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Willy's Handyman, LLC*

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Dec 14 2021 11:35 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID G. MARTINEZ and CHILLY
WILLY'S HANDYMAN SERVICES,
LLC

Petitioners,

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

and

TAYLOR MILES CAPE, and individual,

Respondents.

Supreme Ct. Case No:

Dist. Ct. Case No.:

A-20-818569-C

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

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DATED this 13th day of December, 2021.

DENNETT WINSPEAR, LLP

By /s/ Brent D. Quist
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*Attorneys for Defendant, Chilly Willy's
Handyman Services, LLC*

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 II 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

Videotaping of Forensic Psychiatric Evaluations

similar fashion, criticism both in and out of court would encourage the development and integrity of psychiatrists performing forensic interviews. It may promote understanding of the forensic evaluation by the lay person.

Videotaped forensic interviews would also serve educational purposes. The direct educational use of videotaped interviews would be to teach colleagues, fellows, residents and other trainees about forensic interviews. Videotaped forensic interviews also can be shared among practicing forensic psychiatrists in preparation for interviews concerning unfamiliar issues.

Finally, the legal effects of videotaped forensic interviews should be studied. Anticipated areas of study would include effects of videotaping on attorney preparation, cross-examination, and quality of testimony. Additionally, the courts' use of videotapes can be reviewed periodically.

After reviewing the case law and practical advantages and disadvantages of videotaped forensic interviews, the AAPL task force makes the following recommendations:

1. Given the state of the research, feasibility, possible adverse effects on the examiner and examinee, AAPL does not support a blanket rule of requiring videotaping in all forensic interviews. The Task Force finds the option of videotaping to be an ethically acceptable medical practice.
2. AAPL recognizes the existence of other legal and professional sources (statutes, case law, and practice

guidelines) that may require or recommend videotaping in certain circumstances, such as (a) interviews where hypnosis is used or (b) when children are being evaluated for sexual abuse.

3. Videotaped forensic interviews done by trainees and experienced experts are extremely useful teaching materials. All forensic training programs should consider the educational use of videotaping equipment.

References

1. *State v. Hurd*, 432 A.2d 86 (N.J. 1981), *Borawick v. Shay*, 68 F.3d 597 (1995), *State v. Weston*, 475 N.E.2d 805, 813 (Ohio Ct. App. 1984); *House v. State*, 445 So. 2d 815, 826-27 (Miss. 1984)
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7. *United States v. Byers*, 740 F.2d 1104 (D.C. Cir. 1984) [hereinafter Byers]
8. *People v. Rich*, 755 P.2d 960 (Cal. 1988) [hereinafter Rich]
9. *State v. Wampler*, 569 P.2d 46 (Or. Ct. App. 1977) [hereinafter Wampler]
10. Wampler, 569 P.2d at 47-9
11. Wampler, 569 P.2d at 49
12. Rich, 755 P.2d at 991
13. 755 P.2d at 991 (quoting *Prudhomme v. Superior Court*, 2 Cal. 3d 320, 326 (1970))
14. Byers, 740 F.2d at 1109-15
15. *Byers v. U.S.*, Brief for Amicus Curiae American Psychiatric Association, pp. 30-31, 1981
16. Byers, 740 F.2d at 1115
17. Byers, 740 F.2d at 1115

18. Ughetto et al. v. Acrish, 518 N.Y.S. 2d 398 (N.Y. App. Div. 1987) [hereinafter Ughetto]
19. Ughetto, 518 N.Y.S. 2d at 402-3
20. United States v. Ash, 413 US 315, 316 (1973)
21. Byers, 740 F.2d at 1121
22. United States v. Clark, 753 F. Supp. 355 (S.D. Fla. 1991) [hereinafter Clark]
23. 518 N.Y.S. 2d 398
24. State v. List, 636 A.2d 1103 (N.J. Super. Ct. App. Div. 1990) [hereinafter List]
25. Clark, 753 F.Supp. at 355-7
26. 18 U.S.C. §4247(f) (1984)
27. Ughetto, 518 N.Y.S. 2d 398 at 12-25
28. Ughetto, 518 N.Y.S. 2d 398 at 405-6
29. List, 636 A.2d at 1103
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31. State v. Whitlow, 210 A.2d 763, 775 (N.J. 1965)
32. State v. Bonney, 405 S.E.2d 145 (N.C. 1991)
33. People v. Furman, 404 N.W.2d 246 (Mich. Ct. App. 1987) [hereinafter Furman]
34. Furman, 404 N.W.2d at 259
35. State of Connecticut v. Steiger, 590 A.2d 408 (Conn. 1991)
36. Steiger, 590 A.2d at 422
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38. Stark, 24 M.J. at 384
39. *Id.* at 384
40. United States v. Day, 1 M.J. 1167 (C.G.C.M.R. 1975) [hereinafter Day]
41. Day, 1 M.J. at 1171
42. State of New Jersey v. Hurd, 414 A.2d 291 (N.J. Super. Ct. Law Div. 1980) [hereinafter Hurd]
43. Hurd, 414 A.2d at 306
44. People v. Milner, 753 P.2d 669 (1988) [hereinafter Milner]
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47. Johnson, 32 Cal. App. 3d at 1001
48. Eaton v. State, 394 A.2d 217 (Del. 1978) [hereinafter Eaton]
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54. 60 A.L.R. 3d 333, 347
55. *Id.*
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59. Llan R, Mahl GF: Manifest reactions of patients and interviewers to the use of sound recording in the psychiatric interview. Am J Psychiatry 112:731-7, 1956

EXHIBIT 3

D.N. MMX CV 09 6000620 S : SUPERIOR COURT
LISA ALLOGGIO : J.D. OF MIDDLESEX
VS. : AT MIDDLETOWN
FEDERAL INSURANCE COMPANY : APRIL 8, 2011

STATE OF CONNECTICUT)
) SS:
COUNTY OF NEW HAVEN)

Howard V. Zonana, M.D., being duly sworn, deposes and says:

1. I am over the age of eighteen (18) and believe in the obligation of the oath.
2. I am a medical doctor board certified in psychiatry and forensic psychiatry by the American Board of Psychiatry and Neurology. A copy of my curriculum vitae is attached hereto as Ex. 1.
3. Since 1968 I have been on the faculty of the Yale University School of Medicine having achieved full professorship in 1992.
4. As more particularly set forth in my CV, I have served on a number of committees of the American Psychiatric Association relating to psychiatry and the law and I have likewise served in numerous capacities including President of the American Academy of Psychiatry and Law ("AAPL") and also including serving as the Chair of the Task Force on videotaping forensic psychiatric exams. That Task Force issued a report entitled



"Videotaping of Forensic Psychiatric Evaluations" that was approved by the AAPL Executive Council on May 31, 1998 and published in the Journal of the American Academy of Psychiatry and Law, vol. 27, No. 2, 1999 (copy attached as Ex. 2).

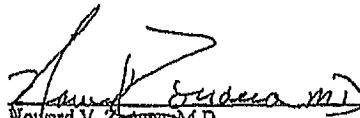
5. My professional career has been devoted to the field of forensic psychiatry and its interaction with the law. I have engaged in clinical practice, research, teaching and contributed to the development of standards of practice and ethical guidelines applicable to forensic psychiatrists.
6. For over 25 years, it has been my practice to videotape all of my forensic psychiatric evaluations. I do not believe that the minor potential that exists that videotaping will somehow interfere or alter the results of a forensic evaluation outweigh the benefits from creating such a record. Having said that, I do not believe that the standard of care requires the videotaping or audio recording of a forensic psychiatric evaluation.
7. My views on this subject are reflected in the article referenced above. Inasmuch as this affidavit is submitted in connection with a personal injury case, I believe the protections afforded by videotaping are far outweighed by any disadvantages.
8. The fact that the Task Force on videotaping that I chaired concluded that videotaping a forensic evaluation was an ethically acceptable medical practice supports my conclusion that the creation of a videotaping should not compromise the forensic evaluation in any significant manner.

9. The creation of the videotape record can assist the examiner in accuracy as the examiner is able to compare handwritten notes with the actual transcript of events revealed on videotape and because so much of mental evaluations involves the total interaction between the examinee and the examiner, the videotape enables the examiner and a third party to view facial expressions, verbal tone, body language and behavior. This information cannot generally be accurately preserved or recorded in hand written notes.
10. Videotape will also ensure that all of the raw data from the exam is preserved and virtually eliminates all disputes about the content of what was said by the examiner and the examinee. The enhanced accuracy of the reporting of the event can therefore resolve disputes that might arise about events that transpired during the interview.
11. The use of a videotape during a forensic examination also provides the examinee with a greater sense that the process will be fair. A compulsory forensic evaluation is adversarial by its very nature and it should be anticipated that the examinee will be naturally suspicious of the motivations of an examiner hired by opposing counsel. With a videotape record, the examinee should take some comfort that the interview will not be distorted; that the examinee's own expert(s) can review the events that would otherwise be inaccessible; and that the examinee's attorney will be capable of preparing a cross-examination about the questions asked and the methodology employed by the examiner. Notably, there is no reliable research that suggests that an examinee alters behavior in

any material way because there is a videotape running. In my extensive experience, I have found that after the first few moments of an interview, most interviewees ignore the presence of the camera.

12. There are very few drawbacks to the use of videotaping during forensic evaluations. The logistics are much easier to accommodate in a civil case than in a criminal case because there is no need to seek accommodation at a correctional facility. Videotaping can occur simply with a camera in the room or with the use of a one-way mirror facility. The cost is relatively modest depending upon the facility and the length of the interview. In addition, some examiners are uncomfortable with the use of a video camera.

13. I continue to believe that in a forensic setting, the best practice from an evaluator's standpoint (although not necessarily the standard of care) is to videotape forensic psychiatric interviews. It ensures that the most accurate record is created of events that would otherwise transpire behind a closed door between a retained expert witness and an examinee. The video record is beneficial to the examiner for ensuring accuracy and provides the examinee's side with the only basis for verifying the events being reported by the adversary's expert witness.


Howard V. Zonana, M.D.

ACKNOWLEDGEMENT

Subscribed and sworn to before me this 8th day April, 2011

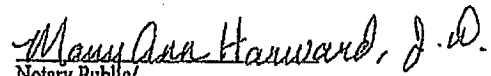

Mary Ann Hayward, J.D.
Notary Public/
Commissioner of the Superior Court

EXHIBIT 4

IN THE CIRCUIT COURT OF THE FIFTH
JUDICIAL CIRCUIT, IN AND FOR LAKE
COUNTY, FLORIDA

CASE NO. 2011-CA-001705

JOHN MICHAEL, JR. and PAMELA MICHAEL,
individually and o/b/o BROCK MICHAEL, a minor,

Plaintiff,

vs.

WILLIE R. KIRKLAND, an individual,
and SOUTHEASTERN FREIGHT LINES, INC.,
a foreign corporation,

Defendant.

AFFIDAVIT OF HARRY D. KROP

STATE OF FLORIDA
COUNTY OF ALACHUA

BEFORE ME, the undersigned authority, personally appeared Harry D. Krop, Ph.D., who
after being duly sworn, deposes and says the following:

1. My name is Harry D. Krop, PhD and my professional address is Community Behavioral Services, 1212 Northwest 12th Avenue, Gainesville, Florida 32601. I am over the age of 18 and have personal knowledge of the facts and events contained herein.
2. I am a Clinical Psychologist licensed to practice in the State of Florida since August 1972.
3. I am a member of the Division of Clinical Neuropsychology (Division 40, APA).
4. I routinely perform neuropsychological evaluations and testing of children,

adolescents, and adults in both my clinical practice and as an expert witness retained by both Plaintiffs and Defendants.

5. I have been qualified as an Expert in Forensic Psychology and/or Neuropsychology in the State Courts of Florida, Georgia, Alabama, Pennsylvania, Massachusetts, and New Jersey. I have also been qualified as an Expert in Federal Court, Military Court and Courts in Canada.

6. The neuropsychological examinations I perform include interviewing the patient, administering the MMPI, the TOMM and a battery of neuropsychological tests including, but not limited to, Wisconsin Card Sorting Test, Stroop Color-Word Test, Controlled Word Association Test, Benton Facial Recognition Test, Wechsler Adult Intelligence Scale-IV, and Wechsler Memory Test-IV.

7. I currently perform and have performed neuropsychological evaluations and testing, including the battery of tests identified above, wherein the evaluation and testing is videotaped. The evaluations and tests were conducted with the stipulation that the videotape would be sealed and released only under a Court Order.

8. I am also familiar with other licensed psychologists in Florida who have conducted similar evaluations and testing with a third party (including a court reporter or videographer) present.

FURTHER, AFFIANT SAYETH NOT.

Harry Krop
Harry D. Krop, Ph.D.

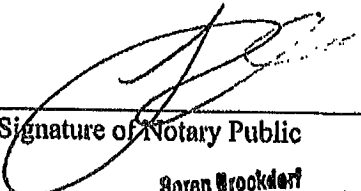
Sworn to and subscribed before me this 8 day of October, 2012.

Notary Public, State of Florida

Print, Type or Stamp Commissioned Name of Notary

Personally Known or -- Produced Identification

Type of Identification Produced: _____



Signature of Notary Public

Soren Brockert
Notary Public, State of Florida
My Comm. Expires Oct. 18, 2015
Commission No. EE 138108

EXHIBIT 5

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY,
FLORIDA

Case No: 02-012638 (18)

Florida Bar No: 0940674

KATHY BONUCHI and GAIL
RENSHAW PERKINS,

Plaintiffs,

vs.

SEA TECH CONSTRUCTION, INC, (a
Florida Corporation) and JEFFREY P.
ERICKSON,

Defendants,

AFFIDAVIT OF JACQUELINE C. VALDES, Ph.D.

STATE OF FLORIDA
COUNTY OF BROWARD

BEFORE ME, the undersigned authority, personally appeared Dr. Jacqueline C. Valdes,
who, after being duly sworn deposes and says:

My name is Dr. Jacqueline C. Valdes and I am over the age of eighteen (18) and have
personal knowledge of the information contained in this affidavit.

2. I am a licensed Ph.D. psychologist in private practice in the State of Florida since 1992.
3. I administer and interpret neuropsychological examinations for persons suspected of
having closed head injuries and am qualified to conduct independent neuropsychological
examinations.
4. By court order, I perform neuropsychological examinations with a video camera present
under the following conditions:
 - a. Arrangement for the video equipment to be remotely operated
 - b. The parties will only use the video tapes (and any copies) for the purposes of the
litigation in this case
 - c. At the end of this case, all tapes and copies will be destroyed
 - d. All efforts are made such that the patient is not aware that
he is being videotaped.

*new
affile*

THE LAW OFFICES OF TODD S. STEWART, P.A.



ARP 000261

Case No. 02-012038 (18)
Affidavit - Dr. Kofitz-Russo

8/21/03
Protective Order that seals confidential protocols and a written agreement between all parties that all test protocols will not be disseminated and will remain protected and will be returned to me at the conclusion of the litigation.

FURTHER AFFIANT SAYETH NOT.

Jacqueline C. Valdes
Dr. Jacqueline C. Valdes

Sworn to (or affirmed) and subscribed before me this 2nd day of April, 2003, by Dr. Jacqueline C. Valdes.



Patricia K. Roberts
Signature of Notary Public

THE LAW OFFICES OF TODD S. STEWART, P.A.

EXHIBIT 6

IN THE CIRCUIT COURT OF THE
19TH JUDICIAL CIRCUIT IN AND FOR
INDIAN RIVER COUNTY, FLORIDA

CASE NO: 98-0669 CA10

MYRIAM LAIRD and
JOHN LAIRD, Her Husband,

Plaintiffs,

CLARENCE PAUL SMITH,
FEDERAL INSURANCE COMPANY
and ALLSTATE INSURANCE
COMPANY,

Defendants.

AFFIDAVIT OF FRED J. PETRILLA JR., PH.D.

STATE OF FLORIDA
COUNTY OF INDIAN RIVER

'BEFORE ME, the undersigned authority, personally appeared Dr. Fred J. Petrilla who, after being duly sworn deposes and says:

1. My name is Fred J. Petrilla Jr. and I am a licensed Ph.D. psychologist who has been practicing in the State of Florida since 1982.

2. I administer and interpret neuropsychological examinations for persons suspected of having closed head injuries and am qualified to conduct independent neuropsychological examinations.

3. If asked, I would be willing to perform an independent neuropsychological examination on the Plaintiff, Myriam Laird, with a video camera present under the following conditions:

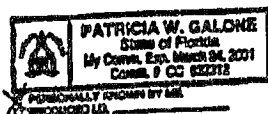
- a. Arrangement for the video equipment to be remotely operated or set up behind one way glass, and the videotape only be released to another Ph.D. licensed psychologist.
- b. The Court's destruction of the videotapes (and any copies) at the conclusion of the case.

- c. Protective Order that seals confidential protocols and a written agreement between all parties that all test protocols will not be disseminated and will remain protected and will be returned to me at the conclusion of the litigation.

FURTHER AFFIANT SAYETH NOT.

Fred J. Petrilla Jr., Ph.D.
FRED J. PETRILLA JR., Ph.D.

Sworn to (or affirmed) and subscribed before me this 21st day of September
1999, by Fred J. Petrilla Jr., Ph.D.



Patricia W. Galone
Signature of Notary Public

EXHIBIT 7



1 **DCRR**
2 MARK L. GENTILE, ESQ.
3 Nevada Bar No. 2709
4 GENTILE LAW GROUP
5 1300 South Decatur Boulevard
6 Las Vegas, Nevada 89102
7 (702) 251-8445
8 GentileLawGroup@Yahoo.com
9 Attorneys for Defendants

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DISTRICT COURT
CLARK COUNTY, NEVADA

EDWARD LEHNARDT,

Plaintiff,

vs.

JAVIER M. LINARES, an individual;
MANUEL J. LINARES, an individual;
DOES I-X, and ROE CORPORATIONS
I-X, inclusive,

Defendants.

Case No: A-19-800506-C
Dept No: XXIX

DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS

HEARING DATE: March 16, 2021, at 10:00 a.m.

APPEARANCES:

Jared B. Anderson, Esq., of Tanner Churchill Anderson, for Plaintiff; and

Mark L. Gentile, Esq., of Gentile Law Group, for Defendants.

I.

FINDINGS

This matter came before the Discovery Commissioner on March 16, 2021, for Defendants' Motion to Compel Independent Medical Examination. This Motion was brought by Defendants to compel a two (2) day neuropsychological examination of Plaintiff Edward Lehnardt, who is claiming that he sustained a traumatic brain injury in the underlying incident. The contested issues in this Motion are whether under NRCP 35 and NRS 52.380, Defendants can compel an examination precluding any recording of the examination and testing and precluding Plaintiff from having an

observer witness the entire examination and testing. Defendants also asked that all examination and interview notes and records and raw data possessed by Plaintiff's treating neuropsychologist (Michael Elliott, Ph.D.) relating to Edward Lehnardt be sent directly to defense expert, Lewis Etkoff, Ph.D., so he can perform a record review.

Defendants cited expert affidavits who opined that no neuropsychologist complying with recognized neuropsychological protocols could perform valid testing in the presence of an observer or have testing recorded that would maintain the copyright protections of the tests. It was argued that requiring an observer/recording would violate defendants' due prices rights. Plaintiff produced expert affidavits who opined that recording examinations was commonplace and did not cause an ethical dilemma, and that such recording would validate the results. Plaintiff did not oppose having Dr. Elliott sending his files and raw data directly to Dr. Etkoff.

The Commissioner grants the Motion to Compel Independent Medical Examination, in part, and denies the Motion, in part, as follows:

II.

RECOMMENDATIONS

IT IS HEREBY RECOMMENDED:

Defendants' Motion to Compel Independent Medical Examination is GRANTED IN PART and DENIED IN PART.

1. Plaintiff is allowed to audio record the entire examination/testing process as per NRCF 35(a)(3);

2. Plaintiff is allowed to have an observer present during the testing, as per NRS 52.380, with restrictions. The observer is not to interrupt or engage in the testing process and must attend virtually in an adjoining room. The observer must be allowed, under NRS 52.380(4), to suspend the examination if any statutory irregularities occur; and

3. Plaintiff is ordered to have his expert psychologist, Michael Elliott, Ph.D., transmit directly to Lewis Etcoff, Ph.D., all examination notes and files, reports, testing result and raw data pertaining to his evaluation and treatment of Edward Lehnardt.

The Discovery Commissioner, having met with counsel for the parties, having discussed the issues noted above and having reviewed any materials proposed in support thereof, hereby submits the above recommendations.

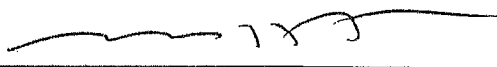
DATED this 6th day of April, 2021.


DISCOVERY COMMISSIONER

Approved as to Form and Content:
TANNER CHURCHILL ANDERSON

Submitted By:
GENTILE LAW GROUP

Did not respond
By: _____
Jared B. Anderson, Esq.
4001 Meadows Lane
Las Vegas, NV 89107
Attorney for Plaintiff

By: 
MARK L. GENTILE, ESQ.
1300 South Decatur Boulevard
Las Vegas, Nevada 89102
Attorneys for Defendants

Case Name: Lehnardt v. Linares
Case No.: A-19-800506-C
Hearing Date: March 16, 2021

NOTICE

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

Objection time will expire on April 20, 2021.

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

_____ Mailed to Plaintiff/Defendant at the following address on the ____ day of _____, 2021.

✓ Electronically filed and served counsel on April 6, 2021, pursuant to N.E.F.C.R. Rule 9.

By Natilie Simonetti
Commissioner Designee

EXHIBIT 8

Ryan Loosvelt

From: Ryan Loosvelt
Sent: Friday, September 10, 2021 9:27 AM
To: 'Brent Quist'
Cc: J. Keating
Subject: RE: Cape Rule 35 exam issues re: 2nd call

Brent, I appreciate your email. To clarify/respond:

1. We agree to an OST that allows us reasonable time for a response.
2. A P.O. takes care of the purported copyright issue if one even exists (remains to be seen).
3. The article was a third-party advocacy piece; ethics and lawsuits call for openness and fairness and again a PO is an order of the court not to share and takes care of it.
4. We raised on our first call that the 2 days was excessive but that we are willing to discuss and hear what Etcoff had planned for the 2 days. We continue to believe the 2 days excessive and not standard.
5. On the contrary, the law does allow for the observer as we specifically discussed on our first call, is copied below (and enacted more recently than Rule 35), *but* we agreed to video to minimize any concerns as compromise:

MENTAL OR PHYSICAL EXAMINATION

NRS 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 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.

Please send over the revised IME stip for what we can agree upon, and an OST/stip.

Thanks,



LAW FIRM
INJURY ATTORNEYS

Ryan Loosvelt

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: Friday, September 10, 2021 9:05 AM
To: Ryan Loosvelt <rloosvelt@ggrmlawfirm.com>
Cc: J. Keating <jkeating@keatinglg.com>
Subject: RE: Cape Rule 35 exam issues re: 2nd call

Ryan:

1. I disagree with point #1. Rule 35 does not allow for an observer in a neuropsychological exam setting. Moreover, that rule does not allow for an observer where the observer interferes with the exam. The presence of an observer in a neuropsychological exam always interferes with the exam. If you read the article attached to my last e-mail to you, you will see why any type of observer will interfere with the exam.
2. With respect to the copyright issues, Dr. Etcoff's position is set forth in my last e-mail to you. The copyright is with respect to the testing itself. And as stated in my last e-mail, the concern is that if the testing materials/questions are shared, there could be an inadvertent sharing of that material with third-parties, including future plaintiffs.
3. Today you stated, for the first time, that you believe the 2-day exam is excessive. A 2 day exam is standard for neuropsychological exams and I suspect your own neuropsychological expert would have performed a multiple day exam with Mr. Cape.

Finally, this is to confirm that you are stipulating to the Defendants' motion to compel the Dr. Etcoff exam on an Order Shortening Time, as that exam is currently scheduled for about one month away.

Brent

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



LAW FIRM
INJURY ATTORNEYS

Ryan Loosvelt

Attorney

O: 702.384.1616 | F: 702.384.2990 | www.ggrmlawfirm.com

2770 S. Maryland Pkwy., Ste. 100 Las Vegas, NV 89109



From: Ryan Loosvelt <rloosvelt@ggrmlawfirm.com>

Sent: Thursday, September 2, 2021 3:37 PM

To: Brent Quist <bquist@dennettwinspear.com>

Cc: J. Keating <jkeating@keatinglg.com>

Subject: RE: Cape Rule 35 exam issues

Brent, I'll review and let's talk Tuesday as planned. I'm traveling tomorrow through the holiday weekend. Thanks,

-Ryan Loosvelt

From: Brent Quist <bquist@dennettwinspear.com>

Sent: Wednesday, September 1, 2021 3:45 PM

To: Ryan Loosvelt <rloosvelt@ggrmlawfirm.com>

Cc: J. Keating <jkeating@keatinglg.com>

Subject: Cape Rule 35 exam issues

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

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Ryan Loosvelt

From: Ryan Loosvelt
Sent: Monday, August 30, 2021 2:34 PM
To: Brent Quist; J. Keating
Cc: Zaira Baldovinos; S. Boschee; Rebeca Guardado; Gianna Mosley; Dillon Coil
Subject: FW: Cape Rule 35 discussion

Brent and John, it was nice speaking with you today about the IMEs. We agreed to speak again Tuesday 9/7 at 2pm so you can follow up with Dr. Etcoff and see if we can reach a compromise on some of the issues we discussed:

Pot'l November availability;
NRS 52.380 observer vs. video;
P.O. for copyright issues, standing, & raw data;
2-day exam vs 1 &/or advise of schedule/pot'l tests identified.

Hopefully we can come to an agreement on some items to stipulate to get these done.

Thank you,



Ryan Loosvelt
Attorney

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



From: Zaira Baldovinos <zaira@dennettwinspear.com>

Sent: Friday, August 27, 2021 10:13 AM

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

Cc: J. Keating <jkeating@keatinglg.com>; Dillon Coil <dcoil@ggrmlawfirm.com>; Rebeca Guardado <rguardado@ggrmlawfirm.com>; Gianna Mosley <gmosley@ggrmlawfirm.com>; S. Boschee <sboschee@keatinglg.com>

Subject: RE: Cape Rule 35 stipulation comments

Confirmed.

Please provide the best contact numbers, extensions included and Brent will initiate the call.
Thank you.

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



ATTORNEYS AT LAW

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

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From: Ryan Loosvelt [<mailto:rloosvelt@ggrmlawfirm.com>]
Sent: Friday, August 27, 2021 10:10 AM
To: Nicole Reyes; Zaira Baldovinos; Brent Quist
Cc: J. Keating; Dillon Coil; Rebeca Guardado; Gianna Mosley; S. Boschee
Subject: RE: Cape Rule 35 stipulation comments

Let's do Monday at 1pm.

-Ryan

From: Nicole Reyes <nreyes@keatinglg.com>
Sent: Friday, August 27, 2021 9:57 AM
To: zaira@dennettwinspear.com; Brent Quist <bquist@dennettwinspear.com>; Ryan Loosvelt <rloosvelt@ggrmlawfirm.com>
Cc: J. Keating <jkeating@keatinglg.com>; Dillon Coil <dcoil@ggrmlawfirm.com>; Rebeca Guardado <rguardado@ggrmlawfirm.com>; Gianna Mosley <gmosley@ggrmlawfirm.com>; S. Boschee <sboschee@keatinglg.com>
Subject: RE: Cape Rule 35 stipulation comments

Good Morning,

Mr. Keating is available Monday after 1:00 p.m. and Tuesday in the morning only.

Thank you,
Nicole Reyes

From: Zaira Baldovinos <zaira@dennettwinspear.com>
Sent: Friday, August 27, 2021 9:50 AM
To: Brent Quist <bquist@dennettwinspear.com>; Ryan Loosvelt <rloosvelt@ggrmlawfirm.com>; J. Keating <jkeating@keatinglg.com>
Cc: Dillon Coil <dcoil@ggrmlawfirm.com>; Rebeca Guardado <rguardado@ggrmlawfirm.com>; Gianna Mosley <gmosley@ggrmlawfirm.com>; S. Boschee <sboschee@keatinglg.com>
Subject: RE: Cape Rule 35 stipulation comments

Our office can do:
08/30 Monday in the morning or after 1pm
08/31 Tuesday before 2pm or after 3:30pm

Please let me know if this works.
Thanks,

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

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From: Brent Quist
Sent: Friday, August 27, 2021 9:14 AM
To: Ryan Loosvelt; J. Keating
Cc: Dillon Coil; Rebeca Guardado; Gianna Mosley; Zaira Baldovinos; S. Boschee
Subject: RE: Cape Rule 35 stipulation comments

I'll have my office make arrangements for a conference call.

Brent

From: Ryan Loosvelt <rloosvelt@ggrmlawfirm.com>
Sent: Friday, August 27, 2021 8:56 AM
To: Brent Quist <bquist@dennettwinspear.com>; J. Keating <jkeating@keatinglg.com>
Cc: Dillon Coil <dcoil@ggrmlawfirm.com>; Rebeca Guardado <rguardado@ggrmlawfirm.com>; Gianna Mosley <gmoseley@ggrmlawfirm.com>; Zaira Baldovinos <zaira@dennettwinspear.com>; S. Boschee <sboschee@keatinglg.com>
Subject: RE: Cape Rule 35 stipulation comments

Brent, let's have a call Monday or Tuesday afternoon to try and finalize this. Thanks,

Ryan Loosvelt

From: Brent Quist <bquist@dennettwinspear.com>
Sent: Thursday, August 26, 2021 8:27 AM
To: J. Keating <jkeating@keatinglg.com>; Ryan Loosvelt <rloosvelt@ggrmlawfirm.com>
Cc: Dillon Coil <dcoil@ggrmlawfirm.com>; Rebeca Guardado <rguardado@ggrmlawfirm.com>; Gianna Mosley <gmoseley@ggrmlawfirm.com>; Zaira Baldovinos <zaira@dennettwinspear.com>; S. Boschee <sboschee@keatinglg.com>
Subject: RE: Cape Rule 35 stipulation comments

Ryan:

My red-line changes to your changes are attached, as well as a clean copy with all changes accepted. If you are not in agreement with my proposed changes, I think the best course of action is to arrange for a call between John, yourself and me to discuss and see if we can come to an agreement.

Best,

Brent

From: J. Keating <jkeating@keatinglg.com>
Sent: Thursday, August 26, 2021 8:00 AM
To: Brent Quist <bquist@dennettwinspear.com>; Ryan Loosvelt <rloosvelt@ggrmlawfirm.com>
Cc: Dillon Coil <dcoil@ggrmlawfirm.com>; Rebeca Guardado <rguardado@ggrmlawfirm.com>; Gianna Mosley <gmosley@ggrmlawfirm.com>; Zaira Baldovinos <zaira@dennettwinspear.com>; S. Boschee <sboschee@keatinglg.com>
Subject: RE: Cape Rule 35 stipulation comments

Can you resend to me?

From: Brent Quist <bquist@dennettwinspear.com>
Sent: Wednesday, August 25, 2021 4:11 PM
To: Ryan Loosvelt <rloosvelt@ggrmlawfirm.com>
Cc: Dillon Coil <dcoil@ggrmlawfirm.com>; Rebeca Guardado <rguardado@ggrmlawfirm.com>; Gianna Mosley <gmosley@ggrmlawfirm.com>; Zaira Baldovinos <zaira@dennettwinspear.com>; S. Boschee <sboschee@keatinglg.com>; J. Keating <jkeating@keatinglg.com>
Subject: RE: Cape Rule 35 stipulation comments

Ryan,

I do have changes to your changes. I think we will need to have a call to discuss. But first, I forwarded the Stipulation and Order with my revisions to John to get his thoughts. I'm hoping to get back to you by Friday.

Thanks,

Brent

From: Ryan Loosvelt <rloosvelt@ggrmlawfirm.com>
Sent: Wednesday, August 25, 2021 4:07 PM
To: Brent Quist <bquist@dennettwinspear.com>
Cc: Dillon Coil <dcoil@ggrmlawfirm.com>; Rebeca Guardado <rguardado@ggrmlawfirm.com>; Gianna Mosley <gmosley@ggrmlawfirm.com>; Zaira Baldovinos <zaira@dennettwinspear.com>; S. Boschee <sboschee@keatinglg.com>; jkeating@keatinglg.com
Subject: RE: Cape Rule 35 stipulation comments

Brent – following up on my Monday email with redline comments to the IME stip. Let me know when you're available to speak on this so we can get it submitted or discuss what we can agree upon and submit the rest to the court, thanks. Happy to confer on any comments you have to our revisions. We also would like both defendants to sign the stip as well since its an agreement between all parties.

Thanks,



LAW FIRM
INJURY ATTORNEYS

Ryan Loosvelt

Attorney

O: 702.384.1616 | F: 702.384.2990 | www.ggrmlawfirm.com

2770 S. Maryland Pkwy., Ste. 100 Las Vegas, NV 89109



From: Ryan Loosvelt <rloosvelt@ggrmlawfirm.com>
Sent: Monday, August 23, 2021 8:13 AM
To: Brent Quist <bquist@dennettwinspear.com>
Cc: Dillon Coil <dcoil@ggrmlawfirm.com>; Rebeca Guardado <rguardado@ggrmlawfirm.com>
Subject: Cape Rule 35 stipulation comments

Brent,

My comments to the stipulation are attached. I'll should be done with mediation later this afternoon to discuss or otherwise available tomorrow after court. Happy to discuss you views of my comments to see if we can come to an agreement.

Ryan Loosvelt
GGRM Law Firm

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EXHIBIT 9

Specialty Guidelines for Forensic Psychology

American Psychological Association

In the past 50 years forensic psychological practice has expanded dramatically. The American Psychological Association (APA) has a division devoted to matters of law and psychology (APA Division 41, the American Psychology–Law Society), a number of scientific journals devoted to interactions between psychology and the law exist (e.g., *Law and Human Behavior*; *Psychology, Public Policy, and Law*; *Behavioral Sciences & the Law*), and a number of key texts have been published and undergone multiple revisions (e.g., Grisso, 1986, 2003; Melton, Petrila, Poythress, & Slobogin, 1987, 1997, 2007; Rogers, 1988, 1997, 2008). In addition, training in forensic psychology is available in predoctoral, internship, and postdoctoral settings, and APA recognized forensic psychology as a specialty in 2001, with subsequent recertification in 2008.

Because the practice of forensic psychology differs in important ways from more traditional practice areas (Monahan, 1980) the “Specialty Guidelines for Forensic Psychologists” were developed and published in 1991 (Committee on Ethical Guidelines for Forensic Psychologists, 1991). Because of continued developments in the field in the ensuing 20 years, forensic practitioners’ ongoing need for guidance, and policy requirements of APA, the 1991 “Specialty Guidelines for Forensic Psychologists” were revised, with the intent of benefiting forensic practitioners and recipients of their services alike.

The goals of these Specialty Guidelines for Forensic Psychology (“the Guidelines”) are to improve the quality of forensic psychological services; enhance the practice and facilitate the systematic development of forensic psychology; encourage a high level of quality in professional practice; and encourage forensic practitioners to acknowledge and respect the rights of those they serve. These Guidelines are intended for use by psychologists when engaged in the practice of forensic psychology as described below and may also provide guidance on professional conduct to the legal system and other organizations and professions.

For the purposes of these Guidelines, *forensic psychology* refers to professional practice by any psychologist working within any subdiscipline of psychology (e.g., clinical, developmental, social, cognitive) when applying the scientific, technical, or specialized knowledge of psychology to the law to assist in addressing legal, contractual, and administrative matters. Application of the Guidelines does not depend on the practitioner’s typical areas of practice or expertise, but rather, on the service provided in the case at hand. These Guidelines apply in all matters in which psychologists provide expertise to judicial, administrative, and

educational systems including, but not limited to, examining or treating persons in anticipation of or subsequent to legal, contractual, or administrative proceedings; offering expert opinion about psychological issues in the form of amicus briefs or testimony to judicial, legislative, or administrative bodies; acting in an adjudicative capacity; serving as a trial consultant or otherwise offering expertise to attorneys, the courts, or others; conducting research in connection with, or in the anticipation of, litigation; or involvement in educational activities of a forensic nature.

Psychological practice is not considered forensic solely because the conduct takes place in, or the product is presented in, a tribunal or other judicial, legislative, or administrative forum. For example, when a party (such as a civilly or criminally detained individual) or another individual (such as a child whose parents are involved in divorce proceedings) is ordered into treatment with a practitioner, that treatment is not necessarily the practice of forensic psychology. In addition, psychological testimony that is solely based on the provision of psychotherapy and does not include psycholegal opinions is not ordinarily considered forensic practice.

For the purposes of these Guidelines, *forensic practitioner* refers to a psychologist when engaged in the practice of forensic psychology as described above. Such professional conduct is considered forensic from the time the practitioner reasonably expects to, agrees to, or is legally mandated to provide expertise on an explicitly psycholegal issue.

The provision of forensic services may include a wide variety of psycholegal roles and functions. For example, as

This article was published Online First October 1, 2012.

These Specialty Guidelines for Forensic Psychology were developed by the American Psychology–Law Society (Division 41 of the American Psychological Association [APA]) and the American Academy of Forensic Psychology. They were adopted by the APA Council of Representatives on August 3, 2011.

The previous version of the Guidelines (“Specialty Guidelines for Forensic Psychologists”; Committee on Ethical Guidelines for Forensic Psychologists, 1991) was approved by the American Psychology–Law Society (Division 41 of APA) and the American Academy of Forensic Psychology in 1991. The current revision, now called the “Specialty Guidelines for Forensic Psychology” (referred to as “the Guidelines” throughout this document), replaces the 1991 “Specialty Guidelines for Forensic Psychologists.”

These guidelines are scheduled to expire August 3, 2021. After this date, users are encouraged to contact the American Psychological Association Practice Directorate to confirm that this document remains in effect.

Correspondence concerning these guidelines should be addressed to the Practice Directorate, American Psychological Association, 750 First Street, NE, Washington, DC 20002-4242.

researchers, forensic practitioners may participate in the collection and dissemination of data that are relevant to various legal issues. As advisors, forensic practitioners may provide an attorney with an informed understanding of the role that psychology can play in the case at hand. As consultants, forensic practitioners may explain the practical implications of relevant research, examination findings, and the opinions of other psycholegal experts. As examiners, forensic practitioners may assess an individual's functioning and report findings and opinions to the attorney, a legal tribunal, an employer, an insurer, or others (APA, 2010b, 2011a). As treatment providers, forensic practitioners may provide therapeutic services tailored to the issues and context of a legal proceeding. As mediators or negotiators, forensic practitioners may serve in a third-party neutral role and assist parties in resolving disputes. As arbiters, special masters, or case managers with decision-making authority, forensic practitioners may serve parties, attorneys, and the courts (APA, 2011b).

These Guidelines are informed by APA's "Ethical Principles of Psychologists and Code of Conduct" (hereinafter referred to as the EPPCC; APA, 2010a). The term *guidelines* refers to statements that suggest or recommend specific professional behavior, endeavors, or conduct for psychologists. Guidelines differ from standards in that standards are mandatory and may be accompanied by an enforcement mechanism. Guidelines are aspirational in intent. They are intended to facilitate the continued systematic development of the profession and facilitate a high level of practice by psychologists. Guidelines are not intended to be mandatory or exhaustive and may not be applicable to every professional situation. They are not definitive, and they are not intended to take precedence over the judgment of psychologists.

As such, the Guidelines are advisory in areas in which the forensic practitioner has discretion to exercise professional judgment that is not prohibited or mandated by the EPPCC or applicable law, rules, or regulations. The Guidelines neither add obligations to nor eliminate obligations from the EPPCC but provide additional guidance for psychologists. The modifiers used in the Guidelines (e.g., *reasonably*, *appropriate*, *potentially*) are included in recognition of the need for professional judgment on the part of forensic practitioners; ensure applicability across the broad range of activities conducted by forensic practitioners; and reduce the likelihood of enacting an inflexible set of guidelines that might be inapplicable as forensic practice evolves. The use of these modifiers, and the recognition of the role of professional discretion and judgment, also reflects that forensic practitioners are likely to encounter facts and circumstances not anticipated by the Guidelines and they may have to act upon uncertain or incomplete evidence. The Guidelines may provide general or conceptual guidance in such circumstances. The Guidelines do not, however, exhaust the legal, professional, moral, and ethical considerations that inform forensic practitioners, for no complex activity can be completely defined by legal rules, codes of conduct, and aspirational guidelines.

The Guidelines are not intended to serve as a basis for disciplinary action or civil or criminal liability. The standard of care is established by a competent authority, not by the Guidelines. No ethical, licensure, or other administrative action or remedy, nor any other cause of action, should be taken *solely* on the basis of a forensic practitioner acting in a manner consistent or inconsistent with these Guidelines.

In cases in which a competent authority references the Guidelines when formulating standards, the authority should consider that the Guidelines attempt to identify a high level of quality in forensic practice. Competent practice is defined as the conduct of a reasonably prudent forensic practitioner engaged in similar activities in similar circumstances. Professional conduct evolves and may be viewed along a continuum of adequacy, and "minimally competent" and "best possible" are usually different points along that continuum.

The Guidelines are designed to be national in scope and are intended to be consistent with state and federal law. In cases in which a conflict between legal and professional obligations occurs, forensic practitioners make known their commitment to the EPPCC and the Guidelines and take steps to achieve an appropriate resolution consistent with the EPPCC and the Guidelines.

The format of the Guidelines is different from most other practice guidelines developed under the auspices of APA. This reflects the history of the Guidelines as well as the fact that the Guidelines are considerably broader in scope than any other APA-developed guidelines. Indeed, these are the only APA-approved guidelines that address a complete specialty practice area. Despite this difference in format, the Guidelines function as all other APA guideline documents.

This document replaces the 1991 "Specialty Guidelines for Forensic Psychologists," which were approved by the American Psychology-Law Society (Division 41 of APA) and the American Board of Forensic Psychology. The current revision has also been approved by the Council of Representatives of APA. Appendix A includes a discussion of the revision process, enactment, and current status of these Guidelines. Appendix B includes definitions and terminology as used for the purposes of these Guidelines.

1. Responsibilities

Guideline 1.01: Integrity

Forensic practitioners strive for accuracy, honesty, and truthfulness in the science, teaching, and practice of forensic psychology and they strive to resist partisan pressures to provide services in any ways that might tend to be misleading or inaccurate.

Guideline 1.02: Impartiality and Fairness

When offering expert opinion to be relied upon by a decision maker, providing forensic therapeutic services, or teaching or conducting research, forensic practitioners strive for accuracy, impartiality, fairness, and independence (EPPCC Standard 2.01). Forensic practitioners rec-

ognize the adversarial nature of the legal system and strive to treat all participants and weigh all data, opinions, and rival hypotheses impartially.

When conducting forensic examinations, forensic practitioners strive to be unbiased and impartial, and avoid partisan presentation of unrepresentative, incomplete, or inaccurate evidence that might mislead finders of fact. This guideline does not preclude forceful presentation of the data and reasoning upon which a conclusion or professional product is based.

When providing educational services, forensic practitioners seek to represent alternative perspectives, including data, studies, or evidence on both sides of the question, in an accurate, fair and professional manner, and strive to weigh and present all views, facts, or opinions impartially.

When conducting research, forensic practitioners seek to represent results in a fair and impartial manner. Forensic practitioners strive to utilize research designs and scientific methods that adequately and fairly test the questions at hand, and they attempt to resist partisan pressures to develop designs or report results in ways that might be misleading or unfairly bias the results of a test, study, or evaluation.

Guideline 1.03: Avoiding Conflicts of Interest

Forensic practitioners refrain from taking on a professional role when personal, scientific, professional, legal, financial, or other interests or relationships could reasonably be expected to impair their impartiality, competence, or effectiveness, or expose others with whom a professional relationship exists to harm (EPPCC Standard 3.06).

Forensic practitioners are encouraged to identify, make known, and address real or apparent conflicts of interest in an attempt to maintain the public confidence and trust, discharge professional obligations, and maintain responsibility, impartiality, and accountability (EPPCC Standard 3.06). Whenever possible, such conflicts are revealed to all parties as soon as they become known to the psychologist. Forensic practitioners consider whether a prudent and competent forensic practitioner engaged in similar circumstances would determine that the ability to make a proper decision is likely to become impaired under the immediate circumstances.

When a conflict of interest is determined to be manageable, continuing services are provided and documented in a way to manage the conflict, maintain accountability, and preserve the trust of relevant others (also see Guideline 4.02 below).

2. Competence

Guideline 2.01: Scope of Competence

When determining one's competence to provide services in a particular matter, forensic practitioners may consider a variety of factors including the relative complexity and specialized nature of the service, relevant training and experience, the preparation and study they are able to devote to the matter, and the opportunity for consultation with a professional of established competence in the sub-

ject matter in question. Even with regard to subjects in which they are expert, forensic practitioners may choose to consult with colleagues.

Guideline 2.02: Gaining and Maintaining Competence

Competence can be acquired through various combinations of education, training, supervised experience, consultation, study, and professional experience. Forensic practitioners planning to provide services, teach, or conduct research involving populations, areas, techniques, or technologies that are new to them are encouraged to undertake relevant education, training, supervised experience, consultation, or study.

Forensic practitioners make ongoing efforts to develop and maintain their competencies (EPPCC Standard 2.03). To maintain the requisite knowledge and skill, forensic practitioners keep abreast of developments in the fields of psychology and the law.

Guideline 2.03: Representing Competencies

Consistent with the EPPCC, forensic practitioners adequately and accurately inform all recipients of their services (e.g., attorneys, tribunals) about relevant aspects of the nature and extent of their experience, training, credentials, and qualifications, and how they were obtained (EPPCC Standard 5.01).

Guideline 2.04: Knowledge of the Legal System and the Legal Rights of Individuals

Forensic practitioners recognize the importance of obtaining a fundamental and reasonable level of knowledge and understanding of the legal and professional standards, laws, rules, and precedents that govern their participation in legal proceedings and that guide the impact of their services on service recipients (EPPCC Standard 2.01).

Forensic practitioners aspire to manage their professional conduct in a manner that does not threaten or impair the rights of affected individuals. They may consult with, and refer others to, legal counsel on matters of law. Although they do not provide formal legal advice or opinions, forensic practitioners may provide information about the legal process to others based on their knowledge and experience. They strive to distinguish this from legal opinions, however, and encourage consultation with attorneys as appropriate.

Guideline 2.05: Knowledge of the Scientific Foundation for Opinions and Testimony

Forensic practitioners seek to provide opinions and testimony that are sufficiently based upon adequate scientific foundation, and reliable and valid principles and methods that have been applied appropriately to the facts of the case.

When providing opinions and testimony that are based on novel or emerging principles and methods, forensic practitioners seek to make known the status and limitations of these principles and methods.

Guideline 2.06: Knowledge of the Scientific Foundation for Teaching and Research

Forensic practitioners engage in teaching and research activities in which they have adequate knowledge, experience, and education (EPPCC Standard 2.01), and they acknowledge relevant limitations and caveats inherent in procedures and conclusions (EPPCC Standard 5.01).

Guideline 2.07: Considering the Impact of Personal Beliefs and Experience

Forensic practitioners recognize that their own cultures, attitudes, values, beliefs, opinions, or biases may affect their ability to practice in a competent and impartial manner. When such factors may diminish their ability to practice in a competent and impartial manner, forensic practitioners may take steps to correct or limit such effects, decline participation in the matter, or limit their participation in a manner that is consistent with professional obligations.

Guideline 2.08: Appreciation of Individual and Group Differences

When scientific or professional knowledge in the discipline of psychology establishes that an understanding of factors associated with age, gender, gender identity, race, ethnicity, culture, national origin, religion, sexual orientation, disability, language, socioeconomic status, or other relevant individual and cultural differences affects implementation or use of their services or research, forensic practitioners consider the boundaries of their expertise, make an appropriate referral if indicated, or gain the necessary training, experience, consultation, or supervision (EPPCC Standard 2.01; APA, 2003, 2004, 2011c, 2011d, 2011e).

Forensic practitioners strive to understand how factors associated with age, gender, gender identity, race, ethnicity, culture, national origin, religion, sexual orientation, disability, language, socioeconomic status, or other relevant individual and cultural differences may affect and be related to the basis for people's contact and involvement with the legal system.

Forensic practitioners do not engage in unfair discrimination based on such factors or on any basis proscribed by law (EPPCC Standard 3.01). They strive to take steps to correct or limit the effects of such factors on their work, decline participation in the matter, or limit their participation in a manner that is consistent with professional obligations.

Guideline 2.09: Appropriate Use of Services and Products

Forensic practitioners are encouraged to make reasonable efforts to guard against misuse of their services and exercise professional discretion in addressing such misuses.

3. Diligence

Guideline 3.01: Provision of Services

Forensic practitioners are encouraged to seek explicit agreements that define the scope of, time-frame of, and

compensation for their services. In the event that a client breaches the contract or acts in a way that would require the practitioner to violate ethical, legal or professional obligations, the forensic practitioner may terminate the relationship.

Forensic practitioners strive to act with reasonable diligence and promptness in providing agreed-upon and reasonably anticipated services. Forensic practitioners are not bound, however, to provide services not reasonably anticipated when retained, nor to provide every possible aspect or variation of service. Instead, forensic practitioners may exercise professional discretion in determining the extent and means by which services are provided and agreements are fulfilled.

Guideline 3.02: Responsiveness

Forensic practitioners seek to manage their workloads so that services can be provided thoroughly, competently, and promptly. They recognize that acting with reasonable promptness, however, does not require the forensic practitioner to acquiesce to service demands not reasonably anticipated at the time the service was requested, nor does it require the forensic practitioner to provide services if the client has not acted in a manner consistent with existing agreements, including payment of fees.

Guideline 3.03: Communication

Forensic practitioners strive to keep their clients reasonably informed about the status of their services, comply with their clients' reasonable requests for information, and consult with their clients about any substantial limitation on their conduct or performance that may arise when they reasonably believe that their clients expect a service that is not consistent with their professional obligations. Forensic practitioners attempt to keep their clients reasonably informed regarding new facts, opinions, or other potential evidence that may be relevant and applicable.

Guideline 3.04: Termination of Services

The forensic practitioner seeks to carry through to conclusion all matters undertaken for a client unless the forensic practitioner–client relationship is terminated. When a forensic practitioner's employment is limited to a specific matter, the relationship may terminate when the matter has been resolved, anticipated services have been completed, or the agreement has been violated.

4. Relationships

Whether a forensic practitioner–client relationship exists depends on the circumstances and is determined by a number of factors which may include the information exchanged between the potential client and the forensic practitioner prior to, or at the initiation of, any contact or service, the nature of the interaction, and the purpose of the interaction.

In their work, forensic practitioners recognize that relationships are established with those who retain their services (e.g., retaining parties, employers, insurers, the

court) and those with whom they interact (e.g., examinees, collateral contacts, research participants, students). Forensic practitioners recognize that associated obligations and duties vary as a function of the nature of the relationship.

Guideline 4.01: Responsibilities to Retaining Parties

Most responsibilities to the retaining party attach only after the retaining party has requested and the forensic practitioner has agreed to render professional services and an agreement regarding compensation has been reached. Forensic practitioners are aware that there are some responsibilities, such as privacy, confidentiality, and privilege, that may attach when the forensic practitioner agrees to consider whether a forensic practitioner-retaining party relationship shall be established. Forensic practitioners, prior to entering into a contract, may direct the potential retaining party not to reveal any confidential or privileged information as a way of protecting the retaining party's interest in case a conflict exists as a result of pre-existing relationships.

At the initiation of any request for service, forensic practitioners seek to clarify the nature of the relationship and the services to be provided including the role of the forensic practitioner (e.g., trial consultant, forensic examiner, treatment provider, expert witness, research consultant); which person or entity is the client; the probable uses of the services provided or information obtained; and any limitations to privacy, confidentiality, or privilege.

Guideline 4.02: Multiple Relationships

A multiple relationship occurs when a forensic practitioner is in a professional role with a person and, at the same time or at a subsequent time, is in a different role with the same person; is involved in a personal, fiscal, or other relationship with an adverse party; at the same time is in a relationship with a person closely associated with or related to the person with whom the forensic practitioner has the professional relationship; or offers or agrees to enter into another relationship in the future with the person or a person closely associated with or related to the person (EPPCC Standard 3.05).

Forensic practitioners strive to recognize the potential conflicts of interest and threats to objectivity inherent in multiple relationships. Forensic practitioners are encouraged to recognize that some personal and professional relationships may interfere with their ability to practice in a competent and impartial manner and they seek to minimize any detrimental effects by avoiding involvement in such matters whenever feasible or limiting their assistance in a manner that is consistent with professional obligations.

Guideline 4.02.01: Therapeutic-Forensic Role Conflicts

Providing forensic and therapeutic psychological services to the same individual or closely related individuals involves multiple relationships that may impair objectivity and/or cause exploitation or other harm. Therefore, when requested or ordered to provide either concurrent or se-

quential forensic and therapeutic services, forensic practitioners are encouraged to disclose the potential risk and make reasonable efforts to refer the request to another qualified provider. If referral is not possible, the forensic practitioner is encouraged to consider the risks and benefits to all parties and to the legal system or entity likely to be impacted, the possibility of separating each service widely in time, seeking judicial review and direction, and consulting with knowledgeable colleagues. When providing both forensic and therapeutic services, forensic practitioners seek to minimize the potential negative effects of this circumstance (EPPCC Standard 3.05).

Guideline 4.02.02: Expert Testimony by Practitioners Providing Therapeutic Services

Providing expert testimony about a patient who is a participant in a legal matter does not necessarily involve the practice of forensic psychology even when that testimony is relevant to a psycholegal issue before the decision maker. For example, providing testimony on matters such as a patient's reported history or other statements, mental status, diagnosis, progress, prognosis, and treatment would not ordinarily be considered forensic practice even when the testimony is related to a psycholegal issue before the decision maker. In contrast, rendering opinions and providing testimony about a person on psycholegal issues (e.g., criminal responsibility, legal causation, proximate cause, trial competence, testamentary capacity, the relative merits of parenting arrangements) would ordinarily be considered the practice of forensic psychology.

Consistent with their ethical obligations to base their opinions on information and techniques sufficient to substantiate their findings (EPPCC Standards 2.04, 9.01), forensic practitioners are encouraged to provide testimony only on those issues for which they have adequate foundation and only when a reasonable forensic practitioner engaged in similar circumstances would determine that the ability to make a proper decision is unlikely to be impaired. As with testimony regarding forensic examinees, the forensic practitioner strives to identify any substantive limitations that may affect the reliability and validity of the facts or opinions offered, and communicates these to the decision maker.

Guideline 4.02.03: Provision of Forensic Therapeutic Services

Although some therapeutic services can be considered forensic in nature, the fact that therapeutic services are ordered by the court does not necessarily make them forensic.

In determining whether a therapeutic service should be considered the practice of forensic psychology, psychologists are encouraged to consider the potential impact of the legal context on treatment, the potential for treatment to impact the psycholegal issues involved in the case, and whether another reasonable psychologist in a similar position would consider the service to be forensic and these Guidelines to be applicable.

Therapeutic services can have significant effects on current or future legal proceedings. Forensic practitioners

are encouraged to consider these effects and minimize any unintended or negative effects on such proceedings or therapy when they provide therapeutic services in forensic contexts.

Guideline 4.03: Provision of Emergency Mental Health Services to Forensic Examinees

When providing forensic examination services an emergency may arise that requires the practitioner to provide short-term therapeutic services to the examinee in order to prevent imminent harm to the examinee or others. In such cases the forensic practitioner is encouraged to limit disclosure of information and inform the retaining attorney, legal representative, or the court in an appropriate manner. Upon providing emergency treatment to examinees, forensic practitioners consider whether they can continue in a forensic role with that individual so that potential for harm to the recipient of services is avoided (EPPCC Standard 3.04).

5. Fees

Guideline 5.01: Determining Fees

When determining fees forensic practitioners may consider salient factors such as their experience providing the service, the time and labor required, the novelty and difficulty of the questions involved, the skill required to perform the service, the fee customarily charged for similar forensic services, the likelihood that the acceptance of the particular employment will preclude other employment, the time limitations imposed by the client or circumstances, the nature and length of the professional relationship with the client, the client's ability to pay for the service, and any legal requirements.

Guideline 5.02: Fee Arrangements

Forensic practitioners are encouraged to make clear to the client the likely cost of services whenever it is feasible, and make appropriate provisions in those cases in which the costs of services is greater than anticipated or the client's ability to pay for services changes in some way.

Forensic practitioners seek to avoid undue influence that might result from financial compensation or other gains. Because of the threat to impartiality presented by the acceptance of contingent fees and associated legal prohibitions, forensic practitioners strive to avoid providing professional services on the basis of contingent fees. Letters of protection, financial guarantees, and other security for payment of fees in the future are not considered contingent fees unless payment is dependent on the outcome of the matter.

Guideline 5.03: Pro Bono Services

Forensic psychologists recognize that some persons may have limited access to legal services as a function of financial disadvantage and strive to contribute a portion of their professional time for little or no compensation or personal advantage (EPPCC Principle E).

6. Informed Consent, Notification, and Assent

Because substantial rights, liberties, and properties are often at risk in forensic matters, and because the methods and procedures of forensic practitioners are complex and may not be accurately anticipated by the recipients of forensic services, forensic practitioners strive to inform service recipients about the nature and parameters of the services to be provided (EPPCC Standards 3.04, 3.10).

Guideline 6.01: Timing and Substance

Forensic practitioners strive to inform clients, examinees, and others who are the recipients of forensic services as soon as is feasible about the nature and extent of reasonably anticipated forensic services.

In determining what information to impart, forensic practitioners are encouraged to consider a variety of factors including the person's experience or training in psychological and legal matters of the type involved and whether the person is represented by counsel. When questions or uncertainties remain after they have made the effort to explain the necessary information, forensic practitioners may recommend that the person seek legal advice.

Guideline 6.02: Communication With Those Seeking to Retain a Forensic Practitioner

As part of the initial process of being retained, or as soon thereafter as previously unknown information becomes available, forensic practitioners strive to disclose to the retaining party information that would reasonably be anticipated to affect a decision to retain or continue the services of the forensic practitioner.

This disclosure may include, but is not limited to, the fee structure for anticipated services; prior and current personal or professional activities, obligations, and relationships that would reasonably lead to the fact or the appearance of a conflict of interest; the forensic practitioner's knowledge, skill, experience, and education relevant to the forensic services being considered, including any significant limitations; and the scientific bases and limitations of the methods and procedures which are expected to be employed.

Guideline 6.03: Communication With Forensic Examinees

Forensic practitioners inform examinees about the nature and purpose of the examination (EPPCC Standard 9.03; American Educational Research Association, American Psychological Association, & National Council on Measurement in Education [AERA, APA, & NCME], in press). Such information may include the purpose, nature, and anticipated use of the examination; who will have access to the information; associated limitations on privacy, confidentiality, and privilege including who is authorized to release or access the information contained in the forensic practitioner's records; the voluntary or involuntary nature of participation, including potential consequences of par-

ticipation or nonparticipation, if known; and, if the cost of the service is the responsibility of the examinee, the anticipated cost.

Guideline 6.03.01: Persons Not Ordered or Mandated to Undergo Examination

If the examinee is not ordered by the court to participate in a forensic examination, the forensic practitioner seeks his or her informed consent (EPPCC Standards 3.10, 9.03). If the examinee declines to proceed after being notified of the nature and purpose of the forensic examination, the forensic practitioner may consider postponing the examination, advising the examinee to contact his or her attorney, and notifying the retaining party about the examinee's unwillingness to proceed.

Guideline 6.03.02: Persons Ordered or Mandated to Undergo Examination or Treatment

If the examinee is ordered by the court to participate, the forensic practitioner can conduct the examination over the objection, and without the consent, of the examinee (EPPCC Standards 3.10, 9.03). If the examinee declines to proceed after being notified of the nature and purpose of the forensic examination, the forensic practitioner may consider a variety of options including postponing the examination, advising the examinee to contact his or her attorney, and notifying the retaining party about the examinee's unwillingness to proceed.

When an individual is ordered to undergo treatment but the goals of treatment are determined by a legal authority rather than the individual receiving services, the forensic practitioner informs the service recipient of the nature and purpose of treatment, and any limitations on confidentiality and privilege (EPPCC Standards 3.10, 10.01).

Guideline 6.03.03: Persons Lacking Capacity to Provide Informed Consent

Forensic practitioners appreciate that the very conditions that precipitate psychological examination of individuals involved in legal proceedings can impair their functioning in a variety of important ways, including their ability to understand and consent to the evaluation process.

For examinees adjudicated or presumed by law to lack the capacity to provide informed consent for the anticipated forensic service, the forensic practitioner nevertheless provides an appropriate explanation, seeks the examinee's assent, and obtains appropriate permission from a legally authorized person, as permitted or required by law (EPPCC Standards 3.10, 9.03).

For examinees whom the forensic practitioner has concluded lack capacity to provide informed consent to a proposed, non-court-ordered service, but who have not been adjudicated as lacking such capacity, the forensic practitioner strives to take reasonable steps to protect their rights and welfare (EPPCC Standard 3.10). In such cases, the forensic practitioner may consider suspending the pro-

posed service or notifying the examinee's attorney or the retaining party.

Guideline 6.03.04: Evaluation of Persons Not Represented by Counsel

Because of the significant rights that may be at issue in a legal proceeding, forensic practitioners carefully consider the appropriateness of conducting a forensic evaluation of an individual who is not represented by counsel. Forensic practitioners may consider conducting such evaluations or delaying the evaluation so as to provide the examinee with the opportunity to consult with counsel.

Guideline 6.04: Communication With Collateral Sources of Information

Forensic practitioners disclose to potential collateral sources information that might reasonably be expected to inform their decisions about participating that may include, but may not be limited to, who has retained the forensic practitioner; the nature, purpose, and intended use of the examination or other procedure; the nature of and any limits on privacy, confidentiality, and privilege; and whether their participation is voluntary (EPPCC Standard 3.10).

Guideline 6.05: Communication in Research Contexts

When engaging in research or scholarly activities conducted as a service to a client in a legal proceeding, forensic practitioners attempt to clarify any anticipated use of the research or scholarly product, disclose their role in the resulting research or scholarly products, and obtain whatever consent or agreement is required.

In advance of any scientific study, forensic practitioners seek to negotiate with the client the circumstances under and manner in which the results may be made known to others. Forensic practitioners strive to balance the potentially competing rights and interests of the retaining party with the inappropriateness of suppressing data, for example, by agreeing to report the data without identifying the jurisdiction in which the study took place. Forensic practitioners represent the results of research in an accurate manner (EPPCC Standard 5.01).

7. Conflicts in Practice

In forensic psychology practice, conflicting responsibilities and demands may be encountered. When conflicts occur, forensic practitioners seek to make the conflict known to the relevant parties or agencies, and consider the rights and interests of the relevant parties or agencies in their attempts to resolve the conflict.

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. In situations in which the

EPPCC or the Guidelines are in conflict with the law, attempts to resolve the conflict are made in accordance with the EPPCC (EPPCC Standard 1.02).

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, but only to the extent required and not in any way that violates a person's human rights (EPPCC Standard 1.03).

Forensic practitioners are encouraged to consider the appropriateness of complying with court orders when such compliance creates potential conflicts with professional standards of practice.

Guideline 7.02: Conflicts With Organizational Demands

When the demands of an organization with which they are affiliated or for whom they are working conflict with their professional responsibilities and obligations, forensic practitioners strive to clarify the nature of the conflict and, to the extent feasible, resolve the conflict in a way consistent with professional obligations and responsibilities (EPPCC Standard 1.03).

Guideline 7.03: Resolving Ethical Issues With Fellow Professionals

When an apparent or potential ethical violation has caused, or is likely to cause, substantial harm, forensic practitioners are encouraged to take action appropriate to the situation and consider a number of factors including the nature and the immediacy of the potential harm; applicable privacy, confidentiality, and privilege; how the rights of the relevant parties may be affected by a particular course of action; and any other legal or ethical obligations (EPPCC Standard 1.04). Steps to resolve perceived ethical conflicts may include, but are not limited to, obtaining the consultation of knowledgeable colleagues, obtaining the advice of independent counsel, and conferring directly with the client.

When forensic practitioners believe there may have been an ethical violation by another professional, an attempt is made to resolve the issue by bringing it to the attention of that individual, if that attempt does not violate any rights or privileges that may be involved, and if an informal resolution appears appropriate (EPPCC Standard 1.04). If this does not result in a satisfactory resolution, the forensic practitioner may have to take further action appropriate to the situation, including making a report to third parties of the perceived ethical violation (EPPCC Standard 1.05). In most instances, in order to minimize unforeseen risks to the party's rights in the legal matter, forensic practitioners consider consulting with the client before attempting to resolve a perceived ethical violation with another professional.

8. Privacy, Confidentiality, and Privilege

Forensic practitioners recognize their ethical obligations to maintain the confidentiality of information relating to a client or retaining party, except insofar as disclosure is

consented to by the client or retaining party, or required or permitted by law (EPPCC Standard 4.01).

Guideline 8.01: Release of Information

Forensic practitioners are encouraged to recognize the importance of complying with properly noticed and served subpoenas or court orders directing release of information, or other legally proper consent from duly authorized persons, unless there is a legally valid reason to offer an objection. When in doubt about an appropriate response or course of action, forensic practitioners may seek assistance from the retaining client, retain and seek legal advice from their own attorney, or formally notify the drafter of the subpoena or order of their uncertainty.

Guideline 8.02: Access to Information

If requested, forensic practitioners seek to provide the retaining party access to, and a meaningful explanation of, all information that is in their records for the matter at hand, consistent with the relevant law, applicable codes of ethics and professional standards, and institutional rules and regulations. Forensic examinees typically are not provided access to the forensic practitioner's records without the consent of the retaining party. 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. Forensic practitioners may charge a reasonable fee for the costs associated with the storage, reproduction, review, and provision of records.

Guideline 8.03: Acquiring Collateral and Third Party Information

Forensic practitioners strive to access information or records from collateral sources with the consent of the relevant attorney or the relevant party, or when otherwise authorized by law or court order.

Guideline 8.04: Use of Case Materials in Teaching, Continuing Education, and Other Scholarly Activities

Forensic practitioners using case materials for purposes of teaching, training, or research strive to present such information in a fair, balanced, and respectful manner. They attempt to protect the privacy of persons by disguising the confidential, personally identifiable information of all persons and entities who would reasonably claim a privacy interest; using only those aspects of the case available in the public domain; or obtaining consent from the relevant clients, parties, participants, and organizations to use the materials for such purposes (EPPCC Standard 4.07; also see Guidelines 11.06 and 11.07 of these Guidelines).

9. Methods and Procedures

Guideline 9.01: Use of Appropriate Methods

Forensic practitioners strive to utilize appropriate methods and procedures in their work. When performing examinations, treatment, consultation, educational activities, or scholarly investigations, forensic practitioners seek to

maintain integrity by examining the issue or problem at hand from all reasonable perspectives and seek information that will differentially test plausible rival hypotheses.

Guideline 9.02: Use of Multiple Sources of Information

Forensic practitioners ordinarily avoid relying solely on one source of data, and corroborate important data whenever feasible (AERA, APA, & NCME, in press). When relying upon data that have not been corroborated, forensic practitioners seek to make known the uncorroborated status of the data, any associated strengths and limitations, and the reasons for relying upon the data.

Guideline 9.03: Opinions Regarding Persons Not Examined

Forensic practitioners recognize their obligations to only provide written or oral evidence about the psychological characteristics of particular individuals when they have sufficient information or data to form an adequate foundation for those opinions or to substantiate their findings (EPPCC Standard 9.01). Forensic practitioners seek to make reasonable efforts to obtain such information or data, and they document their efforts to obtain it. When it is not possible or feasible to examine individuals about whom they are offering an opinion, forensic practitioners strive to make clear the impact of such limitations on the reliability and validity of their professional products, opinions, or testimony.

When conducting a record review or providing consultation or supervision that does not warrant an individual examination, forensic practitioners seek to identify the sources of information on which they are basing their opinions and recommendations, including any substantial limitations to their opinions and recommendations.

10. Assessment

Guideline 10.01: Focus on Legally Relevant Factors

Forensic examiners seek to assist the trier of fact to understand evidence or determine a fact in issue, and they provide information that is most relevant to the psycholegal issue. In reports and testimony, forensic practitioners typically provide information about examinees' functional abilities, capacities, knowledge, and beliefs, and address their opinions and recommendations to the identified psycholegal issues (American Bar Association & American Psychological Association, 2008; Grisso, 1986, 2003; Heilbrun, Marczyk, DeMatteo, & Mack-Allen, 2007).

Forensic practitioners are encouraged to consider the problems that may arise by using a clinical diagnosis in some forensic contexts, and consider and qualify their opinions and testimony appropriately.

Guideline 10.02: Selection and Use of Assessment Procedures

Forensic practitioners use assessment procedures in the manner and for the purposes that are appropriate in light of

the research on or evidence of their usefulness and proper application (EPPCC Standard 9.02; AERA, APA, & NCME, in press). This includes assessment techniques, interviews, tests, instruments, and other procedures and their administration, adaptation, scoring, and interpretation, including computerized scoring and interpretation systems.

Forensic practitioners use assessment instruments whose validity and reliability have been established for use with members of the population assessed. When such validity and reliability have not been established, forensic practitioners consider and describe the strengths and limitations of their findings. Forensic practitioners use assessment methods that are appropriate to an examinee's language preference and competence, unless the use of an alternative language is relevant to the assessment issues (EPPCC Standard 9.02).

Assessment in forensic contexts differs from assessment in therapeutic contexts in important ways that forensic practitioners strive to take into account when conducting forensic examinations. Forensic practitioners seek to consider the strengths and limitations of employing traditional assessment procedures in forensic examinations (AERA, APA, & NCME, in press). Given the stakes involved in forensic contexts, forensic practitioners strive to ensure the integrity and security of test materials and results (AERA, APA, & NCME, in press).

When the validity of an assessment technique has not been established in the forensic context or setting in which it is being used, the forensic practitioner seeks to describe the strengths and limitations of any test results and explain the extrapolation of these data to the forensic context. Because of the many differences between forensic and therapeutic contexts, forensic practitioners consider and seek to make known that some examination results may warrant substantially different interpretation when administered in forensic contexts (AERA, APA, & NCME, in press).

Forensic practitioners consider and seek to make known that forensic examination results can be affected by factors unique to, or differentially present in, forensic contexts including response style, voluntariness of participation, and situational stress associated with involvement in forensic or legal matters (AERA, APA, & NCME, in press).

Guideline 10.03: Appreciation of Individual Differences

When interpreting assessment results, forensic practitioners consider the purpose of the assessment as well as the various test factors, test-taking abilities, and other characteristics of the person being assessed, such as situational, personal, linguistic, and cultural differences that might affect their judgments or reduce the accuracy of their interpretations (EPPCC Standard 9.06). Forensic practitioners strive to identify any significant strengths and limitations of their procedures and interpretations.

Forensic practitioners are encouraged to consider how the assessment process may be impacted by any disability an examinee is experiencing, make accommodations as

possible, and consider such when interpreting and communicating the results of the assessment (APA, 2011d).

Guideline 10.04: Consideration of Assessment Settings

In order to maximize the validity of assessment results, forensic practitioners strive to conduct evaluations in settings that provide adequate comfort, safety, and privacy.

Guideline 10.05: Provision of Assessment Feedback

Forensic practitioners take reasonable steps to explain assessment results to the examinee or a designated representative in language they can understand (EPPCC Standard 9.10). In those circumstances in which communication about assessment results is precluded, the forensic practitioner explains this to the examinee in advance (EPPCC Standard 9.10).

Forensic practitioners seek to provide information about professional work in a manner consistent with professional and legal standards for the disclosure of test data or results, interpretation of data, and the factual bases for conclusions.

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 (Committee on Psychological Tests and Assessment, American Psychological Association, 2007).

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.

Guideline 10.08: Record Keeping

Forensic practitioners establish and maintain a system of record keeping and professional communication (EPPCC Standard 6.01; APA, 2007), and attend to relevant laws and rules. When indicated by the extent of the rights, liberties,

and properties that may be at risk, the complexity of the case, the amount and legal significance of unique evidence in the care and control of the forensic practitioner, and the likelihood of future appeal, forensic practitioners strive to inform the retaining party of the limits of record keeping times. If requested to do so, forensic practitioners consider maintaining such records until notified that all appeals in the matter have been exhausted, or sending a copy of any unique components/aspects of the record in their care and control to the retaining party before destruction of the record.

11. Professional and Other Public Communications

Guideline 11.01: Accuracy, Fairness, and Avoidance of Deception

Forensic practitioners make reasonable efforts to ensure that the products of their services, as well as their own public statements and professional reports and testimony, are communicated in ways that promote understanding and avoid deception (EPPCC Standard 5.01).

When in their role as expert to the court or other tribunals, the role of forensic practitioners is to facilitate understanding of the evidence or dispute. Consistent with legal and ethical requirements, forensic practitioners do not distort or withhold relevant evidence or opinion in reports or testimony. When responding to discovery requests and providing sworn testimony, forensic practitioners strive to have readily available for inspection all data which they considered, regardless of whether the data supports their opinion, subject to and consistent with court order, relevant rules of evidence, test security issues, and professional standards (AERA, APA, & NCME, in press; Committee on Legal Issues, American Psychological Association, 2006; Bank & Packer, 2007; Golding, 1990).

When providing reports and other sworn statements or testimony in any form, forensic practitioners strive to present their conclusions, evidence, opinions, or other professional products in a fair manner. Forensic practitioners do not, by either commission or omission, participate in misrepresentation of their evidence, nor do they participate in partisan attempts to avoid, deny, or subvert the presentation of evidence contrary to their own position or opinion (EPPCC Standard 5.01). This does not preclude forensic practitioners from forcefully presenting the data and reasoning upon which a conclusion or professional product is based.

Guideline 11.02: Differentiating Observations, Inferences, and Conclusions

In their communications, forensic practitioners strive to distinguish observations, inferences, and conclusions. Forensic practitioners are encouraged to explain the relationship between their expert opinions and the legal issues and facts of the case at hand.

Guideline 11.03: Disclosing Sources of Information and Bases of Opinions

Forensic practitioners are encouraged to disclose all sources of information obtained in the course of their professional services, and to identify the source of each piece of information that was considered and relied upon in formulating a particular conclusion, opinion, or other professional product.

Guideline 11.04: Comprehensive and Accurate Presentation of Opinions in Reports and Testimony

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. The specific substance of forensic reports is determined by the type of psycholegal issue at hand as well as relevant laws or rules in the jurisdiction in which the work is completed.

Forensic practitioners are encouraged to limit discussion of background information that does not bear directly upon the legal purpose of the examination or consultation. Forensic practitioners avoid offering information that is irrelevant and that does not provide a substantial basis of support for their opinions, except when required by law (EPPCC Standard 4.04).

Guideline 11.05: Commenting Upon Other Professionals and Participants in Legal Proceedings

When evaluating or commenting upon the work or qualifications of other professionals involved in legal proceedings, forensic practitioners seek to represent their disagreements in a professional and respectful tone, and base them on a fair examination of the data, theories, standards, and opinions of the other expert or party.

When describing or commenting upon clients, examinees, or other participants in legal proceedings, forensic practitioners strive to do so in a fair and impartial manner.

Forensic practitioners strive to report the representations, opinions, and statements of clients, examinees, or other participants in a fair and impartial manner.

Guideline 11.06: Out of Court Statements

Ordinarily, forensic practitioners seek to avoid making detailed public (out-of-court) statements about legal proceedings in which they have been involved. However, sometimes public statements may serve important goals such as educating the public about the role of forensic practitioners in the legal system, the appropriate practice of forensic psychology, and psychological and legal issues that are relevant to the matter at hand. When making public statements, forensic practitioners refrain from releasing

private, confidential, or privileged information, and attempt to protect persons from harm, misuse, or misrepresentation as a result of their statements (EPPCC Standard 4.05).

Guideline 11.07: Commenting Upon Legal Proceedings

Forensic practitioners strive to address particular legal proceedings in publications or communications only to the extent that the information relied upon is part of a public record, or when consent for that use has been properly obtained from any party holding any relevant privilege (also see Guideline 8.04).

When offering public statements about specific cases in which they have not been involved, forensic practitioners offer opinions for which there is sufficient information or data and make clear the limitations of their statements and opinions resulting from having had no direct knowledge of or involvement with the case (EPPCC Standard 9.01).

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Appendix A

Revision Process of the Guidelines

This revision of the Guidelines was coordinated by the Committee for the Revision of the Specialty Guidelines for Forensic Psychology (“the Revisions Committee”), which was established by the American Academy of Forensic Psychology and the American Psychology–Law Society (Division 41 of the American Psychological Association [APA]) in 2002 and which operated through 2011. This committee consisted of two representatives from each organization (Solomon Fulero, PhD, JD; Stephen Golding, PhD, ABPP; Lisa Piechowski, PhD, ABPP; Christina Studebaker, PhD), a chairperson (Randy Otto, PhD, ABPP), and a liaison from Division 42 (Psychologists in Independent Practice) of APA (Jeffrey Younggren, PhD, ABPP).

This document was revised in accordance with APA Rule 30.08 and the APA policy document “Criteria for Practice Guideline Development and Evaluation” (APA, 2002). The Revisions Committee posted announcements regarding the revision process to relevant electronic discussion lists and professional publications (i.e., the *Psy-law-L* e-mail listserv of the American Psychology–Law Society, the American Academy of Forensic Psychology listserv, the American Psychology–Law Society Newslet-

ter). In addition, an electronic discussion list devoted solely to issues concerning revision of the Guidelines was operated between December 2002 and July 2007, followed by establishment of an e-mail address in February 2008 (sgfp@yahoo.com). Individuals were invited to provide input and commentary on the existing Guidelines and proposed revisions via these means. In addition, two public meetings were held throughout the revision process at biennial meetings of the American Psychology–Law Society.

Upon development of a draft that the Revisions Committee deemed suitable, the revised Guidelines were submitted for review to the Executive Committee of the American Psychology–Law Society (Division 41 of APA) and the American Board of Forensic Psychology. Once the revised Guidelines were approved by these two organizations, they were submitted to APA for review, commentary, and acceptance, consistent with APA’s “Criteria for Practice Guideline Development and Evaluation” (APA, 2002) and APA Rule 30-8. They were subsequently revised by the Revisions Committee and were adopted by the APA Council of Representatives on August 3, 2011.

(Appendices continue)

Appendix B

Definitions and Terminology

For the purposes of these Guidelines:

Appropriate, when used in relation to conduct by a forensic practitioner means that, according to the prevailing professional judgment of competent forensic practitioners, the conduct is apt and pertinent and is considered befitting, suitable, and proper for a particular person, place, condition, or function. **Inappropriate** means that, according to the prevailing professional judgment of competent forensic practitioners, the conduct is not suitable, desirable, or properly timed for a particular person, occasion, or purpose; and may also denote improper conduct, improprieties, or conduct that is discrepant for the circumstances.

Agreement refers to the objective and mutual understanding between the forensic practitioner and the person or persons seeking the professional service and/or agreeing to participate in the service. See also Assent, Consent, and Informed Consent.

Assent refers to the agreement, approval, or permission, especially regarding verbal or nonverbal conduct, that is reasonably intended and interpreted as expressing willingness, even in the absence of unmistakable consent. Forensic practitioners attempt to secure assent when consent and informed consent cannot be obtained or when, because of mental state, the examinee may not be able to consent.

Consent refers to agreement, approval, or permission as to some act or purpose.

Client refers to the attorney, law firm, court, agency, entity, party, or other person who has retained, and who has a contractual relationship with, the forensic practitioner to provide services.

Conflict of Interest refers to a situation or circumstance in which the forensic practitioner's objectivity, impartiality, or judgment may be jeopardized due to a relationship, financial, or any other interest that would reasonably be expected to substantially affect a forensic practitioner's professional judgment, impartiality, or decision making.

Decision Maker refers to the person or entity with the authority to make a judicial decision, agency determination, arbitration award, or other contractual determination after consideration of the facts and the law.

Examinee refers to a person who is the subject of a forensic examination for the purpose of informing a decision maker or attorney about the psychological functioning of that examinee.

Forensic Examiner refers to a psychologist who examines the psychological condition of a person whose psychological condition is in controversy or at issue.

Forensic Practice refers to the application of the scientific, technical, or specialized knowledge of psychol-

ogy to the law and the use of that knowledge to assist in resolving legal, contractual, and administrative disputes.

Forensic Practitioner refers to a psychologist when engaged in forensic practice.

Forensic Psychology refers to all forensic practice by any psychologist working within any subdiscipline of psychology (e.g., clinical, developmental, social, cognitive).

Informed Consent denotes the knowledgeable, voluntary, and competent agreement by a person to a proposed course of conduct after the forensic practitioner has communicated adequate information and explanation about the material risks and benefits of, and reasonably available alternatives to, the proposed course of conduct.

Legal Representative refers to a person who has the legal authority to act on behalf of another.

Party refers to a person or entity named in litigation, or who is involved in, or is witness to, an activity or relationship that may be reasonably anticipated to result in litigation.

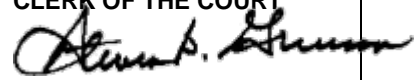
Reasonable or **Reasonably**, when used in relation to conduct by a forensic practitioner, denotes the conduct of a prudent and competent forensic practitioner who is engaged in similar activities in similar circumstances.

Record or **Written Record** refers to all notes, records, documents, memorializations, and recordings of considerations and communications, be they in any form or on any media, tangible, electronic, handwritten, or mechanical, that are contained in, or are specifically related to, the forensic matter in question or the forensic service provided.

Retaining Party refers to the attorney, law firm, court, agency, entity, party, or other person who has retained, and who has a contractual relationship with, the forensic practitioner to provide services.

Tribunal denotes a court or an arbitrator in an arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity. A legislative body, administrative agency, or other body acts in an adjudicative capacity when a neutral official, after the presentation of legal argument or evidence by a party or parties, renders a judgment directly affecting a party's interests in a particular matter.

Trier of Fact refers to a court or an arbitrator in an arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity. A legislative body, administrative agency, or other body acts in an adjudicative capacity when a neutral official, after the presentation of legal argument or evidence by a party or parties, renders a judgment directly affecting a party's interests in a particular matter.



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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.

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

AND

OPPOSITION TO PLAINTIFF'S MOTION FOR SANCTIONS

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 submit the following Reply to their Motion to Compel
NRCP 35 Neuropsychological Exam with Dr. Lewis M. Etcoff, Noticed for October 19-20, 2021,
on an Order Shortening Time AND Opposition to Plaintiff's frivolous Motion for Sanctions.

///

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DECLARATION OF BRENT D. QUIST, ESQ. IN SUPPORT OF REPLY TO MOTION TO COMPEL RULE 35 EXAMINATION AND IN SUPPORT OF OPPOSITION TO PLAINTIFF'S MOTION FOR SANCTIONS.

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

1. As part of my three months of effort to persuade counsel for Plaintiff, Ryan Loosvelt, Esq., to agree to Mr. Cape undergoing the Rule 35 neuropsychological exam with Dr. Etcoff, I sent an e-mail to Mr. Loosvelt detailing the following proposed Rule 35 scope (see **Exhibit A**, Quist e-mail to Loosvelt dated September 2, 2021):

a. That Dr. Etcoff will allow an observer present for the interview portion of the exam; however, he is ethically prohibited from allowing a third-party observer or audio/video recording for the personality test and neuropsychological test exam portions. I explained the observer/recording invalidates the testing process. Plaintiff should be aware of this as the evaluation with his neuropsychologist did not involve a third-party observer or recording device.

b. That Dr. Etcoff will not allow the raw test data, including the neuropsychological test questions, to be produced to a plaintiff or plaintiff's attorneys. I explained there were copyright issues, and there is a concern a leak of the test data/test questions could occur. As I recall, in my subsequent call with Mr. Loosvelt, I clarified that Dr. Etcoff is willing to share the raw test questions/ test data directly with Plaintiff's neuropsychologist.

c. Finally, I explained the standard neuropsychological test will take two days to complete. This is the same length of time Plaintiff's own neuropsychological expert spent examining him.

2. Part of Mr. Loosvelt's request for attorney fees against Defendants is because Defendants were unwilling to "compromise" as to the Rule 35 exam scope. See Opposition, at p. 4. This statement is untrue, as shown above, and ignores that the parties agreed to most of the scope of Dr. Etcoff's exam.

3. Mr. Loosvelt alleges I lied when I stated "Dr. Etcoff would under no circumstances allow an observer or a recording." See Opposition, at p. 6. The basis for this defamatory assertion is that on April 6, 2021, the Discovery Commissioner ordered Dr. Etcoff to perform a Rule 35 neuropsychological exam and, in doing so, allow an observer and audio recording. *Id.*

1 4. As Ex. 7 to his Opposition, Plaintiff produced the attached Discovery
2 Commissioner's Report and Recommendations in the case of *Lenhardt v. Linares*, Case No. A-
3 19-800506-C. See **Exhibit B**, copy of DCRR.

4 5. I did not personally know about this case or that the Discovery Commissioner had
5 entered this ruling when I spoke with Mr. Loosvelt.

6 6. On September 28, 2021, my office reached out to Dr. Etcoff's staff regarding
7 whether Dr. Etcoff proceeded with the Rule 35 exam of the plaintiff in *Lenhardt* under the
8 conditions established by the Discovery Commissioner.

9 7. My staff member was informed that Dr. Etcoff did not move forward with the Rule
10 35 exam. He instead performed a records review.

11 8. Mr. Loosvelt's assertion that I lied to him is untrue and defamatory in nature.
12 Moreover, he never mentioned the Discovery Commissioner's ruling to me during our
13 conversation. It appears we were both unaware of the same.

14 9. Indeed, there were two other cases I was aware of when I spoke to Mr. Loosvelt
15 in which Dr. Etcoff was the proposed Rule 35 examiner. In each, plaintiff would not stipulate to a
16 Rule 35 exam without an observer and audio recording. In both, Dr. Etcoff refused to perform the
17 exam with an observer/recording for the same reasons set forth in Defendants' Motion.

18 10. The first case is *Moats v. Eighth Judicial District Court*, Supreme Court Case No.
19 81912. In that case, Judge Escobar ruled that NRC 35 governs independent medical
20 examinations and ordered the plaintiff to attend the exam with Dr. Etcoff without an observer or
21 audio recorder. The plaintiff appealed.

22 11. The second case is *Ferrellgas, Inc. v. Eighth Judicial District Court*, Supreme
23 Court Case No. 82670. There, Judge Kishner issued the opposite ruling. She held NRS 52.380
24 controls and allows for an observer. Dr. Etcoff would not perform the exam with that requirement
25 and Ferrellgas appealed.

26 12. There is a dispute among the District Court Departments as to the issues set forth
27 in the Motion. The Nevada Supreme Court has not yet issued a ruling. Thus, Plaintiff's
28 contention that Defendants' Counter-Motion is frivolous is without merit.

13. It appears the Counter-Motion may have been filed in haste due to Mr. Loosvelt's frustration that I would not give him an additional day to file his Opposition. On Monday, September 27th, he e-mailed me and asked me for an additional day to file his Opposition. I explained that while I normally have no problems with giving extensions, I could not as the hearing is Friday of this week and I am in hearings all day Wednesday. I was concerned I would not be able to have sufficient time to prepare the Reply and file it all on Thursday. **Exhibit C**, Quist and Loosvelt e-mails dated September 27, 2021.

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

MEMORANDUM OF POINTS AND AUTHORITIES

I.

**RESPONSE TO FALSE ASSERTIONS MADE BY PLAINTIFF REGARDING EDCR 2.34
CONFERRAL PROCESS**

Plaintiff Cape makes two factual assertions that need to be set straight and are addressed by the Declaration of Brent D. Quist, Esq. The first is Plaintiff's allegation defense counsel and Dr. Etcoff lied by representing Dr. Etcoff is ethically barred from conducting Rule 35 neuropsychological exams with observers/audio recording, other than the interview portions of those exams. As "evidence", Plaintiff states that in April of this year the Discovery Commissioner recommended Dr. Etcoff proceed with a Rule 35 exam and allow a third-party observer and audio recording. This decision was made in *Lehardt v. Linares*, Case No. A-19-800506-C. Defendants were unaware of this decision until Plaintiff made note of it in his Opposition. However, Dr. Etcoff did not proceed with the Rule 35 exam. Instead, he was forced to perform a records review. See Quist Declaration, at ¶¶3-8. Defendants are aware of two other cases currently on appeal to the Nevada Supreme Court based on Dr. Etcoff's refusal to perform Rule 35 exams with observers/audio recording, at least with respect to the testing portions of the exam, due to the ethical and professional rules with which he must comply. *Id.* at ¶¶9-12.

Cape alleges Defendants have been unwilling to make any effort to come to an

arrangement with respect to the scope of Dr. Etcoff's exam. This ignores that Defendants spent three months attempting to do just that, and that Dr. Etcoff is willing to allow an observer/audio recording of the interview portion of the exam, will share raw test data/test questions with Plaintiff's neuropsychological expert, and a two-day neuropsychological exam is standard. See Quist Declaration, at ¶1.

II.

ARGUMENT

A. RULE 35 EXAMS ARE NOT ADVERSARIAL IN NATURE.

Nevada courts often refer to Rule 35 exams as independent medical examinations; such exams are not adversarial in nature but are simply a means for the defendants to level the playing field. The Nevada Supreme Court and Nevada Court of Appeals routinely refer to Rule 35 examinations as "independent medical examinations." See *Garcia v. Associated Risk Management, Inc.*, 437 P.3d 1056, at *1 (Nev. 2019) ("In June 2016, a second doctor conducted an **independent medical examination** of Garcia's condition . . .") (emphasis added); *City of Las Vegas v. Lawson*, 245 P.3d 1175, 1177 (Nev. 2010) ("The hearing officer also directed that Lawson undergo an **independent medical examination**") (emphasis added); *Allstate Ins. v. Miller*, 212 P.3d 318, 316 (Nev. 2009) ("a bad-faith action applies to more than just an insurer's denial or delay in paying a claim, such as paying from an **independent medical examination.**") (emphasis added); *McClanahan v. Raley's, Inc.*, 34 P.3d 573, 575 (Nev. 2001) (Parties "agreed that Eric Boyden, M.D., would conduct an **independent medical examination** to provide an additional opinion regarding causation.") (emphasis added); *Gittings v. Hartz*, 996 P.2d 898, 902 (Nev. 2000) ("decision not to . . . seek an **independent medical examination** provides insufficient grounds for completely striking a demand for trial de novo . . .") (emphasis added); *Currier v. State Indus. Ins. System*, 956 P.2d 810, 814 (Nev. 1998) ("at the request of the insurer, an **independent medical examination** was performed on the claimant by a different physician . . .") (emphasis added); *Guaranty National Insurance Co. v. Potter*, 912 P.2d 267, 269 (Nev. 1996) ("Patow sent a letter to Galli requesting that the Potters submit to **independent medical examinations.**") (emphasis added); *Olson v. Dairy*, 2018 WL 3351973, at *1 (Nev.App. 2018)

1 (“the appeal s o fficer a bused hi s di scretion by f ailing t o or der an **independent medical**
2 **examination (IME)** . . .”) (emphasis added).

3 Independent medical examinations are a routine procedural device allowed to level the
4 playing field between the parties. See *Painter v. Atwood*, 2013 WL 5428059, at *2 (D.Nev. 2013)
5 (“Defendants have the right to perform their own assessment, because one of the purposes of
6 Rule 35 is to level the playing field in cases where physical or mental condition is at issue,
7 because ‘a plaintiff has ample opportunity for psychiatric or mental examination by his/her own
8 practitioner or forensic expert.”)(quoting *Ashley v. City & County of San Francisco*, 2013 WL
9 2386655 (N.D.Cal. 2013) and citing *Ragge v. MCA/Universal Studios*, 165 F.R.D. 605, 068 (C.D.
10 Cal. 995)). That i s one o f t he reasons w hy f ederal c ourts generally do not al low ob servers
11 present during those exams. See *Freteluco v. Smith’s Food and Drug Centers, Inc.*, 336 F.R.D.
12 198, 204 (D.Nev. 2020)(“Courts are often reluctant to permit a third party or recording device out
13 of concern that the intrusion would . . . fail to provide a level playing field” as the plaintiff “was
14 not required to tape record his examinations with his own health care providers . . .”)(quoting
15 *Flack v. Nutribullet, LLC*, 33 F.R.D. 508, 518 (C.D.Cal. 2019); see also, *Executive Management,*
16 *Ltd. v. Ticor Title Ins. Co.*, 38 P.3d 872, 876 (Nev. 2002)(“Federal cases interpreting the Federal
17 Rules of Civil Procedure ‘are strong persuasive authority, because the Nevada Rules of Civil
18 Procedure are based in large part upon their federal counterparts.”)(internal citations omitted).

19 Plaintiff Cape obviously does not desire a leveling of the playing field for the parties. He
20 does not wish f or Defendants’ neuropsychological expert t o have the same fair, uno bstructed
21 opportunity to examine him as Cape’s own neuropsychological expert was given. However, the
22 Nevada Supreme Court, like federal courts, desiring a leveling of the playing field. That is why it
23 adopted the most r ecent v ersion o f R ule 35 t hat does n ot al low f or obs ervers in
24 neuropsychological exams and requires a plaintiff to show good cause for an audio recording.
25 The court’s intent to level the playing field in this regard matters because it, not the legislature,
26 has the right to adopt procedural rules for the gathering of evidence in civil cases.

27 ///

1 **B. PLAINTIFF MISUNDERSTANDS OR MISCONSTRUES THE SEPARATION OF**
2 **POWERS DOCTRINE.**

3 Cape's suggestion the Nevada legislature may pass whatever law it wishes, even if the
4 statute disrupts an existing rule established by the Nevada Supreme Court, so long as the
5 legislature believes it has a legitimate reason for the statute, is contrary to Nevada Supreme
6 Court case law. Nevada has "embraced the [separation of powers] doctrine and incorporated it
7 into its constitution." *Commission on Ethics v. Hardy*, 212 P.3d 1098, 1103 (Nev. 2009) (citing
8 Nev. Const. art. 3 §1). "The purpose of the separation of powers doctrine is to prevent one
9 branch of government from encroaching on the powers of another branch." *Id.* (citing *Clinton v.*
10 *Jones*, 520 U.S. 681, 699 (1997)).

11 "In keeping with this theory," of separation of powers, "the judiciary has the inherent
12 power to govern its own procedures." *Berkson v. Lepome*, 245 P.3d 560, 565 (Nev. 2010)
13 (internal citations omitted). "[T]he judiciary is entrusted with 'rule-making and other incidental
14 power reasonable and necessary to carry out the duties required for the administration of justice'
15 and 'to economically and fairly manage litigation.'" *Id.* (quoting *Burger v. District Court*, 102 P.3d
16 600, 606 (Nev. 2004)).

17 Plaintiff suggests in his Opposition the separation of powers doctrine does not apply to
18 the legislature; instead, he believes the legislature can pass any procedural statute—even if it
19 conflicts/nullifies an existing court rule. Cape is incorrect.

20 **C. PLAINTIFF IGNORES NEVADA CASE LAW THAT CLEARLY ESTABLISHES WHERE**
21 **A COURT RULE OF PROCEDURE CONFLICTS WITH A PROCEDURAL STATUTE;**
22 **THE RULE SUPERSEDES THE STATUTE AND CONTROLS.**

23 While the Nevada Supreme Court attempts to harmonize statutes and procedural rules,
24 where a procedural statute is contrary to a rule of procedure, the procedural rule supersedes the
25 statute and controls. Nevada courts will attempt to harmonize statutes and court rules that
26 govern the same topic. *Albios v. Horizon Cmty's., Inc.*, 132 P.3d 1022, 1030 (Nev. 2006).
27 However, the legislature may not pass laws that "interfere with procedure to a point of disruption
28 or attempted abrogation of an existing court rule." *Whitlock v. Salmon*, 752 P.2d 210, 211 (Nev.
1988).

1 *State v. Connery*, 661 P.2d 1298 (Nev. 1983), cited by Plaintiff in his Opposition¹, is
2 instructive. The case arose from an appeal from a district court order dismissing an information
3 charging respondent with one count of robbery with use of a deadly weapon. Respondent moved
4 to dismiss the appeal on procedural grounds. *Id.* at 1299. The respondent argued the State's
5 appeal was untimely based on NRS 17.066 (i.e., was not filed within 30 days from when the
6 judge orally dismissed the charge). The State argued its appeal was timely per NRAP 4(b)(i.e.,
7 within 30 days from the date of entry of the written order). *Id.*

8 The court explained, "The authority of the judiciary to promulgate procedural rules is
9 independent of legislative power, and may not be diminished or compromised by the legislature."
10 *Id.* at 1300 (citing *Goldberg v. District Court*, 572 P.2d 521 (Nev. 1977)). The "legislature may not
11 enact a procedural statute that conflicts with a pre-existing procedural rule, without violating the
12 doctrine of separation of powers," and "such a statute is of no effect." *Id.* (citing *Lindauer v. Allen*,
13 456 P.2d 851 (Nev. 1961)). Where the statute and procedural rule conflict "The rule supersedes
14 the statute and controls." *Id.*

15 The court then noted that while the right to appeal was a substantive right, "**the manner**
16 **in which an appeal is taken is a matter of procedure.**" *Id.* (Emphasis added). Thus, a
17 procedural rule could alter the time during which an appeal may be taken and supersede a
18 statute to the contrary. *Id.*

19 The United States Supreme Court has explained, a rule of procedural that conflicts with a
20 statute will control so long as it "really regulat[es] procedure—the judicial process for enforcing
21 rights and duties recognized by substantive law[.]" *Shady Grove Orthopedic Associates, PA v.*
22 *Allstate Ins. Co.*, 130 S.Ct. 1431, 1442 (2010)(citing *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14
23 (1941)(finding FRCP 35 was properly enacted as one of the court's procedural rules pursuant to
24 the federal enabling act). The focus is on what the rule itself regulates: "If it governs only 'the
25 manner and the means' by which the litigants' rights are 'enforced,' it is valid, if it alters 'the rules
26 of decision by which the court will adjudicate those rights,' it is not." *Id.* (quoting *Mississippi*

27
28 ¹ See Opposition, at p. 9.

Publishing Corp. v. Murphree, 326 US 438, 445 (1946)).

As is evident by *Connery* and *Shady Grove*, the issue comes down to whether a statute is substantive in nature or procedural in nature and, if it is procedural in nature, whether there is a conflicting procedural court rule. For a statute to be substantive in nature, it must be “‘outcome’ or case determinative” instead of simply reflecting a “procedural preference.” *Freteluco v. Smith’s Food and Drug Centers, Inc.*, 336 F.R.D. 198, 203 (D.Nev. 2020) (citing *Flack v. Nutribullet, LLC*, 333 F.R.D. 508, 517 (C.D. Cal. 2019)).

NRS 52.380, like NRCP 35, is procedural in nature. It does not grant any substantive rights. It is not outcome or case determinative. Instead, like Rule 35, it “consigns the procedures to be used in conducting [independent medical examinations].” *Freteluco*, 336 F. R.D. at 203 (quoting *Smolko v. Unimark Lowboy Trans.*, 327 F.R.D. 59, 63 (M.D. Penn. 2018)). The statute governs the manner and means by which the litigants’ rights are enforced. Neither NRS 52.380 nor Rule 35 alters the rules of decision by which a court will adjudicate a party’s rights. Neither the statute nor the rule is substantive in nature. Thus, because both are procedural in nature and because Rule 35 preceded the statutory provision, Rule 35 supersedes and controls. NRS 52.380 is of no effect.

D. THE PLAIN LANGUAGE OF NRS 52.380 SHOWS THE STATUTE GOVERNS THE GATHERING OF EVIDENCE IN CIVIL CASES AND IS THEREFORE A PROCEDURAL STATUTE.

Due to the unambiguous wording of NRS 52.380, the Discovery Commissioner would abuse his discretion if he considered the legislative history of the statute in rendering his decision. “When interpreting statutes, [the Nevada Supreme Court] give[s] effect to legislative intent.” *McNeill v. State*, 375 P.3d 1022, 1025 (Nev. 2016) (citing *State v. Lucero*, 249 P.3d 1226, 1228 (Nev. 2011)). “The starting point for determining legislative intent is the statute’s plain meaning; when a statute is clear on its face, a court cannot go beyond the statute in determining legislative intent.” *Id.* (quoting *Lucero*, supra). See also, *Valenti v. State, Dep’t of Motor Vehicles*, 362 P.2d 83, 85 (Nev. 2015) (“In interpreting a statute, this court looks to the plain language of the statute and, if that language is clear, this court does not go beyond it.”) (quoting *Branch Banking & Tr. Co. v. Windhaven & Tollway, LC*, 347 P.3d 1038, 1040 (Nev.

2015)). *Accord State v. White*, 330 P.3d 482, 484 (Nev. 2014); *Great Basin Water Network v. State Eng'r*, 234 P.3d 912, 918 (Nev. 2010); and *Doolin v. Department of Corrections*, 440 P.3d 53, 55 (Nev.App. 2018).

Additionally, legislative history cannot be used to “read an ambiguity into a statute which is otherwise clear on its face.” *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242, 1247 (11th Cir. 2008).

If a district court, or in this case the Discovery Commissioner, were to not follow the foregoing rules of statutory construction, even in discovery matters such as the present, and consider legislative history even where a statute is plain on its face, the court would abuse its discretion. See *MB America, Inc. v. Alaska Pac. Leasing*, 367 P.3d 1286, 1292 (Nev. 2016) (“An abuse of discretion can occur when the district court bases its decision on a clearly erroneous factual determination or it disregards controlling law.”)

Here, NRS 52.380 is clear and unambiguous. It clearly sets forth procedures for independent medication examinations that contradict the procedures set forth by Rule 35. Cape spends much of his Opposition improperly referencing purported legislative history. However, because NRS 52.380 is clear, the Discovery Commissioner is not permitted to consider legislative history in determining whether, as Defendants contend, NRS 52.380 is procedural in nature and is therefore superseded by NRCP 35. Moreover, the legislative history cited to by Cape should not be used to read an ambiguity into NRS 52.380 that does not exist. Consideration of the purported legislative history of the statute, given the statute’s plain language, would constitute an abuse of discretion.

E. FEDERAL CASE LAW INTERPRETING RULE 35, AS WELL AS CASE LAW FROM NEIGHBORING STATES, RECOGNIZE THERE IS NO SUBSTANTIVE RIGHT TO AN OBSERVER DURING A RULE 35 EXAM, WHICH IS IN LINE WITH NRCP 35.

Plaintiff incorrectly relies on other state court decisions to argue rules governing independent medical examinations are substantive rather than procedural in nature, while ignoring recent, relevant federal case law that holds to the contrary. Cape completely ignores the *Freteluco* decision in his Opposition, even though that case was decided just a year ago, governs the exact issues before the Discovery Commissioner, and is therefore strong persuasive

1 authority. See *Executive Management*, *supra*. United States Magistrate Judge Youchan
2 considered (1) whether NRS 52.380 is procedural in nature and is thus superseded by FRCP 35
3 (and by extension, NRCPP 35), and (2) whether to allow an observer/recording device in a
4 neuropsychological exam. The court determined NRS 52.380 governs the procedure for
5 independent medical examination, and does not create a substantive right that is determinative
6 of the case outcome, and therefore, Rule 35 of the Federal Rules of Civil Procedure governs
7 independent medical exams in Nevada federal court cases. 336 F.R.D. at 203. Additionally, the
8 court recognized the policy reasons not to allow a third-party observer/recording device present
9 for independent medical examinations. The intrusion of either “would (1) potentially invalidate
10 the examination results; (2) fail to provide a level playing field . . .; and (3) inject a greater degree
11 of the adversary process into an evaluation that is to be neutral. *Id.* at 204 (quoting *Flack*, 333
12 F.R.D. at 518)).

13 Plaintiff further fails to note in his Opposition that neighboring states either do not allow
14 for observers/recording or only allow for such if they will not interfere with the examination. See,
15 for instance, Utah Rule of Civil Procedure 35(a) (“The person being examined may record the
16 examination by audio or video means **unless the party requesting the examination shows**
17 **that the recording would unduly interfere with the examination.**”)(emphasis added); Arizona
18 Rule of Civil Procedure 35(c)(1) (“**Unless his or her presence may adversely affect the**
19 **examination’s outcome**, the person to be examined has the right to have a representative
20 present during the exam”) and 35(c)(2)(A) (“**On a showing that such [audio] recording may**
21 **adversely affect the examination’s outcome**, the court may limit the recording”) (emphasis
22 added). See also, Colorado Rule of Civil Procedure 35 (not expressly allowing for either a
23 observer or recording of exam).

24 This is the same approach taken by NRCPP 35. The rule also recognizes that the
25 presence of a third-party observer will always interfere with a neuropsychological examination
26 outcome and therefore does not allow for either in that setting. See NRCPP 35(4)(A). Moreover,
27 Nevada’s Rule 35 provides that an audio recording may interfere with the exam, and therefore
28 the plaintiff must make a showing of good cause before that is allowed. See NRCPP 35(3).

F. WHILE CURRENT PROFESSIONAL ETHICAL STANDARDS ALLOW AN OBSERVER AND AUDIO RECORDING OF DR. ETCOFF'S INTERVIEW OF THE PLAINTIFF, OBSERVERS/AUDIO RECORDING OF THE PROPRIETARY TESTS ARE DISALLOWED AS THEY WILL NULLIFY THE TEST RESULTS; NONE OF THE DOCUMENTS ACCOMPANYING THE OPPOSITION EVIDENCE OTHERWISE.

Defendants have established the ethical/professional rules that govern psychological and neuropsychological evaluations in Nevada prohibit Dr. Etcoff or any other Nevada board-licensed psychologist or neuropsychologist from allowing the presence of a third-party observer/recorder while psychological/neuropsychological tests are performed. Defendants' position is set forth at pages 16 to 19 of their Motion. Moreover, the Discovery Commissioner is referred to Ex. N, State of Nevada Board of Psychological Examiners Letter dated October 1, 2018, and Ex. O, Tannahil Glen et al., Update on Third Party Observers in Neuropsychological Evaluation: An Interorganizational Position Paper, 2021, to the Motion.

In sum, tests used by neuropsychologists are developed and standardized under highly controlled conditions, which do not include observers or recordings; their outside presence will compromise the validity of the data collected. No credible, licensed, Nevada board-certified neuropsychologist will conduct the tests with the presence of an observer/recording device. That is why Cape's own neuropsychologist, Dr. Sunshine Collins, did not conduct her examination with the presence of a third-party observer/recording device and why in the *Lenhardt* case, referenced above, when the Discovery Commissioner ordered Dr. Etcoff to allow for a third-party observer and audio recording of the full exam, not just the interview portion of the exam, the defendants were forced to have Dr. Etcoff perform a records review. He did not proceed with the Rule 35 exam.

The Discovery Commissioner is required to "construe the language of [a] statute" and rule of civil procedure "to effectuate, rather than to nullify, its manifest purpose." *Ferreira v. City of Las Vegas*, 793 P.2d 138 (Nev. 1990). The purpose of Rule 35 is to level the playing field between the parties, to allow a doctor to examine a personal injury plaintiff and independently assess the credibility of the plaintiff's alleged injuries. However, if the Discovery Commissioner rules as he did in *Lehnardt*, then the Defendants will not have an opportunity to have any neuropsychological exam of Plaintiff done. No credible, board-licensed neuropsychologist will

1 conduct that exam under those circumstances because ethically they are prohibited from doing
2 so and the results would be useless.

3 Cape cites to “affidavits” and articles that he argues supports his contention the Nevada
4 Board of Psychological Examiners’ position is not credible and there really is no problem with
5 allowing third-party observers/audio recording of neuropsychological exams. See Opposition, at
6 pp. 14-23. However, these affidavits/articles are from non-Nevada psychological professionals,
7 do not reflect current ethical standards in the profession, and overall, only recognize that third-
8 party observers and audio recording is permissible during the interview portion of the exam—not
9 the testing portions of the exam.

10 The article cited in Exhibit 2 to the Opposition is 22 years old and only permits
11 audio/video recording of interviews, not neuropsychological tests. See Ex. 2 to Opposition, at 1
12 (“With the advent of portable audio and videotaping equipment becoming readily available, it has
13 become increasingly feasible to record the entire **interview.**”) (Emphasis added).

14 Dr. Zonana, MD’s Affidavit is 10 years old. The doctor is licensed in Massachusetts, not
15 Nevada, and the doctor only permits videotaping “**psychiatric interviews.**” Exhibit 3 to
16 Opposition, at p. 4. Dr. Krop’s affidavit is also unhelpful as it is 10 years old, and the doctor is a
17 Florida doctor not a Nevada doctor subject to the State of Nevada Board of Psychological
18 Examiners. Exhibit 4 to Opposition. The affidavit of Dr. Frederick, another Florida doctor, should
19 be disregarded for similar reasons. See Exhibit 1 to Opposition. His personal views obviously
20 differ from that of the Nevada State Board of Psychological Examiners. His license will not be
21 revoked if he violates the board’s ethical rules; however, Dr. Etcoff’s license would be. It appears
22 Florida must have different ethical standards for neuropsychologists than Nevada because Cape
23 references two additional Florida doctor affidavits, one of Dr. Valdes—whose affidavit is 18 years
24 old, and the other of Dr. Petrilla—whose affidavit is 22 years old. See Exhibits 5 and 6 to
25 Opposition.

26 Finally, Cape references an article by the American Psychological Association that
27 provides guidelines for the professional practice of psychologists. It actually supports the
28 Defendants’ position. See Exhibit 9 to Opposition. The article states: “When contemplating third

party observation or audio/video-recording of examination, forensic practitioners strive to consider any law that may control such matters. . . and the potential impact of observation or recording on the validity of the examination and test security.” *Id.* at p. 16.

Here, Dr. Etkoff has considered that law that governs his profession as set by the State of Nevada Board of Psychological Examiners. He is both professional and ethically prohibited to allow third-party observers or recording of the proprietary test portion of the exam. However, he is amenable to an observer being present during the interview portion of the exam. Additionally, he has considered the impact observation or recording will have on the validity of the exam and test security—they will destroy both.

G. DR. ETCOFF DOES NOT HAVE A PROBLEM WITH SHARING THE RAW TEST DATA WITH PLAINTIFF’S NEUROPSYCHOLOGICAL EXPERT.

Plaintiff fails to address the Defendants’ position regarding Dr. Etkoff sharing the raw test data and test questions with Plaintiff’s neuropsychological instead of Plaintiff and Plaintiff’s attorney. Disclosing raw testing materials to anyone other than a licensed psychologist will result in violation of copyright laws as recognized by the *Freteluco* Court, 336 FR .D. at 205 . 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 plaintiff how to answer similar question in future neuropsychological exams, which would nullify future testing procedures/testing results. See Motion, at p, 19. Cape has failed to explain the basis for his dissatisfaction with this arrangement.

H. PLAINTIFF NOW NO LONGER APPEARS TO HAVE A PROBLEM WITH DR. ETCOFF TAKING TWO DAYS TO COMPLETE HIS RULE 35 EXAM.

Additionally, from the Opposition it does not appear Cape still opposes a two-day examination. This makes sense as his own expert took two days to perform his neuropsychological examination of him.

I. THE DISCOVERY COMMISSIONER SHOULD DENY PLAINTIFF’S COUNTER-MOTION FOR SANCTIONS.

Cape’s Counter-Motion for Sanctions is not made in good faith and appears was made out of frustration that defense counsel would not agree to give Plaintiff’s counsel one additional

day to file his Opposition, when he had a full 14 days to file it. However, that is not a basis for seeking sanctions. Moreover, Defendants had good grounds to file their Motion to Compel—whether Rule 35 or NRS 52.380 governs independent medical examinations is unsettled law.

III.

CONCLUSION

For the foregoing reasons, the Court 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 **except for the interview portion of the exam**, (3) allow **two full days for Dr. Etcoff to complete the exam**, which is typical for this type of exam and which is how long Plaintiff's expert, Dr. Sunshine Collins, took to complete her neuropsychological exam, and (4) only require Dr. Etcoff to **provide his raw test data, including test questions, to Dr. Collins**.

DATED this 29th 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 29th 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 **REPLY IN SUPPORT OF 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 Parkway, Suite 100
Las Vegas, Nevada 89109
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***Attorneys for Plaintiff,
Taylor Miles Cape***

JOHN T. KEATING, Esq.
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Las Vegas, Nevada 89148
Telephone: (702) 228-6800
Facsimile: (702) 228-0443
***Attorneys for Defendant
David G. Martinez***

DATED this 29th day of September, 2021.

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

From: [J. Keating](#)
To: [Brent Quist](#)
Cc: [Zaira Baldovinos](#)
Subject: RE: Cape - Reply in Support of Motion to Compel Etcoff IME
Date: Tuesday, September 28, 2021 3:35:51 PM

This is fine

From: Brent Quist <bquist@dennettwinspear.com>
Sent: Tuesday, September 28, 2021 2:54 PM
To: J. Keating <jkeating@keatinglg.com>
Cc: Zaira Baldovinos <zaira@dennettwinspear.com>
Subject: Cape - Reply in Support of Motion to Compel Etcoff IME

John:

Attached is the Reply in Support of Defendants' Motion to Compel Etcoff IME. If you have a moment, I'd appreciate if you could look it over. Let me know of any changes you think should be made and if I can use your e-signature. As the hearing is this Friday, I'd like to get it filed tomorrow morning so the Discovery Commissioner can hopefully review it before the hearing.

Thanks,

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

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EXHIBIT “A”

Brent Quist

From: Ryan Loosvelt <rloosvelt@ggrmlawfirm.com>
Sent: Thursday, September 2, 2021 3:37 PM
To: Brent Quist
Cc: J. Keating
Subject: RE: Cape Rule 35 exam issues

Brent, I'll review and let's talk Tuesday as planned. I'm traveling tomorrow through the holiday weekend. Thanks,

-Ryan Loosvelt

From: Brent Quist <bquist@dennettwinspear.com>
Sent: Wednesday, September 1, 2021 3:45 PM
To: Ryan Loosvelt <rloosvelt@ggrmlawfirm.com>
Cc: J. Keating <jkeating@keatinglg.com>
Subject: Cape Rule 35 exam issues

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,

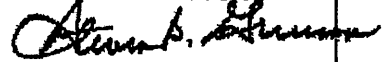
Brent Quist

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EXHIBIT “B”



1 DCRR
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8 GentileLawGroup@Yahoo.com
9 Attorneys for Defendants

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DISTRICT COURT
CLARK COUNTY, NEVADA

EDWARD LEHNARDT,

Plaintiff,

Case No: A-19-800506-C
Dept No: XXIX

vs.

JAVIER M. LINARES, an individual;
MANUEL J. LINARES, an individual;
DOES I-X, and ROE CORPORATIONS
I-X, inclusive,

Defendants.

DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS

HEARING DATE: March 16, 2021, at 10:00 a.m.

APPEARANCES:

Jared B. Anderson, Esq., of Tanner Churchill Anderson, for Plaintiff; and
Mark L. Gentile, Esq., of Gentile Law Group, for Defendants.

I.

FINDINGS

This matter came before the Discovery Commissioner on March 16, 2021, for Defendants' Motion to Compel Independent Medical Examination. This Motion was brought by Defendants to compel a two (2) day neuropsychological examination of Plaintiff Edward Lehnardt, who is claiming that he sustained a traumatic brain injury in the underlying incident. The contested issues in this Motion are whether under NRCP 35 and NRS 52.380, Defendants can compel an examination precluding any recording of the examination and testing and precluding Plaintiff from having an

observer witness the entire examination and testing. Defendants also asked that all examination and interview notes and records and raw data possessed by Plaintiff's treating neuropsychologist (Michael Elliott, Ph.D.) relating to Edward Lehnardt be sent directly to defense expert, Lewis Etkoff, Ph.D., so he can perform a record review.

Defendants cited expert affidavits who opined that no neuropsychologist complying with recognized neuropsychological protocols could perform valid testing in the presence of an observer or have testing recorded that would maintain the copyright protections of the tests. It was argued that requiring an observer/recording would violate defendants' due process rights. Plaintiff produced expert affidavits who opined that recording examinations was commonplace and did not cause an ethical dilemma, and that such recording would validate the results. Plaintiff did not oppose having Dr. Elliott sending his files and raw data directly to Dr. Etkoff.

The Commissioner grants the Motion to Compel Independent Medical Examination, in part, and denies the Motion, in part, as follows:

II.

RECOMMENDATIONS

IT IS HEREBY RECOMMENDED:

Defendants' Motion to Compel Independent Medical Examination is GRANTED IN PART and DENIED IN PART.

1. Plaintiff is allowed to audio record the entire examination/testing process as per NRCP 35(a)(3);

2. Plaintiff is allowed to have an observer present during the testing, as per NRS 52.380, with restrictions. The observer is not to interrupt or engage in the testing process and must attend virtually in an adjoining room. The observer must be allowed, under NRS 52.380(4), to suspend the examination if any statutory irregularities occur; and

3. Plaintiff is ordered to have his expert psychologist, Michael Elliott, Ph.D., transmit directly to Lewis Etcoff, Ph.D., all examination notes and files, reports, testing result and raw data pertaining to his evaluation and treatment of Edward Lehnardt.

The Discovery Commissioner, having met with counsel for the parties, having discussed the issues noted above and having reviewed any materials proposed in support thereof, hereby submits the above recommendations.

DATED this 6th day of April, 2021.


DISCOVERY COMMISSIONER

Approved as to Form and Content:
TANNER CHURCHILL ANDERSON

Submitted By:
GENTILE LAW GROUP

Did not respond
By: _____
Jared B. Anderson, Esq.
4001 Meadows Lane
Las Vegas, NV 89107
Attorney for Plaintiff

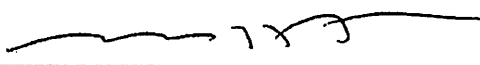
By: 
MARK L. GENTILE, ESQ.
1300 South Decatur Boulevard
Las Vegas, Nevada 89102
Attorneys for Defendants

EXHIBIT “C”

Brent Quist

From: Ryan Loosvelt <rloosvelt@ggrmlawfirm.com>
Sent: Monday, September 27, 2021 9:41 AM
To: Brent Quist
Cc: J. Keating; Rebeca Guardado
Subject: RE: Notification of Service for Case: A-20-818569-C, Taylor Cape, Plaintiff(s)vs.David Martinez, Defendant(s) for filing Clerk's Notice of Hearing - CNOC (CIV), Envelope Number: 8544229

Wow, ok.

-Ryan

From: Brent Quist <bquist@dennettwinspear.com>
Sent: Monday, September 27, 2021 9:33 AM
To: Ryan Loosvelt <rloosvelt@ggrmlawfirm.com>
Cc: J. Keating <jkeating@keatinglg.com>; Rebeca Guardado <rguardado@ggrmlawfirm.com>
Subject: RE: Notification of Service for Case: A-20-818569-C, Taylor Cape, Plaintiff(s)vs.David Martinez, Defendant(s) for filing Clerk's Notice of Hearing - CNOC (CIV), Envelope Number: 8544229

Ryan:

Normally I have no problems with agreeing to an extension. However, the hearing on the OST motion is this Friday. I have hearings all day Wednesday. So, if the extension was granted I'd only have Thursday to prepare the Reply and file it. Not sure I can put myself in that corner. Further, I'd like to get my Reply to the Discovery Commissioner with enough time for him to actually have an opportunity to consider it before the hearing Friday.

Unfortunately, I cannot agree to the extension.

Brent

From: Ryan Loosvelt <rloosvelt@ggrmlawfirm.com>
Sent: Monday, September 27, 2021 8:52 AM
To: Brent Quist <bquist@dennettwinspear.com>
Cc: J. Keating <jkeating@keatinglg.com>; Rebeca Guardado <rguardado@ggrmlawfirm.com>
Subject: RE: Notification of Service for Case: A-20-818569-C, Taylor Cape, Plaintiff(s)vs.David Martinez, Defendant(s) for filing Clerk's Notice of Hearing - CNOC (CIV), Envelope Number: 8544229

Brent and John, may we please have one extra day to file the opposition through tomorrow by 5pm? Had an emergency issue come up this week. If so, please let me know if we can affix your signature to the stipulation, thanks.



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INJURY ATTORNEYS

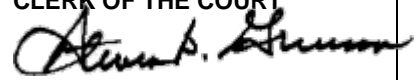
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RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

TAYLOR MILES CAPE,)	
)	CASE NO. A-20-818569-C
Plaintiff,)	
)	
vs.)	DEPT. NO. XXVIII
)	
DAVID MARTINEZ, CHILLY WILLY'S))	
HANDYMAN SERVICES, LLC,)	Transcript of Proceedings
)	
Defendants.)	
)	

BEFORE THE HONORABLE JAY YOUNG, DISCOVERY COMMISSIONER
**DEFENDANTS' MOTION TO COMPEL NRCP 35 NEUROPSYCHOLOGICAL
EXAM WITH DR. ETCOFF, NOTICED FOR OCTOBER 19-20, 2021 ON
ORDER SHORTENING TIME**

FRIDAY, OCTOBER 1, 2021

APPEARANCES:

For the Plaintiff: WILLIAM T. MARTIN, ESQ.
[Via Video Conference]

For the Defendants: BRENT QUIST, ESQ.
[Via Video Conference]
JOHN T. KEATING, ESQ.
[Via Telephone Conference]

RECORDED BY: FRANCESCA HAAK, DISTRICT COURT
TRANSCRIBED BY: KRISTEN LUNKWITZ

Proceedings recorded by audio-visual recording; transcript
produced by transcription service.

1 FRIDAY, OCTOBER 1, 2021 AT 10:06 A.M.

2

3 THE DISCOVERY COMMISSIONER: Calling *Cape versus*
4 *Martinez*, case number A-20-818569-C. Counsel, state your
5 appearance for the record, please, starting with
6 plaintiff's counsel.

7 MR. MARTIN: This is Will Martin, bar number 2534,
8 on behalf of plaintiff.

9 MR. QUIST: Your Honor, Brent Quist on behalf of
10 defendant, Chilly Willy's.

11 MR. KEATING: And, good morning. John Keating on
12 behalf of Martinez.

13 THE DISCOVERY COMMISSIONER: All right. Good
14 morning, gentlemen. This is Defendants' Motion to Compel a
15 Neuropsychological Exam with Dr. Etcoff on Order Shortening
16 Time and I see that an Opposition was filed. I don't see
17 if a Reply was filed. I forgot to check that this morning.
18 I apologize.

19 MR. QUIST: Yeah, Your Honor. This is Brent
20 Quist. We filed our Reply, I believe, Tuesday and, I
21 believe, either Wednesday or Thursday my assistant, I
22 believe, e-mailed the discovery inbox.

23 THE DISCOVERY COMMISSIONER: I apologize, counsel.
24 I typically -- when there's an order shortening time, the
25 morning of, I'll try and see if I can pull up any kind of

1 last minute filings and I failed to do that. So, I will
2 allow you a little bit of extra time to argue in that case
3 and, again, my apologies. You were owed better respect
4 than that.

5 MR. QUIST: Understood, Your Honor. That's fine.

6 THE DISCOVERY COMMISSIONER: Thank you.

7 MR. QUIST: Okay. Well, Your Honor, I'm gonna try
8 to highlight -- I -- the points that I think are most
9 relevant. This is a car accident matter. Mr. Cape, he
10 claims a brain injury. He had a [indiscernible]
11 neuropsychological exam with his own doctor, Sunshine
12 Collins. There was no observer present for that exam and
13 that's going to be a big theme of this argument, Your
14 Honor, is here in Nevada, the Board that governs
15 neuropsychological exams here in Nevada won't allow for
16 observers -- third party observers for the actual testing
17 part of the exam.

18 THE DISCOVERY COMMISSIONER: I'm familiar with
19 that.

20 MR. QUIST: Yeah. So, that's why Dr. Collins was
21 able to proceed with Mr. Cape's exam because there was just
22 her and him. Based on that exam, at least part of it,
23 plaintiff has produced a Life Care Plan where he alleges
24 his future [indiscernible] for the rest of his life was
25 going to be valued at \$5.7 million. For the last three

1 months or so, I've been working with Mr. Keating and with
2 Mr. Loosvelt, plaintiff's attorney, to come to like an
3 agreement as to the scope. And we really -- I think we did
4 a good job. We -- there's three issues that we can't agree
5 to.

6 THE DISCOVERY COMMISSIONER: I'm familiar with
7 them.

8 MR. QUIST: Yeah. So, and that's what we're --
9 the defendants are going to ask the Court to order is for
10 Mr. Cape to come here to meet with Mr. -- or Dr. Etcoff.
11 Dr. Etcoff [indiscernible] have an observer present
12 [inaudible] non -- I guess non-technical interview portion
13 of the exam. That's not the neuropsych actual, you know,
14 tests. And he's -- says, ethically, he's allowed to have
15 an audio recording of just kind of that interview. He's
16 willing to share the raw test data -- the test questions --
17 the actual data with Sunshine Collins. Ethically, he says
18 that the rules that govern what he can and can't do only
19 allow him to show that with another psychologist.

20 And the third thing we're asking the Court is to
21 allow this exam to be a standard two-day exam. And Dr.
22 Collins took two days. For Dr. Etcoff, that's typical for
23 him.

24 MR. MARTIN: I don't mean to interrupt, but we're
25 not opposing that, Your Honor. So, --

1 THE DISCOVERY COMMISSIONER: Okay.

2 MR. MARTIN: Two days.

3 MR. QUIST: So, you've read our brief, Your Honor,
4 and I know -- well, I learned for the first time during the
5 Opposition, I didn't know this before, that six months ago,
6 you had considered this issue -- well, at least the issue
7 of the interplay between NRS 552.380 and NRCP 35 in the
8 case of *Lehnardt*. So, I know it sounds like you're aware
9 of the issue.

10 So, the defendants' position is the problem with
11 NRS 52.380 is it's procedural in nature, that the current
12 NRCP 35 predated it, that the -- that both the statute and
13 the rule of procedural nature would govern the procedure
14 for conducting Rule 35 exams here in Nevada. And that,
15 because of that, it's really within the purview of the
16 Nevada Supreme Court to govern how those procedures take
17 place.

18 Nevada's Constitution adopted the separation of
19 powers doctrine and the purpose of that doctrine is to
20 prevent one branch of government from encroaching upon the
21 powers of another branch. And, really, it's within the
22 sole purview of the Nevada Supreme Court to govern how
23 procedural -- procedures in a civil court matter take
24 place, including gathering of evidence. And you see that
25 throughout the Nevada Rules of Civil Procedure. There's

1 Rule 16.1, Rule 33, Rule 34, Rule 35, and Rule 36, all
2 dealing with: How does evidence get gathered?

3 Now, in the Opposition, it seems that the position
4 that the plaintiff was taking in the Opposition brief,
5 specifically at page 13, is that the Legislature can pass
6 any statute it wants, even a procedural statute, as long as
7 it thinks, the Legislature thinks it's got a good reason
8 for it. And that doesn't comply with the *Whitloff versus*
9 *Salmon* [phonetic] case, right, that the Supreme Court says
10 that the Legislature may not pass laws that interfere with
11 procedure to the point of disruption or that abrogates an
12 existing court rule, and that's exactly what NRS 52.380
13 does.

14 Now, much of the Opposition deals with discussing
15 legislative history. The problem with that is that flies
16 in the face of the rules of construction adopted by the
17 Nevada Supreme Court. The Nevada Supreme Court says:
18 Look, if a statute and a rule or procedure are plain on
19 their face, clear on their face, you don't go and look at
20 the legislative history. And there's caselaw I cite --
21 well, I cited in my Reply. I can -- let me find it. In
22 *Garcia versus Vanguard Car Rental USA*, that's 540 F.3d
23 1242. It's an Eleventh Circuit opinion from 2008. The
24 Court there --

25 THE DISCOVERY COMMISSIONER: [Indiscernible] in

1 your briefs?

2 MR. QUIST: I'm sorry. What's that?

3 THE DISCOVERY COMMISSIONER: What page are you
4 referring to in your brief?

5 MR. QUIST: Oh, I'm sorry. Page 1247.

6 THE DISCOVERY COMMISSIONER: What page of your
7 brief?

8 MR. QUIST: Oh, let me find that, Your Honor.

9 [Pause in proceedings]

10 MR. QUIST: It's page 10. Page 10 of the Reply
11 brief.

12 THE DISCOVERY COMMISSIONER: Can you give me the
13 case citation, again, please?

14 MR. QUIST: Sure. *Garcia versus* --

15 THE DISCOVERY COMMISSIONER: I see it.

16 MR. QUIST: Yeah. And, there, the Court notes
17 that -- you can't really do what plaintiff's trying to do
18 which is to cite or quote legislative history to read
19 ambiguity into a statute or a rule that's clear on its
20 face. And it -- if you read the statute and you read the
21 rule or procedure, they're both really clear and plain.
22 They're just -- they're taking different approaches for how
23 independent medical examination should occur here in Nevada
24 and they contradict each other.

25 Now, another, I guess, rule -- construction rule

1 that the Court here adopts in Nevada is that statutes and
2 rules really should be construed in a manner that
3 effectuates its purpose and doesn't nullify or -- yeah,
4 nullify the purpose. And that's a big problem here because
5 that's exactly what 52.380 does. It nullifies the purpose
6 underlying Rule 35 exams.

7 And, in the -- if I can pronounce the case right,
8 the *Frederico versus Smith's Food and Drug Centers* case,
9 that's -- these are both in my Motion and Reply. That's
10 the Federal Magistrate rulings from last year where the
11 Judge dealt with [inaudible] and the Judge there noted one
12 of the -- and she cites other federal caselaw. But one of
13 the real purposes of Rule 35 is to level the playing field,
14 that the plaintiff has had a chance to have his own expert
15 look at him, unobstructed, unimpeded, and the defense
16 should be able to have an independent doctor come in and
17 have the same type of opportunity to examine him and say:
18 Hey, is this -- did he really, you know, suffer a brain
19 injury? How has that affected his life?

20 The bigger problem with the impact that NRS 52.380
21 has on a Rule 35, for purposes of neuropsychological exams,
22 that basically make it so that they'll never take place
23 because Exhibit N and O to my Motion discuss that. The
24 Exhibit N is the letter from October of 2018 from the State
25 Board of Psychological Examiners to the Clerk of the

1 Supreme Court. Exhibit O is this 2021 article from the
2 Archives of Clinical Neuropsychology addressing third party
3 observers in neuropsychological evaluations. And the
4 *Frederico* case picks up on some of the arguments made in
5 these documents.

6 And they note that the reason why a
7 neuropsychological exam, the actual test part, can't have
8 either a recording device or an observer is because -- even
9 if the observer doesn't say anything, just their presence
10 in the room is going to affect or impact or alter the
11 tests. And those tests are designed and standardized
12 without an observer present. Right? So, if you have an
13 observer present, you're not going to get right results.
14 The test is going to be meaningless. And, so, the position
15 of [inaudible] neuropsychologists here in [inaudible] Dr.
16 Etcoff, and I presume Dr. Collins, is -- just ethically and
17 professionally, they can't do these tests with an observer
18 present.

19 And, so, if the Court rules like it did six months
20 ago in this *Lehnardt* case, hey, you've got to have an
21 observer present or a recording device, what's going to
22 happen is exactly what happened in this *Lenhardt* case. Is
23 that -- again, I wasn't aware of this decision by Your
24 Honor and, so, I reached -- my staff reached out to Dr.
25 Etcoff's staff and said: What did you end up doing? Did

1 you go through with the Rule 35 exam with an observer and
2 the recording device? And the response we got back from
3 the staff and Dr. Etcoff's staff was they had to cancel the
4 exam and he just did a records review. And that's very
5 problematic. What's the purpose of Rule 35? So, that's
6 another reason why --

7 THE DISCOVERY COMMISSIONER: But that's a choice
8 of the industry in response to the statute. Isn't it?

9 MR. QUIST: Well, I think that was the standard
10 even before the statute was passed. Right? The letter
11 written to the Nevada Supreme Court was issued even before.
12 And, I mean, -- and, I think, Rule 35, the current version,
13 takes account of that because the Rule says we're not going
14 to have an observer present, unless. Right? It's an
15 exception. Unless the plaintiff can only show good cause.
16 But I'm not sure that there could ever be good cause
17 because it's going to nullify -- or it's going to make it
18 impossible. Right? They -- those exams will never take
19 place here --

20 THE DISCOVERY COMMISSIONER: So, your suggestion
21 is even under Rule 35 the doctor would have to refuse, if
22 there was an examiner -- or a guest allowed?

23 MR. QUIST: Well, yeah, I think the Court, in that
24 place, would have to go challenge the plaintiff and the
25 plaintiff would have to -- because really, I guess, the way

1 you'd have to read the statute and even -- well, the
2 statute, is it's kind of being used as a protective order
3 by plaintiffs that, well, we never want to be subject to
4 IME for a neuropsych exam here in Nevada. Because that's,
5 effectively, what it does.

6 I think, you know, Judge -- and I'll probably
7 mispronounce her last name, Youchah, in the *Frederico* case,
8 where she -- well, what's the purpose of the statute?
9 Well, the -- and she kind of did an Erie Doctrine kind of
10 analysis and she says: Look, it's -- they're dealing with
11 the same matter, which is how you go about gathering this
12 evidence and the statute doesn't create a substantive
13 right. It doesn't affect the result of the litigation.
14 It's not outcome determinative or case determinative. And,
15 so, she said: Considering that, plus kind of the policy
16 for not allowing observers in the setting of a
17 neuropsychological exam, at least at the test portions, she
18 says: Hey, it's -- the statute is procedural and, so, the
19 Rule 35 -- Federal Rule 35 is going to supersede it. And I
20 think the Court should take that same approach here.

21 THE DISCOVERY COMMISSIONER: All right. Anything
22 else?

23 MR. QUIST: The only other thing is just -- I
24 mean, I can do the rebuttal. I'll do it now.

25 In the Opposition, the plaintiff cites to --

1 includes various affidavits. Okay? Of professionals that
2 the plaintiff says: Hey, these guys say you can have
3 observers present. If you look at those affidavits
4 closely, one, they're old. Like, some of them are 20 years
5 old. They're all out of state. None of them are from
6 Nevada psychologists or neuropsychologists.

7 And I think the most helpful document attached to
8 the Opposition is from the American Psychology Association.
9 That's Exhibit 9 to the Opposition, where it says that:
10 When you're thinking about having observers present for
11 neuropsychological exams, you've got to keep in mind the
12 law governing that in your state and the effect you were to
13 have on the validity of the exam. And, here, Dr. Etcoff,
14 the law governing him and what he does is set by the Board.
15 Right? They don't allow it. And, second, having an
16 observer present for the exam is going to ruin the results.

17 I think that's my argument and then my position is
18 that the test questions, the raw data, should be shared
19 directly with Dr. Collins. I think plaintiff is protected
20 -- if that happens. The *Frederico* Court did the same
21 thing.

22 And, as far as the Countermotion for Sanctions, I
23 think that's frivolous just because this is an ongoing -- I
24 mean, there's two cases I know of right now that are on
25 appeal with the Supreme Court addressing this issue. So, I

1 think this is -- this is not a settled area of the law.
2 So, I'll leave it with that.

3 THE DISCOVERY COMMISSIONER: All right. Mr.
4 Martin, recognizing that I am familiar with the interplay
5 between NRS 52.380 and Rule 35, do you have anything in
6 response?

7 MR. MARTIN: Yeah. I mean, this appears to be a
8 coordinated, you know, an aggressive effort to frustrate
9 transparency in psychological evaluations. I mean, they're
10 taking the position that there would be good cause under
11 Rule -- NRCP 35 to order an examination -- they're saying -
12 - they're reading this October 1st, 2018 letter, which they
13 attach as Exhibit M, as somehow saying it's unethical and
14 your license will be revoked. I think they say that in
15 their pleadings. There's nothing about that in this
16 October 1st, 2018 letter.

17 They really are relying on this October 1st, 2018
18 letter from the Board and the decision by Magistrate
19 Youchah in the case that she considered, and that's a
20 totally different context. There, it's the interplay
21 between a state substantive law -- she doesn't really
22 address, you know, that because the Erie Doctrine says if
23 you're comparing a state law versus a federal statute, and
24 the state law is not outcome determinative, you go to the
25 federal rule. She's not considering -- there's no federal

1 statute that's like the Nevada statute. So, she's not
2 making that analysis as if there was a federal statute
3 addressing it where there was a conflict between the
4 federal statute and the federal law.

5 She doesn't address constitutionality, separation
6 of powers, anything like that. It's really not applicable.
7 Yet, in passing, she says a couple of things about, you
8 know, she believes that people might be distracted by an
9 examiner, but she doesn't go into, you know, the validity
10 of the testing and all of that -- the point defendant tries
11 to go to and saying that an observer should not be allowed
12 a recording.

13 And, if you look carefully at the October 1st, 2018
14 letter, you know, it starts off by talking about third
15 party observers, which is similar to Exhibit O that they
16 cite as some kind of neuropsychological study. But it's
17 just a position paper. It's not -- it's a position paper
18 on third party observers.

19 So, the introductory sentence is about third party
20 observers and, then, the next paragraph makes that broader
21 by talking about observers, monitors, and electronic
22 recording. And, then, if you dig deeply into what they're
23 talking about, when they're talking about research
24 indicating the presence of those observers, monitors, and
25 recorders, they're talking about during the clinical

1 interview portion. So, they're saying the research
2 indicates during the interview portion, you know, somebody
3 being there may stop somebody from disclosing crucial
4 information. Well, Dr. Etcoff has already agreed to the
5 clinical interview portion that, you know, he's had
6 observers -- he's had an audience -- it's not accurate that
7 he's only allowed audiotapes because the footnote in the
8 Youchah opinion says that he's allowed those videotaped.
9 So, he's allowed audio and videotapes of the interview
10 portion.

11 The next sentence --

12 THE DISCOVERY COMMISSIONER: And my memory is he
13 did that prior to the statute as well.

14 MR. MARTIN: What's that?

15 THE DISCOVERY COMMISSIONER: My memory is he did
16 that prior to the statute --

17 MR. MARTIN: [Indiscernible] under good cause.

18 And the next sentence that talks about the testing
19 itself, the concern there that the Board expresses is that
20 it may cause the patient on their performance to -- their
21 weaknesses and strengths are exaggerating. Okay? So that
22 seemed to be the Board's concern about having observation,
23 monitoring, recording during the tests.

24 Now, we cite to the affidavit from -- it's -- let
25 me see. It's Dr. Frederik from 2018 saying, you know,

1 there's lots of reasons why you want videotaping of the
2 testing because he points out all the various inaccurate
3 things that happen during the testing, that if you don't
4 have a videotape -- you know, our preference would be a
5 videotape. You know, that not giving the instructions the
6 publisher requires, exceeding time limits, or shortening
7 time limits, inaccurate recording, or misconstruing results
8 and answers, not performing required follow-up that the
9 test says you're supposed to, not following established
10 patterns for testing and administration, not recording the
11 responses properly, prompting responses, coaching, teaching
12 the examinee how to solve during interactions, improperly
13 positioning his examiner's materials, the examiner's
14 attitude.

15 That was about the only thing that really -- I
16 think that the Magistrate Youchah -- there was a mention
17 that they were concerned about Dr. Etcoff's attitude. And
18 that seemed to be -- you know, in theory, what the
19 plaintiff was complaining about in the case that she was
20 looking at, but, then again, the statutory analysis is not
21 the same as here.

22 You know, then, about interruptions and
23 distractions that are on document -- you know, that's --
24 the recording is the best way to ensure a proper record of
25 the testing that's been done.

1 And in a -- you know, if you closely read the --
2 there's nothing in here about, you know, they're going to
3 lose their license, or it's unethical from the -- you know,
4 from the Board.

5 The -- you know, to go quickly point by point in
6 the argument that was made supporting, you know, Mr. Cape
7 lost consciousness. He was unconscious from the time the
8 car was hit until he came to and he was being -- trying --
9 being extracted from the vehicle.

10 They talk about Dr. Collins was not a treating --
11 I mean, a retained expert. She was a treating provider
12 before litigation. You know, the -- a compelled Rule 35
13 mental or medical evaluation is a highly intrusive and
14 extraordinary measure. You know, it's not about leveling
15 the playing field. It's not a game. It's driven by
16 litigation doing these and it's often adversarial. You
17 know, that retained experts have to provide testimony of
18 this. You know, you rarely find somebody who does 50/50
19 work.

20 You know, Sunshine Collins, like we said, was a
21 treating provider. And that's a very different context
22 than a Rule 35 exam.

23 The Nevada Board won't allow testing. That --
24 that doesn't say that. You know, they express some
25 concerns. They say the research, which is studies,

1 supports clinical interviews might cause somebody to not
2 disclose information and testing, it's more speculative to
3 the effect. We cite to experts who say there are studies
4 showing that there's little effect by having observers.
5 But that isn't what the Board says. If their industry, you
6 know, has a coordinated effort to not allow these to go
7 forward, then they're not going to do them in Nevada, I
8 mean, that's a different issue on them.

9 Ethically, audio -- you know, I think -- you know,
10 footnote 1 in Magistrate Youchah's opinion talks about Dr.
11 Etcoff actually letting videotape take place.

12 Your Honor, I believe, took a very reasonable
13 approach in the opinion that you -- in the prior case that
14 you considered this issue. NRCP 35 allows recording for
15 good cause. It allows an observer for these type of
16 examinations for good cause.

17 You know, and a lot of this stuff is substantive
18 to policy choices. So, it seems like the type of thing --
19 because there's various opinions on accuracy and what
20 effect it has, you know, that really sounds like something
21 the Legislature should be dealing with for policy choices.
22 It's not -- you know, they shouldn't be citing to
23 Magistrate Youchah's opinion that is saying: Oh, well that
24 determined it's procedural in nature. It's a different
25 context.

1 The constitutionality was never something the
2 parties conferred about.

3 Exhibit N and O, I've already talked to you about
4 the letter from the Board and the position paper from some
5 organizations that don't want to have third party
6 observers.

7 Not get the right results, well, that's up in the
8 air. There's no real hard -- you know, it appears
9 different people have different opinions on that.

10 Ethically and professionally cannot have an
11 observer present, there's nothing saying that. If that's
12 the choice of Dr. Etcoff, then, you know, that's his
13 choice. There's other -- we cite to other, you know,
14 psychiatrists and psychologists who say it is allowed and
15 it's reasonable and it helps establish a clear record of
16 what happens and it's transparent. All right. I think the
17 Court, you know, expressed some concern with regard to the
18 position they were taking on that.

19 So, we believe that we should be able to videotape
20 it or have an observer, and audio record it, or, you know,
21 we believe the data should be given to plaintiff's counsel
22 so that they can adequately prepare for cross-examination
23 and not just to a psychologist. They draw arguments about
24 copyright, but they don't give any real sense to it. I'm
25 not an intellectual property lawyer, but property rights

1 are, you know, this is a -- tests are considered literary
2 works. You file an application, you pay a fee, and you
3 provide your work, and that -- you can have a copyright.
4 You know, you can go online and see all kinds of -- I
5 assume the personality tests -- Dr. Etcoff says in the
6 letter that was attached to their Reply, a little bit about
7 what he's going to do. It doesn't give, you know, a list
8 of whether he's going to do the Wechsler IQ test or the
9 MMPI for personality. You know, very common tests that
10 have been around for decades.

11 He said -- you know, he's going to do some motor
12 testing, which sounds more like the -- you know, what
13 doctors do to test your muscles during physical
14 examination. Then there's sensory perception exams which
15 are measures of touch, vision, and sound function. You
16 know, those are important things to see how the doctor does
17 them, and what happens to them, whether they accurately
18 record it. You know, I've had medical IMEs where they say
19 the testing of the range of motion, the doctor's eyeballing
20 it, or they only spend -- they don't perform tests that
21 they say they performed. There's just a lot of controversy
22 with regard to IMEs, which are really Rule 35 examinations
23 and --

24 THE DISCOVERY COMMISSIONER: I was just going to -
25 -

1 MR. MARTIN: -- they're adverse --

2 THE DISCOVERY COMMISSIONER: -- say we don't have
3 IMEs anymore.

4 MR. MARTIN: Yeah. Yeah. The Court doesn't but
5 who does it?

6 So, he says it's about five hours of testing,
7 about three hours for personality testing, two to three
8 hours of the interview. We're assuming he's not going to
9 object to videotaping that or having an observer with audio
10 because that's what he's allowed in the past. So, it's
11 about the personality test and the neuropsychological
12 tests.

13 And, you know, these tests have validity and, you
14 know, he didn't mention that. It's -- there are
15 [indiscernible] symptom validity checks that are done
16 during the process to see whether they're valid. So, you
17 know, a lot of these involve subjective judgments. You
18 know, having a videotape would be our preferred method.

19 We also think that we, as plaintiff's counsel,
20 should be able to get the data and, you know, subject to
21 whatever protective orders there are. If we need to look
22 at some copy -- you know, with the copyright seems like
23 just something that they're throwing out there to, you
24 know, try and make it more difficult to do these. That
25 wasn't even anything the Board addressed in their October

1 1st letter. They just said that the neuropsychological
2 tests and measures are developed and standardized under
3 highly controlled conditions and they're saying one of the
4 conditions is, you know, third party observers aren't
5 allowed, so, therefore, you can infer from that that's not
6 -- that is different than the highly controlled conditions.
7 You know, they say observation, monitoring, recording of
8 these tests is not part of the standardization and it may
9 distort. You know, it's very equivocal.

10 So, you know, Your Honor, we believe that we
11 should be able to videotape it or have an observer and
12 audio recorded, as the rules allow, because there's good
13 cause based on subjective judgments and everything that
14 happens. And we believe plaintiff's counsel is entitled to
15 the data because, you know, we're the ones doing cross-
16 examination, not the psychologist we might retain to rebut
17 Dr. Etcoff.

18 And, you know, if Your Honor's inclined to grant
19 their Motion, we would request a stay so that we can, you
20 know, file an Objection. And we think that sanctions are
21 something that should be considered the -- because it
22 appears to be such a coordinated effort to frustrate the
23 transparency in these evaluations. And they're
24 exaggerating the ethical and licensing issues and what
25 chilling effect it might theoretically have on

1 practitioners and then thrown in copyright.

2 The accuracy, again, I told you, there's different
3 opinions on that and that seems like policy choices that
4 the Legislature should make.

5 So, that's why we oppose.

6 THE DISCOVERY COMMISSIONER: All right. Very
7 well. Mr. Quist, you said you were addressing things
8 rather than in rebuttal in your main argument. Is there
9 anything that you need to cover?

10 MR. QUIST: I think the only thing to cover, two
11 quick points on the --

12 THE DISCOVERY COMMISSIONER: Very quickly, please.

13 MR. QUIST: Yeah. The first is that -- I -- does
14 -- the Court [indiscernible] address the -- showing the
15 test data. Right? She recognizes, under American
16 Psychological Association, that a subpoenaed doctor is only
17 allowed to release test data to qualified professionals
18 such as other psychologists. So, I'm not making that up.
19 I mean, that's just what's required.

20 And if you look at that case, it really does
21 squarely line up with what we have here in this case. So,
22 I do think it has strong persuasive authority. I'll end
23 with that, Your Honor.

24 THE DISCOVERY COMMISSIONER: All right. Very
25 well. I'm granting the Motion in part and denying it in

1 part. I am granting Mr. Martin's request for a stay to
2 allow an Objection in this matter. The Rule 35 exam is
3 compelled.

4 With regard to the observer, there is a question,
5 obviously, whether the statute, NRS 52.380, creates a
6 substantive right and whether that substantive right trumps
7 procedural rules. That's a question that I'm not going to
8 answer to anybody's satisfaction today. It's a question
9 that's in front of the Supreme Court and I assume that they
10 will provide us guidance. But, in the meantime, if I have
11 to err on one, I'm erring on the side of protecting the
12 individual and, that being said, I have to err on the side
13 of the statute.

14 I do find, under Rule 35, that there's good cause
15 to allow an observer and a recording. That good cause
16 exists in the mere fact that the Legislature formed good
17 reason to pass the statute 52.380. And the governor found
18 good cause to sign it into law. I think that, in and of
19 itself, constitutes good cause for allowing the
20 recordation.

21 So, I'm allowing an observer. The observer can be
22 present outside the examination room, but can be listening
23 to the examination either by remote means or directly, with
24 the door open. The exam -- the observer cannot interrupt
25 the examination, except to suspend the examination if any

1 irregularities occur. That's allowed under NRS 52.380
2 subsection 4. The exam can take place over a two-day
3 period. The raw data must be provided to plaintiff's
4 expert, Dr. Collins, who may share that information with
5 plaintiff's attorney, in an attorney's eyes only capacity
6 for preparation of the case. The information is otherwise
7 protected in this matter. It cannot be filed in a public
8 setting. It can be shared between counsel.

9 As to the Countermotion for Fees, counsel, I think
10 that the Motion was substantially justified by the conflict
11 between the rule and the statute and, therefore, I'm not
12 granting either party request for fees.

13 I'm going to ask Mr. Quist to prepare the Report
14 and Recommendation and run that past all counsel for
15 approval as to form and content. Let's get that on file
16 within 14 days. We'll set a status 21 days out to
17 determine if that's been accomplished. If it has, there
18 will be no need to appear. If it hasn't, then you'll need
19 to appear and, pursuant to EDCR 7.60, you'll be given an
20 opportunity to be heard as to why sanctions shouldn't issue
21 for failure to comply with the Court Order.

22 Questions?

23 THE CLERK: [Inaudible] 22nd at 10.

24 MR. MARTIN: I didn't hear that.

25 THE DISCOVERY COMMISSIONER: October 22 at 10

1 o'clock.

2 MR. QUIST: And, Your Honor, I want to make sure,
3 I tried to take notes as fast as I could. With the
4 observer, the observer can be listening remotely or outside
5 the door listening. Is that right?

6 THE DISCOVERY COMMISSIONER: Correct.

7 MR. QUIST: Okay.

8 THE DISCOVERY COMMISSIONER: They cannot be in the
9 examination room, but they can be there for the purpose of
10 protecting the plaintiff from embarrassment, harassment,
11 etcetera.

12 MR. QUIST: Okay. Understood. Thank you.

13 THE DISCOVERY COMMISSIONER: Any other questions
14 or concerns?

15 MR. MARTIN: Your Honor, that applies to the
16 testing, too?

17 THE DISCOVERY COMMISSIONER: Correct.

18 MR. MARTIN: Okay.

19 THE DISCOVERY COMMISSIONER: And then, to be
20 clear, and I did not say this, I'm not allowing the video
21 recording.

22 MR. MARTIN: Okay.

23 THE DISCOVERY COMMISSIONER: I apologize for that.

24 MR. QUIST: I'm sorry. Was that -- you cut out,
25 Your Honor. Was that not allowing the video?

1 THE DISCOVERY COMMISSIONER: Correct. I am not
2 allowing the video recordation.

3 MR. MARTIN: That's even for the interview portion
4 that he's allowed that in the past?

5 THE DISCOVERY COMMISSIONER: Correct.

6 MR. MARTIN: Okay.

7 MR. QUIST: Is -- Your Honor, is audio recording
8 allowed for any of it?

9 THE DISCOVERY COMMISSIONER: Yes. It is. For all
10 of it --

11 MR. QUIST: Throughout the whole -- Your Honor,
12 all of it? Okay.

13 THE DISCOVERY COMMISSIONER: Have a good day,
14 gentlemen. Have a safe weekend.

15 MR. QUIST: Thank you, Your Honor.

16

17 PROCEEDING CONCLUDED AT 10:47 A.M.

18 * * * * *

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1 **CERTIFICATION**

2

3

4 I certify that the foregoing is a correct transcript from

5 the audio-visual recording of the proceedings in the

6 above-entitled matter.

7

8 **AFFIRMATION**

9

10 I affirm that this transcript does not contain the social

11 security or tax identification number of any person or

12 entity.

13

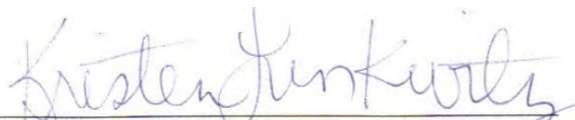
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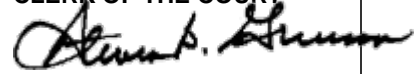
21 INDEPENDENT TRANSCRIBER

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**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.

**DISCOVERY COMMISSIONER'S
REPORT AND RECOMMENDATIONS**

Hearing Date: October 1, 2021

Hearing Time: 9:30 a.m.

Appearances: William T. Martin, Esq., GGRM Law Firm, for Plaintiff Taylor Miles Cape.

Brent D. Quist, Esq., Dennett Winspear, LLP, for Defendant Chilly Willy's

Handyman Services, LLC.

John T. Keating, Esq., Keating Law Group, for Defendant David G. Martinez.

I.

FINDINGS

On October 1, 2021, the Discovery Commissioner, Honorable Jay Young, heard Defendants, Chilly Willy's Handyman Services, LLC and David G. Martinez's Motion to Compel NRCP 35 Neuropsychological Exam with Dr. Lewis M. Etcoff, Noticed for October 19-20, 2021,

1 on an Order Shortening Time; and Plaintiff's Opposition, Counter-Motion for Fees, and to Stay
2 Enforcement. The Commissioner having reviewed the papers and pleadings on file, having
3 heard the oral argument of counsel, and being informed on the premises, finds as follows with
4 respect to Defendants' Motion:

5 Defendants seek a two-day Rule 35 mental examination of Plaintiff. Plaintiff does not
6 oppose the examination take place; rather, he opposes certain parameters of the examination.
7 Plaintiff requested the exam be recorded with an observer and that his expert and counsel be
8 provided the defense expert's raw test data/ test materials under protections. Plaintiff also
9 counter-moved for a stay pending objection to the district court if the protections were not
10 ordered and counter-moved for fees.

11 The COMMISSIONER HEREBY FINDS, under Rule 35, there is good cause to allow a
12 third-party observer of the Rule 35 neuropsychological exam and an audio recording of that full
13 examination.

14 THE COMMISSIONER FURTHER FINDS the good cause to allow a third-party observer
15 and audio recording of the Rule 35 neuropsychological exam is the Legislature passed NRS
16 52.380 and the governor signed it into law. The observer can be present outside the examination
17 room and can listen to the examination either by remote means or directly, with the door open.
18 The observer may not interrupt the examination, except to suspend the examination if any
19 irregularities occur as allowed under NRS 52.380(4).

20 THE COMMISSIONER FURTHER FINDS Plaintiff cannot videotape the examination.

21 THE COMMISSIONER FURTHER FINDS the exam can take place over a two-day
22 period.

23 THE COMMISSIONER FURTHER FINDS the raw test data/test questions and other
24 exam materials must be provided to plaintiff's expert, who may share that information with
25 plaintiff's attorney, in an attorney's eyes-only capacity for preparation of the case. The
26 information is otherwise protected in this matter. It cannot be filed in a public setting. It can be
27 shared between counsel.

28 ///

THE COMMISSIONER FURTHER FINDS, as to Plaintiff's counter-motion for fees, the Motion was substantially justified by the conflict between the NRCP 35 and NRS 52.380 and, therefore, the Commissioner is not granting Plaintiff's request for fees.

THE COMMISSIONER FURTHER FINDS, as to Plaintiff's request for a stay to allow an Objection, that good cause exists to grant that stay.

II.

RECOMMENDATIONS

The Discovery Commissioner, having considered the papers and pleadings on file, having entertained oral argument of counsel, and being informed in the present premises, hereby makes the following recommendations:

IT IS THEREFORE RECOMMENDED that Defendants' Motion be **GRANTED IN PART** and **DENIED IN PART**.

IT IS FURTHER RECOMMENDED the Court compel the NRCP 35 neuropsychological exam of Plaintiff.

IT IS FURTHER RECOMMENDED the exam may take place over a two-day period;

IT IS FURTHER RECOMMENDED that Plaintiff may audio record the exam in full and have a third-party observer present;

IT IS FURTHER RECOMMENDED the third-party observer can be present outside the examination room and can listen to the examination either by remote means or directly, with the door open, but the observer cannot interrupt the examination, except to suspend the examination if any irregularities occur, as allowed by NRS 52.380(4);

IT IS FURTHER RECOMMENDED Plaintiff cannot videotape the examination;

IT IS FURTHER RECOMMENDED the raw test data/test questions and other exam materials must be provided to plaintiff's expert, who may share that information with plaintiff's attorney, in an attorney's eyes-only capacity for preparation of the case. The information is otherwise protected in this matter. It cannot be filed in a public setting. It can be shared between counsel.

///

IT IS FURTHER RECOMMENDED that Plaintiff's counter-motion for fees be **DENIED**;
and

IT IS FURTHER RECOMMENDED that Plaintiff's request for a stay to allow an Objection
be **GRANTED**.

DATED this 15th day of October, 2021.


DISCOVERY COMMISSIONER

Approved as to form and content by:

Respectfully submitted by:

GGRM LAW FIRM

DENNETT WINSPEAR, LLP

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Attorneys for Defendant,
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Respectfully submitted by:

KEATING LAW GROUP

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Attorneys for Defendant
David G. Martinez

NOTICE

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

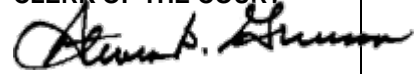
Objection time will expire on November 1, **2021.**

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

 Mailed to Plaintiff/Defendant at the following address on the day of , 2021.

☒ Electronically filed and served counsel on October 18, 2021, pursuant to N.E.F.C.R. Rule 9.

By: Natilie Simonetti
COMMISSIONER DESIGNEE



1 **ODCR**
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13 **Attorneys for Defendant, Chilly**
14 **Willy's Handyman, 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 DISTRICT
COURT REQUESTED

DEFENDANTS' OBJECTION TO DISCOVERY COMMISSIONER REPORT AND
RECOMMENDATION REGARDING DEFENDANTS' MOTION TO COMPEL NRCP 35
NEUROPSYCHOLOGICAL EXAM WITH DR. LEWIS M. ETCOFF

Defendants CHILLY WILLY'S HANDYMAN SERVICES, 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 object to the Discovery Commissioner's Report and
Recommendation regarding Defendants' Motion to Compel NRCP 35 Neuropsychological Exam
with Dr. Lewis M. Etcoff, pursuant to EDCR 2.34(f)(1).

This Objection is made and based upon the pleadings and papers on file herein, the
below Memorandum of Points and Authorities, and the exhibits attached hereto including but not
limited to the Declaration of Dr. Lewis M. Etcoff.

///

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 I.

3 **INTRODUCTION**

4 Plaintiff TAYLOR MILES CAPE alleges personal injuries arising from an automobile
5 accident, including an alleged brain injury, which he asserts will require neurological and
6 psychological treatment. Plaintiff has agreed to submit to a Rule 35 neuropsychological exam
7 with Dr. Lewis M. Etcoff, PhD, on the following conditions, to which Defendants do not agree: (1)
8 that a third-party observer be present throughout the two-day exam, (2) that the full exam, not
9 just the interview portion of the exam, be audio recorded, and (3) that the raw test data/test
10 questions and related materials be shared with Plaintiff's attorneys and not solely Plaintiff's
11 psychological expert.

12 Plaintiff's assertion is he is entitled to the first two conditions, pursuant to NRS 52.380,
13 and that his attorney's need direct access to the exam-related materials to depose/cross-
14 examine Dr. Etcoff. Defendants' position is NRS 52.380 is unconstitutional pursuant to the
15 Nevada Constitution's separation of powers doctrine and good cause does not exist under
16 NRCP 35 for any of Plaintiff's conditions.

17 The Discovery Commissioner granted in part and denied in part the Defendants' Motion
18 to Compel. While the Commissioner stated he was not addressing the Defendants' constitutional
19 challenge to NRS 52.380, he impliedly held NRS 52.380 was constitutional by finding the good
20 cause to require an observer and audio recording is that the Legislature and Governor passed
21 NRS 52.380 into law. He further ruled that while Dr. Etcoff is to disclose the testing-related
22 materials to Plaintiff's psychologist, Dr. Sunshine Collins, she is permitted to disclose that raw
23 test data/test questions to Plaintiff's attorneys.

24 The Discovery Commissioner erred when he impliedly ruled NRS 52.380 is constitutional
25 and governs the procedures for Rule 35 examinations with respect to observers and audio
26 recordings. Pursuant to Nevada's Constitution and NRS 2.120(2), the Nevada Supreme Court
27 has sole authority to regulate the procedural for gathering evidence in civil matters. The
28 amendments to Rule 35 that govern these aspects of an exam, were adopted by the Nevada

1 Supreme Court on March 1, 2019. The Legislature and Governor improperly sought to impinge
2 on the Nevada Supreme Court's rule-making function by adopting NRS 52.380 seven months
3 later. The Nevada Supreme Court has made clear the legislature may not enact a procedural
4 statute that conflicts with a pre-existing procedural rule without violating the doctrine of
5 separation of powers, and such a statute is of no effect. See *Berkson v. Lepome*, 245 P.3d 560,
6 564 (Nev. 2010).

7 Just last year, United States Magistrate Judge Youchah, of the United States District
8 Court for the District of Nevada, in *Freteluco v. Smith's Food and Drug Centers, Inc.*, 336 F.R.D.
9 198 (Nev. 2020), considered the issue of whether NRS 52.380 is procedural in nature. She
10 rightly determined that because NRS 52.380 addresses how evidence is gathered in a civil case,
11 the same as NRCP 35, it is procedural in nature and is therefore superseded by FRCP 35. By
12 extension, NRS 52.380—which again was adopted seven months after the March 2019
13 amendments adopted by the Nevada Supreme Court—is also be superseded by NRCP 35.

14 NRS 52.380 clearly interferes with NRCP 35 in the setting of a Rule 35
15 neuropsychological exam because ethical and professional rules that govern psychologists and
16 neuropsychologists preclude third-party observers, as well as audio recording of the test portions
17 of the exam. (Additionally, these ethical and professional rules bar a neuropsychologist, such as
18 Dr. Etcoff, from sharing test-related materials with anyone other than another psychologist). NRS
19 52.380's allowance for observers and audio recordings of the full exam conflicts with Rule 35
20 and is therefore unconstitutional. Judge Escobar, who recently ruled on this exact issue, likewise
21 found that NRS 52.380 is unconstitutional pursuant to Nevada's separation of powers doctrine.

22 The fact the legislature passed NRS 52.380 and the governor signed it into law does not
23 provide good cause under Rule 35 for an observer and audio recording because they had no
24 constitutional authority to pass that law.

25 Under Rule 35, there is never good cause for an observer and audio recording in a Rule
26 35 neuropsychological exam (outside of an audio recording of only the interview portion of the
27 exam) because of the aforementioned professional and ethical rules that govern the field of
28 psychology. No Rule 35 neuropsychological exams will take place in Nevada if those conditions

1 are in place, which would result in a nullification of Rule 35 and its purpose, which is to level the
2 playing field between the parties and allow the defendants an opportunity to have an
3 independent expert perform an unobstructed examination of the plaintiff.

4 To the degree Plaintiff argues he needs an observer and audio recording to ensure Dr.
5 Etcoff does not lie in his report, this unfounded general concern does not provide good cause for
6 an observer and audio recording of the full exam because Dr. Etcoff adheres to the professional
7 and ethical rules that govern his field and will not lie in his report, Plaintiff has no basis for his
8 alleged concerns that Dr. Etcoff will act improperly, and Plaintiff's counsel will have an
9 opportunity to depose Dr. Etcoff.

10 Good cause also does not exist to allow Dr. Etcoff's raw test data/test questions and
11 related materials to be shared with a non-psychologist, such as Plaintiff's attorneys, due to the
12 professional and ethical prohibitions against that type of disclosure, copyright protections that
13 prevent that type of disclosure, and again, the fact that Plaintiff's attorneys can depose Dr.
14 Etcoff.

15 The *Freteluco* decision, which is considered strong persuasive authority by the Nevada
16 Supreme Court, supports that good cause does not exist to require an observer and audio
17 recording in a Rule 35 neuropsychological exam; nor does good cause exist to allow for the
18 sharing of testing materials with a non-psychologist attorney.

19 Defendants urge the Court to adopt the Rule 35 exam procedure approved of by
20 Discovery Commissioner Erin Truman in September of this year, in which only the interview
21 portion of Dr. Etcoff's Rule 35 neuropsychological exam was ordered to be audio recorded in that
22 case. Moreover, no observer was allowed. And while Commissioner Truman ruled the plaintiff
23 could subpoena Dr. Etcoff for his test-related materials in order to provide him an opportunity to
24 object, Dr. Etcoff has indicated his willingness to share the examination-related materials directly
25 with Plaintiff's psychologist so long as she does not produce that material to Plaintiff's counsel.

26 For the reasons set forth herein, the Discovery Commissioner should sustain Defendants'
27 Objection to the Discovery Commissioner's Report and Recommendation.

28 ///

II.

FACTUAL STATEMENT

According to Plaintiff Cape, the subject accident occurred on November 21, 2018, at the intersection of Durango and Osa Blanca. He asserts he made a left turn on a green traffic light when a vehicle driven by Defendant Martinez and owned by Defendant Chilly Willy's ran a red traffic light and struck the Defendants' vehicle. **Exhibit A**, Plaintiff's Responses to Defendant Chilly Willy's Interrogatories, Response to Interrogatory No. 13. Among his injuries, Plaintiff asserts he experienced an ongoing concussive brain injury, difficulty concentrating, sensitivity to light and noise, short term memory loss, and blurred vision. Plaintiff believes these symptoms indicate permanent mental damage. **Exhibit A**, Plaintiff's Response to Interrogatory No. 3 and Interrogatory No. 14.

On July 9, 2019 and August 26, 2019, Cape underwent a neuropsychological evaluation with Sunshine Collins, PsyD, who diagnosed him with a "mild neurocognitive disorder due to traumatic brain injury causing clinically significant distress and impairment in multiple domains of functioning in multiple settings." **Exhibit B**, Collins Neuropsychological Evaluation Report, at 1. There is no indication anywhere in Dr. Collins' report of a third-party observer, that the evaluation was either audio recorded or video recorded, or that the raw test data/test material was disclosed with any non-psychologist. See generally, **Exhibit B**. As part of the reevaluation, Dr. Collins reviewed Cape's neurology and mental health records (*id.* at 3-6, 10-11), privately interviewed Cape (*id.* at 6-10), performed a mental status examination and psychometric test (*id.* at 11-12), assessed his attention and executive functioning, information processing speed, verbal and language skills (*id.* at 13), his verbal and visual memory and visual perception and organization (*id.* at 14), intellectual functioning, personality and behavior (*id.* at 15-18), and diagnosed Cape with mild neurocognitive disorder due to traumatic brain injury, brief psychotic disorder, schizophreniform disorder and schizophrenia, and Bipolar I Disorder with psychotic features (*id.* at 18).

Based, in part, on Dr. Collins' psychological evaluation and report, Nurse Jan Roughan prepared a Life Care Analysis. **Exhibit C**, Roughan Life Care Analysis. Roughan recommends

ongoing psychological treatment and neuropsychological evaluation/psychometric testing for Cape. *Id.* at bates number 00438.

Cape alleges past and future medical expenses, including the future treatment recommended by Nurse Roughan, of roughly \$5.7 million. **Exhibit D**, Plaintiff's NRCP 16.1(a)(1) Early Case Conference Disclosures, at 8 (pleading only).

III.

PROCEDURAL HISTORY

The Court's Scheduling Order was issued on January 13, 2021. A few days prior, Defendant Chilly Willy's served written discovery, which was responded to by Plaintiff on March 19, 2021. Defense counsel thereafter conferred with Plaintiff's counsel regarding certain discovery responses pertaining to Plaintiff's current physical condition. After receiving clarification from Plaintiff's counsel that Plaintiff asserts ongoing neurological and physical injuries and symptoms allegedly arising from the subject accident, defense counsel conferred numerous times with Plaintiff's counsel regarding Plaintiff undergoing a medical and separate neuropsychological exam pursuant to NRCP 35. The parties conferred regarding the scope of those exams for three months, from June to September of this year.

The parties are in agreement as to the scope of the medical Rule 35 exam and as to many of the parameters of the Rule 35 neuropsychological exam with Dr. Lewis M. Etcoff. Moreover, the neuropsychological exam was noticed for October 19-20, 2021, while the medical exam (and Plaintiff's deposition) has been noticed for November of this year.

However, the parties could not agree as to the following conditions insisted upon by Plaintiff with respect to Dr. Etcoff's exam: (1) that an observer be present throughout the exam, (2) that the full exam be audio-recorded, (3) that the raw test data/test materials be shared not solely with Plaintiff's neuropsychologist, but also with Plaintiff/Plaintiff's attorney, and (4) that the exam only last one day, and not two-days which is standard in the industry.¹

///

¹ At the discovery hearing, Plaintiff stipulated to a two-day exam.

IV.

DISCOVERY HEARING

On September 13, 2021, Defendants filed a Motion to Compel Neuropsychological Exam with Dr. Lewis M. Etcoff, Noticed for October 19-20, 2021, on an Order Shortening Time.

During the hearing before Discovery Commissioner Jay Young, counsel for Plaintiff stated Cape was now consenting to a two-day exam. **Exhibit E**, Discovery Hearing Transcript: at 4:20-5:2. Defendants reaffirmed their position that because NRS 52.380 is a procedural statute and conflicts with NRCP 35, it violates the separation of powers doctrine and is therefore unconstitutional. *Id.* at 5:3-7:24. Defendants further argued the United States District Court for the District of Nevada, which considered whether NRS 52.380 confers a substantive right to observers and audio recording in a Rule 35 neuropsychological setting or whether Rule 35 supersedes the statute, held that NRS 52.380 is procedural in nature and is therefore superseded by FRCP 35, and further explained why there is not good cause for observers and audio recording of those Rule 35 exams. *Id.* at 7:25- 8:19 (in which the case of *Freteluco v. Smith's Food and Drug Centers, Inc.*, 336 F.R.D. 198 (D.Nev. 2020) is discussed). Defendants explained the practical problem with the Court requiring a third-party observer and audio recording: due to the professional and ethical restrictions placed on psychologists, no licensed psychologist or neuropsychologist will conduct a Rule 35 exam with those conditions. A significant concern is that the presence of a third-party observer and audio recording will invalidate test results. **Exhibit E**, Hearing Transcript, at 8:20- 11:5.

In response, Plaintiff argued the Discovery Commissioner should disregard the *Freteluco* decision (*id.* at 13:17-12; 18:22-25), and that Dr. Etcoff is not professional or ethically prohibited from allowing a third-party observer and audio recording (*id.* at 14:13-15:10; 19:10-18). Plaintiff went so far to contend Dr. Etcoff is “exaggerating the ethical and licensing issues[.]” *Id.* at 22:23-24. Plaintiff further argued a third-party observer and audio recording will not invalidate the test results. *Id.* at 15:24-16:14; 17:23-18:8. He suggested an observer is necessary because Dr. Etcoff may lie about the tests conducted and test results, not actually perform the tests he claims he is performing, and the neuropsychological exam will involve “subjective judgments.” *Id.* at

20:11-23; 22:10-14.

Plaintiff contended there is no reason, copyright or otherwise, that Dr. Etcoff must only share the raw test data/test materials with Dr. Collins (instead of Plaintiff's counsel) *id.* at 19:23-20:10), and that his attorneys need the raw test data/test materials to cross-examine Dr. Etcoff. *Id.* at 22:14-17.

The Discovery Commissioner stated he would not rule on the constitutionality of NRS 52.380 (*id.* at 24:4-13), and yet proceeded to impliedly rule the statute is constitutional by finding the good cause under Rule 35 to allow for an observer and audio recording was "the Legislature passed NRS 52.380 and the governor signed it into law." **Exhibit F**, Discovery Commissioner Report and Recommendations, at 2:14-16. The Commissioner granted the Motion in part and denied it in part and, as part of his ruling, made the following recommendations:

- Plaintiff is compelled to attend a NRCP 35 neuropsychological exam, which may take place over a two-day period. *Id.* at 3:13-15.
- Plaintiff may audio record the exam in full and have a third-party observer present. The third-party observer can be present outside the examination room and can listen to the examination either by remote means or directly, with the door open, but the observer cannot interrupt the examination, except to suspend the examination if any irregularities occur, as allowed by NRS 52.380(4). Plaintiff may not videotape the exam. *Id.* at 3:16-22.
- Dr. Etcoff must share the raw test data/test questions and other exam materials to plaintiff's expert, who may share that information with plaintiff's attorney. *Id.* at 3:23-27.
- Plaintiff's counter-motion for fees is denied, while Plaintiff's motion for a stay to allow for an Objection is granted. *Id.* at 3:28-4:3.

Defendants are not objecting to the Commissioner's recommendation that Plaintiff is compelled to attend a NRCP 35 neuropsychological exam, that the examination not be video recorded, and that exam taking place over a two-day period. Defendants are, however, objecting to the remaining recommendations made by the Commissioner.

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V.

**THE NRCP 35 AMENDMENT ADDRESSING OBSERVERS AND AUDIO RECORDINGS WAS
ADOPTED BY THE NEVADA SUPREME COURT SEVEN MONTHS BEFORE NRS 52.380
WAS ENACTED INTO LAW**

The applicable amendments to NRCP 35 took effect March 1, 2019. NRS 52.380 became law on October 1, 2019.

VI.

ARGUMENT**A. STANDARD OF REVIEW**

Discovery orders are generally reviewed for an abuse of discretion. *Club Vista Financial Servs. v. Dist. Ct*, 276 P.3d 246, 249 (Nev. 2012) (citing *Matter of Adoption of Minor Child*, 60 P.3d 485, 489 (Nev. 2002)). A district court's discretionary power is subject to the test of reasonableness. *Imperial Credit v. Eighth Jud. Dist. Ct*, 331 P.3d 862, 866 (Nev. 2014). An abuse of discretion occurs where the court's ruling is unreasonable. *Id.*

Questions of law and statutory interpretations are reviewed de novo. *Northern Nevada Homes, LLC v. GL Construction, Inc.*, 422 P.3d 1234, 1236 (Nev. 2018) (citing *Albios v. Horizon Cmty's, Inc.*, 132 P.3d 1022, 1028 (Nev. 2016)). Moreover, "[w]hether a statute is unconstitutional is a question of law, reviewed de novo." *Tate v. State of Bd of Medical Exam'rs*, 356 P.3d 506, 508 (Nev. 2015). A de novo review does not give any deference to the district court's findings. *GES, Inc. v. Corbitt*, 21 P.3d 11, 13 (Nev. 2001).

Here, although the Discovery Commissioner couched his Report and Recommendations under the guise of Rule 35's good cause standard, by holding the good cause consisted of the passage of NRS 52.380, the Discovery Commissioner impliedly found NRS 52.380 is constitutional and supersedes NRCP 35. The Discovery Commissioner Report and Recommendations should therefore be reviewed by the Court de novo, without giving any deference to the Discovery Commissioner's Report and Recommendations.

Even if the Court were to determine the Discovery Commissioner solely made a determination under Rule 35, and did not inherently rule NRS 52.380 is constitutional, the Court should find the Discovery Commissioner abused his discretion as his decision to condition the

1 Rule 35 examination on the presence of a third-party observer, audio recording of the exam, and
2 permitting the raw test data/test questions and related materials to be produced to non-
3 psychologists, was not reasonable. These conditions will preclude any Rule 35
4 neuropsychological exam from ever taking place in this case or any other Nevada personal injury
5 lawsuit.

6 **B. NRS 52.380 IS UNCONSTITUTIONAL BECAUSE IT VIOLATES NEVADA'S**
7 **SEPARATION OF POWERS DOCTRINE.**

8 1. THE JUDICIARY'S CONSTITUTIONAL AUTHORITY TO ENACT PROCEDURAL
9 RULES CANNOT BE INTERFERED WITH BY THE LEGISLATURE.

10 NRS 52.380 is a procedural statute that interferes with NRC 35, and the ability to
11 conduct examinations authorized thereunder, and therefore the statute violates the separation of
12 powers doctrine enshrined in Nevada's Constitution. "The separation of powers doctrine is the
13 most important foundation for preserving and protecting liberty by preventing the accumulation of
14 power in any one branch of government." *Berkson v. Lepome*, 245 P.3d 560, 564 (Nev. 2010)
15 (citing *Secretary of State v. Nevada State Legislature*, 93 P.3d 746, 753 (Nev. 2004)). The
16 Nevada Constitution "contains an express provision prohibiting any one branch of government
17 from impinging on the functions of another." *Commission on Ethics v. Hardy*, 212 P.3d 1098,
18 1104 (Nev. 2009) (citing *Secretary of State*, 466 P.3d at 753).

19 "As coequal branches, each of the three governmental departments 'has power to
20 administer its own affairs and perform its duties, so as not to become a subordinate branch of
21 government.'" *Berkson*, 245 P.3d at 498 (quoting *Halverson v. Hardcastle*, 163 P.3d 428, 439
22 (Nev. 2007)). The Nevada Supreme Court takes extra care to "keep the powers of the judiciary
23 separate from those of either the legislative or the executive branches." *Id.* (citing *Galloway v.*
24 *Tuesdell*, 422 P.2d 237, 242 (Nev. 1967). "This separation is fundamentally necessary because
25 'were the power of judging joined with the legislative, the life and liberty of the subject would be
26 exposed to arbitrary control, for the judge would be the legislator.'" *Id.*

27 In keeping with the theory of separation of powers, "the judiciary has the inherent power
28 to govern its own procedures." *Berkson*, 245 P.3d at 499 (quoting *State v. Distr. Ct [Marshall]*,
11 P.3d 1209, 1212 (Nev. 2000) (quoting *Whitlock v. Salmon*, 742 P.2d 210, 211 (Nev. 1988)).

“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.’” *Id.* (quoting *Borger v. Dist. Ct.*, 102 P.3d 600, 606 (Nev. 2004)). Indeed, NRS 2.120 recognizes the Nevada Supreme Court is responsible for adopting rules for civil practice. The Court “shall regulate original and appellate civil practice and procedure, including, without limitation, pleadings, motions, writs, notices and forms of process, in judicial proceedings in all courts of the State, for the purpose of simplifying the same and of promoting the speedy determination of litigation upon its merit.” NRS 2.120(2).

Given the Nevada Supreme Court’s inherent and statutory authority to adopt civil procedural rules, 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 499 (quoting *Marshall*, 11 P.3d at 1213) (quoting *State v. Connery*, 661 P.2d 1298, 1300 (Nev. 1983)).

2. NRCP 35 IS PROCEDURAL IN NATURE BECAUSE IT GOVERNS THE MANNER IN WHICH EVIDENCE IS COLLECTED.

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 and means by which litigants’ rights are enforced” may properly be determined by Nevada courts. *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 130 S.Ct. 1431, 1442 (2010) (internal citations omitted). The United States Supreme Court has specifically found Rule 35 examinations to be a matter of procedural law, which is consistent with Nevada’s separation of powers rules. It has held the Federal Rules of Civil Procedure “prescribe methods for serving process, and **requiring litigants whose mental or physical condition is in dispute to submit to examinations** . . . Each of these rules had some practical effect on the parties’ rights, but each undeniably regulated only the **process** for enforcing those rights; none altered the rights themselves, the available remedies, or the rules of decision by which the court adjudicated either.” *Shady Grove*, 130 S.Ct. at 1442-43 (internal citations omitted and emphasis added). See also, *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13 (1941) (finding FRCP 35 was properly enacted as

one of the court's procedural rules pursuant to the federal enabling act).

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

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

3. NRS 52.380 IS A LSO PROCEDURAL IN NATURE BECAUSE IT TOO GOVERNS THE MANNER IN WHICH EVIDENCE IS COLLECTED.

NRS 52.380 also governs the manner in which evidence is gathered and is therefore procedural nature. However, the procedures for governing evidence set forth in NRS 52.380 starkly differ from the procedures set forth in NRCP 35.

Pursuant to NRCP 35(a)(4)(A) and (B), a third-party observer may only be present during a neuropsychological exam if the plaintiff demonstrates good cause; moreover, that observer may not be the plaintiff's attorney. NRS 52.380, however, provides that an observer may attend a neuropsychological exam without the plaintiff first demonstrating good cause for that observer; moreover, the observer may be the attorney of the plaintiff. NRS 52.380(1), (2), and (7).

Additionally, NRCP 35(a)(3) provides a plaintiff may only audio record a neuropsychological exam if the plaintiff first shows good cause. However, NRS 52.380(3) allows an observer to make an audio recording of the exam without first demonstrating good cause. Like Rule 35, NRS 52.380 provides procedures for the collection of specified types of evidence that may be relevant to a plaintiff's personal injury claim.

4. THE COURT MAY NOT CONSIDER LEGISLATIVE HISTORY IN DETERMINING WHETHER NRS 52.380 IS PROCEDURAL IN NATURE BECAUSE THE STATUTE IS NOT AMBIGUOUS.

To the extent Plaintiff improperly references NRS 52.380's legislative history in its

Opposition, the Court must disregard that legislative history as NRS 52.380 is plain on its face. “When interpreting statutes, [the Nevada Supreme Court] give[s] effect to legislative intent.” *McNeill v. State*, 375 P.3d 1022, 1025 (Nev. 2016) (citing *State v. Lucero*, 249 P.3d 1226, 1228 (Nev. 2011)). “The starting point for determining legislative intent is the statute’s plain meaning; when a statute is clear on its face, a court cannot go beyond the statute in determining legislative intent.” *Id.* (quoting *Lucero*, supra). See also, *Valenti v. State, Dep’t of Motor Vehicles*, 362 P.2d 83, 85 (Nev. 2015) (“In interpreting a statute, this court looks to the plain language of the statute and, if that language is clear, this court does not go beyond it.”) (quoting *Branch Banking & Tr. Co. v. Windhaven & Tollway, LC*, 347 P.3d 1038, 1040 (Nev. 2015)). Accord *State v. White*, 330 P.3d 482, 484 (Nev. 2014); *Great Basin Water Network v. State Eng’r*, 234 P.3d 912, 918 (Nev. 2010); and *Doolin v. Department of Corrections*, 440 P.3d 53, 55 (Nev.App. 2018).

Additionally, legislative history cannot be used to “read an ambiguity into a statute which is otherwise clear on its face.” *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242, 1247 (11th Cir. 2008).

If this Court were to not follow the foregoing rules of statutory construction and consider legislative history even though the statute is plain on its face, the Court would commit reversible error. See *MB America, Inc. v. Alaska Pac. Leasing*, 367 P.3d 1286, 1292 (Nev. 2016) (“An abuse of discretion can occur when the district court bases its decision on a clearly erroneous factual determination or it disregards controlling law.”)

Here, NRS 52.380 is not vague. The statute clearly lays out the procedures to be followed in Rule 35 exams with respect to observers and audio recordings during such exams. The procedures are not vague or ambiguous, they simply contradict those set forth in NRCP 35 for those exams. The Court therefore must not consider any legislative history in ruling on the Objection.

5. THE *FRETELUCO* DECISION IS STRONG PERSUASIVE AUTHORITY AND CONFIRMS NRS 52.380 IS PROCEDURAL IN NATURE AND IS SUPERCEDED BY BOTH FRCP 35 AND NRCP 35.

Contrary to what Plaintiff represented to the Discovery Commissioner, Judge Youchah’s

1 decision in *Freteluco*, *supra*, is strong persuasive authority² and should be given serious
2 consideration by the Court as it considers the exact same issues before the Court. In the
3 *Freteluco* case, which was decided just last year, defendant retained Dr. Lewis Etcoff to conduct
4 a Rule 35 neuropsychological exam of the personal injury plaintiff. Plaintiff insisted the exam
5 should be conditioned on a third-party observers and audio recording of the clinical interview. As
6 is the case here, Dr. Etcoff did not disagree to the audio recording of the “clinical interview”
7 portion of the examination. However, he objected to a third-party observer. 336 F.R.D. at 200.

8 The court noted that under the *Erie* Doctrine³ if NRS 52.380 is substantive, then it
9 supersedes FRCP 35. However, if the statute is procedural in nature, then FRCP 35 supersedes
10 the statute. *Id.* at 202. The *Freteluco* Court’s analysis is relevant because it is the same analysis
11 this Court must undertake. Here, if NRS 52.380 is procedural in nature, given that it interferes
12 with NRCP 35 neuropsychological exams, it is unconstitutional and of no effect.

13 The *Freteluco* Court concluded “that whether an observer is present in the
14 neuropsychological examination of Plaintiff is not substantive, but is procedural.” “NRS 52.380
15 sets forth procedures applicable to observers who may attend independent medical
16 examinations” and whether an audio recording is allowed without a showing of good cause. *Id.* at
17 203. NRS 52.380 reflects a “‘procedural preference’” *id.* (quoting *Flack v. Nutribullett, LLC*, 333
18 F.R.D. 5008, 517 (C.D.Cal. 2019)) and is not a substantive law that overrides Rule 35. *Id.*

19 Plaintiff Cape may argue that *Freteluco* is inapposite because the court in *Freteluco*
20 considered whether NRS 52.380 supersedes FRCP 35 pursuant to the *Erie* Doctrine and not
21 whether NRS 52.380 is constitutional under the Nevada Constitution. However, *Freteluco* is
22 strong persuasive authority because it analyzes whether NRS 52.380 is procedural in nature.
23 The *Freteluco* Court found that NRS 52.380 is procedural because it governs how Rule 35

24
25 ² See *Executive Management, Ltd. v. Ticor Title Ins. Co.*, 38 P.3d 872 (Nev. 2002) (federal case
26 law interpreting the same rule of procedure as the corresponding Nevada rule of civil procedure is
27 considered “strong persuasive authority” because the Nevada Rules of Civil Procedure are based in large
28 part upon their federal counterparts).

27 ³ Under the *Erie* Doctrine, a federal court sitting in diversity must apply the substantive law of the
28 forum state and federal procedural law. *Freteluco*, 336 F.R.D. at 202 (citing *Erie R.R. Co. v. Tompkins*,
304 U.S. 64, 78 (1938)).

1 exams must be conducted. NRS 52.380 and Rule 35 both set forth standards by which a court is
2 to determine whether to allow a third-party observer in an exam and audio recording of the
3 exam. The statute is unconstitutional because the procedures the statute sets forth contradict the
4 procedures set forth in Rule 35 to the point that Rule 35 neuropsychological exams cannot
5 occur.

6 6. REQUIRING THIRD-PARTY OBSERVERS AND AUDIO RECORDINGS.
7 PURSUANT TO NRS 52.380, WILL RESULT IN NO RULE 35
8 NEUROPSYCHOLOGICAL EXAMS OCCURRING IN NEVADA AND,
9 THEREFORE, NRS 52.380 UNCONSTITUTIONALLY INTERFERES WITH
10 NRCP 35.

11 NRS 52.380's observer/audio recording procedures for Rule 35 neuropsychological
12 exams disrupt the procedures set forth in Rule 35 and, therefore, pursuant to the separation of
13 powers doctrine set forth in Nevada's Constitution, NRS 52.380 is unconstitutional. Dr. Lewis M.
14 Etcoff has been made aware of the Discovery Commissioner's ruling. **Exhibit G**, Etcoff
15 Declaration, at ¶4. He is a Nevada board-certified neuropsychologist with nearly 40 years of
16 clinical experience. *Id.* at ¶1; **Exhibit G(1)**, Lewis M. Etcoff, PhD, Curriculum Vitae. Dr. Etcoff
17 affirms he is not professionally or ethically permitted to conduct a Rule 35 neuropsychological
18 examination under the conditions placed on that examination by Commissioner Young. *Id.* at ¶5.

19 Dr. Etcoff is aware that the Nevada Supreme Court is currently considering the issue of
20 whether to allow third-party observers and audio recording in the setting of a Rule 35
21 neuropsychological exam in *Moats v. Eighth Judicial District Court (Burgess)*, Supreme Court
22 No. 347683. **Exhibit G**, Etcoff Declaration, at ¶6. On December 11, 2020, the Executive Board
23 of the Nevada Psychological Association submitted to the Nevada Supreme Court a 2017 Amici
24 Curiae brief in *Moats*, which amicus brief was previously submitted to the Michigan Court of
25 Appeals regarding the professional and ethical problems caused by third-party observers and
26 audio recording in Rule 35 neuropsychological exams. **Exhibit G**, Etcoff Declaration, at ¶7;
27 **Exhibit G(2)**, Nevada Psychological Association Letter to Nevada Supreme Court, dated
28 December 11, 2020.

As shown in that Amici Curiae brief, multiple professional neuropsychological
associations argue against allowing third-party observers and audio recording of Rule 35

1 neuropsychological exams due to “(1) the implications for test performance and the validity of
2 test results, (2) ethical considerations, and (3) test security.” **Exhibit G**, Etcoff Declaration, at ¶¶8;
3 **Exhibit G(3)**, Amici Curiae Briefs submitted by The American Academy of Clinical
4 Neuropsychology, the National Academy of Neuropsychology, The Society for Clinical
5 Neuropsychology of the American Psychological Association, The American Board of
6 Professional Neuropsychology, and The Michigan Psychological Association, at 5.

7 These organizations recognize that, to be valid, neuropsychological tests must be
8 administered under conditions that closely replicate the standardized conditions under which
9 they were developed. Standardized conditions do not include the presence of a third-party
10 observer or audio recording. **Exhibit G**, Etcoff Declaration, at ¶¶9; **Exhibit G(3)**, at 8-9. Third-
11 party observers and audio recording distract and disrupt the examinee, may influence how the
12 examinee responds, and have overall significant negative effects on neuropsychological test
13 performance. **Exhibit G**, Etcoff Declaration, at ¶¶9; **Exhibit G(3)**, at 9-10.

14 A recent, 2021, article published in the Archives of Clinical Neuropsychology similarly
15 notes the presence of third-party observers and audio recording in a Rule 35 neuropsychological
16 setting creates test reliability and validity concerns due to “observer effects”, such as distraction
17 of attention of an examinee, which departs from standardized administration procedures. **Exhibit**
18 **G**, Etcoff Declaration, at ¶¶ 10; **Exhibit G(4)**, Update on Third Party Observers in
19 Neuropsychological Evaluation: An Interorganizational Position Paper, Archives of Clinical
20 Neuropsychology (2021), at 1-3.

21 The Nevada State Board of Psychological Examiners also opposes third-party
22 observers/audio recording in neuropsychological Rule 35 exams because “[o]bservation,
23 monitoring, and recording can significantly alter the credibility and validity of results obtained
24 during psychological and neuropsychological medical evaluations, as well as forensic
25 evaluations completed for judicial proceedings.” The presence of a third-party observer or audio
26 recording may also prevent the examinee from disclosing crucial information essential to
27 diagnosis. **Exhibit G**, Etcoff Declaration, at ¶¶ 11; **Exhibit G(5)**, State of Nevada Board of
28 Psychological Examiners letter to Clerk of the Nevada Supreme Court, dated October 1, 2018.

In Dr. Etcoff's experience, there is a risk that if a third-party observer is present in or near the examinee/examination, coaching of the examinee may occur. Such coaching would interfere with the test result validity. **Exhibit G**, Etcoff Declaration, at ¶12.

As a Nevada licensed neuropsychologist, Dr. Etcoff is professionally bound by the *Ethical Principles of Psychologists and Code of Conduct* adopted by the American Psychological Association ("APA"). See NAC 641.250(1) (adopting by reference the "most recent edition of the *Ethical Principles of Psychologists and Code of Conduct* adopted by the American Psychological Association." **Exhibit G**, Etcoff Declaration, at ¶13; **Exhibit G (6)**, NAC 641.250.

According to APA ethical principles, psychologists should adhere to standardized procedures and utilize test materials in an appropriate manner based upon current research. **Exhibit G**, Etcoff Declaration, at ¶14; **Exhibit G(7)**, APA Ethical Principles of Psychologists and Code of Conduct, effective January 1, 2017, at Standard 9.2; **Exhibit G(3)**, at 13.

Test administration should carefully follow standard procedures determined by the test publishers. The environment should minimize distractions as much as possible. **Exhibit G**, Etcoff Declaration, at ¶15; **Exhibit G(3)**, at 13-14. Dr. Etcoff further explains psychologists must make reasonable efforts to maintain the integrity and security of test materials and other assessment techniques. **Exhibit G**, Etcoff Declaration, at ¶16; **Exhibit G(7)**, at Standard 9.11; **Exhibit G(3)**, at 14. Psychologists must not promote the use of psychological assessment techniques by unqualified persons. Third-party observers in a litigation setting are unqualified persons and thus should not be involved in the assessment. **Exhibit G**, Etcoff Declaration, at ¶17; **Exhibit G(7)**, at Standard 9.07; **Exhibit G(3)**, at 14.

Dr. Etcoff further states a psychologist must protect against misuse and misrepresentation of their work. **Exhibit G**, Etcoff Declaration, at ¶18; **Exhibit G(7)**, at Standard 1.01. A third-party observer is not trained as a neuropsychologist and may misrepresent the examinee's performance. Attorneys have neither the education, training nor experience to be a neuropsychological assessment expert. **Exhibit G**, Etcoff Declaration, at ¶18; **Exhibit G(3)**, at 14-15. Psychologists must take reasonable steps to avoid harming examinees. **Exhibit G**, Etcoff Declaration, at ¶19; **Exhibit G(7)**, at Standard 3.04. The examinee, and the field of psychology

1 more generally, is harmed when third-party observers are permitted during neuropsychological
2 exams because their presence diminishes the quality of the evaluation. **Exhibit G**, Etcoff
3 Declaration, at ¶19; **Exhibit G(3)**, at 15.

4 Dr. Etcoff explains in his Declaration that “Test data” refers to raw and scaled scores,
5 client/patient responses to test questions or stimuli, and psychologists’ notes and recordings
6 concerning client/patient statements and behavior during an examination. Psychologist must not
7 release test data to “protect . . . misrepresentation of the data or the test[.]” **Exhibit G**, Etcoff
8 Declaration, at ¶ 20; **Exhibit G(7)**, at Standard 9.04; **Exhibit G(3)**, at 17. Additionally, “Test
9 materials” refers to manuals, instruments, protocols, and test questions and stimuli.
10 Psychologists must make reasonable efforts to maintain the integrity and security of test
11 materials and other assessment techniques. **Exhibit G**, Etcoff Declaration, at ¶21; **Exhibit G(7)**,
12 at Standard 9.11; **Exhibit G(3)**, at 17. Third-party observation directly provides to unlicensed
13 third-parties confidential test questions and information about test stimuli and procedures that
14 substantially compromise test security. **Exhibit G**, Etcoff Declaration, at ¶22; **Exhibit G(3)**, at 17.
15 Public or lay person knowledge of the test materials runs the risk for coaching of individuals in
16 the future, that may result in inflated test scores so individuals appear to have intact cognitive
17 abilities when they do not. **Exhibit G**, Etcoff Declaration, at ¶22; **Exhibit G(3)**, at 17-18.

18 For these reasons, the test data and materials may not be divulged to non-psychologists,
19 such as a personal injury plaintiff or their counsel. However, Dr. Etcoff is amenable to sharing
20 any test data/materials directly with Mr. Cape’s neuropsychologist, Dr. Sunshine Collins.
21 However, ethically it may not be shared with Mr. Cape or his counsel. **Exhibit G**, Etcoff
22 Declaration, at ¶23.

23 In Dr. Etcoff’s nearly forty years of professional practice he has not violated his ethical
24 duties. He holds himself up to a high ethical standard. If he were to violate his professional and
25 ethical responsibilities there is a risk he could place his psychology license in jeopardy. If Dr.
26 Etcoff were to violate his professional and ethical responsibilities, counsel for Mr. Cape could
27 attempt to impeach his credibility at trial. **Exhibit G**, Etcoff Declaration, at ¶¶24-26.

28 In sum, enforcement of NRS 52.380 makes it impossible for any Rule 35

neuropsychological exams from taking place in Nevada. NRS 52.380 thus interferes with Rule 35 neuropsychological exams to the point of completely disrupting the procedures set forth in Rule 35.

7. NRS 52.380 IS UNCONSTITUTIONAL BECAUSE IT IS PROCEDURAL IN NATURE AND CONFLICTS WITH A PRE-EXISTING PROCEDURAL RULE, NRCP 35.

NRS 52.380 violates the separation of powers doctrine, embodied in the Nevada Constitution, because it is procedural in nature and conflicts with the recent amendments of Rule 35 that were adopted seven months prior to NRS 52.380. As discussed above, pursuant to the separation of powers doctrine, 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 499 (quoting *Marshall*, 11 P.3d at 1213) (quoting *Connery*, 661 P.2d at 1300).

Judge Escobar has recognized the foregoing and, on that basis, held NRS 52.380 is unconstitutional. In *Moats v. Burgess*, Eighth Judicial District Court, Case No. A-18-769459-C, the personal injury plaintiff alleged a traumatic brain injury. Like here, the parties agreed to Dr. Etcoff performing a Rule 35 neuropsychological exam of the plaintiff and, as is the case here, the parties could not agree on whether plaintiff was allowed to bring a third-party observer into the examination and whether the full examination could be audio recorded. **Exhibit H**, Order on Defendant Burgess’ Objection to the Discovery Commissioner’s Report and Recommendations and Request for Hearing on Order Shortening Time, at bates number 3. The Discovery Commissioner found that NRS 52.380 controls over NRCP 35 regarding the psychological examination, and therefore, ordered a third-party observer and audio recording of the exam. *Id.* at bates number 4. Defendant filed an Objection. *Id.*

In her Order sustaining the Objection, Judge Escobar stated “NRS 2.120 recognizes that the Nevada Supreme Court is responsible for adopting rules for civil practice.” *Id.* at bates number 5. Judge Escobar also recognized the Nevada Supreme Court’s inherent rule-making authority and that 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.” *Id.* (citing *Connery*, supra).

Judge Escobar found NRS 52.380 is procedural in nature and conflicts with Rule 35, which is a preexisting procedural rule. “Thus, in accordance with the Nevada Constitution and separation of powers doctrine,” she held “that NRCP 35 is controlling on the issue of whether a third-party observer and/or an audio recording is permissible during an NRCP 35 psychological examination.” **Exhibit H**, Moats Order, at bates numbers 5 and 6.

C. THE LEGISLATURE PASSING NRS 52.380 AND THE GOVERNOR SIGNING THE STATUTE INTO LAW DOES NOT PROVIDE GOOD CAUSE TO REQUIRE A THIRD-PARTY OBSERVER AND AUDIO RECORDING IN A RULE 35 NEUROPSYCHOLOGICAL EXAM BECAUSE NRS 52.380 IS UNCONSTITUTIONAL.

The Discovery Commissioner incorrectly found the passage of NRS 52.380 constitutes good cause to allow for a third-party observer and audio recording of the full exam under NRCP 35. The Legislature passing NRS 52.380 and the governor signing it into law (see **Ex. F**, Discovery Commissioner Report and Recommendation, at 2) does not constitute good cause because the Legislature and Governor did not have constitutional authority to enact NRS 52.380. Their views as to how Rule 35 exams should be conducted are irrelevant. The Nevada Supreme Court, alone, has authority to adopt rules governing Rule 35 exams.

D. GOOD CAUSE DOES NOT EXIST TO REQUIRE A THIRD-PARTY OBSERVER AND AUDIO RECORDING IN A RULE 35 NEUROPSYCHOLOGICAL EXAM BECAUSE SUCH REQUIREMENT WILL PREVENT DR. ETCOFF, OR ANY NEUROPSYCHOLOGIST, FROM PERFORMING AN EXAM AND WILL THUS NULLIFY THE PURPOSE OF RULE 35.

There is not good cause to require a third-party observer and audio recording of Dr. Etcoff’s Rule 35 neuropsychological exam of Plaintiff as such requirement will prevent the examination from occurring and will thus nullify the purpose of Rule 35, which is to level the playing field by allowing a reputable doctor of defendant’s choosing to independently examine the plaintiff. The Nevada Supreme Court’s rules of statutory construction require a court to “construe the language of the statute” and a procedural rule “to effectuate, rather than to nullify, its manifest purpose.” *Sheriff, Clark County v. Luqman*, 697 P.2d 107, 111 (Nev. 1985) (citing *Sheriff v. Martin*, 662 P.2d 634 (Nev. 1983)). See also, *Marquis & Aurbach v. Eighth Judicial Dist. Court*, 146 P.3d 1130, 1136 (Nev. 2006) (applying rules of statutory construction to the

1 interpretation of a court rule).

2 “[O]ne of the purposes of Rule 35 is to level the playing field in cases where physical or
3 mental condition is at issue, because ‘a plaintiff has ample opportunity for psychiatric or mental
4 examination by his/her own practitioner or forensic expert.’” *Painter v. Atwood*, 2013 WL
5 54280589, at *2 (D.Nev. 2013) (quoting *Ashley v. City & Cnty of San Francisco*, 2013 WL
6 2386655 (N.D.Cal. 2013) and citing *Ragge v. MCA/Universal Studios*, 165 F. R.D. 605, 608
7 (C.D.Cal. 1995)).

8 Here, the Court should construe Rule 35 to effectuate, rather than nullify, its manifest
9 purpose, which is to provide the Defendants a fair opportunity to have Dr. Etcoff independently
10 examine Cape just as Dr. Collins had an unobstructed opportunity to examine him. Rule 35 is
11 intended to “level the playing field.” That can only happen here if Dr. Etcoff is actually able to
12 examine Cape. However, Dr. Etcoff cannot either ethically or professionally conduct that
13 examination if there is a third-party observer or an audio recording of the full examination, or if
14 that examination is conditioned on him sharing the raw test data/test questions and related to
15 materials to non-psychologists, such as Plaintiff’s counsel.

16 Plaintiff has agreed to the Rule 35 neuropsychological exam. The Discovery
17 Commissioner has recommended the Court compel that examination. However, that examination
18 cannot actually occur under the conditions ordered by the Discovery Commissioner. Good
19 cause, pursuant to NRCPP 35(a)(3) and (4), therefore does not exist to require Dr. Etcoff to
20 conduct the neuropsychological exam with the conditions recommended by Commissioner
21 Young.

22 **E. GOOD CAUSE DOES NOT EXIST TO REQUIRE A THIRD-PARTY OBSERVER AND**
23 **AUDIO RECORDING OF THE FULL EXAM BECAUSE OF (1) THE ETHICAL AND**
24 **PROFESSIONAL OBLIGATIONS THAT GOVERN NEUROPSYCHOLOGICAL**
25 **EXAMS, (2) PLAINTIFF HAS NO BASIS FOR ALLEGED CONCERNS THAT DR.**
26 **ETCOFF WILL ACT IMPROPERLY, AND (3) PLAINTIFF’S COUNSEL WILL HAVE AN**
27 **OPPORTUNITY TO DEPOSE DR. ETCOFF.**

28 To the extent Plaintiff will contend, as he did during the discovery hearing, that a third-
party observer and audio recording is necessary to prevent Dr. Etcoff from lying in his report, the
Court should give little weight to that slanderous argument.

1 Dr. Etcoff has practiced as a neuropsychologist for over forty-years. Throughout that
2 time, he has performed neuropsychological exams in accordance with his professional and
3 ethical obligations. That is the reason he is not willing to conduct the examination of Plaintiff
4 under the conditions ordered by the Discovery Commissioner—he is professionally and ethically
5 prohibited from doing so, and doing so could place his license at risk.

6 Plaintiff has no evidence that Dr. Etcoff has ever acted unethically, that he has ever lied
7 regarding the examinations and tests he has performed, or the results of either. The plaintiff in
8 *Moats* similarly argued to Judge Escobar that a third-party observer and audio recording was
9 necessary to ensure Dr. Etcoff did not lie in his report. However, Judge Escobar found the
10 “Plaintiff’s fear of altered test results in this case, based on his belief that other examiners in
11 separate causes may have altered examination results, is not sufficient cause to permit a third-
12 party observer or an audio recording of the examination[.]” **Exhibit H**, *Moats* Order, at Bates
13 numbers 6 and 7. The plaintiff in *Freteluco* shared a similar “general concern regarding Dr. Etcoff
14 becoming ‘abusive’ during the testing and/or exceeding the scope of the agreed upon
15 examination[.]” 336 F.R.D. at 200. The court found the plaintiff had failed to provide it “with any
16 evidence or information, other than generic concerns,” that warranted “an observer at Plaintiff’s
17 Rule 35 examination.” *Id.* at 204.

18 Here, Plaintiff’s contention that Dr. Etcoff will lie regarding his findings and test results is
19 simply slanderous argument of counsel. Plaintiff has no evidence that Dr. Etcoff is unethical, will
20 perform an improper examination, or that he will lie regarding his findings and test results. These
21 unfounded concerns do not provide good cause to require an observer or audio recording.

22 Additionally, Dr. Collins will receive Dr. Etcoff’s report and raw test data/test question and
23 related materials and will be in a position to assist counsel for Plaintiff in preparing to depose Dr.
24 Etcoff. Plaintiff’s counsel will have an opportunity to depose Dr. Etcoff. Hypothetically, if Dr.
25 Etcoff were to perform a substandard exam or were to lie about his findings and test results
26 (which will not happen), such improprieties can be exposed by Plaintiff’s counsel via a deposition
27 of the doctor.

28 **F. GOOD CAUSE DOES NOT EXIST TO ALLOW DR. ETCOFF’S RAW TEST**

DATA/TEST QUESTIONS AND RELATED MATERIALS TO BE SHARED WITH A NON-PSYCHOLOGIST, SUCH AS PLAINTIFF'S ATTORNEYS, BECAUSE OF (1) THE PROFESSIONAL AND ETHICAL PROHIBITIONS AGAINST THAT TYPE OF DISCLOSURE, (2) COPYRIGHT PROTECTIONS PREVENT THAT TYPE OF DISCLOSURE, AND (3) PLAINTIFF'S COUNSEL CAN CROSS-EXAMINE DR. ETCOFF WITHOUT DIRECT ACCESS TO THE RAW TEST DATA/TEST QUESTIONS AND RELATED MATERIALS.

The sharing of the raw test data/test questions and related materials is ethically, professionally, and legally prohibited. Additionally, Cape's interests can be adequately protected without Dr. Collins, or any other psychologist hired by Plaintiff, sharing the raw test data/test questions and related materials with Cape's attorney.

First, Dr. Etcoff is not ethically or professionally permitted to provide that information to Dr. Collins, or other psychologist, if he knows it could be shared with Mr. Cape or his counsel. **Exhibit G**, Etcoff Declaration, at ¶¶4, 22, and 23; **Exhibit G(3)**, at 17-18. Again, if the Court orders that Dr. Collins may share the raw data and materials with Plaintiff's counsel, Dr. Etcoff will be put in the position of sharing exam-related materials knowing full well he could be in violation of his professional and ethical obligations. He is unable to conduct the examination if that risk exists.

Second, there are copyright laws that preclude a neuropsychologist from disclosing the proprietary test questions used as part of neuropsychological exams with non-psychologists. The *Freteluco* Court recognized these laws and held there was not good cause to allow plaintiff/plaintiff's counsel access to that information due to those copyright concerns. 336 F.R.D. at 205 (citing *Collins v. TIAA-CREF*, 2008 WL 3981462, at *3 (W.D.N.C. 2008) ("The Court in *Collins* also noted the subpoenaed doctor's concerns that disclosing 'raw testing materials to anyone other than a licensed psychologist' would result in violation of copyright laws.")).

The American Psychological Association recognizes the tests performed by psychologists and neuropsychologists have copyright protections; these copyright protections are part of the reason why psychologists/neuropsychologists can only disclose the tests/test results to other psychologists/neuropsychologists. See American Psychological Association FAQs: Disclosure of Test Data and Test Materials, dated April 11, 2019, found at apa.org/science/programs/testing/data-disclosure-faqs (last visited October 14, 2021) ("The

critical concerns regarding the release of test materials primarily relate to test security, the potential invalidation of tests, **copyright laws**, and contractual obligations. Psychologists are required by the Ethics Code to maintain the integrity and security of tests and other assessment techniques consistent with law and contractual obligations (Standard 9.11)”(emphasis added); see also, **Exhibit G(7)**, at Standard 9.11; **Exhibit G(3)**, at 17. “Psychologists are legally and ethically responsible for respecting test copyrights.” See *supra*, American Psychological Association FAQs: Disclosure of Test Data and Test Materials.

G. FRETELUCO SUPPORTS THAT GOOD CAUSE DOES NOT EXIST TO REQUIRE AN OBSERVER AND AUDIO RECORDING IN A RULE 35 NEUROPSYCHOLOGICAL EXAM, OR SHARING THE TESTING MATERIALS WITH A NON-PSYCHOLOGIST ATTORNEY.

Freteluco supports the Defendants’ Objection. With respect to the observer issue, the court stated:

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 plaintiff was not required to tape record his examination with his own health care providers; and (3) inject a greater degree of the adversary process into an evaluation that is to be neutral.

Freteluco, 336 F.R.D. at 204 (quoting *Flack*, 333 F.R.D. at 517).

Further, the *Freteluco* Court recognized a plaintiff’s interests is protected through psychological test materials being only shared with a plaintiff’s expert. 336 F. R.D. at 205-06. Here, the Court should follow the precedent established by *Freteluco* and sustain the Objection.

H. DEFENDANTS ARE NOT OPPOSED TO THE COURT ADOPTING THE APPROACH TAKEN BY DISCOVERY COMMISSIONER TRUMAN FOR RULE 35 NEUROPSYCHOLOGICAL EXAMS.

The Court should adopt the Rule 35 exam procedure approved of by Discovery Commissioner Erin Truman, in September of this year, in the matter of *Paul v. Vegas MF Acquisition Partners, LLC*, Case No. A-20-819012-C. A copy of that Rule 35 Stipulation and Order is attached hereto as **Exhibit G(8)**. There, the parties agreed to audio record Dr. Etcoff’s Rule 35 neuropsychological exam interview, but not the test portions of the exam. **Exhibit F**, Etcoff Declaration, at ¶28; **Exhibit G(8)**, at 2, ¶8. No observers were allowed. **Exhibit G(8)**, at 2, ¶9. Dr. Etcoff was not required to produce the testing materials under conditions where they

could be viewed by a non-psychologist attorney; however, the plaintiff's attorney could serve a subpoena that would allow either the defendant or Dr. Etcoff to file an objection. **Exhibit G**, Etcoff Declaration, at ¶28; **Exhibit G(8)**, at 3¶18.

Here, so long as the Court restricts direct access to the testing materials to Dr. Collins, or another psychologist, Dr. Etcoff will voluntarily disclose that information. **Exhibit G**, Etcoff Declaration, at ¶29. In the alternative, Plaintiff is free to subpoena the material, which would provide Dr. Etcoff and/or Defendants an opportunity to object to the same.

VII.

CONCLUSION

For the foregoing reasons, the Court should hold as a matter of law that NRS 52.380 is unconstitutional, sustain the Objection, and compel Plaintiff's Rule 35 examination with Dr. Etcoff under the following conditions:

1. While the interview portion of the exam may be audio-recorded, no other portion of the exam may be audio-recorded;
2. No video-recording of any portion of the exam;
3. No third-party observer of any portion of the exam;
4. Dr. Etcoff is to share the raw test data/test questions and related materials to Dr. Collins, or another psychologist/neuropsychologist retained by Plaintiff; however, Dr. Collins may not disclose the raw test data/test questions and related materials directly with Plaintiff's attorneys or Plaintiff; or, in the alternative, the exam is not conditioned on Dr. Etcoff producing this information as Plaintiff may subpoena the exam-related materials from Dr. Etcoff.

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5. The neuropsychological exam may last two days.

DATED this 27th day of October, 2021.

DATED this 27th day of October, 2021.

DENNETT WINSPEAR, LLP

KEATING LAW GROUP

By /s/ Brent D. Quist
RYAN L. DENNETT, ESQ.
Nevada Bar No. 005617
BRENT D. QUIST, ESQ.
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***Attorneys for Defendant,
Chilly Willy's Handyman, LLC***

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' OBJECTION TO DISCOVERY COMMISSIONER REPORT AND RECOMMENDATIONS REGARDING DEFENDANTS' MOTIO TO COMPEL NRCP 35 NEUROPSYCHOLOGICAL EXAM WITH DR. LEWIS M. ETCOFF** on all parties to this action by the following method:

_____ Facsimile
_____ Mail
 X Electronic Service

RYAN A. LOOSVELT, ESQ.
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GGRM LAW FIRM
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Taylor Miles Cape***

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Telephone: (702) 228-6800
Facsimile: (702) 228-0443
***Attorneys for Defendant
David G. Martinez***

DATED this 27th day of October, 2021.

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

From: [J. Keating](#)
To: [Brent Quist](#)
Cc: [Zaira Baldovinos](#)
Subject: RE: Cape v. Martinez/Chilly Willy's - draft Objection
Date: Monday, October 18, 2021 4:09:32 PM

This is fine

From: Brent Quist <bquist@dennettwinspear.com>
Sent: Monday, October 18, 2021 12:36 PM
To: J. Keating <jkeating@keatinglg.com>
Cc: Zaira Baldovinos <zaira@dennettwinspear.com>
Subject: Cape v. Martinez/Chilly Willy's - draft Objection
Importance: High

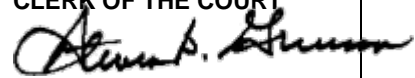
John:

Attached is the draft Objection to the DCRR. The deadline to submit is November 1st. However, Ryan Dennett and I would like to submit it this week.

Thanks,

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

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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.

**APPENDIX TO DEFENDANTS'
OBJECTION TO DISCOVERY
COMMISSIONER REPORT AND
RECOMMENDATIONS REGARDING
DEFENDANTS' MOTION TO COMPEL
NRCP 35 NEUROPSYCHOLOGICAL
EXAM WITH DR. LEWIS M. ETCOFF**

Exhibit	Document Description	Bates
A	Plaintiff's Responses to Defendant Chilly Willy's Interrogatories	000001 - 000019
B	Collins Neuropsychological Evaluation Report	000020 - 000045
C	Roughan Life Care Analysis	000046 - 000063
D	Plaintiff's NRCP 16.1 Early Case Conference Disclosures	000064 - 000080
E	Hearing Transcript for October 1 st , 2021	000081 - 000108
F	Discovery Commissioner's Report and Recommendations	000109 - 000113
G	Etcoff Declaration	000114 - 000118
G.1	Lewis M. Etcoff, Phd, Curriculum Vitae	000119 - 000129
G.2	Nevada Psychological Association letter to Nevada Supreme Court, dated December 11,	000130

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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 **APPENDIX TO DEFENDANTS' OBJECTION TO DISCOVERY COMMISSIONER REPORT AND RECOMMENDATION REGARDING DEFENDANTS' MOTION TO COMPEL NRCP 35 NEUROPSYCHOLOGICAL EXAM WITH DR. LEWIS M. ETCOFF** on all parties to this action by the following method:

_____ Facsimile
_____ Mail
 X Electronic Service

RYAN A. LOOSVELT, ESQ.
Nevada Bar No. 8550
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2770 S. Maryland Parkway, Suite 100
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***Attorneys for Plaintiff,
Taylor Miles Cape***

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Telephone: (702) 228-6800
Facsimile: (702) 228-0443
***Attorneys for Defendant
David G. Martinez***

DATED this 27th day of October, 2021.

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

EXHIBIT “A”



LAW FIRM
INJURY ATTORNEYS

RSPN

DILLON G. COIL, ESQ.

Nevada Bar No. 11541

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Nevada Bar No. 2534

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Email: dcoil@ggrmlawfirm.com

wmartin@ggrmlawfirm.com

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 1 through X;
inclusive,

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**

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

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

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

INTERROGATORY NO. 1:

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

RESPONSE TO INTERROGATORY NO. 1:



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 **RESPONSE TO INTERROGATORY NO. 3:**

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

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



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- 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



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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



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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

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

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



regarding the severity and/or permanency of his injuries.

INTERROGATORY NO. 7:

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

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

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

INTERROGATORY NO. 8:

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

RESPONSE TO INTERROGATORY NO. 8:

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

INTERROGATORY NO. 9:



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.,



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- 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



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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:



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



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



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



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);



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INJURY ATTORNEYS

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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



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 19th day of March, 2021, I caused the foregoing document entitled **PLAINTIFF'S RESPONSES TO DEFENDANT CHILLY WILLY'S HANDYMAN SERVICES, LLC'S 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 PLAINTIFF'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



EXHIBIT “B”

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

NEUROPSYCHOLOGICAL EVALUATION REPORT

Name: Taylor Cape
Date of Birth: 03/25/96
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, amnestic 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, amnestic 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>

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.

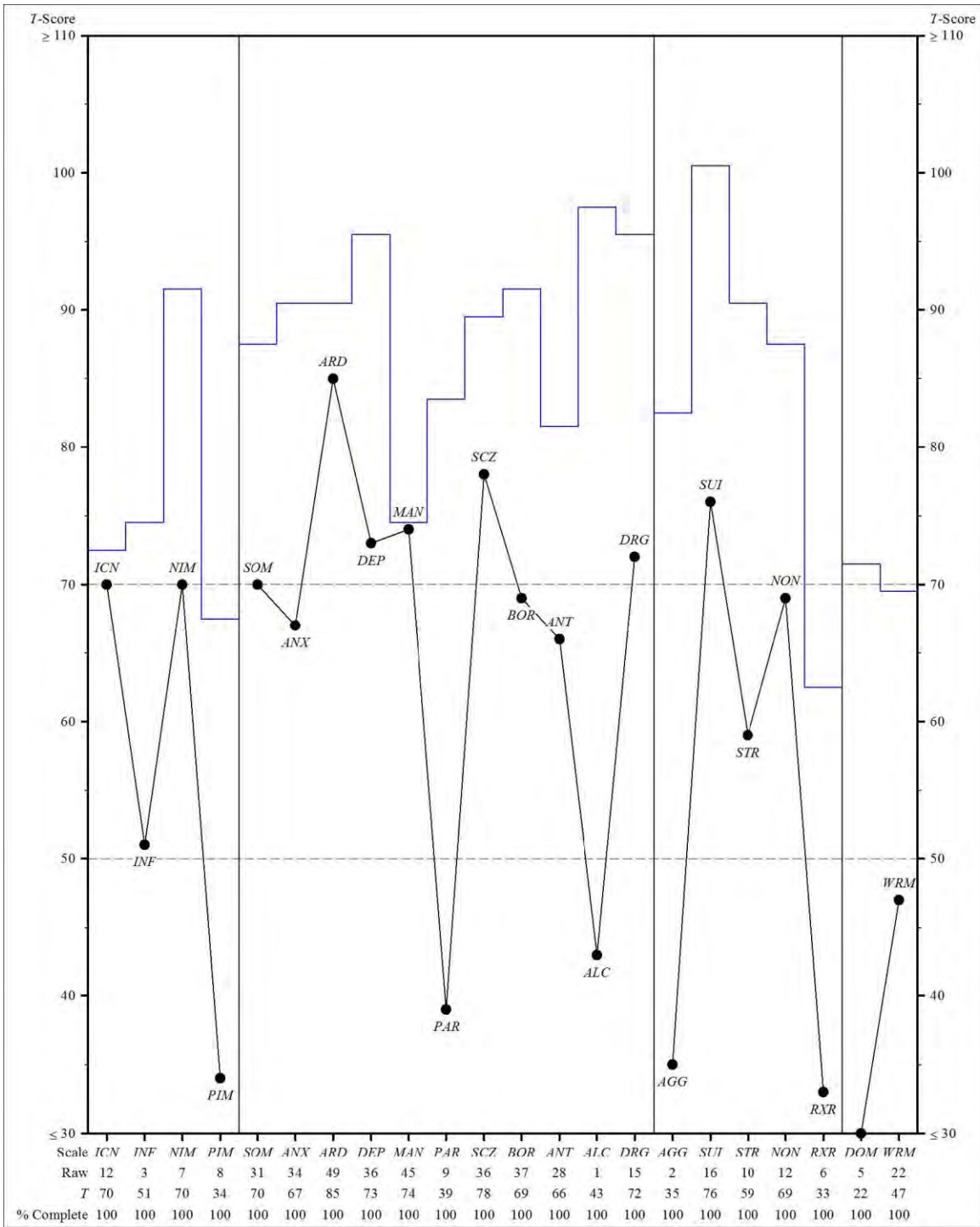
For treatment considerations, a copy of this report should be furnished to any appropriate party for whom it could assist with provision of care. His neurologist would best be able to speak to if the presenting memory loss is consistent with structural damage on neuroimaging. Mr. Cape is referred to 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 dark ink, appearing to read 'SC' or 'Sunshine Collins', with a small 'PsyD' written below it.

Sunshine Collins, PsyD
Licensed Psychologist

APPENDIX A - Personality Assessment Inventory Full Scale Profile

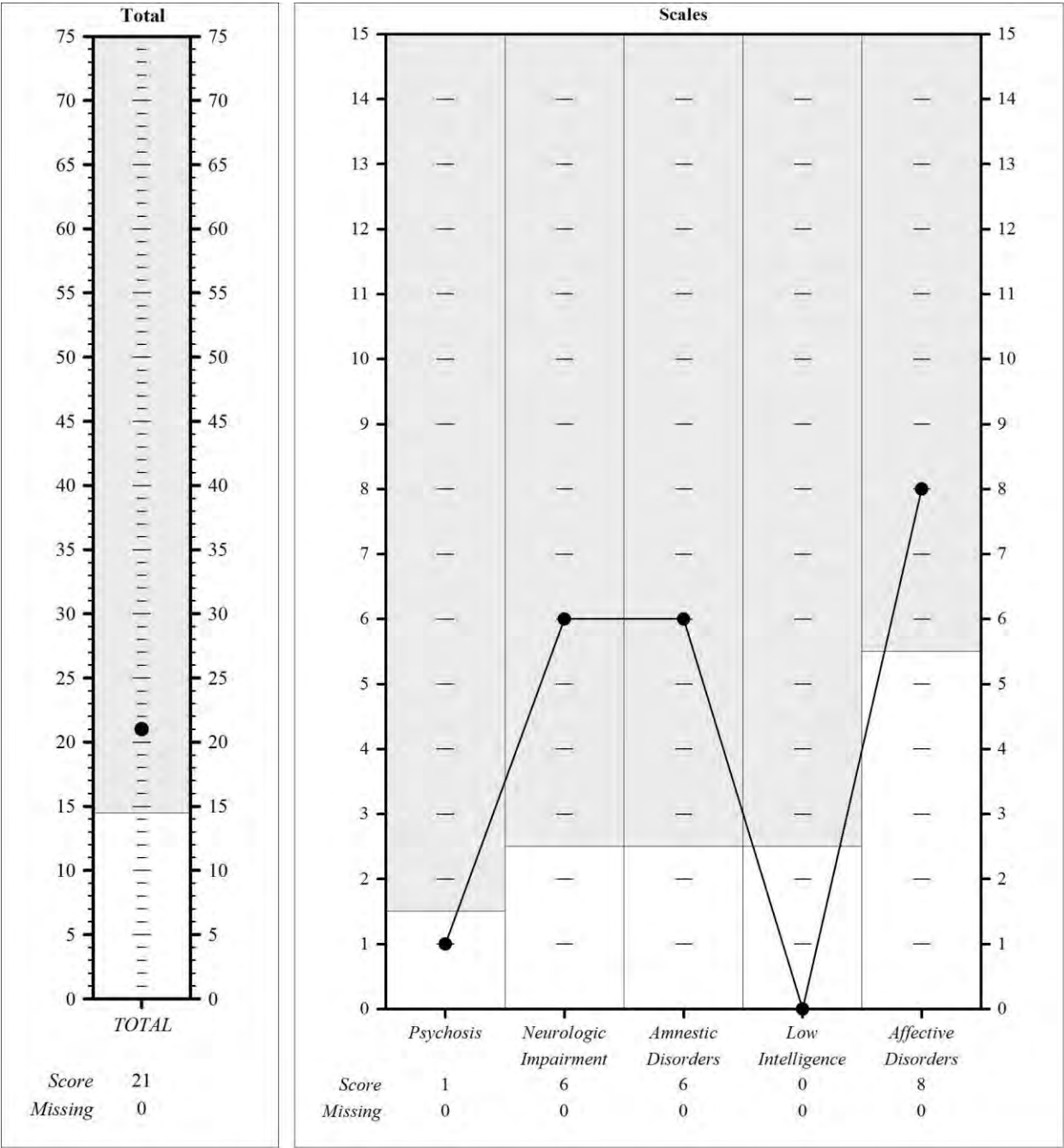


APPENDIX B - Comprehensive Executive Function Inventory Scores

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 “C”



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.

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**.

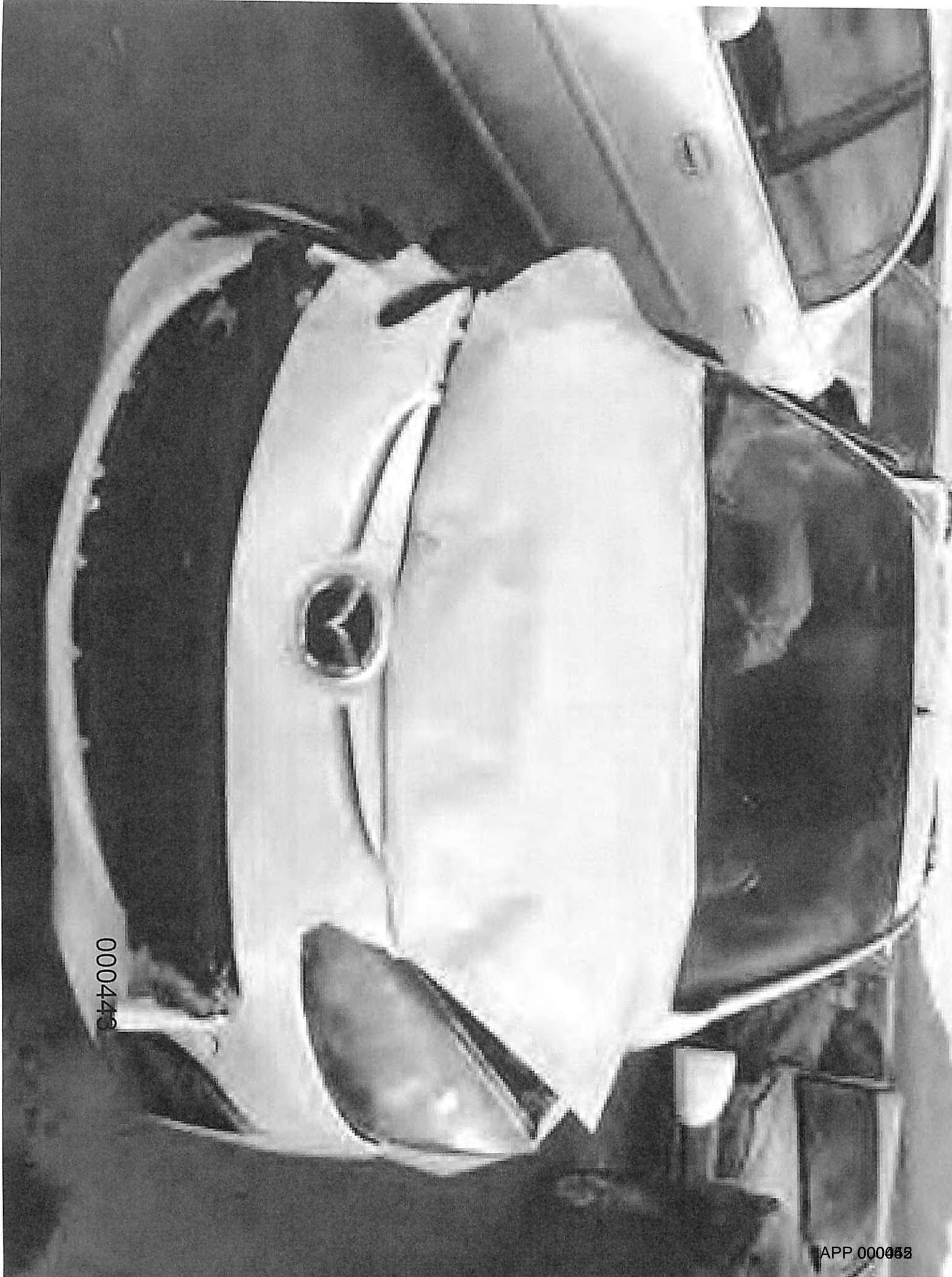
The estimated grand total, excluding items noted as contingent (e.g., ①, ②, ③, etc.) is **\$5,179,050.00**.

- 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



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APP 000058



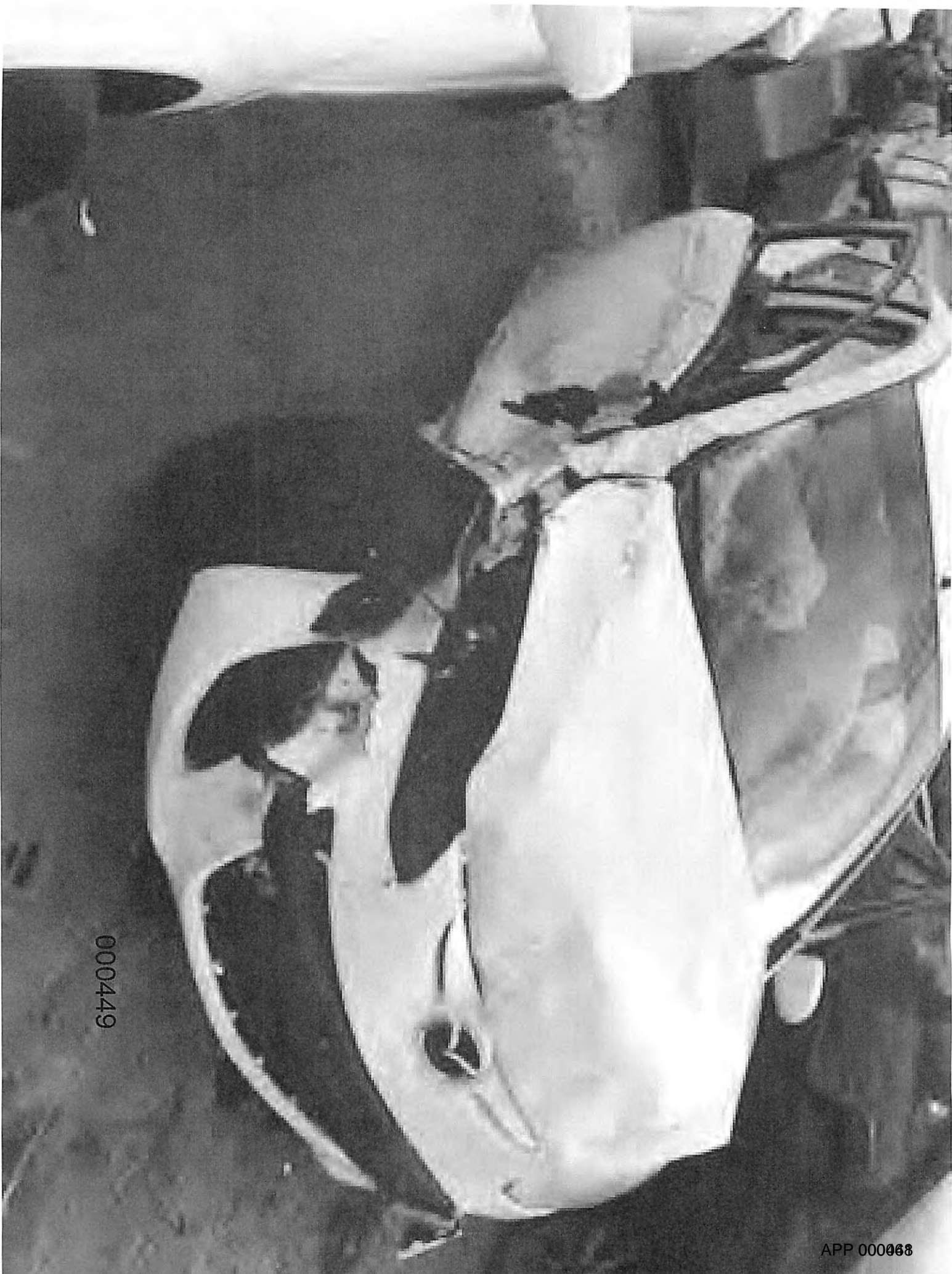
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APP 000059



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APP 000060



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APP 000060

EXHIBIT “D”

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.,



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

- 21 1. Attending Physician and/or
22 N.R.C.P. 30(b)(6) Witness(es) and/or
23 Custodian of Records
24 UMC Medical Center
25 1800 W. Charleston Blvd.,
26 Las Vegas, Nevada 89106
- 27 2. Attending Provider and/or
28 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.



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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.

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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



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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)**

15	NAME	EXPECTED TO PRESENT	SUBPOENAED	MAY CALL	BY DEPO
16					
17	1. Taylor Cape	X			
18	c/o Brian P. Nestor, Esq.				
19	GREENMAN, GOLDBERG, RABY &				
20	MARTINEZ				
21	2770 S. Maryland Pkwy.				
22	Ste. 100				
23	Las Vegas, Nevada 89109				
24	2. David G. Martinez-Holdridge	X			
25	c/o John T. Keating, Esq.				
26	KEATING LAW GROUP				
27	9130 W. Russell Road, Ste. 200				
28	Las Vegas, NV 89148				



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	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	



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	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	



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	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	



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	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;



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- 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



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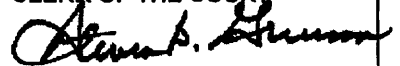
CERTIFICATE OF SERVICE

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 “E”



1 RTRAN

2 DISTRICT COURT

3 CLARK COUNTY, NEVADA

4 * * * * *

5
6 TAYLOR MILES CAPE,

7 Plaintiff,

8 vs.

9 DAVID MARTINEZ, CHILLY WILLY'S

10 HANDYMAN SERVICES, LLC,

11 Defendants.

CASE NO. A-20-818569-C

DEPT. NO. XXVIII

Transcript of Proceedings

12
13 BEFORE THE HONORABLE JAY YOUNG, DISCOVERY COMMISSIONER
14 **DEFENDANTS' MOTION TO COMPEL NRCP 35 NEUROPSYCHOLOGICAL**
15 **EXAM WITH DR. ETCOFF, NOTICED FOR OCTOBER 19-20, 2021 ON**
16 **ORDER SHORTENING TIME**

FRIDAY, OCTOBER 1, 2021

17 APPEARANCES:

18 For the Plaintiff:

WILLIAM T. MARTIN, ESQ.
[Via Video Conference]

19 For the Defendants:

BRENT QUIST, ESQ.
[Via Video Conference]
JOHN T. KEATING, ESQ.
[Via Telephone Conference]

22 RECORDED BY:

FRANCESCA HAAK, DISTRICT COURT

23 TRANSCRIBED BY:

KRISTEN LUNKWITZ

24 Proceedings recorded by audio-visual recording; transcript
25 produced by transcription service.

1 FRIDAY, OCTOBER 1, 2021 AT 10:06 A.M.

2

3 THE DISCOVERY COMMISSIONER: Calling *Cape versus*
4 *Martinez*, case number A-20-818569-C. Counsel, state your
5 appearance for the record, please, starting with
6 plaintiff's counsel.

7 MR. MARTIN: This is Will Martin, bar number 2534,
8 on behalf of plaintiff.

9 MR. QUIST: Your Honor, Brent Quist on behalf of
10 defendant, Chilly Willy's.

11 MR. KEATING: And, good morning. John Keating on
12 behalf of Martinez.

13 THE DISCOVERY COMMISSIONER: All right. Good
14 morning, gentlemen. This is Defendants' Motion to Compel a
15 Neuropsychological Exam with Dr. Etcoff on Order Shortening
16 Time and I see that an Opposition was filed. I don't see
17 if a Reply was filed. I forgot to check that this morning.
18 I apologize.

19 MR. QUIST: Yeah, Your Honor. This is Brent
20 Quist. We filed our Reply, I believe, Tuesday and, I
21 believe, either Wednesday or Thursday my assistant, I
22 believe, e-mailed the discovery inbox.

23 THE DISCOVERY COMMISSIONER: I apologize, counsel.
24 I typically -- when there's an order shortening time, the
25 morning of, I'll try and see if I can pull up any kind of

1 last minute filings and I failed to do that. So, I will
2 allow you a little bit of extra time to argue in that case
3 and, again, my apologies. You were owed better respect
4 than that.

5 MR. QUIST: Understood, Your Honor. That's fine.

6 THE DISCOVERY COMMISSIONER: Thank you.

7 MR. QUIST: Okay. Well, Your Honor, I'm gonna try
8 to highlight -- I -- the points that I think are most
9 relevant. This is a car accident matter. Mr. Cape, he
10 claims a brain injury. He had a [indiscernible]
11 neuropsychological exam with his own doctor, Sunshine
12 Collins. There was no observer present for that exam and
13 that's going to be a big theme of this argument, Your
14 Honor, is here in Nevada, the Board that governs
15 neuropsychological exams here in Nevada won't allow for
16 observers -- third party observers for the actual testing
17 part of the exam.

18 THE DISCOVERY COMMISSIONER: I'm familiar with
19 that.

20 MR. QUIST: Yeah. So, that's why Dr. Collins was
21 able to proceed with Mr. Cape's exam because there was just
22 her and him. Based on that exam, at least part of it,
23 plaintiff has produced a Life Care Plan where he alleges
24 his future [indiscernible] for the rest of his life was
25 going to be valued at \$5.7 million. For the last three

1 months or so, I've been working with Mr. Keating and with
2 Mr. Loosvelt, plaintiff's attorney, to come to like an
3 agreement as to the scope. And we really -- I think we did
4 a good job. We -- there's three issues that we can't agree
5 to.

6 THE DISCOVERY COMMISSIONER: I'm familiar with
7 them.

8 MR. QUIST: Yeah. So, and that's what we're --
9 the defendants are going to ask the Court to order is for
10 Mr. Cape to come here to meet with Mr. -- or Dr. Etcoff.
11 Dr. Etcoff [indiscernible] have an observer present
12 [inaudible] non -- I guess non-technical interview portion
13 of the exam. That's not the neuropsych actual, you know,
14 tests. And he's -- says, ethically, he's allowed to have
15 an audio recording of just kind of that interview. He's
16 willing to share the raw test data -- the test questions --
17 the actual data with Sunshine Collins. Ethically, he says
18 that the rules that govern what he can and can't do only
19 allow him to show that with another psychologist.

20 And the third thing we're asking the Court is to
21 allow this exam to be a standard two-day exam. And Dr.
22 Collins took two days. For Dr. Etcoff, that's typical for
23 him.

24 MR. MARTIN: I don't mean to interrupt, but we're
25 not opposing that, Your Honor. So, --

1 THE DISCOVERY COMMISSIONER: Okay.

2 MR. MARTIN: Two days.

3 MR. QUIST: So, you've read our brief, Your Honor,
4 and I know -- well, I learned for the first time during the
5 Opposition, I didn't know this before, that six months ago,
6 you had considered this issue -- well, at least the issue
7 of the interplay between NRS 552.380 and NRCP 35 in the
8 case of *Lehnardt*. So, I know it sounds like you're aware
9 of the issue.

10 So, the defendants' position is the problem with
11 NRS 52.380 is it's procedural in nature, that the current
12 NRCP 35 predated it, that the -- that both the statute and
13 the rule of procedural nature would govern the procedure
14 for conducting Rule 35 exams here in Nevada. And that,
15 because of that, it's really within the purview of the
16 Nevada Supreme Court to govern how those procedures take
17 place.

18 Nevada's Constitution adopted the separation of
19 powers doctrine and the purpose of that doctrine is to
20 prevent one branch of government from encroaching upon the
21 powers of another branch. And, really, it's within the
22 sole purview of the Nevada Supreme Court to govern how
23 procedural -- procedures in a civil court matter take
24 place, including gathering of evidence. And you see that
25 throughout the Nevada Rules of Civil Procedure. There's

1 Rule 16.1, Rule 33, Rule 34, Rule 35, and Rule 36, all
2 dealing with: How does evidence get gathered?

3 Now, in the Opposition, it seems that the position
4 that the plaintiff was taking in the Opposition brief,
5 specifically at page 13, is that the Legislature can pass
6 any statute it wants, even a procedural statute, as long as
7 it thinks, the Legislature thinks it's got a good reason
8 for it. And that doesn't comply with the *Whitloff versus*
9 *Salmon* [phonetic] case, right, that the Supreme Court says
10 that the Legislature may not pass laws that interfere with
11 procedure to the point of disruption or that abrogates an
12 existing court rule, and that's exactly what NRS 52.380
13 does.

14 Now, much of the Opposition deals with discussing
15 legislative history. The problem with that is that flies
16 in the face of the rules of construction adopted by the
17 Nevada Supreme Court. The Nevada Supreme Court says:
18 Look, if a statute and a rule or procedure are plain on
19 their face, clear on their face, you don't go and look at
20 the legislative history. And there's caselaw I cite --
21 well, I cited in my Reply. I can -- let me find it. In
22 *Garcia versus Vanguard Car Rental USA*, that's 540 F.3d
23 1242. It's an Eleventh Circuit opinion from 2008. The
24 Court there --

25 THE DISCOVERY COMMISSIONER: [Indiscernible] in

1 your briefs?

2 MR. QUIST: I'm sorry. What's that?

3 THE DISCOVERY COMMISSIONER: What page are you
4 referring to in your brief?

5 MR. QUIST: Oh, I'm sorry. Page 1247.

6 THE DISCOVERY COMMISSIONER: What page of your
7 brief?

8 MR. QUIST: Oh, let me find that, Your Honor.

9 [Pause in proceedings]

10 MR. QUIST: It's page 10. Page 10 of the Reply
11 brief.

12 THE DISCOVERY COMMISSIONER: Can you give me the
13 case citation, again, please?

14 MR. QUIST: Sure. *Garcia versus* --

15 THE DISCOVERY COMMISSIONER: I see it.

16 MR. QUIST: Yeah. And, there, the Court notes
17 that -- you can't really do what plaintiff's trying to do
18 which is to cite or quote legislative history to read
19 ambiguity into a statute or a rule that's clear on its
20 face. And it -- if you read the statute and you read the
21 rule or procedure, they're both really clear and plain.
22 They're just -- they're taking different approaches for how
23 independent medical examination should occur here in Nevada
24 and they contradict each other.

25 Now, another, I guess, rule -- construction rule

1 that the Court here adopts in Nevada is that statutes and
2 rules really should be construed in a manner that
3 effectuates its purpose and doesn't nullify or -- yeah,
4 nullify the purpose. And that's a big problem here because
5 that's exactly what 52.380 does. It nullifies the purpose
6 underlying Rule 35 exams.

7 And, in the -- if I can pronounce the case right,
8 the *Frederico versus Smith's Food and Drug Centers* case,
9 that's -- these are both in my Motion and Reply. That's
10 the Federal Magistrate rulings from last year where the
11 Judge dealt with [inaudible] and the Judge there noted one
12 of the -- and she cites other federal caselaw. But one of
13 the real purposes of Rule 35 is to level the playing field,
14 that the plaintiff has had a chance to have his own expert
15 look at him, unobstructed, unimpeded, and the defense
16 should be able to have an independent doctor come in and
17 have the same type of opportunity to examine him and say:
18 Hey, is this -- did he really, you know, suffer a brain
19 injury? How has that affected his life?

20 The bigger problem with the impact that NRS 52.380
21 has on a Rule 35, for purposes of neuropsychological exams,
22 that basically make it so that they'll never take place
23 because Exhibit N and O to my Motion discuss that. The
24 Exhibit N is the letter from October of 2018 from the State
25 Board of Psychological Examiners to the Clerk of the

1 Supreme Court. Exhibit O is this 2021 article from the
2 Archives of Clinical Neuropsychology addressing third party
3 observers in neuropsychological evaluations. And the
4 *Frederico* case picks up on some of the arguments made in
5 these documents.

6 And they note that the reason why a
7 neuropsychological exam, the actual test part, can't have
8 either a recording device or an observer is because -- even
9 if the observer doesn't say anything, just their presence
10 in the room is going to affect or impact or alter the
11 tests. And those tests are designed and standardized
12 without an observer present. Right? So, if you have an
13 observer present, you're not going to get right results.
14 The test is going to be meaningless. And, so, the position
15 of [inaudible] neuropsychologists here in [inaudible] Dr.
16 Etcoff, and I presume Dr. Collins, is -- just ethically and
17 professionally, they can't do these tests with an observer
18 present.

19 And, so, if the Court rules like it did six months
20 ago in this *Lehnardt* case, hey, you've got to have an
21 observer present or a recording device, what's going to
22 happen is exactly what happened in this *Lenhardt* case. Is
23 that -- again, I wasn't aware of this decision by Your
24 Honor and, so, I reached -- my staff reached out to Dr.
25 Etcoff's staff and said: What did you end up doing? Did

1 you go through with the Rule 35 exam with an observer and
2 the recording device? And the response we got back from
3 the staff and Dr. Etcoff's staff was they had to cancel the
4 exam and he just did a records review. And that's very
5 problematic. What's the purpose of Rule 35? So, that's
6 another reason why --

7 THE DISCOVERY COMMISSIONER: But that's a choice
8 of the industry in response to the statute. Isn't it?

9 MR. QUIST: Well, I think that was the standard
10 even before the statute was passed. Right? The letter
11 written to the Nevada Supreme Court was issued even before.
12 And, I mean, -- and, I think, Rule 35, the current version,
13 takes account of that because the Rule says we're not going
14 to have an observer present, unless. Right? It's an
15 exception. Unless the plaintiff can only show good cause.
16 But I'm not sure that there could ever be good cause
17 because it's going to nullify -- or it's going to make it
18 impossible. Right? They -- those exams will never take
19 place here --

20 THE DISCOVERY COMMISSIONER: So, your suggestion
21 is even under Rule 35 the doctor would have to refuse, if
22 there was an examiner -- or a guest allowed?

23 MR. QUIST: Well, yeah, I think the Court, in that
24 place, would have to go challenge the plaintiff and the
25 plaintiff would have to -- because really, I guess, the way

1 you'd have to read the statute and even -- well, the
2 statute, is it's kind of being used as a protective order
3 by plaintiffs that, well, we never want to be subject to
4 IME for a neuropsych exam here in Nevada. Because that's,
5 effectively, what it does.

6 I think, you know, Judge -- and I'll probably
7 mispronounce her last name, Youchah, in the *Frederico* case,
8 where she -- well, what's the purpose of the statute?
9 Well, the -- and she kind of did an Erie Doctrine kind of
10 analysis and she says: Look, it's -- they're dealing with
11 the same matter, which is how you go about gathering this
12 evidence and the statute doesn't create a substantive
13 right. It doesn't affect the result of the litigation.
14 It's not outcome determinative or case determinative. And,
15 so, she said: Considering that, plus kind of the policy
16 for not allowing observers in the setting of a
17 neuropsychological exam, at least at the test portions, she
18 says: Hey, it's -- the statute is procedural and, so, the
19 Rule 35 -- Federal Rule 35 is going to supersede it. And I
20 think the Court should take that same approach here.

21 THE DISCOVERY COMMISSIONER: All right. Anything
22 else?

23 MR. QUIST: The only other thing is just -- I
24 mean, I can do the rebuttal. I'll do it now.

25 In the Opposition, the plaintiff cites to --

1 includes various affidavits. Okay? Of professionals that
2 the plaintiff says: Hey, these guys say you can have
3 observers present. If you look at those affidavits
4 closely, one, they're old. Like, some of them are 20 years
5 old. They're all out of state. None of them are from
6 Nevada psychologists or neuropsychologists.

7 And I think the most helpful document attached to
8 the Opposition is from the American Psychology Association.
9 That's Exhibit 9 to the Opposition, where it says that:
10 When you're thinking about having observers present for
11 neuropsychological exams, you've got to keep in mind the
12 law governing that in your state and the effect you were to
13 have on the validity of the exam. And, here, Dr. Etcoff,
14 the law governing him and what he does is set by the Board.
15 Right? They don't allow it. And, second, having an
16 observer present for the exam is going to ruin the results.

17 I think that's my argument and then my position is
18 that the test questions, the raw data, should be shared
19 directly with Dr. Collins. I think plaintiff is protected
20 -- if that happens. The *Frederico* Court did the same
21 thing.

22 And, as far as the Countermotion for Sanctions, I
23 think that's frivolous just because this is an ongoing -- I
24 mean, there's two cases I know of right now that are on
25 appeal with the Supreme Court addressing this issue. So, I

1 think this is -- this is not a settled area of the law.
2 So, I'll leave it with that.

3 THE DISCOVERY COMMISSIONER: All right. Mr.
4 Martin, recognizing that I am familiar with the interplay
5 between NRS 52.380 and Rule 35, do you have anything in
6 response?

7 MR. MARTIN: Yeah. I mean, this appears to be a
8 coordinated, you know, an aggressive effort to frustrate
9 transparency in psychological evaluations. I mean, they're
10 taking the position that there would be good cause under
11 Rule -- NRCP 35 to order an examination -- they're saying -
12 - they're reading this October 1st, 2018 letter, which they
13 attach as Exhibit M, as somehow saying it's unethical and
14 your license will be revoked. I think they say that in
15 their pleadings. There's nothing about that in this
16 October 1st, 2018 letter.

17 They really are relying on this October 1st, 2018
18 letter from the Board and the decision by Magistrate
19 Youchah in the case that she considered, and that's a
20 totally different context. There, it's the interplay
21 between a state substantive law -- she doesn't really
22 address, you know, that because the Erie Doctrine says if
23 you're comparing a state law versus a federal statute, and
24 the state law is not outcome determinative, you go to the
25 federal rule. She's not considering -- there's no federal

1 statute that's like the Nevada statute. So, she's not
2 making that analysis as if there was a federal statute
3 addressing it where there was a conflict between the
4 federal statute and the federal law.

5 She doesn't address constitutionality, separation
6 of powers, anything like that. It's really not applicable.
7 Yet, in passing, she says a couple of things about, you
8 know, she believes that people might be distracted by an
9 examiner, but she doesn't go into, you know, the validity
10 of the testing and all of that -- the point defendant tries
11 to go to and saying that an observer should not be allowed
12 a recording.

13 And, if you look carefully at the October 1st, 2018
14 letter, you know, it starts off by talking about third
15 party observers, which is similar to Exhibit O that they
16 cite as some kind of neuropsychological study. But it's
17 just a position paper. It's not -- it's a position paper
18 on third party observers.

19 So, the introductory sentence is about third party
20 observers and, then, the next paragraph makes that broader
21 by talking about observers, monitors, and electronic
22 recording. And, then, if you dig deeply into what they're
23 talking about, when they're talking about research
24 indicating the presence of those observers, monitors, and
25 recorders, they're talking about during the clinical

1 interview portion. So, they're saying the research
2 indicates during the interview portion, you know, somebody
3 being there may stop somebody from disclosing crucial
4 information. Well, Dr. Etcoff has already agreed to the
5 clinical interview portion that, you know, he's had
6 observers -- he's had an audience -- it's not accurate that
7 he's only allowed audiotapes because the footnote in the
8 Youchah opinion says that he's allowed those videotaped.
9 So, he's allowed audio and videotapes of the interview
10 portion.

11 The next sentence --

12 THE DISCOVERY COMMISSIONER: And my memory is he
13 did that prior to the statute as well.

14 MR. MARTIN: What's that?

15 THE DISCOVERY COMMISSIONER: My memory is he did
16 that prior to the statute --

17 MR. MARTIN: [Indiscernible] under good cause.

18 And the next sentence that talks about the testing
19 itself, the concern there that the Board expresses is that
20 it may cause the patient on their performance to -- their
21 weaknesses and strengths are exaggerating. Okay? So that
22 seemed to be the Board's concern about having observation,
23 monitoring, recording during the tests.

24 Now, we cite to the affidavit from -- it's -- let
25 me see. It's Dr. Frederik from 2018 saying, you know,

1 there's lots of reasons why you want videotaping of the
2 testing because he points out all the various inaccurate
3 things that happen during the testing, that if you don't
4 have a videotape -- you know, our preference would be a
5 videotape. You know, that not giving the instructions the
6 publisher requires, exceeding time limits, or shortening
7 time limits, inaccurate recording, or misconstruing results
8 and answers, not performing required follow-up that the
9 test says you're supposed to, not following established
10 patterns for testing and administration, not recording the
11 responses properly, prompting responses, coaching, teaching
12 the examinee how to solve during interactions, improperly
13 positioning his examiner's materials, the examiner's
14 attitude.

15 That was about the only thing that really -- I
16 think that the Magistrate Youchah -- there was a mention
17 that they were concerned about Dr. Etcoff's attitude. And
18 that seemed to be -- you know, in theory, what the
19 plaintiff was complaining about in the case that she was
20 looking at, but, then again, the statutory analysis is not
21 the same as here.

22 You know, then, about interruptions and
23 distractions that are on document -- you know, that's --
24 the recording is the best way to ensure a proper record of
25 the testing that's been done.

1 And in a -- you know, if you closely read the --
2 there's nothing in here about, you know, they're going to
3 lose their license, or it's unethical from the -- you know,
4 from the Board.

5 The -- you know, to go quickly point by point in
6 the argument that was made supporting, you know, Mr. Cape
7 lost consciousness. He was unconscious from the time the
8 car was hit until he came to and he was being -- trying --
9 being extracted from the vehicle.

10 They talk about Dr. Collins was not a treating --
11 I mean, a retained expert. She was a treating provider
12 before litigation. You know, the -- a compelled Rule 35
13 mental or medical evaluation is a highly intrusive and
14 extraordinary measure. You know, it's not about leveling
15 the playing field. It's not a game. It's driven by
16 litigation doing these and it's often adversarial. You
17 know, that retained experts have to provide testimony of
18 this. You know, you rarely find somebody who does 50/50
19 work.

20 You know, Sunshine Collins, like we said, was a
21 treating provider. And that's a very different context
22 than a Rule 35 exam.

23 The Nevada Board won't allow testing. That --
24 that doesn't say that. You know, they express some
25 concerns. They say the research, which is studies,

1 supports clinical interviews might cause somebody to not
2 disclose information and testing, it's more speculative to
3 the effect. We cite to experts who say there are studies
4 showing that there's little effect by having observers.
5 But that isn't what the Board says. If their industry, you
6 know, has a coordinated effort to not allow these to go
7 forward, then they're not going to do them in Nevada, I
8 mean, that's a different issue on them.

9 Ethically, audio -- you know, I think -- you know,
10 footnote 1 in Magistrate Youchah's opinion talks about Dr.
11 Etcoff actually letting videotape take place.

12 Your Honor, I believe, took a very reasonable
13 approach in the opinion that you -- in the prior case that
14 you considered this issue. NRCP 35 allows recording for
15 good cause. It allows an observer for these type of
16 examinations for good cause.

17 You know, and a lot of this stuff is substantive
18 to policy choices. So, it seems like the type of thing --
19 because there's various opinions on accuracy and what
20 effect it has, you know, that really sounds like something
21 the Legislature should be dealing with for policy choices.
22 It's not -- you know, they shouldn't be citing to
23 Magistrate Youchah's opinion that is saying: Oh, well that
24 determined it's procedural in nature. It's a different
25 context.

1 The constitutionality was never something the
2 parties conferred about.

3 Exhibit N and O, I've already talked to you about
4 the letter from the Board and the position paper from some
5 organizations that don't want to have third party
6 observers.

7 Not get the right results, well, that's up in the
8 air. There's no real hard -- you know, it appears
9 different people have different opinions on that.

10 Ethically and professionally cannot have an
11 observer present, there's nothing saying that. If that's
12 the choice of Dr. Etcoff, then, you know, that's his
13 choice. There's other -- we cite to other, you know,
14 psychiatrists and psychologists who say it is allowed and
15 it's reasonable and it helps establish a clear record of
16 what happens and it's transparent. All right. I think the
17 Court, you know, expressed some concern with regard to the
18 position they were taking on that.

19 So, we believe that we should be able to videotape
20 it or have an observer, and audio record it, or, you know,
21 we believe the data should be given to plaintiff's counsel
22 so that they can adequately prepare for cross-examination
23 and not just to a psychologist. They draw arguments about
24 copyright, but they don't give any real sense to it. I'm
25 not an intellectual property lawyer, but property rights

1 are, you know, this is a -- tests are considered literary
2 works. You file an application, you pay a fee, and you
3 provide your work, and that -- you can have a copyright.
4 You know, you can go online and see all kinds of -- I
5 assume the personality tests -- Dr. Etcoff says in the
6 letter that was attached to their Reply, a little bit about
7 what he's going to do. It doesn't give, you know, a list
8 of whether he's going to do the Wechsler IQ test or the
9 MMPI for personality. You know, very common tests that
10 have been around for decades.

11 He said -- you know, he's going to do some motor
12 testing, which sounds more like the -- you know, what
13 doctors do to test your muscles during physical
14 examination. Then there's sensory perception exams which
15 are measures of touch, vision, and sound function. You
16 know, those are important things to see how the doctor does
17 them, and what happens to them, whether they accurately
18 record it. You know, I've had medical IMEs where they say
19 the testing of the range of motion, the doctor's eyeballing
20 it, or they only spend -- they don't perform tests that
21 they say they performed. There's just a lot of controversy
22 with regard to IMEs, which are really Rule 35 examinations
23 and --

24 THE DISCOVERY COMMISSIONER: I was just going to -
25 -

1 MR. MARTIN: -- they're adverse --

2 THE DISCOVERY COMMISSIONER: -- say we don't have
3 IMEs anymore.

4 MR. MARTIN: Yeah. Yeah. The Court doesn't but
5 who does it?

6 So, he says it's about five hours of testing,
7 about three hours for personality testing, two to three
8 hours of the interview. We're assuming he's not going to
9 object to videotaping that or having an observer with audio
10 because that's what he's allowed in the past. So, it's
11 about the personality test and the neuropsychological
12 tests.

13 And, you know, these tests have validity and, you
14 know, he didn't mention that. It's -- there are
15 [indiscernible] symptom validity checks that are done
16 during the process to see whether they're valid. So, you
17 know, a lot of these involve subjective judgments. You
18 know, having a videotape would be our preferred method.

19 We also think that we, as plaintiff's counsel,
20 should be able to get the data and, you know, subject to
21 whatever protective orders there are. If we need to look
22 at some copy -- you know, with the copyright seems like
23 just something that they're throwing out there to, you
24 know, try and make it more difficult to do these. That
25 wasn't even anything the Board addressed in their October

1 1st letter. They just said that the neuropsychological
2 tests and measures are developed and standardized under
3 highly controlled conditions and they're saying one of the
4 conditions is, you know, third party observers aren't
5 allowed, so, therefore, you can infer from that that's not
6 -- that is different than the highly controlled conditions.
7 You know, they say observation, monitoring, recording of
8 these tests is not part of the standardization and it may
9 distort. You know, it's very equivocal.

10 So, you know, Your Honor, we believe that we
11 should be able to videotape it or have an observer and
12 audio recorded, as the rules allow, because there's good
13 cause based on subjective judgments and everything that
14 happens. And we believe plaintiff's counsel is entitled to
15 the data because, you know, we're the ones doing cross-
16 examination, not the psychologist we might retain to rebut
17 Dr. Etcoff.

18 And, you know, if Your Honor's inclined to grant
19 their Motion, we would request a stay so that we can, you
20 know, file an Objection. And we think that sanctions are
21 something that should be considered the -- because it
22 appears to be such a coordinated effort to frustrate the
23 transparency in these evaluations. And they're
24 exaggerating the ethical and licensing issues and what
25 chilling effect it might theoretically have on

1 practitioners and then thrown in copyright.

2 The accuracy, again, I told you, there's different
3 opinions on that and that seems like policy choices that
4 the Legislature should make.

5 So, that's why we oppose.

6 THE DISCOVERY COMMISSIONER: All right. Very
7 well. Mr. Quist, you said you were addressing things
8 rather than in rebuttal in your main argument. Is there
9 anything that you need to cover?

10 MR. QUIST: I think the only thing to cover, two
11 quick points on the --

12 THE DISCOVERY COMMISSIONER: Very quickly, please.

13 MR. QUIST: Yeah. The first is that -- I -- does
14 -- the Court [indiscernible] address the -- showing the
15 test data. Right? She recognizes, under American
16 Psychological Association, that a subpoenaed doctor is only
17 allowed to release test data to qualified professionals
18 such as other psychologists. So, I'm not making that up.
19 I mean, that's just what's required.

20 And if you look at that case, it really does
21 squarely line up with what we have here in this case. So,
22 I do think it has strong persuasive authority. I'll end
23 with that, Your Honor.

24 THE DISCOVERY COMMISSIONER: All right. Very
25 well. I'm granting the Motion in part and denying it in

1 part. I am granting Mr. Martin's request for a stay to
2 allow an Objection in this matter. The Rule 35 exam is
3 compelled.

4 With regard to the observer, there is a question,
5 obviously, whether the statute, NRS 52.380, creates a
6 substantive right and whether that substantive right trumps
7 procedural rules. That's a question that I'm not going to
8 answer to anybody's satisfaction today. It's a question
9 that's in front of the Supreme Court and I assume that they
10 will provide us guidance. But, in the meantime, if I have
11 to err on one, I'm erring on the side of protecting the
12 individual and, that being said, I have to err on the side
13 of the statute.

14 I do find, under Rule 35, that there's good cause
15 to allow an observer and a recording. That good cause
16 exists in the mere fact that the Legislature formed good
17 reason to pass the statute 52.380. And the governor found
18 good cause to sign it into law. I think that, in and of
19 itself, constitutes good cause for allowing the
20 recordation.

21 So, I'm allowing an observer. The observer can be
22 present outside the examination room, but can be listening
23 to the examination either by remote means or directly, with
24 the door open. The exam -- the observer cannot interrupt
25 the examination, except to suspend the examination if any

1 irregularities occur. That's allowed under NRS 52.380
2 subsection 4. The exam can take place over a two-day
3 period. The raw data must be provided to plaintiff's
4 expert, Dr. Collins, who may share that information with
5 plaintiff's attorney, in an attorney's eyes only capacity
6 for preparation of the case. The information is otherwise
7 protected in this matter. It cannot be filed in a public
8 setting. It can be shared between counsel.

9 As to the Countermotion for Fees, counsel, I think
10 that the Motion was substantially justified by the conflict
11 between the rule and the statute and, therefore, I'm not
12 granting either party request for fees.

13 I'm going to ask Mr. Quist to prepare the Report
14 and Recommendation and run that past all counsel for
15 approval as to form and content. Let's get that on file
16 within 14 days. We'll set a status 21 days out to
17 determine if that's been accomplished. If it has, there
18 will be no need to appear. If it hasn't, then you'll need
19 to appear and, pursuant to EDCR 7.60, you'll be given an
20 opportunity to be heard as to why sanctions shouldn't issue
21 for failure to comply with the Court Order.

22 Questions?

23 THE CLERK: [Inaudible] 22nd at 10.

24 MR. MARTIN: I didn't hear that.

25 THE DISCOVERY COMMISSIONER: October 22 at 10