



MICHAEL P. LOWRY, ESQ.

Nevada Bar No. 10666

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Attorneys for Edgardo P. Yusi; Keolis Transit Services, LLC

Electronically Filed  
Mar 15 2021 01:05 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

Edgardo P. Yusi; Keolis Transit Services, LLC,  
Supreme Ct. No.:

Dist. Ct. Case No.: A-18-781000-C

Petitioner,

vs.

**Appendix Volume 1 to Edgardo Yusi  
& Keolis Transit Services, LLC's  
Petition for Writ of Mandamus or  
Prohibition**

The Eighth Judicial District Court of the  
State of Nevada and the Honorable  
Nancy Allf, Judge,

Respondents.

and

Heather Felsner,

Real Party in Interest.

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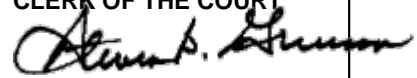
**Certificate of Service**

Per NRAP 21(a) and 25(c), I certify that I am an employee of Wilson Elser Moskowitz Edelman & Dicker LLP, and that on March 15, 2021, **Appendix Volume 1 to Edgardo Yusi & Keolis Transit Services, LLC's Petition for Writ of Mandamus or Prohibition** was served via electronic means by operation of the Court's electronic filing system to:

John B. Shook, Esq. Shook & Stone, Esq. 710 South Fourth Street Las Vegas, NV 89101 Attorneys for Heather Felsner	
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BY: /s/ Michael P. Lowry  
An Employee of





MICHAEL P. LOWRY, ESQ.

Nevada Bar No. 10666

E-mail: [Michael.Lowry@wilsonelser.com](mailto:Michael.Lowry@wilsonelser.com)

ROBERT L. THOMPSON, ESQ.

Nevada Bar No. 9920

E-mail: [Robert.Thompson@wilsonelser.com](mailto:Robert.Thompson@wilsonelser.com)

6689 Las Vegas Blvd. South, Suite 200

Las Vegas, NV 89119

Tel: 702.727.1400/Fax: 702.727.1401

Attorneys for Edgardo P. Yusi; Keolis Transit Services, LLC

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

HEATHER FELSNER and ROGER FELSNER, Case No.: A-18-781000-C

Dept. No.: 27

Plaintiffs,

vs.

**Edgardo Yusi & Keolis Transit Services,  
LLC's Motion for Rule 35 Examination**

KEOLIS TRANSIT SERVICES, LLC, Foreign  
Limited-Liability Corporation and EDGARDO  
PAGUIO YUSI; ALEXANDER DENNIS,  
INC., a Foreign Corporation; DOES II through  
X, inclusive; and ROE BUSINESS ENTITIES I  
through X, inclusive,

Hearing Requested with Discovery  
Commissioner

Defendants.

Mrs. Felsner claims she has an ongoing brain injury as a result of a fall that occurred in Las Vegas. Consequently, Mr. Yusi and Keolis request a Rule 35 examination with a psychologist located less than 45 minutes from her home.

DATED this 16th day of October, 2020.



/s/ Michael P. Lowry

MICHAEL P. LOWRY, ESQ.

ROBERT L. THOMPSON, ESQ.

6689 Las Vegas Blvd. South, Suite 200

Las Vegas, Nevada 89119

Attorneys for Edgardo P. Yusi; Keolis Transit  
Services, LLC



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**Declaration of Michael Lowry**

1. On September 28, 2020 I emailed Plaintiffs’ counsel and proposed a Rule 35 examination with Dr. Axelrod for December 19, 2020.
2. I received no response, so I followed up on October 2, 2020.
3. I still received no response, so I followed up on October 8, 2020. That day I received a response objecting solely because of the drive from Mrs. Felsner’s home to Dr. Axelrod’s office.<sup>1</sup>
4. I then spoke on the phone with John Shook on October 12, 2020. He reiterated the travel objection. He also indicated some of the testing was duplicative of prior testing, but provided no further detail.
5. I declare under penalty of perjury that the foregoing is true and correct.

/s/ Michael P. Lowry

---

<sup>1</sup> Exhibit A.

1 **Memorandum of Points & Authorities**

2 **I. A Rule 35 examination of Mrs. Felsner is merited.**

3 This personal injury case concerns an event that occurred on February 21, 2017. The  
4 complaint was filed on September 12, 2018. Mrs. Felsner alleges she suffered a brain injury as a  
5 result of a fall. Initial expert disclosures are currently due December 22, 2020. Mr. Yusi and  
6 Keolis request a Rule 35 psychological examination.

7 Rule 35(a)(1) permits the court to order “a party whose mental or physical condition ... is  
8 in controversy to submit to a physical or mental examination by a suitably licensed or certified  
9 examiner.” Mrs. Felsner has put her mental and physical condition at issue in this case. Mr.  
10 Yusi and Keolis have proposed Bradley Axelrod, Ph.D. as the examiner. His CV indicates he is  
11 a licensed, practicing psychologist in Michigan where Mrs. Felsner lives.<sup>2</sup> He has both a private  
12 practice and a practice with the Department of Veteran Affairs.

13 Rule 35(a)(2)(A) notes a motion for examination requires good cause. This cause is  
14 present as Mrs. Felsner asserts she has ongoing deficits causally related to her fall.<sup>3</sup> Defendants  
15 propose that the examination of Mrs. Felsner occur December 19, 2020 at 8:00 a.m.

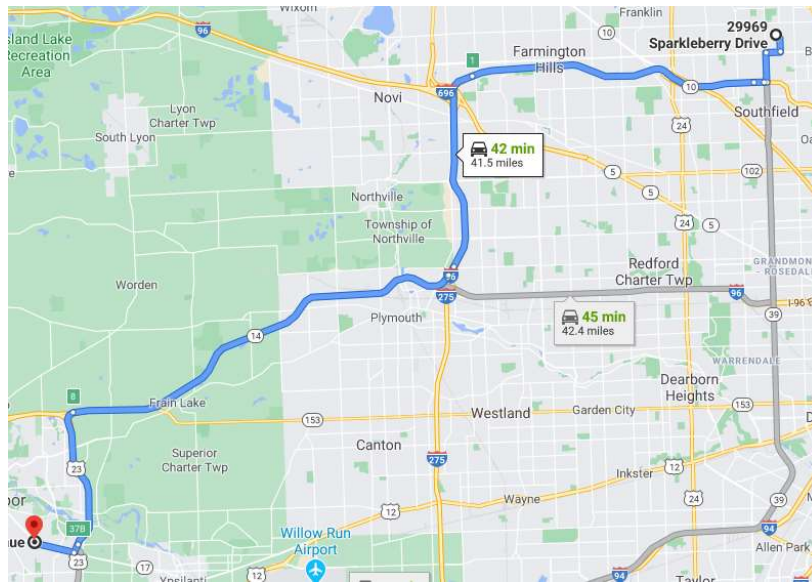
16 **a. Getting to Dr. Axelrod’s office is not a burden.**

17 Rule 35(a)(2)(B) states the “examination must take place ... in the judicial district in which  
18 the action is pending, unless otherwise agreed by the parties or ordered by the court.” Mr. Yusi  
19 would be well within their rights to require Mrs. Felsner to come to Las Vegas for her examination.  
20 However, they chose to locate an appropriately licensed and qualified examiner closer to Mrs.  
21 Felsner’s residence.

22 During the EDCR 2.34 conference, Plaintiffs refused to stipulate to the examination  
23 because the from Mrs. Felsner’s home to Dr. Axelrod’s office is unreasonable. The drive is shown  
24 below on Google Maps. It is 41.5 miles that Google Maps estimates will take 42 minutes to drive.  
25 For comparison, that is only 0.1 mile further than the drive from Centennial Hills Hospital to the  
26 Albertson’s in Boulder City.

27  
28 <sup>2</sup> Exhibit B.

<sup>3</sup> Exhibit C at response to interrogatory 9.



**b. Defendants are not required to rely upon stale test data.**

During the EDCR 2.34 conference Plaintiff's other objection was that this examination would be duplicative of testing already done. They could not specify which test had already been done and when. If Plaintiffs can provide further specificity, Mr. Yusi and Keolis can evaluate this objection.

**c. A slight extension of discovery is necessary.**

Dr. Axelrod's soonest availability is December 19, 2020. Initial expert disclosures are due December 22, discovery closes on March 22, 2021 and the case is assigned to a June 28, 2021 trial group. Mr. Yusi and Keolis propose that the initial expert disclosures be moved to January 8, 2021. This would allow the examination to proceed as scheduled but avoid resetting a trial date. The new schedule would be as below.

- **January 8, 2021:** Initial Expert Disclosures
- **February 8, 2021:** Rebuttal Expert Disclosures
- **March 30, 2021:** Discovery Closes
- **April 30, 2021:** Dispositive Motion Deadline
- **June 28, 2021:** First Day of Trial Stack (unchanged)

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EXHIBIT A

EXHIBIT A

## Lowry, Michael

---

**From:** John Shook <johnshook@shookandstone.com>  
**Sent:** Thursday, October 8, 2020 2:07 PM  
**To:** Robert English; Lowry, Michael  
**Cc:** Kiana A. O'Day; Thompson, Robert L.  
**Subject:** RE: Felsner: Neuropsychological Evaluation on 12/20?

### [EXTERNAL EMAIL]

Michael,

You should go ahead and file your motion.

John Shook  
***Shook & Stone, Chtd.***  
710 S. 4<sup>th</sup> Street  
Las Vegas, NV 89101  
(702) 570-0000  
[johnshook@shookandstone.com](mailto:johnshook@shookandstone.com)  
[www.shookandstone.com](http://www.shookandstone.com)



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*Certified Specialist, Personal Injury Law*  
*State Bar of Nevada*

---

**From:** Robert English <REnglish@shookandstone.com>  
**Sent:** Thursday, October 8, 2020 11:59 AM  
**To:** 'Lowry, Michael' <Michael.Lowry@wilsonelser.com>  
**Cc:** John Shook <johnshook@shookandstone.com>; Kiana A. O'Day <KO'Day@shookandstone.com>; Thompson, Robert L. <Robert.Thompson@wilsonelser.com>  
**Subject:** RE: Felsner: Neuropsychological Evaluation on 12/20?

Michael:

I am in and out of the office on various matters and in Salt Lake from Friday through Sunday. John is included on your email, so I will by way of this email ask him to respond to your request.

I might also be a little concerned that you want her to travel 45 min – 1 hour, in Michigan, in mid-December. Not to offend anyone who may have lived in Michigan, but I have been able to avoid that state my entire life, and especially during the winter. Although, I was a B-52- tail-gunner in the Air Force, and for two years I stationed at Grand Forks. Boy did that suck; 10 months of winter and one month of spring and one month of summer each year.

Thanks,

Robert English  
**Shook & Stone, Chtd.**  
710 S. 4<sup>th</sup> Street  
Las Vegas, NV 89101  
(702) 570-0000  
[renglish@shookandstone.com](mailto:renglish@shookandstone.com)  
[www.shookandstone.com](http://www.shookandstone.com)



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---

**From:** Lowry, Michael [<mailto:Michael.Lowry@wilsonelser.com>]  
**Sent:** Thursday, October 8, 2020 11:41 AM  
**To:** Robert English <[REnglish@shookandstone.com](mailto:REnglish@shookandstone.com)>  
**Cc:** John Shook <[johnshook@shookandstone.com](mailto:johnshook@shookandstone.com)>; Kiana A. O'Day <[KO'Day@shookandstone.com](mailto:KO'Day@shookandstone.com)>; Thompson, Robert L. <[Robert.Thompson@wilsonelser.com](mailto:Robert.Thompson@wilsonelser.com)>  
**Subject:** RE: Felsner: Neuropsychological Evaluation on 12/20?  
**Importance:** High

Robert, please advise. I'd prefer to avoid a motion if possible.

---

**From:** Lowry, Michael  
**Sent:** Friday, October 2, 2020 16:03  
**To:** 'Robert English' <[REnglish@shookandstone.com](mailto:REnglish@shookandstone.com)>  
**Cc:** 'John Shook' <[johnshook@shookandstone.com](mailto:johnshook@shookandstone.com)>; 'Kiana A. O'Day' <[KO'Day@shookandstone.com](mailto:KO'Day@shookandstone.com)>; Thompson, Robert L. <[Robert.Thompson@wilsonelser.com](mailto:Robert.Thompson@wilsonelser.com)>  
**Subject:** RE: Felsner: Neuropsychological Evaluation on 12/20?

Hello Robert, I'm following up on this proposal. Please advise.

---

**From:** Lowry, Michael

**Sent:** Monday, September 28, 2020 12:50

**To:** Robert English <[REnglish@shookandstone.com](mailto:REnglish@shookandstone.com)>

**Cc:** John Shook <[johnshook@shookandstone.com](mailto:johnshook@shookandstone.com)>; 'Kiana A. O'Day' <[KO'Day@shookandstone.com](mailto:KO'Day@shookandstone.com)>; Thompson, Robert L. <[Robert.Thompson@wilsonelser.com](mailto:Robert.Thompson@wilsonelser.com)>

**Subject:** Felsner: Neuropsychological Evaluation on 12/20?

Hello Robert,

I'm writing to propose a neuropsychological examination of Mrs. Felsner on December 19, 2020 at 8:00 a.m. The exam would be with Bradley Axelrod, Ph.D. in Ann Arbor. His CV is attached. Below is a list of the standardized measures he typically uses to evaluate abilities at the time of assessment. This proposed examination date would require use to slightly extend the current expert disclosure deadlines.

I would like to book this examination and revise the disclosure deadlines as soon as practical so we can keep the damages case on track while you work with Alexander-Dennis on its liability discovery. Please contact me about this proposal soon.

Wechsler Adult Intelligence Scale-IV (WAIS-IV)  
Tests of Premorbid Functioning (TOPF)  
Wide Range Achievement Test-V (WRAT-V)  
Wechsler Memory Scale-IV (WMS-IV)  
California Verbal Learning Test-II (CVLT-II)  
Rey Complex Figure Test (CFT)  
Trail Making Test  
Controlled Oral Word Association Test  
Semantic Fluency  
Wisconsin Card Sorting Test (WCST)  
Finger Tapping Test  
Test of Memory Malingering (TOMM)  
Medical Symptom Validity Test (MSVT)  
Warrington Recognition Memory Test (RMT)  
Post-Concussive Symptom Questionnaire (PCSQ)

Michael Lowry  
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Wilson Elser Moskowitz Edelman & Dicker LLP  
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Las Vegas, NV 89119  
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For further information about Wilson, Elser, Moskowitz, Edelman & Dicker LLP, please see our website at [www.wilsonelser.com](http://www.wilsonelser.com) or refer to any of our offices.  
Thank you.

EXHIBIT B

EXHIBIT B

**BRADLEY N. AXELROD, Ph.D.**

2350 Washtenaw Avenue · Suite 7F · Ann Arbor, Michigan 48104 · (734) 913-0627

---

**PROFESSIONAL EXPERIENCE**

**Department of Veterans Affairs, Allen Park/Detroit**

Detroit, Michigan

August 1990-present.

Staff Psychologist, Neuropsychology

**Independent Practice**

Ann Arbor, Michigan

April 1992-present

Psychological and neuropsychological evaluations

**LICENSURE**

State of Michigan (Full License #6301007688; active since February 1990)

State of Colorado (Full License PSY-3119; July 2009-August 2019)

**EDUCATION**

**Wayne State University, Detroit, Michigan.**

Doctor of Philosophy, 1989.

Major: Clinical Psychology; Minor: Cognitive Psychology

Dissertation Title: Frontal lobe functioning in normal aging.

**Wayne State University, Detroit, Michigan.**

Master of Arts, 1988.

Major: Clinical Psychology

Thesis Title: Assessment of verbal and visual-spatial deficits in unilateral brain-injured patients.

**University of Illinois, Champaign, Illinois.**

Bachelor of Science, Summa Cum Laude, 1984.

Major: Psychology

**CLINICAL TRAINING**

**Department of Veterans Affairs, Ann Arbor**

Ann Arbor, Michigan, September 1989-August 1990.

Psychology Intern

**Harper Hospital**

Detroit, Michigan, September 1988-August 1989.

Psychology Intern

**Wayne State University Psychology Clinic**

Detroit, Michigan, March 1986-January 1988.

Psychology Practicum Student

**Detroit Receiving Hospital and University Health Center**

Detroit, Michigan, September 1987-August 1988.

Psychology Intern

**Rehabilitation Institute of Detroit / Rehabilitation Institute of Michigan**

Detroit, Michigan, September 1986-August 1987.

Psychology Intern

**Henry Ford Hospital**

Detroit, Michigan, September 1985-August 1986.

Psychology Practicum Student

**ACADEMIC APPOINTMENTS**

**University of Windsor, Windsor, Ontario**

Promotion, Tenure and Renewal Committee Member

Academic Administrative Unit

Department of Psychology

2004-2005

**Wayne State University College of Science, Detroit, Michigan.**

Adjunct Associate Professor

Department of Psychology

August 2002-present.

**Wayne State University School of Medicine, Detroit, Michigan.**

Adjunct Associate Professor

Department of Neurology

August 2001-2018.

**Utah State University College of Education, Logan, Utah.**

Adjunct Research Professor

Department of Psychology

September 1998-2006.

**Wayne State University College of Science, Detroit, Michigan.**

Adjunct Assistant Professor

Department of Psychology

March 1994-August 2002.

**University of Detroit Mercy, Detroit, Michigan.**

Adjunct Professor  
Department of Psychology  
December 1991-present.

**Wayne State University School of Medicine, Detroit, Michigan.**

Adjunct Assistant Professor  
Department of Neurology  
August 1991-August 2001.

**Wayne State University, Detroit, Michigan.**

Instructor  
May-July 1985; May-July 1986; January 1987-April 1989; September-December 1991.

**Wayne State University, Detroit, Michigan.**

Teaching Assistant  
September 1984-August 1985.

**RESEARCH EXPERIENCE**

**Section Editor (Clinical Psychology and Neuropsychology):**

Central European Journal of Medicine (2006-2012)

**Editorial Board Member:**

Archives of Assessment Psychology (2009-present)  
Assessment (2000-2003)  
Assessment (2009-present)  
The Clinical Neuropsychologist (2003-present)  
Journal of Clinical and Experimental Neuropsychology (2001-present)  
Psychology Injury and Law (2012-present)

**Reviewer:**

Aging and Cognition  
Aging, Neuropsychology and Cognition  
Applied Neuropsychology  
Applied Neuropsychology - Adult  
Archives of Clinical Neuropsychology  
Archives of General Psychiatry  
Archives of Medical Science  
Archives of Physical Medicine and Rehabilitation  
Assessment  
Child Neuropsychology  
Cor et Vasa (Journal of the Czech Society of Cardiology)  
Dementia and Geriatric Cognitive Disorders  
International Journal of Developmental Neuroscience

**Reviewer (continued):**

International Journal of Geriatric Psychiatry  
International Journal of Developmental Neuroscience  
International Journal of Neuroscience  
Irish Journal of Psychological Medicine  
JAMA: The Journal of the American Medical Association  
Journal of Applied Gerontology  
Journal of Articles in Support of the Null Hypothesis  
Journal of Clinical and Experimental Neuropsychology  
Journal of Clinical Psychology  
Journal of General Psychology  
Journal of Geriatric Psychiatry and Neurology  
Journal of the Neurological Sciences  
Journal of Neuropsychiatry and Clinical Neurosciences  
Journal of Psychiatric Research  
Journal of the International Neuropsychological Society  
Journal of Rehabilitation Research and Development  
Journal of Traumatic Stress  
Learning and Individual Differences  
Military Medicine  
Military Psychology  
Nature—Scientific Reports  
Neurocase  
Neuropsychologia  
Neuropsychology: A Journal of the American Psychological Association  
Neuropsychology Review  
Perceptual and Motor Skills  
Psychiatry Research  
Psychological Assessment  
Psychology and Neuroscience  
Psychology Injury and Law  
Psychoneuroendocrinology  
Schizophrenia Research  
The Lancet  
The Clinical Neuropsychologist

**Content Editor:** Introduction to Neuropsychology for Behavioral Health Professionals,  
Western Publisher, 2009

**Advisor:** Handbook of Psychiatric Measures, American Psychiatric Association, 2000

**Rambam Medical Center**, Haifa, Israel.  
Clinical Research Sabbatical  
September 1996-November 1996

**University of Illinois**, Champaign, Illinois.  
Research Assistant  
September 1981-December 1983

## **PROFESSIONAL ORGANIZATION MEMBERSHIPS**

American Academy of Assessment Psychology  
Fellow since 1998  
American Academy of Clinical Neuropsychology  
Affiliate (non-voting) Member since 2011  
American Board of Assessment Psychology  
Diplomate since 1998  
American Board of Professional Neuropsychology  
Diplomate since 2009  
American College of Professional Neuropsychology  
Fellow since 2009  
American Psychological Association  
Member since 1990  
Division 40 (Society for Clinical Neuropsychology)  
Fellow since 2002  
Division 12 (Clinical Psychology), Section IX (Assessment)  
Association for Internship Training in Clinical Neuropsychology  
Member since 1999  
Association for Scientific Advancement in Psychology Injury and Law  
Member since 2008  
Association of Veterans Affairs Psychologist Leaders  
Member since 2007  
International Neuropsychological Society  
Member since 1990  
Michigan Psychological Association  
Fellow since 2014  
National Academy of Neuropsychology  
Member 1992-1997  
Fellow since 1997

## **PROFESSIONAL GOVERNANCE**

American Academy of Sleep Medicine  
American Alliance for Health Sleep, Director, 2017-2020  
American Alliance for Health Sleep, Secretary/Treasurer, 2019-2020  
American Psychological Association  
Integrative Healthcare for an Aging Population,  
Member of the Technical Advisory Panel, 2007-2008  
Continuing Education Committee Member, 2004-2006  
Continuing Education Committee Research subcommittee Member, 2005-2006  
Continuing Education Committee SAS Appeal subcommittee Member, 2009-2018

American Psychological Association, Division 40 (Society for Clinical Neuropsychology)

Membership Committee Chair, 2000-2003, 2003-2006

Fellows Committee Member, 2004-2006

Member-At-Large, Executive Committee, 2011-2013

Association for Internship Training in Clinical Neuropsychology

Member at Large, 2003-2006

Member at Large, 2010-2013

National Academy of Neuropsychology

Awards Committee Chair, 2019-2021

Awards Committee, 2013-2016

Membership Committee, 2010-2013

Policy and Planning Committee, 1998-2004

University of Illinois, Department of Psychology

Alumni Advisory Board Mentoring Chair, 2015-present

Alumni Advisory Board Member, 2012-2015

Panel Discussant 2012, 2014

## SCIENTIFIC POSITIONS

American Academy of Clinical Neuropsychology

Foundation Outcome Studies Grant Program Review Committee 2012

Foundation Outcome Studies Grant Program Review Committee 2013

Foundation Outcome Studies Grant Program Review Committee 2014

Foundation Outcome Studies Grant Program Review Committee 2015

Foundation Outcome Studies Grant Program Review Committee 2016

Foundation Outcome Studies Grant Program Review Committee 2017

Foundation Outcome Studies Grant Program Review Committee 2018

Foundation Outcome Studies Grant Program Review Committee 2019

American Psychological Association

Division 40 (Society for Clinical Neuropsychology), Program Committee, 1994-1997

Department of Veterans Affairs Medical Center, Allen Park/Detroit Michigan

Research and Development Committee, 1993

Clinical Investigation Committee, 1993-2015

VISN 11 Complementary and Alternative Medicine Committee, 2006-2009

VISN 11 Polytrauma Team, 2007-2018

SOTA Research to Improve the Lives of Veterans: Approaches to Traumatic Brain Injury Treatment, Management and Rehabilitation, 2008

VISN 11 Traumatic Brain Injury Advisory Council, 2008-2018

International Neuropsychological Society

Program Committee, 1997

Program Committee, 2005

Program Committee, 2008



National Academy of Neuropsychology  
Scientific Program Committee, 1993  
Scientific Program Committee, 1997  
Scientific Program Committee, 2000  
Scientific Program Committee, 2001  
National Institutes of Health, Center for Scientific Review  
Special Emphasis Panel, 1999  
Southeastern Michigan Traumatic Brain Injury System Advisory Board  
Advisory Board Member, 2009-2014  
Advisory Board Member, 2018-2021  
Wayne State University  
Human Investigation Committee, Behavioral 03 Institutional Review Board  
Member, 2000-2003  
Vice-Chair, 2003-2006

## **GRANT AWARDS**

Van Dyke, S., Axelrod, B. N., & Schutte, C. E. (2009-2010). Utility of the Traumatic Brain Injury Screening Instrument in Predicting Cognitive and Affective Functioning in OEF/OIF Veterans. Department of Veterans Affairs Predoctoral Associated Health Rehabilitation Research Fellowship Program.

Sharp, M. & Axelrod, B. N. (2009). Readjustment Education Material for Veterans Returning from Deployment. Public Health Strategic Health Care Group, Veterans Health Administration.

## **PROFESSIONAL HONORS AND AWARDS**

Phi Beta Kappa, 1984  
Bronze Tablet (Upper 2% of graduating class), University of Illinois, 1984  
Graduate Professional Scholar at Wayne State University, 1985-1986, 1986-1987, 1987-1988, 1988-1989  
Blue Ribbon Award, American Psychological Association, Division 40 (Society for Clinical Neuropsychology), 1993  
Outstanding Rating Certificate, Department of Veterans Affairs Medical Center, 1992, 1993, 1994, 1995, 1996  
Early Career Contributions to Clinical Neuropsychology Finalist, National Academy of Neuropsychology, 1995, 1996  
Outstanding Student Research Award, American Psychosomatic Society, 2000  
Davidson Fellow faculty advisor, Davidson Institute for Talent Development, 2003  
Blue Ribbon Award, American Psychological Association, Division 40 (Society for Clinical Neuropsychology), 2007  
Nelson Butters Award for Research Contributions to Clinical Neuropsychology, National Academy of Neuropsychology, 2008  
TCN/AACN Student Project Competition Runner Up, American Academy of Clinical Neuropsychology, 2017.

## **CONTINUING EDUCATION PRESENTATIONS**

Rationale for and Application of Short Forms for Commonly Used Neuropsychological Measures (November 2001). National Academy of Neuropsychology 21<sup>st</sup> Annual Conference, San Francisco, California.

Practical Issues in Clinical Neuropsychological Assessment (June 2004). American Academy of Clinical Neuropsychology 2004 Annual Conference, Minneapolis, Minnesota.

Challenges in Clinical Practice: Short Forms, False Positive Errors, Demographics, and Practice Effects (November 2004). National Academy of Neuropsychology 24<sup>th</sup> Annual Conference, Seattle, Washington.

Using Standardized Assessment Techniques with Unstandardized Patients (November 2004). National Association of Psychometrists Annual Meeting, Seattle, Washington.

Issues Around Somatoform Conditions, Effort, Symptom Exaggeration, and Compensation: Remember Your Role as a VA Healthcare Provider (June 2008). Department of Veterans Affairs National Polytrauma System of Care Conference: Effective Practice for Improved Outcomes, San Diego, California.

Specificity of Neuropsychological Assessment Measures (November 2009). Connecticut Neuropsychological Society, Hartford, Connecticut.

Assessment of Effort and Validity in Neuropsychological Testing (August 2011). Fifth Annual Defense and Veterans Traumatic Brain Injury Summit, Washington DC.

Evaluating Bias and Effort in Neuropsychology (April 2013). Annual Meeting of the Midwest Neuropsychology Group, The University of Michigan, Ann Arbor, Michigan.

You are testing my patients: Systematic Methods for Evaluating Performance Validity (May 2018). Annual Meeting of the Midwest Neuropsychology Group, Eastern Michigan University, Ypsilanti, Michigan.

Establishing Rationale and Methods for Inclusion of Performance Validity in Neuropsychological Evaluations (August 2018). Washtenaw Psychological Society, Ann Arbor, Michigan.

Vital Neuropsychology Issues in 2019: Test Interpretation, Practice Effects, and Performance Validity (February, 2019). University of Michigan Department of Rehabilitation Medicine and Rehabilitation, Ann Arbor, Michigan.

## PUBLICATIONS

### **Book**

Axelrod, B. N. & Windell, J. (2012). Dissertation Solutions: A concise guide to planning, implementing, and surviving the dissertation process. Lanham, Maryland: Rowman & Littlefield Publishers.

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**Papers Submitted**

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## PRESENTATIONS

Fincham, F. & Axelrod, B. N. (November, 1984). Children as intuitive behavior therapists. Presented at the 18th Annual Meeting of the Association for Advancement of Behavior Therapy, Philadelphia, Pennsylvania.

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- Ricker, J. H. & Axelrod, B. N. (August, 1993). Object naming ability and Hooper VOT performance. Presented at the 101st Annual Meeting of the American Psychological Association, Toronto, Canada. The Clinical Neuropsychologist, 7, 343. **Blue Ribbon Award**

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- Tsanadis, J., Montoya, E., Millis, S.R., Hanks, R. A., Fichtenberg, N. L. & Axelrod, B. N. (May 2007). A Negative Impression Management Scale for the Postconcussive Syndrome Questionnaire. Presented at the 13th Annual Del Harder Rehabilitation Research Day, Detroit, Michigan.
- Barlow, A. S., Axelrod, B. N., & Paradee, C. V. (June 2007). Investigation of the Rarely Missed Index in a Mixed Clinical Sample. Presented at the 5th Annual Meeting of the American Academy of Clinical Neuropsychology, Denver Colorado. The Clinical Neuropsychologist, 21, 384.
- Barlow, A. S., Axelrod, B. N., & Lynch, T. (June 2007). Poor Clinical Sensitivity of the WMS-III Verbal Paired Associate Recognition Test. Presented at the 5th Annual Meeting of the American Academy of Clinical Neuropsychology, Denver Colorado. The Clinical Neuropsychologist, 21, 384.
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- Axelrod, B. N., Randolph, C., Donnell, A., Pliskin, N., & Holdnack, J. (August 2007). Rapidly-Administered short forms of the Wechsler Adult Intelligence Scale-3rd Edition. Presented at the 115th Annual Meeting of the American Psychological Association, San Francisco, California. The Clinical Neuropsychologist, 21, 694.

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- Axelrod, B. N. (October 2008). Cognitive and Emotional Differences among Veterans with Good and Poor Effort. Presented at the 28th Annual Meeting of the National Academy of Neuropsychology, New York, New York. Archives of Clinical Neuropsychology, 23, 670.
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- Van Dyke, S. A. & Axelrod, B. N. (November, 2011). Development of MMPI-2 and MMPI-2-RC short forms with a veteran sample. Presented at the 31st Annual Meeting of the National Academy of Neuropsychology, Marco Island, Florida. Archives of Clinical Neuropsychology, 26, 504.
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- Axelrod, B. N. & Etherton, J. L. (November 2012). Heterogeneity of variance in a non-patient sample. Presented at the 32nd Annual Meeting of the National Academy of Neuropsychology, Nashville, Tennessee. Archives of Clinical Neuropsychology, 27, 678.

- Holcomb, E. & Axelrod, B. N. (November 2012). Introduction of the Rey Complex Figure Forced-Choice Recognition Task. Presented at the 32nd Annual Meeting of the National Academy of Neuropsychology, Nashville, Tennessee. Archives of Clinical Neuropsychology, 27, 638.
- Pierce, C. A., Zacharewicz, M., & Axelrod, B. N. (November 2012). Does The Quality of PASAT Test Material Affect Performance? Presented at the 32nd Annual Meeting of the National Academy of Neuropsychology, Nashville, Tennessee. Archives of Clinical Neuropsychology, 27, 656-657.
- Leavell, B., Van Buren, E., Antaki, F., Axelrod, B. N., Rambus, M. A., & Majumdar, A. P. N. (December 2012). Associations between markers of colorectal cancer stem cells and adenomas among ethnic groups. Presented at the 2012 Summit on the Science of Eliminating Health Disparities, National Harbor, Maryland.
- Holcomb, E. Axelrod, B. N., & Liethen, P. C. (February 2013). Concurrent Validity of the TOMM and CVLT-II Forced-Choice Recognition Tasks with a Rey Complex Figure Forced-Choice Measure. Accepted for presentation at the 32nd Annual Meeting of the International Neuropsychological Society, Waikoloa, Hawaii.
- Holcomb, E. Axelrod, B. N., & Liethen, P. C. (February 2013). Examination of a Forced-Choice Recognition Task for the Rey Complex Figure Test in the Detection of Suboptimal Effort. Accepted for presentation at the 32nd Annual Meeting of the International Neuropsychological Society, Waikoloa, Hawaii.
- Axelrod, B. N. (April 2013). Evaluating Bias and Effort in Neuropsychology (April 2013). Invited address presented at the 2013 Annual Meeting of the Midwest Neuropsychology Group, Ann Arbor, Michigan.
- Sugarman, M. A., Kamper, J. E., & Axelrod, B. N. (April 2013). The utility of the Montreal Cognitive Assessment in predicting general intellectual abilities. Presented at the 2013 Annual Meeting of the Midwest Neuropsychology Group, Ann Arbor, Michigan.
- Kamper, J. E., Sugarman, M. A., Axelrod, B. N., & Schutte, C. (June 2013) The efficacy of additional demographic corrections for the CVLT-II. Presented at the 11th Annual Meeting of the American Academy of Clinical Neuropsychology, Chicago, Illinois. The Clinical Neuropsychologist, 27, 566.
- Rinaldi, A., Kulas, J. F., & Axelrod, B. N. (June 2013) Cross Validation of the Albany Consistency Index, TOMMe10, and Trial 1 alternative scoring methods for the Test of Memory Malinger. Presented at the 11th Annual Meeting of the American Academy of Clinical Neuropsychology, Chicago, Illinois. The Clinical Neuropsychologist, 27, 596-597.



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- Sugarman, M. A., Kamper, J. E., & Axelrod, B. N. (June 2013) The utility of the Mini-Mental State Exam in predicting intellectual abilities. Presented at the 11th Annual Meeting of the American Academy of Clinical Neuropsychology, Chicago, Illinois. The Clinical Neuropsychologist, 27, 602-603.
- Van Dyke, S. A., Millis, S. R., Axelrod, B. N., & Hanks, R. A. (June 2013) Assessing Effort: Differentiating performance and symptom validity. Presented at the 11th Annual Meeting of the American Academy of Clinical Neuropsychology, Chicago, Illinois. The Clinical Neuropsychologist, 27, 605-606.
- Sugarman, M. A. & Axelrod, B. N. (February 2014). Embedded measures of performance validity using verbal fluency tests in a clinical sample. Presented at the 42nd Annual Meeting of the International Neuropsychological Society, Seattle, Washington. Journal of International Neuropsychological Society, 20s.
- Crocket, D. J., Axelrod, B. N., & Shaffer, T. R., & (June 2014). Symbol Digit Modalities Test Scores: Just how stable are they? Presented at the 12th Annual Meeting of the American Academy of Clinical Neuropsychology, New York, NY. The Clinical Neuropsychologist, 28, 427.
- Axelrod, B. N., Meyers, J. E., & Davis, J. J. (July 2014). Using Finger Tapping as a Measure of Performance Validity. Presented at the 2014 Mid-Year Meeting of the International Neuropsychological Society, Jerusalem, Israel. Journal of International Neuropsychological Society, 20s2.
- Bashem, J. R., Rapport, L. J., Billings, N. M., Miller, J. A., Hanks, R. A., Axelrod, B. N., & Kansner, R. (August 2014). Strategies of successful and unsuccessful simulators coached to feign traumatic brain injury. Presented at the 122nd Annual Meeting of the American Psychological Association, Washington DC. The Clinical Neuropsychologist, 28, 697.
- Reslan, S. & Axelrod, B. N. (November 2014). Evaluating the MSVT GMIP (SIP/DP) against other Performance Validity Measures. Presented at 34th Annual Meeting of the National Academy of Neuropsychology, Fajrdao, Puerto Rico. Archives of Clinical Neuropsychology, 29.
- Lippa, S. M., Axelrod, B. N., & Lange, R. T. (November 2015). Psychometric properties of the Mild Brain Injury Atypical Symptoms (MBIAS) Scale in a mixed clinical sample. Presented at the 35<sup>th</sup> Annual Meeting of the National Academy of Neuropsychology, Austin, Texas. Archives of Clinical Neuropsychology, 30.

- Lippa, S. M., Lange, R. T., & Axelrod, B. N. (November 2015). Utility of the Mild Brain Injury Atypical Symptoms (MBIAS) Scale in a mixed clinical sample. Presented at the 35<sup>th</sup> Annual Meeting of the National Academy of Neuropsychology, Austin, Texas. Archives of Clinical Neuropsychology, 30.
- Lippa, S. M., Axelrod, B. N., & Lange, R. T. (February 2016). Subjective memory problems, performance validity test failure, and objective neurocognitive performance. Presented at the 44th Annual Meeting of the International Neuropsychological Society, Boston, Massachusetts. Journal of International Neuropsychological Society, 22s.
- Davis, J., Larrabee, G., Axelrod, B. N., & Millis, S. R. (June 2016). Characterizing failure on a single performance validity indicator. Presented at the 14th Annual Meeting of the American Academy of Clinical Neuropsychology, New York, NY. The Clinical Neuropsychologist, 30.
- Huffman, J., Lee H. J., & Axelrod, B. N. (June 2016). The utility of the Hopkins Adult Reading Test in premorbid function estimation: Comparison with the Wide Range Achievement Test. Presented at the 14th Annual Meeting of the American Academy of Clinical Neuropsychology, New York, NY. The Clinical Neuropsychologist, 30.
- Lee H. J., Huffman, J., & Axelrod, B. N. (November 2016). Predicting Wide Range Achievement Test Word Reading Score from Hopkins Adult Reading Test Scores. Presented at the 36th Annual Meeting of the National Academy of Neuropsychology, Seattle, WA. Archives of Clinical Neuropsychology, 31, 371-372.
- Bakkila, K., Axelrod, B., Kushida, C., Rastogi, R., Vogel, D., & Chowdhuri, S. (April 2017). Impact of Obstructive Sleep Apnea (OSA) and Obstructive Sleep Apnea-Chronic Obstructive Pulmonary Disease on neurocognitive outcomes. Presented at the 31st Annual Meeting of the Associated Professional Sleep Societies, Boston, MA. Sleep, 40s, A229.
- Abbas, H., Bakkila, K., Rastogi, R., Kushida, C., Axelrod, B., Vogel, D., Mukkavilli, V. & Chowdhuri, S. (June 2017). Impact of Overlap Syndrome on neurocognitive outcomes and quality of life. Presented at the 15<sup>th</sup> Annual Meeting of International Sleep & Breathing, Madison, WI.
- Axelrod, B. N. (October 2017). Circus Tricks: Guessing FSIQ using Clinical and Actuarial Prediction Models. Presented at the 37th Annual Meeting of the National Academy of Neuropsychology, Boston, MA. Archives of Clinical Neuropsychology, 32, 668-765.
- Axelrod, B. N., Crocket, D. J., & Sugarman, M. A. (October 2017). Impact of an embedded measure of performance on neuropsychological test performance. Presented at the 37th Annual Meeting of the National Academy of Neuropsychology, Boston, MA. Archives of Clinical Neuropsychology, 32, 667-765.

Morin, R. T. & Axelrod, B. N. (October 2017). Identifying patient groups with Latent Class Analysis using validity, cognition, and emotion. Presented at the 37th Annual Meeting of the National Academy of Neuropsychology, Boston, MA. Archives of Clinical Neuropsychology, 32, 668-765.

Bakkila, K., Axelrod, B., Kushida, C., Rastogi, R., Williams, R., Vogel, D., & Chowdhuri, S. (June 2019). Impact of Obstructive Sleep Apnea (OSA) and Chronic Obstructive Pulmonary Disease (COPD) on Clinical and Neurocognitive Outcomes. Presented at the 33rd Annual Meeting of the Associated Professional Sleep Societies. Sleep, 42s, A193-A194.

Revised: May 13, 2020

EXHIBIT C

EXHIBIT C

1 **RESP**

2 JOHN B. SHOOK, ESQ.

3 Nevada Bar No. 5499

4 DARREN T. RODRIGUEZ, ESQ.

5 Nevada Bar No. 12857

6 SHOOK & STONE, CHTD.

7 710 South 4th Street

8 Las Vegas, NV 89101

9 Office: (702) 385-2220

10 Attorneys for Plaintiffs

11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

13 HEATHER FELSNER and ROGER  
14 FELSNER,

15 Plaintiff,

16 vs.

17 KEOLIS TRANSIT SERVICES, LLC,  
18 Foreign Limited-Liability Corporation and  
19 DOE 1 EMPLOYEE; DOES II through X,  
20 inclusive; and ROE BUSINESS ENTITIES I  
21 through X, inclusive

22 Defendants.

Case No.: A-18-781000-C

Dept. No.: 27

**PLAINTIFF HEATHER FELSNER'S**  
**RESPONSES TO DEFENDANTS,**  
**KEOLIS TRANSIT, LLC'S**  
**INTERROGATORIES**

23 TO: KEOLIS TRANSIT, LLC Defendant;

24 TO: MICHAEL LOWRY, ESQ., Attorney for Defendant

25 COMES NOW, Plaintiff, HEATHER FELSNER, by and through her attorney of record,

26 JOHN B. SHOOK, ESQ. of the law firm of SHOOK & STONE, CHTD., and pursuant to NRCP 33,

27 hereby responds to Defendants Interrogatories in the above-entitled manner as follows:

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1 **INTERROGATORY NO.1:**

2 State your full name, date of birth, address and the name, address, and occupation of each  
3 individual who assisted in the answering of these interrogatories.

4 **RESPONSE:**

5 Heather Park Felsner, 10/20/1952 29969 Sparkleberry Dr. Southfield, MI. 48076 Roger  
6 Felsner 29969 Sparkleberry Dr. Southfield, MI. 48076, Retired  
7

8 **INTERROGATORY NO. 2:**

9 If you have been employed at anytime during the five years preceding the accident alleged  
10 in your complaint through the present, state as to each employer:

- 11 a) name and address;  
12 b) the dates of which you were employed;  
13 c) your job title and the nature of the duties you performed;  
14 d) the reason you left or changed your employment; and  
15 e) the salary, wage or commission you received.  
16

17 **RESPONSE:**

18 Spy King Corporation 26710 Southfield Road, Lathrup Village, MI. 48076. 2010 thru 2013  
19 Co-Owner retail sales store, bookkeeping, inventory control, sales, customer service. Due to  
20 internet competition business closed down. Average salary was \$15,000.

21 **INTERROGATORY NO. 3:**

22 If you have ever been convicted of a felony or crime involved in moral turpitude, state:

- 23 a) the nature of the felony or felonies;  
24 b) the date or dates on which you were convicted; and  
25 c) the place or places where you were convicted.  
26

27 **RESPONSE:**

28 No.

1           **1. Vague and Ambiguous.** This interrogatory/request is vague and ambiguous with  
2 regard to the following terms/phrases: any effects.

3           **2. Burdensome, Oppressive, Overbroad:** This discovery request is so broad and  
4 unlimited as to time and scope as to be an unwarranted annoyance, embarrassment, and is  
5 oppressive. To comply with the request would be an undue burden and expense on the plaintiff.

6           **3. Foundation/Expert Testimony.** This request calls for the Plaintiff to possess expert  
7 knowledge with regard to injuries.  
8

9           Without waiving the referenced objection(s), Plaintiff layperson's response is as follows: I  
10 have trouble focusing on what people say and difficulty paying attention. Sometimes I forget what I  
11 was about to do or forget to turn off the stove after cooking. Many times my husband or daughter  
12 yell at me for leaving the pan on the stove while the fire is still on. I also forget many little things.  
13 My husband and daughter tell me that I constantly repeat myself. I feel like I move more slowly as  
14 if I was going in slow motion I get many headaches since the incident and before that happened I  
15 would seldom get a headache. I have trouble going to sleep and sleeping the whole night. I feel sad  
16 all the time and nothing seems to give me enjoyment. I refuse to leave the house unless it is  
17 absolutely necessary, like going to the doctor or food shopping. I find myself keeping to myself  
18 even avoiding my husband and daughter in the same house. I don't talk to my sisters or friends like  
19 I used to. My right shoulder still hurts even when I am not using my arm. I have less motion in my  
20 right arm than I did before.

21 **INTERROGATORY NO.10:**

22           Describe your physical and medical condition at present as compared with your condition  
23 immediately preceding the accident.  
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VERIFICATION BY AFFIDAVIT

HEATHER FELSNER hereby attests that she has read the foregoing RESPONSES TO DEFENDANTS KEOLIS TRANSIT'S INTERROGATORIES and the same are true to the best of her personal knowledge or, if so stated, upon her best information and belief. This declaration is provided in compliance with EDCR 2.34 and NRCP 33(b)(2).

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct. (NRS 53.045).

Heather Felsner  
HEATHER FELSNER

5-10-19  
DATED

Objections Submitted by:

**SHOOK & STONE, CHTD.**

JOHN B. SHOOK, ESQ.  
Nevada Bar No. 5499  
SHOOK & STONE, CHTD.  
710 South 4th Street  
Las Vegas, Nevada 89101  
Attorney for Plaintiff



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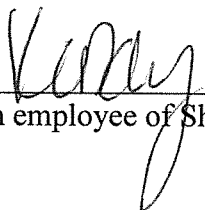
**CERTIFICATE OF SERVICE**

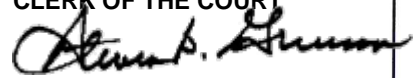
Pursuant to NEFCR 9, NRCP 5(b) and EDCR 7.26, I certify that on this date, I served the foregoing **PLAINTIFF HEATHER FELSNER'S RESPONSES TO DEFENDANTS, KEOLIS TRANIST, LLC'S INTERROGATORIES** by electronic transmission through the Odyssey File & Serve system to the following parties:

Michael Lowry, Esq.  
Amanda A. Ebert, Esq.  
Wilson Elser Moskowitz Edelman & Dicker  
300 South Fourth Street  
Las Vegas, NV 89101

Leonard Fink, Esq.  
Springel & Fink  
10655 Park Run Drive, #275  
Las Vegas, Nevada 89144

DATED this 13 day of May, 2019.

  
\_\_\_\_\_  
An employee of Shook & Stone



OPPS  
JOHN B. SHOOK, ESQ.  
Nevada Bar No. 5499  
ROBERT L. ENGLISH, ESQ.  
Nevada Bar No. 3504  
SHOOK & STONE, CHTD.  
710 South Fourth Street  
Las Vegas, Nevada 89101  
Office: (702) 385-2220  
Attorneys for Plaintiffs

**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

HEATHER FELSNER and ROGER  
FELSNER,

Plaintiffs

vs.

KEOLIS TRANSIT SERVICES, LLC,  
Foreign Limited-Liability Corporation and  
EDGARDO YUSI; ALEXANDER DENNIS,  
INC., a Foreign Corporation, DOES II through  
X, inclusive; and ROE BUSINESS ENTITIES  
I through X, inclusive,

Defendants.

Case No.:18-CV-00617  
Dept. No.: I

**PLAINTIFFS HEATHER FELSNER and  
ROGER FELSNER'S OPPOSITION TO  
DEFENDANTS KEOLIS TRANSIT  
SERVICES, LLC. and EDGARDO YUSI'S  
MOTION FOR RULE 35 EXAMINATION**

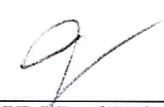
Plaintiffs HEATHER FLESNER and ROGER FELSNER hereby oppose DEFENDANTS  
KEOLIS TRANSIT SERVICES, LLC. and EDGARDO YUSI'S MOTION FOR RULE 35  
EXAMINATION.

///

1 This Opposition is made and based upon the pleadings and papers on file herein, the  
2 attached Points and Authorities, and any argument made by counsel at the hearing of this matter.

3 DATED this 30 day of October, 2020.  
4

5 ***SHOOK & STONE, CHTD.***

6   
7 \_\_\_\_\_  
8 JOHN B. SHOOK, ESQ.  
9 Nevada Bar No. 5499  
10 ROBERT L. ENGLISH, ESQ  
11 Nevada Bar No. 3504  
12 SHOOK & STONE, CHTD.  
13 710 South Fourth Street  
14 Las Vegas, Nevada 89101  
15 Attorneys for Plaintiffs  
16 HEATHER AND ROGER FELSNER  
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 STATEMENT OF FACTS

4 A. Underlying Facts

5 This is a personal injury action arising from a fall down the stairs of a coach operated by  
6 Defendants Keolis and Yusi and manufactured by Defendant Alexander Dennis, Inc. On February  
7 21, 2017, Plaintiff Heather Felsner boarded a double-decker bus and proceeded to climb the stairs  
8 to the second level. The following photographs depict the incident:  
9

- 10 1. Mrs. Felsner approached the top of the stairs.



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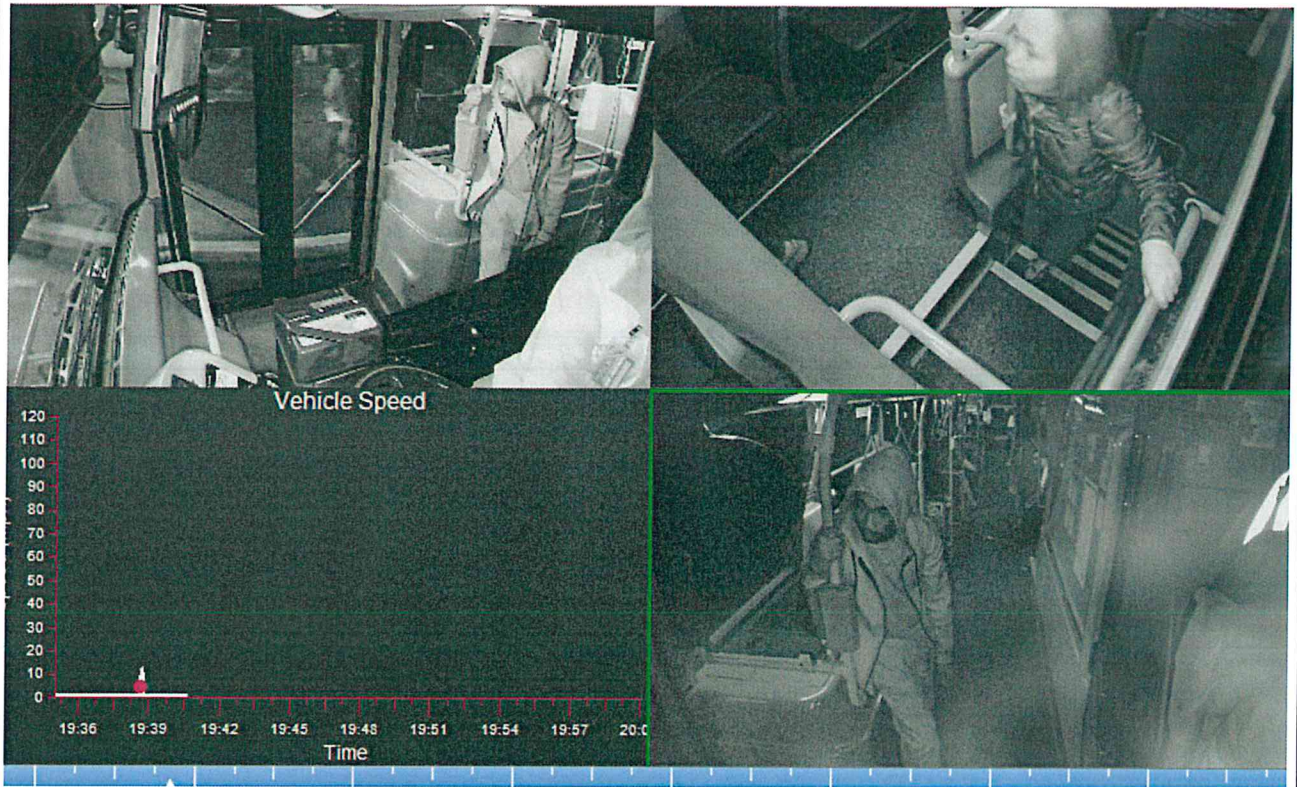
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Coah operator Yusi accelerates coach with Mrs. Felsner still inside the stairwell.



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1 Mrs. Felsner begins to fall.



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Mrs. Felsner attempts to hold on to hand rail to stop her fall.

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1 Mrs. Felsner falling



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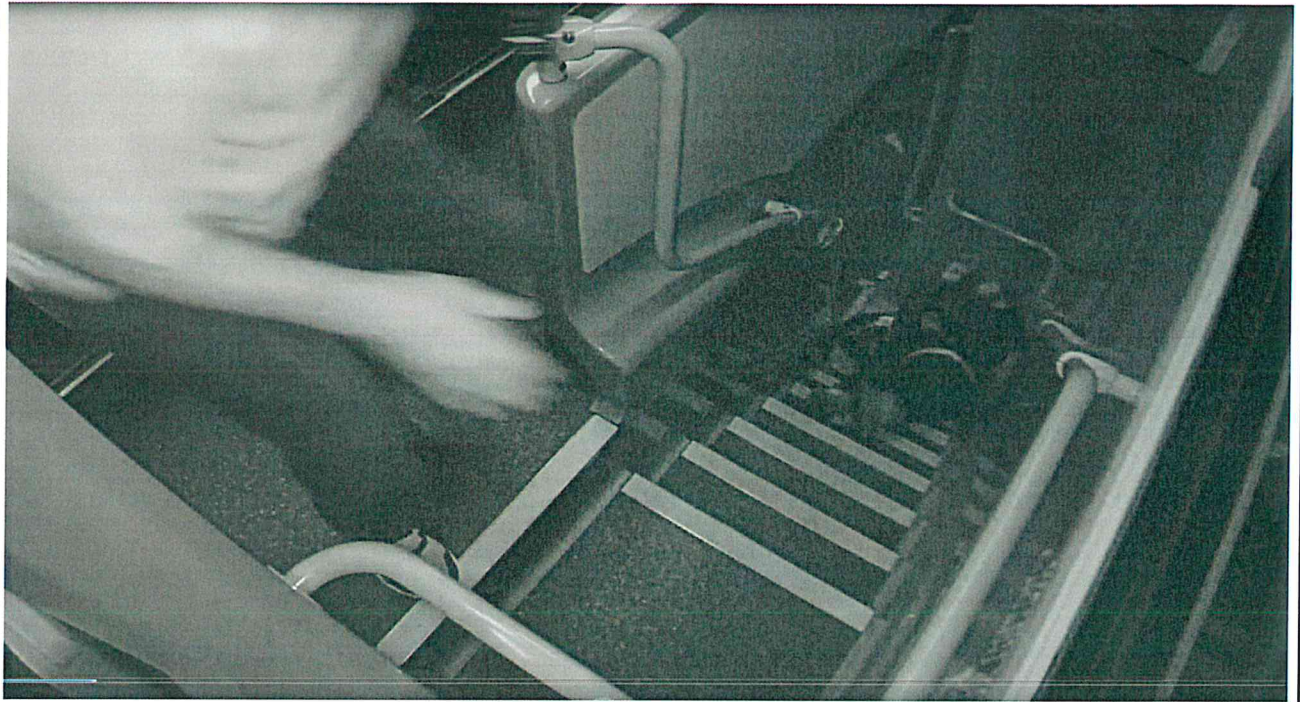
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1 Mrs. Felsner unconscious.



13  
14 After her fall, emergency personnel transported Mrs. Felsner to Sunrise Hospital where  
15 critical care physicians discovered numerous cerebral hemorrhages requiring admission. Following  
16 discharge, Mrs. Felsner was advised to follow-up with a neurologist and rehabilitation center for  
17 further care and monitoring.

18 Upon her return home to Michigan, Mrs. Felsner sought care at the Rehabilitation Institute  
19 of Michigan -- a world renowned rehabilitation center specializing in the treatment of brain injuries,  
20 where Dr. Stephen Vangel, Ph.D., a neuropsychologist, performed testing.

21  
22 According to Dr. Vangel's report<sup>1</sup>, the purpose of the assessment was:

23 **PURPOSE OF ASSESSMENT:** Evaluation to determine the nature and severity of cognitive  
24 difficulties following a traumatic brain injury and intracerebral hemorrhages from a fall in 2017.  
Examinee also describes significant emotional sequelae to this event.

25 *Id.*

26  
27  
28 <sup>1</sup> See, Exhibit 1, Dr. Stephen Vangel's neuropsychology testing report, filed under seal.

1 The examination was lengthy:

2 **Addendum by VANGEL PhD, STEPHEN J on March 04, 2020 16:33 EST**

3 Examinee was seen for:

4 96132: 60 minutes, 2/12/20, 1 unit.

5 96133: 286 minutes, 2/12/20, 2/26/20, 3/04/20, 5 units

6 96138: 30 minutes, 2/12/20, 1 unit

7 96139: 70 minutes, 2/12/20, 2 units.

8 *Id.*

9 Because Mrs. Felsner is a 67 year old Korean female with 14 years of education in Korea  
10 and limited English skills, certain tests were omitted:

11 **NEUROPSYCHOLOGICAL ASSESSMENT**

12 Assessment of this examinee was interpreted cautiously, due to differences between her  
13 developmental experience and that of the normative samples (born & raised in the U.S) for most  
14 tasks. Tests were deliberately omitted where culture and language differences would clearly result  
15 in distortion of interpretation. We chose test that have a minimal amount of instructions and verbal  
16 response requirements, except for one included to assess degree of English comprehension. The  
17 tests given were interpreted in comparison with multiple norm sets, including those of ethnic  
18 minorities, when possible. However, the reader should be aware that these procedures are not  
19 standardized for the examinee, and therefore the validity of test scores and impairment ratings  
20 remains in question. Test results were most often interpreted qualitatively rather than quantitatively.

21 *Id.*



The following tests were performed:

The following neuropsychological test battery was administered:

Test	Raw Score	z-score	Description
WMS-IV Symbol Span (publisher norms <b>A, Ed</b> )	14.0	-0.67	average
WAIS-IV Coding (publisher norms <b>A</b> )	38.0	-1.00	below average
DVT Time (Heaton 2004 printed norms <b>G,A,Ed,Et</b> )	577"	-1.40	low
DVT Errors (Heaton 2004 printed norms <b>G,A,Ed,Et</b> )	7.0	0.20	average
NAB Shape Learning Immediate Recognition (NAB 2003 Manual <b>G,A,Ed</b> )	11.0	-1.20	below average
NAB Shape Learning Delayed Recognition (NAB 2003 Manual <b>G,A,Ed</b> )	2.0	-2.40	exceptionally low
BDAE Complex Ideation (Heaton 2004 printed norms <b>G,A,Ed,Et</b> )	7.0	-4.20	exceptionally low
WAIS- IV Block Design (publisher norms <b>A</b> )	36.0	0.33	average
WCST Categories (Kongs 2000 publisher norms <b>A,Ed</b> )	3.0	-0.67	average

WCST Perseverative Responses (Kongs 2000 publisher norms <b>A,Ed</b> )	5.0	0.90	above average
WCST Perseverative Errors (Kongs 2000 publisher norms <b>A,Ed</b> )	5.0	0.90	above average
WCST Learning to Learn (Kongs 2000 publisher norms <b>A,Ed</b> )	-4.4	-0.67	average
WCST Trials to 1st Category (Kongs 2000 publisher norms <b>A,Ed</b> )	16.0	-0.67	average
WCST % Conceptual Level Responses (Kongs 2000 publisher norms <b>A,Ed</b> )	42.0	-0.30	average
WCST Failure to Maintain Set (Kongs 2000 publisher norms <b>A,Ed</b> )	1.0		
BSI-18 Total (Derogatis 2000 Community Norms)	28.0	1.70	elevated
BSI-18 Somatic (Derogatis 2000 Community Norms)	8.0	1.80	elevated
BSI-18 Depression (Derogatis 2000 Community Norms)	10.0	1.50	elevated
BSI-18 Anxiety (Derogatis 2000 Community Norms)	10.0	1.60	elevated

1 Dr. Vangel's assessment of the testing results is not described here due to privacy concerns  
2 but may be reviewed in Exhibit 1.

3 **B. Procedural Background**

4 As a result of the incident Plaintiffs filed a Complaint on September 12, 2018 against  
5 Defendant Keolis Transportation Services, LLC. ("Keolis"), and DOE Defendants on various  
6 theories of Negligence, Common Carrier Negligence, Strict Products Liability, as well as a claim for  
7 Loss of Consortium. Thereafter, on December 5, 2018 Defendant Keolis filed its Motion to Dismiss  
8 various causes of action, which was denied on January 9, 2019 and the order entered on February 1,  
9 2019. On February 19, 2019 a Stipulation and Order was entered allowing Plaintiff to Amend their  
10 complaint and substitute Alexander Dennis, Inc. ("Alexander Dennis"), the bus manufacturer, as  
11 one of the DOE Defendants. The First Amended Complaint was filed on February 21, 2019,  
12 thereafter Defendants Keolis filed its Answer on February 25, 2019 and Defendant Alexander  
13 Dennis file its Answer on April 9, 2019. On August 21, 2019 A stipulation and Order was entered  
14 allowing the Plaintiff to substitute Doe I Employee with Defendant Edgardo Paguio Yusi ("Yusi").  
15 The Second Amend Complaint was filed on August 21, 2019 and Answer by Keolis on August 26,  
16 2019, September 4, 2019 by Defendant Yusi, and September 12, by Defendant Alexander Dennis.  
17 On October 16, 2020, Defendants filed the instant motion for Rule 35 examination with Dr. Bradley  
18 Axelrod in Ann Arbor, Michigan.<sup>2</sup> Initial expert disclosures are due on December 22, 2020.  
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27 <sup>2</sup> It is unknown what testing Dr. Axelrod plans to conduct. While defendant's counsel did note certain tests which are  
28 typically performed, it is unclear if this will be the case here considering Mrs. Felsner's prior testing and cultural  
background.



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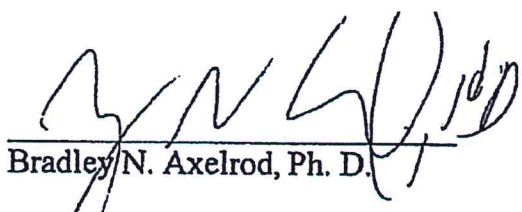
II.

ARGUMENT

A. Dr. Axelrod must be precluded from examining Mrs. Felsner as he believes the presence of an observer invalidates testing and because it is unethical for a psychologist or neuropsychologist to allow a Third-Party Observer to be present during face-to-face evaluation and formal testing of the individual

According to Dr. Axelrod's affidavit from August, 2018,

3. The mere presence of a Third Party Observer alters the results of the evaluation and invalidates the test results.
  4. It is unethical for a psychologist or neuropsychologist to allow a Third Party Observer to be present during the face-to-face evaluation and formal testing of the individual, although they may be present during the initial interview at the outset.
  5. The presence of a Third Party Observer, other than during the initial interview, ethically requires a psychologist or a neuropsychologist to remove themselves and terminate the testing.
- 
6. The presence of an interpreter in an evaluation is different from a Third Party Observer, as the interpreter is independent and has no interest or relationship to the outcome of the evaluation.
  7. The presence of a student or trainee is acceptable as this is a neutral noninvolved party, with no interest in or relationship to the outcome of the evaluation, in a clinical setting as noted by the National Academy of Neuropsychology.

  
Bradley N. Axelrod, Ph. D.

See, **Exhibit 2**, Affidavit of Bradley Axelrod, Ph.D.

As your Honor has previously found, NRC 35 and NRS Section 52.380 conflict regarding the presence of an observer. In resolving that conflict the Court found:

1           10.     The Statute creates substantive rights, including the right of the examinee to have  
2     his or her attorney or that attorney's representative serve as the observer, the right to have the  
3     observer record the examination without making a showing of "good cause," and the right to have  
4     an observer present for a neuropsychological, psychological, or psychiatric examination without  
5     making a showing of "good cause."

6           11.     Because the Statute creates substantive rights, it is substantive rather than  
7     procedural.

8           12.     Because the Statute is substantive, it governs and supersedes the Rule where the  
9     two conflict.

10          13.     An individual submitting to an examination under NRCP 35 has the following  
11     substantive rights, pursuant to NRS Section 52.380: to have his or her attorney or that attorney's  
12     representative serve as the observer; have the observer record the examination without making a  
13     showing of "good cause"; and to have an observer present for a neuropsychological, psychological,  
14     or psychiatric examination without making a showing of "good cause."

15                 See, **Exhibit 3**, Order Re: Discovery Commissioner's Report And Recommendations dated  
16     August 14, 2020, attached hereto.

17                 Because NRS 52.380 creates a substantive right to allow an observer to be present -- which  
18     Plaintiff intends to utilize -- and the testing conducted with an observer present "alters the results of  
19     the evaluation and invalidates the test results", Dr. Axelrod must be precluded from performing an  
20     examination of Mrs. Felsner.

21                 Many courts, including several in Clark County, have held that a Defendant does not have  
22     an absolute right to designate the examiner to conduct a Rule 35 medical examination. The right to  
23     appoint an examiner ultimately rests with the trial court's discretion. See, *Doupouce v. Drake*, 183  
24     F.R.D. 565 (D. Colo. 1998); *Martin v. Superior Court of Maricopa County*, 451 P. 2d 597 (Ariz.  
25     1959);  
26

27                 An individual should not be compelled to undergo an examination conducted by an  
28     examiner against whom the party has valid objections. If the party to be examined

1 makes timely objection to the examiner selected by an adversary, the court usually  
2 will designate another.

3 13-7 Bender's Forms of Discovery Treatise §7.03, [8][b].

4 Here, because Dr. Axelrod has a legitimate concern about his ethical duties and the validity  
5 of the testing performed, he should be disqualified.

6 **B. IF AN EXAMINATION IS ALLOWED, MRS. FELSNER MUST BE**  
7 **ALLOWED TO AUDIO RECORD THE EXAMINATION AS REQUIRED BY NRS 52.380**

8 On April 16, 2020, this Court made the following findings:

9 3. In 2019, the Nevada Legislature enacted NRS 52.380, which provides a party a right  
10 to record a Nevada Rule of Civil Procedure Rule 35 examination and have an observer present.

11 4. During legislative hearings, the Nevada Legislature considered the substantive rights  
12 provided in NRS 52.380, and extended the right of a party being examined  
13 to have the exam audio recorded and an observer present for the exam. (u)

14 5. While NRCP 35 requires "good cause" to audio record or to have an observer  
present, there is no "good cause" requirement in NRS 52.380.

15 See, **Exhibit 4**, DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS dated  
16 April 16, 2020.

17 Because NRS 52.380 created a substantive right to allow a party to record the examination,  
18 Mrs. Felsner must be afforded that same right.

19 **C. THERE IS NO GOOD CAUSE FOR RULE 35 EXAMINATION**

20 **a. Standard For Rule 35 Examination**

21 Rule 35 of the Nevada Rules of Civil Procedure provides,  
22

23 **(a) Order for Examination.**

24 (1) *In General.* The court where the action is pending may order a party whose  
25 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. The  
26 court has the same authority to order a party to produce for examination a person  
who is in the party's custody or under the party's legal control.

27 (2) *Motion and Notice; Contents of the Order.*

(A) The order may be made only on motion for good cause and on notice to all  
28 parties and the person to be examined.



1 (B) The order must specify the time, place, manner, conditions, and scope of the  
2 examination, as well as the person or persons who will perform it. The examination  
3 must take place in an appropriate professional setting in the judicial district in which  
4 the action is pending, unless otherwise agreed by the parties or ordered by the court.

5 (3) *Recording the Examination.* On request of a party or the examiner, the court  
6 may, for good cause shown, require as a condition of the examination that the  
7 examination be audio recorded. The party or examiner who requests the audio  
8 recording must arrange and pay for the recording and provide a copy of the  
9 recording on written request. The examiner and all persons present must be notified  
10 before the examination begins that it is being recorded.

11 (4) *Observers at the Examination.* The party against whom an examination is sought  
12 may request as a condition of the examination to have an observer present at the  
13 examination. When making the request, the party must identify the observer and  
14 state his or her relationship to the party being examined. The observer may not be  
15 the party's attorney or anyone employed by the party or the party's attorney.

16 (A) The party may have one observer present for the examination, unless:

17 (i) the examination is a neuropsychological, psychological, or psychiatric  
18 examination; or

19 (ii) the court orders otherwise for good cause shown.

20 (B) The party may not have any observer present for a neuropsychological,  
21 psychological, or psychiatric examination, unless the court orders otherwise for good  
22 cause shown.

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

25 **(b) Examiner's Report.**

26 (1) *Request by the Party or Person Examined.* Unless otherwise ordered by the court  
27 or discovery commissioner for good cause, the party who moved for the examination  
28 must, upon a request by the party against whom the examination order was issued,  
provide a copy of the examiner's report within 30 days of the examination or by the  
date of the applicable expert disclosure deadline, whichever occurs first.

(2) *Contents.* The examiner's report must be in writing and must set out in detail the  
examiner's findings, including diagnoses, conclusions, and the results of any tests.

(3) *Request by the Moving Party.* After delivering the reports, the party who moved  
for the examination may request--and is entitled to receive--from the party against  
whom the examination order was issued like reports of all earlier or later  
examinations of the same condition. But those reports need not be delivered by the  
party with custody or control of the person examined if the party shows that it could  
not obtain them.

(4) *Waiver of Privilege.* By requesting and obtaining the examiner's report, or by  
deposing the examiner, the party examined waives any privilege it may have--in that  
action or any other action involving the same controversy--concerning testimony  
about all examinations of the same condition.

(5) *Failure to Deliver a Report.* The court on motion may order--on just terms--that  
a party deliver the report of an examination. If the report(s) is not provided, the court  
may exclude the examiner's testimony at trial.



1 (6) *Scope*. Rule 35(b) also applies to an examination made by the parties' agreement,  
2 unless the agreement states otherwise. Rule 35(b) does not preclude obtaining an  
3 examiner's report or deposing an examiner under other rules.

4 Amended effective September 27, 1971. Amended effective January 1, 2005; March  
5 1, 2019.

6 The Eighth Judicial District Court recently faced many of the issues raised in this  
7 Opposition. In *Wilson v. Yancey*, 2017 WL 3087154, Judge Williams entered an order, portions of  
8 which are set out below:

9 Under Rule 35, the mental or physical condition of the plaintiff is always in  
10 controversy in personal injury litigation. However, whether good cause is established  
11 depends on both relevance and need. See *Sacramona v. Bridgestone/Firestone, Inc.*  
12 152 F.R.D. 428 (D. Mass. 1993); *Mohamed v. Marriott Int'l., Inc.*, 1996 U.S. Dist.  
13 Lexis 2788 (S.D.N.Y. Mar. 7, 1996); *Smith v. J.I. Case Corp.*, 163 F.R.D. 229 (E.D.  
14 Pa. 1995); *Peters v. Nelson*, 153 F.R.D. 635 (N.D. Iowa 1994); and *Simpson v.*  
15 *University of Colorado*, 220 F.R.D. 354 (D. Colo. 2004). Thus, controversy does not  
16 equate to good cause, which mandates a separate and distinct analysis, because good  
17 cause may not be found if the mental and physical examination of the plaintiff may  
18 be established by prior documentary evidence.

19 As the United States Supreme Court noted, in determining whether good cause exists  
20 for a Rule 35 examination, "[t]he ability of the movant to obtain the desired  
21 information from other means is also relevant." *Schiagenhauf, supra*, at 118-119.  
22 For example, "[o]ne of the factors which must be considered in determining good  
23 cause is whether the defendants have utilized other discovery procedures before  
24 seeking the medical examination." *Anson v. Fickel*, 110 F.R.D. 184, 185 (N.D. Ind.  
25 1986). Thus, a plaintiff is not required to submit to a Rule 35 medical examination  
26 simply because he or she sustained injury when the defendant had been supplied all  
27 of plaintiff's medical records and had deposed the plaintiff. See *Stanislowski v.*  
28 *Upper River Serv.* 134 F.R.D. 260 (D. Minn. 1991).

21 In the instant matter, there is no need for further neuropsychological examination as Mrs.  
22 Felsner underwent almost eight hours of testing in February 2020. This testing was conducted at a  
23 well-respected rehabilitation center under the supervision of her treating psychologist, Dr. Stephen  
24 Vangel, after consideration of her age and cultural background (Korean) and limited English  
25 abilities. Dr. Vangel has been disclosed as a witness since May, 2020 and Defendant has the ability  
26 to obtain the raw neuropsychological testing data already collected. Similarly, defendant has failed  
27 to provide a specific declaration from their expert spelling out the reasons why any more tests or  
28

1 reviews could conceivably be necessary. Considering the extremely negative effect of such a  
2 forensic examination upon Mrs. Felsner, she will be psychologically traumatized by having to  
3 present herself to yet another doctor who this time is hired by the entities that caused her harm.  
4 Defendants have provided no good reason why exchange of raw data couple with all medical  
5 records would not be sufficient for their expert to review, particularly since the Rehabilitation  
6 Institute of Michigan has done such an extensive work up. Defendants have failed to specifically  
7 describe which tests the want to conduct and why they would be appropriate given Ms. Felsner's  
8 prior testing, age, cultural background and language difficulties.<sup>3</sup>

10 Additionally, Ms. Felsner has been recommended not to drive by her physicians. To force  
11 her to drive or otherwise transport herself from her home in Detroit to Ann Arbor, Michigan in the  
12 middle of winter despite the ability to review the objective raw test data is unwarranted.

14 **D. The reliability of certain types of neuropsychological testing has been questioned**

15 In Hallmark v. Eldridge, 124 Nev. 492, 189 P.3d 646 (2008), the Nevada Supreme Court  
16 discussed the assistance requirement of NRS 50.275. In *Hallmark*, Justice Maupin wrote:

18 If a person is qualified to testify as an expert under NRS 50.275, the district court  
19 must then determine whether his or her expected testimony will assist the trier of fact  
20 in understanding the evidence or determining a fact in issue. An expert's testimony  
21 will assist the trier of fact only when it is relevant and the product of reliable  
22 methodology. In determining whether an expert's opinion is based upon reliable  
23 methodology, a district court should consider whether the opinion is (1) within a  
24 recognized field of expertise; (2) testable and has been tested; (3) published and  
25 subjected to peer review; (4) generally accepted in the scientific community (not  
always determinative); and (5) based more on particularized facts rather than  
assumption, conjecture, or generalization. If the expert formed his or her opinion  
based upon the results of a technique, experiment, or calculation, then a district court  
should also consider whether (1) the technique, experiment, or calculation was  
controlled by known standards; (2) the testing conditions were similar to the  
conditions at the time of the incident; (3) the technique, experiment, or calculation

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27 <sup>3</sup> An additional consideration, given Mrs. Felsner's prior testing, is the practice effect. The practice effect is defined as  
28 score increases due to factors such as memory for specific test items, learned strategies, or test sophistication,  
complicate the interpretation of change. Because it is not known specifically what tests Dr. Axelrod plans to conduct, it  
is impossible to discuss specific practice effects here.



1 had a known error rate; and (4) it was developed by the proffered expert for purposes  
2 of the present dispute.<sup>4</sup>

3 There exists significant disagreement regarding the validity of some types of  
4 neuropsychological testing.<sup>5</sup> Because it is unknown what testing defendant wishes to conduct, plaintiff  
5 is unable to discuss the reliability of such tests -- particularly in relation to Mrs. Felsner. Because many  
6 neuropsychological tests have norms based on the US population, their applicability to Mrs. Felsner, a  
7 67 year old Korean female with 14 years of education in Korea and limited English skills, is  
8 suspect. Additionally, because Dr. Axelrod does not speak Korean and appears to have no one in his  
9 office who speaks Korean, his ability to adequately conduct testing is a concern. Obviously, if the  
10 reliability of Dr. Axelrod's testing and calculations must be determined by the Court to determine  
11 whether his testimony will assist the jury then the data must be provided to all counsel to determine  
12 whether his testing and calculations were controlled by known standards and whether the technique,  
13 experiment, or calculation had a known error rate." *Id.*

15 **E. IF AN EXAMINATION IS ALLOWED, THIS COURT MUST ADOPT**  
16 **REASONABLE CONDITIONS ON THE MANNER AND SCOPE OF THE**  
17 **EXAMINATION**

18 This Court may place reasonable limitations on a Rule 35 examination. Nevada Rule of Civil  
19 Procedure 26(c) provides, in relevant part, that a court "may make any order which justice requires  
20 to protect a party or person from annoyance, embarrassment, oppression, or undue burden or  
21 expense, including one or more of the following: .... (2) that the discovery may be had. only on  
22 specified terms and conditions ..." *Id.*

23  
24  
25 <sup>4</sup> [Hallmark v. Eldridge, 124 Nev. 492, 500–02, 189 P.3d 646, 651–52 \(2008\)](#),

26 <sup>5</sup> See, e.g., David S. Nichols, Ph.D. and Carlton S. Gass, Ph.D., *The Fake Bad Scale: Malingering or Litigation*  
27 *Response Syndrome - - Which is It?*, Archives of Assessment Psychology, Vol. 5, No. 1, (5-10) 2015. See, also,  
28 Carolyn L. Williams, James N. Butcher, Carlton S. Gass, Edward Cumella and Zina Kally, *Inaccuracies About the*  
*MMPI-2 Fake Bad Scale in Reply by Ben-Porath, Greve, Bianchini, and Kaufman*, Psychol. Inj. And Law (2009) 2:182  
– 197

1 If this Court allows additional neuropsychological examination, the following conditions and  
2 limitations should apply:

3 1. The examination will be coordinated with Plaintiff's counsel and must be conducted  
4 no later than December 19, 2020.

5 2. Plaintiff shall not be required to fill out any patient information forms of any type  
6 whatsoever, including, but not limited to "new patient" forms, insurance forms, identification  
7 forms, authorizations for records, arbitration forms, waivers and releases and will not be asked to do  
8 so by the defense medical professional or his/her staff.

9 3. A representative of Plaintiff including the plaintiff's attorney may attend the entire  
10 exam.

11 4. The exam may be audio recorded at Plaintiff's discretion. The defense medical  
12 professionals and their staff will accommodate all reasonable requests to accomplish this recording,  
13 including, but not limited to taking any necessary breaks during the examination; taking a break if  
14 technical difficulties arise.

15 5. Defense counsel may not attend the exam.

16 6. Liability questions may not be asked and the examiner will not offer any opinions as  
17 to liability.

18 7. A copy of the report should be forwarded to Plaintiff's counsel upon receipt by  
19 Defendants.

20 8. This will be the only psychological, neuropsychological, psychiatric defense medical  
21 exam allowed to the defendants in this case.

22 9. The defense medical professional's office will not take any photographs, finger  
23 prints or other identification information from the Plaintiff, including, but not limited to license,  
24 Social Security number and home address.

1           10.           Dr. Axelrod shall conduct the examination of Mrs. Felsner, which total examination  
2 (from start to finish and including any written testing) may take up to 8 hours with Plaintiff able to  
3 take reasonable and appropriate breaks as needed. The reasonable and appropriate break periods  
4 will not be included in the 8 hours. Said oral examination shall not delve into unrelated areas.

5  
6           11.           Any persons assisting Dr. Axelrod must be fully identified by full name and title in  
7 the doctor's report.

8           12.           Dr. Axelrod is permitted to inquire concerning the general health of family members  
9 and the existence of medical or mental conditions and whether treatment was received; however,  
10 Plaintiff is not to be questioned regarding the specifics of any treatment, names of treating  
11 physicians and details of the medical or mental conditions as the rights of privacy of third parties  
12 are in issue.

13  
14           13.           Plaintiff is not to be questioned concerning his conversations with his attorneys  
15 Axelrod, or any person affiliated with his attorneys or his attorney's office, including but not  
16 limited to Shook and Stone, John Shook or Robert English.

17           14.           Plaintiff is not to be questioned concerning his attorney's evaluation of any of  
18 Plaintiff's claims against any of the Defendants, nor is Plaintiff to be questioned about any  
19 discussions Plaintiff has had with his counsel regarding such evaluations, as that is invasive of the  
20 attorney-client and attorney work product privileges.

21  
22           15.           The parties agree that the full and entire scope of this examination shall consist of a  
23 clinical interview and the following psychological tests: **(To be determined by the Court.)**

24           16.           The evaluation will not involve any physical examination. There will be no blood  
25 tests or other intrusive medical studies or procedures. Plaintiff will not be required to submit to the  
26 taking of any x-rays, CT scans, MRIs or other diagnostic test or procedure. The examination will  
27 not be painful, protracted or intrusive.  
28



1        17.        At the conclusion of any psychological testing of Plaintiff, a copy of the actual tests,  
2 test answers, interpretative materials used, reports of tests, raw data generated, scoring and all test  
3 results regarding Plaintiff shall be forwarded to Plaintiff's attorney with the report. With respect to  
4 the raw data generated and all test results regarding Plaintiff (hereinafter "Data").<sup>6</sup>

5        18.        Access to Data and testimony concerning Data is limited to Plaintiff, Plaintiff's  
6 counsel, Defendants' counsel, and experts designated by the parties who are professionally  
7 qualified to use and interpret the Data;

8        19.        Use of Data is limited to only that which is required for the resolution of the pending  
9 action;

10       20.       Data will be affixed with a label or legend indicating that Data is subject to the terms  
11 of this Stipulation and may be used only for limited purposes in connection with this action;

12       21.       At the conclusion of the proceeding, any Data in Defendant's counsel's possession  
13 will be destroyed, along with all copies thereof, save the Data in possession of Dr. Axelrod; and

14       22.       The record will be sealed to the extent any portion of Data are disclosed in  
15 pleadings, testimony, exhibits, or other documents which would otherwise be available for public  
16 inspection.

17       23.       Plaintiff shall be entitled to take reasonable breaks during the examination process,  
18 including, but not limited to taking a lunch break, rest breaks and bathroom breaks. If at any time  
19 during the proceedings, Plaintiff feels in good faith that the proceeding has become abusive, she  
20 will immediately notify her counsel or other designated representative in order to try to resolve the  
21 matter at that time. Plaintiff has the right to terminate the proceeding and seek a protective order  
22 from the Court. If the parties are unable to resolve the issue, should the Court order that the  
23 matter at that time. Plaintiff has the right to terminate the proceeding and seek a protective order  
24 from the Court. If the parties are unable to resolve the issue, should the Court order that the  
25 matter at that time. Plaintiff has the right to terminate the proceeding and seek a protective order  
26 from the Court. If the parties are unable to resolve the issue, should the Court order that the

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27  
28       <sup>6</sup> As noted above, Plaintiff asks for opportunity to further address the propriety of disclosure of tests, interpretive materials and test data to counsel should the Court be inclined not to allow this condition.

1 examination be reconvened, Defendants will have up to 8 hours, not including reasonable and  
2 appropriate breaks and lunch, to complete the examination originally ordered by the Court, but not  
3 any additional time.

4 24. Defendants may not schedule any other examinations by any other doctors or other  
5 persons in the same areas of this examination.  
6

7 25. Defendants are to immediately transmit a copy of this Order to Dr. Axelrod to  
8 promptly advise him that he must comply with the limitations imposed by this Order.

9 26. Defendants shall produce to Plaintiff's counsel the written reports of Dr. Axelrod  
10 (and any interpretive materials and related reports of psychological testing whether done by  
11 computer scoring, hand scoring or anyone else) by email, overnight delivery or personal delivery no  
12 later than 30 days after the examination or by the initial expert disclosure date, whichever is earlier.  
13

14 27. The tests taken by Plaintiff as part of the examination, along with any notes and/or  
15 written reports and/or records maintained in any format, including electronic data, by Dr. Axelrod  
16 are confidential medical records relating to Plaintiff's mental health. These records are confidential  
17 and shall not be subject to distribution without the written authorization of the Plaintiff to anyone  
18 except for counsel for Defendants, counsel's experts or consultants, counsel's staff, defendants, and  
19 the insurance carriers, who shall treat these documents as confidential and subject to a protective  
20 order. Said records may be used by defense counsel in preparation for trial, in trial and in other  
21 proceedings in this matter, but for no other purpose unrelated to this litigation.  
22

23 28. Plaintiff reserves the right to argue that any information acquired or learned or any  
24 evaluation made in violation of this agreement will not be admissible in evidence for any reason.  
25 The parties further agree that the court may, upon motion at trial, strike, preclude or limit any  
26 testimony of the examiner as appropriate and Plaintiff is not waiving his right to such relief by  
27  
28

1 agreeing to this examination. The parties reserve the right to seek whatever sanctions they deem  
2 appropriate.

3 29. The examiner will not offer any secondary gain, malingering or veracity opinions.<sup>7</sup>

4 30. The examiner will not offer any opinions as to criticism of any of Plaintiffs treatment  
5 because it was on a lien (this does not include the reasonableness of the costs for treatment).  
6

7 31. The examiner will not offer any opinions as to Plaintiffs decision to retain counsel  
8 for the subject incident.

9 **F. Opinions regarding secondary gain, malingering or veracity opinions must be barred.**

10 Issues of credibility, such as whether a Plaintiff is seeking "secondary gain", fall outside the  
11 purview of expert witness opinions in Nevada.

12 In *Townsend v. State*, 103 Nev. 113, 118-119, 734 P.2d 705, 708-709 (Nev. 1987), the Nevada  
13 Supreme Court set guidelines for the admissibility of "expert" testimony that comments upon the  
14 credibility of the victim of a child sexual abuse. In *Townsend*, a psychologist who had worked at  
15 length with a child who had been sexually assaulted qualified to give expert testimony at the trial of the  
16 alleged perpetrator. The expert testified that she conducted lengthy interviews and meetings with the  
17 victim and that the victim's actions were consistent with those of other children who had been sexually  
18 abused. The social worker was asked, "Based upon [the victim's post-traumatic stress disorder] did  
19 you form a conclusion as to whether or not she had been sexually assaulted by her father?" The  
20 psychologist state "Yes I did" to which she added "My conclusion was that she had." As such, the  
21 psychologist testified that she believed the child was telling the truth. *Id.*  
22  
23

24 Although the defense did not object to this questioning, the Nevada Supreme Court found that  
25 it was error to have allowed the expert vouch for the victim's credibility. In its findings, the Court  
26 noted:  
27

28 <sup>7</sup> Please see the following section for a discussion of the basis for this limitation.



1 This was improper testimony as it transcended the test of the jury enlightenment and  
2 entered the realm of fact-finding that was well within the capacity of a lay jury. *Id.*

3 In *Townsend*, the Court made this finding even more restrictive upon an expert's testimony  
4 finding it also constituted error when the psychologist was questioned more directly on her opinion as  
5 to the truthfulness of the victim. While the psychologist never answered this question directly, the  
6 Court found through implication, the expert's response left no doubt as to her answer. In this case, the  
7 Court more firmly upheld the role of the jury, finding that this line of questioning solidly invaded their  
8 purview:

9  
10 This was improper since it invaded the prerogative of the jury to make unassisted  
11 factual determinations where expert testimony is unnecessary. The jury was certainly  
12 equipped to weigh and sift the evidence and reach its own conclusion concerning the  
13 child's veracity. *Id.*

14 As noted in *Lickey v. State*, by the Nevada Supreme Court, Nevada is not alone in refusing to  
15 admit expert testimony regarding the credibility of a witness. 108 Nev. 191, 196, 827 P.2d 824, 827  
16 (Nev. 1992), citing for this proposition *State v. Bressman*, 236 Kan. 296, 689 P.2d 901 (1984) (expert  
17 opinion becomes inadmissible as soon as it passes on credibility of the witness); *State v. Logue*, 372  
18 N.W.2d 151 (S.D.1985) (social worker's testimony that victim probably gained his sexual knowledge  
19 from sex with defendant was reversible error); *Gale v. State*, 792 P.2d 570 (Wyo.1990) (expert  
20 commentary on child's veracity is plain error); *see, also, Page v. Zordan*, 564 So.2d 500 (Fla. 2nd  
21 DCA, 1990); *United States v. Stephens*, 73 F.2d 695 (9<sup>th</sup> Cir. 1934).

22 Ultimately, in *In re Assad*, this Court has also extended its strong protection of the province of  
23 the factfinder to any expert testimony, finding it is inadmissible even where it is relevant, "if it  
24 impermissibly encroaches on the trier of fact's province, it is properly excluded." 185 P.3d 1044, 1050  
25 (Nev. 2008).

26 In the present case, the Defendant has the Plaintiff's medical records. The Defendant has access  
27 to prior neuropsychological testing. The Plaintiff can be deposed if the defendant wishes. Just as an  
28

1 expert witness is not entitled to vouch for the credibility of a party or witness, an expert should not be  
2 entitled to give a negative opinion of the plaintiff's credibility or motivation. To do so would turn the  
3 trial into a swearing match between opposing experts, each with an opinion of the Plaintiff's honesty.

4 The Defendant should not be permitted to showcase an attack on the Plaintiff's credibility by  
5 innuendo or supposition. To do so is to allow the Defendant to place issues outside the evidence, and  
6 without any evidentiary support, in front of the jury and to stamp the Plaintiff as a malingerer in the  
7 eyes of the jury. To allow any defense witness, expert or lay, to express an opinion based upon  
8 speculation of financial gain would circumvent the jurors' decision-making role.

10 **G. Extension of Discovery deadlines is unwarranted**

11 As described above, Plaintiff has previously undergone extensive neuropsychological  
12 testing as part of her care with the Rehabilitation Institute of Michigan. The raw data is available to  
13 Defendants and their expert, Dr. Axelrod, who should be able to prepare a report by our initial  
14 expert disclosure date of December 22, 2020. Defendant Keolis has been aware of Mrs. Felsner's  
15 serious brain injury since September 12, 2018 yet have not sought to take her deposition or  
16 otherwise perform examination until right before expert disclosures, perhaps in a strategic move to  
17 gain the benefit of the practice effect following prior testing. Because the raw data is available and  
18 because of Dr. Axelrod's concerns about being observed in person, this Court should allow  
19 defendants to rely upon the test data created by Dr. Vangel and deny further extension of discovery  
20 deadlines.<sup>8</sup>

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25 <sup>8</sup> It should be noted that Defendants motion for extension does not meet the requirements of EDCR 2.35 in that it does  
26 not have:

- 27 (1) A statement specifying the discovery completed;  
28 (2) A specific description of the discovery that remains to be completed;  
(3) The reasons why the discovery remaining was not completed within the time limits set by the discovery  
order;

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III.

CONCLUSION

Defendants Keolis and Yusi have had Mrs. Felsner's medical records since 2018 and have been aware of Mrs. Felsner's serious brain injury since the February 2017 incident, yet only now, shortly before initial expert disclosures are due, have they sought to have Mrs. Felsner examined. In so doing, Defendants have chosen an expert who, may not ethically or practically conduct an examination with an observer present. Whether Dr. Axelrod could perform an examination with an observer present is something Defendants should have inquired about when retaining Dr. Axelrod as it has been the law in Nevada since 2019. As neuropsychological testing must be based upon objective criteria with known error rates, Defendants may use the raw data from Mrs. Felsner's prior testing to formulate reliable opinions. To argue otherwise, begs the question of whether the testing by Dr. Axelrod himself is subjective and therefore unreliable. It is well founded that a defendant has no absolute right to examination by the examiner of his choosing and an examiner may be disqualified for many reasons such as where an examination would be invalid or unethical. While it is unknown exactly what testing Defendant wishes to conduct, because of Mrs. Felsner's cultural background and language issues much of the testing may not be appropriate particularly given the lack of Korean personnel in Dr. Axelrod's office. If this Court believes that further testing should occur, the Court should place reasonable restrictions on the examination and disclosure of tests, testing procedure and data.

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1 Finally, this Court should deny extension of discovery deadlines as Defendants have not  
2 properly sought an extension pursuant to EDCR 2.35 and have sufficient time to provide a report by  
3 the current expert disclosure date of December 22, 2020 by obtaining the raw data created through  
4 Dr. Vangel's prior testing in February 2020.  
5

6 DATED this 30 day of October, 2020.  
7  
8

***SHOOK & STONE, CHTD.***

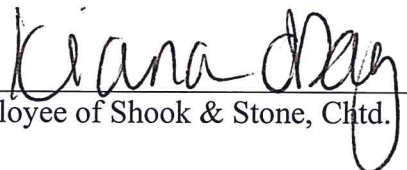
9  
10   
11 \_\_\_\_\_  
12 JOHN B. SHOOK, ESQ.  
13 Nevada Bar No. 5499  
14 ROBERT L. ENGLISH, ESQ.  
15 Nevada Bar No. 3504  
16 SHOOK & STONE, CHTD.  
17 710 South Fourth Street  
18 Las Vegas, Nevada 89101  
19 Attorneys for Plaintiffs  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

I hereby certify, pursuant to NRCP 5(b), that on the 2nd day of ~~October~~ <sup>November</sup>, 2020, I served a true and correct copy of the foregoing **PLAINTIFFS HEATHER FELSNER and ROGER FELSNER'S OPPOSITION TO DEFENDANTS KEOLIS TRANSIT SERVICES, LLC. and EDGARDO YUSI'S MOTION FOR RULE 35 EXAMINATION** by electronic transmission through the Odyssey File & Serve system to the following parties:

Michael Lowry, Esq.  
Wilson Elser Moskowitz Edelman & Dicker  
6689 Las Vegas Blvd, #200  
Las Vegas, Nevada 89119  
Attorney for Defendant KEOLIS

Chad Fuss, Esq.  
Leonard T. Fink, Esq.  
SPRINGEL & FINK, LLP  
10655 Park Run Drive, Ste. 275  
Las Vegas, NV 89144  
Attorneys for Defendant,  
ALEXANDER DENNIS, INC.

  
Employee of Shook & Stone, Chtd.

# Exhibit 1



**Medical records from Stephen Vangel,  
Ph.D.**

**FILED UNDER SEAL**

Mrs. Felsner's opposition in the district court contained this cover page. Mr. Yusi is merely providing a copy of the opposition as it was filed. No exhibits were sealed in the district court. The records referenced on this cover page do not appear on the district court's docket.

## **Exhibit 2**



STATE OF MICHIGAN  
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS  
WORKERS' COMPENSATION AGENCY

STACEY N. TERRELL,  
SS #: XXX-XX-4994,

MAGISTRATE LOGAN  
(DETROIT)

Plaintiff,

VS.

TR 8/29/18

FCA US LLC,  
SELF-INSURED,

DOI: 10/28/16; 03/02/2016, ETC. (alleged)

Defendant.

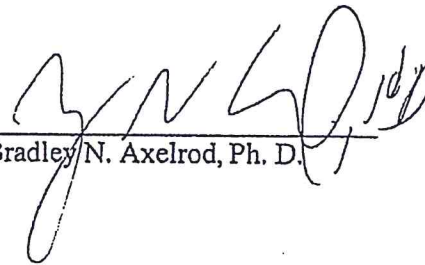
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AFFIDAVIT OF BRADLEY N. AXELROD, PH.D.

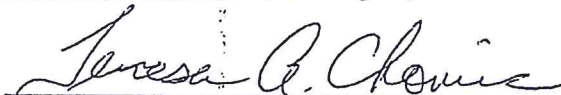
NOW COMES Bradley N. Axelrod, Ph.D., being first duly sworn, under oath, and states as follows:

1. The Michigan Psychological Association is a professional organization for all psychologists in the State of Michigan. The ethical standards offered by MPA are provided as recommendations for all psychologists, not only neuropsychologists and not only those who are MPA members.
2. The national neuropsychology professional organizations, such as National Academy of Neuropsychology and the American Board of Professional Neuropsychology, offer practice standards for all neuropsychologists.
3. The mere presence of a Third Party Observer alters the results of the evaluation and invalidates the test results.
4. It is unethical for a psychologist or neuropsychologist to allow a Third Party Observer to be present during the face-to-face evaluation and formal testing of the individual, although they may be present during the initial interview at the outset.
5. The presence of a Third Party Observer, other than during the initial interview, ethically requires a psychologist or a neuropsychologist to remove themselves and terminate the testing.

6. The presence of an interpreter in an evaluation is different from a Third Party Observer, as the interpreter is independent and has no interest or relationship to the outcome of the evaluation.
7. The presence of a student or trainee is acceptable as this is a neutral noninvolved party, with no interest in or relationship to the outcome of the evaluation, in a clinical setting as noted by the National Academy of Neuropsychology.

  
Bradley N. Axelrod, Ph. D.

Subscribed and sworn to before me this  
27th day of August, 2018



Notary Public, \_\_\_\_\_ County

State of Michigan

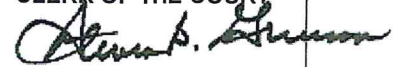
Acting in Oakland County

My Commission expires:

TERESA A. CHOMIC  
NOTARY PUBLIC, STATE OF MI  
COUNTY OF OAKLAND  
MY COMMISSION EXPIRES Dec 11, 2020  
ACTING IN COUNTY OF OAKLAND



# Exhibit 3



1 **ORDR**

2 Jared R. Richards, Esq.

3 Nevada Bar No. 11254

4 Dustin E. Birch, Esq.

5 Nevada Bar No. 10517

6 **CLEAR COUNSEL LAW GROUP**

7 1671 W. Horizon Ridge Pkwy, Suite 200

8 Henderson, NV 89012

9 Telephone: (702) 476-5900

10 Facsimile: (702) 924-0709

11 jared@clearcounsel.com

12 dustin@clearcounsel.com

13 *Attorneys for Plaintiff*

14 *Kalena Davis*

15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 KALENA DAVIS, an individual

18 Plaintiff,

19 vs.

20 ADAM DERON BRIDEWELL, an  
21 individual; LYFT, INC., a foreign  
22 corporation; THE HERTZ  
23 CORPORATION, a foreign corporation;  
24 DOE OWNERS I through X; and ROE  
25 LEGAL ENTITIES I through X, inclusive,

26 Defendants.

CASE NO.: A-18-777455-C

DEPT. NO.: XIII

27 **ORDER**

28 **RE: DISCOVERY COMMISSIONER'S  
REPORT AND RECOMMENDATIONS**

Date of Hearing: April 9, 2020

Time of Hearing: 10:00 a.m.

29 The Court, having reviewed the above Report and Recommendations prepared by the  
30 Discovery Commissioner and,

31 \_\_\_\_\_ No timely objection having been filed,



*Davis v. Bridewell, et al.*  
*A-18-777455-C*  
*April 9, 2020, at 10:00 a.m.*

✓

After reviewing the objections to the Report and Recommendations and good cause appearing,

✓

IT IS HEREBY ORDERED the Discovery Commissioner's Report and Recommendations are affirmed and adopted.

IT IS HEREBY ORDERED the Discovery Commissioner's Report and Recommendations are affirmed and adopted as modified in the following manner:

(attached hereto).

IT IS HEREBY ORDERED this matter is remanded to the Discovery Commissioner for reconsideration or further action.

IT IS HEREBY ORDERED that a hearing on the Discovery Commissioner's Report is set for \_\_\_\_\_, 2020, at \_\_\_\_\_ a.m./p.m.

DATED this 18 day of September, 2020.



DISTRICT JUDGE



**DCRR**

Jared R. Richards, Esq.  
Nevada Bar No. 11254  
Dustin E. Birch, Esq.  
Nevada Bar No. 10517  
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dustin@clearcounsel.com  
*Attorneys for Plaintiff*  
*Kalena Davis*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

KALENA DAVIS, an individual

Plaintiff,

vs.

ADAM DERON BRIDEWELL, an  
individual; LYFT, INC., a foreign  
corporation; THE HERTZ  
CORPORATION, a foreign corporation;  
DOE OWNERS I through X; and ROE  
LEGAL ENTITIES I through X, inclusive,

Defendants.

CASE NO.: A-18-777455-C

DEPT. NO.: XIII

**DISCOVERY COMMISSIONER'S  
REPORT AND RECOMMENDATIONS**

Date of Hearing: April 9, 2020

Time of Hearing: 10:00 a.m.

**APPEARANCES:**

*Attorney for Plaintiff Kalena Davis*

Jared R. Richards, Esq.  
Clear Counsel Law Group

*Attorney for Defendant Adam Deron Bridewell*

Justin D. Gourley, Esq.  
Harper Selim

*Attorney for Defendants Lyft, Inc.  
and The Hertz Corporation*

Jason G. Revzin Esq. and Blake A. Doerr, Esq.  
Lewis Brisbois Bisgaard & Smith, LLP

CLEAR COUNSEL LAW GROUP  
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HENDERSON, NEVADA 89012  
(702) 476-5900



**I. FINDINGS**

1. During the Discovery Commissioner's February 13, 2020, Hearing regarding Defendants' Motion to Compel Rule 35 Examinations, the Commissioner requested that the parties provide additional briefing regarding the interrelationship and conflicts between NRCP 35 and NRS Section 52.380.

2. The parties provided such additional briefing, which came before the Commissioner for Hearing on April 9, 2020. The Commissioner makes the following Report of its findings of fact and conclusions of law, and the subsequent Recommendation to the District Court:

3. Conflicts between Nevada Rules of Civil Procedure 35 (the "Rule") and NRS Section 52.380 (the "Statute") are as follows:

- (a) whether a party's attorney, or a representative of that attorney, may serve as an observer during the examination (which is barred by the Rule but permitted by the Statute);
- (b) whether a party may have an observer during a neuropsychological, psychological, or psychiatric examination without making a showing of "good cause" (which showing is also required by the Rule but not required by the Statute); and
- (c) whether the observer may record the examination without making a showing of "good cause" (which showing is required by the Rule but not required by the Statute).

4. Each of these conflicts is irreconcilable, such that it is not possible to construe the Rule and the Statute in harmony. If the Rule is followed on any of these points, the Statute by definition is not followed. If the Statute is followed on any of these points, the Rule by definition is not followed.

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*Davis v. Bridewell, et al.*  
*A-18-777455-C*  
*April 9, 2020, at 10:00 a.m.*

5. Under Nevada law, the judiciary has the exclusive prerogative to make rules governing its own procedures, while the Legislature has the exclusive prerogative to enact statutes governing the substance of the law. *State v. Connery*, 99 Nev. 342, 345 (1983)

6. This distinction is predicated upon the “separation of powers” doctrine, which is specifically recognized in the Nevada State Constitution. *Berkson v. LePome*, 126 Nev. 492, 498 (2010) (citing Nev. Const. art. 3, § 1(1)).

7. Under Nevada law, a statute is presumed constitutionally valid until its invalidity has been “clearly established.” *List v. Whisler*, 99 Nev. 133, 137-38 (1983). “In case of doubt, every possible presumption will be made in favor of the constitutionality of a statute, and courts will interfere only when the Constitution is clearly violated.” *Id.* This “presumption of constitutional validity places upon those attacking a statute the burden of making a clear showing that the statute is unconstitutional.” *Id.* (emphasis added).

8. A single question is presented here: whether the Statute is procedural or substantive. If the Statute is substantive, the Statute governs where a conflict arises. If the Statute is procedural, it is unconstitutional (and therefore superseded by the Rule) to the extent that the Statute is both procedural and in conflict with the Rule.

9. A substantive standard is one that “creates duties, rights and obligations,” while a procedural standard specifies how those duties, rights, and obligations should be enforced. *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1811 (2019).

10. The Statute creates substantive rights, including the right of the examinee to have his or her attorney or that attorney’s representative serve as the observer, the right to have the observer record the examination without making a showing of “good cause,” and the right to have an observer present for a neuropsychological, psychological, or psychiatric examination without making a showing of “good cause.”

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*Davis v. Bridewell, et al.*  
*A-18-777455-C*  
*April 9, 2020, at 10:00 a.m.*

11. Because the Statute creates substantive rights, it is substantive rather than procedural.

12. Because the Statute is substantive, it governs and supersedes the Rule where the two conflict.

13. An individual submitting to an examination under NRCP 35 has the following substantive rights, pursuant to NRS Section 52.380: to have his or her attorney or that attorney's representative serve as the observer; have the observer record the examination without making a showing of "good cause"; and to have an observer present for a neuropsychological, psychological, or psychiatric examination without making a showing of "good cause."

## II. RECOMMENDATIONS

**IT IS HEREBY RECOMMENDED** that, during any NRCP 35 examination of Plaintiff Kalena Davis ~~(or of any other individual in this matter)~~ <sup>ED</sup> in this matter ordered by the Discovery Commissioner or the District Judge, the individual submitting to the examination be permitted to have an observer present, without regard to the nature of the examination (e.g., neuropsychological, psychological, or psychiatric, and without any requirement of a showing of "good cause" to the Court.

**IT IS FURTHER RECOMMENDED** that, during any NRCP 35 examination of Plaintiff Kalena Davis ~~(or of any other individual in this matter)~~ <sup>ED</sup> in this matter ordered by the Discovery Commissioner or the District Judge, the observer attending the examination may be any person of the examinee's choosing, including but not limited to the examinee's attorney or that attorney's representative.

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*Davis v. Bridewell, et al.*



A-18-777455-C  
April 9, 2020, at 10:00 a.m.

IT IS FURTHER RECOMMENDED that, during any NRCP 35 examination of Plaintiff Kalena Davis ~~(or of any other individual in this matter)~~ in this matter ordered by the Discovery Commissioner or the District Judge, the observer attending the examination may make an audio or stenographic recording of the examination without any requirement of a showing of "good cause" to the Court.

DATED this 14th day of August, 2020.



DISCOVERY COMMISSIONER

Respectfully submitted by:

Approved as to Form and Content:

**CLEAR COUNSEL LAW GROUP**

**HARPER | SELIM**

/s/ Jared R. Richards

/s/ Justin Gourley

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*And The Hertz Corporation*

*Davis v. Bridewell, et al.*  
*A-18-777455-C*  
*April 9, 2020, at 10:00 a.m.*

**NOTICE**

Pursuant to NRCP 16.3(c)(2), you are hereby notified that within fourteen (14) calendar days after being served with a report, any party may file and serve written objections to the recommendations. Written authorities may be filed with objections but are not mandatory. If written authorities are filed, any other party may file and serve responding authorities within seven (7) days after being served with objections.

Objection time will expire on September 1, 2020.

A copy of the foregoing Discovery Commissioner's Report was:

\_\_\_\_\_ Mailed to Defendants at the following addresses on the \_\_\_\_\_ day of \_\_\_\_\_ 2020.

James E. Harper, Esq.  
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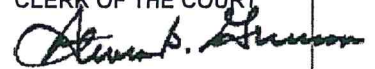
\_\_\_\_\_ Electronically filed and served counsel on the 18 day of August 2020,  
pursuant to N.E.F.C.R. Rule 9.

~~DATED~~ this \_\_\_\_\_ day of \_\_\_\_\_ 2020.

By: Martine Simonet  
COMMISSIONER DESIGNEE



# Exhibit 4



**DCRR**

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Attorneys for Plaintiff(s)

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

NICOLE LIMON, individually,

Plaintiff,

v.

TONY STEPHENS, individually; RYDER  
TRUCK RENTAL, INC.; LOAD 1 TRUCKING  
LLC; DOES I-X; and ROE CORPORATIONS I-  
X, inclusive,

Defendants.

CASE NO.: A-19-794326-C  
DEPT. NO.: 27

**DISCOVERY COMMISSIONER'S  
REPORT AND  
RECOMMENDATIONS**

HEARING DATE: March 26, 2020

HEARING TIME: 9:00 a.m.

ATTORNEY FOR PLAINTIFFS: Joshua L. Benson, Esq., of BENSON ALLRED.

ATTORNEYS FOR DEFENDANT: Tanya Fraser, Esq. of ALVERSON TAYLOR & SANDERS.

**I.**

**FINDINGS**

1. The Defendants filed a motion to compel a Nevada Rule of Civil Procedure Rule 35 exam of Plaintiff Nicole Limon, which also sought to preclude audio recording and the presence of an observer during the exam.

2. The Plaintiff filed an opposition that agreed to a Rule 35 exam but contended that the Plaintiff had a right to audio record the exam under NRS 52.380.

3. In 2019, the Nevada Legislature enacted NRS 52.380, which provides a party a right to record a Nevada Rule of Civil Procedure Rule 35 examination and have an observer present.



1 4. During legislative hearings, the Nevada Legislature considered the substantive rights  
2 provided in NRS 52.380, *and extended the right of a party being examined*  
3 *to have the exam audio recorded and an observer present for the exam.* (ED)

4 5. While NRCP 35 requires "good cause" to audio record or to have an observer  
5 present, there is no "good cause" requirement in NRS 52.380.

6 6. ~~NRS 52.380 is the law that provides a substantive right to an examinee to audio~~  
7 ~~record the examination and have an observer present.~~ (ED)

## 8 II.

### 9 RECOMMENDATIONS

10 IT IS HEREBY RECOMMENDED that Defendants' Motion to Compel is GRANTED in  
11 part and DENIED in part. Defendants' request to have a Rule 35 neuropsychological exam  
12 performed by Dr. Ross is granted. Defendants' motion to preclude audio recording and the presence  
13 of an observer is denied.

14 IT IS FURTHER RECOMMENDED that the neuropsychological examination may be audio  
15 recorded with an observer present. The audio recording, however, is protected and cannot be  
16 utilized in any other litigation, which includes the nature and substance of the audio recording.

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1 IT IS FURTHER RECOMMENDED that the audio recording is protected from disclosure to  
2 any individual other than the parties' counsel and experts, <sup>or utilized in this litigation</sup> as necessary. The Discovery  
3 Commissioner, met with counsel for the parties, having discussed the issues noted above and having  
4 reviewed any materials proposed in support thereof, hereby submits the above recommendations.

5 DATED this 16<sup>th</sup> day of April, 2020.

6   
7 DISCOVERY COMMISSIONER

8 Respectfully submitted by:

9 BENSON ALLRED

10  
11 By: /s/ Joshua Benson  
12 Joshua L. Benson, Esq.  
Attorneys for Plaintiff

13 Approved as to form and content:

14 By: /s/ Tanva Fraser  
15 Attorneys for Defendants  
16  
17  
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NOTICE

Pursuant to NRCP 16.3(c)(2), you are notified that within fourteen (14) days after being served with a report any party may file and serve written objections to the recommendations. Written authorities may be filed with objections, but are not mandatory. If written authorities are filed, any other party may file and serve responding authorities within seven (7) days after being served with objections.

Objection time will expire on May 4<sup>th</sup> 2020.

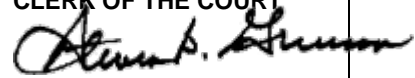
A copy of the foregoing discovery Commissioner's report was:

                     Mailed to Plaintiff/Defendant at the following address on the        day of       , 2020

✓ Electronically filed and served counsel on April 20<sup>th</sup>, 2020, Pursuant to N.E.F.C.R. Rule 9.

By: Natilib Sinomette  
Commissioner Designee





MICHAEL P. LOWRY, ESQ.

Nevada Bar No. 10666

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Attorneys for Edgardo P. Yusi; Keolis Transit Services, LLC

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

HEATHER FELSNER and ROGER FELSNER, Case No.: A-18-781000-C

Dept. No.: 27

Plaintiffs,

vs.

**Edgardo Yusi & Keolis Transit Services,  
LLC's Reply re Motion for Rule 35  
Examination**

KEOLIS TRANSIT SERVICES, LLC, Foreign  
Limited-Liability Corporation and EDGARDO  
PAGUIO YUSI; ALEXANDER DENNIS,  
INC., a Foreign Corporation; DOES II through  
X, inclusive; and ROE BUSINESS ENTITIES I  
through X, inclusive,

Defendants.

Plaintiff's goal is to bar Mr. Yusi and Keolis from obtaining a Rule 35 examination. To do that she manufactures excuses never raised during the meet and confer process and relies upon an unconstitutional statute. Applying Nevada law as Plaintiff urges would effectively void Rule 35 for all neuropsychological examinations. This would deprive Defendants of the ability to obtain information they need to prepare their defenses for trial.

DATED this 13th day of November, 2020.



/s/ Michael P. Lowry

MICHAEL P. LOWRY, ESQ.

6689 Las Vegas Blvd. South, Suite 200

Las Vegas, Nevada 89119

Attorneys for Edgardo P. Yusi; Keolis Transit  
Services, LLC

1 **Memorandum of Points & Authorities**

2 **I. Plaintiff alleges ongoing symptoms related to this case.**

3 There are a few undisputed facts relevant to this motion. The parties agree:

- 4 • Mrs. Felsner alleges she suffered a brain injury as a result of a fall.
- 5 • Mrs. Felsner alleges she has ongoing deficits causally related to her fall.
- 6 • Dr. Axelrod is an appropriately qualified examiner.
- 7 • Initial expert disclosures are currently due December 22, 2020.

8 **II. Plaintiff's opposition should be limited for failure to meet and confer in good faith.**

9 EDCR 2.34 creates the meet and confer requirement prior to filing a discovery motion.

10 This is a discovery motion, so Mr. Yusi and Keolis followed this rule. Their motion attached the  
11 email thread between counsel about meeting and conferring, along with a declaration about the  
12 resulting call between counsel. EDCR 2.34(d) repeatedly requires the parties to meet and confer  
13 in "good faith." This court, like the federal courts, has previously summarily denied motions,  
14 without prejudice, where the moving party did not meet and confer in good faith.

15 Here the reverse is true. The moving party met and conferred in good faith, but the  
16 responding party did not. Plaintiff does not dispute that the meet and confer occurred as  
17 described in Mr. Yusi and Keolis' motion. The objections Plaintiff raised to a Rule 35  
18 examination were 1) requiring Mrs. Felsner to drive from her home to Dr. Axelrod's office; and  
19 2) that some unknown and unidentified testing was duplicative of prior work.<sup>1</sup> Mr. Yusi and  
20 Keolis then prepared their motion to address these objections. Plaintiff's opposition should be  
21 limited to those objections otherwise the point of the meet and confer requirement is defeated.  
22 "If, after request, responding counsel fails to participate in good faith in the conference or to  
23 answer the discovery, the court may require such counsel to pay to any other party the reasonable  
24 expenses, including attorney fees, caused by the failure."<sup>2</sup>

25  
26  
27  
28 <sup>1</sup> Declaration of Michael Lowry, included with motion.

<sup>2</sup> EDCR 2.34(d)

1                   **a. Mrs. Felsner is able to get around.**

2                   Plaintiff's first objection was to driving from her home to the appointment. First, Mrs.  
3 Felsner does not live alone. She resides with her husband who is under no driving restrictions.  
4 Further, her own records indicate she is able to travel from her home to her own physician's  
5 appointments. She was able to make the 36 mile roundtrip from her house to her own  
6 neuropsychologist's office without any apparent problem at least three times.<sup>3</sup> If she plans to  
7 attend this trial in person she will need to get from her home to Detroit's airport, a 50.4 mile  
8 roundtrip.

9                   Mr. Yusi and Keolis would have been well within their rights per Rule 35(a)(2)(B) to  
10 require her to come to Las Vegas for this examination. If Mrs. Felsner is able to travel to her  
11 own doctor appointments then she can travel to the one Mr. Yusi and Keolis request.

12                   **b. Stale data is not a substitute for an examination.**

13                   Plaintiff's second objection was that some unknown and unidentified testing was  
14 duplicative of prior work. This motion was filed October 16, 2020. Plaintiff did not disclose  
15 that prior work until October 29, 2020.<sup>4</sup> It appears the records themselves were printed on  
16 August 5, 2020 and provided to her lawyers no later than August 23, 2020.<sup>5</sup> The report does not  
17 list any observer present for the examinations. Plaintiff has provided only the report.

18                   The report indicates the testing occurred on February 12, February 26, and March 4,  
19 2020. Plaintiff basically argues the data from these tests are good enough for Mr. Yusi and  
20 Keolis. However, these data are stale because Plaintiff's condition can change. Performing a  
21 reevaluation with the prior raw data available for comparison helps to better evaluate abilities  
22 that are improving or stabilizing. The tests also do not identify changes in the last 9 months in  
23 terms of cognitive and emotional functioning.

24  
25  
26 \_\_\_\_\_  
27 <sup>3</sup> Her address is 29969 Sparkleberry Dr, Southfield, MI 48076. Her own neuropsychologist's  
28 records indicate testing was performed at 261 Mack Ave, Detroit, MI 48201. Exhibit A at  
Vangel 00007, 8.

<sup>4</sup> *Id.*

<sup>5</sup> Vangel 00001, 2.

1 Finally, Plaintiff argues that she does not know what tests might be performed and doubts  
2 the reliability of these tests. This is inaccurate. Mr. Yusi & Keolis identified the testing on  
3 September 28, 2020.<sup>6</sup> Plaintiff raised no objection to it during the meet and confer process.

4 **III. If Rule 35 and NRS 52.380 conflict, then Rule 35 controls.**

5 If Plaintiff's failure to meet and confer in good faith is excused, this motion requires  
6 much more work to resolve. Mr. Yusi and Keolis seek a neuropsychological examination per  
7 Rule 35. Plaintiff responds that NRS 52.380 controls.

8 **a. How did we get here?**

9 In 2017 the Supreme Court began a process to comprehensively update Nevada's Rules  
10 of Civil Procedure. The Court appointed a committee, who formed sub-committees including  
11 one dedicated to the discovery rules. Rule 35 proved contentious from the start. The July 26,  
12 2017 meeting minutes from the full committee noted concern with the implications of early  
13 revisions. "As to NRCP 35, the Committee discussed the observer requirement and whether that  
14 person could be an interested party or an attorney."<sup>7</sup> The rule was sent back to committee for  
15 further work.

16 Rule 35 was discussed again at the September 27, 2017 full committee meeting. One  
17 subcommittee member stated "he did not support the rule as written. His concerns are, among  
18 other things, the presence of an observer and the recording of the medical exam. Consideration  
19 of the rule was passed to the next meeting, pending further public comment on the rule and the  
20 development of a proposed alternative...."<sup>8</sup> By the October 25, 2017 full committee meeting  
21 there were at least two competing drafts of Rule 35 under consideration.<sup>9</sup> No agreement was  
22 ever reached within the discovery sub-committee. The December 20, 2017 full committee  
23 meeting noted that, as to Rule 35, "three final proposals were complete and would be submitted  
24 to the Supreme Court. The co-chairs asked the proponents of the proposals to draft summary  
25  
26

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27 <sup>6</sup> Exhibit A to Motion at 3.

28 <sup>7</sup> Exhibit B at 2.

<sup>8</sup> Exhibit C at 4.

<sup>9</sup> Exhibit D at 1-2.

1 statements advocating for their proposal.”<sup>10</sup> The Supreme Court then adopted one of the  
2 proposals that became the Rule 35. It took effect March 1, 2019 and is applicable to this motion.

3 The advocates for the losing proposal then went to the Legislature. On March 18, 2019,  
4 AB 285 was introduced. The former chair of the discovery sub-committee that drafted the  
5 competing proposals made clear what became AB 285 was rejected during the NRCP revision  
6 process and he was asking the Legislature to intervene.

7 We voted 7-to-1 to make substantial changes, the changes that are set forth or  
8 embodied in the bill before you, Assembly Bill 285. Unfortunately, when our  
9 recommendations went to the full Supreme Court of Nevada, they rejected our  
changes for reasons we are still not clear on. At that point, we reassessed our  
position.<sup>11</sup>

10 The bill passed both chambers, the governor signed it on May 23, 2019, and it took effect on  
11 October 1, 2019, as NRS 52.380.

12 **b. NRS 52.380 is an unconstitutional, procedural statute.**

13 The constitutional problem arises due to the separation of powers built into Nevada’s  
14 constitution.<sup>12</sup> Each of government’s three branches is equal. “In keeping with this theory, the  
15 judiciary has the inherent power to govern its own procedures.”<sup>13</sup> NRS 2.120 expressly  
16 recognized that authority. “The judiciary is entrusted with rule-making and other incidental  
17 powers reasonable and necessary to carry out the duties required for the administration of justice  
18 and to economically and fairly manage litigation.”<sup>14</sup> This means “the legislature may not enact a  
19 procedural statute that conflicts with a pre-existing procedural rule, without violating the  
20 doctrine of separation of powers, and such a statute is of no effect.”<sup>15</sup>

21 In addition to the constitutionally mandated bases for keeping separate those  
22 inherent powers of the judiciary, leaving control of court rules and the  
23 administration of justice to the judiciary, and thereby placing the responsibility for  
24 the system’s continued effectiveness with those most familiar with the latest  
issues and the experience and flexibility to more quickly bring into effect  
workable solutions and amendments, makes good sense.<sup>16</sup>

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25 <sup>10</sup> Exhibit E at 2.

26 <sup>11</sup> Exhibit F at 3-4.

27 <sup>12</sup> Nev. Const. Art. 3, § 1.

28 <sup>13</sup> *Berkson v. Lepome*, 126 Nev. 492, 499 (2010) (quotation omitted).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*



1 The judiciary’s authority “to promulgate procedural rules is independent of legislative power,  
2 and may not be diminished or compromised by the legislature. ... Furthermore, where, as here, a  
3 rule of procedure is promulgated in conflict with a preexisting procedural statute, the rule  
4 supersedes the statute and controls.”<sup>17</sup>

5 **c. Nevada case law confirms NRS 52.380 is a procedural statute.**

6 The Supreme Court of Nevada has considered whether prior statutes are procedural or  
7 substantive and these prior cases help explain why NRS 52.380 is unconstitutional. For  
8 example, consider wrongful death cases. “Wrongful death is a cause of action created by statute,  
9 having no roots in the common law.”<sup>18</sup> NRS 41.085 created a substantive right that could be  
10 asserted subject to the judiciary’s procedural rules.

11 In another example, NRS 11.340 allowed “a plaintiff whose judgment is subsequently  
12 reversed on appeal with the right to file a new action within one year after the reversal.”<sup>19</sup> This  
13 statute arguably created a substantive right for a plaintiff whose statute of limitations has expired  
14 to file a new complaint after an unsuccessful appeal. But *Berkson v. Lepome* concluded NRS  
15 11.340 was procedural in nature, violated separation of powers by interfering “with the  
16 judiciary’s authority to manage the litigation process” and was unconstitutional.

17 *Whitlock v. Salmon* addressed tension between NRCP 47(a), stating at the time “the court  
18 shall conduct the examination of prospective jurors and may permit such supplemental  
19 examination by counsel as it deems proper,” and NRS 16.030(b), which stated “the parties or  
20 their attorneys are entitled to conduct supplemental examinations which must not be  
21 unreasonably restricted.” *Whitlock* did not perceive the statute as a legislative encroachment on  
22 judicial prerogatives.

23 Although the statute does implicate trial procedure, it does not interfere with  
24 procedure to a point of disruption or attempted abrogation of an existing court  
25 rule. Rather, the statute confers a substantive right to reasonable participation in  
26 voir dire by counsel; and this court will not attempt to abridge or modify a  
substantive right.<sup>20</sup>

27 <sup>17</sup> *State v. Connery*, 99 Nev. 342, 345 (1983).

28 <sup>18</sup> *Alsenz v. Clark Cty. Sch. Dist.*, 109 Nev. 1062, 1064 (1993).

<sup>19</sup> *Berkson*, 126 Nev. at 494.

<sup>20</sup> 104 Nev. 24, 26 (1988).

1 Mr. Yusi and Keolis have located no Nevada appellate authority yet considering NRS  
2 52.380. It has been interpreted at least once in the local federal court. The plaintiff in *Freteluco*  
3 *v. Smith's Food & Drug Ctrs.* argued NRS 52.380 is a substantive statute and thus applicable in  
4 federal actions rather than FRCP 35. Magistrate Judge Youchah disagreed, concluding “that  
5 whether an observer is present in the neuropsychological examination of Plaintiff is not  
6 substantive, but is procedural. That is, NRS 52.380 sets forth procedures applicable to observers  
7 who may attend independent medical examinations.”<sup>21</sup>

8 NRS 52.380 interferes “with procedure to a point of disruption” and attempts to abrogate  
9 an existing court rule as *Whitlock* feared. NRS 52.380 does not create or modify any substantive  
10 rights. Instead the legislative history indicates the statute’s express purpose was to enact a draft  
11 of Rule 35 the Supreme Court rejected. NRS 52.380 is an unconstitutional, procedural statute.

12 **IV. Plaintiff’s request for an observer is unsupported or unconstitutional.**

13 Plaintiff first requests to have an observer present. Rule 35(a)(4) allows a party to  
14 request an observer, subject to court approval.

15 The party against whom an examination is sought may request as a condition of  
16 the examination to have an observer present at the examination. When making the  
17 request, the party must identify the observer and state his or her relationship to the  
18 party being examined. The observer may not be the party’s attorney or anyone  
19 employed by the party or the party’s attorney.

20 Rule 35(a)(4)(A) then limits the situations in which an observer may be present. “The  
21 party may have one observer present for the examination, unless: (i) the examination is a  
22 neuropsychological, psychological, or psychiatric examination.” Rule 35(a)(4)(B) expressly  
23 reiterates this limitation. “The party may not have any observer present for a  
24 neuropsychological, psychological, or psychiatric examination, unless the court orders otherwise  
25 for good cause shown.”

26 NRS 52.380(1) also creates a conditional right for an observer to attend. “An observer  
27 may attend an examination but shall not participate in or disrupt the examination.” NRS  
28 52.380(2)(a) expressly permits the observer to be the “attorney of an examinee or party

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<sup>21</sup> No. 2:19-cv-759, 2020 U.S. Dist. LEXIS 113217, 2020 WL 3504456 (D. Nev. June 29, 2020).

1 producing the examinee.” NRS 52.280(2)(b) permits the observer to be “[a] designated  
2 representative of the attorney....”

3 Deciding which controls requires an analysis of the statutory construction. “The court  
4 first looks to the plain language of the statute. If the statutory language fails to address the issue,  
5 this court construes the statute according to that which reason and public policy would indicate  
6 the legislature intended.”<sup>22</sup>

7 **a. Plaintiff does not justify why an observer is necessary.**

8 The potential conflict between Rule 35(a)(4) and NRS 52.380(1) and (2) is plain, but it is  
9 possible to harmonize them in this particular circumstance. Rule 35(a)(4) states the party against  
10 whom the examination “may request” an observer attend, NRS 52.380(1) states an observer  
11 “may attend.” “‘May’ is of course generally permissive.”<sup>23</sup> Rule 35 goes further and specifies  
12 that an observer may not attend a neuropsychological, psychological, or psychiatric examination.  
13 NRS 52.380 contains no equivalent language.

14 Neither Rule 35 nor NRS 52.380 provide guidance as to how a court should determine  
15 when an observer “may” attend. They both place the burden to request one on Plaintiff. Applied  
16 here, Plaintiff states no specific reason why she wants an observer present. Her opposition and  
17 own records makes plain she has attended neuropsychological assessments with her own doctors,  
18 without an observer present. She does not explain why she is unable to attend a psychological  
19 assessment with Dr. Axelrod without an observer.

20 **b. Ethical guidelines bar an observer from neuropsychological assessments.**

21 Plaintiff notes an affidavit from Dr. Axelrod stating various ethical rules prohibit  
22 observers from attending neuropsychological assessments. This is true. The American Board of  
23 Professional Neuropsychology has adopted a policy statement concerning what they term “third  
24 party observation” (TPO) of examinations.<sup>24</sup> The Board examined these requests and noted they  
25 are inconsistent with good practice. “Given the body of literature that exists regarding observer

26 <sup>22</sup> *Hardy Cos. v. SNMARK, LLC*, 126 Nev. Adv. Op. 49, 245 P.3d 1149, 1153 (2010) (citations  
27 and quotations omitted); *Marquis & Aurbach v. Dist. Ct.*, 122 Nev. 1147, 1157, 146 P.3d 1130,  
1137 (2006) (applying rules of statutory construction to the interpretation of a court rule).

28 <sup>23</sup> *Ewing v. Fahey*, 86 Nev. 604, 607, 472 P.2d 347, 349 (1970).

<sup>24</sup> Exhibit G.

1 effects, it is incumbent on neuropsychologists who provide evaluations to make clear to patients,  
2 clients, families, and other professionals that they do not endorse TPO and to try to avoid this  
3 type of intrusion in the assessment.”<sup>25</sup> “Multiple studies have established and replicated the  
4 dubious validity of data obtained during recorded or observed evaluations.”<sup>26</sup> When confronted  
5 with a situation such as is at issue in this motion, “neuropsychologists should resist demands for  
6 TPO if requested by opposing counsel, retaining counsel, or the court. The neuropsychologist  
7 should educate the court or those involved as to the APA Ethics Code and the existing scientific  
8 research that supports the negative effects of this type of intrusion.”<sup>27</sup> The Board concluded:

9       Requests for TPO frequently create an ethical dilemma for neuropsychologists as  
10       any observation or recording of neuropsychological tests or their administration  
11       has the potential to influence and compromise the behavior of both the examinee  
12       and the administrator, threatens the validity of the data obtained under these  
13       conditions by, and consequently limits normative comparisons, clinical  
14       conclusions, opinions, interpretations, and recommendations. For these reasons,  
15       APA ethical standards support the position that TPO in neuropsychological  
16       testing should be avoided.<sup>28</sup>

17       The Michigan Psychological Association also issued guidance for these requests that  
18       mirrors the Board’s recommendations. “In forensic situations when retained as an expert witness  
19       and in which TPO is requested by opposing counsel or directed by the court, the psychologist  
20       should educate the court as to the [relevant ethical standards], and the scientific basis for the  
21       negative effects (invalid data) of these intrusions.”<sup>29</sup> “If directed by the court to proceed with  
22       TPO, the psychologist should remove himself/herself from the assessment.”<sup>30</sup>

23       Applied here, Plaintiff was able to complete her own evaluations with her own physicians  
24       within their own ethical confines but without an observer. Yet she now requests an observer and  
25       notes the ethical guidelines barring an observer solely to defeat Mr. Yusi and Keolis’ ability to  
26       obtain their own examination. Her request for an observer should be denied.

---

27 <sup>25</sup> *Id.* at 393.

28 <sup>26</sup> *Id.* at 395.

29 <sup>27</sup> *Id.* at 396.

30 <sup>28</sup> *Id.*

<sup>29</sup> Exhibit H at 12.1.

<sup>30</sup> *Id.* at 12.2.





- 1 • **1:** This term appears to require that if an examination is granted, it may only occur on  
2 December 19 and that if it does not occur on this date, then the examination cannot occur.  
3 This type of inflexibility Plaintiff is trying to create to prevent the examination.
- 4 • **3:** “A representative of Plaintiff including the plaintiff’s attorney may attend the entire  
5 examination.” As discussed above, this request is neither supported nor ethically  
6 permissible.
- 7 • **4:** Recording the examination. As discussed above, this request is neither supported nor  
8 ethically permissible.
- 9 • **5:** “Defense counsel may not attend the exam.” This goes to the structural bias NRS  
10 52.380 was designed to create. Plaintiff can attend with her lawyer, consult with her  
11 lawyer during the examination, and the lawyer can interfere. But the defense who is  
12 paying for the examination cannot attend to document Plaintiff’s abuses.
- 13 • **7:** NRCPP 35(b)(1) allows the parties to provide “a copy of the examiner’s report within  
14 30 days of the examination or by the date of the applicable expert disclosure deadline,  
15 whichever occurs first.” This rule should govern.
- 16 • **8 & 24:** Plaintiff wants to bar Defendants from obtaining a second examination, if  
17 necessary. Defendants agree it would be unusual to have a second examination but  
18 barring them from even requesting one when it is plain Plaintiff plans to sabotage the  
19 process is improper.
- 20 • **9:** This request is unreasonable. Dr. Axelrod needs to confirm the person presenting for  
21 the examination is in fact the person he is supposed to examine. Plaintiff should be able  
22 to provide some sort of government issued photographic identification.
- 23 • **10:** This time limit is arbitrary. Plaintiff made herself available to her own  
24 neuropsychological over a period of 3 days. Further, by implementing a time limit the  
25 court only encourages Plaintiff to stall, delaying the examination further, until the time  
26 period expires.
- 27 • **12, 29, 30, & 31:** This condition is asking the court to instruct Dr. Axelrod how to  
28 practice neuropsychology. If this information is relevant to his assessment, then Dr.

1 Axelrod should be permitted to ask it. If certain information is relevant to his opinions,  
2 he should be permitted to comment upon it. If Plaintiff believes that information is  
3 beyond the scope of his expertise, Plaintiff can bring a motion in limine with the district  
4 court.

- 5 • **16:** “The examination will not be painful, protracted or intrusive.” While this is not a  
6 physical examination, these terms are subjective and intended only to create yet another  
7 reason for Plaintiff to terminate the examination before it is completed.
- 8 • **17, 18, & 26:** These conditions are also intended to prevent an examination. The tests at  
9 issue are standardized and proprietary. Neuropsychologists cannot release the test  
10 without exposing themselves to potential liability and compromising the test’s validity.  
11 Mr. Yusi and Keolis are happy to exchange raw data, but nothing more can be shared.
- 12 • **19, 20, & 27:** These terms are ambiguous and appear to be another attempt to prevent Mr.  
13 Yusi and Keolis from using the data obtained to defend themselves. Further, by  
14 identifying the resulting testing as “confidential medical records,” Plaintiff appears to be  
15 attempting to create a doctor-patient relationship where none can exist.
- 16 • **22:** This term is unacceptable and hypocritical. Mrs. Felsner has placed her mental health  
17 at issue in this case. She has disclosed information about her mental health without any  
18 protective order, but now wants to hamstring Mr. Yusi & Keolis’ ability to use the data  
19 they obtain. If Plaintiff believes a specific document should be sealed, she can bring an  
20 appropriate motion to do so. However, a blanket rule sealing this information is  
21 inappropriate.
- 22 • **23:** The term allowing Plaintiff to unilaterally terminate the examination has no support  
23 in Rule 35, only NRS 52.380. Given the unending stream of excuses designed to  
24 frustrate this examination, Plaintiff can hardly be trusted to decide in “good faith” when  
25 an examination has become “abusive.”
- 26 • **28:** This term is also designed to frustrate the examination. If Plaintiff believes there is  
27 some inadmissible evidence, she can file a motion in limine later. Mr. Yusi and Keolis  
28

1 cannot and will not agree to prospectively exclude evidence that cannot even be  
2 identified yet.

3 **a. Secondary gain is a trial issue.**

4 Plaintiff's final term asks the court to again instruct Dr. Axelrod how to practice  
5 neuropsychology. She asks the court to preemptively bar him from discussing the  
6 neuropsychological diagnosis of secondary gain or malingering. These are potential issues  
7 within the DSM-5 that neuropsychologists evaluate. Further, the question at this point is whether  
8 an examination occurs and, if so, the terms for it. What opinions Dr. Axelrod can give at trial is  
9 an issue for the district court at a later date.

10 **VII. A slight extension of discovery is necessary.**

11 The opening motion noted Dr. Axelrod's soonest availability is December 19, 2020.  
12 Initial expert disclosures are due December 22, discovery closes on March 22, 2021 and the case  
13 is assigned to a June 28, 2021 trial group. Mr. Yusi and Keolis proposed that the initial expert  
14 disclosures be moved to January 8, 2021. This would allow the examination to proceed as  
15 scheduled but avoid resetting a trial date.

16 Plaintiff opposes this, asserting this slight extension is an abuse. Yet Plaintiff also has  
17 created a situation where, if the court agrees with her, no neuropsychological examination could  
18 ever occur. Further, if the court grants this motion or puts conditions on it, both parties will be  
19 able to object, delaying the examination even further. This facilitates Plaintiff's goal of  
20 preventing an examination by running out the clock.

21 **VIII. The examination is appropriate and should be granted.**

22 Mr. Yusi and Keolis have acted reasonably and responsibly. They requested a Rule 35  
23 examination. They followed up with Plaintiff's counsel and received narrow objections, so a  
24 motion was filed to address those narrow objections. Plaintiff's response uses every excuse in  
25 the book to void Rule 35 or otherwise hamper Mr. Yusi & Keolis' ability to obtain the  
26 examination that Rule 35 allows them. Plaintiff's clear purpose is to prevent *any* examination or  
27 sabotage any examination that the court allows. This cannot be permitted, tolerated, or  
28 condoned. The Rule 35 examination is appropriate, supported, and should be ordered.

1 DATED this 13th day of November, 2020.



3 /s/ Michael P. Lowry  
4 MICHAEL P. LOWRY, ESQ.  
5 6689 Las Vegas Blvd. South, Suite 200  
6 Las Vegas, Nevada 89119  
7 Attorneys for Edgardo P. Yusi; Keolis Transit  
8 Services, LLC

9 **Certificate of Service**

10 Pursuant to NRCP 5, I certify that I am an employee of Wilson Elser Moskowitz Edelman  
11 & Dicker LLP, and that on November 13, 2020, I served **Edgardo Yusi & Keolis Transit**  
12 **Services, LLC's Reply re Motion for Rule 35 Examination** as follows:

- 13 ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed  
14 envelope upon which first class postage was prepaid in Las Vegas, Nevada;  
15 ☒ via electronic means by operation of the Court's electronic filing system, upon  
16 each party in this case who is registered as an electronic case filing user with the  
17 Clerk;

18 John B. Shook, Esq.  
19 Shook & Stone, Esq.  
20 710 South Fourth Street  
21 Las Vegas, NV 89101

22 Leonard T. Fink, Esq.  
23 Chad Fuss, Esq.  
24 SPRINGEL & FINK  
25 9075 W. Diablo Dr., Suite 302  
26 Las Vegas, Nevada 89148

27 BY: /s/ Michael Lowry

28 An Employee of



# Exhibit A



1 **SUPP**  
2 JOHN B. SHOOK, ESQ.  
3 Nevada Bar No. 5499  
4 ROBERT ENGLISH, ESQ.  
5 Nevada Bar No. 3504  
6 SHOOK & STONE, CHTD.  
7 710 South 4th Street  
8 Las Vegas, NV 89101  
9 Office: (702) 385-2220  
10 Attorneys for Plaintiffs

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

9 HEATHER FELSNER and ROGER  
10 FELSNER,

11 Plaintiff,

12 vs.

13 KEOLIS TRANSIT SERVICES, LLC.,  
14 Foreign Limited-Liability Corporation and  
15 EDGARDO PAGUIO YUSI; ALEXANDER  
16 DENNIS, INC., a Foreign Corporation, DOES  
17 II through X, inclusive; and ROE BUSINESS  
18 ENTITIES I through X, inclusive,

19 Defendants.

Case No.: A781000  
Dept. No.:XXVII

18  
19 **PLAINTIFFS' FIFTH SUPPLEMENT TO EARLY CASE CONFERENCE LIST OF**  
20 **WITNESSES AND DOCUMENTS PURSUANT TO NRCP 16.1**

21 COMES NOW, Plaintiffs, HEATHER and ROGER FELSNER, by and through their  
22 attorney of record, JOHN B. SHOOK, ESQ. of the law firm of SHOOK & STONE, CHTD., and  
23 hereby submits the following PLAINTIFFS' FIFTH SUPPLEMENT TO EARLY CASE  
24 CONFERENCE LIST OF WITNESSES AND DOCUMENTS PURSUANT TO NRCP 16.1 as  
25 follows:

26 ///

27 ///

**DOCUMENTS/TANGIBLE ITEMS PRODUCED**

DOCUMENTS		
EXHIBITS	DESCRIPTION	BATES NOS.
1.	Plaintiff's First Amended Complaint	FACOM000001- FACOM000013
2.	Defendant Keolis Answer to Amended Complaint	ANSWER000001- ANSWER000006
3.	Photos of Plaintiff's Injuries	INJURY000001- INJURY000006
4.	Photos of inside of the bus	BUS000001- BUS000011

MEDICAL RECORDS		
EXHIBITS	DESCRIPTION	BATES NOS.
100.	Sunrise Hospital Medical Center	SUNRISERECs000001- SUNRISERECs000244
101.	St. Joseph Mercy Oakland	SJMORECS000001- SJMORECS000067
102.	Michigan Internal Medicine Associates	MIMIARECS000001- MIMIARECS000057
103.	Neurodiagnostic & Sleep Disorder	NSDCRECS0000001- NSDCRECS0000032
104.	Team Rehabilitation	TRPTRECS0000001- TRPTRECS0000037
105.	Pueblo Medical Imaging	PMIRECS0000001- PMIRECS0000003
106.	Updated Neurodiagnostic & Sleep Disorder	NSDCRECS0000033- NSDCRECS0000083
107.	Enrico Fazzini, DO	FAZZINI000001- FAZZINI000007
108.	Rehabilitation Institute of Michigan	VANGEL000001- VANGEL000015

MEDICAL BILLS		
EXHIBITS	DESCRIPTION	BATES NOS.
200.	Sunrise Hospital Medical Center	SUNRISEBILLS000001- SUNRISEBILLS000010
201.	Radiology Specialists, Ltd.	RSBILLSS000001

202.	Fremont Emergency Services	FERBILLSS000001- FERBILLSS000004
203.	St. Joseph Mercy Oakland	SJMOBILLS000001- SJMOBILLS000004
204.	Neurodiagnostic & Sleep Disorder	NSDCBILLS0000001- NSDCBILLS0000002
205.	Team Rehabilitation	TRPTBILLS0000001- TRPTBILLS0000004
206.	Pueblo Medical Imaging	PMIBILLS000001

Plaintiff specifically reserves her right to supplement this exhibit list with any and all other relevant documents and records which comes into her or any other party's possession during discovery in this matter, including but not limited to any additional medical records and bills for treatment of their injuries.

#### **PROPOUNDED WITNESS LIST**

1. HEATHER FELSNER c/o John B. Shook, Esq., SHOOK & STONE, CHTD., 710 South , Nevada 89501, (775) 323-2200. Plaintiff HEATHER FELSNER will testify as to the facts and circumstances surrounding the subject incident, her injuries, and to all other relevant matters.

2. ROGER FELSNER c/o John B. Shook, Esq., SHOOK & STONE, CHTD., 710 South , Nevada 89501, (775) 323-2200. Plaintiff ROGER FELSNER will testify as to the facts and circumstances surrounding the subject incident, and to all other relevant matters.

3. MIRACLE FELSNER c/o John B. Shook, Esq., SHOOK & STONE, CHTD., 710 South , Nevada 89501, (775) 323-2200. Plaintiff MIRACLE FELSNER will testify as to the facts and circumstances surrounding the subject incident, and to all other relevant matters.

4. Person Most Knowledgeable (PMK) of KEOLIS TRANSIT SERVICES, LLC. c/o Michael Lowry, Esq., 300 South Fourth Street, 11<sup>th</sup> Floor, Las Vegas, Nevada 89169, (702) 727-1400. Defendant KEOLIS TRANSIT SERVICES, LLC. will testify as to the facts and circumstances surrounding the subject incident and to all other relevant matters.

5. Person Most Knowledgeable (PMK) and/or Custodian of Records for SUNRISE HOSPITAL, 3186 South Maryland Parkway, Las Vegas, Nevada 89109. These witnesses will

1 testify regarding the injuries sustained by Plaintiffs, the medical care and treatment rendered, the  
2 reasonableness and necessity of medical bills incurred due to this accident and Plaintiff's degree of  
3 recovery. Witnesses are expected to provide testimony regarding, but not necessarily limited to,  
4 their review of Plaintiffs' medical records; their examination of Plaintiffs; their opinion that  
5 Plaintiffs' past medical care and/or treatment was reasonable and necessary; and their opinion that  
6 Plaintiffs' need for future care and/or treatment is reasonable and necessary, including the  
7 reasonableness and necessity of treatment as is expected to be provided to Plaintiff by other medical  
8 providers. Witnesses are also expected to provide opinions regarding the causation of Plaintiffs'  
9 injuries; and they are expected to opine that the need for Plaintiffs' past and future medical  
10 treatment was caused by the incident as is at issue in this matter. They are further expected to  
11 provide opinions that the costs of Plaintiffs' past and expected future medical treatment is  
12 reasonable and customary for Nevada. The bases for witness' opinions are expected to include, but  
13 are not necessarily limited to: their education, training and experience, the nature of the trauma  
14 Plaintiffs to which Plaintiffs was subjected because of Defendant's negligence, Plaintiffs' medical  
histories, Plaintiffs' symptomologies and diagnostic tests as have been performed on the Plaintiffs.

15 6. Person Most Knowledgeable (PMK) and/or Custodian of Records for TEAM  
16 REHABILITATION PHYSICAL THERAPY, 17388 w. 13 Mile Road, Beverly Hills, MI 48025.  
17 These witnesses will testify regarding the injuries sustained by Plaintiffs, the medical care and  
18 treatment rendered, the reasonableness and necessity of medical bills incurred due to this accident  
19 and Plaintiff's degree of recovery. Witnesses are expected to provide testimony regarding, but not  
20 necessarily limited to, their review of Plaintiffs' medical records; their examination of Plaintiffs;  
21 their opinion that Plaintiffs' past medical care and/or treatment was reasonable and necessary; and  
22 their opinion that Plaintiffs' need for future care and/or treatment is reasonable and necessary,  
23 including the reasonableness and necessity of treatment as is expected to be provided to Plaintiff by  
24 other medical providers. Witnesses are also expected to provide opinions regarding the causation  
25 of Plaintiffs' injuries; and they are expected to opine that the need for Plaintiffs' past and future  
26 medical treatment was caused by the incident as is at issue in this matter. They are further expected  
27 to provide opinions that the costs of Plaintiffs' past and expected future medical treatment is  
28 reasonable and customary. The bases for witness' opinions are expected to include, but are not

1 necessarily limited to: their education, training and experience, the nature of the trauma Plaintiffs to  
2 which Plaintiffs was subjected because of Defendant's negligence, Plaintiffs' medical histories,  
3 Plaintiffs' symptomologies and diagnostic tests as have been performed on the Plaintiffs.

4 7. MALAZ ALMSADDI, M.D. and/or Person Most Knowledgeable (PMK) and/or  
5 Custodian of Records for NEURO AND SLEEP DISORDER CENTER, 2525 S. Telegraph Road,  
6 #200, Bloomfield Hills, MI 48302. These witnesses will testify regarding the injuries sustained by  
7 Plaintiffs, the medical care and treatment rendered, the reasonableness and necessity of medical  
8 bills incurred due to this accident and Plaintiff's degree of recovery. Witnesses are expected to  
9 provide testimony regarding, but not necessarily limited to, their review of Plaintiffs' medical  
10 records; their examination of Plaintiffs; their opinion that Plaintiffs' past medical care and/or  
11 treatment was reasonable and necessary; and their opinion that Plaintiffs' need for future care  
12 and/or treatment is reasonable and necessary, including the reasonableness and necessity of  
13 treatment as is expected to be provided to Plaintiff by other medical providers. Witnesses are also  
14 expected to provide opinions regarding the causation of Plaintiffs' injuries; and they are expected to  
15 opine that the need for Plaintiffs' past and future medical treatment was caused by the incident as is  
16 at issue in this matter. They are further expected to provide opinions that the costs of Plaintiffs'  
17 past and expected future medical treatment is reasonable and customary. The bases for witness'  
18 opinions are expected to include, but are not necessarily limited to: their education, training and  
19 experience, the nature of the trauma Plaintiffs to which Plaintiffs was subjected because of  
20 Defendant's negligence, Plaintiffs' medical histories, Plaintiffs' symptomologies and diagnostic  
21 tests as have been performed on the Plaintiffs.

22 8. ANDREW ZAZAIAN, DO. and/or Person Most Knowledgeable (PMK) and/or  
23 Custodian of Records for MICHIGAN INTERNAL MEDICINE ASSOCIATES, 1012 W. Huron  
24 Street, Waterford, MI 48328. These witnesses will testify regarding the injuries sustained by  
25 Plaintiffs, the medical care and treatment rendered, the reasonableness and necessity of medical  
26 bills incurred due to this accident and Plaintiff's degree of recovery. Witnesses are expected to  
27 provide testimony regarding, but not necessarily limited to, their review of Plaintiffs' medical  
28 records; their examination of Plaintiffs; their opinion that Plaintiffs' past medical care and/or  
treatment was reasonable and necessary; and their opinion that Plaintiffs' need for future care



1 and/or treatment is reasonable and necessary, including the reasonableness and necessity of  
2 treatment as is expected to be provided to Plaintiff by other medical providers. Witnesses are also  
3 expected to provide opinions regarding the causation of Plaintiffs' injuries; and they are expected to  
4 opine that the need for Plaintiffs' past and future medical treatment was caused by the incident as is  
5 at issue in this matter. They are further expected to provide opinions that the costs of Plaintiffs'  
6 past and expected future medical treatment is reasonable and customary. The bases for witness'  
7 opinions are expected to include, but are not necessarily limited to: their education, training and  
8 experience, the nature of the trauma Plaintiffs to which Plaintiffs was subjected because of  
9 Defendant's negligence, Plaintiffs' medical histories, Plaintiffs' symptomologies and diagnostic  
10 tests as have been performed on the Plaintiffs.

11 9. Person Most Knowledgeable (PMK) and/or Custodian of Records for ST. JOSPEH  
12 MERCY OAKLAND, 44405 Woodward Ave, Pontiac, MI 48431. These witnesses will testify  
13 regarding the injuries sustained by Plaintiffs, the medical care and treatment rendered, the  
14 reasonableness and necessity of medical bills incurred due to this accident and Plaintiff's degree of  
15 recovery. Witnesses are expected to provide testimony regarding, but not necessarily limited to,  
16 their review of Plaintiffs' medical records; their examination of Plaintiffs; their opinion that  
17 Plaintiffs' past medical care and/or treatment was reasonable and necessary; and their opinion that  
18 Plaintiffs' need for future care and/or treatment is reasonable and necessary, including the  
19 reasonableness and necessity of treatment as is expected to be provided to Plaintiff by other medical  
20 providers. Witnesses are also expected to provide opinions regarding the causation of Plaintiffs'  
21 injuries; and they are expected to opine that the need for Plaintiffs' past and future medical  
22 treatment was caused by the incident as is at issue in this matter. They are further expected to  
23 provide opinions that the costs of Plaintiffs' past and expected future medical treatment is  
24 reasonable and customary. The bases for witness' opinions are expected to include, but are not  
25 necessarily limited to: their education, training and experience, the nature of the trauma Plaintiffs to  
26 which Plaintiffs was subjected because of Defendant's negligence, Plaintiffs' medical histories,  
27 Plaintiffs' symptomologies and diagnostic tests as have been performed on the Plaintiffs.

28 10. Person Most Knowledgeable (PMK) and/or Custodian of Records for PUEBLO  
MEDICAL IMAGING, 2628 West Charleston Blvd., #B, Las Vegas, Nevada 89102. These

1 witnesses will testify regarding the injuries sustained by Plaintiffs, the medical care and treatment  
2 rendered, the reasonableness and necessity of medical bills incurred due to this accident and  
3 Plaintiff's degree of recovery. Witnesses are expected to provide testimony regarding, but not  
4 necessarily limited to, their review of Plaintiffs' medical records; their examination of Plaintiffs;  
5 their opinion that Plaintiffs' past medical care and/or treatment was reasonable and necessary; and  
6 their opinion that Plaintiffs' need for future care and/or treatment is reasonable and necessary,  
7 including the reasonableness and necessity of treatment as is expected to be provided to Plaintiff by  
8 other medical providers. Witnesses are also expected to provide opinions regarding the causation  
9 of Plaintiffs' injuries; and they are expected to opine that the need for Plaintiffs' past and future  
10 medical treatment was caused by the incident as is at issue in this matter. They are further expected  
11 to provide opinions that the costs of Plaintiffs' past and expected future medical treatment is  
12 reasonable and customary for Nevada. The bases for witness' opinions are expected to include, but  
13 are not necessarily limited to: their education, training and experience, the nature of the trauma  
14 Plaintiffs to which Plaintiffs was subjected because of Defendant's negligence, Plaintiffs' medical  
15 histories, Plaintiffs' symptomologies and diagnostic tests as have been performed on the Plaintiffs.  
16 Without waiving this objection(s), Please see attached video from Plaintiff's cell phone after the  
17 incident.

18 11. ENRICO FAZZINI DO, 291 North Pecos Avenue Road, Henderson, Nevada 89074 .  
19 These witnesses will testify regarding the injuries sustained by Plaintiffs, the medical care and  
20 treatment rendered, the reasonableness and necessity of medical bills incurred due to this accident  
21 and Plaintiff's degree of recovery. Witnesses are expected to provide testimony regarding, but not  
22 necessarily limited to, their review of Plaintiffs' medical records; their examination of Plaintiffs;  
23 their opinion that Plaintiffs' past medical care and/or treatment was reasonable and necessary; and  
24 their opinion that Plaintiffs' need for future care and/or treatment is reasonable and necessary,  
25 including the reasonableness and necessity of treatment as is expected to be provided to Plaintiff by  
26 other medical providers. Witnesses are also expected to provide opinions regarding the causation  
27 of Plaintiffs' injuries; and they are expected to opine that the need for Plaintiffs' past and future  
28 medical treatment was caused by the incident as is at issue in this matter. They are further expected  
to provide opinions that the costs of Plaintiffs' past and expected future medical treatment is

1 reasonable and customary. The bases for witness' opinions are expected to include, but are not  
2 necessarily limited to: their education, training and experience, the nature of the trauma Plaintiffs to  
3 which Plaintiffs was subjected because of Defendant's negligence, Plaintiffs' medical histories,  
4 Plaintiffs' symptomologies and diagnostic tests as have been performed on the Plaintiffs.

5 12. STEPHEN VANGEL, PH.D. and/or Person Most Knowledgeable (PMK) and/or  
6 Custodian of Records for REHABILITATION INSTITUTE OF MICHIGAN, 17388 42005 West  
7 12 Mile Road, Novi, MI 48377. These witnesses will testify regarding the injuries sustained by  
8 Plaintiffs, the medical care and treatment rendered, the reasonableness and necessity of medical  
9 bills incurred due to this accident and Plaintiff's degree of recovery. Witnesses are expected to  
10 provide testimony regarding, but not necessarily limited to, their review of Plaintiffs' medical  
11 records; their examination of Plaintiffs; their opinion that Plaintiffs' past medical care and/or  
12 treatment was reasonable and necessary; and their opinion that Plaintiffs' need for future care  
13 and/or treatment is reasonable and necessary, including the reasonableness and necessity of  
14 treatment as is expected to be provided to Plaintiff by other medical providers. Witnesses are also  
15 expected to provide opinions regarding the causation of Plaintiffs' injuries; and they are expected to  
16 opine that the need for Plaintiffs' past and future medical treatment was caused by the incident as is  
17 at issue in this matter. They are further expected to provide opinions that the costs of Plaintiffs' past  
18 and expected future medical treatment is reasonable and customary. The bases for witness' opinions  
19 are expected to include, but are not necessarily limited to: their education, training and experience,  
20 the nature of the trauma Plaintiffs to which Plaintiffs was subjected because of Defendant's  
21 negligence, Plaintiffs' medical histories, Plaintiffs' symptomologies and diagnostic tests as have  
22 been performed on the Plaintiffs.

23 13. DAWN & JEFF TUNNICLIFF, 1540 Emmons Avenue, Birmingham, Michigan  
24 48009. These witnesses will testify regarding how they knew Plaintiff before and after the accident.  
25 These witnesses may also testify regarding their knowledge of Plaintiff's injuries and the effects the  
26 injuries have had upon the Plaintiff in addition to all other relevant matters of which they have  
27 personal knowledge.  
28

14. ALISON & MATHEW UZIEBLO, 613 Suffield Avenue, Birmingham, Michigan 48009. These witnesses will testify regarding how they knew Plaintiff before and after the accident. These witnesses may also testify regarding their knowledge of Plaintiff's injuries and the effects the injuries have had upon the Plaintiff in addition to all other relevant matters of which they have personal knowledge.

### **COMPUTATION OF DAMAGES**

#### **Medical Expenses**

Plaintiff, HEATHER FELSNER, will be making a claim for the following medical expenses:

MEDICAL PROVIDER(S)	TOTAL CHARGES
American Medical Response	\$ 1,168.91
Sunrise Hospital	\$ 82,082.25
Fremont Emergency Services	\$ 1,233.00
Radiology Specialists, Ltd.	\$ 753.00
Michigan Internal Medicine Associates	\$ 454.12
St. Joseph Mercy Oakland	\$ 3,502.00
Neurodiagnostic & Sleep Disorder Center	\$ 1,795.00
Team Rehabilitation Physical Therapy	\$ 10,230.00
Pueblo Medical Imaging	\$6,600.00
Enrico Fazzini, DO	\$3,328.00
<b>Total Medical Damages :</b>	<b>\$111,146.28<sup>1</sup></b>

<sup>1</sup> Plaintiffs' medicals may increase as Plaintiff's continues to treat for her injuries related to the accident.

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Pain and Suffering

Plaintiff will be making a claim for general pain and suffering, in an amount to be determined at the time of trial.

Plaintiff reserve the right to amend and/or supplement this computation of damages as discovery continues.

DATED this 29<sup>th</sup> day of October, 2020.

***SHOOK & STONE, CHTD.***

***/s/ John Shook, Esq.***

---

JOHN B. SHOOK, ESQ.  
Nevada Bar No. 5499  
ROBERT ENGLISH, ESQ.  
Nevada Bar No. 3504  
SHOOK & STONE, CHTD.  
710 South 4th Street  
Las Vegas, NV 89101  
Office: (702) 385-2220  
Attorneys for Plaintiffs

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NEFCR 9, NRCP 5(b) and EDCR 7.26, I certify that on this date, I served the  
3 foregoing **PLAINTIFFS' FIFTH SUPPLEMENT TO EARLY CASE CONFERENCE LIST**  
4 **OF WITNESSES AND DOCUMENTS PURSUANT TO NRCP 16.1** by electronic transmission  
5 through the Odyssey File & Serve system to the following parties:  
6

7 Michael Lowry, Esq.  
8 Wilson Elser Moskowitz Edelman & Dicker  
9 6689 Las Vegas Blvd, #200  
Las Vegas, Nevada 89119

10 Chad Fuss, Esq.  
11 Springel & Fink  
12 10655 Park Run Drive, #275  
Las Vegas, Nevada 89144

13  
14 DATED this 29<sup>th</sup> day of October, 2020.

15 */s/ Kiana O'Day*

16 \_\_\_\_\_  
17 An employee of Shook & Stone  
18  
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**Ciox Health**

P.O. Box 409740  
Atlanta, Georgia 30384-9740  
Fed Tax ID 58 - 2659941  
1-800-367-1500

**CIOX**  
HEALTH  
**INVOICE****Electronic Delivery Service**Invoice #: **0313485631**Date: **08/23/2020**Customer #: **2152150**<https://edelivery.cioxhealth.com>

Ship to:

Medical Records  
SHOOK AND STONE  
710 S 4TH ST  
LAS VEGAS,NV 89101-6707

Bill to:

Medical Records  
SHOOK AND STONE  
710 S 4TH ST  
LAS VEGAS,NV 89101-6707

Records from:

RIM NOVI  
42005 W 12 MILE RD  
NOVI,MI 48377

**Requested By:** SHOOK AND STONE  
**Patient Name:** FELSNER HEATHER

**DOB :** 10/20/1952

Description	Quantity	Unit Price	Amount
Basic Fee			25.38
Retrieval Fee			0.00
Per Page Copy (Paper) 1	9	1.27	11.43
Electronic Data Archive Fee			2.00
Subtotal			38.81
Sales Tax			0.00
Invoice Total			38.81
Less Payment			-38.81
Balance Due			0.00
<b>Please Note: Your medical record request has been delivered electronically to your Ciox eDelivery account.</b>			
<b>Terms: Net 30 days</b>			

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April 28, 2020

**VIA U.S. MAIL/FACSIMILE (248) 305-7556**

Stephen Vangel, Ph.D.  
Rehabilitation Institute of Michigan  
42005 W. 12 Mile Road  
Novi, MI 48377

Please provide status of  
request. *Emailed to you*

Re: Our Client : Heather Felsner  
Your Patient : Heather Felsner  
Date of Birth : 10/20/1952  
Date(s) of Service : 02/21/2017- Present

*4/28/20. PLS call*

*Martha  
Law Office*

*Heather Felsner  
Records*

*702-385-2220*

Dear :

I represent the above-named patient of yours, and as shown authorization, who has authorized you to produce their medical records and shall be any and all records and should include (but not be limited to), if applicable, an doctor or nurses' notes, charts, graphs; their hospital admission face sheet; Discharge Summary; Admission History and Physical; progress notes; consultations; radiology reports; lab values; graphic vital signs; anesthesia record; operative reports and notes; pathology reports; recovery room notes; medication records; outpatient records; emergency room records; special diagnostic tests; and fetal strips.

Pursuant to the HITECH Act, 42 U.S.C.A §17935(e)(1), and its implementing regulations, 45 C.F.R. 164.524 (c)(4)(i), we are requesting, in an electronic format only, a complete copy of the patient's medical records for the dates listed above. Please be aware that the HITECH Act applies to requests by third-parties, like our law firm, just the same as it applies to patients. The referenced status states that "if requested by an individual, a covered entity must transmit the copy of protected health information directly to another person designated by the individual." Federal Register January 25, 2013 Vol. 78 No. 17, Page 5634. You may send a CD, email the records and bills to emoreno@shookandstone.com, or fax to 702-778-0776.

We are not requesting paper copies. Please do not bill us for paper copies. The HITECH Act and its regulations do not allow you to bill for paper copies when an electronic copy has been requested. The Department of Health & Human Services (HHS) is authorized to investigate complaints of violation of the law by improperly applying the paper copies rate for electronic records.

If any of the above records and bills are available only as paper copies, and have never been made into an electronic format, please identify the record and provide the cost of copying. Please fax, email, or call us with the amount that you intend to charge before sending the records. Pursuant to NRS 629.061, be advised that we are limited to payment of \$.60 per page received. NRS 629.061 also states that providers of health care "shall make the health care records of a patient available for physical inspection by the patient or a representative with written authorization from the patient" and that those records must be made available "within 10

(702) 570-0000  
shookandstone.com  
info@shookandstone.com

LAS VEGAS OFFICE  
710 S. 4th St.  
Las Vegas, NV 89101

RENO OFFICE  
338 Ryland St.  
Reno, NV 89501



working days after the request." Please be advised that if the total proposed charge for copies does not exceed \$25, you may send both the invoice and records/bills together, at which time we will remit payment. If you send us a bill for paper copies of electronic records, you should expect a complaint with HHS. If you follow the HITECH Act, we will pay our bill promptly.

**FAILURE TO PRODUCE RECORDS TIMELY:** Failure to timely produce records could result in a complaint to Department of Health & Human Services' Office of Civil Rights for Health Information Privacy or the state medical board.

Very truly yours,

***SHOOK & STONE, CHTD.***

Erick J. Moreno,  
Medical Records Department

Enclosure(s)



## CERTIFICATE OF CUSTODIAN OF RECORDS

STATE OF \_\_\_\_\_ )  
 ) ss.  
COUNTY OF \_\_\_\_\_ )

\_\_\_\_\_, being duly sworn, deposes and says:

1. That the deponent is the \_\_\_\_\_ for the medical offices of Stephen Vangel, Ph.D. and in such capacity is the Custodian of the Medical Records.
2. That the deponent has examined the original records on file regarding Heather Felsner, Date of Birth - 10/20/1952, SS # , and has made a true and exact copy of them and that the reproduction of them attached hereto is true and complete.
3. That the original of those records was made at or near the time of the acts, events, conditions, opinions or diagnoses recited therein by or from information transmitted by a person with knowledge in the course of a regularly conducted activity of the deponent or the office or institution in which the deponent is engaged.

**Signature**

SUBSCRIBED and SWORN to before me  
this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

Notary Public in and for said County and State

AUTHORIZATION FOR USE AND DISCLOSURE OF PROTECTED  
HEALTH INFORMATION AND OTHER RECORDS

NAME: Heather Felsner DOB: 10/20/1952 SSN: \_\_\_\_\_

I HEREBY GRANT PERMISSION TO AND AUTHORIZE THE USE OR DISCLOSURE OF THE ABOVE NAMED INDIVIDUAL'S RECORDS AS DESCRIBED BELOW TO THESE DESIGNATED ENTITIES:

SHOOK & STONE, CHTD. - 710 S. 4<sup>th</sup> STREET, LAS VEGAS, NEVADA 89107 p - 702-573-6000 f - 702-384-0594

and/or \_\_\_\_\_

THE FOLLOWING INDIVIDUAL(S), MEDICAL PROVIDER(S), AND/OR ORGANIZATION(S) ARE AUTHORIZED TO MAKE THE DISCLOSURE:

- |  |          |
|--|----------|
| 1. <u>Stephen Vangel, Ph.D.</u>                | 2. _____ |
| 3. <u>Rehabilitation Institute of Michigan</u> | 4. _____ |
| 5. _____                                       | 6. _____ |

DATES REQUESTED: 02/21/2017- Present, up to and including, the present date.

Any and all, but not limited to, the following information are to be disclosed - NO EXCLUSIONS:

1. Complete and Entire Medical File including, but not limited to: Medical Reports, Records/Notes, Itemized Billing, correspondence, photographs, X-Rays/diagnostic studies, diagnostic films, laboratory results, information regarding, HIV/AIDS, sexually transmitted diseases or other communicable disease information, references to drug or alcohol use, and mental health treatment, etc.;
2. Personnel, Attendance, Employment, Payroll, Wage Records, School Records and Transcripts, etc.;
3. Insurance Records, including all Claims, Itemized Billing, Correspondence, Payments and all documents within the file, etc.;
4. Traffic Accident Report's, Police Photographs, and investigation regarding any criminal and/or civil litigation matter, etc.;

PURPOSE: The above information is being obtained to assist said authorized entities in evaluation of my claim for benefits or damages. A copy or facsimile of this document shall be considered as effective and valid as the original.

I understand I have the right to revoke this Authorization at any time. I understand if I revoke this Authorization I must do so in writing. I understand that revocation will not apply to my Insurance Company when the law provides my insurer with the right to contest a claim under my policy. Unless otherwise revoked, this Authorization will expire on the following date, event, or condition: TO CONCLUSION OF CLAIM. If I fail to specify an expiration date, event or condition, this authorization will expire in one year.

I understand that authorizing the disclosure of this Health information is voluntary and that I am entitled to a copy of this Authorization and acknowledge receipt of a copy thereof. I can refuse to sign this Authorization. I understand any disclosure of information carries with it the potential for an unauthorized re-disclosure and the information may not be protected by federal confidentiality rules.

I understand that signing this authorization may not condition treatment, payment, enrollment or eligibility for benefits.

Heather Felsner  
Patient/Natural Parent/Guardian/Legal Representative

Date: 4/28/2020





## CERTIFICATION STATEMENT

Dear Requestor:

The enclosed medical records were provided to you by CIOX Health. We are under agreement with this medical facility to copy all authorized release of information requests.

This is to certify the attached copies of medical information are exact copies made by me from the original medical records on the following patient:

=

Name of patient: Heather Felsner

Facility name: Rehab Institute of MI

Date of Birth or Social Security Number: 10/20/1952

Page count: 9

Certified by: Rebecca Mitchell  
(Print name of Ciox Health Representative)

Signature of Representative: Rebecca Mitchell

Date copies made and certification signed (mm/dd/yy): 08/05/20





Facility: Ortho/Sports Med - Novi  
Address: 261 Mack Ave  
Detroit, MI 48201-

Patient Name: FELSNER, HEATHER

DOB: 10/20/1952

PTID: 41015200

FIN: 409001850646

PCP: NO ATTENDING PHYSICIAN (999904)

Attending: VANGEL PhD,STEPHEN J

Admit Date: 2/12/2020

Discharge Date: 2/22/2020

Medical Service: Physical Med & Rehabilitation

### Name History

Patient names	Begin Date Time	End Effective Dt	Name Type
FELSNER, HEATHER	12/20/2019 12:14		Current

The documents accompanying this transmission contain confidential health information that is legally privileged. This information is intended only for the use of the individual or entity name above. The authorized recipient of this information is prohibited from disclosing this information to any other party unless required to do so by law or regulation and is required to destroy the information after its stated need has been fulfilled.

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**Children's Hospital of Michigan – 313-745-5356**  
**Detroit Receiving Hospital – 313-745-3285**  
**Harper Hutzell Hospital – 313-745-8022**  
**Sinai-Grace Hospital – 313-966-3155**  
**Huron Valley-Sinai Hospital – 248-937-3365**  
**Rehabilitation Institute of Michigan – 313-745-1172**  
**DMC Surgery Hospital – 248-733-2359**

Report Request ID: 90442843  
Requester: MITCHELL,REBECCA

Printed On: 8/5/2020 15:16 EDT  
Page 1 of 9

Patient Name: FELSNER, HEATHER  
FIN: 409001850646

Admit Date: 2/12/2020

### Progress Notes

DOCUMENT NAME: Progress Note  
SERVICE DATE/TIME: 2/12/2020 00:00 EST  
RESULT STATUS: Modified  
PERFORM INFORMATION: VANGEL PhD,STEPHEN J (3/4/2020 16:33 EST); VANGEL PhD,STEPHEN J (2/26/2020 14:22 EST)  
SIGN INFORMATION: VANGEL PhD,STEPHEN J (3/4/2020 16:33 EST); VANGEL PhD,STEPHEN J (2/26/2020 14:30 EST); VANGEL PhD,STEPHEN J (2/26/2020 14:22 EST)  
AUTHENTICATED BY: VANGEL PhD,STEPHEN J (3/4/2020 16:33 EST); VANGEL PhD,STEPHEN J (2/26/2020 14:30 EST); VANGEL PhD,STEPHEN J (2/26/2020 14:22 EST)

#### Addendum by VANGEL PhD, STEPHEN J on March 04, 2020 16:33 EST

Examinee was seen for:

96132: 60 minutes, 2/12/20, 1 unit.

96133: 286 minutes, 2/12/20, 2/26/20, 3/04/20, 5 units

96138: 30 minutes, 2/12/20, 1 unit

96139: 70 minutes, 2/12/20, 2 units.

#### DMC Psychology Rehab Progress Note

"If completed by a medical trainee this document will be reviewed and amended by a supervisor. \*\*\* This document should not be used for physician billing if completed by a MLP unless employed by/or under a shared services agreement with that physician" \*\*

Patient: FELSNER, HEATHER MRN: R-960033359 FIN: 409001850646  
Age: 67 years Sex: Female DOB: 10/20/1952  
Associated Diagnoses: None  
Author: VANGEL PhD, STEPHEN J

#### Document Created

Document Creation: 02/26/20 14:20

#### Date of Service

Date of Service: 02/12/2020.

### Neuropsychology and Rehabilitation Psychology Assessment Report

EXAMINEE: Heather Felsner  
REFERRING PHYSICIAN: Tariq Kakish, M.D.  
CONSULTING PSYCHOLOGIST: Stephen J. Vangel Jr., Ph.D.  
UNIT: DMC RIM NOVI CENTER

The examinee is a 67-year-old right -handed Korean female with 14 years of education in Korea.

**PURPOSE OF ASSESSMENT:** Evaluation to determine the nature and severity of cognitive difficulties following a traumatic brain injury and intracerebral hemorrhages from a fall in 2017. Examinee also describes significant emotional sequelae to this event.

Report Request ID: 90442843  
Requester: MITCHELL,REBECCA

Printed On: 8/5/2020 15:16 EDT  
Page 2 of 9

### *Progress Notes*

**SUMMARY OF FINDINGS:** Due to differences between the developmental histories of the examinee versus the normative sample for our tests, some of the usual predictive data of a neuropsychological evaluation are not available.

**CONCLUSIONS:** Cognitive Impairment (R41.89) due to Traumatic Brain Injury (S06.2X1S, S06.351S) is likely, based on imaging reports of hemorrhage sites, and cognitive difficulties as reported and seen on testing. The severity of cognitive impairment cannot be discerned, however, since other factors, e.g. strong negative mood states, are also likely affecting her cognition.

Anxiety disorder not otherwise specified (F41.9). Anxiety is a component in her experience of cognitive difficulty, making it more difficult for her to focus and react quickly or appropriately to the situation. She acknowledged some symptoms of posttraumatic stress disorder, which should be further evaluated in psychotherapy.

Dysthymia (F34.1). The examinee experiences symptoms of depression, but does not meet criteria for diagnosis of major depression. A constant state of sadness and anhedonia is present, without helplessness, hopelessness or suicidal ideation.

Headache pain (G44.329) is likely to be a contributor to her cognitive difficulties, times when it is present.

Please see the attached appendix to review the data used to reach these conclusions.

### **COGNITIVE PROBLEMS AND RELATED RECOMMENDATIONS:**

#### Memory and Communication difficulties

- Recording important information in a notebook or calendar can be a helpful way to improve recall. This strategy is best used when the information is reviewed regularly. As such, she should use a recording system that allows her to keep the materials with her all the time. Family members can help by reminding her to use or check her memory book.
- The examinee may take more time to respond to information or come up with answers to questions. Family members can help by:
  - Having important conversations in an environment that is quiet and not distracting.
  - Keep sentences short and provide important information one piece at a time. Repeat information as needed.

### *Progress Notes*

- o Give her plenty of time to form her thoughts and respond to questions.
- o Check for understanding by asking her to repeat back information.

#### Rehabilitation

- Evaluation by Occupational and Speech therapists with neurological rehabilitation experience is recommended, to determine if there are therapeutic options for improving functioning in cooking and other cognitive tasks, and increasing communication effectiveness.
- Evaluation by Physical Therapy is also recommended, to potentially address reported hemiplegia.

#### Emotional Status

- Psychotherapy with a psychotherapist who specializes in cognitive behavioral therapy is recommended. Targets of intervention may include learning skills for coping with negative emotions and distress, problem solving for handling interpersonal conflict, and increasing motivation to engage in adaptive activities (e.g. socializing, leisure, etc.).
- It may be beneficial to have some sessions that include her husband and daughter, in order to promote skills and practices to reduce interpersonal conflict at home.

#### Supervision

- The examinee may benefit from having someone provide assistance when she is engaged in a task or using an appliance that involves safety risk, such as using the stove. The person assisting should not take over tasks that she is doing safely, but should instead provide prompts if errors are made (e.g. food left cooking too long or not turning off a burner).
- The examinee may have difficulty remembering all the information she needs to make important decisions. She will benefit from having someone help her make big medical and financial decisions, by summarizing complex information and reminding her of details needed to make an informed decision.

#### Driving

- Aspects of testing performance are concerning for driving, and we recommend that she limit or discontinue driving for the immediate future.
- Anxiety is likely to be a factor in driving difficulty, and the recommended cognitive-behavioral psychotherapy is likely to help.



### *Progress Notes*

- Thus, it may be more cost-effective for her to let others drive until she has made progress in psychotherapy, and then have a driving evaluation by an occupational therapist specialist.

#### Family Caregiving & Planning

- Family caregivers are encouraged to use positive coping strategies for stress, such as exercising, spending time with friends and family, and seeking social support as needed.
- Caregiver resources may also be accessed through local aging service providers, such as: Oakland County Area Agency on Aging ([www.aaa1b.com](http://www.aaa1b.com) or 800-852-7795).

#### Health Maintenance

- The examinee will benefit from discussion of diet with her physicians or dietician, in order to maintain optimal brain health.
- The examinee should engage in aerobic exercise (continuous movement, moderate intensity) for at least 30 to 45 minutes each day, to optimize brain health and improve mood.

A repeat neuropsychological assessment is recommended in one year, or earlier if needed by the treatment team.

We can assist in finding appropriate psychotherapeutic care if interested.

Please feel free to contact us with any questions at 248-305-7379 or 313-745-9763.

### **APPENDIX: DATA SUMMARY**

History was obtained from the examinee, medical records, and collateral interview with her husband. The following details relevant to cognitive status were obtained:

#### **PERTINENT HISTORY:**

Presenting Complaints: Memory problems with learning and recall of new information, reduced alertness, reduced attention and concentration, reduced processing speed, possible reductions in initiation, probable perseveration, difficulty sequencing, reduced auditory comprehension, probable anomia and paraphasias, visual misperceptions versus hallucinations, physical changes in writing her name, occasional balance problems, weakness in arms and legs, tinnitus, reduced taste. Generally, they reported problems with food preparation, occasionally with dressing, financial management, and driving-secondary to anxiety as well as cognitive difficulty. She has withdrawn from social activity.

### Progress Notes

#### Factors Pertinent to Cognitive Status:

- The examinee fell from the upper deck of a bus to the lower deck when it started moving, resulting in a loss of consciousness of around 5 minutes and also orthopedic injury. This occurred while they were on vacation in 2017. She was taken to hospital where imaging revealed intracerebral hemorrhages. She was hospitalized for 3 days, and sent home to follow-up with a neurologist. There was no reported surgical intervention for the hemorrhages, and they reported they were advised to just wait for her recovery. She did have physical therapy for orthopedic injuries.
- CT of the brain on 2/21/17 was reportedly consistent with midbrain (pons) focus of 5.8 mm, without shift or mass effect, a 4 mm focus in the posterior left parietal lobe, and a small hemorrhage along the left side of the tentorium.
- CT on 2/23/17 was reportedly consistent with an increase in size of the left occipital hemorrhagic focus at 1.6 X 1.7 X 1.4 cm. The pontine lesion had resolved.
- CT on 2/24/17 was reportedly consistent with stability of the left temporal-occipital hemorrhage and left tentorial hemorrhage.
- CT on 3/02/17 was reportedly consistent with stability and decrease in attenuation for the parieto-occipital hemorrhage.
- The examinee denied the current experience of pain, but has experienced repeated left parietal/occipital headaches on a weekly basis.
- The examinee acknowledged sleep disturbance. She did report that she has sleep difficulties 1-2 times per month, and gets about 5 hours of sleep on those nights. She did not report distress or difficulties resulting from decreased sleep.
- Current Medications: Effexor 37.5 mg daily.
- Family medical history includes myocardial infarction.

#### **PSYCHOLOGICAL ASSESSMENT**

- The examinee acknowledged anxiety, including symptoms of worry, hypervigilance, hyperarousal, anxious avoidance, intrusive memories, and nightmares. Anxiety is reported to interfere with driving and with sleep.
- The examinee acknowledged depressive symptoms of frequent sadness, anhedonia, sleep disturbance, and low motivation. She denied thoughts of death, suicidal ideation, hopelessness, and low self-esteem. She did state that she feels some part of her is missing.



### Progress Notes

- The examinee acknowledged rare episodes of excess anger. Husband commented that the intensity of anger when it occurs is high enough that he is concerned.
- The examinee denied the experience of delusional thinking and hallucinations, but did report the frequent experience of perceiving faces peeking out at her at times when she is watching television or otherwise engaged in her house. These are not quite in the periphery of her vision but are just outside of the area upon which her vision is focused. She does not experience a compelling feeling that they are real.

**Social History:** Education: 14 years, in Korea. Employment: Retail work, clerical work, co-owner of a store. Married: 30 years. Children: one daughter, age 16. Alcohol use: denied. Tobacco use: denied. Illicit substances use: denied.

### NEUROPSYCHOLOGICAL ASSESSMENT

Assessment of this examinee was interpreted cautiously, due to differences between her developmental experience and that of the normative samples (born & raised in the U.S) for most tasks. Tests were deliberately omitted where culture and language differences would clearly result in distortion of interpretation. We chose test that have a minimal amount of instructions and verbal response requirements, except for one included to assess degree of English comprehension. The tests given were interpreted in comparison with multiple norm sets, including those of ethnic minorities, when possible. However, the reader should be aware that these procedures are not standardized for the examinee, and therefore the validity of test scores and impairment ratings remains in question. Test results were most often interpreted qualitatively rather than quantitatively.

The following neuropsychological test battery was administered:

Test	Raw Score	z-score	Description
WMS-IV Symbol Span (publisher norms <b>A, Ed</b> )	14.0	-0.67	average
WAIS-IV Coding (publisher norms <b>A</b> )	38.0	-1.00	below average
DVT Time (Heaton 2004 printed norms <b>G,A,Ed,Et</b> )	577"	-1.40	low
DVT Errors (Heaton 2004 printed norms <b>G,A,Ed,Et</b> )	7.0	0.20	average
NAB Shape Learning Immediate Recognition (NAB 2003 Manual <b>G,A,Ed</b> )	11.0	-1.20	below average
NAB Shape Learning Delayed Recognition (NAB 2003 Manual <b>G,A,Ed</b> )	2.0	-2.40	exceptionally low
BDAE Complex Ideation (Heaton 2004 printed norms <b>G,A,Ed,Et</b> )	7.0	-4.20	exceptionally low
WAIS- IV Block Design (publisher norms <b>A</b> )	36.0	0.33	average
WCST Categories (Kongs 2000 publisher norms <b>A,Ed</b> )	3.0	-0.67	average

*Progress Notes*

WCST Perseverative Responses (Kongs 2000 publisher norms <b>A,Ed</b> )	5.0	0.90	above average
WCST Perseverative Errors (Kongs 2000 publisher norms <b>A,Ed</b> )	5.0	0.90	above average
WCST Learning to Learn (Kongs 2000 publisher norms <b>A,Ed</b> )	-4.4	-0.67	average
WCST Trials to 1st Category (Kongs 2000 publisher norms <b>A,Ed</b> )	16.0	-0.67	average
WCST % Conceptual Level Responses (Kongs 2000 publisher norms <b>A,Ed</b> )	42.0	-0.30	average
WCST Failure to Maintain Set (Kongs 2000 publisher norms <b>A,Ed</b> )	1.0		
BSI-18 Total (Derogatis 2000 Community Norms)	28.0	1.70	elevated
BSI-18 Somatic (Derogatis 2000 Community Norms)	8.0	1.80	elevated
BSI-18 Depression (Derogatis 2000 Community Norms)	10.0	1.50	elevated
BSI-18 Anxiety (Derogatis 2000 Community Norms)	10.0	1.60	elevated

Additionally, the Behavior Rating Inventory of Executive Functioning – Informant Report (Roth, Isquith, Gioia 2005 norms **A**) and Neurobehavioral Functioning Inventory (publisher norms) were completed by her husband.

**Presentation:** The examinee was alert and cooperative with the assessment process. She was conventionally dressed and groomed. There was no observed difficulty in walking. Motor behavior during the evaluation was unremarkable. Speech was not fluent, with pauses before speaking, and a slow pace of her expression. No paraphasic errors observed. Prosody was unremarkable. Affect was restricted in range, with rare smiling and laughter. Eye contact was normal. Thought processes during interview were logical. Thought content was generally appropriate to situation, and free from confusion, confabulation, delusions, or evidence of hallucinations, with exception of some misunderstanding or confusion with interview questions.

Psychometric assessment of **Validity** and **Effort** was not completed, secondary to potential cultural or language confounds yielded no evidence of incomplete effort during this evaluation.

Performance on assessment of **Attention** abilities ranged from the low-score to average-score range. Lower performance occurred on timed tasks, suggesting greater difficulty with processing speed, though her performance was quite accurate.

- Symbol span performance was within the average range.
- Processing Speed performance was within the below average-score range on a timed graphomotor coding task.

### *Progress Notes*

- Sustained attention performance yielded accuracy within the average range, and completion time within the low-score range, suggesting a strategy that sacrificed speed for accuracy.

Performance on assessment of **Learning and Memory** was within the below average-score range for immediate recognition of visual information, and performance was not benefitted by repeated exposure to stimuli. Delayed recognition performance for the visual stimuli was within the exceptionally low-score range.

**Language** assessment performance was within the exceptionally low-score range on a measure of English comprehension abilities. She evidenced significantly more difficulty on questions pertaining to longer passages that had been read to her.

**Visuospatial and Construction** performance was within the average range based on measure of physical construction of abstract designs.

**Executive Functioning** performance was within the average range overall based on a card sorting task that requires abstract reasoning and shifting of a cognitive set. Her performance did not have an unusual number of perseverative errors. She acquired an understanding of the task demands at an average rate. She demonstrated one failure to maintain cognitive set, which occurred after several ambiguous correct responses.

The examinee's husband completed an informant-report regarding the behavioral aspects of executive functioning. The resulting profile was notable for concerns regarding with flexible cognitive shifting from one behavior to another, initiation of behavior, working memory, as well as planning, organizing, and monitoring behavior to complete a goal.

Assessment of **Emotional Functioning** indicated that the examinee was experiencing clinically significant psychological distress related to depression, anxiety, and somatic complaints.

Informant Report of concerns regarding **Neurobehavioral Functioning** was completed by the examinee's husband. The resulting profile was notable for concerns regarding depressive symptoms, communication difficulties, and aggressive behavior.

# Exhibit B

## Nevada Rules of Civil Procedure Revision Committee Summary

July 26, 2017 Meeting

The fifth meeting of the Nevada Rules of Civil Procedure Committee (Committee) was held on July 26, 2017 at 3:00 p.m. The meeting was video conferenced among the State Bar of Nevada Office in Reno, the Supreme Court conference room in Las Vegas, and the Supreme Court conference room in Carson City. Present in Reno were Discovery Commissioner Wesley Ayres, Graham Galloway, Bill Peterson, Todd Reese, and Don Springmeyer. Present in Carson City were Kevin Powers and Justice Mark Gibbons. Present in Las Vegas were Justice Kristina Pickering, Discovery Commissioner Bonnie Bulla, George Bochanis, Judge Elissa Cadish, Steve Morris and Dan Polsenberg.

The Committee first approved the June 21, 2017 meeting minutes.

The Committee then discussed publicity for NRCP revision process. Justice Pickering advised the Committee that the Supreme Court's website for the Committee would soon be populated and that the State Bar would be contacted to run a notice of the Committee's work in the Nevada Lawyer and to send an email to members of the State Bar. An article written by Kristen Martini would also be running in the Writ, a Washoe County Bar publication, and in the Communiqué, a Clark County Bar publication.

The Committee then discussed the impact of the NRCP revisions on the Nevada Justice Court Rules of Civil Procedure. Many of the NRCP are adopted wholesale in the NJCRCP. Justice Gibbons will notify the Chief Justice of the concerns, with a view toward possibly appointing a committee to examine the NJCRCP in light of any changes to the NRCP.

Discussion then turned to the subcommittees and subcommittee reports and rule recommendations.

### 1) Discovery Subcommittee (NRCP 16, 16.1, 26-37, 45)

Chair: Graham Galloway

Members: Steve Morris, Commissioner Wes Ayres, Commissioner Bonnie Bulla, Dan Polsenberg, George Bochanis, Don Springmeyer, Bill Peterson



The Committee first confirmed that NRCP 16 has been assigned to the Discovery Subcommittee. The Committee then discussed the proposed draft amendments to NRCP 16.1 and 35 submitted by the Discovery Subcommittee.

As to NRCP 16.1, the subcommittee recommended that “data compilations” be changed to “electronically stored information” to be consistent with other jurisdictions. Discussion then turned to the standard appropriate for a party’s initial disclosure obligation. The subcommittee recommended changing the current broad initial disclosure requirement to a narrower requirement that the party disclose any information that the party “may use to support its claims or defenses, including for impeachment or rebuttal.” Some present offered that this was a significant change, in that a party would have no obligation to disclose information that hurts his claims or defenses, only information the party intends to use to support his litigation position or to impeach his opponent. Supporters of the change noted that affirmative discovery requests can flesh out information; the change just concerns initial disclosures. The Committee discussed that, if the change is made, the advisory committee notes should make clear what the limitations are.

The Committee also noted that initial disclosure obligations do not apply when cases are before the probate commissioner but should apply when a probate case reaches district court and discussed whether NRCP 16.1 and the NRCP need revision to make this clear. The Committee noted that NRCP 3 and 81 come into play because probate is a statutory proceeding commenced by petition.

The Committee decided that further discussion was needed and that drafter’s notes in rule 16.1 and or 81 may be warranted along with a change to NRCP 3 to include “petitions” and “applications” in NRCP3’s language. The Committee passed on this rule pending further examination by the Discovery Subcommittee and the Everything Else Subcommittee on NRCP 3 and 81.

As to NRCP 35, the Committee discussed the observer requirement and whether that person could be an interested party or an attorney. The subcommittee reported that the Audio Recording provision was new. The Committee also expressed concern about the language in NRCP 35(b)(1) and (3), which was taken directly from the FRCP counterpart, noting that the language was confusing regarding who would be requesting what from whom, and what exams must be produced. The Committee also discussed how this



rule would apply to minors and interact with other rules applicable to minors, and the Committee recommended adding to the drafter's note to address this concern. The Committee also noted that NRCP 35(a)(2)(B) allowed the court to impose conditions on the examination to protect minors. The subcommittee will reconsider the rule, make alterations, and present the rule at the August meeting.

- 2) Time and Service of Process Subcommittee (NRCP 4, 4.1, 5, 6) (includes all e-service rules, calculation of time, and time to perform acts throughout the NRCP)

Chair: Judge Elissa Cadish

Members: Justice Kristina Pickering, Don Springmeyer, Dan Polsenberg, Todd Reese, Kevin Powers

Judge Cadish reported that FRCP 4.1 has been assigned to the Time and Service of Process Subcommittee for consideration.

- 3) Huneycutt Subcommittee (NRCP 62.1, NRAP 12.1, *Huneycutt v. Huneycutt*, 94 Nev. 79, 575 P.2d 585 (1978) and progeny)

Chair: Racheal Mastel

Members: Justice Kristina Pickering, Justice Mark Gibbons, Todd Reese, Dan Polsenberg

The Committee then discussed the proposed draft addition of NRCP 62.1 and NRAP 12.1 and accompanying draft committee notes submitted by the Huneycutt Subcommittee. The Committee generally approved of the rules and comment, but discussed altering language in the drafter's note regarding whether *Huneycutt* and its progeny would be overruled by the adoption of these rules, and discussed needed changes to the language of the rule reference federal courts. The subcommittee will make the alterations requested and present the rules at the August meeting.

- 4) Everything Else Subcommittee (renamed from the "No Brainer" Subcommittee) (All NRCP Rules not otherwise accounted for)

Chair: Justice Kristina Pickering

Members: Justice Mark Gibbons, Todd Reese

The Committee discussed the proposed draft amendments to NRCP 5.1, 5.2, 7, 7.1, 8, 9, and 11 submitted by the Everything Else Subcommittee. The Committee approved the recommendation to reject FRCP 5.1. The Committee considered FRCP 5.2, and advised against incorporating the Rules on Sealing and Reacting Court Records (SRCR) into Rule 5.2 because the SRCR apply more broadly than the NRCP do. The Committee approved rejecting the text of FRCP 5.2, but advised adding Rule 5.2 to the NRCP with language directing practitioners to the SRCR for rules regarding sealing and redaction. The Subcommittee will redraft NRCP 5.2 and submit it to the Committee for its consideration at the August meeting. The Committee approved NRCP 7, 7.1, and 11 as proposed. The Committee agreed with changes proposed by Racheal Mastel to Rules 7 and 8, leaving in the federal language regarding pleading the jurisdiction of the court. With that change, the Committee approved NRCP 7 and 8.

A discussion was then held of issues of general concern to the Committee members. Concern was voiced with the ambitious pace of this Committee and the scheduling conflicts occurring with the subcommittees. This issue will be revisited in August. Justice Gibbons advised the Committee that Committee meetings are scheduled for August 16, 2017 at 3:00 pm, and September 27, 2017 at 3:00 pm.

There being no further business to come before the Committee, the meeting was adjourned at 5:00 p.m.

Respectfully submitted,  
Kristina Pickering and Mark Gibbons  
Co-Chairs

# Exhibit C

## Nevada Rules of Civil Procedure Revision Committee Summary

### September 27, 2017 Meeting

The seventh meeting of the Nevada Rules of Civil Procedure Committee (Committee) was held on September 27, 2017 at 3:00 p.m. The meeting was video conferenced between the State Bar of Nevada Office in Reno and the Supreme Court conference rooms in Las Vegas and Carson City. Present in Reno were Discovery Commissioner Wesley Ayres, Graham Galloway, Bob Eisenberg, Dan Polsenberg, and Don Springmeyer. Present in Carson City were Judge Jim Wilson, Kevin Powers, and Todd Reese. Present in Las Vegas were Justice Mark Gibbons, Justice Kristina Pickering, Judge Elissa Cadish, Discovery Commissioner Bonnie Bulla, Judge Kim Wanker, Professor Tom Main, George Bochanis, Steve Morris, and Rachael Mastel.

The Committee first approved the August 16, 2017 meeting minutes.

The Committee then welcomed Judge James E. Wilson, who was recently appointed to the Committee. Judge Wilson will join the discovery; NRCP 4, 5, 6; and style subcommittees.

The Committee then discussed publicizing its work and seeking comment from practitioners. It was agreed that, unless otherwise approved by the subcommittee chair, comments on a rule being developed by a subcommittee should not be sought from the bar until the subcommittee has finished their work with the rule. This will allow the subcommittee to completely vet and develop their work and to prevent an incomplete rule from being scrutinized by the bar. After a subcommittee has presented a proposed rule to the committee, however, then the committee members are encouraged to seek comment on the rule from any desired sources. This will enable the committee to have as much input as possible when considering the Rules.

The Committee then discussed the subcommittee rule recommendations.

#### 1) NRCP 68 Subcommittee

Chair: Dan Polsenberg

Members: Don Springmeyer, Prof. Thomas Main

The subcommittee reported that it left “before trial” as is because a better alternative could not be found and that they fixed the time before trial at 21 days. The subcommittee also reported that they added a section to NRCP 68(d) to clarify that a party may pay the amount of the offer within 21 days without an adverse judgment. Todd Reese suggested adding, and will draft, language to NRCP 68(f) to clarify how to calculate the penalty when multiple offers have been given. The Committee also discussed the conflict in NRCP 68 (d) between obtaining a judgment after 14 days but having 21 days to pay without entry of a judgment. The subcommittee will redraft that subsection of the rule. The Committee passed the rule to the November meeting, and the subcommittee will consider language changes to the rule.

2) Everything Else Subcommittee (All NRCP Rules not otherwise accounted for)

Chair: Justice Kristina Pickering

Members: Justice Mark Gibbons, Todd Reese

The Committee then discussed the revised proposed draft amendments to NRCP 5.2, 22, and 25 submitted by the Everything Else Subcommittee. The Committee approved the drafts of NRCP 5.2 and 22. When discussing NRCP 25, the Committee expressed concerns regarding who may file a notice of death, what the purpose of the district court noting the death on the record is, and whether the notice of death trigger a trap for the unwary with the 90 day period to substitute a person after the notice is filed. The Committee discussed whether the dismissal after 90 days should be mandatory or discretionary. The subcommittee will reconsider and redraft the rule, taking into consideration the Committee’s concerns.

3) Class and Derivative Actions Subcommittee (NRCP 23, 23.1, 23.2)

Chair: Prof. Thomas Main

Members: Dan Polsenberg, Don Springmeyer

The Class and Derivative Actions Subcommittee reported that it would present proposed rules at the next Committee meeting. (In November as the October meeting will focus on discovery.)

4) Time and Service of Process Subcommittee (NRCP 4, 4.1, 5, 6)

Chair: Judge Elissa Cadish

Members: Justice Kristina Pickering, Judge Jim Wilson; Don Springmeyer, Dan Polsenberg, Racheal Mastel, Todd Reese, Kevin Powers

The Committee then discussed the proposed draft of NRCP 5 submitted by the Time and Service of Process Subcommittee. The Committee approved NRCP 5 as proposed.

5) NRCP 12 and 56 Subcommittee (NRCP 8, 12, and 56)

Chair: Judge Elissa Cadish

Members: Justice Kristina Pickering, Judge Wanker, Prof. Thomas Main

The Committee then discussed the proposed draft of NRCP 8, 12, and 56 submitted by the NRCP 12 and 56 Subcommittee. The Advisory Committee Note added to NRCP 8 was approved. The Committee discussed the addition to NRCP 12 of the provisions for public entities, officers, and political subdivisions to answer or respond and whether they should have 45 or 60 days to or answer respond. The Committee approved the rules with a 45 day time period subject to syncing the public entities, officers, and political subdivisions provisions with NRCP 4. The Committee also discussed subsections (d) and (e) of NRCP 56, indicating that they did not alter and were consistent with existing law. The Committee approved NRCP 12 and 56 and the Advisory Committee Note proposed for NRCP 12.

6) Discovery Subcommittee (NRCP 16, 16.1, 26-37, 45)

Chair: Graham Galloway

Members: Steve Morris, Commissioner Wes Ayres, Commissioner Bonnie Bulla, Dan Polsenberg, George Bochanis, Don Springmeyer, Bill Peterson

The Committee then discussed the proposed draft amendments to NRCP 16.1, 26, 30, 34, and 35 submitted by the Discovery Subcommittee. As to Rule 35, Rachael Mastel reported that the family law bar suggested developing their own rule to address the unique problems regarding medical exams in family law. Bob Eisenberg sent the committee feedback from other practitioners on



the rule. Bob also stated that he did appreciate the work of the discovery subcommittee, but that he did not support the rule as written. His concerns are, among other things, the presence of an observer and the recording of the medical exam. Consideration of the rule was passed to the next meeting, pending further public comment on the rule and the development of a proposed alternative by Bob Eisenberg. The Committee briefly discussed NRCP 16.1, its approach to initial disclosures, and its approach to the testimony of treating physicians. The Committee also discussed whether Rule 26 should refer to NRCP 16.2 and 16.205. The Committee also briefly discussed NRCP 30 and 34, not mentioning any serious concerns. Because time remaining was short, the co-chairs advised the Committee to review the discovery rules and to be prepared to discuss them at the next meeting. This set of rules will be first on the next meeting agenda to afford sufficient time for their discussion.

A discussion was then held of issues of general concern to the Committee members.

Justice Gibbons advised the Committee that the next Committee meetings are scheduled for October 25, 2017 at 3:00 pm, and November 29, 2017 at 3:00 pm at the usual times and locations. The next Committee meeting in October will focus exclusively on discovery.

There being no further business to come before the Committee, the meeting was adjourned at 5:03 p.m.

Respectfully submitted,  
Kristina Pickering and Mark Gibbons  
Co-Chairs

# Exhibit D

## Nevada Rules of Civil Procedure Revision Committee Summary

October 25, 2017 Meeting

The eighth meeting of the Nevada Rules of Civil Procedure Committee (Committee) was held on October 25, 2017 at 3:00 p.m. The meeting was video conferenced between the State Bar of Nevada Office in Reno and the Supreme Court conference rooms in Las Vegas and Carson City. Present in Reno were Discovery Commissioner Wesley Ayres, Graham Galloway, Bob Eisenberg, and Bill Peterson. Present in Carson City were Justice Mark Gibbons, Judge Jim Wilson, Kevin Powers, and Todd Reese. Present in Las Vegas were Justice Kristina Pickering, Judge Elissa Cadish, Judge Kim Wanker, Discovery Commissioner Bonnie Bulla, George Bochanis, Steve Morris, Rachael Mastel. Dan Polsenberg, Don Springmeyer, and Professor Thom Main.

The Committee first approved the September 27, 2017 meeting minutes.

This meeting focused on discovery. The Committee discussed the following subcommittee rule recommendations.

### 1) Discovery Subcommittee (NRCP 16, 16.1, 26-37, 45)

Chair: Graham Galloway

Members: Steve Morris, Commissioner Wes Ayres, Commissioner Bonnie Bulla, Dan Polsenberg, George Bochanis, Don Springmeyer, Bill Peterson

The Committee discussed the proposed draft amendments to NRCP 16.1, 26, 30, 34, and 35 submitted by the Discovery Subcommittee. As to Rule 35, Bob Eisenberg presented an opposing proposed amendment. The Committee also considered the opposing views submitted by plaintiff and insurance defense counsel regarding Rule 35. Graham Galloway discussed the language in the committee note regarding the location of the exam, indicating that he agreed that the language should be changed so that the location will be in Nevada, unless otherwise stipulated or ordered. The Committee also discussed that this provision was substantive and should be in the text of the rule. The committee then discussed audio and video recordings and observers. The issue is, generally, how to address issues that arise during an examination and whether a person subject to an exam should have a right to a recording or an observer, or whether a court should be required to order a recording or

observer, and if so whether that should be for just cause. Commissioner Bulla emphasized that the committee draft was a compromise position. Several members of the subcommittee felt that exams should be video recorded, but Commissioner Bulla noted her opposition to video recording and her concerns that such videos might end up on the internet, compromising the examinee's privacy. The committee and the subcommittee agreed with the language in Bob Eisenberg's draft that observers should not obstruct the exam and that minors and incompetent persons should be entitled to a parent or guardian as an observer. Judge Cadish commented that a person subject to an exam might have a right to an audio recording but that the court might be required to order an observer. The Committee also acknowledged its lack of understanding whether doctors would refuse to perform exams if recorded or if an observer was present, or if performing an exam with a recording or observer might violate doctors' ethical rules. The committee noted that some attorneys were contacting doctors to get their input on this question. The Committee also discussed the lack of an insurance defense lawyer on the subcommittee and on the committee as a whole. Dan Polsenberg also noted that the draft from Bob Eisenberg was inconsistent on who would be requesting what, and Bob agreed that revisions were appropriate. The Committee passed on Rule 35 to allow Bob Eisenberg to work with the subcommittee to edit their respective drafts as needed, and to attempt to work out a compromise version or to present competing version to the committee at the next meeting.

The Committee next discussed NRCP 26, noting some discrepancy with the cross-citations to Rules 16.2 and 16.205. Subject to correcting those citations, Justice Pickering moved to recommend the rule, the motion was seconded by Justice Gibbons, and the Committee voted to recommend the rule.

The Committee next discussed Rule 30. The subcommittee noted that the rule tracked FRCP 30 including the limitation of 10 depositions absent stipulation or leave of court. The subcommittee noted that Rule 30(h) was kept from the existing rule, and that the rule was not intended to change "7 hours of testimony" referring to 7 hours on the record or the holding in *Coyote Springs Inv., LLC v. Eighth Judicial Dist. Court*, 131 Nev., Adv. Op. 18, 347 P.3d 267 (2015), concerning privileges during breaks in the deposition. Subject to minor edits to the committee note, Don Springmeyer moved to recommend the rule, Judge Cadish seconded, and the Committee voted to recommend the rule.

The Committee next discussed Rule 34, specifically the edited language in Rule 34(b)(2)(E)(i) pertaining to production of documents as they are kept in the usual course of business, unless that form of production is unreasonably burdensome for the discovering party. The Committee recognized that while the producing party should not be permitted to simply dump documents on the discovering party, neither should the discovering party be permitted to require the producing party to organize the documents in a form preferred by the discovering party when the documents are produced in an organized form. Commissioner Bulla stressed that some form of cost shifting or further request for organization was required to address discovery abuses. The Committee passed on Rule 34 so that the discovery subcommittee could address the language in Rule 34(b)(2)(E)(i).

The Committee passed on Rule 16.1 so that the subcommittee could make further edits to the rule.

A discussion was then held of issues of general concern to the Committee members. The Committee Members noted that the link on the Supreme Court's website to the Committee information was difficult to find, and the Committee asked if it could be made easier to find. The Supreme Court staff and Justices will investigate this. Bob Eisenberg asked what materials he could print for presentations concerning the Committee. Any materials that are posted on the website are publicly disseminated, and may certainly be used. These include the minutes, agendas, and recommended rules. Similar to disclosure of other materials, drafts in subcommittee should not be disclosed to allow the subcommittees to perform their work, but any drafts circulated to the committee as a whole may be used. The Justices cautioned the committee not to disclose information about pending cases when discussing hypotheticals. George Bochanis and Graham Galloway agreed to work on redrafting Rule 25 with the Everything Else subcommittee.

Justice Gibbons advised the Committee that the next Committee meeting is scheduled for November 29, 2017 at 3:00 pm at the usual locations, and that the Justices would set a December meeting.

There being no further business to come before the Committee, the meeting was adjourned at 5:00 p.m.

Respectfully submitted,  
Kristina Pickering and Mark Gibbons  
Co-Chairs



# Exhibit E

## Nevada Rules of Civil Procedure Revision Committee Summary

### December 20, 2017 Meeting

The tenth meeting of the Nevada Rules of Civil Procedure Committee (Committee) was held on December 20 at 3:00 p.m. The meeting was video conferenced between the State Bar of Nevada Office in Reno and the Supreme Court conference rooms in Las Vegas and Carson City. Present in Reno were Discovery Commissioner Wes Ayres, Graham Galloway, Bob Eisenberg, and Bill Peterson. Present in Carson City were Justice Mark Gibbons, Justice Kristina Pickering, Judge Jim Wilson, Kevin Powers, and Todd Reese. Present in Las Vegas were Judge Elissa Cadish, Judge Kim Wanker, Discovery Commissioner Bonnie Bulla, Don Springmeyer, Racheal Mastel, and Don Polsenberg.

The Committee first approved the November 29, 2017 meeting minutes with minor edits.

The various subcommittees reported that they would attempt to have Rules 4, 6, 23.1, 23.2, the rest of the discovery rules, the judgment and post-judgment rules, NRAP 26, and NEFCR 9 for the committee's consideration at the January committee meeting. Regarding NEFCR 9, the subcommittee reported that the clerk's offices shed light on the procedure determining when electronic service is given and that the rules would need to be adjusted to reflect the procedure.

The Committee discussed the following subcommittee rule recommendations.

#### 1) Discovery Subcommittee (NRCP 16, 16.1, 26-37, 45)

Chair: Graham Galloway

Members: Judge Jim Wilson, Steve Morris, Commissioner Wes Ayres, Commissioner Bonnie Bulla, Dan Polsenberg, George Bochanis, Don Springmeyer, Bill Peterson, and Loren Young

The Committee discussed the proposed draft amendments to NRCP 16.1, 27, 28, 29, 35, and 37 submitted by the Discovery Subcommittee. As to Rule 16.1, the subcommittee indicated that there was a majority and minority position regarding broader or more restrictive initial disclosure requirements. The committee passed this rule to the January meeting so that additional committee members could be present for the discussion.

The committee briefly discussed Rule 35, noting that three final proposals were complete and would be submitted to the Supreme Court. The co-chairs asked the proponents of the proposals to draft summary statements advocating for their proposal.

The committee also discussed Rule 37, noting the change in language in NRCP 37(a)(4) to account for documents not in compliance with Rule 34(b)(2)(E)(i). The rule was approved as written.

The committee next discussed Rules 27, 28, and 29. The discovery committee proposed to adopt the federal rules without change for use in Nevada. The committee expressed concern about whether Rule 29(b)'s language concerning "any form of discovery" would permit stipulations regarding depositions and whether that language conflicted with the existing rule or the Eighth Judicial District Court Rules. After discussion, the committee believed that there was no conflict, or that any conflict could be resolved. Justice Gibbons moved to recommend the rules as written, the motion was seconded by Justice Pickering, and the Committee voted to recommend the rules.

## 2) Class and Derivative Actions Subcommittee (NRCP 23, 23.1, 23.2)

Chair: Dan Polsenberg

Members: Don Springmeyer and Professor Thomas Main

The Committee next discussed competing proposals regarding Rule 23. Dan Polsenberg proposed adopting FRCP 23, Don Springmeyer proposed retaining the existing NRCP 23 with edits, and Professor Main is agnostic on the proposals. The Committee discussed sending both proposals to the Supreme Court, but noted the new appellate procedure in FRCP 23(f). Nevada does not currently have an "appeal by permission" type of appeal and this would necessitate adopting new appellate rules. Dan Polsenberg agreed to draft two alternative proposals, one retaining the new type of permissive appeal and one with an appeal as of right. Pending the edited rules, the rule was passed to the next meeting.

## 3) NRCP 25 Subcommittee (NRCP 25 and NRAP 43)

Chair: Todd Reese

Members: Justice Kristina Pickering, Graham Galloway, George Bochanis, and Loren Young

The Committee next discussed NRCP 25 and NRAP 43. Todd Reese explained that the rule was adapted from the FRCP and the existing NRCP to give more flexibility to the district courts in dealing with a party's death and to avoid the mandatory dismissal penalty. The rule's provisions are also garnered from the NRAP and other states rules. The rule is not intended to violate due process or change probate law. Justice Pickering noted that the Rule is set for review by probate attorneys to make sure that its provisions do not conflict with probate law. Concerns were also raised regarding whether provisions of the rule permitting an action to proceed despite the party's death would conflict with Rule 17(a). The Committee passed on the rule pending review.

#### 4) Everything Else Subcommittee

Chair: Justice Kristina Pickering

Members: Justice Mark Gibbons, Todd Reese

The Committee discussed the proposed draft amendments to NRCP 38, 39, 40, 43, 44, 48, and 49 submitted by the Everything Else Subcommittee. The committee discussed edits to Rule 38, 40, and 43. The committee also discussed the passive wording of Rule 48, discussing where a jury of 8 persons was authorized. Rule 48 was passed for redrafting and research. Justice Gibbons moved to recommend the remaining rules, Judge Wilson seconded the motion, and the committee voted to recommend the rules.

A discussion was then held of issues of general concern to the Committee members. Justice Gibbons advised the Committee that the next Committee meetings are scheduled for January 17, 2018, and February 21, 2018, at 3:00 pm. The Reno location of the January meeting will be at a Washoe County District Court Room. The other locations will be at the usual locations.

There being no further business to come before the Committee, the meeting was adjourned at 4:35 p.m.

Respectfully submitted,  
Kristina Pickering and Mark Gibbons  
Co-Chairs

# Exhibit F

**MINUTES OF THE MEETING  
OF THE  
ASSEMBLY COMMITTEE ON JUDICIARY**

**Eightieth Session  
March 27, 2019**

The Committee on Judiciary was called to order by Chairman Steve Yeager at 8:04 a.m. on Wednesday, March 27, 2019, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda ([Exhibit A](#)), the Attendance Roster ([Exhibit B](#)), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at [www.leg.state.nv.us/App/NELIS/REL/80th2019](http://www.leg.state.nv.us/App/NELIS/REL/80th2019).

**COMMITTEE MEMBERS PRESENT:**

Assemblyman Steve Yeager, Chairman  
Assemblywoman Lesley E. Cohen, Vice Chairwoman  
Assemblywoman Shea Backus  
Assemblyman Skip Daly  
Assemblyman Chris Edwards  
Assemblyman Ozzie Fumo  
Assemblywoman Alexis Hansen  
Assemblywoman Lisa Krasner  
Assemblywoman Brittney Miller  
Assemblywoman Rochelle T. Nguyen  
Assemblywoman Sarah Peters  
Assemblyman Tom Roberts  
Assemblywoman Jill Tolles  
Assemblywoman Selena Torres  
Assemblyman Howard Watts

**COMMITTEE MEMBERS ABSENT:**

None

**GUEST LEGISLATORS PRESENT:**

None





**STAFF MEMBERS PRESENT:**

Diane C. Thornton, Committee Policy Analyst  
Bradley A. Wilkinson, Committee Counsel  
Lucas Glanzmann, Committee Secretary  
Melissa Loomis, Committee Assistant

**OTHERS PRESENT:**

Alison Brasier, representing Nevada Justice Association  
Graham Galloway, representing Nevada Justice Association  
George T. Bochanis, representing Nevada Justice Association  
David Sampson, Attorney, Law Offices of David Sampson, Las Vegas, Nevada  
Dane A. Littlefield, President, Association of Defense Counsel of Nevada  
Kevin Higgins, Chief Judge, Sparks Justice Court; and representing Nevada Judges of Limited Jurisdiction  
John Tatro, Senior Judge; and representing Nevada Judges of Limited Jurisdiction  
Richard Glasson, Judge, Tahoe Justice Court; and representing Nevada Judges of Limited Jurisdiction  
Ann E. Zimmerman, Judge, Las Vegas Township Justice Court; and representing Nevada Judges of Limited Jurisdiction  
Paul C. Deyhle, General Counsel and Executive Director, Commission on Judicial Discipline  
Jerome M. Polaha, Judge, Second Judicial District Court  
John J. Piro, Deputy Public Defender, Legislative Liaison, Clark County Public Defender's Office  
Kendra G. Bertschy, Deputy Public Defender, Washoe County Public Defender's Office  
John T. Jones, Jr., Chief Deputy District Attorney, Clark County District Attorney's Office; and representing Nevada District Attorneys Association

**Chairman Yeager:**

[Roll was taken. Committee protocol was explained.] Today, we have three bills on the agenda. I will now open the hearing on Assembly Bill 285.

**Assembly Bill 285: Enacts provisions relating to a mental or physical examination of certain persons in a civil action. (BDR 4-1027)**

**Alison Brasier, representing Nevada Justice Association:**

What I would like to do is explain what these examinations are in their current form. They are unique to personal injury litigation. I want to lay the foundation for what these examinations are and then turn it over to my colleagues in Carson City to explain more about the history of how we got here and what this bill proposes to do.

What we are talking about in this bill is commonly referred to as a "Rule 35" examination. They are very unique to personal injury cases because these examinations happen when someone is alleging injury. When a person alleges an injury, he or she can be forced to appear at an examination by an expert witness who is hired by the insurance company and to whom that claimant has no relationship. Under the current state of our rules, that claimant—the victim—has no right to have an observer present. They do not have a right to record what happens. What we have seen is, if there is a dispute in what happens in the examination, most of the time deference is given to the person who is being presented to the judge or jury as an expert witness rather than the victim or plaintiff who was forced to present at that examination. That is the current state of the law. The reason I used the word "unique" at the beginning of my testimony is because the way it currently stands in these forced examinations, the claimant has no rights as part of that examination.

When we look at it in different contexts, we would never expect people to submit to an examination under this current set of conditions. Outside of litigation, if you have an important medical examination, it would be commonplace for you to bring a friend or family member with you, maybe to ease anxiety and to make sure you are capturing all the important information. If you went to a doctor who said, "No, you do not have any right to have someone present with you during this examination," you would have the choice to pursue another doctor if you did not feel comfortable in that scenario. Under the current rules for these Rule 35 examinations, that is not the situation for personal injury victims.

Also, this is very unique to Nevada personal injury cases. Washington, California, and Arizona—all of our neighboring states—currently allow what this bill proposes. They allow an observer to be present during the examination and they also allow a recording to happen. Nevada is really an outlier with our western neighbors as far as not providing these protections for the injured party during the examination.

Additionally, in the workers' compensation context in Nevada, observers are allowed to be present during workers' compensation examinations. Again, this is really an outlier for Nevada personal injury cases where we do not already have these protections afforded to the claimants. I will turn it over to my colleagues to explain why that is important and how we got here.

**Graham Galloway, representing Nevada Justice Association:**

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 made up of two Nevada Supreme Court justices, various district court judges from throughout the state, a number of attorneys who represent the various fields of practice in the civil side of litigation, and a member of the Legislative Counsel Bureau. The committee was broken down into subcommittees, and I chaired the subcommittee that handled this Rule 35 medical examination issue. Our subcommittee recommended substantial changes to the rule. Mr. Bochanis was a member of the committee. We voted 7-to-1 to make substantial changes, the changes that are set forth or embodied in the bill before you, Assembly Bill 285. Unfortunately, when our

recommendations went to the full Supreme Court of Nevada, they rejected our changes for reasons we are still not clear on. At that point, we reassessed our position.

Contrary to the opponents of this bill who want to say this is a procedural matter, this is not a procedural matter; it is a substantive right. It is the right to protect and control your own body. The scenario we often see in this situation is that our clients are going through a green light or sitting at a stop sign, and somebody blasts through the light and clocks them, injuring them. They are then required to go to an examination by an expert who is hired by the defense. These are experts that are trained, sophisticated, and weaponized. They put our clients through an examination and, in the process, the clients are interrogated. Our clients have to go through this without any representation.

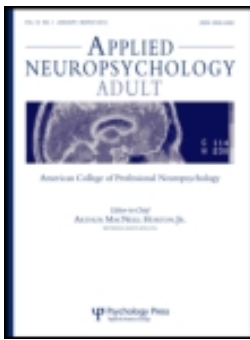
This is not a criminal situation, but in the criminal field, you often hear the terms "right to counsel," "right of cross examination," and "due process." Those terms do not necessarily transfer over into the civil arena. In the civil arena, we have what is called "fundamental fairness." Is it fundamentally fair that an injured person is required to go to a hired expert—an expert whose sole goal is to further the defense side of the litigation—have their body inspected, have their body examined, and then be interrogated without there being a lawyer present to represent that individual? There is nothing in the law in any arena where that occurs except for the personal injury field. That is what A.B. 285 is designed to do: bring some fundamental fairness to the process and to level the playing field. It is not a procedural rule. That is how it is being characterized by the opponents of this bill. It is a fundamental right that you should have representation in such an important situation. I will turn it over to my colleague who will explain the nuts and bolts of the bill.

**George T. Bochanis, representing Nevada Justice Association:**

This bill is very important to individuals who are being subjected to these insurance company examinations. The reason we are before you today is because this bill protects substantive rights. This is not a procedural rule, which you would usually find within our NRCP. Our *Nevada Rules of Civil Procedure* involve things such as how many years someone has to file a lawsuit and how many days someone has to file a motion or an opposition to a motion. This bill does not involve those types of issues but, instead, involves a substantive right of a person during an examination by a doctor whom he did not choose, does not know, and has no relationship with whatsoever, a doctor who was chosen by an insurance defense attorney. This is a doctor who is going to handle this patient. It is not really a patient because there is no doctor-patient relationship. This examinee is going to be touched and handled by this doctor with whom he has zero relationship. It is being forced upon him as part of this examination. That is why this is a substantive right, and this is why we are before you here today.

What I would like to discuss with you are the two components of this bill. The first is that we are requesting that an observer be present during these types of insurance company evaluator examinations. That observer can be anyone; it can be a spouse, parent, friend, or it could be the person's attorney or a person from that attorney's staff. Really, when you look at the current rule, the attorney/observer portion of it is really the only difference between the

# Exhibit G



## Policy Statement of the American Board of Professional Neuropsychology regarding Third Party Observation and the recording of psychological test administration in neuropsychological evaluations

Alan Lewandowski, W. John Baker, Brad Sewick, John Knippa, Bradley Axelrod & Robert J. McCaffrey

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GUEST EDITORIAL

## Policy Statement of the American Board of Professional Neuropsychology regarding Third Party Observation and the recording of psychological test administration in neuropsychological evaluations

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### General

Neuropsychologists are frequently presented with requests from parents, attorneys, nurse case managers, insurance representatives, school personnel, allied health professionals, family members, or other interested parties who have some type of relationship with a patient or client examinee to directly observe or record the administration of psychological and neuropsychological tests. Consequently, a number of practice concerns have been raised that include, but are not limited to, the effects on the examinee's performance and the neuropsychologist administering the assessment, violations of testing guidelines, the impact on standardization procedures, the appropriateness of applying test findings to normative samples established under standardized circumstances, and test security. These requests can become even more problematic and complicated when the request occurs within the adversarial process associated with the legal system, such as competency hearings, custody evaluations, divorce proceedings, civil litigation, and criminal investigations (Bush, Pimental, Ruff, Iverson, Barth & Broshek, 2009; Duff & Fisher, 2005; Howe & McCaffrey, 2010; Lynch, 2005; McCaffrey, Fisher, Gold, & Lynch, 1996; McCaffrey, Lynch, & Yantz, 2005; McSweeney et al., 1998; Sweet, Grote, & Van Gorp, 2002).

### Definition of Third Party Observation

Third Party Observation (TPO) is defined in this practice guideline as the direct or indirect presence of an individual other than the patient or client and the psychologist or their technician administering a published psychological test in order to obtain objective data under standardized conditions for clinical, counseling, or forensic purposes in order to render

clinical conclusions, opinions, interpretations, or recommendations based on the data collected. Direct presence means a person(s) physically present in the room other than the psychologist or his/her technician and the examinee. Indirect presence means viewing through a window, two-way mirror, use of any camera, or audio or video recording device, or any electronic or communication device. The act of recording includes the on-site transcription by a court recorder or reporter during an examination by either direct or indirect involvement (Barth, 2007; Constantinou, Ashendorf, & McCaffrey, 2002; Constantinou, Ashendorf, & McCaffrey, 2005; Eastvold, Belanger, & Vanderploeg, 2012; McCaffrey, Fisher, Gold, & Lynch, 1996).

### Ethical considerations

The Ethical Principles of Psychologists and Code of Conduct of the American Psychological Association (hereafter called the Ethics Code) helps guide the thinking and behavior of psychologists, and provides direction with regard to clinical practice standards. Relevant to TPO and the Ethics Code are both the General Principles and a number of the Ethical Standards.

Within the Ethics Code a series of General Principles are outlined with the intent of guiding psychologists to practice at the highest professional level. Relevant to TPO are General Principle: A (Beneficence and Non-maleficence), B: (Fidelity and Responsibility), C (Integrity), and D (Justice).

In contrast to the General Principles, the Ethics Code offers specific standards that represent obligations to which psychologists are bound, and consequently form the basis for ethical violations and consequently the basis for sanctions. Most relevant to TPO are Ethical Standards 2 (Competence) and 9 (Assessment). (American Psychological Association, 2010).



**Principle A: Beneficence and nonmaleficence**

Principle A is applicable and is described as follows:

Psychologists strive to benefit those with whom they work and take care to do no harm. In their professional actions, psychologists seek to safeguard the welfare and rights of those with whom they interact professionally and other affected persons, and the welfare of animal subjects of research. When conflicts occur among psychologists' obligations or concerns, they attempt to resolve these conflicts in a responsible fashion that avoids or minimizes harm. Because psychologists' scientific and professional judgments and actions may affect the lives of others, they are alert to and guard against personal, financial, social, organizational, or political factors that might lead to misuse of their influence. Psychologists strive to be aware of the possible effect of their own physical and mental health on their ability to help those with whom they work (American Psychological Association, 2010, p. 3).

It is incumbent on neuropsychologists to be vigilant regarding the impact of their professional opinion on others, particularly with regard to diagnostic testing. Scientific and professional judgments and conclusions should be based on data from neuropsychological assessments gathered in a standardized manner and, therefore, without the influence of extraneous factors that might influence the collection of behavior samples. Neuropsychologists must always be mindful that their verbal and written opinions affect the medical, social, and legal lives of others and, therefore, must safeguard those with whom they interact professionally to do no harm.

**Principle B: Fidelity and responsibility**

Principle B is applicable and is described as follows.

Psychologists establish relationships of trust with those with whom they work. They are aware of their professional and scientific responsibilities to society and to the specific communities in which they work. Psychologists uphold professional standards of conduct, clarify their professional roles and obligations, accept appropriate responsibility for their behavior, and seek to manage conflicts of interest that could lead to exploitation or harm.

Psychologists consult with, refer to, or cooperate with other professionals and institutions to the extent needed to serve the best interests of those with whom they work. They are concerned about the ethical compliance of their colleagues' scientific and professional conduct. Psychologists strive to contribute a portion of their professional time for little or no compensation or personal advantage (American Psychological Association, 2010, p. 3).

It is the responsibility of all psychologists who elect to perform diagnostic testing, to do so within the established parameters of the instrument(s) they employ and therefore in a standardized manner. Whether or not a neuropsychologist is engaged in a patient-doctor relationship, acting as an independent clinician, a clinician for an institution, state or federal agency, or an independent examiner for an insurance carrier or legal counsel, a professional obligation exists to uphold standards for the delivery of scientific work commensurate with the responsibilities to the profession, community, and society in general.

**Principle C: Integrity**

Principle C is applicable and is described as follows.

Psychologists seek to promote accuracy, honesty, and truthfulness in the science, teaching, and practice of psychology. In these activities psychologists do not steal, cheat, or engage in fraud, subterfuge, or intentional misrepresentation of fact. Psychologists strive to keep their promises and to avoid unwise or unclear commitments. In situations in which deception may be ethically justifiable to maximize benefits and minimize harm, psychologists have a serious obligation to consider the need for, the possible consequences of, and their responsibility to correct any resulting mistrust or other harmful effects that arise from the use of such techniques (American Psychological Association, 2010, p. 3).

The practice and promotion of clinical assessment requires that neuropsychologists present themselves and their work to others in an accurate and honest manner and avoid any misrepresentation of their findings. A considerable body of research supports that TPO can affect the accuracy of test findings, and to purposefully disregard its potential impact can be construed as a misrepresentation of the data

**Principle D: Justice**

Principle D is applicable and is described as follows.

Psychologists recognize that fairness and justice entitle all persons to access to and benefit from the contributions of psychology and to equal quality in the processes, procedures, and services being conducted by psychologists. Psychologists exercise reasonable judgment and take precautions to ensure that their potential biases, the boundaries of their competence, and the limitations of their expertise do not lead to or condone unjust practices (American Psychological Association, 2010, p. 3–4).

In an attempt to provide fair and just treatment to all patients and clients, neuropsychologists do not modify assessment procedures or alter their work on the basis

of personal opinion or professional bias, nor do they neglect to maintain an awareness of their competency level and the limitations of their expertise. To this end, the American Psychological Association (APA), psychological state organizations, and neuropsychological specialty organizations, provide multiple continuing education opportunities for neuropsychologists to learn, maintain, and improve their professional expertise, and avoid practices that are irregular or not commensurate with accepted clinical practice. **Given the body of literature that exists regarding observer effects, it is incumbent on neuropsychologists who provide evaluations to make clear to patients, clients, families, and other professionals that they do not endorse TPO and to try to avoid this type of intrusion in the assessment.**

### **Ethical standard 2: Competence**

Ethical Standard 2 is applicable to TPO and the recording of test administration. Section 2.04, Bases for Scientific and Professional Judgments states the following:

Psychologists' work is based upon established scientific and professional knowledge of the discipline. (American Psychological Association, 2010, p. 5; see also Standards 2.01e, Boundaries of Competence).

### **Ethical standard 2.04**

Ethical Standard 2.04 requires neuropsychologists to conduct their practice within the boundaries of scientific knowledge. Texts on psychological testing have long cited the need to conduct testing in a distraction-free environment (Anastasi & Urbina, 1997). For example, the Wechsler Adult Intelligence Scale-Third Revision (WAIS-III) requires that, "As a rule, no one other than you and the examinee should be in the room during the testing" (1997, p. 29). The manual further directs, "Attorneys who represent plaintiffs sometimes ask to observe, but typically withdraw this request when informed of the potential effect of the presence of a third person" (Wechsler, 1997, p. 29). The requirement to avoid interference from others is noted in the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV), which advises that no one other than the examiner and the examinee should be in the room during test administration (Wechsler, 2003, p. 23).

The concept of being free from distractibility is also emphasized in the Wechsler Adult Intelligence Scale-Fourth Revision (WAIS-IV) that instructs the examiner to provide a physical environment "free from distractions and interruptions" and stresses that "External distractions must be minimized to focus the examinee's attention on the tasks presented and not on outside

sounds or sights, physical discomfort, or testing materials not in use" (Wechsler, 2008, p. 24). This is also emphasized in the administration manual for the Rey Complex Figure Test (Meyers, 1995, p. 6). Similarly, the scoring manual for the California Verbal Learning Test-Second Edition (CVLT-II) instructs that only the examiner and examinee be present in the room during testing (Delis et al., 2000, p. 8). By eliminating the presence of third parties, the examiner eliminates potential interference and the possibility of their distracting from or influencing the testing process, hence variables that are inconsistent with test standardization.

Most test manuals specify that the examiner is responsible for ensuring that the testing environment is quiet and free from distractions (Meyers, 1995; Williams, 1991; Urbina, 2014) and are often very specific about the testing room being limited to "A table or desk and two chairs" (Meyers, 1995). Similarly, the manual for the California Verbal Learning Test- Second Edition (CVLT-II) states "as a rule, no one other than you and the examinee should be in the room during testing" (Delis, Dramer, Kaplan & Ober, 2000, p. 8). As described above, these instructions serve to emphasize the importance of controlling distraction as an important factor in assessment.

### **Ethical standard 9: Assessment**

Ethical Standard 9 is applicable to TPO and recording. In Section 9.01, Bases for Assessments, the code notes "(a) Psychologists base the opinions contained in their recommendations, reports, and diagnostic or evaluative statements, including forensic testimony, on information and techniques sufficient to substantiate their findings" (American Psychological Association, 2010, p. 12; see also Standard 2.04, Bases for Scientific and Professional Judgments).

Test results generated by nonstandard methods that negatively impact the validity of the findings are insufficient. In forensic settings, neuropsychologists are often required to use their findings in comparison with other evaluations. The ability to compare separate data sets, when one evaluation was conducted following proper testing procedures and the other evaluation had inherent threats to validity such as a third party observer is dubious.

Under 9.01:

(a) the psychologist cannot provide opinions or evaluative statements because TPO presence yields the evaluation of questionable validity. (b) Except as noted in 9.01c, psychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to

support their statements or conclusions. When, despite reasonable efforts, such an examination is not practical, psychologists document the efforts they made and the result of those efforts, clarify the probable impact of their limited information on the reliability and validity of their opinions, and appropriately limit the nature and extent of their conclusions or recommendations. (American Psychological Association, 2010, p. 12; see also Standards 2.01, Boundaries of Competence, and 9.06, Interpreting Assessment Results). (c) When psychologists conduct a record review or provide consultation or supervision and an individual examination is not warranted or necessary for the opinion, psychologists explain this and the sources of information on which they based their conclusions and recommendations.

### **Section 9.02: Use of assessments**

Section 9.02 describes the following:

(a) Psychologists administer, adapt, score, interpret, or use assessment techniques, interviews, tests, or instruments in a manner and for purposes that are appropriate in light of the research on or evidence of the usefulness and proper application of the techniques. (b) Psychologists use assessment instruments whose validity and reliability have been established for use with members of the population tested. When such validity or reliability has not been established, psychologists describe the strengths and limitations of test results and interpretation. (c) Psychologists use assessment methods that are appropriate to an individual's language preference and competence, unless the use of an alternative language is relevant to the assessment issues (American Psychological Association, 2010, p. 12).

Section 9.02 (a) suggests that tests administered by a neuropsychologist in a manner that is inconsistent with the standardization of the instrument and contrary to the test manual, may be in violation of this standard. When an exception exists, it is incumbent on the neuropsychologist to provide a rationale or need that supports altering standardization in the report. Otherwise, TPO is contrary to this standard.

### **Section 9.06: Interpreting assessment results**

Section 9.06 describes the following:

When interpreting assessment results, including automated interpretations, psychologists take into account the purpose of the assessment as well as the various test factors, test-taking abilities, and other characteristics of the person being assessed, such as situational, personal, linguistic, and cultural differences, that might affect psychologists' judgments or reduce the accuracy of their interpretations. They indicate any significant limitations of their interpretations (American Psychological Association, 2010, p. 13; see also Standards 2.01b and c, Boundaries of Competence).

Many authors and organizations (Anastasi & Urbina, 1997; National Academy of Neuropsychology, 2000a; Oregon Psychological Association, 2012; Michigan Psychological Association, 2014) emphasize that, during test development, procedures are standardized without the presence of an observer. Subsequently the data obtained outside of those parameters lacks corresponding assurance of validity and interpretive significance.

### **Section 9.11: Maintaining test security**

Section 9.11 raises the importance of maintaining test security. "Psychologists make reasonable efforts to maintain the integrity and security of test materials and other assessment techniques consistent with law and contractual obligations, and in a manner that permits adherence to this Ethics Code" (American Psychological Association, 2010, p. 13). Test security is a critical issue, as it addresses the prevention of unnecessary exposure of psychometric materials that can result in diminishing a test's ability to accurately distinguish between normal and abnormal performance.

Several professional organizations have emphasized the importance of maintaining test security. The APA, the National Academy of Neuropsychology (NAN), and several state associations (among others) emphasize test security as essential to the practice of psychology, and that it is incumbent on neuropsychologists to protect the integrity of psychological test materials (American Psychological Association, 1999; National Academy of Neuropsychology, 2003; Michigan Psychological Association, 2014).

Other state and national psychological organizations as well as a number of authors have raised concerns about the potential for testing material to be used inappropriately by attorneys or become part of the public domain (American Academy of Clinical Neuropsychology, 2001; American Psychological Association, 1999; Bush et al., 2009; Canadian Psychological Association, 2009; Essig, Mittenberg, Petersen, Strauman, & Cooper, 2001; Kaufman, 2005, 2009; McCaffrey et al., 1996; Michigan Psychological Association, 2014; Morel, 2009; National Academy of Neuropsychology, 1999; Oregon Psychological Association, 2012; Victor & Abeles, 2004; Wetter & Corrigan, 1995). Public accessibility allows individuals involved in litigation to self-educate or be coached as to how to perform on certain measures or how to selectively pass or fail key components of the neuropsychological evaluation and thus invalidate the results of the assessment. As a result, several psychological organizations have taken a formal position against the presence of TPO during assessment.

The National Academy of Neuropsychology (Axelrod et al., 2000) advises that TPO is inconsistent with psychological guidelines and practices, as it threatens the validity, reliability, and interpretation of test scores. The position of the academy is that TPO should be avoided whenever possible outside of necessary situations involving a nonforensic setting where the observer is both neutral and noninvolved (e.g., student training or an interpreter). This view is also held by the Canadian Psychological Association (CPA) that advises “It is not permissible for involved third parties to be physically or electronically present during the course of neuropsychological or similar psychological evaluations of a patient or plaintiff” (CPA, 2009).

The American Academy of Clinical Neuropsychology (AACN; 2001) has taken the position that “it is not permissible for involved third parties to be physically or electronically present during the course of an evaluation assessment of a plaintiff patient with the exception of those situations specified below” (p. 434). Exceptions are described that include as an example, the assessment of young children who require the presence of a family member.

The executive committee of the Oregon Psychological Association (2012) adopted a clear and unequivocal policy that the observation by a third party compromises test validity and security and therefore advises against the presence of TPO during assessment. Similarly, the Michigan Psychological Association Ethics Committee has advised against TPO for the same reasons (Michigan Psychological Association, 2014).

## Research evidence

In support of professional ethics, there is a significant body of research indicating that TPO cannot be assumed as inconsequential to test findings. A review of the pertinent literature overwhelmingly supports the negative consequences of either direct or indirect TPO or recording on the behavior of both the examiner and the examinee, and the validity of findings obtained in a neuropsychological assessment.

It is self-evident that neuropsychological evaluations be conducted in a standardized fashion consistent with the publisher's directives to ensure valid and reliable results. Consistent with other major neuropsychological organizations, it is the position of the American Board of Professional Neuropsychology that altering test procedures to accommodate observation or recording compromises test standardization and affects the subsequent data set obtained. As there is no basis for accepting as valid an assessment under nonstandard (observed or recorded) conditions, it is questionable if findings

reflect a reasonable degree of certainty or fall within an accepted range of probability. Test results therefore lack the normal and accepted parameters of validity and, more importantly, do not reflect the expected standards of psychological care. Given current research it is not surprising that most publishers of psychological tests have cautioned against TPO in their instruction manuals and national organizations have advised against TPO (National Academy of Neuropsychology, 2000a; Committee on Psychological Tests and Assessment, 2007).

The issue of TPO has been investigated by numerous researchers, including an early case study by Binder and Johnson-Greene (1995). Multiple studies have established and replicated the dubious validity of data obtained during recorded or observed evaluations. A considerable amount of research now exists demonstrating the deleterious effect on data obtained during nonstandard evaluations involving executive functioning (Horowitz & McCaffrey, 2008), attention and processing speed (Binder & Johnson-Greene, 1995; Kehrner, Sanchez, Habif, Rosenbaum, & Townes, 2000), and memory/recall of information (Eastvold et al., 2012; Gavett, Lynch, & McCaffrey, 2005; Lynch, 2005; Yantz & McCaffrey, 2005). Eastvold et al. (2012) meta-analysis found negative effects on multiple cognitive measures and that attention, learning, and memory (delayed recall) were most adversely impacted by the presence of an observer.

## Exceptions to TPO

### Third party assistant (TPA)

In selected circumstances, the presence of an unbiased, impartial, and neutral third party observer may be necessary to proceed with or complete a neuropsychological assessment. In these cases, rather than an involved third party observing or monitoring the behavior of the test administrator or examinee, the third party holds a neutral position and acts in an indirect manner to assist or expedite the completion of the assessment. Given this significant difference of purpose, we suggest that the presence of an uninvolved and neutral observer during an evaluation is more accurately identified as a third party assistant (TPA).

A TPA may be deemed appropriate in clinical examinations in which the examiner is acting as a clinical treater with an established patient-doctor relationship, as opposed to an independent psychological examination for an insurance company or a forensic assessment in civil or criminal proceedings. A TPA may be appropriate in a testing situation in which the presence



of a parent, family member, guardian, family friend, or interpreter is necessary, and without whose presence the examination could not proceed because of a mental disability or clinical limitation that requires an accommodation. Examples might include a child with suspected or diagnosed autism, developmental disorders affecting intelligence, confirmed brain injury that precludes independent living, children who are either too young or severely anxious that they cannot be left alone, elderly adults with compromised cognition who are unwilling to participate without the presence of a trusted family member or friend, or patients who have a thought disorder impacting reality testing, among others.

Alternatively, there are cases in which a language barrier precludes valid test administration. While the preference is for the examination to be conducted in the examinee's native language, in some these cases an interpreter may be necessary because a native speaking psychological examiner is not available or within a practical distance. In these situations, to avoid potential conflicts of interest, if it is at all possible the interpreter should have no relationship (i.e., such as family member, close friend or social affiliation) to the person being examined.

Similarly, if an examinee is deaf or hearing impaired, an individual versed in American Sign Language (ASL) or a member of the deaf community would be necessary to complete an examination. Absent a qualified examiner fluent in sign language, a certified specialist or ASL interpreter may be needed.

Training presents another situation in which a TPA is considered appropriate. Not unlike medical students, psychology students and technicians learning the administration of psychology test procedures require direct observation, practice, and supervision to ensure accuracy and competence.

In the aforementioned cases, the examiner is ethically required to document in the neuropsychological report the use of a TPA and any deviations of standardization or modifications in test administration. The limitations of normative data with subsequent impact on the generalization of findings should be clearly noted.

### **Forensic examinations, independent medical examinations, and acting as an expert witness**

Neuropsychologists who choose to perform forensic assessments are ethically required to be aware of the specialty guidelines pertinent to this area of expertise. In order to avoid potential conflict, neuropsychologists who regularly provide forensic consultations should inform referral sources that if TPO or recording

develops as an issue or is required by legal proceedings, they may elect to remove themselves from the assessment.

When retained as an expert witness in forensic situations, neuropsychologists should resist demands for TPO if requested by opposing counsel, retaining counsel, or the court. The neuropsychologist should educate the court or those involved as to the APA Ethics Code and the existing scientific research that supports the negative effects of this type of intrusion. However, it is recognized that often in forensic situations professional ethics and the adversarial nature of the legal system may not agree. If attempts to educate those involved fail and counsel insists, or the court directs to proceed with TPO, the neuropsychologist can consider removing himself/herself from the assessment.

In those exceptions in which a neuropsychologist is *compelled* by the court to evaluate with a TPO because of existing state statutes or if the neuropsychologist is placed in a situation whereby withdrawing will bring clear and substantial harm to the examinee, the manner in which test validity and clinical findings are affected and may be compromised should explicitly documented. The neuropsychologist should then follow existing recommendations and guidelines for protecting test security including requesting that test material and intellectual property be provided only to another licensed psychologist who would be bound by the same duty to protect.

If this is not possible, the neuropsychologist should request a protective order specifically prohibiting either party from copying test material or intellectual property, using them for any other purpose than the matter at hand, and directing that they be returned uncopied directly to the psychologist or destroyed in a manner verifiable by the psychologist.

### **Conclusion**

Requests for TPO frequently create an ethical dilemma for neuropsychologists as any observation or recording of neuropsychological tests or their administration has the potential to influence and compromise the behavior of both the examinee and the administrator, threatens the validity of the data obtained under these conditions by, and consequently limits normative comparisons, clinical conclusions, opinions, interpretations, and recommendations. For these reasons, APA ethical standards support the position that TPO in neuropsychological testing should be avoided.

Ethical standards of practice compel neuropsychologists to avoid or resist requests for conducting assessments complicated by TPO, except for those situations

as described. Neuropsychologists should therefore not engage in, endorse, abet, or conduct assessments complicated by TPO or recording of any kind other than under the order of a court after all reasonable alternatives have been exhausted. It would be entirely appropriate for a neuropsychologist to decline to perform an examination under these conditions.

As an exception, TPA is acceptable under infrequent clinical circumstances that necessitate the involvement of an assistant or in a rare forensic case that might require a neutral or uninvolved party such as a language interpreter. A neuropsychologist is obligated to clarify in the report the rationale for the use of TPA, identify what procedures and standards have been modified, and how or to what degree the findings, results, and conclusions may be impacted. This should include limitations in the generalization of the diagnostic data and the impact on assessment's findings.

In summary, it is the position of the American Board of Professional Neuropsychology that it is incumbent on neuropsychologists to minimize variables that might influence or distort the accuracy and validity of neuropsychological assessment. Therefore, it is the recommendation of the American Board of Professional Neuropsychology that neuropsychologists should resist requests for TPO and educate the referral sources as to the ethical and clinical implications.

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# Exhibit H



## Ethics Committee

The Michigan Psychological Association membership represents the interests of psychologists and the mental health needs of the public by maintaining the highest standards of psychology through the promotion of professional excellence, leadership, scholarship, advocacy and training.

### Michigan Psychological Association Recommendations for Ethical Standards of Practice

#### Ethical Standard of Practice 5

**Title:** Ethical Considerations Regarding Third Party Observation (TPO) And Recording Of Psychological Test Administration For Licensed Psychologists Practicing On The State of Michigan

**Date:** Adopted by the Ethics Committee at the February 2014 meeting, Alan Lewandowski, Ph. D., Chair

#### 1. General

- 1.1. Licensed psychologists practicing in the State of Michigan are frequently presented with requests from parents, attorneys, nurse case managers, insurance representatives, school personnel, allied health professionals, family members or other interested parties who have some type of relationship with a patient or client examinee to directly observe or record the administration of psychological tests. Consequently, this has raised a number of legitimate ethical concerns for psychologists that include, but are not limited to, the effects on the examinee's performance and the psychologist administering the test, violations of testing guidelines, the impact on standardization procedures, the appropriateness of applying test findings to normative samples established under standardized circumstances, and test security. These requests can become even more problematic and complicated when the request occurs within the adversarial process associated with the legal system, such as competency hearings, custody evaluations, divorce proceedings, civil litigation, and criminal investigations (McSweeney et al., 1998; Sweet, Grote, & Van Gorp, 2002; Duff & Fisher, 2005; McCaffrey, Fisher, Gold, & Lynch, 2005; Howe & McCaffrey, 2010).
- 1.2. The purpose of this document is to clarify the ethical issues involving the observation of psychological testing by third parties. The position adopted by the Michigan Psychological Association Ethics Committee regarding this topic is based on a consensus of the existing literature and provides guidance for all psychologists licensed in Michigan from an ethical perspective.

## **2. Definition Of Third Party Observation**

- 2.1. Third Party Observation (TPO) is defined in this practice guideline as the direct or indirect presence of an individual other than the patient or client and the psychologist or their technician administering a published psychological test in order to obtain objective data under standardized conditions for clinical, counseling, or forensic purposes in order to render clinical conclusions, opinions, interpretations, or recommendations based on the data collected.
- 2.2. Direct presence means a person(s) physically present in the room other than the psychologist or his/her technician and the examinee.
- 2.3. Indirect presence means viewing through a window, two-way mirror, use of any camera, or audio or video recording device, or any electronic or communication device. The act of recording includes the on-site transcription by a court recorder during an examination by either direct or indirect involvement (McCaffrey, Fisher, Gold, & Lynch, 1996; Constantinou, Ashendorf, & McCaffrey, 2002; Constantinou, Ashendorf, & McCaffrey, 2005; Barth, 2007; Eastvold, Belanger, & Vanderploeg, 2012).

## **3. Ethical Considerations**

- 3.1. The Ethical Principles of Psychologists and Code of Conduct of the American Psychological Association (hereafter called the Ethics Code) helps guide the thinking and behavior of psychologists, and provides direction with regard to clinical practice standards. Relevant to TPO in the Ethics Code are both the General Principles and a number of the Ethical Standards.
- 3.2. Within the Ethics Code a series of General Principles are outlined with the intent of guiding psychologists to practice at the highest professional level. Relevant to TPO are General Principle: A (Beneficence and Nonmaleficence), B: Fidelity and Responsibility), C (Integrity), and D (Justice).
- 3.3. In contrast to the General Principles, the Ethics Code offers specific standards that represent obligations to which psychologists are bound, and consequently form the basis for ethical violations and consequently the basis for sanctions. Most relevant to TPO are Ethical Standards 2 (Competence) and 9 (Assessment). (American Psychological Association, 2010).

## **4. Principle A: Beneficence and Nonmaleficence**

- 4.1. Principle A is applicable and is described as follows: "Psychologists strive to benefit those with whom they work and take care to do no harm. In their professional actions, psychologists seek to safeguard the welfare and rights of those with whom they interact professionally and other affected persons, and the

welfare of animal subjects of research. When conflicts occur among psychologists' obligations or concerns, they attempt to resolve these conflicts in a responsible fashion that avoids or minimizes harm. Because psychologists' scientific and professional judgments and actions may affect the lives of others, they are alert to and guard against personal, financial, social, organizational, or political factors that might lead to misuse of their influence. Psychologists strive to be aware of the possible effect of their own physical and mental health on their ability to help those with whom they work."

- 4.2. It is incumbent on psychologists to be vigilant about the impact of their professional opinion on others, particularly with regard to diagnostic testing. Psychologists' scientific and professional judgments and conclusions should be based on data from psychological assessments gathered in a standardized manner, and therefore without the influence of extraneous factors that might influence the collection of behavior samples. Psychologists must always be mindful that their verbal and written opinions affect the medical, social, and legal lives of others, and therefore must safeguard those with whom they interact professionally to do no harm.

## **5. Principle B: Fidelity and Responsibility**

- 5.1. Principle B is applicable and is described as follows. "Psychologists establish relationships of trust with those with whom they work. They are aware of their professional and scientific responsibilities to society and to the specific communities in which they work. Psychologists uphold professional standards of conduct, clarify their professional roles and obligations, accept appropriate responsibility for their behavior, and seek to manage conflicts of interest that could lead to exploitation or harm. Psychologists consult with, refer to, or cooperate with other professionals and institutions to the extent needed to serve the best interests of those with whom they work. They are concerned about the ethical compliance of their colleagues' scientific and professional conduct. Psychologists strive to contribute a portion of their professional time for little or no compensation or personal advantage."
- 5.2. It is the responsibility of all psychologists who elect to perform diagnostic testing, to do so within the established parameters of the instrument(s) they employ and therefore in a standardized manner. Whether or not a psychologist is engaged in a patient-doctor relationship, acting as an independent clinician, a clinician for an institution, state or federal agency, or an independent examiner for an insurance carrier or legal counsel, a professional obligation exists to uphold standards for the delivery of scientific work commensurate with the responsibilities to the profession, community and society in general.

## **6. Principle C: Integrity**

- 6.1. Principle C is applicable and is described as follows. “Psychologists seek to promote accuracy, honesty, and truthfulness in the science, teaching, and practice of psychology. In these activities psychologists do not steal, cheat, or engage in fraud, subterfuge, or intentional misrepresentation of fact. Psychologists strive to keep their promises and to avoid unwise or unclear commitments. In situations in which deception may be ethically justifiable to maximize benefits and minimize harm, psychologists have a serious obligation to consider the need for, the possible consequences of, and their responsibility to correct any resulting mistrust or other harmful effects that arise from the use of such techniques.”
- 6.2. The practice and promotion of clinical assessment requires that psychologist present themselves and their work to others in an accurate and honest manner, and to avoid any misrepresentation of their findings. TPO alters the accuracy of test findings, and to ignore the considerable body of evidence supporting this fact, results in conscious misrepresentation.

## **7. Principle D: Justice**

- 7.1. Principle D is applicable and is described as follows. “Psychologists recognize that fairness and justice entitle all persons to access to and benefit from the contributions of psychology and to equal quality in the processes, procedures, and services being conducted by psychologists. Psychologists exercise reasonable judgment and take precautions to ensure that their potential biases, the boundaries of their competence, and the limitations of their expertise do not lead to or condone unjust practices.”
- 7.2. In an attempt to provide fair and just treatment to all patients and clients, psychologists do not modify assessment procedures or alter their work on the basis of personal opinion or professional bias, nor do they neglect to maintain an awareness of their competency level and the limitations of their expertise. To this end both APA and MPA provide multiple continuing education opportunities for psychologists to learn, maintain, and improve their professional expertise, and avoid practices that are irregular or not commensurate with accepted clinical practice. Given the body of literature that exists regarding the negative effects of TPO, it is incumbent on psychologists who provide assessment services to not avoid this practice, but make clear to patients, families, and co-professionals that they do not condone the use of TPO.

## **8. Ethical Standard 2: Competence**

- 8.1. Ethical Standard 2 is applicable to TPO and the recording of test administration. Section 2.04, Bases for scientific and Professional Judgments describes the following: Psychologists’ work is based upon established scientific and professional knowledge of the discipline. (See also Standards 2.01e, Boundaries



of Competence).”

8.2. Ethical Standard 2.04. Ethical Standard 2.04 requires psychologists to conduct their practice within the boundaries of scientific knowledge. Texts on psychological testing have long cited the need to conduct testing in a distraction-free environment (Anastasia and Urbina, 1997). With the publication of the Wechsler Adult Intelligence Scale-Third Revision (WAIS-III) the Wechsler manuals have since stipulated “no one other than you and the examinee should be in the room during the testing session.” Administration further states, “Attorneys who represent plaintiffs sometimes ask to observe but typically withdraw this request when informed of the potential effect of the presence of a third person.” (WASI, WASI-II, WAIS-III, WISC-III, WMS-III, WAIS-IV, WMS-IV). Some test manuals indicate that the testing room should be quiet and distraction free limited to “A table or desk and two chairs, one for the examiner and one for the subject.”(WCST) Similarly, the manual for the California Verbal Learning Test- Second Edition (CVLT-II) states “as a rule, no one other than you and the examinee should be in the room during testing.”

## **9. Ethical Standard 9: Assessment**

9.1. Ethical Standard 9 is applicable to TPO and recording. In Section 9.01, Bases for Assessments, the code notes “(a) Psychologists base the opinions contained in their recommendations, reports, and diagnostic or evaluative statements, including forensic testimony, on information and techniques sufficient to substantiate their findings. (See also Standard 2.04, Bases for Scientific and Professional Judgments.)”

9.2. Test results generated in nonstandard methods that negatively impact the validity of the findings are insufficient. In forensic settings, psychologists are often required to use their findings in comparison with other evaluations. The ability to compare separate data sets, when one evaluation was conducted following proper testing procedures and the other evaluation had inherent threats to validity such as a third party observer is dubious. Under 9.01 (a) the psychologist cannot provide opinions or evaluative statements because TPO presence yields the evaluation of questionable validity.

9.3. (b) Except as noted in 9.01c, psychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to support their statements or conclusions. When, despite reasonable efforts, such an examination is not practical, psychologists document the efforts they made and the result of those efforts, clarify the probable impact of their limited information on the reliability and validity of their opinions, and appropriately limit the nature and extent of their conclusions or recommendations. (See also Standards 2.01, Boundaries of Competence, and 9.06, Interpreting Assessment Results.)

## Ethical Standard of Practice 5

### Ethical Considerations Regarding Third Party Observations (TPO)

- 9.4. (c) When psychologists conduct a record review or provide consultation or supervision and an individual examination is not warranted or necessary for the opinion, psychologists explain this and the sources of information on which they based their conclusions and recommendations.”
- 9.5. Section 9.02: Use of Assessments. Section 9.02 describes the following: “(a) Psychologists administer, adapt, score, interpret, or use assessment techniques, interviews, tests, or instruments in a manner and for purposes that are appropriate in light of the research on or evidence of the usefulness and proper application of the techniques. (b) Psychologists use assessment instruments whose validity and reliability have been established for use with members of the population tested. When such validity or reliability has not been established, psychologists describe the strengths and limitations of test results and interpretation. (c) Psychologists use assessment methods that are appropriate to an individual’s language preference and competence, unless the use of an alternative language is relevant to the assessment issues.”
- 9.6. Section 9.02 (a) indicates that test or instruments used in a manner inconsistent with the standardization of the measure and contrary to the test manual violate this standard. As such, TPO is contrary to this standard.
- 9.7. Section 9.06: Interpreting Assessment Results. Section 9.06 describes the following: “When interpreting assessment results, including automated interpretations, psychologists take into account the purpose of the assessment as well as the various test factors, test-taking abilities, and other characteristics of the person being assessed, such as situational, personal, linguistic, and cultural differences, that might affect psychologists’ judgments or reduce the accuracy of their interpretations. They indicate any significant limitations of their interpretations. (See also Standards 2.01b and c, Boundaries of Competence).”
- 9.8. Many authors and organizations (Anastasi and Urbina, 1997; National Academy of Neuropsychology, 2000; Oregon Psychological Association, 2012) emphasize that during test development procedures are standardized without the presence of an observer and subsequently that data obtained outside the parameters of those procedures lack validity and affect interpretation.
- 9.9. Section 9.11: Maintaining Test Security. Section 9.11 raises the importance of maintaining test security. “Psychologists make reasonable efforts to maintain the integrity and security of test materials and other assessment techniques consistent with law and contractual obligations, and in a manner that permits adherence to this Ethics Code.”
- 9.9.1. Test security is a critical issue, as it addresses the prevention of unnecessary exposure of psychometric materials that would result in diminishing a test to accurately distinguish between normal and abnormal performance.

- 9.9.2. Several professional organizations have offered an opinion with regard to maintaining test security to include the APA. The APA describes test security as an important issue in the practice of psychology and states that it incumbent on psychologists to protect the integrity of psychological test materials (APA, 1999).
- 9.9.3. Other state and national psychological organizations as well as a number of authors have raised concerns about the potential for testing material to be used inappropriately by attorneys or become part of public domain where anyone could access this information (Wetter & Corrigan, 1995; McCaffrey et al., 1996; National Academy of Neuropsychology, 1999; American Psychological Association, 1999; American Academy of Clinical Neuropsychology, 2001; Essig, Mittenberg, Petersen, Strauman, & Cooper, 2001; Victor & Abeles, 2004; Kaufman, 2005; Kaufman, 2009; Morel, 2009; Oregon Psychological Association, 2012). Public accessibility would allow clients involved in litigation to be coached on how to perform on certain measures or give patients the opportunity to learn test material prior to an assessment, both of which would invalidate the results of a psychological assessment. As a result, several psychological organizations have taken a formal position against the presence of TPO during assessment.
- 9.9.4. The National Academy of Neuropsychology (Axelrod et al., 2000) advises that TPO is inconsistent with psychological guidelines and practices and as a result threatens the validity, reliability, and interpretation of test scores. The position of the National Academy of Neuropsychology is that TPO should be avoided whenever possible outside of necessary situations involving a non-forensic setting where the observer is both neutral and non-involved.
- 9.9.5. The American Academy of Clinical Neuropsychology (AACN) has taken the position that “it is not permissible for involved third parties to be physically or electronically present during the course of an evaluation assessment of a plaintiff patient with the exception of those situations specified below” (page 434). Exceptions are described as including young children who require the presence of a family member, etc.
- 9.9.6. The executive committee of the Oregon Psychological Association (2012) adopted a clear and unequivocal policy that the observation of a third party compromises test validity and security and therefore advises against the presence of TPO during assessment. Similarly, the Michigan Psychological Association Ethics Committee has advised against TPO for the same reasons.

## 10. Research Evidence

- 10.1. In addition to national, local and professional standards of ethical practice, a significant body of research evidence supports the negative impact of TPO. A review of the pertinent literature overwhelmingly supports that both direct and indirect TPO and recording affect the behavior of both the examiner and the examinee, and subsequently the validity of findings obtained in a psychological assessment with by limiting data interpretation and conclusions.
- 10.2. It is self evident that psychological evaluations *must* be conducted in a standardized fashion consistent with the publisher's directives to ensure valid and reliable results. The consensus among reasonable psychologists is that any attempt by an examiner to modify test procedures or alter administration to accommodate observation or recording compromises test standardization. As a result, findings are likely to be invalid and cannot be determined to reflect a reasonable degree of certainty or fall within an accepted range of probability, as there is no basis for validating an assessment under these (observed or recorded) conditions. Test results therefore lack the normal and accepted parameters of validity and more importantly, do not reflect normal standards of psychological care. Not surprisingly, most publishers of psychological tests have cautioned against TPO in their instruction manuals and national organizations have advised against TPO (National Academy of Neuropsychology, 2000; Committee on Psychological Tests and Assessment, 2007).
- 10.3. The issue of TPO has been investigated by numerous researchers beginning with a case study by Binder and Johnson-Greene (1995).
  - 10.3.1. A substantial amount of research supports that the presence of an observer negatively affects the data obtained during an assessment, and these significant negative effects on test results have been consistently reproduced in all studies.
  - 10.3.2. More specifically, research has shown a significant impact on test performance on measures involving areas of executive functioning (Horowitz & McCaffrey, 2008), attention and processing speed (Binder & Johnson-Greene 1995; Kerher, Sanchez, Habif, Rosenbaum, & Townes, 2000), and memory/recall of information (Gavett, Lynch, & McCaffrey 2005; Lynch, 2005; Yantz & McCaffrey, 2005; Eastvold et al., 2012). Eastvold, Belanger and Vanderploeg's (2012) meta analysis found negative effects on multiple cognitive measures and that attention, learning and memory (delayed recall) were most adversely impacted by the presence of an observer.

## 11. Exceptions To TPO

- 11.1. Third Party Assistant (TPA). In selected circumstances, the presence of a third party may be necessary to proceed with or complete a psychological assessment. In these cases rather than an involved third party observing or monitoring the behavior of the test administrator or examinee, the third party holds a neutral position and acts in an indirect manner to assist or expedite the completion of the assessment. Given this significant difference of purpose, we suggest that the presence of an additional party during an evaluation in these circumstances is more accurately identified as a third party assistant (TPA).
- 11.2. A TPA may be deemed appropriate in clinical examinations in which the examiner is acting as a clinical treater with an established patient-doctor relationship, as opposed to an independent psychological examination for an insurance companies or a forensic assessment in civil or criminal proceedings. A TPA may be appropriate in a testing situation in which the presence of a parent, family member or family friend is necessary, and without whose presence the examination could not proceed because of a variety of mental disabilities that require accommodations. Examples include patients diagnosed with autism or developmental disorders affecting intelligence, confirmed brain injury that precludes independent living, children who are either too young or too anxious to be left alone, elderly adults with compromised cognition who are unwilling to participate without the presence of a trusted family member or friend, patient's who have a thought disorder impacting reality testing, etc.
- 11.3. Alternatively, there are cases in which a language barrier precludes valid test administration. While the preference is for the examination to be conducted in the examinee's native language, in some these cases an interpreter may necessary because a native speaking psychological examiner is not available or within a practical distance. To avoid conflicts, the interpreter should have no relationship (such as family member) to the person being examined.
- 11.4. Similarly, if an examinee is deaf or hearing impaired an individual versed in American Sign Language (ASL) or a member of the deaf community would be necessary to complete an examination. Absent a qualified examiner fluent in sign language, a certified specialist may be necessary.
- 11.5. Student training presents another situation in which a TPA is considered appropriate. Not unlike the training of medical students in procedures, psychology students require direct observation and practice in the administration of psychological test procedures.
- 11.6. In the above cases, the examiner is ethically required to document in the procedures section of the psychological report of any deviations of standardization or modifications in test administration. Clear note must be made of the limitations of normative data with subsequent impact on the generalization of findings.

## 12. Forensic Examinations, Independent Medical Examinations, and Acting as an Expert Witness

- 12.1. Psychologists who chose to perform forensic assessments are ethically required to act in a proactive manner and be aware of the pertinent specialty guidelines pertinent to this area of expertise. In forensic situations when retained as an expert witness and in which TPO is requested by opposing counsel or directed by the court, the psychologist should educate the court as to the Ethical Principles of Psychologists and Code of Conduct of the APA, the Michigan Psychological Association Standards of Ethical Practice, and the scientific basis for the negative effects (invalid data) of these intrusions. If counsel or the court insists the psychologists should terminate test administration, and if necessary, seek legal counsel from their own personal attorney.
- 12.2. It is recognized that often in forensic situations psychological ethics and the adversarial nature of the legal system may not coincide. If directed by the court to proceed with TPO, the psychologist should remove himself/herself from the assessment. Psychologists who regularly provide forensic consultations are expected to inform referral sources ahead of time that if TPO or recording develops as an issue during legal proceedings, they are ethically required to remove themselves from the assessment and assisting as an expert witness.
- 12.3. In the very rare exception that the psychologist is *compelled* by the Court to evaluate with a TPO, or if the psychologist is in a situation wherein withdrawing will bring clear and substantial harm to the examinee, the psychologist should explicitly document the manner in which the validity of results may be compromised and following existing recommended guidelines for protecting test security including requesting that the test material and intellectual property be provided only to another licensed psychologist who would be bound by the same duty to protect. Alternatively, with a protective order the psychologist should secure an agreement specifically prohibiting either party from copying test material or intellectual property, using them for any other purpose than the matter at hand, and requiring that they be destroyed at the close of the matter.

## 13. Conclusion

- 13.1. TPO and/or any recording of psychological tests or their administration has the potential to influence or compromise the behavior of the examinee and the administrator, the validity of the data obtained under these conditions, and consequently any and all subsequent clinical conclusions, opinions, interpretations, or recommendations. Ethical standards of practice require that psychologists do not engage in or conduct assessments complicated by TPO or recording unless justified by the exceptions described above.



- 13.2. Psychological testing involving TPO should always be avoided. A psychologist who allows TPO and/or any recording of the administration of psychological tests compromises the behavior of the examinee and the administrator, the validity of the data obtained under these conditions and consequently, any and all subsequent clinical conclusions, opinions, interpretations, or recommendations. Ethical standards of practice require that psychologists do not engage in, endorse, or conduct assessments complicated by TPO or recording of any kind. In contrast, TPA is acceptable but only under exceptions involving the most extreme or rare circumstances that require, and is justified only by clinical (not forensic) exception.
- 13.3. It is the recommendation of the Ethics Committee of the Michigan Psychological Association that psychologists who find themselves in a position in which TPO is requested or advocated, should decline the request and educate the referral source as to the ethical and validity implications. If a referral source or interested party insists on TPO or recording, such as in legal matters, psychologists should extricate themselves from the situation and document the reason for termination.
- 13.4. In the case of TPA, the psychologist must clarify in the report the rationale for use of TPA, what procedures and standards have been modified, how, and to what degree, and the impact of the findings, results, and conclusions. This should include limitations in the generalization of the diagnostic data and the impact on assessment's findings.

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## Ethical Standard of Practice 5

### Ethical Considerations Regarding Third Party Observations (TPO)

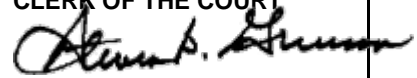
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TRAN

EIGHTH JUDICIAL DISTRICT COURT  
CIVIL/CRIMINAL DIVISION  
CLARK COUNTY, NEVADA

HEATHER FELSNER,  
ROGER FELSNER,

Plaintiffs,

vs.

KEOLIS TRANSIT SERVICES, LLC, et al,

Defendants.

CASE NO. A-18-781000

DEPT. NO. XXVII

BEFORE THE HONORABLE ERIN TRUMAN, DISCOVERY COMMISSIONER

THURSDAY, NOVEMBER 19, 2020

**TRANSCRIPT RE:**

EDGARDO YUSI & KEOLIS TRANSIT SERVICES, LLC'S MOTION  
FOR RULE 35 EXAMINATION

APPEARANCES: (Via BlueJeans Videoconference)

For the Plaintiffs:

JOHN B. SHOOK, ESQ.

For Defendants Edgardo Yusi  
and Keolis Transit Services, LLC:

MICHAEL P. LOWRY, ESQ.

For Defendant Alexander Dennis, Inc.:

DAVID S. SCHOPICK, ESQ.

RECORDED BY: Francesca Haak, Court Recorder

App0204

1 LAS VEGAS, NEVADA, THURSDAY, NOVEMBER 19, 2020, 10:19 A.M.

2 \* \* \* \* \*

3 DISCOVERY COMMISSIONER: All right. Our next motion on for a hearing  
4 today is in the matter of Felsner versus Keolis Transit. This is defendants' motion  
5 for a Rule 35 exam.

6 If I could have counsel for the plaintiff identify him or herself, followed  
7 by counsel for the defendant.

8 MR. SHOOK: Yes, Your Honor. This is John Shook on behalf of the  
9 Felsners.

10 DISCOVERY COMMISSIONER: Thank you, Mr. Shook.

11 MR. LOWRY: Michael Lowry on behalf of --

12 DISCOVERY COMMISSIONER: And for defendant?

13 MR. LOWRY: I'm sorry. Michael Lowry on behalf of Mr. Yusi and Keolis.  
14 There is another defendant. They haven't filed anything concerning this motion  
15 and I don't know if they plan to be here.

16 MR. SCHOPICK: I'm here. David Schopick for -- [inaudible].

17 DISCOVERY COMMISSIONER: I can't hear you, Mr. Schopick.

18 MR. SCHOPICK: Sorry. David Schopick.

19 DISCOVERY COMMISSIONER: Who do you represent?

20 MR. SCHOPICK: Alexander Dennis, Inc.

21 DISCOVERY COMMISSIONER: Okay.

22 All right. Again, Plaintiff Felsner claims she has an ongoing brain  
23 injury as a result of the fall, and the defendant is seeking to conduct a Rule 35  
24 examination. It's my understanding that there are certain parameters that are



1 at issue and whether or not it's appropriate for the examination to go forward.

2 So counsel, would you like to begin?

3 MR. LOWRY: Yes, Your Honor. I did pay attention to your Ferrellgas  
4 hearing just now, so I have an idea of where you may be going with this. I think one  
5 distinction between this file and Ferrellgas is whether we even get to plaintiff's rather  
6 lengthy objections. Plaintiff did not raise any of these during the 2.34 conference.  
7 And I think Valley Health provides us with the basis to say if you are unwilling or  
8 unable to raise your objections in good faith during the 2.34 conference, then you  
9 should not be presenting these objections for the first time after the motion has been  
10 filed. That's why the motion was drafted the way it was. Mr. Shook and I had our  
11 telephone call and we talked about the two issues that were noted in the motion.  
12 We couldn't resolve them, so I did my declaration and I filed my motion and we  
13 move on. And then we get the opposition that barely even gives lip service to the  
14 topics that were raised in the meet and confer.

15 So if the goal is for us to have meaningful meet and confers where  
16 there is an actual opportunity to resolve the issues before we get to the discovery  
17 commissioner, then the Court needs to be willing to take a stand and say no, you  
18 are not allowed to present these arguments because under Valley Health you never  
19 put them out there under the meet and confer. Before I get to the other arguments,  
20 I figured I at least ought to raise that. Otherwise, I think I have an idea how you are  
21 going to rule and I can address that in a moment.

22 DISCOVERY COMMISSIONER: Okay. And I think just as a way of  
23 procedure I need to also say that there was a request that a slight extension of  
24 discovery is necessary. Any change to the disclosure deadlines or any discovery

1 extensions must be brought before the district court judge. That's no longer  
2 appropriate before the discovery commissioner. And so any change that's being  
3 sought, whether by way of stipulation or by motion, needs to be brought before the  
4 district court judge. So I won't be handling that portion of the motion where it was  
5 requesting an extension of the disclosures to January 8th.

6 MR. LOWRY: Understood.

7 DISCOVERY COMMISSIONER: I'm not saying that I think it's an  
8 inappropriate request. I'm just saying that that needs to be brought before the  
9 district court judge.

10 MR. LOWRY: Okay. I understand that. So I guess that leaves us back  
11 at that meet and confer.

12 DISCOVERY COMMISSIONER: Okay. So let me give Mr. Shook a  
13 chance to respond. So which -- based on your understanding, then, so that I'm  
14 clear, Mr. Lowry, first, what issues do you believe are appropriately before -- which  
15 parameters do you believe are appropriately before me versus the ones that you  
16 think are not?

17 MR. LOWRY: Sure. So the issues that are appropriately before you are  
18 the ones that are raised in the original motion, and then if you have our reply they're  
19 addressed in topic or section 2, and that's pages 2 and 3 of the brief. That was --  
20 the objections were about whether Mrs. Felsner could be required to drive from her  
21 home in the Detroit area to Ann Arbor to attend the examination, and then there was  
22 an argument about prior testing, that we learned about only in the opposition, had  
23 occurred in February of 2020. And so we consider that fail because her condition,  
24 her mental condition and her injuries change over time. That's just not making an

1 allegation that she's fibbing or anything, I'm just saying that over time your body  
2 changes. And so the need for current data is there, just like an ongoing physical  
3 examination after a surgery or to assess someone's pain condition, they change  
4 over time. And so that's the point.

5 DISCOVERY COMMISSIONER: All right. Let me turn to -- anything you'd  
6 like to add, Mr. Schopick, or I'll turn the time over to Mr. Shook if there's nothing  
7 from you, Mr. Schopick.

8 MR. SCHOPICK: Yeah, we don't have any comment.

9 DISCOVERY COMMISSIONER: Okay. Mr. Shook.

10 MR. SHOOK: Yes, Your Honor. So with regard to the meet and confer,  
11 we did meet and confer. It was relatively brief. We advised Mr. Lowry that we didn't  
12 feel like a Rule 35 exam was appropriate, considering the testing that occurred in  
13 February of this year and that it would be duplicative. And that from review of the  
14 raw data from that neuropsych exam as part of her treatment and a review of her  
15 medical records and taking her deposition, which they have not done yet, it would  
16 be appropriate to not have an IME, a Rule 35 exam on this particular plaintiff.

17 So we addressed it. We advised him that we felt like it was  
18 unnecessary. We were at loggerheads and so a motion was appropriate. So I  
19 don't believe it would be procedurally proper to preclude us from bringing arguments  
20 when the rule does not require us to stipulate. It does require counsel to seek an  
21 order if they feel like it's appropriate.

22 With regard to the 52.380 substantive right that it provided that an  
23 observer must be present if requested and that it be audiotaped if requested and  
24 that good cause not be shown. We agree with Your Honor and what you laid out

1 previously. Dr. Axelrod has opined and we provided his affidavit that confirmed  
2 that he felt like he could not provide -- he could not ethically go forward and that his  
3 data would be invalid if he tested.

4 And so considering the proportionality of what would be involved for  
5 Ms. Felsner to travel to Dr. Axelrod's office to take a test that occurred eight months  
6 ago, considering her limited Korean language or English skills, she's a Korean  
7 speaker, considering that she has a documented brain injury that is confirmed, we  
8 showed the CT scans and Dr. Vangel's report confirms that she has a brain injury,  
9 and considering that Dr. Axelrod's own documentation that was attached to Mr.  
10 Lowry's motion that a third party observer is appropriate in certain circumstances,  
11 particularly when you have someone that suffers from severe anxiety, which Dr.  
12 Vangel said she does, a person that is elderly wouldn't feel comfortable, a person  
13 that has a documented brain injury that precludes her ability to live independently.  
14 Here we've got a person that is not able to drive, and so in this situation we've got  
15 either an order or the husband to transport her or she gets on a bus. Obviously  
16 that's not going to be very pleasant for this person that just fell down the stairs of  
17 a bus.

18 So with regard to all of this, we feel like it's probably going to be a  
19 moot point. I doubt Dr. Axelrod is going to go forward, considering his affidavit  
20 regarding his stance. But if -- and so because of that, because we feel like he's  
21 probably not going to go forward, it may be better to continue the discussion on  
22 which conditions would apply until after we have confirmation.

23 DISCOVERY COMMISSIONER: Well, I think I'd like to go through the  
24 parameters today and I think the fact that there was no agreement reached on the

1 examination itself doesn't mean that the parameters all had to be addressed in  
2 the 2.34. I think it's preferable, but I'm going to at least go through those with you.

3           So I'm going to go through all of those. Whether or not Dr. Axelrod  
4 agrees to go forward or not, I do think there is good cause to warrant a Rule 35  
5 exam in this case. I am going to let the defendant select the examiner. I think it  
6 is appropriate for -- typically the plaintiff would be required to come to the state of  
7 Nevada. I think under the circumstances it's quite a generous offer to allow it to go  
8 forward close to her home and I'm going to accept that on behalf of the defendants  
9 that it will go forward in the state of Michigan. I think within an hour drive of her  
10 location is appropriate. She's free to select and pay for the transportation she  
11 desires to get her there, but I don't think that that is burdensome to require her to  
12 travel no more than one hour for the examination by vehicle, okay, because I do  
13 think it's appropriate for the defendants to be able to get their own test data to  
14 defend their position in this case.

15           So with regard to the parameters, I'll just go through them. The  
16 examination will be coordinated with counsel. And it says conducted no later than  
17 December 19th. I'm fine with that. Number 2, any information that the examiner  
18 would like the plaintiff to fill out needs to be provided to plaintiff's counsel 10 days  
19 prior to the examination.

20           MR. LOWRY: Commissioner, I may be able to help you. In the reply I listed  
21 the terms that I actually had a problem with.

22           DISCOVERY COMMISSIONER: Okay.

23           MR. LOWRY: I didn't know if that would shorten your list or not. I know you  
24 have other matters as well.

1 DISCOVERY COMMISSIONER: Okay. So which ones -- I guess I didn't  
2 have that documented. Okay.

3 MR. LOWRY: On page 11 of the reply we go through the terms with which  
4 I had a problem.

5 DISCOVERY COMMISSIONER: Okay. Why don't you tell me the numbers  
6 of those.

7 MR. LOWRY: Sure. Number 1, because I read that as requiring the  
8 examination to go on December 19 or be it waived. And from your comment just  
9 now I understand that's not how you interpret Number 1.

10 DISCOVERY COMMISSIONER: No.

11 MR. LOWRY: The next one is --

12 DISCOVERY COMMISSIONER: Okay.

13 MR. LOWRY: The next one is Number 3, and that was due to the ethical  
14 bar -- [inaudible] --

15 DISCOVERY COMMISSIONER: I understand.

16 MR. LOWRY: -- neuropsychologists. And I understand based on your ruling  
17 you're not persuaded by the ethical bars on that, so you're going to --

18 DISCOVERY COMMISSIONER: Well, you know, it's a very complicated  
19 issue with psychological evaluations and I certainly understand that the doctors have  
20 their positions on that. I just am compelled to follow what the law is in the state of  
21 Nevada, and under NRS 52.380 an observer can be present. That's Number 3.  
22 And the examination may be audio recorded. I understand that that may eliminate  
23 some physicians or psychologists from wanting to do the evaluation, but I think  
24 under the law that I am instructed to follow I am going to allow those two parameters,



1 that an observer may be present and the exam may be audio recorded.

2 So what was the next number?

3 MR. LOWRY: There was 3 and 4. You just took care of Number 4. Number  
4 5, it sought to bar me from attending the examination. And we're arguing that that  
5 goes to the structural bias consistent -- that NRS 523.80 is specifically designed to  
6 create. The plaintiff and her lawyer can attend this but the defense, who's paying  
7 for the examination, cannot attend.

8 DISCOVERY COMMISSIONER: And I am not going to allow the defense  
9 counsel to attend the examination.

10 MR. LOWRY: I have not had this particular issue come up. Is there -- do  
11 you have -- why? I guess is my question.

12 DISCOVERY COMMISSIONER: Well, the statute doesn't allow for the  
13 defendant to have an observer because the defendant is the one undertaking the  
14 examination, and so obviously you selected the person that you would like to do that.  
15 The doctor can have a staff member assist, but there's nothing within Rule 35 or  
16 NRS 52.380 that allows the defense counsel to attend. And it does allow a recording  
17 which defense counsel is able to obtain, but I am not going to authorize the defense  
18 counsel to be present.

19 MR. LOWRY: Thank you. The next one was Number 7 and it was when  
20 the report had to be provided.

21 DISCOVERY COMMISSIONER: The report will be -- what I'm going to say  
22 is that the production of the report must follow NRCP 35. It must be submitted  
23 timely under Rule 35 and/or the initial expert disclosure deadline, whichever comes  
24 first.

1 MR. LOWRY: That's fine. That's what we had proposed in our reply. The  
2 next two were -- I combined two of them. They would have been topics 8 and 24.  
3 They seemed related to me. The plaintiff wanted to peremptorily bar defendants  
4 from obtaining a second examination, if necessary. Now, clearly, is a second  
5 examination common? Certainly not. But I can't predict the future, just like Mr.  
6 Shook and the Court can't predict the future, but I don't want to be barred from it  
7 at this point automatically. If we need -- believe another examination is necessary,  
8 certainly we'd have to bring a motion, but I don't want that to be just automatically  
9 barred.

10 DISCOVERY COMMISSIONER: No. And I think any request for further  
11 evaluation or examination of the plaintiff will be brought by motion to the Court.  
12 I think that's what's appropriate.

13 MR. LOWRY: Thank you. Request Number 9 --

14 DISCOVERY COMMISSIONER: And depending on the circumstances,  
15 each will be evaluated individually. Number 9.

16 MR. LOWRY: Topic 9 wanted to bar Dr. Axelrod from requesting any type  
17 of identification from the plaintiff. I thought that was just simply unreasonable  
18 because the examiner does need to confirm who this person is and that I am  
19 examining the person I'm supposed to examine. So asking her to produce some  
20 type of photographic government-issued identification seems pretty reasonable  
21 to me.

22 DISCOVERY COMMISSIONER: And I think that's appropriate. I think the  
23 examinee should present government-issued photo identification on the day of the  
24 examination.

1 MR. LOWRY: Okay.

2 MR. SHOOK: And to confirm that, a photograph will not be taken?

3 DISCOVERY COMMISSIONER: No photograph will be taken, but a  
4 photocopy of the driver's license or passport or other government-issued I.D. can  
5 be taken.

6 MR. LOWRY: Okay. That's fine. Number 10, the plaintiffs wanted to put  
7 an arbitrary time limit on how long the examination can take. I'm not the physician.  
8 I can't tell you what he's going to encounter if this examination can go forward, so  
9 the time limit seems arbitrary. If the physician runs into a limit where he's unable to  
10 complete it, we're going to have to address that at that point, but I also don't want  
11 to be saying you have eight hours, cram as much in there as you possibly can. And  
12 if that's not enough time, then my clients are denied the opportunity to proceed to  
13 obtain that data.

14 MR. SHOOK: Your Honor --

15 DISCOVERY COMMISSIONER: I'm going to say -- I think what's  
16 appropriate, and I'll let Mr. Shook respond, but I think what's appropriate is for a  
17 reasonable time for the psychological evaluation to go forward. If there is any  
18 objection, then the Court can be contacted or a further motion can be brought. But  
19 I am not going to limit -- you know, maybe that's something that we need to get from  
20 the doctor as to how long he anticipates it will happen. But sometimes, you know,  
21 with a neuropsychological evaluation those may last a significant period of time.

22 And so what was the parameter that you were seeking to have put  
23 on it, Mr. Shook?

24 MR. SHOOK: Eight hours, Your Honor. We believe that -- you know, we've

1 got a balancing of the liberty interest, essentially, and the defendant's right to get his  
2 expert up to speed. Eight hours, you know, is appropriate. It's approximately how  
3 long the testing with Dr. Vangel. And also consider in particular this case you've got  
4 a Korean -- a primary Korean speaker. Many of the tests that Dr. Vangel maybe  
5 would have otherwise and said he would have provided or given he didn't do  
6 because of the language and cultural issues. We think that that same limitation  
7 would apply, at least if Dr. Axelrod is considering that. And so it should limit the  
8 amount of time. Eight hours should be a reasonable and proportional amount of  
9 discovery to get what he needs.

10 MR. LOWRY: Commissioner, she -- [inaudible].

11 DISCOVERY COMMISSIONER: It should be, but there may be some  
12 extenuating circumstances that occur that day, you know, and so I'm not willing to  
13 put it in an order what it will be at this point, not knowing what may happen. I think  
14 it's appropriate to say that the examination shall go forward on one day and then  
15 if additional time is needed, additional time will be sought from the Court with  
16 supporting information from the examiner. And I don't think it should be ruled out  
17 that that might need to be considered.

18 MR. LOWRY: That's fair. Number -- I also then grouped Numbers 12, 29,  
19 30 and 31 together. They seem to be instructing Dr. Axelrod how to --

20 DISCOVERY COMMISSIONER: I'm sorry, 12 -- what was the next one?

21 MR. LOWRY: 12 and then the three together, 29, 30 and 31.

22 DISCOVERY COMMISSIONER: Okay.

23 MR. LOWRY: They are -- to me they seem to be instructing Dr. Axelrod  
24 how to practice and trying to limit his opinions or his questioning. And to save us

1 some time, I believe from the prior case, the Ferrellgas one that you just ruled on,  
2 he can ask these questions. It's a little bit more difficult to limit a neuropsychological  
3 examination as opposed to a physical examination where, say, you've got a  
4 shoulder problem, well obviously he shouldn't be examining the legs. But with  
5 neuropsychological it's a bit more difficult. And so I think the ruling was you would  
6 leave that to the examiner's discretion. And if I misspoke, I'm sure you'll clarify me.

7 DISCOVERY COMMISSIONER: All right. Let me -- go ahead, Mr. Shook.

8 MR. SHOOK: Your Honor, if we could deal with them one at a time.  
9 So 12 deals with inquiring of the health of family members, of other people. And  
10 so we're talking about asking about medical conditions for family members. That  
11 seems to be appropriate to me to limit that to general questions regarding the  
12 treatment and mental or medical conditions of other family members because  
13 they're not at issue and you've got privacy issues with regard to other family  
14 members. So I think 12 is appropriate.

15 DISCOVERY COMMISSIONER: I think 12 can be limited to the examiner.  
16 I'm not going to limit it to Dr. Axelrod. But the examiner is permitted to generally  
17 inquire regarding the mental health of family members because he's only evaluating  
18 the mental, psychological condition. I don't think their physical medical conditions  
19 are reasonably related to his inquiry. So I think that the mental or psychological  
20 conditions of other family members, without asking who the specific person is. For  
21 example, I think it's appropriate if he were to understand that there's a history of  
22 some kind of medical -- mental, psychological condition within the family. I think  
23 that's appropriate.

24 I think that it also should be -- with regard to 29, secondary gain and

1 malingering will be addressed by the trial judge. I am just going -- the only limitation  
2 I'm going to state with regard to 29 through 31 is the examiner will offer -- only offer  
3 opinions that are within the examiner's area of expertise. Failure to do so may result  
4 in limitation of testimony by the trial judge; limitation or exclusion, for that matter.  
5 So I'm just going to say the examiner will not offer opinions outside the examiner's  
6 area of expertise.

7 MR. LOWRY: Commissioner, do you just want that language in the Report  
8 and Recommendation?

9 DISCOVERY COMMISSIONER: Yes. The examiner will not offer opinions  
10 outside of the examiner's area of expertise.

11 MR. LOWRY: Okay.

12 DISCOVERY COMMISSIONER: By doing so, the examiner may face  
13 limitation or exclusion of the examiner's testimony at the time of trial.

14 MR. LOWRY: All right. 16, this is something I would normally see in a  
15 physical examination and it makes sense in that context. We're dealing with a  
16 neuropsychological --

17 DISCOVERY COMMISSIONER: I think it can just say -- I don't think that  
18 this would be an issue, but it should just say no physically-invasive testing will be  
19 performed.

20 MR. LOWRY: Thank you. I can do that.

21 DISCOVERY COMMISSIONER: Because certainly I think a psychological  
22 evaluation is somewhat invasive just in and of itself, but no physically-invasive  
23 testing will be performed.

24 MR. LOWRY: Correct. 17 --



1 DISCOVERY COMMISSIONER: Number 17, the expert will follow Rule 35  
2 in production of the report, and the report will be due as required by Rule 35 or the  
3 disclosure deadline, whichever comes first.

4 MR. LOWRY: So I had one additional issue with 17, 18, and then it also  
5 goes to 26. But specifically with psychology and neuropsychologists, the testing that  
6 they use is standardized, so historically these are copyrighted and if they get out into  
7 the public sphere not only do the examiners face potential liability, but it also could  
8 compromise the test. So exchanging --

9 DISCOVERY COMMISSIONER: Yes. I think the data should only be  
10 released to plaintiff's expert only.

11 MR. LOWRY: Thank you. That's -- yeah, okay.

12 MR. SHOOK: Your Honor, if we don't have an expert, can we not get the  
13 data?

14 DISCOVERY COMMISSIONER: Didn't you have a doctor who performed  
15 the same tests?

16 MR. SHOOK: He's a treater. He's not a retained expert.

17 DISCOVERY COMMISSIONER: Oh, he's a non-retained expert, then, I  
18 would assume.

19 MR. SHOOK: He is.

20 DISCOVERY COMMISSIONER: So the treating -- okay, so the treating  
21 provider, the non-retained or retained expert is who it is to be disclosed to, not to  
22 counsel. It goes to the doctor who performed the same tests --

23 MR. LOWRY: Okay.

24 DISCOVERY COMMISSIONER: -- or similar tests.

1 MR. LOWRY: Understood. And I understood that, the ruling, too.

2 DISCOVERY COMMISSIONER: So it should say to the plaintiff's treating  
3 physician, the plaintiff's treating psychologist and/or retained expert.

4 MR. LOWRY: Understood. 17, 18 and 26, we just talked about. Okay.  
5 So we had an objection to 19, 20 and 27. There's no --

6 DISCOVERY COMMISSIONER: 19, 20 and 27.

7 MR. LOWRY: Primarily these are not -- we're not generating medical  
8 records from this examination. We're not creating a doctor-patient relationship  
9 designating these as confidential. It implies something that's not there and it seems  
10 inappropriate for a Rule 35 exam.

11 DISCOVERY COMMISSIONER: What's the purpose of 19 and 20, Mr.  
12 Shook?

13 MR. SHOOK: 19, use of data is limited to only that which is required for the  
14 resolution of the pending action. So this is to -- well, it's part of protecting the data.  
15 That's assuming that we're going to get the data.

16 DISCOVERY COMMISSIONER: Okay. The data is only to be disclosed --  
17 the examiner will only disclose the data to plaintiff's retained and/or non-retained  
18 experts.

19 MR. LOWRY: The raw data?

20 DISCOVERY COMMISSIONER: The raw data.

21 MR. LOWRY: Yeah. Okay.

22 MR. SHOOK: Your Honor, you know -- okay, so that means I can't see --  
23 so let's assume that I retain this treating expert and say, hey, you know, tell me  
24 about the data? Are you saying that he can't tell me what the data said?

1 DISCOVERY COMMISSIONER: He can tell you what his analysis of it is,  
2 but I don't think it's appropriate for him to release it because it's my understanding  
3 that that data is to stay confidential.

4 MR. SHOOK: Normally -- my understanding is, and this is what, you know,  
5 the articles that were attached to the reply brief said, normally the data can be  
6 released to counsel to -- with a proviso that it be destroyed at the end, that it be kept  
7 privileged, that it be filed under seal if it needs to be. But I feel like we are -- you  
8 know, we're allowed to see the data so that we can prepare cross-examination, so  
9 we can understand the basis for the opinion. I mean, let's say this treating expert,  
10 Dr. Vangel, you know, he's off base in his analysis. I have no way to assess what  
11 his interpretation of the raw data is unless I have the raw data.

12 DISCOVERY COMMISSIONER: But your expert will. Your expert has that  
13 ability.

14 MR. SHOOK: Well, I don't have an expert. That's the point, is that Dr.  
15 Vangel is a treater.

16 DISCOVERY COMMISSIONER: You have a treating physician.

17 MR. SHOOK: Again, and so this treating physician was not selected by me,  
18 so I don't know if this treating expert is competent, so I need that. I mean, I guess  
19 the bottom line is for fundamental fairness is to allow us to see the raw data. We  
20 can provide protection for this, but to never have the raw data --

21 DISCOVERY COMMISSIONER: Mr. Shook, how do you looking at the data  
22 -- I mean, I'm assuming that you're not a psychological expert. How are you looking  
23 at raw data going to be able to interpret it or utilize it without having someone  
24 interpret it for you?

1 MR. SHOOK: Well, I would say I have not seen the questions, but let's  
2 assume that a question says something like, you know, I have anxiety in X situation.  
3 Understanding that, how that would be a positive answer or a negative answer, it  
4 is necessary for me to sort of evaluate and cross-examine the other expert, even,  
5 perhaps. I feel like it's --

6 DISCOVERY COMMISSIONER: Mr. Lowry.

7 MR. LOWRY: So I think, Commissioner, I agree with your analysis that  
8 the raw data has to go between the trained psychologists that will be in this case  
9 one way or the other. And if one of them or both of them are off base in some  
10 interpretation of the raw data, then they are the ones that are going to have to  
11 inform Mr. Shook and I of those problems because neither of us have any  
12 background in psychology that would qualify us to interpret these data. Even the  
13 raw data themselves, we don't know why a certain question is on the test. We don't  
14 know that it is designed to measure --

15 DISCOVERY COMMISSIONER: Okay.

16 MR. LOWRY: -- or frequently the questions are tied together. So  
17 exchanging the data between the experts or the treaters seems to be an appropriate  
18 solution that we've used for years.

19 DISCOVERY COMMISSIONER: And that's what I'm going to limit it to.

20 Mr. Shook, you're going to have an audio recording, but the raw data  
21 numbers are only to be released to either a treating or non-treating expert. I'm  
22 sorry, a retained or a non-retained expert. The raw data will only be released to  
23 a retained or non-retained expert. Certainly you will have access to the audio  
24 recording of the examination.

1 MR. SHOOK: And just -- and I'm not familiar. Is it true that the audio  
2 recording picks up the question that's asked, or is it simply a written test?

3 MR. LOWRY: They're either written or on a computer, so it's not -- some  
4 of them. If the others are orally done, then, yeah, they'd be recorded and you'd be  
5 able to hear those.

6 DISCOVERY COMMISSIONER: Anything that's oral will be recorded.  
7 Anything that's written will not. But the raw data is only going to be released to a  
8 professional, a psychological professional.

9 MR. LOWRY: Okay.

10 DISCOVERY COMMISSIONER: All right. What's the next issue?

11 MR. LOWRY: Let's see. 22, plaintiff wanted to seal everything, and that's  
12 just not how we operate in this court. We do not automatically seal documents.  
13 So if there are certain documents that come out in the case the plaintiff needs to  
14 be sealed, then she can file the appropriate motion to do so. But imposing a  
15 blanket --

16 DISCOVERY COMMISSIONER: I think that the psychological evaluation --  
17 I think the psychological evaluation and the report related to her psychological  
18 evaluation is appropriately sealed.

19 MR. LOWRY: She hasn't even sealed her own psychological evaluations  
20 that have been disclosed in this case.

21 MR. SHOOK: Your Honor --

22 MR. LOWRY: How is that not hypocritical?

23 DISCOVERY COMMISSIONER: Okay. All right. Well, let me then restate  
24 it. It will not be attached to any filed document.

1 MR. LOWRY: Thank you.

2 DISCOVERY COMMISSIONER: Mr. Shook, go ahead.

3 MR. SHOOK: We actually did take measures to protect that report. It  
4 wasn't attached and we delivered it to you individually. We can certainly seal that.  
5 That was my intent was not to disclose that, if you see the way I wrote the report  
6 or the motion. So we feel it's appropriate to seal this type of document.

7 DISCOVERY COMMISSIONER: I'm not going to say it is sealed, but I am  
8 going to say that the report of her psychological evaluation will not be attached to  
9 any publicly-filed document.

10 MR. LOWRY: Oh, publicly. Just making my notes here, Commissioner.  
11 23, we interpreted this term as giving the plaintiff a unilateral right to terminate the  
12 examination at any point, and neither Rule 35 or NRS 52.380 allow that to happen.

13 DISCOVERY COMMISSIONER: Well, I'm going to say that the plaintiff  
14 can certainly terminate an examination at any time. You know, I'm not saying that  
15 anyone has to be held hostage. But if they do so, they do so at their own risk and  
16 there has to be good cause and a reasonable basis for doing so or there may be  
17 sanctions that are applied. So I'm not going to -- I mean, I think that it just needs to  
18 say that -- I don't think this is an appropriate writing of it. I just think that the  
19 examination will go forward with one day and reasonable breaks, including a lunch  
20 break will be given.

21 MR. LOWRY: Okay. Then we get to 28. This looks to be one that I think  
22 you addressed in your Ferrellgas motion -- [inaudible].

23 DISCOVERY COMMISSIONER: I'm not going to -- I'm not going to say  
24 what will be admissible or not admissible at the time of trial. That will be an issue



1 that has to be dealt with by motions in limine by the district court judge regarding  
2 admissibility.

3 MR. LOWRY: Okay. That reaches the end of the terms and I appreciate  
4 Your Honor's time. I now need to do -- as a result of the rulings I need now to  
5 request a complete stay of discovery because I have an examination scheduled for  
6 December 19 with a neuropsychologist who says ethically he cannot abide by what  
7 is now the Court's ruling that an observer must attend because of the statute. And,  
8 one, I don't know that I can find someone to replace him. And, two, even if I could,  
9 I'm a little worried about whether I can agree to that because now I have an ethical  
10 guideline that says these physicians are not able to do that. So what we --

11 DISCOVERY COMMISSIONER: Okay. Well, like I said earlier, the stay of  
12 discovery, you're going to have to file that before the district court judge. I am not  
13 going to stay discovery deadlines. You can certainly go forward or not go forward  
14 within the time frame that you have left, but if you're seeking a stay of discovery that  
15 will have to be filed with the district court judge.

16 MR. LOWRY: Okay. Well --

17 MR. SHOOK: Your Honor, one issue -- sorry.

18 MR. LOWRY: I thought that was all the issues, but I think Mr. Shook now --  
19 he has another one.

20 MR. SHOOK: Your Honor, so we saw where they noted the tests that are  
21 typically conducted by Dr. Axelrod, but it's not a guarantee. We'd like to know  
22 exactly what he plans to give, which tests, and actually laid out.

23 DISCOVERY COMMISSIONER: That will be in his report what was  
24 conducted at the time. He can do anything that is reasonably part of a neuro-

1 psychological examination, and everything he does shall be contained -- he needs  
2 to spell out in his report.

3 MR. SHOOK: So, Your Honor, that is the concern is that he's having her do  
4 tests that are not reasonable and appropriate, considering her cultural background,  
5 as Dr. Vangel wrote. Some of these tests have a -- you know, obviously they've  
6 got a U.S. normative data set that they've come up with this sort of right answers  
7 for. Here you've got a woman that, you know, is not that. She grew up in Korea,  
8 14 years there, and limited English skills.

9 DISCOVERY COMMISSIONER: That goes to the weight of his testimony  
10 and whether it should be considered. That doesn't really go to the discoverability or  
11 the ability of him to -- or the reasonableness of him undertaking the testing. So I  
12 think that what he -- I'm not going to limit -- I'm not an expert in the field and I'm not  
13 going to limit what he believes is reasonable to his evaluation, but certainly that's  
14 a matter for cross-examination at the time of trial or a motion in limine.

15 So that's going to be the recommendation, gentlemen. I'm going to  
16 ask Mr. Lowry to prepare the Report and Recommendation. Please circulate that to  
17 Mr. Shook and to Mr. Schopick for their review as to form and content.

18 Anything else anyone would like to add?

19 MR. SHOOK: No, Your Honor.

20 MR. LOWRY: Mr. Schopick, do you even want your copy of this, since you  
21 didn't have anything to say?

22 MR. SCHOPICK: I assume I'd get a copy just of the ruling.

23 MR. LOWRY: I couldn't hear you.

24 DISCOVERY COMMISSIONER: Since he participated in the hearing,

1 I would ask that he have a copy to sign off on as to review as to form and content.

2 MR. LOWRY: Understood. Thank you, Commissioner. Have a good day.

3 DISCOVERY COMMISSIONER: Thank you, gentlemen. Have a great day  
4 and stay well.

5 MR. LOWRY: Thank you.

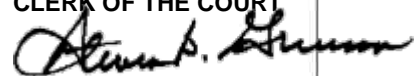
6 MR. SHOOK: Thank you. Bye.

7 (PROCEEDINGS CONCLUDED AT 10:55 A.M.)

8 \* \* \* \* \*

9  
10 ATTEST: I do hereby certify that I have truly and correctly transcribed the  
11 audio/video proceedings in the above-entitled case to the best of my ability.  
12 Note that BlueJeans technical glitches may result in the audio-video distortion  
and/or dropped audio in the recording.

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14 Liz Garcia, Transcriber  
15 LGM Transcription Service  
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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

HEATHER FELSNER and ROGER FELSNER, Case No.: A-18-781000-C  
Dept. No.: 27

Plaintiffs,

vs.

**Discovery Commissioner's Report &  
Recommendations re Edgardo Yusi & Keolis  
Transit Services, LLC's Motion for Rule 35  
Examination**

KEOLIS TRANSIT SERVICES, LLC, Foreign  
Limited-Liability Corporation and EDGARDO  
PAGUIO YUSI; ALEXANDER DENNIS,  
INC., a Foreign Corporation; DOES II through  
X, inclusive; and ROE BUSINESS ENTITIES I  
through X, inclusive,

Defendants.

**Hearing Date:** November 19, 2020, 9:30 a.m.

**Attorney for Plaintiffs:** John Shook of Shook & Stone

**Attorney for Mr. Yusi & Keolis Transit Services, LLC:** Michael Lowry of Wilson Elser  
Moskowitz Edelman & Dicker

**Attorney for Alexander-Dennis, Inc.:** David Schopick of Springel & Fink

**I. Findings**

Defendants Mr. Yusi and Keolis (collectively "Mr. Yusi") moved for a Rule 35 neuropsychological examination of Heather Felsner. She opposed. Defendant Alexander Dennis took no position on the matter. The parties raised numerous issues.

First, a Rule 35 neuropsychological examination is appropriate in this case based upon the allegations Mrs. Felsner has presented. Rule 35 allows Mr. Yusi to select an appropriately

1 qualified examiner. Mrs. Felsner does not dispute that the proposed examiner, Dr. Axelrod, is  
2 appropriately qualified.

## 3 II. Recommendations

### 4 a. Travel Objection

5 Mr. Yusi would be permitted to require Mrs. Felsner to come to Las Vegas for a Rule 35  
6 examination. However, he <sup>ED</sup>have proposed Dr. Axelrod, who is located in Ann Arbor, Michigan.  
7 Mrs. Felsner resides in Southfield, Michigan. Mr. Yusi estimates it is 41.5 miles from her home  
8 to Dr. Axelrod's office. Mrs. Felsner objects to this travel and notes she has been advised to  
9 discontinue driving due to her injuries.

10 Mrs. Felsner resides with her husband, who is also a party to this case. There is no  
11 indication he has any driving restrictions. In the circumstances of this case, a drive of up to 60  
12 minutes is not unreasonable.

### 13 b. Examination is Not Duplicative

14 Mrs. Felsner also objects to the examination generally as duplicative of testing she  
15 received from her own physician in February, 2020. <sup>ED</sup>Time has passed though and Rule 35 allows  
16 defendants to obtain their own data in this particular circumstance, <sup>when good cause is found. ED</sup>

### 17 c. The Meet & Confer

18 Mr. Yusi asserts that Plaintiff presents several objections not discussed during the meet  
19 and confer required by EDCR 2.34(d). He argues these objections should not be heard because  
20 they were not raised during the meet and confer, and argue this is similar to the logic from *Valley*  
21 *Health*. The court disagrees and heard Mrs. Felsner's other objections on the merits.

### 22 d. ~~NRS 52.380 is Constitutional & Controls~~ <sup>and NRCP are in conflict. ED</sup>

23 Mrs. Felsner intends to invoke NRS 52.380(1) and (2) to have an observer attend the  
24 Rule 35 examination with her. She also intends to invoke NRS 52.380(3) to audio record the  
25 examination. Mr. Yusi argues NRS 52.380 conflicts directly with Rule 35, is an unconstitutional  
26 procedural statute, and it should not apply. The court disagrees. NRS 52.380 <sup>involves and</sup> created a  
27 <sup>affects a</sup> substantive right and <sup>shall be applied in this instance.</sup> abrogates Rule 35 to the extent the two conflict. <sup>ED</sup>

Mr. Yusi contend ethical prohibitions <sup>bar</sup> ~~barring~~ neuropsychologists from conducting an examination with a third-party observer like NRS 52.380 allows. Specifically, Dr. Axelrod signed an affidavit indicating he could not perform an examination with an observer present. ~~These ethical prohibitions do not overcome the substantive right NRS 52.380 created.~~ <sup>ED</sup> If Dr. Axelrod is unable or unwilling to perform the examination, Mr. Yusi may locate another appropriately qualified examiner.

**e. Plaintiff's proposed conditions.**

Mrs. Felsner's opposition proposed 31 requirements as a condition of any Rule 35 examination. Mr. Yusi objected to certain of them, identified in italics below.

1. *The examination will be coordinated with Plaintiff's counsel provided that it be conducted no later than December 19, 2020.* Mr. Yusi was concerned this term would require them to conduct the examination on December 19 and if not then the opportunity to examine would be lost. <sup>The court disagrees. ED</sup> ~~This is not how the court reads this term.~~
2. Plaintiff shall not be required to fill out any patient information forms of any type whatsoever, including, but not limited to "new patient" forms, insurance forms, identification forms, authorizations for records, arbitration forms, waivers and releases and will not be asked to do so by the defense medical professional or his/her staff. <sup>There is no dispute as to this condition. ED</sup>
3. *A representative of Plaintiff including the plaintiff's attorney may attend the entire exam.* <sup>(which may be)</sup> ~~ED~~ Mr. Yusi objected to this term because it conflicts with Rule 35. However the court concludes NRS 52.380(1) and (2) <sup>involves and affects a</sup> ~~create~~ <sup>ED</sup> a substantive right that allows Plaintiff do to as term 3 proposes. NRS 52.380(1) and (2) control, not Rule 35. Accordingly, this Court finds this condition appropriate.
4. *The exam may be audio recorded at Plaintiffs discretion. The defense medical professionals and their staff will accommodate all reasonable requests to accomplish this recording, including, but not limited to taking any necessary breaks during the examination; taking a break if technical difficulties arise.* Mr. Yusi objects for the same reasons as term 3. The court disagrees with those reasons because NRS 52.380(3)



controls and specifically allows for recording. Accordingly, this Court finds this condition appropriate.

5. *Defense counsel may not attend the exam.* Mr. Yusi asserts if Mrs. Felsner's lawyer can attend the examination, then so should their lawyer. The court disagrees. Neither Rule 35 nor NRS 52.380 allow a defendant's lawyer to attend an examination.

6. Liability questions may not be asked and the examiner will not offer any opinions as to liability. *The parties agree to this condition.*

7. *A copy of the report should be forwarded to Plaintiffs' counsel upon receipt by Defendants.* The court agrees with Mr. Yusi and Keolis as to term 7. NRCP 35(b)(1) governs this topic.

8. *This will be the only psychological, neuropsychological, psychiatric defense medical exam allowed to the defendants in this case.* ~~The court agrees with Mr. Yusi as to this term.~~ *Mr. Yusi* ~~He~~ will not be automatically precluded from a second Rule 35 examination in this case. However, absent a stipulation of the parties to a second examination, a motion requesting a second examination would be necessary.

9. *The defense medical professional's office will not take any photographs, finger prints or other identification information from the Plaintiff, including, but not limited to license, Social Security number and home address.* *Mr. Yusi disagrees with this term.* The court agrees with Mr. Yusi as to term 9.

The examiner may request that Mrs. Felsner present government issued photographic identification so as to identify herself. The examiner may make a photocopy of the identification provided so as to document it. The examiner may not photograph Mrs. Felsner.

10. *Dr. Axelrod shall conduct the examination of Mrs. Felsner, which total examination (from start to finish and including any written testing) may take up to 8 hours with Plaintiff able to take reasonable and appropriate breaks as needed. The reasonable and appropriate break periods will not be included in the 8 hours. Said oral examination shall not delve into unrelated areas.* The court agrees with Mr. Yusi and Keolis as to term 10. The examination will take place in 1 day. There will be appropriate breaks and

1 a lunch break. If the examiner is unable to complete the examination in one day, further  
2 motion practice may be necessary.

3 11. Any persons assisting Dr. Axelrod must be fully identified by full name and title in the  
4 doctor's report. *This is agreed to by the parties. (E)*

5 12. *Dr. Axelrod is permitted to inquire concerning the general health of family members*  
6 *and the existence of medical or mental conditions and whether treatment was*  
7 *received; however, Plaintiff is not to be questioned regarding the specifics of any*  
8 *treatment, names of treating physicians and details of the medical or mental*  
9 *conditions as the rights of privacy of third parties are in issue.* *This is disputed. Court finds (E)*  
10 The examiner may ask

generally about the mental or psychological health of Mrs. Felsner's family members.

11 The examiner may not ask about their physical health though. Mrs. Felsner is not  
12 required to specifically identify the family members discussed though.

13 13. Plaintiff is not to be questioned concerning her conversations with her attorneys, or any  
14 person affiliated with her attorneys or her attorney's office, including but not limited to  
15 Shook and Stone, John Shook or Robert English. *The parties agree to this provision. (E)*

16 14. Plaintiff is not to be questioned concerning his attorney's evaluation of any of  
17 Plaintiffs claims against any of the Defendants, nor is Plaintiff to be questioned about  
18 any discussions Plaintiff has had with his counsel regarding such evaluations, as that  
19 is invasive of the attorney-client and attorney work product privileges. *The parties agree to this provision. (E)*

20 15. *The parties agree that the full and entire scope of this examination shall consist of a*  
21 *clinical interview and the following psychological tests:* *This provision is disputed. The court finds (E)*  
22 This examination shall consist

of a clinical interview and written and oral tests as shall be reasonable and appropriate.

23 The examination is limited to the examiner's area of expertise. Failure to limit the  
24 examination to this area may lead to the examiner's testimony being limited or excluded  
25 from trial.

26 16. *The evaluation will not involve any physical examination. There will be no blood tests or*  
27 *other intrusive medical studies or procedures. Plaintiff will not be required to submit to*  
28 *the taking of any x-rays, CT scans, MRIs or other diagnostic test or procedure. The*

this provision is in dispute. (27)

1 examination will not be painful, protracted or intrusive. The court rewrites this term as  
2 follows: "The examination will not be physically painful, protracted or intrusive."

3 17. At the conclusion of any psychological testing of Plaintiff, a copy of the actual tests, test  
4 answers, interpretative materials used, reports of tests, raw data generated, scoring and  
5 all test results regarding Plaintiff shall be forwarded to Plaintiffs attorney with the  
6 report. With respect to the raw data generated and all test results regarding Plaintiff  
7 (hereinafter "Data"). This provision is in dispute (27)  
8 The court agrees with Mr. Yusi and Keolis as to terms 17, 18, 19,  
9 20, 26, & 27. The raw data the examiner obtains will be shared with Mrs. Felsner's own  
10 psychological treating or retained physicians. However, the tests themselves may not be  
11 shared with anyone other than the parties' mutual psychological experts because they are  
12 proprietary.

the court finds (27)

13 18. Access to Data and testimony concerning Data is limited to Plaintiff, Plaintiffs'  
14 counsel, Defendants' counsel, and experts designated by the parties who are  
15 professionally qualified to use and interpret the Data;

the court finds (27)

16 19. Use of Data is limited to only that which is required for the resolution of the pending  
17 action;

the court finds (27)

18 20. Data will be affixed with a label or legend indicating that Data is subject to the terms of  
19 this Stipulation and may be used only for limited purposes in connection with this action;

20 21. At the conclusion of the proceeding, any Data in Defendant's counsel's possession will be  
21 destroyed, along with all copies thereof, save the Data in possession of Dr. Axelrod; and

22 22. The record will be sealed to the extent any portion of Data are disclosed in  
23 pleadings, testimony, exhibits, or other documents which would otherwise be  
24 available for public inspection. This provision is in dispute. The court finds (27)

25 The only limit the court places on the report and data  
26 from the examination is that it may not be filed in a public documents.

27 23. Plaintiff shall be entitled to take reasonable breaks during the examination process,  
28 including, but not limited to taking a lunch break, rest breaks and bathroom breaks.  
If at any time during the proceedings, Plaintiff feels in good faith that the proceeding  
has become abusive, she will immediately notify her counsel or other designated

1 representative in order to try to resolve the matter at that time. Plaintiff has the right  
2 to terminate the proceeding and seek a protective order from the Court. If the parties  
3 are unable to resolve the issue, should the Court order that the examination be  
4 reconvened, Defendants will have up to 8 hours, not including reasonable and  
5 appropriate breaks and lunch, to complete the examination originally ordered by the  
6 Court, but not any additional time. *The foregoing provision is in dispute. ED*  
7 examination the party terminating must have good cause or a reasonable basis to  
8 terminate. *The court notes only that if either side terminates the  
finds ED*

9 24. Defendants may not schedule any other examinations by any other doctors or other  
10 persons in the same areas of this examination. *The foregoing provision is in dispute. ED*  
11 term. They will not be automatically precluded from a second Rule 35 examination in  
12 this case. However, absent a stipulation of the parties to a second examination, a motion  
13 requesting a second examination would be necessary.

14 25. Defendants are to immediately transmit a copy of this Order to Dr. Axelrod to promptly  
15 advise him that he must comply with the limitations imposed by this Order.

16 26. Defendants shall produce to Plaintiffs counsel the written reports of Dr. Axelrod (and  
17 any interpretive materials and related reports of psychological testing whether done by  
18 computer scoring, hand scoring or anyone else) by email, overnight delivery or personal  
19 delivery no later than 30 days after the examination or by the initial expert disclosure  
20 date, whichever is earlier, *excepted as limited by provisions 17 to  
19, inclusive, herein. ED*

21 27. The tests taken by Plaintiff as part of the examination, along with any notes and/or  
22 written reports and/or records maintained in any format, including electronic data,  
23 by Dr. Axelrod are confidential medical records relating to Plaintiff's mental health.  
24 These records are confidential and shall not be subject to distribution without the  
25 written authorization of the Plaintiff to anyone except for counsel for Defendants,  
26 counsel's experts or consultants, counsel's staff, defendants, and the insurance  
27 carriers, who shall treat these documents as confidential and subject to a protective  
28 order. Said records may be used by defense counsel in preparation for trial, in trial

1 and in other proceedings in this matter, but for no other purpose unrelated to this  
2 litigation.

3 28. Plaintiff reserves the right to argue that any information acquired or learned or any  
4 evaluation made in violation of this agreement will not be admissible in evidence for  
5 any reason. The parties further agree that the court may, upon motion at trial, strike,  
6 preclude or limit any testimony of the examiner as appropriate and Plaintiff is not  
7 waiving his right to such relief by agreeing to this examination. The parties reserve the  
8 right to seek whatever sanctions they deem appropriate. <sup>This provision is in dispute (ED)</sup> The court agrees with Mr. Yusi  
9 and Keolis as to term 28. Mrs. Felsner may raise this issue with the district court at a  
10 later date if she believes necessary. <sup>The foregoing provision is in dispute (ED)</sup>

11 29. The examiner will not offer any secondary gain, malingering or veracity opinions. <sup>the court finds (ED)</sup> As  
12 to topics 29, 30, and 31, <sup>or opinions (ED)</sup> the examination is limited to the examiner's area of expertise.  
13 Failure to limit the examination to this area may lead to the examiner's testimony being  
14 limited or excluded from trial.

15 30. The examiner will not offer any opinions as to criticism of any of Plaintiffs treatment  
16 because it was on a lien (this does not include the reasonableness of the costs for  
17 treatment).

18 31. The examiner will not offer any opinions as to Plaintiffs decision to retain counsel for the  
19 subject incident.

20 **f. Current Discovery Schedule**



21 Mr. Yusi moved for a slight extension of discovery based upon a December 19 examination  
22 and the current December 22 initial expert disclosure deadline. The Discovery Commissioner <sup>will not (ED)</sup>  
23 ~~cannot~~ hear this aspect of the motion. <sup>as it should be brought before the trial judge. (ED)</sup> It must instead be brought to the district court. The same  
24 analysis applies to Mr. Yusi's request at the end of the hearing to stay discovery pending a  
25 resolution of their objection to aspects of this report and recommendation.

26 ///

27

28 ///

1 The Discovery Commissioner, met with counsel for the parties, having discussed the  
2 issues noted above and having reviewed any materials proposed in support thereof, hereby  
3 submits the above recommendations concerning Edgardo Yusi & Keolis Transit Services, LLC's  
4 Motion for Rule 35 Examination in A-18-781000-C:

  <u>/s/ Michael Lowry</u> MICHAEL P. LOWRY, ESQ. Nevada Bar No. 10666 6689 Las Vegas Blvd. South, Suite 200 Las Vegas, Nevada 89119 Attorneys for Edgardo P. Yusi; Keolis Transit Services, LLC	SHOOK & STONE, CHTD.  <u>/s/ John Shook</u> JOHN B. SHOOK, ESQ. Nevada Bar No. 5499 710 S. 4 <sup>th</sup> St. Las Vegas, Nevada 89101 Attorney for Heather & Roger Felsner
SPRINGEL & FINK, LLP  <u>/s/ David Schopick</u> DAVID S. SCHOPICK, ESQ. Nevada Bar No. 6119 9075 W. Diablo Dr., Ste. 302 Las Vegas, Nevada 89148 Attorneys for Alexander Dennis, Inc.	It is so recommended.   DISCOVERY COMMISSIONER 2/2/2021



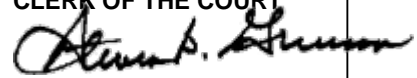
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Objection time will expire on Feb. 18 2021.

Mailed to Plaintiff/Defendant at the following address on \_\_\_\_\_,

By: Natthel Simonetti  
COMMISSIONER DESIGNEE





MICHAEL P. LOWRY, ESQ.

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

HEATHER FELSNER and ROGER FELSNER, Case No.: A-18-781000-C

Dept. No.: 27

Plaintiffs,

vs.

**Edgardo Yusi & Keolis Transit Services,  
LLC's Objection to Discovery  
Commissioner's Report & Recommendation**

KEOLIS TRANSIT SERVICES, LLC, Foreign  
Limited-Liability Corporation and EDGARDO  
PAGUIO YUSI; ALEXANDER DENNIS,  
INC., a Foreign Corporation; DOES II through  
X, inclusive; and ROE BUSINESS ENTITIES I  
through X, inclusive,

Hearing Requested

Defendants.

Mr. Yusi and Keolis (collectively "Mr. Yusi") requested a neuropsychological examination of Heather Felsner per Rule 35. The Discovery Commissioner agreed an examination was appropriate, but put conditions upon the examination per NRS 52.380 that make it impossible for Mr. Yusi to obtain the examination. Mr. Yusi objects to the report and recommendation.

DATED this 5th day of February, 2021.



/s/ Michael P. Lowry

MICHAEL P. LOWRY, ESQ.

6689 Las Vegas Blvd. South, Suite 200

Las Vegas, Nevada 89119

Attorneys for Edgardo P. Yusi; Keolis Transit  
Services, LLC

1 **Memorandum of Points & Authorities**

2 **I. Plaintiff alleges ongoing symptoms related to this case.**

3 This personal injury case concerns an event that occurred on February 21, 2017. The  
4 complaint was filed on September 12, 2018. The parties agree that Mrs. Felsner alleges she  
5 suffered a brain injury as a result of a fall and that she alleges ongoing deficits from this injury.  
6 When the Rule 35 psychological examination was requested, initial expert disclosures were due  
7 December 22, 2020. Mr. Yusi proposed Dr. Axelrod, a licensed, practicing psychologist in  
8 Michigan where Mrs. Felsner lives. Mrs. Felsner did not dispute that Dr. Axelrod is an  
9 appropriately qualified examiner. The crux of the dispute in this objection are conditions the  
10 Discovery Commissioner put on the examination per NRS 52.380.

11 **a. Procedural history below.**

12 Mr. Yusi requested a Rule 35 psychological examination in a motion filed on October 16,  
13 after the meet and confer process was completed. The motion indicated Mr. Yusi had located an  
14 examiner and proposed that the examination occur on December 19, 2020. Plaintiffs' opposed  
15 on various grounds. Two of those grounds were raised during the EDCR 2.34(d) meet and  
16 confer process, but the rest were not. The Discovery Commissioner ultimately agreed an  
17 examination is appropriate, but put conditions on the examination that make an examination  
18 impossible to obtain.

19 Mr. Yusi's motion was heard on November 19, 2020. In the meantime, the district court  
20 granted Mr. Yusi's motion to extend discovery. The district court rejected Mr. Yusi's proposed  
21 discovery schedule though, instead extending the initial expert disclosure deadline from  
22 December 19, 2020 to February 22, 2021. The discussion during the hearing was that this  
23 extension would allow sufficient time for Mr. Yusi's anticipated objection to be heard. But the  
24 Report & Recommendations was not filed until February 4, 2021. As of filing this objection,  
25 Mr. Yusi has asked Plaintiffs to agree to extend but has not yet received their response.

26 **II. The standard of review is unknown.**

27 The standard of review for this objection is unknown. NRCP 16.1(d) establishes the  
28 general parameters for resolving discovery disputes, but is silent as to the standard of review.

1 NRCP 16.3, which creates the discovery commissioner position and generally establishes its  
2 powers and duties, is also silent. EDCR 2.34 also governs discovery disputes, but is silent as to  
3 the standard of review.

4 Applied here, Mr. Yusi believes a de novo standard of review applies. The primary issue  
5 in this objection is the constitutionality and application of NRS 52.380. These are questions of  
6 law and statutory construction that an appellate court would review de novo.<sup>1</sup> After deciding  
7 those questions de novo, it is unknown whether a Discovery Commissioner's report and  
8 recommendation is itself subject to de novo review or abuse of discretion.

9 **III. The recommendation erred by considering objections that were not raised during**  
10 **the EDCR 2.34(d) meet and confer process.**

11 Mr. Yusi complied with EDCR 2.34(d)'s requirements for the parties to meet and confer  
12 before filing a discovery motion. His motion attached an email thread between counsel and a  
13 declaration describing a subsequent call. Plaintiff did not object to the accuracy of the email  
14 thread or the declaration. The objections Plaintiff raised during the EDCR 2.34(d) conference as  
15 to a Rule 35 examination were 1) requiring Mrs. Felsner to drive from her home to Dr. Axelrod's  
16 office; and 2) that some unknown and unidentified testing was duplicative of prior work. Mr.  
17 Yusi's motion addressed those objections. Plaintiff's opposition addressed those arguments as a  
18 side issue, instead arguing multiple new objections that were not raised during the meet and  
19 confer process.

20 In response, Mr. Yusi noted that *Valley Health* concluded "neither this court nor the  
21 district court will consider new arguments raised in objection to a discovery commissioner's  
22 report and recommendation that could have been raised before the discovery commissioner but  
23 were not."<sup>2</sup>

24 A contrary holding would lead to the inefficient use of judicial resources and  
25 allow parties to make an end run around the discovery commissioner by making  
26 one set of arguments before the commissioner, waiting until the outcome is

27 <sup>1</sup> *Estate of Curtis v. S. Las Vegas Med. Inv'rs, LLC*, 136 Nev. Adv. Rep. 39, 466 P.3d 1263, 1266  
28 (2020) ("we review issues of statutory construction de novo.").

<sup>2</sup> *Valley Health Systems, LLC. v. Dist. Ct.*, 127 Nev. 167, 173, 252 P.3d 676, 680 (2011).

determined, then adding or switching to alternative arguments before the district court.<sup>3</sup>

Mr. Yusi asserted this logic should also apply to EDCR 2.34(d)'s meet and confer requirement. If the point of the meet and confer requirement is to reduce the number and scope of discovery motions, then parties should be required to present their objections for discussion during the meet and confer process. If they do not, then the objection is waived just like resulted in *Valley Health*. Allowing parties to present objections that were not raised at the meet and confer process causes the judicial process to break down for the same reasons as *Valley Health*. Applied here, Mr. Yusi filed a motion addressing the objections he reasonably believed were at issue. Having seen these arguments, and perhaps weighing their viability, Plaintiff presented extensive *new* objections she did not previously assert during the meet and confer process. This is improper.

Court rules are subject to the same de novo standard of review as statutory interpretation.<sup>4</sup> The Discovery Commissioner erred as a matter of law by interpreting EDCR 2.34(d) in a manner inconsistent with *Valley Health*, thus allowing Plaintiff to argue objections that were not presented during the meet and confer process. Plaintiff's objections should have been limited to the two she did present. Mr. Yusi does not object to the Discovery Commissioner's resolution of those two objections, but he does not object to the Discovery Commissioner considering objections that were not asserted during the meet and confer process. If the district court agrees, then this avoids the remaining questions in this objection that concern the constitutionality of NRS 52.380.

**IV. The recommendation erred by concluding NRS 52.380(1), (2) and (3) created absolute rights.**

If Plaintiff's other objections are considered on their merits, there is still a potential method of resolving the dispute that avoids constitutional implications. "Under the constitutional-avoidance canon, when statutory language is susceptible of multiple

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<sup>3</sup> *Id.* at 172-73, 252 P.3d at 679-80.

<sup>4</sup> *Marquis & Aurbach v. Dist. Ct.*, 122 Nev. 1147, 1157, 146 P.3d 1130, 1137 (2006) (applying rules of statutory construction to the interpretation of a court rule).

1 interpretations, a court may shun an interpretation that raises serious constitutional doubts and  
2 instead may adopt an alternative that avoids those problems.”<sup>5</sup>

3 Mr. Yusi seeks a neuropsychological examination per Rule 35. Plaintiff responds that  
4 NRS 52.380 controls. Specifically, Plaintiff invokes NRS 52.380(1), which states “[a]n observer  
5 may attend an examination but shall not participate in or disrupt the examination.” “‘May’ is of  
6 course generally permissive.”<sup>6</sup> Neither Rule 35 nor NRS 52.380 provide guidance as to how a  
7 court should determine when an observer “may” attend. They both place the burden to request  
8 one on Plaintiff. Applied here, Plaintiff stated no specific reason why she wants an observer  
9 present. Her arguments to the Discovery Commissioner noted she attended neuropsychological  
10 assessments with her own doctors, without an observer present. The only stated based upon  
11 which she wants an observer to attend is because NRS 52.380(1) exists.

12 The same analysis applies to her intention to invoke NRS 52.380(2) as to who that  
13 observer “may be.” It also applies to NRS 52.380(3), stating the “observer attending the  
14 examination pursuant to subsection 1 may make an audio or stenographic recording of the  
15 examination.” By using the word “may” the legislature created judicial discretion to decide  
16 whether the party citing the statute has met the burden of proof required to invoke it. Again,  
17 Plaintiff here presented no reason why she wanted to invoke these statutes other than that they  
18 existed.

19 Secondly, Mr. Yusi presented evidence that weighed against Plaintiff’s request. Mr.  
20 Yusi provided ethical guidance from the American Board of Professional Neuropsychology and  
21 Michigan Psychological Association noting it is inconsistent with their professional obligations  
22 for a neuropsychologist to conduct a neuropsychological assessment in the presence of a third-  
23 party observer. That same guidance also noted how studies have demonstrated testing data  
24 obtained in the presence of a third-party observer is unreliable.

25 The Discovery Commissioner erred as a matter of law by interpreting NRS 52.380(1),  
26 (2), and (3) as creating an absolute right that a plaintiff can invoke. These statutes instead  
27

28 <sup>5</sup> *Degraw v. Dist. Ct.*, 134 Nev. Adv. Op. 43, 419 P.3d 136, 139 (2018).

<sup>6</sup> *Ewing v. Fahey*, 86 Nev. 604, 607, 472 P.2d 347, 349 (1970).

1 created a permissive right that a plaintiff *may* invoke that a court must then assess on a case-by-  
2 case basis. Appropriately interpreted and applied to this case, either Plaintiff did not meet her  
3 burden of proof to invoke these statutes or, alternatively, her proof is outweighed by the contrary  
4 evidence that Mr. Yusi presented. If the court interprets these statutes in this way, their  
5 constitutional implications are avoided.

6 **V. The recommendation erred by concluding NRS 52.380 is constitutional.**

7 If Plaintiff has otherwise met her burden to invoke NRS 52.380, then the Discovery  
8 Commissioner erred by concluding it is a substantive rather than procedural statute. Mr. Yusi  
9 presented a history of the process that led to Nevada’s revised rules of civil procedure that took  
10 effect on March 1, 2019. This included Rule 35. That history also documented how the  
11 proponents of an alternative version of Rule 35 that was not adopted took that proposal to the  
12 legislature. It eventually became NRS 52.380.

13 This presents a separation of powers problem. Mr. Yusi explained how “the legislature  
14 may not enact a procedural statute that conflicts with a pre-existing procedural rule, without  
15 violating the doctrine of separation of powers, and such a statute is of no effect.”<sup>7</sup> Mr. Yusi also  
16 surveyed prior Nevada appellate decisions exploring the boundaries between substantive and  
17 procedural statutes. Those cases noted “where, as here, a rule of procedure is promulgated in  
18 conflict with a preexisting procedural statute, the rule supersedes the statute and controls.”<sup>8</sup>

19 *Berkson v. Lepome* ruled a statute that interfered “with the judiciary’s authority to  
20 manage the litigation process” was unconstitutional. *Whitlock v. Salmon* noted a statute could be  
21 unconstitutional if it interferes “with procedure to a point of disruption or attempted abrogation  
22 of an existing court rule.”<sup>9</sup> Applied here, NRS 52.380 was expressly intended to interfere with  
23 Rule 35, if not abrogate parts of it. It is a procedural statute, making it unconstitutional because  
24 it interferes with the judiciary’s ability to manage litigation.

25 The Discovery Commissioner erred as a matter of law by concluding NRS 52.380 is  
26 constitutional. As it is unconstitutional, the Discovery Commissioner should have used only

27 <sup>7</sup> *Berkson v. Lepome*, 126 Nev. 492, 499 (2010).

28 <sup>8</sup> *State v. Connery*, 99 Nev. 342, 345 (1983).

<sup>9</sup> 104 Nev. 24, 26 (1988).

1 Rule 35 to assess Mr. Yusi's request for a neuropsychological examination. The terms and  
2 conditions the recommendation contained should be reversed only to the extent they conflict  
3 with Rule 35.

4 **VI. The recommendations should be modified as requested.**

5 Mr. Yusi just wants a neuropsychological examination per Rule 35. The Discovery  
6 Commissioner agreed an examination is appropriate and there is no dispute as to the examiner.  
7 However, by allowing Plaintiff to assert waived objections and interpreting NRS 52.380 as an  
8 absolute rather than permissive right, the Discovery Commissioner denied Mr. Yusi any practical  
9 means of obtaining a Rule 35 examination. Mr. Yusi requests the recommendations be modified  
10 to be consistent with Rule 35 so the neuropsychological examination may eventually proceed.

11 DATED this 5th day of February, 2021.



13  
14 /s/ Michael P. Lowry  
15 MICHAEL P. LOWRY, ESQ.  
16 6689 Las Vegas Blvd. South, Suite 200  
17 Las Vegas, Nevada 89119  
18 Attorneys for Edgardo P. Yusi; Keolis Transit  
19 Services, LLC  
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**Certificate of Service**

Pursuant to NRCP 5, I certify that I am an employee of Wilson Elser Moskowitz Edelman & Dicker LLP, and that on February 5, 2021, I served **Edgardo Yusi & Keolis Transit Services, LLC's Objection to Discovery Commissioner's Report & Recommendation** as follows:

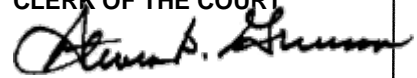
- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada;
- ☒ via electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk;

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BY: /s/ Michael Lowry  
An Employee of





1 **RESP**  
JOHN B. SHOOK, ESQ.  
2 Nevada Bar No. 5499  
3 ROBERT L. ENGLISH, ESQ.  
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4 SHOOK & STONE, CHTD.  
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6 Attorneys for Plaintiffs

7 **EIGHTH JUDICIAL DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

9  
10 HEATHER FELSNER and ROGER  
FELSNER,

11 Plaintiffs

12 vs.

13  
14 KEOLIS TRANSIT SERVICES, LLC,  
Foreign Limited-Liability Corporation and  
15 EDGARDO YUSI; ALEXANDER DENNIS,  
INC., a Foreign Corporation, DOES II through  
16 X, inclusive; and ROE BUSINESS ENTITIES  
I through X, inclusive,

17 Defendants.

Case No.: A-18-781000-C  
Dept. No.: XXVII

**PLAINTIFFS HEATHER FELSNER and**  
**ROGER FELSNER'S RESPONSE TO**  
**DEFENDANT'S OBJECTION TO THE**  
**DISCOVERY COMMISSIONER'S**  
**REPORT & RECOMMENDATIONS**

18  
19  
20 Plaintiffs HEATHER FELSNER and ROGER FELSNER hereby submit their Response to  
21 the Defendants Yusi and Keolis Transit Services, LLC's Objection to the Discovery  
22 Commissioner's Report & Recommendations.

23 ///

24 ///

25 ///

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27 ///

28 ///

1 This Response is made and based upon the pleadings and papers on file herein, the attached  
2 Points and Authorities, and any argument made by counsel at the hearing of this matter.

3 DATED this 12 day of February, 2021.

4  
5 **SHOOK & STONE, CHTD.**

6  
7   
8 \_\_\_\_\_  
9 JOHN B. SHOOK, ESQ.  
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11 ROBERT L. ENGLISH, ESQ  
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15 Las Vegas, Nevada 89101  
16 Attorneys for Plaintiffs  
17 HEATHER AND ROGER FELSNER

18  
19 **MEMORANDUM OF POINTS AND AUTHORITIES**

20 **I.**

21 **STATEMENT OF FACTS**

22 **A. Underlying Facts**

23 This is a personal injury action arising from a fall down the stairs of a coach operated by  
24 Defendants Keolis and Yusi and manufactured by Defendant Alexander Dennis, Inc. Plaintiff  
25 suffered severe brain injuries as a result of the fall. Defendants Keolis and Yusi have conceded  
26 violations of the standard set by defendants for safe operation during their depositions.  
27  
28

1 **Procedural Background**

2 On September 28, 2020, Defendants requested neuropsychological examination of Mrs.  
3 Felsner. Plaintiff's counsel requested defense counsel proceed with their Motion for Order allowing  
4 Rule 35 examination.<sup>1</sup> Thereafter, on October 16, 2020, Defendants filed their motion for Rule 35  
5 examination naming their examiner as Dr. Bradley Axelrod with the examination to occur in Ann  
6 Arbor, Michigan.  
7

8 On November 2, 2020, Plaintiff opposed Defendant's Motion for examination.

9 On November 13, 2020, Defendant filed his reply brief asserting for the first time the  
10 unconstitutionality of NRS 52.380.

11 The Motion for Order allowing Rule 35 Examination was heard by the Discovery  
12 Commissioner on November 19, 2020, at which time she ordered the examination may proceed  
13 with various restrictions and subject to NRS 52.380 which specifically allows for the presence of an  
14 observer and the recording of the examination.  
15

16 Defendant submitted proposed DCRR on December 4, 2021. On December 7, the Discovery  
17 Commissioner requested Defendant submit a properly formatted DCRR.

18 On December 16, 2021, Plaintiff's counsel emailed Defense counsel asking if the amended  
19 DCRR was submitted. In response, Defense counsel confirmed they had submitted the amended  
20 order.  
21

22 On Jan 7, 2021, Plaintiff's counsel staff emailed defense counsel regarding the status of the  
23 DCRR. Defense counsel responded that they had received no response from the discovery  
24 commissioner.  
25

26  
27  
28 <sup>1</sup> Defendant asserts Plaintiff is limited to arguments discussed during EDCR 2.34 discussions. As discussed below, this argument was rejected by the discovery commissioner as (1) discussions did occur and (2) Rule 35 is unique as affirmatively requiring a party seek a Court order for examination if agreement of the parties is not reached.