

**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. 85143  
Electronically Filed  
Aug 23 2022 12:08 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**EMERGENCY MOTION UNDER NRAP 27(e) FOR STAY**

**PENDING WRIT PROCEEDING**

**(Stay requested as soon as possible; trial date is September 6, 2022)**

Petitioners hereby move for an emergency stay of district court proceedings pending the outcome of the writ petition filed on August 10, 2022. An NRAP 27(e)(3) certificate of counsel is attached to this motion.

**The second trial in this medical malpractice case is set for September 6, 2022.** This court previously reversed a judgment and remanded for a new trial. The writ petition challenges orders denying supplemental discovery for the time period after the first trial in 2019, and an order striking defense motions in limine dealing with numerous issues, most of which were raised but not decided by this court in the previous appeal.

Petitioners moved for a stay in the district court on August 12, 2022, on the grounds advanced in this motion.<sup>1</sup> The district court held a hearing in the morning on August 23, 2022. The district court orally denied the stay. The district court has not yet filed a written order for the denial.

Petitioners are filing this motion at the earliest possible time after the hearing. Also, on August 22, 2022, counsel Eisenberg called the clerk of this court and alerted the clerk's office that this motion would be filed on August 23, 2022, if the district court denied the stay motion at the hearing. And at the hearing on

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<sup>1</sup> The present motion is not a verbatim recitation of the district court motion. But the grounds advanced in the present motion are fundamentally the same as in the district court.

August 23, 2022, Eisenberg notified opposing counsel that this motion would be filed.

### **PROCEDURAL BACKGROUND**

The procedural background of this case is set forth in the writ petition and will be abbreviated here.

This is a medical malpractice case that was tried in 2019, resulting in a judgment against Petitioners for more than \$6 million. Petitioners appealed, raising numerous issues. On March 21, 2022, the en banc court unanimously reversed and remanded for a new trial, because the district court erred by admitting evidence of another malpractice case against Petitioners, involving a different patient. After the remand, the district court scheduled the second trial for September 6, 2022.

Petitioners moved to reopen discovery—based upon the three-year time period since the first trial—to find out Plaintiff Titina Farris’s current medical condition and information, including medical records for the post-2019 time period. The district court denied the motion in its entirety, refusing any discovery whatsoever regarding medical information since the first trial.

Petitioners also filed a series of motions in limine (MILs), to deal with multiple evidentiary and procedural issues that this court did not decide in the reversal opinion. *Rives v. Farris*, 138 Nev. Adv. Op. 17, fn. 8, 506 P.3d 1064,

fn. 8 (2022) (“In light of our conclusion, we need not address appellants’ remaining arguments.”). Plaintiffs moved to strike the MILs as untimely. The district court granted the motion and struck the MILs, essentially ruling, among other things, that the MILs were untimely and that the parties were bound by prior rulings made before or during the first trial.

The district court’s rulings—denying supplemental discovery and striking the MILs—are the targets of the writ petition.

### **ARGUMENT**

Under NRAP 8(a)(1), a party moving for a stay in this court must show that a stay was first requested in the district court. Petitioners satisfied this requirement, as described above.

Under NRAP 8(c), this court will consider the following factors in deciding whether to grant a stay in a writ petition case: (1) whether the object of the petition will be defeated if the stay is denied; (2) whether petitioner will suffer irreparable or serious injury if the stay is denied; (3) whether 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 of the writ petition.

#### **1. The object of the petition will be defeated if the stay is denied.**

One of the objects of the petition is to allow Petitioners to obtain updated medical discovery **before the second trial**, regarding Titina Farris’s medical

conditions and disabilities during the three years since the first trial. It will be impossible to ignore this three-year gap at the second trial.

Even if Titina Farris wants to testify that her status is the same now as it was in 2019 (as she indicated in her opposition to the motion for updated medical information), she is not a doctor. She cannot give medical testimony regarding her diagnoses that establish her current medical conditions. Nor can she testify in a manner that essentially compares her 2019 medical diagnosis with her 2022 medical diagnosis. These are things that only a medical expert can establish through medical testimony. Yet the district court's ruling has the effect of preventing defense counsel from finding out any information whatsoever—before the second trial—regarding any of Farris's medical examinations, testing, or treatment, during the entire three years before the 2022 trial. The jury will be left to rank speculation regarding medical care in the last three years.

Similarly, although Farris might attempt to offer non-expert testimony regarding her current disability (foot-drop), she cannot give expert testimony regarding the **causes** of the disability or the **prognosis**. Defense evidence at the first trial showed that Farris has two causes for her foot-drop: preexisting diabetic neuropathy, and complications from sepsis resulting from the surgery at issue. (Explained in detail in docket No. 80271, Opening Brief at pages 2-3, 41-42, 48, 50-52.) A defense medical expert opined at the first trial that the preexisting

neuropathy accounts for 50 percent of the cause of Farris's foot-drop, with the remaining 50 percent attributed to the sepsis. *Id.* at p. 50. The district court's denial of supplement post-reversal medical discovery precludes Petitioners and the defense medical expert from being able to obtain updated information. This precludes the defense expert from giving accurate opinions about Farris's **current** disabilities, and about whether the preexisting neuropathy might account for more than 50 percent of the causes of **current** disabilities.

A denial of the stay will defeat the object of the writ petition regarding updated medical discovery.

A denial of the stay will also defeat the other object of the petition, regarding the numerous motions in limine that were stricken. Rulings on these motions are critical to the parties being able to understand—before the second trial—what evidence is admissible or inadmissible; what trial procedures are appropriate or inappropriate; and the extent to which prior rulings from the 2019 trial can be revisited. If the trial proceeds without a stay, the writ petition on these issues will be rendered moot.

Moreover, one of the overarching objects of the petition is to avoid a tremendous waste of judicial resources, including wasted precious court resources and wasted time for jurors, and potentially a waste of time for everyone involved in this case if a second appeal is necessitated by avoidable error that will occur in the

September 2022 trial. This object of the petition will be defeated if a stay is denied.

**2. Petitioners will suffer irreparable harm if the stay is denied.**

Analysis of this NRAP 8 factor is similar to the analysis of the first factor. Without a stay, the second trial will proceed without any updated medical discovery, and without rulings on evidentiary and procedural issues that are critical to a fair and efficient second trial. Petitioners will be irreparably harmed, because the point of the petition is to avoid unnecessary delays during trial, and to avoid prejudice at the second trial, likely leading to a second appeal, a second reversal, and a third trial. Indeed, if the trial proceeds without a stay, and if there is a second appeal, this will result in another three or four years that will have passed. Farris's condition will likely have further changed by that time; memories will have faded even more; and there could be an endless circle of litigation and appeals.

**3. Plaintiffs will not suffer irreparable or serious injury if the stay is granted.**

After the remand, this case was set for an expedited retrial within a very short time frame. The new trial date (September 6, 2022) is only slightly more than four months since the district court regained jurisdiction after this court issued the remittitur on April 25, 2022. There is no emergency situation that compels holding the new trial on an expedited basis.

Of course, Plaintiffs **want** to advance their case to trial quickly. But in reality, they will not suffer any irreparable or serious injury if a stay is granted—and if the trial is postponed for only a relatively short time while this court considers the writ petition. Indeed, Plaintiffs will most likely benefit by a decision on the writ petition, because this would eliminate much of any potential for error at the second trial, and much of the potential for a second appeal and a third trial.

**4. Petitioners are likely to prevail on the writ petition.**

No party moving for a stay can be expected to show with absolute certainty that the party will prevail in the appeal or the writ petition. A party moving for a stay “does not always have to show a probability of success on the merits.” *Hansen v. Eighth Judicial Dist. Court*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000). The moving party only needs to “present a substantial case on the merits when a serious legal question is involved.” *Id.*

The petition in the present case presents a unique situation in which a large personal injury judgment was reversed; there has been a three-year gap in time since the first trial; the district court denied all supplemental discovery relating to the plaintiff’s medical status since the first trial; the district court struck (and thereby effectively denied) multiple motions in limine, which raised substantial evidentiary and procedural questions that need to be decided before the second trial; and the district court appears to have the belief that the second trial should be



a mirror image of the first trial, with the exception of evidence relating to the Center case.<sup>2</sup>

As explained in more detail in the writ petition—regarding the issue of how a district court should view a case after a reversal and remand—the district court in the present case relied upon and quoted a Nevada Court of Appeals concurring opinion, which indicated: “Nevada law is silent in this situation.” 3P.App.677. Therefore, this is a precedent-setting issue on which the parties and the judiciary need guidance.

Accordingly, the writ petition is a legitimate good faith effort to obtain rulings from this court on issues that are important to the parties and to the judiciary generally. Petitioners respectfully contend that they are likely to prevail.

### **CONCLUSION**

This is an unusual case. This court’s consideration of the petition will avoid needless additional litigation and almost certain additional appeals. The petition will be moot if a stay is denied and the case proceeds to trial. All four NRAP 8 factors for a stay pending a writ petition weigh in favor of a stay. Therefore, the

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<sup>2</sup> Even as to evidence of the Center case—which was the basis of this court’s reversal and remand after the first trial—the district court’s striking of MIL Number 1 had the practical effect of denying the motion. The motion sought to exclude anything regarding Center and her lawsuit against Dr. Rives. Thus, the district court’s action seems to have left the door open to Plaintiffs’ counsel somehow attempting to get the Center case back in front of the second jury in the second trial. Indeed, Plaintiffs’ recent pretrial filings suggest that Plaintiffs will actually be making such an attempt.

court should grant this motion and stay the district court proceedings until this court can rule on the merits of the petition.

Dated: August 23, 2022

/s/ Robert L. Eisenberg  
ROBERT L. EISENBERG (SBN 950)  
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Reno, Nevada 89519  
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*ATTORNEYS FOR PETITIONERS*

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Case No. 85143

**NRAP 27(e) CERTIFICATE**

Robert Eisenberg, counsel for the movant, hereby certifies and provides the following information regarding his emergency motion.

(A) Counsel for Real Parties in Interest:

Kimball J. Jones, Esq.  
3675 West Cheyenne, Ste. 100  
North Las Vegas, Nevada 89032  
Phone: (702) 333-1111

George F. Hand, Esq.  
3442 North Buffalo Drive  
Las Vegas, Nevada 89129  
Phone: (702) 656-5814

Micah S. Echols, Esq.  
4101 Meadows Lane, Ste. 100  
Las Vegas, Nevada 89107  
Phone: (702) 655-2346

(B) Facts showing the existence and nature of the claimed emergency:

Detailed facts showing the existence and nature of the claimed emergency are provided in the body of the emergency motion for a stay and in the writ petition. Briefly, the first trial was in 2019, and this court reversed in 2022. The second trial is scheduled for September 6, 2022. The district court has denied Petitioners' request for supplemental discovery regarding Plaintiff Titina Farris's medical conditions and disabilities for the three-year time period from the first trial in 2019 until the second trial in 2022. Without a stay of the trial, the writ petition will become moot, because Petitioners will have been deprived of necessary and appropriate discovery, and the new trial will occur without Petitioners having access to this information.

The district court also struck numerous motions in limine relating to evidentiary and procedural issues that were left open by this court's reversal opinion. The writ petition challenges this ruling. Again, the writ petition will be rendered moot if a stay is denied and the trial occurs.

(C) Counsel for Real Parties in Interest were notified that this emergency motion would be filed, as follows:

1. The writ petition itself contains a section entitled “Notice of Potential Emergency Motion for Stay,” which indicates that if the district court denies a stay, “petitioners intend to file an emergency motion in this court to stay the trial pending the outcome of this petition.” (Pet. p. 1.)
2. On August 16, 2022, Petitioners filed a notice in this docket regarding the status of the district court motion for a stay. The notice (which was e-served on opposing counsel) indicated that the district court would be holding a hearing on the stay motion on August 23, 2022, and “Petitioners intend to file an emergency motion the same day” if the district court denies the stay at the hearing.
3. At the hearing on August 23, 2022, I personally informed counsel for Real Parties in Interest that I would be filing this emergency motion.

Counsel for Real Parties in Interest were served with the motion electronically as soon as it was filed with this court.

DATED: August 23, 2022

/s/ Robert L. Eisenberg

**CERTIFICATE OF SERVICE**

I certify that I am an employee of LEMONS, GRUNDY & EISENBERG and that on this date, the foregoing ***Emergency Motion Under NRAP 27(e) for Stay Pending Writ Proceeding*** was filed electronically with the Clerk of the Nevada Supreme Court, and service was made in accordance with the master service list as follows:

George F. Hand  
Hand & Sullivan, LLC  
3442 North Buffalo Drive  
Las Vegas, NV 89129  
*Attorneys for Real Parties in Interest*

Kimball J. Jones  
Jacob G. Leavitt  
Bighorn Law  
3675 West Cheyenne, Ste. 100  
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*Attorneys for Real Parties in Interest*

Micah S. Echols  
Claggett & Sykes Law Firm  
4101 Meadows Lane, Ste. 100  
Las Vegas, NV 89107  
*Attorneys for Real Parties in Interest*

I further certify that I served the within document by placing said document, postage prepaid, in the U.S. mail to the following:

Hon. Joanna Kishner  
Eighth Judicial District Court, Dept. 31  
Regional Justice Center  
200 Lewis Avenue  
Las Vegas, NV 89155  
*Respondent*

Dated: August 23, 2022

/s/ Margie Nevin  
Margie Nevin