IN THE SUPREME COURT OF THE STATE OF NEVADA

CESAR HOSTIA, an individual,

Plaintiff,

vs.

DANA FORTE, D.O., LTD., a Nevada limited company dba FORTE FAMILY PRACTICE; BANDEEP VIJAY, MD, an individual; JOSEPH EAFRATE, PA-C, an individual; ROE DEFENDANT business entities 1-10; and DOE DEFENDANT individuals 1-10,,

Defendants.

Supreme Court No.:

District Court No.: A-21-828992-C

PETITIONER'S APPENDIX TO PETITION FOR WRIT OF MANDAMUS VOLUME I

S. BRENT VOGEL
Nevada Bar No. 6858
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CERTIFICATE OF MAILING

I hereby certify that on this 26th day of May, 2022, I served the foregoing **APPENDIX TO PETITION – VOLUME I** 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:

Karl Andersen, Esq.
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Counsel for Plaintiff

/s/ *Heidi Brown*
An employee of LEWIS BRISBOIS BISGAARD & SMITH, LLP

EXHIBIT A

MOT

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EIGHTH JUDIICAL DISTRICT COURT
CLARK COUNTY, NEVADA

CESAR HOSTIA, an individual, Plaintiff, vs. DANA FORTE, D.O. LTD, a Nevada Limited Company dba FORTE FAMILY PRACTICE; SANDEEP VIJAY, MD, an individual, JOSEPH EAFRATE, PA-C; DOE INDIVIDUALS 1-5; and ROE BUSINESS ENTITIES 1-5, inclusive, Defendants.	Case No. A-18-783435-C Dept. No. 3 **MOTION TO EXTEND DEADLINE FOR INITIAL EXPERT DISCLOSURES (SIXTH REQUEST)**

Plaintiff, Cesar Hostia, through counsel, Karl Andersen, Esq., hereby moves the Court to enlarge the time permitted for initial disclosure of expert witnesses. This Motion is made in good faith and based on EDCR 2.35.

Dated this 31st day of December, 2021.

ANDERSEN & BROYLES, LLP

/s/ Karl Andersen, Esq.
Karl Andersen, Esq.
5550 Painted Mirage Road, Suite 320
Las Vegas, Nevada 89149
Attorney for Plaintiff

POINTS AND AUTHORITIES

I. BACKGROUND

This matter relates to the Plaintiff's injuries suffered as a result of being prescribed a derivative of penicillin by the Defendant when the Defendant was acutely aware that the Plaintiff was highly allergic to penicillin. After taking the prescription, the Plaintiff went into anaphylactic shock, drove himself to the nearest hospital, North Vista Hospital, and was immediately admitted and aggressively treated. Furthermore, the high doses of steroids and other treatment necessary to combat the anaphylactic shock has caused ongoing medical issues for the Plaintiff.

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. After the Dr. Levin's initial review, counsel was informed that there was additional ongoing treatment that may be relevant to this matter. Counsel's office immediately requested records from that medical provider (Healthcare for Vibrant Living), so the updated records could be reviewed by the medical expert and included in his analysis and report on Plaintiff's claim. Unfortunately, those records were received on December 27, 2021 and forwarded to Dr. Levin's office.

Notwithstanding the recent gathering of these medical records, Plaintiff still believed that the report could be finished by the deadline date. However, over the last few days, it has become clear that the report will not be finished by December 31st. Given that the deadline has fallen between Christmas and New Year's, it has exacerbated the delay.

Attempt to Resolve: Plaintiff's counsel requested a stipulation for this extension on December 30th. However, as Defendant's had provided their initial expert a few days early, Defendant's counsel was unwilling to agree to a stipulation at this time.

II. THE LAW

Rule 2.35. Extension of discovery deadlines.

(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 received by the discovery commissioner within 20 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.

(1) All stipulations to extend any discovery scheduling order deadline shall be lodged with the discovery commissioner and shall include on the last page thereof the words "IT IS SO ORDERED" with a date and signature block for the commissioner or judge's signature.

(2) A motion to extend any discovery scheduling order deadline shall be set in accordance with Rule 2.34(c).

(b) Every motion or stipulation to extend or reopen discovery shall include:

(1) A statement specifying the discovery completed;

(2) A specific description of the discovery that remains to be completed;

(3) The reasons why the discovery remaining was not completed within the time limits set by the discovery order;

(4) A proposed schedule for completing all remaining discovery;

(5) The current trial date; and,

(6) Immediately below the title of such motion or stipulation a statement indicating whether it is the first, second, third, etc., requested extension, e.g.:

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III. DISCOVERY COMPLETED TO DATE

1. 16.1 initial and supplemental disclosures from both parties;

2. Propounded written discovery from both parties.

3. Deposition of plaintiff.

4. Defendant's Initial Expert Disclosure.

IV. DISCOVERY THAT REMAINS TO BE COMPLETED

1. Treating physician and percipient witness depositions.

2. Depositions of defendants.

3. Remaining expert disclosures and depositions of expert witnesses.

V. REASONS DISCOVERY HAS NOT BEEN COMPLETED

This motion is made more than 21 days before the discovery cut-off and therefore, Plaintiff must only demonstrate a good faith basis for the extension. Here, Plaintiff believed the records from Healthcare for Vibrant Living (which were not previously available) would provide relevant information related to the Plaintiff's care and ongoing injuries. The records were obtained and forwarded to Dr. Levine on or about December 27th. Plaintiff still believed that the report could be finished by December 31st after reviewing the records. Unfortunately, Dr. Levine has been unable to finish the report by this date and Plaintiff requests that the initial expert deadline be extended by two weeks; that the rebuttal expert deadline be extended by two weeks, and that all other discovery deadlines remain unchanged.

VI. PROPOSED SCHEDULE FOR COMPLETING ALL REMAINING DISCOVERY

Deadline	**Current Date**	**Proposed Date**
Deadline to Amend	December 31, 2021	December 31, 2021

Initial Expert Disclosures	December 31, 2021	January 14, 2022
Rebuttal Expert Disclosures	January 31, 2022	February 14, 2022
Discovery Cutoff	April 29, 2022	April 29, 2022
Dispositive Motions	May 31, 2022	May 31, 2022

VII. CURRENT TRIAL DATE

Trial is currently set for the August 1, 2022 Stack.

VIII. CONCLUSION

Based upon the foregoing, Plaintiff respectfully requests that the Court allow an additional two weeks for the disclosure of expert witnesses. This brief extension would allow for a complete review and analysis of Plaintiff's up-to-date medical treatment for the injuries suffered in the underlying incident.

Dated this 31st day of December, 2021.

ANDERSEN & BROYLES, LLP

/s/ Karl Andersen, Esq._____
Karl Andersen, Esq.
5550 Painted Mirage Road, Suite 320
Las Vegas, Nevada 89145
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of December, 2021 I served a true and correct copy of the foregoing **Motion to Extend Deadline for Initial Expert Disclosures** via the Court's e-filing portal to all parties of record, including:

S. Brent Vogel, Esq.
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Attorneys for Dana Forte, D.O., Ltd.
dba Forte Family Practice

/s/ Sean Trumpower
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EXHIBIT B

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DISTRICT COURT

CLARK COUNTY, NEVADA

CESAR HOSTIA, an individual,, Plaintiff, vs. DANA FORTE, D.O., LTD., a Nevada limited company dba FORTE FAMILY PRACTICE; SANDEEP VIJAY, M.D.; JOSEPH EAFRATE, PA-C; ROE DEFENDANT, et al., Defendants.	Case No. A-18-783435-C Dept. 3 **DEFENDANTS DANA FORTE, D.O., LTD., D/B/A FORTE FAMILY PRACTICE AND JOSEPH EAFRATE, PA-C'S OPPOSITION TO PLAINTIFF'S MOTION TO EXTEND DEADLINE FOR INITIAL EXPERT DISCLOSURES (SIXTH REQUEST)** **Hearing Date: February 10, 2022** **Hearing Time: CHAMBERS**

Defendants DANA FORTE, D.O., LTD., dba FORTE FAMILY PRACTICE and JOSEPH EAFRATE, PA-C ("Defendants") by and through their attorneys of record, S. Brent Vogel, Esq., Adam Garth, Esq., and Shady Sirsy, Esq. of the Law Firm of Lewis Brisbois Bisgaard & Smith, LLP, hereby make this OPPOSITION TO PLAINTIFF'S MOTION TO EXTEND DEADLINE FOR INITIAL EXPERT DISCLOSURES (SIXTH REQUEST). This Motion is made and based on the papers and pleadings filed herein, the attached exhibits, and any oral argument that Court entertains at the time of the hearing on this matter.

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DECLARATION OF ADAM GARTH, ESQ.

I, Adam Garth, declare under penalty of perjury as follows:

1. I am a partner at Lewis Brisbois Bisgaard & Smith LLP, and am duly licensed to practice law in the State of Nevada. I am competent to testify to the matters set forth herein, and will do so if called upon.
2. I am one of the attorneys of record representing Defendants in the above-entitled action, currently pending in Department 3 of the Eighth Judicial District Court for the State of Nevada, Case No. A-18-783435-C.
3. I make this Declaration in Opposition to Plaintiff's Motion to Extend the Expert Exchange Deadlines.
4. As this Court's order of September 29, 2021 demonstrates, all initial expert exchanges were to occur on or before December 31, 2021.[1] Plaintiff's counsel agreed to that deadline. What is important to note are the precursors to that extension.
5. In the months that preceded the extension, I suggested that the parties attempt to amicably resolve the case and proceed to mediation in order to give both sides a neutral forum in which to air their respective cases and receive an impartial assessment of the case and its resolution potential. Plaintiff's counsel, Mr. Anderson, agreed to that arrangement and a mediation was scheduled before Judge Stewart H. Bell.
6. Thereafter, Mr. Anderson's associate decided to unilaterally cancel the mediation. Discussions resumed between Mr. Anderson and me in an effort to resolve the case informally. Unfortunately, the parties were unable to resolve the matter, and Mr. Anderson suggested that he would revisit the issue once he had an opportunity to do a more extensive evaluation of the case in consultation with his experts and possibly restart discussions after expert exchange. I suggested we conduct the expert exchange but Mr. Anderson wanted to put the three month extension into place, and for good reason – he had no expert to exchange at the end of September as his motion clearly reflects.

[1] Exhibit "A" hereto

7. After that, and for the past several months, there was no communication from Mr. Anderson whatsoever until December 30, 2021. Given that Defendants' counsel's office was to be closed in observance of the New Year's holiday on both December 30th and 31st, we recognized the impending expert exchange deadline and provided our initial expert report and supporting materials to Plaintiff's counsel two days prior to the deadline, on December 29, 2021.[2]

8. It was only on December 30, 2021, after having our expert report in hand for a day, did Mr. Anderson first reach out and request an extension of time for his expert report. In fact, the deadline was extended for the express purpose of Mr. Anderson's consultation with his expert to determine the viability of issues in this case and to discuss those with his client. He failed to even begin that process, by his own admission in his motion, until several seeks ago.

9. During the phone call, I advised Mr. Anderson that while I readily agree to extend professional courtesies, he never once reached out to request an extension until after having received our expert report. I advised him that he knew of the impending deadline but did nothing in advance to remedy it. I told him that my clients have suffered severe prejudice having exchanged their expert report to give Plaintiff a further opportunity to review and rebut same in derogation of the rules of practice.

10. Moreover, Mr. Anderson never advised me that there were any new medical records he provided to his expert. His sole excuse was that his expert was unable to complete the report timely, and that he needed an extension. The first time the issue of the "new records" was raised occurred in this motion.

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[2] Exhibit "B" hereto

11. I declare under penalty of perjury that the foregoing is true and correct.

FURTHER YOUR DECLARANT SAYETH NAUGHT.

/s/Adam Garth

Adam Garth, Esq.

No notarization required pursuant to NRS 53.045

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MEMORANDUM OR POINTS AND AUTHORITIES

I. INTRODUCTION

This is an action sounding in professional medical negligence in which Plaintiff, a severe diabetic, alleges injuries stemming from his ingestion of penicillin prescribed to him by Defendants, at Plaintiff's insistence, and filled by Plaintiff personally despite his knowing he had an allergy to same. Plaintiff was hospitalized for several days with diabetic ketoacidosis after suffering an allergic reaction to the penicillin he insisted on receiving and took. He was discharged and made a complete recovery.

In an effort to collect money he so fiercely does not deserve, he exaggerates his injuries, essentially claims that everything medically wrong with him today stems from this incident, despite his long standing severe diabetic condition and the multiple pre-existing medical problems he now claims resulted from this incident. What he failed to disclose is that he has no sequalae whatsoever, that he has a host of pre-existing medical conditions which were neither exacerbated nor caused in any way by any of the events involved in this action. To make matters worse, Plaintiff testified at his deposition that he is unable to perform certain activities as a result of this incident, but Defendants' previously disclosed video surveillance footage of Plaintiff demonstrates that he lied at his deposition about his restrictions, performing the very activities he claimed to no longer be able to perform. In essence, this Plaintiff is a liar and is utilizing the legal system as a means of exacting whatever money he can.

In furtherance of this behavior, Plaintiff now seeks to extend the expert disclosure deadline which has already passed, and after receiving Defendants' expert medical report in advance of the deadline for doing so.[3] Permitting Plaintiff the relief he seeks would be severely prejudicial to Defendants inasmuch as Plaintiff has what is now a multi-week preview of Defendants' expert's opinions permitting him to craft his expert opinions accordingly. These deadlines are established to permit the parties a simultaneous exchange of reports. Plaintiff seeks to circumvent that, and is doing so having known the deadline months in advance, and failing to seek an extension until the

[3] Exhibit "A" hereto

last date of the expert exchange deadline. Moreover, Plaintiff never exchanged any of the purported "new evidence" being reviewed by his expert, never provided any documentation of when he became aware of the evidence, nor when he requested the documents. Filed herewith is the Declaration of Adam Garth, Defendants' counsel, outlining the facts and circumstances preceding Plaintiff's instant motion which will give a more complete context to the impropriety of Plaintiff's request. Plaintiff's motion is not made in good faith, it is untimely, and lacks either the element of good cause or a reasonable excuse for delay. In other words, Plaintiff's motion is wholly improper, unsupported, and must be denied.

II. LEGAL ARGUMENT

A. Plaintiffs' Motion Is Not Properly Before The Court And Upon These Grounds Alone Should Be Denied

Explaining the pre-requisites for obtaining an extension, Commissioner Bulla explained that Plaintiffs were required to file their motion within 20 days of the cut-off they are moving to extend, and accompany their moving papers with a showing of good cause:

> EDCR 2.35(a) specifically requires the following: "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 received by the Discovery Commissioner within **20 days before the discovery cut-off date or any extension** thereof." (Emphasis added.)
>
> 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).[4] Plaintiffs' 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, 2011.

[4] 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].

Plaintiff violated the procedural requisites with regard to the relief he seeks, requiring that the motion be denied. Fairness dictates that the Rules apply equally to litigants regardless of their classifications as plaintiffs or defendants. Plaintiff asks this Court to extend him concessions regarding compliance but has created his own discovery mess and is requesting that Defendants be prejudiced as a result.

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 (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 demonstrate either good cause or excusable neglect. Plaintiff has failed to timely serve an expert report by an expert within the deadline set forth in this Court's scheduling order. Further, Plaintiff cannot meet

the proper showing of both good cause and excusable neglect. As such, any request by Plaintiff to extend discovery and permitting this late disclose, especially since no extension of discovery was even sought until after Defendants' expert report was served, should be denied.

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). This, he cannot do, nor did he.

B. Plaintiff Cannot Show Good Cause

Plaintiff's actions are 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 is there any timeline for the receipt of the "new medical records" supposedly provided to Plaintiff's expert. Plaintiff does 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.

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."[5] In other words, when Plaintiff's counsel advised Defendants' counsel more than three months ago 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. Retaining an expert and providing medical records several weeks prior to a known expert exchange deadline, when that

[5] Plaintiff's Motion, p. 2, lines 12-15

deadline falls within a known holiday and vacation time, smacks not only of a lack of diligence, it clearly indicates an absence of good faith by Plaintiff.

If Plaintiff had exhibited a modicum of diligence in this case, he would have reached out to his expert long ago, not several weeks prior to an expert exchange deadline, to obtain an opinion and report. Plaintiff created his own emergent situation and now seeks judicial intercession to cure his own practice failure. To make matters worse, Plaintiff pursues this strategy to the complete disadvantage of and prejudice to Defendants. 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 an expert witness through the extension of the relevant deadline prior to its expiration. ***Plaintiff did none of these things.***

Plaintiff cannot demonstrate that he was diligent in ascertaining that Dr. Levin was available and able to provide a report before the deadline. In fact, Plaintiff admitted that he only retained him several weeks ago, years after the case was commenced. Plaintiff further failed to outline specifically what is contained in the "additional ongoing treatment" records he provided to Dr. Levin, he did not both to exchange those documents, he did not indicate when he was advised of the treatment, or when he first requested the records pertaining thereto. In essence, Plaintiff completely "dropped the ball" in this case, placed it on the "back burner" and now wants to be saved from his own incompetence. That is not the role of the judiciary.

Plaintiff was not diligent in seeking leave of this Court to extend the initial expert deadline. Moreover, in spite of being well aware of the impending deadline, he did not even bother to retain an expert until just a few weeks ago. Such failures are incompatible with a showing of good cause. In other words, a failure on Plaintiff's part cannot be considered an emergency on Defendants' part.

C. <u>Plaintiff Cannot Show Excusable Neglect</u>

Even if Plaintiff was able to show diligence and good cause in seeking a belated extension to the scheduling order, such request should still be denied, as Plaintiff cannot demonstrate his

failure to meet the deadline was the result of excusable neglect. *See* EDCR 2.35 (a request to extend discovery deadlines after their expiration "shall not be granted unless the moving party…demonstrates that the failure to act was the result of excusable neglect"). *Black's Law Dictionary* defines "excusable neglect" as:

> A failure—which the law will excuse—to take some proper step at the proper time…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 oraccident….

Black's Law Dictionary 1133 (9th ed. 2009). Thus, "excusable neglect" only applies to an external factor beyond a party's control that affects that a party's ability to act or respond as otherwise required.

Plaintiff cannot show that his neglect in failing to timely retain his expert is excusable. He has not demonstrated anything concerning these additional records he allegedly supplied to his expert. He has not indicated when he found out about them, when he requested them, when the treatment was supposedly received, the relevance of the treatment to these issues and its importance to any expert report, or why he has not even bothered to exchange them as of this date.

Plaintiff should have timely retained an expert, not a few weeks before the deadline and when that deadline falls squarely within the holiday season. He does not explain why he waited for months after receiving an extension of time to conduct expert disclosure to retain an expert, despite the fact that he led Defendants' counsel to believe he had such an expert already. ***Plaintiff created his own emergency, received Defendants' expert report after doing so, and now wants a further opportunity to prejudice Defendants due to Plaintiff's own practice failures. He was, at a minimum, negligent, in this regard.*** In any case, Plaintiff's actions cannot constitute excusable neglect. Plaintiff's failure to comply with this Court's scheduling order is inexcusable.

D. <u>The danger of prejudice to the opposing party</u>

Plaintiff is already in possession of Defendants' timely expert disclosure. Defendants have nothing from Plaintiff. Plaintiff is in the position of being able to show his expert all of Defendants' expert's opinions, have him craft a report specifically designed to counter those, and then again, provide an additional rebuttal report. In other words, Plaintiff now gets two rebuttals and one initial

report if the motion is granted. The evidence of prejudice is readily apparent. Plaintiff's negligent actions should not be rewarded by the imposition of prejudice on a compliant party.

E. The length of the delay and its potential impact on the proceedings.

Plaintiff's Motion was 20 days late. However, Plaintiffs could have and chose not to, retain an expert earlier, request an extension of time before the 20 day deadline, or moved for the relief weeks earlier than he did. Instead, he chose to wait until he was in a position where Defendants were prejudiced and now wants to add further insult to injury. Plaintiff chose to file a lawsuit and has an obligation to prove his case. That does not mean he is supposed to wait a few weeks before an expert exchange deadline to first get his expert retained and reviewing records to produce a report during holiday time. Defendants timely retained and exchanged their expert, even doing so early to make certain they were in compliance with the Court's order. Plaintiff ignored his responsibilities and now wants to be rewarded for it.

F. The reason for the delay.

Plaintiff has not offered a reason for failing to file his Motion by December 10, 2021.

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III. CONCLUSION

For all of the aforenoted reasons, Plaintiff's motion should be denied in its entirety. Plaintiff caused his own delay, never moved or sought the relief in this motion before the deadline's expiration, let alone within the time allotted by the EDCR, and will cause Defendants to suffer prejudice if the motion is granted. Plaintiff should not be rewarded for creating a crisis of his own making and then requesting that Defendants suffer the consequences for it.

DATED this 14th day of January, 2022

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ *Adam Garth*

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Attorneys for Dana Forte, D.O., Ltd dba Forte Family Practice and Joseph Earfrate, PA-C

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of January, 2022, a true and correct copy **DEFENDANTS DANA FORTE, D.O., LTD., D/B/A FORTE FAMILY PRACTICE AND JOSEPH EAFRATE, PA-C'S OPPOSITION TO PLAINTIFF'S MOTION TO EXTEND DEADLINE FOR INITIAL EXPERT DISCLOSURES (SIXTH REQUEST)** was served by electronically filing with the Clerk of the Court using the Wiznet Electronic Service system and serving all parties with an email-address on record, who have agreed to receive Electronic Service in this action.

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Zachary Peck, Esq.
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By */s/ Tiffany Dube*
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EXHIBIT A

ELECTRONICALLY SERVED
12/29/2021 11:07 AM

S. BRENT VOGEL
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Attorneys for Dana Forte, D.O., Ltd dba Forte Family Practice and Joseph Earfrate, PA-C

DISTRICT COURT

CLARK COUNTY, NEVADA

CESAR HOSTIA, an individual,, Plaintiff, vs. DANA FORTE, D.O., LTD., A Nevada limited company dba Forte Family Practice; SANDEEP VIJAY, M.D.; JOSEPH EAFRATE, PA-C; ROE DEFENDANT, et al. Defendant.	Case No. A-18-783435-C Dept. No.: 3 **DEFENDANTS DANA FORTE, D.O., LTD. D/B/A FORTE FAMILY PRACTICE'S INITIAL EXPERT DISCLOSURES**

Defendants Dana Forte, D.O., Ltd dba Forte Family Practice, and Joseph Eafrate, Pa-C (Defendants) by and through their attorneys of record, LEWIS BRISBOIS BISGAARD & SMITH LLP, hereby submit their Initial Designation of Expert Witness and Reports pursuant to NRCP 16.1(a)(2):

I. WITNESS

1. Dr. Marvin C. Mengel, M.D.
486 Valley Stream Drive
Geneva, FL 32732

Dr. Mengel is a board certified endocrinologist. He is expected to offer his expert opinions as to Cesar Hostia's ("Plaintiff") alleged medical conditions resulting from the incident(s) and action(s) which are the subject of Plaintiff's Complaint. Dr. Mengel will testify regarding the

Plaintiff's medical condition, causation as it pertains to the alleged incident, and Plaintiff's pre-existing conditions as they pertain to his alleged injuries in this case, and whether such any conditions he now alleges were either caused or exacerbated by the incident in this matter. Dr. Mengel may also testify regarding the existence and extent of Plaintiff's pre-incident and post-incident injuries/conditions, as well as prognosis. Dr. Mengel may also testify regarding Defendants' policies and procedures. His expert report, curriculum vitae, fee schedule, and testimony history are attached hereto as **EXHIBIT A**. Dr. Mengel is expected to give rebuttal opinions in response to other witnesses or experts designated in this matter. Dr. Mengel will base his opinions upon his education, professional experience, and review of the facts and records herein. He reserves his right to supplement and/or revise his report as new information is provided.

Defendants further reserve the right to call any and all experts that have been designated by any other party in this case to render expert testimony.

DATED this 29th day of December, 2021

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s/ Adam Garth*

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Lewis Brisbois Bisgaard & Smith LLP on this 29th day of December, 2021, a true and correct copy **DEFENDANTS' DANA FORTE, D.O., LTD. D/B/A FORTE FAMILY PRACTICE'S AND JOSEPH EARFRATE, PA-C'S INITIAL EXPERT DISCLOSURES** was served by electronically filing with the Clerk of the Court using the Wiznet Electronic Service system and serving all parties with an email-address on record, who have agreed to receive Electronic Service in this action.

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EXHIBIT A

Dear Mr. Garth:

Per your request, I conducted a comprehensive review of Cesar Hostia's medical records pertaining to the incident first occurring on October 27, 2017.as provided below, to ascertain whether any of the conditions for which the plaintiff now complains result from that incident.

As you are aware, I am a board certified endocrinologist, and have been so certified since 1973. I received my BA from Johns Hopkins University in Baltimore, MD in 1964 and received my M.D. from that same institution in 1967. I completed my internship at Johns Hopkins in 1968, following by one year of residency at Johns Hopkins in 1969. Both of these were in internal medicine. Thereafter, I completed my residency in internal medicine at University of Florida, Gainesville in Florida in 1972 I then completed at clinical fellowship at University of Florida in genetics, endocrinology and metabolism in 1973. My residency was interrupted for military served from 1969-1971 where I served a chief of clinical genetics at Joint Base Andrews in Maryland where I attained the rank of major. Presently, I perform veterans disability evaluations, provide endocrinology telemedicine consultations, and supervise in house hospital patients with diabetes management. Attached is my CV which explains in greater detail my many years of extensive experience in the field and practice of endocrinology. All opinions I have expressed herein are to a reasonable degree of medical probability.

I was provided the following records to review pertaining to Cesar Hostia:

1. Records from Stephen Castorino, M.D. (85 pgs);
2. Records from Brian Berelowitz, M.D. (12 pgs);
3. Records from Sierra Health and Life Insurance (19 pgs);
4. Records from North Vista Hospital (81 pgs);
5. Records from Summerlin Hospital Medical Center (523 pgs);
6. Records from Forte Family Practice (92 pgs);
7. Records from Walgreens Pharmacy (89 pgs); and
8. Records from Plaintiff's 16.1 Disclosure (229 pgs).

The records indicate that on October 27, 2017, Cesar Hostia was treated for a right otitis media and given a prescription for amoxicillin. Mr. Hostia filled this prescription and began taking the medication despite the fact that he was aware of his penicillin allergy as well as an allergy to other medications in the same class.

After taking the prescription he filled, Mr. Hostia experienced shortness of breath. He proceeded to North Vista Hospital emergency room for that condition. He drove himself to the emergency department. According to the note of Victoria Stephens, a registered nurse, Mr. Hostia took Amoxicillin at approximately 15:29 and he had complaints of shortness of breath and anxiety. At 1615, Mr. Hostia was seen by Dr. Andrew Morrison, an emergency medicine physician. According to Dr. Morrison's note, Mr. Hostia had complaints of swelling and difficulty breathing. He took Amoxicillin 30 minutes prior to his presentation to the emergency department and he began to have a complaint of shortness of breath at that time. He drove himself straight to North Vista Hospital. A valet parking attendant did not think plaintiff looked well and he requested a staff member from the emergency department take him directly to the emergency department. According to one section of Dr. Morrison's

note, plaintiff did not have any difficulty swallowing and he did not have a rash. According to another section of Dr. Morrison's note, Mr. Hostia did have diffuse erythema consistent with anaphylactic shock and some swelling of the tongue. Mr. Hostia was given epinephrine, solumedrol, and Benadryl. Within 1 to 2 minutes of receiving the medications, his tongue swelling decreased. Dr. Morrison's impression was angioedema. The plan was to admit him.

Dr. Abhinav Sinha obtained a history and performed a physical examination. Mr. Hostia reported a history of diabetes, an enlarged prostate, hypertension and an allergy to penicillin. He had been started on insulin in the emergency department and he reported he felt better. He denied any complaints of shortness of breath, chest pain, cough, chill, nausea or vomiting. His body mass index was 36.79. Dr. Sinha's impressions were angioedema due to penicillin, diabetic ketoacidosis, morbid obesity, hypertension, and otitis media. The plan was to admit plaintiff to the intermediate care unit, continue insulin and electrolyte replacement.

Later that day (October 27, 2017), Mr. Hostia was seen by Dr. Jan Pring, a pulmonologist. According to Dr. Pring's note, Mr. Hostia noted a funny feeling which he described as a tingling sensation all over his body after his dose of Amoxicillin. He was noted to progress to anaphylaxis in the emergency department becoming stridorous with a diffuse erythematous rash and an enlarged tongue. He was admitted to the intensive care unit. Dr. Pring's impressions were anaphylactic shock, angioedema, macroglossia, an erythematous rash, a penicillin allergy and otitis media. Physical examination revealed that his lungs were clear, he had no stridor, and he was in no acute distress The plan was to monitor him.

On October 28, 2017, Horacio Bernardo, a nurse practitioner saw Mr. Hostia. Mr. Bernardo's "original note" was incorporated into a note signed by Dr. Paul Stewart, a pulmonologist. Overnight, Mr. Hostia was noted to be hyperglycemic with a positive anion gap metabolic acidosis. He was started on insulin. Plaintiff's hemoglobin A1c was 7.7 percent with a reference range of 4.2 to 6.3 percent. Dr. Stewart's impressions were acute anaphylaxis, diabetic ketoacidosis, hypertension and morbid obesity. The plan was to continue insulin.

Mr. Hostia was discharged home on October 29, 2017. According to Dr. Sinha's discharge summary, Mr. Hostia did not exhibit any swelling of his tongue or lips. His diabetic ketoacidosis and angioedema were resolved. Plaintiff's hemoglobin A1c was 7.9 with a reference range of 4.2 to 6.3 percent. Dr. Sinha's discharge diagnoses were angioedema due to Amoxicillin, diabetic ketoacidosis, morbid obesity, hypertension, otitis media and hyperlipidemia. Plaintiff was told to avoid Amoxicillin and penicillin.

The following morning Mr. Hostia's status and history was contained in the following note:

> Patient was given penicillin after he was seen at the quick care. Came to have swelling which quickly evolved into upper airway edema. Patient was aggressively treated in the emergency room with resolution of his anaphylaxis. Placed in the ICU for observation overnight, was noted to be hyper glycemic with a positive anion gap metabolic acidosis. Patient has been subsequently started on insulin infusion, fluid resuscitation, for diabetic ketoacidosis. Patient is found in intensive care unit this morning alert and oriented, following commands, without any specific complaints such as nausea, vomiting, fever, night sweats, or chills palpitations or chest pain.

The note also lists a patient active problem list that has only angioedema as a diagnosis.

A point of care blood sugar on 10/27 at 5:35 PM was 174
A laboratory blood sugar at 7:00 PM was 422 directly due to steroid therapy of his anaphylaxis. A point of care blood sugar at 3:35 AM on 10/28 was 439. By 6:15 that morning it had dropped to 386.By 7:15 AM it was 294.

The aforenoted blood sugar levels would not create a either a temporary or permanent complication of diabetes, and are levels that are often seen in ambulatory patients lacking significant symptoms except possibly more frequent urination.

Mr. Hostia's blood pH level at 02:47 on 10/28 was only minimally decreased at 7.19, This level is not one associated with either a temporary or permanent complication of diabetes. Moreover, his blood CO2 level dropped only to 8, which is also not associated with any temporary or permanent complication of diabetes. His white blood count rose to 21,700, a direct effect of the steroid therapy he received. Again, this reading is not associated with, nor was it reflective of either a temporary or permanent complication of diabetes.

None of the aforenoted abnormalities produced any lasting negative effects on his body.

His complaints of numbness and tingling in his lower extremities are consistent with peripheral neuropathy related to diabetes and are in no way related to any of the events surrounding his ingestion of the antibiotic. Mr. Hostia's complaint in this regard reflect a chronic problem and would not in any way have been affected, caused, or increased by this brief episode of diabetic ketoacidosis.

Mr. Hostia's complaints of difficulty concentrating, poor balance, headaches, disturbances in coordination, inability to speak, falling down, brief paralysis, visual disturbances, seizures, weakness, sensation of room spinning, tremors, fainting, excessive daytime sleeping, and memory loss, are each individually or collectively unrelated in any way related to the episode of anaphylaxis and diabetic ketoacidosis involved in this matter.

Mr. Hostia's anaphylaxis and diabetic ketoacidosis episode produced no new conditions or problems and in no way exacerbated any of his pre-existing conditions.

In summary, my opinion within a reasonable degree of medical probability, is that the brief mild episode of anaphylaxis and diabetic ketoacidosis that Mr. Hostia experienced had no lasting effect or effects on his body in any way, demonstrated by his condition when he was discharged from the hospital.

There Is no scientific evidence that any negative sequelae would have occurred related tothis episode.

Any other complaints contained in his medical records are pre-existing conditions, natural consequences of diabetes, or related to other conditions that are not in any way related to the episode of anaphylaxis or diabetic ketoacidosis involved in this matter.

Dated: 10/15/2021

Marvin Mengel, M.D.

Marvin C. Mengel, M.D.

486 Valley Stream Drive, Geneva, FL, 32732
Tel. 407-579-5840 Email. Mengel486@aol.com

EDUCATION

- **B.A.**, Johns Hopkins University, Baltimore, MD, 1964
- **M.D.**, Johns Hopkins University School of Medicine, Baltimore, MD, 1967
- **Internship, Internal Medicine**, Johns Hopkins Hospital, 1967-1968
- **Assistant Resident, Internal Medicine**, Johns Hopkins Hospital, 1968-1969
- **Assistant Resident, Internal Medicine**, University of Florida, Gainesville, FL, 1971-1972
- **Clinical Fellow, Division of Genetics, Endocrinology and Metabolism,** University of Florida, 1972-1973
- **J.D.**, LaSalle University Online, 1999

BOARD CERTIFICATION

- **Fellow,** American College of Endocrinology, 1994
- **Diplomate of the American Board of Quality Assurance & Utilization Review Physicians 2017**
  - Certified Physician Advisor, 2017-2019
- **Diplomate of the American Board of Internal Medicine,** Endocrinology and Metabolism, 1973
- **Diplomate of the American Board of Internal Medicine,** 1972

MEDICAL LICENSURES

- **State of Florida,** 1973, *active*
- **State of Maryland,** 1967, *inactive*

MILITARY SERVICE

- **Chief of Medical Genetics, Rank: Major,** Malcolm Grow Medical Center, United States Air Force, Joint Base Andrews, MD 1969-1971

OTHER TRAINING

- **American Association of Medical Directors,** Medical Management Seminar, Lake Geneva, WI, 1988
- **"Continued Education in Business Dynamics,"** Professional Management Academy and NDJ Associates, Inc., Orlando, FL, 1986
- **Clinical Genetics** with Victor McKusick, M.D., Johns Hopkins Hospital, Baltimore, MD, 1964-1969

FACULTY POSITIONS

- **Clinical Assistant Professor,** Department of Medicine, College of Medicine, University of Florida, Gainesville, FL, 1974-1995
- **Clinical Faculty, College of Health,** University of Central Florida, Oviedo, FL, 1987-1995
- **Instructor in Clinical Medicine,** University of Florida, Gainesville, FL, 1974-1995

EMPLOYMENT

- **QTC,** Sept 2020-present
  - Veteran Disability Evaluations
- **Glutality Telemedicine,** Sept 2020-present
  - Evaluate and treat patients with diabetes
- **Glycare, Inc.,** 2018-present
  - Manage hospitalized patients with known diabetes and/or elevated blood sugars and patients with insulin pumps.
  - Oversee nurse practitioners' management of blood sugar in similar patients (approximately 200 patients per day).
  - Provide consultations for hospitalized patients in the field of endocrinology.
- **Orlando Regional Healthcare System**, 1995-2018
  - Served as Physician In-Patient Endocrinology and Diabetes Consultant and Care Provider
  - Served as Director of Physician education/integration
    - Taught physicians and case managers utilization and medical documentation
    - Reviewed diabetes and other endocrinology cases for medical legal issues
    - Reviewed medical documentation and coding
  - Provided Patient Endocrine Care, Orange County Clinics, Orlando, FL and Grace Medical Home, Orlando, FL
  - Served as Director of Continuing Medical Education, OH
  - Served as Physician Advisor for OH system (Utilization, Documentation)
  - Coordinated contracted endocrinologists
  - Participated in Diabetes Task Force
  - Reviewed Medical Documentation and Coding
  - Served as Assistant Medical Director of Health Choice
  - Reviewed utilization, explaining the need for hospital status and needed procedures
  - Reviewed quality for an acute care hospital
- **Assistant Medical Director**, Health Choice Insurance, Orlando, FL 1997-2017
- **Coordinator,** Diabetes Disease Management & Diabetes Program, Leesburg Regional, 1997-2012
- **Medical Director,** Chronic Disease Management, Leesburg Regional, 1997-2012
- **Practicing Physician & Owner,** Diabetes and Metabolic Center of Florida, Orlando, FL, 1989-1995
- **Practicing Physician & CEO,** Diabetes and Endocrine Center of Orlando, Orlando, FL, 1973-1989
- **Medical Director,** Endocrine Unit, Orlando Regional Medical Center, 1982-1985
- **Medical Director,** Healthsouth Rehabilitation, Orlando, FL, 1985-1987
- **Medical Director,** Optifast Weight Reduction Program, Orlando, FL, 1988-1999
- **Medical Director,** Diabetes Unit, Humana Hospital Lucerne, Orlando, FL, 1982-1987

- **Medical Director,** Diabetes Treatment Center, Orlando Regional Hospital, Orlando, FL, 1987-1989
- **Medical Director,** Diabetes Treatment Centers of America, Orlando Regional Medical Center, 1987-1995
- **Research Director,** Humana Foundation, Orlando, FL, 1983-1987
- **Advisor,** Upjohn Healthcare Services, Orlando, FL, 1990-1993

CONSULTING EMPLOYMENT

- **Consultant of Documentation, Compliance and Utilization,** University of Mississippi, Jackson, MS, 1999-2016
- **Medical Director,** Romunde Diabetes Support and Education Clinics, 2008-2011
- **Consultant of Documentation, Quality, and Compliance,** Columbus Regional Hospital, Columbus, GA, 2005-2008
- **Consulting Faculty and Speaker**, Pharmaceutical Corporations including: Merck, Novo, Eli Lilly, Parke-Davis, Pfizer, Smith Kline-Beecham, 1973-2006
- **Consultant of Hospital Quality and Documentation,** Leesburg Regional Medical Center, Leesburg, FL, 1995-2006
- **Consultant,** Health Care Consulting Associates (HCCA), Columbus Regional Hospital, Columbus, GA, 2001-2004
- **Consultant,** Health Care Consulting Associates (HCCA), Archbold Hospital, Thomasville, GA, 2002-2003
- **Consultant of Hospital Quality and Documentation,** Hospital Solutions Inc., Twin City Hospital, Denison, OH, 1996-1998
- **Consultant of Hospital Quality and Documentation,** Hospital Solutions Inc., St. Francis Medical Center, Lynwood, CA, 1995-1996
- **Consultant of Hospital Quality and Documentation,** Health Care Consulting Associates (HCCA), Health Central Hospital, Winter Garden, FL, 1995
- **Consultant of Hospital Quality and Documentation,** Leesburg Regional Medical Center, Leesburg, FL, 1991-1994
- **Consultant of Hospital Quality and Documentation,** Hospital Solutions Inc., Southlake Memorial Hospital, Clermont FL, 1991-1992

MEDICAL STAFF APPOINTMENTS

- **Active Staff,** Orlando Regional Healthcare System, 1973-Present
- **Active Staff,** Florida Hospital, Orlando, FL, 1998-2000
- **Courtesy Staff,** Winter Park Hospital, Winter Park, FL, 1990-1997

SOCIETIES

Florida Medical Association
Southern Medical Association
American College of Physicians
American Diabetes Association
Florida Society of Internal Medicine
Orange County Medical Society
The Endocrine Society
American Association Of Diabetes Educators
Florida Endocrine Society
American Association of Clinical Endocrinologist

AWARDS/OTHER

- **Certified Compliance Professional,** Healthcare Fraud & Compliance Institute, Rockville, MD, 2002
- **American Diabetes Association (ADA) Award,** 1999
- **Orlando Regional Medical Center Teaching Award,** 1979
- **Henry Strong Denison Scholar,** 1967-68
- **Daniel Baker Award,** 1967
- **National Foundation Achievement Award,** 1967

COMMUNITY ACTIVITIES

- **Associate Editor,** The Bio-Ethics Newsletter, 1983-1986
- **Associate Editor,** Journal of the Christian Medical Society, 1983-1987
- **Alternate Delegate,** Florida Medical Society, 1983-1985
- **Member of the Medical Advisory Board,** WKMG TV, Orlando, FL, 1984-1989
- **Chairman of Board of Elders,** Northland Community Church, Orlando, FL, 1976-1983; 1984-1987
- **Alternate Delegate,** Florida Medical Society, 1983-1985
- **Trustee,** Christian Medical Society, 1981-1984
- **President-Elect,** Christian Medical Society, 1985-1987
- **Research Director,** Humana Foundation, Orlando, FL, 1983-1987
- **Delegate,** Christian Medical Society, 1978-1981
- **Elder,** Northland Community Church, Orlando, FL, 1974-1983; 1984-1987
- **Deacon,** Gainesville Community Church, Gainesville, FL, 1971-1973

PUBLICATIONS

1. Mengel, M., Konigsmark, B.W., Berlin, C., and McKusick, V., Recessive Early Onset Neural Defenses. ACTA OTOL 63:313, 1967.
2. Mengel, M., Konigsmark, B.W., Berlin, C., and McKusick, V., Familial Deformed and Low-Set Ears and Conductive Hearing Loss: Probably a New Entity. (Abstract) The American Society of Human Genetics, p.18, 1967.
3. Konigsmark, B.W., Mengel, M., and Berlin, C., Dominant Low- Frequency Hearing Loss: Report of Three Families. (Abstract) The American Society of Human Genetics, p.77, 1967.
4. Mengel, M., Konigsmark, B.W., and McKusick, V., Conductive Hearing Loss and Malformed Low-Set Ears as a Possible Recessive Syndrome. J. Med. Gen. 6:14, 1969.
5. Mengel, M.C., Konigsmark, B.W., and McKusick, V., Two Types of Congenital Recessive Deafness. EENT Monthly, 48:301, 1969.
6. Konigsmark, B., Salman, S., Haskins, H., Mengel, M., Dominant Mid-Frequency Hearing Loss. 1969 Annals Otology, Rhinology, and Laryngology. 79:42, 1970.
7. Mengel, M.C. When Cytogenics Can Help You. (Abstract) Program 13th Annual Meeting, American College of Physicians, Air Force Region, and Society of Air Force Physicians, 5-7 Feb. 1970, San Antonio, TX. p.88.
8. Mengel, M.C. Hereditary Deafness in Amish Isolate. (Abstract) Program 13th Annual Meeting, American College of Physicians, Air Force Region, and Society of Air Force Physicians, 5-7 Feb. 1970, San Antonio, TX. p. 66.
9. Konigsmark, B., Mengel, M., Haskins, H. Familial Congenital Moderate Hearing Loss. H. Laryngol & Otol. 5:495, 1970.

10. Mengel, M.C., Lawrence, G. Hypopituitism in a Unique Setting. (Abstract) Program 14th Annual Meeting, American College of Physicians, Air Force Region, and Society of Air Force Physicians, 25-27 Feb. 1971, Biloxi, MS, p. 39.
11. Armer, J.A., Mengel, M.C. Case Report of a Possible Early Wilson's Disease.(Abstract) Program 14th Annual Meeting, American College of Physicians, Air Force Region, and Society of Air Force Physicians, 25-27 Feb. 1971, Biloxi, MS, p. 44
12. Mengel, M.C., Konigsmark, B.W. Hereditary Mid-Frequency Deafness. The Clinical Delineation of Birth Defects. Vol. VI, #9, Ear, Williams & Wilkins, 1971.
13. Mengel, M.C., Konigsmark, B.W. Two Genetically Distinct Types of Congenital Recessive Deafness, One Mennonite, One Amish. The Clinical Delineation of Birth Defects, Vol. VI, #9, Ear, Williams & Wilkins, 1971.
14. Mengel, M.C., Konigsmark, B.W. Hereditary Conductive Deafness and External Ear Deformity. The Clinical Delineation of Birth Defects, Vol. VI, #9, Ear, William & Wilkins, 1971.
15. Murdock, H.L., Mengel, M.C. An Unusual Eye-Ear Syndrome With Renal Abnormality. The Clinical Delineation of Birth Defects, Vol. VI, #9, Ear, Williams & Wilkins, 1971.
16. Mengel, M. C., Lawrence, G., Shultz, K., and Edgar, P. Osteogenesis Imperfecta and Panhypopituitarism. The Clinical Delineation of Birth Defects, Vol. VII, #10, The Endocrine System, William & Wilkins, 1971.
17. Lawrence, G., Thurste, C., Shulz, K., and Mengel, M.C. Acanthosis Nigricans, Tleangiectasia, and Diabetes Mellitus. The Clinical Delineation of Birth Defects. Vol. VII, #12, Skin, Hair and Nails, Williams & Wilkins, 1971.
18. Konigsmark, B., Mengel, M., Berlin, C. Familial Low-Frequency Neural Hearing Loss. Laryngoscope 81:759, 1971.
19. Mengel, M.C. Conductive Deafness - Low-Set Ears. Compendium of Birth Defects. The National Foundation, 1972.
20. Mengel, M.C., Moore, D.A. Manual of Cytogenetics, Aug. 1971. Printed by USAF.
21. Knizley, H., Mengel, M.C. Anti-Inflammatory Steroids - A Review. J. Florida Medical Association, 60:30, 1973.
22. Fisher, W.R., Hammond, M.G., Mengel, M.C., and Warmke, G.L. A Possible Genetic Determinant for the Molecular Weight of Low-Density Lipoprotein. (Abstract) AFCR Meeting, May 1975.
23. Fisher, W.R., Hammond, M.G., Mengel, M.C., Warmke, G.L. A Genetic Determinant of the Phenotypic Variance of the Molecular Weight of Low Density Lipoprotein. Proc. Nat. Acad. Sci., USA, 72:2347, June 1975.
24. Hammond, M.G., Mengel, M.C., Warmke, G.L., Fisher, W.R. Macromolecular Dispersion of Human Plasma Low Density Lipoproteins in Hyperlipoproteinemia. Metabolism, 26:1231, Nov. 1977.
25. Mengel, M.C. Update - Case Reports. Compendium of Birth Defects. The National Foundation, 1981.
26. Easton, P., Mengel, M., Crockett, S., and Ammon, L. Glycemic Control and Weight Change with Food Choice Plan. Orlando, FL, 1984. (Abstract)
27. Book Review - When Bad Things Happen to Good People. Journal of the Christian Medical Society. Spring 1984.
28. Easton, P., Mengel, M., Ammon, L. Evaluation of a Food Contract System. To the American Diabetes Association Program Poster, 1985.
29. Easton, P., Mengel, M., Higgins, C., Ammon, L. Format and Content Requests for Nutrition. American Diabetes Association Poster, 1985.
30. Easton, P., Mengel, M., Higgins, C., Ammon, l. Patient Chosen Diabetic Diet. XII Congress of the IDF, Madrid, Spain, 1985.

31. Raymond, M., Mengel, M. The Human Side of Diabetes, published locally - Humana Foundation, 1985.
32. Easton, P., Higgins, C., Mengel, M., Ammon, L. Nutrition in the Care of People with Diabetes, published 1986 - Humana Foundation.
33. Pryor, B., Mengel, M. Communication Strategies for Improving Diabetes Self-Care, Journal of Communications, 37(4), p.24.
34. Goodman, J., Mengel, M. Humor Workbook for Physicians, published 1987 - Humana Foundation.
35. Mengel, M. Humor in the Outpatient Setting, (Abstract), Proceedings of the World Humor in Medicine, Conference - 1987.
36. Eaton, W., Mengel, M., Mengel, L., Larson, D., Campbell, R., Montaque, R. Psychosocial and Psychopathologic Influences on Management and Control of Insulin Dependent Diabetes, International Journal of Psychiatry & Medicine. 1992. Vol. 22, No. 2, p. 105.
37. Montague, R., Eaton, W., Mengel, M., Mengel, L., Campbell, R., Larson, D. Depressive Symptomatology in an IDDM Treatment Population, submitted to Journal of Clinical Epidemiology, 1991.
38. Easton, P., Higgins, C., Mengel, M., Ammon, L. Nutrition in the Care of People with Diabetes. Hayworth Press - Food Products Division, 1991.
39. Birth Defects Encyclopedia, Mary Louise Buyse, M.D., Editor in Chief, Center for Birth Defects Information Services, Inc., 1990, p.503, "Deafness - Malformed Low set Ears".
40. "I paid a Bribe to Get the IRS Off My Back". Medical Economics, September 17, 1992, p.62, Vol.69, No. 17.
41. Letter to the Editor - Doctors & Designers Magazine. Vol. 1, No.1, p.15, 1992.
42. Guest Editorial, The Diabetes Educator, May/June 1993, Vol.19, No.3, p.175.
43. Chapters in: The Human Side of Diabetes, Mike Raymond - the Noble Press - A Physicians Response to "Waiting for a Cure" p.116. Accepting Diabetes, The Bottom Line. Pg.133. The Physicians response to, "Appointments- Why every 3 months?" pg.289
44. Enalapril slows the Progression of Renal Disease in Non-Insulin Dependent Diabetes Mellitus (NIDDM): Results of a 3 Year Multi-Center, Randomized, Prospective, Double Blinded Study. H-Lebovitz, A-Cnaan, T. Wiegmann, V. Broadstone, S. Schwartze, D. Sica, M. Mengel, J. Versaggi, S. Shahinfar, W.K. Bolton. American Society of Nephrology, November 15-18, 1992.
45. "Insulin Therapy in 1993," "The Pulse" Orlando Regional Healthcare System, Orlando, FL February 3, 1993
46. "Diabetes, A Dramatic Break Through and its Legal Implications". "The Pulse," Orlando Regional Medical Center, Aug. 1993.
47. Lebovitz HE, Wiegmann TB, Cnaan A, Shaninfar S, Sica DA, Broadstone V, Schwartz SL, Mengel MC, Segal R, Versaggi JA, et al, "Renal Protective Effect of Enalapril in Hypertensive NIDDM: role of baseline albuminuria," Kidney Int Suppl 1994 Feb; 45:S150-5
48. Montague, R.B., Eaton, W.W., Mengel, W., Mengel, L., Larson, D., Campbell, R., "Depressive Symptoms in the Role of Disease Complications in Insulin Dependent Diabetes," International Journal of Psychiatry and Medicine, 1995.
49. Eaton, William, Mengel, M, Mengel, L, Larson, D, Campbell, R, and Montague, R, Psychosocial and Psychopathologic Influences on Management and Control Insulin-Dependent Diabetes The International Journal of Psychiatry in Medicine Vol. 22, #2
50. Gentzkow, G., Iwasaki, S., Hershon, K., Mengel, M., Prendergass, J.J., Ricotta, J., Steed, DP, Lipkin, S. "Use of dermagraft, a cultured human dermis, to treat diabetic foot ulcers." Diabetes Care 1996 Apr; 19(4):350-4
51. Moore, K. and Mengel, M. The use of Volunteers in a Diabetes Management Program, Abstract American Association of Diabetes Educators National Meeting Aug. 2001.

52. Mengel, M., Moore, K. A New cost effective model for Chronic Disease Management [in preparation 2002]
53. Mengel, M. and Moore, K. The use of enticements as a motivational strategy in type 2 diabetes [in preparation 2002]
54. Mengel, M. and Cox, Deborah Accuracy in Documentation and Coding, Privately printed at The University of Mississippi-Feb 2002
55. Moore, K. and Mengel, M. Volunteerism in a Diabetes Management Program, The Diabetes Educator July-Aug 2002
56. Mengel, M Accuracy in Documentation and Coding
57. Updates printed yearly for The university of Mississippi Medical Center
58. "How to Choose a Physician," Patient Handbook, *in process*

RESEARCH ACTIVITIES

1. Nutrition for the Person with Diabetes, with Penelope Easton, Ph.D.
2. Islet Cell Antibodies, Noel MacLaren, M.D. and William Riley, M.D., University of Florida.
3. HLA Antibodies, Noel MacLaren, M.D. and William Riley, M.D., University of Florida.
4. Computer - Assisted Education Program, with Michael Raymond, Ph.D., Stetson University.
5. Insulin Delivery. Peritoneal Access Device, Robert Stephen, M.D., University of Utah.
6. Evaluation of Subcutaneous Oxygen Monitor for Evaluation of Blood Flow.
7. Motivation and Persuasive Techniques for Improved Compliance, Burt Pryor, Ph.D., University of Central Florida.
8. Food Choice Plan. Effect of Patient Selected Choice of Blood Glucose. with Penelope Easton, Ph.D.
9. Psychological Motivation in Adolescent with Diabetes. with Humana Hospital, Orlando, FL 1986-1987.
10. McNeil Laboratories on Linoglyride, Evaluation with McNeil Pharmaceutical.
11. The Positive Power of Humor, with Joel Goodman, Ph.D.
12. Complications of Diabetes. Population Study of Patients with Type I and Type II Diabetes, Diabetes Treatment Centers of America.
13. Psychological Aspects of Diabetes, with William Eaton, Ph.D. and Dave Larson, M.D.
14. Use of Epidermal Growth Factor in Diabetic Foot Ulcers, Ethicon, Inc. Motivation Study. Type II Diabetes in the Outpatient Setting, Diabetes Treatment Centers of America.
15. A Multi-Clinic Double-Blind Study to Compare the Safety and Efficacy of Lovastatin and Probucal in Patients with non-Insulin Dependent Diabetes Mellitus, Sponsored by Merck, Sharp & Dohme.
16. A Long-Term, Multi-Center, Glycemic control Study in Out-Patients with Insulin Dependent (Non-Insulin Dependent Type II) Diabetes Mellitus a Randomized Double-Blind, Safety and Efficacy Comparison of PKG-A, PKG-B versus Tolbutamide. Sponsored by Pharmakinetics Laboratories, Inc.
17. Comparison of Direct 30/30 to Beckman Analyzer and Home Glucose Monitoring Apparatus, Sponsored by CPI.
18. Evaluation of Dial a Dose Novopen, 1988, Sponsored by Squibb Novo Pharmaceuticals.
19. A Multi-Center Double-Blind, Randomized, Placebo-Controlled, Parallel Clinical Study to Determine the Dose-Response Relationship of Diltiazem Extend (ER) in Patients with Mild to Moderate Hypertension, 1989 to present, Sponsored by Merck, Sharp & Dohme Pharmaceuticals.

20. A Multi-Center, Double-Blind, Randomized, Parallel Controlled Study of the Efficacy Safety and Tolerability of Enalapril Compared With Placebo on the Progression of Renal Insufficiency in Diabetic Nephropathy, Sponsored by Merck, Sharp and Dohme.
21. The Effect of Glipizide in Preventing the Development of Non-Insulin Dependent Diabetes Mellitus in Patients with Impaired Glucose Tolerance, Sponsored by Pfizer.
22. Randomized Comparative Evaluation of Low-Dose Glyburide versus Glipizide in the Treatment of Elderly Patients with Non-Insulin Dependent Mellitus, 1990 to 1995, Sponsored by Hoechst-Roussel Pharmaceuticals, Inc.

EDUCATIONAL PRESENTATIONS

Physician and Nurse Groups, Central Florida

- Quality and Patient Outcomes Series
    - Diabetes in The Acute Hospital
    - Utilization: What is an inpatient?
    - Compliance: Medicare rules
    - Communication with Patients
    - Endocrine Emergencies
    - Managing Chronic Medical Problems: diabetes, Hyperlipidemia, etc.
    - Levels of Care
- Communicating with Physicians

Physician and Nurse Groups, Lake County, FL

- "Heart to Heart," Conference
    - Diabetes and Heart Disease
    - Acute and Chronic Diabetes Complications

Physician Groups, University of Mississippi, Jackson and Grenada, MS, 1989-2016

- The Changing Face of Medicine
- The Skills needed for practice survival
- Documentation: ICD10, Utilization, and Medical Coding
- Documentation and Quality of Care

Marvin Mengel MD

486 Valley Stream Drive
Geneva, Florida 32732

Phone 407-349-9993
Fax 407-349-2705

Fee Schedule
Record Review $350.00 per hour
Attorney Conference $350.00 per hour

Deposition $500.00 per hour (in advance) 2 hour minimum

Trial Testimony----
½ day minimum $3000.00
Full day $5,000.00

Court appearances and depositions- 2017 and later

In the Circuit Court of the 10th judicial circuit of Florida, in and for Polk County

case number 2018 – CA – 001523

Thomas Darby plaintiff versus summitwood works, LLC

provided deposition in Polk County, Florida

November7, 2019

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

AUBREY SMITH and
VERMELLE SMITH, his wife,

Plaintiffs, **CASE NO.: 3:17-cv-806-J-39JBT**

v.

UNITED STATES OF AMERICA,

Defendant.
_____/

Deposition date 2018-

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MOHAVE

MARIA GARCIA, mother of Jesus Garcia; and NATALIE GARCIA SOLIS, natural daughter of Jesus Garcia, by and through YADIRA SOLIS,

Plaintiffs,

v.

BULLHEAD CITY HOSPITAL CORPORATION, an Arizona corporation doing business in Mohave County, Arizona as WESTERN ARIZONA REGIONAL MEDICAL CENTER, a hospital;

Case No. CV 2015-00070

NOTICE OF DEPOSITION OF MARVIN MENGEL, M.D.

Deposition 5/22/18-

KENWORTH OF CENTRAL FLORIDA, INC., a Florida corporation,

Plaintiff,

v.

D.G. O'BRIAN, INC., a Florida corporation; and JUERGEN R. MOTZ, an individual,

Case No.: 2014-CA-6180- 2015

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

Deposition ?2017

In the Superior Court of the State of Arizona in and for the county of Maricopa

Case No.: CV2018-051993

Florence Dileo and Michael Dileo, a married couple,

Plaintiffs'

V

Echo Canyon Healthcare, Inc, A Nevada Corporation

d/b/a/ Heritage court Post Acute of Scottsdale; et al

Defendants

Deposition. August 2021

NO. 2009-01063
DfVISION C-10

CfVCL DISTRICT COURT PARISH OF ORLEANS STATE OF LOUISIANA
ARTHUR EDMONDJOHNSON
VERSUS
OCHSNER CLINIC FOUNDATION, DR. WCLLIAM C. COLEMAN, AND DR. AL VA ROCHE-GREEN

Deposition August 2021

EXHIBIT B

Electronically Filed
09/29/2021 3:33 PM
CLERK OF THE COURT

SOED

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Attorneys for Dana Forte, D.O., Ltd dba Forte Family Practice and Joseph Earfrate, PA-C

DISTRICT COURT
CLARK COUNTY, NEVADA

CESAR HOSTIA, an individual, Plaintiff, vs. DANA FORTE, D.O., LTD., a Nevada limited company dba FORTE FAMILY PRACTICE; SANDEEP VIJAY, M.D.; JOSEPH EAFRATE, PA-C; ROE DEFENDANT, et al., Defendants.	CASE NO. A-18-783435-C DEPT. NO. 3 **STIPULATION AND ORDER TO EXTEND DISCOVERY DEADLINES AND CONTINUE TRIAL (FIFTH REQUEST)**

Pursuant to EDCR. 2.35, IT IS HEREBY STIPULATED AND AGREED by and between Plaintiff, CESAR HOSTIA, Defendants DANA FORTE, D.O. LTD., a Nevada limited company dba FORTE FAMILY PRACTICE and JOSEPH EAFRATE, PA-C, by and through their respective counsel of record as follows:

I. FACTS AND PROCEDURAL HISTORY

This medical malpractice action arose from the alleged care Defendants provided to Plaintiff with respect to Plaintiff's complaints of right ear pain and headaches. According to Plaintiff's

Complaint, on October 27, 2017, Plaintiff presented to Defendants for the purpose of medical treatment. Plaintiff alleged Defendants breached the standard of care in the prescription of antibiotics.

II. DISCOVERY COMPLETED TO DATE

1. Written discovery.
2. Deposition of plaintiff.

III. DISCOVERY THAT REMAINS TO BE COMPLETED

1. Treating physician and percipient witness depositions.
2. Depositions of defendants.
3. Disclosure and depositions of expert witnesses.

IV. REASONS DISCOVERY HAS NOT BEEN COMPLETED

Counsel for all parties are working together to complete discovery in an efficient manner, but agree that all necessary discovery will not be completed by the current deadline for close of discovery. The parties inability to complete discovery in the current timeframe is due in part to the COVID-19 pandemic and the associated difficulties in taking in person depositions. Additionally, the parties have been attempting to resolve the matter without the need for trial and expenditure of additional resources which may limit the ability to effectively resolve the matter.

There is no prejudice created by moving the discovery dates and it will allow the parties an opportunity to resolve the matter without the need to take expert depositions to limit expenditures by both parties. Moreover, the parties are hopeful that a mandatory settlement conference conducted by the Court will prove fruitful in resolving the pending issues between the parties.

V. PROPOSED SCHEDULE FOR COMPLETING ALL REMAINING DISCOVERY

DEADLINE	**CURRENT DATE**	**PROPOSED DATE**
Deadline to Amend	September 28. 2021	**December 31, 2021**
Initial Expert Disclosure	September 28, 2021	**December 31, 2021**
Rebuttal Expert Disclosure	October 28, 2021	**January 31, 2022**
Discovery Cutoff	December 31, 2021	**April 29, 2022**

Dispositive Motions	January 31, 2021	**May 31, 2022**

VI. CURRENT TRIAL DATE

Trial is currently set for March 14, 2022. The parties respectfully request that the current trial date be vacated and that a trial date set for sometime in the future beyond the May 31, 2022 deadline for submission of dispositive motions.

VII. CONCLUSION

Pursuant to EDCR 2.35, and for good cause shown, the parties respectfully request that the Court enter this Stipulation and Order extending the discovery deadlines.

IT IS SO STIPULATED.

Dated: September 28, 2021

LEWIS BRISBOIS BISGAARD & SMITH LLP

/s/ Adam Garth
S. Brent Vogel, Esq.
Nevada Bar No. 6858
Adam Garth, Esq.
Nevada Bar No. 15045
6385 South Rainbow Blvd., Suite 600
Las Vegas, Nevada 89118
Attorneys for Dana Forte, D.O., Ltd dba Forte Family Practice and Joseph Earfrate, PA-C

Dated: September 28, 2021

ANDERSEN & BROYLES LLP

/s/ Karl Anderson
KARL ANDERSEN, ESQ.
Nevada Bar No. 10306
5550 Painted Mirage Road, suite 320
Las Vegas, Nevada 89149
Attorneys for Plaintiff

ORDER

IT IS HEREBY ORDERED that, upon stipulation of counsel and good cause appearing therefore, the extension is hereby GRANTED.

The discovery deadlines shall be amended as follows:

1. Final Date to Amend Pleadings or Add Parties	December 31, 2021;
2. Initial Expert Disclosure	December 31, 2021;
3. Rebuttal Expert Disclosure	January 31, 2022;
4. Close of Discovery	April 29, 2022;
5. Dispositive Motion Deadline	May 31, 2022, and

IT IS HEREBY ORDERED that the trial of this matter currently set for March 14, 2022 is hereby vacated, and a subsequent order of this Court containing a new trial date and associated dates attendant thereto shall issue taking into account the new deadlines ordered above.

IT IS SO ORDERED.

Dated this 29th day of September, 2021

DISTRICT COURT JUDGE

E59 D43 E4E2 1D30
Monica Trujillo
District Court Judge

Respectfully Submitted By:

LEWIS BRISBOIS BISGAARD & SMITH LLP

/s/ Adam Garth

S. Brent Vogel, Esq.
Nevada Bar No. 6858
Adam Garth, Esq.
Nevada Bar No. 15045
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Attorneys for Dana Forte, D.O., Ltd dba
Forte Family Practice and Joseph Earfrate, PA-C

Rokni, Roya

From: Karl Andersen, Esq. <karl@andersenbroyles.com>
Sent: Tuesday, September 28, 2021 1:19 PM
To: Garth, Adam
Cc: Vogel, Brent; Rokni, Roya; Atkinson, Arielle; Sirsy, Shady; sean@andersenbroyles.com
Subject: [EXT] RE: Hostia - SAO Extend Discovery (5th Request) 4818-8587-3915 v.1

Stip Looks good to me. You can submit with my e-signature.

Karl

Karl Andersen, Esq.
ANDERSEN & BROYLES, LLP
A Limited Liability Partnership Including Professional Corporations
Attorneys and Counselors at Law
Reno and Las Vegas

5550 Painted Mirage Road, Suite 320
Las Vegas, Nevada 89149
702-220-4529
Fax: 702-834-4529
Email: Karl@AndersenBroyles.com

From: Garth, Adam
Sent: Tuesday, September 28, 2021 1:01 PM
To: Karl Andersen, Esq. <karl@andersenbroyles.com>
Cc: Vogel, Brent <Brent.Vogel@lewisbrisbois.com>; Rokni, Roya <Roya.Rokni@lewisbrisbois.com>; Atkinson, Arielle <Arielle.Atkinson@lewisbrisbois.com>; Sirsy, Shady <Shady.Sirsy@lewisbrisbois.com>; sean@andersenbroyles.com
Subject: Hostia - SAO Extend Discovery (5th Request) 4818-8587-3915 v.1
Importance: High

Karl,

Per our discussion yesterday evening, I revised the proposed stipulation with the dates we discussed. Please indicated whether you approve and whether we have your consent to use your e-signature on submission.

Adam

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Partner
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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Cesar Hostia, Plaintiff(s) vs. Dana Forte D.O., LTD., Defendant(s)	CASE NO: A-18-783435-C DEPT. NO. Department 3

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Stipulation and Order to Extend Discovery Deadlines was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 9/29/2021

S. Vogel	brent.vogel@lewisbrisbois.com
SZD Calendaring Department	calendar@szs.com
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Deborah Rocha	deborah.rocha@cdiglaw.com

EXHIBIT C

REPL

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Attorney for Plaintiff

EIGHTH JUDIICAL DISTRICT COURT
CLARK COUNTY, NEVADA

CESAR HOSTIA, an individual, Plaintiff, vs. DANA FORTE, D.O. LTD, a Nevada Limited Company dba FORTE FAMILY PRACTICE; SANDEEP VIJAY, MD, an individual, JOSEPH EAFRATE, PA-C; DOE INDIVIDUALS 1-5; and ROE BUSINESS ENTITIES 1-5, inclusive, Defendants.	Case No. A-18-783435-C Dept. No. 3 **REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO EXTEND DEADLINE FOR INITIAL EXPERT DISCLOSURES**

Plaintiff, Cesar Hostia, through counsel, Karl Andersen, Esq., hereby replies to the Opposition filed by the Defendants to his MOTION TO EXTEND DEADLINE FOR INITIAL EXPERT DISCLOSURES. This Reply is made in good faith and based on EDCR 2.35.

Dated this 3rd day of February, 2022.

ANDERSEN & BROYLES, LLP

/s/ Karl Andersen, Esq.
Karl Andersen, Esq.
5550 Painted Mirage Road, Suite 320
Las Vegas, Nevada 89149
Attorney for Plaintiff

REBUTTAL ARGUMWENT

1. Defendants' counsel fails to mention key facts.

It wasn't until the eve of the drop-dead date for the disclosure of experts that Plaintiff's counsel understood he would not be able to comply with the Court's scheduling order. Until December 30, 2021, Plaintiff's counsel believed the expert would provide his expert report and that this report would be disclosed timely.

It was on December 30, 2021 that Plaintiff's counsel reached out to Defendants' counsel, advising of the anticipated inability to provide Plaintiff's expert disclosures by the end of the following day and the parties discussed whether a stipulation could be reached to enlarge the Court's December 31, 2020 deadline.

Defendants' counsel was clear that he was not willing to stipulate, even though it was made clear to him that the report was immediately forthcoming but most likely not in time to meet the Court's deadline.

Ultimately, the expert report was received on January 12, 2022 and was disclosed the next day.

2. Defendants' counsel fails to establish any prejudice.

A key issue in any request to enlarge time is whether such an enlargement would operate to the prejudice of the Defendants. It cannot be disputed Defendants were served Plaintiff's expert disclosures on January 13, 2022, the day before Defendants filed the instant Opposition.

/ / /

Despite having Plaintiff's expert report in hand, and despite basing their entire Opposition on the "prejudice" that has resulted by virtue of the January 13, 2021 disclosure, Defendants have failed to enunciate any prejudice. If Defendants really believed Plaintiff's expert report was prejudicial since it was produced after they produced their expert report, then what exactly constitutes the prejudice?

And, even assuming Plaintiff's expert did in fact possess Defendants' expert report before providing his own (which is not the case as Plaintiff's counsel did not forward the report to his expert until after Dr. Levin provided his final report -- a promise made in the late December discussions to which Defendants' counsel tersely replied "I don't trust you."), there is nothing irregular or *per se* prejudicial where one party provides its expert report prior to the opposing party providing its own. It is entirely common and regular practice for an expert to amend its expert report after receipt of the opposing party's expert's report.

Defendants' argument regarding prejudice is nonsensical. Aside from the obvious deficiency in not specifically pointed to language in Plaintiff's expert's report that is "prejudicial," Defendant argues that somehow Plaintiff's expert report would not have been prejudicial if it had been produced by the December 31, 2021 deadline. This does not make any sense as it is clear Plaintiff possessed Defendants' expert report on December 29, 2021 at 11:07 am, which provided for nearly three (3) whole days prior to the disclose deadline wherein Plaintiff's expert could have (1) reviewed Defendants' expert report; and, (2) made changes to his own report which would have constituted a type and kind of rebuttal. And, in any event, the

Court's scheduling order allows for rebuttal expert reports which belies Defendant's rhetoric regarding their production of their expert report on December 29, 2021.

What Defendants are arguing is not supported by the Rules. There is no requirement in the Rules that the parties exchange expert reports at the very same time and there is no prohibition in the Rules to one party providing the other party's expert report to its own expert prior to the expert disclosure deadline.

3. EDCR 2.35 is based on the "discovery cut-off date," not the individual deadlines for elements of discovery.

EDCR 2.35 explicitly provides that any motion to extend any date set by the discovery order must be in writing and -- if filed more than 21 days prior to the "discovery cut-off date" -- be supported by a showing of good cause.

The "discovery cut-off date" in this civil action is set by the Court as April 29, 2022. *See* Stipulation filed herein on 09/29/2021.

The instant motion was filed well ahead of 21 days before the "discovery cut-off date;" thus, Plaintiff's burden is to ask for the enlargement based on "good cause," not the heightened standard of "excusable neglect."

In this matter, given the cooperative efforts of the parties to date to explore settlement, JAMS arbitration and to conduct discovery, good cause exists for a twelve (12) day extension to the expert disclosure deadline.

4. The conduct of the parties in discovery, in any event, satisfies even "excusable neglect."

The Nevada Supreme Court recently addressed the issue of "excusable neglect" in the context of EDCR 2.35, holding that where discovery is not diligently pursued it is not an abuse

of the district court's discretion to deny an EDCR 2.35 motion to enlarge. *Premier One Holdings, Inc. v. Newmyer*, No. 80211 (Nev. Supreme Court 2021).

In this case, Plaintiff has been diligent in pursuing discovery. Timely 16.1 disclosures have been made by both parties, written discovery has been propounded by both parties (Requests for Admissions, Interrogatories and Requests for Production of Documents), timely responses have been provided by both parties and the deposition of the Plaintiff was noticed and conducted without any delay (the parties even cooperated in an effort to have JAMS arbitration).

Plaintiff has explained to the Court and to opposing counsel the delays faced in locating an expert and in providing the expert relevant records to be reviewed in conjunction with the preparation of the expert report. Plaintiff has explained the records from Healthcare for Vibrant Living were received in late December and -- given the holidays -- it did not appear the expert would be able to review these additional records and have his final initial report submitted by the disclosure deadline.

Defendant's Opposition is silent regarding all the cooperative and timely efforts made by the parties in the discovery process prior to the expert disclosure deadline. And, rather than address how the Nevada Supreme Court has framed the issue of "excusable neglect" with regard to EDCR 2.35, Defendants cite to Black's Law Dictionary, which is not controlling given the High Court's discussion of "excusable neglect" and EDCR 2.35 in *Premier One Holdings*.

/ / /

5. The authority cited by Defendants is not controlling.

In a legal maneuver not ever previously confronted by Plaintiff's counsel in any previous civil action, Defendants have cited a CLE course as authority in support of their Opposition. Despite the fact that Ms. Bonnie Bulla was once the Discovery Commissioner, any opinions forwarded by Ms. Bulla in her CLE materials are nothing more than opinion.

The CLE citation relied upon by Defendants fails to account for what 2.35 actually provides; specifically, that a motion to enlarge a discovery deadline can be filed on shorter time but that such a motion filed within 20 days of the subject discovery deadline must be accompanied by a showing of excusable neglect.

6. "Danger of prejudice" is not a legal standard applicable to an EDCR 2.35 motion.

Defendant did not explain to the Court how the EDCR 2.35 motion or the production of the expert report within 12 days of the Court's expert disclosure deadline created "prejudice;" rather, Defendants argue some type of nebulous "danger of prejudice" resulting from the motion and the January 12, 2022 expert disclosures.

The Nevada appellate Courts have not addressed "danger of prejudice" in the context of an EDCR 2.35 motion. It is an irresponsible argument to attempt to create a legal standard that does not appear in Nevada jurisprudence. While "danger of prejudice" is an issue in evidentiary and tolling matters, no Nevada appellate court has ever stated this is an appropriate issue to address when an EDCR 2.35 motion is under consideration by the district court.

7. Defendants fail to disclose to the Court that JAMS was simply too expensive.

Rather than be forthright with the Court and limit its Opposition to the reality of the parties' interactions, Defendants base their Opposition on dishonest argument regarding the parties' efforts to arbitrate this civil matter.

The fact is simple: The parties did not move ahead with arbitration with JAMS because it was much more expensive than what was anticipated. Initially, Defendants' counsel suggested Defendants would cover the costs of arbitration; however, Defendants' counsel changed his mind and the arbitration did not move forward. Plaintiff simply does not have the Defendants' "deep pockets" and could not afford to share the cost of JAMS arbitration.

8. Defendants' counsel is not forthright regarding his efforts to obtain previous extensions.

It was the Defendants who initiated the last extension of time. That is why the Stipulation was drafted by Defendants. *See* Stipulation and Order filed on 9-29-21. Defendants, apparently, do not subscribe to the idea that "what's good for the goose is good for the gander."

In equity, and as Plaintiff has been cooperative with Defendants previous request to enlarge the discovery schedules (which demonstrates "good cause" for the instant request for enlargement), the Court should take judicial notice of the previous enlargement.

This extension was based on the proposition that settlement could be reached, and Plaintiff essentially invested in settlement and placed his expert on the back-burner in September.

/ / /

/ / /

/ / /

9. Plaintiff's expert was retained in September and Plaintiff's counsel believed the expert's report would be available for timely disclosure by December 31, 2021.

Dr. Levin was retained in September 2021 and reviewed initial documents at that time. Due to ongoing settlement negotiations, Plaintiff did not press for the expert's report while the parties first set up arbitration with JAMS; then JAMS got cancelled. Thereafter, the parties discussed settlement outside of mediation. When settlement discussions came to an impasse, Plaintiff's counsel believed that Dr. Levin's report would be made available timely. Prior to obtaining a final report, Plaintiff informed his counsel that additional medical records may be available, and Plaintiff's counsel requested those records with the hopes that Dr. Levin would review those records before finalizing his report. As stated in the underlying Motion, Plaintiff's counsel received those records on December 27th. Notwithstanding, Plaintiff still believed that a final report would be forthcoming by the due date until December 30th. Unfortunately, waiting for the records coupled with the fact that the report was due between Christmas and New Year's, Dr. Levin was not able to finish his report by December 31st. Accordingly, and consistent with the Rules, an appropriate motion was filed to enlarge time for expert disclosures.

Based on the foregoing, Plaintiff requests a two-week extension of the Initial Disclosures and Rebuttal Disclosures as stated in the underlying Motion.

Dated this 3rd day of February, 2021.

ANDERSEN & BROYLES, LLP

/s/ Karl Andersen, Esq._____
Karl Andersen, Esq.
5550 Painted Mirage Road, Suite 320
Las Vegas, Nevada 89145
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of February, 2022 I served a true and correct copy of the foregoing **Reply to Opposition to Motion to Extend Deadline for Initial Expert Disclosures** via the Court's e-filing portal to all parties of record, including:

S. Brent Vogel, Esq.
brent.vogel@lewisbrisbois.com
Adam Garth, Esq.
adam.garth@lewisbrisbois.com
6385 S. Rainbow Blvd., Suite 600
Attorneys for Dana Forte, D.O., Ltd.
dba Forte Family Practice

/s/ Karl Andersen
Representative of Andersen & Broyles, LLP

EXHIBIT D

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Attorneys for Dana Forte, D.O., Ltd., d/b/a Forte Family Practice

DISTRICT COURT

CLARK COUNTY, NEVADA

CESAR HOSTIA, an individual, Plaintiff, vs. DANA FORTE, D.O., LTD., a Nevada limited company dba FORTE FAMILY PRACTICE; BANDEEP VIJAY, MD, an individual; JOSEPH EAFRATE, PA-C, an individual; ROE DEFENDANT business entities 1-10; and DOE DEFENDANT individuals 1-10,, Defendants.	Case No. A-18-783435-C Dept. No.: 3 **NOTICE OF ENTRY OF ORDER**

PLEASE TAKE NOTICE that the Order Granting Motion to Extend Deadline for Initial Expert Disclosures was entered on February 17, 2022, a true and correct copy of which is attached hereto.

DATED this 17th day of February, 2022

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ *Adam Garth*
S. BRENT VOGEL
Nevada Bar No. 006858
ADAM GARTH
Nevada Bar No. 15045
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Tel. 702.893.3383
Attorneys for Dana Forte, D.O., Ltd., d/b/a Forte Family Practice

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of February, 2022, a true and correct copy of **NOTICE OF ENTRY OF ORDER** was served by electronically filing with the Clerk of the Court using the Odyssey E-File & Serve system and serving all parties with an email-address on record, who have agreed to receive electronic service in this action.

Karl Andersen, Esq. ANDERSEN & BROYLES, LLP 5550 Painted Mirage Road, Suite 320 Las Vegas, NV 89149 Tel: 702.220.4529 Fax: 702.834.4529 karl@andersenbroyles.com *Counsel for Plaintiff*	

By /s/ *Heidi Brown*
An Employee of
LEWIS BRISBOIS BISGAARD & SMITH LLP

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EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

CESAR HOSTIA, an individual, Plaintiff, vs. DANA FORTE, D.O. LTD, a Nevada Limited Company dba FORTE FAMILY PRACTICE; SANDEEP VIJAY, MD, an individual, JOSEPH EAFRATE, PA-C; DOE INDIVIDUALS 1-5; and ROE BUSINESS ENTITIES 1-5, inclusive, Defendants.	Case No. A-18-783435-C Dept. No. 3 **ORDER GRANTING MOTION TO EXTEND DEADLINE FOR INITIAL EXPERT DISCLOSURES**

THIS MATTER, having come before the Court on the Court's chamber calendar on February 10, 2022, on Plaintiff's MOTION TO EXTEND DEADLINE FOR INTIAL EXPERT DISCLOSURES (the "Motion"), and the Court having considered the papers and pleadings on file herein, and good cause appearing, therefor:

THE COURT HEREBY FINDS, pursuant to EDCR 2.35, that good cause exists to extend the deadline for initial expert disclosure by two weeks as well as the rebuttal expert deadline by two weeks.

WHEREFORE, IT IS HEREBY ORDERED that the deadline for initial expert disclosure is enlarged by two weeks from the date of the Court's in chambers consideration of the Motion, or until February 24, 2022; and, that the rebuttal expert deadline is enlarged until two weeks later, March 10, 2022.

The Court confirms all other discovery deadlines are to remain the same.

Counsel for Plaintiff shall prepare the order and show it to opposing counsel.

Dated: _____

Dated this 17th day of February, 2022

J. Charles Thompson

F1B F3F E85D E080
J. Charles Thompson
District Court Judge

Submitted by:

ANDERSEN & BROYLES, LLP

/s/ Karl Andersen, Esq.
Karl Andersen, Esq.
5550 Painted Mirage Road, Suite 320
Las Vegas, Nevada 89149
Attorney for Plaintiff

Approved:

LEWIS BRISBOIS BISGAARD & SMITH

/s/ Adam Garth, Esq.
Adam Garth, Esq.
6385 South Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Attorneys for Defendants

From:	Garth, Adam
To:	michael@andersenbroyles.com
Cc:	"Karl Andersen, Esq."
Subject:	RE: [EXT] Order Enlarging Time to Disclose Initial and Rebuttal Experts
Date:	Wednesday, February 16, 2022 7:40:13 AM
Attachments:	Logo_e6253148-26a1-47a9-b861-6ac0ff0bc3c4.png

You may use my e-signature on the proposed order.

Adam Garth
Partner
Adam.Garth@lewisbrisbois.com

T: 702.693.4335 F: 702.366.9563

6385 South Rainbow Blvd., Suite 600, Las Vegas, NV 89118 | LewisBrisbois.com

From: michael@andersenbroyles.com <michael@andersenbroyles.com>
Sent: Tuesday, February 15, 2022 3:34 PM
To: Garth, Adam <Adam.Garth@lewisbrisbois.com>
Cc: 'Karl Andersen, Esq.' <karl@andersenbroyles.com>
Subject: [EXT] Order Enlarging Time to Disclose Initial and Rebuttal Experts

Adam,

Although the Court directed this office to merely show you the order, I have attached a version for your electronic signature.

The version submitted will not have the Court's minutes attached.

Please advise whether you will sign off, giving this office your permission to affix your electronic signature.

If you are not agreeable, this office will submit, noting the order was shown but not signed.

The attached order comports with the email sent to you from the Department.

With regards,

Michael

DISTRICT COURT
CLARK COUNTY, NEVADA

Malpractice - Medical/Dental	**COURT MINUTES**	**February 10, 2022**

A-18-783435-C Cesar Hostia, Plaintiff(s)
vs.
Dana Forte D.O., LTD., Defendant(s)

February 10, 2022 **3:00 AM** **Motion**

HEARD BY: Bixler, James **COURTROOM:** Chambers

COURT CLERK: Grecia Snow

PARTIES PRESENT:

JOURNAL ENTRIES

- Plaintiff s Motion to Extend Deadline for Initial Expert Disclosures (Sixth Request) came before the Court on the February 10, 2022 Chamber Calendar. Having reviewed the Motion, the Opposition, and Reply, the Court FINDS that, pursuant to EDCR 2.35, good causes exists to extend the deadline for initial expert disclosure by two weeks as well as the rebuttal expert deadline by two weeks. All other discovery deadlines are to remain the same. Therefore, Plaintiff s Motion to Extend Deadline for Initial Expert Disclosures (Sixth Request) is GRANTED. Counsel for Plaintiff to prepare the Order, show it to opposing counsel, and submit the same to Chambers.

CLERKS NOTE: This Minute Order was electronically served by Courtroom Clerk, Grecia Snow, to all registered parties for Odyssey File & Serve. 2.10.22 gs

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Cesar Hostia, Plaintiff(s) vs. Dana Forte D.O., LTD., Defendant(s)	CASE NO: A-18-783435-C DEPT. NO. Department 3

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 2/17/2022

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EXHIBIT E

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DISTRICT COURT

CLARK COUNTY, NEVADA

CESAR HOSTIA, an individual, Plaintiff, vs. DANA FORTE, D.O., LTD., a Nevada limited company dba FORTE FAMILY PRACTICE; SANDEEP VIJAY, M.D.; JOSEPH EAFRATE, PA-C; ROE DEFENDANT, et al., Defendants.	Case No. A-18-783435-C Dept. 3 **DEFENDANTS DANA FORTE, D.O., LTD., D/B/A FORTE FAMILY PRACTICE AND JOSEPH EAFRATE, PA-C'S MOTION FOR RECONSIDERATION OF PLAINTIFFS' MOTION TO EXTEND EXPERT DISCLOSURE DEADLINES AND THE COURT'S GRANTING THEREOF** **HEARING REQUESTED**

Defendants DANA FORTE, D.O., LTD., dba FORTE FAMILY PRACTICE and JOSEPH EAFRATE, PA-C ("Defendants") by and through their attorneys of record, S. Brent Vogel, Esq., Adam Garth, Esq., and Shady Sirsy, Esq. of the Law Firm of Lewis Brisbois Bisgaard & Smith, LLP, hereby make this MOTION FOR RECONSIDERATION OF PLAINTIFFS' MOTION TO EXTEND EXPERT DISCLOSURE DEADLINES AND THE COURT'S GRANTING THEREOF. This Motion is made and based on the papers and pleadings filed herein, the attached exhibits, and any oral argument that Court entertains at the time of the hearing on this matter.

MEMORANDUM OR POINTS AND AUTHORITIES

I. INTRODUCTION

This is an action sounding in professional medical negligence in which Plaintiff, a severe diabetic, alleges injuries stemming from his ingestion of penicillin prescribed to him by Defendants,

at Plaintiff's insistence, and filled by Plaintiff personally despite his knowing he had an allergy to same. Plaintiff was hospitalized for several days with diabetic ketoacidosis after suffering an allergic reaction to the penicillin he insisted on receiving and took. He was discharged and made a complete recovery.

Plaintiff untimely moved this Court for an extension of expert disclosure deadlines after having failed to timely retain an expert (by his counsel's own admission), after missing the deadline to make the motion, and after failing to articulate either good cause or excusable neglect in support of his motion.

Despite the requirement that the Court make specific factual findings supportive of a moving party's good cause and excusable neglect, no such findings were made or articulated. Given the complete absence of any facts supporting either good cause or excusable neglect, the Court erroneously granted Plaintiff's motion to extend expert disclosure deadlines. Moreover, in Plaintiff's motion, he failed to supply any excuse for the total disregard of EDCR 2.35's requirements and the Court provided no support or mention of Plaintiff's violation of this Rule or any rationale for its non-application.

Annexed hereto as Exhibits "A", "B", and "C" respectively are Plaintiff's motion to extend expert disclosure deadlines, Defendants' opposition, and Plaintiff's reply in further support. Annexed hereto as Exhibit "D" is this Court's order granting the motion with a conclusion that good cause exists, without so much as a single factual reference demonstrating the allegedly good cause, and no mention whatsoever of the excusable neglect by Plaintiff.

II. LEGAL ARGUMENT

A. The Court Erroneously Excluded Factual Findings Regarding Plaintiff's Good Cause For Failing to Timely Disclose Experts and Made No Findings Regarding Plaintiff's Excusable Neglect

EDCR 2.24 states in pertinent part:

> (a) No motion once heard and disposed of may be renewed in the same cause, nor may the same matters therein embraced be reheard, unless by leave of the court granted upon motion therefor, after notice of such motion to the adverse parties.
>
> (b) A party seeking reconsideration of a ruling of the court, other than any order that may be addressed by motion pursuant to NRCP

> 50(b), 52(b), 59 or 60, must file a motion for such relief within 14 days after service of written notice of the order or judgment unless the time is shortened or enlarged by order.

The implicated order was served with notice of entry on February 17, 2022 (Exhibit "D") making this motion timely.

"A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous." *Masonry & Tile Contractors v. Jolley, Urga & Wirth Ass'n*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997).

In *Clark v. Coast Hotels & Casinos, Inc.*, 130 Nev. 1164 (2014), the Nevada Supreme 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.

> A manifest abuse of discretion is "[a] clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule." Steward v. McDonald, 330 Ark. 837, 958 S.W.2d 297, 300 (Ark. 1997); see Jones Rigging and Heavy Hauling v. Parker, 347 Ark. 628, 66 S.W.3d 599, 602 (Ark. 2002) (stating that a manifest abuse of discretion "is one exercised improvidently or thoughtlessly and without due consideration"); Blair v. Zoning Hearing Hd. of Tp. of Pike, 676 A.2d 760, 761 (Pa. Commw. Ct. 1996) ("[M]anifest abuse of discretion does not result from a mere error in judgment, but occurs when the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias or ill will.").

State v. Eighth Judicial Dist. Court of Nev., 127 Nev. 927, 932, 267 P.3d 777, 780 (2011)

As stated in *Clark*, *supra*,

> Clark argues that the district court abused its discretion by denying her motion to extend discovery because she satisfied her burden of showing excusable neglect. 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).
>
> EDCR 2.35(a) provides that a request for additional time for discovery made later than 20 days from the close of discovery "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 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 of "excusable neglect" does not apply to a party losing a fully briefed and argued motion; instead, 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) (concluding that, under NRCP 6(b)(2), excusable neglect may justify an enlargement of time to allow for substitution of a deceased party where the delay was caused by a lack of cooperation from the decedent's family and attorney); *Stoecklein v. Johnson Elec., Inc.*, 109 Nev. 268, 273, 849 P.2d 305, 308 (1993) (affirming a district court's finding of excusable neglect under NRCP 60(b)(1) where default judgment resulted from a lack of notice); *Yochum v. Davis*, 98 Nev. 484, 486-87, 653 P.2d 1215, 1216-17 (1982) (reversing a district court's order denying a motion to set aside a default judgment under NRCP 60(b)(1) where default resulted from a lack of procedural knowledge).

For a myriad of reasons, Plaintiff's motion should have been denied in its entirety. This Court's order did not address any of those reasons, nor were any factual findings made and articulated which demonstrated that the Plaintiff fulfilled each required element, namely: (1) a motion properly timed in accordance with EDCR 2.35, (2) good cause for defiance of this Court's scheduling order for expert disclosure, and (3) excusable neglect.

Explaining the pre-requisites for obtaining an extension, Commissioner Bulla explained that Plaintiffs were required to file their motion within 20 days of the cut-off they are moving to extend, and accompany their moving papers with a showing of good cause:

> EDCR 2.35(a) specifically requires the following: "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 received by the Discovery Commissioner within **20 days before the discovery cut-off date or any extension** thereof." (Emphasis added.)
>
> 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).[1] Plaintiffs' 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 violated the procedural requisites with regard to the relief he sought. Plaintiff admitted in his original motion that he did not even first engage his expert until several weeks prior to the expert disclosure deadline. Plaintiff thus created his own emergency and then never bothered to seek an extension within the time frame for doing so. His failure to do so required the motion to be denied on that basis alone. Again, the Court never addressed this rule violation or how Plaintiff could somehow extricate himself from it. Fairness dictates that the Rules apply equally to litigants regardless of their classifications as plaintiffs or defendants. Plaintiff asks this Court to extend him concessions regarding compliance but has created his own discovery mess and is requesting that Defendants be prejudiced as a result.

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 (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.

[1] 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].

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. This Court's order did not address any facts demonstrating both prongs of the test to justify the granting of Plaintiff's motion. Thus, it becomes a manifest abuse of discretion to grant a motion which lacks sufficient factual findings which will be required for appellate review.

Plaintiff failed to timely serve an expert report by an expert within the deadline set forth in this Court's scheduling order. Plaintiff never met the proper showing of both good cause and excusable neglect. As such, 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.

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). This, he cannot do, nor did he. Moreover, this Court failed to point to any fact demonstrating the good cause it concluded Plaintiff possessed.

B. Plaintiff Cannot Show Good Cause

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. To date, these new records were never exchanged.

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."[2] In other words, when Plaintiff's counsel advised Defendants' counsel more than three months ago 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. Retaining an expert and providing medical records several weeks prior to a known expert exchange deadline, when that deadline falls within a known holiday and vacation time, smacks not only of a lack of diligence, it clearly indicated an absence of good faith by Plaintiff.

If Plaintiff had exhibited a modicum of diligence in this case, he would have reached out to his expert long ago, not several weeks prior to an expert exchange deadline, to obtain an opinion and report. Plaintiff created his own emergent situation and then sought and obtained judicial intercession to cure his own practice failure. To make matters worse, Plaintiff pursued this strategy to the complete disadvantage of and prejudice to Defendants. 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

[2] Exhibit "A", p. 2, lines 12-15

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

Plaintiff cannot demonstrate that he was diligent in ascertaining that Dr. Levin was available and able to provide a report before the deadline. In fact, Plaintiff admitted that he only retained him several weeks ago, years after the case was commenced. Plaintiff further failed to outline specifically what is contained in the "additional ongoing treatment" records he provided to Dr. Levin, he did not both to exchange those documents, he did not indicate when he was advised of the treatment, or when he first requested the records pertaining thereto. In essence, Plaintiff completely "dropped the ball" in this case, placed it on the "back burner" and look for a lifeline from this Court. That is not the role of the judiciary.

Plaintiff was not diligent in seeking leave of this Court to extend the initial expert deadline. Moreover, in spite of being well aware of the impending deadline, he did not even bother to retain an expert until just a few weeks before the Court ordered deadline. Such failures are incompatible with a showing of good cause. In other words, a failure on Plaintiff's part cannot be considered an emergency on Defendants' part.

C. <u>Plaintiff Cannot Show Excusable Neglect</u>

Even if Plaintiff was able to show diligence and good cause in seeking a belated extension to the scheduling order, such request should still have been denied, as Plaintiff cannot demonstrate his failure to meet the deadline was the result of excusable neglect. *See* EDCR 2.35 (a request to extend discovery deadlines after their expiration "shall not be granted unless the moving party…demonstrates that the failure to act was the result of excusable neglect"). *Black's Law Dictionary* defines "excusable neglect" as:

> A failure—which the law will excuse—to take some proper step at the proper time…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 oraccident….

Black's Law Dictionary 1133 (9th ed. 2009). Thus, "excusable neglect" only applies to an external

factor beyond a party's control that affects that a party's ability to act or respond as otherwise required.

Plaintiff cannot show that his neglect in failing to timely retain his expert is excusable. He did not demonstrate anything concerning these additional records he allegedly supplied to his expert. He did not indicate when he found out about them, when he requested them, when the treatment was supposedly received, the relevance of the treatment to these issues and its importance to any expert report, or why he has not even bothered to exchange them as of this date. Again, this Court never even mentioned or addressed these facts or made any findings pertaining to them or this standard.

Plaintiff should have timely retained an expert, not a few weeks before the deadline and when that deadline falls squarely within the holiday season. He does not explain why he waited for months after receiving an extension of time to conduct expert disclosure to retain an expert, despite the fact that he led Defendants' counsel to believe he had such an expert already. ***Plaintiff created his own emergency, received Defendants' expert report after doing so, and then sought and obtained a further opportunity to prejudice Defendants due to Plaintiff's own practice failures. He was, at a minimum, negligent, in this regard.*** In any case, Plaintiff's actions cannot constitute excusable neglect. Plaintiff's failure to comply with this Court's scheduling order is inexcusable.

D. <u>The danger of prejudice to the opposing party</u>

Plaintiff was in possession of Defendants' timely expert disclosure. Defendants received Plaintiff's disclosure two weeks thereafter, and the disclosure was statutorily noncompliant. Thereafter, Plaintiff "supplemented" his disclosure attempting to cure even the most basic practice failures, however it is still noncompliant. By allowing Plaintiff to exchange late, he effectively received two rebuttal reports. Moreover, when rendering its decision, the 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 1`4 ,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 Court's refusal to apply the rules to Plaintiff and to even make any

findings demonstrating the required elements of Plaintiff's motion continues to prejudice Defendants to Plaintiff's advantage while at the same time failing to provide sufficient justification for the ruling itself. Plaintiff's negligent actions should not be rewarded by the imposition of prejudice on a compliant party.

E. The length of the delay and its potential impact on the proceedings.

Plaintiff's Motion was 20 days late. However, Plaintiffs could have and chose not to, retain an expert earlier, request an extension of time before the 20 day deadline, or moved for the relief weeks earlier than he did. Instead, he chose to wait until he was in a position where Defendants were prejudiced and now wants to add further insult to injury. Plaintiff chose to file a lawsuit and has an obligation to prove his case. That does not mean he is supposed to wait a few weeks before an expert exchange deadline to first get his expert retained and reviewing records to produce a report during holiday time. Defendants timely retained and exchanged their expert, even doing so early to make certain they were in compliance with the Court's order. Plaintiff ignored his responsibilities and now wants to be rewarded for it. Again, this Court failed to address this element and Plaintiff's violation of the Rule.

F. The reason for the delay.

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

III. CONCLUSION

For all of the aforenoted reasons, Defendants' motion for reconsideration should be granted in its entirety. . Plaintiff caused his own delay, never moved or sought the relief in this motion before the deadline's expiration, let alone within the time allotted by the EDCR, and caused Defendants to suffer prejudice. This Court did not make any factual findings to support the ruling that both good cause and excusable neglect exists, or why it was perfectly acceptable for Plaintiff to miss the deadline for moving for the relief and still being permitting to do so.

DATED this 18th day of February, 2022

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ *Adam Garth*

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Attorneys for Dana Forte, D.O., Ltd dba Forte Family Practice and Joseph Earfrate, PA-C

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of February, 2022, a true and correct copy **DEFENDANTS DANA FORTE, D.O., LTD., D/B/A FORTE FAMILY PRACTICE AND JOSEPH EAFRATE, PA-C'S MOTION FOR RECONSIDERATION OF PLAINTIFFS' MOTION TO EXTEND EXPERT DISCLOSURE DEADLINES AND THE COURT'S GRANTING THEREOF** was served by electronically filing with the Clerk of the Court using the Wiznet Electronic Service system and serving all parties with an email-address on record, who have agreed to receive Electronic Service in this action.

Karl Andersen, Esq.
Zachary Peck, Esq.
ANDERSON & BROYLES
550 Painted Mirage Road, Suite 320
Las Vegas, NV 89149
Tel: 702-220-4529
Attorneys for Plaintiff

By */s/ Heidi Brown*
An Employee of
LEWIS BRISBOIS BISGAARD & SMITH LLP

Exhibits A & B have been omitted please refer to Exhibit B to this appendix attached hereto.

EXHIBIT C

REPL

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EIGHTH JUDIICAL DISTRICT COURT
CLARK COUNTY, NEVADA

CESAR HOSTIA, an individual, Plaintiff, vs. DANA FORTE, D.O. LTD, a Nevada Limited Company dba FORTE FAMILY PRACTICE; SANDEEP VIJAY, MD, an individual, JOSEPH EAFRATE, PA-C; DOE INDIVIDUALS 1-5; and ROE BUSINESS ENTITIES 1-5, inclusive, Defendants.	Case No. A-18-783435-C Dept. No. 3 **REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO EXTEND DEADLINE FOR INITIAL EXPERT DISCLOSURES**

Plaintiff, Cesar Hostia, through counsel, Karl Andersen, Esq., hereby replies to the Opposition filed by the Defendants to his MOTION TO EXTEND DEADLINE FOR INITIAL EXPERT DISCLOSURES. This Reply is made in good faith and based on EDCR 2.35.

Dated this 3rd day of February, 2022.

ANDERSEN & BROYLES, LLP

/s/ Karl Andersen, Esq.
Karl Andersen, Esq.
5550 Painted Mirage Road, Suite 320
Las Vegas, Nevada 89149
Attorney for Plaintiff

REBUTTAL ARGUMWENT

1. Defendants' counsel fails to mention key facts.

It wasn't until the eve of the drop-dead date for the disclosure of experts that Plaintiff's counsel understood he would not be able to comply with the Court's scheduling order. Until December 30, 2021, Plaintiff's counsel believed the expert would provide his expert report and that this report would be disclosed timely.

It was on December 30, 2021 that Plaintiff's counsel reached out to Defendants' counsel, advising of the anticipated inability to provide Plaintiff's expert disclosures by the end of the following day and the parties discussed whether a stipulation could be reached to enlarge the Court's December 31, 2020 deadline.

Defendants' counsel was clear that he was not willing to stipulate, even though it was made clear to him that the report was immediately forthcoming but most likely not in time to meet the Court's deadline.

Ultimately, the expert report was received on January 12, 2022 and was disclosed the next day.

2. Defendants' counsel fails to establish any prejudice.

A key issue in any request to enlarge time is whether such an enlargement would operate to the prejudice of the Defendants. It cannot be disputed Defendants were served Plaintiff's expert disclosures on January 13, 2022, the day before Defendants filed the instant Opposition.

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Despite having Plaintiff's expert report in hand, and despite basing their entire Opposition on the "prejudice" that has resulted by virtue of the January 13, 2021 disclosure, Defendants have failed to enunciate any prejudice. If Defendants really believed Plaintiff's expert report was prejudicial since it was produced after they produced their expert report, then what exactly constitutes the prejudice?

And, even assuming Plaintiff's expert did in fact possess Defendants' expert report before providing his own (which is not the case as Plaintiff's counsel did not forward the report to his expert until after Dr. Levin provided his final report -- a promise made in the late December discussions to which Defendants' counsel tersely replied "I don't trust you."), there is nothing irregular or *per se* prejudicial where one party provides its expert report prior to the opposing party providing its own. It is entirely common and regular practice for an expert to amend its expert report after receipt of the opposing party's expert's report.

Defendants' argument regarding prejudice is nonsensical. Aside from the obvious deficiency in not specifically pointed to language in Plaintiff's expert's report that is "prejudicial," Defendant argues that somehow Plaintiff's expert report would not have been prejudicial if it had been produced by the December 31, 2021 deadline. This does not make any sense as it is clear Plaintiff possessed Defendants' expert report on December 29, 2021 at 11:07 am, which provided for nearly three (3) whole days prior to the disclose deadline wherein Plaintiff's expert could have (1) reviewed Defendants' expert report; and, (2) made changes to his own report which would have constituted a type and kind of rebuttal. And, in any event, the

Court's scheduling order allows for rebuttal expert reports which belies Defendant's rhetoric regarding their production of their expert report on December 29, 2021.

What Defendants are arguing is not supported by the Rules. There is no requirement in the Rules that the parties exchange expert reports at the very same time and there is no prohibition in the Rules to one party providing the other party's expert report to its own expert prior to the expert disclosure deadline.

3. EDCR 2.35 is based on the "discovery cut-off date," not the individual deadlines for elements of discovery.

EDCR 2.35 explicitly provides that any motion to extend any date set by the discovery order must be in writing and -- if filed more than 21 days prior to the "discovery cut-off date" -- be supported by a showing of good cause.

The "discovery cut-off date" in this civil action is set by the Court as April 29, 2022. *See* Stipulation filed herein on 09/29/2021.

The instant motion was filed well ahead of 21 days before the "discovery cut-off date;" thus, Plaintiff's burden is to ask for the enlargement based on "good cause," not the heightened standard of "excusable neglect."

In this matter, given the cooperative efforts of the parties to date to explore settlement, JAMS arbitration and to conduct discovery, good cause exists for a twelve (12) day extension to the expert disclosure deadline.

4. The conduct of the parties in discovery, in any event, satisfies even "excusable neglect."

The Nevada Supreme Court recently addressed the issue of "excusable neglect" in the context of EDCR 2.35, holding that where discovery is not diligently pursued it is not an abuse

of the district court's discretion to deny an EDCR 2.35 motion to enlarge. *Premier One Holdings, Inc. v. Newmyer*, No. 80211 (Nev. Supreme Court 2021).

In this case, Plaintiff has been diligent in pursuing discovery. Timely 16.1 disclosures have been made by both parties, written discovery has been propounded by both parties (Requests for Admissions, Interrogatories and Requests for Production of Documents), timely responses have been provided by both parties and the deposition of the Plaintiff was noticed and conducted without any delay (the parties even cooperated in an effort to have JAMS arbitration).

Plaintiff has explained to the Court and to opposing counsel the delays faced in locating an expert and in providing the expert relevant records to be reviewed in conjunction with the preparation of the expert report. Plaintiff has explained the records from Healthcare for Vibrant Living were received in late December and -- given the holidays -- it did not appear the expert would be able to review these additional records and have his final initial report submitted by the disclosure deadline.

Defendant's Opposition is silent regarding all the cooperative and timely efforts made by the parties in the discovery process prior to the expert disclosure deadline. And, rather than address how the Nevada Supreme Court has framed the issue of "excusable neglect" with regard to EDCR 2.35, Defendants cite to Black's Law Dictionary, which is not controlling given the High Court's discussion of "excusable neglect" and EDCR 2.35 in *Premier One Holdings*.

/ / /

5. The authority cited by Defendants is not controlling.

In a legal maneuver not ever previously confronted by Plaintiff's counsel in any previous civil action, Defendants have cited a CLE course as authority in support of their Opposition. Despite the fact that Ms. Bonnie Bulla was once the Discovery Commissioner, any opinions forwarded by Ms. Bulla in her CLE materials are nothing more than opinion.

The CLE citation relied upon by Defendants fails to account for what 2.35 actually provides; specifically, that a motion to enlarge a discovery deadline can be filed on shorter time but that such a motion filed within 20 days of the subject discovery deadline must be accompanied by a showing of excusable neglect.

6. "Danger of prejudice" is not a legal standard applicable to an EDCR 2.35 motion.

Defendant did not explain to the Court how the EDCR 2.35 motion or the production of the expert report within 12 days of the Court's expert disclosure deadline created "prejudice;" rather, Defendants argue some type of nebulous "danger of prejudice" resulting from the motion and the January 12, 2022 expert disclosures.

The Nevada appellate Courts have not addressed "danger of prejudice" in the context of an EDCR 2.35 motion. It is an irresponsible argument to attempt to create a legal standard that does not appear in Nevada jurisprudence. While "danger of prejudice" is an issue in evidentiary and tolling matters, no Nevada appellate court has ever stated this is an appropriate issue to address when an EDCR 2.35 motion is under consideration by the district court.

7. Defendants fail to disclose to the Court that JAMS was simply too expensive.

Rather than be forthright with the Court and limit its Opposition to the reality of the parties' interactions, Defendants base their Opposition on dishonest argument regarding the parties' efforts to arbitrate this civil matter.

The fact is simple: The parties did not move ahead with arbitration with JAMS because it was much more expensive than what was anticipated. Initially, Defendants' counsel suggested Defendants would cover the costs of arbitration; however, Defendants' counsel changed his mind and the arbitration did not move forward. Plaintiff simply does not have the Defendants' "deep pockets" and could not afford to share the cost of JAMS arbitration.

8. Defendants' counsel is not forthright regarding his efforts to obtain previous extensions.

It was the Defendants who initiated the last extension of time. That is why the Stipulation was drafted by Defendants. *See* Stipulation and Order filed on 9-29-21. Defendants, apparently, do not subscribe to the idea that "what's good for the goose is good for the gander."

In equity, and as Plaintiff has been cooperative with Defendants previous request to enlarge the discovery schedules (which demonstrates "good cause" for the instant request for enlargement), the Court should take judicial notice of the previous enlargement.

This extension was based on the proposition that settlement could be reached, and Plaintiff essentially invested in settlement and placed his expert on the back-burner in September.

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9. Plaintiff's expert was retained in September and Plaintiff's counsel believed the expert's report would be available for timely disclosure by December 31, 2021.

Dr. Levin was retained in September 2021 and reviewed initial documents at that time. Due to ongoing settlement negotiations, Plaintiff did not press for the expert's report while the parties first set up arbitration with JAMS; then JAMS got cancelled. Thereafter, the parties discussed settlement outside of mediation. When settlement discussions came to an impasse, Plaintiff's counsel believed that Dr. Levin's report would be made available timely. Prior to obtaining a final report, Plaintiff informed his counsel that additional medical records may be available, and Plaintiff's counsel requested those records with the hopes that Dr. Levin would review those records before finalizing his report. As stated in the underlying Motion, Plaintiff's counsel received those records on December 27th. Notwithstanding, Plaintiff still believed that a final report would be forthcoming by the due date until December 30th. Unfortunately, waiting for the records coupled with the fact that the report was due between Christmas and New Year's, Dr. Levin was not able to finish his report by December 31st. Accordingly, and consistent with the Rules, an appropriate motion was filed to enlarge time for expert disclosures.

Based on the foregoing, Plaintiff requests a two-week extension of the Initial Disclosures and Rebuttal Disclosures as stated in the underlying Motion.

Dated this 3rd day of February, 2021.

ANDERSEN & BROYLES, LLP

/s/ Karl Andersen, Esq._____
Karl Andersen, Esq.
5550 Painted Mirage Road, Suite 320
Las Vegas, Nevada 89145
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of February, 2022 I served a true and correct copy of the foregoing **Reply to Opposition to Motion to Extend Deadline for Initial Expert Disclosures** via the Court's e-filing portal to all parties of record, including:

S. Brent Vogel, Esq.
brent.vogel@lewisbrisbois.com
Adam Garth, Esq.
adam.garth@lewisbrisbois.com
6385 S. Rainbow Blvd., Suite 600
Attorneys for Dana Forte, D.O., Ltd.
dba Forte Family Practice

/s/ Karl Andersen
Representative of Andersen & Broyles, LLP

EXHIBIT D

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EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

CESAR HOSTIA, an individual, Plaintiff, vs. DANA FORTE, D.O. LTD, a Nevada Limited Company dba FORTE FAMILY PRACTICE; SANDEEP VIJAY, MD, an individual, JOSEPH EAFRATE, PA-C; DOE INDIVIDUALS 1-5; and ROE BUSINESS ENTITIES 1-5, inclusive, Defendants.	Case No. A-18-783435-C Dept. No. 3 **ORDER GRANTING MOTION TO EXTEND DEADLINE FOR INITIAL EXPERT DISCLOSURES**

THIS MATTER, having come before the Court on the Court's chamber calendar on February 10, 2022, on Plaintiff's MOTION TO EXTEND DEADLINE FOR INTIAL EXPERT DISCLOSURES (the "Motion"), and the Court having considered the papers and pleadings on file herein, and good cause appearing, therefor:

THE COURT HEREBY FINDS, pursuant to EDCR 2.35, that good cause exists to extend the deadline for initial expert disclosure by two weeks as well as the rebuttal expert deadline by two weeks.

WHEREFORE, IT IS HEREBY ORDERED that the deadline for initial expert disclosure is enlarged by two weeks from the date of the Court's in chambers consideration of the Motion, or until February 24, 2022; and, that the rebuttal expert deadline is enlarged until two weeks later, March 10, 2022.

The Court confirms all other discovery deadlines are to remain the same.

Counsel for Plaintiff shall prepare the order and show it to opposing counsel.

Dated: _____

Dated this 17th day of February, 2022

J. Charles Thompson

F1B F3F E85D E080
J. Charles Thompson
District Court Judge

Submitted by:

ANDERSEN & BROYLES, LLP

/s/ Karl Andersen, Esq.
Karl Andersen, Esq.
5550 Painted Mirage Road, Suite 320
Las Vegas, Nevada 89149
Attorney for Plaintiff

Approved:

LEWIS BRISBOIS BISGAARD & SMITH

/s/ Adam Garth, Esq.
Adam Garth, Esq.
6385 South Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Attorneys for Defendants

From: Garth, Adam
To: michael@andersenbroyles.com
Cc: "Karl Andersen, Esq."
Subject: RE: [EXT] Order Enlarging Time to Disclose Initial and Rebuttal Experts
Date: Wednesday, February 16, 2022 7:40:13 AM
Attachments: Logo_e6253148-26a1-47a9-b861-6ac0ff0bc3c4.png

You may use my e-signature on the proposed order.

Adam Garth
Partner
Adam.Garth@lewisbrisbois.com

T: 702.693.4335 F: 702.366.9563

6385 South Rainbow Blvd., Suite 600, Las Vegas, NV 89118 | **LewisBrisbois.com**

From: michael@andersenbroyles.com <michael@andersenbroyles.com>
Sent: Tuesday, February 15, 2022 3:34 PM
To: Garth, Adam <Adam.Garth@lewisbrisbois.com>
Cc: 'Karl Andersen, Esq.' <karl@andersenbroyles.com>
Subject: [EXT] Order Enlarging Time to Disclose Initial and Rebuttal Experts

Adam,

Although the Court directed this office to merely show you the order, I have attached a version for your electronic signature.

The version submitted will not have the Court's minutes attached.

Please advise whether you will sign off, giving this office your permission to affix your electronic signature.

If you are not agreeable, this office will submit, noting the order was shown but not signed.

The attached order comports with the email sent to you from the Department.

With regards,

Michael

DISTRICT COURT
CLARK COUNTY, NEVADA

Malpractice - Medical/Dental	**COURT MINUTES**	**February 10, 2022**

A-18-783435-C Cesar Hostia, Plaintiff(s)
vs.
Dana Forte D.O., LTD., Defendant(s)

February 10, 2022 **3:00 AM** **Motion**

HEARD BY: Bixler, James **COURTROOM:** Chambers

COURT CLERK: Grecia Snow

PARTIES PRESENT:

JOURNAL ENTRIES

- Plaintiff s Motion to Extend Deadline for Initial Expert Disclosures (Sixth Request) came before the Court on the February 10, 2022 Chamber Calendar. Having reviewed the Motion, the Opposition, and Reply, the Court FINDS that, pursuant to EDCR 2.35, good causes exists to extend the deadline for initial expert disclosure by two weeks as well as the rebuttal expert deadline by two weeks. All other discovery deadlines are to remain the same. Therefore, Plaintiff s Motion to Extend Deadline for Initial Expert Disclosures (Sixth Request) is GRANTED. Counsel for Plaintiff to prepare the Order, show it to opposing counsel, and submit the same to Chambers.

CLERKS NOTE: This Minute Order was electronically served by Courtroom Clerk, Grecia Snow, to all registered parties for Odyssey File & Serve. 2.10.22 gs

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Cesar Hostia, Plaintiff(s) vs. Dana Forte D.O., LTD., Defendant(s)	CASE NO: A-18-783435-C DEPT. NO. Department 3

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 2/17/2022

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EXHIBIT F

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EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

CESAR HOSTIA, an individual, Plaintiff, v. DANA FORTE, D.O., LTD., a Nevada limited company dba FORTE FAMILY PRACTICE; SANDEEP VIJAY, M.D.; JOSEPH EAFRATE, PA-C; ROE DEFENDANTS, *et al.*, Defendants.	Case No.: A-18-783435-C Dept. No.: 26 **PLAINTIFF'S OPPOSITION TO MOTION FOR RECONSIDERATION; AND, COUNTERMOTION FOR EDCR 7.60 SANCTIONS**

Plaintiff, Cesar Hostia, through counsel, Karl Andersen, Esq., hereby opposes Defendants', Dane Forte, D.O., dba Forte Family Practice ("Forte"), and Joseph Eafrate, Motion for Reconsideration of Plaintiff's Motion to Extend Expert Disclosure Deadlines.

This Opposition is based on the following Points and Authorities, the attached exhibits, and the argument of counsel, if any, solicited by the Court upon hearing.

Dated this 28th day of January, 2022.

ANDERSEN & BROYLES, LLP

/s/ Karl Andersen, Esq.
Karl Andersen, Esq.
5550 Painted Mirage Road, Suite 320
Las Vegas, Nevada 89149
Attorney for Plaintiff

POINTS AND AUTHORITIES

I. OVERVIEW

The Court, in its proper exercise of discretion in managing its own docket, granted Plaintiff a short extension to disclose his expert. The Court also enlarged the time for the parties to disclose rebuttal experts.

Despite the obvious authority of the Court to manage its own docket, and despite the inarguable fact Plaintiff moved for the enlargement prior to time prescribed by the Court's scheduling order, Defendants seek to have the Court reconsider its determination to enlarge the deadlines for expert disclosures. The centerpiece of Defendants' request for reconsideration is a basic misunderstanding of the Rules and a misplaced reliance on extra legal opinion contained in a CLE course.

Based on (1) the Court's proper exercise of discretion; and, (2) Defendants' bald failure to provide any meritorious Points and Authorities, the request for reconsideration must be denied.

II. THE LAW AND ARGUMENT

1. Narrow legal basis to seek reconsideration.

The law favors finality. Reconsideration is provided by EDCR 2.24:

> **Rule 2.24. Rehearing of motions.**
>
> (a) No motions once heard and disposed of may be renewed in the same cause, nor may the same matters therein embraced be reheard, unless by leave of the court granted upon motion therefor, after notice of such motion to the adverse parties.
>
> (b) A party seeking reconsideration of a ruling of the court, other than any order that may be addressed by motion pursuant to NRCP 50(b), 52(b), 59 or 60, must file a motion for such relief within 14 days after service of written notice of the order or judgment unless the time is shortened or enlarged by order. A motion for rehearing or reconsideration must be

served, noticed, filed and heard as is any other motion. A motion for reconsideration does not toll the period for filing a notice of appeal from a final order or judgment.

(c) If a motion for rehearing is granted, the court may make a final disposition of the cause without reargument or may reset it for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

There is scant Nevada law on an EDCR 2.24 motion for reconsideration:

- The determination whether to grant EDCR 2.24 reconsideration falls within the discretion of the district court. *Hughes v. Daccache*, No. 82417-CAO (Nev. Court of Appeals 2021).

- A district court "may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous." *Masonry & Tile Contractors Ass'n of S. Nev. v. Jolley, Urga, & Wirth, Ltd.,* 113 Nev. 737, 741, 941 P.2d 486, 489 (1997).

- Motions to reconsider may be brought only where the district court has overlooked or misapprehended a material fact or material issue of law, or has overlooked, misapplied or failed to consider a statute, rule or decision directly controlling a dispositive issue. *McConnell v. State*,107 P.3d 1287 1288 (Nev. 2005).

2. Defendants fail to demonstrate legal grounds to support the request for reconsideration.

In support of their motion for reconsideration, Defendants have chosen to simply regurgitate their failed argument presented in the first instance to oppose the underlying motion to enlarge the time to disclose experts. Each of Defendants failed arguments will be addressed in turn.

Nevada law does not require the Court to provide factual findings

Right “out of the gate” Defendants based their EDCR 2.24 motion for reconsideration on the flawed legal premise that Nevada law requires the Court to provide factual findings in this particular order. In support of this first prong of its EDCR 2.24 motion, Defendants fail to

cite to a single legal authority to support their argument that the Court is required to provide specific findings of fact in support of its conclusion that good cause exists to enlarge the time to make initial or rebuttal expert disclosures.

Of course, the failure to support an argument presented upon motion by adequate points and authorities is grounds for the Court to conclude the argument lacks merit. EDCR 2.20(c) ("The absence of such memorandum may be construed as an admission that the motion is not meritorious, as cause for its denial or as a waiver of all grounds not so supported").

The opinion of a Nevada attorney provided in a CLE course is not controlling law, EDCR 2.35(a) is controlling

While, like the Court, Plaintiff appreciates the contributions made to Clark County jurisprudence by the former Discovery Commissioner Bonnie Bulla, a citation to a 2009 CLE is not controlling legal precedent. Rather than actually cite to controlling precedent, Defendant has turned to an attorney's written opinion drafted for commercial purposes as the centerpiece of their EDCR 2.24 request for reconsideration.

To be clear, Nevada law authorizes a party to seek to enlarge any deadline imposed by the Court by filing a motion prior to the passing of the deadline. And with regard to EDCR 2.35(a), a motion to enlarge any discovery cut-off must be filed no later than "21 days before the discovery cut-off date or any extension thereof."

Defendants grossly misrepresent EDCR 2.35(a)

Although EDCR 2.35(a) is clearly written, Defendants wish to argue the term "discovery cut-off" actually means something other than what it plainly says. In this civil action, the subject discovery cut-off is April 29, 2022. *See* Stipulation and Order entered herein on 09/29/2021. Pursuant to EDCR 2.35(a) any motion to enlarge the discovery cut-off

(the close of discovery) must be filed at least twenty (20) days prior to the Court's cut-off date. Rather than live in the reality of the Rules, Defendants seek to have the Court re-write EDCR 2.35(a) and declare that any motion to enlarge the date for making initial or rebuttal expert disclosures must be made at least twenty (20) days prior to the Court's deadline for making such disclosure(s). To be clear, this is not what EDCR 2.35(a) provides.

To provide Defendants a primer on EDCR 2.35(a): This Local Rule requires any motion to enlarge any date must be in writing and supported by good cause. And, any such motion must be made at least "21 days before the discovery cut-off."

EDCR 2.35(a) makes a plain distinction between "any date set by the discovery scheduling order," on the one hand, and "the discovery cut-off date" on the other hand. If the Nevada Legislature had wanted to equate "any date set by the discovery scheduling order" with "the discovery cut-off date," the Nevada Legislature was certainly free to do so, but unequivocally did not. The two dates ("any date set by the discovery scheduling order" and "the discovery cut-off date") are distinct and easily distinguished one from the other.

A "discovery scheduling order" customarily provides lots of dates (expert disclosures, filing dispositive motions, etc.) but the "discovery cut-off date" is just that, the "drop dead date to conduct any discovery."

Defendants are wrong. Just wrong. EDCR 2.35(a) does not require a motion to enlarge "any date set by the discovery scheduling order" to be filed weeks before the subject date. Rather, EDCR 2.35(a) merely requires such a motion to be filed before the subject date and not within three weeks of the discovery cut-off date.

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The underlying motion to enlarge was timely filed (before the "date set by the discovery scheduling order" for the disclosure of expert witnesses) and this argument by the Defendants should be wholly disregarded as lacking merit.

The motion to enlarge only requires a showing of good cause

Compounding its meritless argument based on its wishful interpretation of EDCR 2.35(a), Defendant yammers on about "excusable neglect" when it is clear Local Rule only requires a showing of "good cause" when seeking to enlarge "any date set by the discovery scheduling order."

The Court can read the simple tents of EDCR 2.35(a) and conclude Plaintiff was only required to make a showing of "good cause" when seeking to enlarge the time for disclosure of initial or rebuttal experts. Defendants' argument regarding "excusable neglect," not surprisingly, wholly lacks merit and should be summarily disregarded by the Court.

Plaintiff's interactions with his expert reach back months

Defendants are so desperate to avoid trial in this matter that they are willing to flatly misrepresent the facts to the Court, including when Plaintiff opened discussions with his expert Dr. Levin.

While it is true the parties have been discussing settlement for months upon months, what is not true is Defendants' statement that Dr. Levin was not retained until December of last year. For the sake of transparency, Plaintiff's counsel provides a copy of his check confirming Dr. Levin has been involved in this civil action since before the first week of October, last year. *See* Exhibit "1" hereto (appropriately redacted).

Rather than hyperventilate regarding the past Christmas holiday and breathlessly base his argument of worthless rhetoric regarding "lack of diligence" and "absence of good faith,"

Defendant should have appropriately and accurately represented his interactions with Plaintiff's counsel since the middle of last year; interactions which included discussions of plaintiff retaining an expert in October and ongoing settlement negotiations which were not fruitful.

Counsel's argument regarding "prejudice" is nonsensical

Somehow, Defendants attempt to argue resulting "prejudice" because they produced their expert's initial report before Plaintiff produced his expert's initial report. Despite characterizing Plaintiff's production of his expert's initial report as a "nightmare," Defendant's argument totally misses the mark of relevance as (1) it is entirely commonplace for one party to produce an initial expert report after receipt of the other party's initial expert report; and, (2) the Court's scheduling order already accounts for rebuttal expert reports which 100% balances the "playing field" between the parties in this regard.

Again, Defendants continue to rant about "the Court's refusal to apply the rules" when it is clear (1) the Court observed the Rules; (2) the Court didn't do anything outside the Rules; (3) the Court properly exercised its discretion; and, (4) Defendants have made themselves look silly by basing their entire argument on an interpretation of EDCR 2.35(a) that has never been adopted by the Nevada courts and which interpretation simply cannot be supported given the long-standing cannons of construction.

A reconsideration motion is not to give a litigant a "second bite"

As already stated, the instant motion for reconsideration is nothing more than a regurgitation, with some new highlights, of the opposition filed by the Defendants to the underlying motion to enlarge time to make initial expert disclosures. This is an improper use of Nevada's codification of its reconsideration Local Rule.

Aside from arguing the Court failed to expressly provide findings regarding what it considered "good cause" for purposes of enlarging the subject deadline, Defendants have not come forward with any substantive argument explaining exactly how the Court either misunderstood or misapplied the law and/or the facts.

The Court should deny the motion for reconsideration as Defendants have chosen to simply regurgitate their previous failed opposition to the underlying motion to enlarge the deadline to make initial expert disclosures and nothing in the purported reconsideration motion meets the legal standard of demonstrating an error as to the law or the facts upon initial consideration of the underlying motion.

3. EDCR 7.60 sanctions against Defendant are warranted.

EDCR Rule 7.60. Sanctions, in relevant part, provides:

> (b) The court may, after notice and an opportunity to be heard, impose upon an attorney or a party any and all sanctions which may, under the facts of the case, be reasonable, including the imposition of fines, costs or attorney's fees when an attorney or a party without just cause:
>
> (1) Presents to the court a motion or an opposition to a motion which is obviously frivolous, unnecessary or unwarranted…
>
> (3) So multiplies the proceedings in a case as to increase costs unreasonably and vexatiously.
>
> (4) Fails or refuses to comply with these rules….

Without just cause, Defendants have filed their reconsideration motion and have grossly misrepresented Nevada law, wishfully basing the reconsideration request on content from a CLE while ignoring the plain and commonsense language of EDCR 2.35(a). The instant motion is frivolous, Defendants have unnecessarily (and breathlessly) multiplied these

proceedings and increased the costs to the parties and Defendants have failed to observe EDCR 2.20 by submitted their meritless and legally unsupported motion for reconsideration.

Plaintiff requests a finding that the present Motion for Reconsideration is frivolous and otherwise violates EDCR 7.60 and order that Defendant is responsible for Plaintiff's reasonable attorney fees to respond to said motion. The Court should then order that Plaintiff may file a memorandum of fees and costs to assess the exact amount of reasonable attorney fees within 5 days which amount will not be known until after the hearing on this matter (but is estimated to be between $2,000 and $3,000). The memorandum must also satisfy the *Brunzel* factors.

III. CONCLUSION

Reconsideration is only appropriate upon a showing the Court manifestly disregarded or misunderstood either the facts or the law. Reconsideration is not appropriate where a defendant misunderstands the application of a simple Local Rule and bases a ten (10) page motion on the misunderstanding.

The Court acted appropriately under the circumstances: (1) The parties endeavored to make timely initial expert disclosures; and, when it was clear Plaintiff would be unable to make such disclosures timely, (2) a motion was timely submitted to enlarge the subject deadline.

The motion presented by the Defendants is based on a misinterpretation of EDCR 2.35(a) that simply belies all sense of reason and tenets of construction. However misguided the Defendants' interpretation of EDCR 2.35(a) is (and it is SIGNIFICANTLY misguided), this error permeates the instant motion for reconsideration and renders the motion as frivolous and lacking merit.

It is commonplace for the Court to enlarge a perfunctory deadline in a scheduling order, especially where the request is timely made at the very beginning of a civil action. Despite Defendant's pending Motion for Reconsideration, it is clear the only party misunderstanding the law or the facts are the Defendants themselves and not this Court.

Based on the foregoing, it is respectfully requested that the Court deny the motion for reconsideration in its entirety. It is further requested, based on the motion for reconsideration lacking merit whatsoever, that the Court award Plaintiff fees and costs pursuant to EDCR 7.60 for having to draft this opposition – allowing the Plaintiff to provide a memorandum of costs and fees (satisfying the *Brunzel* factors).

Dated this 28th day of February, 2022

ANDERSEN & BROYLES, LLP

/s/ Karl Andersen, Esq.
Karl Andersen, Esq.
5550 Painted Mirage Road, Suite 320
Las Vegas, Nevada 89149
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a true and accurate copy of the foregoing via U.S Mail upon counsel for Defendants electronically as permitted by the Rules.

/s/ Michael D. Smith
Representative of
Law Offices of Karl Andersen, P.C.

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10-6-2021
Date

Pay to the Order of Philip Levin, MD

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For HOSTIA #-A-18-783356

[redacted]

EXHIBIT "1"

EXHIBIT G

RIS

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DISTRICT COURT

CLARK COUNTY, NEVADA

CESAR HOSTIA, an individual, Plaintiff, vs. DANA FORTE, D.O., LTD., a Nevada limited company dba FORTE FAMILY PRACTICE; SANDEEP VIJAY, M.D.; JOSEPH EAFRATE, PA-C; ROE DEFENDANT, et al., Defendants.	Case No. A-18-783435-C Dept. 3 **REPLY IN FURTHER SUPPORT OF DEFENDANTS DANA FORTE, D.O., LTD., D/B/A FORTE FAMILY PRACTICE AND JOSEPH EAFRATE, PA-C'S MOTION FOR RECONSIDERATION OF PLAINTIFFS' MOTION TO EXTEND EXPERT DISCLOSURE DEADLINES AND THE COURT'S GRANTING THEREOF** **Hearing Date: March 24, 2022** **Hearing Time: IN CHAMBERS**

Defendants DANA FORTE, D.O., LTD., dba FORTE FAMILY PRACTICE and JOSEPH EAFRATE, PA-C ("Defendants") by and through their attorneys of record, S. Brent Vogel, Esq., Adam Garth, Esq., and Shady Sirsy, Esq. of the Law Firm of Lewis Brisbois Bisgaard & Smith, LLP, hereby make this REPLY IN FURTHER SUPPORT OF MOTION FOR RECONSIDERATION OF PLAINTIFFS' MOTION TO EXTEND EXPERT DISCLOSURE DEADLINES AND THE COURT'S GRANTING THEREOF. This Motion is made and based on the papers and pleadings filed herein, the attached exhibits, and any oral argument that Court entertains at the time of the hearing on this matter.

/ / /

MEMORANDUM OR POINTS AND AUTHORITIES

I. INTRODUCTION

In the first place, it is appropriate under these circumstances to have this motion heard for oral argument and not in chambers, and to do so simultaneously with Defendants' motion for summary judgment, due to the interplay between the two. Therefore, Defendants request that both motions be heard simultaneously, and be heard personally rather than in chambers.

Moreover, it is unclear whether Plaintiff's counsel is exhibiting cognitive dissonance, engaging in the purposeful "gaslighting" of this Court into believing something where there is overwhelming evidence to the contrary, or he actually believes the less than truthful factual information he is imparting. Regardless of the circumstances, the facts and law both demonstrate that the temporary senior judge who decided the underlying motion not only failed to support his conclusions and order with any findings of fact, he manifestly abused his discretion in granting Plaintiff's motion to extend expert discovery deadlines in the wake of overwhelming authority to the contrary, leaving this Court to review and "clean up the mess" created in her absence.

Additionally, Plaintiff now improperly supplies a check dated in late October, 2021 which directly contradicts his own statements made in support of his underlying motion to extend discovery, and proves absolutely nothing other than the date he placed on a check. Moreover, to have not interposed it initially on his motion, when he clearly should have possessed it, is completely improper, especially since his own statements about the timing of his expert retention demonstrate otherwise.[1]

The questions before this Court are whether the senior judge who decided the underlying

[1] See, *Masonry & Tile Contractors Ass'n of S. Nev. v. Jolley, Urga & Wirth, Ltd.,* 113 Nev. 737, 741, 941 P.2d 486, 489 (1997). It is the obligation of a party to explain why additional evidence was previously unavailable or why it was not brought to the Court's attention prior to the order which granted the motion. *See, Coleman v. Romano,* 2014 Nev. Unpub. LEXIS 199 at 11, 130 Nev. 1165, 2014 WL 549489 (2014).

motion for which reconsideration is sought abused his discretion in granting said motion, in light of the facts and legal authority requiring the opposite result, and whether this Court will continue to stand for Plaintiff's counsel's misrepresentation of law and fact to the disadvantage of Defendants. Should this result not be changed, Defendants will have no choice but to seek writ of mandamus relief in the Nevada Supreme Court for what will be a review of the senior judge's manifest abuse of discretion in light of the facts, circumstances and law attendant to this situation.

II. LEGAL ARGUMENT

A. Plaintiff Violated EDCR 2.35, Failed to Make the Requisite Showing of Diligence and Excusable Neglect Under the Rule, and the Senior Judge Deciding the Motion Failed to Follow Said Rule

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 ether person demonstrates that the failure to act was the result of excusable neglect.**

(emphasis supplied). EDCR 2.35 has multiple components, each of which must be demonstrated by the moving party, and the timing of the motion must be in keeping with the Rule's requirements. A failure to do so on any one of these fronts requires denial of the motion. In this entire time, both on his original motion to extend expert discovery deadlines, and in opposition to the instant motion, Plaintiff has yet to fulfil any one of these requirements and the senior judge who decided the underlying motion neither addressed the Rule's requirements or how Plaintiff fulfilled them.

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.

Conspicuously absent from Plaintiff's underlying motion and the senior judge's decision and order was an articulation of **any** of the three prerequisites. Those absences have been carried over to the instant motion in which Plaintiff's counsel attempts to misdirect the Court from his abject failure to fulfil his responsibilities pertaining to this issue, and instead focus on nonsensical assertions.

We will regale this Court the case, statutory and local rule authority cited in Defendants' opposition to the underlying motion and in support of the instant motion. We respectfully refer the Court to such authority.[2] In an unpublished decision of the Nevada Supreme Court:[3],

> We perceive no abuse of discretion in the district court's decision to deny appellant's motion to extend the discovery deadline. Appellant failed to conduct any discovery before the deadline and **his motion for an extension of time was untimely and not properly supported. See EDCR 2.35(a) (providing that a motion to extend discovery must be supported by a showing of good cause and must be submitted within 20 days before the discovery cut-off date, and that a motion made beyond that period shall not be granted unless the moving party demonstrates excusable neglect in failing to act**); *Matter of Adoption of Minor Child*, 118 Nev. 962, 60 P.3d 485 (2002) (stating that a district court's discovery decision will not be disturbed absent a clear abuse of discretion)

McClain v. Foothills Partners, No. 54028, 2011 Nev. Unpub. LEXIS 148, at *1 n.1 (Mar. 18, 2011) (emphasis supplied). The Nevada Supreme Court recognizes the local rules of this Court any forces parties to abide thereby. Similarly, the Nevada Court of Appeals held "EDCR 2.35 mandates that

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[2] Defendants would request the Court to note that none of the opposition to the instant motion by Plaintiff is supported by a single case or binding legal authority in direct contrast to that which Defendants provided, nor has Plaintiff distinguished any of Defendants' cited authority. Plaintiff instead chose to "wing it" and cast aspersions on Defendants legally supported authority.

[3] Per N.R.A.P. 36(c)(2), on or after January 1, 2016, an unpublished decision may be cited for its persuasive value, if any. Supreme Court Rule 123 prohibiting citation to unpublished decisions was repealed on November 12, 2015.

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 . . . within 20 days[4] before the discovery cut-off date or any extension thereof.' EDCR 2.35." *Galey v. Strudley (In re Estate of Wright)*, 2020 Nev. App. Unpub. LEXIS 532, *13-14, 465 P.3d 1186, 2020 WL 3447952.

In this case, Plaintiff never explained why he waited beyond the 21 day deadline, making his motion only 1 day before the deadline, **20 days late**. In order for Plaintiff to have his motion properly considered, he was **required** to demonstrate excusable neglect for not having moved within the 21 day deadline prior to the expert exchange deadline. He never did so. That failure alone precluded this Court from granting Plaintiff's motion. Instead of denying the motion based upon this failure alone, the senior judge deciding the underlying motion completely ignored the rule, completely ignored Plaintiff's failure to demonstrate excusable neglect, failed to articulate the standard associated therewith, and outright granted Plaintiff's motion in derogation of the Rule requiring the diametrically opposite result. For this reason alone, Defendants' motion for reconsideration must be granted and the Plaintiff's motion for an extension of expert discovery deadlines has to be reversed and Plaintiff's motion ultimately denied.

What is more, Plaintiff disregarded the requirement of affirmatively demonstrating "excusable neglect" which was never defined by EDCR 2.35. As noted in the Defendants' motion in chief, and what is truncated here for purposes of limited repetition, is the Nevada Supreme Court's definition of "excusable neglect" and the requirements imposed upon the party required to demonstrate it.

EDCR 2.35(a) provides that a request for additional time for discovery made later than 20 days from the close of discovery "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 meaning of the

[4] Now 21 days by amendment of the EDCR in 2019.

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 of "excusable neglect" does not apply to a party losing a fully briefed and argued motion; instead, 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) (concluding that, under NRCP 6(b)(2), excusable neglect may justify an enlargement of time to allow for substitution of a deceased party where the delay was caused by a lack of cooperation from the decedent's family and attorney); *Stoecklein v. Johnson Elec., Inc.*, 109 Nev. 268, 273, 849 P.2d 305, 308 (1993) (affirming a district court's finding of excusable neglect under NRCP 60(b)(1) where default judgment resulted from a lack of notice); *Yochum v. Davis*, 98 Nev. 484, 486-87, 653 P.2d 1215, 1216-17 (1982) (reversing a district court's order denying a motion to set aside a default judgment under NRCP 60(b)(1) where default resulted from a lack of procedural knowledge).

Clark v. Coast Hotels & Casinos, Inc., 130 Nev. 1164 (2014). Plaintiff provided no facts demonstrating his excusable neglect and the senior judge deciding the underlying motion failed to make any findings pertaining thereto. These failures alone require the granting of Defendants' motion.

Plaintiff's counsel claims that Defendants' counsel "yammers on about 'excusable neglect' when it is clear Local Rule only requires a showing of 'good cause' when seeking to enlarge 'any date set by the discovery scheduling order.'"[5] As demonstrated above, the only "yammering" going

[5] Plaintiff's Opposition, p. 6, lines 7-9

on here is Plaintiff's counsel's inability to either read, understand or accept that there are two hurdles which he was required to overcome: (1) demonstrate excusable neglect for his failure to move 21 days in advance of the expert disclosure deadline, and (2) only after demonstrating excusable neglect to then demonstrate good cause for the relief he requested (an issue dealt with hereinbelow). It is no wonder that Plaintiff's counsel falsely asserts that EDCR 2.35 does not require a showing of excusable neglect when a motion is untimely made – he has no excuse for it, so therefore he chose to cast aspersions on Defendants' counsel when it is he who lacks the intellectual capacity to read and follow simple rules. Again, the senior judge who decided the underlying motion made by Plaintiff disregarded the requirement that excusable neglect in failing to timely move for the relief requested be demonstrated before any issue of good cause be determined. That failure requires reconsideration, and upon such reconsideration, denial of Plaintiff's motion.

B. Plaintiff Violated EDCR 2.35, Failed to Make the Requisite Showing of Good Cause Under the Rule, and the Senior Judge Deciding the Motion Failed to Follow Said Rule

As if the aforenoted failures by Plaintiff were insufficient, Plaintiff failed to demonstrate "good cause" for the extension. The senior judge who decided the underlying motion, without making a factual finding, summarily concluded that "good cause" exists. What good cause? How is any appellate court, or this Court for that matter, supposed to determine what constitutes good cause when there is no factual finding so demonstrating?

"Good cause" has never been specifically defined in the context of EDCR 2.35 by any published decision. However, the factors courts look to in determining whether "good cause" was made out and exists was articulated in other contexts, and provides more than clear guidance on the issue. 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 senior judge deciding the underlying motion made no such findings and Plaintiff never demonstrated any

good cause for seeking the extension in the first place, especially one day before the deadline for expert exchanges and after having already received Defendants' expert disclosure.

A sister Court in the Eighth Judicial District examined whether good cause existed in the context of an EDCR 2.35 extension, and determined that the party so seeking failed to demonstrate the good cause required. That Court held:

> With regard to Defendants' Countermotion to reopen discovery, 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).

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.

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. The Court's examination of the standard is important in the context of this case, and completely contradicts Plaintiff's counsel's assertion that a District Court is not obligated to make findings of fact determinative of "good cause" or any other standard required of a party seeking some form of motion relief.

> 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.
>
> Even where good cause has been shown under NRCP 16(b), the district court must still independently determine whether the amendment should be permitted under NRCP 15(a). *See Grochowski*, 318 F.3d at 86. 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 ("Only upon the movant's demonstration of good cause to modify the scheduling order will the more liberal standard of Rule 15(a) apply to the district court's decision to grant or deny leave.").
>
> In this case, the district court did not make findings in conformance with NRCP 16(b) but rather only applied the standards associated with NRCP 15(a).

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 as justification for either granting or denying a motion seeking relief beyond a deadline impose by statute or rule, 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 senior judge who decided the underlying motion 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, this Court's inquiry should have terminated. It did not, nor was there any inquiry at all since the Court made no findings in this regard. Carelessness on the party seeking the extension is not good cause for granting it. In this case, Plaintiff was not diligent. Despite Plaintiff's inclusion of a check to his expert (an completely improper action on a motion for reconsideration and which, in spite of Plaintiff's assertion otherwise, does not end any inquiry into his expert's retention), 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."[6] (emphasis supplied). Now, after being caught in a material misrepresentation to the Court on the instant motion, Plaintiff's counsel exhibits amnesia with respect to his admission that he only retained his expert a few weeks before the deadline, a function of his own lack of diligence, and his

[6] Exhibit "A" to Defendants' instant motion, p. 2, i.e., Plaintiff's Motion to Extend

shock and dismay when he is now being held to account for his own practice failure. Once again, Plaintiff's counsel has no explanation, let alone an excuse for this lack of diligence, which completely eviscerates his ability to demonstrate good cause. Based upon this factor alone, the Court's inquiry was required to end and denial of Plaintiff's motion was to have ensued.

The remaining factors were also never addressed by Plaintiff nor the Court in granting Plaintiff's underlying motion. For example, neither Plaintiff nor the Court addressed the absence of prejudice to Defendants. Defendants were and are not obligated to demonstrate this factor since Defendants were not the party seeking the underlying affirmative relief. However, despite the absence of such a requirement on Defendants, the prejudice under the circumstances is obvious.

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 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 expert reports, followed by rebuttal reports 30 days thereafter, again simultaneously exchanged. Plaintiff's lack of

diligence and absence of good cause, coupled with the senior judge's erroneous decision eliminated those rules for Plaintiff, while effectively forcing Defendants to comply therewith. Such a holding created an inherent prejudice to Defendants. Plaintiff never even addressed the fact that Defendants were prejudiced, and for good reason – to address the issue would defeat his own request. Thus, the Court's failure to address the prejudice which inured to Defendants' detriment required denial of Plaintiff's motion and the Court's granting thereof was a manifest abuse of discretion.

In short, there are none of the four factors which weighed in Plaintiff's favor. Plaintiff's counsel could not show diligence, nor did he. Plaintiff's counsel created his own emergency, then sought and improperly obtained 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 Court found it to exist despite all facts demonstrating otherwise.

III. CONCLUSION

For all of the aforenoted reasons and those contained in Defendants' motion in chief, Defendants' motion for reconsideration should be granted in its entirety, and upon such granting, Plaintiff's motion to extend expert discovery should be denied. Plaintiff caused his own delay, never moved or sought the relief in this motion before the deadline's expiration, let alone within the time allotted by the EDCR, and caused Defendants to suffer prejudice. This Court did not make any factual findings to support the ruling that Plaintiff demonstrated excusable neglect in making an untimely motion to extend discovery, and thereafter failed to demonstrate good cause for the request for the extension in the first place.

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DATED this 3rd day of March, 2022

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ *Adam Garth*

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of March, 2022, a true and correct copy **REPLY IN FURTHER SUPPORT OF DEFENDANTS DANA FORTE, D.O., LTD., D/B/A FORTE FAMILY PRACTICE AND JOSEPH EAFRATE, PA-C'S MOTION FOR RECONSIDERATION OF PLAINTIFFS' MOTION TO EXTEND EXPERT DISCLOSURE DEADLINES AND THE COURT'S GRANTING THEREOF** was served by electronically filing with the Clerk of the Court using the Wiznet Electronic Service system and serving all parties with an email-address on record, who have agreed to receive Electronic Service in this action.

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By */s/ Heidi Brown*
An Employee of
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EXHIBIT H

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

CESAR HOSTIA, Plaintiff, vs. DANA FORTE, D.O., LTD., ET AL., Defendants.	CASE#: A-18-783435-C DEPT. III

BEFORE THE HONORABLE MONICA TRUJILLO
DISTRICT COURT JUDGE
TUESDAY,MARCH 29, 2022

RECORDER'S TRANSCRIPT OF PENDING MOTIONS

APPEARANCES VIA BLUEJEANS:

For the Plaintiff: KARL ANDERSEN, ESQ.

For the Defendants: ADAM GARTH, ESQ.

RECORDED BY: REBECCA GOMEZ, COURT RECORDER

Las Vegas, Nevada, Tuesday, March 29, 2022

[Case called at 9:15 a.m.]

THE COURT: Case number A-18-783435-C, Cesar Hostia v. Dana Forte, D.O. On behalf of the Plaintiff, who's here?

MR. ANDERSON: Karl Anderson here on behalf of the Plaintiff.

THE COURT: Thank you. On behalf of Defendant.

MR. GARTH: Adam Garth on behalf of the Defendants.

THE COURT: Thank you.

Good morning. And we are here for two motions. I have the first one, Defendant Dana Forte's motion for reconsideration of Plaintiff's motion to extend expert disclosure deadlines and the Court's granting thereof. I've reviewed that motion, the opposition, as well as the reply. And anything further on behalf of Defendants?

MR. GARTH: Yes, Your Honor. I wanted to highlight a few things, just to make sure that we're all on the same page. And both motions sort of dovetailed each other, but in taking the motion for reconsideration first.

In your absence, the Senior Judge who decided this case, or decided this particular motion, did not take into account quite a number of things that the Local Rules and the statutes require. There's a fundamental disagreement that Plaintiff's counsel has with the interpretation of what those rules are, versus what the courts have already articulated and now Justice Bulla, then Discovery Commissioner

Bulla, had articulated in how this particular rule is interpreted.

So let's just get sort of a timeline here so that we're clear. The parties entered into a stipulation to extend certain discovery disclosure deadlines, which included expert disclosures, the close of discovery, and subsequent other actions, as well as an extension of the trial date. And Your Honor signed that order at the end of September of last year.

THE COURT: Right.

MR. GARTH: Subsequent to that, we had our expert evaluate everything and provide a report. The deadlines for providing the report were December 31st, 2021. Our office was going to be closed the 30th and the 31st for the holiday weekend. So recognizing that and knowing we had a court order in place, we wanted to make sure we complied with all the deadlines of your order, and we disclosed our expert on December 29.

I had not heard from Mr. Anderson at all regarding any problems with expert disclosures or a need for any extensions of time until a day after he received my expert disclosure. I was already on vacation, but I took his call, and he asked me if it would be okay to extend the expert disclosures by a couple of weeks, because he was having trouble getting his report done on time and wouldn't be able to comply with the December 31st deadline.

I advised him, I'm sorry for that, but you hadn't contacted me. Had you done so, far enough in advance before I disclosed my expert to you, I would have been more than happy to extend the

professional courtesy. However, you already have my expert report. You will now be able to utilize my report in any extension I give you as basically a double rebuttal. We had a simultaneous expert disclosure deadline. So subsequent to that, he made a motion to extend the remaining discovery deadlines.

Now under the rule, which is EDCR 2.35, it's very clear. It says that whenever you're going to make a motion to extend discovery for any of the items that are contained in the discovery order, you need to do so three weeks in advance of whatever the deadline is. The way Mr. Anderson is interpreting it, is that the has until the complete -- completion of the discovery scheduled within which to make a motion to retroactively get an extension of time.

So in other words, according to his interpretation, a party can defy multiple court order dates, but as long as they make their motion before the final discovery cutoff deadline, they're perfectly fine. That's not what the rule says, because to interpret it that way basically means that the rest of the rule doesn't matter. Court orders don't matter. And the reason why this rule was put into place is for courts to be able to control their docket. To say, is it reasonable, under the circumstances, given what has occurred in the past, the need for the expert -- the need for the extension of time, and how that's going to impact the rest of the Court's calendar.

That's not what happened here. He waited until either December 30th or December 31st, the day before or the day of the final deadline for expert disclosures to make his motion, which was 20 days

late. When you make your motion in less than that three week time, you have multiple hurdles to overcome. The first being you have to show excusable neglect for your failure to make the motion within the three weeks preceding that. Once you show excusable neglect, you then have the obligation of proving what you would otherwise have had to approve when you make the motion, which is then you have good cause.

He never articulated one shred of evidence why he waited until the end, why he did not make the motion three weeks in advance, why he waited until after receiving my expert disclosure before even contacting us to request an extension of time. That is because there is no reasonable excuse. The excusable neglect requires that it not be because the attorney messed up. It's because it was something totally out of his control.

According to the motion, he's saying, well my expert really didn't get a chance to do it, to get it all done. that's not excusable neglect. He controls the expert. He controls when he gets the report. He controls when he asks for the report. So what does he throw into his motion? Well, we got some medical records a few days before the deadline, which we felt were pertinent and needed to be reviewed by the expert.

Now fast forwarding a little bit to what was the eventual expert disclosure a couple of weeks late. It didn't comply with the statute and there was nothing contained in his motion to indicate what in these medical records was so critical for this expert to evaluate.

Now I can tell you, Your Honor, I reviewed that disclosure,

which, by the way, occurred two weeks or more than two weeks after his initial expert disclosure. It didn't occur until the end of January when he gave us copies of these records. I have reviewed those records. There isn't one thing in those records which is pertinent to anything in this case other than what the Plaintiff was complaining about. There was no diagnosis, there was no confirmation of anything. These are pain management doctor records. The doctor isn't diagnosing, or attributing. There is no causation indicated in there. It is a mere report of what the Plaintiff reported to him. That's it.

There is nothing from his expert to indicate that those records were pertinent. There is nothing to indicate why the Plaintiff believed those records were pertinent. This is a stall tactic. He engaged the expert. By his own admission, he says, I engaged the expert several weeks in advance. When he was called out on several weeks in advance demonstrating that he had no excusable neglect, he's like I'm yammering on about the fact that it's -- that he disclosed the expert or engaged the expert late, and he provides a copy of a check from the end of October, purportedly hiring this expert.

We again have no indication when any records were provided to this expert, whether there was a contract between the two of them, when he asked for the report to be prepared, when the expert started the report. There isn't evidence of any of this, because there isn't any of it. The expert was engaged, if you are even to believe that this check began the engagement, a month after Your Honor signed the order, extending expert disclosure deadlines.

At the time of the request for the extension of those deadlines, he hadn't even hired an expert. So now he's complaining, gee, it's not fair to me that I've gotten your expert report. I can't get my expert to generate a report before New Year's. I knew the deadline was coming up. I never called you to ask for it. I never made a motion in time. I never indicated to you why the expert couldn't get me the records. He never told me on the phone anything about any records. He never provided one shred of evidence that this expert actually needed the records. And, by the way, there is nothing in the expert disclosure as to exactly what this expert reviewed and relied upon in direct defiance of the statute.

So there is no excusable neglect here. And for Plaintiff's counsel to actually say, I get to defy a court order so long as I make a motion before the final expert disclosure deadline is disingenuous at best.

Then he has to demonstrate good cause, which again dovetails into what went on here and why he needed the extension of time in the first place. So he's unable to demonstrate why he didn't make the motion in time for the 21 days in advance, and he's not able to demonstrate why he needed the extra time or the supposed import of these medical records, which have no import at all. And his expert doesn't even indicate how important they were or the fact that he even reviewed them and relied upon them. I have no idea what this expert relied on. Absolute zero because of the deficient expert disclosure itself.

Then we get to the expert disclosure. He makes the

disclosure two weeks late, and he proposed his own discovery schedule to the Court in his motion. In an effort to even act in good faith, we attempt to comply with that new proposed discovery disclosure deadline, and we disclose our rebuttal report within a month of his disclosing his own initial late expert disclosure.

We get nothing from him either because he thinks now I've got a pending motion to extend my discovery deadlines for which, by the way, he never asked for the motion to be decided on shortened time because, after all, he has all the time in the world. He doesn't provide an expert disclosure, gets our rebuttal disclosure, and then waits until after the order comes in, and then finally discloses his rebuttal disclosure, once again, late. He doesn't comply with Rule 16 of the Nevada Civil Practice Rules. It articulates specifically what needs to be in an expert disclosure.

When he does the initial disclosure it is missing at least half of the materials. It doesn't indicate the basis upon which the expert rendered his opinion. It doesn't indicate the records upon which he relied in order to arrive at his opinion. It articulates nothing other than this report, which is barely articulated in English. It attaches a copy of his CV, no rate sheet, no testimony list, zero, and then doesn't comply with other elements of the statute.

Then what happens is over time he begins to supplement this stuff, saying I don't even have to comply with what the rules are. I can do it on whatever timeframe I want. So it is this hubris of saying I can defy a court order, I can defy the rules, I can defy professional

courtesies, I can defy cases, statutes, because there is this expectation that somehow he's entitled to this kind of stuff, all to the prejudice of the Defendant.

Now this is a case in which he is claiming res ipsa loquitor applies and that's sort of where it dovetails into the summary judgment motion, which I would be happy to get into if you'd like me to or you want to deal with the issues with respect to the motion to reconsider separately. I'll be happy to handle however you would like, Your Honor.

THE COURT: Yeah. I want to do it separately.

And just to -- I have a question about in your motion you cite -- one second -- the *Clark v. Coast Hotels and Casinos*, and even though it's an unpublished opinion, I'm reading it and the portion you cite it says 20 days before the discovery cutoff date, which it says it means a request to extend any discovery deadline. One second. That's not the part I was looking at. Hold on.

MR. GARTH: It's quoting the statute, Your Honor.

THE COURT: No, I know. I was looking at the portion from the case. Hold on.

MR. GARTH: The *Clark* case was -- I think what I'm quoting is talking about the manifest -- the standards by which a court has to consider the motion to extend discovery and the excusable neglect that the Court look -- the Supreme Court looked to in order to define what excusable neglect was.

THE COURT: All right. Hold on. One second. Okay. This is the part I'm looking for. So you quote on page 3, "EDCR 2.35(a) provides

that a request for additional time for discovery made later than 20 days from the close of discovery."

So, I mean, obviously I know this argument is resting solely on what does the cutoff mean. I understand your point of it has to be the cutoff deadline that we're speaking of, but even this unpublished opinion talks about the rule saying it means close of discovery, or do you disagree with that?

MR. GARTH: I completely disagree with that, Your Honor, because if we interpret it that way, what's the point of the rest of it? In other words, there are multiple deadlines that a court issues in a scheduling order. The initial expert disclosures, rebuttal disclosures, deadlines for summary judgment motions, amending pleadings, discovery cutoff deadlines, and those deadlines are put in place for a reason. You need to make the motion in advance of those deadlines. And a way of trying to interpret it, which if this matter isn't decided favorably, we don't have -- almost no choice but to appeal it.

Commissioner Bulla or now Justice Bulla, indicated very clearly in a speech that she gave saying that it pertains specifically to the deadline that you're seeking to have request -- for which you're requesting an extension. To interpret it otherwise basically means you'll let all the other deadlines pass until you come up to the end of disclosure, and then you can go back to the Court and say, I want you to retroactively grant my motion. That's not the way it works.

THE COURT: Okay. And then with regard to the initial motion, which I did review, you're saying that the fact that he indicated

the medical providers didn't provide the records, essentially in a timely fashion, and that his expert wasn't able to review would not suffice as either good cause or excusable neglect?

MR. GARTH: Well, number one, he didn't articulate what the good cause was. He indicated that he gave these -- first of all, he engaged the expert by his own admission several weeks before the expert disclosure deadline. That's in his own motion papers.

So, by so doing, if you're only engaging the expert a few weeks in advance, and then saying I need my report in a rush, you're causing the problem. That's not good cause. You're creating your own emergency.

Then he says, okay, I now obtained these new medical records on behalf of my client and that those records I'm giving over to my expert to evaluate, because I think they're relevant. But there is nothing to indicate that the expert reviewed them, relied upon them, they were relevant in the first place, and I can tell you, as an officer of the court, I reviewed the records. There is nothing in there that indicates a diagnosis indicating causation, whatsoever, in this case.

The only thing that keeps being repeated, which is in almost every EMR, because the stuff just repopulates at every visit, is what the patient is complaining about. The doctor isn't commenting on it. He isn't causally relating anything in this -- in his pain management of this patient to anything that relates to this case at all. And we have no way of knowing because the expert didn't indicate in any disclosure whatsoever what records he reviewed.

The only statement that's contained in his expert disclosure is, I reviewed pertinent medical records. What does that mean? I have no idea what records he reviewed. And pertinent to whom? Him? The case? I at least should be able to know what it is he looked at. There wasn't -- it's incumbent upon the person who is saying I've got good cause to be able to prove that you've got good cause, not just to say, hey, I just happened to get these records late. They may not mean anything. My expert may or may not have relied on them.

But to say, hey I just -- you know, I got them a few days in advance, and I gave them over to my expert and that's good cause? Huh-uh. That's not the way it works. You have to be able to demonstrate why that is good cause? How it relates to the case? How relevant is it? That wasn't done here. Because he expects to get the request just for the asking, and that's not the way it works either, especially when he had my expert disclosure already.

We complied with the Court's order. We did what we were supposed to do. He didn't, and he hasn't. He hasn't fulfilled any of the requirements at all. And he doesn't just get to -- he doesn't get it for the asking. There isn't -- if he hasn't laid out any reason for it, and it is not supported by any evidence, other than saying, hey, this is what I want, you don't get it.

And we can't keep rewarding attorneys who aren't doing the job and complying with court orders, court rules. The courts are here to provide guardrails for this kind of stuff. And if people are just going to disregard what the rules are, there's no point in bringing a dispute to a

court. We could just fight it out.

The rules are put in here for a reason. And to define them -- what is stunning to me -- I've practiced in this jurisdiction for three years. I had a 31 year career in other jurisdictions. Anytime anybody has defied a court order, the judge gets incredibly annoyed at the party who fails to comply. And what I found here is that when we bring that to a court's attention that somebody has defied a court order, we are critiqued for casting aspersions on the party that defied the court order.

It seems like almost stepping through the looking glass and saying, you can't call out the person who doesn't comply with the rules, who defies court orders, who defies what the case law says, and then we're all supposed to say, gee, that's okay. You can rough shod me, you can steamroll me, we're all good because the rules apply to one side, but another, and that is inherently unfair.

That's exactly what's going on here is that the Plaintiff's counsel is trying to gaslight this court into saying, I don't have to show you anything. I don't have to tell you there's good cause here. I don't have to show you there's excusable neglect here. I don't have to do a thing other than say, I want the extension of time, and you need to give it to me, because if you don't give it to me I'm in trouble. Well, you should have thought of that before you received my expert disclosure deadline that was timely and yours, which isn't.

THE COURT: All right. Thank you, Mr. Garth. Mr. Anderson.

MR. ANDERSON: All right. Let me first -- counsel likes to go through the dispersions, and I would like to kind of address some of

those. We didn't defy a court order. We asked for an extension pursuant to the rules, so he keeps saying we defied a court order, no, we didn't.

He wants to start arguing about our disclosures and that's not in front of the Court, and I'll be glad to go through that, but it's not pertinent right now.

We're here on a motion for reconsideration, so counsel has the burden -- we're talking about defying court orders -- has the burden to demonstrate that the Court messed up, or that there's new law, or that there's new facts that we didn't know, and he's going on this clear -- the Court made a clear error by granting the motion to extend.

We asked for a two week -- and that's just it. Let's put it in -- we asked for a two week extension and, yeah, I had my expert, and, yes, I put this in our original motion, and I clarified it in our reply, we got some documents that we thought were going to be relevant to his final report. We got those earlier the week of the 31st, and I -- even up until a couple days before the deadline, I thought my expert was going to be able to get us our final report, and for some reason he was not able to do so. I think the office closed or something that week, but I still thought we were going to get it until that week.

And then when I realized that he was going to be a little bit late I did ask. I called counsel, and I asked for the extension. And he said, well, I gave mine a couple days early, and so I can't give it to you. And I told him then, I haven't given your report to my expert. I don't want him to deal with that at this point. And he's like, well, I can't trust you, so whatever.

So again we asked for the extension. We filed the motion because he refused to stipulate. I think that's absolutely good cause. You know, and he keeps pointing out there's no information from those records. The records weren't as critical as we were hoping. I think he did use some of the reports from the client. But, yeah, okay, so he didn't -- they weren't as helpful as we thought, but we thought they were going to be helpful. They just weren't as helpful or as relevant as we were hoping.

But the bottom line is we tried. I thought it was going to be done and the expert wasn't able to get me the report, so we asked for the extension, which we're allowed to do. It's not a defying of the court rules by asking for an extension when we know that we need it. And we didn't ask for an extension for the discovery cutoff or the other -- it was a two week extension on the report and the rebuttal report. So I think that's good cause, I've argued in my papers. If the Court wants to call that excusable neglect, I think that's fine too, but the rule doesn't require excusable neglect.

He wants to sit there and say that when EDCR 2.35 says you've got to file for the extension, and you got to make sure it's no later than 21 days before the discovery cutoff, he wants to intertwine discovery cutoff with deadline. I mean, that's just not the case. Statutory construction says that when you've got a phrase for one thing and another phrase for something else in the same statute, they mean two different things. I mean, you can't say deadline in the same statute with discovery cutoff and then, oh, well, they mean the same thing.

I've been in this jurisdiction a long time. I've never heard that deadline means or that discovery cutoff means expert reports, rebuttal reports, initial disclosures, everything. Everything's discovery cutoff. No, when you say discovery cutoff, it's the end of discovery. I mean, counsel wants to sit here and [indiscernible]. He's pissed because -- I don't know why he's pissed, but he's pissed, and so he's taking it out on us. That's fine. He can do that.

Anyway, the rule is satisfied. We clearly had good cause. I think we had excusable neglect even if that was the case. We asked for a two week extension. We had our initial reports done within that timeframe. We've supplemented those reports afterwards within the timeframes that the Court's ordered, and we provided a rebuttal report by the original date of -- not only did we do our initial expert, but we also did a rebuttal report by the original date that was in the original deadline.

I mean, we're not asking for anything other than what the rules allow us to do. The Court didn't mess up. There is no clear error, and the motion for reconsideration has to be denied. I don't know if there's really much else I can say unless the Court has some questions.

THE COURT: All right. Thank you. Mr. Garth, anything further? Mr. Garth.

MR. GARTH: Yeah. Your Honor, I think I've laid it out in the papers and beforehand. There's a fundamental disagreement here as to what EDCR says.

THE COURT: Right.

MR. GARTH: But if you get a clarification from Justice Bulla,

which we cited in our papers, that is how the courts are supposed to be interpreting it. How else are you going to interpret a rule where it says you need to make a motion, but then you can allow deadlines to come and go -- court ordered deadlines -- and you have until the end of discovery to retroactively get those amended. It doesn't make any sense.

What is the point of having to make a motion and deal with the issues that pertain to a calendar discovery order if you can allow those dates to pass, and then allow months to go by, and still wait to make your motion? Then the Court will be asking you, why didn't you ask for it before the court ordered deadline?

And what Mr. Andersen keeps saying is that I don't have to comply with that. All we did was, is we asked for an extension of time that we're entitled to ask for. Sure he can ask for it, but by his own admission the records that he claims that were so relevant he admits weren't relevant at all. I reviewed the records. Mr. Andersen reviewed the records. It is a sham to say that hose records were the reason why this case -- why the expert needed more time. He just told you, the expert's office was going to be closed. He wasn't going to be able to do it on time. That's the reason for it. That isn't good cause. He knew what the deadline was.

He could have called me up on the 27th, when he claims he got these records that he said were so relevant. He could have disclosed it to us. He never did until more than a month -- until about a month later. He never called me up on the 27th, or the 28th, to say that he

needed an extension of time. He didn't even call me up on the day he got my disclosure. He waited until after he got it and said, okay, well, now you're in a tough spot. So now I want you to give me a courtesy. That's not the way it works. I would be more than happy to have given him a courtesy had he called me up when he knew about this stuff. And he knows now, and he knew then those records were meaningless to this case.

So it is nonsense to say that's the reason why it was late. The reason why it was late keeps shifting, once he keeps getting called out. And those -- and the -- what he recently articulates is completely destroyed. The truth is his expert didn't get it to him because it was holiday time. That's it. That's not good cause. My expert got it to me on time because I made sure to get it. That was Mr. Anderson's responsibility. He controls the expert. The tail doesn't wag the dog. And that's what he's basically asking is that he couldn't get it done on time. He knows we've been prejudiced by it, but he still wants the extension and thinks he's entitled to it anyway.

That's not the way it works. He doesn't show any good cause at all. I haven't heard one thing that is at all truthful about what happened here, other than just now when he admitted the records weren't relevant and my -- I guess the expert's office was going to be closed, so I couldn't get it. He didn't know that. He didn't make sure of it. That's not good cause at all.

THE COURT: All right. Thank you, Mr. Garth.

MR. GARTH: Let alone inexcusable neglect.

THE COURT: So I doubt either side is going to be happy. Obviously, the issue is the interpretation and there's a couple things that I want to look up. So I want to issue a minute order on chamber's calendar next week on the 7th. And my preference would be to continue to your motion for summary judgment to the 12th, if that works for both of you, after I issue that minute order. Does the 12th -- you're on mute.

MR. GARTH: I'm sorry, Your Honor. I just want to check my calendar to make sure. Your Honor, I have another hearing that morning at 9:00, that I need to attend. Wait that is on the 13th. Is it possible we can make it the following week, Your Honor? I'm going to try to be out for my kids' spring break.

THE COURT: I'm fine with that. Mr. Andersen, does the 19th work for you for the motion for summary judgment? Mr. Andersen.

MR. ANDERSON: Yeah, the 19th works.

THE COURT: All right. So the motion for summary judgment will be continued to 9:00 a.m., on the 19th, and then I'll issue a minute order on the 7th chamber's calendar for the motion to reconsider.

MR. ANDERSON: I would ask the Court to keep in mind one thing. Counsel keeps arguing about a scenario that's not here, that I could have filed this, you know, months and months after the deadline and retroactively changed it. I did not do that. That's not the issue in front of the Court.

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THE COURT: I understand. All right. Thank you so much. You guys have a good day.

MR. GARTH: Thank you, Your Honor.

MR. ANDERSON: Thank you.

[Proceedings concluded at 9:51 .m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-visual recording of the proceeding in the above entitled case to the best of my ability.

Maukele Transcribers, LLC
Jessica B. Cahill, Transcriber, CER/CET-708

EXHIBIT I

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DISTRICT COURT
FAMILY DIVISION
CLARK COUNTY, NEVADA

CESAR HOSTIA, an individual, Plaintiff, v. DANA FORTE, D.O., LTD., a Nevada limited company dba FORTE FAMILY PRACTICE; SANDEEP VIJAY, M.D.; JOSEPH EAFRATE, PA-C; ROE DEFENDANTS, *et al.*, Defendants.	Case No.: A-18-783435-C Dept. No.: 3 **NOTICE OF ENTRY OF ORDER**

PLEASE TAKE NOTICE, that an Order Denying Defendant's Motion & Plaintiff's Countermotion was entered in the above-entitled action on the 11th day of May, 2022, a true and correct copy is attached hereto.

Dated this 16h of May, 2022.

ANDERSEN & BROYLES, LLP.

/s/ Karl Andersen, Esq.
Karl Andersen, Esq.
5550 Painted Mirage Road, Suite 320
Las Vegas, Nevada 89149

CERTIFICATE OF SERVICE

On the 16th day of May, 2022, the undersigned served a true and correct copy of the foregoing **Notice of Entry of Order** pursuant to the Court's e-serve system to all parties on the e-service list, including the following:

Adam Garth
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/s/ Brooke Creer
Representative of
ANDERSEN & BROYLES, LLP.

ORD

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DISTRICT COURT
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CESAR HOSTIA, an individual, Plaintiff, v. DANA FORTE, D.O., LTD., a Nevada limited company dba FORTE FAMILY PRACTICE; SANDEEP VIJAY, M.D.; JOSEPH EAFRATE, PA-C; ROE DEFENDANTS, *et al.*, Defendants.	Case No: A-18-783435-C Dept. No.: 3 **ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION OF PLAINTIFF'S MOTION TO EXTEND EXPERT DISCLOSURE DEADLINES & PLAINTIFF'S COUNTERMOTION FOR EDCR 7.60 SANCTIONS**

THIS MATTER came before the Court on April 08, 2022 on the MOTION FOR RECONSIDERATION OF PLAINTIFF'S MOTION TO EXTEND EXPERT DISCLOSURE DEADLINES ("Motion") filed by Defendants, Dana Forte, D.O., dba Forte Family Practice and Joseph Eafrate, PA-C ("Defendants") through counsel, S. Brent Vogel, Esq., Adam Garth, Esq., and Shady Sirsy, Esq. of the Law Firm of LEWIS BRISBOIS BISGAARD & SMITH, LLP and on the COUNTERMOTION FOR EDCR 7.60 SANCTIONS ("Countermotion") filed by Plaintiff, Cesar Hostia ("Plaintiff") through counsel, Karl Andersen, Esq., with the law offices of ANDERSEN & BROYLES, LLP.

THE COURT having reviewed the papers and pleadings on file herein, the arguments of the parties at the time of the hearing, and good cause appearing therefore, the Court finds and orders as follows:

THE COURT HEREBY FINDS as follows:

1. Senior Judge Bixler's prior ruling granting Plaintiff's Motion to Extend Deadline for Initial Expert Disclosures was not clearly erroneous pursuant to EDCR 2.24.

2. Plaintiff was required to file the Motion to Extend 21 days before the discovery cut-off date, or close of discovery, pursuant to EDCR 2.35 (amended version effective January 1, 2020).

3. The term "discovery cut-off date" does not mean the initial expert disclosure date of December 31, 2021.

4. The Plaintiff filed the Motion to Extend Expert Disclosures Deadlines on or about December 31, 2021, prior to the agreed upon discovery cut-off date of April 29, 2022.

5. The Plaintiff submitted the Motion to Extend Expert Disclosures Deadlines in a timely manner.

6. The Court's good cause analysis was sufficient to grant the extension, despite not detailing specific findings.

7. No new evidence or arguments were presented to the Court warranting reconsideration.

8. Defendant's conduct does not rise to the level warranting sanctions pursuant to EDCR 7.60, in regard to Plaintiff's Countermotion for Sanctions.

WHEREFORE, IT IS HEREBY ORDERED as follows:

1. Defendant's Motion for Reconsideration of Plaintiff's Motion to Extend Expert Disclosure Deadlines is DENIED.

2. Plaintiff's Countermotion for EDCR 7.60 Sanctions is DENIED.

Dated this _____day of _____, 2022.

Dated this 11th day of May, 2022

408 3E6 89CA D9BE
Monica Trujillo
District Court Judge

Respectfully submitted by:

ANDERSEN & BROYLES, LLP

/s/ Karl Andersen, Esq.
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Approved as to form:

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Subject:	Hostia - RE: [EXT] Proposed Order Updated
Date:	Friday, April 29, 2022 5:06:32 PM
Attachments:	image001.png Logo_e6253148-26a1-47a9-b861-6ac0ff0bc3c4.png
Importance:	High

You may use my e-signature.

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Sent: Friday, April 29, 2022 3:20 PM
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Subject: [EXT] Proposed Order Updated

Mr. Garth,

Please see the attached proposed Order Denying Motion & Countermotion. Our offices have updated it with the missing language the court asked for.

Please review it and let us know if you approve it so we can resubmit.

Thank you,

Brooke Creer

Legal Assistant
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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Cesar Hostia, Plaintiff(s) vs. Dana Forte D.O., LTD., Defendant(s)	CASE NO: A-18-783435-C DEPT. NO. Department 3

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order Denying Motion was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 5/11/2022

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EXHIBIT J

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DISTRICT COURT

CLARK COUNTY, NEVADA

CESAR HOSTIA, an individual, Plaintiff, vs. DANA FORTE, D.O., LTD., a Nevada limited company dba FORTE FAMILY PRACTICE; BANDEEP VIJAY, MD, an individual; JOSEPH EAFRATE, PA-C, an individual; ROE DEFENDANT business entities 1-10; and DOE DEFENDANT individuals 1-10,, Defendants.	Case No. A-18-783435-C Dept. No.: 3 **NOTICE OF ENTRY OF ORDER**

PLEASE TAKE NOTICE that the Order Denying Motion for Summary Judgment in Part, and Granting Motion for Summary Judgment in Part was entered May 19, 2022, a true and correct copy of which is attached hereto.

DATED this 23rd day of May, 2022

LEWIS BRISBOIS BISGAARD & SMITH LLP

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Attorneys for Dana Forte, D.O., Ltd., d/b/a Forte Family Practice

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of May, 2022, a true and correct copy of **NOTICE OF ENTRY OF ORDER** was served by electronically filing with the Clerk of the Court using the Odyssey E-File & Serve system and serving all parties with an email-address on record, who have agreed to receive electronic service in this action.

Karl Andersen, Esq. ANDERSEN & BROYLES, LLP 5550 Painted Mirage Road, Suite 320 Las Vegas, NV 89149 Tel: 702.220.4529 Fax: 702.834.4529 karl@andersenbroyles.com *Counsel for Plaintiff*	

By /s/ *Heidi Brown*
An Employee of
LEWIS BRISBOIS BISGAARD & SMITH LLP

ELECTRONICALLY SERVED
5/19/2022 3:37 PM

Electronically Filed
05/19/2022 3:36 PM
CLERK OF THE COURT

S. BRENT VOGEL
Nevada Bar No. 006858
Brent.Vogel@lewisbrisbois.com
ADAM GARTH
Nevada Bar No. 15045
Adam.Garth@lewisbrisbois.com
LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Telephone: 702.893.3383
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Attorneys for Dana Forte, D.O., Ltd dba Forte Family Practice and Joseph Earfrate, PA-C

DISTRICT COURT

CLARK COUNTY, NEVADA

CESAR HOSTIA, an individual,

Plaintiff,

vs.

DANA FORTE, D.O., LTD., a Nevada limited company dba FORTE FAMILY PRACTICE; SANDEEP VIJAY, M.D.; JOSEPH EAFRATE, PA-C; ROE DEFENDANT, et al.,

Defendants.

Case No. A-18-783435-C
Dept. 3

ORDER DENYING MOTION FOR SUMMARY JUDGMENT IN PART, AND GRANTING MOTION FOR SUMMARY JUDGMENT IN PART

This matter having come on for hearing on the 19th day of April, 2022 at 9:00 a.m., in Department 3 of the Eighth Judicial District Court in and for the County of Clark, on Defendants DANA FORTE, D.O., LTD., a Nevada limited company dba FORTE FAMILY PRACTICE; SANDEEP VIJAY, M.D.; JOSEPH EAFRATE, PA-C (collectively "Defendants") Motion for Summary Judgment. Plaintiff appeared remotely, by and through his counsel of record, Karl Andersen, Esq. of ANDERSON & BROYLES, LLP; and, Defendants appeared by and through their counsel of record Melanie L. Thomas, Esq., of the Law Firm LEWIS BRISBOIS BISGAARD & SMITH, LLP. The Court having considered Defendants' Motion for Summary Judgment and related pleadings, papers, and Plaintiff's opposition thereto, and arguments of counsel, finds and concludes as follows:

THE COURT FOUND that since this motion has been filed the Court has disposed of the portion relating to Plaintiff's failure to disclose an initial expert witness designation by the expert disclosure deadline previously set by this Court, by subsequently re-opening the deadline so that

Plaintiff could retain and expert and serve his expert disclosures.

THE COURT FOUND that Ms. Thomas requested a Stay on that specific issue so that Mr. Garth can file a Writ on the same, within thirty (30) days.

Following arguments by counsel, **COURT ADVISED** with regard to the res ipsa loquitor claim, a plaintiff can proceed with this and a professional negligence claim. Plaintiffs are required to attach an affidavit under the regular professional malpractice claims, but can still proceed on a res ipsa loquitor claim.

THE COURT FURTHER FOUND that the Plaintiff is not required to present an affidavit to survive summary judgment based on *Szydel v. Markman*. Nonetheless, he must still present evidence that gives rise to one of the numerated circumstances of NRS 41A.100(1)(a)-(d), which then establishes the presumption.

THE COURT FURTHER FOUND there are no facts that give rise to *res ipsa loquitor*, and that it does not apply here.

THEREFORE, THE **COURT ORDERED** that the Motion for Partial Summary Judgment as to the First and Second Cause of Actions in the Complaint is DENIED.

THE COURT FURTHER ORDERED that the Motion for Summary Judgment as to Plaintiff's Fourth Cause of Action for *Res Ipsa Loquiter* pursuant to NRS 41A.100 is GRANTED.

THE COURT FURTHER ORDERED as to to the oral request for a Stay to allow time to file a Writ is **DENIED**.

DATED this ___ day of _____, 2022.

Dated this 19th day of May, 2022

DISTRICT COURT JUDGE

E99 CA5 6EB0 EDC9
Monica Trujillo
District Court Judge

DATED this ___ day of _____, 2022.

LEWIS BRISBOIS BISGAARD & SMITH LLP

/s/ Adam Garth

S. Brent Vogel, Esq.
Nevada Bar No. 6858
Adam Garth, Esq.
Nevada Bar No. 15045
Melanie L. Thomas, Esq.
Nevada Bar No. 12576
6385 South Rainbow Blvd., Suite 600

DATED this ___ day of _____, 2022.

ANDERSON & BROYLES, LLP

Karl Andersen, Esq.
Nevada Bar No.10306
550 Painted Mirage Road, Suite 320
Las Vegas, NV 89149
Attorneys for Plaintiff

LEWIS BRISBOIS BISGAARD & SMITH LLP ATTORNEYS AT LAW

From:	Garth, Adam
To:	Brown, Heidi
Subject:	Fwd: [EXT] RE: Hostia v. Forte Proposed Order MSJ
Date:	Friday, May 6, 2022 3:23:15 PM
Attachments:	image001.png image002.png image003.png

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From: Garth, Adam <Adam.Garth@lewisbrisbois.com>
Sent: Friday, May 6, 2022 2:02:01 PM
To: Brown, Heidi <Heidi.Brown@lewisbrisbois.com>
Subject: FW: [EXT] RE: Hostia v. Forte Proposed Order MSJ

Adam Garth
Partner
Adam.Garth@lewisbrisbois.com

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From: Garth, Adam <Adam.Garth@lewisbrisbois.com>
Sent: Thursday, May 5, 2022 12:25 PM
To: kimberly@andersenbroyles.com; karl@andersenbroyles.com; assistant@andersenbroyles.com
Cc: Vogel, Brent <Brent.Vogel@lewisbrisbois.com>; Thomas, Melanie <Melanie.Thomas@lewisbrisbois.com>; Brown, Heidi <Heidi.Brown@lewisbrisbois.com>; San Juan, Maria <Maria.SanJuan@lewisbrisbois.com>
Subject: RE: [EXT] RE: Hostia v. Forte Proposed Order MSJ

I can only wait until noon tomorrow. We need this document finalized. Many thanks.

Adam Garth
Partner
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Adam Garth
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Las Vegas Rainbow
702.693.4335 or x7024335

From: kimberly@andersenbroyles.com <kimberly@andersenbroyles.com>
Sent: Thursday, May 5, 2022 12:17 PM
To: Garth, Adam <Adam.Garth@lewisbrisbois.com>; karl@andersenbroyles.com; assistant@andersenbroyles.com
Cc: Vogel, Brent <Brent.Vogel@lewisbrisbois.com>; Thomas, Melanie <Melanie.Thomas@lewisbrisbois.com>; Brown, Heidi <Heidi.Brown@lewisbrisbois.com>; San Juan, Maria <Maria.SanJuan@lewisbrisbois.com>
Subject: RE: [EXT] RE: Hostia v. Forte Proposed Order MSJ

Mr. Garth,

Mr. Andersen is in an all-day settlement conference today. I am not sure when he will return to the office. Please grant us an extension just until tomorrow, May 6th, in order for Mr. Andersen to review the document

Thank you for your consideration,
Kimberly
Accounts Manager

ANDERSEN & BROYLES, LLP
5550 Painted Mirage Road, Suite 320
Las Vegas, Nevada 89149
702-220-4529
Fax: 702-834-4529
Email: Kimberly@AndersenBroyles.com

From: Garth, Adam <Adam.Garth@lewisbrisbois.com>
Sent: Thursday, May 5, 2022 7:58 AM
To: karl@andersenbroyles.com; assistant@andersenbroyles.com
Cc: Vogel, Brent <Brent.Vogel@lewisbrisbois.com>; Thomas, Melanie <Melanie.Thomas@lewisbrisbois.com>; Brown, Heidi <Heidi.Brown@lewisbrisbois.com>; San Juan, Maria <Maria.SanJuan@lewisbrisbois.com>
Subject: FW: [EXT] RE: Hostia v. Forte Proposed Order MSJ
Importance: High

Karl,

Please see attached and message below. We have been awaiting your response since Monday. Please advise whether we may use your e-signature. If we do not have a response by the end of today, we will have no choice but to submit without your signature and advise the court of your refusal to sign. Thanks in advance.

Adam Garth

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Partner
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From: Brown, Heidi <Heidi.Brown@lewisbrisbois.com>
Sent: Monday, May 2, 2022 3:32 PM
To: Karl Andersen, Esq. <karl@andersenbroyles.com>; Thomas, Melanie <Melanie.Thomas@lewisbrisbois.com>
Cc: Vogel, Brent <Brent.Vogel@lewisbrisbois.com>; Garth, Adam <Adam.Garth@lewisbrisbois.com>
Subject: RE: [EXT] RE: Hostia v. Forte Proposed Order

Dear Mr. Anderson,

Attached please find the proposed summary judgment order for your review and approval. Please contact our office if you have any questions or concerns. Thank you.

Heidi Brown
Legal Secretary to
Adam Garth
Melanie Thomas
Shady Sirsy
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From: Karl Andersen, Esq. <karl@andersenbroyles.com>
Sent: Monday, May 2, 2022 1:39 PM
To: Thomas, Melanie <Melanie.Thomas@lewisbrisbois.com>
Cc: Brown, Heidi <Heidi.Brown@lewisbrisbois.com>; Vogel, Brent <Brent.Vogel@lewisbrisbois.com>; Garth, Adam <Adam.Garth@lewisbrisbois.com>
Subject: RE: [EXT] RE: Hostia v. Forte Proposed Order

I will look for the cleaned up draft.

Karl

From: Thomas, Melanie
Sent: Sunday, May 1, 2022 3:32 PM
To: Karl Andersen, Esq. <karl@andersenbroyles.com>
Cc: Brown, Heidi <Heidi.Brown@lewisbrisbois.com>; Vogel, Brent <Brent.Vogel@lewisbrisbois.com>; Garth, Adam <Adam.Garth@lewisbrisbois.com>
Subject: RE: [EXT] RE: Hostia v. Forte Proposed Order

Looks good. We will accept all those changes, and Heidi will send you the final draft in a clean email tomorrow morning. Once you've had a chance to review, please respond with your approval to add electronic signature. Thank you.

Melanie

From: Karl Andersen, Esq. <karl@andersenbroyles.com>
Sent: Friday, April 29, 2022 5:20 PM
To: Thomas, Melanie <Melanie.Thomas@lewisbrisbois.com>
Subject: [EXT] RE: Hostia v. Forte Proposed Order

I made some clarifying edits. They are redlined. Please let me know if these changes work.

Thanks,

Karl

From: Thomas, Melanie
Sent: Friday, April 29, 2022 4:26 PM
To: karl@andersenbroyles.com
Cc: Garth, Adam <Adam.Garth@lewisbrisbois.com>; Brown, Heidi <Heidi.Brown@lewisbrisbois.com>
Subject: Re: Hostia v. Forte Proposed Order

Good Afternoon Karl:

Please see the proposed order attached. It is due to the Court on 5/3. Please advise whether we may affix your electronic signature. Thank you.

Melanie

Melanie L. Thomas
Partner

LEWIS BRISBOIS

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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Cesar Hostia, Plaintiff(s) vs. Dana Forte D.O., LTD., Defendant(s)	CASE NO: A-18-783435-C DEPT. NO. Department 3

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

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