

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID G. MARTINEZ; AND
CHILLY WILLY'S HANDYMAN
SERVICES, LLC

Petitioners,

vs.

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

Respondents,
And

TAYLOR MILES CAPE, an
individual,

Real Party in Interest.

Supreme Court Case No. 83911

District Court Case No.:
A-20-818569-C

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**REAL PARTY IN INTEREST TAYLOR CAPE'S OPPOSITION TO
PETITIONERS DAVID G. MARTINEZ AND CHILLY WILLY'S
HANDYMAN SERVICES, LLC'S MOTION TO STAY PROCEEDINGS**

I. FACTS AND PROCEDURAL HISTORY

This is an action against Petitioners/Defendants Martinez and Chilly Willy's Handyman Servicers, LLC ("Petitioners" or "Defendants") claiming damages for injuries, including a brain injury, that Real Party In Interest/Plaintiff Taylor Cape ("Plaintiff" or "Cape") sustained in a serious motor vehicle crash. *See* Cape's Supplemental Appendix ("Supp.Appx.") p. 4.

The initial expert deadline in the case was October 7, 2021. *Id.* at p. 14. Rather than filing a timelier writ, the expert deadline was extended at Defendants' request under the guise that their experts were not available for 4-5 months to conduct the two requested two defense medical examinations ("DMEs"). *Id.* at p. 12-13. When there was no intervening ruling by the appellate court, and as the already-extended expert deadline approached, Defendants then belatedly filed a Motion to Compel Rule 35 Exam without the observer and recording parameters after the parties conferred. *Id.* at p.29-51, and p.53-213.

Plaintiff suffers from serious psychological and cognitive issues. Prior to this lawsuit being filed, Plaintiff underwent a neuropsychological examination in 2019 from a treating provider on the referral of his neurologist. *See* Supp.Appx. p. 157-182. This was part of the discovery proceedings record. *Id.* at p. 157-182. The Report states, among other things:

- Mr. Cape has a mild neurocognitive disorder due to traumatic brain injury causing clinically significant distress and impairment in multiple

domains of functioning in multiple settings. His neurocognitive disorder is accompanied by behavioral disturbance. *Id.* at p. 157.

- Mr. Cape's reported sequelae were headache, balance impairment, memory deficit, attention deficit, concentration deficits, word finding difficulty, difficulty getting organized and completing tasks, and environmental overload. *Id.* at p. 159.
- Records reflect symptoms including command hallucinations to kill himself and others, with continuing care of psychiatric and psychotherapy services at the time. *Id.* at p. 161.
- Family history of depression and prior diagnosis of paranoid schizophrenia; believed in conspiracy theories. *Id.* at p. 161-162.
- Mr. Cape was born with Vater syndrome, had 10 surgeries as a child, and suffered from abuse as a youth. *Id.* at p. 162-163.
- Mr. Cape has difficulty with concentration, has memory loss, and has depression. *Id.* at p. 163-164.
- Mr. Cape had psychiatric hospitalizations and mental breaks going on and off his medication. *Id.* at p. 166.
- Mr. Cape had used drugs and exhibited psychotic symptoms. *Id.*
- His "[r]eported mental health history is significant for psychiatric hospitalization" including "going from a depressive to manic state, insomnia, delusions, religious delusions, and feeling overwhelmed." *Id.*
- He had hospitalization going on and off medications that was significant for delusions, insomnia, and bizarre behavior. *Id.*
- His mental health treatment was positive for multiple trials of psychotherapy, and suicidal ideation was reported. *Id.*
- Mr. Cape reported he still sometimes hears voices. *Id.* at p. 167.
- Mr. Cape has a history of repeated psychotic episodes, and has atypical interpretations of his environment. *Id.* at p. 168.

- Information cannot be adequately recalled; immediate memory fell in the extremely low range and delayed memory fell in the borderline or below average range of functioning. *Id.* at p. 170.
- Profile patterns of his type are associated with marked distress and severe impairment functioning, suggesting significant thinking and concentration problems. *Id.* at p.171-172.
- He is “experiencing specific fears or anxiety” surrounding situations.; “Changes in routine, unexpected events, and contradictory information are likely to generate untoward stress.” *Id.* at p, 172
- “It is likely that he experiences unusual perceptual or sensory events (including hallucinations) as well as unusual ideas that may include magical thinking or delusional beliefs.” *Id.*
- “His thought processes are likely to be marked by confusion, distractibility, and difficulty concentrating, and he may experience his thoughts as blocked, withdrawn, and somehow influenced by others.” *Id.*
- His behavior can be reckless, and he can be expected to entertain risks that are potentially dangerous to himself and those around him. *Id.* at p. 173.
- He will subordinate his own interests to those of others in a manner that is self-punitive, failing to assert himself under the exploitation of others. *Id.*
- “Current difficulties in his social support system may give a special significance to the therapeutic relationship and any impasse may need to be handled with particular care.” *Id.* at p, 174.

Mr. Cape was diagnosed with a mild neurological cognitive disorder due to traumatic brain injury with behavioral disturbance with a brief psychotic disorder, evidencing a decline from a previous level of performance. *Id.* at p. 174-175. Mr. Cape’s mental health history was significant for episodes of psychosis, with possible

symptoms part of bipolar disorder or schizophrenia spectrum disorder. *Id.* at p. 176. There are very strong reasons and grounds described and stated in Mr. Cape's Neurological Report on record supporting good cause for an observer and recording of his Rule 35 exam.

Defendants' Motion to Compel in part argued that NRS 52.380 was unconstitutional (*id.* at p. 37-40) and in part argued that no physician could ever take a Rule 35 with an observer or recording (despite Rule 35 allowing it for good cause). *Id.* at p. 44-46. Notably, Defendants did not offer a declaration of Dr. Etcoff during the discovery proceedings but tried to improperly do so in their Objection to the District Court and in their Writ.

Plaintiff filed an Opposition to the Motion to Compel with Exhibits. *See Id.* at p. 215-324. In addition to NRS 52.380 arguments, Plaintiff also argued for a Rule 35 exam for good cause and showed that Rule 35 exams with observers and recordings certainly *can* be ethically conducted contrary to Defendants' unsupported suggestion otherwise. *Id.* at p. 222: 1-8; p. 228-237. In addition to Plaintiff's pre-Suit Neurological Evaluation Report on record, Plaintiff also submitted as Exhibits five affidavits of PH.Ds and the American Psychological Association's ("APA") Specialty Guidelines for Forensic Psychology, all of which demonstrate that Rule 35 exams *can* certainly be done ethically with observers and recordings. *Id.* at p. 228-324.

The Discovery Commissioner recommended a Rule 35 DME with the parameters of an observer and recording for good cause and a protective order keeping the data and materials non-public and limiting it to attorneys' eyes and experts only. *Id.* at p. 326-333. The District Court, after Defendants' Objection, adopted the DCR&R based on its review of the entire discovery proceedings record. *Id.* at 25 ("Good cause under Rule 35 was independently shown ... through the numerous physician affidavits offered by Plaintiff, through the APA guidelines, and through the other evidence offered in the briefing."). The Court also ruled in that Order Defendants failed to follow the statutory procedure of serving the Secretary of State when making their constitutionality challenge. *Id.* at p. 327.

Defendants then filed a Writ (once again offering several exhibits that the courts cannot consider) and filed a motion to stay in the district court. The District Court recently denied that by Order dated February 27, 2022 Order. *Id.* at p. 22-27. The District Court's actual Order denying a stay correctly analyzed the stay under the *Mikohn* factors and held, among other things:

... the District Court's order allowing the parameters in this case was based on Rule 35's good cause standard and is not dependent on the constitutionality of NRS 52.380 or the outcome in other writs before the Supreme Court.

Defendants' Motion to Stay also argues the object of their writ will be defeated if the case is not stayed because neither their expert, Dr. Etcoff, nor any neuropsychologists can perform neuropsychological exams with an observer or audio recording. However ... such an argument also attempts to preclude the

parameters altogether under Rule 35, but which Rule 35 allows for a showing of good cause.

Further, Defendants' arguments are not adequately supported. They are instead based on a self-serving and untimely affidavit of Dr. Etcoff that Defendants failed to offer during the discovery court proceedings, and that therefore cannot be considered by this Court or the appellate court under *Valley Health Sys., LLC v. Dist. Court*, 127 Nev. 167, 173, 252 P.3d 676, 680 (2011). ... the fact that Dr. Etcoff was retained numerous months before those proceedings, and defense counsel in this case and Dr. Etcoff are and had been involved in some of the other writs pending with the Supreme Court prior to the discovery proceedings in this action, belies any such argument that the affidavit was not available at the time.

In addition, Defendants chose and selected Dr. Etcoff ... knowing that he declined to conduct Rule 35 exams with the parameters, a voluntary choice and decision Defendants made when retaining him...

Defendants do not have a likelihood of success ... In addition, the parameters in this case were ordered under Rule 35's "good cause" provision, and the appellate court is not considering overturning Rule 35's good cause provision in the pending writs ... Plaintiff has submitted American Psychological Association Guidelines and several timely affidavits showing good cause and that such examinations can be conducted with observers and recordings.

Defendants will not suffer irreparable harm and the object of the writ will not be defeated if a stay is not granted. The parameters at issue here were ordered under Rule 35 regardless of the constitutionality of NRS 52.380. **Good cause under Rule 35 was independently shown through the legislative history, through the numerous physician affidavits offered by Plaintiff, through the APA guidelines, and through the other evidence offered in the briefing.** Further, Defendants knowingly and intentionally selected Dr. Etcoff with notice he refused to conduct Rule 35 examinations with an observer or recording.

Finally, the harm and prejudice to the injured Plaintiff is significant if a broad stay of all proceedings is ordered here precluding any discovery from being conducted. The harm, if any, to Defendants, is of their own knowing decisions with respect to retention of Dr. Etcoff...

Id. at p. 22-27. While the District Court Motion for Stay was pending, Plaintiff agreed to one last courtesy extension which would allow Defendants, if they so chose, to find another examiner who would comply with Rule 35, but which Defendants apparently have not elected to do. *See* Defs.' Appx., 177-184.

In the interim, Defendants have in fact already conducted another DME of Plaintiff in November 2021 through Dr. Ginsburg, a member of the American Board of Psychiatry and Neurology, whose DME consisted primarily of mental exam questioning. *See* Defs.' Appx. at p. 25. However, despite the DME having been conducted in November 2021, Defendants have neglected, withheld, and failed to disclose that DME report to date in violation of NRCP 35(b)(1), subjecting their examiner to exclusion under NRCP 35(b)(5).

II. ARGUMENT

A. The Mikohn Factors Weigh Against A Stay In Cape.

In considering whether to grant a stay pending resolution of a writ petition, the Court is guided by the following factors: (1) whether the object of the petition will be defeated if the stay is denied; (2) whether the petitioner will suffer irreparable or serious injury if the stay is denied; (3) whether the real party in interest will suffer

irreparable or serious injury if the stay is granted; and (4) whether the petitioner is likely to prevail on the merits of the writ petition. NRAP 8(c). A strong showing on some factors may counterbalance weak factors. *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004). Here, all factors strongly weigh against a stay.

The decision to entertain a writ petition is discretionary. *Davis v. Eighth Judicial Dist. Court*, 129 Nev. 116, 118, 294 P.3d 415, 417 (2013). Generally, extraordinary relief is unavailable to review discovery orders.” *Diaz v. Eighth Judicial Dist. Court*, 116 Nev. 88, 993 P.2d 50, 54 (2000). The Court “may issue a writ of mandamus ... where discretion has been manifestly abused or exercised arbitrarily or capriciously.” *Scarbo v. Eighth Judicial Dist. Court*, 125 Nev. 118, 121, 206 P.3d 975, 977 (2009). “A manifest abuse of discretion is a clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule.” *State v. Eighth Judicial Dist. Court*, 127 Nev. 927, 932, 267 P.3d 777, 780 (2011).

The Court entertained the writ in *Lyft v. Eighth Judicial Dist. Court*, 137 Nev. Adv. Op. 86 (December 30, 2021) to clarify the constitutionality of NRS 52.380. However, the constitutionality of NRS 52.380 is not determinative since the Court here found “good cause” under Rule 35 based on the full record evidence in the discovery proceedings as the District Court confirmed in its Order denying the Motion to Stay. The record included the pre-suit Evaluation and Report of Plaintiff

showing his significant cognitive and psychological issues, the five affidavits of PH.Ds offered by Plaintiff, and the APA Guidelines, among other exhibits.

As the *Lyft* Court acknowledged, Rule 35 allows for audio recording and an observer for good cause “giving ***considerable discretion*** to the district court in determining when good cause is shown.” *Id.* “Where, as here, the court's decision is clearly supported by the record, we will not reverse because the necessary findings will be implied.” *Gorden v. Gorden*, 93 Nev. 494, 496, 569 P.2d 397, 398 (1977).

Here, the District Court did not manifestly abuse its discretion as the record amply supports a highly discretionary good cause ruling by the District Court based on the discovery proceedings record evidence. In *Lyft*, the Court specifically declined to direct that all examinations proceed without observers or audio recording, citing *Ryan's Express Transp. Servs., Inc. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 299, 279 P.3d 166, 172 (2012) that “[a]n appellate court is not particularly well-suited to make factual determinations in the first instance.” *Id.* Instead, factual findings of district courts must be upheld where they are not clearly erroneous and are supported by substantial evidence. *Sowers v. Forest Hills Subdivision*, 129 Nev. 99, 105, 294 P.3d 427, 432 (2013).

Here, Defendants *calculatingly* selected their expert, Dr. Etcoff, knowing he would not do a neuropsychological DME with the parameters under Rule 35’s good cause showing. The Court allows an observer and recording for good cause under

Rule 35, and its Defendants' position Dr. Etkoff cannot and will not do them. Any semblance of prejudice is of their own knowing choices.

Defendants do not have a likelihood of success on the discretionary factual determination of good cause, and instead argue Rule 35's good cause parameters can never be appropriate, an untenable position. The object the of the writ will not be defeated if a stay does not issue because Rule 35 exams allow for the parameters and Dr. Etkoff has taken the position that he himself cannot or will not do. Thus, a stay of all proceedings will accomplish nothing but further and unnecessary delay. The prejudice to Plaintiff is great, given the calculated delays Defendants have already obtained. Any prejudice to Defendants is of their own choices here and they have done at least one DME already. The *Mikohn* factors therefore weigh against a stay in this particular *Cape* case.

III. CONCLUSION

For the foregoing reasons, the Court should therefore deny the motion for a stay of proceedings.

Dated this 1st day March, 2022.

GGRM LAW FIRM

/s/ Ryan A. Loosvelt, Esq.

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CERTIFICATE OF SERVICE

Per NRAP 21(a) and 25 (c), I certify that I am an employee of GGRM Law Firm, and that on the 1st day of March, 2022, service of **Real Party In Interest Taylor Cape's Opposition to Petitioners David G. Martinez and Chilly Willy's Handyman Services, LLC's 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 |
|--|--|--------------------|
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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 | Respondent Court |