 25, 2018, sounding in professional medical negligence thus requiring a medical expert by Plaintiff in order to prove his case in chief.

The District Court issued an order dated September 29, 2021 directing that all initial expert exchanges were to occur on or before December 31, 2021.³ Plaintiff's counsel agreed to that deadline.

Defendants' counsel's office was to be closed in observance of the New

³ Appendix, pp. 44-51

Year's holiday on both December 30th and 31st, and provided our initial expert report and supporting materials to Plaintiff's counsel two days prior to the deadline, on December 29, 2021.⁴

One day prior to the initial expert disclosure deadline, and one day after Defendants' initial expert disclosure, December 30, 2021, Plaintiff's counsel first requested an extension of time for Plaintiff's initial expert report exchange.⁵

An extension of the expert exchange deadline was finalized by the aforesaid September 29, 2021 court order for the express purpose of Plaintiff's counsel's consultation with his expert to determine the viability of issues in this case and to discuss those with his client. Plaintiff's counsel admitted in his motion to extend that he had not even engaged an expert until several weeks prior to his motion.⁶

Due to the fact that our initial expert exchange already occurred, Defendants could not agree to extend expert disclosure deadlines based upon the severe prejudice which would ensue by Plaintiff having additional time and an additional opportunity to rebut Defendants' expert and tailor Plaintiff's expert report accordingly.

On December 31, 2021, Plaintiff moved to extend expert disclosure

⁴ Appendix, pp. 23-42

⁵ Appendix, p. 11

⁶ Appendix, p. 3:12-15

deadlines,⁷ with opposition filed on January 14, 2022,⁸ followed by Plaintiff's reply on February 3, 2022.⁹ A hearing on the issue was never conducted, with Plaintiff's motion decided in chambers on February 17, 2022, with notice of entry thereof served the same day.¹⁰

On February 18, 2022, Defendants filed a motion for reconsideration of the aforementioned decision,¹¹ followed by Plaintiff's opposition thereto on March 1, 2022,¹² and Defendants' reply on March 3, 2022.¹³ The District Court conducted a hearing on March 29, 2022¹⁴ and a minute order issued on April 8, 2022 denying Defendants' motion for reconsideration. An order memorializing that decision was issued on May 11, 2022 and served with notice of entry on May 13, 2022.¹⁵

The issues before the District Court which have now been raised to this Court focus on two primary factors: (1) whether a party seeking to extend any discovery

⁷ Appendix, pp. 2-7

⁸ Appendix, pp. 9-51

⁹ Appendix, pp. 53-61

¹⁰ Appendix, pp. 63-70

¹¹ Appendix, pp. 71-101

¹² Appendix, pp. 103-113

¹³ Appendix, pp. 115-128

¹⁴ Appendix, pp. 130-149

¹⁵ Appendix, pp. 151-158

deadline must move for said relief or stipulate thereto at least 21 days before the deadline sought to be extended pursuant to EDCR 2.35, and if done in less than that time, whether an affirmative showing of excusable neglect is a prerequisite for obtaining that relief, and (2) regardless of the former, whether the factual circumstances of this case demonstrated Plaintiff's good cause for seeking the extension when the emergent nature of the relief was unjustifiably precipitated by Plaintiff himself.

Running parallel with the discovery issue are the implications of the District Court's decision on Defendants' motion for summary judgment. Defendants moved for summary judgment on two grounds, the first being the Plaintiff's failure to timely exchange an expert in a professional negligence case rendered Plaintiff without any expert support at all, requiring summary judgment be granted, and second that Plaintiff's *res ipsa loquitur* claim was waived by his interposition of an expert affidavit in support of his Complaint. The District Court properly granted the portion of the motion for summary judgment on the *res ipsa loquitur* claim, but denied the motion for summary judgment on the portion pertaining to the absence of an expert in light of its decision to extend the expert disclosure deadlines, retroactively permitting the late and improper expert disclosure by Plaintiff.¹⁶

B. Respondent's Orders Giving Rise to Petition

¹⁶ Appendix, pp. 160-170

A party seeking an extension of any discovery ordered deadline must fulfill the following pre-requisites in order to obtain that relief: (1) the motion must be supported by a showing of good cause; (2) the motion must be filed no later than 21 days before the deadline for the act for which an extension is being sought; (3) if the party seeking the extension misses the 21 day deadline for so moving, an extension is prohibited unless the movant demonstrates that the failure to act resulted from excusable neglect.

The District Court incorrectly applied the standards imposed by EDCR 2.35 in that it determined that it was perfectly acceptable for a party to defy court ordered discovery deadlines so long as the motion to extend any deadline, regardless of whether had passed, was made 21 days prior to the final close of discovery deadline. The District Court never considered Plaintiff's failure to even address his excusable neglect in moving only one day before the expiration of the deadline sought to be extended. Moreover, the District Court further abused its discretion in considering the Plaintiff's excuse as good cause when the emergent nature of the situation was precipitated solely by Plaintiff's counsel.

The District Court's complete misreading of EDCR 2.35 resulted in a decision which completely affected the case outcome. By interpreting EDCR 2.35 to require a motion be made 21 days before the final close of discovery deadline rather than the deadline for which the underlying extension was sought, the District Court effectively eviscerated any requirement that a court ordered deadline be adhered to

by the parties, and that any party could retroactively remedy its failure so long as the motion was made 21 days before the final discovery close deadline. Moreover, the District Court manifestly abused its discretion in finding that Plaintiff demonstrated a good faith basis for the extension, when Plaintiff's own motion demonstrated that he was the sole reason for the need for the extension was precipitated by his own delay in timely retaining an expert.

The manifest abuse of discretion was even egregious when it was evident Plaintiff was in timely possession of that Defendants' expert exchange for use by Plaintiff's expert to prepare and craft his initial expert exchange, creating severe prejudice to Defendants.

A Writ of Mandamus is proper to compel the performance of acts by Respondent from the office held by Respondent. Defendants have no plain, speedy, or adequate remedy at law to compel the District Court to perform its duty.

Defendants request the issuance of a Writ of Mandamus directing the District Court to issue an Order denying Plaintiff's motion to extend expert disclosure deadlines and granting Defendants' motion for reconsideration of that decision.

This Petition is made and based upon the Affidavit following this Petition, the Petitioners' Appendix filed herewith and the Memorandum of Points and Authorities filed herewith.

STATEMENT OF FACTS

The District Court signed an order extending expert disclosure deadlines until December 31, 2021.¹⁷ On December 29, 2021, Defendants exchanged their initial expert with Plaintiff.¹⁸ On December 30, 2021, after receiving Defendants' expert disclosure, Plaintiff requested an extension of time to exchange his expert due to what he claimed to be an inability to get his expert report done timely. Defendants could not stipulate to Plaintiff's request due to the obvious prejudice ensuing from the Plaintiff's possession of Defendants' expert report.¹⁹

On December 31, 2021, Plaintiff moved the District Court for an extension, admitting that he retained an expert only several weeks prior to the expiration of the expert disclosure deadline, and his excuse that he needed to provide his expert with new medical records which, at the time of the motion, Plaintiff never bothered to exchange or reveal when the stipulation to extend was sought the day before.²⁰

EDCR 2.35 requires that moving less than 21 days in advance of the deadline requires the movant to demonstrate excusable neglect plus a showing of good cause for the requested extension.

¹⁷ Appendix, pp. 44-51

¹⁸ Appendix, pp. 23-42

¹⁹ Appendix, p. 11

²⁰ Appendix, pp. 2-7

Plaintiff failed to demonstrate excusable neglect, thus dooming the motion itself. Moreover, Plaintiff failed to demonstrate good cause for the extension, i.e., that the failure to comply with the deadline be something outside of his control. Plaintiff's reason for the extension was precipitated by something entirely within his control, i.e., retaining an expert several weeks prior to the expert disclosure deadline. This late retention, given the impending holiday season and upcoming deadline for expert exchange, created the very emergency which precipitated Plaintiff's motion. Moreover, Plaintiff never demonstrated the need for providing the late retained expert any "newly obtained" medical records or how those records were even relevant to the case at bar. As it turned out, even by Plaintiff's own admission at the time of the hearing, the "new" records had no bearing whatsoever on any expert opinion and such was obvious on the face of the records themselves, without need for an expert to even review same to determine their irrelevance.

To make matters worse, the District Court granted Plaintiff's motion despite the complete absence of any proof of excusable neglect or good cause.

EDCR 2.35 set forth the standards by which parties must comply in order to request discovery extensions. The District Court's interpretation of that rule effectively eviscerated its requirements, effectively stating that a party is free to ignore court imposed deadlines but may retroactively remedy those violations merely for the asking. Moreover, the District Court manifestly abused its discretion in finding Plaintiff's good cause when the reason for the extension was precipitated

by Plaintiff himself. Therefore, on two fronts, the District Court erred in its decision.

STATEMENT OF REASONS THE WRIT SHOULD ISSUE

A. Writ of Mandamus Standard

A writ of mandamus is an extraordinary remedy that may be issued to compel an act that the law requires. *Cote H. v. Eighth Judicial Dist. Court*, 175 P.3d 906, 907-08, 124 (Nev. 2008). A writ of mandamus may also issue to control or correct a manifest abuse of discretion. *Id.* A writ shall issue when there is no plain, speedy and adequate remedy in the ordinary course of law. Nev. Rev. Stat. § 34.170; *Sims v. Eighth Judicial Dist. Court*, 206 P.3d 980, 982 (Nev. 2009). This Court has complete discretion to determine whether a writ will be considered. *Halverson v. Miller*, 186 P.3d 893 (Nev. 2008) (“the determination of whether to consider a petition is solely within this court’s discretion.”); *Sims*, 206 P.3d at 982 (“it is within the discretion of this court to determine whether these petitions will be considered.”).

This Court should exercise its discretion to consider and issue a Writ of Mandamus in this case directing the District Court to deny Plaintiff’s motion to extend expert disclosure deadlines and grant the Defendants’ motion for reconsideration of same. The District Court manifestly abused its discretion when it granted Plaintiff’s motion and denied Defendants’ motion for reconsideration. This clear error of law will cause Defendants to be unduly prejudiced by having to proceed to trial with Plaintiff’s untimely expert disclosure while Plaintiff was in possession of Defendants’ timely disclosure, providing Plaintiff with effectively two

expert rebuttals and an ability to craft an expert report tailored to the conclusion of Defendants' expert.

Defendants are aware that this Court may exercise its discretion to decline to hear these issues unless they are brought before it on appeal. However, these issues are better addressed at the current time. This issue is appropriate for interlocutory review because it involves (1) an issue, if decided in favor of Defendants, would effectively become case dispositive due to Plaintiff's failure to proffer an expert in support of his alleged professional negligence case, (2) clarifies requirements of EDCR 2.35 in which the deadline by which to move to extend any discovery deadline must be at least 21 days before the deadline for which an extension is sought actually expires, (3) if moving party fails to articulate excusable neglect in not timely moving for said relief, whether the District Court is obligated to deny the relief requested, and (4) whether an late expert retention by a party seeking an extension of an expert disclosure deadline constitutes good cause.

This Court has repeatedly stated that a writ of mandamus is an appropriate remedy for important issues of law that need clarification or that implicate important public policies. *Lowe Enters. Residential Ptnrs., L.P. v. Eighth Judicial Dist. Court*, 118 Nev. 92, 97 (2002) ("We have previously stated that where an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction, our consideration of a petition for extraordinary relief may be justified."); *Business Comput. Rentals v. State Treasurer*, 114 Nev. 63, 67

(1998) (“Additionally, where an important issue of law needs clarification and public policy is served by this court’s invocation of its original jurisdiction, our consideration of a petition for extraordinary relief may be justified.”).

Thus, in accordance with the above authorities, Petitioner respectfully requests that this Court choose to accept this Petition for Writ of Mandamus for review and refer it to the Court of Appeals in accordance with NRAP 17(b)(13).

B. Plaintiff Was Required But Failed to Demonstrate Excusable Neglect

Nev. EDCR 2.35 states in pertinent part:

(a) Stipulations or motions to extend any date set by the discovery scheduling order must be in writing and supported by a showing of good cause for the extension and be filed no later than 21 days before the discovery cut-off date or any extension thereof. A request made beyond the period specified above shall not be granted unless the moving party, attorney or other person demonstrates that the failure to act was the result of excusable neglect.

The District Court first failed to even address the issue of whether Plaintiff timely moved for said relief, and if so, whether he provided excusable neglect for not having timely moved. Thereafter, upon reconsideration, the District Court determined that excusable neglect was not required because it held that EDCR 2.35 required that a motion to extend discovery be made Plaintiff’s motion was made more than 21 days before the close of all discovery in the case, rather than within 21 days of the specific deadline for which an extension was initially sought. Such an

interpretation was a manifest abuse of discretion.

In the unpublished but instructive opinion in *Clark v. Coast Hotels & Casinos, Inc.*, 130 Nev. 1164 (2014), this Court addressed the standards by which a court must consider a motion to extend discovery. In *Clark*, the Court addressed the issue of excusable neglect and the requirements for establishing same by the moving party, noting that it will reverse an order in which the District Court manifestly abused its discretion by granting an unjustified motion to extend discovery deadlines.

As stated in *Clark, supra*,

The phrase "excusable neglect," as used in the applicable local rule, EDCR 2.35, has not been defined by this court.

This court reviews a District Court's decision on discovery matters for an abuse of discretion. *Club Vista Fin. Servs., L.L.C. v. Eighth Judicial Dist. Court*, 128 Nev. 224, 229, 276 P.3d 246, 249 (2012). This court reviews de novo the District Court's legal conclusions regarding court rules. *Casey v. Wells Fargo Bank, N.A.*, 128 Nev. 713, 716, 290 P.3d 265, 267 (2012).

The meaning of the term excusable neglect appears well settled. For example, *Black's Law Dictionary* defines "excusable neglect" as follows:

A failure—which the law will excuse—to take some proper step at the proper time (esp. in neglecting to answer a lawsuit) not because of the party's own carelessness, inattention, or willful disregard of the court's process, but because of some unexpected or unavoidable hindrance or accident or because of reliance on the care and vigilance of the party's counsel or on a promise made by the adverse

party. *Black's Law Dictionary* 1133 (9th ed. 2009).

A number of Nevada cases have applied "excusable neglect" as grounds for enlarging time under NRCp 6(b)(2) and as a basis for setting aside a judgment under NRCp 60(b)(1) . . . the concept applies to instances where some external factor beyond a party's control affects the party's ability to act or respond as otherwise required. *See, e.g., Moseley v. Eighth Judicial Dist. Court*, 124 Nev. 654, 667-68, 188 P.3d 1136, 1145-46 (2008) . . .

Explaining the pre-requisites for obtaining an extension, then Commissioner Bulla explained that a party must file at least before at some time before the Rule's window preceding the expiration of the deadline for which an extension was sought, and to further demonstrate good cause:

This means a request to extend **any discovery deadline** must be made at least 20 days before the deadline expires. **For example, if the expert disclosure deadline needs to be extended the request must be made 20 days before the deadline for expert disclosures as set forth in the scheduling order.**

The Five Most Common Mistakes Made During Discovery, Bulla, Bonnie A., Discovery Commissioner, CLE Presentation for the Southern Nevada Association of Women Attorneys, (February 20, 2009).²¹

Contrary to then Commissioner Bulla's interpretation and application of EDCR 2.35, the District Court required a motion be made 21 days prior to the close

²¹ Available at: <http://www.compellingdiscovery.com/wp-content/uploads/2013/10/DC-Bullas-Pet-Peeves-02-09.pdf> [last accessed September 22, 2015]. [emphasis in original].

of all discovery. The District Court interpretation effectively eviscerates the Rule itself.

Plaintiff's Motion was filed on December 31, 2021. The initial expert exchange discovery cut-off was December 31, 2021. Plaintiffs were required to file their Motion **no later than** Friday, December 10, 2021.

Plaintiff admitted in his original motion that he did not even first engage his expert until several weeks prior to the expert disclosure deadline,²² creating his own emergency. He never bothered to seek an extension within the time frame for doing so. The District Court chose to ignore EDCR 2.35's requirements, and interpreted it to give Plaintiff until 21 days prior to the close of all discovery to move to extend. That interpretation was patently incorrect. Plaintiff asked the District Court to extend him concessions regarding compliance for an emergency of Plaintiff's own creation, and the District Court gladly and willfully complied, despite a clear Rule violation which resulted in prejudice to the compliant parties.

Finally, "[a]lthough the Court looks at the possible prejudice that might be caused by the modification to the Scheduling Order, the focus of the inquiry is upon the moving party's reasons for seeking modification. *Johnson v. Mammoth Recreation, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). "If a party was not diligent, the inquiry should end." *Id.* In *Derosa v. Blood Sys.*, 2013 U.S. Dist. LEXIS 108235

²² Appendix, p. 3:12-15

(D. Nev. 2013) the plaintiff filed an emergency motion to extend on July 25, 2013. The court explained the law governing this type of motion.

A scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril. The District Court's decision to honor the terms of its binding scheduling order does not simply exalt procedural technicalities over the merits of [the parties'] case. Disregard of the order would undermine the court's ability to control its docket, disrupt the agreed-upon course of the litigation, and reward the indolent and the cavalier.

Id.; quoting *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 610 (9th Cir. 1992) [internal citation and quotations omitted in original].

In addition, requests to extend a discovery deadline filed less than 21 [20] days before the expiration of that particular deadline must be supported by a showing of excusable neglect. See Local Rule 26-4. The Ninth Circuit has held that “the determination of whether neglect is excusable is an equitable one that depends on at least four factors: (1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith.

Bateman v. U.S. Postal Service, 231 F.3d 1220, 1223-24 (9th Cir. 2000) (citing *Pioneer Investment Services Co. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380, 395, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993)).

An expired deadline in a scheduling order can only be revived and modified upon a showing of both (1) good cause and (2) excusable neglect. See EDCR 2.35. Plaintiff cannot and did not demonstrate either good cause or excusable neglect. The District Court's original order did not address any facts demonstrating both prongs

of the test to justify the granting of Plaintiff's motion, and its decision on the motion for reconsideration not only failed to correctly interpret the Rule's requirements, it failed to articulate the facts demonstrating Plaintiff's good cause, an issue addressed herein below. Any request by Plaintiff to extend discovery and permitting this late disclosure, especially since no extension of discovery was even sought until after Defendants' expert report was served, should have been denied.

C. Plaintiff Failed to Demonstrate Good Cause

The primary consideration under the "good cause" standard is the "diligence of the party seeking the amendment" to the scheduling order. *See Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992) (analyzing the analogous federal rule for extension of discovery deadlines). "[C]arelessness is not compatible with a finding of diligence and offers no reason for a grant of relief." *Id.* Rather, a party must demonstrate that the scheduling order "cannot reasonably be met despite the diligence of the party seeking the extension." *Id.* The movant must provide a specific explanation of why the scheduling order deadline was not met, and why a motion to extend the deadline was untimely. *See Toavs v. Bannister*, No. 3:12-cv-00449-MMD-WGC, 2014 U.S. Dist. LEXIS 83648, at *10-11 (D. Nev. May 14, 2014). Despite Plaintiff's failure to demonstrate what facts constituted good cause, the District Court found good cause to exist, which should have been impossible to do when the moving party did not provide any facts to support such an argument. The District Court effectively deemed good cause to exist without a

single fact to support such a conclusion.

“Good cause” has never been specifically defined in the context of EDCR 2.35 by any published decision. Factors used to determine “good cause” has been articulated in other contexts. The primary focus is on the party’s diligence prior to ever seeking an extension of time, and upon so seeking, whether any extension will inure to the opposing party’s detriment. The District Court made no specific factual findings of good cause and Plaintiff never provided any.

In *City Nat’l Bank v. Barajas*, 2013 Nev. Dist. LEXIS 194, *7, CASE NO. A-12-667220-B DEFT NO. XXVII, Decided June 17, 2013, that court held:

. . . the moving party *must* demonstrate that its request is timely and it was diligent in its previous discovery efforts. *See* EDCR 2.35. Pursuant to Eighth Judicial District Court Rule 7.30(a), a party may move the court for a continuance of the trial date only upon a showing of “good cause.” A party’s failure to exercise diligence during the discovery process does not give rise to “good cause” and warrants denial of a trial continuance. *See Thornton v. Malin*, 68 Nev. 263, 267, 229 P.2d 915,917 (1951).

Plaintiff’s lack of diligence and absence of good cause, coupled with the District Court’s erroneous decision eliminated those rules for Plaintiff, creating an inherent prejudice to Defendants. The District Court never even addressed the fact that Defendants were prejudiced, further evidence of its manifest abuse of discretion.

The Nevada Court of Appeals weighed in on the issue of determining “good cause” in the context of a missed deadline under NRCP 16(b) pertaining to the

amendment of pleadings in accordance with NRCP 15.

In determining whether "good cause" exists under Rule 16(b), the basic inquiry for the trial court is whether the filing deadline cannot reasonably be met despite the diligence of the party seeking the amendment. See 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1522.2 (2010), and cases cited therein. Courts have identified four factors that may aid in assessing whether a party exercised diligence in attempting, but failing, to meet the deadline: (1) the explanation for the untimely conduct, (2) the importance of the requested untimely action, (3) the potential prejudice in allowing the untimely conduct, and (4) the availability of a continuance to cure such prejudice. *S&W Enters.*, 315 F.3d at 536. However, the four factors are nonexclusive and need not be considered in every case because, ultimately, if the moving party was not diligent in at least attempting to comply with the deadline, "the inquiry should end." *Johnson*, 975 F.2d at 609. Thus, of the four factors, the first (the movant's explanation for missing the deadline) is by far the most important and may in many cases be decisive by itself. *Id.* ("Although the existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving party's reasons for seeking modification."). Lack of diligence has been found when a party was aware of the information behind its amendment before the deadline, yet failed to seek amendment before it expired. See *Perfect Pearl Co. v. Majestic Pearl & Stone, Inc.*, 889 F. Supp. 2d 453, 457 (S.D.N.Y. 2012) ("A party fails to show good cause when the proposed amendment rests on information that the party knew, or should have known, in advance of the deadline." (internal quotation marks omitted)). In addition, "carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief." *Johnson*, 975 F.2d at 609.

. . . Thus, when a party seeks leave to amend a pleading after the expiration of the deadline for doing so, it must

first demonstrate "good cause" under NRCP 16(b) for extending the deadline to allow the merits of the motion to be considered by the district court before the merits of the motion may then be considered under NRCP 15(a). *See S&W Enters.*, 315 F.3d at 536 . . .

Nutton v. Sunset Station, Inc., 2015 Nev. App. LEXIS 4, *13-15, 131 Nev. 279, 286-287, 357 P.3d 966, 971-972, 131 Nev. Adv. Rep. 34.

Nutton not only indicates that a District Court is obligated to make factual findings about what constitutes good cause, but that such findings meet at least one of the four factors that may aid in assessing whether a party exercised diligence in attempting, but failing, to meet the deadline: (1) the explanation for the untimely conduct, (2) the importance of the requested untimely action, (3) the potential prejudice in allowing the untimely conduct, and (4) the availability of a continuance to cure such prejudice. In the instant case, Plaintiff failed to demonstrate any one of the four factors, and the District Court failed to either explore or make any factual findings as to any of the four factors Plaintiff was required to demonstrate. That failure was clear and manifest error.

Moreover, if the moving party, such as Plaintiff, failed to exercise or demonstrate diligence in attempting to comply with the deadline, the inquiry **has to end**. In this case, Plaintiff failed to demonstrate, and the Court failed to find how Plaintiff was diligent in missing the deadline to move for an extension, or at least seek an stipulation for one **3 weeks after the deadline for doing so had expired**. Based on that failure alone, the District Court's inquiry should have terminated.

Carelessness on the party seeking the extension is not good cause for granting it. In this case, Plaintiff was not diligent. Plaintiff's counsel **admitted** that he only retained his expert several weeks prior to moving to extend expert discovery deadlines. Specifically, Plaintiff's counsel stated: "Initial expert disclosures are currently due by December 31, 2021. **Plaintiff's counsel retained an expert witness, Dr. Philip Levin, an Endocrinologist, several weeks ago**, at which time the witness began reviewing all pertinent medical records related to Plaintiff's injuries and the incident underlying this claim."²³ (emphasis supplied). Based upon this factor alone, the District Court's inquiry was required to end and denial of Plaintiff's motion was to have ensued.

The remaining *Nutton* factors were also never addressed by the District Court including the absence of prejudice to Defendants. Defendants were not and are not obligated to demonstrate this factor since Defendants were not seeking the underlying affirmative relief.

The deadline to exchange experts was December 31, 2021. Defendants provided their expert disclosure timely, on December 29, 2021, since our office was to be closed December 30-31, 2021. It was only after receiving our expert disclosure did Plaintiff's counsel even seek a stipulation to extend expert disclosure. That meant that Plaintiff had Defendants' complete expert disclosure, could exchange it

²³ Appendix, p. 3:12-15

with his expert, have his expert examine it, comment upon it, and obtain the advantage of two rebuttals, the first being addressed by the initial disclosure he possessed, and the second at the time of rebuttal disclosures. That is inherently prejudicial. NRCP 16.1 states in pertinent part:

(E) Time to Disclose Expert Testimony.

(i) A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order otherwise, the disclosures must be made:

- (a) at least 90 days before the discovery cut-off date; or
- (b) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 16.1(a)(2)(B), (C), or (D), within 30 days after the other party's disclosure.

NRCP 16.1 provides for what is supposed to be simultaneous disclosures for initial efavor. Plaintiff's counsel created his own emergency, then sought and improperly obtained the District Court approval of his lack of diligence. Moreover, Plaintiff failed to demonstrate good cause, and without pointing to a single fact justifying that good cause, the District Court found it to exist.

Plaintiff's actions were incompatible with a showing of good cause and diligence with respect to his expert witness and the expert deadlines. In the first place, nowhere in Plaintiff's motion was there any timeline for the receipt of the "new medical records" supposedly provided to Plaintiff's expert. Plaintiff did not indicate when that treatment occurred, when he became aware of the records, when the records were requested, the specific relevance of the records to this case, and

when the records were actually provided to Plaintiff's expert. Moreover, Plaintiff's counsel admitted that the "new records" he was touting actually were of no relevance whatsoever to the case.²⁴

Additionally, and most disturbing, is that "**Plaintiff's counsel retained an expert witness**, Dr. Philip Levin, an Endocrinologist, **several weeks ago**, at which time the witness began reviewing all pertinent medical records related to Plaintiff's injuries and the incident underlying this claim."²⁵ In other words, when Plaintiff's counsel advised Defendants' counsel in September, 2021 that he wanted to review the case with his expert before proceeding with any case resolution issues, Plaintiff's counsel never even had an expert review the case in the first place.

If Plaintiff had exhibited a modicum of diligence in this case, he would have reached out to his expert to obtain an opinion and report long before the expert disclosure deadline, not several weeks prior to that deadline. Plaintiff could have and should have easily retained a new expert in the many years this case has been pending, let alone in three months he was given an extension to conduct expert discovery. Additionally, he could have reached out weeks earlier, after having first retained his expert, to request an extension, before receiving Defendants' expert report. Furthermore, he could have petitioned the Court for additional time to secure

²⁴ Appendix, p. 144:3-8

²⁵ Appendix, p. 3:12-15

an expert witness through the extension of the relevant deadline prior to its expiration. ***Plaintiff did none of these things.***

Plaintiff did not demonstrate that he was diligent in ascertaining that Dr. Levin was available and able to provide a report before the deadline. Plaintiff's excuse of obtaining new medical records was completely debunked when he admitted that they were irrelevant to any issues in this case, evidence of which required no medical interpretation, but rather a legal one – none of the records ever addressed standard of care or causation.

Plaintiff was not diligent in seeking leave of the District Court to extend the initial expert deadline, and he did not even bother to retain an expert until just a few weeks before the deadline. Such failures are incompatible with a showing of good cause.

D. The District Court's Decision Inured to Defendants' Detriment and Prejudice

By allowing Plaintiff to exchange late, he effectively received two rebuttal reports. Moreover, when rendering its decision, the District Court further extended time to conduct rebuttal disclosures until March 10, 2022. In Plaintiff's motion, he sought an extension of rebuttal disclosures until February 14, 2022. In good faith, we exchanged our rebuttal on that date. The Court then gave Plaintiff even more time to rebut our rebuttal. The nightmare created by Plaintiff's abject failure to follow even the most basic Court order, Court rules and statutes started the ball

rolling here. The District Court's refusal to apply the rules to Plaintiff and to make any findings demonstrating the required elements of Plaintiff's motion continues to prejudice Defendants to Plaintiff's advantage.

E. The Length Of The Delay And Its Potential Impact On The Proceedings.

Plaintiff's Motion was 20 days late. Plaintiff chose to untimely retain an expert, failed to request an extension of time before the 21 day deadline, and failed timely move to extend. Instead, he chose to wait until Defendants were prejudiced. Plaintiff chose to file a lawsuit and has an obligation to prove his case. Defendants timely retained and exchanged their expert, even doing so early to make certain they were in compliance with the District Court's order. Plaintiff ignored his responsibilities and the District Court rewarded him for it at the Defendants' expense, without so much as a fact demonstrating good cause.

F. The Reason For The Delay.

Plaintiff offered no reason for failing to file his Motion by December 10, 2021. The District Court did not address that issue either.

CONCLUSION

In accordance with the above, Defendants respectfully request that this Court grant their Petition for Writ of Mandamus and order the District Court to deny Plaintiff's Motion to Extend Expert Disclosure Deadlines and further grant Defendants' Motion for Reconsideration of Plaintiff's aforesaid motion, ultimately

denying the relief sought by Plaintiff.

Dated this 25th day of May, 2022.

LEWIS BRISBOIS BISGAARD & SMITH LLP

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**AFFIDAVIT OF VERIFICATION IN SUPPORT OF PETITION FOR WRIT
OF MANDAMUS**

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

Adam Garth, Esq., being first duly sworn, deposes and states:

1. I am an attorney of record for Petitioner and make this Affidavit pursuant to Nev. R. App. P. 21(a)(5).
2. The facts and procedural history contained in the foregoing Petition for Writ of Mandamus and the following Memorandum of Points and Authorities are based upon my own personal knowledge as counsel for Petitioners. This Affidavit is not made by Petitioners personally because the salient issues involve procedural developments and legal analysis.
3. The contents of the foregoing Petition for Writ of Mandamus and the following Memorandum of Points and Authorities are true and based upon my personal knowledge, except as to those matters stated on information and belief.
4. All documents contained in the Petitioners' Appendix, filed herewith, are true and correct copies of the pleadings and documents they are represented to be in the Petitioners' Appendix and as cited herein.
5. This Petition complies with Nev. R. App. P. 21(d) and Nev. R. App. P.

32(c)(2).

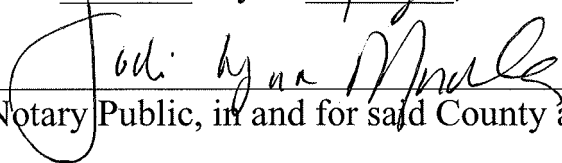
FURTHER YOUR AFFIANT SAYETH NAUGHT.



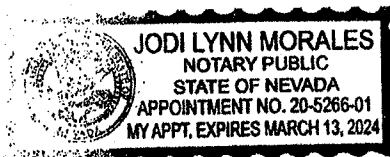
ADAM GARTH, ESQ.

Subscribed and sworn before me

This 25th day of May, 2022.



Notary Public, in and for said County and State



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 for Office 365 in Times New Roman 14 point type

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 21(d) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

Proportionately spaced, has a typeface of 14 points or more, and contains 6,674 words with the exclusions noted in NRAP (a)(7)(C).

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

DATED this 25th day of May, 2022.

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CERTIFICATE OF MAILING

I hereby certify that on this 26th day of May, 2022, I served the foregoing **PETITION FOR WRIT OF MANDAMUS** upon the following parties by placing a true and correct copy thereof in the United States Mail in Las Vegas, Nevada with first class postage fully prepaid:

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