

IN THE SUPREME COURT OF NEVADA

TROY MOATS

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF
NEVADA, IN AND FOR THE
COUNTY OF CLARK AND THE
HONORABLE JUDGE ADRIANA
ESCOBAR,

Respondents,

and

TROY BURGESS

Real Party in Interest.

Supreme Court Case No. 81912

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District Court Case No. A-18-773410-C

AMICUS CURIAE BRIEF OF THE
LAS VEGAS DEFENSE LAWYERS
(In Support of Real Party In Interest)

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NEVADA RULE OF APPELLATE PROCEDURE 26.1(a) DISCLOSURE

The undersigned counsel of record certifies the following are persons and entities that must be disclosed. These disclosures are made in order that the Justices of this Court may evaluate possible disqualification or recusal:

1. The law firm LINCOLN, GUSTAFSON & CERCOS, LLP of Las Vegas, NV;
2. Karissa K. Mack, Esq., President of and counsel for Las Vegas Defense Lawyers; and,
3. Las Vegas Defense Lawyers (“LVDL”), an amicus curiae, is a non-profit organization of civil defense lawyers throughout Southern Nevada. LVDL, and its counsel, did not and have not appeared in the underlying District Court matter.

Dated this 12th day of March, 2021.

LINCOLN, GUSTAFSON & CERCOS, LLP
/s/ Karissa K. Mack

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INTEREST OF AMICI CURIAE

Las Vegas Defense Lawyers (LVDL) is a non-profit organization of local, civil litigation defense lawyers throughout Nevada. LVDL is appearing as *amicus curiae* not only because the decision of the District Court was correct, but because the question of law at stake is critically important, not just to the parties in the instant case, but to litigants in all cases wherein Rule 35 examinations may be utilized. Those involved in litigation will recognize, as does LVDL, that in most personal injury matters which go to trial, the degree of damages, or the degree of injury sustained by the individual claimant/claimant(s) is at issue.

Rule 35 examinations have long been a tool allowing the defense the ability to have an individual outside and independent of a claimant's treating and/or retained expert physicians be able to perform an evaluation of the claimant's alleged injuries to which they seek damages. The 1951 legislature authorized the Nevada Supreme Court to prescribe rules to regulate civil practice and procedure with the Nevada Rules of Civil Procedure, including Rule 35, first becoming effective on January 1, 1953. For more than sixty (60) years, Rule 35 was undisturbed by the legislature. It is imperative that the issue before the Court be framed accurately and, through its brief LVDL seeks to provide the Court with further context as to what has occurred since enactment of NRS 52.380 and how it is directly conflicting with and intervening with the judiciary's inherent authority to govern its own procedures.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

NRS 52.380 demonstrates the textbook example of a violation of the Separation of Powers doctrine through its use by proponents, leaving minimal room to even try and harmonize Rule 35 and NRS 52.380, which undisputedly govern the same topic. *See generally Albios v. Horizon Cmty's, Inc.*, 122 Nev. 409, 132 P.3d 1022 (2006) and *Bowyer v. Taack*, 107 Nev. 625, 817 P.2d 1176 (1991). As will be addressed further below, not only is the history behind the enactment of NRS 52.380 telling, but a plain reading of the statute, coupled with its use by proponents of the statute, demonstrates that the legislature has usurped the powers of the judiciary by creating a statute that dictates how an NRCP 35 examination may proceed forward. For these reasons, the Court should affirm the decision of the District Court striking down the statute as unconstitutional.

II. ARGUMENT

Thomas Jefferson wrote in “Notes on the State of Virginia” in 1784: “All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of despotic government. ...An elective despotism was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of

magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others.”

Thomas Jefferson’s views on the importance of dividing the powers of the government goes beyond limiting potential conflicts of interest and, instead is fundamentally in line with Sir John Dalberg-Acton’s perhaps best-known remark, “Power tends to corrupt, and absolute power corrupts absolutely.” Though not a drafter or signatory, Thomas Jefferson’s strong influence is seen in the May 25, 1787 drafting of the Constitution of the United States of America. Critical to the balance of power was the establishment of three branches of government: Legislative, Executive and Judicial.

Taking guidance from the Constitution of the United States, Article 3 of the Nevada Constitution provides that the powers of the Government of the State of Nevada shall be divided into three separate departments, the Legislative, the Executive and the Judicial; and, no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in the constitution. “The separation of powers doctrine is the most important foundation for preserving and protecting liberty by preventing the accumulation of power in any one branch of government.” *Berkson v. LePome*, 126 Nev. 492, 498, 245 P.3d 560, 564 (2010).

A. NRS 52.380 SETS CONDITIONS FOR RULE 35 EXAMINATIONS UNCONSTITUTIONALLY INFRINGING ON THE JUDICIARY'S AUTHORITY TO GOVERN ITS OWN PROCEDURES.

“It is no easy task to state with precision the exact nature of the distinction between substantive law and the law of procedure[.]”¹ However, in 1937, Judge Sir John William Salmond provided perhaps the best definition: “The law of procedure may be defined as that branch of the law which governs the process of litigation. It is the law of actions....” He continued: “[s]ubstantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which these ends are to be attained.” A right without the protection of a legal sanction which can be put into motion is not a substantive legal right. Once a “remedy” is available, it seems evident there is a clear distinction between the right of redress and the procedural steps to obtain it.²

1. Recording and observer conditions under NRS 52.380 have previously been before This Court and were rejected.

On August 17, 2018, the Nevada Supreme Court was petitioned to amend the Nevada Rules of Civil Procedure, which included as part of the overall submission, three Alternative versions of Rule 35.³

¹ Salmond, Sir John, et al. Jurisprudence: or the Theory of Law. (9th ed., Stevens & Haynes, London, 1937) § 172.

² Kocourek, Albert. Substance and Procedure. Fordham Law Review, Vol. 10, Issue 2, Pg. 162 (1941).

³ Petition, filed August 17, 2018, with pertinent pages related to Rule 35.

Alternative 1 provided that the examinee, as well as the examiner, could at their own expense, have the examination audio recorded. A need to establish good cause for such audio recording was eliminated. Also, under Alternative 1, unless otherwise ordered by the judge or discovery commissioner for good cause, the examinee could have an observer present, though not the examinee's attorney or anyone employed by the examinee or attorney. Though "good cause" was found in this version, the burden shifted from the examinee to the party seeking the examination to establish good cause to not have an observer.

Alternative 2 provided that the examinee, as a condition of the examination, upon a showing of good cause, could audio record the examination at the examinee's expense. The examiner was also allowed to audio record at their own expense. As to observers, Alternative 2 maintained a showing of good cause by the examinee to allow as a condition an observer, who once again could not be the examinee's attorney, or anyone employed by the examinee or examinee's attorney. Alternative 2 further provided that if the examinee was a minor, the minor was permitted to have a parent or legal guardian observe without leave of court.

Alternative 3 provided for, though with some linguistic differences, the same provision of audio recordings as Alternative 1, and as to observers, Alternative 3 provided for the exact provision as in Alternative 2.

The Nevada Supreme Court after receiving written public comment, arguments presented at the public hearing on October 19, 2018, and reviewing the Committee's recommendations, made its own edits and put forth what is currently the operable Nevada Rules of Civil Procedure 35.

This Honorable Court diligently weighed the discussion of the “right” to an audio recording and observer. Through its edited version of Rule 35, this Court maintained that for a person to which has been ordered to a Rule 35 examination to be able to audio record the examination or have an observer present as a condition of the examination, “good cause” must be shown.

2. NRS 52.380 is a procedural rule of discovery enacted by the Legislature in response to the 2019 Rule 35 Amendment.

Within months of the 2019 Rule Amendments, those dissatisfied with this Court's chosen Amendment to Rule 35, turned to the Legislature to usurp the role of the Court in determining the conditions for a Rule 35 examination. Proponents of NRS 52.380, including Petitioner and Amicus Curiae Nevada Justice Association assert this statute creates or reinforces a substantive right to physical integrity. However, to the extent this was NRS 52.380's intention, it clearly interferes “with procedure to a point of disruption” and attempts to abrogate an existing court rule just as the court in *Whitlock v. Salmon*, 104 Nev. 24, 26 (1988) feared.

In *Whitlock*, the Court addressed the tension between NRCP 47(a), stating at the time “the court shall conduct the examination of prospective jurors and may permit

such supplemental examination by counsel as it deems proper,” and NRS 16.030(b), which stated “the parties or their attorneys are entitled to conduct supplemental examinations which must not be unreasonably restricted.” Ultimately, the Court pointed out that the statute was not a legislative encroachment on judicial prerogatives even though the statute implicates trial procedure, because it does not interfere with procedure to a point of disruption or attempt to abrogate an existing rule. Rather, the statute simply confers that substantive right under NRCP 47 to reasonable participation in *voir dire* by counsel. *Whitlock*, 104 Nev. 24 at 26.

The judiciary has inherent authority to govern its own procedures and “the legislature may not enact a procedural statute that conflicts with a pre-existing procedural rule, without violating the doctrine of separation of powers....” *Berkson*, 126 Nev. at 499, 245 P.3d at 565. The judiciary’s authority “to promulgate procedural rules is independent of legislative power and may not be diminished or compromised by the legislature....” *State v. Connery*, 99 Nev. 342, 345, 661 P.2d 1298, 1300 (1983). As NRS 52.380 is expressly procedural, enactment of the same has violated the separation of powers as it has diminished the judiciary’s authority as seen by the arguments of its proponents.

3. An Erie analysis further demonstrates that NRS 52.380 is entirely a rule of procedure.

Prior to the case of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), one of the reasons for seeking out the federal court was the advantage provided in that

forum. For purposes of the matter currently before this Court, a Nevada Federal Court Judge has already performed an *Erie* analysis between NRS 52.380 and FRCP 35 (to which NRCP 35 substantially mimics). The Judge, in reasoning consistent with *Erie* and its progeny, found the provisions of NRS 52.380 were clearly procedural as the statutory provisions of NRS 52.380 are not “outcome” or case determinative, but rather reflect a “procedural preference.” *Freteluco v. Smith’s Food & Drug Ctrs.*, 2020 U.S. Dist. LEXIS 113217, *11 (D. Nev., June 29, 2020) (citing *Flack v. Nutribullet, LLC*, 333 F.R.D. 508, 517 (C.D. Cal. 2019) citing *Smolke 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)).

The court concluded that “whether an observer is present in the neuropsychological examination of Plaintiff is not substantive, but is procedural. That is, NRS 52.380 sets forth procedures applicable to observers who may attend independent medical examinations.” *Id.* at *10-*11. “By specifying that the court may determine ‘the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it,’ Rule 35 *consigns the procedures to be used in conducting these examinations to the sound discretion of the court*, an approach that is consistent with the general guidance of the rules which provide that issues relating to the scope of discovery rest in the sound discretion of the [c]ourt.” *Id.*

at *11-*12 (citations omitted) (quoting *Smolko v. Unimark Lowboy Trans.*, 327 F.R.D. 59, 61 (M.D. Pa. 2018)(emphasis added).

4. The Nevada Supreme Court has inherent authority to establish rules of procedure for civil litigation and has repeatedly struck down statutes that conflict with its rules.

The Nevada Supreme Court has the authority to regulate civil litigation by adopting rules regulating civil practice and procedure:

The Supreme Court, by rules adopted and published from time to time, shall regulate original and appellate civil practice and procedure, including, without limitation, pleadings, motions, writs, notices and forms of process, in judicial proceedings in all courts of the State, for the purpose of simplifying the same and of promoting the speedy determination of litigation upon its merits. Such rules shall not abridge, enlarge or modify any substantive right and shall not be inconsistent with the constitution of the State of Nevada. NRS 2.120(2).

Interestingly, the language of NRS 2.120(2) is comparable to the scope and purpose of Title 4, as found in NRS 47.020(1) and NRS 47.030:

NRS 47.020 Scope of title 4 of NRS. 1. This title governs proceedings in the courts of this State and before magistrates, except: (a) to the extent to which its provisions are relaxed by a statute or procedural rule applicable to the specific situation; and (b) as otherwise provided in subsection 3.

NRS 47.030 Purposes of title 4 of NRS. The purposes of this title are to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

To truly understand the legislative intent behind the enactment of NRS 52.380, it is critical to look at where within the Nevada Revised Statutes the statute at issue is located. Afterall, Nevada Courts will try to harmonize statutes and court rules that govern the same topic. *See generally Albios*, 122 Nev. 409, 132 P.3d 1022 (2006) and *Bowyer*, 107 Nev. 625, 817 P.2d 1176 (1991).

NRS 52.380, which is vaguely entitled “Attendance by Observer” is found in Title 4, Chapter 52 of the Nevada Revised Statutes (titled “Documentary and Other Physical Evidence”). As noted above, Nevada Revised Statute 47.020(1) provides in pertinent part that the scope of Title 4 of the NRS is to “govern[] proceedings in the courts of this State....” Nevada Revised Statute 47.030 continues that the purpose of Title 4 is to secure fairness in administration of the law of evidence. Thus, the Nevada Legislature has laid out the intent of Title 4, of which NRS 52.380 is found, which is meant to be a section providing the means of procedure for “proceedings in the courts,” and a way to secure fairness in “administration” of the law of evidence.

Proponents of the alleged “substantive” nature of NRS 52.380 argue that it is clear the statute was meant to be “substantive” because the legislature would not knowingly violate the separation of powers doctrine. Proponents are right that from the minutes of the meetings, there is no apparent attempt to violate the separation of powers doctrine intentionally or knowingly. Rather, as can be seen by the questions of the legislators, in consideration of enacting NRS 52.380, the legislators thought

they were harmonizing with Rule 35, with the only difference seemingly being whether the observer could be an attorney or a representative of the attorney:

Assembly:

Assemblywoman Backus: ...When looking at the separate branches of government, the court can implement court rules consistent with Nevada law. I was trying to put these two together, and I am thinking about how the language is presented in section 1, subsection 1 of A.B. 285 where it says “An observer may attend,” for example. The current Rule 35 is almost on par with that rule....When I was looking at Rule 35 and A.B. 285 this morning, I could almost read them in sync. The only thing that was glaring to me was the issue of the attorney....That was the only thing I thought was agreed upon by all three amendments that were sent over to the Nevada Supreme Court with the petition. It seemed as though each of them excluded the attorney....

...

...I was just trying to correlate what we have now as our rule and what the law is going to provide for. We all know as practitioners that we are going to continue experiencing the court reading of this law if it gets implemented along with Rule 35....⁴

Senate:

Senator Schieble: In your testimony [NJA], you reference how doctors may act inappropriately during a medical examination. There may be disputes on how a medical examination was conducted, so having a witness observe may alleviate disputed claims. Are you anticipating that plaintiff's counsel will be a witness in his or her own case?

...

⁴ Minutes of the Meeting of the Assembly Committee on Judiciary, March 27, 2019, Pages 7-9.

Senator Schieble: What is the purpose of allowing attorneys in the medical examination room?

..

Senator Pickard: The insurance company hires the more experienced doctor for purposes of rebutting a claim. No provision disallows an injured party from bringing someone in; however, this bill allows the plaintiff's attorney to be in the room during the medical examination....

...

Senator Scheible: I have concerns that A.B. 285 permits the observer to stop the medical examination. This is a legal inquiry-this raises the issue of whether the exam has exceeded the scope of the agreement made by the two attorneys? If the defense attorney exceeds the scope, this objection will lead the doctor to be the legal representative of the defense. This is what your [NJA] testimony says that happens currently. Should both attorneys be present in the room during the examination?

...

Senator Scheible: My reading of the bill differs from the statements made during testimony.⁵

Just as in *Whitlock*, the legislators' intent as seen through their questioning was to try to enact and confer the rights/condition under NRCP 35 related to observers and audio recordings. However, unfortunately, the proponents of NRS 52.380 have utilized the statute in such a way, that a statute which may have been able to be harmonized with Rule 35, just as the statute and rule were in *Whitlock*, is now interfering with procedure to a point of disruption and being used to abrogate an existing rule. *Whitlock*, 104 Nev. 24 at 26.

⁵ Minutes of the Senate Committee on Judiciary, May 6, 2019, Pages 6 and 9.

“[I]t is clear that the judiciary...has inherent powers to administer its affairs, which include rule-making and other incidental powers reasonable and necessary to carry out the duties required for the administration of justice. Any infringement by the legislature upon such power is in degradation of our tripartite system of government and strictly prohibited.” *Goldberg v. Eighth Jud. Dist. Ct.*, 93 Nev. 614, 616-617, 572 P.2d 521 (1977)(citations omitted). “[T]he inherent power of the judicial department to make rules is not only reasonable and necessary, but absolutely essential to the effective and efficient administration of our judicial system, and it is our obligation to insure that such power is in no manner diminished or compromised by the legislature.” *Goldberg*, 93 Nev. at 617; *see also State v. Merialdo*, 70 Nev. 322, 326 (1954)(“Nothing can be clearer...under our constitutional provision, our courts possess the entire body of the intrinsic judicial power of the state....[N]either the legislative nor the executive branches of government may assume to exercise any part of that judicial power, and the district court cannot be directed or controlled or impeded in its functions by either of those branches.”). The Nevada Supreme Court has applied these separation of powers principles to conflicts between statutes and rules many times before. *See, e.g., Berkson, supra*, 126 Nev. 492; *Whitlock, supra*, 104 Nev. 24; *Lindauer v. Allen*, 85 Nev. 430, 456 P.2d 851 (1969).

In *Lindauer*, the Court analyzed the conflict posed between NRCP 41(e) mandating the dismissal of an action if not brought to trial within five years, and the

former NRS 14.150, which extended that time from five to seven years. *Lindauer*, 85 Nev. at 432. The Court explained that “when a statute attempts to limit or destroy an inherent power of the courts, that statute must fail.” *Id.* at 434. “When this court adopted NRCP 41(e) it was consistent with the Nevada Constitution and the laws of the state, and when the legislature later enacted NRS 14.150, it not only indulged in an unconstitutional act but attempted to diminish the effect of NRS 2.120 in an area where it was powerless to act.” *Id.* at 435. Accordingly, the court held that the rule prevailed over the former statute. *Id.*

In the more recent matter *Berkson*, *supra*, this Court found that a statute permitting a plaintiff whose judgment is reversed on appeal with the right to file a new action within one year (NRS 11.340), unconstitutionally interfered with the judiciary’s authority to manage the litigation process. *Berkson*, 126 Nev. at 501. This Court struck the statute as unconstitutional on the grounds of separation of powers. *Id.* “In addition to the constitutionally mandated bases for keeping separate those inherent powers of the judiciary, leaving control of court rules and the administration of justice to the judiciary, and thereby placing the responsibility for the system’s continued effectiveness with those most familiar with the latest issues and the experience and flexibility to more quickly bring into effect workable solutions and amendments, makes good sense.” *Id.* at 500.

It is evident from the location of NRS 52.380 within Title 4, that NRS 52.380 does not create or modify any substantive rights or a right to redress. Instead, NRS 52.380 expressly modifies the administration, the process, by which the courts oversee and govern a very specific aspect of personal injury litigation, and, thus, should be found unconstitutional based on separation of powers.

III. CONCLUSION

The District Court, in applying those rules and procedures which govern civil practice, correctly reached the conclusion that NRS 52.380 is not a substantive statute. It does not provide for a remedy or a right of redress. Rather, it simply overrides the judiciary's inherent power to determine "the time, place, manner, conditions, and scope of the examination" that is well within the discretion of the district court's power in personal injury civil litigation matters. For the foregoing reasons, Amicus Curiae Las Vegas Defense Lawyers respectfully requests this Honorable Court find NRS 52.380 interferes "with procedure to a point of disruption" and attempts to abrogate existing court rule NRCP 35, and, thus, is unconstitutional.

DATED this 12th day of March, 2021.

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NRAP 28.2 CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Amicus Curiae 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 in a proportionally spaced typeface using Microsoft Word 97-2003 in Times New Roman, size 14 font.

2. I further certify that this Amicus Curiae Brief complies with the page or type-volume limitations of NRAP 29 and NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c):

- it does not exceed 15 pages.

3. Finally, I hereby certify that I have read this Amicus Curiae Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose.

4. 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 reference to the page 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 the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 12th day of March, 2021.

LINCOLN, GUSTAFSON & CERCOS, LLP

/s/ Karissa K. Mack

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of March, 2021, I served a true and correct copy of this AMICUS CURIAE BRIEF OF THE LAS VEGAS DEFENSE LAWYERS (*In support of Real Party In Interest*) upon all counsel of records by electronically filing the document using the Nevada Supreme Court's electronic filing system with the Master Service List as follows:

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I further certify that the foregoing documents were served via email to the following:

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/s/ Staci D. Ibarra

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