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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 2 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 2 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	
-------------------------------------------------------------------------------------------------------------------------------	--

BY: /s/ Michael P. Lowry  
An Employee of



1 On December 19, 2021, the Ordered examination did not go forward as the examiner  
2 claimed he could not ethically conduct an examination if forced to comply with Nevada Statutes  
3 which allow in person observation and audio recording. Defendant asserts these safeguards are not  
4 lawful because NRS 52.380 is unconstitutional.

5 On January 13, 2020, Kiana O'Day, with Plaintiff's counsel office, called Natilie at the  
6 discovery commissioner's office regarding the status of the DCRR. Natilie advised they had never  
7 received the corrected DCRR. Ms. O'Day emailed Mr. Lowry regarding this conversation and Mr.  
8 Lowry submitted the corrected DCRR on the same day.<sup>2</sup>

10 After the motion hearing on the examination, defendant moved the court for extension of  
11 expert disclosure deadlines. This was granted. Currently, Expert disclosures are due February 22,  
12 2021. Rebuttal experts are due March 22, 2021. Discovery cutoff is May 21, 2021. Trial is set on a  
13 five-week stack starting June 28, 2021. No party has moved the court for further extension of any  
14 discovery deadline.

16 **II. Issues not raised in initial motion practice before the discovery commissioner are**  
17 **waived**

18 A party filing a motion must also serve and file with it a memorandum of points and  
19 authorities in support of each ground thereof. The absence of such memorandum may be construed  
20 as an admission that the motion is not meritorious, as cause for its denial or as a waiver of all  
21 grounds not so supported. NV ST 8 DIST CT Rule 2.20 See, also, Bongiovi v. Sullivan, 122 Nev.  
22 556, 569, 138 P.3d 433, 443 (2006) (Because reply briefs are limited to answering any matter set  
23 forth in the opposing brief, reviewing court may refuse to consider issue.) See, also, *Greenhow v.*  
24 *Secretary of Health & Human Services*, 863 F.2d 633, 638 (9th Cir. 1988) (holding that "allowing  
25 parties to litigate fully their case before the magistrate and, if unsuccessful, to change their strategy  
26

27  
28 <sup>2</sup> See **Exhibit 1**, email communication attached.



1 and present a different theory” in the district court would “frustrate the purpose” of having  
2 magistrates), *overruled on other grounds by U.S. v. Hardesty*, 977 F.2d 1347 (9th Cir.1992).

3 Here, while the issue of constitutionality of the observer statute was brought up in  
4 Defendant’s reply brief, Defendant failed to assert the issue in its initial motion. Accordingly,  
5 Plaintiff was precluded from briefing the issues with the discovery commissioner. This is a blatant  
6 effort to sandbag when one considers the scholarly work of defense counsel.

7 Defense counsel, Michael Lowry, is well known in the legal community for his scholarly  
8 articles on discovery issues. Indeed, Mr. Lowry wrote about this very issue in his blog, Compelling  
9 Discovery, on September 30, 2019, where he discussed the possibility that AB 235, the observer  
10 statute, would be deemed unconstitutional. See, <https://www.compellingdiscovery.com/?p=5867>.  
11 While this author disagrees with the conclusion reached by Mr. Lowry in his blog, it is clear that  
12 counsel was aware enough of the issue that he should have discussed the matter in his initial motion  
13 practice rather than laying low until springing it in a reply brief. Accordingly, because this matter  
14 was not addressed, this court is within its discretion to waive hearing the issue and affirm the  
15 discovery commissioner’s recommendation.

### 16 **III. Defendants’ reliance upon *Valley Health* is misplaced**

17 Defendant single reference to *Valley Health Sys., LLC v. Dist. Ct.*, 127 Nev. 167, 169, 252  
18 P.3d 676, 677 (2011) is misplaced. First, counsel did meet and confirm and agreement could not be  
19 reached over the need for an examination. Accordingly, because the parties could not reach  
20 agreement over the need for the examination, it would be superfluous to discuss conditions on that  
21 unnecessary examination.

22 Secondly, because rule 35 examinations are examinations of the body or mind, they are not  
23 granted as a matter of right. This is unlike other forms of discovery. Absent agreement of the parties  
24 an Order for examination is granted only on motion for good cause. Because there is no requirement  
25 that a plaintiff submit to an examination without Court’s Order upon good cause, there is no  
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27  
28

1 requirement to meet and confer beyond simply confirming that the examinee is unwilling to  
2 undergo the examination.

3  
4 **IV. No Basis to rule that NRS 52.380 is unconstitutional**

5 **a. Statute is presumed to be valid**

6 The defense is asking this Court to find, as a matter of law, that NRS 52.380 is  
7 unconstitutional and cannot be enforced, and thus the Discovery Commissioner's application thereof  
8 to this DME was an abuse of discretion. The defense, however, has not come close to meeting its  
9 burden of demonstrating that the statute is clearly invalid. Statutes are presumed to be valid and a  
10 court will only intervene when the constitution is clearly violated. *Universal Electric v. Labor*  
11 *Comm'r*, 109 Nev. 127, 129, 847 P.2d 1372, 1373-74 (1993). Here, after numerous hearings on the  
12 matter, the legislature determined observers and audio recording to be a substantive right that  
13 ensured the fairness of the medical examination process. The enactment of substantive rules is well  
14 within the powers conferred upon the legislature by the Nevada Constitution and courts must defer to  
15 the legislature regarding the statute's validity. *Zamora v. Price*, 213 P.3d 490, 492 (Nev. 2009).

16 During the Assembly Committee on Judiciary hearings, the legislature had before it  
17 arguments involving the substantive nature of the bill:

18 Contrary to opponents of this bill who want to say this is a procedural matter, this is not  
19 a procedural matter; it is a substantive right. It is the right to protect and control your  
20 own body... This is not a criminal situation, but in the criminal field, you often hear the  
21 terms "right to counsel," "right to cross examination," and "due process." Those terms  
22 do not necessarily transfer over to the civil arena. In the civil arena, we have what is  
23 called "fundamental fairness." Is it fundamentally fair that an injured person is  
24 required to go to a hired expert—an expert whose sole goal is to further the defense  
25 side of 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.

26 Assembly Committee on Judiciary Hearing on A.B. 285, March 27, 2019. The Senate also  
27 took arguments regarding the substantive right afforded to citizens by NRS 52.380. **Having**  
28 **someone present at an examination and audio recording the exam are substantive rights**

1 **litigants have in California, Utah, Arizona, and in Nevada worker compensation cases. *Id.***  
2 Furthermore, the recording of the examination “promotes openness and transparency during these  
3 examinations.” *Id.* at 5. In fact, before she was appointed to the Nevada Court of Appeals, the  
4 discovery commissioner in the Eighth Judicial District Court in Clark County already allowed audio  
5 recording on all cases.” *Id.* at 6.

6 In enacting NRS 52.380, the legislature found that the statute provided a *substantive right* to  
7 parties—a finding this court must give deference to. NRS 52.380 is granting a litigant a fundamental  
8 right to have an observer present at a Rule 35 exam and a fundamental right to audio record the  
9 exam.

10 **b. Nevada Revised Statute 52.380 provides a substantive right to Observe and Record an**  
11 **independent medical examination.**

12 NRS 52.380 provides Plaintiff a substantive right to record her Rule 35 examination. The  
13 defense wrongfully classifies NRS 52.380’s right to both the presence of an observer and to an audio  
14 recording as a procedural rule when, in fact, it is a substantive right. A substantive law states the  
15 rights and obligations of the parties concerned. A statute is substantive when it concerns a matter  
16 that has as its basis something other than court administration. *Muci v. State Farm Mut. Auto Ins.*,  
17 732 N.W.2d. 88, 96 (2007). The enactment of substantive rules is well within the powers conferred  
18 upon the legislature by the Nevada Constitution and courts must defer to the legislature regarding the  
19 statute’s validity. *Zamora v. Price*, 213 P.3d 490, 492 (Nev. 2009). NRS 52.380 provides a plaintiff  
20 a substantive right to audio record her Rule 35 examination.

21 The legislature already heard and addressed the substantive/procedural arguments. During  
22 testimony in both the Assembly Committee on Judiciary and Senate Committee on Judiciary, the  
23 issues of substantive rights was considered. It was emphasized that “[t]he bill protects fundamental  
24 rights. The bill is a substantive law, not just procedural law.” Senate Committee on Judiciary  
25 hearing on AB 285, May 6, 2019, at 11. At least one court has held that provisions regarding  
26 medical examinations, because they do not concern court administration, are substantive, not  
27 procedural, and are supreme over the court rule, just as the general court rule concerning expert  
28

1 qualifications must yield to statutory requirements concerning expert witness qualifications. *Muci v.*  
2 *State Farm Mut. Auto Ins.*, 732 N.W.2d. 88, 96 (2007). NRS 52.380 is no different.

3       The mere fact that the defense is attempting to block a means for ensuring the integrity of the  
4 medical examination process is very concerning—a should provide good cause to move forward  
5 with audio recording any Rule 35 exam. The primary reason for allowing the recording of a Rule 35  
6 exam is substantive—it enhances the court’s access to the truth. The more that is known about the  
7 Rule 35 process, the better able the trier of fact is to assess the expert’s opinions. Over and above all  
8 interests in this litigation, there is one overriding interest which must be considered: it is the interests  
9 of justice. When the jury is asked to assess the opinions of a Rule 35 medical examiner, the jury  
10 should have before it the best evidence which is available. It should decide the case on all the  
11 evidence, and not on half of it. There is at hand a substantive right provided to the parties that can  
12 conclusively ensure that a Rule 35 examiner conducted the examination fairly—an audio recording  
13 of the examination.

14       The value of recording the examination enhances the court’s, jury’s, and parties’  
15 understanding of what transpired during a Rule 35 examination—and monitors the conduct of both  
16 the examiner and examinee during the meeting. With respect to parties or witnesses, however,  
17 whether lay or expert, the dynamics of an adversarial system introduce pressures that leave the door  
18 open to conscious or even subconscious polarization. In situations where experts are regularly  
19 retained by either plaintiff or defendants, financial considerations add to the potential for  
20 polarization. The value of recording a Rule 35 exam lies not only in the fact that a record is created  
21 which adds a degree of transparency to the process, but also in the additional insights that come from  
22 reviewing the actual communications that formed the basis of the expert opinion.

23       The recording of a medical examination is too necessary to protect the plaintiff and ensure  
24 the integrity of the process—something both sides should want. The defense has done little to  
25 overcome the presumption that the statute is valid and must be enforced. Regardless of the statute,  
26 good cause should exist in every case based upon fundamental issues of fairness and openness.  
27 Thus, the defense motion must be denied.

1 **c. The Presence of an Observer and Recording of the examination will not render the**  
2 **medical examiners opinion inadmissible.**

3 Defendants' Expert claims his testing results will be invalid if an observer is present.  
4 However, this appears to be merely a desperate attempt to cloud openness and fairness. Once again,  
5 why is the defense and expert against openness and fairness? Why is Defense Expert Axelrod so  
6 concerned about ensuring that he is administering the tests correctly? Notably, states throughout  
7 the country grant the same right that NRS 52.380 grants to the plaintiff, but there is not a single  
8 case supporting the absurd position that the observing and recording of an exam would render the  
9 results of the exam void. Simply, the defense needs a new expert then.

10 First, the defense expert alludes that it okay to allow an interpreter or student or trainee  
11 because they are neutral or independent. However, he does not explain how other third party  
12 observers invalidate the test results. Apparently, he is asserting that "third party observer" effects  
13 have been consistently demonstrated to artificially alter or distort an individual's performance  
14 during testing. However, this presumes the fallacy that his testing is independent and not as a  
15 retained defense agent. Plaintiff is entitled to level the playing field and even assuming Axelrod's  
16 assertion is this is true, "[s]ocial facilitation can be defined as "an improvement in performance  
17 produced by the mere presence of others."<sup>3</sup> Thus, this would actually benefit the defense. The  
18 Defendant resorted to assertion that the psychologist should educate the court as to the [relevant  
19 ethical standards], and the scientific basis for the negative effects (invalid data) of these intrusions.  
20 However, how can this been done when the Defendants' expert never even disclosed the actual  
21 testing to be performed and provided no evidence of negative effects. Even so, these should not  
22 outweigh the Plaintiff's substantive right to have an observer present. Defendants' expert in  
23 reliance on an editorial article, *Guest Editorial, Applied Neuropsychology: Adult*, 2016, Vol. 6. 391-  
24 398, 396. (attached hereto as Exhibit 2")<sup>4</sup>

25  
26 <sup>3</sup> Simplypsychology.org/social-facilitation.html.

27 <sup>4</sup> (Note: the article was attached as Exhibit G to Defendants' Reply Brief), asserted, if directed to proceed with TPO, the  
28 psychologist **should** remove himself/herself from the assessment. This same editorial explains that this is not an all or  
nothing standard, but a choice to be made by the examiner. "[T]he neuropsychologist can consider removing  
himself/herself from the assessment." *Id.*

1 Defendant, resorting to the same article, claims that recording the examination will resort in  
2 the “dubious validity of the data”. Again, notably lacking is any explanation of what testing is going  
3 to be done and how audio recording is going to invalidate that test. Instead, it merely seems like  
4 Defense expert Axelrod is attempting to conceal his testing so he cannot be properly cross-  
5 examined at trial.

6 The tell-tale to the instant issue is again, the very same editorial article, *Guest Editorial*,  
7 *Applied Neuropsychology: Adult*, 2016, Vol. 6. 391-398, 396, regarding exhausting other reasonable  
8 alternatives:

9 In those exceptions in which a neuropsychologist is *compelled* by the court  
10 to evaluate with a TPO because of existing state statutes or if the  
11 neuropsychologist is placed in a situation whereby withdrawing will bring  
12 clear and substantial harm to the examinee, the manner in which test  
13 validity and clinical findings are affected and may be compromised should  
14 explicitly documented. The neuropsychologist should then follow existing  
15 recommendations and guidelines for protecting test security including  
16 requesting that test material and intellectual property be provided only to  
17 another licensed psychologist who would be bound by the same duty to  
18 protect. If this is not possible, the neuropsychologist should request a  
19 protective order specifically prohibiting either party from copying test  
20 material or intellectual property, using them for any other purpose than the  
21 matter at hand, and directing that they be returned uncopied directly to the  
22 psychologist or destroyed in a manner verifiable by the psychologist.

23 *Id.*

24 Frankly, Dr. Axelrod does not get to take away a right conferred by Nevada statutes. There  
25 are neuropsychological exams taking place every day in our court system that are observed and  
26 recorded. This is not a “good cause” standard—we are discussing a statutory right. There are  
27 suggestion in the above article that allow for proceeding with the examination while protecting  
28 sensitive data.

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.

*Id.*

1           Thus, if Dr. Axelrod does not feel he can conduct the exam, then the defense needs to find  
2 another expert.

3 **V.     Because of its dilatory conduct, Defendants are unable to meet this court's expert**  
4 **disclosure deadline.**

5           As detailed above, the expert disclosure date is upon us. Defendant is within 21 days of the  
6 initial expert disclosure as amended by this court in December 2020. Defendant has not sought an  
7 extension of this deadline EDCR 2.35 requires that a request made beyond the period specified  
8 above shall not be granted unless the moving party, attorney or other person demonstrates that the  
9 failure to act was the result of excusable neglect. Here, defendant delayed until the final rounds of  
10 discovery to seek an examination, was further dilatory in submitting the amended DCRR, failed to  
11 designate an examiner who would be able to existing Nevada law and has now delayed in seeking  
12 an extension of expert disclosure deadlines until the last moments of the case. This conduct is likely  
13 to disadvantage plaintiff by needlessly compressing discovery deadlines or by delaying justice and  
14 compensation by forcing a continuance of trial.

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#### IV. CONCLUSION

The Nevada legislature provided every citizen a fundamental right: a right to observe and record any Rule 35 exam to protect openness and fairness. The defense is opposed to openness and fairness. Defendants have unnecessarily delayed seeking examination and now are unable to meet the expert disclosure deadline absent further extension. Defendants cannot explain why they chose an examiner that cannot comply with Nevada law in the first place and cannot explain why they have not sought an extension of discovery deadlines now that we are within 21 days of the initial expert disclosure. This delay should not prejudice plaintiffs by forcing them to expedite trial preparations or seek a delay in having their matter fairly decided.

DATED this 12 day of February, 2021.

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

  
\_\_\_\_\_  
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Nevada Bar No. 5499  
ROBERT L. ENGLISH, ESQ.  
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Attorneys for Plaintiffs

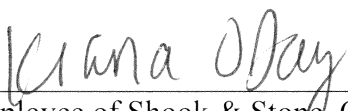


1 **CERTIFICATE OF SERVICE**

2 I hereby certify, pursuant to NRCP 5(b), that on the 12 day of February, 2021, I served a  
3 true and correct copy of the foregoing **PLAINTIFFS HEATHER FELSNER and ROGER**  
4 **FELSNER'S RESPONSE TO DEFENDANT'S OBJECTION TO THE DISCOVERY**  
5 **COMMISSIONER'S REPORT & RECOMMENDATIONS** by electronic transmission through  
6 the Odyssey File & Serve system to the following parties:  
7

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

11 Chad Fuss, Esq.  
12 Leonard T. Fink, Esq.  
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13 9075 West Diablo Drive, #302  
Las Vegas, Nevada 89148  
14 Attorneys for Defendant,  
15 ALEXANDER DENNIS, INC.

16  
17   
18 Employee of Shook & Stone, Chtd.  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

# Exhibit 1

## Kiana A. O'Day

---

**From:** Wong, Agnes R. <Agnes.Wong@wilsonelser.com>  
**Sent:** Friday, December 4, 2020 2:21 PM  
**To:** 'discoveryinbox@clarkcountycourts.us'  
**Cc:** Lowry, Michael; dschopick@springelfink.com; cfuss@springelfink.com; Kiana A. O'Day; John Shook  
**Subject:** A-18-781000-C; Heather Felsner v. Keolis Transit Services, LLC, et al.; Discovery Commissioner's Report & Recommendations re Edgardo Yusi & Keolis Transit Services, LLC's Motion for Rule 35 Examination  
**Attachments:** Discovery Commissioner's Report & Recommendations re Edgardo Yusi & Keolis Transit Services, LLC's Motion for Rule 35 Examination.docx; Discovery Commissioner's Report & Recommendations re Edgardo Yusi & Keolis Transit Services, LLC's Motion for Rule 35 Examination.pdf

Good afternoon,

Attached for the Discovery Commissioner's review and signature, is the Discovery Commissioner's Report & Recommendations re Edgardo Yusi & Keolis Transit Services, LLC's Motion for Rule 35 Examination for the above-referenced matter, in both pdf and Word formats.

Opposing counsels' authorization to e-sign is attached to the end of pdf format of the document.

Thank you,

*Please Note Our New Address*

Agnes R. Wong  
Legal Secretary  
Wilson Elser Moskowitz Edelman & Dicker LLP  
6689 Las Vegas Blvd. South, Suite 200  
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**Kiana A. O'Day**

---

**From:** DiscoveryInbox <DiscoveryInbox@clarkcountycourts.us>  
**Sent:** Monday, December 7, 2020 12:11 PM  
**To:** 'Wong, Agnes R.'  
**Cc:** Lowry, Michael; dschopick@springelfink.com; cfuss@springelfink.com; Kiana A. O'Day; John Shook  
**Subject:** RE: A-18-781000-C; Heather Felsner v. Keolis Transit Services, LLC, et al.; Discovery Commissioner's Report & Recommendations re Edgardo Yusi & Keolis Transit Services, LLC's Motion for Rule 35 Examination  
**Attachments:** DCRR Form.docx

Good Afternoon,

Please use the attached sample to properly format the Report and Recommendations from the November 19<sup>th</sup> hearing. Once corrected please resubmit to the DiscoveryInbox. Let me know if you have any questions.

Thank you,



NATILIE SIMONETTI

Eighth Judicial District Court| DISCOVERY  
[DiscoveryInbox@clarkcountycourts.us](mailto:DiscoveryInbox@clarkcountycourts.us)  
702.671.4486

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**From:** Wong, Agnes R. [mailto:Agnes.Wong@wilsonelser.com]  
**Sent:** Friday, December 4, 2020 2:21 PM  
**To:** DiscoveryInbox  
**Cc:** Lowry, Michael; dschopick@springelfink.com; cfuss@springelfink.com; KO'Day@shookandstone.com; johnshook@shookandstone.com  
**Subject:** A-18-781000-C; Heather Felsner v. Keolis Transit Services, LLC, et al.; Discovery Commissioner's Report & Recommendations re Edgardo Yusi & Keolis Transit Services, LLC's Motion for Rule 35 Examination

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Thank you,

*Please Note Our New Address*

Agnes R. Wong  
Legal Secretary

## Kiana A. O'Day

---

**From:** Kiana A. O'Day  
**Sent:** Wednesday, December 16, 2020 9:25 AM  
**To:** 'Lowry, Michael'; 'Agnes.Wong@wilsonelser.com'  
**Subject:** FW: A-18-781000-C; Heather Felsner v. Keolis Transit Services, LLC, et al.; Discovery Commissioner's Report & Recommendations re Edgardo Yusi & Keolis Transit Services, LLC's Motion for Rule 35 Examination  
**Attachments:** DCRR Form.docx

Was this R&R ever re-submitted? Also I wanted to confirm if an IME still proceeding with Dr. Axelrod on 12/19?

**From:** DiscoveryInbox  
**Sent:** Monday, December 7, 2020 12:11 PM  
**To:** 'Wong, Agnes R.' <Agnes.Wong@wilsonelser.com>  
**Cc:** Lowry, Michael <Michael.Lowry@wilsonelser.com>; dschopick@springelfink.com; cfuss@springelfink.com; Kiana A. O'Day <KO'Day@shookandstone.com>; John Shook <johnshook@shookandstone.com>  
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Thank you,



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## Kiana A. O'Day

---

**From:** Lowry, Michael <Michael.Lowry@wilsonelser.com>  
**Sent:** Wednesday, December 16, 2020 9:31 AM  
**To:** Kiana A. O'Day; Wong, Agnes R.  
**Subject:** RE: A-18-781000-C; Heather Felsner v. Keolis Transit Services, LLC, et al.; Discovery Commissioner's Report & Recommendations re Edgardo Yusi & Keolis Transit Services, LLC's Motion for Rule 35 Examination

Yes, we corrected it to match the form and submitted. We haven't heard anything since. There is no IME on 12/19 due to the ruling though.

**From:** Kiana A. O'Day [mailto:KO'Day@shookandstone.com]  
**Sent:** Wednesday, December 16, 2020 09:25  
**To:** Lowry, Michael <Michael.Lowry@wilsonelser.com>; Wong, Agnes R. <Agnes.Wong@wilsonelser.com>  
**Subject:** FW: A-18-781000-C; Heather Felsner v. Keolis Transit Services, LLC, et al.; Discovery Commissioner's Report & Recommendations re Edgardo Yusi & Keolis Transit Services, LLC's Motion for Rule 35 Examination

### [EXTERNAL EMAIL]

Was this R&R ever re-submitted? Also I wanted to confirm if an IME still proceeding with Dr. Axelrod on 12/19?

**From:** DiscoveryInbox  
**Sent:** Monday, December 7, 2020 12:11 PM  
**To:** 'Wong, Agnes R.' <Agnes.Wong@wilsonelser.com>  
**Cc:** Lowry, Michael <Michael.Lowry@wilsonelser.com>; dschopick@springelfink.com; cfuss@springelfink.com; Kiana A. O'Day <KO'Day@shookandstone.com>; John Shook <johnshook@shookandstone.com>  
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Good Afternoon,

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Thank you,



NATILIE SIMONETTI

Eighth Judicial District Court| DISCOVERY  
[DiscoveryInbox@clarkcountycourts.us](mailto:DiscoveryInbox@clarkcountycourts.us)  
702.671.4486

---

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**Sent:** Friday, December 4, 2020 2:21 PM  
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**Cc:** Lowry, Michael; dschopick@springelfink.com; cfuss@springelfink.com; KO'Day@shookandstone.com; johnshook@shookandstone.com

## Kiana A. O'Day

---

**From:** Kiana A. O'Day  
**Sent:** Thursday, January 7, 2021 11:37 AM  
**To:** 'Lowry, Michael'; Wong, Agnes R.  
**Subject:** RE: A-18-781000-C; Heather Felsner v. Keolis Transit Services, LLC, et al.; Discovery Commissioner's Report & Recommendations re Edgardo Yusi & Keolis Transit Services, LLC's Motion for Rule 35 Examination

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**Sent:** Thursday, January 7, 2021 2:10 PM  
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**Subject:** RE: A-18-781000-C; Heather Felsner v. Keolis Transit Services, LLC, et al.; Discovery Commissioner's Report & Recommendations re Edgardo Yusi & Keolis Transit Services, LLC's Motion for Rule 35 Examination

None. We're as frustrated as you are. The case needs to move forward.

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## Kiana A. O'Day

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**From:** Kiana A. O'Day  
**Sent:** Wednesday, January 13, 2021 2:03 PM  
**To:** 'Lowry, Michael'; Wong, Agnes R.  
**Subject:** RE: A-18-781000-C; Heather Felsner v. Keolis Transit Services, LLC, et al.; Discovery Commissioner's Report & Recommendations re Edgardo Yusi & Keolis Transit Services, LLC's Motion for Rule 35 Examination

I spoke with the discovery commissioner and Natalie advised they never received a corrected DCCR?

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Thank you,

**Kiana A. O'Day**

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**Cc:** dschopick@springelfink.com; cfuss@springelfink.com; Kiana A. O'Day; John Shook  
**Subject:** RE: A-18-781000-C; Heather Felsner v. Keolis Transit Services, LLC, et al.; Discovery Commissioner's Report & Recommendations re Edgardo Yusi & Keolis Transit Services, LLC's Motion for Rule 35 Examination  
**Attachments:** DCRR.pdf

Thank you. The re-formatted DCRR is attached. There were no changes to the substance, only the format.

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[NOTICE: This message originated outside of Eighth Judicial District Court -- DO NOT CLICK on links or open attachments unless you are sure the content is safe.]

Good afternoon,

## **Exhibit 2**



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.

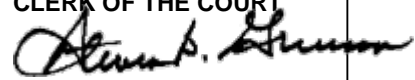
In those exceptions in which a neuropsychologist is *compelled* by the court to evaluate with a TPO because of existing state statutes or if the neuropsychologist is placed in a situation whereby withdrawing will bring clear and substantial harm to the examinee, the manner in which test validity and 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



MICHAEL P. LOWRY, ESQ.

Nevada Bar No. 10666

E-mail: [Michael.Lowry@wilsonelser.com](mailto:Michael.Lowry@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 Reply re 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,

Defendants.

Rule 35 and NRS 52.380 conflict. Mr. Yusi and Keolis (collectively "Mr. Yusi") propose two different ways to resolve this objection that avoids the constitutional separation of powers problem. Plaintiff simply continues to assert there is no problem because NRS 52.380 controls. But if so, then a neuropsychological examination will never be possible in Nevada litigation. Mr. Yusi asks that the report and recommendation be overruled.

DATED this 16th 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

**Memorandum of Points & Authorities**

**I. Plaintiff can't argue positions she never raised.**

There are multiple ways for this court to avoid the constitutional implications at issue in this objection. The first is the simple, undisputed fact that the only objections Plaintiff raised during the EDCR 2.34(d) conference as to a Rule 35 examination were 1) requiring Mrs. Felsner to drive from her home to Dr. Axelrod's office; and 2) that some unknown and unidentified testing was duplicative of prior work. Plaintiff then tried to change horses after Mr. Yusi's motion was filed, asserting multiple objections she admittedly did not raise during the EDCR 2.34(d) conference. If the district court agrees that is impermissible, then the Discovery Commissioner's recommendation should be affirmed as to the rulings on the two objections Plaintiff did raise. The remainder of the report and recommendation would be overruled.

Plaintiff responds by attacking Mr. Yusi, arguing he sandbagged Plaintiff by not addressing NRS 52.380's constitutionality in his opening motion to set a Rule 35 examination. Plaintiff's argument highlights the problem she created at the EDCR 2.34(d) conference. She admittedly never raised NRS 52.380 as an issue at that conference. Since she did not raise it, then there was no reason for Mr. Yusi to address it in his opening motion. Further, Plaintiff seems to misunderstand the purpose of a reply brief. A reply addresses the contentions asserted in the opposition. That is what Mr. Yusi did.

Plaintiff then argues for the first time that motions to set a Rule 35 examination are not subject to EDCR 2.34(d) meet and confer requirements. This is yet another new argument that Plaintiff never raised before. The plain text of EDCR 2.34(d) includes all "discovery disputes." Rule 35 is certainly a discovery rule. EDCR 2.34(d) contains no exception for Rule 35 as opposed to any other "discovery dispute." The text does not support Plaintiff's position. Further, the purpose of the meet and confer requirement is to encourage the parties to communicate about their positions and attempt to resolve them without court intervention. Plaintiff's novel interpretation of EDCR 2.34(d) as applied only to Rule 35 would expressly defeat that purpose.

1 Per *Valley Health* Plaintiff was limited to the objections she raised during the meet and  
2 confer process. The Discovery Commissioner erred as a matter of law by interpreting EDCR  
3 2.34(d) in a manner inconsistent with *Valley Health*, thus allowing Plaintiff to argue objections  
4 that were not presented during the meet and confer process. Plaintiff's objections should have  
5 been limited to the two she did present. Mr. Yusi does not object to the Discovery  
6 Commissioner's resolution of those two objections. The Discovery Commissioner's  
7 recommendation should be affirmed as to the rulings on the two objections Plaintiff did raise and  
8 overruled as to the rest.

9 **II. Plaintiff did not respond to the other constitutional avoidance option.**

10 Mr. Yusi's objection noted a second way to resolve this dispute without involving a  
11 constitutional issue. This alternative relied upon the fact that NRS 52.380(1) states "[a]n  
12 observer may attend an examination but shall not participate in or disrupt the examination."  
13 "'May' is of course generally permissive."<sup>1</sup> Neither Rule 35 nor NRS 52.380 provide guidance  
14 as to how a court should determine when an observer "may" attend. Plaintiff requested the  
15 observer, so she had the burden to justify why one was merited. Plaintiff still has not stated a  
16 reason why she wants an observer to attend other than simply because NRS 52.380(1) exists.  
17 The same analysis applies to NRS 52.380(2) and (3). Plaintiff's position is outweighed by the  
18 ethical guidance Mr. Yusi provided from the American Board of Professional Neuropsychology  
19 and Michigan Psychological Association noting it is inconsistent with their professional  
20 obligations for a neuropsychologist to conduct a neuropsychological assessment in the presence  
21 of a third-party observer. That same guidance also noted how studies have demonstrated testing  
22 data obtained in the presence of a third-party observer is unreliable.

23 If the district court agrees, it could rule that Plaintiff has not met her burden to  
24 successfully invoke NRS 52.380(1), (2), and (3) or her arguments are outweighed by the contrary  
25 evidence that Mr. Yusi presented. In that circumstance, the constitutional arguments are  
26 avoided. The Discovery Commissioner's recommendation would then be affirmed as to the  
27 rulings on the two objections Plaintiff did raise and overruled as to the rest.

28 <sup>1</sup> *Ewing v. Fahey*, 86 Nev. 604, 607, 472 P.2d 347, 349 (1970).

1     **III.     NRS 52.380 is unconstitutional.**

2             If the other arguments are not sufficient to resolve this dispute, then the district court  
3 must rule upon NRS 52.380's constitutionality. NRS 52.380 started its existence as a draft of  
4 Rule 35 that the Supreme Court of Nevada rejected. It was procedural as a draft version of Rule  
5 35. It remained procedural when its drafters took it to the legislature in an attempt to overrule  
6 the version of Rule 35 that the Supreme Court implemented. NRS 52.380 is a procedural statute  
7 expressly intended to restrict the judiciary's ability to regulate cases before it. "[W]here, as here,  
8 a rule of procedure is promulgated in conflict with a preexisting procedural statute, the rule  
9 supersedes the statute and controls."<sup>2</sup>

10            Plaintiff's arguments about where and when recordings are generally permitted in other  
11 jurisdictions and settings are irrelevant. The issue here expressly pertains to a  
12 neuropsychological examination. Rule 35 expressly exempted neuropsychological examinations  
13 from the recording and observer requirements. NRS 52.380 expressly attempted to override  
14 Rule 35. Citing a Michigan case does not make NRS 52.380 any less procedural.

15            *Berkson v. Lepome* ruled a statute that interfered "with the judiciary's authority to  
16 manage the litigation process" was unconstitutional.<sup>3</sup> That same analysis applies here. As NRS  
17 52.380 is unconstitutional, the Discovery Commissioner erred as a matter of law by relying upon  
18 it and should have used only Rule 35 to assess Mr. Yusi's request for a neuropsychological  
19 examination. The district court should overrule the Discovery Commissioner's ruling to the  
20 extent it conflicts with Rule 35.

21     **IV.     The recommendations should be modified as requested.**

22            The Discovery Commissioner resolved the two objections Plaintiff raised and Mr. Yusi  
23 did not object to that ruling. He does object to the remainder of the ruling for all of the reasons  
24 discussed in this briefing. Mr. Yusi requests the recommendations be modified to be consistent  
25 with Rule 35 so the neuropsychological examination may eventually proceed.

26  
27  
28     <sup>2</sup> *State v. Connery*, 99 Nev. 342, 345 (1983).

<sup>3</sup> *Berkson v. Lepome*, 126 Nev. 492, 501, 245 P.3d 560, 566 (2010)



1 DATED this 16th day of February, 2021.



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

8 **Certificate of Service**

9 Pursuant to NRCP 5, I certify that I am an employee of Wilson Elser Moskowitz  
10 Edelman & Dicker LLP, and that on February 16, 2021, I served **Edgardo Yusi & Keolis**  
11 **Transit Services, LLC's Reply re Objection to Discovery Commissioner's Report &**  
12 **Recommendation** 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  
Clerk;

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

Chad Fuss, Esq.  
SPRINGEL & FINK  
20 9075 W. Diablo Dr., Suite 302  
Las Vegas, Nevada 89148

21 BY: /s/ Michael Lowry  
An Employee of



DISTRICT COURT  
CLARK COUNTY, NEVADA

HEATHER FELSNER and ROGER FELSNER,

Plaintiff(s),

v.

KEOLIS TRANSIT SERVICES, LLC, et al.,

Defendant(s).

CASE NO. A-18-781000-C  
DEPT NO. 27

HEARING DATE: November 19, 2020  
HEARING TIME: 9:30 AM

ORDER

RE: DISCOVERY COMMISSIONER'S  
REPORT AND RECOMMENDATIONS

The Court, having reviewed the above report and recommendations prepared by the  
Discovery Commissioner and,

☐ No timely objection having been filed,

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

\* \* \*

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AND

X 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 \_\_\_\_\_, 2021, at \_\_\_\_\_:\_\_\_\_\_ a.m.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2021.

Dated this 19th day of February, 2021

Nancy L Allf  
DISTRICT COURT JUDGE

C48 96A 54BD 5F4E  
Nancy Allf  
District Court Judge

1 **CSERV**

2  
3 DISTRICT COURT  
4 CLARK COUNTY, NEVADA

5  
6 Heather Felsner, Plaintiff(s) CASE NO: A-18-781000-C  
7 vs. DEPT. NO. Department 27  
8 Keolis Transit Services LLC,  
9 Defendant(s)

10  
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District  
13 Court. The foregoing Order was served via the court's electronic eFile system to all  
14 recipients registered for e-Service on the above entitled case as listed below:

15 Service Date: 2/19/2021

16 Michael Lowry	michael.lowry@wilsonelser.com
17 John Shook	ko'day@shookandstone.com
18 Efile LasVegas	efilelasvegas@wilsonelser.com
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