

**No. 05-15-00572-CV**

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IN THE COURT OF APPEALS  
FOR THE FIFTH DISTRICT OF TEXAS  
AT DALLAS

FILED IN  
5th COURT OF APPEALS  
DALLAS, TEXAS  
5/13/2015 3:31:33 PM  
LISA MATZ  
Clerk

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**IN RE GREYHOUND LINES, INC. AND DWAYNE GARRETT,**  
*Relators.*

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Original Proceeding from Cause No. CC-13-05789-C  
In the County Court at Law No. 3  
Dallas County, Texas

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**RESPONSE TO PETITION FOR WRIT OF MANDAMUS**

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## **IDENTITY OF PARTIES AND COUNSEL**

The Petition for Writ of Mandamus misspells the names of two intervenors. “Stephanie Calloway” should be “Stephane Calloway,” and “Joya Ownes” should be “Joya Owens.”

In addition to the counsel identified in the Petition for Writ of Mandamus, please note the appearance of additional counsel for the Real Parties in Interest:

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## TABLE OF CONTENTS

	<b>PAGE</b>
Identity of Parties and Counsel .....	i
Table of Contents .....	ii
Index of Authorities .....	iii
Issue Presented .....	iv
Statement of Facts .....	1
Standard of Review .....	10
Summary of Argument.....	11
Argument.....	12
I. The Overnight Polysomnography Is the Least Intrusive Means of Reliably Diagnosing Sleep Apnea.....	12
A. Deposing doctors who conducted a physical examination of Garrett is not a reliable means of diagnosing sleep apnea. ....	12
B. An in-home study of Garrett is not a reliable means of diagnosing sleep apnea.....	13
Conclusion & Prayer for Relief .....	17
Certificate of Service .....	19
Certificate of Compliance .....	20
Appendix	
Affidavit of Kevin C. Haynes .....	Tab A

## INDEX OF AUTHORITIES

Cases	Page(s)
<i>In re Angelini</i> , 186 S.W.3d 558 (Tex. 2006) .....	10
<i>Brady v. Fourteenth Court of Appeals</i> , 795 S.W.2d 712 (Tex. 1990) .....	10
<i>In re Caballero</i> , 36 S.W.3d 143 (Tex. App.—Corpus Christi 2000, orig. proceeding) .....	16
<i>City of Keller v. Wilson</i> , 168 S.W.3d 802 (Tex. 2005) .....	17
<i>Coates v. Whittington</i> , 758 S.W.2d 749 (Tex. 1988) .....	16
<i>In re Columbia Med. Ctr. of Las Colinas</i> , 290 S.W.3d 204 (Tex. 2009) .....	10
<i>In re Dillard Dep’t Stores, Inc.</i> , 198 S.W.3d 778 (Tex. 2006) .....	10
<i>In re Ford Motor Co.</i> , 988 S.W.2d 714 (Tex. 1998) .....	10, 17
<i>Goode v. Shoukfeh</i> , 943 S.W.2d 441 (Tex. 1997) .....	10
<i>Hooks v. Fourth Court of Appeals</i> , 808 S.W.2d 56 (Tex. 1991).....	10
<i>Tarmas v. Winter</i> , No. 3:07-CV-290-J32HTS, 2009 WL 48210 (M.D. Fla. Jan. 7, 2009).....	16
<i>West v. Solito</i> , 563 S.W.2d 240 (Tex. 1978) .....	10

## **ISSUE PRESENTED**

1. Is the sleep examination that was ordered by the trial court the least intrusive means to obtain the medical information the real parties in interest require to obtain a fair trial?

## STATEMENT OF FACTS

Around 3:30 in the morning on September 14, 2013, a Greyhound bus traveling from Cincinnati to Detroit veered off the interstate. *See* SR Tab 1, at 3. The bus rolled over several times, eventually coming to rest in a cornfield more than 100 feet off the highway. *Id.*

This accident had catastrophic consequences for the passengers. Real Party Ruthie Allen, a 62-year-old, was ejected from her seat and thrown out of the bus. *Id.* She was transported to the emergency room and – after multiple operations – continues to suffer disabling injuries that will likely prevent her from ever being able to walk on her own again. *Id.* at 3-4. Many other passengers, including Intervenor Stephanie Calloway, Robert Claunch, Andre Hudson, Trevor Omer, Joya Owens, and Killian Torres, suffered severe and permanent injuries. *Id.* at 4.<sup>1</sup>

These injured passengers sued Dwayne Garrett, Greyhound Lines, Inc., and FirstGroup America. The principal dispute concerns the cause of the accident. Real Parties contend that Dwayne Garrett, the bus driver, fell asleep at the wheel. SR Tab 1, at 3. Greyhound and Garrett, on the other hand, contend that Garrett passed out after choking on his coffee. *Mandamus Pet.* at 14.

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<sup>1</sup> Plaintiff and these Intervenor are collectively referred to as “Plaintiffs” or “Real Parties.”

## *Sleep Apnea*

As support for their claims against both Greyhound and Garrett, Real Parties seek to establish that Garrett suffers from sleep apnea – an increasingly prevalent sleep disorder that, among other things, increases the risk of fatigue-related motor vehicle crashes by up to six times when left untreated. SR Tab 2, at 2.

Approximately one month before the crash, Dr. Sankar, a Department of Transportation certified medical doctor at Concentra (one of the clinics authorized by Greyhound to perform DOT medical certifications on the company’s drivers) determined that Garrett was at risk of sleep apnea and recommended that he undergo an “in-lab” sleep study (also called a “polysomnography”) to diagnose whether he suffered from Obstructive Sleep Apnea. SR Tab 2, Ex. A, at 186-187; SR Tab 2, Ex. J. For this reason, Garrett received a limited medical certification valid for only 3 months (rather than the standard 1-2 year certification that he had been provided in the past). SR Tab 2, Ex. J, at 2248. Garrett never received this in-lab sleep study – or any other.

Instead, Garrett received a limited physical examination from Steven Jung – a medical resident who was not even licensed to practice medicine at the time – who purported to rule out sleep apnea based on a physical examination. SR Tab 4, at 13-14.

### ***Real Parties Move to Compel a Sleep Study***

In January 2015, Real Parties moved to compel Garrett to undergo the same in-lab sleep study that had been recommended by the DOT physician in order to determine whether Garrett suffers from obstructive sleep apnea. SR Tab 2.

According to the Mayo Clinic, a polysomnography “monitors your sleep stages and cycles to identify if or when your sleep patterns are disrupted or why.” SR Tab 2, Ex. H. “Polysomnography is a noninvasive, painless test.” *Id.* The test requires the patient to spend a single night sleeping in a room comparable to a hotel room, while sensors record sleep activity. *Id.* Greyhound’s safety director has testified that this test is the “gold standard” for diagnosing sleep apnea:

- Q. And sleep studies are a recommended and reliable way to identify people who have sleep apnea, right?
- A. They’re a recommended way to screen and determine whether someone has some kind of sleep disorder.
- Q. And the gold standard, like we talked about yesterday for diagnosing sleep apnea, is called the polysomnograph test, otherwise known as a sleep study; is that right?
- A. That would be correct.
- Q. And Greyhound has been aware for at least -- since 2010 that the polysomnograph is the gold standard for identifying sleep apnea in individuals, right?
- A. Yeah. There are other standards, but, you know, the gold standard is -- if you care to call it that, is what you stated.

SR Tab 2, Ex. C, at 15-16.

Indeed, if DOT suspects sleep apnea, Greyhound itself “would require that a sleep study be done.” SR Tab 2, Ex. C, at 75.

Greyhound’s safety director also acknowledged that sleep apnea cannot be diagnosed based on a physical examination:

Q. And you know, as the director of safety, that sleep apnea cannot be diagnosed based on a physical exam alone, right?

A. That would be correct. A physical exam alone is not going to say one way or the other whether a person has sleep apnea.

SR Tab 2, Ex. C, at 65.

Greyhound and Garrett’s response to the motion to compel did not identify any less intrusive means of diagnosing sleep apnea. SR Tab 3. Here are all six sentences of the response discussing “less intrusive means”:

The final element of good cause requires that it not be possible to obtain the information sought by less intrusive means and that absent the examination the movant will not be able to obtain a fair trial.

*In re Caballero* involved a similar factual scenario wherein the party seeking an IME had not deposed the plaintiff’s doctors. In that instance, the court held that the trial court abused its discretion in ordering a party to submit to examination. Similarly, in this matter, Movants have made no attempt to discover information regarding the [sic] Mr. Garrett’s physical condition through less intrusive means. Instead, Movants advocate for the exceptional remedy of a court ordered medical examination without establishing the prerequisites for such an examination. As [sic] Movants’ failure to meet the good cause requirement prohibits them from obtaining an independent medical examination.

SR Tab 3, at 7-8 (internal citations omitted).

Notably, Greyhound and Garrett's response did not suggest that Garrett's sleep apnea could be diagnosed through an in-home study. *Id.*

### ***January Hearing***

At a January 26 hearing on the motion, the arguments primarily concerned whether Garrett's medical condition was "in controversy" and whether Real Parties had demonstrated good cause. SR Tab 4, at 20-21. Again, Greyhound and Garrett did not argue that sleep apnea could be diagnosed from an in-home study. Instead, their only argument about "less intrusive means" was that Real Parties should have deposed doctors who conducted physical examinations of Garrett. *Id.* at 25.

The trial court recognized that whether Garrett suffers from sleep apnea is a "critical issue" in the case and announced that she would grant the independent medical examination. *Id.* at 25. The required procedure is minimally intrusive: "[A]ll he does is he just lays there at night and take as (sic) few hours sleep. It's like going to a deposition. Not as irritating, but close to as irritating. It's a night deposition." *Id.* at 23.

Greyhound and Garrett then asked the court "to be able to confer with opposing counsel about identifying a facility with a qualified physician near where Mr. Garrett lives or wherever he will be able to be produced." *Id.* at 29-30.

### ***Real Parties Propose a Detailed Protocol***

In March, Real Parties filed a proposed order with a detailed protocol for the sleep study. Supp. SR 1-31.<sup>2</sup> Real Parties had “identified a qualified physician to conduct the exam, Dr. Virgil D. Wooten, who is located in Cincinnati, Ohio, near Mr. Garrett’s place of residence.” *Id.* Dr. Wooten proposed to conduct a Type I nocturnal polysomnography at the Sleep Medicine Center of the University of Cincinnati College of Medicine. *Id.*, Ex. B, at 1. He did not recommend an ambulatory recording, to assure reliable results: “In the case of transportation or critical service workers, I do not recommend ambulatory recordings (Type II-IV) as the devices are more likely to give false negative findings.” *Id.*

Greyhound and Garrett filed objections, but did not challenge Dr. Wooten’s qualifications or request an in-home sleep study. *See* SR Tab 6.

Three weeks later, Relators separately filed an “Exhibit in Support of [Relators’] Objections.” SR Tab 7. Again, they did not request an in-home study or argue that an in-home study was a less intrusive means of diagnosing Garrett with sleep apnea. The new “exhibit” was an affidavit from Dr. Martin Moore-Ede, the chairman and CEO of Circadian technologies and a former professor of physiology. SR Tab 7, Ex. A. The affidavit briefly discusses in-home studies:

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<sup>2</sup> The letter but not the proposed protocol are included in the mandamus record. *See* SR Tab 5.

Current practice has transitioned to using ambulatory OSA evaluations in the patient's home, rather than the previous practice of in-lab polysomnography. Improvements in ambulatory technology and reliability in accurately assessing OSA in the patient's home environment and bedroom have resulted in insurance companies mandating ambulatory OSA assessments rather than in-lab studies. In fact, many clinical sleep labs have now closed because very few patients are today assessed in such facilities.

*Id.* Ex. A ¶4.b (internal citations omitted).

Real Parties responded fully. SR Tab 8. They included an affidavit from Dr. Charles Czeisler, the Frank Baldino, Jr., Ph.D. Professor of Sleep Medicine and Director of the Division of Sleep Medicine at the Harvard Medical School, detailing the deficiencies in Dr. Moore-Ede's opinion and reinforcing the need for the in-lab study recommended by Dr. Wooten and Dr. Sankar. SR Tab 8, Ex. B ¶2.

I disagree with the recommendation of Dr. Moore-Ede, who is not board certified in sleep medicine by either the American Board of Sleep Medicine or the American Board of Medical Specialties, that the diagnostic evaluation of Mr. Garrett be conducted using an ambulatory obstructive sleep apnea assessment in Mr. Garrett's home (clinically called a Home Sleep Test or HS1) rather than using in-laboratory attended Type I nocturnal polysomnography (PSG), as recommended by Dr. Wooten.

*Id.* ¶6. Unlike an in-lab attended polysomnography, he explained, an unattended at-home sleep test is "subject to tampering." *Id.* ¶7. "It is well known among clinicians practicing sleep medicine that unattended at-home sleep tests are subject to manipulation." *Id.* A pamphlet by the Floyd Memorial Sleep Disorders Center explains that this risk is especially acute for professional drivers:

Many professional drivers fearful of losing their licenses may seek to fake a “passing grade” on their sleep evaluation. There are patients who have been known to place home sleep study equipment onto their spouses or children in order to avoid detection of a sleep disorder. Some patients may also wear the equipment, but stay awake all night, in order to hide any breathing issues related to a sleep disorder. Only an in-lab study has the capability to fully monitor the patient to ensure accurate identity and results.

SR Tab 8, Ex. D. The preference for an in-lab, overnight polysomnography is also expressed in a recommendation by an expert panel on Obstructive Sleep Apnea and Commercial Motor Vehicle Driver Safety to the Federal Motor Carrier Safety Administration: “The preferred method of diagnosis and assessment of disease severity is overnight polysomnography (PSG).” SR Tab 8, Ex. C, at 9.

The trial court held a hearing on April 27 regarding the proposed protocol. All of this evidence was before Judge Montgomery, who determined that a valid evaluation of Garrett’s sleep apnea would require an in-lab study. Supp. SR 78. If a person wanted to be evaluated for sleep apnea voluntarily, Judge Montgomery “could see why maybe at home would be good for him.” *Id.* But when a diagnosis of sleep apnea is an important issue in litigation and the subject has an incentive to manipulate the test results, “you want to make sure” the testing is valid and testing “in the lab would be much better.” *Id.* At the end of the hearing, the trial court signed the order proposed by Real Parties. Supp. SR 32-61.<sup>3</sup>

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<sup>3</sup> The order included in the mandamus record does not include the exhibits detailing the protocol for the examination. *See* SR Tab 9.

### *Mandamus*

On May 4, Greyhound and Garrett filed a petition for a writ of mandamus and a motion for temporary relief.

This Court granted the request for temporary relief (staying the order compelling the independent medical examination) and requested that Real Parties file a response “limited to the question whether the examination the trial court has ordered is the least intrusive means available to obtain the medical information the real parties in interest require to obtain a fair trial.”

Real Parties are filing this response just days after the call for a response because Dr. Wooten, the doctor who will conduct the overnight polysomnography, is leaving his current position on June 19, 2015. *See* App. A. Thus, it is essential that the test be completed, if at all possible, before that date to avoid the need for selection of a new specialist to administer the test.

## STANDARD OF REVIEW

A writ of mandamus is an extraordinary remedy, which will issue only to correct a clear abuse of discretion when the abuse cannot be remedied by appeal. *See In re Columbia Med. Ctr. of Las Colinas*, 290 S.W.3d 204, 207 (Tex. 2009). An abuse of discretion occurs only if the trial court's decision is "arbitrary, unreasonable, and without reference to guiding principles." *Goode v. Shoukfeh*, 943 S.W.2d 441, 446 (Tex. 1997).

There is no clear abuse of discretion when the trial court's ruling is based on resolution of disputed facts: "An appellate court may not deal with disputed areas of fact in a mandamus proceeding." *In re Ford Motor Co.*, 988 S.W.2d 714, 722 (Tex. 1998) (quoting *West v. Solito*, 563 S.W.2d 240, 245 (Tex. 1978)). Indeed, the Supreme Court has held repeatedly that appellate courts cannot resolve disputed issues of fact by mandamus review. *Hooks v. Fourth Court of Appeals*, 808 S.W.2d 56, 60 (Tex. 1991); *Brady v. Fourteenth Court of Appeals*, 795 S.W.2d 712, 714 (Tex. 1990). An appellate court cannot substitute its judgment for the trial court in examining the facts of a mandamus proceeding, *In re Dillard Dep't Stores, Inc.*, 198 S.W.3d 778, 780 (Tex. 2006), so when relief would depend on the resolution of a factual dispute, mandamus should be denied. *E.g.*, *In re Angelini*, 186 S.W.3d 558, 560 (Tex. 2006). This is such a case.

## SUMMARY OF ARGUMENT

Relators have not met their heavy burden of showing an entitlement to the extraordinary remedy of mandamus relief.

Real Parties agree that an independent medical examination should be conducted in the least intrusive manner, but determining the least intrusive manner for such a test is a factual determination that should not be disturbed on mandamus. The trial court's conclusion that an in-lab study is the least intrusive manner of validly evaluating Garrett's sleep apnea is fully supported by the evidence and, therefore, is not a clear abuse of discretion.

Indeed, the trial court could hardly rule otherwise. Uncontroverted evidence established that an unmonitored at-home sleep study is subject to manipulation. Such a test may be appropriate when a person voluntarily seeks to be evaluated. But where, as here, a diagnosis of sleep apnea may have serious professional and legal consequences, an in-lab study is the appropriate method for diagnosis.

Thus, the trial court's fact-bound conclusion that the in-lab study is the least intrusive means of evaluating Garrett's sleep apnea is not an abuse of discretion, and mandamus relief is not warranted.

Resolving this petition quickly is important. Dr. Wooten, the doctor who will conduct the overnight polysomnography, is leaving his current position and will be unavailable after June 19, 2015. *See App. A.*

## ARGUMENT

### **I. The Overnight Polysomnography Is the Least Intrusive Means of Reliably Diagnosing Sleep Apnea.**

Judge Montgomery correctly found that the overnight polysomnography requested by Real Parties is the least intrusive means of reliably evaluating whether Garrett suffers from sleep apnea. Presented with conflicting expert testimony on the proper form of sleep testing, this resolution of disputed facts is not a clear abuse of discretion.

The mandamus petition suggests two alternative means of evaluating whether Garrett suffers from sleep apnea: (1) deposing doctors who conducted a physical examination of Garrett; and (2) conducting an unmonitored at-home study of Garrett. Ample evidence supported the conclusion that neither option would reliably evaluate whether Garrett suffers from sleep apnea.

#### **A. Deposing doctors who conducted a physical examination of Garrett is not a reliable means of diagnosing sleep apnea.**

First, Relators suggest that Real Parties should be required to depose the doctors who conducted a physical examination of Garrett before the accident. Mandamus Pet. 19-20. But the testimony in this record uniformly agrees that a sleep study – either in-home or in a lab – is necessary for the diagnosis of sleep apnea and that a physical examination is insufficient. *See* SR Tab 2, Ex. 2 (Greyhound’s safety director). Nothing in the record proves otherwise.

In this litigation, three different doctors – including Relators’ own expert – recommended the use of a sleep study to diagnose sleep apnea. *See* Supp. SR 22 (Dr. Wooten); SR Tab 7, Ex. A (Dr. Moore-Ede); SR Tab 8, Ex. B (Dr. Czeisler). This was also the recommendation of the doctor who tested Garrett for his medical certification before the accident. SR Tab 2, Ex. J, at 2248. This is so because, Greyhound’s safety director admits, “a physical exam alone is not going to say one way or the other whether a person has sleep apnea.” SR Tab 2, Ex. B, at 65.

The trial court’s conclusion that a sleep study is necessary to evaluate whether Garrett suffers from sleep apnea is supported by the evidence and is not a clear abuse of discretion.

**B. An in-home study of Garrett is not a reliable means of diagnosing sleep apnea.**

Second, Relators suggest an in-home study. But whether an in-home study is a less intrusive means of **reliably** evaluating sleep apnea is a factual judgment, and ample evidence supports Judge Montgomery’s conclusion that a monitored sleep study conducted at a lab is the only valid way to conduct this evaluation.

Dr. Moore-Ede noted that many patients are now diagnosed with sleep apnea based on ambulatory in-home sleep studies, and some insurance companies now mandate these assessments. SR Tab 7, Ex. A ¶4.b. Whether or not that is correct, it does not establish that an unmonitored in-home study is suitable for examination of a critical witness in litigation. The trial court had evidence to the contrary.

As Real Parties’ experts explained, an in-home sleep study is valid only if the patient correctly follows the instructions. Either misfeasance or malfeasance will make the data worthless – and because the patient is unmonitored, there is no way to know what caused an invalid test. Professional drivers, like Mr. Garrett, have an incentive to avoid being diagnosed with sleep apnea. SR Tab 8, Ex. B ¶7 (“Many professional drivers fearful of losing their licenses may seek to fake a ‘passing grade’ on their sleep evaluation.”). And tampering with the test results is a familiar problem. *See id.* (“There are patients who have been known to place home sleep study equipment onto their spouses or children in order to avoid detection of a sleep disorder. Some patients may also wear the equipment, but stay awake all night, in order to hide any breathing issues related to a sleep disorder.”).

Voluntary treatment can use a test that depends on voluntary cooperation, but an involuntary evaluation cannot. Dr. Czeisler colorfully explained:

Dr. Moore-Ede’s reference to the increasingly common use of unattended HSTs to diagnose obstructive sleep apnea in clinical practice is no more relevant to the diagnostic evaluation of Mr. Garrett in this forensic setting than would be a reference to the increasingly common use of at-home urine pregnancy tests to suggest that the random drug screens required of certain commercial vehicle drivers be conducted by the driver at home . . . .

*Id.* Similarly, a doctor might be able to diagnosis alcoholism based on a patient’s answers to questions about his or her drinking habits, but this fact hardly suggests that the police should replace breathalyzers with questionnaires.

This is why Dr. Czeisler explained in his affidavit, “Only an in-lab study has the capability to fully monitor the patient to ensure accurate identity and results.” *Id.* It is why an expert panel to the Federal Motor Carrier Safety Administration describes “overnight polysomnography” as “[t]he preferred method of diagnosis and assessment of disease severity.” SR Tab 8, Ex. C, at 9. And it is why a neutral physician recommended this very test for Garrett – before this accident.

The strongest evidence of the proper diagnostic test is the recommendation made during Garrett’s official Department of Transportation medical certification. The doctor suggested an “In-lab study” instead of a “Home sleep test.” SR Tab 2, Ex. J, at 2248. This recommendation by a neutral physician before this litigation – and before the accident – independently validates the trial court’s ruling.

Thus, despite Greyhound and Garrett’s descriptions of the in-home test as “modern” and the in-lab test as “outdated,” they cannot overcome the evidence that an ambulatory test is “more likely to give false negative findings.” Supp. SR 22.

Because the cause of the accident is disputed, Judge Montgomery correctly discerned the importance of this examination: “It’s very relevant to this entire case. I think it’s a critical issue.” SR Tab 4, at 25. A fair trial for Real Parties requires evaluating Garrett’s possible sleep apnea in a way that will yield valid results: “[W]hen you’ve got so much importance on something like this, you want to make sure it’s valid.” Supp. SR 78.

Importantly, Greyhound and Garrett cite no legal authority holding that a trial court must order an in-home rather than in-lab study to diagnose sleep apnea. *See* Mandamus Pet. 21-24. A federal court ordered an overnight polymnography under similar circumstances. *See Tarmas v. Winter*, No. 3:07-CV-290-J32HTS, 2009 WL 48210, at \*1 (M.D. Fla. Jan. 7, 2009). Greyhound and Garrett do not criticize that precedent, which was called to the trial court’s attention, nor do they suggest that the trial court applied an incorrect legal standard. *Id.* Relators simply second-guess the trial court’s factual determination about the least intrusive means to reliably diagnose sleep apnea. This is not an appropriate use of mandamus.

Indeed, the “least intrusive means” test is ordinarily applied in determining **whether** to compel an independent medical examination, not **which** examination to compel. *See, e.g., Coates v. Whittington*, 758 S.W.2d 749, 753 (Tex. 1988) (“[A] movant must demonstrate that it is not possible to obtain the desired information through means that are less intrusive than a compelled examination.”); *In re Caballero*, 36 S.W.3d 143, 145 (Tex. App.—Corpus Christi 2000, orig. proceeding) (requiring a movant to show “that it is not possible to obtain the desired information through means that are less intrusive than a compelled examination”). Garrett and Greyhound cite no authority holding that a trial court abused its discretion in selecting a particular type of independent examination.

The trial court was free to find that a monitored overnight polysomnography, conducted in a lab, is the only valid method of diagnosing a professional driver with sleep apnea in an adversarial proceeding. The court's factual determination that this test is the least intrusive means to secure a reliable result is within the "zone of reasonable disagreement." *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005). This factual determination is not a valid basis for mandamus relief. *In re Ford Motor Co.*, 988 S.W.2d 714, 722 (Tex. 1998).

### CONCLUSION

The Petition for Writ of Mandamus should be denied as soon as possible, so the examination can be completed before the specialist chosen by the trial court leaves his current position on June 19, 2015.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2015, a true and correct copy of the above and foregoing Response to Petition for Writ of Mandamus was forwarded to all counsel of record by the Electronic Filing Service Provider, if registered, otherwise by email, as follows:

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Tex. R. App. P. 9.4 because it contains 3,918 words, excluding the parts of the brief exempted by Tex. R. App. P. 9.4(i)(2)(B).

2. This brief complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14 point Times New Roman font.

Dated: May 13, 2015.

*/s/ Russell S. Post*

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**No. 05-15-00572-CV**

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AT DALLAS

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**IN RE GREYHOUND LINES, INC. AND DWAYNE GARRETT,**  
*Relators.*

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Original Proceeding from Cause No. CC-13-05789-C  
In the County Court at Law No. 3  
Dallas County, Texas

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**APPENDIX**

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**TAB**

A           Affidavit of Kevin C. Haynes

# Tab A

Affidavit of Kevin C. Haynes

**AFFIDAVIT OF KEVIN C. HAYNES**

STATE OF TEXAS

§

COUNTY OF HARRIS

§

§

BEFORE ME, the undersigned notary, on this day personally appeared KEVIN C. HAYNES, who being by me duly sworn, deposed and stated as follows:

1. "My name is Kevin C. Haynes. I am over 18 years of age, of sound mind, have never been convicted of a felony or a crime of moral turpitude, and am fully capable of making this affidavit. The statements made here are within my personal knowledge, and they are true and correct.
  
2. "I am an attorney for the law firm of ZEHL & ASSOCIATES, PC and am co-counsel for Plaintiff and Intervenors in the lawsuit styled, *Ruthie Allen, et al. v. Greyhound Lines, Inc., et al.*, No. CC-13-05789-C (Co. Ct. at Law No. 3, Dallas County, Texas). In that role, I have personal knowledge of discovery, filings, and other relevant procedural history of this lawsuit.
  
3. "On April 27, 2015, the Trial Court executed a written order requiring Defendant, Dwayne Garrett, to submit to a medical exam under Rule 204.1, namely a Type I Nocturnal Polysomnography ("PSG"), before Dr. Virgil Wooten, a qualified physician at the University of Cincinnati Sleep Medicine Center, no later than May 27, 2015. On or about May 4, 2015, Defendants filed a Petition for Writ of Mandamus in the Dallas Court of Appeals, challenging the Trial Court's order, and, the same day, filed a corollary Motion for Temporary Relief, seeking a temporary stay of the medical exam.
  
4. "On May 4, 2015, our firm provided notice to Dr. Wooten of the mandamus proceeding. At that time, Dr. Wooten informed our firm that, after June 19, 2015, he will be leaving his current position at the University of Cincinnati for another position. Therefore, to the extent any PSG of Mr. Garrett takes place after June 19, 2015, Dr. Wooten indicated that he will not be able to interpret the results from any such PSG.

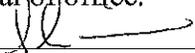
Further Affiant sayeth naught."

Dated this 5th day of May 2015.



\_\_\_\_\_  
KEVIN C. HAYNES

**SUBSCRIBED AND SWORN** before me, the undersigned authority, on this 5th day of May 2015 to certify which witness my hand and seal of office.



\_\_\_\_\_  
Notary Public in and for the State of Texas

My commission expires:

10-23-17

