IN THE SUPREME COURT OF THE STATE OF NEVADA

YEONHEE LEE,

Petitioner,

v.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, THE HONORABLE DAVID M JONES, DISTRICT JUDGE,

Respondent,

and

ALBERTO EDUARDO CARIO,

Real Party in Interest.

Electronically Filed
Aug 05 2021 11:00 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court Case No.: 82831

District Court Case No.: A-19-803446-C

PETITIONER'S REPLY TO REAL PARTY IN INTEREST'S ANSWERING BRIEF

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Docket 82831 Document 2021-22749

NRAP 26.1 DISCLOSURES

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Yeonhee Lee ("Ms. Lee") is an individual.

Ms. Lee is represented by Damon N. Vocke, Dominica C. Anderson, and Tyson E. Hafen of Duane Morris LLP.

DATED: August 5, 2021

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I. REPLY ARGUMENT

A. The Real Party in Interest Effectively Concedes that the Court Should Consider the Petition.

On May 28, 2021, the Court issued an Order directing the Real Party in Interest, Alberto Eduardo Cario ("Cario"), to answer the Petition. Dkt. No. 21-15387. The Court further directed Cario "to *address the propriety of writ relief*, in addition to addressing the merits of the petition, in its answer." *Id*. (emphasis added).

Notwithstanding the Court's direction, the Answering Brief does not discuss the propriety of writ relief. This failure is a tacit concession that, as demonstrated in the Petition ("Pet." at 7-12), the Court should address the Petition on the merits, and if it is found meritorious, grant appropriate writ relief.

B. NRS 30.130 does not Apply to this Action.

Citing NRS 30.130 and this Court's decision in *Moldon v. County of Clark*, 124 Nev. 507, 188 P.3d 76 (Nev. 2008), Cario argues that the Petitioner has waived the argument that NRS 52.380 is unconstitutional because the Petitioner failed in the district court to notify the Attorney General of this proceeding. In *State Office of the Attorney General v. Justice Court of Las Vegas*, 133 Nev. 78, 302 P.3d 170 (Nev. 2017), however, this Court, noting the language of NRS 30.130 and the overall statutory scheme of which NRS 30.130 is a part, and relying on the very decision in *Moldon* that Cario misleadingly cites, held that the statute

applies only to actions for declaratory relief. *Id*. 133 Nev. at 82-83, 301 P.3d at 173-174. As this personal injury case is not such an action, NRS 30.130 does not apply.[1]

C. NRS 52.380 Violates the Separation of Powers and does not Confer Substantive Rights.

1. NRS 52.380 Impermissibly Interferes with the Judiciary's Inherent Rule-Making Authority.

Cario acknowledges the constitutional separation of powers and further acknowledges that NRCP 35 and NRS 52.380 irreconcilably conflict in material ways. Answering Brief ("Ans. Br.") at 6-9. Yet, Cario does not address the Court's standards for determining whether a statute intrudes upon the judiciary's inherent authority to make rules reasonable and necessary to carry out the duties required for the administration of justice. *See Goldberg v. The Eighth Judicial Dist. Court in and for Clark County*, 93 Nev. 614, 616, 572 P.2d 521, 522 (Nev. 1977). Nor does Cario acknowledge this Court's critical obligation to "insure that such power is in no manner diminished or compromised by the legislature." *Id*. 93 Nev. at 617, 572 P.2d at 523. *See also State v. Connery*, 99 Nev. 342, 345, 661 P.2d 1298, 1300

[1] To the extent Cairo means to suggest that the second sentence of NRS 30.130 is not limited to declaratory actions, even if that were true (and under *Attorney General v. Justice Court of Las Vegas*, it is not), that provision is expressly limited to proceedings involving the "validity of a municipal ordinance or franchise." This case involves no such issue.

(Nev. 1983) ("[t]he judiciary has the inherent power to govern its own procedures . . . ."). Thus, if a statute "interferes with the judiciary's authority to manage the litigation process . . ." it is unconstitutional. *Berkson v. LePome,* 126 Nev. 492, 501, 245 P.3d 560, 566 (Nev. 2010).

There can be no reasonable dispute that NRS 52.380 interferes with the judiciary's authority to manage the litigation process. To use Cario's own language, the statute purports to "preempt" key portions of a Nevada Rule of Civil Procedure duly enacted by this Court. *See* Ans. Br. at 6. It is difficult to imagine a more intrusive attack on this Court's inherent rule-making authority. *See also* Pet. at 12-15.

No further analysis is required. NRS 52.380 violates the constitutional separation of powers and is, therefore, invalid.

2. NRS 52.380 does not Confer Substantive Rights.

Cario admits, as he must, that NRCP 35 sets forth the *procedure* for an independent medical examination but improbably contends that NRS 52.380, which pertains to the same procedure, somehow confers substantive rights and is therefore constitutional. Ans. Br. at 8-9. Cario fails to explain, or even address, how a provision that inarguably interferes with the judiciary's ability to manage the litigation process ever could be deemed to create substantive rights. Certainly, he has cited no authority to support this specious contention.

Nor does Cario explain how, when a rule providing for independent medical examinations is within the judiciary's supreme inherent authority to regulate the litigation process, provisions addressing subsidiary matters such as attendance at the examination and recording the exam are not. The illogic of this proposition is self-evident.

Unable to address the relevant legal issues, Cario resorts to discussing policy considerations which purportedly demonstrate the need for NRS 52.380. Ans. Pet. at 9-15. Such considerations are, of course, appropriately addressed to the body with authority to promulgate or amend the provisions governing independent medical examinations, but they have no place in the constitutional analysis being performed here.[2]

In any event, Cario's policy discussion does not support his position. Cario cites a few federal decisions that characterize the independent medical examinations provided for by Federal Rule of Civil Procedure 35 (the federal counterpart to NRCP 35) as adversarial in nature and that therefore permit attendance and recordation similar to that provided for by NRS 52.380. Ans. Br. at

[2] In fact, these policy considerations were raised with the appropriate body, this Court, in connection with the Court's recent extensive revisions to the Nevada Rules of Civil Procedure, including NRCP 35. Only after the Court, in their view, rejected those considerations in amending Rule 35 did the proponents of NRS 52.380 approach the Nevada Legislature and conjure out of thin air the notion that the proposed statute created substantive rights. Pet. at 2-7.

9-11. Cario does not explain, nor could he, how any of this demonstrates that NRS 52.380 confers substantive rights.

Moreover, for every federal case characterizing medical examinations as adversarial and allowing attendance and recordation similar to NRS 52.380, there are many more federal cases that reject this characterization and refuse to allow attendance and recordation. *See, e.g.*, *Smolko v. Unimark Lowboy Trans., LLC,* 327 F.R.D. 59, 61-62 (M.D. Pa. 2018) (noting that the majority of federal courts exclude third parties from medical examinations absent special circumstances because such attendance compromises the results of the examination, interjects an adversarial, partisan atmosphere into an otherwise objective inquiry, and lends a degree of artificiality to the examination that would be inconsistent with the applicable professional standard) (refusing to permit third-party observer); *McKisset v. Brentwood BWI One LLC*, 2015 WL 8041386, at *4-5, Civil Case No. WDQ-14-1159 (D. Md. December 4, 2015) (court follows "majority view" of federal district courts and excludes third parties and recording equipment from Rule 35 examination); *Letcher v. Rapid City Regional Hosp., Inc*., 2010 WL 1930113 at *9, No. Civ. 09-5008-JLV (D. SD. May 12, 2010) (finding no particularized need for presence of third party or a recording device at Rule 35 examination); *E.E.O.C. v. Grief Bros. Corp.*, 218 F.R.D. 59, 64-65 (W.D.N.Y. 2003) (stating that permitting the presence of counsel or a recording device at Rule

35 examination undermines the ability of the requesting party's expert to conduct an effective examination) (denying request to allow counsel to attend and record the examination); *Holland v. U.S.*, 182 F.R.D. 493, 495 (D. S.C. 1998) (noting that the majority of courts have rejected third-party attendance and recordation because allowing them would lend a degree of artificiality that would be inconsistent with applicable professional standards and contrary to the purpose of Rule 35 to create a level playing field between the parties in their respective efforts to appraise the examinee's condition); *Tomlin v. Holecek*, 150 F.R.D. 628, 633-34 (D. Minn. 1993) (refusing to permit counsel to attend Rule 35 exam, or to record the exam, because permitting such attendance and recordation would promote an infusion of the adversary process into the exam). Thus, the majority of federal courts have rejected the federal caselaw that Cario cites in support of NRS 52.380, including the characterization of independent medical examinations articulated in that caselaw.

Far more significant about the decisions cited above, and those that Cario cites, is that in each case the court had substantial discretion to permit or prohibit attendance and recordation as it saw fit, unencumbered by an intrusive statute purporting to dictate to the federal judiciary how it should manage Rule 35 examinations. NRCP 35 prudently sets forth a similarly flexible regime, and

pursuant to the constitutional separation of powers, the legislature cannot subvert this exercise of fundamental judicial authority.

At its essence, Cario's argument is nothing more than a regurgitation of extra-legal policy positions advanced by the proponents of NRS 52.380 coupled with the bare assertion that those policy considerations somehow transform the statute from an improper interference with the judiciary's authority to manage litigation into a provision conferring substantive rights that this Court is powerless to affect. The proponents of NRS 52.380 may find this state of affairs desirable, but it is flatly precluded by the Nevada Constitution.

3. Decisions of Nevada Courts in Related Contexts Further Demonstrate that NRS 52.380 does not Confer Substantive Rights.

Decisions by Nevada courts in related contexts further establish that NRS 52.380 does not create substantive rights.

In *Freteluco v. Smith's Food and Drug Centers, Inc*., 336 F.R.D. 198 (D. Nev. 2020), the plaintiff/examinee argued that, under the *Erie* doctrine, the court should apply NRS 52.380, not Fed. R. Civ. P. 35, because the statute is substantive, not procedural. The court rejected the plaintiff's position and expressly determined that NRS 52.380 is procedural, not substantive. As the court stated:

> [T]he court finds 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. . . .
>
> These statutory provisions are not "outcome" or case determinative, but instead reflect a "procedural preference. . . ." NRS 52.380 sets forth process allowed under Nevada Rules of Evidence applicable to an examination under Nev. R. Civ P. 35, and is not a substantive law . . . .

Id. at 203 (citations omitted). *See also Holdaway-Foster v. Brunell*, 130 Nev. 478, 330 P.3d 471 (2014) (statute that affects only remedies and procedure is not substantive and may be applied retroactively). Consistent with these decisions, NRS 52.380, relating as it does to the procedures for conducting medical examinations, does not confer substantive rights.

4. The Plain Text of NRS 52.380 does not Create Substantive Rights.

The terms of NRS 52.380 are unambiguous in the sense that the procedures they set forth are clear. But whether NRS 52.380 confers substantive rights is not primarily a matter of statutory interpretation but instead requires application of the functional test set forth in *Berkson, supra*, to assess the impact of the statute on the judiciary's inherent authority to manage the litigation process. As demonstrated above, NRS 52.380 fails that test and is, therefore, unconstitutional.

But even to the extent the constitutional inquiry does involve statutory interpretation, contrary to Cario's contention, the terms of NRS 52.380 do not unambiguously confer substantive rights. Rather, it is clear from the statute's text that it is not substantive. In *Whitlock v. Salmon*, 104 Nev. 24, 752 P.2d 210 (Nev. 1988), on which Cario purports to rely, this Court stated that the *voir dire* statute at issue in that case was substantive because the language of the statute had been changed prior to its passage from attorneys "*may*" conduct supplemental *voir dire* examinations to attorneys "*are entitled*" to conduct such examinations. The Court concluded that this change of language evinced a clear legislative intent to confer a substantive right. *Id*. 104, Nev. at 26, 752 P.2d at 211, n. 3.

NRS 52.380 states that observers "may" attend the medical examination, "may" record the examination and "may" suspend the examination under certain circumstances. In view of the decision in *Whitlock*, the use of this language evinces a clear legislative intent *not* to create substantive rights. *See Brazer Homes Nevada, Inc. v. Eighth Judicial District Court*, 120 Nev. 575, 580-81, 97 P.3d 1132, 1135-36 (Nev. 2004) (when legislature adopts language that has a particular meaning or history, rules of statutory construction provide that court may presume that the legislature intended the language to have a meaning consistent with prior

interpretations of the language).[3] At the very least, use of the term "may" precludes the conclusion that NRS 52.380 unambiguously confers substantive rights. And because the statute indisputably interferes with the judiciary's inherent authority to manage litigation, it violates the separation of powers and is, therefore, unconstitutional.

5. The Legislative History of NRS 52.380 does not Confirm that the Statute Creates Substantive Rights.

Cario argues that the legislative history of NRS 52.380 confirms that the statute confers substantive rights. Ans. Br. at 16-19. But reliance on legislative history is simply another form of statutory interpretation, which, as shown above, is not the principal methodology by which to determine whether NRS 52.380 violates the constitutional separation of powers. *See* page 8, *supra*.

In any event, the legislative history on which Cario relies consists entirely of self-serving committee testimony by the proponents of NRS 52.380 asserting that the statute would create substantive rights. Ans. Br. at 16-19. This Court has stated that "testimony before a committee is of little value in ascertaining legislative

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[3] Cairo also contends that *Whitlock* supports his position because even though there was a "clear conflict" in *Whitlock* between NRCP 47(a) and the *voir dire* statute, the Court did not declare the statute unconstitutional. Ans Br. at 25-26. In fact, this Court determined that the statute "[did] *not* interfere with procedure to a point of disruption or attempted abrogation of an existing court rule." 104 Nev. at 26, 752 P.2d at 211 (emphasis added). Of course, NRS 52.380 clearly does attempt to abrogate NRCP 35, rendering the statute profoundly different in its effect from the *voir dire* statute at issue in *Whitlock*. *See also* Pet. at 21-22.

intent, at least where the committee fails to prepare and distribute a report incorporating the substance of the testimony." *Robert v. Justice Court of Reno Tp. Washoe County*, 99 Nev. 443, 446, 884 P.2d 957, 960 (Nev. 1983) (citation and quotation marks omitted). There is no indication that any legislator gave thought to whether NRS 52.380 would create substantive rights and certainly no indication that any committee prepared and distributed a report incorporating the substance of the proponents' testimony on that issue. *See also Freteluco*, 336 F.R.D. at 202 (noting that the legislative record revealed that no legislator ever commented on whether NRS 52.380 is substantive or procedural, court declines to consider self-interested committee testimony of proponents and opponents of the statute when deciding that issue).

The legislative history of NRS 52.380 clearly does not demonstrate that the statute creates substantive rights. And because the statute fails the pertinent constitutional test, it is invalid.

6. The Content of Other States' Equivalents to NRCP 35 is Irrelevant.

Cario asserts that the equivalents to NRCP 35 in California, Utah, Washington and Arizona, which Nevada courts "often look to" for guidance, already confer "substantive" rights allowing third-party attendance at and recordation of independent medical examinations. Ans. Br. at 19-20. But Cario cites no authority, and we are aware of none, that states or suggests that any of

those states in fact consider those purported rights substantive. Indeed, in three states, Utah, Washington and Arizona, the Rule 35 equivalent was adopted by the judiciary. It is, therefore, hardly surprising that Cario can offer no authority to support his bare contention.[4]

In the end, Cario's reference to other states' rules that govern independent medical examinations is just another extra-constitutional argument in support of Cario's preferred regime for such examinations. The content of other states' rules has no relevance whatever to the constitutional questions presented by the Petition.

7. Cario Misconstrues the Authority from Other Jurisdictions Cited in the Petition.

The Petition cited treatises and case law from other jurisdictions – including the United States Supreme Court, the Court of Appeals for the District of Columbia, and six different state courts – to establish two propositions. Pet. at 16-18. First, Rule 35 and the examination process in its ambit is a procedural rule within the scope of the judiciary's inherent authority. Second, courts have consistently held that legislative intrusions on similar such rules violate the separation-of-powers doctrine. *Id*. As discussed above, Cario's Answering Brief

[4] In California, the Rule 35 equivalent was promulgated by the legislature, but not in an effort to "preempt" a pre-existing court rule. In California, in contrast to Nevada, the legislature, not the judiciary, is responsible for that state's Code of Civil Procedure. This profound difference from the separation of powers embodied in the Nevada Constitution renders California law of no use in evaluating the constitutional issues the Petition presents.

does not refute the first proposition. Nor does it discuss the Supreme Court or Court of Appeals cases. Instead, it devotes five pages to drawing minor and immaterial distinctions between NRS 52.380 and the procedures addressed by those state courts. Ans. Br. at 20-25. But this tedious exercise misses the forest for the trees. The point is not whether Nevada's examination procedures differ slightly from those in Illinois or Delaware—the point is that none of these states' legislatures may constitutionally alter or interfere with the procedures established by the judiciary.

Having conceded that Rule 35 is procedural, Cario's efforts to distinguish the other state cases necessarily are futile. Cario is correct, of course, that those cases involved somewhat different procedures governing medical discovery and evidence, as well as somewhat different legislative intrusions into such procedures. But regardless of whether those cases involved the disclosure of medical records or discovery from physicians, their larger lesson is the same: courts consistently hold that the legislature "violates the separation of powers clause" where it enacts a statute that "directly conflicts with the discovery procedures that have been expressly promulgated as rules of this court pursuant to its constitutional rulemaking authority." *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1094, 179 Ill.2d 367, 446 (Ill. 1997); *see also Willeford v. Klepper*, 597 S.W.3d 454, 470 (Tenn. 2020) ("It is well settled that decisions with regard to pre-trial discovery

matters rest within the sound discretion of the trial court."). Significantly, Cario has identified no case upholding legislative intrusion into judicially-created procedures for medical discovery.[5]

Cario also implicitly concedes that, like the statutes in the other states' cases, NRS 52.380 interferes with judicial discretion. He simply protests that the interference is modest because the statute merely eliminates Rule 35's "good cause" requirement. Ans. Br. at 21, 24. But Cario cites no authority for the proposition that the Nevada Constitution would excuse even a minor legislative intrusion into the judicial sphere. Moreover, Cario greatly understates the significance of the intrusion. The discretion to control the conduct of medical examinations goes to the heart of the fundamental judicial authority to oversee "the effective and efficient administration of our judicial system." *Goldberg*, 572 P.2d at 523. As the Supreme Court observed in a case Cario ignores, the independent

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[5] Cario notes that an Illinois statute provides that a plaintiff undergoing an examination may be accompanied by an attorney or other person of his or her choosing. Ans. Br. at 22 (citing 735 ILCS 5/2-1003). This is not the forum to assess whether an Illinois statute is constitutional. Nevertheless, in Illinois, "the legislature may, in some instances, share concurrent power with [the judiciary] to prescribe procedural rules governing discovery," but "where a statutory procedure conflicts with a rule of this court relating to the same procedure, the rule necessarily prevails." *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1092, 179 Ill.2d 367, 439–40 (Ill. 1997). This Court follows the same rule. *See, e.g., Berkson*, 245 P.3d at 564 (legislature violates the separation-of-powers clause if it "enact[s] a procedural statute that conflicts with a pre-existing procedural rule."). Unlike here, there appears to be no Illinois court rule that conflicts with the statute Cario cites. Here, of course, NRS 52.380 directly and undisputedly conflicts with Rule 35.

medical examination process is an important part of "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." *Sibbach v. Wilson & Co*., 312 U.S. 1, 14 (1941).

II. CONCLUSION

For the foregoing reasons, and those set forth in the Petition, the Court should grant the Petition and issue a writ mandating that the district court comply with NRCP 35 and/or prohibiting the district court from following NRS 52.380, which is unconstitutional.

DATED: August 5, 2021

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DECLARATION OF TYSON E. HAFEN, ESQ.

I, Tyson E. Hafen, declare as follows:

1. I am counsel for the Petitioner Yeonhee Lee.

2. I verify that I have read the foregoing Petition for Writ of Mandamus and/or Prohibition and that the same is true to my knowledge, except for those matter stated on information and belief, and as to those matters, I believe them to be true.

3. I, rather than Petitioner, make this verification because the relevant facts are largely procedural and thus within my knowledge as Petitioner's attorney.

4. This verification is made pursuant to NRS 15.010, NRS 34.170, and NRS 34.330.

DATED: August 5, 2021

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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 answering brief has been prepared in proportionally spaced typeface using Microsoft Word with 14-point font size in Times New Roman type style.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding parts of the brief exempted by NRAP 32(a)(7)(C), the brief contains 4,625 words.

3. I hereby 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), which requires every assertion in the brief regarding matters in the record to be supported by a reference to a page of the transcript or appendix where the matter relied on is to be found.

4. 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: August 5, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2021, a true and correct copy of the foregoing **PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION** was submitted for filing via the Court's eFlex electronic filing system, and electronic notification will be sent to the following:

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