

**STATE OF MICHIGAN
IN THE COURT OF APPEALS**

ALIAMA X. SCHAUMANN-BELTRAN,

Plaintiff-Appellee,

v

JOSEPH GEMMETE, M.D.,

Defendant-Appellant

Court of Appeals Case No. 347683

Washtenaw County Circuit

Court Case No. 17-132-NH

Hon. Timothy P. Connors

Consolidated With

ALIAMA X. SCHAUMANN-BELTRAN,

Plaintiff-Appellee

v

THE BOARD OF REGENTS OF THE UNIVERSITY
OF MICHIGAN, d/b/a UNIVERSITY OF MICHIGAN
HEALTH SYSTEM (now Michigan Medicine),
UNIVERSITY OF MICHIGAN MEDICAL CENTER
and C.S. MOTT CHILDREN'S HOSPITAL,

Defendants-Appellants.

Court of Appeals Case No. 347684

Court of Claims Case No. 17-38-MH

Hon. Cynthia Stephens

BRIEF OF AMICI CURIAE

**THE AMERICAN ACADEMY OF CLINICAL NEUROPSYCHOLOGY
THE NATIONAL ACADEMY OF NEUROPSYCHOLOGY
THE SOCIETY FOR CLINICAL NEUROPSYCHOLOGY OF THE
AMERICAN PSYCHOLOGICAL ASSOCIATION
THE AMERICAN BOARD OF PROFESSIONAL NEUROPSYCHOLOGY
THE MICHIGAN PSYCHOLOGICAL ASSOCIATION**

**IN SUPPORT OF DEFENDANT-APPELLANTS' APPEAL FROM THE
JANUARY 25, 2019 ORDER PERMITTING
VIDEOTAPING OF NEUROPSYCHOLOGICAL EXAM**

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STATEMENT OF QUESTION PRESENTED

Whether this Court should reverse the Trial Court’s order permitting a third party to videotape the neuropsychological examination of Plaintiff as a condition for permitting the examination to go forward?

Plaintiff-Appellee answers “no.”

Defendants-Appellants answer “yes.”

Amici Curiae answer “yes.”

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STATEMENT OF INTEREST OF AMICI CURIAE¹

This friend of the court brief is being filed by five organizations whose members have a significant interest in the important issue raised in this appeal. The Trial Court's decision to allow third-party observation through videotaping of the testing portion of a neuropsychological evaluation contravenes professional ethical standards and testing protocol, and will seriously undermine the accuracy, integrity, and usefulness of the evaluation. Thus, this Court's decision will broadly impact the practice of neuropsychology in Michigan, as well as the goals of amici in seeking to advance and promote the highest standards of practice in the conduct of neuropsychological evaluations throughout the country.

The mission of Amicus Curiae *American Academy of Clinical Neuropsychology* (AACN), the organization of professionals certified through the American Board of Clinical Neuropsychology (ABCN), is to advance the profession of clinical neuropsychology through the advocacy of outstanding educational and public policy initiatives and dedication to the following purposes:

- To promote board certification by the American Board of Clinical Neuropsychology (ABCN) as the standard for competence in the practice of clinical neuropsychology.
- To support principles, policies and practices that seek to attain the best in clinical neuropsychological patient care.
- The pursuit of excellence in psychological education, especially as it concerns the clinical neuropsychological sciences.
- To pursue high standards in the practice of clinical neuropsychology and support the credentialing activities of ABCN.

¹ Pursuant to MCR 7.212(H)(3), the Amici Curiae identified above state that neither party's counsel authored this brief in whole or in part, nor contributed money that was intended to fund the preparation or submission of the brief. Further, no person other than the amici curiae have contributed money intended to fund the preparation and submission of this brief.

- To support the quest of scientific knowledge through research in neuropsychology and related fields.
- To communicate scientific and scholarly information through continuing education, scientific meetings, and publications.

Amicus Curiae *The National Academy of Neuropsychology (NAN)* was founded in 1975 and has witnessed steady growth in its membership since its inception. The mission of the National Academy of Neuropsychology is to advance neuropsychology as a science and health profession, to promote human welfare, and to generate and disseminate knowledge of brain-behavior relationships. In order to fulfill its mission, the National Academy of Neuropsychology has established the following objectives:

- To provide information and support to the membership and the profession to enhance neuropsychological assessment, treatment, and consultation services;
- To disseminate neuropsychological knowledge through meetings, professional contacts, publications, reports, the Internet, and other forms of media;
- To promote research to improve knowledge of brain-behavior relationships;
- To improve the efficacy of outcomes in neuropsychological evaluations and interventions;
- To promote understanding of cultural and individual diversity as it applies to the study and practice of neuropsychology;
- To promote the field of neuropsychology as a career choice among students, thus supporting student participation in the Academy's activities;
- To provide education to the public that fosters healthy behavior and the prevention of neurological illness and injury; and
- To advocate in various forums on behalf of the profession, health consumers, and the promotion of neuropsychological health.

The mission of Amicus Curiae *The Society for Clinical Neuropsychology (SCN) of the American Psychological Association (APA)* is to advance the specialty of clinical neuropsychology as a science and profession and as a means of enhancing human welfare. The

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Society furthers this mission by promoting excellence in clinical practice, scientific research, and professional education in the public interest. The goals advanced by this mission are to be achieved in cooperation with the American Psychological Association, other professional organizations, and the general public.

The mission of Amicus Curiae *The American Board of Professional Neuropsychology* (**ABN**) is to establish and maintain professional standards for competence in the practice of clinical neuropsychology. ABN's objectives include validating the skills of clinical practitioners, signifying the practitioner has demonstrated competence through rigorous peer review, offering means for maintaining professional practice competence through continuing education, and providing professionals and consumers with a referral directory of ABN Diplomates.

Through its stated mission, Amicus Curiae, *The Michigan Psychological Association* (**MPA**) seeks to improve the mental health of the people of Michigan and the discipline of psychology by advancing the science, education and practice of psychology at all levels of training.

Amici and their members are alarmed at the increasing number of requests in the litigation context to allow third-party observers at neuropsychological examinations. This much-studied issue has generated several position statements and many academic papers which outline the various ways in which third-party observers detrimentally affect the validity of such examinations and conflict with a neuropsychologist's ethical responsibilities. Some of these papers are addressed below. The rule which amici curiae urge this Court to adopt, and which has been applied by other courts and tribunals, is to protect the effectiveness and integrity of neuropsychological examinations by prohibiting the presence of third-party observers at neuropsychological examinations, directly or indirectly, whether in person, through electronic, digital or video means, via recordings of any kind, through one-way mirrors, or by any other means.

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ARGUMENT

I. Third-Party Observers Should Not be Permitted at Neuropsychological Examinations Because Their Presence, Whether in Person or by Electronic or Indirect Means, Detrimentally Affects the Validity and Integrity of the Examination, Violates Ethical Obligations, and Undermines Test Security.

Clinical neuropsychology is a specialty within the field of clinical psychology dedicated to understanding the relationship between brain and behavior, particularly as applied to the diagnosis of brain disorder, assessment of cognitive and behavioral functioning, and the design of effective treatment.² A clinical neuropsychologist is an independent, professional, doctoral level psychologist who provides assessment and intervention services to people of all ages. A clinical neuropsychologist has a broad background in clinical psychology, as well as specialized training and experience in clinical neuropsychology.³ The work of a clinical neuropsychologist is accomplished, in large part, by conducting a neuropsychological evaluation.

There are several components to a neuropsychological evaluation. The neuropsychologist will gather relevant historical information by interviewing the examinee, possibly conducting a structured clinical interview, reviewing medical/other records and, with the examinee's permission, talking to family members or other knowledgeable persons about the examinee's history and symptoms. The neuropsychologist will also conduct an examination, which typically consists of the administration of standardized tests using oral questions, paper and pencil,

² The above description of clinical neuropsychology, the role of a neuropsychologist, and the neuropsychological examination comes from the website of the American Academy of Clinical Neuropsychology and can be found at <https://theaacn.org/adult-neuropsychology/> (accessed December 5, 2019).

³ A neuropsychologist's training includes: (1) completion of a doctoral degree in psychology from an accredited university training program, (2) a year-long internship in a clinically relevant area of professional psychology, (3) the equivalent of two years of additional specialized training in clinical neuropsychology, and (4) state or provincial licensure to practice psychology and/or clinical neuropsychology independently.

computers, the manipulation of materials such as blocks and puzzles, and other procedures. Depending upon the scope and intent of the evaluation, testing may focus on a wide range of cognitive functions including attention, memory, language, academic skills, reasoning and problem solving, visuospatial ability, and sensory-motor skills. The neuropsychologist may also administer tests and questionnaires concerning psychological aspects of mood, emotional style, behavior, and personality. The goal of testing is to obtain an accurate measure of the examinee's cognitive, emotional, personality, and/or adaptive functioning.⁴

After the evaluation, the clinical neuropsychologist will prepare a comprehensive report based on an analysis of the testing data and other clinical information. Depending upon the referral issue and the scope of the evaluation, the report will provide a description of the examinee's neuropsychological strengths and weaknesses, diagnostic considerations, functional capacities, and recommendations for further evaluation and/or treatment.

A. The Impact of Third-Party Observers Has Been Extensively Addressed in the Relevant Literature and in the Position Statements of Professional Organizations.

The impact of third-party observers has been discussed in great detail within the field of neuropsychology. The profession's opposition to third-party observation reflects three primary concerns: (1) the implications for test performance and the validity of test results, (2) ethical considerations, and (3) test security. These concerns are addressed in several position statements from professional organizations, credentialing boards, respected representatives in the field, and

⁴ Some or all of the testing may be administered by a neuropsychology technician, under the supervision of the clinical neuropsychologist. The amount of direct contact time required for the patient will depend on the scope of the specific evaluation; the evaluation might be a brief screening requiring as little as an hour or a comprehensive assessment requiring 12 hours or more, spread out over multiple appointments.

peer-reviewed research articles. Also instructive are excerpts from current test manuals that specifically discourage the allowance of third-party observations during testing related to lawsuits.

Representative materials are attached as Exhibits A-1 through A-19. These documents include the following:

- Exhibit A-1 National Academy of Neuropsychology, *Presence of Third Party Observers During Neuropsychological Testing: Official Statement of the National Academy of Neuropsychology*, 15(5) Archives of Clinical Neuropsychology, 379-380 (2000).
- Exhibit A-2 National Academy of Neuropsychology, *Test Security: Official Position Statement of the National Academy of Neuropsychology*, 15(5) Archives of Clinical Neuropsychology, 383-386 (2000).
- Exhibit A-3 National Academy of Neuropsychology Board of Directors, *Test Security: An Update – Official Statement of the National Academy of Neuropsychology Approved by the NAN Board of Directors*, <https://www.nanonline.org/docs/PAIC/PDFs/NANTestSecurityUpdate.pdf> (10/13/2003).
- Exhibit A-4 Lewandowski, A. et al., *Policy Statement of the American Board of Professional Neuropsychology Regarding Third Party Observation and the Recording of Psychological Test Administration in Neuropsychological Evaluations*, 23(6) Applied Neuropsychology: Adult, 391-398 (2016).
- Exhibit A-5 American Academy of Clinical Neuropsychology, *Policy Statement on the Presence of Third Party Observers in Neuropsychological Assessments*, 15(4) The Clinical Neuropsychologist, 433-439 (2001).
- Exhibit A-6 American Psychological Association, *Ethical Principles of Psychologists and Code of Conduct*, 57 The American Psychologist, 1060-1073 (2002).
- Exhibit A-7 Joint Committee on the Standards for Educational and Psychological Testing of the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education, *Standards for Educational and Psychological Testing*, Washington, DC: American Educational Research Association (2014).
- Exhibit A-8 Psychological Assessment Resources (PAR), *PAR Position Regarding the Release and/or Photocopying of Test Materials*, found at <https://www.parinc.com/Portals/0/PhotocopyingTestMaterials.pdf?ver=2017-07-13-124734-387>.

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- Exhibit A-9 Pearson Assessments, *Legal Policies*, found at <https://www.pearsonassessments.com/footer/legal-policies.html>.
- Exhibit A-10 Gavett, Lynch, and McCaffrey, *Third Party Observers: The Effect Size Is Greater Than You Might Think*, 4(2) *Journal of Forensic Neuropsychology*, 49-64 (2005).
- Exhibit A-11 Eastvold, Belanger, & Vanderploeg, *Does a Third Party Observer Affect Neuropsychological Test Performance? It Depends*, 16(3) *The Clinical Neuropsychologist*, 520-541 (2012).
- Exhibit A-12 Howe & McCaffrey, *Third Party Observation During Neuropsychological Evaluation: An Update on the Literature, Practical Advice for Practitioners, and Future Directions*, 24 *The Clinical Neuropsychologist*, 518-537 (2010).
- Exhibit A-13 McCaffrey, Fisher, Gold, & Lynch, *Presence of Third Parties During Neuropsychological Evaluations: Who is Evaluating Whom?* 10(4) *The Clinical Neuropsychologist*, 10 (4): 435-449 (1996).
- Exhibit A-14 Constantinou, Ashendorf & McCaffrey, *When the Third Party Observer of a Neuropsychological Evaluation is an Audio-Recorder*, 16(3) *The Clinical Neuropsychologist*, 407-412 (2002).
- Exhibit A-15 Bush et al., *Secretive Recording of Neuropsychological Testing and Interviewing: Official Position of the National Academy of Neuropsychology*, 24 *Archives of Clinical Neuropsychology* 1-2 (2009).
- Exhibit A-16 Wetter & Corrigan, *Providing Information to Clients About Psychological Tests: A Survey of Attorneys' and Law Students' Attitudes*, 26(5) *Professional Psychology: Research and Practice*, 474-477 (1995).
- Exhibit A-17 Youngjohn, J.R., *Confirmed Attorney Coaching Prior to Neuropsychological Evaluation*, (1995), 2(3) *Assessment*, 279-283 (1995).
- Exhibit A-18 Canadian Psychological Association, *The Presence of Involved Third Party Observer in Neuropsychological Assessments*, found at <https://cpa.ca/aboutcpa/policystatements/#Thirdparty>.
- Exhibit A-19 Albanese, Shang, & Hill, *Test Security: A Meeting of Minds*, 87(4) *The Bar Examiner* (Winter 2018-2019).

Key points from these documents are addressed in the discussions that follow.

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B. The Presence of a Third-Party Observer During a Neuropsychological Examination Detrimentally Affects Test Performance and the Validity of Test Results.

As one should gather from the above description, neuropsychological testing is an essential component of a neuropsychological evaluation. It is used by neuropsychologists to assist clinicians, administrative boards, and the courts in reaching well-informed decisions on diagnoses, treatment, and opinions relating to presumptive psychological, intellectual, academic, and neurobehavioral dysfunction.

Neuropsychological tests are developed and standardized at great expense over long periods of time, under a rigorous set of controlled conditions. To be valid, neuropsychological tests must be administered under conditions that closely replicate the conditions under which the tests were developed (“standardized conditions”). This is critically important because to properly interpret the data collected during testing, it must be compared to normative databases, (i.e., data accumulated under standardized conditions). Standardized conditions allow the neuropsychologist to maintain control over the testing environment to ensure extraneous factors do not affect performance. Importantly, standardized conditions do not include the presence of a third-party observer. Maintaining standardized conditions is essential to avoid the invalidation of normative test results, prevent undue influence of extraneous factors on performance and evaluation procedures, and avoid breaches of test security.

Unlike a medical examination, neuropsychological testing requires a quiet, controlled, distraction-free environment that allows the examiner and examinee to maintain a comfortable working relationship over a lengthy period of time. The reason for this is illuminated when one considers the nature of testing.

A neuropsychologist assesses cognitive abilities by looking at performance. Performance can be affected by many factors, such as attention. For example, if an examinee is distracted and

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cannot focus his or her attention on the information being tested, the examinee cannot learn the information. An examinee who does not learn the information because the examinee's attention is impaired by distraction cannot use his or her memory to recall the information (because the information was not learned and placed in the examinee's memory for later recall). This will undoubtedly affect the validity of test results. Thus, because the testing environment can influence the examinee's ability to pay attention, distractions must be minimized. The focus of the examiner and the examinee must be on the assessment procedures.

The presence of a third-party observer - whether in person, electronically, or through a recording device - is a distraction, disrupts the necessary focus of the examinee, and may influence how an examinee may respond.⁵ It could also distract the examiner. A considerable body of scientific literature addresses the deleterious effects of an observer's presence on an individual's task performance, despite best efforts to remain unobtrusive. In fact, Gavett, Lynch, and McCaffrey (2005) conclude, on the basis of meta-analytic analysis of 42 combined research studies on the deleterious effects of third party observation on neuropsychological test findings, that "the inclusion of a third party observer in a neuropsychological evaluation results in clinically meaningful changes in test performance" (p. 61), with memory measures being particularly vulnerable [*Third Party Observers: The Effect Size Is Greater Than You Might Think*, Exhibit A-10]. Whether in person, through the use of a one-way mirror, or via other electronic means such as video or audio taping, the presence of a third-party observer during formal testing significantly jeopardizes the validity of the generated data and the opinions that are based on that data because

⁵ References to "observer" or "third-party observer" throughout this brief include observation in person, electronically, or through a recording device.

the exact effects of the third-party's presence on an individual's test performance cannot be reliably determined.

In fact, controlled research published in peer-reviewed journals has demonstrated that both recording and observation have significant negative effects on neuropsychological test performance. [For a review, see the Meta-Analysis of the available literature consolidating the effects of third-party observers on neuropsychological testing *Does a Third Party Observer Affect Neuropsychological Test Performance? It Depends*, Exhibit A-11]. Phenomena referred to as “social facilitation” and “observer effects” have been consistently demonstrated [*Third party observation during neuropsychological evaluation: an update on the literature, practical advice for practitioners, and future directions*, Exhibit A-12]. These phenomena pertain to the various ways in which the experience of being observed and/or recorded can artificially alter an individual's task performance. Research indicates that social facilitation may cause examinees to perform better than usual on tests of simple or overlearned skills and poorer than expected on more difficult tasks. In other words, social facilitation can have the effect of causing an individual's deficits to appear worse than they actually are and their strengths to appear stronger than what is typical for the individual (because they expend extra effort), resulting in inaccurate test data. [*Presence of Third Parties During Neuropsychological Evaluations: Who is Evaluating Whom?* Exhibit A-13].

Also, recent studies examining the effect of third-party observers during neuropsychological assessment have consistently found the presence of observers to be associated with poorer performance across multiple cognitive domains, including measures of verbal learning, memory, verbal fluency, attention, and executive function, and faster performance on simple motor measures. This association is present regardless of the method of observation (i.e.,

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physically present, audio or video taping, or through a one-way mirror). [See *Does a Third Party Observer Affect Neuropsychological Test Performance? It Depends*, Exhibit A-11]. Specifically, Constantinou, Ashendorf & McCaffrey (2002) [When the Third Party Observer of a Neuropsychological Evaluation is an Audio-Recorder, Exhibit A-14] noted that the presence of third-parties during neuropsychological evaluations is an issue of concern for contemporary neuropsychologists. They note that previous studies reported that the presence of an observer during neuropsychological testing alters the performance of individuals under evaluation. Their study specifically investigated whether audio-recording affects the neuropsychological test performance of individuals in the same way that third-party observation does.

In the presence of an audio-recorder the performance of the participants on memory tests declined. Performance on motor tests, on the other hand, was not affected by the presence of an audio-recorder, further highlighting that the effects of observers on performance are not intuitive or consistent across tests. As highlighted in the position statement of AACN, the presence of observers inherently leads to internal distractions related to social expectations and heightened self-monitoring on the part of the examinee, which cannot be known or directly observed and, thus, cannot be accounted for in test interpretation. The cognitive processes involved in self-monitoring can interfere with performance on tests of attention and processing speed in particular, and potentially results in scores that magnify the appearance of impairment [See *AACN Policy Statement on the Presence of Third Party Observers in Neuropsychological Assessments*, Exhibit A-5].

The literature is clear that the effects of third-party observation are almost universally prone to attenuate test scores leading to conclusions of neurocognitive decrement on which many legal cases hinge. Complicating matters is that this apparent decrement presents itself in an

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unpredictable manner across tests and procedures which makes it impossible to quantify and understand its relevance to the test data. The results can be spurious conclusions of neurocognitive dysfunction based on inaccurate test data.

It is important to note that prohibiting the presence of a third-party observer should not be construed as the intention to withhold information from the opposing party. Instead, test data (including examinee's responses) and other clinical information gathered during an evaluation can be released to the opposing party's retained neuropsychology expert. Additionally, it is standard practice that a detailed formal report is generated, describing the evaluation process as well as the results. Importantly, the attorney has the opportunity to ask detailed questions about all parts of the evaluation and evaluation results as part of the discovery process. Thus, a third-party observer is not necessary to ensure that the opposing party can discover the details of the evaluation. Further complicating matters is that given that most requests for third-party observation are for subsequent evaluations, the third-party observation problem provides a systematic legal bias in favor of plaintiffs in civil litigation and in favor of defendants in criminal proceedings (assuming that civil plaintiffs and criminal defendants generally have their own expert evaluations conducted first and subsequent proceedings prompt an expert examination for the other party).

To summarize, neuropsychological tests are valid measures of neurocognitive capacities (brain-behavior relationships) when administered pursuant to the rigorous, controlled conditions under which they were created. This means that to achieve reliable results, these standardized testing procedures must be replicated during testing. Because the procedures were not standardized in the presence of a third-party observer, the presence of a third-party observer will lead to inaccurate and unreliable results. Consequently, testing conducted in the presence of a third-party observer does not meet the accepted standard of neuropsychological practice, is impermissible

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under current professional guidelines and ethical standards, and contravenes the protocol advanced by board certification and professional organizations.⁶

C. The Presence of a Third-Party Observer During Neuropsychological Testing Violates Ethical Guidelines Related to the Practice of Neuropsychology.

Psychologists in the United States are bound by the Ethical Principles of Psychologists and Code of Conduct of the American Psychological Association (2002) either directly through membership in the Association or indirectly through application of the principles to non-APA members by state psychology boards, the courts, and other public entities [See *APA Ethical Principles of Psychologists and Code of Conduct*, Exhibit A-6]. Permitting the presence of a third-party observer during a psychological examination conflicts with a psychologist's professional guidelines and ethical obligations as articulated by numerous professional organizations. They include the American Psychological Association, American Academy of Clinical Neuropsychology, American Board of Professional Neuropsychology, National Academy of Neuropsychology, and a joint committee to establish standards for educational and psychological testing organized by the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education [See Exhibits A-1 through A-7]. The following examples are illustrative.

First, according to the APA ethical principles, psychologists are encouraged to adhere to standardized procedures and utilize test materials in an appropriate manner based upon current research. See Standard 9.02: *Use of Assessments* [Exhibit A-6]. Likewise, according to the Standards for Educational and Psychological Testing (2014), test administration should carefully

⁶ Under certain circumstances, the presence of an attorney or other third-party observer may be acceptable during the interview portion of a neuropsychological evaluation if the observer understands he or she cannot interfere with the interview process. But there is no allowable exception during testing.

follow standard procedures determined by the test publishers and the environment should minimize distractions as much as possible [See *Standards for Educational and Psychological Testing*, Exhibit A-7].

Second, psychologists and “test users have the responsibility of protecting the security of tests” [See Standard 9.21 of the *Standards for Educational and Psychological Testing*, Exhibit A-7]. Psychologists are ethically bound to “make reasonable efforts to maintain the integrity and security of test materials and other assessment techniques consistent with law and contractual obligations” [See Standard 9.11 *Maintaining Test Security* of the *APA Ethical Principles of Psychologists and Code of Conduct*, Exhibit A-6].

Third, “psychologists do not promote the use of psychological assessment techniques by unqualified persons, except when such use is conducted for training purposes with appropriate supervision” [See Standard 9.07 *Assessment by Unqualified Persons* of the *APA Ethical Principles of Psychologists and Code of Conduct*, Exhibit A-6]. Third-party observers in a litigation setting are unqualified persons and should not be involved in the assessment. As explained above, attorneys can have their own expert neuropsychologist review the test data upon completion of the evaluation.

Fourth, a psychologist must protect against misuse and misrepresentation of their work [See Standard 1.01 *Misuse of Psychologists’ Work* of the *APA Ethical Principles of Psychologists and Code of Conduct*, Exhibit A-6]. Neuropsychologists obtain extensive training in brain-behavior relationships necessary to understand and interpret the multiplicity of behavior that occurs during an evaluation. Someone without such expertise and training may likely misinterpret the examinee’s performance and not take the whole clinical history and surrounding circumstances into account. Attorneys have neither the education, training, or experience to be expert in

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neuropsychological assessment and would need to have expert input from a trained neuropsychologist to properly advocate for their client, obviating their need to review test products and/or recording. Otherwise, this may lead to incorrect attributions of test results. Coaching is another way in which a psychologist's work may be misused.

Finally, “psychologists take reasonable steps to avoid harming their clients/patients, students, supervisees, research participants, organizational clients, and others with whom they work, and to minimize harm where it is foreseeable and unavoidable” [See Standard 3.04 *Avoiding Harm* of the *APA Ethical Principles of Psychologists and Code of Conduct*, Exhibit A-6]. The field of psychology, individual practitioners, the claimant, and the legal system itself are harmed when involved third-party observers are permitted during neuropsychological examinations because their presence diminishes the quality of the evaluation and impacts the neuropsychologist's ability to validly answer the referral question, leading to potential misuse and misinterpretation of test measures. Further, a third-party observer has no compelling reason to protect the test content and if careless with the information, there is no mechanism by which to hold him or her accountable.

Many of the test manuals specifically instruct that third-party observers should be excluded from the examination room. Testing materials provided by the two largest psychological test publishers, Pearson Assessments and Psychological Assessment Resources, along with other testing companies maintain substantially similar protections as reflected in Exhibits A-8 [*PAR Position Regarding the Release and/or Photocopying of Test Materials*] and A-9 [Pearson Assessments Legal Policies]. As set forth in those exhibits, dissemination of testing materials (including through the observations of a third party), violates restrictions on the health care provider's use of testing materials, renders test instruments invalid, and ultimately renders them

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useless to the professional community and the general public. Additionally, attorneys generally do not meet evidentiary qualifications to be considered expert in test administration, scoring, and interpretation; having their neuropsychologist expert review the test data (as mentioned previously) makes more sense than allowing attorneys to review a recording or test protocol.

As a final area of consideration, the National Academy of Neuropsychology issued a position statement in 2009 clarifying that secretive recording reflects deceptive practice, which is inconsistent with ethical behavior [*Secretive Recording of Neuropsychological Testing and Interviewing: Official Position of the National Academy of Neuropsychology*, Exhibit A-15]. In addition, such recording may affect the behavior of the examiner. For these reasons, the statement emphasized that “neuropsychologists do not, and should not, encourage, condone, or engage in secret recording of neuropsychological interviews or testing.” [*Id.* at 2]. The detriment of third-party observation, in person or electronically, prompted the Canadian Psychological Association to promulgate the following official Policy in 2009 (quoted in full):

“It is not permissible for involved third parties to be physically or electronically present during the course of neuropsychological or similar psychological evaluations of a patient or plaintiff. Exceptions to this policy are only permissible when in the sole professional opinion of the assessing psychologist, based on their clinical judgment and expertise, that a third party would allow more useful assessment data to be obtained. Typical examples may include the inclusion of a parent or caregiver until a full rapport is gained. The presence of these observers should be cited as a limitation to the validity of the assessment.” [See *The Presence of Involved Third Party Observer in Neuropsychological Assessments*, Exhibit A-18]

To summarize, governing ethical obligations and standards of practice prohibit conducting a neuropsychological examination in the presence of a third-party observer. These practices and standards exist to maintain and assure neuropsychologists’ ability to obtain valid performance from examinees, upon which their interpretations and conclusions are based. When the presence

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of a third-party observer is compelled by the court, the neuropsychologist cannot participate, which has the potential to limit court access to the most appropriate medical experts.

D. The Presence of a Third-Party Observer During a Neuropsychological Examination Undermines Public Safety and Test Security.

As already noted, the primary purposes for not allowing third-party observation during neuropsychological testing is to protect the public from misuse/misinterpretation and potential invalid/inaccurate test results. Also, as explained above, the Ethical Principles of Psychologists of the American Psychological Association (2010) require psychologists to maintain the “integrity and security” of tests and other assessment techniques and to avoid promoting the use of psychological assessment techniques by “unqualified persons” (i.e., individuals who are not licensed to practice psychology [See Ethical Standard 9.11 *Maintaining Test Security*, and Ethical Standard 9.07 *Assessment by Unqualified Persons*, Exhibit A-6]. These standards implicate the compromise of test security through third-party observation and the release of the raw data to unqualified individuals once the evaluation is complete.

Third-party observation directly provides to unlicensed (in psychology) third parties confidential test questions and information about test stimuli and procedures that substantially compromise test security. Test security is essential to preserving the practical utility of testing measures in both forensic and clinical situations. The failure to secure test materials will compromise the ability of the tests to assist clinicians, administrative boards, and the courts in subsequent clinical and/or forensic proceedings. Indeed, preserving test security protects the public in that many of the tests and procedures used during neuropsychological testing are identical to those used in fitness-for-duty evaluations administered to physicians, airline pilots, lawyers, law enforcement, and other public servants. Public or lay-person knowledge of test stimuli and

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procedures would allow for coaching and preparation for such individuals that may inflate their actual test scores so that they appear to have intact cognitive abilities when they do not.

Through coaching, examinees are given information about psychological tests that may enable them to alter their presentation on those measures to appear a certain way. Wetter and Corrigan surveyed 70 practicing attorneys and 150 law students and found that 22 percent of students and 42 percent of attorneys believed an attorney should provide as much specific information as possible about psychological assessment [See *Providing Information to Clients About Psychological Tests: A Survey of Attorneys' and Law Students' Attitudes*, Exhibit A-16]. Additionally, 36 percent of students and nearly 50 percent of attorneys responded that an attorney should always or usually inform a client of validity scales on psychological tests. This is very concerning because studies have found that even minimal coaching can impact assessment procedures. Giving clients a general idea of what the day will entail and a brief explanation of the purpose of assessment will possibly help lessen a plaintiff's anxiety regarding the assessment. However, giving clients specific and in-depth information regarding psychological and neuropsychological tests can invalidate the assessment and undermine the reason for the referral.

There are no specific ethical guidelines requiring attorneys to maintain test security when they have access to the tests. Once notes or a recording exist, nothing prevents an attorney from coaching other clients on how to obtain a certain desired test result by purposefully altering their behavior to appear in a certain way. Access to advanced and specific information will increase the examinee's ability to alter the test results, akin to knowing the LSAT questions in advance. Examples of this are documented in the literature [See *Confirmed Attorney Coaching Prior to Neuropsychological Evaluation*, Exhibit A-17], which reported a case where an attorney admitted that he deliberately coached his client before testing. One legal remedy to this that we find lacking

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is the Protective Order. First is the client coaching concern just discussed. Despite abiding by the letter of a Protective Order, attorneys are granted the opportunity to misuse their access to the measures to learn about the tests and subsequently use this information in other cases. Also, with electronic conveyance and storage of information, it is easy to inadvertently misplace psychological tests, having them appear later and then misused (e.g., on a thumb drive, on a cell phone, on a hard drive, in an internet server). The strength of a Protective Order is typically limited after the end of a trial.

The need for test security is important to other professions as well: "...the increasing sophistication and miniaturization of technology has increased the risk of test security breaches exponentially. The importance of maintaining test security cannot be overemphasized, because cheating, regardless of which form it takes, erodes the validity of the interpretations of test scores and then undermines the legitimacy of decisions based on those scores. Without remediation, the impacts will be significant." [The Bar Examiner, pp. 30-34, *Test Security: A Meeting of Minds*, Exhibit A-19]. While directed to professional examinations such as admissions (e.g., LSAT) or licensing (e.g., Bar) examinations, the lesson applies to neuropsychological tests as well. For example, once an IQ test is available to the public it can no longer be used to determine IQ. We will not know what it is measuring (e.g., ability to manipulate performance convincingly either for a higher or a lower IQ score).

The Michigan Department of Education also recognized the importance of test security with respect to standardized writing tests. As reported in Howe & McCaffrey (2010) [*Third Party Observation During Neuropsychological Evaluation: An Update on the Literature, Practical Advice for Practitioners, and Future Directions*, Exhibit A-12]:

Michigan's Department of Education in 2007 made thousands of fifth and sixth graders retake part of the state's standardized writing test due to a breach in test

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security - caused by a newspaper publishing a brief article about the test that revealed the topics for two of the questions and could have resulted in an unfair advantage for some students (Bunkley, 2007). Knowing questions contained on neuropsychological assessment measures ahead of time likewise creates an unfair advantage that can impact scores and interpretation. Recording of NP testing increases the likelihood that test security will be violated by attorneys whose ethics call for advocacy at most any price.

To avoid this potential skewing of the results, accepted professional standards and some state laws dictate that the appropriate manner in which to share or allow discovery of test stimuli and/or responses derived from neuropsychological evaluations is to release all of the information gathered during the course of the evaluation directly to the opposing counsel's neuropsychology or other appropriately qualified expert.

Further, actual test materials – including test record forms, test items, and administration procedures – are copyrighted, trade secret materials and are not subject to HIPAA. See the statements from the largest psychological test publishers Psychological Assessment Resources and Pearson Assessment, which require that test purchasers carefully protect test materials from disclosure to non-psychologists [See Exhibits A-8 and A-9]. In this sense, test security also refers to the rights of the publishers of test materials to not have their work rendered useless by the potential public release of questions and answers to third-party observers. For this reason as well, test publishers require proof of appropriate credentials before tests can be purchased.

To summarize, test security is necessary to maintain the integrity of testing procedures in forensic, clinical, and fitness-for-duty evaluations. Public knowledge of test stimuli and procedures would allow for coaching and preparation, with the consequent skewing of test results. Thus, governing ethical principles require psychologists to maintain the security of testing materials and to avoid testing in the presence of a third-party observer.

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II. Many Courts Have Prohibited the Presence of Third-Party Observers at Neuropsychological Examinations.

Courts and tribunals throughout the country have recognized the validity of the above-described concerns as a basis for prohibiting a third-party observer during a neuropsychological examination. While Amici have not undertaken exhaustive research on this subject, we offer helpful decisions that recognize the concerns described above. For example, in *Long v Chippewa Hills School Dist*, unpublished opinion of the Mecosta Circuit Court, issued December 6, 2012 (Docket No. 12-20846-NI), the court initially ordered the plaintiff to submit to a neuropsychological examination but allowed certain conditions, including observation by the plaintiff’s counsel. The neuropsychologist retained by the defendant refused to perform the examination under the conditions set forth in the court’s order. *Id.* at 2. Defense counsel stated that she could find no professional willing to perform the testing and examination in the presence of plaintiff’s counsel. Plaintiff’s counsel said he knew at least two professionals in the State of Michigan who would allow plaintiff’s counsel to observe. Accepting the “well-founded” opinions of defendant’s neuropsychologist that observation would undermine the validity of testing and violate ethical standards, the court opined that “[a] proper balance is not struck by forcing Defense Counsel to use a professional not of her choice, or by forcing her to have the examination conducted in a manner that she is told will result in unethical behavior and/or invalid results.” *Id.* at 2. The court concluded that defendant’s counsel “is entitled to some latitude in carrying out what it is allowed to do pursuant to MCR 2.311(A).” *Id.* at 2.⁷

⁷ This unpublished opinion and other unreported decisions are cited because they address some of the considerations raised in this amicus brief. The issue typically arises on an interlocutory basis at the trial court or tribunal level, and thus does not always result in a published opinion. Copies of unpublished opinions are attached as Exhibit B.

Other courts have held similarly. For example, in its discussion of matters related to whether a capital criminal defendant can be compelled by the state to submit to a psychiatric evaluation for the sole purpose of sentencing, the US Supreme Court in *Estelle v Smith*, 451 US 454, 470 n 14; 101 SCt 1866; 68 LEd2d 359 (1981), quoted and relied on the conclusion of the Fifth Circuit Court of Appeals in the case that “an attorney present during the psychiatric interview could contribute little and might seriously disrupt the examination.” (602 F2d at 708). Also, in *In re Air Crash at Taipei, Taiwan on October 31, 2000*, No. 01-ML-1394-GAF(RCx) (CD Cal, August 12, 2003), the defendant airline sought to compel mental examinations of the plaintiffs pursuant to FRCP 35(a), which provides for such examinations if the mental condition of the party is in controversy and if the defendant can establish good cause for the examination. The various plaintiffs sought certain protections, including video or audio recording of the examinations and/or the presence of different types of third-party observers. *Id.* at 4. The court found that the presence of a recording device could invalidate the results of the examinations, and the concerns advanced by plaintiffs were speculative and unfounded. *Id.* at 5-7. The court further found that the plaintiffs’ counsel could obtain insight into the examinations and prepare for cross-examination of the examiners by requesting detailed written reports of the results. *Id.* at 6. The court ordered mental examinations of the plaintiffs without recording devices or third parties. *Id.* at 7.⁸

Similarly, in *Rando v Gov’t Employees Ins Co*, No. 5:06-cv-336-Oc-10GRJ, 2008 WL 11434556 (MD Fla, January 2, 2008), the plaintiff sought to have a videographer or court reporter present at his neuropsychological examination, claiming that his cognitive problems would preclude him from acting as historian with his attorney after the examination. The court found

⁸ The court did allow the presence of a Cambodian interpreter for the one plaintiff who did not speak English but expressed doubt that the examination would go smoothly or be productive. *Id.* at 6.

that there was no good cause for the presence of a court reporter, the plaintiff's attorney, the plaintiff's spouse, or any recording equipment. *Id.* at 3. The court held that the plaintiff was adequately safeguarded because his counsel would be provided a written report setting forth the findings and the tests administered, and his counsel could depose the examiner. *Id.*

In *Kuber v Garcia*, RJI No. 45-1-2013-1929 (NY Sup Ct, April 20, 2015), the court granted the defendant's request to prohibit the plaintiff's representative from being present during the cognitive portion of the testing. The court found that such presence would impair the validity and effectiveness of the testing. *Id.* at 2.

In *Fusco v Levine*, No. 5:16-cv-01454-SMH-KLH (WD La, January 30, 2018), the plaintiff claimed to have suffered traumatic brain injuries, traumatic neurosis, psychological damage, and depression as a result of a car accident caused by the defendant. When defendant requested an independent neuropsychological examination, plaintiff argued, among other objections, that the examiner should be required to preserve recordings of the examination and that she should be allowed to have a non-attorney support person present. *Id.* at 14. In rejecting that request, the court accepted the neuropsychologist's explanation that third-party observation, whether directly or through electronic recording devices, "compromises the validity of normative comparisons, changes examinee behavior, compromises test security, and interferes with the establishment of clinical rapport." *Id.* The court permitted the plaintiff to have a support person in the waiting room. *Id.*

In *Heraldo v Suffolk Constr Co*, No. 2017-02475-H (Mass Sup Ct, June 24, 2019), the court denied the plaintiff's motion to have his neuropsychological examination videotaped where the defendant's expert raised concerns that it would impair the integrity of the examination, the evidence that the plaintiff's accent would lead to confusion was not compelling, the plaintiff's

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expert examined him successfully and without a witness or recording, and the parties agreed to provide each other the underlying raw data.

The pros and cons of this issue, as well as the professional literature addressing it, was extensively considered in a workers' compensation proceeding in *Goodrich v Fletcher Allen Health Care*, Vermont Dep't of Labor Opinion No. 07-17WC, State File No. DD-60132 (April 14, 2017), where the claimant sought permanent total disability benefits for an employment-related back injury on the ground that the injury, combined with her preexisting learning disability, precluded her from obtaining alternative employment. *Id.* at 3. Vermont law guaranteed an employer's right to require an injured worker to submit to an examination but also provided that the employee "may make a video or audio recording" of the examination "or have a licensed health care provider designated and paid by the employee present at the examination." *Id.* at 4. The claimant notified the defendant that she would exercise her right to have her neuropsychological examination video recorded. *Id.* The defendant's neuropsychologist refused to allow the testing portion to be recorded under ethical standards to which she was bound but indicated that the interview portion could be recorded. *Id.* As the *Goodrich* opinion recites:

The statute guarantees both the employer's right to obtain an independent medical examination and the employee's right to videotape it. The question presented by Defendant's motion is what happens when the two rights collide, as is the case here? [*Id.* at 5].

At an evidentiary hearing, the Administrative Law Judge considered testimony and exhibits from both sides, including policy statements from a number of professional associations, including three of the present amici (AACN, NAN, ABN), setting forth many of the same positions advocated here. *Id.* at 5-12. While noting that case law from other jurisdictions reflects varying approaches, the ALJ ultimately concluded that the claimant could record the interview portion but not the testing portion of her examination, stating:

35. Although I cannot offer a perfect solution, I am convinced that there are ways to substantially protect Claimant's interest in ensuring that Dr. Hebben's evaluation proceeds appropriately and yields valid results. For one, I will hold Dr. Hebben to her agreement to allow Claimant to videotape the interview portion of her exam. Beyond that, Claimant's attorney is free to educate his client beforehand regarding proper test administration conditions, and debrief her immediately afterwards regarding the extent, if any, to which Dr. Hebben deviates from standardized procedures. And certainly Dr. Hebben can be compelled to submit to close questioning under oath on the issue.

36. Short of barring Claimant from videotaping the test portion of the exam, there is no way to safeguard the interests underlying Defendant's right. Certainly there is no legal basis for me to order an examiner to conduct an evaluation he or she is unwilling to conduct, particularly if doing so might violate professional ethics and thereby jeopardize his or her career. Thus, if I side with Claimant on the issue, Defendant will effectively be denied the right to test a central theory underlying her case in chief – that her claimed learning disability has so narrowed her prospects for re-employment as to render her permanently and totally disabled. I cannot imagine that the legislature intended this result. [*Id.* at 14-15.]

In *Schlunt v Verizon Directories Sales-W, Inc*, No. 3:05-CV-666-J-25, 2006 WL 1643727 (MD Fla, June 12, 2006), at *4, the court observed that “[t]he majority of federal courts ... have held that attorneys, court reporters, and recording devices are distractions that may compromise the accuracy of the examination and turn a neutral examination into an adversarial event,” citing as examples, *Shirsat Mutual Pharmaceutical Co Inc*, 169 FRD 68, 71 (ED Pa, 1996) (“the presence of an observer interjects an adversarial, partisan atmosphere into what should be otherwise a wholly objective inquiry ... it is recognized that psychological examinations necessitate an unimpeded, one-on-one exchange between the doctor and the patient”) and *Bethel v Dixie Homecrafters, Inc*, 192 FRD 320, 324 (ND Ga, 2000) (following the reasoning in *Shirsat* in denying the plaintiff's request to have her attorney present and stating that the attorney's presence “would only increase the likelihood of creating an adversarial atmosphere”). Plaintiff's request to have her attorney and a court reporter attend the examination was denied.

Other courts have followed the federal majority. In *Tomlin v Holecek*, 150 FRD 628, 631 (D Minn, 1993), the court noted the split in authority among state cases but gave less weight to

decisions “driven by perceived local customs or the provisions of a State statute.” The court found that the greater weight of federal authority favored the exclusion of the presence of the plaintiff’s attorney during the Rule 35 examination. *Id.* The court also held that a tape recorder would be inconsistent with the underlying principles of the rule because it would invalidate the evaluatory technique and be inconsistent with professional standards. *Id.* at 631-632. The court compelled the plaintiff to undergo an independent psychological examination without the requested presence of a third party or recording. *Id.* at 634. See also *Duncan v Upjohn Co*, 155 FRD 23, 26-27 (D Conn, 1994) (following holding in *Tomlin* to preclude the presence of the plaintiff’s own physicians or mental health professionals during the examination).

In *Shirsat v Mutual, supra*, the Court explained the basis for denying plaintiff’s request for a third-party observer, stating:

This Court denies the plaintiff's request for an observer during the defense's examination of the plaintiff. This Court finds that an observer, court reporter, or recording device, would constitute a distraction during the examination and work to diminish the accuracy of the process.

* * *

Instead, this Court adopts the decisions promulgated in *Duncan v. Upjohn Company*, 155 F.R.D. 23, 27 (D.Conn.1994) and *Galiati v. State Farm Mutual Automobile Insurance Company*, 154 F.R.D. 262, 265 (D.Colo.1994), where the courts denied the plaintiff's request to have an observer present. In *Duncan*, the court noted that because the defendant's doctor “does not propose to use unorthodox or potentially harmful techniques in his examination of Mr. Duncan, ... there is no need for any of plaintiff's physicians or other mental health professionals to be present during the examination...” 155 F.R.D. at 27. In *Galiati*, the court denied the plaintiff's request for an observer during an examination of the plaintiff by the defendant's doctor finding that the “[p]laintiff has presented nothing that indicates that [Defendants' Doctors] will be less than impartial, other than that they have been hired by Defendants.” 154 F.R.D. at 265. [169 FRD at 70-71]

And in *Newman v Gaetz*, 2010 WL 4928868 (ND Ill, 2010), the Court explained:

First and foremost, Dr. Stafford Henry, Respondent's expert, swears in an affidavit filed with Respondent's brief that the presence of a video recorder would interfere with the dynamics of the examination and adversely affect the information that he

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receives from Petitioner. Dr. Henry attests that in eighteen years of performing forensic evaluations for courts, he has never had an examination videotaped. Courts have recognized that the presence of recording equipment can disrupt the examination and have disallowed videotaping on those grounds. See, e.g. *Pizzuto v. Hardison*, 2010 WL 672754, *2 (D.Idaho Feb. 20, 2010) (in habeas case where mentally retarded prisoner requested examination by defendant's expert to be videotaped, court disallowed videotaping of examination based on expert's objections); *Abdulwali v. Washington Area Metro. Transit*, 193 F.R.D. 10, 14 (D.D.C.2000) (denying request that examination be recorded and collecting cases that recognize the disruptive effect of recording equipment on Rule 35 examinations); *Tomlin v. Holecek*, 150 F.R.D. 628, 631–33 (D.Minn.1993) (plaintiff who alleged severe and permanent psychological injury ordered to undergo an independent psychological examination, but without attorney present or recording of the examination, given the intrusive nature of both factors, which the examining psychologist asserted would be inimical to a valid psychiatric examination).”

To summarize, while Amici do not provide exhaustive research on this issue, we offer abundant examples of decisions in which courts have heeded the concerns expressed by the neuropsychologists and denied all forms of third-party observation for the reasons expressed above. It is respectfully requested that this Court do the same.

RELIEF REQUESTED

For these reasons, the American Academy of Clinical Neuropsychology, the National Academy of Neuropsychology, the Society for Clinical Neuropsychology of the American Psychological Association, the American Board of Professional Neuropsychology, and the Michigan Psychological Association respectfully request that this Court reverse the January 25, 2019 Order permitting videotaping of the neuropsychological examination of Plaintiff and adopt a rule which prohibits the presence of third-party observers at neuropsychological examinations, directly or indirectly, whether in person, through electronic, digital or video means, via recordings of any kind, through one-way mirrors, or by any other means.

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Respectfully submitted,

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By: */s/Joanne Geha Swanson* _____

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Dated: February 14, 2020

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CERTIFICATE OF SERVICE

Cynthia J. Villeneuve, being first duly sworn deposes and says that she is employed with the law firm of Kerr, Russell and Weber, PLC, and on February 14, 2020, she filed the foregoing document with the Clerk of the Court using the Court's electronic filing system which will electronically serve all parties of record.

/s/Cynthia J. Villeneuve
Cynthia J. Villeneuve

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STATE OF MICHIGAN
MI Court of Appeals

Proof of Service

Case Title: ALIAMA X SCHAUMANN-BELTRAN V JOSEPH GEMMETE MD	Case Number: 347683
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1. Title(s) of the document(s) served:

Filing Type	Document Title
Motion - Regular	Motion for Leave to File Amicus Brief
Brief	Brief of Amici Curiae
Appendix	Appendix of Exhibits - Vol. I
Appendix	Appendix of Exhibits - Vol. II

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