

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.

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REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY

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Petitioners hereby reply in support of their emergency motion for a stay.¹

NRAP 8 FACTORS ARE ALL SATISFIED

1. The objects of the petition will be defeated if the stay is denied.

The emergency motion established that the objects of the petition will be defeated if a stay is denied. The first object is to obtain updated medical discovery **before the second trial**, regarding Titina Farris's medical conditions since the first trial. If a stay is denied, this object will be entirely defeated, without question. A denial of the stay will also defeat the second object of the petition, regarding the stricken motions in limine. Rulings on these motions are critical to the parties finding out—**before the second trial**—what evidence is admissible; what trial procedures are appropriate; and the extent to which rulings from the 2019 trial can be revisited. Without a stay, the petition on these issues will be rendered moot.

Another object of the petition is to avoid a tremendous waste of judicial resources if a second appeal is necessitated by avoidable error that will occur in the second trial. This object of the petition will be defeated if a stay is denied.

Plaintiffs' opposition contains a topic heading that mentions the first NRAP 8 factor. (Op. p. 5) The **body** of the opposition, however, completely

¹ Plaintiffs' introduction is filled with irrelevant and unsupported assertions. Due to the page limit, this reply will only point out that the introduction relies largely on proposed draft orders that have never been filed. And the introduction argues about whether Petitioners have a plain, speedy, and adequate remedy with a second appeal. That contention will be discussed later in this reply, regarding the fourth NRAP 8 factor.

ignores any analysis whatsoever regarding whether the objects of the petition will be defeated absent a stay. The body of the opposition seems to be arguing the merits of the petition, without really addressing whether the objects of the petition will be defeated in the absence of a stay. It is hardly debatable that the objects of the petition **will** become moot and will be entirely defeated without a stay.

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

Without a stay, the new trial will proceed without Petitioners being allowed 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, a third trial, and a third appeal.

Plaintiffs' opposition primarily argues that Petitioners have a plain, speedy, and adequate remedy at law via an appeal from the final judgment. This argument, however, relates to the fourth NRAP 8 factor. In any event, the petition more than adequately shows why an appeal is not a plain, speedy, and adequate remedy, and why writ relief is appropriate in this case, in light of the precedent-setting issues of statewide importance raised in the petition (such as the extent to which rulings from the first trial can be revisited at the retrial).

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

As demonstrated in the emergency motion, this case was set for an expedited retrial within a very short time frame after the remittitur. The new trial date (September 6, 2022) is only slightly more than four months after the remittitur. There is no emergency situation compelling an expedited new trial.

NRAP 8(c) requires a showing that Plaintiffs will suffer “irreparable” or “serious” harm from a stay. Plaintiffs have a desire to move their case to trial quickly. But 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.

Plaintiffs’ opposition makes the bald assertion that defense counsel has “vowed” to appeal from any verdict in the retrial, “regardless of the issues.” (Op. p. 8). This assertion is wholly unsupported by any actual evidence. Regardless, Petitioners’ attorneys hereby assure this court they will only appeal again if they honestly believe the district court committed reversible error at the second trial. In the absence of a stay and a writ, the likelihood of reversible error at the second trial is highly likely.

The opposition establishes Plaintiffs’ desire to avoid a delay, citing the expression that “justice delayed is justice denied.” (Opp. at p. 9). But sometimes a reasonable delay in a trial is necessary to **avoid** a denial of justice—which is

precisely the case here, and which is the case virtually every time this court entertains and grants a writ petition involving a pretrial issue.

Close examination of Plaintiffs' opposition fails to reveal any cogent argument establishing "irreparable" or "serious" prejudice from a reasonably short delay of the trial pending this court's consideration of the petition.

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

A party moving for a stay only needs to "present a substantial case on the merits when a serious legal question is involved." *Hansen v. Eighth Judicial Dist. Court*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000). Petitioners have made such a showing here.

Plaintiffs argue that a second appeal after the second trial will be a plain, speedy, and adequate remedy. A reversal after a second appeal will result in a third trial and potentially a third appeal. This is thoroughly discussed in the petition and earlier in this reply.

The petition presents a unique situation on which there is no significant Nevada precedent and on which the bench and bar need guidance. Reversals and remands for new trials are not uncommon. The bench and bar would benefit tremendously by an opinion providing guidance regarding the extent to which prior rulings before and during the first trial remain binding in a remand trial. *See* NRCP 54 (judgments can be modified at any time before a final judgment).

Pages 9-10 of Plaintiffs' opposition criticize the Petition's reference to *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). The opposition contends *DeChambeau* is inapposite because it was not "central" to the district court's decision. (Opp. pp. 9-10) The *DeChambeau* concurring opinion, with its recognition of the lack of Nevada law on an important issue, is not something that either of the parties cited in their motion papers. It is a citation that the district court herself raised and relied upon at the hearing. There is no basis for Plaintiffs' argument that the concurring opinion's observation regarding the lack of Nevada precedent was unimportant to the district court and is inapposite.

CONCLUSION

Plaintiffs' opposition fails to provide cogent arguments against application of the four NRAP 8 factors. For the reasons in the emergency motion and in this reply, a stay should be ordered pending the limited time for this court's resolution of the writ petition.

August 25, 2022

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

CERTIFICATE OF SERVICE

I certify that I am an employee of LEMONS, GRUNDY & EISENBERG and that on this date, the foregoing was filed electronically with the Clerk of the Nevada Supreme Court, and service was made in accordance with the master service list as follows:

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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
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Respondent

Dated: August 25, 2022

/s/ Margie Nevin
Margie Nevin