

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
Adrianna Escobar,

Respondents.

Troy Burgess,

Real Party in Interest.

Supreme Court No. 81912

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PETITION FOR A WRIT OF MANDAMUS OR OTHER EXTRAORDINARY
RELIEF

REAL PARTY IN INTEREST'S ANSWERING BRIEF

Prepared By
Thomas E. Winner
Nevada Bar No. 5168
Caitlin J. Lorelli
Nevada Bar No. 14571
Andrew D. Smith
Nevada Bar No. 8890
WINNER & SHERROD
1117 S. Rancho Dr.
Las Vegas, NV 89102
Tel: (702) 243-7000
For the Real Party in Interest

NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are the persons or entities as described in NRAP 26.1(a), and must be disclosed:

Real Party in Interest TROY BURGESS is a party to this action in his individual capacity.

The Real Party in Interest is represented before the district court by Thomas E. Winner and Caitlin J. Lorelli of the law firm Winner & Sherrod. Andrew D. Smith of the same firm joined as counsel for the Real Party in Interest in this writ proceeding.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 6th day of March, 2021.

WINNER & SHERROD

By: /s/ Andrew D. Smith
Thomas E. Winner
Nevada Bar No. 5168
Andrew D. Smith
Nevada Bar No. 8890
1117 South Rancho Drive
Las Vegas, Nevada 89102
Tel: (702) 243-7000
Attorneys for the Respondent

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I.

INTRODUCTION

This matter is before the Supreme Court for clarification of the procedural rules that govern the taking of Rule 35 psychological examinations during civil discovery.

The parties disagree as to whether Nevada courts should apply the provisions of NRCP 35 that (1) preclude an observer from attending a Rule 35 psychological examination without first showing good cause therefor, and (2) require the examinee to show good cause before making an audio recording of the examination. The District Court concluded that NRCP 35 governs, a position supported by this Respondent.

The District Court Judge correctly determined that NRCP 35 governs the procedures for a Rule 35 psychological examination.

II.

PRELIMINARY STATEMENT OF THE CASE AND ISSUES

The Nevada Constitution reserves for the Judicial Branch the power to govern its own procedures. NRS 2.120, *see also* State v. Connery, 99 Nev. 342, 345, 661 P.2d 1298, 1300 (1983) (“The judiciary has inherent power to govern its own procedures ... the authority of the judiciary to promulgate procedural rules is independent of legislative power, and may not be diminished or compromised by

the legislature.”), *citing* Goldberg v. District Court, 93 Nev. 614, 572 P.2d 521 (1977).

The Legislative Branch is given the power to make substantive law. When inconsistencies between the Judiciary’s rules and the Legislature’s acts arise, Nevada courts will try to harmonize them to give effect to both. Albios v. Horizon Cmtys., Inc., 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006). But where rules and statutes irreconcilably conflict, the separation of powers doctrine mandates that the rule made by the branch with proper Constitutional authority prevails. State v. Connery, 99 Nev. at 345 (“[Judicial] rules may not conflict with the state constitution or abridge, enlarge or modify any substantive right ... We have held that the legislature may not enact a procedural statute that conflicts with a pre-existing procedural rule, without violating the doctrine of separation of powers., and that such a statute is of no effect.”).

The Nevada Supreme Court adopted revised Rules of Civil Procedure effective March 1, 2019. This included changes to NRCP 35, which sets procedures for the collection of evidence via medical and psychological examinations. The Nevada Supreme Court approved these revisions after an extensive process that considered the input and concerns of various stakeholders. *See* Supreme Court of Nevada Administrative Docket ADKT 0522, decided December 31, 2018, *In re Creating a Committee to Update and Revise the Nevada*

Rules of Civil Procedure (“WHEREAS, this court has solicited public comment on the petition, received written public comment, and held a public hearing ...; and WHEREAS, this court has determined that the rule changes are warranted...”).

The amicus party in this matter, the Nevada Justice Association, participated in that rule-making process.¹ Some, but not all, of the NJA’s recommendations were implemented in the revised NRCP 35.

The NJA then lobbied the 2019 Nevada Legislature to enact those provisions that the Nevada Judiciary had declined to incorporate into NRCP 35. *See* the Amicus Party’s brief, pages 4-5 and 9-11. NRS 52.380 was the result.

When compared to NRCP 35, NRS 52.380 contains alternate, inconsistent and competing procedures for the collection of medical and psychological evidence of a litigant’s condition.

At least three conflicting provisions are relevant to this case:

(1)NRCP 35 precludes observers from attending Rule 35 psychological examinations without first showing good cause, whereas NRS 52.380 permits them without qualification.

¹ For example, page 10 of the Amicus Party’s brief mentions that George T. Bochanis, representing the NJA, testified to the Nevada Legislature in support of A.B. 285, which became NRS 52.380. Mr. Bochanis was also a member of the Nevada Rules of Civil Procedure Committee that considered rule changes, and specifically, a member of the Discovery Subcommittee, which was tasked with considering revisions to NRCP 35. *See* the Supreme Court of Nevada’s Administrative Office of the Courts, Subcommittee’s web page, https://nvcourts.gov/AOC/Committees_and_Commissions/NRCP/Subcommittees/, accessed March 3, 2021.

(2) NRCP 35 prohibits attorneys, law firm employees, and employees of the examinee from serving as observers. NRS 52.380 explicitly authorizes the examinee's attorney to sit in on the examination and to stop the examination.

(3) NRCP 35 requires examinees to show good cause before being permitted to make audio recordings of the exam, whereas NRS 52.380 permits audio and/or stenographic recordings without qualification.

The conflict between those rules was brought to the District Court's attention during discovery in this case. RA 1-21. The Petitioner, plaintiff in a personal injury case, claimed to have suffered a brain injury. RA 7. The Petitioner sued the Respondent, the defendant in the case below, for compensation under Nevada's tort laws. RA 7. The Respondent moved during discovery for permission to collect evidence of the existence and, if applicable, scope of the alleged brain injury via a Rule 35 psychological or neuropsychological examination. RA 8.

The Respondent's right to take the examination was not disputed. RA 9. Rather, the Petitioner wanted to bring an observer and make a recording of the psychological examination. RA 9. The Respondent objected, arguing that pursuant to NRCP 35, no good cause existed to bring an observer or make a recording, and that the presence of an observer and/or recorder would violate the examiner's professional duties and would actually interfere with the collection of accurate evidence. RA 1-21, particularly page 8.

The District Court Judge correctly ruled that NRCP 35 controlled over conflicting provisions of NRS 52.380. AA 3-8. She also found that the Petitioner had not shown good cause to deviate from the standard procedures of NRCP 35 regarding psychological exams. AA 6. The District Court entered an order requiring the exam to go forward in clinical privacy, without an observer or recording. AA 7-8.

Petitioner has petitioned for a writ ordering the District Court to give the procedures of NRS 52.380 priority over NRCP 35. The petition must be denied because the District Court correctly applied the law when making its decision found in AA 1-8.

This Court's decision will likely turn on whether the manner in which evidence is collected is a procedural matter or a substantive matter.

NRCP 35 and NRS 52.380 are, fundamentally, both rules that control the manner in which evidence is collected in support of, or defense against, a substantive claim. The evidence being collected is data on a litigant's physical or mental condition. These are procedural rules.

The Nevada Judicial Branch has the power to set procedures for collecting evidence. The Nevada Legislative Branch unlawfully exceeded its authority when it attempted to set contradictory procedures and requirements on the topic.

Contrary to arguments made in support of the petition, the Nevada Legislature did not create substantive rights in NRS 52.380. It attempted to modify an existing rule of civil procedure. A procedural matter is not transformed into a substantive one just because lobbyists used the word “substantive” in advocating for passage of a bill. This court should look to the function of NRS 52.380 to determine whether the statute infringes on the Judiciary’s inherent rule-making power.

The amicus party’s brief argues that Rule 35 exams are adversarial procedures. The Respondent strongly disagrees. The majority of courts follow the better-reasoned rule that medical and mental health professionals should follow their ethical and professional responsibilities by collecting data in a scientific and unbiased manner, and that they should be treated as impartial professionals unless a specific reason exists to do otherwise. But ultimately this is red herring – the answer to that question not does not transform the rules governing exams from procedural to substantive.

The District Court’s decision should be upheld, and the writ petition denied.

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III.

COUNTER-STATEMENT OF THE ISSUES PRESENTED

Did the District Court properly exclude a third-party observer and preclude the making of audio recordings when ordering Petitioner to appear for a Rule 35 psychological exam?

IV.

STATEMENT OF RELEVANT FACTS

The lawsuit arises from an auto-pedestrian accident that occurred on November 8, 2016. RA 7. The Petitioner claims to have suffered a brain injury. RA 7. That claim is disputed. Petitioner sued Respondent for damages under causes of action of negligence and negligence *per se*. RA 7.

A psychological or neuropsychological exam may yield relevant evidence where a brain injury has been claimed. The Respondent therefore sought to collect this evidence pursuant to NRCP 35. RA 8.

The matter was brought to the District Court Judge after initially being heard by the Discovery Commissioner. The District Court concluded that the method by which a neuropsychological evaluation is performed under NRCP 35 is procedural in nature and that NRCP 35 controls over NRS 52.380. AA 1-8. An order memorializing that decision was entered on September 29, 2020. AA 1-8. The District Court found that the Petitioner had not shown good cause to bring an

observer or make a recording, and thus ordered no observer may attend and no recording may be made. AA 6-8. This is consistent with the express provisions of NRC 35(a)(4)(A)(i).

V.

LEGAL ARGUMENT

A. Standard of Review.

Article 6, Section 4 of the Nevada Constitution gives the Nevada Supreme Court and Court of Appeals original jurisdiction to issue writs of mandamus. The Court is more likely to act upon a writ petition when it believes that an important issue of law needs clarification. Smith v. Eighth Judicial Dist. Court, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1977).

“The construction of statutes is a question of law, which we review de novo.” Cromer v. Wilson, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010). The writ petition asks the Supreme Court to interpret the validity of a statute. The question should be reviewed de novo.

The District Court’s finding that the Petitioner failed to show good cause to have an observer present or to record the exam is reviewed for abuse of discretion. Club Vista Fin. Servs. v. Eighth Judicial Dist. Court, 128 Nev. 224, 228 276 P.3d 246, 249 (2012).

B. NRCP 35 and NRS 52.380 Contain Conflicting Procedures for Taking Psychological Exams in Civil Discovery.

1. The Text of the Conflicting Rule and Statute.

The current version of NRCP 35 took effect on March 1, 2019. It states, in relevant part,

Rule 35. Physical and Mental Examinations.

(a) *Order for Examination.*

(1) ***In General.*** The court where the action is pending may order a party whose mental or physical condition – including blood group – is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. ...

...

(4) ***Observers at the Examination.*** The party against whom an examination is sought may request as a condition of the examination to have an observer present at the examination. When making the request, the party must identify the observer and state his or her relationship to the party being examined. The observer may not be the party's attorney or anyone employed by the party or the party's attorney.

(A) The party may have one observer present for the examination, unless:

(i) the examination is a neuropsychological, psychological or psychiatric examination; or

(ii) the court orders otherwise for good cause shown.

(B) The party may not have any observer present for a neuropsychological, psychological, or psychiatric examination, unless the court orders otherwise for good cause shown.

NRS 52.380 went into effect October 1, 2019, presumably in an attempt by dissatisfied special interest groups to override NRCP 35. It states, in relevant part,

52.380. Attendance by observer.

1. An observer may attend an examination but shall not participate in or disrupt the examination.

2. The observer attending the examination pursuant to subsection 1 may be:
 - (a) An attorney of an examinee or party producing the examinee; or
 - (b) A designated representative of the attorney, if:
 - (1) The attorney of the examinee or party producing the examinee, in writing, authorizes the designated representative to act on behalf of the attorney during the examination; and
 - (2) The designated representative presents the authorization to the examiner before the commencement of the examination.
3. The observer attending the examination pursuant to subsection 1 may make an audio or stenographic recording of the examination.
- ...
7. As used in this section:
 - (a) “Examination” means a mental or physical examination ordered by a court for the purpose of discovery in a civil action.

2. There Are Three Conflicting and Irreconcilable Terms.

NRS 35 and NRCP 52.380 directly conflict on at least three key points:

- The presence of an observer.
 - NRCP 35(a)(4)(A) and (B) expressly exclude observers from psychological, neuropsychological or psychiatric examinations unless the court orders otherwise, for good cause shown.
 - NRS 52.380 expressly permits observers to attend any mental or physical examination.
- The identity of the observer.
 - NRCP 35(a)(4) expressly states that the observer may not be the party’s attorney, or anyone employed by the party or the party’s attorney.

- NRS 52.380(2) states that the observer may be the party's attorney, or anyone designated by the attorney.
- The taking of audio and/or stenographic recordings.
 - NRCP 35(a)(3) permits any party or the examiner to make an audio recording of the examination, but only for good cause is shown.
 - NRS 52.380(3) only permits the party's observer to make a recording, and the recording may be audio or stenographic.

C. The District Court Judge Ruled the Nevada Legislature Violated the Separation of Powers Doctrine.

The inconsistency between NRCP 35 and NRS 52.382 was argued to the District Court Judge, who correctly reasoned that this was a separation of powers issue. The Judge ruled that by enacting NRS 52.380, the Nevada Legislature infringed upon a purely judicial prerogative. As such, the District Court determined NRCP 35 controls. AA 4-8.

D. The Separation of Powers Doctrine in Nevada.

The separation-of-powers doctrine is part of Nevada's Constitution. Nev. Const. Art. 3, § 1. All of the three branches of government are equal. "In keeping with this theory, the judiciary has the inherent power to govern its own procedures." Berkson v. Lepome, 126 Nev. 492, 499, 245 P.3d 560, 565 (2010)

(*internal citations omitted*). This includes the right and power to promulgate rules of procedure. NRS 2.120 and State v. Connery, 99 Nev. at 345.

This Court has previously explained, “The judiciary is entrusted with rule-making and other incidental power reasonable and necessary to carry out the duties required for the administration of justice and to economically and fairly manage litigation.” Berkson, 126 Nev. at 499. This means “the legislature may not enact a procedural statute that conflicts with a pre-existing procedural rule, without violating the doctrine of separation of powers, and such a statute is of no effect.” Id.

Nevada courts will try to harmonize statutes and court rules that govern the same topic. Albios v. Horizon Cmtys., Inc., 122 Nev. 409, 132 P.3d 1022 (2006) and Bowyer v. Taack, 107 Nev. 625, 817 P.2d 1176 (1991).

For example, NRCP 68 and the former NRS 17.115 both attempted to govern the procedure and penalties associated with offers of judgment. They contained minor differences. “Apparent conflicts between a court rule and a statutory provision should be harmonized and both should be given effect if possible.” Albios, 122 Nev. at 422, 132 P.3d at 1030, *citing* Bowyer, 107 Nev. at 627-28, 817 P.2d at 1178. The prior version of NRCP 68 was silent as to pre-judgment interest, and NRS 17.115 addressed that. Thus this Court gave effect to

the apparent conflict by permitting enforcement of the pre-judgment interest clause of NRS 17.115. Albios at 422.

The Nevada Legislature has not left the Court any opportunity to harmonize NRCP 35 and NRS 52.380. They are directly contradictory on several key points. The separation of powers doctrine therefore renders NRS 52.380 of no effect.

E. Rules Governing the Manner in which Evidence Is Collected Are Procedural.

The question presented here is whether NRS 52.380 is a substantive or procedural rule. If it is procedural, then the Nevada Legislature has improperly encroached on the Nevada Judiciary's inherent rule-making power, and the statute is unenforceable.

This is a question of function, not form. As the United States Supreme Court has explained,

... Congress authorized this Court to promulgate rules of procedure subject to its review ... but with the limitation that those rules 'shall not abridge, enlarge or modify any substantive right.'

We have long held that this limitation means that the Rule must 'really regulat[e] procedure, – the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them,' ... The test is not whether the rule affects a litigant's substantive rights; most procedural rules do. What matters is what the rule itself regulates: If it governs only 'the manner and means' by which litigants' rights are enforced, it is valid; if it alters 'the

rules of decision by which [the] court will adjudicate [those] rights,' it is not.²

Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442, 176 L. Ed. 2d 311, 407 (2010), (*internal citations omitted*).

This Petitioner has sued Respondent for damages in tort. A statute or rule that creates a right to recover such damages is substantive. *See, e.g.* NRS 41.085, which creates rights of recovery for the decedent's estate and heirs in case of wrongful death. The Nevada legislative branch has power to enact that law.³

A rule that governs the manner in which evidence is collected regarding a tort claim is procedural. That lies within the judicial branch's Constitutional domain.

The United States Supreme Court has specifically found Rule 35 examinations to be a matter of procedural law, which is consistent with Nevada's separation of powers rules. Continuing the passage quoted just above,

² The federal act enabling federal courts to promulgate their own rules states those rules are subject to congressional review. The Nevada Constitution and NRS 2.120 include no such caveat. The Nevada separation-of-powers doctrine is stronger in this sense than in the federal system. *See, e.g. Commission on Ethics v. Hardy*, 125 Nev. 285, 293, 212 P.3d 1098, 1103-04 (2009) ("Unlike the United States Constitution ... Nevada's Constitution goes one step further, it contains an express provision prohibiting any one branch of government from impinging on the functions of another.").

³ Where the Nevada legislature has been silent as to substantive rights, and where a traditional right exists at common law, Nevada courts may make common-law rules for recovery. *See, e.g. Turner v. Mandalay Sports Entm't, LLC*, 124 Nev. 213, 180 P.3d 1172 (2008) (listing the rule of decision for negligence claims; the substantive elements a plaintiff must prove to recover damages for negligence at common law.).

Applying that test, we have rejected every statutory challenge to a Federal Rule that has come before us. **We have found to be in compliance with the [enabling act] rules** prescribing methods for serving process, and **requiring litigants whose mental or physical condition is in dispute to submit to examinations**; Likewise, we have upheld rules authorizing the imposition of sanction upon those who file frivolous appeals, or who sign court papers without a reasonable inquiry into the facts asserted. **Each of these rules had some practical effect on the parties; rights, but each undeniably regulated only the process for enforcing those rights; none altered the rights themselves, the available remedies, or the rules of decision by which the court adjudicated either.**

Shady Grove, 130 S. Ct. at 1442-43 (*internal citations omitted and emphasis added*).

The *Shady Grove* decision relied on two prior U.S. Supreme Court decisions for the premise that Fed. R. Civ. P. 35 [governing the physical and mental examination of persons] is “undoubtedly” procedural, not substantive. Those cases are Sibbach v. Wilson & Co., 312 U.S. 1, 61 S. Ct. 422 (1941), and Schlagenhauf v. Holder, 379 U.S. 104, 85 S. Ct. 234 (1964). The decisions merit some discussion.

1. *Sibbach v. Wilson & Co.*: Fed. R. Civ. P. 35 Is Procedural, Not Substantive.

The plaintiff in *Sibbach v. Wilson & Co.* made a claim for personal injuries. The matter was in federal court by virtue of the court’s diversity jurisdiction, 28 U.S.C. § 1332. The court applied federal procedural law but forum state substantive law.

The defendant moved to compel the plaintiff to submit to a physical examination under Fed. R. Civ. P. 35, to help determine the extent of the injuries. The plaintiff refused to submit, so the defendant moved for sanctions. The U.S. District Court ruled it had authority to enforce Fed. R. Civ. P. 35 in a diversity case, and that the plaintiff was in contempt for failure to follow the order to submit to a physical exam.

A question was raised on appeal as to whether Fed. R. Civ. P. 35 was procedural or substantive. If it were held to be substantive, then the U.S. District Court would have to rely on applicable state law – which, at that place and time, contained no requirement to submit to a physical exam. If it were held to be procedural, then the federal rule of procedure would apply, and the exam could be had or sanctions issued for refusing to attend.

The U.S. Supreme Court reasoned that in a negligence case, the litigant's *substantive* right could be described as, “the right not to be injured in one’s person by another’s negligence...” Sibbach, 312 U.S. at 13.

The court then held that Fed. R. Civ. P. 35 was properly enacted as one of the Court’s procedural rules pursuant to the federal enabling act. Id. at 15-16. Rule 35 was procedural in nature, thus federal law governed.

Interestingly, Justice Felix Frankfurter, writing the dissent on the long-abandoned premise that personal privacy rights should preclude any physical exam

in discovery, acknowledged that substantive rights may be affected by procedural rules. “Of course the Rule is compulsive in that the doors of the federal courts otherwise open may be shut to litigants who do not submit to such a physical examination.” Id. at 18.

2. *Schlagenhauf v. Holder* Likewise Held Fed. R. Civ. P. 35 Is Procedural, Not Substantive.

Schlagenhauf v. Holder was a motor vehicle tort case heard in federal court under its diversity jurisdiction. Liability was disputed by the existence of various cross-claims among the defendants. One defendant moved for and obtained an order requiring another defendant to submit to multiple physical and mental examinations pursuant to Fed. R. Civ. P. 35. The district court’s authority to issue the orders was challenged.

The U.S. Supreme Court reinforced the majority holding from *Sibbach*, that Rule 35 is procedural, not substantive. “We hold that Rule 35, as applied to either plaintiffs or defendants to an action, is free of constitutional difficulty and is within the scope of the Enabling Act. We therefore agree with the Court of Appeals that the District Court had power to apply Rule 35 to a party defendant in an appropriate case.” Schlagenhauf, 379 U.S. at 114.

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F. The Function of NRCP 35 Is Purely Procedural.

NRCP 35 does not create or modify a personal injury plaintiff's right to seek recovery for negligence. It does not create or modify ultimate rule governing a right to recovery. Rather, once a complaint for damages has been filed and an answer presented, NRCP 35 provides rules – procedures – for the collection of a specific type of evidence: medical, psychological or psychiatric data that may be relevant to the claim.

Organizationally, Rule 35 falls between the collection of evidence via written requests for the production of documents (NRCP 34) and collection of evidence via requests for admissions (Rule 36).

Procedural rules may affect the likelihood of success of a claim or defense in litigation. And any litigant may see his claims or defenses stricken for failure to follow procedural rules, per NRCP 37. But the mere fact that a procedural rule has the potential to alter likelihood of success does not make it “substantive.”

G. Advocates' Statements in Legislative Hearings Do Not Transform a Procedural Rule into a Substantive One.

The Petitioner and amicus party noted that advocates for the passage of NRS 52.380 repeatedly used the word “substantive” in legislative hearings when describing the type of right they wanted to give to personal injury plaintiffs.

The Court may note that the word “substantive” does not appear anywhere in the text of NRS 52.380. The argument that the statute intended to confer a substantive right is based solely on the arguments of its proponents, all members of the Amicus Party – the NJA. No elected legislators were quoted for the premise that the statute intended to create a substantive right.

The case *Valenti v. State, Dep’t of Motor Vehicles*, 131 Nev. 875, 362 P.3d 83 (2015) was cited by the Amicus Party for the proposition that legislative intent can be determined by examining the statements of a bill’s major proponents. It is respectfully submitted that this misstates the holding. In *Valenti*, this Court was asked to interpret ambiguous language in a statute regarding the admissibility of certain scientific evidence. The legislative history provided little guidance. The Supreme Court noted, incidentally, that “[t]he most informative statement as to the Legislature’s intent in defining chemist came from a lead proponent of [the bill] ... Therefore, we conclude, absent any expression of intent by the 2009 Legislature to, by defining the preexisting term chemist, revoke the established requirement that chemists be court-qualified...” Valenti, 131 Nev. at 881-82.

The Court’s comment in *Valenti* should be read as a criticism of the Legislature’s ambiguity and failure to explain its intent, not a holding that bill proponents’ statements are always relevant or persuasive.

NRS 52.380 attempts to govern a purely procedural function: The manner in which medical, psychological or psychiatric professionals may collect data in medical, psychological and psychiatric examinations during civil discovery. It contains a series of rules regarding who may attend mental and physical exams, and how the exams may proceed. That is a procedural rule, both in the legal sense and in common sense. It covers the exact same subject matter and procedures that were already governed by NRCP 35.

Argument containing the words “substantive right” does not alter the basic function of NRS 52.380.⁴ The statute is a reactionary attempt to override the Nevada Judiciary’s rulemaking decisions – decisions that were the result of a lengthy rulemaking process with participation from multiple stakeholders in our legal system. NRS 52.380 overstepped the Legislature’s authority and should not be enforced.

The lengths to which the statute’s advocates took to place the words “substantive right” into the legislative record suggest that the separation-of-powers

⁴ Opponents of the bill that became NRS 52.380 identified the separation of powers issue during legislative hearings. For example, Dane A. Littlefield of the Association of Defense Counsel of Nevada testified in those hearings that the rules are procedural, not substantive. “This is why the plaintiffs’ bar is trying to cast this proposed statute as affecting a substantive right rather than a procedural one; it is the only way they can try to get away from the Supreme Court’s independent ability to draft and promulgate their own procedural rules. The Supreme Court of Nevada has enacted a comprehensive set of rules dealing with discovery, the NRCP, which includes Rule 35. Minutes of the Meeting of the Assembly Committee on Judiciary 18th Sess. (March 27, 2019) at 2 and 3-4.

problem had been anticipated. Lobbyists' preparation does not change the nature of the rule, though.

The instant writ petition appears to concede that observers and audio recordings in Rule 35 examinations are procedural issues. The writ petition states, "NRC 35 already provides for the procedural right to have an observer at an examination and for recording of an examination." Petitioner's Writ at 5-6. Petitioner then goes on to contend that in presenting conflicting procedures in NRS 52.380, the legislature transformed the procedural elements of the examination into a substantive right by removal of the same. *Id.* In other words, the petitioner claims that the legislature transformed a procedural right into a substantive one simply by announcing it was doing so.

This sort of self-serving rulemaking is offensive to Nevada's Constitution. The substantive vs. procedural question is decided by a rule's function, not its title or the statements of its proponents. Shady Grove, 130 S. Ct. at 1442.

Members of the Nevada legislature will probably not be surprised if NRS 52.380 is ultimately not enforced. The Chairperson of the Assembly Judiciary Committee, Steve Yeager, acknowledged the language of the Assembly Bill was proposed to and rejected by the Nevada Supreme Court. *See Minutes of the Meeting of the Assembly Committee on Judiciary 18th Sess. (March 27, 2019) at 7.*

Respectfully, the Legislature’s attempt at contradicting the Judiciary on a procedural matter does not create a substantive right. NRCP 35 is a well-reasoned and equitably balanced construct for the gathering of evidence in civil cases. A statute enacted by the Nevada Legislature cannot nullify it. The Legislature impermissibly infringed on the Judiciary’s domain when it passed that act.

H. The U.S. District Court for the District of Nevada Recently Ruled that NRCP 35 Is Procedural.

The inconsistency between the current version of NRCP 35 and NRS 52.380 was recently addressed by the U.S. District Court for the District of Nevada in the case of *Freteluco v. Smith’s Food and Drug Centers, Inc.*, Case No. 2:19-cv-00759-JCM-EJY, filed June 29, 2020. While not binding on this Court, the federal district court’s decision is illustrative because it attempted to predict how the Nevada Supreme Court would rule on this issue.

The U.S. District Court found advocates’ and opponents’ statements in legislative hearings unpersuasive. Rather, the Court explained that under the *Erie* doctrine, in diversity cases, federal law governs procedure and forum state law governs substance. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817 (1938).

Applying *Erie*, the U.S. District Court concluded that, “whether an observer is present in the neuropsychological examination of Plaintiff is not substantive, but is procedural. ... These statutory provisions are not ‘outcome’ or case

determinative, but instead reflect ‘procedural preference.’” Freteluco at *6, *citing* Flack v. Nutribullet, LLC, 333 F.R.D. 508, 517 (C.D. Cal. 2019), Smolko v. Unimark Lowboy Trans., 327 F.R.D. 59, 63 (M.D. Penn. 2018), and Stefan v. Trinity Trucking, L.L.C., 275 F.R.D. 248, 250 (N.D. Ohio 2011).

I. NRCP 35 Is Within the Mainstream Rule. NRS 52.380 Is Not.

The amicus brief suggests to the Court that NRCP 35 lags behind “protections” offered to tort plaintiffs in other states. *See* Amicus Brief, page 11, fn. 4. A survey of these cases tends to show, however, that NRCP 35 shows Nevada is actually fairly progressive addressed this issue. The provisions of NRS 52.380 appear to be radical outliers when compared to most states’ approaches.

The brief argues that eight states allow observers *or* recordings as a matter of statute or court rule. Another 10 states allow observers *or* recordings by common law. Thus, just over one-third of states allow observers or recordings in Rule 35 exams. (18 out of 50 is 36%.)

Of those, many do not allow observers or recordings in psychiatric exams. It is generally recognized that psychological and psychiatric exams are of a different nature than a medical exam, and the presence of an observer is more likely to alter the test results. *See, e.g. Metropolitan Prop. & Cas. Ins. Co. v. Overstreet*, 103 S.W.3d 31 (Ky. 2003).

The following cases suggest that the NRCP 35 is within the mainstream in that it tries to strike a balance between protecting examinees while guaranteeing examining parties meaningful and unadulterated exam results.

1. Lagfeldt-Haaland v. Saupe Enterprise, Inc., 768 P.2d 1144 (Alaska 1989).

The court was asked to address whether attorneys could attend medical examinations in personal injury cases. The Alaska Supreme Court acknowledged that allowing attorney attendance is a minority position – it cited to only four states that allowed attorneys to attend – but chose to follow that rule. The court did not address whether attorneys would be allowed to attend psychiatric exams.

Interestingly, two Alaska justices dissented. The dissent explained that most medical examiners are neutral professionals:

The ruling is premised on the assumption that most physicians hired to conduct independent medical exams are nothing more than ‘hired guns.’ The assumption that most physicians will exceed the legitimate scope of such exams unless checked by the presence of opposing counsel denigrates the professionalism and objectivity of the medical profession. While cases of abuse certainly may exist, I submit that these situations are more appropriately dealt with on a case-by-case basis ...

A presumptive rule allowing counsel into medical exams interjects an adversarial, partisan atmosphere into what should otherwise be a wholly objective inquiry.

Lagerfelt-Haaland, 768 P.2d at 1147 (Moore, J. dissenting).

The dissent also noted that allowing the examinee's attorney to attend Rule 35 exams might open the door to demands that a defendant's attorney should be able to attend appointments with the plaintiff's treating and testifying doctors. While probably an exaggerated concern, it does draw attention to a problematic premise that underlies the Petition and Amicus Brief: namely, why should courts, attorneys and litigants be expected to trust *some* doctors – treating doctors – but not independent examiners? This is particularly poignant in cases where a doctor provides treatment in exchange for a lien against the patient's recovery in litigation, and then comes to court to testify that the treatment provided was reasonable, necessary and causally related to the alleged tort. This Court has recognized that this can be a form of potential bias. See Khoury v. Seastrand, 132 Nev. 520, 377 P.3d 81 (2016).

NRCP 35 grants district court judges the flexibility that Justice Moore found to be the best approach. In Nevada, non-attorney observers may attend medical exams. Excluding attorneys from the exams minimizes the adversarial partisanship that Justice Moore believed has no part in a Rule 35 exam.

2. Polcaro v. Daniels, 2007 WL 1299159 (Conn. Sup. Ct. 2007).

In this unreported decision, the Connecticut Superior Court surveyed cases from across the country and noted that they fell into two main groups: A small handful allow attorneys to attend medical exams. The vast majority of federal

courts, and most state courts, do not allow attorney or observers to attend. A few states (like Kentucky, discussed below) allow attendance on a showing of good cause. In this case, the court allowed an observer because the parties had stipulated to one – only for that stipulation to be later challenged. It is not clear whether the Connecticut court would have allowed an observer absent the stipulation.

3. Rochen v. Huang, 558 A.2d 1108 (Del. Sup. Ct. 1988).

This was an extremely unusual case in which four women sued a doctor for sexual harassment during medical treatment and exams. All four plaintiffs claimed damages for post-traumatic stress disorder. Given the nature of the claims, it was undisputed that psychiatric exams were appropriate. But given the nature of the injuries, plaintiffs’ counsel requested a number of accommodations to make the plaintiffs feel safe during the examinations, including attorney attendance.

The Delaware court noted the overwhelming weight of authority was against allowing attorneys to attend. It allowed a non-attorney observer to attend due to the compelling facts of the case.

Nevada courts are free to reach the same result under NRCP 35(a)(4)(B), which would allow an observer at a psychological or psychiatric exam “for good cause shown.”

Subsequent Delaware cases seem to indicate that an observer may not be present as a matter of right – rather, only for good cause shown. *See McClure v.*

Catholic Diocese of Wilmington, 2009 Del. Super. LEXIS. 60 (2009), in which the court denied an examinee's request to bring his own health care provider to an independent exam due to his poor health. The court did not consider this good cause to bring an observer.

4. Metropolitan Property & Cas. Ins. Co. v. Overstreet, 103 S.W.3d 31 (Ky. 2003).

The Kentucky Supreme Court noted that its trial courts (as in Nevada) have discretion to set the conditions of an examination. The court noted that federal courts generally do not allow observers or recordings, while some states do.

The Kentucky court also noted that while there may be an adversarial element to Rule 35 exams, allowing an observer – attorney or otherwise – is not always an appropriate solution:

[T]he recognition of this potentiality does not mean that an external presence should automatically be permitted, as it is in some jurisdictions discussed supra. Indeed, the purpose of CR 35.01 is to 'level the playing field.' An external presence that deprives the examining party of the opportunity to level the playing field by conducting a truly objective examination would destroy the very purpose of the rule.

Therefore, we hold that the trial court may impose an external presence at a CR 35.01 examination only upon a showing of 'good cause' by the examinee. This holding placed Kentucky in the median of the authorities discussed supra. We reject the 'compelling need' test invented by some federal district courts, finding that test to be unsupported by the language or rationale of CR 35.01. Similarly, we decline to make an external presence automatic. Unlike jurisdictions such as California and Pennsylvania, our rule contains no provision for the automatic attendance of the examinee's attorney, physician, or recording device.

Id. at 38.

Nevada's Rule 35 is currently more generous to examinees than Kentucky's. NRCP 35 allows non-attorney observers at medical exams by rule, and non-attorney observers at psychiatric exams on a showing of good cause. Kentucky appears to require a showing of good cause in both situations.

5. Hepburn v. Barr & Barr, 2006 WL 1711849 (Mass. Sup. Ct. 2006).

This unreported case allowed an observer to attend a psychiatric exam. It relied on a prior Massachusetts case of *Velez v. Liberty Mut. Ins. Co.*, 2001 Mass. App. Div. 56 (2001). In *Velez*, a Spanish-speaking plaintiff was allowed to make an audio recording of an exam performed by a non-Spanish speaking doctor, for the sole purpose of ensuring accuracy of communication. The *Velez* court noted, "We stress that our ruling is limited to the facts of this case ... we caution against any interpretation of our ruling as an automatic carte blanche to every insured to insist upon [an observer or recording]." Id. at *6.

6. State ex. rel. Hess v. Henry, 393 S.E. 2d 666 (W. Va. 1990).

The West Virginia Supreme Court held that an examinee has no inherent right to make a recording or bring an observer, but those accommodations may be allowed upon a showing of good cause.

Nevada's Rule 35 is more generous to examinees, because good cause is not required to bring an observer to a medical exam – only a psychological one.

7. Acosta v. Tenneco Oil Co., 913 F.2d 205 (5th Cir. 1990).

This case was cited by the amicus party for the proposition that some federal courts deviate from the well-settled federal practice that neither observers nor recordings are allowed in Rule 35 exams. While the Fifth Circuit Court of Appeals did allow an attorney observer to attend a medical exam, it did so because of a loophole in the law. The defendant had requested leave to conduct a vocational exam. Fed. R. Civ. P. 35, as it existed at the time, only contemplated medical and psychiatric exams. The Fifth Circuit allowed an attorney to attend the exam because it was not technically a Rule 35 exam.

The overwhelming majority federal practice is to exclude observers or recordings. *See, e.g. Ornelas v. Southern Tire Mart, LLC*, 292 F.R.D. 388, 396 (S.D. Texas 2013) (“Third parties are generally prohibited from attending medical examinations because, in part, to allow otherwise would subvert the purpose of Rule 35, which is to put both the plaintiff and defendant on an equal footing with regard[] to evaluating the plaintiff’s medical status.”)

J. The Nature of Psychological Exams Mandates Exclusion of Observers and Recordings in Most Cases.

The unique nature of Rule 35 psychological or psychiatric exams requires, in most cases, “an unimpeded, one-on-one exchange between doctor and patient.

Metropolitan Property & Cas. Ins. Co. v. Overstreet, 103 S.W.3d at 41, *citing* Tomlin v. Holecek, 150 F.R.D. 628, 631-32 (D. Minn. 1993).

For this reason, Nevada's Rule 35 – which provides for greater privacy in psychological and psychiatric exams than in medical exams – is well-founded.

The trial court in this case argument based on a declaration from Dr. Lewis Etcoff, the neuropsychologist commissioned to perform the exam in this case, as to why observers should be excluded. RA 4-6, 8. Dr. Etcoff's professional ethical obligations prohibit observers and recordings in neuropsychological exams. RA 8. Other reasons for privacy in those types of exams include: (1) protecting the security of test instruments and guarding against misuse of test data, (2) the complex observational process of a psychological interview and the facilitation of open disclosure, (3) social facilitation and observer effect that distort test data, rendering the same inaccurate or invalid, (4) maintaining the integrity and security of testing materials and techniques, (5) risk of social harm, (6) exposure of confidential testing materials undermines future utility and validity, and (7) compliance with the National Academy of Neuropsychology. RA 1-21.

Nevada's Rule 35 is thus not only Constitutionally superior to NRS 52.380, it is better-reasoned and more likely to provide test results that are fair to both sides. This Court should deny the writ petition because it will result in less reliable evidence being obtained for Nevada trials.

VI.

CONCLUSION

A direct and material conflict exists between NRCP 35 and NRS 52.380. This conflict simply cannot be resolved to give meaning and effect to both. The separation-of-powers doctrine mandates that NRCP 35 govern the collection of evidence via medical, psychological, neuropsychological, and psychiatric exams. This is fortunate because NRCP 35 is the better-reasoned rule, and it is more consistent with rules published by other states that allow observers or recordings under any situation.

The District Court Judge correctly applied the law. The petition for a writ of mandamus must be denied.

DATED this 6th day of March, 2021.

WINNER & SHERROD

/s/ Andrew D. Smith

and

/s/ Caitlin J. Lorelli

Thomas E. Winner

Nevada Bar No. 5168

Caitlin J. Lorelli

Nevada Bar No. 14571

Andrew D. Smith

Nevada Bar No. 8890

1117 South Rancho Drive

Las Vegas, Nevada 89102

Tel: (702) 243-7000

Attorneys for Real Party in

Interest Troy Burgess

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared using Microsoft Word 2016 in Times New Roman 14-point font.

2. This brief answering a writ petition complies with the page limitations of NRAP 21(d) because although it consists of 31 pages, not including the title page, disclosure statement, table of contents, table of authorities, Certificate of Compliance, and Certificate of Service, per NRAP 32(a)(7)(C), The brief contains 6,673 words.

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

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 6th day of March, 2021.

WINNER & SHERROD

/s/ Andrew D. Smith

Thomas E. Winner

Nevada Bar No. 5168

Caitlin J. Lorelli

Nevada Bar No. 14571

Andrew D. Smith

Nevada Bar No. 8890

1117 South Rancho Drive

Las Vegas, Nevada 89102

Tel: (702) 243-7000

Attorneys for Real Party in

Interest Troy Burgess

CERTIFICATE OF SERVICE

I certify that on this 6th day of March, 2021, I electronically served the foregoing REAL PARTY IN INTEREST'S ANSWERING BRIEF via the Nevada Supreme Court's Eflex electronic filing and service system, addressed as follows:

Marjorie L. Hauf, Esq.
Matthew G. Pfau, Esq.
For the Petitioner

Tom W. Stewart, Esq.
Micah S. Echols, Esq.
For Amicus Party The Nevada Justice Association

I further certify that on this 6th day of March, 2021, I served a copy of this document on the following via U.S. Mail, postage prepaid:

Honorable Adrianna Escobar, District Court Judge
Eighth Judicial District Court, Department XIV
200 Lewis Ave.
Las Vegas, NV 89155
dept14lc@clarkcountycourts.us

/s/ Andrew D. Smith

An employee of WINNER & SHERROD