

IN THE SUPREME COURT OF THE STATE OF NEVADA

**PRO PETROLEUM, LLC; RIP
GRIFFIN TRUCK SERVICE CENTER,
INC.; DAVID YAZZIE, JR.,**

Petitioners,

v.

**EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK, THE HONORABLE SUSAN
H. JOHNSON, DISTRICT JUDGE,**

Respondent,

and

DAKOTA JAMES LARSEN,

Real Party in Interest.

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Supreme Court Case No.: _____

District Court Case No.: A-20-826907-C

PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

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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 Justice of this Court may evaluate possible disqualification or recusal.

Pro Petroleum, LLC, is a Texas Limited Liability Company.

Rip Griffin Truck Service Center, Inc., is a Texas Corporation.

David Yazzie, Jr. is an individual.

Pro Petroleum, LLC; Rip Griffin Truck Service Center, Inc., and David Yazzie, Jr. (“Defendants”) are represented by Annalisa N. Grant and Sonya C. Watson of Grant & Associates.

DATED: September 23, 2021

GRANT & ASSOCIATES

By: /s/ Sonya C. Watson
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David Yazzie, Jr.

ROUTING STATEMENT

Pursuant to NRAP 17(b)(3), this Petition, which challenges a discovery order, would ordinarily be assigned to the Court of Appeals in this first instance. Nevertheless, the discovery dispute that is the subject of this Petition is unique as it raises as a principal issue the separation of powers clause of the Nevada Constitution and thereby implicates NRAP 17(a)(11). Specifically, this Petition addresses the scope of this Court's exclusive authority to promulgate procedures to ensure the fair and efficient function of the Nevada Judiciary, and whether the Legislature improperly infringes upon the Court's authority in enacting a statute that expressly contradicts a rule the Court has promulgated.

Here the Legislature's enactment of NRS 52.380 expressly contradicts this Court's 2019 amendments to Nevada Rule of Civil Procedure 35 ("NRCP 35"), which governs independent medical examinations. Clearly intending to usurp the Court's authority, the Legislature under NRS 52.380, permits counsel to attend the medical examination where NRCP 35 prohibits the attendance of counsel. Further, the Legislature automatically allows for recording the

examination where NRC 35 requires that good cause is shown prior to recording the examination.

It is necessary that the conflict between NRC 35 and NRS 52.380 be resolved definitively and with due speed so that litigants and the lower court may proceed accordingly. The Petitions for Writs of Mandamus in Dockets Number 81912,82618, and 82831 demonstrate that the lower courts have issued conflicting rulings regarding whether NRC 35 is superseded by NRS 52.380. Mandatory authority on this issue is necessary, and therefore this Petition also falls within NRAP 17(a)(12), as it raises a question of statewide public importance. Therefore, the Court should retain this case.

DATED: September 23, 2021

GRANT & ASSOCIATES

By: /s/ Sonya C. Watson
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NOTICE OF FILING OF WRIT PETITION

Pursuant to NRAP 21(a)(1), a petition for a writ of mandamus or prohibition directed a court shall be accompanied by a notice of the filing of the petition, which shall be served on all parties to the proceedings in that court. Therefore, all parties of the Eighth Judicial District Court Case No. A-20-826907-C are hereby placed on notice of this Petition filed by Petitioners Pro Petroleum, LLC; Rip Griffin Truck Service Center, Inc.; and David Yazzie, Jr.

DATED: September 23, 2021

GRANT & ASSOCIATES

By: /s/ Sonya C. Watson
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I. OVERVIEW AND RELIEF SOUGHT

Petitioners, Pro Petroleum, LLC, Rip Griffin Truck Service Center, Inc. and David Yazzie, Jr. submit this *PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION* (“Petition”). Pursuant to NRAP 21 (a), Petitioners respectfully ask the Court to issue a writ of mandamus directing the district court to comply with the provisions of NRCP 35 and /or issue of a writ of prohibition directing the district court to refrain from following NRS 52.380, which unconstitutionally infringes upon this Court’s inherent power to promulgate rules to govern the procedures of the Nevada Judiciary.

II. ISSUE PRESENTED FOR REVIEW

The issue presented here is whether NRCP 35, promulgated by this Court, or NRS 52.380, subsequently enacted by the Nevada Legislature, controls the procedures for independent medical examinations in Nevada. No facts relevant to this Petition are in dispute and the necessary background is provided herein.

III. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. In Amending NRCP 35, this Court Carefully Considered Several Proposed Amendments and Rejected Each of Them in Favor of Its Own Version.

In 2017, this Court undertook the revision of the Nevada Rules of Civil Procedure, establishing a committee (the “Revision Committee”) to review and recommend updates. Appendix (“App.”) at 0001-2. The Revision Committee created subcommittees, one of which was the Discovery Committee, to evaluate the existing rules and develop proposed amendments. Among other rules, the Discovery Committee was tasked with evaluation of NRCP 35.

The Discovery Subcommittee devoted substantial attention to NRCP 35, including the issues of attendance at independent medical examinations and the circumstances under which the examination could be recovered. Unable to agree on the contents of an amendment to NRCP 35, the subcommittee presented the Court with three alternative amendments to NRCP 35, each addressing the issue of attendance and recording. *See App.* at 0007-15

This Court issued an order amending the Nevada Rules of Civil Procedure on December 31, 2018. The amendments became effective on March 1, 2019. *App.* at 0016-19. Included in the amendments was the revision to NRCP 35, which differed from each alternative the Revision Committee had proposed. The Rule Provides in pertinent part:

(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....

(3) **Recording the Examination.** On request of a party or the examiner, the court may for good cause shown, require as a condition of the examination that the examination be audio recorded....

(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.

(C) An observer must not in any way interfere, obstruct, or participate in the examination.

See App. at 0021-25.

Prior to this Court's order amending NRCP 35, the rule did not address recordings and observers at independent medical examinations. The amendment to NRCP 35 reflects this Court's mindful consideration of recordings and observers at independent medical examinations. The new NRCP 35 strikes a careful balance, neither entirely prohibiting recordings and observers nor allowing them without restriction. The new rule is especially mindful of the prejudice that would result from allowing the examinee or the examinee's counsel present at the independent examination.

B. The Legislature is Lobbied to Infringe upon this Court's Rulemaking Authority.

The legislative history of NRS 52.380 indicates the statute's express purpose was to enact a draft of NRCP 35 this Court rejected. On March 18, 2019, AB 285 was introduced. The legislative minutes make clear AB 285 was expressly intended to implement changes to NRCP 35. Supporters of NRS 52.380, including former members of the Discovery Subcommittee, noted that what because AB 285 was rejected during the process that led to the current iteration of NRCP 35:

The origins of this bill flow from a committee formed by the Supreme Court of Nevada two years ago to review, revise, and update our Nevada Rules of Civil Procedure (NRCP) – the rules that govern all civil cases The Committee was broke down into subcommittees, and I chaired the subcommittee that handled this Rule 35 medical examination issue We voted 7-to-1 to make substantial changes, the changes that are set forth embodied in the bill before you, Assembly Bill 285. Unfortunately, when our recommendations went to the full Supreme Court of Nevada, the rejected our changes for reason we are still not clear on. At that point, we reassessed our position.

App. at 0028-29, Minutes of the Meeting of the Assembly Committee on Judiciary, 80th Session, March 27, 2019. The Nevada Legislature was thus persuaded to pass AB 285 and enact NRS 52.380, which provides in pertinent part:

NRS 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

3. The observer attending the examination pursuant to subsection 1 may make an audio or stenographic recording of the examination.

4. The observer attending the examination pursuant to subsection 1 may suspend the examination if an examiner:

(a) Becomes abusive towards an examinee; or

(b) Exceeds the scope of the examination, including without limitation, engaging in unauthorized diagnostic tests or procedures

App. at 0047-48.

The purpose of NRS 52.380 is to provide the examinee with an advantage which this Court clearly decided examinees should not have. Not only does it permit the presence of an examinee's attorney, which NCRP 35 expressly forbids, it also does not require a showing of good cause for recording the examination and permits the attorney observer to suspend the examination upon a subjective belief that the examiner is being abusive or exceeding the scope of the examination. This Court in its wisdom decided against giving examinees and their attorneys the power to control an examination meant to provide the opposing party its one and only opportunity to physically examine a person making an injury claim and potentially discover medical evidence to rebut that produced by the examinee's own physicians.

C. The Relevant Proceedings Below

On August 6, 2021, Petitioners filed a Motion to Compel Rule 35 Exam, seeking that Plaintiff in the underlying matter be required to submit to a physical examination by Petitioners' expert without a recording and without the presence of an observer. App. at 0085-161. Plaintiff opposed Petitioners' motion, arguing that pursuant to NRS 52.380, Plaintiff must be permitted to record the examination and have an observer of his choosing present at the examination. App. at 0162-253. Petitioners filed a reply brief in further support of their motion. App. at 0254-267.

On August 26, 2021, the Discovery Commissioner filed a Report and Recommendation providing that Plaintiff is compelled to submit to a physical examination pursuant to NRCP 35 but is permitted to record the examination and have an observer present pursuant to NRS 52.380. App. at 0268-271. Petitioner timely objected to the Report and Recommendation, and Plaintiff opposed the objection. App. at 0272-416. After hearing arguments on the objection on September 9, 2021, the District Court issued an Order affirming and adopting the Discovery Commissioner's Report and Recommendation with the modification

that Petitioners may also have an observer present at the examination if they so choose. App. at 0432-438. This Petition followed.

IV. ARGUMENT

A. The Court Should Exercise its Discretion to Consider this Petition.

Even when a remedy at law exists, this Court may exercise its discretion to consider a petition for a writ of mandamus when the circumstances involved reveal “urgency and strong necessity, or when an important issue of law requires clarification and sound judicial economy favors granting the petition.” City of Las Vegas v. The Eighth Judicial Dist. Court ex rel County of Clark, 124 Nev. 540, 543-44, 188 P.3d 55, 58 (Nev. 2008) (citations, quotation marks and footnotes omitted). See also Cote H. v. The Eighth Judicial Dist. Court ex rel County of Clark, 124 Nev. 36, 39, 175 P.3d 906, 908 (Nev. 2008) (the court has complete discretion to determine whether it will consider a petition for writ of mandamus or writ of prohibition; while generally an appeal constitutes an adequate and speedy remedy, the court nonetheless may exercise its discretion to intervene when an important issue of law needs clarification and sound judicial economy and administration favor granting the petition).

This Court has exercised its discretion to accept writ petitions addressing important discovery issues on several occasions. In *Okada v. The Eighth Judicial Dist. Court ex rel Clark County Nevada*, 131 Nev. 834, 359 P.3d 1106 (Nev. 2015), the court accepted a writ petitioning for review of a discovery order noting that it is appropriate to do so when the writ raises an important issue of law that needs clarification and public policy is served by the court's invocation of its original jurisdiction. *Id.*, 131 Nev. at 840, 359 P.3d at 1110-1111 (citations, footnotes and quotation marks omitted). The court did so again in *Department of Taxation v. The Eighth Judicial Dist. Court ex rel Clark County Nevada*, 466 P.3d 1281 (Nev. 2020), when it defined what "possession, custody, or control" means under NRCP 16.1. *See Id.* at 1283. *See also Mays v. The Eighth Judicial Dist. Court ex rel Clark County Nevada*, 105 Nev. 60, 61-62, 768 P.2d 877, 878 (Nev. 1989) (the court granted a writ petition seeking review of a district court order granting defendant's motion to waive the requirement of the then newly-adopted NRCP 16.1 and 26).

Similar to the instances *supra*, this Petition raises an issue of law that needs clarification and public policy will be served by the Court's acceptance of this Petition. NRCP 35 and NRS 52.380 cannot

both govern the issue of recordings and observers at independent medical examinations because they conflict. NRCP 35 allows the presence of an observer but the observer may not be the examinee's attorney, or anyone hired by the examinee or the examinee's attorney and does not allow the observer to interfere with the examination, while NRS 52.380 allows an observer to suspend the examination based on a subjective belief that the examiner is being abusive or exceeding the scope of the examination. Further, NRCP 35 requires the examinee to show good cause prior to recording an examination, while NRS 52.380 allows an examinee to record an examination without showing good cause. The conflict between NRCP 35 and NRS 52.380 has already produced a split in the district court as reflected by the petition pending in Docket No. 81912, the petition formerly pending in Docket No. 82618, and the petition pending in Docket No. 82831. It is evident that the instant Petition presents an important legal issue requiring prompt clarification, and judicial economy and public policy are served by entertaining it.

B. This Petition Should be Granted and NRS 52.380 Should be Ruled Unconstitutional.

1. NRS 52.380 Violates Nevada's Separation of Powers Doctrine

NRS 52.380 is an inappropriate infringement by the Nevada Legislature upon the power of the Nevada Judiciary. It violates the separation of powers clause of the Nevada Constitution because it does not grant substantive rights but is instead procedural.

The Nevada Supreme Court has stated that “[t]he 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). The Nevada Constitution therefore provides that powers belonging to one branch may not be exercised by any other branch. *See* Nev. Const. art. 3, § 1. The Legislative and executive branches may not exercise power belonging to the judiciary. *Graves v. State*, 82 Nev. 137, 413 P.2d 503 (Nev. 1966).

The judiciary has inherent powers to administer its affairs. *Dunphy v. Sheehan*, 92 Nev. 259, 266, 549 P.2d 332, 336-37 (Nev. 1976). The scope of judicial power “include[s] rule-making and other incidental powers reasonable and necessary to carry out the duties required for the administration of justice.” *Goldberg v. The Eighth Judicial Dist. Court in and for Clark County*, 93 Nev. 614, 616, 572 P.2d 521, 522 (Nev. 1977). The judiciary may govern its own

procedures. *See State v. Connery*, 99 Nev. 342, 345, 661 P.2d 1298, 1300 (Nev. 1983).

Regarding procedural rules, this Court has stated that “the 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 ensure that such powers is in no manner diminished or compromised by the legislature.” *Goldberg*, 93 Nev. at 617, 572 P.2d at 523. The *Goldberg* Court cites a law review article in showing that it is for good reason that the legislature does not manage the affairs of the judiciary:

Legislatures are not held responsible in the public eye for the efficient administration of the court and hence do not feel pressed to constant reexamination of procedural methods Court rules, on the other hand are flexible in application, easy of clarification, and rapid of amendment should amendment be required. They are the work of any agency whose whole business is court business and for whom court efficiency can become a major interest, an agency keenly aware of the latest problems and fully capable of bringing to bear in the early solution a long and solid experience.

Id. (citing Levin and Amsterdam, Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision, 107

U.Penn.L.Rev. 1, 10 (1958)). Essentially, the legislative process is too slow for judicial rulemaking.

Accordingly, this Court has ruled that the legislature violates the separation of powers when it “enact[s] a procedural statute that conflicts with a pre-existing procedural rule, ... and such statute is of no effect.” *Berkson*, 126 Nev. at 499, 245 P.3d at 565 (internal quotations omitted); see also *Washoe Med. Ctr. V. Second Judicial Dist. Court of State of Nev. ex rel. County of Washoe*, 122 Nev. 1298, 1305, 148 P.3d 790, 795, n. 29 (Nev. 2006) (“Under the separation of powers doctrine, the Legislature may not enact a procedural statute that conflicts with a pre-existing procedural rule”) (internal quotation marks omitted). A statute is unconstitutional if it “interferes with the judiciary’s authority to manage the litigation process and [the] court’s ability to provide finality through the resolution of a matter on appeal.” *Berkson*, 126 Nev. at 501, 245 P.3d at 566. Indeed, a “procedural statute that conflicts with a preexisting procedural rule is of no effect, and the rule supersedes the statute and controls, so as not to interfere with the judiciary’s inherent authority to procedurally manage litigation.” *Washoe Med. Ctr.*, 122 Nev. at 1305, 148 P.3d at 795, n. 29 (citation and internal quotation marks omitted).

NRS 52.380 is an inappropriate infringement by the Nevada Legislature upon the power of the Nevada Judiciary. The statute violates the separation of powers clause of the Nevada Constitution, and therefore has no effect on independent medical examinations. This Court should therefore grant this Petition and issue a writ directing the district court to comply with NRCP 35 and/or prohibiting the district court from following NRS 52.380.

2. Both Federal and State Courts Have Found That Rules Governing Independent Medical Examinations are Procedural

The United States Supreme Court has long held that “**rules authorizing court order[s] for physical and mental examination of a party are rules of ‘procedure[.]’**” *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13-14 (1941) (emphasis added); *see also Schlagenhauf v. Holder*, 379 U.S. 104, 113, 85 S.Ct. 234, 240 (1964) (reaffirming that “the Rule was a regulation of procedure”); *cf. Beach v. Beach*, 114 F.2d 479, 481 (D.C. Cir. 1940) (rejecting “contention that the rule modifies the ‘substantive right’ of litigants”). In other words, NRCP 35 is the means by which a litigant’s rights are enforced, not the rule by which the court will decide those rights. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 130 S.Ct. 1431, 1442 (2010).

In Illinois, an appellate court cited the above federal cases and found that Illinois' rule governing medical examinations was within the judiciary's "inherent power to order physical examinations in appropriate cases." *Kaull v. Kaull*, 26 N.E.3d 361, 380-86, 2014 IL App. (2d) 130175 ¶¶ 56-7- (Ill.App. 2 Dist. 2014); *cf. People ex rel. Noren v. Dempsey*, 139 N.E.2d 780, 783-84, 10 Ill.2d 288, 293-94 (1957) ("In light of the comprehensive discovery allowed today, it would be difficult to justify an exception that would single out for disparate treatment the case of the plaintiff who seeks damages because of his physical condition."). In general, "according to the great weight of authority in this country and the distinct modern trend of the courts, trial courts, in actions to recover damages for personal injuries, have an inherent discretionary power to order a reasonable physical examination the plaintiff" 71 A.L.R.2d 973, Court's power to order physical examination of personal injury plaintiff as affected by distance or location of place of examination (1960).

B. NRS 52.390 does not Confer Substantive Rights.

While it is true the Nevada Legislature has the power and authority to create and modify substantive rights, NRS 52.380 did not create or modify any substantive rights, meaning causes of action that

can be alleged or damages that may be sought. The statute instead expressly attempts to modify the process by which the Nevada Judiciary governs a specific part of personal injury litigation. It is expressly procedural and nothing within NRCP 35 conflicts with the Nevada Constitution, nor does it abridge, enlarge, or modify any substantive right. *See, Connery*, 99 Nev. at 345, 661 P.2d at 1300 (noting that any court created procedural rules “may not conflict with the state constitution or abridge, enlarge or modify any substantive right” (internal quotations omitted)).

To the extent NRS 52.380 intends to create or reinforce a substantive right, it interferes “with procedure to a point of disruption” and attempts to abrogate the existing court rule concerning physical examinations of personal injury plaintiffs. *See contra, Whitlock v. Salmon*, 104 Nev. 24, 26 (1988) (“[a]lthough the statute does implicate trial procedure, it does not interfere with procedure to a point of disruption or attempted abrogation of an existing court rule ...”).

V. CONCLUSION

For the foregoing reasons, the Court should grant this 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: September 23, 2021

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By: /s/ Sonya C. Watson
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Rip Griffin Truck Service Center, Inc., &
David Yazzie, Jr.

DECLARATION OF SONYA C. WATSON ESQ.

I, Sonya C. Watson, declare as follows:

1. I am counsel for the Petitioners Pro Petroleum, LLC, Rip Griffin Truck Service Center, Inc, and David Yazzie, Jr.

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 matters stated on information and belief, and as to those matters, I believe them to be true.

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

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

...

...

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...

...

DATED: September 23, 2021

GRANT & ASSOCIATES

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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 4,484 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: September 23, 2021

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Rip Griffin Truck Service Center, Inc., &
David Yazzie, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 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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