

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.: 83536

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

**PETITIONERS' MOTION TO STAY THE CASE ON AN ORDER
SHORTENING TIME**

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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. (“Petitioners”) are represented by Annalisa N. Grant and Sonya C. Watson of Grant & Associates.

DATED: November 3, 2021

GRANT & ASSOCIATES

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

JURISDICTIONAL STATEMENT

Pursuant to NRAP 8(a)(1), this Motion, which seeks a stay of the case pending Petitioners' Petition for Writ of Prohibition before the Supreme Court, was first heard by the District Court judge assigned to the case. Petitioners now file this Motion with the Supreme Court pursuant to NRAP 8(a)(2)(A)(ii) as the District Court judge denied Petitioners' Motion after a hearing on November 2, 2021 citing concern about uncertainty regarding the length of time the case may be stayed and a desire to manage the court's docket effectively and efficiently.

DATED: November 3, 2021

GRANT & ASSOCIATES

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

NOTICE OF FILING OF MOTION TO STAY THE CASE

Pursuant to NRAP 8(a)(2)(C), in a motion to stay the case the moving party must give reasonable notice of the motion to all parties. Therefore, all parties of the Eighth Judicial District Court Case No. A-20-826907-C are hereby placed on notice of this Motion to Stay the Case filed by Petitioners Pro Petroleum, LLC; Rip Griffin Truck Service Center, Inc.; and David Yazzie, Jr.

DATED: November 3, 2021

GRANT & ASSOCIATES

By: /s/ Sonya C. Watson
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Statutes

NRS 52.380	<i>Passim</i>
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Rules

NRAP 8	<i>Passim</i>
NRCP 35	<i>Passim</i>
NRCP 37	<i>Passim</i>

I. OVERVIEW AND RELIEF SOUGHT

On August 13, 2021, counsel for Petitioners and Real Party in Interest, Dakota Larsen (“Plaintiff”) in the above-captioned matter appeared telephonically before the Honorable Discovery Commissioner Jay Young on Defendants’ Motion to Compel Physical Examination of Plaintiff Pursuant to NRCP 35 and Execution of Employment Releases on an Order Shortening Time. The Discovery Commissioner recommended that Plaintiff be compelled to submit to a physical exam pursuant to Rule 35, but that Plaintiff may record the exam and have an observer present at the exam pursuant to NRS 52.380. Petitioners objected to the recommendation in so far as it allowed Plaintiff to record his Rule 35 exam and have an observer present at the exam. Petitioners requested that the District Court reject and reverse the Discovery Commissioner’s recommendation allowing Plaintiff to record his Rule 35 exam and have an observer present at the exam who is an attorney, attorney representative, or a hired expert/consultant. Petitioners also requested that the Court stay the case pursuant to NRCP 37(b)(1)(D) to allow the Rule 35 exam to be conducted prior to the surgery then scheduled for September 13, 2021.

On September 9, 2021, the District Court issued an Order affirming and adopting the Discovery Commissioner's Report and Recommendations. The Court also denied Petitioners' Motion to Stay the Case pursuant to NRCP 37(b)(1)(D). Petitioners then petitioned this Court for a Writ of Mandamus and/or Prohibition seeking review of the District Court's September 9, 2021 Order. On October 15, 2021, this Court issued an Order Directing Answer and setting a briefing schedule for Petitioners' petition.

Petitioners respectfully request that this Court stay the case while its Petition is pending.

Further, Plaintiff's Rule 35 exam is scheduled to go forward on November 11, 2021 and he is scheduled to undergo lumbar surgery on November 15, 2021. An Order Shortening Time is necessary so that this Motion may be heard and resolved prior to Plaintiff's scheduled Rule 35 examination and lumbar surgery and is not intended for delay. Given the quickly approaching examination and surgery dates, time is of the essence.

II. ISSUE PRESENTED FOR REVIEW

The issue presented here is whether the case should be stayed in District Court while Petitioners' Writ of Prohibition is pending before

this Court. No facts relevant to this Motion are in dispute and the necessary background is provided herein.

III. STATEMENT OF RELVANT FACTS

This case involves a motor vehicle accident in Las Vegas, Nevada, on or about June 20, 2019. Petitioner David Yazzie was traveling behind Plaintiff and Plaintiff alleges that Petitioner Yazzie collided with the rear of Plaintiff's vehicle. Plaintiff alleges injuries to his lumbar and cervical spine as a result of the motor vehicle accident. He further alleges past medical specials totaling \$24,000, future medical specials totaling \$2,000,000+, past wage loss totaling \$2,160 and future wage loss totaling \$1,440,000+. Again, Plaintiff is scheduled to undergo surgery for his lumbar spine on September 13, 2021.

IV. ARGUMENT

A. STANDARD OF REVIEW

NRAP 8(c) provides that

[i]n deciding wither to issue a stay or injunction, the Supreme Court or Court of Appeals will generally consider the following factors: (1) whether the object of the appeal will be defeated if the stay or injunction is denied; (2) whether appellant/petitioner will suffer irreparable or serious injury if the stay or injunction is denied; (3) whether respondent/real party in

interest will suffer irreparable or serious injury if the stay or injunction is granted; and (4) whether appellant/petitioner is likely to proceed on the merits in the appeal or writ petition.

Accordingly, the Court should consider the four factors noted above in determining whether to grant Petitioners' motion. *See Hansen v. Eighth Judicial Dist. Court ex rel. County of Clark*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000).

B. THE OBJECT OF PETITIONERS' WRIT PETITION WILL BE DEFEATED IF THE CASE IS NOT STAYED

The purpose of Petitioners' Writ is to settle a question of law arising from the contradictory language between NRCP 35 and NRS 52.380, and to protect Petitioners through preservation of their sole opportunity to examine the Plaintiff's physical condition without Plaintiff and his attorneys controlling that examination. In this vein, Petitioners' Writ seeks to prevent Plaintiff's Rule 35 examination from proceeding pursuant to NRS 52.380, which is an unconstitutional statute. However, the District Court has ordered that Plaintiff's Rule 35 examination proceed pursuant to NRS 52.380. Therefore, the object of Petitioners' Writ will be defeated if this case is not stayed because then Plaintiff's Rule 35 examination will necessarily proceed pursuant to NRS 52.380, allowing Plaintiff to proceed with recording the Rule 35

examination without showing good cause and to have a medical doctor hired by his attorney present at the examination., which will be attended by a medical professional hired by his attorney.

C. PETITIONERS WILL SUFFER IRREPARABLE INJURY IF
THE IS STAY IS DENIED AND PLAINTIFF WILL NOT IF
THE STAY IS GRANTED

An injury is irreparable if compensatory damages are inadequate to remedy the injury. *See Excellence Cmty. Mgmt. v. Gilmore*, 131, Nev. 347, 353, 351 P.3d 720, 724 (2015). However, where money damages are difficult to calculate, the court may find irreparable injury. *Id.* Here, if Plaintiff's Rule 35 examination proceeds pursuant to NRS 52.380, whereby he may record the examination without first showing good cause to do so, and may have a medical professional hired by his attorney present at the exam, Petitioners will suffer irreparable injury. The presence of a hired medical professional provides Plaintiff an unfair advantage by allowing Plaintiff to control, and potentially interfere with, the examination. Plaintiff's medical professional will be able to observe and later offer opinions regarding the quality and validity of the Rule 35 examination. The injury Plaintiff's unfair advantage will cause Petitioners is not quantifiable, and compensatory damages for this injury are inadequate.

Further, given the gravity of the legal question set before the Supreme Court in several accepted Writs concerning this exact issue, including the one recently accepted for this matter, allowing the examination of Plaintiff to go forward under parameters that this Court may soon deem unconstitutional results in irreparable prejudice to Petitioners in this action. The irreparable harm is manifested in potentially forcing the defense to conduct an examination pursuant to a rule that is unconstitutional, and as has already been noted, gives undue control to Plaintiff's attorneys and hired medical professionals. It then follows that not staying the case in its entirety until the Supreme Court decides the matter, and allowing Plaintiff's surgery to go forward without a Rule 35 examination performed by Petitioners, results in additional prejudice and irreparable harm to Petitioners by depriving them of their sole opportunity to examine Plaintiff in his current physical state.

Conversely, Plaintiff will not suffer any injury if this matter is stayed pending a decision by this Court. Both the Rule 35 examination and the surgery can be rescheduled without any harm to Plaintiff. A brief stay of this action while this Court considers the forthcoming

briefs submitted by the parties results only in a mere postponement of depositions, the Rule 35 examination, and Plaintiff's surgery.

D. PETITIONERS ARE LIKELY TO PREVAIL ON THE MERITS

In their Writ, Petitioners extensively covered whether NRCP 35 or NRS 52.380 controls regarding recordings and observers at Rule 35 examinations. Petitioners will not belabor the point again here, but instead reemphasize that it has long been held that court rules relating to physical examination of a party are procedural, and not substantive. NRS 52.380 is an unconstitutional infringement by the Nevada Legislature upon the power of this Court. This Court has previously held 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 v. LePome*, 126 Nev. 492, 499, 245 P.3d 560, 565 (Nev. 2010). Accordingly, NRCP 35, the pre-existing procedural rule, is the authority upon which the Court should rely in the instant matter, and Petitioners are likely to succeed on the merits of the Writ pending before the Supreme Court.

V. CONCLUSION

Petitioners' Supreme Court petition will become moot if this case is not stayed as the date for Plaintiff's Rule 35 examination quickly

approaches. Further, for the reasons discussed above, if a stay is not granted, Petitioners will suffer irreparable harm while Plaintiff will not if a stay is granted. Finally, Petitioners are likely to succeed on the merits of their petition to the Supreme Court in light of prior rulings of that court. Petitioners therefore respectfully request that the Court stay this case while their petition is pending.

DATED: November 3, 2021

GRANT & ASSOCIATES

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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 Motion to Stay the Case on an Order Shortening Time 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: November 3, 2021

GRANT & ASSOCIATES

By: /s/ Sonya C. Watson
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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: November 3, 2021

GRANT & ASSOCIATES

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

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2021, a true and correct copy of the foregoing **title** 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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/s/ Denisse A. Girard-Rubio

An Employee of Grant & Associates