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**Lyft, Inc. v. Eighth Jud. Dist. Ct., 137 Nev. Adv. Op. 86 (Dec. 30, 2021)**

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*Lyft, Inc. v. Eighth Jud. Dist. Ct.*, 137 Nev. Adv. Op. 86 (Dec. 30, 2021)<sup>1</sup>

Civil Practice: NRS 52.380(3) is Procedural and Conflicts with NRCP 35

### **Summary:**

Lyft challenged the district court's decision overruling their objection to the discovery commissioner's recommendation that medical examinations during civil discovery are governed under NRS 52.380, not the Nevada Rule of Civil Procedure (NRCP) 35.<sup>2</sup> NRS 52.380 was created *after* the Court amended NRCP 35.<sup>3</sup> Lyft requested a writ of mandamus requesting this Court to instruct the district court to vacate its order that NRS 52.380 controls the process. This Court finds that NRS 52.380 is unconstitutional as it conflicts with NRCP 35. The Court granted the petition to vacate the decision and requests the lower court to review the motions according to NRCP 35.

### **Facts and Procedural History:**

Petitioner Lyft, Inc. operates a ridesharing networking in which one of its vehicles hit the real party in interest, Kalena Davis. Due to the collision, Davis suffered severe injuries and sued Lyft for negligence asserting \$11.8 million in damages. Lyft disputed liability and had its experts contest the number of damages. Lyft filed a motion to compel Davis to undergo a physical and mental examination with its experts. They asserted that NRCP 35 should govern the procedure. Davis challenged the motion claiming that an examination was not warranted because good cause was not shown.

In response, the discovery commissioner issued a report and recommendation that Lyft did satisfy the good cause requirement because Davis's condition was in dispute. Davis asserted that NRS 52.380 should govern the examination process. The commissioner issued another report claiming that NRCP 35 and NRS 52.380 conflict. The commissioner concluded that NRS 52.380 supersedes NRCP 35 without legal support. Lyft filed an objection to the recommendation. The district court did not hold a hearing but overruled the objection. Lyft filed a writ of mandamus.

### **Discussion:**

This issue before the Court is whether NRS 52.380 supersedes NRCP 35 regarding medical examinations during discovery in civil litigation?

#### *The Court Will Entertain Lyft's Writ Petition*

The Court retains the discretion as to whether they will entertain a writ petition and it is not mandatory.<sup>4</sup> It considers different factors as to whether they will review a petition (i.e., judicial economy).<sup>5</sup> The Court is likely to exercise their discretion when a question is prone to repetition

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<sup>1</sup> By Alyssa Rogan.

<sup>2</sup> NEV. REV. STAT. § 52.380 (2019).

<sup>3</sup> NEV. R. CIV. P. 35.

<sup>4</sup> *Davis v. Eighth Jud. Dist. Ct.*, 129 Nev. 116, 118, 294 P.3d 415, 417 (2013).

<sup>5</sup> *See Archon Corp. v. Eighth Jud. Dist. Ct.*, 133 Nev. 816, 820, 407 P.3d 702, 706 (2017).

and clarification is warranted.<sup>6</sup> A review is appropriate in cases pertaining to substantial public policy concerns or precedent.<sup>7</sup> Here, the Court found that many parties may be subject to undergo a medical examination during the civil discovery process. Since either NRS 52.380 or NRCP 35 may govern, the Court finds that clarification is necessary to avoid district courts producing different outcomes. Thus, the Court determined that it would review the writ.

### *NRS 52.380 Plainly Conflicts with NRCP 35*

In this instance, the parties do not agree on whether NRS 52.380 violates the separation of powers doctrine between the legislature and judiciary. Before the Court can reach this conclusion, they must first assess whether the two rules conflict with each other or can co-exist. Lyft argues that NRS 52.380 and NRCP 35 conflict. Davis argues that the NRCP outlines the general procedural rules, whereas NRS 52.380 provides the examinee's substantive rights. This includes the right to have an attorney present and audio record the medical examination.

NRCP 35, which this Court amended, applies in civil actions where a party's "mental or physical condition...is in controversy" and the opposing party seeks to have an "examination by a suitably licensed or certified examiner."<sup>8</sup> This rule is limited because a party must request that the other party undergo an examination *only* when there is a "motion for good cause."<sup>9</sup> NRCP 35 is modeled after the Federal Rules of Civil Procedure (FRCP) 35, which provides the conditions of the examination process. The Supreme Court explicitly interpreted that the "good cause" requirement is met when there is "an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy."<sup>10</sup> That means that conclusory allegations provided in the pleadings or mere relevance are insufficient.<sup>11</sup> Specifically, the conditions in contention under NRCP 35 are subsections (a)(3) relating to audio recordings<sup>12</sup> and (a)(4) detailing when and by whom is allowed during the examination process.<sup>13</sup> Both subsections grant the district court the opportunity to exercise its discretion when determining if a good cause is met.

Similarly, NRS 52.380 regulates the conditions of "a mental or physical examination ordered by a court for the purpose of discovery in a civil action."<sup>14</sup> For this case, the subsection in dispute allows an observer, even an attorney, to automatically attend and record any examination.<sup>15</sup>

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<sup>6</sup> *Id.* at 820, 407 P.3d at 706.

<sup>7</sup> *Walker v. Second Jud. Dist. Ct.*, 136 Nev. Adv. Op. 80, 476 P.3d 1194, 1199 (2020).

<sup>8</sup> NEV. R. CIV. P. 35(a)(1).

<sup>9</sup> NEV. R. CIV. P. 35 (a)(2)(A).

<sup>10</sup> *Schlagenhauf v. Holder*, 379 US 104, 118 (1964).

<sup>11</sup> *Id.*

<sup>12</sup> NEV. R. CIV. P. 35 (a)(3) ("[O]n 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").

<sup>13</sup> *See* NEV. R. CIV. P. 35(a)(4) ("(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").

<sup>14</sup> NEV. REV. STAT. § 52.380(7)(a).

<sup>15</sup> *See* NEV. REV. STAT. § 52.380 ("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, if : (1) The attorney of the examinee or party producing the examinee, in writing, authorizes the designated representative to act on behalf of the attorney during the examination; and (2) The designated representative presents the authorization to the

Therefore, the Court finds that each party's argument about who can observe and whether recordings are permissible may be governed by either NRS 52.380 or NRCP 35, causing them to conflict.

#### *An Observer's Presence at the Physical or Mental Examination*

NRCP 35(a)(4) allows the party undergoing the examination to request "to have an observer present at the examination."<sup>16</sup> However, the rule explicitly bars the same party's attorney, or anyone affiliated with the attorney, from attending the examination.<sup>17</sup> In comparison, NRS 52.380(1) allows *any* observer to attend (including their attorney). The statute does not leave room for the district court to exercise its discretion regarding who can attend the examination. Thus, the Court finds that the statute attempts to revoke NRCP 35 by removing the good cause requirement because anyone can attend the examination automatically.

#### *An Audio Recording of the Mental or Physical Examination*

If the court finds good cause to audio record the examination, NRCP 35(a)(4) allows them to grant this request.<sup>18</sup> In comparison, NRS 52.380(3) does not include any language setting forth a good cause requirement.<sup>19</sup> Instead, it allows the observer to record the examination if they wish. Therefore, NRS 52.380(3) conflicts with NRCP 35 because it removes the district court's discretion to determine when audio recordings are permissible.

#### *NRS 52.380 Violates the Separation of Powers Doctrine*

When determining whether NRS 52.380 violates the separation of powers doctrine, the Court will presume that the statute is valid and review it *de novo*.<sup>20</sup> The separation of powers doctrine was intended to preclude "one branch of government from encroaching on [...] another."<sup>21</sup> When rules conflict, the Court must determine if the rules are procedural or substantive. The Supreme Court held that substantive law "create duties, rights, and obligations, while a procedural standard specifies how those duties, rights, and obligations should be enforced."<sup>22</sup>

Lyft asserts that the separation of powers doctrine was violated because both rules are procedural since they outline the medical examination process. In its view, both rules only exist because of the underlying substantive claim.<sup>23</sup> However, Davis asserts that NRS 52.380 is substantive statute because it grants the party the right to determine who can observe the

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examiner before the commencement of the examination. 3. The observer attending the examination pursuant to subsection 1 may make an audio or stenographic recording of the examination").

<sup>16</sup> NEV. R. CIV. P. 35(a)(4).

<sup>17</sup> *Id*; see also NEV. R. CIV. P. 35(a)(4)(A)(i)–(ii); NEV. R. CIV. P. 35(a)(4)(B) (comparing the general rule to this specific subsection which requires that good cause is shown to allow an observing making it an even higher bar to satisfy).

<sup>18</sup> NEV. R. CIV. P. 35(a)(3).

<sup>19</sup> NEV. REV. STAT. § 52.380.

<sup>20</sup> *Tam v. Eighth Jud. Dist. Ct.*, 131 Nev. 792, 796, 358 P.3d 234, 237 (2015).

<sup>21</sup> *Comm'n on Ethics v. Hardy*, 125 Nev. 285, 292, 212 P.3d 1098, 1103 (2009).

<sup>22</sup> *Azar v. Allina Health Servs., \_U.S.\_*, 139 S. Ct. 1804, 1811 (2019).

<sup>23</sup> Recognizing that without the underlying claim, neither NRS 52.380 nor NRCP 35 are triggered because it only relates to the civil discovery process.

examination and if recordings are permissible.<sup>24</sup> Here, the Court rejects the argument that NRS 52.380 is substantive for two reasons. First, NRS 52.380 is invoked *after* a party brings forth a civil claim and is not applicable outside of civil discovery. Second, the statute does not provide a legally cognizable claim for relief.<sup>25</sup>

The Supreme Court previously held that FRCP 35 (NRCF 35's counterpart) is procedural because it enforces the rights and duties of a party during the examination.<sup>26</sup> In addition, the Court found that a Nevada District Court already reached the same conclusion that NRS 52.380 is procedural.<sup>27</sup> Thus, this Court agrees with the federal authorities that NRS 52.380 is procedural because it only details the process of how to conduct the examination. That said, it conflicts with the Court's ability to regulate NRCF 35, which was already an existing rule by the time the statute was enacted. Therefore, NRS 52.380 is unconstitutional and cannot be reconciled with NRCF 35.

### **Conclusion:**

Therefore, the Court finds that NRS 52.380 violates the separation of powers doctrine due to its procedural nature. NRCF 35 already exists and covers this process. The Court grants Lyft's petition to issue a writ of mandamus instructing the district court to vacate its order to affirmatively adopt the discovery commissioner's conclusion that NRS 52.380 supersedes NRCF 35. The Court finds that this was an abuse of their discretion.<sup>28</sup> Thus, the district court must reassess whether good cause is present under NRCF 35. If so, then Davis can have their attorney observe and possibly audio record the examination.

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<sup>24</sup> Davis urges this Court to rely on *Whitlock v. Salmon*, 104 Nev. 24, 26, 752 P.2d 210, 211 (1988), and find that the statute is substantive. In *Whitlock*, the Court found that there was no violation of the separation of powers doctrine when assessing NRS 16.030(6) and NRCF 47(a). The *Whitlock* court found that there was no attempt to abrogate the existing rule because the statute was providing supplemental information to the already existing rule. This Court is unpersuaded and finds that is not what is occurring here because both rules are outlining the process of who can observe medical examinations and whether audio recordings are permissible.

<sup>25</sup> See Legal Right, *Black's Law Dictionary* (11<sup>th</sup> ed. 2019) (defining a right as "[t]he capacity of asserting a legally recognized claim against one with a correlative duty to act").

<sup>26</sup> See *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941).

<sup>27</sup> See *Fretelucio v. Smith's Food & Drug Ctrs., Inc.* 336 F.R.D. 198, 203 (D. Nev. 2020).

<sup>28</sup> See *Ryan's Express Transp. Servs., Inc. v. Amador State Lines, Inc.*, 128 Nev. 289, 299, 279 P.3d 166, 172 (2012) ("An appellate court is not particularly well-suited to make factual determinations in the first instance.").