IN THE COURT OF APPEALS OF THE STATE OF NEVADA

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

Petitioners,

v.

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

Respondent,

and

CESAR HOSTIA,

Real Party In Interest.

Court of Appeals No.: 84775-COA

District Court No.: A-18-783433-C

PETITIONERS' MOTION FOR STAY PENDING DECISION ON WRIT OF MANDAMUS

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Petitioners ("Defendants") respectfully seek a stay of all proceedings in the District Court pending a determination of the Petition for Writ of Mandamus ("Writ") now pending before this Court, **due to the commencement of a trial in this matter scheduled for August 1, 2022**.[1]

This case commenced on October 25, 2018, sounding in professional medical negligence, requiring a medical expert by Plaintiff in order to prove his case in chief. A stay of proceedings until this Court determines whether to accept the Writ petition (and if so, upon is determination) is entirely appropriate since a case dispositive issue hangs in the balance.

If the Writ is entertained and the District Court's decision overturned, Plaintiff will lack expert support required by NRS 41A.100. A stay harms no one, and the parties, as well as the legal community, will obtain both a clear interpretation of EDCR 2.35's the timing requirements and the obligations of the parties to demonstrate specific thresholds attendant to discovery issues.

II. ARGUMENT

The party seeking a stay must first seek a stay from the District Court (NRAP

[1] The original Writ was filed in the Nevada Supreme Court on May 26, 2022. By order dated June 29, 2022, the Supreme Court transferred this matter for final determination by this Court.

8(a)(1)(A)). The District Court's order with notice of entry was served on May 16, 2022 (**Exhibit "A", Bates Nos. 2-9**). Defendants promptly filed their Writ with the Supreme Court on May 26, 2022. On May 31, 2022, Defendants moved the District Court for a stay of all proceedings pending determination of the Writ (**Exhibit "B", Bates Nos. 11-286**). The District Court issued a hearing date in Chambers for July 7, 2022 (**Exhibit "C", Bates No. 288**), meaning that the District Court was in full possession of the fully submitted motion on June 30, 2022. Plaintiff opposed and cross-moved for relief (**Exhibit "D", Bates Nos. 290-313**) followed by Defendants' reply and opposition to the countermotion (**Exhibit "E", Bates Nos. 315-376**).

To date, the District Court has not issued a decision on the motion for a stay and provided no information concerning a date for the decision. A prior oral application for a stay was made in District Court which was denied, but there was no briefing on the issue.[2] Meanwhile, this matter is scheduled for an imminent trial. It is therefore impracticable to await the District Court's determination of the pending motion.

Furthermore, and important to this analysis, is that Defendants separately moved for summary judgment in the District Court on two bases, (1) dismissing the *res ipsa loquitur* cause of action and (2) dismissing the Plaintiff's cause of action in professional negligence. The District Court granted summary judgment dismissing

[2] **Exhibit "B", Bates p. 240, lines 2-3, 18-19**

Plaintiff's *res ipsa loquitur* cause of action, leaving only a cause of action for professional negligence for which medical expert testimony is required per NRS 41A.100 (**Exhibit "F", Bates Nos. 378-388**). If this Court reverses the District Court, Plaintiff will be precluded from offering any expert testimony at trial, thus necessitating the outright dismissal of Plaintiff's case.

The factors to be considered determining a stay in the proceedings are (1) whether the object of the writ petition will be defeated if the stay is denied; (2) whether the petitioner will suffer irreparable or serious injury if the stay is denied; (3) whether the real party in interest will suffer irreparable or serious injury if the stay is granted; and (4) whether petitioner is likely to prevail on the merits in the writ petition. NRAP 8(c); *Fritz Hansen A/S v. Eighth Judicial District Court*, 116 Nev. 650, 657 (2000). No one factor carries more weight than any of the others, but in a particular situation, if one or two factors are especially strong, they are able to counterbalance any weaker factors. *Mikohn Gaming Corporation v. McCrea, Jr.*, 120 Nev. 248, 251 (2004). An analysis of these factors in this case shows that a stay is warranted pending resolution of the Writ.

The issue at bar is completely case dispositive. If Defendants are forced to proceed to trial in about two weeks, the object of the Writ would be defeated, since the very issue of whether the Plaintiff may proceed with his case hangs in the balance.

The second factor, whether the petitioner will suffer irreparable or serious

injury if the stay is denied, also weighs in favor of granting the stay. "[A]cts committed without just cause which unreasonably interfere with a business or destroy its credit or profits, may do an irreparable injury and thus authorize issuance of an injunction." *Sobol v. Capital Mgmt. Consultants*, 102 Nev. 444, 446, 726 P.2d 335, 337 (1986); *see also, Finkel v. Cashman Prof'l, Inc.,* 128 Nev. 68, 270 P.3d 1259 (2012); *Tryke v. V.*, 2020 Nev. Dist. LEXIS 798 (Eighth Jud. Dist. Ct., CASE NO.: A-19-804883-C); *Roush v. Meyerhoff*, 2018 Nev. Dist. LEXIS 1389 (Second Jud. Dist. Ct., Case No. CV18-02031); *Spring Valley Pharm. v. Co. V.*, 2017 Nev. Dist. LEXIS 2184 (Eighth Jud. Dist. Ct., Case No.: A-17-763456-C). A licensee whose license has been revoked or suspended immediately suffers the irreparable penalty of loss of [license] for which there is no practical compensation. *State Dep't of Bus. & Indus. v. Nev. Ass'n Servs.*, 128 Nev. 362, 370, 294 P.3d 1223, 1228 (2012), *quoting Com. v. Yameen,* 401 Mass. 331, 516 N.E.2d 1149, 1151 (Mass. 1987). As applied to the instant case, medical malpractice claims create specific ongoing injuries to medical professionals in the form of higher insurance premiums, damage to professional reputations and reporting requirements. On every application for privileges, renewal of medical malpractice policies and application for state licensure, Defendants will need to list this action which could potentially result in denial of privileges or increased premiums during its pendency. Additionally, forcing Defendants to proceed to trial on both liability and damages when the issue presented on appeal will only prolong these injuries and cause further damage to

them, when it is possible that the case against Defendants will be dismissed in its entirety should this Court rule in Defendants' favor. The potential expenses of proceeding to trial on all issues will require the unnecessary expenditure of all parties' resources.

The third factor, whether the real party in interest will suffer irreparable or serious injury if the stay is granted, also weighs in favor of granting the stay. Plaintiff will not suffer irreparable or serious injury should this stay be granted. It will prevent the expenditure of financial and emotional resources pertaining to a claim which he effectively destroyed by failing to timely move or justify his need for the extension. Should this Court either not accept the Writ or ultimately affirm the District Court's decision, Plaintiff will have suffered no risk or injury.

The final factor for consideration, whether petitioner is likely to prevail on the merits, also weighs heavily in favor of granting the stay requested. Plaintiff's motion to extend should have been denied, and Defendants' motion to reconsider that decision should have been granted in its entirety. Nev. R. Prac. Eight Jud. Dist. Ct. 2.35 requires that motions to extend discovery deadlines be made at least 21 days prior to the expiration of that deadline, not the close of all discovery in the case. To obtain that relief, Plaintiff needed to demonstrate good cause. Motions made less 21 days before the expiration of the deadline for the specific activity, excusable neglect must be demonstrated as well. Plaintiff moved 20 days late to extend, failed to offer good cause why he needed the extension, and failed to demonstrate excusable

neglect.

Explaining the pre-requisites for obtaining an extension, then Commissioner (now Justice) Bulla explained that parties were required to file their motion within 20 days of the cut-off they are moving to extend[3], 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]

In *Clark v. Coast Hotels & Casinos, Inc.*, 130 Nev. 1164, 2014 Nev. Unpub. LEXIS 1238, pp. 6-8 (2014)[5], the Supreme Court addressed the issue of excusable

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[3] The 20-day deadline was changed to 21 days with the revision of the EDCR's rules.

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

[5] Per N.R.A.P. 36(c)(2), on or after January 1, 2016, an unpublished decision may (footnote continued)

neglect, 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.

The District Court refused to make factual findings as to what constituted good cause for defiance of its own scheduling order for expert disclosure. It incorrectly interpreted EDCR 2.35 to require that any motion to extend be made at least 21 days before the close of all case discovery rather than the specific deadline sought to be extended. Additionally, the District Court failed to require the Plaintiff demonstrate his excusable neglect in not moving 21 days prior to the expiration of the expert disclosure deadline. These were all manifest abuses of discretion.

Plaintiff violated the procedural requisites with regard to the relief he sought. He admitted in his original motion that he did not even first engage his expert until several weeks prior to the expert disclosure deadline (**Exhibit "B", Bates No. 30:12-15**), and that the "new" records he never bothered to review were completely irrelevant to any issue in this case (**Exhibit "B", Bates No. 221:4-8**). 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. The District Court never addressed this rule violation or how Plaintiff could somehow extricate himself from it. Plaintiff never addressed his excusable neglect, believing that his time to move expired 21 days before the close

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be cited for its persuasive value, if any. Supreme Court Rule 123 prohibiting citation to unpublished decisions was repealed on November 12, 2015.

of all discovery in the case. The District Court incorrectly agreed with this interpretation. The District Court's ruling effectively states that a party may violate court ordered discovery deadlines, but if the party moves at least 21 days before all discovery closes, no excusable neglect needs to be shown. That interpretation defeats the very purposes of EDCR 2.35's requirements and makes court ordered deadlines completely impotent.

"Although 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 court held:

> A scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril . . . 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)).

Plaintiff failed to timely serve an expert report within the deadline set forth in this Court's scheduling order. Plaintiff never demonstrated either good cause or excusable neglect. As such, any request by Plaintiff to extend discovery should have been denied.

Plaintiff was in possession of Defendants' timely expert disclosure. Defendants received Plaintiff's disclosure two weeks after the scheduling order's deadline, the disclosure was statutorily noncompliant, and remains so even after two "supplements" served beyond the time even ordered by the Court. Plaintiff was unfairly given Defendants' expert report usable by his expert to effectively prepare two rebuttals.

III. CONCLUSION

Defendants respectfully request that this matter be stayed while this Court considers the Writ. With the trial now only two weeks away, and the District Court's refusal to decide the pending stay application before it, the stay will maintain the status quo and prevent what will likely be an unnecessary trial where the effect of Plaintiff's discovery and motion failures will result in preclusion of requisite

expert testimony.

DATED this 14th day of July, 2022

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s/ Adam Garth*

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Attorney or Party without Attorney: S. BRENT VOGEL (SBN 6858) Lewis Brisbois Bisgaard & Smith LLP 6385 South Rainbow Boulevard, Suite 600 Las Vegas, NV 89118 *Telephone No:* (702) 893-3383 *Attorney For:* Petitioners				***For Court Use Only***
	Ref. No. or File No.: 27428-508			
Insert name of Court, and Judicial District and Branch Court: IN THE COURT OF APPEALS OF THE STATE OF NEVADA				
Plaintiff: DANA FORTE, D.O., LTD., a Nevada limited company dba FORTE FAMILY PRACTICE and JOSEPH EAFRATE, PA-C, *Defendant:* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA ex rel. THE COUNTY OF CLARK, AND THE HONORABLE JUDGE MONICA TRUJILLO				
DECLARATION OF SERVICE	*Hearing Date:* 8/1/22	*Time:*	*Dept/Div:*	*Case Number:* A-18-783435-C

1. *At the time of service I was at least 18 years of age and not a party to this action.*

2. I served copies of the PETITIONERS' MOTION FOR STAY PENDING DECISION ON WRIT OF MANDAMUS

3. *a. Party served:* ANDERSON & BROYLES, c/o Karl Andersen
   b. Person served: Kristen Bussey - Front Desk

4. *Address where the party was served:* 5550 Painted Mirage Rd 320, Las Vegas, NV 89149

5. *I served the party:*
   a. **by personal service.** I personally delivered the documents listed in item 2 to the party or person authorized to receive process for the party (1) on: Thu, Jul 14 2022 (2) at: 01:29 PM

Fee for Service:
Pursuant to NRS 53.045
I Declare under penalty of perjury under the laws of the State of NEVADA that the foregoing is true and correct.

6. ***Person Who Served Papers:***
   a. Andre Howell (R-2021-08748, Clark County)
   b. FIRST LEGAL
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   2920 N. GREEN VALLEY PARKWAY, SUITE 514
   HENDERSON, NV 89014
   c. (702) 671-4002

07/14/2022
(Date)

Andre Howell
(Signature)

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of July, 2022, a true and correct copy **PETITIONERS' MOTION FOR STAY PENDING DECISION ON WRIT OF MANDAMUS** was served both by email, serving all parties with an email-address on record.

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Attorneys for Plaintiff

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

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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
Adam.Garth@lewisbrisbois.com

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

ORD

ANDERSEN & BROYLES, LLP
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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.: 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.
Karl Andersen, Esq.
Nevada Bar No. 10306
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Las Vegas, Nevada 89149
Attorney for Plaintiff

Approved as to form:

LEWIS BRISBOIS BISGAARD & SMITH

/s/ Adam Garth, Esq.
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Attorneys for Defendants

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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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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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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 TO STAY ALL PROCEEDINGS PENDING DISPOSITION OF WRIT PETITION TO NEVADA SUPREME COURT** **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 TO STAY ALL PROCEEDINGS PENDING DISPOSITION OF WRIT PETITION TO NEVADA SUPREME COURT. 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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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff moved to extend expert disclosure deadlines over Defendants' objection on December 31, 2021.[1] Defendants opposed this motion[2] and Plaintiff filed his reply.[3]This Court granted said motion on February 17, 2022.[4] On February 18, 2022, Defendants moved to reargue Plaintiff's motion.[5] Plaintiff opposed said motion,[6] and Defendants interposed their reply thereto.[7] A hearing was conducted on March 29, 2022[8] and an order was served with notice of entry on May 16, 2022 denying the motion to reconsider.[9]

Moreover, Defendants moved for summary judgment on two bases, with the Court having granted summary judgment on one of those bases, thereby dismissing Plaintiff's *res ipsa loquitur* cause of action, leaving only a cause of action for professional negligence[10] for which medical expert testimony is required.

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[1] Exhibit "A", Plaintiff's Motion to Extend Expert Disclosure Deadlines dated December 31, 2021

[2] Exhibit "B", Defendants' Opposition to Plaintiff's Motion to Extend Expert Disclosure Deadlines

[3] Exhibit "C", Plaintiff's Reply in Further Support of Motion to Extend Expert Disclosure Deadlines

[4] Exhibit "D", Order Granting Plaintiff's Motion to Extend Expert Disclosure Deadlines dated February 17, 2022 with notice of entry thereof

[5] Exhibit "E", Defendants' Motion to Reconsider the Granting of Plaintiff's Motion to Extend Expert Disclosure Deadlines

[6] Exhibit "F", Plaintiff's Opposition to Defendants' Motion to Reconsider the Granting of Plaintiff's Motion to Extend Expert Disclosure Deadlines

[7] Exhibit "G", Defendants' Reply in Further Support of Defendants' Motion to Reconsider the Granting of Plaintiff's Motion to Extend Expert Disclosure Deadlines

[8] Exhibit "H", Transcript of Proceedings on Hearing Pertaining to Defendants' Motion to Reconsider the Granting of Plaintiff's Motion to Extend Expert Disclosure Deadlines

[9] Exhibit "I", Order Denying Defendants' Motion to Reconsider the Granting of Plaintiff's Motion to Extend Expert Disclosure Deadlines with notice of entry

[10] Exhibit "J", Order Partially Granting Defendants' Motion for Summary Judgment

Defendants filed a writ with the Nevada Supreme Court on May 26, 2022,[11] pertaining to this Court's granting of Plaintiff's motion to extend expert disclosure deadlines and denying Defendants' motion for reconsideration thereof.

The Nevada Supreme Court will decide whether to take up the issues raised in the writ petition. The issues raised by the writ petition are potentially case dispositive. If the Writ is granted, either the Supreme Court, or presumptively the Court of Appeals, will determine whether this Court should have denied Plaintiff's motion and denied any extension of the deadlines for expert disclosure. Moreover, this Court dismissed one of Plaintiff's two causes of action, namely *res ipsa loquitur,* leaving only Plaintiff's professional negligence cause of action as viable, when it decided Defendants' motion for summary judgment. As the Court is well aware, professional negligence cases require expert testimony in order to proceed to trial. The absence of expert support by Plaintiff automatically dooms the Plaintiff's case. If the appellate court reverses this Court's rulings on the discovery motion and the reconsideration thereof, Plaintiff will be preluded from offering any expert testimony at trial, thus necessitating the outright dismissal of Plaintiff's case. Currently, this case is scheduled to commence trial on August 1, 2022. A motion to extend the close of discovery deadline and the trial date is pending before this Court and was supposed to be heard on May 31, 2022, but due to a court emergency, the matter was continued until June 16, 2022 at 9:30 a.m. A stay of proceedings until the appellate court determines whether to accept the Writ petition is entirely appropriate since proceeding while a potentially case dispositive issue hangs in the balance is not productive for either side. Moreover, should the appellate court accept the Writ, the stay should be further extended until such time as that court takes to rule on the pending petition.

II. ARGUMENT

A. Procedural Posture of the Case

This is an action commenced on October 25, 2018, sounding in professional medical negligence thus requiring a medical expert by Plaintiff in order to prove his case in chief. Currently, this case is scheduled to commence trial on August 1, 2022. A motion to extend the close of

[11] Exhibit "K", Writ to Nevada Supreme Court

discovery deadline and the trial date is pending before this Court. A stay of proceedings until the appellate court determines whether to accept the Writ petition is entirely appropriate since proceeding while a potentially case dispositive issue hangs in the balance is not productive for either side. Now, more than any time is appropriate to stay the case, since whether Plaintiff even has sufficient evidence to proceed to trial will be determined by this Writ Petition.

B. A Stay is Appropriate at this Time

A party may move for a stay in District Court proceedings pending resolution of an appellate issue pursuant to the Nevada Rules of Appellate Procedure. NRAP 8(a)(1)(A). The party seeking a stay must first seek a stay from the District Court, as opposed to an appellate court. *Id*. As Defendants already filed their Petition for a Writ of Mandamus on May 26, 2022, Defendants are first seeking a stay with this Court pursuant to NRAP 8(a)(1)(A) and this Motion for Stay is procedurally proper and is properly before this Court.

The factors to be considered by the Court when considering whether to issue a stay in the proceedings when an appellate issue is pending before the Nevada Supreme Court are (1) whether the object of the writ petition will be defeated if the stay is denied; (2) whether the petitioner will suffer irreparable or serious injury if the stay is denied; (3) whether the real party in interest will suffer irreparable or serious injury if the stay is granted; and (4) whether petitioner is likely to prevail on the merits in the writ petition. NRAP 8(c); *Fritz Hansen A/S v. Eighth Judicial District Court*, 116 Nev. 650, 657 (2000). The Supreme Court has not held that any one of these factors carries more weight than any of the others, but in a particular situation, if one or two factors are especially strong, they are able to counterbalance any weaker factors. *Mikohn Gaming Corporation v. McCrea, Jr.*, 120 Nev. 248, 251 (2004) ("We have not indicated that any one factor carries more weight than the others, although . . . if one or two factors are especially strong, they may counterbalance other weak factors.").

An analysis of these factors in this case shows that a stay is warranted pending resolution of Defendants' interlocutory appeal regarding the Court's decision to grant Plaintiff's motion to extend expert disclosure deadlines and to deny Defendants' motion for reconsideration of same.

/ / /

1. Object of Writ Will Be Defeated if Stay is Not Granted

The issue here is completely case dispositive insofar as a reversal by an appellate court results in the preclusion of Plaintiff's expert for any purposes in this case, a factor which is fatal to any professional negligence case pursuant to NRS 41A.100. To require that this matter proceed to trial when a key element to Plaintiff's ability to prove his case hangs in the balance would not only be wasteful, but, the object of the forthcoming writ petition would be defeated, and Defendants' expenses would be increased.

2. Petitioner Will Suffer Irreparable Injury in Absence of Stay

The second factor for consideration pursuant to NRAP 8, whether the petitioner will suffer irreparable or serious injury if the stay is denied, also weighs in favor of granting the stay. For one, medical malpractice claims create specific ongoing injuries to medical professionals in the form of insurance premiums, damage to professional reputations and reporting requirements. Forcing Defendants to proceed to trial on both liability and damages when the issue presented on appeal will only prolong these injuries and causes further damage to them, when it is not only possible, but probable, that the case against Defendants will result in Plaintiff's case being dismissed in its entirety should the Nevada Supreme Court or the Court of Appeals rule in Defendants' favor given that the issue involves whether Plaintiff should have been permitted an extension of time to disclose his experts in light of the facts and circumstances surrounding the motion, and whether Plaintiff even demonstrated the requisite elements in his motion to even be able to obtain the relief he sought. Secondly, the potential expenses of proceeding to trial on all issues will require the unnecessary expenditure of Defendants' resources in having to pursue the additional discovery preparing for trial and moving for summary judgment, when the Plaintiff failed to meet the prerequisites associated with a motion to extend discovery deadlines and the specific requirements of EDCR 2.35.

3. Plaintiff Will Suffer No Serious or Irreparable Injury If Stay Is Granted

The third factor for consideration pursuant to NRAP 8, whether the real party in interest will suffer irreparable or serious injury if the stay is granted, also weighs in favor of granting the stay in proceedings. The real party in interest, the Plaintiff, will not suffer irreparable or serious injury

should this stay be granted. In fact, he will benefit from the stay. The stay will allow a determination of whether the effectively case dispositive issue pertaining to Plaintiff's ability to proffer an expert as required by NRS 41A.100 is permitted. If Plaintiff was improperly granted an extension in contravention of EDCR 2.35's requirements, Plaintiff will therefore be precluded from proffering such expert testimony, thus dooming his case against Defendants. A stay to determine this issue will prevent the expenditure of financial and emotional resources pertaining to a claim which should have been pronounced dead by this Court due to Plaintiff's admitted failure to timely retain and disclose his expert after having received Defendants' timely expert disclosure, placing Defendants in a position of prejudice through no fault of theirs, but through Plaintiff's own negligence. Should the Nevada Supreme Court or Court of Appeal either deny the Writ or ultimately affirm this Court's decision, Plaintiff will have suffered no risk or injury.

4. <u>Defendants Have Strong Likelihood of Prevailing On Appeal</u>

The final factor for consideration pursuant to NRAP 8, whether petitioner is likely to prevail on the merits in the writ petition, also weighs heavily in favor of granting the stay requested. With respect to this Court, Defendants believe that Plaintiff's motion to extend should have been denied, and Defendants' motion to reconsider that decision should have been granted in its entirety.

Nev. R. Prac. Eight Jud. Dist. Ct. 2.35 states in pertinent part:

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

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. 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 orders, either on Plaintiff's original motion or upon reconsideration, 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, then Commissioner (now Justice) Bulla explained that Plaintiffs were required to file their motion within 20 days of the cut-off they are moving to extend[12], 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).[13] As Justice Bulla now sits on the Court of Appeals, and the Court of Appeals is presumptively being assigned to the Court of Appeals in accordance with NRAP 17(b)(13), this citation provides a clear indication of the thought process likely to be employed on the issue of the time from which when the 21 day threshold to request an extension is computed to either implicate or avoid the need to demonstrate excusable neglect on the part of the moving party. Plaintiff's Motion was filed on December 31, 2021. The initial expert exchange discovery cut-off was December 31, 2021. Plaintiffs were required to file their Motion **no later than** Friday, December 10, 2021. It is believed that this Court misinterprets EDCR 2.35's requirement that the timing of the motion be 21 days before final discovery cutoff rather than 21 days prior to the deadline for which an extension is sought.

[12] The 20-day deadline was changed to 21 days with the revision of the EDCR's rules.

[13] 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 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 asked this Court to extend him concessions regarding compliance but has created his own discovery mess and requested 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 and did not demonstrate either good cause or excusable neglect. This Court's orders did not address any facts demonstrating both prongs of the test to justify the granting of Plaintiff's motion. In fact, this Court noted that excusable neglect never needed to be demonstrated since it interpreted the deadline to move for such relief as 21 days from the close of discovery of the entire case rather than the time period for the specific act for which the extension was sought. Thus, it became a manifest abuse of discretion to grant a motion which lacked sufficient factual findings which will be required for appellate review. While the Court determined that good cause for the extension existed, there were no factual findings contained either in the original order or the order on the motion for reconsideration documenting what specific facts were shown by Plaintiff to demonstrate the good cause the Court found to exist.

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.

(a) Plaintiff Cannot and Did Not Show Good Cause

The primary consideration under the "good cause" standard is the "diligence of the party seeking the amendment" to the scheduling order. *See Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992) (analyzing the analogous federal rule for extension of discovery deadlines). "[C]arelessness is not compatible with a finding of diligence and offers no reason for a grant of relief." *Id.* Rather, a party must demonstrate that the scheduling order "cannot reasonably be met despite the diligence of the party seeking the extension." *Id*. The movant must provide a specific explanation of why the scheduling order deadline was not met, and why a motion to extend

the deadline was untimely. *See Toavs v. Bannister*, No. 3:12-cv-00449-MMD-WGC, 2014 U.S. Dist. LEXIS 83648, at *10-11 (D. Nev. May 14, 2014). This, he cannot do, nor did he. Moreover, this Court failed to point to any fact demonstrating the good cause it concluded Plaintiff possessed.

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. What was even more stunning is the fact that Plaintiff's counsel admitted during the hearing on the motion to reconsider the following: "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.[14] A mere glance at the records would reveal to any layperson that no findings were made by the physician in the "new records" but merely noted complaints being made by Plaintiff. That provider made not causative conclusions or comments pertaining thereto whatsoever. Therefore, for Plaintiff's counsel to rely on the "new records" as an excuse for his expert needing to review same, is disingenuous at best.

Additionally, Plaintiff counsel admitted 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."[15] In other words, when Plaintiff's counsel advised Defendants' counsel in September, 2021 that he wanted to review the case with his expert before proceeding with any case resolution issues, Plaintiff's counsel never even had an expert review the case in the first place. Retaining an expert and providing medical records several weeks prior to a known expert exchange deadline, when that

[14] Exhibit "H", p. 15:4-8

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

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 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 and did not 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. Finally, Plaintiff's counsel admitted that these "new records" were of no consequence to this case and were not a factor in Dr. Levin's opinion as they made no conclusion or findings on any of the allegations in this case.[16] 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

[16] Exhibit "H", p. 15:4-8

with a showing of good cause. In other words, a failure on Plaintiff's part cannot and should not be considered an emergency on Defendants' part.

(b) Plaintiff Cannot Show Excusable Neglect

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.

Despite this Court's finding that excusable neglect need not be shown since it interpreted EDCR 2.35 as requiring that a motion be made only 21 days prior to the close of all discovery, not the deadline which the party is seeking to extend. Should whichever appellate court reviewing the writ petition decides to accept it, this interpretation of EDCR 2.35 will be front and center.

Plaintiff cannot show, nor did he, 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. Furthermore, this Court indicated that there was not even a requirement that Plaintiff demonstrate excusable neglect, interpreting the requirement that unless the motion was made less than 21 days from the close of all discovery, not the deadline sought to be extended.

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.

For the reasons cited above, this Court's interpretation of EDCR 2.35 does not match with the case law of that Rule's requirements.

C. <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 14, 2022. In good faith, we exchanged our rebuttal on that date. The Court then gave Plaintiff even more time to rebut our rebuttal. The nightmare created by Plaintiff's abject failure to follow even the most basic Court order, Court rules and statutes started the ball rolling here. The 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.

D. <u>The length of the delay and its potential impact on the proceedings.</u>

Plaintiff's Motion was 20 days late. However, Plaintiff 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.

E. <u>The reason for the delay.</u>

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

The decision whether to grant a motion for a stay in proceedings is left to the sound discretion of the Court. *Nevada Tax Commission v. Brent Mackie*, 74 Nev. 273, 276 (1958)("the granting or denial of the present motion [for stay] lies within the sound discretion of the court."). An analysis of the above factors shows that the Court should exercise its discretion to grant the stay sought by Defendants.

III. <u>CONCLUSION</u>

Defendants respectfully request that this matter be stayed while they appeal the granting of Plaintiff's motion to extend expert disclosure deadlines and the denial of Defendants' motion for reconsideration of same. The procedural posture of this case makes a stay the only way that the issue can be resolved efficiently and effectively prior to the expenditure of considerable resources and to allow the parties to limit their expenses in preparing and trying a case which will need to be dismissed in its entirety should the appellate court disagree with this Court's interpretation of EDCR 2.35.

DATED this 31st day of May, 2022

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s/ Adam Garth*

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of May, 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 TO STAY ALL PROCEEDINGS PENDING DISPOSITION OF WRIT PETITION TO NEVADA SUPREME COURT** 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

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.
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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.
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/ Sean Trumpower
Representative of Andersen & Broyles, LLP

EXHIBIT B

OPPM
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Brent.Vogel@lewisbrisbois.com
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Telephone: 702.893.3383
Facsimile: 702.893.3789

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 **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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Tel. 702.893.3383

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.

Karl Andersen, Esq.
Zachary Peck, Esq.
ANDERSON & BROYLES
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Attorneys for Plaintiff

By */s/ Tiffany Dube*
An Employee of
LEWIS BRISBOIS BISGAARD & SMITH LLP

EXHIBIT A

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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. 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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Tel. 702.893.3383
Attorneys for Dana Forte, D.O., Ltd dba Forte Family Practice and Joseph Eafrate, PA-C

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.

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

By */s/ Tiffany Dube*
An Employee of
LEWIS BRISBOIS BISGAARD & SMITH LLP

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

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Geneva, Florida 32732

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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
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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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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

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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

S. BRENT VOGEL
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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

ORD
ANDERSEN & BROYLES, LLP
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Attorney for Plaintiff

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
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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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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.

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By */s/ Heidi Brown*
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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.
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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.:

/ / /

/ / /

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:

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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. <u>The length of the delay and its potential impact on the proceedings</u>.

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. <u>The reason for the delay</u>.

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.

Karl Andersen, Esq.
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By */s/ Tiffany Dube*
An Employee of
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EXHIBIT A

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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. 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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By */s/ Tiffany Dube*
An Employee of
LEWIS BRISBOIS BISGAARD & SMITH LLP

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,

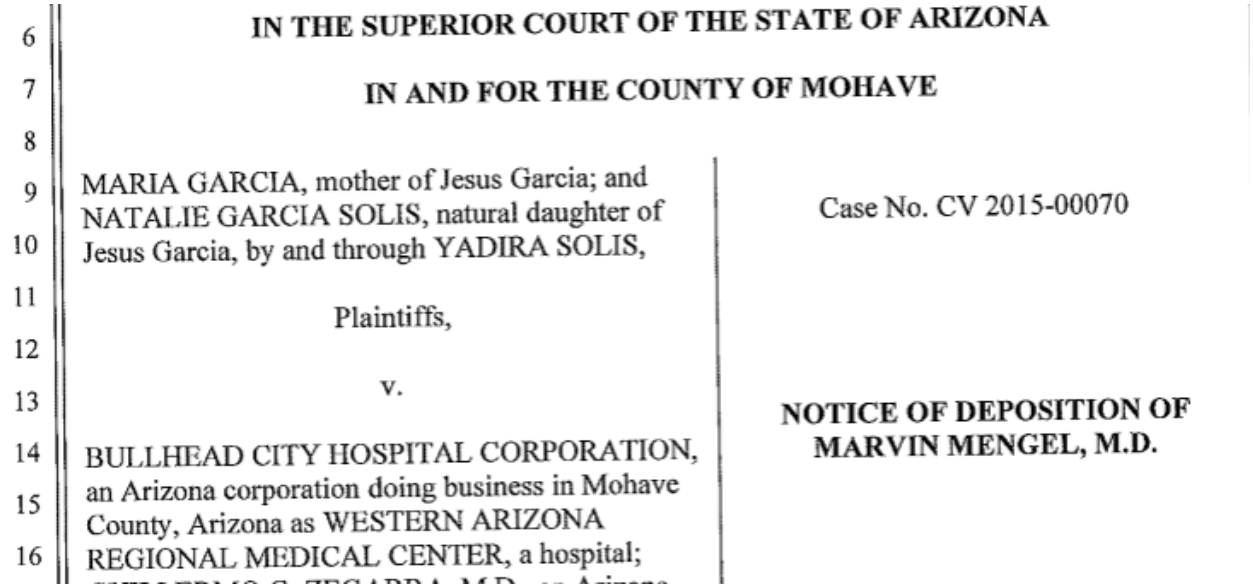
Plaintiffs, **CASE NO.: 3:17-cv-806-J-39JBT**

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
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CLERK OF THE COURT

SOED

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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. 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
6385 South Rainbow Blvd., Suite 600
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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
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702-220-4529
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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

Adam Garth
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:

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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.

/ / /

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

ELECTRONICALLY SERVED
2/17/2022 2:32 PM

Electronically Filed
02/17/2022 2:31 PM
CLERK OF THE COURT

ORD
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Attorney for Plaintiff

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.

Case Number: A-18-783435-C

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

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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

OPPM

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Attorney for Plaintiff

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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94-7074/3212
LAW OFFICES OF KARL ANDERSEN, PC.
5550 PAINTED MIRAGE ROAD, SUITE 320
LAS VEGAS, NEVADA 89149
702-220-4529
10-6-2021
Date
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Philip Levin, MD
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Dollars
WELLS FARGO
Wells Fargo Bank, N.A.
Nevada
wellsfargo.com
For HOSTIA #-A-18-783356

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*

S. BRENT VOGEL
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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.

Karl Andersen, Esq.
Zachary Peck, Esq.
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Attorneys for Plaintiff

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.

Jessica B. Cahill

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

EXHIBIT I

NEO

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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
Adam.Garth@lewisbrisbois.com

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

ORD

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Attorney for Plaintiff

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.: 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.
Karl Andersen, Esq.
Nevada Bar No. 10306
5550 Painted Mirage Road, Suite 320
Las Vegas, Nevada 89149
Attorney for Plaintiff

Approved as to form:

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:	assistant@andersenbroyles.com
Cc:	Brown, Heidi; karl@andersenbroyles.com; Vogel, Brent; San Juan, Maria; Sirsy, Shady; DeSario, Kimberly
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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From: assistant@andersenbroyles.com <assistant@andersenbroyles.com>
Sent: Friday, April 29, 2022 3:20 PM
To: Garth, Adam <Adam.Garth@lewisbrisbois.com>
Cc: Brown, Heidi <Heidi.Brown@lewisbrisbois.com>; karl@andersenbroyles.com
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
ANDERSEN & BROYLES, LLP
A Limited Liability Partnership Including Professional Corporations
Attorneys and Counselors at Law
Reno and Las Vegas

Las Vegas Office:
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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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MEA Filing	filing@meklaw.net
Adam Garth	Adam.Garth@lewisbrisbois.com
Shady Sirsy	shady.sirsy@lewisbrisbois.com
Maria San Juan	maria.sanjuan@lewisbrisbois.com
Kimberly DeSario	kimberly.desario@lewisbrisbois.com
Heidi Brown	Heidi.Brown@lewisbrisbois.com

EXHIBIT J

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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
Facsimile: 702.893.3789
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 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

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 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
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ADAM GARTH
Nevada Bar No. 15045
Adam.Garth@lewisbrisbois.com
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Facsimile: 702.893.3789
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

Get Outlook for iOS

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
Adam.Garth@lewisbrisbois.com

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Las Vegas Rainbow
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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

Adam Garth
Partner
Adam.Garth@lewisbrisbois.com

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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
heidi.brown@lewisbrisbois.com
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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

Melanie.Thomas@lewisbrisbois.com

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Las Vegas, Nevada 89118
Attorneys for Dana Forte, D.O., Ltd dba Forte Family Practice and Joseph Earfrate, PA-C

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

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Service Date: 5/19/2022

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Heidi Brown	Heidi.Brown@lewisbrisbois.com

EXHIBIT K

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Petitioners,

v.

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

Respondent,

and

CESAR HOSTIA,

Real Party In Interest.

Supreme Court No.:

District Court No.: A-18-783435-C

PETITION FOR WRIT OF MANDAMUS

S. BRENT VOGEL
Nevada Bar No. 6858
ADAM GARTH
Nevada Bar No. 15045
Lewis Brisbois Bisgaard & Smith LLP
6385 South Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Telephone: 702-893-3383
Facsimile: 702-893-3789
Attorneys for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

FEDERAL STATUTES

RULES

OTHER

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the justices of this court may evaluate possible disqualification or recusal.

1. All parent corporations and publicly-held companies owning 10 percent or more of the party's stock: None

2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the District Court or before an administrative agency) or are expected to appear in this court: Lewis Brisbois Bisgaard & Smith LLP; Anderson & Broyles

3. If litigant is using a pseudonym, the litigant's true name: N/A

DATED: May 25, 2022.

LEWIS BRISBOIS BISGAARD & SMITH LLP

/s/ Adam Garth

S. BRENT VOGEL, ESQ.
Nevada Bar No. 6858
ADAM GARTH, ESQ.
Nevada Bar No. 15045
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Tel: 702-893-3383

RELIEF SOUGHT

Petitioners ("Defendants") hereby petition for a writ of mandamus requiring the District Court to vacate its orders of February 17, 2022[1] and May 11, 2022[2], in the case of Cesar Hostia v. Dana Forte, D.O., Ltd., a Nevada limited company dba Forte Family Practice, et al., Clark County Case No. A-18-783435-C. The order of February 17, 2022 order granted the motion of Real Party in Interest ("Plaintiff") to extend expert disclosure deadlines in the above entitled matter, and the order of May 11, 2022 and served with notice of entry on May 13, 2022 denied Defendants' motion for reconsideration of the earlier order based upon the District Court's misapplication and misreading of EDCR 2.35.

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

[1] Appendix, pp. 63-70

[2] Appendix, pp. 151-158

ROUTING STATEMENT

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

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

ISSUES PRESENTED

1. Does EDCR 2.35 require that a motion to extend discovery deadlines be made at least twenty-one (21) days prior to the expiration of the deadline for which an extension is being sought?

2. If a motion to extend a discovery deadline is not made within the aforenoted timeframe, does the moving party's failure to demonstrate excusable neglect require the District Court to deny the motion for that extension?

3. Did the Plaintiff offer good cause why the extension should be granted in light of the circumstances giving rise to the motion?

INTRODUCTION

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

A. Procedural History

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

The District Court issued an order dated September 29, 2021 directing that all initial expert exchanges were to occur on or before December 31, 2021.[3] Plaintiff's counsel agreed to that deadline.

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

[3] Appendix, pp. 44-51

Year's holiday on both December 30th and 31st, and provided our initial expert report and supporting materials to Plaintiff's counsel two days prior to the deadline, on December 29, 2021.[4]

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

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

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

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

[4] Appendix, pp. 23-42

[5] Appendix, p. 11

[6] Appendix, p. 3:12-15

deadlines,[7] with opposition filed on January 14, 2022,[8] followed by Plaintiff's reply on February 3, 2022.[9] A hearing on the issue was never conducted, with Plaintiff's motion decided in chambers on February 17, 2022, with notice of entry thereof served the same day.[10]

On February 18, 2022, Defendants filed a motion for reconsideration of the aforenoted decision,[11] followed by Plaintiff's opposition thereto on March 1, 2022,[12] and Defendants' reply on March 3, 2022.[13] The District Court conducted a hearing on March 29, 2022[14] and a minute order issued on April 8, 2022 denying Defendants' motion for reconsideration. An order memorializing that decision was issued on May 11, 2022 and served with notice of entry on May 13, 2022.[15]

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

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[7] Appendix, pp. 2-7

[8] Appendix, pp. 9-51

[9] Appendix, pp. 53-61

[10] Appendix, pp. 63-70

[11] Appendix, pp. 71-101

[12] Appendix, pp. 103-113

[13] Appendix, pp. 115-128

[14] Appendix, pp. 130-149

[15] Appendix, pp. 151-158

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

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

B. Respondent's Orders Giving Rise to Petition

[16] Appendix, pp. 160-170

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

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

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

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

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

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

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

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

STATEMENT OF FACTS

The District Court signed an order extending expert disclosure deadlines until December 31, 2021.[17] On December 29, 2021, Defendants exchanged their initial expert with Plaintiff.[18] On December 30, 2021, after receiving Defendants' expert disclosure, Plaintiff requested an extension of time to exchange his expert due to what he claimed to be an inability to get his expert report done timely. Defendants could not stipulate to Plaintiff's request due to the obvious prejudice ensuing from the Plaintiff's possession of Defendants' expert report.[19]

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

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

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[17] Appendix, pp. 44-51

[18] Appendix, pp. 23-42

[19] Appendix, p. 11

[20] Appendix, pp. 2-7

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

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

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

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

STATEMENT OF REASONS THE WRIT SHOULD ISSUE

A. Writ of Mandamus Standard

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

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

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

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

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

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

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

B. Plaintiff Was Required But Failed to Demonstrate Excusable Neglect

Nev. EDCR 2.35 states in pertinent part:

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

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

interpretation was a manifest abuse of discretion.

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

As stated in *Clark, supra*,

> The phrase "excusable neglect," as used in the applicable local rule, EDCR 2.35, has not been defined by this court.
>
> This court reviews a District Court's decision on discovery matters for an abuse of discretion. *Club Vista Fin. Servs., L.L.C. v. Eighth Judicial Dist. Court*, 128 Nev. 224, 229, 276 P.3d 246, 249 (2012). This court reviews de novo the District Court's legal conclusions regarding court rules. *Casey v. Wells Fargo Bank, N.A.*, 128 Nev. 713, 716, 290 P.3d 265, 267 (2012).
>
> ***
>
> The meaning of the term excusable neglect appears well settled. For example, *Black's Law Dictionary* defines "excusable neglect" as follows:
>
> > A failure—which the law will excuse—to take some proper step at the proper time (esp. in neglecting to answer a lawsuit) not because of the party's own carelessness, inattention, or willful disregard of the court's process, but because of some unexpected or unavoidable hindrance or accident or because of reliance on the care and vigilance of the party's counsel or on a promise made by the adverse

> party. *Black's Law Dictionary* 1133 (9th ed. 2009).
>
> A number of Nevada cases have applied "excusable neglect" as grounds for enlarging time under NRCP 6(b)(2) and as a basis for setting aside a judgment under NRCP 60(b)(1) . . . the concept applies to instances where some external factor beyond a party's control affects the party's ability to act or respond as otherwise required. *See, e.g., Moseley v. Eighth Judicial Dist. Court*, 124 Nev. 654, 667-68, 188 P.3d 1136, 1145-46 (2008) . . .

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

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

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

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

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

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

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

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

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

[22] Appendix, p. 3:12-15

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

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

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

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

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

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

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

C. Plaintiff Failed to Demonstrate Good Cause

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

single fact to support such a conclusion.

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

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

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

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

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

amendment of pleadings in accordance with NRCP 15.

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

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

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

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

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

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

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

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

[23] Appendix, p. 3:12-15

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

> **(E) Time to Disclose Expert Testimony.**
>
> **(i)** A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order otherwise, the disclosures must be made:
> **(a)** at least 90 days before the discovery cut-off date; or
> **(b)** if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 16.1(a)(2)(B), (C), or (D), within 30 days after the other party's disclosure.

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

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

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

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

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

[24] Appendix, p. 144:3-8

[25] Appendix, p. 3:12-15

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

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

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

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

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

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

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

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

F. The Reason For The Delay.

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

CONCLUSION

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

denying the relief sought by Plaintiff.

Dated this 25th day of May, 2022.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s/ Adam Garth*

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AFFIDAVIT OF VERIFICATION IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

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

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

32(c)(2).

FURTHER YOUR AFFIANT SAYETH NAUGHT.

ADAM GARTH, ESQ.

Subscribed and sworn before me
This 25th day of May, 2022.

Notary Public, in and for said County and State

JODI LYNN MORALES
NOTARY PUBLIC
STATE OF NEVADA
APPOINTMENT NO. 20-5266-01
MY APPT. EXPIRES MARCH 13, 2024

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in Times New Roman 14 point type

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

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

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

DATED this 25th day of May, 2022.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ *Adam Garth*

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Tel. 702.893.3383
Attorneys for Petitioner

CERTIFICATE OF MAILING

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

The Honorable Jerry A. Wiese II
The Eighth Judicial District Court
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89101
Respondent

Aaron Ford
Attorney General
Nevada Department of Justice
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Carson City, Nevada 89701
Counsel for Respondent

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

EXHIBIT C

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6/1/2022 7:14 AM
Steven D. Grierson
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
****

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

NOTICE OF HEARING

Please be advised that the Defendants Dana Forte, D.O., Ltd., d/b/a Forte Family Practice and Joseph Eafrate, PA-C's Motion to Stay All Proceedings Pending Disposition of Writ Petition to Nevada SUpreme Court in the above-entitled matter is set for hearing as follows:

Date: July 07, 2022

Time: Chambers

Location: Chambers
Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89101

NOTE: Under NEFCR 9(d), if a party is not receiving electronic service through the Eighth Judicial District Court Electronic Filing System, the movant requesting a hearing must serve this notice on the party by traditional means.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Marie Kramer
Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 9(b) of the Nevada Electronic Filing and Conversion Rules a copy of this Notice of Hearing was electronically served to all registered users on this case in the Eighth Judicial District Court Electronic Filing System.

By: /s/ Marie Kramer
Deputy Clerk of the Court

EXHIBIT D

OPPM

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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.: 3 **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO STAY PROCEEDINGS PENDING DISPOSITION OF WRIT PETITION TO NEVADA SUPREME COURT; AND, COUNTERMOTION FOR SANCTIONS**

Plaintiff, Cesar Hostia, through counsel, Karl Andersen, Esq., hereby opposes Defendants' **DEFENDANTS' MOTION TO STAY PROCEEDINGS PENDING DISPOSITION OF WRIT PETITION TO NEVADA SUPREME COURT**.

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 14th day of June, 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

1. The Court Already Rebuffed Defendant's Oral Motion for a Stay.

The Court will recall that at the hearing on Defendant's motion for summary judgment, Defendant's counsel raised the specter of seeking a writ with the Nevada Supreme Court if his client was not given the relief sought. Defendant's counsel made an oral motion before the bench for a stay pending the writ that would be filed. Plaintiff's counsel objected to a stay, as the anticipated writ was not a close call and that such a stay would be a waste of time and resources.

The Court will recall its reaction; simply stated, that any such effort to seek a writ under the circumstances would not have a likelihood of success since (1) Defendant's counsel's interpretation of the Rules was erroneous; and, (2) this Court has absolute discretion to manage the discovery schedules of cases assigned to its docket. The Court's conclusions were reduced to an enforceable order entered herein on 05/19/2022.

2. The Writ Recycles the Same Tired Argument.

The Court will recall Defendant's counsel based its argument regarding striking Plaintiff's expert on a CLE course drafted by a Discovery Commissioner. Of course, CLE materials, comprised of the opinions of the drafter, do not set the law in Nevada. The Court properly relied on the language of EDCR Rules and denied Defendant's efforts to strike Plaintiff's expert.

Dissatisfied with the Court's ruling, and rather than finalize discovery, Defendant's counsel sought reconsideration, which was properly denied.

Having lost its "bet," and having piddled away the time allocated for discovery, Defendant's counsel remained true to his word and filed a writ, based on the same tired argument rejected by this Court. *See* Petition for Writ of Mandamus, electronically filed on May 6, 2022. This is not a close call, the Writ is a complete waste of time and resources; which, means the request to seek a stay based on said Writ as brought in bad faith or the primary purpose of wasting time and recourses.

3. Defendant's Counsel is Overly Focused on Plaintiff's Expert Disclosures.

The Court will recall it granted Plaintiff's timely and well-reasoned motion to enlarge the deadline to disclose expert witnesses on February 10, 2022, following in chambers consideration. *See* COURT MINUTES, February 10, 2022.

Rather than get about the business of finishing discovery and preparing his client's case for trial, Defendant's counsel kept his head down, kept his blinders on and simply plowed ahead with his theory that the Court was wrong to enlarge the time, which initial disclosures were served within two weeks of the previous deadline.

A Reconsideration Motion was filed on February 18, 2022 (10 weeks before the discovery cut-off-date). Defendant's counsel sought for and obtained a stipulation to continue the hearings on his pending Reconsider and Summary Judgment motions, which order was entered on March 16, 2022 (6 weeks before the discovery cut-off-date).

Despite the looming discovery cut-off-date, Defendant's counsel focused on litigating Plaintiff's request for a two week extension to disclose his expert; instead of finishing its discovery, including noticing a deposition of Plaintiff's expert.

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II. THE LAW

1. Motion for Stay.

NRAP 8(c) provides the relevant factors for a Motion to Stay:

> **c) Stays in Civil Cases Not Involving Child Custody.** In deciding whether to issue a stay or injunction, the Supreme Court or Court of Appeals will generally consider the following factors:
>
> (1) whether the object of the appeal or writ petition will be defeated if the stay or injunction is denied;
>
> (2) whether appellant/petitioner will suffer irreparable or serious injury if the stay or injunction is denied;
>
> (3) whether respondent/real party in interest will suffer irreparable or serious injury if the stay or injunction is granted; and,
>
> (4) whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition.

2. Pending Writ seeks an Alternative Interpretation of "discovery cut-off date" as used in EDCR 2.35.

Nevada law is replete with authority confirming the "discovery cut-off date" is the date all discovery is cut-off, not any intermediate deadline for any phase of discovery (e.g. expert disclosures, written discovery, depositions, etc…):

- In *Jones v. State*, 937 P.2d 55, 61 (Nev. S.Ct. 1997) Nevada's High Court confirms the date "upon [which] everything concerning discovery will be finished" is the "discovery cut-off date."

- In *American Home Assurance Co. v. Dist. Ct.*, 147 P.3d 1120, 1129 (Nev. S.Ct. 2006), the High Court discusses proceedings in a civil action occurring over the course of nearly three (3) years but only uses the term "discovery cut-off date" when referring to the last date to complete all discovery "a few months before trial was to commence."

- In *DeChambeau v. Balkenbush*, 431 P.3d 359, 360 (Nev. Ct.App. 2018), the Appellate Court discusses the "joint case conference report['s] discovery cut-off date" and conjoins this statement with "the close of discovery." And, the Appellate Court specifically refers to "all

of the deadlines set in the joint case conference report, including all discovery deadlines," confirming a clear distinction between discovery deadlines (including deadlines involving expert reports) contained in the Court's Scheduling Order (which are not the close of discovery) as opposed the "discovery cut-off date" (which is the close of discovery).

The *DeChambeau* Court cites with approval State Supreme Court case law from Mississippi (referring to discovery deadlines as "discovery deadlines" not "discovery cut-off dates") and 9th District case law from Arizona also referring to the court's "discovery deadline" for filing dispositive motions. *Id.* at 363.

9th District authority uniformly and unequivocally distinguishes between intermediate discovery deadlines as opposed the close of discovery (the discovery cut-off date):

- In *Colon v. US*, 474 F.3 616, 619-20 (9th Cir. Ct.App 2007), the Appellate Court plainly distinguishes between the close of discovery (the discovery cut-off date) and intermediate discovery deadlines for filing dispositive motions:

> Judge Valerie Cooke of the District of Nevada issued a scheduling order setting October 15, 2004, as the deadline for completion of discovery, and November 15, 2004, as the deadline for filing dispositive motions [and p]rior to the October 15, 2004, discovery cut-off deadline, [Appellant] had not responded to the government's Request for Admissions, the September 28, 2004, follow-up letter, or filed a motion to withdraw his admissions with the Nevada district court under Rule 36(b). (Emphasis added).

- In *Garret v. City of San Francisco*, 818 F.2d 1515, 1517 (9th Cir. Ct.App. 1987) the Appellate Court recites the "DISTRICT COURT PROCEEDINGS:" "On October 25, 1985, the district court issued a scheduling order setting the discovery cut-off date as March 15, 1986, the motion deadline as May 1, 1986, and the trial date as June 2, 1986." (Emphasis added).

  The Garret Court clearly distinguishes between the intermediate discovery deadline for filing a dispositive motion as opposed the close of discovery (the discovery cut-off date).

III. ARGUMENT

1. The Underlying Writ is Not Supportable.

The Writ is fundamentally flawed. Plaintiff recognizes this. The Court recognizes this. The Court already denied Defendant's previous oral motion for a stay.

The grounds for the Writ constitute legal nonsense:

- First, and despite some CLE course materials, EDCR 2.35 does not require a motion to extend a discovery deadline to be made 21 days before the intermediate discovery deadline sought to be extended.

  EDCR 2.35 requires a motion to enlarge be filed at least 21 days before the discovery cut-off date. The "discovery cut-off date" is just that, the cut-off date set by the Court (the deadline to complete discovery). The discovery cut-off date is not – as Defendant argues -- any given intermediate deadline (*e.g.* disclosure of experts, expert reports, written discovery, depositions, dispositive motions) provided in the Court's Scheduling Order and there is no support in Nevada jurisprudence for this nonsensical argument.

- Second, to appeal the Court's exercise of discretion constitutes the most difficult burden on appeal (*i.e.* abuse of discretion). Nevada jurisprudence maintains that the District Courts of this state have the discretion to manage their own dockets, which necessarily includes all discovery scheduling orders or the enlargement of any time set by the Court to conduct discovery. *See e.g. Maheu v. Eighth Judicial District Court*, 493 P.2d 709 (Nev. S.Ct. 1972)("[T]he law is well settled that the trial court has broad case discretion to manage discovery proceedings").

The Court should not grant the stay where (1) the request was previously denied; and, (2) the Writ – until the Appellate Court says otherwise – constitutes legal nonsense.

2. The Request for Stay is premature.

As of April 29, 2022, Discovery is closed. From April 19, 2022 moving forward, the parties have been afforded nearly three-and-a-half (3½) months (until August 1, 2022) to prepare for trial.

Although a Writ is pending before the Nevada Supreme Court, it is highly unlikely the Writ will be granted: The Writ is based on Defendant's counsel's fundamental misunderstanding of the Rules; and, the Writ seeks to have the High Court declare this Court lacks the discretion to manage its own docket (the most difficult burden on appeal – abuse of discretion).

As of today, June 14, 2022, the parties are still six (6) weeks out from trial. It is simply premature for Defendant to seek a stay:

- Defendant's counsel has repeatedly demonstrated an unwillingness to be diligent in the preparation of his case for trial and has repeatedly sought for this Court to "bail him out."

- If the Supreme Court grants the Writ, this Court will certainly stay these proceedings for the pendency of the High Court's briefing schedule; however, (1) the Writ has not been granted yet; and, (2) it is highly unlikely the Writ will be granted.

In the event the Nevada Appellate Court grants the Writ, necessitating a briefing schedule, this Court will certainly have to stay these proceedings. At this juncture however, as there is ample time before trial and as it does not appear the Writ has merit, the Court should deny the motion for stay as premature.

3. The Elements for A Stay Are Not Satisfied.

<u>The Object Of The Writ Petition Will Not Be Defeated If The Stay Is Denied</u>

Any argument that the "object of the writ will be defeated if stay is not granted" would constitute pure speculation. At this point in time, the Appellate Court has not made any determination whether to even accept the Writ; and, based on the points argued within the Writ, it is highly unlikely the Appellate Court would waste its time with a Writ that is based

on a fundamental misunderstanding of the Local Rules and seeks appellate relief under the most difficult of tests, abuse of discretion.

Moreover, the Nevada Supreme Court expressly maintains that "writ relief is an extraordinary remedy [and] the availability of an appeal is generally an adequate legal remedy precluding writ relief." *Spanish Heights Acquisition Co., LLC v. Dist. Ct.,* No. 84149 (Nev. S.Ct. 2022).

As Defendant cannot demonstrate the object of the Writ will be defeated absent a stay (the Writ petition has not been accepted/granted by the Appellate Court), and as the Nevada Supreme Court maintains the "availability of an appeal" obviates any argument that the "object of the writ will be defeated absent a stay," this factor clearly weighs against granting a stay.

Petitioner Cannot Demonstrate It Will Suffer Irreparable Harm

Again, and as the Appellate Court has not made any determination whether to accept the Writ, it is pure speculation whether Petition will suffer any harm, much less irreparable harm.

In support of the request for stay, Defendant argues pure economic injury (*e.g.* insurance premiums, the expense of proceeding to trial) as "irreparable injury." However, and in the same paragraph, Defendant tacitly acknowledges the right to appeal at the close of trial which necessarily obviates Defendant's argument regarding irreparable harm.

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The Nevada Supreme Court holds that a writ petitioner cannot demonstrate irreparable harm based on the economic damages, including having to litigate through trial while the Writ is pending:

> [Petitioner] argues that it should not be required to participate "needlessly" in the expense of lengthy and time-consuming discovery, trial preparation, and trial. Such litigation expenses, while potentially substantial, are neither irreparable nor serious. *Fritz Hansen a/s v. Dist Ct.*, 6 P.3d 982, 986-87 (Nev. S.Ct. (2000); citing *Dixon v. Thatcher*, 103 Nev. 414, 415, 742 P.2d 1029, 1029-30 (Nev. S.Ct 1987).

And,

> [W]ith respect to harm, there should be a reasonable probability that real injury will occur if the injunction does not issue [but that] mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough to show irreparable harm. *Fritz* at 987.

As a matter of settle Nevada law, Defendant cannot demonstrate it will suffer irreparable harm – much less even serious injury – if the stay is not granted and he is compelled to proceed to trial.

This factor clearly weighs against granting a stay.

Defendant Has No Chance of Success on the Merits

Defendant's Writ is based on unauthoritative CLE materials by the then discovery commissioner, and ignores the overwhelming authority of the State and Federal Courts. Defendant's Writ ignores the plain and simple language of EDCR and ignores the legal fact that the "discovery cut-off date" is a Nevada term of art that only applies to the actual cut-off date (the date all discovery closes), not a simple intermediate deadline in a schedule order (*e.g.* deadline to disclose expert, deadline to take depositions, deadline to conduct written discovery) during the time permitted for the discovery.

The Nevada Supreme Court maintains that a Writ does not enjoy a "likelihood of success on the merits" where the legal argument "runs contrary to…well-established law." *Fritz* at 987.

The Appellate Court will likely refuse the Writ, rendering this motion for stay a moot issue. However, given the absurdity of the arguments underlying the Writ (a tortured attempt to recharacterize the definition of "discovery cut-off date"), coupled with the Defendant's burden of demonstrating an "abuse of discretion" in managing the discovery schedules of a civil action on its own docket, the Writ enjoys no possibility of success on the merits.

This factor clearly weighs against granting a stay.

Whether Plaintiff Will Suffer Serious or Irreparable Injury if Granted.

This case was started in 2018 and is almost 4 years old. Any Stay would prolong the opportunity for Plaintiff to get his proverbial "day in court" and could create issues for Plaintiff and 5 year rule. Of course, when reviewing this Motion in conjunction with the Writ and the pending Motion to Continue Trial, delaying this matter seems to be exactly what the Defendant is seeking.

IV. COUNTERMOTION FOR SANCTIONS

EDCR 7.60(b)(1) authorizes the Court to impose a sanction on a party and/or the party's counsel (individually or jointly and severally) when a motion is presented that is obviously "frivolous, unnecessary or unwarranted." Likewise, EDCR 7.60(b)(3) authorizes a sanction where a party opponent has "multiplie[d] the proceedings…as to increase costs unreasonably and vexatiously." And, EDCR 7.60(a)(4) allows for a sanction where a party and/or its counsel have failed to comply with the Rules.

The Court already refused the oral motion for stay. *See* Order attached hereto as Exhibit "1". The Court had all Defendant's argument (based on CLE course materials) and dismissed the oral request quickly and appropriately.

Despite having no cognizable legal authority (not a single citation to state or federal case law) to support the argument that every discovery deadline is, in fact, a "discovery cut-off date," Defendant has wasted the time and resources of the Court and the Plaintiff.

This Motion for Stay is frivolous, unnecessary and unwarranted; furthermore, the Motion for Stay has multiplied the proceedings to increase costs unreasonably. Accordingly, a sanction in the amount of $3,500.00 is requested which will adequately compensate Plaintiff for the time and other resources invested in researching, drafting and filing this stellar opposition and will further serve as a deterrence to Defendant engaging in any more nonsense to try to cover for its failure to engage in any meaningful discovery. Plaintiff's counsel's NRS 53.045 Declaration is attached to satisfy the *Brunzell* factors.

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V. CONCLUSION

The Court already denied this Oral Motion. Additionally, the Motion for Stay is based on Defendant's Writ. The Defendant's Writ is based on changing the definition of "close of discovery." For the sake of brevity, Plaintiff has refrained from citing the hundreds, perhaps thousands of cases nationwide distinguishing between an intermediate discovery deadline as opposes to the "discovery cut-off date" (the close of discovery). Plaintiff invites Defendant's counsel to cite any relevant legal authority to rebut the legal authorities cited herein.

The Motion must be denied and sanctions in the amount of $3,500.00 must be awarded pursuant to EDCR 7.60.

Dated this 14th day of June, 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 on this 14th day of June, 2022, a true and correct copy of **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO STAY PROCEEDINGS PENDING DISPOSITION OF WRIT PETITION TO NEVADA SUPREME COURT; AND, COUNTERMOTION FOR SANCTIONS** was served by electronically filing with the Clerk of the Court using the Electronic Service system and serving all parties with an email-address on record, who have agreed to receive Electronic Service in this action.

/s/ Joseph Montaño
Representative of
Law Offices of Karl Andersen, P.C.

NRS 53.045 Declaration of Counsel

Karl Andersen states subject to penalty of perjury that the following facts are true and correct:

1. I am counsel for the Plaintiff.

2. My fee agreement with Plaintiff is for a contingency fee.

3. That my default billable rate on this matter for all work not covered by the anticipated contingency fee is $350.00 per hour.

4. I have been practicing civil law in Southern Nevada for about thirteen (13) years and I have litigated hundreds of cases, including many bench trials.

5. This Opposition to Defendant's Motion to Stay was of standard complexity and standard difficultly. Although a relatively simple issue, the Motion for Stay attempted to complicate the issue as much as possible. The response required providing significant research for mandatory law directly on point.

6. Based on the time taken to date to review the Motion for Stay, to research the salient issues and to draft an opposition and countermotion, plus the anticipated time for reviewing the REPLY and attending the hearing, drafting the Order, my office will perform more than ten (10) hours of legal services directly associated with the Defendant's Motion to Stay. At my default billable rate, this will be at least $3,500.

7. Given my experience, my billable rate, the legal services performed and the anticipated successful result, the attorney fees I am requesting are both fair and reasonable.

Dated: June 14, 2022

Karl Andersen, Esq.

EXHIBIT 1

EXHIBIT 1

ELECTRONICALLY SERVED
5/19/2022 3:37 PM

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

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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

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Attorneys for Plaintiff

LEWIS BRISBOIS BISGAARD & SMITH LLP ATTORNEYS AT LAW

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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

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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
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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

Adam Garth
Partner
Adam.Garth@lewisbrisbois.com

T: 702.693.4335 F: 702.366.9563

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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
heidi.brown@lewisbrisbois.com
T: 702.693.1716 F: 702.893.3789
6385 S. Rainbow Blvd. Suite 600 Las Vegas, Nevada 89118 | LewisBrisbois.com
Representing clients from coast to coast. View our nationwide locations.

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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Las Vegas, Nevada 89118
Attorneys for Dana Forte, D.O., Ltd dba Forte Family Practice and Joseph Earfrate, PA-C

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: 5/19/2022

S. Vogel	brent.vogel@lewisbrisbois.com
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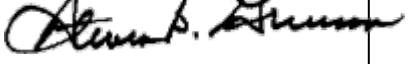
Kimberly DeSario	kimberly.desario@lewisbrisbois.com
Heidi Brown	Heidi.Brown@lewisbrisbois.com

EXHIBIT E



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Telephone: 702.893.3383
Facsimile: 702.893.3789
Attorneys for Defendants Dana Forte, D.O., Ltd dba Forte Family Practice and Joseph Eafrate, 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 **DEFENDANTS DANA FORTE, D.O., LTD., D/B/A FORTE FAMILY PRACTICE AND JOSEPH EAFRATE, PA-C'S REPLY IN FURTHER SUPPORT OF MOTION TO STAY ALL PROCEEDINGS PENDING DISPOSITION OF WRIT PETITION TO NEVADA SUPREME COURT AND IN OPPOSITION TO COUNTERMOTION** **Hearing Date: July 7, 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 REPLY IN FURTHER SUPPORT OF MOTION TO STAY ALL PROCEEDINGS PENDING DISPOSITION OF WRIT PETITION TO NEVADA SUPREME COURT AND IN OPPOSITION TO PLAINTIFF'S COUNTERMOTION. This Reply and Opposition 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 OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff's opposition and countermotion is based upon either miscited law or cases which neither stand for the proposition for which counsel cited them, or fail to state what he asserts they do. Attached hereto are the 5 cases cited by Plaintiff on pp. 4-5 of his opposition[1] for the Court's review. Even a cursory reading of the cases demonstrates that they neither support Plaintiff's assertions nor do they provide any insight whatsoever in interpreting the language of EDCR 2.35. What is even more stunning is the audacity of Plaintiff's counsel to move for costs and fees when Defendants are availing themselves of the appellate process due to the Court's interpretation of a local rule. This is clearly the "best defense is a good offense" type of strategy, trying to distract from the fact that there was never any delineation of any factor justifying good cause why Plaintiff would receive an extension of time for expert disclosure when the law required certain factors to be fulfilled which were never demonstrated by Plaintiff. Moreover, regardless of this Court's conclusion concerning EDCR 2.35's timing requirement, neither the Court nor Plaintiff's counsel provided one piece of legal authority supporting the interpretation of EDCR 2.35. Given the improper interposition of supposed authority which lacks the very support Plaintiff advances, coupled with the supportive authority for this very motion, Defendants' instant motion should be granted, and Plaintiff's countermotion should be denied.

II. ARGUMENT

A. The Object of the Writ Petition Will Be Defeated if a Stay is Not Imposed

Plaintiff's counsel never properly addressed this factor, instead interposing his opinion on whether the Supreme Court should or would take up the Writ. Forcing a party to proceed with litigation and a trial when the issue of whether that party even has timely disclosed a required expert in a professional negligence case makes no sense, especially if Defendants are correct that Plaintiff's disclosure was not only untimely, but that he failed to fulfill an affirmative demonstration of both good cause and excusable neglect. Moreover, the issue on the Writ includes whether this Court

[1] Exhibit "L"

articulated what constituted Plaintiff's good cause for needing the extension (as well as whether excusable neglect should have been required to be demonstrated by Plaintiff, and if so, whether he did so). Extrapolating from that means that if Defendants are correct, Plaintiff lacks an expert which he needs to support his professional negligence claim. Without the expert, this case must be dismissed. Therefore, the ultimate determination of whether Plaintiff even has a case is being decided by this Writ Petition. If this litigation proceeds, it forces a medical provider to litigate and try a case, when the law supposedly protecting him necessitates dismissal. Thus, the very gatekeeping purpose of the law and the effect of this Court ruling thereon defeats the very purpose of the local rules and the implications thereof. This factor thus weighs totally in Defendants' favor.

B. Petitioner Will Suffer Irreparable Injury in Absence of Stay

As expressed in *Sobol v. Capital Mgmt. Consultants*, 102 Nev. 444, 446, 726 P.2d 335, 337 (1986), "acts committed without just cause which unreasonably interfere with a business or destroy its credit or profits, may do an irreparable injury and thus authorize issuance of an injunction." ; *see also, Finkel v. Cashman Prof'l, Inc.*, 128 Nev. 68, 270 P.3d 1259 (2012); *Tryke v. V.*, 2020 Nev. Dist. LEXIS 798 (Eighth Jud. Dist. Ct., CASE NO.: A-19-804883-C); *Roush v. Meyerhoff*, 2018 Nev. Dist. LEXIS 1389 (Second Jud. Dist. Ct., Case No. CV18-02031); *Spring Valley Pharm. v. Co. V.*, 2017 Nev. Dist. LEXIS 2184 (Eighth Jud. Dist. Ct., Case No.: A-17-763456-C). A licensee whose license has been revoked or suspended immediately suffers the irreparable penalty of loss of [license] for which there is no practical compensation. *State Dep't of Bus. & Indus. v. Nev. Ass'n Servs.*, 128 Nev. 362, 370, 294 P.3d 1223, 1228 (2012), *quoting Com. v. Yameen,* 401 Mass. 331, 516 N.E.2d 1149, 1151 (Mass. 1987).

Every application for privileges, renewal of Mr. Eafrate's license, and renewal of his medical malpractice insurance requires a detailed explanation of the facts and circumstances of this case which is being improperly maintained against him and the remaining Defendants despite Plaintiff's failure to timely retain an expert and then be given a lifeline by this Court after failing to demonstrate the requisite threshold for an extension of time pertaining to same. That harm is irreparable since Defendants may be unable to obtain future privileges or licenses while being saddled with a lawsuit which cannot be maintained against him due to Plaintiff's failure. Forcing Defendants to proceed

to trial on both liability and damages when the issue presented on appeal will only prolong these injuries and causes further damage to them, when it is not only possible, but probable, that the case against Defendants will result in Plaintiff's case being dismissed in its entirety should the Nevada Supreme Court or the Court of Appeals rule in Defendants' favor given that the issue involves whether Plaintiff should have been permitted an extension of time to disclose his experts in light of the facts and circumstances surrounding the motion, and whether Plaintiff even demonstrated the requisite elements in his motion to even be able to obtain the relief he sought. Secondly, the potential expenses of proceeding to trial on all issues will require the unnecessary expenditure of Defendants' resources in having to pursue the additional discovery preparing for trial and moving for summary judgment, when the Plaintiff failed to meet the prerequisites associated with a motion to extend discovery deadlines and the specific requirements of EDCR 2.35. Thus, the second factor weighs completely in Defendants' favor.

C. Plaintiff Will Suffer No Serious or Irreparable Injury If Stay Is Granted

The third factor for consideration pursuant to NRAP 8, whether the real party in interest will suffer irreparable or serious injury if the stay is granted, also weighs in favor of granting the stay in these proceedings. The real party in interest, the Plaintiff, will not suffer irreparable or serious injury should this stay be granted. Plaintiff's opposition states that he will be deprived of his day in court. No, he will not, unless the Nevada Supreme Court or Court of Appeals accepts the Writ and decides in Plaintiff's favor. If the appellate Court agrees with Defendants, as we believe it will, Plaintiff will be precluded from having an expert which dooms his case. It is Plaintiff's counsel which is most concerned since the expert issue was of his own doing, not his client's. Thus, if his expert is precluded, Plaintiff has a remedy – a malpractice suit against his attorney. That defeats Plaintiff's irreparable injury argument.

Moreover, a stay will benefit Plaintiff in the short term. While we await the appellate court's decision on the Writ, Plaintiff will not be forced to trial with an expert who can barely articulate a medical opinion in this case, coupled with the fact that Defendants previously exchanged sub rosa materials will be definitive proof that Plaintiff has been either exaggerating his alleged injuries or has been lying about them. Either way, it is a bad look for Plaintiff whose own testimony will be

defeated by video evidence of his lies and misrepresentations of his injuries and limitations. So, Plaintiff will either be saved the embarrassment of a loss at trial, being shown to be a liar, or will have his case dismissed by the appellate court if Defendants' rule interpretation prevails. Any way you view it, Plaintiff will be saved the expense and embarrassment of a trial while this issue makes its way through the appellate process.

D. Defendants Have Strong Likelihood of Prevailing On Appeal

The final factor for consideration pursuant to NRAP 8, whether petitioner is likely to prevail on the merits in the writ petition, also weighs heavily in favor of granting the stay requested. Plaintiff's assertion that Defendants "ignore[] the overwhelming authority of the State and Federal Courts" is belied by the absence of such authority demonstrated by the cases Plaintiff cites in opposition.[2]

First, despite this Court's ruling that Plaintiff demonstrated good cause for requesting the extension, there were no facts demonstrating good cause. Defendants provided a bevy of authority as to how good cause is to be determined. Plaintiff did not present any facts consistent with that definition, and this Court did not point to any such facts. Thus, assuming, *arguendo*, we disregard the "excusable neglect" component, Plaintiff's failure to demonstrate, and this Court's finding of good cause in the absence of any evidence thereof, based upon the law's interpretation of that standard, requires reversal under any circumstances. Couple that ruling with the fact that the purpose of the rule requiring 21-day advance motion practice before the expiration of the deadline seeking to be extended has been effectively defeated by this Court's interpretation of EDCR 2.35 and screams out for a remedy. If this Court's interpretation stands, a party will be permitted to defy a court ordered deadline to conduct a particular item of disclosure, not move for months thereafter so long as he/she does so within 21 days before the final discovery cutoff, and then be able to cure such an ill by merely asking for the relief. That makes no sense and effectively destroys the rule and makes impotent any court ordered discovery deadline. Plaintiff's interpretation means that he is permitted to defy a court order so long as he moves 21 days before all discovery closes to get a

[2] Exhibit "L"

retroactive ruling on his order defiance. Such a position is untenable.

Defendants cited supporting authority and further how Judge Bulla interpreted this very rule which is completely in line with Defendants' interpretation. It is unclear what everyone is so concerned about here. If the Writ Petition is not accepted, the case moves forward. If it is, as we believe it will be, the decision will likely be overturned. There is no harm in staying the trial until the Writ issue is determined, one way or another. Proceeding to trial when there has been a direct violation of a court order by Plaintiff and he has not provided the requisite excuse or abided by the requisite standard for obtaining the relief sought, runs contrary to principles of fairness to the party who has been harmed by this violation, namely Defendants.

Plaintiff violated the procedural requisites regarding 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 asked this Court to extend him concessions regarding compliance but has created his own discovery mess and requested that Defendants be prejudiced as a result.

Plaintiff cannot and did not demonstrate either good cause or excusable neglect. This Court's orders did not address any facts demonstrating both prongs of the test to justify the granting of Plaintiff's motion. In fact, this Court noted that excusable neglect never needed to be demonstrated since it interpreted the deadline to move for such relief as 21 days from the close of discovery of the entire case rather than the time period for the specific act for which the extension was sought. Thus, it became a manifest abuse of discretion to grant a motion which lacked sufficient factual findings which will be required for appellate review. While the Court determined that good cause for the extension existed, there were no factual findings contained either in the original order or the order on the motion for reconsideration documenting what specific facts were shown by Plaintiff to demonstrate the good cause the Court found to exist.

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. As these facts demonstrate a strong likelihood of success on appeal, the stay should issue.

III. OPPOSITION TO COUNTERMOTION

NRCP 8 requires a motion for stay be first made in District Court. This motion is being made directly in accordance with this Rule. There has not been a previous written motion for which a reasoned written ruling has been provided. Should this Court deny such motion, Defendants are permitted to move in the appellate court for this relief. Prior to doing so, Defendants will require a written ruling demonstrating they have fulfilled NRCP 8's requirements in District Court.

Again, Plaintiff's countermotion is based not on sound law or legal reasoning, but his attorney's unilateral determination that Defendants are not permitted to seek Writ relief when they believe a lower court erred, and that to proceed to trial when the Plaintiff's ability to even meet the minimum threshold of proof hangs in the balance equates to Defendants not being able to fully and properly defend their case. In other words, Plaintiff's counsel is deathly afraid of having what may be a malpractice case against him become reality of Defendants are correct here.

Moreover, Plaintiff's countermotion is predicated on the improperly cited and referenced cases annexed hereto as Exhibit "L" upon which Plaintiff's counsel relies. It is not Defendants' counsel acting in bad faith here, it is Plaintiff's counsel who improperly cites and relies upon authority having nothing whatsoever to so with the proposition for which they are cited and presented to this Court. The countermotion is frivolous and should be denied in its entirety as there is a no authority to support it.

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/ / /

IV. CONCLUSION

Defendants respectfully request that this matter be stayed while they appeal the granting of Plaintiff's motion to extend expert disclosure deadlines and the denial of Defendants' motion for reconsideration of same. The procedural posture of this case makes a stay the only way that the issue can be resolved efficiently and effectively prior to the expenditure of considerable resources and to allow the parties to limit their expenses in preparing and trying a case which will need to be dismissed in its entirety should the appellate court disagree with this Court's interpretation of EDCR 2.35. Moreover, Plaintiff's countermotion should be denied as well, as the authority upon which Plaintiff bases his assertion that the issue on appeal has been sufficiently addressed by other courts lacks any basis in law or fact.

DATED this 30th day of June, 2022

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s/ Adam Garth*

S. BRENT VOGEL
Nevada Bar No. 6858
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 dba Forte Family Practice and Joseph Eafrate, PA-C

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of June, 2022, a true and correct copy **DEFENDANTS DANA FORTE, D.O., LTD., D/B/A FORTE FAMILY PRACTICE AND JOSEPH EAFRATE, PA-C'S REPLY IN FURTHER SUPPORT OF MOTION TO STAY ALL PROCEEDINGS PENDING DISPOSITION OF WRIT PETITION TO NEVADA SUPREME COURT AND IN OPPOSITION TO COUNTERMOTION** 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

EXHIBIT L

Jones v. State

Supreme Court of Nevada

April 24, 1997, FILED

No. 28176

Reporter
113 Nev. 454 *; 937 P.2d 55 **; 1997 Nev. LEXIS 52 ***

EDWARD LEE JONES, Appellant, vs. THE STATE OF NEVADA, Respondent.

Subsequent History: Rehearing Denied December 17, 1997.

Prior History: [*1]** Appeal from a judgment of conviction, pursuant to a jury trial, on one count of first degree murder with use of a deadly weapon and from a sentence of death. Eighth Judicial District Court, Clark County; Gene T. Porter, Judge.

Disposition: Affirmed.

Core Terms

blood, murder, penalty phase, district court, trailer, discovery, stab, misconduct, wounds, guilt, prosecutorial misconduct, closing argument, defense counsel, death penalty, mutilation, weapon, suicide attempt, apartment, endorse, bloody, knife, kill, aggravating circumstances, death sentence, exculpatory, girlfriend, violence, testing, animal, jurors

Case Summary

Procedural Posture
Defendant sought review of the judgment of the Eighth Judicial District Court, Clark County (Nevada), convicting him of one count of first-degree murder, after a jury trial, and imposing a sentence of death after the jury's finding that the aggravating factors outweighed the mitigating factors.

Overview

Defendant was convicted of murder for stabbing his girlfriend 36 times with a butcher knife. On appeal, the court held that defendant was not unfairly prejudiced by the prosecution's improper suggestion that a weapon found in defendant's cell could have been meant for use on jurors, or reference to defendant as a "rabid animal," based on the overwhelming evidence of defendant's guilt. The prosecution's statement attributing a "special death penalty quality" to defendant was not improper and the state could properly make comments as to defendant's "future dangerousness." The district court did not abuse its discretion in permitting DNA results to be admitted into evidence, even though the expert report was not available by the discovery deadline, based on the state's good faith. The state's failure to comply with *Nev. Rev. Stat. 173.045(2)*, requiring endorsement of witnesses, did not prejudice defendant because the witness was chosen by the defense to perform the blood analysis. Based on the heinous crime and defendant's propensity for violence, the court upheld the death sentence. The evidence presented supported the jury's finding of the aggravating factor of mutilation.

Outcome
The court affirmed defendant's conviction and death sentence.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Failure to Object

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > General Overview

HN1[] **Preservation for Review, Failure to Object**

Failure to object in the district court precludes

consideration of the issue on appeal; however, the appellate court may address plain error sua sponte.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Criminal Law & Procedure > Trials > Judicial Discretion

Legal Ethics > Prosecutorial Conduct

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

HN2[] Judges, Discretionary Powers

The decision to admit or exclude evidence, after balancing the prejudicial effect against the probative value, is within the discretion of the trial judge, and such a decision will not be overturned absent manifest error.

Criminal Law & Procedure > Trials > Closing Arguments > General Overview

HN3[] Trials, Closing Arguments

During closing argument, the prosecution can argue inferences from the evidence and offer conclusions on contested issues.

Criminal Law & Procedure > Trials > Closing Arguments > Inflammatory Statements

Legal Ethics > Prosecutorial Conduct

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > General Overview

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > General Overview

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Prosecutorial Misconduct

HN4[] Closing Arguments, Inflammatory Statements

A criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone. The reviewing court must determine whether any misconduct was so prejudicial as to deny Jones a fair trial.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > General Overview

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > General Overview

HN5[] Standards of Review, Harmless & Invited Error

In instances where there is overwhelming evidence of guilt presented to the jury, even aggravated misconduct may be deemed harmless error.

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

HN6[] Capital Punishment, Aggravating Circumstances

Prosecutors may argue the future dangerousness of a defendant even when there is no evidence of violence independent of the murder in question.

Criminal Law & Procedure > Defenses > General Overview

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > General Overview

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > General Overview

HN7[] Criminal Law & Procedure, Defenses

A district court's determinations of fact will not be set aside if they are supported by substantial evidence.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Discovery

Criminal Law & Procedure > ... > Discovery & Inspection > Discovery Misconduct > General Overview

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

HN8 **Abuse of Discretion, Discovery**

A trial court is vested with broad discretion in fashioning a remedy when, during the course of the proceedings, a party is made aware that another party has failed to comply fully with a discovery order. The reviewing court will not find an abuse of discretion in such circumstances unless there is a showing that the State has acted in bad faith, or that the non-disclosure results in substantial prejudice to appellant.

Criminal Law & Procedure > Trials > Witnesses > Presentation

HN9 **Witnesses, Presentation**

See Nev. Rev. Stat. 173.045(2).

Criminal Law & Procedure > Appeals > Reversible Error > General Overview

Criminal Law & Procedure > Trials > Witnesses > Presentation

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

HN10 **Appeals, Reversible Error**

Nevada law clearly allows witnesses to be endorsed even after trial has begun. Under statutes such as Nev. Rev. Stat. 173.045(2), the indorsement of names of witnesses upon an information is largely a matter of discretion with the court; and, in the absence of a showing of abuse, or that some substantial injury has resulted to the accused, an order permitting such indorsement, even after the trial has commenced, does not constitute of itself reversible error.

Criminal Law & Procedure > Trials > Witnesses > Presentation

HN11 **Witnesses, Presentation**

There is a presumption that a witness called to testify whose name is not endorsed on the information is one who was not before known to the district attorney.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > General Overview

Criminal Law & Procedure > Trials > Witnesses > Presentation

HN12 **Standards of Review, Harmless & Invited Error**

Nevada case law establishes that failure to endorse a witness constitutes reversible error only where the defendant has been prejudiced by the omission.

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

HN13 **Capital Punishment, Aggravating Circumstances**

In concluding that the death penalty is not excessive, the court may look to the heinous nature of the killing.

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

HN14 **Capital Punishment, Aggravating Circumstances**

See Nev. Rev. Stat. 177.055(2).

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

HN15 **Capital Punishment, Aggravating Circumstances**

The aggravating factor of mutilation may be defined to the jury as "to cut off or permanently destroy a limb or essential part of the body or to cut off or alter radically so as to make imperfect."

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

HN16[] **Appeals, Standards of Review**

The law does not require a perfect trial, but a fair trial.

Counsel: Paul E. Wommer, Las Vegas; Arnold Weinstock, Las Vegas; for Appellant.

Frankie Sue Del Papa, Attorney General, Carson City; Stewart L. Bell, District Attorney, and Abbi Silver, Deputy District Attorney, Clark County, for Respondent.

Judges: ROSE, J. We concur: Shearing, C.J., Young, J. SPRINGER, J., dissenting.

Opinion by: ROSE

Opinion

[58]** **[*458]** *OPINION*

By the Court, ROSE, J.:

On May 11, 1992, a jury convicted appellant Edward Lee Jones (Jones) of one count of murder with the use of a deadly weapon for the August 22, 1991 slaying of his girlfriend, Pamela Williams. Jones was sentenced to death on May 26, 1992. On appeal, this court reversed Jones' conviction and sentence and remanded the case for a new trial, due to ineffective assistance of counsel.

On November 8, 1995, following Jones' second trial, a jury found him guilty of one count of first degree murder with the use of a deadly weapon. At the penalty phase, ending November 14, 1995, the jury **[***2]** returned a special verdict, finding two aggravating circumstances--that the murder was committed by a person previously convicted of a felony involving use or threat of use of violence, and the murder involved the mutilation of the victim, and three mitigating circumstances--that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, the defendant acted under duress or under the domination of another person, and other unspecified mitigating circumstances. The jury found that the aggravating circumstances outweighed the mitigating circumstances and imposed a sentence of death.

Jones filed this direct appeal challenging both his conviction and his sentence of death, alleging (1) prosecutorial misconduct in the guilt and penalty phases, (2) *Brady* violations, (3) violation of a discovery order, and (4) unfair surprise via testimony of an unendorsed witness.

We conclude that Jones' claims are without merit and affirm both the conviction and the sentence.

FACTS

Facts pertaining to the crime

After a night of drinking and smoking crack cocaine with his brother (Gary), Jones returned to the trailer on North Nellis **[***3]** where he lived with his girlfriend, Pamela Williams (Williams), and Williams' two young children, Charlene (age six) and Demetrius (age three). Somewhere around 8:00 a.m. on August 22, 1991, Jones and Williams got into a fight. Charlene woke up to find her mother crying and struggling with Jones over what appeared to be a bank card. Jones told Charlene to go back to bed and led Williams into the master bedroom.

[*459] Charlene went back to sleep. At some point, Jones stuck his head into Charlene and Demetrius' room, and told Charlene that he would get her some cereal. Charlene woke up several hours later and Jones was gone. She went to the master bedroom to find her mother, but the door was locked. Charlene went to the kitchen and retrieved a fork, and then a knife, which she used to pry open her mother's bedroom door. Charlene discovered her mother's bloody corpse sprawled between the master bedroom and the entrance to the master bathroom. Charlene retreated to her room, where she cried herself to sleep. Then, at approximately 1:30 p.m., she woke up and ran to her neighbor's trailer in the adjacent lot. The neighbor checked on Williams, ascertained that she was dead, and called the police **[***4]** from her trailer, as the phone in Williams' trailer was not working.

While the police were en route to the Nellis trailer park, three members of the North Las Vegas Police Department were visiting Jones' brother's apartment complex to teach the owners how to minimize crime in

the area. Two plain-clothed policemen, Herbert Brown (Brown) and Randy Wohlers (Wohlers), and one uniformed officer, Lester Morton (Morton), arrived at the complex to perform their "security survey" at approximately 2:00 p.m. At this time Jones was with Gary in Gary's apartment.

Officers Brown, Wohlers, and Morton rode the elevator up to the third floor of the building, where they were greeted by Rosalee Matthews (Matthews), the mother of Jones and Gary. Matthews testified that Jones had seemed worried about Williams and asked her to telephone the Nellis trailer to check on Williams. When Matthews told Jones that she could not get through to Williams, Gary asked Matthews to telephone the police or his probation officer because he was worried about the fact that he had been taking drugs while on parole. On her way to **[**59]** the pay telephone she met the three policemen and asked them to come to her son's apartment, **[***5]** stating "my boys would like to talk to you guys." The three men accompanied Matthews to Gary's apartment. Gary told Brown that he had been using illegal drugs and did not know what to do about a meeting with his probation officer scheduled for later that afternoon.

After advising Gary to be honest with his probation officer, Brown began speaking with Jones. Jones told Brown that he and his girlfriend had had a fight and that he thought that he had "hurt her bad." After Jones gave Brown the address where the fight had occurred, Brown instructed Morton to radio the communications bureau to notify the Metro police of the address; Brown recalled having heard over the police radio on his way to survey the Pecos apartment about a homicide at the Nellis trailer park. When Morton confirmed that there had been a murder at the address **[*460]** given by Jones, Brown read Jones his *Miranda* rights, while Jones began to cry.

Meanwhile, Detectives Norman Ziola (Ziola) and Karen Good (Good) had arrived at the Nellis crime scene at approximately 2:30 p.m. After performing a cursory inspection of the interior of the trailer, Ziola was apprised of the information gleaned by the North Las Vegas policemen **[***6]** at Gary's apartment. Ziola proceeded to the Pecos apartments where he re-advised Jones of his *Miranda* rights and took Jones and his brother to the detective bureau. En route to the bureau, Jones signed a consent form allowing the police to search the Nellis trailer.

Detective Good was in charge of investigating the crime scene. She testified that she discovered Williams' body lying between the master bedroom and master bathroom, covered with a green quilt. Coagulated blood surrounded the head and shoulders of the body and partially dried blood stained the shirt worn by Williams, the quilt, a robe, and a pile of shorts, underwear, and shoes stacked in the room. After removing the quilt, police noted some thirty stab wounds to Williams' body and a blood covered butcher knife lying under Williams' right foot. In the bathroom, Good found blood in the sink and on the countertop, along with a Band-Aid box and an empty Band-Aid wrapper. A bloody palm print, which would later be identified as Jones' to the exclusion of all others, marred the bedroom wall by the doorway to the master bathroom.

The drawers of the bedroom dresser appeared ransacked, and papers were spread about the bed. **[***7]** Williams' children's birth certificates and Williams' personal identification card were found beneath her body. There was no sign of forced entry or theft; Williams' body still had numerous pieces of jewelry on it. There were no signs of disarray in the rest of the trailer; however, in the kitchen the third drawer down was open, in which the police observed a clean knife similar to the bloody one found in the master bedroom beneath the victim.

The forensic pathologist, Dr. Green, would later testify that Williams had been stabbed approximately thirty-five times in her upper torso and neck, front and back. Of the thirty plus stab wounds, three or four were superficial, the remainder pierced or severed various organs, including the windpipe, lungs, and liver. Dr. Green also noted the presence of many "defensive" wounds on Williams' arms and hands, that is, stab wounds "received in an act of trying to push away or get away from the weapon." Due to the severe injuries to the victim's neck, Dr. Green could not tell if Williams had been choked prior to her death.

In a recorded statement, Jones admitted to having choked and stabbed Williams at the trailer and said that he had left the knife **[***8]** **[*461]** in the bedroom. On the tape, Ziola indicates that he started recording the statement at 3:25 p.m. and stopped the tape at 3:36 p.m. However, at trial the tape was played for the jury, and it ran for approximately four minutes and twenty seconds. Ziola stated that the times stated on the tape were approximate [1] and that he did not edit or stop the

[1] For instance, Ziola testified that he took the 3:25 p.m. time from the time noted on Jones' *Miranda* waiver, which had actually been signed one to four minutes before Ziola started

tape at any time during Jones' statement.

[60]** After giving his statement, Jones was taken to the Clark County Detention Center, where evidence was collected from Jones' person. Jones had splashes of blood on both of his legs and feet, from the knees down, and there was a laceration on Jones' right ring finger. Blood was withdrawn from Jones and tested for drugs and alcohol. The toxicology reports revealed no alcohol, but did indicate a high level of cocaine metabolite in Jones' **[***9]** blood sample. Jones' mother, Matthews, testified that she thought he was under the influence of a controlled substance when she saw him at the Pecos apartment on August 22, 1991. However, the police who questioned and apprehended Jones--Brown, Wohlers, Morton, and Ziola--testified that Jones appeared withdrawn, yet was lucid and articulate, and that none of them suspected that Jones was under the influence of a controlled substance. Moreover, Dr. Green testified that the metabolite found in Jones' blood was merely an inactive byproduct of cocaine and would not have had any affect on an individual's brain functions.

Williams' sister, Jerrie Williams (Jerrie), testified that she had witnessed Jones in a heated argument with the victim on the evening before her death. Laverne Caldwell (Caldwell), Williams' and Jerrie's mother, stated that the night before Williams' death, Jones came to Caldwell's house looking for Williams and acting mad and impatient. Caldwell and Jerrie both testified that Williams was making plans to end her relationship with Jones and move to Mississippi with her children and Jerrie. Jerrie testified that prior to her sister's murder, Jones was often away from home, **[***10]** but when he was with Williams, the two would argue. The prosecution questioned various witnesses about an incident that occurred the May before Williams' death where Jones argued with Williams and then cut his wrists in front of Williams and her children. Jones' expert psychologist, Dr. Hess, testified that this alleged suicide attempt may have been a ploy by Jones to manipulate Williams. The State referred to this alleged suicide attempt in both its opening and closing arguments.

Jones' mother and sister, Matthews and Debra Jones (Debra), testified that Williams and Jones had had a loving relationship and **[*462]** that the two never fought. In the second trial, Debra also testified that two days after Jones' arrest, she had discovered Gary extracting a blood-smeared photograph of Jones and Williams from Jones' automobile. At that time, Debra gave a statement to the police and turned over the bloody photograph, which was later returned at her request.

At the trial below, Matthews testified to having found Williams' necklace hidden behind a picture in the room occupied by Gary at her home (he moved in with her shortly after Jones' arrest). She also stated that Gary resented Williams for coming **[***11]** between Gary and Jones and that Gary had keys to the Nellis trailer. She testified that when she found Jones at Gary's Pecos apartment, he was wearing shorts and there was no blood on his legs or feet. Matthews testified at an evidentiary hearing held before the first trial in 1992, and none of these alleged facts were presented at that time, although Matthews did give a statement and delivered the necklace to the police after its discovery in Gary's room. Gary testified on Jones' behalf at the first trial.

Facts pertaining to prosecutorial behavior

In preparation for the first trial (held in 1992), the State's serologist analyzed the blood found on various pieces of evidence retrieved from the crime scene and compared his results to samples taken from Jones and Williams. The Las Vegas Metropolitan Police Department (Metro) crime laboratory did not have DNA testing capabilities at the time so the serologist performed an ABO blood type comparison. [2] He concluded that both Jones and Williams shared type O blood and that the blood samples also shared the same subgroup and subtype, and testified that he **[**61]** could not differentiate between the two parties' blood found on the evidence. **[***12]**

In preparation for the second trial, Jones' counsel successfully petitioned the court for funds to perform blood analyses. On June 16, 1995, just days before the originally scheduled trial date, the parties met before the district judge in an attempt to resolve an apparent misunderstanding. The prosecution was prepared to hand over vials of blood taken from Williams and Jones, however Jones' counsel demanded the blood spattered items retrieved from the Nellis trailer (the shorts,

the tape.

[2] In a bench conference, the district judge limited the prosecution's questions regarding Metro's DNA capabilities to two areas, the state of the lab's DNA technology in 1991-92 and the state of such technology at the time of the second trial. The State exceeded these restrictions, asking when DNA capabilities would be available, and was admonished by the judge.

underwear, shoes, quilt, knife, etc.). The State did not want to relinquish the evidence, which was already marked and in the custody of the district court.

[*463] Jones' counsel **[***13]** argued that the serologist's unusual findings (that the blood of the victim and Jones' were indistinguishable) warranted retesting by their expert, which would necessitate comparisons between the blood samples and the bloodied pieces of evidence. The State maintained that the defense had originally requested blood for alcohol testing and that "there [was] absolutely no indication until a moment ago, that [Jones' counsel] wanted a murder weapon and he wanted those things taken out of evidence which is crucial to our case."

Finally, the district judge ended the debate, noting "all I can read is the Court minute. And the Court minute says blood. And now we're distinguishing between, well, do we want dry blood or liquid blood or blood on the weapon or blood in a vial or what did we want." The district judge ordered defense counsel and a member of the prosecution to take the evidence to the defense's expert, Dan Berkabile (Berkabile), for the express purpose of finding out what tests could be done, how long the tests would take, and if the results would likely contradict earlier conclusions.

The following week, the parties agreed to continue the trial date until October 23, 1995, **[***14]** and that the State would send the blood and all items requested by the defense to Brian Wraxall of the Serological Research Institute in Northern California. Jones' expert, Berkabile, recommended this particular laboratory, and its credibility was stipulated to by both sides. At a June 21, 1995 hearing, the district judge engaged defense counsel in the following exchange:

> THE COURT: Now, gentlemen, in order to avoid this problem in the future, I want an agreed upon date where everything concerning discovery will be finished in this case. And I want it far enough in advance of this October 23rd trial date so that we don't put this gentleman through any more delays. So, right now on this record, you guys pick it.
>
> [DEFENSE COUNSEL]: I believe we are prepared other than awaiting the results from this lab in California, which is a stipulated one. So, we're not going to send it out a second time. *Good, back [sic] or indifferent, however their information comes*. . . .
>
> THE COURT: *So, we're going to deal with the results whatever they are.*
>
> . . . .
>
> THE COURT: September 14th . . . is your cut off date. Everything that's going to be done in this case is going to be done by **[***15]** September 14th at 5:00.

[*464] (Emphasis added.) By the July 20, 1995 status check, the State had sent the requested evidence to Wraxall at the California laboratory.

At the September 14, 1995 status check, defense counsel complained about the fact that the DNA testing had not been completed prior to the court-imposed discovery cut-off date. The prosecution spoke with Wraxall at the laboratory, who stated that he could not complete his blood analysis until sometime around October 9, 1995. The defense replied, "Whichever way the information comes back, I don't think there's going to be enough time. And absolutely we do not want this continued under any circumstances." The State responded:

> This was done at the request of the defense. I don't care what we do with that property there. I did this [sent the evidence to Wraxall] as an accommodation to [defense counsel].
>
> . . . .
>
> Not only did the defense request this DNA, they supplied us the name of Brian **[**62]** Wraxall. I did everything because it was what [defense counsel] wanted us to do.

(Emphasis added.)

The district judge asked Jones' counsel, "What do you want me to do?," to which the defense stated:

> I don't **[***16]** know what I want the Court to do at this point. I just want the record to reflect that we are not going to stipulate or agree to a continuation of the discovery cut-off date. *If, in fact, it comes back that there is something exculpatory to the defense, we would like to know about it obviously; however, we are not going to agree to allow the State to use this evidence if it is not back by the discovery cut-off date, which was today.*

(Emphasis added.) The district court did not rule on the issue at that time.

On October 18, 1995, the State called the laboratory and Wraxall gave his preliminary results over the telephone. The next day the State telephoned defense counsel with that information. On October 20, 1995 (three days before trial), the State received Wraxall's "Preliminary Analytical Report" which indicated that a combination of Jones and Williams' blood had been

found on the tested items. The State then faxed a copy of Wraxall's report to Jones' counsel.

On October 20, 1995, Jones' counsel filed a motion to dismiss/suppress evidence for the State's alleged violation of the discovery order. On October 23, 1995, the district court held a hearing **[*465]** and subsequently **[***17]** denied Jones' motion to suppress the blood/DNA evidence. Immediately preceding Wraxall's taking the stand, Jones' counsel objected to his testimony on the grounds that the State had failed to endorse Wraxall as a witness. The district court ruled, "Well, both of you [prosecution and defense] agreed to Mr. Wraxall, as far as my notes indicate, so your objection to him testifying this morning is overruled.

At the conclusion of the State's case in chief, Jones' counsel moved to strike Wraxall's testimony, once again citing the prosecution's failure to endorse Wraxall as a witness. At the close of the defense's case in chief, the district judge denied Jones' motion to strike Wraxall's testimony. The jury rendered a guilty verdict on November 8, 1995. The penalty phase followed, concluding November 14, 1995, with the imposition of a death sentence.

During closing arguments at the penalty phase, both the defense and the prosecution made questionable statements to the jury. At one point the prosecution analogized Jones to a rabid animal, and at another, Suggested that weapons found in Jones' cell before the trial could have been meant for use on members of the jury.

Jones also takes **[***18]** issue with the prosecutor's statement that Jones possessed a "special death penalty quality:"

> [PROSECUTOR]: Undoubtedly, ladies and gentlemen, as she was getting stabbed over and over repeatedly she cried out and begged for her life, and she begged to stay alive on behalf of those children of hers. *Can you imagine the special quality of a person who can do this? That's the special death penalty quality of this defendant, Mr. Jones.*

(Emphasis added.) These statements and various other actions taken by the prosecution during this trial form the basis for Jones' present appeal.

DISCUSSION

The prosecutorial misconduct did not constitute reversible error

Jones asserts that the following actions taken by the prosecution in the guilt and penalty phases of his trial constituted reversible error: (1) improper referral to Jones' alleged suicide attempt during closing argument in the guilt phase; (2) exceeding the scope of questions approved by the district court regarding Metro's DNA capabilities in the guilt phase; (3) refusing to release blood evidence to the defense for independent analysis; (4) implying that Jones behaved like a "rabid animal" in the presence **[***19]** of the jury **[*466]** during the penalty phase; (5) intimating during the penalty phase that weapons found in Jones' cell could be used against jurors, and if the jurors did not return a verdict of death in this case Jones could kill them; (6) arguing that this case involved a "special death **[**63]** penalty quality" during closing arguments in the penalty phase.

1. *Alleged prosecutorial misconduct during the guilt phase*

a. *Refusal to release blood evidence to the defense for independent analysis*

Jones maintains that "the prosecution steadfastly refused to release blood evidence to the defense for independent analysis." The record reflects that the State resisted turning over the murder weapon and other bloodied evidence to the defense three days before trial was set to commence; however, the record also shows that despite the misunderstanding as to what items constituted "blood evidence," the State relinquished all requested items to Wraxall, a DNA expert selected by the defense, for analysis. Therefore, we conclude that this claim is without merit.

b. *References to Jones' alleged suicide attempt*

In opening statements of the guilt phase, the State argued:

> Around **[***20]** May of 1991 things were not so good in their relationship, and Pamela [Williams] wanted to leave . . . and in order to stop her from leaving, you will hear testimony from the witnesses, as well as medical documentation that shows that the defendant attempted to kill himself in front of her. And he got that sympathy, and she came back to him . . . .

Jones failed to object to this statement at trial. ***HN1***[↑] Failure to object in the district court precludes

consideration of the issue on appeal; however, this court may address plain error *sua sponte.* Sterling v. State, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992). Because we conclude that the mention of the suicide attempt was not plain error, we will not consider this issue.

During the cross-examination of Jones' expert psychologist, Dr. Hess, the prosecutor asked Dr. Hess if he was aware of a suicide attempt by Jones some months before the murder. Jones' purports that this line of questioning constituted prosecutorial misconduct, however, we construe his argument as one concerning the admissibility of evidence regarding his suicide attempt. ***HN2***[⬆] The decision to admit or exclude evidence, after balancing the **[*467]** prejudicial effect against **[***21]** the probative value, is within the discretion of the trial judge, and such a decision will not be overturned absent manifest error. Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985). We conclude that it was not manifest error to permit introduction of evidence regarding Jones' alleged suicide attempt in May of 1991, and that it was not misconduct for the prosecutor to pursue this line of questioning.

During the guilt phase closing argument, Jones' counsel objected when the State argued that Jones slit his wrists in front of Williams during an argument, in which she was attempting to leave him. ***HN3***[⬆] During closing argument, the prosecution can argue inferences from the evidence and offer conclusions on contested issues. See Domingues v. State, 112 Nev. 683, 696, 917 P.2d 1364, 1373 (1996) (citing Collins v. State, 87 Nev. 436, 439, 488 P.2d 544, 545 (1971) (holding that the prosecutor's statements in closing argument, when made as a deduction or conclusion from the evidence introduced in the trial, are permissible). Reviewing the testimony of Williams' family and Jones' own expert, Dr. Hess, we conclude that the State's argument was not improper, and further conclude that the **[***22]** evidence adduced at trial supported the State's argued deductions and the conclusions asserted in closing argument.

c. *Question regarding Metro's DNA capabilities*

The prosecutor disobeyed the court's directive in asking the serologist when he expected the police department to have DNA capabilities. In light of the judge's explicit limitations on questions pertaining to this subject we conclude that the State acted improperly, but conclude that no unfair prejudice resulted to Jones. ***HN4***[⬆] "A criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone . . . ." United States v. Young, 470 U.S. 1, 11, 84 L. Ed. 2d 1, 105 S. Ct. 1038 (1985). This court must determine **[**64]** whether any misconduct was so prejudicial as to deny Jones a fair trial. Jones v. State, 101 Nev. 573, 577, 707 P.2d 1128, 1131 (1985). We conclude that to the extent any prosecutorial misconduct occurred, it was harmless error.

HN5[⬆] In instances where there is overwhelming evidence of guilt presented to the jury, even aggravated misconduct may be deemed harmless error. *See* Riley v. State, 107 Nev. 205, 213, 808 P.2d 551, 556 (1991); Barron v. State, 105 Nev. 767, 777, 783 P.2d ***[***23]*** 444, 452 (1989). In the instant case, there was overwhelming **[*468]** evidence of Jones' guilt presented to the jury during his trial. Among other things, Jones confessed to stabbing Williams, her blood was splattered on his legs, and he left a bloody palm print above her body. The conviction should stand when the verdict is free from doubt. Riley, 107 Nev. at 213, 808 P.2d at 556.

2. *Alleged Prosecutorial misconduct during the penalty phase*

Attributing a "special death penalty quality" to Jones, inciting fear of Jones' future dangerousness and referring to Jones as a "rabid animal" in the penalty phase closing argument

Jones offers no specific argument or authority to support his claim that the State's attribution of a "special death penalty quality" to the defendant constituted error. We conclude that this unsupported contention should be summarily rejected on appeal. *See* Bennett v. Fidelity & Deposit Co., 98 Nev. 449, 453, 652 P.2d 1178, 1181 (refusing to consider merits when authority not cited); McKinney v. Sheriff, 93 Nev. 70, 71, 560 P.2d 151, 151 (1977) (stating that contentions unsupported by authority are to be summarily rejected). Moreover, **[***24]** a prosecutor's principal objective in penalty phase argument is to convince the jury that the convicted defendant is deserving of the punishment sought. We conclude that the prosecution was merely arguing that Jones' heinous crime was worthy of the death penalty.

As to the State's warning that Jones' weapons could have been meant for inflicting harm on the jurors themselves, we conclude that this portion of the statement was clearly inflammatory; however, the statement did not unfairly prejudice Jones in light of the

overwhelming evidence of his guilt. [3] Moreover, the remainder of the statement in which the prosecutor referred to Jones' propensity for violence falls within the ambit of a "future dangerousness" **[*469]** argument which has been held permissible on numerous occasions. *See* Witter v. State, 112 Nev. 908, 927-28, 921 P.2d 886, 899 (1996) (holding that prosecutor's future dangerousness argument was proper where shank was found in defendant's cell); Haberstroh v. State, 105 Nev. 739, 741-42, 782 P.2d 1343, 1344 (1989) (concluding no misconduct where the prosecutor told the jury that a piece of angle iron had been found in the defendant's possession while in jail and stated that **[***25]** defendant could pose a future threat to others).

Moreover, in Redmen v. State, 108 Nev. 227, 235, 828 P.2d 395, 400 (1992), *overruled on other grounds by* Alford v. State, 111 Nev. 1409, 906 P.2d 714 (1995), this court concluded that it **[***26]** would even "allow HN6[↑] prosecutors to argue the future dangerousness of a defendant . . . when there is no evidence of violence independent of the murder in question." In the instant case, the jury had received a plethora of evidence concerning Jones' violent tendencies, prior to the delivery of the State's remarks regarding Jones' propensity for violence. We conclude that given this evidence, along with the murder itself, there were clear facts to support an argument of future dangerousness. However, we admonish the prosecutor for suggesting **[**65]** that Jones' violent tendencies could be visited upon individual jurors.

Finally, we conclude that likening Jones to a rabid animal was misconduct, but that the misconduct was harmless error in light of the aforementioned overwhelming evidence of guilt. This court has previously warned that "such toying with the jurors' imagination is risky and the responsibility of the prosecutor is to avoid the use of language that might deprive a defendant of a fair trial." Pacheco v. State, 82 Nev. 172, 180, 414 P.2d 100, 104 (1966) (discussing prosecutor's statement calling a defendant a "mad dog."). The prosecutor's reference to Jones as a rabid animal was indeed **[***27]** risky behavior and was wholly unnecessary. Although the State argues that it was "simply pointing out the heinous nature of the defendant's past conduct and his utter disregard for the sanctity of life," we conclude that there was ample evidence from which the jury could have drawn that very same conclusion in the absence of the prosecution's demeaning and unprofessional remarks.

Notwithstanding these improper comments made by the prosecutor during the penalty phase, we conclude that in light of the overwhelming evidence of Jones' guilt, the prosecutor's misconduct constituted harmless error. Because the verdict was free from doubt we will not reverse, however, we caution the prosecution **[*470]** that with a weaker case, such misconduct might very well constitute reversible error.

The State did not violate Brady requirements

Jones argues that the State violated the holding of Brady v. Maryland, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), and its progeny in that potentially exculpatory statements given to police by his mother, Matthews, and sister, Debra, several days after Williams' murder were kept from the defense until the second day of jury selection. The State **[***28]** maintains that these two statements had been in the prosecution's file since 1991 and the file had been readily available to the defense under the State's open file policy since that time.

There is no way for this court to determine whether or not these statements were made available to Jones; the State says that they were in the file, and the defense says that they were not. The district court listened to these facts as presented by both parties and subsequently denied Jones' motion to dismiss the case and/or sanction the State for alleged *Brady* violations. HN7[↑] A district court's determinations of fact will not be set aside if they are supported by substantial evidence. Tomarchio v. State, 99 Nev. 572, 575, 665 P.2d 804, 806 (1983). We conclude that the trial court's determination that these statements were made available to the defense was supported by substantial evidence.

[3] Notwithstanding the dissent's assertion that there was little evidence to support the jury's verdict of first degree murder, we note that "the nature and extent of the injuries, coupled with repeated blows, constitutes substantial evidence of willfulness, premeditation and deliberation." Jones did not stab Williams once, twice, or even ten times; he plunged the knife into her body *thirty-six* times. On these facts, we conclude that there was indeed overwhelming evidence upon which the jury could have found Jones guilty of first-degree murder. Cf. Payne v. State, 81 Nev. 503, 508-09, 406 P.2d 922, 925-26 (1965) ("one may be guilty of murder in the first degree although the intent to commit such a homicide is formed 'at the very moment the fatal shot [is] fired'").

Jones argues that *Jimenez v. State, 112 Nev. 610, 618, 918 P.2d 687, 692 (1996)*, is apposite to his claim on appeal, quoting the opinion for the principle that "it is a violation of due process for the prosecutor to withhold exculpatory evidence, and his motive for doing so is immaterial." Jones argues that **[***29]** "the State fought the disclosure of evidence to the defense," claiming that the State opposed a subpoena for Jones' police file, served on the first day of trial, and refused to allow defense counsel access to the police file.

These facts are distinguished from *Jimenez* in that, as the record reveals, the defense had an adequate opportunity to present the testimony of Matthews and Debra during its case in chief and made use of the allegedly withheld statements at that time. In *Jimenez,* the defense was hindered in presenting certain exculpatory evidence to the jury due to the State's failure to disclose Potentially exculpatory evidence. *Jimenez, 112 Nev. at 620, 918 P.2d at 693*.

As evidenced by the testimony of Matthews and Debra, in the instant case the jury was able to hear that both women had found **[*471]** Williams' property in Gary's possession shortly after Williams' death, along with any other potentially exculpatory evidence contained in Matthews's and Debra's 1991 police statements. Therefore, we conclude that there were no *Brady* violations in regards to these statements, and even if there were, the result was harmless error because the substance **[**66]** of the statements reached **[***30]** the jury for consideration.

The State did not violate the discovery deadline

On appeal, Jones argues that the district court erred in allowing the State to introduce DNA evidence at trial because the DNA expert's report was not available to either side at the discovery deadline of September 14, 1995. We conclude that Jones' claim is meritless.

HN8[↑] "A trial court is vested with broad discretion in fashioning a remedy when, during the course of the proceedings, a party is made aware that another party has failed to comply fully with a discovery order." *Langford v. State, 95 Nev. 631, 635, 600 P.2d 231, 234 (1979)*. This court "will not find an abuse of discretion in such circumstances unless there is a showing that the State has acted in bad faith, or that the non-disclosure results in substantial prejudice to appellant . . . ." Id. We conclude that the district court did not abuse its discretion in permitting the DNA results to be admitted into evidence.

First, we note that the State did not act in bad faith. The State made all reasonable efforts to procure the DNA results before the discovery deadline. The State had sent the materials to Wraxall by July of 1995, approximately **[***31]** two months prior to the deadline. The delay in receiving the results was attributable to Wraxall, and not to the State.

Furthermore, Jones was not prejudiced by the delay. Prior to the evidence being sent to Wraxall, Jones' counsel explicitly told the trial judge that the defense would accept the results of Wraxall's analysis, be they exculpatory or inculpatory. Additionally, the State followed up on the evidence sent to Wraxall, informing the district court and Jones' counsel of its findings. The prosecution at no time withheld the information received from Wraxall and gave the results to defense counsel shortly after receipt, on October 19, 1995.

In the instant case, Jones knew that the report from Wraxall would be forthcoming and in fact noted in his motion to dismiss, dated three days before trial (October 20, 1995), that "during its case-in-chief, the State of Nevada will attempt to introduce blood/DNA evidence. . . ." On June 21, 1995, the defense told **[*472]** the district court that it would accept Wraxall's results, good or bad. However, in his October motion to dismiss, Jones' counsel complained that he would not have adequate time to hire an expert to attack Wraxall's findings. **[***32]** On these facts, we conclude that the State did not act in bad faith and that Jones was not prejudiced by any delay.

The district court did not commit reversible error in permitting unendorsed witness Brian Wraxall to testify

In a related Issue, Jones claims that the State's failure to strictly comply with the provisions of *NRS 173.045(2)*, [4] which requires endorsement of prosecution witnesses,

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[4] ***HN9***[↑] *NRS 173.045(2)* provides, in pertinent part, that:

> The district attorney . . . shall endorse thereon the names of such witnesses as are known to him at the time of filing the information, and shall also endorse upon the information the names of such other witnesses as may become known to him before the trial at such time as the court may, by rule or otherwise, prescribe; but this does not preclude the calling of witnesses whose names, or the materiality of whose testimony, are first learned by the district attorney . . . upon the trial. . . . He shall not endorse the name of any witness whom he does not

necessitates reversal of his conviction. In the second week of trial, the State called an unendorsed witness, DNA expert Wraxall, to testify during its case in chief.

[*33]** *HN10*[↑]

Nevada law clearly allows witnesses to be endorsed even after trial has begun:

> Under statutes such as ours the indorsement of names of witnesses upon an information is largely a matter of discretion with the court; and, in the absence of a showing of abuse, or that some substantial injury has resulted to the accused, an order permitting such indorsement, even after the trial has commenced, does not constitute of itself reversible error.

[67]** *State v. Monahan, 50 Nev. 27, 35, 249 P. 566, 569 (1926)*. However, in the instant case, the State *never* endorsed Wraxall, neither before, nor during the trial.

In *Dalby v. State, 81 Nev. 517, 519, 406 P.2d 916, 917 (1965)*, this court held that where the name and address of an unendorsed witness was known to the defendant and an opportunity was afforded to the defendant to interview the witness during an evening recess, there was no prejudicial error in permitting the witness to testify. However, *HN11*[↑] there is "a presumption that a witness called to testify whose name is not endorsed on the information is one who was not before known to the district attorney." *Id. at 519, 406 P.2d at 917*.

[*473] We conclude that *HN12*[↑] Nevada case law establishes **[***34]** that failure to endorse a witness constitutes reversible error only where the defendant has been prejudiced by the omission. *Redmen v. State, 108 Nev. 227, 234, 828 P.2d 395, 400 (1992)*. While the State did commit procedural error, we conclude that this error did not prejudice Jones because Wraxall was chosen by the defense to analyze the blood; thus Jones' counsel knew Wraxall's name and address as early as June of 1995. Moreover, the defense stated in an October 20th motion that the State *would* be presenting the DNA evidence, and counsel received a copy of Wraxall's report before the trial began. Finally, Wraxall was not called to the stand until the second week of Jones' trial.

The death sentence was not excessive considering the crime and the defendant

HN13[↑] In concluding that the death penalty was not excessive, this court has looked to the heinous nature of the killing. *Libby v. State, 109 Nev. 905, 919, 859 P.2d 1050, 1059 (1993)*, *vacated on other grounds by Libby v. Nevada, 133 L. Ed. 2d 650, 516 U.S. 1037, 116 S. Ct. 691 (1996)*. In the instant case, not only did Jones stab Williams at least thirty-five times with a kitchen knife, he committed this **[***35]** atrocity in the bedroom next to the victim's sleeping children. Although he locked the bedroom door, it was six-year-old Charlene who discovered her mother's bloody corpse.

Besides the armed robbery conviction, the jury heard testimony regarding other violent acts perpetrated by Jones. The evidence indicated that Jones has battered correction officers and detention center workers, threatened his own mother with a gun, beat up a previous girlfriend, and roughly a month before Williams' murder, had shot and wounded a man in an altercation.

In light of the heinous crime and Jones' Propensity for violence, we conclude that the death sentence was not excessive.

1. *The evidence presented supported the finding of the aggravating circumstances*

Although Jones does not address this issue on appeal, *NRS 177.055(2)* [5] requires this court to examine the record and determine **[*474]** whether the evidence supports the finding of the aggravating circumstances. In the penalty phase, pursuant to *NRS 200.033*, the jury found two aggravating circumstances weighing against Jones: (1) the murder was committed by a person who was previously convicted of a felony involving the use or threat of violence **[***36]** to the person of another, and (2) the murder involved mutilation of the victim.

a. *Prior conviction of a violent felony*

During the Penalty phase, the State properly introduced Jones' 1981 conviction for robbing a grocery store at

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reasonably expect to call.

[5] *HN14*[↑] *NRS 177.055(2)* provides, in pertinent part, that this court shall consider:

> (b) Whether the evidence supports the finding of an aggravating circumstance or circumstances;
>
> (c) Whether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor; and
>
> (d) Whether the sentence of death is excessive, considering both the crime and the defendant.

gun point as evidence of an aggravating factor. We conclude that this earlier conviction clearly supports a finding of the aggravating circumstance of prior conviction of a felony involving threat of violence to another. *See generally* Parker v. State, 109 Nev. 383, 393, 849 P.2d 1062, 1068 (1993).

[68]** b. *Mutilation of the victim*

The district court defined ***HN15***[↑] mutilation for the jury as **[***37]** "to cut off or permanently destroy a limb or essential part of the body or to cut off or alter radically so as to make imperfect." This court approved the use of this definition in Deutscher v. State, 95 Nev. 669, 677, 601 P.2d 407, 413, (1979), *vacated on other grounds by Angelone v. Deutscher, 500 U.S. 901, 114 L. Ed. 2d 73, 111 S. Ct. 1678 (1991)*. We conclude that the evidence adduced during the guilt and penalty phases of Jones' trial support the finding of this aggravating circumstance. Specifically, the pathologist testified to thirty-five or more wounds (only three or four of which were deemed superficial), at least one of which severed Williams' windpipe and part of her neck. One of the stabs to the chest was thrust so hard that the knife plunged entirely through her body to her back. In addition to a cluster of seven wounds to her right breast, Williams' lungs and liver had been pierced by one of the stabs. Moreover, Dr. Green found multiple "defensive wounds" to Williams' hands and arms, indicating a futile attempt to protect herself from the repeated blows of the knife.

Therefore, we conclude that the evidence supports the findings of the enumerated aggravating factors, **[***38]** and this issue is affirmed on appeal.

[*475] *The death sentence was not imposed under the influence of passion prejudice or any arbitrary factor*

Jones does not raise this issue on appeal, however NRS 177.055(2) compels this court to address the issue. We conclude that the record contains sufficient evidence upon which the jury could have found that the aggravating circumstances outweighed the mitigating circumstances and thus rendered a death sentence without passion, prejudice, or any arbitrary factor.

CONCLUSION

We conclude that although Jones may not have ***HN16***[↑] received a perfect trial, he did receive a fair trial, which is what the law requires. Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990). The State did engage in misconduct during its penalty phase closing argument; however, in light of the overwhelming evidence of Jones' guilt, we conclude that reversal on this claim is not warranted. We further conclude that Jones' claims of *Brady* and discovery violations, and any other instances of prosecutorial misconduct, are meritless. The State did commit a technical error in failing to endorse Wraxall as a witness, but we conclude that Jones was not prejudiced or **[***39]** unfairly surprised by Wraxall's testimony; thus the error was harmless. Having determined that Jones was fairly tried, convicted and sentenced, we affirm in all respects the judgment of conviction and sentence imposed thereon. [6]

Rose, J.

We concur:

Shearing, C.J.

Young, J.

Dissent by: SPRINGER

Dissent

SPRINGER, J., dissenting:

I dissent to the judgment of conviction and to the death penalty judgment. With respect to the judgment of conviction I agree with the majority that the prosecutor was guilty of misconduct and that the language used by the prosecutor was "clearly inflammatory." I agree with the majority that the prosecutor engaged in the use of "demeaning and unprofessional remarks" and that the prosecutor's references to the defendant as a rabid animal were "wholly unnecessary." Further, I agree with the majority that the "improper comments made by the prosecutor" were indeed "prosecutor's misconduct."

[*40]** I would join with the majority in "admonish[ing] the prosecutor for suggesting that Jones' violent tendencies could be visited **[*476]** upon individual jurors"; but I would not, like the majority, sweep all of this misconduct under the rug and let the prosecutor engage in all of this misconduct without paying any price for it.

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[6] The Honorable A. William Maupin, Justice, did not participate in the decision of this matter.

The majority says that there is "overwhelming evidence" of *guilt* in this case. What the majority should have said is that there is overwhelming evidence of *homicide* committed by Jones. There is, of course, a **[**69]** big difference between the two. In this case, for example, proof that Jones is guilty of intentional, deliberated first-degree murder is anything but overwhelming; in fact, it is quite weak. This is a crime of passion. As stated in the majority opinion, Jones and Williams (his girlfriend) got into a fight and were "struggling . . . over what appeared to be a bank card." The homicide was committed "after a night of drinking and smoking crack cocaine." There is no question that Jones killed his girlfriend, but there is certainly a strong argument that the killing was committed in the heat of passion; and there is certainly ample ground to believe that this **[***41]** may not have been a premeditated murder. The majority asserts that it might have reversed if this had been a "weaker case." This is a "weaker case." Although there is no doubt that Jones killed his girlfriend, there are all kinds of doubts about his mental state at the time of the stabbing. Even, however, if Jones' defense were "weak," what I find to be "weak" is the majority's admonition to the prosecutors, telling them, in effect: "Look out prosecutors, because one of these days we might hold you accountable for such things as telling the jury that the defendant is a rabid animal who, unless convicted, will come back to kill jurors."

With respect to the death penalty judgment, it is very clear to me that multiple stab wounds do not, of themselves, constitute mutilation. Mutilation is intentional mayhem that goes "beyond the act of killing." *Browne v. State, 113 Nev. 305, 933 P.2d 187* (Adv. Op. No. 33, February 26, 1997). The majority's discussion of this aggravating factor is so superficial and incomplete that it is hardly worth responding to. Under the incomplete definition of mutilation recited in the majority any fatal gunshot to the head would be sufficient **[***42]** to constitute mutilation because, clearly, any such wound would "alter radically" the brain of the victim "so as to make [it] imperfect." There is insufficient evidence of mutilation as an aggravator, and this, at the very least, should have been recognized by the majority. This case calls for a new penalty hearing.

Springer, J.

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Am. Home Assur. Co. v. Eighth Judicial Dist. Court

Supreme Court of Nevada

December 21, 2006, Filed

No. 47381

Reporter
122 Nev. 1229 *; 147 P.3d 1120 **; 2006 Nev. LEXIS 136 ***; 122 Nev. Adv. Rep. 104

AMERICAN HOME ASSURANCE COMPANY, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE MICHELLE LEAVITT, DISTRICT JUDGE, Respondents, and DAVID CARLTON MADISON, JR.; TITANIUM METALS CORPORATION; AND GUARDSMARK, INC., Real Parties in Interest.

Prior History: [*1]** Original petition for a writ of mandamus challenging a district court order that denied petitioner's motion to intervene in the underlying personal injury action.

Disposition: Petition denied.

Core Terms

intervene, insurer, district court, injured worker, workers' compensation, reimbursement, tortfeasor, parties, subrogation, benefits, subrogation rights, subject matter, recovered, proceeds, rights, litigation expenses, unconditional right, ability to protect, mandamus, damages

Case Summary

Procedural Posture
In an original petition for a writ of mandamus challenging respondent district court's order denying petitioner workers' compensation insurer's motion to intervene in the real party in interest injured worker's underlying personal injury action, the insurer requested that the supreme court direct the district court to allow it to intervene in the worker's personal injury case.

Overview

Real party in interest property owner hired real party in interest employer to provide on-site security services. The employer hired the worker as a security guard. While on duty, the worker fell into an abandoned furnace pit on the owner's property. As a result of the fall, the worker suffered severe, debilitating injuries, for which he received workers' compensation benefits from the insurer. The worker then filed a personal injury action against the owner. The supreme court concluded that the insurer did not have an absolute right to intervene in the worker's underlying suit under Nev. R. Civ. P. 24(a)(1). Thus, it overruled State Indus. Ins. Sys. v. Eighth Judicial Dist. Court, 111 Nev. 28, 888 P.2d 911 (1995). The supreme court concluded that the insurer could intervene in the worker's litigation to protect its right to reimbursement only if it met certain requirements. Since the insurer waited until shortly before the trial to seek intervention and failed to show that the worker's representation was inadequate, the district court did not abuse its discretion in denying the insurer's intervention application. Thus, extraordinary writ relief was not warranted.

Outcome
The supreme court denied the insurer's petition for a writ of mandamus.

LexisNexis® Headnotes

Civil Procedure > Parties > Intervention > Intervention of Right

Workers' Compensation & SSDI > Third Party Actions > General Overview

HN1[] **Intervention, Intervention of Right**

Because State Indus. Ins. Sys. v. Eighth Judicial Dist.

Court, 111 Nev. 28, 888 P.2d 911 (1995), is unsupportable under the law, it is overruled it. The Nevada Supreme Court concluded that a workers' compensation insurer may intervene in an injured worker's litigation to protect its right to reimbursement only if it meets certain requirements, which include showing that the injured worker cannot adequately represent the insurer's interest in the subject matter of the litigation.

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

HN2 **Common Law Writs, Mandamus**

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust or station, or to remedy a manifest abuse of discretion. Nev. Rev. Stat. § 34.160.

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

HN3 **Common Law Writs, Mandamus**

Mandamus is available only when a petitioner has no plain, speedy, and adequate legal remedy, Nev. Rev. Stat. § 34.170.

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

HN4 **Common Law Writs, Mandamus**

Whether the supreme court will consider a petition for the extraordinary remedy of mandamus is entirely within its discretion.

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

Evidence > Burdens of Proof > Allocation

HN5 **Common Law Writs, Mandamus**

A petitioner bears the burden of demonstrating that mandamus relief is warranted.

Civil Procedure > Parties > Intervention > Intervention of Right

HN6 **Intervention, Intervention of Right**

Nev. Rev. Stat. § 12.130 allows, before a trial commences, any person who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both to intervene in an action under the Nevada Rules of Civil Procedure. Nev. Rev. Stat. § 12.130(1) and (3).

Civil Procedure > Parties > Intervention > Intervention of Right

Civil Procedure > Parties > Intervention > Permissive Intervention

HN7 **Intervention, Intervention of Right**

Nev. R. Civ. P. 24 governs intervention, providing for both intervention of right and permissive intervention.

Civil Procedure > Parties > Intervention > Intervention of Right

Civil Procedure > Parties > Intervention > Time Limitations

HN8 **Intervention, Intervention of Right**

Nev. R. Civ. P. 24(a) directs a district court to approve a timely application to intervene of right when either (1) a statute grants an unconditional right to intervene, or (2) an applicant claims an interest relating to the subject property and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately protected by existing parties.

Civil Procedure > Parties > Intervention > Motions to Intervene

HN9 **Intervention, Motions to Intervene**

An application to intervene must be accompanied by a pleading setting forth the claim for which intervention is sought. Nev. R. Civ. P. 24(c).

Civil Procedure > Parties > Intervention > General Overview

HN10 **Parties, Intervention**

By intervening, an applicant becomes a party to an action in order to do one of the three following things: (1) join a plaintiff in a complaint's demand; (2) resist, with a defendant, the plaintiff's claims; or (3) make a demand adverse to both the plaintiff and the defendant. Nev. Rev. Stat. § 12.130(2).

Civil Procedure > Parties > Intervention > General Overview

HN11 **Parties, Intervention**

See Nev. Rev. Stat. § 12.130(2).

Civil Procedure > Parties > Intervention > Intervention of Right

HN12 **Intervention, Intervention of Right**

Nev. R. Civ. P. 24(a)(1) requires that a statute confer an unconditional right to intervene, and no such statute has been enacted. Thus, an unconditional right of intervention, as necessary to intervene under Nev. R. Civ. P. 24(a)(1), does not exist in Nevada.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Parties > Intervention > Intervention of Right

HN13 **Judges, Discretionary Powers**

The right to intervene should be available only after a district court, exercising its discretion, determines that an applicant has met the Nev. R. Civ. P. 24(a)(2) requirements and the applicant's intervention is otherwise appropriate.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Parties > Intervention > Intervention of Right

HN14 **Judges, Discretionary Powers**

To intervene under Nev. R. Civ. P. 24(a)(2), an applicant must meet four requirements: (1) that it has a sufficient interest in the litigation's subject matter, (2) that it could suffer an impairment of its ability to protect that interest if it does not intervene, (3) that its interest is not adequately represented by existing parties, and (4) that its application is timely. Determining whether an applicant has met those four requirements is within a district court's discretion.

Civil Procedure > Parties > Intervention > Motions to Intervene

HN15 **Intervention, Motions to Intervene**

In a motion to intervene, with regard to the first Nev. R. Civ. P. 24(a)(2) requirement, that an applicant show a sufficient interest in the litigation's subject matter, no bright-line test to determine an alleged interest's sufficiency exists. A general, indirect, contingent, or insubstantial interest is insufficient, however. Instead, an applicant must show a significantly protectable interest. A significantly protectable interest has been described as one that is protected under the law and bears a relationship to a plaintiff's claims.

Business & Corporate Compliance > ... > Workers' Compensation & SSDI > Third Party Actions > Subrogation

Civil Procedure > Parties > Intervention > Motions to Intervene

HN16 **Workers' Compensation, Subrogation**

In a motion to intervene, with regard to the first Nev. R.

Civ. P. 24(a)(2) requirement, that an applicant show a sufficient interest in the litigation's subject matter, an applicant must show a significantly protectable interest. With respect to the two components of the significantly protectable interest, a workers' compensation insurer's interest in obtaining reimbursement through its subrogation right is protected under law and arises out of the same events as do an injured worker's claims. Thus, the insurer generally has an interest sufficient to intervene under Nev. R. Civ. P. 24(a)(2). Under Nev. Rev. Stat. § 616C.215, a workers' compensation insurer is subrogated to the injured workers' right to recover against a tortfeasor. Nev. Rev. Stat. § 616C.215(2)(b). Through its subrogation right, the insurer becomes at least a partial owner of the cause of action. Indeed, under Nevada law, the insurer obtains such a significant interest in the injured workers' claims as the result of its subrogation right, that it may itself sue the alleged tortfeasor, even if the injured worker does not.

Business & Corporate Compliance > ... > Workers' Compensation & SSDI > Third Party Actions > Subrogation

Civil Procedure > Parties > Intervention > Motions to Intervene

HN17 **Workers' Compensation, Subrogation**

Nev. R. Civ. P. 24(a)(2)'s second requirement, that an applicant could suffer an impairment of its ability to protect its interest if it does not intervene, is met if a district court determines that a worker's compensation insurer's ability to protect its interest in the litigation's subject matter might be impaired by the disposition of an injured worker's action. Because the injured worker and the insurer share but one cause of action, the disposition of the injured worker's action necessarily impacts the insurer's subrogation interest. And as, generally, only one final outcome of the claims against the alleged tortfeasor on account of the industrial injury may exist, once the injured worker's case is resolved, whether by judgment, dismissal with prejudice, or settlement, the insurer no longer has any right to proceed with a separate action against the alleged tortfeasor, even if any recovery the injured worker obtains is insufficient to fully reimburse the insurer's expenses.

Civil Procedure > Parties > Intervention > Intervention of Right

Workers' Compensation & SSDI > Third Party Actions > General Overview

Civil Procedure > Parties > Intervention > Motions to Intervene

HN18 **Intervention, Intervention of Right**

Under Nev. R. Civ. P. 24(a)(2)'s third requirement, that an applicant's interest is not adequately represented by existing parties, a worker's compensation insurer has no right to intervene if its interest is adequately represented by an injured worker. Although the applicant insurer's burden to prove that requirement has been described as minimal, when the insurer's interest or ultimate objective in the litigation is the same as the injured worker's interest or subsumed within the worker's objective, the injured worker's representation should generally be adequate, unless the insurer demonstrates otherwise.

Civil Procedure > Parties > Intervention > Motions to Intervene

Workers' Compensation & SSDI > Third Party Actions > General Overview

HN19 **Intervention, Motions to Intervene**

For purposes of the Nev. R. Civ. P. 24(a)(2)'s third requirement, that an applicant's interest is not adequately represented by existing parties, most injured workers undoubtedly will strive to obtain the greatest amount in damages warranted under the circumstances. Consequently, a worker's compensation insurer's objective in obtaining from a tortfeasor an amount sufficient to fully reimburse its costs is completely subsumed within an injured worker's objective. Thus, unless the insurer can show that the injured worker has a different objective, adverse to its interest, or that the worker otherwise may not adequately represent their shared interest, the worker's representation is assumed to be adequate. The longer an insurer waits after the litigation commences before applying to intervene, the more the insurer's acceptance of the injured worker's representation as adequate can be implied, and the stronger the showing to the contrary must be to overcome that inference.

Civil

Civil Procedure > Parties > Intervention > Time Limitations

HN20 **Intervention, Time Limitations**

Nev. Rev. Stat. § 12.130(1) provides that an applicant may intervene before a trial. However, even when made before trial, an application must be timely in the sense afforded the term under Nev. R. Civ. P. 24. Determining whether an application is timely under Nev. R. Civ. P. 24 involves examining the extent of prejudice to the rights of existing parties resulting from the delay and then weighing that prejudice against any prejudice resulting to an applicant if intervention is denied. Further, the timeliness of an application may depend on when the applicant learned of its need to intervene to protect its interests. Thus, in deciding whether an application is timely, a district court must consider the length of delay and the reasons therefore, in light of the applicant's obligation to share in the litigation expenses.

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Cobeaga Law Firm and J. Mitchell Cobeaga, Las Vegas; Eckley M. Keach, Esq., Las Vegas; Murdock & Associates, Chtd., and Robert E. Murdock, Las Vegas, for Real Party in Interest David Carlton Madison, Jr.

Georgeson Angaran, Chtd., and Jack G. Angaran, Reno; Low Ball & Lynch and Dean M. Robinson, San Francisco, California, for Real Party in Interest Guardsmark.

Judges: ROSE, C.J., BECKER, GIBBONS, DOUGLAS and PARRAGUIRRE, JJ., concur.

Opinion by: HARDESTY

Opinion

[*1232] **[**1122]** BEFORE THE COURT EN BANC. [1]

[*2]**

By the Court, HARDESTY, J.:

In Nevada, when a third party is at fault for an industrial accident, the workers' compensation insurer that paid benefits to the injured worker has a lien upon any proceeds that the worker recovers from the tortfeasor, so that the insurer's payments are reimbursed, ultimately, by the tortfeasor. During the proceedings underlying this writ petition, to protect its lien on any proceeds recovered by the injured worker to whom it provided benefits, a workers' compensation insurer asked the district court to allow it to intervene in the injured worker's tort litigation. Although the insurer contended that it had an absolute right to intervene in the litigation under our 1995 decision in *State Industrial Insurance System v. District* ***[**1123]*** *Court*, [2] the district court denied the insurer's application. Accordingly, the insurer has brought this original petition for a writ of mandamus, requesting us to direct the district court to allow it to intervene in the injured worker's case.

[*3]** **HN1** Because our 1995 decision is unsupportable under the law, however, we overrule it. We conclude that a workers' compensation insurer may intervene in an injured worker's litigation to protect its right to reimbursement only if it meets certain requirements, which include showing that the injured worker cannot adequately represent the insurer's interest in the subject matter of the litigation. **[*1233]** Because the insurer here failed to show that its interest was inadequately represented by the injured worker, we deny the insurer's request for extraordinary relief.

FACTS

Real party in interest Titanium Metal Corporation (Timet) hired real party in interest Guardsmark, Inc., to provide onsite security services. Guardsmark employed real party in interest David Carlton Madison, Jr., as a security guard. While on duty, Madison fell into an abandoned furnace pit on Timet's property. As a result of the fall, Madison suffered severe, debilitating injuries, for which he received workers' compensation benefits from Guardsmark's insurer.

Madison then filed a personal injury action against Timet in December 2003, alleging several negligence theories

[1] The Honorable A. William Maupin, Justice, voluntarily recused himself from participation in this matter.

[2] 111 Nev. 28, 888 P.2d 911 (1995).

as bases to recover damages. Timet **[***4]** filed a third-party complaint against Guardsmark for express and implied indemnity, and contribution.

In April 2006, over three years after the accident and approximately two-and-one-half years after Madison filed suit, Guardsmark's workers' compensation insurer, petitioner American Home Assurance Company (AHAC), moved to intervene in Madison's personal injury action for purposes of recovering the workers' compensation benefits that it had paid (and will pay) to Madison. Attached to its motion was a "complaint-in-intervention for reimbursement of workers' compensation benefits," alleging the same negligence claims against Timet as were alleged in Madison's complaint and requesting both damages and a lien against any judgment in favor of Madison, in the amount of the benefits that it paid to Madison. At the time AHAC sought to intervene, a June 2, 2006 discovery cut-off date was in place, and trial was scheduled to begin on September 5, 2006.

Both Madison and Timet opposed the motion to intervene, arguing that AHAC's complaint in intervention constituted an attempt to assert an independent cause of action against Timet and was thus subject to dismissal under the statute of **[***5]** limitations. [3] Further, they argued, given that the intervention complaint did not even contain the word "subrogation," it could not be construed as an effort to enforce a subrogation lien. All parties acknowledged that AHAC retained subrogation lien rights over any recovery Madison obtained and that AHAC could enforce those rights after any settlement was reached or any judgment was entered. Madison pointed out, however, that if AHAC did not intervene in the action, it would be responsible for contributing its share of the litigation expenses when collecting on its lien, as set forth in *Breen v. Caesars Palace*. [4] Madison asserted that AHAC should not be permitted to **[*1234]** intervene at such a late date, as it attempted to do so merely to avoid paying its proportionate share of the litigation costs.

The district court denied AHAC's motion to intervene, determining that AHAC was attempting **[***6]** to assert an independent cause of action against Timet, which was time-barred. The court further found that AHAC's lien rights were adequately protected, as the parties were on notice that the lien would apply, subject to an offset for AHAC's portion of the litigation expenses, as required under *Breen*.

AHAC consequently filed the instant writ petition, challenging the district court's order **[**1124]** denying it leave to intervene. As directed, Madison timely filed an answer, arguing that AHAC's intervention was not appropriate under these circumstances and, therefore, writ relief was not warranted. We stayed the underlying action pending our resolution of AHAC's petition for extraordinary writ relief.

DISCUSSION

HN2[↑] A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust or station, [5] or to remedy a manifest abuse of discretion. [6] *HN3*[↑] Mandamus is available only when petitioner has no plain, speedy, and adequate legal remedy, [7] and *HN4*[↑] whether we will consider a petition for the extraordinary remedy of mandamus is entirely within our discretion. [8] *HN5*[↑] The petitioner bears the burden of demonstrating that mandamus **[***7]** relief is warranted. [9]

We have determined that our discretionary consideration of this petition is appropriate because AHAC has no other adequate means by which to challenge the district court's refusal to allow it to intervene in the underlying suit. [10] After considering the petition and answer thereto, however, we conclude that extraordinary writ relief is not warranted. Specifically, even though AHAC has an interest in Madison's litigation of his personal injury claims, the district court has discretion in deciding whether AHAC has shown that intervention is appropriate so that it may promote or protect that interest. We conclude that the **[***8]** district

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[3] Apparently, Guardsmark did not object to AHAC's intervention.

[4] *102 Nev. 79, 715 P.2d 1070 (1986)*.

[5] *See NRS 34.160*.

[6] *See Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981)*.

[7] *NRS 34.170*.

[8] *See Smith v. District Court, 107 Nev. 674, 818 P.2d 849 (1991)*.

[9] *Pan v. Dist. Ct., 120 Nev. 222, 228, 88 P.3d 840, 844 (2004)*.

[10] *See SIIS, 111 Nev. 28, 888 P.2d 911*.

court did not manifestly abuse its discretion when it denied AHAC leave to intervene, given Madison's ability to adequately represent AHAC's interest.

[*1235] *Intervention is within the district court's discretion*

AHAC argues that, in accordance with this court's decision in *State Industrial Insurance System v. District Court (SIIS)*, [11] it may automatically intervene in Madison's suit against Timet as a matter of right. Accordingly, AHAC argues, the district court was obligated to allow it to intervene. Because we determine that our conclusion in *SIIS*, that an insurer has an absolute right to intervene in an injured worker's lawsuit, is not supportable under Nevada law, and because the district court did not abuse its discretion in disallowing AHAC's intervention, we disagree.

[*9]** *Nevada law*

HN6[↑] NRS 12.130 allows, before the trial commences, "any person . . . who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both" to intervene in an action under the Nevada Rules of Civil Procedure (NRCP). [12] **[***10]** ***HN7***[↑] NRCP 24 governs intervention, providing for both intervention of right and permissive intervention. At issue here, ***HN8***[↑] NRCP 24(a) directs the district court to approve a timely application to intervene of right when either (1) a statute grants an unconditional right to intervene, or (2) "the applicant claims an interest relating to the [subject] property . . . and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately protected by existing parties." [13] ***HN9***[↑] An application to intervene **[**1125]** must be "accompanied by a pleading setting forth the claim . . . for which intervention is sought." [14]

In *SIIS*, we ultimately concluded that the industrial insurer had a right **[***11]** to intervene under both subsections (1) and (2) of NRCP 24(a). **[*1236]** [15] **[***12]** First, a majority of the *SIIS* court concluded that, under NRCP 24(a)(1), statutory intervention rights existed. The majority noted that NRS 616C.215 (formerly NRS 616.560) provides that when a workers' compensation insurer pays benefits to an injured worker, it becomes subrogated to the injured workers' right to recover damages from a third-party tortfeasor. Then the majority pointed out that, by asserting its subrogation rights, an insurer could obtain reimbursement in one of two different ways: the insurer could either enforce a lien statutorily imposed on any proceeds recovered by the injured worker or assert an independent action against the negligent third party. [16] The majority determined that "this latter form of reimbursement, when literally applied, is a statutory right of intervention." [17] Thus, even though neither NRS 616C.215 nor any other statute expressly grants an industrial insurer the unconditional right to intervene in an injured worker's lawsuit, the majority concluded that such a right nonetheless exists.

The majority went on to explain that, since the industrial insurer had a right to sue the third-party tortfeasor

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[11] 111 Nev. 28, 888 P.2d 911.

[12] NRS 12.130(1); NRS 12.130(3). ***HN10***[↑] By intervening, the applicant becomes a party to the action in order to do one of the three following things: (1) join the plaintiff in the complaint's demand; (2) resist, with the defendant, the plaintiff's claims; or (3) make a demand adverse to both the plaintiff and the defendant. NRS 12.130(2).

[13] NRCP 24(a). As the parties have not addressed intervention under NRCP 24(b), this opinion does not address whether AHAC's intervention may have been appropriate under that subsection. Thus, we make no comment on whether a workers' compensation insurer may properly intervene under NRCP 24(b) to protect its subrogation rights.

[14] NRCP 24(c). Accordingly, AHAC properly submitted a complaint-in-intervention that reiterated Madison's negligence claims against Timet and requested reimbursement, even though it did not mention subrogation. *See also* ***HN11***[↑] NRS 12.130(2) ("An intervention takes place when a third person . . . join[s] the plaintiff in claiming what is sought by the complaint."); Nichols v. Lighthouse Restaurant, Inc., 246 Conn. 156, 716 A.2d 71, 76 (Conn. 1998) (approving of an intervening employer's complaint that "repeats all the allegations of the plaintiff's complaint" and indicates that the employer was required to pay benefits to the injured employee).

[15] 111 Nev. 28, 888 P.2d 911.

[16] NRS 616C.215(2)(b), (5); SIIS, 111 Nev. at 31, 888 P.2d at 913 (recognizing the insurer's interpretation of the statutory scheme).

[17] SIIS, 111 Nev. at 32, 888 P.2d at 913.

independently, in which case all the same parties would necessarily be joined, the same amalgamation would occur if the insurer were simply allowed to intervene in the worker's suit, especially as the two separate actions would be providently consolidated. [18] Therefore, the majority concluded, although not an express statutory right, the unconditional right to intervene under NRCP 24(a)(1) "exists by practical application." [19]

The majority also concluded that intervention was also appropriate under NRCP 24(a)(2) because the injured **[***13]** worker's representation was inadequate to "preserv[e] the integrity of [the insurer's] statutory lien." [20] In so concluding, the majority noted that, under *Breen v. Caesars Palace*, [21] an employer (or an employer's insurer) that is reimbursed by way of its lien is required to "reduce the amount of its lien recovery by a proportionate share of the litigation expenses," so that the employer or its insurer does not receive a windfall. [22] Thus, in *SIIS*, the majority deemed intervention appropriate to allow the insurer to expend its own monies and **[*1237]** efforts to obtain reimbursement, and thereby avoid the reduction of any lien recovery under the *Breen* formula. [23]

But our review of this petition leads **[***14]** us to conclude that the *SIIS* majority's analysis is flawed, in respect to both subsections (1) and (2) of NRCP 24(a). First, NRCP 24(a)(1) does not apply, as no statutory right to intervene exists. Second, intervention under NRCP 24(a)(2) is only appropriate when that subsection's requirements have been met.

[1126]** *Intervention under NRCP 24(a)(1) is inapplicable*

As even the *SIIS* majority acknowledged, **HN12**[↑] NRCP 24(a)(1) requires that a statute "confer[] an unconditional right to intervene," and no such statute has been enacted. Thus, an unconditional right of intervention, as necessary to intervene under NRCP 24(a)(1), does not exist in Nevada. The majority's "practical" result, which creates an absolute statutory right of intervention when the Legislature has not done so, may operate unfairly to any injured worker who does not desire the insurer's intervention, in any case in which the insurer's intervention is unwarranted or inappropriate.

The two concurring justices in *SIIS* apparently recognized the injustice that could result from such an inflexible rule allowing an insurer to intervene in every injured worker's case. The *SIIS* concurrence provided **[***15]** that, in the absence of direct legislative direction, the court should not alter the district courts' prior practice to exercise discretion when determining whether intervention was appropriate. [24] Further, the concurrence pointed out, the Legislature has protected an insurer's right to recoup its costs by not only imposing a statutory lien on any proceeds an injured worker may obtain, but also by permitting it to bring an independent action, based on its subrogation rights, if necessary. [25] **[***16]** Accordingly, the concurring justices suggested, the insurer has no need to intervene in every injured worker's lawsuit, and the district court should be able to deny intervention when an insurer's "involvement in the case is unwarranted and would unduly complicate the issues and mislead the jury." [26]

We agree with the concurring justices that **HN13**[↑] intervention of right should be available only after the district court, exercising its **[*1238]** discretion, determines that the applicant has met the NRCP 24(a)(2) requirements and the applicant's intervention is otherwise appropriate. [27] Accordingly, in the action underlying this petition, AHAC had no absolute right to intervene under NRCP 24(a)(1), and we proceed to its assertion that intervention should have been allowed under NRCP 24(a)(2).

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[18] *Id.*

[19] *Id.*

[20] *Id. at 33, 888 P.2d at 914*.

[21] *102 Nev. 79, 715 P.2d 1070*.

[22] *SIIS, 111 Nev. at 33, 888 P.2d at 914*; *see also Breen, 102 Nev. at 84-85, 715 P.2d at 1073-74*.

[23] *SIIS, 111 Nev. at 33, 888 P.2d at 914*.

[24] *Id. at 34, 888 P.2d at 914* (Rose and Shearing, JJ., concurring) (disagreeing with the majority's conclusion that *NRS 616C.215* gives, by "practical application," an insurer the absolute right to intervene under *NRCP 24(a)(1)*).

[25] *See NRS 616C.215*.

[26] *SIIS, 111 Nev. at 34, 888 P.2d at 914* (Rose and Shearing, JJ., concurring).

[27] *Id.*

Intervention is appropriate under NRCP 24(a)(2) only when all the requirements of that subsection have been met

As noted, **HN14**[↑] to intervene under NRCP 24(a)(2), an applicant must meet four requirements: (1) that it has a sufficient interest in the litigation's subject matter, (2) that it could suffer an impairment of its **[***17]** ability to protect that interest if it does not intervene, (3) that its interest is not adequately represented by existing parties, and (4) that its application is timely. Determining whether an applicant has met these four requirements is within the district court's discretion. [28]

[*18]** Normally, a workers' compensation insurer will be able to meet the first two requirements. With respect to the third factor, AHAC has not shown that Madison cannot adequately represent its interests. Accordingly, we do not determine the timeliness of AHAC's application.

Generally, a workers' compensation insurer has an interest in the injured worker's litigation against an alleged tortfeasor

HN15[↑] With regard to the first NRCP 24(a)(2) requirement, that the applicant show **[**1127]** a sufficient interest in the litigation's subject matter, we note that, as federal courts have recognized in interpreting the equivalent federal rule, no "bright-line" test to determine an alleged interest's sufficiency exists. [29] **[***19]** A general, indirect, contingent, **[*1239]** or insubstantial interest is insufficient, however. [30] Instead, an applicant must show a "significantly protectable interest." [31] A "significantly protectable interest" has been described, by the Ninth Circuit Court of Appeals, as one that is protected under the law and bears a relationship to the plaintiff's claims. [32]

HN16[↑] With respect to these two components of "significantly protectable interest," a workers' compensation insurer's interest in obtaining reimbursement through its subrogation right is protected under law and arises out of the same events as do an injured worker's claims. Thus, the insurer generally has an interest sufficient to intervene under NRCP 24(a)(2). As noted, under NRS 616C.215, a workers' compensation insurer is subrogated to the injured workers' right to recover against a tortfeasor. [33] Through its subrogation right, the insurer **[***20]** "bec[omes] at least a partial owner of [the] cause of action." [34] Indeed, under Nevada law, the insurer obtains such a significant interest in the injured workers' claims as the result of its subrogation right, that it may itself sue the alleged tortfeasor, even if the injured worker does not. [35] **[***21]** Consequently, as the provider of Madison's workers' compensation benefits, AHAC shares, by subrogation, a legally protectable interest in Madison's

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[28] *See* Dangberg Holdings v. Douglas Co., 115 Nev. 129, 141, 978 P.2d 311, 318 (1999) (providing that the timeliness of an NRCP 24 motion to intervene is directed to the district court's sound discretion) (citing Lawler v. Ginochio, 94 Nev. 623, 626, 584 P.2d 667, 668-69 (1978) (recognizing that this court may look to the federal courts' interpretations of similar federal rules for guidance)); Nish v. Cohen, 191 F.R.D. 94, 96 (E.D. Va. 2000) (noting that "[a] district court is entitled to the full range of reasonable discretion in determining whether [the FRCP 24(a)(2)] requirements are met" (citing Rios v. Enterprise Ass'n Steamfitters Local Union, 520 F.2d 352, 355 (2d Cir. 1975))).

[29] *See, e.g.*, ***Southern California Edison Co. v. Lynch, 307 F.3d 794, 803 (9th Cir. 2002)*** (discussing Federal Rules of Civil Procedure 24(a)(2)); Executive Mgmt. v. Ticor Title Ins. Co., 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (recognizing that federal decisions involving the federal civil procedure rules are persuasive authority when this court examines its equivalent rules).

[30] ***Lynch, 307 F.3d at 803***; Dairy Maid Dairy, Inc. v. U.S., 147 F.R.D. 109, 111 (E.D. Va. 1993).

[31] Donaldson v. United States, 400 U.S. 517, 542, 91 S. Ct. 534, 27 L. Ed. 2d 580 (1971), *superseded in part by statute, as stated in* Ip v. U.S., 205 F.3d 1168, 1172 (9th Cir. 2000), *and cited in* Sierra Club v. EPA, 995 F.2d 1478, 1482 (9th Cir. 1993).

[32] ***Lynch, 307 F.3d at 803***; *see also* Sierra Club, 995 F.2d at 1482-84.

[33] NRS 616C.215(2)(b).

[34] Geneva Const. Co. v. Martin Transfer & Storage Co., 351 Ill. App. 289, 114 N.E.2d 906, 911 (Ill. App. Ct. 1953); *see also* Laffranchini v. Clark, 39 Nev. 48, 60, 153 P. 250, 254 (1915) (recognizing that a subrogated party "step[s] into the shoes" of the subrogee, so that the same statute of limitations applies to both).

[35] NRS 616C.215(2)(b); *see also* Heyman v. Exchange Nat. Bank of Chicago, 615 F.2d 1190, 1193 (7th Cir. 1980) (recognizing that a sufficient interest is one so direct that it gives the applicant "a right to maintain a claim for the relief sought").

claims against Timet. [36]

Although AHAC's subrogation rights create a sufficient interest to intervene under NRCP 24(a)(2), its lien rights do not. The subject matter of Madison's litigation-whether Timet was negligent- **[*1240]** is significantly different than the question of whether AHAC may recover on its statutory lien. AHAC's lien recovery is contingent upon Madison successfully resolving his claims, and the lien's existence does not give AHAC the right to maintain a claim for negligence against Timet. [37] Accordingly, simply because AHAC has a lien on any proceeds recovered in Madison's **[***22]** litigation does not give it an interest in participating in Madison's attempt to prove that Timet's negligence resulted in a certain amount of damage to Madison. Thus, AHAC's interest in Madison's suit arises solely in connection with its subrogation to Madison's right to recover. [38]

[*23]**

> **[**1128]** *Generally, a workers' compensation insurer's ability to protect its interest could be impaired by the disposition of the injured worker's action*

HN17[↑] NRCP 24(a)(2)'s second requirement is met if the district court determines that the insurer's ability to protect its interest in the litigation's subject matter might be impaired by the disposition of the injured worker's action. Because the injured worker and the insurer share "but one cause of action," [39] **[***24]** the disposition of the injured worker's action necessarily impacts the insurer's subrogation interest. And as, generally, only one final outcome of the claims against the alleged tortfeasor on account of the industrial injury may exist, once the injured worker's case is resolved, whether by **[*1241]** judgment, dismissal with prejudice, or settlement, the insurer no longer has any right to proceed with a separate action against the alleged tortfeasor, even if any recovery the injured worker obtains is insufficient to fully reimburse the insurer's expenses. [40] Thus, in the proceedings below, "as a

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[36] *See* Kelley v. Summers, 210 F.2d 665, 673 (10th Cir. 1954) (recognizing that an insurer's subrogation to the right to sue another in tort is "sufficient interest in the subject matter of the litigation to intervene as a matter of right"). We note that, while AHAC's interest in Madison's claims is closely related to the litigation's subject matter, it is not identical to Madison's interest in the litigation, since it rises only to the level of the compensation AHAC is obligated to pay to Madison on account of his injuries.

[37] *See supra* note 35; NRS 616C.215(2)(b); *see also* Sierra Club, 995 F.2d at 1483 (noting that "the issue is participation in a lawsuit, not the outcome").

[38] *See, e.g.*, Hyland v. 79 West Monroe Corp., 2 Ill. App. 2d 83, 118 N.E.2d 636, 638 (Ill. App. Ct. 1954) (recognizing that an employer's interest in asserting a workers' compensation lien in its injured worker's lawsuit against a third-party tortfeasor was collateral to the worker's litigation and, as the employer did not purport to be a party plaintiff, its intervention was not warranted); Hudson v. Jarrett, 269 Va. 24, 606 S.E.2d 827, 831 (Va. 2005) (noting distinguishable cases in which an insurer's intervention was allowed to protect a compensation lien, but disallowing intervention to do so in that case because the applicant insurers had lien rights but no corresponding cause of action in tort, and thus could not assert any "right involved in the [injured worker's tort] suit," such that the issues resolved would affect the lien, noting that the insurers could recover under their lien without proving the alleged tortfeasor's liability to the injured worker).

[39] Marquette Casualty Co. v. Brown, 235 La. 245, 103 So. 2d 269, 272 (La. 1958). Because the insurer and the injured worker share one cause of action, the expiration of the applicable limitations period does not bar intervention. *Id.*; Arthur Larson, Larson's Workers' Compensation Law § 120.03 3 (2003) [hereinafter *Workers' Compensation Law*]; *see also* Jordan v. Superior Court, 116 Cal. App. 3d 202, 172 Cal.Rptr. 30 (Ct. App. 1981); Nichols v. Lighthouse Restaurant, Inc., 246 Conn. 156, 716 A.2d 71, 76, 78 (Conn. 1998) (concluding that the limitations period was tolled by the injured worker's timely filing of a complaint against the third-party tortfeasor); Geneva Const. Co. v. Martin Transfer & Storage Co., 351 Ill. App. 289, 114 N.E.2d 906, 912 (Ill. App. Ct. 1953); Guillot v. Hix, 838 S.W.2d 230, 232, 235, 35 Tex. Sup. Ct. J. 1187 (Tex. 1992) (tolling the limitations period).

[40] *See* Smith v. Hutchins, 93 Nev. 431, 566 P.2d 1136 (1977) (recognizing that, normally, separate actions may not be maintained on one cause of action, but nevertheless allowing a personal injury plaintiff to proceed with an action for which his insurer had already obtained a judgment, under the particular circumstances noted) (citing Reardon v. Allen, 88 N.J. Super. 560, 213 A.2d 26 (N.J. Super. Ct. Law Div. 1965) (discussing relevant authorities and recognizing that, because an insurer is subrogated to the rights of its insured, once the insured obtains a judgment, the insurer usually cannot maintain an action arising out of its subrogation rights)); *see generally* Sierra Club, 995 F.2d at 1486 (recognizing that, when the "case at bar would have controlling force on those issues" to which the prospective intervenor holds an interest, such as through operation of stare decisis, the prospective intervenor has met the second requirement of the FRCP equivalent to NRCP 24(a)(2), in that the intervenor's ability to

practical matter," AHAC's ability to protect its interest may be impacted by the resolution of Madison's action. [41]

[*25]**

Whether existing parties adequately represent the workers' compensation insurer's interest is determined by the particular facts of each case

But, ***HN18***[↑] under NRCP 24(a)(2)'s third requirement, the insurer has no right to intervene if its interest is adequately represented by the injured worker. Although the applicant insurer's burden to prove this requirement has been described as "minimal," when the insurer's interest or ultimate objective in the litigation is the same as the injured worker's interest or subsumed within the worker's objective, the injured worker's representation should generally be adequate, unless the insurer demonstrates otherwise. [42]

[*26]**

[1129]** To explain, ***HN19***[↑] most injured workers undoubtedly will strive to obtain the greatest amount in damages warranted under the circumstances. Consequently, the insurer's objective in obtaining from the tortfeasor an amount sufficient to fully reimburse its costs is completely **[*1242]** subsumed within the injured worker's objective. [43] **[***27]** Thus, unless the insurer can show that the injured worker has a different objective, adverse to its interest, or that the worker otherwise may not adequately represent their shared interest, the worker's representation is assumed to be adequate. [44] And the longer an insurer waits after the litigation commences before applying to intervene, [45] the more the insurer's acceptance of the injured worker's representation as adequate can be implied, and the stronger the showing to the contrary must be to overcome that inference.

Here, AHAC has not shown that Madison may not adequately protect its interest in recovering damages from Timet. As mentioned, AHAC did not try to intervene in Madison's litigation until approximately two-and-one-half years after it was instituted, shortly before the discovery cut-off date, and only a few months before trial was scheduled to commence. Thus, although AHAC might have more easily met this requirement's "minimal" standard if it had applied to intervene early on, its failure to do so until after Madison **[***28]** had completed much of the pretrial litigation makes AHAC's burden more difficult because it suggests that it is comfortable with how Madison has proceeded with the case.

Even so, AHAC has not even suggested, much less demonstrated, that Madison is not fully and competently prosecuting his case. [46] And AHAC has pointed to no recently discovered information indicating that Madison's interest is somehow adverse to its interest. Further, the district court, which has had ample opportunity to assess Madison's representation, has

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protect that interest "would necessarily result in [its] practical impairment" if intervention is not allowed).

[41] *See, e.g.*, Smith Petroleum Service, Inc. v. Monsanto Chemical Co., 420 F.2d 1103, 1115 (5th Cir. 1970) (recognizing "that where the state workmen's compensation law permits subrogation of a compensation carrier, the carrier is entitled to intervene as a matter of right").

[42] Dairy Maid Dairy, 147 F.R.D. at 112 (citing Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10, 92 S. Ct. 630, 30 L. Ed. 2d 686 (1972)); 6 James Wm. Moore, et al., Moore's Federal Practice § 24.03 4[a][ii] (3d ed. 2006) (noting that when interests or objectives are identical, a presumption of adequate representation may arise, absent "adversity of interest, collusion or nonfeasance").

[43] *See, e.g.*, Breen, 102 Nev. at 87, 715 P.2d at 1074-75 (defining the scope of an employer's (or an employer's insurer's) lien on the injured worker's "total proceeds" as including the right to reimbursement from the worker's recovery of damages for noneconomic losses).

[44] *See* Hughes v. Newton, 295 Ala. 117, 324 So. 2d 270 (Ala. 1975) (recognizing that an insurer's intervention in an injured worker's suit usually is not necessary to protect its subrogation interest, and noting circumstances in which intervention might be warranted because the worker is unable to adequately protect the insurer's interest).

[45] We note that, under NRS 616C.215(7), the injured worker must provide written notification to the workers' compensation insurer before commencing an action against a third-party tortfeasor.

[46] Although, in the district court, AHAC suggested that its intervention was warranted to allow it to conduct expert discovery, it did not further explain what expert discovery, the completion of which was not anticipated by Madison, it believed was necessary. *See* McGinnis v. United Screw & Bolt Corp., 637 F. Supp. 9, 11, 109 F.R.D. 532 (E.D. Pa. 1985) (finding no inadequacy of representation when the insurer fails to show collusion, adverse interest, or less-than-diligent prosecution).

found that his representation adequately protects AHAC's interest. As the court pointed out, **[*1243]** all parties are aware of AHAC's interest in any recovery, and Madison has expressly recognized AHAC's right to be reimbursed from any proceeds.

[*29]** Nevertheless, AHAC argues that, because Madison's interest lies in maximizing his recovery, Madison cannot adequately represent its contrasting interest in avoiding the lien amount's reduction (by its proportionate share of the litigation expenses) under *Breen*. [47] **[***30]** As noted above, however, AHAC's **[**1130]** right to intervene in Madison's litigation is based on its direct interest, arising from subrogation, in the litigation's subject matter, not in its interest in asserting and protecting the size of its anticipated lien on any recovery. Although the *SIIS* majority indicated that intervention is appropriate because an injured worker cannot adequately represent an insurer's interest in avoiding payment of its proportionate share of the litigation costs under *Breen*, that reasoning is based on the insurer's ability to protect an interest for which no right to intervene **[*1244]** exists. Accordingly, we disprove of the *SIIS* majority's reasoning. [48]

Determining whether an application is timely requires balancing any prejudice to the parties

HN20[↑] NRS 12.130(1) provides that an applicant may intervene "[b]efore the trial." As we have previously recognized, however, even when made before trial, an application must be "timely" in the sense afforded the term under NRCP 24. Determining whether an application is timely under NRCP 24 involves examining '"the extent of prejudice to the rights of existing parties resulting from the delay"' [49] and then weighing that prejudice against any prejudice resulting to the applicant if intervention is denied. Further, the timeliness of an application may depend on when the applicant learned of its need to intervene to protect its interests. [50] **[***31]** Thus, in deciding whether an application is timely, the district court must consider the length of delay and the reasons therefore, in light of the applicant's obligation under *Breen* to share in the litigation expenses.

As AHAC's application to intervene was properly denied based on its failure to meet the NRCP 24(a)(2) requirements, however, we do not further discuss the timeliness of its application, other than as it relates to

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[47] AHAC also summarily asserts that intervention is warranted so that it can defend claims of employer negligence, citing *Aceves v. Regal Pale Brew. Co., 24 Cal. 3d 502, 595 P.2d 619, 156 Cal. Rptr. 41 (Cal. 1979)*, *overruled in part on other grounds by Privette v. Superior Court (Contreras), 5 Cal. 4th 689, 21 Cal. Rptr. 2d 72, 854 P.2d 721 (Cal. 1993)*. In *Aceves*, the California court reduced an insurer's reimbursement claim by the percentage of fault attributable to the employer, ultimately denying reimbursement because the insurer had paid less than the amount constituting the employer's percentage share of responsibility. *Id.* As Madison notes, the case cited by AHAC is based on California law, and this court has never determined whether, in Nevada, an insurer's reimbursement from third-party proceeds may be impacted by the employer's concurrent negligence. *See generally Workers' Compensation Law, supra note 39, at § 120.02* 3 (discussing various jurisdictions' differing responses to third-party tortfeasors' allegations that the employer was concurrently negligent); *Outboard Marine Corp. v. Schupbach, 93 Nev. 158, 165, 561 P.2d 450, 454 (1977)* (recognizing that employers are generally immune from suit and from third-party equitable indemnity claims); *cf. Santisteven v. Dow Chemical Company, 362 F. Supp. 646, 651 (D. Nev. 1973)* (interpreting Nevada law to allow a third-party tortfeasor to offset the judgment against him "by the amount of the compensation paid to the injured employee if he can prove that the concurrent negligence of the employer contributed to the injuries").

We do not reach this issue now, however, as AHAC neither attempted to intervene in the district court to help Guardsmark defend against the third-party complaint, *see* NRS 12.130(2) and *Nye County v. Washoe Medical Center, 108 Nev. 490, 493, 835 P.2d 780, 782 (1992)* (noting that this court generally will not consider arguments not raised before the district court), nor fully addressed this argument in its writ petition, *see* NRAP 21(a); *Pan v. Dist. Ct., 120 Nev. 222, 228, 88 P.3d 840, 844 (2004)*. In any case, AHAC has not even suggested that Guardsmark is unable to adequately defend such claims. *Cf. Scammon Bay Association, Inc. v. Ulak, 126 P.3d 138, 143-45 (Alaska 2005)* (recognizing that intervention was not warranted until the employer discovered that the injured worker would not adequately represent its interest).

[48] As we determine that AHAC's intervention was unwarranted in this instance, we do not decide whether to extend *Breen*'s cost-sharing formula to subrogation claims or the extent to which equity might require a proportionate sharing of litigation expenses in cases where intervention is found to be warranted at a late date.

[49] *Dangberg Holdings, 115 Nev. at 141, 978 P.2d at 318* (quoting *Lawler, 94 Nev. at 626, 584 P.2d at 669*).

[50] *See generally Ulak, 126 P.3d at 143*; *see also supra* note 47.

the third NRCP 24(a)(2) requirement. [51]

[*32]** *CONCLUSION*

As our prior opinion in *SIIS* included a flawed analysis, we overrule that decision. Thus, AHAC has no absolute right to intervene **[*1245]** in Madison's third-party tort action under NRCP 24(a)(1) and could have intervened under NRCP 24(a)(2) only if it was able to show that Madison might not adequately represent its interest. Since AHAC **[**1131]** waited until shortly before the trial to seek intervention and failed to show that Madison's representation was inadequate, the district court did not abuse its discretion in denying AHAC's intervention application. Consequently, we conclude that extraordinary writ relief is not warranted. Accordingly, we deny this writ petition and vacate our stay of the underlying proceedings.

ROSE, C.J., BECKER, GIBBONS, DOUGLAS and PARRAGUIRRE, JJ., concur.

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[51] Additionally, we note that Madison contended that intervention was inappropriate because the workers' compensation benefits were, in reality, provided by the same entity as is Timet's liability insurer. As the district court did not address this contention and as we determine that intervention was unwarranted on other grounds, we do not reach this issue, except to note that such a contention is properly considered when the district court is exercising its discretion in deciding an application. *See generally* Workers' Compensation Law, supra note 39, at § 116.06 (discussing the conflict of interest that arises when the insurer is present on both sides of the litigation-as the workers' compensation provider and as the alleged tortfeasor's liability insurer).

Conlon v. United States

United States Court of Appeals for the Ninth Circuit

October 16, 2006, Argued and Submitted, San Francisco, California ; January 16, 2007, Filed

No. 05-15238

Reporter
474 F.3d 616 *; 2007 U.S. App. LEXIS 865 **

MICHAEL J. CONLON, Plaintiff-Appellant, v. UNITED STATES OF AMERICA, Defendant-Appellee.

Prior History: [1]** Appeal from the United States District Court for the District of Nevada. D.C. No. TCV-01-00700-DWH (VPC). David W. Hagen, District Judge, Presiding.

Core Terms

district court, withdrawal, discovery, request for admission, Parole, merits, responses, motion to withdraw, summary judgment, deadline, factors, summary judgment motion, parole term, presentation, prejudiced, answering, dispositive motion, nonmoving party, arrest, deemed admitted, moving party, no prejudice, preparing, amend

Case Summary

Procedural Posture

Plaintiff, a former federal prisoner, sought review of a summary judgment from the United States District Court for the District of Nevada entered against him in his action against defendant United States under the Federal Tort Claims Act, 28 U.S.C.S. §§ 1346(b), 2671-2680. Because the motion turned on "deemed admissions," plaintiff also challenged the denial of his Fed. R. Civ. P. 36(b) motion to withdraw the admissions.

Overview

Plaintiff's action alleged negligence by federal employees in relation to the issuing of a warrant, his arrest, and his subsequent incarceration. Plaintiff, however, failed to respond to the United States' request for admissions within the 30-day time frame set forth in Fed. R. Civ. P. 36(a). Consequently, the United States by letter deemed its request for admissions admitted, and it relied on those admissions when seeking summary judgment. By operation of Rule 36(a), plaintiff admitted that none of the actions were caused by negligent or wrongful acts or omissions of United States employees. Although the court found that the issue was close, it concluded that the district court did not clearly err in finding that withdrawal of the deemed admissions only eight days before the scheduled trial would prejudice the United States. Further, the district court did not abuse its discretion in denying the motion because it considered the two-prong test set forth in Rule 36(b), and it also found that plaintiff could not show good cause for his dilatory conduct. Summary judgment against plaintiff was proper because there was no direct evidence of negligence.

Outcome

The court affirmed the judgment.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > ... > Methods of Discovery > Requests for Admissions > Withdrawal of Admissions

HN1[] Standards of Review, Abuse of Discretion

The appellate court reviews a district court's denial of a motion to withdraw or amend a Fed. R. Civ. P. 36 admission for an abuse of discretion. Trial courts have been advised to be cautious in exercising their discretion to permit withdrawal or amendment of an

admission.

Civil Procedure > ... > Summary Judgment > Summary Judgment Review > Standards of Review

HN2[] Summary Judgment Review, Standards of Review

The district court's decision to grant summary judgment is reviewed de novo.

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

Civil Procedure > ... > Methods of Discovery > Requests for Admissions > Effect of Admissions

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN3[] Supporting Materials, Discovery Materials

Unanswered requests for admissions may be relied on as the basis for granting summary judgment.

Civil Procedure > ... > Methods of Discovery > Requests for Admissions > Effect of Admissions

HN4[] Requests for Admissions, Effect of Admissions

Fed. R. Civ. P. 36(a) states that a matter is deemed admitted unless, within 30 days after service of the request, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. Once admitted, the matter is conclusively established unless the court on motion permits withdrawal or amendment of the admission pursuant to Rule 36(b).

Civil Procedure > ... > Methods of Discovery > Requests for Admissions > Withdrawal of Admissions

HN5[] Requests for Admissions, Withdrawal of Admissions

See Fed. R. Civ. P. 36(b).

Civil Procedure > ... > Methods of Discovery > Requests for Admissions > Withdrawal of Admissions

HN6[] Requests for Admissions, Withdrawal of Admissions

Fed. R. Civ. P. 36(b) is permissive, not mandatory, with respect to the withdrawal of admissions. Rule 36(b) permits the district court to exercise its discretion to grant relief from an admission made under Rule 36(a) only when (1) the presentation of the merits of the action will be subserved, and (2) the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits. However, because requests for admissions have a binding effect on the parties, the provision for withdrawal or amendment specifically provides parties with a potential safe harbor.

Civil Procedure > ... > Methods of Discovery > Requests for Admissions > Withdrawal of Admissions

HN7[] Requests for Admissions, Withdrawal of Admissions

Admissions are sought, first, to facilitate proof with respect to issues that cannot be eliminated from the case and, second, to narrow the issues by eliminating those that can be. Fed. R. Civ. P. 36 is not to be used in an effort to harass the other side or in the hope that a party's adversary will simply concede essential elements. Rather, Rule 36 seeks to serve two important goals: truth-seeking in litigation and efficiency in dispensing justice. Thus, a district court must specifically consider both factors under Rule 36 before deciding a motion to withdraw or amend admissions pursuant to Rule 36(b).

Civil Procedure > ... > Methods of

Civil Procedure > ... > Methods of

Discovery > Requests for Admissions > Withdrawal of Admissions

HN8 **Requests for Admissions, Withdrawal of Admissions**

The first half of the test in Fed. R. Civ. P. 36(b) is satisfied when upholding the admissions would practically eliminate any presentation of the merits of the case.

Civil Procedure > ... > Methods of Discovery > Requests for Admissions > Withdrawal of Admissions

Evidence > Burdens of Proof > Allocation

HN9 **Requests for Admissions, Withdrawal of Admissions**

The party relying on a deemed admission has the burden of proving prejudice for purposes of a motion to withdraw or amend the admission pursuant to Fed. R. Civ. P. 36(b). The prejudice contemplated by Rule 36(b) is not simply that the party who obtained the admission will now have to convince the factfinder of its truth. Rather, it relates to the difficulty a party may face in proving its case, for example, caused by the unavailability of key witnesses because of the sudden need to obtain evidence with respect to the questions previously deemed admitted.

Civil Procedure > ... > Methods of Discovery > Requests for Admissions > Withdrawal of Admissions

HN10 **Requests for Admissions, Withdrawal of Admissions**

A party moving to withdraw deemed admissions during trial faces a more restrictive standard than a party moving to withdraw deemed admissions prior to trial.

Civil Procedure > ... > Methods of Discovery > Requests for Admissions > Withdrawal of Admissions

HN11 **Requests for Admissions, Withdrawal of Admissions**

When undertaking a prejudice inquiry under Fed. R. Civ. P. 36(b), district courts should focus on the prejudice that the nonmoving party would suffer at trial.

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

Civil Procedure > ... > Methods of Discovery > Requests for Admissions > Withdrawal of Admissions

HN12 **Supporting Materials, Discovery Materials**

Reliance on a deemed admission in preparing a summary judgment motion does not constitute prejudice for purposes of Fed. R. Civ. P. 36(b).

Civil Procedure > ... > Methods of Discovery > Requests for Admissions > Withdrawal of Admissions

HN13 **Requests for Admissions, Withdrawal of Admissions**

Fed. R. Civ. P. 36(b) does not require a district court to grant relief when the moving party can satisfy the two-pronged test. The text of Rule 36(b) is permissive. Therefore, when a district court finds that the merits of the action will be subserved and the nonmoving party will not be prejudiced, it "may" allow withdrawal, but is not required to do so under the text of Rule 36(b).

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > ... > Methods of Discovery > Requests for Admissions > Withdrawal of Admissions

HN14 **Standards of Review, Abuse of Discretion**

Although Fed. R. Civ. P. 36(b) itself is permissive, the Advisory Committee clearly intended the two factors set forth in Rule 36(b) to be central to the analysis. Accordingly, a district court's failure to consider these

factors will constitute an abuse of discretion. However, in deciding whether to exercise its discretion when the moving party has met the two-pronged test of *Rule 36(b)*, the district court may consider other factors, including whether the moving party can show good cause for the delay and whether the moving party appears to have a strong case on the merits.

Counsel: James Andre Boles, Reno, Nevada, for the plaintiff-appellant.

Greg Addington, Assistant United States Attorney, District of Nevada, Reno, Nevada, for the defendant-appellee.

Judges: Before: Susan P. Graber, M. Margaret McKeown, and Richard C. Tallman, Circuit Judges.

Opinion by: Richard C. Tallman

Opinion

[*618] TALLMAN, Circuit Judge:

Appellant Michael J. Conlon appeals the district court's entry of summary judgment against him under the Federal Tort Claims Act ("FTCA"), *28 U.S.C. §§ 1346(b)*, *2671-2680*. Conlon failed to respond to the government's Request for Admissions within the thirty-day time frame set forth in *Federal Rule of Civil Procedure 36(a)*. Consequently, the United States by letter deemed its Request for Admissions admitted, and the government relied on those admissions when seeking summary judgment. We conclude that the district court did not abuse its discretion when it denied Conlon's motion to withdraw under *Rule 36(b)*, and **[**2]** we affirm the district court's entry of summary judgment. We are satisfied that the district court conducted an appropriate analysis under *Rule 36*, properly considering both the factors elucidated in the rule, and that it did not clearly err in concluding that the government's case would have been significantly prejudiced by the withdrawal of Conlon's sweeping admissions on the eve of trial.

I

In 1986, Conlon was sentenced to a twelve-year term of federal imprisonment, with an eight-year special parole term to **[*619]** follow. His parole was revoked four times between 1990 and 1996. He was again released on November 7, 1997, with his special parole term set to commence on January 28, 1998, after the expiration of his twelve-year term.

On February 12, 1998, the United States Parole Commission ("Parole Commission") issued a warrant for Conlon's arrest. The warrant application stated that Conlon had failed to notify the Parole Commission of a change of address in violation of his special parole terms. He was arrested on February 19, 1998, and after Conlon admitted the allegations, his parole was revoked and the eight-year special parole term was converted to a regular term of twenty-four months **[**3]** of imprisonment.

On November 29, 1999, the United States District Court for the District of Arizona, the Honorable William D. Browning presiding, granted Conlon's petition for a writ of habeas corpus, ordering him released on or before December 15, 1999. That court found that the Parole Commission never had jurisdiction to issue the warrant because the alleged violation occurred prior to the commencement of Conlon's special parole term.

In the spring of 2000, Conlon was arrested in Minnesota for failure to report to the Parole Commission upon his release. He reopened his previous habeas petition. Because the Arizona district court's original order granting habeas relief did not require Conlon to complete his special parole term, the court concluded that Conlon's failure to report was not improper. The Arizona district court then vacated Conlon's special parole term and ordered him released no later than August 3, 2001.

After exhausting his administrative remedies, Conlon filed a *pro per* civil action in the United States District Court for the District of Nevada. [1] The parties stipulated to dismiss all claims except those arising under the FTCA. In an order filed June 8, 2004, the **[**4]** Nevada district court dismissed on jurisdictional grounds all but the negligence claim arising out of Conlon's February 19, 1998, arrest and subsequent imprisonment. [2]

The court held a status conference on August 17, 2004. United States Magistrate Judge Valerie Cooke of the District of Nevada issued a scheduling order setting October 15, 2004, as the deadline for completion of discovery, and November 15, 2004, as the deadline for

[1] Through later retained counsel Conlon filed an amended complaint on March 19, 2002. A second amended complaint was filed on November 19, 2002.

[2] Conlon does not appeal this decision.

filing dispositive motions. [3] The trial was to commence on January 11, 2005.

The United States served its "First Set of Request for **[**5]** Admissions and First Set of Interrogatories" on August 19, 2004. In the first paragraph, the United States explicitly stated:

> Pursuant to *Rules 26* and *36 of the Federal Rules of Civil Procedure*, defendant requests that plaintiff MICHAEL J. CONLON respond within thirty (30) days from service hereof, to the following requests for admissions. In accordance with *Rule 36*, the failure to respond within the time provided will result in the matters set forth being admitted.

Responses were due September 21, 2004. The more pertinent requests for admissions included Request #7: "The U.S. Parole Commission's issuance of the February 12, 1998 violator warrant was not **[*620]** caused by any negligent or wrongful act or omission of any employee of the United States"; Request #13: "Your February 20, 1998 [sic] arrest was not caused by any negligent or wrongful act or omission of any employee of the United States"; and Request #26: "No portion of your incarceration from February 20, 1998 [sic] to December 15, 1999 was caused by any negligent or wrongful act or omission of any employee of the United States."

Shortly after the thirty-day time frame passed, **[**6]** the United States contacted Conlon to discuss his past-due responses. In a follow-up letter dated September 28, 2004, the assistant United States attorney again warned Conlon of the consequences of his failure to respond:

> As we discussed last week, the responses to the discovery propounded on August 19 (request for admissions and interrogatories) are past due. There has been no request for an extension of the time established for such responses and, given the short discovery period set by the Court, there is no room for flexibility in this regard if additional discovery is to be done (as was contemplated following receipt of the responses). Pursuant to [*Rule 36 of the Federal Rules of Civil Procedure*], the matters set forth in request for admissions numbered 1-27 are deemed admitted for the purpose of this pending action and I will proceed accordingly.

Prior to the October 15, 2004, discovery cut-off deadline, Conlon had not responded to the government's Request for Admissions, the September 28, 2004, follow-up letter, or filed a motion to withdraw his admissions with the Nevada district court under *Rule 36(b)*. On November 3, 2004, Conlon **[**7]** sent deficient responses to the Request for Admissions. [4] In a letter dated November 5, 2004, the United States again told Conlon that his "failure to respond to the requests for admission in a timely manner resulted in those matters being deemed admitted." It further explained that because "the Court provided for a very short discovery period[,] . . . [t]he discovery propounded to [Conlon] was designed to obtain responses well in advance of the expiration of the discovery period so that additional discovery could be conducted based on the responses which were timely received."

On November 12, 2004, three days before the dispositive motions deadline, the United States filed a motion for summary judgment based on the "deemed admissions." On November 15, 2004, Conlon filed a Motion for Relief under *Rule 36(b)*. He argued that (1) he was out of touch **[*621]** with his attorney during part of the period for answering the **[**8]** Request for Admissions, and his participation was essential; (2) once he was contacted the requests were answered forthwith; (3) relief would further the administration of justice, and denial would cause a hardship upon Conlon; and (4) relief would not unduly prejudice the United States. In conjunction with his Motion for Relief, Conlon also served on the United States a new set of answers, rectifying the deficiencies in the responses to interrogatories that were present in the first set. The United States opposed Conlon's Motion for Relief.

On January 3, 2005, Magistrate Judge Cooke denied Conlon's Motion for Relief. The court relied in part on the fact that counsel for the United States twice advised Conlon that the admissions were deemed admitted, and that Conlon sought relief only after the United States had filed a dispositive motion. Moreover, as Magistrate Judge Cooke observed, although Conlon claimed that he was "out of touch with his attorney during part of the time for answering the requests for admissions," he never "allud[ed] to any serious medical condition or other emergency which illustrate[d] the need for the relief requested, nor d[id] he identify which admissions **[**9]** were denied." Rather than simply ignoring the Request for Admissions, the district court

[3] Prior to this, Conlon had twice failed to attend scheduled settlement conferences.

[4] Conlon did not verify the responses and did not set forth the factual basis for any denials.

concluded that, "[a]t minimum, [Conlon] should have sought leave of the court for an extension of time to serve the answers." Therefore, because Conlon "failed to show that presentation of the merits of this action will be subserved by permitting withdrawal of 'several' of the admissions," and because "the defendant will be severely prejudiced by allowing withdrawal of the admissions since a dispositive motion is in the midst of briefing and trial is set to commence in eight days," Magistrate Judge Cooke denied the Motion for Relief. Subsequently, the district court granted the government's motion for summary judgment, stating that the "Defendant's motion for summary judgment turn[ed] on admissions made by plaintiff during discovery."

II

HN1[] We review a district court's denial of a motion to withdraw or amend a Rule 36 admission for an abuse of discretion. 999 v. C.I.T. Corp., 776 F.2d 866, 869 (9th Cir. 1985). "Trial courts [have been] advised to be cautious in exercising their discretion to permit withdrawal or amendment of an admission." *Id.*

HN2[] The district court's decision **[**10]** to grant summary judgment is reviewed de novo. Buono v. Norton, 371 F.3d 543, 545 (9th Cir. 2004). HN3[] Unanswered requests for admissions may be relied on as the basis for granting summary judgment. O'Campo v. Hardisty, 262 F.2d 621, 624 (9th Cir. 1958).

III

HN4[] Rule 36(a) states that a matter is deemed admitted "unless, within 30 days after service of the request . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney." Fed. R. Civ. P. 36(a). Once admitted, the matter "is conclusively established unless the court on motion permits withdrawal or amendment of the admission" pursuant to Rule 36(b). Fed. R. Civ. P. 36(b). Rule 36(b) provides, in pertinent part:

> HN5[] [T]he court *may* permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action **[**11]** or defense on the merits.

Id. (emphasis added).

HN6[] Rule 36(b) is permissive, not mandatory, with respect to the withdrawal of admissions. *See* Asea, Inc. v. S. Pac. Transp. Co., 669 F.2d 1242, 1248 (9th Cir. 1981). The rule permits the district court to exercise its discretion to grant relief from an admission made under Rule 36(a) only when (1) "the presentation of the merits of the action will be subserved," and (2) "the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits." Fed. R. Civ. P. 36(b); Hadley v. United States, 45 F.3d 1345, 1348 (9th Cir. 1995); *see also* Carney v. IRS (In re Carney), 258 F.3d 415, 419 (5th Cir. 2001) ("[A] deemed admission can only be withdrawn or amended by motion in accordance with Rule 36(b)."); Donovan v. Carls Drug Co., 703 F.2d 650, 652 (2d Cir. 1983) **[*622]** (stating that the court may excuse a party from its deemed admissions "only when (1) the presentation of the merits will be aided *and* (2) no prejudice to the party **[**12]** obtaining the admission will result"), *overruled on other grounds by* McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133-34, 108 S. Ct. 1677, 100 L. Ed. 2d 115 (1988). However, because requests for admissions have a binding effect on the parties, *see* Fed. R. Civ. P. 36(b), the provision for withdrawal or amendment specifically provides parties with a potential safe harbor. *Id.*

HN7[] Admissions are sought, first, to facilitate proof with respect to issues that cannot be eliminated from the case and, second, to narrow the issues by eliminating those that can be. *Id.* advisory committee note. The rule is not to be used in an effort to "harass the other side" or in the hope that a party's adversary will simply concede essential elements. Perez v. Miami-Dade County, 297 F.3d 1255, 1268 (11th Cir. 2002). Rather, the rule seeks to serve two important goals: truthseeking in litigation and efficiency in dispensing justice. *See* Fed. R. Civ. P. 36(b) advisory committee note. Thus, a district court must specifically consider both factors under the rule before deciding a motion to withdraw **[**13]** or amend admissions.

A

HN8[] "The first half of the test in Rule 36(b) is satisfied when upholding the admissions would practically eliminate any presentation of the merits of the case." Hadley, 45 F.3d at 1348. The United States filed its motion for summary judgment based on the deemed admissions. In granting that motion, the district court recognized that the motion "turn[ed] on admissions made by plaintiff during discovery." By operation of the rule Conlon "admitted that neither the issuing of the

warrant, his arrest or his subsequent incarceration were caused by negligent or wrongful acts or omissions of United States employees." Therefore, because upholding the deemed admissions eliminated any need for a presentation on the merits, Conlon satisfies the first prong of the test in Rule 36(b).

B

HN9[] The party relying on the deemed admission has the burden of proving prejudice. *Id.*

> The prejudice contemplated by Rule 36(b) is 'not simply that the party who obtained the admission will now have to convince the factfinder of its truth. Rather, it relates to the difficulty a party may face in proving its case, e.g., caused by the unavailability of key witnesses, **[**14]** because of the sudden need to obtain evidence' with respect to the questions previously deemed admitted.

Id. (quoting Brook Vill. N. Assocs. v. Gen. Elec. Co., 686 F.2d 66, 70 (1st Cir. 1982)).

In Hadley, 45 F.3d 1345, and C.I.T. Corp., 776 F.2d 866, we addressed whether the nonmoving party would be prejudiced by a withdrawal of deemed admissions. In *Hadley*, the government served its requests after the discovery cut-off date set by the court. 45 F.3d at 1347. The answers were due by July 8, 1993, but were served a little over a month late on August 14, 1993. *Id.* Hadley filed a motion to withdraw the admissions soon thereafter. The government argued that it would be prejudiced because it had relied on the "deemed admissions" during its deposition of Hadley. Id. at 1349. The government had an affidavit from Hadley that corroborated the admissions and rather than "vigorous[ly] crossexamin[ing]" him, the United States limited the scope of its deposition questions to establishing **[*623]** that Hadley signed the affidavit and that it was true and correct. *Id.*

We rejected the government's **[**15]** argument against withdrawal, reasoning that "[e]ven if the affidavit had contained statements that directly corroborated the admissions, the government had the affidavit available for trial. If Hadley had denied liability at trial, the government could have crossexamined him with the affidavit itself." *Id.* (footnote omitted). Therefore, although withdrawal may have inconvenienced the government, that inconvenience did not rise to the level of prejudice that justified a denial of the motion to withdraw. *Id.*

By contrast, the moving party in *C.I.T. Corp.* did not seek withdrawal until the middle of trial. [5] 776 F.2d at 869. During the discovery period, in response to a request for admission, C.I.T. admitted that an August 2 letter constituted an agreement. Id. at 868-69. During trial, the district court excluded a September 23 letter because it contradicted the pre-trial admission. Id. at 869. In response, C.I.T. filed a motion to withdraw the admissions, which the district court denied. We affirmed. Although we recognized that there was a good argument that the withdrawal would not prejudice 999 because 999 had admitted other **[**16]** evidence of the agreement throughout the trial, we concluded that the district court was justified in its decision because of the timing of the motion. C.I.T. did not move for withdrawal until the middle of trial, after 999 had heavily relied on the admissions and was about to rest its case. *Id.*

Conlon's case falls somewhere between Hadley, where the motion to withdraw was made prior to trial but the government still had other contradictory evidence available, and C.I.T. Corp., where the motion to withdraw was made during trial, after the other party had relied heavily on the admissions and was preparing to rest its case. The United States here argues that it would have been prejudiced by withdrawal because, in reliance on the facts "conclusively established" by the deemed admissions, it chose **[**17]** not to conduct any other discovery that was necessary to disprove negligence. Moreover, it had relied on the admissions to file its motion for summary judgment, and the trial was scheduled to begin only eight days after the district court adjudicated Conlon's motion to withdraw the deemed admissions.

HN11[] When undertaking a prejudice inquiry under Rule 36(b), district courts should focus on the prejudice that the nonmoving party would suffer at trial. *See* Sonoda v. Cabrera, 255 F.3d 1035, 1039-40 (9th Cir. 2001) (holding, without further analysis, that the district court did not abuse its discretion by granting the Rule 36(b) motion to withdraw deemed admissions because the motion was made before trial and the nonmoving party would not have been hindered in presenting its evidence); Hadley, 45 F.3d at 1348 (focusing the prejudice inquiry on the unavailability of key witnesses and a sudden need to obtain evidence); *see also* Raiser

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[5] HN10[] A party moving to withdraw deemed admissions during trial faces a more restrictive standard than a party moving to withdraw deemed admissions prior to trial. C.I.T. Corp., 776 F.2d at 869.

v. Utah County, 409 F.3d 1243, 1247 (10th Cir. 2005) (finding no prejudice when the nonmoving party had relied on the deemed admissions for only a two-week period in preparing its summary judgment motion); Perez, 297 F.3d at 1268 **[**18]** (concluding that no prejudice would result because the nonmoving party had been conducting discovery throughout the discovery period, the motion was made **[*624]** only six days after the deadline, and withdrawal would not create a "sudden need" to gather evidence); Kirtley v. Sovereign Life Ins. Co. (In re Durability Inc.), 212 F.3d 551, 556 (10th Cir. 2000) (holding categorically that preparing a summary judgment motion by relying on admissions does not constitute prejudice); FDIC v. Prusia, 18 F.3d 637, 640 (8th Cir. 1994) (same); Brook Vill., 686 F.2d at 70 (focusing on the difficulty that a party will face in proving his case at trial); Moosman v. Joseph P. Blitz, Inc., 358 F.2d 686, 688 (2d Cir. 1966) (holding that there was no prejudice when the trial date would not be delayed).

We think it is a close question whether withdrawal would have prejudiced the United States. We agree with the other courts that have addressed the issue and conclude that ***HN12***[↑] reliance on a deemed admission in preparing a summary judgment motion does not constitute prejudice. Kirtley, 212 F.3d at 556; Prusia, 18 F.3d at 640. **[**19]** Although the United States relied on the deemed admissions in choosing not to engage in any other discovery, *cf.* Perez, 297 F.3d at 1268, we are reluctant to conclude that a lack of discovery, without more, constitutes prejudice. The district court could have reopened the discovery period, *see id.*, and prejudice must relate to the difficulty a party may face in proving its case at trial, Hadley, 45 F.3d at 1348.

Nevertheless, this case involves more than a mere failure to comply with the deadlines. *Cf.* Raiser, 409 F.3d at 1247. Unlike the situation in *Perez*, the government relied on the admissions for a total of two and a half months, through the discovery and dispositive motion cut-off dates, with no indication that Conlon intended to file a motion to withdraw his admissions. *See* Perez, 297 F.3d at 1268 (finding no prejudice, in part, because Perez had relied on the admissions for only six days); *see also* Raiser, 409 F.3d at 1247 ("Only two weeks passed between the due date for Mr. Raiser's response and the date that he filed his initial motion to amend his admissions or allow an untimely **[**20]** response.").

In addition, when the district court issued its order only eight days remained until trial. With trial imminent, the government relied heavily on Conlon's admissions, which essentially conceded the case. As a result, the government conducted none of the discovery it otherwise needed to prove its case at trial. We cannot speculate as to whether the United States would have had time, without requiring a continuance of the trial date, to prepare for and conduct any needed discovery. Although the issue is close, we conclude that the district court did not clearly err in finding that withdrawal of the deemed admissions at such a late stage in the case would prejudice the United States.

IV

Even if we disagreed with the district court's application of Rule 36(b), based on this record we still could not conclude that the district court abused its discretion in denying Conlon's motion to withdraw the deemed admissions. We have not previously opined on whether ***HN13***[↑] Rule 36(b) requires a district court to grant relief when the moving party can satisfy the two-pronged test. We hold that it does not. The text of Rule 36(b) is permissive. *See* Fed. R. Civ. P. 36(b) **[**21]** (stating that the district court "may permit withdrawal"); In re Carney, 258 F.3d at 419 (stating in dictum that "[e]ven when the[] two factors are established, a district court still has discretion to deny a request for leave to withdraw or amend an admission"); United States v. Kasuboski, 834 F.2d 1345, 1350 n.7 (7th Cir. 1987) (same); Donovan, 703 F.2d at 652 ("Because the **[*625]** language of . . . Rule [36(b)] is permissive, the court is not required to make an exception to Rule 36 even if both the merits and prejudice issues cut in favor of the party seeking exception to the rule."). *But see* Perez, 297 F.3d at 1264-65 (rejecting the argument that a district court may deny withdrawal even if the two-pronged test is met). Therefore, when a district court finds that the merits of the action will be subserved and the nonmoving party will not be prejudiced, it "may" allow withdrawal, but is not required to do so under the text of Rule 36(b).

HN14[↑] Although the rule itself is permissive, the Advisory Committee clearly intended the two factors set forth in Rule 36(b) to be central to the analysis. [6]

[6] The Advisory Committee Notes to the 1970 amendments recognize that, "[u]nless the party securing an admission can depend on its binding effect, [that party] cannot safely avoid the expense of preparing to prove the very matters on which he has secured the admission, and the purpose of the rule is

Accordingly, a district **[**22]** court's failure to consider these factors will constitute an abuse of discretion. *See Gutting v. Falstaff Brewing Corp., 710 F.2d 1309, 1313 (8th Cir. 1983)* ("[T]he district court erred in not considering the factors set out in [R]ule 36(b)."). However, in deciding whether to exercise its discretion when the moving party has met the two-pronged test of *Rule 36(b)*, the district court may consider other factors, including whether the moving party can show good cause for the delay and whether the moving party appears to have a strong case on the merits.

[23]** Here, the district court fully considered the two-pronged test set forth in *Rule 36(b)*. In addition, it concluded that Conlon could not show good cause for his dilatory conduct. The court explained that although Conlon claimed that he was "out of touch with his attorney during part of the time for answering the requests for admissions," he "d[id] not allude to any serious medical condition or other emergency which illustrate[d] the need for the relief requested, nor d[id] he identify which admissions were denied."

This is not a situation in which the United States used a request for admissions to gain an unfair tactical advantage. *Cf. Perez, 297 F.3d at 1268* (stating that Perez used the rule "to harass the other side . . . with the wild-eyed hope that the other side w[ould] fail to answer and therefore admit essential elements"). After the August 17, 2004, status conference, the district court issued a scheduling order setting October 15, 2004, as the discovery deadline and November 15, 2004, as the deadline for filing dispositive motions. The United States served its Request for Admissions on August 19, 2004, well within the allotted discovery period. **[**24]** *Cf. id. at 1258* (revealing that Perez served his first request for admissions at the same time that he served his complaint). Moreover, Conlon had fair warning of the consequences of his noncompliance.

Therefore, because *Rule 36(b)* is permissive, we cannot say that the district court abused its discretion in considering Conlon's failure to show good cause for the delay in filing responses to the government's Request for Admissions. We do emphasize, though, that district courts must consider the factors laid out in the rule when deciding motions to grant or amend requests for admissions.

V

Alternatively, Conlon argues that summary judgment should not have been **[*626]** granted because the Arizona district court had already concluded that the United States was negligent. Although the Nevada district court recognized in a previous order that the Arizona district court had determined that the Parole Commission did not have jurisdiction to issue the warrant, the Arizona district court never made a finding as to whether the Parole Commission acted negligently. Moreover, the government's position in defending the Nevada action was not contrary to, or inconsistent with, its use of **[**25]** the deemed admissions.

Because Conlon never presented any direct evidence of negligence by the Parole Commission (other than the Arizona district court's finding that it lacked jurisdiction to issue the warrant), we uphold the Nevada district court's entry of summary judgment against Conlon.

AFFIRMED.

End of Document

defeated." Therefore, by amending *Rule 36(b)*, the Committee sought to "emphasize[] the importance of having the action resolved on the merits, while at the same time assuring each party that justified reliance on an admission in preparation for trial will not operate to his prejudice."

Dechambeau v. Balkenbush

Court of Appeals of Nevada

September 27, 2018, Filed

No. 72879

Reporter
2018 Nev. App. LEXIS 7 *; 134 Nev. 625 **; 431 P.3d 359 ***; 134 Nev. Adv. Rep. 75

ANGELA DECHAMBEAU; AND JEAN-PAUL DECHAMBEAU, BOTH INDIVIDUALLY AND AS SPECIAL ADMINISTRATORS OF THE ESTATE OF NEIL DECHAMBEAU, Appellants, vs. STEPHEN C. BALKENBUSH, ESQ.; AND THORNDAL, ARMSTRONG, DELK, BALKENBUSH & EISINGER, A NEVADA PROFESSIONAL CORPORATION, Respondents.

Prior History: Appeal from a judgment on jury verdict, an amended judgment, and an order denying a motion for new trial in a legal malpractice action. Second Judicial District Court, Washoe County; Patrick Flanagan **[*1]** , Judge.

DeChambeau v. Balkenbush, 2015 Nev. Unpub. LEXIS 1441 (Nov. 24, 2015)

Disposition: Affirmed.

Core Terms

parties, discovery, expert report, district court, scheduling order, deadlines, waive, expert witness, sua sponte, written report, words, conference report, designated, orders, expert testimony, trial court, malpractice, superseded, prepare

Case Summary

Overview

HOLDINGS: [1]-The district court properly denied the clients' motion for a new trial in their legal malpractice action because, while the court extended the deadlines for disclosing both initial expert witnesses and rebuttal experts, the parties' stipulation—expressly waiving the requirement in *Nev. R. Civ. P. 16.1(a)(2)(B)* to produce expert reports—should be read to continue in effect until and unless expressly vacated either by the court or by a subsequent agreement between the parties.

Outcome
Order affirmed.

LexisNexis® Headnotes

Civil Procedure > Discovery & Disclosure

HN1[] **Civil Procedure, Discovery & Disclosure**

The purpose of discovery rules is to take the surprise out of trials of cases so that all relevant facts and information pertaining to the action may be ascertained in advance of trial.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Discovery > Methods of Discovery > Expert Witness Discovery

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

HN2[] **Standards of Review, Abuse of Discretion**

Normally, appellate courts review district court decisions relating to the adequacy of expert reports and the admission of expert testimony under *Nev. R. Civ. P. 16.1(a)(2)(B)* for an abuse of discretion. Permitting an expert witness to testify in violation of the requirement to provide a written report can, in certain circumstances, constitute an abuse of that discretion.

Civil Procedure > ... > Discovery > Methods of Discovery > Expert Witness Discovery

HN3[] Methods of Discovery, Expert Witness Discovery

Nev. R. Civ. P. 16.1(a)(2)(B) expressly provides that the expert report requirement controls "except as otherwise stipulated or directed by the court" and the court "upon good cause shown or by stipulation of the parties, may relieve a party of the duty to prepare a written report in an appropriate case." Thus, the rule itself provides that its requirements are not mandatory and do not necessarily apply to every case, but may be waived either by the court or by stipulation of the parties.

Business & Corporate Compliance > ... > Types of Contracts > Contracts Law > Types of Contracts

Civil Procedure > Settlements > Settlement Agreements

Contracts Law > Contract Interpretation > Intent

HN4[] Contracts, Types of Contracts

A written stipulation is a species of contract. Stipulations should, therefore, generally be read according to their plain words unless those words are ambiguous, in which case the task becomes to identify and effectuate the objective intention of the parties.

Contracts Law > Contract Interpretation > Intent

HN5[] Contract Interpretation, Intent

When examining the supposed "intent" behind contractual words, what matters is not the subjective intention of the parties (i.e., what the parties may have thought in their minds), but rather the more objective inquiry into the meaning conveyed by the words they selected to define the scope of the agreement.

Contracts Law > Contract Interpretation > Intent

HN6[] Contract Interpretation, Intent

The making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs, not on the parties' having meant the same thing but on their having said the same thing.

Contracts Law > Contract Interpretation > Intent

HN7[] Contract Interpretation, Intent

Contractual intention, whenever possible, must be ascertained from the writing alone.

Contracts Law > Contract Interpretation > Intent

HN8[] Contract Interpretation, Intent

When determining contractual intent, courts ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Contracts Law > Contract Interpretation

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN9[] Standards of Review, De Novo Review

In the absence of ambiguity or other factual complexity, interpreting the meaning of contractual terms presents a question of law that courts review de novo.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

HN10[] Judges, Discretionary Powers

Normally, any order issued by a court on any matter is deemed to remain in effect until expressly superseded by another order on the same question.

Civil Procedure > Appeals > Reviewability of Lower

Court Decisions > Preservation for Review

HN11[] **Reviewability of Lower Court Decisions, Preservation for Review**

A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.

Civil Procedure > Appeals > Record on Appeal

HN12[] **Appeals, Record on Appeal**

An appellant is responsible for making an adequate appellate record, and when the appellant fails to include necessary documentation in the record, appellate courts necessarily presume that the missing portion supports the district court's decision.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

Evidence > ... > Procedural Matters > Objections & Offers of Proof > Offers of Proof

HN13[] **Reviewability of Lower Court Decisions, Preservation for Review**

To preserve excluded testimony for appeal, the party must make a specific offer of proof to the trial court on the record.

Civil Procedure > Appeals > Standards of Review > Reversible Errors

HN14[] **Standards of Review, Reversible Errors**

To be reversible, a party must show that, but for the alleged error, a different result might reasonably have been reached.

Counsel: Kozak & Associates, LLC, and Charles R. Kozak, Reno, for Appellants.

Molof & Vohl and Robert C. Vohl, Reno; Pollara Law Group and Dominique A. Pollara, Sacramento, California, for Respondents.

Judges: Tao, I concur: Gibbons, J.

Opinion by: Tao

Opinion

[625]** BEFORE SILVER, C.J., TAO and GIBBONS, JJ.

[*360]** By the Court, TAO, J.:

In their joint case conference report, the parties to this civil lawsuit stipulated to a discovery schedule that expressly waived the usual requirement, otherwise contained in *Rule 16.1(a)(2)(B) of the Nevada Rules of Civil Procedure* (NRCP), that written reports be produced and exchanged summarizing the anticipated testimony of all expert witnesses designated to appear at trial. Much later in the case, the district court (sua sponte but without objection by either party) entered a scheduling order that extended the deadline for identifying expert witnesses. The order said nothing one way or the other about whether the stipulation to waive expert reports continued in effect or not.

[626]** The question raised in this appeal is whether, in the face of that silence, **[*2]** the original stipulation continued in effect or rather must be deemed to have been entirely superseded by the new order. We conclude that the intent of the parties ultimately controls the duration and scope of the stipulation and, in the absence of any evidence of an intention to the contrary, the stipulation should be read to continue in effect until and unless expressly vacated either by the court or by a subsequent agreement between the parties.

FACTUAL SUMMARY

This case originated as an action in medical malpractice that eventually degraded into a legal malpractice suit. The plaintiffs-appellants, members of the DeChambeau family (the DeChambeaus), allege that they retained the respondents, attorneys licensed to practice law in Nevada (hereafter collectively referred to as Balkenbush), to handle a medical malpractice action on behalf of a deceased relative, but that Balkenbush handled the case negligently and that negligence led to entry of a final judgment adverse to the DeChambeaus. The family then sued Balkenbush for legal malpractice. This appeal arises from the legal malpractice action.

After the filing of the complaint and answer, the parties filed a joint case conference report **[*3]** in which they

mutually stipulated to waive the requirement, otherwise contained in NRCP 16.1(a)(2)(B), that the parties must exchange written reports summarizing the anticipated testimony of any expert witnesses retained by either party. The joint case conference report also contained an agreed-upon discovery cut-off date. Before the close of discovery, Balkenbush retained and designated an expert witness named Dr. Fred Morady. Pursuant to the stipulation, no expert report was prepared.

Shortly before trial, the district court entered summary judgment in favor of Balkenbush, finding that the DeChambeaus' claim failed for lack of causation (an issue unrelated to the question before us in this appeal). The DeChambeaus appealed to the Nevada Supreme Court and, in an unpublished order, the supreme court reversed the grant of summary judgment and remanded the matter back to the district court.

By the time the supreme court issued its order of reversal and remand, all of the deadlines set in the joint case conference report, including all discovery deadlines and the expected trial date, had long expired. Two months after the supreme court's order **[***361]** of reversal and remand, the district court conducted a status **[*4]** hearing with the parties and, apparently sua sponte but without objection by either party, issued a scheduling order which, among other things, extended the deadlines for disclosing both initial expert witnesses and rebuttal experts. The district court's revised scheduling order did not specify **[**627]** whether the requirement to prepare and exchange expert reports would once again be waived.

Balkenbush subsequently retained a new expert witness, Dr. Hugh Calkins, who had not been previously designated. Adhering to the original stipulation filed before the supreme court appeal, Balkenbush did not provide a written report outlining Dr. Calkins' testimony. The DeChambeaus objected to the designation of Dr. Calkins based on Balkenbush's failure to supply an expert report describing his testimony, filing both a motion to strike and a motion in limine seeking to prevent him from testifying at trial. Both were denied. The case proceeded to trial with Dr. Calkins testifying to the jury that, in his expert opinion, Balkenbush had not violated the applicable standard of care. The jury returned a verdict in favor of Balkenbush. The DeChambeaus filed a motion for a new trial arguing that admission of Dr. **[*5]** Calkins' testimony constituted error, which the district court denied. The DeChambeaus now appeal both from the verdict and from the denial of their motion for new trial, presenting the same arguments for both.

ANALYSIS

Of the various issues raised by the DeChambeaus, the one that has been properly preserved for our review and merits extensive discussion is whether the trial court abused its discretion by allowing Dr. Calkins to testify at trial when Balkenbush never produced an expert report pursuant to NRCP 16.1(a)(2)(B).

The starting point for our analysis is, as always, the text of the governing rule. Expert reports are governed by NRCP 16.1(a)(2)(B), which provides, in part:

> (B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The court, upon good cause shown or by stipulation of the parties, may relieve a party of the duty to prepare a written report in an appropriate case. . . .

HN1[↑] The purpose of discovery rules "is to take the surprise **[*6]** out of trials of cases so that all relevant facts and information pertaining to the action may be ascertained in advance of trial." Washoe Cty. Bd. of Sch. Trs. v. Pirhala, 84 Nev. 1, 5, 435 P.2d 756, 758 (1968) (internal quotation marks omitted). **HN2**[↑] Normally, we review district court decisions relating to the adequacy of expert reports and the admission of expert testimony under NRCP 16.1(a)(2)(B) for an abuse of discretion. *See* Khoury v. Seastrand, 132 Nev. , , 377 P.3d 81, **[**628]** 90 (2016) ("This court reviews the decision of the district court to admit expert testimony without an expert witness report or other disclosures for an abuse of discretion."). Permitting an expert witness to testify in violation of the requirement to provide a written report can, in certain circumstances, constitute an abuse of that discretion. *See generally id*.

But the question in this case is whether the parties voluntarily waived the application of that rule. **HN3**[↑] NRCP 16.1(a)(2)(B) expressly provides that the expert report requirement controls "[e]xcept as otherwise stipulated or directed by the court" and the court "upon good cause shown or by stipulation of the parties, may relieve a party of the duty to prepare a written report in an appropriate case." Thus, the rule itself provides that its requirements are not mandatory and do not

necessarily apply to every case, but may be waived **[*7]** either by the court or by stipulation of the parties.

Here, the parties unquestionably stipulated to waive the requirement, at least initially in their original joint case conference report. ***HN4***[↑] "A written stipulation is a species of contract." *Redrock Valley Ranch, LLC v. Washoe Cty., 127 Nev. 451, 460, 254 P.3d 641, 647 (2011)*. Stipulations should therefore generally **[***362]** be read according to their plain words unless those words are ambiguous, in which case the task becomes to identify and effectuate the objective intention of the parties. *See Galardi v. Naples Polaris, LLC, 129 Nev. 306, 309-10, 301 P.3d 364, 366 (2013)*. ***HN5***[↑] When examining the supposed "intent" behind contractual words, what matters is not the subjective intention of the parties (i.e., what the parties may have thought in their minds), but rather the more objective inquiry into the meaning conveyed by the words they selected to define the scope of the agreement. *See Hotel Riviera, Inc. v. Torres, 97 Nev. 399, 401, 632 P.2d 1155, 1157 (1981)* (***HN6***[↑] "[T]he making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs, not on the parties' having meant the same thing but on their having said the same thing." (alteration in original, internal quotation marks omitted)). Thus, the inquiry is not into what the attorneys may have intended in their minds to convey but rather the most reasonable meaning to **[*8]** be given to the words they utilized in the stipulation itself. *See Oakland-Alameda Cty. Coliseum, Inc. v. Oakland Raiders, Ltd., 197 Cal. App. 3d 1049, 243 Cal. Rptr. 300, 304 (Ct. App. 1988)* (providing that ***HN7***[↑] contractual intention, whenever possible, must be "ascertained from the writing alone"). *See generally* Oliver W. Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 417-18 (1899) (stating that ***HN8***[↑] when determining contractual intent, "we ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used").

Here, the stipulation contains no express deadline or time limit. The question thus becomes what the parties intended this silence to **[**629]** mean about how long the stipulation should last. The DeChambeaus argue that once the district court subsequently entered a superseding order following the remand containing new deadlines, the situation reverted by default back to the expectations of *NRCP 16.1(a)(2)(B)*. They note that the parties never agreed to re-enter their prior stipulation and the district court's superseding order never extended it. Thus, they argue that the prior stipulation terminated when the joint case conference report in which it was contained was supplanted by the new scheduling order. In contrast, Balkenbush argues that the district court's **[*9]** silence implies that it did not intend to alter the parties' original agreement to waive expert reports, that the parties themselves never agreed to alter it, and it therefore remained in effect throughout the litigation.

HN9[↑] In the absence of ambiguity or other factual complexity, interpreting the meaning of contractual terms presents a question of law that we review de novo. *Galardi, 129 Nev. at 309, 301 P.3d at 366*. On balance, Balkenbush's position is by far the more reasonable and the most consistent with the plain language of the stipulation. The purpose of the original stipulation is self-evident: to simplify the discovery process by relieving the parties of the obligation to do something that the rules would otherwise require but the parties thought unnecessary. Moreover, the preparation of expert reports often comprises the single most expensive (and sometimes time-consuming) part of the discovery process, so a second obvious goal of the stipulation was to save both parties time and money.

Consequently, there are two flaws inherent in the way the DeChambeaus would have us read the stipulation. They argue in effect that the stipulation was designed to be only temporary and to automatically disappear whenever subsequent **[*10]** scheduling orders were entered, even when those subsequent orders said nothing about expert reports. But reading it that way would result in complicating, not simplifying, the course of discovery by requiring expert reports to be submitted some of the time (i.e., after new scheduling orders were entered), but not at other times (i.e., so long as the original scheduling order remained in effect). It would be more than a little odd to read the stipulation as designed to create such inconsistency and uncertainty at different times during the course of the case and effectively make the litigation more complex than if the parties had never entered into it in the first place and just followed the existing rules of procedure instead.

[*363]** The second flaw in their argument is that it reads the words of the stipulation in a way that is both unnatural and inconsistent with the way that lawyers and judges ordinarily do things. ***HN10***[↑] Normally, any order issued by the court on any matter is deemed to remain in effect until expressly superseded by another order on the same question. *See, e.g.*, *NRCP 16.1(e)* ("[Pre-trial orders] shall control the **[**630]** subsequent course of the action unless modified by a subsequent

order."); *Douglas v. Burley, 134 So. 3d 692, 697 (Miss. 2012)* **[*11]** (holding that "upon remand, prior orders governing discovery remain in place absent a party's motion to extend deadlines and a subsequent order by the trial court"); *see also Greenawalt v. Sun City W. Fire Dist., 250 F. Supp. 2d 1200, 1203, 1206-07 (D. Ariz. 2003)* (original scheduling order deadline for filing dispositive motions remained in effect when post-remand scheduling order did not set a new deadline); *Cell Therapeutics, Inc. v. Lash Grp., Inc., No. C07-0310JLR, 2010 U.S. Dist. LEXIS 153166, 2010 WL 11530557, at *5 n.7 (W.D. Wash. Apr. 30, 2010)* ("Unless the court modifies it, the scheduling order entered in January 2008 remains in effect."). The stipulation here contains no language suggesting that the parties intended to depart from the typical way that other stipulations and orders are ordinarily handled between lawyers and by courts.

Accordingly, in the absence of any indication that the parties intended their agreement to mean something else, the most reasonable way to understand a stipulation like the one before us is that the parties drafted it to govern throughout the course of the litigation until and unless subsequently voided either by the court or by the parties themselves.[1] Once the parties agreed to the stipulation, it remained in effect until modified or superseded by any other agreement between the parties or a contrary order of the court.[2]

[*364]** **[**631]** *CONCLUSION*

In this case, the parties expressly stipulated to waive the requirement to produce expert reports under *NRCP 16.1(a)(2)(B)*. There is no evidence **[*12]** that the parties intended it to expire at any particular point in the litigation, and the terms of the stipulation itself contained no such condition or limitation. The district court did not overrule the prior stipulation, and the parties never agreed to modify it. In the absence of any indication that the district court and the parties did not intend for the stipulation to continue, we conclude that it remained in effect and Balkenbush was not required to submit an

[1] The concurrence proposes an alternative line of reasoning. First, it proposes that Nevada should follow a decision from another jurisdiction even when the underlying rules of civil procedure are not the same in both states. Second, it suggests that the district court's revised scheduling order was ambiguous, but that the DeChambeaus waived the right to challenge this ambiguity on appeal because they failed to timely object to the entry of the revised scheduling order—a conclusion with which we agree, which is why the validity of the revised scheduling order is not at issue in this appeal—and also failed to first ask the district court to "clarify" the scope of the revised scheduling order—a conclusion with which we disagree, for the following reasons. The DeChambeaus would have had little reason to seek any such clarification until Balkenbush disclosed the new expert without an expert report, because only then would it have become apparent that any disagreement existed over the meaning of the revised scheduling order. After the expert was disclosed, the DeChambeaus filed both a motion to strike the expert and a motion in limine to prevent the expert from testifying at trial. The concurrence apparently believes that these two motions were not enough to preserve the matter for appeal unless the DeChambeaus also asked for "clarification" as well. But there is no precedent or authority cited for this proposition, and we disagree with it.

[2] The DeChambeaus allege a number of other errors relating in some way to Dr. Calkins' trial testimony that can be disposed of without extensive discussion. First, as to their arguments that the district court erred in entering a new scheduling order, that Dr. Calkins was not qualified to testify, and that his testimony exceeded the scope of appropriate expert testimony under *Hallmark v. Eldridge, 124 Nev. 492, 189 P.3d 646 (2008)*, they did not object to these alleged errors below, and consequently the matters have not been properly preserved for appeal. *See Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981)* (***HN11***[↑] "A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."). As to the argument that the district court erred in precluding them from calling a rebuttal expert, they failed to provide a transcript of the trial for our review, so we have no record that this happened in the way the DeChambeaus describe, what reasons the district court might have given for doing it, or whether a timely objection was made below. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev., 123 Nev. 598, 603,172 P.3d 131, 135 (2007)* (holding that ***HN12***[↑] the appellant is responsible for making an adequate appellate record, and when "appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision"). Furthermore, without a transcript, we have no basis for determining what the proposed rebuttal evidence would have been and cannot evaluate whether the rebuttal testimony might have affected the outcome of the trial. *See* ***Carr v. Paredes, Docket Nos., 387 P.3d 215 (Order of Affirmance 2017)*** (***HN13***[↑] "To preserve excluded testimony for appeal, the party must make a specific offer of proof to the trial court on the record." (citing *Van Valkenberg v. State, 95 Nev. 317, 318, 594 P.2d 707, 708 (1979)*); *Khoury, 132 Nev. at , 377 P.3d at 94* (stating that***HN14***[↑] to be reversible, a party must show that, "but for the alleged error, a different result might reasonably have been reached" (internal quotation marks omitted)).

expert report in connection with Dr. Calkins. Consequently, the district court did not abuse its discretion by allowing Dr. Calkins to testify at trial even though no expert report was provided. We therefore affirm the judgment of the district court and the denial of the motion for a new trial.

/s/ Tao, J.

Tao

I concur:

/s/ Gibbons, J.

Gibbons

Concur by: SILVER

Concur

SILVER, C.J., concurring:

I concur in the result only. I do believe, however, that the basis of this opinion should have focused on the issue of whether—on remand by the Nevada Supreme Court with discovery closed—the district court erred by sua sponte issuing a *new* scheduling order extending the time for expert disclosures. Nevada law is silent in this situation, but the Mississippi **[*13]** case *of* Douglas v. Burley, 134 So. 3d 692 (Miss. 2012) is illustrative here.

In *Burley*, the lower court entered an initial scheduling order providing discovery deadlines. *Id. at 694*. After discovery closed, but prior to trial, the defendants moved to dismiss and the lower **[**632]** court granted the defendants' motion. *Id. at 695*. The Mississippi Supreme Court reversed, and upon remand the plaintiff noticed a new expert. *Id.* The defendants moved to strike plaintiffs newly designated expert on remand, arguing that the notice was filed years after the close of discovery. *Id.* The plaintiff argued that the prior scheduling order had no effect on remand. *Id. at 696*. The trial court sua sponte reopened discovery in response and refused to strike the newly designated expert. *Id.* The defendant then filed an interlocutory appeal challenging the district court's order reopening discovery. *Id.* The Mississippi Supreme Court reversed, holding that "upon remand, prior orders governing discovery remain in place absent a party's motion to extend deadlines and a subsequent order by the trial court." *Id. at 697*.

Here, similar to *Burley*, the district court granted summary judgment after discovery had closed, and upon remand from the Nevada Supreme Court, the district court inexplicably, sua sponte, **[*14]** entered a new scheduling order extending the time for expert disclosures at a status check prior to resetting the trial. Coincidently, like *Burley*, respondents noticed a new expert for the new trial setting. Prior to trial, appellants moved to strike the expert and filed a motion in limine to preclude the new expert's testimony.

I believe that this court should have followed *Burley* and held that prior discovery orders remain in place absent either a party's motion to extend deadlines or absent a subsequent district court order to the contrary. Nevertheless, distinguishable from *Burley*, appellants here conceded at oral argument that they never objected to the district court's sua sponte scheduling order on remand. As a result, I believe that appellants are now precluded on appeal from challenging the district court's order claiming abuse of discretion. *Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981)* ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

Contrary to the majority's analysis, in my view the question of whether the district court's sua sponte discovery order required the parties under *NRCP 16.1* to prepare expert reports or **[*15]** whether the parties' initial stipulation waiving the expert report requirement governed was ambiguous and not clear. The parties' initial stipulation contained no **[***365]** express deadline or time limit. On the other hand, the district court's sua sponte new scheduling order was also silent as to whether the parties' prior stipulation continued in light of the court's re-opening of discovery.

I believe that the majority opinion unfairly attacks the parties' arguments because both are reasonable interpretations of how the prior discovery stipulation affected the district court's later order. However, dispositive in my view is also the fact that appellants **[**633]** never timely requested that the district court *clarify* its order as to whether expert reports were subsequently required or whether the parties' prior discovery stipulation waiving expert reports governed going forward into the second trial setting.

Much to appellants' chagrin, prior to the second trial setting, respondents designated a *brand new expert*—

an expert not previously designated before the first trial setting after discovery had closed. But, instead of corresponding with opposing counsel, or filing an order shortening time requesting **[*16]** the district court immediately clarify its discovery order as to whether the parties' prior stipulation was in effect, or perhaps noticing the newly designated expert for deposition, appellants appear to have strategically waited. Appellants' strategy—waiting until *after discovery closed* to then file a motion to strike expert and a motion in limine to preclude that new expert from testifying for failing to produce an expert report—just did not pay off under these circumstances. Nevertheless, I do not agree with the majority's analysis of the issues raised in this appeal, and, therefore, I respectfully concur in result only.

/s/ Silver, C.J.

Silver

End of Document

Garrett v. San Francisco

United States Court of Appeals for the Ninth Circuit

March 11, 1987, Submitted [*] ; June 10, 1987, Filed

No. 86-2144

[*] The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 3(f) and Fed. R. App. P. 34(a).

Reporter
818 F.2d 1515 *; 1987 U.S. App. LEXIS 7356 **; 44 Fair Empl. Prac. Cas. (BNA) 865; 43 Empl. Prac. Dec. (CCH) P37,179; 8 Fed. R. Serv. 3d (Callaghan) 352

Billy Eugene Garrett, Plaintiff-Appellant, v. City and County of San Francisco, San Francisco Fire Department, Defendants-Appellees

Prior History: [1]** Appeal from the United States District Court for the Northern District of California, D.C. No. C-82-7087 JPV, John P. Vukasin, Jr., District Judge, Presiding.

Core Terms

discovery, district court, firefighters, summary judgment motion, collateral estoppel, summary judgment, disparate treatment, attorney's fees, sanctions, state court, discovery motion, opposing party, defendants', harassment, merits, documents

Case Summary

Procedural Posture
Appellant firefighter challenged the ruling of the United States District Court for the Northern District of California which granted the motion of appellees, city and fire department, for summary judgment and also awarded attorney's fees in a case involving an action under Title VII of the Civil Rights Act of 1964.

Overview
Appellant firefighter sought review of the ruling of the district court which issued summary judgment in favor of appellee city and appellee fire department in an action under the Civil Rights Act of 1964. The district court also allowed appellees to apply for attorney's fees. Appellant was accused of having taken 13 silver dollars from the scene of a fire and charged with violating a fire department rule. The district court ordered appellant to pay appellees a partial attorney's fee and also awarded sanctions for bringing an action in bad faith for the purposes of harassment. The court stated that the conduct forming the basis of the charge of harassment had to do more than bother, annoy, or vex the complaining party. The district court made no finding of what the harassment might have been, other than the implicit finding of frivolousness. Consequently, the court concluded that the state court record was an insufficient basis to permit the application of collateral estoppel on the disparate treatment issue. The court also reversed the award of attorney's fees and sanctions.

Outcome
The court reversed and remanded the decision of the district court which granted attorney's fees and sanctions against appellant. On review, the court held that the ruling of the district court was inappropriate where the court found no evidence of harassment when appellant filed an action under the Civil Rights Act of 1964.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Summary Judgment > Summary Judgment Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN1[] **Standards of Review, Abuse of Discretion**

When a party opposing a motion for summary judgment cannot present facts essential to justify his opposition to the motion, *Fed. R. Civ. P. 56(f)* permits the party to submit an affidavit stating such reasons. The court may continue a motion for summary judgment if the opposing party needs to discover essential facts. The trial court's refusal to permit further discovery is reviewed for an abuse of discretion. Clearly, a trial court's exercise of discretion will rarely be disturbed.

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN2[] Civil Procedure, Discovery & Disclosure

Even if not formally denominated as a request under Fed. R. Civ. P. 56(f), under Ninth Circuit precedent a discovery motion may be sufficient to raise the issue of whether a party should be permitted additional discovery. Under Rule 56(f), an opposing party must make clear what information is sought and how it would preclude summary judgment.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Evidence > Burdens of Proof > Allocation

Evidence > Burdens of Proof > Ultimate Burden of Persuasion

Labor & Employment Law > ... > Disparate Treatment > Evidence > Burdens of Proof

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

HN3[] Summary Judgment, Burdens of Proof

In a case under Title VII of the Civil Rights Act of 1964, regardless of the interim allocations of the burden of going forward, plaintiff retains the ultimate burden of persuasion. The rule applies in a summary judgment context. A plaintiff can meet this burden by showing that other employees who engaged in similar acts of wrongdoing of comparable seriousness were nevertheless retained.

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

HN4[] Discovery, Privileged Communications

In an action under Title VII of the Civil Rights Act of 1964, of course, the federal common law of privilege controls. Personnel files are discoverable in federal question cases, including Title VII actions, despite claims of privilege.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN5[] Standards of Review, Abuse of Discretion

The availability of collateral estoppel is subject to de novo review, but application of the doctrine, if available, is reviewed for abuse of discretion.

Administrative Law > Agency Adjudication > Decisions > Collateral Estoppel

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > General Overview

HN6[] Decisions, Collateral Estoppel

Collateral estoppel bars relitigation of issues actually adjudicated and essential to the judgment in earlier litigation between the same parties. Under 28 U.S.C.S. § 1738, state court judgments may be entitled to preclusive effect in actions under Title VII of the Civil

Rights Act of 1964. Federal courts apply the collateral estoppel rules of the state from which the judgment arose in determining the effect of a state court judgment. In California, collateral estoppel applies when: (1) the issue decided in the prior action is identical to the issue presented in the second action; (2) there was a final judgment on the merits; and (3) the party against whom estoppel is asserted was a party or in privity with a party to the prior adjudication.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Civil Rights Law > ... > Procedural Matters > Costs & Attorney Fees > Statutory Attorney Fee Awards

Labor & Employment Law > ... > Title VII Discrimination > Remedies > Costs & Attorney Fees

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

HN7[] **Basis of Recovery, Statutory Awards**

If a judgment in a case under Title VII of the Civil Rights Act of 1964 must be reversed, the party who prevailed is no longer a "prevailing parties" under *42 U.S.C.S. § 2000e-5(k)* and any award of attorney's fees must be vacated.

Civil Procedure > Sanctions > Baseless Filings > General Overview

Criminal Law & Procedure > ... > Crimes Against Persons > Coercion & Harassment > Elements

HN8[] **Sanctions, Baseless Filings**

The United States Court of Appeals for the Ninth Circuit narrowly construes "harassment" under the "improper purpose" clause of *Fed. R. Civ. P. 11*. The conduct forming the basis of a charge of harassment must do more than in fact bother, annoy or vex the complaining party. An objective test has been adopted and a complaint which meets the well-grounded/frivolousness test of *Fed. R. Civ. P. 11*'s other prong cannot amount to harassment.

Counsel: Rufus L. Cole, for the Plaintiff-Appellant.

Paula Hagan Bennett, for the Defendants-Appellees.

Judges: Noonan, Jr., and O'Scannlain, Circuit Judges, and Tashima, ** District Judge.

Opinion by: TASHIMA

Opinion

[*1516] TASHIMA, District Judge:

This is an appeal from the judgment [1] **[**2]** of the district court, entered upon the granting **[*1517]** of defendants-appellees' motion for summary judgment in an action under Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000e, et seq.* ("Title VII"). Upon granting the motion, the district court invited defendants to apply for attorney's fees, which they did. Attorney's fees and, alternatively, sanctions were awarded to defendants. Appellant Billy Eugene Garrett ("Garrett" or "plaintiff") appeals those rulings, as well as the denial of his motion to compel discovery. [2] We reverse and remand the action to the district court.

FACTS

Garrett is a black man who began his employment as a firefighter with defendant San Francisco Fire Department (the "Fire Dept.") in 1974. He was accused of having taken 13 silver dollars from the scene of a fire on June 30, 1981, and charged with violating Fire Dept. Rule 2222, which requires firefighters to "immediately

** Honorable A. Wallace Tashima, United States Judge, Central District of California, sitting by designation.

[1] Both the notice of appeal and the amended notice of appeal mistakenly designate the order of May 8, 1986 as the order appealed from. *See* ***F.R. App. P. 3(c)*** (notice must designate order or judgment appealed from). Although both notices describe this order as "granting Defendants' motion for summary judgment and awarding attorney fees and sanctions," and the amended notice additionally designates it as "denying Plaintiff's motion to compel discovery," in fact, it dealt only with attorney's fees and sanctions. Nevertheless, we treat the notices as designating the final judgment and we have jurisdiction over this appeal. The notices make appellant's intent clear and no issue of possible prejudice from the misdesignation has been raised. *See Lynn v. Sheet Metal Workers' Int'l Ass'n, 804 F.2d 1472, 1481 (9th Cir. 1986)*; *Munoz v. Small Business Admin., 644 F.2d 1361, 1364 (9th Cir. 1981)*.

[2] The discovery order is reviewable on appeal from the final judgment. *Munoz, 644 F.2d at 1364*.

report" to their supervisors all monies, jewels or other valuables discovered at the scene of a fire.

It is unnecessary to set forth the substantial evidence adduced in support of this charge; it suffices that in September, 1982, after having held extensive hearings, the San Francisco Fire Commission (the "Commission") found that Garrett had violated Fire Dept. rules and ordered his discharge. Garrett then sought judicial review of the Commission's order in state court. See Cal. Code Civ. Proc. § 1094.5. The order was upheld by the superior court and on appeal the trial court's judgment was affirmed. While the state court proceedings were still pending, Garrett, acting *pro se*, commenced this Title VII action in federal district court.

DISTRICT COURT PROCEEDINGS

[3]** On October 25, 1985, the district court issued a scheduling order setting the discovery cut-off date as March 15, 1986, the motion deadline as May 1, 1986, and the trial date as June 2, 1986. Garrett filed and served defendants with a request for production of documents on November 15, 1985. Request No. 8 sought the personnel records of 16 named Fire Dept. firefighters. Defendants, on December 20, 1985, objected to Request No. 8 on the ground that "the information contained in the personnel records is privileged and confidential, and disclosure of these documents would constitute an invasion of privacy. Further, much of the information contained in them is irrelevant to this case," and refused to produce these files.

On February 6, 1986, Garrett moved to compel production of the documents sought by Request No. 8 and to extend the discovery cut-off date for 30 days. He contended that these documents would establish that black firefighters and white firefighters received different disciplinary sanctions for the same or similar offenses, *i.e.*, that there was disparate treatment, and that the purported justification for his discharge was merely a pretext for racial discrimination.

[4]** Earlier, on January 22, 1986, defendants-appellees had moved for summary judgment.

Both motions were to be heard on March 6, 1986. At the hearing, the district court addressed the summary judgment motion first. It found that given the hearing procedure, the nature of the violation, the overwhelming evidence of Garrett's guilt, and the lack of evidence of disparate treatment, there was no material issue of fact; therefore, it granted defendants' motion for summary judgment. Having granted **[*1518]** defendants' dispositive motion, the court then denied Garrett's discovery motion as "moot" without considering it on the merits. The court next invited defendants to apply for attorney's fees. Defendants did so and on May 8, 1986, defendants' motion was granted in part. The court ordered Garrett to pay defendants $ 5,000 as partial attorney's fees or, alternatively, as sanctions under F. R. Civ. P. 11 for bringing the action in bad faith and for purposes of harassment. This appeal followed.

ISSUES

1. Was summary judgment properly granted without the trial court first ruling on the merits of plaintiff's discovery motion.

2. May summary judgment be sustained by the application of collateral estoppel, **[**5]** thus mooting the issue of further discovery.

3. Were attorney's fees and sanctions properly assessed against plaintiff.

DISCUSSION

I. *Summary Judgment v. Further Discovery*

We do not decide whether on the record before it summary judgment should or should not have been granted by the district court. We assume *arguendo* that on the state of the record before the district court, no disputed issues of fact were raised. The issue is whether Garrett should have been granted an opportunity, as contemplated by F. R. Civ. P. 56(f), to pursue further discovery or at least to complete then-pending discovery.

HN1[↑] When a party opposing a motion for summary judgment cannot present "facts essential to justify his opposition" to the motion, Rule 56(f) permits the party to submit an affidavit stating such reasons. Hancock v. Montgomery Ward Long Term Disability Trust, 787 F.2d 1302, 1306 (9th Cir. 1986). The court may continue a motion for summary judgment if the opposing party needs to discover essential facts. Hall v. Hawaii, 791 F.2d 759, 761 (9th Cir. 1986); Hancock, 787 F.2d at 1306. The trial court's refusal to permit further discovery is reviewed for an abuse of discretion. **[**6]** *Id.*; Landmark Dev. Corp. v. Chambers Corp., 752 F.2d 369, 373 (9th Cir. 1985) (*per curiam*).

Clearly, a trial court's exercise of discretion will rarely be disturbed. This case, however, involves the failure of the

trial court to exercise its discretion, not the abuse of it. Here, the court did not address the merits of Garrett's motion to compel production of the personnel records; it merely denied the motion as "moot" after having disposed of the case. [3]

First, ***HN2***[↑] although not formally denominated as a request under Rule 56(f), under Ninth Circuit precedent Garrett's discovery motion was sufficient to raise the issue of whether he should be permitted additional discovery. Hancock, 787 F.2d at 1306 n.1 (pending motion to compel discovery was sufficient to raise Rule 56(f) consideration); *see also,* Program Eng'g, Inc. v. Triangle Publications, Inc., 634 F.2d 1188, 1193 (9th Cir. 1980) (motion to strike portions **[**7]** of summary judgment motion was sufficient to raise Rule 56(f) consideration); *cf.* Brae Transp., Inc. v. Coopers & Lybrand, 790 F.2d 1439, 1443 (9th Cir. 1986) (references in memoranda and declarations to a need for discovery do not qualify as motions under Rule 56(f)). Under Rule 56(f), an opposing party must make clear what information is sought and how it would preclude summary judgment. Hall, 791 F.2d at 761; Brae Transp., 790 F.2d at 1443; Taylor v. Sentry Life Ins. Co., 729 F.2d 652, 656 (9th Cir. 1984) (*per curiam*).

Garrett's pending discovery motion satisfied Rule 56(f). It made clear the information sought, did not seek broad additional discovery, but rather sought only the personnel records of 16 named firefighters and indicated the purpose for which this **[*1519]** information was sought, namely, to determine whether similarly situated firefighters were being treated differently on the basis of race. Defendants' refusal to produce these documents lead to Garrett's motion to compel. The motion was timely made under the scheduling order and was set for hearing before the discovery cut-off date.

In denying the discovery motion as "moot" after having first granted defendants' **[**8]** summary judgment motion, the district court failed to exercise its discretion with respect to the discovery motion. *See* Patty Precision v. Brown & Sharpe Mfg. Co., 742 F.2d 1260, 1264-65 (10th Cir. 1984) (trial court's failure to rule on opposing party's Rule 56(f) affidavit prior to granting summary judgment against it reversed as a failure to exercise discretion); Sames v. Gable, 732 F.2d 49, 52 (3d Cir. 1984) (error to grant motion for summary judgment while pertinent discovery requests were outstanding); Schering Corp. v. Home Ins. Co., 712 F.2d 4, 10 (2d Cir. 1983) (summary judgment should not be granted while opposing party timely seeks discovery of potentially favorable information). [4]

As the district **[**9]** court stated, the summary judgment motion was granted in part because of, "the lack of evidence of disparate treatment." ***HN3***[↑] In a Title VII case, regardless of the interim allocations of the burden of going forward, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973), plaintiff retains the ultimate burden of persuasion. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981). The rule applies in a summary judgment context. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986). [5] Plaintiff can meet this burden by showing that other employees (firefighters) who engaged in similar acts of wrongdoing of "*comparable seriousness* . . . were nevertheless retained." McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 283 n.11, 49 L. Ed. 2d 493, 96 S. Ct. 2574 (1976) (emphasis in original) (citing McDonnell Douglas, 411 U.S. at 804). *See also,* IBT v. United States, 431 U.S. 324, 335-36 n.15, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977). This is precisely the type of evidence plaintiff's motion to compel sought to elicit. [6] Thus, this case

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[3] Because the district court did not exercise its discretion, the issue of whether or not it should have presents a legal question which is subject to *de novo* review. *See* Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1538 (9th Cir. 1986).

[4] Without passing on the merits of plaintiff's discovery motion (a matter which should be addressed first by the district court), we note that the motion, on its face, does not appear to be entirely without merit. *Cf.* Hancock, 787 F.2d at 1306-07 (district court did not abuse its discretion in denying plaintiff's request for additional discovery and granting summary judgment where discovery sought could not lead to relevant information as a matter of law).

[5] The Court was careful to state that the rule applied only "after adequate time for discovery." *Id. at 2552-53*.

[6] Defendants also contend that the sought documents are protected by state-created privileges. ***HN4***[↑] In a Title VII action, of course, the federal common law of privilege controls. ***F. R. Evid. 501***. This court has held that personnel files are discoverable in federal question cases, including Title VII actions, despite claims of privilege. Guerra v. Board of Trustees, 567 F.2d 352 (9th Cir. 1977); Kerr v. United States District Court, 511 F.2d 192, 197 (9th Cir. 1975), *aff'd*, 426 U.S. 394, 48 L. Ed. 2d 725, 96 S. Ct. 2119 (1976).

presents the circumstance where "a party's access to . . . material is of crucial importance . . . where the information is likely to be in the sole possession of the opposing party." **[**10]** Patty Precision, 742 F.2d at 1264.

It was error for the trial court to have granted defendants' motion for summary judgment without first having determined the merits of plaintiff's pending discovery motion.

II. *Collateral Estoppel*

Defendants contend that plaintiff's Title VII claim is barred by the application of collateral estoppel (issue preclusion). [7] If defendants are correct, then further discovery on the issues of disparate treatment and pretext would be futile and the grant of summary judgment should be affirmed. **[*1520]** *See* Hall, 791 F.2d at 761; **[**11]** Hancock, 787 F.2d at 1306-07.

HN5[↑] The *availability* of collateral estoppel is subject to *de novo* review, but *application* of the doctrine, if available, is reviewed for abuse of discretion. Mack v. South Bay Beer Distrib., Inc., 798 F.2d 1279, 1282 (9th Cir. 1986). Here, we need address only the first issue.

HN6[↑] Collateral estoppel bars relitigation of issues actually adjudicated and essential to the judgment in earlier litigation between the same parties. South Delta Water Agency v. United States Dep't of Interior, 767 F.2d 531, 538 (9th Cir. 1985). Under 28 U.S.C. § 1738, state court judgments may be entitled to preclusive effect (here issue preclusion) in Title VII actions. Kremer v. Chemical Constr. Corp., 456 U.S. 461, 485, 72 L. Ed. 2d 262, 102 S. Ct. 1883 (1982); Trujillo v. County of Santa Clara, 775 F.2d 1359, 1369 (9th Cir. 1985). Federal courts apply the collateral estoppel rules of the state from which the judgment arose in determining the effect of a state court judgment. Marrese **[**12]** v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 84 L. Ed. 2d 274, 105 S. Ct. 1327 (1985). In California, collateral estoppel applies when: (1) the issue decided in the prior action is identical to the issue presented in the second action; (2) there was a final judgment on the merits; and (3) the party against whom estoppel is asserted was a party or in privity with a party to the prior adjudication. *E.g.,* Clemmer v. Hartford Ins. Co., 22 Cal. 3d 865, 874-75, 151 Cal. Rptr. 285, 587 P.2d 1098 (1979). Only the first element is disputed.

The final judgment at issue here is the decision by the California Court of Appeal, First Appellate District, in *Garrett v. San Francisco Fire Comm'n, et al.*, No. A020544 (Jan. 2, 1986) (unpublished). In that decision, the court held that the Commission did not abuse its discretion in dismissing appellant. Necessarily implicit in that holding was the determination that there was sufficient evidence to support the Commission's finding that appellant had committed the rules infraction charged. That issue having been determined on the merits, Garrett cannot relitigate the propriety of the determination that his dismissal for his failure to report property taken from the scene of a fire is supported by **[**13]** substantial evidence.

In order to prevail on their motion for summary judgment, however, defendants must establish that collateral estoppel should also be applied to the disparate treatment issue, *i.e.*, establish that the issue of whether similarly situated white firefighters had received less severe punishment for similar misconduct was actually litigated in the state court action. Although it appears that Garrett attempted to raise this issue in the state court action, at best, it is not clear that the issue was actually litigated.

The superior court's grounds for denying Garrett's petition for writ of mandate are not disclosed by the record on appeal; thus, the record does not support application of collateral estoppel, *i.e.*, there is no showing that the disparate treatment issue was actually litigated in the state trial court. The state court of appeal's opinion also is, at best, ambiguous on the issue. It characterized appellant's claim as follows:

> The gravamen of plaintiff's claim is that the punishment was extreme because theft of $ 13 would at most be a petty offense and because the punishment of dismissal is disproportionate to punishment given other firefighters **[**14]** whose conduct was more injurious to public safety.

Id., slip op. at 15. The state court of appeal went on to hold that the discipline imposed was not an abuse of discretion. Thus, although it might be said that the proportionality of punishment between firefighters was mentioned in the opinion, the issue was not dealt with in terms of Title VII's "disparate treatment" criterion, *i.e.*, such treatment on the basis of race, but in terms of abuse of discretion. We conclude that the state court

[7] Res Judicata (claim preclusion) cannot apply because state courts lack subject matter jurisdiction of Title VII claims. Trujillo v. County of Santa Clara, 775 F.2d 1359, 1366 (9th Cir. 1985).

record is an insufficient basis to permit the application of collateral estoppel on the disparate treatment issue.

[*1521] III. *Attorney's Fees and Sanctions*

Because ***HN7***[⬆] the judgment must be reversed, defendants no longer are prevailing parties under Title VII, *42 U.S.C. § 2000e-5(k)*. Thus, the award of $ 5,000 attorney's fees must be vacated. [8] *See, e.g., Mitchell v. Office of the Los Angeles County Superintendent of Schools, 805 F.2d 844, 847 (9th Cir. 1986)*.

Alternatively, the district court imposed the same $ 5,000 as a sanction under *F.R. **[**15]** Civ. P. 11*, because the court found that "this case was brought in bad faith and to harass defendants." In *Zaldivar v. City of Los Angeles, 780 F.2d 823, 831-32 (9th Cir. 1986)*, ***HN8***[⬆] this court narrowly construed "harassment" under the "improper purpose" clause of *Rule 11*. That case also involved the successive filing of a federal case after rejection of the same or similar issues by a state court. *Id. at 832*. We have stated that "the conduct forming the basis of the charge of harassment must do more than in fact bother, annoy or vex the complaining party." *Id. at 831-32*. *Zaldivar* adopted an objective test and held that a complaint which meets the well-grounded/frivolousness test of *Rule 11*'s other prong cannot amount to harassment. *Id. at 832*. *See Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1538 (9th Cir. 1986)*.

The district court made no finding of what the "harassment" might have been, other than the implicit finding of frivolousness. Because we reverse the judgment, as indicated above, the frivolity issue remains to be determined. *See In re Yagman, 796 F.2d 1165, 1183 (9th Cir. 1986)* (discussing proper timing for imposition of sanctions). **[**16]** Thus, we also vacate the alternative award of *Rule 11* sanctions against plaintiff.

CONCLUSION

The award of attorney's fees and sanctions is vacated. The judgment is reversed and the matter remanded for further proceedings consistent with this opinion.

REVERSED and REMANDED.

[8] We, of course, intimate no view on the propriety of the award or non-award of attorney's fees in this case after further proceedings on remand.

End of Document

EXHIBIT F

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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

By /s/ *Adam Garth*
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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

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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

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

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DATED this ___ day of _____, 2022.

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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
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From: Garth, Adam <Adam.Garth@lewisbrisbois.com>
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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
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Adam Garth
Partner
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

Adam Garth
Partner
Adam.Garth@lewisbrisbois.com

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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
heidi.brown@lewisbrisbois.com
T: 702.693.1716 F: 702.893.3789
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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

Melanie.Thomas@lewisbrisbois.com

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Las Vegas, Nevada 89118
Attorneys for Dana Forte, D.O., Ltd dba Forte Family Practice and Joseph Earfrate, PA-C

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: 5/19/2022

S. Vogel	brent.vogel@lewisbrisbois.com
Karl Andersen	karl@andersenbroyles.com
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