

IN THE SUPREME COURT OF THE STATE OF NEVADA

Troy Moats,

Petitioner,

vs.

**The Eighth Judicial District Court
of the State of Nevada ex rel the
County of Clark and the
Honorable Judge Adriana
Escobar,**

Respondents.

Troy Burgess,

Real Party in Interest.

Supreme Court No.:

Electronically Filed
Oct 09 2020 01:39 p.m.
District Court No. 18-01645-00
Elizabeth A. Brown
Clerk of Supreme Court

APPENDIX, VOLUME I

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1 **ORDR**

2 **EIGHTH JUDICIAL DISTRICT COURT**
3 **CLARK COUNTY, NEVADA**
4

5 TROY MOATS, an individual,
6 Plaintiff(s),

CASE NO.: A-18-769459-C
DEPT. NO.: XIV

7 vs.

8 TROY BURGESS, an individual; DOES I
9 through X, inclusive and ROE Business
10 Entities I through X, inclusive,
11 Defendant(s).

**ORDER ON DEFENDANT BURGESS'
OBJECTION TO THE DISCOVERY
COMMISSIONER'S REPORT AND
RECOMMENDATIONS AND
REQUEST FOR HEARING ON
ORDER SHORTENING TIME**

12 Defendant objected to the Discovery Commissioner's Report and
13 Recommendations regarding the scheduled NRCP 35 psychological examination of
14 Plaintiff. Plaintiff timely replied.

15 This matter was heard before the Honorable Adriana Escobar on September
16 29, 2020, with Thomas E. Winner, Esq. and Caitlin J. Lorelli, Esq. present for
17 Defendant Burgess and Adam Ganz, Esq. present for Plaintiff. In accordance with
18 the pleadings on file and all parties having been heard during oral argument, this
19 Court sustains Defendant's objection, and enters the following findings and order:

20 **BACKGROUND**

21 Plaintiff alleges a traumatic brain injury in the underlying personal injury action.
22 This court compelled an NRCP 35 psychological examination with Lewis M. Etcoff,
23 Ph.D., A.B.N. (hereinafter Dr. Etcoff), for October 12, 2020 and October 13, 2020.
24 The parties stipulated to 29 parameters for the examination, but disagreed on two: (1)
25 whether Plaintiff should be allowed to bring a third-party observer into the
26 examination, and (2) whether Plaintiff can require the examination be audio recorded.
27

1 A hearing on the two outstanding issues was held before the Discovery
2 Commissioner on July 31, 2020. The Discovery Commissioner found that NRS
3 52.380 controls over NRCP 35 regarding the psychological examination. For that
4 reason, the Discovery Commissioner recommended permitting a third-party observer
5 and audio recording of the oral examination portion of the NRCP 35 psychological
6 examination. In the Discovery Commissioner's Report and Recommendations, "[t]he
7 Discovery Commissioner acknowledged there is a clear conflict between NRS 52.380
8 and NRCP 35, and this conflict need be addressed by a higher court, giving
9 deference to NRS 52.380 as it affects the substantive right inherent in a physical
10 examination."

11 Defendant timely objected, contending NRCP 35, as adopted by the Nevada
12 Supreme Court, is in conflict with NRS 52.380, and that under the Nevada
13 Constitution and separation of powers doctrine, NRCP 35 should govern. Defendant
14 argued that in applying NRCP 35, Plaintiff has failed to show good cause permitting
15 the Court, in its discretion, to allow a third-party observer or an audio recording of the
16 NRCP 35 psychological examination. Plaintiff contends NRS 52.380 is applicable,
17 and under this statute, he is permitted to have a third-party observer and an audio
18 recording of the oral portion of the NRCP 35 psychological examination.

19 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

20 The Court makes the following findings of fact and conclusions of law:

21 Under NRCP 35, once the court has ordered an NRCP 35 examination, "[o]n
22 request of a party or the examiner, the court **may, for good cause shown**, require as
23 a condition of the examination that the examination be audio recorded." NRCP
24 35(a)(3) (emphasis added). Additionally, "[t]he party against whom an examination is
25 sought may request as a condition of the examination to have an observer present at
26 the examination." NRCP 35(a)(4). However, "[t]he party may not have any observer
27 present for a neuropsychological, psychological, or psychiatric examination, **unless**

1 **the court orders otherwise for good cause shown.”** NRCp 35(a)(4)(B) (emphasis
2 added).

3 In contrast, NRS 52.380(1) provides that “[a]n observer may attend an
4 examination but shall not participate in or disrupt the examination.” There are no
5 requirements that good cause exist before an observer is permitted under NRS
6 52.380.

7 NRS 2.120 recognizes that the Nevada Supreme Court is responsible for
8 adopting rules for civil practice. Specifically, the Nevada Supreme Court “shall
9 regulate original and appellate civil practice and procedure, including, without
10 limitation, pleadings, motions, writs, notices and forms of process, in judicial
11 proceedings in all courts of the State, for the purpose of simplifying the same and of
12 promoting the speedy determination of litigation upon its merit.” NRS 2.120(2).

13 Additionally, “[t]he judiciary is entrusted with ‘rule-making and other incidental
14 powers reasonable and necessary to carry out the duties required for the
15 administration of justice’ and ‘to economically and fairly manage litigation.’” Berkson
16 v. LePome, 126 Nev. 492, 499 (2010) (citations omitted). The legislature may not
17 enact a procedural statute that conflicts with a pre-existing procedural rule, without
18 violating the doctrine of separation of powers, and such a statute is of no effect. Id.;
19 State v. Connery, 99 Nev. 342, 345 (1983).

20 Here, the Court notes that NRCp 35 is a procedural rule. And although the
21 Legislature may not enact a procedural statute that conflicts with a preexisting
22 procedural rule, NRS 52.380 is procedural in nature. As set forth above, the Nevada
23 Supreme Court has the independent ability to draft and promulgate its own
24 procedural rules and has enacted a comprehensive set of rules dealing with
25 discovery, as set forth in the Nevada Rules of Civil Procedure, which includes NRCp
26 35. Thus, in accordance with the Nevada Constitution and separation of powers
27 doctrine, the Court finds that NRCp 35 is controlling on the issue of whether a third-

1 party observer and/or an audio recording is permissible during an NRCP 35
2 psychological examination. The Court further finds that NRS 52.380 is procedural and
3 does not affect a substantive right as the Discovery Commissioner contends.

4 Persuasive authority also supports this Court's ruling that NRS 52.380 does
5 not apply over NRCP 35 in governing an NRCP 35 psychological examination.
6 Freteluco v. Smith's Food and Drug Centers, Inc., Case No. 2: 19-cv-00759-JCM-
7 EJY, 2020 WL 3504456 (D. Nev. June 29, 2020), presented a similar issue. In
8 Freteluco, the district court ordered a neuropsychological examination of the plaintiff
9 pursuant to FRCP 35.¹ Id. at *1. Pursuant to NRS 52.380, the plaintiff sought to
10 record the examination and also have an observer present. Id. The issue was
11 whether NRS 52.380 controlled over FRCP 35 to govern the examination. Id. at *2.
12 While NRS 52.380 permits the attendance of an observer, under FRCP 35, the
13 method of the examination is within the district court's discretion. The district court
14 acknowledged that federal courts have adopted the majority rule that excludes third
15 parties from observing medical and psychiatric examinations unless good cause
16 exists. Id. at *4. Because federal courts sitting in diversity must apply the substantive
17 law of the forum state and federal procedural law, the district court applied the Erie
18 Doctrine to determine whether NRS 52.380 was substantive such that it controlled
19 the issue of permitting an observer and audio recording. Id. at *3. The Freteluco
20 Court determined that NRS 52.380 was procedural in nature, and thus, FRCP 35
21 governed. Id. at *3-4.

22 In finding that NRCP 35 controls, this Court further finds that Plaintiff has failed
23 to establish good cause to permit the presence of a third-party observer or an audio
24 recording of the upcoming NRCP 35 examination. Plaintiff's fear of altered test results
25 in this case, based on his belief that other examiners in separate cases may have
26

27 ¹The Court acknowledges that NRCP 35 does not mirror FRCP 35, but notes that these
differences have no impact on the persuasive value of Freteluco.

1 altered examination results, is not sufficient cause to permit a third-party observer or
2 an audio recording of the examination under the facts in this case. Specifically, there
3 is no indication that Plaintiff's fear is justified as to Dr. Etkoff. This Court further finds
4 that Plaintiff's claims of social anxiety and nervousness, as presented to this Court, is
5 not sufficient cause. Plaintiff has provided no legal authority or persuasive support for
6 his contention that anxiety and nervousness constitutes good cause. Regardless, the
7 Court does not find, based on the argument and pleadings before it, that anxiety and
8 nervousness establishes good cause for the presence of an observer or audio
9 recording.

10 It is important to note that there are concerns at this time for abiding by social
11 distancing requirements amidst the Covid-19 pandemic and the limited space
12 available to Dr. Etkoff in his office to perform his psychological/neuropsychological
13 examinations.

14 **ORDER**

15 The Court, having reviewed the Discovery Commissioner's Report and
16 Recommendations entered on September 8, 2020, and, after reviewing Defendant's
17 objections thereto, as well as the Plaintiff's reply, in accordance with the pleadings
18 and the arguments of counsel, and good cause appearing, **IT IS HEREBY**
19 **ORDERED** the objection is **SUSTAINED** and the Court orders as follows:

20 **IT IS FURTHER ORDERED** that NRCP 35, and not NRS 52.380, governs
21 whether a third-party observer and/or an audio recording of an NRCP 35
22 psychological and/or neuropsychological examination is permitted.

23 **IT IS FURTHER ORDERED** that Plaintiff is compelled to appear for the NRCP
24 35 psychological and/or neuropsychological examination with Dr. Etkoff on October
25 12, 2020 and October 13, 2020 as previously scheduled, and as the court previously
26 compelled.

27

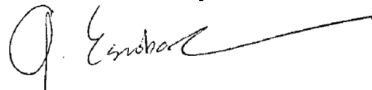
1 **IT IS FURTHER ORDERED** that Plaintiff may not have a third-party observer
2 present at the NRCP 35 psychological and/or neuropsychological examination with
3 Dr. Etcoff on October 12, 2020 and October 13, 2020.

4 **IT IS FURTHER ORDERED** that Plaintiff may not audio record the NRCP 35
5 psychological and/or neuropsychological examination with Dr. Etcoff on October 12,
6 2020 and October 13, 2020.

7 **IT IS SO ORDERED.**

A-18-789459-C

Dated this 7th day of October, 2020



ADRIANA ESCOBAR
DISTRICT COURT JUDGE

10B 08D 4DBE 8EDC
Adriana Escobar
District Court Judge

1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 Troy Moats, Plaintiff(s)

CASE NO: A-18-769459-C

7 vs.

DEPT. NO. Department 14

8 Troy Burgess, Defendant(s)

9
10 **AUTOMATED CERTIFICATE OF SERVICE**

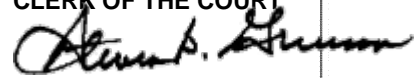
11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Order was served via the court's electronic eFile system to all
13 recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 10/7/2020

15 Matt Pfau	matt@mattpfaulaw.com
16 Ronald Pehr	rpehr@geico.com
17 James Smith	jamesmith@aol.com
18 Stella Taylor	stella@mattpfaulaw.com
19 AWS E-Services	eservices@winnerfirm.com
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ORDR

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Attorneys for Plaintiff

Kalena Davis

DISTRICT COURT

CLARK COUNTY, NEVADA

KALENA DAVIS, an individual

Plaintiff,

vs.

ADAM DERON BRIDEWELL, an
individual; LYFT, INC., a foreign
corporation; THE HERTZ
CORPORATION, a foreign corporation;
DOE OWNERS I through X; and ROE
LEGAL ENTITIES I through X, inclusive,

Defendants.

CASE NO.: A-18-777455-C

DEPT. NO.: XIII

ORDER

**RE: DISCOVERY COMMISSIONER'S
REPORT AND RECOMMENDATIONS**

Date of Hearing: April 9, 2020

Time of Hearing: 10:00 a.m.

The Court, having reviewed the above Report and Recommendations prepared by the
Discovery Commissioner and,

_____ No timely objection having been filed,

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April 9, 2020, at 10:00 a.m.

✓

After reviewing the objections to the Report and Recommendations and good cause appearing,

✓

IT IS HEREBY ORDERED the Discovery Commissioner's Report and Recommendations are affirmed and adopted.

IT IS HEREBY ORDERED the Discovery Commissioner's Report and Recommendations are affirmed and adopted as modified in the following manner:

(attached hereto).

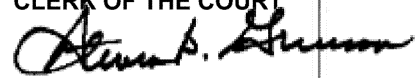
IT IS HEREBY ORDERED this matter is remanded to the Discovery Commissioner for reconsideration or further action.

IT IS HEREBY ORDERED that a hearing on the Discovery Commissioner's Report is set for _____, 2020, at _____ a.m./p.m.

DATED this 18 day of September, 2020.



DISTRICT JUDGE



DCRR

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DISTRICT COURT

CLARK COUNTY, NEVADA

KALENA DAVIS, an individual
Plaintiff,

vs.

ADAM DERON BRIDEWELL, an
individual; LYFT, INC., a foreign
corporation; THE HERTZ
CORPORATION, a foreign corporation;
DOE OWNERS I through X; and ROE
LEGAL ENTITIES I through X, inclusive,

Defendants.

CASE NO.: A-18-777455-C

DEPT. NO.: XIII

**DISCOVERY COMMISSIONER'S
REPORT AND RECOMMENDATIONS**

Date of Hearing: April 9, 2020

Time of Hearing: 10:00 a.m.

APPEARANCES:

Attorney for Plaintiff Kalena Davis

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Clear Counsel Law Group

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Justin D. Gourley, Esq.
Harper Selim

*Attorney for Defendants Lyft, Inc.
and The Hertz Corporation*

Jason G. Revzin Esq. and Blake A. Doerr, Esq.
Lewis Brisbois Bisgaard & Smith, LLP

I. FINDINGS

1. During the Discovery Commissioner's February 13, 2020, Hearing regarding Defendants' Motion to Compel Rule 35 Examinations, the Commissioner requested that the parties provide additional briefing regarding the interrelationship and conflicts between NRCP 35 and NRS Section 52.380.

2. The parties provided such additional briefing, which came before the Commissioner for Hearing on April 9, 2020. The Commissioner makes the following Report of its findings of fact and conclusions of law, and the subsequent Recommendation to the District Court:

3. Conflicts between Nevada Rules of Civil Procedure 35 (the "Rule") and NRS Section 52.380 (the "Statute") are as follows:

- (a) whether a party's attorney, or a representative of that attorney, may serve as an observer during the examination (which is barred by the Rule but permitted by the Statute);
- (b) whether a party may have an observer during a neuropsychological, psychological, or psychiatric examination without making a showing of "good cause" (which showing is also required by the Rule but not required by the Statute); and
- (c) whether the observer may record the examination without making a showing of "good cause" (which showing is required by the Rule but not required by the Statute).

4. Each of these conflicts is irreconcilable, such that it is not possible to construe the Rule and the Statute in harmony. If the Rule is followed on any of these points, the Statute by definition is not followed. If the Statute is followed on any of these points, the Rule by definition is not followed.

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April 9, 2020, at 10:00 a.m.

5. Under Nevada law, the judiciary has the exclusive prerogative to make rules governing its own procedures, while the Legislature has the exclusive prerogative to enact statutes governing the substance of the law. *State v. Connery*, 99 Nev. 342, 345 (1983)

6. This distinction is predicated upon the “separation of powers” doctrine, which is specifically recognized in the Nevada State Constitution. *Berkson v. LePome*, 126 Nev. 492, 498 (2010) (citing Nev. Const. art. 3, § 1(1)).

7. Under Nevada law, a statute is presumed constitutionally valid until its invalidity has been “clearly established.” *List v. Whisler*, 99 Nev. 133, 137-38 (1983). “In case of doubt, every possible presumption will be made in favor of the constitutionality of a statute, and courts will interfere only when the Constitution is clearly violated.” *Id.* This “presumption of constitutional validity places upon those attacking a statute the burden of making a clear showing that the statute is unconstitutional.” *Id.* (emphasis added).

8. A single question is presented here: whether the Statute is procedural or substantive. If the Statute is substantive, the Statute governs where a conflict arises. If the Statute is procedural, it is unconstitutional (and therefore superseded by the Rule) to the extent that the Statute is both procedural and in conflict with the Rule.

9. A substantive standard is one that “creates duties, rights and obligations,” while a procedural standard specifies how those duties, rights, and obligations should be enforced. *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1811 (2019).

10. The Statute creates substantive rights, including the right of the examinee to have his or her attorney or that attorney’s representative serve as the observer, the right to have the observer record the examination without making a showing of “good cause,” and the right to have an observer present for a neuropsychological, psychological, or psychiatric examination without making a showing of “good cause.”

//

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11. Because the Statute creates substantive rights, it is substantive rather than procedural.

12. Because the Statute is substantive, it governs and supersedes the Rule where the two conflict.

13. An individual submitting to an examination under NRCP 35 has the following substantive rights, pursuant to NRS Section 52.380: to have his or her attorney or that attorney's representative serve as the observer; have the observer record the examination without making a showing of "good cause"; and to have an observer present for a neuropsychological, psychological, or psychiatric examination without making a showing of "good cause."

II. RECOMMENDATIONS

IT IS HEREBY RECOMMENDED that, during any NRCP 35 examination of Plaintiff Kalena Davis ~~(or of any other individual in this matter)~~ ^{ED} in this matter ordered by the Discovery Commissioner or the District Judge, the individual submitting to the examination be permitted to have an observer present, without regard to the nature of the examination (e.g., neuropsychological, psychological, or psychiatric, and without any requirement of a showing of "good cause" to the Court.

IT IS FURTHER RECOMMENDED that, during any NRCP 35 examination of Plaintiff Kalena Davis ~~(or of any other individual)~~ ^{ED} in this matter ordered by the Discovery Commissioner or the District Judge, the observer attending the examination may be any person of the examinee's choosing, including but not limited to the examinee's attorney or that attorney's representative.

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Davis v. Bridewell, et al.

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April 9, 2020, at 10:00 a.m.

IT IS FURTHER RECOMMENDED that, during any NRCP 35 examination of Plaintiff Kalena Davis ~~(or of any other individual in this matter)~~ in this matter ordered by the Discovery Commissioner or the District Judge, the observer attending the examination may make an audio or stenographic recording of the examination without any requirement of a showing of "good cause" to the Court.

DATED this 14th day of August, 2020.



DISCOVERY COMMISSIONER

Respectfully submitted by:

Approved as to Form and Content:

CLEAR COUNSEL LAW GROUP

HARPER | SELIM

/s/ Jared R. Richards

/s/ Justin Gourley

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Davis v. Bridewell, et al.
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April 9, 2020, at 10:00 a.m.

NOTICE

Pursuant to NRCP 16.3(c)(2), you are hereby notified that within fourteen (14) calendar days after being served with a report, any party may file and serve written objections to the recommendations. Written authorities may be filed with objections but are not mandatory. If written authorities are filed, any other party may file and serve responding authorities within seven (7) days after being served with objections.

Objection time will expire on September 1, 2020.

A copy of the foregoing Discovery Commissioner's Report was:

_____ Mailed to Defendants at the following addresses on the _____ day of _____ 2020.

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And The Hertz Corporation

✓ Electronically filed and served counsel on the 18 day of August 2020,
pursuant to N.E.F.C.R. Rule 9.

DATED this _____ day of _____, 2020.

By: Natilie Simonard
COMMISSIONER DESIGNEE