

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID G. MARTINEZ and CHILLY
WILLY’S HANDYMAN SERVICES,
LLC

Petitioners,

EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND
FOR THE COUNTY OF CLARK; THE
HONORABLE RONALD J. ISRAEL,
DISTRICT JUDGE,

and

TAYLOR MILES CAPE, and individual,

Respondents.

Supreme Ct. Case No. 83911
Electronically Filed
Feb 08 2022 01:58 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Dist. Ct. Case No.:

A-20-818569-C

PETITIONERS’ MOTION TO STAY PROCEEDINGS

Petitioners DAVID G. MARTINEZ and CHILLY WILLY’S HANDYMAN SERVICES, LLC (“Petitioners”), by and through their attorneys of record, respectfully submit their Motion to Stay Proceedings, and ask this Court to stay the district court proceedings pursuant to Nevada Rule of Appellate Procedure 8 pending this Court’s consideration and determination of Petitioners’ Writ of Mandamus.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL AND PROCEDURAL BACKGROUND

This action arises out of an automobile accident. On 7/27/21, the parties submitted and the district court signed a Stipulation and Order to Extend Discovery (First Request) and Trial (First Request), which established an initial expert disclosure deadline of 1/7/22 and set trial for 6/27/22.¹

On 12/14/21, Petitioners filed their Writ of Mandamus as to the district court's order regarding Dr. Lewis Etcoff, Petitioners' expert.² On 12/14/21, Petitioners filed their Motion to Stay with the district court.³ Respondent filed his Opposition on 12/21/21, and the Reply was filed on 12/23/21.⁴ The Motion to Stay was set for chambers calendar. On 1/14/22, the district court denied the motion.⁵ The district court found: (1) there were not sufficient grounds to stay the entirety of the case pending the Petitioners' Writ; (2) Petitioners' Writ challenged the constitutionality of NRS 52.380, but Petitioners had waived their constitutional challenge by not serving the Secretary of State pursuant to NRS 30.130; and (3) the *Mikohn* factors

¹ Affidavit of Brent D. Quist, ¶3, Appendix at APP000001; Stipulation and Order at 3, Appendix at APP000003-APP000012.

² Affidavit of Brent D. Quist, ¶4, Appendix at APP000001.

³ *Id.* at ¶5; Motion to Stay, Appendix at APP000013-APP000025.

⁴ *Id.* at ¶6; Opposition to Motion to Stay, Appendix at APP000026-APP000062; Reply to Motion to Stay, Appendix at APP000063-APP000174.

⁵ *Id.* at ¶7; Minute Order, Appendix at APP000175-APP000176.

weigh in favor of denying the stay.⁶

On 1/3/21, the district court signed a Stipulation and Order to Extend Discovery and Continue Trial (Second Request) that extended the initial expert disclosure deadline to 4/7/22 and reset trial to 11/14/22.⁷

Petitioners are filing this Motion now so as not to require an emergency motion and burden Respondent Cape and/or this Court.⁸ NRAP 27(e).

II. LEGAL STANDARD

Pursuant to NRAP 8(a)(2) motion to stay district court proceedings may be made to this Court. Pursuant to NRAP 8(c):

Stays in Civil Cases Not Involving Child Custody. In deciding whether to issue a stay or injunction, the Supreme Court of Court of Appeals will generally consider the following factors: (1) whether the object of the appeal or writ petition 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 denied; and (4) whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition.

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⁶ Quist Affidavit, at ¶8, Appendix at APP000001-APP000002. The district court also indicated the proposed Order should “set forth a synopsis of the supporting reasons proffered to the Court in briefing.” The parties are currently discussing the additional language to include in the proposed Order. Appendix at APP000175-APP000184.

⁷ *Id.* at ¶9, Appendix at APP000001-APP000002; Stipulation and Order (Second Request), Appendix at APP000177-APP000184.

⁸ *Id.* at ¶10, Appendix at APP000002.

This Court has “not indicated that any one factor carries more weight than the others, although *Fritz Hansen A/S v. District Court* [, 116 Nev. 650, 6 P.3d 982 (2000),] recognizes that if one or two factors are especially strong, they may counterbalance other weak factors.” *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004).

III. LEGAL ARGUMENT

In *Mikohn*, supra, this Court granted a stay on appeal from an order refusing to compel arbitration. This Court held a stay was proper to avoid defeating the object of the appeal. *Id.* at 251-52. The same is true here. Applying *Mikohn*, this Court should grant Petitioners’ Motion.

A. The Object of The Writ Will Be Defeated If The Stay Is Denied.

The Writ Petition pertains to Plaintiff’s NRCP 35 neuropsychological examination and whether an observer and a recording are allowed at the examination as currently required by the district court’s order, and whether a neuropsychologist must share his raw test data and materials with non-psychologists.⁹ The discovery commissioner found the “good cause” under Rule 35 for requiring an observer and recording of Dr. Etcoff’s neuropsychological exam was “the Legislature passed NRS 52.380 and the governor signed it into law.”¹⁰ The discovery commissioner also

⁹ Minute Order, Appendix at APP000175-APP000176.

¹⁰ DCRR, at 2:14-16; Appendix II to Writ Petition, at APP000350.

found good cause to require Dr. Etcoff to share his raw test data/materials with Respondent and not solely Respondent's expert.¹¹ Dr. Etcoff is professionally and ethically prohibited from conducting the exam under the foregoing conditions.¹² Additionally, Petitioners contend because NRS 52.380 is unconstitutional, its passage into law cannot constitute good cause for the observer and recording requirement.¹³

If the stay is denied, the object of Petitioners' Writ will be defeated procedurally and substantively because Dr. Etcoff will be forced to conduct the neuropsychological examination with an observer and recording thereby significantly impacting test reliability and validity concerns due to "observer effects" that can "significantly alter the credibility and validity of results" and "prevent the examinee from disclosing crucial information essential to diagnosis."¹⁴ Moreover, disclosure of test data and materials to non-psychologists creates the "risk for coaching of individuals in the future, that may result in inflated test scores so individuals appear to have intact abilities when they do not."¹⁵ As such, and absent a strong showing the Writ Petition lacks merit or irreparable harm will result if the stay is granted, a stay should issue. *Mikohn*, supra.

¹¹ DCRR, at 2:23-27; Appendix II to Writ Petition, at APP000350.

¹² Writ Petition, at pp. 18-23.

¹³ Writ Petition, at pp. 13-18.

¹⁴ Writ Petition, at p. 19.

¹⁵ Writ Petition, at p. 20.

B. Petitioners Will Suffer Irreparable Injury if The Stay is Denied.

The Rule 35 examination pertains to Respondent Cape's alleged cognitive injuries, general damages and Life Care Plan. His alleged past and future damages total \$5.7 million.¹⁶ If Petitioners are required to conduct the Rule 35 exam as ordered by the district court, Dr. Etcoff will open himself up to professional and ethical discipline, the presence of an observer and recording will impact test results, and Dr. Etcoff's opinions will be subject to inappropriate challenge. Further, Dr. Etcoff's opinion would not meet the *Hallmark v. Eldridge* standard for admissibility and Petitioners would be without any expert opinion necessary to defend this action. 124 Nev. 492, 500-502, 189 P.3d 646, 651 (2008). Requiring Petitioners to conduct the Rule 35 exam with an observer and recording is tantamount to denying Petitioners an exam.

C. Respondent Cape Will Not Suffer Injury if the Stay is Granted.

The *Mikohn* Court explained:

Although irreparable or serious harm remains part of the stay analysis, this factor will not generally play a significant role in the decision whether to issue a stay. Normally, the only cognizant harm threatened to the parties is increased litigation costs and delay. We have previously explained that litigation costs, even if potentially substantial, are not irreparable harm. Similarly, a mere delay in pursuing discovery and litigation normally does not constitute irreparable harm.

Mikohn, 120 Nev. at 253, 89 P.3d at 39 (citations omitted).

¹⁶ Plaintiff's Initial Rule 16.1(a)(1) Disclosures, Appendix at APP000192.

Here, Cape will only experience delay in pursuing discovery and litigation, but ultimately, he will not be prevented from conducting discovery. Any claimed delay by Respondent to oppose the stay fails. The parties have already had over a year to conduct discovery, which is an ample discovery period.¹⁷

D. Petitioners Are Likely to Prevail on the Merits of The Writ Petition.

Petitioners are likely to prevail on the merits because this Court recently held NRS 52.380 is unconstitutional. In doing so, this Court recognized it alone has authority to establish civil procedure rules.¹⁸ The Legislature and Governor do not have such authority and therefore their determination as to the appropriate scope of a Rule 35 neuropsychological exam cannot serve as good cause to require an observer and recording of that exam.

Lyft v. Eighth Judicial District Court (Davis), 127 Nev. Adv. Op. 86 (2021)¹⁹, is the first in a series of cases addressing the constitutionality of NRS 52.380 and allowable scope of Rule 35 neuropsychological exams. There, the discovery commissioner concluded NRS 52.380 supersedes NRCP 35. The district court affirmed and adopted the discovery commissioner's report and recommendations. *Id.* at 2. This Court granted defendants' writ petition, and in doing so held:

¹⁷ Initial Scheduling Order, Appendix at APP000202-APP000204; Quist Affidavit, at ¶11; Appendix at APP000002.

¹⁸ *Lyft*, *infra*, at 13 n. 7 (“the Legislature expressly gave this court the power to regulate the Nevada Rules of Civil Procedure”) (citing NRS 2.120(2)).

¹⁹ Order Granting Writ, Appendix at APP000207-APP000221.

The judiciary has the power to regulate court procedure, and the Legislature may not enact a procedural statute that would abrogate a preexisting court rule. We conclude that NRS 52.380 attempts to abrogate NRCP 35 and that, by enacting it, the Legislature encroached on the inherent power of the judiciary. Thus, we hold that NRS 52.380 violates the separation of powers doctrine. The district court’s decision to allow the examinations to proceed under NRS 52.380 was therefore a manifest abuse of discretion, and mandamus relief is warranted.

Id. at 3.

On January 27, 2022, this Court granted petitioners’ writ in the matter of *Ferrellgas, Inc. v. Eighth Judicial District Court (Green)*, Case No. 82670.²⁰ The district court in that case had conditioned the Rule 35 neuropsychological exam of the plaintiff on the presence of an observer and audio recording of the exam. The “good cause” was that the plaintiff did not have a doctor-patient relationship with the examining doctor.²¹ This Court held the district court misapplied and manifestly abused its discretion, and ordered the district court to analyze the parties’ positions in light of *Lyft*.²²

On January 27, 2022, this Court entered an Order in *Moats v. Eighth Judicial District Court (Burgess)*, Case No. 81912, denying the personal injury plaintiff’s writ petition to overturn the district court’s order precluding an observer and

²⁰ Order Granting Petition, Appendix at APP000222-APP000225.

²¹ *Id.* at 1-2.

²² *Id.* at 2-3.

recording of a Rule 35 neuropsychological exam.²³

On January 28, 2022, this Court entered an Order Granting Petition for Writ of Mandamus in *Yusi v. Eighth Judicial District Court (Felsner)*.²⁴ There, the district court had adopted the discovery commissioner's holding that NRS 52.380 supersedes NRCP 35 and, in doing so, denied the defendants' motion to compel a Rule 35 neuropsychological exam without an observer and recording. In granting the writ petition, the Court instructed the district court to consider the parties' positions in light of Rule 35.²⁵

The issue at the center of Petitioners' Writ Petition is whether NRS 52.380 is constitutional. The district court wrongly determined Petitioners waived their constitutional challenge.²⁶ Regardless, this Court has already ruled NRS 52.380 is unconstitutional. The remaining question is whether the district court erred in finding the Legislature passing NRS 52.380 and the Governor signing it into law constitutes good cause under Rule 35 to require an observer and recording of the exam. In *Lyft*, this Court held the Legislature and Governor did not have constitutional authority to

²³ Order Granting Petition for Writ of Mandamus, Appendix at APP000226-APP000227.

²⁴ Order, Appendix at APP000228-APP000230.

²⁵ *Id.* at 2-3.

²⁶ As explained in the Writ Petition, NRS 30.130 does not require the Secretary of State to be served. The statute provides for service on the Attorney General. Regardless, pursuant to Nevada case law the district court should have allowed service on the Attorney General and considered the constitutional challenge on its merits. *See* Writ Petition, at pp. 10-13.

enact the statute. *Lyft*, supra. Their judgment as to the appropriate scope of Rule 35 neuropsychological exams is therefore immaterial to a Rule 35 good cause analysis. The district court therefore erred in adopting the discovery commissioner's finding of good cause and rejecting Petitioners' Objection to the discovery commissioner's report and recommendations.

That Dr. Etcoff is ethically and professionally prohibited from conducting a Rule 35 exam under the conditions placed by the district court further supports a finding by this Court that there is not good cause under Rule 35 for the neuropsychological exam to move forward under the conditions placed by the district court.

IV. CONCLUSION

IN ACCORDANCE WITH THE FOREGOING, Petitioners respectfully request this Court grant their Motion to Stay the district court proceedings.

DATED: 02/08/22

DATED: 02/08/22

DENNETT WINSPEAR, LLP

KEATING LAW GROUP

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CERTIFICATE OF SERVICE

Per NRAP 21(a) and 25 (c), I certify that I am an employee of Dennett Winspear, LLP, and that on the 8th day of February, 2022, service of **Petitioners' Motion to Stay Proceedings** was served via electronic means by operation of the Court's electronic filing system to:

NAME	TEL., FAX & EMAILS	PARTY REPRESENTING
Ryan A. Loosvelt, Esq. Nevada Bar No. 8550 GGRM LAW FIRM 2770 S. Maryland Parkway Suite 100 Las Vegas, Nevada 89109	Telephone: (702) 384-1616 Facsimile: (702) 384-2990 Email: rloosvelt@ggrmlawfirm.com	<i>Plaintiff Taylor Miles Cape</i>
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Honorable Judge Ronald J. Israel Department 28 REGIONAL JUSTICE CENTER 200 Lewis Avenue Las Vegas, Nevada 89155	Telephone: (702) 366-1407	<i>Respondent Court</i>

/s/ Zaira Baldovinos
An Employee of DENNETT WINSPEAR, LLP

Zaira Baldovinos

From: Brent Quist
Sent: Monday, February 07, 2022 10:17 PM
To: Zaira Baldovinos
Subject: Fwd: Cape v. Chilly Willy's (draft Motion to Stay to Supreme Court)

See below.

Sent from my iPhone

Begin forwarded message:

From: "J. Keating" <jkeating@keatinglg.com>
Date: February 7, 2022 at 10:09:22 PM PST
To: Brent Quist <bquist@dennettwinspear.com>
Subject: Re: Cape v. Chilly Willy's (draft Motion to Stay to Supreme Court)

Yes

Sent from my iPhone

On Feb 7, 2022, at 10:07 PM, Brent Quist <bquist@dennettwinspear.com> wrote:

Thanks. May I use your signature on the Motion?

Sent from my iPhone

On Feb 7, 2022, at 9:45 PM, J. Keating <jkeating@keatinglg.com> wrote:

This looks fine

From: Brent Quist <bquist@dennettwinspear.com>
Sent: Friday, February 4, 2022 11:49 AM
To: J. Keating <jkeating@keatinglg.com>
Cc: Zaira Baldovinos <zaira@dennettwinspear.com>
Subject: Cape v. Chilly Willy's (draft Motion to Stay to Supreme Court)

John,

Attached is a draft motion to stay to the Supreme Court. The foot notes still need to be finalized and formatted. However, the substantive arguments from my end are complete. Please review and let me know any changes you believe are required.

My plan is to finalize the motion and get it filed Monday of next week.