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Attorneys for Gabriel L. Martinez; Universal Protection Services, LLC

Electronically Filed
Mar 10 2022 03:44 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

IN THE SUPREME COURT OF THE STATE OF NEVADA

Gabriel L. Martinez; Universal Protection Services, LLC,

Petitioners,

vs.

The Eighth Judicial District Court of the State of Nevada and the Honorable Joe Hardy, Judge,

Respondents.

and

Douglas J. Kennedy,

Real Party in Interest.

Supreme Ct. No.: 84265

Dist. Ct. Case No.: A-20-820254-C

Gabriel L. Martinez & Universal Protection Services, LLC's Motion to Stay

Emergency Motion Under NRAP 27(e)

This motion concerns an initial expert disclosure deadline presently scheduled for Monday, March 14, 2022.

NRAP 27(e) Certificate

1. The parties appearing in this matter are all represented by counsel, who are listed below. Prior filings in this matter indicate all are subscribed for electronic service in this case. Petitioners served this motion via the same electronic service that has been previously used in the case.

Joseph J. Troiano
Cogburn Law
2580 St. Rose Parkway, Suite 330
Henderson, Nevada 89074
Attorneys for Real Parties in Interest

2. This writ petition concerns Petitioners' request for a neuropsychological examination. The examination has not occurred, and Petitioners believe it cannot occur, for the reasons at issue in the substantive briefing. Petitioners also believe that the physician who performs a neuropsychological examination must be designated an initial expert. The district court set March 14, 2022 as the deadline to disclose initial experts and denied Petitioners' motion to stay the case. Petitioners believe that if the initial expert disclosure deadline expires, then the object of this petition is lost.
3. I have communicated with Mr. Troiano concerning the draft order denying the motion to stay. The order has not yet been prepared.
4. I declare under penalty of perjury that the foregoing is true and correct.

/s/ Michael P. Lowry

Memorandum of Points & Authorities

I. The district court denied Petitioners' request for a stay.

This petition arises from a motor vehicle accident involving Martinez and Kennedy on November 5, 2018. Kennedy alleges he suffered a brain injury from that accident that still affects him in material ways. The parties agreed to a Rule 35 neuropsychological examination that did not substantively start. A motion was then necessary to set a continued examination. The district court granted Martinez's motion to continue the examination, but also granted Kennedy's request to record a continued examination. Martinez contends ordering the examination be audio recorded makes it impossible to obtain the examination. Martinez filed this original proceeding to seek review of that question, and two others.

Martinez filed this petition on February 22, 2022. That same next day he asked the district court to stay the case per NRAP 8.[1] Martinez asserted that ordering the audio recording effectively precluded him from obtaining the neuropsychological examination that the district court agreed was appropriate. Kennedy opposed[2] and the district court denied the motion on March 7, 2022. A written order has not yet been entered, but the transcript from the hearing is available.[3] Martinez acknowledges an oral order is not valid for any purpose, but

[1] Exhibit A.
[2] Exhibit B.
[3] Exhibit C.

the written order is not yet available and the disclosure deadline expires on Monday, March 14. This is due simply to the normal process of preparing an order, not due to delay by Kennedy or Martinez. Martinez will supplement this motion with the written order once it is available.

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

NRAP 8(a)(1) states ordinarily a motion for stay must first be made to the district court. Martinez compiled with that requirement and the motion was denied. Martinez's recourse is to now file this motion asking the appellate courts to stay the case pending the disposition of the writ petition.

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

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

Applied here, the point of this petition will be defeated if a stay is denied. Martinez wants a Rule 35 neuropsychological examination. The district court

agreed an examination is merited, but allowed Kennedy to audio record it. This created a condition on the examination that prevents Martinez from obtaining it. The Advisory Committee Note to the 2019 revision to Rule 35 imply, if not express, that a Rule 35 examiner is an initial expert.[4] If the case continues forward with expert disclosures, then Martinez's ability to obtain a neuropsychological examination and disclose the results of that examination as an initial expert, if desired, are lost. That would defeat the purpose of the writ petition.

At this point in the case, it appears the second factor favors a stay. This is not a case where property will be seized or sold. However, unless a stay is entered, the initial expert disclosure deadline will expire and Martinez's ability to obtain a neuropsychological examination would seem to be permanently lost. The third factor seems neutral. Kennedy argues he would suffer irreparable harm because his case would be delayed further. Mere delay is not the type of irreparable harm the third factor considers though.

The fourth factor is difficult to predict, like any other appeal or writ petition. Applied here though, the district court agreed a Rule 35 neuropsychological examination was appropriate, but then granted Kennedy's condition that makes the examination impossible to obtain. This effectively voids Rule 35. The district

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

court's ruling prevents Martinez from exercising the very right the district court agreed he could exercise. The fourth factor favors a stay.

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

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

DATED this 10th day of March, 2022.

WILSON ELSER
WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

/s/ Michael P. Lowry
MICHAEL P. LOWRY, ESQ.
6689 Las Vegas Blvd. South, Suite 200
Las Vegas, Nevada 89119
Attorneys for Gabriel L. Martinez; Universal Protection Services, LLC

Certificate of Service

Per NRAP 21(a) and 25(c), I certify that on March 10, 2022, **Gabriel L. Martinez & Universal Protection Services, LLC's Motion to Stay** was served via electronic means by operation of the Court's electronic filing system to:

Joseph J. Troiano Cogburn Law 2580 St. Rose Parkway, Suite 330 Henderson, Nevada 89074 Attorneys for Real Parties in Interest	

BY: */s/ Michael P. Lowry*

Exhibit A

ELECTRONICALLY SERVED
2/22/2022 5:52 PM

Electronically Filed
02/22/2022 5:52 PM
CLERK OF THE COURT

WILSON ELSER
WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

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Universal Protection Services, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

DOUGLAS J. KENNEDY, an individual; and LORI KENNEDY, an individual, Plaintiffs, vs. GABRIEL L. MARTINEZ, an Individual; UNIVERSAL PROTECTION SERVICES, LLC d/b/a ALLIED UNIVERSAL SECURITY SERVICES, a Foreign Limited Liability Company; DOE Family Members 1-10; DOE Individuals 11-20; and ROE Corporations 21-30, Inclusive, Defendants.	Case No. A-20-820254-C Dept. No. 15 **Defendants' Motion to Stay Case on Order Shortening Time** Hearing Requested

Mr. Kennedy claims an ongoing brain injury as a result of the motor vehicle accident at issue in this case. Defendants requested a Rule 35 examination. The district court agreed an examination is appropriate, but put conditions on it that make an examination impossible to obtain. Defendants have now petitioned for a writ of mandamus to discuss this ruling. Consequently, they request the case be stayed until the writ petition is concluded.

///

///

Case Number: A-20-820254-C

DATED this 22nd day of February, 2022.

WILSON ELSER
WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

BY: */s/Michael Lowry*
MICHAEL P. LOWRY, ESQ.
Nevada Bar No. 10666
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Las Vegas, Nevada 89119
Attorneys for Gabriel L. Martinez;
Universal Protection Services, LLC

Declaration of Michael Lowry

1. If heard in the ordinary course, this motion would likely be heard after the initial expert disclosure deadline presently scheduled for March 14, 2022. This motion directly affects Defendants' ability to prepare for that deadline. An order shortening time is merited so as to either allow the parties to stay the case, or for Defendants to then seek further relief per NRAP 8.

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

/s/ Michael Lowry

Order Shortening Time

The request for an order shortening time in A-20-820254-C is granted. This motion is scheduled for hearing on March 7, 2022 at 9:00 am. ~~Oppositions will be due on _____, and replies on _____.~~

Dated this 22nd day of February, 2022

By: Joe Hardy
DISTRICT JUDGE

DAA C17 32A8 523D
Joe Hardy
District Court Judge

Memorandum of Points & Authorities

I. The district court's order prevents Defendants from obtaining a neuropsychological examination.

This personal injury case concerns a motor vehicle accident that occurred on November 5, 2018. The complaint was filed on August 27, 2020. Mr. Kennedy alleges he suffered a brain injury from the motor vehicle accident. To summarize, Defendants requested a Rule 35 neuropsychological examination. The district court granted the examination, but also granted Mr. Kennedy's request to audio record it per NRCP 35(a)(3). As Defendants argued in their briefing, that condition effectively deprives them of their ability to conduct an examination because the scientific literature concludes recording compromises the data gathered in the examination.

While the Discovery Commissioner's report and recommendations were pending, Defendants also moved to extend discovery. The district court denied that motion, except to allow Defendants until March 14, 2022 to complete their initial disclosure of a neuropsychological expert witness. Unable to obtain the neuropsychological examination that the district court concluded is appropriate, Defendants have filed a petition for writ of mandamus to determine whether Mr. Kennedy presented good cause to audio record the examination. The petition's docket number is 84265.

II. A stay is merited to preserve Defendants' rights.

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

> (1) whether the object of the appeal or writ petition will be defeated if the stay or injunction is denied;
> (2) whether appellant/petitioner will suffer irreparable or serious injury if the stay or injunction is denied;
> (3) whether respondent/real party in interest will suffer irreparable or serious injury if the stay or injunction is granted; and

(4) whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition.

Applied here, Defendants want a Rule 35 neuropsychological examination, but the district court's order put conditions on that examination that prevent Defendants from ever obtaining one. The Advisory Committee Note to the 2019 revision to Rule 35 imply, if not express, that a Rule 35 examiner is an initial expert.[1] If the case continues forward with expert disclosures, then Defendants' ability to obtain a neuropsychological examination and disclose the results of that examination as an initial expert, if desired, are lost. That would defeat the purpose of the writ petition.

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

The fourth factor is difficult to predict, like any other appeal or writ petition. The real question is whether the Supreme Court will at least agree to hear the petition on its merits. It seems likely to do so, because it accepted briefing on all writ petitions that challenged first the constitutionality of NRS 52.380 and then whether the conditions it imposed could also be imposed via NRCP 35. While *Lyft* answered the question as to NRS 52.380, it did not answer the question about NRCP 35. *Lyft* was instead remanded to the district court for further factual development on that point. The question Defendants present here is at least part of the question that *Lyft* did not answer.

III. A stay is merited under these particular circumstances.

Defendants' request for a stay is supported and practical. This court agreed a neuropsychological examination is appropriate in this case, but put conditions on that examination

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

that directly conflict with neuropsychologists' ethical obligations. Defendants cannot obtain the examination under these conditions and has now sought the Supreme Court's guidance on this topic. Proceeding forward and forcing Defendants to defend the case without the examination this court agreed he should have is fundamentally unfair. Staying the case preserves the status quo until the Supreme Court rules on or otherwise rejects this petition.

DATED this 22nd day of February, 2022.

WILSON ELSER
WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

BY: */s/ Michael Lowry*

MICHAEL P. LOWRY, ESQ.
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Las Vegas, Nevada 89119
Attorneys for Gabriel L. Martinez;
Universal Protection Services, LLC

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Douglas Kennedy, Plaintiff(s)	CASE NO: A-20-820254-C
vs.	DEPT. NO. Department 15
Gabriel Martinez, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

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

Service Date: 2/22/2022

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Exhibit B

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DISTRICT COURT

CLARK COUNTY, NEVADA

DOUGLAS J. KENNEDY, an individual; and LORI KENNEDY, an individual, Plaintiff, vs. GABRIEL L. MARTINEZ, an individual; UNIVERSAL PROTECTION SERVICES, LLC, d/b/a ALLIED UNIVERSAL SECURITY SERVICES, a Foreign Limited Liability Company, DOE Family Members 1-10; DOE Individuals 11-20; and ROE Corporations 21-30, Inclusive, Defendant.	Case No.: A-20-820254-C Dept. No.: 15 Hearing Date: March 7, 2022 Hearing Time: 9:00 a.m.

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO STAY CASE ON ORDER SHORTENING TIME

Plaintiffs, Douglas J. Kennedy and Lori Kennedy, by and through counsel, Cogburn Law, hereby file this Opposition to Defendants' Motion to Stay Case on Order Shortening Time. This Opposition is made and based upon the papers and pleadings on file herein, the following Memorandum of Points and Authorities, any exhibits attached hereto, and any oral argument this Court may choose to entertain.

COGBURN LAW
2580 St. Rose Parkway, Suite 330, Henderson, Nevada 89074
Telephone: (702) 748-7777 | Facsimile: (702) 966-3880

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL AND PROCEDURAL BACKGROUND

After the Court denied Defendants' motion to extend discovery, but permitted Defendants to produce a report from a neuropsychologist following a Rule 35 examination, and weeks after the initial expert deadline, Defendants produced a "rebuttal" expert report from Dr. David Ginsburg, a neurologist. *See* Ginbsurg report, attached as **Exhibit "1."** Plaintiffs' counsel deposed Dr. Ginsburg on February 15, 2022, and he agrees that Plaintiff sustained a traumatic brain injury because of the subject motor-vehicle accident:

> Q. In your report did you offer an opinion as to whether or not my client sustained a traumatic brain injury as a result of the November 5th, 2018 motor-vehicle accident?
>
> A. Yes, I did.
>
> Q. And your opinion is that he in fact sustained a traumatic brain injury as a result of the November 5th, 2018 motor-vehicle accident, correct?
>
> A. Yes. Correct.

See Ginsburg deposition, attached as **Exhibit "2"** at 8:21 – 9:4.

Dr. Ginsburg, who testified that he was retained in early January 2022, also provided opinions at his deposition regarding Plaintiff Douglas Kennedy's need for 24/7 attendant care. While Dr. Ginsburg does not believe that Plaintiff's need for 24/7 attendant care is causally related to the TBI Doug sustained because of the crash, Dr. Ginsburg instead believes that Doug's need for 24/7 attendant care is related to anxiety/depression (Plaintiff was diagnosed with because of the TBI); medications he is currently on and/or took in 2019 (Dr. Ginsburg doesn't know what medication Plaintiff is currently on); and sepsis (an opinion not disclosed in his report). *Id.* at 44:24 – 47:9.

Because Defendants produced a report from a neurologist that offered the opinion that Plaintiff sustained a TBI because of the subject crash, and offered opinions regarding Plaintiff's

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future medical needs, there isn't even "good cause" anymore that would require Plaintiff to undergo a Rule 35 neuropsych examination. Moreover, Defendants cannot argue that they have been prejudiced by the Court's ruling that the Rule 35 neuropsych examination must be recorded because again, Defendants retained an expert who offered causation opinions regarding Plaintiff's TBI and his future medical needs.

II. LEGAL ARGUMENT

Based on scientific articles, and not even an affidavit from Dr. Stacie Ross, Defendants filed a writ asking the Nevada Supreme Court reverse this Court's decision affirming a Discovery Commissioner's Report and Recommendations that required Plaintiff's Rule 35 examination neuropsych examination be recorded. As a reminder, the "good cause" presented to have the examination recorded is Dr. Stacie Ross' decision to instruct Plaintiff Douglas Kennedy sign forms he was directed by his counsel not to sign. Instead of simply selecting a different neuropsychologist, Defendants decided to stick with Dr. Ross, and thus, maintain "good cause" for a recorded examination.

In the writ, Defendants do not even contend that they will suffer prejudice in the event that they are unable to go forward with a neuropsych Rule 35 examination. Instead, Defendants seem to be asking the Nevada Supreme Court for it to create, without any suggestion, a test as to what constitutes "good cause" that requires a Rule 35 examination to be recorded. While this may an interesting issue, the fact is that because Defendants' own medical expert agrees that Plaintiff sustained a traumatic brain injury because of the crash, there isn't even "good cause" for a Rule 35 examination to move forward.[1] Consequently, there is *zero* prejudice to Defendants if they are unable to have Plaintiff undergo a neuropsych Rule 35 examination because through Dr. Ginsburg, Defendants have an expert to address Plaintiff's TBI.

[1] To avoid creating an appellate issue, and because it has become obvious that Plaintiff would not undergo a neuropsych Rule 35 examination, Plaintiffs never raised this issue with this Court.

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However, the prejudice to Plaintiff for staying this case is severe. It is uncontroverted that Plaintiff Douglas Kennedy sustained a traumatic brain injury because of the crash caused by Defendant Gabriel Martinez. Because of the traumatic brain injury he suffered, Plaintiff is now a fall risk, and because of that, his future medical expenses outline 24/7 attendant care. To stay the case to get clarification regarding what constitutes "good cause" for a recording is pointless when the examination isn't even needed. The writ petition will either be summarily denied, and in the event Plaintiff required to file an answering brief, the writ petition will be denied when the Nevada Supreme Court learns that Defendants' own neurologist agrees that Plaintiff sustained a TBI because of the subject crash, and offers opinions regarding Plaintiff's future medical needs.

Dated this 3rd day of March 2022.

COGBURN LAW

By: */s/Joseph J. Troiano*

Jamie S. Cogburn, Esq.
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Joseph J. Troiano, Esq.
Nevada Bar No. 12505
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO STAY CASE ON ORDER SHORTENING TIME** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 3rd day of March 2022.

I further certify that I served a true and correct copy of the foregoing document as follows:

☒ Pursuant to NEFCR 9 & EDCR 8.05(a), electronic service of the foregoing document shall be made in accordance with the CM/ECF E-Service List as follows:

Michael Lowry (michael.lowry@wilsonelser.com)
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Chris Richardson (chris.richardson@wilsonelser.com)
Kaitlyn Brooks (Kaitlyn.Brooks@wilsonelser.com)
Kait Natarajan (kait.natarajan@wilsonelser.com)

/s/*Sarah C. Wilder*
An employee of Cogburn Law

Exhibit ‘1’

DAVID L. GINSBURG, M.D.
DIPLOMATE, AMERICAN BOARD OF PSYCHIATRY AND NEUROLOGY
DIPLOMATE, AMERICAN BOARD OF ELECTRODIAGNOSTIC MEDICINE

851 S. RAMPART BOULEVARD, SUITE 115, LAS VEGAS, NV 89145
(702) 778-9300 FACSIMILE (702) 778-9301

REBUTTAL REPORT

CLAIMANT: Douglas Kennedy
DATE : 01/14/22
D.O.L. : 11/05/18

To Whom It May Concern:

I reviewed the following additional documents on the above-named claimant.

Eight color photographs from accident reviewed.

11/05/18 State of Nevada Traffic Crash Report reviewed.

11/05/18 **Gabriel L. Martinez.** Voluntary Statement reviewed.

11/05/18 **Douglas Kennedy. Voluntary Statement.** Got hit from behind. I was in the far right lane.

11/05/18 **Cory James Carter.** Voluntary Statement reviewed.

Additional color photographs of accident site reviewed.

08/27/2020 **Complaint reviewed.**

01/22/21 **Plaintiff Douglas J. Kennedy's Answers to Defendant Universal Protection Services, LLC's First Set of Interrogatories.** Interrogatory #9: If you claim to presently suffer from any effects of the accident, describe the symptoms, complaints, or disabilities that you claim are a result of the accident. Answer to Interrogatory #9: Headaches, lightheadedness, varying degrees of head pain which is daily from manageable to debilitating wherein I need to lay down in the dark for 1 to 1.5 hours until it alleviates. Balance issues which also create a fear of falling and therefore I now use a cane and a scooter to move around. I also have memory/concentration issues.

10/13/2020 **Plaintiff's Initial Disclosure of Witnesses and Documents Pursuant to NRCP 16.1.**

Records reviewed from Henderson Hospital including the following:

Billing records reviewed.

11/06/18 **Samuel B. Wright, D.O.** Patient is a -year-old male who presents because of an MVA. Patient states that yesterday he was a restrained driver in a car that was at rest when it was struck from behind by a car traveling approximately 75 MPH. Patient states he was pushed across the freeway and another car struck him in the rear of the vehicle once again. The patient states that he did not pass out. Patient did complain of a mild headache afterwards but was able to ambulate at the scene and is feeling well this morning except for a brief twinge of pain in his right lower back. Patient at present has no pain, dizziness, or other symptoms. He simply wanted to be evaluated to make sure he was okay. Neurological review of systems: Negative except as documented in HPI. Head is normocephalic, atraumatic. Alert, oriented to person, place, time, and situation. No focal neurological deficit observed. Cooperative. Appropriate mood and affect. Normal judgment. Patient is asymptomatic after a car accident and does not require any imaging or lab testing. He is discharged in a stable condition.

05/30/19 Shadow Emergency Physicians PLLC Billing Statement reviewed.

Records reviewed from Advanced Orthopedic & Sports Medicine/Michael Trainor, D.O. including the following:

02/19/19 Review of systems: Positive for headache, dizziness. Alert and oriented times three. Assessment: Postconcussion syndrome with headaches following motor vehicle collision.

01/08/19 The patient was scheduled to undergo evaluation by Neurology with Dr. Chopra. His balance is improving. He continues to undergo testing with Dr. Chopra. He does note improvement compared to last visit. Review of systems: Positive for headaches and dizziness. Assessment: Postconcussion syndrome with headaches following motor vehicle collision.

12/04/18 The patient is also seeing a neurologist and states he was scheduled for an EEG. Review of systems: Positive for headache, dizziness. The patient does have some balance changes which I do not believe are related to spinal cord compression on the MRI scan. The patient is seeing Dr. Chopra in neurology consultation to further evaluate postconcussion type symptoms.

11/20/18 The patient was the driver. The vehicle was impacted from rear. After being rear-ended, the patient states he was hit by another vehicle. The patient's symptoms are aggravated by daily activities. The patient describes headaches. The patient notes no prior history of present symptoms. Review of systems: Positive for headaches and dizziness. Plan: Postconcussion syndrome with headaches following motor vehicle collision. The patient is experiencing a combination of paracervical muscle spasms, neck pain, headaches, loss of memory. I would recommend an evaluation with a neurologist for postconcussion syndrome symptoms.

11/28/18 **Las Vegas Radiology. MRI Cervical Spine without contrast.** Report reviewed.

04/23/19 Review of systems: Positive for headache, dizziness. There are no abnormalities with balance or coordination. Assessment: Postconcussion syndrome with headaches following motor vehicle collision. He remains neurologically intact.

04/20/19 Review of systems: Positive for headache, dizziness. Assessment: Postconcussion syndrome with headaches.

04/13/19 **Las Vegas Radiology. MRI Lumbar Spine without contrast.** Report reviewed.

Records reviewed from Dynamic Spine & Sport Rehabilitation:

07/09/19 **Michael Trainor, D.O.** At the previous visit, the patient described significant improvement in all symptoms. Assessment: Postconcussion syndrome with headaches following motor vehicle accident. He remains neurologically intact.

Billing records reviewed from Las Vegas Radiology.

Records reviewed from Gobinder S. Chopra, M.D. including the following:

Billing records reviewed.

08/03/2020 Patient reports his headaches and memory have not made any changes. Patient had an MRI of the brain done at SimonMed 07/17/2020. Patient does not take any medication. His MMSE is 28 out of 30. Patient previously has seen Dr. Whiteman in Psychology. Patient and wife still states patient balance is off. He is still anxious. He complains of insomnia. Patient's neck pain is resolved. Still complains of memory problems. He is scoring 28 out of 30 on the Folstein Mini Mental Status Examination. He still complains of headaches. Auditory brain potentials were normal. Videonystagmogram was still abnormal. Patient uses a cane to walk and for stabilization. VNG 07/27/2020: Caloric responses are weak bilaterally and other tests such as the head thrust test or if available active and passive rotation testing is required to confirm presence of bilateral vestibular dysfunction. MRI Brain with and without 07/17/2020: There is a single focus of hemosiderin deposition involving the left posterior frontal lobe measuring 3 mm. There is a single focus of hemosiderin deposition involving the right posterior left superior temporal lobe measuring 3 mm. There is a single 3 mm focus involving the left temporal lobe centrally. These are in subcortical locations and may relate to microhemorrhage secondary to the patient's history of trauma. Please note hypertense etiology could appear similarly. Correlate with history and for risk factors. Review of systems: Positive for headache, memory loss. Alert, attentive. Affect anxious. MMSE 28 out of 30. Gait sway positive. Tandem gait impaired. Diagnoses: Diffuse axonal brain injury, memory loss, ataxic gait, reduced concentration, irritability, depression, anxiety, dizziness, memory loss, problem with balance, dysfunction of vestibular system.

06/22/2020 Ongoing lightheaded, balance issues, tiredness, memory loss. Memory is improving. Headaches are intermittent but have been great the last five to six days. Patient has been experiencing new symptoms such as lightheadedness, balance, and fatigue. Patient was treated at Henderson Hospital for UTI and St. Rose for prostate. MMSE 28 out of 30.

06/22/2020 Patient Intake Form reviewed.

06/22/2020 Epworth Sleep Scale reviewed.

06/22/2020 The Rivermead Postconcussion Symptoms Questionnaire reviewed.

10/21/19 MMSE on 10/21/19. Patient scored 27 out of 30. Patient denies any ongoing neck pain and headaches. Memory is improved. Medications: Amitriptyline 10 mg one to two times per day.

08/08/19 **Janet E. Baumann, Ph.D. Clinical Neuropsychological Evaluation.** Mr. Kennedy reports that approximately 12 hours after the accident he drove his own vehicle to Henderson Hospital. He reported that immediately after the accident he had no symptoms. He just wanted to go home. The next morning he went to the hospital to be seen. He reported that he fell approximately five times three days later. Mr. Kennedy reports that he experienced a sudden acceleration and deceleration of movement with his head. He reports that he has been diagnosed with a concussion indicating that he has two bruises on his brain. He denies loss of consciousness. He denied retrograde or antegrade amnesia. He reports that he was confused, bewildered, and unable to think clearly for about two days after the accident. He was also overwhelmed and in a temporary state of shock for approximately 14 days after the accident. He currently feels he is functioning below his preinjury levels. He indicates his average percentage of brain impairment is at 25%. He denies a history of seizures. Postconcussion symptoms include dizziness, lightheadedness, headaches, fatigue, impatient, poor short-term memory, poor long-term memory, poor attention, concentration, or focusing, confused thinking, mentally foggy, finding the right words to say. Beck Depression Inventory: Mr. Kennedy obtained a raw score of 6, placing him in the minimal range of depression. Beck Anxiety Inventory: Mr. Kennedy obtained a raw score of 2, placing him in the minimal range of anxiety. Thought process: Logical, linear, and coherent and thought content related to mood and circumstances. Oriented to person, place, time, and situation. Alert, responsive, and attentive. DSM-V Diagnostic Descriptions (rising out of the 11/05/18 accident): (1) Mild neurocognitive disorder due to traumatic brain injury. As a result of that accident, he is diagnosed with a concussion. The medical reports indicate positive findings on the MRI consistent with mild traumatic brain injury. A neuropsychological reevaluation in six to 12 months post current assessment should be done to identify improvement and/or residual impairment.

07/02/19 **Gobinder S. Chopra, M.D.** Mental status: Alert, attentive. Affect within normal limits. MMSE 29 out of 30. Due to ongoing short-term memory problems, patient is going to be seen by Neuropsychology.

05/16/19 **Gobinder S. Chopra, M.D.** Patient was seen in four-month followup. Patient is accompanied by a very concerned wife. She has concerns regarding patient's short-term memory problems. Patient's short-term memory is worsening. His Folstein Mini Mental Status Examination score is 26 out of 30. MMSE was 28 out of 30 on 10/19. Patient's previous MRI of the brain was performed on 12/18/18 which was abnormal; however, request repeat MRI brain with and without contrast with comparison as well as neuropsychological testing for worsening short-term memory problems. EEG done on 01/03/19 within normal limits. Ongoing medical problems include neck pain, headache, memory loss.

06/12/19 **SimonMed. Brain MRI without contrast (TBI protocol).** Conclusion: (1) There is a single focus of hemosiderin deposition involving the left posterior frontal lobe measuring 3 mm. There is a single focus of hemosiderin deposition involving the right posterior more superior frontal lobe measuring 3 mm. There is a single 3 mm focus involving the left temporal lobe. These are in subcortical locations and may relate to microhemorrhage secondary to the patient's history of trauma. Please note hyperintensive etiology could appear similarly, correlate with history and for risk factors. (2) Relative right hippocampal atrophy, a finding consistent with patient's history of head trauma. (3) Volumetric software demonstrates diffuse cortical volume loss which is in the first percentile as compared to age-matched controls and involves every lobe. This finding has been described following head trauma, please correlate. (4) The diffusion tensor imaging with fiber tracking and FA values of the corpus callosum are decreased, findings consistent with the patient's age, the white matter findings, the left-sided hemosiderin deposition and the history of head trauma in the appropriate clinical setting. (5) Findings correlate with white matter changes of aging and microvascular disease, the possibility that some of these subcortical foci are secondary to shear injuries are not excluded in the appropriate clinical setting. Mild diffuse cerebral and cerebellar atrophy.

03/25/19 **Dynamic Spine & Sport Rehabilitation.** Report reviewed.

01/10/19 **Gobinder Chopra, M.D.** Chief complaint: Neck pain, headache, memory loss. Headaches - Generalized headaches occasionally affecting the patient. Frequency can fluctuate, although he has slight headache every other day. Dizziness - Patient occasionally has to hold onto things otherwise he feels he is due to fall all of a sudden. Those do not last a long time. Memory problems - The patient states that memory problems are somewhat improved. Patient was wearing a seat belt and denies hitting the head inside the car. MMSE 28 out of 30. Auditory brain and evoked potentials were normal. EEG was normal. Videonystagmogram on 12/11/18 shows peripheral vestibular syndrome with left unilateral weakness in her right directional preponderance, findings of this type can be seen with MTBI. Patient is still complaining of insomnia and he is losing about three hours of sleep a night. Prescription will be given for Elavil 10 mg by mouth at bedtime on an as-needed basis. I will request repeating MRI of the brain and video nystagmogram in the next nine months with comparison. MMSE 29 out of 30. Assessment: Diffuse axonal brain injury, dysfunction of vestibular system.

12/11/18 **Gobinder Chopra, M.D.** Upper Extremity EMG study reviewed.

11/29/18 **Gobinder Chopra, M.D.** Chief complaint of neck pain, headache, memory loss. He apparently was rear-ended and then was hit by another pickup. Started having symptoms a few days later. Patient is noticing insomnia - is complaining of difficulty initiating and maintaining sleep. Generalized headaches occasionally affecting the patient. Frequency can fluctuate, although he has slight headache every other day. Dizziness - Patient occasionally has to hold onto things otherwise he feels he is due to fall. All the symptoms do not last a long time. Memory problems - Patient states that memory problems are somewhat improved. MMSE 29 out of 30. Assessment: Arthritis.

01/03/19 **EEG.** Impression: This EEG is within normal limits.

11/28/18 **Las Vegas Radiology. MRI Cervical Spine without contrast.** Report reviewed.

12/18/18 **Pueblo Medical Imaging. MRI Brain with SWI and DTI with and without contrast with perfusion.** Conclusion: (1) Petechial hemorrhage, left frontal lobe. There are also some scattered foci of elevated T2/FLAIR signal in the white matter. (2) The fractional line as such. The corpus callosum was less than 0.6. Correlate clinically. (3) Hippocampal volume on the right is in the 37th percentile and on the left is in the 72nd percentile. Correlate clinically.

12/11/18 **Gobinder S. Chopra, M.D.** Video ENG Report. Probable peripheral vestibular syndrome with left unilateral weakness and right directional preponderance, correlate clinically.

12/11/18 **Brainstem Auditory Evoked Potentials.** Impression: Normal brainstem auditory evoked response including curve configuration and interpeak latencies bilaterally.

11/29/18 Patient Intake Form for Gobinder Chopra, M.D. reviewed.

11/29/18 **Epworth Sleep Scale II.**

11/29/18 The Rivermead Postconcussion Symptoms Questionnaire. Score 21.

Billing records from Dynamic Spine & Sport Rehabilitation reviewed.

12/10/18 **Dynamic Spine & Sport Rehabilitation.** Patient is a -year-old retired male who was the restrained driver of a Hyundai Elantra involved in a rear-end accident with a Toyota Tacoma and Ford F-150. He denies LOC and airbag deployment. He did not receive any imaging afterward; however, he was provided an x-ray by Dr. Trainor. He expresses lightheadedness intermittently throughout the day and states he uses an SPC because he feels unsteady at times.

12/24/18 **Dynamic Spine & Sport Rehabilitation.** Patient mentions that he is more aware of his lightheadedness sensation. In addition, he reports that he was getting out of the car

and as soon as he started walking noticed he started leaning to his right as if he was about to fall over. Blood pressure taken several times: Supine 126/92; sitting 132/92; initial standing 108/93 and after two minutes in standing 108/88. Patient is experiencing orthostatic hypotension which may be contributing to the lightheadedness sensation he experiences while walking.

Various additional progress notes reviewed from Dynamic Spine & Sport Rehabilitation including the following:

12/28/18 The patient states that he continues to experience lightheadedness and occasional headaches.

01/02/19 He continues to experience lightheadedness though it has been "on and off throughout the day rather than all day."

01/04/19 In regards to lightheadedness, he admits that he is fearful of falling and uses a cane when he knows he has to walk long distances.

01/07/19 He clarifies that his dizziness and lightheadedness are not as severe and frequent as before.

01/11/19 Patient reports that he visited his M.D., who explained to him that he obtained a "brain bruise" from his MVA and that the results from his balance test were positive.

Health insurance claim form from Pueblo Medical Imaging reviewed.

Billing statement from Baumann and Associates reviewed.

Additional records reviewed from Baumann and Associates including the following:

06/02/19 Motor Vehicle Travel Anxiety Checklist reviewed.

06/21/19 Traumatic Brain Injury Questionnaire reviewed.

Psychosocial History Questionnaire reviewed.

06/21/19 Mental Status Questionnaire reviewed.

08/04/2020 Invoice from SimonMed reviewed.

07/17/2020 **SimonMed Brain MRI with and without contrast (TBI protocol).** Conclusion: There is a single focus of hemosiderin deposition involving the left posterior frontal lobe measuring 3 mm. There is a single focus of hemosiderin deposition involving the right posterior left superior temporal lobe measuring 3 mm. There is a single 3 mm focus involving the left temporal lobe centrally. These are in subcortical locations that may relate to microhemorrhage secondary to the patient's history of trauma. Please note hypertensive etiology

could appear similarly, correlate with history and for risk factors. Cortical volumes are again noted to be decreased versus lower limits of normal as described above. These may be mildly improved as compared to prior. This may secondary to differences in technical involving the scanners. Similar comments regarding the diffusion tensor imaging.

Records reviewed from Total Care Family Practice including the following:

07/16/19 **Erum Malik, P.A.-C.** Medications include ibuprofen, Norco. Alert, oriented times three. Plan: Cyclobenzaprine.

Records reviewed from Kelly Hawkins Green Valley including the following:

Billing records reviewed.

09/23/19 He continues to have fear of falling, anxiety when in the car, dizziness, memory/cognitive dysfunction, and difficulty focusing or staying on task. Assessment: Patient presents with S/S consistent with postconcussion syndrome secondary to a mild TBI sustained in MVA.

10/09/19 Patient continues to have cognitive limitations especially with word finding and short-term memory. Balance improving.

01/02/2020 Patient continues to improve balance and gaze through habituation and adaptation exercises.

Records reviewed from MedTrak Diagnostics, Inc including the following:

09/25/19 Invoice reviewed.

09/25/19 **Proposed Care Plan.** Brief summary of test results: There is evidence of significant peripheral vestibular dysfunction. There is evidence of significant central vestibular dysfunction. The results of computerized neurocognitive testing reveal abnormalities in immediate recall. More specifically, it is important to note: Immediate and delayed recall abnormalities exhibited during testing suggest medial temporal lobe and/or frontal lobe dysfunction causing diminished memory and diminished mental processing. The patient's subjective complaints were of anxiety, balance problems, blurred vision, difficulty with attention, difficulty with maintaining focus, diminished ability to concentrate, diminished taste, dizziness, fatigue, fear of falling, feeling frustrated, headache, interrupted sleep, lightheadedness, memory problems, mood swings, multiple neurological issues, restlessness, taking longer to think, and word-finding issues. Impression: The VNG objective test results exhibiting significant peripheral vestibular systems function. The VNG objective test results exhibiting significant central vestibular system dysfunction. The patient's subjective complaints and objective test findings are consistent with patients who sustain traumatic brain injuries and require substantial ongoing vestibular and generalized rehabilitation program.

09/24/19 **Videonystagmography.** Report reviewed.

09/24/19 **Posturography.** Report reviewed.

09/24/19 **BrainCheck Clinical Report.** Presence of cognitive impairment: Unlikely. Clinical correlation warranted.

10/20/2020 **First Supplement to Plaintiff's Initial Disclosure of Witnesses and Documents Pursuant to NRCP 16.1.**

10/19/2020 **Norton A. Roitman, M.D.** Mr. Kennedy's car stopped moving. It felt to him that the entire incident took place in an "instant." He was dazed, disoriented, and found it difficult to process what had occurred. He did not think he was missing a gap in time and reported no loss of consciousness or dissociation. Within two days of the accident, he felt intense dizziness and lightheadedness. Mr. Kennedy stopped working because he cannot concentrate or present himself in a positive consistent panel. Mr. Kennedy is forgetful, easily distractible, and absent-minded. Mr. Kennedy has symptoms of neurocognitive disorder due to a traumatic brain injury. Diagnostic impression: Mild neurocognitive disorder due to the November 5, 2018, traumatic brain injury with disturbances of cognition and emotional dysregulation, depressed mood, pervasive insecurity, anxiety, and insomnia. The basis for my estimate of duration of outpatient treatment is based on the finding that most brain injuries resolve or reach a plateau five years after the injury. Based on that premise, Mr. Kennedy has about a three-year window to propel him forward and take advantage of that potential. After that, he should be considered on maintenance care. Conclusion: Mr. Douglas Kennedy incurred neuropsychiatric injuries as an exclusive consequence of a motor vehicle accident on November 5, 2018. Mr. Kennedy has a brain injury evidenced by physical, neuropsychological, and mental status examination findings. In accordance with the DSM-V Diagnostic Manual, his neurological injury is identified as a mild neurocognitive disorder formerly referred to as postconcussion syndrome.

12/31/2020 **Second Supplement to Plaintiff's Initial Disclosure of Witnesses and Documents Pursuant to NRCP 16.1.**

10/20/2020 **Firooz Mashhood, M.D.** He did not believe he sustained a direct head injury. He did not seek immediate medical attention and went home. Dr. Chopra reviewed the MRI study findings, which per Dr. Chopra's report showed diffuse axonal brain injury and dysfunction of vestibular system. He received cognitive training. He complains of headache and impaired memory along with occasional dizziness and lightheadedness. The patient is alert and oriented. Assessment: The patient is status post motor vehicle accident with closed head injury with bifrontal contusion with residual cognitive deficits as well as impaired function.

01/28/21 **Third Supplement to Plaintiff's Initial Disclosure of Witnesses and Documents Pursuant to NRCP 16.1.**

Various handwritten notes from Douglas Kennedy reviewed.

02/23/21 **Fourth Supplement to Plaintiff's Initial Disclosure of Witnesses and Documents Pursuant to NRCP 16.1.**

November 2020 **Deborah Perlman, R.N., CRRN, RNCB.** Since the 11/05/18 accident, Mr. Kennedy has ongoing residual deficits that have altered his personal and vocational lifestyle remarkably. He is now approximately two years postinjury and remains with ongoing medical and cognitive impairments necessitating assistance from others for his most basic self-care needs including bathing, grooming, dressing, assistance with mobility, etc. He reports daily constant headaches, dizziness, memory challenges, emotional/cognitive/behavioral impairments, and mobility challenges. In summary, it is my opinion as an R.N./Board Certified Rehabilitation Registered Nurse Specialist with extensive experience in adult and pediatric rehabilitation that due to the residuals of this life-altering incident, Mr. Douglas Kennedy will require a lifetime of ongoing medical management for his complex physical and psychological impairments and the necessity for caregiver services in his home.

03/03/21 **Fifth Supplement to Plaintiff's Initial Disclosure of Witnesses and Documents Pursuant to NRCP 16.1.**

Records from Healing with Grace Counseling Center reviewed for Lori Kennedy.

03/22/21 **Sixth Supplement to Plaintiff's Initial Disclosure of Witnesses and Documents Pursuant to NRCP 16.1.**

Records from State Medical Equipment reviewed.

04/07/21 **Seventh Supplement to Plaintiff's Initial Disclosure of Witnesses and Documents Pursuant to NRCP 16.1.**

Records from Healing with Grace Counseling Center reviewed for Douglas Kennedy.

Records reviewed from Fyzical Therapy and Balance Centers including the following:

03/04/21 He states he went to Kelly Hawkins after his TBI and he is consistently doing his balance and eye exercises. Patient reports feeling lightheaded every day but states he does not know if he gets dizzy. The patient has trouble remembering things since his TBI. Patient states he does lose his balance sometimes.

03/04/21 Mental status/cognitive function appears impaired? No.

02/03/21 Patient has trouble remembering things since his TBI. Patient states he does lose his balance sometimes.

Records reviewed from Larry Yu, M.D. including the following:

01/26/21 Chief complaint of hoarseness. He also complains of chronic vertigo. Former smoker. Impression: Dizziness.

Additional records reviewed from Dynamic Spine & Sports Rehabilitation.

Additional records reviewed from Henderson Hospital including the following:

Billing records reviewed.

07/14/19 **Victor Sun, D.O.** Review of systems: Negative for headache or dizziness. Alert, oriented to person, place, time, and situation.

07/21/19 **Kathleen Thomas, P.A.-C.** Review of systems: Negative for headache or dizziness.

08/02/19 **Jessica L. Leduc, D.O.** Review of systems: Negative for headache, dizziness. Normal speech observed.

08/03/19 **Roy M. Margallo, M.D.** Chief complaint: Shortness of breath and dizziness today. Review of systems: Negative for headache. Affect, mood, and thought process normal. Recent and remote memory intact.

Records reviewed from Las Vegas Radiology.

Additional records reviewed from MedTrak Diagnostics including the following:

09/24/19 Subjective complaint. Intake form reviewed.

Billing statement from Pueblo Medical Imaging reviewed.

05/20/21 **Eighth Supplement to Plaintiff's Initial Disclosure of Witnesses and Documents Pursuant to NRCP 16.1.**

04/06/21 **Head CT without contrast.** Conclusion: No increased or decreased attenuation involving the brain parenchyma. No evidence for parenchymal calcifications.

01/25/21 **Healing with Grace Counseling Center.** SOAP note reviewed.

06/09/21 **Ninth Supplement to Plaintiff's Initial Disclosure of Witnesses and Documents Pursuant to NRCP 16.1.**

04/22/21 **Gobinder Chopra, M.D.** Patient states he is fine and nothing is worse. He had a CT done at SimonMed 04/2021. Memory is better. Headaches are still there. Alert, attentive. MMSE 28 out of 30. Medications attached to this encounter: Zolpidem.

03/29/21 **Gobinder Chopra, M.D.** His memory is better and improving. His headaches are less often and intense. MMSE 28 out of 30. Alert, attentive. He was in today to discuss concerns and travel clearance. I will request CT of the brain without contrast with comparison with the MRI of the brain done with and without contrast on 07/17/2020.

04/22/21 **Handwritten Note.** Wife states patient cannot remember what he is being told and she needs to be in the room.

07/20/21 **Tenth Supplement to Plaintiff's Initial Disclosure of Witnesses and Documents Pursuant to NRCP 16.1.**

Documents from Allied Universal Security Services reviewed.

08/18/21 **Eleventh Supplement to Plaintiff's Initial Disclosure of Witnesses and Documents Pursuant to NRCP 16.1.**

09/14/21 **Twelfth Supplement to Plaintiff's Initial Disclosure of Witnesses and Documents Pursuant to NRCP 16.1.**

07/24/21 **Enrico Fazzini, D.O., Ph.D., FACN.** The patient was the driver in a vehicle and struck in the rear, propelled across the freeway, struck by another vehicle in the rear, and then spun so that finally his car landed in reverse direction against the direction that he was originally traveling in. The patient was shaken, jolted, and dazed by these impacts and the motion of his car. He stated that he did not hit his head and he did not have loss of consciousness. The patient was having headaches and balance impairment with memory, language, attention, concentration, spatial orientation, and cognitive problems. Mental status tests revealed he was alert and oriented times three. He seemed to have some difficulty with word processing and working memory. Language skill seemed intact. Formal tests of language, attention, concentration, memory, and spatial orientation were not performed. Gait was slow because of imbalance and the patient's balance was so poor that he could not even sit straight without tipping over to the right or left. Impression: (1) Cognitive deficits following traumatic brain injury. (2) Postconcussive balance impairment. (3) Postconcussive headaches. Recommendations: Aricept 5 mg a day to be taken after a meal.

08/14/21 **Enrico Fazzini, D.O. Ph.D., FACN.** The patient still complained of headaches and severe balance impairment with cognitive impairments. The patient was on Aricept 5 mg a day with no improvement. The patient did have headaches and some depression and he wanted treatment for this. Impression: (1) Cognitive deficits following traumatic brain injury. (2) Postconcussive balance impairment, severe. (3) Postconcussive headaches. Recommendations: Increase Aricept to 10 mg a day. Add Pamelor 10 mg a day.

Undated Curriculum Vitae from Douglas J. Kennedy reviewed.

12/17/21 **Thirteenth Supplement to Plaintiff's Initial Disclosure of Witnesses and Documents Pursuant to NRCP 16.1.**

11/22/21 **Deborah Perlman, R.N., CRRN, RNCB.** Letter to Mr. Joseph Troiano, Esq. reviewed.

November 2021 **Deborah Perlman, R.N., CRRN, RNCB.** Future Life Care Plan and Cost Provisions for Douglas Kennedy. Neurologist/traumatic brain injury specialist, level V office visit. First year one initial visit and five follow-up visits. Second year through life expectancy six follow-up visits per year through lifetime TBI/memory care specialist. ADL personal care attendant/IADL Assistant: Daily care 24 hours per day, 365 days per year through lifetime. Botox injection: One injection every three months to head and neck. 3-T Brain MRI: One study per year through lifetime. EEG: Two studies over lifetime. Aricept 10 mg 30 tablets per month through lifetime. Pamelor 10 mg 30 tablets per month through lifetime. Aimovig 70 mg per month through lifetime. Ubrelvy 50 mg per day through lifetime.

08/02/21 **Enrico Fazzini, D.O., Ph.D., FACN. Review of Records.** The patient was in an automobile accident on 11/05/18 in which he experienced multiple torsional forces applied to his brain. He was struck from behind, spun, and struck from behind again. These forces made it more likely than not that he would sustain injury to his brain. He has had not one but three MRIs of his brain which have demonstrated hemorrhagic white matter shearing and contusions in the bilateral frontal and temporal lobes. There have been associated injuries to the subcortical white matter and brainstem. There has been demonstrated damage to the corpus callosum which worsened and then improved over time. The patient has had numerous independent assessments of his balance and has been found to have both a central and peripheral vestibular disorder. He developed cognitive impairments that corresponded to the areas of brain injury: Visual, spatial (right frontal and temporal) including visual and spatial memory, attention, concentration, and slow processing speed (bilateral frontal), and a construction apraxia (left temporal). The brain is injured and his cognitive deficits have been persistent and causally related to this brain injury. The cognitive impairments and balance impairments are permanent and will worsen over time.

09/11/21 **Enrico Fazzini, D.O., Ph.D., FACN.** The patient still is having headaches, still had severe dizziness, still had memory, attention, and concentration problems, and his balance was getting him depressed. His depression was increasing. Impression: (1) Postconcussive balance impairment which is both central and peripheral in nature. (2) Cognitive deficits following traumatic brain injury. (3) Depression.

10/02/21 **Enrico Fazzini, D.O., Ph.D., FACN.** The patient continued to have headaches, severe balance impairment, and difficulty with memory, attention, and concentration. Impression: (1) Postconcussive balance impairment which is both central and peripheral in nature. (2) Cognitive deficits following traumatic brain injury. (3) Depression which is better on today's evaluation. Recommendations: Discontinue Pamelor. Try trazodone for safe impairment. Try to get a U-step walker instead of a cane as it might help the patient's balance a little bit more.

06/22/21 **Gabriel Barnard, M.D., M.S.** Two days after the accident, he started feeling unwell. Today he continues to complain of worsening memory, stuttering, and difficulty completed activities of daily living because of major balance and cognitive issues. He has significant difficulty with concentration, is tired in the evenings, and his wife works full time. Psychiatric exam: Good judgement. Normal mood and affect. Oriented to time, place, and person. Diagnosis related to incident on 11/05/18: (1) Traumatic brain injury with intracranial hemorrhage. (2) Abnormalities of gait related to traumatic brain injury. (3) Cognitive impairment. (4) Postconcussion syndrome. A mainstay of TBI treatment should be cognitive rehabilitation administered by a psychologist with experience working with TBI patients. He should also be followed regularly by a neurologist who can track his symptoms with memory impairment and headaches. Given his memory impairment and balance disabilities, Mr. Kennedy is unlikely safe at home by himself. He will require in-home care with ADLs and IADLs.

12/01/21 **Benjamin Luster, Ph.D.** Report reviewed.

11/25/21 **Terrence M. Clauretie, Ph.D.** Report on Present Value of Life Care Plan for Mr. Douglas Kennedy.

Carli Snyder, Psy.D. Psychological Summary. His symptoms include loss of balance, pain in the front of his head, fear and avoidance with driving.

Billing statement from Medical Rehabilitation Associates reviewed.

Billing records from Healing with Grace Counseling Center reviewed.

12/17/21 **Plaintiff's Designation of Expert Witnesses.**

11/06/18 Three hours and 7 minutes of Nevada Highway Patrol police videos reviewed.

The following imaging study was personally reviewed:

12/08/18 **Pueblo Medical Imaging. MRI Brain**

DISCUSSION

Based upon my review of the aforementioned documents, Mr. Kennedy was involved in a motor vehicle accident on 11/05/18. He was the restrained driver of his vehicle that was struck from behind by a second vehicle. The records also indicate that the rear of his vehicle was subsequently struck by a third vehicle. Mr. Kennedy did not lose consciousness. According to the 11/06/18 report from Dr. Wright at Henderson Hospital, Mr. Kennedy was asymptomatic. He was alert, oriented times four, exhibited normal judgment and a normal neurological examination. Dr. Wright indicated that Mr. Kennedy did not require any imaging or laboratory studies. Mr. Kennedy's next documentation of medical care was at the time of his 11/20/18 evaluation by Dr. Trainor. According to that report, Mr. Kennedy was reporting headaches,

dizziness, and memory loss. Dr. Trainor recommended evaluation with a neurologist for postconcussion syndrome. Accordingly, Mr. Kennedy was evaluated by Dr. Chopra on 11/29/18. According to Dr. Chopra's note, Mr. Kennedy reported experiencing symptoms within a few days of the accident that included insomnia, headaches, dizziness and memory loss. Dr. Chopra ordered a brain MRI that was subsequently performed on 12/18/18 at Pueblo Medical Imaging. This study revealed a petechial hemorrhage within the left frontal lobe. Mr. Kennedy was subsequently reevaluated by Dr. Chopra on 01/10/19. At that time, he was reporting dizziness, slight headaches every other day, and some improvement in his memory difficulties. Dr. Chopra diagnosed Mr. Kennedy with diffuse axonal injury. According to the 05/16/19 report from Dr. Chopra, Mr. Kennedy reported worsening short-term memory. Dr. Chopra ordered a follow-up brain MRI that was performed on 06/12/19 at SimonMed. I would be happy to review these MRI images should they become available at a later date. However, according to the MRI report, there were three subcortical foci of hemosiderin each measuring 3 mm (left frontal lobe, right posterior/superior frontal lobe, and left temporal lobe). According to the interpreting radiologist, these may represent microhemorrhages secondary to trauma versus hypertension. Since Mr. Kennedy has no history of hypertension, trauma would appear to be the more likely etiology. Mr. Kennedy was subsequently evaluated on 08/08/19 by Dr. Baumann for a neuropsychological evaluation. Based upon her evaluation and the brain MRI findings, Dr. Baumann diagnosed Mr. Kennedy with a mild neurocognitive disorder due to traumatic brain injury.

Mr. Kennedy was subsequently revaluated by Dr. Chopra on 10/31/19. According to Dr. Chopra's report, Mr. Kennedy denied headaches, and indicated that his memory was improving. According to Dr. Chopra's 06/22/2020 report, Mr. Kennedy once again stated that his memory was improving. According to Rivermead Concussion Questionnaire, Mr. Kennedy also reported depression and anxiety. Patients with these symptoms often report associated cognitive complaints. According to the 03/29/21 report of Dr. Chopra, Mr. Kennedy indicated that his memory was improving and his headaches were less often and less intense. According to the 04/22/21 report from Dr. Chopra, Mr. Kennedy stated that his memory continued to improve.

Mr. Kennedy was subsequently evaluated by Dr. Fazzini on 07/24/21. According to Dr. Fazzini's report, Mr. Kennedy reported headaches, difficulties with balance, memory, language, attention, concentration, spatial orientation and cognitive problems. According to the 08/14/21 report from Dr. Fazzini, Mr. Kennedy indicated that he wanted treatment for depression. Dr. Fazzini prescribed Pamelor 10 mg q.h.s. According to the 09/11/21 report from Dr. Fazzini, Mr. Kennedy was reporting worsening depression. According to the 08/02/21 report from Dr. Fazzini, he opined that Mr. Kennedy's cognitive deficits will worsen over time. Dr. Fazzini's statement is considered speculative, and contradicts Mr. Kennedy's clinical course as reported in the records of Dr. Chopra. Based upon my experience as a Board-Certified Neurologist, I have treated a large number of patients with traumatic brain injury whose associated cognitive impairments have either remained stable or improved with time. This is consistent with the aforementioned records from Dr. Chopra in which Mr. Kennedy stated that his memory was improving. Based upon the records currently available, if Mr. Kennedy has any worsening of his cognition, this is likely related to alternative factors such as worsening depression or anxiety and/or medications. For example, according to the 04/22/21 report of Dr. Chopra, Mr. Kennedy was utilizing zolpidem. This medication is associated with cognitive impairment. Additionally,

according to the 07/16/19 report from P.A.-C. Malik, Mr. Kennedy was utilizing Norco and cyclobenzaprine, both of which are associated with cognitive difficulties.

According to the 11/22/21 report of Deborah Pearlman, she proposed multiple future care needs. Based upon my experience, I have the following comments on her proposed Life Care Plan. First, Dr. Pearlman proposed six follow-up neurology appointments per year through lifetime. In contrast, a reasonable follow-up frequency would be two to three times per year. Next, Ms. Pearlman proposed a Personal Care Attendant 24 hours per day, 365 days per year through his lifetime. There is no documentation in his medical records that he has required such care, and therefore any future needs for a Personal Care Attendant is considered speculative from a neurological standpoint. Ms. Pearlman opined that Mr. Kennedy will require a brain MRI on an annual basis through life expectancy. On the other hand, since they would not be expected to yield any additional benefit to his care, Mr. Kennedy is not anticipated to require any future brain MRI studies with regard to the subject accident. Ms. Pearlman also opined that Mr. Kennedy will require two EEG studies over his lifetime. Mr. Kennedy already had one EEG performed in the office of Dr. Chopra that was normal. Since he has not experienced any seizures, he is not anticipated to require any future EEG studies with regard to the subject accident. Ms. Pearlman stated that Mr. Kennedy will require the medication Aricept 10 mg per day through lifetime. Since this medication is indicated for patients with Alzheimer's disease, its use for traumatic brain injury would be considered off label. Furthermore, Aricept is not a medication I use in my practice for patients with traumatic brain injury. Ms. Pearlman also recommended Botox injections into the head and neck every three months for lifetime, but did not state the reason for such injections. Ms. Pearlman also recommended the medications Aimovig and Ubrelvy for headaches. These medications are indicated for migraine headaches, and Mr. Kennedy has neither been diagnosed nor treated for migraines by either of his neurologists.

The above statements are made within a reasonable degree of medical probability. Should further documents become available for my review, and/or I am asked to perform an independent medical evaluation, I reserve the right to amend/supplement my opinions as stated above.

Respectfully submitted,

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David L. Ginsburg, M.D.
Diplomate, American Board of Psychiatry & Neurology
Diplomate, American Board of Electrodiagnostic Medicine

DLG:cak

DD: 01/14/22
DT: 01/14/22

cc: Michael Lowry, Esq.
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Exhibit ‘2’

DISTRICT COURT

CLARK COUNTY, NEVADA

DOUGLAS J. KENNEDY, an individual; and LORI KENNEDY, an individual,

Plaintiffs,

vs.

CASE NO. A-20-820254-C

GABRIEL L. MARTINEZ, an individual; UNIVERSAL PROTECTION SERVICES, LLC, d/b/a ALLIED UNIVERSAL SECURITY SERVICES, a Foreign Limited Liability Company, DOE Family Members 1-10; DOE Individuals 11-20; and ROE Corporations 21-30, inclusive,

Defendants.

_____/

VIDEOTAPED VIDEO CONFERENCE DEPOSITION

OF DAVID L. GINSBURG, M.D.

on Tuesday, February 15, 2022

at 1:30 p.m.

By a Certified Court Reporter

Las Vegas, Nevada

Reported remotely by: Denise R. Kelly, CCR #252, RPR

Oasis Job No. 47986

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EXHIBITS

INFORMATION TO BE SUPPLIED

None

LAS VEGAS, NEVADA, TUESDAY, FEBRUARY 15, 2022, 1:30 P.M.

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THE VIDEOGRAPHER: Good afternoon.

Today is Tuesday, February 15th, 2022. We are on the record at approximately 1:30 p.m. This begins the recorded video conference deposition of David L. Ginsburg, M.D., in the matter of Douglas J. Kennedy, an individual, and Lori Kennedy, an individual, plaintiff, versus Gabriel Martinez, an individual, et al., defendants.

My name is Elizabeth Vinson, court videographer with Las Vegas Legal Video. The court reporter is Denise Kelly, CCR No. 252 with Oasis Reporting Services.

This deposition is requested by the attorneys for the plaintiff.

Counsel must agree to the remote manner by which this proceeding is being transcribed. Please state your appearances and consent to the remote arrangement for the record, then the court reporter will administer the oath.

MR. TROIANO: This is Joseph Troiano for the plaintiffs.

I consent.

MR. RICHARDSON: Chris Richardson for the defendants.

I consent.

THE VIDEOGRAPHER: Thank you, Counsel.

DAVID L. GINSBURG, M.D.,
having been first duly sworn, was
examined and testified as follows:

COURT REPORTER: Counsel may proceed.

EXAMINATION

BY MR. TROIANO:

Q. Doctor, can you please state and spell your name.

A. David Ginsburg, G-i-n-s-b-u-r-g.

Q. Dr. Ginsburg, it's my understanding that you have authored one report in this case; is that accurate?

A. That's correct.

Q. And the date of your report is January 14th, 2022; is that accurate?

A. That's correct.

Q. Have you been asked to author any additional reports?

A. No.
Q. Are you currently working on drafting an additional report?
A. No.
MR. TROIANO: What we will do is, I guess after the deposition, we could or you can email a copy of your rebuttal report to the court reporter. We will mark that as Exhibit No. 1.
(Deposition Exhibit No. 1 identified.)
MR. TROIANO: Exhibit No. 2 will be a current CV.
(Deposition Exhibit 2 identified.)
MR. TROIANO: And Exhibit No. 3 will be current a fee schedule.
(Deposition Exhibit 3 identified.)
MR. TROIANO: Exhibit No. 4 will be a current testimony list.
(Deposition Exhibit 4 identified.)
BY MR. TROIANO:
Q. Is that okay?
A. Sure. I can have my assistant email that to the court reporter.
Can I get the court reporter's email, please.
COURT REPORTER: It's Denise, D-e-n-i-s-e,

Kelly, K-e-l-l-y, 26@gmail.com.

THE WITNESS: Okay. Thank you.

BY MR. TROIANO:

Q. Dr. Ginsburg, we will talk about this later, but I provided your report to Dr. Fazzini to offer a rebuttal report to yours. Have you seen that?

A. No.

Q. Does your report contain a complete statement of all the opinions that you will express in this case?

A. I believe so.

Q. Does your report set forth a complete statement of all the bases and reasons for each of your opinions?

A. I believe so.

Q. Does your report set forth a complete statement of all the data or other information you considered or relied upon in forming your opinions?

A. Yes.

Q. Does your report identify all documents you were provided for review?

A. Yes, it does.

Q. Did you review the body cam footage from NHP?

A. Let's see. Yes, I did review that.

Q. When were you retained?
A. I believe it was sometime in the early part of January of this year.
Q. Do you recall how you were retained? I mean was it initially through an email? Through a letter? Through a phone call?
A. I believe it was through an email or a phone call, but I don't recall specifically.
Q. What were you asked to do?
A. Review the records and produce a rebuttal report.
Q. So you understood that the scope of your retention was to provide rebuttal opinions in this case?
A. Yes.
Q. Were you asked to offer an opinion as to whether my client sustained a traumatic brain injury as a result of the November 5th, 2018 motor vehicle accident?
A. I don't recall.
Q. In your report did you offer an opinion as to whether or not my client sustained a traumatic brain injury as a result of the November 5th, 2018 motor vehicle accident?
A. Yes, I did.

Q. And your opinion is that he in fact did sustain a traumatic brain injury as a result of the November 5th, 2018 motor vehicle accident; correct?
A. Yes. Correct.
Q. Were you asked to provide the basis for the opinions as to whether or not my client sustained a traumatic brain jury as a result of the November 5th, 2018 motor vehicle accident?
A. I don't recall.
Q. Were you asked to review the MRI studies and to offer opinions as to whether or not they indicate evidence of traumatic brain injury?
A. I did request to see the MRI, MRI images. I haven't received all of them. I only received one of them.
Q. In your report did you offer an opinion regarding whether the MRI reports indicate evidence of traumatic brain injury?
A. I believe I did discuss that in my report.
Q. And I think you just said you have now reviewed some MRI images?
A. I reviewed the 12/8/18 MRI images from Pueblo Medical Imaging. I requested the other ones, but I have not received those as of yet.
Q. MRI studies is objective evidence;

correct?
A. I'm sorry?
Q. You would characterize MRI studies to be objective evidence?
A. In this case, yes.
Q. Were you asked to review records regarding my client's neurological examinations and to make an opinion as to whether those examinations revealed objective abnormalities?
A. Yes.
Q. In your report did you offer an opinion regarding whether my client's neurological examination revealed objective abnormalities?
A. I'm sorry. Did I put that in my report? Is that your question?
Q. Yes. I mean the first question is were you asked to do that? And the question is did you in fact do that?
A. You know, I was asked to prepare a rebuttal report. I don't know if I was asked to perform that specific activity in the report.
Q. Did my client's neurological examinations reveal objective abnormalities?
A. Excuse me. I'm just looking through my report here.

There was some reports that stated his balance was impaired.

Q. Balance impairment is that an objective abnormality?

A. Yes.

Q. Balance impairment is an objective abnormality -- strike that.

In your rebuttal report after you wrote To Whom It May Concern, you wrote:

"I reviewed the following additional documents on the above-named claimant."

Is that just a typo?

A. Yes. I'm sorry, that is a typo.

Q. In your report you reviewed records from Dr. Michael Trainor; correct?

A. Correct.

Q. Dr. Michael Trainor is an orthopedic surgeon; correct?

A. That's my understanding.

Q. You are not an orthopedic surgeon; correct?

A. Correct.

Q. In your report you did not offer any opinions regarding my client's orthopedic injuries; correct?

A. Correct.
Q. At trial you will not offer any opinions regarding my client's orthopedic injuries; correct?
A. Correct.
Q. In your report you reviewed a report from Dr. Norton Roitman; correct?
A. Correct.
Q. Dr. Roitman is a psychiatrist; correct?
A. Well, unfortunately he recently passed away. So he was a psychiatrist, that's correct.
Q. Did you work with him?
A. I have known Dr. Roitman for several years.
Q. Yeah, I just learned that preparing for today.
You are not a psychiatrist; correct?
A. Correct.
Q. In your report you do not offer any opinions to rebut those provided by Dr. Roitman; correct?
A. Correct.
Q. In your report you will not -- sorry. At trial you will not provide any opinions to rebut those provided by Dr. Roitman; correct?
A. Correct.

Q. In Dr. Roitman's report he offered the opinion, or quite a few opinions, but two of them was that he related depression and anxiety as a result of the motor vehicle accident. Is that your understanding of his report?
A. Yes.
Q. Did you review any records that predated this accident?
A. Not to my knowledge.
Q. So is it fair to say that you have no -- there is no evidentiary basis for the opinion that my client suffered from depression and/or anxiety prior to the accident; is that a fair statement?
A. I have no knowledge of that.
Q. Dr. Janet Baumann is a neuropsychologist; correct?
A. Yes.
Q. You are not a neuropsychologist; correct?
A. That's correct.
Q. Defense identified Dr. Staci Ross who is also a neuropsychologist. Did you have any conversations with Dr. Staci Ross regarding this case?
A. No.
Q. You know who she is though; right?
A. I do.

Q. Were you aware that she was identified as an expert by the defense?
A. No.
Q. In your report you did not offer any opinions to rebut those provided by Dr. Baumann; correct?
A. Correct.
Q. At trial you will not offer any opinions to rebut those provided by Dr. Baumann; correct?
A. Correct.
Q. In your report you reviewed records from Dr. Chopra; correct?
A. Correct.
Q. Like yourself, Dr. Chopra is a neurologist?
A. Correct.
Q. In your report you did not offer any opinions to rebut those provided by Dr. Chopra; correct?
A. That's correct.
Q. At trial you will not provide any opinions to rebut those provided by Dr. Chopra; correct?
A. That is my understanding.
Q. You do not have any criticisms of the care Dr. Chopra provided to Mr. Kennedy; correct?

A. Correct.
Q. In your report you also reviewed reports and records from Dr. Fazzini; correct?
A. Correct.
Q. And, again, Dr. Fazzini, like Dr. Chopra and yourself, he is a neurologist; correct?
A. That is correct.
Q. In your report you did not offer any criticisms of the care Dr. Fazzini has provided to Mr. Kennedy; correct?
A. That is correct.
Q. Unlike yourself, Dr. Chopra -- I'm sorry. Unlike yourself, Drs. Chopra and Fazzini have both treated and examined my client; correct?
A. That is correct.
Q. You have never examined Mr. Kennedy; correct?
A. That is correct.
Q. When you were retained by defense counsel in early January of this year, did you ask them for the opportunity to physically examine and do an IME of Mr. Kennedy?
A. I generally prefer to examine the individual. In this case I don't think there was sufficient time to arrange that.

Q. It's your preference to perform that type of examination though prior to authoring one of these reports?
A. That is my preference.
Q. And there is -- strike that.
In your report you reviewed a report authored by Dr. Gabriel Bernard (sic); correct?
A. I'm sorry. What was the name?
Q. Gabriel Bernard, B-e-r-n-a-r-d. He is a doctor from California.
A. I have Dr. -- let's see. Oh, yes, Barnard. Yes, I'm sorry.
Q. I misspelled it. B-a-r-n-a-r-d. Thank you.
Dr. Barnard is a physical medicine and rehabilitation doctor; correct?
A. That's my understanding.
Q. You are not a physical medicine and rehabilitation doctor; correct?
A. Correct.
Q. In your report you are not offering opinions to rebut those provided by Dr. Barnard; correct?
A. Correct.
Q. At trial you will not provide any opinions

to rebut those provided by Dr. Barnard; correct?
A. Correct.
Q. According to Dr. Barnard's report, he physically examined Mr. Kennedy on June 22nd, 2021; correct?
A. Correct.
Q. In your report you do not offer any opinions that dispute the findings made by Dr. Barnard as a result of his physical examination of Mr. Kennedy; correct?
A. Correct.
Q. In your report you did not offer any opinions to dispute Dr. Barnard's opinion regarding Mr. Kennedy's post-injury functional status; correct?
A. Correct.
Q. In your report you did not offer any opinions to dispute Dr. Barnard's findings after his musculoskeletal examination of Mr. Kennedy; correct?
A. Correct.
Q. In your report you did not offer any opinions to dispute Dr. Barnard's findings after his neurological examination of Mr. Kennedy; correct?
A. Correct.
Q. You are familiar with Balance Error Scoring System; correct?

A. With what? I'm sorry.
Q. The Balance Error Scoring System. I guess the acronym is BESS, B-E-S-S.
A. I don't use that in my practice.
Q. Are you familiar with it?
A. No.
Q. According to Dr. Barnard, he states:
"Given his memory impairment and balance disabilities, Mr. Kennedy is unlikely safe at home by himself and he will require in-home care with ADLs and IADLs."
In your report you do not rebut the doctor's opinion that Dr. Kennedy is unlikely safe at home by himself given his memory and balance disabilities; correct?
A. Did I address that in my report? No.
Q. I doubt you agree with Dr. Barnard's opinion that given Mr. Kennedy's memory impairment and balance disabilities he is unlikely safe at home by himself.
You agree with that statement; correct?
A. Well, the thing is his memory actually got better according to records from Dr. Chopra.
It also appears that his balance improved. There was a record from Dr. Trainor in April of '19

stating he was not having balance problems. So I think those issues did improve.

Q. By April of 2019, and based upon the record from Dr. Trainor, you believe that Mr. Kennedy's balance improved?

A. I believe that his balance did improve at that point.

Q. I mean how do you account for the numerous records after the April 2019 visit with Dr. Trainor that discuss the balance issues that Mr. Kennedy has? How do you account for that?

A. Well, you know, he was on various medications that could also affect his balance, Norco, cyclobenzaprine, zolpidem. These could also affect his balance.

Q. Do you know what medications he was on during his physical examination with Dr. Barnard back in June of last year?

A. At that time, I don't know at that particular time, no. But these were medicines he was utilizing throughout his treatment.

Q. According to Dr. Barnard's report, he was on Flomax, MiraLAX, vitamins, palmetto, and melatonin. That's according to Dr. Barnard's report. Do you understand what I'm telling you?

A. Yes, I do.
Q. And do you have an opinion as to whether or not either of those vitamins, or supplements I guess, and the medications would affect Mr. Kennedy's balance?
A. Probably not.
Q. We will talk more about that opinion later.
In your report you do not rebut Dr. Barnard's opinion that given Mr. Kennedy's memory impairment and balance disabilities he will require in-home care with ADLs and IADLs; correct?
A. Did I discuss that in my report? I did not. But, again, his memory did improve throughout the records reported by Dr. Chopra. And the medications he was taking could also affect his memory. And he was also, I don't know if I discussed this in my report, but he was septic. He developed sepsis, and sepsis could affect one's cognition.
Q. Did you offer that opinion in your report?
A. I documented he had bacteremia. I don't think I mentioned this in my discussion section.
Q. The TBI is an injury that disrupts the normal function of the brain?
A. That's correct.

Q. TBI can be caused by a bump, blow, or jolt to the head; correct?
A. Correct.
Q. The severity of a TBI can be classified as mild, moderate, or severe on the basis of clinical presentation of a patient's neurologic signs and symptoms; correct?
A. Many people categorize TBI into those categories, that's correct.
Q. Do you agree with the following statement: The symptoms of TBI vary from one person to another. And although some symptoms might resolve completely, others especially as a result of a moderate and severe TBI can result in symptoms that persist resulting in partial or permanent disability?
Do you agree with that statement?
A. Yes. I would agree with that.
Q. TBI is recognized more as a disease process rather than a discrete event because of the potential it presents for nonreversible and chronic health effects; correct?
A. I don't think I've heard that stated before. I'm not, I'm not sure if I agree with that.
Q. Do you disagree with it?
A. Well, can you repeat the statement,

please?

Q. Sure.

TBI is being recognized more as a disease process rather than a discrete event because of the potential it presents for nonreversible and chronic health effects.

A. I don't know that I agree with that. I think you're talking about the same event.

Q. A TBI can adversely affect a person's quality of life in numerous ways, including cognitive, behavioral/emotional, and physical effects that affect impersonal -- I'm sorry, interpersonal, social, and occupational function.

Do you agree with that?

A. Yes.

Q. In addition to the impact of the TBI on an individual, TBIs can negatively impact families.

Do you agree with that?

A. Yes.

Q. Adverse family effects include caregiver stress, depression, and deterioration of family functioning after TBI; correct?

A. Yes.

Q. A TBI can result in health effects that vary in intensity, length, and clinical manifestation;

correct?
A. Yes.
Q. These health effects can persist and contribute to potential impairment, functional limitation, disability, and reduced quality of life; correct?
A. Correct.
Q. Cognitive impairment is the hallmark system -- strike that.
Cognitive impairment is a hallmark symptom of TBI; correct?
A. It's certainly one symptom.
Q. What would you characterize? What symptom would be the hallmark symptom of a TBI for you?
A. You know, I'm not going to state there is one particular hallmark symptom. Somebody could have a variety of symptoms related to a TBI.
Q. TBI can affect behavior, emotion, and motor function; correct?
A. Yes.
Q. Cognitive disturbances can lead to difficulties with memory, attention, learning, and coordination; correct?
A. Correct.
Q. Signs and symptoms of TBI include

headaches, fatigue, and sleep disturbances; correct?
A. They can, yes.
Q. For the records you reviewed, you saw where Mr. Kennedy complained of headaches, fatigue, and sleep disturbances; correct?
A. Yes.
Q. Secondary neurologic disorders, such as new disorders and posttraumatic epilepsy can occur following TBI; correct?
A. They can.
Q. Scientific literature suggests that TBI increases the risk of neurodegenerative disorders such as dementia; correct?
A. The literature is mixed in that regard.
Q. TBI can appear as focal or diffuse injury; right?
A. Correct.
Q. Focal injury results when bleeding, bruising, or a penetrating injury is isolated to a portion of the brain; correct?
A. Correct.
Q. A diffuse injury occurs when brain tissue suffers widespread damage often resulting from acceleration and deceleration forces; correct?
A. Correct.

Q. Impact of the head against another object can cause focal brain injury under the skull at the site of the impact and at the site on the opposite side of the head; correct?
A. Correct.
Q. The most common form of TBI is caused by a combination of impact and acceleration/deceleration forces, such as those occurring in high-speed motor vehicle crashes; correct?
A. I don't know the answer to that.
Q. Do you disagree with that?
A. I don't -- I neither agree nor disagree. I don't know the answer to that.
Q. What is the most common cause for a TBI in your opinion?
A. You know, I see TBI from a variety of different causes. I see them from motor vehicle accidents. I see them from slip-and-fall injuries. I see them from gunshot wounds. There is a variety of causes of TBI.
Q. Have you ever seen the CDC's -- the CDC's statistics on the causes of TBI?
A. I may have. I don't recall specifically.
Q. Certain regions of the brain are particularly vulnerable to the external forces that

cause TBI; correct?
A. Yes.
Q. External forces that initiate brain movement can stretch and disrupt the integrity of brain tissue and cause the brain to impact bony protuberances within the skull; correct?
A. Correct.
Q. TBIs can lead to a spectrum of secondary conditions that might result in long-term impairment; including functional limitation, disability, and reduced quality of life; correct?
A. Correct.
Q. Psychological and neurologic disorders can develop following TBI; correct?
A. Correct.
Q. Depression is a psychological disorder that can develop following TBI; correct?
A. Correct.
Q. PTSD is a psychological disorder that can develop following TBI; correct?
A. That's out of my scope of practice.
Q. In-home attendant care for persons with catastrophic injuries can be a desirable alternative to long-term placement in an institution such as a nursing home or group home. Do you agree with that

statement?
A. In some cases.
Q. In-home internet -- sorry.
In-home attendant care can enhance rehabilitation outcomes and quality of life for the injured person; correct?
A. I think that's true in some cases.
Q. Looking at your report, this is on page 15.
A. Okay.
Q. That top paragraph in the middle of it where:
"Mr. Kennedy reported worsening short-term memory. Dr. Chopra ordered a follow-up brain MRI that was performed on 6/12/19 at SimonMed."
Do you see that part?
A. I do.
Q. Is that the MRI that you were talking about earlier that you had recently reviewed?
A. No. I had not seen the SimonMed MRI.
Q. But if you skip down I guess a few lines:
"According to the interpreting radiologist, these may represent microhemorrhages secondary to trauma versus

hypertension. Since Mr. Kennedy has no history of hypertension, trauma would appear to be more likely etiology."

Did I read that correctly?

A. Yes.

Q. That's, I guess, one of your opinions to support your other opinion that Mr. Kennedy sustained a traumatic brain injury because of this accident?

A. That's correct.

Q. And, again, that MRI report that you reviewed is objective evidence to support that?

A. Yes.

Q. Can you go down to the third paragraph. About six lines down, it says:

"According to the 8/2/21 report from Dr. Fazzini..."

Do you see that?

A. Yes.

Q. "According to the 8/2/21 report from Dr. Fazzini, he opined that Mr. Kennedy's cognitive deficits will worsen over time. Dr. Fazzini's statement is considered speculative, and contradicts Mr. Kennedy's clinical course as reported in the records of Dr. Chopra."

Do you see that?
A. Yes.
Q. And the records from Dr. Chopra, I think you discussed them previously, you're talking about the ones from October 31st, 2019?
A. Well, he had several different reports.
Q. Which reports are you specifically referring to in that, when you're making that opinion?
A. Well, 3/29/21 his memory is better and improving. His headaches are less often and intense.
4/22/21 patient states he is fine and nothing is worse. Memory is better. Headaches are still there.
11/29/18 patient states that memory problems are somewhat improved.
1/10/19 patient states that memory problems are somewhat improved.
Those would be the reports from Dr. Chopra.
Q. Excuse me if I'm incorrect, but the reports from Chopra that you mentioned is from Dr. Kennedy's self-reporting of his impairments improving?
A. Yes, I believe so.
Q. Is there any, I guess, objective

evidence -- well, you would consider findings from a physical examination to be objective evidence, right?

A. Objective evidence, yes.

Q. Then we talked about earlier MRIs and CT scans would also be objective evidence, right?

A. Yes. He also demonstrated some improvement on his mini mental status exam. He went from a 26 out of 30 to 28 out of 30 on a couple of occasions.

Q. So that would be objective evidence outside of his self-reporting that you believe he's improved from the traumatic brain injury caused by the accident?

A. That would be one piece of evidence, that's correct.

He also scored a 29 out of 30.

Q. You have a statement here in that same paragraph on page 15:

"Based upon my experience as a board-certified neurologist, I have treated a large number of patients with traumatic brain injury whose associated cognitive impairments have either remained stable or improved with time."

Do you see that?

A. I do.
Q. Tell me about your practice. I understand that you are a professor; is that correct?
A. That's correct.
Q. Do you also treat patients?
A. That's what I do. That's my primary role is to see patients in my clinic five days a week.
Q. I'm sorry. Is your clinic at 851 South Rampart Boulevard?
A. No. My practice is part of Roseman University. It's the Roseman Medical Group. That's where I see my patients.
Q. You teach there and you treat patients there?
A. I teach residents that rotate with me in the clinic.
Q. Would you consider your practice to be busy? I mean can you give me, I guess, some explanation as to how often you treat patients versus, you know, you're in the setting of teaching?
A. Sure. I mean like I said, I see patients Monday through Friday. I see new patients, follow-up patients. I do some procedures on patients, EMGs, nerve conduction studies. I do botulinum toxin injections.

Again, when I do my teaching it's in the clinical setting here in the office.

Q. Going back to that statement about how you have -- let me just read it:

"I have treated a large number of patients with traumatic brain injury whose associated cognitive impairments have either remained stable or improved with time."

It's also true that for those traumatic brain injury patients that you've seen their cognitive impairments worsen over time; correct?

A. Well, you know, I think that can certainly happen; but when that happens it's typically related to some other condition that may be going on.

Q. Like what?

A. Well, if they have another injury. If they have some metabolic problem, a tumor, aneurysm rupture. They can develop dementia sometimes as can other people.

Q. In this case, and you talk about it, I guess, in the second -- if you skip a sentence, you say:

"Based upon the records currently available, if Mr. Kennedy has any worsening of his cognition, this is likely related to

alternative factors such as worsening depression or anxiety and/or medications."

Do you see that?

A. I do.

Q. I think we talked about it before, depression and anxiety, you saw the reports, the report from Dr. Roitman, he believes those are associated with this accident; fair?

A. That's my understanding, correct.

Q. The medications, I think you kind of talk about them next. You are not familiar with what Mr. Kennedy is currently taking, are you?

A. Right now, no.

Q. For example, I want to talk about some of medications you mention. Zolpidem, z-o-l-p-i-d-e-m, that's a medication that treats insomnia; is that fair?

A. That's correct.

Q. And, again, you didn't review any records that showed that Mr. Kennedy was prescribed zolpidem prior to this accident; fair?

A. I didn't see any records prior to this accident.

Q. You talk about 7/16/19 where Dr. -- or I'm sorry, P.A.-C Malik, M-i-l-i-k (sic), prescribed

Mr. Kennedy with Norco. And Norco is a pain medicine, right?

A. It's a narcotic, a hydrocodone.

Q. The records you reviewed -- I'm sorry, let me be more clear.

The records you reviewed show he was prescribed Norco in July of 2019; is that accurate?

A. Well, he was taking the medication at that time.

Q. Do the records show that he was prescribed Norco in 2020 or 2021 or this year?

A. I don't recall.

Q. Another prescription you mention is cyclobenzaprine?

A. Correct.

Q. C-y-c-l-o-b-e-n-z-a-p-r-i-n-e. And that's a medication that treats muscle spasms; is that fair?

A. That's correct.

Q. And that medicine was prescribed to him at the same time that Norco was prescribed in July of 2019; is that fair?

A. I don't recall when it was prescribed, but he was utilizing it at the same time.

Q. In July of 2019?

A. Correct.

Q. Do you have records you reviewed to show he was utilizing Norco or cyclobenzaprine anytime after July of 2019?

A. I don't recall offhand. I would have to go through the records again.

Q. Give me one second. I'm going to try to make this easier for us.

I'm trying to pull up Dr. Fazzini's rebuttal report, because I think he makes it simple for me as to the dispute over the life care plans. Just give me a second.

Dr. Ginsburg, on your screen do you see the document with Dr. Fazzini's name at the top?

A. I do.

Q. So this is the rebuttal report he prepared after I gave him a copy of your report. And he offered some opinions, which I'll ask you some questions on.

A. Again, I've not had the opportunity to review this report.

Q. Okay. I understand that. But for the purpose of this next line of questioning, just read to yourself 1 through 7 and let me know if that fairly, I guess, captures the dispute or your dispute with the life care plan, these seven areas.

A. (Deponent complies.)
It looks like it does, yes.
Q. Obviously the big point of contention is the personal care attendant.
Let's talk about the medication first. The first one is, how do you -- is it Aricept?
A. Aricept, yes.
Q. A-r-i-c-e-p-t. What is that?
A. That's a medication that's indicated for patients with Alzheimer's disease.
Q. And then in your report you say that's not a medication that you use in your practice for your patients with traumatic brain injury; is that accurate?
A. That's correct.
Q. I mean are you criticizing Dr. Fazzini for using that medication or are you just saying, hey, I understand why he is using it, but I don't use it for my patients?
A. Well, you know, I've seen it used in my patients. And I personally haven't found it to be helpful in TBI patients. So I don't use it in my practice.
Q. The next one is Botox injections for headaches. Do you yourself use Botox injections to

treat headaches for TBI patients?

A. I use it for migraines. From what I recall, there was no specific indications why he was recommending Botox injections. I don't even recall seeing those were for headaches.

Q. And the next, I guess the answer to my next question, did you see no records indicating that Mr. Kennedy had migraine headaches? Is that why you are saying no medicine from migraine headaches?

A. I don't recall anybody diagnosing him with migraines.

Q. Do you prescribe medication to TBI patients that suffer headaches?

A. Yes, I do.

Q. What medication would you prescribe to TBI patients that have headaches?

A. Well, it's a very individualized decision. And I try to tailor the medications I use to perhaps other medical problems the patient may be having.

Q. EEGs. What is your opinion on that? Does Douglas Kennedy need any more EEGs or what is your opinion?

A. I don't believe he needs any future EEGs based on this accident. He did have one EEG that was normal. He hasn't had any seizures. I don't see a

need for any future EEGs based on what I've seen.
Q. Regarding the MRIs of the brain, Dr. Fazzini is saying yearly MRIs of the brain. Is it your opinion that he does not need any MRIs of the brain, at least as a result of this accident? In your mind what would indicate a reason for the cause of an MRI following, if it's like today, a worsening of a condition or anything like that?
A. Well, if he was having new symptoms for whatever reason, that might be a reason to get another MRI.
Q. The neurology follow-ups, Dr. Fazzini is saying six a year. Do you think two to three is fair?
A. Yes. Based on my experience, two to three would be reasonable.
Q. Would you have any problem with Dr. -- or I'm sorry, Mr. Kennedy doing six a year?
A. I just don't think it's necessary based on my history of treating patients with TBI.
Q. But it is -- you do believe that as a result of this accident it is reasonable and necessary that Mr. Kennedy has two to three neurological -- or I'm sorry, visits with a neurologist two to three times a year; is that fair?
A. I think that would be reasonable.

Q. Let's talk about, I guess, the big point of contention regarding the attendant care. Is that okay?

A. Sure.

Q. In your report, this is on page 16, you say:

"There is no documentation in his medical records that he has required such care, and therefore any future needs for a personal care attendant is considered speculative from a neurological standpoint."

That is your opinion; correct?

A. That is correct.

Q. When -- hold on a second.

(Brief interruption in the proceedings.)

BY MR. TROIANO:

Q. Sorry about that.

Do you yourself refer patients who suffered a traumatic brain injury for a personal care attendant?

A. You know it depends on the situation. I'm sure I have in the past for certain patients.

Q. What type of symptoms would you be looking for that would cause you to make that recommendation for a personal care attendant?

A. Well, I think somebody that couldn't perform his activities of daily living independently. Somebody with severe cognitive impairment, that would be another reason.

Q. So one reason would be a person that has difficulties performing ADLs?

A. Correct.

Q. What would be an example of a significant -- did you say significant cognitive impairment that would cause you --

A. Correct.

Q. -- to recommend?

What would -- what is a significant cognitive impairment?

A. Well, I think that's a very broad category. There is not one specific item in there. Somebody that's having difficulties functioning from a cognitive standpoint on a daily basis, you know, on the basis of their own cognitive abilities.

Q. Would, I guess, memory issues or memory loss be one example of a cognitive impairment?

A. Yes. If it's significant or severe memory loss, that could be a reason, yes.

Q. We talked earlier about Mr. Barnard's report where he performed a physical examination and

made certain findings that you didn't offer any opinions on. And quite a few of those findings talk about difficulty walking, memory loss, poor balance upon the neurological examination, poor visual convergence is what he found. Those would all be reasons to provide attendant care for a person; right?

A. I understand what you're saying; but like we discussed before, Dr. Chopra's records had indicated he improved. His memory improved. His balance and dizziness got better.

So based on those records, it doesn't seem like he would need it. So like I said in my report, if he is getting worse for some reason, it's related to alternative factors.

Q. I think you and I are on the same page. Tell me if I'm wrong, but it's your opinion that Mr. Kennedy suffered a traumatic brain injury as a result of the November 2018 crash; however, it's your opinion that what impairments he had and disabilities he had improved based on your review of records by -- sometime in 2019; is that fair?

A. Yes, it is.

Q. So what you believe he was reporting, for instance in June of 2021 to Dr. Barnard at his physical examination, would be this is not related to

the traumatic injury caused by the car accident and must be something else?

A. Correct.

Q. Okay. So taking away a causation opinion, meaning, hey, in June of 2021 these conditions are related to the November 2018 accident. Taking that away, would you agree though, based upon how he presented to Dr. Barnard in June of 2021, these would be reasons to cause a person to have a personal care attendant?

A. They could be. So based on his subjective reporting, he is saying he has worsening memory, stuttering, difficulty completing activities of daily living because of major balance and cognitive issues. He says he has significant difficulty with concentration, tired in the evenings, his wife works at home. But on exam he doesn't really document any objective abnormalities. He says he has good judgment, normal mood and affect, he's oriented to time, place, and person.

Q. According to Dr. Barnard's report on page 5, I guess during the physical examination in the musculoskeletal section for gait, he writes:

"Markedly poor balance using signal point cane."

Markedly poor balance during a physical examination would be objective evidence; right?

A. Yes, it would be. But again, he is putting that under musculoskeletal exam, that's outside of my scope.

And once again, his balance had previously gotten better. So if it's getting worse, that would again seem to be related to other factors.

Q. I get that. We are on the same page. You're saying, I think it was a 2019 Chopra record say he is improving. I'm not talking about causation. I'm just talking how he presented in June of 2021, what's in -- what Dr. Barnard found during his physical examination would be indications to you that this person needs a personal care attendant. Do you understand what I'm saying?

A. Potentially. Again, he's a physiatrist, I'm not. He addresses some other issues that I don't address in my practice, particularly like musculoskeletal-type issues.

Q. In his report, Dr. Barnard's report for the neurological examination, it says:

"Cranial nerves II," that's Roman numerals, "II through VII grossly intact except poor visual convergence."

What is poor visual convergence?
A. That is difficulties directing the eyes to a near object.
Q. Is poor visual convergence an example of a cognitive impairment?
A. Well, it could be if he is not putting forth, you know, a good effort perhaps.
It could also be physiologic, but I don't recall seeing that anywhere else in his previous exams.
Q. Well, you reviewed the reports from Dr. Baumann. Did she make comments about poor effort during his neurological examination with her?
A. I don't recall. I would have to look at her report again.
I'm sorry, I'm trying to find that.
Q. That's fine. We've got time.
A. Well, it says that:
"During the test he was easily distracted. He required redirection during the test, but his motivation and effort were consistent and optimal."
That's what she says.
Q. So, again, I understand your opinion that you wouldn't relate any care -- personal care

attendant for the reasons we discussed. But talking again about the symptoms that were presented to Dr. Barnard in June of 2021, including issues with ADLs, that would be an issue that you yourself would refer a patient for a personal care attendant; fair?

A. For the symptoms he is reporting you mean?

Q. Yeah.

A. For the symptoms, yeah, potentially he would require it based on the symptoms he is reporting.

Q. So kind of to follow up on that regarding -- and obviously the dispute in the case is how much. Let me back up.

Is the need for a personal care attendant related to this incident; and if so, how much time? You understand that dispute, right?

A. Yeah. No, I do. You know, again, we've talked about this a couple of times. I think that he got better from this injury, and there are other factors that are coming into play here.

Q. What are the other factors that are coming into play?

A. Well, medications. The effective issues, depression, anxiety. Like I mentioned, he was septic also. He was hospitalized with sepsis. That could

also impair one's cognition.
Q. Medications. The medications that we discussed that were in your report, right?
A. Correct.
Q. The depression and anxiety we discussed are related to this incident, right?
A. You know, I would defer that to the psychiatrist and psychologist in the case.
Q. And then him being septic does not -- I'm sorry. That opinion is not in your report; fair?
A. That's correct.
Q. So, what about the car accident? Would that be a reason for his cognitive impairments that he is complaining of today; or is it your opinion no because of what we talked about previously he reported getting better to Dr. Chopra?
A. Well, yeah, he was getting better in the records from Dr. Chopra. So, you know, I think that issue had improved.
Q. I guess what I'm saying, are you completely rejecting the argument that his current complaints are directly related to the November 5th, 2018 accident?
A. I think they are not directly related. That's correct.

Q. I'm saying would you completely reject that opinion though?
A. If he requires 24/7 care, I don't think it's related to this accident directly.
Q. If he needs 24/7 attendant care, in your mind that would be either depression or anxiety and/or the medications he is currently on?
A. And whatever role the sepsis may have played.
Q. Do you have an opinion -- we talked about obviously the need for attendant care. Do you have an opinion regarding hours that he would need it for?
In other words, hey, I don't think he needs attendant care because of this incident; but if a jury were to find that he needed it, I don't think he needs 24 hours. I think he needs four hours. I think he needs eight. I think he needs two. Do you have an opinion on that?
A. No, I don't.
Q. Dr. Ginsburg, I think I'm done. Since I paid you for two hours, please give me a few minutes to review my records --
A. Sure.
Q. -- my notes to see if I have any questions. Just give me 10 minutes. Is that okay?

A. You got it.
THE VIDEOGRAPHER: The time is approximately 2:31 p.m., and we are going off the record.
(Recessed from 2:31 p.m. to 2:39 p.m.)
THE VIDEOGRAPHER: The time is approximately 2:39 p.m., and we are back on the record.
BY MR. TROIANO:
Q. Dr. Ginsburg is there a specific date or timeframe, I guess, of a few months where you would say that you would no longer causally relate his symptoms to the November 5th, 2018 car accident?
A. Well, again, based on Dr. Chopra's records, there was several visits where he was continuing to improve.
And then there was also a report by Dr. Trainor, I think it was April of '19, where he was not having balance problems.
Q. So is it fair -- so are you saying in or around April 2019 you believe that any symptoms or any symptoms he had were not causally related to the car accident; is that fair?
A. Umm...
Q. I guess you could say it better than I am.

I guess I am trying to figure out when we go to trial on this case, I'm going to say: Hey, this is Dr. Ginsburg. And it's his opinion after reviewing all of the medical records that treatment in or around April or June of 2019 that's probably the last time it was related to the car accident, anything beyond that is not. That's what I'm kind of looking for.

A. I understand.

Let's see. I mean certainly the first portion of 2019 he was documented as getting better. Dr. Chopra stated that. Dr. Trainor stated that. But I think that would probably be a reasonable timeframe.

Q. Is it like six months after the car accident you would think that what he was reporting was related to the accident, and after six months what he was reporting was not related?

I guess I'm looking for Dr. Trainor the date on that record that you're talking about.

A. Yeah, that date was April of '19. Let's see.

I'm trying to find that for you.

Okay. So 4/23/19 he has:

"There is no abnormalities with balance or coordination. He's neurologically intact."

That's what he says.
Q. Trainor?
A. That's what Trainor says, yeah.
Q. Do you have some dates on the records from Chopra that, I guess, correspond with that?
A. Okay. Let's see.
Well, with Chopra he is basically stating that he is improving on several different visits. 6/22/20.
Q. But in your report, specifically referring to the MRIs and objective evidence reporting TBI, you're referring to the 6/12/19 MRI; is that fair?
A. Well, he had three MRIs if I recall. The second one showed a little more than the first one did from what I recall.
Q. But I guess my question is, the three MRIs, there is 5/16/19, 6/12/19, and what were the other?
A. 12/18/18.
Q. Okay. 6/12/18, 5/16/19, and 6/12/19; fair?
A. I'm sorry. Did you say 12/18/18?
Q. Yeah. The first one is 12/18/18; right?
A. That's correct.
Q. At first -- and this is according to your

report, this study revealed -- how do you pronounce that word? Petechial?

A. Petechial.

Q. Petechial, sorry, hemorrhage within the front -- within the left frontal lobe.

Is that evidence to support a traumatic brain injury?

A. In this case I believe it is.

Q. The report, MRI report of 5/16/19 is evidence to support a traumatic brain injury, correct?

A. That MRI I think mentioned three areas of hemosiderin, which would be consistent with a TBI.

Q. The MRI report that you reviewed from 6/12/19, does that report identify findings that support the finding of a TBI?

A. Let's see. Yes. The same thing, the three areas of hemosiderin.

Q. 12/18/18 MRI, that shows positive findings of traumatic brain injury you would relate to the November 5th, 2018 accident, right?

A. Yes. I don't have an alternative explanation for that.

Q. Do you have the same answer for the May 16th, '19 accident -- or I'm sorry, MRI?

I'm sorry. Let me be more clear.

Is it your opinion that the findings from the May 16th, 2019 MRI support a traumatic brain injury caused by the November 5th, 2018 accident?

A. Yes.

Q. And the same thing about June 12th, 2019, is it your opinion that the findings from that MRI and that report you reviewed does that support the conclusion that Douglas Kennedy sustained a traumatic brain injury as a result of the November 5th, 2018 accident?

A. Yes.

Q. I don't know if waxing and waning is the correct term to use for this kind of setting. But I guess I'm trying to figure out when you treat patients on a daily basis, you have the -- well, in your experience, they'll show up one day saying they are doing terrible, show up a week later saying they are doing a lot better, and then two weeks later they say they are doing terrible. That's something that you commonly see; right?

A. That can happen. But, again, there seem to be a trend of improvement in Dr. Chopra's records.

Q. Well, I guess I'm trying to stop when he started treating with Dr. Fazzini, because Dr. Fazzini notes cognitive defects. You agree with that, his

reports and records indicate cognitive deficits; fair?
A. Well, Fazzini that was based on his subjective reporting to Dr. Fazzini. I don't believe Dr. Fazzini did any objective cognitive testing.
Q. Before I let you go, let me go back to Fazzini's report. I know you hadn't seen it. So we can talk about it a little bit, and I guess you can let me know if you don't think it's fair. If you can offer opinion, you can. And if you can't, let me know. Let me pull this up.
Do you see his report?
A. Yes. Let me...
Q. Sorry, let me pull it up.
So this is on page 1 where we had talked about with the dispute regarding the life care plan.
And then on the second page he offers some opinions to address your report.
Can you just read to yourself. And we will do this for each one, each opinion. Read it to yourself and let me know if you are able to comment on it, if you are not able to comment, just let me know.
A. Well, I mean we can take one at a time I guess and...
Q. Just let me know. We'll start with No. 1. Do you have any comments on it or do you need more

time to consider it?

A. I mean, again, I have not had a chance to look at the entire report. So I'm basically taking what you are giving me at this point.

Q. Well, I can show you. It's only really two pages, then he attaches a study.

But I guess subject to, you know, you not really having a lot of time. And I don't want to, you know, pin you down on something you don't feel comfortable in doing it.

But I think No. 1 we can talk about quickly. You are saying, I think you are saying two to three, he is saying six.

A. You know, that may be more of a difference in, you know, practice. You know practice habits or philosophy. But, you know, based on my experience, I think two to three times a year is perfectly sufficient.

Q. Okay. No. 2 he is talking about the attendant care. And you and I talked about this. It's your opinion any need for attendant care is related to some other condition not causally related to this car accident; fair?

A. That's correct.

Q. Well, except for depression and anxiety

may be causally related to the car accident, but we talked about -- never mind.

No. 3 Fazzini talks about yearly MRIs of the brain. He needs this to continue to follow the sequelae of his hemorrhage, which would include hydrocephalus.

A. I would disagree with the hydrocephalus statement. His bleeds were very very tiny, okay. He is not going to get hydrocephalus on the basis of those tiny bleeds.

Q. And he talks about increased brain atrophy. Do you have any opinion on that?

A. You know, patients can get brain atrophy with or without traumatic brain injury. I don't see how it's going to help in this case. I don't see how it's going to add to his care in any way.

Q. Then No. 4 EEGs with temporal lobe injury could be given easily to detect possible seizure activity. I think two EEGs over his lifetime are very reasonable.

Any thoughts on that?

A. Again, you know, he had a normal EEG. He's not had any seizure activity. He's what, three years out. I just don't anticipate a need for future EEGs, you know, based on what I've seen so far.

Q. And any thoughts or comments regarding opinion No. 5.

A. So, again, Aricept is a medicine that I use in my practice for patients with Alzheimer's. He doesn't have Alzheimer's. I've not found it helpful in my practice for patients with TBI. It's not a medicine I would use in this particular case. I don't think it's anything going to be helpful for him based on my experience.

Q. Any opinions regarding his opinion No. 6?

A. Botox for headache. Again, there was no specific wording in the recommendation for Botox regarding headaches. You know, I use Botox in my practice for migraine headaches. He's not been diagnosed with migraines. It would be off-label use. There are probably other medicines I would try before using Botox on him.

Q. Just a couple more topics before I get you out of here.

We had just previously talked about those three MRIs. More specifically the last one, I think it was June of 2019. June 12th, 2019. Again, that's your opinion -- or it's your opinion that the June 12th, 2019 MRI is evidence of a traumatic brain injury caused by the November 5th, 2018 motor vehicle

crash; correct?
A. Yes.
Q. Having said that, do you have an opinion as to when you would stop relating his treatment -- or I'm sorry, his cognitive deficits to the November 5th, 2018 crash?
A. I think it's going to be difficult to give you a hardline date. Like I said, there seems to be a trend throughout his course of treatment with Dr. Chopra that he was improving.
Let's see. You know he became septic around I believe it was May or June of 2019. And I think, again like we talked about, that probably has contributed to his worsening cognition.
So I would say shortly up until that point would probably be the timeframe.
Q. Okay. But you didn't offer that opinion in your report; right?
A. No. You are right, I did not. But it's something that, you know, when I was preparing for today's deposition, I was reviewing some information and you know wanted to add that piece of information to my opinions.
Q. And just lastly before I get you out of here. We talked about this a little bit regarding

the -- I think I understand what you're saying. The need for attendant care in your opinion is not related to the brain injury caused by this accident, it instead is related to a combination or independently, septic, or him being sepsis I guess, the medications you outlined in your report, and depression and/or anxiety; is that fair?

A. That's fair.

Q. The medications that are outlined in your report, the zolpidem, Norco, and the cyclobenzaprine, do you know what the dosage was for those?

A. Not offhand. I would have to go back and find those dosages.

Q. Do you have any -- are you aware of any scientific literature that would support the opinion that these medications either combined or independently would cause the cognitive difficulties that Mr. Kennedy had at the time he was taking them?

A. They are discussed in the PDR.

Q. I'm sorry?

A. They are listed in the PDR.

Q. What is the PDR?

A. The Physician's Desk Reference. It lists each medication, indications, dosing, side effects.

Q. Oh, do you know how much you were paid for

your services?
A. I don't keep track of my billing. I have a biller that handles that.
Q. Do you know how much you charge to get retained for a case?
A. It depends on the size of the case.
Q. Were you billed -- have you billed more than $10,000 for your services so far?
A. I believe so.
Q. Is it somewhere between 10 and 15; is that fair?
A. I don't recall.
Q. Why does it cost more to depose you with video?
A. It doesn't. My new fee schedule, my latest fee schedule I don't have a distinction.
Q. Oh, then why did we -- okay.
What do you charge per hour then?
A. $2,000 an hour.
Q. Okay. Regardless of video or not?
A. Correct.
MR. TROIANO: Understood, okay.
Doctor, I appreciate your time. We are all done.
THE WITNESS: Okay.

MR. TROIANO: Chris, do you have anything?
MR. RICHARDSON: No, I don't have anything.
Thanks, Dr. Ginsburg.
THE WITNESS: Okay. Thank you.
THE VIDEOGRAPHER: (Inaudible.)
MR. RICHARDSON: Oh, you are muted.
THE VIDEOGRAPHER: Before we go off the record, opposing counsel, would you like a copy of video?
MR. RICHARDSON: I'll hold off on the video for now.
THE VIDEOGRAPHER: Absolutely.
COURT REPORTER: Would you like a copy of the transcript?
MR. RICHARDSON: Yes, please.
THE VIDEOGRAPHER: Is there anything you would like to add, Denise?
COURT REPORTER: No. Thank you very much.
THE VIDEOGRAPHER: Absolutely.
Then this concludes the recorded video conference deposition of David L. Ginsburg, M.D. on February 15th, 2022.
The original media of today's testimony will remain in the custody of Las Vegas Legal Video.

We are going off the record at approximately 2:59 p.m.

(Whereupon, the deposition concluded at 2:59 p.m.)

REPORTER'S DECLARATION

STATE OF NEVADA)
) ss
COUNTY OF CLARK)

I Denise R. Kelly, an officer of the court, Clark County, State of Nevada, do hereby declare:

That I reported the taking of the deposition of the witness, DAVID L. GINSBURG, M.D., commencing on Tuesday, February 15, 2022, at the hour of 1:30 p.m.

That prior to being examined, the witness was by me duly sworn to testify to the truth, the whole truth, and nothing but the truth.

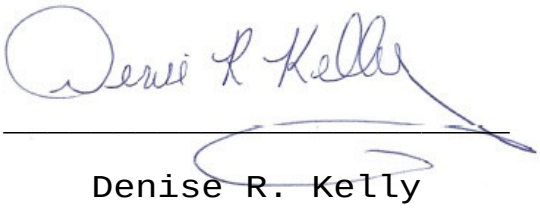
There being no request by the deponent or party to read and sign the deposition transcript, under Rule 30(e) signature is deemed waived. The original transcript and exhibits will be forwarded to Joseph Troiano, Esq.

That I thereafter transcribed my said shorthand notes into typewriting and that the typewritten transcript of said deposition is a complete, true, and accurate transcription of my said shorthand notes taken down at said time.

I further certify that I am not a relative or employee of an attorney or counsel of any of

the parties, nor a relative or employee of any attorney or counsel involved in said action, nor a person financially interested in the action.

Dated this 17th day of February, 2022.



Denise R. Kelly
CCR #252, RPR

Exhibit C

TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

DOUGLAS KENNEDY, LORI KENNEDY, Plaintiffs,	)	CASE NO. A-20-820254-C
vs.	)	DEPT. NO. XV
GABRIEL L. MARTINEZ, UNIVERSAL PROTECTION SERVICES, LLC, D/B/A ALLIED UNIVERSAL SECURITY SERVICES, Defendants.	)	**Transcript of Proceedings**

BEFORE THE HONORABLE JOE HARDY, DISTRICT COURT JUDGE

DEFENDANTS' MOTION TO STAY CASE ON ORDER SHORTENING TIME

MONDAY, MARCH 7, 2022

APPEARANCES (ALL VIA VIDEO CONFERENCE):

For the Plaintiffs: JOSEPH J. TROIANO, ESQ.

For the Defendants: MICHAEL LOWRY, ESQ.

RECORDED BY: MATTHEW YARBROUGH, DISTRICT COURT
TRANSCRIBED BY: KRISTEN LUNKWITZ

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

MONDAY, MARCH 7, 2022 AT 9:28 A.M.

THE CLERK: *Douglas Kennedy versus Gabriel Martinez* case?

MR. TROIANO: Good morning, Your Honor. Joseph Troiano for the plaintiff.

MR. LOWRY: Michael Lowry for the defendants.

THE COURT: Good morning. Bear with me.

[Pause in proceedings]

THE COURT: So, Defendants' Motion to Stay Case on Order Shortening Time. Welcome arguments, beginning with Mr. Lowry.

MR. LOWRY: That's correct, Judge.

So, what we have here in this particular Motion is, unfortunately, a fact pattern that is relatively common now where, although the Supreme Court ruled that 5.2380 is unconstitutional, they didn't answer the next question, which came up in at least six of the seven writs on that topic, which is: How does the good cause standard in Rule 35 apply to neuropsychological examinations?

The reason it is important for the neuropsychological examination is the reasons that we highlighted in the previous Motion. And I'm not here to reargue it, but the point was either we -- in order to do an examination with the condition that it be recorded, my

clients either have to locate an examiner who is willing to violate their own ethical code, which creates a wonderful fact for cross-examination or -- or, in addition to that, they also have to then do an examination that we know is going to lead to a *Hallmark* motion because all of the scientific literature indicates that when it's recorded those data are invalid. So, it creates a situation where the defendant, in that case, is unable to obtain a Rule 35 examination. Again, I'm not here to reargue it, but that's the background that we're looking at.

So, we bring this Motion to Stay because we do -- we have pursued that writ. It's very similar to the writs that were previously sought, but now we're specific to Rule 35 and what is good cause when we have this particular situation. It's a matter that's going to come up before you and some other judges relatively quickly, I imagine. And I would love to get clarification because it really does affect not only this case but a few others that I have.

Now, as -- specifically to the stay, why is a stay merited? Well, a Rule 35 examiner, and the way I read the rules, is an initial expert. So, if we proceed forward with initial expert designations, then we're going to rely on a Report and there's really no going back from that, as best as I can understand. There is not a way to designate

initial experts and then go back and do a Rule 35 examination. So, if we go forward from this point, then my clients are going to lose that opportunity to obtain a neuropsychological examination that they -- well, that the Court agreed was appropriate in this particular case.

I realize in Plaintiff's Opposition they highlight that my client was able to get a neurologist and his particular testimony, and that's great, but these are two different disciplines. You have a neuropsychological examination that is designed to evaluate the person in a clinical setting. The neurologist did not have that opportunity.

So, we believe that staying the case is merited just to keep everybody at their status quo and, then, perhaps the Supreme Court rejects the writ outright, perhaps they order briefing, who knows. But the point is if we preserve the -- if we go forward and my clients lose their ability to get a Rule 35 examination and that seems quite unfair and not consistent with what we're trying to do with a lot of these cases.

With that, I'm happy to answer any questions that you may have, Judge.

THE COURT: Thank you. In terms of a procedural posture, I guess this is not -- you know, we're a little different in this case, I think, but if you could remind me

in terms of -- you know, isn't everything else closed, other than this examination or am I overstating or misstating that?

MR. LOWRY: Your memory is correct. We had a Motion to Extend that you denied, except as to the neuropsychological examination. And that disclosure is due by -- well, I think Thursday. It's March 10th, whatever that date is. That is the only initial expert disclosure -- designation that is remaining.

THE COURT: Okay.

MR. LOWRY: And, then, plaintiff would have the opportunity to rebut that as well.

THE COURT: Okay. No, thank you very much. Thank you.

Mr. Troiano, go ahead.

MR. TROIANO: Thank you, Your Honor. Just a couple of points.

This is a case where my client had initially showed up to an examination with Dr. Staci Ross back in July. And, because of her failure to timely produce documents, we got them the day before the examination. He shows up. She has a disagreement with him regarding forms or sections of the forms that we had crossed off. Instead of calling defense counsel, or try to work it out, or instead of providing the documents well in advance, she

didn't do that. And, so, the good cause was her instructing the traumatic brain injury person to complete forms he had been instructed by his counsel not to sign.

Now, defense, all they had to do was select a different examiner and good cause would have been -- would have disappeared because, obviously, the good cause was to Dr. Staci Ross. They decided not to do that. The Discovery Commissioner found good cause because they wanted her to do it.

And, now, in light of the fact that not only did they identify a neurologist, that neurologist agrees with my experts that my client sustained a traumatic brain injury because of this crash. And, as we pointed out, and cited to his deposition transcript, he offered causation opinions. He offered opinions regarding future care. So, frankly, there is no more good cause to even have the examination.

And, lastly, the prejudice to my client is significant. Like I said, my experts and defense expert agree he has a traumatic brain injury. He has a balance issue. He's a fall risk. And to stay this case -- I think they're asking for nine months, on an issue of a neuropsych exam that's not even needed now, it shouldn't happen. We just ask the Court to deny the Motion.

And if you have any questions, I'll do my best to

answer them.

THE COURT: No questions for you. Thank you.

Mr. Lowry, any rebuttal?

MR. LOWRY: I'd just like to point out that this is the second time plaintiffs have misstated the record. We offered to select a new examiner but the plaintiffs insisted that the new examiner still be recorded. So, let's be clear about that.

Otherwise, plaintiff gets to have a neuropsychologist of his own that has examined him, that has seen him, that has been able to talk to him, but they want to deny my clients their ability under Rule 35 to have equal access to the same evidence. So, that's why we believe the stay is appropriate to see how the Appellate Courts will weigh in on this particular topic.

Thank you for your time, Judge.

THE COURT: No, thank you. The Court appreciates arguments from both sides on this and acknowledges we don't have a case directly on point, although we have ones that are, you know, guiding the Court, if you will.

The Court is going to deny Defendants' Motion to Stay for reasons set forth in Plaintiff's Opposition. But, most particularly, here all discovery is closed. The Court did permit defendants to go forward with the Rule 35 examination under certain rules and strictures. The Court

had to do that -- well, didn't have to, I guess, but the Court did that in light of -- and here's part of the reason why I'm denying the stay. You know, this kind of unique procedural posture, in terms of all of the discovery has been closed except for this, this delay and -- is a delay that's largely, not 100 percent, but largely of defendants' expert's own making -- defendant and defendants' experts' own making. There's no good cause for a stay.

The Court did grant relief to allow the identification examination to take place after the close of all other discovery. There's no good cause to grant further relief, as the Motion for Stay essentially seeks to do, which is: Hey, let's identify but don't allow the recording. Well, I already granted the -- some relief that I thought was appropriate and that has not changed. I understand the request, but, here, no good cause has been shown to grant the stay as set forth, as I've said, and as detailed in Plaintiff's Opposition as well.

So, Mr. Troiano, prepare that Order. Submit it to Mr. Lowry for review and approval.

MR. TROIANO: Thank you.

THE COURT: Thank you.

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MR. TROIANO: Have a good day.

THE COURT: Thank you.

PROCEEDING CONCLUDED AT 9:39 A.M.

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CERTIFICATION

I certify that the foregoing is a correct transcript from the audio-visual recording of the proceedings in the above-entitled matter.

AFFIRMATION

I affirm that this transcript does not contain the social security or tax identification number of any person or entity.

KRISTEN LUNKWITZ
INDEPENDENT TRANSCRIBER