

1 RYAN L. DENNETT, ESQ.
Nevada Bar No. 005617
2 rdennett@dennettwinspear.com
BRENT D. QUIST, ESQ.
3 Nevada Bar No. 009157
bquist@dennettwinspear.com
4 **DENNETT WINSPEAR, LLP**
3301 N. Buffalo Drive, Suite 195
5 Las Vegas, Nevada 89129
Telephone: (702) 839-1100
6 Facsimile: (702) 839-1113
Attorneys for Defendant, Chilly
7 *Willy's Handyman, LLC*

Electronically Filed
Dec 14 2021 11:34 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

8 IN THE SUPREME COURT OF THE STATE OF NEVADA

9
10 DAVID G. MARTINEZ and CHILLY
11 WILLY'S HANDYMAN SERVICES,
12 LLC

13 Petitioners,

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

17 and

18 TAYLOR MILES CAPE, and individual,

19 Respondents.

Supreme Ct. Case No:

Dist. Ct. Case No.:

A-20-818569-C

**Appendix Volume I to Chilly
Willy's Handyman, LLC's Petition
for Writ of Mandamus or
Prohibition**

20 **Table of Contents**

21 Defendants' Motion to Compel.....	1-184
22 Plaintiff's Opp to Defendants' Motion to Compel	185-294
23 Reply in Support of Defendants' Motion to Compel.....	295-320
24 Transcript from Hearing re Motion to Compel	321-348
25 Discovery Commissioner's Report & Recommendations.....	349-353

26
27
28

1	Defendants' Objection to Discovery Commissioner's Report & Recommendations	
2	354-611
3		
4	Plaintiff's Opposition to Objection to Discovery Commissioner's Report &	
5	Recommendations.....	612-676
6		
7	Defendants' Reply in Support of Objection to Discovery Commissioner's Report &	
8	Recommendations.....	677-699
9	Order re Discovery Commissioner's Report & Recommendations.....	700-707
10		

11 DATED this 13th day of December, 2021.

12
13 **DENNETT WINSPEAR, LLP**

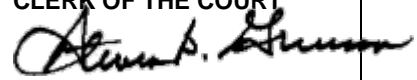
14
15 By /s/ Brent D. Quist
16 RYAN L. DENNETT, ESQ.
17 Nevada Bar No. 005617
18 BRENT D. QUIST, ESQ.
19 Nevada Bar No. 009157
20 3301 N. Buffalo Drive, Suite 195
21 Las Vegas, Nevada 89129
22 Telephone: (702) 839-1100
23 Facsimile: (702) 839-1113
24 *Attorneys for Defendant, Chilly Willy's*
25 *Handyman Services, LLC*
26
27
28

CERTIFICATE OF SERVICE

Per NRAP 21(a) and 25 (c), I certify that I am an employee of Dennett Winspear, LLP, and that on the 13th day of December, 2021, service of **Appendix to Volume I to Chilly Willy's Handyman, LLC's Petition for Writ of Mandamus or Prohibition** was served via electronic means by operation of the Court's electronic filing system to:

NAME	TEL., FAX & EMAILS	PARTY REPRESENTING
Ryan A. Loosvelt, Esq. Nevada Bar No. 8550 GGRM LAW FIRM 2770 S. Maryland Parkway Suite 100 Las Vegas, Nevada 89109	Telephone: (702) 384-1616 Facsimile: (702) 384-2990 Email: rloosvelt@ggrmlawfirm.com	Plaintiff Taylor Miles Cape
John T. Keating, Esq. Nevada Bar No. 6373 KEATING LAW GROUP 9130 W. Russell Road Suite 200 Las Vegas, Nevada 89148	Telephone: (702) 228-6800 Facsimile: (702) 228-0443 Email: jkeating@keatinglg.com	Defendant David G. Martinez
Aaron D. Ford, Esq. Nevada Bar No. 7704 NEVADA OFFICE OF ATTORNEY GENERAL 555 E. Washington Avenue #3900 Las Vegas, Nevada 89101	Telephone: (702) 486-3768 Facsimile: (702) 486-3420	
Honorable Judge Ronald J. Israel Department 28 REGIONAL JUSTICE CENTER 200 Lewis Avenue Las Vegas, Nevada 89155	Telephone: (702) 366-1407	

/s/ Zaira Baldovinos
An Employee of DENNETT WINSPEAR, LLP



RYAN L. DENNETT, ESQ.
Nevada Bar No. 005617
rdennett@dennettwinspear.com
BRENT D. QUIST, ESQ.
Nevada Bar No. 009157
bquist@dennettwinspear.com
DENNETT WINSPEAR, LLP
3301 N. Buffalo Drive, Suite 195
Las Vegas, Nevada 89129
Telephone: (702) 839-1100
Facsimile: (702) 839-1113
**Attorneys for Defendant, CHILLY
WILLY'S HANDYMAN SERVICES, LLC**

DISTRICT COURT
CLARK COUNTY, NEVADA

TAYLOR MILES CAPE,

Plaintiff,

Case No: A-20-818569-C
Dept. No: 28

vs.

DAVID G. MARTINEZ, individually; CHILLY
WILLY'S HANDYMAN SERVICES, LLC, a
domestic limited-liability company; DOES I
through X; and ROE BUSINESS ENTITIES I
through X, inclusive,

Defendants.

**HEARING BEFORE THE DISCOVERY
COMMISSIONER REQUESTED**

**DEFENDANTS' MOTION TO COMPEL NRCP 35 NEUROPSYCHOLOGICAL EXAM WITH DR.
LEWIS M. ETCOFF, NOTICED FOR OCTOBER 19-20, 2021, ON AN ORDER SHORTENING
TIME.**

Defendants CHILLY WILLY'S HANDYMAN SERVICE, LLC, by and through its counsel of
record, DENNETT WINSPEAR, LLP, and DAVID G. MARTINEZ, by and through his counsel of
record, KEATING LAW GROUP, hereby move the Discovery Commissioner to recommend the
Court compel the Rule 35 exam of Plaintiff with Dr. Lewis M. Etcoff.

///

///

///

///

///

1 This Motion is made and based upon the records and pleadings on file herein, together
2 with the Declaration of counsel and Points and Authorities attached hereto, and such argument
3 of counsel as may be entertained by the Court at the time and place scheduled for the hearing of
4 the Motion.

5 DATED this 13th day of September, 2021.

6
7 **DENNETT WINSPEAR, LLP**

8
9 By /s/ Brent D. Quist
10 RYAN L. DENNETT, ESQ.
11 Nevada Bar No. 005617
12 BRENT D. QUIST, ESQ.
13 Nevada Bar No. 009157
14 3301 N. Buffalo Drive, Suite 195
15 Las Vegas, Nevada 89129
16 Telephone: (702) 839-1100
17 Facsimile: (702) 839-1113
18 ***Attorneys for Defendant, Chilly Willy's***
19 ***Handyman Services, LLC***

20 **DECLARATION OF BRENT D. QUIST, ESQ. IN SUPPORT OF MOTION TO COMPEL RULE**
21 **35 EXAMINATION AND IN SUPPORT OF ORDER SHORTENING TIME**

22 I, BRENT D. QUIST, ESQ., hereby declare under penalty of perjury:

23 1. I am an attorney with the law firm of Dennett Winspear, LLP, and have personal
24 knowledge as to the matters stated herein.

25 2. I am an attorney representing Defendant Chilly Willy's Handyman Services, LLC.

26 3. On June 3, 2021, my office sent correspondence to the partner representing
27 Plaintiff, Dillon Coil, Esq., proposing Rule 35 exams, including with Dr. Lewis Etcoff who is a
28 neuropsychologist. **Ex. A**, Quist correspondence to Loosvelt, dated August 17, 2021, at p. 1. I
then forwarded a draft Stipulation and Order re Rule 35 exams to the associate representing the
Plaintiff on the case, Ryan Loosvelt, Esq., on June 15, 2021. *Id.*

///

///

1 4. On June 29, 2021, I spoke with Mr. Loosvelt and we agreed to continuing
2 discovery for the purpose of completing the Rule 35 exams. That stipulation and order was
3 signed by the Court on July 27, 2021. *Id.*

4 5. On July 19, 2021, I sent an e-mail to Mr. Loosvelt asking him if he had an
5 opportunity to review the Rule 35 Stipulation and Order, which I had e-mailed to him over a
6 month previously. *Id.*

7 6. On August 5, 2021, I e-mailed Mr. Loosvelt regarding scheduling a conference
8 call between counsel regarding the proposed Rule 35 exam scopes. *Id.* Unfortunately, myself,
9 Mr. Loosvelt and other defense counsel, John Keating, Esq., could not find a time where we
10 could all speak. *Id.*

11 7. On August 6, 2021, I asked Mr. Loosvelt to provide me with his proposed
12 revisions to the Rule 35 exam Stipulation and Order by August 11, 2021, so I could discuss them
13 with Mr. Keating. Mr. Loosvelt indicated he would have the changes to me by August 11th. *Id.*

14 8. By August 12th I still had not received revisions from Mr. Loosvelt. On August 13th,
15 I asked him to have the revisions to me by August 16th, and on August 17th, I sent him lengthy
16 correspondence asking for the revisions by August 18th. *Id.* at 2.

17 9. On August 30, 2021, Mr. Loosvelt, Mr. Keating and I had a nearly one-hour long
18 phone call in which we discussed the scope of Dr. Etcoff's Rule 35 exam. Upon information and
19 belief, and to the best of my memory, the issues we could not agree to were (a) whether Dr.
20 Etcoff would allow for a video recording of the testing portions of his two-day exam of the
21 Plaintiff, (b) whether Dr. Etcoff would allow his test data/test questions to be produced to Mr.
22 Loosvelt and not simply the Plaintiff's neuropsychologist, and (c) why two days would be needed
23 for Dr. Etcoff's exam.

24 10. Mr. Keating and I conferred with Dr. Etcoff regarding these matters and on
25 September 1, 2021, I sent Mr. Loosvelt a lengthy e-mail detailing Dr. Etcoff's position regarding
26 these topics. **Ex. B**, Quist e-mail to Loosvelt and Keating, dated September 1, 2021.

27 11. Counsel was supposed to speak again regarding these issues on September 7th,
28 however, that phone call did not occur until the morning of September 10th. **Ex. C**, e-mails

1 between Quist and Loosvelt from September 7-9, 2021. It should be noted that the e-mails
2 indicate Dr. Etcoff's Rule 35 exam is scheduled for November; it is actually scheduled for
3 October 19-20, 2021.

4 12. On September 10, 2021, Mr. Keating, Mr. Loosvelt and I spoke for about a half
5 hour regarding Dr. Etcoff's Rule 35 exam. Plaintiff is insisting on an observer being present at
6 the neuropsychological exam, or the exam being videotaped. He is also conditioning the exam
7 on Dr. Etcoff transmitting his data and test questions to Plaintiff's attorneys, in violation of Dr.
8 Etcoff's ethical and professional obligations. And, for the first time, Mr. Loosvelt stated that he
9 would condition the Rule 35 exam on it occurring in a single day even though his own
10 neuropsychologist and ever other neuropsychologist in Las Vegas (to my knowledge) require two
11 days to complete the standard neuropsychological exam.

12 13. The parties were able to agree to most of the other conditions with respect to the
13 Rule 35 exams of Dr. Etcoff, as well as neurologist David Ginsburg. The parties are in the
14 process of preparing a Stipulation and Order detailing those agreements and will submit it to the
15 Discovery Commissioner shortly.

16 14. I hereby certify that I made every good faith effort possible to come to an
17 agreement regarding the neuropsychological Rule 35 exam scope; however, the parties are not
18 in agreement regarding the three issues addressed above.

19 15. Because Dr. Etcoff's exam is scheduled for October 19-20, 2021, I am requesting
20 the Discovery Commissioner consider this Motion on an Order Shortening Time. Plaintiff is not
21 opposed to this shortened briefing schedule. **Ex. D**, Loosvelt e-mail to Quist dated September
22 10, 2021, at p. 1 ("We will also agree to an OST for the D.C. to hear it that allows us sufficient
23 time for our response.") I would ask that Defendants be provided at least a few days to prepare a
24 Reply to any Opposition filed by the Plaintiff.

25 16. Of note, the parties agreed to the October 19-20, 2021 exam with Dr. Etcoff, at
26 least to hold those dates for the exam, back in June 2021. **Ex. E**, Marchant e-mails with Loosvelt
27 dated June 30, 2021 and July 1, 2021. The Notice of Rule 35 Exam was served August 17,
28 2021. **Ex. F**, Notice of Rule 35 Examination of Plaintiff to be Conducted by Lewis M. Etcoff, PhD.

17. The delay in bringing this Motion was due to the numerous good faith efforts to resolve this matter without filing the Motion. Moreover, as noted above, there was difficulty with counsel finding dates/times to speak to try and resolve the issue.

18. In order for the Motion to be considered by the Discovery Commissioner prior to the Rule 35 exams and potentially for the Court to hear any objections as to the Discovery Commissioner's ruling, I ask the Discovery Commissioner to hear this Motion on an Order Shortening Time.

/s/ Brent D. Quist
BRENT D. QUIST, ESQ.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

EDCR 2.34 CERTIFICATION

As set forth in the Declaration of counsel, above, defense counsel has attempted for over three months now to address the scope of Dr. Etcoff's Rule 35 exam with Plaintiff's counsel. Despite repeated written correspondence and phone conversations, the parties have been unable to agree to the scope of that exam and therefore, Plaintiff will not agree to voluntarily appear for that exam without an Order of the Court.

II.

INTRODUCTION

Plaintiff Taylor Miles Cape was involved in an automobile accident and now claims various injuries, including a traumatic brain injury that will allegedly require him to undergo future counseling, cognitive remediation, and neuropsychological evaluation/psychometric testing. His past and future medical specials, which include treatment for his alleged brain injury, total nearly \$5.7 million.

Since June 2021, the Defendants have attempted to work out the parameters of the Rule 35 neuropsychological exam with Plaintiff's counsel. Plaintiff will not stipulate to the Rule 35 exam, although counsel did agree to hold dates of October 19-20, 2021, and the exam has been

1 noticed for those dates, because (1) he insists on an observer being present for the exam or the
2 exam being video recorded, (2) he insists Dr. Etcoff share his test data/test questions with
3 Plaintiff's counsel and not solely with Dr. Sunshine Collins, Plaintiff's neuropsychologist, and (3)
4 even though Plaintiff had agreed to a two-day neuropsychological exam, which is standard as
5 shown by the fact that his own expert took two days to complete her neuropsychological exam,
6 he will now only agree to a one-day exam.

7 For the reasons below, the Discovery Commissioner should not require an observer be
8 present at Dr. Etcoff's exam. Procedural rules designed to govern evidence gathering in civil
9 matters are within the sole purview of the Nevada Supreme Court pursuant to Nevada's
10 separation-of-powers doctrine. The Nevada Legislature unconstitutionally attempted to wrest the
11 power to govern Nevada court procedural rules when it passed NRS 52.380 AFTER the Nevada
12 Supreme Court adopted the revised NRCP 35.

13 Federal case law construing the application of NRS 52.380 in light of Rule 35, which case
14 law is considered "strong persuasive authority" by the Nevada Supreme Court, holds that NRS
15 52.380 is procedural in nature, not substantive, and therefore it does not govern how Nevada
16 courts gather evidence, including physical exams pursuant to Rule 35. The majority rule held by
17 federal courts is that observers should not be present during Rule 35 exams because they will
18 interfere with the exam and their presence frustrates Rule 35's purpose of leveling the playing
19 field between the plaintiff and defense experts.

20 The State of Nevada Board of Psychological Examiners and the field of neuropsychology,
21 generally, strongly opposes the presence of third-party observers because their presence
22 interferes with neuropsychological exams, harms the validity and reliability of the exam results,
23 and violates test security guidelines, ethical principles and standards of conduct in the field. No
24 neuropsychologist will conduct a neuropsychological exam with an observer present. As a result,
25 if Nevada courts order third-party observers as part of neuropsychological exams, no such
26 exams will ever be conducted. The purpose of Rule 35 will be frustrated. Defendants will never
27 have an opportunity to independently verify the brain injury claims made by plaintiffs, such as
28 Plaintiff Cape. And yet, plaintiffs will always be able to use neuropsychologists as experts

1 because no observer will ever be present. This is an unfair and unworkable result.

2 Plaintiff's concern that a two-day exam is too long is disingenuous. The standard for
3 neuropsychological exams is two days. Dr. Etcoff's schedule outlining generally what is done
4 over the course of the two-day is attached. It is hypocritical for Plaintiff to complain that Dr. Etcoff
5 requires two days for the exam when Plaintiff's expert, Dr. Collins, also took two days for her
6 exam.

7 Dr. Etcoff has ethical and copyright infringement concerns with respect to disclosing the
8 testing data and test questions to Plaintiff's counsel. There are also concerns that once the test
9 questions are out in the general public, regardless of a confidentiality order, future personal
10 injury plaintiffs could be coached using those questions. If that were to occur, it would place
11 future test results at risk.

12 **III.**

13 **FACTUAL STATEMENT**

14 **A. SUBJECT ACCIDENT AND ALLEGED INJURIES/DAMAGES**

15 Plaintiff alleges on November 21, 2018, he was operating his vehicle at Durango and Oso
16 Blanca, in northwest Las Vegas, on a green light when he was struck by a vehicle owned by
17 Chilly Willy's Handyman Service and driven by David Martinez. **Ex. G**, Plaintiff's Responses to
18 Defendant David G. Martinez First Set of Interrogatories, at p. 3, Response to Interrogatory No.
19 5.

20 His alleged injuries include a brain concussion, permanent mental damage, body
21 bruising, upper back misalignment, and leg and knee pain. **Ex. H**, Plaintiff's Responses to
22 Defendant Chilly Willy's Handyman Services, LLC's First Set of Interrogatories, pp. 2-3,
23 Response to Interrogatory No. 3. He further alleges past and future medical specials in the
24 amount of \$5,696,934.47. **Ex. I**, Plaintiff's Initial Early Case Conference Witness and Exhibit List
25 and Pre-Trial Disclosures, at p. 8.

26 **B. PLAINTIFF'S NEUROPSYCHOLOGICAL CLAIMS**

27 On July 9, 2019 and August 26, 2019, Plaintiff underwent a neuropsychological
28 evaluation by Sunshine Collins, PsyD. **Ex. J**, Collins Neuropsychological Evaluation Report. He

1 was referred by his neurologist, Enrico Fazzini, DO, on May 31, 2019. Notably, there is no
2 indication in the report that any observers were present for either day of Dr. Collins' examination
3 of Plaintiff. *Id.* at p. 1. However, his father was separately interviewed. *Id.* at p. 2. Dr. Collins has
4 diagnosed Plaintiff with the following conditions: mild neurocognitive disorder due to traumatic
5 brain injury, with behavioral disturbance (mood disturbance), brief psychotic disorder, in full
6 remission, schizophreniform disorder, schizophrenia, and bipolar I disorder, with psychotic
7 features, most recent episode manic, in full remission. *Id.* at p. 18. After noting his mental health
8 history is "significant for pre-existing episodes of psychosis," (*id.* at p. 20), she opines that
9 Plaintiff has "reduced functioning in some areas" and that it would be appropriate for him to
10 participate in "psychotherapy to address his frustration and/or other emotional reactions to his
11 neurocognitive disorder symptoms, as needed." *Id.* at p. 21. She recommends cognitive
12 rehabilitation. *Id.*

13 Based in part of Dr. Collins' observer-free neuropsychological evaluation, Nurse Jan
14 Roughan prepared a "Life Care Analysis," the preliminary report of which was produced as part
15 of Plaintiff's Rule 16.1(a)(1) disclosures. In her report, Nurse Roughan recommends Plaintiff for
16 individual and family counseling, cognitive remediation, and neuropsychological
17 evaluation/psychometric testing at a reported cost of over half a million dollars. **Ex. K**, Roughan
18 Report, at p. 5.

19 IV.

20 PROCEDURAL HISTORY

21 The defense started to arrange for the Rule 35 exam with Dr. Etcoff back in June of this
22 year. Plaintiff agreed to dates of October 19-20, 2021, although Plaintiff has very recently
23 changed his mind and now argues that two days is too long for a neuropsychological exam even
24 though the exam with Dr. Collins took two days. As noted in counsel's Declaration, the parties
25 request the Discovery Commissioner hear this on an order shortening time so the Court can rule
26 on the scope of Dr. Etcoff's exam prior to October 19, 2021.

27 ///

28 ///

V.

ARGUMENT

A. PLAINTIFF STIPULATES THAT DEFENDANT IS ENTITLED TO A RULE 35 EXAM WITH DR. ETCOFF; HE SIMPLY DISAGREES AS TO THE SCOPE.

Plaintiff is not disagreeing to a Rule 35 exam with Dr. Etcoff as a whole. He acknowledges his claims provide a basis for that exam. He simply disagrees as to the scope of the exam.

B. NRS 52.380 UNCONSTITUTIONALLY VIOLATES THE DOCTRINE OF SEPERATION OF POWERS GUARANTEED BY ARTICLE 3 OF THE NEVADA STATE CONSTITUION BY PRESCRIBING A PROCEDURAL RULE FOR EVIDENCE GATHERING THAT IS SOLELY WITHIN THE ROLE OF THE NEVADA SUPREME COURT TO DETERMINE, AND WHICH IT HAS DETERMINED PURSUANT TO NRCP 35.

The Discovery Commissioner should not force Dr. Etcoff to conduct his neuropsychological exam of Plaintiff with an observer present or allow recording of any kind pursuant to NRS 52.380, because that statute infringes on the Judiciary's authority to govern its own procedures, violates the doctrine of separation of powers, and is therefore unconstitutional.

1. **NRCP 35 AND NRS 52.380 CONTAIN CONFLICTING PROCEDURES FOR TAKING PSYCHOLOGICAL EXAMS IN CIVIL DISCOVERY.**

The current version of NRCP 35 took effect on March 1, 2019. It states, in relevant part,

Rule 35. Physical and Mental Examination.

(a) *Order for Examination.*

(1) In General. The court where the action is pending may order a party whose mental or physical condition—including blood group—is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner...

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

///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

- (i) the examination is a neuropsychological, psychological or psychiatric examination; or
- (ii) the court orders otherwise for good cause shown.

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

NRS 52.380 went into effect October 1, 2019, presumably in an attempt by dissatisfied special interest groups to override NRCP 35. It states, in relevant part:

52.380. Attendance by observer.

1. An observer may attend an examination but shall not participate in or disrupt the examination.
 2. The observer attending the examination pursuant to subsection 1 may be:
 - (a) An attorney of an examinee or party producing the examinee; or
 - (b) A designated representative presents the authorization to the examiner before the commencement of the examination.
 3. The observer attending the examination pursuant to subsection 1 may make an audio or stenographic recording of the examination.
- ***
7. As used in this section:
 - (a) "Examination" means a mental or physical examination ordered by a court for the purpose of discovery in a civil action.

NRCP 35 and NRS 52.380 directly conflict on at least three key points: First, the presence of an observer. NRCP 35(a)(4)(A) and (B) expressly exclude observers from psychological, neuropsychological or psychiatric examinations unless the court orders otherwise, for good cause shown. NRS 52.380 expressly permits observers to attend any mental or physical examination.

Next, with respect to the observer, NRCP 35(a)(4) expressly states that the observer may not be the party's attorney, or anyone employed by the part or the party's attorney. NRS 52.380(2) states that the observer may be the party's attorney, or anyone designated by the attorney.

Finally, with respect to the taking of audio and/or stenographic recordings, NRCP 35(a)(3) permits any party or the examiner to make an audio recording of the examination, but only for good cause shown. NRS 52.380(3) only permits the party's observer to make a recording, and the recording may be audio or stenographic.

2. HISTORY OF NRCP 35 AND NRS 52.380.

To understand how Nevada courts found themselves in the present position, due to the legislature, a history of how NRS 52.380 came about is important. On August 17, 2018, the Nevada Supreme Court was petitioned to amend the Nevada Rules of Civil Procedure, which included as part of the overall submissions, three alternative versions of Rule 35. **Ex. L**, Order Amending the Rules of Civil Procedure, The Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, filed December 31, 2018; see also, **Ex. M**, Lowry and Saxe, *May the Nevada Legislature Constitutionally Revise the Rules of Civil Procedure*, Nevada Lawyer (July 2020), at p. 23 (noting that on March 1, 2019, the revised rules which significantly changed NRCP 35 took effect). The court considered, as part of these revisions to Rule 35, whether to allow an observer during exams, whether to allow an observer only if good cause was shown by the examinee, and who could act as an observer. The Nevada Supreme Court rejected attempts to require the presence of an observer at a neuropsychological exam and required an audio recording of such exam to only be allowed for good cause shown by the examinee. Further, the observer cannot be the examinee's attorney.

Less than a month after the current Rule 35 was adopted by the Nevada Supreme Court, on March 18, 2019, AB 285 was introduced with the express intent to implement changes to Rule 35. **Ex. M**, Lowry and Saxe Article, at p. 1. "Supporters noted what became AB 285 was rejected during the process that led to Nevada's amended rules of civil procedure." *Id.*

///

3. THE SEPARATION OF POWERS DOCTRINE IN NEVADA.

NRS 52.380 is unconstitutional because it violates the separation-of-powers doctrine expressly set forth in Nevada's Constitution, Art. 3, §1. All of the three branches of government are equal. "In keeping with this theory, the judiciary has the inherent power to govern its own procedures." *Berkson v. Lepome*, 245 P.3d 560, 565 (Nev. 2010) (internal citations omitted). This includes the right and power to promulgate rules of procedure. NRS 2.120 and *State v. Connery*, 661 P.2d 1298, 1300 (Nev. 1983)(citing *Goldberg v. District Court*, 527 P.2d 521 (Nev. 1977)).

The Nevada Supreme Court has explained, "The judiciary is entrusted with 'rule-making and other incidental power reasonable and necessary to carry out the duties required for the administration of justice' and 'to economically and fairly manage litigation.'" *Berkson*, 245 P.3d at 565 (quoting *Burger v. District Court*, 102 P.3d 600, 606 (Nev. 2004)). This means "the legislature may not enact a procedural statute that conflicts with a pre-existing procedural rule, without violating the doctrine of separation of powers, and such a statute is of no effect." *Berkson*, 245 P.3d at 565 (quoting *State v. District Court (Marshall)*, 11 P.3d 1209, 1213 (Nev. 2000)). Where possible, Nevada courts will attempt to harmonize statutes and court rules that govern the same topic. *Albios v. Horizon Cmtys., Inc.*, 132 P.3d 1022, 1030 (Nev. 2006), and *Bowyer v. Taack*, 817 P.2d 1176 (Nev. 1991)). However, the legislature may not pass laws that "interfere with procedure to a point of disruption or attempted abrogation of an existing court rule." *Whitlock v. Salmon*, 752 P.2d 210, 211 Nev. 1988). Here, the Nevada Legislature has not left Nevada courts any opportunity to harmonize NRCP 35 and NRS 52.380. They are directly contradictory on several key points. The statute disrupts and attempts to abrogate an existing court rule, i.e., NRCP 35. Thus, the separation of powers doctrine renders NRS 52.380 of no effect.

4. RULES GOVERNING THE MANNER IN WHICH EVIDENCE IS COLLECTED ARE PROCEDURAL AND RIGHTLY ESTABLISHED BY THE NEVADA SUPREME COURT.

Rules governing the gathering of evidence are procedural in nature and therefore solely within the purview of the Nevada Supreme Court. In other words, rules that govern the "manner

1 and means by which litigants' rights are enforced" may properly be determined by Nevada
2 courts. *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 130 S.Ct. 1431, 1442
3 (2010) (internal citations omitted). The United States Supreme Court has specifically found Rule
4 35 examinations to be a matter of procedural law, which is consistent with Nevada's separation
5 of powers rules. It has held the Federal Rules of Civil Procedure "prescribe methods for serving
6 process, and **requiring litigants whose mental or physical condition is in dispute to submit**
7 **to examinations** . . . Each of these rules had some practical effect on the parties' rights, but
8 each undeniably regulated only the process for enforcing those rights; none altered the rights
9 themselves, the available remedies, or the rules of decision by which the court adjudicated
10 either." *Shady Grove*, 130 S.Ct. at 1442-43 (internal citations omitted and emphasis added). See
11 also, *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13 (1941) (finding FRCP 35 was properly enacted as
12 one of the court's procedural rules pursuant to the federal enabling act); see also, *Schlagenhauf*
13 *v. Holder*, 379 U.S. 104, 114 (1964) (with respect to a district court's authority to issue a Rule 35
14 exam order, stating, "We hold that Rule 35, as applied to either plaintiffs or defendants to an
15 action, is free of constitutional difficulty and is within the scope of the Enabling Act.").

16 NRCP 35 does not create or modify a personal injury plaintiff's right to seek recovery for
17 negligence. It does not create or modify a rule governing the right to recovery. It provides
18 procedures for the collection of specific types of evidence: medical, psychological or psychiatric
19 data that may be relevant to the claim. Notably, the rule falls between rules governing the
20 collection of evidence via written requests for production of documents (NRCP 34) and requests
21 for admissions (Rule 36).

22 Thus, only the Nevada Supreme Court has constitutional authority to enact
23 rules/procedures governing Rule 35 exams, including those performed by a neuropsychologist
24 such as Dr. Etcoff.

25 **D. NEVADA FEDERAL COURTS HAVE RECOGNIZED THAT BOTH RULE 35 AND NRS**
26 **52.380 CONTAIN PROCEDURAL RULES FOR CONDUCTING INDEPENDENT**
27 **MEDICAL EXAMS, AND THEREFORE, RULE 35 TRUMPS NRS 52.380.**

28 Last year Magistrate Judge Youchah in a case very similar to the present held the
procedures set forth in NRS 52.380 pertaining to independent medical exams are procedural in

1 nature and therefore FRCP 35, not NRS 52.380, governs how such examinations are to be
2 carried out in federal civil cases. Magistrate Judge Youchah's opinion in *Freteluco v. Smith's*
3 *Food and Drug Centers, Inc.*, 336 F.R.D. 198 (D.Nev. 2020), is considered "strong persuasive
4 authority" because the Nevada Rules of Civil Procedure are based in large part upon their
5 federal counterparts. *Executive Management, Ltd. v. Ticor Title Ins. Co.*, 38 P.3d 872 (Nev.
6 2002) (internal citation omitted).

7 The defendant in *Freteluco* retained Dr. Etcoff to perform a two-day neuropsychological
8 exam at his office. There was no dispute of the doctor's qualifications to conduct the exam.
9 However, as in the case in this matter, the plaintiff in *Freteluco* insisted on the presence of an
10 observer. The defendant in that case argued, as the Defendants in this matter contend, that
11 having an observer present during a neuropsychological examination alters the behavior of the
12 examinee and results of the examination. *Id.* at 200. The defendant further noted that NRS
13 52.380 outlines the procedure for the presence of an observer at a mental or physical
14 examination pursuant to NRCP 35. *Id.* at 201.

15 Magistrate Judge Youchah, relying on the Erie Doctrine, determined NRS 52.380 is
16 procedural in nature, not substantive, and therefore FRCP 35 governs neuropsychological
17 examinations in Nevada federal cases. "Under the Erie Doctrine, a federal court sitting in
18 diversity must apply the substantive law of the forum state and federal procedural law."
19 *Freteluco*, 336 F.R.D. at 202 (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)). The
20 court found "that whether an observer is present in the neuropsychological examination of [the
21 plaintiff] is not substantive, but is procedure . . . NRS 52.380 sets forth procedures applicable to
22 observers who may attend independent medical examinations." *Id.* at 203. NRS 52.380 does not
23 determine the outcome of a case, and thus is not substantive, but instead reflects a "procedural
24 preference." *Id.* (citing *Flack v. Nutribullet, LLC*, 333 F.R.D. 508, 517 (C.D.Cal. 2019)). In other
25 words, "NRS 52.380 sets forth process allowed under Nevada Rules of Evidence applicable to
26 an examination under [NRCP 35], and is not a substantive law the application of which overrides
27 existing federal law found in [FRCP 35]." *Id.* at 203.

28 ///

After holding NRS 52.380 is procedural in nature, the court reasoned that plaintiff had failed to show why an observer needed to be present during Dr. Etcoff's exam when "the majority rule adopted by federal courts" is to "exclude third parties from observing medical and psychiatric examinations." *Id.* (citing *Flack*, 333 F.R.D. 517). Dr. Etcoff's exam was ordered to move forward without an observer present. *Id.* at 204.

Here, the Nevada Supreme Court has sole authority to establish the procedures that govern independent medical examinations. The Nevada Legislature overstepped its authority when it enacted NRS 52.380 because that statute sets forth different procedures for independent medical examinations than NRCP 35. Because NRS 52.380 is an unconstitutional, procedural statutory provision that conflicts with NRCP 35, the civil procedure rule trumps the statute. The Discovery Commissioner should therefore recommend the Court allow the Rule 35 exam with Dr. Etcoff to move forward on October 19-20, 2021 without an observer present.

E. FEDERAL COURTS GENERALLY DO NOT ALLOW FOR OBSERVERS DURING RULE 35 EXAMS.

As noted in *Freteluco*, the majority rule in federal courts is not to allow for observers in Rule 35 exams unless the examinee can show good cause why an observer is needed. This is also the approach taken by NRCP 35. Judge Youchah's reasoning for disallowing observers in Rule 35 exams is sound: "The introduction of a third party 'changes the nature of the proceeding, much in the way that television 'coverage' of events qualitatively changes what occurs in front of the camera.'" *Freteluco*, 336 F.R.D. at 203 (quoting *Tirado v. Erosa*, 158 F.R.D. 294, 299 (S.D.N.Y. 1999)). She further noted:

Courts are "often reluctant to permit a third party or recording device out of concern that the intrusion would (1) potentially invalidate the examination results; (2) fail to provide a level playing field as a plaintiff was not required to tape record his examinations with his own health care providers; and (3) injects a greater degree of the adversary process in to an evaluation that is to be neutral.

Id. at 204 (quoting *Flack*, 333 F.R.D. at 518).

Other federal courts similarly disallow third-party observers in Rule 35 exams, especially where the exams are neuropsychological in nature. See *Glennon v. Performance Food Group, Inc.*, 2021 WL 3130050, at **3, 5 (S.D. Ga. 2021)(recognizing, in case where neuropsychologist

1 contended a third-party observer would never be appropriate in a Rule 35 exam, that “counsel’s
2 presence could actively undermine the findings of the examination” and denying Plaintiff’s
3 request for an observer at the exam); see also, *Cato v. Township of Andover*, 2018 WL 1639692,
4 at *4 (D.N.J. 2018)(disallowing presence of third-party observer at neuropsychological Rule 35
5 exam, finding the exam was intended to facilitate the open disclosure of information that often
6 involves the most intimate details of a person’s life, and that the presence of third-party
7 observers or recording devices is known to interfere with the expert’s ability to establish the
8 necessary credibility and rapport with the examinee and would affect the validity of the test
9 scores).

10 The majority rule adopted by federal courts, which is in harmony with the plain language
11 of NRCP 35, should be followed by the Discovery Commissioner. The Discovery Commissioner
12 should recommend the Court compel Plaintiff to attend the exam with Dr. Etcoff without a third-
13 party observer or recording device.

14 **F. REQUIRING THE PRESENCE OF OBSERVERS AT NEUROPSYCHOLOGICAL**
15 **EXAMS WILL EFFECTIVELY PREVENT DEFENDANTS FROM EVER OBTAINING AN**
16 **INDEPENDENT NEUROPSYCHOLOGICAL EXAM OF THE PLAINTIFF.**

17 Dr. Etcoff, as well as all other neuropsychologists nationwide, are professionally and
18 ethically prohibited from allowing observers during examinations and therefore, if Nevada courts
19 hold the Nevada Legislature can craft procedural rules that govern Nevada courts, and thus NRS
20 52.380 trumps NRCP 35, defendants will effectively be precluded from conducting Rule 35
21 exams of a plaintiff alleging psychological injuries from a tort. This is likely why Plaintiff in this
22 case, as well as personal injury plaintiffs in most all other cases, now demand the presence of
23 observers during neuropsychological exams.

24 On October 1, 2018, the State of Nevada Board of Psychological Examiners sent a letter
25 to the Clerk of the Nevada Supreme Court setting forth the licensing board’s position on third-
26 party observers in psychological evaluations. It was sent as public comment regarding the
27 proposed changes to Rule 35 of the Nevada Rules of Civil Procedure. **Ex. N**, State of Nevada
28 Board of Psychological Examiners Letter dated October 1, 2018. The letter states “allowing third-
party observers, monitors, and/or electronic recording equipment during psychological and

1 neuropsychological evaluations poses a significant threat to public safety” as they can
2 “significantly alter the credibility and validity of results obtained during psychological and
3 neuropsychological medication evaluations” and Rule 35 exams. The presence of these outside
4 factors “directly impacts patient behavior and performance such that [individuals] may avoid
5 disclosing crucial information essential to diagnosis and clinical recommendations.” Further the
6 tests used by neuropsychologists “are developed and standardized under highly controlled
7 conditions.” Observers, monitoring and recording of tests “is not part of the standardization,” and
8 they will “compromise the validity of the data collected” and the examiner’s “ability to compare
9 tests results to normative data.” Additionally, “the risk of secured testing and assessment
10 procedures being released to non-Psychologists poses risk to the public in that exposure of the
11 test and assessment confidentiality can undermine their future validity and utility.” *Id.*

12 A recent neuropsychological paper, issued earlier this year, affirms the field of
13 neuropsychology as a whole opposes the presence of third-party observers in the setting of
14 medicolegal or forensic neuropsychological evaluations. **Ex. O**, Tannahill Glen et al., Update on
15 Third Party Observers in Neuropsychological Evaluation: An Interorganizational Position Paper,
16 2021, at p. 1. The paper states that third-party observers have “been shown to impact the
17 cognitive functions most often assessed in forensic or medicolegal settings,” that such third-party
18 observation, “whether in person, recorded or electronic,” is a “threat to the validity and reliability
19 of evaluation results, and violates test security guidelines, ethical principles and standards of
20 conduct in the field.” It then notes the sad truth that demands for third-party observers as part of
21 Rule 35 exams “have become a tactic designed to limit the ability of the consulting
22 neuropsychologist to perform assessment and provide information to the trier of fact.” *Id.*

23 The reality that third-party observers can invalidate examination results or
24 interfere/obstruct the examination, especially in the context of neuropsychological exams, and
25 thus invalidate the exam results is one reason why federal courts do not allow third-party
26 observers absent a showing of good cause by the examinee. See *Freteluco*, 336 F.R.D. at 204
27 (citing *Flack*, 333 F.R.D. at 518). Similarly, NRCP 35(a)(4)(C) recognizes a third-party observer
28 “must not in any way interfere, obstruct, or participate in the examination.” The problem with

1 third-party observers in the context of a neuropsychological exam is their mere presence always
2 interferes and obstructs the exam, regardless of whether the observer says or does anything.

3 Neuropsychological examiners cannot perform a reliable, effective, proper exam if an
4 observer is present. As a result, no neuropsychological examiners will perform their exams with
5 an observer. Ethically and professionally, they are prohibited from doing so. If a Nevada court
6 construes NRCP 35 and NRS 52.380 as mandating the presence of a third-party observer at
7 neuropsychological IME exams, no such exams will ever take place. If this were to occur, the
8 purposes of NRCP 35 would be completely frustrated. One chief purpose of that rule is to allow a
9 defense expert a fair opportunity to examine the plaintiff, without outside influence, just as the
10 plaintiff's doctor was able to examine the plaintiff, without outside influence, in order to "level the
11 playing field." See *Freteluco*, 336 F.R.D. 204 (citing *Flack*, 33 F.R.D. at 518)(noting one of the
12 purposes of Rule 35 exams is to "provide a level playing field."); see also, *Narayan v. Compass*
13 *Group USA, Inc.*, 2019 WL 265109, at *4 (E.D. Cal. 2019)("the court is 'to construe Rule 35
14 liberally in favor of granting discovery and a purpose of Rule 35 is to level the playing field
15 between parties in cases in which a party's physical or mental condition is in issue.")(quoting
16 *Silva v. Mercado Food Enter., Inc.*, 2012 WL 174926, at *6 (E.D. Cal. 2012)). Courts must
17 "construe the language of [a] statute" and rule of civil procedure "to effectuate, rather than to
18 nullify, its manifest purpose." *Ferreira v. City of Las Vegas*, 793 P.2d 1328 (Nev. 1990).

19 The Discovery Commissioner should recommend the Court compel the Rule 35 exam
20 with Dr. Etcoff, without the presence of any third-party observer or device, as doing otherwise will
21 prevent Dr. Etcoff—or any neuropsychologist—from examining Plaintiff and will thus nullify the
22 clear purpose of Rule 35.

23 Moreover, such an order would be inherently unfair. Dr. Collins examined Plaintiff without
24 any third-party observer present. She was able to perform the neuropsychological tests in the
25 manner they were intended to be performed, without outside influence. Hypothetically, if the
26 Defendants could find a neuropsychologist who would perform the exam with an observer
27 present, **which will not happen**, that neuropsychologist would be unable to formulate their
28 opinions with any degree of confidence because the presence of the third-party observer would

effectively nullify the exam and exam results.

Defendants cannot have a full and fair opportunity to defend this case if the Court requires the presence of a third-party observer or video recording at the exam with Dr. Etcoff.

G. A TWO-DAY NEUROPSYCHOLOGICAL EXAM IS STANDARD IN THE INDUSTRY.

Neuropsychologists routinely require two-days to complete their examinations. Plaintiff's requirement that Dr. Etcoff complete his examination in one day is not made in good faith, especially in light of the fact that Plaintiff's own neuropsychologist took two days to complete her exam of him.

The scope of Dr. Etcoff's exam is set forth in the attached letter and lays out why he requires two-days to perform a neuropsychological exam. A two-day exam is standard in the industry. **Ex. P**, Etcoff letter to Quist, dated August 23, 2021. Unfortunately, the Plaintiff is simply being difficult with respect to this issue.

H. PLAINTIFF'S RIGHTS WILL BE PROTECTED IF DR. ETCOFF'S RAW DATA AND TESTING QUESTIONS ARE SHARED SOLELY WITH DR. COLLINS.

Dr. Etcoff is willing to share his testing data, including testing questions, with Dr. Collins. However, he cannot allow Plaintiff's counsel to review the raw data/testing questions. The reason for this position is two-fold. Dr. Etcoff's neuropsychological tests, including the test questions, are confidential and proprietary. Plaintiff will argue this concern can be addressed with a protective order. However, as noted in *Freteluco*, pursuant to ethical guidelines of the American Psychological Association, a subpoenaed doctor is only permitted to release test data to qualified professionals such as other psychologists. Disclosing raw testing materials to anyone other than a licensed psychologist will result in violation of copyright laws. 336 F.R.D. at 205 (citing *Collins v. TIAA-CREF*, 2008 WL 3981462, at **3-5 (W.D.N.C. 2008)). Additionally, there is a concern that if Plaintiff or their counsel review the testing data/testing questions, it could be used in future cases to coach plaintiffs how to answer similar questions in future neuropsychological exams.

///

///

At the end of the day, Plaintiff should be satisfied with Dr. Etcoff sharing the test data/test questions directly with Dr. Collins should not require that his attorney personally view them. Through this arrangement, Plaintiff's rights will be preserved. Plaintiff will have an opportunity, through Dr. Collins, to challenge the exam and findings of Dr. Etcoff. Further, Dr. Etcoff will not be required to violate ethical rules or copyright protections.

VI.

CONCLUSION

For the foregoing reasons, the Discovery Commissioner should grant the Motion and recommend the Court (1) compel Plaintiff to attend a neuropsychological Rule 35 exam with Dr. Etcoff at his office in Las Vegas, Nevada, on October 19-20, 2021, (2) not allow for an observer at the exam, (3) allow two full days for Dr. Etcoff to complete the exam, which is typical for this type of exam, and (4) only require Dr. Etcoff to provide his raw test data, including test questions, to Plaintiff's expert, Dr. Collins.

DATED this 13th day of September, 2021.

DENNETT WINSPEAR, LLP

By /s/ Brent D. Quist
 RYAN L. DENNETT, ESQ.
 Nevada Bar No. 005617
 BRENT D. QUIST, ESQ.
 Nevada Bar No. 009157
 3301 N. Buffalo Drive, Suite 195
 Las Vegas, Nevada 89129
 Telephone: (702) 839-1100
 Facsimile: (702) 839-1113
Attorneys for Defendant,
Chilly Willy's Handyman Services, LLC

DATED this 13th day of September, 2021.

KEATING LAW GROUP

By /s/ John T. Keating
 JOHN T. KEATING, Esq.
 Nevada Bar No. 6373
 9130 W. Russell Road, Suite 200
 Las Vegas, Nevada 89148
 Telephone: (702) 228-6800
 Facsimile: (702) 228-0443
Attorneys for Defendant,
David G. Martinez

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), EDCR 7.26 and N.E.F.C.R. 9, I certify that on this date, I served the foregoing **DEFENDANTS' MOTION TO COMPEL NRCP 35 NEUROPSYCHOLOGICAL EXAM WITH DR. LEWIS M. ETCOFF, NOTICED FOR OCTOBER 19-20, 2021, ON AN ORDER SHORTENING TIME** on all parties to this action by the following method:

_____ Facsimile
_____ Mail
 X Electronic Service

Ryan A. Loosvelt, Esq.
Nevada Bar No. 8550
GREENMAN GOLDBERG RABY & MARTINEZ
2770 S. Maryland PKWY., Suite 100
Las Vegas, Nevada 89109
Telephone: 702. 384.1616
Facsimile: 702.384.2990
***Attorneys for Plaintiff,
Taylor Miles Cape***

John T. Keating, Esq.
Nevada Bar No. 6373
KEATING LAW GROUP
9130 W. Russell Road, Suite 200
Las Vegas, Nevada 89148
Telephone: 702.228.6800
Facsimile: 702.228.0443
***Attorneys for Defendant
David G. Martinez***

DATED this 13th day of September, 2021.

 /s/ Zaira Baldovinos
An Employee of DENNETT WINSPEAR, LLP

From: [J. Keating](#)
To: [Zaira Baldovinos](#); [Brent Quist](#)
Subject: RE: Cape - draft motion to compel Rule 35 exam
Date: Monday, September 13, 2021 2:10:15 PM

You can affix my signature

From: Zaira Baldovinos <zaira@dennettwinspear.com>
Sent: Monday, September 13, 2021 1:48 PM
To: Brent Quist <bquist@dennettwinspear.com>; J. Keating <jkeating@keatinglg.com>
Subject: RE: Cape - draft motion to compel Rule 35 exam
Importance: High

Hi, John.

Please find attached the final draft for the Motion to Compel on this case.

Please review and advise if it is okay to affix your e-signature so I can file this today.

Thank you,

Zaira Baldovinos

Legal Assistant to
Matthew J. Wagner, Esq.
Brent D. Quist, Esq.



3301 North Buffalo Drive, Suite 195
Las Vegas, Nevada 89129
702.839.1100 voice
702.839.1113 fax

CONFIDENTIALITY NOTICE: INFORMATION IN THIS MESSAGE IS INTENDED ONLY FOR THE PERSONAL AND CONFIDENTIAL USE OF THE RECIPIENT(S) NAMED ABOVE. This message may be an Attorney-Client communication, or may be an Attorney Work Product, and is therefore privileged and confidential. If the reader of this message is not the intended recipient or an agent responsible for delivering it to an intended recipient, you are hereby notified that you have received this message in error, and that any review, dissemination, distribution, or copying of this message is strictly prohibited. If you received this message in error, please notify the sender immediately by return email, delete the message and return any hard copy printouts to the address above. Thank you.

From: Brent Quist
Sent: Monday, September 13, 2021 1:31 PM
To: J. Keating
Cc: Zaira Baldovinos
Subject: Re: Cape - draft motion to compel Rule 35 exam

Thanks John. I'll make those revisions and try and get filed today or tomorrow morning at the latest.

Sent from my iPhone

On Sep 13, 2021, at 1:18 PM, J. Keating <jkeating@keatinglg.com> wrote:

I think this is good. The only change I have is a typo in the word "Guaranteed" is spelled incorrectly in Section B heading. On page 20, the last sentence before the conclusion seems like it is missing something.

From: Brent Quist <bquist@dennettwinspear.com>
Sent: Friday, September 10, 2021 6:57 PM
To: J. Keating <jkeating@keatinglg.com>
Cc: Zaira Baldovinos <zaira@dennettwinspear.com>
Subject: Cape - draft motion to compel Rule 35 exam
Importance: High

John:

Attached please find a draft motion to compel the Rule 35 exam with Dr. Etcoff. I've worked on it since this morning. Hopefully it makes sense!

Feel free to make any red-line changes you'd like. My goal is to get it filed Monday, if possible.

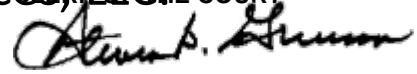
Thanks,

Brent Quist
Dennett Winspear, LLP
3301 North Buffalo Drive, Suite 195
Las Vegas, Nevada 89129
702.839.1100 - Phone
702.839.1113 - Fax

CONFIDENTIALITY NOTICE: INFORMATION IN THIS MESSAGE IS INTENDED ONLY FOR THE PERSONAL AND CONFIDENTIAL USE OF THE RECIPIENT(S) NAMED ABOVE. This message may be an Attorney-Client communication, or may be an Attorney Work Product, and is therefore privileged and confidential. If the reader of this message is not the intended recipient or an agent responsible for delivering it to an intended recipient, you are hereby notified that you have received this message in error, and that any review, dissemination, distribution, or copying of this message is strictly prohibited. If you received this message in error, please notify the sender immediately by return email, delete the message and return any hard copy printouts to the address above. Thank you.

Cape v. Chilly Willy's Handyman Services, LLC

Electronically Filed
9/13/2021 2:37 PM
Steven D. Grierson
CLERK OF THE COURT



Case No. A-20-818569-C

Defendants' Motion to Compel NRCP 35
Neuropsychological Exam with Dr. Lewis M. Etcoff

Exhibit List

Exhibit	Document
Ex. A	Quist correspondence to Loosvelt, dated August 17, 2021
Ex. B	Quist e-mail to Loosvelt and Keating, dated September 1, 2021
Ex. C	E-mails between Quist and Loosvelt from September 7-9, 2021
Ex. D	Loosvelt e-mail to Quist dated September 10, 2021
Ex. E	Marchant e-mails with Loosvelt dated June 30, 2021 and July 1, 2021
Ex. F	Notice of Rule 35 Examination of Plaintiff to be Conducted by Lewis M. Etcoff, PhD
Ex. G	Plaintiff's Responses to Defendant David G. Martinez First Set of Interrogatories
Ex. H	Plaintiff's Responses to Defendant Chilly Willy's Handyman Services, LLC's First Set of Interrogatories
Ex. I	Plaintiff's Initial Early Case Conference Witness and Exhibit List and Pre-Trial Disclosures
Ex. J	Collins Neuropsychological Evaluation Report
Ex. K	Roughan Report
Ex. L	Order Amending the Rules of Civil Procedure, The Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, filed December 31, 2018
Ex. M	Lowry and Saxe, May the Nevada Legislature Constitutionally Revise the Rules of Civil Procedure, Nevada Lawyer (July 2020)
Ex. N	State of Nevada Board of Psychological Examiners Letter dated October 1, 2018
Ex. O	Tannahill Glen et al., Update on Third Party Observers in Neuropsychological Evaluation: An Interorganizational Position Paper, 2021
Ex. P	Etcoff letter to Quist, dated August 23, 2021

EXHIBIT “A”



A LIMITED LIABILITY LAW PARTNERSHIP
INCLUDING PROFESSIONAL CORPORATIONS

REPLY TO:

BRENT D. QUIST, ESQ.
bquist@dennettwinspear.com

August 17, 2021

SERVE VIA E-SERVICE

Ryan Loosvelt, Esq.

**GREENMAN GOLDBERG RABY &
MARTINEZ**

2770 S. Maryland Parkway, Suite 10
Las Vegas, Nevada 89109

Re: **Taylor Miles Cape vs. David G. Martinez and Chilly Willy's Handyman**
Case No.: A-20-818569-C

Dear Mr. Loosvelt:

This correspondence is sent pursuant to EDCR 2.34 in a final attempt to confer with you regarding the scope of the Rule 35 exams of Plaintiff Taylor Cape with Dr. Etcoff and Dr. Ginsburg, prior to filing a motion to compel with the Discovery Commissioner.

I have made numerous attempts to confer regarding the Rule 35 exams of Mr. Cape and the scope of those exams over the last two months. On June 3, 2021, my office sent correspondence to Mr. Coil of your office proposing Rule 35 exams. See **Attachment A**. I forwarded a draft Stipulation and Order re Rule 35 exams to you, via e-mail, on June 15, 2021. See **Attachment B**. On June 29, 2021, we conferred regarding extending discovery for the purposes of allowing sufficient time for the Rule 35 examiners to prepare their reports after the exams were completed. See **Attachment C**. That Stipulation and Order to Extend Discovery (First Request), which extended initial expert disclosures to January 7, 2022, was signed by the Court on July 27, 2021. See **Attachment D**.

On July 19, 2021, I send you an e-mail asking you if you had an opportunity to review the Rule 35 Stipulation and Order, which I had e-mailed you over a month prior. See **Attachment E**.

On August 5, 2021, I e-mailed you regarding scheduling a conference call between counsel regarding the Rule 35 exam scopes. See **Attachment F**. Unfortunately, our offices could not find a date/time in which you, Mr. John Keating, and myself could all speak. See **Attachment G**. I then asked you, on August 6th, to provide me with your proposed revisions by August 11, 2021, so I could discuss them with Mr. Keating and we could then respond to the proposed changes. Id. You informed me that you would provide responses by that date. See **Attachment H**.

By August 12, 2021, you still had not provided me with your revisions. You informed me that things in other cases had come up, but would provide me the revisions in the "next day or so." I replied on August 13th and asked you for your revisions by Monday, August 16th. See **Attachment I**. I still have not received any proposed revisions.

We are intending to proceed with the Rule 35 exams of Mr. Cape in October and November. There is a likelihood the parties will not be able to agree to 100% of the Rule 35 exam terms, and therefore, it is probable Defendants will need to file a motion to compel the Rule 35 exams with the Discovery Commissioner. If that Motion is necessary, I intend to file it by

Ryan Loosvelt, Esq.
**GREEMAN GOLDBERG RABY &
MARTINEZ**

Re: **Taylor Miles Cape, Plaintiff vs. David G. Martinez and Chilly Willy's Handyman**
Case No. A-20-818569-C

August 17, 2021
Page 2

Monday of next week—August 23rd. I believe I have provided you more than sufficient time to provide any changes to the Stipulation and Order re Rule 35 exam. Moreover, I have attempted on multiple occasions to confer, and therefore feel that I have complied with my EDCR 2.34 obligations.

Please have any changes to the Stipulation and Order re Rule 35 exam to me by Wednesday, August 18th, so there is time for the defense to consider the proposed changes before filing a motion to compel next week.

In the meantime, my office will proceed to serve the Rule 35 exam notices today.

Very truly yours,

DENNETT WINSPEAR, LLP



Brent D. Quist, Esq.

BDQ/zb

Encl.

cc: John Keating, Esq.



A LIMITED LIABILITY LAW PARTNERSHIP
INCLUDING PROFESSIONAL CORPORATIONS

REPLY TO:

BRENT D. QUIST, ESQ.
bquist@dennettwinspear.com

June 3, 2021

SERVE VIA E-SERVICE

Dillon G. Coil Esq.
GREENMAN GOLDBERG RABY &
MARTINEZ
2770 S. Maryland Parkway, Suite 10
Las Vegas, Nevada 89109

Re: Taylor Miles Cape vs. David G. Martinez and Chilly Willy's Handyman
Case No.: A-20-818569-C

Dear Mr. Coil:

As we have discussed, given Plaintiff Taylor Cape's claims of traumatic brain injury and ongoing orthopedic injuries and pain symptoms, I request that Mr. Cape submit to NRCP 35 physical examinations with our experts, Dr. Lewis Etcoff and Dr. David Oliveri. I have spoken with each doctor, and they have agreed to conduct their exams during the same week so that Mr. Cape need only travel to Las Vegas one time. Each of their availability for the exams is as follows:

- Dr. Etcoff: November 16 and 17, 2021 (This exam is expected to take 2 days)
- Dr. Oliveri: November 18, 2021 at 8:15 a.m. (The exam is expected to last 1hr45m)

Additionally, so as not to require Mr. Cape to travel to Las Vegas more than once, we would like to schedule Mr. Cape's in-person deposition to take place in Las Vegas this same week. Accordingly, please advise of yours and Mr. Cape's availability for deposition during the week of November 16, 2021.

Please advise my paralegal, Ashley, within five (5) business days by phone or email at amarchant@dennettwinspear.com as to whether your clients agree to present for the requested deposition and physical examinations on the above dates and times and whether your client will require an interpreter. I intend to forward you a proposed scope of the Rule 35 exams and will forward them to you in the very near future.

As noted above, the first week that Dr. Etcoff and Dr. Oliveri both have available Rule 35 exam appointments is during the week of November 16, 2021. The deadline for initial expert disclosures is October 7, 2021. To allow for the Rule 35 exams of Mr. Cape, and to provide the doctors sufficient time to prepare their reports, and to allow parties sufficient time to complete

Dillion G. Coil, Esq.
Greenman, Goldberg, Raby & Martinez
Re: Taylor Miles Cape, Plaintiff vs. David G. Martinez and Chilly Willy's Handyman
Case No. A-20-818569-C
Page 2

the deposition of Mr. Cape as well as expert depositions, I request a 90-day continuance of the discovery deadlines. Please let us know whether you would be amenable to this discovery extension and I will prepare a stipulation and order to extend discovery.

Very truly yours,
DENNETT WINSPEAR, LLP



Brent D. Quist, Esq.

BDQ/am

cc: John Keating, Esq.

Brent Quist

From: Brent Quist
Sent: Tuesday, June 15, 2021 4:41 PM
To: Dillon Coil; rloosvelt@ggrmlawfirm.com
Cc: Rebeca Guardado; Ashley Marchant
Subject: Cape v. Martinez, Chilly Willy's Handyman -proposed Rule 35 SAO
Attachments: 21-06-11 SAO Rule 35 exams.doc; 2021 Examinee Policy-Etcoff.pdf; 2 day description of evaluation-Etcoff.pdf

Dillon, Ryan:

The attached Rule 35 Stipulation and Order is based on (1) similar Rule 35 Stipulation and Orders used in prior cases, and approved by the Court, and (2) input from Dr. Oliveri's office and Dr. Etcoff's office regarding appropriate scopes of their respective Rule 35 exams. With respect to Dr. Etcoff's Rule 35 exam scope the Stipulation and Order references Exhibits A and B. Those are written policies/procedures that Dr. Etcoff's office forwarded to our paralegal, Ashley. I have attached them in full for your review. Once you have had an opportunity to review the proposed Stipulation and Order please contact me to discuss.

Also, to follow up on the last set of e-mails between our offices, I hope to discuss with you soon the scheduling of your client's depositions and Rule 35 exams and whether you would like them all in the same week, in November 2021, or whether you would prefer them spread out- which would require him to travel to Las Vegas more than once. Additionally, I hope to discuss with you soon your position on a discovery extension to effectuate the completion of your client's deposition and the Rule 35 exams.

Best,

Brent Quist
Dennett Winspear, LLP
3301 North Buffalo Drive, Suite 195
Las Vegas, Nevada 89129
702.839.1100 - Phone
702.839.1113 - Fax

CONFIDENTIALITY NOTICE: INFORMATION IN THIS MESSAGE IS INTENDED ONLY FOR THE PERSONAL AND CONFIDENTIAL USE OF THE RECIPIENT(S) NAMED ABOVE. This message may be an Attorney-Client communication, or may be an Attorney Work Product, and is therefore privileged and confidential. If the reader of this message is not the intended recipient or an agent responsible for delivering it to an intended recipient, you are hereby notified that you have received this message in error, and that any review, dissemination, distribution, or copying of this message is strictly prohibited. If you received this message in error, please notify the sender immediately by return email, delete the message and return any hard copy printouts to the address above. Thank you.

Brent Quist

From: Brent Quist
Sent: Tuesday, June 29, 2021 10:02 AM
To: Ryan Loosvelt
Cc: Ashley Marchant; Zaira Baldovinos; Rebeca Guardado; Gianna Mosley; Dillon Coil
Subject: RE: Cape - IMEs and Plaintiff deposition

Thank you Ryan. Ashley will see if she can find more availability for the IMEs with Dr. Etcoff and Dr. Oliveri. A challenge we are facing, particularly with Dr. Oliveri, is that he will only hold IME dates for a certain period of time. The dates we provided you previously, in November, for Dr. Oliveri's availability may no longer be available.

I will wait to prepare the stipulation and order re discovery extension until we get firm IME and deposition dates.

My intent is to obtain dates that will not require trial to be continued. Ashley should be providing those possible IME dates, hopefully this week.

Thanks for speaking with me,

Brent

From: Ryan Loosvelt <rloosvelt@ggrmlawfirm.com>
Sent: Tuesday, June 29, 2021 9:49 AM
To: Brent Quist <bquist@dennettwinspear.com>
Cc: Ashley Marchant <amarchant@dennettwinspear.com>; Zaira Baldovinos <zaira@dennettwinspear.com>; Rebeca Guardado <rguardado@ggrmlawfirm.com>; Gianna Mosley <gmosley@ggrmlawfirm.com>; Dillon Coil <dcoil@ggrmlawfirm.com>
Subject: RE: Cape - IMEs and Plaintiff deposition

Brent, this will confirm our call. We agreed to extend expert/rebuttal deadlines 3 months (to Jan/Feb 2022) and the discovery deadline 2 months (to March 2022) so trial (June 2022) will not be moved, in order to accommodate your IME experts. You will send us the available dates for your IME doctors in October and November, and I will discuss what works for my client for travel. I will get back to you on the IME stipulation as well.

Thanks,

Ryan Loosvelt
GGRM Law Firm

From: Brent Quist <bquist@dennettwinspear.com>
Sent: Friday, June 25, 2021 8:34 AM
To: Ryan Loosvelt <rloosvelt@ggrmlawfirm.com>
Cc: Ashley Marchant <amarchant@dennettwinspear.com>; Zaira Baldovinos <zaira@dennettwinspear.com>
Subject: Cape - IMEs and Plaintiff deposition
Importance: High

Ryan:

I had something come up that requires me to be out of the office this afternoon. I also have a client meeting that will last all morning. I am unclear if Mr. Cape wants to have his deposition taken at a different time than his IMEs, or split up his IMEs. So I see that there are a couple of options.

First, he could split up the IMEs. Dr. Etcoff is available in October. Dr. Oliveri is only available in November. Mr. Cape could come out here for his deposition in October and, while here, also attend an IME with Dr. Etcoff. Mr. Cape would then need to return the next month for his IME with Dr. Oliveri.

Second, he could do the IMEs the same week and the deposition at a different time. In other words, both IMEs would need to take place in November. However, he could have his deposition conducted sooner. I have trial in August, but I could try and schedule his deposition for July or September.

Please let me know which of these options Mr. Cape wants to do.

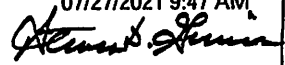
Also, please let me know if you are amenable to extending discovery to complete the IMEs, as addressed in my previous e-mail. I am requesting a three month continuance.

Thanks,

Brent Quist
Dennett Winspear, LLP
3301 North Buffalo Drive, Suite 19S
Las Vegas, Nevada 89129
702.839.1100 - Phone
702.839.1113 - Fax

CONFIDENTIALITY NOTICE: INFORMATION IN THIS MESSAGE IS INTENDED ONLY FOR THE PERSONAL AND CONFIDENTIAL USE OF THE RECIPIENT(S) NAMED ABOVE. This message may be an Attorney-Client communication, or may be an Attorney Work Product, and is therefore privileged and confidential. If the reader of this message is not the intended recipient or an agent responsible for delivering it to an intended recipient, you are hereby notified that you have received this message in error, and that any review, dissemination, distribution, or copying of this message is strictly prohibited. If you received this message in error, please notify the sender immediately by return email, delete the message and return any hard copy printouts to the address above. Thank you.

* * * This e-mail and any attachments may contain confidential and privileged information. If you are not the intended recipient, please notify the sender immediately by return e-mail, delete this e-mail and destroy any copies. Any dissemination or use of this information by a person other than the intended recipient is unauthorized and may be illegal.

Electronically Filed
07/27/2021 9:47 AM

CLERK OF THE COURT

RYAN L. DENNETT, ESQ.
Nevada Bar No. 005617
rdennett@dennettwinspear.com
BRENT D. QUIST, ESQ.
Nevada Bar No. 009157
bquist@dennettwinspear.com
DENNETT WINSPEAR, LLP
3301 N. Buffalo Drive, Suite 195
Las Vegas, Nevada 89129
Telephone: (702) 839-1100
Facsimile: (702) 839-1113
Attorneys for Defendant,
Chilly Willy's Handyman Services, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

TAYLOR MILES CAPE,

Plaintiff,

Case No: A-20-818569-C

Dept. No: 28

vs.

DAVID G. MARTINEZ, individually; CHILLY
WILLY'S HANDYMAN SERVICES, LLC, a
domestic limited-liability company; DOES I
through X; and ROE BUSINESS ENTITIES I
through X, inclusive,

Defendants.

STIPULATION AND ORDER TO EXTEND DISCOVERY (FIRST REQUEST)

Plaintiff TAYLOR MILES CAPE, by and through its counsel of record GREENMAN
GOLDBERG RABY & MARTINEZ, Defendant CHILLY WILLY'S HANDYMAN SERVICES, LLC,
by and through its counsel of record, DENNETT WINSPEAR, LLP, and Defendant DAVID G.
MARTINEZ, by and through their counsel of record, KEATING LAW GROUP, hereby request the
Court continue discovery for a period of 90 days.

I.

INTRODUCTION

This case arises out of an automobile accident on November 11, 2018. Plaintiff TAYLOR
CAPE was allegedly operating his vehicle southbound on Durango Drive attempting to make a
left turn with a permissive green signal onto Oso Blanca Road. Defendant DAVID G. MARTINEZ,

DENNETT WINSPEAR
ATTORNEYS AT LAW

1 who was an alleged employee of CHILLY WILLY'S HANDYMAN SERVICES, LLC, allegedly
2 went through the traffic light and struck Plaintiff CAPE.

3 Plaintiff alleges a traumatic brain injury, neck and back injuries, and ongoing pain
4 complaints. In his NRCP 16.1(a)(1) disclosures, Plaintiff asserts past and future medical specials
5 in the amount of \$5,696,934.47.

6 Plaintiff currently lives on the east coast. He has agreed to travel to Las Vegas for his
7 deposition and for orthopedic and neuropsychological Rule 35 exams. However, given the
8 examining doctor availability, these exams cannot occur until November 2021.

9 **II.**

10 **EDCR 2.35 REQUIREMENTS**

11 **A. DISCOVERY COMPLETED TO DATE**

12 The parties have served their initial and supplemental NRCP 16.1(a)(1) disclosures.
13 Parties have also served and responded to written discovery.

14 **B. DISCOVERY THAT REMAINS TO BE COMPLETED**

15 Party depositions need to be completed, including the deposition of Plaintiff CAPE.
16 Plaintiff intends to conduct further written discovery and take the deposition of Defendants,
17 including Rule 30(b)(6) depositions.

18 The parties are also discussing parameters for Defendants' proposed IMEs of Plaintiff
19 CAPE, which include proposals for one orthopedic Rule 35 exam and one separate
20 neuropsychological Rule 35 exam in Las Vegas. These parameters will be determined by
21 stipulation of the parties if they can agree or by order of the Court. The Parties have discussed
22 dates for IMEs based on Defendants' experts' limited availability. In addition, other discovery
23 including expert discovery needs to occur including medical expert depositions.

24 **C. REASONS WHY DISCOVERY HAS NOT BEEN COMPLETED**

25 The Complaint was filed on July 24, 2020. The Answer was filed October 13, 2020. The
26 scheduling order was issued January 13, 2021.

27 **///**

On January 6, 2021, Defendant CHILLY WILLY'S HANDYMAN SERVICES, LLC served written discovery to Plaintiff CAPE. Defendant CHILLY WILLY'S HANDYMAN SERVICES, LLC provided Plaintiff CAPE additional time to respond to written discovery. Answers were served March 19, 2021. Thereafter, counsel for the parties conferred pursuant to EDCR 2.34 regarding what defense counsel believed could be insufficient discovery responses. However, after conferring, it was decided supplemental responses would not be provided.

However, based on Plaintiff CAPE's written discovery responses it was unclear to defense counsel whether and to what extent Rule 35 exams were necessary. Additional discussions occurred in or about April 2021 regarding the need, type and scope of Rule 35 exams. After numerous discussions it was ultimately determined both orthopedic and neuropsychological exams would be appropriate. The parties are still in the process of working out the scope of those exams.

Additionally, in June the parties discussed the timing of the exams and Plaintiff's deposition. Given that Plaintiff CAPE lives on the east coast, Defendant CHILLY WILLY HANDYMAN'S SERVICES LLC wanted to make it convenient for Plaintiff to undergo the Rule 35 exams and his depositions.

Given the schedules of the Rule 35 examiners chosen by the defense, one of Plaintiff CAPE'S Rule 35 exams is planned to go forward during the week of October 19, 2021 and Plaintiff's deposition, as well as the second Rule 35 exam, is planned to go forward during the week of November 15, 2021, once the parties agree on parameters of the IMEs or as otherwise ordered by the Court. This means Plaintiff will travel twice to Las Vegas for discovery purposes. However, given the delays occasioned by the timing of the Rule 35 exams due to the examiners' schedules, a discovery extension is needed.

In addition, the other discovery identified above necessitates a discovery extension as well. Trial will not be affected by the proposed extension.

D. PROPOSED DISCOVERY SCHEDULE

DEADLINE	CURRENT DATE	PROPOSED DATE
Discovery deadline	January 7, 2022	March 7, 2022

1	Initial expert disclosures	October 7, 2021	January 7, 2022
2	Rebuttal expert disclosures	November 8, 2021	February 7, 2022
3	Dispositive motions	February 7, 2022	April 7, 2022
4	Amend pleadings/add parties	October 7, 2021	October 7, 2021

E. CURRENT TRIAL DATE

Trial is currently set on a five-week stack to begin June 27, 2022. Trial does not need to be continued as a result of this requested continuance.

DATED: 07/27/21

**GREENMAN GOLDBERG RABY &
MARTINEZ**

By: /s/ Ryan A. Loosvelt
RYAN A. LOOSVELT, ESQ.
Nevada Bar No. 8550
2770 S. Maryland Parkway, Suite 100
Las Vegas, Nevada 89109
Telephone: (702) 384-1616
Facsimile: (702) 384-2990
**Attorneys for Plaintiff,
Taylor Miles Cape**

DATED: 07/27/21

DENNETT WINSPEAR, LLP

By: /s/ Brent D. Quist
RYAN L. DENNETT, ESQ.
Nevada Bar No. 005617
BRENT D. QUIST, ESQ.
Nevada Bar No. 009157
3301 N. Buffalo Drive, Suite 195
Las Vegas, Nevada 89129
Telephone: (702) 839-1100
Facsimile: (702) 839-1113
**Attorneys for Defendant,
Chilly Willy's Handyman Service, LLC.**

DATED: 07/27/21

KEATING LAW GROUP

By: /s/ John T. Keating
JOHN T. KEATING, ESQ.
Nevada Bar No. 6373
9130 W. Russell Road, Suite 200
Las Vegas, Nevada 89148
Telephone: (702) 228-6800
Facsimile: (702) 228-0443
**Attorneys for Defendant,
David G. Martinez**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ORDER

UPON STIPULATION OF COUNSEL and good cause appearing,

IT IS SO ORDERED THIS _____ day of _____, 2021.

Dated this 27th day of July, 2021



DISTRICT COURT JUDGE
A-20-818569-C

Submitted by:

DENNETT WINSPEAR, LLP

E2B D56 6D2D 1605
Ronald J. Israel SJ
District Court Judge

By /s/ Brent D. Quist

RYAN L. DENNETT, ESQ.

Nevada Bar No. 005617

BRENT D. QUIST, ESQ.

Nevada Bar No. 009157

3301 N. Buffalo Drive, Suite 195

Las Vegas, Nevada 89129

Telephone: (702) 839-1100

Facsimile: (702) 839-1113

Attorneys for Defendant,

Chilly Willy's Handyman Services, LLC

From: Brent Quist
To: Zaira Baldovinos
Subject: FW: Cape - SAO re extend discovery
Date: Tuesday, July 27, 2021 8:55:13 AM

From: Brent Quist
Sent: Monday, July 19, 2021 4:25 PM
To: Zaira Baldovinos <zaira@dennettwinspear.com>
Subject: FW: Cape - SAO re extend discovery

From: J. Keating <jkeating@keatinglg.com>
Sent: Monday, July 19, 2021 4:24 PM
To: Brent Quist <bquist@dennettwinspear.com>; Ryan Loosvelt <rloosvelt@ggrmlawfirm.com>
Cc: Ashley Marchant <amarchant@dennettwinspear.com>
Subject: RE: Cape - SAO re extend discovery

You have my approval to attach my signature.

From: Brent Quist <bquist@dennettwinspear.com>
Sent: Monday, July 19, 2021 10:42 AM
To: Ryan Loosvelt <rloosvelt@ggrmlawfirm.com>; J. Keating <jkeating@keatinglg.com>
Cc: Ashley Marchant <amarchant@dennettwinspear.com>
Subject: Cape - SAO re extend discovery
Importance: High

Ryan:

I agree with your revisions to the SAO to extend discovery. I made a couple of additional grammatical changes. Please let me know if you agree, and if I can use your e-signature.

John, please let me know if you agree to the SAO to extend discovery to complete expert discovery and if I can use your e-signature.

Thanks,

Brent Quist
Dennett Winspear, LLP
3301 North Buffalo Drive, Suite 195
Las Vegas, Nevada 89129
702.839.1100 - Phone
702.839.1113 - Fax

From: Brent Quist
To: Zaira Baldovinos
Subject: FW: Cape - SAO re extend discovery
Date: Tuesday, July 27, 2021 8:54:58 AM
Attachments: [image002.png](#)
[image003.png](#)
[image004.png](#)
[image005.png](#)
[image006.png](#)
[21-07-19 Cape Redlined SAO Discovery Extension \(RI-PL revision\) - BDO revision.doc](#)
Importance: High

Zaira:

Please make red-line changes and file. Ryan Loosvelt's e-signature authorization is below. I will send you John Keating's e-signature authorization.






Brent

From: Brent Quist
Sent: Monday, July 19, 2021 4:25 PM
To: Zaira Baldovinos <zaira@dennettwinspear.com>
Subject: FW: Cape - SAO re extend discovery
Importance: High

From: Ryan Loosvelt <rloosvelt@ggrmlawfirm.com>
Sent: Monday, July 19, 2021 11:11 AM
To: Brent Quist <bquist@dennettwinspear.com>; J. Keating <jkeating@keatinglg.com>
Cc: Ashley Marchant <amarchant@dennettwinspear.com>; Rebeca Guardado <rguardado@ggrmlawfirm.com>; Dillon Coil <dcoil@ggrmlawfirm.com>
Subject: FW: Cape - SAO re extend discovery
Importance: High

Brent, this is fine with both parties' revisions, you can use my e-signature.



Ryan Loosvelt
Personal Injury Attorney
O: 702.384.1616 | F: 702.384.2990 | www.ggrmlawfirm.com
2770 S. Maryland Pkwy., Ste. 100 Las Vegas, NV 89109
    

From: Brent Quist <bquist@dennettwinspear.com>
Sent: Monday, July 19, 2021 10:42 AM
To: Ryan Loosvelt <rloosvelt@ggrmlawfirm.com>; jkeating@keatinglg.com
Cc: Ashley Marchant <amarchant@dennettwinspear.com>
Subject: Cape - SAO re extend discovery
Importance: High

Ryan:

I agree with your revisions to the SAO to extend discovery. I made a couple of additional grammatical changes. Please let me know if you agree, and if I can use your e-signature.

John, please let me know if you agree to the SAO to extend discovery to complete expert discovery and if I can use your e-signature.

Thanks,

Brent Quist
Dennett Winspear, LLP
3301 North Buffalo Drive, Suite 195
Las Vegas, Nevada 89129
702.839.1100 - Phone
702.839.1113 - Fax

CONFIDENTIALITY NOTICE: INFORMATION IN THIS MESSAGE IS INTENDED ONLY FOR THE PERSONAL AND CONFIDENTIAL USE OF THE RECIPIENT(S) NAMED ABOVE. This message may be an Attorney-Client communication, or may be an Attorney Work Product, and is therefore privileged and confidential. If the reader of this message is not the intended recipient or an agent responsible for delivering it to an intended recipient, you are hereby notified that you have received this message in error, and that any review, dissemination, distribution, or copying of this message is strictly prohibited. If you received this message in error, please notify the sender immediately by return email, delete the message and return any hard copy printouts to the address above. Thank you.

* * * This e-mail and any attachments may contain confidential and privileged information. If you are not the intended recipient, please notify the sender immediately by return e-mail, delete this e-mail and destroy any copies. Any dissemination or use of this information by a person other than the intended recipient is unauthorized and may be illegal.

1 **CSERV**

2
3 **DISTRICT COURT**
4 **CLARK COUNTY, NEVADA**

5
6 **Taylor Cape, Plaintiff(s)**

CASE NO: A-20-818569-C

7 **vs.**

DEPT. NO. Department 28

8 **David Martinez, Defendant(s)**

9
10 **AUTOMATED CERTIFICATE OF SERVICE**

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

14 **Service Date: 7/27/2021**

15 **Theresa Amendola** **tamendola@dennettwinspear.com**

16 **Susan Boschee** **sboschee@keatinglg.com**

17 **Dillon Coil** **dcoil@ggrmlawfirm.com**

18 **Ashley Marchant** **amarchant@dennettwinspear.com**

19 **Rebecca Guardado** **rguardado@ggrmlawfirm.com**

20 **Nicole Reyes** **nreyes@keatinglg.com**

21 **Gianna Mosley** **gmosley@ggrmlawfirm.com**

22 **Zaira Baldovinos** **zaira@dennettwinspear.com**

23 **Ryan Loosvelt** **rloosvelt@ggrmlawfirm.com**

Brent Quist

From: Brent Quist
Sent: Monday, July 19, 2021 10:43 AM
To: Ryan Loosvelt
Cc: Ashley Marchant
Subject: Cape - SAO re Rule 35 exam

Ryan:

Have you had an opportunity to review the SAO re Rule 35 scope? Do you have any proposed changes?

Thanks,

Brent Quist
Dennett Winspear, LLP
3301 North Buffalo Drive, Suite 195
Las Vegas, Nevada 89129
702.839.1100 - Phone
702.839.1113 - Fax

CONFIDENTIALITY NOTICE: INFORMATION IN THIS MESSAGE IS INTENDED ONLY FOR THE PERSONAL AND CONFIDENTIAL USE OF THE RECIPIENT(S) NAMED ABOVE. This message may be an Attorney-Client communication, or may be an Attorney Work Product, and is therefore privileged and confidential. If the reader of this message is not the intended recipient or an agent responsible for delivering it to an intended recipient, you are hereby notified that you have received this message in error, and that any review, dissemination, distribution, or copying of this message is strictly prohibited. If you received this message in error, please notify the sender immediately by return email, delete the message and return any hard copy printouts to the address above. Thank you.

Brent Quist

From: Brent Quist
Sent: Thursday, August 5, 2021 7:10 AM
To: Ryan Loosvelt; jkeating@keatinglg.com
Cc: Zaira Baldovinos
Subject: Cape v. Chilly Willy's (SAO re Rule 35 exams)

Ryan, John:

What availability do you have next week for a conference call to discuss the proposed Stipulation and Order re Rule 35 exams with Dr. Oliveri and Dr. Etcoff? I had forwarded those proposed Stipulations and Orders to you previously, however, I can forward those to you again if you'd like.

I have the following availability:

Monday afternoon;
Tuesday all day;
Wednesday morning;
Thursday afternoon; and
Friday all day.

Thanks,

Brent Quist
Dennett Winspear, LLP
3301 North Buffalo Drive, Suite 195
Las Vegas, Nevada 89129
702.839.1100 - Phone
702.839.1113 - Fax

CONFIDENTIALITY NOTICE: INFORMATION IN THIS MESSAGE IS INTENDED ONLY FOR THE PERSONAL AND CONFIDENTIAL USE OF THE RECIPIENT(S) NAMED ABOVE. This message may be an Attorney-Client communication, or may be an Attorney Work Product, and is therefore privileged and confidential. If the reader of this message is not the intended recipient or an agent responsible for delivering it to an intended recipient, you are hereby notified that you have received this message in error, and that any review, dissemination, distribution, or copying of this message is strictly prohibited. If you received this message in error, please notify the sender immediately by return email, delete the message and return any hard copy printouts to the address above. Thank you.

Brent Quist

From: Brent Quist
Sent: Friday, August 6, 2021 2:20 PM
To: Ryan Loosvelt; jkeating@keatinglg.com
Cc: S. Boschee; Gianna Mosley; Rebeca Guardado; nreyes@ggrmlawfirm.com; Zaira Baldovinos
Subject: Cape v. Chily Willy - Rule 35 scope
Importance: High

Counsel:

My office has been unable to find a time that we can all do a conference call. Busy schedule next week! What I propose is for Ryan to send to John and me his proposed redline changes to the Rule 35 SAO. John and I can confer and, at that point, if we think a phone call is necessary we can try again to arrange for that.

Ryan, if you would like a phone call with me on, next Monday or Wednesday at the times your assistant has said you are available, before you send over your revisions that is fine. However, I'm assuming you have a general idea of your client's position on each of the proposed terms. I would very much appreciate you providing me your revisions to John and me by Wednesday, August 11th so as to give John and me some time to discuss them.

My goal is to have a stip and order and/or motion to the Discovery Commissioner filed by mid-August. That will allow time for the Discovery Commissioner to issue a ruling, if necessary, prior to the October/November Rule 35 exams.

Thanks,

Brent Quist
Dennett Winspear, LLP
3301 North Buffalo Drive, Suite 195
Las Vegas, Nevada 89129
702.839.1100 - Phone
702.839.1113 - Fax

CONFIDENTIALITY NOTICE: INFORMATION IN THIS MESSAGE IS INTENDED ONLY FOR THE PERSONAL AND CONFIDENTIAL USE OF THE RECIPIENT(S) NAMED ABOVE. This message may be an Attorney-Client communication, or may be an Attorney Work Product, and is therefore privileged and confidential. If the reader of this message is not the intended recipient or an agent responsible for delivering it to an intended recipient, you are hereby notified that you have received this message in error, and that any review, dissemination, distribution, or copying of this message is strictly prohibited. If you received this message in error, please notify the sender immediately by return email, delete the message and return any hard copy printouts to the address above. Thank you.

EXHIBIT “B”

Brent Quist

From: Brent Quist
Sent: Wednesday, September 1, 2021 3:45 PM
To: Ryan Loosvelt
Cc: J. Keating
Subject: Cape Rule 35 exam issues
Attachments: Thrid Party article.pdf

Ryan:

The following is my understanding as to Dr. Etcoff's positions regarding Rule 35 neuropsychological observers/video recording and sharing of test data with the plaintiff, and the format of the two-day exam:

Observer or vide of neuropsychological portion of two-day exam

The examination will include an interview, personality test, and neuropsychological testing. It is my understanding Dr. Etcoff would allow an observer present for the interview portion of the test. However, he will not allow an observer for the personality test and neuropsychological testing. The presence of a video camera is the same as that of an observer and therefore, Dr. Etcoff will not allow for either. The reason why third-party observers are not allowed during the testing is described more fully in the attached third-party article. However, in sum, an observer cannot be present during the testing (or a video recording done) because it invalidates the testing process. It can change the dynamic of the doctor and examinee. The examinee may not feel open/free to discuss matters with the doctor as the examinee would be without the outside presence. Neuropsychological testing ethics do not allow for the presence of a third-party observer/recording.

Additionally, Rule 35 only allows for an observer so long as the observer does not interfere or obstruct the examination. The problem with an observer/video recording in a neuropsychological test setting is that such third-party presence will always interfere/obstruct. The mere presence will prevent a fair/accurate examination from taking place. The defense only has one opportunity to examine the plaintiff, that is part of the reason why the third-party cannot obstruct/interfere with the exam. The other reason is so the exam can be fair and accurate. Both of these purposes are frustrated in a neuropsychological exam if there is a third-party observer or video recording done.

Raw data/copy right issues

Dr. Etcoff will not allow the raw data including the neuropsychological test questions to be produced to a plaintiff or the plaintiff's attorneys. Part of the reason is the copyright issue, which he is unsure a protective order would fully address. Part of the other concern is that leak of the testing protocol/questions/data could potentially occur. Whether intentionally or not, future plaintiffs could be verbally advised/guided as to the type of questions asked and how to best answer those questions. If this were to occur, it would result in an inaccurate examination/testing. I am not suggesting you or your firm would do anything unethical. I have found you, Dillon, and your firm all have very high ethical standards. However, in theory, a leak could potentially occur. Dr. Etcoff wants to preclude the potential of this from happening.

General schedule of two-day exam

Dr. Etcoff will conduct a standard Forensic Neuropsychological Evaluation over a two-day period, which will comprise a structured interview, personality testing, and neuropsychological testing. The entire evaluation takes 10 to 11 hours. The neuropsychological tests require 5 hours of administration time. Personality tests can take upwards of 3 hours to complete. The structured interview will take between 2 and 3 hours, depending on Mr. Cape's number of case-related symptoms/impairments as well as the complexity of the pre-existing conditions. No portion of any test may be completed outside of Dr. Etcoff's office. The neuropsychological testing will use standardized, valid and reliable measures, and will assess working, verbal, and visual immediate and delayed memory functioning, effort/symptom

validity, motor, sensory perceptual, verbal/language, visual organizational, information processing speed and accuracy, executive functions and academic skills.

Hopefully the foregoing answers your questions. If you are not agreeable to the foregoing, please let me and John know so we can determine the next course of action.

Best,

Brent Quist
Dennett Winspear, LLP
3301 North Buffalo Drive, Suite 195
Las Vegas, Nevada 89129
702.839.1100 - Phone
702.839.1113 - Fax

CONFIDENTIALITY NOTICE: INFORMATION IN THIS MESSAGE IS INTENDED ONLY FOR THE PERSONAL AND CONFIDENTIAL USE OF THE RECIPIENT(S) NAMED ABOVE. This message may be an Attorney-Client communication, or may be an Attorney Work Product, and is therefore privileged and confidential. If the reader of this message is not the intended recipient or an agent responsible for delivering it to an intended recipient, you are hereby notified that you have received this message in error, and that any review, dissemination, distribution, or copying of this message is strictly prohibited. If you received this message in error, please notify the sender immediately by return email, delete the message and return any hard copy printouts to the address above. Thank you.

EXHIBIT “C”

Brent Quist

From: Brent Quist
Sent: Thursday, September 9, 2021 12:50 PM
To: Ryan Loosvelt; J. Keating
Cc: Zaira Baldovinos
Subject: RE: Cape Rule 35 exam issues

Ryan,

Our call was cleared with you for 1 p.m. today. I am okay postponing the call until tomorrow morning, but we really will need to have the call tomorrow morning. I don't want to have to file a motion but the Rule 35 exam is now only two months away. I am concerned that the Defendants are running out of time to address the issue with the Discovery Commissioner, and possibly the Court, if needed.

What time tomorrow works best for you? John, what time works best for you? I'm open all morning.

Thanks,

Brent

-----Original Message-----

From: Ryan Loosvelt <rloosvelt@ggrmlawfirm.com>
Sent: Thursday, September 9, 2021 12:46 PM
To: J. Keating <jkeating@keatinglg.com>
Cc: Brent Quist <bquist@dennettwinspear.com>; Zaira Baldovinos <zaira@dennettwinspear.com>
Subject: Re: Cape Rule 35 exam issues

Let's do Friday morning as I'm not in the office currently. Thanks.

Ryan Loosvelt

Sent from my iPhone

> On Sep 7, 2021, at 1:09 PM, J. Keating <jkeating@keatinglg.com> wrote:
>
> Thursday afternoon is fine
>
> -----Original Message-----
> From: Brent Quist <bquist@dennettwinspear.com>
> Sent: Tuesday, September 7, 2021 1:04 PM
> To: Ryan Loosvelt <rloosvelt@ggrmlawfirm.com>
> Cc: J. Keating <jkeating@keatinglg.com>; Zaira Baldovinos <zaira@dennettwinspear.com>
> Subject: RE: Cape Rule 35 exam issues
>
> Ryan,
>
> Tomorrow I am in depositions all day. However, I am available Thursday afternoon and Friday all day.
>
> Do any of those times work for you?

>
> John, do any of those times work for you?
>
> Thanks,
>
> Brent
>
> -----Original Message-----
> From: Ryan Loosvelt <rloosvelt@ggrmlawfirm.com>
> Sent: Tuesday, September 7, 2021 1:01 PM
> To: Brent Quist <bquist@dennettwinspear.com>
> Cc: J. Keating <jkeating@keatinglg.com>
> Subject: Re: Cape Rule 35 exam issues
>
> Brent, my travel plans changed to this afternoon but I'm available whenever works for you tomorrow to discuss the final parameters.
>
> Ryan Loosvelt
> GGRM Law Firm
>
> Sent from my iPhone
>
>> On Sep 2, 2021, at 3:37 PM, Ryan Loosvelt <rloosvelt@ggrmlawfirm.com> wrote:
>>
> * * * This e-mail and any attachments may contain confidential and privileged information. If you are not the intended recipient, please notify the sender immediately by return e-mail, delete this e-mail and destroy any copies. Any dissemination or use of this information by a person other than the intended recipient is unauthorized and may be illegal.
> * * * This e-mail and any attachments may contain confidential and privileged information. If you are not the intended recipient, please notify the sender immediately by return e-mail, delete this e-mail and destroy any copies. Any dissemination or use of this information by a person other than the intended recipient is unauthorized and may be illegal.

EXHIBIT “D”

From: [Zaira Baldovinos](#)
To: [Zaira Baldovinos](#)
Subject: FW: Cape Rule 35 exam issues re: 2nd call
Date: Monday, September 13, 2021 1:57:00 PM
Attachments: [image002.png](#)
[image003.png](#)
[image004.png](#)
[image005.png](#)
[image006.png](#)
[image002.png](#)
[image003.png](#)
[image004.png](#)
[image005.png](#)
[image006.png](#)

From: Ryan Loosvelt <rloosvelt@ggrmlawfirm.com>
Sent: Friday, September 10, 2021 8:41 AM
To: Brent Quist <bquist@dennettwinspear.com>
Cc: J. Keating <jkeating@keatinglg.com>
Subject: RE: Cape Rule 35 exam issues re: 2nd call

Brent, this will confirm our call this morning. We stated in response to your issues below:

1. You declined any observation for the testing which we are allowed by law. We also agreed to minimize any alleged issue by videotaping instead of having a physical person present which you still declined.
2. You have not identified true copyright issues or standing, nor how a protective order would not solve the purported issues raised. We believe we are entitled to the materials and will agree to a PO keep the materials protected as desired. In addition the attorneys would need the info for fair cross, and a PO for 'expert/attorney's eyes only' should suffice.
3. We believe the proposed 2-day exam to be excessive.

We also discussed that we are agreeable to enter a revised stip on the items we can agree upon including the dates (and the other IME) that reference that we are leaving the unagreed-upon parameters to the court. We will also agree to an OST for the D.C. to hear it that allows us sufficient time for our response.

Thanks,

-Ryan



Ryan Loosvelt
Attorney

O: 702.384.1616 | F: 702.384.2990 | www.ggrmlawfirm.com
2770 S. Maryland Pkwy., Ste. 100 Las Vegas, NV 89109



EXHIBIT “E”

Ashley Marchant

From: Ryan Loosvelt <rloosvelt@ggrmlawfirm.com>
Sent: Thursday, July 01, 2021 2:08 PM
To: Ashley Marchant; Brent Quist
Cc: Zaira Baldovinos; Rebeca Guardado; Gianna Mosley; Dillon Coil
Subject: RE: Cape - IMEs and Plaintiff deposition

We will get back to you on the parameters and stipulation. If notices of the IMEs are being issued, we ask that the notices merely state the dates, with the details to be worked out by the parties through stipulation or motion practice. At present we have an agreement on dates only. Thanks,

Ryan Loosvelt
GGRM Law Firm

From: Ashley Marchant <amarchant@dennettwinspear.com>
Sent: Thursday, July 1, 2021 1:28 PM
To: Ryan Loosvelt <rloosvelt@ggrmlawfirm.com>; Brent Quist <bquist@dennettwinspear.com>
Cc: Zaira Baldovinos <zaira@dennettwinspear.com>; Rebeca Guardado <rguardado@ggrmlawfirm.com>; Gianna Mosley <gmosley@ggrmlawfirm.com>; Dillon Coil <dcoil@ggrmlawfirm.com>
Subject: RE: Cape - IMEs and Plaintiff deposition

Good Afternoon, Mr. Loosvelt,

We have confirmed the IME dates with our experts and will issue Notices of Examination in the coming days.

Thank you!

Ashley Marchant | Paralegal



3301 N. Buffalo, Suite 195 | Las Vegas, NV 89129
Ph: (702) 839-1100 | Fax: (702) 839-1113

From: Ryan Loosvelt <rloosvelt@ggrmlawfirm.com>
Sent: Thursday, July 01, 2021 9:39 AM
To: Ashley Marchant <amarchant@dennettwinspear.com>; Brent Quist <bquist@dennettwinspear.com>
Cc: Zaira Baldovinos <zaira@dennettwinspear.com>; Rebeca Guardado <rguardado@ggrmlawfirm.com>; Gianna Mosley <gmosley@ggrmlawfirm.com>; Dillon Coil <dcoil@ggrmlawfirm.com>
Subject: RE: Cape - IMEs and Plaintiff deposition

Ashley/Brent, we did not hear back confirming the IME dates. Please do so and we will make travel arrangements.

Thanks,

Ryan Loosvelt
GGRM Law Firm

From: Ryan Loosvelt <rloosvelt@ggrmlawfirm.com>

Sent: Wednesday, June 30, 2021 9:32 AM

To: Ashley Marchant <amarchant@dennettwinspear.com>; Brent Quist <bquist@dennettwinspear.com>

Cc: Zaira Baldovinos <zaira@dennettwinspear.com>; Rebeca Guardado <rguardado@ggrmlawfirm.com>; Gianna Mosley <gmosley@ggrmlawfirm.com>; Dillon Coil <dcoil@ggrmlawfirm.com>

Subject: RE: Cape - IMEs and Plaintiff deposition

Our client believes he can do option 1, IME Oct, depo/IME November. I'll get back to you whether the depo works the day before or after in November, but go ahead and confirm the dates with your doctors while we work out travel arrangements. Thanks,

Ryan Loosvelt
GGRM Law Firm

From: Ryan Loosvelt <rloosvelt@ggrmlawfirm.com>

Sent: Tuesday, June 29, 2021 11:42 AM

To: Ashley Marchant <amarchant@dennettwinspear.com>; Brent Quist <bquist@dennettwinspear.com>

Cc: Zaira Baldovinos <zaira@dennettwinspear.com>; Rebeca Guardado <rguardado@ggrmlawfirm.com>; Gianna Mosley <gmosley@ggrmlawfirm.com>; Dillon Coil <dcoil@ggrmlawfirm.com>

Subject: RE: Cape - IMEs and Plaintiff deposition

I've relayed to our client and will let you know when I hear back. Thanks,

Ryan Loosvelt
GGRM Law Firm

From: Ashley Marchant <amarchant@dennettwinspear.com>

Sent: Tuesday, June 29, 2021 11:22 AM

To: Ryan Loosvelt <rloosvelt@ggrmlawfirm.com>; Brent Quist <bquist@dennettwinspear.com>

Cc: Zaira Baldovinos <zaira@dennettwinspear.com>; Rebeca Guardado <rguardado@ggrmlawfirm.com>; Gianna Mosley <gmosley@ggrmlawfirm.com>; Dillon Coil <dcoil@ggrmlawfirm.com>

Subject: RE: Cape - IMEs and Plaintiff deposition

Good Morning, Mr. Loosvelt,

I have spoke with both Dr. Oliveri's and Dr. Etcoff's offices to discuss potential IME dates, and we have a couple options moving forward:

Option #1 - Two trips to Las Vegas

IME with Dr. Etcoff - October 19 and 20

IME with Dr. Oliveri - November 18

Option #2 - One trip to Las Vegas

IME with Dr. Etcoff - November 16 and 17

IME with Dr. Oliveri - November 18

Please let us know as soon as possible which of the above dates you would like us to confirm for your client's exams. And then once dates are selected, we will arrange to also take your client's deposition during his time here in Las Vegas.

Thank you!

EXHIBIT “F”

RYAN L. DENNETT, ESQ.
Nevada Bar No. 005617
rdennett@dennettwinspear.com
BRENT D. QUIST, ESQ.
Nevada Bar No. 009157
bquist@dennettwinspear.com
DENNETT WINSPEAR, LLP
3301 N. Buffalo Drive, Suite 195
Las Vegas, Nevada 89129
Telephone: (702) 839-1100
Facsimile: (702) 839-1113
**Attorneys for Defendant, CHILLY
WILLY'S HANDYMAN SERVICES, LLC**

DISTRICT COURT
CLARK COUNTY, NEVADA

TAYLOR MILES CAPE,

Plaintiff,

Case No: A-20-818569-C
Dept. No: 28

vs.

DAVID G. MARTINEZ, individually; CHILLY
WILLY'S HANDYMAN SERVICES, LLC, a
domestic limited-liability company; DOES I
through X; and ROE BUSINESS ENTITIES I
through X, inclusive,

Defendants.

**NOTICE OF RULE 35 EXAMINATION OF PLAINTIFF TAYLOR MILES CAPE TO BE
CONDUCTED BY LEWIS M. ETCOFF, PH.D.**

TO: Plaintiff TAYLOR MILES CAPE and his attorneys

PLEASE TAKE NOTICE that on the **October 19 and 20, 2021 beginning at the hour of 9:00 a.m.** a Rule 35 examination of Plaintiff TAYLOR MILES CAPE will be conducted by Dr. Lewis M. Etcoff, Ph.D. at his office located at 8475 S. Eastern Suite 205, Las Vegas, NV 89123, the telephone number is (702-876-1977).

If Plaintiff fails to appear for the examination and/or timely cancel the examination, Plaintiff will be subject to Dr. Etcoff's cancellation fees per his attached fee schedule.

Dr. Etcoff's Examinee Policy and appointment notification letter are attached for your reference.

///

1 If you require the services of an interpreter at the examination, please notify counsel at
2 least five (5) business days prior to the scheduled exam.

3 DATED this 16th day of August, 2021.

4
5 **DENNETT WINSPEAR, LLP**

6
7 By /s/ Brent D. Quist
8 RYAN L. DENNETT, ESQ.
9 Nevada Bar No. 005617
10 BRENT D. QUIST, ESQ.
11 Nevada Bar No. 009157
12 3301 N. Buffalo Drive, Suite 195
13 Las Vegas, Nevada 89129
14 Telephone: (702) 839-1100
15 Facsimile: (702) 839-1113
16 ***Attorneys for Defendant, Chilly Willy's***
17 ***Handyman Services, LLC***
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), EDCR 7.26 and N.E.F.C.R. 9, I certify that on this date, I served the foregoing **NOTICE OF RULE 35 EXAMINATION OF PLAINTIFF TAYLOR MILES CAPE TO BE CONDUCTED BY LEWIS M. ETCOFF, PH.D.** on all parties to this action by the following method:

_____ Facsimile
_____ Mail
 X Electronic Service

Ryan A. Loosvelt, Esq.
Nevada Bar No. 8550
GREENMAN GOLDBERG RABY & MARTINEZ
2770 S. Maryland PKWY., Suite 100
Las Vegas, Nevada 89109
Telephone: 702. 384.1616
Facsimile: 702.384.2990
***Attorneys for Plaintiff,
Taylor Miles Cape***

John T. Keating, Esq.
Nevada Bar No. 6373
KEATING LAW GROUP
9130 W. Russell Road, Suite 200
Las Vegas, Nevada 89148
Telephone: 702.228.6800
Facsimile: 702.228.0443
***Attorneys for Defendant
David G. Martinez***

DATED this 17th day of August, 2021.

 /s/ Ashley Marchant
an Employee of DENNETT WINSPEAR, LLP

Lewis M. Etcoff, Ph.D., A.B.N.

*Nevada Licensed Psychologist No. 129
Diplomate, American Board of Professional Neuropsychology #257
Fellow, National Academy of Neuropsychology
Fellow, The American College of professional Neuropsychology*

2021

RATE AND FEE SCHEDULE

FORENSIC PSYCHOLOGICAL/NEUROPSYCHOLOGICAL EVALUATIONS

Professional Hourly Fee

Lewis Etcoff, Ph.D.	\$ 470.00 per hour
Associate/Advanced Doctoral Student	\$ 330.00 per hour

Retainer (I do not accept llems)

Records Review (at the time the records review is requested)	\$ 7,500.00
One-day Evaluation	\$ 7,500.00
Two-day Evaluation	\$ 10,000.00

No show or Cancellation Evaluation (If my office is not given four working days' notice, the retaining party will forfeit the scheduling retainer, One-day \$7,500.00, Two-day \$10,000.00 which will be considered a no-show fee).

TRAVEL COSTS (Evaluation, Deposition, Trial Testimony)

Outside Las Vegas area for each hour spent in transit \$ 470.00 per hour

Reimbursement

I will require reimbursement for all expenses related to the travel but not limited to:

Airfare, lodging, food, vehicle rental and gasoline.

Unexpected Delays (preventing my ability to return to Las Vegas for next regularly scheduled day of work) \$1,750.00 per day

DEPOSITION FEES

Deposit (for up to 2 hours of my time) \$1,200.00

(Must be paid in advance before my office will schedule a time for the deposition)

Each additional hour \$ 600.00 per hour

Preparation Time \$ 470.00 per hour

(If my office is not given three working days' notice of deposition cancellation or postponement, the attorney forfeits the entire \$ 1,200.00 deposit).

TESTIMONY FEES (Trial, Arbitration, Mediation)

Half-day (morning or afternoon) \$2,500.00

If testimony extends into both half-days \$5,000.00

Full day \$5,000.00

Retainer: \$2,500.00

Trial Preparation: \$ 470.00 per hour

PHOTOCOPY FEES

Black and White copies \$ 0.60 per page

Color copies \$ 0.89 per page

05/05/2021

8475 S. Eastern Avenue, Suite 205, Las Vegas, NV 89123
(702) 876-1977 – (702) 876-0238

APP 000060

LEWIS M. ETCOFF, Ph.D.
8475 S. EASTERN AVENUE, SUITE 205
LAS VEGAS, NEVADA 89123
(702) 876-1977

NAME: Taylor Cape

YOU HAVE AN APPOINTMENT SCHEDULED WITH DR. ETCOFF ON:

October 19 + 20, 2021 AT 9:00 AM

Most neuropsychological evaluations are scheduled for two consecutive days from 9:00 a.m. to 5:00 p.m. A lunch break is typically scheduled from noon to 1:30 p.m. There are many restaurants within the immediate area. You will be offered breaks of 10-15 minutes several times during the day or as necessary. Dr. Etcoff asks that you get a good night's sleep and be fully rested for both days of the evaluation. If you wear glasses, contact lenses, hearing aids or any other physical aid, please bring them with you to the evaluation. If you are currently taking prescription medications, please bring a copy of the prescription to the evaluation. Please refrain from drinking alcoholic beverages the evenings before the evaluation; nor should you drink alcoholic beverages during the breaks on the day of the evaluation.

DIRECTIONS TO OUR OFFICE:

8475 S. EASTERN, SUITE #205

WE ARE LOCATED NORTH OF THE 215 BELTWAY ON EASTERN ON THE
NORTHWEST CORNER OF EASTERN & WIGWAM.

If you have any questions, please call our office at 876-1977.

Lewis M. Etcoff, Ph.D., A.B.N.

*Nevada Licensed Psychologist No. 129
Diplomate, American Board of Professional Neuropsychology #257
Fellow, National Academy of Neuropsychology
Fellow, The American College of professional Neuropsychology*

FORENSIC PSYCHOLOGICAL / NEUROPSYCHOLOGICAL EVALUATIONS POLICIES AND PROCEDURES – 2021

Dear Examinee:

The purpose of this letter is to help you understand what you can expect during your psychological evaluation so that you can feel well prepared and so you can consent to proceed. This letter provides a description of the basic procedures of a typical forensic examination and explains my role and legal status as an independent forensic expert. Please feel free to contact your attorney if you have other questions and/or concerns about this examination or the information provided below.

So that you know something about my professional background, I am a licensed psychologist in Nevada. I received my Ph.D. in clinical psychology in 1983, and was board-certified in professional neuropsychology in 1992. This means that in addition to my training as a psychologist, I have advanced training in how the brain affects behavior, thoughts, and feelings. My practice is one of assessment, or evaluation of psychological issues.

LIMITS TO CONFIDENTIALITY

In this situation, my role is one of an advisor to the Court. This means that I am *not* “your witness” or that of opposing counsel. Rather, I am the “court’s witness,” regardless of who contacted me, who retained me, and who pays for the examination. You can feel confident that I will do my best to provide a neutral, objective and unbiased examination.

At the same time that I am not to be considered “your witness,” you also are not considered to be “my client.” For the purposes of a forensic evaluation, my client is the attorney who retained me. Sometimes, therefore, my client will be the attorney who is opposing you. Further, since you have entered into a civil lawsuit, you have waived the rights to confidentiality that one would typically retain in a more traditional clinical psychological evaluation conducted for non-forensic purposes. A psychological or neuropsychological evaluation conducted for forensic purposes (as yours will be) is not subject to the same protections provided to a traditional clinical psychological evaluation by the Health Insurance Portability and Accountability Act (HIPAA).

I will prepare a report regarding my findings during my evaluation of you, and this report will be submitted to the attorney who retained me. Whether or not the attorney who retained me is your attorney or the attorney opposing you, eventually both you and your attorney, and the opposing attorney, will receive access to a copy of the report. Please do not ask me for my impressions of your test performance as I will not have had ample opportunity to consider all the information necessary to form any conclusions. Instead, you should ask your attorney to provide you with a copy of my report.

POTENTIAL RISKS OF THE EVALUATION

Thus, it is important that you understand some of the potential risks involved in consenting to this type of an evaluation. Some aspects of this process that may be upsetting are:

1. Re-living past events or injuries;
2. Being asked about very personal aspects of your life;
3. Learning the results of the examination, (at a later date);
4. Having other people learn about very personal aspects of your life as contained in my report, deposition, and courtroom testimony.

STRUCTURE OF THE EVALUATION

In addition to interviews, we also will likely administer a battery of neuropsychological and psychological tests to objectively measure the complaints / symptoms you are reporting. It is important that you try your best on all of these tests. *If you have undergone a neuropsychological or similar evaluation in the last 6 months, please inform me or a member of my staff as soon as possible, as this may have the potential to affect the validity of the test results during your evaluation.*

If you are presenting for a one-day psychological evaluation, my office manager will arrange with your attorney a short appointment, which will be scheduled for approximately one week prior to your evaluation date (if you are coming from out of town for your evaluation, different arrangements will be made based on your travel schedule and availability). At this short appointment, you will be asked to complete one or more questionnaires, which are given in a paper-and-pencil format, and which you can complete privately, at your own pace. Most people are able to complete these tests in two to four hours; however, as each person is unique, it may take you more or less time to complete your tests.

If you are presenting for a two-day neuropsychological evaluation, you will complete the same tests during your two-day appointment, and you will not need to complete tests ahead of your scheduled two-day appointment.

In terms of interview content, some general areas of discussion you may want to consider ahead of time include:

1. What your life was like before this subject incident/accident, both immediately and, to a lesser extent all the way back to your childhood?
2. The accident / incident itself;
3. How and what you have been doing since the accident / incident;
4. The connection between the accident / incident and any difficulties you have had since;
5. How and what you are likely to be doing in the future.

I should also add that it is important that you be as honest with me as possible. If I ask you a question you would prefer not to answer, inform me as such, and I will honor your request.

You should be aware that in accordance with the 1999 Official Statement of the National Academy of Neuropsychology regarding the presence of third-party observers during neuropsychological testing,

2020 EXAMINEE LETTER

third-party observers (including attorneys, attorney representatives, court reporters, and audio and / or video recording devices) will not be allowed to be present during evaluation proceedings. Such third-party observation can not only invalidate test results by altering the behavior or performance of the examinee, but also exposes trade-secret testing information to individuals who do not have instruction, supervision, or experience in standardized psychological testing and clinical procedures.

PSYCHOLOGICAL PERSONNEL

When you arrive for your evaluation, you may find yourself working with one or two of my associates. I employ individuals who have advanced degrees in Clinical Psychology (Psy.D. or Ph.D.), who are trained and supervised by me, and who may help review records, interview, test, or dictate case records. All of these individuals are subject to the same ethical guidelines as I am. They conduct themselves with professionalism and treat all clients with respect. Ultimately, however, results of all tests are interpreted and reviewed by me.

DANGER AND THE DUTY TO WARN AND PROTECT

On very rare occasions, typically during the course of evaluating a teenager or adult, I will become convinced that an examinee is intent on causing him or herself serious harm (e.g. planning a suicide attempt). On even rarer occasions, an examinee may inform me that he or she is intent on causing harm to another human being. In these situations, I will always attempt to protect the examinee or the individual whose life may be in danger. In the event the examinee is a minor, I am obligated by Nevada law to alert the parent or guardian, the appropriate authorities, or both. Similarly, I must make it known to parents and authorities if I have reason to believe that a child or an elderly individual is being physically, sexually, or otherwise abused.

I look forward to meeting you.

Sincerely,



Lewis M. Etcoff, Ph.D., ABN

EXHIBIT “G”

1 **RSPN**
2 **DILLON G. COIL, ESQ.**
3 Nevada Bar No. 11541
4 **WILLIAM T. MARTIN, ESQ.**
5 Nevada Bar No. 2534
6 **GGRM LAW FIRM**
7 2770 S. Maryland Pkwy., Suite 100
8 Las Vegas, Nevada 89109
9 Phone: 702.384.1616 ~ Fax: 702.384.2990
10 Email: dcoil@ggrmlawfirm.com
11 wmartin@ggrmlawfirm.com

12 *Attorneys for Plaintiff*

13 **DISTRICT COURT**
14 **CLARK COUNTY, NEVADA**

15 TAYLOR MILES CAPE,
16
17 Plaintiff,

18 vs.

19 DAVID G. MARTINEZ, individually;
20 CHILLY WILLY'S HANDYMAN
21 SERVICES, LLC, a domestic limited-
22 liability company; DOES I through X and
23 ROE Business Entities III through X,
24 inclusive.

25 Defendants.

CASE NO.: A-20-818569-C
DEPT. NO.: XXVIII

**PLAINTIFF'S RESPONSES TO
DEFENDANT DAVID G. MARTINEZ
FIRST SET OF INTERROGATORIES**

26 TO: David G. Martinez, Defendant; and

27 TO: John T. Keating, Esq. of Keating Law Group, Counsels for Defendant.

28 COMES NOW, Plaintiff, TAYLOR MILES CAPE, by and through his attorneys of
GGRM Law Firm, hereby responds to Defendant David G. Martinez's First Set of
Interrogatories, as follows:

///

///

///





LAW FIRM
INJURY ATTORNEYS

1 **INTERROGATORY NO.1:**

2 State your full name, and all names by which you have been known, your present address,
3 telephone number, Social Security Number, date of birth and birthplace.

4 **RESPONSE TO INTERROGATORY NO. 1:**

5 Taylor Miles Cape, 1326 Beaufort river Dr., Myrtle Beach, SC 29588, 03/25/1996, Las
6 Vegas, NV, Single, XXX-XX-4500.

7 **INTERROGATORY NO.2:**

8 Please list each of your complete addresses within the past seven years, and further state
9 the dates of your residence at each such address, whether you owned or rented each such
10 residence, and if renting, please identify the owners, landlords or managers to whom you were
11 immediately responsible for the payment or rent.

12 **RESPONSE TO INTERROGATORY NO. 2:**

13 1326 Beaufort River Dr., Myrtle Beach, SC 29588 (Aug. 2019 - Present); 10426 Artful
14 Stone Ave., Las Vegas, NV 89149 (July 2007 - July 2019). Relocated to follow family who were
15 seeking retirement in SC.

16 **INTERROGATORY NO.3:**

17 If you have ever been married, state the name and present address of each spouse and
18 former spouse, the date and place of each marriage, the date and place of termination of each
19 marriage, and the name, address and age of each child born of each marriage.

20 **RESPONSE TO INTERROGATORY NO. 3:**

21 Plaintiff has never been married.

22 **INTERROGATORY NO. 4:**

23 If you have ever been convicted of a felony, set forth all relevant facts relating to such
24 conviction, including but not limited to, the nature of the felony and the date and place of such
25 conviction.

26 **RESPONSE TO INTERROGATORY NO. 4:**

27 Plaintiff has never been convicted of a felony.

28 **INTERROGATORY NO. 5:**



1 In your own words, describe the accident or incident which is the subject matter of the
2 Complaint on file herein.

3 **RESPONSE TO INTERROGATORY NO. 5:**

4 Plaintiff, in his own words, states the following: "At around ~11:30pm, November 21st,
5 2018, at the intersection of Durango and Oso Blanca, I was stopped at a red light in the
6 innermost of a two-lane left turn lane waiting to turn onto Oso Blanca. As the light turned green,
7 signaling that it was safe to begin moving, I began the turn. I remember checking my peripherals
8 to make sure the other left turn lane wasn't occupied during the turn, as I needed to get into the
9 right lane immediately after the turn in order to turn into the Centennial Hills Park & Ride
10 parking lot. Mid-turn, the opposing party failed to stop at the red light, causing our two vehicles
11 to collide. I immediately lost consciousness and do not remember the collision. The driver of
12 the pick-up truck that failed to yield the red light later came up to me and admitted fault while
13 we were inside the UMC Trauma Center."

14 **INTERROGATORY NO. 6:**

15 Identify, sufficiently to permit service of subpoena, each witness to the accident
16 mentioned in the Complaint known to you, your attorney, agent, or any investigator or detective
17 employed by you or your attorney or anyone acting on your behalf in addition to those disclosed
18 by your attorney at the early case conference.

19 **RESPONSE TO INTERROGATORY NO. 6:**

- 20 1. Taylor Cape
21 c/o Dillon G. Coil, Esq.
22 GREENMAN, GOLDBERG, RABY & MARTINEZ
23 2770 S. Maryland Pkwy., Ste 100
24 Las Vegas, Nevada 89109
- 25 2. David G. Martinez-Holdridge
26 c/o John T. Keating, Esq.
27 KEATING LAW GROUP
28 9130 W. Russell Road, Ste. 200
Las Vegas, NV 89148

///



LAW FIRM
INJURY ATTORNEYS

- 1 3. Chilly Willy's Handyman Services, LLC
2 c/o Ryan L. Dennett, Esq.
3 DENNETT WINSPEAR, LLP
4 3301 N. Buffalo Drive, Ste. 195
5 Las Vegas, NV 89129
- 6 4. Angela Olguin
7 346 Ocean View Blvd.
8 Lompoc, CA 98437
- 9 5. Ashley Warren
10 6835 Rolling Boulder St.
11 Las Vegas, NV 89149
- 12 6. Chris Osorio
13 8704 Willow Cabin St.
14 Las Vegas, NV 89131
- 15 7. Silina Indalecio
16 9354 Writing Ave.
17 Las Vegas, NV 89149
- 18 8. Jose Gonzalez Martinez
19 1209 Pyramid Dr.
20 Las Vegas, NV 89108
- 21 9. Officer Matthew Ware
22 LVMPD ID No. 9684
23 400 S. Martin Luther King, Jr Blvd.
24 Las Vegas, NV 89106
- 25 10. Jan Roughan, BSN, RN, PHN, CRRN/ABSNC
26 465 N. Halstead Street, Ste. 120
27 Pasadena, CA 91107
- 28 11. Attending Physician and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
UMC Medical Center
1800 W. Charleston Blvd.,
Las Vegas, Nevada 89106
12. Attending Provider and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
Pueblo Medical Imaging



LAW FIRM
INJURY ATTORNEYS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

5495 S. Rainbow Blvd. Ste. 203
Las Vegas, NV 89118

13. Sunshine Collins, PsyD and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
9163 W. Flamingo Rd., Ste. 120
Las Vegas, NV 89147
14. Attending Physician and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
Spring Mountain Treatment Center
7000 Spring Mountain Rd.
Las Vegas, NV 89117
15. Attending Physician and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
Seven Hills Behavioral Health Hospital
3021 W. Horizon Ridge Pkwy.
Henderson, NV 89052
16. Leesha Bitto and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
Leesha Bitto
3201 S. Maryland Pkwy., Ste. 318
Las Vegas, NV 89109
17. Attending Physician and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
Las Vegas Radiology
3201 S. Maryland Pkwy., Ste. 102
Las Vegas, NV 89109
18. Attending Physician and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
Greenwalt Chiropractic
7500 W. Sahara Ave.
Las Vegas, NV 89117



LAW FIRM
INJURY ATTORNEYS

19. Enrico Fazzini, M.D. and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
826 E. Charleston Blvd.
Las Vegas, NV 89074
20. Attending Physician and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
Emp of Clark UMC PPL
P.O. Box 18925
Belfast, ME 04915
21. Attending Physician and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
Desert Radiologist
11460 N. Meridian St.
Carmel, IN 46032
22. Attending Physician and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
American Medical Response
50 S. Main St., Ste. 401
Akron, OH 44308
23. Akindale Kolade, MD and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
3201 S. Maryland Pkwy., #318
Las Vegas, NV 89109

INTERROGATORY NO. 7:

If you consumed any intoxicating beverages, medications or drugs within 72 hours preceding the incident made the basis of this litigation, state the kind and amount consumed and the time, and place of consumption of each intoxicating beverage, medication or drug, along with the name and address of each person present at the consumption of each intoxicating beverage, medication or drug and if you consumed medication during the stated time, by whom was it prescribed and for what medical condition.



1 **RESPONSE TO INTERROGATORY NO. 7:**

2 Not applicable.

3 **INTERROGATORY NO. 8:**

4 Identify sufficiently to permit service of subpoena, each person, including doctors,
5 known to you or your attorneys or anyone acting on your behalf, having knowledge of facts
6 relevant to the subject matter of this action in addition to those disclosed by your attorney at the
7 early case conference.

8 **RESPONSE TO INTERROGATORY NO. 8:**

- 9 1. Attending Physician and/or
10 N.R.C.P. 30(b)(6) Witness(es) and/or
11 Custodian of Records
12 UMC Medical Center
13 1800 W. Charleston Blvd.,
14 Las Vegas, Nevada 89106
- 15 2. Attending Provider and/or
16 N.R.C.P. 30(b)(6) Witness(es) and/or
17 Custodian of Records
18 Pueblo Medical Imaging
19 5495 S. Rainbow Blvd. Ste. 203
20 Las Vegas, NV 89118
- 21 3. Sunshine Collins, PsyD and/or
22 N.R.C.P. 30(b)(6) Witness(es) and/or
23 Custodian of Records
24 9163 W. Flamingo Rd., Ste. 120
25 Las Vegas, NV 89147
- 26 4. Attending Physician and/or
27 N.R.C.P. 30(b)(6) Witness(es) and/or
28 Custodian of Records
Spring Mountain Treatment Center
7000 Spring Mountain Rd.
Las Vegas, NV 89117
5. Attending Physician and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
Seven Hills Behavioral Health Hospital
3021 W. Horizon Ridge Pkwy.
Henderson, NV 89052



LAW FIRM
INJURY ATTORNEYS

6. Leesha Bitto and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
Leesha Bitto
3201 S. Maryland Pkwy., Ste. 318
Las Vegas, NV 89109
7. Attending Physician and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
Las Vegas Radiology
3201 S, Maryland Pkwy., Ste. 102
Las Vegas, NV 89109
8. Attending Physician and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
Greenwalt Chiropractic
7500 W. Sahara Ave.
Las Vegas, NV 89117
9. Enrico Fazzini, M.D. and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
826 E. Charleston Blvd.
Las Vegas, NV 89074
10. Attending Physician and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
Emp of Clark UMC PPL
P.O. Box 18925
Belfast, ME 04915
11. Attending Physician and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
Desert Radiologist
11460 N. Meridian St.
Carmel, IN 46032
12. Attending Physician and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
American Medical Response

50 S. Main St., Ste. 401
Akron, OH 44308

INTERROGATORY NO. 9:

If you have communicated with any expert or consultant in connection with the occurrence which is the subject matter of this action, identify sufficiently to permit service of subpoena and state the specific area of knowledge of each person and the date when each such person was first contacted.

RESPONSE TO INTERROGATORY NO. 9:

Objection. This Interrogatory is premature. Expert Disclosures are not due for this matter until October 7, 2021. Plaintiff will disclose the requested information about experts in accordance with this matter's Discovery and Scheduling orders, should Plaintiff choose to retain an expert.

INTERROGATORY NO. 10:

If you expect to call any expert witnesses or consultants at the trial of this matter, identify each of them sufficiently to permit service of subpoena and please state the date each such person was first contacted, the subject matter upon which each such expert or consultant is expected to testify, the substance of the facts and opinions to which each such expert or consultant is expected to testify, a summary of the grounds of each opinion, and if a written document or report was prepared by such expert or consultant, please identify the same sufficiently to permit service of subpoena duces tecum or Rule 34 Request for Production.

RESPONSE TO INTERROGATORY NO. 10:

Objection. This interrogatory calls for Plaintiff to provide an expert medical opinion. Furthermore, this Interrogatory is compound and contains at least six subparts. Notwithstanding the objection, and without waiving it, Plaintiff responds as follows:

Discovery is ongoing. Expert disclosures are not due until October 7, 2021. It is Plaintiff's understanding that his brain injuries are permanent and will require ongoing care in the future. However, Plaintiff will rely on his physicians and experts at the time of trial to opine regarding the severity and/or permanency of his injuries.

INTERROGATORY NO. 11:





LAW FIRM
INJURY ATTORNEYS

1 Identify sufficiently to permit service of subpoena duces tecum or Rule 34 Request for
2 Production, each document, writing or physical object provided to each person identified in your
3 Answers to Interrogatories No. 9 and 10, each document, writing or communication you have
4 received from each such person.

5 **RESPONSE TO INTERROGATORY NO. 11:**

6 See Plaintiff's responses to Interrogatories 9 and 10.

7 **INTERROGATORY NO. 12:**

8 Identify sufficiently to permit service of subpoena duces tecum or Rule 34 Request for
9 reports of Production, each document, writing or communication, statements, notes,
10 conversations, phonetic recordings of conversations, stenographic verbatim reports of
11 conversations, transcriptions of phonetic recordings or any other memoranda whatsoever related
12 or communicated by any party or witness, or any agent or representative of any party or any
13 witness, excluding attorney-client communication, which pertains in any manner to this incident
14 or to the issues arising therefrom.

15 **RESPONSE TO INTERROGATORY NO. 12:**

16 See Plaintiff's initial disclosures, 0001-451, as well as Defendant Martinez's disclosures
17 as MART21-333, and Defendant Chilly Willy's disclosures at 7-376.

18 **INTERROGATORY NO. 13:**

19 If you know of the existence of, or have in your possession, any photographs, moving
20 pictures, diagrams, sketches or maps showing the Plaintiff, the Defendant, the incident scene, or
21 any instrumentality involved in the alleged incident or of the location of said incident, please
22 identify the same sufficiently to permit service of subpoena duces tecum or Rule 34 Request for
23 Production.

24 **RESPONSE TO INTERROGATORY NO. 13:**

25 See Plaintiff's disclosures and any supplement thereto, specifically at 442-451; as well
26 as Defendant Martinez's disclosures at MART 30; MART 116-189; as well as Defendant Chilly
27 Willy's disclosures at 15-307.

28 **INTERROGATORY NO. 14:**



LAW FIRM
INJURY ATTORNEYS

1 If you have overheard any conversation between an agent or representative of any
2 Defendant and any other person concerning the incident, state your best recollection of the
3 conversation, when it occurred, where it occurred, and the names and addresses of all persons
4 present.

5 **RESPONSE TO INTERROGATORY NO. 14:**

6 Objection. This interrogatory is overly broad, unduly burdensome, and not limited in
7 time or scope. Without waiving said objections:

8 None.

9 **INTERROGATORY NO. 15:**

10 State all such injuries, ailments or symptoms experienced by you which you contend are
11 a result of the accident or incident mentioned in the Complaint on file herein, and state the extent
12 of your recovery from the injuries you claim resulted from this incident.

13 **RESPONSE TO INTERROGATORY NO. 15:**

14 Objection. This Interrogatory seeks a medical expert opinion. Without waiving said
15 objection, Plaintiff responds as follows:

16 Plaintiff still experiences symptoms including difficulty concentrating, sensitivity to
17 light and noise, short term memory loss, depression, and blurred vision. Plaintiff will rely on
18 his treating physicians and experts to address the full scope of his symptomology and treatment
19 at the time of trial.

20 **INTERROGATORY NO. 16:**

21 List all injuries, symptoms, or ailments enumerated in the Answer to Interrogatory No.
22 15 which you had prior to this incident.

23 **RESPONSE TO INTERROGATORY NO. 16:**

24 Objection. This Interrogatory seeks an expert medical opinion and is overbroad, and
25 burdensome. Without waiving said objections, the response is as follows:

26 None.

27 **INTERROGATORY NO. 17:**

28



LAW FIRM
INJURY ATTORNEYS

1 Identify sufficiently to permit service of subpoena, each institution at which you have
2 been hospitalized or received medical treatment since the accident or incident mentioned in the
3 Complaint on file herein, whether each such hospitalization was either wholly or partially the
4 result of injuries or symptoms resulting from said incident, and identify sufficiently to permit
5 service of subpoena, each doctor or physician or health care professional who has advised you
6 that you will in the future require further hospitalization or treatment for any injury or symptom
7 wholly or partially resulting from said incident and the purpose for such future hospitalization
8 or treatment.

9 **RESPONSE TO INTERROGATORY NO. 17:**

10 Objection. This interrogatory is overly broad and unduly burdensome, and contains
11 several subparts. Furthermore, this Interrogatory requests that Plaintiff provide expert medical
12 opinions. Experts are not due until October 7, 2021. Notwithstanding the objection, and without
13 waiving it, Plaintiff responds:

- 14
15 1. Attending Physician and/or
16 N.R.C.P. 30(b)(6) Witness(es) and/or
17 Custodian of Records
18 UMC Medical Center
19 1800 W. Charleston Blvd.,
20 Las Vegas, Nevada 89106
- 21
22 2. Attending Provider and/or
23 N.R.C.P. 30(b)(6) Witness(es) and/or
24 Custodian of Records
25 Pueblo Medical Imaging
26 5495 S. Rainbow Blvd. Ste. 203
27 Las Vegas, NV 89118
- 28
3. Sunshine Collins, PsyD and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
9163 W. Flamingo Rd., Ste. 120
Las Vegas, NV 89147
4. Attending Physician and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records



LAW FIRM
INJURY ATTORNEYS

- 1 Spring Mountain Treatment Center
2 7000 Spring Mountain Rd.
3 Las Vegas, NV 89117
- 4 5. Attending Physician and/or
5 N.R.C.P. 30(b)(6) Witness(es) and/or
6 Custodian of Records
7 Seven Hills Behavioral Health Hospital
8 3021 W. Horizon Ridge Pkwy.
9 Henderson, NV 89052
- 10 6. Leesha Bitto and/or
11 N.R.C.P. 30(b)(6) Witness(es) and/or
12 Custodian of Records
13 Leesha Bitto
14 3201 S. Maryland Pkwy., Ste. 318
15 Las Vegas, NV 89109
- 16 7. Attending Physician and/or
17 N.R.C.P. 30(b)(6) Witness(es) and/or
18 Custodian of Records
19 Las Vegas Radiology
20 3201 S. Maryland Pkwy., Ste. 102
21 Las Vegas, NV 89109
- 22 8. Attending Physician and/or
23 N.R.C.P. 30(b)(6) Witness(es) and/or
24 Custodian of Records
25 Greenwalt Chiropractic
26 7500 W. Sahara Ave.
27 Las Vegas, NV 89117
- 28 9. Enrico Fazzini, M.D. and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
826 E. Charleston Blvd.
Las Vegas, NV 89074
10. Attending Physician and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
Emp of Clark UMC PPL
P.O. Box 18925
Belfast, ME 04915
11. Attending Physician and/or



LAW FIRM
INJURY ATTORNEYS

1 N.R.C.P. 30(b)(6) Witness(es) and/or
2 Custodian of Records
3 Desert Radiologist
4 11460 N. Meridian St.
5 Carmel, IN 46032

- 6 12. Attending Physician and/or
7 N.R.C.P. 30(b)(6) Witness(es) and/or
8 Custodian of Records
9 American Medical Response
10 50 S. Main St., Ste. 401
11 Akron, OH 44308

12 **INTERROGATORY NO. 18:**

13 Identify sufficiently to permit service of subpoena, each doctor, physician, chiropractor,
14 therapist, psychiatrist or other health care professional who has examined, treated or consulted
15 with you since the date of the incident mentioned in the Complaint on file herein, the dates of
16 each such examination, treatment or consultation, whether such examination, treatment or
17 consultation was wholly or partially required by reason of said incident, and whether you were
18 examined or treated by any of these health care professionals prior to this incident, and the
19 purpose of such examination.

20 **RESPONSE TO INTERROGATORY NO. 18:**

21 Objection. This interrogatory is overly broad and unduly burdensome, and contains
22 several subparts. Notwithstanding the objection, and without waiving it, Plaintiff responds:

- 23 1. Attending Physician and/or
24 N.R.C.P. 30(b)(6) Witness(es) and/or
25 Custodian of Records
26 UMC Medical Center
27 1800 W. Charleston Blvd.,
28 Las Vegas, Nevada 89106
2. Attending Provider and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
Pueblo Medical Imaging
5495 S. Rainbow Blvd. Ste. 203
Las Vegas, NV 89118



JAW FIRM
INJURY ATTORNEYS

- 1 3. Sunshine Collins, PsyD and/or
2 N.R.C.P. 30(b)(6) Witness(es) and/or
3 Custodian of Records
4 9163 W. Flamingo Rd., Ste. 120
5 Las Vegas, NV 89147
- 6 4. Attending Physician and/or
7 N.R.C.P. 30(b)(6) Witness(es) and/or
8 Custodian of Records
9 Spring Mountain Treatment Center
10 7000 Spring Mountain Rd.
11 Las Vegas, NV 89117
- 12 5. Attending Physician and/or
13 N.R.C.P. 30(b)(6) Witness(es) and/or
14 Custodian of Records
15 Seven Hills Behavioral Health Hospital
16 3021 W. Horizon Ridge Pkwy.
17 Henderson, NV 89052
- 18 6. Leesha Bitto and/or
19 N.R.C.P. 30(b)(6) Witness(es) and/or
20 Custodian of Records
21 Leesha Bitto
22 3201 S. Maryland Pkwy., Ste. 318
23 Las Vegas, NV 89109
- 24 7. Attending Physician and/or
25 N.R.C.P. 30(b)(6) Witness(es) and/or
26 Custodian of Records
27 Las Vegas Radiology
28 3201 S. Maryland Pkwy., Ste. 102
Las Vegas, NV 89109
8. Attending Physician and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
Greenwalt Chiropractic
7500 W. Sahara Ave.
Las Vegas, NV 89117
9. Enrico Fazzini, M.D. and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
826 E. Charleston Blvd.
Las Vegas, NV 89074



LAW FIRM
INJURY ATTORNEYS

10. Attending Physician and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
Emp of Clark UMC PPL
P.O. Box 18925
Belfast, ME 04915

11. Attending Physician and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
Desert Radiologist
11460 N. Meridian St.
Carmel, IN 46032

12. Attending Physician and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
American Medical Response
50 S. Main St., Ste. 401
Akron, OH 44308

INTERROGATORY NO. 19:

If you, your agent or representative have received any written reports concerning your physical condition from any doctor, physician or other health care provider, identify sufficiently to permit service of subpoena duces tecum or Rule 34 Request for Production.

RESPONSE TO INTERROGATORY NO. 19:

1. UMC Medical Center medical records and billing (Bate Nos. 0009- 0083);
2. Pueblo Medical Imaging medical records and billing (Bate Nos. 0084- 0088);
3. Sunshine Collins, LLC medical records and billing (Bate Nos. 0089- 0116);
4. Spring Mountain Treatment Center medical records and billing (Bate No. 0117- 0344);
5. Las Vegas Radiology medical records and billing (Bate No. 0345-0352);
6. Greenwalt Chiropractic medical records and billing (Bate Nos. 0353- 0406);
7. Enrico Fazzini, MD medical records and billing (Bate Nos. 0407- 0418);
8. Emp of Clark UMC PLLC billing statement (Bate Nos. 0419- 0422);



1 9. Desert Radiologist billing statement (Bate No. 0423);

2 10. American Medical Response medical records and billing (Bate Nos. 0424- 0433);

3 **INTERROGATORY NO. 20:**

4 Please state the name, business address and specialty of your regular family, personal
5 and/or primary care physician.

6 **RESPONSE TO INTERROGATORY NO. 20:**

7 Plaintiff does not currently have a primary care physician.

8 **INTERROGATORY NO. 21:**

9 If you have had any illnesses, diseases or injuries during the past fifteen (15) years, state
10 the nature and inclusive dates of same and identify sufficiently to permit service of subpoena all
11 hospitals, doctors and other health care institutions or professionals rendering treatment.

12 **RESPONSE TO INTERROGATORY NO. 21:**

13 Objection. This interrogatory is overly broad, unduly burdensome, and not limited in
14 scope. Furthermore, this Interrogatory requests information outside of permissible Discovery.
15 *Schlatter v. Eighth Judicial Dist. Ct.*, 93 Nev. 189, 192, 561 P.2d 1342, 1344 (1977). Without
16 waiving said objections, the response is as follows:

17 My overall health was excellent from 2013 until August 2017, when I experienced
18 psychosis for the first time at age 21. I was hospitalized at Spring Mountain Treatment Center,
19 and again a month later at Seven Hills Behavioral Health Hospital. After stabilizing on the
20 medication prescribed by my psychiatrist, Dr. Kolade, I was diagnosed with Schizoaffective
21 Bipolar Disorder. After months of recovery, I was in stable and good health again by April of
22 2018, when I was hired as an Elementary Physical Education Assistant Coach at Somerset
23 Academy Lone Mountain. I remained in good health up until the accident in November 2018.

24
25 Spring Mountain Treatment Center - 7000 Spring Mountain Rd, Las Vegas, NV 89117

26 Seven Hills Behavioral Health Hospital - 3021 W Horizon Ridge Pkwy, Henderson, NV
27 89052

28 Dr. Kolade - 3201 S Maryland Pkwy #318, Las Vegas, NV 89109



1 **INTERROGATORY NO. 22:**

2 If you have had any incidents of any type during the past fifteen (15) years, wherein you
3 received personal injuries, describe each such injury, if any, how it was incurred, the dates and
4 places of such injuries, and identify sufficiently to permit service of subpoena all hospitals,
5 doctors and other health care professionals rendering treatment for any such injuries.

6 **RESPONSE TO INTERROGATORY NO. 22:**

7 Objection. This interrogatory is overly broad, unduly burdensome, and not limited in
8 scope. Without waiving said objections, the response is as follows:

9 None.

10 **INTERROGATORY NO. 23:**

11 If you had any earlier injury or illness which left a residual or permanent disability, or
12 any temporary symptoms which had not disappeared at the time of the incident mentioned in
13 the Complaint on file herein, please describe.

14 **RESPONSE TO INTERROGATORY NO. 23:**

15 Objection. This Interrogatory seeks an expert medical opinion and is overbroad, and
16 burdensome. Without waiving said objections, the response is as follows:

17 None.

18 **INTERROGATORY NO. 24:**

19 If you have had any injury or illness since the incident described in the Complaint on file
20 herein, state the nature and inclusive dates thereof, and describe where the incident occurred or
21 illness arose, the circumstances surrounding the incident or illness, any complaints that you now
22 have as a result of the incident or illness and identify sufficiently to permit service of subpoena
23 each person or institution who treated you for the illness or injury.

24 **RESPONSE TO INTERROGATORY NO. 24:**

25 Plaintiff has not endured further injuries outside of the injuries that are a direct result of
26 the incident that is the subject of this litigation.

27 **INTERROGATORY NO. 25:**



LAW FIRM
INJURY ATTORNEYS

If you have made any claims prior to, or during the pendency of the present action, against any person or organization for damages or personal injuries or damages to your property, state the nature and dates thereof, and further state the date and place of the accident or occurrence out of which such claim arose and the name of the judicial or administrative tribunal or agency, if any, in which such claim was prosecuted, and the case or proceeding number and identify sufficiently to permit service of subpoena, each such person or organization to which you made said claims, if any.

RESPONSE TO INTERROGATORY NO. 25:

Plaintiff has not made any previous claims for personal injuries or property damage, nor has he filed any previous lawsuits.

INTERROGATORY NO. 26:

List in detail all expenses which you have incurred solely by reason of the accident or incident mentioned in the Complaint on file herein.

RESPONSE TO INTERROGATORY NO. 26:

MEDICAL PROVIDER	DATES OF SERVICE	TOTAL CHARGES
UMC Medical Center	11/22/18	\$9,037.77
Pueblo Medical Imaging	1/10/19	\$5,700.00
Sunshine Collins, LLC	6/3/19- 9/30/19	\$3,181.19
Leesha Bitto		Pending
Las Vegas Radiology	6/20/19	\$1,650.00
Greenwalt Chiropractic	11/28/18- 2/11/19	\$1,940.00
Enrico Fazzini, DO.	12/15/18- 7/24/19	\$3,900.00
Emp of Clark UMC PLLC	11/22/18	\$1,051.20
Desert Radiologist	11/22/18	\$425.00
American Medical Response	11/21/18	\$1,286.31
Akindele Kolade, MD		Pending
PAST MEDICAL EXPENSES		\$40,171.47

INTERROGATORY NO. 27:

If you are making a claim for lost income, lost future income or loss of earning capacity,



1 state your business or occupation during the past five (5) years and identify sufficiently to permit
2 service of subpoena each of your employers during such period, and your immediate boss,
3 foreman, or supervisor.

4 **RESPONSE TO INTERROGATORY NO. 27:**

5 Plaintiff is not making a claim for lost wages. However, Plaintiff's experts will likely
6 opine regarding how the injuries from the subject incident may impact Plaintiff's future earning
7 capacity.

8 **INTERROGATORY NO. 28:**

9 If you have lost any salary, compensation or income since the incident, state the amount
10 of such loss which has resulted solely by reason of injuries sustained in said incident, the total
11 amount of time lost from your employment, business or occupation since this incident and solely
12 by reason of injuries suffered in said incident, the date you returned to work and the amount of
13 time lost from your employment, business or occupation resulting from reasons other than
14 because of injuries suffered in said incident, and the reasons for such loss of time.

15 **RESPONSE TO INTERROGATORY NO. 28:**

16 Plaintiff is not making a claim for lost wages. However, Plaintiff's experts will likely
17 opine regarding how the injuries from the subject incident may impact Plaintiff's future earning
18 capacity.

19 **INTERROGATORY NO. 29:**

20 If you have filed income tax returns with the Internal Revenue Service or with the
21 appropriate taxation authority of any state, commonwealth, city or foreign country during the
22 past five (5) years, please state, the name or names and identification number(s) under which
23 each such return was filed.

24 **RESPONSE TO INTERROGATORY NO. 29:**

25 Plaintiff is not making a claim for lost wages.

26 **INTERROGATORY NO. 30:**

27 If you are making a claim for lost income, lost future income or loss of earning capacity,
28



1 for each of the past five (5) years, please state your yearly gross and net income as well as the
2 identity of the person, firm or corporation having custody of records pertaining to your income.

3 **RESPONSE TO INTERROGATORY NO. 30:**

4 Plaintiff is not making a claim for lost wages. However, Plaintiff's experts will likely
5 opine regarding how the injuries from the subject incident may impact Plaintiff's future earning
6 capacity.

7 **INTERROGATORY NO. 31:**

8 If you claim that your earning capacity will be impaired as a result of the incident
9 mentioned in the Complaint on file herein, state the nature of the condition that will cause the
10 impairment, the manner in which your ability to work will be impaired, an estimate of the
11 amount of potential lost income, and how the claim for future lost income is calculated.

12 **RESPONSE TO INTERROGATORY NO. 31:**

13 Plaintiff's experts will likely opine regarding how the injuries from the subject incident
14 may impact Plaintiff's future earning capacity. Experts are not due until October 7, 2021.

15
16 DATED this 31st day of March, 2021.

17
18 **GGRM LAW FIRM**

19
20 */s/ Dillon G. Coil*

21 **DILLON G. COIL, ESQ.**

22 Nevada Bar No. 11541

23 **WILLIAM T. MARTIN, ESQ.**

24 Nevada Bar No. 2534

25 2770 S. Maryland Pkwy. Suite 100

26 Las Vegas, Nevada 89109

27 *Attorneys for Plaintiff*
28



LAW FIRM
INJURY ATTORNEYS

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of GGRM LAW FIRM, and that on the 31st day of March, 2021, I caused the foregoing document entitled **PLAINTIFF'S RESPONSES TO DEFENDANT DAVID G. MARTINEZ FIRST SET OF INTERROGATORIES** to be served upon those persons designated by the parties in the E-service Master List for the above-referenced matter in the Eighth Judicial Court E-filing System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules, to wit:

/s/ Michael Madden

An Employee of GGRM LAW FIRM

VERIFICATION OF PLATINFF'S RESPONSES TO INTERROGATORIES

Plaintiff, Taylor Cape, states that he has read the above and foregoing Responses to Interrogatories and knows the contents thereof; and, that the same is true of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 31st day of March, 2021.

/s/ Taylor Cape

Taylor Cape



LAW FIRM
INJURY ATTORNEYS

EXHIBIT “H”



LAW FIRM
INJURY ATTORNEYS

1 **RSPN**
2 **DILLON G. COIL, ESQ.**
Nevada Bar No. 11541
3 **WILLIAM T. MARTIN, ESQ.**
Nevada Bar No. 2534
4 **GGRM LAW FIRM**
5 2770 S. Maryland Pkwy, Ste. 100
Las Vegas, NV 89109
6 Phone: 702.384.1616 ~ Fax: 702.384.2990
7 Email: dcoil@ggrmlawfirm.com
wmartin@ggrmlawfirm.com

8 **DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

10 TAYLOR MILES CAPE,

11 Plaintiff,

12 vs.

13
14 DAVID G. MARTINEZ, individually;
15 CHILLY WILLY'S HANDYMAN
16 SERVICES, LLC, a domestic limited-
17 liability company; DOES I through X; and
ROE BUSINESS ENTITIES 1 through X;
inclusive,

18 Defendants.

CASE NO.: A-20-818569-C

DEPT. NO.: 28

**PLAINTIFF'S RESPONSES TO
DEFENDANT CHILLY WILLY'S
HANDYMAN SERVICES, LLC'S FIRST
SET OF INTERROGATORIES**

19 TO: Chilly Willy's Handyman Services, LLC., Defendant; and

20 TO: Ryan L Dennett, Esq. and Brent D. Quist, Esq., of Dennett Winspear, LLP.,
21 Counsels for Defendant.

22 COMES NOW, Plaintiff, TAYLOR MILES CAPE, by and through his attorneys of
23 GGRM Law Firm, hereby responds to Defendant Chilly Willy's Handyman Services, LLC's
24 First Set of Interrogatories, as follows:

25 **INTERROGATORY NO. 1:**

26 Please state all names by which you have been known, your present address, date of
27 birth, place of birth, marital status and social security number.

28 **RESPONSE TO INTERROGATORY NO. 1:**



LAW FIRM
INJURY ATTORNEYS

1 Taylor Miles Cape, 1326 Beaufort river Dr., Myrtle Beach, SC 29588, 03/25/1996, Las
2 Vegas, NV, Single, XXX-XX-4500.

3 **INTERROGATORY NO. 2:**

4 List each of your addresses during the past ten (10) years stating the dates of residence
5 at each address and reason for relocating.

6 **RESPONSE TO INTERROGATORY NO. 2:**

7 1326 Beaufort River Dr., Myrtle Beach, SC 29588 (Aug. 2019 - Present); 10426 Artful
8 Stone Ave., Las Vegas, NV 89149 (July 2007 - July 2019). Relocated to follow family who were
9 seeking retirement in SC.

10 **INTERROGATORY NO. 3:**

11 Describe any ailment, injury, ache, pain, or other form of discomfort (mental, physical
12 or emotional), which you claim to have suffered as a result of the incident alleged in your
13 Complaint. In reference to each, specify:

- 14 a) the part or parts of your body affected;
15 b) the nature of the injury;
16 c) the severity of the injury;
17 d) the duration of the injury; and
18 e) whether the injury is alleged to be permanent in nature.
19

20 **RESPONSE TO INTERROGATORY NO. 3:**

21 Objection. This interrogatory calls for Plaintiff to provide an expert medical opinions.
22 Furthermore, this interrogatory is compound and contains several subparts. Without waiving
23 said objections, Plaintiff responds as follows:

- 24 a) Head/brain, chest torso, upper back, left leg, right knee
25 b) Concussive brain injury, bruising along body (seatbelt), upper back out of
26 alignment causing pain/discomfort, could not put weight on left leg/limping, knee
27 pain/discomfort/affected ability to walk.
28



LAW FIRM
INJURY ATTORNEYS

- 1 c) Head/brain severity: high; chest torso severity: low; upper back severity: moderate;
2 left leg severity: moderate/low; right knee severity: moderate/low.
3 d) Head/brain duration: from incident to present, ongoing; chest/torso: approximately
4 two weeks; upper back: approximately 16 months; left leg: approximately one
5 month; right knee: approximately 16 months.
6 e) Head/brain: ongoing struggles suggest permanent mental damage; chest/torso: not
7 permanent; upper back: not permanent; left leg: not permanent; right knee: not
8 permanent.
9

10 Plaintiff's treating physicians and experts, which will be disclosed at the time
11 prescribed by the operative discovery scheduling order, are better equipped to speak regarding
12 Plaintiff's injuries.

13 **INTERROGATORY NO. 4:**

14 List any injuries, symptoms or ailments enumerated in your answer to the preceding
15 Interrogatory which you experienced at any time before the subject incident and state the name
16 and address of each and every health care provider who examined and/or treated you in regard
17 to said injury or condition.

18 **RESPONSE TO INTERROGATORY NO. 4:**

19 Objection. This Interrogatory seeks an expert medical opinion and is compound,
20 overbroad, and burdensome. Without waiving said objections, the response is as follows:

21 Previous back/spine alignment. Dr. Greenawalt – Chiropractor - 7500 W Sahara Ave,
22 Las Vegas, NV 89117.

23 **INTERROGATORY NO. 5:**

24 List the name and address of each physician, hospital, psychiatrist, psychologist,
25 technician, clinic or institution which has treated you for the injury or injuries you allege as a
26 result of the incident at issue in your Complaint. For each one, specify:

- 27 a) the nature and extent of the examination, treatment or care;
28 b) the inclusive dates of treatment, care, rehabilitation or confinement; and



LAW FIRM
INJURY ATTORNEYS

c) the amount of charges incurred by you or by any other person or firm on your account.

RESPONSE TO INTERROGATORY NO. 5:

1. Attending Physician and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
UMC Medical Center
1800 W. Charleston Blvd.,
Las Vegas, Nevada 89106
2. Attending Provider and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
Pueblo Medical Imaging
5495 S. Rainbow Blvd. Ste. 203
Las Vegas, NV 89118
3. Sunshine Collins, PsyD and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
9163 W. Flamingo Rd., Ste. 120
Las Vegas, NV 89147
4. Attending Physician and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
Spring Mountain Treatment Center
7000 Spring Mountain Rd.
Las Vegas, NV 89117
5. Attending Physician and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
Seven Hills Behavioral Health Hospital
3021 W. Horizon Ridge Pkwy.
Henderson, NV 89052
6. Leesha Bitto and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
Leesha Bitto
3201 S. Maryland Pkwy., Ste. 318
Las Vegas, NV 89109
7. Attending Physician and/or
N.R.C.P. 30(b)(6) Witness(es) and/or



LAW FIRM
INJURY ATTORNEYS

- 1 Custodian of Records
2 Las Vegas Radiology
3 3201 S. Maryland Pkwy., Ste. 102
4 Las Vegas, NV 89109
- 5 8. Attending Physician and/or
6 N.R.C.P. 30(b)(6) Witness(es) and/or
7 Custodian of Records
8 Greenwalt Chiropractic
9 7500 W. Sahara Ave.
10 Las Vegas, NV 89117
- 11 9. Enrico Fazzini, M.D. and/or
12 N.R.C.P. 30(b)(6) Witness(es) and/or
13 Custodian of Records
14 826 E. Charleston Blvd.
15 Las Vegas, NV 89074
- 16 10. Attending Physician and/or
17 N.R.C.P. 30(b)(6) Witness(es) and/or
18 Custodian of Records
19 Emp of Clark UMC PPL
20 P.O. Box 18925
21 Belfast, ME 04915
- 22 11. Attending Physician and/or
23 N.R.C.P. 30(b)(6) Witness(es) and/or
24 Custodian of Records
25 Desert Radiologist
26 11460 N. Meridian St.
27 Carmel, IN 46032
- 28 12. Attending Physician and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
American Medical Response
50 S. Main St., Ste. 401
Akron, OH 44308

MEDICAL PROVIDER	DATES OF SERVICE	TOTAL CHARGES
UMC Medical Center	11/22/18	\$9,037.77
Pueblo Medical Imaging	1/10/19	\$5,700.00
Sunshine Collins, LLC	6/3/19- 9/30/19	\$3,181.19
Leesha Bitto		Pending



LAW FIRM
INJURY ATTORNEYS

Las Vegas Radiology	6/20/19	\$1,650.00
Greenwalt Chiropractic	11/28/18- 2/11/19	\$1,940.00
Enrico Fazzini, DO.	12/15/18- 7/24/19	\$3,900.00
Emp of Clark UMC PLLC	11/22/18	\$1,051.20
Desert Radiologist	11/22/18	\$425.00
American Medical Response	11/21/18	\$1,286.31
Akindele Kolade, MD		Pending
PAST MEDICAL EXPENSES		\$40,171.47

The nature and extent of each providers' care has been included in the each providers' medical records, which were included in Plaintiff's initial disclosures, specifically Bate Nos. 9-433. Discovery is ongoing and Plaintiff reserves the right to supplement this answer if necessary.

INTERROGATORY NO. 6:

If you are claiming disability as a result of the injury, describe:

- a) whether the disability is total or partial;
- b) the nature of the disability;
- c) what activities, if any, you are precluded from performing;
- d) whether you have ever been judged disabled by any governmental agency;
- e) whether you have ever been determined to be partially or totally disabled by any physician, psychologist, psychiatrist, other health care practitioner, or administrative or regulatory agency;
- f) whether you are claiming any loss of earning capacity as a result of the disability, and, if so, what percentage loss of earning capacity you claim

RESPONSE TO INTERROGATORY NO. 6:

Objection. This interrogatory calls for Plaintiff to provide an expert medical opinion. Furthermore, this Interrogatory is compound and contains at least six subparts. Notwithstanding the objection, and without waiving it, Plaintiff responds as follows:

Discovery is ongoing. Expert disclosures are not due until October 7, 2021. It is Plaintiff's understanding that his brain injuries are permanent and will require ongoing care in the future. However, Plaintiff will rely on his physicians and experts at the time of trial to opine



LAW FIRM
INJURY ATTORNEYS

1 regarding the severity and/or permanency of his injuries.

2 **INTERROGATORY NO. 7:**

3 Give an itemized account of all losses, expenses or other costs (hospital, physician,
4 psychologist, psychiatrist bills, medical appliance costs, home health care expenses,
5 rehabilitative expenses, lost wages, loss of earning capacity claim, lost benefits or pensions, etc.)
6 that you allege you incurred as a result of the accident/incident.

7 **RESPONSE TO INTERROGATORY NO. 7:**

MEDICAL PROVIDER	DATES OF SERVICE	TOTAL CHARGES
UMC Medical Center	11/22/18	\$9,037.77
Pueblo Medical Imaging	1/10/19	\$5,700.00
Sunshine Collins, LLC	6/3/19- 9/30/19	\$3,181.19
Leesha Bitto		Pending
Las Vegas Radiology	6/20/19	\$1,650.00
Greenwalt Chiropractic	11/28/18- 2/11/19	\$1,940.00
Enrico Fazzini, DO.	12/15/18- 7/24/19	\$3,900.00
Emp of Clark UMC PLLC	11/22/18	\$1,051.20
Desert Radiologist	11/22/18	\$425.00
American Medical Response	11/21/18	\$1,286.31
Akindele Kolade, MD		Pending
PAST MEDICAL EXPENSES		\$40,171.47

18 Discovery is ongoing and Plaintiff reserves the right to supplement this answer if necessary.

19 **INTERROGATORY NO. 8:**

20 If you have ever made any claim or filed any lawsuit against any person, group or
21 organization, corporation or industrial commission or any other entity, describe in detail the
22 nature of the claim or lawsuit, the date the claim was first made, against whom it was made, if
23 the claim or lawsuit was for personal injuries, a description of the personal injuries, how it was
24 resolved and the court or jurisdiction in which any lawsuit was filed. If you have not, please
25 state, "I have not made any previous claims or filed any lawsuits."

26 **RESPONSE TO INTERROGATORY NO. 8:**

27 Plaintiff has not made any previous claims or filed and previous lawsuits.

28 **INTERROGATORY NO. 9:**



LAW FIRM
INJURY ATTORNEYS

1 If prior or subsequent to the incident at issue in this litigation, you were involved in any
2 accident(s) or sustained any injuries, including while in the course of your employment,
3 describe in detail the manner in which the accident(s) or injury(ies) occurred, including the date,
4 time, and place of the accident or injury(ies), the names and addresses of each practitioner who
5 treated you for any injury(ies) sustained as a result of said incident(s), and if the injury(ies)
6 were sustained on the job, the name, address and telephone number of the employer for whom
7 you were working when the injury(ies) were sustained.

8 **RESPONSE TO INTERROGATORY NO. 9:**

9 Plaintiff was not involved in any previous incident while in the course of his
10 employment.

11 **INTERROGATORY NO. 10:**

12 If you have obtained a written or oral statement (whether recorded or not) from any
13 person with facts which may be relevant to this lawsuit, state the name and address of such
14 person, and the date of such statement.

15 **RESPONSE TO INTERROGATORY NO. 10:**

16 See Plaintiff's initial disclosures, specifically at Bate Nos. 1-451. Additionally, see
17 Defendant Martinez's disclosures at MART21-29; MART190; as well as Defendant Chilly
18 Willy's disclosures at 7-14; and audio recorded statements of Ashley Warren and David
19 Martinez (not labeled).

20 **INTERROGATORY NO. 11:**

21 State the names, addresses and telephone numbers of any witnesses known to you or
22 your attorneys who observed the incident which is the subject of this litigation, or the relevant
23 events immediately prior or subsequent to the incident.

24 **RESPONSE TO INTERROGATORY NO. 11:**

- 25 1. Taylor Cape
26 c/o Dillon G. Coil, Esq.
27 GREENMAN, GOLDBERG, RABY & MARTINEZ
28 2770 S. Maryland Pkwy., Ste 100
Las Vegas, Nevada 89109



LAW FIRM
INJURY ATTORNEYS

- 1 2. David G. Martinez-Holdridge
2 c/o John T. Keating, Esq.
3 KEATING LAW GROUP
4 9130 W. Russell Road, Ste. 200
5 Las Vegas, NV 89148
- 6 3. Chilly Willy's Handyman Services, LLC
7 c/o Ryan L. Dennett, Esq.
8 DENNETT WINSPEAR, LLP
9 3301 N. Buffalo Drive, Ste. 195
10 Las Vegas, NV 89129
- 11 4. Angela Olguin
12 346 Ocean View Blvd.
13 Lompoc, CA 98437
- 14 5. Ashley Warren
15 6835 Rolling Boulder St.
16 Las Vegas, NV 89149
- 17 6. Chris Osorio
18 8704 Willow Cabin St.
19 Las Vegas, NV 89131
- 20 7. Silina Indalecio
21 9354 Writing Ave.
22 Las Vegas, NV 89149
- 23 8. Jose Gonzalez Martinez
24 1209 Pyramid Dr.
25 Las Vegas, NV 89108
- 26 9. Officer Matthew Ware
27 LVMPD ID No. 9684
28 400 S. Martin Luther King, Jr Blvd.
Las Vegas, NV 89106
10. Jan Roughan, BSN, RN, PHN, CRRN/ABSNC
465 N. Halstead Street, Ste. 120
Pasadena, CA 91107
11. Attending Physician and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
UMC Medical Center
1800 W. Charleston Blvd.,



LAW FIRM
INJURY ATTORNEYS

- 1 Las Vegas, Nevada 89106
- 2 12. Attending Provider and/or
- 3 N.R.C.P. 30(b)(6) Witness(es) and/or
- 4 Custodian of Records
- 5 Pueblo Medical Imaging
- 6 5495 S. Rainbow Blvd. Ste. 203
- 7 Las Vegas, NV 89118
- 8 13. Sunshine Collins, PsyD and/or
- 9 N.R.C.P. 30(b)(6) Witness(es) and/or
- 10 Custodian of Records
- 11 9163 W. Flamingo Rd., Ste. 120
- 12 Las Vegas, NV 89147
- 13 14. Attending Physician and/or
- 14 N.R.C.P. 30(b)(6) Witness(es) and/or
- 15 Custodian of Records
- 16 Spring Mountain Treatment Center
- 17 7000 Spring Mountain Rd.
- 18 Las Vegas, NV 89117
- 19 15. Attending Physician and/or
- 20 N.R.C.P. 30(b)(6) Witness(es) and/or
- 21 Custodian of Records
- 22 Seven Hills Behavioral Health Hospital
- 23 3021 W. Horizon Ridge Pkwy.
- 24 Henderson, NV 89052
- 25 16. Leesha Bitto and/or
- 26 N.R.C.P. 30(b)(6) Witness(es) and/or
- 27 Custodian of Records
- 28 Leesha Bitto
- 3201 S. Maryland Pkwy., Ste. 318
- Las Vegas, NV 89109
17. Attending Physician and/or
- N.R.C.P. 30(b)(6) Witness(es) and/or
- Custodian of Records
- Las Vegas Radiology
- 3201 S. Maryland Pkwy., Ste. 102
- Las Vegas, NV 89109
18. Attending Physician and/or
- N.R.C.P. 30(b)(6) Witness(es) and/or
- Custodian of Records



LAW FIRM
INJURY ATTORNEYS

Greenwalt Chiropractic
7500 W. Sahara Ave.
Las Vegas, NV 89117

19. Enrico Fazzini, M.D. and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
826 E. Charleston Blvd.
Las Vegas, NV 89074

20. Attending Physician and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
Emp of Clark UMC PPL
P.O. Box 18925
Belfast, ME 04915

21. Attending Physician and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
Desert Radiologist
11460 N. Meridian St.
Carmel, IN 46032

22. Attending Physician and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
American Medical Response
50 S. Main St., Ste. 401
Akron, OH 44308

23. Akindale Kolade, MD and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
3201 S. Maryland Pkwy., #318
Las Vegas, NV 89109

INTERROGATORY NO. 12:

State the name and address of each and every person whom you intend or expect to call as an expert witness at the time of trial and, as to each witness, state the subject matter on which the expert is expected to testify, the substance of the facts and opinions on which the expert is expected to testify, and a summary of the grounds for each opinion.

RESPONSE TO INTERROGATORY NO. 12:



LAW FIRM
INJURY ATTORNEYS

1 Objection. This interrogatory is premature. Plaintiff will timely produce the requested
2 information in accordance the operative discovery scheduling order.

3 **INTERROGATORY NO. 13:**

4 State the time and location of the accident or incident at issue in the subject Complaint
5 and describe the details of the accident or incident in your own words, describing factually
6 (without legal conclusion) what caused it to happen.

7 **RESPONSE TO INTERROGATORY NO. 13**

8 Plaintiff, in his own words, states the following: "At around ~11:30pm, November 21st,
9 2018, at the intersection of Durango and Oso Blanca, I was stopped at a red light in the
10 innermost of a two-lane left turn lane waiting to turn onto Oso Blanca. As the light turned green,
11 signaling that it was safe to begin moving, I began the turn. I remember checking my peripherals
12 to make sure the other left turn lane wasn't occupied during the turn, as I needed to get into the
13 right lane immediately after the turn in order to turn into the Centennial Hills Park & Ride
14 parking lot. Mid-turn, the opposing party failed to stop at the red light, causing our two vehicles
15 to collide. I immediately lost consciousness and do not remember the collision. The driver of
16 the pick-up truck that failed to yield the red light later came up to me and admitted fault while
17 we were inside the UMC Trauma Center."

18 **INTERROGATORY NO. 14:**

19 If you are still treating for any of the injuries which you claim were caused by this
20 Defendant, please state what treatment, if any, you are receiving, what symptoms you are still
21 experiencing, and the name and address of any health care provider(s) with whom you are still
22 treating.

23 **RESPONSE TO INTERROGATORY NO. 14:**

24 Objection. This Interrogatory seeks a medical expert opinion. Without waiving said
25 objection, Plaintiff responds as follows:

26 Plaintiff still experiences symptoms including difficulty concentrating, sensitivity to
27 light and noise, short term memory loss, depression, and blurred vision. Plaintiff will rely on
28



LAW FIRM
INJURY ATTORNEYS

1 his treating physicians and experts to address the full scope of his symptomology and treatment
2 at the time of trial.

3 **INTERROGATORY NO. 15:**

4 Describe in detail your physical and/or medical condition in the five (5) years preceding
5 the subject accident including the nature and inclusive dates of all diseases, injuries (including
6 the subject accident or incident) or serious illnesses you experienced during the last five (5)
7 years for which you received medical treatment or consultation, and state the name and address
8 of all hospitals, doctors and other health care institutions or professionals rendering treatment
9 or consultation for each such disease, injury or serious illness.

10 **RESPONSE TO INTERROGATORY NO. 15:**

11 Objection. This interrogatory calls for Plaintiff to provide an expert medical opinion.
12 Furthermore, the term "medical condition" is not clearly defined and subject to interpretation.
13 Notwithstanding the objection, and without waiving it, Plaintiff responds as follows:

14 My overall health was excellent from 2013 until August 2017, when I experienced
15 psychosis for the first time at age 21. I was hospitalized at Spring Mountain Treatment Center,
16 and again a month later at Seven Hills Behavioral Health Hospital. After stabilizing on the
17 medication prescribed by my psychiatrist, Dr. Kolade, I was diagnosed with Schizoaffective
18 Bipolar Disorder. After months of recovery, I was in stable and good health again by April of
19 2018, when I was hired as an Elementary Physical Education Assistant Coach at Somerset
20 Academy Lone Mountain. I remained in good health up until the accident in November 2018.

21 Spring Mountain Treatment Center - 7000 Spring Mountain Rd, Las Vegas, NV 89117

22 Seven Hills Behavioral Health Hospital - 3021 W Horizon Ridge Pkwy, Henderson, NV
23 89052

24 Dr. Kolade - 3201 S Maryland Pkwy #318, Las Vegas, NV 89109

25
26 **INTERROGATORY NO. 16:**

27 State the name and address of each and every physician, therapist or other health care
28 provider who examined, consulted or treated you within the 10 years preceding the date of the



LAW FIRM
INJURY ATTORNEYS

1 accident to the present date, and as to each physician state the date of any examination,
2 consultation or treatment, and describe the nature or type of condition, illness or injury that was
3 the subject of the examination, consultation or treatment you received.

4 **RESPONSE TO INTERROGATORY NO. 16:**

5 Objection. This interrogatory is overly broad and requests information beyond the scope
6 of permissible discovery.

7 **INTERROGATORY NO. 17:**

8 State whether you have any photographs, films, motion pictures or videotapes depicting
9 the accident scene or vehicles involved in the subject accident, or of your alleged injuries and,
10 if so, state the date that each photograph, film, motion picture or videotape was taken, what is
11 depicted therein and by whom it was taken.

12 **RESPONSE TO INTERROGATORY NO. 17**

13 See Plaintiff's initial disclosures and any supplement thereto, specifically Bate Nos. 442-
14 51; as well as Defendant Martinez's disclosures MART118-180; and Defendant Chilly Willy's
15 disclosures at 26-88; 296-307.

16 **INTERROGATORY NO. 18:**

17 If you claim that as a result of this incident you have suffered injuries or disabilities
18 which have caused you to limit or cease your participation in any hobbies or other forms of
19 recreation, please state in detail all such claimed losses, including the exact nature of your
20 participation in the hobby or form of recreation before the incident and how that participation
21 has changed since the incident.

22 **RESPONSE TO INTERROGATORY NO. 18:**

23 Objection. This Interrogatory calls for an expert medical opinion. Without waiving said
24 objection, Plaintiff responds as follows:

25 In the years prior to the accident, Plaintiff's hobbies generally included mentally
26 stimulating games that required strict concentration such as chess, sudoku, and an occasional
27 video game. Plaintiff now finds these activities difficult due to an inability to concentrate as well
28 as short-term memory loss. This mental fatigue is frustrating, fatiguing, and debilitating. This



LAW FIRM
INJURY ATTORNEYS

1 also impacts Plaintiff's ability to perform at school. Plaintiff will rely on his treating providers
2 and experts at the time of trial to opine regarding the full scope his limitations.

3 **INTERROGATORY NO. 19:**

4 State all facts that support your Second Cause of Action for Negligent Entrustment.

5 **RESPONSE TO INTERROGATORY NO. 19:**

6 Objection. This interrogatory is premature. Defendants have not yet completed all
7 disclosures nor have they responded to upcoming Discovery requests. Depositions of party and
8 percipient witnesses are pending. Discovery is ongoing and Plaintiff reserves the right to
9 supplement this response as more information becomes available.

10 **INTERROGATORY NO. 20:**

11 State all facts that support your Third Cause of Action for Negligent Training, Hiring,
12 Management, Retention and/or Supervision.

13 **RESPONSE TO INTERROGATORY NO. 20:**

14 Objection. This interrogatory is premature. Defendants have not yet completed all
15 disclosures nor have they responded to upcoming Discovery requests. Depositions of party and
16 percipient witnesses are pending. Discovery is ongoing and Plaintiff reserves the right to
17 supplement this response as more information becomes available. Without waiving said
18 objections, the response is as follows:

19 Upon information and belief, the defendant driver was acting in the course and scope of
20 his employment at the time of the collision with Plaintiff.

21 **INTERROGATORY NO. 21:**

22 State all facts that support your Fourth Cause of Action for Vicarious
23 Liability/Respondeat Superior

24 **RESPONSE TO INTERROGATORY NO. 21:**

25 Objection. This interrogatory is premature. Defendants have not yet completed all
26 disclosures nor have they responded to upcoming Discovery requests. Depositions of party and
27 percipient witnesses are pending. Discovery is ongoing and Plaintiff reserves the right to
28 supplement this response as more information becomes available. Without waiving said



1 objections, the response is as follows:

2 Upon information and belief, the defendant driver was acting in the course and scope of
3 his employment at the time of the collision with Plaintiff.

4 **INTERROGATORY NO. 22:**

5 State all facts that support your claim for punitive damages

6 **RESPONSE TO INTERROGATORY NO. 22:**

7 Objection. This interrogatory is premature. Defendants have not yet completed all
8 disclosures nor have they responded to upcoming Discovery requests. Discovery is ongoing and
9 Plaintiff reserves the right to supplement this response as more information becomes available.

10 **INTERROGATORY NO. 23:**

11 State all facts and identify all documents that support Jan Roughan's Life Care Analysis,
12 including the amounts identified in pages 2 and 3 of that Life Care Analysis.

13 **REPOSPOSE TO INTERROGATORY NO. 23:**

14 Objection. This request is overly broad and unduly burdensome. Furthermore, this
15 Interrogatory requests that Plaintiff interpret medical records and opinions as if he were an
16 medical expert. Notwithstanding the objection, and without waiving it, Plaintiff responds:

- 17 1. LVMPD State of Nevada – Traffic Crash Report (Bate Nos. 0001- 0008);
- 18 2. UMC Medical Center medical records and billing (Bate Nos. 0009- 0083);
- 19 3. Pueblo Medical Imaging medical records and billing (Bate Nos. 0084- 0088);
- 20 4. Sunshine Collins, LLC medical records and billing (Bate Nos. 0089- 0116);
- 21 5. Spring Mountain Treatment Center medical records and billing (Bate No. 0117-
22 0344);
- 23 6. Las Vegas Radiology medical records and billing (Bate No. 0345-0352);
- 24 7. Greenwalt Chiropractic medical records and billing (Bate Nos. 0353- 0406);
- 25 8. Enrico Fazzini, MD medical records and billing (Bate Nos. 0407- 0418);
- 26 9. Emp of Clark UMC PLLC billing statement (Bate Nos. 0419- 0422);
- 27 10. Desert Radiologist billing statement (Bate No. 0423);
- 28 11. American Medical Response medical records and billing (Bate Nos. 0424- 0433);



LAW FIRM
INJURY ATTORNEYS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

12. Jan Roughan, BSN, RN, PHN Life Care Plan report (Bate Nos. 0434- 0441);

13. Color photographs of Plaintiff's property damage (Bate Nos. 0442- 0451).

All document included in Plaintiff's initial disclosures.

DATED this 19th day of March, 2021.

GGRM LAW FIRM

/s/ Dillon G. Coil

DILLON G. COIL, ESQ.

Nevada Bar No. 11541

WILLIAM T. MARTIN, ESQ.

Nevada Bar No. 2534

GGRM LAW FIRM

2770 S. Maryland Pkwy, Ste. 100

Las Vegas, NV 89109

Phone: 702.384.1616 ~ Fax: 702.384.2990

Attorneys for Plaintiff

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of GGRM LAW FIRM and
3 that on the 19th day of March, 2021, I caused the foregoing document entitled **PLAINTIFF'S**
4 **RESPONSES TO DEFENDANT CHILLY WILLY'S HANDYMAN SERVICES, LLC'S**
5 **FIRST SET OF INTERROGATORIES** to be served upon those persons designated by the
6 parties in the E-service Master List for the above-referenced matter in the Eighth Judicial Court
7 E-filing System in accordance with the mandatory electronic service requirements of
8 Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules, to wit:
9

10 */s/ Michael Madden*

11 _____
12 An Employee of GGRM LAW FIRM
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



VERIFICATION OF PLATINFF'S RESPONSES TO INTERROGATORIES

Plaintiff, Taylor Cape, states that he has read the above and foregoing Responses to Interrogatories and knows the contents thereof; and, that the same is true of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 19th day of March, 2021.

/s/ Taylor Cape

Taylor Cape



LAW FIRM
INJURY ATTORNEYS

EXHIBIT “I”



ECC
GABRIEL A. MARTINEZ, ESQ.
Nevada Bar No. 326
DILLON G. COIL, ESQ.
Nevada Bar No. 11541
BRIAN P. NESTOR, ESQ.
Nevada Bar No. 13551
GREENMAN GOLDBERG RABY & MARTINEZ
2770 S. Maryland Pkwy., Ste. 100
Las Vegas, NV 89109
Phone: 702.384.1616 ~ Fax: 702.384.2990
Email: gmartinez@ggrmlawfirm.com
dcoil@ggrmlawfirm.com
bnestor@ggrmlawfirm.com

Attorneys for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

TAYLOR MILES CAPE,
Plaintiff,

vs.

DAVID G. MARTINEZ, individually;
CHILLY WILLY'S HANDYMAN
SERVICES, LLC, a domestic limited-
liability company; DOES I through X and
ROE Business Entities III through X,
inclusive,

Defendants.

CASE NO.: A-20-818569-C
DEPT. NO.: 28

PLAINTIFF'S INITIAL EARLY CASE CONFERENCE
WITNESS AND EXHIBIT LIST AND PRE-TRIAL DISCLOSURES

Plaintiff, TAYLOR MILES CAPE, by and through his attorneys, Gabriel Martinez, Esq.,
Dillon G. Coil, Esq., and Brian P. Nestor, Esq., of the law firm GREENMAN GOLDBERG RABY &
MARTINEZ, hereby submits his list of witnesses, exhibits and pre-trial disclosures, as follows:

///



I.
WITNESSES

1. Taylor Cape
c/o Brian P. Nestor, Esq.
GREENMAN, GOLDBERG, RABY & MARTINEZ
2770 S. Maryland Pkwy., Ste 100
Las Vegas, Nevada 89109

Taylor Cape is expected to testify regarding his knowledge of the facts and circumstances surrounding this collision, which is the subject of this litigation as well as damages and injuries she sustained.

2. David G. Martinez-Holdridge
c/o John T. Keating, Esq.
KEATING LAW GROUP
9130 W. Russell Road, Ste. 200
Las Vegas, NV 89148

David G. Martinez is expected to testify regarding his knowledge of the facts and circumstances surrounding this collision, which is the subject of this litigation as well as damages and injuries Plaintiff sustained.

3. Chilly Willy's Handyman Services, LLC
c/o Ryan L. Dennett, Esq.
DENNETT WINSPEAR, LLP
3301 N. Buffalo Drive, Ste. 195
Las Vegas, NV 89129

Chilly Willy's Handyman Services, LLP is expected to testify regarding its knowledge of the facts and circumstances surrounding this collision, which is the subject of this litigation as well as damages and injuries Plaintiff sustained.

4. Angela Olguin
346 Ocean View Blvd.
Lompoc, CA 98437

Angela Olguin is expected to testify regarding her knowledge surrounding this collision, which is the subject of this litigation.

5. Ashley Warren
6835 Rolling Boulder St.
Las Vegas, NV 89149



1 Ashley Olguin is expected to testify regarding her knowledge surrounding this collision,
2 which is the subject of this litigation.

3 6. Chris Osorio
4 8704 Willow Cabin St.
5 Las Vegas, NV 89131

6 Chris Osorio is expected to testify regarding his knowledge surrounding this collision,
7 which is the subject of this litigation.

8 7. Silina Indalecio
9 9354 Writing Ave.
10 Las Vegas, NV 89149

11 Silina Indalecio is expected to testify regarding her knowledge surrounding this collision,
12 which is the subject of this litigation.

13 8. Jose Gonzalez Martinez
14 1209 Pyramid Dr.
15 Las Vegas, NV 89108

16 Jose Gonzalez Martinez is expected to testify regarding his knowledge surrounding this
17 collision, which is the subject of this litigation.

18 9. Officer Matthew Ware
19 LVMPD ID No. 9684
20 400 S. Martin Luther King, Jr Blvd.
21 Las Vegas, NV 89106

22 Officer Matthew Ware is expected to testify regarding his knowledge surrounding this
23 collision, which is the subject of this litigation.

24 10. Jan Roughan, BSN, RN, PHN, CRRN/ABSNC
25 465 N. Halstead Street, Ste. 120
26 Pasadena, CA 91107

27 Ms. Jan Roughan is expected to testify regarding the injuries sustained by Plaintiff and
28 future treatment required as a result of these injuries.

PLAINTIFF'S HEALTHCARE PROVIDERS

29 The following treating physicians are expected, but not limited to testify to the opinions
30 (including causation) outlined in their records and/or otherwise disclosed and based upon the
31 records contained in their file, to any additional opinions that result from Plaintiff's continued
32 treatment and will testify and give opinions regarding the care and treatment of Plaintiff.,



Plaintiff's ancillary treatment and Plaintiff's diagnosis and prognosis. It is expected that the following individual medical providers, their custodians of records and persons with knowledge will testify regarding the injuries, treatment, expense, costs for future treatment, and all other relevant information pertaining to Plaintiff. Additionally, each and every one of the following medical providers is designated and deemed an expert and may be called at the time of trial to provide expert testimony regarding Plaintiff's injuries, the causation of said injuries and all the medical treatment and damages incurred by Plaintiff. Their testimony and opinions will consist of the nature of the Plaintiff's injuries, Plaintiff's diagnosis and prognosis, causation of Plaintiff's injuries and the necessity of the medical treatment rendered, the necessity of future treatment to be rendered, the causation of the necessity for past and future medical treatment, and/or their opinions as to past and future restrictions of activities, including work activities, causally related to the subject incident. Their testimony will also include authenticity of medical records, the cost of past and future medical care, the reasonableness of such costs, and whether those medical costs are reasonable and customary for this community. Their testimony will also address any referrals made to other providers and the billing and treatment of same, including any surgical recommendations. Their testimony will also include opinions as to whether Plaintiff has a diminished work life expectancy as a result of the subject incident. They will testify in accordance with their file and regarding documents reviewed outside their file in the course of providing treatment and/or defending their treatment and opinions against the criticisms of experts retained by the Defendant.

1. Attending Physician and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
UMC Medical Center
1800 W. Charleston Blvd.,
Las Vegas, Nevada 89106
2. Attending Provider and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
Pueblo Medical Imaging
5495 S. Rainbow Blvd. Ste. 203
Las Vegas, NV 89118



LAW FIRM
INJURY ATTORNEYS

3. Sunshine Collins, PsyD and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
9163 W. Flamingo Rd., Ste. 120
Las Vegas, NV 89147
4. Attending Physician and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
Spring Mountain Treatment Center
7000 Spring Mountain Rd.
Las Vegas, NV 89117
5. Attending Physician and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
Seven Hills Behavioral Health Hospital
3021 W. Horizon Ridge Pkwy.
Henderson, NV 89052
6. Leesha Bitto and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
Leesha Bitto
3201 S. Maryland Pkwy., Ste. 318
Las Vegas, NV 89109
7. Attending Physician and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
Las Vegas Radiology
3201 S. Maryland Pkwy., Ste. 102
Las Vegas, NV 89109
8. Attending Physician and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
Greenwalt Chiropractic
7500 W. Sahara Ave.
Las Vegas, NV 89117
9. Enrico Fazzini, M.D. and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
826 E. Charleston Blvd.
Las Vegas, NV 89074



10. Attending Physician and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
Emp of Clark UMC PPL
P.O. Box 18925
Belfast, ME 04915
11. Attending Physician and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
Desert Radiologist
11460 N. Meridian St.
Carmel, IN 46032
12. Attending Physician and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
American Medical Response
50 S. Main St., Ste. 401
Akron, OH 44308
13. Akindale Kolade, MD and/or
N.R.C.P. 30(b)(6) Witness(es) and/or
Custodian of Records
3201 S. Maryland Pkwy., #318
Las Vegas, NV 89109

Further, these medical providers are expected to testify regarding Plaintiff's injuries resulting from the collision, their treatment, prognosis and the cost of the services rendered. Plaintiff anticipates that she may require testimony from any and all custodians of records, which are necessary to authenticate documents, which are not stipulated to regarding admissibility by the parties herein.

Plaintiff reserves the right to call any and all expert witnesses which Plaintiff may hereafter select as the need arises during the course of this litigation; and Plaintiff further reserves the right to supplement this witness list if any other witnesses becomes known to Plaintiff as this litigation progresses and as other witnesses are discovered or located.

Plaintiff reserves the right to call rebuttal and/or impeachment witnesses; to call the records custodian for any person(s) or institutions(s) to which there is an objection concerning authenticity; and call any and all witnesses of any other party in this matter.



II.

DOCUMENTS

1. LVMPD State of Nevada – Traffic Crash Report (Bate Nos. 0001- 0008);
2. UMC Medical Center medical records and billing (Bate Nos. 0009- 0083);
3. Pueblo Medical Imaging medical records and billing (Bate Nos. 0084- 0088);
4. Sunshine Collins, LLC medical records and billing (Bate Nos. 0089- 0116);
5. Spring Mountain Treatment Center medical records and billing (Bate No. 0117- 0344);
6. Las Vegas Radiology medical records and billing (Bate No. 0345-0352);
7. Greenwalt Chiropractic medical records and billing (Bate Nos. 0353- 0406);
8. Enrico Fazzini, MD medical records and billing (Bate Nos. 0407- 0418);
9. Emp of Clark UMC PLLC billing statement (Bate Nos. 0419- 0422);
10. Desert Radiologist billing statement (Bate No. 0423);
11. American Medical Response medical records and billing (Bate Nos. 0424- 0433);
12. Jan Roughan, BSN, RN, PHN Life Care Plan report (Bate Nos. 0434- 0441);
13. Color photographs of Plaintiff's property damage (Bate Nos. 0442- 0451).

Plaintiff reserves the right to submit as an exhibit any document or tangible item identified by any other party in this action or obtained from any third party. Plaintiff further reserves the right to amend and/or supplement this list of documents or tangible items as discovery proceeds.

In addition, neither inclusion of any documents or tangible items within this disclosure nor acceptance of documents provided by any other party hereto in a disclosure shall be deemed as a waiver by Plaintiff of any evidentiary rights Plaintiff may have with respect to those documents and/or tangible items, including, but not limited to, objections related to authenticity, materiality, relevance, foundation, hearsay, or any other rights as may be permitted pursuant to the Nevada Rules of Evidence.

///

///



LAW FIRM
INJURY ATTORNEYS

III.

PLAINTIFF'S COMPUTATION OF DAMAGES

The following medical specials were incurred as a direct result of the subject collision:

MEDICAL PROVIDER	DATES OF SERVICE	TOTAL CHARGES
UMC Medical Center	11/22/18	\$9,037.77
Pueblo Medical Imaging	1/10/19	\$5,700.00
Sunshine Collins, LLC	6/3/19- 9/30/19	\$3,181.19
Spring Mountain Treatment Center	8/24/17- 8/29/17	\$12,000.00
Seven Hills Behavioral Health Hospital		Pending
Leesha Bitto		Pending
Las Vegas Radiology	6/20/19	\$1,650.00
Greenwalt Chiropractic	11/28/18- 2/11/19	\$1,940.00
Enrico Fazzini, DO.	12/15/18- 7/24/19	\$3,900.00
Emp of Clark UMC PLLC	11/22/18	\$1,051.20
Desert Radiologist	11/22/18	\$425.00
American Medical Response	11/21/18	\$1,286.31
Akindele Kolade, MD		Pending
PAST MEDICAL EXPENSES		\$40,171.47

Past Medical and Related Expenses \$40,171.47

Past Wage Loss To be determined

Future Loss of Wages and Earning Capacity To be determined

Future Medical Expenses \$5,656,763.00

Total Special Damages To be determined

Further, at trial, the Jury will decide upon a sum of money sufficient to reasonably and fairly compensate Plaintiff for the following items:

1. The reasonable medical expenses Plaintiff has necessarily incurred as a result of the collision and the medical expenses which the Jury believes the Plaintiff is reasonably certain to incur in the future as a result of the collision, discounted to present value.

2. Plaintiff's loss of earnings or earning capacity from the date of the collision to the present.

3. Plaintiff's loss of earnings or earning capacity which the Jury believes the Plaintiff is reasonably certain to experience in the future as a result of the collision, discounted



LAW FIRM
INJURY ATTORNEYS

1 to present value. Also, the Jury will include the reasonable value of services performed by
2 another in doing things for the Plaintiff, which except for the injuries, Plaintiff would ordinarily
3 have performed.

4 4. The physical and mental pain, suffering, anguish and disability endured by the
5 Plaintiff from the date of the collision to the present; and

6 5. The physical and mental pain, suffering, anguish and disability which the jury
7 believes Plaintiff is reasonably certain to experience in the future as a result of the collision,
8 discounted to present value.

9 Plaintiff reserves all rights to seek other damages including, but not limited to, general
10 and exemplary damages in an amount to be proven at trial.

11 **PRE-TRIAL DISCLOSURES**

12 **Pursuant to N.R.C.P. 16.1.(a)(3)**

13 **I.**

14 **PLAINTIFF'S WITNESSES PURSUANT TO N.R.C.P. 16.1 (a)(3)(A)**

	NAME	EXPECTED TO PRESENT	SUBPOENAED	MAY CALL	BY DEPO
15 1.	Taylor Cape c/o Brian P. Nestor, Esq. GREENMAN, GOLDBERG, RABY & MARTINEZ 2770 S. Maryland Pkwy. Ste. 100 Las Vegas, Nevada 89109	X			
22 2.	David G. Martinez-Holdridge c/o John T. Keating, Esq. KEATING LAW GROUP 9130 W. Russell Road, Ste. 200 Las Vegas, NV 89148	X			



LAW FIRM
INJURY ATTORNEYS

	NAME	EXPECTED TO PRESENT	SUBPOENAED	MAY CALL	BY DEPO
3.	Chilly Willy's Handyman Services, LLC c/o Ryan L. Dennett, Esq. DENNETT WINSPEAR, LLP 3301 N. Buffalo Drive, Ste. 195 Las Vegas, NV 89129	X			
4.	Angela Olguin 346 Ocean View Blvd. Lompoc, CA 98437			X	
5.	Ashley Warren 6835 Rolling Boulder St. Las Vegas, NV 89149			X	
6.	Chris Osorio 8704 Willow Cabin St. Las Vegas, NV 89131			X	
7.	Silina Indalecio 9354 Writing Ave. Las Vegas, NV 89149			X	
8.	Jose Gonzalez Martinez 1209 Pyramid Dr. Las Vegas, NV 89108			X	
9.	Officer Matthew Ware LVMPD ID No. 9684 400 S. Martin Luther King, Jr. Blvd. Las Vegas, NV 89106			X	
10.	Jan Roughan, BSN, RN, PHN, CRRN/ABSNC 465 N. Halstead Street, Ste. 120 Pasadena, CA 91107			X	



LAW FIRM
INJURY ATTORNEYS

	NAME	EXPECTED TO PRESENT	SUBPOENAED	MAY CALL	BY DEPO
11.	Attending Physician and/or N.R.C.P. 30(b)(6) Witness(es) and/or Custodian of Records UMC Medical Center 1800 W. Charleston Blvd., Las Vegas, Nevada 89106			X	
12.	Attending Provider and/or N.R.C.P. 30(b)(6) Witness(es) and/or Custodian of Records Pueblo Medical Imaging 5495 S. Rainbow Blvd. Ste. 203 Las Vegas, NV 89118			X	
13.	Sunshine Collins, PsyD and/or N.R.C.P. 30(b)(6) Witness(es) and/or Custodian of Records 9163 W. Flamingo Rd., Ste. 120 Las Vegas, NV 89147			X	
14.	Attending Physician and/or N.R.C.P. 30(b)(6) Witness(es) and/or Custodian of Records Spring Mountain Treatment Center 7000 Spring Mountain Rd. Las Vegas, NV 89117			X	
15.	Attending Physician and/or N.R.C.P. 30(b)(6) Witness(es) and/or Custodian of Records Seven Hills Behavioral Health Hospital 3021 W. Horizon Ridge Pkwy. Henderson, NV 89052			X	
16.	Leesha Bitto and/or N.R.C.P. 30(b)(6) Witness(es) and/or Custodian of Records Leesha Bitto 3201 S. Maryland Pkwy., Ste. 318 Las Vegas, NV 89109			X	



LAW FIRM
INJURY ATTORNEYS

	NAME	EXPECTED TO PRESENT	SUBPOENAED	MAY CALL	BY DEPO
17.	Attending Physician and/or N.R.C.P. 30(b)(6) Witness(es) and/or Custodian of Records Las Vegas Radiology 3201 S, Maryland Pkwy., Ste. 102 Las Vegas, NV 89109			X	
18.	Attending Physician and/or N.R.C.P. 30(b)(6) Witness(es) and/or Custodian of Records Greenwalt Chiropractic 7500 W. Sahara Ave. Las Vegas, NV 89117			X	
19.	Enrico Fazzini, M.D. and/or N.R.C.P. 30(b)(6) Witness(es) and/or Custodian of Records 826 E. Charleston Blvd. Las Vegas, NV 89074			X	
20.	Attending Physician and/or N.R.C.P. 30(b)(6) Witness(es) and/or Custodian of Records Emp of Clark UMC PPL P.O. Box 18925 Belfast, ME 04915			X	
21.	Attending Physician and/or N.R.C.P. 30(b)(6) Witness(es) and/or Custodian of Records Desert Radiologist 11460 N. Meridian St. Carmel, IN 46032			X	
22.	Attending Physician and/or N.R.C.P. 30(b)(6) Witness(es) and/or Custodian of Records American Medical Response 50 S. Main St., Ste. 401 Akron, OH 44308			X	



	NAME	EXPECTED TO PRESENT	SUBPOENAED	MAY CALL	BY DEPO
23.	Akindale Kolade, MD and/or N.R.C.P. 30(b)(6) Witness(es) and/or Custodian of Records 3201 S. Maryland Pkwy., #318 Las Vegas, NV 89109			X	

Plaintiff may call the Custodian of Records of all treating physicians to testify as to the completeness and accuracy of records, medical records and bills generated in the normal course of business.

Plaintiff reserves the right to call any witness named by Defendants. Plaintiff reserves the right to call any witness as may be necessary for the purpose of impeachment. Plaintiff may call any and all witnesses in rebuttal to testimony given by Defendants' witnesses. Plaintiff reserves the right to object to any of Defendants' witnesses at the time of trial.

I.

PLAINTIFF'S EXHIBITS PURSUANT TO N.R.C.P. 16.1 (a)(3)(B)

	EXHIBIT	EXPECT TO USE	MAY USE
1.	LVMPD State of Nevada – Traffic Crash Report (Bate Nos. 0001- 0008);	X	
2.	UMC Medical Center medical records and billing (Bate Nos. 0009- 0083);	X	
3.	Pueblo Medical Imaging medical records and billing (Bate Nos. 0084- 0088);	X	
4.	Sunshine Collins, LLC medical records and billing (Bate Nos. 0089- 0116);	X	
5.	Spring Mountain Treatment Center medical records and billing (Bate No. 0117- 0344);	X	
6.	Las Vegas Radiology medical records and billing (Bate No. 0345-0352);	X	
7.	Greenwalt Chiropractic medical records and billing (Bate Nos. 0353- 0406);	X	
8.	Enrico Fazzini, MD medical records and billing (Bate Nos. 0407- 0418);	X	
9.	Emp of Clark UMC PLLC billing statement (Bate Nos. 0419- 0422);	X	
10.	Desert Radiologist billing statement (Bate No. 0423);	X	



	EXHIBIT	EXPECT TO USE	MAY USE
11.	American Medical Response medical records and billing (Bate Nos. 0424- 0433);	X	
12.	Jan Roughan, BSN, RN, PHN Life Care Plan report (Bate Nos. 0434- 0441);	X	
13.	Color photographs of Plaintiff's property damage (Bate Nos. 0442- 0451).	X	

Plaintiff may use any and all writings, published works, journals, treatises, medical texts, affidavits, films, drawings, graphs, charts, photographs, reports, computer tapes, computer discs, and other data compilations, and other medical reference materials which Plaintiff and/or Plaintiff's expert use in support of Plaintiff's allegations.

Deposition transcripts will be used as needed for rebuttal or impeachment. Deposition transcripts may also be used for direct examination if the witness is unable to appear at the time of trial.

Plaintiff may also use the parties' responses to discovery as necessary.

Plaintiff reserves the right to object to the admission of Defendants' exhibits at the time of trial.

Plaintiff reserves the right to use any and all other exhibits needed for rebuttal or impeachment.

Plaintiff may offer documents produced by Plaintiff and Defendants which experts have reviewed or used in forming their opinions, including but not limited to reports, pleadings, correspondence, notes, as well as medical records and billings.

Plaintiff further reserves the right to utilize any and all documents produced by Defendants.

III.

PLAINTIFF'S OBJECTION TO DEFENDANT'S EXHIBITS

PURSUANT TO N.R.C.P. 16.1 (a)(3)(c)

None at this time. Plaintiff reserves the right to object to any exhibit listed by Defendants in Pre-Trial Disclosures and after such time as the Court has ruled on pre-trial motions and motions in limine and/or at the time of trial.



1 IV.

2 **PLAINTIFF WILL PRESENT THE FOLLOWING DEPOSITIONS AT TRIAL**
3 **PURSUANT TO N.R.C.P. 16.1 (a)(3)(B)**

4 Plaintiff does not anticipate presenting testimony by deposition at this time.

5 V.

6 **PLAINTIFF'S DEMONSTRATIVE EXHIBITS**

7 Plaintiff may offer at trial, certain Exhibits for demonstrative purposes including, but not
8 limited to, the following:

- 9 a. Actual surgical hardware, plates, screws, surgical tools, and surgical equipment
10 as used in Plaintiff's medical treatment and anticipated to be used in future
11 treatment;
- 12 b. Demonstrative and actual photographs and videos of surgical procedures and
13 other diagnostic tests Plaintiff has undergone and will undergo in the future;
- 14 c. Actual diagnostic studies and computer digitized diagnostic studies;
- 15 d. Samples of tools used in surgical procedures;
- 16 e. Diagrams, drawings, pictures, photos, film, video, DVD and CD ROM of
17 various parts of the human body, diagnostic tests and surgical procedures;
- 18 f. Computer simulation, finite element analysis, mabymo and similar forms of
19 computer visualization;
- 20 g. Power point images/drawings/diagrams/animations/story boards depicting the
21 facts and circumstances of the subject incident, the parties involved, the
22 location of the subject collision and what occurred in the subject collision;
- 23 h. Pictures of Plaintiff prior and subsequent to the subject collision;
- 24 i. Surgical Timeline;
- 25 j. Medical treatment timeline;
- 26 k. Future Medical Timeline;
- 27 l. Charts depicting Plaintiff's Loss of Earning Capacity;
- 28 m. Charts depicting Plaintiff's Life Care Plans;



LAW FIRM
INJURY ATTORNEYS

- n. Charts depicting Plaintiff's Loss of Hedonic Damages;
- o. Charts depicting Plaintiff's Loss of Household Services;
- p. Photographs of Plaintiff's Witnesses;
- q. Charts depicting Plaintiff's Life Expectancy;
- r. Story boards and computer digitized power point images;
- s. Blow-ups/transparencies/digitized images of medical records, medical bills, photographs and other exhibits;
- t. Diagrams/story boards/computer re-enactment of the subject incident;
- u. Diagrams of various parts of the human body related to Plaintiff's injuries;
- v. Photographs of various parts of the human body related to Plaintiff's injuries;
- w. Models of the human body related to Plaintiff's injuries;
- x. Samples of a spinal cord stimulator and leads;
- y. Sample of an intrathecal drug delivery system and leads;
- z. Samples of the needles and surgical tools used in Plaintiff's various diagnostic and therapeutic pain management procedures.

DATED this 11th day of November, 2020.

GREENMAN GOLDBERG RABY & MARTINEZ

/s/ Dillon G. Coil

GABRIEL A. MARTINEZ, ESQ.

Nevada Bar No. 326

DILLON G. COIL, ESQ.

Nevada Bar No. 11541

BRIAN P. NESTOR, ESQ.

Nevada Bar No. 13551

2770 S. Maryland Pkwy, Ste. 100

Las Vegas, NV 89109

Phone: 702.384.1616 ~ Fax: 702.384.2990

Attorneys for Plaintiff



LAW FIRM
INJURY ATTORNEYS

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of GREENMAN, GOLDBERG, RABY & MARTINEZ, and that on the 11th day of November, 2020, I caused the foregoing document entitled **PLAINTIFF'S INITIAL EARLY CASE CONFERENCE WITNESS AND EXHIBIT LIST AND PRE-TRIAL DISCLOSURES** to be served upon those persons designated by the parties in the E-service Master List for the above-referenced matter in the Eighth Judicial Court E-filing System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules.

/s/ Michael Madden

An Employee of GREENMAN, GOLDBERG,
RABY & MARTINEZ

EXHIBIT “J”

Sunshine Collins, PsyD
Licensed Psychologist
Clinical, Forensic, & Family Psychology

NEUROPSYCHOLOGICAL EVALUATION REPORT

Name: Taylor Cape
Date of Birth:
Age: 23 years/3 months
Sex: Male
Ethnicity: White
Dates of Evaluation: 07/09/19 and 08/26/19
Date of Report: 09/25/19
Evaluator: Sunshine Collins, PsyD
Referral Source: Enrico Fazzini, DO
Date of Injury: 11/21/18

FINDINGS

Mr. Cape has a mild neurocognitive disorder due to traumatic brain injury causing clinically significant distress and impairment in multiple domains of functioning in multiple settings. His neurocognitive disorder is accompanied by behavioral disturbance primarily comprised of mood disturbance.

REASON FOR REFERRAL

Mr. Cape was referred for a neuropsychological evaluation by his neurologist, Enrico Fazzini, DO on 05/31/19. Purpose of this evaluation was to determine current levels of functioning following a head injury sustained in a motor vehicle accident on 11/21/18.

PROCEDURES OF EVALUATION

1. Clinical Interview of Taylor Cape 07/09/19 and 08/26/19
2. Collateral Interview of father, Robert Lawson 08/26/19
3. Administration of Tests to Taylor Cape 07/09/19
 - a. WAIS-IV - Wechsler Adult Intelligence Scale, 4th Edition
 - b. WMS-IV - Wechsler Memory Scale, 4th Edition
4. Completion of Tests by Taylor Cape 08/26/19
 - a. CEFI - Comprehensive Executive Function Inventory, Adult, Self-Report
 - b. SIMS - Structured Inventory of Malingered Symptomatology
 - c. PAI - Personality Assessment Inventory
5. Mental Status Examination of Taylor Cape 07/09/19
6. Review of Records from Enrico Fazzini, DO
 - a. Neurology Records of Enrico Fazzini, DO dated 12/15/18, 01/12/19, 03/08/19, 05/31/19
 - b. MRI Brain Imaging Report by Pueblo Medical Imaging test date 01/10/19
7. Review of Records from Taylor Cape
 - a. State of Nevada Criterion-Referenced Test Student Report - Reading test date Spring 2009 8th grade

- b. State of Nevada Criterion-Referenced Test Student Report - Science test date Spring 2009 8th grade
 - c. State of Nevada Criterion-Referenced Test Student Report - Mathematics test date Spring 2009 8th grade
 - d. Correspondence by Colleen Vlacancich of the Clark County School District's Highly Gifted Program to parents of Taylor Cape 01/14/08
 - e. Correspondence by Colleen Vlacancich of the Clark County School District's Highly Gifted Program to Unstated (likely teachers) Undated
 - f. Correspondence by Tracy Baldwin of Unstated (likely Clark County School District's Highly Gifted Program) to Unstated Undated
8. Review of Records from Seven Hills Hospital
- a. Psychiatric Evaluation Report 09/25/17
 - b. History and Physical Examination Report 09/25/17
 - c. Discharge Summary Report 10/11/17
9. Review of Records from Spring Mountain Treatment Center
- a. Intake Screening Tool 08/24/17
 - b. Intake Face to Face Assessment 08/24/17
 - c. Assessment Summary / Clinical Formulation 08/24/17
 - d. Continuing Care Plan 08/30/17
 - e. Discharge Summary Report 09/25/17

CONSENT

Mr. Cape was informed that he was referred for a neuropsychological evaluation. He was informed that a report would be prepared and sent directly to his neurologist (Enrico Fazzini, DO) and that a courtesy copy would be forwarded to his attorney (Greenman, Goldberg, Raby and Martinez Law Firm). He was made aware that his attorney may choose to share the report with the judge and opposing counsel in his case. He was advised that the information he provided during the evaluation was not confidential and would be included in the report. He acknowledged the limits of confidentiality and provided verbal and written consent to participate in the evaluation under these conditions. Mr. Cape provided verbal and written consent for his father, Robert Lawson, to be interviewed as part of the evaluation. Father was advised of the purpose of the evaluation and limits of confidentiality and provided verbal consent to participate under those conditions. Given the delay between Mr. Cape's appointments for this evaluation, he was advised of the purpose of this evaluation and the limits of confidentiality again at his second appointment. His consent for collateral interview of father was also confirmed again at his second appointment.

LIMITATIONS

Mr. Cape was first seen on 07/09/19. Attempts to schedule a second appointment to complete testing were unsuccessful, with Mr. Cape not responding to outreach on 07/26/19. Attorney's office was noticed on 08/01/19 that Mr. Cape was needed for a second appointment and could not be reached. Attorney's office was contacted again on 08/20/19 and advised of same. Contact with Mr. Cape was

restored on 08/26/19. Mr. Cape had by that time moved out of state and so was available only for testing that could be administered remotely. As such, some domains that are commonly tested for an evaluation of this nature were not able to be tested (e.g., academic achievement). This did not have a meaningful effect on the findings of this evaluation; however, it does mean that there may exist additional deficits that were not established through this evaluation. If there arise data that suggest deficits in domains that could not be assessed through this evaluation, gathering of additional data through further psychometric testing would be appropriate.

COLLATERAL INTERVIEW

Mr. Cape's father, Robert Lawson, was interviewed by telephone on 08/26/19. He was asked if he observed any changes in Mr. Cape following the motor vehicle accident. Father reported that Mr. Cape's premorbid functioning was "highly gifted" in math but that after the accident Mr. Cape stopped doing math problems and became withdrawn. He stated that Mr. Cape had increased forgetfulness and problems concentrating. He stated that Mr. Cape was unable to concentrate at work and unable to sit there all day. Father reported that Mr. Cape's recent prescription for Aricept has been helping. He stated that Mr. Cape has been able to remember more things since beginning Aricept. Before Aricept, Mr. Cape was reportedly having difficulty remembering to do things around the home, such as cleaning the cat litter box. He had difficulty following a daily routine and would reportedly stare blankly at father when being reminded of things. Father reported that he has noted improvements over the last 1.5 weeks. Prior to that, Mr. Cape was reportedly exhibiting depressed mood and decreased participation in previously enjoyed activities of going out and socializing. He had stopped composing music. He began composing music again within the preceding 3 weeks of father's interview. Father reported that Mr. Cape plays keyboard, guitar, and violin. He reported that Mr. Cape is not currently employed but when he was employed, he would report to father subjective "crappy" workdays due to inability to perform at his previous level. Father indicated that the pattern of Mr. Cape's good and bad days is not predictable.

RECORDS

Neurology records indicate that Mr. Cape was evaluated by neurologist Enrico Fazzini, DO on 12/15/18 in relation to injuries sustained on 11/21/18 in a motor vehicle accident. Mr. Cape's reported sequelae were headache, balance impairment, memory deficit, attention deficit, concentration deficits, word finding difficulty, difficulty getting organized and completing tasks, and "environmental overload." Impressions noted by Dr. Fazzini were postconcussive balance impairment and headaches; complaints of cognitive deficits following possible traumatic brain injury; cervical, thoracic, and lumbar myofascial pain syndrome; and cervical spine central disc protrusions. Recommendation was for MRI of the brain and cervical spine, reevaluation in one month, continued chiropractic and/or physical therapy, and refraining from excessive physical activity and stress. Document states that Mr. Cape "remains moderately impaired

as a direct consequence of the injuries sustained in the motor vehicle accident of 11/21/18.”

Per an imaging report by Pueblo Medical Imaging, an MRI of Mr. Cape’s brain was conducted on 01/10/19. Findings were of left hippocampal volume at 88th percentile and right hippocampal volume at 41st percentile along with abnormal spectroscopy in the white matter of both frontal lobes with depression of the N-Acetylaspartate peaks.

Neurology records indicate that Mr. Cape participated in a follow-up evaluation by neurologist Enrico Fazzini, DO on 01/12/19. Mr. Cape reported decreased headaches, balance impairment, and cervical spine pain but persisting deficits of memory, attention, and concentration. Document states that the MRI of the brain on 01/10/19 demonstrated right hippocampal atrophy and a decrease in N-Acetylaspartate in both frontal lobes and was “positive evidence for the presence of a traumatic brain injury.” Dr. Fazzini stated that neurological evaluation and mental status testing revealed persisting decreases of attention and concentration. Impressions noted by Dr. Fazzini were postconcussive balance impairment and headaches gradually resolving, cognitive deficits following traumatic brain injury, and cervical myofascial pain syndrome. Recommendations were for reevaluation in 2 months, continued chiropractic therapy, and refraining from excessive physical activity and stress. Document states that Mr. Cape “remains moderately impaired as a direct consequence of the injuries sustained in the motor vehicle accident of 11/21/18.”

Neurology records indicate that Mr. Cape participated in a follow-up evaluation by neurologist Enrico Fazzini, DO on 03/08/19. Mr. Cape reported that previous headaches, dizziness, and balance impairment resolved. Mr. Cape reported his cognition was greatly improved. Mr. Cape reported persisting cervical and upper thoracic pain and stiffness but noted he was soon to discontinue chiropractic therapy. Impressions noted by Dr. Fazzini were postconcussive balance impairment and headaches resolved, postconcussive cognitive deficits resolved, and cervical myofascial pain syndrome and thoracic myofascial pain syndrome resolving. Document states that Mr. Cape is at an increased risk for developing dementia as a consequence of the traumatic brain injury sustained on 11/21/18 regardless of his reported recovery. Document states that Mr. Cape was advised to return for reevaluation with neurologist only if cognitive impairments return or if there is another change in neurological status.

Neurology records indicate that Mr. Cape participated in a follow-up evaluation by neurologist Enrico Fazzini, DO on 05/31/19. Mr. Cape reported that decreased attention and concentration, decreased memory skills, and increased anxiety were noticed by Mr. Cape when he started a new job. Mr. Cape also reported return of cervical spine pain that had seemed to have been successfully addressed with chiropractic therapy. Document states that neurological evaluation and mental status testing revealed decreased attention and concentration and increased anxiety. Impressions noted by Dr. Fazzini were complaints of cognitive deficits

following traumatic brain injury, cervical myofascial pain syndrome with central disc protrusions, and anxiety. Recommendations were for MRI of the cervical spine, neuropsychological testing, refraining from excessive physical activity and stress, and reevaluation after MRI or neuropsychological testing results became available. Document states that Mr. Cape "remains moderately impaired as a direct consequence of the injuries sustained in the motor vehicle accident of 11/21/18."

State of Nevada Criteria Non-Referenced Test Student Reports from test date Spring 2009 while Mr. Cape was in the eighth grade show that Mr. Cape performed at standard in the domain of reading and exceeded standard in the domain of science and in the domain of mathematics.

Miscellaneous school records indicate that Mr. Cape performed in the 99th percentile on the Naglieri Nonverbal Ability Test on an unknown date. Per the reviewed records, Mr. Cape was qualified for participation in the Clark County School District Highly Gifted Program in 2008 due to performance on administered intelligence testing falling 3 standard deviations above the norm (Stanford-Binet IV Composite Score = 145; Verbal Reasoning standard age score = 109; Abstract/Visual Reasoning standard age score = 155; Quantitative Reasoning standard age score = 156; where a standard age score has a mean of 100 and a standard deviation of 16). Per the reviewed records, Mr. Cape grade skipped halfway through 6th grade. Reviewed documents emphasized the discrepancy between Mr. Cape's verbal and mathematics scores on intelligence testing, with the latter being the stronger performance.

Reviewed records from Spring Mountain Treatment Center indicate that Mr. Cape was hospitalized from 08/24/17 to 08/30/17 on a Legal 2000 due to psychosis. He was transferred from Centennial Hospital emergency room. Symptoms included command auditory hallucinations to kill himself and others. Continuing care plan was for psychiatric services by Dr. Kolade and psychotherapy services by Michelle Formica of Aspire Mental Health. Appointments were set for both to occur September 2017. Diagnoses were unspecified psychosis and THC abuse. Documents state that marijuana use contributed to his psychosis. Discharge diagnoses were unspecified psychosis and marijuana abuse. Medication was Risperdal 2 MG QPM.

Reviewed records from Seven Hills Hospital indicate that Mr. Cape was hospitalized from 09/24/17 to 10/04/17 for psychosis. Presentation on intake was significant for word salad, disorganization, auditory hallucinations, visual hallucinations, religious preoccupation, responding to internal stimuli, bizarre behavior (e.g., attempting to do his laundry in the toilet at Summerlin Mall, opening his mouth for a long time for no reason), and noncompliance with psychotropic medication. Documents note family history of depression (father). Diagnosis on admission was paranoid schizophrenia. Documents note history of Risperdal use. Documents note that urine toxicology was negative when Mr. Cape was first brought by the police to Summerlin Hospital emergency room prior to Seven Hills Hospital admission. Mr. Cape was brought in by the police due to

bizarre behavior. Documents state that mother reported that Mr. Cape became psychotic after starting to use "whack" (defined in the document as a type of marijuana) one month prior. Discharge diagnosis was brief psychotic episode.

CURRENT COMPLAINTS AND HISTORY

Psychosocial information below was obtained from Mr. Cape's self-report, except where otherwise indicated.

Family of Origin

Mr. Cape was born in Las Vegas Nevada. He was raised by his mother and father in two separate households. He transitioned between homes almost every week. He has 2 paternal sisters and 3 maternal sisters. He was raised with all 5 of his siblings. He also has 2 stepbrothers and 1 stepsister. History of sexual abuse was denied. History of exposure to domestic violence or gang involvement was denied. Mr. Cape was uncertain as to if he has ever experienced verbal or physical abuse, noting that his father hit him a couple of times and that there was perhaps "a little bit of verbal abuse from my stepdad and my dad" when Mr. Cape would get in trouble.

Stepfather has been in Mr. Cape's life since Mr. Cape was 3 years old. He had a stepmother that he characterized as "very strict regarding handwriting" from kindergarten to 3rd grade. His next stepmother has been in his life since 5th grade.

Education

Mr. Cape attended 2 elementary schools. He reported that he completed 3 years of middle school in 2 years. He reported that he attended 1 high school, Northwest Career Technical Academy majoring in engineering. He reported that he graduated high school in 2013. History of suspensions or expulsions was denied.

Mr. Cape attended University of Nevada Las Vegas part time, participating in course work fall 2013, fall and spring 2015, spring 2016, and spring 2018. He is not currently participating in higher education. Reason for his sporadic attendance was reported as having "some trouble during these years." Mr. Cape explained that he had poor grades when he began college because "I believed in a conspiracy theory: climate change was going to bring the end of the world. Felt like it was better to divert attention to how to survive and be self-sustainable." Mr. Cape reported he did this by reading a lot online about survival skills.

Mr. Cape reported he later replaced his poor grades by retaking classes and earning better grades. He reported that his GPA is 2.95. He did not plan to return to UNLV due to family's plan to relocate to South Carolina where his mother's family resides. He stated he has begun to look at schools in that area but has not made any decisions about it yet.

Residential

Although Mr. Cape lived in both his mother and father's households, by college he spent more time at his mother's home. He continues to live with her presently. They recently moved to South Carolina.

Medical - History

Mr. Cape reported that he was born 1 month premature. He was reportedly in the neonatal intensive care unit for an unknown length of time. He reported that he met his developmental milestones within expected time frames.

Mr. Cape reported he was born with "VATER syndrome" and had 10 surgeries as a young child. He reported that his presentation consisted of needing a colostomy, absence of an anal opening, 2 spleens, hole in his heart, a tracheoesophageal fistula necessitating surgery to separate the esophagus and trachea, and "trigger thumb" necessitating surgery. He denied requiring follow-up medical care related to his congenital anomalies after their initial surgical treatment.

Medical records from neurologist Enrico Fazzini, DO from 12/15/18 characterize "VATER syndrome" as a congenital anomaly leading to numerous internal organ and skeletal abnormalities, including for Mr. Cape a tracheoesophageal fistula requiring surgical correction, presence of 2 spleens, a misplaced aorta, and a left-appearing thumb on the right hand.

Medical - Motor Vehicle Accident

Mr. Cape reported that he was in a motor vehicle accident on 11/21/18. He was picking up his then girlfriend at Fashion Show Mall. He turned left on green and a pickup truck hit him running the red light. He reported that his vehicle slid 50 feet into a third vehicle and the airbags were deployed. He reported that the vehicle he was driving was totaled. He stated that he does not remember the accident and lost consciousness until paramedics were removing him from the vehicle. He stated that he remembers taking the turn and remembers waking up with the rearview mirror in his lap and glass everywhere. His passenger had bruising and an injured finger. Both were transported to the hospital. Both were there for 1 hour. Mr. Cape reported that a CAT scan of his neck was done. He knew not of what other medical steps were taken. They were both released to home by 3 AM.

Mr. Cape reported that he experienced nausea and poor balance immediately after the motor vehicle accident. He did not experience immediate vision changes but reportedly later experienced changes of his vision. He stated that he initially had a "horrible" headache almost constantly for 3 weeks. Headaches then occurred 1 to 2 times per week lasting 3 hours each time. Mr. Cape stated that he had a pain in his calf like a "Charlie horse" pain that caused him to still be limping when he was released from the hospital. He stated that his balance was off "for a while," and indicated that he is still dealing with it currently. He reported that exercise improves his balance. Mr. Cape did not participate in physical therapy. He did participate in chiropractic therapy. He did not participate in

vestibular rehabilitation interventions. He reported that he currently has moments when he is able to have a conversation and moments when he is overstimulated and cannot. He was uncertain if this is a new presentation since his motor vehicle accident. Mr. Cape reported noticing a change in his concentration. He reported memory loss. During an arithmetic task on testing, Mr. Cape became tearful and stated, "I used to be able to do that."

Mr. Cape indicated that he is no longer participating in any formal treatments related to the motor vehicle accident. He noted that he is being followed by neurology (i.e., Enrico Fazzini, DO). He continues to exercise to improve his functioning. He reported having a good relationship with his neurologist.

Mr. Cape reported experiencing depressed mood following motor vehicle accident. He attributed it to the loss of his motor vehicle, and thus his independence. He also noted that he had spent money on his stereo in his vehicle and noted that making music is a part of his identity that he could not access during that time. He also noted that being stuck at home with his mother at age 22 was not fun. He otherwise perceived no mood changes associated with the motor vehicle accident.

Mr. Cape was asked specific questions about his reported memory deficits since the motor vehicle accident. He reported that he can recall information from conversations better if the conversation was interesting. He reported intact remote memory, such as remembering information from high school. He stated that his memory deficits appear to "flareup" in relation to stress and dealing with the public. He stated that his ability to cope declined and began scaring his mother and family. He reported that they were noticing signs of poor coping and made an appointment for him to see his psychiatrist. Psychiatrist reportedly advised family that his reaction was normal, although Mr. Cape acknowledged that he was only pretending to be taking his prescribed mental health medication at that time. Mr. Cape reported that he felt overwhelmed at that time. He indicated that he is feeling better now. Mr. Cape was asked if his reported memory deficits impact his ability to work. He stated that he has days with great focus and great awareness of what tasks need to be completed but that on other days his memory is poor and he is unable to do his job well, finding himself going back and forth unable to remember the next steps. He stated that he expends unnecessary time and energy at those times. He was unable to estimate the frequency of bad days. He stated that this inconsistency in performance ability was not present prior to the motor vehicle accident.

Mr. Cape reported that he was prescribed and began taking Aricept July 2019. He stated that the medication caused an increased subjective feeling of clarity and consciousness.

Employment

Mr. Cape's first job was selling newspapers on the corner at age 14. He did this for 3 years from 6 AM to 1 PM every Sunday. Position ended due to resignation because "I just wanted my Sundays back while I was in school."

Mr. Cape worked in the back at Hollister from October 2013 to March 2014 working 4 to 15 hours per week. Position ended due to resignation. Mr. Cape resigned due to not getting enough hours and not liking management. He denied having a conflictual relationship with management, explaining that he simply did not like how they treated their employees.

Mr. Cape worked in multiple positions at DKNY from June 2014 to January 2017 working 20 to 30 hours per week. Position ended due to conflict with new management coming in as well as due to pending school enrollment. Mr. Cape described the conflict as "cutting" people and lying to people about commission.

Mr. Cape worked on the floor at Calvin Klein performing sales from March 2014 to January 2015 working 20 to 25 hours per week. Position ended due to beginning the spring 2015 semester at UNLV.

Mr. Cape worked as a cashier and sales associate at Lucky Brand beginning March 2017 working 20 hours per week. He stated that they stopped giving him hours after his psychiatric hospitalizations and looked at him differently. He stated that this led him to call and end his employment.

Mr. Cape worked as an assistant physical education teacher at Somerset Academy from April 2018 to May 2018. Position ended with the end of the school year. He reported that they wanted him to return but the position was not compatible with his own school schedule.

Mr. Cape worked as a personal assistant to a psychic setting up audio equipment for daily meditation, doing his laundry, and doing his dishes for 1 month in summer 2018. Position required that he fly to Minnesota to join his boss and travel with his boss as a companion of sorts. This represents the only time Mr. Cape has not lived with family. Position ended because Mr. Cape discontinued his medication and "had somewhat of a mental break and I had to come home." He stated that he returned home and promptly went on an annual father-son camping trip July 2018. He stated his father noticed that something was "off" and Mr. Cape had "an experience out there that wasn't very fun."

Mr. Cape reported difficulty obtaining employment thereafter noting absence of transportation. He eventually obtained employment as a sales associate at Mailing and More 30 hours per week.

Interpersonal

Mr. Cape is not currently dating. His longest relationship was 3 to 4 months long. He has no children. He stated that he has friends "all over the place." He noted that he has multiple groups of friends. He stated that he last socialized with friends in person one week before his interview. He reported seeing friends once weekly in an attempt to see everyone before moving to South Carolina. Prior to this push, he was seeing friends socially once every 2 weeks.

He indicated that the quality of his relationships could be better and he is "not exactly" satisfied with his friendships.

Legal

History of arrests or convictions was denied. History of DUIs were denied. Mr. Cape stated he has a driver's license.

Substance Use

Mr. Cape reported that he became "addicted to concentrated marijuana" in 2017. Reviewed records indicate that Mr. Cape's mother has said that he began exhibiting psychotic symptoms after one month of using "whack," which she characterized as a type of marijuana. It is unclear what substance Mr. Cape was using, as this terminology is used to identify multiple different recreational substances, most commonly marijuana laced with PCP. Mr. Cape reported that his substance use led to "drug induced psychosis."

Mental Health

Reported mental health history is significant for psychiatric hospitalization twice in 2017. Mr. Cape reported that his presentation on initial hospitalization included going from a depressive state to a manic state, insomnia, delusions, religious delusions, feeling like everything had a meaning, and feeling overwhelmed. He stated he was hospitalized for 1 week and released back to his parents with no diagnosis and a prescription. He stated that he had a poor reaction to the prescribed medication Risperdal and discontinued use as soon as he was released, leading to a second hospitalization soon thereafter. He provided a detailed explanation of his symptoms leading to his second hospitalization. The description was significant for delusions, insomnia, and bizarre behavior. Mr. Cape was started on Risperdal again. He discontinued the medication in June 2018. His symptoms began to return in July 2018. Mr. Cape resumed use of medication at father's insistence. Mr. Cape was able to transition from Risperdal to Abilify, which he characterized as a better medication for him.

Mr. Cape was prescribed Abilify in December 2018. He reported that he discontinued use of the medication due to feelings of lethargy, depressed mood, and cognitive slowing. He did not take medication for 5 months. When he advised his parents in May 2019 that he had discontinued the medication and felt he was doing fine without it, they insisted that he restart the medication, which he reportedly did. Mr. Cape reported that he was diagnosed with "bipolar with schizoaffective bipolar." This is not an accurate name of any known mental health diagnosis. He may have been referencing schizoaffective disorder, bipolar type, although that diagnosis was not represented in any reviewed records.

Mental health treatment is positive for multiple trials of psychotherapy. Poor fit and staff turnover were the primary reasons that therapy trials were discontinued. Mr. Cape has not participated in psychotherapy since 2018.

Mr. Cape stated that his current mental health is "better." He explained that he had a good few days previous to his first interview for this evaluation. He stated that he hiked Mt. Charleston, played basketball, and visited his father and friends. He stated that he was going out more often and taking on more responsibility, such as watching the house, dogs, and babies.

History of suicide attempt was denied. Suicidal ideation last occurring in December 2018 was reported. Mr. Cape identified "knowing how much it would affect my family" as a protective factor against suicide.

Mr. Cape reported that he still sometimes hears voices when he is waking but was uncertain if it is dream related or auditory hallucinations. He stated that he is able to tell his mental world from the physical world. He stated that he has a ringing in his ears that is like a communication and that he sometimes still has hair on the back of his neck that will stand up and then something will happen.

MENTAL STATUS EXAMINATION

Dress was appropriate. Grooming and hygiene were within normal limits. Facial expression was mobile. Posture was within normal limits. Mr. Cape exhibited mild restlessness in his seat consistent with nervousness. Interactions were open and cooperative. Speech was of normal rate and volume. Pronunciation was clear. Mr. Cape spoke in spontaneous complete sentences. Prosody, continuity, response latency, and quantity of speech were within normal limits. Speech was coherent. Affect was nervous or anxious but pleasant. Mr. Cape was tearful, at times, but this was consistent with the content of the conversation. There was no evidence of responding to internal stimuli. Mr. Cape was alert and oriented to person, city, and to the purpose of this evaluation.

Throughout testing, Mr. Cape advocated for himself well. He asked questions as needed and requested breaks as needed. Mild word finding difficulty was present, as evidenced by brief pauses in spoken language followed by eventual completion of the statement.

PSYCHOMETRIC TEST RESULTS (see Appendices for scores in table format)

Mr. Cape was invested in performing well on administered testing. He indicated that he had been meaning to participate in intelligence testing prior to the motor vehicle accident. Effort appeared good and results are deemed an accurate reflection of current abilities under ideal conditions.

Mr. Cape's performance scores were determined by comparing his scores to those obtained by same age peers in a standardization sample.

Effort

A screening tool (SIMS) for the detection of feigned or exaggerated psychiatric disturbance and cognitive dysfunction among adults ages 18 years and older across

a variety of clinical and forensic settings was administered. The measure yields a summary score and 5 nonoverlapping scales that reflect potential for malingering under specific categories of psychosis, neurologic impairment, amnesic disorders, low intelligence, and affective disorders. Taylor Cape completed the assessment in 14 minutes, 93% of the average completion time of 15 minutes. There are no missing item responses in the protocol, providing a complete data set for interpretation.

The SIMS Total score is an overarching summary score that incorporates all of the SIMS scales. The Total score provides an overall estimate of the likelihood that an individual is feigning/exaggerating symptoms of psychiatric or cognitive dysfunction. Although review of individual scale scores is recommended for all SIMS protocols in order to identify the specific types of deficits and/or symptoms being feigned or exaggerated, the Total score has demonstrated the best utility in the identification of potential feigning response styles. Mr. Cape's Total score was significantly elevated above the recommended cutoff score for the identification of likely feigning (SIMS Total Score = 21). Mr. Cape endorsed a high frequency of symptoms and impairment that is highly atypical of individuals who have genuine psychiatric or cognitive disorders. Despite this finding, malingering is not suspected. Mr. Cape has a history of repeated psychotic episodes. Although he is managing his symptoms with medication, atypical interpretations of his environment are anticipated to still present despite treatment. This was exemplified in his self-report that he still hears a ringing in his ears that he sometimes thinks is a communication being sent to him. Atypical perceptions are the element being assessed through the SIMS so it is unsurprising that Mr. Cape's responses elevated some of the scales.

Notably, Mr. Cape's responses did not elevate the Psychosis or the Low Intelligence scale. These are both areas of functioning well-known to this patient. Given this, these areas are unlikely to be misinterpreted or misunderstood by Mr. Cape. His responses, therefore, did not artificially elevate these scales. The other scales tested, however, are not areas of known functioning for Mr. Cape. Mr. Cape has limited exposure to or experience with neurologic impairments, amnesic disorders, or affective disorders. As such, elevations for him in the scales evaluating these domains of functioning are more likely indicative of his atypical interpretation of symptoms on these domains than of malingering.

Further supporting this finding is that the resultant interpretive report from Mr. Cape's responses stated that despite not elevating the Psychosis scale, Mr. Cape endorsed at least one symptom that is highly atypical or inconsistent with the presentation of a patient who has genuine psychosis, leading to what the interpretive report characterized as a moderate elevation on the Psychosis scale. Mr. Cape has a known history of psychiatric hospitalization for psychosis that was able to be corroborated with medical records provided directly by the treating hospitals. As such, Mr. Cape's moderate elevation on the Psychosis scale appears to be an artifact of his general response style, a style that he

would have used in responding to the test items for all of the scales on this measure, further explaining the elevations seen in his resultant profile of scores from the SIMS.

Attentional System and Executive Functioning

Mr. Cape's ability to hold information in memory and manipulate information to provide responses on cue (Working Memory) fell in the average range of functioning (standard score = 95, 37th percentile). Within this index, he performed in the average range on a task requiring him to repeat simple strings of numbers both in forward, reverse, or numerical order (Digit Span scaled score = 9, 37th percentile) and on a task that required him to hold and manipulate information to complete verbally presented arithmetic problems (Arithmetic scaled score = 9, 37th percentile).

A self-report measure of perceived functioning in domains relevant to executive function (i.e., attention, emotion regulation, flexibility, inhibitory control, initiation, organization, planning, self-monitoring, and working memory) was administered to Mr. Cape. He completed the measure in 11 minutes, a typical response time. Mr. Cape perceived his overall executive functioning to fall in the low average range (CEFI Full Scale standard score = 88, 21st percentile). He deemed his capacity for attention and for initiation to fall in the low average range. He deemed his capacity for organization, planning, self-monitoring, and working memory to fall in the average range. He deemed his capacity for inhibitory control to fall in the high average range. He deemed his capacity for emotion regulation and flexibility to fall in the superior range.

Information Processing Speed

Mr. Cape's ability to process information leading to performance on timed tasks, as measured by the WAIS-IV Processing Speed Index, fell in the low average range (standard score = 89, 23rd percentile). Within this index, performance fell in the low average range on a task of speeded visual discrimination (Symbol Search scaled score = 7, 16th percentile) and in the average range on a task measuring ability to rapidly fill in symbols corresponding to a code (Coding scaled score = 9, 37th percentile).

Verbal and Language Skills

An assessment of Mr. Cape's educational attainment and prior learning opportunities fell in the high average range of functioning (WAIS-IV Verbal Comprehension standard score = 114, 82nd percentile). Within this index, he performed in the high average range of functioning on a measure of abstract verbal concept formation (WAIS-IV Similarities scaled score = 13, 84th percentile). Mr. Cape's performance on a measure of expressive vocabulary skills (WAIS-IV Vocabulary scaled score = 11, 63rd percentile) fell in the average range. Mr. Cape's ability to acquire, retain, and retrieve general factual information fell in the high average range (WAIS-IV Information scaled score = 14, 91st percentile).

Verbal Memory

Auditory memory fell in the borderline range (WMS-IV Auditory Memory standard score = 75, 5th percentile). Specifically, when information was presented to Mr. Cape as part of a narrative, his immediate recall fell in the below average range (WMS-IV Logical Memory I scaled score = 4, 2nd percentile), indicating inadequate retention of story details immediately after hearing them. Following a time delay, his recall of the stories fell in the below average range of functioning (WMS-IV Logical Memory II scaled score = 5, 5th percentile). This indicates that information presented in a story format cannot be adequately recalled by Mr. Cape following a ≤ 30-minute delay. His recall of auditory information was not improved when assessed with a recognition task, falling in the borderline or below average range of functioning (WMS-IV Logical Memory II Recognition standard score = 3rd-9th percentile).

When information was presented as repeated word pairs, Mr. Cape demonstrated below average performance on immediate recall (WMS-IV Verbal Paired Associates I scaled score = 5, 9th percentile) and average performance on delayed recall (WMS-IV Verbal Paired Associates II scaled score = 9, 37th percentile). Mr. Cape's ability to recall the information during a recognition task fell in the low average range (WMS-IV Verbal Paired Associates II Recognition scaled score = 17th-25th percentile).

Visual Perception and Organization

Mr. Cape's nonverbal flexible abilities, such as problem solving and abstract reasoning, fell in the high average range of functioning (WAIS-IV Perceptual Reasoning standard score = 113, 81st percentile). Within this index, performance on a timed task requiring the use of blocks to construct designs indicated that ability to analyze and synthesize visually presented information fell in the high average range (Block Design scaled score = 14, 91st percentile). He performed in the upper end of the average range on a task requiring him to view a completed puzzle and select pieces that, when combined, reconstructed the puzzle (Visual Puzzles scaled score = 12, 75th percentile). Mr. Cape's performance fell in the average range when tasked to solve visual puzzles that required nonverbal fluid reasoning (Matrix Reasoning scaled score = 11, 63rd percentile).

Visual Memory

Visual memory fell in the borderline range (WMS-IV Visual Memory standard score = 74, 4th percentile). On a task requiring the reconstruction of a visual stimulus from memory, Mr. Cape performed in the low end of the average range for immediate recall and in the low average range for delayed recall (WMS-IV Designs I scaled score = 8, 25th percentile; Designs II scaled score = 7, 16th percentile). Recognition of the designs for this task fell in the average range (WMS-IV Designs II Recognition scaled score = 26th-50th percentile). This indicates that his visual memory is elevated with cueing, such as photographs, drawings, or other visual elements. On a task in which he was asked to actually draw designs from memory, he performed in the extremely low range for immediate recall and in the low average range for delayed recall (WMS-IV Visual Reproduction I scaled

score = 2, 0.4th percentile; Visual Reproduction II scaled score = 6, 9th percentile). Recognition of the design elements fell in the low average range of functioning (WMS-IV Visual Reproduction II Recognition scaled score = 17th-25th percentile).

Visual working memory fell in the average range of functioning (WMS-IV Visual Working Memory standard score = 97, 42nd percentile). This is comprised of a task in which he was asked to identify designs in a particular order from a group of designs (WMS-IV Symbol Span scaled score = 7, 16th percentile) and a task in which he had to manipulate visual input to create a visual product (WMS-IV Spatial Addition scaled score = 12, 75th percentile), performances which fell in the low average and upper end of the average ranges of functioning, respectively.

Overall Memory Functioning

Immediate memory fell in the extremely low range and delayed memory fell in the borderline or below average range of functioning (WMS-IV Immediate Memory standard score = 65, 1st percentile; Delayed Memory standard score = 78, 7th percentile).

Overall Intellectual Functioning

The WAIS-IV yields two estimates of overall intellectual functioning, the Full-Scale IQ and the General Ability Index. Full Scale IQ (FSIQ) is an estimate of overall intelligence comprised of four indices: Verbal Comprehension, Perceptual Reasoning, Working Memory, and Processing Speed. Mr. Cape's FSIQ fell in the average range of functioning (standard score = 106, 66th percentile). General Ability Index (GAI) is an estimate of overall intelligence that does not incorporate performance scores from the Working Memory or Processing Speed Indices. The GAI is considered a better estimate of overall intelligence for individuals whose performance on these indices may artificially lower the FSIQ. Mr. Cape's GAI fell in the high average range (standard score = 115, 84th percentile). Although these scores reflect a decline from similar measures taken during his early school years, they cannot necessarily be entirely attributed to injuries sustained in the motor vehicle accident, as schizophrenia spectrum and other psychotic disorders are commonly accompanied by cognitive decline.

Personality and Behavior

Mr. Cape took the Personality Assessment Inventory (PAI) on 08/26/19. He completed the assessment in 47 minutes, 78% of the average completion time of 60 minutes. The PAI measures the personality of adults 18 to 89 years of age. It provides validity and clinical scores.

Mr. Cape's PAI validity scores do not reflect intentional efforts toward negative or positive impression management.

The PAI clinical profile is marked by significant elevations across several scales, indicating a broad range of clinical features, increasing the possibility of multiple diagnoses. Profile patterns of this type are usually associated with

marked distress and severe impairment in functioning. The configuration of the clinical scales suggests a person with significant thinking and concentration problems, accompanied by prominent distress and ruminative worry. He is likely to be withdrawn and isolated, feeling estranged from the people around him. As a result, he probably has few if any close interpersonal relationships and tends to become quite anxious and threatened by such relationships. His social judgment is probably fairly poor and he is tense and pessimistic about what the future may hold. He indicated that he is experiencing specific fears or anxiety surrounding some situations. The pattern of responses reveals that he is likely to display a variety of maladaptive behavior patterns aimed at controlling anxiety. He does not appear to be suffering from significant phobias. However, he is probably seen by others as being something of a perfectionist. He is likely to be a fairly rigid individual who follows his personal guidelines for conduct in an inflexible and unyielding manner. He ruminates about matters to the degree that he often has difficulty making decisions and perceiving the larger significance of decisions that are made.

Changes in routine, unexpected events, and contradictory information are likely to generate untoward stress. He may fear his own impulses and doubt his ability to control them.

A number of aspects of Mr. Cape's self-description suggest noteworthy peculiarities in thinking and experience. It is likely that he experiences unusual perceptual or sensory events (including hallucinations) as well as unusual ideas that may include magical thinking or delusional beliefs. His thought processes are likely to be marked by confusion, distractibility, and difficulty concentrating, and he may experience his thoughts as blocked, withdrawn, or somehow influenced by others. He may have some difficulty establishing close interpersonal relationships. He described significant problems frequently associated with aspects of a manic episode. It appears that his clinical picture is primarily characterized by grandiosity. Content of thought is likely marked by inflated self-esteem or grandiosity that may range from beliefs of having exceptionally high levels of common skills to delusional beliefs of having special and unique talents that will lead to fame and fortune. Others may view him as self-centered and narcissistic. However, abnormal levels of activity and marked irritability do not appear to be cardinal features of the clinical picture at this time.

He reported a number of difficulties consistent with a significant depressive experience. The quality of his depression seems primarily marked by cognitive features such as negative expectancies and low self-esteem. He is likely to be quite pessimistic and plagued by thoughts of worthlessness, hopelessness, and personal failure. Experienced sadness and physiological disturbances, however, appear to play only a minimal to moderate role in the clinical picture. He indicated that his use of drugs has been sufficient to have had negative consequences on his life. Problems associated with drug use appear to be noteworthy, including strained interpersonal relationships, vocational and/or

legal problems, and possible medical complications. Mr. Cape demonstrates an unusual degree of concern about physical functioning and health matters and probable impairment arising from somatic symptoms. He is likely to report that his daily functioning has been compromised by one or more physical problems. While he may feel that his health is good in general, he is likely to report that the health problems that he does have are complex and difficult to treat successfully. Physical complaints are likely to focus on symptoms of distress in neurological and musculoskeletal systems, such as unusual sensory or motor dysfunction. In psychiatric populations, such symptoms are often associated with conversion disorders, although they may be a result of numerous neurological conditions as well. Mr. Cape indicated that he is uncertain and indecisive about many major life issues and has little sense of direction or purpose in his life as it currently stands. He mentioned that he is experiencing some degree of anxiety and stress; this degree of worry and sensitivity is still within what would be considered the normal range. He reports a personality style that involves a degree of adventurousness, risk-taking, and a tendency to be rather impulsive. Others may view him as pragmatic and perhaps unsympathetic in his relationships. At times his behavior is likely to be reckless; he can be expected to entertain risks that are potentially dangerous to himself and to those around him. He is likely to be easily bored by routine and convention, and he may act impulsively in an effort to stir up excitement. According to his self-report, he describes NO significant problems in the following areas: antisocial behavior; undue suspiciousness or hostility.

The self-concept of Mr. Cape appears to involve a generally positive self-evaluation, but in combination with a pessimistic view of the prospects for his future. However, his episodes of positive self-esteem may be defensive in response to feelings of pessimism and a sense of inadequacy. As a result, his self-esteem will tend to be fragile and very reactive to the quality of his interactions with other people. His pessimism may result from a sense that the external environment consistently provides obstacles to the accomplishment of his aims and goals. Responsibility for any setbacks is thus likely to be attributed externally.

Mr. Cape's interpersonal style seems best characterized as self-effacing and lacking confidence in social interactions. He is likely to have difficulty in having his needs met in personal relationships and instead will subordinate his own interests to those of others in a manner that may seem self-punitive. His failure to assert himself may result in mistreatment or exploitation by others, and it does not appear that this interpersonal strategy has been effective in maintaining his most important relationships. In considering the social environment of Mr. Cape with respect to perceived stressors and the availability of social supports with which to deal with these stressors, his responses indicate that he experiences his level of social support as being somewhat lower than that of the average adult. He may have relatively few close relationships or be dissatisfied with the quality of these relationships. However, he reports relatively little stress arising from this or other major life areas.

Mr. Cape's interest in and motivation for treatment is typical of individuals being seen in treatment settings, and he appears more motivated for treatment than adults who are not being seen in a therapeutic setting. His responses suggest an acknowledgement of important problems and the perception of a need for help in dealing with these problems. He reported a positive attitude towards the possibility of personal change, the value of therapy, and the importance of personal responsibility. Current difficulties in his social support system may give a special significance to the therapeutic relationship and any impasse may need to be handled with particular care. He may currently be too disorganized or feel too overwhelmed to be able to participate meaningfully in some forms of treatment. He tends to be emotionally constricted and may initially have difficulty with the expression of emotional material.

DIAGNOSIS

331.83 (G31.84)	Mild Neurocognitive Disorder due to Traumatic Brain Injury, with behavioral disturbance (mood disturbance)
298.8 (F23)	Brief Psychotic Disorder, in full remission
RULE OUT 295.40 (F20.81)	Schizophreniform Disorder
RULE OUT 295.90 (F20.9)	Schizophrenia
RULE OUT 296.46 (F31.74)	Bipolar I Disorder, with psychotic features, most recent episode manic, in full remission

SUMMARY AND RECOMMENDATIONS

Mr. Cape sustained a traumatic brain injury in a motor vehicle accident on 11/21/18. A traumatic brain injury is a brain trauma with specific characteristics (i.e., loss of consciousness, posttraumatic amnesia, disorientation and confusion, and/or neurological signs) that are caused by an impact to the head or other mechanism that results in rapid movement or displacement of the brain within the skull. In Mr. Cape's case, he experienced loss of consciousness. Neurologist Enrico Fazzini, DO diagnosed a traumatic brain injury on 01/12/19. As a result of this traumatic brain injury, Mr. Cape developed neurocognitive disorder.

Given loss of consciousness of less than 30 minutes and probable Glasgow Coma Scale score (degree of disorientation and confusion at initial assessment) considering his release from the hospital without admission, Mr. Cape's head injuries would be characterized as a mild traumatic brain injury. Neurocognitive symptoms associated with mild traumatic brain injury tend to resolve within days to weeks after the injury, with complete resolution typically occurring by 3 months. Symptoms such as headache and photosensitivity also tend to resolve in the weeks following mild traumatic brain injury.

Patients are deemed to have developed a neurocognitive disorder if they are evidencing decline from a previous level of performance in one or more of the

cognitive domains of complex attention, executive function, learning and memory, language, perceptual-motor, and social cognition. The presenting cognitive functioning changes seen in individuals with neurocognitive disorder vary in severity. When the cognitive deficits interfere with independence in everyday activities, the condition is termed major neurocognitive disorder. When the cognitive deficits do not interfere with capacity for independence in everyday activities, the condition is termed mild neurocognitive disorder. Mr. Cape is able to independently complete complex instrumental activities of daily living, although greater effort, compensatory strategies, or accommodation may be required. As such, Mr. Cape has a mild neurocognitive disorder.

Mr. Cape's overall performance on measures that reflect attention and concentration fell in the average range. No overt signs of inattention were observed during the first appointment, which was 3.5 hours long. Procedures for this evaluation were administered under ideal conditions, meaning that testing tasks were administered in a one-to-one format and the testing environment was relatively free of distracting audio or visual stimuli. It is possible that Mr. Cape would not perform as highly in a more dynamic or distracting setting.

On administered measures of processing speed, Mr. Cape performed in the low average to average ranges. Slowed processing speed contributes to a patient's perception of their recovery following a head injury, with inability to function at previous levels in this domain often leading the person to have a negative appraisal of their recovery in other domains of functioning.

Specific measures of executive functioning could not be administered (see LIMITATIONS). Patient and parent report indicate some decline in planning and decision making abilities. Test taking behavior indicated some preservation of functioning, with Mr. Cape evidencing effective self-advocacy.

On administered measures of learning and memory, Mr. Cape generally performed in the borderline or below average range for verbal and visual memory tasks. Presently, Mr. Cape does not appear to benefit from information being provided in a meaningful context. His ability to recall verbally provided information was better facilitated with repetition of the information. These results are also consistent with self-reported difficulties in attention and concentration, as information provided in a long form / meaningful context may be more difficult for Mr. Cape to focus on over a period of time. Where necessary, it would be appropriate to encourage Mr. Cape to interact with information actively, such as by repeating back information, restating information in his own words, or some other means by which he can observably demonstrate that he has been attentive to information.

On administered measures of verbal and language skills, Mr. Cape generally performed in the high average range. Performance on verbal skill tasks can serve as a general indicator of premorbid functioning such that it can be estimated that Mr. Cape previously performed in the high average range across most domains.

Despite maintenance of high average functioning in this domain, there were some indicators of persisting word finding difficulty observed during testing. Mr. Cape may presently be having difficulty expressing abstract or complex feelings or thoughts.

On administered measures of visual perception and organization, Mr. Cape generally performed in the high average range. Functioning in this domain appears relatively intact.

A neurocognitive disorder is considered to include behavioral disturbance if the cognitive disturbance is accompanied by clinically significant psychotic symptoms, mood disturbance, agitation, apathy, or other behavioral symptoms. Mr. Cape reported experiencing situational depression immediately following the motor vehicle accident. Mr. Cape denied new onset of other signs or symptoms of behavioral disturbance on interview, but his responses on personality testing were indicative of depressed mood. Father reported decreased participation in previously enjoyed activities and decreased involvement in social activities. Taken together, these factors suggest that Mr. Cape's cognitive disturbance includes the mild behavioral disturbance of mood disturbance. Individuals who have sustained traumatic brain injuries typically report more depressive symptoms than peers without such injuries.

Mental health history is significant for pre-existing episodes of psychosis. Data indicate that Mr. Cape has had two episodes of brief psychotic disorder. It is possible that his symptoms were part of a bipolar disorder or schizophrenia spectrum disorder. There is not enough data available through this evaluation to further discriminate past brief psychotic disorder, however, this is not anticipated to impact the findings achieved through this evaluation. Schizophrenia spectrum disorders commonly include cognitive deficits in processing speed, attention, working memory, verbal learning and memory, visual learning and memory, reasoning, and problem-solving.¹ Mr. Cape's mental health symptoms, however, were well controlled with medication at the time of and following the motor vehicle accident. As such, his history of brief psychotic disorder is likely to represent a smaller contribution to the observed cognitive deficits identified through this evaluation than his traumatic brain injury.

Physical disturbances experienced by Mr. Cape following the motor vehicle accident have largely subsided. As those disturbances were not present prior to the injury, they are deemed attributable to the traumatic brain injury.

Individual differences in patients can impact the rate of recovery. Mr. Cape has already made a number of gains since the attack. Early response of persisting symptoms to recently initiated Aricept pharmacotherapy is promising.

¹Nuechterlein, K. H., Barch, D. M., Gold, J. M., Goldberg, T. E., & Heaton, R. K. (2004). Identification of separable cognitive factors in schizophrenia. *Schizophrenia Research*, 72, 29-39. <https://doi.org/10.1016/j.schres.2004.09.007>

RE: CAPE.TAYLOR
09/25/19

Mr. Cape's functioning appears to have improved since the acute period following his injuries. Despite this, Mr. Cape continues to notice reduced functioning capacity in some areas. Use of compensatory strategies can improve functioning but the subjective experience of reduced capacity can be frustrating. It would be appropriate for Mr. Cape to consider participating in psychotherapy to address his frustration and/or other emotional reactions to his neurocognitive disorder symptoms, as needed.

A traumatic brain injury can exacerbate pre-existing difficulties as well as result in new difficulties in emotional functioning and behavior. As such, Mr. Cape is strongly advised to be compliant with pharmacotherapy for his pre-existing mental health condition. Repeated traumatic brain injuries increase the risk for persisting neurocognitive symptoms. It is strongly recommended that Mr. Cape avoid participation in activities that have a high likelihood of incurring such injuries.

Cognitive rehabilitation is a common intervention for neurocognitive disorder due to traumatic brain injury and can provide an interdisciplinary approach to recovery. It can be helpful at any stage but is most useful soon after the injury. As Mr. Cape is only 10 months post injury, participation in such a program may be appropriate. As he has recently relocated to South Carolina, he is encouraged to explore options for outpatient cognitive rehabilitation near him in that state, if desired.

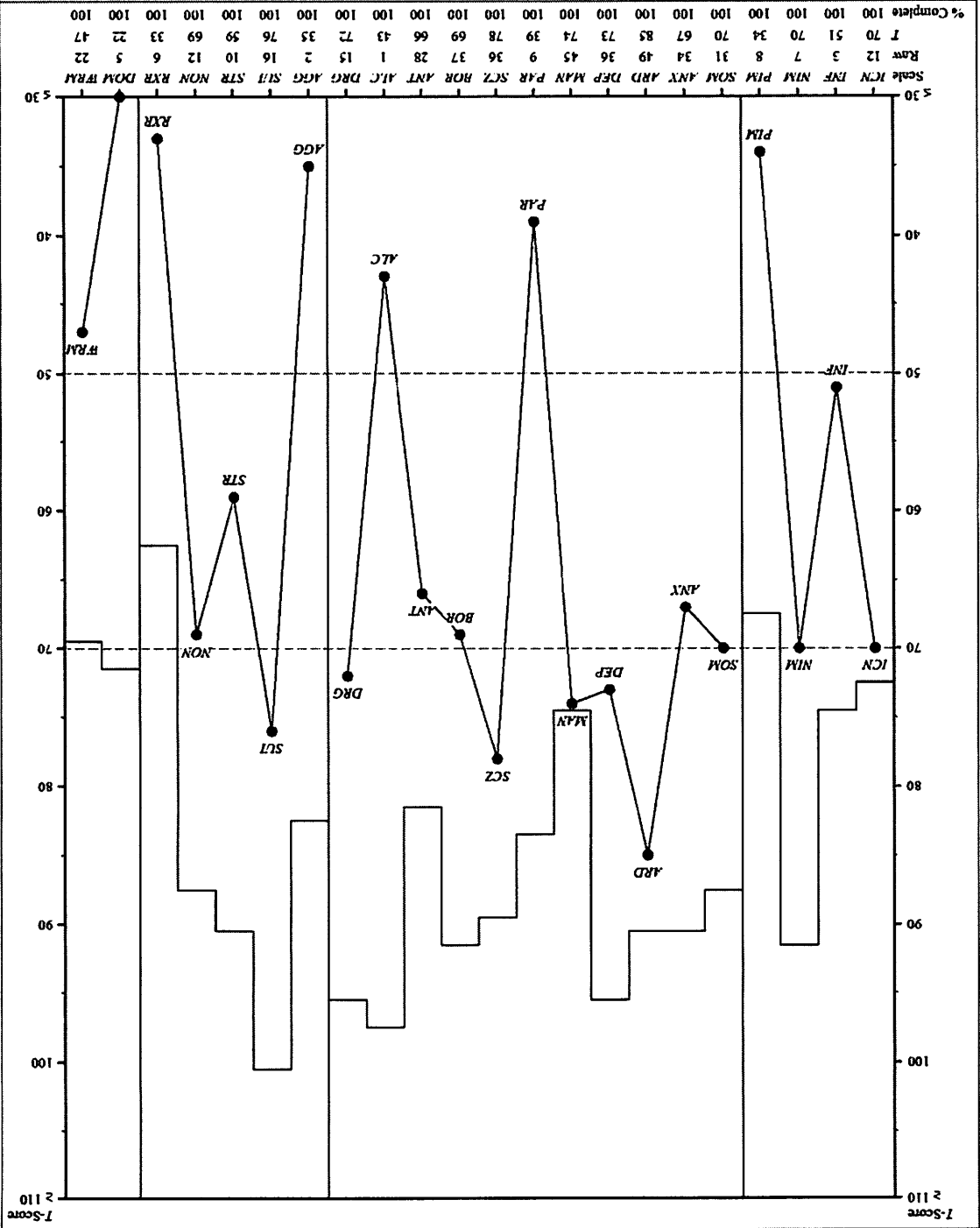
For treatment considerations, a copy of this report should be furnished to any appropriate party for whom it could assist with provision of care. His neurologist would best be able to speak to if the presenting memory loss is consistent with structural damage on neuroimaging. Mr. Cape is referred to his other providers for further development of his treatment plan given neuropsychological findings herein. It was a pleasure to work with Mr. Cape. Thank you for the opportunity to assist in Mr. Cape's care. Please feel free to contact my office with any questions.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'SC' with a stylized flourish, followed by the initials 'RJD'.

Sunshine Collins, PsyD
Licensed Psychologist

APPENDIX A - Personality Assessment Inventory Full Scale Profile

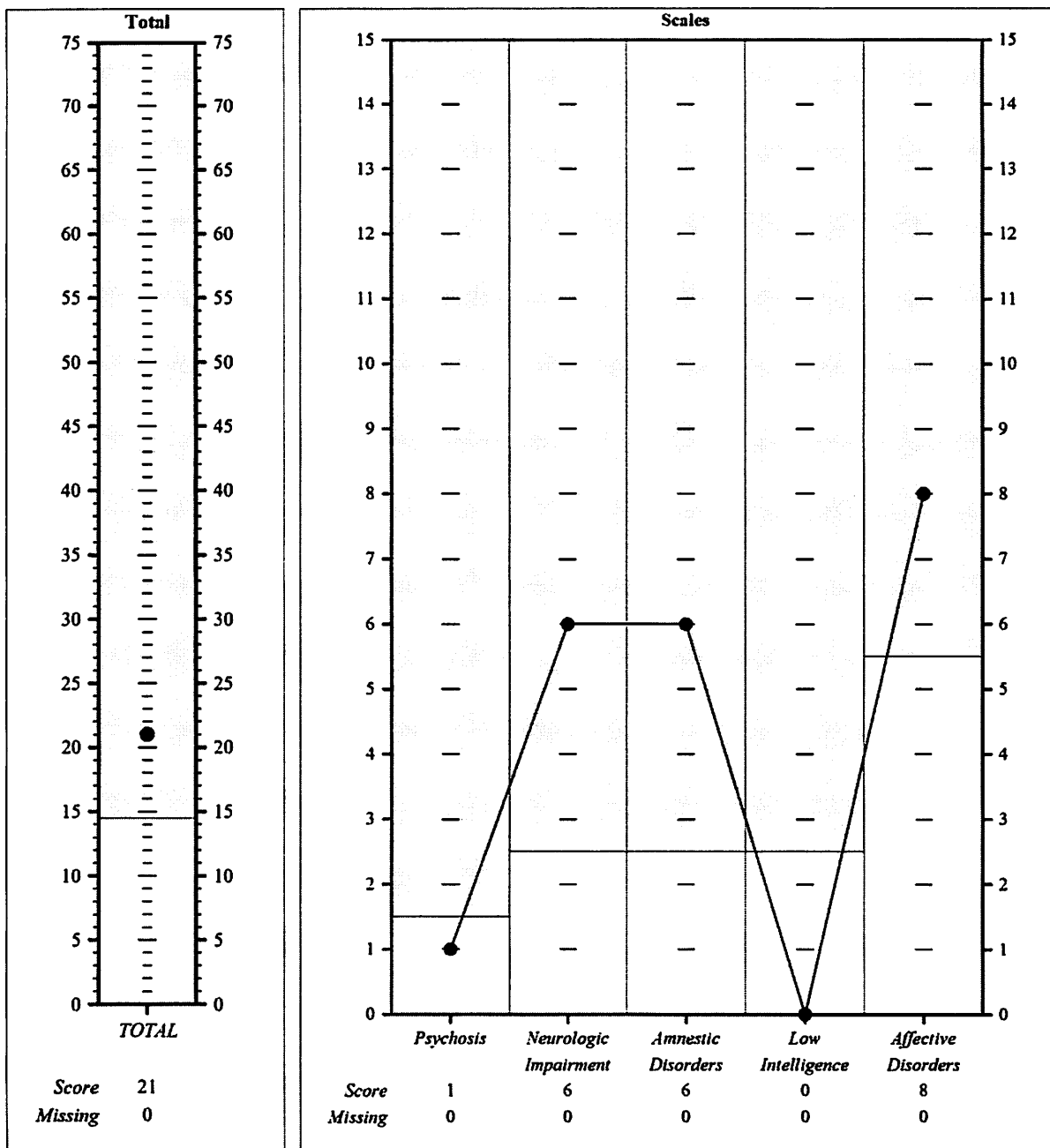


APPENDIX B - Comprehensive Executive Function Inventory Scores

Full Scale							
Standard Score		90% Confidence Interval		Percentile Rank		Classification	
106		102-110		66		Average	

CEFI Adult Scales							
Scale	Standard Score	90% Confidence Interval	Percentile Rank	Classification	Difference from Average (104.8)	Statistically Significant? (p < .05)	Executive Function Strength/Weakness
Attention	89	81-102	23	Low Average	-15.8	Yes	Weakness
Emotion Regulation	127	111-131	96	Superior	22.2	Yes	Strength
Flexibility	122	108-127	93	Superior	17.2	Yes	Strength
Inhibitory Control	119	106-125	90	High Average	14.2	Yes	Strength
Initiation	84	78-96	14	Low Average	-20.8	Yes	Weakness
Organization	97	90-105	42	Average	-7.8	No	-
Planning	106	95-115	66	Average	1.2	No	-
Self-Monitoring	105	94-114	63	Average	0.2	No	-
Working Memory	94	86-104	34	Average	-10.8	No	-

APPENDIX C - Structured Inventory of Malingered Symptomatology Scores



APPENDIX D - Other Psychometric Test Scores

WAIS / WMS		Qualitative Description	Age Equivalent	Score	Percentile
ATTENTIONAL SYSTEM AND EXECUTIVE FUNCTIONING					
WAIS-IV	Working memory	Average		95	37
	Digit span	Average		9	37
	Arithmetic	Average		9	37
INFORMATION PROCESSING SPEED					
WAIS-IV	Processing speed	Low average		89	23
	Symbol search	Low average		7	16
	Coding	Average		9	37
VERBAL AND LANGUAGE SKILLS					
WAIS-IV	Verbal comprehension	High average		114	82
	Similarities	High average		13	84
	Vocabulary	Average		11	63
	Information	High average		14	91
VERBAL MEMORY					
WMS-IV	Auditory memory	Borderline		75	5
	Logical Memory I	Below average		4	2
	Logical Memory II	Below average		5	5
	Logical Memory II Recognition	Borderline			3-9%
	Verbal Paired Associates I	Below average		5	9
	Verbal Paired Associates II	Average		9	37
	Verbal Paired A. II Recognition	Low average			17-25%
VISUAL PERCEPTION AND ORGANIZATION					
WAIS-IV	Perceptual Reasoning	High average		113	81
	Block design	High average		14	91
	Visual puzzles	Upper end of avg		12	75
	Matrix Reasoning	Average		11	63
VISUAL MEMORY					
WMS-IV	Visual memory	Borderline		74	4
	Designs I	Low end of avg		8	25
	Designs II	Low average		7	16
	Designs II recognition	Average			26-50%
	Visual reproduction I	Extremely low		2	0.4
	Visual reproduction II	Low average		6	9
	Visual reprod. II recognition	Low average			17-25%
	Visual working memory	Average		97	42
	Spatial Addition	Upper end of avg		12	75
	Symbol Span	Low average		7	16
OVERALL MEMORY FUNCTIONING					
WMS-IV	Immediate memory	Extremely low		65	1

RE: CAPE.TAYLOR
09/25/19

	Delayed memory	Borderline		78	7
OVERALL INTELLECTUAL FUNCTIONING					
WAIS-IV	Full-Scale IQ	Average		106	66
	General ability	High average		115	84

EXHIBIT “K”



Life Care Analysis

ATTORNEY: Dillon Coil, Esquire
Greenman, Goldberg, Raby and Martinez Law Firm
2770 S. Maryland Pkwy.
Suite 100
Las Vegas, NV 89109

PLAINTIFF: Taylor Cape

DATE PREPARED: April 2020

PREPARED BY: Jan Roughan, BSN, RN, PHN, CRRN/ABSNC, CNLCP®, CCM

Preliminary Report for Mediation/Settlement Conferences Purposes Only Per California Evidence Code Sections 1119, 1152, 1154, et seq.

465 N. Halstead Street, Suite 120 • Pasadena, California 91107
(626) 351-0991 • Fax (626) 351-0992

000434

APP 000155

This case involves a now 24 year old, left hand dominant, Caucasian male, Taylor Cape, who reportedly sustained multiple traumatic injuries due to his involvement, as the driver of one of the automobiles, involved in an Auto vs. Auto, motor vehicle accident (MVA), that occurred on **11/21/2018**.

FINDINGS

Objective*

**See medical records*

Subjective

It is reported in the medical records, and affirmed by Mr. Cape, and his Mother, Lisa Lawson, that **prior to** his unfortunate **11/21/2018** accident and resultant injuries, he **was**: independent and timely in the performance of his activities (e.g., bathing, dressing, grooming, mobilizing, etc.) of daily living (ADL's) and instrumental activities (e.g., household chores, etc.) of daily living (IADL's); in stable physical and mental health; able to see with the use of corrective lenses; free of chronic pain; enjoying full use and movement of his spine, and adequate use and movement of his upper and lower extremities; participating in a variety of leisure activities (e.g., dancing, shopping, playing basketball, etc.); free of sleep pattern disturbances; kind; hard working; sociable; confident; even-tempered; happy; etc.

These same sources note that, **subsequent to** his unfortunate **11/21/2018** accident and resultant injuries, Mr. Cape is **now**: slower in the performance of his ADL's and IADL's; and, is **experiencing**: daily blanking out/staring episode; additional ophthalmological difficulties (e.g., blurred vision, eye fatigue and irritation, etc.); an increased frequency of the prior ringing/buzzing in both ears; limitations in his range of motion and multiple musculoskeletal ailments (e.g., constant neck pain; decreased left shoulder and wrist mobility; mid back pain; bilateral knee and ankle pain; diminished strength in both legs; etc.), all of which interfere with his day to day activities and attempts to engage in gainful employment or his preferred recreational/leisure pursuits; sleep disturbances, including difficulty staying asleep; forgetfulness/memory lapses; mood lability (e.g., irritability, frustration, etc.); diminished focus and concentration; fear in situations triggering his memory of the incident; an aversion to socialization and a propensity toward being isolative and withdrawn; depression and despondence over his limitations and resultant dramatic changes in lifestyle.

Summary

It is evident from the medical records and collateral interviews in respect to Mr. Cape's pre- and post-morbid functioning that he has suffered significant sequelae from the injuries incurred during the **11/21/2018** incident. The constellation of neurologic, ophthalmologic, otologic, orthopedic, and psychiatric/psychological

Preliminary Report for Mediation/Settlement Conferences Purposes Only Per California Evidence Code Sections 1119, 1152, 1154, et seq.

impairments associated with his difficulties significantly compromises Mr. Cape's participation in normal life experiences requisite to a positive self-concept, and effective and satisfying family system interactions conducive to ongoing adult growth and development. The extent and severity of his disability have imposed permanent alterations to his self-care, social, home maintenance, leisure and recreational domains. Additionally, there are ongoing residual problems related to his injury that require further evaluation and long-term medical management by a sophisticated interdisciplinary team of specialists if his outcome is to be optimized and complications minimized. Lastly, case management services will be needed to monitor his status, to provide appropriate recommendations as events and needs occur, and to facilitate identification of, and access to, quality resources and services.

RECOMMENDATIONS:

I. PROCEDURAL/SURGICAL/INTENSIVE INTERVENTION INCLUDING, BUT NOT LIMITED TO:

- Comprehensive Seizure Disorder Evaluation: *First Stage (Outpatient)*
- Comprehensive Seizure Disorder Evaluation: *Second Stage (Inpatient)* ①
- Epidural Steroid Injection: *Bilateral Cervical Spine (C₅-C₆)*
- Medial Branch Block/Facet Joint Block: *Bilateral Cervical Spine (C₅, C₆)*
- Radiofrequency Ablation: *Bilateral Cervical Spine (C₅, C₆)* ②
- Neurocognitive/Pain Management/Functional Restoration Program: *Outpatient*
- Trigger Point Injection: *Upper Paraspinal Muscles*
- Intercostal Nerve Block: *Thoracic Spine (T₈, T₉, T₁₀)*

Estimated Subtotal, including all items:	\$ 280,664.00
Estimated Subtotal, excluding items noted as contingent:	\$ 98,418.00

II. HOME/FACILITY CARE INCLUDING, BUT NOT LIMITED TO:

- Life Skills Specialist (LSS)(through age: 49)
- Assisted Living-Memory Care (beginning at age: 50)

Estimated Subtotal, including all items:	\$ 2,594,235.00
---	------------------------

Preliminary Report for Mediation/Settlement Conferences Purposes Only Per California Evidence Code Sections 1119, 1152, 1154, et seq.

III. FUTURE MEDICAL CARE INCLUDING, BUT NOT LIMITED TO:

- Physiatrist/Pain Management Specialist
- Psychiatrist: *Medication Management* ③
- Orthopedic Surgeon/Lower Extremity Specialist
- Orthopedic Surgeon/Spine Specialist
- Neuro-Ophthalmologist
- Neuro-Optometrist
- Otorhinolaryngologist (ENT) ④
- Audiologist
- Case Management

Estimated Subtotal, including all items:	\$ 343,535.00
Estimated Subtotal, excluding items noted as contingent:	\$ 309,174.00

IV. ONGOING DIAGNOSTIC EVALUATION INCLUDING, BUT NOT LIMITED TO:

- Comprehensive Metabolic Panel (CMP)/Complete Blood Count (CBC)/ Venipuncture- Likely needed, albeit not at this frequency, irrespective of injury
- Electroencephalogram (EEG): *Sleep Deprived/Photic Stimulation*
- Therapeutic Medication Monitoring: *Antiseizure* ①
- Radiological Studies: *Cervical Spine, Thoracolumbar Spine*
- Tesla 3.0 MRI Scan without contrast, with Diffusion Tensor Imaging (DTI) and Susceptibility Weighted Imaging (SWI): *Brain*
- Audiogram
- Visual Examination

Estimated Subtotal, including all items:	\$ 31,968.00
Estimated Subtotal, excluding items noted as contingent:	\$ 21,842.00

V. ORTHOTICS/PROSTHETICS INCLUDING, BUT NOT LIMITED TO:

- Palliative (i.e., Comfort) Modalities
- Thromboembolic Disease (TED) Stocking: *Bilateral Lower Extremities*

Estimated Subtotal, including all items: \$ 48,396.00

VI. PSYCHOLOGICAL SERVICES:

- Individual Counseling
- Family Counseling

Estimated Subtotal, including all items: \$ 7,975.00

VII. THERAPEUTIC INTERVENTION AND TREATMENT INCLUDING, BUT NOT LIMITED TO:

- Physical Therapy
- Restorative Massage/Acupuncture
- Community Fitness Program with Pool
- Speech Therapy/Cognitive Remediation
- Neuropsychological Evaluation/ Psychometric Testing: *Comprehensive*

Estimated Subtotal, including all items: \$ 475,998.00

VIII. EDUCATIONAL/VOCATIONAL SERVICES INCLUDING, BUT NOT LIMITED TO:

- Vocational Assessment
- Monitoring/Job Search
- Post-Employment Training

Estimated Subtotal, including all items: \$ 11,250.00

IX. THERAPEUTIC EQUIPMENT NEEDS INCLUDING, BUT NOT LIMITED TO:

- Safety Items
- Shower Bench/Chair
- Tempur-Pedic Mattress/Foundation: *Queen Size*
- Tempur-Pedic Pillow

Estimated Subtotal, including all items: \$ 16,794.00

X. AIDS FOR INDEPENDENT FUNCTION INCLUDING, BUT NOT LIMITED TO:

- Adaptive/Compensatory Devices

Estimated Subtotal, including all items: \$ 9,701.00

XI. DRUGS/SUPPLIES INCLUDING, BUT NOT LIMITED TO:

- Neuropathic Pain Agent/Antidepressant
- Anti-Alzheimer
- Antidepressant
- Anti-Seizure ①

Estimated Subtotal, including all items: \$ 1,181,923.00

Estimated Subtotal, excluding items noted as contingent: \$ 930,943.00

XII. PERSONAL NEEDS INCLUDING, BUT NOT LIMITED TO:

- Legal Services: *Special Needs Trust*
- Legal Services: *Guardianship/Conservatorship of Person*
- Guardian/Conservator

Estimated Subtotal, including all items: \$ 383,924.00

XIII. HOME/HOME MAINTENANCE INCLUDING, BUT NOT LIMITED TO:

- IADL Assistant/Driver (through age: 49)

Estimated Subtotal, including all items: \$ 270,400.00

COST:

The estimated grand total, including all items, throughout Cape's lifetime (i.e., an additional 53.3 years; a **normal** life expectancy) is **\$5,656,763.00**.

The estimated grand total, excluding items noted as contingent (e.g., ①, ②, ③, etc.) is **\$5,179,050.00**.

- ① Need contingent upon outcome of Comprehensive Seizure Disorder Evaluation: First Stage (Outpatient), and Physician's evaluation and recommendations
- ② Need contingent upon outcome of Branch Block and Physician's evaluation and recommendations
- ③ Need beyond 3 years contingent upon outcome of Physician's evaluation and recommendations
- ④ Ongoing need contingent upon outcome of diagnostic tests and Physician's evaluation and recommendations

EXHIBIT “L”

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF CREATING A
COMMITTEE TO UPDATE AND
REVISE THE NEVADA RULES OF
CIVIL PROCEDURE.

No. ADKT 0522

FILED

DEC 31 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

*ORDER AMENDING THE RULES OF CIVIL PROCEDURE, THE
RULES OF APPELLATE PROCEDURE, AND THE NEVADA
ELECTRONIC FILING AND CONVERSION RULES*

On February 2, 2017, this court established a committee to review and recommend updates to the Nevada Rules of Civil Procedure and the associated district court and specialized rules. The committee consisted of co-chairs Justice Mark Gibbons and Justice Kristina Pickering, Judge Elissa F. Cadish, Judge Kimberly A. Wanker, Judge James E. Wilson, Discovery Commissioner Wesley M. Ayres, Discovery Commissioner Bonnie A. Bulla, Professor Thom Main, and attorneys George T. Bochanis, Robert L. Eisenberg, Graham A. Galloway, Racheal Mastel, Steve Morris, William E. Peterson, Daniel F. Polsenberg, Kevin C. Powers, Don Springmeyer, Todd E. Reese, and Loren S. Young. The Nevada Supreme Court acknowledges and thanks the NRCP committee members for their dedication, time, and effort to comprehensively review and revise the NRCP and recommend the associated amendments to the NRAP and NEFCR.

On August 17, 2018, the committee co-chairs, Justices Mark Gibbons and Kristina Pickering of the Nevada Supreme Court, filed a petition to amend the Nevada Rules of Civil Procedure, the Nevada Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules. This court solicited public comment on the petition, received written public comment, and held a public hearing on October 19, 2018, in this

matter. This court reviewed the committee's recommendations, considered the public comment, and edited the rules. In particular, as to the proposed NRCP 32(a)(5), regarding the use of expert and treating physician deposition transcripts, the court agrees that the use of deposition transcripts would lower the cost of litigation and assist access to justice. The court, however, is reluctant to create by rule an additional exception to the hearsay rule, beyond those established in NRS Chapter 51. Establishing such a hearsay exception is the province of the Legislature.

The revised Nevada Rules of Civil Procedure, Nevada Rules of Appellate Procedure, and Nevada Electronic Filing and Conversion Rules contain significant changes. These changes will necessitate the review and probable revision of other associated rules and forms, including, among others, the family court financial disclosure forms, the Nevada Justice Court Rules of Civil Procedure, and a more thorough review of the Nevada Rules of Appellate Procedure. The Nevada Supreme Court will address the need for review of these rules in 2019.

For the benefit of the bench and the bar and to facilitate the transition from the existing rules to the new rules, the Nevada Supreme Court will create redlines of the new NRCP against the former NRCP and against the current FRCP. These redlines will be posted in ADKT 0522 and will be available on the Nevada Appellate Courts' website located at: [https://nvcourts.gov/AOC/Committees and Commissions/NRCP/Adopted Rules and Redlines/](https://nvcourts.gov/AOC/Committees_and_Commissions/NRCP/Adopted_Rules_and_Redlines/). If any discrepancies exist between the redlines and the attached exhibits, the attached exhibits control as they are the officially adopted rules. The committee's agendas and minutes are available on the committee's website and will also be posted to ADKT 0522.

Accordingly,

WHEREAS, this court has solicited public comment on the petition, received written public comment, and held a public hearing on October 19, 2018; and

WHEREAS, this court has determined that rule changes are warranted;

IT IS HEREBY ORDERED that the Nevada Rules of Civil Procedure shall be amended and shall read as set forth in Exhibit A; and

IT IS HEREBY ORDERED that the Nevada Rules of Appellate Procedure shall be amended and shall read as set forth in Exhibit B; and

IT IS HEREBY ORDERED that the Nevada Electronic Filing and Conversion Rules shall be amended and shall read as set forth in Exhibit C.

IT IS FURTHER ORDERED that this amendment to the Nevada Rules of Civil Procedure, the Nevada rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules shall be effective prospectively on March 1, 2019, as to all pending cases and cases initiated after that date. The clerk of this court shall cause a notice of entry of this order to be published in the official publication of the State Bar of Nevada. Publication of this order shall be accomplished by the clerk disseminating copies of this order to all subscribers of the advance sheets of the Nevada Reports and all persons and agencies listed in NRS 2.345, and to the executive director of the State Bar of Nevada. The certificate of the clerk of this court as to the accomplishment of the above-described publication of notice of entry and dissemination of this order shall be conclusive evidence of the adoption and publication of the foregoing rule amendments.

IT IS FURTHER ORDERED that on and after the effective date, these amended rules shall control when conflicts arise between these amended rules and the local rules or the district court rules. Time frames accruing before the effective date of these amended rules shall be calculated using the existing, unamended rules. Time frames accruing on or after the effective date of these amended rules shall be calculated under these amended rules. If a reduction in the time to respond or other adverse consequence results from the change in and application of these amended rules, an extension of time or other relief may be warranted to prevent prejudice.

Dated this 31 day of December 2018.

Douglas, C.J.
Douglas

Cherry, J.
Cherry

Gibbons, J.
Gibbons

Pickering, J.
Pickering

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Stiglich, J.
Stiglich

cc: Richard Pocker, President, State Bar of Nevada
Kimberly Farmer, Executive Director, State Bar of Nevada
All District Court Judges
All Court of Appeal Judges
Clark County Bar Association
Washoe County Bar Association
First Judicial District Bar Association
Administrative Office of the Courts

EXHIBIT “M”

May the Nevada Legislature Constitutionally Revise the Rules of Civil Procedure?

BY MICHAEL LOWRY, ESQ. AND NATHANIEL SAXE

On March 1, 2019, Nevada's revised rules of civil procedure took effect after a lengthy editing process. Some of the changes were generally supported, while others were enacted over dissent. In at least one instance, the dissenters took their proposed changes to the subsequent Legislature and successfully lobbied for those changes to be enacted into law. But is that statute a constitutionally permissible exercise of the Legislature's power?

Rule 35 vs. NRS 52.380

The revised rules significantly changed Rule 35. When the draft changes were published for public comment, there were three proposed drafts for Rule 35. Eventually one of the drafts was adopted and took effect on March 1, 2019.

On March 18, 2019, AB 285 was introduced. The legislative minutes make clear AB 285 was expressly intended to implement changes to Rule 35. Supporters noted what became AB 285 was rejected during the process that led to Nevada's amended rules of civil procedure.

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

The bill passed both chambers, the governor signed it on May 23, 2019, and it took effect on October 1, 2019, as NRS 52.380. Rule 35 is compared with NRS 52.380 below.

Rule 35	NRS 52.380
<p>(4) Observers at the Examination. The party against whom an examination is sought may request as a condition of the examination to have an observer present at the examination. When making the request, the party must identify the observer and state his or her relationship to the party being examined. The observer may not be the party's attorney or anyone employed by the party or the party's attorney.</p> <p>(A) The party may have one observer present for the examination, unless:</p> <p>(i) the examination is a neuropsychological, psychological, or psychiatric examination; or</p> <p>(ii) the court orders otherwise for good cause shown.</p> <p>(B) The party may not have any observer present for a neuropsychological, psychological, or psychiatric examination, unless the court orders otherwise for good cause shown.</p> <p>(C) An observer must not in any way interfere, obstruct, or participate in the examination.</p>	<p>1. An observer may attend an examination but shall not participate in or disrupt the examination.</p> <p>2. The observer attending the examination pursuant to subsection 1 may be:</p> <p>(a) An attorney of an examinee or party producing the examinee; or</p> <p>(b) A designated representative of the attorney, if:</p> <p>(1) The attorney of the examinee or party producing the examinee, in writing, authorizes the designated representative to act on behalf of the attorney during the examination; and</p> <p>(2) The designated representative presents the authorization to the examiner before the commencement of the examination.</p>
<p>(3) Recording the Examination. On request of a party or the examiner, the court may, for good cause shown, require as a condition of the examination that the examination be audio recorded. The party or examiner who requests the audio recording must arrange and pay for the recording and provide a copy of the recording on written request. The examiner and all persons present must be notified before the examination begins that it is being recorded.</p>	<p>3. The observer attending the examination pursuant to subsection 1 may make an audio or stenographic recording of the examination.</p> <p>4. The observer attending the examination pursuant to subsection 1 may suspend the examination if an examiner:</p> <p>(a) Becomes abusive towards an examinee; or</p> <p>(b) Exceeds the scope of the examination, including, without limitation, engaging in unauthorized diagnostics, tests or procedures.</p> <p>5. An examiner may suspend the examination if the observer attending the examination pursuant to subsection 1 disrupts or attempts to participate in the examination.</p> <p>6. If the examination is suspended pursuant to subsection 4 or 5, the party ordered to produce the examinee may move for a protective order pursuant to the Nevada Rules of Civil Procedure.</p>
No equivalent.	

CONTINUED ON PAGE 24

May the Nevada Legislature Constitutionally Revise the Rules of Civil Procedure?

Rules of Civil Procedure vs. Legislative Enactments

The constitutional problem arises due to the separation of powers built into Nevada's constitution.² Each of government's three branches is equal. "In keeping with this theory, the judiciary has the inherent power to govern its own procedures."³ NRS 2.120 expressly recognized that authority. "The judiciary is entrusted with rule-making and other incidental powers reasonable and necessary to carry out the duties required for the administration of justice and to economically and fairly manage litigation."⁴ This means "the legislature may not enact a procedural statute that conflicts with a pre-existing procedural rule, without violating the doctrine of separation of powers, and such a statute is of no effect."⁵

In addition to the constitutionally mandated bases for keeping separate those inherent powers of the judiciary, leaving control of court rules and the administration of justice to the judiciary, and thereby placing the responsibility for the system's continued effectiveness with those most familiar with the latest issues and the experience and flexibility to more quickly bring into effect workable solutions and amendments, makes good sense.⁶

The judiciary's authority "to promulgate procedural rules is independent of legislative power, and may not be diminished or compromised by the legislature. ... Furthermore, where, as here, a rule of procedure is promulgated in conflict with a pre-existing procedural statute, the rule supersedes the statute and controls."⁷

Is NRS 52.380 Constitutional?

NRS 52.380's constitutionality may rest on whether it is a substantive

or procedural statute. Discussing other statutes may help contextualize the difference between substantive and procedural statutes. For example, consider wrongful death cases. "Wrongful death is a cause of action created by statute, having no roots in the common law."⁸ NRS 41.085 created a substantive right that could be asserted subject to the judiciary's procedural rules.

In another example, NRS 11.340 allowed "a plaintiff whose judgment is subsequently reversed on appeal with the right to file a new action within one year after the reversal."⁹ This statute arguably creates a substantive right for a plaintiff whose statute of limitations has expired to file a new complaint after an unsuccessful appeal. But *Berkson v. Lepome* concluded NRS 11.340 was procedural in nature, violated separation of powers by interfering "with the judiciary's authority to manage the litigation process" and was unconstitutional.

Whitlock v. Salmon addressed tension between NRCP 47(a), stating at the time "the court shall conduct the examination of prospective jurors and may permit such supplemental examination by counsel as it deems proper," and NRS 16.030(b), which stated "the parties or their attorneys are entitled to conduct supplemental examinations which must not be unreasonably restricted."

Whitlock did not perceive the statute as a legislative encroachment on judicial prerogatives. Although the statute does implicate trial procedure, it does not interfere with procedure to a point of disruption or attempted abrogation of an existing court rule. Rather, the statute confers a substantive right to reasonable participation in voir dire by counsel; and this court will not attempt to abridge or modify a substantive right.¹⁰

Turning to NRS 52.380, supporters asserted it created or reinforced a

substantive right to physical integrity. However, to the extent this was NRS 52.280's intention, it interferes "with procedure to a point of disruption" and attempts to abrogate an existing court rule as *Whitlock* feared. NRS 52.380 does not create or modify any substantive rights. Instead the legislative history indicates the statute's express purpose was to enact a draft of Rule 35 the Supreme Court rejected. In this circumstance, NRS 52.380 appears unconstitutional.

1. Minutes of Assembly Committee on Judiciary, March 27, 2019, Page 4, statement of Graham Galloway.
2. Nev. Const. Art. 3, § 1.
3. *Berkson v. Lepome*, 126 Nev. 492, 499 (2010) (quotation omitted).
4. *Id.*
5. *Id.*
6. *Id.*
7. *State v. Connery*, 99 Nev. 342, 345 (1983).
8. *Alsenz v. Clark Cty. Sch. Dist.*, 109 Nev. 1062, 1064 (1993).
9. *Berkson*, 126 Nev. at 494.
10. 104 Nev. 24, 26 (1988).

MICHAEL LOWRY is a partner with Wilson Elser Moskowitz Edelman and Dicker LLP, practicing primarily from its Las Vegas office. He also separately publishes the award-winning *Compelling Discovery* blog. He prefers the term "Rule 35 Exam" rather than "IME" and wrote this article during the COVID-19 quarantine when no Rule 35 exams were occurring anyway.



NATHANIEL SAXE is a 3L at UNLV's Boyd School of Law and is anticipated to graduate in spring 2020. He was selected for Wilson Elser's Spring 2020 law student internship program. If all goes well, by the time you read this, he will be deep into bar examination preparation, resulting in his second quarantine of 2020.



EXHIBIT “N”



STATE OF NEVADA
BOARD OF PSYCHOLOGICAL EXAMINERS

4600 Kietzke Lane, Building B-116
Reno, Nevada 89502
Telephone 775 / 688-1268 • Fax 775 / 688-1060
nbop@govmail.state.nv.us
Psyexam.nv.gov

October 1, 2018
Gabe Linfoot
Governor

Elizabeth Brown
Clerk of the Supreme Court
201 South Carson Street
Carson City, NV, 89701.

Michelle G. Paul, Ph.D.
President, Las Vegas

Whitney E. Koch-Owens, Psy.D.
Secretary/Treasurer, Las Vegas

John H. Krogh, Ph.D.
Board Member, Reno

Stephanie Holland, Psy.D.
Board Member, Las Vegas

Anthony Paps, Ph.D.,
Board Member, Reno

Pamela L. Becker, M.A.
Public Board Member, Reno

Patrick M. Ghezzi, Ph.D., BCBA-D, LBA
Board Member, Reno

Dear Ms. Brown:

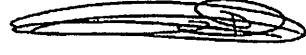
Please see below the Licensing Board's position on third-party observers in psychological evaluations. This statement has been provided to the Nevada State Supreme Court as public comment regarding the proposed changes to Rule 35 of Nevada Civil Procedure.

In the interest of protecting the needs of the public, it is the position of the Nevada Board of Psychological Examiners that allowing third-party observers, monitors, and/or electronic recording equipment during psychological and neuropsychological evaluations poses a significant threat to public safety. Observation, monitoring, and recording can significantly alter the credibility and validity of results obtained during psychological and neuropsychological medical evaluations, as well as forensic evaluations completed for judicial proceedings. Research indicates that the presence of observers, monitors and recorders during patient clinical interviews and evaluations directly impacts patient behavior and performance such that patients may avoid disclosing crucial information essential to diagnosis and clinical recommendations. Additionally, (neuro)psychological tests and measures are developed and standardized under highly controlled conditions. Observation, monitoring, and recording of these tests is not part of the standardization. Observation, monitoring, and recording of psychological assessment components (i.e., testing) of evaluations may distort patient task performance, such that patient weaknesses and strengths are exaggerated, yielding inaccurate or invalid test data. Furthermore, research highlights that this impact on performance is independent of method of observation. In other words, there is no "good" or "safe" way to observe, monitor, or record such (neuro)psychological evaluations without impacting and potentially invalidating the evaluation. Ultimately, deviations from standardized administration procedures compromise the validity of the data collected and compromise the psychologist's ability to compare test results to normative data. This increases the potential for inaccurate test results and erroneous diagnostic conclusions, thus impacting reliability of results and future treatment for the patient. In addition, the risk of secured testing and assessment procedures being released to non-Psychologists poses risk to the public in that exposure of the test and assessment confidentiality can undermine their future validity and utility.

Sincerely
for the Board of Psychological Examiners


Morgan Gleich
Executive Director


Michelle Paul, Ph.D.
Board President


Whitney Owens, Psy.D.
Board Secretary/Treasurer


Pam Becker, MA
Public Member


Stephanie Holland, Psy.D.
Board Member

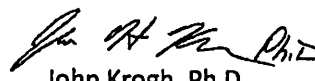

John Krogh, Ph.D.
Board Member

EXHIBIT “O”

Update on Third Party Observers in Neuropsychological Evaluation: An Interorganizational Position Paper

Tannahill Glen¹, Mark Barisa², Rebecca Ready³, Edward Peck⁴, Tresa Roebuck Spencer⁵

¹Neuropsychology, Inc, Jacksonville FL USA

²Performance Neuropsychology, Frisco TX USA

³University of Massachusetts Amherst, Dept of Psychological and Brain Sciences, Amherst MA USA

⁴Neuropsychological Services of Virginia, Richmond VA USA

⁵Jefferson Neurobehavioral Group, Houston TX USA

*Corresponding author at: ABPP, 3019 St. Johns Avenue, Jacksonville, FL 32205, USA. E-mail address: neuropsychology@tannahillglen.com.

Received 8 March 2021; revised 2 March 2020; Accepted 9 March 2021

Abstract

Objective: The National Academy of Neuropsychology (NAN), the American Academy of Clinical Neuropsychology (AACN), and the American College of Professional Neuropsychology (ACPN) collaborated to publish an update to their original position statements, confirming the organizations' opposition to third party observer (TPO).

Method: A review of literature addressing TPO effects, ethical standards, professional organization position statements, test publisher policies and new telemedicine developments was completed to obtain consensus on relevant issues in TPO and recording of neuropsychological evaluations.

Results: TPO has been shown to impact the cognitive functions most often assessed in forensic or medicolegal settings. Third party observation, whether in person, recorded or electronic, remains a potential threat to the validity and reliability of evaluation results, and violates test security guidelines, ethical principles and standards of conduct in the field. Demands for TPO in the context of medicolegal or forensic settings have become a tactic designed to limit the ability of the consulting neuropsychologist to perform assessment and provide information to the trier of fact.

Conclusion: The field of neuropsychology opposes the presence of TPO in the setting of medicolegal or forensic neuropsychological evaluations.

Keywords: Assessment; Forensic neuropsychology; Professional issues

Introduction

The National Academy of Neuropsychology (NAN), the American Academy of Clinical Neuropsychology (AACN), and the American College of Professional Neuropsychology (ACPN) are united in their opposition to third party observer (TPO) in clinical neuropsychological evaluations. The presence of third-party observation is opposed because, most fundamentally, it introduces concerns about reliability and validity of test procedures and results (i.e., the presence of a TPO will negatively affect the accuracy and utility of the neuropsychological assessment). TPO introduces extraneous factors that deviate from the assessment procedures' intended use. Specifically, TPO departs from standardized administration procedures because it creates observer effects which are known to affect human performance and test validity. Observer effects, such as distraction of attention of an examinee, are not taken into account in collection of normative data, which may result in inaccurate conclusions pertaining to the extent and severity of abnormal findings. Replacing in-person observation with camera recording or remote observation does not eliminate these issues (Constantinou, Ashendorf, & McCaffrey, 2005). TPO and recording of evaluations conflict with

requirements for test security, published ethical principles, and standards of conduct in the field that are designed to protect the public, examinees, and the profession as a whole.

The potential deleterious effects of TPO are particularly problematic in the medicolegal or forensic context, because of the unique consultant role of the neuropsychologist. These evaluations are adversarial, often entail adherence to a Court Order, and typically involve an opportunity to complete a medicolegal or forensic examination and formulate opinions based on data obtained during that assessment. Therefore, it is especially critical to minimize the effects of TPO. Follow-up contacts and repeat examinations do not occur as they might for clinical assessments, in which there is an opportunity to further evaluate unclear or invalid results. In non-medicolegal or non-forensic assessment there is an iterative process between clients and clinicians, allowing for ongoing communication such that findings can be updated, reconsidered, or amended. In forensic settings there is no similar reciprocal communication between the forensic evaluator and the fact finder, and typically, the evaluator has one opportunity for diagnosis or description of deficits. Expert opinion based on collected data is often critical in deliberations concerning, for instance, a defendant's life or liberty, or a plaintiff's economic justice. Any variable, however small, that may adversely affect the neuropsychological evaluation should be guarded against.

Further, attorneys have recognized that neuropsychologists have reservations about assessments involving TPO. It has become a legal tactic for attorneys attempting to limit or even preclude neuropsychological assessment to demand TPO, which potentially limits the availability of impactful evidence to the trier of fact. Neuropsychologists frequently fend off requests for videotaping or remote monitoring of examination, or allowing an involved third party such as attorney, legal assistant, spouse, or even a psychologist to attend the interview and examination to monitor and take notes. These requests may compromise the ability of neuropsychologists to gather valid data and render empirically-based opinions (Zasler, 2019) and may ultimately affect information experts can provide to the court.

Consistent with our prior position statements, neuropsychologists recognize that there are circumstances in which TPO is permitted. Those circumstances are limited to specific evaluation *context* (clinical, as opposed to medicolegal or forensic) and the *type of observer*. For example, TPO may be necessary in the assessment of an anxious child who is unable to participate in testing unless a parent is present. Similarly, an interpreter may be required when assessment cannot be completed in the patient's preferred language. In these instances, TPO facilitates data collection when assessment could not otherwise proceed. Trainees such as residents and interns are also examples of TPO with no stake in the outcome of an evaluation, and who appear only in the clinical context. These examples are in contrast to TPO whose presence may interfere with data collection without adding advantage, such as those with a stake in the outcome of the evaluation, for example, an attorney or a party retained by the attorney.

Prior Statements on TPO

In 2000, NAN published an official statement opposing the presence of TPO during neuropsychological testing (Axelrod, Barth, Faust, Fisher, Heilbronner...Silver, 2000). In close succession, AACN published its own policy statement on TPO (American Academy of Clinical Neuropsychology, 2001).

The two publications were the first formal statements from major professional organizations on the issue of TPO in neuropsychological assessment. They were closely followed by other organizations (e.g., American Psychological Association, 2007) that also opposed TPO. Additional position statements on related issues, such as recording of evaluations and test security (e.g., National Academy of Neuropsychology, 2000; Inter Organizational Practice Committee, 2014; American Board of Professional Neuropsychology, 2016) have been subsequently released.

In the two decades since their publication, the NAN and AACN statements have been valuable resources in neuropsychologists' efforts to minimize external factors that could compromise data collection and interpretation, standardization, and test security. Importantly, the 2016 policy statement from the American Board of Professional Neuropsychology (ABN) extended the argument against TPO to recording of neuropsychological evaluations. The purpose of the current paper is to present a collaborative position statement, updated to reflect new research, test publisher policies, and technological developments, such as advances in telehealth.

TPO Affects Test Performance and Validity

The impact of TPO on examinee performance has long been one of the foundations upon which neuropsychologists base objections to the presence of an involved observer in their evaluations. Test performance can be affected by many factors, such as distraction by repetitive loud noises, frequent interruptions by persons entering the room, or the mere fact of being observed, leading to difficulty maintaining focus, encoding and remembering new information, or increased anxiety. The presence of TPO—whether in person, electronically, or through a recording device—may influence an examinee or examiner response.

A considerable body of scientific literature addresses the deleterious effects of an observer's presence on an individual's task performance, despite the best efforts to remain unobtrusive. Observer effects have been noted in precisely the cognitive domains often in question in the context of medicolegal or forensic evaluation including memory, attention, processing speed, and executive functions (Kehrer, Sanchez, Habif, Rosenbaum & Townes, 2000; Horwitz & McCaffrey, 2008; Eastvold, Belanger & Vanderploeg, 2012). These modifications in performance unnecessarily raise the risk for misinterpretation of results obtained under observation or monitoring conditions, and make direct comparison of other data difficult, such as with prior evaluations not performed under TPO conditions (Lewandowski et al., 2016). Neuropsychological tests are reliable and valid measures of neurocognitive capacities (brain-behavior relationships) when administered pursuant to the rigorous, controlled conditions under which they were created. Varying testing procedures and conditions across two examinations, one with an observer and one without, may compromise comparison of results.

Observer effects have been reported whether the observer was present for the purpose of considering the examinee (Eastvold, Belanger, & Vanderploeg, 2012) the examiner (McCaffrey, Lynch & Yantz, 2005), or when the purpose of examination was not explained (Horwitz & McCaffrey, 2008). Similar findings were observed when TPO was performed via video recording device (Constantinou, Ashendorf, & McCaffrey, 2005) or audio recording device (Constantinou, Ashendorf, & McCaffrey, 2002). Because observer effects are significant when the context is medicolegal or forensic, and when the observer has a stake in the outcome, TPO is opposed even if the third party is a neuropsychologist retained to observe the examination.

In addition to observer effects on neuropsychological test performance, the presence of a TPO may affect validity of test administration and interpretation of results (Constantinou, Ashendorf, & McCaffrey, 2005; Eastvold, Belanger, & Vanderploeg, 2012). Tests are developed and standardized in the absence of TPO, and evaluation procedures rely on uniform testing conditions and administration. Introduction of a factor not accounted for in test administration and standardization may jeopardize reliability, validity, and interpretation of assessment results.

To summarize, TPO can affect the cognitive functions most often assessed in forensic or medicolegal settings and may impact interpretation and comparison of test results. Consequently, testing conducted in the presence of TPO is not consistent with best practices in clinical neuropsychology, may interfere with obtaining accurate data in a neuropsychological examination, and therefore jeopardizes the accuracy of decisions and judgments made by the trier of fact when based on these data.

TPO Conflicts with Ethical Guidelines and Code of Conduct

The presence of third-party observers during neuropsychological test administration potentially conflicts with the American Psychological Association's Ethical Principles of Psychologists and Code of Conduct (APA, 2017), which sets forth general principles and ethical standards. The ABPN policy statement on TPO (Lewandowski, Baker, Sewick, Knippa, Axelrod, & McCaffrey, 2016) describes these areas of conflict in detail. In short, the General Principles of Beneficence and Nonmaleficence, Fidelity and Responsibility, Integrity, and Justice encourage optimal standards of practice (which preclude presence of TPO); when these are eroded, the outcome may compromise the data interpretation, diagnostic opinion, and recommendations, which has direct impact on public welfare.

APA Ethical standards of Competence and Assessment (2017) are likewise in conflict with the presence of TPO. These include standards 9.01 and 9.02 (Basis and Use of Assessments), 9.06 (Interpreting Assessment Results), and 9.11 (Test Security), which advise adherence to standardization procedures, reporting limitations to interpretation validity, and maintaining test security. Similarly, the Standards for Educational and Psychological Testing (American Educational Research Association, 2014) advise that clinicians must create a test setting with minimal distractions (Standard 15.2). Thus, in addition to the practical matter of test validity, allowing the presence of TPO may place the clinician in violation of ethical and practice standards.

Furthermore, TPO and/or recording/monitoring of evaluations present a dilemma for neuropsychologists in that non-qualified individuals could influence test selection by proxy: in order to minimize test content disclosure or observer distraction effects, neuropsychologists may alter the test selection. The influence of TPO on test selection conflicts with a NAN statement on test selection that explicitly warns against influence of test selection by unqualified third parties (Fazio, Roebuck-Spencer, Denney, Glen, Bianchini...Scott, 2018).

Finally, it is clear that professional ethical principles and standards require test administration, transcription, and interpretation of responses in a manner consistent with standardization procedures and in a manner that ensures valid assessment of underlying abilities without undue influence of extraneous factors on performance. Thus, a priori suggestions that clinicians will behave unethically without observation or recording are inconsistent with professional standards and principles. On occasion, an attorney for an examinee, or their proxy, may demand TPO for their client, citing the potential for malfeasance on the part of the neuropsychologist. It is our position that such a claim is inappropriate given that it is contrary to best practices in the field of neuropsychology, and rather than safeguarding the testing process, may actually introduce error in the test data gathered.

TPO Impacts Test Security and Public Safety

TPO is objectionable in addition, because the practice may violate professional and ethical standards to protect the confidentiality of test materials. The 2017 APA Ethical Code Standard 9.11 (Maintain Test Security) asserts that psychologists “maintain the integrity and security of test materials and other assessment techniques,” and Standard 9.04 specifically notes the importance of protection of test materials, including “manuals, instruments, protocols and test questions, or stimuli,” all of which risk disclosure when direct observation or recording is allowed.

Indeed, APA has long asserted that psychologists must protect materials from third parties (APA, 1999). The American Educational Research Association, the National Council on Measurement in Education, and APA Standards for Educational and Psychological Testing (2014) state that “test users have the responsibility to protect the security of tests, including that of previous editions” (Standard 9.21).

Test security is of paramount importance for public safety. Valid and reliable neuropsychological assessment rests on the assumption that a test taker has not been exposed to test content or structure. The United States Supreme Court, in *Detroit Edison Co v NLRB*, 440 US 301 (1979), reinforced this notion when it moved to protect future test integrity by prohibiting disclosure of test content to non-psychologist petitioners. Prior exposure to test materials may alter client responses to the stimuli and interfere with valid test score interpretation, and accurate conclusions cannot be drawn from the assessment. When test materials are not adequately secured, the public may have exposure to manuals, test instructions and answers, and testing procedures. Subsequently, the utility of the tests is diminished, neuropsychological evaluations are less effective, public safety is at risk, and persons are deprived of access to a valid evaluation.

Neuropsychological tests are used for high-stakes decisions, such as to determine suitability for surgery, the ability to safely work as a pilot or police officer, access to academic accommodations, fitness to parent, the ability to stand trial, the need for medication and other treatment, and return to play decision following a sports concussion, to name a few. Neuropsychologists must be able to use tests and interpret scores according to standardized administration, comparison to normative data, and assurance that the test takers have not been previously exposed to the materials and procedures. Unfortunately, published studies have shown that preparation for psychological testing is supported by a majority of attorneys (Spengler, Walters, Bryan, & Millsbaugh, 2020), which highlights the importance of test security as it relates to the need to protect test content and procedures. Inability to perform neuropsychological evaluations that adhere to ethical and test administration and interpretation guidelines places the general public at risk.

Consensus of Other Organizations on TPO

National psychology and neuropsychology organizations, state psychological associations, international partners, consensus standards for psychological assessment, and test publishers (Psychological Assessment Resources, Pearson Assessments, MHS Assessments, Green’s Test Publishing) are unified in opposition to TPO during neuropsychological test administration. Organizations with published statements pertaining to the opposition to TPO include the American Psychological Association (APA Committee on Psychological Tests and Assessment, 2007), several U.S. state psychological or neuropsychological associations (e.g., Colorado, New York, and Virginia), the Canadian Psychological Association (CPA), the Standards for Educational and Psychological Testing, the National Academy of Neuropsychology (NAN), the American Academy of Clinical Neuropsychology (AACN), and the American Board of Professional Neuropsychology (ABN).

The Standards for Educational and Psychological Testing (2014), published by a joint committee of American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education, assert that test administration should follow standard procedures and minimize distractions, both of which are inconsistent with TPO.

Many Courts Have Agreed That TPO Should Be Prohibited

Many courts have agreed that TPO should not be allowed in forensic or medicolegal evaluations; however, court decisions have varied by case, region, and jurisdiction. Neuropsychologists who encounter TPO demands in medicolegal/forensic cases are encouraged to work with the retaining party to craft a formal response to any such motion, often in the form of an affidavit, detailing the arguments against and potential negative consequences of allowing TPO, including those outlined in this position statement, accompanied by supportive documents. Should there be an adverse ruling or motion to compel TPO, neuropsychologists should weigh their options carefully and consult legal and ethical guidance as appropriate.

TPO Presence Conflicts with Test Publisher Policies and User Contracts

The majority of psychological and neuropsychological tests are copyrighted and users of psychological and neuropsychological tests are subject to strict credential review by test publishers. As users of copyrighted materials, neuropsychologists are required to maintain test security and to ensure that the materials are not shared with persons unqualified in their use and interpretation. TPO with a stake in the outcome of the evaluation have a potential incentive to distribute test content which would violate copyright protections and other mandates designed to protect test materials from unnecessary exposure to unqualified persons.

Test publishers require specific user qualifications and security of test content. Three major test vendors (MHS Assessments, Pearson Assessment, and Psychological Assessment Resources, Inc.) publish statements indicating release of test content is subject to the trade secret exemption, "Protection of Trade Secrets," cited in Section 1172(e) of Health Insurance Portability and Accountability Act (HIPPA, 1996). The test vendor statements note the potential for public harm if test integrity is compromised and note there are limited alternative measurements, should copyrighted and confidential content be released. Another test publisher, Green's Publishing, has a user contract specifying that misuse or unauthorized distribution of test materials will result in revocation of the clinician's license to use the test (P. Green, personal communication, July 26, 2019).

Therefore, TPO and recording potentially violate trade secrets and jeopardize the integrity and security of test content in a manner that places the clinician at risk of losing test user contracts, and thus access to tools of the trade.

Telehealth Developments

Following the outbreak of coronavirus disease in 2020, hospitals and clinics nationwide were temporarily closed to mitigate against rapid spread of the virus. Thus followed a dramatic increase in the use and reimbursement for "remote" or telehealth appointments by mental health professionals and neuropsychologists. Given the nature of remote testing, there is potential for observer effects, test content disclosure, and examination recording, which are significant threats to the validity of test results and test security. As Miller and Barr (2017) write, "There would be nothing in place to prevent someone from recording the assessment via external device or simply writing items down for future reference . . . even video feeds of the assessment would not be able to entirely safeguard against this."

Despite the increasing use of teleneuropsychology, TPO standards still apply and are recognized by clinicians and researchers. Marra, Hamlet, Bauer, and Bowers (2020) note that at least one test publisher, Pearson Assessments, requires documentation of examinee agreement not to record testing or reproduce materials. The authors recommend examiner attention to test security and validity, and amending consent forms to prohibit recording and to reflect the possible unknown effects of video-based assessment. The InterOrganizational Practice Committee (IOPC) issued recommendations for teleneuropsychology (Bildler et al., 2020), noting there are insufficient data to establish guidelines for modification of routine testing for telehealth. Furthermore, cognitive assessments performed in teleneuropsychology studies tend to be very brief and targeted, appropriate for limited conditions and contexts without the presence of a potentially adversarial or even invested observer. In contrast, independent neuropsychological examinations done in a litigation context are much more extensive and subject to observer effects given the examination's potential impact on the outcome of a case. Thus, the research supporting basic cognitive teleneuropsychology screening in specific targeted populations cannot be generalized to medicolegal/forensic evaluations. Therefore, the TPO policy in the current paper is unchanged by recent developments in teleneuropsychology, consistent with literature differentiating between presence of a paraprofessional technical administrator or video monitoring in a brief clinical screening, and the TPO and monitoring associated with medicolegal or forensic examinations.

Conclusion and Looking Ahead

Neuropsychological evaluation is an integral part of diagnosis and treatment for a wide range of medical and psychiatric conditions, with demonstrated clinical (Watt & Crowe, 2017) and economic value (Glen, Hostetter, Roebuck-Spencer, Garmoe, Scott...Espe-Pfeifer, 2020). Third party observation presents a threat to the validity and reliability of data collection and interpretation, potentially conflicts with ethical standards, and poses risks to the public by eroding utility of vital clinical measures that cannot be replaced in a timely or cost-effective manner. The longstanding NAN, AACN, and ABN policies, which are in opposition to TPO in neuropsychological evaluations, are maintained.

Conflict of Interest

The authors have no disclosures.

Acknowledgements

This position paper is a summary of current issues and positions regarding the policy of third party observers in neuropsychological testing. This paper has been approved by the National Academy of Neuropsychology (NAN) Board of Directors, the American Academy of Clinical Neuropsychology (AACN) Board of Directors, and the American College of Professional Neuropsychology (ACPN) of the American Board of Professional Neuropsychology (ABN). The authors thank NAN Policy and Planning committee members Robin Hilsabeck, Shawn Acheson, Scott Sperling, Patricia Espe-Pfeifer, Tahlia Bragg, Jason Bailie, and Mollie Colvin for their review and suggestions regarding this article.

References

- American Academy of Clinical Neuropsychology (2001). Policy statement on the presence of third party observers in neuropsychological assessments. *The Clinical Neuropsychologist*, 15(4), 433–439. doi: 10.1076/clin.15.4.433.1888.
- American Educational Research Association, American Psychological Association, & the National Council on Measurement in Education (2014). *Standards for educational and psychological testing*. Washington D.C.: American Educational Research Association.
- American Psychological Association (1999). Test security: Protecting the integrity of tests. *American Psychologist*, 54, 1078. doi: 10.1037/0003-066x.54.12.1078.
- American Psychological Association, Committee on Psychological Tests and Assessment. (2007). *Statement on third party observers in psychological testing and assessment: A framework for decision making*. American Psychological Association, Washington D.C. <https://www.apa.org/science/programs/testing/third-party-observers.pdf>.
- American Psychological Association. (2017). *Ethical principles of psychologists and code of conduct*. American Psychological Association, Washington D.C. <https://www.apa.org/ethics/code/ethics-code-2017.pdf>.
- Axelrod, B. & Barth, J., Faust, D., Fisher, J., Heilbronner, R., Larrabee, G., Pliskin, N. & Silver, C. (2000). Presence of Third Party Observers During Neuropsychological Testing: Official Statement of the National Academy of Neuropsychology. *Archives of Clinical Neuropsychology*, 15(5), 379–380. doi: 10.1093/arclin/15.5.379.
- Bilder, R. M., Postal, K. S., Barisa, M., Aase, D. M., Munro Cullum, C., Gillaspay, S. R. et al. (2020). InterOrganizational practice committee recommendations/guidance for teleneuropsychology (TeleNP) in response to the COVID-19 pandemic. *The Clinical Neuropsychologist*, 34, 1314–1334. doi: 10.1080/13854046.2020.1767214.
- Canadian Psychological Association (2009). *Position statements: The presence of involved third party observer in neuropsychological assessments*. Retrieved March 26, 2021, from <https://cpa.ca/aboutcpa/policystatements/#Thirdparty>.
- Colorado Neuropsychological Association (2011). *Official position of the Colorado Neuropsychological Society regarding audio or video taping of neuropsychological evaluations*.
- Constantinou, M., Ashendorf, L., & McCaffrey, R. J. (2005). Effects of a third party observer during neuropsychological assessment: When the observer is a video camera. *Journal of Forensic Neuropsychology*, 4(2), 39–47. doi: 10.1300/J151v04n02_04.
- Constantinou, M., Ashendorf, L., & McCaffrey, R. J. (2002). When the third party observer of a neuropsychological evaluation is an audio-recorder. *The Clinical Neuropsychologist*, 16(3), 407–412. <https://psycnet.apa.org/doi/10.1076/clin.16.3.407.13853>.
- Detroit Edison Co v NLRB, 440 US 301 (1979).
- Eastvold, A. D., Belanger, H. G., & Vanderploeg, R. D. (2012). Does a third party observer affect neuropsychological test performance? It depends. *The Clinical Neuropsychologist*, 26(3), 520–541. doi: 10.1080/13854046.2012.663000.
- Fazio, R.L., Spencer, T.R., Denney, R.L., Glen, E.T., Bianchini, K.J., Garmoe, W.S., Hostetter, G., & Scott, J.G. (2018) The role of the neuropsychologist in selecting neuropsychological... tests in a forensic evaluation. *Position Statement by the National Academy of Neuropsychology*. [https://nanonline.org/docs/ResearchandPublications/PositionPapers/Test%20Selection%20Statement%20Approved%202015-2018%20\(002\).pdf](https://nanonline.org/docs/ResearchandPublications/PositionPapers/Test%20Selection%20Statement%20Approved%202015-2018%20(002).pdf).
- Glen T, Hostetter G, Roebuck-Spencer TM, Garmoe WS, Scott JG, Hilsabeck RC, Arnett P, Espe-Pfeifer P. (2020) Return on Investment and Value Research in Neuropsychology: A Call to Arms. *Archives of Clinical Neuropsychology*, 24;35(5):459–468. doi: 10.1093/arclin/acan010. PMID: 32219365.
- Health Insurance Portability and Accountability Act of 1996, Pub Law No. 104–191, 110 Stat 1936. <https://www.gpo.gov/fdsys/pkg/PLAW-104publ191/pdf/PLAW-104publ191.pdf>.
- Horwitz, J. E., & McCaffrey, R. J. (2008). Effects of a third party observer and anxiety on tests of executive function. *Archives of Clinical Neuropsychology*, 23(4), 409–417. doi: 10.1016/j.acn.2008.02.002.
- Inter Organizational Practice Committee (2014). *Letter to the Supreme Court of British Columbia regarding audio recording of neuropsychological evaluations*. Retrieved March 26, 2021, from <https://www.nanonline.org/docs/PAIC/PDFs/IOPC%20audio%20recording%20of%20IME.PDF>.
- Kehrer, C. A., Sanchez, P. N., Habif, U. J., Rosenbaum, G. J., & Townes, B. D. (2000). Effects of a significant-other observer on neuropsychological test performance. *The Clinical Neuropsychologist*, 14(1), 67–71. doi: 10.1076/1385-4046(200002)14:1;1-8;FT067.
- Lewandowski, A., Baker, W. J., Sewick, B., Knippa, J., Axelrod, B., & McCaffrey, R. J. (2016). Policy statement of the American Board of Professional Neuropsychology regarding third party observation and the recording of psychological test administration in neuropsychological evaluations. *Applied Neuropsychology. Adult*, 23(6), 391–398. doi: 10.1080/23279095.2016.1176366.
- Marra, D. E., Hamlet, K. M., Bauer, R. M., – Bowers, D. (2020). Validity of teleneuropsychology for older adults in response to COVID-19: A systematic and critical review. *The Clinical Neuropsychologist*. doi: 10.1080/13854046.2020.1769192.
- McCaffrey, R. J., Lynch, J. K., & Yantz, C. L. (2005). Third party observers: Why all the fuss? *Journal of Forensic Neuropsychology*, 4(2), 1–15. https://doi.org/10.1300/J151v04n02_01.
- MHS Assessment (2020) *MHS: Test disclosure policy*. Retrieved March 26, 2021, from <https://mhs.com/test-disclosure-policy/>.
- Miller, J. B., & Barr, W. B. (2017). The technology crisis in neuropsychology. *Archives of Clinical Neuropsychology*, 32(5), 541–554. doi: 10.1093/arclin/acx050.

- National Academy of Neuropsychology Policy, & Planning Committee (2000). Presence of third party observers during neuropsychological testing: Official statement of the National Academy of Neuropsychology. *Archives of Clinical Neuropsychology*, 15(5), 379–380.
- National Academy of Neuropsychology (2000). Official position statement on test security. *Archives of Clinical Neuropsychology*, 15(5), 383–386.
- New York State Association of Neuropsychology (2014). *Letter to New York State Worker's Compensation Board, Re: Adopted Regulations Amendment of 12NYCRR 300.2 (IME Regulation)*.
- Pearson Assessments. (2018). *Legal policies*. Retrieved March 26, 2021, from <https://www.pearsonassessments.com/footer/legal-policies.html>.
- Psychological Assessment Resources, Inc. (2020). *Legal: PAR's privacy and legal policies*. Retrieved March 26, 2021, from <https://www.parinc.com/Legal>.
- Spengler PM, Walters NT, Bryan E, Millspaugh BS. Attorneys' Attitudes Toward Coaching Forensic Clients on the MMPI-2: Replication and Extension of Attorney Survey by Wetter and Corrigan (1995). *J Pers Assess*. 2020;102(1):56–65. doi: 10.1080/00223891.2018.1501568.
- Virginia Neuropsychological Association. (2006). Policy statement on the presence of third party observers in forensic neuropsychological assessments performed in the commonwealth of Virginia.
- Watt, S., & Crowe, S. F. (2017). Examining the beneficial effect of neuropsychological assessment on adult patient outcomes: A systematic review. *The Clinical Neuropsychologist*, 32(3), 368–390. doi: 10.1080/13854046.2017.1414885.
- Zasler, N. D. (2019). Limiting expert witness evaluation in cases of traumatic brain injury is unwise. June 6, 2019. Virginia Academy of Clinical Psychology Electronic Announcement-Vital.

EXHIBIT “P”

Lewis M. Etcoff, Ph.D., A.B.N.

*Nevada Licensed Psychologist No. 129
Diplomate, American Board of Professional Neuropsychology #257
Fellow, National Academy of Neuropsychology
Fellow, The American College of professional Neuropsychology*

VIA FACSIMILE OR EMAIL ONLY

August 23, 2021

Brent Quist, Esq.
Dennett Winspear
3301 N. Buffalo, Suite 195
Las Vegas, NV 89129
E-Mail: amarchant@dennettwinspear.com

RE: Renee Tice

Dear Mr. Quist,

Per your request, I have prepared a description of the Forensic Neuropsychological Evaluation that I would conduct for Ms. Tice to assess her mental, cognitive, and emotional status and to determine whether any impairments that may be present are associated with the subject incident/accident as described in the Complaint.

I will conduct a standard Forensic Neuropsychological Evaluation over a 2-day period, which comprises a structured interview, personality testing, and neuropsychological testing. The entire evaluation takes 10 to 11 hours. The neuropsychological tests require 5 hours of administration time; personality tests can take up to 3 hours to complete, and the structured interview takes between 2 and 3 hours, depending on Ms. Tice's number of case-related symptoms/impairments as well as the complexity of preexisting conditions. **All testing must be completed during the scheduled 2-day evaluation. No portion of any test may be completed outside of my office.**

The structured interview will address Ms. Tice's descriptions and perceptions of the injuries that she perceives to be caused by the subject incident/accident, and her claimed cognitive, somatic, and emotional problems/impairments. Interviewing will also address alternate stressors that may be responsible for causing or maintaining Ms. Tice's complaints and impairments. Pre-subject incident, post-subject incident, and current levels of Ms. Tice's psychological functioning will be addressed to ascertain substantiality and genuineness of complaints, and whether impairments that are present are proximately caused by the subject incident/accident. The impact of any impairments on salient dimensions of Ms. Tice's life will also be examined. The structured interview will inquire into the quality of Ms. Tice's historical adaptation through addressing early childhood, developmental, educational, vocational, relational, medical, trauma-related, and psychological histories.

Neuropsychological testing, using standardized, valid and reliable measures, will assess the following: working, verbal, and visual immediate and delayed memory functioning; effort/symptom validity; motor,

8475 S. Eastern Avenue, Suite 205, Las Vegas, NV 89123
(702) 876-1977 – (702) 876-0238

APP 000182

RE: RENEE TICE
AUGUST 23, 2021
PAGE 2

sensory perceptual, verbal/language, visual organizational, information processing speed and accuracy, executive functions, and academic skills.

Should there be any questions or need for elaboration or clarification, please do not hesitate to contact my office (702) 876-1977

Sincerely,

A handwritten signature in black ink that reads "Lewis M. Etkoff Ph.D." in a cursive script.

Lewis M. Etkoff, Ph.D., ABN

FORENSIC PSYCHOLOGICAL INTERVIEW TOPICS FOR PERSONAL INJURY LITIGATION

Family of Origin Relationships (including names, DOBs, ages)

- Mother
- Father
- Stepparents
- Siblings (including half and step)
- Parents' marriages
- Other pertinent relations (GPs, uncles, aunts)
- Family Psychiatric History

Marital / S.O. History (including names, DOBs, ages)

- Nature of relationships (dated, cohabitated, etc.)
- Both parties' ages at start and end of relationships

Examinee's Children (including names, DOBs, ages)

- Name of each son and daughter
- Nature of relationship (if adopted, step, etc.)

Subject Accident Related Information

- Accident recollections
- Immediate post-SA complaints
- Immediate post-SA treatments

Current Medical Care

- Treatment modalities
- Health care providers
- Medications

Educational History

- Names of schools
- Type and location (city, state) of schools
- Years and grades attended
- Major areas or programs (college prep, etc.)
- Certificates, degrees awarded and when
- Last grade attended
- Learning Disorders or ADHD?
- Educations strengths and weaknesses

Occupational History

- How earned money while growing up
- Adult jobs, positions, and responsibilities
- Employer
- Dates of employment
- Age when job was started
- Hours worked per week
- Reasons for leaving position

Residential History

- Location (city, state)
- Dates lived there
- Type of residence (home, apartment, etc.)
- Who else lived there

Medical History

- Type of disorder, illness, or injury
- Date of each injury or condition
- Doctors or hospitals where treated
- Medications prescribed
- Degree of recovery

Mental Health History

- Type of counseling (including hospitalization)
- Name of counselors or therapists
- Total number of sessions
- Starting and ending dates
- Medications prescribed
- Current emotional condition

Legal History

- Criminal activities, allegations, charges
 - Ages at which these occurred
 - Results (paid bonds or other fees, probation or parole, incarceration, house arrest)
- Civil or business law
- Worker's Comp
- Juvenile, divorce, paternity, other family law matters
- Agency, union grievance, or admin law matters

Traumatic Life Experiences

- Type and age at which it occurred

Current Life Stressors

Substance Use History

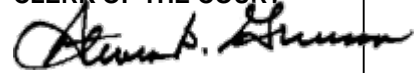
- What was used
- Where (home, job, bars, etc.)
- When (at dinner, weekends, holidays, etc.)
- How often (per day, week, month, year)
- How much consumed each time
- Ages at which use occurred

Recreational and Leisure Activities

- Name or type of activity
- Description of participation
- Years participated

Military History

- Service
- Branch, rate, rank
- Locations where stationed
- Dates at each location
- Age at time of service
- Any combat experiences



1 **OPPS**
2 **DILLON G. COIL, ESQ.**
Nevada Bar No. 11541
3 **RYAN A. LOOSVELT, ESQ.**
Nevada Bar No. 8550
4 **GGRM LAW FIRM**
2770 S. Maryland Pkwy, Ste. 100
5 Las Vegas, NV 89109
6 Phone: 702.384.1616 ~ Fax: 702.384.2990
7 Email: dcoil@ggrmlawfirm.com
rloosvelt@ggrmlawfirm.com

8 *Attorneys for Plaintiff*

9 **DISTRICT COURT**

10 **CLARK COUNTY, NEVADA**

11 TAYLOR MILES CAPE,

12 Plaintiff,

13 vs.

14
15 DAVID G. MARTINEZ, individually;
16 CHILLY WILLY'S HANDYMAN
SERVICES, LLC, a domestic limited-
17 liability company; DOES I through X; and
18 ROE BUSINESS ENTITIES 1 through X;
inclusive,

19 Defendants.
20

CASE NO.: A-20-818569-C

DEPT. NO.: 28

**PLAINTIFF'S OPPOSITION TO
DEFENDANTS MOTION TO COMPEL
IME BY DR. ETCOFF,**

COUNTERMOTION FOR FEES,

**AND IN THE ALTERNATIVE,
COUNTERMOTION TO STAY
ENFORCEMENT**

21 COMES NOW, Plaintiff, TAYLOR MILES CAPE ("plaintiff"), by and through his
22 attorneys of GGRM Law Firm, hereby files his Opposition to Defendants Motion to Compel
23 Neuropsychological IME with Dr. Etcoff and Countermotions.

24 This opposition/countermotion made and based on upon this Motion, the papers and
25 pleadings on file herein, the papers and orders incorporated herein, the accompanying Points

26 ///

27 ///

28 ///





1 and Authorities and Declaration, exhibits submitted herewith, and such oral argument as this
2 Court may entertain at the time of the hearing of this Motion.

3 DATED this 27th day of September, 2021.

4 **GGRM LAW FIRM**

5 */s/ Ryan A. Loosvelt, Esq.*

6 **DILLON G. COIL, ESQ.**

7 Nevada Bar No. 11541

8 **RYAN A. LOOSVELT, ESQ.**

9 Nevada Bar No. 8550

10 2770 S. Maryland Pkwy, Suite 100

11 Las Vegas, NV 89109

12 Phone: 702.384.1616 ~ Fax: 702.384.2990

13 *Attorneys for Plaintiffs*

14 **DECLARATION OF RYAN A. LOOSVELT, ESQ.**

15 I, Ryan A. Loosvelt, do hereby declare as follows:

16 1. I am over the age of eighteen, am an attorney with GGRM Law Firm duly licensed to
17 practice in the State of Nevada, attorneys of record for Plaintiff. I have personal knowledge of
18 the matters stated herein, unless otherwise stated upon information and belief, and can
19 competently testify thereto if called to do so. I file this Declaration in support of Plaintiff's
20 Opposition to Defendants' Motion to Compel IME by Dr. Etcoff and Countermotions.

21 2. Attached as **Exhibit 1** is a true and correct copy of the October 30, 2018 Affidavit of Dr.
22 Richard I. Frederick, PH.D.

23 3. Attached as **Exhibit 2** is a true and correct copy of the American Academy of Psychiatry
24 Law, Vol. 27, No. 2, article "Videotaping of Forensic Psychiatric Evaluations."

25 4. Attached as **Exhibit 3** is a true and correct copy of April 8, 2011 Affidavit of DR.
26 Howard V. Zonana.

27 5. Attached as **Exhibit 4** is a true and correct copy of the October 8, 2012 Affidavit of Dr.
28 Harry D. Krop, PH.D.



1 6. Attached as **Exhibit 5** is a true and correct copy of the April 2, 2003 Affidavit of Dr.
2 Jacqueline C. Valdes, PH.D.

3 7. Attached as **Exhibit 6** is a true and correct copy of the September 23, 1999 Affidavit of
4 Dr., Fred J. Petrilla Jr., PH.D.

5 8. Attached as **Exhibit 7** is a true and correct copy of the April 6, 2021 Order of the
6 Discovery Commissioner in Eighth Judicial District Court, Case No. A-19-800506-C, allowing
7 for an observer and recording of Dr. Etcoff's defense exam

8 9. Attached as **Exhibit 8** are true and correct copies of my emails with defense counsel
9 concerning the parameters of the IME.

10 10. Attached as **Exhibit 9** is a true and correct copy of is a true and correct copy of the
11 American Psychological Association's "Specialty Guidelines for Forensic Psychology."

12 11. The parties could also not come to an agreement on providing the materials to Plaintiff
13 and his counsel. Defendants during conferral raised copyright issues for not providing the
14 materials but were unable to articulate standing or any specific copyright issues. Nevertheless,
15 I offered to agree to Rule 26(c) protective order protections limiting the information to experts
16 and attorney's eyes only (for cross-examination purposes), limiting the use to this case, and
17 preventing any dissemination or commercial use. Nevertheless, Defendants refused.

18 12. Defendants never raised with Plaintiff during their discussions purported issues of
19 constitutionality of NRS 52.380 in order to properly bring it as a ground in its Motion.

20 13. Defendants represented during conferrals that Dr. Etcoff will not do exams with
21 observers and full recordings but did not reveal the Etcoff order, Exhibit 7, to Plaintiff, which
22 came to my attention while preparing this Opposition.

23 I declare under penalty of perjury under the laws of the State of Nevada that the foregoing
24 is true and correct.

25 DATED this 27th day of September, 2021.

26 /s/ Ryan A. Loosvelt
27 RYAN A. LOOSVELT
28



MEMORADNUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In this case the Plaintiff is willing to appear for an independent medical examination by defense physician Dr. Etcoff provided the parties could agree on the manner, scope and conditions of the examination. While Plaintiff was agreeable to compromises, none were provided by Defendants on the issues. In fact, the issues Plaintiff requested—an observer and recording—were recently ordered by this Court to be allowed at Dr. Etcoff’s exam in another case, but Defendants unreasonably fail to comply or agree with such conditions—that are allowed by law under NRS 52.380. Consequently, Defendants should also be sanctioned under EDCR 7.60(b) and ordered to pay for Plaintiff’s reasonable attorneys’ fees caused by their refusal and Motion, allowing Plaintiff’s counsel to submit its *Brunzell* analysis consistent therewith.

Specifically, Plaintiff wants to have an observer present during his neuro examination and also wants to have an audio and video recording of the entire examination, which Nevada law and recent orders of this Court specifically allow, and he will only agree to an examination subject to these conditions. Plaintiff also seeks to have defendant doctor’s notes, results, and materials provided to the defense so they can fairly cross-examine Dr. Etcoff during discovery a well. Plaintiff agreed to the imposition of Rule 26(c) protections to keep the materials limited to this case, not publicly disclosed, and expert/attorney’s eyes only, to address any concerns therewith. The Defendants have unreasonably refused to agree to these conditions which resulted in the instant Motion to Compel. Incidentally, the Plaintiff also has agreed to a 1.5 hour recorded physical IME with another defense physician as well.

Plaintiff has a right to refuse to appear for a Rule 35 examination unless the Defendant agree to the conditions set forth above. Having an observer present and recording the examination will not adversely affect the validity of the examination. Neuropsychological examinations are routinely performed under conditions where the examination is recorded and observers are present. It is also only fair that Plaintiff and his experts also have access to the defendant doctor’s results and materials in order to fairly cross-examine him. There is no reason



1 not to allow Plaintiff access to the defense physician's notes and materials, particularly since the
2 materials are agreed to be protected and not used outside this case or publicly disseminated under
3 Rule 26(c) protections. But serial defense expert Dr. Etcoff wishes his exams and results to be
4 conducted in secret given how open to manipulation these types of exams are.

5 For all of these reasons, the Defendant's Motion to Compel the Plaintiff to appear for an
6 examination without reasonable parameters should be denied. Alternatively, if an observer and
7 recording is not permitted, enforcement of this order should be stayed until the District Court
8 Judge can rule on Plaintiff's Objection to the DCR&R with respect to those parameters.

9 **II. STATEMENT OF FACTS**

10 This is an action claiming damages for injuries including traumatic brain injuries that
11 Plaintiff sustained in a serious motor vehicle crash. On or about, November 11, 2018, Plaintiff
12 was operating his vehicle southbound on Durango Drive attempting to make a left turn with a
13 permissive green signal onto Oso Blanca Road. Complaint, ¶9. Defendant Martinez, an unfit
14 employee of Defendant Chilly Willy's in the course and scope of his employment, ran the red
15 traffic signal which caused a violent collision with Plaintiff's vehicle resulting in debilitating
16 and life-long injuries to Plaintiff. *Id.* at ¶11, 17, 24.

17 Plaintiff previously underwent a neuropsychological examination in 2019 from a
18 *treating provider*, not a retained expert, about one year prior the filing of the Complaint on July
19 24, 2020. This treating provider neuro exam is Exhibit J to Defendant's Motion (and should be
20 stricken from the public record under Rule 12(f), Rule 26(c), and/or the Court's inherent
21 authority as it contains highly sensitive and private information about Plaintiff). This exam,
22 however, being conducted by a treating provider one year to the filing of the Complaint in this
23 case, was not in the course of litigation, discovery, or the retained expert process when
24 performed.

25 The parties conferred over the parameters of Dr. Etcoff's proposed IME, but could not
26 come to an agreement on an observer and recording. *See* Exhibit 8 emails. The parties could
27 also not come to an agreement on providing the materials to Plaintiff and his counsel. *Id.*
28 Defendants during conferral raised copyright issues for not providing the materials but were



1 unable to articulate standing or any specific copyright issues. *See* Loosvelt Decl. Nevertheless,
2 Plaintiff offered to agree to Rule 26(c) protective order protections limiting the information t
3 experts and attorney’s eyes only (for cross-examination purposes), limiting the use to this case,
4 and preventing ay dissemination or commercial use. Nevertheless, Defendants refused. *Id.*

5 Defendants, while acknowledging NRS 52.380 exists, nevertheless file their Motion and
6 argue, that despite it being the current state of Nevada law, it should not be enforced based on a
7 defense attorney advocacy article it submitted with its Motion. Defendants represented to
8 Plaintiff during conferrals that Dr. Etcoff would under no circumstances allow an observer or a
9 recording, and stated they might thus have to find a new expert. *Id.* However, this representation
10 turned out to be false, as Dr. Etcoff and/or Defendants failed to inform Plaintiff that Dr. Etcoff
11 was recently and specifically ordered in another case to allow an observer and recording.

12 In Eight Judicial District Court Case No. A-19-800506-C, Dr. Etcoff’s exam was
13 specifically ordered on April 6, 2021 to allow an observer and full recording:

- 14 1. Plaintiff is allowed to audio record the entire examination/testing
15 process as per NRCP 35(a)(3);
- 16 2. Plaintiff is allowed to have an observe present during the testing, as per
17 NRS 52.380 ...

18 Exhibit 7, April 6, 2021 Order. Yet, Dr. Etcoff and Defendants hid this from Plaintiff who
19 discovered it in preparing this Opposition.

20 Dr. Etcoff and Defendants also raise purported ethical issues with observers and
21 recordings, which are dispelled by the many physician affidavits submitted as **Exhibit 1-6**
22 hereto. In addition, the American Psychological Association (“APA”) has issued specific
23 Guidelines for forensic psychology that provide for openness, fairness, transparency, and
24 compliance with the court rules, law, and process in litigated matters. **Exhibit 9.** These
25 Affidavits and APA Guidelines are discussed more fully below.

26 ///

27 ///

28 ///



1 **III. ARGUMENT**

2 **A. The History and Purpose of NRS 52.380, Which Constitutes The Current**
3 **State of Nevada Law.**

4 Rule 35 states that a court “may order a party whose mental or physical condition . . . is
5 in controversy to submit to a physical or mental examination by a suitably licensed or certified
6 examiner.” NRCP 35(a)(1). Although Rule 35 exams are commonly referred to as “independent
7 medical exams,” that phrase is misleading because “[t]hese examinations are generally
8 performed by a defense-selected, defense-paid doctor, not a court-ordered independent expert.”
9 *Davanzo v. Carnival Cruise Lines*, 2014 WL 1385729, at *1-2 (S.D. Fla. Apr. 9, 2014). “[I]t is
10 somewhat artificial and unrealistic to describe such an exam as an [independent medical exam].”
11 *Id.*

12 Instead, a more accurate view is as a compulsory examination that is “more akin to a
13 litigant attending a deposition than a medical patient seeing his doctor.” *Id.* As a result, many
14 courts recognize that the examination is not independent but, rather, is “inextricably intertwined
15 with the adversarial process.” *Goggins v. State Farm Mut. Auto. Ins. Co.*, 2011 WL 1660609,
16 at *3 (M.D. Fla. May 3, 2011); *see also Zabkowicz v. West Bend Co.*, 585 F. Supp. 635, 636
17 (E.D. Wis. 1984) (“[T]he defendants’ expert is being engaged to advance the interests of the
18 defendants; clearly, the doctor cannot be considered a neutral in the case.”).

19 The inherently adversarial nature of a Rule 35 exam provided the backdrop for the need
20 for and eventual enactment of statutory safeguards for litigants during the exam, in particular,
21 the right to have an observer (including her or his attorney) and the right to record the exam.

22 These substantive safeguards were first recommended to be included in the 2019
23 revisions to Nevada’s Rules of Civil Procedure. *See* Hearing on A.B. 285 Before the Assembly
24 Judiciary Comm., 80th Leg. (Nev., Mar. 27, 2019), (statement of Graham Galloway, representing
25 NJA) (testifying that the subcommittee tasked with providing recommendations on the updated
26 NRCP 35 “voted 7-to-1 to make substantial changes, the changes that are [now] set forth or
27 embodied in [NRS 52.380].”).

28 ///



1 However, despite the recommendations, the adoption of NRCP 35 modified those
2 safeguards in two crucial ways. First, the rule allowed recording at the court’s discretion “for
3 good cause shown,” rather than as a matter of right. Second, the rule prohibited a “party’s
4 attorney or anyone employed by the party or the party’s attorney” from serving as an observer
5 of the examination, and prohibited observers at a “neuropsychological, psychological, or
6 psychiatric examination, [unless] the court orders otherwise for good cause shown.” Here,
7 whether the Court allows it under NRS 53.380, it may and should alternatively do so for good
8 cause under Rule 35.

9 Because of the recommendations, yet omission of those crucial safeguards from NRCP
10 35, the 2019 Legislature sought to enshrine those substantive rights in statutory form to make
11 sure they were allowed to litigants. *See, e.g.,* Hearing on A.B. 285 Before the Assembly
12 Judiciary Comm., 80th Leg. (Nev., Mar. 27, 2019) (statement of Graham Galloway) (“The
13 origins of this bill flow from a committee formed by the Supreme Court of Nevada two years
14 ago to review, revise, and update our Nevada Rules of Civil Procedure—the rules that govern
15 all civil cases.”).

16 The result was **NRS 52.380**, entitled “**Attendance by observer**,” under the section
17 entitled “**MENTAL OR PHYSICAL EXAMINATION**,” more recently adopted after Rule
18 35’s latest prior adoption. The statute mandates that, *as a matter of right*, a party may have an
19 observer, including a party’s attorney, present at his or her examination. NRS 52.380(1)-(2).
20 Further, the statute provides that the observer may, as a matter of right, make a recording of the
21 examination. NRS 52.380(3). In addition to those substantive safeguards, the statute includes
22 several additional procedural rights, including the right for an observer or the examiner to
23 suspend the examination and the ability to file a protective order. NRS 52.380(4)-(6).

24 NRS 52.380 provides, in relevant part, that:

25 **MENTAL OR PHYSICAL EXAMINATION**

26 **NRS 52.380 Attendance by observer.**

- 27 1. An observer may attend an examination but shall not participate in or
28 disrupt the examination.
2. The observer attending the examination pursuant to subsection 1 may be:



- (a) An attorney of an examinee or party producing the examinee; or
- (b) A designated representative of the attorney, if:
 - (1) The attorney of the examinee or party producing the examinee, in writing, authorizes the designated representative to act on behalf of the attorney during the examination; and
 - (2) The designated representative presents the authorization to the examiner before the commencement of the examination.
3. The observer attending the examination pursuant to subsection 1 may make an audio or stenographic recording of the examination.
4. The observer attending the examination pursuant to subsection 1 may suspend the examination if an examiner:
 - (a) Becomes abusive towards an examinee; or
 - (b) Exceeds the scope of the examination, including, without limitation, engaging in *unauthorized diagnostics, tests or procedures*.

As the Nevada State Legislature intended, the enactment of NRS 52.380 provided litigants with a right to have an observer present and a recording made of a Rule 35 examination, including a neuropsychological examination. In addition, as shown by the “unauthorized” tests and procedures, a physician must identify the authorized tests he or she might seek to utilize. NRS 52.380 is the current state of the law in Nevada, and Defendants in essence are refusing to comply with the law in bringing their instant Motion.

B. NRS 52.380 Creates a Substantive Right to Record and have Observed One’s Own Rule 35 Medical or Psychological Examination.

A substantive rule or statute is one that “creates duties, rights and obligations,” while a procedural rule or statute merely “specifies how those duties, rights, and obligations should be enforced.” *Azar v. Allina Health Services*, 587 U.S. —, —, 139 S. Ct. 1804, 1811 (2019); *see also* 1 James W. Moore, *Moore’s Federal Practice* § 1.05[2][b], at 1-29 (3d ed. 2016) (“Substantive rights are rights established by law. The term ‘substantive’ does not mean rights that are ‘important’ or ‘substantial,’ but rather those that have been conferred by the Constitution, by statute, or by the common law.”). A substantive statute supersedes a conflicting procedural statute or court rule. *Connery*, 99 Nev. at 345, 661 P.2d at 1300.

The statute’s plain language and legislative history confirm that NRS 52.380 creates a right to record and have observers, including an attorney, present at one’s own NRCP 35 exam.



1 Thus, NRS 52.380’s substantive provisions preempt NRCP 35’s conflicting provisions as was
2 intended by the Legislature of the State of Nevada.

3 **1. The plain language of NRS 52.380 shows it creates substantive rights.**

4 This Court reviews questions of statutory construction de novo. *APCO Constr., Inc. v.*
5 *Zitting Bros. Constr., Inc.*, 136 Nev., Adv. Op. 64, 473 P.3d 1021, 1027 (2020). When
6 “construing a statute, [this Court’s] analysis begins with its text.” *Shue v. State*, 133 Nev. 798,
7 805, 407 P.3d 332, 338 (2017). “When the language of a statute is plain and unambiguous, a
8 court should give that language its ordinary meaning and not go beyond it.” *City Council of*
9 *Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 891, 784 P.2d 974, 977 (1989).

10 The plain language of NRS 52.380, contains rights that can be protected or enforced by
11 law as well as the means with which those rights should be enforced. Indeed, the statute both
12 creates the substantive right to right to have an observer present at one’s own independent
13 medical exam, including a psychological, neuropsychological, or psychiatric exam, see NRS
14 52.380(1)-(2), to have an observer record one’s own exam, see NRS 52.380(3), and provides the
15 procedural rules to enforce those rights. See NRS 52.380(4) (allowing observer to suspend the
16 exam); NRS 52.380(5) (allowing examiner to suspend the exam); NRS 52.380(6) (allowing the
17 examinee to move for a protective order if the exam is suspended).

18 Thus, the Court need not go beyond the statute’s plain text to determine that those plainly
19 substantive portions of the statute—NRS 52.380(1)-(3)—create the right to record and have
20 observed one’s own psychological, neuropsychological, or psychiatric independent medical
21 exam that supersede the conflicting portions of NRCP 35.

22 **2. The legislative history of NRS 52.380 proves it is a substantive right.**

23 Although the Court need not go beyond the plain text of NRS 52.380 to resolve this
24 issue, the statute’s legislative history further confirms that the right to record and to have
25 observers present are, and were intended to be, substantive rights that supersede NRCP 35.

26 Indeed, “[t]here is . . . no more persuasive evidence of the purpose of a statute than the
27 words by which the legislature undertook to give expression to its wishes. Often these words are
28 sufficient in and of themselves to determine the purpose of the legislation.” *United States v.*



1 *Am. Trucking Ass'ns*, 310 U.S. 534, 543 (1940). The legislative intent of a statute can be
2 determined by examining the statements of a bill's major proponents. *See, e.g., Valenti v. State,*
3 *Dep't of Motor Vehicles*, 131 Nev. 875, 881, 362 P.3d 83, 87 (2015) ("The most informative
4 statement as to the Legislature's intent in defining [a statutory term] came from a lead proponent
5 of [the bill].").

6 Here, the legislative history explicitly provides that NRS 52.380 was enacted to provide
7 a substantive right to record and to have observers in one's own exam:

8 The reason we are before you today is because [A.B. 285] protects
9 substantive rights. This is not a procedural rule, which you would usually
10 find within our [Nevada Rules of Civil Procedure]. Our Nevada Rules of
11 Civil Procedure involve things such as how many years someone has to
12 file a lawsuit and how many days someone has to file a motion or an
13 opposition to a motion. This bill does not involve those types of issues
14 but, instead, involves a substantive right of a person during an
15 examination by a doctor whom he did not choose, does not know, and has
16 no relationship with whatsoever, a doctor who was chosen by an
17 insurance defense attorney.

18 *See* Hearing on A.B. 285 Before the Assembly Judiciary Comm., 80th Leg. (Nev., Mar. 27,
19 2019) (statement of George T. Bochanis, representing NJA).

20 Additionally, proponents of the bill noted that having an observer present at an
21 examination and or having the ability to record the exam are substantive rights litigants have in
22 Alaska, Arizona, California, Connecticut, Delaware, Florida, Illinois, Indiana, Kentucky,
23 Massachusetts, Michigan, New Jersey, New York, Pennsylvania, Oklahoma, Washington, West
24 Virginia, and Utah, as well as in the Fifth Circuit and indeed in Nevada in the workers-
25 compensation context.⁴ *See* Hearing on A.B. 285 Before the Assembly Judiciary Comm., 80th
26 Leg. (Nev., Mar. 27, 2019) (Exhibit C).

27 As outlined in Exhibit C to the Assembly Judiciary Committee, Arizona, California,
28 Illinois, Michigan, Pennsylvania, Oklahoma, Washington, and Utah authorize either the
presence of an observer or audio recording of the exam by statute or court rule. *See* Ariz. R.
Civ. P. 35(c); Cal. Code Civ. P. § 2032(q)(2); 735 Ill. Comp. Stat. § 5/2 - 1003(d) (2008); Mich.



1 R. Civ. P. R. 2, 311 (1985); Pa. R. Civ. P. 4010 (2002); 12 Okla. Stat. § 3235(D); Wa. Super.
2 Ct. R. Civ. Cr. 35 (2001); Utah R. Civ. Proc. R. 35 (1993).

3 Additionally, Alaska, Connecticut, Delaware, Florida, Indiana, Kentucky,
4 Massachusetts, New Jersey, New York, West Virginia, and the Fifth Circuit have all recognized
5 one or both of the substantive rights in their caselaw. *See Lagfeldt–Haaland v. Saupe Enterprise,*
6 *Inc.*, 768 P.2d 1144, 1147 (Alaska 1989); *Polcaro v. Daniels*, 2007 WL 1299159 (Conn. Sup.
7 Ct. 2007); *Rocken v. Huang*, 558 A.2d 1108, 1111 (Del. Sup. Ct. 1988); *Lunceford v. Florida*
8 *Central Railroad Co., Inc.*, 728 So.2d 1239, 1241 (Fla. App. 5. Dist. 1999); *Jacob v. Chaplain*,
9 639 N.E. 2d 1010, 1013 (Ind. 1994); *Metropolitan Property & Cas. Ins. Co. v. Overstreet*, 103
10 S.W. 3d 31, 38-40 (Ky. 2003); *Hepburn v. Barr & Barr*, 2006 WL 1711849 (Mass. Sup. Ct.
11 2006); *B.D. v. Carley*, 704 A.2d 979, 981 (N.J. 1998); *Flow v. Cty. of Oneida*, 34 A.D. 3d 1236
12 (N.Y. 2006); *State ex rel. Hess v. Henry*, 393 S.E. 2d 666 (W. Va. 1990); *Acosta v. Tenneco Oil*
13 *Co.*, 913 F.2d 205 (5th Cir. 1990).

14 Finally, the legislative history reveals that, although members of the committee tasked
15 with recommending revisions to NRCP 35 for the 2019 overhaul of Nevada’s Rules of Civil
16 Procedure voted 7-to-1 to provide the substantive rights now embodied in NRS 52.380, the
17 changes were not adopted in the 2019 update to the rules. *See* Hearing on A.B. 285 Before the
18 Assembly Judiciary Comm., 80th Leg. (Nev., Mar. 27, 2019) (statement of George T. Bochanis,
19 representing NJA). The failure to include the substantive protections within NRCP 35
20 necessitated the proposal, and eventual enactment, of what is now NRS 52.380.

21 This legislative history confirms what the statute’s plain text demonstrates: that NRS
22 52.380 was explicitly enacted to create substantive right for litigants when they are most
23 vulnerable during discovery—during one’s own examination by “a defense-selected, defense-
24 paid doctor” in a process “inextricably intertwined” with the inherently adversarial litigation
25 process. The Legislature considered the effect an observer could have during an NRCP 35
26 examination, and ultimately allowed a litigant to have an observer, including his or her attorney,
27 present during any type of NRCP 35 exam and to have their observer record the exam. Granting
28



1 this right was well within the Legislature’s power, meaning the substantive provisions of NRS
2 52.380 preempt the competing provisions of NRCP 35.

3 **3. NRS 52.380 is Constitutional.**

4 Although legislation that violates the separation of powers is unconstitutional, *see*
5 *Comm’n on Ethics v. Hardy*, 125 Nev. 285, 299, 212 P.3d 1098, 1108 (2009), all statutes are
6 **presumed to be constitutional** and “every possible presumption will be made in favor of the
7 constitutionality of a statute.” *List v. Whisler*, 99 Nev. 133, 137-38 (1983). In other words,
8 “unless it be demonstrated that there is clearly no rational and legitimate reason for the
9 [enactment of the statute], [this Court] must uphold the law.” *Mengelkamp v. List*, 88 Nev. 542,
10 545, 501 P.2d 1032, 1034 (1972); *see also* Michael L. Stokes, Judicial Restraint and the
11 Presumption of Constitutionality, 35 U. Tol. L. Rev. 347, 372-73 (2003) (“While the
12 fundamental principle of judicial review dictates that the judiciary must have the last word in
13 constitutional matters, the other branches consider the matter first, and their conclusions deserve
14 deference.”). Defendants have not made any such showing, and the advocacy article by defense
15 attorneys they provided is likewise unavailing.

16 Here, ample evidence of the rational and legitimate reasons for NRS 52.380’s enactment
17 further support the statute’s presumptive constitutionality. The Legislature heard testimony
18 detailing the need for substantive safeguards for litigants undergoing NRCP 35 exams and the
19 specific safeguards that were necessary to protect the litigants during those exams. The
20 safeguards discussed in that testimony are now embodied as the substantive provisions of NRS
21 52.380. As a result, this Court should conclude that NRS 52.380’s substantive provisions
22 regarding the right to record and the right to have an observer at an NRCP 35 exam are
23 constitutional and/or not reach that issue because Defendants never properly conferred with
24 Plaintiff on the issue of constitutionality in order to bring it as a ground in its Motion. *See*
25 *Loosvelt Decl.*; EDCR 2.34. Thus, NRS 52.380 is the current state of the law in Nevada.

26 ///

27 ///

28 ///



1 **C. The Rule 35 Neuropsychological Examination May be Ethically and**
2 **Accurately Performed with an Observer and a Recording, And the**
3 **Providing of All Data to Plaintiff and his Attorneys.**

4 In support of its request that the Court disregard the provisions of NRS 52.380,
5 Defendants argue there are ethical concerns about sensitive neuropsychological test materials
6 being disseminated to the public and concerns that the presence of observers and/or the recording
7 of the examination may alter or change the results of the testing. Dr. Etcoff's objections to
8 having observers and/or recording of his Rule 35 examination are based upon his own personal
9 idiosyncrasies rather than established standards or some broad consensus in the psychological
10 community, and have previously been rejected by this court. *See e.g.* Exhibit 7, Order allowing
11 observer and recording at Dr. Etcoff's examination. Dr. Etcoff's positions are not shared by the
12 majority of the members of the psychological community and his objections are not well
13 founded.

14 **1. There is no Ethical Prohibition on Observers or Recording And**
15 **Safeguards like Protective Orders may be issued.**

16 It is ethical for an examiner such as Dr. Lewis Etcoff to allow an observer to be present
17 and to allow the recording of a Rule 35 examination. Psychologist Richard I. Frederik, Ph.D.
18 authored an affidavit on October 30, 2018 in which he explained that there is no prohibition on
19 psychologists allowing their examinations to be recorded. As he explained:

20 The Ethical Principles of Psychologists and Code of Conduct (2010, American
21 Psychological Association) does not in any way restrict evaluating psychologists
22 from recording evaluations to be used in legal proceedings. The requirement
23 (Section 9.11) is that "Psychologists make reasonable efforts to maintain the
24 integrity and security of test materials and other assessment techniques consistent
25 with the law and contractual obligations, and in a manner that permits adherence
26 to the Ethics Code."

27 "Reasonable efforts" to maintain security of test materials do not require that
28 evaluating psychologists work to prevent the recording of their assessments.
Consulting psychologists must have free and unfettered access to recordings of
assessments to provide a full and useful analysis of the reliability and validity of
assessments offered as evidence in a disputed manner. Attorneys must be able to



1 examine specific instances of variations, errors, omissions, or misbehavior to allow
2 for cross-examination of opinions offered by evaluating psychologists.

3 Exhibit 1: Affidavit of Richard I. Frederik, Ph.D. Paragraph 16-17. Dr. Frederik explains that
4 the ethical guidelines for psychologists anticipate and allow for the need to comply with court
5 proceedings by producing even sensitive and confidential materials:

6 The 2014 edition of the Standards for Educational and Psychological Testing
7 anticipates the need to produce documents and secure test information in the
8 resolution of disputed matters. Standard 6.7 of the Standards states “Test users must
9 balance test security with the rights of all test takers and test users. When sensitive
10 test documents are at issue in court or in administrative agency challenges, it is
11 important to identify security and privacy concerns and needed protections at the
12 outset. Parties should ensure that the release and exposure of such documents
13 (including specific sections of those documents that may warrant redaction) to third
14 parties, experts, and the courts/agencies themselves are consistent with the
15 conditions (often reflected in protective orders) that do not result in inappropriate
16 disclosure and that do not risk unwarranted release beyond the particular setting in
17 which the challenge has occurred.” Psychologists who are unwilling to record their
18 examinations are unwilling to balance the rights of the plaintiff against the need for
19 test security.

20 *Id.* at ¶18. He explains that exams can be recorded provided that reasonable safeguards are
21 followed:

22 There is no part of Standard 6.7 that can be read to mean that an evaluation cannot
23 be recorded or that the recording cannot be reviewed by those who are obligated to
24 protect test security. There is no part of Standard 6.7 that can be read to mean that
25 an evaluation cannot be recorded to identify which parts should be reviewed by
26 “third parties” or “courts/agencies” to determine if opinions or conclusions have
27 valid and reliable bases. Instead, current standards of testing require that
28 psychologists anticipate how to “release and expose” such documents to third
parties that protect the security issues.

29 *Id.* at ¶19.

30 Here, Plaintiff proposed agreeing to protective order limitations, yet Defendants flatly
31 refused. However, Dr. Frederik also explains that any ethical concerns can be resolved through
32 the issuance of a protective order regarding the manner in which confidential materials are
33 handled:



1 A protective order ensures that all test security concerns are addressed so that the
2 evaluating psychologist can fulfill his or her ethical responsibilities to protect tests
3 and test information.

4 *Id.* at ¶11).

5 **2. There is no Ethical Prohibition on Videotaping**

6 Dr. Frederik went on to explain that a protective order also addresses any test security
7 concerns while giving all parties access to the test data and recordings:

8 Video recording and production of raw test data preserve evidence of all variations,
9 errors, omissions, and misbehavior on the part of the psychologist, should they
10 occur. Although there are legitimate and important reasons for any psychologist to
11 maintain the protection of test items, test questions, and stimulus materials from
12 public access, the need for security must not prevent preservation of evidence of
13 potential errors and misconstructions that form the basis for the evaluation
14 psychologist's conclusions. A protective order will address all test security concerns
15 while giving all parties access to the test data and recordings.

16 *Id.* at ¶15. Here, Plaintiff offered videotaping the exam under protections but Defendants
17 refused an observer or videotaping.

18 The American Academy of Psychiatry and the Law published a study titled "Videotaping
19 of Forensic Psychiatric Evaluations," attached as **Exhibit 2**, in which the task force evaluated
20 the benefits and drawbacks of videotaping psychological examinations. Following an
21 exhaustive review of the subject, the findings were as follows:

22 **"The Task Force finds the option of videotaping to be an ethically
23 acceptable medical practice."**

24 Exhibit 2: "Videotaping of Forensic Psychiatric Evaluations."

25 The Chairman of the American Psychiatric Association's Task Force on Videotaping
26 Forensic Psychiatric Examinations, Yale's Dr. Howard Zonana authored an affidavit in which
27 he explained that allowing a video recording is a commonly accepted practice which does not
28 compromise ethics. Exhibit 3: Affidavit of Howard V. Zonana, M.D.

There is no ethical prohibition on allowing video recording and/or an observer during
the Rule 35 examination. The manner in which the test materials and/or recording of the testing



1 are to be handled can be maintained subject to appropriate confidentiality agreements and can
2 be disposed of at the conclusion of the case.

3 **3. The Rule 35 examination will not be Adversely Affected by the**
4 **Presence of an Observer and the Recording of the Examination.**

5 An observer during the examination and recording the examination does not adversely
6 affect the outcome of the testing. The recent consensus among the majority of psychologists is
7 that having observers present and/or recording neuropsychological examination and testing does
8 not impact the test results to any appreciable degree.

9 The Chairman of the American Psychiatric Association's Task Force on Videotaping
10 Forensic Psychiatric Examinations, Yale's Dr. Howard Zonana, testified that he has video
11 recorded examinations for over twenty-five years with advantageous effects. Dr. Zonana
12 explains that video recording provides the following benefits and protections, which far
13 outweigh any perceived disadvantage:

- 14 1. videotape does not compromise ethics;
- 15 2. videotape is more comprehensive than handwritten notes;
- 16 3. videotape accurately records the entire interaction;
- 17 4. videotape enables objective evaluation of facial expressions, verbal tone,
18 body language and behavior;
- 19 5. videotape ensures that all raw data is preserved;
- 20 6. videotape eliminates subsequent disputes;
- 21 7. videotape provides the examinee with greater sense that the process will
22 be fair;
- 23 8. videotape provides accessibility;
- 24 9. no reliable research suggest that videotape substantively alters
25 examination or test results;
- 26 10. most examinees ignore the video camera;
- 27 11. the logistics of videotaping are simple, once instituted;
- 28 12. the cost of videotaping is relatively minor;
13. videotaping may be easily accomplished with a simple camera or one-
way mirror;
14. the examiner's best practice is to videotape forensic examinations;



1 15. videotape is beneficial to the examiner by ensuring accuracy (i.e. proof
2 examiner did not abuse the process or examinee);

3 16. videotape provides the examinee with the only basis for verifying
4 events reported by the adversary's expert witness.

5 Exhibit 3: Affidavit of Howard V. Zonona, M.D.

6 Similarly, Psychologist Richard I. Frederik, Ph.D explains that it is a common practice
7 in the psychological field to record psychological examinations:

8 Recordings are commonly used in psychological examinations to create a record of
9 exactly what happened in the examination session. Recording is a common practice
10 that does not need to create any sort of disruption to the psychological testing
11 process, when modern equipment is used. I have reviewed many hours of recorded
12 evaluations conducted by licensed, board-certified psychologists and
13 neuropsychologists.

14 Exhibit 1 at ¶14).

15 Many psychologists have explained that it is common practice to record psychological
16 examinations:

- 17 • Psychologist Harry D. Krop, Ph.D., **Exhibit 4**, explains that video
18 recording psychological examinations is a common practice in the field
19 of psychology.
- 20 • Psychologist Jacqueline C. Valdes, Ph.D., **Exhibit 5**, explains that she
21 regularly performs examinations while being video recorded subject to a
22 protective order.
- 23 • Psychologist Fred J. Petrilla, Ph.D., **Exhibit 6**, explains he regularly
24 performs examinations while being video recorded subject to a protective
25 order.

26 Dr. Frederik, Ph.D. further explained that recording does not adversely affect the results
27 of a neuropsychological examination. He explained:

28 Some psychologists claim that knowledge that one is being record (and the
examiner's knowledge that the examination is being recorded) negatively affects test
performance. A 2002 report showed that knowledge that an examination was being
recorded produced very small differences in test performance on memory tasks. A
2013 report revealed that no such differences actually existed, and, in fact,
differences in testing were better accounted for by gender and handedness—
random variables that cannot possibly be controlled. There is no reason to believe
that knowledge that one is being recorded systematically affects psychological
assessment in any meaningful way.



Eastvold, Belanger, and Vanderploeg (2012) published a review of all known articles dealing with the effects of being observed or recorded during cognitive task performance. They found 210 such articles, and they included 62 that were satisfactory for comparisons in their review. Most of the studies of the effect of having an observer or knowledge that one is being recorded during neuropsychological examination show no effect or have the effect of improving performance. Some studies show a negative effect of being observed or recorded, decreasing performance. As can be seen in Figure 1 from Eastvold et al. (2012), the overall effect across all studies included for review is near zero. When all known studies are included and evaluated and not selectively chosen for their negative findings, it is immediately seen that there is no systematic phenomena from being observed or recorded.

Exhibit 1 at ¶¶23, 25).

4. Public Policy Reasons Support NRS 52.380 Because of the Manipulation that occurs in secret in litigation by hired experts.

Dr. Frederik also examine and explained some of the potential problems with unobserved and unrecorded Rule 35 neuropsychological examinations which demonstrate the importance of having an accurate record of what actually transpired during the examination:

The reason for reviewing the videos is to ensure that tests were administered in ways that they must be administered in order for the tests to have any reliability or validity for understanding client conditions, attitudes, behavior, and cognition. Variations to standard test administration are important. Most tests have exact procedures in instructions, wording, practice, feedback, time of exposure, documentation, and scoring of responses. These exact procedures must be followed, and the exact procedures are easily followed by trained test administrators who adhere to ethical practice of psychometrics.

I have reviewed about 40-50 video recorded assessments in litigated matters. Some of these reviews have included reviews of video recordings of Dr. Sally Kolitz Russell and her staff. Reviews of these videos have revealed numerous, pervasive, and important changes to standardized procedures, and the reports accompanying those evaluations did not report her failures to strictly observe the same procedures used when obtaining for generating test scores. She nevertheless generated the test scores as if she had followed test procedures and interpreted test scores as if she had done what was necessary to afford the interpretation. I have generated lengthy reports identifying in detail the numerous, pervasive, and important changes to standardized procedure that would not have been discovered had not the examinations been video recorded.



1 I have rarely observed an examination by neuropsychologists or clinical
2 psychologists that did not include important deviations from standard procedure
3 that did not include striking, important departures from standard procedure.
4 Following standard procedure is what makes test interpretation possible. When
5 standard procedure is not followed, the psychologist is obligated to report it and to
6 explain the potential implications to reliability and validity of test results—the test
7 results should be considered invalid for interpretation unless the psychologist can
8 explain why the departure is unimportant. Again, I have rarely seen an entire video
9 recorded examination without a serious violation to standard procedure, and I can
10 think of only one or two occasions in which the psychologist reported a deviation
11 to standard procedure and discussed it. Without the video recordings, the serious
12 problems in examinations would be unknown.

13 Exhibit 1, at ¶¶ 7, 9, 10.

14 Dr. Frederik also discusses the problems with testing that has been done that he has
15 been able to identify through use of video recordings, making it beneficial for the fair cross-
16 examination of hired gun experts:

17 Following are some of the many problems that I have observed upon review of the
18 data and recordings of psychological examinations:

19 a. A test is reported to have been administered. A review of the video shows
20 that the test was never given.

21 b. Tests are given, but they are given incorrectly:

22 i. The examiner fails to give instructions in the way required by the
23 publisher. The examiner makes up instructions or uses non-standard
24 instructions.

25 ii. The examiner fails to limit the time in which certain tasks can be
26 accomplished. Some tasks require strict time limits.

27 iii. The examiner times the tasks as required but records an
28 inaccurate time.

iv. The examiner fails to follow rules for when certain follow-up
tasks are to be administered.

v. The examiner fails to follow an established pattern for how tests
are to be administered and does not record or identify failure to follow the
established pattern of test administration.

vi. The examiner fails to read instructions in a verbatim manner as
prescribed by the test publisher. Instead, the examiner makes up the
instructions as the test progresses.

vii. The examiner does not query certain responses in a prescribed
manner. viii. The examiners queries responses that were not to be queried.



ix. The examiner prompts for a response when prompts are explicitly prohibited.

x. The examiner is given an incorrect response. Instead of scoring it as wrong, the examiner tells the plaintiff that the answer is wrong and then prompts for a correct response with hints. The resulting response is then given full credit.

xi. The examiner teaches the plaintiff how to solve certain problems when this is explicitly prohibited by the publisher, and then gives the plaintiff credit for responses following the teaching of the task.

xii. The plaintiff gives one answer. The examiner writes down a different answer never uttered by the plaintiff.

xiii. The test requires that the examiner be positioned in a certain way or that materials be positioned in a certain way, and these requirements are ignored and not documented in the report.

c. The examiner uses a demeaning tone when giving instructions, speaks angrily to the plaintiff, or mocks the plaintiff.

d. There are undocumented interruptions to the testing procedure by actions or noise. None of the following distractions, interruptions, impediments to valid testing (all discovered only by recording), or consideration of their potential impact were reported by the examiner:

- A plaintiff attempts to memorize material for testing while a landscaper used a Weed-Eater directly outside the window.

- An assistant comes into the room and refills coffee for the examiner and plaintiff while the plaintiff is being given lists of words for memorization.

- An examiner noisily re-loads his copier machine while the plaintiff is completing a paper-and-pencil test.

- An examiner responds to e-mail by clacking on his keyboard while the plaintiff is completing a paper-and-pencil test.

- The plaintiff appears to be sedated or falling asleep during the examination, but this is not noted by the examiner.

- A plaintiff is presented with a series of pictures to memorize. Bright sunshine is unshaded by the examiner. The pictures for memorization are presented with a sharp glare on them.

- A plaintiff is presented with series of pictures to memorize. The examiner has his head on the examining table and does not notice that the plaintiff is massaging his neck during the presentation with his head pointed at the ceiling. The plaintiff never saw most of the pictures presented.

- An examiner presents a test for the memorization of words by computer. The examiner is required to leave the room during the several-



minute interval for memorization. Instead, he stays in the room and makes a great deal of noise during the attempt to memorize by the plaintiff.

e. Scoring rules for recorded items are followed incorrectly. Responses by the plaintiff are assigned incorrect values.

f. The examiner mis-scores the test. The examiner erroneously assigns a score to items because of calculation errors or by misidentifying incorrect responses as correct or correct responses as incorrect. Some mis-scorings cannot possibly be identified without a recording. For example, some scores depend on writing down and scoring exactly what is said or by recording the absolutely correct time to complete a task. I have seen examiners write down a different response or a different time and thereby mis-score the item.

g. The examiner mis-enters responses into a computer-based scoring program.

h. The examiner uses bootleg and illegal scoring programs that generate incorrect values for test scores used for interpretation.

i. The examiner derives certain scores when scoring the responses and then reported different values in the written report.

All of these instances represent threats to the accuracy, reliability, validity, and appropriateness of the opinions and conclusions of the evaluating psychologist who performed the testing. Most of the threats to the accuracy, reliability, validity, and appropriateness of the opinions and conclusions of the evaluating psychologist would not have been discovered had not evidence been secured from the evaluation. Clearly, merely providing copies of test forms is not satisfactory for allowing an evaluation of the opinions and conclusions of the evaluating psychologist. Recording the examination is the best way to ensure a proper record of the examination exists. Video recording and audio recording provide these safeguards—video recording offers the best protection.

Exhibit 1, ¶¶12-13.

The problems that Dr. Frederik has observed and identified illustrate the danger of allowing psychological examinations to be performed unsupervised, unrecorded, and in secret as Dr. Etcoff seeks to do here. Nevada law provides an examinee with the right to have an observer and recording.

5. The APA has also recognized the need for transparency and compliance with the legal process in its Guidelines.

The American Psychological Association (“APA”) has issued specific Guidelines for forensic psychology that provide for openness, fairness, transparency, and compliance with the court rules, law, and process:



Guideline 7.01: Conflicts With Legal Authority

When their responsibilities conflict with law, regulations, or other governing legal authority, forensic practitioners make known their commitment to the EPPCC, and take steps to resolve the conflict. ... When the conflict cannot be resolved by such means, forensic practitioners may adhere to the requirements of the law, regulations, or other governing legal authority ...

Guideline 8.02: Access to Information

... Access to records by anyone other than the retaining party is governed by legal process, usually subpoena or court order, or by explicit consent of the retaining party ...

Guideline 10.06: Documentation and Compilation of Data Considered

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, and transcriptions; assessment and test data, scoring reports and interpretations; and all other records in any form or medium that were created or exchanged in connection with a matter. When contemplating third party observation or audio/ video-recording of examinations, forensic practitioners strive to consider any law that may control such matters, the need for transparency and documentation, and the potential impact of observation or recording on the validity of the examination and test security.

Guideline 10.07: Provision of Documentation

Pursuant to proper subpoenas or court orders, or other legally proper consent from authorized persons, forensic practitioners seek to make available all documentation described in Guideline 10.05, all financial records related to the matter, and any other records including reports (and draft reports if they have been provided to a party, attorney, or other entity for review), that might reasonably be related to the opinions to be expressed.

Exhibit 9.

While the Defendants submit an article/advocacy piece, the American Psychological Association makes clear that fairness, transparency, and compliance with the legal process is permissible and should be adhered to.

///

///



1 **D. To The Extent The Court Does Not Allow Plaintiff's Requested Parameters,**
2 **It Should Stay Enforcement Pending Objection to the District Court.**

3 Under EDCR 2.34(e), the “commissioner may stay any disputed discovery proceeding
4 pending resolution by the judge.” Here, if Plaintiff’s parameters are not recommended and the
5 exam proceeds before the District Judge can rule on Plaintiff’s Objection, the harm cannot be
6 undone, and the Objection would be rendered moot. Therefore, Plaintiff countermoves for a
7 stay of enforcement to the extent its requested parameters are not recommended by the
8 Discovery Commissioner. “An opposition to a motion that contains a motion related to the same
9 subject matter will be considered as a countermotion” and a “countermotion will be heard and
10 decided at the same time set for the hearing of the original motion if a hearing was requested,”
11 as here. EDCR 2.20(e).

12 **E. Defendants Should Be Ordered to Pay Plaintiff's Reasonable Fees Caused**
13 **By Their Motion.**

14 Defendants have failed to comply with Nevada law in NRS 52.380, have unreasonably
15 failed to agree with an order concerning Dr. Etcoff examination parameters recently issued by
16 the Court, and concealed the same from Plaintiffs during conferrals, instead representing that
17 Dr. Etcoff never has had an observer or full recording. This conduct has resulted in the vexatious
18 multiplication of these proceedings, unnecessary increase in costs, among other things.

19 “The court may, after notice and an opportunity to be heard, impose upon an attorney or
20 a party any and all sanctions which may, under the facts of the case, be reasonable, including
21 the imposition of fines, costs or attorney’s fees when an attorney or a party without just cause:”

22 (1) Presents to the court a motion or an opposition to a motion which is
23 obviously frivolous, unnecessary or unwarranted ...

24 (3) So multiplies the proceedings in a case as to increase costs
25 unreasonably and vexatiously.

26 (4) Fails or refuses to comply with these rules.

27 (5) Fails or refuses to comply with any order of a judge of the court.

28 EDCR 7.60(b).



Defendants should therefore be ordered to pay for Plaintiff's reasonable attorneys' fees caused by its conduct here, and upon so allowing, Plaintiff should be permitted to provide his support and *Brunzell* analysis in furtherance thereof.

IV. CONCLUSION

For the foregoing reasons and arguments, this Court should:

1. DENY Defendants' Motion, and:

- a. allow a video recording (Plaintiff's preference) or audio recording;
- b. allow an observer attend, but not interfere, with the exam; and,
- c. provide all the raw data, notes, files, testing, results, pertaining to his evaluation and treatment of Plaintiff to be provided to Plaintiff's expert and to Plaintiff's attorneys under Rule 26(c) protections.

2. Alternatively, this Court should stay enforcement of this order until the District Court Judge has ruled on Plaintiff's Objection to DCR&R to the extent these parameters are not ordered in this proceeding.

3. This Court should also GRANT Plaintiff's Countermotion under EDCR 7.60(b), and allow Plaintiff to submit its *Brunzell* analysis and support for Defendants not complying with the same parameters ordered in the *Lehnardt* case against Dr. Etcoff on April 6, 2021, unnecessarily and vexatiously increasing the costs of this case by not agreeing to the same parameters here it know the Court requires.

DATED this 27th day of September, 2021.

GGRM LAW FIRM

/s/ Ryan A. Loosvelt

DILLON G. COIL, ESQ.

Nevada Bar No. 11541

RYAN A. LOOSVELT, ESQ.

Nevada Bar No. 8550

2770 S. Maryland Pkwy, Ste. 100

Las Vegas, NV 89109

Phone: 702.384.1616 ~ Fax: 702.384.2990

Attorneys for Plaintiff



LAW FIRM
INJURY ATTORNEYS

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of GGRM LAW FIRM and that on the 27th day of September, 2021, I caused the foregoing document entitled **PLAINTIFF'S OPPOSITION TO DEFENDANTS MOTION TO COMPEL IME BY DR. ETCOFF** to be served upon those persons designated by the parties in the E-service Master List for the above-referenced matter in the Eighth Judicial Court E-filing System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules, to wit:

/s/ Gianna Mosley

An Employee of GGRM LAW FIRM

EXHIBIT 1

IN THE CIRCUIT COURT IN AND FOR BREVARD COUNTY, FLORIDA

CASE NO. 05-2013-CA-028522

LAUREN C. CAMP, as guardian advocate of E.L.F., and LAUREN C. CAMP, individually,

Vs.

BREVARD ACHIEVEMENT CENTER, INC., a Florida corporation.

AFFIDAVIT OF RICHARD I. FREDERICK, PH.D.

I, Richard I. Frederick, Ph.D., who being duly sworn under oath with penalties of perjury applying and states from his own firsthand knowledge:

PROFESSIONAL BACKGROUND

1. My name is Richard I. Frederick, Ph.D. I am over eighteen (18) years of age. I am engaged in the private practice of psychology in the state of Missouri.
2. I am a psychologist licensed in the State of Missouri, continuously so licensed without interruption since 1992, and engaged full-time in the practice of forensic psychological assessment since 1988. I also am licensed as a psychologist in the States of Arkansas, Kansas, Texas, Florida, Iowa, Oklahoma, Wisconsin, and Louisiana.
3. I am board certified by the American Board of Professional Psychology, with a specialty in Forensic Psychology since 1996. I am board certified by the American Board of Assessment Psychology since 2007.
4. My professional activity includes 23 years of service to the US Navy as an evaluating and treating psychologist, including assignment in 2003 to the Combat Stress Unit, 4th Medical Battalion, I Marine Expeditionary Force, mobilized to a combat zone for Operation Iraqi Freedom. My role in the US Navy included assessment and testimony

for many courts-martial as a mental health expert. I retired as a US Navy Captain in 2008.

5. My professional activity includes 20 years as expert witness for the US Department of Justice, involved in hundreds of evaluations of criminal defendants for criminal responsibility, competency to proceed, and dangerousness to others. I have produced neutral forensic psychological assessments and provided expert testimony for all federal circuits and numerous federal districts. My *curriculum vitae* is attached as Exhibit A.
6. I retired from the US Department of Justice in 2012. Since my retirement from the federal government, I have been able to work in forensic psychological matters without restriction. My regular and routine work involves reviewing the accuracy, reliability, validity, and appropriateness of psychological test data that have been generated by psychologists in litigated and criminal matters. Part of my review of evidence generated by psychological experts includes the review of video recorded neuropsychological assessments. I have reviewed about 40-50 of such assessments in litigated matters.
7. The reason for reviewing the videos is to ensure that tests were administered in ways that they must be administered in order for the tests to have any reliability or validity for understanding client conditions, attitudes, behavior, and cognition. Variations to standard test administration are important. Most tests have exact procedures in instructions, wording, practice, feedback, time of exposure, documentation, and scoring of responses. These exact procedures must be followed, and the exact procedures are easily followed by trained test administrators who adhere to ethical practice of psychometrics.
8. *The Standards for Educational and Psychological Testing* (2014, 3rd ed.), published jointly by the American Educational Research Association, American Psychological Association, and National Council on Measurement in Education guide professional

behavior regarding following standardized procedures. The *Standards* makes clear that psychological tests should “follow carefully” “standardized procedures” and that test administration rules should be “*strictly observed*”:

Standard 6.1 Test administrators should follow carefully the standardized procedures for administration and scoring specified by the test developer and any instructions for the test user....Specifications regarding instructions to test takers, time limits, the form of item presentation or response, and test materials or equipment should be strictly observed. In general, the same procedures should be followed as were used when obtaining the data for scaling and norming the test scores.

Standard 6.3 Changes or disruptions to the standardized test administration procedures or scoring should be documented and reported to the test user.

9. I have reviewed about 40-50 video recorded assessments in litigated matters. Some of these reviews have included reviews of video recordings of Dr. Sally Kolitz Russell and her staff. Reviews of these videos have revealed numerous, pervasive, and important changes to standardized procedures, and the reports accompanying those evaluations did not report her failures to strictly observe the same procedures used when obtaining for generating test scores. She nevertheless generated the test scores as if she had followed test procedures and interpreted test scores as if she had done what was necessary to afford the interpretation. I have generated lengthy reports identifying in detail the numerous, pervasive, and important changes to standardized procedure that would not have been discovered had not the examinations been video recorded.

**REASONS WHY VIDEO RECORDING DEFENSE
NEUROPSYCHOLOGICAL EXAMINATIONS IS NECESSARY**

10. Dr. Kolitz Russell's testing practices are not unique. I have rarely observed an examination by neuropsychologists or clinical psychologists that did not include important deviations from standard procedure that did not include striking, important departures from standard procedure. Following standard procedure is what makes test interpretation possible. When standard procedure is not followed, the psychologist is obligated to report it and to explain the potential implications to reliability and validity of test results—the test results should be considered invalid for interpretation unless the psychologist can explain why the departure is unimportant. Again, I have rarely seen an entire video recorded examination without a serious violation to standard procedure, and I can think of only one or two occasions in which the psychologist reported a deviation to standard procedure and discussed it. Without the video recordings, the serious problems in examinations would be unknown.
11. Psychological testing involves asking the examinee to perform tasks or answer questions. The "raw test data" from an examination are not only the answers to questions, but how the client behaved, how quickly, how effortfully, and how accurately. Timing is essential. Accurate record keeping is essential. Video recording and copies of documents completed during testing all parties to generate and present hypotheses about the meaning of test behavior, test responses, and test scores. A protective order ensures that all test security concerns are addressed so that the evaluating psychologist can fulfill his or her ethical responsibilities to protect tests and test information.
12. Following are some of the many problems that I have observed upon review of the data and recordings of psychological examinations:

- a. A test is reported to have been administered. A review of the video shows that the test was never given.
- b. Tests are given, but they are given incorrectly:
 - i. The examiner fails to give instructions in the way required by the publisher. The examiner makes up instructions or uses non-standard instructions.
 - ii. The examiner fails to limit the time in which certain tasks can be accomplished. Some tasks require strict time limits.
 - iii. The examiner times the tasks as required, but records an inaccurate time.
 - iv. The examiner fails to follow rules for when certain follow-up tasks are to be administered.
 - v. The examiner fails to follow an established pattern for how tests are to be administered and does not record or identify failure to follow the established pattern of test administration.
 - vi. The examiner fails to read instructions in a verbatim manner as prescribed by the test publisher. Instead, the examiner makes up the instructions as the test progresses.
 - vii. The examiner does not query certain responses in a prescribed manner.
 - viii. The examiners queries responses that were not to be queried.
 - ix. The examiner prompts for a response when prompts are explicitly prohibited.
 - x. The examiner is given an incorrect response. Instead of scoring it as wrong, the examiner tells the plaintiff that the answer is wrong and

then prompts for a correct response with hints. The resulting response is then given full credit.

- xi. The examiner teaches the plaintiff how to solve certain problems when this is explicitly prohibited by the publisher, and then gives the plaintiff credit for responses following the teaching of the task.
 - xii. The plaintiff gives one answer. The examiner writes down a different answer never uttered by the plaintiff.
 - xiii. The test requires that the examiner be positioned in a certain way or that materials be positioned in a certain way, and these requirements are ignored and not documented in the report.
- c. The examiner uses a demeaning tone when giving instructions, speaks angrily to the plaintiff, or mocks the plaintiff.
- d. There are undocumented interruptions to the testing procedure by actions or noise. None of the following distractions, interruptions, impediments to valid testing (all discovered only by recording), or consideration of their potential impact were reported by the examiner:
- A plaintiff attempts to memorize material for testing while a landscaper used a Weed-Eater directly outside the window.
 - An assistant comes into the room and refills coffee for the examiner and plaintiff while the plaintiff is being given lists of words for memorization.
 - An examiner noisily re-loads his copier machine while the plaintiff is completing a paper-and-pencil test.

- An examiner responds to e-mail by clacking on his keyboard while the plaintiff is completing a paper-and-pencil test.
 - The plaintiff appears to be sedated or falling asleep during the examination, but this is not noted by the examiner.
 - A plaintiff is presented with a series of pictures to memorize. Bright sunshine is unshaded by the examiner. The pictures for memorization are presented with a sharp glare on them.
 - A plaintiff is presented with series of pictures to memorize. The examiner has his head on the examining table and does not notice that the plaintiff is massaging his neck during the presentation with his head pointed at the ceiling. The plaintiff never saw most of the pictures presented.
 - An examiner presents a test for the memorization of words by computer. The examiner is required to leave the room during the several-minute interval for memorization. Instead, he stays in the room and makes a great deal of noise during the attempt to memorize by the plaintiff.
- e. Scoring rules for recorded items are followed incorrectly. Responses by the plaintiff are assigned incorrect values.
- f. The examiner mis-scores the test. The examiner erroneously assigns a score to items because of calculation errors or by misidentifying incorrect responses as correct or correct responses as incorrect. Some mis-scorings *cannot* possibly be identified without a recording. For example, some scores depend on writing down and scoring *exactly* what is said or by recording the

absolutely correct time to complete a task. I have seen examiners write down a different response or a different time and thereby mis-score the item.

- g. The examiner mis-enters responses into a computer-based scoring program.
- h. The examiner uses bootleg and illegal scoring programs that generate incorrect values for test scores used for interpretation.
- i. The examiner derives certain scores when scoring the responses and then reported different values in the written report.

13. All of these instances represent threats to the accuracy, reliability, validity, and appropriateness of the opinions and conclusions of the evaluating psychologist who performed the testing. Most of the threats to the accuracy, reliability, validity, and appropriateness of the opinions and conclusions of the evaluating psychologist would not have been discovered had not evidence been secured from the evaluation. Clearly, merely providing copies of test forms is not satisfactory for allowing an evaluation of the opinions and conclusions of the evaluating psychologist. Recording the examination is the best way to ensure a proper record of the examination exists. Video recording and audio recording provide these safeguards—video recording offers the best protection.

See the following table:

Problems in forensic psychological assessment and ways to identify them			
Problematic behavior or issue	Copies of all generated test data	Audio recording of assessment	Video recording of assessment
Test not administered even though report says it was	Can Identify	Can Identify	Can Identify
Testing time limits not observed by examiner	Cannot identify	Cannot identify	Can identify

Examiner records inaccurate time taken to accomplish test	Cannot identify	Cannot identify	Can identify
Examiner fails to follow rules for follow-up questions or tasks.	Might identify	Can identify	Can identify
Examiner fails to follow the established pattern of test administration	Cannot identify	Can identify	Can identify
Examiner makes up instructions—does not read instructions in manner required	Cannot identify	Can identify	Can identify
Examiners does not query certain responses in prescribed manner to fully develop response	Might identify	Can identify	Can identify
Examiner queries responses that were not to be queried	Might identify	Can identify	Can identify
Examiner makes up answers that were not given and writes them down	Cannot identify	Can identify	Can identify
Examiner, in violation of test rules, teaches how to do certain tasks and then gives credit for correct responses	Cannot identify	Might identify	Can identify
Client gives one answer. Examiner writes down something different.	Cannot identify	Can identify	Can identify
The client and test materials are supposed to be positions in a specified manner, but the examiner ignores the requirement	Cannot identify	Cannot identify	Can identify
Examiner uses demeaning tone when speaking to client	Cannot identify	Can identify	Can identify
Undocumented interruptions occur,	Cannot identify	Can identify	Can identify

threatening the validity of the test administration			
Scoring rules are followed incorrectly	Can identify	Can identify	Can identify
Examiner mis-scores the test	Can identify	Can identify	Can identify

14. The current examination is being used to create evidence intended for use in a disputed matter. Dr. Kolitz Russell, who was retained by the defense, will depend on the evidence generated to support opinions or conclusions about the plaintiff. It is important for others to be able to evaluate the basis, the reliability, and the validity of Dr. Kolitz Russell's opinions and conclusions. A recording of the examination will permit an evaluation of the basis for these opinions and conclusions. Recordings are *commonly* used in psychological examinations to create a record of exactly what happened in the examination session. Recording is a *common* practice that does not need to create any sort of disruption to the psychological testing process, when modern equipment is used. I have reviewed many hours of recorded evaluations conducted by licensed, board-certified psychologists and neuropsychologists.

15. Video recording and production of raw test data preserve evidence of all variations, errors, omissions, and misbehavior on the part of the psychologist, should they occur. Although there are legitimate and important reasons for any psychologist to maintain the protection of test items, test questions, and stimulus materials from public access, the need for security must not prevent preservation of evidence of potential errors and misconstructions that form the basis for the evaluation psychologist's conclusions. A protective order will address all test security concerns while giving all parties access to the test data and recordings.

**THERE IS NOTHING INHERENTLY UNPROFESSIONAL OR
UNETHICAL ABOUT RECORDING AN EVALUATION**

16. The Ethical Principles of Psychologists and Code of Conduct (2010, American Psychological Association) does not in any way restrict evaluating psychologists from recording evaluations to be used in legal proceedings. The requirement (Section 9.11) is that “Psychologists make reasonable efforts to maintain the integrity and security of test materials and other assessment techniques consistent with the law and contractual obligations, and in a manner that permits adherence to the Ethics Code.”
17. “Reasonable efforts” to maintain security of test materials do not require that evaluating psychologists work to prevent the recording of their assessments. Consulting psychologists must have free and unfettered access to recordings of assessments to provide a full and useful analysis of the reliability and validity of assessments offered as evidence in a disputed manner. Attorneys must be able to examine specific instances of variations, errors, omissions, or misbehavior to allow for cross-examination of opinions offered by evaluating psychologists.
18. The 2014 edition of the *Standards for Educational and Psychological Testing* anticipates the need to produce documents and secure test information in the resolution of disputed matters. Standard 6.7 of the *Standards* states “Test users must balance test security with the rights of all test takers and test users. When sensitive test documents are at issue in court or in administrative agency challenges, it is important to identify security and privacy concerns and needed protections at the outset. Parties should ensure that the release and exposure of such documents (including specific sections of those documents that may warrant redaction) to third parties, experts, and the courts/agencies themselves are consistent with the conditions (often reflected in protective orders) that do not result

in inappropriate disclosure and that do not risk unwarranted release beyond the particular setting in which the challenge has occurred.” Psychologists who are unwilling to record their examinations are unwilling to balance the rights of the plaintiff against the need for test security.

19. There is no part of Standard 6.7 that can be read to mean that an evaluation cannot be recorded or that the recording cannot be reviewed by those who are obligated to protect test security. There is no part of Standard 6.7 that can be read to mean that an evaluation cannot be recorded to identify which parts should be reviewed by “third parties” or “courts/agencies” to determine if opinions or conclusions have valid and reliable bases. Instead, current standards of testing require that psychologists anticipate *how* to “release and expose” such documents to third parties that protect the security issues.

RECORDING IS NOT THIRD-PARTY OBSERVATION

20. Professional organizations have expressed legitimate concerns about the presence of third parties (usually attorneys) in evaluation settings. The primary concern is observers will abandon the role of observer and interrupt the examination. Such interruptions could certainly invalidate certain parts of an assessment.
21. An audio or video recording system is not a “third-party observer.” Modern recording devices are not inherently distracting. Furthermore, potential distractions are common in psychological assessment. Evaluators commonly bring their cell phones into examining rooms and have their computers up and running. I have seen many evaluators respond to texts, check messages, and engage in computer tasks while an evaluation is being conducted. Plaintiffs often bring in their own phones and the examiner does not instruct them to turn them off. I have yet to see psychologists in such situations state in their reports that such distractions occurred or that they had any impact on the examination.

**THERE IS NO COMPELLING EVIDENCE THAT RECORDING AFFECTS
PLAINTIFF TEST PERFORMANCE IN ANY MEANINGFUL WAY**

22. There is a subgroup of professional psychologists who continue to resist having their work product scrutinized or evaluated by making a recording, and they often cite a case study¹ from 1995 to support a claim that third party observers can influence test performance. The third party in this case study was the examinee's mother.
23. Some psychologists claim that knowledge that one is being record (and the examiner's knowledge that the examination is being recorded) negatively affects test performance. A 2002² report showed that knowledge that an examination was being recorded produced very small differences in test performance on memory tasks. A 2013³ report revealed that no such differences actually existed, and, in fact, differences in testing were better accounted for by gender and handedness—random variables that cannot possibly be controlled. There is no reason to believe that knowledge that one is being recorded systematically affects psychological assessment in any meaningful way.
24. It is reasonable for psychologists to be concerned about threats to the reliability and validity of their data collection process. It is reasonable for psychologists to strive to make their testing environment as similar as possible to the circumstances under which the normative sample was given the tests originally. But there are many much greater threats to the validity of test interpretation that psychologists routinely ignore and do not comment upon, for example:

¹ Binder, L. M, & Johnson-Greene, D. (1995) Observer effects on neuropsychological performance: A case report. *The Clinical Neuropsychologist*, 9, 74-78.

² Constantinou, M., Ashendorf, L., and McCaffrey, R. J. (2002). When the third party observer of a neuropsychological evaluation is an audio-recorder. *The Clinical Neuropsychologist*, 15, 407-412.

³ Stencik, J. H. (2013). Effects of third party observation behind a one-way mirror on neuropsychological tests with varying conative load. Unpublished dissertation.

a). The normative samples for most of the tests Dr. Kolitz Russell intends to administer did not contain a single person who was involved in litigation. The exception is that some of the tests Dr. Kolitz Russell will use to evaluate for malingering may have included such samples. Both plaintiff and defense psychologists readily agree to test plaintiffs with tests that were developed only for use with patients who have no stake in the outcome of testing—who were tested only to provide information about abilities or to develop the test—and not to serve as a basis for decisions about claimed impairment from an injury. Plaintiffs and patients are two different groups of people with different characteristics. It is obviously unreasonable for a psychologist to readily agree to interpret scores that depart so severely from the characteristics of the normative samples upon which the tests are based, “but only if they do not know they are being recorded. Knowing that they are being recorded is far more threatening to valid interpretation than not having a counterpart in the normative sample.” Such a view is absurd.

b). The normative samples for most of the tests Dr. Kolitz Russell intends to administer do not include individuals who reasonably construe the examiner as an agent of the people who are trying to prevent what they consider as rightful compensation for an injury. It does not matter whether Dr. Kolitz Russell is the independent and above-board examiner we should expect him to be. We cannot prevent plaintiffs from mistrusting individuals hired by the defense. The normative samples of most of the tests Dr. Kolitz Russell intends to administer do not include individuals that openly mistrust their examiners. Trust between examiner and examinee is one of the essential underpinnings of valid and reliable

testing, and it is obviously unreasonable for a psychologist to assert that it is acceptable to test individuals who do not trust their examiners, “but only if they do not know they are being recorded. Knowing they are being recorded is far more threatening to valid interpretation than failing to develop a collaborative relationship during testing.” Such a view is absurd.

c). Psychologists readily and commonly bring assistants and supervisees into the testing situation, or they themselves sit in the testing session while their assistants administer tests. Psychometrists have to be trained and supervised. New psychologists have to be trained and supervised. It is unprofessional for psychologists to allow psychometrists and new psychologists to train themselves without direct supervision. They must be observed. In-person observation of testing is a routine practice of psychologists.

d). Recording of examinations reveals that psychologists and their assistants routinely engage in actions or behavior that directly threatens the reliability and validity of test data. Interpretations of data that are unreliably generated are misleading, inaccurate, and invalid. Without recording, these serious lapses of professional examiner behavior would be hidden and unknown.

25. Eastvold, Belanger, and Vanderploeg (2012) published a review of all known articles dealing with the effects of being observed or recorded during cognitive task performance. They found 210 such articles, and they included 62 that were satisfactory for comparisons in their review. *Most of the studies* of the effect of having an observer or knowledge that one is being recorded during neuropsychological examination show *no effect* or have the *effect of improving performance*. *Some studies* show a negative effect of being observed or recorded, *decreasing performance*. As can be seen in Figure 1 from

Eastvold et al. (2012), the overall effect across all studies included for review is near zero. When all known studies are included and evaluated and not selectively chosen for their negative findings, it is immediately seen that there is no systematic phenomena from being observed or recorded.

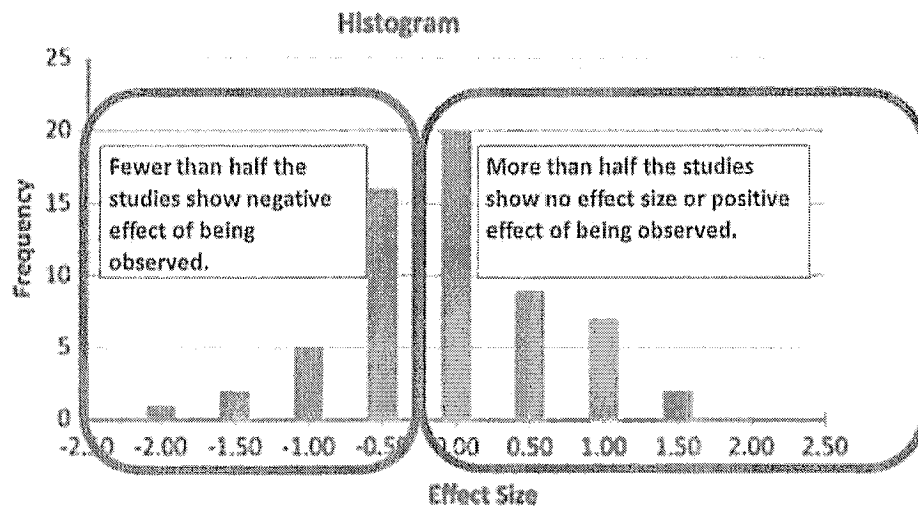


Figure 1. Frequency of 63 unweighted effect sizes from 62 studies

RECORDING A PSYCHOLOGICAL EXAMINATION IS CONSISTENT WITH PROFESSIONAL STANDARDS

26. The American Psychological Association promulgates standards for psychologists who apply scientific, technical, or specialized knowledge of psychology to the law to assist in addressing legal matters. The specialty guidelines for forensic psychology are informed by APA's Ethical Principles of Psychologists and Code of Conduct.
27. Guideline 11.04 states: "Consistent with relevant law and rules of evidence, when providing professional reports and other sworn statements or testimony, forensic practitioners strive to offer a complete statement of all relevant opinions that they formed within the scope of their work on the case, the basis and reasoning underlying the

opinions, the salient data or other information that was considered in forming the opinions, and an indication of any additional evidence that may be used in support of the opinions to be offered.”

28. The Ethical Principles 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....”
29. 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]
30. The 2014 edition of the Standards for Educational and Psychological Testing anticipates the need to produce documents and secure test information in the resolution of disputed matters. Standard 6.7 of the Standards states “Test users must balance test security with the rights of all test takers and test users. When sensitive test documents are at issue in court or in administrative agency challenges, it is important to identify security and privacy concerns and needed protections at the outset. Parties should ensure that the release and exposure of such documents (including specific sections of those documents that may warrant redaction) to third parties, experts, and the courts/agencies themselves are consistent with the conditions (often reflected in protective orders) that do not result in inappropriate disclosure and that do not risk unwarranted release beyond the particular

setting in which the challenge has occurred.” There is no part of Standard 6.7 that can be read to mean that an evaluation cannot be recorded or that the recording cannot be reviewed by those who are obligated to protect test security. There is no part of Standard 6.7 that can be read to mean that an evaluation cannot be recorded to identify which parts should be reviewed by “third parties” or “courts/agencies” to determine if opinions or conclusions have valid and reliable bases.

31. Those who work in the legal environment—those working as forensic psychologists—should strive to address the needs of all parties involved. There is a legitimate basis for a claimant to want the protection of having his or her examination recorded. The legal community is well aware of such issues.
32. For example, with respect to the value of recording to protect the interests of individuals being evaluated in adversarial matters, the American Bar Association’s 2016 Criminal Justice Standards on Mental Health addresses the importance of documenting evaluations through video recording:

Standard 7-3.5. Procedures for conducting evaluations:

(d) recording the evaluation

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

(iii) Jails and other correctional facilities should maintain equipment that evaluators may use to make audio and video recordings of evaluations they conduct in such facilities. The equipment should be available, on 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.

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

33. For example, The state of Illinois requires video recording of all criminal mental health examinations unless it is impractical to do so:

<http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=098-1025> (Section 5, 2d).

RECORDING OF PSYCHOLOGICAL EXAMINATIONS
NEED NOT COMPROMISE TEST SECURITY

34. Psychologists do have legal and ethical obligations to ensure that some test information be kept from public disclosure. Such release would potentially compromise the usefulness of the tests and in doing so would certainly threaten the proprietary interests of the test publisher. The leading publisher of psychological tests in the world is Pearson Assessments. Their position (as found on their website) is this: "Should litigation in which a psychologist is involved reach the stage where a court considers ordering the release of proprietary test materials to non-professionals such as counsel, we request that the court issue a protective order prohibiting parties from making copies of the materials; requiring that the materials be returned to the professional at the conclusion of the proceeding; and requiring that the materials not be publicly available as part of the record of the case, whether this is done by sealing part of the record or by not including the materials in the record at all" (bolding added). The sort of protective order anticipated here concerns both recording and the copying of test documents.

WHY VIDEO RECORDING IS ESSENTIAL IN LITIGATED MATTERS

35. As I noted in paragraph 6, my regular and routine work involves reviewing the accuracy, reliability, validity, and appropriateness of psychological test data that have been generated by psychologists in litigated and criminal matters. Part of my review of evidence generated by psychological experts includes the review of video recorded neuropsychological assessments. I have reviewed about 40-50 of such assessments in litigated matters. For the most part, these assessments were conducted by board certified neuropsychologists who are members of both the American Academy of Clinical Neuropsychology and the National Academy of Neuropsychology. I am aware that many of the neuropsychologists that I watch conduct assessments of litigants strongly objected to the presence of a video camera in their assessment. Nevertheless, they agreed to have the assessments record, because there is no ethical or professional requirement that prevents them from doing so. They do not like being recorded, but they agreed to be recorded. I have yet to see in a single report completed by any neuropsychologist that I have viewed giving examinations any statement identifying any basis to reject the reliability or validity of their assessments because they were video recorded.
36. All of these instances represent threats to the accuracy, reliability, validity, and appropriateness of the opinions and conclusions of the evaluating psychologist who performed the testing. Most of the threats to the accuracy, reliability, validity, and appropriateness of the opinions and conclusions of the evaluating psychologist would not have been discovered had not evidence been secured from the evaluation. Clearly, merely providing copies of test forms is not satisfactory for allowing an evaluation of the opinions and conclusions of the evaluating psychologist.

37. Video recording preserves evidence of all variations, errors, omissions, and misbehavior on the psychologist, should they occur. Although there are legitimate and important reasons for any psychologist to maintain the protection of test items, test questions, and stimulus materials from public access, the need for security must not prevent preservation of evidence of potential errors and misconstructions that form the basis for the evaluation psychologist's conclusions. The consulting psychologists should be able to review with plaintiff's attorney those portions of the video that demonstrate variations, errors, omissions, or misbehavior so that plaintiff's attorney can evaluate their usefulness in cross-examining the evaluating psychologist regarding the evidence that form the bases of his opinions.

38. This means that the attorney must be authorized to have access to the videos of the examination and the attorney must be able to review certain "raw data" that are otherwise restricted in access. For example, if the evaluating psychologist mistakes a constructional task in which both the blocks used to make constructions and the pictures provided to prompt constructions are otherwise considered protected from public access, the attorney must be able to view the video and to see the nature of the error. In doing so, the attorney will see the blocks and the pictures for blocks. The consulting psychologists retained by the attorney must be specifically authorized by the court to use the videos and raw data in this way to provide the plaintiff's attorney with a full and fair evaluation of the evidence on which the psychologist's opinions are based. Consulting psychologists are retained to afford the opportunity to understand and appreciate the nature of the evidence used by the psychologist to form opinions. The consulting psychologists should not have to fear complaints that they violated any professional standards by explicitly

identifying variations, errors, omissions, or misbehavior through reference to raw data or videos of examinations.

SUMMARY

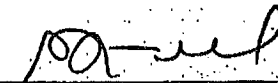
39. In summary,

- a) The only way to ensure that data collection during a psychological evaluation was conducted in a scientifically valid and reliable manner is to record the examination. Video recording offers more protection than audio recording.
- b) Recording of psychological examinations consistently and routinely reveals invalid and unreliable methodology that was unreported or admitted to by the examiner.
- c) Some of this invalid and unreliable methodology has been so profound as to invalidate the examination—once it was discovered.
- d) Recording does not have to be distracting, intrusive, or to result in any decrement in test performance. There is no compelling evidence that knowledge that one is being recorded has any systematic influence on test scores.
- e) It is not a violation of copyright or publisher agreements to record examinations and to deliver the recording to another licensed psychologist. If attorneys need to see elements of the examination (e.g., the recording itself or certain test materials), a protective order is commonly used to ensure that secure test information is not publicly disclosed. Publishers do not forbid recording of examinations, and they have provided guidance for how to conduct examinations in legal matters in a way that protects their proprietary interests.
- f) No professional standards exist in psychology that prohibit a psychologist from recording examinations. On the contrary, standards of practice for test

professionals embrace transparency and demonstration that procedures are reliable and valid. Psychologists routinely and commonly record examinations in litigated matters.

FURTHER, AFFIANT SAYETH NOT.

Dated: This 30 day of OCT, 2018


Richard I. Frederick, Ph.D.

I, Richard I. Frederick, PhD, swear or affirm under the penalties of perjury, that the foregoing information and representations contained within this affidavit are true and accurate to the best of my knowledge.

Dated: This 30 day of OCT, 2018


Richard I. Frederick, Ph.D.

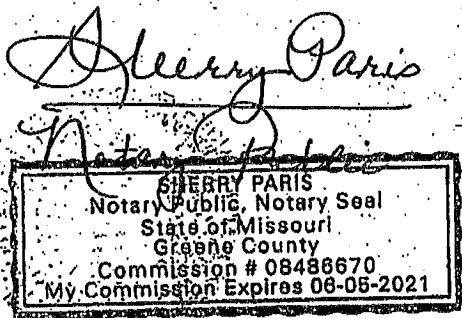


EXHIBIT 2

Videotaping of Forensic Psychiatric Evaluations

AAPL Task Force

Forensic psychiatry, like other areas of medicine, is working to establish standards of practice as the subspecialty expands. There are a growing number of experts who routinely videotape or audiotape their evaluations. Some of them have proposed that videotaping should be the standard of practice for forensic evaluations. The purposes of the AAPL Task Force on Videotaping Forensic Interviews are to review the relevant case law, to consider the advantages and disadvantages of videotaping forensic interviews, and to give guidance to psychiatrists working as legal consultants. Many of the clinical issues are similar for audiotaping and videotaping, but this paper focuses on videotaping and the conclusions pertain to videotaping.

The first part of this report discusses the clinical and forensic advantages and disadvantages of videotaping forensic interviews. The next section will examine the emerging case law on videotapes of forensic interviews. The third part of the report will review the technique of admitting videotapes into evidence, with emphasis on the responsibility of the foren-

sic psychiatrist. The final section contains recommendations from the task force to AAPL.

Clinical Issues

The results of forensic evaluations are generally summarized in a report submitted to the court or to the attorney requesting the evaluation. Testimony may be required and would be subject to direct and cross-examination. It is necessary for psychiatric experts to be able to explain the basis for their conclusions both in their reports and on the witness stand. The conclusions are frequently grounded, in part, upon what the plaintiff or defendant told the expert. Experts also have to describe their observations of the defendant's or plaintiff's demeanor and behavior during the evaluation. It is not surprising that most forensic psychiatrists take copious notes during the interviews and/or dictate notes shortly after the interviews so as to preserve impressions and data. With the advent of portable audio- and videotaping equipment becoming readily available, it has become increasingly feasible to record the entire interview.

The most common reason for videotaping or audiotaping is to create a more complete and accurate record in lieu of or

This report was approved by the AAPL Executive Council on May 31, 1998. Task force members are: Howard V. Zonana, MD, Chair, John M. Bradford, MB, Deborah L. Giorgi-Guarnieri, MD, JD, Park E. Dietz, MD, Steven K. Hoge, MD, Daniel J. Sprehe, MD, and Stephen S. Teich, MD.

in addition to note-taking. When report preparation begins, the immediate advantage is that the psychiatrist may review both what the client specifically said and how the client looked thus promoting accuracy in description and quotations. After the interviews, disputes about the factual basis for an evaluation, disclosures made during the course of an evaluation, the adequacy of an evaluation, or changes in mental status may arise. The client also may distort or misinterpret the psychiatrist's statements or questions and make allegations of inappropriate behavior by the evaluator. A videotape record will enhance the accuracy of the primary data in the resolution of these disputes. The evaluator who videotapes can document and disclose all raw data of the interview. Another long-term advantage is that the psychiatrist can review the videotapes prior to trial. Frequently, there is a lengthy time lapse between the evaluation and the trial or deposition. Being able to review the actual interview is a great asset to testifying more clearly about an evaluation which may have occurred several years before. Additionally, in some evaluations such as testamentary capacity, it may be useful to have a videotape record if challenges are brought after the death of the testator. Finally, some courts have required videotape recordings of certain types of evaluations, such as hypnosis, if testimony of the expert is to be permitted.¹

Currently, some psychiatrists videotape or audiotape their forensic interviews and others do not. The practice is not uniform. Psychiatrists should consider the issues that arise with this diversity of practice.

In considering the videotaping, psychiatrists should review the following questions:

- What are the effects of videotaping on the interview?
- What is the possible in-court use of the videotapes?
- What is the possible out of court use of the videotapes?
- Do the overall advantages of videotaping outweigh the disadvantages?
- What type of consent is necessary?

There has been little research about the effects of videotaping on the interview. One study focused on audiotaped psychiatric interviews indicated that 60 percent of patients demonstrated no significant disturbance, and another 20 percent showed no disturbance after the first few moments.⁵⁹ Some researchers have indicated that the use of tape recorders or videorecording devices may have a substantial inhibiting effect on a psychological or psychiatric interview.² Another study aimed at residents and their patients indicated that the residents demonstrated more disturbance/anxiety than the patients when videotaped.³ Subsequent studies performed on "normals" found that videotaped students reported more anxiety than audiotaped students.⁴ Similarly, videotaped therapists indicated feelings of defensiveness and decreased empathy when videotaped.⁵ (All of these studies can be criticized for methodology and reliability.) Of course, note-taking itself has been studied due to concerns about the possible distorting effects from cueing the interviewee with indications of what the psychiatrist considers important.

Videotaping of Forensic Psychiatric Evaluations

Some psychotherapists feel that note-taking also interferes with the therapist's attention to the patient.

All of these studies addressed the traditional psychiatrist-patient relationship and not forensic interviews. Forensic evaluations, unlike therapeutic ones begin with adversarial tensions. The examinee is not seeking consultation with a therapeutic objective. There is no doctor/patient relationship and the usual confidentiality rules rarely apply. Regardless of the psychiatrist's efforts to perform an impartial evaluation, the examinee will perceive the psychiatrist as an agent of the adversary if the examinee's attorney has not hired the psychiatrist. Even if the examinee's attorney has hired the psychiatrist, the examinee will be attempting to make the best possible case to support the position at issue. In this context the question then becomes how much more does the presence of a videotape recording further distort the evaluation by encouraging the examinee to "play to" the camera. The nature of forensic psychiatry may attract psychiatrists who are more comfortable with an audience and clients who are less concerned about disclosures to viewers. At this point, the effect of the forensic interview remains unstudied and the related studies indicate conflicting results.⁶

Advantages and disadvantages also depend upon how videotapes may be used in court. If courts were unwilling to admit videotapes into evidence, this would not be an issue. A summary of the case law, however, indicates that most courts find videotaped psychiatric interviews admissible as discussed below (see "Case Law and Guidelines on Videotaped Psychiatric

Interviews"). Most commonly, videotapes are offered to demonstrate the process of the expert psychiatrist. It allows the jury to view the demeanor of the plaintiff or defendant and can aid in the jury's understanding of the expert's conclusions. Although it is meant to aid the judge or jury, admission of videotapes presents the risk of confusing its court audience. Admission of videotapes also allows the opposing attorney to question the expert about the details of the expert's approach, appropriateness of the questions, and content of the videotape. It may provide ammunition for impeachment of the expert's statements as interviews may contain some material that may be inconsistent with the expert's conclusions and will have to be explained. Some inconsistencies in the evaluatee's statements are generally the rule rather than the exception.

In a related fashion, the case law suggested that the opposing expert could discover the videotapes. This allows the opposing expert to thoroughly review and critique videotaped interviews. The opposing expert then has the option to videotape his interview. Some psychiatrists may find this practice more time-consuming. Experts may be faced with the prospect of not only reviewing their own tapes but those of the opposing expert as well. More time may also have to be spent reviewing tapes with the attorney that may lead to more intricate cross-examination. The idea of intricate cross-examination, however, should be familiar to the forensic psychiatrist.

Possible out-of-court uses should also be considered. The most likely out-of-

court use is record keeping. The use of videotaped interviews is unlikely to create increased liability due to the nature of forensic interviews. If, however, a lawsuit occurs, then the videotapes will be discoverable. In a similar fashion, the videotapes will serve as a record of billing in the event of a billing dispute. There are also concerns about how the tape may be used following the legal proceeding. Any use, such as for teaching purposes, should only occur with the informed consent of the individual. Tapes should be regarded as part of the forensic work product.

Finally, there are many logistical problems. It is difficult to videotape in jails or prisons without prior notification, approval, and preparation. Opposing attorneys sometimes have objections to videotaping and hearings may be held to review the issue. Judges may ask if it is necessary to videotape in order to perform the evaluation. It is difficult in most circumstances to say that it is an absolute requirement. There are many evaluations where the added cost and effort may simply not be worth it.

There is some disagreement regarding the necessity of obtaining consent before videotaping interviews. Some experts feel that videotaping is equivalent to notetaking and that only consent to the interview is necessary. It is generally prudent to notify the opposing attorney that you are planning to videotape. If the attorney has objections, they may be raised before the evaluation proceeds.

In summary, there are advantages and disadvantages to videotaping psychiatric interviews. The advantages include the accuracy of the record, improvement in

reporting and the ability to use videotapes in court to support expert's opinion. The disadvantages include the likely occurrence of more intricate cross-examination (by the opposing attorney), close scrutiny by the opposing expert, inconvenience, and unknown effect on the interview, and the remote possibility of their use as a basis for liability.

Case Law and Guidelines on Videotaped Psychiatric Interviews

The case law provides several areas of guidance. The first area concerns potential admissibility of the videotapes. The next focuses on the right or requirement of videotaping forensic interviews. Finally, the courts' treatment of videotaped hypnotic interviews differs from general forensic interviews.

A. Fifth Amendment Arguments and Admissibility The basis of the Fifth Amendment argument opposing the admission of videotapes is that the individual has a right against self-incrimination. The argument presents itself either as a self-incrimination discussion or as a failure to give Miranda warnings argument. The right against self-incrimination is applied typically in criminal cases, but it may also be applied in civil cases. *United States v. Byers*,⁷ *The People v. Rich*,⁸ and *State of Oregon v. Wampler*⁹ are three criminal cases in which defendant's Fifth Amendment rights were asserted.

In *State v. Wampler*,¹⁰ the appellate court faced the issue of whether the trial court erred in allowing the prosecutor to introduce videotapes of the defendant's psychiatric exams. The facts of the case

Videotaping of Forensic Psychiatric Evaluations

surrounding the videotapes are somewhat unusual. The defendant initially requested the videotapes of himself in order to assist the psychiatrists with their diagnoses. The prosecutor objected to the request. When the prosecution introduced them at trial, the trial judge ruled the tapes admissible. On appeal, the defendant contended that he would have had his counsel present and he would have refused to answer questions about the shooting if he had known that the videotapes were admissible. He further contended that he was not read Miranda warnings prior to the interviews. His argument contained a combination of the self-incrimination and failure to give Miranda warnings approach. The appellate court held that the tapes were admissible. Their rationale was,

"... that defendant admitted to the shooting at trial, that the interviews were conducted and videotaped at the behest of defense counsel, and that defense counsel was fully aware that he could be present at the examinations and that his client could decline to answer questions regarding the shooting."¹¹

In *People v. Rich*,¹² the trial court ordered the defendant to give the State videotapes prepared by defendant's expert. The videotapes contained 14 hours of hypnotic narcoanalysis sessions. The tapes were admitted into evidence during the trial. The prosecutor then requested the tapes so that the State's expert could view them. Defendant argued that the court order violated his privilege against self-incrimination. The Supreme Court of California rejected this argument on two bases. The defense counsel previously had given the tapes to the prosecutor. The defense counsel also admitted the tapes

into evidence during the trial. Thus, he waived his privilege. Further, even if he had not given the tapes to the prosecutor and they had not been viewed at trial, the tapes would have been discoverable. The court previously recognized that,

the principal element in determining whether a particular demand for discovery should be allowed is not simply whether the information sought pertains to an "an affirmative defense" or whether defendant intends to introduce or rely upon the evidence at trial, but whether disclosure thereof conceivably might lighten the prosecution's burden of proving its case in chief.¹³

The court held that the use of videotapes would not make it easier for the State to prove its case in chief:

In *U.S. v. Byers*,¹⁴ the facts did not include a videotape, but an interview which occurred while defendant was in a correctional facility. In a vigorous dissent, Judge David Bazelon argued that the protections guaranteed by the self-incrimination clause of the Fifth Amendment required recording or videotaping of all court-ordered psychiatric evaluations. The requirement would insure that the psychiatrist did not manipulate or intimidate the defendant and that there was no overreaching. The APA submitted an *amicus* brief saying that "too little is known about the potentially disruptive effect of counsel's presence at the examination, or the use of other procedures," (audio- or videotaping) "to confidently assess whether the perceived need for such safeguards outweighs their possible costs. Although some psychiatrists may find their examination is not disturbed or impaired by the use of certain procedures, other psychiatrists may find that the same

procedures do interfere with the performance of a thorough and valid psychiatric evaluation. In so saying, we in no way wish to discourage the case by case experimentation with such procedures on a voluntary basis."¹⁵ The majority argued that "such fiats would be appended to, rather than contained within, the self-incrimination clause of the Fifth Amendment."¹⁶ The court held that,

when the defendant raises the defense of insanity, he may constitutionally be subjected to compulsory examination by court-appointed or government psychiatrists without the necessity of recording; and when he introduces into evidence psychiatric testimony to support his insanity defense, testimony of those examining psychiatrists may be received (on that issue) as well.¹⁷

Taken together, the holdings in *Wampler*, *Rich*, and *Byers* provide the following guidelines. The self-incrimination clause does not bar the admission of videotapes of psychiatric interviews. A Miranda-type warning is not required prior to a taped psychiatric interview. Finally, the protections guaranteed by the Fifth Amendment do not include mandatory recording of compulsory psychiatric examinations.

Although Fifth Amendment arguments typically arise in criminal cases, the plaintiffs in *Ughetto et al. v. Acrish*¹⁸ argued that their right against self-incrimination applied to civil commitment prehearing evaluations. Plaintiffs specifically argued that they could refuse to participate in court-ordered prehearing evaluations for continued commitment. The court held that the privilege against self-incrimination does not attach at the prehearing psychiatric interview. The court went on to find a statutory right to

preserve the interview on videotape.¹⁹ (See discussion under "Required Videotaping or Presence of an Attorney/Expert").

B. Sixth Amendment Arguments In addition to the Fifth Amendment arguments in *Byers*, the appellant argued that his Sixth Amendment guarantee of assistance of counsel was violated. The court reviewed whether the Sixth Amendment required recording or videotaping of compulsory psychiatric interviews as an alternative to the presence of an attorney. In making their decision, they quoted *United States v. Ash* for the proposition that the "[l]ack of scientific precision and inability to reconstruct an event are not tests"²⁰ for the Sixth Amendment guarantee. The court held:

Recording psychiatric interviews may be a good idea, but not all good ideas have been embodied in the Constitution in general or the Sixth Amendment in particular. It is enough, as far as the Constitutional minima of the criminal process are concerned, that the defendant has the opportunity to contest the accuracy of witnesses' testimony by cross-examining them at trial and introducing his own witness in rebuttal.²¹

The *Byers* court suggests that the Sixth Amendment neither requires nor bars videotaping of psychiatric interviews.

C. Required Videotaping or Presence of an Attorney/Expert Fifth and Sixth Amendment guarantees have fallen short of requiring psychiatrists to videotape their forensic interviews. There are some state and federal courts, however, that have upheld other bases which allow the defendant to request videotaping. The courts of *United States v. Clark*²² and *Ughetto et al. v. Acrish*²³ dealt with stat-

Videotaping of Forensic Psychiatric Evaluations

utorily required videotaping. The court of *State of New Jersey v. List*²⁴ found a case law basis for required videotaping of the prosecution's witness.

U.S. v. Clark was a federal insanity defense case.²⁵ Defendant Clark was found not guilty by reason of insanity under Title 18, United States Code, Section 4244(b). Three months later, a dangerousness hearing was held to determine the appropriateness of and/or conditions of release. Defendant requested pursuant to Title 18, United States Code, Section 4247(f) that any further evaluations (to be used in preparation for forensic reports) be videotaped. The court reviewed the referenced section which stated,

Upon written request of defense counsel, the court may order a videotape record made of defendant's testimony or interview upon which the periodic report is based pursuant to subsection (e). Such videotape record shall be submitted to the court along with the periodic report.²⁶

The court granted the request.

In *Ughetto v. Acrish*,²⁷ involuntarily committed patients at Harlem Valley Psychiatric Center argued that they had a right to counsel at prehearing psychiatric interviews which were the basis for expert testimony at subsequent judicial retention hearings. The court held that counsel is permitted to observe directly or by videotape the prehearing psychiatric evaluations following the motion for recommitment. The attorney, however, may not interfere with the psychiatric examination. The court based its holding on the comprehensive nature of the statutory provisions of the Mental Hygiene Law. The court went on to state that had they not found a statutory basis, they would

have upheld a due process requirement. The court found that,

plaintiffs have advanced a cogent argument as to how the fundamental fairness of their retention hearings is undermined by the refusal of the defendants to allow counsel to observe prehearing examinations. Permitting counsel to observe at such examinations would serve to assist the plaintiff's attorneys in preparation for retention hearings and, thus, enhance the reliability of such hearings as to the truth finding functions.²⁸

In *State v. List*, the defendant made a motion to preclude the state's expert from "questioning the defendant whether he killed the decedent."²⁹ The court denied the motion. The court, however, stated that the "State may either permit defendant's expert to attend its examination or it should videotape it."³⁰ The defendant was entitled to this relief under the precedent of *State v. Whitlow*.³¹

D. Other Case Law There are a number of other cases in which videotaped psychiatric interviews were offered into evidence. In *State of North Carolina v. Bonney*,³² the defendant's expert videotaped sessions in which defendant's 10 personalities were interviewed. The tapes were admitted into evidence to illustrate the expert's testimony. The videotapes were not at issue in the case.

In *People of the State of Michigan v. Furman*³³ the trial court denied defense counsel's motion to admit defense psychiatric expert's videotaped interviews into evidence. The trial court's rationale was that the tape was prejudicial because defendant would be allowed to testify without being under oath and without being subject to cross-examination. The trial court further reasoned that a caution-

ary instruction would not be enough. The appellate court reviewed the decision on the abuse of discretion standard and upheld the ruling.³⁴

This case may represent an exception to the admissibility of videotaped psychiatric interviews. It is distinguishable from the previous cases in that the tapes were made by defendant's expert and are being offered by the defendant in addition to the defendant's testimony or decision not to testify.

In *State v. Steiger*³⁵ the Connecticut Supreme Court reviewed the introduction of the videotaped interviews, by the state's expert, of the defendant in an insanity defense trial. On appeal the defendant objected to their introduction on a number of grounds. At one point the defendant argued that the tapes were inadmissible as the expert was capable of testifying concerning the basis of his opinion without relying on the tapes. The Court responded:

This argument misrepresents the standard to be applied in determining whether video recordings of psychiatric examinations are admissible when the defendant has raised his mental status as a defense. The question is not whether the psychiatrist has a clear recollection of the examination and could possibly testify without the tapes, but rather whether the probative value of the tapes outweighs the risk that the trier of fact might not be able to consider and weigh their relevance properly.³⁶

The tapes were admitted into evidence and shown in full to the triers of fact (a three judge panel).

E. Military Cases *United States v. Stark*³⁷ dealt with the issue of whether the military judge erred by denying admission of videotapes of defendant made by

defendant's psychiatric expert. The defendant was hypnotized during some of the interviews. The court of appeals affirmed based on five points.

First, the psychiatrist testified about the videotapes and the hypnotic interviews. Second, court review of the videotapes would allow defendant "to smuggle eight hours of testimony before the court members without subjecting himself to the crucible of cross-examination."³⁸ Third, the use of hypnotic testimony is controversial. Fourth, it was not necessary for the court to see the process in order to understand, determine and apply the psychiatrist's findings to the ultimate conclusion. Finally, defendant was allowed the opportunity to testify and to have his expert testify.³⁹ This holding is consistent with the holdings of other cases considering hypnotic sessions (see discussion under "Hypnotic Sessions").

*United States v. Day*⁴⁰ dealt with the issue of whether the government's psychiatrist should give a Miranda warning prior to interviewing a defendant. The court reviewed previous case law and an amended paragraph in the *Manual for Courts-Martial* (para. 140a(2), MCM 1975) to conclude that a psychiatrist may interview a defendant and testify about his conclusions from the interviews without giving a Miranda warning.⁴¹ This holding is consistent with the previously discussed Fifth Amendment decisions.

F. Hypnotic Sessions In general, videotapes of hypnotic sessions and amytal-induced interviews are less likely to be admitted into evidence than traditionally conducted interviews. This is due more to the unreliable nature of the tech-

Videotaping of Forensic Psychiatric Evaluations

niques than to the inadmissibility of videotapes. In the majority of cases, the purpose of hypnosis or amytal-induced interview is intended to aid in the recovery of memory.

A landmark case on admissibility of hypnotically refreshed memory is *State of New Jersey v. Hurd*.⁴² The court enumerated standards for admissibility of testimony that included:

All contacts between the hypnotist and the subject should be recorded so that a permanent record is available for comparison and study to establish that the witness has not received information or suggestion which might be later reported as having been first described by the subject during hypnosis. Videotape should be employed if possible, but should not be mandatory.⁴³

Even though the standard requires recording of the interviews, many courts ironically have denied admission of the videotapes into evidence. The following three cases provide examples.

In *People v. Milner*,⁴⁴ defendant was unable to remember a stabbing in which he allegedly murdered a man during the course of a robbery at Gamble's clothing store. Three psychiatrists interviewed the defendant for the defense. One psychiatrist conducted a sodium amytal interview. Another used hypnosis. The defense attempted to admit the videotaped hypnotic sessions as a basis for the psychiatric conclusions. The court ruled that the videotapes were inadmissible because the tapes would confuse and mislead the jury. The California Supreme Court found that the trial court's exclusions of the videotapes was not an abuse of discretion.⁴⁵

Similarly, the appellate court in *People*

*v. Johnson*⁴⁶ reversed the trial court. The trial judge had admitted a videotape of a sodium amytal interview. The appellate court stated, "In this case, the People did not even attempt, by expert witnesses, to prove the reliability of sodium amytal tests. In such a situation, and in the face of defendant's experts' testimony, it was clearly error for the truth serum interviews to have been admitted."⁴⁷

Finally, the trial court in *Eaton v. State of Delaware*⁴⁸ refused to admit a tape recording of an amytal interview that defendant's psychiatrist conducted. Defense attorney argued that he offered the tape recording to support the expert witness. The expert changed his opinion in the second trial after conducting the interview. The Supreme Court of Delaware found that the trial judge ruled the tapes inadmissible for possible prejudice and confusion and, therefore, did not abuse his discretion.⁴⁹

ABA Criminal Justice Mental Health Standards

In the late 1970s, the American Bar Association (ABA) sought clarification of the mental health issues in criminal law. The Criminal Justice Mental Health Standards Project contained six interdisciplinary task forces with representatives from the American Psychiatric Association, the American Psychological Association, the American Orthopsychiatric Association, and the National Sheriffs' Association. The standards were designed for use by lawyers and clinicians. The standards formulate uniform requirements for ordering, conducting, and reporting mental examination results in criminal proceedings.

The ABA House of Delegates adopted the standards in 1984. Standard 7-3.6(d) states:

Recording the evaluation. All court ordered evaluations of the defendant initiated by the prosecution should be recorded on audiotape or, if possible, on videotape, and a copy of the recording should be provided promptly to the defense attorney. The defense may use the recording for any evidentiary purpose permitted by the jurisdiction. If the defense intends to use the recording at the trial, it should notify the court. Upon receiving notice, the court should promptly provide to the prosecution the recording. Upon defense motion, the court may enter a protective order redacting portions of the recording before it is forwarded to the prosecution.⁵⁰

The commentary on the standard clarifies that recordings have frequently demonstrated the basis of the expert mental health or mental retardation professional opinions. It cautions that recordings must be excluded if their prejudice effect outweighs their probative value. It notes that the California Supreme Court has allowed the use of audiotapes for the impeachment of a witness.⁵¹

American Academy of Child and Adolescent Psychiatry Guidelines

Courts have used the videotaping of children more extensively. Videotaping has been viewed as protecting the child from the stresses of courtroom testimony and guarding against the coercion and suggestion of testimony. The American Academy of Child and Adolescent Psychiatry adopted guidelines for the clinical evaluation of child and adolescent sexual abuse in 1988. The position statement

commented on the use of videotaped interviews. Guideline 13 stated:

Videotaping, when possible, can serve useful purposes including (1) preserving the child's initial statements; (2) avoiding duplication of efforts by sharing the video with others involved in the investigation; (3) encouraging the defendant to plead guilty, thereby sparing the child from testifying in court; (4) presenting the video to the grand jury in lieu of the child; and (5) as a teaching tool to help the interviewer and others to improve techniques.

In making a videotape, the following concerns, disadvantages or risks should be taken into consideration. Videos can be used to harass or intimidate the child on cross-examination, or viewers may regard the testimony as more credible because it was given on video. Videos might be shown out of context or fall into the hands of those who have no professional obligations of confidentiality or concerns for the child's best interest. Clinicians should familiarize themselves with the laws in their states relative to admissibility of videotaped testimony. The child should always be informed as to the purpose of the videotape and about who is present if a one-way mirror is being used. Parental consent and the child's assent should be obtained to videotaping.⁵²

Clinical evaluations of child and adolescent sexual abuse may arise from or eventually become part of a legal case. The guidelines are part of a position paper. The guidelines have been cited in legal cases.⁵³ Guideline 13 and its videotaping recommendations, however, have not been an issue in any published legal cases.

Technical Admission into Evidence

It is important for the forensic expert to have an appreciation of the attorney's obligations to the court if videotape evidence is going to be part of the case.

Videotaping of Forensic Psychiatric Evaluations

Admitting videotapes into evidence is similar to the admission of photographs. In order to lay the proper foundation, the attorney must demonstrate the following seven points:

1. The videotape is capable of functioning properly, both as to the visual part and the audio part;
2. The operator of the device is competent—not necessarily an expert, but well-trained in operating the device and somewhat experienced in doing so;
3. The recording as well as the video part is authentic and correct;
4. No changes, additions, or deletions have been made;
5. The film has been properly preserved;
6. The visual part is clearly visible and the audio part is sufficiently audible so as not to be unintelligible or misleading; and
7. The confessions or statements involved, if any, were made voluntarily and without improper inducement.⁵⁴

Points 2, 5, and 7 are points that directly affect a psychiatrist filming a forensic interview. In order to prove that the operator of the device is competent (point 2), the attorney need not demonstrate special training or skill. The videotape, however, must show an accurate portrayal.⁵⁵ In essence, the psychiatrist need not be an expert in two fields. The psychiatrist should have video equipment that complements his skills or arrange for technical support.

Point 5 deals with the proper preservation of the videotape. This usually means

a continuity of possession. The psychiatrist should keep videotaped interviews in a safe place until turned over to the attorney or court in order to prevent tampering. Continuity of possession is not a rigid requirement. When the question of tampering arises, the content of the videotape is considered in addition to the continuity of possession.⁵⁶

Point 7 deals with the voluntary nature of statements and confessions. Although this takes on a different meaning in other contexts, the psychiatric interview, by its nature, should address this point. Case law has not required Miranda warnings. APA ethical guidelines and some state confidentiality statutes require the forensic expert to clarify the limits on confidentiality prior to beginning a forensic evaluation. Other parts of the interview will naturally speak to issues regarding voluntariness and/or competence.⁵⁷

Recommendations of the AAPL Task Force on Videotaping Forensic Interviews

The Task Force on Videotaping Forensic Interviews began by reviewing the current case law and professional guidelines. There were no specific AAPL or APA standards or guidelines on videotaping forensic interviews. Similarly, a review of pertinent case law indicated videotaping forensic interviews was neither prohibited nor mandatory; admissibility of videotaped interviews is neither barred nor mandated by Fifth and Sixth Amendment arguments. Case law also does not provide strict guidelines for videotaping forensic interviews (except in the area of hypnotic and amytal interviews). Conse-

quently, the issue of videotaped forensic interviews is an appropriate area in which to establish AAPL standards.

Both state and federal courts indicate that the Fifth Amendment right against self-incrimination does not bar videotapes of defendants who have put their mental state at issue. Likewise, the defendant does not have the legal right to a formal Miranda warning prior to the forensic psychiatric interview, although the expert at the beginning of the evaluation should clarify the confidentiality status of the communications. Finally, the absence of counsel during the videotaping does not violate the Sixth Amendment guarantee of assistance of counsel. In the reciprocal argument, the courts have not found constitutional bases for mandating videotaping.

Although the admission of videotapes into evidence is not the primary purpose of making the tapes, their potential uses in court are important considerations. First, two courts (one civilian and one military) found videotapes of defendants made by defense experts inadmissible. Although multiple reasons were cited, both courts found that the videotapes gave defendants the opportunity to testify without taking an oath or being cross-examined. Second, courts have generally found videotapes of hypnotic and amytal-induced interviews inadmissible on the basis that they are confusing and misleading. The final exception deals with mandatory videotaping. Statutory requirement and case law precedent were the bases for finding mandatory videotaping. The court of *Ughetto*, however, indicated that they would have upheld a due process argu-

ment for videotaping had the statutory basis not existed in civil commitment proceedings as an alternative to the attorney being in the interview room.

The purposes of videotaping forensic interviews focus on creating a complete record. The advantages include review of statements and appearances to prepare for future interviews, report writing and testimonial. In cases where counsel is permitted to observe the interview, it may be preferable to use videotape and/or monitor rather than have the attorney in the room.

Commonly cited disadvantages included inconvenience, cost, and review time. Considering convenience, both the types of interview and personal practices were cited. For example, videotaped competency evaluations might be less useful than videotaped insanity defense or civil suit interviews. Similarly, it is usually more convenient to videotape in a private office than a jail. Finally, the actual cost of videotaping was considered minimal for all cases, except for the additional time spent by the expert in reviewing the tapes.

The goals for recommending videotaped forensic interviews included peer-review and educational and legal factors. Practical future effects of recommending or requiring videotaped forensic interviews included establishing interview guidelines as well as sanctions for those who fail to provide adequate interviews.⁵⁸ Taped forensic interviews would provide both means to view and to critique others' interviews. Videotapes would also encourage the creation of standardized interviews for common forensic issues. In a