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IN THE SUPREME COURT OF THE STATE OF NEVADA

Edgardo P. Yusi; Keolis Transit Services, LLC,
Supreme Ct. No.: 82625

Dist. Ct. Case No.: A-18-781000-C

Petitioner,

vs.

The Eighth Judicial District Court of the
State of Nevada and the Honorable
Nancy Allf, Judge,

**Edgardo Yusi & Keolis Transit
Services, LLC's Reply re Petition for
Writ of Mandamus or Prohibition**

Respondents.

and

Heather Felsner,

Real Party in Interest.

ORIGINAL PETITION

From the Eighth Judicial District Court, Clark County
The Honorable Nancy Allf, Judge

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Attorney's Certificate of Compliance

1. I 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point Times New Roman.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 4,329 words.

3. Finally, I certify that I have read this 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. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the

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1 requirements of the Nevada Rules of Appellate Procedure.

2 DATED this 15th day of July, 2021.



4

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Certificate of Service

Per NRAP 21(a) and 25(c), I certify that I am an employee of Wilson Elser Moskowitz Edelman & Dicker LLP, and that on July 15, 2021, **Edgardo Yusi & Keolis Transit Services, LLC's Reply re Petition for Writ of Mandamus or Prohibition** was served via electronic means by operation of the Court's electronic filing system.

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BY: /s/ Amanda Hill
An Employee of



1 **A. The parties mutually urge a ruling on the merits.**

2 The parties mutually urge Nevada’s appellate courts to consider this petition
3 on its merits, but they request different outcomes. The parties agree that judicial
4 economy and administration are promoted by resolving the points raised in this
5 petition.

6 Mr. Yusi and Keolis’ (collectively “Mr. Yusi”) petition noted two other
7 pending petitions on substantively similar topics, cases 81912 and 82618. Case
8 82618 has since settled. Mr. Yusi has since learned of three other cases on
9 substantively similar topics. They are cases 82148, 82670, and 82831. The fact
10 that multiple petitions are now pending on this topic supports the parties’
11 arguments that judicial efficiency is promoted by deciding this dispute now rather
12 than in the normal appellate course.

13 **B. The district court erred by considering objections that were not raised**
14 **during the EDCR 2.34(d) meet and confer process.**

15 The parties agree to the facts and procedural history relevant to this issue.
16 The meet and confer process that EDCR 2.34(d) requires occurred, but Mrs.
17 Felsner did not raise NRS 52.380 as an issue until her opposition to Mr. Yusi’s
18 motion. The parties agree the district court’s interpretation of EDCR 2.34(d) is
19 subject to de novo review. If Mr. Yusi’s position prevails the district court’s order
20 after § II(b) is void, resolving the petition without further analysis.

1 **1. EDCR 2.34(d) required Mrs. Felsner to raise NRS 52.380.**

2 Mr. Yusi contends the district court erred as a matter of law by interpreting
3 EDCR 2.34(d) to allow a party to raise an argument that was not first raised during
4 the meet and confer process. Mrs. Felsner conversely asserts the purpose of EDCR
5 2.34(d)'s requirements "is simply to see what can be resolved prior to seeking
6 judicial intervention."¹ She asserts the meet and confer process was satisfied in
7 this case simply by Mr. Yusi requesting the neuropsychological examination and
8 Mrs. Felsner refusing the request. No further discussion was required in Mrs.
9 Felsner's view.

10 Mrs. Felsner's position conflicts with EDCR 2.34(d)'s plain language. A
11 discovery motion must be supported by a declaration or affidavit describing the
12 efforts that occurred to meet and confer, along with the results. "Moving counsel
13 must set forth in the affidavit what attempts to resolve the discovery dispute were
14 made, what was resolved and what was not resolved, *and the reasons therefor.*"²
15 Mrs. Felsner's position would void the italicized clause. A simplistic yes or no
16 meet and confer between the parties, without discussing the reasons for the dispute
17 or the parties' respective positions, would not satisfy the meet and confer
18 requirements. The parties *must* discuss their positions and the reasons for those
19 positions to comply with EDCR 2.34(d)'s plain language.

20 ¹ Response at 11-12.

² Emphasis added.

1 Secondarily, if EDCR 2.34(d)'s purpose is to promote informal resolution of
2 discovery disputes without court intervention, or at least narrow the disputed issues
3 that require the court's consideration, then Mrs. Felsner's interpretation would
4 defeat that purpose. A simplistic yes or no meet and confer does not promote
5 informal resolution of discovery disputes because it does not require the parties to
6 state and explain their positions. Such a perfunctory meet and confer only
7 encourages litigants to withhold information about their positions until a motion is
8 filed. This prevents the litigants from assessing the relative strengths of their
9 positions or potential compromises *without* court intervention. Mrs. Felsner's
10 interpretation of EDCR 2.34(d) would increase the volume of discovery disputes
11 requiring court intervention, contrary to the rule's purpose.

12 **2. Mrs. Felsner waived NRS 52.380 by not timely raising it.**

13 If Mrs. Felsner was required to raise NRS 52.380 as a basis for declining Mr.
14 Yusi's request for a neuropsychological examination and she did not raise it, what
15 is the consequence? The parties agree EDCR 2.34(d) is silent on this point.

16 Mrs. Felsner argues there should be no consequence. But again, if EDCR
17 2.34(d)'s purpose is to promote informal resolution of discovery disputes without
18 court intervention, or at least narrow the disputed issues that require the court's
19 consideration, then Mrs. Felsner's argument would defeat the rule's purpose. How
20 can litigants resolve a dispute without court intervention if the reasons for the

1 dispute are not raised and discussed during the meet and confer process? *Valley*
2 *Health's* rationale about why new arguments are not permitted in an objection to a
3 discovery commissioner's report and recommendation applies equally in this
4 context. Allowing new arguments in the objection "would lead to the inefficient
5 use of judicial resources and allow parties to make an end run around the discovery
6 commissioner by making one set of arguments before the commissioner, waiting
7 until the outcome is determined, then adding or switching to alternative arguments
8 before the district court."³ Applied here, allowing parties to present objections that
9 were not raised at the meet and confer process causes the judicial process to break
10 down for these same reasons, defeating EDCR 2.34(d)'s purpose.

11 District court's interpretation of EDCR 2.34(d)'s meet and confer
12 requirement was erroneous as a matter of law. A party may not raise new
13 arguments that were not first raised during the EDCR 2.34(d) meet and confer
14 process. The district court then clearly abused its discretion by considering
15 arguments that were admittedly not raised during the EDCR 2.34(d) meet and
16 confer process. Consequently, the district court's order after § II(b) is void.

17 **3. Mr. Yusi preserved this argument.**

18 Mrs. Felsner argues in a footnote that Mr. Yusi waived this argument
19 because he did not affirmatively raise NRS 52.380 during the meet and confer

20 ³ *Valley Health Systems, LLC. v. Dist. Ct.*, 127 Nev. 167, 172-73, 252 P.3d 676, 679-80 (2011).

1 process or in his motion.⁴ But that highlights the problem Mrs. Felsner created in
2 the EDCR 2.34(d) process. She admittedly never raised NRS 52.380 as an issue
3 during that process. Since she did not raise it, then there was no reason for Mr.
4 Yusi to address it in his opening motion. Further, Mr. Yusi's reply brief
5 supporting his motion was appropriate. A reply addresses the contentions asserted
6 in the opposition. That is what Mr. Yusi did.

7 Mrs. Felsner also characterizes Mr. Yusi's position as attempting to
8 weaponize EDCR 2.34(d). But by insisting that she comply with EDCR 2.34(d)
9 and discuss the arguments she planned to assert, Mr. Yusi complied with the letter
10 and purpose of EDCR 2.34(d). Complying with a rule does not weaponize it.

11 **C. Mrs. Felsner did not meet her burden to invoke NRS 52.380.**

12 If Mrs. Felsner preserved her arguments as to NRS 52.380, Mr. Yusi
13 proposes an interpretation that could harmonize it with NRCP 35 in this particular
14 case. Mrs. Felsner rejects the idea that they can be harmonized, instead asserting
15 NRS 52.380 abrogated NRCP 35.

16 **1. She had the burden to justify an observer and recording.**

17 Mrs. Felsner wants an observer to attend the neuropsychological
18 examination and record it. NRCP 35 and NRS 52.380 treat these requests
19 differently.

20 ⁴ Response at 10, n.5.

	NRCP 35	NRS 52.380
<i>Observer</i>	Barred for neuropsychological examination. NRCP 35(a)(4)(A) & NRCP 35(a)(4)(B)	“An observer may attend an examination....” NRS 52.380(1)
<i>Who May Be an Observer</i>	“[M]ay not be the party’s attorney or anyone employed by the party or the party’s attorney.” NRCP 35(a)(4)	May be the party’s attorney or authorized representative. NRS 52.380(2).
<i>Recording</i>	“[T]he court may, for good cause shown, require as a condition of the examination that the examination be audio recorded.” NRCP 35(a)(3)	The “observer attending the examination ... may make an audio or stenographic recording of the examination.” NRS 52.380(3)

The district court concluded NRS 52.380 trumped NRCP 35 and gave Mrs. Felsner an absolute right to these requests. But that ruling ignored the fact NRS 52.380(1) states an observer “may attend,” that NRS 52.380(2) states an observer “may be” certain individuals, and that NRS 52.380(3) states an observer “may” record. “‘May’ is of course generally permissive.”⁵ Applying that, these statutes gave Mrs. Felsner the ability to request an observer and a recording, but it also gave her the burden to justify them. The district court then had the discretion to decide whether Mrs. Felsner met that burden. The district court’s interpretation of NRS 52.380 was erroneous.

⁵ *Ewing v. Fahey*, 86 Nev. 604, 607, 472 P.2d 347, 349 (1970).

1 Mrs. Felsner responds that “may” as used in these statutes is *not* permissive,
2 but instead created an absolute right that she could invoke at will. But Nevada has
3 long ruled that in statutory construction “‘may’ is permissive and ‘shall’ is
4 mandatory unless the statute demands a different construction to carry out the clear
5 intent of the legislature.”⁶ Plaintiff cites no authority re-defining “may,” nor does
6 she present cogent argument as to why Nevada should re-write its rules of statutory
7 construction.

8 NRS 52.380 was drafted using permissive language. If the legislature
9 intended to create absolute rights, it could have done so using different language.
10 The language the legislature used means Mrs. Felsner could assert her request but
11 then had to justify that request to the district court, who in turn had the discretion
12 to deny it.

13 **2. She did not meet that burden.**

14 Mr. Yusi asserted that if NRS 52.380 applies, then Mrs. Felsner had the
15 burden to justify her requests and she did not meet it. Mrs. Felsner’s response
16 disputes only that she had any burden. She implicitly concedes that if she had the
17 burden to justify her requests, she did not meet it. In that scenario the district court
18 abused its discretion by granting Mrs. Felsner’s requests where did not meet her
19 burden to justify them.

20 ⁶ *WPH Architecture, Inc. v. Vegas VP, LP*, 131 Nev. 884, 890, 360 P.3d 1145,
1149 (2015).

1 **D. NRCP 35 controls because NRS 52.380 is unconstitutional.**

2 If this petition cannot be resolved on alternative grounds, then the Court
3 reaches the constitutional conflict between NRCP 35 and NRS 52.380. Mr. Yusi
4 asserts NRS 52.380 is unconstitutional as a violation of the separation of powers
5 doctrine. It is a procedural statute that interferes “with procedure to a point of
6 disruption or attempted abrogation of an existing court rule.”⁷ Mrs. Felsner
7 counters that NRS 52.380 creates substantive rights that abrogated NRCP 35.

8 **1. NRS 52.380 creates a procedure.**

9 Although Nevada appellate courts have previously evaluated whether certain
10 statutes are substantive or procedural, these prior cases have not provided a
11 definition for distinguishing between them. Mr. Yusi proposes a definition
12 borrowed from Connecticut. “While there is no precise definition of either
13 substantive or procedural law, it is generally agreed that a substantive law creates,
14 defines and regulates rights while a procedural law prescribes the methods of
15 enforcing such rights or obtaining redress.”⁸ This definition is consistent with the
16 example of NRS 41.085 as substantive law that Mr. Yusi provided in his petition.
17 It is also consistent with *Berkson* and *Whitlock*’s conclusions about two statutes
18 that are procedural in nature.

19
20 ⁷ *Whitlock v. Salmon*, 104 Nev. 24, 26, 752 P.2d 210, 211 (1988).

⁸ *D'Eramo v. Smith*, 872 A.2d 408, 416 (Conn. 2005).

1 Applied here, Mrs. Felsner asserts NRS 52.380 creates substantive rights.
2 But the plain language does not create any rights that she could independently seek
3 to enforce. NRS 52.380 applies only where there is 1) an underlying civil lawsuit
4 and 2) an examination is sought per NRCP 35. NRS 52.380 affects only the
5 manner in which a NRCP 35 examination occurs. Rather than creating new,
6 substantive rights, NRS 52.380's plain language defines only the methods of
7 enforcing Mrs. Felsner's rights to seek redress for personal injury. This makes it a
8 procedural statute.

9 As a procedural statute, NRS 52.380 is unconstitutional for the same reasons
10 *Berkson* concluded NRS 11.340 was procedural and unconstitutional. These
11 statutes directly interfere "with the judiciary's authority to manage the litigation
12 process"⁹ and are unconstitutional.

13 **2. The legislative history confirms its procedural intent.**

14 Mrs. Felsner then argues if the statute is ambiguous, then the legislative
15 history demonstrates an intent to create substantive rights. But she does not
16 dispute Mr. Yusi's history of how NRS 52.380 came to be or that it is a draft
17 version of NRCP 35 that the Supreme Court rejected in the 2019 revisions to the
18 rules of civil procedure. Those supporting this rejected draft simply took it to the
19 legislature and repackaged it as a bill. The comments of the former chair of the

20 ⁹ *Berkson v. Lepome*, 126 Nev. 492, 501, 245 P.3d 560, 566 (2010).

1 discovery sub-committee that drafted the competing proposals made that expressly
2 clear.

3 We voted 7-to-1 to make substantial changes, the changes that are set
4 forth or embodied in the bill before you, Assembly Bill 285.
5 Unfortunately, when our recommendations went to the full Supreme
6 Court of Nevada, they rejected our changes for reasons we are still not
7 clear on. At that point, we reassessed our position.¹⁰

8 Repackaging a draft rule of civil procedure into a bill does not transform a
9 procedural rule into a substantive statute. The Supreme Court weighed the merits
10 of the three proposed drafts of NRCP 35 and selected the one it thought best based
11 upon the record before it. The separation of powers doctrine prevents the
12 legislature from deciding otherwise. “[L]eaving control of court rules and the
13 administration of justice to the judiciary, and thereby placing the responsibility for
14 the system’s continued effectiveness with those most familiar with the latest issues
15 and the experience and flexibility to more quickly bring into effect workable
16 solutions and amendments, makes good sense.”¹¹

17 NRS 52.380 was drafted as a procedural statute to overcome a rule of civil
18 procedure. It is consequently unconstitutional because it violates the separation of
19 powers.

20 ¹⁰ App. Vol. 1 at 177-178.

¹¹ *Berkson*, 126 Nev. at 499, 245 P.3d at 565 (quotation omitted).

Mr. Yusi requests an order overruling the district court's order after § II(b).
If so, then the neuropsychological examination with Dr. Axelrod would go forward
per NRC 35.

DATED this 15th day of July, 2021.

