MEMORANDUM

On July 1, 2024, Defendant and Third-Party Plaintiff Kronemann Construction, Inc. filed a notice of motion and motion requesting that the Court order the mental health examination of Plaintiff Christiansen Keefe without the use of audio or video recording devices and compel Mr. Keefe to complete necessary waivers and questionnaires. Mr. Keefe agreed to attend the Rule 35 independent medical examinations (IMEs) requested by Kronemann Construction, Inc. on certain conditions, including audio recording the IMEs. Defendant Raguse Family Partnership did not take a position on Kronemann Construction, Inc.'s motion.

Mr. Keefe was involved in an accident on January 27, 2021, when he fell down a manlift shaft at an elevator in New Effington, South Dakota. As Kronemann Construction, Inc. stated on the record at the motion hearing, there is no dispute that Mr. Keefe has brought a claim for personal injury and his mental and physical status is at issue. In addition, Kronemann Construction, Inc. agreed to the following conditions requested by Mr. Keefe regarding the defense IMEs: that Kronemann Construction, Inc. will reimburse Mr. Keefe for his reasonable travel expenses from Montana to attend the IMEs in Minnesota; that the neurophysical examination with Dr. Thomas Misukanis, orthopedic examination with Dr. Rick Davis, and vocational examination with Ms. Jennifer Bey will be audio recorded; Kronemann Construction, Inc. will provide the reports from the IMEs by the defense expert deadline; and Kronemann Construction, Inc. will waive any objection to Mr. Keefe calling the Rule 35 examiners as opinion witnesses in the event Kronemann Construction, Inc. does not call them as witnesses. As a result, this leaves two issues for the Court's consideration: (1) the audio recording of the psychological examination with Dr. Jennifer Service; and (2) the history questionnaires, consent forms, and waivers Dr. Misukanis and Ms. Bey have requested that Mr. Keefe complete as part

of their neurophysical examination and vocational examination respectively.

Dr. Service objects to having her psychological examination with Mr. Keefe audio recorded. Kronemann Construction, Inc. stated Dr. Service is uncomfortable having the examination recorded because it is a psychological examination and recording could affect the validity of the examination. Kronemann Construction, Inc., also objected to allowing an audio recording of Dr. Service's examination due to an issue of fairness, as Mr. Keefe has already completed two examinations of which there is no recording thereby creating "an unlevel playing field" for the defense. Mr. Keefe argued IMEs are adversarial and the Court is allowed to make conditions regarding the IMEs. Mr. Keefe requested to record the IME with Dr. Service to prevent any he said/she said conflicts, noting it is legal to record a conversation to which a person is a party in Minnesota. Mr. Keefe also argued there is no declaration from Dr. Service or justification for her objection to audio recording the neurophysical examination.

Mr. Keefe objected to any requirement to complete the history questionnaires, consent forms, and waivers Dr. Misukanis and Ms. Bey have requested that Mr. Keefe complete as part of their neurophysical examination and vocational examination respectively. Mr. Keefe argued that the questionnaires are an end run around discovery, that he has already furnished written discovery, and the questionnaires create the potential for him to have to make admissions outside of discovery. Kronemann Construction, Inc. noted the questionnaires, consent forms, and waivers requested by Dr. Misukanis and Ms. Bey are standard forms that these examiners ask all examinees to complete. When questioned by the Court during the motion hearing, Kronemann Construction, Inc. stated it was agreeable to providing the forms to Mr. Keefe prior to the IMEs.

I. Good Cause Shown for IMEs

Minnesota Rule of Civil Procedure 35.01 states:

> In an action in which the physical or mental condition . . . of a party, . . . is in controversy, the court in which the action is pending may order the party to submit to, or produce such agent or person for a physical, mental, or blood examination by a suitably licensed or certified examiner. The order may be made only on motion for good cause shown and upon notice to the party or person to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is made.

Minn.R.Civ.P. 35.01 (2024). Mr. Keefe will be required to undergo the IMEs requested by Kronemann Construction, Inc. Mr. Keefe has placed his physical and medical condition in controversy in this matter, and Defendant/Third-Party Plaintiff Kronemann has good cause which entitles them to conduct the proposed IMEs.

II. All IMEs May be Audio Recorded by Plaintiff Christiansen Keefe

Pursuant to Minnesota Statutes section 626A.02, subdivision 2(d), a party to a communication may record the communication. Based on this statute along with the Court's ability to set the conditions of an IME pursuant to Minnesota Rule of Civil Procedure 35.01, the Court will allow Mr. Keefe to audio record the psychological examination with Dr. Service or any other examiner chosen by Kronemann Construction, Inc. to complete a psychological examination. The Court will allow Mr. Keefe to audio record the three other IMEs as well pursuant to the parties' agreement as noted above. Additionally, as noted by other district courts in Minnesota, independent medical examiners are not treating physicians, and there is no doctor-patient confidentiality, so an audio recording of an IME does not pose a risk in that respect.

III. All Questionnaires, Consent Forms, and Waivers Must be Provided to Mr. Keefe's Counsel Prior to the IME

Under the Court's discretion to set the conditions of IMEs pursuant to Minnesota Rule of Civil Procedure 35.01, the Court will require that all questionnaires, consent forms, and waivers requested by Kronemann Construction, Inc.'s examiners be provided to Mr. Keefe's attorney prior

to the IME. This provides Mr. Keefe's attorney the opportunity to review the documents before the IME and prepare an objection, if any.

For the above reasons, the Court will grant the motion to compel Mr. Keefe to attend the independent medical examinations requested by Kronemann Construction, Inc. but will allow Mr. Keefe to audio record all four examinations (psychological examination, neurophysical examination, orthopedic examination, and vocational examination). In addition, the Court will require any questionnaires, consent forms, and waivers produced by the examiners for Mr. Keefe to complete be provided to Mr. Keefe's attorney prior to the independent medical examination.

KMM

MINNESOTA JUDICIAL BRANCH