IN THE SUPREME COURT OF THE STATE OF NEVADA

BARRY JAMES RIVES, M.D.; and LAPAROSCOPIC SURGERY OF NEVADA, LLC,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, CLARK COUNTY; AND THE HONORABLE JOANNA S. KISHNER, DISTRICT JUDGE,

Respondents,

and

TITINA FARRIS and PATRICK FARRIS,

Real Parties in Interest.

Case No.

PETITION FOR WRIT OF MANDAMUS

(Trial date: September 6, 2022)

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities 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. There are no parent corporations or publicly-held companies owning any of the petitioners' stock.

2. Law firms who have appeared for petitioners in this case:

Lemons, Grundy & Eisenberg

Schuering Zimmerman & Doyle

Collinson, Daehnke, Inlow & Greco

Clark Newberry Law Firm

Mandelbaum Ellerton & Associates

3. Petitioners are not using pseudonyms.

Dated: August 10, 2022

/s/ Robert L. Eisenberg

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Petitioners hereby petition for a writ of mandamus to compel the district court to vacate its orders denying petitioners' motion to reopen discovery and striking petitioners' motions in limine.

NOTICE OF POTENTIAL EMERGENCY MOTION FOR STAY

The second multi-week medical malpractice trial in this case is scheduled for September 6, 2022. Petitioners are in the process of requesting the district court to stay the trial, pending the outcome of this writ petition. If the district court denies a stay or fails to rule on the requested stay, petitioners intend to file an emergency motion in this court to stay the trial pending the outcome of this petition.

INTRODUCTION[1]

This is a medical malpractice action. The case was tried in 2019, resulting in a $6 million judgment in favor of real parties in interest (Plaintiffs). Petitioners (Defendants) appealed, challenging numerous rulings by the district court.

On March 21, 2022, this court reversed and remanded for a new trial. *Rives v. Farris*, 138 Nev. Adv. Op. 17, 506 P.3d 1064 (2022). The reversal was based primarily upon the district court's abuse of discretion in admitting evidence of another malpractice case against Defendants (the Vicki Center case). This court also determined that the district court abused its discretion by giving an adverse-inference

[1] For ease of reading, this introduction will omit appendix citations, but the citations will be provided in the body of the petition for all factual statements in this introduction.

jury instruction. The opinion did not address any other arguments. *Id.* at fn. 8 ("In light of our conclusion, we need not address appellants' remaining arguments.").

After the remand, the district court (the same district judge who had been reversed) scheduled the new trial for September 6, 2022. Defendants moved to reopen discovery, based upon the nearly three-year time period since the first trial. Defendants argued that they were entitled to know medical information concerning Titina Farris's medical care, and any changes in her medical condition or disabilities since the first trial. The district court denied the request in its entirety, refusing to allow any discovery whatsoever regarding Titina Farris's medical information since the first trial.

Defendants also filed a series of motions in limine (MILs), primarily intending to deal with the evidentiary and procedural issues that had been raised on appeal, but which this court did not address in the reversal opinion. Plaintiffs moved to strike the MILs as untimely. The district court granted the motion and struck the MILs, ruling that the original deadline—before the first trial in 2019–still applied. Moreover, the district court essentially ruled that none of the earlier evidentiary and procedural rulings could be revisited on remand, and that the parties were bound by the prior rulings.

The district court's rulings were without legal bases, and were manifest abuses of discretion. Unless this court intervenes, the case will proceed to the second trial

with Defendants stripped of any ability to challenge the rulings that had been raised in the first appeal. Some of the rulings are clearly not applicable any more, yet the district court refused to exercise its discretion to consider the issues raised in the MILs. A writ of mandamus should be issued, to compel the district court to exercise its discretion on the MILs.

Moreover, the district court's flat refusal to allow updated medical discovery—for the three-year period since the first trial—is grossly unfair, and will result in trial by ambush. Plaintiffs' counsel has represented to the district court that Plaintiffs will not present anything new. Even if this is true, Defendants still have the right to updated medical discovery on whether Titina Farris has had any improvement in her medical condition or improvement in her disability during the last three years, and whether her preexisting medical condition, which is one of the causes of her disability, has gotten worse.

Accordingly, a writ should issue to prevent this unfair result.

ROUTING STATEMENT

The Nevada Supreme Court should retain this case pursuant to NRAP 17(a)(11) and (12), because this petition presents issues of first impression and statewide public importance, primarily involving procedures after a reversal and remand for a new trial.

RELIEF SOUGHT

Defendants seek a writ of mandamus compelling the court to vacate its order denying updated medical discovery, and compelling the district court to hear the MILs and to exercise its discretion.

ISSUES PRESENTED

1. Whether the district court properly denied Defendants' request for updated medical discovery since the first trial nearly three years ago.
2. Whether the district court erroneously struck the MILs, and whether the prior evidentiary and procedural rulings from the first trial will be binding in the second trial.

STATEMENT OF FACTS

A. Procedural history before appeal.

In 2015, petitioner Barry Rives, M.D. (Dr. Rives) performed hernia surgery on Plaintiff Titina Farris. Farris had problems following the surgery, including sepsis. 1P.App.115-16. She eventually developed drop foot in both feet, hindering her ability to walk unassisted. 1P.App.116. She and her husband sued Dr. Rives and his medical entity (petitioner Laparoscopic Surgery of Nevada, LLC) for medical malpractice. *Id.*

The case was tried in October 2019. After a statutory reduction of the jury's award for noneconomic damages, judgment was entered for approximately $6.3 million. 1P.App.118.

B. The appeal

Defendants appealed, raising numerous assignments of error by the district court, including:

(1) allowing Plaintiffs to use the reptile theory

(2) admitting evidence of alleged negligence involving another patient (Vickie Center)

(3) giving an adverse inference instruction

(4) error regarding ERISA preemption

(5) limiting and excluding defense experts

(6) granting Plaintiffs' NRCP 50(a) motion, and filling in the verdict form for the jury, awarding approximately $4.7 million in economic damages

(7) error regarding hospital records

(8) error regarding the deposition transcript of Plaintiffs' medical expert

(9) error regarding cross-examination of a medical expert

(10) awarding attorney's fees.

1P.App.21-22.

On March 31, 2022, this court issued a unanimous en banc opinion, reversing and remanding for a new trial. *Rives v. Farris,* 138 Nev. Adv. Op. 17 (2022). The reversal was primarily based upon the district court's prejudicial abuse of discretion in allowing evidence of the Center case. 1P.App.123-130. The opinion also held that the district court abused its discretion by giving an adverse-inference instruction. 1P.App.129fn7. The court expressed no opinion whatsoever regarding Defendants' remaining appellate arguments, stating: "In light of our conclusion, we need not address appellants' remaining arguments." 1P.App.130fn8. In light of the reversal, the court also vacated the attorneys' fees and costs. *Id.*

C. Proceedings after remand

After the reversal, the district court issued a scheduling order with the new trial set for September 6, 2022. 1P.App.159. The order contained the following provision:

> **Motions in Limine –** The Motion in Limine filing date has not been extended. **Omnibus Motions are not accepted. Orders shortening time will not be signed except in extreme emergencies.**

1P.App.160 (underlining and bold in original).

D. Motion to reopen discovery

On July 7, 2022, Defendants filed a motion to reopen limited discovery. 1P.App.138. Defendants noted that several years had passed since the first trial, and

Titina Farris presumably continued to seek medical care and treatment since the first trial. 1P.App.148. Defendants requested extremely limited additional discovery, including disclosure of identities of Titina Farris's medical providers since the first trial, with releases allowing Defendants to obtain updated medical records; depositions of no more than five treating medical providers; and an independent medical examination. 1P.App.143. Plaintiffs' opposition primarily argued that they "are not placing any new treatment at issue," and that at the second trial, Plaintiffs "will request compensation for the same past treatment as the first trial." 1P.App.145. Plaintiffs also argued that additional discovery was barred by the law-of-the-case doctrine, and by the scope of this court's remand. 1P.App.147-48.

Defendants replied in support of their motion. 2P.App.258. Defendants argued that they have the right to be adequately informed of how Titina Farris is expected to present at trial, in light of the fact that it has been almost three years since the first trial. 2P.App.260. Defendants further argued that they have the right to find out whether Titina Farris's progressive conditions have evolved since the first trial, with her conditions better or even worse than at the first trial. *Id.* Defendants argued that they have a right to "an updated and accurate understanding of [Titina Farris's] current condition going into retrial." *Id.*

At the hearing on the motion, the district court seemed to indicate her belief that this court's remand was limited, with the validity of pretrial rulings not within

the scope of the remand, and with reopening of discovery outside the scope of the remand. 3P.App.596. The district court also questioned whether Plaintiffs would be presenting anything new at the second trial. *Id*.

Defense counsel observed that the district court should not rely on Plaintiffs' representations that everything is essentially the same as in 2019. 3P.App.598. Defense counsel observed that three years had passed since the first trial, and that Titina Farris has several progressive conditions, including uncontrolled diabetes and neuropathy; and those conditions may have changed or worsened. *Id.* And even if Plaintiffs do not offer any new medical bills, records, or changes regarding her condition, Defendants still should have an opportunity to assess Titina Farris and to find out her current condition (i.e., whether she is better or worse than three years ago). 3P.App.599.

In response, the district court again referred to this court's reversal opinion. The district court noted that there was "nothing mandating [additional discovery] from the Supreme Court order," and that there was "nothing even inferring allowing [additional discovery]." 3P.App.600.

Plaintiffs' counsel argued that Plaintiffs were not intending to assert "anything new" at the second trial. 3P.App.609-10. "The damages are all going to be the same." 3P.App.610. Counsel also argued that the claim for future care and future pain and suffering "are all going to be exactly the same." *Id.* The district court

denied the motion to reopen discovery, repeating her view that the Supreme Court's reversal did not direct the district court to reopen discovery. 3P.App.615. As of the date of this writ petition, the district court has not yet entered a written order on the motion.

E. Motions in limine

On July 22, 2022, Defendants filed 13 MILs.[2] 2P.App.266. The motions dealt with several evidentiary and procedural issues likely to arise during the retrial. And several of the motions dealt with the issues raised in the appeal (issues not decided by this court in the reversal opinion).

Some of the MILs dealt with rulings at the first trial that were based on timing considerations. For example, one motion requested permission to lodge a deposition transcript for use at trial, regarding Plaintiffs' medical expert, Dr. Hurwitz. 2P.App.400. His deposition transcript had been identified in defense counsel's pretrial memorandum, but at a calendar call a few days before trial, defense counsel did not lodge the transcript with the clerk, because the transcript was not yet available. 1P.App.89. The next week, defense counsel attempted to lodge the

[2] The motions were accompanied by appendix volumes containing several hundred pages of exhibits. The exhibits are not essential to understanding matters set forth in this petition; therefore the motion appendix documents have not been included with this petition. See NRAP 21(a(4) (writ petition appendix should include only documents essential to understand the petition).

deposition transcript, but the district court did not rule on whether this would be allowed. *Id.*

A few days later, on direct examination of Dr. Hurwitz, Plaintiffs' counsel asked questions disclosing to the jury the fact that the doctor had been deposed. 1P.App.90. Later, defense counsel objected because the doctor's opinions had not been previously disclosed. The district court asked to look at the deposition transcript; she was provided with the transcript; and she read into the record extensive portions of the transcript, with page and line numbers. *Id.*

On cross-examination, defense counsel attempted to use the transcript to show that the doctor's trial testimony was radically different from his deposition testimony. 1P.App.90-93. The district court refused to allow cross-examination of the doctor's testimony because the transcript had not been lodged at the calendar a few days before trial. 1P.App.93. On appeal, Defendants argued that this ruling was a highly prejudicial abuse of discretion, with a hyper-technical and unfair enforcement of a procedural rule. 1P.App.93-94.

In MIL 6, Defendants simply asked for a ruling that Dr. Hurwitz's deposition transcript could be lodged with the court for use at the second trial. The calendar call before the second trial in this case is scheduled for August 30, 2022. 1P.App.159. At the calendar call, the parties must provide depositions that they intend to use at the second trial. 1P.App.160. Because the district court's refusal to

allow defense counsel to use the transcript at the first trial was based upon a procedural rule—failure to lodge the transcript at the calendar call before the first trial–Defendants' MIL 6 should not really have been a contested matter.

A similar situation exists regarding hospital records. This is discussed in MIL 5. 2P.App.376. The parties had agreed to present a single exhibit with all of the hospital records, but Plaintiffs' exhibit binder included only a fraction of the records. 2P.App.393-94. When defense counsel attempted to add additional pages, the district court refused, ruling that the additional documents should have been provided by the end of the business day of the calendar call. 2P.App.395-97. In fact, there was no such deadline. *Id*. In any event, the district court prevented defense counsel from offering approximately 400 pages of medical records that were relevant to the case. 2P.App.397.

Because the district court's refusal to allow the additional medical records was based upon a perceived failure to comply with a time deadline allegedly imposed a few days before the first trial, there is no reason why the additional medical records should be refused at the second trial. Defendants' MIL 5 merely sought to introduce the hospital records into evidence, as the parties had originally stipulated.

In any event, Plaintiffs did not file oppositions to the MILs. Instead, Plaintiffs filed a motion to strike the MILs. 3P.App.535. Plaintiffs' motion contended that the deadline for MILs "had already expired." 3P.App.540. Plaintiffs relied on the

district court's July 7, 2022 Amended Order Setting Jury Trial, in which the district court indicated that the "Motion in Limine filing date has not been extended." *Id.* The same order indicated that omnibus MILs would not be accepted, and orders shortening time for MILs would not be signed except in extreme emergencies. *Id.*

Defendants opposed the motion to strike. 3P.App.553. Among other things, Defendants noted that EDCR 2.47 requires MILs to be filed 45 days before the start of trial. 3P.App.566. Thus, the July 7, 2022 order—which indicated that the filing date for MILs had not been extended—must have been referring to the deadline 45 days before the **second** trial. Defendants also noted that Plaintiffs' interpretation of the scheduling order would render portions of the order superfluous and nugatory. *Id.* Defendants also argued that consideration of the MILs would promote efficiency by clarifying issues that will undoubtedly arise at the retrial, thereby preventing extensive delays for the court, the parties and the jury during the trial. 3P.App.568-69.

Plaintiffs filed a reply. 3P.App.572. They repeated their contention that the July 7, 2022 order should be interpreted as indicating that the 2019 deadline (before the first trial) would not be extended. 3P.App.576-77.

The district court held a hearing on August 2, 2022. 3P.App.657. Defense counsel argued, in essence, that the old deadline for MILs was no longer applicable, and that the case is controlled by scheduling requirements "at this point" in time.

3P.App.664. Defense counsel also pointed out that the July 2022 scheduling order "does not say that motions in limine are not permitted." *Id*. In fact, the order referred to omnibus motions and orders shortening time. Such references would have been unnecessary if the order flatly prohibited all MILs. *Id.* Defense counsel observed that the local rule imposed a deadline of 45 days before the trial date, and the defense attorneys believed the scheduling order was prohibiting any extensions beyond that deadline; but the scheduling order did not prohibit any MILs within the allowed 45-day deadline. 3P.App.666-67.

The district court concluded that "everything was closed" for purposes of the second trial. 3P.App.681. The district court mentioned a concurring opinion in a Nevada case, as well as a Mississippi case cited in the concurring opinion; and the district court recognized that "Nevada law is silent in this situation." 3P.App.677. The district ruled that the motion in limine deadline had already expired; it had not been extended; and the MILs were therefore stricken. 3P.App.676-685.

ARGUMENT

A. Writ relief is appropriate

Mandamus compels the performance of an act required by law. NRS 34.160; *Borger v. District Court*, 120 Nev. 1021, 1025, 102 P.3d 600, 603 (2004). Mandamus also controls a district court's arbitrary or capricious exercise of discretion. *Badger v. Eighth Judicial Dist. Ct.*, 132 Nev. 396, 402, 373 P.3d 89, 93

(2016). An exercise of discretion is arbitrary if not based on reason, and it is capricious if contrary to the evidence or established rules of law. *Id.* Writ relief is also available when needed to remedy a gross miscarriage of justice. *Salaiscooper v. Eighth Judicial Dist. Ct.*, 117 Nev. 892, 902, 34 P.3d 509, 516 (2001).

This court may grant writ relief when the petitioner lacks a plain, speedy, and adequate remedy at law. See *Beazer Homes Holding Corp. v. Eighth Judicial Dist. Ct.*, 128 Nev. 723, 730, 291 P.3d 128, 133 (2012). Though an appeal from a future judgment is usually an adequate remedy, this court determines in each particular case whether a future appeal is adequate. *Id.*

Even if the petitioner might be able to raise the issue in a subsequent appeal from the final judgment, this court will consider a pretrial writ when there is a "novel legal question of statewide importance requiring clarification," or where the case "implicates substantial public-policy concerns." *R.J. Reynolds v. Eighth Judicial Dist. Court*, 138 Nev. Adv. Op. 55 at 6 (Nev., July 28, 2022). The court will also entertain a writ petition where the interests of sound judicial economy and administration would be served by granting the petition. *Tam v. Eighth Judicial Dist. Ct.*, 131 Nev. 792, 796, 358 P.3d 234, 237 (2015).

In *Tam*, the defendant filed a pretrial motion in limine requesting a cap on damages. The district court denied the motion, and the defendant filed a writ petition. This court recognized that the defendant could appeal from a final

judgment, thereby providing an adequate remedy. This court nonetheless accepted the petition and granted a writ, because the petition raised an important public policy issue that needed clarification, and the court's consideration of the petition could "resolve or mitigate related or future litigation." *Id.* at 796, 358 P.3d at 237.

In *Williams v. Eighth Judicial Dist. Ct.*, 127 Nev. 518, 262 P.3d 360 (2011) (consolidated cases), district courts issued rulings on MILs involving exclusion of evidence. Like *Tam*, the *Williams* court recognized that the losing parties could appeal from subsequent final judgments. *Williams* also recognized that writ relief is appropriate where an important issue needs clarification or where public policy is served. *Id*. at 524-25, 262 P.3d at 364-65. "Ultimately, however, our analysis turns on the promotion of judicial economy." *Id.* (citing and quoting *Smith v. District Court*, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997), for the proposition that the interest of judicial economy is "the primary standard by which this court exercises its discretion" in determining whether to entertain a writ petition).

The present case is unique. The first trial lasted 15 days. It was a grueling, hard-fought trial with complex issues involving medical malpractice liability and unusual issues regarding damages. The verdict was more than $13 million before statutory reductions. There were dozens of motions before, during, and after the trial. There were scores of rulings by the district court. Several rulings were challenged on appeal. The en banc court unanimously reversed and remanded, based

upon improper admission of evidence involving another patient (Center). The court also found an abuse of discretion in an adverse-inference jury instruction.

Nevertheless, unfortunately for the parties, this court's opinion did not resolve all the appellate contentions. The opinion did **not** indicate the court had actually considered the other contentions and found them without merit, as the court's opinions sometimes indicate. *E.g. State Engineer v. Eureka County*, 133 Nev. 557, 560, n. 2, 402 P.3d 1249, 1251 (2017) ("We have considered [appellants'] other theories of error and conclude that they are without merit."). Instead, the *Rives* opinion stated: "In light of our conclusion, we need not address appellants' remaining arguments." *Rives*, 138 Nev. Adv. Op. at n. 8. Thus, the opinion did not provide guidance for the second trial on any of the other "remaining arguments" Dr. Rives had raised in the appeal.

Nevada law is unsettled regarding the important question of how a district court should evaluate such issues and contentions on remand – i.e., the extent to which prior rulings are binding or may be revisited. Indeed, the district court quoted the concurring opinion in *DeChambeau v. Balkenbush*, 134 Nev. App. 625, 631, 431 P.3d 359, 364 (Nev. Ct. App. 2018; Silver, J. concurring), which recognized: "**Nevada law is silent in this situation**…." (emphasis added). 3P.App.677. This is a statewide question with significant policy implications for the public and the judiciary.

Nevada law is also unsettled regarding the extent to which a personal injury defendant should be allowed to conduct supplemental discovery regarding the plaintiff's damages after a reversal. There is no definitive rule or caselaw on this issue. The upcoming trial will take place approximately three years since the first trial, yet Defendants are being deprived on any opportunity to conduct supplemental discovery concerning Titina Farris's treatment and medical visits since the first trial, or whether her medical and disability conditions have improved or gotten worse.

As a result of the reversal, another lengthy and complex trial will take place. But at this trial the defense will have been completely deprived of any information regarding Titina Farris's three-year medical history from 2019 until 2022. Farris and perhaps her doctors may attempt to testify that her medical/disability condition is the same now as it was in 2019. Yet Defendants will be deprived of any opportunity to verify the accuracy of this testimony or to conduct meaningful cross-examination. The new trial will also be conducted without the defense knowing the legitimacy of the judge's rulings from the first trial (rulings that this court did not consider in the appeal). The new multi-week trial will take place, after which there will almost certainly be a second appeal challenging these additional rulings. And if the second appeal results in a reversal on these issues, there will need to be a third trial, with potentially a third appeal. This is a question of fundamental fairness that

can arise virtually every time a judgment for a plaintiff is reversed and remanded for a new trial in a personal injury case.

These circumstances cry out for extraordinary writ review at this time. It is vital for this court to provide clarification to the district court and the parties in this case, and to the bench and bar generally on these issues. Equally important, the interests of sound judicial administration weigh heavily in favor of writ review at this time. This lawsuit has already been tried once—for nearly a full month—resulting in a verdict for Plaintiffs and an eventual reversal. The case will be tried again, but this time with additional error already built into the case. Accordingly, the court should consider these contentions and grant a writ of mandamus.

B. The district court manifestly abused its discretion by denying all post-remand supplemental discovery.

After this court's remittitur following the March 31, 2022 reversal and remand, the district court expedited the second trial and set it for September 6, 2022. Because the new trial will take place nearly three years since the first trial, Defendants requested limited supplemental medical discovery regarding Titina Farris, for this three-year time period. Among other things, Defendants requested an opportunity to obtain the identities of treating medical providers since the first trial, updated records from these providers, depositions of no more than five of the

providers, and an NRCP 35 medical examination (IME) of Titina Farris. 1P.App.138.

Plaintiffs opposed the motion, arguing that discovery was closed (before the first trial) [1P.App.169-70], and that Plaintiffs do not intend to offer any evidence of changed medical conditions since the first trial. 1P.App.172 ("Plaintiffs are not placing any new treatment at issue," and "Plaintiffs will request compensation for the same past treatment as the first trial."); 3P.App.610 ("The damages are all going to be the same."). Titina Farris provided a declaration stating her condition and disabilities "are generally the same today as they were in 2019," and her testimony at the retrial "will be consistent with the testimony I provided in 2019." 1P.App.215.

The district court agreed with Plaintiffs and denied any supplemental or updated discovery. The district court ordered Plaintiffs' counsel to prepare the order. As of the date of this petition, the district court has not yet entered a written order. Additionally, although parties have a duty to provide timely supplemental discovery disclosures (NRCP 26(e)), Plaintiffs have not supplemented their previous discovery disclosures or provided Defendants with any updated medical information for the three years since the 2019 trial. *See Nationstar Mortgage v. West Sunset 2050 Trust*, 2020 WL 6742725 *1 (Nev., November 13, 2020; No. 79271; unpublished) (after reversal and remand, party had duty to supplement previous disclosures before second trial).

"A trial is a search for the truth." *Cardinal v. Zonneveld*, 89 Nev. 403, 407, 514 P.2d 204, 206 (1973). 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." *DeChambeau, supra*, 134 Nev. at 627, 431 P.3d at 361, quoting *Washoe Cty. Bd. of Sch. Trs. v. Pirhala*, 84 Nev. 1, 5, 435 P.2d 756, 758 (1968).

The Ninth Circuit issued an instructive opinion in *City of Pomona v. SQM North America Corp.*, 866 F.3d 1060 (9th Cir. 2017). The Ninth Circuit had reversed a district court's exclusion of the plaintiff's expert. Upon remand, the plaintiff moved to reopen discovery, to supplement the expert's report to reflect additional scientific data that was developed while the appeal was pending. The district court denied the motion. In the second appeal, the Ninth Circuit reversed again, holding that the district court abused its discretion by refusing to reopen discovery. *Id.* at 1065-68. Among other reasons, the Ninth Circuit noted that the supplemental discovery was material, and the refusal to reopen discovery was prejudicial. *Id.*

Here, the district court agreed with Plaintiffs' attempt to limit the scope of the retrial. As noted above, Titina Farris's declaration states her medical conditions and disabilities are "generally" the same as in 2019, and her testimony at the retrial will be "consistent with" her 2019 testimony. No rule of procedure or evidence requires a defendant to accept a plaintiff's testimony as absolutely true. Like every other

aspect of civil litigation, a party has the right to conduct discovery for the purpose of testing the accuracy and believability of the opposing party's story.

Cross-examination is the "greatest legal engine ever invented for the discovery of the truth." *California v. Green*, 399 U.S. 149, 158, 90 S.Ct. 1930, 1935 (1970). If Titina Farris testifies at the retrial that her medical and disability conditions are "generally" the same and "consistent with" her status in 2019, Defendants have the right to conduct meaningful cross-examination, to test the truth of her testimony and to provide the jury with information with which to weigh the testimony. Without discovery for the three-year period leading up to the retrial, Defendants will be completely deprived on any opportunity to discover information relevant to Farris's testimony.

Similarly, Plaintiffs have not provided any supplemental information from Titina Farris's treating doctors. At the retrial, if these doctors opine that Farris's condition is the same now as it was in 2019, Defendants have the right to find out the bases for those opinions—with review of the medical records and other information on which the doctors are relying for their retrial opinions. Being deprived of any ability to obtain the doctors' records, Defendants are deprived of their right to conduct cross-examination of the doctors.

Of course, it is theoretically possible that Farris's conditions and disabilities are the same now as in 2019. But it is also possible that her conditions and

disabilities have improved, or that factors other than her surgery with Dr. Rives are influencing her conditions and disabilities. Plaintiffs do not have the right to hide this information. And Defendants have the right to discovery regarding this information **before trial**, to avoid being ambushed and surprised at trial.

Moreover, if the district court's ruling is allowed to stand, Defendants will be completely deprived of access to three years of medical records, and Defendants will not be able to make an offer of proof with the records. As such, if Defendants file an appeal from a judgment after the retrial, the district court's ruling deprives Defendants of their absolute right to establish prejudice from the denial of supplemental discovery. This itself will likely require a second reversal.

Accordingly, the district court's refusal to allow limited reopening of medical discovery, for updated information for the last three years, is grossly unfair and unjust. It is a manifest abuse of discretion that should be remedied with a writ of mandamus.

C. The court manifestly abused its discretion by striking the MILs.

1. The motions were timely.

Instead of filing opposition to the MILs, Plaintiffs filed a motion to strike the MILs, with an order shortening time. Defendants opposed the motion, first arguing that a motion to strike is not the proper vehicle for opposing a MIL. 3P.App.555. Defendants also argued that the ridiculously short time (24 hours) for Defendants'

opposition—established in the order shortening time that the district court issued—was grossly unfair. 3P.App.557.

In any event, timeliness of MILs is governed by EDCR 2.47, which provides that such motions must be filed 45 days before trial. With a September 6, 2022 trial date for the retrial, motions were due by July 22, 2022. Defendants complied with that deadline and filed their motions on July 22, 2022. Yet the district court granted Plaintiffs' motion to strike, determining that the motions were governed by the previous deadline established years earlier before the first trial in 2019.

The district court also relied on the July 7, 2022 scheduling order, which, as indicated above, contained a paragraph entitled "Motions in Limine," and which stated: "The Motion in Limine filing date has not been extended." The district court interpreted this sentence as referring to the filing date years earlier before the first trial, but the sentence was unclear, at best. Defense counsel reasonably interpreted the sentence as meaning that the July 22, 2022 filing deadline has not been extended.

In opposing Plaintiffs' motion to strike, Defendants correctly observed that the sentence containing the clause "has not been extended" in the July 7, 2022 order needed to be read in harmony with the second and third sentences in the same paragraph. The second sentence said, in all bold and underlined font: "**Omnibus Motions [in limine] are not accepted**." (Emphasis in original). If the first sentence truly meant that no MILs would be allowed at all—because such motions would be

time barred by the old 2019 deadline—this second sentence, which prohibited omnibus MILs, would be entirely unnecessary and superfluous.

Likewise, the third sentence in the paragraph was also in bold underlined font: "**Orders shortening time [for MILs] will not be signed except in extreme emergencies**." (Emphasis in original). Again, this sentence would have been entirely superfluous if the first sentence truly meant that no MILs would be allowed at all before the retrial.

An order or judgment's interpretation is a question of law. *Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 570, 170 P.3d 989, 992-93 (2007). The legal effect "must be determined by construing the judgment [or order] as a whole," and in case of ambiguity, the court will employ a reasonable interpretation that brings the language into harmony. *Id*. A court should avoid an interpretation that renders language meaningless or superfluous. *Cf. Karcher Firestopping v. Meadow Valley Contractors, Inc.*, 125 Nev. 111, 113, 204 P.3d 1262, 1263 (2009) (dealing with interpretation of statute).

References to omnibus MILs and orders shortening time in the "Motions in Limine" paragraph of the July 7, 2022 order can only be explained as **allowing** MILs, but prohibiting any extensions of the July 22 deadline before the remand trial. The district court's contrary ruling was clear error.

2. The earlier rulings are not binding

The district court appears to be of the opinion that all her rulings from the first trial are binding now and should be the same (except, presumably, admissibility of the Center evidence). 3P.App.596 ("this is a remand, right, but remember the nature of the remand was not pretrial rulings or inability to get certain witnesses in, et cetera, right."); 3P.App.676-77 (upon remand, prior orders remain in place); 3P.App.681 ("Everything was closed."). This view is wrong as a matter of law.

The earlier appeal in this case raised numerous evidentiary and procedural contentions. As noted above, this court did not reach many of the issues. *Rives*, 138 Nev. Adv. Op. 17 at footnote 8 ("In light of our conclusion [on other issues], we need not address appellants' remanding arguments.").

The law-of-the-case doctrine "only applies to issues previously determined, not to matters left open by the appellate court." *Wheeler Springs, LLC v. Beemon,* 119 Nev. 260, 266, 71 P.3d 1258, 1262 (2003). The doctrine does not apply unless the appellate court actually addressed and decided the issue, explicitly or by necessary implication. *Dictor v. Creative Management Services, LLC*, 126 Nev. 41, 44, 223 P.3d 332, 334 (2010). Where a previous appellate court's order did not mention, let alone address, a party's claim, the appellate court did not decide any rule of law concerning the claim; therefore, the law-of-the-case doctrine does not

apply. *See Las Vegas Sands Corp. v. Suen*, 2016 WL 4076421, at *2 (Nev.; July 22, 2016; No. 64594; unpublished).

While a district court on remand must follow the appellate court's holdings, the district court should otherwise begin with a clean slate and is not bound by other prior evidentiary rulings that were not addressed by the appellate court. *Obrey v. England*, 215 Fed. Appx. 621, 624 (9th Cir., 2006; unpublished). At a new trial after an appellate remand, the new trial provides a clean slate; the parties may thus present evidence differently. *See White v. Stewman*, 932 So.2d 27, 33 (Miss. 2006).

Here, the district court took an extremely limited and unjustified view of the impact of the previous rulings. Defendants believe this court's decision not to address the remaining issues in the appeal was likely because the court believed (or hoped) the issues would not arise again at the retrial. All of the issues, however, **will** necessarily arise again, causing tremendous disruptions at trial for the judge, the jury, the lawyers, and the parties. Further, the district court's refusal to rule on the MILs will foster the need for a second appeal after the retrial, with a good chance for another reversal, another retrial, and yet another (third) appeal.

Under these circumstances, mandamus should issue to compel the district court to determine the issues anew, on a clean slate, without being bound by the prior rulings.

3. The district court should have ruled on the MILs.

By striking the MILs, the district court avoided providing any guidance for the parties on critical evidentiary and procedural issues that will certainly arise at the second trial—issues that will then almost certainly be raised in a second appeal.

Although mandamus is not available to review ordinary discretionary decisions, mandamus **is available** to order a respondent to exercise its discretion, where the respondent has failed to do so. *See Kochendorfer v. Bd. of County Com'rs*, 93 Nev. 419, 422, 566 P.2d 1131, 1133 (1977); *cf. Benson v. Eighth Jud. Dist. Ct.*, 85 Nev. 327, 329, 454 P.2d 892, 893 (1969) (mandamus is proper remedy where district court erroneously decides it has no jurisdiction).

Here, the MILs raised fundamental issues that truly need to be resolved before the trial. Some of the issues are so plainly obvious that they can hardly be opposed (which is probably why Plaintiffs moved to strike the MILs instead of filing oppositions to them). The following are a few examples.

MIL 1 (Center) 2P.App.266

This MIL simply asked the district court to preclude any references or evidence to the Center case. After all, this court's unanimous en banc opinion determined the district court committed reversible error by allowing the jury to be presented with information regarding the Center case. This court held that the evidence was irrelevant **and** it was also unduly prejudicial. This court's ruling is the

law of the case and governs subsequent proceedings. *Wheeler Springs*, 119 Nev. at 266, 71 P.3d at 1262. It is blindingly obvious that this MIL should be granted. Yet the district court struck it and refused to rule on it.

MIL 2 (Reptile tactic) 2P.App.296

This MIL asked the district court to prohibit Plaintiffs' counsel from using the reptile tactic, which is a jury verdict enhancement tactic that courts have widely disapproved, particularly in medical malpractice cases. Plaintiffs' counsel used the tactic in the presence of the jury throughout the first trial. This issue was the first issue raised in Defendants' opening brief in the appeal following the first trial. This court, however, did not rule on the issue.

This MIL, if decided by the district court, would have provided important guidance for both sides, most likely eliminating numerous objections and bench conferences throughout the trial, and perhaps eliminating a ground for appeal after the retrial. Yet the district court struck the MIL, refusing to rule on it.

MIL 3 (collateral source evidence) 2P.App.321

The collateral source rule, which is generally applicable in personal injury cases, is **not applicable** in medical malpractice case. Instead, NRS 42.021 allows admission of collateral source evidence. In the first trial, the district court ruled that the statute was preempted by federal law, because Plaintiffs' insurance policy was a

self-funded ERISA policy. The ruling was challenged on appeal, but this court declined to decide it.

The questions of whether federal preemption applies, and whether Plaintiffs' health insurance policy is a self-funded ERISA policy, were hotly contested at the first trial. This issue involves a large amount of money for the jury's consideration, and the issue will surely arise again at the retrial. But the district court struck the MIL and refused to decide it.

MIL 4 (defense experts) 2P.App.347

This MIL dealt with defense experts who were disclosed as rebuttal experts. The district court refused to allow them to testify as rebuttal experts (or severely limited their testimony), primarily because, in the district court's view, they should have been disclosed earlier as initial experts, and the late disclosure as rebuttal experts had an element of surprise for Plaintiffs.

But now, three years have passed since Defendants disclosed the experts and their reports. Plaintiffs cannot possibly assert any prejudice resulting from the allegedly late rebuttal disclosures that were made before the first trial in 2019.

MIL 5 (hospital records) 2P.App.376

This MIL is discussed in detail earlier in this petition. In short, the district court refused admission of a defense exhibit consisting of stipulated hospital records, all because of a perceived (and incorrect) view of a time limit for defense counsel to

offer the exhibit. This issue was raised but not decided in the appeal. With the judgment reversed and a new trial about to occur, there is absolutely no logical or rational basis for excluding the stipulated records. Yet the district court struck the MIL and refused to decide it.

MIL 6 (Dr. Hurwitz deposition transcript) 2P.App.400

This MIL is also discussed in detail above. The district court thought the transcript should have been lodged with the clerk by defense counsel a few days earlier. The district court therefore precluded defense counsel from using the transcript to impeach the doctor's testimony, despite the fact that the district court herself had previously relied on the transcript at trial, even reading portions of it into the record. With defense counsel having been limited in his cross-examination due to his failure to lodge the transcript a few days before the 2019 trial, there is no logical basis for imposing the same limitation now. Yet the district court struck the MIL.

Other MILs

Other MILs are provided in the appendix with this writ petition. 2P.App.424-3P.App.530. Most of the issues were raised but not decided in the appeal. The issues are critical to a smooth and efficient presentation of the trial—without the need for numerous objections and hearings outside the presence of the jury during the trial.

And resolution of the issues now will go a long way to avoid another appeal. Yet once again, the district court struck the MILs and refused to rule on them.

CONCLUSION

For the foregoing reasons, this court should issue a writ of mandamus requiring the district court to allow supplemental discovery, and requiring the district court to rule on the MILs.[3]

Dated: August 10, 2022

/s/ Robert L. Eisenberg

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ATTORNEYS FOR PETITIONERS

[3] This petition is timely. It challenges the ruling in which the district court struck Defendants' MILs. The ruling was made at a hearing on August 2, 2022. Defendants' attorneys prepared this writ petition as soon as practicable after the oral ruling. This petition also challenges the denial of supplemental discovery. This ruling was made at a hearing on July 14, 2022, but the district court has not yet entered a written order. It was reasonable for Defendants' attorneys to wait for the order. Now that the district court also struck the MILs, Defendants' attorneys decided to combine the issues into one writ petition, which is timely.

VERIFICATION

I, Robert L. Eisenberg, declare as follows:

1. I am an attorney duly licensed to practice in Nevada, and I am counsel for petitioners.

2. I verify that I have read the foregoing petition for writ of mandamus; that the matters stated in the petition are true to my own knowledge, based upon my personal review of the district court record in this case; and I declare under penalty of perjury that the foregoing is true and correct.

Dated: August 10, 2022

/s/ Robert L. Eisenberg

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CERTIFICATE OF COMPLIANCE

1. Pursuant to NRAP 21(e), I hereby certify that this petition complies with NRAP 32(a)(9) and the formatting requirements of NRAP 32(a), including the fact that this petition has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman type style.

2. I further certify that this petition complies with the word-count limitation of NRAP 21(d), because, using the computation guidelines in NRAP 32(a)(7)(C), it contains 6,925 words.

3. Finally, I hereby certify that I have read this petition, 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 petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion regarding matters in the record to be supported by appropriate references to 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 this petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: August 10, 2022

/s/ Robert L. Eisenberg
ROBERT L. EISENBERG (SBN 950)

CERTIFICATE OF SERVICE

I certify that I am an employee of LEMONS, GRUNDY & EISENBERG and that on August 10, 2022, the foregoing *Petition for Writ of Mandamus and Appendix Volumes I, II and III* was filed electronically with the Clerk of the Nevada Supreme Court and sent via Federal Express to the following:

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