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Oct 28 2021 01:14 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.: 82625

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

Petitioner,

vs.

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

**Edgardo Yusi & Keolis Transit
Services, LLC's Motion to Stay**

Respondents.

and

Heather Felsner,

Real Party in Interest.

The district court denied Mr. Yusi's request to stay the underlying case pending disposition of this petition. Mr. Yusi now asks the appellate court grant a stay as to the underlying case so as to preserve the status quo until this petition is decided.

1 DATED this 28th day of October, 2021.



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

8 **Memorandum of Points & Authorities**

9 **I. The district court denied Mr. Yusi's request for a stay.**

10 This personal injury case concerns an event that occurred on February 21,
11 2017. Mrs. Felsner alleges she suffered a brain injury as a result of a fall. Mr.
12 Yusi requested a Rule 35 neuropsychological examination. The examination was
13 granted but Mr. Yusi contends the conditions imposed on the examination by NRS
14 52.380 make it impossible for him to obtain the examination. Mr. Yusi filed this
15 original proceeding to seek review of those conditions. His pending petition is one
16 of seven presently pending concerning the conflict between NRCP 35 and NRS
17 52.380.¹

18

19

20 _____

¹ The others are 81912, 82148, 82625, 82670, 82831, and 83536.

1 Mr. Yusi filed this petition on March 15, 2020. The next day he asked the
2 district court to stay the case per NRAP 8.² Mr. Yusi asserted that he could not
3 complete his initial expert disclosures without knowing if a neuropsychological
4 examination would be possible, thus a stay was warranted pending the writ
5 petition's disposition. Plaintiff opposed³ and the district court denied the motion,
6 but provided alternative relief.⁴ Rather than staying the case, the court extended
7 the initial expert disclosure deadline to July 2, 2021.

8 Extensions were continued and on October 27, 2021 the court entered the
9 latest extension that makes January 31, 2021 the deadline for initial expert
10 disclosures.⁵ But the district court's order also stated no further extensions will be
11 granted.

12 During the hearing though, the court stated it will not grant any
13 further extensions of discovery in this case, regardless of the pending
14 writ petition. In briefing Plaintiffs raised a concern about the five
15 year rule and Mr. Yusi and Keolis suggested staying the case rather
16 than extending discovery would provide the relief they seek while also
17 addressing Plaintiffs' concern. The court previously denied Mr. Yusi
18 and Keolis' motion for a stay. If they believe a stay is appropriate
19 then they must seek that relief from the appellate courts.

20 ² Exhibit A.

³ Exhibit B.

⁴ Exhibit C.

⁵ Exhibit D.

1 **II. A stay is now warranted to preserve the status quo.**

2 NRAP 8(a)(1) states ordinarily a motion for stay must first be made to the
3 district court. Mr. Yusi complied with that requirement and the motion was
4 denied. Mr. Yusi’s recourse is to now file this motion asking the appellate courts
5 to stay the case pending the disposition of the writ petition.

6 NRAP 8(a)(1)(A) expressly authorizes “a stay of the judgment or order of,
7 or proceedings in, a district court pending ... resolution of a petition to the
8 Supreme Court or Court of Appeals for an extraordinary writ.” NRAP 8(c)
9 establishes factors the appellate courts will generally consider when to issue a stay.

- 10 (1) whether the object of the appeal or writ petition will be defeated if
 the stay or injunction is denied;
11 (2) whether appellant/petitioner will suffer irreparable or serious
 injury if the stay or injunction is denied;
12 (3) whether respondent/real party in interest will suffer irreparable or
 serious injury if the stay or injunction is granted; and
13 (4) whether appellant/petitioner is likely to prevail on the merits in the
 appeal or writ petition.

14
15 Applied here, Mr. Yusi wants a Rule 35 neuropsychological examination,
16 but the district court’s order applied NRS 52.380 and put conditions on that
17 examination that prevent Mr. Yusi from ever obtaining one. The Advisory
18 Committee Note to the 2019 revision to Rule 35 imply, if not express, that a Rule

1 35 examiner is an initial expert.⁶ If the case continues forward with expert
2 disclosures, then Mr. Yusi's ability to obtain a neuropsychological examination
3 and disclose the results of that examination as an initial expert, if desired, are lost.
4 That would defeat the purpose of the writ petition.

5 At this point in the case, it appears the second favors a stay. This is not a
6 case where property will be seized or sold. However, unless a stay is entered, the
7 initial expert disclosure deadline will expire and Mr. Yusi's ability to obtain a
8 neuropsychological examination would seem to be permanently lost. The third
9 factor seems neutral. Real party in interest argues she would suffer irreparable
10 harm because her case would be delayed further. Mere delay is not the type of
11 irreparable harm the third factor considers though.

12 The fourth factor is difficult to predict, like any other appeal or writ petition.
13 However, the Supreme Court has ordered briefing on all other writ petitions
14 addressing the same core issue Mr. Yusi raises. Two of those petitions, 81912 and
15 82148, were submitted for decision without oral argument on October 22, 2021.
16 The Supreme Court also granted a stay when it was requested in 82670. On whole,
17 it appears some type of decision on this issue is coming, although no one can
18 predict what that decision may be. The fourth factor favors a stay.

19 ⁶ "The disclosure deadlines contemplate that the report will be provided by the
20 initial expert disclosure deadline, assuming that deadline is within 30 days of the
35 examination." Comment to Subsection (b).

1 **III. The case should be stayed pending this petition's disposition.**

2 Allowing the underlying case to continue while this petition is pending
3 seriously harms Mr. Yusi because the challenged order makes it ethically
4 impossible for him to obtain a Rule 35 neuropsychological examination. Granting
5 a stay until this petition is decided preserves the status quo and is appropriate in
6 this scenario.

7 DATED this 28th day of October, 2021.



9 /s/ Michael P. Lowry

10 MICHAEL P. LOWRY, ESQ.
11 6689 Las Vegas Blvd. South, Suite 200
12 Las Vegas, Nevada 89119
13 Attorneys for Edgardo P. Yusi; Keolis
14 Transit Services, LLC
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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 October 28, 2021, **Edgardo Yusi & Keolis Transit Services, LLC's Motion to Stay** was served via electronic means by operation of the Court's electronic filing system.

John B. Shook, Esq. Shook & Stone 710 South Fourth Street Las Vegas, NV 89101 Attorneys for Heather Felsner	Judge Nancy Alf Eighth Judicial District Court Department 27 200 Lewis Ave. Las Vegas, NV 89155
Tom W. Stewart, Esq. Ryan T. O'Malley, Esq. The Powell Law Firm 8918 Spanish Ridge Ave, Suite 100 Las Vegas, NV 89148 Attorneys for Heather Felsner	Evan D. Schwab Schwab Law Firm 7455 Arroyo Crossing Pkwy., Suite 220 Las Vegas, NV 89113 Attorneys for American Board of Professional Neuropsychology

BY: /s/ Amanda Hill
An Employee of



Exhibit A

Exhibit A

Heather S. Felsner
CLERK OF THE COURT



MICHAEL P. LOWRY, ESQ.

Nevada Bar No. 10666

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

ENTERED kl

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 to Stay Case on Order
Shortening Time**

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.

Mrs. Felsner claims she has an ongoing brain injury as a result of a fall that occurred in Las Vegas. Mr. Yusi and Keolis (collectively "Mr. Yusi") requested a neuropsychological examination per Rule 35. The district court agreed an examination is appropriate, but put conditions on it that make an examination impossible to obtain. Mr. Yusi has now petitioned for a writ of mandamus to discuss this ruling. Consequently, he requests the case be stayed until the writ petition is concluded.

DATED this 15th day of March, 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

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Declaration of Michael Lowry

1. This motion asks the court to stay the case due to a pending writ petition that concerns Mr. Yusi's ability to obtain a neuropsychological examination per NRCP 35. If heard in the normal course this motion would not be heard until after the March 22 initial expert disclosure deadline. Consequently, we request that this motion be heard on an order shortening time, preferably before March 22.
2. I declare under penalty of perjury that the foregoing is true and correct.

/s/ Michael P. Lowry

Order Shortening Time

Mr. Yusi's request for an order shortening time is granted. This motion is scheduled for hearing on March 18, 2021 at 9:30 a.m.XXXXXXXXXXXXXXXXXXXXX
Oppositions will be due on XXXXXXXXXXXXXXXXXXXXX, and replies on XXXXXXXXXXXX.

Dated this 16th day of March, 2021

By: Nancy L Alf
DISTRICT JUDGE

F59 811 11A9 59F6
Nancy Alf
District Court Judge

1 **Memorandum of Points & Authorities**

2 **I. The district court's order prevents Mr. Yusi from obtaining a neuropsychological**
3 **examination.**

4 This personal injury case concerns an event that occurred on February 21, 2017. Mrs.
5 Felsner alleges she suffered a brain injury as a result of a fall. Mr. Yusi and Keolis requested a
6 Rule 35 psychological examination in a motion filed on October 16, after the meet and confer
7 process was completed.

8 The Discovery Commissioner heard that motion on November 19, 2020. The report and
9 recommendations was filed on February 4, 2021. Mr. Yusi objected on February 5 and the
10 district court affirmed the report and recommendations on February 19, 2021. Mr. Yusi's writ
11 petition was filed March 15, 2021.¹ Initial expert disclosures are presently due March 22, 2021.²

12 While waiting for the Discovery Commissioner's report and recommendations, Mr. Yusi
13 moved to extend discovery. His motion proposed extending the initial expert disclosure deadline
14 to September 24, 2021, because "the reality of this issue is that it seems highly probable one side
15 or the other may attempt a writ petition no matter how the district court rules on the objection.
16 This in turn leads to further delay." The district court granted an extension, but for a shorter
17 duration. Unfortunately Mr. Yusi's prediction came true.

18 **II. A stay is merited to preserve Mr. Yusi's rights.**

19 NRAP 8(a)(1) states ordinarily a motion for stay must first be made to the district court.
20 NRAP 8(a)(1)(A) expressly authorizes "a stay of the judgment or order of, or proceedings in, a
21 district court pending ... resolution of a petition to the Supreme Court or Court of Appeals for an
22 extraordinary writ." NRAP 8(c) establishes factors the appellate courts will generally consider
23 when to issue a stay. The rule does not expressly state whether these factors also apply to the
24 district court's evaluation.

- 25 (1) whether the object of the appeal or writ petition will be defeated if the stay or
26 injunction is denied;
27 (2) whether appellant/petitioner will suffer irreparable or serious injury if the stay
or injunction is denied;

28 ¹ Docket 82625.

² Scheduling order filed February 19, 2021.

1 (3) whether respondent/real party in interest will suffer irreparable or serious
2 injury if the stay or injunction is granted; and
3 (4) whether appellant/petitioner is likely to prevail on the merits in the appeal or
4 writ petition.

5 Applied here, Mr. Yusi wants a Rule 35 neuropsychological examination, but the district
6 court's order applied NRS 52.380 and put conditions on that examination that prevent Mr. Yusi
7 from ever obtaining one. The Advisory Committee Note to the 2019 revision to Rule 35 imply,
8 if not express, that a Rule 35 examiner is an initial expert.³ If the case continues forward with
9 expert disclosures, then Mr. Yusi's ability to obtain a neuropsychological examination and
10 disclose the results of that examination as an initial expert, if desired, are lost. That would defeat
11 the purpose of the writ petition.

12 Initially, it would appear the second and third factors would not favor a stay. In the
13 context of a request for stay pending determination of a writ petition concerning personal
14 jurisdiction, the Supreme Court stated "mere injuries, however substantial, in terms of money,
15 time and energy necessarily expended in the absence of a stay are not enough to show irreparable
16 harm." However, that comment came in the earliest stages of the litigation. This file is far past
17 that and the parties are preparing for initial expert disclosures. These disclosures are just 90 days
18 before discovery closes.

19 The fourth factor is difficult to predict, like any other appeal or writ petition. The real
20 question is whether the Supreme Court will at least agree to hear the petition on its merits. It
21 seems likely to do so, because it has already accepted briefing on another petition raising
22 substantively the same issue. In docket 81912 the defendant sought a neuropsychological
23 examination like Mr. Yusi. The Discovery Commissioner applies NRS 52.380 to it, but the
24 district court overruled and applied NRCP 35. The plaintiff then filed a writ petition. Rather
25 than denying the petition procedurally, the Supreme Court directed the defendant to file an
26 answer. It also accepted amicus briefing from the Nevada Justice Association and the Las Vegas
27 Defense Lawyers. The plaintiff's reply brief is due March 22, 2021.

28 ³ "The disclosure deadlines contemplate that the report will be provided by the initial expert
disclosure deadline, assuming that deadline is within 30 days of the examination. There may be
rare circumstances that would justify a rebuttal Rule 35 examination." Comment to Subsection
(b).

Mr. Yusi's request for a stay is supported and practical. This court agreed a neuropsychological examination is appropriate in this case, but put conditions on that examination that directly conflict with neuropsychologists' ethical obligations. Mr. Yusi cannot obtain the examination under these conditions and has now sought the Supreme Court's intervention on this topic. Proceeding forward and forcing him to defend the case without the examination this court agreed he should have is fundamentally unfair. Staying the case preserves the status quo until the Supreme Court rules on or otherwise rejects this petition.



WILSON ELSE
WILSON ELSE MOSKOWITZ EDELMAN & DICKER LLP

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Services, LLC

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
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 Motion to Stay was served via the court's electronic eFile system to all
recipients registered for e-Service on the above entitled case as listed below:

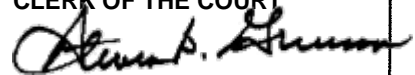
14 Service Date: 3/16/2021

15 Michael Lowry	michael.lowry@wilsonelser.com
16 John Shook	ko'day@shookandstone.com
17 Efile LasVegas	efilelasvegas@wilsonelser.com
18 Kait Chavez	kait.chavez@wilsonelser.com
19 Amanda Hill	amanda.hill@wilsonelser.com
20 Mail Room	espringel@springelfink.com
21 Nakesha Duncan	nduncan@springelfink.com
22 Alma Duarte	aduarte@springelfink.com
23 Chad Fuss	cfuss@springelfink.com
24 Pam January	pjanuary@springelfink.com

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27
28

Exhibit B

Exhibit B



1 **OPPS**
2 JOHN B. SHOOK, ESQ.
3 Nevada Bar No. 5499
4 ROBERT L. ENGLISH, ESQ.
5 Nevada Bar No. 3504
6 SHOOK & STONE, CHTD.
7 710 South Fourth Street
8 Las Vegas, Nevada 89101
9 Office: (702) 385-2220
10 Attorneys for Plaintiffs
11 HEATHER FELSNER
12 and ROGER FELSNER,

13 **EIGHTH JUDICIAL DISTRICT COURT**

14 **CLARK COUNTY, NEVADA**

15 HEATHER FELSNER and ROGER
16 FELSNER,

Case No.: A-18-781000-C
Dept. No.: XXVII

17 Plaintiffs

18 vs.

PLAINTIFFS HEATHER FELSNER and
ROGER FELSNER'S OPPOSITION TO
MOTION TO CASE STAY ON ORDER
SHORTENING TIME

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

25 Defendants.

26 Plaintiffs HEATHER FELSNER and ROGER FELSNER hereby submit their Opposition to
27 the Defendants Yusi and Keolis Transit Services, LLC's Motion to Stay Case on Order Shortening
28 Time.

///

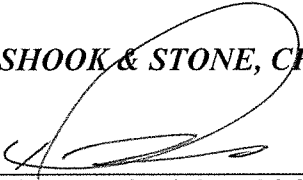
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1 This Opposition is made and based upon the pleadings and papers on file herein, the
2 attached Points and Authorities, and any argument made by counsel at the hearing of this matter.

3 DATED this 17th day of March, 2021.

4
5 **SHOOK & STONE, CHTD.**

6
7 
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13 710 South Fourth Street
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15 Attorneys for Plaintiffs
16 HEATHER AND ROGER FELSNER

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS

A. Underlying Facts

This is a personal injury action arising from a fall down the stairs of a coach operated by Defendants Keolis and Yusi and manufactured by Defendant Alexander Dennis, Inc. Plaintiff suffered severe brain injuries as a result of the fall. Defendants Keolis and Yusi have conceded violations of the standard set by defendants for safe operation during their depositions.

I. Procedural Background

On September 12, 2018, Plaintiffs filed their complaint.

On April 8, 2019, a joint case conference report was filed.

On January 3, 2020, the parties agreed to extend all deadlines 90 days pushing the initial expert disclosure from March 24, 2020 to June 24, 2020.

1 On June 19, 2020, the parties agree to extend expert disclosure deadlines to December 22,
2 2020.

3 On September 28, 2020, Defendants requested neuropsychological examination of Mrs.
4 Felsner and conducted an EDCR 2.34 conference. The parties were unable to agree on the need and
5 parameters for same and plaintiff's counsel requested defense counsel proceed with their Motion for
6 Order allowing Rule 35 examination.
7

8 On October 16, 2020, Defendants filed their motion for Rule 35 examination naming their
9 examiner as Dr. Bradley Axelrod with the examination to occur in Ann Arbor, Michigan.

10 On November 2, 2020, Plaintiff opposed Defendant's Motion for examination.

11 On November 13, 2020, Defendants filed their reply brief asserting for the first time the
12 unconstitutionality of NRS 52.380.
13

14 On November 19, 2020, the discovery commissioner heard the Motion for Order allowing
15 Rule 35 Examination at which time she ordered the examination may proceed with various
16 restrictions and subject to NRS 52.380 which specifically allows for the presence of an observer
17 and the recording of the examination.

18 On November 23, 2020, defendants moved for extension of all discovery deadlines for sixty
19 days.
20

21 On December 4, 2021, Defendant submitted a proposed DCRR.

22 On December 7, 2021, the Discovery Commissioner requested Defendant submit a properly
23 formatted DCRR.

24 On December 9, 2021, the discovery commissioner granted defendants motion to extend
25 making intial experts due February 22, 2021.
26
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1 On Jan 7, 2021, Plaintiff's counsel staff emailed defense counsel regarding the status of the
2 DCRR. Defense counsel responded that they had received no response from the discovery
3 commissioner.

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

8 On February 5, 2021, Defendants filed their objection.

9 On February 19, 2021, the Court affirmed the DCRR. On that same day the parties agreed to
10 a thirty-day extension of expert disclosure deadlines to March 22, 2021.

11 On March 15, 2021, Defendants Yusi and Keolis filed their Petition for Writ of Mandamus
12 or Prohibition to the Nevada Supreme Court.

13 On March 16, 2021, Defendants filed the instant motion.

14 Initial Expert disclosures are now due March 22, 2021.

15 Rebuttal experts are due April 22, 2021.

16 Discovery cutoff is June 21, 2021.

17 Trial is set on a five-week stack starting September 7, 2021.

18 **II. Defendant controlled his own future**

19 Defendants argue they predicted that a writ would be filed in their motion to extend expert
20 disclosures in September, 2021. Indeed, defense counsel has been predicting an appeal since
21 September 2019 when he discussed the constitutionality of AB285 in his blog. See,
22 <https://www.compellingdiscovery.com/?p=5867> . In light of these predictions, one must ask why
23 defendants waited from April 8, 2019 when a joint case conference report was filed until shortly
24 before the initial expert September 28, 2020 to request a rule 35 examination. If defendants believed
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1 a writ was likely -- and that they were likely to prevail on the issue of constitutionality -- they
2 should have sought the rule 35 examination earlier to allow the Supreme Court to decide in their
3 favor. A defendant cannot manufacture need for continuance by refusing to act. *McCabe v.*
4 *State*, 98 Nev. 604, 655 P.2d 536 (1982). See, also, *State v. Nelson*, 36 Nev. 403, 136 P. 377 (1913)
5 (defendant only entitled to continuance where he or she can show no negligence in securing
6 witnesses' attendance.)
7

8
9 **III. Defendants concede three of four NRAP 8(c) factors do not support grant of stay**

10 Defendant cites to NRAP 8(c) for the four factors reviewing courts should consider in
11 granting a stay:

- 12 (1) whether the object of the appeal or writ petition will be defeated if the stay or injunction
13 is denied;
- 14 (2) whether appellant/petitioner will suffer irreparable or serious injury if the stay or
15 injunction is denied;
- 16 (3) whether respondent/real party in interest will suffer irreparable or serious injury if the
17 stay or injunction is granted; and
- 18 (4) whether appellant/petitioner is likely to prevail on the merits in the appeal or writ
19 petition.

20 Defendants concede factors two and three favor denial of stay.

21 Defendants also concede that factor four -- whether appellant/petitioner is likely to prevail
22 on the merits -- does not support their motion for stay because it is impossible to predict how the
23 Supreme Court will rule. Plaintiffs agree that factor four does not support staying the matter, not
24 because it is impossible to predict but because it is likely that NRS 52.380 will be found
25 constitutional. Statutes are presumed to be valid and a court will only intervene when the
26 constitution is clearly violated. *Universal Electric v. Labor Comm'r*, 109 Nev. 127, 129, 847 P.2d
27 1372, 1373-74 (1993).

28 Additionally, the Supreme Court will likely find NRS 52.380 constitutional because there
are many good reasons to record the examination and have an observer present during the
examination. This view was supported by documents the legislature relied upon in passing the
legislation including the affidavit of Richard L. Frederick, PH.D., a board-certified

1 neuropsychologist, with a specialty in Forensic Psychology and board certified by the American
2 Board of Assessment Psychology. He opined differently as to the effects of recording
3 neuropsychological examination especially in the context of litigated cases. Pertinent portion of that
4 affidavit are attached as *Exhibit 1*.

5
6 9. Every examination by a neuropsychologist in a litigated matter is a
7 departure from the standardized conditions under which the normative
8 data were collected that Dr. Fink intends to compare the claimant's
9 performances to. None of the data the make up the standardization
10 samples for IQ tests, memory tests, or other cognitive tests included
11 anyone who was in a litigated setting, making a claim for compensation.
12 Dr. Fink nevertheless willingly and enthusiastically engages in
13 assessments that significantly depart from standardized conditions in
14 broad and extensive ways with no apparent concern for the potential for
15 "unreliable and invalid" results. What he is asserting in his affidavit is
16 essentially this: "I am willing to depart from standardized conditions in
17 broad and extensive ways to conduct an examination of the claimant,
18 risking unreliable and invalid results, except I am not willing also to
19 depart so far as to video record the examination-that would be too
20 much." Such an assertion has no scientific basis.

21 ...
22 14. No publisher of psychological tests prohibits copying of test forms or
23 video recording of evaluations in forensic examinations. The publishers,
24 consistent with professional standards for psychologists, requests that
25 psychologists take reasonable efforts to protect test items from public
26 disclosure. There are many avenues, simple methods, to accomplish this
27 goal.

28 15. The Ethical Principals of Psychologists and Code of Conduct
(EPPCC) does not require that psychologists record their examinations.
However, 6.01 of EPPCC states that "Psychologists create, and to the
extent the records are under their control, maintain, disseminate, store,
retain, and dispose of records and data relating to their professional and
scientific work in order to (1) facilitate provision of services later by
them or by other professionals "

16. The Specialty Guidelines of Forensic Psychologists (10.06) states:
"Forensic practitioners are encouraged to recognize the importance of
documenting all data they consider with enough detail and quality to
allow for reasonable judicial scrutiny and adequate discovery by all
parties. This documentation includes, but is not limited to, letters and
consultations, notes, *recordings* " [Emphasis added]

17. The 2014 edition of the Standards for Educational and Psychological
Testing anticipates the need to produce documents and secure test

1 information in the resolution of disputed matters. Standard 6.7 of the
2 Standards states "Test users must balance test security with the rights of
3 all test takers and test users. When sensitive test documents are at issue
4 in court or in administrative agency challenges, it is important to identify
5 security and privacy concerns and needed protections at the outset.
6 Parties should ensure that the release and exposure of such documents
7 (including specific sections of those documents that may warrant
8 redaction) to third parties, experts, and the courts/agencies themselves
9 are consistent with the conditions (often reflected in protective orders)
10 that do not result in inappropriate disclosure and that do not risk
11 unwarranted release beyond the particular setting in which the challenge
12 has occurred." There is no part of Standard 6.7 that can be read to mean
13 that an evaluation cannot be recorded or that the recording cannot be
14 reviewed by those who are obligated to protect test security. There is no
15 part of Standard 6.7 that can be read to mean that an evaluation cannot
16 be recorded to identify which parts should be reviewed by "third parties"
17 or "courts/agencies" to determine if opinions or conclusions have valid
18 and reliable bases.

12 18. Those who work in the legal environment-those working as forensic
13 psychologists should strive to address the needs of all parties involved.
14 There is a legitimate basis for a claimant to want the protection of having
15 his or her examination recorded. The legal community is well aware of
16 such issues.

15 19. For example, with respect to the value of recording to protect the
16 interests of individuals being evaluated in adversarial matters, the
17 American Bar Association's 2016 Criminal Justice Standards on Mental
18 Health addresses the importance of documenting evaluations through
19 video recording:

19 Standard 7-3.5. Procedures for conducting evaluations:

20 (d) recording the evaluation

21 (ii) Whenever feasible, recordings should be made of all court-ordered
22 evaluations of defendants initiated by the prosecution or the court.
23 Copies of such recordings should be provided promptly to the defense
24 attorney and the prosecution.

25 (iii) Jails and other correctional facilities should maintain equipment that
26 evaluators may use to make audio and video recordings of evaluations
27 they conduct in such facilities. The equipment should be available, on
28 request of the evaluator, for use in a private room when feasible and
consistent with security requirements. Alternatively, facilities should
allow evaluators to use their own
equipment.

(iv) If an evaluation is recorded, video recording should be considered
preferable to audio recording.

1 The ABA Standards were developed by committees of both ABA
2 members and forensic psychologists.

3 Dr. Frederick then documented the numerous problems he observed in such examination in
4 paragraph 22 of his affidavit, which he opined represented threats to the reliability of such testing.
5 He then opined in combating such bias that:

6 24. Recording the examination is the best way to ensure a proper record
7 of the examination exists. This includes maintaining an independent
8 confirmation of the source and context of the clinical history. I have seen
9 examinations in which a spouse or partner provided information about
10 the client's abilities, but the information was not properly attributed in
11 the psychologist's report. Consequently, the report incorrectly indicated
12 that the information came from the plaintiff.

13 25. Video recording preserves evidence of all variations, errors,
14 omissions, and misbehavior on the psychologist, should they occur.
15 Although there are legitimate and important reasons for any psychologist
16 to maintain the protection of test items, test questions, and stimulus
17 materials from public access, the need for security must not prevent
18 preservation

19 of evidence of potential errors and misconstructions that form the basis
20 for the evaluation psychologist's conclusions. The consulting
21 psychologists should be able to review with plaintiff's attorney those
22 portions of the video that demonstrate variations, errors, omissions, or
23 misbehavior so that plaintiff's attorney can evaluate their usefulness in
24 cross-examining the evaluating psychologist regarding the evidence that
25 form the bases of his opinions.

26 See Affidavit of Dr. Frederick attached hereto as Exhibit 1.

27 IV. **It is not fundamentally unfair to require Defendants to abide by the**
28 **Court's deadlines**

29 Defendants assert that it is impossible for their examiner to ethically conduct an
30 examination with an observer present and that it is "fundamentally unfair" to force them to defend
31 their case without first conducting an unobserved neuropsychology examination. Defendants are
32 wrong on both counts.

1 Defendants, in prior motion practice, argue that it is impossible to ethically conduct an
2 examination and cite *Guest Editorial, Applied Neuropsychology: Adult*, 2016, Vol. 6. 391-398, 396.¹
3 However, review of the article confirms that a neuropsychologist *may* proceed with the examination
4 if “withdrawing will bring clear and substantial harm to the examinee” The article goes on to explain
5 how the neuropsychologist should proceed:
6

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

21 *Id.*

22 While it may be true that the defendant’s proposed examiner is unwilling to proceed,
23 Defendants have provided no evidence that they have sought to obtain a different neuropsychologist
24 who is willing to comply with existing Nevada law and examine Ms. Felsner. As discussed above,
25 a defendant cannot manufacture the need for a stay by failing to act seasonably.

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¹ (Note: the article was attached as Exhibit G to Defendants’ Reply Brief), asserted, if directed to proceed with TPO, the 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.*

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IV. CONCLUSION

Defendants concede that three of four factors laid out by NRAP (c) do not support grant of stay. Defendants cannot show good cause as to why they delayed seeking examination earlier. Defendants cannot show it is impossible for them to obtain a neuropsychology examination within the confines of existing Nevada law. Defendants cannot explain why they chose an examiner that cannot comply with Nevada law. Defendants cannot show prejudice if they are required to comply with the Court's deadlines for disclosing expert witnesses.

Wherefore, based on these foregoing, Plaintiff respectfully request this Court deny the Motion to Stay the Case on Order Shortening Time.

DATED this 17th day of March, 2021.

SHOOK & STONE, CHTD.



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
Attorneys for Plaintiffs

1
2 **CERTIFICATE OF SERVICE**

3 I hereby certify, pursuant to NRCP 5(b), that on the 17 day of March, 2021, I served a
4 true and correct copy of the foregoing **PLAINTIFFS HEATHER FELSNER and ROGER**
5 **FELSNER'S OPPOSITION TO DEFENDANTS MOTION TO SATY CASE ON ORDER**
6 **SHORTENING TIME** by electronic transmission through the Odyssey File & Serve system to the
7 following parties:

8
9 Michael Lowry, Esq.
10 Wilson Elser Moskowitz Edelman & Dicker
11 6689 Las Vegas Blvd, #200
Las Vegas, Nevada 89119
Attorney for Defendant KEOLIS

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

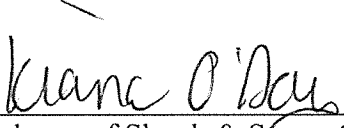
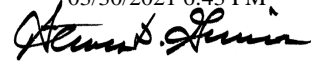
16
17 
18 _____
Employee of Shook & Stone, Chtd.
19
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Exhibit C

Exhibit C


CLERK OF THE COURT

ORDR

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

DISTRICT COURT

CLARK COUNTY, NEVADA

HEATHER FELSNER and ROGER
FELSNER,

Case No.: A781000
Dept. No.: XXVII

Plaintiff,

vs.

**ORDER DENYING DEFENDANT'S
MOTION TO STAY CASE ON AN
ORDER SHORTENING TIME**

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.

On the 18th day of March, 2021, Defendant Edgardo Yusi and Keolis Transit Services, LLC's Motion to Stay Case originally came on for hearing before the above-entitled Court. The Court having considered Defendants' Motion and Plaintiffs' Opposition being filed and the oral arguments thereon, and good cause appearing hereby finds and orders as follows:

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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 Denying Motion was served via the court's electronic eFile
14 system to all recipients registered for e-Service on the above entitled case as listed below:

15 Service Date: 3/30/2021

16 Michael Lowry	michael.lowry@wilsonelser.com
17 John Shook	ko'day@shookandstone.com
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20 Amanda Hill	amanda.hill@wilsonelser.com
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23 Alma Duarte	aduarte@springelfink.com
24 Chad Fuss	cfuss@springelfink.com
25 Pam January	pjanuary@springelfink.com

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27
28

Exhibit D

Exhibit D

Heather S. Felsner
CLERK OF THE COURT



MICHAEL P. LOWRY, ESQ.

Nevada Bar No. 10666

E-mail: 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.

**Order re Edgardo Yusi & Keolis Transit
Services, LLC's Motion to Extend Discovery
(7th Request)**

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.


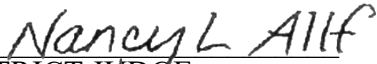
This motion was heard on an order shortening time on October 21, 2021. Mr. Yusi and Keolis appeared through Michael Lowry. Plaintiffs' opposed the motion and appeared through John Shook. Alexander-Dennis took no position on the motion but appeared through Quanisha Holloway.

The court concludes there was excusable neglect for the motion's timing and good cause to grant the motion as discussed below. During the hearing though, the court stated it will not grant any further extensions of discovery in this case, regardless of the pending writ petition. In briefing Plaintiffs raised a concern about the five year rule and Mr. Yusi and Keolis suggested staying the case rather than extending discovery would provide the relief they seek while also addressing Plaintiffs' concern. The court previously denied Mr. Yusi and Keolis' motion for a stay. If they believe a stay is appropriate then they must seek that relief from the appellate courts.

As a result of this motion being granted, the new discovery schedule is below. The initial expert disclosure deadline applies to Mr. Yusi and Keolis only, and only for the purpose of completing their designation of a neuropsychologist. The initial expert disclosure deadline remains closed for all other purposes and parties. The remainder of the discovery schedule functions as normal.

Amend Pleadings	Closed
Initial Experts	January 31, 2022
Rebuttal Experts	March 2, 2022
Discovery Deadline	April 29, 2022
Dispositive Motions	May 27, 2022

The court will enter a separate order re-assigning a trial date.

 <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 th St. Las Vegas, Nevada 89101 Attorney for Heather & Roger Felsner
October 27, 2021	It is so ordered. Dated this 27th day of October, 2021  DISTRICT JUDGE

TW

1EB 434 D2F5 7300
Nancy Alif
District Court Judge

Hill, Amanda M.

From: John Shook <johnshook@shookandstone.com>
Sent: Wednesday, October 27, 2021 9:44 AM
To: Lowry, Michael
Cc: Kiana A. O'Day; Robert English
Subject: RE: Felsner: Order on Mtn

[EXTERNAL EMAIL]

Looks good to me but you probably should get chad to sign off on it too.

From: "Lowry, Michael" <Michael.Lowry@wilsonelser.com>
Date: October 21, 2021 at 2:02:19 PM PDT
To: John Shook <johnshook@shookandstone.com>
Subject: Felsner: Order on Mtn

John, the proposed order from this morning's hearing is attached. May I submit it with your signature?

Michael Lowry
Attorney at Law (Admitted to practice in NV & OR)
Wilson Elser Moskowitz Edelman & Dicker LLP
6689 Las Vegas Blvd. South, Suite 200
Las Vegas, NV 89119
702.727.1267 (Direct)
702.727.1400 (Main)
702.727.1401 (Fax)
michael.lowry@wilsonelser.com

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For further information about Wilson, Elser, Moskowitz, Edelman & Dicker LLP, please see our website at www.wilsonelser.com or refer to any of our offices.
Thank you.

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 Stipulation and Order to Extend Discovery Deadlines was served via
14 the court's electronic eFile system to all recipients registered for e-Service on the above
entitled case as listed below:

15 Service Date: 10/27/2021

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23 Chad Fuss	cfuss@springelfink.com
24 Pam January	pjanuary@springelfink.com
25 Kait Natarajan	kait.natarajan@wilsonelser.com

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